TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT BELL
COMMISSIONER ALLISON

B2023/771

s.234 - Application for an intractable bargaining declaration

United Firefighters' Union of Australia
and
Fire Rescue Victoria T/A FRV
(B2023/771)

Melbourne

10.02 AM, TUESDAY, 19 DECEMBER 2023

Continued from 18/12/2023

PN898

DEPUTY PRESIDENT MILLHOUSE: Good morning, everyone. Ms Sweet, you're on your feet. Before we adjourned yesterday, you had indicated an opposition to some supplementary documents sought by Mr Borenstein. I understand Mr Borenstein, that the request for those documents is pressed?

PN899

MR BORENSTEIN: Not only pressed, but it's been met.

PN900

DEPUTY PRESIDENT MILLHOUSE: Thank you.

PN901

MS SWEET: I have mellowed overnight, Deputy President.

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DEPUTY PRESIDENT MILLHOUSE: Thank you.

PN903

MS SWEET: We have provided those. They're redacted on the grounds of relevance but they have been provided, I think, only relatively recently. So I don't know if my learned friend has had a chance to take them in, but there's no opposition and they have been provided.

PN904

DEPUTY PRESIDENT MILLHOUSE: All right. Thank you. They haven't made their way to the Bench at this stage, Mr Borenstein?

PN905

MR BORENSTEIN: They may be coming via our computer because we got them two minutes ago.

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DEPUTY PRESIDENT MILLHOUSE: All right. Thank you.

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MR BORENSTEIN: And I won't trouble the Commission to complain about that. But we would appreciate a few moments to actually look at them, if that's possible.

PN908

DEPUTY PRESIDENT MILLHOUSE: Indeed. We will stand the matter down for 10 minutes.

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MR BORENSTEIN: Thank you.

PN910

MS SWEET: We should indicate they are now sent to the Full Bench.

PN911

DEPUTY PRESIDENT MILLHOUSE: Thank you, Ms Sweet.

SHORT ADJOURNMENT **[10.03 AM]**

RESUMED **[10.27 AM]**

PN912

DEPUTY PRESIDENT MILLHOUSE: Thanks, Mr Borenstein?

PN913

MR BORENSTEIN: Thank you. The decision that's called on for determination in this proceeding is – are the agreed terms which are the matters that are in issue that will need to be determined in the course of making the intractable bargaining termination.

PN914

The position of the view in summary is that other than terms that involve increases to wages and increases to allowances, all matters between the UFU and the FRV were agreed terms within the meaning in the legislation. And that was consistent with the statement which was issued by Commissioner Wilson with the agreement of FRV on the 19 June 2023.

PN915

Our submission is that the Commission should find that all terms that were identified as agreed in version 14 of the Enterprise Agreement, which is dated 26 July 23, were agreed terms for the purposes of section 274(3). That document is to be found as Annexure LC11 to Ms Campanaro's third statement and is at Court Book A109. We also filed in accordance with the directions of the Commission, a position document which the Commission will find at page 8 – sorry, A879, which sets out the position I have just outlined.

PN916

So the only matters that were still at issue at the conclusion of the post-declaration negotiating period were the quantum of wages and allowances and the funding for minimum staffing provisions. And emphasize the funding because the staffing numbers were otherwise agreed and that is set out in paragraph 143 of Ms Campanaro's third witness statement. Thank you. Third witness statement which you will find at page A49 of the court book.

PN917

Now, the resolution of a preliminary issue about agreed terms caused in the first place for an exercise of statutory interpretation of section 274(3) according to well-established principles and then the application of that interpretation to the facts that had been presented to the Commission about what has happened in the bargaining between the two bargaining representatives and those facts will include the evidence which Ms Crabtree gave yesterday about the dealings between FRV and the Minister in the period leading up to the 7 August offer. And we will make submissions about the significance of that shortly.

PN918

We seek to emphasize though that for the purpose of construing section 274(3), and looking at the actual terms of that provision. The focus is expressly about agreement between the bargaining representatives. And not outsiders. The focus is on what the bargaining representatives who are engaged in bargaining for an enterprise agreement, not for a determination but for an enterprise agreement. What agreement those entities arrived at.

PN919

Now, in terms of the statutory framework, the intractable bargaining provisions were the subject of a reform of the Fair Work Act which came into operation on 1 July 2023. They replaced provisions concerning serious breach declarations which basically had been not used to in great effect and to date, so far as we can ascertain, there have been no intractable bargaining, workplace determinations made by the Commission. And there has been no occasion on which the Commission has had to consider the meaning of agreed terms under section 274(3).

PN920

The scheme for intractable bargaining commences at section 234 of the Act and it's to be noted and this is a matter that we will address shortly in terms of its place in the strategies provided for by the Fair Work Act. It starts at section 234 which is to be found in Division 8 of Part 2/4 of the Act. Part 2/4 of the Act deals with enterprise agreements. And as we will say shortly, these intractable bargaining provisions are introduced and are intended to operate in aid of the process of bargaining for enterprise agreements.

PN921

So section 234(1) says that:

PN922

A bargaining representative for a proposed enterprise agreement - a bargaining representative - other than –agreement other than the Greenfields Agreement may apply to the Fair Work Commission for a declaration defined as an intractable bargaining declaration under section 235 in relation to the agreement. Access to the Commission for such a declaration is confined to a bargaining representative who is bargaining for an enterprise agreement.

PN923

It's very important in our submission to keep in mind the connection to the process of bargaining for enterprise agreements. Section 235, then, provides that:

PN924

The Fair Work Commission may make an intractable bargaining declaration in relation to a proposed enterprise agreement.

PN925

Again, focus on enterprise agreement.

PN926

If an application for the declaration has been made and the Fair Work Commission is satisfied of the matters set out in subsection (2).

PN927

Subsection (2) sets out the matters that the Commission must be satisfied about. The first one is that:

PN928

The Commission has dealt with the dispute about the agreement under section 240 and that the applicant has participated in those processes.

PN929

That's occurred here. That's not contentious. Secondly:

PN930

There's no reasonable prospect of agreement being reached if the Fair Work Commission doesn't make the declaration.

PN931

And that's been dealt with in the first Full Bench decision. And then thirdly:

PN932

It's reasonable in all the circumstances to make the declaration taking into account the views of all the bargaining parties.

PN933

And that's what happened in the first hearing. The Full Bench was satisfied about those prerequisites and did that. Now, the declaration - subsection (4) provision is made that:

PN934

The declaration comes into operation on the dates made and ceases to be an operation when each employer specified in the declaration is covered by an enterprise agreement or a workplace determination.

PN935

And then I don't need to read the balance of that section. I read section 235A, which deals with the post-declaration negotiating period and you will see in subsection (1) that:

PN936

Provision is made for the Commission if it considers it is appropriate to do so to specify in the declaration a post-declaration negotiating period and there's provision in subsection (2) for that period to be extended if required.

PN937

The making of a workplace determination is then provided for in Part 2/5 together with the other forms of workplace determinations that the Commission can deal with. And provision is made in section 269 for that. It provides that:

PN938

If an intractable bargaining declaration has been made in relation to the proposed enterprise agreement, the Commission must make a determination as quickly as possible if there's a post-declaration negotiating period after the end of that period, otherwise after the making of the declaration.

PN939

So the trigger for this is contained in Part 2/4 in the sections I have read to you. And then if that trigger is activated the intractable bargaining workplace determination procedures come into effect.

PN940

And then there's various provisions in section 270 that deal with the terms of the tractable bargaining workplace determination. Section 270 in subsection (1) provides that:

PN941

The intractable bargaining determination must comply with subsection (4) which deals with who is to be covered by the determination and include the terms set out in this section and the core terms set out in section 272 and the mandatory terms set out in section 273.

PN942

And then importantly for our purposes, subsection (2) says that the determination must include the agreed terms for determination. And then subsection (3):

PN943

The determination must include the terms that the Fair Work Commission considers deal with the matters that were still at issue if there is a post-declaration negotiating period after the end of that period, after otherwise – after the making of the declaration.

PN944

Now, we are concerned with the issue of agreed terms in the first instance and this section directs our attention to section 274(3). And section 274(3) defines what is an agreed term for an intractable bargaining workplace determination. And it says that:

PN945

An agreed term is a term that the bargaining representatives - - -

PN946

We emphasize those words,

PN947

- - - for the proposed enterprise agreement had at whichever of the following times agreed should be included in the agreement.

PN948

So we are talking about agreement between bargaining representatives in the process of bargaining for an enterprise agreement and reaching a stage where they have agreed that a term should be included in the agreement, meaning the enterprise agreement. So it is focussed on the process that applies in the bargaining for an enterprise agreement and it is looking at agreements about terms, individual terms that is arrived at in that process.

PN949

Now, we say that the terminology of that provision is significant and supportive of the submissions which we make about how it's to be construed.

PN950

Now, in terms of the relevant principles of statutory construction, there's no contest between the parties about those. They are well settled, there are a number of cases that the Commission will find in the parties list of authorities. In substance, what's called for is to keep in mind the text of the provision, that is the starting point for the exercise and as is said in the ALCAN case, 'The end of the process, but consideration of the text has to be undertaken in the context of the provision which includes its general purposes and policies and those general terms and policies are to be derived from the text of the legislation. And it's on that basis, that we propose to address the Commission about it, what you should make of these provisions.

PN951

Also important is that the interpretation of the legislation should strive to give effect to a construction that promotes the purpose of the statute, of the provision. There's common law authority about that and that's also provided for expressly in section 15AA of the Acts Interpretation Act 1901.

PN952

The task of the entity interpreting the legislation is to give the words of the provision the meaning that the legislator is intended to have – I am sorry, the legislator is taken to having intended them to have. And that's a proposition that appears in the judgment of the plurality in Project Blue Sky which we have provided to the Full Bench in our list of authorities at Tab 9 and the relevant passages at paragraph 78. And I don't need to read it to you. It's a well-accepted and well-known passage.

PN953

Now, when the cases talk about context, and taking into account context, they also indicate that concept includes the mischief which the statute was designed to overcome. In this case, the amendment for the introduction of the intractable bargaining provisions, which are superimposed on the pre-existing provisions about enterprise bargaining.

PN954

And the court authority for that proposition is in the Network 10 case which we have given you at Tab 10 of our list of authorities and specifically at paragraph 11 of that authority, which again, I won't go to now in the interests of saving time.

PN955

Applying those principles then to the provisions, we look firstly at section 274(3) and we say that it's apparent that what has to be determined is whether or not a particular term was agreed by specified persons. That is the bargaining representatives and has been agreed by them as being one which should go into the proposed agreement.

PN956

The use of the conditional word should, in our submission indicates that the focus is on some future time when the proposed agreement will be finalised. The requirement is only that there is a conditional agreement reached on a term. The condition is that when all the terms are agreed they will all go to make up a final enterprise agreement and then the final agreement will be agreed in accordance with the processes of the Fair Work Act. And as the Commission knows full well, the bargaining representatives can't make that final agreement. That's a process that involves having the employees who will be covered by the agreements approving the agreement by ballot. And as the Act says, the agreement is not quite made until that happens.

PN957

And so our submission is that the process of reaching an agreed term doesn't require any sort of formal contractual agreement of the kind that's being proposed at various places in our friend's submissions. It's a criterion directed at the Commission ascertaining of a particular point in time whether the bargaining representatives had agreed that a particular term should be – should form part of an agreement when that agreement is reached.

PN958

We also draw attention to the fact, the textual fact that the choice of the conditional word 'should' as opposed to the imperatives such as 'must' or 'shall' in section 274(3) indicates that the verbs intended to identify the normative position taken by the parties. That is, that an agreement on the desirability of the inclusion of the term 'in the proposed agreement'. That is a construction which embraces the situation where the parties reach an agreement which is either expressly or implicitly conditioned on being able to reach agreement on an overall enterprise agreement.

PN959

It probably goes without saying because in any negotiations for an enterprise agreement you have nothing until you have everything in terms of an actual agreement. The purpose of this provision is to focus on things that are happening in the process of reaching that final agreement in circumstances where the parties are not able to reach that final agreement because there are various terms that they cannot agree on.

PN960

And in fact, the intractable bargaining provisions arise or only arise because no overall agreement has been able to be reached. And so we say that it's an innate aspect of this definition and this process that the parties don't reach the sort of finalised agreement that our friends refer to and that their agreement is conditional in the sense that all bargaining in enterprise agreement bargaining is conditional until you get to the end. The purpose of the intractable bargaining provisions is to assist parties who are engaged in enterprise bargaining for an enterprise agreement where they can't reach the finality of that process and to assist them in dealing with the point of impart, the point at which they reach an impasse.

PN961

And we say that it's apparent, the purpose and the object of these provisions is apparent and it's apparent from the terms of section 2743 that it is designed to

build on the stage at which the parties have reached when the application for the declaration is made. And it's not designed to facilitate or allow what has transpired in the period up to the application for the declaration to be unwound and to be retracted as a new form of bargaining device to recalibrate the whole relationship between the bargaining representatives in response to an application for a bargaining declaration.

PN962

It's intended to help not to undo. It's intended to build on, not to undo. And we say that, that follows from the fact that it's clearly intended to operate in the realms and in conjunction with the processes for bargaining for an enterprise agreement and to solve problems arising from impasses by allowing the Commission a limited range of power – sorry, a limited scope for arbitration. The function of these provisions is not to create a situation where the Commission ends up having to arbitrate a complete agreement so to speak for the parties on the basis that one of the parties decides when the application for declaration is made, that everything is off the table, everything is to be arbitrated which is basically what the Minister seeks to advance in this case. Apparently over the resistance of the other bargaining representative.

PN963

The Fair Work Act as evidenced in part by Section 3 of the objects at paragraph (f) seeks to encourage enterprise bargaining to be undertaken by the parties who will be affected and bound by the agreement as much as possible and our construction of these intractable bargaining provisions is consistent with that. It's consistent because we say that it gives effect to as much of the bargaining as the parties can achieve agreement about. Before allowing the Commission to intervene and arbitrate what is left. To adopt and accept the submissions which our friends make, would have the opposite effect. It would undercut the object of allowing the parties to have as much input into the agreement, the industrial instrument that's going to govern their activities as possible. On their construction these provisions allow for the Commission to be lumbered with formulating the whole of the industrial instrument irrespective of the position that the parties have reached in the course of bargaining for the enterprise agreement prior to the declaration.

PN964

And we say that it's consistent with our hypothesis about the way in which this legislation should work, that it's mandatory for the Commission in making a determination to include the agreed terms. The Commission, the legislation, envisages that there will be agreed terms and it would be incongruous if terms that were otherwise agreed at the time of making the declaration, were able to be rendered nugatory so that there are no agreed terms and that at every stage, the Commission will be called on to arbitrate the whole of the industrial instrument between the parties.

PN965

DEPUTY PRESIDENT BELL: Isn't that a factual issue that in part depends on how the parties have presented themselves? I mean, if the parties use express words for example and say, nothing's agreed until everything's agreed, what – where does that - - -

PN966

MR BORENSTEIN: Well, we say that's the case whether it's expressed or not. We say because it uses the word 'should', we say that's significant. And we say, and I think we have said it in our written submissions, it is – whether it's stated expressly or it's unstated, they're bargaining for an enterprise agreement. There can be no truly final agreement on anything until you have the whole package. But on the way through, you can agree that every fifth Sunday will be such and such or every something else will be something else and that can be agreed as an issue and it can be put in the box and then you move onto the next issue but it's not locked in. It's conditional in the sense that it's not locked in until everything is locked in.

PN967

But it is agreed that that is a term that should go in the enterprise agreement when we get there. That's what the words of the sections say. And so we say that you have to approach it in that spirit. You have to look at what's happened and yes, you do have to look at the evidence. And you may find here, that everybody understood that the terms that they were agreeing upon were subject to final agreement.

PN968

But the Commission intervenes under these provisions before you reach the final agreement. And that's why at 2743 is framed as it is. Because at the stage when the Commission intervenes, the agreement is conditional in all cases. We agree that the overtime provision, this clause, that clause should go in the agreement but we have still got to bargain the rest of the clauses. And we get through clauses 1 to 99 and we can't resolve 100. So we don't have an agreement.

PN969

And so we go to the Commission and we ask for an intractable bargaining determination and the point of that is to give credence to what's happened in the enterprise bargaining up to that point and seek to assist the parties and to improve what some perceive to be deficiencies in enterprise bargaining prior to this by arbitrating the areas that they can't agree on and in that way expediting the reaching of an industrial instrument for a particular workplace.

PN970

That's what we say is the scheme of these – of this reform. And - - -

PN971

COMMISSIONER ALLISON: Mr Borenstein, where I am struggling is that it's not just conditional on, 'We have agreed to 99 things and there's one thing outstanding so let's go to the Commission and sort that out. You, in bargaining, it will be we agree to 99 things, subject to getting an appropriate agreement on number 100, so normally that's in the context of wages and you might have compromised all the way through on the 99 things because your wages is your big claim and if wages aren't appropriate, it puts everything else in doubt. So it's quite ordinary in a bargaining context to everything has been agreed subject to wages, but if there is an agreement on the wages, the union may well say, well, we don't – we no longer have agreement on redundancy or minimum staffing because the wages isn't appropriate. Everything's back in question. So it's not just that it's

waiting for agreement on the point 100, it's actually subject to appropriate agreement on the 100. And that's where I am struggling with what you're - - -

PN972

MR BORENSTEIN: Well, the reforms call for us to look at the process of enterprise bargaining through a different lens. There are – there were, sorry – there was generally a sense that enterprise bargaining wasn't working as efficiently or as fairly as it should, before these reforms and it's apparent that these reforms were intended to improve the process.

PN973

Now, to take your example, Commissioner, having agreed on 99 conditions, and having come to the 100th one which is the money condition, the parties will presumably have discussions, they won't just simply say oh, well, that's the money that's going to get a bargaining bit. There will be negotiations and discussions around that. And just hypothesising, those discussions might take the form of one party saying, look, we gave you that, you should give us this, in consideration for that or you should give us more, because we gave you that and so on. That's okay.

PN974

If you can't reach agreement on that, then the point of these reforms is that you can go to the Commission and in the Commission, when you make your arguments on the appropriate monitory amounts that should go in, in relation to the 100th clause, all of the things that were taken into account by the bargaining representative getting up to that, all of the things about, look, we gave you an extra day here and extra hours there and so on and you should give us something else in return for the money, or you should give us more money in return for that, they're all things that can be ventilated in the Full Bench. And they're all things that can be taken into account in the Full Bench. But this new paradigm is designed to break the impasse that you have reached, because otherwise, you then just get stuck and there's nowhere to go. And the enterprise bargaining process breaks down.

PN975

Now, there's nothing to stop the parties after they come to the Commission from continuing to talk about things and from reaching agreement on the money, but the point of the reforms is to provide a process where the parties can't agree and somebody can come in and circuit break and find an outcome for the outstanding matters. But if you say that in order for that to happen, all the other things have to be back on the table, then you defeat the purpose. You defeat the purpose, you undermine the whole point of allowing parties as much as possible to bargain their own conditions.

PN976

The scenario that you have put to me can be addressed in the Commission and it's a question of what, I guess, for those who pass the legislation, it's a question of weighing up the different considerations. Wanting to improve the outcomes in enterprise bargaining and finding a mechanism which may have some deficiencies but weighing up which is more significant. I mean, we can all think of many, many examples over the years, where people have just got stuck in enterprise bargaining and there's nowhere to go and they have just been stuck there.

