



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER RYAN

AG2022/5602

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

**Application by Oipo Pty Ltd
(AG2022/5602)**

Sydney

1.00 PM, THURSDAY, 27 APRIL 2023

Continued from 13/04/2023

PN1

THE COMMISSIONER: Good afternoon, or good morning, depending on where you're located. I will take appearances. Mr Patrick, you appear for the CFMMEU and the AWU?

PN2

MR J PATRICK: That's correct, Commissioner, yes.

PN3

THE COMMISSIONER: Thank you. And for the applicant we have Mr Pollock I can see.

PN4

MR A POLLOCK: Yes, thank you, Commissioner, (indistinct) my appearance.

PN5

THE COMMISSIONER: Thank you. Now, I note the parties have filed some documents with my chambers over the course of yesterday and today. How would the parties propose we proceed today. Mr Pollock?

PN6

MR POLLOCK: Thank you, Commissioner. You will recall that on the previous occasion we dealt with an application from the CFMMEU for order for production of documents and those being payslips for the relevant employees, and that application you will recall was made shortly prior to the hearing and you gave an indicative view as to the apparent relevance of those documents, at least for a confined period, and in response to that indicative view my client produced those documents.

PN7

You will recall also that I indicated we may need to adduce some additional evidence to explain and textualise those documents. Rather than do that on the fly orally we have sought to ensure that my learned friend has notice of what the witnesses are going to say about those things. So to that end we have provided chambers and to the intervenors yesterday three short statements that we would seek leave to file and rely upon. Two of those statements go to explaining the content of the payslips and the reasons why those payslips were issued by Polaris Metals and not Oipo.

PN8

THE COMMISSIONER: Mr Pollock, I might just - sorry to interrupt you, but I just interrupt to indicate we are getting some feedback or some static when you're talking.

PN9

MR POLLOCK: Commissioner, if you bear with me just one moment I'm going to just flick over to another microphone and see if that assists.

PN10

THE COMMISSIONER: Thank you.

PN11

MR POLLOCK: Is that any better, Commissioner?

PN12

THE COMMISSIONER: That's much better. Thank you, Mr Pollock, please continue.

PN13

MR POLLOCK: Thank you. As I was saying, Commissioner, two of those statements go to explaining the content of the payslips and the reasons why those payslips were issued by Polaris Metals and not Oipo, my client. The third goes to the question that arises during the course of cross-examination about the signed contracts of employment. You will recall my learned friend pursued a line of cross-examination with Mr King suggesting that - or the import of the line of cross-examination was that a Jones v Dunkel inference will be drawn from Ms Rohr's absence, being the person who informed him that the contracts had been signed and returned.

PN14

Now, Ms Rohr was overseas and unavailable at the time that the evidence was prepared at trial. She has now returned and the import of her witness statement is to give direct evidence about her distribution of the Oipo employment contracts to each of those employees in the voting group, and her receipt of signed contracts from each one of them.

PN15

Commissioner, in my submission there's no apparent prejudice that can arise in us being granted leave to file and rely upon those statements. They are confined statements, they deal with issues that have been previously flagged, and perhaps most importantly, Commissioner, it is necessary as a matter of fairness that they be admitted to answer points arising in two ways. Firstly from the documents provided in answer to the application that is raised at the hearing, and points arising for the first time at the hearing, i.e. the Jones v Dunkel inference that's sought to be drawn and the significance to be made of the absence of these signed contracts.

PN16

My learned friend has had those statements since yesterday afternoon. He may have something to say about all that, but in circumstances where the issues are confined and they are, in my submission, necessary from a matter of fairness for us to be able to answer those points that we would seek leave that they be admitted.

PN17

THE COMMISSIONER: So the King statement and the O'Connor statement deal with the payslip issue, and the Rohr statement deals with you say - - -

PN18

MR POLLOCK: The contract issue.

PN19

THE COMMISSIONER: The contract - - -

PN20

MR POLLOCK: That's right.

PN21

THE COMMISSIONER: And I note there was some additional documents regarding Marco Gemignani.

PN22

MR POLLOCK: Yes. As I understand it the documents previously provided on the previous occasion had been in one respect incorrectly provided and my instructors have circulated the correct document.

PN23

THE COMMISSIONER: Thank you. Mr Patrick?

PN24

MR PATRICK: Thank you, Commissioner. I will deal with these in two separate categories. Firstly turning to the witness statements, the further witness statement of Mr King dated 26 April and the witness statement of Ms Gunston also dated 26 April. We think that - - -

PN25

THE COMMISSIONER: Sorry, who was the second person?

PN26

MR PATRICK: Ms Gunston. Her maiden name is O'Connor, Commissioner.

PN27

THE COMMISSIONER: I see. Okay, thank you. Yes.

PN28

MR PATRICK: With respect to those statements, Commissioner, we say that the payslips are business records and they speak for themselves. On that basis we don't see the need for the statements explaining them. That's the extent of our objection there. If you are minded to admit those statements we seek to cross-examine Mr King on his statement in particular.

PN29

With respect to Ms Rohr's evidence Ms Rohr has provided evidence that could fairly be characterised as opinion. For example at 5 of her witness statement Ms Rohr refers to change of condition letters for the employees that were transferring to Oipo. The interpretation of the change of condition letter is an issue that was flagged during Mr King's cross-examination, and we say that that is a matter of law, that that is determined by the correct construction of the change of condition letter. I don't propose to object to Ms Rohr's evidence being admitted. However we do object to the extent that it characterises the contract, or it characterises the change of condition letter as one of transferring an employee to Oipo. We say that's a question for you and it's a question that will be determined - - -

PN30

THE COMMISSIONER: Just to cut through that, Mr Patrick, you don't object to the tender of Ms Rohr's evidence or the statement, but you may have some objections or submissions to make as to the weight or the characterisation she places on that as in her evidence?

PN31

MR PATRICK: That's correct, Commissioner. We will make submissions that the correct characterisation of those letters of offer aren't such that the employees transfer to Oipo Pty Ltd.

PN32

THE COMMISSIONER: And will you be seeking to cross-examine Ms Rohr as well?

PN33

MR PATRICK: Commissioner, we don't seek to cross-examine Ms Rohr. We say it's a matter of opinion. It's clear on the face of the documents. We say if you agree with us Ms Rohr's evidence is neither here nor there, we just object on the basis of it being (audio malfunction).

PN34

THE COMMISSIONER: And in relation to the other two witnesses you seek to recall Mr King for further cross-examination?

PN35

MR PATRICK: We object on the basis that they are business records and they speak for themselves. However, if you are minded to admit them, which we understand is your prerogative, we would seek to cross-examine Mr King both on the content of the payslips and on some of the further information that he's put in his witness statement.

PN36

THE COMMISSIONER: Very well. Mr Pollock, I don't need to hear from you in reply. I am minded to admit the statements of the three witnesses and Mr Patrick will be given the opportunity to cross-examine Mr King. We might just deal with this in this order. We might just deal with the Rohr statement first. I will hear from Mr Patrick as to whether there's any objections.

PN37

MR POLLOCK: Commissioner, I take it from those observations that we can simply tender subject to what my learned friend has to say about objections and we don't need to actually have Ms Rohr joined to the hearing and sworn in. You're content for it to be dealt with on an on papers tender?

PN38

THE COMMISSIONER: Mr Patrick?

PN39

MR PATRICK: Happy to proceed that way, Commissioner, no need for Ms Rohr to join the line.

PN40

THE COMMISSIONER: Mr Patrick, why don't you take me through the objections you have to the statement of Jennifer Rohr.

PN41

MR PATRICK: Commissioner, the first will be the last sentence of paragraph 5. Essentially the foundation of all of the objections is the basis that Ms Rohr is expressing opinion that the employees transferred to Oipo, and that that's a matter of law. We say that that occurred - in the last sentence of paragraph 5 that the employees were transferring to Oipo - - -

PN42

THE COMMISSIONER: Wouldn't it be paragraph 5? There is only one sentence in paragraph 5.

PN43

MR PATRICK: Then I apologise, Commissioner. We object to the first sentence of paragraph 6 to the extent that it characterises the employees transferred to Oipo. The final sentence of paragraph 6, again to the extent that it characterises that the employees transferred to Oipo Pty Ltd. Again in paragraph 10 - sorry, Commissioner, just bear with me one moment. Again in paragraph 10 evidence stating that Ms Rohr was running employees through the rosters that they work at Oipo. We say whether they were working rosters at Oipo or Onslow Iron Pty Ltd, or anybody else is a matter for the interpretation of the contracts. The second sentence of paragraph 10 to the extent that Ms Rohr suggests the employees transferred to Oipo Pty Ltd. That's the extent of our objections, Commissioner.

PN44

THE COMMISSIONER: So the objections really go to Ms Rohr's characterisation?

PN45

MR PATRICK: That is correct, Commissioner, yes.

PN46

THE COMMISSIONER: I am not minded to strike those matters out, but you will be given the opportunity to make submissions in relation to those matters.

PN47

MR PATRICK: Commissioner, we are content with that (indistinct). We just don't want it suggested later on in the piece that we have admitted evidence of Ms Rohr that we haven't challenged, and that evidence directly goes to the employees being employed by Oipo Pty Ltd.

PN48

THE COMMISSIONER: Thank you.

**EXHIBIT #6 STATEMENT OF JENNIFER ROHR DATED
26/04/2023**

PN49

We will now deal with the statement of Nicole Gunston, that statement being dated - - -

PN50

MR POLLOCK: It's also 26 April, Commissioner.

PN51

THE COMMISSIONER: Thank you, Mr Pollock. Mr Patrick, any objections?

PN52

MR PATRICK: (Audio malfunction) objections, Commissioner, just the objection we have already dealt with.

PN53

THE COMMISSIONER: Very well.

**EXHIBIT #7 STATEMENT OF NICOLE GUNSTON DATED
26/04/2023**

PN54

That brings us to Mr King, and, Mr Patrick, I understand you wish to cross-examine Mr King in relation to documents produced, as well as his further statement; is that correct?

PN55

MR PATRICK: Yes, thank you, Commissioner.

PN56

THE COMMISSIONER: Do we have Mr King available, Mr Pollock?

PN57

MR POLLOCK: I understand that to be the case. I will make sure that my instructors get him on the line momentarily.

PN58

SPEAKER: Yes, we do.

PN59

MR POLLOCK: Commissioner, can I also indicate I'm having a lot of trouble hearing Mr Patrick. I'm not sure whether you're having the same issue, but (audio malfunction).

PN60

THE COMMISSIONER: There has been a couple of times where it's just faded a little bit, but, Mr Patrick, if you could perhaps just adjust your volume upwards that may assist. You're on mute at the moment.

PN61

MR PATRICK: Thank you, Commissioner. I've moved the microphone close to me and I will attempt to speak louder. Is that okay, Mr Pollock?

PN62

MR POLLOCK: Projection is perfect, Mr Patrick.

PN63

THE COMMISSIONER: I might just ask the parties at this particular point is there any difficulty with hearing the Commission?

PN64

MR POLLOCK: No, Commissioner, we are well adept at listening intently to the Bench.

PN65

THE COMMISSIONER: So, Mr Pollock, how are we going with Mr King?

PN66

MR POLLOCK: I understand that he's being joined as we speak. The vagaries, Commissioner, of running hearings when the Bench is in Sydney, the counsel are in Melbourne and the witnesses are in Perth.

PN67

THE COMMISSIONER: Video does add some efficiency, but also I think it takes some away at times.

PN68

MR POLLOCK: Indeed. Commissioner, while we're waiting if I can just briefly discuss programming just from a time - I'm not sure how long my learned friend intends to be with Mr King and then with Mr Tonkin, but I suppose I'm enquiring as to how late you were intending to sit this afternoon and whether we're in a position to close today or whether it is a more likely outcome that we finish the evidence and perhaps put on written submissions in writing or come back another day for closing submissions. I'm not sure whether you turned your mind to how you prefer to conduct the proceedings.

PN69

THE COMMISSIONER: I am open hearing from the parties on that. Mr Patrick, perhaps the ball is sort of in some respects in your court because the remaining witnesses to be cross-examined will be cross-examined by yourself. So do you have an indication as to how long you will be with the witnesses?

PN70

MR PATRICK: Sorry, Commissioner - - -

PN71

THE COMMISSIONER: I'm not holding you to it, I'm just seeking an indication at this stage.

PN72

MR PATRICK: Yes, thank you, Commissioner. I believe with Mr King I will be relatively short, 15 to 20 minutes I would assume. With Mr Tonkin that could be somewhat longer, I'd estimate potentially an hour. In closing submissions I would suggest somewhere between 45 minutes and an hour, Commissioner.

PN73

THE COMMISSIONER: That would put us roughly around - depending on how long you may be, Mr Pollock, in terms of any re-examination, closing submissions, we may be able to round it out today, but why don't we get the cross-examination and revisit it. It may be the parties may indicate (indistinct) from the cross-examination whether they prefer to have submissions in written form. I'm open to hearing any submissions on it.

PN74

MR POLLOCK: Thank you, Commissioner. By the looks of things, Commissioner, Mr King is now on the line.

PN75

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

PN76

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

PN77

MR KING: Yes. Damien Francis King, (address supplied).

<DAMIEN FRANCIS KING, AFFIRMED [1.21 PM]

EXAMINATION-IN-CHIEF BY MR POLLOCK [1.21 PM]

PN78

THE COMMISSIONER: Mr Pollock?

PN79

MR POLLOCK: Thank you, Commissioner. Mr King, you will recall on the previous occasion we tendered two witness statements that you previously prepared. I understand that you've prepared a further witness statement in this proceeding?---Yes, that's correct.

PN80

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

PN81

Can you just confirm to me that that statement runs to four paragraphs and is dated 26 April 2023?---Yes, correct.

PN82

And you've had an opportunity to read that statement recently?---I have, yes.

PN83

Is that statement true and correct?---Yes, it is.

PN84

And do you wish to adopt that statement as part of your evidence in this proceeding?---Yes.

*** DAMIEN FRANCIS KING

XN MR POLLOCK

PN85

I tender the statement, Commissioner.

PN86

THE COMMISSIONER: Mr Patrick?

PN87

MR PATRICK: No objections, Commissioner.

**EXHIBIT #8 WITNESS STATEMENT OF DAMIEN KING DATED
26/04/2023**

PN88

MR POLLOCK: Nothing further, Commissioner.

PN89

THE COMMISSIONER: Thank you. Mr Patrick?

PN90

MR PATRICK: Thank you, Commissioner.

CROSS-EXAMINATION BY MR PATRICK

[1.22 PM]

PN91

Good morning, Mr King. My name's Jack Patrick. I'm a national legal officer with the Mining and Energy Union. I'm here today representing the MEU and the AWU. I have several questions today to help me understand the evidence that you've given, or the further evidence that you've given and the payslips that have been provided by the applicant. Commissioner, it's just occurred to me that the payslips may not have been accepted into evidence yet.

PN92

THE COMMISSIONER: No, and I'm anticipating that at some stage today you will be seeking to do so.

PN93

MR PATRICK: Commissioner, it may be convenient to do that now if there is no objection from the other side.

PN94

MR POLLOCK: No objection.

PN95

THE COMMISSIONER: Very well. I think we might need to - - -

PN96

MR POLLOCK: Commissioner, I should indicate in circumstances where my learned friend is going to be cross-examining on these documents anyway that the usual course would be to cross-examine on them and then tender them at the conclusion of cross-examination, unless you've got a contrary view.

*** DAMIEN FRANCIS KING

XXN MR PATRICK

PN97

THE COMMISSIONER: Yes. Mr Patrick, are you going to be taking the witness to specific payslips?

PN98

MR PATRICK: Mr King I will be, yes.

PN99

THE COMMISSIONER: Then perhaps as we proceed and you take him to a particular payslip of, for example employee X, we can then deal with the tender as we go. If there's any residual matters at the end or residual payslips at the end that you wish to tender then we can deal with that at the end of Mr King's evidence. What I would be anticipating as well is I gave some thought as to whether these documents were to be tendered whether they be tendered as a bundle or individually. If you're going to be taking the witness to individual payslips it might be easier to tender them as individual documents, on a per employee basis that is.

