



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**ACTING PRESIDENT HATCHER
DEPUTY PRESIDENT CROSS
COMMISSIONER RIORDAN**

B2022/1749

s.240 - Application to deal with a bargaining dispute

**Application by Sydney Trains
(B2022/1749)**

B2022/1750

s.240 - Application to deal with a bargaining dispute

**Application by NSW Trains
(B2022/1750)**

C2022/8265

s.739 – Application to deal with a dispute

**Application by Australian Rail, Tram and Bus Industry Union, The Association of Professional Engineers, Scientists and Managers Australia, Australian Municipal, Administrative, Clerical and Services Union, Australian Manufacturing Workers' Union, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and The Australian Workers' Union
(C2022/8265)**

C2023/571

s.739 – Application to deal with a dispute

Application by Australian Rail, Tram and Bus Industry Union, The Association of Professional Engineers, Scientists and Managers Australia, Australian Municipal, Administrative, Clerical and Services Union, Australian Manufacturing Workers'

**Union, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing
and Allied Services Union of Australia and The Australian Workers' Union
(C2023/571)**

AG2023/240

s.185 – Application for approval of a single-enterprise agreement

**Application by Sydney Trains
(AG2023/240)**

Sydney

10.00 AM, WEDNESDAY, 8 FEBRUARY 2023

Continued from 02/02/2023

PN1

ACTING PRESIDENT HATCHER: I will take the appearances. Mr Taylor, you appear with Mr Saunders for the rail unions.

PN2

MR I TAYLOR: Yes, I do, although in respect of the matter that's also listed today in respect of approval of the enterprise agreement, Mr Saunders is appearing only in that matter.

PN3

ACTING PRESIDENT HATCHER: All right, thank you. Mr Shariff, you appear with Mr Parajasingham - - -

PN4

MR Y SHARIFF: Pararajasingham.

PN5

ACTING PRESIDENT HATCHER: Pararajasingham, I'm sorry.

PN6

MR SHARIFF: For Sydney Trains and New South Wales Trains, but, like Mr Taylor, I am only appearing in the dispute application under section 739, which we can't get to until Mr Woods, who is appearing for my two clients, has the agreement approved.

PN7

ACTING PRESIDENT HATCHER: All right. I note your appearance as well, Mr Woods.

PN8

MR T WOODS: Yes.

PN9

ACTING PRESIDENT HATCHER: As you both noted, I have listed the agreement approval application with these four matters. We are still awaiting, I think, the report from the agreements team as to compliance with the statutory requirements. Assuming that's all clear, I will raise it at an appropriate time and the parties can address me on that. The unions might want to consider filing a notice seeking to be bound by the agreements, and I will grant leave to file those notices in court, if that's more convenient.

PN10

There is one other preliminary matter. We have had correspondence from Mr Bonatesta in effect withdrawing his appearance and his claims, so, Mr Taylor, can I take it we don't need to deal with the claim for the cleaning allowance to apply to on-board services employees?

PN11

MR TAYLOR: That's our understanding, yes.

PN12

ACTING PRESIDENT HATCHER: All right. So can we modify the second question accordingly to delete the reference to them?

PN13

MR TAYLOR: Yes, if it pleases.

PN14

ACTING PRESIDENT HATCHER: All right. Apart from that, we are ready to go.

PN15

MR WOODS: Excuse me.

PN16

ACTING PRESIDENT HATCHER: Mr Woods, yes?

PN17

MR WOODS: Just in relation to the approval matter, might we perhaps then stand it down till 2 o'clock, or something, for mention?

PN18

ACTING PRESIDENT HATCHER: Just give me one second, Mr Woods, I just want to check that a report hasn't turned up yet. It has turned up, I'm sorry. Yes, I will stand that matter down till 2 pm, so we will address it, and that will give you a chance to look at this report and if there's any matters that need to be addressed, I will provide a copy of the report to the parties.

PN19

MR WOODS: Thank you. Also we filed this morning a section 271 application in relation to the contents pages and changes.

PN20

ACTING PRESIDENT HATCHER: Yes, I saw that. I don't know if the unions have seen that yet, but that can be - - -

PN21

MR WOODS: They have been served with one. Everyone is listed as receiving the application that was filed yesterday, so that's gone to everybody.

PN22

There is another matter, which might be an undertaking under section 190, which the RTBU and the rail entities would want to bring before the Commission, but it's not quite ready in relation to that. I expect it will be ready for 2 o'clock to be able to try and address at that time.

PN23

ACTING PRESIDENT HATCHER: Thank you. You are excused then till 2 o'clock.

PN24

MR WOODS: Thank you.

PN25

ACTING PRESIDENT HATCHER: All right. Who's going first? Mr Taylor?

PN26

MR TAYLOR: Yes, if it please. Can I indicate by reference to a document that was provided to the Commission, the last iteration of the document provided to the Commission called a Witness Timetable, what we propose to deal with today first, just by way of housekeeping. That document provided a list of witnesses today. It has since been further adjusted such that following the opening submissions, Mr Toby Warnes, who has two statements, will be in fact the first witness. A decision has been made by Trains that they do have some short questions for him and, as he is instructing, he will be the first witness.

PN27

Thereafter, the order will be as indicated, other than the fact that it is agreed that Mr Houston, who was, in any event, the last witness for the day and there would be some doubt as to whether we could have dealt with him, he will now not be called today. He provided a further supplementary report late last night and we just need a bit more time before we can cross-examine him. As I understand it, he has been advised that he will not be required today.

PN28

ACTING PRESIDENT HATCHER: Do we have a time marking for Dr Stanford with the video link?

PN29

MR TAYLOR: Yes. As a result, Mr Houston will be after Mr Stanford tomorrow. Mr Stanford will be giving evidence by AVL from Canada and, as a result, the parties have reached an understanding that he will be interposed to the extent necessary so that he can commence giving his evidence at 10 am tomorrow.

PN30

Finally, I can indicate that it may be the case that Ms Muir is not required for cross-examination in light of the fact that Mr Warnes is going to be cross-examined this morning. No doubt Mr Shariff can update us about that in due course, but, if that's the case, that will mean that tomorrow we will effectively deal with the two economic experts and we will otherwise deal with the evidence today.

PN31

Moving then to an opening on behalf of our clients, our clients are, of course, the combined rail unions who, as two members of this Bench are very familiar, have bargained with the Trains entities over a significant period of time, the Trains entities being the two entities Sydney Trains and New South Wales Trains, to replace two agreements known as the 2018 enterprise agreements.

PN32

The evidence is that they commenced bargaining in about May of 2021 at the point where the Federal Government was introducing amendments to the Act to deal with intractable bargaining - some were suggesting that they could simply define intractable bargaining as New South Wales Trains bargaining - but, as it

turns out, following those amendments, agreement was in fact reached on a basis that two issues would be dealt with by way of consent arbitration. Those two issues are identified in the questions that the Bench has. Could I ask the Bench to now go to the court book, if the Bench has that court book available to it.

PN33

Just while I'm mentioning that, it was brought to my attention this morning that there are some pages in the court book dealing with Mr Houston's evidence which, in preparing it, there are some lines which can't be read and so it may be that between now and the time Mr Houston gives his evidence tomorrow, we take some step by way of either producing a hard copy or perhaps a supplementary court book just so that those pages can be seen.

PN34

If the Commission can go to the court book at page 251, it is a page from the first statement of Mr Warnes, who will be the first witness, and at paragraph 14 on court book page 251, we see that, as part of the agreement that the parties reached in negotiations, which is reflected now in the enterprise agreement which has now been approved by a vote and which is the subject of the proceedings that will recommence at 2 pm, certain minimum increases which will apply during the life of that agreement and they are there set out in paragraph 14: firstly, no increase for the period from 1 May 2021 to 1 May 2022; secondly, a 2.53 per cent minimum rise commencing 1 May 2022 and, third, a 3.03 per cent minimum wage rise commencing 1 May 2023, and the question for the Bench is what increases in fact should apply for each of those three periods, the answer to which, as I will come to in a moment, we have set out in our written submissions.

PN35

I should note that in respect of each of the two increases at May 22 and May 23, the reason those figures are what they are, 2.53 and 3.03, is that they have regard to changes in superannuation such that, on the Trains' case, the increase in remuneration that they would say effective 1 May 2022 is 3 per cent and 1 May 2023 is 3.5 per cent.

PN36

The second issue that the parties determined by agreement to refer to consent arbitration is whether a particular allowance, a higher standards cleaning allowance, which the parties agreed to introduce for cleaning attendants, should also be paid to customer service attendants.

PN37

ACTING PRESIDENT HATCHER: Mr Taylor, the way that's set out in paragraph 14(a) is not precisely the way in which the agreed question is formulated, is it?

PN38

MR TAYLOR: No, and I don't by that suggest that the agreed questions aren't the appropriate questions that the Bench had. The agreed questions are contained in our written submissions at paragraph 9, the first question being: 'What increases for remuneration should apply or the Fair Work Commission award effective between 1 May 2021 and 30 April 2024?' and the second being: 'Should the

higher standards cleaning allowance, or any component of it, be paid to customer service attendants' and then - having deleted the words 'and/or on-board service employees' - 'who perform cleaning duties?'

PN39

ACTING PRESIDENT HATCHER: Does the question imply a date and point of 1 May 2021 for the purpose of analysis?

PN40

MR TAYLOR: It doesn't imply that that's the datum point; it does imply that the Commission would be considering pay rises from 1 May 2021. For our part, we say that the relevant datum point or the starting point is the last wage rise that employees received, which was 1 May 2020. There was no pay rise, as Mr Warnes' evidence indicates at paragraph 14(a), on 1 May 2021, so the last increase was 1 May 2020, and the evidence that you will hear is the effect that inflation over the period from that date of 1 May 2020 through to the end of this period, 30 April 2024, taking into account forecasts of inflation, is going to be in total substantially more than those increases that Mr Warnes sets out at paragraph 14 as are contained in the enterprise agreement, such that those increases alone would, if the Commission doesn't determine to award additional increases, leave employees with a substantial reduction in remuneration in real terms.

PN41

That is a matter we don't think ultimately will be in dispute. Dr Stanford will give expert evidence on behalf of our clients and his evidence will be that over that period, there has been - even after you take into account the increases that Mr Warnes has identified in paragraph 14 - a 13 per cent decline in the purchasing power of the wages paid to employees of the two Trains entities, such that if the Bench, contrary to our case, were to simply make a one-off increase effective 1 May of this year to ensure that wages were going to keep pace with inflation, the further increase in addition to the increases set out in the enterprise agreement would be a fraction under 15 per cent, 14.91 per cent.

PN42

That isn't the way in which our claim is structured. The approach that we take as to the touchstone of the way in which the Commission will consider it is - and the parties are at one on this - that the Commission is going to be exercising a broad discretion to determine what it considers fair and reasonable in all the circumstances.

PN43

That approach historically, as we put in our written submissions, is one which, when the Commission has been exercising powers of determining wages, it has consistently taken an approach, which in our written submissions we hark back to the decision of Powers J, the Three Shillings decision, and decisions since then of two components: firstly, a component which involves a small increase to reflect improved labour productivity over periods of time and, secondly, an amount to cover changes in the cost of living so employees' real wages don't go backwards, so, in fact, they are maintained plus a small increase.

PN44

It is on that basis that we have put forward a proposal based on Dr Stanford's evidence that the appropriate approach is, reflective of long-term historical changes in real wages, a 1 per cent increase each year in real terms, plus, of course, an amount to take into account inflation over the period in question. What that translates to is the amounts that we have set out in our written submissions, in the final paragraph of our written submissions, smoothed over the course of the three pay traditional increase dates of 1 May, firstly, a 6 per cent increase on 1 May 2021 and then two further increases, 3.47 on 1 May 2022 and 2.97 on 1 May 2023. Those figures are based on Dr Stanford's evidence as to what will be required to achieve that outcome.

PN45

Those figures, we acknowledge, do not have regard to two matters. The first, as I have identified, is the fact that during that period, there will be increases in superannuation contributions. We don't have regard to that because those amounts are not going to alter the capacity of rail workers to meet increased costs of day-to-day living to pay their mortgage and the like; but, even if they were to be considered, because of timing issues as to when those increases occur relevant to the period in question, ending in April 2021, the difference is, I understand, less than half a per cent. We are not talking about a significant effect.

PN46

The other matter which is not taken into account in these figures is the \$4500 amount which we understand is going to be paid some time in the next two to three weeks to every rail employee as a result upon the agreement being approved. That amount is not characterised as back pay. The Commission would no doubt consider that it's a matter which has to be taken into account if one is considering all the circumstances, but one has to be careful that that amount is not characterised as back pay. As best as one can infer from the fact that it has no explanation is that it is an amount of money by way of a bonus payable as a result of employees voting in favour of an agreement, but certainly one has to be careful, if one is trying to consider the extent to which there has been changes in employees' capacity to pay money, to pay for things out of their wages, that that is not built into wages going forward. There is no suggestion there will be a \$4500 payment every year; to the contrary, it will be paid once, and once only, some time in the next two to three weeks.

PN47

I indicated there is some degree of agreement between the parties as to the appropriate approach. Can I just for a moment turn to the Trains' position, and by 'Trains', I, of course, mean the two entities who appear represented together. In their primary written submissions, they give two reasons why the Commission would not award any further increases at paragraph 23, the first of which is because these increases are 'consistent with New South Wales Government wages policy' and the second because they are 'fair and reasonable.'

PN48

It is from the latter and the fact that when they examine what is fair and reasonable, they do so by reference to changes in the value of real wages that one can see some level of agreement in the approach of the two parties, that is, when one is considering what's fair and reasonable, having regard to changes in the

value of real wages is a critical component, certainly a critical component as submitted by both parties, albeit that the Trains don't, in their calculations, have regard to the need or the appropriateness of changes also incorporating some ongoing and regular increase in real wages to reflect ongoing improvements in productivity.

PN49

Can I just deal with those two reasons that they give at a broad level. The first one, as I said, is that it is consistent with the New South Wales Government wages policy. As to that, it is not clear why that is said to be so, given that it involves no increase on 1 May 2021. There was nothing, as generally understood about the New South Wales Government wages policy, which required an outcome of zero per cent for 1 May 2021, and it is the absence of any increase on that date which, on any view, is having a significant effect on the loss of the real value of the wages over this period.

PN50

ACTING PRESIDENT HATCHER: Mr Taylor, am I right in recalling that in 2021, there was, generally speaking, a 2.5 per cent increase awarded by the State Commission to the rest of the public sector?

PN51

MR TAYLOR: In 2021, the government wages policy allowed for an increase of up to 2.5 per cent. In 2021, in respect of many Crown employees, the government advocated that there should be a zero per cent increase and the Commission awarded for many an increase of 0.3 per cent.

PN52

ACTING PRESIDENT HATCHER: I thought that was 2020.

PN53

MR TAYLOR: Sorry, that was 2020. My apologies. For 2021, it was - I think your Honour's right - 2.5 per cent, and there are many employees for whom the 2.5 per cent, teachers being one example, the maximum of the wages policy, as the Crown understood it, was consistently applied.

PN54

The second issue as to this issue that the Commission should place some weight on or, indeed, should determine that the current increases are appropriate because they are consistent with the New South Wales Government wages policy, for our part, we say that it's entirely unclear from the submissions why the Commission would consider it persuasive or even relevant, the wages policy ultimately being no more or less than the New South Wales Government's preferred outcome. It is no more persuasive than any employer's negotiated position; it's just what they say they would like to achieve.

PN55

Certainly we don't find, as we can see in the evidence, any attempt to suggest the amounts of 2.53 per cent and 3.03 per cent, or, including super, 3 per cent and 3.5 per cent, have been determined to be appropriate through some rational or explicable process that is referable to some economic indicators or some other

way in which one can rationally identify that those figures are ones, beyond them being simply the figures the government prefers.

PN56

Finally, and this will be explored more in the evidence, I think, but ultimately we expect to submit that the approach that Trains has taken to the enterprise agreement is not actually consistent with the wages policy in any event, so the suggestion that the Commission ought to not award increases because these are consistent with the wages policy, we think will fall away because it is not in fact consistent with the wages policy in any event.

PN57

Secondly, Trains identify the increases as fair and reasonable on the basis of evidence that doesn't attempt to suggest they are fair and reasonable by reference to a period commencing 1 May 2020 or, indeed, for that matter, 1 May 2021. The evidence that Trains rely upon - that's the evidence of Mr Houston who you will hear from tomorrow - is he wasn't asked to do those calculations. What he was asked to do instead was determine what he considered to be changes in the real wages and he was given a dataset of effectively a 14-year period commencing in April 2010 and ending in April 2024. We can't ourselves see any evidence, any reason why that particular period was chosen simply beyond the fact that that was the data Mr Houston was given. It is notable that by going back that far, one is picking up increases that date way back to 2010 to 2013, which Mr Houston will say were higher than CPI changes for those relevant years. So, by going back that far and starting at that point and picking those three years, the whole starting point of the analysis has a built-in positive which then is parlayed through Mr Houston's figures.

PN58

We say that such an approach ignores what would be sort of a traditional or longstanding approach to determining changes in pay, which is that one goes back to a datum point of the last wage rise. One doesn't go back to some earlier point and, after all, why stop at April 2010, why not keep going to some other date period, but the appropriate thing to do is to look at the last date period at which the Tribunal, or in this case the parties, determined rates of pay to be appropriate, presumably doing so in light of past history, in light of the nature of the work, and then examine to what extent there should be changes to that rate of pay in light of things that have happened since that time, which might include, in a work value case, which this isn't, changes in work value and it might include changes in productivity, which, as we understand, this case does involve, and it might involve changes in inflation, but it's from that datum point and not some earlier datum point.

PN59

Frankly, if you think about it from the individual employee's perspective, someone employed in the last four years, genuinely irrelevant to what the pay rate was in 2010. If they have taken out a mortgage some time in the last four years, they have done so based on their rate of pay, not on what the rate of pay was in 2010. Inevitably employees, all people, make decisions about their expenditure based on their income at that time, not on their income 10 years earlier, but if, having received a pay rise on 1 May 2020, they have a certain level of pay,

financial decisions are made on that basis, and then inflation erodes that to a value of something like 20-odd per cent, which, after these increases, will leave them still some 13 per cent less in real terms, that's going to have a real effect on those people and it can't be wished away by the fact that some other employee in 2010 got a pay rise that was an increase in real terms.

PN60

It is also, with great respect, inappropriate from a more sort of fundamental wage fixing basis because the very nature of wage fixing has always understood, as we indicated earlier, that there is a level of real increase in wages over time which is indicative of changes and improvements in labour productivity over time. It's what you would expect. You would actually expect to see some increase over a period of 14 years. It would be disappointing, frankly, and contrary to a general approach to wages to see something different.

PN61

The other thing, Mr Houston's calculations, of course, necessarily depend on assumptions that he's asked to make, and the question of whether those assumptions are valid, including in particular whether the assumption that he makes, because he's asked to make it, that there's been a 2.1 per cent increase in average remuneration for employees as a result of conditions changes which have been agreed by Trains, is one which, we think, after the cross-examination we will be putting to you is one that can be safely put aside, that is, that those conditions matters are not changes in remuneration that all employees get or even only some employees get and, as I said, there's some questions that will be asked about how the \$4500 is to be taken into account and also how superannuation is to be taken into account, but we will deal with that by way of closing submissions after cross-examination.

PN62

That deals with the first question.

