TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT SLEVIN

C2023/7124

s.604 - Appeal of decisions

Appeal by Unilever Australia Trading Ltd T/A Streets Ice Cream Minto (C2023/7124)

Sydney

10.02 AM, WEDNESDAY, 14 FEBRUARY 2024

PN1

DEPUTY PRESIDENT CLANCY: Good morning, I will take appearances, please, for the transcript.

PN2

MR J FERNON: Yes. If the Commission pleases my name is Fernon, and I seek permission to appear for Unilever Australia Ltd T/A Streets Ice Cream Minto.

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DEPUTY PRESIDENT CLANCY: Thank you, Mr Fernon.

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MR J MARTIN: May it please the Commission Martin, initial J, I appear on behalf of the AMWU.

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DEPUTY PRESIDENT CLANCY: Thank you. Mr Martin, any comments on the application for permission?

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MR MARTIN: There's no objection.

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DEPUTY PRESIDENT CLANCY: Thank you. The members of the Full Bench have consulted on the question of permission, and we are of a view to grant permission. Thank you. Are there any housekeeping matters before we get underway?

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MR FERNON: Nothing from me.

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DEPUTY PRESIDENT CLANCY: Thank you.

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MR MARTIN: If I may, sorry, to my friend, just interject, there is one very minor matter. My friend did file an amended notice of appeal. Just for abundance of clarity we don't object to that either.

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DEPUTY PRESIDENT CLANCY: Thank you.

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MR FERNON: Yes, I am grateful. That's correct. We seek leave to amend our notice to incorporate the amendments that were previously provided.

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DEPUTY PRESIDENT CLANCY: Leave is granted. All right, thank you, we will hear oral submissions now.

PN14

MR FERNON: If the Commission please. This appeal raises for determination the meaning of clause 6 of the relevant enterprise agreement; that's the Unilever Australia Limited T/A Streets Ice Cream Minto Enterprise Agreement, and in particular whether there is an entitlement to an allowance, the heavy vehicle driving allowance, which is provided for in clause 20.2(c) of the Food, Beverage and Tobacco Manufacturing Award of 2020.

PN15

In making the decision appealed from the Commissioner was arbitrating a dispute, the formulation of which is set out in the decision, the decision appearing or commencing at page 7 of the appeal book, and the formulation of the dispute being set out in paragraph 3. The agreed question is stated to be:

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The parties have agreed that the following question is appropriate for determination.

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And quote:

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In the circumstances of the application, and having regard to the agreed statement of facts and the agreement, are employees who are required to operate a heavy vehicle entitled to payment of the heave vehicle driving allowance, as prescribed by clause 20.2(c) of the Food, Beverage and Tobacco Manufacturing Award 2020.

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And for the assistance of the Commission if I could advise, without taking the Commission to, the statement of facts at page 645 of the appeal book. So that was the question for determination as formulated by the parties and recorded in the decision. The Commissioner found that there was an entitlement to the allowance.

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DEPUTY PRESIDENT DEAN: Sorry, Mr Fernon, the statement of facts is that also at paragraph 4 of the decision or is there anything that's different to that?

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MR FERNON: I am sorry, that's what I was just noting as being at page 645 of the appeal book.

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DEPUTY PRESIDENT DEAN: All right. Thank you.

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MR FERNON: The statement of facts consists of six paragraphs at that page. So the Commissioner found that there was an entitlement to the allowance. The judgment deals with that in paragraphs 10 and 11, and further went on to find that, 'An employee required to drive should be paid on an all-purpose basis', which is distinct from when engaged particularly on the work.

PN24

Part of the appeal contends, going to this second limb, the Commissioner overstepped the jurisdiction to determine the dispute. In other words she went beyond the bounds of the dispute upon which there was consent to arbitrate. It is common ground that the Commission is empowered to deal with a dispute under clause 20 of the agreement.

PN25

The agreement itself commences at page 523 of the appeal book, and clause 20 - and again I give this to the Commission by way of reference only, at least at this stage - is it at page 555. So the important first consideration concerns the meaning of clause 2.6 of the agreement and how it relates to the award, and in particular clause 20.2(c) of the award which prescribes for the heavy vehicle allowance.

PN26

In the decision below there was an extract of the award in evidence, and that commences at page 677 of the agreement, and that includes at that point clause 20.2(c) on page 678. Just to give the consideration that is to come some context if I may, I take the Commission to page 677 which is the allowances provision in the award, and clause 20.2 is concerned with wage related allowances.

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Paragraph (a) provides that:

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Allowances paid for all-purposes are included in the rate of pay of an employee who is entitled to the allowance when calculating any penalties or loadings or payments while they're on annual leave. The following allowances are paid for all-purposes - - -

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And it includes the heavy vehicle driving allowance in (ii). There are a number of other allowances set out in clause 20.2, and at (c) is the heavy vehicle driving allowance, providing:

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An employee who is required to drive a vehicle of more than 3 tonnes GVW must be paid while they are engaged on such work:

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Varying rates of pay per hour. So that was the particular provision with which the Commission was concerned under the award. Clause 2.6 of the agreement with which she was also concerned is set out at page 9 of the court book, which is the third page of the decision. In the preceding page at paragraph 6 the Commissioner refers to clause 2.5 referring to definitions, and then she goes on to clause 2.6, which provides at 2.6.1, and this is the important provision of the agreement with which the Commission was concerned:

PN32

To the extent that there is any inconsistency between this agreement and the awards then the provisions of this agreement will apply. Where this agreement is silent then the relevant award(s) will apply. Where this agreement is silent and where the award(s) differ on conditions the industrial parties will resolve the issues and add into the agreement at its next review.

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That was the relevant provision with which the Commission was concerned. The Commissioner found that there was no inconsistency between the agreement and the award. The Commissioner found that the agreement was silent, relevantly silent, in that the agreement did not provide for a heavy vehicle driving allowance, and in those circumstances found that the award provision, which we just looked at, which provided for the heavy vehicle driving allowance, applied. That was the essence of the Commission's finding or conclusion. One perhaps goes to paragraph 10 of the decision of the Commissioner to see how that unfolded.

PN34

In response to the submission that there was inconsistency, and we submit on this appeal that there is inconsistency, but in response to that submission the Commissioner in paragraph 10 turned first to the inconsistency point, did not accept the submission that the effect of the clauses constituted an exhaustive set of conditions or a stand alone package of entitlements pertaining to the allowances payable at the Minto site, et cetera. She says for example:

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In circumstances where the agreement does not make any reference to any other (or more generous) award benefits such as to apply to the exclusion of any modern award.

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And then she goes on, importantly:

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This is because the agreement itself, in mandatory language, says at clause 2.6.1 what will apply where it is silent, and while the agreement addresses various matters concerning allowances across those clauses it is silent in relation to the heavy vehicle allowance as would otherwise apply under the Food Award. That is, the agreement does not contain either a heavy vehicle driving allowance, or for example any other analogous or broadly analogous allowance or payment identified as being referable to providing remuneration to employees who undertake heavy vehicle driving.

PN38

And then she goes on to say something about the tool allowance, which we will come back to. But in my submission paragraph 10 in a sense formulates the way in which the Commissioner has addressed the question that she was dealing with in the dispute, and in our submission did so erroneously. And broadly what's necessary to occur is to read the provision as a whole and to apply it in the context in which it applies.

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The Commission would be well familiar with the principles that have been settled in the Berri judgment of the Full Bench in 2017, and without wishing to labour what's a well known judgment of the Full Bench of this Commission is the *Australian Manufacturing Workers' Union v Berri* may I very quickly and briefly remind the Commission of the principles set out in paragraph 114, where there are 15 principles set out. But just to focus if I may on principle 1; that involves a consideration of the ordinary meaning of the relevant words.

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The resolution of a disputed construction turns on the language having regard to context and purpose.

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When we come to look more closely at the decision we will see that the Commission has sought to address purpose, but in our submission, we will come to that, has done so erroneously when dealing with what the clause in the award means, but we will come to that. 3:

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The common intention of the parties is sought to be identified objectively, that is by reference to what a reasonable understand by the language the parties have used to express their agreement, without having regard to the subjective intentions or expectations.

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The fat that the instrument being construed as an enterprise agreement is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.

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That, in our submission, is not something that the Commissioner took into account or gave sufficient or any weight to. 7:

PN46

In construing it is first necessary to determine whether an agreement has a plain meaning or is ambiguous or susceptible of more that one meaning.

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In our submission, which we will come to, this is an important principle that the Commissioner in her decision overlooked or did not take into consideration or sufficient consideration. But rather as the Commission would have seen already in paragraph 10 came to a conclusion which did not take into account the ambiguities or susceptibilities of meaning in the clause. 10:

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If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation.

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11:

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The admissibility of evidence of surrounding circumstances is limited to evidence to establish objective background facts which are known to both parties which inform the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

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And that's an important principle when we come to look at the way in which the Commissioner dealt with what she referred to as the common understanding of the parties. Put simply the Commissioner directed her attention to subjective intentions, actual intentions and expectations of the parties, rather than looking at objectively what the language of the agreement was concerned with.

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Evidence of objective background facts will include: evidence of matters in common contemplation and constituting a common assumption.

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That's an extract of the principles which, in our submission, are among principles that are important for the way in which the Commission would approach this issue of construction.

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In our submission when one looks at the clause, 2.6.1, in paragraph 7 of the decision, bearing in mind that one reads it as a whole, bearing in mind that it's a provision of an enterprise agreement, bearing in mind that it is in the terms of, as Madgwick J so long ago referred to the language of - had put it as the authors were men of practical bent - bearing in mind those considerations one would not, in our submission, approach the meaning in the way the Commissioner did. But rather conclude that what the clause is concerned with when it's concerned with the ideas that it addresses of inconsistency and silence, what it's concerned with is topics or subject matters, rather than an analysis of individual paragraphs of the award, which is the way in which the Commissioner would seem to have approached the question.

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She approaches the question in paragraph 10 as considering that this mandatory language that if one identifies a provision such as that which provides for the heavy vehicle allowance one doesn't have an inconsistency, one has silence, and so the agreement is to operate in a way that she says.

PN57

But in our submission this clause, 2.6, is in truth susceptible of more than one meaning or ambiguous in the way in which those expressions are used in Berri and the cases that precede it. What does it mean when one speaks of any inconsistency between this agreement and the awards? What does that mean? It's (indistinct) in the context of an enterprise agreement.

