



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CROSS

C2023/6606

s.739 - Application to deal with a dispute

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and
Allied Services Union of Australia
and
Sydney Trains
(C2023/6606)**

Sydney Trains and NSW TrainLink Enterprise Agreement 2022

Sydney

10.00 AM, THURSDAY, 22 FEBRUARY 2024

Continued from 29/11/2023

PN1

THE DEPUTY PRESIDENT: Yes, can I take the appearances.

PN2

MR A AGHAZARIAN: Appearing for the applicant Mr Aghazarian, initial A.

PN3

THE DEPUTY PRESIDENT: Thank you.

PN4

MR S JENKINS-FLINT: Appearing for the respondent Jenkins-Flint, initial S.

PN5

THE DEPUTY PRESIDENT: Thank you.

PN6

MR JENKINS-FLINT: And with me I've got - - -

PN7

MS M HARIRI: Appearing for the respondent Mona Hariri.

PN8

THE DEPUTY PRESIDENT: Thank you. Have the parties had any discussions about how they wish to proceed today?

PN9

MR JENKINS-FLINT: Your Honour, I spoke with my friend and asked if he would mind if our witness Ms Kelly sat in for the duration of the hearing.

PN10

THE DEPUTY PRESIDENT: Yes.

PN11

MR JENKINS-FLINT: He didn't object. That's fine.

PN12

THE DEPUTY PRESIDENT: That's okay?

PN13

MR AGHAZARIAN: Yes, and there will be a very brief of cross-examination of Ms Kelly. I am informed the respondent does not intend to cross-examine Mr Beville.

PN14

THE DEPUTY PRESIDENT: No problems. Do you wish to make an opening then, Mr Aghazarian?

PN15

MR AGHAZARIAN: Sorry?

PN16

THE DEPUTY PRESIDENT: Do you wish to open or - how do you wish to proceed today?

PN17

MR AGHAZARIAN: I haven't discussed it with my friends, but suggest maybe a brief opening statement. I rely largely on the written statement, then cross-examination.

PN18

THE DEPUTY PRESIDENT: We can proceed with the evidence.

PN19

MR AGHAZARIAN: Yes.

PN20

THE DEPUTY PRESIDENT: Yes.

PN21

MR JENKINS-FLINT: That's fine with me.

PN22

THE DEPUTY PRESIDENT: Off you go.

PN23

MR AGHAZARIAN: I rely on the written submissions filed. I just want to note one error in the written submissions. This is at page 48 of the court book.

PN24

THE DEPUTY PRESIDENT: Yes.

PN25

MR AGHAZARIAN: Paragraph 37. The second last line of paragraph 37, the first word. That was intended to say week day, not weekend.

PN26

THE DEPUTY PRESIDENT: Sorry. Yes.

PN27

MR AGHAZARIAN: 'The award also provides that ordinary hours may only be worked on a weekend.' That would be a very unusual award indeed.

PN28

THE DEPUTY PRESIDENT: It would be. So it's week day?

PN29

MR AGHAZARIAN: Week day.

PN30

THE DEPUTY PRESIDENT: No worries.

PN31

MR AGHAZARIAN: Yes. And I rely on the submissions in reply as well. Just to summarise briefly the primary submission is a plain language argument. In the applicant's view there is a meeting of minds and a common view in terms of the principles to be applied here largely - although I would say the Berri principles state that surrounding circumstances can be looked at to determine whether there is an ambiguity or not.

PN32

The key principle is if the Commission finds there is a plain meaning to it it's not susceptible to more than one meaning. The evidence of surrounding circumstances is not admissible for the purposes of determining objective intention or construing the clause. Although I concede that the surrounding circumstances do have to be looked at there is a two step process, and there's a task first of determining whether there is a plain and ordinary meaning for the words and whether it is susceptible to more than one meaning.

PN33

So look at that in light of the surrounding circumstances, and then if it is susceptible to more than one meaning then look at the surrounding circumstances. And our primary submission is there is a plain and ordinary meaning to the word, that in excess of eight hours of overtime worked, in excess of eight hours on any one shift means overtime which is greater in quantity than eight hours, and the first three hours of overtime worked refers to the overtime worked on the shift.

PN34

Now, we do accept and this is apparent from the submissions and submissions in reply that that is not quite how the previous awards worked. There was a slight difference in language. However, I think one being brought out in submissions is the original awards, or the predecessor awards didn't quite seem to contemplate the very existence of standalone overtime shifts, because they provided for ordinary hours of 76 hours a week, or ordinary hours of 152 hours over a four week cycle.

PN35

From that context that appears to be essentially a 19 day four week roster, because it refers to eight hours. So essentially ordinary hours, at least as contemplated by the original award, were worked Monday to Friday and were either of eight hours length if it was a 152 week four week cycle, or 7.6 hours in length, and anything worked on top of those shifts or on a weekend was overtime. So where you had essentially ordinary hour shifts of only eight or 7.6 hours it's not really possible to have a standalone overtime shift occurring on a week day in the ordinary course.

PN36

So it didn't quite contemplate that situation. There is, I guess one could say, a bit of a gap in the award, because where you have a situation where ordinary hours are worked that way it makes sense to say, all right, well ordinary hours - sorry, overtime hours is either hours worked in excess of 76 hours in the week, which by extension it means that's essentially on a weekend if you have that system of eight or 7.6 hour shift, or hours worked in excess of eight or 7.6 hours per shift, in which case it's overtime in the form of hours added to the end of the shift.

PN37

So there is a bit of a gap in dealing with where you have a standalone overtime shift on a week day where you would have - if you have a system of say 12 hour shifts or 10 hour shifts like exists under this agreement and is allowable under this agreement. That's not to say that the award can't be looked at if there is found to be an ambiguity in this clause.

PN38

I would just submit it's not entirely helpful, and indeed looking through the history of these awards a frustrating thing one finds with these awards it's very, very difficult to shed any light on the original industrial purpose, because 90 per cent of the time terms are made by consent. To the extent that there was anything going on at the time or anything in the contemplation of parties the evidence probably lies in the basement of a now retired union official somewhere in the country, to put it candidly.

PN39

I would submit simply that simply looking at the history of awards and (indistinct) awards is the original purpose of this is not particularly helpful in this situation. Really one must look to the ordinary meaning of the words. And while circumstances surrounding can be looked at to determine just the purpose of whether there is an ambiguity or not, we would submit, and we say this in our reply submissions, it's not particularly helpful to determining whether there is ambiguity or not, because there's nothing in the surrounding circumstances that for example shows differing understandings of what is meant by this clause, or shows differing understandings of what this clause would mean when it's translated into the agreement of particular words.

PN40

So we would simply submit it can be resolved by an ordinary reading of the terms. The history of the awards may show a different way of this working, but given they are created in different circumstances, a different regime of overtime, not particularly helpful using them to construe this clause.

PN41

The agreement was a consolidation of different awards in 2008, I think. Obviously there is a risk that comes with consolidation. It's rare in a consolidation that everything will be replicated precisely as they are, as opposed to a mere incorporation where you have just all the different terms lobbed together. This is a consolidation where there was an attempt, a genuine attempt by the parties - I wouldn't deny there was a genuine attempt to substantially replicate the terms of the various awards, but there's always things that are going to be lost. So again the intention around that - indeed there's not that much evidence of what the intention was back in 2008 - I would submit is not particularly helpful.

PN42

In terms of the industrial outcome there's some points made about absurd outcomes, and I just emphasise the point, it's not an absurd outcome in the sense of creating an exorbitant entitlement to overtime. It's I think pretty uncontroversial to say overtime usually it was very common for overtime to work

as the first three hours of overtime being time and a half and the remainder being double time. If anything this clause is a little bit unusual in that it provides - well, on Sydney Trains' interpretation provides for a situation where overtime can be paid at double time, but it provides for double time to kick in after 11 hours potentially. It's just a bit unusual. It's not to say it's unusual for overtime to be at time and a half only, but where you have an overtime, a tiered system of overtime where it's time and a half (indistinct) double time kicks in, it's not particularly normal for that to be after or - - -

PN43

THE DEPUTY PRESIDENT: I think clause 60.2 does it.

