



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER RIORDAN

C2023/7659

s.739 - Application to deal with a dispute

**Construction, Forestry and Maritime Employees Union
and
Svitzer Australia Pty Ltd T/A Svitzer Australia Pty Ltd
(C2023/7659)**

Svitzer Australia Pty Limited National Towage Enterprise Agreement 2023

Sydney

10.00 AM, THURSDAY, 14 MARCH 2024

Continued from 20/12/2023

PN1

THE COMMISSIONER: Good morning. Thank you for your time. Could I have the appearances, please. Mr Fagir?

PN2

MR O FAGIR: If it please the Commission I seek permission to appear for the notifier.

PN3

THE COMMISSIONER: Thank you.

PN4

MR G YATES: If it pleases the Commission my name is Yates, initial G, appearing for the Australian Institute of Marine & Power Engineers.

PN5

THE COMMISSIONER: Thank you, Mr Yates.

PN6

MR L IZZO: Commissioner, Mr Izzo, initial L, seeking permission to appear on behalf of the respondent, Svitzer Australia.

PN7

THE COMMISSIONER: Thank you, Mr Izzo. Leave is granted for both Mr Fagir and Mr Izzo to appear. Mr Fagir.

PN8

MR FAGIR: Commissioner, I should say I am most grateful to the Commission for putting back the start time, and I think, Commissioner, you wanted some indication of the reasons for that.

PN9

THE COMMISSIONER: I have since been advised it was due to some childcare responsibilities.

PN10

MR FAGIR: The short version is preschool at 9 in Birch Grove and a hearing at 9. The problem is that I didn't realise until late yesterday it was a 9 am start. I should have checked that earlier and made other arrangements.

PN11

THE COMMISSIONER: Thank you.

PN12

MR FAGIR: But I'm grateful to the Commission for accommodating me. Commissioner, both sides have filed submissions. As the Commission is painfully familiar with the background to this dispute unless there is anything, Commissioner, that was on your mind that I could assist with at the outset I propose to call Mr Garrett and get straight into it.

PN13

THE COMMISSIONER: Thank you.

PN14

MR FAGIR: So I call Mr Paul Garrett.

PN15

THE ASSOCIATE: Mr Garrett, will you please state your full name and address.

PN16

MR GARRETT: Paul Garrett, 365 Sussex Street, Sydney.

<PAUL GARRETT, SWORN

[10.02 AM]

EXAMINATION-IN-CHIEF BY MR FAGIR

[10.02 AM]

PN17

MR FAGIR: So once more for the record your name is Paul Garrett?---Yes.

PN18

Your address for work purposes is Level 1, 365 Sussex Street, Sydney?---Yes.

PN19

You're the Deputy Secretary of the Sydney Divisional Branch of the Maritime Union of Australia Division of the Construction, Forestry, Maritime and Energy Union?---Construction, Forestry and Maritime Employees' Union now, yes.

*** PAUL GARRETT

XN MR FAGIR

PN20

I'm sorry, Maritime Employees' Union. Have you prepared a statement for the purpose of these proceedings?---I have.

PN21

Is that statement of 78 paragraphs signed on 9 February 2024?---Yes.

PN22

Do you have a copy of that statement with you?---I do.

PN23

Are its contents true and correct to the best of your knowledge and belief?---Yes.

PN24

I tender the statement of Mr Garrett.

PN25

THE COMMISSIONER: Thank you. Any issue, Mr Izzo?

PN26

MR IZZO: There is, Commissioner. We exchanged with the MUA a table of objections. I think (indistinct) is that once we exchanged with them I think we intended to send it your chambers and I don't think we actually did that. There is objections to six paragraphs of the statement. I am in your hands as to how we

can do it, but I can arrange for that to be provided to your chambers now. I can take you through the objections. I have certainly notified the MUA of the objections a couple of days ago.

PN27

THE COMMISSIONER: Mr Fagir, do you have any comments to make, general comments to make about the objections?

PN28

MR FAGIR: Simply this, that there are five objections which are to the effect that the evidence is evidence of Mr Garrett's subjective personal understanding. The last two are objections to evidence which is argumentative or bearing into submission. We accept that evidence of Mr Garrett's subjective understanding is not admissible in the construction exercise. So whether the evidence is strictly excluded or not there's not going to be an issue about that.

PN29

In terms of the last two objections nothing turns on that evidence. It's an expression of Mr Garrett's view about the qualitative consultation, but we accept at the end of the day I need to persuade you that the consultation was sufficient or insufficient, and Mr Garrett's evidence doesn't take that matter very far.

*** PAUL GARRETT

XN MR FAGIR

PN30

THE COMMISSIONER: Yes. Well, you've both appeared before me on numerous occasions. You know how I intend to deal with this type of objection, and that is that I will take into account the objections and the responses when I'm writing my decision. Mr Izzo, if you could arrange for that document to be sent to my chambers that would be appreciated.

PN31

MR IZZO: Certainly, Commissioner, and we're happy for it to be dealt with on that basis.

PN32

THE COMMISSIONER: On that basis I will mark Mr Garrett's witness statement as exhibit 1.

**EXHIBIT #1 WITNESS STATEMENT OF PAUL GARRETT DATED
09/02/2024**

PN33

THE COMMISSIONER: Any points of clarification, Mr Fagir?

PN34

MR FAGIR: No, Commissioner, just that I understand Mr Garrett is yet to go to bed after travelling back from Perth I assume, but I'm sure if he begins to feel faint or needs a break at any stage he will let us know. If the Commission please.

PN35

THE COMMISSIONER: Thank you. Any questions, Mr Izzo?

CROSS-EXAMINATION BY MR IZZO

[10.05 AM]

PN36

MR IZZO: There are. I take it you are comfortable - you're in a position to answer questions this morning, Mr Garrett; that's correct?---Yes.

PN37

Thank you. Do you have a copy of your witness statement in front of you, Mr Garrett?---Yes.

PN38

Could I please ask you to turn to paragraph 21 of that statement. Just let me know once you're there?---I'm there.

PN39

So from about paragraphs 21 to 27 you talk about meetings that gave rise to a change in the Sydney POPs; do you see that?---Yes.

PN40

Now, what you're talking about there are the negotiations that gave rise to the introduction of references to LIR crew in the Sydney POPs; that's right?---Yes.

PN41

So we're entirely clear can I just take you to - do you have the court book in front of you, Mr Garrett, or you've got - - -?---Digitally here, yes.

*** PAUL GARRETT

XXN MR IZZO

PN42

Okay. So I just want to take you to annexure PG1 which is at page 19 of the court book?---Yes.

PN43

Sorry, I apologise, PG2, which is at page 31 of the court book, apologies?---Yes.

PN44

You will see that PG2 is a copy of the Sydney POPs as at 10 September 2021?---Yes.

PN45

And you will see that clause 1 says 'Current crewing compliment'; you see that?---Yes.

PN46

And then the second paragraph starts with, 'As from the date of hiring', and it's got sub-paragraphs (a) and (b); do you see that?---Yes.

PN47

That's the negotiation of the LIR crew. So when in paragraphs 21 to 27 of the statement you're talking about changes to the POPs you're talking about the changes that introduced those clauses isn't the Sydney POPs. That's correct, isn't it?---Primarily, yes.

PN48

Okay. Can I ask you to go back to your statement. At paragraph 27 you say it was your understanding that the employees were fully utilised, they would be made permanent. Do you see that? It's in the first sentence of paragraph 27?---Just one moment.

PN49

Certainly?---Yes.

PN50

No one from Svitzer told you in your negotiating meetings that the crew would be converted to permanent full-time, did they?---No.

PN51

Now, you received the POPs on about - when I say the POPs there was obviously some negotiations, but on 11 August you received a version of the POPs, and that is at DS4. So let me just get you a court book reference. So that is annexure DS4 to the Sheehan statement. It's court book 179?---Yes.

PN52

There's an email from Mr Sheehan to a range of union representatives, including yourself; you see that?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN53

They attach a POPs which talks about the addition of two times 100 per cent LIR crew. You see that in the second paragraph?---Yes.

PN54

Now, attached to that email if you go to court book 180 is a draft of the Sydney POPs?---Yes.

PN55

And you will see it has the language which I believe reflects the language that was ultimately agreed; is that right?---Yes.

PN56

You accept that this document doesn't say that the LIR crew would become permanent at the end of their contracts; you accept that?---Yes.

PN57

And receiving this you didn't then respond to Svitzer and insist that the POPs state that the crews will be made permanent if they were shown to be fully utilised. You never asked for that, did you?---As a response to this email?

PN58

Yes?---No, but there had been ongoing discussions on that point.

PN59

There had been ongoing discussions - what do you mean by that? Are you saying that you had asked for them to be made permanent?---Yes.

PN60

When did you - -?---I couldn't say specifically with the time that's elapsed, but there was a consultation process, which in my statement I refer to Mr Maley was involved with the MUA along with Mr Riley from AIMPE, Mr Gray from the AMOU, and there's ongoing discussions, and I think somewhere along the course I had those conversations with Ms Faraj and Mr Sheehan. Along the way of course it would be unremarkable for a trade union official to ask for jobs to be made permanent, and that's what I did.

PN61

Mr Garrett, I appreciate this is some time ago, so I might go about it this way. If I can ask you to go to the court book at page 230?---Yes.

PN62

At page 230 this is transcript from a hearing that you will no doubt recall involving Mr Campbell and the cessation of his contract on 31 December 2022. This is an extract from the cross-examination that was conducted and evidence you gave at that hearing. In that hearing at PN107 - do you see that?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN63

I said, 'You never asked for the POPs to state the crews would be made permanent having received this?' You said, 'No. As I said before the delegates were allowed to go into the room.' So in that hearing you said you'd never asked for them to be made permanent. In fairness to you I think later on in the transcripts you say it might have been possible that others had asked, but your evidence was that you personally did not ask. Would that be a more accurate reflection?---I think you're confusing the issues. Along the line that was in response to - here it says 10 August and 11 August. I understand the question's towards a response to that document. As I said this time and last time there was no debate on the situation. The delegates were in the room having those discussions on that particular issue, with crews being made permanent.

PN64

Perhaps to short circuit this; so you're saying that it was asked to be made permanent?---Yes.

PN65

But obviously that was not accepted by Svitzer?---Yes.

PN66

If I can take you back to your statement. At paragraph 27 - - -?---Yes.

PN67

Sorry, just bear with me one moment. The second sentence you say:

PN68

Alternatively there was not enough work to support the two new crews. The parties would review utilisation and MUA understood that they would either be reduced or they would be discontinued all together.

PN69

Do you see that?---Yes.

PN70

Do you accept that the POPs that were ultimately agreed do not state that that is the only reason for which the crews can be discontinued?---I'm not sure I have a firm view on it, because at the time the engagement of the crews were about doing the navy work and being utilised. At the time Svitzer wanted two 50 per cent crew, and that was argued up to 100 per cent. There and then settled at a fixed term basis when the original position was full-time basis, but I couldn't accept that on a premise, I don't have a firm view on it. My recollection was that those crews were based on utilisation and would assist with navy work, not any other material matter, from the best of my recollection at this point.

PN71

So if I could take you to the court book again at page - it's PG02 - it's court book 31?---Yes.

PN72

You will see that it says in the second sentence:

PN73

Svitzer has the discretion as to whether to extend the contracts.

*** PAUL GARRETT

XXN MR IZZO

PN74

Then at sub-paragraph (a) it says:

PN75

One month prior to the end of the term Svitzer will conduct a review of its operational requirements to assess whether to based on its requirements it needs to extend or reduce to a lower percentage or bring them to an end.

PN76

Do you see that?---Yes.

PN77

And that says that it's based on Svitzer's operational requirements. Do you accept that?---Yes.

PN78

So what I am putting to you is that there are other operational requirements that might also give rise to an exercise of a discretion to bring the LIR contracts to an end. Utilisation is not the only possible operational requirement. Do you accept that?---I probably don't have a firm view on it, because at the time the operational requirements was the utilisation.

PN79

Now, at paragraph 45 of your statement - just let me know once you get to paragraph 45?---I'm at 45.

PN80

Sorry, did you say you're at 45?---I'm at 45.

PN81

You say:

PN82

The MUA would never agree to a variation which allowed Svitzer to pick and choose which contracts to extend or to replace one of the crew members with casual.

PN83

Where you're talking about them picking and choosing are you talking about a decision as to whether some were extended and others ended and that you would never have agreed to that; is that what you're talking about there?---Yes.

PN84

Okay. So you agree that in this case that they've been dealt with, the LIR contracts have been dealt with collectively, that is they've all been ended?---Which case?

PN85

I withdraw that. In the circumstances where the LIR crew were ended on 31 December 2023 - - -?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN86

- - - all the LIR crew were ended collectively, there was no selective picking and choosing. You agree with that?---No.

PN87

You don't agree with that. So are you saying that some contracts were chosen to be extended and others were not?---Originally, yes, all were ended, and then Mr Gray I understand was offered an extension again. So, no, I don't agree with it.

PN88

In terms of Mr Gray you're aware that he was issued a notice telling him that his contract will come to an end; that's right?---Yes.

PN89

I think the date for your reference is 11 December is when all of the employees were formally notified that there would be no further engagement beyond 31 December. Perhaps I will just show that to you for your benefit so you don't have to take my word for it?---I'm aware of that.

PN90

Okay. As at that date when that decision was made all of the LIR crew had their engagements, or notified their engagement would end. You agree with that?---Yes.

PN91

You're referring to the fact that after that date a position was identified that Mr Gray might be able to perform. That's what you're referring to?---Yes.

PN92

Mr Gray is an engineer?---Yes.

PN93

Do you have any understanding of the position that was found for him?---I have some understanding.

PN94

And what's your understanding?---(No audible reply.)

PN95

What was your understanding?---My understanding there was a vacancy and there was an issue with utilisation where there was a potential vacancy and there was an opportunity to extend his contract.

PN96

So someone else in the Sydney port had resigned; that's right, isn't it?---My understanding.

PN97

Yes. And so that created a vacancy that Mr Gray could fill?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN98

And you're not saying that the decision to - once Svitzer had notified the LIR crew that the contracts were ending, the fact that a different role arose elsewhere that could be filled, you're not saying that's a breach of the POPs, are you?---I'm not sure where I've asserted that.

PN99

No, you're not asserting that though, are you?---I haven't asserted that at this point. It's an institute recruitments matter, or the engineer recruitments matter for the AIMPE. I'm just going back to your previous comments, because equally there was a vacancy in the ratings ranks as well that wasn't dealt with in the same manner.

PN100

You have not given any evidence of that in your statement, have you?---No.

PN101

But that vacancy you're talking about that was considerably before 11 December?---Yes.

PN102

And it was filled?---I'm not really sure what the position is in regards to vacancies within Sydney. I've struggled, and in my witness statement I've made the point repeatedly where I've tried to reach out to Mr Sheehan for meetings.

PN103

So if I put to you that it was filled by one of the LIR crew would you agree with that?---Yes, but there are other vacancies caused by workers job sharing.

PN104

Where is that in your statement?---It's not.

PN105

What I want to put to you is that at the time that this review was conducted and at the time the decision was made there was no vacancy of a fixed term or permanent nature that could have been filled by Mr Campbell?---Okay.

PN106

'Okay', you agree with that?---No, I'm just saying okay, you put it to me. At the time we'd done the consultation I struggled to get any information out your client whatsoever. So I couldn't say with any certainty what went into the decision making process - - -

*** PAUL GARRETT

XXN MR IZZO

PN107

So your answer is you don't know whether there was a vacancy at that time or not?---I couldn't say with any certainty. At that point in time I'd given up trying to work out who worked in the business, because it was that confused and convoluted and there was an excessive use, and still is an excessive use of casuals and part-timers. I'm struggling to keep up on a day to day basis who's working there.

PN108

If I could now ask you about the time that Mr Campbell was engaged?---Yes.

PN109

You will recall Ms Vivian Faraj was the Chief People and Strategy Officer at Svitzer. I take it you remember that?---Vaguely.

PN110

I might just for the record, Mr Garrett - - -

PN111

THE COMMISSIONER: It's all right, I understand.

PN112

MR IZZO: Yes.

PN113

THE COMMISSIONER: I understand the answer.

PN114

THE WITNESS: Yes, I recall Ms Faraj, vividly.

PN115

MR IZZO: Before Mr Campbell was engaged you made representations to Ms Faraj to try to secure him one of the LIR crew roles. That's right, isn't it?---Yes.

PN116

You effectively vouched for him?---Yes.

PN117

Now, at the time that you were speaking to Ms Faraj about trying to assist Mr Campbell in securing this role your understanding was that you were asking for Mr Campbell to fill one of the LIR crew's spots identified in clause 1(a) of the POPs. That's right, isn't it?---Yes.

PN118

And he was ultimately offered the role as a consequence of your discussions with Ms Faraj?---Yes.

PN119

And there was a common understanding between the MUA and Svitzer that those two LIR crews that were engaged in September 2021, which includes Mr Campbell, were the two times 100 per cent LIR crew referred to in clause 1 of the POPs?---Yes.

PN120

Now, did you know at the time that the contract he was given was a fixed term contract, that is it had a set end date?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN121

At paragraph 64 of your statement you say:

PN122

There was a belief - - -

PN123

This is in the end of the second line at paragraph 64:

PN124

There was a belief that he may have actually been a permanent full-time employee.

PN125

Do you see that?---Yes.

PN126

Who are you saying held that belief?---I held that belief.

PN127

When are you saying you held that belief? I take it it's during the consultation?---The 1 December 2023 when I - when I made that statement. That 64 is part of 56 to 66, and that's reflective of the 1 December 2024(sic) meeting.

PN128

Yes. You're not saying you held that belief when he was engaged?---No.

PN129

Now, you're saying you held that belief. You knew on 1 December 2023, so when these consultations were ongoing, that Commissioner Riordan had ordered that this contract be extended to 31 December 2023; you knew that?---Yes, I did. Can I just say I just said 1 December 2024 in my witness statement about 56. It should be 1 December 2023.

PN130

2023, yes?---Possibly another sleep deprived error. Sorry, your question again?

PN131

My question is that when those consultations were occurring you knew that Commissioner Riordan had ordered the contract only be extended to 31 December 2023?---Yes.

PN132

None of the documentation in place in relation to the engagement of Mr Campbell said that his employment will continue beyond that date, did it?---No.

PN133

So on what basis do you say he was permanent? On what basis did you hold that belief?

*** PAUL GARRETT

XXN MR IZZO

PN134

MR FAGIR: I object, because I accepted context of an objection to the witness evidence. Mr Garrett's subjective personal beliefs are neither here nor there. So not probably all that concerned about it one way or another, but it's just a matter of - it's a waste of time to hear from Mr Garrett his construction of the enterprise agreement or the contracts, because it ultimately goes nowhere in terms of the decision that you are required to make, Commissioner.

PN135

MR IZZO: Commissioner, Mr Garrett has given evidence that there was a belief he was permanent. As long as that evidence stands one of the considerations as to whether a contract is ongoing and for a fixed term is about the expectations that were created between the parties. If he is giving evidence that says there was an expectation of permanent I'm entitled to test why that is. If there is no basis then that will be relevant to understanding whether it was a genuine contract or not. If the evidence is not pressed I'm happy to discontinue the line of questioning. If the evidence is pressed I think it's highly relevant.

PN136

THE COMMISSIONER: Isn't the situation though that Mr Garrett was not party to the contract?

PN137

MR IZZO: I agree with that, Commissioner, but the difficulty is we have him giving evidence about the fact that there's belief.

PN138

THE COMMISSIONER: He's entitled to his opinion though, isn't he?

PN139

MR IZZO: He's entitled to an opinion, but if it's being accepted as evidence for these proceedings that might influence the outcome, then I think I should be entitled to test that opinion.

PN140

THE COMMISSIONER: All right, I will give you a little bit longer.

PN141

MR IZZO: The only question I had left, Mr Garrett, is to say on what basis do you say you held that opinion?---The issuing of several contracts and some developments in the Fair Work legislation in regards to contract - the nature of rolling contracts.

PN142

So that legislation is the fixed term contract laws that came into effect on 7 December 2023. You're talking about that legislation?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN143

And that several contracts he was issued you agree he was issued a contract in September 2021 and a second contract in March 2022; that's right?---If you say so. I know there's been several. If you can take me to it. I know there's been several.

PN144

Yes?---I don't want to say with specificity without being drawn to it.

PN145

Certainly. Can I take you to court book 198 - - -?---I accept that several contracts have been issued. I'm sure - I'm sure it's there in evidence.

PN146

What I want to put to you is that there's two key contracts. So the first is at PG6. It's at court book 74?---Yes.

PN147

So that's September 2021 on the first page?---Yes.

PN148

And then the second contract is at court book 81?---That's one to Rob Campbell, it's addressed 'Dear Glenn.'

PN149

That's the one?---Yes.

PN150

That's March 2022?---Yes.

PN151

So that's the second contract that ran to 31 December 2022?---Well, that's an extension of - that's an extension.

PN152

It attaches a second contract, the next page, yes?---Yes.

PN153

And then thereafter you agree there were extensions by order of Commissioner Riordan; that is - - -?---Yes.

PN154

Okay. I think in your statement you've given evidence that you believe there's still work for the LIR crew to do. That's your view, isn't it?---That's my opinion, yes.

PN155

Now, you're aware that Svitzer sometimes has difficulties in scheduling or rostering work because there can be changes in the shipping demand that's required at Svitzer. You accept that?---It's a broad statement.

*** PAUL GARRETT

XXN MR IZZO

PN156

So let me give some examples. So the wind might pick up, and so you might go from a three tug operation to a four tug operation. That might happen?---Yes.

PN157

A crew individual or multiple, depending on the sporting fixtures for the weekend, might call in sick?---That's an irresponsible statement.

PN158

I withdraw that. A crew or individuals might call in sick?---Yes.

PN159

And there might be limited cover, so it might affect fluctuations in demand?---I don't know what limited cover means.

PN160

I will go back. What I'm asking is if this scenario (indistinct) to be tested, call crew at late notice to cover for reasons. I have given one example, which is the wind picking up, wind change, three tug to four tug operation. Another is that someone might call in sick. That might create a need for someone to be called in; yes?---Yes.

PN161

There also might be actual changes in the shipping movements as well; that is a vessel might be scheduled to depart at a particular time, but for some other

operational reason it's now leaving at a later time or an earlier time?---I'm not sure where that causes operational difficulties.

PN162

What I'm asking is that that might require additional crew to be called in that weren't previously planned?---No, because if a ship's moving from an earlier departure time to a later departure time the crew just does the job later, or the crew rostered the next day does the job. There's already crews assigned that would do the job. So it doesn't create an additional demand, it just creates - it's a utilisation of people already engaged.

PN163

But wouldn't there be a possibility that if it crosses over from one roster period to another there might not have been cover planned for that type of shipping movement?---I'm not sure why there wouldn't be a cover plan. There's a roster there that plans - that has the coverage available.

PN164

So let me give you an example. A shift finishes - I can't remember if Sydney is 12 to 12 or 8 to 8, but you would know, what's the 12 hour shift?---You're the one asking the questions.

*** PAUL GARRETT

XXN MR IZZO

PN165

What's the 12 hour shift in Sydney, is it midnight to midday or is it 8 to 8?---Would you like to take me to the port operating procedures? It was Sydney or Botany, which port are we doing?

PN166

All right. Let's just take an example of - if you go to flexi crew - so let's just say that there is a shipping movement that is scheduled to occur at 4 am in the morning and that there is a crew that is designated to cover that. That shipping movement is moved back to another period where that crew is not rostered. So 9 am, 10 am, there hadn't been a plan to have a shipping movement at that time. Wouldn't that create a need to notify crew to come in that might not otherwise be required?---Yes, but the joy is they're rostered on and they have two hour notices and mobile phones issued. So you get the call you do the job.

PN167

But that's not the joy with the LIR crew?---You're speaking of massive hypotheticals here, asking for specific answers.

PN168

You say they're rostered on, they can come in on two hours notice. The LIR crew need to be told at 1800 the day before, don't they?---Can you take me to the POPs where that's - - -

PN169

Yes, I will. So if we go to court book - I think there's two relevant provisions - if we go to court book 39. So that should be clause 4.7 of the POPs. So 4.7, the first thing is it identifies at (c):

PN170

The notification of leave for next calendar day must be issued by 1800.

PN171

You see that?---Yes.

PN172

So the LIR crew need to be told whether they're going to be on leave the next day by 1800?---Yes.

PN173

And in addition to that - - -?---Sorry, did you say flexi in your example or LIR?

PN174

LIR?---I thought you said flexi in your example, someone's flexi in the job moves back from 0400 to 0900.

PN175

I mentioned flexi, but I'm talking about the LIR crew who might be engaged to - my understanding is - - -?---You're talking about two different things. This is where it gets confused. Flexi crew is engaged. LIR may or may not be engaged, but flexi crew is engaged.

PN176

But it's entirely possible that an LIR crew might be engaged to fill a spot in the flexi roster; isn't that right?---That's right.

*** PAUL GARRETT

XXN MR IZZO

PN177

Yes?---So if they're engaged they're engaged. My two hour assumption of mobile phone assumption is correct.

PN178

But they need to be told by 1800 whether they're working the next day?---Yes, but your example said flexi 3. You mentioned one of the flexi crews being engaged. It's a binary position, either you're engaged or not. If you're engaged as a flexi crew then you're obliged to work. You're confusing your examples, respectfully.

PN179

I may be. Let's just take a different example then. An LIR crew has been scheduled to perform a movement at 4 am?---Yes.

PN180

The window for that movement changes to a later period when they are not rostered on. Therefore there might not be a crew that has been scheduled to perform that movement, and that someone might need to be called in. You accept that?---No, because your example is redundant. You don't get engaged as an LIR crew. The LIR crew gets engaged in Botany or as a flexi 1 or flexi 2 or flexi 3. You're crossing the examples over to try and make a point, and you're not hitting the point. The LIRs are crew the same as crew 1 through 15 is crew 1

through 15. How they're engaged on the day is how they're utilised. The question you're going is about utilisation and pressures on the business. Yes, there's pressures on the business when there's towage work. The pressures are greater when you don't engage enough people in the crews. That's the problem, and that's where it goes back to the original question on utilisation and the proper assumption on the data and working through the data.

PN181

The point I'm putting to you is that there are operational examples. We talked about two and we're now talking about a third, which is about a change in shipping movement. But there are operational things that might happen that require a late notice call for a crew to come in and cover?---I accept that.

PN182

Yes. Now, the difficulty with using the LIR crew to do that is that they need to be notified by 1800 if they are to work the next day. You accept that as well, don't you?---Yes.

PN183

You accept that that's not the case for part-time employees?---No, I don't, I don't accept that.

*** PAUL GARRETT

XXN MR IZZO

PN184

So part-time employees can be given two hours notice and asked to attend for work related purposes. That's the case, isn't it?---I will say on part-timers I'm not sure how Svitzer are managing the part-timers, because in reviewing this it seems that part-timers are exempt from the port operating procedures which wasn't the intent of the enterprise agreement, and I really don't have any fixed views on that, and that's a matter that I will be following up following this hearing.

PN185

When you say they're exempt from the port operating procedures - - -?---There seems to be assumptions from Svitzer that the part-timers operate outside of any port operating procedures and have their own (indistinct), and I generally don't understand how that's being applied.