PN58

We know that the award won't have any particular application by section 57 of the Fair Work Act, but this is addressing inconsistency between the agreement and the award, then the provisions of this agreement will apply. But if one is looking at the agreement, the whole of the agreement, and one is looking at the award, the whole of the award, they're inconsistent. They provide for different things. They do it in a different way, and if it's construed in that way the provisions of the agreement will apply.

PN59

But whilst that's a meaning to which the clause is susceptible look at the agreement, look at the award, is there any inconsistency, any inconsistency being the words used in the clause. If there's any inconsistency then the provisions of the agreement will apply, but that probably is not the approach, because that's in effect what section 57 provides. So it must mean something different.

PN60

We contend that what it's asking the reader to do is to understand that where there's inconsistency between topics or subject matters in the agreement and the award, then one applies to an idea rather than to analyse the award paragraph by paragraph, which is in effect what the Commissioner's approach would require, so as to see whether there's an inconsistency or a silence.

PN61

Rather we submit that if for example, and this is a for example, but to illustrate the point, if for example the agreement did not provide for say redundancy, that topic, one might conclude that the agreement is silent on that topic. Why would one view it that way? Because that is the way, in our submission, that best suits the three sentences that comprise clause 2.6.1. In looking at the second sentence where this agreement is silent then the relevant award will apply.

PN62

The Commissioner looked at clause 20.2(c) of the award, and concluded, well the agreement doesn't have that heavy vehicle allowance or anything analogous to it, so it's silent on that. Therefore the award will apply. But in our submission that doesn't take into account the context. It doesn't take into account that the agreement, the enterprise agreement is a negotiated document that is to replace the award.

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It doesn't take into account that the effect of that approach is to mean that the agreement will apply in its terms, and every additional paragraph of the award will also apply where the agreement doesn't otherwise provide for that provision. So that if one were to consider this award and one were to note by way of example that the agreement doesn't provide for a number of the special

allowances in paragraph (f) such as hot places, wet places, confined spaces, dirty or dusty work, fumigation gas, none of those are provided for in the agreement.

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It would seem to follow from the way in which the Commissioner has concluded is that one looks to whether the agreement is silent as to hot places, wet places, confined spaces, dirty or dusty work. If it's silent those provisions of the award will apply, in addition to the terms of the agreement that have been negotiated in the context of section 57 which effectively replaces those terms and conditions.

PN65

How does it relate to a provision such as the leading hand term in the award which is an allowance for a leading hand in charge of three or more people where there is an extra rate payable per week under clause 20.2(b). There's no leading hand provision in the award. There is no provision in the agreement for a leading hand. However, in the agreement at clause 15 at page 544 there are provisions for wages, penalties and allowances, and one of those classifications to which those rates apply is the ICM7 classification, which is dealt with at page 564 of the appeal book, dealing in particular with the role description of a shift leader and various duties of a shift leader as set out. Is that a provision which is said to be inconsistent with the award, or is the agreement silent in respect of a leading hand, that is one in particular who's in charge of more than three people?

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What this submission is directed to is that the approach of the Commissioner did not take into account that this is an enterprise agreement. Did not take into account that the drafting is done by men of practical bent, to adopt Madgwick J's formulation. So that one needs to, and again as Madgwick J formulated all those times ago, search for what is the meaning, and when one searches for the meaning one comes to, in our submission, a meaning which concludes that the true meaning is looking at the topic, the subject matter, and what this agreement provides for.

PN67

It provides for allowances. The award provides for allowances. The agreement provides for wages. The award provides for wages. One doesn't descend into the minutiae, the micro analysis of the award, to see whether there is a particular provision not dealt with in the agreement to come to the conclusion as to whether there's a relevant silence. Rather one looks at a broader general level to determine whether a particular topic or a particular subject matter is dealt with, and what perhaps shows that to be the case is the third sentence.

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Because what the drafter had in mind here was that the agreement would apply if some particular matter, we would submit, of importance was not provided for in the agreement, such that the agreement was silent, then the award would apply in respect of that subject matter, but that subject matter would be dealt with by the industrial parties on the next occasion.

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DEPUTY PRESIDENT SLEVIN: Mr Fernon, can I interrupt you, I just don't read that third sentence that way.

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MR FERNON: Yes.

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DEPUTY PRESIDENT SLEVIN: 'Where this agreement is silent', and - so the second criteria - 'where the awards' - we know there are two awards that underpin the agreement - 'differ on conditions' - as those topics - 'the industrial parties will resolve the issues and add into the agreement at its next review.'

PN72

So what the third sentence reads to me is doing is, 'If during the course of the life of the agreement the agreement is found to be silent on a topic' - to use your term - I will come back to what the clause says - and the awards, which need to be referred to, to fill that lacuna - have differing ways of dealing with that topic, then the parties would turn their mind as to how they would deal with that tension. So the third sentence is basically saying, look, if we need to apply award conditions and the two awards have competing ways of dealing with that, we better turn our minds to which one of those, or whether there's a third way that we want to deal with that, using your term, topic.

PN73

MR FERNON: That's a possible approach, but in my submission what indicates that that's no so much the approach is the use of the bracket around the 's'. So what the agreement is recognising is that there's two awards, two modern awards to which the agreement applies, and it's taking into account that one or the other or both might differ on conditions, so that it's not requiring that the awards as between themselves also differ on the conditions.

PN74

With respect, Deputy President, you're correct to point out that the third sentence requires silence and the awards differing on conditions, and what we're suggesting is that the drafters were concerned to ensure that if there was any particular topic dealt with in a relevant award that would otherwise apply to employees it's not dealt with in the agreement, but that be dealt with at the next review, and how it's next dealt with is a matter for the parties we would say.

PN75

But what we point to it for is to identify that this is an indicator to the parties of a topic that's provided for in the award that employees are not otherwise entitled to under the agreement, save for perhaps the operation of the second sentence, but that needs to be dealt with at the next review the drafter seems to be saying. And what we say is it points away from the way in which the Commissioner dealt with.

PN76

The drafter is not, in our submission, inviting the parties to analyse the award paragraph by paragraph, provision by provision, commission by commission, to conclude that the agreement is silent in respect of all of those individual little things. No, contextually an enterprise agreement overcomes all of that, but where

there is a topic of importance what the agreement is asking the parties to do is to resolve that omission by way of agreement, however it's done, if it's done, at the next review.

PN77

What we submit is that when one looks at the three sentences, the way in which they bind together, searching for the meaning, recognising that the clause is susceptible of more than one meaning, one looks for the meaning that best represents what those of practical bent would mean when formulating the enterprise agreement.

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DEPUTY PRESIDENT DEAN: Mr Fernon, if you take the second sentence, come back to the second sentence for a moment, when in your submission would that apply in the sense that an award provision would be applicable where the agreement was silent?

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MR FERNON: Yes. Let's say for example that the award provided for redundancy and the agreement didn't. So the agreement would be said to be silent on that topic of redundancy, but the award provision would apply.

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DEPUTY PRESIDENT DEAN: Okay. Stick with that example and then tell me how that relates to the third sentence.

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MR FERNON: Where the agreement is silent and where the award differs on conditions. So the agreement is silent on the question of redundancy.

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DEPUTY PRESIDENT DEAN: Yes.

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MR FERNON: The award differs on the condition because it provides for the redundancy. It's different to what the agreement provides. It provides for redundancy. The parties, the industrial parties would resolve that absence or that silence at the next review.

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DEPUTY PRESIDENT DEAN: Surely the third sentence, as the Deputy President mentioned earlier, must be the awards differ, because otherwise the third sentence wouldn't be necessary. You would just apply the second sentence, wouldn't you?

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MR FERNON: If it was the case that the awards were not described as (s) I would agree, but it has a broader (indistinct). My suggested interpretation I think is slightly broader than what Deputy President Slevin was suggesting in that as I understand what's being suggested is that it would require both awards to differ in respect of redundancy.

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DEPUTY PRESIDENT DEAN: Redundancy in your example. Yes.

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MR FERNON: Whereas I am not putting it that highly because of the (s). But if the (s) is ignored that's where you will end up.

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DEPUTY PRESIDENT DEAN: But it's difficult to see how the third sentence has any work to do unless that's the interpretation, because otherwise you would simply not need to go past the second sentence, i.e. the topic of redundancy is not covered, therefore you apply the award.

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MR FERNON: Well, that would assume that that provision would be in the next agreement.

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DEPUTY PRESIDENT DEAN: Regardless of whether you put it in the agreement you would still have an obligation, wouldn't you, to apply it because of the second sentence?

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MR FERNON: During the terms of that agreement?

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DEPUTY PRESIDENT DEAN: Yes.

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MR FERNON: But what the third sentence is concerned with is the next enterprise agreement.

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DEPUTY PRESIDENT DEAN: Yes.

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MR FERNON: And irrespective of a continuation of a clause 2.6 type clause, which incidentally has been traditionally what has occurred, but putting that to one side, in terms of what the construction based on the legalities are the third sentence is concerned with, if you like, the negotiation or the resolution for the next agreement, irrespective of whether there's a clause 2.6.1. So let us say - - -

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DEPUTY PRESIDENT DEAN: It won't change the entitlement at this point in time.

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MR FERNON: I am sorry?

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DEPUTY PRESIDENT DEAN: It won't change the entitlement at this point in time. So again coming back to your example, if redundancy wasn't covered as a

topic and the agreement is silent in that sense, but the award provides redundancy, then redundancy would apply by virtue of the award.

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MR FERNON: By virtue of the second sentence.

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DEPUTY PRESIDENT DEAN: Yes.

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MR FERNON: And given the operation of the enterprise agreement and given the bargaining that would occur the agreement is directing the industrial parties to resolve that issue. Now, it might be that the industrial parties resolve it on the basis that there is to be no redundancy in the enterprise agreement, or they resolve it on the basis that it will provide a different way. But it's a direction in respect of the next enterprise agreement. Excuse me.

PN102

DEPUTY PRESIDENT CLANCY: You're urging an interpretation of inconsistency of topics in your interpretation of the first and second sentence. Doesn't the reference to conditions in the third sentence, and then when reading 2.6.1 as a whole, doesn't that speak to rather it being inconsistency of topics, but inconsistency of conditions?

