TRANSCRIPT OF PROCEEDINGS
*Fair Work Act 2009*

**DEPUTY PRESIDENT O'NEILL**

**C2023/2015**

**s.739 - Application to deal with a dispute**

**"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)**
**and**
**Programmed Facility Management Pty Ltd**
**(C2023/2015)**

**Programmed Facility Management Melbourne Water AMWU Mechanical and Field Services Agreement 2022**

**Melbourne**

**10.00 AM, WEDNESDAY, 2 AUGUST 2023**

**Continued from 08/05/2023**

PN1

THE DEPUTY PRESIDENT: Good morning everybody. Mr Fodrocy, can you see and hear me clearly?

PN2

MR S FODROCY: Yes, good morning, Commissioner.

PN3

THE DEPUTY PRESIDENT: Good morning. Mr Howard, you are seeking permission to represent Programmed in this matter?

PN4

MR L HOWARD: I am, Deputy President.

PN5

THE DEPUTY PRESIDENT: Well, in light of the fact that the AMWU doesn't object to permission and having read the material, I am well satisfied that it's appropriate to exercise my discretion and grant permission and I do so.

PN6

MR HOWARD: Thank you.

PN7

THE DEPUTY PRESIDENT: All right. In terms of how we deal with the matter today, you have all been provided with a digital hearing book, so if you can, during the course of the day, refer to pages in that document. That helps with the smooth running of the hearing, particularly where it's via video.

PN8

I also have the respondent's authorities and a decision provided by the AMWU this morning. So, they are the materials that I have before me. In relation to the witnesses, as I understand it, Mr Hunter is not required for cross-examination but Ms Ower is required for cross-examination. Is that the case, Mr Fodrocy?

PN9

MR FODROCY: Yes.

PN10

THE DEPUTY PRESIDENT: All right. What I suggest is that we deal with the evidence first and then move to submissions, starting with the applicant. Does that sound like a sensible way to proceed?

PN11

MR FODROCY: Yes.

PN12

THE DEPUTY PRESIDENT: Terrific. One further matter is I suggest that we take a short 15-minute break at around 11.30 or thereabouts and otherwise adjourn at around 1 pm, if we're still going at that point in time, for lunch. Just to be clear, just for lunch, not for the rest of the day.

PN13

The final matter is I just want to confirm that the question to be arbitrated is agreed and is as set out at page 54 of the hearing book?

PN14

MR HOWARD: That's correct.

PN15

THE DEPUTY PRESIDENT: All right. Unless there's any matters that either party wishes to raise, did you want to deal with Mr Hunter's evidence first, Mr Fodrocy?

PN16

MR FODROCY: Yes, thank you. Will Mr Hunter need to be affirmed, Deputy President?

PN17

THE DEPUTY PRESIDENT: Yes. Good morning, Mr Hunter, my associate will just have you take the affirmation.

PN18

MR HUNTER: Good morning, Deputy President.

PN19

THE ASSOCIATE: Thank you, Mr Hunter. Could you please state your full name and address.

PN20

MR HUNTER: Marc Jason Hunter, (address supplied).

**<MARC JASON HUNTER, AFFIRMED [10.05 AM]**

**EXAMINATION-IN-CHIEF BY MR FODROCY [10.05 AM]**

PN21

Mr Hunter, can I take you to page 72 of the court book. That is Mr Hunter's witness statement. Do you have that in front of you?---Yes, I do.

PN22

Thank you. Can you confirm that this is your - that you wrote this witness statement?---Yes, I did.

PN23

Are there any changes that you wish to make?---No, there's no changes.

PN24

Okay. Do you confirm that the statement is true and correct to the best of your knowledge?---Yes, I confirm.



PN25

Thank you. I don't know if it's your practice, Deputy President, to mark the exhibits. I tender that as an exhibit.

PN26

THE DEPUTY PRESIDENT: All right. There is no objection, Mr Howard, I take it?

PN27

MR HOWARD: No, Deputy President.

PN28

THE DEPUTY PRESIDENT: All right. I will mark that exhibit AMWU 1.

**EXHIBIT #AMWU1 WITNESS STATEMENT OF MARC JASON HUNTER DATED 09/06/2023**

PN29

Thank you, Mr Hunter, you are now excused?---Thank you.

**<THE WITNESS WITHDREW [10.06 AM]**

PN30

THE DEPUTY PRESIDENT: All right, Mr Howard, shall we now deal with Ms Ower's evidence?

PN31

MR HOWARD: Yes, Deputy President, that would be convenient.

PN32

THE DEPUTY PRESIDENT: All right. Ms Ower, my associate will just have you take the affirmation.

PN33

THE ASSOCIATE. Thank you, Ms Ower. Could you please state your full name and address.

PN34

MS OWER: Rebecca Ower, (address supplied).

**<REBECCA OWER, AFFIRMED [10.07 AM]**

**EXAMINATION-IN-CHIEF BY MR HOWARD [10.07 AM]**

PN35

Ms Ower, good morning. You have made a witness statement in this matter?---Yes, I have.

PN36

For the Commission's benefit, it's at page 24. It's the witness statement of 10 paragraphs dated 29 June 2023?---That's correct.

PN37

Are there no changes you wish to make to that statement?---No, there's not.

PN38

And it's true and correct?---It's true and correct.

PN39

Deputy President, I tender the witness statement of Rebecca Ower dated 29 June 2023.

PN40

THE DEPUTY PRESIDENT: Thank you. Mr Fodrocy, no objection? All right, I will mark that exhibit R1.

**EXHIBIT #R1 WITNESS STATEMENT OF REBECCA OWER DATED 29/06/2023**

PN41

MR HOWARD: No questions in chief, Deputy President, but I understand that there is a short cross-examination.

PN42

THE DEPUTY PRESIDENT: All right, Mr Fodrocy, over to you.

PN43

MR FODROCY: Thank you, Deputy President.

**CROSS-EXAMINATION BY MR FODROCY [10.08 AM]**

PN44

Ms Ower, just a quick question. I won't keep you too long. If you don't understand anything that I ask, please just let me know and I might rephrase it. I understand from your statement, in paragraph 1 - do you have it in front of you, Ms Ower?---Yes, I do.

PN45

In paragraph 1, you say that you are the regional and human resource manager and you have been in that role since January 2018?---That's correct.

PN46

Prior to that, were you also in human resources?---Yes, I was.

PN47

For how long have you been in the position of a human resource manager or officer in that sort of area?---I have been in a position within the human resources since about 2001, so is that 21, nearly 22, years.



PN48

At any time in your career as a human resource manager or staff person or officer, did you - before I go there, let me start with this question: has that work been

primarily in Victoria or elsewhere in the country?---No, I've only been engaged in this role within Victoria.

PN49

In your previous role, at any time did you work for a company and accrue seven years of continuous service?---Yes, I have.

PN50

MR HOWARD: What's the relevance of that?

PN51

THE DEPUTY PRESIDENT: I have to say what is the relevance of that, Mr Fodrocy?

PN52

MR FODROCY: I understand that part of the respondent's argument from its submissions in response to ours is that the Commission should consider the industrial context when it comes to determining the construction of the clause in the agreement and part of that industrial context is the ATO's ruling and the otherwise availability or entitlement of the superannuation scheme and the long service leave scheme.