PN63

The second question is an issue, as I indicated earlier, to do with a specific allowance. Can I firstly take the Bench to the new allowance. It is contained at court book page 413, which is one of the pages from the enterprise agreement that the employees have voted to approve, and you will see at the bottom of court book page 413 the heading '103.9 Higher Standards Cleaning Allowance'. There is there an allowance for cleaning attendants and cleaners in charge. The effect of it is that for every shift that they work, they get paid for the whole of that shift an allowance of \$2.25 per hour in recognition of the following duties, and there are three duties there identified: removal of graffiti, removal of hazardous waste and the use of respirators and appropriate PPE.

PN64

There is nothing in the clause, of course, that requires them on any day that they are paid that allowance to do all three of those or, indeed, any one of them, but rather it's recognition of the fact that their duties will involve them doing one or more of those at some point when conducting their work. That is relevant for reasons that we will come to, but, in particular, can I note that the evidence that will be led by Trains indicates that there are cleaning attendants who do not

remove graffiti in the manner that others do, that do not use respirators, but do remove hazardous waste.

PN65

I should say, before I hand up a document which gives some detail to the nature of our claim, this allowance that you see here at page 413 replaced and consolidated two earlier allowances that were paid to cleaning attendants. So, there was, in respect of the first, those who had the duty of removing graffiti, there was an allowance of 74 cents per hour in recognition of the nature of the chemicals and the PPE equipment that has to be worn in light of the chemical fumes involved in doing work of removal of graffiti, and for those whose duties involved use of respirators and appropriate PPE, there was a further allowance of 32 cents per hour, making a total of \$1.06 per hour, again paid for the whole of the shift even if they only did one or other of those tasks at some point in the shift.

PN66

During the course of the negotiations, the evidence will reveal the concept of an allowance for removal of hazardous waste was initially resisted, but the Trains' evidence is that, at a certain point, Trains itself proposed that there be a new allowance separately paid for removal of hazardous waste, again at 74 cents per hour for the whole of a shift, not just for any particular hour in which they might do it, paid to cleaning attendants.

PN67

The unions' response, the evidence will reveal, is that the better way would be to have a rolled-up allowance and they proposed a rolled-up allowance for the three at \$3.56 per hour for every hour and that that should also be paid to those known as cleaning service attendants.

PN68

Trains ultimately agreed to roll up the three and determined, rather than making it \$3.56, ultimately proposed it being \$2.25. I think the Minister's intervention at one point, the evidence will reveal, was that it be \$2 - Minister Elliott - but later on ultimately agreed at \$2.25 for cleaning attendants doing that work.

PN69

Can I hand up a document which provides a definition of hazardous waste. This document is our clients' proposed outcome in respect of this particular second question, that is, that the Bench would, if the Bench is with us, determine in effect that customer service attendants also be paid an allowance in respect of removal of hazardous waste. It does so, firstly, by defining hazardous waste and, as the evidence will reveal, it's a definition which was first proposed by Trains itself during negotiations and, secondly, in (b), identifies that the customer service attendant will be paid an allowance - and I will come to the sum in a minute - on any shift on which they are required to clean hazardous waste for all hours worked on the said shift, that is - - -

PN70

ACTING PRESIDENT HATCHER: The \$1.19 is just \$2.25 minus the amounts of the existing allowances?

PN71

MR TAYLOR: Correct, and the Trains' evidence is that that approach of doing that mathematical exercise is one which assumes that part of the allowance is entirely attributable to this new task that has been recognised by an allowance, and that's true, so, as your Honour has properly identified, that's how the \$1.19 figure is arrived at. At the point where Trains was originally, as I said, indicating a willingness to introduce an additional allowance for cleaning attendants for hazardous waste, it was 74 cents, but the difference between the two, after negotiations continued and ultimately reached \$2.25, it means the difference is \$1.19.

PN72

Can I just indicate what we understand the Bench ultimately will find was not in issue and then what the questions are to be determined. It is not in issue that there's a new higher allowance being paid to those who clean hazardous waste as defined, that is cleaning attendants, nor is it in issue that customer service attendants have, as part of their ordinary duties, a requirement to clean hazardous waste. The evidence will be that it's smaller stations that do not have a cleaning assistant, a CA. The CSAs then have the cleaning duties that a CA has in the larger stations.

PN73

ACTING PRESIDENT HATCHER: So the allowance would be paid per hour, not on an across-the-shift basis; is that right?

PN74

MR TAYLOR: No. It would be paid for the shift on any shift where, during the course of that shift, they were required to clean hazardous waste, in the same way as the cleaning assistants are paid an allowance for the whole shift in circumstances where they may not remove graffiti or use respirators at all and may only have to remove hazardous waste at some point in the shift.

PN75

ACTING PRESIDENT HATCHER: So, if they do cleaning, they make a claim for the shift? Is that the way it would work?

PN76

MR TAYLOR: Yes, because we - - -

PN77

ACTING PRESIDENT HATCHER: There's various distressing photos that will be placed into evidence. Is that the way they make out the claim on a shift by shift basis?

PN78

MR TAYLOR: One would hope one wouldn't need the photos, no, but it's accepted that the reason it's been proposed on a shift by shift basis rather than a more ambitious claim of simply having it paid to every customer service attendant, it's accepted, as the Trains' evidence will reveal, that there are stations that employ cleaning assistants, who then, as a result, the CSAs at those stations

are not ordinarily required to be cleaning hazardous waste because there is a CA who is being paid the allowance who does that work.

PN79

But the evidence will also reveal that there are many stations at which there is no cleaning assistant and the CSA does have to do the work, and the proposal then is that on days when they do have to do the work, they get the same allowance, albeit not the whole of the allowance but a proportion of it, referable to the fact that the whole of the allowance is paid for a wider range of duties, but they don't get paid on those days on which it's not something they have to do.

PN80

So, one might expect that, at some stations, it would be a regular payment when people are at work and, at other stations, an unlikely payment, but the questions for the Bench are: 'Do CSAs have to do this work and, if so, should they get an allowance in the same way that cleaning assistants get an allowance and, if so, what portion of the allowance should they get?' and, as your Honour's question has identified: 'Should that be payable for every shift or only the shifts they do clean the hazardous waste?'

PN81

We have constructed something that we think is conservative in that regard by limiting it to only the shifts in which they in fact do the work, and we understand in that regard that, as I said, the evidence will reveal that Trains is going to be paying the full quantum of the allowance to cleaning assistants who only, in effect, do removal of hazardous waste in the same way as CSAs and, as a matter of industrial equity as well as just a simple question of appropriateness of paying people some small allowance for dealing with having to clean human bodily fluids, this claim is not only conservative but entirely appropriate.

PN82

They are the matters we just wanted to outline so that the Commission can understand the nature of our case by way of opening. If it please the Commission.

PN83

ACTING PRESIDENT HATCHER: Can I just pose one question. The first question, when it refers to increases in remuneration, to the extent that we did anything at all in that space, does that imply that it would have to be an increase to the actual rates of pay as distinct from some flat amount or some other form of payment?

PN84

MR TAYLOR: No, I think the question - increases in remuneration, from our point of view, certainly envisage changes to base rates of pay, but I don't think I could submit that question is in some way limiting the Commission as to how it might address the issue in that regard.

PN85

ACTING PRESIDENT HATCHER: Thank you. Mr Shariff?

PN86

MR SHARIFF: May it please. I will obviously develop responses to each of Mr Taylor's submissions in closing submissions. There are just some brief observations I would make in response at this stage. The Commission will have received our submissions in chief and, hopefully, our submissions in reply which set out our position in relation to the two questions.

PN87

If I could first start by turning back to paragraph 9 of our learned friend's submissions to understand the case that we understand is being put. The questions are framed in the way that they are, but, in relation to question 2, which was framed as, 'Should the higher standards cleaning allowance, or any component of it, be paid to CSAs?' - leaving to one side on-board service employees - as we understand the claim that's put in relation to question 2, what is actually sought is that which is contained at paragraph 48 in the second part, which is a claim for a \$1.19 payment per shift in totality if a CSA performs any form of hazardous cleaning work by reference to the definition that's now been advanced. That's the way we understand their claim, even though question 2 is framed more broadly.

PN88

In relation to questions of principle, we are in unheralded territory - this is rather novel - that this Commission, in the context of a consent arbitration, is setting, by reference to question 1, the wage rates for these employees. As far as our researches could dig up, that hasn't occurred in an enterprise bargaining context, even as I could best see it, not even in the context of a workplace determination arbitration. So, this is a first - it may not be the last - but it's important that the Commission, we say, be assisted in that task and the Commission arrive at whatever conclusion it does by reference to a reasoned and principled basis.

PN89

We disavow any reliance upon historical concepts of wage setting. Going back to 1906 and the aftermath of it we just say has no place here because, amongst other things, what the Conciliation and Arbitration Court and its predecessors and successors were dealing with was the setting of minimum wage rates, that is, minimum rates of pay in industrial awards, not enterprise bargaining, which is the statutory framework that we deal with now.

PN90

Even in the context of the national minimum wage, that is, the Federal minimum wage and the things that flow from it, increases to minimum wages in modern awards, this Commission doesn't adopt the approach of the historical case law; it's guided by the statutory criteria now contained within the Act. To rely upon those matters where, in an historical context, members of the Conciliation and Arbitration Court were dealing with gender bias, racial bias, which has all been well observed, in circumstances where the social compact between employer and employees was radically different without the existence of the modern conditions that we now have in contemporary workplaces, for example, those enshrined in the National Employment Standards and those enshrined and not in dispute here in the underlying modern award, or that which has been agreed in the 2023 enterprise agreement, such as conditions for leave and enhancements to conditions of leave.

PN91

Those decisions were also determined in the context where there wasn't any sense of forced savings upon the workers in the economy through the development of superannuation in the mid-80s, so that one didn't account for the fact that some proportion of a living wage would need to be diverted to a worker's retirement, which has now occurred.

PN92

We certainly don't think that that's the correct approach in going about the task here, but it begs what is the approach. Whatever the approach is, and we can debate that in closing submissions, what the Commission couldn't do is to adopt a historical and a contextual approach to the context of wage setting.

PN93

In one sense, the dispute between Dr Stanford and Mr Houston presents that because Dr Stanford's analysis, which we will come to and explore with him in cross-examination, ignores everything that has gone before. The idea that one takes a macro-economic assessment of inflationary trends and alleged productivity increases and applies them at the micro-economic level to an enterprise is bizarre because it doesn't account for real wage growth that this cohort of employees have obtained as a group - I'm not talking about the individual - as a group over the course over the last decade.

PN94

To the extent that Dr Stanford addresses that, as we point out in our reply submissions, he accepts that there has been substantial real wage growth. Our learned friend says, 'Well, there are employees here who will be affected by the inflationary pressures and the inflationary trends that presently exist', but not one jot of evidence has been called by the combined rail unions to present what financial circumstances confront this group of employees, either individually, or as a whole, by way of survey, or any of those types of things one might expect; rather, what our learned friends have done in the conduct of their case is to present Dr Stanford's macro-economic analysis and tried to shoehorn it into the enterprise level.

PN95

ACTING PRESIDENT HATCHER: As a mathematical exercise, we should be able to get agreed numbers as to relationship between the wage increase and the agreement and the rate of inflation over different periods.

PN96

MR SHARIFF: Yes. Can I invite - I apologise for the delay occasioned by me for the further supplementary report of Mr Houston, which was provided last night or late last evening. When I looked at Mr Houston's various reports and Dr Stanford's various reports, I noticed that one thing that hadn't been done is an aggregation with the compounding effect of the actual wage increases to base rate of pay since of 2010. If I invite your Honours to take that up - - -

PN97

ACTING PRESIDENT HATCHER: Before you do that, one of the problems lining up the two reports is that they both select datum points, so Dr Stanford is

instructed to proceed on the basis of the last wage increase, 1 May 2020, you have instructed Mr Houston to go to 2011.

PN98

MR SHARIFF: Well - - -

PN99

ACTING PRESIDENT HATCHER: On one view - let me just finish - the first question invites an analysis from 1 May 2021.

PN100

MR SHARIFF: In one sense, and Dr Stanford, even in that analysis, doesn't allow for the wage increase that was offered or provided on 1 May 2021, but, by the by, but Dr Stanford, the questions that were put to Dr Stanford were, number one, to ask, 'What is the effect of real wage growth in the economy, what are the benefits of it?' and then he's asked the question - and so he answers that at the macro-economic level - and then he's ask the question, 'Well, what wage increases would be needed to deliver these employees real wage growth over the next period?' So, by reference to the questions, the paradigm he's given is just to look at this narrow point without any consideration of history.

PN101

This Commission, and I commend the Commission's decision last year in its Federal Minimum Wage Review, had considered a detailed analysis of inflationary trends in the economy, both headline and underlying inflation, impact on the poverty line, impact on social living to arrive at a conclusion that, putting the Federal minimum wage to one side, that the wage rates in modern awards be increased by 4.9 per cent this year. In that analysis, one doesn't just look at what the wage rate increase was last year or the year before COVID affected, one looks at the trend over time in the economy, and the fact is, as Dr Stanford himself accepts, that for over a period of a decade, because of the economic prosperity of this nation, the share of real wage growth was met, and it was met here in respect of this enterprise.

PN102

The point of the further supplementary report is that if one looks at the compounding effect of each of the wage rate increases from 1 April 2010, the employees, as a group - I'm not talking about particular employees - as a group in this enterprise derived a 38.08 per cent increase in wages as against inflation over the same period of 32.46 per cent.

PN103

So, it's no answer to that to come along and say, 'Well, employees who made decisions last year or the year before to enter into a mortgage, like all of us did, are now being confronted with real changes in living standards' because that's an age historical concept. It doesn't account for the fact that for a period of over 12/14 years, employees, and the nation as a whole, households as a whole, had increased savings, increased accumulation of capital and investment as a whole. That's a macro-economic fact. But, the fact is that if one looks through the singular prism that Dr Stanford was invited to, one leads to skewed results, but

then say the effect of which is, on our learned friend's case, you would need, as I understand it, an 18 per cent increase in wages over the next three years.

PN104

ACTING PRESIDENT HATCHER: What I was trying to drive at, Mr Shariff, was, speaking for myself, it would be useful if we could have the type of analysis that appears in table 2.1 of Mr Houston's latest report, calculated from 1 May 2021.

PN105

MR SHARIFF: I think that is included in there. I think what's missing is the 2023 and 2024 because that's based at the moment on forecasts.

PN106

ACTING PRESIDENT HATCHER: Yes.

PN107

MR SHARIFF: But we will attend to that on our side.

PN108

ACTING PRESIDENT HATCHER: Yes, and if the parties can reach agreement about it, that's not to say we'd draw any inference from that, but just to have the mathematical exercise or have the numbers would be useful.

PN109

MR SHARIFF: Yes. But what we reject is some kind of slavish exercise that this Commission is being invited to engage in by the combined rail unions, which is to say, 'Well, because inflation is running at that rate, the wage increase has to be equivalent to inflation.' I think I dusted out RJ Hawkes' six principles of wage indexation and not even a principle that the late Robert Hawke invited upon previous tribunals.

PN110

That kind of approach has been well rejected and, at the level of the enterprise, one might expect to see productivity trade-offs in return for wage increases to meet the cost of living and, for reasons we will develop, there are none here, and those which are proffered up by the combined rail unions as examples of productivity trade-offs are non-existent, and we will come to that.

PN111

That's what I wanted to say by way of just entrée to what we will develop after we have cross-examined Dr Stanford on question 1.

PN112

In relation to question 2, can I just make these observations. The role of CSAs has not changed. The position descriptions that have been put before the Commission demonstrate that the role of CSAs has not changed. Secondly, it is the fact that CSAs are paid considerably more than cleaning attendants and the cleaners in charge. Thirdly, even if one says, 'Well, the CSAs can, from time to time, be called upon to do cleaning of hazardous waste', the idea that, irrespective of the time they spend on it, the whole shift allowance would be paid for that is

beyond us. That case hasn't been made out and we will develop that more in closing after we have engaged in cross-examination.

PN113

Could I also say that if one looked at a \$1.19 shift allowance, effectively for hazardous waste, on the average rate of pay - I'm just going by the 2023 classification rate for a CSA of something in the order of \$30 per hour - that would be something, on my rudimentary mathematics, a 3.9 per cent increase in the wage rate of those employees.

PN114

We haven't even got to the fact that it's accepted the engineers, to the extent that they satisfy conditions, get a 1.5 per cent loading for every hour that they work.

PN115

ACTING PRESIDENT HATCHER: Sorry, say that again.

PN116

MR SHARIFF: There is, under the 2023 agreement, a loading to become payable to engineers of 1.5 per cent of every hour they work. There's an electricity safety allowance to be payable. What our learned friends do in their analysis via Dr Stanford is to say, 'Well, you've got to ignore the \$4500 payment.'

PN117

ACTING PRESIDENT HATCHER: Are we back to question 1 now?

PN118

MR SHARIFF: I'm just doing this by the by because I'm saying the effect of granting \$1.19 per shift to CSAs would result in a 4 per cent increase in their wage rate of pay, effectively, and I'm just by the by saying there's a whole range of other conditions that are also super-added to - - -

PN119

COMMISSIONER RIORDAN: Mr Shariff, it's \$1.19 per hour per shift, isn't it?

PN120

MR SHARIFF: There is something in the semantics of that that I thought might be relevant, but it doesn't matter. They want it for the whole of the shift. It doesn't - - -

PN121

COMMISSIONER RIORDAN: Yes, (indistinct) shifts, they are going to get \$9.60.

PN122

MR SHARIFF: Yes, even if what the CSA does on this definition that we have been presented with is, for 10 minutes, go in and make sure - at a station where they have cleaners - make sure that the toilet is clean and help them. 'Well, I've done 10 minutes of work, I get to claim it for the whole shift.' Really what it is, in stealth, is a disability allowance, an industry type allowance, for the notion that CSAs perform hazardous cleaning from time to time, or could be called to

perform. So whilst they say it will only be paid when they do the cleaning work, it will be paid for the whole of the shift.

PN123

COMMISSIONER RIORDAN: What about those CSAs where there are no cleaners at those stations?

PN124

MR SHARIFF: The evidence, I think, accepts, from our side, that where there are no cleaners, CSAs perform that cleaning work. We've seen the graphic images. That is accepted, but what we've been met with in this - I don't want to go over old wounds - history of bargaining is intransigent positions. I'll develop that in closing after we've conducted some cross-examination. I'll develop that.

PN125

COMMISSIONER RIORDAN: Thank you.

PN126

MR SHARIFF: That's really all I wanted to say at this stage, but as I say, I'm really just introducing where I see the contests are going to be between the parties.

PN127

I had indicated that we would cross-examine Ms Yee and Ms Muir, but I didn't want to let Mr Warnes get away scot-free, so I thought if he was here we could cross-examine him, and subject to the cross-examination of Mr Warnes, it may be that I don't need to cross-examine Ms Yee or Ms Muir at all.

PN128

I think I told my learned friend this morning it would be Ms Muir because I thought we shouldn't inconvenience her by coming back tomorrow. It may be that I may not need Ms Yee, but could I just reserve my position after I've concluded with Mr Warnes? Unless there's anything further, that's all I wish to say.

PN129

ACTING PRESIDENT HATCHER Thank you. All right. Are we ready to call Mr Warnes?

PN130

MR TAYLOR: Yes. Just before we do, your Honour the Acting President identified that, speaking for your Honour, it might be useful to have some tables which identify calculations from 1 May 2021.