PN186

I am not sure that that's the company's position, but in any event what I want to put to you is that a part-timer can be called in to cover work on two hours notice?---I think the answer that I give is not the specific one. The problem is you're giving hypothetical examples. Through the consultation process in a delusional world I reside in, and particularly someone who worked in the leave in running crews in Sydney back in the day, where there's examples of pressures or mis-shipping there's an opportunity to sit down with the crews and the delegates to work through those and try and find resolutions to it. It's towage, it's fluid, things change. The problem - and that's accepted, I've never challenged, and I've been in this witness box more than once with this company before this Commissioner and said things to the same effect. Generally the process is the parties have adult conversations, have a look at the examples and find a better way

to do things to accommodate the changing nature of shipping. Through the whole process of this, and I know it's a long winded answer to the question you didn't quite ask, is if there were specific examples geez it would have helped if your client sat down and said on 3 March this happened, on 7 July that happened, with some specificity so we could have worked the problem.

PN187

The question I'm asking you is much narrower and simpler. It's simply whether part-time crew can be engaged to perform work on two hours notice. Do you accept that or not?---365 days of the year? Never. Never accepted it once.

PN188

They have - - -?---Legally, industrially, morally, it's all reprehensible to think that someone can sit by a phone 365 days on two hours notice, and this Commission is well versed in my views on that through EA negotiations.

PN189

So the first thing is it's not 365 days a year. They have nominated hard wide leave periods that are programmed, which you're well aware of, yes?---No.

PN190

You're not aware of them. Okay, let me take you - - -?---No idea how the part-timers are working in Sydney, no.

*** PAUL GARRETT

XXN MR IZZO

PN191

Let me just take you to the EA provisions. Just bear with me one moment, Mr Garrett. You might not have a copy of the EA in front of you actually. I take it you have a copy of the EA, Commissioner.

PN192

THE WITNESS: Yes.

PN193

MR IZZO: Can I just hand Mr Garrett a copy of the enterprise agreement.

PN194

THE WITNESS: I've got a copy here.

PN195

MR IZZO: You've got a copy?---Yes.

PN196

Can I ask you to go to page 49 of the EA?---Yes.

PN197

You will see that's a continuation of clause 40.1. At 48 there's a heading 'Hours of work', and if you go over to page 49 there's a heading 'Off duty periods for part-time employees'?---I'm struggling to hear, can you just say that again.

PN198

Yes. So page 49 the heading is 'Off duty periods for permanent part-time employees'?---Yes.

PN199

At sub-paragraph (a) it says:

PN200

Permanent part-time employees may nominate to take seven days free from duty each month.

PN201

?---Yes.

PN202

It also says that they instead can take an election to take five days free of duty each month, plus a 25 day period off, amounting to what they call a 30 day block out period - - -?---Yes.

PN203

You see that?---Yes.

PN204

So the proposition is not that part-timers need to be available 365 days a year because we need to provide that leave. You must accept that?---I accept that's what the EBA says.

*** PAUL GARRETT

XXN MR IZZO

PN205

That's what the EBA requires. Yes, okay. What I am putting to you is that outside of that nominated leave part-timers can be required to perform work on two hours notice, in particular when they have not yet reached their PPT threshold; that is their percentage that they have been engaged for. Do you accept that?---I'm not sure where the EBA says the two hours notice. Could you take me to that?

PN206

So if I take you to page 49 you will see 40.1.3 - sorry, go up. Just above 40.1.2 it says:

PN207

Permanent part-time employees must otherwise be available for relief work duty in accordance with 40.1.7.

PN208

So what I'm putting to you is it says they get their leave, but they must otherwise be available. Do you see that?---Sorry, what clause?

PN209

So this is the text just above clause 40.1.2?---Yes.

PN210

It then says at 'Availability':

PN211

The objective of any duty roster is ensuring employees are available at any time on no more than two hours notice.

PN212

Do you see that?---I'm sorry, I'm just going back and forth. Which clause is that?

PN213

40.1.3. It's the same page?---Can you - it's not quite what the clause says. The clause says:

PN214

The objective of any duty roster is to ensure that sufficient employees are available at any time to satisfy customers' requirements on no more than two hours notice, unless the port operating procedures specify otherwise to meet those requirements.

PN215

It doesn't say part-time employees need to be available on two hours notice, it says, 'The objective of any duty roster.' It goes beyond the individual, it goes to the collective roster and the intent of how the roster design is supposed to be.

*** PAUL GARRETT

XXN MR IZZO

PN216

But the Sydney POPs do not have an alternate provision that provides for more notice than two hours, does it?---No, but what it does provide is that there's a roster, and that's the point I'm making, is the part-timers should be subject to the port operating procedures in that relevant port. And this has been raised with your client on umpteen occasions now, that the part-timers aren't reflected in the Sydney port operating procedures, as they should be.

PN217

But you accept that - well, there's two points to this; (1) the POPs can be changed to include part-time provisions. That's available to my client?---Yes.

PN218

And secondly, under clause 1 of the POPs, and I will take you to that, that's at page 31 of the court book:

PN219

Svitzer is conferred a discretion by the POPs to appoint fixed term employees from time to time.

PN220

That's in the end of the second paragraph. Do you see that?---Yes.

PN221

So that discretion could enable Svitzer to engage additional fixed term employees whether that be on a full-time or part-time basis?---Yes, but the discretion to

engage is different to the availability of those who are engaged. The POPs - the POPs try to deal with the availability and the working arrangements of those who are engaged.

PN222

But you accept that Svitzer could engage part-time employees on a fixed term basis?---Well, that was the original proposal, yes.

PN223

In April 2023 Svitzer commenced a recruitment process for part-time employees in Sydney. You're aware of that?---Not directly through Svitzer, but, yes.

PN224

When you say not directly through Svitzer how did you become aware?---Through someone, and I can't recall off the top of my head, but someone alerted me to advertisements that were on Seek or one of the job listings.

PN225

And those advertisements were public, weren't they?---I assume so, yes.

PN226

And you agree that the MUA was notified that these roles were being advertised?---No.

*** PAUL GARRETT

XXN MR IZZO

PN227

Just bear with me. Can I ask you to go to court book 448, annexure DS15. Just let me know when you're at DS15?---Yes, I'm there.

PN228

There's an email to Shane Maley. He's an MUA delegate, isn't he?---That's one of his many roles, yes.

PN229

He's elected as a representative of the MUA by his peers; yes?---Workplace delegate, yes.

PN230

This email identifies that he was sent advertisements for new advertised positions for a crew in Sydney; you accept that?---No.

PN231

It says, 'Attached resumes for currently advertised positions'?---He wasn't - he wasn't notified. These are the resumes that were sent to him as part of the recruitment process after the notification and all the applications come in.

PN232

You will see that the second line of that email invites Mr Maley to forward it to any other candidate he feels might be suitable?---I see that. I thought your question was about notification of the recruitment of PPTs.

PN233

My question is whether the MUA was made aware that there was a recruitment process for part-time employees?---After it went live, yes. My understanding is after it went live.

PN234

After it went live you were made aware. Okay?---As a responsible official I wasn't notified.

PN235

But your organisation was?---No.

PN236

An MUA delegate was notified?---A delegate is not an officer holder at the Maritime Union of Australia.

PN237

Did your delegate send this on to you?---The 11 April email?

PN238

Yes?---What's that, a leading question to terminate him. Of course he didn't send that on to me. No way in the world would he send that on. That's got people's resumes in it.

*** PAUL GARRETT

XXN MR IZZO

PN239

Nevertheless your evidence is that you were at about this time made aware that there was advertising going on?---Yes. Someone - as I said someone contacted through Seek. There was - there was a convention that there be dialogue directly with the union, and delegates are not office holders of the union, they're workplace delegates. The general convention was to notify the responsible official for the AMOU or the institute or the MUA that had (indistinct) on that port. That's not unknown. The delegates never met that test and now it's just being applied to saying we notified a delegate and that covers that test. That email is after the fact, after it went live and after the resumes come in.

PN240

The next page is another email to a Geoffrey Gray. He's not a member of the MUA, is he?---He was once upon a time, but he's now a master with Svitzer with the AMOU.

PN241

Is he an AMOU delegate?---Yes.

PN242

You were also aware that a month or so earlier Svitzer had emailed or sent a letter to the LIR crew telling them that it was very unlikely their contracts would be extended after 31 December 2023. Do you recall that?---Can I just say there was a lot of correspondence in 2023. We were negotiating an EBA at that time as well.

PN243

So can I take you to court book 444?---Yes.

PN244

This is a sample letter, it's gone to Blake Thompson who is one of the LIR crew, in this case a master. Do you recognise that letter, the content of that letter?---Yes.

PN245

So my question to you is you knew by the time that Svitzer was recruiting fixed term PPTs in Sydney you knew that Svitzer was also telling its LIR crew that it was unlikely that their contracts would be extended beyond 31 December 2023?---I accept that these were sent, but I think these letters were sent after an argument between Ms Faraj and myself somewhere in this building in the presence of Nicolaj Noes, because at the time we were doing the whole unfair dismissal thing circumstances with Rob Campbell, and these conversations - the genesis of these were the discussions about the leave in running crews, and we were told somewhere in this building that these letters would be sent out afterwards. It was before 28 February. I think we were here 22 February, but it was somewhere in February we had those discussions and these come out thereafter.

*** PAUL GARRETT

XXN MR IZZO

PN246

So you knew about that at the time. So when it comes to April you had every opportunity to tell the LIR crew to express interest in the part-time roles. You could have done that?---Well, how do I tell people to express interest in a part-time role that doesn't exist. Secondly, you may recall there was a whole process before the Commissioner that involved Mr Campbell. You advocated for Svitzer at the time. So we had a lot of weight invested in that process.

PN247

But that process was to have - just in terms of the second matter you discussed there, that process was about extending Mr Campbell's contract to 31 December 2023. That's what that process was about?---Yes, but - - -

PN248

Yes?---Yes, it was. No, it was about - no, it wasn't an extended contract, it was about keeping the person employed.

PN249

But the relief you sought was for his contract to be extended like the other LIR crew. That's the - - -?---I'd have to go back to the file on that, but I certainly didn't ask a member to go and apply for a job which we weren't even aware about and didn't understand what was happening.

PN250

When you say you weren't aware, Mr Garrett, you just accepted that you were aware of it. You found out on Seek - - -?---I wasn't - no, that's not correct. I wasn't aware on 28 February that there was part-time jobs being made - - -

PN251

Mr Garrett, the position I'm putting to you is this; in April 2023 you knew part-time positions were being advertised. I will just put three simple propositions and ask you answer them together. (1) In April 2023 you knew part-time positions were being advertised for fixed term deckhands?---No.

PN252

You didn't know?---Didn't know they were fixed term, no.

PN253

But you knew part-time positions were being advertised?---Yes.

PN254

(2) You knew at that time that the LIR crew had been notified that their roles would not likely be extended?---Yes.

PN255

(3) You had an opportunity therefore to tell the LIR crew to express interest in the part-time role. You had that opportunity?---That's the assumption.

*** PAUL GARRETT

XXN MR IZZO

PN256

You must have?---I understand that's what's being put to me. I'm just saying there was a pretty heavy case being run last year about the leave in running crews. The intention - and I think my opinions are well known to everyone in this room, possibly except for the associate, with regards to part-time employment when there's full-time employment available. It's not that I'm a shy little wallflower that keeps my views to myself. The union advocated very heavily for permanent full-time employment, and at the time we were running a rather significant case on that matter with Mr Campbell, because we felt we got screwed when we negotiated the navy crews.

PN257

You chose not to encourage the LIR crew to apply for those part-time roles; yes?---I don't mean I made a choice on it. We weren't - I wasn't dealing with it at the point where I had to make a choice on it. I'm not trying to be evasive, it was just not something in my thought process. That's the best evidence I can give, because we were running a significant case about the whole leave in running crews at the time.

PN258

Just bear with me one moment, Mr Garrett. At page 78 -sorry, at paragraph 78 of your statement, which appears on page 18 of the court book you talk - just let me know once you've got there, sorry. It's page 18 court book, paragraph 78 of your statement?---Yes.

PN259

You talk about Ms Karina Seto and Caitlyn Tucker being offered employment in Sydney following March 2023. You will see that?---Yes.

PN260

They're the two PPTs that were engaged as a result of that PPT recruitment process - - -?---Yes.

PN261

- - - we just discussed. You accept that?---Yes.

PN262

At paragraph 59 of your statement, which appears on page 9, you talk about Svitzer refusing to provide date. You will see that?---Yes.

PN263

Can I ask you to go to PG12, which is at page 100 of the court book?---Yes.

PN264

So at PG12 you say that you were requesting total number of days worked by casuals, LIRs, PPTs and recall days, and a list of crews, PPTs and casuals. You see that?---Yes.

PN265

That's the data you were saying Svitzer refused to provide?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN266

Can I take you to PG13, page 103 of the court book. You will see there that the days worked from LIR crew are identified - or the number of days worked, I should say, are identified at the beginning of the email; you see that?---I agree there are numbers there.

PN267

The number of days worked?---Well, I just connect - I see the assumptions we're trying to draw here. So the question was the total number of days worked by casuals, leave in running, PPTs and recall days for the last 12 months. The data I got on 1 December for our members and ratings was GPH1 138 and GPH2 2BD.

PN268

So 138 is the number of days GPH1 worked?---Yes.

PN269

GPH2 is presumably Mr Campbell?---I couldn't say with certainty, but we call all make assumptions.

PN270

Well, Mr Campbell didn't work virtually any days in 2023; that's right?---Again, it was provided on a deidentified basis, but in a round about way I'll accept GPH2 was Mr Campbell.

PN271

Yes?---But if we can do GPH1, Mr Hunter, those numbers were nonsensical because that data was provided but GPH1 went into a permanent full-time position. I struggled to understand that data because we asked for the last

12 months for the leave in running crews. It's mathematically impossible for Mr Hunter to do 138 days as a leave in running - - -

PN272

You obviously don't accept the data, but what they were saying they were providing to you there is the number of days worked by those LIR crew; yes?---I reject it's provided.

PN273

You don't agree that it has been provided?---No, I reject it's provided. I agree the number is 138 there, but I reject that's the leave - - -

PN274

You don't accept that it's the right number?---Absolutely not.

PN275

Then below that you will see there is a list of crew?---Yes.

PN276

That responds to a query in relation to you asking for a list of crews; PPTC, casuals. That's right, isn't it?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN277

Then if I can ask you to go to PG18, which is at court book 115?---Yes.

PN278

You will see there is a list of days worked by PPTs; you see that?---Yes.

PN279

A list of recalls in total; you see that?---Yes.

PN280

Then casual days worked by rank; you see that?---Yes.

PN281

I note that you have said that you don't agree that the days worked by the LIRs was accurate, but, putting aside that, all the information you requested was provided?---No, it wasn't.

PN282

What information was not provided?---Well, firstly, this was provided on 14 December, three days after the definite decision had been made on 11 December, and you'll see that at PG17. It wasn't provided until after the consultation period had concluded for me.

PN283

I understand that. That was provided on 14 December?---Yes.

PN284

But it is then provided?---But that's the industrial equivalent of shutting the gate after the horse has bolted. Here are some numbers - the purpose of providing numbers is to give the parties the capacity to interrogate the numbers, because if I had an opportunity to speak to these numbers they would raise questions about the GPHs and 557. The volume of GPHs would then go into the question of training and type rating, and how many of those days have been used for training and type rating. Then it would go into the question of the PPT utilisation, the sample period that it has been assessed from and to, as well as the recalls. This is where we have an adult discussion that generally takes not longer than an hour. That's why I say there has been no effective consultation, because the horse had bolted.

PN285

That information was provided on the morning of 14 December. You then had a conference in the Fair Work Commission that day. That's correct, isn't it?---There was a conference, yes.

PN286

A place where an adult discussion could be undertaken?---Absolutely not, absolutely not. No way in the world. Not via teleconference at short notice with limited time, no way at all.

PN287

Facilitated by a member of the Fair Work Commission?---Absolutely not. No, I will say that openly.

*** PAUL GARRETT

XXN MR IZZO

PN288

So my understanding is the 14 December conference was in person; is that correct?---Even being in person there still wasn't the time to interrogate it.

PN289

So then there was a further conference on 20 December?---Yes.

PN290

There were two conferences in the Commission at which you could have raised the matters you wanted to raise about that data?---I can, and I did. I think the answer you're looking for is your client was evasive and didn't want to discuss the data.

PN291

That's not the answer I'm looking for?---It's the one you're getting - - -

PN292

I've got the answer I was after, thank you?--- - - - because at the end of the day it should have been done on 1 December when we were all around the boardroom and could have interrogated the data.

PN293

You say at paragraph 63 of your statement that the data that was provided was from the COVID-19 period. Mr Sheehan has said in his statement that it's the

roster cycle from 2 January 2023 to 23 April 2023. Is there any reason you hold a different view?

PN294

SPEAKER: Which data are you talking about?

PN295

MR IZZO: I can rephrase the question, so, Mr Garrett, if you just wait. Can I take you to paragraph 63 of your statement?---Yes.

PN296

You say - I think you quote yourself - - -?---Yes.

PN297

- - - as saying:

PN298

Some of the shipping assumptions include initial COVID-19 period.

PN299

?---(No audible reply.)

PN300

You say earlier on:

*** PAUL GARRETT

XXN MR IZZO

PN301

It's apparent that the labour assumptions were based on COVID-19 downturn.

PN302

You see that?---Yes, yes.

PN303

By the labour assumptions, you mean the level of utilisation; is that right?---There was a letter provided somewhere in - on 1 December. There was a PowerPoint actually which had the data up on the screen.

PN304

Yes?---I think that has been transferred into a letter. It started off with a number of hours per week worked, which was wrong. We interrogated that. Mr Sheehan may have said what he said in his statement, but at the meeting we were told that included that the COVID period and that data went back - because I was asking some obvious questions because there were some obvious errors in it and that's what I was told at the 1 December meeting.

PN305

All right. So that's why you hold that view?---Yes.

PN306

Who do you say told you that?---I'm going to say a Svitzer representative.

PN307

You can't remember which one?---Just off the top - I remember taking contemporary (sic) notes on it at the time.

PN308

Are they attached to your statement?---No.

PN309

So you can't remember which Svitzer representative?---No, but it was said. I think there was a point I had my head down in my hands, because I was just struggling with the data. I can't remember specifically. I know Ms Connolly was speaking to it and I recall Ms Tiedeman, from memory, was on the telephone - or videoconference at the time.

PN310

You accept that Mr Campbell was treated during the consultation process in the same way as the other workers that were subject to the consultation?---I'm not sure how the other workers were treated.

PN311

So you don't know whether there was any differential treatment of Mr Campbell as far as you were aware?---I'm saying ditto. I'm not sure what answer - - -

PN312

Okay. No further questions. Thank you.

*** PAUL GARRETT

XXN MR IZZO

PN313

THE COMMISSIONER: Thank you. Mr Yates, I should have come to you earlier. Did you have any questions for Mr Garrett?

PN314

MR YATES: Just a couple of questions, if I may.

CROSS-EXAMINATION BY MR YATES

[11.09 AM]

PN315

MR YATES: If you can go to paragraph 27 of your statement?---Yes.

PN316

You were taken to that by Mr Izzo. Can I just say - - -

PN317

THE COMMISSIONER: No, you can ask a question, Mr Yates.

PN318

MR YATES: Yes, yes.

PN319

THE COMMISSIONER: You can't say anything.

PN320

MR YATES: My apologies.

PN321

Was it a reasonable belief from your experience in the past regarding new operations and the establishment of new operations in towage ports that these types of arrangements, fixed term, leave in running, casual, part-time, would progress as the operation got - - -

PN322

MR IZZO: I object. Commissioner, the basis of my objection is this: my understanding is that AIMPE are here in support of the application. If AIMPE are going to ask questions, they should not be leading questions. If there is evidence-in-chief they are seeking to extract, they could be given some limited leave noting they're not a party, but if their role is to ask leading questions that Mr Fagir would not be entitled to ask, I think that's highly prejudicial to our case.

PN323

MR YATES: I'm referring to the statement that you make in paragraph 27 of your statement regarding that the positions - the LIR positions - they would eventually be converted to permanent full-time positions.

PN324

THE COMMISSIONER: I'm surprised it took Mr Izzo so long to stand up in relation to your question.

*** PAUL GARRETT

XXN MR YATES

PN325

MR IZZO: Yes, I did have hesitation in getting up, but - - -

PN326

THE COMMISSIONER: Because you started off straightaway by leading.

PN327

MR YATES: Yes.

PN328

THE COMMISSIONER: You can't lead.

PN329

MR YATES: Okay.

PN330

THE COMMISSIONER: You know that.

PN331

MR YATES: I will rephrase the question, okay.

PN332

Mr Garrett, is this the first time that you have been engaged in dealing with the expansion of ports and the engagement of new crews?---No.

PN333

On how many occasions would you have dealt with this particular type of expansion?---I've been an official for 21 years, so I would say several times. I couldn't say definitively, but multiple times.

PN334

In those circumstances where you have had discussions with operators - it doesn't matter whether it's Svitzer, Smith or Engage - is it your operational experience in dealing with these expansions that you would review crew utilisation at - - -

PN335

MR IZZO: I object. Commissioner, I think this is leading, as well, but, moreover, Mr Yates is effectively here with your leave; he is not a party to the proceedings. He appears to be trying to obtain further evidence-in-chief. That's really the role of Mr Fagir if he had to clarify anything. Evidence has been filed, cross-examination is now being conducted and this appears to be an attempt to obtain further evidence-in-chief about matters that Mr Garrett has already given evidence on.

PN336

If it was to clarify something, that might be different, but that's not what is happening here and, in any event, it's leading again. I think there is significant prejudice caused if Mr Yates is allowed to just expand on the evidence-in-chief at this stage of the proceedings.

*** PAUL GARRETT

XXN MR YATES

PN337

THE COMMISSIONER: It was leading again, Mr Yates.

PN338

MR YATES: Yes, okay.

PN339

THE COMMISSIONER: Mr Izzo, I will give you a chance to re-examine Mr Garrett on those - the questions from Mr Yates. You just need to be very careful, Mr Yates.

PN340

MR YATES: Yes.

PN341

THE COMMISSIONER: You're in that very unusual circumstance of being an intervener as such.

PN342

MR YATES: I acknowledge that and I'm trying to move cautiously.

PN343

THE COMMISSIONER: Thank you.

PN344

MR YATES: When the operators expanded their operations or there is a proposal to reduce, there would generally be a review?---(No audible reply.)

PN345

That's a leading question. I'll withdraw that. What would happen - well, I'll just withdraw for the time being. I wasn't expecting to - - -

PN346

THE COMMISSIONER: No, that's fine.

PN347

MR YATES: Yes.

PN348

THE COMMISSIONER: Thank you.

PN349

MR YATES: If I may, may it please the Commission.

PN350

THE COMMISSIONER: I don't think there's any need for you, Mr Izzo, to stand up again.

PN351

MR IZZO: No. Thank you, Commissioner.

*** PAUL GARRETT

XXN MR YATES

PN352

THE COMMISSIONER: Mr Fagir.

RE-EXAMINATION BY MR FAGIR

[11.14 AM]

PN353

MR FAGIR: Mr Garrett, do you mind going to court book 103?---Yes.

PN354

Do you have there an email from Renee Connolly of 1 December 2023?---I do.

PN355

Do you recall Mr Izzo asked you some questions about, in particular, the first set of numbers there, 'Total numbers so far for LIR crew'?---Yes.

PN356

If my note is accurate you said something to the effect that the numbers aren't right; not right?---That's correct.

PN357

You said something about it, but I don't think you completely explained why you said that. Would you do that now, explain to the Commissioner why you say these figures can't have been right?---If I can limit my comments to what's marked as GPH1 and GPH2, the ratings. Assumptions are made that GPH2 is Rob

Campbell, although I do note he was back there in the workplace doing training and return-to-work, so 'TBD' I am not sure is the correct answer. GPH1 138, I assume to be Glenn Hunter. Now, Glenn Hunter was the other member in the two leave in running crews for the position of rating. Ordinarily 182 days is the amount of work that you do on a calendar year basis.

PN358

Accepting this is 1 December and accepting that I don't actually have specific dates, it says, 'Please see below total numbers for LIR crew.' Assuming that's the 12 months to that date - Mr Hunter moved into a permanent crew somewhere around April/May of 2023, so accepting that there are 182 days worked in the year, if I was to work six months I would only work 91 days. To work 132 days in a five-month period or a four-month period appears to be a mathematical impossibility, so on the assumption that those dates - I think there has been, one, a crossover.

PN359

Mr Hunter's time as a rating in the permanent crew has also counted towards the leave in running crew. Secondly, I can't make a confident assessment of that without knowing the sample period of those dates.

*** PAUL GARRETT

RXN MR FAGIR

PN360

THE COMMISSIONER: Mr Garrett, isn't it possible that GPH1 is a classification rather than a person? So GPH1 was engaged on that tug for 138 days, the same way that LIR master 1 was for 132 days and engineer 1 was 89 days?---That's one way to read the data, but again the inability to actually interrogate the data - my understanding was that GPH1 was Mr Hunter. It was just the name was deidentified as opposed to a - it was a person, not a position.

PN361

Right?---I made that assumption with GPH2 being Mr Campbell on the basis that he hadn't been working because of the matter that was before yourself last year.

PN362

From my recollection - and I know we shouldn't conflate evidence and the like, but from my recollection Mr Campbell was allocated to LIR crew 2?---Yes.

PN363

That's correct?---Yes.

PN364

So is it right for me to assume that GPH2 is probably LIR2?---I can't speak for Svitzer.

PN365

No. Thank you?---Sorry, probably that's a flippant answer. That would be the assumption I make, as well, but again that's where a little bit of attention to detail would have assisted in this process quite significantly.

PN366

Yes. Thank you.

PN367

MR FAGIR: Mr Garrett, you have been asked if a couple of things are possible. Am I right in understanding that you accept that they're possible, but what's not possible is to say clearly one way or another based on the information that actually appeared on the page that we were just looking at?---Yes, that's correct.

PN368

Do you mind flicking forward a few pages to court book 115?---Yes.

PN369

Again, you were asked some questions about this and in the course of one answer you said this information should lead to effectively further questions. For example, about GPH 557, and you referred to training and familiarisation days. Can you just explain to the Commissioner what you're talking about?---Svitzer, when they start new employees, have a process of familiarisation. You don't just jump on board a tugboat and start working, you have to be familiarised and assessed. There has been a whole number of casuals come in, so an obvious assumption for someone with experience doing that is, firstly, 557 is a remarkably high number of days for casuals and make an assessment whether that number has been skewed up because of things like training and familiarisation which there is always going to be a component of, but to work out whether it's skewed.

*** PAUL GARRETT

RXN MR FAGIR

PN370

Then outside of that number and making that assessment and assumption, then it's about going back - so that's the answer to that question, is to have a look at the data there on training and whether there has been a skewing because of the number of casuals that have been started in 2023, because, once that assessment is made, then it goes back to the question of the high number of days particularly when compared to the masters and engineers.

PN371

MR FAGIR: I see. Finally, can I ask you to turn to court book 454, please?---Yes.

PN372

You were asked some questions about something you said - some evidence you gave about a meeting on 1 December?---Yes.

PN373

There seems to be some dispute about the period to which certain data relates. I just want to try to be clear, if I can, what data we're talking about. At 454, do you see there a letter dated 27 November?---Yes.

PN374

Do you see at the bottom of that first page a table?---Yes.

PN375

Do you mind flicking forward a few pages to 459?---That's it, yes.

PN376

Do you see there what seems to be the first page of a presentation of some kind?---Yes.

PN377

If you flick forward two pages to 461, do you see what appears to be the same table reproduced?---Yes.

