



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER PERICA**

**C2023/3617**

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

**Mr Larry Goldsworthy  
and  
Victoria Police T/A Victoria Police  
(C2023/3617)**

**Victoria Police (Police Officers, Protective Services Officers, Police Reservists  
and Police Recruits) Enterprise Agreement 2019**

**Melbourne**

**2.34 PM, THURSDAY, 7 DECEMBER 2023**

**Continued from 28/11/2023**

PN3389

THE COMMISSIONER: A bit of overkill, sergeant, rising in your own house, but I will take it as a mark of respect.

PN3390

MR GOLDSWORTHY: As it was meant, sir.

PN3391

THE COMMISSIONER: Okay, we finally got there. Are you ready to give us your closing submissions, sergeant?

PN3392

MR GOLDSWORTHY: Yes, I am.

PN3393

THE COMMISSIONER: Wait a minute. I lost my page in my notes. Okay.

PN3394

MR GOLDSWORTHY: Commissioner, I previously supplied the Fair Work Commission with my application for the Commission to deal with the dispute, the Form F10, and I've supplied two written submissions and my statement, which I rely upon in this hearing.

PN3395

The procedure for applying for purchase leave is outlined in organisation-wide policy, and with the Victoria Police manual on leave. As per clause 14 of the enterprise agreement and the Victoria Police manual my application for purchase leave can only be rejected on reasonable business grounds. The question before the Commissioner for determination remains; were the stated grounds reasonable business grounds in accordance with the agreement.

PN3396

My submission of fact of law address the issue of reasonable business grounds as per the *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council* decision citing the Emery matter at paragraph 15 and 16:

PN3397

*It is more than just a small inconvenience. The grounds need to point to some cost or adverse impact over and above the inevitable small adverse impacts associated with material requests that is sufficient to outweigh the employee's personal considerations in the legitimate pursuit of better work life balance.*

PN3398

THE COMMISSIONER: One of the difficulties I have with this is that it's plucked. Reasonable business grounds are out of its sensible construct within flexible work arrangements. So it's asymmetrical in that the grounds for refusing it are rehearsed, but the personal grounds on the individual for accepting it are not. And I think this is one of the reasons why the inspector and the divisional commander have had trouble with it, because they're trying to give some job

activity to the grounds. I mean it's asymmetrical in the sense that the basis of excluding that is there, but the basis of including is not.

PN3399

MR GOLDSWORTHY: I agree. I (indistinct), sir. If there was sufficient - - -

PN3400

THE COMMISSIONER: This is my last chance, I have got to ask you these questions. All right, please.

PN3401

MR GOLDSWORTHY: Quoting:

PN3402

*If it was sufficient for counsel to simply point to any costs or business difficulties, however small, and then rely upon that as constituting a reasonable business ground to refuse the request the practical right intended by clause 20 will become illusory.*

PN3403

The *Natasha Fyfe v Ambulance Victoria* case at paragraph 33 provides further clarity.

PN3404

*The word 'reasonable' in the expression of reasonable business grounds imports a standard of reasonableness, such that the Commission must ascertain the objective basis for any such business grounds.*

PN3405

Of the grounds stated in the June 23 email by Inspector Henry those grounds do no more than business as usual for Victoria Police. For the more than two decades that I've worked at the Wodonga Police Station there has always been vacancies, members off on unplanned leave and WorkCover throughout the division and support units, and that will never change. There are more police working in ED4 than there has ever been before.

PN3406

The circumstances surrounding the Wodonga Highway Patrol and Corryong Police Station staff numbers are neither exceptional or even unusual. In fact they are pretty typical, as borne out by the tables I've presented in my statement. The argument that members at Corryong have risk of fatigue due to working availability needs to be balanced with asking what of those that are left at Wodonga.

PN3407

Evidence from Assistant Commissioner Langdon and Inspector Henry was that the Wodonga Police Station was adequately resourced. Superintendent Arbuthnot and Inspector Henry gave evidence that the failure to meet BMSL was primarily due to unplanned leave, not planned leave. From the respondent's initial submission of an average of 15 non-compliance shifts per month to Inspector

Henry's evidence that BMSL will never be totally achieved on a monthly basis, it demonstrates non-compliance with BMSL is business as usual.

PN3408

People take sick leave, and evidence from the respondent's witnesses all show that it is not progressed up the chain of command to the Deputy Commissioner level, because it is also saying that it's business as usual. It has been shown that BMSL and minimum station profiles account for WorkCover and purchase leave as part of the matrix to determine staffing numbers.

PN3409

That ED4 has tried to use this as grounds to refuse my purchase leave application without considering the reasonably foreseeable changes as of June show a disingenuous attempt to deny an entitlement that is clearly provided for in the enterprise agreement.

PN3410

Commissioner, you have heard sworn evidence from Sergeant Larkin, the person in charge of compiling the planned leave roster, that there was sufficient capacity at Wodonga for me to take purchase leave on the dates that I requested. The purchase leave was planned leave that was taken into account the same as annual, recreation leave and long service leave, and that is why we have a divisional planning office. You have heard that - - -

PN3411

THE COMMISSIONER: Yes. What's the purpose of the roster? What's the purpose of that roster that (indistinct) talked about then?

PN3412

MR GOLDSWORTHY: Yes. So the annual leave roster?

PN3413

THE COMMISSIONER: Yes.

PN3414

MR GOLDSWORTHY: So that it can be planned out in advance with the known recreation leave and long service leave.

PN3415

THE COMMISSIONER: Yes. Okay.

PN3416

MR GOLDSWORTHY: And purchase leave.

PN3417

THE COMMISSIONER: Yes.

PN3418

MR GOLDSWORTHY: You have heard from Senior Sergeant Parr, who acting as the Wangaratta Local Area Commander and sat with Inspector Henry and went through the purchase leave applications assessing them primarily on the personal grounds of each application, not assessing reasonable business grounds at that

time. He further informed you that the staff numbers at Corryong are back to normal levels and they have had two additional positions allocated. The return to strength was it reasonably foreseeable and that the resourcing from Wodonga Uniform was brief and minimal. You have also heard it confirmed that no amount of police enforcement would have prevented the collision at Chiltern that claimed the lives of four elderly people.

PN3419

In addition you have heard from Leading Senior Constable Glen Allerdice from the Wodonga Highway Patrol. He had his purchase leave approved on 29 May this year, and then on 16 June he was advised his purchase leave was going to be reassessed, and it was deemed to be a glaring issue by the then Acting Superintendent Mason. The reassessment was done on the pretence that the highway patrol needed additional resources. This was despite the highway patrol having effectively the same resources for the last six years.

PN3420

Leading Senior Constable Allerdice and another highway patrol member were advised on 18 July this year that their purchase leave had been refused. The email from Inspector Sprague advising that his leave had been refused stated that his application is being assessed by the purchase leave panel. This was incorrect information as the purchase leave panel only met once on 1 June. This was on the back of an acknowledgement by Inspector Sprague to Superintendent Arbuthnot in an email that in essence we won't support any purchase leave.

PN3421

Leading Senior Constable Allerdice is an expert in his field, and he too confirmed that no amount of police enforcement would have prevented the collision at Chiltern that claimed the lives of four elderly people. This evidence is important as at the time of rescission of my purchase leave application the fatality rate for the Wodonga PSA was the same as last year, and the serious injury collisions at that time were down 21.3 per cent.

PN3422

THE COMMISSIONER: What do you think I should do with the halo effect evidence, if you can call it that, or as aspiration, if you can call it that?

PN3423

MR GOLDSWORTHY: I feel that it was reasonably canvassed. I think there's strong evidence to suggest that there isn't an impact when it comes to policing around the halo effect.

PN3424

THE COMMISSIONER: All right. Thank you.

PN3425

MR GOLDSWORTHY: The submission and evidence led by Victoria Police contained exaggerations and inaccuracies in an attempt to justify the ad hoc decision making process that was undertaken in relation to the approval process. There was a clear direction given from senior management within eastern region to minimise purchase leave applications. ED4 took this direction to

the extreme; at first giving a direction that no purchase leave would be approved, having that direction rescinded by the Assistant Commissioner once the Police Association got involved, and then effectively they still did not approve any purchase leave for general duties members.

PN3426

My original application was for two weeks of purchase leave from 12 November until 25 November. While it was refused as purchase leave I was actually given the same period off as annual leave instead. There was no alteration to the roster for any other members as a result of this. In consultation with the divisional planning - - -

PN3427

THE COMMISSIONER: Is that in your statement? I don't know whether that's the first time I have heard that. Was that in the material, that you got it by way of annual leave?

PN3428

MR GOLDSWORTHY: The initial dates were listed in Inspector Henry's evidence, and from my original submission the dates were provided for in that.

PN3429

THE COMMISSIONER: Thank you.

PN3430

MR GOLDSWORTHY: Yes. Yes, okay.

PN3431

THE COMMISSIONER: All right. Thank you.

PN3432

MR GOLDSWORTHY: In consultation with the divisional planning office and Senior Sergeant Martin my November purchase leave dates were changed to a one leave block from 17 until 24 March 2024. My second two week block of leave was to be from 3 March until 17 March 2024. In consultation this was changed to a three week block from 5 May up to and including 25 May 2024. These leave dates however were ultimately not approved.

PN3433

The respondent has not demonstrated how taking purchase leave on any of these dates would cause any sort of loss, let alone a significant loss. Testimony from Superintendent Arbuthnot indicated that the only two things taken into consideration when rostering is the minimum service profile and other calculations as determined by the tasking coordination process. So effectively another ad hoc process that fails to provide a quantitative outcome of the resources required when planning for a leave a year in advance. Sergeant Larkin gave - - -

PN3434

THE COMMISSIONER: It's your case, isn't it, that the process in that you provided evidence of emails that said different people were applying different

tests, and I mean the whole thing of, as I said the hokey pokey where people got leave or were approved leave and then it was taken away, there was a disaster as far as expectation management wouldn't you say?

PN3435

MR GOLDSWORTHY: Very much so, sir, and I covered that further in my submission.

PN3436

THE COMMISSIONER: Yes.

PN3437

MR GOLDSWORTHY: Sergeant Larkin also gave evidence that as the DPO he had not seen the service delivery for workforce plan. Inspector Henry confirmed there was no workforce plan. How could Victoria Police possibly justify refusing purchase leave when they don't know what resources are actually required. I reiterate that the onus is on the Victoria Police to prove that my absence from work at the requested times would be likely to result in a significant loss or negative impact, and they have not done so.

PN3438

The periods in which my purchase leave dates were changed to are also dates where only two other sergeants are on leave at that time. These are planned dates that can easily be accommodated in the leave roster. There are more than 145,000 shifts of annual leave taken every year in eastern region. The Assistant Commissioner took umbrage at the additional 4036 shifts being approved for purchase leave, which was a 27.5 per cent reduction on last year's figures, and which he also failed to communicate to subordinate superintendents.

PN3439

Victoria Police has tried to convince you, Commissioner, that eastern region Division 4 is somehow different to the rest of the organisation, that we are desperately short on staff, and that by refusing my application for purchase leave that somehow miraculously that the road trauma and crime will decrease. That is clearly not the case. Wodonga has 12 additional positions at constable and senior constable ranks above the minimum station profile, and two more sergeants above the MSP. Yet not one general duties member in ED4 have a single week of purchase leave approved at any time during the 23/24 leave period.

PN3440

There are very valid grounds to look at comparisons between other divisions, the workforce as a whole and ED4. A perfect example is ED6. Not only do they have more isolated mountainous terrains than ED4, they have just as many if not more natural emergencies like fires and floods. They have more than 200 kilometres of coastline and attracts visitors across the rest of Australia and the world. They are even more remote than ED4 and they have a 15 per cent smaller workforce.

PN3441

The key difference between ED4 and the rest of Victoria Police is when it comes to approving purchase leave applications ED4 has approved them at a rate of 13.8

per cent, where the rest of the regions comprising 11,000 members is at 71 per cent.

PN3442

THE COMMISSIONER: How can I import that into the relative comparison, the 13 per cent and the 70 per cent - I was going to ask this anyway - into an objective assessment of reasonableness of the business grounds applied to you?

PN3443

MR GOLDSWORTHY: I believe it shows that there has been a blanket refusal given across ED4 in comparison to any other area within the police force. They have not complied with policy, and the grounds that they maintain are reasonable business grounds are in fact not valid. I don't know that I answered that question that well, but - - -

PN3444

THE COMMISSIONER: No, no, I need as much input as I can get. So if you want to give me a data that's fine, and I need your impressions on these things, because I'm really wrestling with this I've got to say. So any assistance you could give me will be appreciated. Okay.

PN3445

MR GOLDSWORTHY: So ED6 with 271 members approved 113 weeks of purchase leave. ED4 with 327 members ultimately approved just nine weeks of purchase leave. There is no justifiable reason for this discrepancy. As I maintain and continue to submit the stated grounds were not reasonable grounds.

PN3446

At the time of the application for purchase leave the 16 positions for sergeants at the Wodonga Police Station were 100 per cent filled. The commitment to sergeants performing temporary duties and upgrading was foreseeably going to be significantly reduced in the coming year. But the capacity of both the Wodonga Highway Patrol and the Corryong Police Station were going to return to their long term levels.

PN3447

At paragraph 31 of the Emery case it cites the Brimbank decision.

PN3448

*Any flexible work arrangement that is agreed between a manager and an employee or a work unit is a stand alone agreement and shall not be considered as a precedent or as an acceptable business case for any other flexible work arrangement that another employee or work unit seeks with their manager.*

PN3449

I am but one employee asking for four weeks purchase leave. The argument that 20 shifts over an entire year were ever going to increase staffing at the Corryong Police Station, and at the Wodonga Highway Patrol, and at the Family Violence Unit, and prevent BSML from not being achieved to any degree, and every other resource (indistinct) wish list duties are fanciful.



PN3450

The process that was undertaken to assess my and other applications for purchase leave was an abomination. In relation to the so-called purchase leave panel there were no terms of reference. There were no instructions on how the process should be undertaken. No minutes were kept and the inspector in charge of the investigations and response unit, who is also the line control for the divisional planning office, was not invited to attend.