PN100

MR PATRICK: Commissioner, no issue on our end.

PN101

THE COMMISSIONER: Very well.

PN102

MR PATRICK: I apologise for that, Mr King. Mr King, you're the manager of Employee Relations for Mineral Resources Limited, aren't you?---Yes, that's correct.

PN103

And you have previously given evidence as to what your role at Mineral Resources Limited requires you to do, haven't you?---Yes.

PN104

And broadly speaking you're the (indistinct), human resources functions for Mineral Resources subsidiaries?---Yes.

PN105

Mr King, you previously gave evidence that Oipo Pty Ltd has 12 employees, haven't you?---Yes, at the time we commenced the bargaining, that's correct.

PN106

And on the first day of hearing, so the last time you and I were talking, you gave evidence that Oipo Pty Ltd had 12 employees. To the best of your knowledge we had acknowledged that there was a hiring round going and there may be sort of individuals that you're not unaware of. The evidence to my understanding was the individuals that participated in the Operation Readiness Project are still employed, essentially was your evidence?---Yes.

*** DAMIEN FRANCIS KING

XXN MR PATRICK

PN107

At 4 of your statement that you filed today or tendered today, the statement 26 April 2023, is while Polaris is the paymaster Oipo remains the employing entity of these employees, don't you?---Yes.

PN108

And that statement that you previously provided in the hearing on the first day, and this statement at (indistinct) in your witness statement of 26 April is based on the fact that Ms Rohr told you that 10 individuals had signed the change of employee conditions, and that the remaining two individuals had accepted the change of employee conditions via email, isn't it?---Yes, that's correct.

PN109

Thank you, Mr King. Mr King, you're aware that the applicant has provided a series of payslips to the unions and the Commission, aren't you?---Yes.

PN110

Have you had a chance to look at these payslips?---Yes, I have.

PN111

I would like to take you to the payslip of Mr Jacob Vandenbrink(?). It may be convenient to tender this statement, or this payslip at this point in his statement. Is that how you'd like to proceed?

PN112

THE COMMISSIONER: I think we will (audio malfunction) questions and then we will deal with the tender.

PN113

MR PATRICK: Mr King, do you have that payslip in front of you, or that series of payslips; it's three payslips in total?---Is that within the (indistinct)?

PN114

THE COMMISSIONER: Mr King, I think your solicitors (indistinct) a copy of that?---Yes. So Mr Jacob Vandenbrink, yes?

PN115

MR PATRICK: Mr Jacob Vandenbrink?---Yes, I've got that in front of me.

PN116

Can you see the box titled 'Payee details', sort of three-quarters of the way down the page?

PN117

THE COMMISSIONER: The document, Mr Patrick, is a three page PDF document. You want page?

PN118

MR PATRICK: Page 1, Commissioner and Mr King?---So page 1 and then the first box where it's got 'Pay details' in the third row down?

*** DAMIEN FRANCIS KING

XXN MR PATRICK

PN119

Yes, that's correct, that's the box I'm talking about?---Yes.

PN120

Can you see where it says 'Annual base salary' in that box, and then it says \$198,800?---Yes. Yes, sorry.

PN121

That indicates that Mr Vandenbrink is paid \$198,800 per year, isn't it, as his base salary?---Yes.

PN122

And that rate, \$198,800, is greater than any rate that Mr Vandenbrink would be paid under the agreement, isn't it?---No, it doesn't align with being the specific classification that he would be covered by under the Oipo agreement, no.

PN123

That is there is no pay rate in the agreement that would allow Mr Vandenbrink to be paid \$198,800 a year in (audio malfunction)?---No, but I think it's important to note that in saying that Mr Vandenbrink if I recall correctly is employed as a team diesel fitter, and I am acutely aware of the labour market challenges that we currently face, particularly in that classification, and whilst agreements are made it doesn't necessarily mean that we will attract people and pay them in exact accordance with the agreement.

PN124

And that's because this agreement is a baseline agreement, isn't it, it doesn't reflect the pay rates that will be paid to the employees whom it applies, isn't it?---No, that's not - that's not entirely correct. It's - I wouldn't call it a baseline agreement because there is - from my recollection when we were working through calculations there is an employee within the original cohort that will receive pay increase, albeit a small one, I think it'd probably be about \$1,000 or \$1,500, to align with the classification level within the agreement.

PN125

Mr King, can you go to page 240 of the court book, please?---I've got that in front of me.

PN126

At 240, I take you to this page because to my knowledge, unless I am incorrect about this, the court book doesn't contain a copy of the enterprise agreement, or is there somewhere else there that it does. Mr Pollock, if you're able to help me about that - - -

PN127

THE COMMISSIONER: Are you asking the Commission, Mr Patrick, or are you asking the witness?

*** DAMIEN FRANCIS KING

XXN MR PATRICK

PN128

MR PATRICK: Asking yourselves. I have taken the witness to this document (indistinct), because I don't believe that the court book contains the agreement. If it does I'm happy to take the witness to the actual agreement as it was approved, but this document outlines the agreement just before it was approved and for the relevant purposes of this it is identical.

PN129

MR POLLOCK: The witness should be taken to the agreement that was actually made. Putting some previous iteration has obvious - - -

PN130

THE COMMISSIONER: It doesn't appear that the agreement as made - I think you used the word 'approved', Mr Patrick, the agreement hasn't been approved as yet, but in terms of the agreement as made doesn't appear to have been included in the court book. I think what we will do is I will arrange for my associate to send that to all the parties now, and then, Mr Pollock, it might be convenient for Mr Stutley, your instructor, to - - -

PN131

MR POLLOCK: Provide a copy.

PN132

THE COMMISSIONER: - - - provide a copy to the witness.

PN133

MR POLLOCK: Yes, thank you.

PN134

THE COMMISSIONER: So, Associate, can you arrange for the (audio malfunction) part of the application to be provided to the parties, please.

PN135

THE ASSOCIATE: We will send that through now.

PN136

THE COMMISSIONER: That email is just being finalised. So that agreement should be travelling down the Hume and across the Nullarbor in a moment. That should be on its way to your respective mailboxes. Mr Patrick, have you received that?

PN137

MR PATRICK: (Indistinct) received it, Commissioner.

PN138

THE COMMISSIONER: Yes, thank you. Mr Pollock, presumably the version going to the applicant has gone to Mr Stutley?

PN139

MR POLLOCK: I would assume so, Commissioner, and (indistinct) will shortly thereafter come to me.

*** DAMIEN FRANCIS KING

XXN MR PATRICK

PN140

THE COMMISSIONER: So that will be backtracking across the Nullarbor twice.

PN141

MR KING: I've got that in front of me now. Thank you.

PN142

THE COMMISSIONER: Thank you. Just one moment, Mr Patrick. Mr Pollock, have you received an electronic copy?

PN143

MR POLLOCK: I have not received it yet. I can only assume that - no, it's arrived.

PN144

THE COMMISSIONER: Thank you.

PN145

MR POLLOCK: Thank you, Commissioner.

PN146

THE COMMISSIONER: Mr Patrick?

PN147

MR PATRICK: Mr King, can you turn to the second page of that enterprise agreement. So there's the title page and then there's the second page with terms 1 and 2?---Yes.

PN148

And in the third paragraph of that page it says:

PN149

This agreement is a safety net agreement which sets out the minimum entitlements for all employees.

PN150

?---Yes.

PN151

And you've given evidence this morning that one of the employees received a pay increase, or would receive a pay increase under this agreement. Is that correct?---Yes, that's correct.

PN152

Eleven of those employees are currently being paid more than they would under the terms of the agreement?---Yes, that is my knowledge.

*** DAMIEN FRANCIS KING

XXN MR PATRICK

PN153

And that's because the agreement is a safety net agreement, it doesn't provide the true terms and conditions for those 11 employees that negotiated the enterprise

agreement?---We maintain that we transferred them onto the Oipo entity. We agreed that we would maintain their existing salaries. We didn't want them to be disadvantaged by the work that they would be doing, and it was explained to them that there may be a change to their pay, a reduction, in the event that we went ahead with an even time roster, because most of those employees it's my recollection were on a two and one roster. So they were advised that they would - they would have to take a pay reduction by virtue of working less hours over the year.

PN154

THE COMMISSIONER: Mr King, can you just confirm the document that was just handed to you what was that document?---That was a copy of the Oipo Enterprise Agreement, the one, the final version that was lodged for approval.

PN155

Okay, thank you.

PN156

MR PATRICK: Thank you, Commissioner, I have no further questions for Mr King.

PN157

THE COMMISSIONER: Thank you, Mr Patrick. Mr Pollock, was there any re-examination that arises?

PN158

MR POLLOCK: No re-examination.

PN159

THE COMMISSIONER: Thank you, Mr King, for your evidence, you're excused?---Thank you.

<THE WITNESS WITHDREW

[1.43 PM]

PN160

MR POLLOCK: Commissioner, at this stage I don't intend to take Mr Tonkin to any of the payslips. However, we would seek to tender those, those payslips.

PN161

THE COMMISSIONER: If the parties just bear with me one moment. I think we're at exhibit 9. I might just deal firstly with the bundle of payslips with file name Jacob Vandenberg, 21075. Is there any objection to that tender, Mr Pollock?

PN162

MR POLLOCK: No objection, Commissioner.

EXHIBIT #9 BUNDLE OF PAYSLIPS WITH FILE NAME JACOB VANDENBRINK, 21075

*** DAMIEN FRANCIS KING

XXN MR PATRICK

PN163

THE COMMISSIONER: Mr Pollock, just for efficiency is there any objection to the tender of any of the other payslips?

PN164

MR POLLOCK: No, there's not, Commissioner. Of course we will make submissions about (indistinct words).

PN165

THE COMMISSIONER: Yes, that can be made in due course.

EXHIBIT #10 BUNDLE OF PAYSLIPS WITH FILE NAME SARAH MARKON, 17432

EXHIBIT #11 BUNDLE OF PAYSLIPS WITH FILE NAME KELLY GREEN, 10250

EXHIBIT #12 BUNDLE OF PAYSLIPS WITH FILE NAME JOSHUA BUCKET, 17193

EXHIBIT #13 BUNDLE OF PAYSLIPS WITH FILE NAME MATTHEW STEWART, 22178

EXHIBIT #14 BUNDLE OF PAYSLIPS WITH FILE NAME MARK HERRERA, 21293

PN166

I will come back to Marco Gemignani.

EXHIBIT #15 BUNDLE OF PAYSLIPS WITH FILE NAME PAUL SCOOT, 13582

EXHIBIT #16 BUNDLE OF PAYSLIPS WITH FILE NAME DAVID MILLER, 20377

EXHIBIT #17 BUNDLE OF PAYSLIPS WITH FILE NAME BRETT GAYE, 12867

EXHIBIT #18 BUNDLE OF PAYSLIPS WITH FILE NAME ROBERT HALL, 17895

EXHIBIT #19 BUNDLE OF PAYSLIPS WITH FILE NAME ROSS ALDERSON, 19257

PN167

In relation to Marco Gemignani, Mr Patrick, the respondent has filed additional documents yesterday which I think you were copied to that correspondence. Are you seeking the tender of the documents produced on 13 April or the documents filed yesterday?

PN168

MR PATRICK: Commissioner, with respect to Marco Gemignani we seek to tender the documents filed yesterday. Mr Pollock, any objection?

PN169

MR POLLOCK: No objection.

EXHIBIT #20 THE DOCUMENT WITH FILE NAME MARCO GEMIGNANI, 16547 POLARIS

EXHIBIT #21 THE DOCUMENT WITH FILE NAME MARCO GEMIGNANI, 16547 CSI

PN170

THE COMMISSIONER: I did not miss any, did I? I think that completes the - - -

PN171

MR PATRICK: Not that I have seen, Commissioner. My learned friend might have a different - - -

PN172

THE COMMISSIONER: Very well. Does that bring us to Mr Tonkin then?

PN173

MR POLLOCK: It does, Commissioner.

PN174

THE COMMISSIONER: Is Mr Tonkin available, Mr Pollock?

PN175

MR POLLOCK: As I understand it. He appears to be on the line now.

PN176

THE COMMISSIONER: Associate, if you can administer the affirmation.

PN177

THE ASSOCIATE: Can you please state your full name and address.

PN178

THE COMMISSIONER: You're on mute, Mr Tonkin.

PN179

MR TONKIN: Michael Liam Tonkin, work address 20 Walters Drive, Osborne Park.

<MICHAEL NEIL TONKIN, AFFIRMED [1.50 PM]

EXAMINATION-IN-CHIEF BY MR POLLOCK [1.50 PM]

PN180

THE COMMISSIONER: Mr Pollock?

*** MICHAEL NEIL TONKIN

XN MR POLLOCK

PN181

MR POLLOCK: Thank you, Commissioner. Mr Tonkin, you can see and hear me clearly?---Yes, I can, thank you.

PN182

Just for the benefit of the transcript can you please repeat your full name and your business address?---Michael Neil Tonkin, business address 20 Walters Drive, Osborne Park, WA.

PN183

Thank you. And what role do you hold in the (indistinct) office?---I'm the general manager of the Onslow Iron projects.

PN184

What does that role involve on a day to day basis?---At this stage in the construction phase we are preparing to be ready for Operational Readiness. Once we are fully constructed I'll be responsible for the operation of the project from the mine through the port through to the shipload.

PN185

Thank you. You've made a witness statement in this proceeding, haven't you?---That is correct, yes.

PN186

Can I ask you to turn to page 154 of the court book. Do you have that in front of you?---I do. Yes, 154.

PN187

Can I just get you to confirm that the document there commencing with that page, which runs to 43 paragraphs and two annexures, that that's the witness statement that you prepared in this proceeding?---Yes, I confirm that.

PN188

And you've had an opportunity to read that statement recently?---Yes, I have, thank you.

PN189

And that's true and correct?---Yes, it's correct.

PN190

And you wish to adopt that statement as your evidence in this proceeding?---I do, thank you.

PN191

I tender the statement and the annexures, Commissioner.

PN192

THE COMMISSIONER: Mr Patrick, any objections?

*** MICHAEL NEIL TONKIN

XN MR POLLOCK

PN193

MR PATRICK: No objections, Commissioner. (Indistinct) submissions, with respect.

PN194

THE COMMISSIONER: Thank you.

PN195

MR POLLOCK: Commissioner, with leave I would seek to ask one or two very short further questions.

PN196

THE COMMISSIONER: Just one moment, Mr Pollock.

**EXHIBIT #22 STATEMENT OF MICHAEL TONKIN DATED
21/03/2023 AND SET OUT IN THE HEARING BOOK FROM PAGE
154 ALONG WITH ITS ACCOMPANYING ANNEXURES TO PAGE
191**

PN197

Mr Pollock?

PN198

MR POLLOCK: Thank you, Commissioner.

PN199

THE COMMISSIONER: I think you were about to make an application to adduce further evidence-in-chief.

PN200

MR POLLOCK: Just a very small number of additional questions, Commissioner, just directed towards one particular issue and it will take no longer than I think two minutes at most.

PN201

THE COMMISSIONER: Are you able to give an indication of the scope of the issue and why (indistinct) evidence-in-chief?

PN202

MR POLLOCK: I can indicate that. I would simply be taking the witness to one of the contracts, one of the signed contracts found in the court book at page 200. This arises in the context of some questions that my learned friend has asked Mr King and some issues that my learned friend indicated that he's going to pursue in his closing submissions that certainly weren't apparent from the ones (indistinct) was initially framed.

PN203

MR PATRICK: (Audio malfunction).

*** MICHAEL NEIL TONKIN

XN MR POLLOCK

PN204

THE COMMISSIONER: One moment. I will hear from you in a moment, Mr Patrick.

PN205

MR PATRICK: Commissioner, I have to ask for the witness to be excused while Mr Pollock outlines the nature of his concerns here. These may be matters that the unions wish to pursue in cross-examination. It's inappropriate for Mr Pollock to make a submission in front of the witness.