PN378

Just to be clear, was the discussion on 1 December had by reference to this information that we have just looked at?---Yes, and if we can go back - that's in the vagueness of my answer where did I get that from, about the COVID period. This appears to be the PowerPoint presentation that was given on the day and the data assessment at the top of it - and if I can, 'Data assessment - 1 May 2020 to 7 May 2023,' that's where I got the assumption from that this was done during the COVID period which was raised previously.

PN379

I see. All right. Now, you said that at one point in this meeting you had your head in your hands because you were struggling with the data?---Yes.

PN380

Can you just go to the table, please, either the one on 454 or 461?---461, yes.

*** PAUL GARRETT

RXN MR FAGIR

PN381

What is so difficult about this data?---In the first column it says, 'Table towage hours per week 84.' I don't know where that assessment or assumption comes from other than an ideological position that Svitzer tried to advance during EBA negotiations, because tugboat workers aren't engaged for a 12-hour day. They can work up to 14 and can work up to 16 or they can work less, depending on the port they're engaged for the day, not hours per day. I struggled because we're back to that again and I thought we had put that to bed. 'Average towage hours per week' - in the second column - '39.4.' Based on what? It's a wonderful figure with no data, no metrics, no guidance behind it on any point.

PN382

Sorry, Mr Garrett, can I just pause there?---Yes.

PN383

Is there some sort of punch-in/punch-out system that would deal with that period, the average towage hours?---No.

PN384

Does someone have to clock on/clock off when they are doing that work as opposed to some other task?---No. There is no Bundy system. There is logbooks on the tugboats and I'm not sure that the computer systems are that competent to monitor in real-time towage hours, but towage can also incorporate standby

between shifts and I'm not sure the assumption of that data - for example, using Mr Izzo's, if there is a 4 o'clock job you may have to wait around a couple of hours for a pilot to get off one ship and into the next one, and how that data is calculated. So, no, there is not a punch-in/punch-out and there's no understanding how that 39.4 was calculated.

PN385

Thank you. I think you were up to the second - well, you had just dealt with the second column when I interrupted you?---The third one, 'Available maintenance hours per week.' Considering the long and winding path that everyone has done on maintenance, including the Commissioner, I'm very much struggling where 97.7 hours of maintenance come up per week and how you're available for 97.7 hours of maintenance per week. I just note there is only 168 hours in the week, so I'm not sure when you sleep or tow ships, but we struggled with that.

PN386

The fourth column, 'Average maintenance hours per week per crew.' I suppose - if I can, to be blunt - in my very simple nature struggled with how we got 12.2, because considering the long and laborious negotiations where we dealt with the question of maintenance this data wasn't available. So now we've identified that there's 12.2 hours of average maintenance per week per crew and I'm sure there are some assessments made to that, but again that's just not understood.

*** PAUL GARRETT

RXN MR FAGIR

PN387

Then to the fifth column, 'Estimated activation of hours engaged per week towage and maintenance 51.7 and 61 and a half per cent of 84 hours,' well, I've addressed the concern on average towage hours per crew and average maintenance hours per crew, and it's 84 hours, and again it felt like we're back to the EBA negotiations when we try and argue an hourly rate and how this all went in. The head in the hands comment goes back to 1 May 2020 when we're using the data across those five columns across COVID and then probably my industry experience that this data could be provided for this process, but it couldn't be provided for the EBA negotiations.

PN388

MR FAGIR: However that may be, do you actually know how this data was able to be produced at this point?---Wouldn't have a clue and I asked that question at the meeting, and couldn't get an answer on that.

PN389

What do you understand, if anything, to be the meaning of 'estimated activation of hours engaged per week towage and maintenance'?---Through mathematical deduction, I know it's .1 out. My understanding, it's the composite of average towage hours per week and average maintenance hours per week per crew, but I'm only deducing that from the mathematics that approximately equals 51.7.

PN390

I'm sorry if it's a stupid question, but is this about the amount of time someone is usefully working during their rostered shift or something else?---It appears that that's what the argument is and it's a time and motion - - -

PN391

Do you know how that relates to the question of whether you should have two LIR crews or one or nil or some other configuration?---Well, it doesn't relate to it, but it lends to the concerns I have that there is an alternate rostering model that has been worked on in the background and this is part of that process.

PN392

Thank you, Mr Garrett. They are my questions, Commissioner.

PN393

THE COMMISSIONER: Mr Izzo, Mr Fagir took Mr Garrett to a document that you didn't cross-examine him on, part of Mr Sheehan's statement. The question I've got is whether you have any questions of Mr Garrett in relation to that document.

PN394

MR IZZO: I might, yes, take that opportunity, Commissioner. You're talking about the slide deck presentation with our assessment - - -

PN395

THE COMMISSIONER: Yes.

*** PAUL GARRETT

RXN MR FAGIR

PN396

MR FAGIR: I don't mean to be difficult about this, Commissioner, but, just to be clear, Mr Garrett was asked questions about 1 December, the time period in respect of which data related, and the questions that I asked were clarifying what that data is that was being discussed. I don't mean to be difficult about it, I just want to - - -

PN397

THE COMMISSIONER: I understand that, but - - -

PN398

MR FAGIR: - - - resist the idea that that wasn't properly in re-examination.

PN399

THE COMMISSIONER: From my reading, there is no identification that the data was provided at the meeting of 1 December. The document says 27 November and certainly the presentation - once again there's no identification that it was 1 December, but I'm prepared to accept that it was.

PN400

MR FAGIR: That's what I was trying to clarify.

PN401

THE COMMISSIONER: Yes. I just think for the sake of fairness though, I should allow Mr Izzo to have an opportunity - you will get another go, Mr Fagir.

PN402

MR FAGIR: If the Commission pleases.

FURTHER CROSS-EXAMINATION BY MR IZZO

[11.29 AM]

PN403

MR IZZO: Mr Garrett, my understanding is that the evidence of Mr Sheehan is that the roster cycles that this was based on was a period - first six months of 2023 and where he says that is at - if I take you to paragraph 113 of his statement which is court book - it's about 165 or 164.

PN404

THE COMMISSIONER: 166.

PN405

MR IZZO: 166. Thank you, Commissioner. At paragraph 113 he says, 'The data extracted was based on my cycle 2, January 2023 to 23 April 2023,' do you see that?---Yes, just one moment if I can. Yes.

PN406

Now, obviously where you say the confusion has risen, and let me just go back to the annexure - so, if I can take you to court book 461, you're saying the reason you formed the view it's a different period is obviously because of the heading?---Yes.

*** PAUL GARRETT

FXXN MR IZZO

PN407

That's why. Okay In relation to the estimated activation perhaps I can just clarify some of the matters of what the columns refer to. If I could start with the last column, 'Estimated activations,' you said that 51.7, you think, represented the combination of the average maintenance performed per week, which is 12.2, and the average towage per week which is 39.4?---Yes.

PN408

And the reason you think that is because when we add those two numbers together I think you get 51.6?---Yes.

PN409

Yes. And what I wish to put to you is that if you add the average amount of towage for the crew each week, and we add the average maintenance being performed each week and you add them together, you will get the total numbers of hours that they are actively engaged. Does that follow?---You know what I said that the assumption is.

PN410

Yes. Yes, so when it says, 'Estimated activation of hours,' what that's referring, it would make sense to you, that it is the total hours of towage that crews perform per week, and maintenance perform per week. That's the total number of hours on

average they are actively engaged in some form of active duty. Do you agree with that proposition?---I don't know what it means.

PN411

But that's the assumption that you've made?---That's the assumption I've made, yes. I'll just – if I can, I just want to go back to your previous question. The data assessment on the top says, '1 May, 2020.'

PN412

I understand that?---But even though Mr Sheehan says that he got it wrong, that's what Mr Sheehan and his team provided me. I'm only going on what he said.

PN413

No, I understand. You formed that view based on the heading?---Yes.

PN414

That's right, yes?---I made the mistake of listening to him.

PN415

I don't know if that evidence is going to take us particularly far, Mr Garrett. Can I just put one other matter to you. The available maintenance hours per week, what I want to put to you is that it's the total number of hours in the shift remaining outside of – sorry, bear with me one moment – what I want to put to you is that the total amount of maintenance available once towage has been taken out, so once active towage has been taken out, the number of available hours under the POPs remaining to perform maintenance is what is represented in that third column of 97.7. Do you understand that to be the case? Is that your assumption?---I wouldn't have a clue what it means.

*** PAUL GARRETT

FXXN MR IZZO

PN416

Okay?---And I'm not sure your client does either.

PN417

All right?---I just answered. There's 168 hours in a week. If you take 39.4 and you have 97.7, I still don't know when anyone's supposed to sleep.

PN418

But what I'm putting to you is, that's the total available hours. That's not necessarily what's been worked but that's the total available there?---Under what? What I'm – in response and to answer the question of what you're putting to me, I have absolutely no idea what the assumptions are and how you get those total available hours, other than a number that's on a page. I have no understanding of start time, finish time, around the clock. It's 97.7 across 168 and I don't know what that means.

PN419

All right.

PN420

THE COMMISSIONER: Mr Fagir?

PN421

MR FAGIR: No, nothing further from me, Commissioner. That's my client's evidence.

PN422

THE COMMISSIONER: Thank you, Mr Garrett. You're excused.

<THE WITNESS WITHDREW

[11.34 AM]

PN423

THE COMMISSIONER: Mr Yates, your witness wasn't required for cross-examination but I'll mark the statement of

PN424

Mr Gray(?), unless there's any objection, as exhibit 2.

PN425

MR YATES: Thank you.

EXHIBIT #2 STATEMENT OF MR GRAY

PN426

THE COMMISSIONER: Mr Izzo.

PN427

MR IZZO: Thank you, Commissioner. We have one witness which is Mr Sheehan and we'll just ask for him to attend the courtroom.

*** PAUL GARRETT

FXXN MR IZZO

PN428

THE COMMISSIONER: Is he in the country, Mr Izzo, or - - -

PN429

MR IZZO: He should be next door. He's just quickly going to the bathroom, Commissioner. Apologies.

PN430

THE COMMISSIONER: We'll go off record.

OFF THE RECORD

[11.39 AM]

ON THE RECORD

[1.40 AM]

PN431

THE ASSOCIATE: Mr Sheehan, please state your full name and address.

PN432

MR SHEEHAN: Dylan Sheehan, (address supplied).

<DYLAN SHEEHAN, SWORN

[11.40 AM]

EXAMINATION-IN-CHIEF BY MR IZZO

[11.40 AM]

PN433

MR IZZO: Mr Sheehan, you've filed, or we've filed on your behalf a witness statement in these proceedings which is

PN434

13 pages long. Do you have a copy of that statement in front of you?---I do.

PN435

There are also a number of annexures to that statement that will be located in the court book that's there. There are 30 annexures in total. Do you recall there being that number of annexures?---Yes.

PN436

And that statement is dated 1 March 2024. Can you satisfy yourself that that's on page 13 of your statement?---(No audible reply.)

PN437

Can you confirm if that statement is true and correct to the best of your knowledge and belief?---It is.

PN438

We would seek to tender that statement, Commissioner if there's no objections.

PN439

MR FAGIR: There's no objections.

*** DYLAN SHEEHAN

XN MR IZZO

PN440

THE COMMISSIONER: Any issue, Mr Fagir?

PN441

MR FAGIR: No, Commissioner.

PN442

THE COMMISSIONER: I'll mark the statement of Mr Dylan Sheehan as exhibit 3.

EXHIBIT #3 STATEMENT OF DYLAN SHEEHAN

PN443

Any questions for clarification?

PN444

MR IZZO: There are not, Commissioner.

PN445

THE COMMISSIONER: Thank you. Mr Fagir, any questions?

CROSS-EXAMINATION BY MR FAGIR

[11.41 AM]

PN446

MR FAGIR: Mr Sheehan, you're the General Manager East for Svitzer Australia Pty Ltd?---I am, yes.

PN447

What does that involve?---I manage operations from far north Queensland, down to Victoria.

PN448

Including Sydney and Botany, obviously?---Including Sydney and Botany.

PN449

You've been with Svitzer for the last ten years, have you?---Yes.

PN450

And were you in the maritime or towage industries before that, was is this your first – is Svitzer your first role in this industry?---I was in a business development role in the maritime industry previously.

PN451

Now, many of the annexures to your statements are letters that you signed but some aren't, is that right?---Correct.

PN452

Emails or letters, whatever it is. Correspondence?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN453

And can we take it that by virtue of the fact that they're annexed to your statement you've read them and you're familiar with them?---Correct.

PN454

In familiarising yourself did you form any concerns that the contents of Svitzer's correspondence to the MUL and

PN455

Mr Campbell were inaccurate or incorrect?---I don't believe so.

PN456

What I'm trying to understand is whether I ask you about, for example, an email that someone else wrote on Svitzer's behalf, whether we're going to have an issue about whether you know what they said, or whether it was right, or whatever else. Can we put that to one side?---I'm happy to review it. I'm not across the explicit details or for any actions, in terms of line by line but I'm happy to review.

PN457

Sure. And on that topic why are you the person who gave this statement as opposed to someone else in the business, do you know?---I'm ultimately responsible for all of these customer operations.

PN458

And you in fact were involved in the consultation and the various events that are being examined in this proceeding?---Correct.

PN459

Has Svitzer sacked Mr Campbell, or do you say his employment just ended by the passage of time in accordance with the terms of his contract?---The latter. Once we had come to that conclusion his contract was terminated as laid out in the POPs.

PN460

Not by virtue of any step that Svitzer had to take, but just because that, as you see it, is what his contract contemplated?---Can you repeat that?

PN461

Did you take any step to dismiss Mr Campbell?---Not personally, no.

PN462

Did Svitzer take any step to sack Mr Campbell?---Yes.

PN463

What was that?---In December of 2022 when we had the fixed term expiring for the leave in running contracts it was decided that we would terminate Mr Campbell at that time.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN464

What did you actually do to sack him?---If I recall correctly I wasn't involved directly at that time. That was before I had assumed the role as general manager for the east coast. We had issued a letter indicating that

PN465

Mr Campbell's contract would not be renewed for 2023.

PN466

So, in terms of any steps that Svitzer took that's within the correspondence that's attached to your statement, there's not some other thing that we're not aware of that the Commission needs to be concerned about?---I mean, the matter was dealt with separately. In terms of what's in the annexures I stand behind what's in there.

PN467

No. Look, I'm just trying to understand, apart from the correspondence that we've all seen - - -?---Yes.

PN468

You know, has someone picked up the phone and said to Rob, 'Rob, you're sacked as of 31 December,' anything like that? That's what I'm trying to understand?---I don't know the exact correspondence that took place at the end of 2022 in terms of how that unfolded. I was back in Canada at that point and as I mentioned, I wasn't in the east coast role.

PN469

Okay. In the next break can you take steps to find out? Tell me if this was too hard. I just want to know if anyone said anything to Mr Campbell beyond what's in the correspondence that's already in evidence?---I'd be pleased to have that discussion.

PN470

Thank you.

PN471

THE COMMISSIONER: Mr Fagir, are you talking about 2022, or 2023?

PN472

MR FAGIR: 2023.

PN473

THE COMMISSIONER: Well - - -

PN474

MR FAGIR: The most recent.

PN475

THE COMMISSIONER: Most recent.

PN476

MR FAGIR: Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN477

THE COMMISSIONER: Sorry. Mr Sheehan's talking about 2022.

PN478

MR FAGIR: I'm terribly sorry, Mr Sheehan. I'm sure it's completely my fault because everyone else seems to understand exactly what you were talking about. No, I'm talking about the most recent, the end of 2023?---Okay.

PN479

Did anyone – I just want to know, and I've seen the correspondence that's in evidence. I just want to know if someone picked up the phone and said to Rob, 'You're sacked,' or sent him a letter saying, 'You're sacked,' or is it just the correspondence that we've got here, saying, 'Your contract is due to expire on 31 December and we're not going to renew it'?---From what I recall, we issued letters indicating termination, not only for Mr Campbell but for all the other leave in running crew that that applied to.

PN480

Just forget about the others. I'm only interested in

PN481

Mr Campbell. Did you write him any letter that is not in the evidence?---The letter that we had issued would be in the evidence.

PN482

But the reason that I'm asking about this is that I've seen a number of letters that say, 'Your contract is coming up and your employment is going to expire on 31 December and we are not going to renew it.' I just want to make sure there's nothing beyond those sorts of letters, anything that I've missed?---Not to my recollection.

PN483

When did Svitzer make a final decision that it would no longer utilise LIR Crews 1 and 2?---It would have been in mid-December following the consultation with the union delegates.

PN484

Mr Sheehan, I need you to be really as precise as you can. What date? Let me see if I can help, Mr Sheehan. Do you mind turning to page four six – do you have the court book, or - - -?---I do, yes.

PN485

Can you go to page 466, the bottom right-hand – the number's in the bottom, right-hand corner?---I do have it as part of my statement, as well, so – as number seventy – paragraph 73. In my statement of 11 December 2023 I conclude the consultation process.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN486

Okay. Thank you. That's useful. Now, do you mind going to page 466 and I'll just make sure we're on the same page here?---Sure. Okay.

PN487

Do you see there a letter dated 11 December?---Yes.

PN488

And that's consistent with your statement in evidence, is that on or perhaps just before 11 December the consultation period ended?---Correct.

PN489

All right. Now, I'm sorry to jump around like this but I just want to go back in time to 2021, and it was in around August 2021 that you described negotiations to amend the Sydney and Botany POPs?---Yes.

PN490

And in broad terms – well, you say this at paragraph 14 and you can turn to it if you want, 'We had not yet seen how the crewing would operate in practice, nor did we know the precise volume of the Navy contract work.' Do you see you say that in 14?---M'mm.

PN491

And you say that in the context of explaining the position that Svitzer had taken in that negotiation. I'm sorry, I'll take a step back. Paragraph 14, 'At the time I had no intention of making the roles permanent because we had not yet seen how the

crewing would operate in practice, nor did we know the precise volume of the navy contract work.' Do you see that?---Yes.

PN492

And that's the reason why Svitzer resisted engaging the two additional crews on a permanent basis, and instead wanted them on a fixed term basis?---That's correct.

PN493

Now, that was two and a half years ago, something like that, August '21. Now, do you mind turning to paragraph 27 of your statement and I'll just read it. 'Given the scope of the Navy contracts it took a few months for Svitzer and the LIR crew to become familiar with the requirements of the Navy contract and the work which needed to be done to service this contract.' Do you see that?---Yes.

PN494

And how many months was a few months?---I don't have the precise information but it would have taken at least three months for us to get all of the crews familiarised across the assets.

PN495

All right. And then next, just picking up this broad chronology, at 33 you say, 'On or around December '22, about a year after the confirmation of the Navy contract it remained the case that we needed the 16th and 17th crews to service the port, at least on a short-term basis.' Do you see that?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN496

But you say at this point as a management team you remained unclear on what the best model was to service the port, do you see that?---Yes.

PN497

And that was, what, 15 months after you'd started using these two crews?---Correct.

PN498

You were still, at that stage, unclear on what the best model was?---Yes.

PN499

All right. At 45, now into 2023, you say during the course of '23 it became apparent to you there were issues using the LIR crew?---Yes.

PN500

And at 49 you say it started to become apparent to you that you might need a better servicing model in Sydney which relied upon a part-time crew, 'but also that our overall resourcing should be reconsidered as part of a holistic roster review'?---Correct.

PN501

And at 51 you say, as indicated above, you and Ms Farage and Ms Connolly had started to form a preliminary suspicion that the LIR crew might not be the best model. Do you see that?---Yes.

PN502

When we're talking about it during 2023, we're talking at least 18 months after you brought the two crews on?---Yes.

PN503

Now, do you say it took 18 months for you to get the point of forming a preliminary suspicion that the model wasn't the best model?---Correct, along with other factors, but yes, correct.

PN504

But it's not really that complicated, is it? How much work have you got to do, and how many people do you need?---In fact, it is complicated because there's a lot of different factors including commercial arrangements that come and go. If you look at the contracts that we had in Port Jackson, in particular, there are a couple of contracts that were major to that port and the volume that we serviced that impacted the utilisation of that crew.

PN505

You said it is complicated because there are commercial arrangements that come and go. Is that the only source of complexity or are there others?---That would be one of the major considerations.

PN506

But are there any others, at all?---No. It would be largely related to the volume that we had to service at the port.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN507

And that, you say, fluctuates for a whole variety of reasons, including contracts being won and lost?---Correct.

PN508

All right. And with the fluctuation of work, what you have to figure out whether you're best off having LIR crews, casuals, part-timers, for example?---Yes.

PN509

You have to work out how to best meet the work that you have?---Yes.

PN510

And does that take into account the nature of the work that you're actually doing, as well?---Can you expand on that?

PN511

Well, does it make a difference whether you're staffing the Navy contract, as opposed to a cruise ship contract, as opposed to something else?---In terms of the actual engagement our preference is to have flexible crew.

PN512

All right. Now, I suspect there aren't many employees in Australian who would take a different view to that. But if we just try to be a little bit more specific - - - ?---Sure.

PN513

That involves developing some sort of model that combines permanent casual, permanent part-time, LIR, whatever it is, into the best, most flexible arrangement, yes?---Correct.

PN514

And am I right in thinking that there are many different permutations of that workforce construction and roster construction that might be adopted?---Yes.

PN515

And that in itself, working out the optimum model, is a complicated exercise?---Yes.

PN516

Now, just coming back to 49, you say it started to become apparent to you that you might need a better servicing model in Sydney, and also that your overall resourcing should be reconsidered as part of a holistic roster review,' do you see that?---Yes.

PN517

Was there a holistic roster review conducted?---Was there a holistic roster review conducted?

PN518

Yes?---No.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN519

When did you decide that the crewing model at the port should not include LIR crews? Is that 11 December or is there some different date?---So, as mentioned in my statement there was a preliminary suspicion that that was not the best model, and that's when we issued the initial letters back in February of '23. We then went through a review of the analysis and the data and concluded that on 11 December 2023.

PN520

Sorry, can you say the last bit, again? You - - -?---We concluded that by - - -

PN521

No, just before that. What did you say about data?---The data that we had received and had reviewed.

PN522

Okay. Now, if we go forward to late in 2023 it's – I'm sorry, let's start in February 2023. Do you mind turning to court book 444?---Okay.

PN523

And I hope you have there a letter dated 28 February?---Yes.

PN524

And this is to a Master, whose name is presumably – it's a template letter and the same one went to Rob Campbell, correct?---Yes. Yes. Noting that the date is incorrect, 28 February 2023.

PN525

To 23. Yes, of course?---Yes.

PN526

So, just to clarify, so that – just, apologies to correct the record with that, that date should be 23.

PN527

THE COMMISSIONER: Thank you.

PN528

MR FAGIR: Okay, now the fourth paragraph of that letter, 'Based on the current expected operational needs we consider it prudent to confirm that it's highly likely Svitzer will not be extending in any fixed term LIR crews beyond their current expiry.' That's the gist of the letter?---Yes.

PN529

And a couple of paragraphs on you say unfortunately, given the confidentiality and commercially in-confidence reasons you are unable to provide any further detail in relation to the operational demands at this time?---Correct.

PN530

Was that true?---Correct.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN531

All right. Now - - -

PN532

THE COMMISSIONER: But Mr Campbell wasn't being offered any shifts at this point, was he?---This was in February of '23?

PN533

Yes?---He – in terms of the timeline of – so, he was still employed. We had the rollover of the leave in running crew until December 31, 2023. And in terms of - -
-

PN534

Wasn't it at this point though that the matter was in dispute and was currently before me, and I was extending

PN535

Mr Campbell's employment?---Yes. That's correct. Yes.

PN536

And you were still having discussions. Are you familiar with that point in time?---In terms of the – in terms of that dispute or?

PN537

Yes?---Yes.

PN538

So, are you sure that Mr Campbell got sent a copy of this letter?---Yes, from what I recall. There were six issued. I believe that Mr Campbell received a copy, as well.

PN539

All right, thank you.

PN540

MR FAGIR: Now, if you'd flick forward a few pages to 447, Mr Sheehan?---M'mm.

PN541

And this might have something to do with the question the Commission just asked you. Do you see there an email to Paul Garrett and others?---Yes.

PN542

'Please note we have written to all LIR crew in Sydney to advise them as per the terms of their contracts the fixed term contracts will come to an end on 31 December 2023.' Do you see that?---Correct, yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN543

You wanted to give them as much notice as possible about the contracts not being extended or renewed, so they could start planning early on for ultimate opportunities of employment. Do you see that?---Yes.

PN544

Now, Svitzer's view of the matter is that if nothing happened the employment of the crew would just come to an end on 31 December 2023?---Can you clarify what you mean by, 'if nothing happened'?

PN545

Well, unless the contracts were extended or terminated in advance, they would just end on that date?---Following a consultation process, yes.

PN546

All right. But it's not a matter of Svitzer having to go out and sack someone. It's their contract coming to an end by the passage of time. That was Svitzer's view of it?---In terms of a maximum fixed term that was an element of it. But there was still a consultation as to the POPs that we just needed to go through.

PN547

Just forget about the consultation for the moment, please. There's no trick in this. I'm just trying to make sure that I understand that Svitzer's view was that unless Svitzer terminated early, or extended the contract and the employment would just end on 31 December 2023?---Yes.

PN548

And subject to any need to consult, Switzer didn't need to take any other step to bring the employment to an end?---Correct.

PN549

In fact, it didn't take any other step. It just let the contracts lapse?---Aside from the consultation.

PN550

Aside from the consultation, all right. Now, the reason that this email needed to be sent was that there were multiple possibilities. That's right, isn't it? This was a courtesy, saying just so you're clear we think what's almost certainly going to happen is your employment will just end by the passage of time?---What was your first question? There is multiple possibilities?

PN551

There were multiple possibilities?---Correct.

PN552

It could be, say, sooner, it could be extended, could be offered a different position, et cetera?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN553

But the idea here was to write and say it's probably not going to be any of those things, it's almost certainly going to be that your employment will just end with the passage of time?---Not exactly. There was a number of the LIR crew, when vacancies came up were redeployed to those vacancies.

PN554

Sure. All right. Now, what was the confidential information that you couldn't share on 28 February 2023?---As mentioned, the commercial arrangements that we had in place with our customers.

PN555

Which are what?---Contracts with shipping lines.

PN556

What were the operational demands that you referred to in the '23 – or that Rene commonly referred to in the 8 February '23 letter that couldn't be shared at that time?---Which letter are we referring to?

PN557

Quite right. Can you go back to 444?---M'mm.

PN558

The second-last paragraph. 'Unfortunately, given confidentiality and commercially in-confidence reasons we are unable to provide any further detail in relation to the operational demands of the port at this time'?---M'mm.

PN559

Do you see that?---Yes.

PN560

What were the operational demands referred to in the letter?---An uncertainty around – based on the commercial discussions that we were having, we didn't have certainty on what the operational demands would be for the operation going forward.

PN561

Can you be any more specific than that?---Not without breaching confidentiality of our commercial arrangements. We do have – I'm happy to say that we have a contract in place with the Navy, as an example, with cruise ship lines, with tanker companies. And as I mentioned previously, those vary from year to year. They can be anywhere from a six month – they can be anywhere from a spot contract for one vessel, through into a three year contract. And we had intel and discussions at that time that jeopardised the future of some of those contracts.

PN562

And those operational demands that you've just described, did they continue to be a factor through to the end of 2023?---Yes, and they still remain that way.