PN131

Can I just indicate and hand to the Bench - Mr Saunders, who will be cross-examining Mr Houston, prepared some tables which had been provided to Mr Houston directly in the hope that that will shorten up the cross-examination. I just hand to the Bench, though, that document. We are hoping that Mr Houston will have an opportunity to look at this material before he gets into the witness box, just to save time.

PN132

Can I just identify that as the document reveals, it does that calculation based on a variety of changing assumptions, including, for example - including or not including the 2.1 per cent, including or not including super, and the like. It is double-sided, I should add.

PN133

The other thing I can note is that it does commence from 1 May 2020. That is in part because Mr Houston's figures, when we're talking about the relevant date period, combine as a single row the date period 1 May 2020 to 30 April 2022.

PN134

The rest of his tables are a year apart, but for some reason he combines two years, and to ensure that there's no disagreement as to what CPI is, that's one of the reasons why we've taken the same approach of starting at 1 May 2020. There are also issues that can be raised with him as to the appropriateness of what is the base starting point if you're talking about inflation and wage rises.

PN135

Just in light of your Honour's question, we provide that document to the Bench as well, but it is a matter that Mr Saunders will be taking up with Mr Houston, and if Mr Houston is able to identify separately the CPI for the years ending April 21 and April 22 rather than combining them, then the table clearly could be re-cut commencing 1 April 2021 in a manner that would then be consistent with his own data.

PN136

But, yes, beyond providing that document to the Bench and indicating that we are hoping that Mr Houston will have an opportunity to review it before he gives evidence, we're now in a position to call the witnesses that are required for cross-examination, the first of which is Mr Warnes, who has two statements, 20 January and 3 February.

PN137

ACTING PRESIDENT HATCHER All right. Come forward, Mr Warnes.

PN138

THE ASSOCIATE: Please state your full name and address for the record.

PN139

MR WARNES: Toby Warnes, level 4, 321 Pitt Street, Sydney.

<TOBY WARNES, AFFIRMED [11.13 AM]

EXAMINATION-IN-CHIEF BY MR TAYLOR [11.13 AM]

PN140

MR TAYLOR: Your name is Toby Warnes?---Yes.

PN141

Your work address is level 4, 321 Pitt Street, Sydney?---That's right, yes.

*** TOBY WARNES

XN MR TAYLOR

PN142

You're currently employed as director of organising for the Australian Rail, Tram and Bus Industry Union, New South Wales Branch?---Yes, that's correct.

PN143

For the purpose of these proceedings you have signed two statements, the first of which being signed on 20 January 2023?---Yes, that's right.

PN144

The second of which being signed on 3 February 2023?---Yes, that's right.

PN145

And you have those two statements with you in the witness box?---I do.

PN146

With respect to the first statement, do you say the contents of that statement are true and correct to the best of your knowledge and belief?---Yes, I do.

PN147

With respect to the second statement, do you say the contents of that statement are true and correct to the best of your knowledge and belief?---Yes, I do.

PN148

I tender those statements.

PN149

MR SHARIFF: Your Honour, we just sent a document this morning of some very minor objections to Mr Warnes' statement, and to some others. Could I just provide that, and I'm not going to - - -

PN150

ACTING PRESIDENT HATCHER Yes. I don't think I've seen that.

PN151

MR SHARIFF: You have seen that? I'm sorry - - -

PN152

ACTING PRESIDENT HATCHER We have not seen that.

PN153

MR SHARIFF: I do apologise. I don't want to waste time. Could it just be marked for identification and noted?

PN154

ACTING PRESIDENT HATCHER I'll mark the statements first. So the statement of Toby Warnes dated 20 January 2023 will be marked exhibit 1 and the further statement of Toby Warnes dated 3 February 2023 will be marked exhibit 2.

*** TOBY WARNES

XN MR TAYLOR

**EXHIBIT #1 WITNESS STATEMENT OF TOBY WARNES DATED
20/01/2023**

**EXHIBIT #2 FURTHER WITNESS STATEMENT OF TOBY
WARNES DATED 03/02/2023**

PN155

And the objections document handed up by the Rail entities will be marked MFI 1.

**MFI #1 OBJECTIONS DOCUMENT HANDED UP BY RAIL
ENTITIES**

PN156

MR SHARIFF: May it please.

PN157

MR TAYLOR: I overlooked, if it please your Honour, asking your Honour to mark the two documents I've handed to the Commission so far, one being the document I described as effectively the claim in respect of the allowance, and the second document being the document I described as the document provided to Mr Houston which will be for the purpose of him reviewing that prior to cross-examination.

PN158

ACTING PRESIDENT HATCHER I won't mark the calculations document yet until we deal with that further.

PN159

MR TAYLOR: Yes.

PN160

ACTING PRESIDENT HATCHER I'll mark the - I'll call it the Unions' claim for CSAs, as exhibit 3.

EXHIBIT #3 UNIONS' CLAIM FOR CSAs

PN161

MR TAYLOR: Thank you. No further questions for us.

PN162

ACTING PRESIDENT HATCHER Mr Shariff?

CROSS-EXAMINATION BY MR SHARIFF

[11.15 AM]

PN163

MR SHARIFF: Yes, thank you. Good morning, Mr Warnes. Were you employed by the RTBU at the time that the log of claims was issued that commenced the period of bargaining in respect to the disputed enterprise agreement?---Yes.

*** TOBY WARNES

XXN MR SHARIFF

PN164

Could I invite you to be shown the court book, with Mr McDonald's exhibits open. It commences, I'm told, at page 1715. That will be provided to you shortly. I'm sure you've read it. Could I invite you to go to - I don't know if your version is tabbed, Mr Warnes?---It is.

PN165

GJM4?---Wait, no, it's not. Page?

PN166

That's page - you'll have to excuse me. I've been working off documents pre court book. Page 1883?---83?

PN167

Yes?---Yes.

PN168

Do you identify that as the combined rail unions' log of claims?---Yes. That's the first version, yes.

PN169

Issued in about May 2021. Is that right?---I think it was slightly later than that, but around that time, yes.

PN170

If you go over to section 2, wages and conditions, is it the case that the bargaining position in terms of the log of claims initiated by the combined rail unions sought a 3.5 per cent increase for each year of the life of the agreement? That's where it started, right?---Yes. That's right, yes.

PN171

When we come to section 2, specific claims, commencing, numbered at the bottom, page 183 - it's identified as clause 12 of the log?---Yes.

PN172

Page 1908. There are a set of specific claims to those employees covered by section 2. Correct?---Yes, that's right.

PN173

Then if we go over the page to clause 13 there was a set of claims applicable to section 3 employees?---Yes.

PN174

In relation to section 3 - - -

PN175

ACTING PRESIDENT HATCHER Sorry, Mr Shariff, what page of the court book are we on?

*** TOBY WARNES

XXN MR SHARIFF

PN176

MR SHARIFF: Section 3 is page 1911.

PN177

ACTING PRESIDENT HATCHER Thank you.

PN178

MR SHARIFF: And section 3, you'd accept, is the section that covers cleaning attendants and cleaners in charge. You'd accept that?---Yes. That's right, yes.

PN179

So we see there at clause 13.1.1 there was a claim made in respect of cleaners, if I can use the paraphrase, for inclusion of those three allowances there specified, for graffiti, hazardous and nauseous materials. Correct?---Yes, that's right.

PN180

When we go to section 4, over the page, you'd accept, wouldn't you, that there was not at the time of the initiation of the log of claims any claim made on behalf of CSAs for the payment of any allowance in respect of cleaning work, if I could use that shorthand. Do you accept that?---Yes, that's right. There wasn't.

PN181

And in fact it's the case, isn't it, the claim for an allowance for CSAs didn't arise until mid to late 2022. Correct?---I couldn't give an exact time, but it would have been in 2022. It could have been earlier than that.

PN182

Could I suggest to you that the claim for CSAs, that is, the claim for a payment of the whole or a component of the cleaning allowance for CSAs, arose in circumstances after the Train entities had locked in their position in agreement to pay such an allowance, or part of it, to cleaners. Do you accept that?---I don't recall the exact timing, but it would have been around the same time. There was some debate between us about when the hazardous waste - at least the first iteration, was first agreed, and it obviously did evolve between, I think, around May 22 to when it was finally accepted.

PN183

If you go to GJM8, page 1927 of the court book, and just read that. That's, I think, a text message you sent to an officer of the Rail entities on 19 March 2022?---Yes.

PN184

Could I suggest to you that at that point of the negotiations, in March 2022, the parties were discussing the payment of allowances on a per day basis to cleaners. Do you agree with that?---No. I was just referencing it to the graffiti allowance which was paid per day.

*** TOBY WARNES

XXN MR SHARIFF

PN185

Yes, but my question is that at that stage of the negotiations the parties were talking about the payment of an allowance to cleaners on a daily basis, not an hourly basis. Would you accept that?---No, that's not right.

PN186

So when you said here in the text message, 'The hazardous waste allowance is proposed to be the same value as the graffiti allowance, \$5.92 per day', what you were putting was, wasn't it, that there should be an additional hazardous waste allowance of \$5.92 payable per day. Correct?---No, I was referring it as the same value. So I think it came out at 74 cents per hour at that stage, something like that.

PN187

I see?---Yes.

PN188

It was going to be 74 cents per hour but payable to cleaners on a daily basis. Correct?---Yes.

PN189

Could you go over to - - -

PN190

ACTING PRESIDENT HATCHER That seems to be a better offer than where you ended up, but - - -

PN191

MR SHARIFF: I'm sorry?

PN192

ACTING PRESIDENT HATCHER That seems to be a better offer than where you ended up.

PN193

MR SHARIFF: Well, we'll come to that. If you go to the next exhibit at page 1928, you see by this stage the Trains entities were accommodating of the graffiti removal allowance. See that?---Yes.

PN194

And the negotiations thereafter continued, didn't they, to lock in the payment of that as a combined allowance of \$2.32 per hour payable for every hour that cleaners worked on a shift?---Well, in a brief way, yes. I mean, at that point in time the hazardous waste part was rejected.

PN195

Yes?---And then it continued on throughout negotiations and we ended up where we ended up.

PN196

All right. If you go to GJM10, which is at page 1930, you see it's an email from you. 'To satisfy the RTBU claims, inclusion in the agreement of the following allowances: graffiti allowance and hazardous allowance.' See that?---Yes.

*** TOBY WARNES

XXN MR SHARIFF

PN197

And in addition you were seeking an industry allowance akin to something in the waste management industry. See that?---Not in addition. It was in lieu.

PN198

I see?---Yes.

PN199

This is at May 2022, and you would accept, wouldn't you, that the claims being advanced by the combined rail unions at that stage were only on behalf of cleaners. Correct?---Yes.

PN200

So you'd agree that the claim in respect of CSAs didn't arise until at least some time after May 2022. Correct?---Look, I don't know, off the top of my head.

PN201

You've prepared two statements for the purpose of these proceedings. You were involved in the negotiations?---Yes.

PN202

Can't you recall now that the claim for CSAs arose after Sydney Trains had wedded itself to the position that's now agreed on the cleaners allowance?---No, what I'm saying is I can't remember exactly when the claim for CSAs came up, whether it was before or after 13 May. This email is just for cleaners.

PN203

Yes?---But that doesn't mean that that claim hadn't arisen before then.

PN204

Doing your best, do you now say that it arose sometime after the claim for cleaners had been agitated or sometime before?---Well, the claim for cleaners was in the initial log of claims, so it was definitely after.

PN205

Could I suggest to you that what happened was that once the Train entities had agreed to pay a \$2.30 amount, approximately, to cleaners per hour, per shift that they worked, there was then a claim made by CSAs for payment of the same allowance?---No, that's absolutely not right.

PN206

All right?---That was the absolute last thing signed off. It was in the final day before agreement in principle that - - -

PN207

Could I suggest to you that the claim for CSAs to be paid any allowance evolved after the claim in respect to cleaners had been well advanced and you had a fairly sophisticated position back from the Train entities?---Look, I can't agree with that, because I don't recall specifically when it arose, but certainly the order was cleaners first, then CSAs after that.

*** TOBY WARNES

XXN MR SHARIFF

PN208

You've had occasion, haven't you, for the purpose of these proceedings, to examine the position descriptions for CSAs?---Yes.

PN209

You accept, don't you, that their duties have not changed over time?---In respect of?

PN210

Cleaning and customer service?---I accept that there's a cleaning role in their duty descriptor, yes.

PN211

Would you accept, for example, that those duties have not changed for at least the last decade?---I can't speak to that.

PN212

What is your current position?---I'm the director of organising at the RTBU.

PN213

So you weren't advancing claims on behalf of CSAs for the purpose of negotiation without understanding the facts, were you, Mr Warnes?---No.

PN214

Why is it that you can't tell us whether you know or not whether the duties of CSAs have changed over time?---What I'm saying is I can't tell you what CSAs cleaned 10 years ago.

PN215

Right?---I can't do that.

PN216

At the smaller stations where there are no cleaners and cleaning attendants, you'd accept, wouldn't you, back in time that it fell to CSAs to do the cleaning work then?---Yes.

PN217

You accept, don't you, that CSAs have been paid considerably more than cleaners over time?---Not considerably, but more, yes.

PN218

It's certainly the case, isn't it, that by the time the combined rail unions come to put a log of claims to the Train entities, it occurred to no one to advance a claim with the Trains entities in respect of a cleaning allowance for CSAs. You accept that, don't you?---Yes. It wasn't on our initial log of claims.

*** TOBY WARNES

XXN MR SHARIFF

PN219

So wasn't it simply a case of the CSAs seeing that the cleaners were going to be paid some kind of allowance, that they wanted to be paid something as well? Isn't that just really what happened, Mr Warnes?---Yes, well, considering that they

perform similar duties to what the cleaners were performing in relation to hazardous waste.

PN220

And you now understand that there's a claim being made for the payment of \$1.19 per hour per shift that the CSA do cleaning work. Correct?---Yes.

PN221

How have you arrived at the \$1.19 figure?---It's the \$2.25 less the graffiti and respirator allowance amounts.

PN222

How did the \$2.25 come up?---By way of negotiation, purely.

PN223

So the \$1.19 is not reflective of any work value analysis that the unions have taken?---No.

PN224

So the \$1.19 is just, 'Well, we'll do the mathematical exercise of what you've agreed to pay the cleaners. We'll deduct the two things that we don't think they really do and we'll just make a claim for \$1.19?---Yes. The \$1.19 is a hazardous waste component of the \$2.25.

PN225

In your statement you say that the Rail Industry Modern Award has no application to these employees. Is that right?---Yes.

PN226

Have you been involved in putting documents before the Commission for the purpose of approval of the enterprise agreement 2023?---Yes, I - yes. In a broad sense.

PN227

By reference to what award is the BOOT analysis being undertaken?---The Rail Industry Award.

PN228

So you'd accept, wouldn't you, that the Rail Industry Award is the base award for workers who work in this industry?---Yes. The award that the BOOT's performed against, yes.

PN229

Is there, to your knowledge, any cleaning allowance for CSAs in the modern award?---I'd have to have a look. I don't know, off the top of my head.

PN230

You don't know?---No.

*** TOBY WARNES

XXN MR SHARIFF

PN231

Could I suggest to you that there's an allowance of 72 cents for dirty work?---Yes. I'd accept that.

PN232

Would that accord with your understanding?---I don't know. I don't have it in front of me. I have no reason to disagree with you, though.

PN233

Has anyone within the union conducted an exercise to determine what the wage rates under this agreement are relative to the wage rates under the modern award?---Not recently.

PN234

But does that mean someone has done it, just not recently? Do you know whether they have?---No, I don't know.

PN235

Are you in a position to inform the Commission whether the wage rates for all employees under this award are substantially higher, just higher, incrementally higher, than those wage rates under the modern award?---No.

PN236

You're not?---No.

PN237

Did the RTBU make any submissions to the Commission as part of its federal minimum wage review?---I would imagine so. I don't know.

PN238

You don't know?---No. I can imagine the national office did.

PN239

Do you know whether the ARTBIU made any submissions in respect of the percentage increase to be made to modern awards in the 2022 review?---No, I don't know.

PN240

Let me ask you this. In your first statement you talk about concessions that have been made. Could I put this to you. You'd accept, wouldn't you, that there's been no productivity trade-off, to your knowledge, been offered by the rail unions in return for increases to conditions under the 2023 agreement?---There was a change to clause 12.

PN241

All right. What was the change, Mr Warnes?---It took out the need for the union to agree in principle before a facilitation of change process went to a vote of affected employees.

*** TOBY WARNES

XXN MR SHARIFF

PN242

The facilitation change process, just correct me if I'm wrong, would potentially involve a variation to the enterprise agreement, and the idea of a facilitation agreement is you need to agree with the union first before you put it to a vote of employees?---Yes, as it used to be.

PN243

As it used to be?---Yes.

PN244

You understand under the scheme of this Fair Work Act that any variation to an enterprise agreement has to be approved by a valid majority of employees. You know that, don't you?---Under the provisions of the Fair Work Act.

PN245

Yes?---Two one - what it is.

PN246

And that needs to come to the Commission for approval?---Are we talking about variations under the Fair Work Act?

PN247

Yes?---Yes.

PN248

So giving away the right to a facilitation agreement as a necessary step to putting something to employees is in your opinion giving away what, Mr Warnes, on behalf of the unions?---It's giving away the union's right to say a proposition shouldn't go to a vote of employees.

PN249

So if the Rail entities during the course of this enterprise agreement wanted to change something that in the past required a facilitation agreement, is your view that the unions would just have no say in what they tell workers about that?---No. The change is that the union doesn't get the right to say you can't put it to a vote of affected employees.

PN250

But you're going to do that anyway, aren't you?---We can't do it.

PN251

You're going to be talking to your members and letting them know what you think about the proposed change, aren't you?---Of course, yes.

PN252

So what's the productivity trade-off arising from an amendment to clause 12?---The fact that the employer has the unfettered right now to put something to a vote of employees - - -

PN253

How does that - - -?---A productivity-increasing measure.

*** TOBY WARNES

XXN MR SHARIFF

PN254

What's your frame of reference for productivity? How do you measure that that will result in some kind of efficiency for the enterprise?---It would depend upon what the proposal is that the entities put forward in the clause 12 process.

PN255

What other concessions have been made?---There's - a couple of entitlements are replaced with other entitlements.

PN256

A couple?---Yes.

PN257

Has anyone from the combined rail unions done an analysis of where you started with a log of claims - remember the one I took you to in May 2021 - to work out how many of those the combined rail unions succeeded in getting something out of the Rail entities?---Yes.

PN258

Could I suggest to you that you got a lot of what you were asking for?---Yes.

PN259

Right?---Yes, we were pretty happy with it.

PN260

And all that's been provided by way of concession is clause 12 facilitation agreements a couple of changes to conditions. Is that right?---In terms of changes to the EA for the employer?

PN261

Yes?---Yes. I mean, there were some changes to the objects of the agreement too. Yes, I think that'd be right.

PN262

Have you seen this definition of hazardous waste that was handed up this morning?---I have. I neglected to bring it to the box with me.

PN263

I've only got one copy.

PN264

MR TAYLOR: I gave you a second, didn't we?

PN265

MR SHARIFF: Did you? No, I'm sorry. Just have a look at that. I just want to explore with you, because undoubtedly if this allowance is (indistinct) appear here agitating for the payment of the allowance. How does this work, Mr Warnes? In the case of the CSA, if a CSA cleans a toilet for 30 minutes, would you be regarding that as cleaning hazardous waste?---It depends what's in the toilet.

