



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER RYAN

C2022/7051

s.739 - Application to deal with a dispute

**Australian Workers' Union, The
and
Cobar Management Pty Ltd
(C2022/7051)**

Cobar Management Pty Ltd Operations Enterprise Agreement 2020

Sydney

10.00 AM, TUESDAY, 20 DECEMBER 2022

Continued from 11/11/2022

PN1

THE COMMISSIONER: Good morning. I'll take the appearances. For the applicant?

PN2

MS DOUST: Yes, if it please the Commission, my name is Ms Doust, and I seek the Commission's permission to appear on behalf of the applicant. Do you wish me, Commissioner, to address the grounds in section 596(2)(a) and (c) of the Act now?

PN3

THE COMMISSIONER: We'll do that in a moment, Ms Doust. I'll just complete the appearances first.

PN4

MS DOUST: I'm sorry. It's Ms Doust. For the record, that's Doust, and with me, although not in shot, is Ms Duan, D-u-a-n, initial J, from the Australian Workers' Union.

PN5

THE COMMISSIONER: Thank you. Appearing for the respondent?

PN6

MS JAFFRAY: Commissioner, J. Jaffray for the respondent, with my solicitors Brett Feltham and Esme Wong from King & Wood Mallesons.

PN7

THE COMMISSIONER: Thank you, Ms Jaffray. Just dealing with the issue of permission, the respondent has previously been granted permission to be represented by lawyers. That was on 28 October in a conference before the Commission, but, Ms Doust, just returning to the applicant's request for permission to be represented by a lawyer, is there anything you wish to say about that?

PN8

MS DOUST: Simply that in circumstances where you, Commissioner, have been satisfied, I presume, as to the ground in subsection 596(2)(a) in respect of the respondent, then any such finding would apply equally in respect of representation for the applicant.

PN9

A further ground that becomes available where you've already given permission to the respondent is the ground in subsection (2)(c) of section 596, that of fairness between the parties.

PN10

THE COMMISSIONER: Very well. Ms Jaffray, is there anything you wish to say about the applicant's request for permission to be granted?

PN11

MS JAFFRAY: No, Commissioner.

PN12

THE COMMISSIONER: Very well. Permission is granted to the applicant on the basis that the precondition set out in section 596(2)(a) of the Fair Work Act has been met and I'm satisfied that my discretion to grant permission should be exercised.

PN13

MS DOUST: Please the Commission. Commissioner, I think you should have a copy of the court book that has been prepared by your chambers, and you will find in the court book the material that's sought to be relied upon by the applicant in the proceeding. You should have an outline of submissions, which although are undated - and they appear at tab 3 and page 16 of the court book - they were filed with the Commission on 25 November 2022.

PN14

In addition, the applicant filed a witness statement of Mr Cowdrey dated 25 November 2022. There is one minor correction that needs to be made to that witness statement which I can address now, if it's convenient. It's just a typographical error.

PN15

THE COMMISSIONER: Why don't we do that when we get to the tender of the statement, Ms Doust?

PN16

MS DOUST: If it please, Commissioner. In addition, the applicant has filed in reply an outline of submissions dated 19 December 2022 - an outline of submissions in reply, that is. That's at tab 8, page 270 of the court book, and in addition there's a witness statement in reply of Mr Cowdrey which appears at tab 9 at page 274 of the court book.

PN17

Can I just indicate this. The applicant proposes to call Mr Cowdrey to give evidence by way of adopting his statements and he'll then be available for cross-examination. I propose to open briefly before proceeding to call Mr Cowdrey to give his evidence, Commissioner, and that's how we anticipated the matter would proceed today.

PN18

THE COMMISSIONER: Yes. That was going to be my first question to the parties. I note the parties have both filed outlines of submissions and an outline in reply from the applicant's perspective, but is there anything further that the parties wish to say by way of opening or are they content to rely on those outlines?

PN19

MS JAFFRAY: Commissioner - sorry, Ms Doust. Commissioner, I have a housekeeping matter, and I'm not sure on the order in which I should make this submission, but it concerns the order of witnesses. One of my witnesses, Mr Christen, has two young children and he's been travelling overnight to Switzerland. He's currently jetlagged but online at the moment. Is there any way, Commissioner, and my learned friend, if we could accommodate his

cross-examination - I know this is out of the ordinary course - coming ahead of the applicant's cross-examination - of the applicant's witness.

PN20

THE COMMISSIONER: It would be unusual, but, Ms Doust, is there any objection, given the circumstances?

PN21

MS DOUST: It's simply this. I may wish to address in cross-examination of Mr Christen something that arises in Mr Cowdrey's cross-examination. So that's the difficulty. It may be able to be - I apologise for that. The applicant can certainly choose to call Mr Christen first, and I don't anticipate being long with him.

PN22

THE COMMISSIONER: Sorry, the applicant can choose to call - - -

PN23

MS DOUST: I'm sorry. The respondent can choose to call Mr Christen first of its witnesses, and - - -

PN24

THE COMMISSIONER: Yes, and you mean after you've dealt with Mr Cowdrey.

PN25

MS DOUST: Yes. After Mr Cowdrey's been called, yes.

PN26

THE COMMISSIONER: Ms Jaffray, do you imagine you'll be long in cross-examination with Mr Cowdrey?

PN27

MS JAFFRAY: I anticipate cross-examination up to an hour, so I am concerned about timing it. I've just been told it's past midnight in Switzerland. Perhaps, Commissioner and my friend, I could propose that the cross-examination of Mr Christen occur first and that there be leave to re-examine as required following matters which arise out of my cross-examination of the applicant's witness, and in which case, if that does occur, we can seek to wake up my witness, who will have tried to go back to sleep at that point.

PN28

THE COMMISSIONER: Ms Doust, if there's the ability to recall if necessary?

PN29

MS DOUST: I've said what I have to say, and it's really a matter for the Commission now. It might be something in respect of which some further accommodation about the operation of any rule in *Browne v Dunn* works, in the circumstances.

PN30

THE COMMISSIONER: Yes. Ms Jaffray, while I'm sympathetic to the time difference, I think it's probably most beneficial if we proceed in the usual course. We're talking about perhaps another hour at best, and I'm just concerned that it might disrupt things too much if the evidence was delivered out of order, so to speak. So we'll proceed in the usual way.

PN31

MS JAFFRAY: May it please the Commission.

PN32

THE COMMISSIONER: Ms Doust, I think you indicated you wished to make a brief opening.

PN33

MS DOUST: Yes.

PN34

THE COMMISSIONER: I just question whether that's necessary in light of the filing of the outline of submissions, but I'm in your hands.

PN35

MS DOUST: It's not anticipated to be very long, Commissioner, and I'll commence immediately, if that's convenient.

PN36

THE COMMISSIONER: Yes. Just one moment. Ms Jaffray, does the respondent intend to make a brief opening?

PN37

MS JAFFRAY: No.

PN38

THE COMMISSIONER: Very well. Ms Doust?

PN39

MS DOUST: Commissioner, this dispute arises under the Cobar Management Pty Ltd Operations Enterprise Agreement 2020, and if I refer to the 2020 agreement, that's what I'm referring to. There was a prior agreement made in 2015 of the same name, and I'll refer to that throughout as the 2015 agreement.

PN40

The dispute was notified to the Commission on 22 October 2022 and the gravamen of that dispute appears in the dispute notice at page 7 of the court book. This is that employees were informed that from the next panel onwards pre-start meetings would be held underground. That's at paragraph 2 of the dispute notice. This involved a change from the then existing practice by which pre-start meetings were held on the surface.

PN41

What the proposed change means, we will say, is that employees will be required to proceed underground prior to what is the - and I'm using quotes around this

phrase, the designated shift commencement time, and that is the time by which employees are required to be clothed and ready to work.

PN42

I'll come to the terms of the relevant clause in due course, but in short, in this matter the AWU contends that the agreement provides for a period of 15 minutes prior to the designated shift commencement time during which underground employees are to be available on the surface to facilitate shift changeover. That's our contention about the way in which the agreement operates.

PN43

I can say very briefly there doesn't appear to be any dispute in this matter about the capacity of the Commission to deal with a dispute pursuant to the 2020 agreement. I don't see any indication to that effect in the submissions of the respondent and the Commission has the power under clause 18.7 to arbitrate the dispute and make a binding determination in the event the Fair Work Commission is unable to resolve the dispute at the earlier stage, which involves conciliation and the like.

PN44

This agreement is one - if I can ask whether you have, Commissioner, a copy of the enterprise agreement, the 2020 enterprise agreement, to hand?

PN45

THE COMMISSIONER: Yes.

PN46

MS DOUST: I'll just briefly take you to some provisions of that agreement. Clause 2 of the agreement, which is at page 4, establishes coverage, which is of the employees engaged in the classifications outlined in clause 20.

PN47

That clause is at page 24 of the agreement, and one can see at clause 20.5 thereafter that there are a series of classifications organised under different departmental headings, the first being Mining Operations and then Underground Maintenance and so on.

PN48

You'll note, Deputy President, the reference at the top of each classification to 'Average 43 hours per week roster'. Apart from the final group, which is surface maintenance, which are a group that we say aren't affected by the present dispute.

PN49

You'll hear evidence, Commissioner, that the underground workers work a seven-day on, seven-day off roster and that the shift change-over time, which we say is the designated shift commencement time, is 7 am and 7 pm, and that the salaries for those underground workers, being the workers in the mining department referred to in clause 20.5 - sorry, mining operations and underground maintenance, their salaries are calculated on the basis of an average 43-hour working week.

PN50

If I can ask you then, Commissioner, to turn back to clause 19, which is at the focus of this dispute. At the start of that clause you'll see, Commissioner, that at 19.1 the ordinary hours of work for a full-time employee are 38 hours per week.

PN51

There's an obligation in 19.2, the usual obligation to work reasonable additional hours.

PN52

19.4 provides for continuous coverage, seven days per week, day shift, night shift.

PN53

And 19.8 in particular you can see there that there is a 12-hour continuous shift for full-time employees, and that's the employees in question, for which they're entitled to a meal break of 45 minutes. That break is paid and smokos and rest pauses are foregone.

PN54

So that's the background context we'll take you to, ultimately, Commissioner.

PN55

The relevant clauses are at 19.10. That's the focus of this application. The first clause, 19.10.1, imports an obligation upon employees to be changed and ready to commence work at the designated shift commencement time. That phrase 'designated shift commencement time' is an important one, we'll say.

PN56

19.10.2, shift employees are to be on the job - we refer to the quotation marks around 'on the job', and that's important, and they must be on the job to facilitate an effective shift changeover at least 15 minutes prior to that shift commencement time.

PN57

The term 'shift employees' isn't defined in the agreement, but we say it has an ordinary and understood meaning. The term 'continuous shift worker' is defined in clause 5, by the way.

PN58

Clause 19.10.3 operates in respect of employees in the mining department, and we say that's that first classification I took you to in clause 20.5. For those employees there's an additional facilitation requirement in the 30 minutes prior to the first shift of each new roster panel. So when they're coming back on roster there's a 30-minute period required to facilitate an effective shift - shift back meeting, I'm sorry.

PN59

19.10.4, this again is a group of employees differently described as underground employees, and we say that's a group that is constituted by each of the mining and underground maintenance groups that are referred to in clause 20.5. Again the

phrase 'on the job' appears in quotation marks, and that's defined as a point on the surface as designated by the employer.

PN60

The applicant's case, very shortly, is this, and these propositions are adapted to the question that was posed for arbitration in this matter. It's this. The pre-shift meetings and what are called cross-shift or cross-over meetings are required in order to facilitate shift changeover, that underground employees must be available at a designated point on the surface in the 15 minutes prior to the designated shift commencement time to participate in those activities.

PN61

At the designated shift commencement time employees must then be clothed and ready to commence work and may be required to commence work, but we say the converse of that is this. The employer may not require underground employees to proceed underground until such time as shift commencement time, which is the time when they must be changed and ready to commence work.

PN62

So that's all I wish to say by way of opening, unless there's any questions, Commissioner.

PN63

THE COMMISSIONER: Thank you, Ms Doust. Ms Jaffray, I think you indicated you didn't wish to make an opening, but I'll just give you the opportunity to do so if there's anything that's been raised that you wish to - - -

PN64

MS JAFFRAY: No, Commissioner.

PN65

THE COMMISSIONER: So let's proceed to the evidence then. Ms Doust?

PN66

MS DOUST: I call Ronald Cowdrey.

PN67

THE COMMISSIONER: Just before we administer the affirmation, it might be appropriate - I don't know that we have - I can't see Mr Buckman on the line, but I do see Mr Christen. I just wonder, just while Mr Cowdrey gives evidence, if Mr Christen can disconnect.

PN68

MR CHRISTEN: Sorry, just to confirm, Commissioner, you'd like me to disconnect from the call now?

PN69

THE COMMISSIONER: Yes. Is there any objection to that, Ms Jaffrey?

PN70

MS JAFFRAY: No, Commissioner.

PN71

THE COMMISSIONER: Yes, okay. If you could disconnect, Mr Christen.

PN72

MR CHRISTEN: Yes.

PN73

THE COMMISSIONER: Very well. Associate, if you could administer the affirmation to Mr Cowdrey, please.

PN74

THE ASSOCIATE: Mr Cowdrey, could you please state your full name and address?

PN75

MR COWDREY: Ronald Cowdrey, (address supplied).

<RONALD COWDREY, AFFIRMED

[10.31 AM]

EXAMINATION-IN-CHIEF BY MS DOUST

[10.31 AM]

PN76

THE COMMISSIONER: Ms Doust?

PN77

MS DOUST: Thank you. Mr Cowdrey, is your name Ronald Cowdrey?---It is.

PN78

Are you the vice president of the New South Wales branch of the Australian Workers' Union?---I am.

PN79

In that capacity do you have responsibility for organising the members of the CSA mine operated by Cobar Management Pty Ltd at Cobar?---I do.

PN80

Have you prepared for the purpose of the proceeding before the Commission a witness statement dated 25 November 2022?---I have.

PN81

Can I ask you to go to paragraph 7 of that document?---Yes.

PN82

For the record, that appears at tab 4 of the court book at page 27. Can I just interpose for a moment, Commissioner, to inquire, as I understand, my friend doesn't have pages in her version of the court book and I just wish to inquire whether my references are not helpful.

*** RONALD COWDREY

XN MS DOUST

PN83

MS JAFFRAY: My friend, I have paragraph numbering and the original affidavit paginations - statement paginations, but I am not privy to the court that was emailed through yesterday, I think.

PN84

MS DOUST: I see. All right. I apologise then. Can I ask the witness then to turn to the second page of the witness statement dated 25 November, which is paragraph 7.

PN85

THE COMMISSIONER: There are some red page numbers at the bottom of the page in the court book, however I don't know that the red page numbering has continued right through onto some of the annexures, for whatever reason, but if you have an electronic version of the hearing book, the red page numbering aligns, if you're opening it in Adobe Acrobat, with their numbering at the top. So Mr Cowdrey's statement dated the 25th is both page number - red number 27 as well as 27 of 286 on the electronic version.

PN86

MS DOUST: Thank you, Commissioner. Mr Cowdrey, when you go to paragraph 7 of that witness statement, I see that the last sentence says that annexed to the witness statement is a copy of the 2015 enterprise agreement. Should that be a reference to the 2020 enterprise agreement being the annexure at RC1?---That's right, Ms Doust.

PN87

I tender that.

PN88

THE COMMISSIONER: Very well. Ms Jaffray, I note there's been some objections sent through to my chambers this morning - well, there's been objection by both parties in relation to various witness statements that proposed to be tendered. How do the parties wish to deal with the objections?

PN89

MS DOUST: For my part, Commissioner, I'm content to deal with them in submissions. There's no jury in this matter from which the material needs to be kept and we can address you, Commissioner, as to what we say can be made, if anything, of any of the evidence to which we take objection.

PN90

THE COMMISSIONER: Yes. Ms Jaffray?

PN91

MS JAFFRAY: Commissioner, whilst I understand the evidence rules don't apply in a Fair Work Commission, as a matter of fairness it is still appropriate sometimes for the Commission to have regard to those rules.

*** RONALD COWDREY

XN MS DOUST

PN92

THE COMMISSIONER: Yes.

PN93

MS JAFFRAY: I'd be content to address problems with Mr Cowdrey's evidence in his first statement by way of submissions, but in respect to his second statement, Commissioner, in a number of respects he travels - and I know we haven't got to that, so if you'd prefer for me to deal with that separately I can.

PN94

THE COMMISSIONER: We'll deal it in a moment. So in relation to the objections, the statement will be admitted but the objections will be noted and it will be a matter of weight and submission that I'll hear from the parties. Is there any other objection to the tender of that statement, Ms Jaffray?

PN95

MS JAFFRAY: No, Commissioner.

PN96

THE COMMISSIONER: The statement of Ronald Cowdrey dated 25 November and set out in the hearing book, along with the annexures, from page 27 to 233, will be exhibit A1.

**EXHIBIT #A1 WITNESS STATEMENT OF RONALD COWDREY,
TOGETHER WITH ANNEXURES, DATED 25/11/2022, PAGES 27
TO 233 OF HEARING BOOK**

PN97

MS DOUST: I'm sorry, Commissioner, I may have neglected to ask Mr Cowdrey whether the statement was true and correct to the best of his belief and knowledge, subject to that correction.

PN98

THE COMMISSIONER: If we might just do that for completeness.

PN99

MS DOUST: Mr Cowdrey?---To the best of my knowledge, that statement is true and correct.

PN100

Thank you.

PN101

THE COMMISSIONER: Thank you. Ms Doust?

PN102

MS DOUST: Mr Cowdrey, have you prepared another witness statement in relation to this proceeding dated 19 December 2022?---I have, Ms Doust, yes.

PN103

Do you have a copy of that in front of you?---I do.

*** RONALD COWDREY

XN MS DOUST

PN104

For the record, that appears in the court book at the ninth tab and at page 274, I think, in the PDF document. Can I just ask you to go to paragraph 10 of that document, Mr Cowdrey?---Yes.

PN105

In paragraph 10, on the second page, there's a reference to 1.5 kilometres down. Do you need to correct that reference?---I do, Ms Doust, yes.

PN106

Can you please let me know how you need to correct that?---So the reference to 1.5 kilometres needs to be taken away and corrected with, 'Workers must travel approximately 800 metres down to the nine level, where the cage stops underground to let the workers out.'

PN107

Thank you. Save for that correction - - -?---Yes.

PN108

Sorry, is there a correction you need to make to paragraph 12?---Yes, there is.

PN109

What is that?---So in paragraph 12 I have referenced Mr Christen's reference to the tag-in gate.

PN110

Yes?---So the tag board system which I've referenced in Mr Christen's witness statements need to be changed. The tag board that I'm referring to is on the 9010 level.

PN111

Yes?---And the tag that Peter Christen is referring to is actually the gate at the site, when they tag in to come in the gate. There's a separate tag board on the 9010.

PN112

Thank you.

PN113

TH COMMISSIONER: So how are you proposing that paragraph 12 is amended, Mr Cowdrey? Is it to remove the words - - -?---'1.5 kilometres', Commissioner.

PN114

In terms of paragraph 12, you say, 'The tag board system currently - - -?---I see.

PN115

- - - referenced at paragraph 19(a) of Mr Christen's witness statement', comma?---Yes.

*** RONALD COWDREY

XN MS DOUST

PN116

Is it the words between those two commas you're saying should be removed?---Yes.

PN117

So paragraph 12, with the amendment made, should say, 'The tag board system refers to a safety mechanism', and then it continues?---Yes. I just need to make sure, Commissioner, that I'm clear that the tag board that I am referring to is situated on the 9010 level.

PN118

Well, it's your witness statement. How do you propose that paragraph 12 should be amended then?---That the words 'below the 9010 level which is below the nine level where the cage rests underground' is removed.

PN119

So the words 'below the 9010 level' be removed?---Yes.

PN120

And does that continue then to 'which is below the nine level'?---That's right, 'where the cage rests underground'.

PN121

So are you seeking to remove those words or keep those words?---Let me read what I wrote there, please, Commissioner.

PN122

MS DOUST: Commissioner, might I proceed in this way and simply not read the paragraph and simply ask the witness to give the evidence orally?

PN123

THE COMMISSIONER: That might be a more convenient way of dealing with it. Just before we do that, just coming back to paragraph 10, and just to confirm, the reference to 1.5 kilometres should I say - do I understand the effect of the applicant's amendment is 'Workers must travel some 800 metres'?---That's correct.

PN124

To the nine level?---Yes.

PN125

So insert the words after 'some' - delete '1.5 kilometres down' and insert '800 metres to the nine level'?---That's right, Commissioner.

PN126

'To reach the point' - - -?---That's where the cage rests and workers get out at the nine level.

PN127

Yes. So how do you say that - - -?---'Workers must travel some 800 metres down to reach the point at which they leave the cage'.

*** RONALD COWDREY

XN MS DOUST

PN128

Okay. So just substitute - - -?---1.5 k's - - -

PN129

Remove 1.5 kilometres and insert 800 metres. Okay?---Yes, thanks.

PN130

Okay. Let's deal with paragraph 12 then?---Okay.

PN131

So you're not proposing, Ms Doust, to read paragraph 12.

PN132

MS DOUST: No.

PN133

THE COMMISSIONER: Very well. We'll come to the further evidence-in-chief in a moment. Are there any other amendments to the statement?

