TRANSCRIPT OF PROCEEDINGS
*Fair Work Act 2009*

**DEPUTY PRESIDENT GOSTENCNIK**
**DEPUTY PRESIDENT BELL**
**DEPUTY PRESIDENT MILLHOUSE**

**C2023/6948**

**s.604 - Appeal of decisions**

**Appeal by Surveillance Australia Pty Ltd T/A Leidos - Airborne Solutions (C2023/6948)**

**Melbourne**

**2.00 PM, TUESDAY, 13 FEBRUARY 2024**

**Continued from 24/11/2023**

PN1

DEPUTY PRESIDENT GOSTENCNIK: Good afternoon. Mr Avallone, you are seeking permission to appear for the appellant?

PN2

MR B AVALLONE: Yes, I do, Deputy President.

PN3

DEPUTY PRESIDENT GOSTENCNIK: Thank you. Mr Crosthwaite, you are seeking permission to appear for the respondent?

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MR H CROSTHWAITE: I do. Thank you, Deputy President.

PN5

DEPUTY PRESIDENT GOSTENCNIK: Yes, permission is granted in each case. We should indicate to the parties that we have had the opportunity of reading your helpful submissions, so we don't need those repeated.

PN6

MR AVALLONE: Thank you, Deputy President.

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DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN8

MR AVALLONE: Just before getting into the heart of the appeal, can I just say something brief first about the relevant standard applicable in this appeal. The union filed materials last Friday, Friday last, which - well, first, they correctly capture the relevant issue, which is at paragraph 4 of their submissions, which is to the effect that the question for determination on appeal is: 'Are the rostering terms related to annual leave inconsistent with the FW Act or the EA and of no effect?' Respectfully, I say that's the right question - that's the heart of it - but the next paragraph in the respondent's submissions does invite the Full Bench into error.

PN9

Paragraph 5 of the respondent's submissions quote the judgment of Kitto J in *Australian Coal & Shale Employees' Federation v The Commonwealth*. I won't read the citation because it's set out in the submissions, but I note that it's in the appellant's folder of authorities. Does the Full Bench have the small folder of authorities from the appellant?

PN10

DEPUTY PRESIDENT GOSTENCNIK: I have mine on my laptop.

PN11

MR AVALLONE: Would it assist any of the members if - do we have copies?

PN12

SPEAKER: Yes.

PN13

DEPUTY PRESIDENT GOSTENCNIK: All right.

PN14

MR AVALLONE: If it assists any members, Deputy President - - -

PN15

DEPUTY PRESIDENT GOSTENCNIK: Well, if it assists those instructing you not having to cart heavy loads of documents back to chambers, then we'll take them, but, otherwise, they're of no assistance, but we'll have them.

PN16

MR AVALLONE: It just makes it much more worthwhile for them and it's more rewarding.

PN17

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right, although the cool change, I think, appears to have arrived, so maybe I should make them carry them back.

PN18

MR AVALLONE: Thank you. I note the wind outside. If anyone sees a house flying by, just let me know.

PN19

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN20

MR AVALLONE: I have put a copy of Australian Coal & Shale employees behind tab 1. The union rely upon that decision or that judgment at 627 as authority for the proposition that there is a strong presumption in favour of the correctness of the decision appealed from, and that decision should therefore be affirmed, unless the Court of Appeal is satisfied that it's clearly wrong.

PN21

However, I submit that it's important to read that sentence in full. A little bit earlier in that same sentence, it makes it clear that this is - well, as Kitto J referred to it:

PN22

> *... the true principle limiting the matter in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment.*

PN23

MR AVALLONE: It's a pretty - I hope it's a non-controversial point.

PN24

DEPUTY PRESIDENT GOSTENCNIK: The way in which the question is framed, there's either a right answer or a wrong answer, is there not?

PN25

MR AVALLONE: Correct, and we've included in the folder of authorities a decision that you will be familiar with, Deputy President Gostencnik, *UGM*

*Mining Services v CFMMEU*, a Full Bench, and we have got the reference to paragraph 13 there, which stands for that proposition that the correct standard applies. So, too, we've included, at tab 3 of the folder of authorities, the decision of Deputy President Millhouse in the stay application in this proceeding, which, at - I think it's paragraph 12 - and the footnote to that - it's footnote (h) - cites, amongst other things, UGM Mining, and several other decisions as authority for that proposition.

PN26

If I could provide just a bit of background, some of which will be apparent on the face of the materials, but just to put this appeal in its context, Surveillance Australia provides 365-day-a-year coverage - part of protecting the borders of Australia - it employs a number of pilots and other employees. It has a number of bases at remote locations, and some pilots have expressed a preference to work fly in/fly out arrangements, FIFO arrangements.

PN27

The circumstances are that some of the employees have agreed, initially as part of a document loosely described as an individual flexibility agreement, but subsequently, as part of a common law agreement, to 28-day roster arrangements so as to facilitate fly in/fly out. Relevantly, those agreed arrangements include an agreement between each relevant employee and his or her employer - the appellant - as to when he or she will take annual leave, and fundamentally this appeal does concern whether those agreements, or that type of agreement, is consistent with those employees' annual leave entitlements under the relevant enterprise agreement.

PN28

DEPUTY PRESIDENT GOSTENCNIK: This is the document that appears under cover of the draft letter at 149?

PN29

MR AVALLONE: Yes, 139 through to 155 of the appeal book.

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DEPUTY PRESIDENT GOSTENCNIK: Can I just ask you a question about that document. Is there in evidence a signed copy of any document?

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MR AVALLONE: There's not in evidence a signed copy, no. There is - - -

PN32

DEPUTY PRESIDENT GOSTENCNIK: Or an addressed copy?

PN33

MR AVALLONE: Sorry?

PN34

DEPUTY PRESIDENT GOSTENCNIK: Or an addressed copy?

PN35

MR AVALLONE: No.

PN36

DEPUTY PRESIDENT GOSTENCNIK: This is a draft.

PN37

MR AVALLONE: That's right. Before Deputy President Millhouse in the stay application, Mr Smallwood gave evidence, and he was cross-examined on his statement. We can provide copies of that, if that will assist, but, relevantly, his evidence included that, as at that point and, indeed, as at the point that the first instance hearing was conducted, there were two employees who had made agreements consistent with the document that's at appeal book 149 to 155.

PN38

DEPUTY PRESIDENT GOSTENCNIK: As at that point, and as at the point the Commissioner made his decision?

PN39

MR AVALLONE: Yes. So those two employees had made, and I can - perhaps it will assist if I turn up the Smallwood statement. When I say the Smallwood statement - - -

PN40

DEPUTY PRESIDENT GOSTENCNIK: Is this the one at appeal book 177?

PN41

MR AVALLONE: No, it's not. That statement says the same thing, might I add, but the reason that I'm shying away from relying upon that is - - -

PN42

DEPUTY PRESIDENT MILLHOUSE: Sorry, that's 23 November?

PN43

MR AVALLONE: Yes, that's right. The reason that I shy away from the one in the appeal book is that that was not tendered at first instance. I can't recall the transcript reference. (Audio malfunction.) I don't know if we're still being recorded after that outage.

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DEPUTY PRESIDENT GOSTENCNIK: We are just checking.

PN45

MR AVALLONE: Thank you.

PN46

DEPUTY PRESIDENT GOSTENCNIK: Yes, things are - - -

PN47

MR AVALLONE: Thank you. Sorry, Madam Associate, there's a copy, thank you. The reason that I shy away from the Smallwood statement at first instance is there was some discussion of it before the Commissioner, there was some

objection to it foreshadowed, and then my instructor, Ms Sweatman, who was appearing on that day, did not tender it, which is why I don't rely upon it.

PN48

DEPUTY PRESIDENT GOSTENCNIK: So it shouldn't be in the appeal book at all?

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MR AVALLONE: Well, it was a document that the Commissioner included in the court book and it was replicated to the court book at first instance.

PN50

DEPUTY PRESIDENT GOSTENCNIK: But it probably shouldn't be there because it's - - -

PN51

MR AVALLONE: You can strike a line through it. But the one that I've just passed to your associate and your associate has handed up was marked as an exhibit in the stay application. It's the statement of Tom Smallwood dated 23 November 2023. It was marked as exhibit A on 23 November 2023 in this appeal proceeding in the stay. Mr Smallwood, as I say, was cross-examined. At paragraph 17, Mr Smallwood gave evidence that:

PN52

*Prior to the hearing at first instance, Surveillance Australia entered into agreements with five of the nine affected employees in relation to the taking of annual leave during the FIFO off swing. Of these pilots...*

PN53

Then paragraph (a) refers to two of them who made - sorry:

PN54

*... are rostered and flying in accordance with a common law agreement dated 23 August 2023 under which they have agreed to take annual leave during their off swing.*

PN55

My instructions are that that's in the same terms as the document that is at 149 to 155.

PN56

DEPUTY PRESIDENT GOSTENCNIK: Am I correct in assuming that the common law agreement is an employment contract?

PN57

MR AVALLONE: Yes. It will operate as part of the - it's probably not the entirety of the employment contract, but it's part of the employment contract.

PN58

DEPUTY PRESIDENT GOSTENCNIK: So the employment contract is - so this is part of the employment contract. So the employment contract is constituted by this document and perhaps another document, and perhaps also - - -

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MR AVALLONE: Implied (indistinct).

PN60

DEPUTY PRESIDENT GOSTENCNIK: Putting the implied terms aside, but it's partly oral and partly in writing?

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MR AVALLONE: Yes.

PN62

DEPUTY PRESIDENT GOSTENCNIK: If one wants to terminate this arrangement, how would one do that?

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MR AVALLONE: To terminate the arrangement at 149 to 155?

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DEPUTY PRESIDENT GOSTENCNIK: Yes, this part of the arrangement.

PN65

MR AVALLONE: Well, presumably that would be - it's a matter of contract between the parties, the parties being the individual employee and the employer.

PN66

DEPUTY PRESIDENT GOSTENCNIK: The parties could presumably agree to vary the terms.

PN67

MR AVALLONE: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: They could agree to terminate the terms.

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MR AVALLONE: Yes.

PN70

DEPUTY PRESIDENT GOSTENCNIK: But a unilateral termination would require, would it not, a termination of the employment?

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MR AVALLONE: I don't know that that's necessarily - a unilateral - sorry, your question is whether a party can - - -

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DEPUTY PRESIDENT GOSTENCNIK: 'I no longer want to be bound by this arrangement.'

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MR AVALLONE: An aspect of it.

PN74

DEPUTY PRESIDENT GOSTENCNIK: Yes, that's right. Perhaps another way, your submissions, if I understand it, say and rely heavily on there being an agreement for annual leave.

PN75

MR AVALLONE: Yes.

PN76

DEPUTY PRESIDENT GOSTENCNIK: How can one terminate that agreement without terminating perhaps the contract of employment?

PN77

MR AVALLONE: One can enter into negotiations with one's employer or one's employee to negotiate a variation to the employment contract at any point in time. Consistent with section 88(2), an employee could request, for example, to take annual leave at a particular time, and 88(2), I believe, provides that that will not be unreasonably refused. If that type of request were made and that type of request were acceded to, then obviously that would operate - well, it would underpin the contract and that would have operative effect.

PN78

DEPUTY PRESIDENT GOSTENCNIK: Sure, but my question is if I didn't want to take annual leave in accordance with this arrangement at all. Having agreed to it, how do I do that without terminating my - - -

PN79

MR AVALLONE: Well - - -

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DEPUTY PRESIDENT GOSTENCNIK: I'm not requesting a period of leave, I'm simply saying I don't want to take leave.

PN81

MR AVALLONE: Well, that would be a discussion that any employer and any employee would have to have at any time: 'I'm not happy with the terms that apply to my contract. Can we vary them?' If, at the end of the day, the answer was, 'No', and if that were consistent with section 88(2) that I've already mentioned, then the individual employee has a choice to make.

PN82

DEPUTY PRESIDENT GOSTENCNIK: But under 88(2), if I were to reach an agreement with my employer to take leave over the Easter period, say, and then my circumstances changed, can't I withdraw my agreement to take leave?

PN83

MR AVALLONE: Well, you can request to take leave at a different time - that's 88(2) - and that won't be unreasonably refused.

PN84

DEPUTY PRESIDENT GOSTENCNIK: No, but having made an agreement under 88(1), can I withdraw that agreement before it is effected because of the circumstances?

PN85

MR AVALLONE: Not unilaterally, and there's good reason for that. The good reason for it is that no man is an island, or no woman is an island. It's not simply a matter of when is one person going to be rostered to work, or rostered on duty and rostered off duty, or in their off swing, it's a matter of how does the employer make sure that it's appropriately servicing the client and providing meaningful work to all of its employees, and that includes a degree of forward planning. That includes making sure that there's going to be a sufficient number of pilots on swing and available to work at relevant bases at any particular time and, to be frank, not having a surplus of people.

PN86

If someone was to say, 'Look, I know I agreed to take annual leave that week, or that 12-day period, but' - sorry - 'to take my off swing', including the 8 RDOs, some annual leave and a bit of bonus time off, 'but I don't want to take that time off then any more', presumably an employer, any employer, would try to accommodate that, if given sufficient notice, and might speak to other employees about, 'You're on swing, but do you want to swap that around?'. But, at the end of the day, no employer should be expected or required to, at the drop of a hat, cancel somebody's leave and then end up with too many employees, such that one of them is sitting on their behind with no work to do.

PN87

The fundamental point is that these arrangements - and I focus on those two employees because they are the two employees where there's evidence that there is a common law agreement - they have agreed to this arrangement, and that's the key word in section 88, which I will come to shortly.

PN88

DEPUTY PRESIDENT GOSTENCNIK: I'm assuming for present purposes that that's correct. An agreement is an agreement as contemplated by 88, but what I'm exploring is whether there's capacity to unilaterally withdraw from the agreement, and here we're not talking about agreeing to the next period of leave, which might be at Easter, we're talking about agreeing to this roster pattern for so long as the employment is on foot, and so your construction of 88 is that once I've agreed, unless there's an agreement to alter, I can't unilaterally withdraw from that?

PN89

MR AVALLONE: Subject to the operation of 88(2) as well about request and it's not unreasonably refused.

PN90

DEPUTY PRESIDENT GOSTENCNIK: Sure, but the not unreasonably refused means that the employer agrees, so there's consent.

PN91

MR AVALLONE: Well, yes, but the capacity - when we're talking about a unilateral variation by the employee, which is what I think we're talking about, the capacity of the employer just to say, 'No, talk to the hand' is affected by section 88(2).

PN92

DEPUTY PRESIDENT GOSTENCNIK: Under the current arrangement, the two employees have, in effect, agreed to the way in which - the periods in which they will take annual leave in 2026, assuming they are still employed?

PN93

MR AVALLONE: Yes, and the - - -

PN94

DEPUTY PRESIDENT GOSTENCNIK: How do I now say to my employer, 'Well, in 2026, I don't want to take leave in accordance with that roster and I don't agree.'

PN95

MR AVALLONE: Well - - -

PN96

DEPUTY PRESIDENT GOSTENCNIK: 'I do agree in 2025 and 2024, but not in 2026.'

PN97

MR AVALLONE: There are two things. One is - I've already said section 88(2), so I won't go back to that. The other thing is that under the agreed arrangements - and this is on appeal book 152 over to 153 - there is the ability to, by agreement - or to request a modification to undertake an extended - - -

PN98

DEPUTY PRESIDENT GOSTENCNIK: That's the six-month period.

PN99

MR AVALLONE: That's right, yes. So it's not completely inflexible. And I should say, at any point in time, it's always possible for the employer and the employee to agree to modify it. That's what happens in the modern workplace.

PN100

The other thing I should note from Mr Smallwood's statement, which was exhibit A in the stay application, at 17(b)(ii), Mr Smallwood gave evidence then that - and this was in the context where a stay was being sought, but at that stage it was intended that two other employees would each be provided with the IFA, which is somewhat irrelevant, but then later on - and a separate agreement to confirm their agreement to take their annual leave during the roster swing in a form substantially similar to that, but, of course, that's always going to be subject to the employer and employee might negotiate changes to it.

PN101

DEPUTY PRESIDENT BELL: I might just ask, as a matter of factual background or relevance, looking at paragraphs 17(b) and (c) there, are there three employees for whom there is an IFA in place?

PN102

MR AVALLONE: Yes.

PN103

DEPUTY PRESIDENT BELL: Would it be accepted if those IFAs were terminated in accordance with their provisions that the leave arrangements would terminate?

