TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT SLEVIN

AG2023/2623

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

Application by OS MCAP Pty Ltd
(AG2023/2623)

Brisbane

10.00 AM, MONDAY, 19 FEBRUARY 2024

Continued from 20/11/2023

PN1

THE ASSOCIATE: In the matter of AG2723/2623, the Fair Work Commission is now in session.

PN2

THE DEPUTY PRESIDENT: Good morning. The appearances, please?

PN3

MR NEIL: If the Commission pleases, I appear with my learned friend Mr McLean, to ask for permission to appear for the applicant.

PN4

THE DEPUTY PRESIDENT: Thank you, Mr Neil.

PN5

MS C HOWELL: May it please the Commission, Howell, initial C. I seek permission to appear for the Mining and Energy Union, instructed by Ms Sarlos.

PN6

THE DEPUTY PRESIDENT: Thank you, Ms Howell. And online?

PN7

MR S ROULSTONE: If it pleases the Commission, Roulstone, Shane, appearing for the AWU.

PN8

THE DEPUTY PRESIDENT: Thank you. Any objections to permission to appear? I've looked through the material, it would be an understatement to say that it's complex enough to grant permission, and I'll grant permission, under section 596.

PN9

Who's going first?

PN10

MR NEIL: Well, of course, practices differ. It's our application and that would indicate, in our submission, that we would carry the burden of going first, although the submissions were done in reverse order.

PN11

THE DEPUTY PRESIDENT: I noted that, Mr Neil. I wondered if that had been discussed previously. But are we all content for Mr Neil to go first?

PN12

MS HOWELL: I think logically, if it please the Commission, the evidence OS should go first, if I can refer to them as OS, in shorthand. In terms of the submissions, in my submission, it makes sense for the unions to go first, simply because we've done submissions in chief, and a reply and that's they way, certainly, the submissions are structured. I fit please.

PN13

THE DEPUTY PRESIDENT: All right. I think I'll hear from you first, Mr Neal.

PN14

MR NEIL: If the Commission pleases.

PN15

Now, we hope that the parties have communicated to you, Deputy President, that none of the witnesses, on either side, will be required for cross-examination.

PN16

THE DEPUTY PRESIDENT: Yes, I'm aware of that. Thank you.

PN17

MR NEIL: I move on the application taken up on 4 August 2023. There's a court book, the application appears behind tab 1, beginning at page 3.

PN18

THE DEPUTY PRESIDENT: I don't think I need to mark the application.

PN19

MR NEIL: We would not ask for that to be done, if it please. But I then rely upon the declaration made on the same day, the F17A, and I should tender that, for that purpose. It begins at page 11, tab 2.

PN20

THE DEPUTY PRESIDENT: I'll mark the form F17A declaration, and the annexures, Mr Neil?

PN21

MR NEIL: Commission pleases. Could I draw attention to some features of that declaration for the moment, we hope to help you, Deputy President, navigate through the material. Page 28, which in my copy is rather engagingly presented upside down.

PN22

THE DEPUTY PRESIDENT: Mine as well.

PN23

MR NEIL: It was question 23 that I wish to refer to. You'll see, Deputy President, that the answer is given in a tabular form, the first row of which refers to material dated 7 July 2023. Could I ask you, first, to look at the first dot point. The document there referred to is attached to the form 17A and it begins at page 38. It's also the subject of evidence given by the applicant's witness. I'll come to her evidence in a moment, but the reference is paragraph 25, last sentence, page 141 of the court book.

PN24

THE DEPUTY PRESIDENT: Thank you.

PN25

MR NEIL: Then second dot point, you will seek, Deputy President, that it refers to a video. There are screenshots of that video that begin at page 607 of the court book and there's a transcript of the audio of the video, that begins at page 728.

PN26

THE DEPUTY PRESIDENT: That transcript wasn't prepared by your client?

PN27

MR NEIL: It was not, but there's no issue about its accuracy. Those were the features of the form 17A we'd wish to draw attention to. So I tender that declaration.

PN28

THE DEPUTY PRESIDENT: I'll receive that. Are there any objections?

PN29

MS HOWELL: No objections, thank you.

PN30

THE DEPUTY PRESIDENT: I'll mark that exhibit 1.

EXHIBIT #1 FORM 17A

PN31

MR NEIL: Commission pleases. I then tender a statement made by Allison Maree Chauncy, A-l-l-i-s-o-n M-a-r-e-e C-h-a-u-n-c-y, it's behind tab 5 in the court book and begins at page 138. I tender that statement, together with the documents annexed to it.

PN32

THE DEPUTY PRESIDENT: Thank you. Any objections?

PN33

MR ROULSTONE: No.

PN34

MS HOWELL: No objections, thank you.

PN35

THE DEPUTY PRESIDENT: I'll mark the statement of Allison Maree Chauncy, dated 10 November 2023, as exhibit 2.

EXHIBIT #2 STATEMENT OF ALLISON MAREE CHAUNCY DATED 10/11/2023

PN36

MR NEIL: That's my evidence. There's a written outline of our submissions, it's behind tab 4 of the court book and it begins at page 118.

PN37

THE DEPUTY PRESIDENT: I don't propose to mark that, but I have it, thank you.

PN38

MR NEIL: Now, we also hand up a bundle of authorities, largely but not entirely referred to in that written outline. Travelling with that bundle, the bundle is indexed, tabbed and index, our learned friend has a copy. Travelling with that, but not a part of it, it didn't seem to make the exercise of compilation, is a decision given by Saunders DP, in the matter of the Operation Services Repair Centres Agreement, on 11 December 2023. Could I hand that up separately. Thank you.