PN53

Ms Ower has given evidence in her statement about her experience as a human resource manager - in her role, sorry, as a human resource manager of the company. She has also given some evidence, in paragraph 4, about the company, its operations and its employees, in paragraph 5, about her responsibilities. So she, in my submission, and what I would be submitting, has knowledge and expertise around the industrial context, part of which would be the availability of long service leave and entitlement to superannuation contributions while someone is on long service leave, and I seek to take evidence on cross-examination about the industrial context which goes to superannuation payments and contributions being made, and she is in a position to give that evidence.

PN54

THE DEPUTY PRESIDENT: I am making a few assumptions here, so correct me if I am wrong, but you are suggesting that it's relevant in construing this agreement, or at least you contend that the respondent says that the industrial context is relevant and that part of that industrial context is the conditions of employees that are not covered by the agreement nor the award?

PN55

MR FODROCY: It is relevant in that it goes to the AMWU's argument that the ordinary case which is in the industrial context is that a person on long service leave from an employer is entitled to superannuation contributions to be made on their behalf, and if the construction that the respondent puts forward is adopted, it would be the case that the Commission, in its construction, would be departing from what is otherwise the ordinary case. If the - - -



PN56

THE DEPUTY PRESIDENT: I - - -

PN57

MR FODROCY: Sorry, Deputy President, just a minor point, that if the ATO's ruling, which goes to the general context and speaks nothing of the agreement, is relevant to the construction, I would think that the broader situation, as would be evidenced by Ms Ower, is also relevant to the construction.

PN58

THE DEPUTY PRESIDENT: I don't think there's any contest that employees not covered by CoINVEST are entitled to receive superannuation guarantee payment contributions when they take paid long service leave. I don't understand that that's to be controversial. In any event, Ms Ower's personal circumstances I don't see are relevant. I struggle to see the relevance of the question generally, but I will allow it if the question is directed not at Ms Ower personally but at other employees of Programmed.

PN59

MR FODROCY: Thank you, Deputy President.

PN60

Ms Ower, in your role as an HR manager, for employees other than those covered by the agreement that we are talking about today, can you state whether an employee of Programmed, other than those covered by the agreement, after seven years of continuous service would be entitled to long service leave?---So what I can confirm is, dependent upon the industrial agreement to which an employee is attached, there would be variations of how that person can take long service leave. So, if a person is attached to an agreement, it may have provisions in it around long service leave. If an employee is a salaried employee and attached to a common law contract and not underpinned by any other agreement, then that person would take paid long service leave from the business in terms of applying for that paid leave through the business and relative to the statutory requirement of the seven years.

PN61

Taking that hypothetical person as an example, if that person were to take their long service leave under the statutory requirements, as entitled, paid for by Programmed, would Programmed - and if you don't know this, you can just say you don't know - would Programmed also have an obligation to make superannuation contributions on behalf of that person for the period of the long service leave?---That is paid - so, yes, in the context, if it's paid leave taken as leave from the company and paid by the company.

PN62

I might take an example. Office workers at Programmed - there are other managers who work at Programmed; it's not just yourself, presumably?---That's correct.



PN63

They are not covered by the agreement that's before the Deputy President today?---That's correct.

PN64

To the best of your knowledge, yes. I don't know if they are covered by a different agreement. Perhaps you might know. Is there an enterprise agreement that covers yourself and other persons in the HR department?---No, there's not.

PN65

If a manager or an employee in those circumstances were to take paid long service leave, the company - so I can confirm your evidence - the company, as you understand it, would be obligated to make superannuation contributions on behalf of that person?---That's correct, to the best of my understanding.

PN66

Thank you, Ms Ower. Those are the only questions I have in cross-examination?---Thank you.

PN67

THE DEPUTY PRESIDENT: All right. Any re-examination, Mr Howard?

PN68

MR HOWARD: No, Deputy President.

PN69

THE DEPUTY PRESIDENT: All right. Ms Ower, thank you for your evidence - short but sweet - and you are now excused?---Thank you, Deputy President.

**<THE WITNESS WITHDREW [10.19 AM]**

PN70

THE DEPUTY PRESIDENT: All right, Mr Fodrocy.

PN71

MR FODROCY: Thank you, Deputy President. I will try not to go into too much detail in terms of my submissions.

PN72

THE DEPUTY PRESIDENT: I have had the opportunity to read the material, so you can safely do that.

PN73

MR FODROCY: In essence, the AMWU's argument really is that the plain and ordinary meaning of the words of clause 4.8.1 should govern the construction and the entitlements of the employees who are covered by that clause. That ordinary meaning we think is plain on the text. It is quite a simple phrase: 'Any paid leave from the employer.'



PN74

Clause 4.8, which provides some context as to the meaning of the clause that's actually in question, clause 4.8 is not only worded differently, it employs different words, they are in a different order, and if the Commission is to adopt the plain and ordinary meaning of 4.8.1, which is what is to be expected because that is how the employees who are covered by it will read it, they will see that the agreement adopts different language when it comes to outlining what a person's entitlements are, and it is only by ignoring that difference that the respondent's construction might be adopted.

PN75

What's more important, I think, and having read the respondent's submissions, the introductory words to clause 4.8.1, which I will read out:

PN76

> *Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for.*

PN77

Then point (a) being the category under which this falls.

PN78

The key word, that as I understand it has not been addressed by the respondent, is that clause 4.8.1 says the employer must 'also'. The word 'also' has been inserted. We think that it is in reference to providing additional obligations/entitlements additional to what is set out in the more general clause 4.8.

PN79

If, as I understand the respondent's construction to be, if that were to be adopted that the entitlement to superannuation contributions set out by the phrases 'authorised leave paid by the company' is to be taken as synonymous with any paid leave from the employer, then it's not clear why clause 4.8.1 is said to be an obligation also, that is, in addition to the obligation set out at 4.8. It would not make sense for 4.8 to say superannuation is payable in circumstances (a) and is also payable in circumstances (b) where they are both the same. That's not the end of our argument, but I think it's an important one.

PN80

As with the differences in the words employed as well as the way that the words are used, and I won't go into them because I went into a quite detailed analysis in my submissions.

PN81

THE DEPUTY PRESIDENT: You did. I felt like I had a well overdue grammatical lesson, which certainly was not my strong suit, so it was helpful.

PN82

Can I just ask you, does it follow that you don't contend that the reference in the first sentence of clause 4.8 on authorised leave paid by the company, that that is not - that does not therefore apply in the context of someone on leave receiving payments from CoINVEST? So your argument is entirely based on 4.8.1(a)?

PN83

MR FODROCY: Our argument in this matter is entirely based on 4.8.1(a) and we don't rely on the words in 4.8. That is more of a - it's a decision that has been made in terms of this litigation, for want of a better word, about the construction of the agreement. I am not prepared to take it any further than that.

PN84

THE DEPUTY PRESIDENT: All right. Can I also ask you - and I am sure Mr Howard will speak to this later - but, as I understand, the company's submissions give some import to the introductory words in 4.8.1, 'Subject to the governing rules of the relevant superannuation fund' and, as I understand it, essentially contend that that has the effect of picking up the legal provision under the Superannuation Guarantee Act, which is, for example, reflected in the ATO's interpretive ruling that you have both referred to. It's not quite clear to me what your response to that submission is.

PN85

MR FODROCY: I hadn't understood that to be the argument of the respondent, but, if that is the argument of the respondent that the phrase 'Subject to the governing rules of the relevant superannuation fund' is to capture the obligations - - -

PN86

THE DEPUTY PRESIDENT: Perhaps, given that, I may well be misrepresenting Mr Howard, so perhaps leave that to come back to final submissions in reply.

PN87

MR FODROCY: Yes.