PN3451

The purchase leave applications were considered on personal, not business grounds, and the authority to make a decision unclear amongst those assessing the applications. The threshold to be met to approve applications varied from the Assistant Commissioner and considering the needs of the employee, to extenuating circumstances, critical and exceptionally compelling, with no information provided to applicants that was the way the assessment process or how to state their case.

PN3452

From the very beginning there was a clear (indistinct) towards minimising the number of weeks that applications would be approved, if not out of refusal, and ultimately leading to the rejection of all but a couple of applications from I&R members.

PN3453

You heard evidence from Inspector Henry that despite submitting some purchase leave applications that well and truly met the above criteria to be approved, Superintendent Arbuthnot made it clear that unless you could guarantee the BSML would not be affected then they should not be approved. He went on to say even without purchase leave it would have challenges in meeting BSML. It's not because Wodonga doesn't have the numbers, it's because of unplanned leave. This was an impossible standard to meet, and of course no purchase leave was approved for any general duties members. It was procedurally unfair and a breach of natural justice.

PN3454

And again I reiterate the point that the onus is on the respondent to demonstrate that it weighed up the value of my purchase leave application to me against the costs to ED4 of the 20 shifts over the 12 months, and how it determined that this would likely cause a significant loss. It is my position that the respondent has been unable to demonstrate this.

PN3455

The enterprise agreement provides the purchase leave. The Chief Commissioner agreed to the terms. The staff allocation model takes into account purchase leave and other flexible work arrangements, and Wodonga Uniform is fully staffed. We are all here to serve and of course we want to provide the best for our community and we would always want to do that little bit extra to do more.

PN3456

The general duties police members working in the divisional van do it all. They're out enforcing the road rules, the Crimes Act, Summary Offences Act, and

everything in between. Not only do we provide a reactive service to jobs like family violence and mental health, we go out actively seeking, actively looking for more in a proactive way. We arrest offenders, attend crime scenes, follow through on investigations, doing search warrants and taking statements. Some shifts are busy and others are not.

PN3457

We perform the neighbourhood policing shifts as required by the MSP, and this is above and beyond the additional patrol shifts that are rostered, and the shifts required for BMSL. In general summer is busier than winter. The sergeant's role in all this is to make sure that the right activities are taking place at the appropriate times with the appropriate resources. Provided there is a sergeant working as a 251 supervisor and another overseeing custody operations there is no impact on efficiency, productivity or customer service from one sergeant to another.

PN3458

The suggestion that general duties do not contribute to reducing crime and road trauma shows a clear lack of knowledge and understanding of what general duties work we actually undertake. Yes, the more police you have the more you can do, but this has to be balanced with reality. We don't live in a perfect world.

PN3459

The Wodonga Police Station is well above the numbers required to meet BMSL, and despite the requirement of the Chief Commissioner's instructions on the minimum station profiles clearly stating, 'When considering a request for assignments and upgrading, including developmental opportunities under other Victoria Police policies, supervisors and managers must consider the impact on the resourcing requirements outlined in the CCI', it therefore has continued to rob Peter to pay Paul, and no wonder all unplanned leave goes up and BMSL is not always achieved.

PN3460

Division 4 senior management has undertaken a process of constructing a work environment to suit their position of not permitting purchase leave. They have consistently taken staff away from the Wodonga Police Station to work elsewhere. They have failed to fill vacancies in a timely manner, and they have failed to understand, advocate and plan in a proactive way to manage the human resources required to staff the division a year in advance to enable the decisions on purchase leave to be made in an informed way.

PN3461

In terms of a comparator it's my position that ED4 is not experiencing anything like the resource pressures listed in the *Police Federation of Australia v The Chief Commissioner of Police*, the (indistinct) case, and yet not a single week of the purchase leave was granted to a uniform member. Despite assurances to the contrary there is little doubt that the practical effect is that there was a blanket rejection of the entitlement under the agreement, and that is unreasonable. The fact that of the 29 applications for purchase leave that were considered for approval only four were approved and not one of those was the frontline general duties.

PN3462

THE COMMISSIONER: Yes. Well, there was not one general duties approved, was there?

PN3463

MR GOLDSWORTHY: That's right, not one. Resourcing is an amount. The respondent's submission and witnesses have all been around quantity, with no bearing on efficiency, productivity or customer service. The test of whether there are reasonable business grounds to refuse a purchase leave application is an objective one.

PN3464

Commissioner, it is important to distinguish between aspirational, necessary and feasible levels of service and resourcing. This is especially true for the unpredictable. Applications for purchase leave should not be assessed against a perfect world levels of service and resourcing. Doing so would effectively remove any prospect of purchase leave ever being granted.

PN3465

THE COMMISSIONER: You would say that wasn't reasonable business grounds if the ideal world is what is the test?

PN3466

MR GOLDSWORTHY: Absolutely.

PN3467

THE COMMISSIONER: Yes, okay.

PN3468

MR GOLDSWORTHY: Every witness for the respondent admitted that they have a role to play in ensuring compliance with the enterprise agreement. They all agreed Victoria Police promotes policing is a job where you can achieve a work life balance. It's been my hope that senior management of ED4 and eastern region would abide by the (indistinct) of the Victoria Police enterprise agreement, namely:

PN3469

*The employer is committed to provide flexible work options to assist employees in achieving an appropriate balance between organisational requirements and personal lives.*

PN3470

Where they have failed I am now asking you, Commissioner, to make a determination that when Victoria Police assessed my purchase leave application the stated grounds were not reasonable grounds in accordance with the agreement. Thank you, sir, that's my submission.

PN3471

THE COMMISSIONER: All right. I have got a couple of questions. Inspector Henry's thing about the compounding effect of sergeants and people having to act up, what do you say about that?

PN3472

MR GOLDSWORTHY: There are 16 sergeants at Wodonga. To effectively run two sergeants per shift on every fortnightly roster you need between eight and nine sergeants. At any one time there is between two and three sergeants on leave. So that gives you 12 sergeants taken out of the mix. You have another four or three and a half FTE to do other things.

PN3473

THE COMMISSIONER: Yes.

PN3474

MR GOLDSWORTHY: So there is capacity for four sergeants to do some relieving, but a lot of people, a lot of those acting up are actually because the sergeants are taken into other areas that are seen by division ED4 as priorities, but they don't assist Wodonga Uniform whatsoever. So they're robbing Peter to pay Paul.

PN3475

THE COMMISSIONER: All right. There's many cases in relation to the way that industrial instruments are applied, and the myth that they're written in plain English is one of them, but in a recent, not that recent, there's a case of Reeves, Bromberg and O'Callaghan JJ in the Full Federal Court, *CFMEU v Hay Point Services*. You don't have to have it, it's 282 IR 228. They refer with approval to a statement by Kirby J on *Ancor v CFMEU* where they said:

PN3476

*The construction to be given to a clause in an industrial instrument should not be a strict one, but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the agreement.*

PN3477

Right. Now, it would have been helpful to me if the TPAV had of been here and told me what they thought it meant. Do you say that the 129 and the 14 contributes to a sensible industrial outcome?

PN3478

MR GOLDSWORTHY: As you previously indicated when the respondent was in their opening address there is a process for refusal but not a process for approval. So I don't know that a sensible outcome has been achieved within our (indistinct). And I would also say my original argument that the definition of reasonable business grounds only equates to what's in 14.10 and it doesn't open it up to other grounds, which I specifically mentioned for 14.9, and that's not part of the definition.

PN3479

THE COMMISSIONER: I think even Ms Leoncio says it's been amputated from it, its sound basis in 14, in the way it applies to 129, in that there's no Yin and Yang. There's no set minimums of the way that the personal circumstances of the individuals can be assessed.

PN3480

MR GOLDSWORTHY: That's - - -

PN3481

THE COMMISSIONER: So in that way I think there's an argument that what it really is, it's not a right, it's a grace provided at the fiat of the employer, because all police in every area are, it seems to me on the evidence, under-resourced.

PN3482

MR GOLDSWORTHY: Yes, but it was part of - - -

PN3483

THE COMMISSIONER: I haven't reached a concluded view, as I say. That thing of Jacob, Jacob wrestling with the angel, that's what I'm feeling like with this matter at the moment, yes.

PN3484

MR GOLDSWORTHY: Yes, but part of the allowance of having that ability to purchase leave was offset with the ability to sell leave. It was in that agreement, that if you could – and it was selling that the department pushed, and as I say, they signed up to it and I think the expectation from their perspective was that there would be more members to sell leave, so that they would have more working, rather than members looking to purchase leave.

PN3485

THE COMMISSIONER: Yes.

PN3486

MR GOLDSWORTHY: The outcome has been overwhelming that there are more members that want to purchase leave. I agree, there isn't that process to try and judge the requirements of the person, the individual, against the organisation requirements like there is in the rest of section 14 that talks about all those things that are congruent with section 65 of the Fair Work Act. It's a stand alone condition.

PN3487

THE COMMISSIONER: Yes. Thank you, sergeant. That's most helpful, and thank you for your assistance through this proceeding. Ms Leoncio, over to you. Please help me.

PN3488

MS LEONCIO: Thank you, Commissioner. We have filed detailed written submissions so I won't take you through those in great detail, but I do - - -

PN3489

THE COMMISSIONER: Yes. They're most helpful, yes, and I've just reread them over the last 24 hours.

PN3490

MS LEONCIO: Yes. I do hope to develop some of those submissions on the proper construction point.

PN3491

THE COMMISSIONER: Do I need to have it in front of me for you to do that? I've got it.

PN3492

MS LEONCIO: There was actually - - -

PN3493

THE COMMISSIONER: I've got so many tabs it's become a self-defeating thing, but I have it here. R1.

PN3494

MS LEONCIO: There's actually one thing I wanted to just draw to your attention, so it is helpful to bring it out. I think it starts at 313, hopefully.

PN3495

THE COMMISSIONER: Yes, I have that.

PN3496

MS LEONCIO: I just wanted to take you to paragraph 44. It's a bit of an unfortunate typo, but just so that you're not misled – just bear with me for one moment, sorry. Yes. So paragraph 44, unhelpfully, the word 'negative' is missing from this intended extraction of clause 14.10. So just to be clear, subparagraph (e) there, clause 14.10, includes:

PN3497

*It's a significant negative impact on customer service.*

PN3498

I just thought it was important to ensure that you have that word 'negative'.

PN3499

THE COMMISSIONER: Hang on, I've lost you. Take me through it again.

PN3500

MS LEONCIO: Okay. So - - -

PN3501

THE COMMISSIONER: So 44, yes, I see what they call the chapeau there, which means the hat.

PN3502

MS LEONCIO: Yes.

PN3503

THE COMMISSIONER: What happens after that?

PN3504

MS LEONCIO: So you see there it says, 'Clause 14.10 provides,' and there's a colon.

PN3505

THE COMMISSIONER: Yes.

PN3506

MS LEONCIO: It's intended to be an extraction but there's a transposition error. So when you go to subparagraph (e) you'll see there the word – so it says:

PN3507

*The new working arrangements requested by the employer would be likely to have a significant impact.*

PN3508

It should say 'significant negative impact'. That's what the clause says.

PN3509

THE COMMISSIONER: Yes, all right.

PN3510

MS LEONCIO: Just to be clear about what the terms are, because it's of course important.

PN3511

THE COMMISSIONER: Yes, I follow that. Of course, I missed that. Thank you for pointing that out.

PN3512

MS LEONCIO: So before I take you to the agreement, I do want to just briefly set out what we say the respondent's case is as to why the answer to the question for determination should be yes.

PN3513

In summary, what we say is that there was a significant loss of productivity and a significant negative impact on customer service, and we broadly rely on these categories, which is the impact on the minimum service levels, so the BMSL, which I'll take you to in a moment, the Wodonga Highway Patrol and the issues that were happening there, what was going on at Corryong Police Station and also the Family Violence Investigation Unit.

PN3514

We say that is significant, because when you look at the resourcing challenges within ED4, you can understand why those additional pressures assume a level of significance. I do want to just briefly touch on this 'business as usual' point, because we say, yes, there is a level of - - -

PN3515

THE COMMISSIONER: Particularly in ED4.

PN3516

MS LEONCIO: Yes. So there is a level of resourcing shortfalls across the organisations that will ebb and flow to some extent. What we say is in - - -

PN3517

THE COMMISSIONER: For the foreseeable future, according to Inspector Henry.

PN3518

MS LEONCIO: Well, I'll come back to that point, but there is - - -

PN3519

THE COMMISSIONER: It's on my mind and so I might as well say it. I understand plain English words. You've given me the chapter and verse on that. None of that is particularly controversial. I have to also construe it in a way – and there's a big, long legal maxim – in a way to give it efficacy. It seems to me as far as the general duties police in the ED4, that provision is not efficacious, because for now and to the foreseeable future they will not be able to access purchased leave, and it's a right in the agreement.

PN3520

MS LEONCIO: The evidence of Superintendent Arbuthnot is that there is what they call a review of the staff allocation model. So in response to questioning about, 'When will I ever get my purchased leave?' Superintendent Arbuthnot's response is, 'Well, there's a constant review of the minimum station profile, of the staff allocation model. As things currently stand, that's out of - - -'

PN3521

THE COMMISSIONER: That might go up. That doesn't help you. The service standards might go up.

PN3522

MS LEONCIO: No, not the – so in terms of the minimum station profile - - -

PN3523

THE COMMISSIONER: MSL, yes.

PN3524

MS LEONCIO: That's talking about looking at more staff so that you ensure that you can meet the BMSL, but what the evidence was is that there's been a difficulty in the past because of the data to try and work out the number of people that we need to be available, and there's evidence that has been put through Superintendent Arbuthnot, is that there's an estimate around, 'How many staff do we actually have available?' This year the data is such that unfortunately the staff allocation model doesn't reflect the minimum service level.

PN3525

THE COMMISSIONER: That doesn't take you very far, because that is, 'It will change, but we don't know sufficient to allow them to access their right under 129.'

PN3526

MS LEONCIO: My - - -

PN3527



THE COMMISSIONER: All he said was change, he didn't say that it would be sufficient to – particularly something as amorphous as reasonable business grounds.

PN3528

MS LEONCIO: There's a process that's in place to try and continually assess the needs versus the staff that's allocated. So in terms of the staff allocation model and what I'm about to take you to in a moment, demonstrate that there is this movement, and that minimum station profile, it changes.