PN39

THE DEPUTY PRESIDENT: Before you move on from your evidence, Mr Neil, I just have some questions about the annexures - - -

PN40

MR NEIL: This is to Ms Chauncy's statement?

PN41

THE DEPUTY PRESIDENT: Ms Chauncy's statement. The table on page 142. Perhaps I'd be assisted if you could just briefly assist - briefly explain to me why I have those documents, having, in particular, over 400 pages of records of bargaining meetings uploaded to the OS online information hub. Why do I have those?

PN42

MR NEIL: We will refer to them, but only in passing. They're relevant because one of the contextual matters that we wish to rely upon, in the Commission's assessment of the adequacy or the reasonableness of our explanation is the fact that the explanation that was given during the access period followed upon a long course of bargaining, about which detailed reports were made to members of the voting cohort. That's really the only point we wish to rely upon that material to demonstrate.

PN43

THE DEPUTY PRESIDENT: All right.

PN44

MR NEIL: In other words, it wasn't a standing start.

PN45

THE DEPUTY PRESIDENT: The information bulletins on the OS online information hub - - -

PN46

MR NEIL: Same point.

PN47

THE DEPUTY PRESIDENT: The collection of ballots speaks for itself and the explanation document.

PN48

MR NEIL: Yes. AC6 will be an important document. It concerns the explanation, or constitutes a part of the explanation given in relation to the over award guarantee.

PN49

THE DEPUTY PRESIDENT: And you'll have to bear with me, that document, does it appear a number of times in the material?

PN50

MR NEIL: It does.

PN51

THE DEPUTY PRESIDENT: In different forms?

PN52

MR NEIL: I don't know about different forms, but I'm conscious of there being more than one copy.

PN53

THE DEPUTY PRESIDENT: All right. Thank you. This one has - maybe it - the numbers on my hardcopy - - -

PN54

MR NEIL: There's been a degree of regrettable overprinting at about this point.

PN55

THE DEPUTY PRESIDENT: Yes. All right. So when we get - what I'd like to do is just identify a working copy, as it were, so that we're all using the same copy, rather than jumping around.

PN56

MR NEIL: May we take that on notice and we'll undertake that task. It might be helpful, at the same time, if we produce the - reproduce, without the overprinting, those pages on which the number have been overprinted.

PN57

THE DEPUTY PRESIDENT: There's no need to do that. Thank you. I just want to make sure that when we're dealing with the explanation document, because it looms large, that we're all signing off the same - - -

PN58

MR NEIL: The version to which we will be referring, in our submissions this morning, is the version that appears at page 602, using the red numbers at the bottom right-hand corner. It's been overprinted, but it has in there, at the top middle, AC6.

PN59

THE DEPUTY PRESIDENT: Thank you. I've got that.

PN60

MR NEIL: So that's the version we'll be asking you to look at, Deputy President, this morning.

PN61

THE DEPUTY PRESIDENT: So it's the same as the attachment to the F17A?

PN62

MR NEIL: Materially, yes.

PN63

THE DEPUTY PRESIDENT: Thank you. The screenshots, I've covered that. The transcript, you're content to refer to transcript?

PN64

MR NEIL: Yes. Then the flyer we wish to refer to, which is AC8, we wish to rely upon to make good another proposition, contextual proposition. You will have seen, Deputy President, that one of the criticisms that is made, on the part of the MEU, of our explanation is that, at times, it was over enthusiastic in identifying the benefits in the agreement. We wish to point, as an element of the context against which that submissions should be assessed, the fact that at the same time a contrary case was being propounded by the MEU, to the voting cohort. Nothing wrong with that, of course, in our submission, but it's all part of the information that they had.

PN65

THE DEPUTY PRESIDENT: I don't think I need to trouble you any further, Mr Neil, I'll just checking my notes, something in my notes.

PN66

In terms of the table, I know earlier requests from the Vict President in this matter, about the workings for the guarantee or the wages, how those calculations, are those two versions Ms Sarlos has provided, similar detail, work experience, in terms of the applicants working to those numbers - - -

PN67

MR NEIL: There's nothing further we wish to rely upon in that regard.

PN68

THE DEPUTY PRESIDENT: Okay. Good. Thank you. All right.

PN69

MR NEIL: You will have appreciated, Deputy President, we'll come to develop this proposition more fully, of course, that the over award guarantee means what it says.

PN70

THE DEPUTY PRESIDENT: Yes. I understand that, I was just making sure that there wasn't another document that I needed to pay attention to, as it were.

PN71

MR NEIL: It's not, and that brings us to the end of our evidence and the material, the written material that we wish to rely upon.

PN72

THE DEPUTY PRESIDENT: Thank you. Ms Howell, (indistinct) for the same purpose.

PN73

MS HOWELL: Thank you. Deputy President, the MEU's materials begin at tab 6 of the court book, with form 18 and tab 7 being our submissions in chief. The first statement which we wish to rely on is at tab 8, and it's the statement of Eliza Sarlos, and annexures.

PN74

MR NEIL: No objection and no cross-examination.

PN75

THE DEPUTY PRESIDENT: Thank you. I will receive and mark the statement of Eliza Sarlos, dated 13 October 2023 and mark it exhibit 3 in the proceedings.

EXHIBIT #3 STATEMENT OF ELIZA SARLOS DATED 13/10/2023

PN76

MS HOWELL: Thank you. The second statement is that of Richard Staker, S-t-a-k-e-r, and annexures.

PN77

MR NEIL: No objection and no cross-examination.

PN78

THE DEPUTY PRESIDENT: I receive the statement of Mr Staker, dated 12 October 2023, and mark it exhibit 4.