PN134

MS DOUST: No, Commissioner.

PN135

THE COMMISSIONER: Do you seek to tender the statement?

PN136

MS DOUST: Yes. Mr Cowdrey, subject to - - -

PN137

THE COMMISSIONER: Sorry - - -

PN138

MS DOUST: Mr Cowdrey, subject to the amendment to paragraph 10 that you've just advised us of and the deletion of paragraph 12 in that document, is the document true and correct to the best of your belief and knowledge?---To the best of my knowledge, that statement is true and correct.

PN139

I tender that.

PN140

THE COMMISSIONER: We'll just deal with the objections. Ms Jaffrey?

PN141

MS JAFFRAY: Commissioner, this statement is of a different nature than the other statement, insofar as it's prepared as reply evidence, and we only received it yesterday. That was by agreement between the parties, Commissioner, but the consequence of that is evidence which travels out the scope of what's properly in reply my client has not had an opportunity to deal with.

*** RONALD COWDREY

XN MS DOUST

PN142

So we do press each of these objections as a matter of fairness to my client, given they haven't had the opportunity of putting on reply evidence to this new evidence. Can I take the Commission through these objections?

PN143

THE COMMISSIONER: Yes. So these are objections - on the document filed this morning, they're objections related to opinion, conclusion, speculation, relevance and hearsay. Are you saying the objections taken now are on the basis that they fall outside the scope of reply evidence?

PN144

MS JAFFRAY: Most of them do, Commissioner, but others, as a matter of fairness, given the timing of this evidence, shouldn't be allowed in if we can't properly understand it as a matter of form and so forth.

PN145

So, for example, paragraph 18, the last sentence, is referring to communications with unidentified members, and at this point in time that's not fair to my client without that being put in proper form, and in any event it's hearsay.

PN146

THE COMMISSIONER: Ms Doust?

PN147

MS DOUST: The Commission is, of course, not bound by the rules of evidence, and it's customary to receive evidence from worker representatives as to workforce concerns. They are relevant, of course, to the exercise by the Commission of its discretion, at the end of the day, in relation to how it disposes of the application before it.

PN148

THE COMMISSIONER: I'm prepared to leave that statement in, Ms Jaffrey, but it will be a matter of weight.

PN149

MS JAFFRAY: May it please the court. If I could ask for the same ruling, as a matter of weight, for paragraph 19.

PN150

THE COMMISSIONER: Would it be convenient that we deal - similarly to the first statement - - -

PN151

MS JAFFRAY: I'm happy with that.

PN152

THE COMMISSIONER: Actually, given that you've - sorry, we will do them one by one, because you did indicate there might be a different form of objection.

*** RONALD COWDREY

XN MS DOUST

PN153

MS JAFFRAY: If I could jump to the ones that are other than opinion and conclusion and so forth which we say raise new evidence.

PN154

THE COMMISSIONER: Yes. So maybe just focus on the ones which you say raise new evidence at this stage.

PN155

MS JAFFRAY: So if I could take the Commission to paragraph 22. Issues of safety were raised squarely in Mr Cowdrey's first statement. My clients, in their evidence, don't give any evidence about the matters to which paragraph 22 is responding, and the attachment referred to at RC2-1 concerns issues in that email unrelated to these proceedings.

PN156

We have not had the opportunity to put on responsive evidence in respect of issues regarding dust and the lack of constant suppression. To the extent that they were safety concerns that were known and held by the applicant, they should have been properly put in their first statement.

PN157

THE COMMISSIONER: Ms Doust?

PN158

MS DOUST: It's really responsive, because the tenor of Mr Christen's evidence is that there is no genuine safety concern associated with the practice that is disputed, and so this is really in the nature of supporting that those concerns are legitimate and genuine by virtue of the fact that they've been articulated previously to the respondent.

PN159

THE COMMISSIONER: Ms Jaffray, do I understand that the respondent is seeking to tender a document which has a file name '9L Heat Survey'?

PN160

MS JAFFRAY: Yes. That's in respect of the heat. We've been able to, at this late stage, get a document in respect of heat. I'm making submissions in respect of dust and lack of constant suppression. We are not in a position to put on evidence in respect to that.

PN161

For example, if the Commission was minded to allow this evidence in, then we would seek some indulgence from the Commission in respect to perhaps some brief supplementary evidence dealing with that issue, insofar as it becomes relevant during the course of today.

*** RONALD COWDREY

XN MS DOUST

PN162

Otherwise, in respect to what my learned friend has said about it arising as a matter of reply, Commissioner, it doesn't. Mr Christen deals with matters

unconnected with issues of dust and suppression, and to the extent, as I've said, this was a matter of safety, the applicant put in 'Issues, safety' in its first statement, and if this was a type of safety issue about which it was concerned, it should have been dealt with in that statement so that we could properly reply to it with our evidence, Commissioner.

PN163

THE COMMISSIONER: So are you seeking then all of 22 to be - or is it just from the commencement of the third sentence, 'Further'?

PN164

MS JAFFRAY: Yes, it's from the commencement of the third sentence, Commissioner.

PN165

THE COMMISSIONER: From the commencement of the third sentence with 'Further', that statement and the annexure RC2-1 will not be admitted.

PN166

MS JAFFRAY: May it please the Commission. The next paragraph raises similar issues in respect of references to, 'Workers are exposed to hazardous dust and other risks when underground', as again, we haven't had the time to deal with that issue of hazardous dust, and the reference to 'other risks' is undefined and prejudicial to my client in its current form.

PN167

THE COMMISSIONER: Ms Doust? I mean, it's not responsive to - a reading of Mr Christen's statement, he responds in his statement to safety concerns raised by the applicant in chief and then it seems that this paragraph introduces new matters.

PN168

MS DOUST: He does go further than that, though, Commissioner, because he says at paragraph 30 the blanket statement, 'I do not consider that the proposed changes create any safety issues.' So he purports to give evidence which is in absolute terms, and that's really what opens up the question of what we would have thought are inarguable hazards associated with the activity of underground mining.

PN169

THE COMMISSIONER: My ruling is 23 is to be excised, or not admitted.

PN170

MS JAFFRAY: May it please the Commission. One moment. Then finally, Commissioner, in respect of matters to which we can't deal with in the time we've had, paragraphs 28 and 29 give evidence about issues in respect of dangers with exiting using the decline, 28, and 29 refers to communications with both CSA management and the regulator. Nothing is attached, and we have not had time to put together responsive evidence in respect to those quite serious allegations.

*** RONALD COWDREY

XN MS DOUST

PN171

THE COMMISSIONER: Ms Doust?

PN172

MS DOUST: Commissioner, again, it's responsive to the rather broad statement at paragraph 30 of Mr Christen's statement.

PN173

THE COMMISSIONER: There is a hearsay aspect to both of those paragraphs, so I will allow them, but it will be a matter of weight for those two paragraphs, Ms Jaffray.

PN174

MS JAFFRAY: May it please the Commission. Subject to those particular objections, I would respectfully submit that the rulings that the Commissioner made just before about it being subject to weight be applied to this statement.

PN175

THE COMMISSIONER: So that's in relation to the other objections foreshadowed in the document earlier today? Yes.

PN176

MS JAFFRAY: Yes, Commissioner.

PN177

THE COMMISSIONER: Very well. The statement of Ronald Cowdrey which was filed on 9 December and is set out at pages 274 to 283 of the hearing book will be exhibit A2.

**EXHIBIT #A2 WITNESS STATEMENT OF RONALD COWDREY
FILED 09/12/2022 SET OUT AT PAGES 274 TO 283 OF HEARING
BOOK**

PN178

Now we just need to deal with paragraph 12. Ms Doust, in terms of - - -

PN179

MS DOUST: Commissioner, I'm just not sure whether I asked Mr Cowdrey whether his second statement was also true and correct, subject to the amendments that we discussed. I wonder if I might repeat that, just so that it's clear on the record.

PN180

THE COMMISSIONER: I thought you did, but just to put it beyond doubt - - -

PN181

MS DOUST: I apologise if I'm repetitive. Mr Cowdrey, subject to the amendments that were made to paragraph 10 and 12 of the document, is that second witness statement true and correct to the best of your belief and knowledge?---Yes. To the best of my belief and knowledge it's true and correct.

*** RONALD COWDREY

XN MS DOUST

PN182

Thank you. Thank you, Commissioner.

PN183

THE COMMISSIONER: Do you need to deal with paragraph 12 further, Ms Doust?

PN184

MS DOUST: Yes. Mr Cowdrey, is there a tag board system that operates underground at the Cobar mine?---As I understand it, yes, on the 9010 level.

PN185

Can you please describe that system?---As I understand it, employees get off the cage, go down, and when they proceed past the 9010 level they tag in and proceed to their work area.

PN186

Is there a particular number of tags that are available for employees proceeding through that area?---As I understand it, 104. There's availability for 104.

PN187

So there's a limit of 104 people who may proceed past the 9010 level. Is that right?---Yes, the tag board allows, as I understand it, for 104 people to tag on and proceed past.

PN188

All right. Thank you. Nothing further.

PN189

THE COMMISSIONER: Ms Jaffray, any cross-examination?

CROSS-EXAMINATION BY MS JAFFRAY

[10.58 AM]

PN190

MS JAFFRAY: Yes, Commissioner. Mr Cowdrey, I am Jocelyn Jaffray, counsel for the respondent. I'm going to ask you a few questions in respect of the statements that you've given before the Commission today. Just before, you answered some questions by reference to the phrase 'as I understand it'. Can I just clarify for the Commission's benefit, is that direct knowledge or from communications you've had with other people?---By direct - - -

PN191

MS DOUST: (indistinct) that question.

PN192

MS JAFFRAY: Pardon me?

PN193

THE COMMISSIONER: Sorry, Ms Doust?

*** RONALD COWDREY

XXN MS JAFFRAY

PN194

MS DOUST: It's vague, and so therefore it's unfair.

PN195

MS JAFFRAY: I'll withdraw the question. I'll ask a different one. When you said 'as I understand it', is that from your direct knowledge and experience, having gone down to look at the tag board?---I have tagged on at that tag board.

PN196

When did you tag on at the tag board?---October. I have to check my dates, Ms Jaffray. I went down to conduct some dust monitoring on behalf of the members.

PN197

Mr Cowdrey, you've prepared two statements which you've said on oath are true and correct to the best of your ability?---To the best of my knowledge, not ability.

PN198

Yes, your knowledge. And you prepared each of those two statements carefully?---As best I could, Ms Jaffray, yes.

PN199

So you agree with my question?---Yes.

PN200

You prepared them carefully?---As best I could, yes.

PN201

Prior to preparing the second statement, you carefully reviewed the statements put on by the respondent?---I went through the statements, yes.

PN202

There were two, a Jade Buckman and Peter Christen?---That's correct.

PN203

You identified parts of those statements that you thought you needed to reply to and carefully dealt with that in your second statement?---To the best of my ability, yes.

PN204

In your first statement - do you have that handy?---I do, Ms Jaffray, yes.

PN205

In your first statement you give evidence about your involvement in the enterprise bargaining in 2019 and 2020. You attach minutes of the enterprise bargaining meetings. Correct?---Yes.

PN206

Each of those meetings were prepared by a designated minute-taker?---Yes.

*** RONALD COWDREY

XXN MS JAFFRAY

PN207

Then emailed to the parties?---Yes.

PN208

They did not purport to be an exhaustive statement of everything said at the meetings, did they?---No.

PN209

At no point in respect of any of the meeting minutes which you received did you email the minute-taker and identify problems with the minutes, did you?---I emailed the HR representative at the time, Scott Purdie, to identify any issues with any of the minutes, not just myself but other employee representatives around the table.

PN210

So issues that you had with the minutes?---Yes.

PN211

All minutes?---Yes.

PN212

I call for that email and attachment. If my friend could be so kind as to have that emailed through to me.

PN213

MS DOUST: I'm afraid I'm not in a position to do that until such time as I have an opportunity to confer with Mr Cowdrey. He's remote to me, Commissioner.

PN214

THE COMMISSIONER: Yes, but there's a call for that document to be produced in due course, Ms Doust.

PN215

MS DOUST: I understand the call, and unless I confer with Mr Cowdrey, I'm not in a position to give any answer to the call at this stage. So I can only say that it will have to be deferred until after his cross-examination is concluded.

PN216

MS JAFFRAY: Commissioner, I'm happy, when we have a morning tea break, if that's your habit, or over lunch, that whilst he is in cross-examination he's able to take steps to locate that document, and my submission is that there's no need to consult with his counsel about that.

PN217

THE COMMISSIONER: Yes. We'll deal with it over a break. So if you can please continue, Ms Jaffray.

*** RONALD COWDREY

XXN MS JAFFRAY

PN218

MS JAFFRAY: May it please the Commission. You've attached three sets of minutes to your first statement. The minutes for the meeting dated 11 December 2019?---Yes.

PN219

And 28 January 2020?---Yes.

PN220

And 5 February 2020?---Yes.

PN221

Do you agree that in each of those minutes there is a notation under the heading 19.10(d) to delete reference to underground changeover?---I do.

PN222

In none of these minutes that you've attached to your statement - and if you would like me to take you to them, let me know, Mr Cowdrey, but in none of these minutes was there any record of a reason for why the employee representatives wanted those words removed. Do you agree?---In the minutes there is no reference to why.

PN223

Yes. Do you agree with that?---I would agree.

PN224

You agree that during one or more of the meetings that you attended the company representatives had said at the meeting that they were contemplating moving pre-shift meetings underground. You're aware that they said that?---I can recall that, yes.

PN225

If I could take you to annexure JSB1. Do you have that in front of you, Mr Cowdrey?---I will get it. Yes.

PN226

Do you recognise this as an attachment to Mr Buckman's statement?---I do.

PN227

These are the meeting minutes for 25 February 2020 bargaining meeting?---They are.

PN228

This was the last set of minuted meeting minutes. Correct?---I don't know if that's entirely true, Ms Jaffray. COVID hit around that time, or COVID was hitting, and there was a pause on the meetings, and I think we reconvened via WebEx. So I would suggest that the minutes as they stand now, you're probably correct, however I would say that there would be recordings of those minutes from meetings onward.

*** RONALD COWDREY

XXN MS JAFFRAY

PN229

Mr Cowdrey, you weren't emailed minutes from those subsequent meetings, were you?---I would have to check, but I think I have got minutes of meetings after February, if that's what you're asking.

PN230

Commissioner, can I just have one moment? I call for those meeting minutes that you've just referred to for subsequent meetings, Mr Cowdrey.

PN231

THE COMMISSIONER: There's a call for minutes of additional meetings post 25 February 2020.

PN232

MS DOUST: Same response, Commissioner. I won't be in a position to answer the call until such time as the Commission breaks and I have an opportunity to speak with Mr Cowdrey.

PN233

MS JAFFRAY: In terms of meetings that you - sorry, before I - you see on the first page of the 25 February 2020 minutes that you are an attendee at that meeting?---I am.

PN234

THE COMMISSIONER: The first page, Ms Jaffray, just for completeness, you're still referring to JSB1?

PN235

MS JAFFRAY: Yes, Commissioner. If I take you to your statement and take you to paragraph 17 of your first statement - if you could have that handy, as well as the minutes that I've taken you to?---Yes.

PN236

Paragraph 17 you refer to a meeting on 5 February. Do you agree that you don't refer to any other meetings after 5 February?---In my statement?

PN237

In your statement?---But I don't refer to any other meetings?

PN238

Yes?---No, I don't.

PN239

Where in this statement do you refer to meetings after 5 February?---No, I said no, I don't.

PN240

I thought you said - - -

*** RONALD COWDREY

XXN MS JAFFRAY

PN241

THE COMMISSIONER: Yes. I think he said no, he doesn't refer to meetings, but I think it may have been interpreted as no, he doesn't agree with the proposition you put to him.

PN242

MS JAFFRAY: Yes, that's how I understood it. If I take you back to the meeting minutes for 25 February 2020?---Yes.

PN243

Do you agree that these are more recent meetings than what you've attached in your statement?---More recent meetings as to where?

PN244

Sorry. More recent meeting minutes than what you have attached in your statement, you agree with that?---From 5 February?

PN245

Yes?---Of course.

PN246

Can I take you to page 6 of 13 of those minutes?---Yes.

PN247

You see there's a reference to 19(d)?---I do.

PN248

Then under that there's the phrase, 'discussed deleting reference to underground changeover'?---That's correct.

PN249

And under the first bullet point, beneath that heading, there is a recording that you said you would like company to add wording, 'protect employees for payment of additional time worked', do you see that?---I do.

PN250

That's a correct notation of what you said at that meeting, that's correct?---If it's on there it's correct.

PN251

This comment is made in the context of changing the wording from the 2015 enterprise agreement, you agree?---No, I don't. It's not in that context.

PN252

Well, this is a negotiation to change the wording?---To remove – no – no, sorry, not to change the wording; to remove the reference to meetings being held underground.

PN253

Which was previously the 2015 agreement?---That was in the 2015 agreement. It wasn't to change the wording. It was to remove the reference.

*** RONALD COWDREY

XXN MS JAFFRAY

PN254

But you agree that what was in the 2020 agreement had wording which was changed from what was in the 2015 agreement, you agree with that?---No, I do not.

PN255

So you - - -?---I will state that the wording that was in the 2015 agreement, which had reference to 'meetings being held underground if travelling arrangements were made' was removed. The wording was not changed, Ms Jaffray; it was removed.

PN256

So your evidence before the Commissioner is that there was no change to the wording in the previous clause, but all that occurred is the removal of the reference to 'underground changeover'?---No. I'm answering your question that you asked me about changing the wording, and all I'm saying is that the reference to the 'underground meetings' – or 'meetings being held underground' was removed, right. We didn't change the words about underground, and they're not in the clause anymore.

PN257

No, I was talking about the context of the discussion in respect to deleting reference to 'underground changeover' was in the context of considering the changes proposed to what was in the 2015 agreement. You agree with that?---The context of the comment that you asked is noted in the minutes – okay, the context of that, as I recall in that meeting, was employees were, and are, concerned that they would be spending extra time underground, and if the underground meetings were left in the agreement, that we needed to make sure that there was a safeguard for employees to be properly remunerated for spending more time underground because of the meetings being held there.

PN258

You're aware that in the 2015 agreement the wording was, 'on the job is the pre-shift meeting room?' Are you aware that was the wording in the 2015 agreement?---Yes.

PN259

And so if the pre-shift meeting room were to be moved underground, then you agree that employees were concerned that 'on the job' would be arrival at the underground meeting room?---No.

PN260

The additional time you've referred to in this clause here, in the minutes, is referred to for time travelling to the pre-shift meeting room, isn't it?---No.

PN261

You haven't attached these minutes to your statement, have you?---I'm sorry?

*** RONALD COWDREY

XXN MS JAFFRAY

PN262

You haven't attached the minutes of this meeting to your statement, have you?---To the 25th, the meetings of the 25th?

PN263

Yes?---No.

PN264

And you did that because what's recorded here in these minutes is not helpful to the evidence that you're giving before the Commissioner, that's correct, isn't it?---No, it's not.

PN265

You don't mention anywhere in your first statement that one of the concerns you had in respect to this clause was to ensure that there was wording added to protect employees for payment of additional time worked; you don't refer to that concern in your statement, do you?---Not in my statement.

PN266

And that's because that concern is inconsistent with the evidence that you put in your statement that, for example, at paragraph 11 of your first statement, Mr Cowdrey, 'the discussions regarding removing the ability for pre-start and cross-shift meetings being held underground, as I recall, centred on management rejecting the request to remove the reference for meetings being held underground a couple of times.' That's not a true and accurate reflection of the nature of what was being discussed in these meetings, is it, Mr Cowdrey?

PN267

MS DOUST: I object to that question. There are at least four sentences before the ultimate sentence, such that I am unable to understand, and I don't think the witness will be able to clearly understand, nor will the transcript show, what was actually the subject of the question.

PN268

MS JAFFRAY: I withdraw the question, Commissioner.

PN269

THE COMMISSIONER: Okay.

PN270

MS JAFFRAY: Mr Cowdrey, you agree that nowhere in your statement have you referred to concerns about additional time worked being protected for employees in your statements; I think you'd with that?---In my statement – can you repeat the question again, sorry?

PN271

You've already said to me, and I'm just refreshing your memory here, that you've agreed that your statement does not identify your concern in this meeting minute that you would like company to add wording to protect employees for payment of additional time work. Do you agree with that?---In my statement – I agree. Yes, you're right. It doesn't say it in there.

*** RONALD COWDREY

XXN MS JAFFRAY

PN272

You've already agreed that the minutes attached to your meetings do not identify any reason for why the employees wanted 'underground changeover' removed. Do you agree with that?---I'll agree that the minutes don't, but to your further point earlier on, the minutes don't reflect everything that was spoken about.

PN273

I put it to you that what's identified in these minute meetings is the first reason identified in any of the minutes for why the employees wanted 'underground changeover' removed; I put that to you. Do you agree with that?---What I will agree with, that the minutes don't reflect that. However, to your earlier point, the minutes don't reflect every conversation that was taking place in relation to the negotiations.

PN274

I'm asking about what the minutes have recorded, Mr Cowdrey?---Yes, look, answering – sorry, go on.