PN563

They remain that way today?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN564

All right. Can I ask you to move forward in time, not in the bundle, to November 2023, and can you go to page 98 of the bundle, please?---Sorry, 98?

PN565

Ninety-eight, nine eight, yes?---Okay.

PN566

Do you have there a letter from 27 November '23?---Yes.

PN567

And this is, you say, a letter that kicked off the consultation?---Correct.

PN568

Do you accept that your obligation under the enterprise agreement when consulting with employees about major change, is to give them all relevant information about the change?---Yes.

PN569

And do you say you did that in this letter?---This was a precursor for the information that we then provided, as well.

PN570

What information was that?---Information that was requested during the consultation process.

PN571

Not information that you volunteered but information that someone asked you to give?---Yes.

PN572

Which was what?---We had three separate information requests, of which we provided two.

PN573

What were they? Well, actually, we'll come to them,

PN574

Mr Sheehan. Just while we're here, was there some explainer that came with this letter or some appendix, or something that explained what the table was talking about, the table on the first page now?---No. As mentioned, this was the precursor, followed by a presentation that we shared when we held the initial consultation.

PN575

So, the figures that appear in the table, what period do they relate to?---I don't recall specifically.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN576

Of course, Mr Sheehan, the period of the data would be critically important to understanding its significance?---Yes, which was contemplated when we gathered the data.

PN577

And that's because things change, as we discussed earlier. Commercial arrangements come and go?---Yes.

PN578

And if someone is going to understand whether this sort of information is significant or not, it's really important that they understand what period it relates to?---Yes. And from recollection we provided that period during the discussion.

PN579

All right. What does this table actually deal with? What's the subject matter?---It deals with the utilisation of crew across both Port Botany and Port Jackson.

PN580

When you say, 'utilisation,' can you be more specific?---The utilisations of the time records that the crew is either available or used for towage and maintenance in the relevant ports.

PN581

During the periods that they're actually at work or being paid?---Yes.

PN582

So, it's paying someone, a crew member, for say, 84 towage hours a week and we're paying them whatever we're paying them, and they're actually in that time doing 12.2 hours of maintenance a week and 39 and a half hours of towage?---M'mm.

PN583

We're talking about utilisation within shifts?---Yes.

PN584

We're not talking about, for example, how many shifts a member of the LIR crew is doing. This is a different issue?---Can you repeat that question?

PN585

Well, when you say, 'utilisation' - - -?---Yes.

PN586

You might ask yourself, well, we've got these ten casuals on the roster and we're giving them each 50 shifts a week out of whatever the maximum is. That's utilisation in once sense. Where utilisation in another sense is when we're paying someone for how much of their time they actually spend in doing productive work. But that's another sense?---Correct.

PN587

And this is utilisation in the second sense?---Correct.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN588

Did this letter explain how utilisation within shift hours related to utilisation of crews?---It did not.

PN589

Did the letter explain how this figure that was produced impacted on the future of the LIR crews?---It did not.

PN590

Now, did the letter or anything else explain where these numbers came from, 12.2 and 39.4, in particular?---These were derived from the third party analysis we conducted.

PN591

And just pause for a moment. I asked you, did you explain that to anyone? Did the letter explain where they came from or did you tell anyone that's where they came from?---Not specifically.

PN592

Who was the third party that conducted the analysis?---We haven't shared that.

PN593

Who was the third party that conducted the analysis you've just referred to?---We've maintained confidentiality over that since the consultations.

PN594

Well, I'm afraid, Mr Sheehan, that saying something is confidential is not a proper basis on which you can avoid answering a question in this context. It's certainly my view. The Commissioner might have a different one. So - - -

PN595

THE COMMISSIONER: I don't. I'm waiting for Mr Izzo to jump up and object, though. But if he's not going to then you need to answer the question, Mr Sheehan.

PN596

MR FAGIR: I suspect he's not going to because he's got no basis to do it. Of course, if he wants to make an application about confidentiality of the transcript or anything else, he's perfectly entitled to do this.

PN597

Mr Sheehan, I'm going to ask you the question, again. Who was the third party that conducted the third party analysis to which you've just referred?---Ship Point Solutions.

PN598

And what is Ship Point Solutions?---Ship Point Solutions is a specialist in rostering across major industries, including maritime.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN599

They were engaged by Svitzer Australia, were they?---That's correct.

PN600

To do what?---To review the utilisation data for Port Botany and Port Jackson.

PN601

When were they engaged?---I don't recall the specific date. It would have been in the second quarter of 2023.

PN602

The second quarter of the calendar year, or financial year?---Calendar year.

PN603

So, somewhere between March, April, May?---Yes.

PN604

Sorry, April, May, June?---April, May, June, yes.

PN605

And how long did it take them to produce their analysis?---Very long. When we had commenced discussions with them it would have been in Q2, and we received the final report in Q4.

PN606

And what was the product of their analysis?---It was a review of the utilisation of the crew with potential solutions proposed, going forward.

PN607

And they're the people that did the 12.2 calculation, are they?---Yes.

PN608

How did they actually do that?---Based on the data that was provided from the local team.

PN609

And the same goes for the 39.4, presumably?---Yes.

PN610

That then fed into this bottom line, 51.7 and 61.5 per cent figure. And that formed part of the basis for the position that Svitzer had reviewed, that Svitzer had come to and communicated in this letter?---That's correct.

PN611

THE COMMISSIONER: Mr Sheehan, I might just get you to clarify your evidence?---Sure.

PN612

The hours contained in this table - - -?---M'mm.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN613

What's the base? What's it measuring?---It's measuring the total productivity and utilisation of the crew. So, if you consider a seven day shift in a week, which is what we employ our crews on, seven times twelve gives you the 84 hours in a week. What we're saying is that on average a crew member works 51.7 of the 84 hours. So, the utilisation is 61 per cent out of the total available hours.

PN614

So, how can you have 97.7 available maintenance hours in an 84 hour week?---That's -- so, that's average towage per week - minimal maintenance hours per week is related to the number of -- I'm not sure if that's specific to a crew member or to the entire crew. I'd have to double check that 97.

PN615

Well, it makes it a bit ridiculous, doesn't it? If you -- how can you have a table which is supposed to identify a base and you're saying it's per employee - - - ?---Yes.

PN616

When you have a column in the table which doesn't relate to the base?---Yes. I guess the other columns provide the information that's necessary. So, the 39.4 and the 12.2 provide the 51.7(sic). So, in terms of that reflection of the percentage of utilisation that demonstrates the utilisation per crew member per week.

PN617

But how can you have – there may be another document which proves this but how can you have some average maintenance hours per week per crew when the column next to it is clearly wrong because it doesn't relate to the same base?---I'd have to confirm that with the team. I can probably do that over the break but I can't speak to that one specifically based on that figure.

PN618

Well, it's your correspondence?---Yes.

PN619

It is correct you didn't ask question, or when you put this letter together you didn't think, hold on a minute, that's clearly wrong?---There is foundation. I believe there is but I just have to seek clarification as to what the foundation is.

PN620

So, you didn't prepare the letter?---Yes.

PN621

You did prepare the letter?---I did prepare the letter, yes.

PN622

All right, thank you.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN623

MR FAGIR: Mr Sheehan, if we go over to the second page, do you see the heading – the next page, page 99, do you see the heading, 'Opportunity for feedback'?---M'mm.

PN624

'The purpose of this letter is to outline our preliminary thinking.' Do you see that?---Yes.

PN625

Is that actually a fair description of the character of your thinking as at 27 November, that it was preliminary?---Yes.

PN626

All right. 'The purpose of this letter is to outline our preliminary thinking so that you can provide any input and raise any other considerations before a final decision is made.' Do you see that?---Yes.

PN627

'We invite you to provide any additional information you wish Svitzer to have regard to prior to making its final decision by reply email, by no later than 5 pm, February 1 December'?---Correct.

PN628

So, the letter goes on the Monday and you require a response by February, 1 December?---Yes.

PN629

And from your point of view, that was the process. I'm going to write to you on Monday, you respond on Friday then we make a final decision?--- With in-person consultation.

PN630

I see. Where does the letter invite someone to – I might be overlooking something but does the letter say, 'Let's have a meeting to talk about this'?---That was arranged separately.

PN631

By whom?---By our team, with the union officials and delegates.

PN632

Okay. Do you see the next paragraph there. 'You should treat this opportunity for consultation seriously as absent any intervention from Svitzer your employment will automatically cease on 31 December 2023.' Do you see that? And I'm sorry to keep repeating this but I just want to be clear. Svitzer's view was, if we don't do anything your employment will end on 31 December 2023?---Yes, following consultation.

PN633

Now, the Commissioner just asked you some questions about this table and we got to a point where you need to go back and clarify something - - -?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN634

With your team about some numbers?---I'll clarify that 97.7.

PN635

Oaky. So, let's just understand the situation. You send this letter on 27 November with no explainer or appendix, dictionary or anything like that. It's just this letter, right?---Correct.

PN636

The letter doesn't tell Mr Campbell, for example, how many people are employed by Svitzer in Port Jackson and Port Botany?---No.

PN637

It doesn't tell them how many are full-timers, part-timers, casuals, LIR, none of that sort of information?---No.

PN638

It doesn't tell them how much work is being done on recalls, as to roster work, for example?---No.

PN639

It doesn't give them any sense of how much the LIR crews were being utilised, versus casuals, versus permanent

PN640

part-timers, for example?---No.

PN641

Now, I think I asked you whether you accepted that your obligation was to provide all relevant information about the change. Do you remember that?---Yes.

PN642

Is it your view that the things that I was just talking about were not information relevant to the change that was being proposed?---Our view of the analysis was that we were reviewing the utilisation and whether we needed to engage leave in running, going forward. So, our view was that the figures that we had derived from utilisation, that was the relevant information to provide.

PN643

That was your view of the matter?---Yes.

PN644

So, for example, in your view it didn't matter how many casuals were engaged at the port or how many hours they were working?---Not in terms of providing that feedback for the leave running crews.

PN645

Because this 51.7 was decisive from your point of view, as to the fate of the LIR crews. You didn't need to know anything else?---That's incorrect.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN646

Okay. Well, if you needed to know something else, where do you tell Campbell there's something else? If he needed more information than 51.7 when did you give him that?---During the consultation process.

PN647

When was that?---I believe it was the 6th of – we had extended from 1 December through to 8 December on the consultation. And then we provided the information, I believe it was on 6 December, if I recall correctly.

PN648

See, Mr Sheehan, isn't this the position? From your point of view, all that was going to happen was what you'd proposed in this letter. That was your plan. Provide it to them on Monday, get the feedback on Friday, that's it, done and dusted. Correct?---Unless there was views that changed our mind during the consultation process.

PN649

Right. And to the extent there was any in-person meeting or any other information provided, that was because

PN650

Mr Garrett and others demanded that?---Correct.

PN651

And you co-operated with that in the most minimalistic way you possibly could?---That could be your view but I don't believe it was. They requested specific information which we then provided.

PN652

Can you go to page 100?---Yes.

PN653

This is Mr Garrett writing to you. 'Thanks for the email. As you know, I've been trying to engage with you for several months now on this issue. I assume you're now back from leave.' Do you see that?---Yes.

PN654

You'd been on some leave, had you?---At that time of the year, yes, that's correct.

PN655

All right. Now, there was a meeting scheduled, what, for the Friday, the day that the response was required?---Correct, yes.

PN656

Then under, 'Data,' you'll see Mr Garrett asks for total number of days worked by casuals and LIR's, PPT and recall days, do you see that?---Yes.

PN657

And a list of crews?---M'mm.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN658

Permanent part-timers and casuals, do you see that?---Yes.

PN659

Now, that's the information that Mr Garrett asked for and it was absolutely the most basic, elementary information anyone would need to grapple with any question of staffing at the port. Would you agree with that?---Yes.

PN660

When I hear that someone was going to engage or any question of staffing at the port without even knowing how many crews were engaged, is ridiculous. You'd agree with that?---No. I don't agree with that.

PN661

Okay. Now, you did give the information listing the crews, permanent part-timers and casuals. And you did provide a list of the days worked by LIR crew members, is that right?---That's correct.

PN662

But you refused to give the number of days worked by the casuals, LIR's, permanent part-timers on recall days?---I believe you just stated leave and runnings in that third category, as well.

PN663

I'll try again. You refused to provide information about the number of days worked by casuals, permanent part-timers and recalls?---Correct.

PN664

Because you said it did not relate to the LIR crew?---Correct.

PN665

Now, are you seriously suggesting that Mr Campbell or anyone else could seriously engage with you on the question of the staffing of this port without knowing how much work casuals and permanent part-timers were doing?---Yes.

PN666

Because as far as you're concerned the 51.7 is the answer. The utilisation figure that you extracted in the letter is all anyone needs to know?---That was the foundation for our review, yes.

PN667

Of course, it was up to Mr Campbell to work out for himself what 51.7 had to do with the continued engagement of LIR crews because you didn't tell him?---I'm actually not sure what other additional information we could have provided that would have supplemented that number. I mean, we could go through daily rosters and provide that but that wouldn't have been useful.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN668

Mr Sheehan, you're obviously operating from a base of encyclopaedic knowledge of these issues and I am at the other opposite end of the spectrum. But even I understand that if you're talking to someone about whether an LIR crew should continue to be engaged or not, one of the things that's going to be relevant is, how much work are the casuals doing? That's obviously relevant to that question, isn't it?---Not necessarily, no.

PN669

All right. I suggest to you the amount of work being done on recalls is a question that's obviously relevant to the future of the LIR's?---Can you repeat your question?

PN670

The amount of work being done on recalls is a piece of information that's obviously relevant to the question of whether the LIR crews should be kept on or not?---You could say there would be a degree of relevance, yes.

PN671

A high degree of relevance?---I don't think it's a high degree, no.

PN672

You see, Mr Sheehan, if Mr Campbell could see that there were, and I'm just making up a number, 500 days a year being done on recalls and another 500 by casuals, he'd then be able to say to you, 'Mr Sheehan, I've got an idea. Put all this work being done on recalls that costs you twice as much – you'd be much better off having an LIR crew doing this work.' That's an obvious type of thing that he

could say to contribute to your decision-making process. Similar to whether it's casuals, recalls, whatever else. I mean, that's – as I said, I'm coming to this from a position of ignorance but even I can see that. It's obvious, isn't it?---I guess there's a couple of different factors that go into the leave in running crew engagement, as well, right?

PN673

What are they?---So, the first one was the component of utilisation which we covered off in detail.

PN674

In detail, do you think?---In terms - - -

PN675

In terms of - - -

PN676

MR IZZO: Objection. He was answering the question.

PN677

MR FAGIR: Okay. I'm sorry, Mr Sheehan. Keep going, okay?---In terms of the information that was provided in the letter.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN678

Yes?---Secondly, when we look at the leave running form of engagement, as I mentioned at the get-go it's our ambition to have a flexible workforce. The leave in running engagement requires us to engage crew at 18:00 the day previously. And we thought that other crews, such as part time crews that didn't have those restrictions were a better solution to service the ports.

PN679

Right. Okay. I understand that's where you're coming from but the idea of the consultation is that you get someone else's point of view. Right?---Correct.

PN680

And what I am saying to you is – and I'm talking about the most basic bit of information that Mr Campbell would have needed to be able to contribute to be the opportunity to say, 'You've got all this work being done by casuals. You'd be better off keeping us and cutting down that work that the casuals are doing.' That's just an example of an elementary contribution that Mr Campbell could have made to your decision-making process. Correct?---That's correct.

PN681

But he couldn't do that because you refused to give him that information?---I believe we did oblige in the end, to provide all three forms of information that were requested.

PN682

After the end of the consultation?---At which point we hadn't issued letters.

PN683

Is that right?---I believe so. I think we were sat in this room.

PN684

All right. Can you go to 108? I'm sorry, actually while you're on your way there. No, I'm sorry. Just go to 108. I'm sorry, Commissioner. Can we go to 106? I'll get this right eventually. Do you see a letter there from Mr Garrett?---Yes.

PN685

And he notes that the consultation meeting has been called on at 3.00 pm that day? He says that at the bottom of that first page?---Yes.

PN686

On the next page he says, 'MUA and Svitzer have not yet had the opportunity to speak to the proposal, review the labour utilisation statistics and deal with the notion of replacing permanent full-time employment and permanent part-time and casual employment.' Do you see that?---Yes.

PN687

And then he goes on to say a series of things, including at three, 'The MUA is yet to receive a response to our request for information.'?---Sorry, where was that?

PN688

Dot point three?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN689

Dot point four, 'Noting the consultation meeting is to take place later today the MUA hasn't had an opportunity to meaningfully consult with Svitzer, and in turn consult with Rob. Accordingly, it's not possible for Rob to provide a comprehensive response by 5.00 pm today.' Do you see that?---Yes.

PN690

And, of course, that was absolutely correct what he said at four?---Correct. Yes.

PN691

All right. Now, if you go to the next page – 6 December?
---M'mm.

PN692

'Clarification on data for roster modelling confirmed utilisation based on the work rules set out in the POPs.' Then there's another heading, 'Request for additional data'. Do you see that?---Yes.

PN693

There's a note of what information was requested and some that had been provided. Confirmation of some earlier tentative figures. Do you see that?---M'mm.

PN694

And then, next you say, 'We don't consider the other data request to be relevant, to be LIR crews or the proposed change. Even if the data were to show the number of hours worked by casuals allows PPTs and recalls to be hired, it doesn't change the fact we can't be looking at the alternative roster modelling or the men which would not require the LIR crew.' Do you see that?---Yes.

PN695

Now, that was not true, was it?---Why is that?

PN696

Well, do you remember the discussion we just had about how utilisation of casuals and recalls and so on is something that's obviously relevant to the change?---Yes. Yes.

PN697

And the position that's been put in this email is we're not going to give you that information because it's not relevant. That's what the email says, doesn't it?---Right. Yes.

PN698

And that's what I am saying to you. The email is wrong?---Mm.

PN699

And, obviously, this isn't some nuanced point. It's a statement that's bleedingly obvious, isn't it?---I mean I think we all came to the realisation after the fact that there was information that we were willing to share when we had our session - - -

*** DYLAN SHEEHAN

XXN MR FAGIR

PN700

Okay?---- - - in that following week.

PN701

Now, can I just see if you can help me understand the phrase, 'Currently looking at an alternative roster modelling.'?---M'mm.

PN702

I'm trying to understand whether that means there's no point giving you this information because we're going to an alternative roster or something else? Because I'm just struggling to understand. Even if the casual days are hired it doesn't change the fact we're looking at alternative roster modelling. I just can't quite get my head around that?---Mm.

PN703

Can you give any insight into what the sentence is actually saying?---I think it's referring back to the fact that there is multiple factors. When we reviewed the data that formed our view, one being utilisation, and the second being that LIRs weren't the optimal form of engagement.

PN704

I mean leaving aside these weasel words of 'looking at', the point the email was making is we're going to an alternative roster and so you're wasting your time

asking for this other information. Correct?---I mean as we discussed earlier we had a view that an alternative review would be considered.

PN705

And that's why you're just saying, 'Forget about asking about the casuals. We're going to a different roster. You're wasting your time.'?---Not necessarily.

PN706

Okay. All right. Now, I think we discussed earlier that the consultation ended on the 11 December. Is that right?

---I believe so, yes.

PN707

Now can I just make sure we're clear about this? As of the 11 December this is the information that you provided to Mr Campbell – 27 November letter – correct?---Yes.

PN708

The information in the 6 December email. Correct?---Yes. But previous to that also a presentation.

PN709

Quite right. And that was the third and we'll come to that in just a minute because we haven't looked at them. We'll have them in just a minute. But they're the three pieces of information that you shared with Rob and the unions before the 11 December?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN710

All right. Now, can we just go to the PowerPoint? I think is – why don't you start at 457 DS19?---Okay.

PN711

There were some tentative figures about shifts worked by LIR crew that were confirmed a few days later?---Yes.

PN712

And then there was the crew list?---M'mm.

PN713

And then if we flick forward two pages to DS20 there's a PowerPoint presentation?---Correct.

PN714

And if we go to page 461 we see the table which was reproduced in the 27 November letter?---Yes.

PN715

Under the heading 'data assessment' 1 May 2020 to 7 May 2023?---M'mm.

PN716

Do you see that?---Yes.

PN717

That was wrong, was it?---1 May 2020 to 7 May 2023 – from what I recall that was the timeline that we provided to shift work to analyse the data.

PN718

I see. So that information that appears below that heading is based on the assessment of data for that period?---Correct.

PN719

The extent you suggest otherwise in your statement is your wrong are you?

PN720

MR IZZO: Well, I object. I think Mr Fagir should take Mr Sheehan to the relevant section of the statement he's referring to, Commissioner.

PN721

THE COMMISSIONER: Yes, thank you.

PN722

MR FAGIR: Maybe you can do that in re-examination. Now, beyond this presentation that's it in terms of the information. The 27 November letter, 1 December email, 1 December email presentation, 6 December email?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN723

All right. And that's, you say, well perhaps you now have a different view. That's all relevant information about the change?---Including the two pieces of information that was requested from the unions, yes. And the third piece of information that was provided following that.

PN724

Okay. Now, I'm very sorry to keep asking you to jump around like this. Can you go to 101, please, of the court book?---May I clarify the 97.7? Might I see the definition on that?

PN725

Sure?---So I understand now the 97.7 was including all crew. So we have designated maintenance hours as I'm sure, Commissioner, you're familiar with. That's across all of the crew for a period of time during that week. So what the engagement is per crew – across the duty crews, flexi-crews, and the Sydney crew.

PN726

THE COMMISSIONER: So across the 17 crews?---No. Across the crew that are engaged in the roster during a week period.

PN727

Right, so - - -?---You would have the 7:00 to 16:00 availability of which the morning crew would be available from about 07:00 to 12:00 and the afternoon crew would be available from 12:00 to 16:00. It's an accumulation of those hours.

PN728

All right. Thank you. That's not just the IR crew though?---That's right. No, that's all crews.

PN729

MR FAGIR: All right. So can you go to 101, please?---Okay.

PN730

And do you the second half of that page is the 27 November email to the unions that – well, 27 November email to various union officials?---Yes.

PN731

'Good afternoon, Jarrod, Greg and Paul. Upon an extensive review by Svitzer please see attached a letter' et cetera?
---Yes.

PN732

And then if you go to 98, which is the letter itself. I'm sorry, can we just stay on 101? So when did that extensive review start?---Q2 of '23.

PN733

Is that the shift work solutions review?---That's correct.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN734

All right. So it started in Q2 and ended in Q4. I'm sorry, did it end in Q4?---Yes.

PN735

When?---After a number of back and forths. I think it was in November. I'd have to confirm but I believe it was in November of '23.

PN736

Okay. Can you go to 98?---Yes.

PN737

The second paragraph, 'We are presently conducting a review of our operational needs with respect to the LIR crew.' Do you see that?---Yes.

PN738

Was that a different review? Or what review is that?---That was – that was the same review.

PN739

I thought you just said it ended in November?---Correct.

PN740

When the letter says, 'We're presently conducting a review of our operational needs.' It should say, 'We have conducted a review of our operational needs.'?---We considered, I guess, the word 'presently' was to include the consultation.

PN741

All right. Now, can you go to 108 please? This is back to the 6 December email?---Yes.

PN742

Now, can you go over to page 109? Do you see at paragraph beginning, 'This decision is not being proposed.' Do you see that?---Yes.

PN743

The second sentence, 'Rather the decision is being proposed because the operational review including the extensive roster modelling that's been underway is identified that these roles will no longer be needed and we therefore do not consider it possible to offer permanency.' Do you see that?---Yes.

PN744

And that was true. There had been an operational review including extensive roster modelling?---Proposed roster modelling. Yes, various scenarios.

PN745

And it was true that the decision being discussed was proposed on the basis of that review, including the extensive roster modelling?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN746

Next paragraph, 'The offer of casual employment is intended to support the employees as much as we can.' Do we see that?---Yes.

PN747

You don't expect employees to work the same volumes or pattern on an ongoing basis. Do you see that?---Yes.

PN748

'They will likely have some initial work but the new roster arrangement being considered will dissipate the need for LIR crews on an ongoing basis.' Do you see that?---Yes.

PN749

Was that true?---Yes. There is consideration for that.

PN750

Was the second to last sentence of that paragraph true or false?---It's true because it's rosters that we are considering and still considering.

PN751

Okay. Now, can I just make sure I haven't overlooked anything. You won't find anywhere in the information that you provided the union any description of or information about the extensive review that had been undertaken?---That's correct.

PN752

Nor will we find any description of, or information about the roster modelling?---Correct.

PN753

Nor will we find any description of or information about the new roster arrangement?---Yes, that's correct but we do plan to share that as we move into that consultation phase in the coming months.

PN754

We won't find any information about the new roster arrangement even though there was the new roster arrangement which will dissipate the need for LIR crew?---Based on the models that were being considered. Yes.

PN755

Yes. All right. So can I just see if I have got this clear? You conduct an extensive review with the assistance of this third party consultant. Correct?---Yes.

PN756

That includes extensive roster modelling?---There was – yes, scenarios put forward but nothing definitive.

PN757

Did it involve extensive roster modelling or not?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN758

Through that process a new roster arrangement was developed?---No.

PN759

Okay. Can you go back to the paragraph that we were just looking at?---Yes.

PN760

'They will likely have some initial work but the new roster arrangement being considered will dissipate the need for LIR crew on an ongoing basis.' Do you see that?---Yes.

PN761

Was there a new roster arrangement being considered?---Yes.

PN762

A new roster arrangement will dissipate the need for LIR crew. Correct?---Potentially.

PN763

I asked you for the sentence as it appeared on the page was correct just a couple of minutes ago. Do you remember that?---Yes.

PN764

And I think you said, 'Yes, it is.'?---Yes.

PN765

Now we can all read it, 'They will likely have some initial work but the new roster arrangement being considered will dissipate the need for LIR crew on an ongoing basis.' Do you see that?---Yes.

PN766

It's not 'will potentially'. It's 'it will'?---There's multiple scenarios. That's the – I mean the wording of this – the wording of this sentence may not be exactly descriptive of our intentions.

PN767

Yes. But see it's not just a question of wording. It's the fact that you're saying there's not going to be work because of the new roster arrangement. You're not saying to them, 'There might not be work and we're still thinking about it.' You're saying there's not going to be work because of the new roster arrangement which will dissipate the need for the LIR crews?---I mean we still – even to this day – we're considering our options in terms of what that looks like.

PN768

You might be. But when it comes to the LIR crews the decision has already been made. We've got a new roster arrangement that's going to dissipate the need for you – goodbye, you can have some casual work – true?---I can't fully agree with that sentence, no.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN769

All right. In any case this whole exercise is consultation with the LIR crews about their future. Correct?---Yes.

PN770

Now, it's clear as day that the extensive review, the roster modelling, the new roster arrangement were all massive factors in deciding what would happen to the LIR crew. True?---Yes.

PN771

But you did not provide them any information about any of those things at any time?---Again we provided the information that we felt was necessary in terms of the utilisation data and the following data that was provided in December.

PN772

The proposition that I put to you was that you never provided any information about the review, the roster modelling, nor the new roster arrangement to the LIR crews or their representatives at any time?---I still don't see how the roster arrangement would have been relevant to provide at that time.

PN773

That's it. You're free to express your opinion about it, Mr Sheehan, if you want, as soon I've finished my questions I'll sit down and you can have the stage. I just want to – and I think I'm asking a question you've already answered.

PN774

MR IZZO: Well, then there's no need to ask it again Mr Fagir.