*** TOBY WARNES

XXN MR SHARIFF

PN266

What if there's just the standard mess, urine, you just need to scrub the toilet?---If they're cleaning up hazardous waste which falls within - - -

PN267

Let's say there's nothing on the floors, there's nothing on the walls?---If there's no hazardous waste, then it's not cleaning hazardous waste.

PN268

If there's some substance on the floor, be it faecal matter or otherwise, and that took half an hour to clean, is the way this will work, your members would make a claim for the payment of the allowance for the whole of the day?---Yes. Yes, they tick a box on their claim sheet, 'Hazardous waste', I assume.

PN269

ACTING PRESIDENT HATCHER: But how, practically, would you establish that?---Well, it happens with a variety of other allowances, and it's essentially you note it on your time sheet or whatever and if a shift manager, a manager of some description, doesn't agree with you, they say - well, they put you to task, essentially, like any other function on a time sheet.

PN270

At the smaller stations where they clean, CSAs work alone. Correct?---At some, yes.

PN271

Presumably they'll just clean it up and it will be gone and they'll tick a box. There's never any way to verify it, is there?---Well, yes - - -

PN272

Unless they took a photo, like the ones we've seen in evidence?---Yes, that's right.

PN273

But you're not suggesting that would be a practical thing to you, would you?---Well, it happens in a variety of places, where I think there's a degree of trust, I suppose you could put it, and if there is some suspicion that the duty or whatever it is isn't being performed, then there's the regular managerial processes that take place to ensure that the work is actually being performed, and if it's not, then there's disciplinary measures that can be taken for, I suppose, fraud, if you're claiming something you're not doing.

PN274

MR SHARIFF: The CSAs on such days would continue to do all their other duties, attending to customers?---Yes.

PN275

Gantry observations and - sorry, garrison observations, and so on. Right?---Depending on what station they're on, yes, their other duties.

*** TOBY WARNES

XXN MR SHARIFF

PN276

You've read in the Rail entities' evidence, haven't you, that the Rail entities say that in addition to what they've proposed by wage increases and the payment of these allowances, there are other conditions that are being offered under the 2023 enterprise agreement that haven't existed before?---Yes.

PN277

And you accept that, don't you?---Yes.

PN278

For example, off-duty payments, engineering allowance, electrical safety allowance?---Yes. They're examples, yes.

PN279

Some of those allowances, you'd accept, are additions of loadings to base rate of pay. Correct?---Yes.

PN280

Other allowances are ones that have reformed previous entitlements, like living away from home allowance?---Yes. Yes, I think it's described as an enhancement.

PN281

Yes. I have no further questions.

PN282

ACTING PRESIDENT HATCHER: Mr Warnes, can I just clarify something about this claim for the CSAs allowance. So you accept that that wasn't part of the 2021 log of claims?---Yes. The initial one, no.

PN283

And it came up during 2022?---Yes, I believe so.

PN284

So what caused that claim to be made in 2022, in circumstances where it wasn't part of the original log?---It arose in the course of bargaining when you've got cleaner delegates who are explaining the rationale around why they're making the claim - 'We clean X on a train every night', and it just - I suppose it's the nature of a multi-classification bargain, where another classification says, 'Hey, I clean some really horrible things on particular stations', and it was that point in time we expanded the claim to ensure that - I suppose the claim was to compensate CSAs, in this instance, for doing the same work as what we were making - the claim we were making for cleaners.

PN285

And when, to the best of your recollection, was that claim advanced to the Rail entities?---Look, from the best of my recollection, I think it was at the beginning - or in the first half of 2022. I could find it somewhere. It would be noted in an email or something somewhere, but it didn't come up when I was preparing my evidence.

*** TOBY WARNES

XXN MR SHARIFF

PN286

All right. Thank you. Anything arising, Mr Shariff?

PN287

MR SHARIFF: No.

PN288

ACTING PRESIDENT HATCHER: Any re-examination, Mr Taylor?

RE-EXAMINATION BY MR TAYLOR

[11.40 AM]

PN289

MR TAYLOR: Just a couple of things. There were some questions, Mr Warnes, in respect of clause 12 and the changes to clause 12, to that title 'Facilitation of changes to the terms of this agreement'. The questions I think were put on an assumption that any such change would then require a formal amendment of the enterprise agreement, but what's your understanding of clause 12 and the circumstances in which it's supposed to apply and it does apply in practice?---Yes. So clause 12, the process doesn't - it amends the enterprise agreement but doesn't require the enterprise agreement to come to the Commission to be approved by the Commission.

PN290

Is there a recent example of the exercise of the union's power under clause 12 as it was which has prevented trains from implementing some change?---Yes. There was - I believe it was in - yes, it was 2021 when the enterprise agreement expired. New South Wales Trains attempted to put a proposal forward in order to run the new intercity fleet under clause 12 and the union utilised its power under clause 12 to stop that proposal going to a vote of affected employees.

PN291

And under the current clause that veto power is gone. Is that the understanding?---Yes, that's right.

PN292

So that would allow Trains to then take such a change simply to a vote of employees?---Yes, that's right.

PN293

No further questions.

PN294

ACTING PRESIDENT HATCHER: Thank you for your evidence, Mr Warnes. You're excused and can return to the Bar table?---Thank you, your Honour.

<THE WITNESS WITHDREW

[11.42 AM]

PN295

MR SHARIFF: I'm sorry to rise on this occasion, but could I have the indulgence of a five-minute adjournment, because I just want to look at my notes and see if I need Ms Yee for cross-examination.

PN296

ACTING PRESIDENT HATCHER: All right. We'll adjourn for approximately say 10 minutes, and if you need longer, just tell my associates, Mr Shariff.

PN297

MR SHARIFF: May it please.

SHORT ADJOURNMENT

[11.42 AM]

RESUMED

[11.55 AM]

PN298

MR SHARIFF: Thank you for that indulgence. I've informed my learned friends that we do not require Ms Yee or Mr Muir for cross-examination.

PN299

ACTING PRESIDENT HATCHER: Sorry, Ms Yee and who?

PN300

MR SHARIFF: Mr Muir.

PN301

ACTING PRESIDENT HATCHER: Mr Muir. All right. Thank you.

PN302

MR SHARIFF: I've then in turn been informed - and I'll let my friend indicate this, but I've been informed that Mr Joleski and Mr Dixon in my side are not required for cross-examination.

PN303

ACTING PRESIDENT HATCHER: Right.

PN304

MR SHARIFF: So I think that means we'd be now into - - -

PN305

ACTING PRESIDENT HATCHER: So Mr Joleski and who?

PN306

MR SHARIFF: Mr Dixon.

PN307

ACTING PRESIDENT HATCHER: Mr Dixon, yes.

PN308

MR SHARIFF: That would mean that we're into my side's case, and I'd be calling Mr McDonald and then Mr Devitt and then Mr Quaintance, but I'll let my friend - - -

PN309

MR TAYLOR: So as far as our case is concerned, I think what that means is that at a time that's convenient to the Commission, we would formally tender all our evidence other than Mr Stanford's, which we can deal with tomorrow, because none of them are required for cross-examination.

PN310

ACTING PRESIDENT HATCHER: All right. Well, let's do that then.

PN311

MR TAYLOR: What we could do is provide a schedule of all those at some point between now and tomorrow morning so that that can be dealt with by way of a written schedule.

PN312

ACTING PRESIDENT HATCHER: No, we'll do it now. So the statement of Alec Bevell dated 3 February 2023 will be marked exhibit 4.

EXHIBIT #4 STATEMENT OF ALEC BEVALL DATED 03/02/2023

PN313

The statement of Alan Neenwyk dated 3 February 2023 will be marked exhibit 4.

**EXHIBIT #5 STATEMENT OF ALAN NEENWYK DATED
03/02/2023**

PN314

The statement of Debra Yee dated 20 January 2023 will be marked exhibit 6.

EXHIBIT #6 STATEMENT OF DEBRA YEE DATED 20/01/2023

PN315

The statement of Geordie Muir dated 20 January 2023 will be marked exhibit 7.

EXHIBIT #7 STATEMENT OF GEORDIE MUIR DATED 20/01/2023

PN316

The statement of Keith Lang dated 3 February 2023 will be marked exhibit 8.

EXHIBIT #8 STATEMENT OF KEITH LANG DATED 03/02/2023

PN317

The statement of Natalie Falvey dated 3 February 2023 will be marked exhibit 9.

**EXHIBIT #9 STATEMENT OF NATALIE FALVEY DATED
03/02/2023**

PN318

The statement of Nyssa Parsons dated 20 January 2023 will be marked exhibit 10.

**EXHIBIT #10 STATEMENT OF NYSSA PARSONS DATED
20/01/2023**

PN319

The statement of Tim Neil dated 3 February 2023 will be marked exhibit 11.

EXHIBIT #11 STATEMENT OF TIM NEIL DATED 03/02/2023

PN320

Is that all of them, Mr Taylor?

PN321

MR TAYLOR: There were two statements of Ms Muir.

PN322

ACTING PRESIDENT HATCHER: I see.

PN323

MR TAYLOR: I'm not sure if you dealt with the second of those.

PN324

ACTING PRESIDENT HATCHER: So what was the date of the second statement?

PN325

MR TAYLOR: 3 February 2023.

PN326

ACTING PRESIDENT HATCHER: I'll mark that - - -

PN327

MR TAYLOR: It's at page 616 of the court book.

PN328

ACTING PRESIDENT HATCHER: I'll mark that exhibit 7A.

**EXHIBIT #7A STATEMENT OF GEORDIE MUIR DATED
03/02/2023**

PN329

Anything else?

PN330

MR TAYLOR: That was 7A?

PN331

ACTING PRESIDENT HATCHER: Yes.

PN332

MR TAYLOR: I had marked Ms Muir's first statement as exhibit 6, but I might have - - -

PN333

ACTING PRESIDENT HATCHER: No, Debra Yee was 6.

PN334

MR TAYLOR: It was 7, was it? That's my mistake, yes. Yes, that is the evidence of our witnesses, and that takes us then into my friend's case.

PN335

ACTING PRESIDENT HATCHER: All right. So Mr McDonald is next, is he?

PN336

MR SHARIFF: Yes.

PN337

ACTING PRESIDENT HATCHER: All right. He can come forward.

PN338

MR SHARIFF: I ask that he be called.

PN339

THE ASSOCIATE: Please state your full name and address for the record.

PN340

MR McDONALD: Yes. Gregory Jason McDonald, and my address is 231 Elizabeth Street.

PN341

THE ASSOCIATE: Thank you.

<GREGORY JASON MCDONALD, AFFIRMED [12.01 PM]

EXAMINATION-IN-CHIEF BY MR SHARIFF [12.01 PM]

PN342

ACTING PRESIDENT HATCHER: Mr Shariff?

PN343

MR SHARIFF: Yes, thank you. Your full name is Gregory Jason McDonald?---Correct.

PN344

And your business address is 231 Elizabeth Street, Sydney?---That's correct.

PN345

Mr McDonald, you prepared two statements for the purpose of these proceedings. I'll have provided to you the court book where those are located. For the benefit of the Commission, the first of the statement is at page 1715 and the second of the statements is at page 2499. If you turn up page 1715, numbered at the top in red. Do you say that that's the statement you prepared on 20 January 2013?---That's correct.

PN346

Are the contents of that statement true and correct to the best of your knowledge, recollection and belief?---Correct.

PN347

The next statement is in the next volume, I think, at page 2499, numbered at the top - sorry, it's in the same volume?---Yes, I have that.

PN348

Is that a statement you prepared for the purposes of these proceedings on 3 February 2023?---That's correct.

PN349

And are the contents of that statement true and correct to the best of your knowledge, recollection and belief?---Correct.

PN350

I tender those statements, together with their exhibits.

PN351

ACTING PRESIDENT HATCHER: The statement of Gregory McDonald dated 20 January 2023 will be marked exhibit 12 and the further statement of Mr McDonald dated 3 February 2023 will be marked exhibit 13.

EXHIBIT #12 STATEMENT OF GREGORY McDONALD DATED 20/01/2023

EXHIBIT #13 FURTHER STATEMENT OF GREGORY McDONALD DATED 03/02/2023

PN352

MR SHARIFF: May it please. I have no further questions.

PN353

ACTING PRESIDENT HATCHER: Mr Taylor?

CROSS-EXAMINATION BY MR TAYLOR

[12.03 PM]

PN354

MR TAYLOR: Mr McDonald, you, as the senior manager of employee relations for Sydney Trains, represented Sydney Trains throughout the enterprise agreement bargaining?---That's correct.

PN355

And in this first statement you give some evidence as to the history of bargaining as to one particular matter, namely the ultimate agreement of introducing a new rolled-up allowance for cleaning assistants called the higher standards cleaning allowance?---Correct, for cleaning attendants and - - -

PN356

Cleaning attendants?---Yes.

PN357

I might have used the wrong expression. Can I just run through some of that with you. It's the case, is it not, that there was a graffiti removal allowance of some 74 cents an hour paid for each hour for a whole shift to cleaning attendants which was first introduced in about 2004?---That's correct.

PN358

But for whatever reason, even though it was paid, it was not actually a clause of any enterprise agreement up until today?---That's correct.

PN359

So one of the things that the parties discussed was the inclusion of a clause that reflected the actual practice, that is, paying a 74-cent allowance for graffiti removal to cleaning assistants?---Yes. That was a claim of the unions, to incorporate that into the agreement.

PN360

So can you turn to court book page 1928, where you will see a letter from Mr Claassens on the RTBU. It's one of your annexures?---Yes, I have that.

PN361

Am I reading this correctly, that a little down just beyond the middle of the page, Mr Longland is indicating a willingness to include or add to schedule 3B a new item, 'Graffiti removal allowance per hour of 74 cents, current rate, subject to EA increase'?---Yes.

PN362

But in the following sentence rejected the introduction of a separate hazardous waste allowance for the same amount?---Yes.

PN363

Just to be clear, the allowance, the graffiti removal allowance, 74 cents, that was paid for every hour worked in a shift, regardless of whether the person was in fact removing graffiti on each and every hour?---Yes, that's my recollection.

PN364

The one rider is it wasn't paid on days that they weren't working. That is, it wasn't paid when they're on leave?---Correct.

PN365

Bear with me. If you go now to your statement to which this is an attachment and go to paragraph 28, is the next thing that happened after this letter - so this is now - just tell me when you've got paragraph 28 of your first statement?---Yes.

PN366

So it's page 1720 of the court book, for the record. After that letter was sent, was the next relevant matter that happened that Sydney Trains decided it would agree to a hazardous waste allowance and it would be to the same sum, that is, 74 cents an hour?---Yes.

*** GREGORY JASON MCDONALD

XXN MR TAYLOR

PN367

That was done - it refers there to seeking approval from ERC. Do you recall, was that approval sought from ERC and was it provided?---Yes. So at the time we were putting together details of a package that would go up to the Expenditure Review Committee of cabinet, and that was a claim that was included, that payment.

PN368

Could I take you to court book page 1933, which is part of one of your annexures, GJM11. So maybe starting at page 1932, just to remind you, you sent an email to Mr Warnes in June which attached the position of Sydney Trains in response to the cleaning claims, and then what's following at the next page is effectively a summary of Sydney Trains' position?---Yes, I have that.

PN369

At page 1933, if you look at the third paragraph that commences with the words 'Sydney Trains', what that does is confirm that Sydney Trains at this point, that is, in around - or certainly between March and July, had supported the inclusion of a hazardous waste allowance of 74 cents an hour for cleaners, in the same amount as the graffiti removal allowance. Is that right? And that was the Sydney Trains' position at that point. There would actually be two allowances, one graffiti allowance and one hazardous waste allowance, both be paid to cleaners?---Correct.

PN370

Similarly, on the same basis, that is, not just for the hours they do hazardous waste cleaning but for every hour for the whole of a shift that they're working?---Yes. Yes, it was calculated on the basis that the hazardous waste would be - came across in every hour of that shift.

PN371

If I can just take you now forward a few pages, the position that was put, in that sense, by Trains, can I suggest to you, was documented on 8 July 2022 at page 1936 of the court book, an email again - or a letter, perhaps, from you to Mr Warnes which proposed some clauses in this respect. Do you have that page, 1936?---Yes. Yes.

PN372

Can I take you to page 1937, and does that record the Trains' position in respect of this allowance as at that date, that is, that there would be a new clause number 103.10, hazardous waste, that would define hazardous waste and then identify a rate per shift of \$5.92?---Yes. So that came out of a meeting that we had on 4 July. We drafted this based on - we had a discussion with the union delegates and the union officials involved and drafted this clause based on those discussions.

PN373

That \$5.92 is simply 74 cents per hour but paid for every hour for an eight-hour shift. Is that your - - -?---That's my understanding, yes.

*** GREGORY JASON MCDONALD

XXN MR TAYLOR

PN374

The unions' position was that instead of - and by the way, at this point in time there was also, was there not, a separate allowance that's not referred to on this page because it was already in the agreement, it didn't need to be added, of some 32 cents in respect of those cleaners who are wearing respiratory masks to do their work?---Yes.

PN375

The union position was, was it not, that the appropriate approach would be to roll up the three allowances, that's the graffiti removal allowance which existed but was now being recognised, the hazardous waste allowance which was agreed to be added, and that respiratory mask allowance, into a single allowance that would be paid?---Yes. That was a union position.

PN376

Is that something that one sees if one goes to page 1930 and 1931?---Yes, that's correct. So that's the union position that was put on 13 May after we'd sort of had discussions around what was going to be included in the enterprise agreement.

PN377

So the unions' position was a rolled-up allowance right through at least till July. The Trains' position was not roll it up but - agree to have a further hazardous waste allowance but not rolled up, but at some point Trains then decided that it would agree to a rolled-up allowance, not at the figure of \$3.65 but at a lower figure?---Yes. So the position of 13 May, you know, reflects the unions' position, where they wanted to align it to the waste management award, I think, which is a Victorian award, or there was some allowance in one of the Victorian awards, and there was a discussion around that, and the amount was sort of - you know, the rolled up piece was part of that with that higher rate.

PN378

If you can go back to your statement at paragraph 32, which is at page 1721 of the court book, you give some of this chronology at paragraph 32. So you identify at 32(a) that Trains was offering, as of 8 July, two - offering it as separate allowances, and then you identify that on 31 August the Minister for Transport offered an amount of \$2 for a combined allowance, but it's the case, is it not, that between those two dates Trains had moved to accept the concept of a combined allowance. What was at issue was the quantum of it?---Yes. There was a discussion. There were meetings that were held about having a combined allowance, or how that allowance would be administered, and those sort of issues were raised.

PN379

Yes?---Yes.

PN380

And on 31 August Minister Elliott walked into a meeting and said, 'You can have \$2 for the cleaning'?---Yes. That's my understanding.

*** GREGORY JASON MCDONALD

XXN MR TAYLOR

PN381

That wasn't accepted, but ultimately, in negotiations, the parties ended up with \$2.25?---Yes. So my understanding - I wasn't in the meeting when the minister came in, but I was doing drafting later that night with the negotiations that had happened that day and we'd drafted it based on the \$2 that, you know, had been worked through in that day, and there was a draft sent through. We thought at that time it was agreed, but later on it wasn't accepted.