PN977

For what it's worth, I had the unfortunate experience being involved in a dispute between the AWU and ESO about offshore workers down in Sale. That was years ago. Those people have been unable to reach an enterprise agreement until I think a month ago. Like, seven or eight years where they have been unable to reach an agreement and they're the sort of examples that one reads about which move people to pass these sort of reforms. Now, the last issue might be money. The last clause number 100 might not be money. It might be something else altogether. It might be rosters.

PN978

The issue in dispute down in Sale was rosters. The company wanted 14 days rosters that employees had been working seven day rosters for decades. And they couldn't reach an agreement and there was nowhere for them to go. Under this process, there's somewhere for them to go to solve the problem, to give better effect to the enterprise bargaining process. Now, we can't guarantee that there won't be instances where things will not work as well as they might work, but introducing something like this involves the balancing that's done by the legislature and it – but it also importantly calls for thinking about this differently then we used to think about just enterprise bargaining, standing alone. We have to think about enterprise bargaining now as something where if you don't reach an agreement, if you can't reach an agreement, you reach an impasse and mechanism has been provided to you. It may not be perfect but it is a mechanism which the legislature obviously has to assess in the overall, not in a single case, to decide whether it will improve overall, the functioning of the scheme or not.

PN979

So the sort of issues that you have raised with me, Commissioner, are all issues which will be ventilated in the Full Bench and the Full Bench would take into account. Look, we have given up this, we have given up that and we have given up that and what they're offering us in compensation is inadequate. I mean, in this particular case, the union has agreed on a range of efficiencies that have been in part already implemented on faith. And they're valued somewhere between 117 million and something north of that. Yes, 117 million on FRV figures. Right? Now, they are matters that would fit into Pillar 3 of the – I don't know if you're familiar with the pillars but Pillar 3 of the Wages Policy.

PN980

Now, we haven't been able to reach agreement on those figures and when we come to the arbitration we will be saying to the Commission, 'Look, we've agreed to all these things and we should get compensated properly for that.' And they're not compensating us for that. So it's analogous to the situation you've put to us.

PN981

But I'm confident that FRV won't be coming along and saying, 'Well, all those efficiencies they're all off the table now. They're not agreed any more.' They'll be saying, 'Yes, you've agreed to those and we'll just have an argument about what they're worth.' And that's the way we would say this is intended to work in relation to the arguments about money.

PN982

The individual bargaining representatives have been unable to agree on what it's worth and that's the whole point of having the arbitration to break that impasse.

PN983

DEPUTY PRESIDENT BELL: Does that mean then when one or both bargaining parties convey that a particular term is agreed subject to or in principle or on the condition that that language is ineffective at a later stage against 274(3)?

PN984

MR BORENSTEIN: No. We say that that's consistent with section 274(3). It doesn't undercut that because 274(3) doesn't say that that agreement or term which must be included or shall be included. It's which should be included. We say there's a significant difference and that accommodates that because saying something is agreed in principle is implicit in all this bargaining.

PN985

What we say is that these intractable bargaining provisions are built on the regime for enterprise bargaining. They're intended to operate by reference to that because they're focused on what's happening in the course of bargaining for an enterprise agreement. And so you've got to keep in mind how bargaining for enterprise agreements occur, what the regime for that is, what the framework for that is. And, as I said, earlier there's no final agreement until there's a complete agreement and so to accommodate the fact that people are bargaining in principle, or are making offers of things which they feel should be or expect to be included in a final agreement that's the sort of agreed term that this is talking about. And they're allowing the parties to go as far as they can with those things. And encouraging the parties through section 240 and so on to reach agreement as much as they can. But recognising, based on recent experience that it's sometimes not possible to go that last mile.

PN986

And in those circumstances the party can apply and ask for the Commission to assist in helping it get through the last mile. But to propose the construction which would allow a party for whatever reason to undo the whole journey up until then would be antithetical to the purpose of the reforms as we would submit.

PN987

DEPUTY PRESIDENT MILLHOUSE: So your position, excuse me, relies heavily on the use of the term 'should'?

PN988

MR BORENSTEIN: Yes. Because if it was meant to be an absolute, complete agreement that was needed in the sort of contractual sense which we say is inappropriate in this context it would say terms that must be or shall be. So you have to give some effect to the fact that they don't use those sort of mandatory terms.

PN989

DEPUTY PRESIDENT BELL: There still needs to be agreement though.

PN990

MR BORENSTEIN: Yes.

PN991

DEPUTY PRESIDENT BELL: The term – the words that follow are the subject matter of the agreement.

PN992

MR BORENSTEIN: There still has to be agreement. We agreed with that.

PN993

DEPUTY PRESIDENT BELL: Yes.

PN994

MR BORENSTEIN: But it's not – it's agreement but agreement about what?

PN995

DEPUTY PRESIDENT BELL: Yes. Correct. The subject matter.

PN996

MR BORENSTEIN: Yes. Yes, and that is agreement about something that should be.

PN997

DEPUTY PRESIDENT BELL: Should be included.

PN998

MR BORENSTEIN: And that's our point.

PN999

DEPUTY PRESIDENT BELL: Yes.

PN1000

MR BORENSTEIN: We don't say – we accept clearly there has to be agreement. And you have seen in this material there's reams of material that record the agreements that have been reached on the various terms over the three years that they have been bargaining and they have been recorded and documented and what have you. The point that's being made is, 'Oh, yes, but it's all only in principle.' It's always only in principle when you're bargaining for an enterprise agreement because you're always only bargaining for something that you would like to have in the agreement when you reach it. And you don't reach it until the very end, and if you get to the very end well we don't have intractable bargaining because you have done your own work. But you only get to it where your aspirations are blocked. But you're supposed to give credence, we say, to the process until you get to that point. And so you have got to interpret what's happening within the paradigm of enterprise bargaining which is you're only ever agreeing in principle.

PN1001

There's no mandate in this Act to apply a different test just because you applied for intractable bargaining declaration or determination. And, indeed, the definitions all refer to bargaining representatives bargaining for an enterprise agreement. So that's the context in which you have to frame your thinking about what's an agreed term.

PN1002

DEPUTY PRESIDENT BELL: In your reply submissions you take issue, I think, with the language of FRV describing an agreement as requiring a consensus I think it was.

PN1003

MR BORENSTEIN: Requiring which? I'm sorry, I didn't hear you.

PN1004

DEPUTY PRESIDENT BELL: I've understood the UFU's reply submissions. This is on the question of what agreement means.

PN1005

MR BORENSTEIN: Yes.

PN1006

DEPUTY PRESIDENT BELL: As distinct from the subject matter of the agreement which was what when you said there's an agreement about what? But I am just focusing on the concept of agreement because I think there's a dispute as to what that means.

PN1007

MR BORENSTEIN: Are you referring to paragraph 15? The word 'consensus'?

PN1008

DEPUTY PRESIDENT BELL: Yes.

PN1009

MR BORENSTEIN: Yes. We're criticising the use of that term by FRV in their submissions and we're criticising it because it's raised in aid of or in context of another argument which they make about the level of finality of the agreement that needs to be reached. And then introduces a new term 'consensus' which is unexplained. And that we say just muddies the waters. We have got language in the section. We don't need a party introducing new terms undefined to assist in the construction of the terms which are understandable in common parlance that appear in the provision. That was the point of criticism and the reference to consensus.

PN1010

If you look at paragraph 34 – excuse me - - -

PN1011

DEPUTY PRESIDENT BELL: These are your submissions or - - -

PN1012

MR BORENSTEIN: Well, these are our submissions critical of paragraph 34 of the FRV's submissions. So if you look at paragraph 34 of the FRV's submissions. I'm sorry I don't have the electronic page number. It says, 'There's nothing in the text or context of section 274(3) of the Act to suggest that a term that has been 'agreed' would include a term that was at a stage of negotiation falling short of a

determined or settled agreement such as a term which was agreed only in principle and subject to final approval.'

PN1013

Now, when they used the word 'consensus' in the following sentence it's in aid of that proposition and it's that primary proposition that I have been endeavouring to address which is that this paragraph 34 exposes a misunderstanding of what is involved in enterprise bargaining when one is going through term by term the proposed terms of the log or whatever.

PN1014

They say that you have to have more than a term that was agreed only in principle and subject to final approval. Well, that can't be right because final approval is when the agreement is made. It can't be right in the context of what we're dealing with here because we're dealing here with a situation before you ever get to final approval. If you got to final approval you wouldn't be here. The intractable bargaining is designed to deal with people who can't get to the final approval.

PN1015

So it goes nowhere, we say, and then saying, 'Well consensus means something similar.' We don't know what consensus means. We look at the words of the section and the provision and it talks about terms that should be included in the agreement, meaning terms that should be included if you ever get there. And if you ever get there then we don't need the help of the Commission. But if we don't get there then we want the help of the Commission with those things that we can't agree on. And that's the proposition.

PN1016

And saying that they need to be agreed in principle we say that if you put yourself in the shoes of any bargaining representatives for any enterprise agreement you understand that you're bargaining each of the terms. You're reaching agreement on it term by term by term and you deal with one, you move to the next. You move to the next. You move to the next. It's understood. It's implicit that clearly everybody understands that you're not going to get a final agreement until you get a final agreement. That's just implicit in the process.

PN1017

The fact that you agree terms on the way through is precisely the process of enterprise bargaining and it's that process that the intractable bargaining provisions are built on. And they're built on that and they say, 'Good. You do as much as you can. You get as many agreed terms as you can.' Because that's consistent with the central pillar of the Act which is people who are to be bound by an instrument should have the same bargaining for it.

PN1018

And it's only when you can't go any further that we will help you with what's left. It would be inconsistent with the whole way in which the legislation has been framed around enterprise bargaining which create a situation where the Commission is put in a position where it is called on to arbitrate the whole of the industrial instrument.

PN1019

That would be so antithetical to the way in which this legislation and enterprise bargaining has been framed in the legislation over decades but it couldn't possibly be intended by the legislature that as a ploy in bargaining, as a leverage in bargaining that one bargaining representative can say to the other, 'Oh, well, if you go to the Commission for intractable bargaining everything is off the table and we'll get the Commission to arbitrate everything.' That can't have been intended and the way in which section 274(3) is framed is completely inconsistent with that.

PN1020

I mean why would you need that? Why would you need that at all if the intention was the Commission can arbitrate the whole thing you don't need to worry about agreed terms. You just tell the Commission to arbitrate, include the mandatory terms and so on. And there you go. You don't need to have this argument. The legislation isn't structured like that. It's framed in a way which makes it clear that the parties are encouraged to reach as much agreement as they can. And it doesn't have to be a final agreement. It only has to be agreement on what should be included in the enterprise agreement. It's framed like that deliberately to identify that bargaining representatives should be able to do as much as they can. And then when they reach an impasse and they reach a road block, if they can't go any further they can seek the assistance of the Commission to get them over the road block. But not to redo the whole job.

PN1021

DEPUTY PRESIDENT BELL: On the question though when there's an agreement for something – a term should be included in the enterprise agreement, given as I was perceiving the parties' submissions I couldn't find anything directly of the point. But there's a long line of cases in the competition sphere which deal with the statutory expressions contract arrangement or understanding. And give a citation 2022 FCA 1475. And this is a Blue Scope Steel decision by Justice O'Bryan for a cartel case.

PN1022

But his Honour talks about a contract at one end and you've said this isn't a contract case for agreement.

PN1023

MR BORENSTEIN: Well, enterprise agreements aren't contracts.

PN1024

DEPUTY PRESIDENT BELL: Sorry, yes. And then describes while – and this is at 106 – 'While an arrangement is well described in terms of undertaking obligations or duties albeit not legally enforceable an understanding, the lower one again is more aptly described as arriving in a common mind or consensus as to a particular course to be followed.'

PN1025

So, even on the lower end of the threshold those cases, at least, indicate that all need to be an agreement there needs to be some sort of meeting of the mind or

consensus, albeit as to the subject matter of the statute in our case which is that a term should be included in an enterprise agreement.

PN1026

MR BORENSTEIN: Well, the first thing I'd say, Deputy President, is that one needs to be very careful about taking terms in one statutory framework and trying to transpose them into another. And we say that that's a recipe for error with all due respect.

PN1027

The arrangement that your Honour is referring to is the subject matter itself. The arrangement is the actionable – I wouldn't call it tort – statutory tort that the legislation is focusing on. Here we have a different context altogether and one needs to be very careful. I can't give you a citation to a case that underlines the caution that one needs to apply when one's looking at what courts say in one particular context or about one statute and applying it another, particularly where the first court doesn't indicate that what it's saying is intended to have general application. I don't have the citation at hand but - - -

PN1028

DEPUTY PRESIDENT BELL: I think the point is an uncontroversial one.

PN1029

MR BORENSTEIN: Yes.

PN1030

DEPUTY PRESIDENT BELL: And there's no question that Justice O'Bryan was suggesting that this be - - -

PN1031

MR BORENSTEIN: Yes, and that's why - - -

PN1032

DEPUTY PRESIDENT BELL: - - -applied - - -

PN1033

MR BORENSTEIN: That's why it's difficult to respond directly - - -

PN1034

DEPUTY PRESIDENT BELL: Yes.

PN1035

MR BORENSTEIN: - - -to what you put to me Deputy President. I would rather say to you that the terms that we're dealing with are not technical terms in the sense of having any scientific meaning or anything. They're ordinary English terms in the section and they need to be construed in the context in which they appear and to further the purpose and object of this particular provision.

PN1036

And it may be that in the competition legislation a particular construction will further the object of that. But here it's important to bear in mind section 15AA says of the Acts Interpretation Act you've got a right of interpretation that

supports the purpose and object of the legislation as you find it. And we've said what we say the purpose and object of this is and that is to encourage bargaining representatives to do as much as they can to arrive at an enterprise agreement and if they can't to provide a facility where the unresolved matters can be arbitrated.

PN1037

And the construction which we propose for section 274(3) is entirely consistent and supportive of that and we say that the use of the word 'should' it underscores that we are looking at a situation that predates the final agreement. And so to say as FRV says in that submission we read that it's all in principle, we say, 'Well, of course it is. All enterprise bargaining is in principle until you get to the end.'

PN1038

And it only gets locked in when you have got final agreement that's been signed off by the employer and voted on by the employees. So I talk about final agreements in the context of intractable bargaining is a non-separate.

PN1039

I've already made the point but I would emphasise that you have to look at these intractable bargaining reforms as being an adjunct to and in aid of the enterprise bargaining processes. And so when you're looking at the terminology that's used you have to bear in mind the activity that the intractable bargaining reforms are targeted at and you have to keep in mind the terminology and the elements of that activity when you are seeking to construe the intractable bargaining provisions so that they are consistent with and they work harmoniously with those enterprise bargaining provisions.

PN1040

As I said earlier section 235 which is the trigger appears in Part 2-4 of the Act which is the enterprise bargaining provision. The Minister in her submissions seeks to make something of the fact that section 269 appears in Part 2-5 which deals with workplace determinations, as if to say that because of that the intractable bargaining provisions can be separated or isolated or disconnected from the enterprise bargaining processes under the Act.

PN1041

We say that that that's a completely untenable proposition and the fact that the machinery or giving effect to the intractable bargaining reforms appears in a different place than the trigger. It is completely of no consequence.

PN1042

We then come to this issue of the post-declaration negotiating period. And that arises because following the making of the declaration the FRV and the Minister urged the Full Bench to fix a post-declaration negotiating period.

PN1043

The FRV submitted to the Bench that that would provide an opportunity for narrowing the matters between the parties. Now, as it transpired you will have heard that an offer was made on the 7 August and if you read the written submissions of the other parties you will see that they proposed that that offer – the rejection of that offer – resulted in all of the matters that had previously been

agreed in principle, being no longer agreed and that everything effectively fell for arbitration.

PN1044

Now, as a result of the evidence of Ms Crabtree yesterday it's apparent that that's a mischaracterisation of what that letter of the 7 August in fact was. I will deal with that in some detail shortly but you will remember that the evidence of Ms Crabtree was that the Minister authorised on the 15 June of this year the making of an offer and you will recall that the offer was to contain an ultimatum that if the offer wasn't accepted the agreed terms would be unagreed.

PN1045

And then you will recall the evidence of Ms Crabtree yesterday, although this didn't appear in her written statement and it didn't appear and no explanation was given for why it didn't appear in her witness statement. Although at one point we were told that there was something in the witness statement which her lawyers had removed, which is a matter of some concern in terms of being frank with the Commission.

PN1046

But, apparently, yes our friends don't think there's anything in being frank with the Commission apparently. Apparently there was resistance from FRV to making that offer and that resistance continued for something like six weeks from the 15 June through to the 7 August. And we understand from Ms Crabtree – and we understand from Ms Crabtree that as a result of representations made to the Minister of the FRV's concerns the 7 August offer was framed and approved by the government.

PN1047

And Ms Crabtree accepted that the ultimatum which was supposed to go in the original offer was no longer in the offer. This is in 67 of Ms Crabtree's statement. So we say that properly construed the submission that our friends seek to make in reliance on the letter of the 7 August is flawed and wrong.

PN1048

But coming back to the concept of the post-declaration negotiating period it's our submission that when you construe that provision in the framework of the intractable bargaining provisions and their overall purpose and object, it is a period that is designed or intended to allow for the narrowing of the matters in dispute between the parties.

PN1049

It would be bizarre if it were otherwise. It would be bizarre if the legislation allowed in the context of intractable bargaining for a party to seek a post-declaration negotiating period and then undo everything that had been achieved from the previous bargaining period. It would be totally inconsistent we would say with the purpose of the reforms.

PN1050

So we say that the interpretation of the provisions dealing with the post-declaration negotiating period should be that that is a period for narrowing the

areas in dispute between the parties and that the period does not permit the parties to repudiate agreements that they had previously reached and which would previously have constituted an agreed term under section 274(3).

PN1051

DEPUTY PRESIDENT BELL: Where is that in the statute?

PN1052

MR BORENSTEIN: Sorry?

PN1053

DEPUTY PRESIDENT BELL: Where is that in the statute?

PN1054

MR BORENSTEIN: Where is that in the statute?

PN1055

DEPUTY PRESIDENT BELL: That proposition.

PN1056

MR BORENSTEIN: We say that you are able to construe what is meant by a post-declaration negotiating period. I'm just looking for the provisions. Sorry. The provision for the post-negotiating bargaining period is in section 235A and we submit that the Commission is entitled to construe that provision as a provision which allows for the nomination of a period, the purpose of which is to allow for further agreed terms to be reached between the parties, that that's a construction that is consistent with the overall scheme. And it's a construction of the purpose of which that provision is included in the new legislation.

PN1057

And that construction is consistent with what appears in section 270 subsection 3, which talks about what's to go in the determination. And it says the determination must include the terms that the Fair Work Commission considers deal with the matters that were still at issue if there's a post declaration negotiating period under section 235A, after the end of that period or after the making of the declaration.

PN1058

So it envisages not an expansion of terms that are at issue but a facility under section 235A after the declaration is made for the parties to seek to further agreed terms. I mean, if you look at the process, if you have a process where you make an intractable bargaining declaration. In the absence of a post bargaining declaration period the agreed terms are the agreed terms as at that date. Section 270 subsection 3 says that.

