



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CROSS

B2022/1569 B2022/1570 B2022/1571

s.240 - Application to deal with a bargaining dispute

David John McLeod
and
Forest Coach Lines Pty Ltd T/A Forest Coach Lines
(B2022/1569)

s.238 - Application for a scope order

Application by McLeod
(B2022/1570)

s.229 - Application for a bargaining order

Application by McLeod
(B2022/1571)

Sydney

PN1

THE DEPUTY PRESIDENT: I'll take the appearances, please.

PN2

MR D McLEOD: David McLeod for the applicant.

PN3

THE DEPUTY PRESIDENT: Thank you.

PN4

MR S SASSE: If the Commission pleases, Sasse, initial S, with Mr Nelson, for the respondent.

PN5

THE DEPUTY PRESIDENT: Thank you. This matter was previously before the Commission on 12 December, at which time there were various issues taken and an adjournment application acceded to. There were some tasks that the parties had to undertake in the intervening period. Firstly, Mr McLeod, have you provided a draft order to the Commission of what you seek today?

PN6

MR McLEOD: I thought I provided that we just wanted to be covered by one EA. I wasn't sure - sorry, I didn't know I had to provide a draft order. I do apologise.

PN7

THE DEPUTY PRESIDENT: I'm sorry. It's just listed in the transcript where we traversed you providing a draft order. What about the circulation of the court books?

PN8

MR McLEOD: I circulated the court books to everybody. I put it - so it was a drop box which could just be accessed by clicking on the link and downloading the court books.

PN9

THE DEPUTY PRESIDENT: Is that agreed to by the respondent?

PN10

MR SASSE: Yes, your Honour. We were able to, happily, download the court book, and I think we've now provided your associate with the correct form.

PN11

THE DEPUTY PRESIDENT: Yes. Just one matter that's occurred to me, Mr McLeod. You appear today as a bargaining representative of whom?

PN12

MR McLEOD: It was myself when I started this, but also people from Terrey Hills and Cromer.

PN13

THE DEPUTY PRESIDENT: Do you have an instrument of appointment?

PN14

MR McLEOD: No, I don't, because they were given to Forest. When we were given them, when we were just given the application form, we gave them to Forest.

PN15

THE DEPUTY PRESIDENT: Did the respondent receive those?

PN16

MR SASSE: Your Honour, we're not in possession of those documents. If I might - - -

PN17

THE DEPUTY PRESIDENT: Yes.

PN18

MR SASSE: It appears they don't seem to be in our possession, your Honour.

PN19

THE DEPUTY PRESIDENT: It's just an issue that I was interested in. It goes to a key point, that you need to have standing to agitate, but it's not something that's being taken against you. It's something that can be dealt with in the intervening period.

PN20

MR McLEOD: Sorry, your Honour. The way the appointments were made was via a form that was then submitted to Forest, and that was done twice, both in May and again in October. As far as I'm aware I had between seven or eight from Cromer and originally out of Terrey Hills I think I had 30, but we weren't given - we didn't keep possession of those because it's an internal - 'Here's the application form and give it into Forest itself', the respondent. Thank you.

PN21

THE DEPUTY PRESIDENT: No problems. Well, it's your application, Mr McLeod. How do you wish to proceed?

PN22

MR McLEOD: It is an application. I want to have this dismissed.

PN23

THE DEPUTY PRESIDENT: Is that still pressed?

PN24

MR SASSE: Your Honour, we're a little concerned about the degree to which the applicant complied with the directions from the hearing on the 12th in terms of time limits and in terms of the quality of the material that's been produced, which is quite incoherent and very, very difficult to wrap one's head around in terms of evidence.

PN25

THE DEPUTY PRESIDENT: Timeliness, you say. What's the difficulty?

PN26

MR SASSE: I'm sorry?

PN27

THE DEPUTY PRESIDENT: What's the difficulty insofar as timeliness?

PN28

MR SASSE: The witness statements were filed three days after the deadline that you imposed.

PN29

THE DEPUTY PRESIDENT: And is that seriously being put as a problem?

PN30

MR SASSE: It's a question of process.

PN31

THE DEPUTY PRESIDENT: Do you press that you have been prejudiced in any way?

PN32

MR SASSE: No, we don't, your Honour.

PN33

THE DEPUTY PRESIDENT: Then we'll move on. Anything further from the respondent at this stage?

PN34

MR SASSE: No, your Honour.

PN35

THE DEPUTY PRESIDENT: Thank you. So back to your application, Mr McLeod.

PN36

MR McLEOD: Deputy Commissioner, again, I don't have a lot of experience in this Commission at all. I do apologise if I've missed out on any mechanical steps I was supposed to take. My understanding is in my submissions I've always said that both depots, or the drivers in the greater Sydney metropolitan area employed by the respondent, should be covered by one EA, not two. I have submitted that under section 186(3) - - -

PN37

THE DEPUTY PRESIDENT: You see, and this is the problem.

PN38

MR McLEOD: Yes.

PN39

THE DEPUTY PRESIDENT: You're submitting on whose behalf?

PN40

MR McLEOD: On behalf of the drivers within Forest. I have three here today that are all bargaining representatives.

PN41

THE DEPUTY PRESIDENT: So on behalf of - - -

PN42

MR McLEOD: On behalf of the representatives - - -

PN43

THE DEPUTY PRESIDENT: - - - those that you are the nominated representative who - - -

PN44

MR McLEOD: Who have all - sorry. In my submissions I put evidence on that I have actually done a poll of all the drivers at Cromer and 30 or 40 drivers at Terrey Hills that all said that they only want one EA.

PN45

THE DEPUTY PRESIDENT: Well, no, that's not the evidence.

PN46

MR McLEOD: I thought I put that in. Sorry.

PN47

THE DEPUTY PRESIDENT: They didn't all say that.

PN48

MR McLEOD: Most of them said that, your Honour.

PN49

THE DEPUTY PRESIDENT: There's a big distinction between all and most. It was 70 per cent, I think you put it at, wasn't it, or more?

PN50

MR McLEOD: Sorry. 70 per cent of them said that they want one EA, not two. All of the drivers at Cromer said that they wanted one EA. One of the problems I do have with the respondent's submissions and witness statements is that they haven't actually put in the contract they keep referring to, which is the region 14 contract. Everything is based around that the region 14 contract says they have to do this, they have to do that, they have to do this.

PN51

THE DEPUTY PRESIDENT: Do you dispute - - -

PN52

MR McLEOD: I dispute that they have to do this, because they've been operating this business as one EA, under one EA, for the last eight years.

PN53

THE DEPUTY PRESIDENT: I've noted in your submission - it almost descends into a mantra - that because they haven't provided the contract to you, I cannot even consider their submission.

PN54

MR McLEOD: It's that, and also that they haven't - it is also that it is not geographically distinct, because - - -

PN55

THE DEPUTY PRESIDENT: But just dealing with your point - - -

PN56

MR McLEOD: Sorry, yes.

PN57

THE DEPUTY PRESIDENT: - - - the fact that you've not provided me with one iota of evidence in relation to the poll, am I then to say that I disregard the poll?

PN58

MR McLEOD: No, your Honour. You may have to disregard the poll if I haven't put the evidence on.

PN59

THE DEPUTY PRESIDENT: What have you done to seek production of the contract that you wish to challenge?

PN60

MR McLEOD: I haven't done anything, your Honour, because I didn't know I could.

PN61

THE DEPUTY PRESIDENT: Why was the contract not annexed to the statements of the respondent's witnesses?

PN62

MR SASSE: Your Honour, the contract is commercial in confidence between Transport for New South Wales and the respondent and we're not in a position to be able to release it. We have a witness in the form of the operations manager who is responsible for the negotiation and execution of that contract, and our submission would be that he is more than capable of giving direct evidence in relation to what that contract requires of the company.

PN63

THE DEPUTY PRESIDENT: I had expected that the commercial in confidence point would be raised.

PN64

MR McLEOD: The commercial in confidence point is a problem, because it will actually be put up on the website of the New South Wales government under the GIRA Act or PIRA Act and it will be up there in May. It will have redacted out of the contract the commercial in confidence parts, but the operational clauses will remain in them.

PN65

I think I attached or put in my submission a contract that is up on the website for one of the regions which basically says that they can use outside contractors and they can use associated employees, subject to having commercial contracts within them.

PN66

THE DEPUTY PRESIDENT: And so if this contract is the same as that contract - - -

PN67

MR McLEOD: They will have those similar sorts of terms within that contract, otherwise you couldn't have any outside bargains.

PN68

THE DEPUTY PRESIDENT: Why am I to assume that the contracts will be the same?

PN69

MR McLEOD: I don't know, your Honour, but I can only go - the contracts are up on the web pages as their region metropolitan bus contracts.

PN70

THE DEPUTY PRESIDENT: And you say it will be uploaded in May. May 2022 or May 2023?

PN71

MR McLEOD: May 2023, from my reading, is when it becomes operational. They have to do it by law. I would have expected it to be up there now, but it doesn't commence until May 2023.

PN72

THE DEPUTY PRESIDENT: So you haven't sought production of the document. If you then read it in May 2023 and it doesn't line up with the evidence given before this Commission, then you can take appropriate steps in relation to people's evidence before this Commission.

PN73

MR McLEOD: One of the other problems is that the company's been known to cherry-pick clauses to sort of have a favourable outcome, as was outlined in the decision from McLeod v Forest at clause 71, which is in evidence.

PN74

THE DEPUTY PRESIDENT: I've read it. I don't see assistance drawn from that decision in relation to how I might expect the respondent to behave. You won on a point of interpretation of the enterprise agreement.

PN75

MR McLEOD: Yes. I would say that if it shows a propensity to actually having a cherry-picking of the contract to meet their needs, they will do so.

PN76

THE DEPUTY PRESIDENT: Anyway, how do you wish to proceed, Mr McLeod.

PN77

MR McLEOD: Well, I still don't think they've proved that it's geographically, organisationally, operationally distinct.

PN78

THE DEPUTY PRESIDENT: Okay. Let's step through this. What documents contained in the digital court book do you seek to rely upon? We have to mark them as exhibits, because if you're dissatisfied with my decision or if the respondent's dissatisfied, either of you might wish to appeal my decision, and so it's necessary to have everything that's before me marked so that we all understand exactly what is before me.

PN79

Also, you've got a statement from yourself and a statement from Mr Munro that you will have to - is there cross-examination, Mr Sasse?

PN80

MR SASSE: At this stage we would probably intend to have very limited clarification questions in cross-examination, but no more than two or three.

PN81

THE DEPUTY PRESIDENT: Okay. So your witnesses will have to sit in the witness box, be affirmed or sworn, adopt the evidence in the statements. They then will be marked as exhibits, some short questioning and then - but this is the admission of the evidence.

PN82

So if there's documents that you rely upon - for example, the five attachments to the submissions from 5 December. You might wish to rely on them, and I'll hear from Mr Sasse about relevance, and that way we'll step through and we will mark each of the documents that you and the respondent rely upon, and therefore we'll have a full understanding of what the case before me is.

PN83

MR McLEOD: One of the things I said in my submission which I want to rely on is the attachment which is the TWU CDC Drivers Agreement, which is a 16-depot agreement.

PN84

THE DEPUTY PRESIDENT: Okay. Looking chronologically at the index from the court book, I would imagine - and I'll mark submissions in this matter, because they do move between evidence and submissions.

PN85

MR McLEOD: Submissions and witness - - -

PN86

THE DEPUTY PRESIDENT: But the first document that you might seek to rely on is at page 15, your outline of submissions.

PN87

MR McLEOD: Yes, your Honour, I do rely on the outline of submissions.

PN88

THE DEPUTY PRESIDENT: Can we mark that as exhibit A1? Any objections, Mr Sasse?

PN89

MR SASSE: No, your Honour.

EXHIBIT #A1 APPLICANT'S OUTLINE OF SUBMISSIONS

PN90

THE DEPUTY PRESIDENT: We then have the five attachments. So the first is - - -

PN91

MR McLEOD: Attachment 1, outline of submissions, offer of employment, bus driver, number 25. Attachment - - -

PN92

THE DEPUTY PRESIDENT: Any objections, Mr Sasse?

PN93

MR SASSE: No, your Honour.

PN94

MR McLEOD: Attachment 2, applications, outline of submissions, the CDC TWU agreement.

PN95

THE DEPUTY PRESIDENT: Attachment 1 will be exhibit A2.

**EXHIBIT #A2 ATTACHMENT 1, OUTLINE OF SUBMISSIONS,
OFFER OF EMPLOYMENT, BUS DRIVER**

PN96

Attachment 2, being Commissioner Mathieson's decision, any objection, Mr Sasse?

PN97

MR SASSE: No, your Honour.

PN98

THE DEPUTY PRESIDENT: Exhibit A3.

**EXHIBIT #A3 ATTACHMENT 2, COMMISSIONER MATHIESON'S
DECISION**

PN99

Attachment 3, outline of submissions, Transdev New South Wales Agreement. Any objections?

PN100

MR SASSE: No.

PN101

THE DEPUTY PRESIDENT: Exhibit A4.

**EXHIBIT #A4 ATTACHMENT 3, OUTLINE OF SUBMISSIONS,
TRANSDEV NEW SOUTH WALES AGREEMENT**

PN102

Attachment 4 to the applicant's outline of submissions, travel allowance claim form. Any objection?

PN103

MR SASSE: No.

PN104

THE DEPUTY PRESIDENT: A5.

**EXHIBIT #A5 ATTACHMENT 4 TO APPLICANT'S OUTLINE OF
SUBMISSIONS, TRAVEL ALLOWANCE CLAIM FORM**

PN105

Attachment 5, applicant's outline of submissions, letter Mark Munro to Frank Hurley. Any objections?

PN106

MR SASSE: No.

PN107

THE DEPUTY PRESIDENT: That will be exhibit A6.

**EXHIBIT #A6 ATTACHMENT 5 TO APPLICANT'S OUTLINE OF
SUBMISSIONS, LETTER MARK MUNRO TO FRANK HURLEY**

PN108

Applicant's response to respondent's outline of submissions. Any objections?

PN109

MR SASSE: No.

PN110

THE DEPUTY PRESIDENT: That will be exhibit A7.

**EXHIBIT #A7 APPLICANT'S RESPONSE TO RESPONDENT'S
OUTLINE OF SUBMISSIONS**

PN111

We're then down to the witness statements. Is it convenient to at least mark them now so we understand what they are, and then we can deal with them?

PN112

MR SASSE: Yes, of course, your Honour.

PN113

THE DEPUTY PRESIDENT: Any objections to any parts of these statements?

PN114

MR SASSE: N.

PN115

THE DEPUTY PRESIDENT: So that's exhibit A8, is the witness statement of David McLeod of 5 December 2022.

**EXHIBIT #A8 WITNESS STATEMENT OF DAVID McLEOD OF
05/12/2022**

PN116

Exhibit A9 is the witness statement of Mark Munro dated 5 December 2022.

**EXHIBIT #A9 WITNESS STATEMENT OF MARK MUNRO OF
05/12/2022**

PN117

Then a further statement - - -

PN118

MR McLEOD: Responsive witness statement David McLeod, 2 January.