PN3529

We've heard already that there is – there was evidence from Assistant Commissioner Langdon that that minimum station profile that we have that was in place as at December 2022, that's already changed as well. So to say that, 'This year, with the current constraints that we have, you won't be able to get your purchased leave,' does not mean that forever more you won't. It just means that at various points in time - - -

PN3530

THE COMMISSIONER: It's less likely.

PN3531

MS LEONCIO: Well, at - - -

PN3532

THE COMMISSIONER: I mean, I don't know. There's no guarantee in what you've said. 'We're re-assessing.' It's fairly low level, as far as my making an assessment as to whether next year the general duties police in ED4 could have a right which they're able to exercise. I can't see, on what you say, that being the case, and as I say, Henry said, 'Not for the foreseeable future.'

PN3533

MS LEONCIO: But that is within ED4. That's not to suggest that - - -

PN3534

THE COMMISSIONER: Not within ED4. That's very consoling for the general duties police in ED4.

PN3535

MS LEONCIO: In 2023, and there have - - -

PN3536

THE COMMISSIONER: No, 'foreseeable future'. I took that to mean beyond – I mean, look, I have to look at his evidence more clearly. I haven't really been able to have a look at the transcript, but I need to examine that and examine what precisely Arbuthnot said, because if I come to the view that not this year, doesn't look like next year, may not be the year after, well, how is that a functional provision that is a sensible industrial outcome?

PN3537

MS LEONCIO: It's not the question that's being asked of you. The question that's being asked of you is are there reasonable business grounds which are set this year – are they reasonable. It's not, well - - -

PN3538

THE COMMISSIONER: On objectively applying my capacity to reason, as limited as that is. Look, perhaps rather than rehearse this, I might listen to what you have to say and save my questioning till the end, because as I say, I'm wrestling with it.

PN3539

MS LEONCIO: What I was going to just point to in terms of we're not in business as usual, particularly for this year, is that there is evidence about those 13 additional resources that were deployed to ED4. That was a rare occurrence. It occurred by lobbying from the police association. There's evidence from the witnesses that that does not occur routinely. That's a recognition that in ED4 in particular - - -

PN3540

THE COMMISSIONER: So they've just had a bad year.

PN3541

MS LEONCIO: This is a particularly bad year, but also a particularly bad division.

PN3542

THE COMMISSIONER: But in circumstances where ED4 - the background noise, the things you say are not contributed to the reasonable business grounds, large area, small resources. That never changes. So as far as the provision of resources is concerned, it's more likely than not that these issues will continue into the future.

PN3543

MS LEONCIO: What it demonstrates is a couple of things, this additional resources being brought into ED4, (1) that there was a particular need in ED4, (2) that if there are needs that occur, if there is a requirement to have more people, then there are mechanisms to put that in place. So that could happen next year, it could happen the year after. Now, the evidence is that it's rare, it doesn't occur as a matter of course.

PN3544

THE COMMISSIONER: Yes.

PN3545

MS LEONCIO: But in terms of the way in which allocations are increased or decreased, in my submission, when you're considering the question of this particular application, there isn't enough evidence to demonstrate that that would forever more – if you were to say that there are reasonable business grounds today, that that would mean as a necessity that next year it would also not be approved, or that there would again next year not be - - -

PN3546

THE COMMISSIONER: Okay.

PN3547

MS LEONCIO: In terms of the deployments, I do just want to take you to exhibit R7 just while I'm at this introductory level. I think I still have that bundle. This is in October, so it occurs after the rejection of the application, but it's just demonstrative of the way in which additional resources are deployed. It's a recognition here that there's a deployment – you'll see the highlighted section:

PN3548

*The deployment of the 502 additional police is based on the following priorities. Core service delivery requirements aligned to minimum station profile commitments to ensure consistent base-level resourcing across police stations.*

PN3549

So it's just demonstrative of the process. If you turn over to the next page you'll see that there are additional resources that were allocated. So I don't seek to draw that to your attention to say that's something that they should take into account in June. It's merely just to demonstrate that where there are service delivery needs, the process is such that additional resources will be deployed as part of a process of trying to ensure that those minimum service delivery requirements are met.

PN3550

I do want to just start with the provisions of the 2019 agreement, which is behind tab 2, and I want to just start by taking you to clause 12. Now, you had asked me in opening about productivity and how that is to be defined.

PN3551

THE COMMISSIONER: Yes.

PN3552

MS LEONCIO: I just thought I'd raise 12.1 or bring to your attention clause 12.1 which is under the heading Productivity Measures.

PN3553

*The employer and the police association recognise that it is an organisational objective to increase the efficiency of police services provided to the community. To support this objective the employer and the police association acknowledges the importance of an agreement that provides an appropriate remuneration package for employees and facilitates effective and efficient service delivery.*

PN3554

Now, I just pause it there because in my submission, productivity incorporates a concept of an effective service delivery and that you can take into account whilst -  
- -

PN3555

THE COMMISSIONER: What is effective service delivery?

PN3556

MS LEONCIO: Well, in my submission productivity relates to productive work and I will take you to it in a moment.

PN3557

THE COMMISSIONER: No, but as I say you believe it would reduce the productivity because you're taking out an input?

PN3558

MS LEONCIO: Yes, that is correct, but it's about whether it's a significant loss of productivity and in my submission the way in which you consider that is the kinds of things we have been talking about now. What is it actually that you're losing. So there may be instances where for example, if you are way above your BMSL, you're constantly - - -

PN3559

THE COMMISSIONER: Is there anywhere in Victoria where they are?

PN3560

MS LEONCIO: There's no evidence to that. But I - - -

PN3561

THE COMMISSIONER: I would just like to know.

PN3562

MS LEONCIO: I don't have an answer to that, Your Honour. Commissioner. So in terms of the productive work and the loss of productive work, in terms of the significance of that, it's a question of in the context of a particular division or in the context of the particular work that is being lost, is that significant.

PN3563

THE COMMISSIONER: What's the measure of significance.

PN3564

MS LEONCIO: It's a relative term. So in terms of – well, there's no answer. Commissioner, there's no specific answer to that. But what I would say is that - - -

PN3565

THE COMMISSIONER: You're taking this to mean as though there's some science involved. Twelve is aspirational. There's no obligation that's enforceable in 12.

PN3566

MS LEONCIO: I am taking you to 12 because it refers to productivity, it's relevant for the construction of the term productivity as it appears in clause 14.10.

PN3567

THE COMMISSIONER: Yes.

PN3568

MS LEONCIO: So that's all that I am seeking to draw from clause 12.1, is that it's a provision which provides context as to what we mean by productivity.

PN3569

THE COMMISSIONER: 'Effective and efficient service delivery.'

PN3570

MS LEONCIO: Yes.

PN3571

THE COMMISSIONER: That's what productivity is. We have come a long way from economic definition but I accept what you're saying. Insofar as I am considering something in a document, and there is something that supports to be in a way of assessing what productivity is, that's what 12 is – does. Is that what you're saying?

PN3572

MS LEONCIO: Yes, that's correct.

PN3573

THE COMMISSIONER: Okay.

PN3574

MS LEONCIO: Now, 12.3 is also significant because it refers back to part 15 and it does say:

PN3575

*In recognition of the fact that Victoria Police operates 24 hours per day, 7 days per week including public holidays and they roster accordingly, all employees will be granted leave in accordance with part 15.*

PN3576

Now, in my submission that just emphasizes the fact that it is an additional form of rhetoric. So part 15, I should just set back, includes recreational leave and includes the additional purchase leave and now it reinforces the - - -

PN3577

THE COMMISSIONER: Yes, but that's not – that aspiration is not represented in the formulation of 12.3 because the only thing that is there is it may only be rejected on reasonable business grounds. There's nothing to say – to balance the leave requirements or otherwise of the employee.

PN3578

MS LEONCIO: That's correct. So it's to demonstrate – this is to demonstrate the purpose of the leave which we say is additional recreational leave and there's not really – I don't perceive there to be any real issue about the characterisation or the purpose of the leave. But it's just to draw your attention that that appears to be what the party has intended would be the purpose of recreational leave.

PN3579

THE COMMISSIONER: But they haven't succeeded?

PN3580

MS LEONCIO: They haven't succeeded.

PN3581

THE COMMISSIONER: They haven't succeeded in making that proportional provision insofar as the needs or requirements of an employee are not part of the regulated calculation, of whether or not purchase leave should be approved or not.

PN3582

MS LEONCIO: Well, they achieve that by ensuring that it will be granted unless there are reasonable business grounds. So the balance that I had alluded to at the very start in terms of my opening submissions between the balance that is generally recognised in terms of an employee's rights to rest or recreation and an employer's interest in being able to meet its service level requirements. In my submission, that balance is achieved through the imposition of this mechanism of a rejection of a reasonable business grounds. You still have to meet that - - -

PN3583

THE COMMISSIONER: It's not regulating. You'd agree with me that the things they can take into account, whether in approving is not regulated by 129, it's a one line thing referring to reasonable business grounds.

PN3584

MS LEONCIO: Well, it's reasonable business grounds, that's the test.

PN3585

THE COMMISSIONER: And that's an assessment of the business grounds. Not the individual.

PN3586

MS LEONCIO: That's correct, yes.

PN3587

THE COMMISSIONER: Well, how is it balanced?

PN3588

MS LEONCIO: The balance is by inserting that mechanism. So the balance is that you get entitled to it.

PN3589

THE COMMISSIONER: But that's employer fiat. It's not regulated.

PN3590

MS LEONCIO: But it needs to be reasonable business grounds, that's – it can't just be any business grounds, so if I said any business grounds, then of course that's – that would be, you know, weighted in favour of the employer. But it does need to be reasonable business grounds and that refers to the - - -

PN3591

THE COMMISSIONER: Yes, but that is nothing to do with the employee. This is my point.

PN3592

MS LEONCIO: It's the procedure of it, is what I am saying. Not the fact that you have to take those things into account.

PN3593

THE COMMISSIONER: But ED4 as a higher, more dangerous threshold for reasonable business grounds. I mean, that's your whole case.

PN3594

MS LEONCIO: But that's the point. Exactly.

PN3595

THE COMMISSIONER: If a business is ED4. Okay.

PN3596

MS LEONCIO: Yes.

PN3597

THE COMMISSIONER: It is harder for them to get regulation there and there's nothing to do to – there's certain dates of the employer, although they took into account - I don't know on what basis, because that's – the only assessment here is reasonable business grounds – it's asymmetrical to me. I might be wrong. But the regulation itself is asymmetrical. I am not saying that – I mean obviously, I have to – what I have to construe is what's there. But I would say what's there is not optimal.

PN3598

MS LEONCIO: Well, that is what the parties had drafted.

PN3599

THE COMMISSIONER: Yes.

PN3600

MS LEONCIO: And that is of course what you'd need to construe.

PN3601

THE COMMISSIONER: I wish, as I say, the TPAV is not here to tell me what they meant by it, so.

PN3602

MS LEONCIO: But ultimately what I am putting to you, Commissioner is that I can understand because we're looking at it through the framework of the flexible work arrangements and flexible work arrangements - - -

PN3603

THE COMMISSIONER: We're not looking at it that way, that's the trouble.

PN3604

MS LEONCIO: No, but the comparison that you're drawing is to the flexible work arrangements.

PN3605

THE COMMISSIONER: No, no. But it's just on the plain works. There's no reference to the employee other than the fact they have a right.

PN3606

MS LEONCIO: But the – it may be that it's not an equal balance. It may be that the balance is more in favour.

PN3607

THE COMMISSIONER: I have to interpret what's there, but I am saying that it's less than ideal. But you can't say you're representing a whole, I understand that. But I can find – I could opine that with that and find that reasonable business grounds have applied.

PN3608

MS LEONCIO: That's correct. Yes.

PN3609

THE COMMISSIONER: Okay.

PN3610

MS LEONCIO: Now, I will take you then to clause 51. I just want to take you to that clause because there's been some references in the evidence to recall to work, this is where there's a recall to work from recreational leave so there is an ability to recall employees and this is the mechanism by which that can occur.

PN3611

THE COMMISSIONER: Yes.

PN3612

MS LEONCIO: But it should be read in conjunction with clause 59.

PN3613

THE COMMISSIONER: What's the context that was brought up? I can't say I remember it.

PN3614

MS LEONCIO: It's in terms of if someone's on purchase leave and you go below the baseline minimum service level, the argument as I understand it from the applicant is that one solution could be to recall - - -

PN3615

THE COMMISSIONER: Bring people back.

PN3616

MS LEONCIO: - - - people back from duty.

PN3617

THE COMMISSIONER: Yes.

PN3618

MS LEONCIO: And the evidence of Victoria Police's witnesses is that that's not satisfactory outcome because of the rights to disconnect. And that's what the next



clause that I was going to take you to which is clause 59, and that's talking about a right to disconnect.

PN3619

THE COMMISSIONER: So recalling is not the answer?

PN3620

MS LEONCIO: It's not the answer. No. So clause 59 just says:

PN3621

*Supervisors and managers must respect employee's periods of leave and rest days.*

PN3622

If you're going to grant it, you can't really grant it on the expectation that you might recall them if there's a high probability or a high likelihood that you think you're going to need to recall them, in my submission, that's not an appropriate mechanism. So then if we go then to page 247, sorry, clause 124.1. So this is the part 15 that talks about recreation leave. We have brought this to your attention a number of times so I won't go through it. But clause 124 raised the recreational leave. There's nine weeks of leave, comprises seven weeks recreational leave plus 10 days accrued time off. That's if you're not a recruit. And a 40 hour week will be worked as well as regular shift work and public holidays will be worked as rostered.

PN3623

THE COMMISSIONER: Okay.

PN3624

MS LEONCIO: That's just to indicate that there is – as I had indicated, it's part of the framework in terms of understanding that yes, there are acknowledgments throughout this agreement and also through various Victoria Police documents about the importance of well-being, the importance of health. It's not simply solely based on whether or not you get purchase leave. There are other parts of the agreement which ensure that that objective is met.

PN3625

THE COMMISSIONER: So is it the Vic Pol's position that everyone should be taking recreation leave instead, is it?

PN3626

MS LEONCIO: No, no. It's just to acknowledge that there isn't - - -

PN3627

THE COMMISSIONER: They have got holidays.