PN775

MR FAGIR: You didn't give any information about any of the three things that I've just listed to the LIR crews, or their representatives at any point?---Can you relist three?

PN776

The three things were the extensive review which had been undertaken with the assistance of the consultant. That's one. The extensive roster modelling is two. And, three, the new roster arrangement that was being considered?---Not if we provided the information that we thought was necessary.

PN777

All right. Then, on the 11 December you write to Rob and say, 'Consultations ended.' Or, in fact, ended on the 8 December. Is that right?---Sorry, where are we?

PN778

113. Letter of 11 December?---Okay.

PN779

Third – fourth paragraph, 'The consultation period concluded on Friday 8 February.'?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN780

Svitzer hadn't been provided with any information to change the preliminary view. Then you can have some casual work, that's sort of the gist of the (indistinct)? I'm sorry, I think I missed the - - - ?---Were you just looking for a confirmation?

PN781

Yes?---Yes.

PN782

Thank you. I'm sorry. And finally, really as a postscript, Mr Sheehan, page 115 is some additional information was provided on the 14 December. Do you see that?---Yes.

PN783

And I think I earlier put to you that the level of utilisation of casuals and the level of recalls is something that's obviously relevant to the change that's been proposed. Do you remember that?---I recall.

PN784

And for example, if we look at this information that was eventually provided, 557 days having been worked by casual ratings. That's what the table indicates?---Yes.

PN785

And, of course, again it's obvious that blind Freddy that the fact that the equivalent of three full time work years had been done by casual ratings. It's obvious to blind Freddy that that's relevant to the change that's been proposed?---Yes.

PN786

Excuse me for a moment, Mr Sheehan. I'm sorry, excuse me for a moment, Commissioner. Mr Sheehan, you said something earlier about meeting to notify LIR crews by 16:00 the day before a shift if they were going to work.

PN787

MR IZZO: 18:00.

PN788

MR FAGIR: Eighteen?---18:00, yes.

PN789

Now, is there of the enterprise agreement that says that? Or the POPS? Or where do we find it?---Within the POPS, yes.

PN790

The Sydney – the Botany contracts of the POPS, is it?---I believe so. Correct, yes.

PN791

MR IZZO: I think my position is – okay – all right.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN792

MR FAGIR: Thank you, Commissioner. They're - - -

PN793

MR IZZO: No need to object.

PN794

THE COMMISSIONER: We're not there yet.

PN795

MR IZZO: Oh - - -

PN796

THE COMMISSIONER: Just trying to get some clarification from you, Mr Sheehan. So I'll take you back to page 98?---yes.

PN797

I'll get to that in a second, yes. The LIR crew did not only perform work on the navy contract?---That's correct.

PN798

So they just formed part of the total workload of the Port Jackson port?---As well as Port Botany, yes.

PN799

So there was 17 crews and the two LIR crews just rotated through the roster?---There is a 50 per cent component where they're actually rostered in the roster.

PN800

Sure?---And a 16-crew.

PN801

Yes?---And the remaining time – the remaining 50 per cent they're available to fulfil in as a part.

PN802

So the table on page 98?---M'mm.

PN803

Does that only apply to when they're doing the navy work? Or was that for all work?---That's for all work.

PN804

So how did the two crews compare to the other 15 crews?---This was an average across all the crews.

PN805

That's across all crews?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN806

So what your analysis is really saying is that all crews only provide you with 51.7 per cent availability?---That's correct.

PN807

And you've reached your decision based on that analysis?---Yes. And just to clarify again that the analysis that we're seeking is part of a review of Sydney as a whole, is that we feel that the number of crew we have in the port is sub-optimal for our operations. So that if we were to reduce the number of crew we could have a higher percentage than the 61.5 and make us more cost-effective and productive.

PN808

Right. That being the case in your roster arrangements, whatever they may be?---We don't even know that.

PN809

No?---Yes.

PN810

But there is an ambition to increase the 61.5 per cent?---Yes.

PN811

So let's say your roster brings it up to 80, just as a ballpark figure?---Sure.

PN812

Wouldn't that new roster also apply to the LIR crew?---The intention would be that we'd move away from the leave in running models based on restrictions.

PN813

Okay?---Yes.

PN814

Let's take the assumption this way for the LIR crew is still in place?---Yes.

PN815

You do a roster review. You decide this is the way we're going to do a new roster?---Sure.

PN816

It would apply to the LIR crew would it not?---What would apply to the LIR crew?

PN817

The new roster would apply to the LIR crew?---If we were to move forward with some form of leave in running crew, yes it would apply to them as well.

PN818

Because they work within the other crews?---Yes. Yes. But out of – yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN819

Is it not prejudicial to exclude the LIR crew from that process?---I don't think it's prejudicial. No. I believe there's other forms of engagement that would allow us to be – to provide more optimal solutions. If you're referring to leave them running as a concept or as the individuals themselves?

PN820

I basically was talking about the two crews – call them whatever you like – leave in running or whatever?---Sure.

PN821

The argument from the MUA is that those crews were actually permanent crews and should have been permanent crews based on the amount of work that they were doing and the amount of work that casuals – the permanent part-time employees were doing – as the basis – basic premise of the MUA argument?---Sure.

PN822

So if the 16 or 17 crew were permanent crews?---M'mm.

PN823

Or the permanent crews they would form a part of this review and this new roster?---Not necessarily, because the new roster might move away from that model. Right?

PN824

I understand that?---Yes.

PN825

The new roster may not have 16 or 17 crews in it?---That's right. Yes. Including or leave in running for that matter.

PN826

Well, that's the analysis at that point in time though is it not?---The analysis at that point in time? Sorry, can you repeat that?

PN827

That becomes the analysis at that point in time though, after you look at this new roster?---Yes.

PN828

And then that – you know – you'll make a decision with consultations. Do you accept that?---Yes.

PN829

About the number of crews with – you need for at the Sydney Ports?---Sure. Yes.

PN830

Isn't there a provision in the enterprise agreement in relation to the privacy of full-time employment?---Yes.

*** DYLAN SHEEHAN

XXN MR FAGIR

PN831

How does your decision in relation to leave in running crew and your admission to going to permanent part-time with these casuals comply with that provision?---I think after the fact that it was a fixed term contract to begin with gave us the flexibility to determine that before we moved to permanent fixture. And we've made it very clear from day one, dating back to the 3 August that, you know, we initially had even proposed the 50 per cent of those leave in running rules. And in close collaboration with the union officials and the delegates we did see benefits and incorporate that 16 to 17th crew in the roster at that time, and that's why we ended up with the 200 per cent. But it was always under the premise that that was for a fixed term.

PN832

Well, that flexibility was for your benefit, not for the employees, because they were brought on to do the navy work. So probably should have just stayed on navy work, shouldn't they?---It doesn't – it doesn't quite work like that. The navy work isn't a component but it's not – yes.

PN833

I do understand - - -?---It was never - - -

PN834

I do understand that. But - - -?---Yes. It was never intentioned just to isolate the crews.

PN835

That doesn't say that anywhere though, does it?---What was that, sorry?

PN836

It doesn't say that anywhere, though, does it?---Well, it was implied when we updated the roster and the POPs include - - -

PN837

Certainly implied?---Yes. But – and written in the POPs – and when we updated the roster that that crew would not just be expected to complete navy work.

PN838

The POP starts at – page 31?---Yes.

PN839

So where does it say that they're going to be doing this extensive work?---I'm just thinking if we have – I don't know if we've provided a copy of the roster, Commissioner, but the roster would make it evident that the way that the LIR crews are rostered that it's not just allocated to the Sydney crews.

PN840

I understand the rosters identify that?---Yes.

PN841

Thank you. Mr Fagir, anything arising?

*** DYLAN SHEEHAN

XXN MR FAGIR

PN842

MR FAGIR: No, Commissioner.

PN843

THE COMMISSIONER: Thank you. Mr Yates, do you have any questions for Mr Sheehan?

PN844

MR YATES: No, thank you, Commissioner.

PN845

THE COMMISSIONER: You can ask leading questions at this point, Mr Yates, but anyway. Mr Izzo?

PN846

MR IZZO: Thank you, Commissioner. One moment. I'm hoping that I won't be too long.

RE-EXAMINATION BY MR IZZO

[1.04 PM]

PN847

MR IZZO: You mentioned in your cross-examination that your preference was to have flexible crew. Do you remember that?---Yes.

PN848

Who are flexible crew? What do you mean by flexible crew?
---Flexible crew – more flexible crew would include permanent part-time as an example.

PN849

Would it include LIR?---They're less flexible than the part-times.

PN850

You were asked about the data or the figures by both Mr Fagir and Commissioner Reardon. I suppose the best place to go is to the slide deck which I believe appears at – just bear with me one moment – DS - - -

PN851

THE COMMISSIONER: 461 wasn't it?

PN852

MR IZZO: - - -461. Thank you, Commissioner. Now you will see there's a series of columns there. The column in the middle, 'Available Maintenance Hours per week', and it says 97.7?---Yes.

PN853

You said when asked if that was just LIR. You said, 'No, that's all crews.'?---M'mm.

*** DYLAN SHEEHAN

RXN MR IZZO

PN854

Do you recall that?---Yes.

PN855

Can you just confirm that the other columns, who do they relate to? Is that all crews? Is that LIR?---All crew.

PN856

All crew. Thank you. Now, in relation to that 97.7 were you asked to explain that number during the consultation process by any of the MUA representatives?---I don't recall specifically being asked. I remember we walked through each of the columns, in particular, at that point.

PN857

In relation to Mr Campbell, did he ask you at any time for any more information about what was in that table?---No.

PN858

Can I ask you? You were asked about annexure PG14. That's court book 106. You will see that there's a two-page letter that you were asked about from the MUA?---Yes.

PN859

And the MUA said that they requested the time for response to be extended to close of business on 4 December. Do you see that?---M'mm.

PN860

And you were asked about that?---Yes.

PN861

And then you were asked about the letter that followed which provided further information. And at the bottom of that letter. So we're now on annexure PG15, at 109?---M'mm.

PN862

It required a further response by COB 8 December. Do you see that?---Yes.

PN863

Did you get a response from the MUA by COB, 8 December?---Yes.

PN864

You did?---I believe on 110.

PN865

And that's the response they provided?---If I recall correctly. Yes.

PN866

Okay, thank you. If I could take you to your witness statement at paragraph 113?---Yes.

*** DYLAN SHEEHAN

RXN MR IZZO

PN867

You talk about the data that was provided and you say it was based on the roster cycle from 2 January 2023 to 23 April 2023. Do you see that?---Yes. Yes.

PN868

You were then asked about the slide deck?---M'mm.

PN869

Which again appears at court book 458, DS20? If I could ask you to go to court book 461?---Yes.

PN870

And you will see that it talks about a period from 1 May 2020 to 7 May 2023?---Correct, yes.

PN871

Are you able to explain the difference? Are you aware why the statement talks about a different period?---2 January – so, yes – the data that we had referenced

had taken the information as explained in my statement from the 2nd. Right? So, the information that we had provided was from January 2nd, through until the 23rd.

PN872

Are you aware why the heading might have been different in that slide there?---I can't recall.

PN873

You were asked a lot about alternative rostering scenarios. Has Svitzer introduced a new roster for Sydney yet?---No.

PN874

What are Svitzer's intentions in relation to Sydney rostering?---We're currently reviewing it and intend to go to the unions for consultation in the coming months.

PN875

In relation to – you were asked about the data on the casual rating usage?---Yes.

PN876

That's at PG – it's court book 469 and it's annexure DS23?
---Okay.

PN877

You will see that there was a days engaged for masters casual, engineers casuals, then the GPH is much higher. Can you think of any reason why that one - - -

PN878

MR FAGIR: I object. That doesn't arise. I didn't ask why they were home. I asked if Mr Sheehan accepted that this was something that was obviously relevant to the question being consulted about.

PN879

MR IZZO: Well, Commissioner.

*** DYLAN SHEEHAN

RXN MR IZZO

PN880

THE COMMISSIONER: I'm happy for you to clarify Mr Izzo – that data.

PN881

MR IZZO: Can you think of any reason why that number might be higher?---Yes.

PN882

What's that reason?---We have a number of long-term sick employees, including Mr Campbell was offered an extended period of time.

PN883

What was that period of time?---Most of '23.

PN884

I take it Mr Campbell is no longer being paid. Is that correct?---No. He's employed.

PN885

He's employed?---Yes.

PN886

On what basis is he employed?---Casual basis.

PN887

On a casual basis?---Yes.

PN888

And when did that come in?---I believe the contract was signed on 31 December 2023.

PN889

And you say he's been paid. Has he been offered shifts?---He's not available.

PN890

Why's that?---He's not medically fit to work.

PN891

THE COMMISSIONER: Well, how can he be paid as a casual if he's not working?---He would be – he would be paid if he was to be engaged. But as a casual at the moment we can't engage him because he's medically not fit to work.

PN892

So he's not actually being paid?---He's not been paid. Yes.

PN893

That's fine. I just wanted to clarify that?---Yes.

*** DYLAN SHEEHAN

RXN MR IZZO

PN894

MR IZZO: Yes, thank you. Just bear with me one moment. You mentioned that there was a third party provider. You were reluctant to provide the name but when you heard the name was shift work essentially, the third party provided some of this data?---Yes.

PN895

Was there any discussion about the data coming from a source during the consultation?---Yes.

PN896

What was that discussion?---That we had done an extensive review with a third party provider.

PN897

MR FAGIR: I object. This doesn't arise. I didn't ask any questions about this. This is a whole new front that's being opened up.

PN898

THE COMMISSIONER: I agree, Mr Fagir. Mr Izzo, wondering about the relevance?

PN899

MR IZZO: That the relevance is simply this, Commissioner. There's been a whole suite of questions about the data that was used to form a view about the LIR crew the use of another provider to obtain that data. And I am just asking whether that was the subject of any discussion in consultation. That's the scope of the question. There's no further questions other than that. It wasn't mentioned in consultation and I think that's relevant.

PN900

MR FAGIR: It might be relevant. It's whether it arises. It's not whether it's relevant.

PN901

MR IZZO: Well, I say it arises - - -

PN902

MR FAGIR: But just to clarify an answer that was given in cross-examination where clarification was needed.

PN903

THE COMMISSIONER: Yes, I tend to agree with Mr Fagir. Mr Izzo?

PN904

MR IZZO: I have no further questions for re-examination, thank you.

PN905

THE COMMISSIONER: Mr Sheehan, thank you for your evidence. You're excused?---Thank you.

<THE WITNESS WITHDREW

[1.15 PM]

*** DYLAN SHEEHAN

RXN MR IZZO

PN906

We'll go off record.

OFF THE RECORD

[1.15 PM]

ON THE RECORD

[2.02 PM]

PN907

THE DEPUTY PRESIDENT: We're on record now.

PN908

MR FAGIR: Thank you, Commissioner.

PN909

Commissioner, we filed an outline of submission some time ago. Our case today doesn't immediately depart from what appears in that written submission. We've identified three issues that are in dispute.

PN910

Firstly, a question of whether Mr Campbell is, in fact, or ever was employed for a specified period or specified task or whether he was, alternatively, a permanent employee, from the point of his engagement. That's the first issue and it's the one that I described earlier as a relatively neat, legal question.

PN911

The second matter that we raise for consideration is whether Svitzer properly consulted with Mr Campbell, and his union, in relation to its decision to remove the LIR crews from the Port Jackson and Port Botany rosters.

PN912

Thirdly, we've suggested that the decision to end the employment of Mr Campbell contravened section 3HHH of the Fair Work Act, that is the provision of the new fixed term employment provisions.

PN913

And finally, was always, the question is, in light of the answers to those matters, what relief is appropriate? What should the Commission actually do about it?

PN914

Can I deal with the first issue first. We extracted, in our case outline, the relevant term of the 2016 Enterprise Agreement, which was the agreement that applied at the point Mr Campbell was hired. The relevant provision is 15.4.1 and it defines an employee or the category of employment for a specified period of time or specified task in the terms set out. It is:

PN915

An employee engaged for a specified period of time or specified task -

PN916

The clause provides:

PN917

is an employee who works on either a permanent full-time or permanent part-time basis but is engaged for a specified period of time or specified task.

PN918

Now, that is a phrase that has some history in industrial legislation. I'll say something about that in a just a moment and say something about the relevance of that history, in the context of this agreement.

PN919

But before doing that, can I note that Mr Campbell's original offer of employment, which is now at court book 77, provided as follows:

PN920

We're pleased to offer you maximum term employment with Svitzer Australia Pty Ltd, in the position or classification of deckhand, commencing on the specified date. Your maximum term employment will continue until 28 March 2022. Should you be required to continue working in your employment beyond this date you'll be advised in writing.

PN921

So there's two aspects of that notice to note. Firstly, reference to 'your maximum term of employment' and, secondly, the provision that - which contemplated or provided that Mr Campbell might be required to continue working beyond that date, in which case he would be advised in writing.

PN922

Separately, the offer, under the heading 'Termination of employment', provided as follows:

PN923

Your maximum term full-time employment will come to an end on 28 March 2022 unless: (a) the period of your employment is extended -

PN924

There's a requirement for that to be done in writing:

PN925

or your employment is terminated, in accordance with this clause.

PN926

There's then a provision for termination on one week's notice prior to the nominal end date.

PN927

Now, as we put it in the submission, the offer contemplated at least three scenarios. One is that the employment would end on the nominal end date of 28 March 2022, that was one possibility. A second was that Mr Campbell would be required to continue working in his employment beyond this date, subject to advice in writing, which is the second. And the third was that the employment could end before 28 March 2022 by the expedient of one week's notice.

PN928

I mention in passing, not much turns on it for present purposes, but we note, in passing, that the required to continue working, the extension, didn't require an application, re-issue of a contract or any other step, other than Svitzer's advice, in writing.

PN929

Now, that, we say, is not employment for a specified period of time. The starting point, as always, is the simple meaning of the words, as we've noted in the submission, to specify, is, 'To state or identify clearly or definitely'. The sort point, and I'm not paragraph 11 of the latest submission, is that there was nothing definite about the period of the employment, it was changeable at Svitzer's initiative and, to some extent, at Mr Campbell's initiative. That is, it would be

brought to an end early by either party or it could be extended by Svitzer. There was no clear or definite period of employment. It's a simple matter of dictionary definition of the word.

PN930

Now, of course, Commissioner, you'll appreciate that the phrase, 'For a specified period of time', has appeared in unfair legislation for decades, in the context of an exclusion from unfair dismissal protection for employees, engaged for a specified period of time.

PN931

Now, the approach that the courts have taken to the phrase, in that context, is relevant, but it needs to be approached with a little bit of nuance because, of course, the construction of a statute or a contract or an enterprise agreement starts with the words, but words to be understood in a particular context.

PN932

As the courts have, over the years, construed the phrase, a variety of contextual factors have come to bear on that exercise of interpretation. For example, in the early days of the unfair dismissal jurisdiction, the statutory jurisdiction, the international conventions were all the rage.

PN933

In the Keating version of the legislation there were specific references to them and when the courts grappled with the question of, 'How does this exclusion operate? Who's engaged for a specified period of time?', one of the factors that was considered was the convention, the relevant convention. That's a matter that was relevant there and brought to bear that has nothing to do with the terms of this enterprise agreement or the contract in view.

PN934

So we should have regard to what the courts have said about the phrase but bearing in mind that the result there isn't necessarily the result here. But, of course, to the extent the courts have dealt with the phrase, as a matter of language, that is relevant.

PN935

Again, I'm telling you, Commissioner, what you know, probably better than all of us, is that - could I hand up a copy of - in the context of unfair dismissal legislation and until a couple of months ago, it has consistently been held, in the courts and in the tribunals, that what sometimes is called an outer limit contract or a maximum term contract is not a contract for a specified period of time. There are innumerable cases that have held that a capacity to terminate on notice, before the nominal end date, takes employment outside the category of employment for a specified period of time.

PN936

The first decision, or maybe the second, by a couple of weeks, dealing with the issue is the decision in Anderson, which I've just handed up, Commissioner. The analysis - the relevant part of the analysis is on page 106 and we've extracted it in

the written submission as well. Commissioner, you'll note this is, primarily, an analysis of the words used, von Doussa J points out that the expression:

PN937

'Specified' is the past participle of the verb 'to specify'. The ordinary meaning of 'to specify' is to mention, speak of or name something definitely or explicitly, to set down or state categorically or particularly.

PN938

His Honour then says something about the convention, as I said, was then fashionable and then goes on to say:

PN939

A specified period of time is a period of time that has certainty about it. A contract of employment for a specified period of time would be one where the time of commencement and the time of completion are unambiguously identified by a term of the contract, either by dates or by stating the time or criterion by which one or the other end of the period of time is fixed and by stating the duration. As a period of time is defined in this way it's apt to refer to a contract of employment for a specified period of time is a contract of employment for a fixed term, although that's not the way it's actually described in the regulation.

PN940

His Honour goes on to say:

PN941

A contract of employment to run through a nominated number of days, weeks or years would be a contract of employment for a specified period of time. If the terms of the contract of employment, instead of identifying, in this manner, the period of time during which it's to run, provides it's to run until such future event the timing of the happening of which is uncertain, the contract will be for an indeterminate period of time.

PN942

Then passing over the next paragraph, his Honour, and I won't pause to read this, notes that the contract in that case provided for termination on two weeks' notice. In the final sentence of the paragraph his Honour says:

PN943

At any point during the two year period identified by the commencement and cessation dates neither side could know, with any certainty, when the period of the contract of employment might come to an end.

PN944

And in the next paragraph his Honour points out that, 'Rights to terminate are not conditioned on any breach'. So we don't have a question of whether there's a repudiation complication that comes with that, it's a termination on notice without cause. And his Honour goes on to conclude that, 'Given the capacity to terminate on notice, this was not employment for a specified period'.

PN945

Again, I emphasise that although his Honour touched on the convention, the analysis was primarily an analysis of the words used, which are the same as the words used here.

PN946

Now, that analysis not only applies in this context, it applies with even greater force because there's uncertainly not only within the nominal term, as to whether you'll get there, but uncertainty as to whether the employment will, in fact, end on that date. So it's not only that it might end sooner, but, subject only to Svitzer's exercise of its right to advise of a continuation, it might continue beyond the end date. That's what the contract provides.

PN947

Now, as Svitzer submitted, in an earlier round of this litigation, in light of the decisions in *Jamsek v Personnel Contracting*, when it comes to identifying species of employment, if there's a formal written contract and unless someone says it's a sham or something of that nature, the contract defines the employment.

PN948

Now, we embrace that and say, in this case, and of course what their Honours in the High Court said, it's not the matter of the labelling, it's not whether it's headed fixed term contract or employment agreement or independent contractor agreement or whatever else, it's what the rights and obligations are, under the contract, and nothing more, that define the nature of the employment.

PN949

Now, here, it's a little bit more nuanced, because there's an enterprise agreement, of course, which ultimately governs the position. But in terms of understanding what the contract says, and we make this submission because, Commissioner, you'll have seen the written submission, which refers to a whole series of extraneous matters: content of cover letters, discussions people are said to have had, that's all by the by. The question, as we would have it, is, what does the contract contemplate or permit and if it contemplates or permits employment ending before the nominal end date or continuing after it, it is not the contract for a specified period of time.

PN950

Now, the authorities were all one way, until very recently. Svitzer points to a decision of Raper J recently, and we deal with this at paragraph - I'm sorry, before I come to that I should say, there have been many cases grappling with some of the nuance in the unfair dismissal legislation, dealing with questions of whether there is a dismissal if employment ends on the nominated end date. That can be difficult but that's not the question here. We're dealing here with the narrower question of, when is employment employment for a specified period? So some of those things are grappled with in *Navitas* and elsewhere, are not relevant to the issue that the Commission is being asked to deal with here.

PN951

The decision of Raper J departed from that long line of authority, insofar as her Honour said, in obiter comments, the matter had already been determined on

another basis but her Honour went on to hold that an outer limit contract is, or at least can be, a contract for a specified period, within the meaning of the unfair dismissal legislation. That's critical because we've set out the provision that was actually being construed at 386. The exception is expressed in a bit of a roundabout way now, not how it used to be, differently. A person's been dismissed if their employment has been terminated at the employer's initiative. A person hasn't been dismissed if they were employed under a contract for a specified period and the employment terminated at the end of the period.

PN952

Now, as her Honour makes clear, in the passage that we've extracted at 16, her Honour's decision to depart from that long line of authority reflected the specific history of the provision. As her Honour says, she accepts the contrary argument is that the phrase is replicated in the Fair Work Act and it being previously construed as not applying to outer limit contracts. But her Honour said:

PN953

The phrase must be construed on the context of the current differently crafted legislative provision as a whole. That context is instructive and supports the view that the legislator intended that the provision have a different effect than how its predecessor provisions had been interpreted.

PN954

So it's that particular legislative context which drove her Honour to the conclusion that she reached in that case, construing the particular provision that she did.

PN955

Now, one of that - of course the context which her Honour referred and which dictated the result is completely foreign to this enterprise agreement and this contract. Nothing her Honour said alters the starting position, which is that it's a matter of language, a contract which can end before a nominal end date and, a fortiori, a contract which can continue beyond the nominal end date is not a contract for a specified period of time.

PN956

This is really secondary but the Commission would note that her Honour's decision came many years after the 2016 enterprise agreement was made, to the extent - it's not necessary, but to the extent one was to wonder about the objectively ascertained intention of the parties taking that phrase 'well understood' and putting it into the enterprise agreement, one would have to proceed on the basis that the phrase was to be understood, as it had been for decades, from Anderson onwards, as opposed to having been intended to have a meaning that was uncovered several years later, by her Honour, in the Federal Court. So I say secondary, but we mention it in passing.

PN957

We should also mention that none of the authorities and certainly not the decision of Raper J, so far as we can tell, dealt with a contract which not only contemplated an early end but also contemplated unilateral extension in the same (indistinct).

PN958

We then pointed out, at paragraph 20, the enterprise agreement contemplates employment on four bases: permanent full-time, permanent part-time, casual and fixed term. It's not suggested that Mr Campbell was a permanent part-time nor a casual, nor could that be suggested. If he's not a fixed term or employed to be - more precise, if he's not engaged in the category of employment contemplated by clause 15.4 of the enterprise agreement, he could only have been a full-time employee, within the meaning of clause 15.2.

PN959

If we're right about that, any of the offers that came to Mr Campbell, the whole of the history of it followed his acceptance of that initial offer of employment is by the by. As it happens, there were slight tweaks of the language of the offers which he nominally accepted later, but not in a way that alters any of the analysis that we've just offered up. If the Commission agrees with us about that, the appropriate relief is that which we set out at clause 22, which is a determination that Mr Campbell is and always has been a permanent, full-time employee. And subject to dealing with any issue about fitness, Mr Campbell should be returned to the full-time permanent roster. That's the first point.

PN960

The second point relates to consultation and we've dealt with it in the written submission. Without wishing to belabour the point, it was obvious, before today, that this consultation was not only superficial, it wasn't consultation in any real sense.

PN961

Mr Sheehan, as he told us today, has been grappling with this question of - this difficult question of the optimal construction of the workforce and the roster at Port Botany and Port Jackson, literally for years. It took him years, or more than one year, to start to form a preliminary suspicion that the structure that was in place was suboptimal. In that context, on 27 November, Svitzer sends the letter that we went to earlier and invites a response by 1 December.