PN206

MR POLLOCK: I'm not making a submission.

PN207

THE COMMISSIONER: Mr Pollock, it might be - - -

PN208

MR POLLOCK: I'm content for the witness to be excused.

PN209

THE COMMISSIONER: If you could just exit that meeting room that you're in and shut the door behind you for a moment, and we will ask you to come back in. I think it might just be to allow the parties to speak freely, Mr Pollock.

PN210

MR POLLOCK: Yes, of course.

<THE WITNESS WITHDREW

[1.55 PM]

PN211

THE COMMISSIONER: Please continue, Mr Pollock.

PN212

MR POLLOCK: Thank you, Commissioner. As you will have perhaps apprehended from my learned friend's cross-examination of Mr King and from the way in which my learned friend's case appears to be evolving there appears to be a suggestion, and a submission will be advanced, that Oipo Pty Ltd was not in fact the employer of these employees at the time the agreement was made. What I simply seek to do is to ask a very small (indistinct) of questions to explain with reference to the contract on page 200 of the court book what Oipo is that is reflected in the employing entity and the role that Onslow Iron Pty Ltd plays with respect to the project. You will see in the covering letter it reads:

PN213

On behalf of Onslow Iron Pty Ltd I would like to advise changes to your conditions.

*** MICHAEL NEIL TONKIN

XN MR POLLOCK

PN214

And then in the change of those conditions the employing entity is (indistinct) Oipo. Now, all I would seek to do is to ask the witness what is it that Onslow Iron Pty Ltd does in this project and what is it that Oipo does on this project, and I seek

to adduce that evidence in order to deal with a matter that at least I apprehend that my learned friend appears to want to close on, which is that Oipo Pty Ltd was never relevantly the employer of these employees. My learned friend will obviously have the opportunity to cross-examine on those matters, and in circumstances where he's (indistinct) a case there's something that has evolved during the course of the case as its developed and certainly not in the manner in which the case was initially framed in writing. I'm entitled to explore that as an additional question in-chief.

PN215

THE COMMISSIONER: Mr Patrick?

PN216

MR PATRICK: If the scope is limited to that scope - (audio malfunction) Mr Tonkin's evidence with respect to the characterisation - - -

PN217

THE COMMISSIONER: Mr Patrick, I might just ask if you can - I don't know if you can adjust your volume or move that microphone closer.

PN218

MR PATRICK: Is that better, Commissioner?

PN219

THE COMMISSIONER: It's still a little bit faint.

PN220

MR PATRICK: I'm sorry. I'm not sure there's a lot I can do, that I can - - -

PN221

THE COMMISSIONER: You're just coming through (audio malfunction). So whatever you've just done keep doing it.

PN222

MR PATRICK: No problem. How Mr Tonkin characterises the contracts or the letters titled 'Change of employment conditions' from 200 to 213 of the court book isn't relevant. The letters are letters of offer. They're documents. They're characterised by their objective understanding of those. The High Court has been very, very clear about interpreting an individual's employment conditions that there's a written contract, and what is relevant is what is on the page, not what the characterisation is of some person after the documents have been executed.

PN223

THE COMMISSIONER: I don't think Mr Pollock was intending to cross-examine on how those documents should be interpreted. My understanding is his scope of questions - Mr Pollock you can correct me if my understanding is incorrect - that you wish to seek to adduce further evidence-in-chief from the witness on the basis of what role Onslow Iron plays in the project and what is Oipo's.

PN224

MR POLLOCK: That's quite right, Commissioner, and to be clear to adduce precisely the sort of evidence that the High Court on many occasions have made plain is relevant in construing instruments. It's a question of what a reasonable person in the position of the parties with the knowledge of all the relevant background circumstances would understand the written document to mean. Now, what those relevant circumstances relevantly include are who are these entities that these documents are referring to, what role do they play in the context of the project that this contract relates, and that's simply, that's as far as it -

--

PN225

THE COMMISSIONER: I will allow the further questions, Mr Pollock, but it's limited to that narrow scope that you've outlined.

PN226

MR POLLOCK: Of course.

PN227

MR PATRICK: Commissioner, if I may, Mr Pollock can ask those questions without reference to the documents. He can ask the witness what scope, what roles Onslow Iron or what Iron Pty Ltd does and what Oipo Pty Ltd does without taking him to the documents. There's no course for Mr Pollock to take the witness to the documents to ask those questions, and we would object that the witness be taken to the documents and the questions framed in that light.

PN228

THE COMMISSIONER: I suppose the question in terms of your scope do you need to take Mr Tonkin to the documents to ask him what role Onslow Iron plays?

PN229

MR POLLOCK: Commissioner, in circumstances where that evidence is relevant to the construction of that particular instrument, and I think I'm entitled to ask that question in reference to that instrument.

PN230

THE COMMISSIONER: Yes, I will allow it. Mr Pollock, if you can arrange for Mr Stutley - - -

PN231

MR POLLOCK: I apprehend that he's bringing Mr Tonkin back in. Yes, I can see him now.

<MICHAEL NEIL TONKIN, RECALLED

[2.02 PM]

EXAMINATION-IN-CHIEF BY MR POLLOCK, CONTINUING [2.02 PM]

PN232

THE COMMISSIONER: Mr Pollock.

MICHAEL NEIL TONKIN

XN MR POLLOCK

PN233

MR POLLOCK: Thank you. Mr Tonkin, can I take you to page 200 of the court book?---Yes.

PN234

Would you take a moment to read that document and let me know when you've done so. I just have a small number of questions about it?---Yes.

PN235

You can see in the first line it reads, 'Dear Marco, re change of employment conditions.' And then, 'On behalf of Onslow Iron Pty Ltd.' Can I ask you first, what role does Onslow Iron Pty Ltd play in relation to this project?---So Onslow Iron isn't the name of the (indistinct) company for the project. So it's the - they are joint venture ownership structure, and they own the Onslow Iron Pty Ltd company, and that's the company that manages the project.

PN236

And if you go some lines down you will see 'Effective date, project, condition title, reporting to', and then 'Employing entity', and you will see there it then reads 'Oipo'.

PN237

MR PATRICK: Commissioner, I have to object. The question is leading. It's suggesting (indistinct) answer the question in the way the question is framed - - -

PN238

MR POLLOCK: Commissioner, I'm doing nothing - - -

PN239

MR PATRICK: Before I make submissions on that point I'd ask the witness to leave the room.

PN240

MR POLLOCK: Commissioner, with respect, I'm doing absolutely nothing of the sort. I'm orienting the witness in the document to where I'm going to ask the question.

PN241

THE COMMISSIONER: I will hear Mr Patrick's objection. So, Mr Tonkin, if you could just exit the room again?---Sure.

<THE WITNESS WITHDREW

[2.04 PM]

PN242

THE COMMISSIONER: Mr Patrick?

*** MICHAEL NEIL TONKIN

XN MR POLLOCK

PN243

MR PATRICK: Commissioner, this was our concern having the witness taken to the document. The role that Oipo plays in the operation can be asked fairly without the witness providing evidence as to what Oipo in the document means. Mr Pollock is attempting to draw a distinction between these two - the

employing entity as it existed, the (indistinct) line of the piece of information on behalf of Onslow Iron Pty Ltd. There is nothing in the document that suggests that. It's inappropriate for Mr Pollock to - - -

PN244

THE COMMISSIONER: There's nothing in the document which suggests what, sorry, Mr Patrick?

PN245

MR PATRICK: That Oipo as it is at point 5 next to 'Employing entity' is Oipo Pty Ltd. The contrast that Mr Pollock is drawing through his line of questioning is to allow the witness to provide an opinion as to whether this Oipo as it existed in the contract is distinct from Onslow Iron Pty Ltd. It's information that isn't relevant to the objective construction of the document, and it's a leading question.

PN246

MR POLLOCK: It's not at all a leading question. I in fact hadn't yet put the question to the witness. I was simply orienting the witness in the document, and my learned friend has made abundantly clear that he says that that written document speaks for itself.

PN247

THE COMMISSIONER: (Audio malfunction). I was anticipating based on the scope that Mr Pollock indicated that the question had it flown would have been what the letters O-i-p-o mean, and I think if that's the question I will allow the question.

PN248

MR PATRICK: The objection stands, Commissioner. We say it's irrelevant. To the extent that - - -

PN249

THE COMMISSIONER: The objection is noted, Mr Patrick, but I have made a ruling. I will allow the question.

<MICHAEL NEIL TONKIN, RECALLED

[2.06 PM]

EXAMINATION-IN-CHIEF BY MR POLLOCK, CONTINUING [2.06 PM]

PN250

MR POLLOCK: Mr Tonkin, we are still on page 200 of the court book. I was taking you down through that list of terms and conditions of employment down to the fifth line next to the heading 'Employing entity'. Can I ask this question; to the right of that there's the letters O-i-p-o. What do they refer to?---They refer to the Onslow Iron Projects Operations.

PN251

And do I understand that - you can agree or disagree - do I understand that that is the applicant in this proceeding; you can agree or disagree.

*** MICHAEL NEIL TONKIN

XN MR POLLOCK

PN252

THE COMMISSIONER: That's a leading question.

PN253

MR PATRICK: That was a leading question.

PN254

MR POLLOCK: With respect, Commissioner, it's not a question which suggests the answer. That's the definition of a leading question. The witness can agree or disagree with the proposition. It's not suggesting that the answer is yes or no at all. It's not a leading question.

PN255

THE COMMISSIONER: I'm not allowing the question, Mr Pollock.

PN256

MR POLLOCK: Thank you.

PN257

THE COMMISSIONER: Any further questions, Mr Pollock?

PN258

MR POLLOCK: Nothing further, Commissioner.

PN259

THE COMMISSIONER: Mr Patrick, any cross-examination?

PN260

MR PATRICK: Thank you, Commissioner.

CROSS-EXAMINATION BY MR PATRICK

[2.08 PM]

PN261

Mr Tonkin, my name is Jack Patrick, I'm a legal officer with the Mining & Energy Union. I'm here today representing the MEU and the AWU. I have a number of questions for you today. My questions are intended to help me understand your evidence. If I ask a question that you don't understand please feel free to ask me to repeat the question. I'm going to ask you some questions about the applicant in this proceeding who I will refer to as Oipo. You understand who I'm referring to when I say Oipo, do you not, Mr Tonkin?---Yes, I do.

PN262

Mr Tonkin, you're employed as the general manager of Onslow Iron at Mineral Resources Limited, aren't you?---That's correct, yes.

PN263

Mr Tonkin, do you have a copy of the enterprise agreement as I say approved by the workforce - as made by the workforce, in front of you?---Is it R4?

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN264

It is, and I apologise.

PN265

THE COMMISSIONER: I think, Mr Tonkin, Mr Stutley is making his way. One of the benefits of glassed walls (audio malfunction).

PN266

THE WITNESS: Okay, thank you. I do now, yes.

PN267

MR PATRICK: Can you just open that enterprise agreement for me and go to the first page. So after the title page the first page in very (indistinct) says Oipo Enterprise Agreement 2023, and there's terms 1, 2, 3 and 4 on that page?---Yes.

PN268

Can I take you to clause 2. Can you read the third paragraph on the page, and the paragraph that starts, 'This agreement is'?---'This agreement is a safety net agreement which sets out minimum entitlements for employees. All employees will have terms and conditions of employment under this agreement which are better off overall, and those which would otherwise apply under the award.'

PN269

What's your understanding of the agreement being a safety net agreement?---So my understanding of the agreement is it is a minimum set of standards, which are applied across the employees of the Onslow Iron Projects Operations.

PN270

So employees of Oipo, of the applicant, will have contracts, and if factual term is better than the equivalent term in the EA they will be entitled to the benefit of that contract, won't they?---Sorry, can you please repeat the question.

PN271

The employees that Oipo engages will have contracts of employment, weren't they?---That's my understanding, yes.

PN272

And because this is a safety net agreement because it provides the minimum standards it may be the case that those contracts would provide the terms more advantageous than those contained in the agreement, isn't it?---My understanding is that there's potential for that, but the agreement sets a common set of conditions for the employees across the operation.

PN273

This morning I provided a document to the Commissioner to chambers and to the applicant. It's a document entitled 'Australian Securities Investment Commission application for registration as an Australian company.' The relevant company is listed as Oipo Pty Ltd. Can the witness be given a copy of that document.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN274

THE COMMISSIONER: Mr Pollock, I think Mr Stutley might be making arrangements for that.

PN275

MR PATRICK: Do you have a copy of that document in front of you now, Mr Tonkin?---I do.

PN276

If you can take a moment to familiarise yourself with the document if you like. Let me know when you're ready to proceed?---Yes.

PN277

This is the application lodged by, I believe it's a Mr Oelofse. I hope I'm pronouncing his name correctly. Please feel free to correct me if I am incorrect. Mr Oelofse that effected the registration of Oipo Pty Ltd, isn't it?---Sorry, I'm not all that familiar with these, the nature of these documents, but it says that there is (indistinct), yes, that's correct.

PN278

Can I take you to the last page, and the application was signed by Mr Derek Andrew Oelofse. That's correct, isn't it?---That's what it says, yes.

PN279

Who is Mr Oelofse? Do you know who Mr Oelofse is?---So I believe he's one of the company secretaries of mineral resources.

PN280

Can you see below where it says, 'Details of the applicant - Applicant name: Oelofse, Derek Andrew', and underneath that it has, 'Address of the applicant: 3 Kershaw Gardens, Leeming, WA 6149', is that correct? To the best of your understanding, is that Mr Oelofse's address?---I don't know where Mr Oelofse lives.

PN281

That is the address that's listed on the application, is it not?---That's what it says on the application, yes.

PN282

Go back over to the first page for me where you talk about the page on the right-hand side. There's a box that says, 'Electronic lodgement, document note', it'll have the document number, and it says, 'Lodgement date and time: 28/11/2022 13.32.23'?---Yes.

PN283

That's referring to WA time, isn't it?---I don't know.

PN284

MR POLLOCK: Commissioner, how could this witness possibly answer the question, and more to the point how is it possibly relevant?

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN285

THE COMMISSIONER: Well, I think I might suspect where it's going but we'll see, on the issue of relevance, but in terms of the first question, the witness can answer whether he knows it or not?---I don't know.

PN286

MR PATRICK: You don't know if this is Perth time or some other time; it's not in your knowledge?---No. That's correct. I don't know.

PN287

Even though at the bottom of the third page there provides that Mr Oelofse is based in WA?---Yes.

PN288

But you don't believe that this is WA time?---I'm not saying I don't believe. I said I don't know whether it's WA time, or whether ASIC is listed in Sydney or Canberra or Melbourne or wherever it is. I'm not sure.

PN289

THE COMMISSIONER: Mr Patrick - - -

PN290

MR PATRICK: (Indistinct) - - -

PN291

THE COMMISSIONER: Mr Patrick, it might assist you if you look to the left of that box on page 1 to the lodging party or agent name and their address.

PN292

MR PATRICK: Thank you, Commissioner. Mr Tonkin, can I take you to Annexure 1 of your witness statement?---Yes.

PN293

This is an expression of interest that was sent to all of Mineral Resources' entities, is that correct?---To operational sites, yes.

PN294

Beneath the sort of headline saying, 'Seeking expressions of interests', there's a line that says, 'Lifestyle-friendly 8/6/7/7 roster'?---That's correct.

PN295

That indicates that employees employed at the Onslow Iron project were working an 8/6 or a 7/7, doesn't it?---No. It implies that they work an 8/6/7/7 roster, which is eight day shifts, six R&R days, seven night shifts, seven R&R days.

PN296

And those shifts on each of those days are 12 hours in length, aren't they?---That's the plan, yes.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN297

See your statement at MT2 is a slide deck you presented to the individuals that participated in the Operation Readiness Project, isn't it?---That's correct.

PN298

Mr Tonkin, were you present on each day of the Operation Readiness Project?---I didn't like to attend every day, no.