PN3628

MS LEONCIO: It's just to acknowledge that there is a generous recreation leave entitlement and purchase leave of course sits on top of that. So there is - - -

PN3629

THE COMMISSIONER: Would you say from your client's point of view, it's supplementary?

PN3630

MS LEONCIO: Well, it's additional. That's the terms of the – and understood. If you look at clause 129.1, it says it's in addition to. So supplementary is perhaps – another word to say that, but it is. It's in addition to.

PN3631

THE COMMISSIONER: Yes, there's a different shade of meaning from supplementary to additional, but I take your point.

PN3632

MS LEONCIO: All right. Then if you go to clause 129 point – well, clause 29, that is of course what we have been talking about in the hearing so you're well aware of it. It's 129.1 says:

PN3633

*The employees may apply to purchase between one and four weeks leave per year in addition to that provided in clause 124.*

PN3634

And 129.2 is:

PN3635

*Applications for purchase leave may only be rejected on reasonable business grounds as described in clause 14.*

PN3636

Now, you have made the observation, Commissioner about the workability of clause 14.10. If we just turn over to it. This talks about reasonable business grounds and includes this non-exhausted list. And subparagraphs (d) and (e) are the focus of this hearing which talks about that:

PN3637

*The new working arrangements requested by the employer would be likely to result in a significant loss in efficiency or productivity.*

PN3638

Or going off (e):

PN3639

*Would be likely to have a significant negative impact on customer service.*

PN3640

In terms of how you apply this or the understanding of the threshold, there doesn't seem to be much dispute in terms of the principles that apply. And they're set out in the submissions at paragraphs 38 to 39. Now, the case that's been put by the applicant is that personal circumstances need not be considered. And so in my submission, that's not a matter that needs to be determined in this case, because - -

-

PN3641

THE COMMISSIONER: Could it be the source of commentary though?

PN3642

MS LEONCIO: Because we also say there is not necessarily of need but in any event, we say that ultimately both the applicant and the respondent say there weren't any particular personal circumstances that needed to be considered to be taken into account into the assessment.

PN3643

THE COMMISSIONER: Well, he did raise something and that was the source of a happening last time we were here.

PN3644

MS LEONCIO: Well, we are proceeding on the basis that that is not a matter that's in contest in terms of that not being required to be - - -

PN3645

THE COMMISSIONER: But you're just confirming what I said. It's that asymmetrical and personal circumstances are irrelevant to the reasonable grounds.

PN3646

MS LEONCIO: Yes.

PN3647

THE COMMISSIONER: So on what basis do they make the assessment? That's the question. I mean, they're – and you know, how forensic do you have to be? Because surely, how does the loss of one employee over all the employee human resources amount – are equal to an even loss in efficiency and productivity?

PN3648

MS LEONCIO: Well, that is why we need to – it's what the words say, first of all. But my – in my submission we need to have that context. So we need to be able to construe - - -

PN3649

THE COMMISSIONER: How forensic does it have to be?

PN3650

MS LEONCIO: Well, because it's four weeks of leave or one week of leave or two weeks of leave, that is potentially some time in the very far future, in my submission, the way in which this test is set out in this agreement, is such that you have to assess as best as you can whether or not there is going to be – likely to be a significant impact on service delivery or – the word significant is still there. So that it needs to be a certain level. But it can't be that on all occasions, because it's only four weeks, it's not, you know, it's not significant.

PN3651

THE COMMISSIONER: But it's one individual over four weeks.

PN3652

That's what I am talking about. How can that reach the level of significance?

PN3653

MS LEONCIO: Well, you have to – that's why in my submission, you have to not just look at it in terms of the loss of 20 shifts. If we looked at it just simply as the loss of 20 shifts.

PN3654

THE COMMISSIONER: That's too forensic.

PN3655

MS LEONCIO: Well - - -

PN3656

THE COMMISSIONER: Is that right?

PN3657

MS LEONCIO: No - - -

PN3658

THE COMMISSIONER: I am just trying to work out what – obviously the gravemente of the Sergeant's cross-examination. It was very, very sifting through each shift. There's a difference in the way that – you know what I mean? And so it's thing is that a forensic view on the basis of all the material that's provided and is – a lot of material about shift patterns, et cetera, et cetera. I am just wondering if I was the inspector handling, making the assessment, what level of forensic detail would I need to go to to determine whether or not there's going to be significant loss of inefficiency or proactivity?

PN3659

MS LEONCIO: Given the context that it's four weeks. In my submission, it does not need to go into that granular detail or every shift and every – or an exact consequence of that. Again, it's coming back to likely, so they need to make an assessment of what will be likely to occur. But they don't need to say on this shift, this will occur and this will result in this loss of productivity. In my submission, that's not the way in which this test is drafted.

PN3660

THE COMMISSIONER: And you'd say there's no process requirements in assessing reasonable business grounds? Like the fact there's procedural fairness or unfairness or the fact that, you know, it was cancelled and then reviewed and then that is irrelevant to the assessment of the reasonable business grounds in this case.

PN3661

MS LEONCIO: That is correct and that doesn't apply to Sergeant Goldsworthy. So there was a lower level approval in terms of the - - -

PN3662

THE COMMISSIONER: Well, it was unequivocally everybody, wasn't it?

PN3663

MS LEONCIO: There were some, sir, there was a reference to Allerdice who's had his leave approved.

PN3664

THE COMMISSIONER: He had the hokey-pokey.

PN3665

MS LEONCIO: And had it rejected.

PN3666

THE COMMISSIONER: He was in and then he was out.

PN3667

MS LEONCIO: Yes. I am just making the point that there was not an approval and then a withdrawal in respect of Sergeant Goldsworthy. That was just the distinction I wished to make. But yes, and I do wish to just point out, because I think it is important. Commissioner, I think you appreciate that you can't take into account a consideration of unreasonableness of a conduct or an assessment about unreasonableness of the conduct of the employer as compared with what we say is the correct focus which is the reasonableness of the business grounds.

PN3668

And in the Full Bench decision in Fyfe, and I - - -

PN3669

THE COMMISSIONER: You refer to that in your - - -

PN3670

MS LEONCIO: We do and I am not sure if you - - -

PN3671

THE COMMISSIONER: You have got that? Yes. I had a copy of it but I have lost it somewhere.

PN3672

MS LEONCIO: I had a folder of authorities. I am not sure if I have handed it up yet. We haven't? No. Okay. So we just hand that up to you.

PN3673

THE COMMISSIONER: You have given me the Rolls-Royce treatment now.

PN3674

MS LEONCIO: And it's behind tab 10.

PN3675

THE COMMISSIONER: Yes.

PN3676

MS LEONCIO: Now, at paragraph 62 to 64 of that decision, now this is a Full Bench decision where there was an appeal by Ambulance Victoria in respect of a Commissioner's decision to find that they did not have reasonable business

grounds. But that decision was ultimately upheld but I just wanted to raise the point at paragraph 62 to 64 which deals with - - -

PN3677

THE COMMISSIONER: Hang on, hang on. So now I have lost my highlighter in the documents. Okay. Sixty - - -

PN3678

MS LEONCIO: Sixty-two to 64.

PN3679

THE COMMISSIONER: Okay.

PN3680

MS LEONCIO: The error that there was the Ambulance Victoria had raised was one of an issue of proper construction. And you will see here that at paragraph – there was an issue about whether or not there'd been this conversation, a genuine conversation with the employee. And the contention of Ambulance Victoria was that assessment of reasonable business grounds should not import an issue about unreasonableness of the employer. And that was upheld in the sense of this – there was found to be a misconstruction of the reasonable business grounds.

PN3681

THE COMMISSIONER: Yes. So the fact that they acted unreasonably is not relevant to the issue of whether there is reasonable business grounds, you say?

PN3682

MS LEONCIO: Yes, that's correct. Yes.

PN3683

THE COMMISSIONER: Okay.

PN3684

MS LEONCIO: It's just to affirm that point.

PN3685

THE COMMISSIONER: All right. Okay. Okay.

PN3686

MS LEONCIO: Now - - -

PN3687

THE COMMISSIONER: All right. That's helpful. Thank you.

PN3688

MS LEONCIO: Now, the reasonable business grounds we say needs to be informed by the context and the (indistinct) I took you through around what we say that it's additional form of recreational leave that it's this four week period. And that there is this – well, I have described it as this mechanism within clause 14.10 which talks about bringing into account clause 14.10 which is about how some of the non-exhaustive examples - - -

PN3689

THE COMMISSIONER: Well, it's not that – it's not a mechanism. It's a – well, I suppose it's a mechanism for judging reasonable business grounds, but it's not a procedure. It's - - -

PN3690

MS LEONCIO: No, no. Not in that sense, no.

PN3691

THE COMMISSIONER: It's a shopping list that's not exclusive – not exclusive.

PN3692

MS LEONCIO: In terms of the word 'significant', the applicant has helpfully set out in his submissions at page 298 of the commission books, under the dictionary definitions. We do rely on those definitions in terms of ordinary meaning of the word significant. It's one of importance or of consequence. Now, in the context as we say, of a four week - an application for one to four weeks' leave, there needs to be a consideration of what's possible. What's in the realm of possibilities of likely consequences.

PN3693

THE COMMISSIONER: But a consequence, it's like the Thomistic theory for God. Everything has a consequence. A consequence alone is not enough. It's got to be a level of consequences.

PN3694

MS LEONCIO: Yes, and so in the context of four weeks' leave, what is an important – what is an important loss of productivity or negative impact to customer service.

PN3695

THE COMMISSIONER: Okay.

PN3696

MS LEONCIO: I have – in terms of the clause – the reference to productivity, I have already taken you to clause 12, which talks about efficiency and effective service delivery. But I also just wanted to take you to tab 11 which is the case of *The Police Association v Chief Commissioner*, a decision of Deputy President Bell last year.

PN3697

THE COMMISSIONER: Yes. Yes.

PN3698

MS LEONCIO: Now, it's a slightly different context, but because this is of course looking at flexible work arrangements, if you go to paragraph 90 to 94.

PN3699

THE COMMISSIONER: Paragraph what, sorry?

PN3700

MS LEONCIO: Paragraphs 91 to 94.

PN3701

THE COMMISSIONER: Okay.

PN3702

MS LEONCIO: There is there a reference to – so at 91 is the onus for establishing reasonable business grounds, lives Victoria Police. And that they had in that case – we have in that case relied on a contention that there are currently experiencing a significant staffing shortfall. And there is references there in paragraph 92 to some of the difficulties in terms of what that shortfall is resulting in.

PN3703

*The picture presented of Victoria Police operations regarding public safety on key sections of the transport network with higher crime rates is bleak. Nightshifts in the key - - -*

PN3704

THE COMMISSIONER: Where is this? Nightshifts and key – yes, I am with you.

PN3705

MS LEONCIO: Oh, sorry. Yes. In paragraph 92.

PN3706

*We're operating at 50 per cent of the minimum operation model afternoon shifts fared only slightly better. Offenders arrested to the networks via (indistinct) being released simply because no officers were available to process them. It was likely this included offenders with existing arrest warrants.*

PN3707

And in paragraph 93:

PN3708

*I accept that this context is a relevant matter to assess a flexible work request that would result in the loss of further shifts.*

PN3709

And if that loss is just two shifts in a much larger number, and it is difficult because we're talking about shift rosters in slightly different contexts, but in my submission, the loss of shifts can result in a loss of productivity. And at 94, you will see:

PN3710

*If a flexible work arrangement would result in an employee being unable to perform useful or productive work for a meaningful portion of their proposed work pattern, I consider that would prima facie be a reasonable business ground to refuse a flexible work arrangement request. It was clear to me that the proposed roster pattern would result in (indistinct) being unavailable to perform sufficiently productive work.*

PN3711



Now, I appreciate in that context, it's slightly different because we're talking about a change in shift rosters. So he was going from a 5 x 8 roster pattern to a 4 x 10.

PN3712

THE COMMISSIONER: Yes.

PN3713

MS LEONCIO: So the issue there was whether or not they would be able to with that roster pattern, whether the loss of work and certain periods would mean that there was a loss of productive work. So there were certain periods where he wasn't able to do the same level of work. So it's a slightly different comparison but this idea - - -

PN3714

THE COMMISSIONER: Yes. Yes. Ms Leoncio, can you – sorry. I am thinking today is tomorrow. I am sorry.

PN3715

MS LEONCIO: No, no. That's okay.

PN3716

THE COMMISSIONER: I have got a matter tomorrow afternoon and I am conflating Thursday and Friday. Okay.

PN3717

MS LEONCIO: So I am taking quite a bit of time, but I will try my best to - - -

PN3718

THE COMMISSIONER: No, no. I have been – I have been peppering them with questions. Like, yes. No, we're free and clear. We have got nothing else this afternoon. So - - -

PN3719

MS LEONCIO: So in my submission though, the assessment of productive work is a relevant test in terms of if there is a loss of productive work that is something that happens – that relates to the notion of productivity. But I appreciate that it's a significant loss of productivity because of cause any leave is going to result in a loss of productive work. So the way in which you look at it is just to determine whether or not that's a significant loss in productivity by the context.

PN3720

In terms of customer service, I just want to quickly take you to tab 8. This is at the decision of Commissioner Bissett in the *The Police Association v Victoria Police* of October 2021. Now, paragraph 127, the Commissioner there makes observations about the demands to provide resourcing to certain operations and Commissioner Bissett says:

PN3721

*I am satisfied that this has affected service delivery in the Hume local area and at Broadmeadows.*

PN3722

And at 127:

PN3723

*I accept that the demand of resourcing has impacted the ability of Broadmeadows Police Station to meet its service delivery and operational needs. And hence provides reasonable business grounds.*

PN3724

I just draw you to that part of the decision because in my submission that is our reliance on service delivery and operational needs is – is how you define – sorry, I withdraw that. In terms of customer service in 14.10(e) that the reference to impact on customer service can be construed within the context of Victoria Police's Operations to mean an impact on service delivery and the operation needs.

PN3725

THE COMMISSIONER: Within ED4. The business is ED4. You maintain.