PN1059

Then it goes on to provide that under section 235A you can have a post declaration negotiating period, and section 270, as I said, subsection 3 says that if you have that period then you can look at the agreed terms as they were at the end of that period. Now we say that the tenor of that whole process is totally inconsistent with the idea that you can have agreed terms at the making of the

declaration but that you can then unagreed those terms during the bargaining period.

PN1060

The Commission has a discretion to make or to order a post negotiation bargaining period. It is a discretion which would need to be exercised in aid of the scheme of those contractable bargaining provisions, consistent with them. It would be completely antithetical to that scheme for the Commission to order a post negotiating bargaining period if during that period the terms that had been agreed at the time of the declaration could be undone.

PN1061

How would that serve the purpose that we've identified for these provisions? So all of that points to the fact that the bargaining period is intended, as a matter of statutory construction the bargaining period is intended to allow the parties to reach further agreed terms, not to reduce the number of agreed terms. That would be completely antithetical to the way in which these reforms are intended to work. And as I say, in this context, in this case none of the other parties said we want a negotiating period so that we can undo agreed terms.

PN1062

None of them said that. The transcript will show none of them said that. They all said, we think that this will assist in arrowing the gap between the parties, to paraphrase. And they did that because everybody understands that the bargaining period is intended to try to narrow the gap between the parties, not to allow facility to increase it.

PN1063

And we say that that interpretation is based on giving effect to the purpose and object of the retractable bargaining reforms and the process of identifying agreed terms and then arbitrating what can't be agreed. And as I said earlier, insofar as these provisions are intended to encourage the bargaining representatives to reach as much agreement as possible, the allowing of a post declaration negotiating period is also to be seen in that light.

PN1064

That it's a further opportunity to the bargaining representatives to try and reach further agreed terms that should be included. And we say that's the way in which you get that interpretation, Deputy President. We say that the contrary interpretation would be quite incongruous and to the extent that you might need some authority to be persuaded of the approach can I just give you a reference to a case which you probably know well which is Cooper Brookes. And Cooper Brookes is reported in (1981) 247 CLR at page 297.

PN1065

And I can hand out an extract from that if that's of any assistance. I apologise. It's just an extract because the case is a lengthy one. The extract that I hand up is from the joint judgement of Justices Mason and Wilson which is the passage starting at page 320 and going on to 321 which is often cited in later cases. This is the passage where their Honours dispose of the black letter law interpretation rules and lay the foundation for the purpose of constructions of legislation.

PN1066

And I just briefly draw attention to the paragraph at the top of page 321 where their Honours say:

PN1067

When the Judge labels the operation of the statute as absurd, extraordinary, capricious, irrational or obscure, he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the proprietary for imparting from the literal interpretation is not confined to situations where described by these - - -

PN1068

Sorry:

PN1069

Extends to any situation from in which for good reason the operation of the statute in a literal reading does not conform to the legislative intent as ascertained from the provisions of statute, including the policy which may be discerned from those provisions.

PN1070

Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations as we said, the advantage may lie with that with produces the fairer and more convenient operation as long as it conforms with the legislative intention.

PN1071

If however one interpretation has a powerful advantage in the ordinary meaning and grammatical sense it will only be displaced if the operation is perceived to be unintended.

PN1072

In this particular case, and you will see in the next paragraph that their Honours refer to the particular provision that they were dealing with which was a provision of the Income Tax Act and it was a question about whether -the issue was that its literal interpretation would work a strange outcome. And their Honours say in the fourth paragraph:

PN1073

In our minds a decisive factor in making the choice is that the literal interpretation of section 82(3) results in an operation of section 80B(5)(c) which in our opinion is capricious and irrational.

PN1074

And they go on to explain that and I don't need to trouble you with that. But the sentiments that they express in that passage are entirely consistent with the submissions that we put about why you would read the provisions about the bargaining period in the way in which we propose.

PN1075

Because we say that it would be a, to use a word that their Honours hadn't used, a (indistinct), if having set up a process where you are seeking to encourage people to reach agreement as much as they can and then intervene by a declaration, to then allow in the period following the declaration for all their previous bargaining to be unravelled in the way in which our friends argue you can do.

PN1076

DEPUTY PRESIDENT MILLHOUSE: Do you require us to make that interpretation of the statute to defeat FRV's reliance on its 18 October 2023 letter?

PN1077

MR BORENSTEIN: 7 August?

PN1078

DEPUTY PRESIDENT MILLHOUSE: No, no. I'm in the post declaration negotiation period at the end of that.

PN1079

MR BORENSTEIN: I'll just turn up that letter.

PN1080

DEPUTY PRESIDENT MILLHOUSE: Yes, certainly. It's an attachment to Ms Crabtree's affidavit beginning on page B62, so volume B, 62. And I think no doubt the parts that I think FRV will underline if they haven't in their submissions, was B64, which I think Ms Campanaro was taken to in cross-examination, as well.

PN1081

MR BORENSTEIN: I'm looking at the second page of that letter if that's where you are looking?

PN1082

DEPUTY PRESIDENT MILLHOUSE: Well, I'll be more precise. I was just looking at the FRV submissions and this is a - - -

PN1083

MR BORENSTEIN: Well, can I look at the letter perhaps, sorry.

PN1084

DEPUTY PRESIDENT MILLHOUSE: Yes, certainly.

PN1085

MR BORENSTEIN: The letter, when you look at the third last paragraph, is premised on the purport of the 7 August offer. And our submission is that that offer did not in its terms withdraw an agreement to the terms that had previously been agreed. It made, I think, apart from 1 which was the bargaining – the instructions, but it added an offer of money. Now, we say that the rejection of that offer was based on a rejection of, and I think this is in the correspondence which we responded to immediately after the offer, was based on a rejection of the adequacy of the money.

PN1086

And we say that that offer, and particularly when you construe that offer against the background of the 15 June authorisation from the government and the very helpful evidence of Ms Crabtree yesterday about what transpired after that and the fact that the ultimatum about refusal of this offer will result in the withdrawal of all the previous agreements that having been gone and not included in this letter, we say that a proper construction this never was.

PN1087

That is, making an offer of money. The money offer was rejected but there's no indication and it shouldn't be construed as having the effect that all the other clauses that had been agreed up until that time were no longer agreed. Now in short form that's our summary response to the effect of the 7 August letter.

PN1088

But if one needs to go further then we say that the construction of the provision allowing for the grant of a post declaration bargaining period should be that it is a period during which the parties are enabled to reach further agreement and not to undo the agreements that were there at the date of the declaration. It is not intended to allow parties to undo the position that was there.

PN1089

You see, with that letter and for the purpose of construing that letter and I mean, this is only Mr Freeman's construction of the letter and ultimately you'll need to construe it for yourself, but the third last paragraph says that the effect of rejection of the offer was that there are currently no matters that met the definition of agreed terms for the purpose of inclusion in the workplace determination.

PN1090

Now, we don't know what Mr Freeman means by 'agreed terms.' We asked Ms Crabtree what she meant and her meaning was quite different than what the act talks about, so who knows what Mr Freeman thinks of it. And he didn't give any evidence. We don't know why he didn't give any evidence but he didn't give any evidence. But there was nothing in the letter that says that. There's nothing in the letter that says that, at all.

PN1091

There was an ultimatum in the minister's authorisation on 15 June but that's not here. That was agreed not to be put in apparently. So, there was nothing to indicate that that would be the position. And to say that the offer was put as a package, well, that creates its own ambiguities, as well and nobody from FRV had the good grace to come and explain to us what that means.

PN1092

So, these are all, we would say, expo facto nationalisations of a situation to benefit FRV and we say that you shouldn't place any particular credence on what Mr Freeman says is the meaning of the letter. As you said to me yesterday, it's an objective process and what he thinks that it means in the absence of him coming along and giving evidence about it and being open to cross-examination, we'd say you ought give no weight to that.

PN1093

But we say that it doesn't have the effect he says it does. But in any event it's his subjective view and that doesn't really take us very far.

PN1094

DEPUTY PRESIDENT MILLHOUSE: I suppose a different way of saying that is that your position on this 18 October letter, that it rises no higher than the 7 August letter. And you've addressed me - - -

PN1095

MR BORENSTEIN: Yes.

PN1096

DEPUTY PRESIDENT MILLHOUSE: You addressed us all separately on some of those things.

PN1097

MR BORENSTEIN: Yes. No, no, we do say that.

PN1098

DEPUTY PRESIDENT MILLHOUSE: Yes.

PN1099

MR BORENSTEIN: But we don't step back from the submissions we made to you about how one should view the bargaining period in terms of what it's intended to facilitate. As a footnote it would be unthinkable that any Full Bench in any future case that was approached by a party and told we want a bargaining period because we want to canvas withdrawal from enterprise – in terms that we'd previously agreed upon, that any Full Bench would think that that was an exercise of discretion that it should undertake consistent with these (indistinct). It falls within all the adjectives that Justices Mason and Wilson deployed.

PN1100

Can I just briefly deal with some of the matters that are raised in the other parties' submissions. Dealing with the minister's submissions at paragraph 33 of her first submissions she - - -

PN1101

DEPUTY PRESIDENT MILLHOUSE: Sorry, can I just ask, was that the first submissions or the reply submissions that you said?

PN1102

MR BORENSTEIN: The first submissions.

PN1103

DEPUTY PRESIDENT MILLHOUSE: Thank you.

PN1104

COMMISSIONER ALLISON: Did you say 33?

PN1105

MR BORENSTEIN: Thirty-three. The submission made by the FRV is one that calls up reference to dictionary meanings of 'agree,' requiring determined or

settled agreement. And we say that when they talk about the finality to notify the term, and so on and so on. Now that's all very interesting as a semantic exercise. Paragraph 33.

PN1106

DEPUTY PRESIDENT MILLHOUSE: Sorry, I was looking at the minister's submissions. I think you're looking at the FRV submissions.

PN1107

MR BORENSTEIN: I was. Did I say the minister? If I did, I'm sorry.

PN1108

DEPUTY PRESIDENT MILLHOUSE: You did. No, that's okay.

PN1109

MR BORENSTEIN: My apologies. We'll get to the minister in due course.

PN1110

DEPUTY PRESIDENT MILLHOUSE: I'm sure you will.

PN1111

MR BORENSTEIN: I'm sorry. So, at paragraph 33 the FRV goes to dictionary definitions of 'agree,' or 'agreed,' and suggests the finality which is denoted by thus definitions is important. And then in a bootstraps argument says it's important because the agreement by FRV to all terms prior to the 7 August offer was consistent with the requirements of the wages policy only ever in principle and subject to specified conditions.

PN1112

The problem with the submission is that it fails to take account of the most central of the principles of statutory interpretation and again I've referred to Project Blue Sky earlier and if you look at Project Blue Sky at paragraph 69 you will see the importance that their Honours attached to context. And this interpretation that's proposed in paragraph 33 pays no attention to context.

PN1113

And as I've explained to you earlier the submissions which the FRV advances takes no account of the context in which the term agreed is used in these provisions and so this is of no assistance, at all. It might be said more generally that the submissions of FRV and the minister about these provisions completely overlook the purpose of these provisions which I've outlined this morning.

PN1114

And the connection between these provisions and the enterprise bargaining processes and the first sentence at paragraph 34 in FRV's submissions, again fails to grapple with that context and indeed completely ignores the whole dynamic of enterprise bargaining, suggesting that the term can only be agreed once you have a settled agreement. And as we said, if that's the correct interpretation then there's no room for retractable bargaining ever. The next sentence which introduces the term, 'consensus' also contains an inherent contradiction between the idea of

having an agreement that's a settled agreement and then trying to arbitrate to break any deadlocks.

PN1115

As we say, there are no deadlocks if you've got a final agreement. At paragraph 35 FRV refers to the decision of Qantas Airways and refers to a passage at paragraph 18 of that decision. Can I just make the submission, and I don't need to go to the document itself, that the sentence to which the FRV refers contains a statement that there may be circumstances where agreement to a matter subject to an overall satisfactory package might mean that that matter is an agreed matter within the meaning of section 267 subsection 2 of the Act.

PN1116

And of course, this was not a case about intractable bargaining. This was a case about industrial action determinations. But nonetheless, countenanced by the Full Bench that you might agree a matter subject to an overall satisfactory package and that might mean that you have an agreed matter within the meaning of that definition. And that's analogous to the position that we are advancing.

PN1117

The other thing that arises out of the FRV and the minister's submissions is the failure to recognise that the definition in section 274 subsection 3 focuses on a term, not an overall agreement. It focuses on a term being agreed. So, talking about reaching some final agreement as they do in paragraph 34 is just not to the point. It doesn't address the language of the definition.

PN1118

The language of the definition is clearly focused on a situation which predates a final agreement. And as I have said before, necessarily so because if there is a final agreement we're not here. But when you talk about there needs to be finality of the agreement and things of that sort, or you know, can't be in principle because that's not final, it fails to accord attention, necessary attention to the fact that the definition is talking about a term, a step on the path to a final agreement.

PN1119

And when you focus on that then the analysis which we advanced becomes apparent. What the FRV and the minister propose in their construction is one that in lies the difference between the concept of an agreement, final agreement, and that of the desirability of the inclusion of a single term in an agreement if it is reached.

PN1120

An example of that may be found in paragraph 101 of the minister's submissions where it's said that any in principle agreement in the circumstances of the present application could not amount to a binding agreement in the relevant sense because the agreement was subject to an overall package and the government's authority. Now that clearly exposes the error and the failure to identify the focus being on the term rather than the need for an overall package. And then the minister goes on to say:

PN1121

Further, the bargaining representatives have not reached agreement on the essential terms of the contract. Specifically the bargaining representatives have not reached agreement on the monetary terms to be included in the proposed enterprise agreement.

PN1122

Now the statute says nothing about essential terms of the contract. It must say there is no contract, that it's only an enterprise agreement and the Full Court in Marmara tells us that's not a contract. It's a statutory artefact and it's not created like a contract as we've already discussed.

PN1123

So, to make a submission to say that it can't be an agreed term and it can't be a final package because they haven't agreed on essential terms, namely the money, completely misses the point. It's a complete disconnect from the issue that needs to be resolved here which is, look at a term. Is it agreed that that term should be included in an enterprise agreement, (if one is concluded). And it's got nothing to do with whether the term is about an essential term or a monetary term or anything else.

PN1124

And so we say that the premise of the submissions that are made are entirely unsupported and unsustainable and untenable under the Act. And if the minister's construction that I read to you from paragraph 101 were accepted then the whole purpose of this reform would be defeated for the reasons that I've explained earlier.

PN1125

And it would result as we said earlier that in effect, unless you reached a complete agreement that all terms in every case would have to be arbitrated in the workplace determination. There would never been agreed terms because on their submissions unless you have final agreement you have nothing. That's just so patently at odds with what the intractable bargaining provisions prescribe and are intended to do, and it's just completely untenable.

PN1126

That then leads to these notions that our friends put forward that agreed terms shouldn't be held to apply to terms that are agreed in principle or subject to qualifications. And they say that 'bargaining will be impeded with parties negotiating on a conditional basis are held piecemeal to an in principle agreement on discrete clauses then subject to an arbitration outcome on the core issues of wages and allowances.' And that's in the minister's submission at paragraphs 104-5 and FRV's submissions at 34 which we've looked at.

PN1127

The answer to that is the answer that I gave to the Commission in response to your earlier question that the previously held views about what is and isn't possible under enterprise bargaining have to be reviewed to take account to the reform that's been introduced by this legislation. And to do otherwise is really to deprive the reforms of any effect, as we've seen.

PN1128

If you don't reach agreement on everything there's no agreement, there's no agreed terms, the Commission arbitrates everything. That's not the intent of the reforms. And the fact that parties will be held to terms that were agreed along the way is a function of the effect of the reforms. And there are opportunities for those parties to make submissions in the arbitration about what the Commission should or shouldn't do in response to the fact that certain terms have been agreed.

PN1129

And the Commission will make its decision as to how they allow for that if the Commission feels that there is some need for allowance. But it may be that in fact the Commission doesn't regard that as a difficulty or a problem. The important thing, the important thing is to recognise that there have been reforms. They are reforms that affect the manner in which enterprise bargaining is to be dealt with under this legislation.

PN1130

They are reforms that are directed to try and improve the outcomes of enterprise bargaining in the general sense. And in that respect they are to be seen as remedial legislation and are to be given an appropriate generous construction consistent with that and a construction that gives effect to their purpose.

PN1131

Now having identified those interpretational matters and what we say is the proper operation of the legislation I would seek to draw attention to some of the evidence of the facts that occurred in this negotiation. You have already marked the affidavits that we filed from Ms Campanaro and Mr Kefalas. Can I make the general observation at the outset that the statements of Ms Campanaro and Mr Kefalas are all, as you will see, based on their own personal observations and involvement in the bargaining process and they constitute first-hand evidence of what happened.

PN1132

They name the people from FRV who were involved in the various stages of the negotiation. And they are explicit and direct in what they say about those events. They stand in stark contrast to the evidence relied on by FRV and derivatively by the minister, being the statements of

PN1133

Ms Campanaro - - -

PN1134

DEPUTY PRESIDENT MILLHOUSE: Crabtree.

PN1135

MS SWEET: Crabtree.

PN1136

MR BORENSTEIN: Crabtree, I'm sorry. Too many c's.

PN1137

Ms Crabtree. You will have seen that Ms Crabtree was not involved in the negotiations until mid to late 2022. Her evidence yesterday was that various parts of her material were based on things that she was told by other people, informants that she hasn't identified, although she said in her statement that when she was informed she would identify the informants. Didn't do that.

PN1138

And also the very unusual confession from her that a significant part of her statement was removed by the lawyers before filing with the Commission, so as to keep from the Commission and the other parties relevant material. We say that as a general proposition you should approach the evidence and the statement of Ms Crabtree with great caution. And where there is any contradiction between her evidence and that of Ms Campanaro you should prefer the evidence of Ms Campanaro and Mr Kefalas.

PN1139

Now in terms of the evidence that's given by Ms Campanaro you will see from her statement which is at page A27 in the court book that bargaining commenced in 2022, shortly after the establishment of the FRV which I think was in July 2022 – 2020, my apologies. 2020. 2020. She refers to a heads of agreement at pages A28 and A29. The heads of agreement is Annexure LC1 which is at page A55. And this was a heads of agreement which was signed with the then minister in February of 2020 and you will see that the parties to the agreement are the minister and the United Firefighters Union Australia.

PN1140

And in paragraph 1 the purpose of the agreement is set out and then at paragraph 4 this deals with the renegotiation of enterprise agreements and by way of explanation when the FRV commenced operation in July of 2020 the previous agreements that had applied to the Metropolitan Fire & Emergency Services Board and the Country Fire Authority were merged into what became an interim agreement, a transitional agreement in 2020.

PN1141

And Deputy President Gostencnik oversaw that process and made an interim order for the interim enterprise agreement which is the 2020 agreement and you will see in paragraph 7 that there is a reference to a transfer of business instrument. The arrangements that this deed provided for was that there would be a common law deed entered into, to protect the conditions of the employees until these industrial instruments could be put in place.

PN1142

The first industrial instrument that was put in place was the interim agreement which was the transitional instrument. And then at paragraph 9 there's provision for the negotiation of a FRV enterprise agreement. And then at paragraph 11, 'The minister reaffirms the government's previous commitment with the terms and conditions of employment presently applicable to CFA and MFB operational staff through the relevantly applicable agreements in place today will not be diminished and will not change other than by agreement.'