PN104

MR AVALLONE: The IFAs were presented, if I could put this quite frankly, somewhat confusingly, as a part A and a part B, and the part A, in a sense, was the true IFA, doing the things that an IFA needs to do, and they are things that an IFA, in my client's submission, can do, and part B is probably best not really described as part of the IFA, doing other things, and one of the other things that it did was the annual leave arrangements. I'm about to be told that I've slightly got that wrong, I think.

PN105

What I'm instructed, Deputy President Bell, is that the first two people who are named in 17(a), the first one of whom's first name is Alexander and the second one whose first name is James, that their IFAs that were signed by them did not deal with annual leave. There are clearly two separate instruments for those two individuals. There's an IFA and, separately to that, there's the common law agreement along the lines of 149 to 155 of the appeal book.

PN106

DEPUTY PRESIDENT GOSTENCNIK: And the IFA deals with alteration to the hours to facilitate the rostering arrangement.

PN107

MR AVALLONE: Yes.

PN108

DEPUTY PRESIDENT GOSTENCNIK: The common law contract deals with that, or at least the annual leave, amongst other things, consequences of that arrangement?

PN109

MR AVALLONE: Yes. If, in the case of those - - -

PN110

DEPUTY PRESIDENT GOSTENCNIK: But that's not true in respect of (b) and (c). Those people entered into - - -

PN111

MR AVALLONE: That's right, but those people had an IFA which, perhaps confusingly, did have - - -

PN112

DEPUTY PRESIDENT GOSTENCNIK: Included, effectively, the annual leave.

PN113

MR AVALLONE: That's right. The way it was put at first instance, that it was something of an ancillary clause, noting that that's the way that annual leave is going to be dealt with without, on my client's case, varying their entitlements to annual leave under the NES.

PN114

Coming back to your question, Deputy President Bell, for those two groups of people, the latter two, if the IFAs were to be terminated, I think the reality is it would then have to become a question of whether the employees agreed in a common law sense to the arrangements, and it would be necessary to make - well, it would be necessary, if the FIFO arrangements were going to be in place, it would be necessary to make an agreement of a common law kind consistent with 149 to 155.

PN115

I guess what I'm saying is that by the time that the matter came before Connolly C, the primary reliance was on common law arrangements, and the question to be determined by Connolly C was whether those common law arrangements were consistent with section 88 and the enterprise agreement. So, in a sense, IFAs were something of a distraction, part of the factual matrix or part of the road that led to the Commission, but by the time that the parties were before the Commissioner, the battleground, for want of a better word, was in relation to the common law agreements.

PN116

DEPUTY PRESIDENT GOSTENCNIK: Mr Avallone, if you look at footnote [2] of Mr Smallwood's statement, which is referencing the employees' arrangement under paragraph (b) of paragraph 17, the reference there is to digital court book page 84, appeal book 240. My appeal book has only got (indistinct).

PN117

MR AVALLONE: That's a good point. I should be able to answer that by reference to the digital court book number 84. You will see in the appeal book - - -

PN118

DEPUTY PRESIDENT GOSTENCNIK: Yes, at the top, yes.

PN119

MR AVALLONE: Yes, the red - - -

PN120

DEPUTY PRESIDENT GOSTENCNIK: 84 - - -

PN121

MR AVALLONE: Which is 210. That's a typographical error in the footnote. Appeal book page - - -

PN122

DEPUTY PRESIDENT GOSTENCNIK: This appears to be an attachment to a letter from Mr Woodhams to the union on 7 July rather than the IFA.

PN123

MR AVALLONE: Yes. I'm just, sorry, going to do a bit of flicking back and forth before I open my big mouth. I've just noticed that there is some difference between the document that you and I, Deputy President Gostencnik, have been talking about, 149 to 155, while Mr Smallwood's evidence, the version that people have signed up to is this version which starts at appeal book 206. I'm sorry, I've been corrected again. That footnote - I should have looked at what the footnote related to - that footnote there is the people who have an IFA; it's not the common law agreement.

PN124

DEPUTY PRESIDENT GOSTENCNIK: No, I understand that.

PN125

MR AVALLONE: Sorry.

PN126

DEPUTY PRESIDENT GOSTENCNIK: I was wanting to have a look at it.

PN127

MR AVALLONE: Yes.

PN128

DEPUTY PRESIDENT GOSTENCNIK: And it tells me it's at page 240 of the appeal book, and I don't have a 240 of the appeal is my point.

PN129

MR AVALLONE: No. The typo there is 210, so the document starts at 206.

PN130

DEPUTY PRESIDENT GOSTENCNIK: I was just looking at - 240 is transposed to 204? Is that - - -

PN131

MR AVALLONE: It could well be.

PN132

DEPUTY PRESIDENT GOSTENCNIK: The document which has those roster arrangements, which starts at 206 of the appeal book, appears to be an attachment to a letter from Mr Woodhams to (indistinct) the Pilots' Federation, which commences at 203.

PN133

MR AVALLONE: Yes.

PN134

DEPUTY PRESIDENT GOSTENCNIK: That's not the IFA. It might tell him what's in the IFA, but it's not the IFA.

PN135

MR AVALLONE: No, but his evidence, as I now understand it, his evidence is that those two individuals, David Devlin and Andrew Jackson - - -

PN136

DEPUTY PRESIDENT GOSTENCNIK: I see, I see. The footnote is - it says it's in the form of the agreement shown, but I don't see an agreement at any of these pages.

PN137

MR AVALLONE: No, but the letter that you were referring to, which starts at appeal book 203, refers to an IFA, or proposed IFA, however it's described, and, as I understand it, it then attaches an IFA, which is the document that follows at page 206 through to - - -

PN138

DEPUTY PRESIDENT GOSTENCNIK: I see.

PN139

MR AVALLONE: - - - whatever it's up to.

PN140

DEPUTY PRESIDENT GOSTENCNIK: 215, which is the signature page.

PN141

MR AVALLONE: Yes. And that relevantly includes page 210 of the appeal book, which happens to have been at first instance digital court book 84, which is the reference there to digital court book 84 in that footnote.

PN142

DEPUTY PRESIDENT GOSTENCNIK: Which is the annual leave provision, yes.

PN143

MR AVALLONE: So I think it's a simple typo.

PN144

DEPUTY PRESIDENT GOSTENCNIK: 210 of the appeal book, both in footnote [1] and [5]?

PN145

MR AVALLONE: Let me just look at footnote [5].

PN146

DEPUTY PRESIDENT GOSTENCNIK: I think it's referring to the same thing.

PN147

MR AVALLONE: Yes.

PN148

DEPUTY PRESIDENT GOSTENCNIK: Yes. All right. Thank you for that.

PN149

MR AVALLONE: Whilst we're talking about IFAs, can I note that the Commissioner did not decide the case on the basis of whether there were IFAs that had been genuinely agreed, to use the language of section 203(3), and the appeal grounds which we had relied upon, you will see from the appeal submissions, about genuinely agreed have been withdrawn. So whether they were genuinely agreed within the meaning of that subsection is irrelevant to this appeal, I submit.

PN150

Whether the employees had, to use the union's language in the respondent's submissions at 6, a real choice is really about the same point. 'Real choice' is another way to say 'genuinely agreed' within the meaning of 203(3), and I say that that's not relevant to the appeal either.

PN151

What this case is really about, I submit, is whether the Commissioner's decision was correct when he said that arrangements of the kind that have been entered into - at 149 to 155 - when he says that they are inconsistent with section 88(1) and the agreement, whether they are agreed or not - and that's his language - whether he was correct when he said that, and I submit that the plain language of 88(1), that that is - that he was wrong.

PN152

Can I just go to the enterprise agreement just to take you to some relevant clauses in the agreement. The enterprise agreement starts at appeal book 75, and it's really to put things in context. The agreement - this is appeal book 94 - the agreement provides at clause 4.3.1 that:

PN153

*An Employee is entitled to eight days off in each 28-day roster period as nominated by the employer.*

PN154

So that's eight days, not 12, but eight days. At appeal book 104, clause 6.1.1:

PN155

*A permanent Employee is entitled to six weeks (42 calendar days) of paid annual leave (inclusive of Saturdays, Sundays and Public holidays) for each completed year of service.*

PN156

Then it continues on. Also on that same page, relevantly, clause 6.1.3 provides that:

PN157

*Annual leave will be taken at times agreed between the Employee and the Employer.*

PN158

Mirroring, I submit, the language of section 88(1). Note especially that both clause 6.1.3 and also section 88(1) use that word 'agreed'.

PN159

I have already taken you to the document at 149 to 155, but perhaps if we can just go to that just very briefly. At page 151 of that document, we note that it provides for - this is the top left paragraph - a 28-day roster cycle made up of 14 days of duty, two days of travel and 12 days off at home. So effectively, if one includes the two travel days, it's a 16/12 roster.

PN160

Over the page on appeal book 152, part of the agreement includes - and this is just under the heading 2, 'Annual leave and leave':

PN161

*Your annual leave entitlement to annual leave will be acquitted during the off duty periods.*

PN162

And the calculations are set out there in the right-hand column as to what that looks like. On that right-hand column, about just under halfway below - or halfway down the page - it makes that point that someone on a non-FIFO arrangement, so someone who has not agreed to this arrangement, would be entitled to 92 rostered days off - maybe the language could perhaps be better - that's essentially your eight days off per 28-day period - for the 46 weeks of non-leave time. So 92 days plus the 42 days of annual leave per annum, which comes to a total of 134 calendar days off for the people who have not entered into this agreement.

PN163

People who have entered into this agreement are dealt with in the next paragraph. They would be covered by a FIFO roster which provides for 175 days off duty, less the 26 days of travel back and forth. So that's a net of 149 calendar days with no work: days at home, away from the base and not travelling. So that amounts to an additional 15 days that employees who have made this agreement will be entitled to under the common law agreement.

PN164

I will come back to this in a bit, but the respondent's submissions seem to - well, I'll deal with those 15 days shortly, if I can.

PN165

Can I say one other thing. When the agreement says - it would be a mistake to say that it's exactly four days of annual leave. So this 16/12 roster, the 12 days off is eight days that someone's entitled to under the agreement for days off, plus another four days off. That's not four days of annual leave. It includes the annual leave, but, because of these bonus days, the 15 bonus days, they are actually getting three and a-bit days of annual leave plus a bit of a bonus day, or part of a day, as time off.

PN166

DEPUTY PRESIDENT GOSTENCNIK: Or was it they get four days' annual leave until they reach the entitlement level, then they get the bonus days?

PN167

MR AVALLONE: Perhaps. You say tomato - - -

PN168

DEPUTY PRESIDENT GOSTENCNIK: Yes. Well, it's potentially an important issue, though, isn't it, for an employee who might resign and be looking to have annual leave that's not taken paid out?

PN169

MR AVALLONE: It is, and the way that it's expressed is that it will be acquitted during the off duty periods. So if that were - if it were done proportionately across, it would be three point something something and, on that construction, they would be more likely to have a bit of an annual leave accrual. I mean, the reality is that, unless employees have got - and some of them do - unless employees have got some annual leave from previous periods of employment accrued, they are going to be using it effectively as they go. That's what they're agreeing to.

PN170

DEPUTY PRESIDENT GOSTENCNIK: Well, actually, just pausing there, in a 28-day period, what do you say the agreement provides for to be deducted from annual leave?

PN171

MR AVALLONE: So it's obviously the last few words.

PN172

DEPUTY PRESIDENT GOSTENCNIK: What does the agreement provide for to be deducted from the annual leave accrual?

PN173

MR AVALLONE: It is something lightly less than four days because - sorry, it will end up effectively necking out. Nothing will be deducted. They will accrue annual leave over their 16 days, which is 14 days of work and the two travel days. Over that period of time, they're going to accrue some annual leave, and the annual leave that they've accrued over that time, they will then take within the four days, but it's not going to be four exactly.

PN174

I am instructed that the employees do receive a rostering schedule which marks which days are being treated - in that off swing period, which days are annual leave and which days are effectively the bonus days off. So there will be just - and which days are their rostered days off, which they are guaranteed under the agreement.

PN175

DEPUTY PRESIDENT GOSTENCNIK: You might not know the answer, but does that account for public holidays that might fall in the 12-day period?

PN176

MR AVALLONE: The agreement provides for 42 days of annual leave, which is inclusive of public holidays. So essentially they're rolled into the 42. So most employees out there are going to have 20 days off, obviously, and some - I can't remember if it's 10 or 11 - days of public holidays on top of that. Under this agreement, public holidays are rolled into the 42. So it's not - you know, the planes fly on Good Friday.

PN177

DEPUTY PRESIDENT GOSTENCNIK: I understand that, but we're not talking - they're not taking annual leave when the plane's flying, they're - - -

PN178

MR AVALLONE: Well, the plane - - -

PN179

DEPUTY PRESIDENT GOSTENCNIK: That's part of their 16-day on.

PN180

MR AVALLONE: Yes, so the plane's being flown by somebody, so there will be somebody on that day, whether it's Good Friday or Christmas Day, and one might ask, 'When does that employee get their day in lieu of a public holiday?', if I can put it that way. The answer is in the agreement itself, which provided that, instead of getting 20 days of annual leave, you get 42, but that's inclusive of public holidays.

PN181

So on my - there'll be a shepherd's crook that will pull me if I say the wrong thing here - but, as I understand the rosters that are presented to people, it doesn't have a separate colour for public holidays as time off, or anything like that, because you're either on swing or you're off swing, or you're travelling between the two, but, in that off swing, the off swing days are identified as either being RDO, or annual leave, or 15 bonus days, for want of a better word.

PN182

DEPUTY PRESIDENT GOSTENCNIK: Yes. So the roster distinguishes between those three?

PN183

MR AVALLONE: Yes, as I understand my instructions.

PN184

I don't know that I need to necessarily take you to it, but I can give you the reference where these 15 additional days were referred to at first instance. They are referred to in my client's first instance submissions at appeal book 171 at paragraph 5.6. My instructor today, who appeared at first instance for my client, referred to it in appeal book 57, paragraph number 183 of the transcript, referred to it as basically 15 free days; at appeal book 70, referred to it - at PN 275 - 15 free days are days that employees are not required to work, for which they get a benefit, they continue to get paid throughout.

PN185

The reason that I raise all that is that the respondent's submissions that were filed a few days ago, at paragraphs 9 and 10, suggest that these 15 days - first, that the 15 days were linked to a deficit or a debt of annual leave. That's not the case. I think that's at paragraph 9. Then, at paragraph 10, the respondent's submission seem to say that, well - - -

PN186

DEPUTY PRESIDENT GOSTENCNIK: Does that contention presuppose that annual leave is acquitted only to the point of accrual and anything else in that period of off swing? It's not RDO, it's not annual leave, it's the additional time?

PN187

MR AVALLONE: Yes, it's an additional part day, yes. Exactly. Precisely so.

PN188

Paragraph 10 of the respondent's submissions, second sentence - well, the first sentence says that those 15 extra days of leave - well, they're not leave - 15 extra days of leave are required to facilitate 12 roster periods and not accounted for by any form of leave or RDO entitlements - just quoting the respondent's submissions.

PN189

Second sentence:

PN190

*It follows that those extra 15 days must be additional rostered days off...*

PN191

in quotes:

PN192

*... under the terms of the enterprise agreement.*

PN193

Respectfully, I say that that's making the same - it's the same syllogistic fallacy as the Commissioner fell into, this concept of days off under the agreement. The eight minimum days are days when work is not performed. These are days when work is not performed; therefore, they must be days off as required by the agreement. It's similar to saying, 'All cats have four legs; that dog has four legs; therefore that dog must be a cat.' It just doesn't follow. These 15 days are additional days over and above the annual leave entitlement, over and above the eight days off which are required each 28-day period under the agreement.

PN194

In relation to the benefits of the agreement, not in the case about genuinely agreed, but in case one might wonder, 'Well, why would an employee agree to these arrangements?' One answer to that might be the 15 additional days; another might be - and there's a reference in this to the - I haven't got the footnote off the top of my head, but it's referred to in the submissions on appeal - a reference to what was said in transcript, that there is one pilot who uses his off swing periods

to spend - well, uses the leave arrangements that have been agreed to to spend time each month, or from time to time, with his girlfriend, who lives in Germany. That's not something that would be possible under anything other than a fly in/fly out arrangement.

PN195

Just on that, I note that at paragraph 13 of the respondent's submissions, the respondent relies upon *WorkPac v Skene* as authority for a proposition that annual leave is to access rest and recreation, and I think it relies on *WorkPac v Rossato* as authority for the proposition that the entitlement is to take annual leave at the time of one's choosing. Well, this is an employee who has chosen to access rest and recreation in a particular way at a time of his choosing, and these are the arrangements that he's agreed to to facilitate that, and to find that that agreed arrangement is somehow inconsistent with section 88, I submit, would be incorrect; it would be a misapplication or a misconstruction of section 88.