PN119

THE DEPUTY PRESIDENT: Yes. That is exhibit A10. Any objections?

PN120

MR SASSE: No, your Honour.

PN121

THE DEPUTY PRESIDENT: No.

**EXHIBIT #A10 RESPONSE TO WITNESS STATEMENT OF DAVID
McLEOD DATED 02/01/2023**

PN122

MR McLEOD: And the attachments, 1, 2 and 3.

PN123

THE DEPUTY PRESIDENT: They will be, as agreed, exhibit A11.

**EXHIBIT #A11 ATTACHMENTS 1 TO 3 TO WITNESS
STATEMENT OF DAVID McLEOD DATED 02/01/2023**

PN124

Witness statement, Paul Steele. Do you seek to rely on that?

PN125

MR McLEOD: Yes, please, I do.

PN126

THE DEPUTY PRESIDENT: Mr Sasse.

PN127

MR SASSE: That's fine.

PN128

THE DEPUTY PRESIDENT: No objection. Exhibit A12.

EXHIBIT #A12 WITNESS STATEMENT OF PAUL STEELE

PN129

MR McLEOD: And the attachments.

PN130

THE DEPUTY PRESIDENT: That will be part of A12, and then we don't mark the authorities. So as you see, all of your materials have now been marked. We know exactly what is in the applicant's case before us.

PN131

MR McLEOD: I do apologise.

PN132

THE DEPUTY PRESIDENT: No, it's fine. As we said on the last occasion, this is not your normal stamping ground. We can leave your case till later, if that's convenient, Mr Sasse.

PN133

MR SASSE: Yes, of course.

PN134

THE DEPUTY PRESIDENT: Do you wish to make an opening statement, Mr McLeod?

PN135

MR McLEOD: Yes, I do, your Honour.

PN136

THE DEPUTY PRESIDENT: Okay.

PN137

MR McLEOD: Is it 'your Honour' or 'Deputy Commissioner' or either?

PN138

THE DEPUTY PRESIDENT: Either. Deputy President.

PN139

MR McLEOD: Sorry, Deputy - - -

PN140

THE DEPUTY PRESIDENT: Yes.

PN141

MR McLEOD: I'm not having a good day.

PN142

THE DEPUTY PRESIDENT: That's all right.

PN143

MR McLEOD: I've submitted to basically say that the operations of the respondent currently and in the future are not geographically, organisationally, operationally distinct and the affected workers probably haven't - haven't agreed to having one EA.

PN144

The respondent is a wholly-owned subsidiary of CDC New South Wales. CDC New South Wales operates 16 different depots within New South Wales. They are all covered by one EA. Three of the depots run metropolitan school bus services - metropolitan bus service contracts, as well as do ad hoc charters. They are all covered under one EA.

PN145

In my submissions - they've also stated that they run both charters, ad hoc charters, and private school services. Seven school services are now run out of Dural depot on a private school service which has just won another contract under the Metropolitan School Bus Services contract.

PN146

The drivers at Cromer during the school holidays and at weekends operate out of Terrey Hills. Within my evidence I've given a roster for January that has drivers from Cromer operating route services out of Terrey Hills. This is not unusual. They do it on weekends and in school holidays on a regular basis.

PN147

Up until 10 weeks ago they were eligible for a travelling allowance. Until we received the witness statements and the submissions from Forest, the drivers at Cromer were under the understanding they were still covered by the EA at Terrey Hills that they had been covered on since they were employed. They've been told that they are no longer covered by that except for the goodwill of the respondent.

PN148

THE DEPUTY PRESIDENT: How can you say what the drivers thought? You can say what those who are instructing you thought. You don't speak for the larger group.

PN149

MR McLEOD: Sorry. Drivers have informed me or instructed me to say that they were not informed by Forest. I was not told by the respondent that I was no longer covered by the EA when I was transferred down to Cromer. We were not told that it was only under their goodwill that we were covered by that EA. Our impression was that we were still covered by that EA.

PN150

When I introduce the two witnesses, their statements, I will be asking that question and I've been informed that they were not informed either verbally or in writing by the respondent that they had been removed from the EA.

PN151

From an organisationally distinct, the respondent still has one computer system running the rosters for the drivers. They do all of the repairs, maintenance, panel beating, from the Terrey Hills depot, even with buses down at Cromer. They again roster drivers on from Cromer out of Terrey Hills on a daily, weekly and monthly basis.

PN152

The transport industry is currently facing a driver shortage. I have been informed by management of the respondent in discussions with the general managers that there is a shortage of 30 to 40 drivers, which is evident in how they are dropping runs and things like that.

PN153

In discussions with management before I was summarily dismissed they said that up until 24 December they had some charter work, that in January drivers will be needed to drive from Terrey Hills depot, and in fact some drivers seconded to Cromer driving during the week from Terrey Hills at this time.

PN154

I also submit that - a large percentage of drivers, I've been informed in discussions with various drivers from Terrey Hills, are also dependent on charter work to supplement their income and they'd be disadvantaged by the lack of charter work appearing out of Terrey Hills at the moment.

PN155

I also stated earlier that all bus service, maintenance, repairs, panel beating, are done at Terrey Hills and not at Cromer because they do not have - there's insufficient room to have full-width workshops at Cromer.

PN156

When I was employed at the respondent I was the chairman of the drivers committee and I was also a bargaining representative, and in discussions with other bargaining representatives and people that have instructed me, they have basically - they have said that most of them are in favour, as I said in my submission - - -

PN157

THE DEPUTY PRESIDENT: Where in the evidence is that? I mean, you're just giving hearsay evidence - - -

PN158

MR McLEOD: Sorry.

PN159

THE DEPUTY PRESIDENT: - - - as part of your opening. You represent a number of people.

PN160

MR McLEOD: Drivers.

PN161

THE DEPUTY PRESIDENT: A number of drivers. They've appointed you as their bargaining rep. You can make submissions on their part, but - - -

PN162

MR McLEOD: Sorry.

PN163

THE DEPUTY PRESIDENT: - - - it's of little utility to say to me that the majority of drivers have told you X, Y, Z.

PN164

MR McLEOD: Yes, your Honour. The company has also split the negotiating groups into three, which was raised at the first directions hearing, which has made it difficult to actually have coherent or structured negotiations. That's my opening statement.

PN165

THE DEPUTY PRESIDENT: Thank you. I would expect that you are your first witness.

PN166

MR McLEOD: Pardon.

PN167

THE DEPUTY PRESIDENT: You would be your first witness.

PN168

MR McLEOD: Yes, your Honour.

PN169

THE DEPUTY PRESIDENT: Are Mr Munro, Mr Steele and Mr Eliades giving evidence?

PN170

MR McLEOD: Paul Steele and Mark Munro would be.

PN171

THE DEPUTY PRESIDENT: Okay. It'd probably be best if they wait outside until it's time to give evidence.

PN172

MR McLEOD: Andrew will give evidence, if it's - with your permission.

PN173

THE DEPUTY PRESIDENT: Andrew?

PN174

MR McLEOD: Andrew Eliades.

PN175

THE DEPUTY PRESIDENT: Then Mr Eliades should wait outside as well. Your witnesses, Mr Sasse, should probably - as well, just to make sure that there's no question - and, Mr McLeod, if you can come up to the witness box. Just here, thanks.

PN176

MR McLEOD: May I take a copy of my witness statement with me?

PN177

THE DEPUTY PRESIDENT: Yes. You can take the whole court book.

PN178

THE ASSOCIATE: If you could firstly state your full name and address for the record.

PN179

MR McLEOD: David John McLeod, (address supplied).

<DAVID JOHN MCLEOD, AFFIRMED [10.33 AM]

EXAMINATION-IN-CHIEF BY THE DEPUTY PRESIDENT [10.33 AM]

PN180

THE DEPUTY PRESIDENT: Just dealing with some formalities, Mr McLeod, you provided an applicant's outline of submissions dated 14 November 2022 in this matter?---Yes.

PN181

That's been marked exhibit A1. Are the contents of that document true and correct?---To the best of my knowledge they are.

PN182

Then you've provided a witness statement on 5 December 2022?---Yes, your Honour.

PN183

That's been marked exhibit A8. Are the contents of that document true and correct?---To the best of my knowledge they are, yes.

*** DAVID JOHN MCLEOD

XN THE DEPUTY PRESIDENT

PN184

There's also at page 166 of the court book the document titled 'Response to Witness Statement David McLeod'?---Yes, your Honour.

PN185

Are the contents of that - I note that that's dated 2 January 2022?---Yes.

PN186

Marked exhibit A10. Are the contents of that document true and correct?---To the best of my knowledge they are, yes.

PN187

I think that covers all of the documentation, Mr Sasse. Is that correct? Okay. Mr McLeod, Mr Sasse might ask you some questions now, so if you could just attend to those questions.

PN188

MR SASSE: We have no questions of the witness.

PN189

THE DEPUTY PRESIDENT: Okay. You're free to go back to the Bar table, thank you, Mr McLeod.

<THE WITNESS WITHDREW

[10.35 AM]

PN190

THE DEPUTY PRESIDENT: Who will be your next witness, Mr McLeod?

PN191

MR McLEOD: Paul Steele.

PN192

THE DEPUTY PRESIDENT: Do you wish to ask any questions of Mr Steele?

PN193

MR SASSE: Yes, your Honour, just one or two.

PN194

THE DEPUTY PRESIDENT: Okay. We'll get Mr Steele in. Could you go and get Mr Steele, please?

PN195

THE ASSOCIATE: If you could just stay standing and state your full name and address for the record.

PN196

MR STEELE: Paul Edward Steele, (address supplied).

<PAUL EDWARD STEELE, SWORN

[10.37 AM]

EXAMINATION-IN-CHIEF BY MR MCLEOD

[10.37 AM]

*** PAUL EDWARD STEELE

XN MR MCLEOD

PN197

THE DEPUTY PRESIDENT: Mr McLeod, would you like me to deal with the formalities?

PN198

MR McLEOD: If you could.

PN199

THE DEPUTY PRESIDENT: Mr Steele, you prepared a statement for these proceedings dated 2 January 2022?---That's correct.

PN200

Are the contents of that document true and correct?---All bar one minor point which I realised afterwards has an incorrect date on it.

PN201

Is that that it was dated 5 December when it was in fact sworn on the 30th?---No.

PN202

All right?---No, it's one - I haven't got a copy in front of me. I have in my bag a copy of the statement, but I can tell you which item number it is that's got an error.

PN203

You can tell after you've viewed it?---All right.

PN204

Is that what you're saying to me? Can you tell me now or do you need to have a look at it?---I need to view it to get the right item number.

PN205

Okay, well, permission to approach, Mr McLeod. You'll see the date there and the title where you've got 5 December. That's the error?---Yes. That is a typo, sorry.

PN206

Yes?---I forgot to change that. That was going back to the draft. Item 12, your Honour.

PN207

Yes?---I've got 'up to 19 July'. I confused that with the date of some of the other drivers. It's actually the beginning of term 2, which was 26 April.

PN208

Okay?---And obviously that same date changes in both.

PN209

All right. Twice. Okay?---Yes.

*** PAUL EDWARD STEELE

XN MR MCLEOD

PN210

So subject to that change, are the contents of the document true and correct?---Correct.

PN211

Thank you. Mr Sasse?

CROSS-EXAMINATION BY MR SASSE

[10.39 AM]

PN212

MR SASSE: Yes, thank you. Just a couple of quick questions, if I may. Can I take you to paragraph 21?---Yes.

PN213

The second sentence in that paragraph says:

PN214

The drivers from the Cromer depot will still be required to perform cover shifts during the week and weekend shifts out of the Terrey Hills depot.

PN215

Could you outline what you mean by 'required'?---Well, we're all working there right now.

PN216

Is it a condition of your employment that you work there?---A condition of my original employment was to work at the depots, yes.

PN217

Is it a condition of your current employment arrangements that you must work at Terrey Hills?---Yes. As I understand it, it is.

PN218

Okay. Thank you?---Because if I refuse to work there I don't know whether I'll still be employed.

PN219

Okay. Thank you.

PN220

THE DEPUTY PRESIDENT: Nothing further?

PN221

MR SASSE: No further questions.

PN222

THE DEPUTY PRESIDENT: Any re-examination?

RE-EXAMINATION BY MR MCLEOD

[10.40 AM]

*** PAUL EDWARD STEELE

XXN MR SASSE

*** PAUL EDWARD STEELE

RXN MR MCLEOD

PN223

MR McLEOD: Paul, when did you discover that you were supposedly no longer covered by the current EA?---Not until I read submissions that are lodged for here, because the correspondence I received to say that I was being employed - or being transferred to the Cromer depot permanently did not state that we were no longer covered by the EA, and neither prior to that was I verbally informed or did I receive any other communications saying that I wasn't.

PN224

So your understanding is that you've always been covered by the EA?---I was until that point in time, yes.

PN225

If the company splits (indistinct) as they've stated, will that affect your work?

PN226

THE DEPUTY PRESIDENT: How does this arise from cross-examination?

PN227

MR McLEOD: Sorry, I'm not sure what cross-examination is, so if I can't ask the question, I will sit down.

PN228

THE DEPUTY PRESIDENT: Well, I'll just step you through it. The evidence of the witness was accepted. We've used statements in these proceedings so that people's evidence is in writing and everyone's on notice of what they're going to say.

PN229

Then we had cross-examination, where Mr Sasse went to paragraph 21 and the question of what was meant by 'required'. You, in re-examination, can clarify things that arise - we use the term 'arise', something arises in cross-examination.

PN230

MR McLEOD: Okay.

PN231

THE DEPUTY PRESIDENT: Not much arises in cross-examination because there were two questions. You're now going further than the cross-examination, but Mr Sasse isn't objecting. So I've asked the question as to how this arises. I understand this to be your case, but my question is - - -

PN232

MR McLEOD: Does it arise out of cross-examination? It probably hasn't, your Honour.

PN233

THE DEPUTY PRESIDENT: No.

*** PAUL EDWARD STEELE

RXN MR MCLEOD

PN234

MR McLEOD: But it just goes to what has been put in the witness statement and - - -

PN235

THE DEPUTY PRESIDENT: All right. There's been no objection, so continue.

PN236

MR McLEOD: You're currently working out of Terrey Hills?---Yes, I am, a mixture between Terrey Hills and Cromer. Predominantly at Terrey Hills at the moment, though.

PN237

But your roster from your employer, being the respondent, has said that you have to work at Terrey Hills?---Yes.

PN238

MR SASSE: Your Honour, I had no objection to the proposed cross-examination discussion around the application of the enterprise agreement because it's completely irrelevant and operates as a matter of law, but we don't really think that any other matters should be discovered or asked further from this witness.

PN239

THE DEPUTY PRESIDENT: So now the point is being taken that this doesn't arise.

PN240

MR McLEOD: But he asked my witness whether he was required under the EA to work there.

PN241

THE DEPUTY PRESIDENT: And what's your question?

PN242

MR McLEOD: And I've asked him is he required to work there because he's been rostered out of Terrey Hills.