PN1143

And then at paragraph 12 you will see, 'The parties agree that work is underway to prepare draft instruments for a common law deed to be settled with the UFU and the transfer of business instrument pursuant to the Fair Work Act to provide an appropriate agreed legal basis and certainty for UFU members in relation to these commitments.'

PN1144

Then the last sentence, 'The parties confirm that the parties' transfer of business instrument will affect the existing terms of the MFB and CFA operational agreements so that these terms are transferred into FRV and preserved until replaced by the FRV operational agreement.' So, the status quote at the moment is that the transitional agreement which is called an 'interim agreement' in its title, which came into effect in 2020 on the order of Deputy President Gostencnik is still in place.

PN1145

And the negotiations which commenced at 2020 were for the replacement FRV operational agreement. And that's where we are today.

PN1146

DEPUTY PRESIDENT MILLHOUSE: Do we need to see the common law deed of agreement if it was entered into?

PN1147

MR BORENSTEIN: No. This is just to provide you with an historical picture of what's happened and what this piece of agreement says. Mr Friend reminds me that by its terms it ceased to have its effect when the interim order came into operation. And you actually see that in paragraph 14 in the first sentence. It makes that provision.

PN1148

So, that was the commitment that was given by the government to the union at the outset. And the intention, you will see there, was that there would not be a reduction of conditions going into FRV. Then the formal bargaining commenced in 2021/2022 but in paragraph 39 and following of Ms Crabtree's first affidavit she refers to what she describes as government approval.

PN1149

And she says, 'On 29 July 2021 the FRV informed the UFU that it was required to seek approval from the Victorian Government in order to commence negotiations in accordance with the 2019 wages policy.' Then in paragraph 40 she says that 'in August 2021 FRV sought the Victorian Government's approval to commence bargaining for the operation of the act.' And that is the EA which is referred to in the heads of agreement that is replacing the interim document.

PN1150

'In doing so, FRV acknowledged the requirement to reach agreement with the UFU in accordance with the Victorian Government's wages policy and any proposed final agreement would be subject to approval by the Victorian Government.' In paragraph 41 says, 'At this time FRV identified its key

objectives for the bargaining process as being.' And 'objective A, we emphasise the key objective maintaining current conditions unless otherwise agreed.'

PN1151

'B, harmonising the terms and conditions of former MFB and CFA operational employees.' That refers to the circumstances that are reflected in the interim agreement. The interim agreement has separate paths, one for the MFB employees, one for CFA employees and the intention here was to try and harmonise those. 'C, fostering a constructive relationship with the UFU in promoting community and firefighter safety.' And D, and so on are matters that we don't need to deal with.

PN1152

We emphasise paragraph A which we say is a key, 'the maintenance of current conditions unless otherwise agreed.' At paragraph 42 Ms Crabtree says, 'The Victorian Government approved FRV to commence bargaining on the basis of its proposed bargaining strategy and objectives.'

PN1153

And in paragraph 43 Ms Crabtree assures us that 'throughout the bargaining FRV has maintained its focus on these key objectives and operated within the parameters approved by the Victorian Government including making it clear to all bargaining representatives that any proposed final agreement would be subject to approval by the Victorian Government.' Now paragraph A, the key objective in paragraph A has particular significance when one looks at what FRV has attempted to do in the post negotiating bargaining period.

PN1154

Ms Campanaro has given evidence at paragraph 8 on page A27 that there were 32 meetings between July 2020 and 26 April 2022. Progress was made towards agreeing clauses and claims in the log of claims. She says at paragraph 12 of her third statement at page A2 that there was never any discussion at that time that there were any qualifications or reservations to agreements reached by parties during the bargaining, being agreements in respect of particular terms.

PN1155

She has given evidence at paragraph 8 that formal bargaining commenced on 26 April 2022 when a notice of employee representational rights was issued. And then there were a further 32 meeting between then and the end of 2022. In paragraph 14 she deposes that the parties always operated on the basis that the existing agreement was the starting point for bargaining.

PN1156

And she says that this was mentioned by Mr Peter Parkinson who was representing the FRV at the very first bargaining meeting on 26 April 2022, and you'll find that at paragraph 14 on page A28. That was not contradicted in any evidence from FRV. She goes on to say that the parties entered into a bargaining charter which she has produced at page A61, and that that charter made no mention of the need for government approval of any item. And that's in paragraph 19 of her statement and the charter, as I say, is at page A61. You will see that

charter says that these are the principles and protocols for FRV operational staff enterprise agreement bargaining.

PN1157

And I won't go through it line by line but I just draw your attention to the fourth item under the heading, 'Bargaining process,' where it's said arrangements for conducting the bargaining meetings will be determined jointly by the parties with the intent of ensuring a fair, respectful and efficient approach by all participants, a chair to be appointed to the parties for each meeting. The matters and actions agreed will be recorded and confirmed by the parties as required. And agreed protocol for minuting and its management to be determined.'

PN1158

Now she goes on to give evidence that the agreements were recorded by reference to the original agreement and that was updated by the various versions. And you'll recall earlier in the day I mentioned version 14 which was the ultimate version that they'd reached and was being recorded in accordance with these bargaining protocols. And as she says, there is nothing in there that says that any particular agreement on any particular terms needs to be somehow authorised and we rely on that.

PN1159

Then she goes on to say at paragraph 52 of her statement which is at A33, that while the UFU representatives were aware that the government wages policy required approval of new agreements they were never told that when FRV reached agreement on a particular provision it had not already obtained authority in relation to that or some authority needed to be obtained in relation to that.

PN1160

She states at paragraph 60 which is at A34, I think, that on 16 August 2022 FRV tabled a response document to the proposed operational staff agreement version 10, and she extracts the response. And the final paragraph of the response is that 'all clauses are set out in the UFU log unless otherwise commented on below are agreed in principle and be subject to final agreement on an overall package of provisions for the proposed EA.' And she attaches that document at LC10.

PN1161

So, that identifies for you the framework and the context in which those negotiations took place. Then on 8 August Mr Parkinson who was the FRV negotiator, circulated a document about implementation of the terms agreed thus to that point. And there was no indication in that document that it was provisional or subject to any approval of those terms. And the document showed that the relevant terms were agreed. The document itself is Annexure LC8 and appears at page A95. I don't need to take time to go through the document.

PN1162

It is acknowledged by Ms Campanaro that the exception to the understanding about not requiring government approval is in relation to wages and allowances which were understood to be subject to government approval because of the wages policy.

PN1163

Now as I said, during the bargaining policy the parties use a draft copy of the proposed operational agreement and you will see that explained in paragraphs 20 to 31 of

PN1164

Ms Campanaro's statement, and you'll find that at pages A29 through to 31 of the court book. She says that:

PN1165

By July 2023 every item in the draft agreement, other than those items dealing with wages and allowances was noted as being agreed by being shaded in green.

PN1166

That's at paragraph 69 of her statement, at page A35. She produces that document at page A109.

PN1167

On a number of occasions each of the parties sought assistance from the Commission, under section 240 and they were each dealt with by Commissioner Wilson. Commissioner Wilson issued two statements, the first of them was on 3 February 2023 and that's referred to in paragraph 83 of Ms Campanaro's statement, at page A37, and the statement itself is at page A757.

PN1168

The Commissioner recorded that the parties had reached agreement on all but 10 issues, and he listed those. He invited FRV to put a monetary proposal to advance the negotiations. The parties continued to negotiate and all matters were resolved, other than wages and allowances, but June of 2023 when Commissioner Wilson issued his second statement. That statement is to be found at page A763.

PN1169

Ms Campanaro's explanation about that statement is at paragraphs 87 to 90 of her statement and she explains, and Ms Crabtree confirmed yesterday, how it was that the FRV gave its agreement to the terms of that statement by Wilson C.

PN1170

Ms Campanaro then goes on, at paragraph 86(d) of her statement, which is at page A39, to report that:

PN1171

In March of 2023 Fire Rescue Commissioner, Gavin Freeman, published a video to all FRV staff in which he stated -

PN1172

And she extracts this:

PN1173

'Significant progress has been made with these negotiations for the operational agreement, for example, all matters have been agreed, other than the

firefighters' registration board clause, the funding to increase minimum staffing requirements and annual leave for fire safety officers and incident management support clause for those fire safety officers, the quantum of wages and allowance increases of course is yet to be agreed as well'.

PN1174

So the Fire Rescue Commissioner, in March of 2023, characterised all of the preceding clauses, apart from the exceptions he noted, as having been agreed.

PN1175

The new wages policy, about which we heard yesterday, was published in May of 2023, and you'll find that at page A811. Despite that, no offer was forthcoming at that time and no offer on wages and allowances was forthcoming after Commissioner Wilson's statement of 19 June.

PN1176

Unbeknownst to the UFU, on 15 June, as we heard yesterday, on 15 June the Minister authorised the making of an offer and that offer is set out in Ms Crabtree's first statement, at paragraphs 66 and 67, and that's at D2165.

PN1177

You will recall the evidence that Ms Crabtree gave in her cross-examination about that, and, in particular, about the ultimatum that was contained that she's recorded in paragraph 67(a) of her statement. You will recall the evidence that she gave about what she described the concerns of FRV about making an offer in these terms. And she gave evidence about a series of discussions that apparently took place between FRV people and the Minister's people and that, ultimately, an offer in different terms was issued, on 7 August 2023.

PN1178

The offer that was issued is in terms that are quite different to that which was authorised on 15 June. Importantly, it doesn't contain the ultimatum which the Minister originally required, and it also contained no indication that a failure to accept the offer would result in FRV purporting to withdraw agreement to all other terms.

PN1179

Now, without taking any more time up on these factual matters, can I just simply say that the Minister's submissions, original submissions, contain, from paragraphs 28 to 52, a chronology of various matters and we would direct the Commission's attention to paragraphs 31 to 32 of our reply submissions, which fill in the gaps.

PN1180

THE DEPUTY PRESIDENT BELL: Sorry, Mr Borenstein, just before we move on from the 7 August letter, what's the significance that you say attaches to your contention that the 7 August letter did not contain the more clear directive from the Minister's statement from - - -

PN1181

MR BORENSTEIN: 15 June.

PN1182

THE DEPUTY PRESIDENT BELL: - - - 15 June, I think it was.

PN1183

MR BORENSTEIN: Well, we draw on a number of things. First of all, we draw on the evidence that Ms Crabtree gave, and it was clear, from what she was saying, that FRV were not happy about putting an offer on that basis. So we say that that's the first thing that comes into play in discerning what the offer was about, the 7 August offer was about.

PN1184

Secondly, if the offer did not convey to the offeree this dramatic consequence that it said would follow from a failure to accept the offer, then that's not something that the Commission should infer and not something that should be visited on the offeree, as a consequence of the rejection of the offer.

PN1185

So we say that looking at the offer objectively, reading the offer, it does not say, 'If you don't accept this offer everything is off the table', and we say that's the significant thing.

PN1186

You shouldn't draw any inferences about that, it's just clear on its face. Any inferences would go against the propositions which our friends seek to build on that offer because of (a) their failure to communicate it clearly to our people; (b) the failure of the offer to contain a clear indication as well; and, thirdly, the conscious and deliberate move of position by the FRV from the explicit warning, on 15 June, which the government wanted, to a document that didn't contain any hint of it. So why would you construe the document as doing any more than what it says it does? Why would you construe it as being a warning that everything is off the table if you don't accept this offer?

PN1187

THE DEPUTY PRESIDENT BELL: Isn't that how the UFU construed it? It replied the same day, and I'm looking at A826, and it wrote, 'Your letter of 7 August, is suggestive of an intention to resile from a number of agreements already made by FRV'.

PN1188

MR BORENSTEIN: Because there were a number of terms that the letter - for example, the registration board term, that it previously purported to have been agreed. So there were -

PN1189

THE DEPUTY PRESIDENT BELL: It's fair to say, from this letter, that the UFU were not happy with the letter of - - -

PN1190

MR BORENSTEIN: They weren't happy, no.

PN1191

THE DEPUTY PRESIDENT BELL: - - - 7 August. I've perhaps understated it to a considerable degree there.

PN1192

MR BORENSTEIN: Well, they refer to three items. This is on page 826. One of them is the allowances clause, which is (a). The second one is the registration board, which is (b), and the third one - I believe those two are expressly referred to in the letter. The staffing increases is the third item. That's also referred to in the letter.

PN1193

THE DEPUTY PRESIDENT BELL: All right.

PN1194

MR BORENSTEIN: But there's no mention about the other hundred and however many clauses there were and marked green. So we say that the letter is a bargaining letter. It puts a position, it raises certain matters that they want to depart from, and there's a response to that, objecting to that. That's a far cry from the sort of thing that we saw on 15 June and is not apt to share the purpose of withdrawing agreement, after the bargaining declaration, from terms that had previously been agreed.

PN1195

I think the other matters that I wanted to address you on I've already mentioned in passing. Other than these oral submissions, we rely on the material in our written submissions and we say that you should determine the agreed matters as those that are in the agreed - sorry as are agreed in version 14 of the agreement and that the matters to be resolved are those that are stated to be unagreed in that document and in the position paper which identifies all that.

PN1196

Unless there are any other matters that I can assist the Commission with, they are our submissions in chief.

PN1197

DEPUTY PRESIDENT MILLHOUSE: Thank you, Mr Borenstein.

PN1198

COMMISSIONER ALLISON: Mr Borenstein, I just wanted to tease out the issue of authority a bit more. The letter of 7 August presents a package, but it also says there are some elements that the FRV has not been authorised by the government to include. Where to you see or how do you see the matter of authority playing out, in relation to FRV?

PN1199

MR BORENSTEIN: The starting point is the definition of agreed term, that's what the Commission is concerned with. The definition talks about an agreed term as between bargaining representatives. Much as she would like to be, the Minister is not a bargaining representative, so the focus of the Commission's attention has to be on what is agreed between the bargaining representatives: FRV and UFU.

PN1200

What goes on between FRV and the Minister, behind closed doors, or in camera meetings that these documents we got this morning refer to, we don't know. We only know what is conveyed to us by representatives of FRV. We know, for example, because they make clear, that an overall package has to be approved, ultimately, by the government. But, as Ms Campanaro has said in her statement, there was never any indication to them, in the course of bargaining, over three years, that agreement on any particular clause that was agreed, was subject to government approval and there was never any indication, from FRV, that the government had withdrawn agreement to one of the previously agreed clauses.

PN1201

I asked Ms Crabtree yesterday, you may recall, I asked her that. I asked her whether FRV was regularly reporting progress to the government about what was being agreed, and she said it had. And I asked her to confirm that the government, at no stage, said, 'No, you can't agree to that clause or any other clause' and she agreed with that.

PN1202

So all the ay through, all the way through, the agreements between the FRV and the UFU, about terms that should be included in an ultimately agreement were done on that basis.

PN1203

Now, we say that on that basis those terms meet the definition of agreed term. That the Minister sees fit, after the bargaining and declaration, to instruct FRV about what she would like or not like to see in an arbitrated outcome, or in an enterprise agreement, we say is not relevant to the Commission's function of identifying what are the agreed terms between the bargaining representatives.

PN1204

Now, in terms of the 7 August letter, as I said, that is a bargaining letter. It's a letter proposing a bargain. It's an attempt to try and reach agreement to undo what had previously been agreed, because the Minister didn't want clause A or B or C in the document. That was rejected. So, in terms of agreement, to vary what had previously been agreed, it goes nowhere. So you really come back to a proposition; can one party, at the instigation of the Minister, unilaterally try and undo what had previously has been agreed and which previously - which would otherwise meet the definition of an agreed term between bargaining representatives.

PN1205

So the Minister may tell FRV that she doesn't want this and she doesn't what that, but that doesn't effect the proper analysis of what was an agreed term and it doesn't effect the proper analysis of what the effect of the 7 August letter is.

PN1206

DEPUTY PRESIDENT MILLHOUSE: We have to interpret that provision, as you've said, in a way that is not irrational or extraordinary or capricious, and if we have a scenario where the bargaining reps is limited in its authority or it's clear that they don't have the budget or, from the union's point of view, that the union,

as the bargaining rep, is saying something that the union members have not approved, surely we can't interpret it that way, because that would lead to - well, it would not lead to a workable outcome.

PN1207

MR BORENSTEIN: Well, the position, throughout the bargaining, on all the terms, throughout the bargaining, up until the declaration date, was a position which - during which there was no indication from the Minister, from FRV or anyone else, to the UFU, that what was being done was not authorised. That's the starting point.

PN1208

So at the time of the bargaining declaration, before this letter, if the Commission were to apply itself to identify agreed terms, those terms would be agreed.

PN1209

Now, what's happened here is, we say, impermissibly, after the bargaining declaration a letter has been produced and the letter seeks to put an offer of money on the basis that certain terms that had previously been agreed should be withdrawn.

PN1210

Now, whoever wanted them withdrawn, whether it's the FRV or the Minister or whoever else, the first question is, asking for them to be withdrawn, if there's no agreement to them being withdrawn, can't affect what would otherwise be an agreed term, based on what's happened up until the bargaining declaration.

PN1211

So you then have to decide whether, after the bargaining declaration, during a post declaration negotiating period where the FRV and the Minister said, 'We're trying to narrow the field', they can come along and say, all of a sudden, 'We want to broaden the field', and whether that's permissible. We've said, 'Well, it's not'.

PN1212

But we say that the question of authority is something that's to be resolved between the Minister and FRV and it can't be right that a third party that has entered into an arrangement, agreement, I shouldn't use the word 'arrangement', an agreement or agreed terms, without knowledge and has proceeded, on the basis of that. I mean the UFU made an application for an intractable bargaining declaration, and it made it on an understanding that it had about what was agreed on that date.

PN1213

So if you want to look at the equities of the situation, we would say it's quite inequitable, having led someone to make an application up until that point and by making the declaration and giving up its right to take industrial action, I should say, and then come along and say, 'No, we had our fingers crossed, we don't really mean all that', that can't be right.

PN1214

As I said earlier, there are questions of balance here, between competing interests, but it can't be right, in any sort of contractual situation, that if party A contracts with party B and then later on comes along and says, 'Party C told me I haven't got authority to do that', that doesn't effect the situation.

PN1215

In fact, in an analogous situation the Full Court of the Federal Court, in a case called *ANMF v Kaizen* which we've actually got in our list of authorities I believe, it's number 1 even. That was a case, I don't know if you recall or know it, but that was a case where an employer's bargaining agent bargained on behalf of the employer, with the Nurses Federation, and entered into an agreement. Then it was sought to prevent the approval of that agreement, by the Commission, on the basis that that person didn't have authority to sign the agreement, on behalf of the employer.

PN1216

The Full Court held that his behaviour and his conduct, throughout the bargaining, demonstrated that he had an ostensible authority to bind the employer and they held the employer to the agreement, based on his signature.

PN1217

Now, throughout this process, if we need to use that sort of terminology about authority, it's at least clear that the ostensible position of FRV was that it was authorised to make these offers, and they did, and they were agreed.

PN1218

We just say it's too late, after the event, for the Minister to come along and say, 'Well, you agreed them back then, but I want them out now'. We say that it can have no effect and that the letter just needs to be construed on the basis of its terms and we say that on its terms it is an offer. The offer is not accepted and so it doesn't change the pre-existing state of affairs.

PN1219

Had it included something like the ultimatum that was in the instructions, on 15 June, there might have been a completely different response. There might have been a completely different response. The UFU might have withdrawn its application and gone back to taking industrial action.

PN1220

But the ultimatum wasn't there. This was an offer and it was responded to as an offer and we say it's ineffective to undo the terms that have previously been agreed.