PN88

THE DEPUTY PRESIDENT: In case I have misunderstood the company's submissions.

PN89

MR FODROCY: Okay. Thank you, Deputy President. What I do recall from the company's submissions is that they are asking the Deputy President to somehow import the situation as set out in the ATO's ruling as being the meaning that should be adopted as set out in the text, as that 4.8.1(a) says nothing more than setting out what the situation is as the bare requirement under superannuation legislation. Whether that is from the introductory words at 4.8.1 or the words at 4.8, which talk about the contribution rate required by the superannuation guarantee legislation, I certainly reject the submission and don't think that that is the proper construction of the phrase or the clause.

PN90

That goes to what I was saying earlier, I guess, in a way. If clause 4.8.1 were to say nothing more than what the superannuation guarantee legislation provides, why is it there and why is it said to be the employer must also make the contributions in those circumstances? It is not clear, as a point of context, why.

PN91

I believe the respondent submits this, that subclause (b) of 4.8.1 provides for circumstances additional to and in circumstances where money is paid to a person who is absent from the company, from their work for a company, where that payment is made by someone other than the company. So, (b) is said to be additional but (a) is not; (a) is just a restatement of what the bare legislation requirements are, and I think, Deputy President, you could only come to that construction if you were to ignore the word 'also' and you were to ignore the differences in wording between paragraph (a) of paragraph 4.8.1 and the wording in the first paragraph of 4.8.

PN92

I guess that's where it comes to our argument around purposive argument. Deputy President, you don't have evidence from either of the parties as to what the intended meaning might have been for the words used at the time the words were inserted into the agreement. Now, it is clear from the face of the provisions that the intention is to set out the circumstances in which superannuation contributions are to be made, which doesn't really resolve the point, but, as a sort of counterfactual argument, the respondent appears to be seeking the construction that would mean that - and this is why I asked the question of Ms Ower earlier - the ordinary situation, which is what informs the industrial context, the ordinary situation is that employees who meet the continuous service requirements under the Long Service Leave Act in Victoria are entitled to long service leave after seven years and, as set out in the ATO ruling, whilst on that long service leave from their employer, superannuation contributions are payable; the company is obligated to make those contributions.

PN93

The situation with the members covered by this agreement is that their entitlement to long service leave arises under the Construction Industry Long Service Leave Act. That says nothing of whether superannuation contributions are payable while someone is on long service leave. The ATO's ruling goes to whether CoINVEST, or presumably a similar fund set up under the Construction Industry Act, might be obligated to make contribution payments and it says that it's not, CoINVEST is not obligated to make those payments to our members, and that's not disagreed with by the AMWU.

PN94

What we say is that the agreement provides for that entitlement and the agreement, especially clause 4.8.1, does not refer back to the ATO ruling, it does not refer back to the superannuation guarantee legislation. I don't see anything in it, and I can't take you to anything that might imply those things, other than the phrase 'Subject to the governing rules of the relevant superannuation fund', but that doesn't go into the legislation and it doesn't go to the ATO ruling. It goes to what may or may not be in an employee's fund, in the rules in the employee's fund.

PN95

The absence of any supporting extrinsic material to take to you a purpose that might seek to exclude the entitlement to superannuation contributions is telling because such a construction would deprive employees who are entitled to long service leave by way of the Construction Industry Act superannuation

contributions which are given to and are entitled by essentially almost all other employees who meet the eligibility under the Long Service Leave Act in Victoria.

PN96

THE DEPUTY PRESIDENT: There is somewhat of a counterargument to that, presumably, which is that employees who get the benefit of the CoINVEST scheme are entitled to long service leave in circumstances where, but for the scheme, they may well not ever become entitled to long service leave because of the changing work in the industry. So, it could be put that there's swings and roundabouts, the swings are the access to long service leave, the roundabout being the non-access to superannuation contributions.

PN97

MR FODROCY: Indeed. I hesitate to point that - the company has not made that submission, and I think that, whilst one might consider that to be the case and can see how an argument could be made that that's the case, but there's nothing in the Construction Industry Long Service Leave Act which would suggest that. Rather, its purpose is to be facilitative and beneficial to members of the construction industry, workers in the construction industry, in recognition of that disadvantage that comes from working in the industry, as identified by yourself, that it's seeking to address a harm, which is that the construction industry work can be transient and short term, which results in those workers not having access to long service leave, and that is the harm that it seeks to address and essentially says nothing of the superannuation component.

PN98

If that were the sort of quid pro quo of the scheme, then I would imagine there would be something in the Act or the Explanatory Memorandum and other extrinsic material which would go to that. I'm not aware of it, I have nothing to present to you, but I am sure it's open to the Deputy President to look at those materials to see.

PN99

So, I don't think it really resolves the point and, if anything, we could say, well, the Construction Industry Act is seeking to provide a benefit to workers in that industry by addressing the issue of them ordinarily being unable to access long service leave because of the short-term nature of their work in general and it would be at odds with that purpose for it to be construed to also be limiting that in this way where it is otherwise available to other employees.

PN100

I guess that takes me to the other point, which is the decision, which I lodged late, which I apologise for, this morning, the Victorian Building Industry Disputes Panel decision of 2019. Now, that Panel, I am told - I presume this is sort of common knowledge - has been a feature of the construction industry for some time.

PN101

THE DEPUTY PRESIDENT: I am familiar with the history and the operations of the Panel.

PN102

MR FODROCY: Yes. This decision that was made was chaired by, again, someone I am told is a well-regarded practitioner, and it sort of goes to the fact that, whilst we are dealing with this agreement with Programmed and by virtue of the Construction Industry Long Service Leave Act, it is not an isolated issue and this is something that the construction of this clause could go to very many agreements and very many entitlements to superannuation contributions. In much the same way that the ATO ruling might have some relevance, the decision of the Panel, I think, also will have some relevance.

PN103

On point is that, in paragraph 10, it notes that the Panel was not bound to apply the decision. I would say that neither is the Commission. It also notes that:

PN104

*Enterprise agreements generally provide entitlements which are more generous than under an applicable award or other legislative entitlement. In some respects, they are required to pass the better off overall test.*

PN105

In the last few sentences of paragraph 10, the Panel talks about how the reference to the Superannuation Guarantee Administration Act 1992 in the agreement does no more than ensure that an employee does not receive less than what is provided in the legislation.

PN106

The Commission can say the same thing about clause 4.8:

PN107

*All superannuation contributions will be paid monthly at the contribution rate required by the superannuation guarantee legislation while at work or on authorised leave paid by the company.*

PN108

And then it deals with salary sacrifice.

PN109

Clause 4.8.1 does not refer back to the superannuation guarantee legislation and it states that the employer is also obligated to make contributions in the two circumstances of (a) and (b). It is clear, on the face of it, that the agreement is providing for entitlements additional to the legislation, more generous than the legislation, and so the ATO ruling does not govern the construction of that clause.

PN110

THE DEPUTY PRESIDENT: I have to say I found it surprising that neither party has located any authorities dealing with the issue beyond this matter because I would have thought that this would have been an issue that would have come up previously and been dealt with, but I am assuming that's because the particular language in this agreement is not standard throughout the industry. I'm not sure if that's a correct assumption or not.

PN111

MR FODROCY: Well, the award itself, as set out, goes to 'contributions also payable for any paid leave' - full stop.

PN112

THE DEPUTY PRESIDENT: Yes.