EXHIBIT #4 STATEMENT OF RICHARD STAKER DATED 12/10/2024

PN79

MS HOWELL: The third statement is that of Shane Wiseman. Deputy President, we provided a signed copy of that statement this morning, so I'm not sure if the Commission wants to substitute that, if there are any issues.

PN80

MR NEIL: There are no issues from our point of view.

PN81

MS HOWELL: The provisional statement is dated 13 October 2023.

PN82

THE DEPUTY PRESIDENT: Thank you. I receive the statement of Shane Wiseman, dated 13 October 2023, and mark it exhibit 5.

EXHIBIT #5 STATEMENT OF SHANE WISEMAN DATED 13/10/2023

PN83

MS HOWELL: The fourth statement is that of Stephen Pearce(?), with annexures. Before the Commission marks that, there is an issue with the annexures. We've somehow included two documents which should be in there, from pages, in the case book, 1042 to 1219. It's a copy of the 1997 award and a duplicate copy of the award restructuring decision. So we don't tender those annexures and I apologise for that.

PN84

THE DEPUTY PRESIDENT: So that's 1042 to - - -

PN85

MS HOWELL: One-two-one-nine.

PN86

THE DEPUTY PRESIDENT: That's the only amendment?

PN87

MS HOWELL: Yes.

PN88

MR NEIL: No objection and no cross-examination.

PN89

THE DEPUTY PRESIDENT: So the witness statement of Stephen Pearce, which is dated 13 October 2023, I will mark it exhibit 7.

EXHIBIT #6 STATEMENT OF STEPHEN PEARCE DATED 13/10/2023

PN90

MS HOWELL: They only other document we rely on, Deputy President, is our submissions in reply, which are behind tab 12.

PN91

THE DEPUTY PRESIDENT: I'll just correct myself, that should be exhibit 6 for Mr Pearce. I won't mark the submissions.

PN92

In relation to the evidence, before we go to the submissions (indistinct). Ms Howell, I won't ask you similar questions to those I asked Mr Neil, about the annexures. My concern here is that I don't know if you're referring to documents, whether they're duplicated or similar, so that's my purpose.

PN93

So in terms of the - I don't have an index of your annexures, I don't think, Ms Howell, but - perhaps the easiest way is simply to go through the statement and just be assisted just by a brief statement of the purpose of each annexures. We've got screenshots - so I'm starting at exhibit 3. We've got the screenshots of ES1.

PN94

MS HOWELL: Yes, Deputy President, those are relevant to the issue of the hubs. I think it's clause 6 of the agreement, which defines the workplace as the hub, in effect, and there's an issue between the parties about the effect of that and whether it, effectively, narrows the scope of the redundancy provision by widening the area in which an employee can be compulsorily transferred. Those screenshots show that the jobs which the employees are taking are properly characterised as jobs, at a particular mine, rather than jobs in the - anywhere in the hub. That is, anywhere in the state of Queensland. So that's the purpose of those ES1.

PN95

THE DEPUTY PRESIDENT: The standard letters of offer?

PN96

MS HOWELL: I think there's a number of functions of that, Deputy President. One of them is to show the hours of work which employees are customarily required to work, under the award, which we say is inconsistent with the award and also the provision about where the job is located.

PN97

THE DEPUTY PRESIDENT: Thank you. I gather that's the same for ES3, the advertisement?

PN98

MS HOWELL: Yes.

PN99

THE DEPUTY PRESIDENT: And ES4, the advertisement there?

PN100

MS HOWELL: Yes.

PN101

THE DEPUTY PRESIDENT: Then the various material distributed to employees, during the access period, are these - the handbooks, in particular, these are not repeated in the applicant's evidence, are they? I don't think they are.

PN102

MS HOWELL: I don't think so. No.

PN103

THE DEPUTY PRESIDENT: All right. Thank you. There are the various versions at 5, 6 and 7. The redundancy policy and the explanation. Is the explanation - I see, at ES9, is that otherwise in as well?

PN104

MS HOWELL: I think it was subsequently included in the OS material, I'm not a - I think it was.

PN105

THE DEPUTY PRESIDENT: Mr Neil, is that AC6?

PN106

MR NEIL: Yes.

PN107

THE DEPUTY PRESIDENT: It is? Thank you. Are you content if we use AC6, talking about these documents. Am I going to put you to too much trouble if we do that?

PN108

MS HOWELL: No, Deputy President, I think - if there's any tricky questions about that, I might refer them to Ms Sarlos, in any event so it would be her problem.

PN109

THE DEPUTY PRESIDENT: You can be warned, Ms Sarlos, if there are any tricky questions about them, then it - ES10 is the bonus information. Is that otherwise in?

PN110

MS HOWELL: I'm not sure.

PN111

MR NEIL: I don't think so.

PN112

THE DEPUTY PRESIDENT: I don't think it is. Thank you. And the transcript that we've already mentioned is ES11. I understand ES12 and the announcement, in relation to the Blackwater Mine. ES13, similarly. The underpayments question, Ms Howell, why do I have a news release about those underpayments?

PN113

MS HOWELL: I think it's really in the context of the AAG and what we say are the inadequacies of the AAG are emphasised or become more significant because of the fact that BHP has a track record of substantial underpayments of its employees.

PN114

THE DEPUTY PRESIDENT: The spreadsheets, at 15, 16, 17 and 18, about - we'll be talking about those later, I understand?

PN115

MS HOWELL: Well, I can say, Deputy President, that those follow on from the points that I just made, which is our calculations do not match the OS calculations.

PN116

THE DEPUTY PRESIDENT: I noted that, and I would like to focus on that at some stage. But for the moment, just for the exercise of understanding the nature of the evidence, I understand that.

PN117

If we move to Mr Staker's statement, there are similar documents to those that we've already discussed that are attached to Ms Sarlos' statement, I don't need to trouble you about that.