PN275

No, that's okay. If I could just direct you back to my question. You agree that the minutes, the first reason given is found in the 25 February minute meetings and no previous reference to a reason given is identified; you agree with that?---What I will agree with is those minutes reflect a concern about spending extra time underground if meetings were held underground, right. However, I'll repeat what I just said before to your earlier point, Ms Jaffray, the minutes do not reflect every conversation around the negotiations.

PN276

Well, you've taken the time, as you've told the Commissioner, to carefully review the evidence when you're preparing your reply statement. Have you identified in your reply statement any concerns you had about missing information in the 25 February 2020 minutes?---No.

PN277

And that's because there isn't any material missing information in these minutes, is there, Mr Cowdrey?---I would disagree with that.

PN278

Now, this statement's attached to Mr Buckman's statement. If I could ask you to turn to that statement?---His statement itself, Ms Jaffray, or - - -?

PN279

Yes?---Yes. Okay.

PN280

You haven't replied to any matters raised by Mr Buckman in his statement in your second statement, have you?---Have I replied to anything that Jade said, is that what you're saying?

*** RONALD COWDREY

XXN MS JAFFRAY

PN281

No. I'm putting it to you that you have not replied specifically to anything raised by Mr Buckman in his statement?---No, I haven't.

PN282

If I could ask you to move to paragraph 16 of his statement?---Yes.

PN283

Where Mr Buckman says that:

PN284

At one of the initial meetings a member of the employee bargaining team explained that they wanted the reference to be removed, because –

PN285

and this is the reference to 'underground changeover' –

PN286

because - - -

PN287

?---Yes, I see that.

PN288

If pre-shift meetings were located underground, employees would have to be ready to work approximately 15 to 30 minutes earlier, without being paid for it, to catch the cage to go underground, be on the job 15 minutes prior to the shift commencement time.

PN289

Do you see that paragraph?---I see that paragraph, yes.

PN290

You haven't put on any evidence to the effect that you didn't hear communications at the meeting to that effect. I want to put it to you that that's because you heard communications to that effect taking place?---I didn't put anything in reply to that statement because I didn't – like, I didn't hear anything to that effect at all.

PN291

Well that's entirely different. That would have required you, with respect, Mr Cowdrey, to have put on reply evidence saying you disagree with paragraph 16. I'm putting to you that the reason why after telling the Commissioner that you carefully reviewed the statements of the respondent that you agreed with what was said at 16, and that is why you did not deal with it in your reply statement. That's correct, isn't it?---No.

PN292

And you understand it's the first time the Commissioner is hearing that you disagree with paragraph 16?---Yes. Right. May I ask but, if I would've disagreed with paragraph 16 - - -

*** RONALD COWDREY

XXN MS JAFFRAY

PN293

THE COMMISSIONER: Mr Cowdrey - - -?---Sorry.

PN294

You're under cross-examination. It's appropriate that you answer questions - - -
?---Sorry.

PN295

MS JAFFRAY: Now, it's not correct that all underground crews start at 7 am or 7 pm, is it?---As far as I'm aware it is – I will add to my statement that I believe that there are some underground maintenance employees that may start earlier, and I – yes, I think that might (indistinct) correct to say, Ms Jaffray.

PN296

So you agree that it's not correct that all underground crews currently start at 7 am or have a crossover at 7 pm, you agree with that?---To the best of my knowledge, people covered under the Mining department in the classifications in the agreement start at 7 am. I believe that consultation has taken place for the underground maintenance employees to start at 6.30.

PN297

The evidence that you've given in your second statement assumes that any changes going forward in respect to the location of a pre-shift meeting is on the same roster system?---Well, there hasn't been any evidence to suggest that it's not going to be.

PN298

But if you can answer my question, Mr Cowdrey. Your evidence is premised on an assumption that any changes to the location of a pre-shift meeting will be on the same roster system?---So my answer's the same. I can only answer – I can only put forward what I know, and that is that the same roster system is being implemented, suffice as I just noticed, I just said earlier, Ms Jaffray, that I'm aware that some consultation has taken place with underground maintenance to move to 6.30.

PN299

So if there was evidence that the rostering system would be changed in order to roll out different start times for crews, you agree that parts of your evidence would not be currently correct as it stands?

PN300

MS DOUST: I object.

PN301

MS JAFFRAY: I withdraw the question. Have you ever attended a cross-shift meeting, Mr Cowdrey?---No, I'm not allowed to.

*** RONALD COWDREY

XXN MS JAFFRAY

PN302

You're aware that these meetings are quite short and generally only take two minutes?---So I would disagree with that. Where I stand in my right of entry I see the cross-shift meetings taking place, although I don't partake in them.

PN303

You're aware that Mr Christen has given evidence that:

PN304

A cross-shift meeting is quite short and generally only occurs for a couple of minutes.

PN305

You haven't put in your reply evidence that you disagree with that, have you?---No.

PN306

MS DOUST: I object to that question. Mr Christen has not given evidence. There is a witness statement that has been provided, but he hasn't yet reached the stage of averring it and so it's incorrect to put it to the witness in that way.

PN307

MS JAFFRAY: I withdraw that. Can I take you to page 17 of Mr Christen's statement?---17?

PN308

Yes?---Yes.

PN309

Do you see the first sentence, 'A cross-shift meeting is quite short and generally occurs for a couple of minutes?' Do you see that?---I do see it.

PN310

You haven't responded in your reply statement directing any concerns to this sentence, have you?---In my reply statement, no.

PN311

And that's because as a matter of truth don't disagree with that sentence, do you, Mr Cowdrey?---I disagree with that sentence. The reason I haven't put it in is I thought I'd get asked about it.

PN312

So - - -?---And you're asking me about it, right? Like, so I'm telling you I disagree with that statement from what I've seen.

PN313

So how many other matters do you disagree with which aren't identified in your statement, Mr Cowdrey? A number?---I couldn't tell you. I don't know, because you haven't asked me any questions. I disagree. I've put in my statement what I disagree with Peter, and you've asked me about that statement, so I'm disagreeing with it.

PN314

So when you said before to the Commissioner that you took efforts to carefully prepare reply evidence that was true and accurate, your evidence now is that it was missing a whole lot of evidence about which you disagree with the respondent's evidence, is that what you're saying, Mr Cowdrey?---No, that's not what I'm saying. I filled out my second – my reply statement I should say to the best of my knowledge and ability, right, as asked before.

PN315

But I've just taken you to paragraph 17 and you said you knew when you read it that you disagree, but you'd wait until questioning to tell the Commissioner that you disagreed with it?---And - - -?

PN316

And you're also telling the Commissioner that you prepared carefully reply evidence which was true and accurate to the best of your ability?---Yes.

PN317

Bringing matters of relevance to the Commissioner's attention?---I understand.

PN318

MS DOUST: No, I object to that.

PN319

THE COMMISSIONER: What's the basis of the objection, Ms Doust?

PN320

MS DOUST: My friend has incorrectly stated the content of the earlier evidence. I think she's added a gloss in the final part of it, which may be a submission she ultimately wants to make, but it's not based on the evidence.

PN321

MS JAFFRAY: Commissioner, the transcript will reflect what I've said. I think I put something initially about matters relevant, or issues he had raised in response. The transcript (audio malfunction), Commissioner.

PN322

THE COMMISSIONER: I'll allow the question, but it'll be subject to any submissions made later subject to weight. Perhaps if you re-ask the question, Ms Jaffray.

PN323

MS JAFFRAY: I'll ask a different question, Mr Cowdrey. You haven't been full and frank in your evidence as to everything you disagree with when you're preparing this reply evidence, have you?---I have to the best of my knowledge, Ms Jaffray.

PN324

Well, I've taken you to paragraph of Mr Buckman's statement. You disagreed with that. You didn't put that in your statement, did you?---No, I didn't.

PN325

You didn't put the 25 February meeting minutes in your statement, either your first or your second one, that's correct?---No, they're not in my statement.

PN326

And you haven't raised any concerns of the nature that we've heard about this morning in respect to the content of the minutes for the 25 February 2020 meeting, you agree with that?---I've answered that question before. Yes.

PN327

Now, if I could take you to paragraph 20 of your second statement?---Yes.

PN328

And ask you also to open up to paragraph 24 of Mr Christen's statement?---Yes.

PN329

Do you see at paragraph 24(d) Mr Christen says that the proposed plan is that the workers will meet with their counterparts before pre-shift meetings?---At (d)?

PN330

Yes?---'The workers will then meet their counterparts and hold their cross-shift meetings before the pre-shift meeting.'

PN331

Yes?---Yes, I do.

PN332

If I take you to paragraph 20 of your statement, you say here:

PN333

The crossover meeting is to take place with oncoming workers (which may not take place until the pre-shift meeting has commenced).

PN334

?---Yes.

PN335

Do you agree that that's inconsistent with paragraph 24(d)?---It's different to what Peter's saying, yes.

PN336

And that's evidence that you've given without explaining why you've taken a different approach to what the respondent's management team in respect of these changes has said?---So what's the question?

PN337

That evidence that you've given in respect of, 'which may not take place until the pre-shift meeting has commenced', is not reflected in the proposed approach by the respondent, is it?---It's different to what Mr Christen's saying, if that's what you're asking. My evidence is different to Mr Christen's, yes.

PN338

Yes, and if so, if you could just answer my question. You agree it's not part of the proposed approach by the respondent, what you've said at paragraph 20 in brackets? I'm not asking if it's different. I'm saying it's not part of the respondent's proposed approach?---Well, it's different – my evidence is different to Mr Christen's. I don't understand, sorry.

PN339

You've given some evidence about the temperature underground?---Yes.

PN340

You haven't distinguished between the underground work sites and the exit from the cage on platform 9L, do you agree?---I agree with that, yes.

PN341

And do you agree that the temperature at the exit from the cage on platform 9L is not necessarily the same as the underground work surface temperatures?---I would agree with that, Ms Jaffray, yes.

PN342

And the temperatures at platform 9L are not as hot as they are further underground where work - - -?---That's correct.

PN343

You haven't identified that in your statement, these matters, have you, Mr Cowdrey?---I haven't separated the 9 level from anywhere else, that is correct to say, Ms Jaffray.

PN344

If I take you to paragraph 22 of your statement?---Yes.

PN345

You refer to conditions underground are harsh, and temperatures are much hotter than on the surface?---Yes.

PN346

But if we look at the temperatures at platform 9L, they're relatively comparable to what's on the surface, that's correct?---I haven't taken temperature readings. I know there's fresh air – it's a fresh air area at the 9 level. That's how I'll answer that question.

PN347

And you haven't made that distinction there at paragraph 22, have you?---What distinction's that?

PN348

Well, the fact that there's fresh air at platform 9L compared to higher temperatures further underground?---No, I haven't made that distinction.

PN349

You haven't made that distinction in order to indicate to the Commissioner that it would be unreasonable for pre-shift meetings to occur underground, that's correct?---That's not correct.

PN350

Now, can I take you to paragraph 24 of your statement?---Yes.

PN351

You refer to the level 9 training room as being very compact?---Yes.

PN352

Do you know the size of this room?---Have I measured it?

PN353

Yes?---No.

PN354

Are you familiar with the development team meeting room?---No, I am not.

PN355

Have you heard of the 'production team meeting room'?---Underground?

PN356

No, on the surface?---I haven't visited them, but I do know that currently that meetings are held on the surface in different rooms.

PN357

So you haven't visited either of those two rooms I've just mentioned?---Have I been – I'm not allowed to. They don't let me in there.

PN358

Have you heard of the 'operations team meeting room'?---I know there are different meeting rooms on the surface, Ms Jaffray, if that's what you're going to keep asking me, yes.

PN359

So when you say 'it's very compact' in paragraph 24, are you trying to suggest to the Commissioner that the level 9 training room is smaller than the other on-surface training rooms?---Not at all. I'm saying in that statement that it's a small room as I – when I stood in there. Well, I haven't been in the other meeting rooms, so why would I say that to the Commission?

PN360

So it's just simply, having no experience of where - the size of other meeting rooms on the surface, you have an opinion that it's compact on level 9?---Based on my 53 years of living on the earth I believe that that room is compact.

*** RONALD COWDREY

XXN MS JAFFRAY

PN361

Yes, but - - -?---I don't have to visit other meeting rooms to know whether that room is compact or not. I'm sorry, but – yes, 53 years, I know what compact is. In my view, it's a compact room.

PN362

So if I put it to you that it's bigger than all the current on-surface meeting rooms that I've just referred to, what do you have to say about that?---I can't answer that, because I haven't visited the other rooms. However, what I will say to you is, if you're going to put all those employees, right, that visit those separate rooms on the surface in that one room, I would daresay that'd be compact. That would be my answer. But to answer your direct question, I can't answer that, because I haven't visited the other rooms. I just give evidence to suggest that.

PN363

If I can direct you to paragraph 24?---Yes.

PN364

Do you read paragraph 24 as all the crews moving at once?---Do I read it that way?

PN365

MS DOUST: Specify which - sorry, which statement (audio malfunction)?

PN366

MS JAFFRAY: (Audio malfunction) at paragraph 24. Sorry, and I'll withdraw my question. I'll take you to paragraph 24, Mr Cowdrey, and put to you that nowhere in this proposed change is it intended or identified that all the crews will be going to their pre-shift meetings at once. Do you agree with that?---Can you say that again, sorry?

PN367

I'm taking you to paragraph 24 of - - -?---Yes, I'm looking at it. I just – that question – can you repeat the question, sorry?

PN368

It does not state in this paragraph that the proposed changes include all the underground crews going to their pre-shift meeting at the same time?---My statement does not say that, no.

PN369

No, Mr Christen's statement does not say that?---Sorry. I'm looking at – sorry about that.

PN370

So Mr Christen's statement at paragraph 24?---No, it just references the 'workers' - - -

*** RONALD COWDREY

XXN MS JAFFRAY

PN371

Yes?--- - - - (indistinct) underground to the 9 level – 'workers', 'workers', 'workers.' So there is no distinction there that – yes, that all the workers will be down there at the one – in that statement, I would say.

PN372

Just as you haven't attended a cross-shift meeting, do I take it that you haven't attended a pre-shift meeting?---I'm not allowed in there, no.

PN373

One moment, Commissioner. Commissioner, I have no further questions.

PN374

THE COMMISSIONER: Any re-examination, Ms Doust?

PN375

MS DOUST: Yes.

RE-EXAMINATION BY MS DOUST

[11.44 AM]

PN376

MS DOUST: Mr Cowdrey, early in the cross-examination you were asked a question to this effect, that in none of the minutes – and I think the question referred to the minutes that were attached to your statement – was there any record of the reason why the employee representatives wanted the reference to 'underground changeover' removed, and you gave an answer to that where you said something about there being no reference to that in the minutes. Can I ask you, was there any discussion during those meetings of the reasons why the employee representatives wanted that reference removed?

PN377

MS JAFFRAY: I object.

PN378

THE COMMISSIONER: What's the objection?

PN379

MS JAFFRAY: Commissioner, the question was only focused on what was recorded in the minutes. The question did not refer to other types of communications. That was the basis upon which the question was asked. It is not appropriate for re-examination to travel outside the scope of it, because it's not necessary to clarify the answer in respect of what was recorded in the minutes, Commissioner.

PN380

THE COMMISSIONER: Ms Doust?

*** RONALD COWDREY

RXN MS DOUST

PN381

MS DOUST: Well, the witness gave evidence elsewhere that the minutes don't reflect everything that was spoken about in the meeting. I apprehend I'll be met ultimately with a submission along the lines of if something doesn't appear in the

minutes then it can't possibly have been discussed or mentioned, and that's the reason why I go to it.

PN382

THE COMMISSIONER: I'll allow the question.

PN383

MS DOUST: Do you remember the question, Mr Cowdrey?---No. Can you repeat it, please, Ms Doust?

PN384

I was taking you back to some evidence that you were asked about there being no reference in the minutes of the meetings attached to your witness statement about why the employee representatives wanted the reference to 'underground changeover' removed, and you gave some evidence to the effect that there was no reference in those minutes, and you later gave some evidence that the minutes don't reflect everything that was spoken about. My question is this: was there any discussion in the meetings about the reasons why employees wanted the reference to 'underground changeover' removed?---I can recall discussions taking place, because the initial claim was put forward at the first meeting, and I can recall discussions relating to, you know, more time being spent underground, not being paid for it, concerns around safety, those type of things, Ms Doust. I'm going back to 2020, so I'm trying to recall as best as I can for you.

PN385

I want to take you to some questions that you were asked about the comment in the minutes, and I believe these are minutes that were attached to your witness statement and I'll take you to them just presently, if you give me a moment. Just pardon me for one moment and I'll just pull up the reference. Yes, I believe it's in the minutes that are attached to Mr Buckman's statement?---Okay.

PN386

Do you have that reference?---I have the – yes, I do.

PN387

That's the minutes dated 25 February 2022, JSB1, and there is a passage at page 6 of 13 of those minutes under the heading, '19(d)'?---19(d)?

PN388

Yes?---Yes.

PN389

You were asked in respect of the notations that appear under that, and in particular the first notation, which says:

PN390

One would like company to add wording to protect employees for payment of additional time worked.

*** RONALD COWDREY

RXN MS DOUST

PN391

?---Yes.

PN392

And you were asked a question to this effect: the additional time that's referred to there was time travelling to the pre-shift meeting room. Do you recall that question?---I do.

PN393

Your answer was, 'No.' Can you tell me what was the additional time that was referred to there?---The additional time that people would spend underground itself; the reliance on the cage; you know, the reliance on having to maybe travel up the decline if the cage had tripped out or wasn't working. There was, as I recall, a range of – a small range of concerns around meetings being held underground. As I understand it, the company had tried this in 2016 or so and it didn't work, so they went straight back to the surface.

PN394

Now, just while I'm asking you about that minute, there's a reference there to:

PN395

Chris discussed there is a current study relating to shaft 1 for man-riding.

PN396

?---Yes.

PN397

Are you able to identify what that notation refers to?

PN398

MS JAFFRAY: I object. Commissioner, this doesn't arise out of any of my questions. This is an attempt by my learned friend to add in evidence which her client hasn't dealt with at all in his reply statements.

PN399

THE COMMISSIONER: How does that arise through re-examination, Ms Doust?

PN400

MS DOUST: Well, some negative propositions are, I anticipate, going to be put by my friend about what was discussed at the meeting and what were the issues that were alive during the course of the meeting, and I'm attempting to go to that.

PN401

MS JAFFRAY: With respect, Commissioner, these were matters which should have been put and squarely dealt with by Mr Cowdrey in reply. That was part of my cross-examination and he didn't deal with it. It is not appropriate for it to be mocked up, respectfully, in re-examination.

PN402

THE COMMISSIONER: I won't allow the question, Ms Doust.

*** RONALD COWDREY

RXN MS DOUST

PN403

MS DOUST: I'm sorry, did you say you will allow or you won't allow it?

PN404

THE COMMISSIONER: I won't allow the question.

PN405

MS DOUST: Thank you. Mr Cowdrey, the question I asked last about the reference to 'additional time', following that question my friend put this proposition to you: 'You didn't attach the minutes of the 25 February 2020 meeting because they were not helpful', and your answer to that was, 'No.' Can I just ask you was your answer accepting the proposition that the minutes were not helpful or was your answer denying that you failed to attach them for that reason?---My answer was no, that I didn't attach the minutes. It wasn't for any reason whatsoever.

PN406

You were asked some questions about Mr Christen's evidence about the cross-shift meetings being quite short and only a couple of minutes, and you said you disagree from what you've seen of those meetings. What have you seen of those meetings?---So where I've been - - -

PN407

MS JAFFRAY: Sorry, Commissioner, I object to these questions. This is hearsay on hearsay here, without it being put in his reply statement and not necessary to clarify his answer, which is he doesn't have experience of cross-shift meetings, has only seen them.

PN408

THE COMMISSIONER: He did say he observed them. He did say in his evidence that he observed cross-shift meetings even though he wasn't able to attend or participate in them. I'll allow the question in terms of – Ms Doust, the question you're asking is limited to what he observed.

PN409

MS DOUST: Yes. His answer was, 'I disagree from what I've seen.' My question was, 'What have you seen' - - -

PN410

THE COMMISSIONER: Yes, I'll allow the question.

*** RONALD COWDREY

RXN MS DOUST

PN411

MS DOUST: Mr Cowdrey, what have you seen to lead you to disagree with what Mr Christen said about those meetings?---Yes, so I've seen members come out of their pre-start, go straight to their crossover with bits of paper, which I assume, because I don't know, are the plans for the night or the day shift, for the next shift, and then they go and speak to them about concerns – and this is as I understand it - around the plant, or the drill, or the ground that they're actually operating in. So what I've observed is meetings that take longer than two minutes - and I respectfully disagree with Peter on this - they're an important part of

shift changeover, and I have observed members speaking to each other in relation to that for longer than two minutes. That's what I've observed, Ms Doust.

PN412

Thank you. Nothing further, Commissioner. Might the witness be excused?

PN413

THE COMMISSIONER: Thank you, Mr Cowdrey. That concludes your evidence. You can be excused or remain online to observe the proceedings?---No worries. Thank you.

<THE WITNESS WITHDREW

[11.55 AM]

PN414

THE COMMISSIONER: Ms Doust, does that conclude the evidence for the - - -?

PN415

MS DOUST: That's the evidence for the applicant, Commissioner.

PN416

THE COMMISSIONER: Very well. I'm just looking at the time. It's 12 o'clock. Ms Doust, do you require both of the respondent's witnesses for cross-examination?