PN962

Now, without delving to any of the detail, and I put this to Mr Sheehan more times than I needed to and I'll try not to belabour it now, the idea that you can consult with someone about whether the LIR crews should continue, without giving them any information about the rest of the workforce is ridiculous. The idea that - bearing in mind, the idea is - the enterprise agreement specifically says, 'You've got to provide all relevant information'. Even if it didn't, the whole point of the exercise is to invite someone's views and allow them to express views and influence the outcome.

PN963

Inherent in that is an obligation to give them enough information that they can understand where you're coming from and what you're proposing and respond to it in some helpful way. The idea that that could be done without any indication of, effectively, what had been happening, what the status of the workforce was, is self-evidently wrong. To refuse to provide, for example, the casual and recall days is something that without - if we just stopped there that would, in my respectful submission, be enough to vitiate this alleged consultation. But, of

course, where we got to today, picking up on some hints in the materials, is that there's a whole lot more to it than that.

PN964

There's a six-month exercise engaged in by an external consultant conducting a review. The review involves extensive roster modelling that leads to a proposed roster arrangement which, if one accepts Mr Sheehan's evidence that the statement in the 6 December email was correct, if one accepts that, the roster arrangement eliminated the need for the LIR crews.

PN965

Now, the idea that you could consult with someone without giving them any of that information, again, is - it goes, almost without saying, that that cannot be real consultation. You're withholding not the sole basis, the primary basis for the decision you're making. You're suggesting that you're inviting someone to engage and giving them the opportunity to change their mind, but without explaining the basis on which you've come to the view, come to the proposal about which there is nominally consultation.

PN966

If we're right about that, this is a fairly blatant breach of the requirement, under the enterprise agreement, to consult, including the specific obligation to provide all relevant information about the change, including the nature of the change.

PN967

I'll come to relief in just a moment again. Can I just add a couple of observations that perhaps are not essential but are relevant. The 27 November letter and the table, that's a very strange document. It's a cryptic document. We spent some time today trying to understand what it all meant and it's all terribly interesting but, in terms of the quality of the consultation, the very fact that we're here trying to work out what column 1 means and what the figure - where the figure in column 2 comes from and what period it relates to. It highlights the fact that it was useless. It was useless information. It was a provision of information nominally only, it raised more questions than it answered. Commissioner, it may be that you know more about this enterprise than I do and perhaps you've started to - - -

PN968

THE DEPUTY PRESIDENT: More that I should Mr Fagir.

PN969

MR FAGIR: Certainly more than you should. Certainly more than I do. And it may be, Commissioner, that you have some sort of an idea of how that figure in the table, what logical steps lead to the conclusion that no more LIR crews. But, save for my own part, I don't get it. That might be because I'm obtuse. More likely it's because it's useless information.

PN970

The way that you get from - we've got some alleged issue with intra shift utilisation leading to getting rid of two full-time crews. There's some kind of series of logical steps and probably data in between that has never been provided.

PN971

If one were forced to guess on what this is all about, and this really emerged, primarily, from some questions that you asked Mr Sheehan, Commissioner. It seems that there is a view that if you have less full-time crews you'll get higher intra shift utilisation. Now, what that is, no one knows, it hasn't been explained. But if that's right, it seems that what's being contemplated is a reduction in the number of full-time crews and an increase in the usage of permanent part-times and casuals.

PN972

Now, if that's right, the consultation that should have occurred is not just with the two LIR crews, it really should have been with the whole workforce because when they were first cabs off the rank, because their contracts were expiring, but if the idea is we need less full-time crews and more of other species of employees, that's a change that's relevant not just to the two crews that were on the chopping block at that moment but to everyone.

PN973

In any case, to say we have in mind this arrangement, we don't have to consult about the roster arrangement because it's not being implemented but the roster arrangement means that we don't need you. There's a Kafkaesque quality to this whole thing. We're here, we're consulting with you, we're talking about what we do next but because we're thinking about this option we don't have to give any information about the casuals, permanent part-timers, whatever. It's all nonsense and the sentence in the 6 December email that says, 'In the context of consultation we don't have to give you this because we are looking at a roster arrangement and because we are looking at it we don't have to give you the information'. That's all rubbish.

PN974

Now, the real question, as we would see it is, if we're right about all this, there has been a failure to consult, how is it to be remedied? That's what we would see as the more nuanced issue. We've set out our proposal at paragraph 39 and it involves, firstly, a determination that there's been a failure to consult with Mr Campbell and his union, in accordance with the agreement and that the appropriate remedy for that breach, and there should be one, these are words that should be given effect because they're important. They potentially determine people's working future. Breaches of this kind should not be treated as some failure in a formal step. This sort of thing matters and that means, in thinking about how to respond, we would respectfully submit that there shouldn't be any diffidence about responding in a way that truly reverses the effect of the breach.

PN975

It's in that context we say the appropriate remedy is the Commission to determine that Mr Campbell's employment should continue as it was before 31 December. There should be, as we propose at 39(c), a provision of the information which we know exists and which we know was withheld. There should be a meeting ASAP and then the matter should come back before the Commission. After that, really the first step has been taken. That's how we say the Commission should deal with it.

PN976

Finally, on this point, this is, after all, an industrial Commission and although the barristers and solicitor have been wheeled out once again for this dispute, there's a real industrial issue underlying it. Commissioner, what you've heard a few times today is a reference to the inflexibility of the LIR crews, because they have to have notice six hours before they work.

PN977

Set aside the question of how much flexibility do you want, put that to one side, Commissioner, you would have also noted that there's been some bemusement, on my client's side of the table and from Mr Yates, where this requirement comes from and what is this inflexibility and flexibility relative to whom? How does the - whether there is such a requirement, of course, is relevant. But the point is, if Svitzer had consulted in the way that the agreement contemplated and in the way which is industrially sensible, come along and said, 'We've got an issue with the LIR crews and having to give them this notice. Because of that we think we can do better with the permanent part-timers or casuals or recalls or whatever it is. Can we have a discussion about it?'

PN978

Now, there's no certainty that a solution would have been reached, but it would have been a damn sight more likely that the problem could have been fixed than the way it actually unfolded. And although I'm perfectly happy to come along here and be paid my very reasonable rate to have these arguments every three to six months, it might really - - -

PN979

THE DEPUTY PRESIDENT: Give a discount.

PN980

MR FAGIR: There's no discounts.

PN981

It might really be worthwhile pausing to ask what would have happened if someone had picked up the phone or sent an email and said, 'Forget about the agreement, forget about our obligations, we've got this issue, can we have a talk about it? Is there some way we can work together to overcome this problem?', there may well have been an outcome that would have been better for everyone, safe for Mr Izzo and I.

PN982

Finally, the final issue that we deal with is the anti avoidance point. We don't have much to add to what we've dealt with in writing. The point really is this. Mr Sheehan and Ms Connelly before him, and everyone who's ever given evidence for Svitzer in the last two years, has emphasised the uncertainty of this business.

PN983

In the context of that uncertainty, Mr Sheehan's evidence in his statement, that fixed term contracts were offered. Now, the position, as Mr Sheehan would have

it today, or Svitzer would have it, is that there's a proposed roster arrangement that they're thinking about. They need to consult about it. It involved getting rid of the LIR crews. We don't know what else it involved but it had some sort of impact.

PN984

Now, if Svitzer had just taken the same approach that it had from August 2021 onwards, we would invite the Commission to infer that it would have engaged Mr Campbell on a further fixed term contract for a short period. Whatever period it thought it was going to take to sort out those roster arrangements: three months, six months, nine months, whatever it was.

PN985

We invite the Commission to draw that inference, based on the fact that that's what they've done with Mr Campbell, that's what they've done with a number of other employees. That's what they've done with Mr Gray, who was a member of one of the LIR crews. That is, if Minister Burke hadn't intervened and introduced the Division 5 of Part 2-9 of the Act, that's exactly what Svitzer would have done. We would invite the Commission to infer the reason they didn't do that was they understood if they did, they'd tick over the threshold and Mr Campbell would be a permanent employee.

PN986

If we're right about that, if the Commission does draw those inferences, it would follow that the company has unlawfully altered the employment relationship from a permanent fixed term to a casual relationship, contrary to the anti avoidance provisions of the new part of the Act.

PN987

Now, there's yet another jurisdictional objection. We accept that the Commission couldn't, absence Svitzer's consent, arbitrate that question alone, although the Commission is specifically empowered to do everything, short of arbitration, section 333L(4), 'The Commission is entitled to resolve the dispute by expressing an opinion, giving a recommendation' et cetera, on the specific anti avoidance question.

PN988

But, more broadly, the Commission is seized with the power to deal with this dispute about employment status under the enterprise agreement and about consultation. One of the matters the Commission is entitled to take into account and resolve in that dispute is whether there's been a contravention of the Act. Now, whether or not the Commission itself can deal with that, other than by expressing an opinion or a recommendation is one thing, but the Commission's not required to close a tie as to the fact that this has occurred in deciding how the dispute should be resolved, or how the various breaches or the conduct of the company should be remedied.

PN989

So whether it's a matter of exercising a power to express an opinion or make a recommendation, or simply as one factor to be taken into account in the exercise of the Commission's broader discretion, either way it's in play.

PN990

Would you excuse me for a moment. Unless I can assist you further, Commissioner, they're my submissions. Mr Izzo seems very, very keen to stand up. You might have to wait.

PN991

MR YATES: I'll just be brief, if I could. If it please the Commission we support the submissions of the CFMMEU. We support the submissions, particularly in relation to the status issue and the consultation. In relation to the evidence, I'd just highlight there, the only point that I really want to get across was that Mr Garrett is very experienced in this area and that's the sole point. I think Mr Fagir has said all that can be said about Mr Sheehan's submissions.

PN992

In terms of the one thing that I did want to take the Commission to, this one particular point about this issue about the submissions at 3.2 and Mr Sheehan's statement, at paragraph 46, and that's the slight misconception about the words, 'and availability of the LIR crew'.

PN993

On page 55 of the court book, and PGO2 and clause 4.7, that should be, at the top of the page it refers to 4.6 call-backs and casuals, have you got the page?

PN994

THE DEPUTY PRESIDENT: Yes.

PN995

MR YATES: In 4.7 I take you to dot point (c). There's been reference to this 1800 notification time. I'll just highlight that that was for the notification of leave on the next calendar day must be issued by the 1800 point. Now, that's not the notification of work but notification to the LIR crew that they're on days free of duty, as they are entitled to, under clause 31.3 of the enterprise agreement.

PN996

I just highlight that on the preceding page, page 54, in the second column, about three-quarters of the way down the page, there's an area called 'Work orders'. And it says, 'Daily SMS to be sent out between 1500 and 1600 for the following day's work'. And that doesn't clarify that that excludes the LIR, so that's all the crews that are on roster. So once the crew are placed on leave, they are on day 3 of duty. There's no obligation for the crew to be called back.

PN997

However, when you go back to page 55, we refer to clause 5, 'Relief arrangements to be utilised in the port', it refers to first call LIR1, LIR 2, in the first two ports and then, in (i), it says, 'LIR on recall'. So this is when they're on a roster day free of duty and that's defined as an LIR engaged after 1800. So there's a clear distinction between the notification of work orders and the notification of whether the crew are going to be on a day free of duty.

PN998

I think the crew are entitled to have their leave when notified and the - I just want to highlight that there's a slight rouse in that, or inflection that that requirement that they are protected in terms of having access to their leave, as an inflexibility is really - you know, there's time for the captain to organise their work orders between 3 and 4 o'clock each day. Then there's two hours buffer to notify the LIR crew as to whether they're going to be on a day free of duty, or not. I think that's fair enough.

PN999

I'd also just further add that I support the remedy, in relation to what's been outlined by Mr Fagir. And with regard to the submissions on the anti avoidance, I just round off by saying those submissions by the CFMMEU are quite eloquent and well stated. May it please the Commission.

PN1000

THE DEPUTY PRESIDENT: Thank you, Mr Yates. Mr Izzo.

PN1001

MR IZZO: I'm not sure I need to respond whether Mr Fagir is eloquent or not, to determine these proceedings, Commissioner.

PN1002

THE DEPUTY PRESIDENT: I've always been told that self praise is no praise.

PN1003

MR IZZO: What I might to, though, Commissioner, if convenient, is just address the point raised by Mr Yates, in relation to the comment about inflexibility of the LIR, because you may have the POPs in front of you and I just want to clarify how it operates.

PN1004

I think, by the end of the submissions, we are on the same page and that is, if I take you to clause 4.7, which is at court book 39, you'll see, at subclause (c), it mentions that the LIR crew need to be notified of leave for the next day by 1800. So when we talked, during the cross-examination, colloquially, that they needed to be notified of their work by 1800, that's because, by 1800, they need to either be told they're going on leave or they can still be available for work. Once they're notified they're on leave, as I think Mr Yates pointed out, then they are told to make their own arrangements.

PN1005

There is, at clause 5 on the same page, a recall process, but that recall is voluntary because this is now one of their leave days. So when we talk about inflexibility, the reality is these crews need to be told, by 1800, whether they're rostered to work or they're going to be rostered on leave. Because, to refresh your memory, Commissioner, leaving running is this very unique arrangement whereby, effectively, they could be rostered, effectively, on leave the whole time until they're told, the day before, 'No, it's a work day' and they take their leave. In running it's this unique arrangement whereby they get told the day before whether it's a leave day or not.

PN1006

That gives some flexibility but also inflexibility because they need to be notified in a period more in advance than certain other categories of employment, such as part-time. That's the kind of flexibility point. So I thought I would just clarify that.

PN1007

In relation to what I would like to address, we obviously rely on our written submissions. I would like to deal with five matters. They are whether Mr Campbell was, indeed, engaged for a specified period of time. The second, importantly, is even if we are wrong on that first point. Even if you accept Mr Fagir's analysis, which we don't say you should, the relief sought by the MUA still is not appropriate nor jurisdictionally available, and I'll obviously explain why. The third is to address the alleged failure to consult. The fourth is to address this alleged breach of fixed term contract anti avoidance provisions, that took effect on 7 December 2023 and for which the Commission is not currently seized the jurisdiction to determine. And I'll, very briefly, respond, lastly, to the AMP submission.

PN1008

If I can start with the first point, which is, is Mr Campbell and - sorry, was Mr Campbell an employee engaged for a specified period of time. The starting point is to ask what is meant by the phrase 'specified period of time', in the EA.

PN1009

Now, before I come to the EA, I would like to draw your attention to the decision of Raper J, regarding the phrase. I've supplied those authorities yesterday, I'm not sure if you have them available, Commissioner?

PN1010

THE DEPUTY PRESIDENT: I do.

PN1011

MR IZZO: Could I please take you to page 40 of that decision, so it's *Alouani v NRL*.

PN1012

THE DEPUTY PRESIDENT: I don't have page numbers on my copy.

PN1013

MR IZZO: I can take you - paragraph 91.

PN1014

THE DEPUTY PRESIDENT: Paragraph number would be better.

PN1015

MR IZZO: Paragraph 91, *Alouani-Roby v National Rugby League* [2024] FCA 12, paragraph 91. So Raper J identifies 'It's not in dispute that the contract', and this is the last line of the paragraph, before you go overleaf, 'said that it operated for a maximum term, commencing on 1 December, terminating on 30 November the next year and it would end at the completion of a term but could be terminated

earlier'. So what she's outlining there is it, effectively, is an outer limit contract or a max term contract, as they are often known.

PN1016

At paragraph 93 the judge then proceeds to call out the differences between the Workplace Relations Act, which had provisions about specified term contracts, or contracts for a specified period of time, and the Fair Work Act.

PN1017

At 95 Raper J calls out that there's a notable difference between the predecessor provision and the current provision, which came in, in 2009. She then says, at 96:

PN1018

If one were to interpret -

PN1019

And this is the second sentence:

PN1020

If one were to interpret the provision as not applying to max term contracts -

PN1021

So if one is to interpret this provision about in contracts for a specified period not applying to max term:

PN1022

the result would be directly contrary to the intent of the provisions.

PN1023

Raper J then identifies that there is a contrary argument that the Commission has previously adopted. This is at 97. She cites two decisions, *Cooper v Darwin Rugby League* and *Andersen v Umbakumba Community Council*, which is the decision Mr Fagir took you to. And she says:

PN1024

Whilst that might have been the position adopted historically, the phrase must be construed in the context of the current differently drafted legislative provision as a whole.

PN1025

So she notes the importance of context. She then says, in the next sentence, 'Context is instructive', and goes on to ultimately find that in the Fair Work Act the reference to contracts for a specified period of time must incorporate outer limit contracts or contracts that we might describe as maximum term contracts.

PN1026

She further identifies, overleaf, at 99, the explanatory memorandum to the Act, that expressly set out that it reflected the common law position and that an employment contract could be terminated earlier would not alter the specified period of time, nature of the engagement.

PN1027

She then says, at 100:

PN1028

The reference to the common law position is instructive. The common law position is regardless of whether the contract is capable of early termination. Contract that have fixed and maximum terms terminate automatically on their expiry.

PN1029

She says that that's an uncontroversial common law position about max term contracts.

PN1030

What I would like to say about that decision are two things. One, that does not, and I think Mr Fagir's on the same page, that does not mean that we automatically take Raper J's reasoning and say, 'Well, that's exactly what the phrase means in the EA'. She's construing a statutory provision, the EA is a provision of an industrial instrument. But what it does demonstrate is two things.

PN1031

One, certainly it is possible for an outer limits contract to fall within the meaning of a contract for a specified period of time. That's what occurred in that legislative context. So, depending on the context, it can. Secondly, what it demonstrates is that context itself is very important to construing the meaning of the phrase.

PN1032

Mr Fagir has taken you to a different decision, and do you still have a copy of that decision with you, Commissioner? That is *Andersen v Umbakumba Community Council*. If I could just briefly take you and, again, this emphasises the importance of context, to page 102. So halfway down the page they cite the industrial relations regulations. So what they're looking at is provisions of the Industrial Relations Act 1988, I assume unfair dismissal provisions.

PN1033

They discuss the regulations, and when I say 'they', von Doussa J, and the justice identifies that the regulations excludes specified employees if it's permitted by paragraphs 2, 4 or 5 of Article 2 of the Termination of Employment Convention. So you see that there's heavy reliance on the convention.

PN1034

Then there's a reference, below that, to regulation 30, and it talks about the sub-regulation talking about employees engaged under a contract for a specified period of time. So there's that same phrase.

PN1035

Then we get to page 106. Now, Mr Fagir took you to the first sentence of the second paragraph about the natural language of the use of the word 'specified'. He then, very quickly, skipped over the second sentence, with somewhat of a mumble, and that second sentence is:

PN1036

In the context of Article 2, paragraph 2(a) of the Termination of Employment Convention, 'specified' identifies a period of time for a task, the scope and parameters which are stated definitely.

PN1037

That finding is expressly influenced by the context of the Termination of Employment Convention. Based on that, the judge then goes on with further reasoning about the fact that if the contract can be terminated earlier, that would be inconsistent. Then the third paragraph starts with:

PN1038

As the court is concerned to determine the meaning of an expression used in the international convention, resort to decided cases, under the common law, are of limited assistance.

PN1039

Again, there's an emphasis on the convention. And, ultimately, the decision is made that a specified period of time contract should not be one that's terminable before the end of its term.

PN1040

The reason I'm taking you to those provisions is to identify that there was specific context considerations that influenced that outcome, just like Raper J has been influenced by other contextual considerations to do with changes in the language of the Act.

PN1041

So having understood all of that, the question becomes, 'Well, we're not construing an Act, we're construing the EA, what's the context for the EA?'. The context is, there's use of a phrase, 'specified period of time', which is not defined. We say there are yardsticks or reference points which mean that an outer limits contract would fall within that meaning.

PN1042

The very first of those reference points is to look at objective extrinsic materials that were available at the time that might shed light on the intention of the parties. Not subjective, which is what our objections to go, in terms of Mr Garrett's views, but is there anything that is available that has a probative nature, to influence an understanding of what that means? And the unambiguous answer to that question is, 'Yes', that is the explanation that all the employees were given before they voted on the document. That explanation is at court book 525. That is exhibit DS29.

PN1043

This is, self-evidently, terms and conditions explanation to the EA. Mr Sheehan explains in his statement that was distributed to all the employees. At court book 525 there's a clause that says 'Termination of employment', and there's an explanation:

PN1044

This clause applies to permanent employees, permanent full-time and permanent part-time employees, including those engaged for a specified period of time or for a specified task. It does not apply to casuals.

PN1045

We say that is unambiguous. Everyone was told, who voted, that clause 20 also applies to specified period of time employees. What that means is, in the context of this EA a specified period of time contract could be terminated with the notice periods in clause 20.1, which depend on your length of service at a period: one week, two week, three week, four week. So the meaning of that phrase, in this context, was that it could also be an outer limits contract.

PN1046

This point is made in *Berri*, I won't take you to the authority, you must have *AMWU v Berri* recited to you on a weekly basis, Commissioner. I'm sure you take it to bed at night. But I will give you the paragraph reference, it's 114.13.

PN1047

In that judgment *Ross J* - sorry, it's not *Ross J*, it's a Full Bench, identified that the context of making enterprise agreements has changed. It's no longer union with an employer, the agreement is made by employees, it's a voting process. In that context *Berri* says:

PN1048

What was said in negotiations is now less important, or influential or even has relevance to determining the EA, other extrinsic objective materials, like the explanations employees were given before they voted, are likely to be far more influential.

PN1049

That's the very type of document we're talking about here.

PN1050

That is not the only yardstick though that helps us understand the meaning of the phrase. There is another yardstick in the EA, which is clause 21 of the EA, which is the redundancy clause.

PN1051

So the redundancy clause immediately follows the termination clause. The redundancy clause says, 'It applies to permanent, full-time and part-time employees'. Then it goes on to say, 'It does not apply to employees engaged for a specified period of time, task or to casuals'. Very same approach as the termination clause above.

PN1052

The first clause, the starting point, is it clarifies its operation and the EA makes it very clear that 21, redundancy, does not apply to specified period of time or task. That language is missing from the clause preceding it. We say that's a clear marker that specified period of time or task was intended to have termination of employment provisions operate with that nature of engagement, including the

table at 20.1, but redundancy was not meant to apply. That contrasting language you certainly can have regard to in construing the document.

PN1053

All of that, Commissioner, leads us to say that in this context an outer limit contract can be a contract for a specified period of time.

PN1054

We then need to consider what happened in this case to see whether Mr Campbell was engaged on an outer limits contract. We say the conduct of the parties is unambiguously clear. We say there was no lack of clarity as to what role he was filling.

PN1055

The starting point for that is the evidence of Mr Sheehan. There's a few things that are very clear. A POPs is negotiated to deal with increased work in Sydney. That POPs provides for six LIR crew to be engaged on a fixed term basis, that's what the POP says, they'll be on a fixed term basis. Six employees are then employed as LIRs, one of those is Mr Campbell.

PN1056

The contracts on which they're employed, and Mr Fagir has focused a lot on the first contract, and we'll come to that, but the contracts on which they're employed, I think self describe themselves as maximum term full-time employment. That's at Annexure Dias 5, which appears on court book 192.

PN1057

We then heard, from Mr Garrett, under cross-examination. He conceded that no one told him, during the negotiations, that the crews would become permanent. He gave evidence that whilst there was a request, at some point, by the union for this automatic conversion to permanency, that was evidently rejected, in terms of the ultimate drafting that was provided.

PN1058

Then I asked him about Mr Campbell's engagement, specifically. He gave evidence to demonstrate he was all across that engagement. In fact he was heavily responsible for Mr Campbell's introduction and he knew, at the time, that it was a fixed term contract. All of that points to an unambiguous meeting of the minds of the parties that the engagement was meant to be for a specified period.

PN1059

Now, Mr Fagir focuses heavily on the first contract to say, 'There's some infelicity of expression in the first contract that says this is all ambiguous'. Well, Mr Campbell, for the period that's relevant, he wasn't on that contract. The contract - yes, he was engaged on the first contract initially, but the contract that he was later engaged on is actually a different contract entirely. It's a contract dated 21 March 2022 and it's at page 198 of the court book.

PN1060

That contract has none of the language Mr Fagir seemed to delight in taking you to, and Mr Fagir didn't take us to the second contract at all. The second contract is preceded - yes, so Annexure DS6, 198 of the court book, it says:

PN1061

We're pleased to offer you employment for a specified term -

PN1062

It says, using similar language to the EA:

PN1063

on the basis outlined at item 1 in the position at item 1, commencing on the date in item 2.

PN1064

It says:

PN1065

It will initially be full-time. Your fixed term employment will automatically come to an end on the date outlined at item 2. You acknowledge, due to the nature of the employment being for the contract period that you're not entitled to any notice of termination.

PN1066

The next paragraph:

PN1067

You acknowledge Svitzer is under no obligation to provide you with employment beyond the contract period.

PN1068

No representation has been made that the contract will be extended beyond the contract period. This is unambiguous. Then we go to the termination clause. Again, you were not taken to this in the MUA's closing. Clause 15, page 203 of the court book, 15.1:

PN1069

Your employment will automatically come to an end at the end of the contract period -

PN1070

Then it says:

PN1071

unless the contract is extended, which will only be done by mutual agreement.

PN1072

I mean that's not remarkable at all. I mean any contract can be extended by mutual agreement. That's not a representation that the contract's ongoing. I mean, at any point, parties can agree to do something different. We say that's entirely unremarkable. What is clear is that absent any other action by anyone, the contract will end automatically.

PN1073

That is the contract that Mr Campbell was engaged under. That contract applies from March '22 to December 2022, at which point you'll recall, Commissioner, that you became somewhat intertwined and involved in this matter and you issued a number of interim orders extending the employment and, ultimately, the last order extended the employment contract to the end of 2023. But this is the contract that was extended, not the first contract, it was the second one which Mr Campbell was engaged under.

PN1074

THE DEPUTY PRESIDENT: Wasn't there a third contract for the other five LIR employees?

PN1075

MR IZZO: There was a third contract they were issued, from 1 January 2023 to 31 December 2023, yes.

PN1076

THE DEPUTY PRESIDENT: You're saying that Mr Campbell was never presented with that contract, or signed it?

PN1077

MR IZZO: No. Well, he wasn't given that contract, which is what gave rise to the initial proceedings before you.

PN1078

THE DEPUTY PRESIDENT: Yes.

PN1079

MR IZZO: You issued an interim order, just before Christmas in 2022, to extend the employment into early 2023. Now, this isn't in the evidence, but I don't think it's contested and if it is Mr Fagir will jump up.

PN1080

I think, consistent with your first order, a fixed term contract in the same form as this one, the second one, was - sorry, what happened was, this contract had the expiry date rubbed out and a new date was put in, to align with your order, and that was done a couple of times. That's not in evidence, but I don't think it's contested.

PN1081

MR FAGIR: I don't know if that's right or wrong. I've got no idea.

PN1082

MR IZZO: So Mr Fagir doesn't know if it's right or wrong.

PN1083

THE DEPUTY PRESIDENT: That's okay. If he didn't sign the third contract, that's fine.

PN1084

MR IZZO: He didn't sign the third contract. But what did happen is you then, ultimately, Commissioner, made an order, in the final disposition of the previous proceedings, that his contract be extended to 31 December 2023. Now, that order is at court book 440. I'm just going to it. The order - yes, so it's court book 440, page 60 of your decision. I'll just wait for you to get to it:

PN1085

For the reasons stated, I hereby order that Mr Campbell's contract be extended until 31 December 2023.

PN1086

So we say that contract, based on the evidence before you today, that must be the second contract. As I said, there were - I mean if the MUA wants to contest it, I'm happy for leave for them to contest it in a written submission, but there was a couple of variations to the expiry date, to align with your interim orders, but the contract we're talking about is the second contract, not the first. That's the position I'm just making clear. And it will be very difficult to construe your order as referring to the first, which had long expired and was not in contest at the time.