PN103

MR FERNON: I think the conditions can be read with the topics. I think what the Commission is putting to me is a point that can be made because of the use of the word 'condition', and you might be directed to think more narrowly in respect of it. But when reading it overall, and bearing in mind that it's not drafted by parliamentary draftsmen - - -

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DEPUTY PRESIDENT CLANCY: I understand your point about who it's drafted by, but I am saying that if you read the three sentences of 2.6.1 instead of approaching it in a step by step basis that you're urging us, you read the whole clause and you look at the third sentence which talks in terms of conditions. Then you say, well to the extent there's any inconsistency in the conditions in the first sentence where this agreement is silent on conditions and where they differ on conditions. There's no introduction of a notion of topics in the wording of the clause, but there is conditions.

PN105

MR FERNON: Yes. It takes one back to the second sentence as well, because at the commencement I raised the question of inconsistency. Well, what does that mean, and it can't mean just a difference between the award and the agreement because of the context. When one goes to the second sentence where this agreement is silent, but it doesn't say about what, silent about what.

PN106

DEPUTY PRESIDENT CLANCY: But then the third sentence gives you, it says where it's silent and where the conditions differ.

PN107

MR FERNON: Yes. The second sentence, silent about what. The third sentence, where this agreement is silent - still about what - and where the award differs on conditions. One might say, well conditions is to be subsumed into the silent, where it's silent on conditions. Well, those conditions can be a topic such as redundancy. Those conditions can be a paragraph like the heavy vehicle driving allowance. Again one is driven to this, if I may describe it, slightly awkward clause where it is susceptible of more than one meaning. But where this agreement is silent on conditions, well why wouldn't redundancy as the example be construed as a condition? It might be. Why wouldn't a heavy vehicle driving allowance be construed as a condition? It might be.

PN108

It doesn't necessarily drive an answer, in our submission, because no matter which way you cut it there are various ways in which the meaning can be looked at, and what I'm seeking to offer the Commission as a way forward is to look at the context, which is the correct way, and to understand the way in which persons of practical bent would have in mind. What are they seeking to deal with here with this clause?

PN109

And in my submission when one applies the meaning to individual conditions in the meaning of a particular allowance, whether it's a hot allowance, whether it's a cold allowance, whether it's a meal allowance after two hours and not after three hours, the operation of the agreement effectively becomes unworkable or inconsistent with what an enterprise agreement is all about. It would effectively provide for the agreement and anything in the award that didn't happen to be included by particular reference in the agreement, and that inevitable result can't be what the drafters had in mind.

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DEPUTY PRESIDENT CLANCY: Take your redundancy example, the agreement is quite prescriptive on redundancy, and - - -

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MR FERNON: I am not trying to put forward redundancy as a particular expression of the argument. I'm putting it forward as a topic to illustrate the point.

PN112

DEPUTY PRESIDENT CLANCY: Sure, but just using it, it outlines a formula for calculating redundancy pay, and the award takes one to the National Employment Standard rate of payment, and then the award has transferred lower paid duties on redundancy and leaving during redundancy. I am just not sure whether the agreement speaks in such terms. So how would you reconcile those differences?

PN113

MR FERNON: If there's an inconsistency the agreement will provide. If the agreement is providing for redundancy then the provisions of the agreement will prevail; (1) because it's an enterprise agreement, and (2) in any event if the award provides for redundancy the agreement and the award are inconsistent.

PN114

DEPUTY PRESIDENT CLANCY: But there's all sorts of things dealt with under the topic of redundancy; some in the agreement, some in the award, and some of them are different. So how do you reconcile that?

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DEPUTY PRESIDENT DEAN: Sorry, it's your submission then that because the topic of redundancy is dealt with in the agreement you just don't go to the award at all regardless of whether - - -

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MR FERNON: Yes.

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DEPUTY PRESIDENT DEAN: - - - the award provides additional terms.

PN118

MR FERNON: Yes, thank you, that is the submission, and what the Commission is reasoning, would direct one to, is to look at the redundancy provision, and where some particular aspect of the redundancy provision in the award was not included in the agreement, thereby the agreement being silent in respect of that aspect, that aspect would apply, because the agreement is silent. Whereas my submission is that one looks at the topic. One doesn't drill down into the aspects of redundancy to conclude that in respect of that aspect the agreement is silent, and so that aspect should be included into the redundancy requirements under the agreement.

PN119

DEPUTY PRESIDENT SLEVIN: I don't think that's how it works with the reasoning of the Commissioner at paragraph 10. The Commissioner doesn't focus solely on is there a tool allowance in the agreement. The Commissioner says in the last sentence of paragraph 10 of her decision:

PN120

Unlike what the agreement says about the tool allowance in relation to maintenance levels and apprentices, for example, there is no identification in the agreement that an HVDA - heavy vehicle driving allowance - is subsumed into some other rate or payment in the agreement, or that it is excluded.

PN121

And so the Commissioner has taken that broader approach. She didn't go looking for a heavy vehicle driving allowance, she went looking for where the heavy vehicle driving allowance may have been subsumed into some other rate or payment in the agreement, similar to your example of the leading hand allowance, which you might say was subsumed into the pay at level 7.

PN122

So the Commissioner hasn't taken the approach of does an allowance so described appear in the agreement. She said, well what's happened to that allowance? I can't see that that condition or even topic has been dealt with in the agreement, and in those circumstances the award applies.

PN123

MR FERNON: In my submission that's not the way in which the Commissioner approached it. Rather what the Commissioner did was to pick the HVDA, the heavy vehicle allowance, because halfway through she picked the allowance and she sought to justify that approach by the reference to the tool allowance, rather than the other way around, in my submission, because she said:

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This is because the agreement, in mandatory language, says at clause 2.6.1 what will apply where it is silent - - -

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And she went on to say:

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It is silent in relation to an HVDA.

PN127

So in my submission she was in fact picking, what we were recalling a moment ago, the aspect. So she was picking an aspect of the allowance provision in the same way as the example we were talking about a moment ago would be picking the aspect of a redundancy, and she sought to justify that picking by reference to the tool allowance, which incidentally is not an allowance that's in the Food Award in any event, it's in the Manufacturing Award.

PN128

But it was the approach which, in my submission, is revealed halfway through the paragraph, and she sought to justify that approach with the reference to the tool allowance. But she didn't refer to any of the other allowances that are provided for in the award, the other aspects of the allowance provision, the hot and the cold and the others, the confined spaces, to conclude that they must also necessarily apply on that analysis.

PN129

My submission is that when one follows that reasoning through one comes to a conclusion that you effectively look at the agreement, then look at the award in respect of every aspect of every clause. Where that aspect is not included in the enterprise agreement you just incorporate it into the enterprise agreement, which in our submission is not consistent with the context. It's not consistent with what an enterprise agreement is. But when one understands this particular (indistinct) in clause 2.6 by reference to topics it makes more sense.

PN130

DEPUTY PRESIDENT SLEVIN: Paragraph 11, the use of the expression (indistinct) and HVD-type allowance, and those words do not appear - - -

PN131

MR FERNON: Sorry, in paragraph 11?

PN132

DEPUTY PRESIDENT SLEVIN: Of the decision.

PN133

MR FERNON: Yes.

PN134

DEPUTY PRESIDENT SLEVIN: 'The agreement does not contain any form of an HVDA or an HVD-type allowance.' The Commissioner has turned her mind to just looking at one aspect as you described it to something broader. It's not a HVD-type allowance, the topic of a HVD allowance, to use your expression, (indistinct) that the condition of a HVD-type allowance, to use the expression in 2.6.1, the third sentence.

PN135

MR FERNON: I'm sorry - - -

PN136

DEPUTY PRESIDENT SLEVIN: I'm just pointing out - I think your answer to my question on paragraph 10 was, 'No, the Commissioner has really just turned her mind to whether there is a HVD allowance', and I read paragraph 10 as the Commissioner searching for some condition in the agreement that compensates for heavy vehicle driving. You responded by saying you didn't think she did. And I said, well I think paragraph 11 also indicates that she did.

PN137

MR FERNON: Yes. I was - - -

PN138

DEPUTY PRESIDENT SLEVIN: The Deputy President has already raised with you the word 'condition' is used in the third sentence, and shouldn't that permeate the entire clause because we're reading it in context, and so we're talking about topical condition and how granular we get when we're using those terms.

PN139

MR FERNON: That's right.

PN140

DEPUTY PRESIDENT SLEVIN: It seems to me that the Commissioner did turn her mind to - indeed what the Commissioner turned her mind correct interpretations and that which you say the correct (indistinct) apply here. But I think the question for us is, is it correct to take the approach that you take, which is to read those three sentences or that whole sub-clause to be referring to be topic inconsistency, or is the sub-clause referring to inconsistencies in relation to conditions, and then what does that mean.

PN141

MR FERNON: Yes. As an overall comment the clause is we would accept susceptible of more than one meaning, and there is struggle to understand, and it will be infelicitous language. The task for us all is to identify consistent with the principles what is meant by this clause, and bearing in mind the correctness standard does apply. And what I'm suggesting is that addressing it as topics gives one a consistent coherent outcome rather than an outcome which would have the agreement apply, and every additional condition provided for in the award also

applying, bearing in mind that the background of an agreement is negotiation, the give and take of negotiation; presumably some provisions being negotiated away, other conditions being negotiated up. The whole environment in which an enterprise agreement comes to play ends up with an agreement that effectively replaces the award. What the Commissioner's approach does, I am suggesting, is to effectively ignore all of that context, but that context does not ignore if one approaches it as one of topics.

PN142

When one goes to paragraph 11, the first dot point, the Commissioner is looking at the first sentence and she sets out the provisions. She says:

PN143

As I read the agreement there is no inconsistency, such that the provisions of the agreement will apply in relation to effectively excluding entitlement to payment of the Food Award's HVDA.

PN144

Again, in our submission, that's an incorrect approach, because the HVDA is excluded by virtue of the enterprise agreement by reason of section 57 of the Act. Rather the question is whether the HVDA is included by operation of the agreement. The Commissioner has started with this approach that, well these provisions apply. The agreement doesn't talk about that provision. That award provision thereby needs to be brought into the agreement by operation of the clause 2.6 clause, whereas the HVDA does not apply, it is excluded by virtue of the Fair Work Act. So the starting point was a wrong position.

PN145

DEPUTY PRESIDENT CLANCY: So where does your - you're invoking section 57, if the agreement was to have said the allowances in this agreement are limited to the following.

PN146

MR FERNON: I'm sorry, Deputy President?