PN118

MS HOWELL: Thank you.

PN119

THE DEPUTY PRESIDENT: Mr Pearce's statement appears to address the history of the award and goes to this question of the 12 and a half hour shifts, more than 10 hour shifts, I'm right in that's the reason that material is there?

PN120

MS HOWELL: That and the public holidays clause, if it please the Commission.

PN121

THE DEPUTY PRESIDENT: Yes. All right. Thank you. I think that's all I need.

PN122

MS HOWELL: Thank you.

PN123

THE DEPUTY PRESIDENT: Mr Roulstone, I don't have any evidence from you, do I?

PN124

MR ROULSTONE: No, Deputy President, you don't. We're just rely upon our F18, which is part of the Mining and Energy's submission, as I understand it.

PN125

THE DEPUTY PRESIDENT: Thank you. So you're supporting the material provided by the MEU, are you?

PN126

MR ROULSTONE: The AWU is, that is correct.

PN127

THE DEPUTY PRESIDENT: Thank you. Right, over to the submissions now, Mr Neil?

PN128

MR NEIL: Commission pleases.

PN129

Unless, in relation to any particular matter you have anything of us, Deputy President, we had not proposed to repeat what we have already put in writing. But there were some issues that we - and propositions - that we wish to develop. They are all matters referred to in the written submissions.

PN130

THE DEPUTY PRESIDENT: Thank you. There is one issue that I'll - I'll just draw it to your attention now. It just occurred to me that one matter that doesn't appear to be addressed in the material, that's probably because it hasn't been raised before, is just the NERR have been so old, whether there's any issue arising.

PN131

MR NEIL: We do not apprehend there to be any issue about that and we are proceeding on the basis that there is not.

PN132

THE DEPUTY PRESIDENT: All right. So your submission, put briefly, is that it meets the requirement, in section 173 - – -

PN133

MR NEIL: Correct.

PN134

THE DEPUTY PRESIDENT: - - - of the NERR for the earlier agreement. So the earlier agreement doesn't get approved, ultimately, and then negotiations continue to - well, negotiations are recommenced on the basis of that earlier notice?

PN135

MR NEIL: Shortly, yes. Had we apprehended that it was an issue, had it been raised as an issue, there's a deal of evidence we would have wanted to lead about that, in order to make good the submission that I've just made. But we are proceeding on the basis that it is accepted that the Commission can be satisfied on that subject.

PN136

THE DEPUTY PRESIDENT: Okay. I'll just - Ms Howell?

PN137

MS HOWELL: We have no submissions to make on that point, if it please the Commission. Deputy President, you'll, of course, have to be satisfied of the statutory requirements.

PN138

THE DEPUTY PRESIDENT: Thank you.

PN139

MR NEIL: So we'll proceed, if it please, Deputy President, on the basis that that issue has been put to rest and you don't wish to hear any further from us, in relation to that.

PN140

Could be take our first issue a little out of order and go, first, to the potential transferring instrument issues, as we've called it in our written submissions? Now, the unchallenged position is that a small number of employees, who we'll call, as we have in our written submissions, the potentially transferring employees, a small number of employees who would be covered by the proposed agreement, who were represented in bargaining for that agreement

and who voted on the agreement, proposed agreement, may - I emphasise that word - may have been covered by transferring instruments that had not been identified to them, in connection with an explanation of the proposed agreement, or its effect.

PN141

As identified, in schedule 1 to our written outline, there were up to 12 employees included on the - 21, I'm sorry, employees, included on the role of voters who met the following conditions. One, within three months of the commencement of their employment with the applicant they were employed by another entity within the BHP group at a location and in a position that may have been within the coverage of an enterprise agreement.

PN142

Two, they might, at the time the vote for the proposed agreement at issue here, have been covered by an industrial instrument other than the Mining Industry Award of the Black Coal Mining Industry Award.

PN143

Now, of course, you will appreciate, Deputy President, that in making a final determination as to whether any such agreement existed and as to whether it had transferred with the employees in question, when they took up employment with the applicant also involves an evaluative and comparative assessment, for example, of the similarity of the work.

PN144

We have not undertaking that assessment and we do not ask the Commission to do so. In fact, our case is that it is not necessary for the Commission, in this exercise, to enter into a factual inquiry as to whether and, if so, how many of the 21 potential transfer employees, if any, were, in fact, covered by a transferring instrument.

PN145

Our case, instead, is that even if one assumes that all of the 21 employees who met the conditions that we have identified were covered by a transferring instrument then it does not matter, for present purposes. On this issue, we pin our colours to the mast of that proposition.

PN146

Implicit in that is that it is acceptance that it is by no means certain that there are, in fact, nay transferring employees, any of the potential transferring employees who are, in fact covered, or were, in fact, covered by the transferring instrument. That's why we've used the word 'may' in our answer to question 7, in the form F17A, exhibit 1, page 14 of the court book. And that's why we've used the word 'potential' in our written submissions, for example, in paragraph 51 on page 130 of the court book, and that's why we use that word now.

PN147

One thing is clear, and that is that on the state of the material, the unchallenged evidence is that if there are, in fact, any of the potential transferring employees

who were covered by a transferring instrument, then there are no more than 21 of them. That's the maximum number.

PN148

The maximum number of potential transferring employees then falls to be compared with two other numbers, in our submission, for purposes relevant to the present inquiry. One such number is the number of the total voting cohort for the present agreement. That number is 1338. That means that the maximum number of potential transferring employees is less than 2 per cent of the total voting cohort.

PN149

The second number with which the maximum number of potential transferring employees falls to be compared, in our submission, is the size of the majority in favour of approval of the potential agreement. That number, Deputy President, you will have seen in the evidence, is 322.