PN243

MR SASSE: Your Honour, my question to the witness did not mention the enterprise agreement.

PN244

MR McLEOD: Neither has mine.

PN245

THE DEPUTY PRESIDENT: This one is going to the question of requiring - another point that you're going to have to focus on, at least with Mr Munro and Mr Eliades, is this. It's of no assistance if you ask a leading question. When you're cross-examining, ordinarily you will always ask a leading question, but of your own witness, just to be putting propositions to him in such a positive sense doesn't assist me greatly.

*** PAUL EDWARD STEELE

RXN MR MCLEOD

PN246

MR McLEOD: Yes. Paul, how did you find out where you were working this week?---By the roster that was provided by my employer.

PN247

THE DEPUTY PRESIDENT: How does this arise from cross-examination, Mr McLeod?

PN248

MR McLEOD: Because he's asked is he required to work. His employer has actually asked him where he - telling him where he is working from.

PN249

THE DEPUTY PRESIDENT: Okay. Well, you've got your answer. What's your next question?

PN250

MR McLEOD: I don't have any other questions.

PN251

THE DEPUTY PRESIDENT: No further questions?

PN252

MR McLEOD: No.

PN253

THE DEPUTY PRESIDENT: You free to go then. Thank you very much for attending?---Thank you, your Honour.

<THE WITNESS WITHDREW

[10.44 AM]

PN254

THE DEPUTY PRESIDENT: Who is your next witness? Mr McLeod?

PN255

MR McLEOD: Pardon? Sorry.

PN256

THE DEPUTY PRESIDENT: Who is your next witness?

PN257

MR McLEOD: Mark Munro.

PN258

THE DEPUTY PRESIDENT: Can you get Mr Munro? Mr Sasse, do you require Mr Munro for cross-examination?

PN259

MR STEELE: Excuse me, your Honour, do I need to exit again?

*** PAUL EDWARD STEELE

RXN MR MCLEOD

PN260

THE DEPUTY PRESIDENT: No, you can stay and watch. We're just waiting to see whether Mr Munro will be asked questions.

PN261

MR SASSE: No questions.

PN262

THE DEPUTY PRESIDENT: For Mr Munro. What about Mr Eliades?

PN263

MR SASSE: We've not seen a statement from Mr Eliades.

PN264

THE DEPUTY PRESIDENT: He's pretty well hidden.

PN265

MR McLEOD: It's not there, your Honour. I didn't - - -

PN266

THE DEPUTY PRESIDENT: It's in the old court book, I think. Where is it? Where can we find it?

PN267

MR McLEOD: It was just to back up the other two witnesses on where they were working at this point in time.

PN268

THE DEPUTY PRESIDENT: Do you seek to read it?

PN269

MR McLEOD: No, it's all right, your Honour.

PN270

THE DEPUTY PRESIDENT: Sorry?

PN271

MR McLEOD: I don't have his witness statement, your Honour.

PN272

THE DEPUTY PRESIDENT: Well, do you - - -

PN273

MR McLEOD: So if they don't want Mr Mark Munro then I won't call Mr Eliades.

PN274

THE DEPUTY PRESIDENT: Then Mr Munro is not required. Mr Steele, if you can tell Mr Munro and Mr Eliades that they can come back in?

PN275

Just looking at the first annexure to Mr Steele's statement, which is the appointment letter in relation to the Cromer depot, am I to understand that at the time of the transfer on 23 September 2022 the company undertook to continue 'afford all entitlements' - this is at the third paragraph - under the existing enterprise agreement? Is that the case?

PN276

MR SASSE: Sorry, your Honour?

PN277

THE DEPUTY PRESIDENT: Am I to understand that notwithstanding that it is said that the agreement no longer covered employees because they moved to Cromer and it only applied to the Terrey Hills depot, that notwithstanding that, the company undertook to continue to apply all entitlements?

PN278

MR SASSE: Yes. The documentation is very clear. The Forest Coach Lines agreement can only apply to employees that work predominantly out of the Terrey Hills depot, so once they're transferred to any other depot it must cease to apply. The company has given it effect through a common law contract of employment.

PN279

THE DEPUTY PRESIDENT: Okay. That would seem to be the case of the applicant then, so all your witness evidence is in, and annexures. It's now time to move on, unless there's something further you wish to put in your case?

PN280

MR McLEOD: (indistinct) I would, but basically I can only go on what I've submitted and - - -

PN281

THE DEPUTY PRESIDENT: Your submissions come later. We're just dealing with each party's evidentiary case. For example, you've just - - -

PN282

MR McLEOD: Mr Sasse has said they're under a common law contract. We've never seen a common law contract, your Honour.

PN283

THE DEPUTY PRESIDENT: Sometimes you can't see them. Sometimes - - -

PN284

MR McLEOD: But, sorry, I've never received this letter saying that when I was transferred down that I was no longer covered by the EA. The reason Mr Steele got this letter was because he went from a provisional driver to a permanent part-time driver on a different rate. Myself, Mr Munro and other drivers that weren't provisional drivers when they were transferred down have not received this letter saying that we were no longer covered by the EA.

PN285

THE DEPUTY PRESIDENT: I was just asking the question because I saw the third paragraph and I was trying to understand what was said.

PN286

MR McLEOD: Well, nothing was said and nothing was given to us in regard to being taken off that EA when we were transferred.

PN287

THE DEPUTY PRESIDENT: Okay. Any further evidence?

PN288

MR McLEOD: No, your Honour.

PN289

THE DEPUTY PRESIDENT: Mr Sasse, what do you rely on, going through - - -

PN290

MR SASSE: We'll be wanting to rely on the witness statements from Ms Purcell and Mr Matarazzo.

PN291

THE DEPUTY PRESIDENT: Firstly, what about the respondent's response to the application dated 21 October 2022?

PN292

MR SASSE: We certainly rely on that.

PN293

THE DEPUTY PRESIDENT: As we've marked the applicant's submissions, we'll mark yours. That will be R1. Any objection, Mr McLeod? Any objection to - - -

PN294

MR McLEOD: I object because their submissions keep stating the contract region 14 which was not adduced into evidence. That would be my major objection to the submission.

PN295

THE DEPUTY PRESIDENT: You can make that argument, but I'll allow it.

**EXHIBIT #R1 RESPONDENT'S RESPONSE TO APPLICATION
DATED 21/10/2022**

PN296

Respondent's outline of submissions of 28 November 2022. Any objections?

PN297

MR McLEOD: Only the same one I keep adding.

PN298

THE DEPUTY PRESIDENT: Exhibit R2.

**EXHIBIT #R2 RESPONDENT'S OUTLINE OF SUBMISSIONS
DATED 28/11/2022**

PN299

Then the statement of Bettina Purcell. Any objections? Now, Mr McLeod, what I mean by any objections is does the statement contain hearsay, matters that are irrelevant? You obviously won't agree with many parts of it, but it's whether there are objectionable parts that you wish to agitate.

PN300

MR McLEOD: Can I just have one moment? Ms Purcell's is the statement that they're no longer covered by the EA', that all the drivers will transfer to a special purpose vehicle. There's no evidence they will have to transfer to a special purpose vehicle. It hasn't been discussed with any of the - - -

PN301

THE DEPUTY PRESIDENT: Which paragraph are you talking about?

PN302

MR McLEOD: Sorry. Paragraph 3 of Ms Purcell's statement.

PN303

THE DEPUTY PRESIDENT: Yes. What's wrong with it?

PN304

MR McLEOD: Well, it's stating that all the drivers currently employed by the respondent at Terrey Hills will transfer to a special purpose vehicle.

PN305

THE DEPUTY PRESIDENT: Paragraph 3.

PN306

MR McLEOD: Of Ms Purcell's statement.

PN307

THE DEPUTY PRESIDENT: Where does she say 'special purpose vehicle'?

PN308

MR McLEOD: Paragraph 5, your Honour.

PN309

THE DEPUTY PRESIDENT: What's wrong with that? What's the basis of your objection?

PN310

MR McLEOD: They weren't permanently attached and they ceased to cover them because of the scope. This limited drivers wholly employed, but I don't think they can take somebody off an EA.

PN311

THE DEPUTY PRESIDENT: This is a statement of fact. This is what Ms Purcell says occurred. What is the basis of your objection? Do you say it's irrelevant?

PN312

MR McLEOD: It's irrelevant and there's no evidence that it did occur.

PN313

THE DEPUTY PRESIDENT: She says that's what occurred. You can question her if you wish to dispute it.

PN314

MR McLEOD: Yes, your Honour.

PN315

THE DEPUTY PRESIDENT: Next? Any further objections?

PN316

MR McLEOD: At point 7 they say the only remaining employees of FCL will be drivers at Cromer base. I'll have to ask her what about the Wee Waa and Narrabri employees of the respondent.

PN317

THE DEPUTY PRESIDENT: So you don't object to that.

PN318

MR McLEOD: I don't think it's true, but I don't object to it.

PN319

THE DEPUTY PRESIDENT: Any further objections?

PN320

MR McLEOD: No, your Honour.

PN321

THE DEPUTY PRESIDENT: That will be exhibit R3.

EXHIBIT #R3 WITNESS STATEMENT OF BETTINA PURCELL

PN322

The last statement then would be Mr Matarazzo. Any objections to any parts of that statement?

PN323

MR McLEOD: Only the contract's not in evidence, which I've said before.

PN324

THE DEPUTY PRESIDENT: I think I've made it abundantly clear to you - - -

PN325

MR McLEOD: Yes. No, your Honour.

PN326

THE DEPUTY PRESIDENT: No objections? That will be exhibit R4, and that will be confirmed by Mr Matarazzo, I expect, when he gives evidence.

EXHIBIT #R4 WITNESS STATEMENT OF RINO MATARAZZO

PN327

Who's your first witness then, Mr Sasse?

PN328

MR SASSE: If I may, Mr Matarazzo.

PN329

THE DEPUTY PRESIDENT: If you can please get him.

PN330

THE ASSOCIATE: Firstly, if you could please state your full name and address for the record?

PN331

MR MATARAZZO: My name's Rino Matarazzo and I reside at (address supplied).

<RINO MATARAZZO, SWORN

[10.57 AM]

EXAMINATION-IN-CHIEF BY MR SASSE

[10.57 AM]

PN332

THE DEPUTY PRESIDENT: Mr Sasse?

PN333

MR SASSE: Mr Matarazzo, much of your statement refers to a contract that deals with the region 14 outsourced service that the business is about to mobilise in May of this year. Could you describe for the Commission, please, how familiar you are with the content of that contract?---Quite familiar with the content of that contract, Deputy President. Obviously gearing up now to enter into that new contract and the significant difference it has from the existing contract we're currently under and transitioning to this new one.

PN334

But you are comfortable that you're able to give solid evidence to the Commission about the content and commercial and operational implications of that contract?---Yes.

PN335

THE DEPUTY PRESIDENT: Please don't lead.

PN336

MR SASSE: Sorry?

*** RINO MATARAZZO

XN MR SASSE

PN337

THE DEPUTY PRESIDENT: Please don't lead.

PN338

MR SASSE: Right?---I am confident about the knowledge of the contracts, yes.

PN339

Thank you. That's all we have.

PN340

THE DEPUTY PRESIDENT: All right. Just formally, I note that you prepared a statement for the purposes of these proceedings dated 16 December 2022. Are the contents of that document true and correct?---Yes.

PN341

Thank you. Cross-examination?

CROSS-EXAMINATION BY MR MCLEOD

[10.59 AM]

PN342

MR McLEOD: Mr Matzarano - I'm probably saying that wrong?---Yes.

PN343

This contract differs from the region 12 contract that you acquired, in that the region 14 contract is with an associated entity?---I'll answer the question the way I sort of interpreted it, and region 12 currently under Transdev is under probably a similar form of contract as we had for FCL, for Forest Coach Line, for region 14. So my understanding from the question that you've asked is that we currently have similar contracts but we are collectively moving to a new contract where region 14 and region 12 now become one region 14 under CDC New South Wales Region 14.

PN344

The business you acquired from Transdev under the new region 14 contract, Transdev is not an associated entity of the respondent?---So the new contract that we're entering under in May of this year, of 2023, is for CDC New South Wales Region 14, and CDC Region 14 in that New South Wales region has the combination of what's currently region 14 and region 12.

PN345

Is Transdev an associated entity of CDC New South Wales or Forest?---So Transdev is not an association of CDC New South Wales, but the structure of the new contracts require and have listed names of people who have been designated and nominated as part of that contract who are to be transferred or requested by CDC New South Wales and offered employment into the new CDC New South Wales Region 14 entity.

*** RINO MATARAZZO

XXN MR MCLEOD

PN346

I want to split the old region 12, which is Transdev, and Forest out of each other. When you took over the region 12 contract, which is now incorporated in

the new region 14 contract, you were bringing all the drivers over. You were taking the depot?---No. Look, it's not as clean cut as that. So the way the contract works is the contract for region 12 - I'll use that to start with - has a list of nominated positions and people who are proposed to come over, but we need to make a formal offer for those people to come over. It's also up to CDC New South Wales to organise the location of where we operate that business from.

PN347

Right?---And there's been negotiations taking place to do that. The contract has not come in, though, yet. It formally comes in in May this year.

PN348

Right, but you know all of the details of the contract?---The details of the contract we're entering into.

PN349

The assumption of the current region 14 contract from Forest, Forest is an associated entity of CDC New South Wales?---Currently the contract that is - the current contract that's in place with transport is a Forest Coach Line under CDC New South Wales.

PN350

The new contract is with CDC New South Wales, or CDC New South Wales Region 14 Pty Ltd?---So it is CDC Region 14 - CDC New South Wales Region 14, CDC, and it's proprietary limited, yes.

PN351

Okay. I see?---It is called Region 14. So the new contract is registered as CDC New South Wales Region 14 Pty Ltd.

PN352

The contract name is in CDC New South Wales Pty Ltd or CDC New South Wales Region 14 Pty Ltd?---CDC New South Wales Region 14 Pty Ltd.

PN353

Right?---Which is the former region 12 and region 14 bus regions amalgamated into one.

PN354

But that is not CDC New South Wales?---Well, it is CDC New South Wales Region 14 Pty Ltd. CDC is a large business and covers many areas.

*** RINO MATARAZZO

XXN MR MCLEOD

PN355

Yes, it does. Companies are individual entities in their own right, irrespective of whether they're completely owned by one company or another, so a contract that is held by CDC New South Wales Pty Ltd is not held by CDC New South Wales Region 14, is it?---I'm not sure I understand the question. I'm getting a bit confused here. I mean, CDC is an entity in itself. We have contracts that we're going through and we've been awarded which we're going through the implementation of those and the transition of those new contracts. The new

contract we're talking about here today is CDC New South Wales Region 14 Pty Ltd.

PN356

And they're the name on the contract?---That's the contract name. That's what we're - - -

PN357

That's the proprietary limited company?---That's the registered name of the company.

PN358

The parties in that contract are?---So I mentioned earlier, in the submission for tenders for the new contracts for each region you need to specify who the intended employees are who would be part of that entity, and they're those people there.