PN299

You attended the first day on 28 November though?---Yes, I did.

PN300

Can you please turn to page 189 of the court book?---Sure.

PN301

The first dot point on page 189 of the court book provides that the individuals engaged in the OIPO Readiness Project would work 8 till 4 each day of the Readiness Project, doesn't it?---Yes.

PN302

They work a nine-day fortnight, isn't that correct?---So the – no. I'm not sure.

PN303

The second dot point there Mr Tonkin says, 'Referring to the' - - -?---I'm the author (indistinct), yes.

PN304

It's a nine-day fortnight that they were working during the Operational Readiness Project?---Yes, that's correct.

PN305

Mr Tonkin, can I just ask you to flip over the page there to 190 of the court book? You've got that in front of you?---Yes.

PN306

That's the example itinerary for events of the Operational Readiness Project, and in that example itinerary, you've got a one-hour lunch break where employees – well, were individuals that participated in the Operational Readiness Project given a one-hour lunch break every week?---I think it varies. It depends on what's happening at the time on each day. So it varies (indistinct) schedule for each day.

PN307

It sometimes may be a little bit more, sometimes may be a little bit less?---Yes. It was flexible based around the activities that were planned for each day.

PN308

You understand what I mean when I say, 'job and knock'?---I understand the concept of 'job and knock', yes.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN309

Is it ever the case that the employees job and knocked – they sort of were given a task, they worked that task, and they left during the day?---No, we had effectively a full day's activity planned for each day of that four-week process.

PN310

I understand your evidence. Thank you, Mr Tonkin. Just reflecting between the sort of – it's an eight or nine-hour nine-day fortnight worked by the employees on the Operational Readiness Project, and the 12-hour 7 and 7 or 8 and 6 roster worked by employees, or that will be worked by employees during the life of the – for the agreement, would you accept that there's a disconnect between the hours worked by the individuals negotiating the agreement and the employees that will ultimately be covered by it?---No, I don't accept it as a disconnect. It comes down to the nature of the activities that we were doing at that time.

PN311

So the nature of the activities that they participated in during the Operational Readiness Project are materially different from those that will be engaged in by the employees during the life of the agreement, is that your evidence?---So, no. The nature of the activities during the Operational Readiness phase prior to mobilising to site is naturally, by nature of the activities, is fundamentally different to the work perform on-site, which was going to be performed on-site by these same employees. So - - -

PN312

I understand your evidence. Thank you, Mr Tonkin?---Yes.

PN313

Can I take you to page 160 of the court book? At 160 at paragraph 37, you say that your vision for the Onslow Iron Project was a 1-10 culture and that was the reason the agreement was negotiated. Is that correct?---That is part of the reason for the single agreement, yes.

PN314

The agreement's intended to cover individuals engaged at the Onslow Iron Project?---Yes.

PN315

The Onslow Iron Project is in the Pilbara, isn't it?---Yes, it is.

PN316

Individuals who participated in the Operational Readiness Project were in Perth, weren't they?---For the duration of that period? They were normally site-based employees. The Operational Readiness work was conducted in Perth. Then those same employees would then return back to work in the Pilbara once operations commenced.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN317

If the individuals were engaged in the Operational Readiness Project, there's a disconnect between the location where they were performing their work i.e. Perth and the location that the work will be performed i.e. the Pilbara. Would you

accept that?---No, I would not accept that. You've got site-based employees who are normally based on-site, working at other Mineral Resources operating sites. At the Onslow Iron mine site, it's currently just spinifex; there's nothing there. So it's not practical to actually go and conduct those activities on-site. There's nothing there.

PN318

They weren't on-site, were they, Mr Tonkin; they were in a boardroom in Perth?---Yes, the Operational Readiness work, yes, was conducted in Perth by - - -

PN319

So there is a disconnect between where they were performing their work in Perth and where they may potentially perform work in the Pilbara?---I don't see there's a disconnect at all. It's just a different office building for the same company.

PN320

A different office building a couple of thousand kilometres away?---I don't agree there's a disconnect. It's operational people talking about Operational Readiness work in the head office of the company. I don't see what the issue is.

PN321

I understand your evidence. Can you turn to page 59 of the court book, please, Mr Tonkin?

PN322

THE COMMISSIONER: Was that 59?

PN323

MR PATRICK: 159, sorry, Commissioner?---Yes.

PN324

Can you read paragraph 35 of your witness statement to the Commission, please?---Yes:

PN325

Over the course of the following four weeks the group went through a series of workshops, (indistinct) had sessions to catch the key requirements for the Operational Readiness program. Week 1 involved documenting a day in a life of each role to capture the key activities and procedures. Week 2, review the necessary training requirements and capture the first fill equipment lists. Week 3 was focused on risk assessments and safe work procedures. Week 4 consolidated documentation and defined the onboarding process for the new-starters.

PN326

Can you flick over to 200 of the court book for me, please, Mr Tonkin?---Mm.

PN327

This is the letter of change of employment conditions that was provided to Marco Gemignani, isn't it?---Yes.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN328

Marco's position title is fixed plant operator?---Yes.

PN329

Did Marco fix any plant or machines when he was in Perth?---No, he did not, but he did, you know, contribute to the Operational Readiness Project by sharing his knowledge of what was required to get ready to commence fixed plant operations on-site, the operations commence.

PN330

At 201 of the court book is the change of employment conditions that was provided to Mr Matthew Stewart, isn't it?---Yes.

PN331

Matthew's a heavy diesel fitter, is that correct? The 'HD fitter' refers to heavy diesel fitter?---That's correct.

PN332

Did Matthew work on any machines or trucks while he was working down in Perth?---I think that answer to your question is no, but he did share his knowledge of what's required to get set up to establish a mechanical workshop and operation at site, which was the purpose of the exercise.

PN333

I take it that if I took you to each of these letters, your answer would be the same, that no, they didn't engage in that task, but they engaged in a task that sort of was in line with your evidence in 35 of your witness statement?---Yes, that's correct.

PN334

Can you turn to page 208 of the court book, please?---Mm.

PN335

This is the change of employment conditions that was provided to Mr Brent Gay, isn't it?---Yes.

PN336

Next to 'Position title' there, it provides 'service person'?---Mm-hm.

PN337

Can you flick back to page – I think it's 23 of the court book; it's the F16?---Yes.

PN338

On page 30 it has Mr Gay listed as an apprentice heavy diesel fitter in the F16?---Mm-hm.

PN339

Is that the same Mr Gay that I just took you to, which is a letter of change of employment conditions?---Yes, it is.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN340

So Mr Gay was engaged as a service person, but here he's listed as an apprentice heavy diesel fitter?---Yes, and the answer is he's both.

PN341

He's both?---Correct. So he's a service person who works in a workshop team, who drives lubricating machines, and as part of his career path he's commenced an adult apprenticeship to learn how to become a fitter.

PN342

Could I take you back to page 200, Mr Tonkin? As we've already established, this is the letter of change of employment conditions provided to Marco Gemignani, isn't it?---Yes.

PN343

Can you read the first line of the letter stating, 'On behalf of'?---Yes:

PN344

On behalf of Onslow Iron Pty Ltd I'd like to advise you of a change to your conditions of employment. Your new terms and conditions of employment are outlined below.

PN345

So you were making this offer on behalf of Onslow Iron Pty Ltd, weren't you?---I beg your pardon?

PN346

You were making this offer, this offer of change of employment conditions, on behalf of Onslow Iron Pty Ltd, weren't you?---Yes, that's correct.

PN347

Can I take you to page 190 of the court book?---Yes.

PN348

At 190 you'll see a table, an itinerary for day one, and we've already had a look at this, but the third box down says, 'Employment transfer to Onslow Iron'?---Yes.

PN349

So employees were transferring their employment to Onslow Iron Pty Ltd, weren't they?---I'm not sure if it was Onslow Iron Pty Ltd or it was Oipo, but it was the Onslow Iron entity.

PN350

Mr Tonkin, this process of transferring the employees to the Onslow Iron entity occurred at 10.30 to 11.30 on the 28th, didn't it?---Yes, it's my understanding.

PN351

10.30 to 11.30 - with respect to the documents that you were provided, the Australian Securities Investment Commission document that stated, 'The entity was incorporated at 1.30 on 28 November', how could the employees be transferring to anyone other than Onslow Iron Pty Ltd?

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN352

MR POLLOCK: Commissioner, I object to the question, and the witness should perhaps be excused from the room in order to deal with the objection.

PN353

THE COMMISSIONER: Very well. Mr Tonkin, if you can remove yourself from - - -

PN354

MR PATRICK: Commissioner, maybe I can short-circuit this. I'm happy to withdraw the question.

PN355

MR POLLOCK: Okay.

PN356

THE COMMISSIONER: On that basis we'll continue.

PN357

MR PATRICK: Mr Tonkin, could I ask you to turn to paragraph 37 of your witness statement?---Sorry, which paragraph again, sorry?

PN358

Paragraph 37. It's on page 460(?) of the court book?---Yes.

PN359

At 37 of your statement, you say that, 'A 1-10 culture is essential for the success of the project'?---Yes.

PN360

And at 48 you describe what you mean by '1-10 culture', is that correct?---Yes.

PN361

At 38 you say that you do not believe it is appropriate for employees working on the same project to have different terms and conditions of employment, is that correct?---Yes.

PN362

And that that underpins, or is the foundation of this 1-10 culture?---It's an element of it, yes.

PN363

You say that the agreement, the Oipo agreement, is the best way to achieve this 1-10 culture, don't you?---Yes.

PN364

Can you turn to page 185 of the court book?---Yes.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN365

I apologise that's not 185. Just bear with me one moment. Yes, that's 175 of the court book?---Yes.

PN366

This was a slide that was presented to the employees at the commencement of the Operational Readiness Project, isn't it?---That's correct, yes.

PN367

And that slide provides, 'Oipo will eventually employ 2100 people'?---Yes.

PN368

But only 12 people participated in the negotiations – only 12 alleged employees participated in the negotiations?---That's correct, yes.

PN369

I'm just trying to understand your evidence here. You say that it's critical for employees to be involved in negotiating their terms and conditions of employment, and that that is significant – I think you said it was one of the important factors in the 1-10 culture, yet you're content for 12 out of 2100 employees to be engaged in that process?---Given the starting nature of the process and the small team who are starting this, yes.

PN370

You can't say that it's important for the employees to be engaged in setting their own conditions when you have such a small number of employees participating in that process, can you?

PN371

MR POLLOCK: Commissioner, that's not a proper question. That's a matter for submission if my learned friend wants to make it, but it's not going to adduce any kind of relevant answer.

PN372

MR PATRICK: It's challenging the statement that having the employees' input is significant in the success of the project.

PN373

THE COMMISSIONER: Are you responding to the objection, or have you moved on?

PN374

MR PATRICK: I'm responding to the objection, Commissioner.

PN375

THE COMMISSIONER: Yes, go on. Sorry, can you just repeat that?

PN376

MR PATRICK: It challenges the evidence given by Mr Tonkin that having the employees participate in setting the terms and conditions is truly a part of the motivation of the Operational Readiness Project.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN377

THE COMMISSIONER: (Indistinct) the question, you may have to re-ask it.

PN378

MR PATRICK: Mr Tonkin, we've been discussing that it's crucial to the 1-10 culture that employees be engaged, or employees be involved in setting the terms and conditions of employment. We've established that you expect 2100 employees to be employed by Oipo Pty Ltd, yet only 12 of those employees participated in the negotiations. I'm ask you if it is really your evidence that it is crucial that employees participate in setting the terms and conditions for the project?---So, let me answer that question. The operation's starting from scratch. The same as last year, there was one employee. That was me. In October this went to two, and as we got closer to what we thought was going to be the start date, that's when we started to organise to increase or ramp up our recruitment to start our small operation development team. The nature of the supply chain is that the mine is closely coupled to the haul road to the port, and to the trans-shipping operation, and on each of those most people work closely together to – for the whole system to perform. The contract structure is complex and it's important that all those teams or elements work together in harmony, in unison, and they'll be working on two sites, in the mine site at Ken's Bore and at Onslow at the port, and I wanted the team to be dealing with multiple entities as one team. It's standard conditions, standard – everyone has the same conditions, mechanic, et cetera, and everyone's all – with regards to the shirt they were wearing – all part of the same team. So that was the overall philosophy of how to start the project, how we build it up, and go from there. We're not starting operations for another 12 to 18 months' time. This is the kicking off the early works in preparation for once the plant is fully constructed and commissioned and handed over. To start with we only have a small team to commence the early works, which is why we had a small group to kick off the Operational Readiness work, and establish an employment agreement for the broader team as since expanded. So the reason we haven't got 2100 employees is because that's still, you know, a couple of years away. We're starting small; we're building up. So that's the reason why we started with a small group.

PN379

In our discussion in the cross-examination, you confirmed that Oipo employees will have contracts of employment, didn't you?---Sorry, can you repeat the question?

PN380

Earlier in cross-examination, you confirmed that Oipo employees will have contracts of employment?---That's my understanding, yes.

PN381

And that the terms of those contracts of employment may be better than those contained in the enterprise agreement; they may be paid a higher rate?---That's my understanding, yes.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN382

Will all of those contracts be identical?---They can't be, no.

PN383

Can you guarantee that no labour hire employees will be engaged to work at the Onslow Iron Project?---No, I can't guarantee that.

PN384

I'm finding it really hard to see – how can it be your evidence that you believe it's appropriate that all employees working at the Onslow Iron Project have the same terms and conditions?---Sorry, can you repeat the question?

PN385

Is it still your evidence, after acknowledging that there will be various contracts of employment, labour hire employees may be engaged on site - is it still your evidence that you do not believe it is appropriate for employees working on the same project to have different terms and conditions of employment?---Sorry, can you repeat the question one more time?

PN386

You've confirmed that employees engaged by Oipo will have various contracts of employment, with different pay rates in it. You've said that it may be the case that labour hire employees not engaged by Oipo will work on the Onslow Iron Project. I'm asking if it's still your evidence that you believe it isn't appropriate for employees working on the same project to have different terms and conditions of employment?---The intention is for the conditions to be as consistent as possible. So people have a say about annual leave, people work the same hours, you've got similar rosters. So there are a number of conditions to make it as consistent as possible. You're saying that are all the contracts identical. Well, they can't be for different roles, based on – yes, so they will attract (indistinct) person from a – I think it's basically (indistinct), for example. So you say all the contracts are identical, and I said they can't be. That's the reason for that.

PN387

So all the heavy diesel fitters that are going to be employed at Oipo Pty Ltd, will they all be employed on the same contractual rate?---I'm not sure is the answer.

PN388

Mr Tonkin, I put it to you that the Oipo enterprise agreement wasn't negotiated to live out this one team dream, but it was negotiated so that MinRes did not have to negotiate with a larger collective that was forming or about to form in the near future?---Sorry, is that a question?

PN389

Is that correct?---No, that's incorrect.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN390

Mr Tonkin, I put it to you that MinRes incorporated the new entity and transferred 12 employees from entities that it controls – it selected 12 employees from entities it controls to bargain with?---So, it transferred employees to a new entity which

would employ all the employees for the new project. It started with 12, and those first 12 were engaged in the bargaining for the agreement for the new projects.

PN391

I put it to you, Mr Tonkin, that you negotiated the agreement with those 12 individuals to shield against the risk of a future workforce taking protected industrial action?---That is not correct.

PN392

Commissioner, that's the cross-examination of Mr Tonkin. Thank you, Mr Tonkin?---Thank you.

PN393

THE COMMISSIONER: Thank you, Mr Patrick. Mr Pollock, is there any re-examination?

PN394

MR POLLOCK: Nothing in re-examination, Commissioner.

PN395

THE COMMISSIONER: Thank you for your evidence, Mr Tonkin. You're excused?---Thank you.

<THE WITNESS WITHDREW

[2.49 PM]

PN396

THE COMMISSIONER: Mr Patrick, just in relation to documents you took the witnesses to, firstly the signed copy of the enterprise agreement filed as part of the application, (audio malfunction) tender that? (Audio malfunction) application, I don't know if it's absolutely necessary but - - -

PN397

MR PATRICK: If it is necessary, if you believe it necessary, then I seek to tender that document, Commissioner.