PN147

DEPUTY PRESIDENT CLANCY: Sorry. If the agreement was to have said, it gets to clause 15, wages, penalties and allowances, and then it starts at clause 15.5(d) (indistinct) the allowances, and this is at page 546 of the appeal book, and it said something like the allowances are limited to the following.

PN148

MR FERNON: If that was provided for in the - - -

PN149

DEPUTY PRESIDENT CLANCY: In the agreement.

PN150

MR FERNON: - - - in the agreement. That would be then a provision of the agreement. It might be said to provide for an inconsistency, such that the agreement - - -

PN151

DEPUTY PRESIDENT CLANCY: The following allowances shall only apply.

PN152

MR FERNON: Yes.

PN153

DEPUTY PRESIDENT CLANCY: But you're sort of saying you don't need that because of section 57, aren't you?

PN154

MR FERNON: I am saying you don't need that because of section 57, and what is happening rather than something being excluded as the Commissioner approached the analysis, the approach is, well what does clause 2.6 mean so as to provide in the first sentence of the agreement will apply in circumstances where the agreement is going to apply anyway by virtue of the Act. So it must mean something different as just a bald statement of look at the agreement and look at the award. It must mean something different.

PN155

DEPUTY PRESIDENT DEAN: Mr Fernon, surely 57 deals with a circumstance where you've got an agreement that doesn't say anything about an award. The agreement does to the exclusion of the award.

PN156

MR FERNON: Yes.

PN157

DEPUTY PRESIDENT DEAN: But the difficulty here is the award has, at least in part, almost been incorporated, because the parties have referenced the award.

PN158

MR FERNON: In the agreement.

PN159

DEPUTY PRESIDENT DEAN: In the agreement, and brought that ineffectively.

PN160

MR FERNON: Yes. So the question is - - -

PN161

DEPUTY PRESIDENT DEAN: So it's difficult to see how 57 has any role to play I have to say in circumstances where you've effectively incorporated chunks of the award.

PN162

MR FERNON: Yes. Its role to play is as, if you like, the source of the entitlement. There's no entitlement under the award to a heavy vehicle allowance or a wet allowance or other confined space allowance where the agreement applying. The question is whether by virtue of the agreement what happens to be provided for in the award is applying. So it does have application we would say

because it addresses the source of the entitlement. One has to go to 2.6 to understand - - -

PN163

DEPUTY PRESIDENT DEAN: But isn't 2.6 effectively the source of the entitlement?

PN164

MR FERNON: 2.6 is the source of the entitlement.

PN165

DEPUTY PRESIDENT DEAN: Yes.

PN166

MR FERNON: One then needs to understand, well what is it, what is meant by the agreement being silent. The clause doesn't say about what is silent; silent (about what) we would say. So we have to look at the context. We have to look at the nature of the instrument to try and glean a meaning and to understand what is, if you like, the sensible meaning that is consistent with the operation of the enterprise agreement regime. The Commission's approach to identify a paragraph of a clause and to say that the agreement is silent because it doesn't provide for that paragraph, whether heavy vehicle allowance is provided for, is not the correct approach. Because it's not only that paragraph, it's many paragraphs. It could be many, many paragraphs incorporating into the agreement provision that otherwise don't apply or wouldn't apply.

PN167

DEPUTY PRESIDENT SLEVIN: That's the consequences (indistinct), isn't it, Mr Fernon? The Commissioner was dealing with a specific dispute about a specific clause in the award the union claimed applied because of 2.6.1 and the silence in the agreement. So she's really only dealing with that, and what she was dealing with is a condition, isn't it, it's not a paragraph, to say she's just gone and found a paragraph that's not in the agreement, but the paragraph deals with a condition of employment. This clause contemplates dealing with conditions of employment, rather than topics.

PN168

MR FERNON: That's the problem. To say that this deals with conditions is what I have described as being the question, because what we're doing is what Madgwick J suggests we should do, is search for the meaning.

PN169

DEPUTY PRESIDENT SLEVIN: If where the parliamentary draftsperson was to give this clause the meaning that he wanted to be more precise, should we read it as, 'To the extent that there is any inconsistency between topics in this agreement and the awards then the provisions of this agreement will apply.' And then, 'Where this agreement is silent on a topic then the relevant awards will apply.' And then, 'Where this agreement is silent and where the awards differ on conditions.' If we read topics into the first two sentences we create a tension for an ambiguity when we read the clause as a whole, because the clause then expressly refers to conditions.

PN170

MR FERNON: Yes. But if one were to follow that course and get to the third sentence and understand it as where this agreement is silent on a topic, and where the award differs on conditions in respect of the topic, one has a coherence, in my submission. We recognise that this is not a clause where the meaning jumps out at one. One has to search for it.

PN171

What I am suggesting is that whilst it is that the Commissioner was dealing with one little aspect of the operation of an allowance, she was addressing herself to a clause that had general application to the construction of the agreement and the award. So it is appropriate in the process of the search to understand the way in which that approach would bear upon the broader general interpretation of both the agreement and the award. So whilst I'm using paragraph, I am using paragraph, but the paragraph contains the condition or the relevant entitlement, and the issue is whether one searches through for omissions, silence about what; silence about a paragraph in which a condition is expressed, silence about a particular qualification for a condition.

PN172

There are so many combinations and permutations one can start to identify that, in my submission, the approach is to really step back and search for what are people really trying to say here in the context of negotiating and settling on the enterprise agreement. And they're concerned about - - -

PN173

DEPUTY PRESIDENT CLANCY: If section 57 operates on its terms why is it necessary to have clause 2.6, because the parties have sat down and said, well we understand how section 57 operates, whilst the agreement is in place the award won't apply, subject obviously to passing the better off overall test and the like. But then they have sat down and contemplated the interaction between the award terms and the agreement terms. So section 57 isn't your whole answer. It can't be that, can it?

PN174

MR FERNON: No, I am not suggesting it is, but I am suggesting it is part of the context. And so for example when one looks at the first sentence it can't mean simply as it reads, because it's more nuanced than that, and I am suggesting the nuance is explained by addressing the topic or the subject matter of what the agreement and what the award deals with. Why is the clause there? One of course can only surmise. Is what the clause is directed to is identifying that where there's an inconsistency the agreement plainly provides, but where the agreement is silent then the relevant award will apply. That's a different provision to the way in which the Act would operate on an enterprise agreement. It's seemingly incorporating in one way or another.

PN175

The question is what's it directed to, and my submission is that the approach is to identify silence about a topic such as redundancy, which is just an example. It's not silent about allowances. Allowances are dealt with in the agreement. And so where there's difference between the agreement and the award about allowances

there's inconsistency, and in that circumstance the agreement will apply, the agreement allowances will apply. The agreement is not silent about allowances. The agreement deals with allowances. So the operation of the second sentence doesn't - the second sentence doesn't operate.

PN176

I put on the list a reference to the case of *DL Employment Pty Ltd v AMWU*. It's [2014] 247 IR234, and it's [2014] FWCFB 7946. I put that on the list not because it's particularly applicable to the interpretation of the clause that we're considering, but because it addresses somewhat the idea of inconsistency in the section 109 sense. So if I may just take the Commission to a couple of paragraphs of that judgment, which I hope can assist in the analysis that we're concerned with. At paragraph 57, halfway through the paragraph, the Commission says:

PN177

> *We do not consider that the passage can otherwise be read as advancing a universal proposition that a provision of a statutory industrial instrument can never seek to cover the field as far as it may lawfully do so under its governing statute.*

PN178

So the question is when one is looking at the idea of inconsistency one is looking at whether a particular subject in an instrument covers the field. It cites *Ansett v Wardley*:

PN179

> *It will be seldom, in my opinion, that an award will lend itself to the covering the field test of inconsistency on the subject of the contract of employment. Few, if any, awards reflect an intention to express completely, exhaustively or exclusively the law governing that contract.*

PN180

That's conventional wisdom. But then in paragraph 58 they refer to the *Robinson v Haylor* judgment, which was concerned with long service leave and whether the provision of the federal award which was silent on the subject of long service leave was such as to be inconsistent with the provisions of the Long Service Leave Act, and in that particular instance it was not. Halfway through:

PN181

> *In those circumstances the court concluded there was nothing to show that he meant that his determination should cover the ground on long service leave to the exclusion of any right arising from any other source of authority.*

PN182

The fact that the award was silent on long service leave didn't exclude the operation of the New South Wales Act, but Dixon J in *Ex Part McLean* is referred to. Towards the bottom of paragraph 58:

PN183

> *Dixon J explained that the governing statute under which federal awards were made might have the effect of giving a federal award an exhaustive operation.*

PN184

'The Federal instrument, which prescribes performance of the shearers' contract of service, is the award of the Arbitration Commission. But unlawful as it is to depart from the course which such an instrument describes and requires, the instrument itself, nevertheless it's not a law of the Commonwealth. Section 109 cannot operate directly upon it so as to render a state law invalid. But these considerations do not end the matter. They do establish that if state law is superseded it must be upon the ground that the state law thereupon becomes inconsistent with the meaning and effect of the Act itself. But the provisions of that Act, which establish awards made under authority, may have a meaning and effect consistently with the state law which could not further affect a matter for which such an award completely provides. If the Act means not only to give the determinations of the arbitrator binding force between the disputants, but to enable him to prescribe completely or exhaustively upon what any subject matter in dispute shall be their industrial relations, then section 109 would operate to give paramountcy to these provisions.'

PN185

Dixon J went on to confirm that the Act had empowered the making of federal wards with this exclusive authority.

PN186

And then paragraph 60:

PN187

Whether a particular enterprise agreement made under the Act constitutes an exclusive statement of the rights and obligations of the employer and the employees covered by the agreement depends upon the terms of the agreement in question.

PN188

That is in a different context I readily recognise, but I refer the Commission to it in the context of the use of the words 'consistency in an enterprise agreement' which effectively covers the field by virtue of section 57.

PN189

When one looks to the agreement as to whether or not it's silent one is looking at it in the context of that operation of section 57 that the agreement applies, effectively replacing the award. One doesn't thereby, in our submission, look to individual conditions or individual paragraphs. One looks at what are the topics, what are the subject matters about which there might be an inconsistency or a silence.

PN190

Just shortly, and perhaps I am slightly repeating myself here, but in dealing with the AWU's submission at the bottom of page 10, dealing with paragraph 10, a submission which the Commissioner seems to have accepted, in my submission the approach was again to ask oneself whether the award is applying and whether for example a tool allowance is being displaced. In my submission that's putting it around the wrong way. A tool allowance doesn't apply, even in the

Manufacturing Award, by virtue of the Fair Work Act. The question rather is whether the operation of clause 2.6 is silent, is relevantly silent.