PN113

MR FODROCY: Full stop. In some respects, you could say that that is considerably broad and that is why it's probably not been contested by a company because, as I understand, Programmed's argument in this case is that the phrase 'from the employer' is synonymous with the phrase 'by the company', meaning that the payment must be received by the company, whereas, in the award, you could say that view could not be advanced because there's no mention of the employer, and so that might go to why, in other agreements, perhaps it doesn't include the phrase 'from the employer' at the end of it, but I'm not aware and I can't take you to any where that's the case.

PN114

I guess that's where we get into my detailed grammatical construction of the words and how, in 4.8.1(a), it refers to 'paid' leave. The phrase 'paid' is describing of the type of leave, not an action of the company, unlike, in clause 4.8, where the word 'paid' is used in the sense of being an action by the company, as well as the differences between the meaning of 'by' and 'from'.

PN115

I wouldn't say the Deputy President needs to make your decision on that reasoning because the use of the word 'also' is very relevant, I think, or I would say it goes to what I was saying earlier, that neither party has really given any evidence before you about why, in the minds of the parties when it was drafted, those words 'from the employer' were used.

PN116

The applicant's, you know, only submission on that really is that it is unlikely to have been an intended purpose of the parties to exclude the circumstances in which superannuation contributions are payable when 4.8.1(a) was put in an agreement, accepting that I have no evidence to take you to that point, but, equally, the company has not, as I am aware, provided any evidence to say that the purpose was to adopt the bare construction of the legislation as set out by the ATO ruling, or, taking it further, to essentially alter the situation for our members in the construction industry covered by the Act to deny them superannuation contributions which are available to, essentially, all other employees under the Long Service Leave Act in Victoria.

PN117

I would imagine that if the company had intended that purpose when this was entered into the agreement and it was agreed to by, presumably, the AMWU at the time, then that evidence would have been led or provided to yourself, and it hasn't.

PN118

I think I started this by saying I would be brief, and I haven't been. I don't have any other submissions for yourself, Deputy President, unless there are any other questions.

PN119

THE DEPUTY PRESIDENT: There may be a couple of questions in response, but nothing from me at this stage, thank you.

PN120

Just before you start, Mr Howard, I am just going to stand up and move around because my lights have turned themselves off.

PN121

MR HOWARD: Of course. Thank you, Deputy President. Mr Fodrocy has been brief and we are making very good time. We are definitely not going to be here after lunch would be my prediction, so no late nights for you, Deputy President, and your associate, which is pleasing.

PN122

I, too, rely on the written submissions and I note that Mr Fodrocy has - and myself - really exhaustively ventilated the dispute in writing. I do rely on them in full and I don't want to restate them but, rather, illuminate them by reference primarily to the material that I have referred to.

PN123

Deputy President, you do have that authorities folder you mentioned this morning. I will be primarily going through that, and we may as well start there. So, in that authorities folder, it commences with the extract of the agreement at page 2, after the Index.

PN124

Just pausing there, Deputy President, this is a Greenfields agreement, which is just something I needed to clarify to you given paragraph 8 of Mr Fodrocy's reply submissions, which made the point that this should have been explained to employees. There were no employees. That also explains a lack of bargaining evidence that has been complained of orally. This is a Greenfields agreement. We don't rely on any bargaining evidence for that reason, and we don't need to. Our construction is textual and contextual and purposive and resting on the four walls of what we say the agreement says when read in context.

PN125

Turning the page to the clause within this bundle, the parties agree, I think, that the first sentence of clause 4.8 requires a construction, or informs the dispute. That says:

PN126

> *Superannuation contributions will be paid monthly at the contribution rate required by superannuation guarantee legislation while at work or on authorised leave paid by the company.*

PN127

We say, as you will have figured out, authorised leave paid by the company is that which is paid by the company, not by CoINVEST.

PN128

Then the other clause that requires an interpretation to resolve this dispute is 4.8.1(a), which says that, in addition, contributions are to be made for paid leave while the employee is on paid leave from the employer. Now, we say 'from the employer' likewise is that paid leave that is provided by Programmed, not by CoINVEST.

PN129

If you could just take a mental snapshot, Deputy President, of 4.8.1 and then turn to page 8 of the bundle. Page 8 of the bundle I have highlighted for you as 31.5. That is precisely the same clause. It is a direct copy and paste, save for one issue, which I will come to. The drafter of the agreement has taken 31.5(a) and pasted it into 4.8. There is no escaping that conclusion; it's very obvious. The intention was to make sure that 31.5 finds itself in the agreement, obviously for clarity purposes, to avoid, for example, an employee having to consult the award and the agreement, and then probably the union and the company, as to, 'Well, what's my situation when I'm taking paid leave or I'm on a work-related injury or illness?' So there was a criticism or a question as to why did we do that. Well, obviously, for clarity purposes.

PN130

Any routine enterprise agreement contains clarification, but the other point, and the more important point for the questions of context and purpose, is that this is a direct transplant, and we have a *Short v Hercus* situation, Deputy President. Are you aware of that authority?

PN131

THE DEPUTY PRESIDENT: I am.

PN132

MR HOWARD: I don't have it in the bundle. I will get Mr Farrant to send it to your chambers. We do rely on it. I will bring it up on my screen for Mr Fodrocy. I will do that now.

PN133

When we are looking at the context in the process of construction, as Burchett J says, it may include, in some cases:

PN134

> *ideas that gave rise to an expression in a document from which it has been taken* -

PN135

as in here:

PN136

> *When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength* -

PN137

which it does here:

PN138

*There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance -*

PN139

as Mr Fodrocy does. True, it may stand alone, but it should not be assumed. It is precisely the situation, Deputy President, you find yourself in. We say that it's highly - what's governing the construction of the award ultimately governs the construction of 4.8 in context.

PN140

THE DEPUTY PRESIDENT: Is it your contention that, under the award, superannuation payments are not payable while someone is on long service leave and receiving payments from CoINVEST?

PN141

MR HOWARD: Yes.

PN142

THE DEPUTY PRESIDENT: Is there any authority to that effect?

PN143

MR HOWARD: No. I notice you asked Mr Fodrocy that and there's no authority to that precise effect, be it court or tribunal, in the sense that there's no interpretation of this award provision and, Deputy President, you would be the one, by a side wind, as it were, to be giving that interpretation for the first time.

PN144

THE DEPUTY PRESIDENT: And then I suspect mine might not be the last word on the matter.

PN145

MR HOWARD: Which is why we do need to proceed carefully and I will go through this very carefully.

PN146

Now that we have gone to the award, if I can just go back to the agreement at page 3.

PN147

THE DEPUTY PRESIDENT: Sorry, I just want to be really clear: your submission is that the critical language is 'paid leave' rather than the 'from the employer'?

PN148

MR HOWARD: No, I rely on each and every word. I rely on the - - -

PN149

THE DEPUTY PRESIDENT: So two separate points, essentially?

PN150

MR HOWARD: Yes, two points, but ultimately I rely on the natural language.

PN151

At page 3 of the bundle - and I think, Deputy President, just to pick this up and the reason why I am going back to it, the difference between 4.8.1 and the award is the words in 4.8.1(a) 'from the employer'. That's the only change between the two documents, and the question for you, Deputy President is, 'Why did they make that change?' and it's obvious, we say: Programmed wished to clarify and make abundantly clear that this entitlement only extends to paid leave from the employer, paid by the employer; it does not extend to situations where payments come from third parties such as CoINVEST. Why do those word appear otherwise? It is a very telling textual indication as to what the intention is. No other reason why you would put those words in.