PN44

MR AGHAZARIAN: Yes, but clause 60.2 refers to an extended shift. Now, there is a difference between the parties on what an extended shift means, which is really a further context to this. Just to clarify Sydney Trains as I understand it says employees who currently work eight hour ordinary time shifts and work overtime on top of that get time and a half for the first three hours and then double time thereafter by virtue of clause 60.3. We would say it's by virtue of clause 60.2, because it refers to an extended shift.

PN45

Unfortunately that term is not defined, and the clause it refers back to doesn't refer at any point to an extended shift. It merely says in that clause maybe work in shifts of up to 12 ordinary hours. So an extended shift in one form or another is a shift that is an ordinary time shift that has overtime at the end of it. Whether there's a narrower definition which is a subset of that is another question, but it wouldn't be a situation of overtime being paid at time and a half for 11 hours.

PN46

It would be a situation of ordinary time of at least I would think eight hours and then time and a half after that, but the interpretation of 60.3 that Sydney Trains has it's a situation where overtime can be worked at for 12 hours, only overtime, no ordinary time, and double time kicks in in the 11th hour.

PN47

So in terms of the industrial outcome we say it doesn't create a particularly unusual situation. You might create an increase cost, and I will have something to say about that after the evidence, but it's not an exorbitant or unusual cost to be essentially doing what this - not that uncommon a situation, which is overtime paid at double time after the first three hours. And to the extent that there is an industrial purpose to this clause our primary submission is it appears it's an incentive to ensure overtime shifts aren't excessively long. It does create an incentive and one would think of it creating an incentive to keep standalone overtime shifts under eight hours. That's the extent there's an industrial purpose. That's all I have to say in opening.

PN48

THE DEPUTY PRESIDENT: Keeping overtime excessively long, but it's a replacement 12 hour shift, it's always going to be a 12 hour shift. You're not by

calculations trying to limit the access to overtime by the respondent. If somebody has gone on leave they're going to take a 12 hour shift.

PN49

MR AGHAZARIAN: Yes, that is correct. So, yes, it's a replacement shift. But again it does - one can still see it creating incentives to create alternate situations or alternate ways of dealing with that, covering that 12 hour shift. Indeed Sydney Trains mentions, and while it's not particularly common at the moment, one way of dealing with a 12 hour shift is by extending the shift on either side for people who are finishing shifts. That may lead to a very long shift, but it doesn't lead to employees working more days than they would ordinarily work at least. So that's one way of dealing with it, but I accept if one is replacing a 12 hour shift, certainly on our submissions, the usual course would be to have another 12 hour shift replace that.

PN50

THE DEPUTY PRESIDENT: Thank you.

PN51

MR AGHAZARIAN: That's my opening submissions.

PN52

THE DEPUTY PRESIDENT: There's no cross-examination of Mr Beville?

PN53

MR JENKINS-FLINT: There's no cross-examination, your Honour. I do have just a short list of objections to hand up.

PN54

THE DEPUTY PRESIDENT: Shall we deal with that evidence then, Mr Aghazarian?

PN55

MR AGHAZARIAN: Yes, Deputy President.

PN56

THE DEPUTY PRESIDENT: Is paragraph 4 seriously pressed? I mean the objection. Is the objection to paragraph 4 seriously pressed?

PN57

MR JENKINS-FLINT: We press it because Mr Beville doesn't know this, he's not qualified to know this. It may be true (indistinct) another award, and so - - -

PN58

THE DEPUTY PRESIDENT: It may be true. But it is true, isn't it?

PN59

MR JENKINS-FLINT: That they were covered by four separate awards. Regardless this is not within Mr Beville's qualification to give that evidence.

PN60

THE DEPUTY PRESIDENT: He works in the industry. I have only been dealing with this industry for a couple of years and I have worked this out. I should imagine he would have worked it out before me. Why don't you take some time to think to revise your objections down to what in fact is objectionable. Would you like five minutes to do that?

PN61

MR JENKINS-FLINT: We can do that, your Honour.

PN62

THE DEPUTY PRESIDENT: Adjourn the matter until 10.25.

SHORT ADJOURNMENT

[10.20 AM]

RESUMED

[10.32 AM]

PN63

MR JENKINS-FLINT: Thank you, your Honour. On further consideration we press objections to the following; Mr Beville's paragraph 5, his paragraph 8, his paragraph 10, 17 and 18 of his first statement, and we continue to press objections to his paragraph 3 and paragraph 4 of his second statement.

PN64

THE DEPUTY PRESIDENT: Okay. Why is he not qualified to give the evidence at 5?

PN65

MR JENKINS-FLINT: Those awards covered people a long time ago. I don't think he would have been there at the time, and I don't think he'd have access to the data as to who those awards primarily covered.

PN66

THE DEPUTY PRESIDENT: But is there an issue about what he says about it?

PN67

MR JENKINS-FLINT: We think it's incorrect.

PN68

THE DEPUTY PRESIDENT: Okay.

PN69

MR JENKINS-FLINT: Rather than cross-examining we would just rather deal with it by objection, put it on the record that it's just not within his qualifications to know that.

PN70

THE DEPUTY PRESIDENT: You're having an each way bet there, are you? I mean either you want to cross-examine on the point and test it, but you also say the principal point is you just want it struck out because you say it's wrong. You haven't tested whether it's wrong or right with Mr Beville.

PN71

MR JENKINS-FLINT: I accept it's wrong, because you asked me (indistinct). I'd rather we just - (indistinct) each way bet. We're saying it's just an objection that he's not qualified to provide that evidence.

PN72

THE DEPUTY PRESIDENT: Okay. That's something you can test in cross-examination. So we will leave it in and you can test that. Paragraph 8. It's a factual assertion based on his experience I would imagine. 'It's not always the case that an RC employee will be somebody who was previously covered by the industrial awards, as an example.' Then there's the statement more in relation to (indistinct) this work from the fifth last line. 'However there's no standalone section.' That may or may not be correct. Do you say that's incorrect?

PN73

MR JENKINS-FLINT: Yes, we do say that's incorrect. Yes, it is the second part that we say that Mr Beville isn't qualified to give evidence of that nature. He's not an industrial expert. He's not an employment lawyer. He wasn't around at the time of the 2002 RIC agreement.

PN74

THE DEPUTY PRESIDENT: They're matters you can put to him in cross-examination. I will allow it. Paragraph 10. Is that in question?

PN75

MR JENKINS-FLINT: Again Mr Beville doesn't have access to the data (indistinct) to say this information. He doesn't know - he isn't qualified to know there's only a small number of employees.

PN76

THE DEPUTY PRESIDENT: He might not have access to the data, but is it incorrect?

PN77

MR JENKINS-FLINT: Yes.

PN78

THE DEPUTY PRESIDENT: So what is being said there is incorrect you say?

PN79

MR JENKINS-FLINT: It's a very strong indication it's correct, but he's saying, 'There's however a small number of employees.' That may be true, but there's also lots of other employees.

PN80

THE DEPUTY PRESIDENT: But he's only talking about the small number, 'However a small number.'

PN81

MR JENKINS-FLINT: Yes, giving an indication that there's only a small number. He's not qualified to know whether it's only a small number or whether it's a large number.

PN82

THE DEPUTY PRESIDENT: It's the small grouping of the thousands, is it not, that arises from your submission. I thought it was consistent with that that it was a small number, 'However there's a small number.' If it's factually incorrect you can test him on it. So I will allow that. Paragraph 17. So you haven't objected to paragraphs 15 and 16 now, you've amended that. Then at 17 it says:

PN83

From my understanding the process of working overtime for all other section to employees is mostly the same, which I describe above. The business areas that do 12 hour shifts in section 12 include.

PN84

So he's got the basis of why he says that in a summary sense. He's made a statement about business areas. What's the difficulty with the paragraph? Not qualified to give evidence of this nature?

PN85

MR JENKINS-FLINT: We won't press objection to paragraph 17.

PN86

THE DEPUTY PRESIDENT: And 18. Not qualified to give this evidence - well, he understands. Does he have to give evidence-in-chief as to how he's got this understanding?

PN87

MR JENKINS-FLINT: We say he's got no qualification.

PN88

THE DEPUTY PRESIDENT: No, not qualification, he works in the industry.