PN150

That means that if the maximum number of potential transferring employees is deducted from the total majority, it still leaves a majority of 301. We will develop shortly, if we may, why that is important. Before we do that, may we explicitly acknowledge, accept, that if it is assumed, at the highest against us, that there were, in fact, transferring instruments that applied to 21 potential transferring employees, then it would follow that we did not give an explanation to any of the potential transferring employees that identified to them the transferring instruments that may have applied to them or of the effect of the proposed agreement, as it would operate for those employees.

PN151

We accept that we did not give an explanation to those 21 potential transferring employees that in that respect compliant in relation to the potential transferring employees with paragraph 180(5)(a) and therefore, in that respect, with paragraph 188(1)(a), as it stood at the relevant time.

PN152

Perhaps we should interpose with the observation, we are proceeding on the basis that it is the unamended form of section 188 that is relevant to the present application.

PN153

THE DEPUTY PRESIDENT: Yes. I've got my old copy of the Act with me.

PN154

MR NEIL: Commission pleases.

PN155

Now, at the risk of labouring the point, we make this observation. The assumptions on which those concessions have been made, the concessions that I've just outlined, are all assumed, for the purpose of the argument, the strongest case against us. In fact, the evidence doesn't conclusively show that the case rises that high.

PN156

Now, against that concession, and against those assumptions, may be turn to develop our answer to that case? It falls into two parts. One, the failure to give an explanation of the kind that we identified a moment ago to any of the 21 potential transferring employees was a minor procedural or technical error, within the meaning of paragraph 188(2)(a). Second, the requirements of paragraph 188(2)(b) were otherwise - were and are otherwise met in relation to that error. Could we take each of those propositions in turn, starting with paragraph 188(2)(a).

PN157

Now, may we ask you to take up the bundle of authorities, Deputy President, and turn to tab 9. That's a copy of the decision of the Full Bench in Huntsman Chemical Company. We reminded you of this authority, Deputy President, in support of the proposition that it demonstrates that the requirement imposed by paragraph 180(5)(a), and then picked up by paragraph 188(1)(a), is a requirement that is, at least, one of either a procedural or technical requirement, for the purposes of paragraph 188(2)(a).

PN158

There are two places in Huntsman where that proposition is made good. The first is in paragraph 117, which begins on page 32 of the printed copy of the decision. You'll see, Deputy President, from the chapeau at paragraph 117 that there is collected a number of propositions held to be good by the Full Bench. There's a little difficulty in that the same subparagraph numbers are used twice. It's the first proposition 7 that we'd wish to draw attention to. That then, in terms, refers back to table 1, in paragraph 52. That begins on page 15.

PN159

Table 1, as paragraph 117 makes plain, is a collection of the procedural or technical requirements to which 188(2) applies. One can see that from the heading. You'll notice, Deputy President, the bolded words, 'Procedural or technical requirement'. There's no distinction, in table 1, between the requirements of those two characters, they're dealt with together. Then if one looks at the rows that relate to section 188(1)(a) and the third such row is paragraph 180(5)(a).

PN160

It's clear, from all of that, when one puts that together, that the Full Bench held that that requirement, or the requirement imposed by that section, was a requirement that met the requisite description of either a procedural or a technical requirement, for the purposes of section 188(2)(a). That's the first proposition.

PN161

The second proposition focuses on the word 'error' in that test, in the test in 188(2)(a). There's, in our submission, no basis in the material to doubt that noncompliance, in respect of the transferring employees, was an error. There is no available suggestion that the applicant knowingly made a decision not to explain coverage of any transferring instruments to any potential transferring employee and thereby not to comply with section 180(5)(a).

PN162

You will recall, Deputy President, that in Huntsman the Full Bench held that both advertent and inadvertent errors were captured by or fell within section 188(2)(a).

PN163

Then the next question is whether the erroneous noncompliance in question is minor. That requires an evaluative judgment about the impact of the error, assessed by reference to the object of the requirement that it had erroneously not been met. Again, we rely on Huntsman for that proposition, for that submission. We start with paragraph 117, page 32 is the beginning of that paragraph. This time we go to the second numbered proposition. Second numbered proposition 5, which is on page 34, then 6, then 7, for present purposes particularly the first sentence.

PN164

So together they capture the test in the submission, a test that requires an evaluative judgment about the impact of the error, the actual error, assessed by reference to the object of the requirement that had erroneously not been met.

PN165

From that point, we proceed to the next submission, which is as follows. The object of the requirement, in paragraph 180(5)(a) is to ensure the genuineness of the agreement. That calls for an evaluation of the implications of the error, for the process of bargaining. Because, in this case, the process of bargaining culminated in a vote, in our submission, that evaluation turns on the arithmetical comparison of the number of employees affected by the error as against the margin of approval.

PN166

There are three authorities of which we'd wish to remind you, all of which, in our submission, make that proposition good, by analogy. We start with Charles Darwin University, which is tab 3.

PN167

The circumstance considered here, as you will recall, Deputy President, is that the voting cohort erroneously included a number of employees who were not qualified for inclusion. The passage of which we wish to remind you is in paragraphs 11 and 12. The aspects of paragraph 11, on which we particularly focus, are, of course, a reference to the theoretical worse case scenario against the university's position and to the explicit reliance - explicit and determinative reliance on the clear majority in favour of the approval of the agreement, as a matter of mathematics, notwithstanding the error.

PN168

THE DEPUTY PRESIDENT: In terms of the maths here, Mr Neil, is there an indication anywhere, as to how many of those who are covered by this agreement, as opposed to those who voted, are Coal Mining Industry Award employees, and how many are Mining Industry employees?