PN152

Can I go to what 4.8.1 does because I don't think it's been completely addressed by Mr Fodrocy. There is subparagraph (a), which is paid leave. So, it extends the superannuation entitlement to all forms of paid leave. Now, it's wrong to encapsulate that narrowly as long service leave or as something to do with long service leave, prima facie or exhaustively.

PN153

In superannuation legislation and law, not every form of leave attracts super contributions, Deputy President. I have provided you the ruling in that regard. I don't have it in my authorities bundle, but it is footnoted, if you are interested to learn about it, but I am sure, Deputy President, you are aware parental leave does not attract superannuation contributions; jury service leave does not attract superannuation contributions; Defence Service leave does not attract superannuation contributions; special paid leave, if it's created (indistinct), will not attract superannuation contributions because none of those forms of leave constitute ordinary time earnings, ordinary time earnings being the concept that governs contributions, and those forms of leave that I have just enumerated are not based on ordinary time earnings. That's leave. All of those circumstances are leave payments based on the happenstance of an event rather than ordinary time earnings.

PN154

So jury service leave; you're not rendering any service by reference to ordinary time to your employer when you do jury service leave. So you do not get superannuation contributions. So bringing that back to what the agreement is doing it's extending forms of leave, those forms of leave and the obligation to pay superannuation. So that's what it's doing, that's its purpose, but it does not extend to any paid leave from the employer. So that's the first clause, and the second clause deals with the same issue.

PN155

Deputy President, when you are in receipt of workers compensation payments you are not rendering ordinary time earnings. You're not rendering any service and being paid for that service by reference to time. You're injured and you're getting payments from a third party, an insurance payment from a third party. So the

obligation there is to also extend the obligation to make superannuation contributions to that circumstance. So that's what the agreement and the award are doing.

PN156

The next thing I wanted to bring your Honour's attention to is the award and a little bit more about the award. If we go to page 6 of the bundle and 31.1(a). This was a clause that was a common issue as I understand it, introduced across a number of awards, modern awards, so that era. But you will see 31.1(a) outlines the superannuation legislation, including all that listed, is to deal with rights and obligations of employers and employees. And then (b) says the rights and obligations supplement those superannuation legislation.

PN157

So what happened subsequent in this clause over pages 7 and 8 is supplementation. We must read this clause in light of the superannuation legislation that's outlined in clause 31.1(a), and this goes to answer one of your questions, Deputy President. When 31.5 says, 'Subject to the governing rules of the relevant superannuation fund', that's a superannuation legal concept that your Honour needs to take account of, apply. So governing rules is superannuation language, which I provided to you at page 10 of the bundle. So governing rules means the trust deed rules, but also the legislation or combination that constitute the governance of a superannuation fund.

PN158

So subject to the governing rules of relevant superannuation funding means, subject to the rules that govern the question of ordinary time earnings. That's what it means, because that is the principle upon which the enterprise agreement turns, ordinary time earnings, and ordinary time earnings is the concept in the governing rules found in the superannuation legislation. So it's a bit of a misnomer to say, for example as Mr Fodrocy did, that there should have been some sort of reference to a ruling in the clause, what have you. None of that really takes the matter very far. I'm just relying on the text of the clause. So subject to the principles governing ordinary time earnings, this is how we treat paid leave and work related injuries or illnesses.

PN159

Can I now turn to - sorry, your Honour.

PN160

THE DEPUTY PRESIDENT: Wouldn't that also provide that the subject to the governing rules might also just refer to any inconsistency with those? I'm struggling to understand the work the clause - the language 'must also make the superannuation contributions' does if the provision means that whatever the legislation provides is the standard. Surely the use of the employer must also make the superannuation contributions extends and travels beyond what the legislation requires.

PN161

MR HOWARD: That is true. There's two concepts that I probably need to answer there that, Deputy President, you have introduced. The reliance on 'must

also' in the agreement much is made of that by Mr Fodrocy and the union, but that's just a direct copy and paste from the award, which also says 'must also'. So we don't, and your Honour does not need to place any emphasis on the question of 'also' as if the drafter decided to intentionally use 'also' as some sort of distinguishing characteristic from the head clause. What the drafter has clearly and obviously done is copy and pasted 31.5.

PN162

THE DEPUTY PRESIDENT: But it also has to have work to do.

PN163

MR HOWARD: It does, and I've demonstrated that. So it has work to do in the sense of extending contributions to parental leave - - -

PN164

THE DEPUTY PRESIDENT: Paid leave.

PN165

MR HOWARD: - - - jury service leave, defence leave, workers' compensation, et cetera. But the reality has to be that the person who drafted this agreement copied and pasted it, and he or she or they are not parliamentary draft persons and I'm not holding to them that standard and neither should the Commission. This is an enterprise agreement, not an Act of parliament. So that's the 'also' matter dealt with.

PN166

And then the other matter raised by that question is subject to the ordinary time earnings principle doesn't that mean, you know, this clause applies supplementary to. We agree with that, but it has limits. So subject to the principles of ordinary time earnings paid leave attracts contributions, as does third party insurance payments and workers' compensation. But then you've got, and this is why you have to give a meaning to everything that's happened, the introduction of from the employer, because the drafter really wanted to make clear to the worker and everyone reading it that it does not extend to payments from Co-INVEST or third parties.

PN167

Turning now to the interpreted decision we say that's contextual for this - we don't say, as Mr Fodrocy seems to say we said - we don't say the interpreted decision is elevated beyond some sort of hierarchal principle that must apply subject - or overrides the enterprise agreement. What we are saying is that the principles of superannuation law form part of the context and explains why the clause has been drafted this way.

PN168

Just to page 12 you will see, Deputy President, that the worker subject to this ruling was in the building construction industry and subject to a fund, and I think it is Co-INVEST, although it's not expressly stated. And I say that because in this ruling it's a Victorian trust fund in the building industry. The ATO has made it a general application because it's aware that there are other trust funds that manage the same scheme. So Co-INVEST is not addressed directly.

PN169

The submission was that this ruling says that Co-INVEST is not required to provide super contributions, but says nothing about the employer. Now, that's obviously not a correct summation of the ruling. Now, if we turn to page 13, halfway down the page there's a question and then it's answered with four paragraphs. Section 5 - I will just summarise all paragraphs - section 5 imposes the SG standard employer. Sections 22 and 23 specify the method of reducing the SGC to zero. The next paragraph, 'Ordinary time earnings is standard and is based on which to calculate the amount against the employers required to calculate the contributions necessary.' OT is defined in section 6.1 of the SGAA, and does include long service leave payments, except lump sum payments of unused long service leave.

PN170

In relation to the facts of this case the employees have not received a payment from the employer. As no payment has been made by the employer to the employee the employee accrued long service leave. The employer has no obligation to provide superannuation guarantee contributions on the long service leave payments. I summarised this ruling hopefully to assist you, Deputy President, in my written submissions. So that is all I really wanted to take you to at the moment in the authorities.

PN171

Turning now to the contentions said against me, the union's submission should be rejected. I have dealt with them from paragraph 23 onwards in my written submissions, Deputy President. The first contention is that the words 'any paid leave from the employer is synonymous', which is the word equated to a concept that they say, and I will quote, 'Authorised absence from the company for which a payment is received.' That's basically the submission that's put against me in multiple paragraphs, many, many paragraphs.

PN172

Now, that's not a proper process of construction. There's no reason to equate words that way, and the concept that the AMWU's submissions introduce authorised absence from the company for which a payment is received, that's not a concept inside the enterprise agreement. It's something that has been - it's external to the issues. You should reject the resolution of a constructional exercise by reference to something that's been invented external to the agreement.