PN89

MR JENKINS-FLINT: Okay. We'll withdraw all the objections.

PN90

THE DEPUTY PRESIDENT: And dealing with the reply statement, paragraphs 3 and 4. So he's responding to a paragraph of Ms Kelly. He notes his experience, something is not common practice, preferred practice. What's controversial about that? You say he's not qualified to give evidence of this nature? It falls within for example previous objections in the previous statement to paragraphs 10, 17, 18, 8.

PN91

MR JENKINS-FLINT: I will deal with those on cross-examination, your Honour.

PN92

THE DEPUTY PRESIDENT: Okay. So we're going to admit the whole of each of the Beville statements. So the first will be exhibit A1. We can just mark them now and then of course once Mr Beville is sworn he can adopt them. Is that convenient? That will make the reply exhibit A2.

EXHIBIT #A1 WITNESS STATEMENT OF ALEC BEVILLE

EXHIBIT #A2 WITNESS STATEMENT IN REPLY OF ALEC BEVILLE

PN93

So you wish for Mr Beville to be called to give evidence?

PN94

MR JENKINS-FLINT: Yes, your Honour.

PN95

MR AGHAZARIAN: Deputy President, Mr Beville was of the understanding that he wouldn't be subject to cross-examination today. We don't object to him being cross-examined, but I will ask for the Commission's indulgence for a 10 minute adjournment just to have a conversation with him.

PN96

THE DEPUTY PRESIDENT: Any objection to that, Ms Hariri or Mr Jenkins-Flint?

PN97

MR JENKINS-FLINT: No, your Honour.

PN98

THE DEPUTY PRESIDENT: We will resume - is 11 more convenient?

PN99

MR AGHAZARIAN: Eleven would be greatly appreciated, Deputy President.

SHORT ADJOURNMENT

[10.42 AM]

RESUMED

[11.03 AM]

PN100

THE DEPUTY PRESIDENT: Mr Aghazarian?

PN101

MR AGHAZARIAN: Yes, Deputy President, I would like to call the applicant's first witness, Mr Alec Beville.

PN102

THE DEPUTY PRESIDENT: Mr Beville, are you there?

PN103

MR BEVILLE: Yes, I am.

PN104

THE DEPUTY PRESIDENT: Can you please follow the instructions from my associate.

PN105

THE ASSOCIATE: Mr Beville, can you please state your full name and address.

PN106

MR BEVILLE: Alec Beville, (address supplied).

<ALEC BEVILLE, AFFIRMED

[11.03 AM]

EXAMINATION-IN-CHIEF BY MR AGHAZARIAN

[11.03 AM]

PN107

THE DEPUTY PRESIDENT: Mr Aghazarian.

PN108

MR AGHAZARIAN: Mr Beville, I would just like to confirm do you have a copy of the court book there in front of you?---I do, yes.

PN109

Can I take you to page 50 of the court book?---Page 50. Yes, page 50.

PN110

This is a statement you made in these proceedings; is that correct?---Yes, that's correct.

PN111

And the statement is some 18 paragraphs long?---Yes, that's correct.

PN112

Are there any changes you wish to make to the statement?---There is one change I'd like to make, yes.

PN113

Yes?---The change I'd like to make is for paragraph 5 where I refer to the award being covered - the award which covers the large majority of employees which would later be covered by section 2 is the Professional Officers Award. I'd like to amend that if it's all right. What I meant to say was that the award which covered the large majority of the employees which would later be covered by section 2 was the Professional Officers Award and the Salaried Officers Award - I'm not sure of the split between them - and the Senior Officers Award would be a minority.

PN114

Okay. So to clarify the award which covered the large majority of employees which would later be covered by section 2 was the Professional Officers Award and the Salaried Officers Award 2002. Is that your statement then?---Yes, that's correct. The point I was trying to make is that in totality section 2 and the awards covered by section 2 to majority of non-trade and non-technical staff. That's the point I was trying to make, compared to trade staff.

PN115

So with that amendment is the statement otherwise to the best of your knowledge true and accurate?---Yes, that's correct.

*** ALEC BEVILLE

XN MR AGHAZARIAN

PN116

Deputy President, I would like to tender the statement contained at page 50 of the court book as evidence.

PN117

THE DEPUTY PRESIDENT: Yes. That's already been marked exhibit A1.

PN118

MR AGHAZARIAN: Mr Beville, I would like to take you to page 54 of the court book - sorry, not 54, page 59 of the court book?---Yes, I'm at page 59.

PN119

So this is a statement you made on 12 February 2024?---Yes, correct.

PN120

And the statement is some four paragraphs long?---Yes, that's correct.

PN121

Are the contents of the statement to the best of your knowledge true and accurate?---Yes, they are.

PN122

Deputy President, I would like to tender the statement of Alec Beville contained at page 59 of the court book as evidence.

PN123

THE DEPUTY PRESIDENT: That has been marked exhibit A2. Any examination-in-chief?

PN124

MR AGHAZARIAN: No, Deputy President, no examination-in-chief.

CROSS-EXAMINATION BY MR JENKINS-FLINT

[11.07 AM]

PN125

MR JENKINS-FLINT: Hello, Mr Beville, just a few questions. If you can turn to page 51 of the court book, your paragraph 8?---I'm at page 51, yes.

PN126

You can see your paragraph 8?---Yes, paragraph 8.

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN127

When were telecommunications workers rolled into the RC classifications?---My understanding is that they were rolled in somewhere between 2002 and 2008. I believe it was a long process where there was a number of different discussions had, because there was a couple of changes made to telecommunications workers where previously they had been employed by Argus which was meant to be a private company. That got shut down after (indistinct). They were then rolled back into I suppose what is Sydney Trains (indistinct) at the time, and there was negotiations that went on for a long while as to them coming into the RC

grade. Off the top of my head I can't exactly remember what date it was they came in.

PN128

So just to confirm you said somewhere between 2002 and 2008?---Yes, that's correct.

PN129

Do you mean to say in the making of the 2008 agreement telecommunications workers were rolled into RC classifications?---Sorry, can you repeat that question, it just cut out there for a second.

PN130

Are you saying that telecommunications workers became covered by the RC classifications, to use your phrase 'rolled in', at the commencement of the 2008 agreement?---That is my understanding, yes.

PN131

When you say telecommunications workers do you exclusively mean the five grades of telecommunications workers who appear in section 5 of the 2002 RIC agreement?---What I'm referring to - yes, so - sorry, what I am referring to is employees that were within the business units, C&CS, or communications and control systems. So, yes, it was those employees that were covered by (indistinct) grades if that's what you're referring.

PN132

So to ask my question again. You're only referring to telecommunications workers who were in the five grades who appear in section 5 of the 2002 RIC agreement. You're not talking about any other telecommunication workers?---Yes, what - yes, I believe so. If you could just remind me what those specific grades are just so I can answer your question with more clarity, sorry.

PN133

There's five grades, there's a list of five grades in the 2002 agreement that appear in section 5?---Yes.

PN134

What about telecommunication workers who were covered by section 6 of the 2008 agreement. Were they rolled into RC classifications?---That's correct, yes. Yes, so those - sorry, yes, in section 6 that rolled into section 2 employees that I'm also referring to as well. Like I said there were a number of changes in that time, like a large amount of amalgamations.

PN135

When did the telecommunications workers who were covered under section 6 of the 2008 agreement get rolled into RC classifications?---I don't have an exact date, sorry, not off the top of my head.

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN136

So would it be true to say that not all telecommunications workers were rolled into RC classifications at the making of the 2008 agreement?---Look, it was my understanding that that was the case previously. However, it may not be completely correct. I might have to go and spend a little bit more time looking into it again.

PN137

When did you commence employment with Sydney Trains?---I commenced employment at the start of 2015.

PN138

So how do you know the nuances of telecommunications workers being rolled into the RC classifications?---I know this because I've had discussions - so I've had discussions and conversations with ETU members and delegates who have been around - sorry, ETU members, delegates and people who were delegates previously, who were in the ETU that have been around the business since pre 1990s. Yes.