PN417

MS DOUST: Yes, I do.

PN418

THE COMMISSIONER: Would it be convenient to take a break now, and when we come back we'll deal with – Ms Jaffray, I assume you'll be dealing with Mr Christen first?

PN419

MS JAFFRAY: Yes, and could I just inquire as to the length of the break, Commissioner?

PN420

THE COMMISSIONER: Yes. Ms Doust, do you anticipate – I know this isn't a firm number, but just in terms of your anticipation - how long do you anticipate being with each witness?

PN421

MS DOUST: I would have thought in the territory of between 15 and 30 minutes, Commissioner.

PN422

THE COMMISSIONER: Well, we might come back at 1 o'clock, if that's - - -

*** RONALD COWDREY

RXN MS DOUST

PN423

MS JAFFRAY: Commissioner, could I – I think it's 2 am currently in Switzerland. In an hour it's even later. He's heavily jetlagged.

PN424

THE COMMISSIONER: Do you want - - -

PN425

MS JAFFRAY: Could we perhaps have a short break of five to 10 minutes, and then if I could respectfully request that he be cross-examined and then we have a longer break for lunch?

PN426

THE COMMISSIONER: We'll proceed on that basis, and just in terms of the call for documents, in that short break, Ms Doust, if you can liaise with Mr Cowdrey and – well, we'll deal with those after we deal with Mr Christen's evidence then.

PN427

MS DOUST: I've already put the steps in motion, Commissioner, and I hope to be able to have an answer shortly.

PN428

THE COMMISSIONER: Very well. We might take a short break. I think in the circumstances if we return at 5 past 12.

PN429

MS DOUST: If it please the Commission.

PN430

MS JAFFRAY: Thank you.

PN431

THE COMMISSIONER: The Commission will adjourn until then. Thank you.

SHORT ADJOURNMENT

[11.57 AM]

RESUMED

[12.09 PM]

PN432

THE COMMISSIONER: Are we ready to proceed, Ms Jaffray?

PN433

MS JAFFRAY: Sorry, Commissioner, you might have – I had you on mute, my apologies.

PN434

THE COMMISSIONER: Sorry. Are we ready to proceed?

PN435

MS JAFFRAY: Yes, Commissioner, we are.

PN436

THE COMMISSIONER: Thank you. I'll have my associate administer the affirmation to Mr Christen.

PN437

THE ASSOCIATE: Mr Christen, can you please state your full name and address?

PN438

MR CHRISTEN: Peter Christen, (address supplied).

<PETER CHRISTEN, AFFIRMED [12.10 PM]

EXAMINATION-IN-CHIEF BY MS JAFFRAY [12.10 PM]

PN439

THE COMMISSIONER: Ms Jaffray.

PN440

MS JAFFRAY: Mr Christen, can you state your full name for the Commission?---Peter Christen.

PN441

And could you (audio malfunction) your business address for the Commission?---The business address is 1 Louth Road, CSA Mine.

PN442

Have you prepared a statement for these proceedings?---I had provided my statements on 9 December.

PN443

Yes. Do you have a copy of that statement in front of you?---Yes.

PN444

Could I ask you to move to paragraph 24 of that statement?---Yes.

PN445

Is there anything you would like to clarify in respect of what you've stated there that you've admitted to include, in respect to the timing – of the staggered timing in respect of the proposed changes?---Yes. Sorry, I was just reading it to refresh my memory on that. So each crew, or different crews will start at slightly different times. We had a presentation that outlined this in greater detail, though I don't have it in front of me, so the exact times, but each crew would start at slightly different times, approximately 15 minutes between them, between the development crews, the production crews and operation crews to ensure they weren't all starting at the same time and then creating a bottleneck at the cage brace or at the underground meeting room.

PN446

Can I take your attention to paragraph 24(d)?---Yes. 'The workers will then meet their counterparts, if any', is that correct?

*** PETER CHRISTEN

XN MS JAFFRAY

PN447

Yes. Have you omitted anything in this subparagraph as to the effect of the cage going down where the crew goes down to meet the counterparts – have you omitted anything in respect of when - - -

PN448

THE COMMISSIONER: Ms Jaffray, are you seeking to adduce further evidence-in-chief, or are you seeking to deal with amendments?

PN449

MS JAFFRAY: I had understood there was something missing in that, but you're right, Commissioner, I don't want to lead it out of him. Mr Christen - - -

PN450

THE COMMISSIONER: Well, perhaps just ask - in relation to paragraph 24(d), Mr Christen, is there anything further you wish to say about that paragraph or any way that paragraph should be amended?---Yes. So the ideal scenario is that people would go down, meet their counterparts underground and have their handover meetings there. However, if they were to miss the cage, they would be at the surface there where their counterparts - when they returned to the surface would see them there and also have an opportunity to have a brief handover at the surface, assuming that that person was only waylaid by a couple of minutes and not 15 or 20 minutes for some other reason, in which case there might be some loss(?). So they still – they do have the opportunity to be both ideally underground till they have their handover, but they can see each other on the surface.

PN451

And is that for the cross-shift meetings or the pre-shift meetings?---Just for the cross-shift meetings. The pre-shift meetings would be held underground. In part (e), the pre-shift meetings would be underground.

PN452

Do I take it, Ms Jaffray, that that should be treated as additional evidence-in-chief rather than an amendment to the statement?

PN453

MS JAFFRAY: Yes, Commissioner.

PN454

THE COMMISSIONER: Well, we need to deal with the statement, so firstly, are there any further amendments or corrections to the statement?

PN455

MS JAFFRAY: Mr Christen?---Not that I'm aware of.

PN456

Is the statement otherwise true and correct to the best of your belief?---Yes.

*** PETER CHRISTEN

XN MS JAFFRAY

PN457

Commissioner, I'm in your hands. The evidence that Mr Christen's just given is necessary in order to properly understand paragraph 24.

PN458

THE COMMISSIONER: Yes. Well, I think we'll treat that as additional evidence-in-chief rather than corrections to the statement.

PN459

MS JAFFRAY: May it please the court.

PN460

THE COMMISSIONER: Ms Doust can then – it'd be open to Ms Doust if she wishes to ask any further questions on that. Ms Doust, in terms of the tender of the statement, I understand you have some objections filed with my Chambers this morning in relation to paragraph 40.

PN461

MS DOUST: Might I just ask that those objections perhaps be given a marking, an MFI marking, just so that they form part of the record, Commissioner, and I'll otherwise deal with that matter ultimately in submissions?

PN462

THE COMMISSIONER: Ms Jaffray, do you wish to say anything about whether those documents be marked for inspection?

PN463

MS JAFFRAY: No, Commissioner.

PN464

THE COMMISSIONER: I might just deal with it in order then. The respondent's objections to the statements of Ronald Cowdrey will be marked MFI1.

MFI #1 RESPONDENT'S OBJECTIONS TO THE WITNESS STATEMENTS OF RONALD COWDREY

PN465

And the document titled, 'Applicant's schedule of objections to respondent's witness statements', will be marked MFI2.

MFI #2 APPLICANT'S SCHEDULE OF OBJECTIONS TO RESPONDENT WITNESS STATEMENTS

PN466

MS DOUST: Thank you, Commissioner.

PN467

THE COMMISSIONER: There's no objection to the tender of Mr Christen's statement subject to your objection being given the appropriate weight?

*** PETER CHRISTEN

XN MS JAFFRAY

PN468

MS DOUST: No, Commissioner. Thank you.

PN469

THE COMMISSIONER: The statement of Mr Christen dated 9 December and set out at pages 251 to 258 of the hearing book will be exhibit R1.

**EXHIBIT #R1 WITNESS STATEMENT OF PETER CHRISTEN
DATED 09/12/2022**

PN470

Does that conclude the evidence-in-chief, Ms Jaffray?

PN471

MS JAFFRAY: Yes, Commissioner.

PN472

THE COMMISSIONER: Thank you. Ms Doust.

PN473

MS DOUST: Thank you, Commissioner.

CROSS-EXAMINATION BY MS DOUST

[12.19 PM]

PN474

MS DOUST: Mr Christen, I'll try to be short?---Thank you.

PN475

Can I just first of all ask about your history, and that appears at paragraph 10 of your witness statement? You say that you continued as director and principal engineer at Christen Consulting up until August 2021?---Yes, correct, but there was very inactive in that space until I officially sort of closed the business. It was mostly active between '16 and '18 – 2016 - - -

PN476

You commenced with Glencore in September 2019. Was that commencing directly into that role of general manager at the CSA Mine?---Yes.

PN477

Now I'll just ask you, you've dealt with both pre-shift meetings and cross-shift meetings in your statement. The first question I want to ask you is this: do you regard a pre-shift meeting as a necessary part of the shift changeover?---At pre-shift meeting, yes. That is necessary to have as part of the preparations to go underground and get into the job, yes.

PN478

Is it necessary to facilitate the shift changeover?---Sorry, is the pre-shift necessary to facilitate the shift - - -

*** PETER CHRISTEN

XXN MS DOUST

PN479

Facilitate the shift changeover?---I don't sort of see that the pre-shift is necessary in all aspects to facilitate a shift changeover, no, because it would – yes.

PN480

All right. You also refer to cross-shift meetings. Are they also known as crossover meetings?---Yes.

PN481

Are those shift meetings necessary to facilitate a shift changeover?---A cross-shift meeting would be necessary or ideal to have in a handover, yes, of shifts, yes.

PN482

Do you agree with this proposal: in order for a worker to proceed underground, they must be changed and have done everything to be ready to commence work?---Sorry, for a person to - - -

PN483

MS JAFFRAY: I object to that question, Commissioner.

PN484

THE COMMISSIONER: What are the grounds for the objection?

PN485

MS JAFFRAY: To be changed and ready to commence work is quite a broad statement, and apt to lead the witness into confusion if it's not clarified.

PN486

MS DOUST: I'll do it the long way then, Commissioner.

PN487

Mr Christen, there is certain gear that a worker must don before they can proceed underground; you agree with that?---Yes, correct. There are is mandatory safety equipment they need to wear.

PN488

Just tell me the sort of gear that they need to wear before they can commence underground?---Our mandatory safety equipment would be steel cap boots, long pants, long shirt - both with reflective stripes and hi-vis colours - a hard hat, glasses, a self-rescuer, a cap lamp and a miner's belt which would hold the self-rescuer.

PN489

All right. So they need to have all that gear on before they can commence work, don't they?---Yes, correct.

PN490

They must have all of that gear on in order to enter the cage; agreed?---Yes, correct.

*** PETER CHRISTEN

XXN MS DOUST

PN491

Now, do you agree with me that shift commencement time for underground workers is currently 7 am for the day shift, 7 pm for the night shift?---Currently the shift start is slightly staggered already. The development crew start a little bit earlier; their pre-shift meeting is at 6.30. The production crew start at 6.45, their pre-shift meeting.

PN492

All right. That's about 15 minutes beforehand that occurs at the 6.45 - doesn't it?---For the production crew, yes. The development crew starts at a little bit earlier than that and the maintenance crew starts at 6.30, as well (audio malfunction).

PN493

Sorry, so maintenance – there has been some discussions about them actually commencing at half past 6; is that right?---They currently start their meetings at about half past 6.

PN494

About half past 6, all right. Thank you. For the underground workers in production it's the case, isn't it, that the pre-shift activities, the pre-shift 15 minutes, starts at 6.45, but the actual shift is from 7.00 until 7.00?---Yes, their pre-shift meeting starts at 6.45, when they're expected to be at that start, so, yes.

PN495

Yes, all right. At paragraph 22 of your statement you say that it's difficult to monitor whether or not cross-shift meetings occur or are always effective?---Yes, that's what is there.

PN496

What I want to suggest to you is that if you're not in a position to monitor that, you weren't in a position to say at paragraph 21(a) that there are workers who are not willing to have such a meeting; do you agree with that?---Only through their own admission saying that they don't always have them.

PN497

Well, that's not saying that they're not willing to have them, is it?---I'll just read my statement there. Sorry, I'm not sure – so part 22 where it says 'not willing to have them'?

PN498

Yes?---It says they don't all occur and they're not always effective. They're not willing to stay late to have them on some occasions or some people - I can't sort of presume that they're not willing to have them because they've stated that they don't stay around for them.

*** PETER CHRISTEN

XXN MS DOUST

PN499

Right, and there is no mandatory instruction, is there, that there is a cross-shift meeting at the end of every shift?---The expectation is set that there is one. However, as I've said, it's difficult because there are 20 or 30 separate little meetings happening to judge how effective they are occurring.

PN500

All right. Currently is it the case that when those meetings occur on the surface, that the cross-shift meeting will occur after the pre-shift meeting has occurred?---It would occur after the pre-shift meeting.

PN501

Yes?---If the people from night shift are all still there, yes. They were happening during for some time, yes.

PN502

Yes, all right. I just want to ask you about the proposed changes to current practice. You made mention to my friend of each crew or different crews starting at slightly different times. Do you recall giving that answer?---Yes.

PN503

Can you just tell me what is the suggestion about staggering the times between the crews?---So the proposal would be so that each cage, which has a limited capacity and the different crews, would start at approximately 15-minute increments separating them to start. They have the opportunity to go underground and then have their meetings and so forth without everyone bottlenecking at the same place. So it would be all of the same crew of people, the functional groups, all starting at the same time, but the different functional groups starting slightly staggered.

PN504

So instead of someone having an arrangement whereby they were doing a night shift that went from 7.00 to 7.00 with the 15-minute prior, are you saying you might bring that block of time forward or back by half an hour; is that right?---We won't be looking at that as 15 minutes is the current – from what their current movements are. It looks like for the mobile maintenance team, the move of - - -

PN505

So a 15 - - -?---The others aren't staggered by that 15 minutes.

PN506

Apologies, it's hard to know when you've finished precisely. I'm sorry for interrupting. Are you saying that a 15-minute change at either end in total would be sufficient for all of the staggering to be carried out or would some groups be pushed forward by 15 minutes, some groups pushed forward by a further 15 minutes?---The production crew would stay exactly as they are. The development crew would stay as they – slightly, I think, five minutes or so, and then the mobile maintenance team is, I think, 15 to 20 minutes earlier they would start.

PN507

All right, so - - -?---I don't have the exact time frames in front of me, sorry, but, yes, it's that – because some of them will stay exactly as they are and some will change slightly.

*** PETER CHRISTEN

XXN MS DOUST

PN508

So for those employees there is actually a change to their rostered hours of work, isn't there?---Yes, that would be – the start and finish time would slightly change.

PN509

Now, can I just suggest this to you: that change to rostered hours of work is not something in respect of which the company has engaged in consultation pursuant to the agreement, is it?---We have consulted with all the mobile maintenance crews. There was discussions with them. Grant Paterson, one of the managers who has coordinated this, went to each of the crews to talk through that specifically - with that crew, because they are the crew that is moving time. The five minutes that the development crew, I think, is moving is not changing. The production crew are not changing start times in our proposed - - -

PN510

What is it, are you actually changing the times for any underground workers?---Yes, the mobile maintenance crew are moving and they did have a consultation with each of the four crews.

PN511

Other than mobile maintenance, are you staggering the times for the crews for their rostered hours of work?---The stagger will be occurring. Development and production currently already have a 15-minute offset and they won't be changing.

PN512

No, no, I'm asking you whether you have a proposal to change those hours going forward?---No, no, because there is already an offset – a staggered offset – between those two departments.

PN513

All right. Now, I will just ask you, just looking at that paragraph 24 – at paragraph 24(c) you say about this proposal:

PN514

It is proposed that each crew will enter into the lift at the same time.

PN515

?---Yes, so each functional group, being production, being a crew, will hop in at the same time or development as a crew or the operations crew.

PN516

I just want to understand this. Does 'crew' there mean each - - -?---Sorry, in this instance 'crew' would mean each functional group. So on there is A crew or B crew. That might cause confusion, but each functional group we call a crew, as well. Apologies for the confusion in that, but, yes, functional group being development or production or - - -

PN517

How many are in each functional group?---We sort of say there is between 15 to 25 roughly.

*** PETER CHRISTEN

XXN MS DOUST

PN518

All right. So the cage rule just takes simply that group and no part of any other group? Will it just be that or might some other groups be split and some of them put in with another group?---There will be some overflow from smaller groups that will go in where they can fit in, which will be the surface maintenance crews or technical professionals that need to go underground beforehand or something like that.

PN519

But this is the situation, isn't it: even once you take the underground maintenance teams or those workers out of the picture, you still have to descend into the mine all of the mining operations employees that are rostered on that day shift and night shift; do you agree with that?---Yes.

PN520

That is how many employees in total?---The mining operations between development and production groups is about 70, I believe.

PN521

All right. So that's two plus cages to descend into the mine; do you agree with that?---Yes.

PN522

There will be down in the mine to come out another two-plus cages worth of workers?---Yes.

PN523

I think you say that between the surface and the bottom it takes four minutes. Do you agree it might be a bit longer than that; five to seven?---The timing that we put is – that I've been provided as four minutes is a typical cycle time to, you know, get the cage down from surface to 9 level or back.

PN524

The ultimate descent of the cage is left to the winder driver, isn't it? They need to ensure that it's descending safely?---Yes, correct, yes.

PN525

Of course once the cage gets to the bottom you have to allow time for the people who are in that cage to leave the cage?---Yes.

PN526

Then for anyone waiting to then come into the cage?---Yes, correct.

PN527

Then it takes just as long, doesn't it, if not more, to ascend to the surface?---Yes - it takes the same amount of time to go up as go down, but, yes.

PN528

The thing is there is only one cage, isn't there?---Yes.

*** PETER CHRISTEN

XXN MS DOUST

PN529

You don't have a second cage to speed this process of people coming in and out of the mine?---No.

PN530

All right. Now, what has occurred in the past or been a problem at the mine has been bottlenecks at shift changeover time?---Sorry, can you ask that again.

PN531

There has been bottlenecks at the cage at shift changeover time in the past, hasn't there?---There currently is where everybody gets to the cage at the same time or similar time.

PN532

You have a group of employees waiting at the bottom to get into a cage to come up and a group of employees waiting at the surface to get into a cage to come down?---At separate times offset, but, yes, that occurs. There is a group of people waiting at the bottom to get out and then half an hour or 45 minutes later there is a group of people waiting to get down, but not at the same – not currently people at the bottom and the top both waiting to get in or out.

PN533

Yes. At paragraph 26 you refer to your proposed approach being designed to approve efficiencies in respect of workers travelling to and from underground?---Yes.

PN534

By 'efficiencies' what you mean is this, don't you: the workers who are coming off the shift really wear the risk of any delays in the cage. That's right, isn't it?---No, by 'efficiencies' we meant that currently we have a cage that goes up full and then down empty, then up full and then down empty and repeats that four times, whereas with the proposal we would have a cage that goes up full and then down full so instead of eight cycles we would have four cycles and, as you described, that cycle is 15-odd minutes so we would be saving ourselves that time there.

PN535

But if there is any delays and the worker coming off shift has to wait for their opposite number, then they are the person that wears the risk in that situation, aren't they?---If somebody's cross-shift is not there at the bottom of the cage they would need to assume that that person isn't there, as they do now. There is a number of reasons that a person wouldn't be at the bottom of the cage or there, because of sickness or injury or illness or some reason they didn't come into work, so – yes, they would not wait for that person to show up.

*** PETER CHRISTEN

XXN MS DOUST

PN536

So they would assume that that person was not at work rather than that they were up at the surface?---They can meet them at the surface, as was asked prior. There is the opportunity to meet them at the bottom of the cage when they came out. If

they weren't there, they would hop on the cage and go up. If they still weren't there waiting at the surface brace, then they could do some further investigations; check if they were at a drug test or a hydration test or for some reason weren't there, or that they were just not in on that day.

PN537

Are you quite sure that this system is going to result in efficiencies, Mr Christen? It does sound like it might be rather a shemozzle?---I believe it will result in efficiencies, in that we will be able to get the people down the cage and back up the cage quicker than we currently do.

PN538

But in any event what you're proposing involves, doesn't it, the workers who are attending for that 15-minute period prior to shift commencement - that they proceed immediately to the cage and be proceeding underground during that 15 minutes. That's right, isn't it?---Yes, the expectation is that people are ready on the job and that time starts on the job at the surface cage brace.

PN539

So that is at that 15-minute point prior to the shift commencement time at 7.00 or whatever time it is?---Yes. As is my understanding, the EA says that they're ready on the job at that time (audio malfunction).

PN540

You're saying they need to be clothed and ready at that time, which is 15 minutes prior to the shift commencement time.

PN541

MS JAFFRAY: Commissioner, I object just because the use of the word 'ready' in the clause which I'm anticipating a submission at the end of the day is not the same as 'changed', so there is 'ready to commence work' and there is 'changed and ready'. Can my friend just clarify when she is using the word 'ready', what she means by that.

PN542

MS DOUST: Well, that's a cynical objection, Commissioner.

PN543

THE COMMISSIONER: I understood that Ms Doust was asking a question in the context as it appears in clause 19.10.1, but I might be wrong.

PN544

MS JAFFRAY: Yes.

PN545

THE COMMISSIONER: Ms Doust, is there anything you want to say in response?

PN546

MS DOUST: I don't need to say anything in response to that.

*** PETER CHRISTEN

XXN MS DOUST

PN547

THE COMMISSIONER: I will allow the question. You might have to re-ask it.