PN398

THE COMMISSIONER: What's your position on it?

PN399

MR POLLOCK: (Indistinct).

PN400

MR PATRICK: I'm sorry, Commissioner, sorry, this is the version of the enterprise agreement that was made.

PN401

THE COMMISSIONER: Made and signed and filed as part of the application.

*** MICHAEL NEIL TONKIN

XXN MR PATRICK

PN402

MR PATRICK: I have no objection to it going in. Whether you require it as an exhibit or it's just part of the file, it's really a matter for you, Commissioner, I think.

PN403

THE COMMISSIONER: I don't think it's essential, but I wanted to put it to the parties to hear their views. So having heard the parties, I don't think it's necessary. That brings me to the next document, which was the document you took Mr Tonkin to, Mr Patrick, that being the ASIC application for registration as an Australian company, document form 201. Do you see to tender that?

PN404

MR PATRICK: Commissioner, we seek to tender that document.

PN405

THE COMMISSIONER: Any objection, Mr Pollock?

PN406

MR POLLOCK: None, Commissioner.

PN407

THE COMMISSIONER: The ASIC application for registration document for Oipo Pty Ltd, dated 28 November 2022, will be exhibit 23.

**EXHIBIT #23 ASIC APPLICATION FOR REGISTRATION
DOCUMENT FOR OIPO PTY LTD DATED 28/11/2022**

PN408

Does that conclude the evidence?

PN409

MR PATRICK: It does, Commissioner.

PN410

THE COMMISSIONER: How do the parties wish to proceed in relation to any final or closing submissions?

PN411

MR POLLOCK: Well, Commissioner, from our perspective we're ready to proceed now, and I would have thought, we're the applicant, we'd go first. My learned friend can say something and we'd reply.

PN412

MR PATRICK: Commissioner, we're ready to proceed now also. With respect to the order, the intervenors filed material in the evidence - material in the matter first. They filed their submissions in the matter first. It doesn't make sense to me that that order be changed at this point in time.

PN413

THE COMMISSIONER: Yes, Mr Pollock. Why should the batting order be changed compared to how the submissions came?

PN414

MR POLLOCK: Well, Commissioner, ultimately we're in your hands. There are obviously some late breaking issues, but, you know, we would certainly consider we'd want a proper opportunity to deal with them. Again, it is our application. At the end of the day, I'm not unduly vexed if my learned friend goes first. It's really a matter for you, Commissioner. In the ordinary course the applicant would go first, but – yes, I'm in your hands.

PN415

THE COMMISSIONER: We'll proceed on the same way the submissions flowed in. So, Mr Patrick, over to you.

PN416

MR PATRICK: Thank you, Commissioner. I'd just note that on that note that Mr Pollock has said that there appears to be elements that have arisen late in the piece, I'd say that the evidence has evolved significantly throughout the proceeding after the point that the union had an opportunity to file written submissions in the matter.

PN417

If Mr Pollock is suggesting in some way that we're trying to take the applicant unfairly off guard, we are more than happy to proceed on the basis of written submissions to allow Mr Pollock a proper chance to consider the applicant's case as it is to put.

PN418

We do not intend to take anybody off guard, and if that is an accusation that will be levelled later in the piece we would prefer for it to be dealt with in a different way.

PN419

THE COMMISSIONER: Well, both parties have indicated they're prepared to make oral submissions now. If the parties upon reflection wish to have a timetable for written submissions, I'm happy to accommodate that.

PN420

MR PATRICK: No, Commissioner, I'm content to proceed.

PN421

MR POLLOCK: (Indistinct) - - -

PN422

THE COMMISSIONER: Mr Pollock, I note your comment that your client is the applicant, but I think at the first directions hearing you treated it similarly to an objection to an application where the objector would usually put their material on first, and that's how the matter - - -

PN423

MR POLLOCK: And I'm content with that approach, Commissioner. As I said, it doesn't vex me particularly one way or the other.

PN424

THE COMMISSIONER: I think the parties' preferences in terms of how these matters proceed where there's an objection to an enterprise agreement seems to differ from matter to matter. I'm tending to take the view that, well, in the unfair dismissal context, if an employer objected the employer would file their materials first.

PN425

MR POLLOCK: Yes.

PN426

THE COMMISSIONER: And so let's – we're proceeding (audio malfunction) the objector's putting their case in (audio malfunction). Over to you.

PN427

MR POLLOCK: Thank you, Commissioner. Commissioner, I'd like to start today by addressing a question that you've put to me earlier in this proceeding. You suggested that – well, one question during a notice to produce, I believe the first notice to produce, you asked me how this case isn't disrupted - how the intervenor's case isn't disrupted by *Aldi Foods Pty Ltd v SDA* [2017] HCA 53.

PN428

Commissioner, I'd like to start today by addressing that decision. In *Aldi*, the High Court accepted that a small cohort of employees was capable of making an enterprise agreement that will later apply to a larger group of employees. We don't cavil with that finding.

PN429

In doing so, the High Court construed section 186(2)(a) of the Fair Work Act - and I can take you to it if you'd like, Commissioner, but I don't believe that's necessary – provides that if an agreement is not a greenfields agreement, the agreement has been genuinely agreed to by the employees covered by the agreement.

PN430

Section 186(2)(a) directs the Commission to ask two questions. First, it asks the Commission to identify the cohort of individuals who must genuinely agree to the agreement. Secondly, it asks the Commission to be satisfied that the agreement was genuinely agreed by this cohort.

PN431

The High Court's reasoning concerning the interpretation of 186(2)(a) can be found between paragraph 77 and 88 of the majority judgment. The High Court's reasoning responded to a contention that the court placed significance on the tense covered – attached to covered, so the present tense covered, as it appears in 186(2)(a).

PN432

The submission that was accepted and determinative – this submission, the tense be critical, was accepted and determinative in the proceedings before the

Full Federal Court, and this was the submission to which the High Court rejected in plain terms at paragraph 78 of the judgment.

PN433

The principle to be distilled from the HCA's judgment was succinctly stated by the majority at paragraph 77, and I would take you to that paragraph, Commissioner. Commissioner, at 24 of the authority bundle provided by the applicant prior to the first proceeding, that statement provided by High Court provides:

PN434

The question of coverage that arises when the Commission asks whether the agreement has been genuinely agreed to for the purposes of s 186(2)(a) is not whether the employees voting for the agreement are actually employed under its terms, but rather whether the agreement covers all employees who may in future have the terms and conditions of their jobs regulated by it.

PN435

The High Court's judgment in Aldi addressed the first of the two questions that I had posed with respect to 186(2)(a), namely the identification of the cohort of individuals who must have genuinely agreed to the agreement.

PN436

Aldi is largely silent on that second question of whether the individuals actually genuinely agreed. The only comment the High Court makes with respect to that second question with respect to whether there was actual genuine agreement is the significance the High Court places on part 2-4's protective provisions.

PN437

I won't take you to these comments, Commissioner, but they can be found at paragraphs 84 and 87 of the High Court's judgment.

PN438

Commissioner, you may remember when you asked me this question the first time I referred to the judgment of the Full Federal Court in *One Key Workforce Pty Ltd v CFMMEU*, MNC [2018] FWCFC 77.

PN439

In this judgment the Federal Court grapples with the distinction between the question answered by the High Court in Aldi and the question that presented itself to the court in One Key Workforce. The question in One Key Workforce was the second, was this genuinely agreed by the cohort of employees. Not who those employees were, but was it genuinely agreed by the cohort of employees?

PN440

In One Key Workforce the Full Federal Court confirmed that although it is possible for an agreement to be made by two or three employees in relation to a new enterprise, it does not follow that the Act is unconcerned with agreement-making of this kind.

PN441

At 152 to 154 of One Key the Full Federal Court engages with the High Court's reasoning in Aldi. Commissioner, I would like to take you to paragraph 154 of the Full Federal Court's judgment in One Key. That can be found at 114 of the applicant's bundle of authorities.

PN442

Commissioner, I'd like to draw your attention to the last several sentences in 154, from where it says:

PN443

Like those provisions -

PN444

referring to the sub-provisions in part 2-4 -

PN445

- other provisions of that subdivision, including section 186(2) and section 188, cover protective purpose.

PN446

That section 188 harbours a concern directed at agreements made by a small number of employees in circumstances where the agreement covers a wider range of employees -

PN447

- and then it goes on to cite the explanatory memorandum in support of its position there.

PN448

While the employment status or the - as my friend has correctly pointed out, we will make submissions as to who the correct employer of the employees are. While that is in doubt, and we'll return to it later, we do not submit that the relevant employees, whoever they are, were not covered by the agreement within the meaning of 186(2).

PN449

This question was definitively answered by the High Court in Aldi and we're not attempting to grapple with that. We are saying that with respect to that second question, did those employees genuinely agree, we submit that the agreement was not genuinely agreed by the relevant employees within the meaning of section 188 of the Act.

PN450

Commissioner, if you are - - -

PN451

THE COMMISSIONER: Are you saying although those 12 employees were covered by the agreement, they didn't otherwise fall within the full range of classifications covered by the agreement?

PN452

MR PATRICK: The Fair Work Act draws a distinction between coverage and application. I'm sure this is not something that - but we say that with respect to whether an employee is covered by the enterprise agreement - and it is a matter of whether the agreement was made.

PN453

If you do find that the employees are employees of Onslow Iron Pty Ltd, there would be a question whether the agreement was made, but we say that in circumstances where you find that they are employees of OIPO, we do not say that those employees wouldn't be covered by the agreement, we say that the agreement will not apply to those employees, in the relevant sense.

PN454

THE COMMISSIONER: (indistinct) would not apply in the relevant sense?

PN455

MR PATRICK: Sorry, Commissioner. I may have misspoken here.

PN456

THE COMMISSIONER: The point I thought you were making, Mr Patrick, was that while the 12 employees may fall within the scope of the classifications set out in the agreement, reference to paragraph 154, they didn't fall within the scope of the full range of classifications in the agreement. Is that accurate?

PN457

MR PATRICK: That's not the contention. The contention is that the agreement will never relevantly apply to their employment because the agreement's coverage provision is that of OIPO Pty Ltd, and we will contend that those employees are engaged by a different entity, being Onslow Iron Pty Ltd, and therefore the agreement will never cover those employees' employment.

PN458

THE COMMISSIONER: So the 188 genuine agreement contention that you rely on is that they never have been and never will be, or never were, at the relevant times, employed by the applicant entity.

PN459

MR PATRICK: Commissioner, that is our primary contention, and we will provide other submissions around that point. Commissioner, potentially, it may be convenient now for me to address you on our specific contentions.

PN460

Firstly, we say that the relevant employees lack stake within the meaning of the Full Bench in *KCL Industries* [2016] FWCFB 3048. Commissioner, I don't intend to take you to every citation that I will provide, but this is another one that I would like to take you to. I'm going to take you to paragraph 36 of *KCL Industries*, Commissioner.

PN461

THE COMMISSIONER: Paragraph 36.

PN462

MR PATRICK: At paragraph 36 the Full Bench finds that the employees had no stake in the agreement. We're reading at the bottom of that paragraph, Commissioner:

PN463

The employees had no stake in the agreement's rates of pay since they were assured their existing high rate of pay would remain in place.

PN464

And:

PN465

They could not have given informed consent in relation to the occupation of the industries in which they did not work and presumably had no experience.

PN466

We say that KCL provides two avenues for you to find that an employee does not have stake in an agreement - well, potentially three. (1) the rates of pay are not such that the agreement would relevantly govern their rates of pay, and (2) they couldn't have given informed consent in relation to the occupations or industries in which they did not work and presumably had no experience. We say these are two separate categories that you can say that the employees had no stake on.

PN467

Our submissions on stake, Commissioner, are threefold. As we've been grappling with already, on the objective evidence before the Commission, the employees were not employed by Oipo during the negotiation of the enterprise agreement and they presently are not employed by Oipo, they are employed by Onslow Iron Pty Ltd.

PN468

Commissioner, if you either accept that the individuals, the 12 individuals, the employing entity of those 12 individuals changed - and on the evidence of Ms Rohr we accept that that is open to you. If you are to make that finding, we say, however, the employees that transferred as a result of this acceptance are employees of Onslow Iron Pty Ltd.

PN469

The characterisation of the individuals' employment must be done with respect to binding contractual terms. There is no suggestion in the evidence that the employees were engaged under any contract other than those that have been provided. I believe they're at 200 to 213 of the court book, the change of employment condition letters.

PN470

Commissioner, on an objective construction of those letters you will find that the employees were not engaged by Oipo Pty Ltd. An objective construction of the letters reveals that Onslow Iron Pty Ltd is the employing entity.

PN471

In those circumstances, the individuals that negotiated the agreement have no stake in its terms. It does not and will not and will never, I should say, apply to their employment on the evidence before the Commission.

PN472

Mr King's evidence that the individuals were engaged by the applicant, he confirmed in cross-examination, is based on his belief the individuals signed those letters, the letters on which the terms of the written contract - the letters that we say offered employment with Onslow Iron Pty Ltd.

PN473

Commissioner, during Mr Tonkin's cross-examination he was unable to say whether Oipo Ltd even existed at the time that the individuals signed the letters of offer. It just can't be so that those letters of offer, which do not state at all Oipo Pty Ltd, can fairly be construed as offering employment or contracts of employment for Oipo Ltd.

PN474

Commissioner, if you're against us on this and find that the individuals were engaged by Oipo Ltd - and this is where we make our previous submissions about the High Court's decision in Aldi. We say that this is where this is engaged.

PN475

Our previous submissions with respect to the High Court's position in Aldi refer to, in circumstances that you accept that those employees are engaged by Oipo Pty Ltd, we say that you still must be concerned about the nature or the genuineness of the agreement of those individuals.

PN476

We say that the principles that the High Court espoused in *WorkPac v Rossato*, MNC [2021] HCA 23, relevantly at paragraph 61 - we say that those principles both support a construction that Onslow Iron Pty Ltd is the relevant employer, but we also say that those principles provide that, on an objective construction of those letters of offer, the employees, the individuals, were being offered fixed-task employment for the duration of the Onslow Iron Readiness Project.

PN477

Commissioner, I'd like to take you to the evidence that we say necessitates that finding. First I'd like to take you to page 200 of the court book. At page 200 we have plainly stated the project that these individuals were employed for is the Onslow Operational Readiness Project.

PN478

At page 215 of the court book we have an email from Ms Rohr to Josh Blencat. The first line of that email is:

PN479

Please find attached the change of condition letter for your employment terms for the length of the Onslow Iron Operation Readiness Project.

PN480

Page 186, the second dot point provides, 'Operational Readiness Project now', being 28 November, 'to 22 December 2022.' Confined term, not operating after 22 December 2022.

PN481

At page 265 of the court book we have a statement from Mr King. Mr King's statement here establishes that employees performed work during the making of the agreement, that is all.

PN482

On page 158 of the court book - - -

PN483

THE COMMISSIONER: Sorry, Mr Patrick?

PN484

MR PATRICK: Page 158 at paragraph 26 of Mr Tonkin's statement we have a statement that says:

PN485

I had multiple discussions with my fellow GMs across the various MinRes entities to assist in identifying which interested employees within their entities possessed the particular skillset and whether they had the capacity to release these employees to the Onslow Iron Project to assist with the Operational Readiness audit.

PN486

That there is a reference to the Operational Readiness project. As the agreement will never apply to these employees' employment, they cannot possibly have had a stake in the agreement in the manner contemplated by the Full Bench in KCL.

PN487

Commissioner, just returning briefly to the High Court's decision in Aldi here, we note that the question of state did not arise in Aldi, and it didn't arise in Aldi because - and if I may, I'll take you back to that judgment, because it is an important point.

PN488

At 7 of the High Court's judgment - - -

PN489

THE COMMISSIONER: Have you got the page reference for the joint bundle?