PN1221

DEPUTY PRESIDENT MILLHOUSE: Mr Borenstein, thank you very much for your submissions.

PN1222

Parties, we propose to adjourn for lunch. Before we do so, without holding FRV or the Minister to a timeframe for its respective submissions, do you consider, Ms Sweet, that there is any need to truncate the lunch break?

PN1223

MR O'GRADY: Could we confer?

PN1224

DEPUTY PRESIDENT MILLHOUSE: Thank you.

PN1225

MS SWEET: I can't really say without - no, we don't believe so, Deputy President.

PN1226

DEPUTY PRESIDENT MILLHOUSE: All right, thank you very much.

PN1227

MR O'GRADY: Perhaps if we come back at 2, rather than a quarter past.

PN1228

MS SWEET: I agree.

PN1229

DEPUTY PRESIDENT MILLHOUSE: We'll return at 2.

LUNCHEON ADJOURNMENT **[1.01 PM]**

RESUMED **[2.01 PM]**

PN1230

DEPUTY PRESIDENT MILLHOUSE: Thank you, Ms Sweet.

PN1231

MS SWEET: Thank you, Deputy President. I indicate I've spoken with Mr O'Grady and we're conscious to avoid, where possible, duplication between FRV's submissions and the Minister's submissions, which means that I will be taking, I think what Mr O'Grady has called the minimalist approach, so I'm going to briefly address you on two sets of closing written submissions and in light of the evidence, on the evidence that's fallen from the witnesses in the last day or so, I'm then going to address some short points of the evidence of both Ms Crabtree and Ms Campanaro, and then I have a short reply to some of the matters raised by my learned friend, particularly focusing on the 7 August letter and the proposed negotiating bargaining period.

PN1232

Deputy President, FRV cannot be more than what it is. It's a creature, like barristers of instruction, it is a creature with limits. One of those limits is that it bargains under the auspices of the wages policy. At all relevant times the UFU knew this. It was told this by FRV, prior to formal bargaining. The UFU brought a section 240 application because FRV was not acting quickly enough to obtain formal authority to commence bargaining. That formal authority is a requirement, under the wages policy.

PN1233

The relevant 240 application is at volume D, 2206, where part of the relief sought is some orders, with respect to what FRV should do to obtain formal authority. And you'll see that the requirement to obtain authority, prior to bargaining, is contained within the wages policy and within the enterprise bargaining framework section of the wages policy, and that is at 2179, volume D.

PN1234

The Full Bench will have noted, Ms Campanaro was very nuanced in her evidence about what she'd read and what she'd taken away from things and she shied away very much from virtually everything that was contained within the enterprise bargaining framework and anything that references in principal agreement. But her evidence was, she's read it. The evidence was that the UFU's understanding of it was nuanced enough that they sought the help of this Commission to kick-start bargaining, under the wages policy. So that speaks volumes about the UFU's understanding of the wages policy and it's applicability to these enterprise negotiations.

PN1235

The wages policy was on the table from the very beginning of formal bargaining. It was raised by FRV in the first meeting and the Full Bench will recall, I took Ms Campanaro to the agenda for that meeting, which was contained as part of the Charter, which appears at the - the relevant portion appears at volume A62, and it is a matter for the Bench to construe that Charter. But whether or not it's formally part of it, or not part of it, it's raised in the beginning and it's clear that it's a fundamental tenet of bargaining principles and bargaining protocols within this negotiation.

PN1236

The union was aware that FRV considered itself to be bound by wages policy. That concession was made by Ms Campanaro. It's also contained in her evidence, volume D page 736 paragraph 71. To the extent that the charter doesn't contain the wages policy by reference, it's clearly not a comprehensive statement of what the principles were within bargaining.

PN1237

The Full Bench will also recall I took Ms Campanaro to a number of the versions of the FRV response to the log, which expressly stated that the agreement, any agreement, in respect of matters that were in the log but not otherwise referenced in that response were agreed in principle and were subject to final agreement of an overall package and the Full Bench will remember that Ms Campanaro's evidence was somewhat evasive on this and she would not accept the plain implications of that clear statement. She tried to narrow it down to just about wages and she said, 'I read the document, the whole in principle meant only wages', and she did that with a number of documents which were against the statements in her evidence, and she was not particularly convincing in her denials for that.

PN1238

I also took Ms Campanaro to the bargaining meeting of 11 October 2022, and the 240 proceeding where FRV set out what had occurred at the meeting and I raised with her the inadequacy of the minutes of the 11 October 2022 bargaining meeting, because they didn't sufficiently capture another express requirement.

FRV said, 'We wanted to provide the log, we wanted to provide the new version of it, which reflects our in principle agreement'. There was a great deal of shying away, by Ms Campanaro, of anything that suggested that this was put on the table in an unequivocal way which was not limited to wages and allowances.

PN1239

So the evidence is clear that, from at least August 2022, this was the logs, the response to the logs clearly set out the in principle, subject to a government and package nature, of FRV's agreement.

PN1240

I took Ms Campanaro to the 15 March 2023 UFU counteroffer, which purported to accept the FRV's offer, with various conditions, which was, essentially, a rejection and a counter offer. At least from this point, the UFU is referring to an agreement between the parties, which is not reflecting the in principle agreement and Ms Campanaro refused that that was being done deliberately, in the full knowledge that any agreement of FRV was in principle only, subject to the conditions that I won't keep repeating.

PN1241

I also took Ms Campanaro to the report back, on 17 March, before Wilson C, and to a document that was part of that report back, which appears at volume D, page 2273, and which was expressly said to be read in conjunction with FRV's detailed response to version 12 of the log. In my submission, what that evidence showed was that it was expressly discussed within the section 240 conferences and Ms Crabtree gave evidence to this effect yesterday, that FRV, in those conferences, was plain about the fact that their agreement was in principle and that this was something that was raised with Commissioner Wilson and which he was obviously aware of. There are various statements or various references in his statements to the wages policy. His statements ought to be read in the context of these report backs, which clearly raise the in principle nature of the agreement.

PN1242

One might infer, and I invite the Full Bench to infer, that Commisisoner Wilson used the word 'resolved', not 'agreed', advisedly, when he said the various matters between the parties had been resolved, because they were resolved, save for the issues of the raised allowances, to the extent that FRV, as a (indistinct) agency could agree, and that was used advisedly.

PN1243

There has been exceptional focus, by the UFU, on the 7 August 2023 letter, and one can understand why that might be. In my submission, we had the song and dance yesterday about produce this, produce this, I call for this, I call for this, in respect of documents that in no way will assist the Full Bench to construe the 7 August offer. My learned friend today has sort of had it both ways to say these, in my submission, unremarkable communications between government and FRV, as to the terms of the 7 August offer, that they could have anything to do with assisting to construe the offer. They can't, that's the basic principle of cases like *Toll v Alphapharm*, where they're not objective background facts known to both parties.

PN1244

So there's been this sideshow, over the last two days, about these documents and Ms Crabtree has been unfairly maligned for leaving them out of her statement, in circumstances where they're simply not relevant. Particular attention was paid to - well, the ultimatum wasn't put in the letter, those words to appear, that's correct, but the fact that there was discussion between Ms Crabtree and others, and government, doesn't assist to resolve or construe that letter. It's construed on its terms, pursuant to the objective background facts known to the parties.

PN1245

In any event, it's all a bit neither here nor there, so the ultimatum is not in there, and it's not there. The evidence is, and Deputy President Bell picked up on this before and raised it with my learned friend, it was treated as if it was there. I don't want to take the Full Bench to many of the documents, but I will take you this one.

PN1246

On any view, the 7 August offer was brought on an overall basis and it was rejected outright and out of hand, in the words of Mr Marshall, on a whole of package basis. But even, for argument's sake, if the agreement to those - the other matters, what are effectively now uncontested matters, and I'll come to the fact of uncontested and how that means the process is actually working rather than going off track. Even if that agreement to the other matters remains, it couldn't go any higher than we've always said, which is in principle agreement.

PN1247

Therefore, on the question, the question that the Full Bench is asked to decide, the agreement to those matters is still conditional upon whole of package and government approval, which doesn't exist at the relevant time, which is at the end of the PVMP.

PN1248

So whether or not - so, first of all, the discussions between departments and FRV have no relevance and even if the in principle agreement remains, it doesn't lead to there being any agreed terms.

PN1249

Much attention is paid to this by my learned friend because if there's some sort of knock out of the 7 August letter, that leads to agreed terms, but, of course, we say it doesn't. But there are a number of layers as to why there aren't agreed terms, and these are dealt with in the submissions, but you could leave the 7 August offer out, there still aren't agreed terms because there was always the wages policy. That had always been communicated to people and, in any event, you've got the PVMP and you've got the letters, the exchange of offers, on 17 and 18 October and the inescapable conclusion from that exchange of correspondence is that the parties hadn't agreed any terms.

PN1250

I want to just raise now, this argument that my learned friend puts, as to our construction is wrong because it would lead to all sorts of dreadful outcomes. It isn't, in this case, and there's no indication that you - you shouldn't construe it,

based on what is, in effect, scare mongering by the UFU. The workplace determinations and the concept of agreed terms have been in play, in the industrial arena, since the commencement of the Fair Work Act. Obviously not in respect of intractable bargaining but in terms of industrial action workplace determinations.

PN1251

What is being asked is that the Commission determine, at this point, what was the consensus. What do the parties agree to? That's the query. What was agreed to and what is still in issue. The fact that what is being done here is extremely orderly, no, there aren't agreed terms, but there are a number of things that are now put as uncontested and the Commission, of course, has the discretion to look at the fact that they're uncontested. Look at the merits of the matters. Look at the fact that many of these are long agreed terms, in order to make the workplace determination. So this isn't, I think what I described before the previous Full Bench, this isn't a ground zero determination, it actually shows that the provisions are working, they don't lead to these sort of end of days catastrophic results. This is an example of the provisions working.

PN1252

In respect of this concept of agreed terms, the first case in our authorities, *ALEA v Qantas Airways*, it's also in the Minister's authorities, and we've quoted paragraph 18. This is one of these cases where both sides says it's on point and it supports them. But you'll see that there, this was the first workplace determination, in respect of industrial action workplace determinations, and you'll see - I don't need to take your Honour's to it, but it sets out what the definition of an agreed term is, at that time, under 274. It's the same. It's the same definition of what is an agreed term. So when my learned friend says there's been no consideration of it, there has, in the context of industrial action workplace determination and there's no relevant difference for what the Full Bench has to decide.

PN1253

Of course, in that case, while the Full Bench says that:

PN1254

There may be circumstances where agreement to a matter, subject to an overall satisfactory package might mean the matter is an agreed matter, within the meaning of the relevant provision.

PN1255

But in that case where there were three matters where one party had said, 'Agree to these things and then I'll withdraw this other claim', and the Full Bench said:

PN1256

As no agreement was reached on the other outstanding matters, before the end of the post industrial action period, the condition attached to the withdrawal or agreement, with respect to these matters was not satisfied and those three matters were also at issue at the end of the post industrial action negotiation period.

PN1257

Again, it wasn't an end of days scenario, it was just a matter of categorising what's agreed by the end of the time and then what's in issue.

PN1258

So we say that it's exactly the case here. We've got a number of - the vast majority of conditions that were subject to overall agreement and they aren't agreed terms, for the purposes of the workplace determination, but they've become uncontested matters and the Full Bench can take regard to that consensus to trigger my learned friend when the Full Bench makes the workplace determination.

PN1259

What my learned friend is trying to do is rob the term 'in principle' of its meaning and of its protective cloak and colouration, particularly for bargaining parties like FRV, where the quality of its agreement is necessarily, for want of a better work, hog tied to things like the wages policy. In my submission, it's a furphy to say that this is otiose, everything is in principle until you've got approval. It misstates the case that's put by FRV, which is to say that what we say is the relevant condition is a suitable overall package and government approval. You can see, in the wages policy itself, that the need for this comes before there are any steps taken, with respect to the Fair Work Act steps.

PN1260

My learned friend is trying to use a trick of the light to say, 'All bargaining is conditional because of the conditions of the EA approval process'. That is not what we're saying and it can't be how bargaining would practically operate. This idea of this sort of set and forget is entirely inapt for bargaining parties such as FRV.

PN1261

It's not that, I think it was put against us by my learned friend that, for the purpose of construing 274(3), the focus is expressly about agreeing between bargaining representatives and not outsiders, 'outsiders' obviously meaning the Minister. We're not trying to introduce the Minister as a bargaining party by a side wing. This is not about what the Minister agrees, it's about the quality and the limitations around our agreement, in respect of looking at what can be an agreed term, under the Act.

PN1262

It's put against us, in the reply submissions, at paragraphs 14 to 15, that we're insisting upon there being some sort of determined or settled agreement whereas that state is not achieved until agreement is approved. Again, our submission is not that the state of agreement had to be settled or determined for all time, but, in the sense that it couldn't be reconsidered or revoked, such as would be the case once the agreement is approved. It was simply that the agreement should be settled or determined in an unqualified way at the relevant time, here being the post declaration bargaining period end.

PN1263

I just want to go now to the - circling back to the 7 November offer, 7 August offer. At 2291 the Commission makes clear, says specifically:

PN1264

It's a settlement offer. It's a settlement offer that's been put in the context of an overall package and it's provided on a without prejudice basis.

PN1265

Then we see, on the same day, a very lengthy letter from Mr Marshall, which starts at volume D 2293, and the first thing it does is it express the concerns about FRV's conduct and raises a concerns notice, under 229 of the Act. The second paragraph:

PN1266

Given the long history of bargaining for a proposed FRV/UFU operational staff enterprise agreement, and the agreement reached between the bargaining parties on all but two matters, this offer is rejected outright.

PN1267

And we see down the very end, which is at 2296:

PN1268

Your offer is made on the eve of the first hearing of the UFU's intractable bargaining application. Aside from matters relating to the increase of quantum of wages and allowances, everything else was agreed and you have gone on the record to that effect. This offer is rejected because it's not a genuine offer, it's nothing more than a cynical disingenuous and transparent attempt to reframe the issues that will be liable to be arbitrated in an intractable bargaining workplace determination. It is seen by the UFU as such and rejected out of hand.

PN1269

So it's been rejected outright. It's been rejected outright because it wasn't seen as a genuine offer. There's no evidence that it wasn't a genuine offer and there's no evidence that it wasn't put on an overall package basis, which it was.

PN1270

This argument that somehow the PMP should be construed such that parties - it's not what it says on the label, which is that it's a negotiating period, but somehow that, in a way I don't quite understand, must mean that that offer and its rejection cannot be relied upon by the Commission in working out whether or not there is an agreed term is something I don't understand, but I urge the Full Bench to reject that construction.

PN1271

The post negotiating bargaining period is not about not going backwards, although, obviously, all parties want to go forwards and this party certainly did. It's about finding out what is agreed and what is in issue. That's the statutory job and that's the statutory purpose of the negotiating period and working out, at the relevant time, where the matters sit.

PN1272

This concept of some sort of unilateral action because there were, again, in my submission, unsurprising meetings between government and FRV is now

described as some sort of unilateral movement. The fact is, in bargaining, most offers are unilateral, that's why they're an offer being made, unilaterally, to another party. It's put and then the offer is rejected. It wasn't suggested to Ms Crabtree that this wasn't a genuine offer. She clearly had misgivings about its terms and one can understand why she might have. But it was put, on its terms and rejected. There's no suggestion that it was or no evidence that it was capricious and somehow shouldn't form part of the Commission's consideration as to what is an agreed term.

PN1273

It needs to be construed in its context. It was written well before the statutory threshold for determining what 'agreed terms' are and to say there's any ambiguity as to whether the version 14 matters were withdrawn at the relevant time, then the 18 October letter, from FRV, puts that beyond doubt.

PN1274

These assertions that have come from the other end of the bargaining table about a tactical ploy should be utterly rejected. Again, there's no evidence and it wasn't put to Ms Crabtree that this was a tactical ploy. It was not put to her that this was part of some dastardly ploy and that she was some Machiavellian mastermind. Her presentation in the witness box was the very opposite of that. She was an absolutely genuine bargaining participant trying to reach agreement with the UFU and any other description of her is entirely unwarranted and unfair.

PN1275

She was, clearly, in a difficult position, as was the government that was trying to do its best to approve a major agreement in accordance with public sector principles in a challenging economic environment. The idea that this is not genuine is a tactical ploy and you should disregard it in my submission ought to be rejected.

PN1276

There have been various nuances about *Jones v Dunkel* inferences made from the end of the Bar table but of course *Jones v Dunkel* inferences are only at where there's an unexplained failure of the parties to give evidence. These internal machinations as I've said today and I said yesterday, were not relevant to whether or not there are agreed terms.

PN1277

So, to the extent that there's something put against FRV that there's been some failure to call people who could give evidence that would have assisted the Commission but wouldn't have assisted the FRV is not a submission that ought to find favour. The rule only applies where it's required to explain or contradict some other evidence.

PN1278

The evidence here establishes the importance and the union knowledge of the wages policy and its applicability to this bargaining.

PN1279

And in my submission the UFU's argument in this case is actually contrary to what it said its putting this construction of agreed terms as being what – is effectively what the union sees as a binding and irrevocable agreement. It seems to be based largely on the evidence of

PN1280

Ms Campanaro which was to the effect that in her view that sort of agreement had been reached.

PN1281

But I imagine Minister O'Grady would happily say because a lot of that was entirely conclusory and we appeared based on Ms Campanaro's evidence to be of wilful blindness with respect to the wages policy, with respect to anything that didn't say 'wages and allowances.' The evidence of people like Mr Parkinson and Ms Walker, Ms Schroeder, the Fire Service Commissioner, would not have assisted the Commission in its role. And there is no, in fact, identified evidentiary conflict which such evidence is said to be (indistinct). Yes, the Full Bench, that completes my oral submissions. I otherwise rely on my written, or our written closing submission.

PN1282

DEPUTY PRESIDENT MILLHOUSE: Thank you, Ms Sweet.

PN1283

Mr O'Grady?

PN1284

MR O'GRADY: Yes, thank you, Deputy President. Can I commence by handing up some amended documents which I have provided to my learned friends this morning. And they're three documents which my learned instructor will pass to the associate. The first is an amended position document and you'll see that the amendments are tracked in these documents. And the amended position document, an amendment of the document that is currently in court book part C at page 3.

PN1285

And you will see that what we've done is we have enumerated some other clauses that go to wages and allowances, and those are underlined as they appear in number 1 of attachment A. And one thing I think we are all in heated agreement about as I understand the position, Deputy President, is that wages and allowances are not an agreed term. So, there's nothing controversial about that. The other documents are amended outlines of our submissions on matters in issue and the amended reply submission, so they're relevantly at court book part C at 15 and page 41.

PN1286

All we've sought to do in respect of those amendments is incorporate references to the court book in our footnotes and/or where we've referred to the evidence in these submissions. We've simply considered that it might assist the Full Bench if you had access to relevant court book references, particularly in circumstances

where a number of the documents, for example, the wages policy, appear at various times. And we obviously rely upon those submissions.

PN1287

What I would be proposing to do this afternoon is briefly address a number of the broader issues that my learned friend raised this morning and then go in some more detail to some of the factual matters because in our respectful submission our learned friend has not correctly stated what the documents disclose. And then finally address some of the other matters that flow from my learned friend's submissions.