PN1087

There are other indications. If we're just talking about the expectations of the parties, there's a cover letter that goes on the second contract, which is annexed, by Mr Garrett, at page 81 of the court book. That cover letter makes it extremely clear that the period of the engagement was just to bed down the Navy contract and address specific operational and commercial pressures. It says:

PN1088

For a variety of reasons there's uncertainty that makes it unambiguously clear that there's no expectation the work will be offered beyond the end date of the March 2022 contract.

PN1089

With all of that in mind, there just was no representation made that could leave anyone with a view that either, (a) this was to be automatically converted or (b) that the nature of the engagement was for an ongoing nature. All the correspondence was to the opposite effect. Mr Garrett considered, in cross-examination, that at the time of formation his understanding was it was a fixed term basis. He says later, in December 2023, some two years later, he started to form a different view, and I asked him about the basis for that.

PN1090

I don't agree with the basis of that, but at the time of formation Mr Garrett says he understood it was fixed term and I'm afraid the applicant has a problem here, if they want to say the understanding was different, where is Mr Campbell giving evidence to that effect? Mr Campbell could have put on a statement saying that, 'My understanding was that it was going to be ongoing. I got told by various management that it would be ongoing and that's why I formed that view'. There's no evidence of that nature, Commissioner, and you should draw a negative inference, in accordance with the principles in *Jones v Dunkell* that Mr Campbell would not give evidence that would assist him on this point. That is, he would not give evidence that he had an expectation, or acceptable evidence that there was

expectations, legitimate expectations, of an ongoing nature. The evidence will be unhelpful in that regard. We say that's self evident because of all the documentation that we've outlined before you.

PN1091

I don't think I need to do this, but to the extent that Mr Garrett has a view, in December 2023, about the contract, that view is entirely irrelevant. It's objected to, it's one of our objections. It's his opinion, he's not the party to it so I don't think I need to say much further about Mr Garrett's view in that regard.

PN1092

There's also a letter that goes in February 2023, to the employees, to the effect that they shouldn't expect the contract to be renewed and it encourages them to seek other opportunities. That letter is at page 444 of the court book, is a sample of that letter. But under cross-examination Mr Sheehan said, his understanding is that it went to Mr Campbell. He said it went to all six. 'All six' is referencing the six LIR crew, of which Mr Campbell was one. In any event, what we do know is it went to Mr Campbell's number 1 representative, Mr Garrett, because that's at page 446 and 7 of the court book.

PN1093

So not only do we have Mr Sheehan telling us Mr Campbell got it, but we've got evidence that it went to Mr Garrett, of the MUA as well.

PN1094

THE DEPUTY PRESIDENT: What I struggle with this is, though, is that no employee who is working full-time is going to sign up for a part-time employment, or walk away from full-time employment, in my 36 years of experience in industrial relations.

PN1095

MR IZZO: The best - sorry, I'll let you finish, Commissioner.

PN1096

THE DEPUTY PRESIDENT: That's issue number 1. Issue number 2 would be, is Svitzer scouting or recruiting for fixed term employees, at that point in time, with a view to replacing the LIR employees? Why didn't they terminate their fixed term contracts and appoint them to the permanent part-time roles?

PN1097

MR IZZO: I think there's two, so I'll start with the first and then I'll go to the second query. The first query was that, in your experience, which is considerable, employees wouldn't choose part-time employment over full-time employment. I think the point we're making there is we were telling them, in no ambiguous terms, that the full-time employment would end. So, to the extent that they wanted to take up alternative opportunities, they were encouraged to do so. It was just notifying them of what was likely to come on the horizon.

PN1098

THE DEPUTY PRESIDENT: Ten months down the track.

PN1099

MR IZZO: Yes, or nine months down the track. In terms of your second query, I don't think the evidence is that these part-time positions were to replace the LIR crew. The evidence is that there was additional part-time employees brought on, but only for a fixed term in any event. So they're not necessarily a replacement, they were employed concurrently.

PN1100

THE DEPUTY PRESIDENT: Well, reading between the lines, from Mr Sheehan's evidence, it's certainly the intention.

PN1101

MR IZZO: I'm not sure - - -

PN1102

THE DEPUTY PRESIDENT: On the roster review.

PN1103

MR IZZO: We'll come to the roster review. I think the intention was - all you could glean from the evidence is the intention was to have them on a fixed term basis for a period, after which a decision gets made. Not necessarily a replacement - - -

PN1104

THE DEPUTY PRESIDENT: Let's get away from the first issue then.

PN1105

MR IZZO: Yes.

PN1106

THE DEPUTY PRESIDENT: Last I checked, there was 10 months between February and December, why would anybody pass up 10 months full-time fixed term employment to pick up I don't know how many months were these part-time fixed term contracts you were talking about, advertised around that time?

PN1107

MR IZZO: Whist I know the answer to how long, I don't think it's in evidence, so I won't. There's no evidence I can draw you as to the duration. You raised a point as to whether it was attractive? It may not have been to some, but the point I'm trying to make is, throughout the course of this engagement, the fact that these were ending was made very clear to everyone. And to the extent that some criticism that part-timers were engaged, well, Svitzer was very open about that. It advertised the positions, it notified the MUA the positions were available, so it's not that there was this surreptitious, underhanded engagement.

PN1108

THE DEPUTY PRESIDENT: Okay. The correspondence of February '23 had also been presented to these employees, these six employees, in 2022.

PN1109

MR IZZO: Before they signed their 2022 contracts, is that what you're asserting, Commissioner?

PN1110

THE DEPUTY PRESIDENT: I was thinking immediately after they signed their 2022 contracts.

PN1111

MR IZZO: They received a letter like this?

PN1112

THE DEPUTY PRESIDENT: To say that their contract will expire on 31 December 2022 and they should not think that they're going to be employed any further.

PN1113

MR IZZO: They received a cover letter that went with their contract, is that what you're referring to?

PN1114

THE DEPUTY PRESIDENT: That might be the cover letter, yes.

PN1115

MR IZZO: Yes. This is a cover letter before they signed.

PN1116

THE DEPUTY PRESIDENT: So the same wording which occurred in February '23 had been sent to them previously and they got a subsequent extension.

PN1117

MR IZZO: In 2022, yes. So you're - there was a warning given, in 2022, that they should not expect the contracts to be extended, and they were extended, that is right.

PN1118

THE DEPUTY PRESIDENT: Yes.

PN1119

MR IZZO: A similar warning was given to them in - well, we don't have any evidence that the round of contracts that went for the five remaining, but what we do have in evidence is, after they signed those contracts very early on, they got another letter. Now, that type of letter was not given in 2022, halfway through their contracts. The letter you're talking about was the cover letter that preceded the 21 March contracts. That cover letter is at court book 81. That preceded the signing of the contracts, just to make it very clear what was happening when they were forming a new relationship or a further relationship. This is not really a cover letter preceding the contract, it's being issued midway through the relationship.

PN1120

THE DEPUTY PRESIDENT: Or two months into a 12-month contract.

PN1121

MR IZZO: Two months into the relationship, yes. Yes.

PN1122

THE DEPUTY PRESIDENT: Not midway, it's - - -

PN1123

MR IZZO: Apologies, Commissioner?

PN1124

THE DEPUTY PRESIDENT: It's not midway.

PN1125

MR IZZO: No, it's not.

PN1126

THE DEPUTY PRESIDENT: It's 16 per cent.

PN1127

MR IZZO: It is of slightly different nature because already, a little bit into the contract, Svitzer's forming the view that this time they are not going to be extended and it's doing everything it can to alert them to that.

PN1128

Mind you, a number of the LIR's took up the hint, because what we know is, by the end of 2023 there's only three LIRs left. Three have all gone to other roles during the course of 2023.

PN1129

THE DEPUTY PRESIDENT: That's not my understanding either, but anyway.

PN1130

MR IZZO: Well, I think what's in evidence is that three were no longer with Svitzer in that position.

PN1131

THE DEPUTY PRESIDENT: No.

PN1132

MR IZZO: There's only three that were left.

PN1133

THE DEPUTY PRESIDENT: Yes.

PN1134

MR IZZO: Yes, that much is clear.

PN1135

THE DEPUTY PRESIDENT: The three had been put into a permanent crew, from memory.

PN1136

MR IZZO: Yes. They'd left their LIR position and then when you say 'put into' they must have accepted an offer, somewhere along the lines.

PN1137

So all of that, we say, points to this being a genuine out of limits contract. There is, in *Navitas v Khayam*, of which you're probably well aware, Commissioner, there's talk of vitiating factors: misrepresentation, duress, things that might vitiate an out of limits contract so that it doesn't automatically end on the expiry of its term. None of that is here.

PN1138

The messaging is all in one direction and, as I said, to the extent it was in a different direction, Mr Campbell has not given evidence as to some different inconsistent messaging that was given.

PN1139

For that reason, we say he was on a specified period of term contract, that contract ended in accordance with its terms, and that's our primary position and we hold that position firmly. But let's just say, for reasons that I - I withdraw that.

PN1140

Let's say you disagree, Commissioner, and let's say you accept the position of Mr Fagir and you accept Mr Fagir's view that, as at 31 December 2023, Mr Campbell was, in fact, a permanent employee, engaged under the EA. We say that does not alter the outcome, and that's for two reasons.

PN1141

Firstly, let's just say he is a permanent, that does not mean the contract still does not have work to do. The permanent engagements were all subject to notice of termination provisions, in clause 20.1 of the EA. All that has happened, in this case, is that the employer and employee have engaged in a contract whereby there was a mutual agreement that there would be an agreed end date on the contract. It doesn't change the engagement. The engagement can be on a permanent, full-time basis.

PN1142

Mr Fagir, there's an inference, he hasn't said it, but there's an inference in his submission, that once you're permanent full-time it's a job for life. That's not right. The EA allows permanent full-time engagements to be terminated. All that's happened here is, the parties have agreed, in advance, on what the date of that termination is. And, accordingly, the contract has expired and the relationship terminated, in accordance with that pre-agreement that they made. So, on that basis, there's nothing unlawful and there's no breach of the EA that would require the Commission's intervention.

PN1143

THE DEPUTY PRESIDENT: That the contract terminated or the relationship terminated?

PN1144

MR IZZO: Both. The other element of this is this, even if you don't accept that argument, there's no question here that what's happened is Mr Campbell's employment was terminated, at least the LIR crew engagement, that fixed term full-time employment, was terminated on 31 December 2023. We know that by reference to the letter of 11 December. I mean if you put aside all the consultation and the various letters that were sent, on 11 December it's made quite clear. So this is at court book 466:

PN1145

Consultation closes. Svitzer has concluded its view. No new information to change our employment with a preliminary view to issue you new contracts. Your current contract will conclude on 31 December, in accordance with its terms. Those terms made it clear that the contract and employment would end, however, it doesn't mean you can't still be employed in a different manner.

PN1146

And that's when the offer of casual employment is made.

PN1147

The EA does not regulate termination of employment, other than to require notes. So there is no provision in the EA that deals with disciplinary processes. There's no provision of the EA that can be relied upon if an employee is terminated to somehow challenge that termination.

PN1148

Now, in this case, Mr Campbell was told three weeks before 31 December that his employment would end. Unambiguous notice that aligns with the obligations of the EA. So even if he was terminated, at Svitzer's initiative, even if you find this was a dismissal, a dispute doesn't arise under the EA. All that's happened is a permanent employee has had their employment terminated. But that's permissible, under the EA. The appropriate course of action would have been to file an unfair dismissal claim. That has not been done.

PN1149

But there is no jurisdiction conferred on you, Commissioner, to say, 'Well, he's been terminated. I find that that's unfair, therefore I'll reinstate or give compensation'. There's nothing in the EA that allows that to happen. The dispute clause is about matters arising under the EA. If we accept he's permanent he was still, as I said, able to be terminated. That doesn't change that a termination has occurred and there's no provisions that talk about disciplinary processes, or you can only be terminated in certain circumstances, none of that arises. So there is no dispute that you're able to arbitrate or an order you're able to give to deal with a harsh or an unfair termination. Now, if you find that a provision of the EA has been breached, it might be something different, but there's no provision about that.

PN1150

You then have an additional hurdle, in any event, Commissioner, and that is the words of the Sydney POPs. If I could take you to court book 31. So it's a page you're well familiar with, Commissioner. It talks about Svitzer engaging two times 100 per cent LIR crew. It then says that Svitzer has the discretion as to

whether to extend the contracts and a discretion to appoint new employees. It then says, at subparagraph (a), that one month prior to the end of the contracts there's a review to be conducted and Svitzer can decide whether it needs to extend or bring them to an end.

PN1151

We say the POPs which are incorporated into the EA make it very clear that the discretion as to whether the LIR contracts should be ended or not, is one that only vested in Svitzer. It's unfettered, subject to there being an operational review, which we say occurred. So if you were to make an order saying that it was unfair or it should not have been terminated, that flies directly in the face of the provisions of the instrument which said that this discretion will be Svitzer's and Svitzer's alone. And, as you know, section 739 of the Fair Work Act does not allow you to make orders inconsistent with the provision of an enterprise agreement, and this has that effect, given it's been incorporated. There is also - so we say it's a jurisdictional barrier to issuing the order Mr Fagir has sought.

PN1152

There are also a myriad of practicability issues. The crew were engaged as a crew, that is, a master, an engineer and a ratings. The five others had gone, there's no other LIR crew, there's just Mr Campbell. If you were to reinstate Mr Campbell, the POPs talk about 15 full-time crew, so it wouldn't be to one of those positions because they're filled. You would, effectively, be creating a new position in the POPs. Now that goes well beyond what we say would be available, given that POPs has 15 full-time crew, fixed term provisions. The POPs contemplates these two times 100 LIR spots, on a fixed term basis, but you would be creating a new category in the POPs and we say that would also sit very uncomfortably with the terms of the instrument that regulates this port.

PN1153

The final issue, in terms of practicability, is when you just consider it a discretionary basis for relief to be granted. Mr Campbell, and this evidence is in Mr Sheehan's statement, he has not worked since December 2022. So you issued interim orders saying that he's to be available for work and that he was to be put back, and he has been on workers compensation since February 2023. There is no indication as to when he will be fit, it's been more than a year. It's not terribly clear what the effect of your order would be, other than he still continues to be unfit for work, based on workers compensation. There's no evidence that any of that will change.

PN1154

So, from a practicality perspective, it doesn't change the servicing report.

PN1155

THE DEPUTY PRESIDENT: It's not really a relevant consideration though, is it?

PN1156

MR IZZO: It is a consideration in this sense. If you think that there is some issue that has been done incorrectly or some breach that warrant intervention, then your discretion is enlivened as to what the appropriate relief is. Whether the employee is fit to go back to work would be something that's relevant in determining

whether you're going to reinstate him, which is what the MUA is seeking. Just like it would be relevant in an unfair dismissal context which talks about practicability of reinstatement.

PN1157

There's one other point that we make, in relation to this specified period of time point, which I think the arguments that I've already raised provide a compelling basis not to grant the relief sought. But, in any event, if you are persuaded by Mr Fagir that conform with the EA, the other finding available to you is everyone thought it was a specified term engagement, everyone proceeded on that basis. The mutual intention of the parties was that it was a specified term of engagement. Therefore, to the extent that there is a provision in the contract that allows early termination, if that's inconsistent with the nature of the engagement then it just has no operation. That will be the common law effect.

PN1158

You can't have a provision of a contract that's inconsistent with the EA. You don't necessarily need to find that the engagement is of an entirely different nature to what everyone else thought at the time and what the POPs contemplated. That will be a much bigger step and we say it's one you don't need to make to try and construe what the parties intended at the time.

PN1159

So they are our submissions on the specified period of time point, unless you had any questions on that issue, Commissioner?

PN1160

THE DEPUTY PRESIDENT: No, thank you.

PN1161

MR IZZO: The alleged failure to consult, and I've heard your questions on this point as well, Commissioner, which I intend to address. There's some background we need to bear in mind, and that is that the POPs, they're at page 31 of the court book, contemplate an operational review being done one month prior to the end of the term.

PN1162

Now, if we've learnt nothing else, fastidious compliance to this will be required, less Svitzer otherwise be alleged to have been in breach. So Svitzer had to do it a month prior. They do it earlier than that, no doubt be criticised. Do it later than that, no doubt be criticised. So the POPs gave Svitzer one month to do this review to try to ascertain whether it was going to engage the LIR crew further. The consultation needs to be borne in mind in the context of that provision, which is incorporated into the EA.

PN1163

So what happens? At court book 452, on 27 November, which is one month and four days before they expire, a letter goes, with some utilisation data, which has received a lot of attention in these proceedings, saying, 'We've looked at the utilisation of the crew and predicted workload, we don't think we require the LIR crew and, in any event, we think there are other forms of engagement that might

be better suited to the port, in any event'. There is some information given about utilisation, which I'll come to. It's made clear there's no definite decision. That also goes to the unions, at court book 454, and then there is a presentation, which is at court book 459, where, again, the data is presented but there's an opportunity to discuss.

PN1164

Now, we need to bear this in mind. There is a presentation at which the union's attend where the union's are given the opportunity to give feedback and to ask questions. Now, I asked Mr Sheehan whether anyone had asked about the meaning of some of the data, in relation to the columns provided, in particular the available maintenance hours. I think he couldn't recall whether anyone asked about the 97.7 available maintenance hours, which is one of those columns. He certainly recalled that Mr Campbell did not. But what we are told is that there is a robust discussion with the unions and as a result of that, three pieces of information are sought. Now, I'm going to come to show you that all of those three pieces of information were given, ultimately.

PN1165

So whilst there has been some criticism about the data given, there was the very opportunity to ask if they wanted anything further and everything that was asked for was given. So there's this criticism that the numbers, which are the product of a third party utilisation review, there should have been further explanation or further information given. But the unions had an opportunity to have a discussion, in person, where the slides were talked to and out of that they asked three questions and those three questions were answered.

PN1166

So now, retrospectively, after we've had already conferences before the Commission, additional questions have been asked in this hearing. But if they were relevant at the time, or they were important to the unions, they could have easily have asked for it at the time and they did not, Commissioner.

PN1167

THE DEPUTY PRESIDENT: I think they did before me, to be fair.

PN1168

MR IZZO: They did ask for the information out of that table.

PN1169

THE DEPUTY PRESIDENT: I know that table. They asked for additional - Mr Garrett, in particular, asked for additional information, as explained in this morning's evidence, which required, I think, either a direction or recommendation from me that the information be provided.

PN1170

MR IZZO: And it was.

PN1171

THE DEPUTY PRESIDENT: It was?

PN1172

MR IZZO: Yes. So let's just go to that then.

PN1173

THE DEPUTY PRESIDENT: Only just before the start of the final conference, from memory.

PN1174

MR IZZO: The start of the second last conference, as it turned out.

PN1175

THE DEPUTY PRESIDENT: Second last, was it?

PN1176

MR IZZO: But let's just go to that, Commissioner, because this is important. So if we go to PG12, at court book 100. We have exactly what's been asked for here. There's two things that Mr Garrett asked for. The total number of days worked by casuals, LIRs, PPTs and recall days for the last 12 months, and then a list of crews, PPTs and casuals.

PN1177

That information was all provided, well before the decision was actually implemented, and I'll come to what I mean by 'implemented'.

PN1178

If we go to, firstly, court book 457, annexure DS19. So on 1 December there's a list of total numbers of days worked from the LIR crews so far. You'll see the days there. Now GPH2 is Mr Campbell. The reason his TBD are high is because Mr Campbell wasn't working that entire time, he was on workers compensation, that's why there are no numbers for Mr Campbell. I think that's self evident. But they are the days for the LIR crew and there's all the crew names beneath it. So in terms of the names of the crew, that was given. And in terms of the LIR days worked, that was also given.

PN1179

Then further information is given on 6 December, this is at court book 464. You'll see 122 days worked master 1. Master 2, 178 days, so on and so forth. Now, when I spoke to Mr Garrett about this, his issue with this, I said to him, 'These are the days worked, that's what you asked for'. His response was not that we hadn't given the data he says he just doesn't agree with it. Well, that's different to providing the data. And if he didn't agree with it he had the opportunity to raise those concerns, and we'll come to that in a moment, because he did.

PN1180

Then we've got a third piece of data given, at court book 468. This is everything else that the unions asked for. This is PPT days worked, for each PPT. Recalls in total and casuals by rank, the days that casuals had worked. Mr Sheehan has given evidence that the reason there is an unusually high number of GPH, there was some criticism of that data point, as if it didn't make sense or that it somehow should have warranted further consideration because there was work that could

have been utilised by the LIR crew there. The answer for that is, the reason it's so high is because a full-time position, that of Mr Campbell's, had to be filled for virtually the whole year and that's why there's a high number of casual GPHs there.

PN1181

THE DEPUTY PRESIDENT: I think the evidence was that there were a number.

PN1182

MR IZZO: Yes, it was that there were a number.

PN1183

THE DEPUTY PRESIDENT: A number of long-term absences.

PN1184

MR IZZO: Yes. But one of them, as well, we know of, and so that explains the higher number there.

PN1185

So what we say, when you come back to page 100 of the court book, at PG12, is that every data item requested was, in fact given. Now, one of those, Commissioner, which is the casual PPTs and recall days, was only given after - well, I'm not fully across the conference process, but your suggestion and I think is broadly accurate, that it was given after conferences where you may have suggested that that was an appropriate course of action.

PN1186

Now, whether it came from your prompting or unprompted, the reality is, it was given whilst these matters were still being heavily ventilated. The date was 14 December, which was before the second conference, and there was another conference before you, on 20 December. Those conferences gave the opportunity to Mr Garrett to give further feedback. And under cross-examination I said to Mr Garrett, 'Well, you could have then gone and given feedback on those numbers', and his response, and I quote, 'I can and I did'. Knowing how forceful Mr Garrett is in conferences, I'm sure you and the others here would remember that he obviously did give forceful feedback in relation to the data. He's not the kind of person that would have held back. Which means that before the decision had practical effect, that is, before 31 December, all the information requested was given.

PN1187

Yes, I accept that the final letter, on 11 December, goes before some of the data was given. But that is rectified, because then there's a dispute before you and there's two further conferences of which place - there's still an opportunity to consider and nothing Mr Garrett said chanced Svitzer's position. Which means nothing Mr Garrett would say now would - it's still the same data.

PN1188

I think now we come to this question about the roster and this possible roster change. Mr Sheehan is clear, there hasn't been a roster change yet. I asked him when it might be and he said, 'In the coming months'. Clearly, from his evidence,

the possibility of a roster change has been something in his contemplation for some time. I think that much was conceded under cross-examination. This is a very different beast. What is being suggested here is that a thorough consultation or a roster change is required.

PN1189

Let's be clear what this roster change is, Commissioner. We're talking about data being obtained by Svitzer that showed the crew were under utilised. The roster change will be to remove crews from the port. Everyone here knows what that will entail. That will entail an enormous dispute. That will entail a consultation process, over many months, and that will ultimately, likely, end up before you, Commissioner, to determine the permissibility of that and - - -

PN1190

THE DEPUTY PRESIDENT: I'm unavailable. I'm unavailable.

PN1191

MR IZZO: That's because you have another important matter to deal with, Commissioner. And not only that, it's going to involve a POPs change, possibly.

PN1192

Now, Svitzer's record of POPs changes, in the last four years, is abysmal. People like to say, 'It's easy to change a POPs', it's nigh impossible. Termination proceedings were run on the previous EA, they had a difficulty in changing the POPs. We're told that we have one month to review the LIR positions and in that one month we also need to consult on a roster change. The roster change will take the better part of a year. So it is not feasible to conflate these two concepts and say, when you decide whether to keep a fixed term employee who was always told their employment would end on a particular date, you also need to consult on something that may happen, that Mr Sheehan hasn't even worked out yet whether it's going to happen in the future. All that was being said is that, 'There's going to likely be a roster change as well and, as part of that, we don't think the LIRs will be part of it'. He's been up front about that. But to expect him to consult on the roster change would be an enormous task and not possible in the timeframe that POPs provided. The POPs expected this to be done in a month. I repeat, if we had gone early, if we'd gone six months early, the first criticism out of the gate would be, 'You're not doing it at the right time, the review needs to be a months before'. We're constrained by what the POPs permitted, so consultation had to be consistent with the POPs.

PN1193

What we say is there's two decision points. The first is, do we need the LIR crew? The Shiftwork Solutions report effectively gave Svitzer two things, and the evidence from Mr Sheehan talked to this. One is utilisation data and the other is roster model. One of those things is critically relevant to the LIR crew, the other is not.

PN1194

The roster modelling will help Svitzer if, on day, it decides to lower its crew numbers. Because, to put it in a different context, you have low utilisation, you're told it's at 69 per cent.

PN1195

MR FAGIR: What's the evidence for any of this?

PN1196

MR IZZO: Evidence for what?

PN1197

MR FAGIR: For everything that you're saying.

PN1198

THE DEPUTY PRESIDENT: If you've got an objection, Mr Fagir?

PN1199

MR IZZO: Let's hear the objection. I'm happy to point to the evidence. The evidence - - -

PN1200

MR FAGIR: I'm giving you the opportunity to make a submission that will have some force, based on evidence, as opposed to just your views about this.

PN1201

THE DEPUTY PRESIDENT: Mr Fagir, if you've got an objection to make, please make it.

PN1202

MR FAGIR: If the Commission please. I'll withdraw my comment, I'll deal with it in due course.

PN1203

MR IZZO: There's a table that's in the letter. That table is obviously in evidence, it has utilisation figures in it. Mr Sheehan gave evidence today where that data came from. That evidence was that it came from a third party that he then, under sufferance, named. He named. He named Shiftwork Solutions, that was all in evidence.

PN1204

Mr Fagir also identified an email, from Ms Tiedeman, which talked about roster modelling. He asked Mr Sheehan about that. Mr Sheehan gave evidence that the Shiftwork Solution report had roster modelling on it. But the point I want to make is this, and all of that was in evidence. The point I want to make is this, you have low utilisation. The letters say, 'We've identified there's low utilisation, we don't think we'll need the LIR crew, going forward. We also think part-time is probably a better form of engagement'.

PN1205

If, and this is not in evidence, but this is the inference you could draw, if you have low utilisation, you've identified you don't need some crew, obviously when you switch to actually go down crew numbers, you've going to have to develop a new roster. That is a separate consideration and that is one that Mr Sheehan is going to have to grapple with, during the course of this year, or whenever they do their roster change, but it's a separate decision point.

PN1206

The first decision point is, 'Do we have too many crew?', the second is, 'If we reduce the crew what's the roster model?'. The reason we know they haven't got to that decision point is immediately after terminating the LIR contracts they offered them casual employment. They're not saying they don't need the work initially, they do need the work because they haven't done the roster change. But what they're saying is, there will be a roster change at some point, because of the low utilisation. Now everyone is trying to conflate the two different decision points.

PN1207

The reality is, Svitzer does not - Mr Sheehan says they're looking at it in the coming months, they've been looking at it for some time. For whatever reason they've decided they're not in the position to make the roster change in December 2023, but the LIR decision does need to be made in December 2023, because that's when the contracts expire. And the POPs confer that express discretion to end the contracts at that point in time. It's very convenient to conflate it all but, as I said, it could not be practical to revolutionise a whole roster in the space of four weeks, which is what would have been required to thoroughly consult on the roster.