PN548

THE WITNESS: Could you, please, yes.

PN549

MS DOUST: Mr Christen, you are really suggesting that the workers have to be in that state of readiness at that point in time 15 minutes prior to the designated shift commencement time, aren't you?---Prior to going underground people need to be ready for that environment, yes, so they need to have all their personal protective equipment on and so forth, so, yes.

PN550

They need to be in that state of readiness in that 15-minute period that's referred to as the pre-shift meeting period, don't they? That's what your proposal involves?---Yes, ready to start work at that time, yes, with all equipment and personal protective equipment, yes.

PN551

So you refer to the entire period of work as a period of 12 hours and 15 minutes in total. You're saying that they need to reach that state of readiness right at minute one of that 12-hour and 15-minute period, don't you?---Yes.

PN552

Yes, okay. Thank you. Just one thing, Mr Christen. You accept, don't you, that there is intrinsic risks in performing work in an underground mine, don't you?---I think we can manage most of the risks there, but, yes, it is an environment that has risks, yes.

PN553

Yes, one of the risk is rock fall, isn't it?---Correct, yes. That's one of our primary risks, yes.

PN554

And form a collapse?---Yes, yes, that is a risk.

PN555

All right. In some circumstances workers may need to be evacuated from out of the mine, don't they?---Yes, yes, we have emergency evacuation readiness plans and so forth.

PN556

It's much more difficult to evacuate a larger group of workers out of the mine than it is to evacuate a smaller group of workers?

PN557

MS JAFFRAY: I object to these questions, Commissioner, on the basis of relevance.

*** PETER CHRISTEN

XXN MS DOUST

PN558

THE COMMISSIONER: Ms Doust?

PN559

MS DOUST: Perhaps that might be dealt with in submissions.

PN560

THE COMMISSIONER: I will allow the question.

PN561

THE WITNESS: Yes, so the more people that are there to evacuate the longer it would take, yes.

PN562

MS DOUST: Yes?---If needing to evacuate is required, it is a different question depending on where they are in the mine.

PN563

All right. Can I just ask you this: on occasions have you ever had to carry out an evacuation at that mine?---At the CSA Mine?

PN564

Yes?---I had to carry out an evacuation, yes - sent people to safe work areas or refuge chambers - but we have not had to evacuate the mine.

PN565

In the event of an evacuation can you rely upon using the cage to evacuate or will that be dependent upon the circumstances?---It obviously depends on the scenario. You would expect the cage would be one of our last areas to be an issue, but if the cage was the source of the emergency obviously it would not - - -

PN566

Yes?--- - - - be used.

PN567

The alternative to using the cage to evacuate is using the decline, isn't it?---So we have the decline as one of the alternatives or shaft 1, which has man riding capacity. We could place a maintenance canopy on the top of shaft 1, which is the other shaft. Shaft 2 is the cage riding shaft. We can evacuate people via shaft 1 also.

PN568

All right. Just tell me – sorry, just bear with me for a moment. I won't take much longer. Shaft 1, tell me, how long would it take to get shaft 1 operable in the event of an emergency?---I would have to confirm with the maintenance department, but it would be an hour between the section and putting a canopy on. It's not five minutes and it's not a day, you know, so - - -

*** PETER CHRISTEN

XXN MS DOUST

PN569

Right. Somewhere between those two?---Yes. I'm just trying to say it's an hour, but not down to the minute. I couldn't give you accuracy on that.

PN570

Yes?---But it would be around an hour.

PN571

All right. Just in terms of a sense of the decline, that's the roadway that comes into the mine and moves down to the operative areas of the mine. You agree with that description?---Yes, the decline connects to the surface. It's a travel aid that you can drive on from the surface to 9 level and then beyond, yes.

PN572

The distance over road? I know the decline, it goes down between 800 and 15 hundred metres in depth directly, but what is the roadway distance?---From 9 level to the surface is seven and a half kilometres, roughly.

PN573

All right. It's a significant amount of time if you have to walk the decline to exit the mine; you agree with that?---I can't envisage a scenario where we would instruct people to walk the decline, but, yes, obviously uphill that would be quite a trek, yes.

PN574

An emergency, Mr Christen, that's what I'm talking about?---Yes, I can't envisage – I can't think of an emergency that would require people to walk out of the mine. We have the safe location at 9 level, that we would ask people to stay there far more than walk out of the mine.

PN575

Nothing else, Commissioner.

PN576

THE COMMISSIONER: Ms Jaffray, is there any re-examination?

PN577

MS JAFFRAY: Yes, Commissioner.

RE-EXAMINATION BY MS JAFFRAY

[12.47 PM]

PN578

MS JAFFRAY: Mr Christen, you were asked some questions about readiness for work. Do you recall some questions about that?---Yes.

PN579

I think you also were asked some questions in respect of pre-shift meetings facilitating the commencement of the workers' shift?---Yes.

*** PETER CHRISTEN

RXN MS JAFFRAY

PN580

When you answered that you expected workers to be ready to work when they entered the cage brace, were you intending to mean that they were ready to commence their shift prior to their pre-shift meeting?

PN581

MS DOUST: I object. That's leading.

PN582

THE COMMISSIONER: Yes, rephrase the question, Ms Jaffray.

PN583

MS JAFFRAY: Rephrase it.

PN584

You answered one of my friend's - - -

PN585

THE COMMISSIONER: Not leading (audio malfunction).

PN586

MS JAFFRAY: Mr Christen, you answered one of my friend's questions about readiness to start work. You said they had to wear the right clothing?---Yes, correct.

PN587

Do you have anything you wanted to say as to what you meant by readiness to work?---Yes, for someone to be ready to work is ready to have all their personal protective equipment on and available to start work, so all of their PPE and stuff that I listed prior to go to work regardless of the location of the cage brace. They definitely it before they go underground, so - yes.

PN588

So your question was focusing on what clothing was required to work?---Yes, yes, that was sort of, you know, what clothing is required to work and to enter the mine, yes.

PN589

No further questions, Commissioner.

PN590

THE COMMISSIONER: Thank you, Mr Christen. That concludes your evidence, so you're excused. Usually I would indicate to a witness that they're welcome to remain online and observe the proceedings, but I think it might be preferable for you to get some sleep?---I might do, cheers. Thank you, all.

<THE WITNESS WITHDREW

[12.50 PM]

PN591

THE COMMISSIONER: In terms of breaking for lunch, would the parties be open to returning at – I might just say 1.30 pm, 40 minutes. Is that sufficient?

*** PETER CHRISTEN

RXN MS JAFFRAY

PN592

MS JAFFRAY: Yes, Commissioner.

PN593

MS DOUST: Yes, Commissioner.

PN594

THE COMMISSIONER: Ms Doust, is there any update at this stage on the court documents or is that something we can deal with at 1.30?

PN595

MS DOUST: I would ask that we deal with it then. I just haven't had time to confer, unfortunately, with the witness.

PN596

THE COMMISSIONER: Very well. The Commission will adjourn until 1.30. Thank you.

LUNCHEON ADJOURNMENT [12.51 PM]

RESUMED [1.36 PM]

PN597

THE COMMISSIONER: Ms Jaffray, I can see Mr Buckman is on the line.

PN598

MS JAFFRAY: Yes, Commissioner.

PN599

THE COMMISSIONER: Very well. I will have my associate administer the affirmation.

PN600

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

PN601

THE WITNESS: Jade Stuart Buckman, (address supplied).

<JADE STUART BUCKMAN, AFFIRMED [1.36 PM]

EXAMINATION-IN-CHIEF BY MS JAFFRAY [1.37 PM]

PN602

MS JAFFRAY: Mr Buckman, can you state your full name for the record?---Jade Stuart Buckman.

PN603

Your business address for the record?---My business address is CSA Mine, via Louth Road.

*** JADE STUART BUCKMAN

XN MS JAFFRAY

PN604

Have you prepared a statement in these proceedings?---I have.

PN605

What was the date of that statement?---9 December.

PN606

Was this statement prepared true and accurate to the best of your belief?---It was.

PN607

Commissioner, could I have leave to ask a few questions in-chief dealing with matters that were arising, we say, for the first time in the reply statement of Mr Cowdrey? I can identify the topics if you would like. There are just two discrete areas.

PN608

THE COMMISSIONER: If you wish to adduce further evidence-in-chief, let's complete the tender first.

PN609

MS JAFFRAY: Yes. I have no further questions and I seek to tender that statement.

PN610

THE COMMISSIONER: Ms Doust, are you dealing with the objections in the same way?

PN611

MS DOUST: Yes, Commissioner, in the same way, please.

PN612

THE COMMISSIONER: The witness statement of Jade Stuart Buckman, dated 9 December 2022 and set out along with its annexures at pages 233 to 250 of the hearing book, will be exhibit R2.

**EXHIBIT #R2 WITNESS STATEMENT OF JADE BUCKMAN
DATED 09/12/2022 PLUS ANNEXURES - PAGES 233 TO 250 OF
HEARING BOOK**

PN613

Which matters, Ms Jaffray, do you wish to – what are the areas you wish to traverse in adducing any further evidence-in-chief?

PN614

MS JAFFRAY: Two matters. First in respect to the heat on platform 9L and, secondly, in respect to the attire worn currently at pre-start shift meetings.

PN615

THE COMMISSIONER: Sorry, can you just direct my attention to where the second matter arises.

*** JADE STUART BUCKMAN

XN MS JAFFRAY

PN616

MS JAFFRAY: Yes, so paragraph 24 in Mr Cowdrey's reply evidence. He refers to employees having to wear PPE under this new proposed plan and then he says at the last sentence:

PN617

The necessity to wear this might impact their ability to participate in the pre-start meetings.

PN618

THE COMMISSIONER: Ms Doust, is there anything you wish to say as far as seeking to or adduce further evidence-in-chief on those two matters?

PN619

MS DOUST: Yes, those two, the second – well, as to both actually, it seems to be reply to reply and that's not normally permitted.

PN620

MS JAFFRAY: Commissioner, in respect of, first, heat, our position is that that should have been properly led in their first – their statements. For the reasons I said before, I carved it out of the dust issues because I said we could deal with it in-chief, so I didn't include it. In respect to the clothing, again we say that should have been dealt with in-chief. It has been raised in their reply submissions. Their construction by reference to the clothing part of 19.10, that has been raised in reply. That focused on the clothing as a reference to a construction argument.

PN621

It didn't come out in the first set of statements or in their submissions, so we haven't, with respect, been able to lead any responsive evidence and the evidence that you heard from Mr Cowdrey in respect of what he knows about matters is limited because he hasn't attended these meetings. Currently, your Honour, you would be asked to make some decisions on construction by reference to submissions put by my friend about clothing without any benefit of understanding what is going on at the moment.

PN622

THE COMMISSIONER: You're on a tight lease, however, Ms Jaffray, on those two matters, so I'll allow some further evidence-in-chief. Ms Doust, of course it will be open to you to cross-examine the witness on that if you wish to.

PN623

MS JAFFRAY: Can I have shown to the screen the document entitled – a .pdf document called 'CSA Mine' that we have emailed through to the court earlier with heating information, Commissioner.

PN624

THE COMMISSIONER: CSA Mine.

*** JADE STUART BUCKMAN

XN MS JAFFRAY

PN625

MS JAFFRAY: It was the document which we indicated we would like to tender.

PN626

THE COMMISSIONER: Actually I think it was called - - -

PN627

MS JAFFRAY: Sorry, I wasn't - it's called 'NL heat survey'.

PN628

THE COMMISSIONER: '9L'.

PN629

MS JAFFRAY: '9L heat survey'.

PN630

THE COMMISSIONER: '9L heat survey', yes.

PN631

MS JAFFRAY: Apologies, Commissioner.

PN632

THE COMMISSIONER: I'll see if we can get that shown on the screen. Associate, are you able to bring that document up on the screen?

PN633

THE ASSOCIATE: Yes, I will attempt to bring it up now. Can the parties see this?

PN634

MS JAFFRAY: Mr Buckman, can you see that document on the screen?---Sorry, yes, I can.

PN635

Do you recognise this document as a document that you provided to my solicitors earlier?---Yes.

PN636

Can you explain to the Commission what this document is?---Yes, so this is a heat survey that was done on 9 level back on 11 November 2022.

PN637

Can you explain who prepared this, how you got it and – sorry, I'll stop with those two questions?---Yes, so I received it from Ben Dormer, the ventilation engineer, as part of my investigation into the response from the witness around working underground in heat or the additional work to be conducted underground in heat.

*** JADE STUART BUCKMAN

XN MS JAFFRAY

PN638

Could you explain to the Commission what this document might indicate about the surface temperature at the mine and the temperature at the 9L platform?---Yes, so what happens is the ventilation engineer takes a wet bulb and a dry bulb temperature. The dry bulb temperature is what we call the ambient temperature which is what we reference to on a day-to-day basis. Wet bulb - I'm not as

adversed(sic) into it, but wet bulb indicates the humidity or the humid temperature. In this case here on the surface as a control we see 20.2 for dry bulb and 18.2 for wet bulb, and then from that if you scroll down you will see wet bulb and dry bulb temperatures, and this is a layout of 9 level; you can see the temperatures that were taken on this date. So what it indicates on this particular day is that the temperatures at 9 level are comparable to what was on the surface.

PN639

Commissioner, I tender that document.

PN640

THE COMMISSIONER: Any objection, Ms Doust?

PN641

MS DOUST: Could I deal with them in submissions, Commissioner?

PN642

THE COMMISSIONER: Yes. The document titled '9L heat survey' will be exhibit R3.

EXHIBIT #R3 9L HEAT SURVEY

PN643

MS JAFFRAY: Could I ask you to turn up Mr Ron Cowdrey's statement, dated 19 December.

PN644

THE COMMISSIONER: You no longer need that document on the screen?

PN645

MS JAFFRAY: I no longer need that, Commissioner. This is a question directed to Mr Buckman.

PN646

Could I ask you to go to Mr Cowdrey's statement, dated 19 December?---Yes.

PN647

If you could move to paragraph 24?---Yes.

*** JADE STUART BUCKMAN

XN MS JAFFRAY

PN648

If I could direct your attention to the part of the paragraph that talks about employees; their practice currently in respect of wearing personal protective equipment at pre-shift and cross-shift meetings. Could I ask you to tell the Commissioner, based on your experience, what underground employees currently wear at pre-start shift meetings?---Yes, so currently at pre-start meetings they wear their full PPE in terms of steel cap boots, long pants – sorry, long trousers, long-sleeve shirts. You do see self-rescuers worn at times, their hard hat or sometimes they wear their hard hat and their cap lamp. I will say that at times, like, their lunch bag and their hard hat is kept outside of the pre-start meeting

rooms, but they do have their PPE on which is, you know, what can happen at 9 level, as well; they could leave their crib bag outside.

PN649

Commissioner, no further questions.

CROSS-EXAMINATION BY MS DOUST

[1.49 PM]

PN650

MS DOUST: Mr Buckman, just going back to exhibit R3, none of the locations shown on that document where the temperature is being taken are actually the working face of the mine, are they?---No, it's of 9 level.

PN651

Yes, so it's not until you get below that level that you get to the places where the work is occurring?---No, the work occurs at 9 level, as well.

PN652

Which areas of 9 do you say the work is occurring? Not in the locations where the temperature readings are?---Yes, correct.

PN653

So in the distant locations that are shown on that map?---(No audible reply)

PN654

I'll put that again. If you look to the top row of boxes and you see in the fourth box across from the left the letters, or the numbers, 9500 9280 RAW – do you see that indication?---No, sorry, Ms Doust, I can't see the drawing.

PN655

Look to the top of the drawing - - ?---No, sorry, sorry, can I bring it up on my screen? Is that okay?

PN656

I'm sorry, you don't have it with you?---I do have it with me, but am I okay to open it up?

PN657

Yes, sorry, sorry. Yes, of course?---Okay.

PN658

THE COMMISSIONER: Would it be more convenient to have it be on the shared screen again, Ms Doust?

PN659

MS DOUST: I don't require it.

PN660

THE COMMISSIONER: Okay.

*** JADE STUART BUCKMAN

XXN MS DOUST

PN661

MS DOUST: I think we can probably navigate it. It won't take long.

PN662

THE COMMISSIONER: So, Mr Buckman, Ms Doust has directed your attention to almost the centre of that document. At the top there is a red marking with some numbers, 9 - - -

PN663

MS DOUST: 9500, I think it is.

PN664

Let me know when you've got that document up, Mr Buckman?---Yes, I've got it up.

PN665

So the work on 9 level is only happening out at the ends at those locations like 9500, 9280 RAW, isn't it?---Yes, when you – what I was referring to, when you see – come down to – in the blue writing with number 1, number 2 shaft, there is a 9 level workshop in there. Work occurs in there.

PN666

Yes, but that's not where any actual extraction is taking place on 9 level, is it?---No, that's correct.

PN667

But below that where the extraction is taking place the temperatures are much greater?---In some locations, yes.

PN668

Yes, all right. Thank you. Now, I just want to take you – do you have a copy of the court book there, Mr Buckman?---Yes, I do, Ms Doust.

PN669

Can I ask you to go – I'm not sure whether you will be able to navigate by page number, but if you could go to page 118 if you're able to do that?---Yes.

PN670

That is RC4. I just want you to have a look – sorry, just if we start at the page before you see the heading '19.10 company happy'. You see those words?---(No audible reply)

PN671

MS JAFFRAY: Commissioner, could I interrupt, I'm so sorry. My court book doesn't have pagination throughout, so I don't know where 118 currently is. I'm so sorry to my friend to interrupt.

*** JADE STUART BUCKMAN

XXN MS DOUST

PN672

MS DOUST: It's annexure RC4 to the affidavit of Mr Cowdrey – sorry, to the first statement of Mr Cowdrey. It's the minutes of the enterprise agreement

meeting of 11 December 2019 and it's about four pages in. In the middle of the page in bold you see 'Part 3 – Hours of work, remuneration and related matters'. If everyone can let me know when they have got that page.

PN673

THE COMMISSIONER: Do you have that, Ms Jaffray? Yes, okay. Please proceed, Ms Doust.

PN674

MS DOUST: Mr Buckman, do you have that page?---I'm on page 118, so at the top does it start with 'Discuss'?

PN675

Yes?---Yes.

PN676

If you just go the page prior to that and you see the last entry is '19.10 company happy'?---Yes.

PN677

Okay. This part of the minutes from 'company happy' down over the other page - down the next page to where you see point 20, records some of the discussion between the parties concerning clause 19.10 of the enterprise agreement, doesn't it?---Yes.

PN678

All right. If we just focus on that part of the discussion that's recorded on the second page there, you see there is a reference to a discussion of 'B' and it says:

PN679

Handovers are necessary. Shaft is creating bottlenecks.

PN680

Do you see those words?---No, sorry, where am I looking?

PN681

Right at the top of the page, right at the top of page 118?---Yes.

PN682

The word 'Discussed'?---Yes.

PN683

And 'B':

PN684

Commencement longer than 15 minutes prior and end of shift.

PN685

?---Yes.

*** JADE STUART BUCKMAN

XXN MS DOUST

PN686

Then after that:

PN687

Handovers are necessary. Shaft is creating bottlenecks.

PN688

?---Yes.

PN689

There were bottlenecks for employees getting out of the mine at the end of their shift because there was only one cage operating, wasn't there?---I would say no, that's incorrect.

PN690

What do you mean when you say, 'I would say no?' Is it or isn't it correct that there were bottlenecks for employees getting out of the mine because there was only one cage operating?---There's only one cage but it runs multiple times.

PN691

All right?---It runs at different times.

PN692

And it wasn't possible to get all the employees in the outgoing shift or coming off shift out of the mine in one run, was it?---No, it's not possible.

PN693

So what was happening was there were a number of employees waiting at the cage to get out of the mine at the end of shift?---Within the hours of work.

PN694

Well, it's correct, isn't it, that the fact there was only one cage operating was slowing down their getting out of the mine?---No, it's not correct.

PN695

All right. You see there is a reference to:

PN696

Employee proposed new clause for cage times. Management must ensure that CMPL employees are on the surface at least 20 minutes prior to finish time.

PN697

?---I see that, yes.

PN698

Do you recall then that there was a discussion there about employees coming off shift being taken to the surface in sufficient time that they wouldn't be delayed in finishing up their shift at finishing time?---Sorry, can you please repeat that.

*** JADE STUART BUCKMAN

XXN MS DOUST

PN699

That is a reference there to a discussion about implementing a change to ensure that employees coming off shift got off work at the end of their shift; do you agree?---No, I don't, because that is their end of shift.

PN700

You recall, don't you, a discussion about that proposal along the lines of that being designed to ensure that employees could finish at the end of their shift rather than being delayed?---No.

PN701

I see. I can just ask you about the reference afterwards, 'Scott and Chris to check gate times and process map.' What was that a reference to?---That was a reference to check the gate times and do a process map. I don't recall the process map, that being mapped out, what that looked like, but it was to check the gate times to ensure that people were leaving, yes, within their 12 hours and 15 minutes or 12 hours and 30 minutes.

PN702

Let me just put something to you very clearly, Mr Buckman. Are you denying that the discussion that is recorded here involved the employees wanting measures to ensure that they could get out of the mine at the end of their shift and not be –

PN703

THE COMMISSIONER: You've just muted yourself, Ms Doust.

PN704

MS DOUST: No doubt everyone is greatly relieved. I will put that question again.