PN173

The next thing I needed to raise in relation to that is what the consequences of that equation is. So if paid leave, that word, was to be equated with authorised absence from the company for which a payment is received, then there would not have been a reason to put in 4.8.1(b). That's just supernumerary to everything, which is the workers' compensation. So workers' compensation is an authorised absence from the company for which a payment is received. It obviously can't be equated that way. It doesn't work. There would be no reason to have 4.8.1(b), because that concept would do all the work.

PN174

The next issue that's raised by the written submissions at least, not so much pressed today, is a distinction about what 'by' means and what 'from' means. You should reject that entirely. They mean the same thing. Now, can I take you back to the authorities.

PN175

THE DEPUTY PRESIDENT: Page 37 I think.

PN176

MR HOWARD: I was going to take you to page 36 of our authority folder.

PN177

THE DEPUTY PRESIDENT: I have got that.

PN178

MR HOWARD: You've got that. So just to orientate your Honour about the use of dictionaries and to help your Honour identify the principle in relation to that, I've provided your Honour with Thiess in paragraph 23 where this sort of approach is criticised quite heavily. Quoting the US Supreme Court actually where that court says:

PN179

*One of the surest indices of a mature and developed jurisprudence not to make a fortress out of the dictionary - - -*

PN180

As Mr Fodrocy seems to do.

PN181

*- - - but to remember the statutes always have some purpose or object to accomplish whose sympathetic imagined discoveries the surest guide to their meanings.*

PN182

So we need to tread very carefully dictionaries, but let's go there anyway, and I have that at page 37, the definition in the Macquarie of 'by'. I know your Honour knows what 'by' means, but I just want to give you that meaning, and obviously it's used in the eighth sense, so through the authority of by his own account, so by the company. So through the authority of - that's how we're using 'by' in this circumstance. 'By' is a conjunctive word that has multiple uses, but it's very clear what 'by' means in this clause.

PN183

Turning to page 39 I have the definition of 'from'. Mr Fodrocy has correctly to an extent supplied you with that definition from the Macquarie where in his submissions at page 69 he says, 'It's a particle specifying a starting point and hence used to express the removal or separation in space', and he's left alone the rest of the definition. Now, we all know what 'from' means, and we all know what it means in this circumstance, and it's point 3, 'The source or origin.' So drawn from nature, 'paid from the company.'

PN184

'From' is identifying the source, and again it's a conjunctive word or particle, multiple uses in our wonderful English language. I need not trouble you about that any further, but I would invite you to reject the use of the dictionary in the way that Mr Fodrocy has sought to use it. Obviously a purposive construction as a whole, of the whole clause, 4.8.1(a), needs to be given. 'From' in that paragraph obviously means the source or origin, so from Programmed.

PN185

THE DEPUTY PRESIDENT: What I understood Mr Fodrocy's submission to be is not that the 'from' is not from the company, but whether the word 'paid' indicates the type of the leave and is separate to the from the company. So the leave is the action of the company, leave from the company, but that's not the same thing as a description of the leave which is separate, i.e. paid leave.

PN186

MR HOWARD: I can't understand how that works. It's a one sentence. It says, 'While the employees on any paid leave from the employer.' So why are we chopping it up.

PN187

THE DEPUTY PRESIDENT: That's what I understand Mr Fodrocy's submission to be.

PN188

MR HOWARD: Yes, and that submission can't go very far because we're interpreting a sentence. So you can't stop at any paid leave, which is basically what seems to be the effect of that. So paid leave is a concept of leave for which is paid. I think we can all agree on that. But then there's this additional concept of paid leave from the employer. So why are we stopping at paid leave when we've got the added words. If that's a submission that's obviously an incomplete reading of the clause.

PN189

Turning to the fairness argument, which is that - I think was a large portion of Mr Fodrocy's cross-examination and submissions today. I have addressed that at paragraph 28 of my submissions. It's of no assistance to you, Deputy President, interpreting agreement to appeal to what other people get, or how it should be fair. I have provided your Honour with the quote in Cutts(?) which I won't repeat, but I am sure you have read more than once in that clause. It is swings and roundabouts to adopt your characterisation, and it's not for you and Mr Fodrocy and I to really talk about, well what's fair. It's really the award and legislation that produces this outcome, and all the agreement is doing is making it abundantly clear. The only change is - - -

PN190

THE DEPUTY PRESIDENT: I didn't understand Mr Fodrocy's submission to be that it's anything other than part of the industrial context in which the language should be interpreted against.

PN191

MR HOWARD: Yes, but that doesn't really disclose any substantive difference. So contextually other people get forms of leave, long service leave. That doesn't really inform the context of this clause at all, and really we're not interested in what other people receive by way of entitlement. It's all swings and roundabouts in the end. Appeals to fairness don't get us very far in the resolution of this dispute because it is swings and roundabouts. I'd personally love to be a member of the Co-INVEST scheme for the reasons that my briefs are transient. I don't accrue seven years of continuous service with Mr Farrant, but them's the breaks. So it doesn't really take us anywhere.

PN192

Finally, the disputes panel decision. Obviously there's problems trying to equate that decision. It's a decision of a different agreement, different industry, different context, different purpose, different decision-maker. So it's not going to assist you. It's not authority for anything. That's not to downplay the importance of the disputes panel to the Victorian construction industry, it is just completely not on all fours. But to assist you with that it's a very different clause.

PN193

At page 3 of the decision you will see that that agreement - I assume it's the pattern for it, Deputy President - fixes contributions in terms. So a weekly payment $195. So there goes the concept of ordinary time earnings. It's just not relevant any more because this agreement as it is fixes amounts. So hence why ordinary time earnings doesn't really have any relevance to the resolution of the dispute, because this clause says you will get $195 weekly. So that's why perhaps superannuation law didn't really have much of - or it wasn't as important to the dispute panel. So you don't have that sort of thing in this situation. This agreement refers to, picks up and applies the superannuation law and the concept of ordinary time earnings.

PN194

I have taken you to the meaning of 'also', something that my friend sought to rely upon this morning, but just to reiterate that should not be given, and it does not have any significance in the circumstances where the obvious inference is that this is a cut and paste and also does have work to do anyway. We've already had that discussion.

PN195

By way of conclusion, Deputy President, the text is clear. The clause extends the obligation to pay leave by the employer or from the employer. There's no other way to construe it. The context supports that construction as you have seen. The award and the superannuation is against the proposition put by my friend, and the purpose supports it. The purpose was to bring up into the agreement the award entitlement for clarity and certainty for the worker and the reader. The purpose was to clarify unmistakeably that it only extends to paid leave from the employer, which is why those words were added. Deputy President, you have to give meaning to that departure from the award as it is, it's quite significant. Unless, Deputy President, you have any further questions of me or I can assist you in any other way those are Programmed submissions.

PN196

THE DEPUTY PRESIDENT: Thank you, Mr Howard. No, I don't have any questions for you. Mr Fodrocy?

PN197

MR FODROCY: Yes, thank you, Deputy President. I might start with what Mr Howard ended with, which is that supposedly the purpose of the clause on the company's submission. (Indistinct) the purpose perhaps is to avoid a situation where an employee is having to check their entitlement in other documents such as the award, rather than being able to read the clause and then ascertain what those entitlements are from a clause in the agreement.