PN382

You're familiar with the fact that this rolled-up allowance which - now at \$2.25 - is paid to cleaning assistants whose responsibilities as a station cleaner are effectively - of the three things for which the allowance is paid, is effectively limited to the hazardous waste cleaning?---Yes. It's paid to all cleaning attendants, as proposed.

PN383

Including those who don't, as a part of their role, do much or any graffiti removal or wear the respirators?---Correct.

PN384

At paragraph 39 I think you refer to that, and you do so with a sentence at the end, which is, 'This is the basis on which the costings for the 2022 agreement were prepared and presented for ERC approval.' So just to be clear, this presumably was - these costs were done, were they, after agreement had been reached that it's \$2.25?---I don't believe so. What we were talking about is the numbers of how many people would receive the allowance, and the allowances at that point were the 74 cents. What got taken to the Expenditure Review Committee was the 74 cents for each allowance.

PN385

I see. So under the wages policy, anything above the amounts in the wages policy need to be approved by the ERC, do they not?---That's correct.

PN386

I'm just a bit unclear. I assumed from paragraph 39, but maybe incorrectly, that ERC has in fact given approval for the \$2.25?---That could be the case. The \$2.25 was, I think, resolved in conciliation proceedings, but there could have been a discussion and approvals through that process.

PN387

I see?---I wasn't aware of the actual approval process, but I do know it was raised in the Commission.

PN388

Were you involved at all with actually developing any of the costings?---No.

PN389

But as lead negotiator for Sydney Trains, you were aware - sorry, you were very familiar with the government wages policy?---Yes.

*** GREGORY JASON MCDONALD

XXN MR TAYLOR

PN390

And that is a document, if you could bear with me, which you find at court book page 1964. I just want to confirm that, but it's another witness's - another Trains' witness has provided evidence that this is the New South Wales Government Public Sector Wages Policy 2022. Just tell me when you have - - -?---Yes, I've got the page, 1964.

PN391

Yes, and you recognise there the New South Wales Public Sector Wages Policy 2022, being a policy which to the best of your knowledge applies and has applied in respect to the latter part of the negotiations?---Yes.

PN392

And the way in which this policy works is – can I draw your attention firstly to paragraph 3.1 – that there can be under the policy enhancements to employee-related costs, provided they do not increase by more than in respect of the '22, '23 year 3 per cent. That's the nature of the policy, am I right so far?---Annual increase, yes – 3 per cent, yes.

PN393

The increase that the proposed enterprise agreement – or the enterprise agreement that employees have voted on and approved provides for 2022/'23 an increase of 2.53 per cent; that's your understanding?---Yes, correct.

PN394

But as far as this policy is concerned, if you're talking about employee-related costs, you also have to have regard to superannuation, which will increase in the same period, do you not?---Yes, it says, 'inclusive of superannuation in 3.1'.

PN395

And so the figure of 2.53, if you include super, is equal to the full 3 per cent maximum that 3.1.1 provides for that year?---Correct.

PN396

And 3.1.2 has a similar figure of 3 per cent for the year '23/'24. The enterprise agreement, though, is going to pay – have an increase as a minimum of 3.03 per cent, plus superannuation. That's above that figure, is it not?---Yes.

PN397

Is that something that's permitted by this wages policy?---So I think 3.2 deals with where an additional 0.5 per cent increase per annum could be provided in the year 2023, 2024.

PN398

Yes, and so you've drawn attention to clause 3.2, which allows an additional half a per cent, where there is a substantial employee contribution made to productivity enhancing the forms, is that right? Is that the clause you were drawing attention to?---That's where it provides for an additional 0.5 per cent increase, yes.

*** GREGORY JASON MCDONALD

XXN MR TAYLOR

PN399

So if one takes the proposition that the enterprise agreement that's been approved by employees includes an increase of 3.5 per cent inclusive of super, then it's only consistent with this policy if that additional 0.5 per cent is referable to a substantial employee contribution made to productivity enhancing performance?---Um, sorry, I - - -

PN400

That's fine, I'll put the question differently: if there are not substantial employee contributions to have – that's been made to productivity enhancing reforms then it would be outside the policy to have a 3.5 per cent increase inclusive of super for the year '23, '24?---That's the reading of the procedure, yes – the policy.

PN401

And given your involvement, both with your knowledge of the wages policy and your involvement in negotiations, is it your understanding that there's been an acceptance as part of the approval process for this enterprise agreement that there has been substantial employees' contributions made to productivity-enhancing reforms?---I'm not – not aware of that.

PN402

Now, you are aware, I think, are you not, that in addition to the two increases that I've identified in the enterprise agreement there is also – under the enterprise agreement – a further \$4,500, one-off payment to be paid to all employees?---Yes.

PN403

And secondly, are you aware of the fact that in these proceedings, trains are – have asked their expert to assume, and are submitting to this Commission – that there have been changes to employee conditions which equal an increase of a further 2.1 per cent in employee-related costs?---Um, sorry, I'm a bit confused. You're talking about the \$4,500 but - - -

PN404

I'll deal with that first and I think you agreed that that is in the agreement?---Yes.

PN405

The new agreement contains changes to conditions which Sydney Trains and New South Wales Trains say will increase employee-related costs, quite apart from the wage rises?---Yes, correct.

PN406

And you are aware, are you not, that in these proceedings, Sydney Trains and New South Wales Trains say that those change of conditions – once you've had regard to any offsets, amount to an increase in 2.1 per cent in employee-related costs?---Um, I haven't seen a submission or evidence of that but yes, so I'm not aware.

*** GREGORY JASON MCDONALD

XXN MR TAYLOR

PN407

Are you familiar at all with whether there's been material placed before the ERC to allow it to understand the increase in employee-related costs over and above the wage increases?---I'm not aware.

PN408

To the extent to which there are additional benefits which increase employee-related costs, including, for example, the \$4,500 one-off payment – is it the case that under this policy they would only be permitted if they came within 3.3 of the wages policy?---I think – so 3.1 talks about the employee remuneration - - -

PN409

Yes?--- - - - or other conditions of employment that may be provided, so to me, it's when you're looking at the whole aspect of it in terms of – there is a cost associated with allowances and other conditions which have to be considered.

PN410

Yes, but to the extent to which there are any new allowances that have been introduced, they also – do they not – to the extent to which they do in fact increase employee-related costs after considering any offsets, that's something that needs to be factored in under this policy, does it not?---Yes.

PN411

And if you can assume – because I think you said you didn't know – but if you can assume that in these proceedings, Trains have submitted that there have been improvements in conditions over and above existing allowances, which equal an increase of 2.1 per cent in employee-related costs. Is it the case that that could only be incorporated to be consistent with this policy if the circumstances of 3.3 arise – that is, they're offset?---I'm not aware of what was put forward.

PN412

You're not aware of any other provision in this wages policy which identifies amount which – that is consistent with this policy, that there are one-off payments or additional benefits over and above the wage rise – over and above the percentages in 3.1 and 3.2 as to how that could be achieved?---I'm not aware.

PN413

ACTING PRESIDENT HATCHER: Are you finished with that topic, Mr Taylor?

PN414

MR TAYLOR: I'm finished with that document and that's actually the end of the cross-examination.

PN415

ACTING PRESIDENT HATCHER: Perhaps I'll ask a more direct question arising out of those questions, Mr Taylor – do you say that the wages position together with the other benefits to which the agreement applies, plus super, complies with the government's wages policy?---Um, I wasn't involved in actually putting the submission together, Your Honour, in that process. So I haven't actually seen the documents and how they match the policy.

PN416

Well, if you look at 2022, '23, there's a wage increase of 2.5, correct?---Correct.

*** GREGORY JASON MCDONALD

XXN MR TAYLOR

PN417

There'll be super of half a per cent and there's the flat payment of \$4,500, which I think your experts costed at about 3.7 per cent. By no stretch of the imagination does that comply with the policy, does it?---Um - - -

PN418

Even leaving aside the other benefits that have been costed at 2 per cent?---Based on a reading of the policy, yes, yes.

PN419

Thank you.

PN420

MR TAYLOR: Nothing arising.

PN421

ACTING PRESIDENT HATCHER: Right, thank you for your evidence, Mr McDonald. You're excused, you may go?---Thank you, Your Honour.

<THE WITNESS WITHDREW

[12.29 PM]

PN422

MR SHARIFF: The next witness is Mr Devitt. He has two statements. Yes, he's only got one statement. That can be found in the court book at page 1,116, if he could be called.

PN423

ACTING PRESIDENT HATCHER: Let's bring Mr Devitt in, please.

PN424

MR SHARIFF: Sorry, Your Honour – I didn't hear your question.

PN425

ACTING PRESIDENT HATCHER: I said let's bring Mr Devitt in, please.

PN426

THE ASSOCIATE: Please state your full name and address for the record.

PN427

MR R DEVITT: (Indistinct) Devitt, (address supplied).

<ROLAND EDWARD DEVITT, AFFIRMED

[12.31 PM]

EXAMINATION-IN-CHIEF BY MR SHARIFF

[12.31 PM]

PN428

MR SHARIFF: Is your full name Roland Edward Devitt?---Yes.

PN429

Mr Devitt, your business address is 146 Manchester Road, Auburn?---Yes.

*** ROLAND EDWARD DEVITT

XN MR SHARIFF

PN430

You prepared a statement for the purpose of these proceedings?---Yes.

PN431

I'll have a copy of it provided to you in the court book, if my junior could please approach? That's a statement you signed on 20 January 2023?---Yes.

PN432

Could I take you to paragraph 18 of your statement? Is there a correction that you wish to make to that paragraph?---What paragraph was it?

PN433

Paragraph 18?---Yes, where in paragraph 18 it says: 'These are distinct from the position descriptions', it should be, 'These are similar to the position descriptions or other CSAs' – or, 'CAs and CICs, such as station cleaners', (indistinct words).

PN434

So you want to delete the words, 'distinct from'?---Yes.

PN435

And substitute them with the words, 'similar to'?---Yes.

PN436

Thank you. Apart from that correction and now with that correction do you say the contents of this statement are true and correct to the best of your knowledge, recollection and belief?---Yes, it is.

PN437

I tender that statement, together with its exhibits.

PN438

ACTING PRESIDENT HATCHER: All right, the statement of Roland Devitt, dated 20 January 2023, will be marked exhibit 14.

PN439

MR SHARIFF: May it please. I have no further questions.

PN440

ACTING PRESIDENT HATCHER: Mr Taylor.

CROSS-EXAMINATION BY MR TAYLOR

[12.33 PM]

PN441

MR TAYLOR: Mr Devitt, cleaning assistants, or CAs, the primary purpose of their employment is so that Sydney Trains can achieve a strategic directive of improving customer satisfaction?---So cleaning attendants - - -

PN442

Yes?---Not cleaning assistants – cleaning attendants - - -

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN443

Yes?---Um, say that again – their primary focus?

PN444

A primary purpose of their employment is to achieve the strategic directive of improving customer satisfaction?---Yes.

PN445

Their roles include cleaning of trains – that is fleet; some CAs clean fleet, is that right?---Yes.

PN446

Some are employed to clean stations?---Yes.

PN447

Where they're employed to clean stations, they're often referred to as station cleaners?---Yes.

PN448

Can I ask you, using the court book document that we have been provided, I'll ask you to turn to page 1164, which has a map. You describe it in your statement at paragraph 23 as a map of locations across the Sydney Trains network. Do you have that document with you?---I do.

PN449

If I just look at the highlighted box at the bottom of the page, 'Cleaning: where, what who, and then stations – am I reading this correctly, that stations which are firstly starting with the last one: 'Stations which on the map above are in blue are cleaned by an external service provider'?---That's correct.

PN450

Then moving up, stations which are – where the name of the station is, let's call it orange, then there one finds cleaning attendant or a CA who is in charge of cleaning?---Sorry, not a CA who's in charge of cleaning – you would find – so the orange box is a cleaning attendant and also cleaners in charge.

PN451

Yes?---Yes, not just cleaners in charge.

PN452

I should – thank you. So at those stations which are orange, cleaning, including of – for example – the toilets, it falls to cleaning attendants and cleaners in charge?---Yes.

PN453

Then finally, the last – those stations which are or the name of which does not appear in a colour, the cleaning of the station, including the toilets, falls to a CSA or a customer service attendant?---Yes.

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN454

ACTING PRESIDENT HATCHER: If you just stop there – so when it's in black, I thought we had evidence that when it was a busy station, which have cleaners?---This is effective 2019.

PN455

Right?---So – and I look after fleet cleaners so I'm not – I can't advise whether we – when it is externally or internally cleaned still. I am assuming it would have dedicated cleaners.

PN456

MR TAYLOR: So if one looks at the orange stations, starting, for example – if you're looking at the - - -

PN457

ACTING PRESIDENT HATCHER: The question's directed – I think there's some orange stations on the evidence which aren't marked on this map.

PN458

MR TAYLOR: Mr Devitt, I think you indicated that this, as you understand, was a map as at 2019 and the Acting President has identified that in the evidence some suggestion that some of the stations that are in black, might in fact now have cleaning attendants and so if there was an updated map, they'd be orange. Is that your understanding of what the position is?---If this has changed since 2019, the colours codes would change to reflect that, I'm assuming, yes.

PN459

You're not aware of whether it's changed or not?---No. I can with the fleet, but I can't do you for stations.

PN460

Now, you're familiar with the fact that under the enterprise agreement that is being voted up there is now something called a, 'Higher standards cleaning allowance', that will be paid at the rate initially of \$2.25 per hour for every hour that a cleaning assistant is on duty?---Yes.

PN461

It's not paid when they're on leave, is that right?---Yes.

PN462

Thinking of saving time, it might be easier to take you to the clause just so that we're clear about this. So if you could go to court book page 413?---I think I need assistance. I can find 239, 305 - - -

PN463

It's the red numbering, top of the page, court book page 413. I'm sorry, apparently you don't have the right volume. So that will now be provided to you?---Thank you.

PN464

Tell me when you have court book page 413?---I have 413.

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN465

And you'll see there the new clause, towards the bottom of that page, 103.9, and that allowance that we've identified at \$2.25 per hour for every hour on shift, is paid in recognition of the following duties – and you'll see there three duties: removal of graffiti, removal of hazardous waste and use of respirators and appropriate PPE. So your understanding of the way this is paid is that that allowance will be paid to cleaning attendants whenever they're on duty, whether or not they in fact on any given day do any of those three things?---So on any given day, a cleaner would do those three things unless they were at a training course or something like that but on any given day they would do those three things.

PN466

Well, we'll come back to that. If you could now go to – back into your statement, and go to 1167 - - -?---117?

PN467

It's your annexure 11?---Sorry, what page am I looking for?

PN468

It's got a reference at the top of the page in red, court book page 1167. It might be in the other folder, I'm not sure?---No, I've got it, yes.

PN469

So this is one of your annexures and this records a meeting in which the union and Trains discussed what circumstances a hazardous waste allowance might be paid and in particular, discussed a description of what hazardous waste is?---Yes.

PN470

Following that, that document seems to record that a cost analysis would be performed. Were you involved at all in preparing costs analysis and the way that was done?---No.

PN471

Just at this point, the proposal that was being discussed was not a rolled-up allowance but a separate allowance for cleaning hazardous waste. Are you familiar – I think you're aware of that?---Yes.

PN472

And at those stations, which are staffed by a CA, with the duties of keeping our station clean, hazardous waste would need to be cleaned by – or would be as part of their normal duties – would be cleaned by a CA, would it not – that's the way it works?---Um, I would imagine so. I can talk for fleet.

PN473

And at those stations which do not have a CA, that any hazardous waste that might arise on the station, in a toilet, in a tunnel or a walkway, would fall to the CSO to clean?---Depending on the type, volume – um, type, volume, number of people, et cetera. There's a lot of dependencies there.

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN474

If you could just turn back some pages to page 1161, you'll see there a Safe Work instruction document. It's a work description of removal of bio hazards from Sydney Trains facilities?---1169?

PN475

1161?---Yes.

PN476

This Safe Work instruction is a Safe Work instruction that would apply to a CA when the CA is dealing with hazardous waste at a station?---Um, this Safe Work instruction would apply to anybody in Sydney Trains.

PN477

So it would apply to a CA when cleaning hazardous waste at a station?---Anyone in Sydney Trains.

PN478

And it would apply to a CSO when cleaning hazardous waste at a station?---Anyone in Sydney Trains.

PN479

Can I take you to your paragraph 31 of your first statement, which I'll just find the page reference for - - -

PN480

MR SHARIFF: Paragraph 31 also includes the answer to Your Honour's question.

PN481

ACTING PRESIDENT HATCHER: What page are we on?

PN482

MR TAYLOR: Page 1122 – in this paragraph you describe the work of station cleaners, is that right?---Sorry, what paragraph?

PN483

Paragraph 31 on page 1122?

PN484

ACTING PRESIDENT HATCHER: I thought Mr Joleski said something different. Those stations weren't in the contractor colour, either. I thought Mr Joleski's statement said he is the manager of (indistinct) and he talked about the cleaners who work under his charge.

PN485

MR SHARIFF: Yes, paragraph 16 of Mr Joleski's statement – I'm sorry, I just thought I'd raise it now.

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN486

ACTING PRESIDENT HATCHER: Yes.

PN487

MR SHARIFF: He says (indistinct) larger stations (indistinct) central and busy stations: 'CSOs are generally rostered on together with dedicated cleaning staff or cleaning contractors and are rarely responsible for cleaning duties'. So whatever the map says in 2019 that's the position Mr Joleski (indistinct words).

PN488

MR TAYLOR: I was taking you to paragraph 31 but in light of the interchange that's just occurred, it's been suggested to me that it might be helpful to go to 1679. It may be, Mr Devitt, that you are familiar with documents of this type but it's been suggested to me that what this document at 1679 – you see – do you have that page, 1679?---I do.

PN489

And so just looking at the first line, dealing with Hurstville, customer area Hurstville, we see at Allawah, the first line and the next two, begins with the fact the cleaning is done by station staff, you see that?---I see the first line is Hurstville, permanent full-time Allawah – cleaning by station staff, yes.

PN490

Yes. That's also true – I'm really only looking at the last two columns, the station and who does the cleaning at Arncliffe, station staff at a time and station staff, when you get to Ashfield, the cleaning is done by station cleaning staff?---Mm-hm.

PN491

Is it the case that where this document refers to station staff it's referring to CSA – so that is CSAs would be doing the cleaning of that station where it refers to station cleaning staff it would indicate that at that station a CA does the cleaning?---So it's my assumption is that if it's station staff, it's CSAs. If it's station cleaning staff then it would be dedicated cleaning staff.

PN492

ACTING PRESIDENT HATCHER: When you just dealt with on 1697 - - -

PN493

MR TAYLOR: Yes. Can I take you then back to page 1122 and paragraph 31 and tell me when you have that. Do you have that before you now?---1122.

PN494

And paragraph 31?---Yes.

PN495

Here you're describing the work of a type of CA called the station cleaner?---Yes.

PN496

This type of CA, like call CAs, would be – you understand – paid the full \$2.25 for every hour that they are at work?---Yes.

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN497

They are – you tell us – located at larger stations and (indistinct) perhaps would be a station where one might find them?---Is that a question?

PN498

Yes?---Yes.

PN499

They do not do cleaning work that requires respirators?---No.

PN500

By no, you're agreeing with me?---Yes.

PN501

And they are not required to carry out graffiti removal work to the same extent as CAs include maintenance?---That's right.