PN1288

In respect of the general observations, the first submission we would make is that any suggestion that FRV and the minister's position would undermine bargaining or is inimical to the scheme of the Act or it is unfair as between the parties, we say it should be rejected. Indeed in our submissions the construction contended for by the UFU is going to have those effects.

PN1289

And indeed as you pointed out, Commissioner Allison, there is a degree of potential capriciousness in the construction contended for by the UFU in circumstances where bargaining invariably involves pay rates and invariably involves parties working through issues on the understanding that in respect of one party agreeing to X, other parties will agree to Y.

PN1290

If it be the case that in the course of argument having obtained concessions from another bargaining representative a party who had not made concessions or sufficient concessions or the concessions being sought by the other bargaining representative can run off to the Commission, lock in the concessions that have been achieved in bargaining to date. Because they can't be the subject of arbitration.

PN1291

And then chance there are in respect of the arbitration for the determination there is in our respectful submission a number of capricious, unfair and adverse consequences for the purpose of bargaining that apply. Dealing with them in reverse orders, why would a bargaining representative make any concession in bargaining if they know that it is open to the other bargaining representatives upon having jumped through the hoops of a 240 application and being able to characterise the current position as intractable. They can run off and lock in whatever has been conceded.

PN1292

In our respectful submission such a construction is going to significantly undermine the policy objective of enterprise bargaining. Because one cannot sensibly work through the issues in the knowledge that whatever conditions you attach to it, and this is my learned friend's submission, it doesn't matter how you express it, whether it's conditional or in principle or subject to agreement or subject to some other concession, once you agree it it's locked in.

PN1293

And in our respectful submission that is as we say, amicable to the focus within the Act on bargaining and the objectives in respect of achieving productivity and the like that can be achieved through bargaining. It obviously has a capricious consequence because for the person who has made the concession they lose the opportunity on my learned friend's construction to have the matters that were the subject of that concession so subject to the arbitration.

PN1294

They are left in the position where whatever they've conceded, whatever they have to put on the table is locked in. And then they have to, in effect, fight through the various criteria set out in 275 with the other bargaining representatives in respect to the matters that are still in issue. And my learned friend says, oh, well, that can all be taken into account by the Full Bench when they come to 275. The Full Bench when it comes to 275 is confined by the criteria that are in that provision.

PN1295

It does not have the ability to unwind a concession that has been made if it be the case that that concession give rise to an agreed term. It is also in our respectful submission contrary to the terms of the Act. And can I take you to section 274 subsection 3. 'An agreed term for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had at whichever of the following times applied, agreed should be included in the agreement.'

PN1296

And the relevant time here is at the conclusion of the post declaration negotiating period. My learned friend's construction gives no work for the words, 'at whichever of the following times applied, agreed should be included in the agreement.' My learned friend's construction is an agreed term, is a term that the bargaining representatives have at any stage of the negotiations for an enterprise bargain agreed should be included in the terms of the agreement.

PN1297

If parliament had meant that, they could have said that and they didn't. And as my learned friend knows because he handed up and referred to Project Blue Sky this morning, a key feature of statutory construction is to give work to the words in the provision. And my learned friend's construction gives no work in our respectful submission to the fact that parliament has identified a specific drop-dead date, namely at the conclusion of the post declaration negotiating period.

PN1298

In our submission the UFU construction also fails to have regard to how bargaining operates. As I've already indicated there is in our submission a feature of bargaining trade-offs. And Commissioner Allison, you made this point in your question to my learned friend. One can readily imagine a scenario where because that is a priority for the employer the union might agree to change the redundancy provisions in an enterprise agreement in consideration for there being some wage increase.

PN1299

Under my learned friend's construction, once that concessions have been made by the employee organisation in respect of, say, redundancy, the employer can run off and seek a declaration and there can be no revisiting of that issue. In our respectful submission that is contrary to the way bargaining operates and as I've already indicated would defeat it as an objective of the Act.

PN1300

My learned friend also spent some time this morning saying that on the construction of FRV and the minister the Commission's capacity to act as a circuit breaker would be lost. In our respectful submission there is no basis for that proposition. The Commission can still act as a circuit breaker and these provisions can still act as a circuit breaker if bargaining reaches an impasse.

PN1301

A declaration is made. The parties then can seek to narrow the issues in dispute during the post declaration negotiating period. They may resolve the agreement in its entirety in the knowledge that they're now in a space where absent agreement there will be an arbitration. And arbitration may carry a risk for both sides.

PN1302

If they're not able to reach agreement then there is the capacity of the Commission to arbitrate the matters. And that in itself will act as a circuit breaker. That can be contrasted in our submission with what flows from the construction being contended for by the UFU where there is no incentive to bargain for the reasons I have already indicated.

PN1303

There is no incentive to engage in making concessions because you do so at your peril, at the peril that at an opportune time when a bargaining representative thinks that enough concessions have been made, they can go off to the Commission, they can get a declaration and they can force you into an arbitration where they've got no skin in the game, where they've obtained and locked in the concessions that they've achieved and then they have to chance their arm as to whether they get more or less in respect of the matters that are still in issue.

PN1304

The submissions being contended for by my learned friend also raises the issue that you again touched on, Commissioner Allison, namely the question of authority. It does in our respectful submission give rise to a capricious outcome whereby a government agency who, and I'll go to this in more detail in due course, who because of the constraints of relevant government enterprise bargaining and wages policy is not able to agree to particular terms, is at peril of having those terms in effect locked in.

PN1305

Because in the course of bargaining and seeking to reach an agreement as a whole, concessions have been made. And of course, importantly terms and conditions cost money. My learned friend doesn't seem to wish to engage with that as a brutal fact. Clearly wages and terms and conditions are interrelated. The capacity to offer a particular term and condition may well be contingent upon a particular

wage outcome just as a willingness of an employee organisation to make concessions in respect of redundancy might be contingent on a particular wage outcome.

PN1306

My learned friend's position seems to be, well, you can go into a car sales room, you can say I want to have the Ford Falcon with these options, and you are locked in even though you don't know what the price is going to be. And that is why there is a need to look at these things as a package and that is why government wages policy, as I'll come to in a moment, insists upon that being the case.

PN1307

And to the extent that my learned friend says, well, everything is conditional because enterprise bargaining can only ever give rise to an agreement once an agreement has been approved by the membership and voted up and so it's otiose, I think is the language he uses in his written submissions to say, well, it's in principle, because nothing is agreed until everything is agreed.

PN1308

But the reality is here we have an additional layer of conditionality because the capacity of the bargaining representatives for FRV to make concessions was itself conditional on government approval. That's completely independent and comes before the issue of whether or not an agreement can be agreed by employees. Now there may be other employees who aren't subject to those constraints but on the material before the Commission FRV clearly was.

PN1309

To the extent that my learned friend says, well, our construction would mean there were no agreed terms and that that is a reason why it should not be accepted, there are a couple of points we'd seek to make. Firstly, I think the Full Bench will find at tab 20 of the UFU's list of authorities the explanatory memorandum or the revised explanatory memorandum in respect of these provisions, and can I simply direct the Full Bench to paragraph 869 and I'll read it for emphasis:

PN1310

Agreed terms would be defined as any terms of a proposed enterprise agreement which the bargaining representatives had already agreed prior to the expiration of the post declaration negotiating period, if any.

PN1311

So, parliament has clearly contemplated that there may be a scenario where there are no agreed terms for the purposes of section 474 or at the time, if any. And again you'll note that there is this focus upon the relevant time being the expiration of the post declaration of the negotiating period. Or if there is no post declaration of the negotiating period, at the time the intractable bargaining declaration was made.

PN1312

The other reason why in our submission no weight should be given to my learned friend's suggestion that there won't be any agreed terms, is that one can readily contemplate there being a situation where there are terms that the parties are

willing to have included in the agreement come what may, irrespective of what occurs in bargaining in respect of the matters that are the subject of the log of claims.

PN1313

It may be for example that it generally a rollover agreement, save for one or two terms. And the parties may be quite content with those terms. It may be they may be terms that are necessary to maintain for the efficient operation of the business and there is no desire upon anybody to upset them. Now you can have that situation and therefore you can have agreed terms for the purpose of these provisions.

PN1314

There is no suggestion in our respectful submission that those are the terms that were the subject of this application. This application and this negotiation was occurring on the basis that everything was to be a package. And in those circumstances in our respectful submission there are no agreed terms although the Full Bench will have noted in the position statement, whilst we say there are no agreed terms for the purposes of 474, we have indicated that the vast bulk of terms are matters that we do not seek to have an active contest in respect of.

PN1315

So, to pick up my learned friend, Ms Sweet's language this sort of doomsday scenario that might be postulated by my learned friend about everything having to be arbitrated, we say that that is slightly overblown, that the reality is there will be a need to apply the statutory criteria to the matters that are not being contested but are not agreed terms if I can use that language. And I would have thought that would have been a relatively straight-forward process.

PN1316

And it flows that my learned friend's suggestion that, well, the minister and the FRV's submissions are to the effect that you need to have an agreement on the entire package before there can be an agreed term, again is in our respectful submission misconceived. The position of the minister is that there is scope under the construction that she contends for there to be agreed terms. And one would expect that that would often be the case.

PN1317

And that occurs, if you like, at a number of stages. It might occur during the course of bargaining because these are terms that people are content with, come what may. It may occur during the course of the post declaration negotiating period where the parties in light of the fact that there is now going to be an arbitration in respect of matters that have not been agreed for the purpose of the act, are willing to make concessions in order to narrow the scope of the dispute between them.

PN1318

And I'll have to come to it in due course but the position of the minister is that when one has regard to what occurred here it was the UFU's failure to meaningfully engage in the post declaration negotiating period that gave rise to

the fact that there are no agreed terms. The FRV was prepared just to have as its starting point the

PN1319

7 August 2023 letter and work through issues in order to try and narrow the matters in dispute. But the UFU were not prepared to engage in that process and hence we are where we are.

PN1320

The last point I wanted to make by way of general observation is that my learned friend's submissions are in respect of the meaning of 'agreed terms' and the weight to be given to 'should' and the like, in our submission is contrary to authority. And my learned friend, Ms Sweet, referred the Full Bench to ALAEA decision which is behind tab 3 of the our bundle and as she said, the relevant terms of 274 insofar as applies to industrial action of workplace determinations in substantially the same terms as those that applied to intractable bargaining determinations.

PN1321

You will find at page 169 at the foot of that page they've set out the relevant definition of 'agreed term' for an industrial action determination and it says:

PN1322

An agreed term for an industrial action related to termination is a term where the bargaining representatives for a proposed enterprise agreement of concern had at the end of the post industrial action negotiating period agreed should be included in the agreement.

PN1323

The word, 'should,' upon which so much of my learned friend's submission rests is there in respect of the equivalent provision concerning an industrial action related workplace determination. And as my learned friend, Ms Sweet noted, at paragraph 18 of that decision the Full Bench was prepared to proceed on the basis that notwithstanding the word 'should' being in that definition, that if there was not agreement in respect of outstanding matters then there would be no agreement in respect of matters that have been conditionally agreed.

PN1324

In my submission and in those circumstances, in our respectful submission the word 'should' cannot be given the meaning contended for by our learned friend and indeed much of the arguments raised this morning by him we submit falls away. A similar approach although in a slightly different context was taken by the Full Bench in the *TWU v Qantas Airways* case. That's behind tab 15 of our decision's authorities.

PN1325

Again we're dealing with an industrial action workplace determination. So, again we're dealing with the definition of 'agreed terms' being in substantially the same form and that appears at the top part of page 23 of the decision. And at paragraph 59 the Full Bench says:

PN1326

It is accepted by the parties in the proceedings that there were no agreed terms at the end of the post industrial action negotiating period because the negotiations were conducted on a premise that nothing was agreed until everything was agreed.

PN1327

We agree that this is the position and there are no agreed terms as defined in section 274 of the act to be inserted in the workplace determination.

PN1328

To the extent there is now some consensus as to certain matters we are required to apply the test to the court terms and any agreement is likely to impact upon the merits of those matters.

PN1329

In our submission parliament can be taken to have understood that there was a settled line of Full Bench authority in respect of the definition of 'agreed terms,' in respect of industrial action determinations. And when it enacted section 274(3) and adopted nearly identical language save for the reference to intractable bargaining as opposed to industrial action, nearly identical language.

PN1330

They should have intended to have sought to achieve the same result, namely that the approach that would be adopted by the Commission in determining these issues would reflect the line of authority that had been established back some ten years ago.

PN1331

Could I then turn to some of the evidence and to this end I want to go to some of the materials that are referred to in both Ms Crabtree's and Ms Campanaro's statements. Can I start with the initiation of bargaining and this is dealt with in Ms Crabtree's first statement and it's in exhibit 10 to her statement and I think it is at page D2153. And you'll see that this is – I'm sorry, that's not the right reference. I apologise.

PN1332

Yes, sorry. It's attachment 4 to that statement which I relevantly at 2203. And you'll see that this was a 240 application that the UFU brought against FRV in respect of the failure of FRV to take the necessary steps to commence bargaining. And relevantly at paragraph 13 of part 2.1 describing what the bargaining dispute was about, the UFU say,

PN1333

On 29 July FRV informed the UFU that to bargain under the applicable wages policy the UFU needed to make a

PN1334

request the Victorian Government to commence bargaining by 1 August. FRV informed UFU would make the submission with respect to the new enterprise agreement within this timeframe to ensure when the parties were ready to

commence negotiations (indistinct) that they would be in a position to do so having already obtained government approval.

PN1335

And then there's:

PN1336

The plaintiff FRV, failed to do that.

PN1337

And then in 2.2, at 1(b):

PN1338

What's being sought is to formalise - the matters in dispute are the (indistinct) by FRV to formalise a bargaining process by taking the necessary action to obtain Victorian Government approval.

PN1339

And then if I could ask you to go to the relevant wages policy. Because it's apparent in our submission that UFU at least in that application - or brought that application conscious of the fact that FRV was bound to – right to comply with government wages policy.

PN1340

Indeed, it couldn't commence bargaining without it and what was being sought was that FRV be required to do what it needed to do to be able to commence bargaining. And then if I could take you to the wages policy, and this appears at various parts of the materials, but dealing with Ms Campanaro's statement, it's exhibit LC12 which is at Volume A, Part 745 or page 745. And the first point, I'd seek to draw the Full Bench's attention to is at – notwithstanding Ms Campanaro's rather flippant answer yesterday, 'Well, they only dealt with wages because it's called a wages policy', or words to that effect - when one looks at the policy, it is the wages policy and enterprise bargaining framework. Any suggestion that this is just about wages in our respectful submission is certainly not reflected in the title, but nor is it reflected in the substance of that policy.

PN1341

And that becomes apparent at page 747 which deals with the public sector priorities where there's reference to those priorities and the first one which I think Ms Campanaro was taken to in evidence yesterday is to deliver exceptional service and value for Victorians. And that's broken up into a number of bullet points and the first one being, 'Deliver service efficiencies'.

PN1342

And then at the foot of that page, you will see:

PN1343

There are a range of tools available to deliver these priorities including legislation policy and operational practice. Enterprise bargaining in is one important tool.

PN1344

So this isn't just about wages. This is about among other things, improving efficiencies. And this is what the policy seeks to govern. And then it says:

PN1345

The government wages policy has been set to encourage property to agencies to reflect these priorities in their operational practice.

PN1346

And then you will note at page 750, there is a specific provision for something that's described as the secondary pathway. And the secondary pathway as appears from the second substantive paragraph under that heading is in effect a role-over agreement with the exception of wages.

PN1347

So there is a mechanism where if you want to just keep things the same, you can do so. But if you're not going to do that, then this policy in all of its manifestations applies to you.

PN1348

And then if I could ask the Bench to look at page 718, and the first paragraph under the heading 'Enterprise Bargaining Framework':

PN1349

The Enterprise Bargaining Framework describes the governments approval arrangements which public sector agencies must meet before commencing bargaining, during bargaining and before seeking employees approval of final enterprise agreements.

PN1350

It couldn't be clearer in our respectful submission that the effect of this policy which is in mandatory terms, applies at all three stages and these are mandatory requirements that must be met, by a government agency like FRV. You will see then, there's a heading of 'Major and Non-Major Agreements', and importantly:

PN1351

Major agreements include any enterprise agreement covering relevantly firefighters.

PN1352

So not only is this an agreement that is bound by – or that binds FRV, it's a major agreement requiring a higher degree of scrutiny by a government. And then at page 754, we have got what is to occur during bargaining.

PN1353

And public sector agency must keep their portfolio department. IIV and DTF informed about the progress of bargaining.

PN1354

And then in the second paragraph:

PN1355

Public strategies cannot make offers during bargaining outside approved parameters without the offer and the expected financial implications being approved at the appropriate level of government for agreement (indistinct).

PN1356

And then in the third paragraph:

PN1357

All offers should be made on an in principle basis with the public sector agency. Communicate and the offer is subject to government approval and maybe subject to change to ensure compliance with the wages policy, the industrial relations policy, the Fair Work Act, and other relevant legislation.

PN1358

So it is clear in our respectful submission that FRV was only ever empowered to make an in principle offer. And then:

PN1359

Approval requirements, all proposing enterprise agreements require the approval of government prior to commencement of any formal approval requirements outlined in the Fair Work Act.

PN1360

And so there is a further level of approval, once you have a package. So the policy clearly contemplates that there is going to be a creation of a package. And then in the paragraph underneath the two bullet points in the last sentence approval of major agreements, and a high level of government is required. And of course, as I have already said, the reason why approval of a package is important is because of the interrelationship between terms and conditions and wages.

PN1361

It is in our respectful submission, with respect to my learned friend a nonsense to suggest that one can agree on contentious terms, without there being a willingness to agree as a package.

PN1362

DEPUTY PRESIDENT BELL: Well, just on that note, Mr O'Grady, that's what Mr Borenstein says happened as a factual matter at least by the 19 June statement that Commissioner Wilson issued and the parties - - -

PN1363

MR O'GRADY: Well, we say that didn't happen and we say that for a number of reasons. Firstly, we say that the 19 June statement needs to be read in the knowledge that everybody including Commissioner Wilson was aware of the fact that FRV was bound by these wages policies.

PN1364

And indeed in the February statement by Commissioner Wilson, he actually made reference to the fact that negotiation was occurring under the auspices of wages policies. And this is in our respect, Deputy President, our answer to the complaints made in respect of Ms Crabtree's evidence.

PN1365

When Ms Crabtree says, 'When I agreed to that statement. I did so on the basis that it was an in principle agreement because I was negotiating under the wages policy', that in our respectful submission flows from the fact that this policy was known to all the parties. It's not as if this was kept secret. Ms Campanaro was aware of it. She read it. In our respectful submission, she should be taken and the UFU should be taken to be on notice that any agreement would – or any offer could only be in principle and any agreement could only be in principle given the terms of the policy. And I want to come in a moment – or perhaps I might do it now while I am dealing with it. Can I take the Full Bench to an authority that's not in our bundle but we will hand up. It's the *Realestate.com v Kelland Hardingham & Ors* case. It's a decision of the High Court, the media news citation is [2022] HCA 39.

PN1366

So this is a contractual case. But it goes to the point you were raising yesterday, Deputy President Bell in respect of the need to ascertain these things objectively rather than relying on subjective understanding. And there's – but there's some useful observations as to how these concepts work in the context of contract. If I could ask the Full Bench to go to paragraph 16 in the joint judgment of justices or Chief Justice Kiefel and Justice Gageler as he then was.