PN198

On his submission, on Mr Howard's submission, the drafter has copied and pasted the award provision and then made some changes to it, so the key point to be made, and then to provide some clarity to the employee who would come to be employed and governed by the terms of the agreement. Well, it's not clear to me, and I don't think it would be clear to a construction industry worker covered by the agreement, that variously the words 'subject to the governing rules of the superannuation fund' means the rules set out in the Administration Act, the Guarantee (Administration) Act. That somehow despite the definition, which I think Mr Howard has actually provided in his bundle, the definition of governing rules, which is in the Superannuation Industry (Supervision) Act, which is page 10 of Mr Howard's bundle, provides at section 10 of that Act:

PN199

*Governing rules in relation to a fund, scheme or trust means any rules contained in a trust instrument, other document or legislation, or combination of them or any unwritten rules. Governing the establishment or operation of the fund, scheme or trust.*

PN200

I take it that that means for instance if a member were a member of the Cbus superannuation fund or Australian Super superannuation fund or any other fund, the rules of those individual funds for each employee that they're a part of. It obviously goes without saying a document that sits outside of this agreement. And so for a worker to ascertain their entitlements under the agreement they would probably have to consult that, and the words 'subject to the governing rules of the relevant superannuation fund' is a marker which would tell them to go look to that fund and see what their entitlements might be as set out in that fund. And that might be different for each person.

PN201

I hazard to guess a person might even have their own - I forget the phrase now - they might run their own fund for themselves, a SMSF - I forget what it stands for, sorry.

PN202

THE DEPUTY PRESIDENT: Self-managed. Yes.

PN203

MR FODROCY: And so really neither you nor I nor Mr Howard will know what those rules say, but the member would know, the member of the fund that is. And the definition in the Act does not go to the superannuation guarantee legislation, which is a bundle of Acts. It does not go to interpreted rulings of the ATO either. And so I simply don't understand how those words in the introductory paragraph of 4.8.1 can incorporate or somehow colour the interpretation of the foregoing words that follow.

PN204

THE DEPUTY PRESIDENT: So what work would they have to do?

PN205

MR FODROCY: So for example I would imagine that the fund might set out - the rules of the fund might set out administrative mechanisms. This is speculation, but I imagine that the rules of the fund govern how it is that administratively and practically funds could be received and disbursed.

PN206

THE DEPUTY PRESIDENT: Yes.

PN207

MR FODROCY: It would be assistive to the Commission if we had before you example rules of a superannuation fund, but ordinarily I would not expect them to set out the substantive circumstances under which an employer is obligated to pay, simply because the employer does not have the contract for an agreement with the fund. The member does, and the employer's obligations to make the payments arise under the enterprise agreement and the superannuation laws and rules.

PN208

The agreement between employees and the employer sets out substantive circumstances when contribution must be made. I would submit that the phrase 'subject to the governing rules of the relevant superannuation fund' do not go to the substantive circumstances about when the obligations arise; substantive being the types of leave for instance that someone might take which might attract this obligation, but rather for more administrative purposes the rules would set out matters of a more procedural nature as opposed to a substantive obligation. I don't have an example of the superannuation fund rules before me to provide yourself with.

PN209

The point remains that at paragraph 18 of Mr Howard's submissions or the respondent's submissions sets out a summary in five paragraphs about the ATO's interpretive ruling, which I don't dispute, the AMWU does not dispute. Then at paragraph 19 the submissions of the company seen in that light clause 4.8.1(a) simply giving effect to this, the above legal situation.

PN210

I understand from Mr Howard today and from the submissions that the company is seeking the construction to be that clause 4.8.1 is somehow communicating to employees a rather complicated situation that is set out in the ATO's ruling, which

there's no mention of the ATO's ruling. There's no mention of the legislation for that matter in 4.8.1, albeit there is in 4.8.

PN211

It's odd to suggest, and I think the Commission should reject that suggestion, that the purpose - there's two components of it; (1) the purpose of 4.8.1 by being transposed is to provide clarity and assistance to the member employee without having to refer to the award to ascertain what their entitlements are. But they're somehow supposed to know that their entitlements are also governed by this ATO ruling which is set out in five paragraphs in the company's submissions, instead of being able to rely upon the ordinary and plain meaning of the words that appear in the agreement, which are simply, 'Superannuation contributions provided for while the employee is on any paid leave from the employer.' It's a very simple statement. The question really is, is an employee on paid leave from the employer. That's the question.

PN212

I appreciate, and I'm not shy about the fact that the argument around the meaning of the words are very technical and grammatical, and I think that the Deputy President would deal with that appropriately, and I don't disagree with the notion that, (1) the agreement was drafted not by legislative drafters, and (2) that these are agreements made between in this instance the union and the employer, that its purpose is to cover employees working in the construction industry. It is not expected to contain technical legal language and to be readable and understandable in the industrial context in which it sits.

PN213

We have a dispute before you which is about what the meaning of the words are used in the provision to ascertain what the entitlement is. And as Mr Howard did immediately after saying we should not make a fortress out of the dictionary, citing the case in the bundle of authorities, I ask the Deputy President how is it we're supposed to ascertain what the meaning of the words is without reference to some document such as a dictionary to do so, and indeed Mr Howard took you to the dictionary.

PN214

And it's in that light that the phrase adopted in our submissions, an authorised absence for which payment is received is used, merely in a way to expand upon by reference to the meanings of the words to expand upon what the words in our construction should be taken to mean. It's not to insert any words into the agreement that aren't there. It's just another way of putting the words that are there.

PN215

Mr Howard took you to the definition of the word 'from'. So the AMWU is comfortable with, there's no issues with either meaning being adopted, whether it's a starting point, expressing removal or separation in space, or from a source or origin. The point, and I think this was in the question that you put to Mr Howard, the point is unlike clause 4.8, 4.8.1(a) adopts the language 'any paid leave from the employer.' We have no issue in saying that the leave is that which must be

taken from the employer. That's what the word say. We could not argue otherwise.

PN216

So the leave is either separated or removed from the employer, or it's leave granted or taken from the source or origin being the employer. It takes us nowhere. I don't think it resolves the issue, because what the company is appearing to submit, which we reject, that the payment must also be from the employer. The purposes of this dispute and in our argument we are merely relying on the words in 4.8.1(a) to say that there is an entitlement, and in that circumstance that clause adopts the phrase 'paid leave'. The word 'paid' describes the type of leave, to distinguish it from any leave that is unpaid, such as an employee has exhausted their leave and has sought authorised absence from work to deal with a caring situation that would be unpaid leave for which superannuation contributions are not made.

PN217

Words adopted in this clause and not adopt the meaning of payments from the employer. If it could we take out the word 'leave' and it would say 'payment from the employer.' So while the employee is on any payment from the employer it would sort of be a nonsense, it took us nowhere. Adoption of the word 'paid' is unlike in clause 4.8, it's not describing any action by the company, it's describing the type of leave. Clause 4.8 where it's reversed and it says 'authorised leave paid by the company', not only does it adopt the words 'paid by', which has a different meaning, but the paid aspect is clearly used as a verb to describe an action by the company.

PN218

That difference we think has some work to do, but accepting that we should not make a fortress out of the dictionary and that an overly technical construction is not appropriate when we're dealing with these types of agreements. We don't rely solely on that argument, but we think that it's relevant, certainly relevant to the construction, because it's only by ignoring those words and you adopt the construction of the company, ignoring those differences that is.