PN359

That's not the question I asked. The parties to the contract that signed the contract for the new region 14 contract, was it CDC New South Wales Pty Ltd?---So it was CDC and Transport for New South Wales forming a new contract for CDC New South Wales Region 14 Pty Ltd. That's the registered name on the contract.

PN360

So it's CDC New South Wales Region 14 Pty Ltd which are the two contracting parties, not CDC New South Wales?---Look, I'm not sure. I feel like I'm getting tangled up here in - the new contract name is issued very clearly to CDC New South Wales Region 14 Pty Ltd.

PN361

But you've said that these contracts were awarded to CDC New South Wales, not CDC New South Wales Region 14. So I'd like to just clarify then. So CDC had submissions for new contracts and tendered for new contracts, and those new contracts were various regions and there was also options in those contracts to tender for regions that we currently didn't control or don't control. CDC New South Wales applied for those regions and those tenders.

PN362

So they're the ones that were - - -?---So there was no former registered CDC New South Wales Region 14 Pty Ltd as it's proposed today, because that never included the region 12 component.

PN363

So an associated entity of yours, of CDC New South Wales, will be employing the people - will be employing the drivers?---An associated entity?

*** RINO MATARAZZO

XXN MR MCLEOD

PN364

CDC New South Wales Region 14 Pty Ltd is an associated entity of CDC New South Wales Pty Ltd?---We have a number of divisions within CDC and this will be one of those divisions that fits into the Transport for New South Wales contract regions.

PN365

An associated entity is something that has a common shareholding or common businesses. When the contract - and the reason I'm going there is you're saying that all of the employees must go to region 14 and therefore people from Forest cannot drive route work for CDC region 14?---Sorry, where have I said that in there? In the statement?

PN366

MR SASSE: Have you got a copy?---I've got it in front of me, yes. I just want to clarify it, because - - -

PN367

MR McLEOD: 11. 'As a condition of the Transport for New South - all personnel, including overhead staff, assets and systems, who are necessary for the effective operation of region 14 must be identified and organisationally separated from CDC New South Wales'?---Yes. So I'm happy to clarify this and just re-clarify what I've written here in this statement, and that is, as I mentioned earlier, when you actually apply for these tenders, we were the incumbent of the existing region 14 contract. Transdev would have done this for their region 12, and what you need to do in these new contracts is you need to list all your personnel who belong to that region. So Transdev did the same for region 12. They said, 'We have X amount of drivers, this number of mechanics, this number of X, Y, Z.' That's what we've had to do in this case, is list those. Now, had we have not been successful in the contract, that list would have been offered to the new company, to whoever was taking on the new region, and they would have offered employment to those people, as we're doing in region 12. It's part of the contract.

PN368

But as associated entity that's taken over the contract - you're an associated entity of Forest, there are different terms under the contract applying, aren't they?---Well, the contract for region 14 under Forest expires - has already expired.

PN369

The new region 14 contract because Forest is an associated entity of CDC New South Wales and CDC Region 14 Pty Ltd, there are different clauses regarding associated entities within that contract. Is that true?---No, I disagree. So what we had to clearly do, and I'll repeat that again, is we had to list in our submission for tender the positions that we deemed are appropriate to operate region 14, and they're the positions we listed and they're the positions which will become part of the new contract, which excludes what we're talking about in terms of the Cromer drivers. So if that explains it, Deputy President.

PN370

In an existing contract, in my response, is there a clause that has a heading similar to Arrangements with Related Entities?---Not sure without looking at an existing contract. Nor sure.

*** RINO MATARAZZO

XXN MR MCLEOD

PN371

Sorry, I'm not talking about an existing contract, I'm talking about the new contract that we are talking about, which is region 14, and you've told me you know the contract very well. Is there a clause in there dealing with related entities?---Not necessarily related entities, but it does refer to what I've been referring to in point 11. There is a list of people who have been nominated to transfer into the new company.

PN372

I'm not worried about people transferring into the new company. I've asked a question about related entities, and related entities in past contracts has said that the owner must not enter into an agreement or arrangement, whether legally enforceable or not, between it and a related entity unless the related party arrangement is on arms-length commercial terms. Are there terms like that in the new contract?---Look, word for word, not aware of those exact words.

PN373

No?---Not aware of those exact words, but the way this contract deal with it is each operator needed to clearly specify what positions they deemed were part of servicing that contract, and they are the positions that are nominated to be part of the new contract.

PN374

So you are not allowed to have any related party in any form from any one of your other depots working under that contract?---Not aware that that's the case. I wouldn't put it in that terms, because we may have, for example, an external cleaning company doing cleaning for us and there's arrangements under those in terms of the contract and how they're treated.

PN375

So you're allowed to use external contractors?---For certain things, but they have to be part of our original submission for the contract.

PN376

So you can't change your cleaning firm?---Yes, we can.

PN377

But you said they had to be parties under the original contract?---So we need to nominate that we - how do we structure them in the contract? 'We propose to have an external cleaning company carry out that cleaning and this is roughly the terms and this is roughly the terms and conditions that they'll be under.'

*** RINO MATARAZZO

XXN MR MCLEOD

PN378

So you didn't nominate the specific company. You can nominate a cleaning company. If you run short of drivers how do you get drivers to come and work for you?---So I'll just try and get that in context. So first of all, the one on the cleaning, so we don't currently have an existing contract so there was no name of a contractor provided, but it was deemed that the way we would handle that contract in terms of the cleaning is that we would have a contractor come in and do that, as we currently do today. In terms of how do we employ drivers, we

currently have a driver traineeship. We've got two methods of how we employ and we've recently had a workshop with Transport, because across the industry in certain areas there is a driver shortage right now, and that's no different to many industries. Transport have agreed to work collectively with the industry to try and help resolve that and to try and help manage that, and the way that we've done that, some of you would have heard some ads that have recently come out that are from Transport for New South Wales about employment and trying to recruit people for drivers and using Transport as an entity to try and bring people into the industry as well. So that's one method to employ drivers. The other method to employ drivers that we have adopted is a thing called the traineeship, where we bring people in who have got a C class licence, so a car licence, and then we'll take them through a program to upskill them to become a driver, and that's been an ongoing program that we've been operating through. The other method is if we have people who are qualified heavy vehicle drivers we've got a method to bring them in - assess them and bring them into the industry. So that's predominantly - - -

PN379

That's how you train drivers?--- - - - how some of those are taken.

PN380

That's how you train drivers?---No, the question was how do we get drivers.

PN381

Okay?---How do we get drivers. That's how.

PN382

If you have a shortage on a day and you don't have time to train drivers, how do you get drivers to cover shifts that you can't cover from your workforce currently?---Okay. So - - -

PN383

From your Terrey Hills workforce?---Yes. So under our arrangement with Transport - there is a driver shortage, and again, that's public knowledge, that there is a driver shortage across the industry. What we did do earlier this - sorry, earlier in 2022, is we requested Transport to put in a supplementary timetable, a new, modified timetable, which meant we could operate more efficiently in terms of customer information and customer apps and customer accessories. We implemented that modified timetable on 8 August, which meant that we could run basically a timetable more efficiently with less drivers, and we did that across the industry, which was an accepted practice and - - -

PN384

THE DEPUTY PRESIDENT: But the question is how do you cover effectively driver absences?---Driver absences, yes .

*** RINO MATARAZZO

XXN MR MCLEOD

PN385

So on a particular day, one driver down, how do you cover that?---How do we cover it. Okay. So a number of ways. So the first is we do have a small pool of

what we call, you know, WOD drivers, where we've got drivers that are there for that reason. So they're almost like a relief, standby driver. So we have a number of those. So that would be the first coverage. The second one would be do we have options to extend someone's existing shift or someone who's rostered off and bring them in to operate, but what we do have is visibility on the drivers available that we could call in who aren't working on that day.

PN386

MR McLEOD: Does that include drivers at Cromer?---It has included, yes.

PN387

So in holiday periods - sorry, in school holiday period do you employ drivers out of Cromer to drive a route?---So Cromer has some drivers that are on guaranteed hours, so if someone's on, for example, guaranteed 21 hours and they don't have the work there at Cromer, we have taken them on to do work at Terrey Hills, yes.

PN388

Are they rostered onto Terrey Hills?---Only if they're available. What's happened over this last holiday period is they've become less and less available because of the additional work that Cromer's been taking on. So they've been less and less reliable in terms of knowing them for an extended period of time - so an ad hoc, day-to-day basis, yes.

PN389

So you run all the depots?---So the depots I operate are across region 4, region 14 and the Blue Mountains and our operations control centre and customer service division.

PN390

So the roster for the week ending January 6 you had 150 shifts. Would that be about right?---Roughly. Probably a few less, but probably around 120.

PN391

Sorry, I'm only going from the published - you've got 150 drivers. The number of drivers rostered from Cromer were 28 and the number - sorry, there was 28 Cromer drivers. Would that be about right?---There's roughly currently about 28 at Cromer, yes.

PN392

And 20 drivers were rostered on for Terrey Hills in that week?---In that week? Not aware, but it could be the case.

PN393

From the roster of 6 January there were 20 drivers rostered on for route work at Terrey Hills. That is something that happens on a regular basis in school holidays?---In school holidays, yes, it can.

*** RINO MATARAZZO

XXN MR MCLEOD

PN394

How many drivers, to your knowledge, were rostered on during the week for covering shortage of shifts as well? Do you have a number that you know that are

rostered on during the week and cover shifts for you?---I can't confidently give that number without looking at the rosters, but what I can say is on an ad hoc basis they are used, and if I use the example even just this weekend that's passed, there was rail replacement work on and that meant that the drivers we would normally access from Cromer were not available to come over to Terrey Hills because they were doing other work, and in the industry that's not uncommon, for people to do other work.

PN395

And they were rostered out of Terrey Hills for that?---No. So the rail replacement work was rostered out of Cromer.

PN396

Where did they pick the buses up from?---Various places. It could have been region 12 - - -

PN397

No, the Cromer drivers?--- - - - region 14 - or region 14.

PN398

Sorry, the Cromer drivers, where did they pick the buses up from?---If they're doing route work - - -

PN399

Yes. Rail - - -?--- - - - under their transport contract route it would be from Terrey Hills.

PN400

And in the rail replacement work, was that picked up from Terrey Hills as well?---It could be region 12, region 14, and also some of our other associated regions would have supported that. So region 4, for example, it's - - -

PN401

I'm only talking the Cromer drivers. I'm not talking region 12 drivers, I'm just talking Cromer drivers. Did they pick their buses up predominantly from Terrey Hills?---Only if they're doing route work, not if they're doing their charter work.

PN402

No, rail replacement, I just said?---So for rail replacement it would come from various locations, including region 12 now, and again, that's not too dissimilar - so work we do, say, out of region 4 would also mean that people come from other locations to do rail replacement work - casuals, weekend casuals. Across the industry that's not too dissimilar.

*** RINO MATARAZZO

XXN MR MCLEOD

PN403

No, I'm talking about Forest, under this, where you have an EA that you're saying you want split into two because the Cromer drivers can't do route work?---Yes. I haven't said that in this statement here. What we are - what we have endeavoured to do is given that we've got two competing businesses and we've got two businesses that, you know, particularly for region 14 - and I'll talk on region 14

here, the new arrangement under the new contracts are much stricter, and to be able to perform those contracts and successfully perform those contracts, we need to make sure that we're delivering on those requirements, and when you look at Cromer and Terrey Hills, Cromer's a booming - growing business, and what we found there is there's very competing priorities. We're needing to run route services for Transport for New South Wales in region 14 at the same time that we've signed up contracts, existing and new contracts, to run school services for the private school charter business.

PN404

Are you - - -?---So we do see that there's - - -

PN405

Are you relying on - - -?--- - - - significant differences.

PN406

- - - Cromer drivers to drive - - -

PN407

THE DEPUTY PRESIDENT: Please let the witness finish his answer - - -

PN408

MR McLEOD: Sorry.

PN409

THE DEPUTY PRESIDENT: - - - before you proceed with your next question?---Thank you, your Honour. So we do see that we're building those two businesses because there is such a demand for the private school buses and growing that contract, and the fact now that region 12 will no longer be operated by Transdev offers additional opportunity for that, which is part of the reason why we are structuring and have been going down this path of looking at the two separate EAs. It makes business sense. We've got competing priorities at the end of the day when it comes to Cromer and the work that region 14 needs to do and we think this is the most effective way to start structuring the business, developing these EAs - obviously going for a vote for the EA, but developing the EAs under that process, which you're aware of.

PN410

MR McLEOD: You also picked up region 8, was it, in the new contracts, the new region 8 contract?---No.

PN411

Sorry, region 4?---Region 4? Well - - -

PN412

Sorry, region - - -?--- - - - region 4 was similar to what we had in region 14. We had the existing region 4 and we've picked up the new contract for region 4 which commences in April this year.

*** RINO MATARAZZO

XXN MR MCLEOD

PN413

How many enterprise agreements do you have for the region 4 depots?---For region 4 depots?

PN414

4?---They're under two separate agreements.

PN415

Dural drivers are under two agreements. There is a Dural agreement in your 16 depots agreement?---So there is a CDC New South Wales TWU agreement and there is a Dural agreement, and the Dural agreement has two components to it.

PN416

Does the CDC New South Wales TWU agreement also encompass Dural?---No. The CDC Dural agreement encompasses that, and they're the two agreements we have in region 4. There's a CDC TWU agreement and there's a Dural agreement, and the Dural agreement has two clauses.

PN417

Are the employees, the respondent's employees, or Forest Coach Lines employees - do you have any other employees outside of Sydney?---Sorry, could you ask that question again?

PN418

Does Forest employ any other drivers outside the greater metropolitan area?---Look, CDC New South Wales does.

PN419

So CDC currently employs everybody at Narrabri and Wee Waa?---The way that the organisation is structured and has been restructured, we have a CDC New South Wales and we also have a regional - what's called RAD, which is the Regional Australia Division of CDC. We operate CDC New South Wales, not the RAD component.

PN420

Does Forest Coach Lines employ the people at Narrabri and Wee Waa?

PN421

MR SASSE: Your Honour, none of this is in the primary witness evidence.

PN422

MR McLEOD: 12: 'This means all existing FCL employees other than Cromer, but including drivers based at Terrey Hills, will be employees of CDC Region 14'?---Yes, I can answer that. So if you look at point 11 above, we have listed in our submission, in our tender documents, to Transport for New South Wales these positions as driver, mechanic, et cetera, operations supervisors. They go with that contract, and this is what point 12 means, that those people listed in that excluded 28 drivers from Cromer.

*** RINO MATARAZZO

XXN MR MCLEOD

PN423

But that's not what it says?--- 'This means that all existing FCL employees' - so again, you've got to read it in context with the point above - 'other than Cromer, but including drivers based at Terrey Hills, will be employed' - to become employed as part of the CDC New South Wales Region 4 team, Pty Ltd.

PN424

I didn't know I had to read it from the point above, because it says 'all existing FCL employees', but you actually have employees at Narrabri and Wee Waa as well, don't you?---They're not part of region 14, no.