PN139

So none of your evidence in relation to the rolling in of telecommunications workers into the RC classifications comes from your direct knowledge?---I wasn't there at the time, no. I have - look, I have gone through and reviewed the awards and agreements, but most of my information is based off conversations I've had where I've asked past delegates questions about things that have happened in agreements and certain negotiations, that kind of thing.

PN140

You say you've read the relevant agreements that we're talking about. Have you reviewed section 6 of the 2008 EA?---Not since I read the statement. I did - I did review it when I read the statement.

PN141

So I want to put it to you that there were telecommunications workers who were not rolled into RC classifications on the commencement of the 2008 agreement?---Okay.

PN142

Do you agree with that?---I'd have to look at the section 6 again to agree or disagree with you.

PN143

So you're saying you're not sure?---At this stage I'm not sure.

PN144

It is possible that there were telecommunications workers who at the commencement of the 2008 agreement and for its duration were not in RC classifications?---It is possible. Yes, I'll agree with you on that, but like I said I'd have to go and check again, my apologies.

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN145

Is it possible that all telecommunications were covered by RC6 classifications in the 2008 agreement?---Sorry, can you repeat that question, I didn't fully understand it.

PN146

Is it possible to your knowledge if all telecommunications workers covered by the 2008 agreement were in RC classifications?---It is possible. Like I said my understanding is the transition took a bit of time. I don't know the exact dates of when employees were rolled from one specific grade into the RC grade. I don't know if it happened all at the same time. I don't know if it was done in batches. I'm not 100 per cent sure.

PN147

Are the classifications in section 6 of the 2008 agreement identical to the classifications in section 5 of the RIC 2002 agreement?---I can't remember off the top of my head, my apologies. I'd have to go and double check.

PN148

I want to take you to paragraph 10 of your statement. We're still on page 51 of the court book?---Yes.

PN149

That paragraph reads:

PN150

There is however a small number of employees who work across all 24 hours of the day and seven days in the week. These employees are rostered to work over a 28 day cycle. They work eight, 10 or 12 hour shifts.

PN151

?---Yes.

PN152

Now, you're referring only to section 2 employees of the 2022 EA; is that right?---Correct.

PN153

What is a small number in this case?---Sorry, did you just ask me what is a small number?

PN154

Give me an estimate, give me an actual number?---Look, a small number could be 10, it could be 20, it could be a thousand, it would depend on like the totality of numbers, right.

PN155

So when you wrote your statement, 'There is however a small number', was it 10, 20 or a thousand that was in your mind?---So are you asking me if I have a specific number instead of using the word 'small'?

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN156

I didn't write your statement, Mr Beville, you wrote - - -?---Yes. No, I know.

PN157

So you - - -?---Okay.

PN158

- - - you wrote the words:

PN159

There is however a small number of employees who work across all 24 hours of the day seven days of the week.

PN160

I am asking you what number was in your mind. You must have had a number in your mind if you said it was small?---Yes. I didn't have an exact number in my mind, but to my knowledge there is far less employees that don't work shift compared to those - sorry, there is a far less number of employees that do work shift compared to employees that don't work shift. Look, I used the word 'small', I could have used a word that could have said there's less. I chose to use the word 'small', because compared to the amount of employees that don't perform shift - the amount of employees that do perform shift work is far less than the employees that work Monday to Friday. That was the point I was trying to make.

PN161

In section 2 of the 2022 EA. That's what you - - -?---Correct.

PN162

Have you ever worked in fleet in Sydney Trains?---No, I haven't worked in fleet.

PN163

Does the ETU have coverage of people who work in fleet in Sydney Trains?---Yes.

PN164

Is it possible that it's more than a thousand people who work these type of shift arrangements covered by section 2?---It could - it could be around a thousand people, I don't have the exact numbers, but I do know that section 2 covers, I believe it's somewhere around 3000 to 3500 people. That's not exact, I apologise if that's completely out of whack. That's my understanding, and if you were to say that there's a thousand people that are covered that do shift work I would say that number is small compared to the amount of people that don't do shift work.

PN165

How many people are covered by section 2 roughly in the 2022 EA?---My understanding is it's anywhere between 3000 and 3500. However, I can't be exact, I don't have the numbers. I don't know off the top of my head.

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN166

I will move on?---These are just estimations from looking at the org chart and things like that.

PN167

You say from looking at the org chart you made an estimation of how many people work across 24 hours of the day seven days a week. Does the org chart show that?---Look, the org chart shows what their position is, you know, what their position title is, and when looking at people's, you know, position titles usually you can pretty easily assume if that's a shift-based position or if it's not a shift-based position. Again it's an assumption.

PN168

You said you believe there's somewhere around 3000, 3500 people employed by section 2 in the EA?---Yes, correct.

PN169

Did you look at org charts for those people, did you?---Sorry, what do you mean do I go and look what individual people are to see if they're section 2 or not? Sorry, I'm just trying to understand the question a little better.

PN170

That's what you just told me. You said you could look at - - -?---Yes.

PN171

- - - org charts of people and determine what their shift arrangements are in section 2. Then I asked you is that what you did for 3500 people covered by section 2?---I didn't do it for - look, I didn't do it for 3500 people. The way that I did it is going and looking at different groups or teams of people that I know are covered by section 2 that have ETU coverage or don't is a very, very general mapping.

PN172

And you landed on a small number?---Yes, correct, as compared to employees that work Monday to Friday.

PN173

You said earlier in cross-examination that it could be 10, 20 or a thousand. So I'm wondering in this exercise you undertook to arrive at a small number using org charts it could have been 10, 20 or a thousand people who work these shift arrangements?---When I mentioned 10, 20 or a thousand people what I was attempting to say was that saying that a number is small it's in context of what a large number might be. So if I'm talking about - look, if I'm talking about a thousand people versus 3500 - sorry, a thousand people that do work shift and 2500 people that don't work shift I would say that that number of a thousand is small compared to the larger number of people that don't work shift.

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN174

Now that I know a bit more about how you did this exercise to come to your evidence at paragraph 10 I ask again was it 10, 20 or a thousand; can you give me an estimate?---I don't have - look, I don't have an exact number, but if I was to

estimate I would say it's anywhere between 500 and a thousand people that work shift work on my own knowledge.

PN175

Specifically who work across all 24 hours of the day and seven days of the week is the arrangements you refer to in paragraph 10?---Yes.

PN176

Is that 500 to a thousand people do you think?---Yes.

PN177

We will move on then. I want to take you to page 53 of the court book at your paragraph 17?---Yes.

PN178

You write:

PN179

From my understanding the process of working overtime for other section 2 employees is mostly the same as that which I have described above. Business areas that are also do 12 hour shifts in section 2 include (indistinct) staff, specifically (indistinct), (indistinct) control system operators and electrical operations centre operators.

PN180

?---Yes.

PN181

How do you know how those other groups - - -?---Because I've had conversations with the employees that worked there to ask them how they're processed for rostering overtime or how they get overtime works.

PN182

You have said at the top of paragraph 17, I will take you back to it:

PN183

From my understanding the process of working overtime for all other section 2 employees is mostly the same as I have described above.

PN184

You said it could be anywhere from 500 to a thousand people who work across 24 hours a day seven days a week?---Yes.

PN185

I accept they may not all be doing 12 hour shifts, but how would you know how many of those are doing 12 hour shifts?---Sorry, can you repeat the question.

PN186

Sorry, I will ask it a bit more simply?---Yes, please do, I'd appreciate that, thank you.

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN187

How many people roughly in section 2 work 12 hour shifts?---How many people within section 2 work 12 hour shifts? I don't have an exact number.

PN188

Do you have a rough number?---I don't have a rough number. However I believe it's - I don't believe it's that many employees. I don't have a rough number, I apologise.

PN189

Do you know - - -?---So I was (indistinct). Sorry, I cut you off, my apologies.

PN190

That's okay. I take you to paragraph 18, still on the same page?---Yes.

PN191

You say:

PN192

I understand that there are a small number of section 2 employees primarily covered by the ASU who are rostered to work shifts eight hours and 15 minutes. However, from my experience the only purpose of this kind of 15 minute addition would be to allow for a handover.

PN193

?---Yes.