PN191

The Commissioner also reasoned that a common understanding of the parties was that the allowance would apply, and for that purpose she relied upon the Form 17 to conclude that it was the common understanding of the parties that the allowance didn't apply. I don't think there's any difference between us that that's not really an approach that was available to the Commissioner, because what she was doing was relying upon a subjective intention.

PN192

In addition the form did not specifically address the particular question that was before her. The form didn't address whether it was understood that that allowance applied. Rather it was a general form which was filed in the process of the making of the enterprise agreement. In our submission it's not consistent with the principles in Berri that those subjective statements would in any way be taken into account. But rather what the Commissioner did not take into account that was proper and available for her to take into account was that the previous iterations of the enterprise agreement had provided in similar terms to the clause 2.6, and there was no further resolution by the industrial parties of the silence in respect of a heavy vehicle driving allowance as one would expect under the third sentence of previous agreements.

PN193

So the common understanding might be inferred to be that there was no silence in respect of that condition, if that's the way in which the clause is to be construed, because it was not further dealt with on reviews. No matter which way one looks at this common understanding, in our submission it is really a matter which is something that's not on any of the evidence specifically addressed. One is making inferences from what I have said about the third sentence, which has the attraction of at least being objective. The Commissioner was making inferences from the Form 17 which has the disadvantage of being subjective. But if the Commission pleases we don't put a lot of weight on any of the common understanding, but to the extent that it's available it's of course the construction for which we contend.

PN194

Yes. I have also given the Commission a reference to the judgment of the Federal Court in the *Rail, Tram and Bus Industry Union v KDR Victoria T/A Yarra Trams*. This is Wheelahan J. At paragraph 63 he refers to various decisions of Gray J concerned with a common understanding as being an aid to construction. He says:

PN195

The reasons for caution before regard may be had to a suggested common understanding commence from the premise that it is the instrument itself that is to be construed - - -

PN196

We submit that that's the approach that we adopt.

PN197

- - - and any recourse to industrial practices said to amount to a common understanding are no more than part of the context in which the text of the instrument is to be construed. Industrial practices do not take the place of the terms of the instrument. There is also the need to maintain coherence with other principles, including, amongst other things, the subjective understanding of individuals is rarely relevant to objective meaning.

PN198

I won't read all of that, but that's by way of illustration of the way in which we suggest the Commission deal with the common understanding idea.

PN199

Next we have submitted that in dealing with the dispute - and this is going on to deal with the next point now. I have dealt with construction. Dealing now with the next point of what we call exceeding jurisdiction and misconstruing the interpretation of the clause. The Commissioner did two things; she went on to consider the meaning of the clause 20.2(c) in the award, which in our submission was to exceed the jurisdiction forwarded by the agreement of the parties to arbitrate, and in any event in doing so misconstrued the provision.

PN200

On the exceeding jurisdiction point the Commission would be well aware that it's well settled that the jurisdiction of the Commission to arbitrate in these circumstances is provided in the Act, it depends upon the agreement of the parties, and in this particular agreement it's clause 20, and that is found at page 555 of the agreement in the court book.

PN201

At paragraph 28 of the judgment on page 17 the Commissioner referred to the AMWU submission that the Commission is required to determine whether the allowance is payable. We agree with that. The dispute was concerned as was formulated, that it was an issue of entitlement to a payment of an allowance. But it was additionally put that if there is that entitlement that there's a question of how and to whom the allowance is to be paid, and the Commissioner notes at the top of page 18:

PN202

Unilever noted that this was not part of the agreed question and otherwise submitted that it would not be jurisdictionally appropriate or available for the Commission to purport to determine the operation of the payments under the award.

PN203

And the Commissioner concluded:

PN204

Thus, there is disagreement between the parties as to how and when the payments are engaged under the award and whether that matter should be determined.

PN205

It seems that what the Commissioner has there done is to conclude that there is disagreement for which one might read a dispute between the parties, and accordingly it was appropriate and available to her to go on and to deal with that question of the how and to whom the allowance would be paid, and in our submission that was not an approach that was available.

PN206

We accept that the formulation of the dispute is not necessarily a determiner of the bounds of the dispute. We accept that. Rather it's an objective question. But plainly the way in which the dispute is formulated by the parties in the dispute is highly relevant to the bounds of the dispute. Not conclusive, we accept, but highly relevant. What the parties did in this case was formulate it as we have been to already, and it's concerned with the entitlement payment of the allowance, whether 'Yes' or whether 'No'.

PN207

In the clause there is a provision for dispute settling, and it's at page 555, and if I may take the Commission to it briefly. It's in the usual sort of form that the Commission would have seen a thousand and one times in various forms; an employee having a grievance take the matter up first with the shift manager. So there is a procedure. And one gets to 20.4:

PN208

If the matter remains unresolved either party will have the right to notify the Commission to conciliate and to arbitrate on matters dealt with by this agreement.

PN209

So, in my submission, the formula for getting to the Commission to arbitrate requires the matter, being a grievance, to be dealt with in that way, and in respect of those grievances they are matters dealt with by the agreement, then there is a right to notify the Commission to conciliate and to arbitrate.

PN210

What Mr Campbell said, who provided a statement in the AMWU case, said in his paragraph 12 at page 86 of the court book:

PN211

I have never been paid the heavy vehicle driving allowance. In my capacity as a union delegate employee I am not aware of any employee receiving the heavy vehicle driving allowance during the period of my employment. This was the basis for commencing the dispute resolution procedure.

PN212

So, in my submission, as far as Mr Campbell's evidence is concerned about what the dispute is about it's about the entitlement. It's about the way in which it was formulated as a question of entitlement. 'I am not aware of any employee receiving the allowance. This was the basis for the dispute resolution procedure', he says.

PN213

Ms Piccinin whose statement was tendered in the Unilever case - her statement starts at page 94 - she says at paragraph 18 at page 97:

PN214

From my participation in these proceedings I am aware the applicant union asserts that the allowance prescribed should have application to employees at the site covered by the 2021 award. This heavy vehicle driving allowance has not been payable and paid to any employee at the Minto site since the commencement of the Food Award in January 2010.

PN215

Again, in our submission, the evidence, this time from the employer side, was concerned with a dispute that was about entitlement rather than going into then a construction of the award. In our submission the parties were correct in the formulation of the question as set out by the Commissioner, but the Commissioner was not correct to go on as she was invited to do, to go on and effectively construe clause 20.2(c).

PN216

So even if the Commission is against us in respect of the entitlement question, the construction question of clause 2.6, in our submission the Commission would quash that, dismiss or overrule that part of the Commissioner's decision that is concerned with the construction of clause 20.2(c) of the award, of the Food Award. They're the submissions that we wish to make in respect of the jurisdictional point.

PN217

I now deal with the contending constructions of clause 20.2(c), and before doing that might we just go back to that clause, clause 20.2(c), at page 678 of the appeal book, providing:

PN218

An employee who was required to drive a vehicle of more than 3 tonnes must be paid while they are engaged on such work.

PN219

Just reading it the clause is addressed to those who are required to drive a vehicle of a particular type, namely not more than 3 tonnes, and that they must be paid, and it deals with when, while they are engaged on such work.

PN220

DEPUTY PRESIDENT DEAN: It seems, Mr Fernon, there's an inconsistency between 20.2(c) and 20.2(a).

PN221

MR FERNON: I'm sorry - - -

PN222

DEPUTY PRESIDENT DEAN: One seems to suggest it's all-purpose and one seems to suggest it's - - -

PN223

MR FERNON: Yes. The way to construe it, and the Commissioner has referred to the all-purpose idea - I'm sorry, I misunderstood what you were saying. The way to construe it, in my submission, is to look at the provision, (c), about being required to drive a vehicle they must be paid whilst they're engaged on such work. So the proposition that we advance is that this is an allowance that's payable when someone's doing the job, rather than somebody that's required to do the job, and I think that fairly states the contending interpretations, or the competing interpretations.

PN224

Now, it's put against us, well this is an all-purpose allowance. The first thing to do is to work out what the allowance is, then to understand it in the context of being an all-purpose allowance. So what is an all-purpose allowance? 'Allowances paid for all-purposes are included in the rate of pay of an employee who is entitled to the allowance.'

PN225

So the first thing in regard to the allowance is one that's entitled to it, and that's when we go to the provisions of the allowance first to work out who's entitled to it. So we say you're entitled to it when you're engaged in doing the work, rather than engaged to do the work. So it's paid to an employee who is entitled to do the work. 'When calculating any penalties or loadings, or payments while they're on annual leave the following allowances are all-purposes.'

PN226

It works perfectly well, in our submission, to be an all-purpose allowance understood in the way paragraph 8 talks about it, because if you are doing the work at a time when a penalty will be payable that allowance will be paid at the penalty rate. If you're doing the work when a loading would otherwise be payable the loading would apply in respect of the allowance.

PN227

Where one hits a snag in respect of that analysis is the annual leave, but a seeming snag. One nevertheless needs to go back to the entitlement, and so that when one is on annual leave that all-purpose allowance, in our submission, would not apply because you're not engaged on that work at the time when you're on annual leave. So it applies perfectly well for a penalty. It applies perfectly well for a loading. It applies consistently with the entitlement.

PN228

If one looks at the leading hand allowance, which is another all-purpose, it's an allowance that's paid for a person in charge of three or more people. So that's a person who has that status. They have that status of being in charge of three or more people. So one can understand that it would apply equally in loadings, penalties or annual leave for that leading hand being entitled where in charge of three or more people.

PN229

Boiler attendant is the other one. That's a person that is entitled where they hold a particular certificate and are appointed to act as a boiler attendant. That can apply

equally well in respect of penalties, loadings or annual leave. So that whilst the Commissioner has identified it as a matter of significance, and in dealing with your question, Deputy President, about that, and I've described it as a snag, in our submission when one looks at and analyses the way in which the clauses fit together, looking at whether your entitlement arises, and then the all-purpose being entitled to the allowance when calculating other benefits, you see that it does have a coherence and a meaning and can be understood as an all-purpose allowance for those occasions when you'd be paid a penalty or a loading, but it wouldn't be payable on annual leave because you wouldn't otherwise have an entitlement.