PN425

No, are they part of Forest?---Look, I'm not sure what entity, if you're asking what entity, they're currently under, but this point clearly refers to region 14 at Terrey Hills and the fact that we've had to list every person's - not necessarily - every position that would transfer. So had we have not been successful of retaining region 14 at Terrey Hills, we would have had to provide that list to the new incumbent and they would have asked those drivers to come across. That excludes the list of the 28 drivers from Cromer and that's what that point articulates.

PN426

It still doesn't - okay. Why do we need two EAs, in that case? Why can't one EA do for both - two companies, as you have multi-company EAs already?---Yes. Look, the real business decision for this was we've really got competitive and competing priorities. The new contract is such that we know that there's a lot more stringent deliverables in this new contract and we need to focus on that. A competing priority is Cromer and their growth in the charter business and the private school business. They do that quite well. They've been significantly growing and the direction the business wants to take is to continue that and be very clear that we also then have an option in the future that region 14 and the existing region 12, when it comes to negotiating a new contract, can be merged, because they're under a same New South Wales contract business and it gives greater protection for the employees.

PN427

Well, not if you're actually excluding employees from actually being able to do route work which they're currently able to do?---Look, I'm not talking about that at all. We're not excluding people. In the industry it's quite common, like I referred to the rail replacement, that drivers can be utilised, and there's coverage in their EAs on how they are utilised should they work at other locations.

*** RINO MATARAZZO

XXN MR MCLEOD

PN428

So why do you need two EAs to do that?---Because we've got very separate businesses. And the other thing that has been brought up before and I think is a real benefit is given that the business and the type of work is different - so, for example, in terms of delivering KPIs against the new Transport contract and in a Cromer charter set-up where you're trying to encourage new business, new school charters, you've got the ability there to start to put in different incentives, and that's where you can drive those agreements in future, that there's different

incentives on, if we get to that point, how can we look at rewarding or remunerating people in terms of that growth in the business.

PN429

But you may never get to that point, and you're affecting the drivers by splitting out their EAs and reducing their ability to negotiate as a group?---I disagree in the statements that you've said, in the fact that we have communicated about this, we have got some really good inroads in terms of going through the consultation, working through, understanding what's in these EAs. I've been working on the region 14 EA and we've progressed quite some way, and we do intend to go out to vote for that and obviously it will be up to the vote of the EA and for that to be successful as well going forward.

PN430

THE DEPUTY PRESIDENT: Is there a proposed date for a vote?---Look, not at this stage. What we have done is late last year we progressed significantly well in some of the discussions for region 14. I won't talk on Cromer, because I haven't been part of those conversations, but we have progressed a significant way. What we're hoping to do is, early this year, in 2023, be in the position where we can go to vote with that, and ultimately, you know, with an EA, it is going to be - it needs to be voted in.

PN431

Any further questions?

PN432

MR McLEOD: No, your Honour.

PN433

THE DEPUTY PRESIDENT: Any re-examination?

PN434

MR SASSE: Just very briefly, if I may, your Honour.

PN435

THE DEPUTY PRESIDENT: Yes.

RE-EXAMINATION BY MR SASSE

[11.33 AM]

PN436

MR SASSE: Mr Matarazzo, there was some questioning from Mr McLeod in relation to Transdev, and just to make sure that everything is crystal clear, can you clarify whether or not Transdev is or is not related to CDC?---Transdev is not related to CDC. They're a - - -

PN437

Thank you. No further questions.

*** RINO MATARAZZO

RXN MR SASSE

PN438

THE DEPUTY PRESIDENT: Thank you very much for attending to give evidence. You're excused. You can remain in the body of the court now?---Thank you, Deputy President. Thanks.

<THE WITNESS WITHDREW

[11.33 AM]

PN439

THE DEPUTY PRESIDENT: Do you want to take a short adjournment or do you wish to just proceed with Ms Purcell?

PN440

MR SASSE: Your Honour, we'll keep going. I'm quite happy - - -

PN441

THE DEPUTY PRESIDENT: That's okay, yes. Possibly we can have a short break after Ms Purcell. We'll just see what time it is.

PN442

THE ASSOCIATE: So can you firstly state your full name and address for the record?

PN443

MS PURCELL: It's Tina Purcell, (address supplied).

<BETTINA PURCELL, AFFIRMED

[11.35 AM]

EXAMINATION-IN-CHIEF BY MR SASSE

[11.35 AM]

PN444

THE DEPUTY PRESIDENT: Thank you. Mr Sasse?

PN445

MR SASSE: Thank you. Ms Purcell, you've prepared a statement for this proceeding?---I have.

PN446

That's the document in front of you?---It is.

PN447

Is there any aspect of that that we need to amend or modify?---Actually, there is two items at 7 and 9.

PN448

At 7, yes?---At 7, to start with, 7 states:

PN449

At the point that the Terrey Hill's driver transferred to CDC 14 the only remaining employees of FCL will be the drivers at Cromer.

*** BETTINA PURCELL

XN MR SASSE

PN450

Yes?---That needs to say 'will be the drivers at Cromer in the Sydney metropolitan region'.

PN451

So there may be other FCL employees outside of Sydney metro?---Correct, in regional New South Wales.

PN452

Right, which is not part of the division?---Correct, and that is similar in 9 at (d). Where it says, 'The Cromer depot drivers will be the only employees of FCL', that should also state 'in Sydney metropolitan area'.

PN453

Okay. Thank you.

PN454

THE DEPUTY PRESIDENT: Otherwise the contents are true and correct?---Correct.

PN455

Thank you. No further questions?

PN456

MR SASSE: No further questions, your Honour.

PN457

THE DEPUTY PRESIDENT: Any cross-examination?

CROSS-EXAMINATION BY MR MCLEOD

[11.37 AM]

PN458

MR McLEOD: You stated in 4 that all the drivers seconded at Terrey Hills to the Cromer depot were permanently appointed to Cromer - in part 4. When you said they were permanently appointed, did you write to them and tell them they were no longer covered by the EA?---No, we didn't.

PN459

Why not?---Because we continued to apply the enterprise agreement to those employees anyway.

PN460

So under your good graces you decided that you'd take them off an EA but you'd cover it because you wanted to?---We didn't take them off the EA, we moved them to an area outside of what the EA covered.

PN461

Without letting them know?---We didn't take them - any terms of the conditions away from them.

*** BETTINA PURCELL

XXN MR MCLEOD

PN462

But they had a contractual obligation to be covered by that and you took that contractual obligation away from them without telling them. Is that correct?---No, that's not correct.

PN463

Well, if they weren't covered without your good graces - - -?---They were covered by the Passenger Vehicle Transportation Award when they moved to Cromer but we continued to apply the FCL agreement to them when they moved. So none of their terms and conditions changed.

PN464

Except the one that they were allowed to have under the terms of employment and you took that away without telling them.

PN465

THE DEPUTY PRESIDENT: Where?

PN466

MR McLEOD: Under the terms of employment it says - - -

PN467

THE DEPUTY PRESIDENT: Where? Can you point to the document?

PN468

MR McLEOD: In my terms of employment - - -

PN469

THE DEPUTY PRESIDENT: Well, if it's not your terms of employment, Mr Steele's terms of employment you might look at pages 191 and 192.

PN470

MR McLEOD: I thought I'd put mine in. Sorry, I'm missing 191 and 192. I think it was when I took his statement out.

PN471

THE DEPUTY PRESIDENT: Anyway, please continue. I was just seeking the basis of the question. Please continue, Mr McLeod.

PN472

MR McLEOD: In 11 you said, 'Hours worked at Cromer and Terrey Hills vary, however in a typical week Cromer drivers would complete 1000 and Terrey Hills, 5250 hours in a week' - in 11. That's because there's obviously less drivers at Cromer than at Terrey Hills, isn't it?---Yes.

PN473

Your analysis basically shows that in the peaks and troughs where the proportion of drivers' work at Cromer drops to 30 per cent, the (indistinct) rises to 70 per cent. That's during the school holidays, isn't it?---Sorry, I'm not sure I understand the question.

*** BETTINA PURCELL

XXN MR MCLEOD

PN474

The peak in table 2 at Terrey Hills is because the Cromer drivers are driving route work out of Terrey Hills and it's during the school holidays. Is that correct?---Yes, maybe.

PN475

The school holidays go from December through to January. They also operate in May, so at the moment what is the percentage of drivers at Terrey Hills from Cromer? How many Cromer drivers will be working at Terrey Hills?---Today?

PN476

This week. As a percentage. Would most of them be driving route work at the moment or would they be doing charter work?---So all the drivers are driving charter at Cromer unless they volunteer to go and work at Terrey Hills and do route work.

PN477

So they volunteered, did they?---Correct.

PN478

Were they rostered on by the company?---No.

PN479

So none of the drivers were rostered on at Terrey Hills this week to drive route work?---I don't understand what you mean by 'rostered on'. So there are routes they can do at Terrey Hills, but it's voluntary. So they work for the charter business at Cromer where they do charter hours and they're rostered, most of them, for a minimum of 21 hours per week. If they wish, they can go and drive route at Terrey Hills and they can put their name on the roster, but they are not required to work - - -

PN480

So if you don't - - -?--- - - - on a roster at Terrey Hills.

PN481

So if you don't have 21 hours' work for them at Cromer and they don't have any work, you just pay them?---If they don't want to go and work at Terrey Hills, but most of them do volunteer to go and work at Terrey Hills and do route work.

PN482

Am I allowed to recall a witness?

PN483

THE DEPUTY PRESIDENT: You can make any application you wish.

PN484

MR McLEOD: Right. No further questions of this witness.

PN485

THE DEPUTY PRESIDENT: Any re-examination?

*** BETTINA PURCELL

XXN MR MCLEOD

PN486

MR McLEOD: No further questions?---Okay.

PN487

THE DEPUTY PRESIDENT: Any re-examination?

PN488

MR SASSE: Just one, if I may, thank you.

PN489

THE DEPUTY PRESIDENT: Yes.

RE-EXAMINATION BY MR SASSE

[11.44 AM]

PN490

MR SASSE: Ms Purcell, just to clarify the latter part of that discussion you had with Mr McLeod, can you explain simply what you mean by Cromer drivers volunteering to work route work at Terrey Hills and how that process is implemented on site?---Okay. So as I said, they're employed to work as charter drivers at Cromer, and as you know, there is also a route business at Terrey Hills where they can go and work route services. There's a route roster that's implemented by an operations business at Terrey Hills and that roster's done by supervisors. The Cromer charter drivers can put their names down on that roster if they wish. So that's open to them.

PN491

So if I was to use the term that the Cromer drivers were required to work at Terrey Hills, that would be a misuse of the word 'required'?---Correct.

PN492

Thank you?---There is no permanent requirement - no permanent roster for them.

PN493

No further questions at our end, your Honour.

PN494

THE DEPUTY PRESIDENT: Thank you. Thank you very much for attending to give evidence. You can now follow the proceedings from the body of the court?---Thanks, your Honour.

<THE WITNESS WITHDREW

[11.46 AM]

PN495

THE DEPUTY PRESIDENT: Anything further in your case, Mr Sasse?

PN496

MR SASSE: No, your Honour. That closes us, thank you.

PN497

THE DEPUTY PRESIDENT: Thank you.

*** BETTINA PURCELL

RXN MR SASSE

PN498

MR McLEOD: Deputy President, can I make an application to recall two witnesses, please?

PN499

THE DEPUTY PRESIDENT: On what basis?

PN500

MR McLEOD: To rebut what she said on volunteer.

PN501

THE DEPUTY PRESIDENT: Is it not already included in their materials?

PN502

MR McLEOD: No, because we didn't know they were - I didn't realise they were volunteering, according to the company, not rostered to work.

PN503

THE DEPUTY PRESIDENT: So these witnesses that you wish to recall have been listening to all of this?

PN504

MR McLEOD: Pardon?

PN505

THE DEPUTY PRESIDENT: These witnesses that you wish to recall have been sitting listening to all of this?

PN506

MR McLEOD: Yes, your Honour. I didn't realise that they'd be needed to be recalled. All I want to ask them is did they put their names down at Terrey Hills - - -

PN507

THE DEPUTY PRESIDENT: If you insist, fine.

PN508

MR McLEOD: Can I call Paul Steele, please?

PN509

THE DEPUTY PRESIDENT: Sorry?

PN510

MR SASSE: Deputy President, if I can take you, please, to paragraph 10 of Ms Purcell's witness statement, and I'll just read that first sentence:

PN511

In the past, Cromer drivers supplemented their hours and income by working occasionally and on a voluntary basis from the Terrey Hills depot. We expect that this will continue.

PN512

This material has been in evidence since this witness statement was served on the applicant, in accordance with your directions, from the 12th, and we oppose the idea of reopening the subject at this stage of the proceeding.

PN513

THE DEPUTY PRESIDENT: What do you say to that, Mr McLeod?

PN514

MR McLEOD: The volunteering he was doing was on top of his required hours under his employment conditions. In other words, he's a permanent - - -

PN515

THE DEPUTY PRESIDENT: Who?

PN516

MR McLEOD: Paul Steele.

PN517

THE DEPUTY PRESIDENT: Okay.

PN518

MR McLEOD: In that statement my understanding is that is voluntary work on top of his 21 hours, to give him more hours for more income. During the holidays they are rostered onto Terrey Hills if there is not enough work for them to work in Cromer, which means the companies are not organisationally or operationally distinct.

PN519

THE DEPUTY PRESIDENT: How is this relevant pursuant to section 238(4)?

PN520

MR McLEOD: 238(4), is that geographically, operationally distinct? Sorry, otherwise I'll have to go online to look it up.

PN521

THE DEPUTY PRESIDENT: It has the title 'When the Fair Work Commission may make a scope order' and then outlines considerations.

PN522

MR McLEOD: The considerations are geographically, organisationally, operationally distinct.

PN523

THE DEPUTY PRESIDENT: That's one of the considerations.

PN524

MR McLEOD: If drivers at Cromer are required and rostered to work at Terrey Hills it means they're not geographically, organisationally or operationally distinct.

PN525

THE DEPUTY PRESIDENT: Yes.

PN526

MR McLEOD: Therefore she said they volunteered.

PN527

THE DEPUTY PRESIDENT: They say it's because people volunteer for extra work there and you say it's because they're rostered to work there.

PN528

MR McLEOD: Yes. I'm saying they're rostered to work there because if they're on 21 hours they will not be paid if they do not go up to Terrey Hills to work. If there is no charter work for them they will not be - - -

PN529

THE DEPUTY PRESIDENT: Run that one past me again. You're saying that it's not voluntary because they only have 21 hours' work a week and so they have to.

PN530

MR McLEOD: If they would not - they are rostered to go to Terrey Hills to work in school holidays. They are voluntary when they cover additional work outside their 21 hours, or rostered hours, but they are rostered on to work at Terrey Hills during school holidays unless they have charter work, and the company requires them to work at Terrey Hills. It is not a voluntary basis to do so.

PN531

THE DEPUTY PRESIDENT: And that's been put in your evidence.

PN532

MR McLEOD: Pardon?