PN194

How do you know there aren't others besides this group you know about in section 2 who work shifts of more than eight hours?---What I know when I wrote paragraph 18 it was based on a conversation I had with one of the ASU delegates that does work these eight hour and 15 minute shifts. I had a conversation with her and asked her about the eight hour and 15 minute shifts and how they work. I also asked her if she knows if there are other people that do eight hour and 15 minute shifts. She said she doesn't believe so. I then reached out to a few different delegates that I know across Sydney Trains that work shift work, just to ask them specifically, you know, do they know anyone that works this eight hour and 15 minute shift, and what I got back from everyone was 'No'. Yes.

PN195

So is it possible there are others outside of what you call the small group of section 2 employees who work shifts of eight hours and five minutes, eight hours and 10 minutes; is that possible?---It is possible, but I don't have any experience with any employees that do work those times of shift and that's not something I've heard of or seen.

PN196

Thank you. If I could take you now to your statement in reply, which is at page 59 of the court book?---Yes.

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN197

Specifically paragraph 3?---Paragraph 3?

PN198

Yes. The second sentence of paragraph 3?---The second sentence of paragraph 3, yes.

PN199

Sorry, I withdraw that. I just take you to the start - - -?---Okay, sure.

PN200

- - - the first sentence of paragraph 3.

PN201

In response to paragraph 4.4 I say as follows. I do not disagree that there are instances where an employee on leave from an eight hour shift may be covered by two other employees working four hours of overtime before and after their shifts. But from my experience this is not a common practice.

PN202

?---Yes.

PN203

Given that you believe there's roughly 3500 employees covered by section 2, and we're only talking about those employees, how do you know it's not a common practice?---I know it's not a common practice through having conversations with delegates that work in those areas and asking them about the overtime arrangements.

PN204

You go on to say:

PN205

The preferred practice is for one employee to cover an employee on leave by working one overtime shift.

PN206

?---Yes.

PN207

Whose preferred practice, whose the person doing the preferring in that sentence?---My understanding when I had conversations with these people they said it was preferred practice by both the business units and the employees.

PN208

Are you familiar with overtime practices for all section 2 employees on 24/7 rosters working eight hour shifts?---Of all employees, no, I'm not.

PN209

No further questions, your Honour.

*** ALEC BEVILLE

XXN MR JENKINS-FLINT

PN210

THE DEPUTY PRESIDENT: Thank you. Any re-examination.

PN211

MR AGHAZARIAN: Yes, just on one point.

RE-EXAMINATION BY MR AGHAZARIAN

[11.29 AM]

PN212

You were questioned on paragraph 5 of your statement, your first statement, not the statement in reply?---Yes. What page is that, I'm sorry?

PN213

That's page 50?---Yes.

PN214

And you stated you're not sure of the exact numbers who are non-operational clerical staff versus operational staff who perform shift work. Do you recall that?---Yes, I do.

PN215

And it was put to you is a thousand a small number, and you replied from your understanding there's anywhere between 3000 and 3500 section 2 employees?---Yes.

PN216

So that would be a small number, at least in your evidence. You also said you don't know exactly how many section 2 employees there are?---That's correct.

PN217

Now, just to close that off, you've read the statement - well, you submitted a reply to the statement of Rachel Kelly; is that correct?---Yes, that's correct.

PN218

I would just like to take you to one paragraph of Rachel Kelly's statement which deals specifically with this point, and it's at page 79 of the court book?---Yes, page 79.

PN219

Paragraph 2.3?---Yes, I've got paragraph 2.3.

PN220

You did not reply to this paragraph in your reply statement, but given you've been cross-examined on the numbers and there's numbers given here do you have any - - ?---Yes.

PN221

So it states:

*** ALEC BEVILLE

RXN MR AGHAZARIAN

PN222

There are approximately 1276 section 2 covered employees in operational roles that are rotated on shift work and overtime on weekends at a total of 4385 employees covered by section 2 within Sydney Trains.

PN223

Do you have any comment on that statement?---My maths is pretty good.

PN224

You disagree with it. Do you have any reason to disagree with it?---No, I don't have any reason to disagree, but - - -

PN225

Thank you, Mr Beville, I think that closes that point. Nothing further.

PN226

THE DEPUTY PRESIDENT: Thank you, Mr Beville, you're excused and you can remain in the Teams meeting?---Thank you.

<THE WITNESS WITHDREW

[11.33 AM]

PN227

Anything else in your case?

PN228

MR AGHAZARIAN: No, that concludes the applicant's evidentiary case, Deputy President.

PN229

THE DEPUTY PRESIDENT: Thank you.

PN230

MR JENKINS-FLINT: Your Honour, I may save verbal submissions for after Ms Kelly's evidence.

PN231

THE DEPUTY PRESIDENT: Yes, that's fine. So you call Ms Kelly?

PN232

MR JENKINS-FLINT: So I call Ms Kelly.

PN233

THE ASSOCIATE: Please state your full name and address.

PN234

MS KELLY: Rachel Kelly, Rachel Andre, and my work address is 231 Elizabeth Street, Sydney.

<RACHEL ANDRE KELLY, AFFIRMED

[11.33 AM]

EXAMINATION-IN-CHIEF BY MR JENKINS-FLINT

[11.33 AM]

RACHEL ANDRE KELLY

XN MR JENKINS-FLINT

PN235

THE DEPUTY PRESIDENT: Thank you. Please be seated.

PN236

MR JENKINS-FLINT: Ms Kelly, you wrote a statement dated 5 February 2024. Is that true to the best of your knowledge?---Yes.

PN237

Do you have any amendments that you want to make to that?---No.

PN238

I tender the statement.

PN239

THE DEPUTY PRESIDENT: Any objection?

PN240

MR AGHAZARIAN: No objections, Deputy President.

PN241

THE DEPUTY PRESIDENT: That will be exhibit R1.

**EXHIBIT #R1 WITNESS STATEMENT OF RACHEL KELLY
DATED 05/02/2024**

PN242

MR JENKINS-FLINT: No questions.

PN243

THE DEPUTY PRESIDENT: No questions. Cross-examination?

CROSS-EXAMINATION BY MR AGHAZARIAN

[11.34 AM]

PN244

MR AGHAZARIAN: Yes. I will try to be brief. My questions largely concern some of the numbers that you give. Some of these are questions of clarification. I just want to understand what it actually says. Some of them go to more data. Obviously if they're not questions you can answer off the top of your head that's fine, just say so. So I'd just like to take you to paragraph 2.3 of your statement, which is on page 79?---Yes.

PN245

You state that there are approximately 4385 employees covered by section 2.

PN246

1276 of those are in operational roles that are rostered to perform shift work and overtime on weekends.

*** RACHEL ANDRE KELLY

XXN MR AGHAZARIAN

PN247

I just want to clarify what you mean by rostered to perform shift work and overtime on weekends. Does that mean they're ordinarily rostered to perform shift work as it's defined by section 56 of the agreement?---I think you meant week days. I think you said weekends, but - - -

PN248

Week days, sorry?---That's okay. So 56 provides the shift penalties that are paid to operational employees who are classified as shift workers, which is that 1276 number.

PN249

So the 1276 number is essentially employees that work shifts, ordinarily work shifts other than just between 6 am and 6 pm on week days?---Those that are classified as shift workers, yes.

PN250

All right. Can I just clarify the implication of that and what appears to be the implication of that. So 4385 minus 1276, that's 3109, and it's on the record, so the math can be checked on that later. But essentially everyone other than those 1276 are essentially workers that ordinarily work 6 am to 6 pm Monday to Friday?---They're not classified as shift workers.

PN251

Does that mean they are workers that ordinarily work 6 am to 6 pm Monday to Friday?---Ordinarily.

PN252

Your evidence is they may work overtime on weekends. That's not what I'm disagreeing with. I'm saying ordinarily their ordinary hours would be 6 am to 6 pm Monday to Friday?---There is instances that they would do ordinary hours outside of 6 am to 6 pm Monday to Friday. Section (indistinct) provides for that (indistinct), as well as week day overtime would be performed by employees who aren't classified as shift workers as well.

PN253

Okay. So of the workers outside the 1276 that would include some employees who would perform one of the shifts in 56, afternoon, night shift or early morning shift, they may do that as an ordinary shift; is that correct?---They wouldn't be paid under 56 because they're not shift workers, but there's another clause that provides for them to perform work outside of those hours.