PN502

They do, though, carry out hazard – waste cleaning found in stations such as station toilets?---All hazard removal within the station environment, yes.

PN503

Yes, something you describe as something that's not permanently part of their role but on a semi-regular basis they do that?---Yes.

PN504

CSAs who, under the clause as drafted at the moment, do not get the allowance, can I suggest to you like station cleaners also will not do work requiring respirators?---Yes.

PN505

They also will not carry out graffiti work to the same extent as CAs in fleet maintenance?---Yes.

PN506

And they will be required to carry out cleaning of hazardous waste at stations on a semi-regular basis (indistinct), is that right?---No.

PN507

On what basis – did you say they are not required to carry out cleaning of hazardous waste or is it the semi-regular basis part of the question that you have difficulty with?---Well, you said CSAs against CAs.

PN508

I said CSAs, yes?---Yes, and I put in my 31 is CAs, station cleaners, which is not CSAs.

PN509

I understand that?---So I haven't referred to CSAs. If you're talking to 32, I referred to CSAs. Is that where I am now?

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN510

If you just put the paragraphs aside for a moment?---Okay, sorry, I thought we were reflecting back to the statement.

PN511

We are to some extent?---Okay.

PN512

In paragraph 31 you describe the work of station cleaners and I think we've dealt with the situation as to what work they had to do or not. I just wanted to ask you with respect to CSAs, I might just go back – I know you've answered some of these questions but just in case of some misunderstanding as to whether I was talking about CAs or CSAs – CSAs, like station cleaners, do not – are not required to do work requiring respirators?---Maybe I can – is it all right if I put it in perspective, rather than just go through - - -

PN513

It'd be helpful if you just answer my question. Is that right? Is that correct?---What was your question, sorry?

PN514

CSAs, like station cleaners, are not required to do work requiring respirators?---That's correct.

PN515

CSAs, like station cleaners, do not carry out graffiti work to the same extent as CAs and fleet maintenance?---That's correct.

PN516

CSAs, like station cleaners, are required to carry out cleaning of hazardous waste found at stations, including toilets, on a semi-regular basis?---I think from time to time, not on a semi-regular basis, no.

PN517

I see. In the stations where there is no cleaning attendant, at least in those stations, the cleaning of the toilets falls to CSAs, does it not?---Cleaning of the toilets falls to CSAs but removal of hazardous waste from time to time – difference between cleaning toilets and removal of hazardous waste.

PN518

I see. To the extent to which someone has defecated in the toilets in a manner that has fallen to the side of the toilet, that would be the CSA's role at that particular station, if they – if there's no cleaning attendant?---Depending on the degree of defecation – they could call in – have the toilet locked and call in people to do that.

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN519

ACTING PRESIDENT HATCHER: Can we just pause there? The situation which Mr Taylor just described – would that fall within the definition of

hazardous waste?---If – if, um, there was human waste outside of that toilet bowl, yes.

PN520

But as against cleaning a toilet in the ordinary way, if we can call it that – is that – that's not hazardous - - -?---No.

PN521

- - - regarded as hazardous waste?---That wasn't the intent of the – so that's why I was trying to put it into context before. Everyone's saying, 'hazardous waste' – cleaning a toilet is cleaning a toilet. You're going to have marks on the toilet bowl, et cetera, et cetera. Well, that's not hazardous waste. I mean, it's – how do we describe it? It's when people – our great customers do, you know - - -

PN522

Step outside the boundaries?---Boundaries, yes – (indistinct words). And then fleet, that's every day, that's what they do, and then station cleaners at the bigger stations, that's their full-time job. It's not once a day go cleaning toilets. They're cleaning toilets, where people have gone outside of the boundaries, every day. That's their job and it's not a job that most of us would like.

PN523

MR TAYLOR: You, I think – tell me if this is right – would accept, would you not, that CSAs in stations where there is no station cleaner, do from time to time clean faeces off floor and walls if it's present at the station?---Look, I'm assuming so. I'm not across that process but I'm assuming if there's faeces on the floor they would clean it off. If there's faeces on the wall I'm assuming they would lock it off and call in the specialist team.

PN524

Similarly, blood – you'd assume that if there's no cleaning attendant at those stations where a CSA is the person responsible for cleaning, it would fall to them to be cleaning off floor or walls if it's present?---Again, I'm assuming but I can't – the answer is I don't know. I'm assuming that's the case. I look after fleet.

PN525

Vomit, where vomit is present – again it would fall to the CSA on station where there is no cleaning attendant to have to deal with cleaning up vomit?---I'm assuming so, yes.

PN526

And when you say you assume so, to the extent to which it actually arises in practice, do you accept that the witnesses that the combined rail unions have called who do the work are more likely to know how often it arises than you?---Yes.

PN527

As part of their role?---Yes.

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN528

No further questions.

PN529

ACTING PRESIDENT HATCHER: Any re-examination?

PN530

MR SHARIFF: No, Your Honour.

PN531

ACTING PRESIDENT HATCHER: Thank you for your evidence, Mr Devitt. You're excused and you're free to go.

<THE WITNESS WITHDREW

[12.59 PM]

PN532

ACTING PRESIDENT HATCHER: So we should break for lunch now.

PN533

MR SHARIFF: Yes, I was just – before we do, with Mr Joleski, who is here, he can clarify the position in relation to Wynyard, if Your Honour wishes it, but I'm instructed it's a combination of cleaning attendants and cleaning contractors, whether the evidence (indistinct words). I'm not sure it makes much of a difference but I hope that answers Your Honour's question. But I can call him to clarify the position.

PN534

ACTING PRESIDENT HATCHER: Will he be the next witness?

PN535

MR SHARIFF: Well, he's not required for cross-examination.

PN536

ACTING PRESIDENT HATCHER: I see, I see. No, that's all right. No, that's not necessary. So who's the next witness?

PN537

MR SHARIFF: Mr Quaintance, and that will be it for today, but I understand Your Honour is going to deal with the approval date to appeal.

PN538

ACTING PRESIDENT HATCHER: Yes.

PN539

MR SHARIFF: May it please.

PN540

ACTING PRESIDENT HATCHER: And I know Mr Wood's not here, but Mr Saunders, you will have seen that we've sent through the enterprise agreement check list.

*** ROLAND EDWARD DEVITT

XXN MR TAYLOR

PN541

MR SAUNDERS: I haven't in fact seen it but I'm sure I will very shortly.

PN542

ACTING PRESIDENT HATCHER: I'm not expecting an answer to all the issues at 2 o'clock but you might be able to provide an indication about when the parties might be convenient to address us on those issues.

PN543

MR SAUNDERS: Yes.

PN544

ACTING PRESIDENT HATCHER: All right, we'll now adjourn.

LUNCHEON ADJOURNMENT **[1.00 PM]**

RESUMED **[2.04 PM]**

PN545

ACTING PRESIDENT HATCHER: So can we just come back to the agreement approval applications, Mr Woods – and is it Mr Saunders? We've received the form F18 so I haven't looked at them but I assume they clear the request to be covered by the agreement, so we can deal with that. So we've sent through to both parties, I think – and to everybody, all bargaining representatives, I hope – the agreement approval check list, which raises some issues. I don't think any of them will be insurmountable but there are some issues we need to address. What might be a convenient time before the end of this week when the parties might appear before us and address those issues?

PN546

MR WOODS: Your Honour, I expect that we'd have a response back for 2 o'clock tomorrow, if that's convenient.

PN547

ACTING PRESIDENT HATCHER: All right. Is that convenient, Mr Saunders?

PN548

MR SAUNDERS: Yes, (indistinct).

PN549

ACTING PRESIDENT HATCHER: All right, it's probably a bit early to say but if the response involves any proposed undertakings, can you make sure you distribute those to the bargaining representatives?

PN550

MR WOODS: Yes, we will.

PN551

ACTING PRESIDENT HATCHER: Thank you. You're excused, Mr Woods.

PN552

MR SHARIFF: Your Honour, whilst we're talking about timing, where we're at is at the moment we've got one more witness to deal with today, Mr Quaintance, which I understand the estimate of cross-examination is roughly an hour so we'll finish earlier today.

PN553

ACTING PRESIDENT HATCHER: Yes.

PN554

MR SHARIFF: Tomorrow we'll have Dr Stanford at 10 am, I anticipate give or take an hour in cross-examination with him, and then there's Mr Houston, and that might be give or take an hour, subject to other things. So I anticipate we'll complete all the evidence before lunch time tomorrow. We're happy to – at least side's happy – move straight into submissions and in light of the enterprise agreement approval process I was thinking that we'd allocate an hour each so that we can keep a nice time limit and only go into Friday if absolutely necessary but it's a bit in your hands and how my learned friend wants to proceed with it.

PN555

ACTING PRESIDENT HATCHER: Well, that all sounds convenient. Mr Taylor, do you have any disagreement?

PN556

MR TAYLOR: Well, only this: our preference – and it does firstly depend on those estimates ultimately being accurate, but for our part our preference would be to complete the evidence tomorrow, for whatever time in the afternoon is necessary for the agreement approval to be utilised in the afternoon and for us to deal with submissions on the morning of Friday, the matter having been set down for that day as well.

PN557

ACTING PRESIDENT HATCHER: All right, well, perhaps you keep discussing that and see if you can come up with an accommodation.

PN558

MR SHARIFF: Yes, (indistinct words). Could I just also clarify the question that Your Honour the Acting President raised in relation to the further data set? I – with no disrespect – find the tables prepared by Mr Saunders too small and too difficult to decipher. What we have asked Mr Houston to do or are in the process of asking him – and I just want to be clear about this – is taking his supplementary report as the (indistinct) to ask him to create a data set picking up only the increases from 1 May 2020 – that's that last line item in that table – but starting with that as the first line item and then going from 1 May 2020 to 30 April 2022, 1 May 2021 to 30 April 2022. I think I might have said 30 April - - -

PN559

ACTING PRESIDENT HATCHER: I'll let you finish but an easy way to do this is we've had an internal information note prepared which does the analysis from 1 May 2021 by reference to Sydney CPA and then the projected RBA rate as against just the wages increases and the one-off payment. What I can do is provide that to the parties after we finish today and the parties can tell us –

(indistinct words) it's only a question of mathematics. It's not any question about what inference should be drawn from it. I just want to get the mathematics right.

PN560

MR SHARIFF: Well, if Your Honours have done that, engaged in that exercise, we won't get Mr Houston to repeat it. Rather, we'll get him to look at it.

PN561

ACTING PRESIDENT HATCHER: Look at it, yes.

PN562

MR SHARIFF: Thank you. I'm in a position to call Mr Quaintance, who I believe is here. He's got two statements. The first is at volume 3, page 1942 and the second is at page 2540 in the same volume and if he could be provided with that in due course.

PN563

THE ASSOCIATE: Please state your full name and address for the record.

PN564

MR J QUAINANCE: James Peter Quaintance, level 11, 230 Elizabeth Street, Sydney.

<JAMES PETER QUAINANCE, AFFIRMED [2.10 PM]

EXAMINATION-IN-CHIEF BY MR SHARIFF [2.10 PM]

PN565

MR SHARIFF: Is your full name James Peter Quaintance?---Yes.

PN566

Am I pronouncing that name correctly?---Yes.

PN567

Your business address is Level 1, 231 Elizabeth Street?---Level 11.

PN568

Level 11 – and you're prepared two statements for the purposes of these proceedings?---Yes, that's correct.

PN569

You'll have a folder there which is volume 2. If you could turn up page 1942, numbered at the top in red print? You see that's a copy of your statement dated and signed by you, 20 January 2023?---Sorry, one thousand, nine hundred and - -

PN570

Forty-two?---Yes.

*** JAMES PETER QUAINANCE

XN MR SHARIFF

PN571

That's your statement dated and signed by you on 20 January 2023?---Yes, that's correct.

PN572

And if you go to page 2540, that's your second statement dated and signed by you on 3 February, 2023?---Yes, that's right.

PN573

You say the contents of those statements are true and correct to the best of your knowledge, recollection and belief?---Yes.

PN574

I tender those two statements and their annexures.

PN575

ACTING PRESIDENT HATCHER: All right. The statement of James Quaintance, dated 20 January 2023, will be marked exhibit 15.

**EXHIBIT #15 WITNESS STATEMENT OF JAMES QUAINANCE
DATED 20/01/2023**

PN576

And the further statement of Mr Quaintance dated 3 February 2023 will be marked exhibit 16.

**EXHIBIT #16 FURTHER WITNESS STATEMENT OF JAMES
QUAINANCE DATED 03/02/2023**

PN577

MR SHARIFF: May it please.

PN578

ACTING PRESIDENT HATCHER: Mr Taylor.

CROSS-EXAMINATION BY MR TAYLOR

[2.11 PM]

PN579

MR TAYLOR: Mr Quaintance, are you an employee of Sydney Trains or Transport for New South Wales?---Transport for New South Wales.

PN580

Wherein in your statement you have identified in the first statement the – at paragraph 11, you provide a table which has total employee-related expenses. Is that – do those expenses include expenses of people like you, who work for Sydney Trains but are in fact employed not by Sydney Trains?---No, those expenses are for employees covered only under the enterprise agreement.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN581

I see. And similarly, when it comes to paragraphs 5 and 6, where you're dealing with a table of pay rates and you have, as you identify at paragraph 6A, you've

provided an average annual base salary. When you were producing that document, is that a document you've produced which is – includes or doesn't include employees who are employed by Transport for New South Wales but in fact work for one of the two rail (indistinct)?---The table only includes employees covered under the enterprise agreement for Sydney Trains and New South Wales Trains.

PN582

And paragraph 6B and C, you identify that the figures that you've done there – average overtime and other penalties – are for full-time staff and 6A doesn't identify whether it's including or not including part-time staff. Are you able to - - -?---All numbers in the first part of the table on page 1950 at the top of that table are for full-time staff. It's the same data set.

PN583

Now, you've identified in paragraph 3 your responsibilities. Is it part of your role – is it part of your role that your responsibilities include providing costings to be used to obtain approval for proposed offers in an enterprise bargaining process?---Yes, that's correct. My team and myself would undertake costings that are put up through submissions.

PN584

And they are costings of what proposed change might amount to as a change to employee-related costs?---Yes, that's correct.

PN585

And that is because – and tell me if you know this or not – under the government wages policy, the government wages policy has limits as to how much can be offered as a percentage increase of employee-related costs?---I'm aware of government wages policy. I'm not an expert – not really my field of expertise. But I'm aware that there are obviously guidelines or limits that are in place.

PN586

Yes, and you accept, do you not, that changes in conditions may increase employee-related costs without there necessarily being a change (indistinct) employees' remuneration?---Uh, sorry, can you rephrase the question? Are you implying that some employees wouldn't necessarily receive the benefit of condition?

PN587

Firstly, let me take you to the stages: employee-related costs incorporate a wider concept than simply a change in remuneration that might flow to employees?---I think most – well, employee-related costs would generally – you know, obviously base pay, overtime penalties, allowances – a lot of those things have a relationship to the rate of base pay, but not all. I'm not sure if that answers your question.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN588

A change which led to an increased number of employees being employed to do particular work would lead to an increase in employee-related costs but not necessarily an increase in remuneration to those doing the work?---Yes, that's correct.

PN589

A change which increases leave entitlements, for example, a change to bereavement leave entitlements, might increase employee-related costs but not actually lead to an employee receiving any more remuneration?---I think that would possibly depend on the nature of the employee's permanent relationship. If that was a waged employee, they are paid obviously on a weekly or a daily basis as opposed to a salaried employee, where it wouldn't increase remuneration.

PN590

How would an increase in bereavement leave lead to a salaried employee receiving more remuneration?---Not a salaried employee – a waged employee. So a salaried – sorry – salaried employees are obviously a vast majority of employees covered under the enterprise agreement are waged employees, not salaried employees.

PN591

Yes?---An increase in the bereavement leave, as an example – it's from two to five days. There is a cost in that, you know – it's paid time for those employees that are in that situation.

PN592

Yes?---They would not otherwise be paid.

PN593

Isn't the case they don't receive any more remuneration, but Trains have to backfill those positions and that would mean that costs would go up, not that employees get more money as a result of that leave change?---Yes, that's correct. The front line workers that (indistinct words) would need to be covered with a backfill arrangement. Then again, these situations are all down to the individual circumstances and I guess it depends whether that employee would have used their annual leave to take longer or whether they would have taken unpaid leave or some other arrangement.

PN594

In the table that you describe in paragraph 6, at 6B you identify average overtime. You I presume have no difficulty with accepting the proposition that there are many employees employed by the two Trains entities who do not get paid overtime?---Undoubtedly in 12,000 employees there would be quite a few that don't work overtime. There's a lot that do as well.

PN595

When we get to 6C, the word, 'Other', penalties, allowances, et cetera – what does, 'et cetera', cover?---It would be anything that's not covered in A and B in terms of what was filed with the ATO for those employees.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN596

I didn't quite catch the bit about the ATO?---It would be anything that was not covered under parts A and B of that table, so A was the base pay, B was the overtime. It's all other payments to those employees. I was excluding superannuation.

PN597

Would that include reimbursement of expenses?---Ah, I don't believe so but I can't be certain of that.

PN598

So if the living away from home allowance is paid, is that included in, 'other', or not included?---The living away from home allowance is a – would be an allowance in that situation. I wouldn't characterise it as a reimbursement of expenses necessarily, the way it operates.

PN599

It is an allowance paid to people who are living away from home to cover costs associated with meals and the like, is it not?---Yes, but it's more the nature of how it's applied rather than a reimbursement, per se.

PN600

Does, 'other', include bonuses?---I'm not aware of any bonuses being paid other than the drivers' overtime bonus, which is a payment made based on a threshold of additional shifts worked by drivers over a period.

PN601

Termination payments, do they fit into, 'other'?---I don't know.

PN602

In respect of overtime you have – I'm dealing with them one by one. It's not just in respect of overtime but in respect of overtime, you have provided a figure excluding superannuation? I'm looking at 6B, just your text: 'Average overtime before tax, excluding superannuation'?---Yes, obviously overtime does not attract superannuation but that heading can be used across those tables.

PN603

Yes, I wasn't looking at the tables at this stage. I was just looking at the text in paragraph 6B. But you've just, I think – you've jumped ahead, is where I was going. Trains entities do not pay superannuation on overtime, do they?---No.

PN604

And in respect of those things that fall into, 'other', it's the case, isn't it, that some of those payments attract superannuation and some of them do not?---Ah, that's more than likely, yes.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN605

It's only those amounts which are paid referable to ordinary time which attract superannuation and to the extent to which there are penalties that are payable or other matters such as meal allowances that are payable for people who are

working additional hours, they do not attract superannuation?---I could not confirm – there are obviously many, many allowances in Sydney Trains.

PN606

Yes, but there are some of the matters which are included in 'Other' – so in your 'Other' column some of those amounts superannuation will be paid on and some of them will not be paid?---Yes, that's more than likely.

PN607

The overtime that has been calculated for the purpose of this total is based on actual records for the year ending 30 June 2022; am I right?---Yes, that's correct.

PN608

Is it based on a full year or is it based on a part of the year and then extrapolated?---That is based on the actual full year.

PN609

That year – that is the year commencing on 1 July 2021 and ending 30 June 2022 – was a year in which all workplaces, including Sydney Trains, were affected by – or workers were affected by COVID and the need at various times for people to not work, and have their work replaced by others; you accept that?---Yes.