PN3726

MS LEONCIO: Yes, that's correct. Yes. Now, while we have this decision in front of us, and I should have given a background, but again this is one of those decisions that relate to the flexible working arrangement. And there are of course, differences between the provisions in clause 14 – sorry, the provisions relating to flexible working arrangements in clause 129. But we say these observations are relevant. If I just take you quickly to paragraph 79. We say:

PN3727

*In terms of the Commission's task it is the same in the sense that it is to determine if the business grounds relied upon by Victoria Police.*

PN3728

Well, it's not the same in the sense it's not a flexible working arrangement - - -

PN3729

THE COMMISSIONER: Yes.

PN3730

MS LEONCIO: - - - but whether or not there are reasonable business grounds and that that needs to be determined objectively. Reasonableness needs to be determined on an objective basis. We also just note that the next sentence starts:

PN3731

*It is not the Commission's role to determine whether a request should be granted. Should the Commission find the grounds for refusal have not been made out, it would be expected that the employer in such circumstances would immediately review its decision.*

PN3732

I just make that point because we say the focus should really be, and the Commission's task should really be, just on the question of are there reasonable business grounds - - -

PN3733

THE COMMISSIONER: The question I formulated with the intent of the parties is that if I find there was not reasonable business grounds, then he would be afforded purchase - he would have purchase leave at a mutually agreeable time in this case, because otherwise it's like - as I've said to representatives of Vicpol before - Heraclitus. Heraclitus, you know, he said that no one can stand in the same river twice because the person has got older and the water has flowed. Well, the assessment of reasonable business grounds comes over time, so what is refused there may not be - so the second part of the question was if - - -

PN3734

MS LEONCIO: Yes, I see, yes. Sorry, Commissioner, I didn't mean to interrupt, but, yes, I hadn't appreciated that that was by consent, so I withdraw that part of the submission.

PN3735

THE COMMISSIONER: Yes, and that was because, you know, we will reconsider it - well, what is a right? I don't know. Anyway, I take the issue though that the focus is there is enough meat in reasonable business grounds to keep me going for three months, so if we get to that, well, you'll get to that.

PN3736

MS LEONCIO: Okay. At paragraph 86 - I made mention of this in my opening submissions, but again this is about it's not a comparative assessment:

PN3737

*It's necessary to consider each of the individual matters. In doing so, it would be easy to make some comparative assessment of the grounds at the time the decision was made compared to how they might have affected such a request in the 12 months prior to the decision or period since the decision, but to do so would be wrong.*

PN3738

*The assessment to be made is not a comparative assessment, but whether the grounds stand the test as the circumstances were at the time the decision to refuse the request was made.*

PN3739

THE COMMISSIONER: You say individual right, okay, but if I'm the third sergeant to apply in ED4, that may diminish your right to have it.

PN3740

MS LEONCIO: This is a point that was raised in the applicant's submissions, but also has been the subject of consideration in the Emery decision.

PN3741

THE COMMISSIONER: Yes.

PN3742

MS LEONCIO: I'll just take you to that. It's tab 7 and the relevant paragraph is 109. You'll see here - this is more of an observation - it follows an assessment or

a reference to Brimbank. As you'll see here, Wilson C found - or he observed that:

PN3743

*It may well be that an employer has no reasonable business grounds to refuse the first flexible work arrangement request which might be made. It may not even have reasonable business grounds to refuse the 30th, even on the basis of what may be worked by other employees.*

PN3744

*However what of the 200th request? Very plainly at some point the preponderance of approvals going before the one presently before an employer may well lead to the conclusion that there is a reasonable business ground available for the refusal of the request simply because too many other staff have arrangements in place with varying degrees of flexibility which means that the full span of unit work demands are not able to be filled by the available working hours of the available staff.*

PN3745

THE COMMISSIONER: Yes.

PN3746

MS LEONCIO: Now, in that case and in Brimbank the concern was really about the hypothetical application that hadn't yet been made. You can't on this application say there is going to be a floodgates on this application, because - - -

PN3747

THE COMMISSIONER: I wouldn't put it as a floodgates argument. It's a logical conclusion from what you are saying that you have to do it with individuals at the time. Obviously where you are time wise as far as purchase leave in people in your rank, that may impact on the significance of the effect of it. It's only logical from what you're saying - you're construing it individually. That's not a floodgates argument, it's just a common-sense argument if it's one application at a time, sweet Jesus.

PN3748

MS LEONCIO: So the assessment that was done was on a group basis, so looking at all the applications that were made not in some kind of sequence, but altogether.

PN3749

THE COMMISSIONER: Yes.

PN3750

MS LEONCIO: In my submission, there's nothing wrong with looking at it from this cumulative basis because of what is said here about the impact really ultimately. If you have all of these applications there's going to be potentially at some point a tipping point where you do have a reasonable business ground for rejection. The issue in Brimbank and the concern that they had was that they felt if they agreed to this flexible work arrangement, then potentially in the future this might mean that lots of people want to apply for flexible work.

PN3751

THE COMMISSIONER: Yes.

PN3752

MS LEONCIO: It's different to what we're looking at here.

PN3753

THE COMMISSIONER: No, no, I understand.

PN3754

MS LEONCIO: Yes.

PN3755

THE COMMISSIONER: I understand what you're saying.

PN3756

MS LEONCIO: Where it's a cumulative - - -

PN3757

THE COMMISSIONER: So I don't know, is it an individual right or is it determined on - is reasonable business grounds determined individually or collectively?

PN3758

MS LEONCIO: Well, you need to consider them individually, so there is an application and you need to consider the application, but in determining whether there are reasonable business grounds you can take into account - and I say this is really an extension of what comes here at paragraph 109 - the impact that all of those purchase leave requests, if granted, would have on the business.

PN3759

THE COMMISSIONER: In circumstances where ED4 was that tipping point you say this year and unlikely to be there again.

PN3760

MS LEONCIO: Yes. I mean, the tipping point is - - -

PN3761

THE COMMISSIONER: The background - okay, high area, low resources. Road trauma, alpine, that never changes. The Hume runs through there, that never changes. So the threshold in comparison to other areas is higher for reasonable business grounds.

PN3762

MS LEONCIO: I have to accept that, yes.

PN3763

THE COMMISSIONER: Is just irrelevant that there is 13 per cent here and 70 per cent everywhere else?

PN3764

MS LEONCIO: In my submission, it is, because you're looking just at the reasonable business grounds here and it may be that in this division that is - that the business grounds for rejection were reasonable.

PN3765

THE COMMISSIONER: What about ED6 as the most - the easiest comparator. Surely applying my capacity for reason in relation to business grounds, you know - it's like the search for terrestrial life. You find a planet with a moon somewhere and say, 'Well, there's more likely to be - here.' You've got the two most similar as far as geographical area and human resources. One has less resources, one has a greater amount of business grounds - of approvals than the other. Is that foreclosed to me?

PN3766

MS LEONCIO: So it's a strange arrangement with ED6. I'll have to take you through the evidence on that, because in my submission the evidence about approval rates for this financial year does not necessarily demonstrate that the approach taken in ED4 - I withdraw that. It does not necessarily demonstrate that the higher approval rate in ED6 means that it was unreasonable to reject the applications or have a lower level of approval rate in ED4 and that's because of the review that was undertaken. I will need to take you to that.

PN3767

THE COMMISSIONER: Okay.

PN3768

MS LEONCIO: But basically the figures are somewhat skewed because of the process that was taken, so I'll have to take you through - - -

PN3769

THE COMMISSIONER: The process taken there in ED4 or the process taken in ED6?

PN3770

MS LEONCIO: In ED6.

PN3771

THE COMMISSIONER: All right.

PN3772

MS LEONCIO: But I'll take you to that in a moment. I just want to finish off on this 101 - - -

PN3773

THE COMMISSIONER: Please.

PN3774

MS LEONCIO: On this paragraph - - -

PN3775

THE COMMISSIONER: If you say, 'Just let me finish - please tell me.

PN3776

MS LEONCIO: Just in terms of this tipping point, the point I was making was around the number of applications. So it may be that if there was two applications in ED4, it might have been able to be approved and in fact there were three that were approved, so it actually wasn't - - -

PN3777

THE COMMISSIONER: Yes. None from the general duties police.

PN3778

MS LEONCIO: None from the general duties, but if there was one it's potentially possible. Ultimately what I'm saying in terms of the tipping point is that in that particular year there were quite a number of applications.

PN3779

THE COMMISSIONER: I'm a bit confused about the way it applies then. Is it an individual right? Is the assessment reasonable business ground; you can do it collectively?

PN3780

MS LEONCIO: In assessing the impact on the service we can take into account whether or not there would be a number of other purchase leave applications in that year. Okay, so I might just move on. Just to finish off - just to turn back to Bissett C's decision in tab 8 - - -

PN3781

THE COMMISSIONER: Yes.

PN3782

MS LEONCIO: - - - the other point that I think is worth noting is at paragraph 123.

PN3783

THE COMMISSIONER: Okay.

PN3784

MS LEONCIO: And this is that point around:

PN3785

*I should observe that it would be easier to say that none of the business reasons given by Victoria Police for refusing the request would dissipate because one more shift per week was available by the refusal of the four by 10 roster, but that is not the assessment to be made. It is whether there are reasonable business grounds to refuse the 2021 -*

PN3786

so it's just to address the point that the applicant raises about we can't solve the whole BSML. That's not the test. We don't have to demonstrate that the - - -

PN3787

THE COMMISSIONER: So it's not the straw that broke the BSML's back, it's everyone together - whether they do or they don't - if in a year they make purchase

leave requests, because you have to do an expression of interest, et cetera, et cetera, and the purpose of that, you would say - - -

PN3788

MS LEONCIO: Yes.

PN3789

THE COMMISSIONER: - - - is to flush out where it was and enable an assessment of reasonable business grounds.

PN3790

MS LEONCIO: Yes. It doesn't need to solve the resourcing problem as a whole. Okay, so I'm not sure if there is a dispute about the relevant business from - but from Victoria Police's perspective the relevant business is the business of Victoria Police conducted in the E4 and we rely on the evidence of Assistant Commissioner Langdon. He provides that it's the divisional superintendents who are responsible - - -

PN3791

THE COMMISSIONER: Yes.

PN3792

MS LEONCIO: - - - for specific service needs.

PN3793

THE COMMISSIONER: He gave a background about ED4 and the reasons why it was set up that way, et cetera.

PN3794

MS LEONCIO: Yes.

PN3795

THE COMMISSIONER: Yes.

PN3796

MS LEONCIO: There was a point that was put to me in opening submissions about the way in which you define the division may result in an employer structuring in a particular way - - -

PN3797

THE COMMISSIONER: It's like a fairly chosen test, isn't it? If the employer is doing it for a reason other than legitimate operational reasons - - -

PN3798

MS LEONCIO: In my submission, there is no evidence that there is some kind of artificial construct. That is a way in which - - -

PN3799

THE COMMISSIONER: No, but there is just one division where you're unlikely to get purchase leave. Less likely compared to others, everybody else, but you say that's an irrelevant consideration for whether or not they're reasonable business grounds.



PN3800

MS LEONCIO: Yes. I just note that in terms of the relevant division, we say that's consistent with previous approaches of the Commission in respect of Victoria Police's business.

PN3801

THE COMMISSIONER: Yes.

PN3802

MS LEONCIO: It's obviously going to depend on the facts, but if you at some point have regard to the decision behind tabs 8 and 11 which I just took you through, there is a reference as to the way in which the business is defined and you'll see it's quite a similar approach that's taken. At 34 to 35, there is the tab 11 authority and paragraph 108 of the - - -

PN3803

THE COMMISSIONER: Hang on, hang on.

PN3804

MS LEONCIO: Sorry.

PN3805

THE COMMISSIONER: You're going too fast. Okay, what was the first one?

PN3806

MS LEONCIO: So tab 11 is the Deputy President's - this is *Police Association v Chief Commissioner of Victoria Police*.

PN3807

THE COMMISSIONER: Yes.

PN3808

MS LEONCIO: So that's paragraphs 34 to 35.

PN3809

THE COMMISSIONER: Yes.

PN3810

MS LEONCIO: And then 2021, Bissett C's decision, is at tab 8.

PN3811

THE COMMISSIONER: Yes.

PN3812

MS LEONCIO: And the relevant paragraph is 108.

PN3813

THE COMMISSIONER: Okay. Thank you. That's helpful.

PN3814

MS LEONCIO: Now, I'm just conscious of the time so I won't - I was going to just develop my submissions around - - -

PN3815

THE COMMISSIONER: No, no, don't. We're here now. As I say, I need all the help I can get, so don't truncate what you're saying for my benefit. As I say, I thought today was Friday, but I haven't got V-LINE until tomorrow afternoon so -  
- -

PN3816

MS LEONCIO: So in terms of the business of Victoria Police in ED4, you may recall, Commissioner, I took the applicant through various documents of Victoria Police which outline the business which includes things like the over-arching role, which is to the serve the Victorian community, uphold the law so as to promote a safe, secure and orderly society. I won't trouble you with those for now. But effectively - - -

PN3817

THE COMMISSIONER: Who was the statement that was attached to?

PN3818

MS LEONCIO: That's at annexure JA2, so it's Superintendent Arbuthnot.

PN3819

THE COMMISSIONER: Arbuthnot gives all those things, like the strategic objectives and all that.

PN3820

MS LEONCIO: Yes, that's right. So it's annexure JA2 which is Commission book 520. I might just give you the references: annexure JA3, which is Commission book 541.

PN3821

THE COMMISSIONER: Yes, you don't need to give me the reference to that. I can - - -

PN3822

MS LEONCIO: Okay.

PN3823

THE COMMISSIONER: I know where it is.

PN3824

MS LEONCIO: Yes, but ultimately - - -

PN3825

THE COMMISSIONER: What do you say it shows?

PN3826

MS LEONCIO: Well, it shows that there are these core functions of Victoria Police. One of them is preserving the peace, patrolling to provide a highly visible policing presence in the community, protecting life and property, prevent offending and respond to Triple 0 calls and also investigate offences.

PN3827

THE COMMISSIONER: You say that's more than an mission statement.

PN3828

MS LEONCIO: Yes, that is – I didn't understand there to be much dispute about the functions being as described in these documents as evidencing the actual functions of Victoria Police. There was some minor disputes around some of the aspects of it, which – but in terms of that broader policing - - -

PN3829

THE COMMISSIONER: Okay, good – I get it, thank you.