PN254

All right, that's fine. I would just like to take you to paragraph 3.1. You said there were 1351 employees who claimed the week day overtime over this period, so overtime occurring on a week day. Do you know how many of these are operational employees who are classified as shift workers?---No.

*** RACHEL ANDRE KELLY

XXN MR AGHAZARIAN

PN255

All right. You say they claimed overtime. You refer later in there to people who are paid overtime. I just want to clarify, is this number referring to people who

claimed overtime or claimed and were paid overtime?---Claimed and were paid overtime.

PN256

Claimed and were paid overtime. Okay, thank you. So would it be correct to say 1351 employees - sorry, the 16,577 claims, just to clarify again, it just says claims, is that claimed or claimed and paid?---Claims that were paid.

PN257

So 1351 employees made and were paid 16,577 instances of overtime?---There's a slight distinction.

PN258

Yes?---In that it's in brackets, 'excluding any claims for one hour of double time paid after - - -'

PN259

Okay. So there would be a greater claim?---There would be employees who were paid (indistinct) be counted.

PN260

Okay. Thanks for that. So you say 1967 of them were claims for shifts, standalone shifts of overtime, operated in eight hours. Now, can I confirm this, the apparent implication there that everyone other than that in 16,567, those are claims either for overtime occurring at the end of a shift or before a shift, or standalone overtime of less than eight hours; is that correct?---Yes, and eight hours and less.

PN261

Eight hours and less, sorry. So (indistinct) genuinely don't know this, it's just the question, but is it particularly common to have claims of standalone overtime of less than eight hours?---It occurs, eight hours.

PN262

Eight hours or less. Is it common at all to have a claim for standalone overtime at six hours, someone comes in for six hours?---I don't know in terms of what you mean by common, like frequency, but certainly it was in the records (indistinct) a six hour overtime length.

PN263

No, that's fine. I won't go much further with that. I won't ask any further things about that. I would just like to take you to paragraph 3.2?---Yes.

PN264

This is where you state, 'The impact of this interpretation'?---Yes.

PN265

So you say:

*** RACHEL ANDRE KELLY

XXN MR AGHAZARIAN

PN266

Over the period from February 2023 to July the ETU's interpretation is correct. The cost of these shifts - - -

PN267

Meaning the 12 hour standalone overtime shifts.

PN268

- - - *would be an additional \$468,045.*

PN269

?---But - - -

PN270

Sorry?---Not just 12 hour shifts.

PN271

Yes, any shifts greater than eight hours. Yes, sorry, that was my error there. So \$468,045. How much of the overall wage cost over this period was that?---I don't know.

PN272

Okay. You don't know. This could well be as little as 1 per cent of the overall wage cost over that period?---I don't know.

PN273

Nothing further, Deputy President.

PN274

THE DEPUTY PRESIDENT: Thank you. Any re-examination?

PN275

MR JENKINS-FLINT: Nothing further, your Honour.

PN276

THE DEPUTY PRESIDENT: You're excused?---Thank you.

PN277

Thank you for attending.

<THE WITNESS WITHDREW

[11.42 AM]

PN278

Anything further in the respondent's case?

PN279

MR JENKINS-FLINT: Yes, your Honour, I'd just like to make some verbal submissions.

PN280

THE DEPUTY PRESIDENT: Well, if we're moving on to submissions - - -

*** RACHEL ANDRE KELLY

XXN MR AGHAZARIAN

PN281

MR JENKINS-FLINT: Nothing further in the case.

PN282

THE DEPUTY PRESIDENT: Obviously the parties have provided written submissions. How do you wish to handle submissions, oral today?

PN283

MR AGHAZARIAN: Yes.

PN284

THE DEPUTY PRESIDENT: Yes, that's fine.

PN285

MR AGHAZARIAN: Yes. The applicant is prepared to make oral closing submissions.

PN286

THE DEPUTY PRESIDENT: Okay, proceed.

PN287

MR AGHAZARIAN: Most of what I said was covered in the written submissions. I mean really the evidence, if anything, is the circumstances surrounding the origin of this clause. I should emphasise, and this is apparent from I think the reply really from Mr Beville, there's a lot that is really not cavilled with in the respondent's submissions. We don't cavil with their numbers. We never cavilled with their numbers, but I think 1276 out of 4385, it's certainly open to call that a small number when you're dealing with large numbers out of this, for a small number of 4385, but we don't cavil with that.

PN288

We don't cavil, and I do emphasise this; Mr Beville's statement really was that the 2022 agreement doesn't contain a standalone section for telecommunications employees. He was cross-examined on that, but I do note the respondent's evidence spoke to this. They noted the point, yes, while the 2022 agreement might not contain a standalone section for RIC employees, the 2008 agreement did, and that's in the statement of Ms Kelly, there was a standalone section in 2008 and 2010, and then they put in evidence about the employees being rolled in, in 2013. Again just to clarify we don't cavil with that evidence. It was not in the reply of Mr Beville, but I acknowledge there's an entitlement to cross-examine Mr Beville on that point.

PN289

But the point remains (indistinct) the same. It's unclear what the original industrial purpose of this clause was. Unfortunately the history of the awards is not particularly helpful. The original award provides for a scenario or a regime where such shifts are not really contemplated, because it provides for a system where if you read the clauses together you really can't have ordinary time shifts exceeding eight hours, and where you couldn't really have overtime, standalone on a week day, because it says ordinary time cannot exceed eight hours and cannot be worked on a weekend, the original award.

PN290

I just don't see how that's possible. You would not have a standalone overtime shift of eight hours where ordinary time shifts can only be eight hours, and it's Monday to Friday, and that's the number of hours per week. So there is a gap and it's a matter of construing the provision of 60.3, and again we reiterate it can be construed on its ordinary terms.

PN291

The impact as well - I mean just because there's an impact or a financial impact to Sydney Trains and, yes, while it's something to consider the context, it doesn't have, we would submit, any bearing on the correct interpretation here, and certainly we don't know, it's not in the evidence, what that is as an actual impact on Sydney Trains. I mean \$468,000 might sound like a lot of money, but I don't know what Sydney Trains' overall wage bill was. I assume it would be a very, very large sum. So we just don't know what the impact there is.

PN292

So to sum up, and it's really just a matter of construing the clause, there is a sensible industrial purpose. It doesn't lead to an absurd outcome. It can be construed, yes, there are surrounding circumstances here, which is the history of the award, but it's not particularly helpful to establishing a common intention or objective background not tacked to the parties, because again it's a consolidated agreement pulling a whole bunch of awards. It's expected that certain things will be lost.

PN293

Just on the point of the memorandum as well and the rolling in of the telecommunications employees in 2011, and again we don't cavil with this evidence, but what the evidence shows is that it was acknowledged between the parties that the telecommunications employees would be paid overtime under the provisions of section 2. Now, Sydney Trains gives an argument to say that the parties would have expected that they would have had a loss there.

PN294

I would say to that the opposite argument could equally be made, that if parties expected that these employees would be getting paid under this new section then they wouldn't have agreed to that if there was a loss, or a substantial loss. I think that argument could quite easily have been made either way, which is not to sound support for our argument, I just don't think it's particularly helpful one way or the other. Those are my closing submissions.

PN295

THE DEPUTY PRESIDENT: Just one question. At paragraph 37 of the respondent's submission they outline what they saw as an absurd result arising from your construction. I suppose two questions. Number 1, you disagree with the calculations contained in paragraph 37, and secondly do you have any submission in relation to absurdity?

PN296

MR AGHAZARIAN: Sorry, paragraph - - -

PN297

THE DEPUTY PRESIDENT: Page 76 of the court book.

PN298

MR AGHAZARIAN: Thank you, Deputy President. It's explained in hours and not time and a half which is always a bit confusing, but just allow me another - - -

PN299

THE DEPUTY PRESIDENT: But they're total hours. So it's 14.8 hours and 12 hours being the totality of the calculation.

PN300

MR AGHAZARIAN: Yes, eight hours and 10 minutes of overtime will be paid - sorry, 12 - no, that's - - -

PN301

THE DEPUTY PRESIDENT: There was no response to this in the reply submissions, so I assume that the calculation was not cavilled with.