PN610

Am I right you haven't done any analysis to understand whether the overtime that you've identified for this particular period is unusual or contrary to a longer term trend?---Overtime for the year 21/22 was actually slightly lower than the three preceding years.

PN611

In paragraph 9 you have identified that you provided base pay for five classifications. You didn't provide average overtime or average other payments in respect of those classifications, did you?---No, just the base pay from the enterprise agreements.

PN612

Given your knowledge, there's no reason why one would assume that those five classifications would on average each earn the average amount of overtime across the entire Sydney Trains cohort?---That table was not provided for any reason other than to provide a view on the changes and base pay overtime.

PN613

In paragraph 10 you deal with the one-off payment and you indicate at paragraph 10(a) that an estimate was calculated by your team on or around 25 November 2022 of the total cost of such a payment. Do you recall the reason why you were asked to do it on that date?---We were advised of an updated amount for the payment and we calculated that accordingly.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN614

You were advised there was an updated figure and you calculated it accordingly. Were you advised of the reason?---No.

PN615

The calculation you have done includes amounts over and above the amounts that will be paid to employees before tax?---Sorry, are you referring to payroll tax?

PN616

I think there are two additional amounts, is there not? There is superannuation and then there is also payroll tax?---Yes, those are the two amounts identified.

PN617

In paragraph 11 you have a table and you've compared that to something called 'total employee-related expenses'. Firstly, when we're dealing with total employee-related expenses what is included in total employee-related expenses? Is it the same amounts that are at paragraphs 6(a), (b) and (c), base pay, overtime and other, or is it something further than that?---It should – sorry, what was the paragraph? Paragraph 6(c) did you refer to?

PN618

Yes?---It should be materially consistent with what's included in that.

PN619

I just want to be clear about this. Total employee-related expenses, earlier you indicated this is for all Sydney Trains and New South Wales Trains. It includes – let's take it one by one – firstly, amounts paid as base pay?---Yes.

PN620

Amounts paid as overtime?---Yes.

PN621

Amounts paid as allowances and penalties?---Yes.

PN622

To the extent to which there are any bonuses, it would include them?---The drivers' overtime bonus would be.

PN623

Superannuation, is that included?---Yes, it is.

PN624

Payroll tax, is that included?---Yes.

PN625

Are there any other on-costs which are included when coming up with a figure of employee-related expenses, such as workers compensation payments or the like?---I believe it might include workers compensation.

PN626

Are you able to give some identification of how that would compute as a percentage of the total?---Sorry, I don't know exactly – there is a very small number, but - - -

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN627

Beyond the matters we have discussed, so now beyond payroll tax, workers comp, actual payments made to employees, is there anything further that you can recall as incorporated in the concept of total employee-related expenses?---I can't recall. Those are the primary items that are included.

PN628

Do I take it that that figure is the total for all employees, both part-time and full-time?---Yes, that's correct.

PN629

At 11(f) it says this:

PN630

One-off payment expresses a percentage of average annual gross earnings.

PN631

Looking at that formula, is it not the case that it is in fact a percentage not of average gross earnings of employees but rather a percentage of total employee-related expenses, which includes matters of course that are not in earnings?---I think I've made in my statement a reference that things like payroll tax is in the denominator and remunerator.

PN632

Yes?---And it doesn't materially change the percentage if it's excluded, and neither does superannuation.

PN633

So it's just to the extent to which there is workers compensation that one wouldn't correlate average annual gross earnings with total employee-related expenses?---Yes, I believe so.

PN634

Can I take you now to the heading 'Changes in conditions', paragraph 12 and following. At paragraph 12 you identify that on a certain date – 20 December 2022 – you provided what you say is the estimated value of enhancements to employees' conditions. It expresses a percentage of average annual gross earnings of each employee. Firstly, the calculations, or the enhancement calculations, they were not prepared in around 20 December 2022. They had been prepared earlier during the course of the enterprise bargaining process?---Yes, we have had – we were doing calculations over a period of time.

PN635

These were calculations that were being done consistent with the fact that under the wages policy any increase in employee-related costs needs to be factored in when obtaining approval to enter into an enterprise agreement?---Yes. My understanding, to the best of my knowledge, is it is - yes, obtained approval for the bargaining parameters.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN636

The table that you set out in paragraph 13 which has some totals, these are based on estimates, are they not?---Yes, that's correct.

PN637

They estimate both changes to employee-related costs and also changes in the value of existing conditions that have been offset?---It's just the change in the value of the conditions over the employee-related cost that was the same number that was used for the one-off payment calculation.

PN638

They include as components, firstly, estimates as to what extent a change in employment-related conditions might increase costs but also includes some estimates, to the extent to which there are offsets, to what extent there will be savings in employee-related costs?---Yes, yes.

PN639

Now, I think you tell us quite frankly in paragraph 14 these are estimates based on what – not done by you, but done by others?---No, I don't think I've said that. Some of them have been done by others.

PN640

Are you able to identify which of the estimates that appear in paragraph 16 were done by you and which were done by others?---Sorry, I think when you say me, myself and my team?

PN641

Yes?---Yes. I believe the cab allowance for drivers and the cabin security allowance for guards at the bottom of page 7.

PN642

Yes, are what?---Are done by others. I believe everything else my team have been involved in developing the costing.

PN643

When you say involved in the development, you relied on information provided by business subject matter experts as to how these changes in conditions will actually apply in practice?---Yes, that's correct.

PN644

You didn't yourself – neither you or your team validated the cost estimates developed by business subject matter experts?---We have done a calculation on those two items separately.

PN645

At paragraph 14(e) you identify some of the cost estimates that were developed by business subject matter experts and were not validated by your team. Are you able to identify which ones they were?---Sorry, did you say paragraph 14(b)?

PN646

(e)?---(e)?

PN647

'E' for 'elephant'?---Yes, I think it was not validated by my team at the time the costing was prepared. We have subsequently done a calculation on those two items.

PN648

I'm sorry, I missed that answer. Can you just say that again. It says here:

PN649

Some of the cost estimates were developed and were not validated by my team at the time the costing was prepared.

PN650

What did you say after that?---We have subsequently done a costing on those two items.

PN651

I'm going to come to those items, so I won't jump ahead. You identify again in paragraph 14 that estimates would have been done at – calculated at a high level only. What does that mean?---Many of these conditions we can't accurately probably assess until after they have been in place to, you know, get an accurate costing, so we're – you know, it's often working with quite high level information and assumptions.

PN652

Is it the case that some of these figures are based on information which was – or they're based on calculations done during the course of bargaining and you haven't gone back to check whether in fact the final version of the agreement reflects changes that were underpinned by the same – that the current agreement doesn't contain provisions which reflect the assumptions upon which those earlier costings were made?---Sorry, can you reframe that question.

PN653

I can. Maybe by reference to paragraph 14(d), you indicate there that:

PN654

The final agreed position on enhancements to conditions may vary from the position that was used for the purposes of developing a cost estimate.

PN655

Is that another way of saying that you don't know whether these costings in fact reflect the final form of these clauses in the enterprise agreement?---I'm only aware of one where we believe it changed subsequent to what we had costed.

PN656

Which one is that?---That was the overtime cap for operational RC-graded employees.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN657

ACTING PRESIDENT HATCHER: What was the nature of that change, Mr Quaintance?---It was about the – I believe when we did the original costing we weren't aware there was going to be a new cap so we costed it up to the maximum grade permissible. The actual final, as implemented, is up to RC6E. There will be some difference between that and what was costed that went up to the RC7E grade for – obviously most employees would be probably under the 6E, but there are definitely some that are up there.

PN658

Sorry, Mr Quaintance, my question was at a more basic level. When it says 'increase the overtime cap', what does that mean?---Sorry, basically when – or there is a limit to the extent to which overtime is paid, so an employee might be at an RC7E grade and their overtime was capped at – and I think it was previously RC6C on the top line there, but it limits the grade at which the overtime is paid at.

PN659

So high grades were expected to work whatever hours required without earning overtime - - -?---They will earn overtime, but not at their grade, at a lower grade which are these overtime caps which are outlined in the agreement.

PN660

Thank you.

PN661

MR TAYLOR: How does that affect the figure that's contained in the table at paragraph 16 – in the middle of the page of page 1448 of the court book – 1.45 million, 0.1 per cent?---It means that number is probably higher than it should be. I can't recall the exact number that we recalculated for that.

PN662

Just dealing with that one for a moment, even at some lower figure it assumes of course, does it not, that there is in fact an overtime cap under the current enterprise agreement as properly understood? Are you familiar with the evidence that has been led by one of the Trains witnesses, who is not being cross-examined, that the unions at least understand there is no current overtime cap and if that were the case then that would actually be zero rather than one figure lower than 1.45 million? Do you accept that?---I have seen the evidence. I'm not familiar with the issue and the – around there being a cap or not. I guess with this it is an increase over what the current cost base is, which is how we've interpreted that. We haven't - I haven't looked at that in respect of whether there's a cap or not. It was actually an incremental cost.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN663

In respect to the table in paragraph 13 and the second – maybe technically the third row, but the row numbered (b) which deals with offsets, you have identified a figure here, but unlike what we find in paragraph 16 we don't see a list of the offsets or any explanation as to how they have been calculated. Are you able to assist us as to what are the offsets that have been factored in?---So for Sydney Trains the offset amount provided in 13(b) is the drivers' overtime bonus, which is

being used an offset for the working on book-off day or robot payment. There are, however, also some offsets in the 31 which I haven't pulled out because some of the costings were done net - - -

PN664

Sorry, some of the costings were - - -?---Done on a net basis, so, for instance, the higher standards cleaning allowance is in the 31.6, however, there is an offset within that number for the graffiti allowance and respirator allowance that are currently paid.

PN665

The figure though in 13(b), 1.6 million plus 3.5 million, total 5.1 million, is that only the drivers' overtime bonus?---I believe for TrainLink there are some other items in there, although I'm not obviously - - -

PN666

When you say you believe there are - - -?---Yes, that is the drivers' overtime bonus in TrainLink and there is some other items of which I haven't done the costings for TrainLink, so - - -

PN667

Where do these figures come from - this 5.1 million? Apart from the one that you have done, where does the balance of the costings come from?---That would be from the TrainLink sort of finance and transformation teams, I believe.

PN668

Do you know what they have done to come up with those figures?---They basically have something in there that offsets with something above completely, so it removes it. I'm not familiar with the details of it.

PN669

So you assume that the figure for Translink(sic) is 3.5 million, but you have no way of explaining to this Commission whether that figure is one that you in fact can say is correct. You haven't attempted to verify it yourself?---No.

PN670

Do you know whether or not – well, I guess to what extent has the fact that train guards have agreed to give up their right to be provided with practise drives being factored into offsets?---Sorry, are you referring to New South Wales Trains TrainLink here?

PN671

As I understand it – and I might be wrong – it's train guards generally, so that would apply to both entities, agreeing to give up their right to be provided with practise drives, something which will create a saving for the entities. Has that been factored in?---My understanding is for Sydney Trains we already have a 'working on book off day' payment for guards and that was - - -

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN672

You already have a – you just have to speak up, I'm afraid?---Sorry.

PN673

I'm just not catching - -?---For Sydney Trains we already have a 'working on book off day' payment for guards, so they – I believe that was used in the facilitation as an offset back in either 2017 or 2018, so that wouldn't be relevant for Sydney Trains.

PN674

To what extent is the entitlement – the previous entitlement – to depot ratios, which was removed as part of this negotiation, something that has been factored into that 5.1 million to your knowledge?---I'm not aware of any offsets for depot ratios in Sydney Trains and to the best of my knowledge for TrainLink it has not been used as an offset.

PN675

Mr Lang on behalf of the unions has given evidence that changes to the fleet roster are going to give rise to savings to the rail entities. That is, a requirement for the fleet roster to be posted some weeks in advance which reduces the need for late changes which give rise to overtime and like. Is that something that has been factored into offsets?---That's not something we could reliably cost. I've outlined in my statement at paragraph 14 that new rostering arrangements aren't something we can reliably cost until a roster has been developed.

PN676

I see. There may well be further offsets, just not ones that you feel confident you can put a dollar figure on yet?---It's possible as there may well be further costs, as well.

PN677

To the extent to which you have done estimates, I think you make the point that the Commission ought to understand that they're nothing more than estimates. Until these things actually operate in practice, you have no way of knowing whether these figures – or how accurate these figures in fact are?---I believe with some of these figures we have done the best estimate we could possibly do with the information we've got without the conditions being implemented. The electrical safety allowance, you know, we've got a lot of information supporting that from the transport learning and development system on which employees would, you know, have the necessary certifications to obtain that allowance at the varying levels.

PN678

So dealing with that one, the electrical safety allowance, have you got any understanding of what percentage of all employees will be able to access this allowance?---No.

PN679

The figure you have here of 7.75 million is not simply how much increase in gross remuneration employees will receive every pay period, but also includes superannuation and payroll tax?---Yes, it will include superannuation and payroll tax.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN680

Can I deal with the off-duty payment. Is this one that you and your team have verified?---We have done the calculation, yes.

PN681

Yes. This is a payment the effect of which will mean that employees are no worse off financially if they are directed to stay at home than if they had remained on the roster in circumstances where they are required to be at home?---Yes, that's my understanding.

PN682

It was a particular issue, was is not, during those times when as a result of COVID employees who had been in direct contact with relatives who had COVID or for other reasons were required not to attend work and suffered a reduction in remuneration?---I'm not aware of the issue throughout COVID.

PN683

You examined a particular period, October '21 to December '21?---Yes, that's correct.

PN684

And you accept that that is a period during which it is likely that there was an increased number of employees who were required to be directed to go home and not work because of COVID?---Sorry, are you asking if that data included employees who were stood down as a result of COVID?

PN685

Yes?---I don't believe so. I believe that's more operational off-roster information.

PN686

So the notion of people who are getting an additional payment because they're directed to stay at home, when you looked at data for the period of October '21 to December '21 what is the cohort of employees that were included as being people who were directed to stay at home?---We did the analysis based on the train crew off-duty/off-roster information over that period.

PN687

Yes, and as I understood your earlier answer you said, well, that did not include people who were required to stay at home because of COVID?---I don't believe so.

PN688

What is the basis for you coming to that view?---The numbers that we used in the calculation I recall being similar to when I used to support train crew years ago in terms of the operational off-duty numbers.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN689

I see, so the reason you came to the view is that you had some recollection of something that happened some years earlier when again staff were directed to not attend work?---No, in areas like train crew there are always a certain number of

crew that will be off duty or off roster for a variety of different reasons, so that's something that's sort of tracked and monitored in that business.

PN690

As I read the explanation, having done that calculation based on data for the period of October '21 to December '21, the full figure was achieved by taking that figure and doubling it?---Yes. We did not have in the time we had available to do the costing access to the similar information for other parts of the business, so - - -

PN691

So there is an assumption that whatever is true for train crew is true for all the other employees combined?---That's a high level assumption, yes.

PN692

That high level assumption, do you accept, has some difficulties given that train crew work on these master rosters but a large percentage of the balance of the workforce do not have this issue?---There are other parts of the workforce that do have master rosters, but, yes, there are other parts of the business that don't, as well.

PN693

Is this an example of when you indicated earlier in paragraph 13 that these are estimates, the extent to which they can be capable of being verified is difficult. This is a particular example of that, is it not?---Yes, this would be an example of where it is a higher level estimate.

PN694

Yes. The living away from home allowance change, is this the case: part of this change is that instead of employees receiving an allowance which includes an amount referable to accommodation, they will instead receive only an allowance referable to meals that arise during the period they are away from home and the business will instead pay for accommodation directly?---Yes, that's correct.

PN695

Am I right, too, that the majority of the increase in what sets the employee-related costs arises from an assumption as to the fact that that will in fact – that is, payments to accommodation providers directly is going to be where the increase in costs arises?---It's the net difference between the payments to accommodation providers for accommodation and parking and the fourth bed service that was previously provided to that group of employees.

PN696

The amounts that have been paid for meals is increasing but only by a small margin referable to inflation. It may be referable to something else; I should withdraw that. There are four components of the allowance at the moment. Let's deal with that. The first three components are each reimbursing for meals, breakfast lunch and dinner?---Yes, I believe so.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN697

And the fourth is accommodation?---Yes, bed, I believe it's called.

PN698

To the extent to which this change is occurring, is there any change at all to the amounts paid for breakfast, lunch and dinner?---No, they are remaining at the current - - -

PN699

So the entire increase in costs is referable to the fact that what your team has identified is that by no longer paying employees for accommodation but paying for the accommodation directly, that will lead to an extra approximately \$3 million being spent?---But the difference between paying for the accommodation and the parking and offset with the value of that fourth payment you mention.

PN700

This is an example, is it not, where this change is not a change that's actually going to lead to employees receiving an extra \$3 million? It's a change in employee-related costs because there's higher costs of providing accommodation for them, but they don't receive that money?---Yes, that's correct, they don't receive the money; however, I guess to the extent that the \$52.50 was enough to pay for their accommodation in the past, they probably are receiving some more than what they were previously receiving.

PN701

But wasn't the issue raised in bargaining that that amount clearly was inadequate given the costs of accommodation and a higher amount needed to be paid?---I was not involved in bargaining.

PN702

To the extent to which your statement has made statements to the effect that the 2.1 per cent that you've calculated can properly be described as an increase in annual gross earnings, you would accept that, at least in respect to this LAA chain, you would need to take out the .22 per cent because that's not referable to any increase in average gross earnings, is it?---Well, yes, I will accept that.

PN703

Can I then deal with the increase in the overtime cap for operational RC graded employees. I think you've already accepted that the actual figure is less than the figure here of 1.45 million or .1 per cent as a result of information you have since received, so I think I can pass on and I won't ask you to deal with that. Relief signallers to work a standard 24/7 rotating roster, is the change here one, as you understand it, that will mean that signallers on relief lines will get an increased amount of access to weekend work?---Yes.

PN704

That occurs by them being placed on a rotating roster, which they previously were not placed on?---Yes, correct.

PN705

Those particular signallers will, because they have access to weekend penalties, receive some additional remuneration?---Yes.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN706

They are, though, replacing, are they not, employees who otherwise would have been doing weekend work that would have accessed that additional remuneration, so in what manner is it increasing the costs by 1.59 million?---I'm not aware that they are replacing other - I mean the other employees are still getting paid if they're sick, or whatever the nature of the relief arrangement is.

PN707

The bottom line is the relief signallers, because they will be working on the weekend, will in fact receive additional pay referable to the fact that the enterprise agreement has penalties for working on the weekend, but the only reason this is included is because the net effect of that is that total employee-related expenses will increase as a result, not that relief signallers are getting an increase in their rate of pay?---Sorry, can you reframe that question?

PN708

Let me put it differently. You've done this calculation on an assumption that the Trains entities won't, in effect, reduce remuneration to other workers in respect of work that these relief signallers will be replacing?---Yes, that's accurate.

PN709

ACTING PRESIDENT HATCHER: Mr Quaintance, why is this item regarded as an employee enhancement, that is, presumably, if the rail entities are setting up these rosters because there's work on weekends that needs to be done, whether an employee sees that as a benefit or not may depend upon the employee?---We calculated what we believe is the incremental cost associated with the change.

PN710

But that's a cost arising from the fact that the entities require work to be done on weekends; it's not a cost arising from the fact that employees necessarily want to work on weekends or - - -?---Yes.

PN711

Do you accept that?---Yes.