PN196

Just going back to - in case any member of the Full Bench has concerns about relying upon the Smallwood statement which was before Deputy President Millhouse at the stay application, there was an unopposed submission from the Bar table, or two unopposed submissions from the Bar table, to that same effect, that there were two employees who had agreed to the common law arrangements. That's appeal book 60 at paragraph 61 of the transcript, and also appeal book 51 at paragraphs 130 to 132. It is well established, I submit, that the Commission can take into account, effectively as evidence, unopposed submissions as to factual matters.

PN197

If there be any doubt about that, there is a Full Court in *Australia Post v D'Rizario* where Jessup J said words to that effect. If it's of interest to the Commission, I can provide the citation later. I just can't recall it off the top of my head. Sadly, I recall giving evidence in the matter, so if you searched on my name, you'd probably find it. Just search in AustLII for the phrase 'Avallone and pornography' and you'll find it.

PN198

Fundamentally, in circumstances where the position was unopposed that there were two employees who had made these types of common law agreements, the only issue really necessary to consider is whether those arrangements are consistent with section 88(1) and with the agreement.

PN199

I won't spend a lot of time on the grounds - you don't need to do that Google search: *Australian Postal Corporation v D'Rozario* [2014] FCAFC 89, and my recollection is it was Jessup J.

PN200

As I have already said, grounds 6 and 7 are not pressed. I rely upon the written submissions. If you will grant me indulgence, I will say a few things really to address what's been put in writing just the other day by the respondent.

PN201

Appeal ground 1 really is the critical ground. The Commissioner found that agreements between an employee and his or her employer as to the timing of multiple future periods of annual leave over an extended period were not consistent with section 88(1) or clause 6.1.3. The crux of the Commissioner's decision seems to come down to paragraph 110 of the decision, where the Commissioner focused on the indefinite article, the word 'a' in section 88(1) where 88(1) reads:

PN202

*Paid annual leave may be taken for a period agreed between an employee and his or her employer.*

PN203

I submit that that was a very narrow and an overly narrow reading of section 88(1). I have included the relevant provision from the Acts Interpretation Act in the authorities, which is section 23(1)(b) that:

PN204

*In any Commonwealth Act, unless the contrary intention appears, words in the singular include words in the plural.*

PN205

There is no contrary intention, I submit, in the language, the purposes or the context of section 88(1). There's nothing unusual or untoward, I submit, about an employer and its employees agreeing in advance on future periods of annual leave. It's just not realistic, I submit, to say that you can only have an agreement: 'Can I take annual leave in a couple of months' time?' 'Yes, okay.' 'The week after that, can I have another day?' - you know, this idea that they have to be ad hoc arrangements.

PN206

If that were the case, if it were not permissible to have agreements for multiple periods of annual leave some time in the future, then one can cast aside the idea of leave planning rosters such as are common in a number of industries, including, for example, the power industry down in the Latrobe Valley. One can forget about FIFO even-time arrangements where there's, like in this case, employees agreeing in advance to take annual leave during their off swings as part of an even-time roster. It's simply, as I say, unrealistic and impracticable for there to be the need for an ad hoc agreement each and every time.

PN207

It's consistent with a more reasonable construction of section 88(1) to find or to conclude that it is permissible to have agreement in advance for multiple periods of annual leave, and I note that's consistent as well with clause 6.1.3 of the agreement, which refers to multiple - well, which refers to periods of employment.

PN208

I am indebted, by the way, while I mention a construction point and the agreement, to my learned friend for the fact that his folder of authorities includes *WorkPac v Skene* at tab 4, and the reason that I'm indebted is because, at

paragraph 197, *WorkPac v Skene* sets out the applicable principles according to the Full Court, which I submit should be followed as to the construction of enterprise agreements, including the well-know phrase from Kucks that 'narrow or pedantic approaches are misplaced' and I submit that relying upon the word 'a' to find you can only ever have one agreement at a time and there must be a separate instrument of agreement each time that annual leave is agreed, that that is a narrow and pedantic approach, which should be rejected.

PN209

So, too, and I'll come back to it, paragraph 203 of *WorkPac v Skene*, that words, when used in agreement, so, too, in legislation, unless the contrary intention appears, should be given their ordinary meaning.

PN210

DEPUTY PRESIDENT GOSTENCNIK: Mr Avallone, on one view, section 88 is not concerned with whether agreements can be made in respect of more than one period, but rather it's permissive, that is, it allows an employee to absent him or herself from the workplace for a period, if that period is agreed.

PN211

MR AVALLONE: Yes.

PN212

DEPUTY PRESIDENT GOSTENCNIK: It's talking about the length of absence, and the agreement can be in respect of a number of periods and the relevant question is whether the period of absence that the employee was away from work was agreed and, if it was, then the employee may absent themselves for that period.

PN213

MR AVALLONE: Yes, but the one caveat I put on that is that 'period' is not just about - you know, it's not one day some time in the future, it's one day, one week, or whatever it is, on that particular date, or however ascertained.

PN214

DEPUTY PRESIDENT GOSTENCNIK: Yes. So from 13 to 20 April an employee was absent, and the employee says, 'I'm on annual leave' and the question is whether or not that period was agreed.

PN215

MR AVALLONE: Yes.

PN216

DEPUTY PRESIDENT GOSTENCNIK: An employee might have also agreed with the employer to be away from May 3 to May 7.

PN217

MR AVALLONE: Yes.

PN218

DEPUTY PRESIDENT GOSTENCNIK: And the question will be whether that period was agreed.

PN219

MR AVALLONE: Yes.

PN220

DEPUTY PRESIDENT GOSTENCNIK: It's not concerned about the number of agreements, as such, about periods, but rather it's permissive, that is, the employee may - annual leave may be taken - and the only person who can take annual leave is an employee - so may be taken by the employee for the period agreed between the employee and his or her employer for the length and the dates.

PN221

MR AVALLONE: Yes.

PN222

DEPUTY PRESIDENT GOSTENCNIK: So I'm not sure that having discussions about whether 'a' is singular or plural takes the matter much further. The relevant question is: can an employee take annual leave during that period? Here the employees have agreed, presumably, to have their annual leave dictated by a roster, and the period in the roster which appears as annual leave is the agreed period, and so the employee may take leave during that period.

PN223

MR AVALLONE: Yes. The reason that I focus - well, I agree with you that one shouldn't focus overly on the word 'a'. The reason that I raise it is because that is what, on the face of paragraph 110 of the decision, the Commissioner - - -

PN224

DEPUTY PRESIDENT GOSTENCNIK: I understand that.

PN225

MR AVALLONE: Yes.

PN226

DEPUTY PRESIDENT GOSTENCNIK: I understand that.

PN227

MR AVALLONE: And that seems to have been a central tenet of the reasoning, you know, that there can't be agreements - I think the Commissioner used the phrase 'in perpetuity' - but the reasoning for that was based on it being 'a', as in singular.

PN228

The respondent's submissions at paragraphs 13 to 17 really, I submit, miss a fundamental point, which is that, as I have already said, the annual leave arrangements that are in paragraphs 149 to 155, on the evidence, for two of the employees, and the only two relevant employees really, that they are agreed. It's not that they've been imposed upon people. They have agreed to them. To find - if you go back - - -

PN229

DEPUTY PRESIDENT BELL: What exactly has been agreed, though, in circumstances where we've got 12 days off duty and we've got a little bit less than four days of annual leave? What are the days that are agreed in the contract that we've been looking at, or is it that there's an agreement to agree?

PN230

MR AVALLONE: There's an agreement that your off swing of 12 days will include the eight you're entitled to under clause - I think it's 6.4.3 - plus another four days consisting of, or, sorry, including your annual leave. What are the precise days, one would need to look further, which is the roster that I've referred to, but I don't have to - - -

PN231

DEPUTY PRESIDENT BELL: I understand that, but looking at 88(1), which is directed at an agreement for leave taken for a period, is it fair to say that that period does not crystallise until a roster's published and the pilot, he or she, says, 'That looks good to me'?

PN232

MR AVALLONE: It may be that one can't put a finger on that's the particular day until that roster is promulgated, for want of a better word, or distributed, but what the employee has agreed to is a pattern of 16/12, or, probably better put, one travel day, 14, 1 and 12, those 12 including annual leave.

PN233

DEPUTY PRESIDENT BELL: The contract at 152 says:

PN234

*Your annual entitlement to annual leave will be acquitted during the off duty periods.*

PN235

MR AVALLONE: Yes.

PN236

DEPUTY PRESIDENT BELL: So that's a wider period than, presumably, the period 88(1) is talking about, which is four days versus 12 days.

PN237

MR AVALLONE: Yes, slightly less than four days within the 12.

PN238

DEPUTY PRESIDENT GOSTENCNIK: So at what point is there an agreement?

PN239

MR AVALLONE: Sorry?

PN240

DEPUTY PRESIDENT GOSTENCNIK: At what point is there an agreement for the period the employee may take annual leave?

PN241

MR AVALLONE: Well, there's agreement at the point that the employee and the employer agree on this document that the period will, as Deputy President Bell put it - sorry, I shouldn't put words in your mouth. There is agreement that during the 12 days of off swing, the annual leave will be taken or will be acquitted, but, at that point, or at the point of signing this, can one point to the calendar and say, 'Definitely on such and such date, someone will be on annual leave'? No, not until the annual leave roster is provided to the employees, and presumably there's a period, or there could be a period, of going back and forth, but until that's locked in, I do need to accept that you couldn't - until that roster's locked in, you couldn't say, 'That is the day that annual leave will be taken on.'

PN242

DEPUTY PRESIDENT GOSTENCNIK: Is it then correct to say that the common law contract agrees to no more than participation, or for the acquittal of annual leave by a particular method, but doesn't represent an agreement to take annual leave for a period, that period is determined at a later date, once the roster is published, and presumably the employee agrees?

PN243

MR AVALLONE: Well, I think it's agreement - it might not be agreement to a particular day, but it's agreement that it will be taken during the off swing periods. At the end of the day, in a practical sense, what does happen is that the roster is, whether it's published, or promulgated, whatever the verb might be, and then, consistent with that and consistent with the agreement that the employees have made with their employer, the employee takes those days.

PN244

DEPUTY PRESIDENT GOSTENCNIK: If that's right, the employee can choose which of the three and a-bit days of the 12 he or she will take as annual leave. If the agreement is, 'You can take annual leave during the off swing, but at this point we don't know what days that will be', the employee can choose which of the days are annual leave?

PN245

MR AVALLONE: In theory, yes, and in one sense with the regular 16/12 arrangement, it doesn't really matter because - - -

PN246

DEPUTY PRESIDENT GOSTENCNIK: No.

PN247

MR AVALLONE: - - - there's eight days - - -

PN248

DEPUTY PRESIDENT GOSTENCNIK: Off.

PN249

MR AVALLONE: - - - off duty and three and a-bit annual leave, and it doesn't really matter. They are still getting paid and they're still not required to work and they're still at home, or in Germany, if that's what they want to do, but there's also

the ability to reach agreement for the extended off swing, which is mentioned - extended on swing, which will facilitate part - which will allow people to accrue additional annual leave, which can then be used later on.

PN250

DEPUTY PRESIDENT GOSTENCNIK: But it is the practice here that when the roster is published, of the 12 days, there are designated days in the roster that the - - -

PN251

MR AVALLONE: That's my understanding of my instructions, yes.

PN252

DEPUTY PRESIDENT GOSTENCNIK: When did the employee agree to that period that's identified in the roster?

PN253

MR AVALLONE: Well, I guess in theory, someone could say, 'Well, I've got those 12 days off, that's fine, but I really don't want those eight days to be my days off and those three and a-bit days to be my annual leave; I want to switch it.' I can't imagine why someone would do that, but, in theory, it might be possible for there to be some process of going back and forth to shift around the deckchairs, but the impact of it's going to be - - -

PN254

DEPUTY PRESIDENT GOSTENCNIK: I understand that, in most cases, it's going to be insignificant in a practical sense.

PN255

MR AVALLONE: Yes.

PN256

DEPUTY PRESIDENT GOSTENCNIK: But there might be some circumstances where it is material. An employee resigns during that period - - -

PN257

MR AVALLONE: During the off swing?

PN258

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN259

MR AVALLONE: Could, in theory, yes.

PN260

DEPUTY PRESIDENT GOSTENCNIK: And the way the accrued is to be paid out - and so doesn't agree to the days nominated, which are at the end of the period - sorry, at the beginning of the period instead of some later stage. I mean, there can be occasions, but, on most occasions, it's 12 days off and which days doesn't matter, but what I'm trying to understand is whether this common law contract is the agreement for the purposes of 88(1), not whether there's an

agreement at some point later for the employees to take leave during the identified period in the roster.

PN261

MR AVALLONE: I submit this is, well, at least a very big part of it. It is an agreement as to when it will be taken, but to get the whole picture, one would need to look at the roster.

PN262

Just to pick up on the point you made a minute ago about someone resigning part way through - or the date of effect of their resignation being part way through their 12 days off swing, just while I'm on my feet, it occurs to me that if someone's worked 16 days and are entitled to their eight paid days off per 28-day period, I can't see a world where they wouldn't get paid that. They are entitled to it as paid days off. The fact they have resigned part way through - what I'm trying to get to is I don't know that it really matters, even for that, what their final termination payment is going to be.

PN263

DEPUTY PRESIDENT GOSTENCNIK: Do the eight days accrue, do they, the RDOs?

PN264

MR AVALLONE: Sorry?

PN265

DEPUTY PRESIDENT GOSTENCNIK: Do the eight RDOs accrue in the sense - - -

PN266

MR AVALLONE: Well, it's an entitlement to take days off as paid days under - I think it's 6.4.3.

PN267

DEPUTY PRESIDENT GOSTENCNIK: If you're still employed.

PN268

MR AVALLONE: Yes.

PN269

DEPUTY PRESIDENT GOSTENCNIK: If you're not employed, there's no entitlement, so that if I terminate at the beginning of the off swing, I'm not entitled to the eight days off (indistinct).

PN270

MR AVALLONE: That might be an argument for another day, I suspect.

PN271

DEPUTY PRESIDENT GOSTENCNIK: Yes. In any event, it's a rarity.

PN272

MR AVALLONE: Yes. The respondent's submissions rely upon - this is at paragraph 16 and I think it's footnote [11] - they rely upon a judgment of Katzmann J in *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd*, which, I submit, really deals with a different word, or a different section, in a different context and a different word. What her Honour was dealing with there was the meaning of the phrase in section 62 'request' or 'require' - and, relevantly, it was really about 'require'.

PN273

I won't take you to her Honour's judgment now. It's in at least the respondent's authorities, but paragraph 178 sets out the words of section 62. Paragraph 220, that the union rely upon, uses the word - and it's clearly about whether something's a requirement. Paragraph 223 of her Honour's judgment again deals with whether something is required. The word 'required' does not appear in section 88(1). It's about the word 'agreed'.

PN274

Coming back to what I said about *WorkPac v Skene* before, unless the contrary intention appears, then words should be presumed to have their ordinary meaning. That's why I've included in the appellant's folder of authorities the Macquarie Dictionary and Shorter Oxford English Dictionary extracts as to the word 'agreed' and the word 'agree'. Behind tab 10, the left-hand column, about halfway down, is the word 'agreed', which is 'arranged by common consent'. A bit higher up, the definition of 'agreed', definition 1, 'to yield, assent, consent'; definition 4, 'to come to one opinion or mind, come to an arrangement or understanding, arrive at a settlement'; number 8, 'to yield, assent or consent'; number 10, 'to determine or settle'. Similar definitions of words tend to mean the same thing.

PN275

In the Shorter Oxford English Dictionary, 'agreed' is on the second - I haven't highlighted it - it's on the second page, left-hand column, number 3, 'arranged or settled by common consent', and then - I won't read them all out, but in the Oxford it's, relevantly, definitions 4, 7 and 10. They all are about 'coming to an accord', 'coming to a common position'.

PN276

That is what section 88(1) is about and that, I submit, is what the document at appeal book 149 to 155 is about. It's the employee and the employer coming to a consent position, or a settled position, as to the periods in which the employee's going to take annual leave, and those periods are to be taken during their off swing as part of a 16/12 roster. I submit that that's exactly what section 88(1) envisages: an agreement.