PN3830

MS LEONCIO: - - - I didn't understand there to be a large dispute about that. But ultimately, we say once you go through those documents and see what the functions of Victoria Police are, there is a focus on visible – high visible police presence, that things like the highway patrol and having more cars on the road, that is something that we say is consistent with business delivery services, that they say legitimate focus - - -

PN3831

THE COMMISSIONER: But compares to Corryong and the other things you've mentioned – if the specific operational things in ED4, the halo effect is – you could double the amount of police and not receive – do the amount of halo effect you needed to diminish crime. I mean, it's like in Italy. Every corner has got a cop.

PN3832

MS LEONCIO: Well, it's about – perhaps what I'm submitting is that Victoria Police has identified as a priority having more police presence on the road: that is part of its service delivery and it is a - - -

PN3833

THE COMMISSIONER: So what's that? Is that a customer focus or is that a productivity measure or what do you say that is?

PN3834

MS LEONCIO: Well, that's part of its service delivery requirements or what forms part of its service delivery. So it really impacts both of those limbs.

PN3835

THE COMMISSIONER: Okay.

PN3836

MS LEONCIO: Another core part of that – so there is this - - perhaps if I just take you to – I'll just take you to Commission book 551.

PN3837

THE COMMISSIONER: Okay, yes.

PN3838

MS LEONCIO: Now, this is the Chief Commissioner's instruction which sets out the general duties rostering, some of the principles for general duties rostering.

PN3839

THE COMMISSIONER: Yes.

PN3840

MS LEONCIO: I'll just take you to 554, just paragraph 8, I think.

PN3841

THE COMMISSIONER: Five-five-four, paragraph 8, 'Service delivery requirements'.

PN3842

MS LEONCIO: Yes, that one. So you'll see there that there are several important (indistinct) roster that must be considered to meet the service delivery requirements. I emphasise that there are three components. So there's this one component that talks about minimum station profiles. The second is about service demand forecasting and the third is about other operational resourcing requirements as directed through TMC and/or DLG, which I believe is the divisional leadership group. But it's important to have the framework because there is of course in the evidence quite a focus on the minimum station profiles, which I'll take you through in a moment.

PN3843

But that's really about the minimum service. Ultimately, that is really about the patrol response, ultimately, we say: being able to respond to calls for assistance and there are other parts of the service delivery that form part of Victoria Police's business. They include the things that I've said just there: the service demand forecasting, other operational resourcing requirements. So really when we're looking at the minimum station profile, that's just in Superintendent Arbutnot's words, just the bare bones of the service.

PN3844

I do want to take you to the Chief Commissioner's instruction relating to the minimum station profile and that's at 560.

PN3845

THE COMMISSIONER: It's these infernal black numbers. It's hard for my poor eyes. Okay, yes, I've got it.

PN3846

MS LEONCIO: Okay, so - - -

PN3847

THE COMMISSIONER: JA7.

PN3848

MS LEONCIO: That's correct. So you'll see there – so this is minimum station profiles. You see that first paragraph talks about Victoria Police is committed to delivering a safer Victoria. There is a requirement that police stations be allocated sufficient resources to provide an adequate police response to calls for assistance across the state. So that's really the core of this minimum station profile

policy. You'll see, if you turn to – if we just turn to 562, there's the station resource framework. That's at the top of the table there.

PN3849

THE COMMISSIONER: Yes.

PN3850

MS LEONCIO: There's this distinction between core funded positions and what we call MSP. Now, the core funded positions are the fulltime equivalents, total number of gazetted general duties police resources at a police station to enable the delivery of policing services.

PN3851

THE COMMISSIONER: Yes.

PN3852

MS LEONCIO: And you'll see there also: 'This includes resources that can be used for discretionary policing activity and to cater for leave entitlements'. Now, discretionary is not used there in the sense of, 'Nice to have'. If you look up at paragraph 2, you'll see:

PN3853

*In planning for resourcing needs divisional commanders, local area commanders and station biases will ensure that.*

PN3854

When you look at the fourth dot point:

PN3855

*Any available police resources above MSP may be tasked at the discretion of local management.*

PN3856

So that's what the reference to, 'discretionary', is. And you'll see then if you go back to the table in that second row, this is MSP. So this is the minimum number of available full-time equivalent general duties police resources required at a police station across each fortnight to ensure baseline service delivery. This includes police response, supervision, management of people in custody and NHP activities. Before I go on in that paragraph, I do just want to go to the definition of baseline – it says baseline service delivery but I don't think there's any dispute that that's talking about BMSL, which is the - - -

PN3857

THE COMMISSIONER: They always get the letter in the acronym wrong.

PN3858

MS LEONCIO: So this is the base - - -

PN3859

THE COMMISSIONER: BMSL, it is, isn't it?

PN3860

MS LEONCIO: That's right. So that's the baseline minimum service so if you turn - - -

PN3861

THE COMMISSIONER: That's at 2, page whatever it is. I can't - - -

PN3862

MS LEONCIO: So if you turn back, there's the definition there. So Wodonga police station is a 24-hour police station so what's required there is this primary response patrol function, available 24 hours, seven days a week. That's for form two up. The reception needs to be two up as well and the patrol supervisors will be rostered to include a driver, so that effectively means it's also two up. So that's the way in which the station framework works. You've got – actually, I'll just turn back to the MSP. It says the MSP for each station is informed by – it has a list of things which does include purchase leave, and I'll elaborate on the data that informs the MSP.

PN3863

But effectively, the MSP is the number of people that you need, taking into account all of the leave that gets taken, all the rest days and night shifts, a various range of inputs in order to meet that baseline minimum service, which is the – you know, two on the patrol, two in the watch house, and two in terms of that patrol supervisor. Now, in ED4 there is a further response unit which is rostered for the afternoon and night shifts and they are there to meet the demands of – sorry, I've said ED4 but I think I mean Wodonga police station.

PN3864

THE COMMISSIONER: That's a 24/7 one, isn't it?

PN3865

MS LEONCIO: Yes, so there's a notion of minimum service as per the policy but in practice, there is also a second response vehicle which has been – which was initially staffed by those 13 additional staff so when I mentioned those 13 additional staff that were deployed, eight of those went to – actually sorry; I think I've got those numbers wrong. But there's a portion of those 13 that came down to Wodonga. The point of that was to have this additional vehicle, patrol vehicle on the road, because of a need for safety, both in terms of the members but safety also in terms of the community.

PN3866

Superintendent Arbuthnot gives evidence about the reasons why they had a second van on the road. So in my submission, in respect of service delivery at Wodonga police station, the minimum service is actually even above this BMSL because we have included on the roster an afternoon and a night shift with – sorry, an additional van for the afternoon and night shifts.

PN3867

THE COMMISSIONER: Is that unique to Wodonga or is that every 24-hour station?

PN3868

MS LEONCIO: The additional one? The evidence is that it was those supplementary resources that were deployed. I'm not sure if that applies to Wangaratta.

PN3869

THE COMMISSIONER: It doesn't matter. It doesn't matter. (Indistinct words). I'm trying to get a handle on what, 'minimum', means.

PN3870

MS LEONCIO: Yes. Now, in terms of Victoria Police wanting to run the patrols as two up, the evidence is that the reason that is employed is because of evidence about safety and there is Assistant Commissioner Langdon at PN1519 and also at 1753 provides some context to the reasons for that two up patrol. But effectively it was as a result of a fatal shooting incident where there was then a change of policy to ensure there are two people in those vehicles. Now, it's not directly the same. It's not completely on all fours but I just note in Fyfe, which is the first decision behind tab 14 of your folder, this is of course involving Ambulance Victoria.

PN3871

At paragraph 95 it was part of Ambulance Victoria's rostering framework that two officers would be working on each shift. Now, that's of course in the context of Ambulance Victoria's specific requirements in terms of needing two people to deal with patient needs but I just raise this because in this decision Commissioner Johns said at the top of page 40 in paragraph 95:

PN3872

*In any case I accept that it is entirely reasonable for Ambulance Victoria to want to have two officers working on each shift.*

PN3873

It's going to depend on each circumstance, I appreciate that, but in my submission, it is reasonable.

PN3874

THE COMMISSIONER: So paragraph 95 – so 39, the best explanation of alleged problems, is that it?

PN3875

MS LEONCIO: Yes, that's right, but if you - - -

PN3876

THE COMMISSIONER: And then where's the bit you read from?

PN3877

MS LEONCIO: If you see the second line down, it says: 'In any case I accept that it is entirely reasonable for AV to want to have two officers'.

PN3878

THE COMMISSIONER: Yes, right, okay, yes. I see that, thank you.

PN3879

MS LEONCIO: In my submission, the Commission should reject any suggestion that patrol supervisors should go out on the road as a one up. There's evidence that's given by Assistant Commissioner Langdon as to why that should not proceed and to safety considerations. But also that they're doing critical services which are identified in exhibit R3 which I don't take you to now.

PN3880

In terms of going back to this concept of baseline minimum service level, there are various escalation points. And you will see at paragraph 9 that where there is unplanned leave there is a number of steps that can be taken which include things like recall and authorising overtime.

PN3881

Now the evidence of Superintendent Arbutnot is that they do try to cover the shifts as much as possible with overtime and the like but there are still breaches in that minimum service level. But in terms of recall to duty it's that point that I raised earlier about that not being a reasonable solution.

PN3882

The other evidence that is in the materials is that of course baseline minimum service is only dealing with one threshold. It doesn't play a role in disrupting crime or those proactive and preventative tasking units. And that in order to perform or in order to perform that the service delivery requirements are met that you need to resource not just that baseline minimum service level which is the bare bones.

PN3883

THE COMMISSIONER: What's the empirical measure?

PN3884

MS LEONCIO: Of, sorry, Commissioner?

PN3885

THE COMMISSIONER: Of the other things, the police presence, et cetera, you mentioned last?

PN3886

MS LEONCIO: Yes. So, there is in the evidence quite a bit of material about the performance of those tasking – previously tasking the highway patrol, and there's no empirical number. But it's a question then of the significance. To what extent  
- - -

PN3887

THE COMMISSIONER: But to diminish that requires an exponential increase in resources. Like, if you align the stars in, you know, being on everyone's phone, on every street corner, you could be fairly sure that less crime would take place. So, I understand the point you're making and I understand it's an argument but I just – that thing, the preventative thing, is when is the amount of resources that's required to be adequate to address the standard of delivery?

PN3888



MS LEONCIO: In this particular case, because of the breaches of the minimum service level there's not a need to consider what level of tasking or what level of the things it does.

PN3889

THE COMMISSIONER: Yes.

PN3890

MS LEONCIO: Is it acceptable and reasonable. In this particular - - -

PN3891

THE COMMISSIONER: So, if a BMSL is routinely transgressed, that would provide a reasonable business ground?

PN3892

MS LEONCIO: Yes. It would.

PN3893

THE COMMISSIONER: Okay, thank you.

PN3894

MS LEONCIO: So, the baseline minimum service level also doesn't take into account resourcing or I&R, TMC units, Special Services, Special Policing, Issue Operations and supporting various investigations. And that's in the evidence of Inspector Henry at Commission book 679.

PN3895

THE COMMISSIONER: What page number?

PN3896

MS LEONCIO: Page 679. I won't take you through it.

PN3897

THE COMMISSIONER: Okay.

PN3898

MS LEONCIO: In terms of the minimum station profile I'll take you just to page 567.

PN3899

THE COMMISSIONER: Five?

PN3900

MS LEONCIO: 567.

PN3901

THE COMMISSIONER: Okay.

PN3902

MS LEONCIO: Now unfortunately as things stand the minimum station profile which is based on the member availability, so you can see the MSP's are based on

member availability, the number of shifts and positions typically performed annually, and this formula uses data over a three year average.

PN3903

THE COMMISSIONER: Yes.

PN3904

MS LEONCIO: And has been considered for each division and separated by rank. So, it is an historical calculation in terms of trying to understand, for example, how many people, how many members would be on recreational leave and how many members would be on, for example, purchase leave based on the data for the previous years.

PN3905

Now the evidence of Superintendent Arbuthnot is that unfortunately the data that is relied upon in terms of the purchase leave, because it's a historical analysis, or in terms of the data that's relied on it's historical, it's based on two shifts per person per annum, taking purchase leave. So, obviously purchase leave is not always applied for. It's not always taken. That is just what has been formulated based on the previous three years.

PN3906

So, the minimum station profile at the moment in terms of the way in which it's intended to meet the minimum service level, it's just part of the way in which these calculations are made, is that it doesn't necessarily reflect the current number of purchase leave - - -

PN3907

THE COMMISSIONER: I think she says that it includes the COVID year, so that's – was that there?

PN3908

MS LEONCIO: Yes. Well, the evidence is actually that because COVID was not a year in which it could really rely on because it was so different - - -

PN3909

THE COMMISSIONER: So, let's keep it as junk in, junk out, because that was way, way forced out of the (indistinct) year.

PN3910

MS LEONCIO: Yes. So, it was based on '17, '18, and then '21, '22, yes.

PN3911

THE COMMISSIONER: Okay. So, what you're saying is that the applicant's reliant on that can't be - - -

PN3912

MS LEONCIO: What I'm saying is that, yes, in terms of purchase leave being incorporated, it's not unfortunately reflected in the current - - -

PN3913

THE COMMISSIONER: What's the purpose of the roster? What do you say about the roster? We have that - - -

PN3914

MS LEONCIO: The division planning - - -

PN3915

THE COMMISSIONER: Yes.

PN3916

MS LEONCIO: The roster. Well, the roster doesn't take in – it's just a roster that the police station gives out. So, it doesn't take into account, for example, the Highway Patrol, that you actually needed to staff or resource the Highway Patrol, as well. It also doesn't take into account – so, it's done at the - - -

PN3917

THE COMMISSIONER: If it's not relied on what's the purpose of it?

PN3918

MS LEONCIO: If it's not relied on?

PN3919

THE COMMISSIONER: If it's not relied on on reasonable business grounds, what's the purpose of it? A division plan so you can plan out the year – it's for every sort of other planning except for the assessment of reasonable business grounds, is it?