PN705

Mr Buckman, do you deny that this was a discussion about measures to ensure that employees could get out of the mine by the end of their shift?---No, I'm not denying that. What I'm saying is that the cage is currently available and was at the time for people to exit the mine and exit the mine site within their hours of work.

PN706

You're not denying it because you knew that one of the issues that was being raised by the employees was a concern about employees being able to get away from work at the end of their shift rather than being stuck down the mine?---No, I'm – no. Sorry, can you repeat that. You're putting words in my mouth.

PN707

I'm suggesting to you that you knew from this discussion that employees were concerned to be able to leave at the end of their shift rather than to be stuck at the end of their shift down the mine waiting for a cage to come?---I would say that it didn't come across as they were saying they were concerned. They wanted the 20 minutes in there to ensure they could come – to be on surface at the end of their shift.

*** JADE STUART BUCKMAN

XXN MS DOUST

PN708

All right. Can I ask you to go now to JSB1, please, Mr Buckman, and that is the first annexure to your witness statement. There are page numbers at the bottom of that in light grey, page 6 of 13, and this is page 243 of the .pdf court book. Are you at that page now, Mr Buckman?---I am.

PN709

Okay. All right. You see there is a heading '19(d)' and discussing 'deleting reference to underground changeover'?---Yes.

PN710

That is in the bold print there. That was a reference, wasn't it, to what was then 19.10(d) of the 2015 agreement; do you agree with that?---I agree, yes.

PN711

There had been a proposal by employees to delete a reference to underground changeover. You understood that, didn't you?---I did.

PN712

Deleting a reference to an underground changeover involved deleting the reference in 19.10(d) for the on-the-job location to be the pre-shift meeting room which could be underground?---No, incorrect.

PN713

What do you say the reference to 'deleting reference to underground changeover' in 19(d) was then?---Yes, it's the reference to underground changeover – I mean, like, having the meeting underground.

PN714

All right. So it was a bit - - -?---Not about the – yes, the on-the-job.

PN715

But it was a reference to that paragraph of the 2015 agreement; agreed?---Yes, agreed, yes.

PN716

And the way in which the negotiations proceeded was that the parties took the existing agreement as the starting point and put forward the changes or additions that they were suggesting based on that 2015 agreement; you agree with that?---I agree, yes.

PN717

So where there are numbering references, that's a reference to the clause in the existing 2015 agreement; do you agree with that?---Agree.

PN718

But there where it just says '19(d)', that's really 19.10(d), yes?---Correct, yes.

*** JADE STUART BUCKMAN

XXN MS DOUST

PN719

So what appears underneath that heading was a discussion that took place in the context of the claim to delete a reference to 'underground changeover'; agree with that?---I agree with that.

PN720

Can I just ask you to have a look at the second point there:

PN721

Chris discussed there is a current study relating to shaft 1 for man-riding.

PN722

You see that point?---Yes.

PN723

That was a reference to Chris Hamilton, wasn't it?---Correct.

PN724

That was a reference to there having been some inquiry he had been involved in undertaking about whether or not shaft 1 could be put into use for moving workers from the surface to underground?---I would say I wasn't involved in it, so I can't comment on it.

PN725

Well, that was discussed in the meeting, wasn't it?---As in it was discussed that there was a current study relating to shaft 1 for man-riding, yes.

PN726

Yes, and did Mr Hamilton talk about that inquiry?---Yes.

PN727

Was that something he had conducted?---Well, there was a current study, so Chris discussed that there was a current study relating to shaft 1.

PN728

That was a study – I'm not asking you whether you did it. I'm asking you what was the content of the discussion about it. That was discussed as an inquiry about whether or not shaft 1 could be used in addition to shaft 2 to transport employees. Do you agree with that?---I agree with that.

PN729

And that was suggested as something that might eliminate the company's desire to have changeover meetings underground, wasn't it?---Sorry, can you repeat the question?

PN730

Mr Hamilton mentioned that and was saying, 'It may be that we'll be able to open up shaft 1, and that will mean we won't have to bring the meetings underground', as the company had indicated it wished to do?---No, that's incorrect.

*** JADE STUART BUCKMAN

XXN MS DOUST

PN731

What was it about, then?---It's just about when you talk about the bottlenecks - so in terms of reducing the number of cage runs.

PN732

Yes?---So it's about that efficiency, not the efficiency of moving the shift change underground.

PN733

And efficiencies are only gained by moving the change underground because it means that you shift the risk of delay to the workers coming off the job, rather than the workers coming onto the job; doesn't it?---No, there's efficiencies in many other ways as well.

PN734

It was about dealing with the bottleneck, wasn't it, that desire to move the meetings underground?---No, it was around efficiency.

PN735

Yes. Efficiencies of getting employees into the mine. Correct?---Correct.

PN736

Now, after the 25 February meeting there were further WebEx meetings to discuss the agreement; weren't there?---Correct.

PN737

Were you the person tasked with drafting the agreement?---No.

PN738

There were further drafts that exchanged hands, in any event, weren't there?---Correct.

PN739

Is this right? Were the WebEx meetings recorded?---In what meeting?

PN740

Well, in some sort of digital medium?---No, not to my knowledge.

PN741

Was there not a system for recording what people said in the meetings so that a minute could be kept?---No, it's my understanding there was no minutes. We were just updating the 2015 agreement.

PN742

So, so far as there was discussion, that was contained in the - or so far as there was movement, that was contained in the versions of the agreement that were exchanged later, subsequently?---Yes. Correct.

*** JADE STUART BUCKMAN

XXN MS DOUST

PN743

I just want to go, if we might, to Mr Cowdrey's statement to RC7. Do you have that, Mr Buckman?---If you can point me in the right direction. No, no, I do, sorry. That's in response?

PN744

THE COMMISSIONER: Page 140?---Okay. Sorry. Sorry, Commissioner, what was that?

PN745

Page 140. One hundred and 40.

PN746

MS DOUST: And I'll just ask you to go to page - I think it's 163. Do you have page 163?---Yes.

PN747

Can I just ask, were you the person that drafted this document with the different colours?---No.

PN748

Do you know who was?---Scott Purdie.

PN749

But you understood, didn't you, that subparagraph (d) there was drafted in response to the claim by the employees to delete the reference to changeover occurring underground?---It was - yes, it was drafted without agreement.

PN750

But that was the clause that later was adopted. Agree?---I disagree.

PN751

Minus the bit at the end in parentheses with proposed 18(3), that was the clause was that later adopted, wasn't it?---I'll have to confirm but, no.

PN752

Okay?---It's worded differently.

PN753

Yes. Nothing further.

PN754

THE COMMISSIONER: Ms Jaffray, any re-examination?

PN755

MS JAFFRAY: No, Commissioner.

PN756

THE COMMISSIONER: Thank you, Mr Buckman, for your evidence. You're excused and free to go, or remain on the line and observe the proceedings?---All right. Thank you, Commissioner.

*** JADE STUART BUCKMAN

XXN MS DOUST

<THE WITNESS WITHDREW

[2.11 PM]

PN757

MS JAFFRAY: Wait. Sorry, Commissioner, I'm so sorry. I've got one.

PN758

THE COMMISSIONER: Sorry, there is?

PN759

MS JAFFRAY: There is one question in re-examination. I overlooked it, I'm so sorry, Commissioner.

PN760

THE COMMISSIONER: Are your instructors able to - - -

PN761

MS JAFFRAY: Yes. We are just getting him back. I'm so sorry.

PN762

THE COMMISSIONER: Just while that's happening, in terms of any final submissions, does counsel wish to deal with those orally today, or does counsel prefer to a timetable for written submissions?

PN763

MS JAFFRAY: Commissioner, sorry, I've changed my mind on the further re-examination. I don't require that. In respect of oral submissions, I'm content - I'm in your hands as to what would be more helpful for you. I am prepared to proceed today, if that's convenient for the Commission.

PN764

THE COMMISSIONER: Ms Doust.

PN765

MS DOUST: I'm prepared to proceed now.

PN766

THE COMMISSIONER: Okay. Very well. Just before we do that, where did we get to with the call for documents, Ms Doust?

PN767

MS DOUST: I've produced to my friends online given our lack of proximity, emails in response to the first call, which is the call for emails from Mr Cowdrey to Scott Purdie, to identify any issues with the minutes. In respect of the call for minutes of 25 February - of meetings after 25 February, they're not in our possession. So there's nothing to produce in answer to the call.

PN768

THE COMMISSIONER: Does anything arise from that, Ms Jaffray?

*** JADE STUART BUCKMAN

XXN MS DOUST

PN769

MS JAFFRAY: I don't think I need to recall Mr Cowdrey to make the submissions about credit, which I will make in light of those answers.

PN770

THE COMMISSIONER: Okay. Are the parties prepared to proceed now, or do the parties wish to have a short break?

PN771

MS DOUST: I'm content to proceed now, Commissioner.

PN772

THE COMMISSIONER: Ms Jaffray?

PN773

MS JAFFRAY: Yes. Yes, Commissioner.

PN774

THE COMMISSIONER: Very well. Over to you, Ms Doust.

PN775

MS DOUST: Yes, thank you. Commissioner, the question which presents to the Commission in this matter has been identified in paragraph 4 of the applicant's outline of submissions which appears in the hearing book. It is this. In relation to underground employees, clause 19.10 of the agreement require cross-shift meetings and pre-start meetings to take place on the surface. Can I say at the outset, that question was posed in the expectation that it was the respondent's position that both cross-shift meetings and pre-start meetings are meetings which are necessary to facilitate effective shift changeover, and that's language which is found in the terms of clause 19.10 of the agreement.

PN776

Ultimately, Mr Christen accepted that the cross-shift or crossover meetings were necessary to facilitate that effective shift changeover, and he accepted, I think in part, that pre-start meetings were necessary to facilitate the shift changeover. You might recall his evidence, he initially was reluctant to embrace that proposition but ultimately I think accepted in part that the meetings are of that quality.

PN777

In order to answer the question, the Commission must really undertake the task of construction of the 2020 agreement, and the principles relevant to that task are well-settled, and no doubt, Commissioner, you are more familiar than you would probably prefer to be with those submissions, no doubt hearing them frequently. We've extracted the principles that are set out by a Full Bench of the Commission in the AMWU v Berry case, at paragraph 114 of that decision.

PN778

At paragraph 7 of the applicant's outline of submissions, we of course rely upon that outline and only wish to make some further comments to expand on those submissions and the reply submissions. Can I just focus for the time being on a couple of those principles. The first is that contained in paragraph 114(1).

PN779

The construction of an enterprise agreement like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. And the resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose.

PN780

So that's, we say, really that's the fundamental principle here. And also in paragraph 3, the Full Bench says:

PN781

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

PN782

Can I digress at this point, because it's convenient to do so, to observe that the evidence of the respondent has purported in some parts to deal with how the respondent intended or understood clause 19.10 as amended in the negotiation process for the 2020 agreement would operate. Paragraphs 18, 19 and 20 of Mr Buckman's statement and paragraph 40 of Mr Christen's statement are particular examples of this category of evidence.

PN783

So where the witnesses have purported to say that they always understood that the clause would operate in a particular way, or that the intention of the clause is one thing or another, that is of course evidence that is entirely irrelevant to the task of interpretation or construction of an agreement. What must be discerned is the objective intention as signalled by the words of the document.

PN784

So the Commission, we say, must put that evidence that we've identified in what's MFI 2 aside, and focus upon the meaning that a reasonable person would give to the language of the agreement that's used by the parties. Can I turn to that language now, and can I just inquire whether you have to hand, Commissioner, a copy of the agreement before you?

PN785

THE COMMISSIONER: The 2020 agreement, yes.

PN786

MS DOUST: Yes. If I can just go to clause 19 of that agreement to address the structure and the language of the provision. And it's really 19.10 which is relevant here. Clause 19.10 commences with those words:

PN787

In relation to the shift commencement and finishing times the following applies.

PN788

Of course those words 'in relation to' are of broad import. They can be apt to comprehend either a direct relationship or a less direct relationship. What they import in any particular case depends upon the particular context. It's obvious here that the terms of 19.10 of the agreement deal not just with shift commencement and finishing times, but also with obligations which arise immediately prior to those shift commencement and finishing times. And I've referred to some authority in the reply submissions in support of that understanding as to how the phrase 'in relation to' operates in the circumstances.

PN789

We say it is apparent from the plain words of clause 19.10 that it introduces two distinct concepts. The first concept is that of shift commencement or the shift, and you'll see that language used in 19.10.1 at the end of that subclause or subparagraph. There's a reference there to the designated shift commencement time. At that time employees have to be changed and ready to commence work. So this is quite a distinct moment.

PN790

When employees have to be changed, and you would read, Commissioner, that language, 'changed and ready to commence', as referring to whatever clothing or other equipment that is required to be gathered in order for employees to be able to commence work. Some of the employees comprehended by this clause may be employees who are working on the surface who don't need to be in possession of a self-rescuer or similar equipment.

PN791

But for those employees who are required to wear that particular PPE or carry the equipment, that is the obligation that arises at that point in time. Now, we say what follows thereafter is a series of provisions about obligations that arise in the period prior to that shift commencement time which is the moment of ultimate readiness, if you like.

PN792

What one can see in those three paragraphs, 19.10.2, point 3 and point 4, is this concept of being, with quotation marks 'on the job'. And the appearance of that phrase on those three occasions, in quotation marks, that the same phrase appearing in 19.10.5 without quotation marks, indicates that the phrase where it's used in 10.2, 10.3 and 10.4, has a specific and different meaning to the different meaning in 19.10.5.

PN793

And we say, Commissioner, you would think that in 19.10.5 where there are no quotation marks, that the phrase has its ordinary meaning. The meaning being at the workplace or still on shift. Whereas there's a very particular meaning attached in the paragraphs above.

PN794

THE COMMISSIONER: In what do you say that particular meaning is, Ms Doust?

PN795

MS DOUST: That's a meaning which, consistent with the principles in Berry, arises from reading it in the light of the entirety of that paragraph 19.10. The first thing is this, being on the job is something that is limited by time and one can see at 19.10.2 and 10.3, 'on the job' involves for shift employees a period of 15 minutes prior to shift commencement. And 'on the job' for mining department employees is - and mining department employees are shift employees. They're just a subset of shift employees. But mining department employees 'on the job' is a period of 30 minutes on that first shift of each new panel.

PN796

So 'on the job' is a period of usually 15 minutes; once every panel for mining employees, 30 minutes. So 'on the job' is delineated by time, and this is something that is distinct from the shift, because this happens before shift commencement. So the shift commences but for 15 or 30 minutes before, there's something different which is happening which isn't regarded as part of the shift.

PN797

When we go to - sorry, the second quality that defines what being, quote/unquote 'on the job' is, is the references in 19.10.2 and 19.10.3 to the purpose of that activity, and that is to facilitate in the case of 19.10.2 an effective shift changeover. In the case of 19.10.3, to facilitate an effective first shift back meeting. And the term 'facilitate' is obviously different to one of commencing work or commencing shift. Facilitate suggests a state of availability or readiness to engage in those things. So to engage in an effective shift changeover or an effective first shift back meeting.

PN798

Given that the shift doesn't commence until either 15 or 30 minutes after this period, you wouldn't read these clauses as entitling the employer to simply direct the employees at the commencement of that period, to go immediately to the workplace and commence productive work. This is about a particular period which has been identified as set aside or quarantined, if you like, for the purpose of engaging in those activities of the pre-shift meeting or facilitating the effective shift changeover, which may be constituted by part of the pre-shift meeting or by the crossover meeting.

PN799

So 'on the job' is defined by reference to the period of time, by reference to the activities, and it's apparent that comparing 19.10.2 and 10.3 to 10.1, that prior to commencement time the employee's not expected to do anything other than that facilitation. An employee may be wearing their street clothes during that period. Provided they reach a state of clothed readiness by that shift commencement time, which we say on the evidence you would be satisfied is 7 o'clock.

PN800

When precisely the shift commencement time is neither here nor there, but what is clear is that there is a period of 15 or 30 minutes prior to the shift which is set aside for different activities. And consistent entirely with the concept of facilitation, which appears in those subclauses, the employee may spend very little

of the 15 or 30 minutes prior to the shift commencement devoted to the shift changeover.

PN801

Just one moment. So it may well be the case that the bulk of that period is spent by the employee in waiting for the employee who is their opposite number to approach them to engage in the crossover meeting or cross shift meeting. It may be that only a small amount of the period is spent in participating in a pre-shift meeting but the obligation as defined in 10.2 and 10.3 is that availability to facilitate. They do not need to be engaging themselves in productive work for the entirety of that period.

PN802

Now, the final point to be made about the definition of 'on the job' is this. That it is defined at 19.10.4 as being a point on the surface. So being on the job, which we say is a state that continues until shift commencement time, is defined as being at a point on the surface. It's not something that commences at a point on the surface. And, indeed, we say that an employee could not, at the commencement of that period, be required to have all of their gear on and ready to go, and to proceed immediately underground.

PN803

That would, in effect, involve taking that obligation in 19.10.1 about readiness and shifting that forward by readiness to the start of this particular period that is defined in 19.10.1 19.10.4 doesn't provide that the shift commences 15 minutes prior to shift commencement. One can see the circularity really of the respondent's argument here that it, in effect, attempts to bring the point of shift commencement forward to the commencement of the pre-shift period, in effect.

PN804

So those are the two distinct concepts we say are apparent from a close reading of clause 19.10 of the agreement, and they provide for very different things. Read together, what they provide for is an obligation upon an underground shift-worker, which is the class of workers which we refer to in particular here, for those workers the clause provides an obligation for them to be available for a specified period at a location the employer designates at the surface to participate in the activities that enable a shift changeover.

PN805

Now, I think my friends have provided the Commission with a copy of the decision of the Full Federal Court in *James Cook University v Ridd*. I'm not sure if you have that to hand, Commissioner. There's a short passage in that judgment
- - -

PN806

THE COMMISSIONER: Just one moment, Ms Doust. I'll just see if that's - Ms Jaffray, were those authorities sent to my chambers?

PN807

MS JAFFRAY: I'm not aware of the authorities that my friend is referring to. Sorry, are you talking about - I thought that - we haven't emailed authorities through, Commissioner.

PN808

THE COMMISSIONER: Okay. Ms Doust, sorry, what was the authority you were referring to?

PN809

MS DOUST: It's *Ridd v James Cook University*. And the passage appears in the judgment. It's [2020] 278 FCR 566. Apologies, Commissioner, I thought you would have received a copy of that.

PN810

THE COMMISSIONER: Just one moment. I'll bring up the authority. And what paragraph are you referring to, Ms Doust?

PN811

MS DOUST: It's paragraph 65, which in the - I'm not sure if your Honour has the Federal Court Report version, but it's at page 580.

PN812

THE COMMISSIONER: Relevant principles.

PN813

MS DOUST: Yes, there's a helpful collection of the principles, and in particular there's a discussion there about what may be made of context in the task of interpreting an enterprise agreement. And, in particular, in roman iv, the court identifies - referring to *Short v Hercus*, that:

PN814

Context may include '...ideas that gave rise to an expression in a document from which it has been taken'.

PN815

And:

PN816

Recourse may be had -

PN817

this is in roman v of 65:

PN818

Recourse may be had to the history of a particular clause 'Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form...'

PN819

You will have seen, Deputy President - sorry, apologies, Commissioner, it's late in the year. It's very late in the year. My apologies. Mr Cowdrey annexes at RC3 of

his witness statement the 2015 agreement. And I'll ask you to go, Commissioner, to the comparable paragraph as it appeared in the predecessor.

PN820

THE COMMISSIONER: I have that.

PN821

MS DOUST: That's at 98 - page 98 of the court book, and over onto page 100. Can I ask whether you have that to hand, Commissioner?

PN822

THE COMMISSIONER: Yes.

PN823

MS DOUST: You'll see, Commissioner, that - and I make this submission just reminding you of the evidence of Mr Buckman when questioned previously, that the task of drafting the 2020 agreement was one which started with the 2015 agreement and the parties went through the process of identifying their additional demands or claims. And you've seen the evidence, Commissioner, about the way in which claims in respect of the operation of - or the future provision in respect of shift commencement and finishing times, and the provisions in relation to those times evolved.

PN824

There's no question that in the course of those negotiations, there was a demand by the employees to remove shift changeover occurring underground. That was the gravamen of the claim that was made, and you would be satisfied, Commissioner, having regard to the albeit scanty references in the minutes, that that was in part related to concerns about employees working underground being able to finish up their shift at the appointed time.

PN825

That is of course an entirely understandable claim in circumstances where employees were working seven shifts of 12 hours, with an additional obligation for a 15-minute period prior to the shift, and the possibility and the ongoing obligation to work reasonable additional hours. That's readily understandable why employees would be anxious to conclude shifts at the finish time rather than somewhat later.

PN826

You'll see, Commissioner, just comparing the terms of 19.10 in the 2015 agreement to those in the 2020 agreement, that they remain identical, save in respect of subparagraph (d), and save in respect of a different numbering protocol was adopted. So paragraph 19 - sorry, the preamble is identical. Paragraph (a) of 19.10 of the 2015 agreement, identical to 19.10.1. And so on, down to paragraph (d). And 19.10(d) identified 'on the job' as the pre-shift meeting room:

PN827

This may be underground should travelling arrangements be available.