PN277

The union, and also Connolly C, put reliance on the decision in *Australian Federation of Air Pilots v HNZ Australia*, which is at authorities tab 4 of the appellant's authorities, a Full Bench that Deputy President Gostencnik will be familiar with. There, relevantly, the Full Bench held that an enterprise agreement clause which mandated employees to take annual leave during the roster swing was inconsistent with section 88(1), and I submit that that is different to this

factual circumstance here because there is no mandating by some instrument external to the parties, the parties being the employer and the employee, there is simply an agreement between the employee and the employer.

PN278

In HNZ, the clause is set out at paragraph 8 of the decision, and focus came on 14.2.1(b), which provides what the tour will be - on the basis of an equal time roster - something similar to what's been put in place here, but, importantly, it's in an enterprise agreement that the parties are bound to comply with, whether they like it or not. It has statutory effect.

PN279

The Full Bench, at 14, about four lines down - I think it's the third sentence - said:

PN280

*Self evidently clause 14.2.1(b) of the Agreement has the effect of denying a touring pilot the opportunity of reaching agreement with HNZ about when annual leave may be taken and the duration of leave.*

PN281

That's very different, I submit, to this circumstance in this case because the employees have not only had the opportunity to agree, they have agreed. It's not a world where an enterprise agreement clause is being imposed upon them. They, to sound like a broken record, have agreed. It was on the basis that the pilots were denied the opportunity of reaching agreement that, at paragraph 17, the Full Bench in HNZ found that the clause is detrimental - sorry, the Full Bench said that that clause is a term:

PN282

*... not permitted by s.55(4) of the Act because it is detrimental to a touring pilot in the respect that we have already identified, namely that it denies the touring pilot the full benefit of s.88 of the Act.*

PN283

I have already said that is about denying the pilots the opportunity to agree, and they have agreed in this case. So I submit that it is different to that case.

PN284

I think the respondent's submissions use, in paragraph 26, the phrase 'binding limitation'. There's no binding limitation, there's an arrangement which an individual employee and his - because they're both male - his employer have agreed upon.

PN285

The respondent's submissions, at paragraphs 20 to 22 - 19 really, but through to 22 - rely upon clause 6.9. They go through some of the clauses that I've already mentioned. They rely upon, sorry, clause 6.1.9, which is about the ability of an employee to apply for annual leave and the employer being required to either approve or reject the application within 14 days. There's nothing in the agreed arrangement that prevents that from occurring, nothing that prevents an employee from saying, 'Look, that's the roster that's in place, but I want to take' - you know -

'Can I take annual leave at this particular time?' and there's nothing to prevent the employer from providing a response to that and, if they reach agreement, to effectively vary the roster, and so be it, the new period of annual leave becomes a period of annual leave agreed under section 88(1). There is nothing inconsistent with the Act or the agreement in any of that.

PN286

The union's submissions, also at that paragraph 20 and following, rely upon clause 6.1.10, which is about cashing out of annual leave. I submit that that's simply irrelevant to the circumstances of this case. It's not a case involving cashing out of annual leave.

PN287

There is, I submit, when one reads all of 6.1, nothing inconsistent with the agreement in the agreed arrangements that a person, once they reach agreement, will be given annual leave as part of their off swing and that they receive the additional 15 days off per year.

PN288

I might have already mentioned this phrase, but I don't think I've given you the reference to it. The Commissioner used the phrase, at paragraph 98, he said, to paraphrase the start, that the 12 off swing days cannot - and this is a quote:

PN289

*... include a period of annual leave, whether that is by agreement or not.*

PN290

And that really does come to the crux of it. It just can't be a proper - that phrase there, 'whether that is by agreement or not', cannot, I submit, be consistent with a proper construction of section 88(1) of the Act or clause 6.1.3.

PN291

DEPUTY PRESIDENT GOSTENCNIK: I don't understand the reasoning. Is that because annual leave is taken during a period where ordinary hours would be worked and here, under the roster arrangement, the full complement of ordinary hours will have already been worked in the 16 days, and then there are no ordinary hours left to be worked in the remaining 12?

PN292

MR AVALLONE: Well, that's - I don't know that that's the reasoning the Commissioner had. The reasoning in paragraph 98, the reasoning of the Commissioner, well, seems to be that the days off are required - well, he says that:

PN293

*... rostered days off under the Agreement are to be days free of work ... annual leave is to be taken on days that would otherwise have been worked. On this basis, I am not convinced that the 12 off swing days proposed by the employer as rostered days off in these circumstances can include a period of annual leave...*

PN294

I'm really - I guess this is getting into the second ground of appeal, that there just seems to be this - well, I've used the phrase already 'syllogistic fallacy' that they're days off, therefore they can't be days of annual leave, and that just doesn't follow.

PN295

DEPUTY PRESIDENT GOSTENCNIK: That's probably correct in relation to the eight - - -

PN296

MR AVALLONE: Yes.

PN297

DEPUTY PRESIDENT GOSTENCNIK: - - - but there's the other four days, or three and a-bit. If a pilot works for six days, has the eight off and then has three days of annual leave, if the pilot didn't have three days of annual leave on those days, what would the pilot be doing?

PN298

MR AVALLONE: Well, if there were no agreement of this kind, then they would be on a non-fly in/fly out arrangement, they would be on something of a more conventional - a base-based work arrangement, if I can put it somewhat clumsily.

PN299

DEPUTY PRESIDENT GOSTENCNIK: Yes,

PN300

MR AVALLONE: It won't be fly in/fly out at all.

PN301

DEPUTY PRESIDENT GOSTENCNIK: The reason I ask is this, that the statute obviously needs to be read in context, and section 90, for example, provides that:

PN302

*If, in accordance with this division, an employee takes a period of paid annual leave, the employer must pay the employee's base rate of pay for the employee's ordinary hours of work in that period.*

PN303

MR AVALLONE: Yes.

PN304

DEPUTY PRESIDENT GOSTENCNIK: 'In that period.' So what are the employee's ordinary hours of work in that - what would they have been in that period, those three days?

PN305

MR AVALLONE: Well, what's a day's - and I'll have to get instructions - but whatever the number of hours in a day.

PN306

DEPUTY PRESIDENT GOSTENCNIK: They have already worked their ordinary hours in the previous 16 days.

PN307

MR AVALLONE: Yes.

PN308

DEPUTY PRESIDENT GOSTENCNIK: If they worked, they could only be overtime hours, surely?

PN309

MR AVALLONE: Well, no, because it shouldn't be a static analysis, it should be a dynamic analysis. The counterfactual is not a world where the parties have agreed to part of the arrangement 16/12 but without an agreement that those 12 days include annual leave, the counterfactual is a world where the employees have not agreed on a 16/12 arrangement and they would have, on those four days, been working the ordinary hours of work that would ordinarily apply. You can't unscramble - - -

PN310

DEPUTY PRESIDENT GOSTENCNIK: But the agreement provides for ordinary hours to be averaged over an averaging period.

PN311

MR AVALLONE: Yes.

PN312

DEPUTY PRESIDENT GOSTENCNIK: And here the hours are averaged over a 28-day period.

PN313

MR AVALLONE: Yes.

PN314

DEPUTY PRESIDENT GOSTENCNIK: Ordinary hours of work, the full complement of them are worked in the first 16.

PN315

MR AVALLONE: Under the arrangement that's been agreed.

PN316

DEPUTY PRESIDENT GOSTENCNIK: Yes. So what ordinary hours on the next three days is the employee being relieved working by taking annual leave?

PN317

MR AVALLONE: The ordinary hours that, had they not entered into this agreement, they would have worked on those days.

PN318

DEPUTY PRESIDENT GOSTENCNIK: But you're ignoring the 16 days that they've already worked.

PN319

MR AVALLONE: Well, that's because, as I say, you know, there's one set of circumstances where they agree on the arrangements.

PN320

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN321

MR AVALLONE: There's another set of circumstances where they haven't agreed on the arrangements, and the ordinary - - -

PN322

DEPUTY PRESIDENT GOSTENCNIK: Assuming that they have agreed to the arrangements, the arrangement in place, I'm just trying to understand what ordinary hours are they not working on those three days that they - - -

PN323

MR AVALLONE: The reality is that, like a lot of employees out there, annual leave will accrue - you know, the way it's calculated is that it will accrue on the basis of ordinary hours that are worked.

PN324

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN325

MR AVALLONE: So it will be based on the ordinary hours that they've worked over the previous 16 days.

PN326

DEPUTY PRESIDENT GOSTENCNIK: But a Monday to Friday worker, for example, a Monday to Friday worker doesn't work on Saturday and Sunday. An employer can't enter into an agreement with that employee to say, 'You've got to take annual leave on Saturdays and Sundays' because the employee has already worked all of their ordinary hours, Saturdays and Sundays are not a relief from working ordinary hours. It's not a period of annual leave - - -

PN327

MR AVALLONE: That they would ordinarily have worked.

PN328

DEPUTY PRESIDENT GOSTENCNIK: So what I'm asking here is, given that the employees have worked 16 days of ordinary hours, and assuming that's the full complement permissible, what are the ordinary hours from which they are being relieved so that they can take annual leave on those three days?

PN329

MR AVALLONE: Again this is - I might sound like a broken record - but it doesn't work to look at it part way through the 28 days and assume that you've applied part of the agreement and then come up with a counterfactual as to what's going to happen in the rest of it. You really need to look at the start of the period and say, 'If there had not been an agreement, then what would the ordinary hours of work have been?'

PN330

DEPUTY PRESIDENT GOSTENCNIK: I understand that, but here we're not talking about, 'If there hadn't been an agreement, you can take those three days off because you would have worked.' There is an agreement. So there's no ordinary hours to be worked on those days.

PN331

MR AVALLONE: Only because it's been agreed that they'll be worked - - -

PN332

DEPUTY PRESIDENT GOSTENCNIK: But they've already worked the hours. Yes, they've worked them. So what's the annual leave that's been taken in relation to that period? What are the ordinary hours from which the employee is getting relief?

PN333

MR AVALLONE: It's the ordinary hours that had there not been an agreement they would have worked.

PN334

DEPUTY PRESIDENT GOSTENCNIK: I accept that, but here there is an agreement.

PN335

MR AVALLONE: Yes, we've got - - -

PN336

DEPUTY PRESIDENT GOSTENCNIK: There's no, well if you hadn't agreed to this you would have been required to work. You're not, because you've already worked them. I am just trying to understand what work section 90 for example has to do in this circumstance. On one view there were no ordinary hours in that period and the employer is relieved from the obligation to pay.

PN337

MR AVALLONE: That would be a surprising conclusion - - -

PN338

DEPUTY PRESIDENT GOSTENCNIK: (Indistinct) that an employer (indistinct).

PN339

MR AVALLONE: Well, it would be a surprising conclusion to reach.

PN340

DEPUTY PRESIDENT GOSTENCNIK: I agree. I agree, but that's what the statute - it's talking about the same period that we are referring to under 88. So an employee takes a period - the determination of that which the employee is entitled to be paid is by reference to the ordinary hours of work in that period, the period that they're taking leave. So I am just asking what is the - - -

PN341

MR AVALLONE: I think it was Cambridge C who put it in - - -

PN342

DEPUTY PRESIDENT GOSTENCNIK: Yes, but with all due respect to that decision that was not concerned with the proper construction of section 88.

PN343

MR AVALLONE: No, but - - -

PN344

DEPUTY PRESIDENT GOSTENCNIK: The definition or - yes.

PN345

MR AVALLONE: The point that I was going to make was that - - -

PN346

DEPUTY PRESIDENT GOSTENCNIK: And entitlements to recall - - -

PN347

MR AVALLONE: Yes, it is different. The point that I was going to make was that Cambridge C identified that the types of arrangements here in place - - -

PN348

DEPUTY PRESIDENT GOSTENCNIK: Are unusual.

PN349

MR AVALLONE: They're unusual and they don't easily fit the standard understandings of - - -

PN350

DEPUTY PRESIDENT GOSTENCNIK: I accept that. But, yes, we need to understand them in the context of this statute. They need to be applied in the context of the statute. And saying that the arrangements are unusual or require a different sort of view about them doesn't assist in that sense. One still needs to ask the very basic question, and that is whether the arrangement is one that's consistent with at least so much of the entitlement as is based in the NES, is consistent with the NES.

PN351

MR AVALLONE: Yes. It would be hard to see a world where the conclusion is that employees are not entitled to pay for those days that they have agreed effectively to take off as annual leave on the basis that they didn't have ordinary hours. In circumstances where the employees have agreed, whether it's through an IFA or whatever, it is that they're going to work their ordinary hours over 14 days, have travelled the two days around that, and on one view have no ordinary hours that they would otherwise have worked in the subsequent 12 day period, perhaps it could be viewed that it's just unpaid days off.

PN352

The practical reality is that that's not what the employees have agreed to, that the employees have agreed, 'I'm going to take my annual leave as part of that, and as part of that agreement I'm going to have time off and I'm going to receive an

amount of pay effectively being my annual leave which is accrued in over 16 days.'

PN353

DEPUTY PRESIDENT GOSTENCNIK: I understand that, but one couldn't say in respect of a Monday to Friday employee that because they'd agreed that the employee would take annual leave on a Saturday or Sunday that that's an agreement.

PN354

MR AVALLONE: That that's what, sorry?

PN355

DEPUTY PRESIDENT GOSTENCNIK: That that is an agreement for the purposes of 88(1). That is a Monday to Friday employee agrees that the employee will take annual leave on Saturday and Sunday.

PN356

MR AVALLONE: Well, that's not annual leave.

PN357

DEPUTY PRESIDENT GOSTENCNIK: No, it's called cashing out. Isn't that on one view what's happening here?

PN358

MR AVALLONE: No, I submit that it's not because these are not Monday to Friday workers. They're employees who are covered by an enterprise agreement that provides that they have 42 days of annual leave inclusive of Saturdays, Sundays and public holiday.

PN359

DEPUTY PRESIDENT GOSTENCNIK: All of the leave that's in excess of NES dealt with by the agreement, and I am not concerned about that aspect of it, but to the extent that there's annual leave that is regulated by the NES, the four weeks, based on one view that leave needs to be taken on a day that would otherwise have been worked by the employee, under whatever arrangement they have entered into, as ordinary hours. To permit an employee to take annual leave on a day they would otherwise not have worked amounts to cashing out. I accept it's not an issue that's canvassed in the submission, and so at least for my part if you want to - rather than trying to deal with the issue on your feet you might provide a short note.

PN360

MR AVALLONE: Yes, I appreciate that.

PN361

DEPUTY PRESIDENT GOSTENCNIK: And likewise I would allow the union obviously to provide a short note on that issue.

PN362

MR AVALLONE: Thank you.

PN363

DEPUTY PRESIDENT GOSTENCNIK: I would be happy to do that. I accept that we're sort of raising this on the go, and it is a little bit unfair.

PN364

MR AVALLONE: I might be of more use to the Commission, to the Full Bench if I could do that.

PN365

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN366

MR AVALLONE: Sorry, just give me a second to - sorry, just in passing I mention that paragraph 117 the Commissioner seemed to find that the employees who have made an agreement are subject to requirement that leave be taken on a particular day, or that they be subject to specific limitations. Again I make the point that I have already made, there's no requirements here. There's agreements that have been entered into. I will try to dance through things a bit quicker.

PN367

DEPUTY PRESIDENT GOSTENCNIK: It's all right, Mr Avallone, take your time. It's as much our fault - - -

PN368

MR AVALLONE: Ground 2 - - -

PN369

DEPUTY PRESIDENT GOSTENCNIK: The longer you're here the less time hopefully we will spend in the rain outside.

PN370

MR AVALLONE: True. Although I don't know it's going to get any better; the weather that is. The appeal ground 2 was dealt with in writing, and I will try not to say too much about that. Effectively as I said before just because the days off swing are days not worked does not, it cannot lead to the conclusion that they are part of the mandated eight days off required by the agreement, and that was the error that the Commissioner made relevantly. It's the same reasoning that you will see at paragraph (indistinct) of the respondent's written submissions, and so too the respondent's written submissions at paragraph 28 to 31. They valiantly attempt to defend the Commissioner's reasoning, but it falls into the same illogistic fallacy.

PN371

Appeal ground 3 is about employees being required, and I have already made the point about required to take their annual leave on particular days. Appeal ground 4 relates back to the same point about paragraph 98 of the decision, that 12 off swing days cannot include a period of annual leave whether that's by agreement or not. It really picks up on things I have already talked about, and also see my written submissions at paragraphs 19 to 21.

PN372

I have referred and I have mentioned the decision of Cambridge C in Curtis Island. I won't repeat what I said there in writing. They're not concepts that are easily translated for the NES entitlements, but nevertheless it is possible, I submit, for these types of agreed arrangements to allow an employee to acquit their annual leave during an off swing period. In relation to the Full Bench decision in Curtis Island that Mr Crosthwaite's book of authorities includes it at 9, I note that the Full Bench found no error in the reasoning of Cambridge C. That's paragraph 17, and also I think at paragraph 14 if I am not mistaken. The Full Bench found - I will just double check that I have got the right paragraph - yes, the Full Bench said that the conclusions reached by the Commissioner were open to him and they're satisfied that his conclusion was correct.