PN490

MR PATRICK: I am just finding it now, Commissioner. Sir, it's page 8 of the joint bundle.

PN491

THE COMMISSIONER: Thank you.

PN492

MR PATRICK: It's paragraph 7. It starts on page 7 and proceeds over to page 8. It extracts the letter of offer that was provided to the relevant employees in the Aldi case, and you'll see there it says:

PN493

I'm pleased to advise that Aldi Stores wishes to offer you ongoing employment.

PN494

This is the reason that this issue was not raised in Aldi. The individuals in Aldi were offered ongoing employment. The individuals here were not. They were offered fixed-task employment. On that basis alone Aldi is distinguishable.

PN495

Commissioner, if you're against us on the first two submissions, we say that in the alternative - so if it's accepted that, firstly, they are employees of Oipo Pty Ltd, secondly, they are relevantly employed beyond the Operational Readiness Project, we submit that the rates of pay and the characteristics of the individuals that negotiated the Oipo Enterprise Agreement, is disconnected from the characteristics of the individuals to whom the agreement will apply, and for that reason they have no stake within the meaning of the KCL judgment.

PN496

Turning to the evidence that we say necessitates that finding, we say that the payslips, which I think are marked annexures 7 to 21 - well, not annexures, sorry, exhibits 7 to 21, establish that the pay rates paid to the individuals during negotiation and subsequent to negotiation were in excess of those offered under the agreement.

PN497

At page 215 of the court book we have an email from Jennifer Rohr. This is the same email to Josh Blencat. The second paragraph of that email provides:

PN498

Your employing entity will change and you'll be working five-two, four-three roster, eight hours per day. Your salary will not be affected.

PN499

So essentially what we have is Mr King's evidence that employees who were negotiating the enterprise agreement, some of which came from rosters working 14-seven rosters and being remunerated as such, transferred to Perth to work in a boardroom for nine days a week, eight hours a day, and did not lose the rate of pay. There is an incentive there.

PN500

At page 190 of the court book, annexed to Mr Tonkin's statement, is that itinerary. That itinerary provides for six hours of work, starting at 8.45 - and we accept that some days they may have worked the full eight - or the full seven, as it were, because on this particular day there was six hours of work and a one-hour lunch break.

PN501

On other days we accept that it could have been as much as seven hours of work and a one-hour lunch break, but it's still very significantly different employment conditions between those who were negotiating the enterprise agreement, the boardroom in Perth and those to whom it would apply. I think Mr Tonkin referred to it as a spinifex field in the Pilbara.

PN502

Just for the sake of completeness, Commissioner, on page 200, the statement that Ms Rohr made in her email with respect to the rosters and salary not being affected is confirmed on the change of employment conditions. So there's roster five days on, two days off, followed by four days on, three days off, and then underneath it says:

PN503

All other terms and conditions of your employment contract will remain the same -

PN504

- being their rate of pay.

PN505

Commissioner, we say that this evidence establishes fairly definitively that the rates of pay paid to the individuals negotiating the enterprise agreement and those to whom the enterprise agreement would apply are materially different. There is a disconnect between those two statements.

PN506

Further evidence of this disconnect between the workforce that's negotiating the enterprise agreement and those to whom it will apply is the place of performance, and this was held to be significant by the Federal Court in CFMEU AIRC MNC [1999] FCA 487 at 26 - paragraph 26, that is.

PN507

You'll note in that paragraph, Commissioner - I won't take you to it, but the Federal Court in that circumstances refers specifically to the place of performance. The employees engaged to negotiate this enterprise agreement were engaged in Perth.

PN508

It's confirmed in Mr Tonkin's cross-examination. That's where they performed work, the employees to whom the agreement will apply, is that spinifex field in the Pilbara.

PN509

Similarly, at 31 of KCL the Full Bench has noted that KCL was a matter where there was an obvious disjunct between the content of the agreement and those who entered into it. That is how they adopted their analysis. They say there is a disconnect between the employees negotiating it and those who entered into it.

PN510

We say that the disjunct in the characteristics between the agreement and the individuals entered into it is that they were not in the place in which the work will be performed, e.g., the agreement has national scope.

PN511

At the very most we can say that this agreement will apply in the Pilbara. That's the evidence of Mr Tonkin, is it will apply to those employed at the Operational Readiness Project - sorry, to the Onslow Iron Project in the Pilbara, yet the agreement has national scope.

PN512

The individuals engaged to perform the agreement are not engaged from New South Wales, from South Australia, from the Northern Territory, from Queensland. You'll see on the payslips that have been tendered the address of those individuals are all within WA. It's all in WA, yet the agreement scope is national. There is a disjunct between the characteristics of those employed to negotiate the agreement and the scope of the agreement.

PN513

Further, we note that the - - -

PN514

THE COMMISSIONER: What was the paragraph reference for that Federal Court decision, Mr Patrick? I thought you said 26.

PN515

MR PATRICK: 126, Commissioner. This appears to be a recurring problem for me, and with respect to that, Commissioner, we place particular significance on the words 'and its place of performance' used by the court in that paragraph.

PN516

Commissioner, we say that the circumstances that you're presented with today are directly analogous to those in KCL, meaningfully analogous to those in KCL, and while it not be necessary that they are, in this case they are. We say that the principles of KCL would otherwise apply, that conveniently here there is a disjunct between the characteristic of the employees and the terms of the agreement.

PN517

Commissioner, I'd like to move to submissions with respect to the contention at 44 and 45 of the MEU's submissions that the agreement was negotiated with the intention of avoiding negotiating with a larger, potentially unionised workforce.

PN518

The evidence of Mr Roulstone establishes that the AWU has - Mr Roulstone and Mr Beveridge - has employees engaged by MinRes's subsidiaries from which they drew the relevant employees for which they could have negotiated this enterprise agreement. They chose not to. They chose to avoid those employees.

PN519

We've heard evidence that the agreement will eventually apply to 2100 employees, but that will not happen for 18 months, was the evidence of Mr Tonkin. Mr Tonkin has provided that there was no urgency in this process.

PN520

On the evidence of Mr Tonkin you should find that there was no urgency for this to occur. It could have been the case, and if in fact Mr Tonkin's alleged motivation of involving employees in setting the employment conditions is accepted, it could have been done now.

PN521

They are presently engaging employees for Oipo Pty Ltd. They could have waited until the cohort was established and negotiated with those employees and it would have been a truer reflection of the one team motivation that Mr Tonkin has espoused.

PN522

During cross-examination Mr Tonkin was challenged on that motivation, and on the facts of the case and his responses in cross-examination, Commissioner, it can't be held that that is the motivation here. The only motivation they have provided is, 'We wanted to ensure that a one' - I'll get the exact words instead of - a 'one team culture' is the justification that has been provided, and it just didn't withstand cross-examination.

PN523

In those circumstances, you should draw an inference on the facts of the case, just as the Full Bench did in *Karrijini*. That decision in *Karrijini* which I refer to, Commissioner, is the decision of the Full Bench in *CFMEU v Karrijini Rail* [2021] FWC 4522 which commences at 131 of the court book, and, Commissioner, we draw your attention to paragraph 116 of that decision.

PN524

Commissioner, we say that these concerns evoke the concepts of authenticity and moral authority (indistinct), is the agreement authentic. We say that - again, were the terms of the decision of the Full Bench in *KCL*. The Full Bench in *KCL* adopts the reasoning of Deputy President Asbury in a case *Central Queensland Services Pty Ltd* [2012] FWA 9512.

PN525

Commissioner, at 29 of *KCL*, you'll see there the commencement or Deputy President Asbury, as she was then, I should say, you'll see the commencement of the Full Bench's extract that it's lengthy extract, so I'm not going to read you through it, but rather pointing out a number of key aspects to the Deputy President's consideration.

PN526

The extract commences with the Deputy President outlining a number of principles concerning 188(1)(c) and those principles can be found - well, the record under paragraph 29 it's an extract that commences with paragraph 65 of that *Central Queensland* decision. In this regard, we point out the primary principle of those findings of:

PN527

The requirement for genuine agreement considered in conjunction with the objects of the Act in relation to the agreement betokens concerns with respect to authenticity and moral authority of the agreement.

PN528

The DP then cites cases to which both parties have referred to in their written submissions being Gordonstone at 357 as per Wilcox J and Madgwick J in support of this principle. The Deputy President continues by stating - and this is directly beneath those dot points:

PN529

The facts in this case - the facts in cases where genuineness of agreement of employees has been brought into question are instructive.

PN530

We say in this respect that while the facts in the cases to which the DP subsequently refers are instructive of the principles to which those cases would follow and apply, the principles are not confined to those facts. They're instructive. They're not determinative. At 11 of the applicant's written submissions, they suggest that:

PN531

The notions, stake, authenticity and moral authority should properly be understood through the lens of the cases which have developed them.

PN532

Commissioner, we submit that the Commission would be careful not to unduly confine the principles of stake, moral authority and authenticity to precise factual circumstances that have given rise, for the Commission to raise those concerns previously, we say that 188(1)(c) (indistinct) so are those principles.

PN533

They will apply in a range of circumstances and understood through a wide number of factual circumstances and this is clear when you look at Deputy President - as to the cases to which Deputy President Asbury cites in this decision that the Full Bench have adopted in KCL. There is no clear line through these cases.

PN534

There's not one circumstance that the Deputy President sort of calls out in each of these. These are distinct factual circumstances, each different from the last and in each case the Deputy President discusses how moral authority and authenticity and stake are what concerns in those factual circumstances.

PN535

Karijini is another example as it was written well after this time but it's another example of factual circumstance distinct from any of those to which Deputy President Asbury cites, distinct from KCL where moral authority, stake and authenticity were the key consideration when not approving that agreement.

PN536

I've already taken you to - or I've already noted that 116 sets out the facts of Karijini that they say were relevant in that circumstance and they are meaningfully different from the cases cited by Deputy President Asbury which the Full Bench has endorsed in KCL.

PN537

Section 188(1)(c) is broadly drafted. It is intended to capture any consideration not contemplated by 188(1)(a) and 188(1)(b). It is intended to address cases such as this where a process is undertaken when negotiating an agreement, that reveals the applicant's intention to rush through the agreement to prevent a broad workforce from negotiating its own terms and conditions and from supporting its claims they're exercising its rights under the Acts for industrial action.

PN538

We understand that there's a commercial imperative to attempt to limit that. We don't cavil with that, but we say that is something that you ought be concerned by. That is something that 188(1)(c) addresses. Taking each of the submissions that I have made today, Commissioner, in isolation, we say that the Commissioner will find that the agreement is not genuinely agreed by the relevant employees.

PN539

(Indistinct) the note and this is what they did in Karijini, they looked at the facts as a whole and they just said, 'This doesn't seem right', and Commissioner, this just doesn't seem right. There is something that is off about this and it's the process that was undertaken. And 188(1)(c) allows you to refuse to approve the agreement on that basis, on that feeling.

PN540

Commissioner, they're our submissions concerning section 188(1)(c) of the Act. With respect to our submissions concerning 188(1)(a) of the Act, with respect to whether the agreement was - whether the applicant took all reasonable steps to explain the agreement to the relevant employees, we press our written submissions and those of the AWU and we don't intend to say anything further on those today.

PN541

Commissioner, I guess I should note that both (indistinct) and the AWU have filed written submissions in this matter. They commence at 45 and 57 of the court book respectively and the MEU has filed submissions in reply which commence at 192 of the court book and we press those submissions, Commissioner.

PN542

Commissioner, I'd like to conclude by taking you to a comment of the Full Federal Court of Australia in One Key. In One Key, the Federal Court provided the word genuinely in the phrase, 'Genuine agreement', indicates that a new agreement will not suffice, that a consent of higher quality is required.

PN543

We say that the consent, if it did apply - was provided by employees engaged by Oipo Pty Ltd, if it was provided by employees engaged by Oipo Pty Ltd, it was

not of a higher quality. Commissioner, those are the submissions of the MEU and the AWU.

PN544

THE COMMISSIONER: Thank you, Mr Patrick.

PN545

Mr Pollock?

PN546

MR POLLOCK: Commissioner, might I just ask for a very short adjournment, no longer than five minutes, just to - just for a comfort break?

PN547

THE COMMISSIONER: Yes. We have been going for about three hours. Yes, we might just take an adjournment to, say, 3.55 pm, Sydney time.

PN548

MR POLLOCK: Thank you.

PN549

THE COMMISSIONER: Thank you. Until then.

SHORT ADJOURNMENT

[3.42 PM]

RESUMED

[3.43 PM]

PN550

THE COMMISSIONER: Mr Pollock?

PN551

MR POLLOCK: Yes. Thank you, Commissioner. My learned friend closed his submissions by saying that you can engage section 188(1)(c) on the basis of a feeling that something's not quite right.

PN552

Now, Commissioner, listening to that submission, I was reminded of the well-worn Boston lyric, 'It's more than a feeling', you can reasonable ground for believing that the agreement hasn't been genuinely agreed and with the greatest of respect to my learned friend, nothing that he's raised, in writing or orally, reaches that threshold.

PN553

Can I deal first with perhaps what I've described as a (indistinct) issue, that is the identity of the employer. Commissioner, of course, you must be satisfied that the agreement's been genuinely agreed and that relevantly includes being satisfied that the agreement was made in accordance with section 182(1) and that of course, feeds into your satisfaction formed under 188(1)(b).

PN554

So the question then is whether the cohort of employees were asked to vote on the proposed agreement, were in fact, employees of Oipo at the time. Now, the

evidentiary picture on that issue is clearer than it perhaps was on the previous occasion upon the provision of payslips.

PN555

We now have (indistinct) direct evidence that she distributed those contracts and received signed copies back from all but two employees and we have the evidence of those remaining two employees communicating their acceptance via email. We have those documents.

PN556

We also have the evidence from Mr King that each of those employees started work at head office and attended those sessions for the operational readiness project. You'd also recall his oral evidence on the previous occasion that there was no other reason why they would attend the head office other than in order to take part in that readiness project as employees of Oipo.

PN557

What initially presented as ambiguity in the employee payslips is also clear. We've received the evidence of Ms Gunston and the further statement of Mr King, none of which was - well, Ms Gunston's evidence wasn't challenged in cross-examination and Mr King's evidence wasn't materially challenged on these issues going to the reasons why other entities were used as pay agents, that is, given that he (indistinct) technical impediments preventing (indistinct) from setting up (indistinct) as a payroll into the systems and the time constraints that a decision - that Mr King made the decision to use another entity as the payroll agent and he explains the reasons why (indistinct) was seen as the easiest fit.

PN558

Now, of course, that issue doesn't appear to be the subject of material challenge, of course. I make the observation that there's nothing inherently unusual or improper about using a different entity to administer payroll and Ms Gunston and Mr King's explanation as to why is cogent and again, wasn't subject of challenge.

PN559

There was a suggestion, at least pursued in cross-examination, perhaps not pressed in closing submissions, but out of completeness, I'll deal with it and this concerns the timing issue on the face of that ASIC registration document. There appeared to be at least some similarity to the submissions that, well, the entity couldn't possibly be - have been created at the time these contracts were entered into.

PN560

That is, Commissioner, a red herring. The document as you identified in an exchange between Bar and Bench was lodged by the New South Wales entity at, I think 1.32 in the afternoon Australian Eastern Daylight-Saving Time, so about 10.32 am Western Daylight-Saving Time. You compare that to Ms Rohr's unchallenged evidence that contracts weren't signed until around 1.17 pm Australian Western Daylight-Saving Time and you'll see that evidence at paragraph 8 of her statement.

PN561

Now, really, the meat of the issue, Commissioner, concerns the construction of their written contracts and perhaps if I can take you, Commissioner, to page 200 of the court book, that being Mr Gemignani's contract and that, I think, has been the one that has been the relevant reference point for the cross-examination and the additional evidence-in-chief.

PN562

THE COMMISSIONER: Yes.

PN563

MR POLLOCK: But of course, Commissioner, my learned friend is correct to identify that an objective construction - approach to construction, is the approach to be adopted. We all relevantly know the principles here, but it is not simply a matter of construing the document entirely with reference to the words on the page without any other contextual understanding.