PN828

So that facilitated the pre-shift meeting to occur underground. And that provision of course was taken out of the agreement and replaced with what became 19.10.4, which designates that being on the job is a point on the surface as designated by the employer. So there's capacity on the employer's part to identify a location on the surface for the conduct of the pre-shift activities.

PN829

But we say that doesn't enable the employer to simply direct employees at the commencement of that pre-shift period to, in effect, be changed and ready to commence work and to proceed underground. First because it is really effectively bringing forward that obligation in 19.10.1 of the agreement. Second, because 19.10.4 makes it clear that this state of being 'on the job' is being at a point on the surface as designated by the employer.

PN830

Now, in that agreement it really matters very little what it is that employees choose to wear themselves to the pre-shift meeting. If they decide that they wish to get into their work gear an hour ahead of work, if they decide to sleep in it, that's entirely a matter for them. But they cannot, in my submission, be required by the employer to be in it by the 'on the job' period. Nor can they at that stage, in my submission, be directed to commence work, because that is something that only occurs at the designated shift time once this agreement is properly construed.

PN831

Can I say finally, we say that the clause for which - or, sorry, the reading for which we contend is supported by the fact that it promotes a sensible industrial outcome. That sensible industrial outcome being, first of all, limiting the amount of hours that are spent underground by the employees in question with of course the movement of employees underground being something that inevitably involved a range of safety concerns.

PN832

Regardless of the steps that are taken pursuant to the respondent's obligations to manage or minimise those safety risks, we think that a reading that is consistent with minimising that risk is the reading to be preferred. And, second of all, it is a reading which is more likely to ensure that employees coming off shift conclude their shift in time, rather than being kept for extended periods beyond the shift time.

PN833

Of course, in circumstances where there's even days in a row of shifts of 12 hours plus an additional 15 or 30 minutes' obligation, that is a very significant burden of working hours, and it must be said is absolutely at the limit of what might reasonably be required of an employee, such that any obligation or risk to work beyond the rostered hours is something that will be regarded as undesirable.

PN834

Unless there are any questions, Commissioner, that's all I wish to say in support of the construction argument. The applicant has obviously posed as a question for determination by the Commission, a question about the undertaking of particular activities. The Commission's not ultimately bound to deal with that question by

simply saying yay or nay, and the Commission might ultimately - obviously it has the discretion in exercising its dispute resolution powers to give a determination which sets out reasoning that may lead in another direction to that which has been proposed by the applicant.

PN835

But we certainly think it's fairly uncontroversial that the Commission's role in exercising its dispute powers isn't simply just a binary one in this circumstance. So unless there are any questions about that, Commissioner, those are the submissions.

PN836

THE COMMISSIONER: If I can take you to the 2020 agreement and clause 19.10, Ms Doust.

PN837

MS DOUST: Yes.

PN838

THE COMMISSIONER: If I understand the AWA or the union's position - - -

PN839

MS DOUST: Yes.

PN840

THE COMMISSIONER: - - - and working through those first four subclauses in 19.10.1, it's the Union's position that the word employees there refers to all employees covered by the agreement?

PN841

MS DOUST: Yes.

PN842

THE COMMISSIONER: 19.10.2 refers to those - a subset of shift employees.

PN843

MS DOUST: Yes.

PN844

THE COMMISSIONER: 19.10.3 refers to a further subset that are mining department employees.

PN845

MS DOUST: Yes.

PN846

THE COMMISSIONER: And general mining department employees are a subset of the shift employees?

PN847

MS DOUST: I'd say it's not even generally.

PN848

THE COMMISSIONER: Yes.

PN849

MS DOUST: All of those are shift employees.

PN850

THE COMMISSIONER: And then in relation to underground employees, are they both shift and mining department employees?

PN851

MS DOUST: It's clear we say from the - if I can ask you to go to clause 20.

PN852

THE COMMISSIONER: Yes.

PN853

MS DOUST: You'll see there's mining operations employees.

PN854

THE COMMISSIONER: Yes.

PN855

MS DOUST: And they're underground, I think apart from pit ram operators. But underground maintenance are also underground. And then there's all processing and surface maintenance there, they're surface roles. So it's only mining and underground that are the underground - sorry, mining and underground maintenance. Effectively production and engineering in another context, those two categories.

PN856

THE COMMISSIONER: And I understand the union's position is that whether it's 15 or 30 minutes, there is a period of time prior to the commencement - prior to the designated shift commencement time - - -

PN857

MS DOUST: Yes.

PN858

THE COMMISSIONER: - - - in which the relevant employees are required to be on the job?

PN859

MS DOUST: Yes.

PN860

THE COMMISSIONER: Now, Mr Christen gives evidence that - current practice at paragraph 19 of his statement, and he says:

PN861

Presently the shift commences immediately prior to the commencement of the pre-shift meeting.

PN862

MS DOUST: Just one moment. I'm just - which paragraph, can I inquire?

PN863

THE COMMISSIONER: Nineteen. There's a heading titled, 'Current Practice'.

PN864

MS DOUST: Yes.

PN865

THE COMMISSIONER: And he says the shift commences on the surface prior to the commencement of the pre-shift meeting. This may be a question I have for Ms Jaffray in a minute but does the union accept that that 15 or 30 minutes is paid?

PN866

MS DOUST: We accept that it is paid because - and that's clear from - if I can ask you to go to paragraph 20.5?

PN867

THE COMMISSIONER: Yes.

PN868

MS DOUST: The salaries are said to be calculated by reference to a 43 hours per week roster, and 43 hours per week is what one arrives at when one multiplies seven by 12 hours and 15. So the period - and, sorry, seven by 12 hours and 15, plus a 30 minutes every - at the start of every panel. So that averages out to be 43 hours a week. So we agree that the period of 15 minutes prior to the shift is a paid period, however, we also say that it is clear that the hours of work or that the shift hours are 12 hours, and that's clear at - you can see the reference, for example, in 19.8. Pardon me. There's a reference there to either the 12-hour continuous shift or the nine-hour day shift.

PN869

THE COMMISSIONER: Okay. Thank you.

PN870

MS DOUST: So there's two concepts, I think. And this is perhaps at the heart of the bedevilment in respect of this matter. The first concept is, what is a shift as the agreement understands. The second is, what's a shift in a sort of a broader sense of the word being how long are you there on site, or when do you commence engaging in any activities. But we say that 19.10.1 refers to a very specific time, and that it's a contradiction in terms to talk about a pre-shift meeting happening after the commencement of the shift.

PN871

THE COMMISSIONER: Okay. Thank you. Just one moment, Ms Jaffray.

PN872

MS JAFFRAY: Commissioner, could I ask for an indulgence of five minutes, if that's okay?

PN873

THE COMMISSIONER: Yes, it might be - let me just take a short break of five minutes. So we'll come back at - why don't we take a break until five past 3.

PN874

MS JAFFRAY: Thank you.

PN875

THE COMMISSIONER: The Commission is adjourned.

SHORT ADJOURNMENT

[2.56 PM]

RESUMED

[3.06 PM]

PN876

THE COMMISSIONER: Ms Jaffray?

PN877

MS JAFFRAY: May it please the Commission. We agree with my learned friend in respect to the dominance of the language of the clause, however, from a logical point of view, I will start with the 2015 agreement, not because we say the Commission should go there directly but as a matter of a logical progression of ideas it makes sense to start there, in light of my friend's submissions, where she's already taken you to that.

PN878

Now, if I could take you to the 2015 agreement, Commissioner, we emphasise different parts of this clause than what's been emphasised by my friends. In particular clause (d), if I can just read it out for the record:

PN879

For underground employees on the job in the pre-shift meeting room, this may be underground should travelling arrangements be available.

PN880

Now, Commissioner, that's significant because the effect of this clause, given my friend's already made the submission that the remainder of the other provisions, subclauses in 19 haven't changed. The effect of subsection (d) is that, effectively, employees are on the clock at the point in time when they are at the pre-shift meeting room. That is significant because if the pre-shift meeting room is underground, they are not on the job until they get underground. So under the 2015 agreement if the respondent had organised for pre-shift meetings to be held underground, the employee would have to go to the cage brace area, on the surface, travel down in the cage and go to the room underground that was designated. It's only at that point that they are on the job.

PN881

The significance of that has been, understandably, overlooked by my friend, but it's crucial when one looks through the changes that have been made to that clause, in the minutes, and then the key reason given by Ron Cowdrey, attributed to him in the 2020, 25 February meeting, and explaining the context of what ends

up changing in the March and the May draft 2020 enterprise agreement statements.

PN882

So I'm going to take you through that, just to make my submission good, in respect of the relevant context that the respondent says the Commission should take into account when it comes to construing the changes that have been made in helping you construe the 2020 agreement, Commissioner.

PN883

We say this is significant because I think you can take it from me, Commissioner, without me needing to take you to the different meeting minutes - sorry, I'm just getting my document up = that the 11 December 2019 minutes, and I'll read it on the transcript, and this is found at RC4, under the clause 19.10(d), the only notation is, 'Delete reference to underground changeover'. There's no further discussion recorded.

PN884

At the 28 January 2020 meeting minutes, at RC5, there is, again, no discussion recorded, other than, 'Delete reference to underground changeover - no agreement'.

PN885

For the 5 February 2020 minutes, at RC6, there's a little bit more of a notation, but no reasons identified for the disagreement between the parties and under 19.10(d), 'Employee proposal', again it's stated, 'Delete reference to underground changeover - no agreement'. Then there's a reference to, 'Chris to do a process map and present'. Ron is recorded as saying, 'This is an important part of the agreement', and then, 'Scott proposed to make a smaller group and discuss further. Meeting arranged for 24 February'.

PN886

Then we understand that there was a meeting on 25 February, Commissioner. I spent a bit of time, in cross-examination, on this minute with Mr Cowdrey. This is the first minute where a reason for the dispute between the parties is identified. The respondent's emphasise, this is at JSB1 to Mr Buckman's statement, if I can take you to that minute, Commissioner and if I could take you to clause 19(d) on page 6. There's a reference here, 'To discuss deleting reference to underground changeover'. Again, that's been repeated. That's consistently been referred to in the meetings and the first time the Commissioner can see any objective contemporaneous evidence that will be relevant to construction is that bullet point underneath it, where Ron says, 'Ron would like company to add wording to protect employees for payment of additional time worked'.

PN887

The respondent says that that concern makes sense, in respect of the reason why they wanted underground changeover deleted because in the original 2015 agreement they would not have been paid for any time travelling to the on the job spot, if it was underground. So the concern is being elucidated here as to why they want that deleted and that is because they want to make sure they get paid for time arriving at the on the job spot.

PN888

We say, pausing here, it's significant that paragraph 16 of Mr Buckman's statement, if I can take you briefly to that, Commissioner, refers expressly to this reason and says that he recalls a member of the employee bargaining team explained that they wanted the reference to be removed because if pre-shift meetings were located underground, employees would have to be ready to work approximately 15 to 30 minutes earlier, without getting paid for it, because they would not be on the job in the time that they're travelling, to get to the on the job spot, if it was to be underground.

PN889

This evidence is consistent with the contemporaneous objective file note that was circulated to all the parties at the time, Commissioner, and we way there are a few things, in respect to paragraph 16. First, when Mr Cowdrey came to review the respondent's evidence and put on reply evidence, he didn't say anything about paragraph 16. The Commissioner should be slow to accept that he would have overlooked that and not put on some evidence, if he disagreed with it.

PN890

The paragraph 16 is supported by the language of the 25 February meeting minute and it's supported by the changes that were subsequently made to the clause 9.10, which I'll take you to shortly, Commissioner.

PN891

In respect of the - just while I'm on these 25 February meeting minutes, if I can keep my submissions in topic, so I'm not jumping around, Mr Cowdrey, in re-examination, gave some further evidence as to things that were discussed at this meeting minute.

PN892

The respondent submit that the Commission would be slow to put much weight on that evidence, in circumstances where it's not raised in any of his statements. It's clearly relevant to the issues before the Commission and in circumstances where my friend did not challenge Mr Buckman, in paragraph 16 or the accuracy of that, it was not put to him that the conversations to the effect that he recalled hearing did not occur.

PN893

If I could tender the email that my solicitors have sent through just before. Do you have a copy of that email, Commissioner?

PN894

THE COMMISSIONER: Which email are you referring to? Is that the minutes that were - the document that was answered or produced in response to a call?

PN895

MS JAFFRAY: Yes, and it was sent to your associate, at 3.04 pm this afternoon, and it was in response to a call. It was in respect to concerns raised by Mr Cowdrey, in respect to minutes.

PN896

THE COMMISSIONER: Yes, I've got that email now.

PN897

MS JAFFRAY: I won't take you through it, other than to take you to the part of the email chain which starts - is sent by Mr Cowdrey, on 15 December 2019, at 7.55 pm. If you can let me know, Commissioner, when you've found that little part of the email chain?

PN898

THE COMMISSIONER: Sorry, can you give that date and time reference again?

PN899

MS JAFFRAY: It's at - - -

PN900

THE COMMISSIONER: Did you say 7.55 pm on Sunday, 15 December?

PN901

MS JAFFRAY: Yes.

PN902

THE COMMISSIONER: Yes, I've got that.

PN903

MS JAFFRAY: You recall that I questioned Mr Cowdrey about the fact that it was only in the 25 February meetings where the reason is identified in the minutes, for the request to remove underground changeover and I said that that was significant and that if there was other important matters they would have been recorded in these minutes and that it didn't identify, in any emails, any corrections or changes to these minutes.

PN904

I just wanted to draw your attention in respect of Mr Cowdrey's evidence that other matters were discussed, along the lines of what he said in re-examination, as to the reasons why the employees had wanted this amendment. He states, in this email:

PN905

Meeting minutes are a document of reflection of discussions that take place. The only fact that is required to be included in minutes is whether the words were spoken at the meeting and you are aware that they were.

PN906

I don't take it any further than that, Commissioner, other than just to recall the fact that Mr Cowdrey, at least in this email chain, appears to take it relatively seriously what's been recorded in meetings and wants facts recorded in the meeting minutes. I'm not saying that they're exhaustive, because they're not verbatim, but material things that were said, the Commissioner should accept, in light of no reply evidence being put to the contrary by Mr Cowdrey, that they do accept - they do reflect the record of what was going on between the parties.

PN907

If I can now move to the amended - the draft agreements, and the first one was in March 2020, that's attached to Mr Cowdrey's statement at R7, RC7.

PN908

THE COMMISSIONER: Yes, I have that.

PN909

MS JAFFRAY: Here is purple wording, indicating that it's the employees that have proposed this language, and, significantly, what's changed here, Commissioner, is that on the job is no longer the pre-shift meeting room, it is a particular point on the surface and it's expressly said, 'It should not necessarily be the pre-shift meeting room'.

PN910

So we say that that is a key part of the change which the employees wanted, in order to demarcate the correlation in the 2015 agreement, between being on the job and being in the pre-shift meeting room. They're not the same anymore here. However, what's clear from these changes is that a designated point on the surface does not need to be the meeting room, indicating that it was envisaged, in these changes, that you don't have to stay at the on the point spot, that's the spot where you become on the job, but it's not the spot where you have to stay because you might be required to go to a different spot afterwards, for example, to be in the pre-shift meeting room.

PN911

But for the purposes of protecting the employees rights to have the clock run, in contrast to the 2015 agreement where they are on the job when they reach, for example, the underground pre-shift meeting room, under this clause they are on the job when they get to a designated point on the surface and from that point in time the clock runs.

PN912

I'll come to the changes that are, ultimately, found in the final agreement, because they did change around the language of this first sentence, so 'cage brace' is moved around and the structure of this clause changes slightly, but the focus that the parties had on protecting the employees financially is emphasised in the following sentences.

PN913

So:

PN914

In normal circumstances, expected on site hours will not normally exceed 12 hours and 45 minutes per day. Additional hours associated with this clause will be paid, in accordance with clause 22 'Work outside normal rostered hours' and in compliance with safe site safety system fatigue management requirements.

PN915

This is what's been proposed by the employees, Commissioner, in order to ensure that any work undertaken after they are on the job, during the on the job period, is

work that's covered and for which they will be paid and that they are not out of pocket with having to spend time getting to an on the job spot because it will always be on the surface.

PN916

So we say that's the context, the relevant industrial context, using the language - adopting the language that my friend has taken you to in the case law, relevant to the background of the construction of the 2020 agreement.

PN917

If I can jump ahead then, to take you to the 2020 language, in the court book? I'll start going through it sequentially, starting at clause 10.10, Commissioner. We agree that the words 'in relation to' have some level of breadth to what they mean. They do, however, have a causal connection and they are concerned with when an employee's shift commences and finishing times.

PN918

So the point of that, Commissioner, is that all of clause 19.10, at the end of the day, has a temporal element, it is concerned with timing. I'll talk the Commission through that.

PN919

In respect of clause 19.10.1, the respondent has a different construction to that subclause than what my friend's have proposed and particularly in this way. My friend have focused on the requirements of being properly clothed to be ready to work, in that subclause. We take issue with construing the subclause in that way. We say that it is important that that subclause be construed as a composite manner. What that clause is concerned with, Commissioner, is requiring that employees be changed and ready to commence work. That's significant. It's not one or the other, the use of the word 'and' is composite in a sense of requiring both of those counterparts to be together at the same time.

PN920

I see my friend making some facial expressions there, she will have her opportunity to make some submissions in reply.

PN921

The composite nature of that phrase is such that when one reads subclause (1), together with the other subclauses, an employee is not ready to commence work until they have completed pre-shift meetings and crossovers. They may not have all the necessary gear they might need to commence the work because, for example, in the cross-shift meeting they might be told they need a particular type of item to be carried, for whatever reason. The phrase will be 'changed and ready to commence work' is a composite phrase taking into account what happens in the following subclauses. It doesn't say anything, one way or the other, as to the content of those subclauses, without more.

PN922

Subclause 10.2 is concerned with shift employees and, as, I think, my learned friend has said, all the relevant underground employees are, for current purposes,

sift employees, and they are required to be on the job, to facilitate an effective shift change over, at least 15 minutes prior to the shift commencement time.

PN923

The respondent says that this is not simply being available 15 minutes before, as my friends have submitted, they are required, under this clause, to be on the job at a point in time at least 15 minutes prior to the shift commencement time. It doesn't tell them where they then need to be or what then happens after that point in time, it says:

PN924

At least 15 minutes prior to the shift commencement time shift employees are to be on the job.

PN925

It doesn't tell you where 'on the job' is. 19.10.2, the object and purpose of that is the timing for shift employees as to when they are to be on the job.

PN926

My friend seeks to give the word 'facilitate an effective changeover' a different meaning from what we say an ordinary, reasonable construction of those words can possibly bear. It doesn't mean they do nothing more than turn up at a particular spot and can do whatever they like for the next 15 minutes, and it can't possibly, with respect to my friend, bear that construction. It needs to be given a business construction consistent with the object and purpose of that clause.

PN927

'To facilitate an effective shift changeover' means exactly what it says. It is to do what is reasonable, in the circumstances, to facilitate an effective shift changeover.

PN928

Now, what that might be might depend on the circumstances, and when I come to - in fact, I'll jump over point 3 and come to point 10, just for this particular point, sorry 10.4.

PN929

The clause envisages that the on the job spot can be a point on the surface where an employee is fully dressed in PPE clothing. The first sentence, in 10.4, says:

PN930

On the job is a point on the surface, as designated by the employer, which is not necessarily the pre-shift meeting room, e.g., a cage brace.

PN931

It doesn't say anything about requiring, one way or the other, the state of dress of an employee, at that particular point in time. They need to be able to facilitate an effective changeover. There is no provision in these clauses for them to, prior to the 15 minutes to the shift commencement time, to do things, such as changing outfits, going to the bathroom and so forth. These clauses are concerned with when they start with on the job. Once they are on the job they can then be

reasonably directed to attend a pre-shift meeting. If that pre-shift meeting goes for 15 minutes, they will then need to be in a position to go straight to the commencement of their shift.

PN932

10.3 does something similar as 10.2 and the difference between mining department employees and why it's a subset is it's designed to pick up, Commissioner, those employees who do seven days on and seven days off. For those employees that do seven days on, the first day they come back for that week they have to have a longer - under this clause they are required to be on the job for a longer period of time to accommodate the operational requirements that there'll be more information for the supervisors to impart in a pre-shift meeting.

PN933

THE COMMISSIONER: Because they have been out of the site for seven days?

PN934

MS JAFFRAY: Yes, correct, Commissioner. As with 10.2, 10.3 is concerned with the time in which they are - the point in time in which they are on the job and when you are coming back from your seven days off you are required to be on the job at least 30 minutes prior, in order to - prior to the shift commencement time, in order to facilitate an effective first shift back meeting.

PN935

The connection between 'facilitate an effective first shift back meeting' we say, Commissioner, enables the respondent to do what it is doing, or proposing to do, to say that the point on the surface is not the same as the pre-shift meeting room is, for example, a cage brace and for them to be requested to go down, on the cage, and go to a pre-shift meeting.

PN936

If it's considered to be appropriate, in order to facilitate an effective shift changeover, there is no reason why clauses 10.2 or 10.3 have anything to say against that.

PN937

In respect of 10.4, the ordinary reading of that first sentence, Commissioner, is that the spot on the surface, which is designated by the employer, is the point in time - is the location, in respect of the point in time identified in the previous subclauses. So the previous subclauses are concerned with the temporal element of when you need to be on the job and clause 10.4 tells you where on the job is.