PN3920

MS LEONCIO: Well - - -

PN3921

THE COMMISSIONER: Obviously they're fitting in – the problem is the unpurchased leave. The purchase leave – I mean, this is the point that the Sergeant made. Unplanned leave, sick leave, stress leave, all that, that throws the thing into – the DVO(?) and the construction of the roster is to smooth it out.

PN3922

MS LEONCIO: That's correct.

PN3923

THE COMMISSIONER: But that isn't a thing I can take into account. The Divisional Planning Office doing that work is not something that I can take into account in the reasonable business grounds, insofar as someone whose job it is to try to smooth out the planned leave is just – what do you say about that?

PN3924

MS LEONCIO: We say that that doesn't take into account all the considerations. So, no, you can't take that – you can't rely simply on it looking like it can - - -

PN3925

THE COMMISSIONER: Well, what are they planning for? Is it planning that – they're putting it – banking in the purchase leave which they do the expressions of interest for and its plugged into the system. But people may not take it. So, why put it in? No, people may not be entitled to it on your analysis, so why plan for it? I don't understand.

PN3926

MS LEONCIO: So, the leave roster is prepared by the Divisional Planning Office. The evidence is that it does not - - -

PN3927

THE COMMISSIONER: It's Larkin - - -

PN3928

MS LEONCIO: Yes, that's right, Sergeant Larkin.

PN3929

THE COMMISSIONER: Larkin being not seen like a good fella.

PN3930

MS LEONCIO: Now, the evidence is that it doesn't take into account commitments such as the Wodonga Highway Patrol, the Family Violence Investigation Unit, the - - -

PN3931

THE COMMISSIONER: Why plug it in? You should at least put it in with an asterisk, saying, oh, well, this is subject to all those other matters that are subject to reasonable business grounds. I don't understand. What's the purpose of it?

PN3932

MS LEONCIO: It's only - - -

PN3933

THE COMMISSIONER: It's a pointless exercise because the purchase leave might be taken, might be approved.

PN3934

MS LEONCIO: It provide an indication of when leave could be taken. But ultimately it's the decision of people like Inspector Henry and Superintendent Arbuthnot. So, it gets prepared for those members or the people making the decision to take it into account. But then of course the superintendent and the sector are aware of other pressures which are not taken into account for that leave roster. So that it's just one stage - - -

PN3935

THE COMMISSIONER: So, it's planning for a contingency that may not happen, as far as purchase leave is concerned. Well, because it's subject to approval with all those myriad of things that you've just mentioned.

PN3936

MS LEONCIO: It is subject to approval, yes. It's not – that is not an approval.

PN3937

THE COMMISSIONER: But I don't understand planning for something that may not happen.

PN3938

MS LEONCIO: Well, because it's only – that's the Divisional Planning Office. So, the Divisional Planning Office doesn't have oversight on every single operation or every single task, or every person's comment or every single perceivable need. They've got their own level of things that they're conscious of that they know of.

PN3939

But ultimately it's for the superintendent and inspector – well, we would say the inspector as a matter of course, will be looking at that leave roster and to approve it. The Divisional Planning Office just provides a function of trying to do that analysis, of inputting the data. It doesn't have the level of knowledge, for example, the forecasting that goes on top of MSP which we took you to in that document. That's not something that the Divisional Planning Office - - -

PN3940

THE COMMISSIONER: So, it's irrelevant to the planning of purchase leave as far as the superintendent is concerned, and the inspector?

PN3941

MS LEONCIO: Just because it looks like it fits, doesn't mean that it does. It doesn't mean that it does.

PN3942

THE COMMISSIONER: So, why plan for it?

PN3943

MS LEONCIO: Because it's the first level. So, it's the first level. Let's see if it fits into the calendar. That's level 1.

PN3944

THE COMMISSIONER: Okay.

PN3945

MS LEONCIO: But the second level is does it actually make sense in reality.

PN3946

THE COMMISSIONER: Okay, yes. Yes, I understand.

PN3947

MS LEONCIO: Okay. Now, the evidence that Superintendent Arbuthnot gave is that when you turn over to 56(a) there is really, unfortunately only a small number of people between that core position FTE and the MSP which means that it's a delicate balance. So, in terms of just meeting the minimum service level if you have quite a number of people - - -

PN3948

THE COMMISSIONER: So, you reckon that that will adequately change next year? So, the chances of purchase leave next year might be, everyone might get it. It might go from 13 per cent to a hundred per cent?

PN3949

MS LEONCIO: The evidence is that it has changed already. Now, whether or not it meets everything I can't give you the answer but it's forecasting into next year. I don't know what the requirements will be then or what the resourcing challenges will be then.

PN3950

THE COMMISSIONER: Well, heaven help if we be here next year with the same problem.

PN3951

MS LEONCIO: That - - -

PN3952

THE COMMISSIONER: Anyway. Okay, okay. I get it.

PN3953

MS LEONCIO: So, just in terms of the framework that we set out - - -

PN3954

THE COMMISSIONER: So, what am I to make of JA8?

PN3955

MS LEONCIO: So, in terms of JA8 we say that there is a narrow margin between the core positions and the MSP's which means that if there is added pressure on the roster or added pressure as a result of, say, vacancies in the Highway Patrol or vacancies in Corryong, that that margin can be very significant albeit the impact of those additional resources can be very significant.

PN3956

Because ultimately you're eating into your minimum service once you get below the MSP. Does that make sense? Once there are these constant features of the BMSL then any additional pressures through, whatever, Highway Patrol or whatever it might be, that that means that if you have less people on the roster that is significant.

PN3957

Now, I think we have already spoken about the challenges in ED4 specifically, so I won't take you through that but that's set out in our submissions, in terms of the geography.

PN3958

THE COMMISSIONER: They're burned into my mind, Ms Leoncio. You don't have to.

PN3959

MS LEONCIO: Yes. So I'll move on. And there are also some other references in Superintendent Arbutnot's statement, which deals with some other additional

rostering considerations. I won't take you through them. But there are things like increased report in crime, (indistinct) tasking, road policing, events and operations, emergency incidents, neighbourhood policing, high levels of absenteeism.

PN3960

THE COMMISSIONER: Where's that?

PN3961

MS LEONCIO: That's in Superintendent Arbuthnot's statement. And you'll see it at paragraphs 53 to around 72.

PN3962

THE COMMISSIONER: Okay. Thank you.

PN3963

MS LEONCIO: In terms of the levels of absenteeism, there was also in evidence, exhibit R6, which does demonstrate that there has been this quite significant increase in unplanned absences and WorkCover. And that, we say, supports the contention that there is an unusually high level of absenteeism currently, and also last year. But if you look through that spreadsheet, it's quite exponential, in terms of the difference in the last five years.

PN3964

THE COMMISSIONER: Yes.

PN3965

MS LEONCIO: Now, of course that's talking about unplanned leave. What we say is that if there are these consistent breaches of the VMS caused by unplanned leave, then you can almost plan to predict that that will continue. And therefore, that having more people on roster will mean that you're more likely to meet your minimum service.

PN3966

And it's at this particular point in time where you're have these constant breaches.

PN3967

THE COMMISSIONER: Doesn't seem to go away quickly, in my experience, high levels of absenteeism. Again, adds to my argument that now, for the foreseeable future, given the resources demands at ED4, people won't get around to access it. I mean, I don't know whether you know that the literature (indistinct), it's a very hard and incremental thing to get down once you're in a high level of absenteeism in a workplace. There's no evidence before me that, you know – anyway, look, there's this year, everything else is irrelevant, right?

PN3968

MS LEONCIO: Yes. Now, just to bring it to this year, so in terms of the eastern region, the chronology that's in the evidence is that the resourcing pressures across the eastern region was identified as an issue as early as February 2023 at the regional leadership level. There's various meeting minutes which describe the

challenges. And that purchase leave was identified as a potential lever, amongst other things.

PN3969

THE COMMISSIONER: Well, because there's no input from the employer, that's the lever they can pull. Because there's no actual right, subject to reasonable business grounds.

PN3970

MS LEONCIO: That's correct.

PN3971

THE COMMISSIONER: So when I say supplementary, that's why I say supplementary.

PN3972

MS LEONCIO: Well, in some instances it will be – it won't reach the level of reasonable business grounds. So - - -

PN3973

THE COMMISSIONER: Except when you're a general duties police officer in 2023.

PN3974

MS LEONCIO: Well, yes. In ED4, that's correct.

PN3975

THE COMMISSIONER: Yes, okay.

PN3976

MS LEONCIO: But, in my submission, that was the purpose of putting reasonable business grounds in. It's to enable this very exact – to enable Victoria Police to reject the application, in this very circumstance. So it acknowledges that there would be pressures.

PN3977

THE COMMISSIONER: But it means that there's an apartheid, as far as purchase leave in – you know, all the resourcing pressures on ED4, compared to everyone else in every other ED in the whole of Victoria, 70 per cent and 13 per cent. And I understand what you're saying. It makes logical sense to me but, I've got to say from a resident's point of view, that doesn't seem entirely fair to me. And that's not a matter that I can take into account, unfortunately.

PN3978

MS LEONCIO: Unfortunately it's not a matter of fairness. It's a matter of are there reasonable business grounds. That's what the parties put into the document.

PN3979

THE COMMISSIONER: Yes.

PN3980



MS LEONCIO: And into the test. And unfortunately, there will be instances where there are reasonable business grounds to reject (indistinct) - - -

PN3981

THE COMMISSIONER: So the process has not managed expectations. And anyway, I can't take that into account. It's not even half, it's less than – it's a third of what the – and purchase leave available in everywhere else. They are two things I cannot take into account.

PN3982

MS LEONCIO: We say that they're not relevant.

PN3983

THE COMMISSIONER: Of course.

PN3984

MS LEONCIO: Yes. But it has been foreshadowed. In terms of the resourcing constraints and the issues that were identified in ED4, the whole point of the expressions of interest was to indicate – and I can take you to the expressions of interest document – but it says, quite clearly, you know, we have resourcing challenges. This is to gauge the interest because we're trying to plan for it. But it may not be approved. So it was a genuine concern, about the resourcing pressures.

PN3985

THE COMMISSIONER: But then there was an expression of interest and then there was a letter to the inspector, reacting to what his boss told him about the resourcing. So, I don't know. Okay, look, well, I understand what you say. I'm construing the words – the words on reasonable business grounds. Those other things, as you pointed me to the cases, are not relevant, in your view.

PN3986

MS LEONCIO: Yes. Commissioner, I can appreciate that it is – and I can sense that there's discomfort or there's a - - -

PN3987

THE COMMISSIONER: It's sub-optimal.

PN3988

MS LEONCIO: - - - it feels uncomfortable. And I appreciate that. But unfortunately, when you read through the black and white text of what's in the test, and how that applies in this particular eastern division, Division 4, this is the outcome. And I'm trying to take you through to explain why that is so. It can be an - - -

PN3989

THE COMMISSIONER: Well, you're doing it in plausible detail, if I may say so.

PN3990

MS LEONCIO: Well, because I can sense the discomfort with the position. And I want to ensure that this was taken very seriously. I mean, each of the police

officers that gave evidence, were incredibly conscious of all of the needs of each of those members and all of the needs of the community. So this was not some, you know, light-hearted task - - -

PN3991

THE COMMISSIONER: I'm not in any way saying it's capricious, in any way.

PN3992

MS LEONCIO: No.

PN3993

THE COMMISSIONER: I'm not. And Arbuthnot said, you know, 'I'm glad it's here', but then I'm construing the words on your say so, all that is irrelevant.

PN3994

MS LEONCIO: I'm trying to - - -

PN3995

THE COMMISSIONER: It's not a fairness test, according to - - -

PN3996

MS LEONCIO: It's not a fairness test and I understand and I appreciate that there are concerns about fairness. But what I'm trying to explain is that the test is about reasonable business grounds and that is what was met in this instance.

PN3997

THE COMMISSIONER: You're doing it in 14-point, bold font. You don't need to tell me. I understand your argument.

PN3998

MS LEONCIO: Yes, okay.

PN3999

THE COMMISSIONER: But I'm needing to voice these things.

PN4000

MS LEONCIO: No, I appreciate that. I just want to make sure that you understand the - - -

PN4001

THE COMMISSIONER: You say Bissett.

PN4002

MS LEONCIO: Yes.

PN4003

THE COMMISSIONER: It's Bissett. Well, you know, you might have a terrible process, it might be unfair, relative to every other division in Victoria Police, but nonetheless, that's irrelevant because what we're doing is reasonable business grounds in 2023.

PN4004

MS LEONCIO: Yes. And look, I won't make it a point too much, but there are the – really, in terms of the assessment that was undertaken and the reasonable business grounds that were relied upon, we've got the breaches of the baseline within the service level.

PN4005

THE COMMISSIONER: Hang on, let me – I think I should record this. Okay.

PN4006

MS LEONCIO: And you'll find that that doesn't seem to be in dispute. We're talking about an average of 15 breaches per month. And that's at Commissioner Book 679, the evidence of Inspector Henry.

PN4007

THE COMMISSIONER: Yes. Thank you.

PN4008

MS LEONCIO: Now, in 84 in the last 12 months, there were 261 breaches across the whole of the division. That's at - - -

PN4009

THE COMMISSIONER: So what was the period for that?

PN4010

MS LEONCIO: That was in the last 12 months before the statement of Superintendent Arbuthnot.

PN4011

THE COMMISSIONER: Okay.

PN4012

MS LEONCIO: And in terms of the unresolved breaches, since December 2022 there were 91 unresolved breaches in ED4.

PN4013

THE COMMISSIONER: How many? Ninety-one?

PN4014

MS LEONCIO: Ninety-one.

PN4015

THE COMMISSIONER: Where is that evidence?

PN4016

MS LEONCIO: That is at paragraph 73(a) of Superintendent Arbuthnot's statement.

PN4017

THE COMMISSIONER: Okay.

PN4018

MS LEONCIO: There's this issue about neighbourhood policing shifts and the evidence of Victoria Police is that, effectively, that second unit that I was referring to, the lights or call signs changed and that becomes an HP. But - - -

PN4019

THE COMMISSIONER: Yes. What do you say about that?