PN373

So I submit that the decision of the Full Bench should not be seen as saying anything different to what Cambridge C said, although I take your point, Deputy President Gostencnik, that it was a different question before him. And it's important not to read, I submit, to read the Full Bench's decision out of context, which is what the respondent's submissions at paragraph 27 do. I have included in the authorities *Jones v Odyssey Marine*, a decision of the WA Industrial Court, but I rely upon what we have put in writing in relation to that.

PN374

Appeal ground 5 relates to the final paragraph of the decision of Connolly C, paragraph 120, which reveals that the Commissioner considered the agreements that he was considering to be either an IFA or any other instrument purporting to have the same effect of an IFA. I submit that that was itself an error.

PN375

The decision of Connolly C at paragraph 77, the last sentence, records as I have tried to explain that the annual leave matters were taken out of an instrument that was called IFA part B and were carved out into a separate agreement. And as Cambridge C puts it, or it may be that he's quoting the appellant, but it was a separate document that does not operate as an IFA in intention or effect.

PN376

The document that we have been discussing at AB149 to 155 it just doesn't have any of the hallmarks of an individual flexibility agreement. Patently it's not an individual flexibility agreement. Then it becomes a question of whether Connolly C was in error saying that it purports to have the same effect as an IFA, and I submit that that was an error. Fundamentally relying upon the same reasoning that I have already explained in the appellant's submission the common law agreement did not vary anyone's entitlement to agree as to when annual leave will be taken. It is an agreement with the employee as to when annual leave will be taken.

PN377

Appeal grounds 6 and 7 as I have already said are not pressed. Appeal ground 8, I note that that is not - unless I have missed something - it's not addressed at all in the respondent's written submissions. It relates to the finding that employees by virtue of them agreeing to the agreements to when annual leave will be taken that they were somehow prevented from taking extended leave by agreement. The

number of times that I have just said 'agreement' in that sentence demonstrates the circularity of the reasoning. It's dealt with in my submissions on appeal at paragraphs 29 to 33. Of course it is open to an employer and an employee to agree on certain arrangements that will apply in relation to periods of extended leave.

PN378

The Commissioner's conclusion, I submit, amounts to saying that an employee can at any time at the drop of a hat just say, 'Look, I'm going to take six weeks consecutive leave without any notice and without the employer agreeing to it', and that just can't be correct in the practical world of industrial relations. It would, I submit, throw leave planning for many employers and their employees into chaos.

PN379

In a world where the Act provides at section 88(1) that leave is to be taken at a time agreed, it is open to an employer and employees to agree in advance, 'If you want to take an extended period of leave, if you want to seek my agreement to an extended period of leave, then give me some notice. Don't just do it overnight.' But of course is it possible that having reached agreement under 149 to 155 that an employee could turn around and say, 'Look, I know we've got this arrangement in place, but something's come up and I want to take with 14 days notice - can we reach agreement on an extended period of leave.' Of course they can make that request.

PN380

Section 88(2) provides that - let's not paraphrase it - sorry, there's nothing about 14 days notice - 'The employer must not unreasonably refuse' - that's going to be said taking into account all of the circumstances. All of the circumstances will include how much notice has been provided. There is nothing, I submit, inconsistent with the Act in the arrangements that the employees have agreed to put in place.

PN381

Appeal ground 9 is a bit of a catchall. I don't know that I need to say anything more. Permission to appeal, I gather from the written submissions, and Mr Crosthwaite will correct me if I am wrong, but as I understand it permission to appeal is not opposed in relation to the construction issue. The construction issue, I submit, is at the heart of the appeal and permission should be granted. I rely upon the written submissions that have been put.

PN382

There will be prejudice or an injustice to both the employer and the employees who have agreed on these arrangements if permission to appeal is denied. Fundamentally I submit that there is an error and it should be corrected. In relation to the disposition of the appeal I rely upon what has been put in writing, the decision should be quashed. The Full Bench should not feel itself bound by the question for determination which the Commissioner put up, which in one sense didn't really deal with the heart of the issue.

PN383

What I submit is that the Full Bench should find that agreed arrangements, if they are agreed, as to when annual leave is taken of the kind that's in AB149 to 155, do not vary an employee's entitlements under section 88 of the Act, or clause 6.1 of the agreement. Unless there be any other questions - - -

PN384

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Avallone.

PN385

MR AVALLONE: If it please the Commission.

PN386

DEPUTY PRESIDENT GOSTENCNIK: Mr Crosthwaite?

PN387

MR CROSTHWAITE: Thank you, Deputy President. I have a bundle of provisions from the Fair Work Act and the Acts Interpretation Act that didn't make it into our folder of authorities. Those can be handed up if that would be convenient, but I hazard a guess that the Bench does have ready access to the Fair Work Act.

PN388

DEPUTY PRESIDENT GOSTENCNIK: Yes, tools of the trade are usually brought in, but if you want to get rid of the documents you can hand them to my associate and we will put them in the recycle bin.

PN389

MR CROSTHWAITE: Thank you. Perhaps whilst that's being dealt with I could in the interest of time deal with some of the things that arose during my learned friend's submissions. Deputy President, you raised a good question when asking what happens when an employee who has made one of these agreements decides they no longer want to be bound. The submission of the appellant as I understand it is that that employee would be entitled to go and have a conversation with their employer, 'Things have changed, I would like to depart from that agreement', and that is a pathway through which they might be able to remove themselves from that aspect of their FIFO arrangement.

PN390

A couple of short things to say about that. There's no principle or contract law that I am aware of that is the equivalent of section 88(2) that would require an employer to abandon some entitlement that they might have under their contract of employment with the employee on the grounds of reasonableness, and it seems reasonably clear to me that an employee that unilaterally decided that they were no longer going to be bound by the agreement might face some sanction.

PN391

The issue of how much leave is taken when at the end of a period of work on the 28 day cycle is rather complicated. We've heard today for the first time as I understand it that the additional 15 days are split up over the course of each off work period, and as a consequence the annual leave taken in any given period is I think a period just short of four days. In the time that my friend was making his

submissions I did some rough calculations to supplement the various rough calculations that the Federation has done over the course of preparing for this matter, and I understand that what we're looking at is on the fourth day - if the 15 days are to be split over 28 cycles, then the fourth day would comprise 2.656 hours of annual leave with the balance of the 5.714 hours that is used on any particular day of annual leave.

PN392

And I note that I am making an assumption here that does depart from the assumptions set out in my submissions, which is that the 40 ordinary hours are spread across seven days rather than five, that the entirety of the leave required, the annual leave required for any given period would be 19.798 hours, leaving an employee at the end of the first period at the start of the second 28 day cycle with a leave balance (indistinct) at 1.398 from which they can't recover.

PN393

DEPUTY PRESIDENT GOSTENCNIK: Just to recap that. The premise there is that you've got a new employee who on day one at that stage has zero accrued leave, and over that 28 day cycle you have calculated the leave accrual during that period to be - sorry, what was it?

PN394

MR CROSTHWAITE: I might run through briefly - if I can take the Bench through the assumptions. We're dealing with six weeks or 42 days or 240 hours of leave a year. The ordinary hours in each year are 2080, being 40 times 52. The hours of leave accrued for each hour, each ordinary hour of work is .1153, being 240 divided by 2080. The number of hours for each of leave in each day of leave, depending on how you calculate it, perhaps it's eight, or five days at 40, perhaps it's 5.714 for seven. The terminology of the enterprise agreement would indicate it's the latter. So the hours of leave accrued for each work cycle is 18.41 hours. That is - - -

PN395

DEPUTY PRESIDENT GOSTENCNIK: Sorry, that's based on a 40 hour ordinary hours?

PN396

MR CROSTHWAITE: Yes, it's based on the assumption that in any there are - the true calculation, because 13 doesn't go particularly easily into a single year, the true calculation is 159.56 hours of ordinary hours in any particular cycle. So 159.56 times .1153 is 18.41. So that's how much leave an employee has accrued at the end of their ordinary hours at the first cycle.

PN397

DEPUTY PRESIDENT GOSTENCNIK: But it's based on an average calculation of ordinary hours at 40?

PN398

MR CROSTHWAITE: At 40 hours.

PN399

DEPUTY PRESIDENT GOSTENCNIK: Is that not an incorrect assumption; shouldn't it be 38, because the two additional hours in the agreement are reasonable additional hours, they're not ordinary hours. It might be paid as (indistinct), but for the purposes of complying with the ordinary hours provision in the NES it can only be 38 or an average of 38.

PN400

MR CROSTHWAITE: Yes. Deputy President, that's right, but the lower the number of ordinary hours the worst that this becomes for - - -

PN401

DEPUTY PRESIDENT GOSTENCNIK: I understand that. I understand that.

PN402

MR CROSTHWAITE: So we're being generous and we're sticking with the enterprise agreement's 40 hours - - -

PN403

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN404

MR CROSTHWAITE: The calculation can certainly be done for 38. Then as a consequence of what we have heard today that ordinarily if we were to calculate a day of leave at 5.714 hours and there were to be four of them that would be 22.85 hours minus 22.85 from 18.41. You may (indistinct) 4.4. What we have heard today is that that isn't the way it will be done, although I pause to observe that the proposition that that's not the way it will be done isn't as I understand it reflected in any of the materials before the Commission.

PN405

In any event you end up with negative 1.398 hours of annual leave at the end of the first cycle, even if you are bringing in those 15 days, and that's a consequence of not accruing annual leave when you're taking it, because it's not your ordinary hours.

PN406

DEPUTY PRESIDENT GOSTENCNIK: But does it follow then that if they're not going into negative leave that the employees are in fact getting more time off for which they're being paid?

PN407

MR CROSTHWAITE: If they weren't to go into negative numbers, yes, that would follow. But I think this really demonstrates the problem at the heart of this arrangement. I will leap forward to a submission that needs to be made about the agreement. So if I could ask the Bench to turn to page 149 of the appeal book. I will just run through a couple of matters arising from this, because it's relevant to later submissions that I will make. But first that you can see that in the first paragraph the employment is to commence on a specified date and is said to contain the terms of the FIFO arrangement. The employment contract appears to be as a type as with many contracts of employment, that is it's anticipated to commence after it's been executed.

PN408

Turning to page 151 we can see that the relevant employee is made an offer and they're asked to sign where indicated and return a signed copy being acceptance. At 151 the first table sets out the roster. In the left-hand column the roster is described and the roster provides 14 days on, two days travel, 12 days off at home. That language is critical.

PN409

Beneath that paragraph the roster makes the observation in any given year commencing after the first year a 21 day duty period will occur. I pause to mention that it's not entirely clear from the rest of the document whether that 21 day period is expected to occur within the first 12 months or as the first cycle after the first 12 months. Either way it doesn't really change the outcome.

PN410

Annual leave is not mentioned in that table, but in the second column various clauses of the enterprise agreement are, including the rosters, ordinary hours and days off clause, which I will take the Commission to shortly and make submissions about. So that's the roster term, and the roster term in and of itself provides 14 days of duty, two days of travel and 12 days off at home.

PN411

In the second table at page 152 we deal with annual leave. That term provides that the entitlement will be acquitted during the off duty period. Again that table on page 150 refers to relevant clauses of the enterprise agreement being days off in a 28 day period and days off start again at 84 day period.

PN412

So the deficiency - and perhaps I will take the Commission to those aspects of the enterprise agreement that are relevant. At page 82 of the appeal book the term for the purposes of the enterprise agreement 'day off' is defined. Turning to clause 1.2.47 the term 'roster' is defined as a scheduled arrangement of work days, non work days and a start time for a specified period. There is a consistency between the language that's used in the relevant term of the agreement and the enterprise agreement. So the roster as it's defined in the term is scheduled arrangement of work days and non work days. Turning to clause 4.2 at appeal book page 93:

PN413

*The roster will be provided by the employer 14 days in advance and will be for 14 days duration.*

PN414

The roster will be for 14 days duration. Again there's consistency between the terms of the enterprise agreement and what is anticipated by the common law agreement, because the enterprise agreement requires that the roster be a 14 day roster. That taken with the obligation in 4.3, that an employee is entitled to eight days off in each 28 day period as nominated by the employer, leaves four days. The roster can't be 20 days duration - 4.2.1 makes that clear - and there must be at least, we say, eight days off in each 28 day period, but that leaves four days, and the question what is to become of those four days.

PN415

Maintenance of a 28 day roster under those conditions set out in the enterprise agreement necessarily requires four days in between each roster cycle, and in the Federation's submission that is a consequence because when this agreement was negotiated the circumstances that the Commission is presented with now weren't a part of the work anticipated to be regulated by this enterprise agreement.

PN416

DEPUTY PRESIDENT BELL: Can I ask a factual question which we discussed at the very start about this with Mr Smallwood's statement, and I don't know the answer to this, which is why I am asking. Were any of these 4.2 or 4.3 provisions amended by any IFA to your knowledge?

PN417

MR CROSTHWAITE: I would need to seek instructions on that matter, Deputy President.

PN418

DEPUTY PRESIDENT BELL: Thank you, if you could.

PN419

MR CROSTHWAITE: In any event the terms of the enterprise agreement go some way to explaining how it is that the parties have found themselves in this situation, and that is what Connolly C focused on in his reasons, and ultimately, in my submission, relied on in making the finding that those extra four days were days off. The language of days off is used in the agreement, and it is also used along with the term 'RDO' in the same way at paragraph 4.3. Days off ought to be understood to mean non work days for the purposes of a roster as it's defined in clause 1. So the roster is defined as work days and non work days.

PN420

The 14 days in 4.2 will be the work days. Here we have some flight that is also defined as the pilot's duties elsewhere in the agreement; that becomes 16 days, and eight days of RDOs being non work days, leaving four days where plainly no work is anticipated to be performed, therefore being non work days for the purposes of the definition of roster.

PN421

DEPUTY PRESIDENT BELL: Mr Crosthwaite, what is the reference to the 28 day roster period in 4.3, if rosters are only to be of 14 days duration? And again it's 4.3.5, 'Replace that day within the 28 day roster cycle.'

PN422

MR CROSTHWAITE: Yes. In my reading of the enterprise agreement leaves that question as somewhat of a mystery. The notion of a 28 day roster cycle it is used repeatedly, but on my reading of the enterprise agreement it's not a term that for example is defined, and it's not a term that is expressly described - it's not a concept that is expressly described by a term. But what is clear is that if a person has a 14 day working cycle and eight RDOs, then there's going to be a period of time between - and if the agreement assumes or if the parties to the agreement

assumed the 28 day roster cycle there's going to be some time where work is not being done and the person is not on one of the eight day RDOs.

PN423

DEPUTY PRESIDENT BELL: Can I ask a question, a technical question about clause 4.3.7, which seems to modify the number of RDOs by reducing when leave is taken in a 28 day period. In the present case there's potentially four days of annual leave.

PN424

MR CROSTHWAITE: Yes.

PN425

DEPUTY PRESIDENT BELL: And I say that with an asterisk, because I am told it's possibly a little bit less than four days, but let's just say it's four. Then applying that formula the number of rostered days off as an entitlement would be 28 minus four, because 24 divided by 28, which becomes six-sevenths times eight, which by my reckoning is fractionally under seven, but I understand it would be rounded up to seven.

PN426

MR CROSTHWAITE: And then presumably the clause beneath that has some work to do. I haven't done the calculation, Deputy President. We can do the calculation.

PN427

DEPUTY PRESIDENT BELL: Are they broadly what are being called the bonus days? Do you know that or is that something different?

PN428

MR CROSTHWAITE: As I understand it, and as I mentioned earlier there isn't as far as I am aware really any evidence about this at all as a consequence of Mr Smallwood's witness statement not being tendered, but they are days that are said to have been given because of the unsociable hours of FIFO work.

PN429

DEPUTY PRESIDENT BELL: We're talking the bonus days here?

PN430

MR CROSTHWAITE: Bonus days.

PN431

DEPUTY PRESIDENT BELL: I think the bonus days, at least on the employer's position, is roughly speaking articulated at appeal book 152 on that table where they have compared 149 days off with no work related activity under the FIFO arrangements, to the arithmetic presented there is 134 calendar days off, the difference being 15.