PN169

MR NEIL: I think there may be some evidence about that, but may I take that on notice?

PN170

THE DEPUTY PRESIDENT: Yes.

PN171

MR NEIL: The second authority we'd wish to rely upon, in this area, is the Commonwealth Bank of Australia, at tab 4 of the bundle. The error was of the same character as considered in Charles Darwin University. The passage which we particularly wish to remind you, Deputy President, is paragraph 11, on page 3, top of page 4. Which is, in our submission, on all fours with the approach taken in Charles Darwin University.

PN172

Then the third authority of which we wish to remind you, in connection with this aspect of our submissions, is the Shop Distributor and Allied Employees Association case, which is behind tab 10 in the bundle. The particular passage is paragraph 43. Error is of the same kind. Paragraph 43 is on page 248 of the reported decision. The weight of the reasoning there is in the last sentence of the conclusion, top of page 249.

PN173

Now, in our submission, the theoretical worst case against the applicant is that all of the 21 potential transferring employees were actually affected by the error and all of them, if the correct position had been identified to them, would have voted no. That's the theoretical worst case. Of course, that would have made - that could not have affected the overall result. It would have made absolutely no difference to the result.

PN174

For the same reason, paragraph 188(2)(b) is satisfied. The error could not have disadvantaged any of the potential transferring employees because even if the missing information would have caused them to vote no, then the - then no would comfortably have been outvoted.

PN175

Now, subject to hearing what is said against us, to develop the respondent's case on that issue, that's what we would wish to say about the potential transferring instruments issue, by way of supplementing that which we put in writing.

PN176

THE DEPUTY PRESIDENT: What do you say, though, do you have some indication of what's said against you, that it's not just a numbers game (indistinct) all of the purposes of the purpose of these provisions is not simply to get to a vote but to allow employees to discuss the merits of the proposal being put to them and engage in campaigning, I think it's described as, towards a particular end. So these employees were denied the opportunity to say to their workmates, 'Please don't vote this up because we've got these outstanding issues arising from the transition instruments'.

PN177

MR NEIL: Our answer to that proposition is this. Properly understood, that proposition comes down, or falls to be evaluated in this way. Was it likely, and 'likely' is a word that we emphasise in this regard, we'll explain why in a moment. Was it likely that possession of the missing information about the potential transferring instruments, for the 21 potential transferring employees, was it likely that possession of that information would have advantaged the non transferring employees, in the sense that it would have equipped them with information that was likely to have caused a sufficient number of them to have voted differently.

PN178

The proposition that, Deputy President, you have raised with us, focuses on the - ultimately focuses on the state of mind of the employees who don't fall within the category of potentially transferring employees. Could their mind have been changed? Were they disadvantaged because they were not given - they were not given the opportunity to change their mind and the transferring employees were not given the opportunity to attempt their mind. It all focuses on the state of mind of the non transferring employees.

PN179

If one's looking at the impact, which is what the disadvantage test in paragraph (b) focuses on, then the question of probability is raised, explicitly in the statute.

PN180

There are two authorities we'd wish to remind you of, in that regard. Huntsman is one, but we wanted to start, if we might, with Woolworths, which is behind tab 12 of the bundle. Woolworths concerned a case about misrepresentations made in the course of giving an explanation.

PN181

We start at paragraph 138, page 38 of the printed copy of the decision. So factual circumstances, you will recall, Deputy President, misrepresentation made by the employer was the - did that have a material effect on the genuineness of the resulting agreement. About halfway through the paragraph 138 you'll see, Deputy President that Gostencnik DP identified a number of relevant matters hat might be taken into account as to that question. Some of these matters include whether the employee bargaining representatives put or had a reasonable opportunity to put a corrective to the employees, or a statement asserting the position of the bargaining representative to the employee. So where they denied the opportunity to make a case and influence the state of mind of the voting cohort.

PN182

It's the last three sentences that really capture the proposition we wish to rely on:

PN183

Where a statement made is actually a misrepresentation, it is relevant to consider whether any misrepresentation concerning the content or effect of the agreement was significant or trivial. It may also be relevant to consider whether, by reason of any misrepresentation, it could be said that employees were reasonably likely or expected to have been misled into voting for an

agreement. That is, if they had known the true position would it have been likely that the employees would not have voted for the agreement.

PN184

Stopping there for a moment, in our submission, what is there considered is a close analogy to the present circumstance because - that is, to the question that you have raised, Deputy President.

PN185

Were the potential transferring employees denied the opportunity of saying to their colleagues, it is not the case that there are no transferring instruments, there may be transferring instrument, they may apply to us, that should influence your state of mind as to whether you approve this agreement or not.

PN186

The mere fact that that possibility, as Gostencnik DP held, is not enough. One has to look at the impact. Has to make a finding as to the likely - the reasonable likelihood or expectation of the consequence of the provision of the missing information. Was it likely that the employees would, once given the missing information, would have voted for the agreement.

PN187

While, Deputy President, you have Woolworths open could we, just in connection with this area, also remind you of paragraph 139? That paragraph doesn't directly concern the question that you've just asked. The core of our reliance on Woolworths, for that question, is in paragraph 138.

PN188

Then if we could go back to Huntsman, tab 9? This time perhaps we should start at paragraph - so to remind you, Deputy President, of how this fits together, the discussion about the meaning and operation of paragraph 180(2)(b) begins in paragraph 87, at the top of page 26. The statutory test, as it then stood, is identified in the first sentence at paragraph 95.

PN189

The meaning of the word 'disadvantage' for the purpose of paragraph 188(2)(b), is the subject of paragraph 104. Then we would remind you, particularly, Deputy President, if we may, at paragraph 105, which makes the important point that one doesn't focus exclusively on the word 'disadvantage'. The test is, 'Were not likely to have been disadvantaged'. So that's, again, a focus on the word 'likely'.