PN1208

I won't take you to it, there's a table in our submissions, at court book 144, which sets out all the steps that were taken, and I do wish to note, again, even though some data was given after the 11 December letter, there were three conferences before you, Commissioner. This comes to the point, let's say you, again, are with Mr Fagir, for reasons that I would have difficulty in understanding, but let's say you agree with Mr Fagir and you say the consultation is deficient, again there's a big question arises as to what's the appropriate relief. You've already held three conferences between the parties. So let's say you were to reinstate Mr Campbell for a fixed - you had to extend his contract for a fixed period, or else you'd actually convert his engagement status, which we say you don't have the power to do. What, for a further period of consultation?

PN1209

I think the parties have ventilated these matters, over the course of meetings between themselves and in front of you. I don't think that's going to change the outcome of the view as to whether LIR are required. As I said, if it's to sort out the new roster, that's a much, much bigger exercise, which involves changes to POPs and all sorts of things.

PN1210

So, for that reason, we don't think it would be practicable to just simply reinstate. And I do have to caution, particularly in relation to this, Commissioner. How do you reinstate? It was a fixed term contract. If you just put him back, you'd have to extend the fixed term contract again, for a limited period and I just query whether any of that consultation would be productive, given how much has been exchanged to date.

PN1211

They are our submissions on consultation, unless you had anything further. It sounds like Mr Fagir wants to say something in reply, but he can do that in due course.

PN1212

Mr Fagir's submissions on - I withdraw that.

PN1213

The alleged breach of the Fair Work Act. We should not be put to answering this question, Commissioner. That is the simple starting point. It did not arise under the EA. For the vast majority of the period these laws didn't even exist. They only came into play on 7 December 2023. They clearly do not arise under the EA and yet we have been put to the task of putting on evidence to respond to these matters. You simply do not have jurisdiction to determine this. No claim has been filed, under section 333F, I think it is, I might have the letter wrong, but under that section of the Act. A section 739 dispute has been filed, about matters arising under the EA.

PN1214

Mr Fagir has said very little about this jurisdictional point. There is no sufficient answer, just simply, with the greatest of respect, you cannot determine this. In any event, even if you were to wish to form a view, Mr Sheehan has given evidence as to why the LIR crew were removed. Those reasons are throughout the correspondence and they are: (1) there's low utilisation, so we don't need ongoing extra crew. (2) LIR aren't the ideal form of engagement because they can't be called after 1800.

PN1215

Let's just be clear about this, Mr Garrett agreed with that, under cross-examination. He agreed that they can't, effectively, be notified to work after 1800 because they've probably already been put on leave.

PN1216

Mr Garrett also agreed, ultimately, after a little bit of difficulty, that there are a variety of reasons that shipping in an industry that just naturally changes. I quote, Mr Garrett said, 'Towage is fluid, things change'. He accepted that you have a need for last minute crew. Svitzer has formed the view LIR don't fit well within that and there are other forms of engagement that are better. People can be disparaging about the word 'flexibility' as much as they want. The reality is, in this POPs there was no obligation to maintain the LIR. The POPs were drafted to give Svitzer that discretion to end them.

PN1217

Now, you may have a dim view, Commissioner, of this notion that Svitzer wishes to move to a more flexible form of engagement but, under the EA, that's exactly what Svitzer was entitled to do under the POPs, it was given that discretion. And to find that, on a merit basis, again you think that's not the appropriate course, that would end up in a finding that directly contradicts their discretion under the POPs, which was granted and is a term of the EA.

PN1218

But, in any event, they are the reasons that motivate the decision. That has nothing to do with fixed term engagement. There's an enormous hurdle here that the union hasn't grappled with, which is Mr Campbell wasn't the only employee terminated. There was a master and an engineer who were also terminated. Now, they are not covered by those fixed term laws. The reason they're not covered is because their salaries are in the back of the EA, as a master and an engineer, and you will find that those salaries exceed the high income threshold.

PN1219

So how could the decision be about fixed term engagement laws when Svitzer terminated three employees, two of whom are covered by those laws. Unless the suggestion is that Svitzer has deliberately terminated three employees in order to get around fixed term employment laws for one of them only. That would be cutting one's nose to spite one's face, Commissioner and it applies a level of cynicism to my client's conduct that perhaps even Mr Garrett wouldn't fathom. We just don't accept that that is the scenario as to what's taken place. We say the fact that three were terminated, collectively, all for the same reason, means this has nothing to do with fixed term contract laws.

PN1220

To the AIMPE submission, there's only one thing I'd like to say. AIMPE have raised a concern that we are relying on the POPs clause to get around clause 13 of the EA. Now, MUA don't talk about clause 13 at all, and I think with good reason. Clause 13 is about cessation or growth in port business.

PN1221

We're not saying there's been a cessation or growth in port business. We're just saying, as part of business as usual, a review has been done on utilisation and it turns out that the staff that we have could be better utilised. That has nothing to do with clause 13 of the EA so we don't accept that there's been any breach, in relation to that clause.

PN1222

If I could now just deal with a couple of matters, by way of reply to things that were said orally. Commissioner, if I could deal with your question first, you asked a question of someone, Mr Sheehan perhaps, or Mr Fagir, about the primacy of full-time employment under the enterprise agreement. That provision needs to be read in the context of the Sydney POPs. The Sydney POPs, whilst that provision may have some work to do, in determining future disputes, the Sydney POPs talks about the LIR crew specifically, that they were engaged for a fixed term and that Svitzer had the discretion to end it, and that was at Svitzer's discretion, no one else's. So to the extent that anyone tries to rely on that other provision about primacy of full-time, it needs to be read subject to the express term in the POPs. They both form part of the EA and the POP says, in relation to this specific crew model they will only be for a fixed term and Svitzer could elect to end those engagements.

PN1223

THE DEPUTY PRESIDENT: Isn't there also a provision in the enterprise agreement, which I haven't had a look at for quite some period of time now,

thankfully, that the - I think the agreement applies over the POP where there's an inconsistency.

PN1224

MR IZZO: Where there's an inconsistency. But what we would say here is, this particular issue, that is, the actual allocation of crew to the port, is a matter the EA expressly leaves to the POPs.

PN1225

So if you go to clause 40.1 of the EA, the EA says - where's the bit about the POPs, bear with me one moment. So at 40.2(c) it says, 'The port operating procedures may include content about the subject matters in 40.1'. Then you go to 40.1 and it talks about rosters, detailing work days, predictable leave days, number of crews on duty, leave required to man the roster. Those matters are all under the heading 'Port rosters', but the clause 40.2 says the POPs that can deal with those subject matters.

PN1226

So the EA says the POPs is to deal with that. The POPs has dealt with that it's said, 'We're going to have primarily full-time employment, 15 full-time crews, and a small number of LIR'. The other thing to bear in mind, Commissioner, is that full-time employment is being enormously preferred in the port. There's 15 full-time crews. We're just talking about the relief crewing. The LIRs are, effectively, a relief crew. Fifty per cent of their time they're not even rostered. They're just not as effective a relief crew as part-time employees, for instance. I think that needs to be borne in mind, that the vast majority of crew in the port are full-time. It's just the flex component at the end, which I don't think it's contested that there is allowed to be some flexible employment in the port.

PN1227

That was your question. Mr Fagir said this afternoon it's ridiculous that no indication as to what days were being worked by the rest of the workforce was given. I simply just need to repeat, all that information was ultimately given, and I've taken you to where.

PN1228

Mr Fagir said the information in the table the way it was presented is useless. Again, what I say to that is that table presented in a meeting on 1 December. They talked through the table. Questions were able to be raised. The questions that were raised were answered.

PN1229

The third point that's been made is that there's logical steps and data missing to identify why the LIR crew are not needed. We disagree. Two simple propositions were put forward: one, there's low utilisation so we don't think we need all of this permanent full-time crewing in the port, which is one, and that's shown in the low utilisation table; and two, to the extent that we want relief crews, part-time is a better form of relief crew, and that was in the consultation letters.

PN1230

Again, in terms of the relief, and I think I've covered this, but Mr Fagir said the remedy is to determine to put Mr Campbell back in the position as he was before 31 December '24. Again, I have real difficulties with that. The position he was in was that his contract was ending.

PN1231

So if you were minded, and we strongly oppose this, but if you were minded to grant relief you would need to remain a fixed-term employee until whatever you say is incorrect is remedied, and as I've said, I don't think that's a practical course, nor will it substantively change the outcome of the view with respect to LIR.

PN1232

Then some comment is raised about the concerns to do with inflexibility, and Mr Fagir said well why didn't they have an adult discussion about it; if the problem was the LIR crew couldn't be used after 1800, why didn't Svitzer discuss this.

PN1233

It was put front and centre, Commissioner. If I just take you to court book 99 at PG11, the first consultation letter, 27 November says that the utilisation's low. It then under the table says:

PN1234

The port engages part-timers and casuals to provide coverage.

PN1235

In the beginning of page 99:

PN1236

Our experience over the past 12 to 18 months has demonstrated that part-time crew offer greater flexibility given their availability on two hours' notice and accordingly a better resource to utilise going forward. If we were to engage new crew we would likely prefer additional part-time crew.

PN1237

The issue was put front and centre as part of Svitzer's thinking, and I'm sure it was responded to – it would've been responded to in the conferences, because it was raised, and if it wasn't then that's a matter for the MUA.

PN1238

This suggestion that Mr Gray received another contract and somehow he's been treated differentially, we don't accept that. The evidence is that he received – and this is in the Sheehan statement – he received a notice of termination on 11 December, just like everyone else.

PN1239

Mr Sheehan states at court book 163 that after the letter is sent a new opening arose in another crew, and so on 19 December he's offered a fixed-term contract to fill to be seconded into another position. Mr Gray describes that as a position in – I think he calls it crew F in his statement.

PN1240

All that's happened is in one of the other crews someone has left, or gone on absence or whatever, so a vacancy has arisen and he's been plugged into that. There's nothing, again, underhanded about any of that. The LIR crew roles are gone. A vacancy happened to arise in one of the other ongoing – or one of the other positions, and he was put into it on a fixed-term basis.

PN1241

I put it to Mr Garrett that there were no such similar vacancies with the casual deckhands at the time. Mr Garrett I think – the transcript will show his response; I think it will say he didn't know, was his answer. He didn't concede – he didn't say yes he agreed, and nor did he disagree. I think he said he didn't have the information.

PN1242

So we don't say that there's been any differential treatment of Mr Campbell, and indeed he was offered a casual employment. He remains a casual employee should he be fit for work, and should there be a roster consultation process he would have the benefit of being involved in that, and again, it's unlikely, because we'd be talking about reducing crew, but if vacancies arose he'd have the ability to apply.

PN1243

They are the submissions unless there's any questions, Commissioner.

PN1244

THE COMMISSIONER: No. Thank you, Mr Izzo. You failed your 30 per cent extension though, but that's all right. Sorry, Mr Fagir, your final go.

PN1245

MR FAGIR: I think Mr Yates wanted to say something.

PN1246

THE COMMISSIONER: Mr Yates, you want to go first?

PN1247

MR YATES: Thank you - - -

PN1248

MR IZZO: The intervenor now has a right of reply.

PN1249

MR YATES: I just wanted to point out a couple of things, just on the admissibility side of things. I think the issue to do with shift work solutions, it can be noted that the review was done and there was a company called Shiftwork Solutions that had carried it out, but I don't think anything that came out of that – it's not before us, and relying on it to be privileged - and when they seek to rely on it, I mean that's all the Commission can have regard to, is the evidence that a review was being carried out on an ongoing basis over, as Mr Fagir pointed out, I think about six months.

PN1250

On the second issue about the explanatory document that went out with the enterprise agreement – have you got the Commission's copy of the enterprise agreement before you?

PN1251

THE COMMISSIONER: That's all right, I remember most of it.

PN1252

MR YATES: In paragraph 4 of Easton DP's decision on 11 July 2023, it refers to:

PN1253

Svitzer sent an explanatory statement to employees detailing the changes to the agreement and how they affect the employees prior to the vote, but apparently did not send the same document to the union bargaining representatives.

PN1254

The Australian Institute of Marine and Power Engineers and the Australian Maritime Officers Union were bargaining representatives to the matter and were in support of the agreement. The Institute and the AMOU disagreed with the statements made in the form 17 regarding the agreement explanation. The AIMPE raised concerns with some incorporated material not being provided, and the AMOU generally agreed with the context -

PN1255

et cetera, et cetera. But I think it's probably relevant that I probably send it to the parties and yourself a copy of the F18 that I signed and completed and sent to the Commission, unless you would like me to read it.

PN1256

MR IZZO: Your Honour, can I raise - - -

PN1257

MR YATES: Because there's been assertions made - - -

PN1258

THE COMMISSIONER: Hold on, there's an objection.

PN1259

MR IZZO: There's objection on two bases, Commissioner. The explanatory document was in our submissions. It was attached to our evidence, and as was the form F18 filed by the MUA. This was before all the parties.

PN1260

The first thing I have to say is absolutely I'm going to need a right of reply to this, because all of this was in my written materials and Mr Yates has said nothing until his ultimate reply at the end of the day.

PN1261

So firstly, I will need to respond to what's just been said. The notion of filing additional materials now at the end of the hearing when there's no cross-examination, we would certainly object to that. Mr Yates has had ample

time to do this. He's an intervenor in these proceedings. He's not even a party, and I think he's going beyond what the Commission should allow in terms of the appropriate conduct of the case, but in any event I do request an opportunity to respond to this.

PN1262

THE COMMISSIONER: Mr Yates?

PN1263

MR YATES: We'd also suggest that the Commission can inform itself, particularly about previous decisions of this Commission and the supporting material, and that F18 is part of that approval material and approval decision in the approval decision to do with the enterprise agreement.

PN1264

I'll send it to the parties and I'll let you deal with it how you see fit.

PN1265

THE COMMISSIONER: You don't need to send it to the parties, Mr Yates. I can look at the file.

PN1266

MR YATES: With regard to submissions about the Institute's submissions, we make a very subtle point about, in paragraphs 35 and 36 of our outline of submissions, and in our reply submissions at paragraph 5, where what the Institute has done is paraphrased the particular offending provision of the port operating procedures to take out the contextual approach, and just to highlight that Svitzer is – when you read it, it says:

PN1267

Svitzer has the sole discretion and discretion to –

PN1268

And at (a):

PN1269

Svitzer will conduct a review of its operational requirement to assess whether based on the requirement it needs to –

PN1270

Our submissions are that – and basically the company's submissions is that that provision is allowable in terms of under clause 5.3. We see it as being inconsistent with 5.3, because effectively what that does is limits the – it has the effect of limiting – if port pressed by the company the consultation requirements under clause 11 as well as clause 13, and productively in relation to changing the port operating procedures, and in relation to this matter about how the configuration of the port was going.

PN1271

We go on to further say that if the clause in the agreement said after consultation under clause 11 and/or 13 that Svitzer has the discretion to, that wouldn't be

offensive, but in terms of the word 'solely' being 'Svitzer has the discretion to' in our view is a restrictive term that fetters other parts of the enterprise agreement and potentially renders it a nugatory provision, because it's inconsistent with the provisions of the agreement that require that good faith consultation. If I may.

PN1272

THE COMMISSIONER: Thank you.

PN1273

MR IZZO: Commissioner, before Mr Fagir goes can I just address - - -

PN1274

THE COMMISSIONER: Mr Izzo, you can certainly respond.

PN1275

MR IZZO: Commissioner, we filed with our materials documents that go to this point, and I'll just give you the references. Court book 495 is the – Annexure DS28 – is the form F17, 'Employer's declaration in support of the enterprise agreement being made.'

PN1276

In that employer's declaration, reference is made to an explanatory document that was given to employees as part of the approval process. That is identified at court book 509. There's a date that says 2 June, 'Explanatory document detailing the changes to the AA and how they affect employees. The document provides comprehensive explanation,' et cetera.

PN1277

So the F17 says there's a comprehensive explanation as to how the terms work. That's the F17. And Annexure DS29, which is at court book 513 is the explanatory document. Annexure DS30, court book 544, is the MUA's form F18. The MUA say that they agree with the content of the employer's form F17, and that is at clause – so that is page 546 of the court book.

PN1278

So from the MUA's perspective, no issue was taken either before or after the vote as far as I'm concerned in relation to the content of the explanatory document. (Indistinct) we're told that AIMPE had some objection to – I don't know what, and I don't know if it's the clause I'm referring to. I'm aware they filed a form F18. The F18 is not attached to the decision.

PN1279

Whether AIMPE took issue with the explanation or not, unclear, in relation to a specified period of time, but also there's no suggestion that that was told to the employees at the time either.

PN1280

If you are minded to look at the file, you will need to turn your mind to whether it even talks about employees for a specified period of time, but from the MUA's perspective no issue was taken.

PN1281

THE COMMISSIONER: Thank you. Mr Fagir.

PN1282

MR FAGIR: I'll be quick, Commissioner. When it comes to consultation, you need to bear in mind the thing that's relevant is the actual obligation that's imposed by the agreement, that is, to discuss with the relevant employees the introduction of the change, the effect the change is likely to have, the measures that are being taken to avert or mitigate the adverse changes on employees, and for the purpose of the discussion provide in writing to the relevant employees all relevant information about the change, including the nature of the change proposed, information about the expected effects and other matters likely to affect the employees.

PN1283

The obligation is not to, in dribs and drabs, and after being dragged to the Commission and bashed around the head by the Commissioner, provide - - -

PN1284

THE COMMISSIONER: I don't think that's a fair description on what transpired.

PN1285

MR IZZO: You should take offence to that, Commissioner.

PN1286

MR FAGIR: The obligation is not to provide one cryptic table, and then in dribs and drabs respond to requests for information, produce some of them, after and in the context of proceedings having been commenced in the Commission, and there's a very sensible reason why that's so. It's not some technicality.

PN1287

There's always going to be, or almost always going to be an asymmetry of information. Some of the information that's relevant employers and unions will be able to work out, and some they won't, and to take the example in this case, it's obvious to blind Freddy, as I put to Mr Sheehan, and at one stage he might have accepted, another rejected, but information about the amount of work being done by casuals and en-route calls was relevant to the issue, and it wouldn't need some detective or mind-reader to work that out.

PN1288

On the other hand, the fact that there had been a secret review conducted by a consultant, producing roster modelling, a proposed roster arrangement and a whole series of ideas about how the workforce should be organised, that's something that the union, the employees wouldn't ordinarily be expected to know. But that should not have made any difference, because the obligation is to proactively provide the information, not reluctantly provide some of what's been produced, in dribs and drabs, and in critical respects after the end of the consultation period, and Commissioner, you'd bear in mind that Mr Sheehan was completely clear about the period of the consultation.

PN1289

Just to highlight why this is important practically, the submission was made that Mr Garrett's issue with the information about the days worked by casuals, et cetera, was that it was wrong. Now, the point is, you provide the information that can then be interrogated. There can be a discussion about whether it's right or wrong, why the figure for casuals is 557 as opposed to 1000 or 100, or whatever else it is, and there's an exchange, and the exchange might expose that there is an error, and part of the utility of the exercise - and that's a matter acknowledged in the cases dealing with consultation - is that it's an opportunity for another set of eyes, another perspective to point out mistakes, and they might be everything from typos to much more profound sorts of issues, and if this matter had been approached properly all of the information that was eventually given and more would have been volunteered; there would have been, one would expect, a series of discussions given there was a real major fundamental issue underlying it all, and all of these questions about whether the information's right or wrong would have been ventilated in that context.

PN1290

The second thing that I wanted to say about consultation is this: there were a series of things said about the review, the roster modelling, what it all meant, what was likely to happen next. It's of course important to hover closely to the evidence, and Commissioner, the transcript will note that Mr Sheehan accepted, as he had to, that the three things, and he asked me to repeat them you will recall: the review, the roster modelling, the proposed roster arrangement were all essential integers in the decision about the fate of the LIR crews, and it would've been ridiculous to suggest otherwise, but anyway he accepted that, and he accepted that that information wasn't provided, and he couldn't have said otherwise, with respect, because Svitzer's own email said, in as many words, we're not giving you the information about the casuals, et cetera, because we're looking at a proposed roster arrangement that dissipates the need to be LIRs.

PN1291

When, Commissioner, you're reflecting on some of the submissions that have been made about whether all of those things matter or not, some of them by reference to evidence, some of them perhaps getting a little bit detached from the actual evidence, we would suggest that that's really the key - the matters that the Commission should look to are those, Mr Sheehan's - and it's just a handy reference point, or a handy conclusion of what would otherwise be obvious about what information was important to the decision and whether or not that information was provided.

PN1292

Could I then deal with the specified period, and there were many points made about this, and in due course when my friend's a bit more experienced he'll realise that it's better to be selective with your points and choose your best two or three as opposed to your best 11 or 12.

PN1293

But the key matter that became a bit muddled, and should be borne in mind is this: the question is what was Mr Campbell's mode of engagement under the enterprise agreement - was it specified period in accordance with clause 15.4, or permanent full-time in accordance with clause 15.2.

PN1294

That is a function of the operation of the enterprise agreement, not a contract, not POPs, nothing else. The enterprise agreement prevails. It's at the top of the hierarchy in this context.

PN1295

The reason that we go to the first contract is because, in asking what were the terms of the engagement, in this case they're recorded in the contract. There might be different examples. Someone might respond to an advertisement, there might be a conversation, there might be conceivably, as we see in the public sector, a regulation that dictates the terms of the engagement. The content – the answer to that question of how has this person been engaged might come from a variety of sources. In this case it came from the first contract, and when the Commission asks itself was Mr Campbell engaged for a specified period, one looks to the contract, because that's what specified the terms of the engagement.

PN1296

Now, that's it in terms of the significance of the contracts, because the question isn't what did Mr Campbell and Svitzer negotiate, what was their agreement; it's what does the enterprise agreement dictate. Mr Campbell and Svitzer could go off and agree on whatever they like, it's not going to prevail over the enterprise agreement, but if the answer to the initial question is no, he was not engaged for a specified period, having regard to the terms of the contract, then that's that.

PN1297

The contracts that come later might have some significance in a court of equity or in a contractual dispute, but for our purposes they're immaterial, particularly given there's no suggestion that the employment ended and recommenced.

PN1298

It would be different if it had been suggested that Mr Campbell's employment on that basis had ended, and then he'd been reengaged under a second contract or a third, or pursuant to the Commission's order or whatever else. That hasn't been suggested, nor could it be suggested.

PN1299

Whatever was happening contractually is immaterial in terms of the nature of the employment under the enterprise agreement. So we'd urge the Commission not to be distracted by references to the detail of later contracts, or whatever came afterwards. That's by the by. How was this person engaged? Was it for a specified period? If not, no one's suggesting casual or permanent part-time. We're left with permanent full-time, and that one point really disposes of a number of the contentions that have been made today.

PN1300

On the termination point, could I just reiterate, because it was said – there were a number of loose references to termination. Mr Sheehan – and I asked him about this a number of times. I probably went back for my hat when I shouldn't have. The sensible thing would be if you get the answer just leave it alone. Anyway, I went back and it was clear, and it's clear from the documents, there was no dismissal.

PN1301

No one called Mr Campbell and said you're sacked. He wasn't sent a letter saying it was – the proposition was if we do nothing, your employment will end. That was based on a mistaken view of the nature of the employment under the enterprise agreement, and Mr Garrett accepted – of course he did - but at the point of the engagement he thought it was fixed-term employment.

PN1302

None of us need to shy away from that subjectively. That would've been his answer, and his answer truthfully today was yes, that's how I thought about it, but it matters not. It's a question of the operation of the terms of the enterprise agreement.

PN1303

Now, the construction of any instrument starts with the words, and little alarm going off when one's taken as a first step not to the text, not to a dictionary, to something the employer said about the meaning of a term, a different term in the enterprise agreement.

PN1304

The starting point are the words, and that's a matter that hasn't been grappled with at all, Commissioner. You've been taken directly to secondary materials.

PN1305

Now, the explanation given – it doesn't matter what AIMPE said about it, or the MUA said about it or anyone else. That's an expression of Svitzer's subjective view.

PN1306

The idea that this was some carefully considered – a product of some carefully considered analysis of how the agreement operated is a bit unrealistic, but it makes no difference. Svitzer could have whatever view they wanted about whether clause X applied to category of employees Y. That's irrelevant to the task of construction, and this is a matter that's completely clear. It's not a matter of objective circumstance. It's not a matter of common understanding. That's a statement of how Svitzer thought the agreement operated. It might be so, but it is literally irrelevant to the task of construction.

PN1307

Again, pointing to contracts, pointing to POPs, pointing to a whole series of other extraneous documents, many of them coming after the relevant point, takes the matter nowhere. As we say, it's a really narrow question: what were the terms of the engagement originally when the employment relationship commenced; where do we discern them in the contract; did the contract provide that employment would start day A and end on day B. If it didn't, if it provided for any other scenario, then it was not for a specified period. One point that was made that might be relevant was about the operation of other clauses in the agreement.

PN1308

Now, one approach is this. That's relevant context, there's no doubt about that. There's no question about whether it's admissible or relevant. One would

approach it with some caution knowing what we know about industrial instruments and the way that they're drafted, and the accuracy and internal consistency of some of these documents, but they're relevant.

PN1309

The one point that counted was a reference to the redundancy clause, and it was said – it specifically provides that it doesn't apply to employees engaged for a specified period. Its effect is quite the opposite.

PN1310

The reason that it doesn't apply to employees for a specified period is because there's no issue – there's no termination, there's no question of redundancy, you work on a true fixed-term contract, on an engagement for a specified period; you start at date A, you finish at day B, there's no question of redundancy, there's no question of anything else. If your employer wants to terminate you during the course of the period, they're up for payment of the balance of the fixed term.

PN1311

That's how that operates, and that's why redundancy doesn't apply, but if we're talking about an outer limit contract, that's quite different. If someone's engaged on a two-year outer limit contract and they're dismissed during the term because their job's no longer required to be done, they are entitled to redundancy under the NES, and if 15.4 contemplated outer term limits then there could be no exclusion from the redundancy provision. If it did, it would arguably derogate from the NES. There might then be a question about whether there was a precedence clause, et cetera.

PN1312

It's not necessary to delve into it to that level of detail. The point is that the exclusion from the redundancy provision is consistent only with 15.4, providing for a true fixed-term engagement.

PN1313

They're the points that I wished to make, if the Commission please.

PN1314

THE COMMISSIONER: Thank you, Mr Fagir. I thank the parties for their submissions and evidence today. I shall order the transcript and send you all a copy, and I will reserve my decision and notify you in due course. Thank you.

ADJOURNED INDEFINITELY

[4.29 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

PAUL GARRETT, SWORN.....	PN16
EXAMINATION-IN-CHIEF BY MR FAGIR.....	PN16
EXHIBIT #1 WITNESS STATEMENT OF PAUL GARRETT DATED 09/02/2024	PN32
CROSS-EXAMINATION BY MR IZZO.....	PN35
CROSS-EXAMINATION BY MR YATES	PN314
RE-EXAMINATION BY MR FAGIR.....	PN352
FURTHER CROSS-EXAMINATION BY MR IZZO	PN402
THE WITNESS WITHDREW	PN422
EXHIBIT #2 STATEMENT OF MR GRAY	PN425
DYLAN SHEEHAN, SWORN.....	PN432
EXAMINATION-IN-CHIEF BY MR IZZO.....	PN432
EXHIBIT #3 STATEMENT OF DYLAN SHEEHAN.....	PN442
CROSS-EXAMINATION BY MR FAGIR.....	PN445
RE-EXAMINATION BY MR IZZO.....	PN846
THE WITNESS WITHDREW	PN905