PN938

But we say, Commissioner, that's a very different thing from regulating where you need to stay for the next 15 or 30 minutes. It's clear, from the first sentence in 10.4, subclause 10.4, that the parties envisaged that once you are at that spot, that point on the surface, you don't need to stay there because it's not necessarily the same as the pre-shift meeting room.

PN939

Now, at all points in time all parties, and it doesn't seem to be controversial, everyone understands that these underground mining employees attend pre-shift meetings, they currently attend pre-shift meetings on the surface. There's no question that that's no longer on the table. It is relevant, constructionally, Commissioner, that this envisages a meeting which everyone agrees occurs prior to the commencement of a shift, as my friend said, it's axiomatic that a pre-shift meeting is pre-shift. If it agreed, in this first sentence, that 'on the job' is not the same as a pre-shift meeting room, we submit that's because this sentence encapsulates the purpose and object of identifying a point in time - a point on the surface where you become on the job, but does not talk to where you then stay to be on the job.

PN940

Now, my friends, in clause 10.5, have noted that 'on the job' isn't in quotations there and we accept that, but we say that that works with our construction of 'on the job' because, in clause 10.5, it refers to the fact that, 'Employees will remain on the job until the designated finishing time'.

PN941

It's not in quotations there, because it's not referring to the starting point or the starting location of 'on the job', but it's referring to 'on the job' in the sense of, 'You are on the job', but it's not that very point in time when you are clocking on, but you are still on the job. It gives the Commissioner a sense of the flexibility of the location of where an employee can be. I'm not sure if you follow that submission, Commissioner, I might have muddled my sentences, but - - -

PN942

THE COMMISSIONER: I understand your submission, Ms Jaffray.

PN943

MS JAFFRAY: So when my friend has said, in her submissions, that we are, effectively, requiring employees to be commencing productive work and, effectively, requiring them to commence a shift before their shift, I want to make it clear that that's not the respondent's submissions. We are requiring them to be on the job at a point that we're able to designate on the surface, and then travel to, either on the surface or underground, wherever has been identified by the employer as the pre-shift meeting room.

PN944

That does not require the employee to be - that is not the same as requiring the employee to, effectively, commence their shift. As the Commissioner has heard today evidence that, currently, employees already turn up, in protective - full protective equipment, at their pre-shift meetings, that wasn't challenged by my friend. There's no evidence from anyone who attends pre-shift meetings that they do not do that. There's no reason, on the construction of these clauses, that simply because you are required to turn up in the cage brace area, as a spot which is on the surface, you are therefore being required to commence work, in the sense of commencing your designated shift commencement time. We don't say that's what the respondent is asking the employees to do and we don't invite the Commission to make that - accept that construction submission by my friends.

PN945

An employee is only ready to commence work at the designated shift time when they have completed their pre-shift and, if required, cross-shift meetings. Because of the nature of the information that is imparted in those meetings, there's no submission being made by the respondent that they are to be required to commence their designated shift commencement time prior to the meetings provided for and envisaged in clauses 10.2 through to 10.4.

PN946

One moment, Commissioner.

PN947

Now, there's a little bit of confusion with the wording in 19.10.4, in the first sentence, as compared to, for example, the March draft statement, enterprise agreement statement, where the employees have proposed the language for underground employees:

PN948

On the job is a designated point on the surface, e.g. cage brace; not necessarily the pre-shift meeting room.

PN949

In the final version 'cage brace' comes after, 'Not necessarily the pre-shift meeting room'.

PN950

We don't say anything turns on this, Commissioner, but it is relevant because a pre-shift meeting room is never going to be the cage brace. The cage brace is an outside area preceding the cage itself that takes you downstairs. It's not protected by the elements, it doesn't have computer systems set up to facilitate pre-shift meetings.

PN951

So the way that we would suggest, Commissioner, that you understand the first sentence, in 10.4, is not that case brace is an example of a pre-shift meeting room. The way that we would suggest to the Commissioner that you understand this sentence is to put a comma before 'employer' so it reads, 'By the employer' comma, 'which is not necessarily the pre-shift meeting room' and then put another comma after 'room', so that, 'On the job is a point on the surface as designated by the employer, cage brace.' And that's consistent, we say, Commissioner, with the language proposed by the employees, in the March 2020 enterprise agreement changes, which they marked up.

PN952

If the Commissioner was to accept the respondent's submissions on that matter, then it brings home the submissions I've just made, in respect to the fact that there is nothing inherently wrong or offensive to the respondent's construction to require employees to turn up at the on-the-job spot, on the surface, at a location that requires them to wear protective equipment.

PN953

You'll recall, Commissioner, that Mr Christen gave evidence that the cage brace clearly requires employees to wear protecting equipment. We say that that is what is envisaged in the employees own drafting of that clause.

PN954

THE COMMISSIONER: Isn't the cage brace essentially the waiting area to catch the cage down?

PN955

MS JAFFRAY: Yes, and the requirements are, I think it's 20 metres before you get to that area you have to be in PPE equipment.

PN956

Then, I think I've already mentioned this, but as in the original, in the marked up version, in March 2020, there is, again, requirements, in clause 10.4, for employees to be compensated for additional hours worked outside, associated with this clause, in accordance with clause 22.

PN957

Again, we say, when that clause is read as a whole, the changes to that clause concern protecting employees for being paid for their time to ensure they're not travelling down to a pre-shift meeting room without being paid, which is, again, what we say Mr Cowdrey's key concerns were, as identified in the meeting minutes of the enterprise bargaining agreement meeting.

PN958

One moment, Commissioner.

PN959

I think I've responded to the construction points raised by my friend. In respect to safety issues, our primary submission is that unless there's cogent evidence of safety concerns, in respect of the employer's proposed changes, and I'll come to my submissions in wide areas and such evidence before the Commission.

PN960

The Commission should approach issues of safety, having regard to the onerous obligations on all employers in Australia, in mines, to ensure the health and safety of their workers, arising as a result of the Work Health and Safety Act 2011, in New South Wales and the Work Health and Safety (Mines and Petroleum Sites) Act 2013.

PN961

In that context, one needs to consider the assertions of concerns and respect to safety raised by the applicant. We have identified various objections to the applicant's evidence, and I won't take the Commission through them, but it is necessary - it's a little unclear to what extent my friend is relying on certain safety issues, so if I just cover a - - -

PN962

THE COMMISSIONER: Well, if I could ask this, and I think, perhaps I'll ask Ms Doust, at the appropriate time as well, but isn't my task to construe the proper

construction of clause 19? That will either allow something or it won't, it will have its construction. To the extent that the outcome, hypothetically, might allow the employer to conduct meetings down there, to the extent that raises further safety concerns or consultation requirements, aren't they matters that the employer would then have to work through, but that's separate and distinct from the task before the Commission presently?

PN963

MS JAFFRAY: Yes, Commissioner, that's exactly what I was going to ultimately come to, that submission, in that they, the types of safety issues raised by my friends are not such that they would be relevant to the construction of the clause. So I say that in this way, if it was - if there was a safety issue that was established on the evidence as creating a real risk of blindness, this is just a very hypothetical, such that it was a known fact, I accept that a known fact, in respect of safety issues, might be relevant to a construction exercise, to the extent that it would inform what a reasonable business person, a reasonable FOE might think, when reading these clauses. There's no such evidence which might give rise to a relevance issue, in terms of the constructions.

PN964

The type of safety issues that have been raised by the applicant are speculative, at best, and to the extent that they exist, they should, appropriately be dealt with, we say, in further consultation and communications.

PN965

THE COMMISSIONER: Thank you.

PN966

MS JAFFRAY: So, for example, Ron Cowdrey has given various evidence that, for example, at paragraph 28 and 29, that will go in subject - has gone in subject to weight in respect to issues relating to the decline.

PN967

Some evidence was given, in cross-examination, by Mr Christen about these matters, but the Commission doesn't have detailed evidence, in respect of these concerns and we say it would not be appropriate for the Commission to place weight on concerns of this type, in construing the wording, the ordinary wording, in light of these types of safety issues having no foundation in the objective contemporaneous documents at the time and the hearsay nature of what's been alleged in these paragraphs.

PN968

The same goes for - sorry, I withdraw that. In respect of other types of assertions made by Mr Cowdrey, such as things like the heat of the area, well, the Commission's heard evidence that the area in which the pre-shift meetings and/or the waiting to get the cage up and down is not of any comparable difference to the surface temperature, so that submission should be given no weight in his statement. His evidence about the size of the meeting room, again, should be given no weight, it's of no difference to the other - no comparable difference to the other meeting rooms on the surface.

PN969

In the circumstances of this case, the Commissioner should be satisfied that there is no cogent evidence established, in respect of a safety concern, such that it affects the construction of clause 19.10.

PN970

Finally, just circling back to final submissions, in respect to the submissions my friend made, in respect to concerns raised from the bargaining process, my friend said that there were concerns raised, relating to the underground finishing times being extended. We say two things in response to that, Commissioner.

PN971

First, the Commission would be slow to accept that those matters were, in fact, raised, in respect of why the employees were concerned to remove the reference to underground changeover, because it's not found in the content of the minutes. The only explanation given to the reasons why those phrases were to be removed are found in the 25 February meeting minutes, and they don't support that contention. Mr Cowdrey didn't deal with this in his reply evidence and we're hearing about it, for the first time, in a high level - in re-examination.

PN972

Secondly, Commissioner, the proposed changes, by the respondent, were explained by Mr Christen to involve - to have aimed involved efficiencies and not to slow things down and not to have underground employees waiting for longer underground. Mr Christen gave evidence that for employees who had finished their shift, if their counterpart wasn't immediately available for a short cross-shift meeting they did not need to wait and they would go straight up. The counterparts that were there, at platform 9L for their changeover, the conversations would be short, he wasn't challenged on this evidence that it would be about two minutes long, and then they could have time to get back into that cage and get to the surface. That evidence wasn't challenged.

PN973

There is no evidence before you sufficient to enable you to make a conclusion that there would be an extension of time that employees would spend underground, as a result of the respondent's proposed changes. That's not envisaged in the respondent's proposed changes. The timing which was set out in paragraph 24, as explained when he gave some further evidence in respect of how that would be staggered and how cross-shift employees would not - cross-shift meeting employees would not need to wait at 9L was not challenged.

PN974

One moment, Commissioner. If the Commissioner has any other questions, those are my submissions.

PN975

THE COMMISSIONER: Thank you, Ms Jaffray.

PN976

Ms Doust, is there anything in reply?

PN977

MS DOUST: Yes. First of all - - -

PN978

THE COMMISSIONER: Sorry, I might just ask, at the outset, you would have heard a question I asked of Ms Jaffray about - well, to put it frankly, the relevance of safety matters - - -

PN979

MS DOUST: I'll deal with that.

PN980

THE COMMISSIONER: Yes, very well.

PN981

MS DOUST: I plan to deal with that.

PN982

First point is this, I object to the tender of documents when the tender is first made in my friend's final submissions, when the documents were provided by us to my friend prior to their last witness hitting the box. Really, if it was to be relied upon in evidence, it should have been tendered at that stage and certainly not for the respondent to wait until I've completed my final submissions, so that's the first point I want to make.

PN983

The second point is this, a great deal of my friend's submissions were based on this furphy. It's about the absence of, on the part of the union, of any reasons or reasons considered legitimate to the employer, for the change to the agreement or for not having the meetings underground.

PN984

The first reason why that's a furphy is because it's just wrong in principle. A party doesn't need to reach some sort of threshold of having a sufficient reason for a particular construction to be given to an enterprise agreement.

PN985

The second reason is, it is demonstrably wrong, on the evidence, and I'll ask you to go, if I might, Commissioner, to page 118 of the court book, which is the minutes of the December meeting. One can see there that there is a demand there that management must ensure that CMPL, that's the company, Cobar Management Pty Ltd, employees are on the surface at least 20 minutes prior to finish time. That's in those minutes, after there's a reference to the shaft creating bottlenecks.

PN986

So, clearly, there is a desire there, on the part of employees, at the same time as there's a demand about deleting the reference to the changeover happening underground, for the off-going shift to be out of the mine on time. That was something that Mr Buckman ultimately conceded, that there was a concern, on the part of employees, that the outgoing shift finish their shift on time.

PN987

So the suggestion that the employees or the union hadn't articulated a reason for the demand for not holding these meetings underground, or for their particular view about where the meetings should be held, that this was all simply about money, that is just not true, as those minutes demonstrate.

PN988

The second point I want to go to is this, the context. Well, an important point of context is this, the prior iteration of this agreement specifically allowed for that 'on the job' to be at a location underground. That reference was ultimately removed from what became the corresponding provision of the later agreement. That is a very significant part of the context.

PN989

My friend has made something of the capacity for movement in that period prior to the commencement of the shift, and the fact that the clause says that the location is not necessarily the pre-shift meeting room, you'll remember, Commissioner, there was a deal of evidence about there being a range of meeting rooms on the surface, any of which could have been used to carry out a pre-shift meeting or a crossover meeting. So the fact that the meeting wouldn't necessarily take place at the pre-shift meeting room doesn't mean that the parties embraced or envisaged that the employees would be picked up from that spot and taken immediately underground.

PN990

Just on that question of construction, I just want to go to this, 19.10.2, 10.3 and 10.4 are all referring to 'on the job'. 10.2 and 10.3 talk about this 15 minutes prior, 30 minutes prior. 'On the job', in my submission, is either something that goes for the entirety of that period or if, as my friend says, it is simply a point in time moment, in 19.10.4, then really what she's saying is that the obligation in 19.10.2 and 10.3, about facilitation, isn't something that continues on throughout that period. That description of 'on the job' just be consistent and it either describes an ongoing obligation, in respect of that period.

PN991

My friend seems to be saying it's only one moment in time but, in my submission, you would read it, consistently across each of those clauses. If the obligation is ongoing in the period of 15 or 30 minutes, in 19.10.2 and 10.3, then the specification as to location, in 19.10.4 carries on over that period as well.

PN992

So far as my friend dealt with the question of safety, and referred to the existence of safety legislation, what we say is this, the existence of other obligations does not render those matters irrelevant. One doesn't simply assume that because there's legislation dealing with the area that automatically that everything that is done by an employer is in compliance with those obligations. That's not the way that reasoning in this area works.

PN993

The question of safety, we say, comes up in this way. It informs the Commission about the applicant's attempt to remove underground meetings from the agreement.

PN994

Now, we're met by the respondent with a suggestion that, 'There is no safety issue, everything is safe and this can't possibly be relevant'. What we identify is the basis for, on the part of our members, a legitimate concern as to spending extended periods underground. We would have thought that is entirely understandable.

PN995

So to the extent that we are met with an argument that there was no genuine desire to ensure those meetings happened on the surface, or that we had no reason to want those meetings to happen on the surface, we point to the manifold risks that are associated with being underground or remaining underground as a reason why employees would logically prefer not to conduct those meetings in that location. That was clearly and demonstrably a claim that was advanced not just at that first meeting in December, but thereafter, repeatedly, and which ultimately resulted in an amendment of the relevant clause to remove the reference to meetings occurring underground.

PN996

So it's not that we invite you, Commissioner, to make some sort of finding that there's been a breach of safety obligations or anything of that nature, it's simply that we say that our - - -

PN997

THE COMMISSIONER: It informs the background to the extent that the background can be taken into consideration, is about (indistinct).

PN998

MS DOUST: Entirely, and in understanding the way and the reasons such a claim would be advanced.

PN999

The final point it this. My friend made something about the fact that we'd not challenged Mr Christen about the way in which meetings would occur. I think she was referring to paragraph 24 of his statement. Now, of course, that was a statement about how he proposed that changes would occur in the future. I can scarcely put to him, 'That didn't happen, did it?', because this is some expected or hoped for arrangement in future.

PN1000

What I will say about the crossover meetings and the pre-shift meetings is that the evidence as to how those meetings occur currently is that Mr Christen had a concern about employees who were coming off the off-going shift interrupting employees who were having their pre-shift meeting, so that they could get away. So what we know occurs now is that there are employees who hare having their pre-shift meeting before the crossover or cross-shift meeting occurs with their counterpart employee.

PN1001

Now, that, we say, is sufficient basis for there to be an apprehension that that may occur in the manner in which any shift of meetings underground occurs. Obviously workers will be, presumably, in the company of whoever their supervisor is and, as Mr Christen indicated, it was his wish for the crews to travel together. One can readily see how that might result in the group who have already been assembled already commencing their pre-shift discussions before they reach the underground, so the path out of the mine, by the off coming employee being delayed in that way and, with respect, it's not incumbent upon us to put a proposal about that reality having already occurred with meetings occurring underground where that hasn't happened as yet.

PN1002

Commissioner, unless there's anything further, I think those were the submissions that I had in reply to what my friend said.

PN1003

One final submission, my friend made the abberous submission, if I can put it that way, that this was just all about the lucre, it was all about the dollars. It is, of course, as we all know, quite common for employees to be interested both in payment and their conditions of work. So the fact that a claim for payment is being advanced and a claim about payment is reflected in the clause, does not, by its very existence, mean that there was no other concern of the employees or that there was no other demand being advanced. It is apparent that the demand about not conducting meetings, the changeover meetings, underground was something that was advanced repeatedly throughout the meetings. The minutes show it. So the attempt to suggest that there was no reason for this, no reason advanced and that was clear, throughout the minutes, that, in my submission, doesn't reflect the evidence before the Commission at all and such a demand is one that is readily understandable for anyone who knows anything about the conditions operating in one of those minds.

PN1004

Unless there's any questions, Commissioner, those are the submissions of the applicant.

PN1005

THE COMMISSIONER: Just on the last, one last point, is this email that was provided, as part of a call. Ms Jaffray has asked for it to be tendered, during the final submissions. You object to the tender at that point?

PN1006

MS DOUST: Yes.

PN1007

THE COMMISSIONER: At the point - well, can I leave the determination of whether that document is admitted, as part of my consideration of the - and deal with that as part of the decision?

PN1008

MS DOUST: Yes, Commissioner. I must say I've not - I've not looked at it, so I haven't addressed anything in relation to that document. Under the ordinary rules, if a party calls for a document in questioning, what then occurs is that it is then at the election - sorry, the party producing can compel the party making the call to tender it. They can compel it, but if it was something that the respondent elected to tender, on their own election, no reason why it wasn't done in the respondent's case because the document was provided prior to Mr Buckman being affirmed or sworn, I can't recall, and no explanation is given as to why it wasn't raised at that stage.

PN1009

THE COMMISSIONER: Ms Jaffray, is there anything you wish to say, on that point?

PN1010

MS JAFFRAY: Commissioner, I only received this document right before the end of the lunch break, so I wasn't able to consider it, I was listening to my friend's submissions. It was a late receipt by my friends and there's no - I mean if there is some prejudice arising from this tender, I would not have any problems with any supplementary submissions my friend would want to put on, about this email. It's uncontroversial. It's a work document, it's perfectly able to be tendered. If it's a timing issue, and if my friend is identifying some kind of prejudice she should do so.

PN1011

THE COMMISSIONER: Ms Doust, is there any prejudice, other than the timing issue?

PN1012

MS DOUST: The prejudice is that it's only arisen in my friend's submissions and it would now add further time to respond to it. I just simply think a basis for accepting it isn't made out, where it was provided before the respondent's case had closed.

PN1013

THE COMMISSIONER: Okay. Well, I'll deal with it as part of the -whether that document is admitted into evidence, as part of my overall determination of the matter.

PN1014

MS JAFFRAY: Commissioner, could I have the indulgence of the Commission to make one little submission, in reply to what I've heard from my friend?

PN1015

THE COMMISSIONER: In relation to what issue, Ms Jaffray?

PN1016

MS JAFFRAY: Just in relation to the fact that these minutes deal with this submission that there was a concern about additional time underground.

PN1017

THE COMMISSIONER: This is page 118 of the hearing book?

PN1018

MS JAFFRAY: Yes. It's just one point, Commissioner. It will be no more than a minute.

PN1019

THE COMMISSIONER: I will then give Ms Doust the opportunity to make - to say anything in response then.

PN1020

MS JAFFRAY: The submission is just simply this. The minutes have been organised under topic headings and the comments that my friend has taken you to, in respect of the concerns about timing, were discussions recorded in respect of a proposal to add in a clause (g) and they're not recorded as being relevant to why the employees identified they wanted a deleted reference to underground changeover. That was the first time we heard any connection between the two was in re-examination by Mr Cowdrey. May it please the Commission.

PN1021

THE COMMISSIONER: Ms Doust?

PN1022

MS DOUST: It's simply this, Commission, you wouldn't read minutes like that carefully corraling what's said, in relation to each of the subclauses of 19.10 in that way. It's clear that in the discussion about those clauses, in a rough set of minutes, that there's concerns about the logjam at the gate and there's also a demand about getting employees to the surface 20 minutes before the end of their shift. It really is an extremely legalistic and, dare I say, artificial reading of those minutes that my friend urges upon you.

PN1023

THE COMMISSIONER: Very well. I thank the parties for their submissions. I will give consideration to the evidence and the submissions. I will reserve my decision and I will publish my decision and reasons in due course.

PN1024

The Commission is adjourned. Thank you.

PN1025

MS DOUST: Please the Commission.

PN1026

MS JAFFRAY: Please the Commission.

ADJOURNED INDEFINITELY

[4.15 PM]

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