PN432

MR CROSTHWAITE: I must admit I struggled with that arithmetic, Deputy President. I don't understand how one ends up at 175 with essentially any - as I

was calculating it - any multiple of 13, whether it be four or eight or whatever it is, doesn't really get us to that point. The difficulty with the 15 days is that it relies on a set of assumptions, and the Federation is not aware of the assumptions that is being used by Surveillance Australia to calculate that number.

PN433

But we reverse engineered it, and the consequence is that that reverse engineering coupled with the basic arithmetic around the use of four days after 16 days or whatever it is, whichever way you cut it, it produces a negative annual leave balance as, Deputy President Bell, you said, and your employee begins to accrue leave when they commence their employment.

PN434

But those matters, in my submission, shouldn't stop the Commission from making a finding that Connolly C was correct when he did read the enterprise agreement and he looked at the definition of roster and on days and off days and non work days and work days, taking into those matters that, Deputy President Gostencnik, you raised with my learned friend about what are the ordinary hours when a person is said to be taking leave if all of their ordinary hours are exhausted at the end of the 14 day roster. It is very difficult to understand how those four days could properly be said to be annual leave taken on a day when a person would otherwise be doing work.

PN435

DEPUTY PRESIDENT GOSTENCNIK: Doesn't that suggest they're just getting extra days off; is that a good thing?

PN436

MR CROSTHWAITE: Indeed, they may very well be just extra days off. My best guess is that they're a consequence of the restrictions as to rostering in a circumstance where the roster cycle is 28 days and needs to be 28 days for whatever reason. As cited in our written submissions the cook can't complain if the master wants to eat out every night, but they're not days for work, and that's the critical point.

PN437

I might turn now to what we say is the proper construction of section 82. The term of the common law agreement that is inconsistent with the Fair Work Act is not necessarily the whole of the arrangement. It can really be narrowed down to that term that provides that annual leave will be acquitted during time off. And we say that it is inconsistent with section 88 having regard to its text, context and purpose. Considering first the text of section 88, in section 88(1) we have:

PN438

*Paid annual leave may be taken for a period agreed between an employer - - -*

PN439

And in subsection (2):

PN440

*The employer must not unreasonably refuse to agree to a request by the employee.*

PN441

So a request is made by the employee and that request can be agreed or refused, and we say the language of those two subsections shows that section 88 anticipates employees having an entitlement to make a request, to have that request considered and agreed to unless it would be unreasonable. That construction is the construction that Bromberg J referred to in - I think it was Skene at 125. In any event it's in the written submissions and in the authorities.

PN442

DEPUTY PRESIDENT GOSTENCNIK: Do you say it is the consequence of that construction that an employer can't request an employee to take annual leave and the employee agree to that period, that that's not an agreement for the purposes of 88(1)? Does there need to be a request?

PN443

MR CROSTHWAITE: I wouldn't put it as high as that, Deputy President. I would say that - because what we're dealing with here is employment entitlements and the base entitlement of all employees. In consideration of that overarching context what 88 does is protect an employee's entitlement to make a request, have it considered and not have it refused where it would be unreasonable to refuse it.

PN444

I wouldn't put it as high as, or say that it is prescriptive insofar as - indeed the capacity to make a request is drawn from an inference arising from the language used by the parliament. But it does mean that employees are entitled to make individual and ad hoc requests for annual leave during the course of their employment. The use of the term 'agree' in different tenses in both subsections shows the process, a request is made and the agreement can be reasonably refused. And then assuming that it's not a period of leave agreed might be taken.

PN445

Chronologically the process by which annual leave is taken as anticipated by section 88 begins with the commencement of employment and the engagement of the Act. Section 60 provides that in part 2-2 the word 'employee' means a national system employee, and employer means a national system employer. I am sure I don't need to take the Bench to those terms. But the benefits and entitlements under the NES are only available insofar as the employee is deployed.

PN446

Where an employment contract sets a commencement date for employment in the future that is a date from which the NES benefits and entitlements such as annual leave commence, and any agreement for the purpose of 88 can only occur between a national system employer and a national system employee after the employment has commenced, not after the contract is signed or executed. Section 88 is interested in - - -

PN447

DEPUTY PRESIDENT BELL: Sorry, can I just unwind that. You're saying it's a factual matter, the contracts, a contract was signed before employment commenced?

PN448

MR CROSTHWAITE: I am saying that as a matter of construction section 88 assumes - for section 88 to operate there must be employment as opposed to a common law agreement. So the employment must have commenced.

PN449

DEPUTY PRESIDENT BELL: Are you also saying that that employment must co-exist at the point in time which the agreement for annual leave is made; is that where you're going?

PN450

MR CROSTHWAITE: What I'm saying is that if an agreement for annual leave is made before the employee is engaged - - -

PN451

DEPUTY PRESIDENT GOSTENCNIK: They haven't (indistinct) the employer, because they're not - - -

PN452

MR CROSTHWAITE: They're not a national system employee.

PN453

DEPUTY PRESIDENT BELL: And therefore it can't be, you're saying, something agreed under 88(1)?

PN454

MR CROSTHWAITE: That's right, because the precondition to the term - because what we're looking at here is the definition of the term 'employee'.

PN455

DEPUTY PRESIDENT BELL: But factually, and that's what you're saying is the position in this matter before us, because I have only seen draft contracts. That's part of the challenge that we're dealing with here as you have probably worked out from a few of my questions.

PN456

MR CROSTHWAITE: Indeed. I can sympathise with you, Deputy President Bell, because it's not entirely clear. However, the witness statement that was relied on at the stay hearing at paragraph 15 appears to indicate that Mr Gasta may not have been employed before any agreement would have been created, if one has. The circumstance is obviously going to be different for a person that is employed and is in fact varying their agreement.

PN457

DEPUTY PRESIDENT BELL: Was this put to Connolly C below?

PN458

MR CROSTHWAITE: I will need to seek instructions on that. I didn't appear for the Federation before this hearing. But the short point is that at least insofar as this scheme is intended to be deployed for new employees, in my submission whatever agreements are made before the employment commences are not agreements to which section 88 applies, because they're not agreements between national system employees and (audio malfunction) employers.

PN459

Turning now to the context of section 88, first the provisions of division 6 of part 2-2 as the Full Court observed in *WorkPac v Skene* at 125, the purpose of part 2-2 division 6 is to provide employees with an entitlement to access rest and recreation, and that's in the respondent's authorities at page 152.

PN460

Section 87(1) and (2) provides a mechanism for determining the minimum annual leave an employee is entitled to accrue, and the calculation method for accrual. Section 88 then anticipates the process whereby employees are entitled to make a request for a period of annual leave to be agreed unless unreasonable.

PN461

There is further context to be found, in my submission, in section 340, because that provision - well, section 340(1) and (2) provide in effect that:

PN462

> *An employer is not permitted to refuse to employ a prospective employee or discriminate against a prospective employee in terms or conditions on which the employer offered employment to prevent the exercise of a workplace right.*

PN463

Agreement under section 88, in my submission, should be read consonant with that prohibition. A person going into an employment relationship can't be placed in a position where the employment is contingent on them giving up workplace rights. Those benefits identified in - - -

PN464

DEPUTY PRESIDENT GOSTENCNIK: Exercising a workplace right in a particular way.

PN465

MR CROSTHWAITE: Exercising a workplace right in a particular way. And without going into the detail of the current circumstance in that context we say that those provisions ought to be read harmoniously.

PN466

The operation of section 323 and section 93 of the Fair Work Act mean that as described by Wheelahan J in *Warren v Secretary, Attorney-General*, the entitlement to annual leave is a composite entitlement to both take leave and be paid for it, and insofar as an employee has an entitlement to cash out leave they can do so only if the leave balance permits an extended break, but retains four weeks for rest and relaxation. There can be little doubt that parliament intended employees to have extended leave available to them during their employment, and

refer the Commission to the explanatory memorandum of the Fair Work Bill at page 378.

PN467

Those are relevant matters to the construction of section 88, because section 93 creates a boundary protective of the importance of extended breaks. Under section 88 an employee must be able to exercise the capacity to take such a break. That's the intention.

PN468

Fourthly, in support of this proposition the observation that agreement in section 88(1) is expressly qualified only by the reasonableness of any refusal to agree. And what we're dealing with in section 88 and other provisions of the Fair Work Act in respect of leave is a scheme driven by - there's a degree of cooperation, in my submission, inherent in a number of the Fair Work Act provisions relating to the use of leave, and section 88 is one of them, but in each circumstance driven by the desire of the employee subject to reasonableness and flexible to the circumstances of the employee as they emerge.

PN469

The process that I have described as having an element of cooperation can be compared with that adopted by Surveillance Australia. The agreement said to be consistent with section 88 arose as a consequence of the formation of a contract of employment, or the variation of a contract of employment. The relevant term is not one requested by any employee, but is one offered by Surveillance Australia, and you will recall that I took you to the terms of the letter and the ordinary rules of contract formation.

PN470

It is one offered by Surveillance Australia to employees, or future employees, and the term was only capable of acceptance by an employee. Indeed what's proposed by Surveillance Australia here inverts the process inherent to section 88.

PN471

As a consequence of the ordinary chronology of the contract formation Surveillance Australia's proposal as to when annual leave would be taken was made before in the case of any new employee part 2-2 of division 6 applied, and those rights and benefits under section 88 were rendered unavailable from the moment the employment began.

PN472

DEPUTY PRESIDENT BELL: Is that predicated again on the proposition that it's not an agreement under 88(1) unless it was entered into at the time a person was a national system employee?

PN473

MR CROSTHWAITE: No, it's predicated on the alternative, because it assumes that the agreement has work to do. If they're not a national system employee then it's just not agreement for the purpose of section 88 and - - -

PN474

DEPUTY PRESIDENT BELL: But if they already are?

PN475

MR CROSTHWAITE: But if they already are then essentially as soon as a contract begins those benefits are section 88, the capacity to make a request to take extended leave, so and so forth, they're dead on arrival. The unavailability of a positive leave balance after the end of the first 28 day rostering cycle, and a fixed annual schedule, means that FIFO employees cannot in any real sense make a request for annual leave once they're employed.

PN476

Turning to the context of the remainder of the National Employment Standards the number of the terms of the National Employment Standard - - -

PN477

DEPUTY PRESIDENT GOSTENCNIK: Is that because it will always be reasonable to refuse a request for annual leave when the balance is insufficient?

PN478

MR CROSTHWAITE: Well, that's one reason. That's one reason, or it might be that you refuse leave because the leave is allocated forever. You know, 'I'm terribly sorry, Ms Smith, your leave has been allocated forever.'

PN479

DEPUTY PRESIDENT GOSTENCNIK: Is the vice here that unlike an IFA they can't be terminated on 28 days notice?

PN480

MR CROSTHWAITE: Certainly the vice here is that subject to variation agreed by both sides an employee can't excuse themselves from that system.

PN481

DEPUTY PRESIDENT GOSTENCNIK: But you would accept, would you not, that there is nothing in the agreement which prevents the employer and employee agreeing to a period of annual leave other than that prescribed, and there's nothing which prevents in terms an employee from making a request, or from the employer considering the request and granting or refusing to grant it on reasonable grounds?

PN482

MR CROSTHWAITE: With respect, Deputy President, I would say there is something. The annual leave term says your annual leave will be acquitted during your time off.

PN483

DEPUTY PRESIDENT GOSTENCNIK: I understand that, but the contract doesn't prohibit the making of a valid agreement which would effectively be a variation or an agreement not to be bound by that particular term for a period, would it, and there's nothing in the agreement to prevent that.

PN484

MR CROSTHWAITE: Insofar as it's a private law agreement and parties by private law agreement can vary their agreements whenever they want. That's right, but the benefit under section 88 is as I said before driven by the employee's desire to take leave. And in responding to things said by my learned friend there is no rule of contract law, that I am aware of at least, that would impose an obligation on one party to behave in a reasonable manner if the black letter of the contract didn't require them, and no doubt that there is nothing here.

PN485

As was the case in HNZ there was nothing in the enterprise agreement in that matter that did the work of section 88(2), and there's nothing in the agreement here that does the same work. In fact the method for taking extended leave really just entrenches the difficulty. The only way to take extended leave and comply with the obligation is to work an additional day for every day that you want off; not be paid for it, be paid for it at another time. It is certainly not annual leave as understood in the Fair Work Act.

PN486

Turning now to further context in the National Employment Standards it's not at all uncommon for the National Employment Standards to provide employers and employees an opportunity to tailor the operation of entitlements under the NES to suit changing needs of the employee. Each of these provisions similar to section 88 insofar as the need arises the employee is able to make a request for the benefit of a particular entitlement, and the way the entitlement is used could be the subject of agreement between an employer and an employee.

PN487

I would refer the Commission to section 106A which deals with the entitlement to be paid family violence and domestic leave; section 105 which deals with compassionate leave; 103 which deals with unpaid carer's leave; 94 and 85. Because it's short I will make the point by reference to section 103, which provides that:

PN488

*An employee may take unpaid carer's leave for a particular permissible occasion if the leave is taken to provide care or support as referred to in section 102. An employee may take unpaid carer's leave for a particular permissible occasion as a single continuous period of up to two days, or any separate periods to which the employee and his or her employer agree.*

PN489

There are a number of provisions in the NES that operate in that way, but entitlement sets a baseline that if the employer and employee agree the baseline can be dealt with in another fashion.

PN490

The National Employment Standards for many purposes sets that benchmark of entitlements and has inbuilt flexibility to respond to employee and employer needs as they arise by agreement. That is the proper way of reading those provisions in the NES that anticipate agreement between an employer and employee. Keeping in mind the presumption that phrases have a consistent

meaning within the Act it is a proper way to read section 88. Section 88 is an entitlement that arises as the need arises. A person is entitled to take leave, annual leave, so that they can take a break when they need to take a break.

PN491

If the appellant's construction of section 88 is correct then, in my submission, very serious consequences could flow regarding the availability of other workplace entitlements. On the appellant's construction it would be perfectly legitimate for an employer to contract with say a part-time employee, such that they were employed on a particular day at regular intervals for the sole purpose of acquitting leave as it accrues, or indeed before it accrues. Having regard to the purposes of section 88 the Federation submits that cannot have been the intention of parliament.

PN492

Similarly if the appellant's construction is correct there is no good reason to consider that agreement in the other parts of 2.2 that I have referred to could not also reasonably be pre-determined at the point of signing an employment contract. For example the benefit associated with unpaid carer's leave, compassionate leave, domestic violence leave, those matters that I went through earlier, would all be capable of pre-determination.

PN493

The Federation submits that such a construction should be rejected because it offends the purposes of the NES generally being ensuring a guaranteed safety net for relevant enforceable minimal terms and conditions with the National Employment Standards, and in particular the purposes of 88.

PN494

The deficiency, in my submission, in the enterprise agreement in HNZ is relevantly identical to the deficiency in the agreement at the centre of this dispute. The Full Bench at 6 observed - and that's at the applicant's authorities tab - apologies, that's an incorrect reference. In any event at HNZ at 6 the Full Bench observed that:

PN495

*The provision is a term that is detrimental to the affected pilots when compared to the NES. Because the new roster requires the taking of annual leave to make up the required number of touring days off, in its operation, it deprives the affected pilots of the full benefit of section 88 of the Act. Consequently the relevant clause has no effect.*

PN496

Similarly the Full Bench at 14 to 15 identified analogous aspects of the enterprise agreement that was impugned in that case stating:

PN497

*At the very least, the clause limits the days on which annual leave may be taken by agreement. There is no scope under the clause to reach agreement to take annual leave during any 21 day on duty period, nor is there any requirement that HNZ will not unreasonably refuse a request.*

PN498

The same can be said of this agreement. Indeed if you want to take leave during the period in which you are rostered on that falls in that other category of leave where you have to work extra days in order to take it and be paid for it, and be paid for it at a later time. It's not annual leave. Under the agreement there is no scope to reach agreement to take annual leave during the 21 day on duty period, and it's not sufficient to say, well employers and employees can have a chat and do it informally. That's not sufficient.

PN499

The question here is not about what people can do informally outside of the act of the enterprise agreement. It's what people are entitled to do and what people are bound to do under a purportedly enforceable common law agreement. That common law agreement does not contain any of those capacities, and for that reason the decision of the Full Bench in HNZ is relevantly analogous and applicable.

PN500

Turning now to the question of consistency with the enterprise agreement, I have taken the Commission to the characterisation, what we say the current characterisation of the off swing period under the rostering agreement is. A roster is a schedule or arrangement of work days and non work days, and we say that every day other than a work day is a non work day for the purposes of the enterprise agreement.