PN712

MR TAYLOR: Other the heading 'Other Conditions' there's a number of conditions which have been collectively costed at 6.09 million, the second of which deals with a situation or a change for engineering and maintenance field-based employees who would be given penalties if they don't get at least a 10-hour break. Am I right so far?---Yes, I believe that's correct.

PN713

Am I right - I'm referring, I think, to some evidence that Trains' employees have put on - these employees in question currently get additional penalties if they don't have at least an eight-hour break?---I'm not familiar with that.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN714

So when this costing was done, was it done on the basis that this was a brand new entitlement, or was it done on the basis that it would only arise if employees were

required to work having had more than eight but less than a 10-hour break?---I believe, to the best of my recollection, it was a 10-hour break and obviously there was an assessment done by the business of, you know, how often the business could potentially not be able to meet that requirement and the double time penalty would apply for that percentage of instances and that was how we derived the cost.

PN715

When you say 'We', I'm just not sure whether, in light of the last answer, you derived a cost at all or simply accepted a dollar figure that you were told?---We worked with the business to develop the costing. Obviously, we're not subject matter experts and every - in the enterprise agreement or operationally how the business works, so we do need to rely on business SMEs and how some of the stuff works.

PN716

Are you able to know whether, when these subject matter experts came up with this, they were taking into account that these penalties already arise if there's a less than eight-hour break?---Yes, so it was the incremental above the eight.

PN717

It was?---Yes.

PN718

You accept that if, in fact, employees are not asked to work until they'd had a 10-hour break, then this won't arise at all?---Yes, and I guess to my earlier comment, there was an assessment made - obviously, if everyone was getting a 10-hour break, there would be no cost - and there was an assessment made that there will be a cost, that there will be a certain percentage of situations where operationally they can't meet the 10-hour break requirement.

PN719

The 1.5 per cent loading applied to ordinary base pay for professional engineers, what were the assumptions made in this respect?---So, we were advised by the business how many people may apply to be professional or go through the process to be professional engineers and then there was an assessment of the additional 1.5 per cent value on their base pay.

PN720

What was the figure that you were told as to - - -?---I can't recall the exact number of engineers.

PN721

Did you do the calculations?---I did.

PN722

That is you and your team do the calculations?---Yes.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN723

Did those calculations necessarily start from the point of view of the amount of base pay that's paid to all professional engineers?---This is an incremental 1.5 per cent.

PN724

Yes?---Where they supervise staff.

PN725

I'm sorry?---This is an incremental 1.5 per cent above their current rates of base pay where - - -

PN726

Yes. I'm saying the starting point - I might be wrong - but I was suggesting to you the starting point is the base rate of pay for all professional engineers and then one would then work out what 1.5 per cent of that is, subject to a percentage, i.e. it's not a hundred per cent of professional engineers but some lower percentage?---Yes, I can't recall the exact specifics of the calculation.

PN727

I see. Ms Falvey has given some evidence about this which is to the effect that it's not all professional engineers who would or could successfully apply to become a registered or chartered professional engineer and meet one of the two criteria to get this allowance. Is that your understanding?---I'm not sure exactly what Ms Falvey is referring to.

PN728

But you do understand that this allowance does not apply to professional engineers that do not supervise?---Yes, it's people that supervise is my understanding.

PN729

Ms Falvey's evidence, by reference to other organisations, is something in the order of about 25 per cent of professional engineers might be expected to successfully apply for the relevant recognition which would qualify them for 1.5 per cent. Is that a figure that you used?---I can't recall the figure we used, but, again, I'm not in a position to talk to something that another witness has - - -

PN730

Do I take it from the way the calculations have been done that all these calculations assume that the full amount will be payable from day one of the enterprise agreement?---Yes, this is an annualised view; this isn't, you know, a cash flow-based view, which is a sort of part-year impact.

PN731

You didn't factor in the fact that it might actually take some six or more months before criteria is developed which will allow any professional engineer to apply for this amount?---No, we have taken the (indistinct) cost of what we believe the ongoing run rate of these costs will be.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN732

The cab allowances, the cab allowance for drivers incorporated and cab and security allowance for guards incorporated into hourly rates, so there's two - I want to deal with them together unless you identify - and feel free to identify - in response to my next question if there's a difference, but, by their very nature, I suggest to you there's no change in gross remuneration or superannuation that arises from rolling an allowance into base pay?---The allowances that were determined during bargaining were higher than the value of the cab and the security allowance. These items were previously offered in facilitation in 2017/18 and it was determined that the amount offered was going to essentially match what was previously offered in facilitation with the three lots of 3 per cent from the previous enterprise agreement; hence there was a cost differential between the actual cab and security allowance offset and the - you know, there was basically a top-up required to match those previous rates that were offered.

PN733

So the rolling it in aspect made no difference, but the fact that what was rolled in was actually a higher amount is where this calculation comes from?---Yes.

PN734

The compassionate/bereavement leave increase from two to five days, I asked you broadly about in what way that would change remuneration for employees earlier. It may be that your answers more generally are specific to this particular change, but is there some - is it the case that you were able to identify some increase in costs arising from employees being able to take more than two days of compassionate/bereavement leave?---Sorry, can you reframe your question?

PN735

Other conditions, cost impacts all below .1 per cent each - the last on that page is compassionate/bereavement leave increase from two to five days. As I understand it, and tell me if I'm wrong, you were able to identify this would have an increase in employee-related costs, firstly - so far I'm on the same page as you?---Yes.

PN736

What I'm suggesting to you, that does not give rise to any increase in remuneration to employees. To the extent to which there's any costs, it could only be arising from the costs involved in backfilling their work in some manner?---I think I'd refer to that comment I made earlier that, to the extent - again, some of these are very difficult to cost or estimate because they are very individual circumstances - but, to the extent where five days is available - I mean it depends whether you're talking about the individual, but you would obviously consider the cover cost as well, but - - -

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN737

Yes, which comes back to a question I asked earlier. To the extent to which your evidence is that the 2.1 per cent is an increase in average employee remuneration, it isn't, is it? What you've done is a calculation of an increase in employee-related costs against existing employee-related costs; it doesn't necessarily correlate to any increase in average remuneration of employees?---It's very difficult to say

when you're dealing with 12,000 people. Obviously, in some instance, yes, that would be the case; in others, it won't.

PN738

But these things added together, even if we accept the basis upon which the assumptions are made as being valid, are no more than a calculation of an increase in Trains' - the two entities' - employee-related costs. You haven't attempted to calculate what the increase is in remuneration of employees across employees, never mind any particular employee?---I think I've said in my statement it's a high level assessment of the value of these conditions, the 2.1.

PN739

By 'the value', you mean the cost to Trains of providing them?---And there's a portion of that that has financial benefit to the employees.

PN740

Yes?---And there's some portions that, as you say, are probably a cost to provide.

PN741

The next one, which is at the top of the next page:

PN742

Equalised meal allowance arrangements for waged infrastructure workers. Waged infrastructure workers will now receive the same meal allowances as salaried infrastructure workers.

PN743

I don't know whether this has been brought to your attention, but Mr Lang has put on evidence, and he's not being cross-examined, that this equalisation arrangement has in fact been in place since 2018. This is not a change?---I'm not aware of that.

PN744

Of course, if that were right, then that line item would have to come out of this and some adjustment be made as a result. Do you accept that?---My understanding is it is a change, but I can't comment to what Mr Lang has said.

PN745

No. You have been asked to assume that it is a change is about as high as you can put it?---Sorry?

PN746

When you say you understand that it is a change, what you are saying is someone has told you that it is a change and you have assumed that that's correct, but you, yourself, have no independent knowledge about that?---My understanding is it is part of what is in the - actually been put on the (indistinct) website as a change in the enterprise agreement, so it is a change, and it's - - -

PN747

Yes, a change in the text - - -

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN748

MR SHARIFF: Can you let him finish.

PN749

MR TAYLOR: I'm sorry, I thought he had.

PN750

THE WITNESS: It's an incremental cost, obviously, of providing the same level of meal allowances to waged infrastructure workers as we do for salaried infrastructure workers.

PN751

MR TAYLOR: If, in fact, Mr Lang is correct and this amount has in fact been paid since 2018, just not contained in express terms in the enterprise agreement, then the only change is that there's now a legal obligation to do that which was being done before; do you accept that?---I'm not familiar with Mr Lang's - whether that's correct or not.

PN752

The next one, the increase to HV cables competence classification. Mr Bevall has given some evidence, and he's not being cross-examined, that this is, to his knowledge, going to apply to six workers. Is that the assumption upon which the calculation was done?---I can't remember the exact number; it is quite a small number of workers.

PN753

Finally, the last one, new group leader role for plant mechanic stream at pay level 4.3. Again, Mr Bevall has given some evidence about this. Were the calculations done on the basis that this change will create three new positions?---I can't recall the exact number, but it was, again, a small number of work group leaders - it might have been four. I can't recall the specifics.

PN754

Creating new positions at a higher level, which increases employee-related costs, but is not actually increasing any employees' remuneration; do you accept that?---Well, it depends on the employee you're referring to.

PN755

Unless they successfully apply to be appointed to the promotional position, it's not increasing pay, it's simply creating additional higher level positions which attract, by the nature of their position, a higher level of pay?---Yes.

PN756

In your second statement - and we can turn to it if you like, but I think you will remember this broadly - you do some calculations based on the increase in employee-related costs that flow from applying the union claim, as advanced in submissions, of a 6 per cent increase each year, commencing 1 May 2021 over three years, less the amounts that have already been budgeted, and you come up with a total figure of \$533 million?---Yes.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN757

Would it be convenient to open it? I've got no difficulty with you doing so. Just give me a moment?---Sorry, what's the page reference again?

PN758

Yes, I'll find that. I'll get it in a sec. 2540. I'm sorry, my friend says I've got the wrong figure. 566 million. I'm glad we went to it because I misled you by giving you the figure of 533. You will see there at paragraph 7:

PN759

My team and I have undertaken a costing. The incremental cost of the remuneration position is \$566 million over three years.

PN760

That's made up of, as the last box in paragraph shows, two things, is it not? Firstly, the increase in employee-related expenses each year over what would otherwise be the case under the enterprise agreement and, secondly, a change in leave entitlements?---Yes, that's correct.

PN761

The first is an increase in operating costs each year?---Yes.

PN762

The second is an increase in liabilities, is it not?---No, what's shown is the increase in operating costs, but the liability is the leave entitlements in those top two boxes for the rail entities' remuneration position and the CRU remuneration position. The movement in the entitlements is expenditure in the profit and loss.

PN763

When one has total employee-related expenses for a year ending 30 April 2022, does that not include any payments made to employees when they are taking leave?---Sorry?

PN764

Total employee-related expenses for the year ending 30 April 2022, whatever that figure is?---Yes.

PN765

Take, for example, in the first box, 1.694.3 million?---Billion.

PN766

Pardon?---Billion.

PN767

Billion - my apologies - billion. That figure, that includes, does it not, payments made to employees while they are on leave?---Yes, it does.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN768

The leave entitlements are the entitlements they are accruing during the course of the year, are they?---Yes. What this is trying to show is what we describe as the revaluation of the leave entitlements.

PN769

Yes?---So when employees are given a pay increase, their leave is worth more.

PN770

Yes?---And, obviously, in the rail entities' position versus the CRU position, there's a differential on the value of that leave.

PN771

Yes. To the extent to which it is suggested that the increase will require additional payments to be made for leave, that's wrong; rather it's an increase in the liability that Trains is carrying for leave during the course of that year which is going to increase?---No, I don't agree with that. Ultimately, the leave entitlements are paid out one way or the other, either employees - you know, a lot of employees, with their long service leave, might hold that until they ultimately retire.

PN772

Yes?---Which they are paid it out at the higher value.

PN773

At some later point. That was the only thing I was trying to get clear about. I think we may be on the same page. There's not a suggestion that in these three years, the additional payments will be 566 million; there will be increased payments - you calculate at 496 million - and increased liability of payments that will be made in the future over and above what would otherwise be accruing of another 70 million?---Yes, and, obviously, the extent to what amounts that are cashed out in the next three years, I can't make an assessment of that.

PN774

No, but to the extent to which they are cashed out, they would be part of employee-related expenses, which are captured, are they not, in the first figure?---No, because it would be higher than what's captured in that first figure because it would be at a higher value.

PN775

Thank you. They are the questions.

PN776

ACTING PRESIDENT HATCHER: Re-examination?

PN777

MR SHARIFF: Nothing arising.

PN778

ACTING PRESIDENT HATCHER: Thank you for your evidence, Mr Quaintance, you are excused and you can leave?---Great, thank you.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN779

MR SHARIFF: That's the evidence for today. We have Dr Stanford and Mr Houston tomorrow. We will have a look at the table overnight and get Mr Houston to comment on that. I've got to confess, as a matter of candour, that I've had some anxiety about something that your Honour the Vice President said earlier this morning when your Honour said to Mr Taylor that the question as put is one about remuneration, not necessarily fixed to a point in time within the continuum.

PN780

Obviously the parties have put their rival positions and we obviously urge our position upon the Full Bench, but if there's some other position then, I think, as a matter of fairness to my clients, we would want some notice about that.

PN781

ACTING PRESIDENT HATCHER: Sorry, what is your position?

PN782

MR SHARIFF: Our position is that that which has been put forward, 2.53 and 3.03 - - -

PN783

ACTING PRESIDENT HATCHER: Sorry, I can't hear you, Mr Shariff.

PN784

MR SHARIFF: That which has been put forward should be accepted, and no more.

PN785

ACTING PRESIDENT HATCHER: Yes.

PN786

MR SHARIFF: They say it should be 6 per cent every year. If there's going to be something else, I'm just identifying that we would - - -

PN787

ACTING PRESIDENT HATCHER: I'm still a bit unclear as to what I said that caused the concern.

PN788

MR SHARIFF: I think what you said to my learned friend was in response to question 1, the way the question has been framed is that it is remuneration during that period, that your Honour's don't feel bound by one party's position or another is the way I'd understood it.

PN789

ACTING PRESIDENT HATCHER: Well, I think I raised two issues.

*** JAMES PETER QUAINANCE

XXN MR TAYLOR

PN790

MR SHARIFF: Yes.

PN791

ACTING PRESIDENT HATCHER: The first was the question of a datum point for the purpose of analysis, given both parties have filed expert evidence comparing the wage increases to inflation, and it seemed to me that Dr Stanford had proceeded on the basis of a datum point of the last increase on 1 May 2020 and, although he wasn't fixed on that, Mr Houston had gone back to 2011.

PN792

MR SHARIFF: Exactly.

PN793

ACTING PRESIDENT HATCHER: So that was the first question. The second question was in respect of what answer might be given to question 1. Did the question in respect of remuneration direct itself only to base rates of pay or does it relate to any monetary benefit which might flow?

PN794

MR SHARIFF: Yes.

PN795

ACTING PRESIDENT HATCHER: Just to give an example - - -

PN796

MR SHARIFF: Yes, that's what I would like to tease out.

PN797

ACTING PRESIDENT HATCHER: Just to give you - I'm not saying it's in anybody's mind, but just as an entirely hypothetical example, could we say that the one-off payment should be increased to \$6000 as an answer to question 1?

PN798

MR SHARIFF: That's really what I was trying to inelegantly put, that the parties have put their rival positions, but the formulation of the question is, I think, sufficiently broad to pick up some alternative, and all I'm really saying is my clients' position is we would like to proceed into submissions tomorrow at the conclusion of the evidence. I know my friend's got a different view, but that's what we would like to do. But, if there's some other thing to consider, then, I don't know, in the course of argument or after we close submissions, then it's just a matter of procedural fairness that we have an opportunity to be heard about that. It's really alarm-raising.

PN799

ACTING PRESIDENT HATCHER: I think you can assume that we won't be considering an outcome more than what the unions have proposed.

PN800

MR SHARIFF: I am pleased to hear that.

PN801

ACTING PRESIDENT HATCHER: Or less than what the rail entities have proposed.

PN802

MR SHARIFF: I was surprised there wasn't an amended application after yesterday's RBA announcement, yes, but we would obviously wish to be heard if that were to happen. I'm just saying that we've come here to deal with the case, but if there's some other thing, for example, hypothetically your Honour was to put to us in the course of argument, that is something I would need to get some information about from the likes of Mr Houston and also some instructions.

PN803

ACTING PRESIDENT HATCHER: While you are there, Mr Shariff, am I right in saying that as a result of clause 11.6 of the new agreement, the one-off payment either should have been made or is imminent, that is, it talks about it being made in the first full pay period commencing on or after the agreement being made?

PN804

MR SHARIFF: My instructions are it is going to be made in the next week or so.

PN805

ACTING PRESIDENT HATCHER: All right. I only raise it because, if I've read Mr Houston's report correctly, he puts it in the next financial year and I was just wondering why that's the case.

PN806

MR SHARIFF: Well, as I apprehend it, there's going to be a rival contention - I might be wrong about this - that it should actually be allocated to the past financial year.

PN807

MR TAYLOR: The current one.

PN808

MR SHARIFF: The current one?

PN809

ACTING PRESIDENT HATCHER: How you allocate it - perhaps someone will explain what it's for at some stage, but - - -

PN810

MR SHARIFF: Well - - -

PN811

ACTING PRESIDENT HATCHER: Or maybe not, but, as a simple matter of chronology, if it's going to be made in this financial year, Mr Houston seems to have it being paid in the next financial year.

PN812

MR SHARIFF: We will have a look at that. I think that's, as we apprehend it, something that my learned friend's side wish to put to Mr Houston, but, as to its purpose, I think it's been made clear in what has transpired, but I would also, I

think, identify that Commissioner Riordan has conducted several conciliations in this Commission and it will be evident what the purpose of it is, but we can address that in submissions. I see Mr Taylor looking at me with a puzzled look.

PN813

MR TAYLOR: I've got no idea what he means.

PN814

MR SHARIFF: But the idea that you are going to get a \$4500 one-off payment, but let's not take that into account for the purpose of purchasing power and cost of living, whether it's this financial year or in the next, what does it matter? What is being presented is that, over the next - looking back and going forward, both parties are proceeding on the basis that there is some rate of inflation, known and projected.

PN815

What we have been met with is, 'Well, you've got to have wage rates equivalent to the rate of inflation for real wage growth and that's it.' As I opened on this morning, I think alluding to the further jurisdiction this Commission has now inherited, how one determines those things is a very important question of principle.

PN816

ACTING PRESIDENT HATCHER: That's led me to a question to you, Mr Taylor. Having regard to the submissions in reply filed by the rail entities, should we proceed on the basis that we are answering the questions in the context of a section 739 dispute, that is, we can put section 240 aside?

PN817

MR TAYLOR: Is that something that - I might consider that overnight and respond in the morning, if I could?

PN818

ACTING PRESIDENT HATCHER: Yes, all right.

PN819

MR SHARIFF: Whilst we are at it, just because these are matters important to submissions, is that both parties have said - putting to one side what our learned friends say about the principles one imports from section 240 or workplace determinations - both parties have indicated to your Honours that one looks at the objects of the Act, as one must, but the objects of the Act are framed in reference to the national economy, and here we are trying to resolve a question particular to an enterprise, and these do raise very important questions of principle, and that's why I'm saying I'm going to try and spend some time on that tomorrow afternoon, but if there's something else that I need to consider, I would need some assistance from those behind me.

PN820

ACTING PRESIDENT HATCHER: Yes. We will now adjourn and we will resume at 10 am in the morning.

ADJOURNED UNTIL THURSDAY, 09 FEBRUARY 2023

[3.27 PM]

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