PN302

MR AGHAZARIAN: It's not cavilled with, but it is worth noting eight hours that would equal time and a half. That would come to 12 hours. Yes, five of those hours would be paid at double time, so that would come to 10 hours plus three hours at time and a half. That will come to four and a half hours - 10. Yes, I don't think it was cavilled with because it is very slightly - it's very, very slightly off. It's more 14 and a half, 10 minutes, so that's effectively 20 minutes. It's effectively 14 hours and 50 minutes. So, yes, it is slightly off, but it is roughly correct. We don't cavil with the five calculations.

PN303

At (indistinct) a pay difference for 10 minutes of work is clearly absurd given the varying amounts of overtime commonly worked across - yes, I mean we don't cavil with the calculation, but we do say that's not necessarily an absurd outcome, because again if one takes the industrial purpose as compensating for long overtime shifts, and there's a disability that accrues for working a long overtime shift, the inconvenience experienced as a result of coming in for a longer day, there is a penalty which is attached to the whole of the hours of overtime.

PN304

If one can think of an analogue for this in other awards there are awards - one specifically I can think of is the Market and Research Centres Award, which I remember looking at this a while ago, but there might be situations where a shift penalty accrues to the entirety of the shift if any part of the shift falls outside the ordinary span of hours.

PN305

So if the span of hours for example is 7 am to 7 pm, and you work a shift which finishes at 8 pm, it's not that uncommon to say, all right, well that's now an afternoon shift and it attaches a 15 per cent loading for the entire shift. It's not like you get ordinary time up until 8 pm and then 15 per cent for the hours after 8 pm. So I would submit an overtime shift which exceeds eight hours in that nature,

so once it sort of goes over eight hours it is of a different nature, it is a long overtime shift which takes with it other disabilities, and that is compensated for by having double time, or having this formula time and a half for the first three hours and double time for the entirety of the shift.

PN306

THE DEPUTY PRESIDENT: I think you're confusing shift penalties and overtime, but nonetheless thanks for the answer.

PN307

MR AGHAZARIAN: Yes, I acknowledge they are different. The submission is it's analogous, but, yes, I accept the point.

PN308

THE DEPUTY PRESIDENT: Okay. Thank you.

PN309

MR JENKINS-FLINT: Thank you, your Honour. We say the second sentence in clause 60.3, '(Indistinct) overtime hours worked after the first eight hours of a shift', that's the existing practice. There's very available plain reading what the words 'In excess of' mean. I want to take a hypothetical to draw this out. Say an employee works a 12 hour shift, this dispute boils down to whether or not the 9th, 10th and 11th hours of that shift are in excess of eight hours. If the answer is 'Yes', which we say it is based on the plain words, then the Commission would interpret the agreement in Sydney Trains' favour.

PN310

If the 9th, 10th, 11th and 12 hours are overtime then the employee will be entitled to a penalty rate of time and a half for the first three hours, that is the 9th, 10th and 11th, and double time for the 12th hour. Now, assume, as this case is about, the entire shift is overtime. In that situation the 9th, 10th, 11th and 12th hours are still in excess of eight hours, and the penalty rates to apply to them are the same. So there's a very clear and simple operation of this clause available.

PN311

There are three bases to reject the ETU's interpretation. First, Sydney Trains' interpretation is consistent with the surrounding provisions, where as the ETU's would make 60.3 an outlier. Eleven hours is a frequently appearing period beyond which the overtime penalty increases from time and a half to double time. You only have to look directly upwards to clause 60.2 for this concept of 11 hour trigger point.

PN312

There's other clauses in the current EA. There's 59.2, there's 95.4, there's 118.3, 118.6, 118.8, 174.2, 175.2, 203.3 and 203.6. They're all clauses that replicate what Sydney Trains says the second sentence of clause 60.3 does, that is create an 11 hour trigger that overtime penalties (indistinct) double time.

PN313

Secondly, Sydney Trains' interpretation is consistent with our clause 60.3 and its predecessor clause which have been applied since at least 2007 and probably

earlier, whereas the ETU's interpretation constitute a very significant change. You can see the pay rules applied by Sydney Trains at annexure RK X2 of Rachel Kelly's statement.

PN314

In this respect it's noteworthy that this is in fact the second time the ETU has brought this dispute. The same dispute was agitated in 2020. The ETU chose to discontinue that dispute. There followed lengthy negotiations for a replacement enterprise agreement that resulted in the current agreement. No changes were sought or made to clause 60.3.

PN315

Four years later now we have this same dispute that was brought in 2020. There is no evidence of any instance where the ETU's interpretation was bargained for. The highest point the ETU's submission reaches on this point, that is the point of when this interpretation might have been introduced, is to speculate that a compromise was reached in the making of the 2008 agreement.

PN316

Thirdly, the predecessor instruments from which a disputed clause emanates are all entirely consistent with our interpretation. We have prepared a document to assist the Commission containing these clauses. While some of those clauses may appear in submissions it might be helpful to have them all in one document, so I would like to hand that up.

PN317

THE DEPUTY PRESIDENT: Yes.

PN318

MR JENKINS-FLINT: I will call that document clause extracts.

PN319

THE DEPUTY PRESIDENT: It seems to be an aide memoir, Mr Aghazarian.

PN320

MR AGHAZARIAN: Sorry?

PN321

THE DEPUTY PRESIDENT: It seems to be an aide memoir to assist in drawing together a number of provisions. So unless you want to be heard in relation to this

- - -

PN322

MR AGHAZARIAN: There's no objection to it.

PN323

THE DEPUTY PRESIDENT: It's not seeking to be tendered, but it's just - - -

PN324

MR JENKINS-FLINT: Just an aide memoir. I should have just called it that at the top. You will see at the top of the aide memoir we extract clause 48 from the current agreement which tells us the provisions of section 2 are principally

derived from three awards. In this aide memoir those awards are extracted in the second row and the third row, and then we simply have a note at the top of the second page saying that the third award mentioned by clause 48 isn't relevant because it doesn't have any similar clause.

PN325

So in summary Sydney Trains' interpretation makes sense according to the ordinary meaning of the words, is consistent with the context and purpose of surrounding provisions in the 2022 agreement. It is also consistent with the other clauses been applied for over 30 years, or probably around 50 years. It is consistent with the predecessor instruments from which clause 60.3 emanates.

PN326

I also just want to take some time to deal with some of the ETU's arguments, which we say can be boiled down to a couple of key points. The first is that clause 60.3 was introduced in the 2008 agreement - sorry, not introduced in the 2008 agreement, but that clause 60.3 in the 2008 agreement introduced a novel overtime entitlement. That is the ETU's submission as to the history of this type of overtime, that it's novel and it came about in 2008. So it was novel in 2008.

PN327

Their second key argument is that Sydney Trains' interpretation is inconsistent with the ordinary meaning of the words. The ETU says telecommunication workers fell into section 2 of the agreement that was made in 2008. That isn't correct. Maybe some did, but in 2008 when the consolidated agreement was made there was an additional section, section 6 of the 2008 agreement which applied to telecommunications, which is why I spent time cross-examining Mr Beville on that point.

PN328

Importantly clause 182.1 in section 6 of the 2008 agreement conferred, 'In some circumstances overtime is somewhat the same.' But the ETU says the second sentence of clause 60.3 does. Crucially 182.1 in section 6 of the 2008 agreement doesn't make any reference to shift work, and this is a key point. There is not a single clause in the Sydney Trains EA or any of its predecessors that provides a length of shift beyond which the overtime penalty rate retrospectively increases. That is go one minute past eight hours of an overtime shift, and then all the hours you work cease being time and a half and become double time.

PN329

The ETU submit that this concept, this novel overtime entitlement, first appeared in the 2008 agreement as a compromise between clause 30.1 of the 2002 RIC agreement and clause 39.3 of the Railway Professional Officers Award 2002. The ETU submit this compromise was the genesis of this retrospective overtime rate increase concept, but there is zero evidence of such a compromise being made in the making of the 2008 agreement.