PN501

Apologies, I am just trying to skip over that which I have already dealt with. To the extent that Surveillance Australia relies on the enterprise agreement to support the making of the rostering agreement the EA may include terms requiring an employee or allowing for an employee to be required to take paid annual leave in particular circumstances, but only if it's reasonable. Now, that particular term was relevant to HNZ. We say that plainly an employee is required to take annual leave during their off roster period when they're not on an RDO, because they're bound by a variation to their contract or their contract of employment to do so. Again the terminology used in the agreement is not permissive. It's obligatory, this will happen.

PN502

Regarding the requirement to take leave at paragraph 220 to 223 of *Australasian Meat Industry Employees Union v Dick Stone* Katzmann J found that an employee was required to work certain hours by operation of his employment contract, and that his free entry into that contract was no barrier to that finding.

PN503

Section 62 uses the terminology of requirement. Section 93 uses the terminology of requirement. Justice Katzmann's decision is authority for the proposition that the notion of requirement that where an employee has a contract that requires a thing that requirement will be recognised by the National Employment Standards. Here employees are required to take their annual leave in a particular way until such time as that requirement is varied.

PN504

Consistent with HNZ at 27 referred to by Connolly C at 98 the requirement imposed on FIFO employees to always take annual leave on days that they would otherwise not be working is unreasonable and contrary to section 93(3).

PN505

Should the Commission consider that contrary to the reasoning in HNZ, the requirement on employees to take annual leave during non work days, is consistent with the EA. The Federation submits that the requirement is nevertheless inconsistent with the annual leave provision by the enterprise agreement, and of no effect. This is because like section 88 of the Fair Work Act clause 6.1.3 of the agreement provides that annual leave be taken at times agreed between the employee and the employer.

PN506

Employee is defined at clause 1.2.29 to mean an employee of the employer engaged in a particular activity. Accordingly, agreement under clause 6.1.3 is only available once the employment has commenced, not before. This construction accords with the construction of the Fair Work Act that I took the Bench to earlier. Agreement is facilitated by the making and consideration of an employee's application for annual leave under clause 6.1.9.

PN507

Plainly, in my submission, the enterprise agreement provides an employee with an entitlement under the enterprise agreement to make such an application, receive a response within an allotted time. To the extent that clause 6.1.3 does not qualify agreement between an employer and employee by reference to reasonableness as set out in section 88, it is of no effect pursuant to subsection 55(4) of the Fair Work Act. It provides that a modern award or enterprise agreement may include terms ancillary, so on and so forth, but only to the extent that the effect of those terms is not detrimental to an employee in any respect when compared with the NES. To the extent that that provision is not qualified by reasonableness it is consistent because it permits the depravation of benefits that would otherwise be available under section 88.

PN508

I note as well as relevant context to clause 6.1.3 that 6.1.4 provides limited express circumstances in which Surveillance Australia might roster an employee on to leave. I have spoken about how section 88 starts with the employee, and then the employer is permitted to agree or refuse, only if reasonable, and what Surveillance Australia's agreement does is invert that process.

PN509

Clause 6.1.4 provides a limited express circumstance in which Surveillance Australia might roster an employee on to leave. The objective intent of that provision, in my submission, was to set the boundaries and permissions around the way that Surveillance Australia might pre-emptively roster leave outside of the request agreement paradigm in clause 6.1.3 and 6.1.9, and the Fair Work Act.

PN510

Clearly the parties to this agreement intended to put some boundaries around the way that leave could be required by the employer. Those boundaries are set in clause 6.1.4 and it is open to the Commission to, and in my submission the Commission should find that boundaries beyond that are inconsistent with the intention of the parties to this enterprise agreement, and for that reason clause 6.1.3 shouldn't be read as permitting the type of agreement that Surveillance Australia seeks to implement.

PN511

As observed by the Full Bench in HNZ to the extent that an enterprise agreement limits, or by logical extension purports to permit the limitation of a benefit under the National Employment Standards it's of no effect. Should the Commission find that common law agreement is consistent with the provisions of the enterprise agreement it would still fall foul of the NES and be of no effect.

PN512

I rely having regard to the time on my submissions in response to the various grounds advanced by Surveillance Australia. I rely on my written submissions in response to the grounds advanced by Surveillance Australia, and just deal with now a couple of short matters that I would have otherwise dealt with at the commencement of my submissions.

PN513

DEPUTY PRESIDENT GOSTENCNIK: Before you do, and I may have missed it, but you don't appear in your written submissions to have dealt with the respondent's ground 8.

PN514

MR CROSTHWAITE: Yes, and I will deal with that now. Perhaps I will deal with that immediately. The Federation has dealt in detail with how a person can't take leave, extended annual leave. Apologies, I just want to make sure I'm responding to the precise ground. Yes. The Commissioner was right to find that the agreements between the appellant and individual employees prevented an employee from taking an extended period of annual leave by agreement.

PN515

If agreement is meant agreement in the context of section 88 or agreement in the context of the enterprise agreement then the Commissioner was right for the reasons that I have advanced. If agreement is meant as any agreement, agreement to vary, then certainly, but that could be said of any employment entitlement in any contract I would have thought. We certainly don't make any concession that that ground is valid at all, and we have gone to some detail to show how extended periods of annual leave are actually impossible.

PN516

Indeed the alternate method for taking leave is only necessary because you can't do it as annual leave. It's in addition to the four days. It must be. So when a person is looking out at their year they know that every 28 days they're going to be required to take four days of annual - or 3.6 days of annual leave and .4 days of something else perhaps. And the question is left to them, 'Well if I'd like to go away for six weeks what do I do?'

PN517

They're required to six months prior to whatever the date is ask if they can do so, and then they have to work the remaining days that aren't acquitted by physically RDOs and annual leave under the agreement in order to fill the gaps. That is the method for extended annual leave, and it's only necessary because you can't say, 'Well, I'd really prefer to gather 20 days of annual leave over December, November, October, September and August and use them in January.' It simply can't be done, and again it's because the terms of the agreement are obligatory. It's not permissive language, it's binding language, as Katzmann J found.

PN518

The Federation accepts that the question of proper construction of both the Fair Work Act and the enterprise agreement - these are a couple of preliminary matters that I didn't deal with at the start because I sort of leapt into responding to my friend's submissions - but the Federation accepts that the question of proper construction of the Fair Work Act and the enterprise agreement are not matters in the exercise of discretion.

PN519

But the submissions at paragraph 5 of the Federation's written submissions quoting Australian Coal & Shale Employees' Federation regarding the review of an exercise of discretion are still relevant insofar as Connolly C decided that the enterprise agreement to the extent that it allowed employees to be required to take annual leave was not reasonable.

PN520

A decision qualified by reasonableness involves an exercise of discretion. Such a decision is required under an assessment under section 93(3), and I refer the Commission to HNZ at 24 and Connolly C at 98, where a similar assessment was made. The power to make a decision qualified by reasonableness is a classic discretionary decision, and in those circumstances we say that Australian Coal & Shale Employees' Federation still applies.

PN521

Finally, whatever criticism Surveillance Australia may make of Connolly C's reasoning, in our submission those criticisms do not rise to appealable error because for the reasons that I've described Connolly C correctly decided the critical question of whether the proper construction of the Fair Work Act or the enterprise agreement sanctioned the annual leave component of Surveillance Australia's employee contracts at the centre of this dispute.

PN522

To the extent that there might be criticism made of Connolly C's reasoning, it should have no impact on the outcome of this dispute. Those are the submissions for the Federation.

PN523

DEPUTY PRESIDENT BELL: Thank you. Anything in reply, Mr Avallone?

PN524

MR AVALLONE: Yes. Thank you, Deputy President. I'll try to be very quick. There was a question that you asked, Deputy President Gostencnik, about whenever just someone goes if it's in the middle of their 28 day period, and we were discussing about whether RDO's are paid out. That's dealt with in clause 4.3.9 of the agreement at appeal book 95 which is paraphrasing about that if someone can't take their days off within the set number of days they'll get paid it out.

PN525

Mr Crosthwaithe went through a lot of numbers today, reminding me of something that Mark Felman has said to me before, which is to the effect that there are three types of lawyers and I count myself in this, and I don't want just to be seen as backhanded – saying that there are three types of lawyers, those who can count and those who can't. And it may not be of great assistance to the Full Bench to try to deal with the maths other than at the big picture level.

PN526

And the big picture level is dealt with in the document that was agreed to an employee - in fact, two employees, and the employer, appeal book 152, which looks at it on a yearly basis. If one wonders why 152 talks about 92 rostered days off, how does that work, the answers to that are in the clause which Deputy President Bell referred to, 4.3.7 which effectively provides that rostered days off are pro rata according to annual leave.

PN527

If one steps away from the monthly analysis and just looks at it over the course of a year, six weeks of annual leave means that there are 46 weeks of the year which are not annual leave. And that's the explanation for why on page 152 of the appeal book the non FIFO arrangement refers to 92 rostered days off which is 46 weeks, if that makes sense. So, 46 weeks times two give you 92.

PN528

The maths works out, I submit, to get to the 134 calendar days. In relation to the 149 calendar days of what has been agreed to, I think Mr Crosthwaite said that that doesn't add up if one looks at a 13 weeks – it's not divisible by 13, or something to that effect.

PN529

The explanation for that is that the precise roster arrangement that's been agreed set out in the decision, but certainly the materials, there are 12 roster periods in which – at 16.12, and then there's a 13th roster period which is slightly different. It's a 21 day period. I won't go through the detail of it now but that is how we get to 149 days where there's no work required.

PN530

Mr Crosthwaite referred to clause 4.2 which talks of rosters being provided 14 days in advance and with 14 days duration. I submit that, well, of course enterprise agreements can always provide minimums or minimum obligations and it's open to employers to do something more beneficial such as, in this case, provide a roster which goes out further which gives employees more notice as to what the roster arrangements are going to be.

PN531

Deputy President Bell, I think you asked whether clause 4.2 and 4.3 – whether the effect of them was amended by IFA's. There are two page references. One is appeal book 206. That's the first version an IFA that was agreed to with some employees. So that was the one that sought to do everything in a part A and part B, so that's appeal book page 206.

PN532

The second version of an IFA, so that's the 13 July version, that's at appeal book 1.35. And again, that says something about and therein lies the problem.

PN533

DEPUTY PRESIDENT GOSTENCNIK: Hold on. 135, did you say?

PN534

That's what I said because that's what my note says. But the way that a lot of these documents got before the Commissioner, and 'got before' is terrible language, but were before the Commissioner was that they were attached to the materials filed by the union. And that's one of them. I don't think there is any controversy as to the existence or the terms of those documents. It's a debate ultimately about whether the – not so much that agreement or that IFA but ultimately the 149 to 155 common law agreement that was consistent with the Act. Just on that, or what was – sorry.

PN535

DEPUTY PRESIDENT GOSTENCNIK: The persons who entered into the common law agreement which is specified at paragraph 17(a), they also executed an enterprise flexibility agreement?

PN536

MR AVALLONE: Yes. And that was the - - -

PN537

INSTRUCTING SOLICITOR: Yes, so that's built into that one.

PN538

MR AVALLONE: Okay.

PN539

INSTRUCTING SOLICITOR: In the statement.

PN540

MR AVALLONE: Yes is the short answer. The slightly longer answer is that when – you'll remember earlier on – yes, is the short answer, Deputy President. And as I understand my instructions that's an IFA in terms of the 13 July 303 version which is at appeal book 135 or thereabouts which was attached to the applicant's submissions.

PN541

DEPUTY PRESIDENT GOSTENCNIK: So, this is the part A and part B?

PN542

MR AVALLONE: Yes. And I'm told that - you'll remember we were talking about a footnote before.

PN543

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN544

MR AVALLONE: With the reference – and I think off the top of my head it was 240 which I, by a process of inference, said must be 210 because that is consistent with the digital court book reference that was given. And I'm told now that it's actually appeal book 140 which is the document headed, 'part B.' I note that that's something different to – you know, on its text, as I said, it's something different to an IFA. The IFA is what it's called.

PN545

DEPUTY PRESIDENT GOSTENCNIK: So that the IFA is that instrument which finishes at 139. And then 140 is the incidental conditions which are those that are set out at in the separate common law?

PN546

MR AVALLONE: Right, so – that's right, something different to an IFA. But at 140 it's expressed at the very start, 'Whilst the arrangement outlined is in place these will apply.' If the arrangement in part A ceases it would appear that the part B arrangements cease, as well. That's a fair reading of those words. And of course, IFA's do have – or the Act provides and I'm sure the IFA leave provides for termination in accordance with the provisions of the Act.

PN547

Mr Crosthwaite referred again I think to a negative annual leave balance somehow coming out of those numbers. Again, I repeat the point that I made before that it's not negative leave. It's extra days off which are paid. Mr Crosthwaite made an argument which is certainly the first time that I'm aware of it being raised and that it wasn't raised at first instance, about that reliance can't be placed on agreements because it's said that they must have been people who are not yet employees and therefore it doesn't fall within the strict terms of 88.1 because the employee didn't agree.

PN548

The first thing is, as I say, it's not a point that was taken at first instance. Second, Mr Smallwood's statement in the stay application, the statement of 23 November at paragraphs 7 and 8 say something about the process of how employees come to be on FIFO arrangements. And it's to the effect that you don't just get to be employed as a pilot and, hey presto, you're on FIFO arrangements. But a pilot needs to be first checked into line which is a competency check undertaken for all employees that have completed their training.

PN549

Mr Smallwood says, 'All new pilots must be checked into line irrespective of how experienced they are. Access to the FIFO arrangements occurs after checking into line. All training prior to the check into line is conducted on a fulltime basis

under the strict conditions of the SAPL agreement. I submit that on a fair reading of that they are employees.

PN550

I'll come to paragraph 15 in a second but with the exception of Mr Gasta there's an employee; an employee is doing their training; they're employed on a fulltime basis; they're asked effectively, if they wish to do FIFO to agree to these arrangements and if they agree, the agreement comes into effect. On that basis the point that Mr Crosthwaite had made today falls away.

PN551

Paragraph 15 of Mr Smallwood's statement referred to a night pilot in somewhat different circumstances to the rest. He really did it for the sake of completeness, referring to the fact that he's currently employed by a different related company. And that he hadn't at that stage yet completed his training or checked into line. It just doesn't take the union's argument anywhere at all, I submit. The argument that Mr Crosthwaite has made relying upon section 340 relies upon the same hypothesis and falls away in the same way.

PN552

Mr Crosthwaite as I understand an argument that he's made today to the effect that the relevant arrangements to take leave at an agreed time and not an agreement that's been requested – or it's not a period that's been requested by the employee, rather than it's one that's being offered by the employer and agreed to by the employee, and it's said that that somehow inverts the process in section 88. I submit that that's just a misreading of section 88.

PN553

Of course it's open to an employer and an employee to agree on when leave is being taken or is to be taken, no matter whose idea it is and no matter who requests it. The critical question is whether they have agreed.

PN554

The argument that was put, as I recall it or as my note reads that Mr Crosthwaite said something to the effect that it would always be reasonable, and this is in the context of section 88(2), that it would be always be reasonable for an employer to refuse a request to take leave if the leave is being allocated in advance. That, I submit, is to invite the Full Bench to adopt a decision rule as to what might be reasonable in some circumstances in the future.

PN555

What's reasonable at some point at some point in the future is going to depend upon the circumstances at the time. But there is nothing, I submit, in the agreement that's been made to prevent a request being made under section 88(2) to take annual leave or to prevent an employer from doing what's required by section 88(2) which is to, and I'm paraphrasing it, accede to that request unless it's unreasonable, with the reasonableness component in there.

PN556

Mr Crosthwaite as I understand it, said that the only way for employees to take additional leave or extended periods of leave is to work additional days and not be

paid for it but to be paid at a later time. That's not so, I submit. The employees are paid throughout. They're all paid days. It's simply a matter that if an employee wants to take an extended period of leave then they need to save up that leave, just as any employee in any scenario, say they want to take six weeks to go on a European holiday for their honeymoon - - -

PN557

DEPUTY PRESIDENT GOSTENCNIK: Isn't that Mr Crosthwaite's point, that under the arrangement the employee can never save up for leave?

PN558

MR AVALLONE: Well, they can. And they way that they do that - - -

PN559

DEPUTY PRESIDENT GOSTENCNIK: They stop participating in the arrangement.

PN560

MR AVALLONE: No. The agreement – well, there are two ways. The agreement expressly provides that it can be done by give six months' notice and we'll rearrange things. So, you do work extended on swings to save up some leave so you can take that extended break. Or, of course, it's possible for someone, consistent with section 88 subsection (2), to make a request and that would not be unreasonably refused. It is always possible to do it and the - - -

PN561

DEPUTY PRESIDENT GOSTENCNIK: But you can only make the request in respect of leave you've accrued.