PN4020

MS LEONCIO: So, in my submission, it does not meet what is contemplated by a neighbour policing shift because that is intended to be a stand-alone shift. And in terms of the majority of the baseline minimum service level, I've already – being due to unplanned leave – I've already addressed you on that. But effectively, it's about the reduction in the pool of other ranks, that we say occurs frequently.

PN4021

THE COMMISSIONER: Yes. And it's on the rise, you would say?

PN4022

MS LEONCIO: Yes.

PN4023

THE COMMISSIONER: For determination in there, solely within the unique year of 2023, that's never going to be reproduced again.

PN4024

MS LEONCIO: Now, in terms of Wodonga Highway Patrol, I'll just note the evidence of Superintendent Arbuthnot, 2531, sorry, PN2531. And that's her evidence that I was alluding to earlier, about if we have additional people on the roster, then we could fill the BMSL shifts. And my submission is that it's more comfortable to be able to – if you have more people on the roster, then you can fill those shifts.

PN4025

THE COMMISSIONER: Yes.

PN4026

MS LEONCIO: Now, in terms of Wodonga Highway Patrol - - -

PN4027

THE COMMISSIONER: Hang on. So that's not a Wodonga Highway Patrol point, that's an unplanned leave point, is it?

PN4028

MS LEONCIO: Sorry, yes. That was about BMSL.

PN4029

THE COMMISSIONER: Okay. PN2531?

PN4030

MS LEONCIO: Yes, that's correct.

PN4031

THE COMMISSIONER: Okay. All right. So now we're moving on to Wodonga Highway Patrol. What do you say about that?

PN4032

MS LEONCIO: In terms of Wodonga Highway Patrol, so this is a specialist work unit. Its purpose is to drive the reductions in road trauma. Now, even Leading Senior Constable Allerdice gave evidence that visibility and enforcement is important for the Wodonga Highway Patrol. It's at PN654. He goes on to say that, you know, it would not necessarily have prevented a particular fatality but is a demonstration of the importance of having police cars on the road. In terms of the vacancies: So there was a sergeant who was from Wodonga PSA that was temporary backfilling at Wodonga Highway Patrol and at the time that the assessment was made to reject the applicant's purchase leave, that the intention was for another rank to provide support to the Wodonga Highway Patrol once the sergeant role was filled. And so, on that basis, Inspector Henry's assessment was that there would be required around 430 shifts across the year, to the Wodonga Highway Patrol. And you'll see that reference in Inspector Henry's statement, but also in the email to the applicant, notifying him of the reasons for rejection.

PN4033

THE COMMISSIONER: Yes. Which is the pivotal email. The state of grounds email.

PN4034

MS LEONCIO: Yes, that's right.

PN4035

THE COMMISSIONER: Six, 77 in the book.

PN4036

MS LEONCIO: Yes.

PN4037

THE COMMISSIONER: Okay. Right. Okay, I get it.

PN4038

MS LEONCIO: Now, in terms of Corryong station, there was going to be – there should have one sergeant and 4.8 other ranks. At the time of the leave application being rejected, it was anticipated that two full-time constables would leave Corryong police station from around 30 June. That's at paragraph 61 of Inspector Henry's statement. And paragraph 86 of Superintendent Arbuthnot's statement. Now, Sergeant Goldsworthy accepted, in his cross-examination, that losing two members out of six was significant, in respect of Corryong. He said that it wasn't in the overall policing operations. But in my submission, that is correct, in terms of two out of six being a significant reduction. And that on the basis of that, Inspector Henry estimated that there would be around 150 shifts from Wodonga PSA that would be needed to support Corryong.

PN4039

Now, there's ample evidence about Corryong police station being difficult to staff. That's confirmed by Senior Sergeant Chris Parr at PN513. Also in terms of Assistant Commissioner Langdon's evidence at PN - - -

PN4040

THE COMMISSIONER: Hang on. PN what, with Parr?

PN4041

MS LEONCIO: Five, one, three.

PN4042

THE COMMISSIONER: Five, one, three. Okay.

PN4043

MS LEONCIO: And in terms of Assistant Commissioner Langdon's evidence, that's at PN1809 to 18 - - -

PN4044

THE COMMISSIONER: 1809 to where?

PN4045

MS LEONCIO: 1815.

PN4046

THE COMMISSIONER: Yes.

PN4047

MS LEONCIO: And he talks there about the remoteness of Corryong police station. So there was a need to provide that support to Corryong police station. We say that that expectation of 150 shifts, which is what Inspector Henry had estimated at that time as being needed, that that is a significant resourcing pressure on Wodonga PSA.

PN4048

In terms of the I&R units, there's Wodonga Family Violence Investigation Unit and the Sexual Offence and Child Abuse Unit. The evidence of Superintendent Arbuthnot is that both had significant resourcing shortfalls for extended periods. That's at paragraph 45 – 44 of her statement. And it was intended that Wodonga PSA would provide support to these units, to build up expertise and support succession planning.

PN4049

THE COMMISSIONER: Yes.

PN4050

MS LEONCIO: And in terms of the members in E4 that had leave approved from the I&R units, the evidence is that the individuals who were in the crime scene services and divisional intelligence units, that they have specific specialist functions and can't be used to assist with the baseline minimum service level. And that's at Superintendent Arbuthnot's evidence at 2356.

PN4051

Now in terms of the letter, that has the stated grounds, it provides what the consequence would be if purchase leave had been approved. And that is that there would be a necessary upgrading, that's the evidence of Inspector Henry, that if Sergeant Goldsworthy went on leave there - - -

PN4052

THE COMMISSIONER: It was a particular problem with sergeants.

PN4053

MS LEONCIO: Well, there would need to be an upgrading - - -

PN4054

THE COMMISSIONER: So he's doubly cursed in that he's part of the general duties and he's a sergeant.

PN4055

MS LEONCIO: Well, it's just that – it's to explain why - - -

PN4056

THE COMMISSIONER: Well, it's a compounding effect, isn't it?

PN4057

MS LEONCIO: It's more to explain why the loss of other ranks which are the officers or the ranks that would actually be doing a Wodonga Highway patrol backfilling or the Corryong backfilling. Although Sergeant Goldsworthy wouldn't be needed to do those particular things, that because there is an upgrading from the pool of other ranks that do those backfilling tasks, that's why his purchase leave application – his absence - - -

PN4058

THE COMMISSIONER: If he had of been a lower rank, it may not have been a problem.

PN4059

MS LEONCIO: No, no. It's still a problem. So if it's lower rank, the pool of ranks gets smaller, we're just - - -

PN4060

THE COMMISSIONER: No, I know. But you don't have the problem with acting up in somebody that's not a sergeant.

PN4061

MS LEONCIO: No, so there is – yes, I see what you – I see, yes - - -

PN4062

THE COMMISSIONER: It's – he's doubly cursed.

PN4063

MS LEONCIO: Yes. Although, the concern of Inspector Henry, I understand it, is more in terms of the reduction of other rank's pools. But, yes, it's also the fact that he's a sergeant and also there's that double-edged sword - - -

PN4064

THE COMMISSIONER: Okay. I get it.

PN4065

MS LEONCIO: Now I've gone through at length all the various reasonable business grounds - - -

PN4066

THE COMMISSIONER: Yes.

PN4067

MS LEONCIO: - - - and reasons why we say it's significant. But I do just want to emphasise that when we talk about significance in the context of this particular application and in terms of the significant, or the likely results on productivity and the negative impact to the community, we focus on the fact that highway patrolling services were already quite stretched, there were already quite a lot absences in that unit and that there is a focus and an importance on highway patrolling, reducing road trauma and visible police presence on the roads, but is a priority area for Victoria Police.

PN4068

Now the nature of some of the services that were not able to be performed in ED4, which include things like baseline response, which is really focused on calls for assistance, the primary function of Victoria Police.

PN4069

THE COMMISSIONER: Yes.

PN4070

MS LEONCIO: So the nature of the services that are lost, we say that is part of the reasons why we say this is significant.

PN4071

THE COMMISSIONER: I get it.

PN4072

MS LEONCIO: And a small number of lost shifts, even though it sounds only small, is significant in that context. And we say that things are, in 2023, unfortunately, there's this compounding - - -

PN4073

THE COMMISSIONER: It's an outlier - - -

PN4074

MS LEONCIO: - - - multi-factorial - - -

PN4075

THE COMMISSIONER: - - - like an asteroid coming towards, isn't it? It's never going to happen again.

PN4076

MS LEONCIO: There's no evidence about what will occur - - -



PN4077

THE COMMISSIONER: Other than Henry saying he's not pessimistic about – he's pessimistic about the future. He's the one that's making the decision.

PN4078

MS LEONCIO: Yes. Although, he doesn't actually, the staff allocation model is not something that he has control over - - -

PN4079

THE COMMISSIONER: But he's making the assessment.

PN4080

MS LEONCIO: Yes - - -

PN4081

THE COMMISSIONER: On reasonable business grounds, year on year.

PN4082

MS LEONCIO: Yes. But they are informed by and influenced by the staff allocation model and various needs and services that are occurring at various points in time that he does not have control over.

PN4083

Now, as I said, the test is not about whether the rejection of 20 shifts or this leave which was only 20 shifts, would resolve the highway patrol shortages or resolve BMSL. It's just those shortages that we've identified are reasonable business grounds for rejecting the purchase leave. And that we should, where it was reasonable, it was a reasonable decision to make to keep those shifts on the roster. Unless I can be of any further assistance.

PN4084

THE COMMISSIONER: No, no. I'm going to go away and torture myself with this now. So thank you. Look, Sergeant Goldsworthy, I want to thank you, you're the clubhouse leader as far as self-represented litigants I've had before me so far, so thank you. And thank you for your common-sense way of approach to this matter. As I say, very very unlikely for me to reach a decision before the end of 2024, even though I'm working through. I'll try to get you the – I'll reserve, and I'll try to get the decision to you as soon as possible. And thank you, Ms Leoncio  
- - -

PN4085

MR GOLDSWORTHY: Excuse me, Commissioner.

PN4086

THE COMMISSIONER: Yes.

PN4087

MR GOLDSWORTHY: Is there any chance that I have an opportunity to have a brief reply to some of what was made in the closing statement for the respondent?

PN4088

THE COMMISSIONER: Do you have a problem with that?

PN4089

MS LEONCIO: No, no.

PN4090

THE COMMISSIONER: It's not usual. But all right. Let me open my notebook again. And all right.

PN4091

MR GOLDSWORTHY: Very briefly.

PN4092

THE COMMISSIONER: Okay. Great.

PN4093

MR GOLDSWORTHY: In the enterprise agreement, it was raised at 12.1 about effectiveness and efficiency, it's not 12.1, or 12 is not in isolation. And if you look at the employee's requirements at 12.4, it talks about what the expectations are to demonstrate a commitment to workplace diversity, maintain core policing skills, all employees must successfully complete and maintain an (indistinct) qualification unless certified medically unfit to do so. That's the only requirement around effectiveness and efficiency.

PN4094

THE COMMISSIONER: Yes. Okay.

PN4095

MR GOLDSWORTHY: I'd point out that in – with 5 that was raised - - -

PN4096

THE COMMISSIONER: Yes.

PN4097

MR GOLDSWORTHY: - - - whilst the process may not have been included in the EB when the assessment was done for purchase leave applications, they didn't consider reasonable business grounds at that time.

PN4098

In relation to those that have been raised by the respondent in today's hearing, you've been resiled the non-compliance with that is an issue, then no person will ever get – well, no operation member will ever get purchase leave again if that's a sole issue.

PN4099

In relation to neighbourhood policing, I believe that the documents that were provided indicate that the neighbourhood policing shifts were standalone and in compliance with requirements for – when they mentioned - - -

PN4100

THE COMMISSIONER: What document was that in? That was that matrix - - -

PN4101

MR GOLDSWORTHY: The duty summary sheets.

PN4102

THE COMMISSIONER: Yes.

PN4103

MR GOLDSWORTHY: In relation to (indistinct), and it is paragraph 91 to 94 that you were taken to, that related more about the two hours either side of the shift, rather than the eight hours of the non-productivity losing the two shifts.

PN4104

In relation to the original planning office, it's not correct about the statements were made by the respondent. Not only in the leave preparation for the roster, they also prepare operation orders, they include state-wide operations and they're regularly consulted by the inspector and senior sergeants around what's 'I'm going,' and they fit those into the roster. You heard evidence from the Inspector – Daniel Brains, who was part of the DPR, actually sat in on that meeting that was later referred to as a purchase leave panel.

PN4105

THE COMMISSIONER: Yes.

PN4106

And my better last point is the unclaimed absences, that table that was brought up by Super Intendent, and you were shown the other – the requesting from across ED4 from 6000 up to 10,000.

PN4107

THE COMMISSIONER: Yes.

PN4108

MR GOLDSWORTHY: I took the Super Intendent through that, that was not relevant to Wodonga Police sergeants, and it was not relevant to the neighbouring stations and the sergeants there. They were all showing steady reduction. So to – you can't – that should not be used against me for my - - -

PN4109

THE COMMISSIONER: Okay.

PN4110

MR GOLDSWORTHY: - - - application. So the - - -

PN4111

THE COMMISSIONER: There's a number of points you made in cross-examination of the – well, that you drew out in the cross-examination of the Super Intendent.

PN4112

MR GOLDSWORTHY: Yes.

PN4113

THE COMMISSIONER: Okay. All right.

PN4114

MR GOLDSWORTHY: So that's – just I wanted to clarify some of those points.

PN4115

THE COMMISSIONER: No worries. Thank you. As I say, I need all the help I can get. But as I was – but really, thank you, Ms Leoncio, you've been very helpful to me. And I appreciate the – as I said to you before – the manner in which you conduct these, because occasionally the – in my experience there's more class warriors on the employer's side than the employee. So it's good to see someone that's (indistinct) like a barrister and being good. So thank you very much.

PN4116

So with that, I'll reserve, and adjourn. I don't know whether it's too early to say compliments of the season, but compliments of the season.

PN4117

MR GOLDSWORTHY: Merry Christmas.

PN4118

THE COMMISSIONER: And I'll work as quickly as I can, I'm working through Christmas so – I've got four other smaller decisions to write. But I'm blocking out blocks of time so I can devote to it and get it out to you quickly. Thank you everybody. With that, I'll adjourn.

**ADJOURNED INDEFINITELY**

**[4.59 PM]**