PN330

This imagined compromise is even more unlikely when looking at clause 182.1 of the 2008 agreement, which I just described. Clause 182.1 replicates the entitlement provided by clause 30.1 of the 2002 RIC agreement without

compromise and covered all the relevant telecommunications classifications. That is to say, your Honour, there was no compromise. The key clause the ETU seeks to say made up part of the compromise that resulted in this novel type of overtime was actually just carried through in its entire effect into section 6 of the 2008 agreement. It played no part in the speculated compromise.

PN331

It was not until 2011, I think rather than 2013 as may have been suggested today by Mr Beville, that the relevant section 6 classifications were translated into section 2, and this is why we say the MOU is important. Within the MOU between the employer and the ETU discovered this translation of telecommunications workers into the RC classifications of section 2, what was then clause 64 and is now clause 60, and perhaps confusingly was also clause 60 in the 2008 agreement, was expressly mentioned to apply to the translated workers. So that is the MOU expressly called out clause 60 as applying to these workers. At that time it was clause 64.

PN332

The MOU could have called out clause 182.1 as carrying over in that translation process. It didn't. It's not like the parties didn't turn their mind to that being a possibility, because the MOU did stipulate that 182.2 would be translated, that is would be carried over. 182.2 is about something separate to this dispute. It's about overtime, but not connected. 182.2 is about Sunday rates. So what that says is that the parties did at the time of the translation, which was 2011, did consider these entitlements and did not carry over 182.1 into section 2.

PN333

Just back to the words of the current day clause 60.3 in the 2022 agreement our interpretation is entirely consistent with the range of clauses that I listed earlier, but also with the first sentence of clause 60.3, which also uses the phrase 'In excess of' to reference hours worked beyond 76 hours. In fact the phrase 'In excess of' is used consistently throughout the 2022 agreement as referring to amounts or matters or beyond a particular point. For example clause 60.1 refers to overtime hours worked in excess of ordinary hours of the agreement.

PN334

If the ETU's interpretation were to be correct clause 60.3 could easily have been written as overtime shifts greater than eight hours will be paid at time and a half for the first three hours of the shift and double time thereafter. That's not how the second sentence (indistinct).

PN335

The cost implications, I just want to draw a point to my friend who mentioned the cost might be \$460,000 roughly. That was an estimation based on a particular six month period. Clearly if Sydney Trains maintained its current shift working arrangements that would be we estimate approximately \$900,000 every year. To the extent that's relevant it's not just a one off cost.

PN336

In response to the applicant's submissions in reply at paragraph 11 they assert, 'The predominant position for overtime is to be paid at 150 per cent for the first

three hours and double time thereafter.' This isn't true. In fact an overwhelming number of clauses in the RIC EA refer to 150 per cent being paid for the first 11 hours with double time after that. As I mentioned earlier 11 hours is a commonly appearing duration, the trigger point where the hours thereafter are double time.

PN337

In their reply at paragraph 11 the ETU cherry pick provisions that are applicable for a relatively minor group of employees and disregard clauses that provide for overtime to be paid at double time after 11 hours. Again there's no basis to suggest as the ETU does at paragraph 13 of its submissions in reply that the purpose of clause 60.3 is to de-incentivise overtime shifts being longer than eight hours. This is something you touched on earlier, your Honour. (Indistinct) labour the point a bit.

PN338

Overtime shifts are between eight and 12 hours un-voluble in any work group where you have ordinary hour shifts of 12 hours, or perhaps any length, 11 hours, 10 hours. If you have someone who is sick their colleague is going to be called into work to cover their shift. The cost or otherwise of that overtime shift is not a consideration or a motivating factor. So what would be the effect of Sydney Trains abiding by the ETU's supposed disincentive against overtime shifts in particular being more than eight hours.

PN339

Earlier it was discussed what that can be and we're still unsure. Could it be calling in two people to cover the absence of one person from their 12 hour shift; that is calling in someone for six hours and then another person for another six hours. We don't think that would be an industrially sensible outcome, or one preferred by employees we suspect.

PN340

Another possibility would be extending colleagues as we do for people who work eight hour shifts. That is as we discussed extend a person who works an eight hour shift to work a 12 hour shift and their colleague would come in earlier, arrive earlier. That way you could cover an eight hour shift by two shifts on extension. But in the case of these workers where there's a 12 hour shift that would mean employees would then be working 18 hour shift, which is clearly not an industrially sensible outcome. So there is no sensible disincentive purpose that the ETU's interpretation could serve.

PN341

In response to their paragraph 15 of their submissions in reply we stated previously that the application of this clause would negatively impact the ETU and other union members and employees who work scenario 3 of the agreed facts; that is eight hours ordinary time followed by four hours overtime. This would mean if the ETU's definition of clause 60.3 is accepted as the whole shift is not overtime they would not be entitled to the higher rate of pay, which is double time after 11 hours.

PN342

I want to make a point that may be relevant, we're unsure, but the ETU's definition of clause 60.2, that is what is an extended shift, clause 60.2 clearly calls back to clause 52.5 to define what an extended shift is. An extended shift is an ordinary shift that's longer than eight hours, and that's clear by the use of the words, 'Overtime worked at the conclusion of an extended shift.' So the shift has to already be an extended one. It's not an extended shift merely by the addition of overtime.

PN343

So in conclusion the simplicity and logic of Sydney Trains' interpretation I can capture it in a rhetorical question. If you work a 12 hour shift how many hours in excess of eight hours have you worked? We say four hours is the only answer to this question. On the basis of the material before the Commission we say the answer must be the words 'In excess of eight hours' refers to those hours worked which are in excess of eight hours and not the totality of the shift. Thanks, your Honour.

PN344

THE DEPUTY PRESIDENT: Thank you. Is there anything in reply?

PN345

MR AGHAZARIAN: Deputy President, there's nothing further to add. There's just one somewhat unrelated point I wish to raise, and a very, very small point, but I neglected to mention this at the start.

PN346

THE DEPUTY PRESIDENT: About the unions?

PN347

MR AGHAZARIAN: Yes. It is a very small point, and the AMWU just asked me to advise that while they have an interest in dispute they don't have any intention to intervene. I don't believe it's strictly necessary given they have informed me they don't intend to intervene or they don't wish to intervene, but for transparency I just advise the Commission of that contact with the AMWU.

PN348

THE DEPUTY PRESIDENT: Yes, I have just noticed that while I was preparing the matter for hearing that there seemed to be a number of other people that could be affected.

PN349

MR AGHAZARIAN: Yes, and the AMWU have - they have certainly related that they have an interest in it, which could mean they are affected, but they do not wish to intervene.

PN350

THE DEPUTY PRESIDENT: From the RTBU, anything from them?

PN351

MR AGHAZARIAN: I have had no contact from the RTBU after serving this on

- - -

PN352

THE DEPUTY PRESIDENT: But they were aware that these proceedings were on today?

PN353

MR AGHAZARIAN: Well, I served it upon their industrial officers in particular, so to my knowledge they would be aware, as well as the ASU which would be another common union.

PN354

THE DEPUTY PRESIDENT: And Professionals?

PN355

MR AGHAZARIAN: And Professionals Australia, yes.

PN356

MR JENKINS-FLINT: Apologies, your Honour, I just have one further submission - - -

PN357

THE DEPUTY PRESIDENT: Sorry.

PN358

MR JENKINS-FLINT: It might help. My friend said a number of times today, I don't think it was in the ETU's written submissions, that part of the reason for this compromise in 2008 that generated this new type of overtime type was because standalone overtime shifts hadn't been contemplated in the previous agreements and awards. There's obviously no evidence of that lack of contemplation. It's speculation, and we say that it needed to have been contemplated the same arrangements apply all the way through, and there must have been standalone overtime shifts for many decades before 2008 purely to cover absences, personal leave and such. Thank you, your Honour.

PN359

THE DEPUTY PRESIDENT: No reply to that?

PN360

MR AGHAZARIAN: No reply to that.

PN361

THE DEPUTY PRESIDENT: I thank the parties for their efficient conduct of this matter. I intend to reserve my decision. You will receive that decision between four and 12 weeks from today's date. Thank you very much, the matter is adjourned.

ADJOURNED INDEFINITELY

[12.14 PM]

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