PN533

THE DEPUTY PRESIDENT: That's been put in your evidence.

PN534

MR McLEOD: It's already been put in my evidence, your Honour.

PN535

THE DEPUTY PRESIDENT: So what have you got to recall witnesses for?

PN536

MR McLEOD: Because I wanted them to confirm that. That was all, your Honour.

PN537

THE DEPUTY PRESIDENT: You were on notice of this point at paragraph 10 of Ms Purcell's statement. Correct?

PN538

MR McLEOD: Yes, your Honour.

PN539

THE DEPUTY PRESIDENT: Did you wish to be heard further?

PN540

MR SASSE: Your Honour, in addition to the initial point that we made, as you pointed out, the probative value of having further evidence from witnesses who have witnessed the examination, cross-examination, re-examination of Ms Purcell strikes me as a little unfair.

PN541

THE DEPUTY PRESIDENT: And the utility of it, bearing in mind you've put your case. You've put the compulsion in relation to rostering that you say - if I have to consider - - -

PN542

MR McLEOD: Sorry, your Honour.

PN543

THE DEPUTY PRESIDENT: - - - (4A), I have to balance the evidence. You seem to be not pressing your application.

PN544

MR McLEOD: I keep getting beaten up. That's fine.

PN545

THE DEPUTY PRESIDENT: Well, you shouldn't feel beaten up. I'm just trying to understand what you seek, but the respondent's closed their case. You seem to be prepared to proceed to submissions.

PN546

MR McLEOD: Yes, your Honour.

PN547

THE DEPUTY PRESIDENT: Yes?

PN548

MR McLEOD: Yes.

PN549

THE DEPUTY PRESIDENT: Do you wish to take a short break just to compose yourself before you commence your submissions?

PN550

MR McLEOD: Yes, your Honour.

PN551

THE DEPUTY PRESIDENT: If we rejoin at 12 o'clock. I'll adjourn the matter till 12 midday. Thank you.

SHORT ADJOURNMENT

[11.51 AM]

RESUMED

[12.05 PM]

PN552

THE DEPUTY PRESIDENT: Mr McLeod?

PN553

MR McLEOD: My understanding, to get a scoping order the 238(4) basically says - - -

PN554

THE DEPUTY PRESIDENT: Where is your concerns document?

PN555

MR McLEOD: Pardon?

PN556

THE DEPUTY PRESIDENT: Where is your concerns document?

PN557

MR McLEOD: Probably didn't have one, your Honour.

PN558

THE DEPUTY PRESIDENT: Well, you've got to have one, because you told us in your application that it was dated 7 October 2022, and you'll see this is at question 2.4 of the form F31 application for a scope order. So you have advised - and this is what we were referring to on the last occasion as the gateway provisions. Do you remember that?

PN559

MR McLEOD: Yes, your Honour. The concerns I have - - -

PN560

THE DEPUTY PRESIDENT: Well, where can I see this document - - -

PN561

MR McLEOD: Only in my - - -

PN562

THE DEPUTY PRESIDENT: - - - dated 7 October 2022?

PN563

MR McLEOD: We asked in a meeting with the respondent that we had concerns about how they were treating the drivers in getting two EAs because of how it would affect the work of the drivers and reduce their workload.

PN564

THE DEPUTY PRESIDENT: You asked in a meeting.

PN565

MR McLEOD: That was actually stated in a meeting.

PN566

THE DEPUTY PRESIDENT: Where is the document?

PN567

MR McLEOD: I don't have one, your Honour. I only have my submissions that outline my concerns.

PN568

THE DEPUTY PRESIDENT: Have a look at section 238. You have to have concerns and you have to have given written notice setting out the concerns to the relevant bargaining representatives. Remember on the last occasion we were going through how many bargaining representatives - I think I was told there were 14, and not all had been notified, and that's why there were - - -

PN569

MR McLEOD: I had - sorry.

PN570

THE DEPUTY PRESIDENT: Don't speak over me. That's why there were specific directions in relation to providing a copy of the court book to all of the bargaining representatives, so everyone knew the application that you were advancing on behalf of the people that you represent.

PN571

MR McLEOD: Yes.

PN572

THE DEPUTY PRESIDENT: And you'll see in the rules of the Commission at rule 29 it provides that a section 238 application for a scope order must be accompanied by a copy of the written notice setting out concerns expressed, because those concerns expressed set up the jurisdictional gateway at 238(1), which is what are your concerns about bargaining? It seems to be just that the company wants two agreements.

PN573

MR McLEOD: It's the effect of two agreements on the drivers, your Honour.

PN574

THE DEPUTY PRESIDENT: Yes.

PN575

MR McLEOD: And we notified them that there were - - -

PN576

THE DEPUTY PRESIDENT: But this is the first time I've been told it was an oral notification of concerns.

PN577

MR McLEOD: Sorry, your Honour. I'm sorry, Deputy President.

PN578

THE DEPUTY PRESIDENT: In preparation for the matter I was searching through the court book, because on the last occasion the notification of concerns was raised and I wanted to see exactly what was expressed in that, because I was trying to understand the application of subsection (4) of section 238.

PN579

MR McLEOD: I thought that I hadn't given the court book - all the documents to the other parties, your Honour. I didn't realise I needed that.

PN580

THE DEPUTY PRESIDENT: On the last occasion.

PN581

MR McLEOD: Mm.

PN582

THE DEPUTY PRESIDENT: Yes, but we got over that and we worked out how we're going to notify everyone of this, but my understanding on the last occasion was there was a written concerns document. It wasn't annexed to the form F31 as it notes it must be, but we proceeded. But I just couldn't find the document.

PN583

MR McLEOD: I've got a problem.

PN584

THE DEPUTY PRESIDENT: Well, yes. Anyway, proceed.

PN585

MR McLEOD: The concerns - and I can't say of the drivers, but I had, and in talking to drivers and people that instructed me, was that when we were informed that they wanted two EAs we were negotiating for one. They cancelled the one EA agreement and went to two. We objected at that point in time and they basically said, 'We will do what we want.' In the submissions I've made - - -

PN586

THE DEPUTY PRESIDENT: I want you to be very specific. Who is 'we'?

PN587

MR McLEOD: Sorry. The other people at the meeting - Ms Nicole James, Amanda Young, Robert Bukharian. These were the meetings for the bargaining representatives for the first round in May, which I've put evidence on, I think, within my submissions that having two EA reduces the availability of work for the Cromer drivers, that having two EA - - -

PN588

THE DEPUTY PRESIDENT: No, attend to my question. I'm trying to understand - and this is what I raised earlier on. You have been appointed as a bargaining representative pursuant to instruments.

PN589

MR McLEOD: Yes, I have.

PN590

THE DEPUTY PRESIDENT: You provided those instruments to the respondent so you've difficulties in being specific as to who it is that you represent in the bargaining process.

PN591

MR McLEOD: That's right.

PN592

THE DEPUTY PRESIDENT: Can you estimate who you think you represent? And I'm going to ask the respondent whether they have documents that can clarify exactly who you do represent.

PN593

MR McLEOD: No, because the individuals actually do the bargaining representative documents. I collected 30 or 40 bargaining representative documents when I did a straw poll appointing me to be a bargaining rep. I don't know which were the official ones that were put in by the people but I know there were - people informed me that they had bargaining representation on my behalf, and I think there were six, eight, nine or 10 of those.

PN594

THE DEPUTY PRESIDENT: Yes. Mr Sasse, can you assist? Were there records kept?

PN595

MR SASSE: If the Deputy President pleases, I've viewed the documents that Mr McLeod refers to and there's six or eight at best appointing Mr McLeod as a bargaining representative.

PN596

THE DEPUTY PRESIDENT: And do you keep those documents in a folder or - - -

PN597

MR SASSE: In a folder that I don't have access to here, unfortunately, Deputy President.

PN598

THE DEPUTY PRESIDENT: Okay, but Mr McLeod could view that folder?

PN599

MR SASSE: He could, yes.

PN600

THE DEPUTY PRESIDENT: Okay. So it may be that you represent six to eight people. When you say 'we' - - -

PN601

MR McLEOD: I represent the other - - -

PN602

THE DEPUTY PRESIDENT: You're no longer an employee of the respondent.

PN603

MR McLEOD: No, I'm not, your Honour.

PN604

THE DEPUTY PRESIDENT: But you are the appointed bargaining representative, as you can remain, even not being an employee, of those who have nominated you. Now, the respondent says that's six to eight people. That's

something you can clarify and we can set directions so that you can check that, but when you say 'we', I'm going to take that as, subject to confirmation on the exact number, six to eight people that you represent in the bargaining.

PN605

MR McLEOD: And bargaining representatives I speak to and am grouped up within the different bargaining meetings.

PN606

THE DEPUTY PRESIDENT: See, now we're getting into rank hearsay.

PN607

MR McLEOD: Right.

PN608

THE DEPUTY PRESIDENT: You know - - -

PN609

MR McLEOD: I know, but I'm just saying, that's the other people that I have spoken to in regard to how they view two EAs.

PN610

THE DEPUTY PRESIDENT: Yes.

PN611

MR McLEOD: I did go and do a straw poll in June where I got people, when I was asking them, 'One or two EAs?' Cromer drivers on the majority, vast majority of them out of the 28 were opposed to two EAs.

PN612

THE DEPUTY PRESIDENT: '90 per cent of over 70 employees were against splitting the workforce into separate EAs.'

PN613

MR McLEOD: That's right.

PN614

THE DEPUTY PRESIDENT: The unchallenged evidence of the respondent - well, unchallenged assertion is, at page 12 of the court book, that there's 230 drivers or employees at Terrey Hills and 70 at Cromer.

PN615

MR McLEOD: Seven?

PN616

THE DEPUTY PRESIDENT: 70.

PN617

MR McLEOD: At Cromer.

PN618

THE DEPUTY PRESIDENT: Yes. Sorry, 30 at Cromer.

PN619

MR McLEOD: Yes. Two have left.

PN620

THE DEPUTY PRESIDENT: 230 at Terrey Hills and 30 at Cromer, sorry. So just looking at that, comparing your figure - and we don't have - it's a straw poll - it would not appear that that straw poll would constitute a majority - in fact, by some distance.

PN621

MR McLEOD: If you could get around all 230 drivers at Terrey Hills at any point in time or have them respond to any sort of poll, 30 was not a bad number to achieve.

PN622

THE DEPUTY PRESIDENT: Well, there's one way of working out what people want, and that's putting things to a vote.

PN623

MR McLEOD: If we could have a vote that would have been tremendous.

PN624

THE DEPUTY PRESIDENT: Sorry?

PN625

MR McLEOD: If we could have had a vote on one or two EAs, but they split it out before any vote was taken. They didn't ask the drivers if they wanted one or two EAs, they just said, 'We're going to have two EAs.'

PN626

THE DEPUTY PRESIDENT: Which raises another point that I might as well raise with you right at the commencement of this. What's the status quo?

PN627

MR McLEOD: At this point in time?

PN628

THE DEPUTY PRESIDENT: Well - - -

PN629

MR McLEOD: We have - well, sorry - - -

PN630

THE DEPUTY PRESIDENT: It's the notorious question of when do you assess status quo, but taking the cohort of drivers at Cromer and Terrey Hills, they were all previously covered prior to 1 April 2022 by one agreement.

PN631

MR McLEOD: 1 October, I think they said they - because we were seconded down there. They firmly transferred us, according to the evidence.

PN632

THE DEPUTY PRESIDENT: Well, the depot was set up on 1 April. Are you saying that there wasn't any secondment of drivers or people were not transferred there until September, October?

PN633

MR McLEOD: That's right.

PN634

THE DEPUTY PRESIDENT: Is that the case? There's no time for homework yet, Mr Sasse. But I'm just trying to understand what's the status quo? Isn't the status quo - and if you are transferred or you accept a transfer, however it comes, and you're told, or at least it's understood by the employer, that the terms of the 2019 enterprise agreement will continue to apply to you, what's the status quo? Is the status quo one agreement or two?

PN635

MR McLEOD: One at the moment.

PN636

THE DEPUTY PRESIDENT: Quite arguably.

PN637

MR McLEOD: We're only arguing that the status quo stays.

PN638

THE DEPUTY PRESIDENT: No, you've made a scope application - - -

PN639

MR McLEOD: For one EA.

PN640

THE DEPUTY PRESIDENT: - - - seeking one. I'm obviously pointing out a factor in your favour, that you may very well say that actually the status quo is one.

PN641

MR McLEOD: One EA.

PN642

THE DEPUTY PRESIDENT: And you're not - see, you might say, 'We'll characterise it as being the respondent's application for a scope order', because they want two. I'll hear the parties on this, but these are just questions that come to me in this matter. Also, I still wonder where the Transport Workers' Union is.

PN643

MR McLEOD: Well, the Transport Workers' Union sent an email to us saying they still want one EA, which I think is in evidence.

PN644

THE DEPUTY PRESIDENT: Where's that?

PN645

MR McLEOD: Don't tell me it didn't go in. Well, likely in evidence then.

PN646

MR SASSE: Page 183, your Honour.

PN647

THE DEPUTY PRESIDENT: Yes, I don't think this says exactly as you characterised it, but let's have a look.

PN648

MR McLEOD: Basically, this was in response to Mr Matarazzo saying in his witness statement that the union was all right with two EAs. We went back to Ms Yelena Cedric(?) – and this is also in Mark Munro's evidence – that they stated – they were asked a question can you please clarify the TWU's position that supports two EAs in point 29 of Mr Matarazzo's witness statement, and she goes on to say:

PN649

Apologies for not replying earlier. Mark and I also note that my reply to her sits in my draft. At our LOCs, which we are requesting one EA, we also understand that this is (indistinct) both depots.

PN650

As for point 29, this is Rino's statement, his version of the conversation held.

PN651

THE DEPUTY PRESIDENT: Which was that they were supportive of two.

PN652

MR McLEOD: Yes. They're saying they're not supportive to – so where the union is on this I don't know. The union seemed to be very – not active where Forest Coach Lines is concerned, because it's a low union depot. I would have preferred that the union was doing this, not me. They're better at it, or more experienced at it.

PN653

The current status quo, as you said, is one EA. We tried to – sorry.

PN654

THE DEPUTY PRESIDENT: I haven't determined it. I just put it as - - -

PN655

MR McLEOD: The status quo.

PN656

THE DEPUTY PRESIDENT: - - - something you might consider.

PN657

MR McLEOD: The status quo. In January this year we were starting to ask when is the new EA going to be negotiated, in amongst other meetings we had on different problems that we've been having with the respondent in regards to wages and things like that.

PN658

We then had to write to the respondent and ask them to commence an EA negotiation. In the first meeting they said we want to have two EAs, and we said well, we don't think the drivers want that. Why do you want two EAs? Because we want two EAs. We've never had a reason to actually get two EAs. Why? We have to have two coverages for the same employees when they have a 16-depot agreement.

PN659

And that depot then - just as an aside, the 16-depot agreement does cover CDC Dural Hills depot. It's one of the 16 depots named, as this has cover and has been covered by the CDC TWU agreement, which was only ratified, from memory, in August last year.