PN562

MR AVALLONE: Yes.

PN563

DEPUTY PRESIDENT GOSTENCNIK: You can't make a request in respect of leave you haven't approved.

PN564

MR AVALLONE: No. And that underlies the inherent logic of, if you're going to do this, and usually people don't get married with less than six months' planning – sometimes they do – but it explains inherent logic of if you're planning on taking an extended break then give us six months' notice so we can work things out, so that we can work out the roster in a way that allows you to accrue that leave so that you can take it.

PN565

And of course, if there were circumstances where the employee came along and said, actually, something has arisen, I need to take an extended period of annual leave, what can we work out, then there's no reason not to think that there won't be compliance(?) with section 88(2). And there's no reason to think that the employer would act unreasonably.

PN566

DEPUTY PRESIDENT BELL: Can I just ask actually what's occurring in that scenario? Is it the case that instead of taking four days annual leave during the 28 day cycle, they're just in fact taking two days annual leave and working two, so they're working 18 days?

PN567

MR AVALLONE: Yes. My instructions are that it hasn't happened yet because no one has made the request yet. But what is envisaged is that it would work something like that. That the employees, of course they take their eight days off as required by 6.4.3, off the top of my head, but they would work – instead of working 14 days on and two travel days, it'd be a longer period on, trimming into the days that would otherwise have been annual leave.

PN568

But obviously even that is going to take some co-ordination because there's only a certain number of seats the pilots can sit in and fly. It's not a simple matter of, we'll just give this employer an additional two days on his swing. There are going to be flow-ons to other people, as well. Mr Crosthwaite as I understood it, was drawing an analogy somehow between the right to take annual leave when agreed, with personal and carer's leave, for example.

PN569

There are similarities between the two types of leave, of course. They're both paid and absence from work. But they are fundamentally different because personal carers leave is triggered by illness, injury or the need for carers leave under section 97. There is nothing in the Act that says you'll take carers leave or personal leave when agreed. That's just not a trigger for it. There is an entitlement too that certain things occur.

PN570

The entitlement to annual leave is different under the Act. You take annual leave if it's agreed. And you can request it, but not unreasonably refused. It's just a different starting point and it's just not a clear analogy.

PN571

Mr Crosthwaite says that an employee is required, and this is where he relies upon the judgment of Katzmann J that an employee is required to take annual leave in their off-swing. I say that that's not so. I say that that's not so. Perhaps it's a fundamental, philosophical difference but the difference is this. Employees, I submit, are allowed to agree on arrangements as to when they take annual leave. It's not a requirement to do it. It's that they are allowed as independent, rational actors to make an agreement as to when they're going to do it.

PN572

And that's what section 88 subsection (1) envisages. If one were to take the union's approach to its logical conclusion, say we weren't talking about FIFO arrangements, we were just talking about a bog standard nine to five worker who agrees, and agreed some time in advance that they're going to take a period of leave next week. And then on Monday they decide, actually, I don't want to take annual leave, I want to go to work.

PN573

On the union's argument the employee can just show up and demand work and demand to have the annual leave revoked. And if the employer were to say no, sorry, you're on annual leave, we've got someone doing the work already, that would be for them to impose a requirement which would be unlawful unless either there was an enterprise agreement provision which allowed it, or they were award and agreement free, in which case reasonableness comes into it.

PN574

That's just correct that the underlying point is that once someone agrees to something it's agreed. Mr Crosthwaite puts some reliance upon 6.1.4 of the agreement. I say that that clause is not (indistinct) as to the circumstances as to when – it really doesn't evolve, at all, the circumstances in which employees can agree to take leave. And it doesn't qualify or restrict the circumstances in which an employee can agree.

PN575

In relation to just the final point, what Mr Crosthwaite said about Coal & Shale still being relevant, and as I understand it he's referred there to the question of reasonableness, a requirement which is really an issue about section 93.3. In the appeal there is no reliance placed on a clause being supported by section 93.3. We're not reliant upon an enterprise agreement provision which says that the employer can require an employee to do anything.

PN576

We are submitting, or I am submitting that an employee and an employer are allowed to agree in the way that's been done as to when annual leave will be taken. If it please the Commission.

PN577

DEPUTY PRESIDENT GOSTENCNIK: Mr Avallone, what would you like us to do with the statement of Mr Smallwood?

PN578

MR AVALLONE: What I would seek is that the Full Bench have regard to the statement of Mr Smallwood dated 23 November 2023. It's before the Commission in this proceeding. Mr Smallwood has been cross-examined on it already. It's relied upon effectively for two points. One, the discussion of what's occurred – or 17(a) which is simply for the fact that employees have agreed to the arrangements that are subject to the appeal. So, it's not going to be a hypothetical matter.

PN579

Two, by way of background that's relied upon for those paras that I mentioned before, paragraphs 7 and 8, I don't – and Mr Crosthwaite might correct me but I don't understand there to be any dispute about what's said in paragraphs 7 or 8. It's merely factual background that might assist the Full Bench.

PN580

DEPUTY PRESIDENT GOSTENCNIK: Mr Crosthwaithe?

PN581

MR CROSTHWAITE: Thank you, Deputy President. The statement as I understand it is not – what's said in the statement doesn't go to any ground of appeal. And in that circumstance one wonders the relevance of it.

PN582

DEPUTY PRESIDENT GOSTENCNIK: The difficulty for us is that based on one view there is no evidence about any employee having entered into anything.

PN583

MR CROSTHWAITE: Yes.

PN584

DEPUTY PRESIDENT GOSTENCNIK: So that this is purely an academic exercise or seeking an advisory opinion about – as opposed to dealing with particular terms of an actual arrangement that was entered into.

PN585

MR CROSTHWAITE: I understand, Deputy President. To the extent that the Commission seeks to rely on the statement in order to have comfort that there is a proper basis for those actual matters that you've identified, then we wouldn't oppose. To the extent that the statement is – yes, I think we're safe to not oppose it. To the extent that it raises some issue that hasn't been the subject of the ground of appeal or written submissions about that matter, we might request an opportunity to be heard. But I can't see it really being a problem.

PN586

DEPUTY PRESIDENT GOSTENCNIK: Mr Avallone, anything? Is it sought to – you seem to rely upon it for a purpose other than the one that I've outlined, so - - -

PN587

MR AVALLONE: The two purposes for this, one is that there is a bone that the parties are fighting over, if I can use the phrase that's put in Electrolux to Mr Parry(?).

PN588

DEPUTY PRESIDENT GOSTENCNIK: The four-legged cat aspirating as a dog fighting over the bone?

PN589

MR AVALLONE: Yes. It's an eight-legged cat. Sorry for that. The second is, in answer to the point that was raised as I understand it for the first time today, which is that section 881 doesn't apply because they weren't employees when they agreed, and that's why I drew the Full Bench's attention to paragraphs 7 and 8.

PN590

MR CROSTHWAITE: Deputy President, I just make the observation that that statement was not a statement before Connolly C. Perhaps the parties having heard what the Bench has said - - -

PN591

DEPUTY PRESIDENT GOSTENCNIK: Well, neither was the submission (indistinct), was it?

PN592

MR CROSTHWAITE: Yes but that was a submission only about the law. And I should add that in the absence of knowing those matters, and I have to say that Ms Moore's(?) statement, having read it out doesn't really disclose it. Really the proposition advanced is a proposition of law about the definitions used in section 88 of the relationship as - - -

PN593

DEPUTY PRESIDENT GOSTENCNIK: Yes, I accept that. But the proposition needs to have some factual basis to it. But that is the question. When was this arrangement entered into? Or was it at a time that they were employees of the employer, or not?

PN594

MR CROSTHWAITE: These are matters that are going to be known to Surveillance Australia. Perhaps the parties can – and I'm speaking without instructions, but come to some sensible position as to those facts that the Commission has expressed a desire - - -

PN595

DEPUTY PRESIDENT GOSTENCNIK: At least from my perspective I don't see any utility in answering that question about whether or not the construction that you propose is correct and that a person can only make an agreement for the purposes of section 88(1) in an employment relationship, is the effect of your submission.

PN596

MR CROSTHWAITE: Yes.

PN597

DEPUTY PRESIDENT GOSTENCNIK: And that seems to make some sense given the words of the statute. But there's no need to express an opinion about that, is there, if it's a matter of fact? That is, employees were in an employment relationship when they made this arrangement.

PN598

MR CROSTHWAITE: Deputy President, might I have just a brief moment to speak with Mr Avallone?

PN599

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN600

MR CROSTHWAITE: I assure the Full Bench this is intended to shorten the time that the Full Bench has to deal with it. Apologies, Deputy President. So, my instructions are that the paragraphs of Mr Smallwood's statement from 14 to 20 about the Federation is comfortable for that to be relied on, I'm instructed that

those paragraphs do not necessarily show the full circumstances in respect of all the employees. I understand that Mr Avallone's case relies on the first two who did make an agreement and did so after they were employed.

PN601

MR AVALLONE: I think that might answer it, Deputy President. But just to reiterate, on my instructions Mr Alexander Begadska(?) Adanski and Mr James Teagle, when they made common law agreements to the effect that this entire appeal is about, prior to them making that agreement with their employer they were employed by Surveillance Australia.

PN602

DEPUTY PRESIDENT GOSTENCNIK: And as I understood what you were putting, the nature of the agreement that they entered into, because we don't have a copy of it, that it is found at 134 of the appeal book, that is they were sent a letter. They entered into an individual flexibility arrangement and there was a part B arrangement, common law arrangement.

PN603

MR AVALLONE: Can I just have a moment, Deputy President?

PN604

DEPUTY PRESIDENT GOSTENCNIK: Yes. I'm only saying – can I tell you why I'm inquiring about that, because there's also the arrangement which is at 149 through to 151 which is different.

PN605

MR AVALLONE: Sorry, Deputy President.

PN606

DEPUTY PRESIDENT GOSTENCNIK: That's all right.

PN607

MR AVALLONE: Sorry, Deputy President. I'm just - - -

PN608

DEPUTY PRESIDENT GOSTENCNIK: That's all right.

PN609

MR AVALLONE: Rather than wasting your time could I make this offer to the Full Bench and to Mr Crosthwaite that we will, if permitted by the Full Bench, obtain copies of the two agreements that we rely upon, the signed ones that Mr Smallwood refers to dated, I think, 23 August, and we provide those to the Full Bench. And if the Full Bench is minded to have regard to them then we'd rely upon sections – it's around 607, but the ability of the Full Bench to admit further evidence.

PN610

DEPUTY PRESIDENT GOSTENCNIK: And this will be done by consent, will it?

PN611

MR AVALLONE: That's what I would seek.

PN612

MR CROSTHWAITE: Deputy President, we don't have an issue with the proposition that the persons at 14(a) and (b), as I understand it, entered into an arrangement to perform FIFO work of the type we've discussed today after they were employed by Surveillance Australia.

PN613

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN614

MR CROSTHWAITE: We have a difficulty in respect of 14 and 15 because we think that the ordinary reading of that evidence indicates that Mr Begadska did, being one of the nine at 14, enter into an employment agreement to perform FIFO work but at the time of, at least this witness statement, was not an employee of Surveillance Australia.

PN615

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN616

MR CROSTHWAITE: And we say that that demonstrates the submission that we made in respect of section 74 (indistinct) which is - - -

PN617

DEPUTY PRESIDENT GOSTENCNIK: I understand that. But my question goes to perhaps a related but different subject matter. That is, the submissions, or at least the respondent's submissions in part, relied upon the material as the common law contract that which is contained at 149 and 151. Now that is not accompanied by any obvious individual flexibility arrangement.

PN618

And if that's one of the arrangements that's entered into, the answer to that question will be different perhaps to the circumstances in which an employee has entered into the other arrangement which commences at 134. And the point is we don't know whether such an arrangement was entered into, if and who, when. None of that. And the first of we're learning that 134 is the arrangement that was entered into by at least some employees, is today.

PN619

MR AVALLONE: Firstly, Deputy President, I fear that Mr Crosthwaite might be operating under a misreading of 14 of Mr Smallwood's statement. Mr Smallwood's statement says at 14, there are nine pilots. It's unhelpful that it says 'with whom Surveillance Australia', because Begadska – as said at paragraph 15, is employed by someone else, but has entered into employment agreements to perform FIFO work. That's a bit unhelpful.

PN620

Paragraph 17 clarify that only five of the nine had entered into an annual leave agreement and it describes what they are. And paragraph 20, and you're about to

ask me what happened to the last one – one of them, I think it's apparent, had left and that's dealt with at paragraph 18. He'd entered into an arrangement. Paragraph 20, there are three who have never agreed to the annual leave arrangement. For this appeal the only relevant people, I submit, are the two employees referred to in paragraph 17(a).

PN621

And what I offer to do if it's consented to is, so that the Full Bench can be properly informed as to the factual basis upon which it is being asked to make a decision, is to provide the common law agreement, and if there is any IFA of around that same date, the agreements dated 23 August 2023 with those two employees who are referred to in paragraph 17(a). And the Full Bench can make of those documents what it will.

PN622

DEPUTY PRESIDENT GOSTENCNIK: And in respect of the employees in B?

PN623

MR AVALLONE: My client can provide those if it's wished that we do so. But the primary argument that we put is not on the basis of the version one IFA which blended things together somehow. It's on the - - -

PN624

DEPUTY PRESIDENT GOSTENCNIK: But are Mr Devlin and Jackson working at the moment as FIFO's?

PN625

MR AVALLONE: I'm instructed that Mr Devlin is still in training and that Mr Jackson, I'm instructed, is rostered and flying. And the - - -

PN626

DEPUTY PRESIDENT GOSTENCNIK: As a FIFO?

PN627

MR AVALLONE: Yes. And that reliance is being placed on the 13 July 2023 IFA. So, I can imagine that you would want to see a copy and I would understand why you want to see a copy of that document.

PN628

DEPUTY PRESIDENT GOSTENCNIK: Yes. Because I approached things today and I might have misread it but I've understood the appeal concerned purely a common law arrangement.

PN629

MR AVALLONE: Yes.

PN630

DEPUTY PRESIDENT GOSTENCNIK: Which I understood to mean that an employee who does not have an IFA – well, they may separately have an IFA - - -

PN631

MR AVALLONE: Yes.

PN632

DEPUTY PRESIDENT GOSTENCNIK: But dealing with thing other than annual leave, dealing with varying some agreement entitlements so as to facilitate a FIFO arrangement but not dealing with annual leave.

PN633

MR AVALLONE: Yes.

PN634

DEPUTY PRESIDENT GOSTENCNIK: But if the common law arrangements are subservient to or parasitic upon an IFA which can terminate on 28 days, that may well bear on - - -

PN635

MR AVALLONE: That might be relevant to your judgment.

PN636

DEPUTY PRESIDENT GOSTENCNIK: To the common arrangement.

PN637

MR AVALLONE: I accept that.

PN638

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN639

MR AVALLONE: And that's why I say that what I offered to do on behalf of my – well, offered on behalf of my client for my client to do, is to provide with those two employees, Begadska(?) and Teagle, to provide not just the common law agreement dated 23 August 2023, but if there's some IFA around that same date, whether that's somehow subservient to or relates to, then to provide that, as well.

PN640

And if the Full Bench seeks it in relation to Mr Jackson who I mentioned before for the July one then I'm sure that could be provided, for whatever that document is of July to be provided, as well.

PN641

DEPUTY PRESIDENT GOSTENCNIK: Yes. All right. Well, if the parties can consult one another about those documents and then file them within the next seven days by consent.

PN642

MR AVALLONE: Yes. There was a point that you asked me about and I gratefully took on your offer.

PN643

DEPUTY PRESIDENT GOSTENCNIK: I'm coming with that. And will seven days for a short note be sufficient?

PN644

MR AVALLONE: Yes, absolutely.

PN645

DEPUTY PRESIDENT GOSTENCNIK: And seven days for a reply?

PN646

MR CROSTHWAITE: Yes, Deputy President. Deputy President, I just – I'm reluctant to rise again but my learned friend was asked a question about annual leave and extended leave on reply, and he said that on his instructions that extended leave could be annual leave. And I'd simply draw the Commission's attention to the second part of the annual leave and leave table at 152 that makes inescapably clear that it can't be. And it relies on a mechanism in the enterprise agreement for working extra days and indeed reads, 'In order to be eligible to make such request you must approve 14 additional on days in advance with six months' notice.'

PN647

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you. All right. Subject to receiving the additional information and the short notes, and I stress the 'short' in that suggestion, we would thank the parties for their helpful written and oral submissions. We reserve our decision and we propose to adjourn. Have a good evening.

**ADJOURNED INDEFINITELY** **[5.47 PM]**