PN230

On the construction question the Commissioner took into account a number of submissions that were made, and they're set out in paragraph 29. Firstly that a construction was said to conform with the underlying purpose; namely to compensate employees for having the requisite skills and training and maintaining the qualifications to operate a forklift as required. But when one looks at the formulation of the clause itself, which is where one gleans the purpose from, the purpose is, in our submission, to compensate employees who are doing the work. It's to compensate employees while they're engaged on such work.

PN231

And whilst it may be, and I wouldn't wish to be heard to say it would include a compensation for having a qualification, because you must have a qualification in order to be required to drive, the principle purpose is to engage this to compensate for the doing of the work, because it's a compensation paid while they are engaged on such work.

PN232

So, in our submission, to the extent that one is looking at purpose the submission which the Commissioner seems to have accepted, in our submission, doesn't accurately characterise the purpose that's to be gleaned from the terms of the clause.

PN233

Then the next submission deals with the grouping as an all-purpose allowance, referring to the leading hand, the boiler attendants, are payable for all hours worked, not just the periods that for example a boiler was operating. As we have just seen all of the allowances are in different terms. The boiler allowance for example is not particularly directed to hours worked. That might be a consequence, but it's directed to persons holding a certificate and being appointed. The leading hand allowance is directed to being in charge of a particular number of employees, and the consequence being while soever those qualifications or conditions apply one would be paid for one's work.

PN234

But they're in different terms to the allowance that we're concerned with, the heavy vehicle allowance, which is paid while they're engaged on such work. Those words don't appear in either of the leading hand allowance or the boiler attendance allowance. So they can't in that sense be grouped together to understand a meaning. The all-purpose idea is something different.

PN235

Then there's a reference to the examination of provisions of the Bread Industry (State) Award, and the Commission will have seen from my learned friend's submissions that this is an award, one of the predecessors of the current award. But when one goes to the Bread Industry it's different; it's different, and it's importantly different. So that if one goes to page 675, which is an extract from the Bread Industry Award which commences at 672, there is the reference to the heavy vehicle driving allowance in paragraph (b) page 675, providing that:

PN236

An employee who is required to drive a vehicle of more than 3 tonnes - - -

PN237

So far so good.

PN238

- - - as part of the condition of employment shall be paid an allowance for all-purposes for driving a vehicle.

PN239

It's a different provision where in the award the way in which it's been formulated, in our submission, is to make it clear that the payment is while one is engaged on such work. The Bread Award is for all purposes of the award for driving a vehicle which might be said to be ambiguous or susceptible of more than one meaning. What does that mean? In our submission when one comes to the Food Award with which we are concerned it has been made clear that rather than adopting the words and practice of the Bread Award one under this Food Award is paid while engaging on such work. In our submission it's suggesting otherwise. The Commissioner erred in her construction, which is an important matter.

PN240

DEPUTY PRESIDENT SLEVIN: Mr Fernon, the difference that the Commissioner is addressing in the decision appears to be a question of whether, and the expression 'stopwatch' is used, the allowance is to be paid on the basis of whether you worked for 15 minutes or whether you were required to work for an hour, but you may have only driven the forklift for 15 minutes. It seems to be inclined to that, and these issues of work needs to be an all-purpose allowance, et cetera, weren't really pressed by the Commissioner, because that was the dispute, as it were, that was before her.

PN241

I am just wondering why we would be interested in starting to turn our minds to a broad enunciation of the meaning of the award clause. It concerns me from two points of view. One is that that appears to be a long way from what the Commissioner was doing. And secondly, if we were to do that there are far more parties who would be interested in the exercise of interpretation than the parties who are here today.

PN242

MR FERNON: Yes. And that, with respect, is one of the reasons that we submit that permission to appeal is appropriate in this case, because this could have potentially broader ramifications where presumably lots of people have lots of things to say.

PN243

DEPUTY PRESIDENT SLEVIN: But do you propose that we give you permission to appear and then we allow all of those parties to come back on another day and address us on the point?

PN244

MR FERNON: No. Our first point is that the Commissioner went beyond the bounds of the dispute and so it was outside of her jurisdiction in expressing an opinion about the construction of clause 20.2. If we're wrong about that she was wrong in the construction, and the Commission would set that aside. This then becomes a determination of an arbitration rather than a declaration of the meaning of the award of course. So perhaps at one level I was speaking against myself, but that's what it is. But it's plainly a decision of the Full Bench on an instruction of the clauses as a matter of importance and for guidance, if nothing else, to all of those other parties that are not heard.

PN245

But our submission is that the first place to go is the terms of the award. What the Commissioner seems to have done is seems to have been much influenced by the stopwatch idea, and how the clause actually operates in practice. I will just take one step back. The stopwatch idea seems to have come from a statement by Mr Campbell in his paragraph 11 at page 86. He says:

PN246

Depending on the type of work required forklifts are operated at multiple junctures varying from seconds to minutes to hours over the course of the day. I operate a forklift on average once a week currently, but have operated a forklift more frequently in the past.

PN247

That's the evidence. So the way in which forklifts are in fact operates was not particularly the subject of evidence. That seems to be the extent of it. One can imagine in a workplace forklifts are operated as they're required, but how that operates and how it would operate in circumstances where - I withdraw that. It's a question of entitlement, and the provision provides a per hour benefit. Whether that is a per hour of all of the work engaged, or once work is performed it's a per hour entitlement, is a question about which there's no evidence and hasn't been considered.

PN248

But, in our submission, really the Commissioner went beyond what the dispute required, and one might imagine that there might have been a lot more evidence and consideration of the point if it had been truly within the bounds of the dispute.

PN249

So, in our submission, this is an appropriate case for permission to an appeal. It does involve questions of interpretation, and the approach to interpretation, and the construction of an enterprise agreement, and the proper application of the Berri principles, and including the circumstances for the identification of ambiguity or clauses that are susceptible to more than one meaning.

PN250

In our submission the approach of the Commissioner was to effectively put to one side those fundamental foundational approaches and didn't recognise a search really that's required in this case for the meaning of the clause. Rather simply concluding, as she does in paragraph 10, that the agreement itself in mandatory language says what will apply and what's silent. In our submission it's much more nuanced than that, and when one brings into consideration those different meanings to which this clause is susceptible the construction question comes to what we have submitted to be one for the identification of topics. But that analysis, in our submission, is demonstrative of an example of a case for which permission to appeal is appropriate. If the Commission please they're our submissions.

PN251

DEPUTY PRESIDENT CLANCY: Thank you. Thank you, Mr Martin.

PN252

MR MARTIN: Thank you, Deputy President. I won't take the Commission, laboriously go back through the clauses that my friend and the Bench has engaged in, but obviously what the dispute here is whether employees who are required to operate forklifts are entitled to receive the heavy vehicle driving allowance. It turns upon the construction of 2.6.1 and in turn clause 20.2(c) of the Food Award.

PN253

In essence there's a threshold or a gateway issue insofar as the construction of 2.6.1. If we're right about that the entitlement to the HVD allowance flows through by virtue of the Food Award.

PN254

I might just, seeing as we were just recently dealing with the award, if I can just take the Bench to page 678 of the appeal book, which is clause 20.2(c) of the Food Award. For these purposes I am not (indistinct) with the construction at this point, but this is really just a matter of background. It was dealt with below. It hasn't been raised on appeal, but just for the abundance of clarity the reference to 3 tonnes gross vehicle weight that's not in dispute.

PN255

That is referable and it's dealt with in our submissions below that that's the maximum loaded weight of the vehicle. Mr Campbell gives evidence that each of the seven forklifts on site are over 4.5 tonnes, and that is the reason why if we are correct and the Commissioner's decision is upheld that the $1.31 per hour as it pertains to in the Food Award would apply.

PN256

My friend has gone through in some detail around the (indistinct). In essence what has occurred is that the Food Award separately provides for a heavy vehicle driving allowance, which is not what's provided for in the agreement. As the agreement is silent and there was no inconsistency the award applies, which means the employee is entitled to the payment, and the heavy vehicle driving allowance is payable for all purposes, and that means it's payable for all hours worked. That's in essence the gravamen of the decision.

PN257

With respect to grounds 1 and 2 of my friend's submissions Unilever contends that there's an inconsistency between the agreement and the awards, and the agreement is not silent as to the allowances. The notion of inconsistency isn't actually traversed in my friend's submissions. They have been dealt with orally, but in essence the argument around inconsistency and silence is identical. That is there's an inconsistency between the agreement and the Food Award, or the agreement is not otherwise silent regarding the HVD allowance as the agreement contains a comprehensive set of allowances.

PN258

Inconsistency occurs, in our submission, where two clauses cannot be simultaneously complied with. There's a decision referred to in our reply submissions below involving Teekay Shipping [2019] FWCFB 6047 at 82, and we rely on that. There is a decision that I have referred to in our authorities, which is a decision of Simplot, which is at tab 1 of our authorities. If I can take the Commission there, and in particular to paragraph 29 of that decision, which is on page 16 of the list of authorities.

PN259

This case involved a somewhat similar issue. It involved the payment of - whether employees who were not rostered to work on an Easter Saturday were entitled to be paid. It involves almost an identical clause. I should note as well, I did skip past it, this is a single member decision. There is a reference on the front of that decision to it being appealed. That appeal was discontinued, so this decision has not been disturbed. But you will note at paragraph 29 the Commissioner referred - then who was:

PN260

An enterprise agreement will not be signed in relation to a particular matter if (a) the matter is addressed by the agreement expressly, or (b) the enterprise agreement implicitly deals with a matter where one or more clauses is intended to cover the field in relation to the subject. The intention to cover the field in relation to a subject can be express or implied from the text of the clauses, including by reference to the degree of detail covered by the clauses, their subject matter and the context. It is not necessary for alternative rights to be expressly excluded, and omission may show an intention to cover the field.

PN261

My friend had drawn your attention to the decision in DL Employment. That probably more neatly sets out the position insofar as inconsistency or silence.

PN262

Having regard to those principles our submission is that there is no express words in the agreement that provide for a heavy vehicle driving allowance. It then follows that the second limb needs to be enlivened for my friend's argument to be successful. So at its highest Unilever's case is that it's implied that the allowances set out in the agreement are intended to cover the field.

PN263

We say that there are two significant contextual matters that tell against that construction. The first is that clause 15.5 of the agreement, which I will shortly take you to, does not list all the allowances payable to employees. If I can then take you to page 546 of the court book, which is under tab 16, and if the Bench has that you will see that that lists six allowances in the agreement.