PN190

Then may we next remind you, particularly, of paragraph 106, particularly the first sentence. Following that sentence you will see, Deputy President, that a number of authorities and dictionary definitions are considered. The conclusion of the Full Bench is in paragraphs 110 and 111. Perhaps we should also, for completeness, refer to the first two sentences of paragraph 112.

PN191

Now, in this case there is no evidentiary basis, of any kind, to use the expression in Huntsman:

PN192

Nothing to indicate that it was odds on that knowledge of the existence of the potential transferring employees, or of the possibility that they might be covered by transferring instruments, would have caused a sufficient number of non transferring employees who actually voted yes to change their vote to no.

PN193

No basis upon which to make that finding.

PN194

Significant in this case is that although this has been an issue now, a live issue for a very long time, neither of the respondents rely on any evidence from an employee, in the voting cohort, a potential transferring employee and a non potential transferring employee, who says, 'Knowledge of the potential existence of the potential transferring employees, or of the possibility that they might be covered by transferring instruments, would materially have changed my mind'. Nor do they rely on any hearsay evidence to that effect. There's no union official, for example, who comes along and says, 'I have been told of that matter by one or more employees'. None. That's our answer to that question.

PN195

Could we turn then to address the generalised complaints that are made about the adequacy of our explanatory material, in particular the notion that it was presented in a way that was, in some statutory sense, inadequate, or that it was unduly partisan. We've dealt with those propositions in our written submissions but we did just want to remind you, Deputy President, on the evidence about what we actually did.

PN196

The evidence about what we did is summarised in our written submissions, page 122 of the court book, paragraph 25. Ms Chauncy says, in paragraph 25 of her statement, court book page 141 that:

PN197

The applicant circulated to the voting cohort, a ballot pack which included (1) A copy of the proposed enterprise agreement; (2) A document that explained the terms and effect of the enterprise agreement.

PN198

That's the document that appears at - that begins at page 38 of the court book, goes from 38 to 66.

PN199

(3) An email, covering email -

PN200

A copy of which is at page 34 of the court book:

PN201

that encouraged employees to ask their superintendent, or so called EA champion, in the event that they had any questions.

PN202

Provided employees with an email address to which they could send any questions by email and reminded employees that further information was available on the OSEA information hub, an online service.

PN203

That online service, the information hub, was discussed, by Ms Chauncy, in paragraphs 25 and 29 of her statement. It included - all employees in the cohort had ready access to the hub and, Deputy President, you will have seen, in Ms Chauncy's statement, at paragraphs 11 to 14, that employees in the voting cohort were well used, as an ordinary incident of their employee, well used to accessing information online.

PN204

The information hub included a number of documents: (1) A copy of the proposed enterprise agreement; (2) Copies of the materials referred to in the enterprise agreement; (2) A copy of the explanatory document, pages 38 to 66, together with supporting material such as, for example, the NES, that is, extracts from the Fair Work Act setting out the terms of the NES; and the video.

PN205

The video was presented to employees at prestart meetings, another ordinary mechanism for the provision of information to the applicant's employees. The video, of course, Deputy President, you have the screenshots, beginning at page 607 and the transcript, beginning at page 712.

PN206

In paragraph 29 of her statement Ms Chauncy deposes to the applicant having conducted in-person briefings, at prestarts at each site where employees in the voting cohort performed work. At those meetings copies of the explanatory materials, to which we've already referred, were made available. Ms Chauncy deals with that in paragraph 30 of her statement. 'The explanatory materials are discussed', paragraph 29 of the statement and, 'The video was played', paragraph 29.

PN207

For those employees who, for one reason or another, did not attend the prestart or crew briefings, attempts were made to contact them by telephone, text message and email to confirm that they had received the explanatory materials.

PN208

Ms Chauncy, paragraph 30.

PN209

THE DEPUTY PRESIDENT: Does Ms Chauncy tell us how many of those - - -

PN210

MR NEIL: There are no particulars of those numbers. paragraph 31 I should have said, I'm sorry, perhaps read together with paragraph 30.

PN211

Now, as to the - so that's what was actually done. As to the particular criticism that at least some of our material was over enthusiastic in advocating for a yes vote, may we draw attention to the fact that the vote on the enterprise agreement opened on 17 July 2023. Of the documents actually identified by the MEU as allegedly not explaining the supposedly detrimental effects of the EA, but focusing only on the advantages, only one of those was issued after the date that the ballot was notified.

PN212

Court book page 34 is a copy of an email, we've already referred to this, of 7 July 2023. When you look at that you'll see, Deputy President, that we'd announced that the agreement was being put to the vote. It referred employees again to the EA hub, which contained all of the information to which we've earlier referred, and encouraged employees to raise questions with their superintendent, or EA champion. So that's the document that the EAs criticism in this area focuses on, issued after the date the ballot was notified.

PN213

Other documents are earlier in point of time. One is dated 15 May 2023. These are the other documents to which the MEU's criticism in this regard relates. That's at page 678 of the court book. Another is dated 5 July 2023, and that's court book pages 691 and 702.

PN214

Each of those documents also directed employees to the EA hub, the information hub, where all the explanatory material was to be found. Each of those documents also encouraged employees to ask questions of their superintendent or manager, or the employee relations team. And each of those documents also provided with an email address to which they could also - to which they could address any questions.

PN215

All the documents, of course, need to be considered in the light of what we have characterised as the vigorous no campaign being, at the same time, conducted by the MEU. You will see that this is another, regrettably, instance of page number overprinting. It's at - it immediately follows - page 620 is clearly printed and then the no material being circulated, in July 2023 for example, appears at pages 621 to 625.