PN660

Those depots encompass both charter and route and straight charter work. The submission I've been saying is the company cannot be geographically different if workers are rostered in both geographical locations. So having two EAs because they're geographically separate is not valid in this case, because the drivers go up to the Terrey Hills depot for maintenance on their buses, for panel beating, for repairs, for washing.

PN661

A lot of the training is done out of the Terrey Hills depot. The drivers in school holidays, as I've said, are rostered - they don't volunteer, they are rostered to go and work at the Terrey Hills depot.

PN662

In the school holidays that I worked there for three years, I worked out of the Terrey Hills depot. Even though I did mainly charters, I did volunteer to cover work to increase the hours that I worked. I worked an average of about 50 hours a week, both as route and charter work.

PN663

Organisationally,, they are paid rostered either in school holidays or at weekends from Terrey Hills. Operationally, they rely on the Cromer drivers to actually cover work that they can't cover out of casuals or their trainees or other individuals they may have on call – their WOD drivers, workers director drivers.

PN664

The drivers are also, if they get two EAs, have been told that they're going to go on a common law contract which hasn't been negotiated or even described on how they're going to continue doing the same work when they go and cover work at the Terrey Hills depot at the expiry of this EA, if two EAs are put in, which will give them problems with their income, because they could be classed as having a separate employer, because they can go up as a casual worker rather than being employed as they currently are, which is - - -

PN665

THE DEPUTY PRESIDENT: I think you're drawing a long bow there.

PN666

MR McLEOD: As in hearsay, that's actually how it's being described to us, that they may have to have a common law contract to go and do route work on the school holidays.

PN667

THE DEPUTY PRESIDENT: Do you mean what Mr Sasse said earlier this morning about a common law contract?

PN668

MR McLEOD: Yes, Mr Sasse, and in meetings - - -

PN669

THE DEPUTY PRESIDENT: Yes, which was the common law contract continuing the conditions of the 2019 agreement.

PN670

MR McLEOD: That hasn't been stated to anybody, your Honour.

PN671

THE DEPUTY PRESIDENT: Except when we look at the annexure to Mr Steele's statement where the continuation of the 2019 agreement is noted. But you say that was only because he was transferring from category of employment, not depot.

PN672

MR McLEOD: That's right. The system is that if you don't have a heavy vehicle licence or have never driven a bus, they put you into a Cert III traineeship, and that's normally between 18 months and two years. At the end of that period you then get transferred to a permanent part-time, non-provisional driver. They have the right under the current EA to actually switch you to casual at their discretion. But they then send you a letter, like Mr Steele received, to actually give you the terms and conditions.

PN673

Again, in my submissions I keep coming back to what's in the contract and what's not in the contract. I can't understand a contract that would not allow an associated employee to be seconded to work and still come under the one EA, because currently when the other Region 4 contract comes into play in April next year, the existing 16-depot contract EAs must be applied to by all the employees that will be going across to what I think he said was CDC Region 4 Pty Ltd. The same EA that covers charter work, covers ad hoc charter work, covers charter work out of the depots will be applied to the region for contracts, even though the people may be seconded from Hillsbus.

PN674

I also put in my submissions that one of the contract clauses was an associated employer paragraph. That deals with having people that are associated with the company working under the contracts.

PN675

So, while you have to have accountability to what is casting the government to run these services, it's an accounting basis that's not an employment basis, because as Mr Rino said, all assets have to be transferred to the new entity. The question I didn't ask Mr Matarazzo was is the depot at Forest going across to the new entity; are all the panel shops and workshops being transferred to the new entity.

PN676

The panel shops and workshops, and the buildings at Terrey Hills, I don't think are being moved to the new entity, but are still going to have to be used by Cromer, because they have no facilities to actually do any work at Cromer. It's not set up. It doesn't have a workshop, it doesn't have a wash basin, it doesn't have a panel shop. Cromer has a fill depot to fill the buses and a parking and a small office.

PN677

Operationally, they still use TIMS, which is run on the same server where you can see all of the Terrey Hills and Cromer drivers' roster for the week; the charter, route combination of both workers directed, or rail. So they haven't split up the company at all, and they will still need, because of the shortage of drivers, to have drivers come from Cromer to cover work they can't cover. So it can't be organisationally or operationally distinct, and geographically distinct doesn't necessarily mean just because it's 14 kilometres away it's geographically distinct if workers from both work in either depot.

PN678

Now, I know I've made mechanical errors in this, but I'm hoping that won't affect the drivers, because at this point in time there is no reason why they should have to submit to two EAs and reduce their bargaining position.

PN679

THE DEPUTY PRESIDENT: The six to eight drivers that you represent?

PN680

MR McLEOD: Well, any of the drivers. They will be affected by having two EAs.

PN681

THE DEPUTY PRESIDENT: But some drivers may like it. I don't know. All I have before me is an application by a bargaining representative, who I've been told represents six to eight people, out of a total of - - -

PN682

MR McLEOD: 230, around that.

PN683

THE DEPUTY PRESIDENT: - - - 260/270, who says they did a survey of 70, and 90 per cent of those 70 said they were supportive at some point in time. I mean, how is it reasonable in all the circumstances for me to intervene and set the parameters of the scope of bargaining in an enterprise agreement on that limited foundation?

PN684

MR McLEOD: Is it possible to have a vote to find out if they want one or two to start, as a - - -

PN685

THE DEPUTY PRESIDENT: You've had a fair few cracks at this so far. One has to be fair.

PN686

MR McLEOD: Okay.

PN687

THE DEPUTY PRESIDENT: There can be a vote. I mean the agreement can be put up for a vote, and if drivers strongly disagree with it, or even disagree with it, they can vote accordingly.

PN688

But I'm just telling you exactly what I want you to understand is this: I'm having concerns that I'm being urged to effect the enterprise agreement negotiations of a large group of employees from the urgings of a few, in circumstances where one of the key jurisdictional gateway has not been traversed. So, they're my distinct concerns, if you want to address me on.

PN689

MR McLEOD: I probably can't address the first one, which is the gateway question.

PN690

THE DEPUTY PRESIDENT: Well, it does seem to be – I mean, you may only for a scope order if you've taken all reasonable steps to present a written notice to all bargaining representatives.

PN691

MR McLEOD: Which lot of bargaining representatives?

PN692

THE DEPUTY PRESIDENT: All bargaining representatives.

PN693

MR McLEOD: Well, when I first started this there were seven in May.

PN694

THE DEPUTY PRESIDENT: Who were they?

PN695

MR McLEOD: There was Mr Mark Munro, Jamie Burns, Mark Brooking, Robert Morris and David McLeod, and Andrew Eliades and John Gilling.

PN696

THE DEPUTY PRESIDENT: So these were people that you say were employee bargaining representatives - - -

PN697

MR McLEOD: In May 2022.

PN698

THE DEPUTY PRESIDENT: They're not listed at question 2.4 of your application. You see there you've listed only what we might call the employer bargaining representatives.

PN699

MR McLEOD: Yes, I'm sorry, there was - at that point in time it was - well, we don't know who the bargaining representative there, because they didn't tell us who they were - there were officers of the company there. There was Nicole James.

PN700

THE DEPUTY PRESIDENT: Frank Hurley, Edward Thomas, Rino Matarazzo, and Robert - - -?

PN701

MR McLEOD: Bukharian.

PN702

THE DEPUTY PRESIDENT: - - - Bukharian - that you've listed, but you've also just outlined I think seven further bargaining representatives, who may or may not be supportive or express the concerns that you expressed. But you see, even if you look at the form, it's fairly clear, and you'd listed 7 October 2022 as the date on which a written notice had been given.

PN703

MR McLEOD: The only people we were told were bargaining representatives at that point in time were the seven employees, and in meetings we informed them that we wanted a scoping order, that we didn't want two EAs - and I'm saying 'we', which was the bargaining representatives in that, and excluding Rob Millar, who at that point in time wanted one, and Mark Brooking, who was not sure which way he wanted to go.

PN704

In October they decided to say that bargaining group was now defunct and we want two EAs, and I said will you please apply for scoping orders. If you won't I will, because we can't understand why you want two EAs.

PN705

THE DEPUTY PRESIDENT: We?

PN706

MR McLEOD: Myself, Mark Munro, Jamie Burns, the other bargaining representatives at that point in time, which now comprised the Cromer group and the second group at Terrey Hills.

PN707

THE DEPUTY PRESIDENT: Anything further? Okay. Mr Sasse?

PN708

MR SASSE: Thank you, your Honour. In order for the Commission to make the order sought, we'd like to take you to section 238.

PN709

Firstly, 238(3), which you've described as the gateway provision, in our initial application to dismiss that was lodged on 12 December we, at 2.2 items (2) to (6), outline precisely where in our view the applicant had failed to satisfy all of the sub-requirements of section 238(3), and we assumed on the basis of the instruction to circulate the court book to all bargaining reps as a result of the last hearing that there would be somewhere in there a formal statement of those concerns.

PN710

In our view, the court book, having been through it in some detail, is a litany of different concerns, grievances, past issues, most of which don't seem to be relevant, and it takes some imagination to try and calculate what those concerns actually are, let alone satisfy subsections (b) and (c) and go through some process of due diligence as to what those other bargaining representatives may or may not think of those issues.

PN711

The second line of argument from our perspective is that even if the Commission is minded to accept that 238(3) in some form or another has been satisfied, we then need to go to 238(4), which requires that the Commission is satisfied, firstly, that the applicant has met the good faith bargaining requirements; secondly, that making the order will promote fair and efficient bargaining; (c) that the group employees that will be covered by the agreement is fairly chosen; and (d) that it's reasonable in all the circumstances to make the order.

PN712

If, in respect of (c), the order is not to cover all of the employees subject to the application is where the concept of geography, operational and organisational distinction comes into play.

PN713

If we address each one of those, firstly, that the applicant has met the good faith bargaining requirements, well there's at least some material before the Commission in the form of a letter that went to yourself on 9 December, which suggests that some of the applicant's conduct in bargaining may not have been in good faith.

PN714

THE DEPUTY PRESIDENT: That's not before me. It's not part of the court book. It's not been tendered. I don't have it before me.

PN715

MR SASSE: Okay. We don't rely on that submission. The second point then is fair and efficient bargaining. There is no evidence at all on the part of the applicant to show how or why the making of the order, whatever that order may look like, will promote fair and efficient bargaining.

PN716

The uncontested evidence of Ms Purcell suggests that the eight bargaining representatives who actually work at Terrey Hills want a single EA for Terrey Hills only, and it's only the bargaining reps based at Cromer who want an EA to cover both depots, and it seems patently unfair that Cromer, which is working 80 per cent fewer hours in terms of size than Terrey Hills, can have the ability to thwart the preferences of those Terrey Hills bargaining representatives and the drivers that they represent.

PN717

THE DEPUTY PRESIDENT: Every driver down at Cromer used to be at Terrey Hills, didn't they?

PN718

MR SASSE: In the order of about 30. Turning to the second aspect in terms of efficient bargaining - - -

PN719

THE DEPUTY PRESIDENT: How would they thwart it? I mean if there's only 30 down there, and there's 200 at Terrey Hills, if we're looking at some group of employees being overborne by sheer weight of numbers, isn't it the Cromer employees that might have concerns? I'm just having difficulty seeing how the Cromer employees have some of whip hand.

PN720

MR SASSE: I wouldn't say they have a whip hand. I'd say that all of this proceeding is coming from the Cromer bargaining reps. The Terrey Hills bargaining reps, according to Ms Purcell's evidence, don't support the application.

PN721

Then turning to the 'fairly chosen' question, we will be relying on three Full Bench decisions, which should be before you, starting at page - - -

PN722

THE DEPUTY PRESIDENT: 202.

PN723

MR SASSE: Which for brevity I will refer to as ResCo(?) in the first case, QGC in the second, and Teese(?) in the third. In relation to geographical distinction, I'm not able to see why it can be possibly disputed that the locations are not geographically distinct because they're not in the same place, and I think the meaning of those words has to be taken as literally as that.

PN724

In terms of operational distinctiveness, the two depots are fundamentally different, and if you look at QGC, it outlines what the Commission views the word 'operational' to mean, and it says it 'refers to an industrial or productive activity.'

PN725

If we take the uncontested evidence of Mr Matarazzo, it's clear that the operations of the two depots are markedly different. The fleets are different in respect of

ownership, livery and fitments. At Cromer they own the fleet. At Terrey Hills they lease it. The clients are different. Terrey Hills has a single client, the state government of NSW in effect. Cromer has numerous smaller clients.

PN726

The forms of contract and their terms are fundamentally distinct. The Terrey Hills operations are governed by a contract of several hundred pages long and highly prescriptive as to how the company is to carry out its obligations under it, whereas at Cromer the contracts are simpler, short, and the company has far more flexibility in terms of how it delivers its services and constructs its commercial rates.

PN727

The sources of revenue and profitability for the two businesses are also fundamentally different. The TfNSW contract, according to Mr Matarazzo's evidence, is predicated on the company performing to a series of key performance indicators and there's very, very limited ability for it to influence the commercial terms once the contract is in place for its seven-year duration, whereas at Cromer each contract is negotiated with each of the various clients and the company has substantially more leverage in setting its terms of business, including pricing.

PN728

The final key point, which was made very clear in the evidence, is that the expected growth trajectories for the two businesses are quite different, with the Cromer fleet expected to double over the next three to five years.

PN729

If we go to the Full Bench decision in ResCo, the trainees that were the subject of the dispute were found –

PN730

to be clearly of a different nature to trained operators and other employees of the employer because they were subject to detailed contractual requirements, and we would suggest that an outsourcing contract with the state of NSW is in order of magnitude more complex than a group training contract, and that those employees who have to discharge the company's obligations under that contract ought be engaged under an enterprise agreement that congruently reflects the requirements of that contract that is not complicated by having to deal with employees who are not so engaged.

PN731

Finally, the question of organisational distinctiveness, again the definition of the Full Bench in QGC:

PN732

The term 'organisation' refers to the manner in which the employer has organised its enterprise in order to conduct those operations.

PN733

THE DEPUTY PRESIDENT: Where's that? Which paragraph?

PN734

MR SASSE: 44.

PN735

THE DEPUTY PRESIDENT: Thank you.

PN736

MR SASSE: So it's very clear from the evidence that CDC NSW has two distinct businesses that are relevant to this particular application. The first is the charter business, which incorporates the Cromer depot and reports in to a dedicated general manager. The second is the Transport for NSW contracted business for metropolitan Sydney, also with its own dedicated general manager.

PN737

Each of the two divisions is managed as a profit centre. Each produces its own monthly accounts, and each of the two general managers are solely accountable for their division's performance, including for safety, profitability and customer service.

PN738

The two divisions are organisationally distinct until the point where the two GMs report in to the chief executive officer. It would be impossible to create a more distinct organisational structure without divesting one of the two businesses.