PN264

If one is to construe this particular clause as exhaustively setting out the allowances, the issue with that is then one turns to page 538 of the appeal book, which is then clause 10 of the agreement. You will see that it separately lists a meal allowance. If clause 15.5 was intended to exhaustively list the allowances one would expect all the allowances to appear in that clause, but they don't.

PN265

The second contextual factor that tells against my friend's construction - sorry, if I can switch back then to clause 15.5, which is on 546 again - you will see immediately below the table of allowances that there's a reference to a tool allowance which does not appear in those exhaustive, so to speak, allowances, which then says:

PN266

For the avoidance of doubt all maintenance levels are inclusive of the tool allowance. This allowance will be included as part of salary for overtime, annual leave, sick leave, redundancy, and any other entitlement.

PN267

I might just for the benefit of the Bench, this clause does have a long standing history, I may just take the Bench - if I can initially take you back to page 128 of the appeal book which is under tab 10, which is the 2003 agreement. If the Bench has that you will see on page 128 at the very bottom of that page it says, 'Trade levels receive tool allowance in addition.' So that's different at this particular point in time. And you will see on page 129 that it actually lists the tool allowance that's payable.

PN268

If one then turns to page 194 of the appeal book, which is then the 2008 agreement, which deals with the same clause, about halfway down the page.

PN269

DEPUTY PRESIDENT CLANCY: Sorry, what page?

PN270

MR MARTIN: Sorry, Deputy President, it's 194 of the appeal book, which is clause 21 of the 2008 agreement. You will see there about halfway down the page

on 194 it says, 'Trade levels are inclusive of the tool allowance.' That's the first time that it changes from being in addition to, as being inclusive, and you will note down the bottom of that page the tool allowance is expressly referred to.

PN271

If I can then take the Bench to the 2017 agreement, which is page 472 of the appeal book, and this is the agreement that immediately precedes the enterprise agreement, the subject of these proceedings. You see on page 472 about halfway down the page you will see, 'All maintenance levels are inclusive of the tool allowance.' That remains exactly the same. Then on page 473 the tool allowance still is referred to in the table.

PN272

One then now comes back to with that history in mind page 546, which is the current clause insofar as it deals with the allowances. You will see that the tool allowance no longer actually appears as a numerical value or otherwise indicates what it would be worth in the table. In fact it's been replaced by the line coordinator allowance.

PN273

Now, what my friend says in his submissions is that the purpose of clause 15.5.1(a) in terms of displacing that tool allowance is not to overcome what would otherwise be silence as to the payment of the tool allowance under the agreement. Rather it's simply just to inform employees how that would be payable. But if that was the case why would there be any need to make reference to it, because it's not an entitlement under the agreement. It was historically, but it's now no longer an entitlement under the agreement.

PN274

That wording has been left in and it's been given work to do about why the tool allowance is inclusive of the maintenance levels. And the only reason that can be given to that is that the parties were cognisant of the incorporated awards, in this case the Manufacturing Award. By incorporating that award the parties have turned their minds to the fact that if it was not expressly displaced by the agreement the tool allowance would be payable in addition to the agreement, and by rolling up the tool allowance into the rates of pay Unilever avoided this issue, and importantly the parties could have taken the exact same approach with the heavy vehicle driving allowance, but they didn't.

PN275

It follows that when one has regard to the principles that are elicited in the Simplot decision I have just taken you to the agreement is silent. There cannot be any intention discerned from the language of the agreement that demonstrates that allowances were intended to cover the field. In fact there are two significant contextual factors that demonstrate that they didn't intend to cover the field.

PN276

If I can then take the Bench to the decision of *Rice Growers Limited v United Workers' Union* [2022] FWCFB 2005. That is at page 27 of our list of authorities if the Bench has that. This was a somewhat similar case that came before the Commission. The UWU in that case contended that the heavy vehicle driving

allowance under the Food Award, as well as the first aid allowance and the fumigation gas allowance contained in the Food Award that were incorporated were payable.

PN277

You will see then at paragraph 5 of that decision it makes reference to clause 11.1 of the agreement, which states that, and in particular in .1(a) it says:

PN278

The wage rates and allowances during the term of this agreement is set out in schedule A.

PN279

The decision ultimately turned on that particular language. And if I can then take you to paragraph 51 of that same decision, which is on page 35 of the list of authorities, and the Bench in that case said:

PN280

In our opinion the Deputy President's interpretation of clause 11.1(a) was erroneous because it attached no significance on the use of the definitive article and the phrase 'the wage rates and allowances during the term of this agreement.' The particular use of the definitive article in clause 11.1(a) must be given meaning and work to do.

PN281

And about halfway down the page a little bit further on you will see:

PN282

By virtue of its reference to the allowances during the term of the agreement we consider clause 11.1(a) had a plain meaning. It specifies the allowances as set out in schedule A and leaves no room for the allowances in the Food Award or Metals Award to be incorporated into the agreement through the operation of clause 6.

PN283

That is a point that Deputy President Clancy has raised earlier, is that if those words had appeared, or words to the effect of 'These are the allowances pertained to in the agreement', that would be the end of the matter.

PN284

Separately in this case there was no silence, there was no clause as it pertains to silence, and there was also no other significant contextual factors that otherwise told against the incorporation of those allowances. The difficulty here as we have noted no such language exists in the present agreement. Rather it just lists various allowances, not even in the same clause, and yet we're expected to perceive that as being an exhaustive list of the allowances.

PN285

The other difficulty with my friend's argument around this subject matter, just by way of analogy, is that if for example overtime on a Saturday was only dealt with in the agreement, and overtime on a Sunday in the underlying award would not be

payable, because the subject matter of overtime had already been dealt with in the agreement. And that's where this subject matter or topic submission seems to fall apart, and that's why other than having regard to the express words of the agreement in 2.6.1, which the Bench has been taken to, it has to pertain to conditions.

PN286

When one has regard back to those principles in Simplot the issue is what is the textual (indistinct) that intended to cover the field. My friend can't identify one. That is the problem. It was open for Unilever to negotiate an enterprise agreement that did not incorporate by way of silence the underpinning awards, such that they weren't given work to do, but they didn't. They wanted to give those clauses work to do.

PN287

My friend made a reference earlier to giving the words a sensible meaning. In essence this appeal is essentially what they would prefer the industrial outcome to be, as opposed to having regard to the specific words in the agreement and the award. So in our submission there is no inconsistency, the agreement is silent, and the heavy vehicle driving allowance is payable by virtue of the Food Award.

PN288

That's all I wish to say in terms of construction around the silence. Unless the Bench has any questions I will move on to the other grounds of appeal. I will very briefly make reference to ground 3 insofar as it pertains to the Form F17.

PN289

There is no dispute that the Form F17 couldn't properly inform the construction of the agreement. That is a post agreement, pre-approval document that is a subjective interpretation of a particular person that filled out the form. But the difficulty for my friend is that as the Bench has identified the correctness standard applies in the field which doesn't involve discretion. It takes the matter nowhere.

PN290

The issue is did the Commissioner actually construe the agreement correctly, and insofar as she improperly relied upon the Form F17 that is of no note and is a moot point, and we rely on the decision of *Tracey v BP Refinery (Kwinana) Pty Ltd* [2022] FWCFB 2010 at 75, which is cited in our submissions. All that arises from that is that she had regard to an irrelevant consideration, but because discretion isn't involved it makes no difference. She correctly construed the agreement, in our submission.

PN291

In terms of jurisdiction and the construction of the Food Award, which is ground 4 of my friend's grounds of appeal, broadly contend that the Commissioner exceeded jurisdiction by determining the circumstances in which the HVD allowance is to be paid, and incorrectly construed clause 20.2(c) of the Food Award by finding it was payable for all-purposes.

PN292

If I can take the Bench to tab 16 of the appeal book, and page 555 in particular. You will see on page 555 - my friend has taken the Bench to it earlier around the dispute settling procedure - it provides up the top at clause 20.1:

PN293

In the event of an employee having a grievance the employee in the first instance must take the matter up with the shift manager.

PN294

So it's a very broad dispute resolution procedure in relation to any grievance. And then at 20.4:

PN295

If the matter remains unresolved either party will have the right to notify the Fair Work Commission to conciliate or arbitrate on matters dealt with by this agreement.

PN296

We would say that given the silence enlivens the Food Award that is plainly a matter that is contemplated by the agreement for the purposes of clause 20.4, and the Commission has jurisdiction to deal with the matter unequivocally.

PN297

The other difficulty with my friend's submission that the Commission should only have determined that there was some unspecified entitlement to the heavy vehicle driving allowance is that it's directly inconsistent with Full Bench authority in respect to the appropriate inclusion of arbitrated proceedings.

PN298

This is dealt with in submissions, but it is worth highlighting, the Bench no doubt is aware that arbitration of ultimately making a decision which conclusively establishes the rights of the parties as to the arbitrated dispute, and that is determining an industrial dispute by way of arbitration is as per the decision in Falcon Mining at 75 referred to in our submissions. It is intended to be more than simply just expressing an opinion. Instead, as was held in paragraph 84 of DL Employment, which I might briefly take the Bench to, which is in my friend's authorities at page 137. This matter involved whether employees were entitled to redundancy entitlements. You will see towards the bottom of that paragraph 84:

PN299

It nonetheless remains necessary for a final determination or final orders to be made identifying the arbitrated outcome of the dispute, since it is not the role of the Commission to declare the legal rights of parties.

PN300

That was ultimately referred to the Senior Deputy President in those circumstances and orders were made to resolve the dispute to finality.

PN301

Resolving the dispute in this case requires identifying the employees who are entitled to receive the allowance and the amount that is payable. In the absence of

that the dispute is unresolved, the parties will just come back to the Commission and reagitate the same dispute. So failure to determine the dispute to finality would have been an appealable error if the Commissioner had failed to do so, but she didn't, and in doing so she correctly determined the matter.

PN302

That's all I wish to say about jurisdiction. If I can then turn to page 678 of the appeal book, which is the Food Awards, and it was drawn towards the end of my friend's submissions around, 'An employee who is required to drive a vehicle of more than 3 tonnes gross vehicle weight must be paid while engaged on such work.' Our submission is that this is referable to the overarching requirement to drive a forklift, not the individual occasions on which they operate a forklift.

PN303

DEPUTY PRESIDENT DEAN: And the words say, 'while they are engaged on such work.'