PN1367

And you will see there's reference to *Hawkers v Clayton* and where Dean said:

PN1368

The first step in ascertaining what was being included in the agreement is one of inference and actual intention of the parties taking into account the circumstances disclosed by the evidence. It's only when the first enquiries were complete that consideration might be given to an appropriate case to whether a term may be implied.

PN1369

And then in 17, although Dean in *Hawkers v Clayton* used the word 'intention', indeed actual intention, it must be understood in the sense used in contractual – in a contractual context:

PN1370

In the Greek orthodox community case it was said that the word intention describes what it would be objectively be – what objectively would be conveyed by what was said or done having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties.

PN1371

Now, and that's a reason why we join in Ms Sweet's complaint about the content of much of the UFU's statement's, that they are replete, in our respectful submission to what Ms Campanaro understood. Or what Mr Kefalas understood.

PN1372

That in our respectful submission is completely beside the point. It is what a reasonable person would have understood having regard to the broader context and a core part of the broader context is that government wages policy exists in these terms and that FRV has made it clear that it considers itself bound by government wages policy in the course of these negotiations.

PN1373

And a reasonable person, looking at those facts would necessarily in our respectful submission conclude that any agreement that was entered into by FRV or any offer that was made by FRV was necessarily in principle or contingent upon government appeal.

PN1374

COMMISSIONER ALLISON: So Mr O'Grady, is it your position then that no matter how many bargaining meetings occurred, however long the parties were in negotiations, that FRV could never have come to any agreed terms with UFU?

PN1375

MR O'GRADY: No, no. In our submission, when FRV got authority to put the offer that manifested itself in the 7 August offer, it had government approval to reach agreed terms. But that was of course a position – that particular offer was put in terms of a package and as you have heard Commissioner, that package was rejected.

PN1376

But we say that, and it may be the case that in respect of a government agency, there may be non-contentious terms of the type that I was referring to earlier where simply by virtue of the need to operate there may be some capacity to go to government and say, 'Look, this is a term that we need. We should just agree it. But there's no suggestion that that's happened here. And so in our submission there are no agreed terms for those reasons. But in circumstances where the UFU is aware of government wages policy, there is no need to pick up the sort of language used by Ms Campanaro for people who have said, 'Well, we agree that that agreement is subject to government approval'. Even though that did occur subsequently, I will go over that in a moment. 'Because it must be taken as read that when somebody from FRV says this is agreed, in the knowledge that they are negotiating pursuant to government wages policy, it must be an in principle offer.

PN1377

And if that was sought to be clarified, you know, one would have thought steps could have been taken. But there's no suggestion that the UFU said to FRV, 'Do you have government approval pursuant to government wages policy for you to agree to these terms. And absent that, we say that the conclusion flows from watching the terms of the policy as part of the context.

PN1378

Could I just briefly go to the other decisions. Justice Gordon deals with these issues at paragraph 45 and following and it's to similar affect and there's a reference there to *Toll v Alphapharm*. And you will note that there is a distinction that Her Honour draws between formal agreements and informal agreements and that's at 45 and then on 46 and 47.

PN1379

Again, there is a focus on weighing up the objective surrounding circumstances. Then their Honours Justice Edelman and Steward deal with these matters at paragraph 83 through to 86, but they adopt a slightly different way of expressing themselves, but in our submission they get to the same conclusion including that the subjective views of the parties are irrelevant.

PN1380

Having it in your mind is nothing. The term of contract expression implied therefore arises from the communication between the parties understood in context including by drawing inferences to identify the implied content of the communication.

PN1381

The same points that I have made about the 2019 wages policy can be made in respect of the 2023 wages policy. Can I simply refer the Full Bench to the pages. That's at A811, A817, A819 and A820.

PN1382

So in my submission, the application of that authority means firstly, that what Ms Campanaro or anybody else from the union understood or believed is irrelevant. And the numerous assertions to that effect in her statement and that of Mr Kefalas should be ignored. The issue is what a reasonable person would have understood what was said and done when viewed in context.

PN1383

Secondly, as I have already said, when Ms Crabtree explains at paragraphs 51 and 71 that agreement in the statements of Commissioner Wilson was in principle, that's not her in effect asserting some sort of subjective understanding. That is simply her making reference to the fact that government wages policy have been the subject, I think of – she said of numerous discussions with the Commissioner in the course of bargaining. As was reflective in the 3 February statement. The Commissioner knew that government wages policy was in operation and that FRV was confined by it.

PN1384

The third thing that flows in my submission is that it means that my learned friend's reliance on the Kaizen Hospital case that he referred to just prior to sitting down, is in our respectful submission, misplaced. The Kaizen Hospital case is behind Tab 1 of our authorities. And the relevant paragraph's at paragraph 66. And the point we would make is, and appears from the second half of the paragraph:

PN1385

Put simply, if Mr Subrimalan had apparent authority to make agreements, it seems difficult to conclude that he did not have apparent authority to sign the agreements as the employees were not on notice of any circumstance which would have suggested that his apparent authority was at an end.

PN1386

In our submission, the UFU was clearly on notice that FRV was bound by government wages policy and FRV could only make offers in the terms that that policy contemplated. And whether or not Ms Campanaro read the policy thoroughly or skimmed it or has forgotten bits of it is in our respectful submission not to the point, you know, as she was asked yesterday, one would have thought it was part of her job to be familiar with the policy. Or she said it wasn't part of her job. Well, in our respectful submission that is a failing that cannot be visited on FRV or the Minister. It was there in black and white what the limitations on bargaining were and FRV could have looked at it.

PN1387

And the effect of all of that is in our submission, it means that this case is far more similar to the *ALEA v Qantas* decision that I have taken you to and the *TW v Qantas* decision that I have taken you to than to Kaizen Hospital because what you have there is you have negotiations that have gone on for some time but at the end of the day, either because they were contingent upon other things happening that did not happen in respect of the ALEA scenario, or because bargaining occurred on an in principle basis, or both, which is probably the better construction. There was no agreed term.

PN1388

In any event, it is clear from August 2022 that FRV was putting offers on an in principle basis and a without prejudice basis with a need for agreement on overall package. And if I could take the Commission to page A34.

PN1389

DEPUTY PRESIDENT BELL: A34?

PN1390

MR O'GRADY: A34, yes. Sorry, before departing from this, could I also make reference to the bargaining protocols that my learned friend referred to this morning. And they are at A61 and following. And as the Full Bench will recall, part of the agenda for the first meeting was to provide an explanation of government wages policy. Again, FRV was on notice and I think Ms Campanaro – but I don't have transcript so please forgive me if I don't have this entirely correct. But I think Ms Campanaro acknowledged that. That meant that not all of the bargaining protocol was included in this document. It included the wages policy, as it needed to in circumstances where FRV was constrained in the way that it was.

PN1391

But if I could go then, to A34, and you will see there at paragraph 59, Ms Campanaro talks about FRV changing its language. And the user language of in principle and need for overall agreements package. So more than 12 months ago, putting to one side whatever was the position prior to August 2022, more than 12 months ago, FRV has put the UFU on notice that agreement is in principle and there needs to be an overall package. And my learned friend took you to paragraph 60 this morning, but he didn't read out the first paragraph, the first paragraph of the quote:

PN1392

The following provides FRV the reasons for the response to the above log on a without prejudice basis. Noting that a range of substantive matters now await instructions to FRV by state government. FRV have apprised the government of the UFU's law.

PN1393

And then going to the part my learned friend referred to,

PN1394

All clauses are set in the UFU log unless otherwise commented below, agreed in principle by FRV subject to agreement on an overall package of provisions for the proposed EA.

PN1395

And if one goes to LC10, which is at page 103 of Volume A, one sees those words appearing and they apply to the agreement to the log version 10 as a whole. And then if one goes to what occurred in November and this is at attachment 7 of Ms Campanaro's – sorry. Sorry, forgive me. I will probably see it in a moment. Yes, sorry. Going back to Ms Crabtree's statement, at Attachment 7, we have the response and that is at page 2224. We have the response to the November log. And again, without prejudice, 29 November 2022, FRV's response to the UFU revised log version 12 received by FRV 23 November:

PN1396

The following provides FRV's response to the above revised UFU log on allow prejudice basis noting that a range of standing matters are subject to government instruction and approval.

PN1397

And then:

PN1398

After listing a high level summary of matters that remain unresolved and then it states, FRV notes that in principle agreement had been reached on a substantial number of matters including conditional concessions. It is often during bargaining including but not limited to the following.

PN1399

And then you have the heading FRV's response to the UFU log and the second paragraph:

PN1400

All clauses set out in the UFU revised log version 12 unless otherwise commented on from below are agreed in principle by FRV subject to a final agreement on an overall package of provisions for the proposed EA and subject to proceedings, the efficiencies proceedings.

PN1401

And then you will note in the next sentence:

PN1402

The qualification re the efficiency proceedings is necessarily given that FRV ELT has made in principle agreement concessions to the proposed EA over a range of measures which are estimated cost approximately 22 million over three years. And that cost was intended to be funded by agreed efficiency.

PN1403

So at least as at 29 November, again, more than a year ago, the UFU could be under no misapprehension of the fact that FRV required government approval to agree to a term, not to agree to, and indeed it required a package and that was clearly communicated. And it appears that what is being done here is a stratagem to in effect lock in the 22 million dollars in efficiencies in concessions that FRV has made and then go and have another bite of the cherry in respect of an arbitration seeking among other things an efficiencies allowance.

PN1404

And that goes to, in our respectful submission, the inherent unfairness of the construction being contended for by the UFU. If you are irrespective of what sort of conditions or reservations you make in your course of bargaining, locked into a concession that you have made and then can be subject to an arbitration in respect to the matters that have not been conceded by the other side. In our submission, it is fundamentally unfair and unbalanced to use the language that my learned friend used this morning.

PN1405

I have made reference to the 3 February statement of Commissioner Wilson and I have – that's at A38, and the role of paragraph 6 where the Commissioner refers to the fact that negotiations are occurring on a policy. And then our submission, the 19 June statement should be seen as also being conducted pursuant to wages policy.

PN1406

And then you have the offer that's made on the 10 March and this is at, I think it's A48 referred to in Ms Campanaro's statement. And she said that on 15 March the UFU agreed subject to conditions or some language along those lines. Could I take you to the FRV offer and that is exhibit LC20 which is at page A789. And the offer appears at A790. And then what Ms Campanaro has described as an agreement with conditions, appears at A798. And you will see that on any view, it is a strained construction to describe this as an acceptance of the offer that was being made by FRV.

PN1407

FRV, the offer was a three year agreement, three annual increase of 2 per cent and one sign on payment over $1500. The purported acceptance of 15 March attached conditions, namely - and these appear at A799 - a mechanism to protect against cost of living changes capped at 5 per cent if CPI is higher than the 2 per cent base wage increase. The efficiencies allowance of not less than $117 million. Employees to benefit from any change to wages policy and the new agreement settle of liabilities, an additional bonus payment of $1500 shall be made to each employee covered by the agreement upon commencement on, and each yearly anniversary date.

PN1408

So there's an offer and then there's a rejection of the offer. And then we have what occurred on 7 August and if I can take the Full Bench to 821 and my learned friend seems to say, 'Well, this offer didn't expressly threaten to withdraw what had been agreed and therefore even though we've rejected those, agreed terms remain agreed terms.'

PN1409

There are a number of points we'd make about that. The first one is, for the reasons that I've already sought to explain, this is not a matter of, in effect, threaten to take things off the table. The terms that were the subject of a negotiation that have been highlighted in green in version 14 were never on the table. They couldn't be on the table until the government had given approval for those offers to be made on a substantial basis. But that never occurred.

PN1410

But the second point is that this offer is clearly put on a package basis. That's the effect of the penultimate substantial paragraph. And this offer was rejected on a package basis. Insert to the extent that there were any things that had been agreed, they were superseded by the making of this offer.

PN1411

In any event, prior to the making of the determination FRV went on record before the Full Bench and explained that there were not agreed terms. And the relevant transcript is in volume D, commencing at page 645 and relevantly at paragraph 197, Ms Sweet made reference to the fact that FRV can only propose an agreement if it's authorised by government and in doing that it needs the agreement to be funded by the government. It needs government authorisation approval to make the offer. Those are the circumstances in which the 7 August offer was made.

PN1412

And then at the next, at page 664, 'So in that sense FRV's hands are tied such that as of today there is no overall agreement that therefore there isn't agreement. Therefore there isn't agreement.' And then when pressed on some of these issues by his Honour the President at page 666 paragraph 222, and then at 224, the President asked, 'What's the current position? Well, it's the current position. If we did it today, there's time today. It's a yes or not answer. Are they agreed terms for the purposes of 274(3) or not? Because if there is no post-negotiation period, you won't get the opportunity to consider this. It's either now agreed or not agreed.' And Ms Sweet says, 'Then it's not agreed.'

PN1413

Now, importantly of course, this is occurring prior to the making of the declaration and certainly prior to the relevant drop-dead date, namely the conclusion of the post-negotiating period. So FRV is on record well before the relevant time as to be saying, 'It's not agreed.'

PN1414

And then you have reference to the offers that I've already taken you to by Asbury VP, at 231. And at 234 she says, 'So the letter basically says - it makes

clear as I read it and perhaps I'm putting it in the vernacular, but it makes clear if this package is rejected then, we will consider it's open and that everything is back on the table. And some of the clauses that we see as being restricted in the proposed agreement we will be seeking to bargain again. So we are not going to necessarily accept what has been agreed in principle.'

PN1415

So that's the direction to FRV to go back and make that clear. And she says, 'Yes, and then of course it flows from the terms of the offer, because as Ms Sweet says at 239, the 7 August letter is put on a whole package basis.' And so the Vice President says, 'So essentially there is an agreement,' and Ms Sweet says, 'That's correct.'

PN1416

And that proposition was accepted by that and at 250 for completeness, Ms Sweet says that nothing is an agreed term. And that position was acknowledged by the Full Bench in its decision, which commences at page 685 of part D and in paragraph 46, they say in the bottom third of the paragraph, given that FRV's current stated position is that there were no agreed terms at all, we do not accept the UFU's position that a post-declaration negotiation period would be counterproductive, because it would give FRV the opportunity to renege on agreements about items which it contends have already been reached.

PN1417

So the position, in our submission, is contrary to that being put forward by my learned friend that there was an attempted use by FRV to use the post declaration negotiating period to take the parties further apart, rather than our submission what occurred was there was nothing agreed at the time the declaration was made. There was nothing agreed at the time the post-declaration negotiation period commenced.

PN1418

FRV sought through the correspondence to narrow the matters in issue, and I will go to that correspondence now, but was unable to do so.

PN1419

This is dealt with in Ms Crabtree's second statement at paragraphs 14 to 18 which is in part B at pages 19, I think. Sorry, I think it's B17. And you will see there really at paragraph 13 she commences about having had the meeting and then at 14 she deals with the letter that was sent on 13 October and at 18 she deals with the letter that was sent on 18 October.

PN1420

Now, irrespective of everything else that has been put, in our respectful submission, it is clear beyond argument that as at the relevant time, namely 18 October, nothing has been agreed, because that it what FRV is saying in this letter of 18 October and a reasonable person having regard to that correspondence could not come to any other conclusion in our respectful submission. And that letter is at page 62 of volume B. Inherent in the nature of agreement is mutuality and FRV is, in effect, saying that 'As at the relevant time we do not say that we now see that there are any agreed terms.'

PN1421

And in those circumstances, we submit that in respect of the position as at the post declaration bargaining period, the position is analogous to that as discussed in the decision of Specialist Diagnostic Services, which is behind tab 14 of our authorities at paragraphs 21 and 31. This is the Full Bench decision of Deputy President Clancy and Commissioner Cirkovic.

PN1422

You will see there that the Full Bench's focus is on what was the position as at the relevant time. And paragraph 21, they note that HSU relied on a notated working draft of an enterprise agreement which the parties used for the purpose of their negotiations (working document). And then in the last sentence, they say:

PN1423

Although the terms of the working document arguably identify agreement about the entirety of a termination of employment provision at some point in time, it is impossible to exclude the possibility that Dorevitch advanced a claim for clause 12.5 sometime prior to 16 October 2017 such as to make the issue not agreed as at that date.

PN1424

Again, with respect, it's impossible to reconcile in my submission my learned friend's argument that he put to you this morning with the approach of adopted by this Full Bench, albeit in the context of an industrial related workplace determination, but as I've said repeatedly, construing provisions that are substantially identical to the ones that he's being asked to construe. And then at 31, you will see the conclusions, in effect, reached by the Full Bench in respect of this instrument.

PN1425

My learned friend put a submission this morning that the purpose of the post declaration negotiation period was to each agreement. Now, I make a couple of brief submissions about that. Firstly, that's not in the terms of section 235A. It doesn't confine in that way. Secondly, in our submission, that would inimical to bargaining during the course of the post-declaration period, because if it be the case that anything that's been agreed is locked-in and that can't be resiled from, then it's difficult to see how bargaining can successfully be achieved during the post-declaration bargaining period, in that bargaining invariably involves trade-ups. There may be, to pick up your example, Commissioner, a situation where in the course of the post-declaration bargaining period, an organisation might say, 'Well, look, we made these concessions in respect of redundancy. We want you to address them - - -

PN1426

MR BORENSTEIN: Post-declaration negotiation period.

PN1427

MR O'GRADY: I'm reminded. And on my learned friend's construction the employer could say, 'We don't care. That's locked in. If you want to reach agreement during this negotiation period, you just need to make concessions in

respect of wages,' or the like. Again, we would submit that that is contrary to the scheme in the Act.

PN1428

DEPUTY PRESIDENT BELL: I didn't think the UFU was putting it that way and I think I acknowledged it could still trade up terms that were agreed under a definition of agreed term at least, during that period.

PN1429

MR O'GRADY: I'm not sure that that's right. And indeed, if it right, it's difficult to see where my learned friend draws the line. If it be the case that, to take the circumstances in this case, if Ms Campanaro has highlighted a clause in green, and that means it is locked in, even if it was accompanied by some conditionality, then how could you then trade it off? And once you can, then it seems to me it must mean that everything is back on the table.

PN1430

And we would also submit that the inability to trade things off would be capricious in the Cooper Brookes sense in the light of the observations of my learned friend this morning. And I've already made the submissions about the inherent unfairness of that position to the party who hasn't pulled the trigger in respect of the contractual bargaining declaration. Unless there are any further questions, those are the submissions I submit on behalf of the Minister.

PN1431

DEPUTY PRESIDENT MILLHOUSE: Thank you very much, Mr O'Grady. Mr Borenstein?

PN1432

MR BORENSTEIN: Thank you, Deputy President. This is a bit out of order, but can I start off by dealing with a theme that Mr O'Grady developed about the need to demonstrate government approval of all of the individual clauses that have been agreed on the way through the bargaining. He said the wages policy required approval of the government to make offers and that was a (indistinct) on to the establishment of agreed terms.

PN1433

Can I remind the Bench and Mr O'Grady of the evidence that Ms Crabtree gave yesterday. Unfortunately, we don't have the transcript, but you will have the transcript in due course, where I asked her specifically whether over the course of the bargaining FRV reported regularly to what was happening in the bargaining, reported that to the government, and she said yes. And I said, 'On any occasion to the government say to FRV that any particular clause that you had agreed to shouldn't have been included. And she said, 'No. We were done.'