PN564

The test is whether a reasonable person in the position of the parties and with the understanding and the relevant background, facts in contemplation, what they would understand the document to mean. Now, the reason, Commissioner, why I asked additional questions of Mr Tonkin to set out what it is that Onslow Iron Proprietary Limited does on the one hand and what Oipo does on the other.

PN565

If what you see in this document is a clear distinction between Onslow Iron and Oipo. You'll see that on behalf of Onslow Iron and this is - Onslow Iron relevantly is the project manager, Mr Tonkin is advising these employees of changes to conditions of employment. Relevantly, the employing entity five lines down, is Oipo. That is an entity.

PN566

On the plain words of the contract and construing that based on what the parties would understand that to mean, that is relevantly an entity that is capable of employing and that is to be distinguished from both the reference to Onslow Iron Proprietary Limited in the chapeau, that is the first paragraph, and also to the line immediately above it:

PN567

Reporting to general manager, Onslow Iron.

PN568

One needs to give and consistent with orthodox (indistinct) of construction, one needs to give that fifth line employing entity Oipo some work to do. What my learned friend seeks to do here is to strike a line through the very - the term of this agreement that deals with the very issue that we're seeking to grapple with, who's the employing entity.

PN569

It seeks to avoid that and so we don't need to look back because there's a reference in the chapeau to Onslow Iron Proprietary Limited. Now, it is - now, perhaps the document can be, you know - well, could be clearer, Commissioner, but the high

point you have to reference Onslow Iron Proprietary Limited is on behalf of that project manager, they're advising of changes to the terms and conditions, but clearly, the nature of the offer and the acceptance of the offer is for Oipo as the employing entity.

PN570

Now, building on that question of the objective construction of the document itself, of course, it wasn't put to any witness that Oipo Proprietary Limited was not, in fact, the employing entity. The highest it got was a suggestion that the offer was made on behalf of Onslow Iron Proprietary Limited and again, as I've made clear, Onslow Iron being the project manager and that's perhaps not a surprising proposition.

PN571

And in fact, my learned friend put to Mr Tonkin the opposite, that there was - and we'll have the benefit of the transcript after today, I'll assume, Commissioner, that there was a (indistinct) of questions towards the close of Mr Tonkin's cross-examination, it was put to him that MinRes transferred 12 employees to a newly incorporated entity in order to avoid bargaining for a large cohort and if you examine that passage of transcript closely, Commissioner, it's abundantly clear and I think in express terms, the reference is to (indistinct) Oipo.

PN572

But the absence of it being plainly put to the witnesses that in fact Oipo was not the employing entity but that Onslow Iron Proprietary Limited was, couple that with the cross-examination proceeding on precisely the contrary footing, Commissioner, there's a very real question around whether or not my learned friend can even close on that point.

PN573

But those don't sweep to the side what is the fundamental inquiry. You have to be satisfied, of course, that these employees were relevantly employed by Oipo Proprietary Limited at the time and for the reasons I've set out just on the plain face of the document for you to give each provision in that agreement, work to do.

PN574

The delineation between Onslow Iron on the one hand and Oipo on the other, that is the only sensible inference to draw from that document as a - from a reasonable reader in the position of the parties armed with the background knowledge of the parties.

PN575

Now, you're then left, Commissioner, with two species of objection. The first is that a purported absence of genuine agreement because Oipo had manipulated the bargaining process and there are several secondary contentions that fall below that.

PN576

And secondly, that there is no genuine agreement because Oipo failed to meet its explanation obligations under section (indistinct) (5) and my learned friend has relied on his written submissions as far as the explanation's concerned. I intend to

adopt the same approach, Commissioner, unless there's anything particular that you'd like to be addressed on, I intend to focus on the first base of issues in relation to bargaining which was the subject of my learned friend's oral submissions.

PN577

On the question of manipulation, in writing, my learned friend advances three principal contentions, a purported absence of evidence of bargaining, purportedly brief bargaining period and some asserted similarities between the agreement and another agreement, the IRBR '22 Enterprise Agreement.

PN578

If I can just touch upon those briefly. We've answered those largely in writing and what should now be abundantly clear from Mr King's evidence is that this contention around an absence of bargaining or a brief bargaining period simply falls away. Mr King's evidence - and this is set out in the outline of submissions at paragraph 6.

PN579

And you'll see also in Mr King's first statement at paragraph 14 there's an articulation of the progress of bargaining, there's a - it's set out in some detail the nature of the claims that the employees advanced and that those claims which were accepted, those that were pushed back on, where (indistinct) given partially and the relevant changes that were made to the agreement in order to reach an agreement that the employees ultimately voted on.

PN580

That evidence was not relevantly the subject of challenge and set against that, Commissioner, you have nothing more than assertions divorced from any firsthand knowledge of the enterprise or manner in which bargaining unfolded, and that's no surprise, given that the union wasn't relevantly the bargaining representative, that somehow this bargaining was inauthentic and that seems to rise no higher than, well, you got the job done quickly.

PN581

Commissioner, I perhaps need not labour the point that unauthentic bargain does not - it doesn't follow that a bargain must be drawn out of fear in order to be authentic or to demonstrate genuine agreement.

PN582

I wanted to spend a little more time, Commissioner, dealing with these subsidiary issues that my learned friend has developed more fully orally. The first is this, there is a submissions that, 'Well, look, these employees really are nothing more than consultants, they're working at head office. They don't understand the work and it's said that they won't in fact, perform the work.'

PN583

Again, with respect to my learned friend, Commissioner, that just doesn't reflect the evidence at all. The voting group substantially covered the breadth of the classifications contained in the agreement and the voting group had substantial

prior experience in the mining industry. You've had the benefit of Mr King's and Mr Tonkin's evidence on those matters and again, no relevant challenge.

PN584

It wasn't suggested that these people lacked the relevant experience in - across these relevant classifications. The high point it got to today was confined to cross-examination on, 'Well, these people didn't perform diesel fitting work while they were developing policies and procedures and advising on how the mine should operate whilst at head office.'

PN585

Well, again, with respect to my learned friend, that - of course, they would, performing diesel fitting work in the Pilbara at that time but they are only able to perform this operational readiness work and to provide relevant advice on how this operation should be prepared and, you know, practices, procedures, safety plans, all these sorts of things, they can only do that with the relevant experience of the type of work that's going to be performed.

PN586

If anything, that demonstrates that these employees have the requisite experience in order to provide informed consent. And the idea that one is confined in the analysis, to that particular period of time in which they were performing this readiness project work and shut their eyes to the substantial relevant prior experience they had in the industry is - well, just finds no foundation in the authorities, Commissioner.

PN587

At the end of the day, all these questions - and I'll get to the analysis of the 'Stake and moral authority', in due course, but can I just plant this seed at this stage. Stake is not - the word, 'Stake' is not found in part II of the Act at all, nor is 'Moral authority.' These are concepts which are developed in the authorities, some predating - stake emerges, of course, in (indistinct) industries under - relevantly under the Fair Work Act.

PN588

'Moral authority' emerges in, you know, in the late 90s, well prior to the Fair Work Act and I've set out, I think, in the written submissions that some of the reasons why just transposing the Gordonstone Full Court that my learned friend relies on is not a safe path to take in the different statutory context. But the point really is this.

PN589

Those concepts are aimed in guiding you in an analysis of whether or not the agreement's been genuinely agreed, but we know from the approach of the Full Court in One Key, that ultimately the question here is whether in assessing the genuineness of the agreement is whether or not the employees could provide informed consent to the agreement.

PN590

These concepts of stake and moral authority of themselves don't assist you other than to answer that next question and these employees, insofar as it said, 'Well,

they were performing work, you know, hundreds of kilometres away and they weren't actually working as diesel fitters', or 'They weren't actually working as operators at the time.' Well, none of that engages with that question.

PN591

Now, can I just give you some evidentiary references here, Commissioner? I - in the interests of time, I won't take you through them line by line, but just on this question around the connection of the premobilisation work done, the connection with the work they were going to perform at site and the relevant experience, you might have a look at paragraphs 22 to 24 of Mr Tonkin's evidence in paragraphs 27 through to 34, but you've also been taken, I think, in my learned friend's submissions to in (indistinct), which was that relevant starter pack showing what the nature of the work was going to be.

PN592

There's also a submission advanced that, 'Well, these employees are simply going to work on the operational readiness project and once that's done', I think it was suggested, 'Well, it's fixed task employment.' Well, the short answer to that again, Commissioner, is it doesn't reflect the evidence as it unfolded, both Mr Tonkin and Mr King gave evidence that these employees will transfer to site once it's signed and up and running.

PN593

That evidence again, wasn't the subject of challenge. The fact that the written document at the time it was entered into and again, not surprising, given that at that point no relevant - or that at that point there was - there's nothing more than the readiness project to do and where approvals are still forthcoming, it's not at all surprising that the document might describe it in those terms, but it certainly wasn't put to any of these witnesses that they were - that their evidence was incorrect in saying those employees will transfer.

PN594

Yes, it wasn't put to them that those employees - the fixed task having concluded, that those employees have - are no longer employed by Oipo. There's just simply no basis to advance that submission given the way the evidence unfolded and the absence of challenge to it.

PN595

So to be clear, Commissioner, this is not a case where a small cohort of employees have been employed for a short period of time, it's simply to get the agreement done and then they're punted off elsewhere. The evidence does not support that conclusion. The evidence was to the contrary effect. The unchallenged evidence was to the contrary effect and it would be an invitation to error to adopt the submissions that my learned friend has advanced on that score.

PN596

Now, my learned friend also made some submissions around, 'Well, the agreement's got a national scope and all of the employees who made the agreement were based in Western Australia.' Well, again, no evidence was adduced by my learned friend to suggest that there was any material difference in

the work to be performed at an iron ore mining site in the Pilbara as opposed to any other location in Western Australia or indeed across the country.

PN597

There is no reasonable ground to believe that a cohort of employees with substantial requisite experience in precisely that type of work, couldn't give informed consent to an agreement covering that work, whether or not it's confined to the Onslow Iron Project Site or has broader geographical coverage.

PN598

There's also a submission advanced in writing and also orally, that this cohort had somehow been cherry-picked in order to avoid bargaining with a broader cohort to avoid bargaining with union members or to have unions as bargaining representatives. As to this question of whether or not union members were excluded, Commissioner, I'll - again, I'll just give you the evidentiary references.

PN599

Have a look at Tonkin at paragraphs 29 to 34 and King in his first statement at paragraph 31. In short compass, Oipo doesn't know whether or not these people are union members, nor could they know. They don't conduct (indistinct) and there's nothing to suggest on the evidence to the contrary. It certainly wasn't the subject of challenge.

PN600

As to this submission that the cohort was picked to avoid having bargained with a larger group, there are several points to raise in answer, Commissioner. The first - just touching on a point my learned friend made orally, he said, 'Well, there was no urgency to do all of this. The larger cohort as it was, wasn't going to be mobilised for another 18 months or so, based on Tonkin's evidence.'

PN601

Well, that point - it highly underscores why a small cohort was appropriate to engage. They've got people who are commencing work in relation to this project and want consistent terms. There's nothing at all artificial about that approach and why on earth would an employer engage several thousand employees in not going to deploy at that instant time when a smaller cohort is all they need at that point? So the notion that staging it in that fashion somehow demonstrates inauthenticity just simply doesn't arise on the facts here.

PN602

The secondary point here of course is that there's nothing in principle wrong with a smaller group voting on an agreement that would cover a larger group and I know my learned friend has taken you to certain passages in Aldi Foods. Can I take you, Commissioner, back to that judgment? You'll find that at tab 1 of the joint bundle.

PN603

THE COMMISSIONER: Which page was it, sorry?

PN604

MR POLLOCK: Well, it's tab 1, so it commences at page 1 of the bundle. My learned friend, I think, sought to – well, he took you to and sought to define the majority analysis to the question or the construction of who forced him to the definition of, 'Will be covered', for the purposes of 106(2)(a) as opposed to the fairly-chosen analysis. Of course you'd recall that was an integral part of what the High Court was there dealing with. What my learned friend didn't take you to of course was the broader analysis of the making or I suppose the policy underpinnings of part 2(4) and the making of enterprise agreements covering multi cohorts.

PN605

It really begins at paragraph 81, which is on page 25 of the bundle. Now, at 81 in the – and perhaps before I go to this, Commissioner, it's worth recalling the facts in Aldi. You had a group of employees who were presently employed but with respect to a different site, who were asked to make an agreement covering a – relevantly what was otherwise a genuine new enterprise and the fight was really, well, you should have made a greenfields. But you made an agreement with a cohort of employees who hadn't yet worked at that site and who didn't have that relevant experience – so very similar to the sort of contention that's being raised here.

PN606

Now, you'll see at the conclusion of paragraph 81, the majority makes the point that the fact that a greenfields agreement could be have been made covering Regency Park operations with persons who have not been employed by Aldi is beside the point. That's because the agreement was made as the Act allowed, as a non-greenfields agreement. In 82:

PN607

It follows in line with the ordinary and natural meaning of the terms in part 2(4) a non-greenfields agreement can be made with two or more employees, so long as they are the only employees employed at the time of voting were covered by the agreement. It does not matter that the agreement may in due course come to apply to many more employees. That understanding is consistent with the approach of the Full Court in John Holland.

PN608

You then have a distillation of the analysis in John Holland and accordingly, at 84:

PN609

The conclusion indicated by the ordinary and natural meaning of these provisions of the Act is not brought into question by the concern identified by White J in the Full Court below but there is something implausible in the legislature accepting that a small group of employees may be able to fix the terms and conditions of employment for all of the employees who may be employed in the enterprise in the future. Our concern was averted to and rejected in John Holland. It is a concern that does not warrant the adoption and understanding of the Act. It is contrary to the ordinary and natural meaning of the text. Indeed, the concern is addressed and largely allayed by the protective provisions of the Act relating to the right to representation,

fairly-chosen provisions of subsections (3) and (3)(a) of 186 and most importantly, the need to pass the BOOT.

PN610

Now, can I just pause there, Commissioner: this is an important point. My learned friend touched on that point in passing, pivoting then to One Key Workforce. This is a point often overlooked: there's a reference in One Key Workforce here to the protective provisions and the Full Court there transposes into the analysis the genuine agreement point. The High Court does not, in paragraph 84 there, when it's describing the protective provisions, it doesn't refer to 188(1)(c) at all. Insofar as the Full Court in One Key Workforce suggests otherwise, then with respect, they are at the wrong (indistinct).

PN611

Now, perhaps moving on, the rubber continues to hit the road at 85 when the approach of the majority of the Full Court, the concern that the decision affecting only a few in the present made by many in the future is one that is only to be remedied in the case of the enterprise is notwithstanding it may equally arise in relation to already-existing ones. On any construction, 172(2)(a), i.e. the making of a non-greenfields, single enterprise agreement, may be used to make an enterprise agreement with two or more employees for an already-existing enterprise. In the case of a small but already-existing enterprise, it is uncontroversial that the votes of fewer (indistinct) employees may eventually bind a much larger group as the enterprise grows. The construction in the majority of the Full Court does nothing to remove that possibility, nor could it.

PN612

Now, that is an unequivocal rejection of the concerns of the Full Court below that some – that these concerns around the possibility of manipulation or that there is something implausible about a smaller group making room for a larger group, that warrants some different approach. But in any event, Commissioner, there is simply no basis to form a reasonable belief of manipulation here. The highest point of the cross-examination today of Mr Tonkin seemed to be, well, you, Mr Tonkin, talked in your witness statement about wanting one team and consistent terms and conditions but you acknowledged the possibility that people will be engaged on over-agreement terms and so forth and therefore there must be some other basis for having made the enterprise agreement.