PN304

MR MARTIN: 'While they are engaged on such work.' They do say that, but where it's referable to such work we say that that's referable to that overarching requirement and whenever they're required to perform that work is by virtue of their employment. But, Deputy President, you did draw attention earlier to a potential inconsistency that arises in clause 20.2(a) in terms of the all-purpose allowance. And all my friend says about that is that effectively you never get it on annual leave. You would only get it in relation to calculation on penalties and loadings. But if that was the case, looking at 20.2(a), there would be no need to make any reference to annual leave at all, because it would never be payable. So that would be giving those words no work to do.

PN305

So in those circumstances it would follow that if a person is on annual leave how do you then calculate the amount that they're entitled to. Do you for example calculate it by reference to the average time that was spent driving a forklift, and over what period would that calculation be averaged. That's the difficulty with that construction. It follows that it has to be paid for all purposes. We accept that the wording is different to that historically to what it was in the Bread Award, but we say there's no discernible difference insofar how - - -

PN306

DEPUTY PRESIDENT CLANCY: There is a discernible difference though, it was payable for a weekly rate and now it's hourly.

PN307

MR MARTIN: It is payable hourly. What we say about that is that that is just a mechanism by which it's paid as opposed to - the reference to whether it's paid weekly or by hourly we don't say anything necessarily turns on that. You have to have regard to the all-purposes.

PN308

DEPUTY PRESIDENT CLANCY: It sort of lends itself more to an interpretation that says while doing the work. Otherwise you just pay it weekly. I can see the

difference between the leading hand allowance or a boiler attendant's allowance, but this one is paid hourly. It seems to draw back to actual performance of that work.

PN309

MR MARTIN: Sure. But the difficulty is then if one is on annual leave how do you pay that amount?

PN310

DEPUTY PRESIDENT CLANCY: The submission is made the wording in 20.2(a) is your entitlement to the allowance arises when you're doing the work. Not just by virtue of being employed, whether a requirement to do that work.

PN311

MR MARTIN: Yes, and we say the entitlement arises as a result of the overarching requirement.

PN312

DEPUTY PRESIDENT CLANCY: Of the overarching requirement.

PN313

MR MARTIN: Yes. So that's the distinction, and in those circumstances you would not be able to reconcile it being paid for a discrete period of time as opposed to the entire period in which they're required to perform the work.

PN314

DEPUTY PRESIDENT SLEVIN: Was that issue, Mr Martin, agitated before the Commission? It doesn't appear to be.

PN315

MR MARTIN: Submissions were certainly made in relation to this particular point.

PN316

DEPUTY PRESIDENT SLEVIN: On annual leave.

PN317

MR MARTIN: Yes, that was expressly dealt with on transcript.

PN318

DEPUTY PRESIDENT SLEVIN: The determination made by the Commissioner seems to focus more on your stopwatch argument.

PN319

MR MARTIN: Yes, that's correct. I did note that earlier, Deputy President. That was raised below. This particular point around annual leave for whatever reason hasn't turned up in the decision, but we say otherwise it doesn't affect the correctness of the decision.

PN320

DEPUTY PRESIDENT CLANCY: You're going to have a stopwatch whether it's less than an hour or over an hour though, aren't you?

PN321

MR MARTIN: What we're saying is it was payable for all the hours that you work.

PN322

DEPUTY PRESIDENT CLANCY: Then why would it expressed as an hourly rate?

PN323

MR MARTIN: What we say is it has historically been paid as a weekly rate and then it's been changed to an hourly rate. In our submission we don't say that anything turns on that. I understand the Deputy President's point about that it lends itself more to the fact that you would get paid based on the hourly rate. But we just say that's the mechanism by which it's payable. It doesn't actually change the overarching entitlement.

PN324

DEPUTY PRESIDENT SLEVIN: It's a difference between whether you drive it for 15 minutes or whether you're required to drive it within an hour. Is that how that practically applies?

PN325

MR MARTIN: Sorry, I don't quite understand the question, Deputy President.

PN326

DEPUTY PRESIDENT SLEVIN: Your stopwatch approach is, and Mr Fernon referred to this, you get paid per hour if you work say over one shift four blocks of 15 minutes on the forklift, as opposed to what I understand your approach to be is that for each of those hours in which you were required to drive, albeit only for 15 minutes. So on your interpretation there would be four hourly payments, and Mr Fernon's interpretation there would be one hourly payment, or additional payment.

PN327

DEPUTY PRESIDENT DEAN: Actually I understood your submission to mean it's paid on every hour - - -

PN328

MR MARTIN: That's correct.

PN329

DEPUTY PRESIDENT DEAN: - - - regardless of whether you're doing work effectively.

PN330

MR MARTIN: Yes. So if for example someone is employed as a forklift driver whether they work on a forklift for eight hours or they work on it for four hours, or no hours, the point is that they're required to perform that work, and therefore they're paid for it.

PN331

DEPUTY PRESIDENT DEAN: So in your argument it's paid for the eight hours of the shift?

PN332

MR MARTIN: Correct.

PN333

DEPUTY PRESIDENT SLEVIN: Is that how they're employed, as forklift drivers? I got the impression they're employed as operators and they may have to drive a forklift if they're required to during - - -

PN334

MR MARTIN: There is no evidence formally on this. I have to seek instructions on that, Deputy President. That is a possibility, but I couldn't make comment on that either way.

PN335

Otherwise if I can then just take the Bench to page 24 of the court book, which is just our submissions in reply below - our submissions on appeal, sorry. It's just worth noting that irrespective of whichever way, if our construction is deemed to be correct that it was silence and the heavy vehicle driving allowance is to be payable. Whether that turns on is payable for the hours specifically worked or whether it's payable for the whole shift that doesn't really matter for this point.

PN336

The point is that there are differing amounts that are payable by virtue of the annual wage rate review. I have set those out at paragraph 30, which indicate that for particular periods they change. Currently it's $1.31, but you will note at paragraph 31 I have indicated that from 1 July 2024 going forward that allowance payable will change by virtue of the annual wage review. So in resolving the dispute regard should be had to those differing amounts.

PN337

I had intended to deal with it, but seeing as it has been the subject of significant discussion, the Deputy President has just drawn the matter to my attention around the stopwatch, I don't intend to make any further submissions around that particular point. The Bench is aware of my construction in that respect. Unless there's any other questions those are our submissions.

PN338

DEPUTY PRESIDENT CLANCY: Thank you.

PN339

MR MARTIN: May it please.

PN340

DEPUTY PRESIDENT CLANCY: Any submissions in reply?

PN341

MR FERNON: If the Commission pleases. I will be very brief I think. Just dealing with this question of construction and my learned friend's proposition that one looks at the conditions. Could I take the Commission to the provision in clause 15.5. My learned friend addressed clause 15.5. In clause 15.5.3 and 5.4.7 provides for a cold allowance. So this is allowance showing in 15.5 will be paid to palletising operators, not other operators.

PN342

This allowance is applied for shift work in this area, including overtime shifts. This allowance will be paid to others by exception if they are working in palletising based on the criteria below.

PN343

Et cetera. I draw attention to that cold allowance. That's the way it works, palletising operations. Go to the award and page 678, clause 20. This is one of the special allowances in (f)(ii) cold places.

PN344

An employee who works for more than one hour in places where the temperature is reduced by artificial means below nought degrees centigrade must be paid 73 per hour. In addition where the work continues for more than two hours the employees are entitled to 20 minutes rest.

PN345

When one looks at the condition what is that? Is it inconsistent or is the agreement silent about cold allowances for other than palletising operators? The proposition that we advance by looking at the topics says contrary to my learned friend's submission, that where the allowances are provided for in the agreement they are the allowances that are provided for. That topic is dealt with, and it doesn't matter whether the allowances are dealt with in one, two, three, four, five clauses in the agreement. The fact that the allowances are dealt with is the point. The allowances are dealt with in clause 20. There is an allowance dealt with in clause 15.

PN346

The allowances are dealt with in the agreement, and that's the point, very much as the award itself deals with some allowances in clause 20. And the particular extract in the appeal book doesn't go to the extent of the meal allowance, but the point is allowances are dealt with in the agreement. That topic is dealt with in the agreement. Descending into conditions and trying to work out whether it's an inconsistency or whether it's a silence I would suggest is demonstrated by merely looking at the cold allowance. How does that apply.

PN347

In my submission the reference to the tool allowance doesn't assist with the resolution of the problem that we're confronted with. The provision in the agreement is one that's for the avoidance of doubt. It seems really to have nothing to do with the problem that we're concerned with. It seems really, if anything, to indicate to all concerned reading the agreement and covered by the agreement that the tool allowance is in the salary provision, rather suggesting that there's not scope for, or to the extent that a tool allowance was to be discussed on a further

occasion that it would obviously need to take into account that notation in the agreement that it's included as part of the salary. So in our submission the reference to the tool allowance doesn't assist in the resolution of the construction issue.

PN348

Then lastly, I think, on the question of jurisdiction, my learned friend is correct in his submission that the Commission needs to resolve the dispute to finality. We don't cavil with that. The point is what's the dispute to be resolved to finality. It's a dispute that has its foundation or jurisdiction in the agreement of the parties. It's not an arbitration in the sense of an arbitration as understood in other circumstances, and is perhaps understood in the days of the arbitrating of awards. This is a different idea, and there's no issue with deciding the dispute to finality, but what's the dispute? And our submission is that the dispute is formulated as one of entitlement and it really requires in deciding to finality whether it is or it isn't, it's a yes or a no.

PN349

Lastly on the question of annual leave in the all-purpose idea, it's not that the reference to annual leave has no work to do in paragraph (a). Annual leave does have work to do. It has work to do in respect of the boiler attendant, and it has work to do in respect of the leading hand. Our proposition is in circumstances where there is no entitlement unless you're working doing the work, and you're not doing the work in annual leave, paragraph (a) wouldn't operate to have the allowance paid during annual leave, but penalty times, loading times, it would apply. They're our submissions in reply if the court pleases.

PN350

DEPUTY PRESIDENT CLANCY: Thank you very much. We thank the parties for the material they have filed ahead of today's hearing and for their submissions today. The Full Bench will reserve its decision and it will be sent to the parties directly when complete.

PN351

MR FERNON: If the Commission pleases.

PN352

DEPUTY PRESIDENT CLANCY: Thank you, we're adjourned.

ADJOURNED INDEFINITELY **[12.41 PM]**