PN1434

Now, in the absence of evidence from the government or evidence from the FRV of people who were actually involved in communications with the government about terms or agreed terms, the clear inference that the Commission should draw on an objective basis, based on the facts that you know of, is that the government approved all of those individual terms in version 14 that are coloured in green,

because the government was aware that those offers had been made and did nothing to suggest that they weren't authorised.

PN1435

And, indeed, in the 15 June letter, the ultimatum implicitly acknowledged that by saying 'We will withdraw that.' Now, the knowledge of any government disapproval of those terms is within the realms of the minister or FRV. They have called no evidence about any of that. And one of our friends referred to *Jones v Dunkel*.

PN1436

That is a clear case for an inference to be drawn that if evidence was called, it would not assist either of our friends. The clear implication from the facts that are known and taking into account the actual evidence of Ms Crabtree is that the government knew and did not demur from those matters being offered, and it can be inferred from that that the government approved and authorised those offers. And so all of this admissions which Mr O'Grady made on that premise can be put aside, because they are none of them in conformity with the evidence that is before this Commission.

PN1437

On the question of whether these terms have been agreed 'in principle', we made some submissions this morning about how that should be viewed and for our part we don't wish to add to those submissions. We rely on those submissions. As I said, that is the way in which all enterprise bargaining really is to be seen. Everything is dependent on ultimately coming to a conclusion.

PN1438

The complaint that Mr O'Grady made about creating a situation where a party might be held to terms that were agreed in principle during the bargaining we say is a hollow complaint. Where terms are raised - where claims are raised during bargaining, it is open to any bargaining representative who wishes to have those terms conditional on some other term to raise that in the context of the bargaining. 'We will give you an extra week off at Christmas time if you agree to work seven days a week some other time.' That is a proposal for an agreed term that is made conditional on the acceptance of that term, together with another term. That's a different situation than where a term is agreed in the sense of section 274(3) which is a standalone term dealing with a particular topic.

PN1439

I'm trying to think, but I can't think of an easy example, I'm sorry, but - - -

PN1440

DEPUTY PRESIDENT BELL: The name of the parties or the name of the enterprise agreement?

PN1441

MR BORENSTEIN: Whatever. The names to be put in a lunchroom or what we want to all the lunchroom. But the point is that it is not directly connected to something else. It's not conditional on saying. 'You can have double time on Sunday if you work Saturday.' they would be linked in the bargaining. You

would imagine that in the normal course of bargaining if you've got a clause that is directly conditional on another clause they would be linked and they would be bargained. And if both of them are agreed, then the two of them are agreed terms for the purposes of section 274(3).

PN1442

And it's not to the point to say, 'Well, there is another term that we want to talk about, which is related to where you're going to park your car at the plant, and we want to open this up, because we want to talk about that.' The fact that the two original terms are locked in, and closed as agreed terms, even if they are on an in-principle basis, is the way in which bargaining works and then you negotiate for something else.

PN1443

In terms of saying, 'Okay, when we come to the end of it,' and as the Commissioner raised this morning, usually the last clause is the money clause, why should you be locked in to the things that you've agreed on when the money clause is up in the air and it might be influenced by what has been agreed in the agreed terms.

PN1444

But accommodation is made for that in the provisions of the Act dealing with what the Commission can take into account in making the determination and that is set out in section 275. And clearly they are intended to take into account the circumstances in which the parties come before the Commission for the determination, taking account of what's transpired in the bargaining.

PN1445

If you look at section 275 the Commissioner must - mandatory 'must' - take into account in deciding which terms to include in the workplace determination include the following; the merits of the case, the interests of the employers and employees who will be covered by the determination, the significance to those employers and employees of any arrangements or benefits in an enterprise agreement that immediately before the determination is made applies to any of the employers in respect of any of the employees, public interest, how productivity might be improved and if, importantly, the extent to which the conduct or the bargaining representatives of the proposed enterprise agreement concerned was reasonable during the bargaining for the agreement, the extent to which the bargaining representatives for the proposed enterprise agreement have complied with good faith bargaining and incentives to continue bargaining at a later time.

PN1446

So there is a range of relevant matters, perhaps because it's the first one it's probably the most significant one, the merits of the case. That's consistent with the general obligations of the Commission in dealing with matters. And so when the Commission comes to determine what the money should be, it will obviously take into account what has been agreed which has a monetary consequence.

PN1447

And so it is entirely consistent with the overall intent of this process to take into account the concessions that have been made - perhaps I shouldn't call them

concessions, but the agreements that have been reached in the interests of trying to bargain between the parties to reach an agreement. So it's not as though in a workplace determination the Commission will ignore altogether that one part or the other has given this up and given that up and given the other up without taking into account what impact that has on the money clause, for example.

PN1448

And the Commission is bound generally to act fairly and in accordance with the merits of the case and clearly it will take those matters into account so that people won't be inappropriately disadvantaged.

PN1449

So the complaint that's made by our friends that, you know, people will be significantly disadvantaged because they will be locked into clauses that they've agreed to previously, when it comes to enterprise bargaining and other parties will be able to run off to the Commission and get a determination where they will make a huge windfall gain is just unrealistic.

PN1450

It's just not how this is going to work. The Commission will take a much more judicious approach to workplace determinations and will be able to have regard under section 275 on the conduct of the parties that are before it.

PN1451

So if the Commission is of the view that the conduct of the parties in coming to the Commission is something less than is to be expected, that will obviously affect what happens in the determination.

PN1452

So we say it is a mischaracterisation to paint this access to the Commission as something that people will rush to take up rather than endeavour to reach agreement through the normal course of enterprise bargaining.

PN1453

DEPUTY PRESIDENT MILLHOUSE: So do those submissions, Mr Borenstein, address the position that was put by Mr O'Grady that the Full Bench doesn't have the capacity to unwind the agreement in the context of determination?

PN1454

MR BORENSTEIN: The Commission doesn't have the capacity to undo agreed terms. That is what he meant.

PN1455

DEPUTY PRESIDENT MILLHOUSE: Yes. That's as I understand it.

PN1456

MR BORENSTEIN: That statute makes that clear.

PN1457

DEPUTY PRESIDENT MILLHOUSE: Yes.

PN1458

MR BORENSTEIN: But to the extent that the Commission is called on to assist in resolving the unresolved matters, section 275 says that you can take things into account. And to the extent that the unresolved matters form part of the 'quid pro quo' for the resolved matters, that's something that particularly the Commission could take into account, as I've said, in the example of the money.

PN1459

Clearly you could take into account - nobody could argue - I thought twice about saying it. Nobody could argue that you couldn't take it into account, clearly. If you've got to take into account the merits and when you've done the sums, it's apparent that in the agreed terms what's been given calls for X amount of compensation or the other way around, you would clearly have to take that into account on any sensible basis.

PN1460

And the submission that our friend made, well, looking at the date in question or the date that arises under section 274(3) for when you decide what are the agreed terms, Mr O'Grady misunderstands the submission we make about the operation of the post-declaration negotiating period. As we said this morning, that is designed to allow for the outstanding items to be narrowed.

PN1461

And so the first drop dead time is the date of the declaration when you can identify all the agreed terms then, and then there is a reason why you have another drop dead date, which is the end of the bargaining period, because the expectation is you may have additional agreed terms which also need to be taken into account in the determination.

PN1462

So the process, as we said this morning, is one of incremental agreements occurring, further agreements occurring, rather than going the other way. Mr O'Grady's argument suggests that, 'You can have 99 agreed terms at the date of the declaration, but it's permissible by the time of the end of the bargaining period to have no agreed terms any longer'. And we say, as we said this morning, that that doesn't fit very well with the scheme of this.

PN1463

And the reference that he made to the explanatory memorandum, paragraph 869 is really of no consequence. The explanatory memorandum doesn't suggest by referring to agreed terms if any that that's a mandate for example to go from the situation where you have many agreed terms to saying, 'Oh well, we can now take them all out because the explanatory memorandum says 'if any''. That's a nonsensical reading of that. All that the explanatory memorandum is doing is recognising the potential possibility that in some situations there will genuinely be no agreed terms that have been arrived at throughout the bargaining. That may occur. It's highly unlikely, I would suggest, it's highly unlikely because in making the declaration, the Commission would have to take into account whether there has been some appropriate bargaining prior to that date including applications under section 240. But the explanatory memorandum in it's wisdom says that. But that's not a mandate for what our friends propose in terms of its operation.

PN1464

Now, a friend tried to assuage concerns of the Commission about having to arbitrate all clauses by saying, 'Oh, well, you know, we have got a position now where a lot of these clauses that were agreed are now not opposed'. Now, there is a significant substantive difference between those two categories. When terms are agreed, they go in automatically into the determination. If they are not opposed, then they are amenable to various limitations in the Act about the nature of the clauses and the need to put in default clauses rather than agreed clauses and our friends have also flagged in their position document that there are a number of clauses where they wish to raise concerns about RE AEU meaning the intrusion into Victorian Government policy.

PN1465

Now, they do that in respect of a number of clauses that are in the existing agreement by consent. And there's authority in the Federal Court that they are the types of clauses where FRV can consent to them and in consenting to them, RE AEU principles don't apply. And so the real reason why FRV maybe seen to be saying, 'Oh well, we're not agreeing to these but we don't mind if they go in', is because they want to come along on the day of the arbitration and say, 'You can't put them in because of RE AEU'. That's what that's about. It's not being nice to anybody by saving you work. It's a situation where these terms have been agreed with FRV on the 'In principle basis', but now at the direction of the government, they are not agreed and they are not opposed. But they will be opposed on RE AEU matters. They will be opposed on that and there will be a real question about whether the Commission as an arbitrator is jurisdictionally able to make those – to make orders that include those terms.

PN1466

Now, can I just briefly make a short submission about the RE AEU – I am sorry, the 7 August offer. And the suggestion that our friend made was that the 7 August offer was a starting point. It's not clear what that means. In circumstances where coming to the 7 August we had numerous indications that we were at the end point not the starting point in the sense that there were all those terms in version 14 that had been agreed, 'in principle'. And objectively on the evidence as I said earlier, can be taken to have been approved by the government.

PN1467

So how it can genuinely be said 7 August letter is a starting point, is a mystery. But 7 August letter is an offer, as I said earlier. It's an offer and it was an offer that was responded to and not accepted. Our friends don't explain how a party can unilaterally undo the agreed terms. We say there's a real question that they can't do that. That agreed terms are agreed terms and to come along and make some offer that's, take hypothetically, an offer that's out of the realms of any realistic proposition and then say you didn't accept that offer, therefore all the RE terms are off the table makes no sense.

PN1468

It's an incongruous situation. An offer can be made and an offer can be accepted and if it's accepted then it's accepted and you have a result. If it's not accepted, then it's just an offer. There is no suggestion in this offer that if you don't accept

this offer, everything that we have agreed to up until now is withdrawn. No suggestion.

PN1469

If you look at this offer objectively, it doesn't say that. It may say, this is an offer as a package, that's fine. But it doesn't say if you don't accept it then everything we previously agreed to is unagreed. It doesn't say that. And as I said earlier, it's very important that it doesn't say that in light of the evidence of Ms Crabtree. You are looking at this objectively. If you look at the terms of this letter objectively. They say to you, when you're looking at this letter objectively, take into account what was said to us by the government on the 15th of June and the relevance of the evidence of Ms Crabtree which our friends seek to deny, the relevance of her evidence is to create a disconnect between 15 June, the instructions on 15 June and 7 August. And so when you look at it objectively at the letter of 7 August, you can't take into account 15 June except in one respect. Except to see the differences. And the differences are critical.

PN1470

15 June has an ultimatum. If 15 June had been included in the letter of 7 August, if the clause in 15 June had been included, which said in the terms that they say, if you don't accept this, all these things are off the table, that would be a completely different argument. But we know from Ms Crabtree that FRV didn't want to put that. And in the end, it wasn't put.

PN1471

Now, we asked for various documents and the documents they produced were very uninformative. That's not our fault. The point is that she accepted that FRV didn't want to put the ultimatum and in the end it wasn't put. So when you come to construe the letter of 7 August objectively, you shouldn't construe it as being built on the offer of 15 June and being to the same effect as the offer of 15 June, in fact to the contrary.

PN1472

DEPUTY PRESIDENT BELL: Interpret it later, letter on the basis of the earlier letter that wasn't communicated to the UFU.

PN1473

MR BORENSTEIN: That would be so, but our friends are saying that the letter – and I don't want to argue against that. But our friends are saying that you should construe the letter of 7 August as being a letter which contained an unspoken implied, implicit ultimatum and that you should read it that way, because that was the instructions we got.

PN1474

Now, I fully accept that 15 June letter wasn't made available to us but it's been put in evidence by Ms Crabtree and as we understand part of the way in which our friends want to advance the 7 August letter is that it is an ultimatum. And we say that to the extent that they do that, when you look at that letter, there's no reference to an ultimatum in it. And to the extent that it might be suggested or urged on you that you should imply the ultimatum because we're doing this on instructions from the government and here's our government instructions. We say

you shouldn't do that. We agree that you should look at the letter of the 7 August and the letter of 7 August contains no ultimatum and therefore, you should construe it in the way in which we have proposed.

PN1475

Now, our friend also referred to the wages policy at court book A712 and took you to some parts of the policy and I just want to quickly suggest to you, he asked you to look at the section on page 721 of the court book, during of bargaining. And at paragraph 3 there:

PN1476

There are a number of reasons that he read out to you for a change that the parties should be informed of the possibility of change.

PN1477

What we wanted to simply say is that those – that in identifying – I am sorry, it's 754 of the court book. It's 721 of a different number.

PN1478

And you will see in the third paragraph, it says,

PN1479

All offers should be made on an in principle basis.

PN1480

This is a passage that our friend read.

PN1481

With the public sector agency communicating that the offer is subject to government approval and may be subject to change to ensure compliance with the wages policy industrial relations policy, the Fair Work Act and other relevant legislation.

PN1482

So you see you're informed of the possibility of change for those identified reasons. Only those reasons. No other reasons. And those reasons aren't identified here for the change in situation. Now, I just want to also draw attention to the evidence of Ms Campanaro at paragraph 63 at page number A35 of the court book. And this goes again to this question about the government having approved the making of the various – the offers of the various turns. And Ms Campanaro at 63 says,

PN1483

On occasion, Mr Parkinson - that is the FRV representative - said of some matters that they were subject to government approval or package. Whenever he did, one of the UFU representatives would ask in effect if the matter was agreed or not and every time, he replied that it was agreed.

PN1484

And Mr Kefalas makes a comment to similar effect at page A16 in paragraph 15 where he says,

PN1485

It was never suggested by the FRV that the whole process of bargaining would come to nothing if the government didn't agree that the clauses that the parties had agreed to. On occasion, Mr Parkinson or Mr Sands would say words to the effect that an agreement breach was subject to government approval or subject to the overall package.

PN1486

In response Laura Campanaro said,

PN1487

And I said words to the effect, 'Do we have agreement or not on what has been agreed?' And Mr Parkinson or Mr Sands for the FRV would say, 'Yes,' in reply to such questions.

PN1488

Mr Kefalas wasn't cross-examined on that and Mr Parkinson didn't give any evidence although he is their representative. And so we say that the suggestion which our friend makes now in closing submissions that there's some question or doubt about the UFU being aware of the lack of any government authority is put to rest by this evidence. It's apparent that it was represented to the UFU and that they had no other knowledge than that the terms that they were agreeing to on a progressive basis were approved and agreed by FRV and no other questions arose.

PN1489

Now, I next want to make a submission in response to our friends reliance on the High Court case of Realestate.com.au and make the preliminary comment that of course this is a case about contracts and I think we said this morning that the Full Court and the Federal Court has recognised that enterprise agreements are not contracts and they're not made in the same way as contracts and so one has to be very careful about drawing connections between what might apply in relation to a commercial contract and what applies in relation to an enterprise agreement or enterprise bargaining. But we want to just take up one point. Our friend referred to the judgment of Justice Gordon in that case. And at paragraph 47, Her Honour says, and this is the paragraph our friend referred to:

PN1490

The task is to ascertain what the words and conduct of a parties would have conveyed in all the circumstances to a reasonable person who had knowledge reasonably available to the parties. And the essential question is whether the parties conduct, what was said and not said and the evident commercial aims and expectations of the parties and the context of what they knew review as an understanding or agreement or as sometimes expressed, the manifestation of mutual ascent to be legally bound in some particular respect.

PN1491

Now, when you look at the evidence of Ms Campanaro and Mr Kefalas about what happened throughout the bargaining and particular the paragraphs I have just read to you, it's apparent and it's not contested that over a period of time, Mr Parkinson and others were negotiating particular terms with the union representatives. They were agreeing on terms and when they made reservations,

the union representatives questioned them and they were told this is agreed. So if you apply the guidance of Justice Gordon to that analysis, and look at the conduct and the words that were spoken by the parties, and you put yourself in the shoes of a reasonable person who is watching that, we say that you would come to the conclusion that as between the parties, they agreed and it was understood that they were authorised to agree on the terms that are in version 14 of the enterprise agreement.

PN1492

Our friend made some submissions about Ms Crabtree's evidence about what's put in paragraphs 51 and 71 of her witness statement about the two statements of Commissioner Wilson. And suggested that she had given some evidence about those and about Commissioner Wilson's knowledge of the consent being in principle. We don't have the transcript unfortunately of her cross-examination but I would ask the Bench to look at that cross-examination evidence. Our recollection is somewhat different than our friends about what she said about that.

PN1493

With regard to our friend's references to the transcript of the Full Bench about agreed terms, we suggest that the Commission should not be influenced by that because that issue was not argued before the Full Bench. Certainly, we didn't argue it before the Full Bench. The issue before the Full Bench was whether there was any likelihood of agreement being reached and the random comments of members of the Bench and counsel are not authoritative and we would caution against reliance on them.

PN1494

Now, then going to Ms Sweet's submissions and I won't be very long about this. We reject her characterisation of the way in which Ms Campanaro gave her evidence. She gave her evidence genuinely and in a considered way. The fact that she did not make concessions to propositions put to her by Ms Sweet is not a subject for cross-examination. Ms Sweet asked her a number of questions which she answered directly and when the answer was not what Ms Sweet was hoping for, there was no follow up from Ms Sweet and so she can't be heard to complain about those answers. Then Ms Sweet made some submissions about the fact that Commissioner Wilson used the word 'resolved' in his statement rather than 'settled'. To the extent that that has any significance, we say that it's not something that effects the analysis which the Commission has to undertake. If Commissioner Wilson meant by using the word resolved that it's a resolved in principle, that doesn't assist our friends for the reasons that I have explained earlier today.

PN1495

I am reminded that of course in the first statement at court book 757 in paragraph 4, the Commissioner didn't in fact use the word 'resolved' but used the word – the FRV and UFU had reached 'agreement' on all the 10 issues. Yes, 'resolved' is used in the second statement but not in that statement. Yes.

PN1496

Subject to those matters, if the Commission pleases, we rely on our written submissions and we ask the Commission to make orders in the way in which we have proposed in our position document about the agreed terms.

PN1497

DEPUTY PRESIDENT MILLHOUSE: Thank you, Mr Borenstein.

PN1498

MR BORENSTEIN: Thank you.

PN1499

DEPUTY PRESIDENT MILLHOUSE: In fact we thank all parties, counsel and their instructors for the very helpful submissions today. Our decision is reserved and we will adjourn on that basis. Good afternoon, everyone.

ADJOURNED INDEFINITELY [4.25 PM]