PN613

Now, Mr Tonkin gave cogent evidence as to why there was a small initial cohort. They had particular work that needed to be performed. They couldn't bring on larger groups of employees from the other entities because of the pipeline of work that those other entities currently have. He gives evidence that they're likely to go to market, to deal with the - as the work ramps up. Now, just on this point, Commissioner, can I take you briefly to MUA v Toll Energy Logistics? This is at tab 4 of the bundle, commencing on page 65. This was perhaps a similar submission to that advanced by my learned friend here. The Full Bench observes:

PN614

It was further submitted that Toll Energy Logistics knew that it would need to employ additional employees to perform the work and these employees were identifiable as the employees employed by Toll Marine (indistinct) and Farquhar.

PN615

This is similar to my learned friend's contention that, well, you knew that you were going to have to ramp up and you have all these other employees in other entities.

PN616

THE COMMISSIONER: Which paragraph are you referring to?

PN617

MR POLLOCK: I'm sorry – this is paragraph 67 of MUA v Toll. It's on page 77 of the joint bundle. The Full Bench goes on:

PN618

It is not contested that up until March 2015 negotiations were (indistinct) employees of Toll Marine for an enterprise agreement that would cover new-build vessels. It is also not contested that in April 2015 it was intended that employees on the Sandfly and Firefly be transferred to the new-build vessels and that through their bargaining with the MUA they were bargaining for an agreement which would cover work. It is not contested that these employees in the MUA were never advised that Toll Marine Logistics had stopped bargaining, nor were they told, except for the seven crew, that Toll Marine Logistics was going to be the employer of the new-build vessels. It cannot be denied that the decision engaging only seven employees denied those employees the opportunity to bargain for an agreement which would if they accepted employment with Toll Energy Logistics covered employment.

PN619

However, there is no evidence to support a finding that the seven employees employed by Toll Energy Logistics were not employed for bona fide business reasons. There is no question that crew were needed to operate the vessel. The MUA complains that Toll Energy Logistics did not engage the second crew when it knew that it would have to employ them within a very short period of time. Mr Woodward gave evidence that it would not have been commercially viable for Toll Energy Logistics to employ the second crew at the same time the first crew were engaged as the client would not pay Toll Energy Logistics for the second crew at that time.

PN620

'Commercial reasons' – no dissimilar here. Why would Oipo employ 2100 people when ground hasn't been broken? Mr Tonkin and Mr King give that evidence. When asked why the employees could not have been offered employment to commence at a later date, Mr Woodward advised that it was not how the company operated. He denied that the effect of this decision was to deny the employees the opportunity to be engaged in bargaining for a new agreement. Says, 'Here's the evidence that at the time the prospective employees had not been identified or selected'. 'We are unable to conclude that Toll Energy

Logistics, by not employing the second crew at the same time as it employed the first crew, did anything improper'. There is nothing inherently improper with an employer negotiating with a small number of employees in circumstances where it knows that a larger group of employees will be engaged in the near future. In this matter the contractual requirement to have an agreement in place prior to the commencement of the first swing made the need for such an agreement a priority. Now, Commissioner, my learned friend seeks to draw parallels to Karijini Rail, no.2 and for my sins, Commissioner, I was in that case on appeal. Even a cursory analysis of the facts in that case and the evidence in that case make plain there were material distinctions between them. There just isn't evidence in this case to show that there was some scheme to avoid bargaining with a larger cohort or to avoid bargaining with any particular bargaining representative.

PN621

Again, Mr Tonkin gave evidence we still challenge as to the reasons why a smaller cohort was employed and objectively, that evidence holds up. A smaller cohort is employed to perform a particular set of duties consistent and commensurate with where the project was at at the time. Those employees are not punted off to go back to different employment. Those employees remain employed and they will be employed at site performing their roles of heavy diesel fitter and so forth once that work is there to be performed. Those employees, those 12 employees, have substantial, existing, relevant experience in the nature of the work that is to be performed. They cover a breadth of – or at least a substantial cross-section – the classifications to be covered by the agreement.

PN622

This is not Karijini, nor, relevantly, is it anywhere close to KPL Industries. Now, KCL Industries is a useful juncture to touch on these contentions of a lack of stake. My learned friend suggests, well, these employees are employed on higher contractual rates of pay and they're working reasonably cushy hours at head office and that appears to be the foundation for a submission that they can't have a (indistinct), putting aside my learned friend's primary point that, well, they're not employees of Oipo and therefore they can't have a stake in the agreement. Of course, Commissioner, if you were to find that they're not employees of Oipo then we don't get to an analysis of a stake. You would not find the agreement has been genuinely agreed on 188(1)(b) grounds. You wouldn't get to an analysis of (c).

PN623

But for the reasons we've advanced, of course, we say you do. But dealing with perhaps the secondary stake contentions that my learned friend's advanced around the rates of pay and so forth: well, of course, Commissioner, we don't have an approved agreement yet. What we have of course is the preservation of existing rates of pay for these employees. That's not at all surprising. My learned friend seems to suggest that there's some vice in an employer paying a higher contractual rate of pay to employees who are otherwise covered by an industrial instrument. The mere fact that an employee might receive over-agreement payments doesn't mean that the employees lack a stake in the agreement. There's a few points to make here: (1), the fact that a higher rate of pay might be paid doesn't mean that the balance of the terms of an enterprise agreement won't

directly apply to the employee. Employees can have a stake in a range of terms and an agreement and a range of terms which of course the Commission considers when considering, amongst other things, the better off overall test.

PN624

If it was just a matter of looking at what the rate of pay is then the BOOT would be a far easier proposition, Commissioner. But you know as well as anyone that that analysis is often fraught and requires a balance of a range of financial and non-financial terms that extend beyond base rates. These employees still receive the benefit of the agreement as an enforceable safety net. They receive the benefit of other terms directly. Of course making the agreement is a key element of this project's development, so employees who work on the project once it breaks ground and that's the unchallenged evidence of Mr Tonkin and Mr King and that hasn't been challenged in cross-examination, they of course have a stake in that project's progression and relevant elements that contribute to it, one of which is the making of an enterprise agreement to cover its employees.

PN625

I call to mind on that score, Commissioner, another case that I was involved in, BGC Contracting. Now, I don't have it in the bundle but relevantly at first instance Deputy President Binet refused approval relevantly on stake grounds on this point, that the employees were paid higher contractual rates of pay and it was submitted, as my learned friend submits here, that the employees couldn't have had a stake in the agreement because they were paid higher rates. That was knocked off on procedural fairness grounds on appeal but the Full Bench also observed there that in any event, that analysis on stake was wrong and that the employees had, relevantly, a stake in the agreement, notwithstanding that their rates of pay were preserved by contract on the basis that they had an interest in the employer continuing to be able to win work and having an enterprise agreement in place that had, relevantly, these terms, was a component of that.

PN626

THE COMMISSIONER: What was the name of that entity, you say - - -

PN627

MR POLLOCK: BGC Contracting – I can find the citations for you. The appeal decision is [2017] medial neutral FWCFB 2741 and it's reported in the IRs at volume 268 Industrial Reports at 21. The first instance decision of Deputy President Binet was [2017] FWC 852.

PN628

THE COMMISSIONER: I've got the Full Bench decision now, thank you.

PN629

MR POLLOCK: And on rehearing it went to Deputy President Gostencnik, which I think was [2018] FWC 1466. That's testing my recollection. But certainly, the Deputy President on rehearing had concerns on genuine agreement on other grounds but the analysis of stake that the Full Bench adopted was not disturbed. Now, that analysis of the Full Bench is really not surprising. It would be a powerful disincentive for employees to – well, it would be. This is disincentive to providing the appropriate remuneration and wage rises to

employees if the mere fact of paying contractual over-agreement rates was relevantly a barrier to enterprise bargaining. There's nothing in the Act that, on its plain terms, that suggests that. Again, the high point of my learned friend's submissions is to draw on a passage in KCL Industries.

PN630

But the facts in KCL Industries were materially different. Commissioner, that was a case where you had two or three employees who were made an enterprise agreement that was expressed to cover a broad array of industries and classifications. It was an omnibus-type agreement that these employees simply could not and did not have any relevant experience in – couldn't have had the faintest degree of experience in the array of industries covered by that agreement was sufficiently broad that no one could have had that kind of experience. One sees in the analysis in KCL Industries, if I can take you briefly, Deputy President, this is behind tab 7 of the joint bundle.

PN631

THE COMMISSIONER: Do you have a page reference, Mr Patrick?

PN632

MR POLLOCK: It commences at page 186.

PN633

THE COMMISSIONER: Yes.

PN634

MR POLLOCK: Can I take you to – where are we? Can I take you to paragraph 36?

PN635

THE COMMISSIONER: It's on page 200?

PN636

MR POLLOCK: Yes, that's correct. You'll see at 31 there's a precis of the coverage of the agreement. But 36 is what I wanted to draw your attention to. This is really the meat of the Full Bench's analysis:

PN637

In summary the position is that the agreement covers a wide range of classifications, most of which have no relevance to the work performed by KCL's three existing employees, encompasses industries in which KCL does not currently operate, and contains rates of pay which even in respect of those classifications relevant to current employees are not to apply to those employees. In those circumstances we do not consider that any authenticity could attach to the agreement for two employees to the rates and conditions of the agreement. The employees have no say in the agreement's rates of pay since they were assured their (indistinct) rates would remain in place and they could not have given informed consent in relation to occupations and industries in which they do not work and have no experience.

PN638

It's the collocation of all of those matters, Commissioner – the idea that you can isolate the fact that these employees were getting higher contractual rates of pay and say that that alone on the authority of KCL is sufficient to say that the employees lacked a stake in the agreement. It's just simply wrong. The Full Bench considered all of those matters together as informing ultimately the conclusion that they couldn't satisfy the agreement (indistinct) agreed. But here none of the balance of those matters arise on the facts. Here we are dealing with – in my submission – a wholly orthodox scenario where particularly given that the employees – the agreement is not yet approved and we're not dealing with a situation where there's an existing enterprise agreement for covering this entity and these employees.

PN639

It's not at all surprising that these employees are paid contractually higher rates. Again I come back to the point that I made at the outset: all of these are merely tools for you to assess whether these employees were capable of giving informed consent in order to satisfy you that the agreement was genuinely agreed. When you factor in the balance of the evidence concerning the characteristics of this cohort, demonstrated ably by the sort of work they were doing on the Operation Readiness Project, i.e. getting in at the ground floor and designing how this work is going to be performed. They're relevant subject matter experts. That is a powerful criteria and powerful factors that would demonstrate that these employees are ably capable of providing informed consent to terms governing the (indistinct). So we say KCL is just nowhere near the facts here and my learned friend has not pointed to any relevant authority that's on all fours that grapples with these sorts of issues. Now, lastly, I might have touched on this briefly – this point that my learned friend raises around the disconnection between the location and the work whilst bargaining. Again, we say for reasons I've already advanced it's simply not (indistinct). If it were otherwise and the employees actually needed relevant experience in the work and the location before they could make an enterprise agreement, well, one only needs to ask how the agreement in Aldi Foods could ever have been made and approved.

PN640

My learned friend relies on a reference in a 1999 judgment of the Full Court in a different statutory context in Gordonstone to suggest that relies on a reference to work location. Well, Commissioner, again I set out in writing some of the reasons why we would treat that reliance on Gordonstone with at least some caution. You'll see that at paragraphs 9 through to 17 of the written submissions and with particular reference to paragraphs 13 and 14. I don't restate them but, Commissioner, they may (indistinct). Lastly – and this is a point that my learned friend touches on in writing that he didn't spend any time on it today orally – this suggestion that there are similarities to this other agreement, the IRBR agreement, leans it inauthentic.

PN641

Well, the short point in answer to that, Commissioner, is just perhaps not surprising an employer would take a recent agreement covering similar work when that agreement has been approved, it's passed the BOOT and so forth that it's not surprising they might use that as a template to work with as it would give

them some comfort that those terms have had at least some of the relevant approval concerns – particularly BOOT-related concerns – that those have been ironed out. Mr King gives evidence that the claims that were advanced and the changes that were bargained for and made so we're not talking about an agreement that is a carbon copy. Again, no relevant challenge to that evidence.

PN642

Of course, it is perhaps (indistinct) strange that the CFMMEU in particular would take issue with the authenticity of the agreement purely because of some similarity with other approved agreements, given the ubiquity of CFMMEU endorsed agreements across the construction industry. That's a matter for my learned friend to grapple with but we simply say that that substantial similarity is not a vice held. Now, as to the explanation points, Commissioner, I rely on the written submissions. My learned friend didn't deal with that further orally insofar as he continues to press his written submissions we just set out in writing, in detail, the reasons why those contentions have no force.

PN643

Commissioner, those are all the matters that I wanted to address orally. I'll rely on the written submissions, unless there's anything further I can assist you with. Those are the submissions of the applicant and pausing only to say that consistent with I think the way I opened, insofar as there are any other (indistinct) Commissioner, that extend beyond the matters that have been raised in parte we'd of course seek an opportunity to address those and potentially provide undertakings (indistinct) the ones that have been raised in objections.

PN644

THE COMMISSIONER: Thank you. Mr Patrick.

PN645

MR PATRICK: Thank you, Commissioner. Commissioner, I just have three very brief things in reply. Mr Pollock started his submissions by referencing a comment where I mentioned – used the term 188(1)(c) adopts or allows you to engage with a feeling that this is off. I'd just say that with that submission we weren't suggesting that the Commission would apply a standard other than a belief of a reasonable grounds and, Commissioner, we'd note that we wouldn't expect you'd have any feeling that wasn't reasonable in that regard. Mr Pollock has - - -

PN646

THE COMMISSIONER: It's a higher banner than just a vibe.

PN647

MR PATRICK: That is so, Commissioner. We agree with Mr Pollock it's reasonable grounds but we note that if you were to have a feeling, it would be a reasonable one. Mr Pollock has suggested that it is not just the contract of employment that the Commission ought be – when I say the contract of employment, the letters of change of engagement that the Commission would be minded to. It's not just the objective understanding of those letters. In doing so he's suggested that the employees would have had some – the parties at point of contract would have had some common understanding of what Oipo refers to next to an employment entity other than that of Onslow IMP Pty Ltd. Commissioner,

in that regard I won't run you through that. But I'll draw your attention to the slide show that was prepared and presented. It is annexed to Mr Tonkin's evidence at MT2. In that slide show – this is the slide show that was presented to the employees immediately before or on the same day as they allegedly executing those contracts. Commissioner, there is no reference to Oipo Pty Ltd in that slide deck. There is reference to Onslow Iron repeatedly in that slide deck – over and over and over again, Onslow Iron, Onslow Iron, Onslow Iron. We say that if there is relevant material that you ought consider, that is the relevant material and our primary submission is that that is unnecessary; that it is plain on the face of those letters. Commissioner, Mr Pollock has suggested that something should be made of the fact that I didn't take the witness to those contracts and ask what they meant by Oipo with respect to the employing entity and to that, we say we didn't do that because it wasn't relevant. It is not relevant how Mr Tonkin or any of the other witnesses characterises that statement.

PN648

What is relevant is an objective understanding based on that document of what it communicates. The witnesses weren't crossed on it, it wasn't relevant and Mr Pollock has also made submissions with respect to questions in Mr Tonkin's – that were put to Mr Tonkin in the latter half of the cross-examination where he alleges that the transcript will show that the questions were framed with respect to a newly-incorporated entity. Now, it's just not open for the Commission to find that those questions referred to Oipo Pty Ltd. It just can't be said that that's the case. Commissioner, they are the – unless you have any questions for us, they are the submissions in reply of the MEU and the AWU.

PN649

THE COMMISSIONER: Okay, thank you. I thank the parties for their submissions. I intend to give consideration to the evidence and submissions of the parties and publish a decision and reasons in due course so accordingly my decision will be reserved. Is there anything further the parties wish to raise with me today? Mr Pollock?

PN650

MR POLLOCK: Nothing further.

PN651

THE COMMISSIONER: Mr Patrick.

PN652

MR PATRICK: Nothing further, Commissioner.

PN653

THE COMMISSIONER: We'll adjourn on that basis, thank you.

ADJOURNED INDEFINITELY

[4.41 PM]

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