PN739

Finally, Mr McLeod's evidence and his submissions appear to be predicated on the view that because employees at Cromer and employees at Terrey Hills are all driving buses, then they should be seen as carrying out the same type of work, and in that one, we would like to take you to the Full Bench decision in Teece where the Full Bench says – and I'll read it in full because it's relevant –

PN740

Merely because the work undertaken by some members of the group is not different from other work which might be done to attract customers seeking contractors and maintain the equipment is not a sufficient basis to conclude that the group is not organisationally or operationally distinct.

PN741

The point may be illustrated through a simple example. An employer may be conducting its business in the commercial building and civil construction sectors. It may, for instance, employ a number of engineers. Organisationally the employer conducts and organises the commercial building aspect of its business separately from the civil construction aspects of its business. It assigns some of its engineers to perform their work exclusively for civil construction projects, while others are assigned to perform their work exclusively for commercial building projects undertaken by the employer.

PN742

The work performed by engineers in both settings is not materially different, yet there will be little doubt that one group of engineers is organisationally distinct from the other. Substitute 'bus driver' for 'engineer' and the issue is

fairly clear. The nature of the work being carried out is not relevant to the determination of operational or organisational distinctiveness.

PN743

The final statutory requirement that we need to address is the one of reasonableness, and we would submit that on the basis of Mr Matarazzo's evidence, any decision that complicated the ability of CDC Region 14 Pty Ltd to discharge the specific requirements of the contractors that relate to employer relations generally and to the proposed Region 14 enterprise agreement in particular by forcing the company to cater for the Cromer charter business in that instrument will complicate the company's ability to maintain the requisite organisation and financial separation between the Region 14 contract and the other parts of its business.

PN744

The company's position here is not arbitrary or capricious. It's based clearly on sound commercial decision-making and reflects the obligations that the company has to its customers under the contract.

PN745

Finally, again turning to ResCo, there's no barrier to the Cromer drivers entering into an enterprise agreement, and indeed the company issued a Notice of Employer Representational Rights to that workforce on 14 October last year.

PN746

In summary, we submit, your Honour, that none of the statutory requirements have been satisfactorily addressed and that the application cannot stand. If it pleases the Commission.

PN747

THE DEPUTY PRESIDENT: Am I to take it that the question of one or two agreements is non-negotiable in the eyes of the respondent?

PN748

MR SASSE: It's a bold employer that says things are non-negotiable, your Honour, but it's certainly the company's very strong preference, for the reasons that have been outlined very clearly by our witnesses.

PN749

THE DEPUTY PRESIDENT: Thank you. Anything in reply, Mr McLeod?

PN750

MR McLEOD: It's submitted that the company's had two different employers. I don't disagree with that, but I disagree the work is different. They both have to connect the 'T's'; they both have to do - apart from the driving of buses he says - they both have to satisfy the clients of the employer.

PN751

He stated that they were organisationally distinct. If Cromer did nothing else but drive charters and did not go up to Terrey Hills to then drive routes for the same company - and I cannot envisage it changing with the shortage of drivers where

they will not require drivers to be rostered onto the route work that will be needed post May - it can't be organisationally distinct.

PN752

Geographically, yes, the words say 'geographically distinct', but it is also – they have a 16-depot EA, which has just been negotiated for a contract with the state government that will continue into next year, and they have no difficulty having the same – having a multi-depot EA for a business that will be operating under the same restrictions that Forest Coach Lines will be operating under.

PN753

So they must be able to have it organisationally distinct, because they need to do it for a major part of their business, for CDC's business, because it will be operating under a 16-depot agreement.

PN754

So, geographically distinct, they haven't made a scoping order to split out the Region 4 depots from their current EA. They didn't make a scoping order prior to this in August last year, or prior when they were negotiating it, to say we can't run a multi-EA agreement because it's in breach of any contract we may go into next year.

PN755

They put – I don't know why they're trying to split up two EAs within the Forest or the respondent. The drivers will continue to work in the route business. When we talk of 'efficiently' and 'fairly', collective bargaining is a process, and by splitting the employees into three different groups to negotiate these EAs, they have created a barrier for information flow between the parties.

PN756

THE DEPUTY PRESIDENT: Which three groups?

PN757

MR McLEOD: They've got two groups at Terrey Hills and they have a group at Cromer.

PN758

THE DEPUTY PRESIDENT: These are the three negotiating?

PN759

MR McLEOD: That's right.

PN760

THE DEPUTY PRESIDENT: Why? Where's the barrier to information-sharing?

PN761

MR McLEOD: Well, we're not getting the information from group 1 at Terrey Hills. We are translating the group 2 at Terrey Hills back to the Cromer – well, I am, and the other negotiating parties from the Terrey Hills group 2 are then putting it back to the Cromer parties. It's a divide and conquer situation.

PN762

I can only reiterate that they operate a 16-depot EA. It doesn't seem to affect their ability to operate a contract next year. Operationally they say it's, you know, just because we drive different buses we're different operationally. If we have to then go from charter to route back to charter, we're not different operationally.

PN763

Organisationally they say the accounting's different because of the different contracts they've got. It's an accounting problem, it's not an employment problem. They still roster drivers in public holidays, weekends and after their charter work. Terrey Hills drivers are still doing charter work on an ad hoc basis, doing school term and non-school term. So they are still doing charter work and will continue to do charter work, because the drivers at Terrey Hills need the charter work to be able to have their income levels at the same level as they currently are.

PN764

Most drivers drive split shifts on the split. A lot of them drive ad hoc charter work in the route buses in the middle of their splits. So they're using assets of Forest to do charter work. So they would have to account for that work that is outside the route work within their organisational or operational requirements under any contract they have with the state government.

PN765

So, organisationally, they will be using assets for charter work as well as route services, and they'll be using the same drivers to drive that charter work that were doing route work in the morning and then going back to that in the afternoon.

PN766

I made a submission, or part of my witness statement, where I said Mr Rob Bukharian, who is the depot manager at Terrey Hills, said we still need to do charter work and we will still rely on charter drivers to come and drive route work. So it can't be organisationally, operationally different, and the drivers at Cromer and at Terrey Hills will be adversely affected in regard to having two EAs.

PN767

THE DEPUTY PRESIDENT: How?

PN768

MR McLEOD: Because they're saying the EA they're currently employed under at Forest will not carry over to the other route work they're doing for Forest or the associate of Forest, which is CDC Region 14 Pty Ltd.

PN769

THE DEPUTY PRESIDENT: No, but how is it that they'll be worse off, I think you said?

PN770

MR McLEOD: Because they'll effectively have two employers, according to what we've been told in the EA meetings.

PN771

THE DEPUTY PRESIDENT: Well, they'll have a principal employer, being the company operating from Cromer, and either if they're rostered, on your version, or if they volunteer, on the employer's version, they will get some additional work possibly at the Terrey Hills depot.

PN772

MR McLEOD: Yes. If it - - -

PN773

THE DEPUTY PRESIDENT: How are they worse off?

PN774

MR McLEOD: If they are two employers, as they're saying it's going to be, their hours will then not accumulate to overtime. So, they do 21 hours at Cromer, then go and work after hours doing route work on weekends – that will not count towards their ordinary hours, which means they won't get overtime and penalty rates on those hours, because it will be a different employer.

PN775

THE DEPUTY PRESIDENT: Overtime after 21 hours?

PN776

MR McLEOD: Sorry, after 38 hours.

PN777

THE DEPUTY PRESIDENT: Yes.

PN778

MR McLEOD: So if there are two totally different employers, if I'm working for my first employer I get 21, 30 hours, or even 38 hours. If I then go and work for another employer for another eight hours, I will get ordinary hours' rates for those eight hours. Currently, if I go from charter to route work, it counts towards my hours for the same employer.

PN779

THE DEPUTY PRESIDENT: I'm not seeing this overtime argument in the materials.

PN780

MR McLEOD: Sorry, your Honour.

PN781

THE DEPUTY PRESIDENT: It's just - - -

PN782

MR McLEOD: It's – okay.

PN783

THE DEPUTY PRESIDENT: You know, I have a different (indistinct), because I feel I'm hearing it for the first time. The respondent may have difficulty, because

it's something that they've not been able to address in their materials. That's all I'm highlighting.

PN784

MR McLEOD: Sorry, but that's how they're going to be disadvantaged, is because their hours won't accumulate with one employer. It will be with two employers, which means they go back to the ordinary hours for that employer, which means their overtime will not accumulate.

PN785

THE DEPUTY PRESIDENT: Okay.

PN786

MR McLEOD: Which is time-and-a-half and double-time. Their holidays won't accumulate in the same way, because they'll more than likely be casual with the other employer. Therefore they won't get holiday pay either, holiday accrual. All the things covered in an EA would be lost with a second employer.

PN787

THE DEPUTY PRESIDENT: Mm-hm.

PN788

MR McLEOD: So that's a major disadvantage to the drivers. In *National Union of Workers v Linfox*, at 49 to 51, in the second sentence:

PN789

Those involved in the process that have a right to bargain collectively, the right will be undermined if bargaining representatives are denied the opportunity to meet with the employer as a composite group and/or if the information about the proposal is made by the bargaining party or the response for those proposals is denied to the other bargaining representatives.

PN790

THE DEPUTY PRESIDENT: Which paragraph?

PN791

MR McLEOD: That was at 49, page 375. But also in clause 31, if they've been fairly chosen:

PN792

Selection based on criteria, which could have the effect of undermining collective bargaining or other legislative objectives, would also be unlikely to be fair.

PN793

Because we've gone from bargaining representatives from 230 or 260 down to 30, the power of the people negotiating goes down, in this regard that we were 230 negotiating a collective agreement for the whole company down to having split into two.

PN794

THE DEPUTY PRESIDENT: How does the bargaining power go down?

PN795

MR McLEOD: Because we've gone from 270 covering all of the business to one to 30 employees negotiating for a part of the business.

PN796

THE DEPUTY PRESIDENT: How does the bargaining power go down?

PN797

MR McLEOD: Well, I think we're not as - - -

PN798

THE DEPUTY PRESIDENT: It doesn't go by numbers. It goes by strength, does it not?

PN799

MR McLEOD: Well, I think the strength of the employees go down if there's less of them in a group of 270 drivers.

PN800

THE DEPUTY PRESIDENT: It depends on how crucial that part of the business is to the employer. It might be that that small group can create a whole lot of damage and have significantly greater bargaining power.

PN801

MR McLEOD: It may have less too, your Honour.

PN802

THE DEPUTY PRESIDENT: Yes, but for you to tell me that it's necessarily less on a sheerly arithmetic basis is not a sound argument I'm suggesting.

PN803

MR McLEOD: It also goes on to state:

PN804

In this regard, it is not only in the interests of the employees covered by the agreement, but relevant for the interest of those employees who are excluded from the coverage of the agreement.

PN805

In other words, I think we're being excluded from an EA at this point, or trying to be excluded from an EA with the majority of our other drivers. It restricts us being able to transfer to it, and not stay with the charters but go back to the route work, which we were all basically employed under at the start.

PN806

THE DEPUTY PRESIDENT: Is your real complaint, or real complaint of the people that you represent, that they were transferred without their consent?

PN807

MR McLEOD: No – sorry.

PN808

THE DEPUTY PRESIDENT: You make some submissions in your response to the respondent's material, so your reply, in relation to duties to consult; alleged breaches of the enterprise agreement and the consultation provisions of the enterprise agreement are each breaches of various provisions of the Fair Work Act relating to section 342 was one.

PN809

But it seems to me that your complaint relates not to the future possibly but to the past. Am I incorrect in that?

PN810

MR McLEOD: Part of the complaint is how they operate their industrial relations in this company, and how they treat their staff. The major problem is being told that when you continue to do the same work that you were doing before it will affect your income, because you will go onto a different contract when you are going to do the same work that you were doing prior to this.

PN811

In other words, I'm a charter driver down at Cromer, but I regularly route work out of Terrey Hills. Under the new system they're saying it will be a different EA and a different agreement.

PN812

THE DEPUTY PRESIDENT: It might be better.

PN813

MR McLEOD: It may be worse.

PN814

THE DEPUTY PRESIDENT: It might be better.

PN815

MR McLEOD: I have my doubts it will be better.

PN816

THE DEPUTY PRESIDENT: My question to you was, is the concern of those that you represent in fact really what occurred in the transfer of employment process.

PN817

MR McLEOD: By being taken off the EA, they weren't aware of it at that point in time.

PN818

THE DEPUTY PRESIDENT: Well, by being transferred without their consent, is that what you put?

PN819

MR McLEOD: That's one of their concerns. The major concern is how they continue working for the company as they were before and under conditions that they will be working going forward, with maybe the loss of overtime, maybe the loss of annual leave entitlements. It is the unknown circumstances where we were

under one EA, and going forward, doing the same work, they want to put us into two.

PN820

THE DEPUTY PRESIDENT: Okay. Anything further?

PN821

MR McLEOD: No, your Honour.

PN822

THE DEPUTY PRESIDENT: I can see two matters arising. The first is something that was agitated earlier, which was the identification of who in fact you represent. It was indicated that there's a folder of bargaining representative instruments of appointment. Would Mr McLeod be able to access that, and I note if you've got confidentiality issues you should raise them?

PN823

MR SASSE: We have no confidentiality concerns, and I'm happy to share them. I've had someone in the office check, and we'll be able to put something together in - - -

PN824

THE DEPUTY PRESIDENT: Okay. And just if I can get a note from the parties indicating who it is that is making the application – well, the application has been made by you, but who it is you speak for.

PN825

MR SASSE: Yes.

PN826

THE DEPUTY PRESIDENT: The second is a very practical issue, and you will note that I asked a question of Mr Matarazzo as to whether a vote was likely. Scope order applications are often made very early before the ball gets rolling on negotiations. That's just the way they normally go, but this one has not been, and the bargaining, as I understand it, has been continuing.

PN827

It may be that in, for example, four weeks time a vote might occur that might be successful, and if an agreement is made, as the Act provides, that will - - -

PN828

MR McLEOD: Stop the scoping order.

PN829

THE DEPUTY PRESIDENT: Yes, frankly. So I intend to reserve my decision, but the parties should keep me apprised if events occur that will affect the application that is before the Commission. Do I need to put any more detail on it?

PN830

MR McLEOD: I don't think so.

PN831

THE DEPUTY PRESIDENT: Okay. No problems. Is there anything further today, Mr Sasse, just arising from the reply of Mr McLeod?

PN832

MR SASSE: Very briefly, your Honour, only that much of the reply seems to be ignoring Mr Matarazzo's uncontested evidence in terms of the structure and operation of the business.

PN833

The second observation that I would make is that the concerns that Mr McLeod has enunciated about exactly how a process would work of Cromer-based drivers carrying out route work for the Contract 14 business at Terrey Hills strike me as perfect material for the content of the negotiation of the Cromer enterprise agreement. Thank you.

PN834

THE DEPUTY PRESIDENT: Anything further, Mr McLeod?

PN835

MR McLEOD: No, your Honour.

PN836

THE DEPUTY PRESIDENT: As I said, I intend to reserve my decision. I will await the notification of the identification of those that you represent, and otherwise, as I said, I reserve my decision. Thank you very much.

ADJOURNED INDEFINITELY

[1.12 PM]

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