PN219

Going to Mr Howard's point that the type of leave in clause 4.8.1(a) does not refer to long service leave, it's not exhaustive by referring to long service leave. I agree it's not exhaustive. It's not limited to long service leave, but in the list of types of leave Mr Howard gave you, parental leave, community service leave, all sorts of types of leave that you would get with pay, one of them would be long service leave. The ATO's ruling, the superannuation ruling 2009/2, does refer to long service leave. At paragraph - I had it before me earlier - at paragraph 235 of that Superannuation Guarantee Ruling it provides that:

PN220

*Although leave payments not paid for actual attendance at work or for services salary or wages that an employee receives in respect of periods of paid leave is continuation of their ordinary pay during their ordinary hours of work, and therefore takes the place of earnings in respect of actual hours worked. Therefore any salary or wages that an employee receives while on*

*annual leave, long service leave or sick leave is in respect of their ordinary hours of work and is OTE, ordinary time earnings.*

PN221

Now, we don't submit to the Commission that the ruling governs the obligations and entitlements under the agreement for the reasons already stated, but to the extent that it is relevant as to what the obligations and entitlement might be under the legislation it's certainly relevant to that point as informing the industrial context. Superannuation payments are payable whilst on long service leave, and long service leave is one of those paid leave scenarios in addition to say parental leave and community service leave to the extent someone paid for that.

PN222

It is important to note that under the construction industry Act, Long Service Leave Act, the company is one of many companies which is obligated to pay a charge into the fund for the purpose of funding payments that are made out of it to employees on long service leave. We haven't relied on an argument to say that that is leave paid by the company, but it's certainly the case that the Victorian Government, as well as I believe the New South Wales Government and potentially others, have made a policy decision to provide long service leave as portable, targeted to construction industry, and I believe members of possibly the cleaning industry and potentially other industries which are insecure and short term.

PN223

And businesses participating in the states with these legislative Acts are obligated to make the charges to fund that leave as a result of that policy, and it is from that all the funds that the person's long service leave is paid. So it's certainly not resolved, and I don't think it's necessary for the Commission to make a decision on this. But it's not a resolved question to say that the leave paid for by Co-INVEST is not paid by the company. I think that is not before the Commission and I don't think it's required to be determined. But we are merely relying on 4.8.1(a) and the words that appear there, and that does not say that the leave has to be paid by the company. It would have been perfectly simple for it to do so, but it doesn't.

PN224

The other point I would make is Mr Howard referred to how the panel's decision that I lodged with the Commission and served this morning deals with a different agreement, different members, it's a different arbitral body than the one in which you sit. This is all true certainly, but the same can be said of the two ATO rulings that have been brought to your attention. They don't deal with the agreement that's before you. The ATO rulings are of a general nature, the Superannuation Guarantee Ruling that I drew to your attention is of a general nature. It does not deal with this agreement, and the interpretive decision in the company bundle again does not go to the words in this agreement.

PN225

It does go to what can be taken as far as saying if we were in a situation where clause 4.8 did nothing more than state superannuation contributions are payable in accordance with the legislation, then they would certainly be relevant. It doesn't

say that obviously. Whether it provides or supplements or additional obligations to make contributions you might use either word for that. It certainly provides for obligations beyond that is in the legislation, and don't agree that if you adopted our construction paragraph (b) would have no work to do. I believe I addressed this in my reply submissions.

PN226

Paragraph (b) fixes 2(a) in accordance with our construction. In two respects it differs. It could limit it to a maximum of 52 weeks, and it makes the point about workers' compensation payments directly from the employer. So in contradistinction between (a) it's even more clear, we would say more limited, by saying the regular payments directly from the employer in accordance with the statutory requirements. So that would, I assume, rule out any payment made from an insurer.

PN227

It's clearly something on our general construction, adopting the meaning of the words 'paid leave from the employer', might cover an absence due to a workplace injury. This is true, but as in all agreements, as in legislative instruments and Acts, the more specific clause deals with the more specific situations. (b) deals specifically with workplace injuries. So it clearly governs those scenarios, and that is why it's separated out from (a), for those two differences when it comes to a limited number of weeks, and because the limitation to regular payments directly from the employer.

PN228

For whatever reason, I don't propose to go into speculation on it, those have been separated out, and (a) remains as is and must be given some construction. Our construction that we submit should be adopted for the bare contextual reason of what purpose does it have at all except merely restates the legislative requirement. And if its purpose is to provide additional obligations to make superannuation contributions while on paid leave such as parental leave, community service leave, other such types of leave, they might otherwise be excluded by the legislation. It on our construction also includes long service leave taken from the employer out of the funds of Co-INVEST pursuant to the construction industry long service leave.

PN229

It is also in that sense that we go to the purpose of what it's for, of what this clause is for. Even if the purpose might be to clarify it's not clear that on the company's construction there is any clarity for employees, whereas our construction does nothing more than rely on the plain and ordinary meanings of the words uses, which is what's to be expected for workers to rely upon, and that meaning is informed or supported by reference to dictionaries, fortunately one of the ways in which we could do so, because the words 'any paid leave from the employer' it's not an industrial specific phrase that's going to be used in the construction industry or a term of art. There's no reason to think that it might refer to accounting, meanings under accounting banners or anything like that.

PN230

So we accept the clause should be clear to the employees who will be covered by it. I think the Commission is still at the same point where we started where there is no reasonable basis for a construction to be adopted in pursuit of a purpose which would appear to be to deny construction industry employees superannuation contributions while they're on long service leave through the fund pursuant to the Act.

PN231

A finding of that purpose to support the company's construction would need more than what I think the Commission has before you as provided by Mr Howard, because it would have brought an implication, and I believe earlier Mr Howard's submissions on the award provision when he's saying that it's merely a transposition would suggest that it might have implications for the construction of the award provision as well.

PN232

There is no explanation why, or there's no evidence to support an explanation why the words 'from the employer' are inserted at the end of that sentence. Similarly no evidence to support why the introductory words of clause 4.8 are there. They don't appear in the award either. It would be speculation, I submit, to suggest that the introduction of the words 'from the employer' are directly targeted at limiting the obligation for paid superannuation contributions to the long service leave which is taken from the employer and paid out of the Co-INVEST fund.

PN233

Regardless of the fact that it's a greenfields agreement there would have been by its nature a negotiation between the union and the employer when this agreement was being drafted. So it might have included emails, discussions, members of each party who are present might recall what was said or done or the purpose for which those things happened. None of that evidence is before you which would support a construction to say that the purpose of those words were to exclude the entitlements to superannuation contributions while on long service leave.

PN234

I won't belabour the point, maybe I already have, but that is important because what the company appears to be asking the Commission to do in construing this clause is to depart from what is the plain and ordinary meaning of the words that are there. And that is why in our submissions we have relied quite heavily on what the dictionary meaning of the words might be, because that is a shortcut to finding out what the words might mean to an employee who comes to read it. Even if we accepted that the clarity was sought, as a purpose was to provide clarity and refrain someone from having to refer to an outside document such as the award, the same is true of them having to refer to the superannuation legislation, the interpretive rulings that have been made subsequent. That does not provide them with any clarity and should not be accepted as one of the ways to construe this clause. Unless there is any questions or I can otherwise assist, Deputy President, those are my submissions.

PN235

THE DEPUTY PRESIDENT: No, thank you. You've answered the questions that was in my mind through the course of your submissions. Thank you both for

your assistance today and your submissions. I will consider what's put, reserve my decision and hand that down as soon as I am able. Thank you, the Commission is now adjourned.

**ADJOURNED INDEFINITELY [12.07 PM]**

## LIST OF WITNESSES, EXHIBITS AND MFIs