PN216

Now, all of - that's one of the contextual matters that we point to. There are two others - for the purposes of evaluating the adequacy of our explanation. There are two others - - -

PN217

THE DEPUTY PRESIDENT: Are we going to the others?

PN218

MR NEIL: Yes.

PN219

THE DEPUTY PRESIDENT: It wasn't the union's job to explain.

PN220

MR NEIL: It wasn't, of course, but what was being said by the company can't be considered in isolation, of course, it has to be considered in light of what else was being said by others.

PN221

THE DEPUTY PRESIDENT: The union was drawing the employees attention, and no doubt the company's attention, to this material, in particular in relation to clause 7, about the lack of transparency and failure to provide formulas and calculations for the rates. Doesn't that go against you? You've provided an explanation and someone came along and said, 'That's inadequate, you haven't provided us with these details', and then you didn't.

PN222

MR NEIL: Would your Honour excuse me for one moment.

PN223

Well, in theory, yes, if there'd been any substance in the criticism. But, in fact, no, because there's no substance in the criticism and it did not appear that this trenchant criticism of the absence of actual calculations for actual people was a matter of concern to any employees that voted yes. The inference is that they were all satisfied that they understood that the over award guarantee was of a guarantee that their annual salary would be at least 105 per cent of the amount that they would be paid, under the award that would otherwise have covered them for the shifts they were actually - and rosters they were actually working.

PN224

THE DEPUTY PRESIDENT: Isn't the only evidence I have about that Mr Wiseman, and he says the opposite.

PN225

MR NEIL: Mr Wiseman didn't vote yes, I don't think, on his evidence.

PN226

THE DEPUTY PRESIDENT: True. But he provided us with his state of knowledge.

PN227

MR NEIL: It would be very - remembering, of course, that this came during the access period. It came from a union that was the bargaining representative of at least some members of the voting cohort. There would be no reason to doubt that it was a criticism which was taken seriously by at least a significant number of the voting cohort and not accepted by a convincing majority of them.

PN228

THE DEPUTY PRESIDENT: How widely was it distributed? Do you have evidence?

PN229

MR NEIL: I don't know that there's any particular evidence about that. I might have - may we look at that?

PN230

The other two contextual matters that we'd wish to refer to, we identified them a little earlier. One is that the proposed agreement that's presently in issue was the second version of an agreement to cover the same employees. The first version, having been made by reason of a vote conducted in 2020. Ms Chauncy deals with that in paragraphs 18 and 19.

PN231

The second contextual circumstance that we point to is that the contents of the proposed agreement presently in issue were the subject of an extensive process of detailed bargaining about what you have seen a great deal. Throughout that process of bargaining, the cohort of voting employees was represented, including by the MEU and the AWU, and it was kept informed by the applicant of what was being said and done during the course of bargaining. Ms Chauncy deals with that in paragraphs 20 to 22 of her statement and, of course, annexes a great deal of material about that.

PN232

THE DEPUTY PRESIDENT: Is the litigation that surrounded the earlier agreement part of the context as well, for the employees, do you think?

PN233

MR NEIL: We gave some consideration as to whether we could explicitly rely upon that, but there is no evidence that the employees - that we could point to, to demonstrate that employees were made aware of the detail of the argument and findings in the earlier round. Obviously, the fact of the earlier round and the litigation was made known to them. But, in terms of informing them about the content of the proposed agreement, we don't rely on that.

PN234

Could we then turn to say something about the particular matters which are said against were not adequately explained. We start with the NES preservation clause, in clause 3.3. All we'd wish to do there, by way of supplementing that which we have put in writing, is to remind you of where explanations were given.

PN235

May we go, first to page 38. We're doing this, I must say, Deputy President, against the background that one of the responses that we make to this and other particular criticisms is to make the submission that the criticisms are founded on a selective reference to the explanatory material.

PN236

The NES preservation clause is the subject of topic 3, page 38, 'Relationship with other instruments and the National Employment Standards'. The 'other instruments' are referred to in the first two paragraphs and then the relationship between the propose agreement and the National Employment Standards is dealt with in the third, fourth and fifth paragraph, from the words, 'The National

Employment Standards', all the way to the end of the first row, on the top of page 39. You'll see that employees are actually given access to a copy of the NES provisions in the Fair Work Act.

PN237

THE DEPUTY PRESIDENT: Is the NES criticism pressed? It's obviously subject to reply.

PN238

MS HOWELL: Yes.

PN239

MR NEIL: Now, there's also a particular discussion of clause 3.3, on page 53. The first row, in table B, under the heading, 'Terms in the proposed agreement that are not in the Mining Industry Award'.

PN240

Then, in the context of the Black Coal Mining Industry Award, page 60, the first row again, in the same table, a table with the same purpose or subject.

PN241

In our submission, taken together, those explanations constituted a sufficient, statutorily sufficient explanation of the effect of clause 3.3.

PN242

You will remember, of course, Deputy President, there are a number of other provisions in the agreement that is specifically expressed to be subject to the NES and a number of those are - the subject of particular criticisms here. Our submission is that those particular references all make explicit, in the fact that the terms of the NES prevailed over those of the agreement in every case in which there was an inconsistency, except to the extent that the agreement was more beneficial. Otherwise, in connection with this topic, we rely on what we have put in writing.

PN243

The next particular criticism relates to clause 9, the hours of work. Could we just show the Deputy President how that topic was dealt with? First of all, pages 42 and 43, the section headed, 'Clause 9 - hours of work'. Then page 613, this is the screenshot from the video.

PN244

THE DEPUTY PRESIDENT: What page is that?

PN245

MR NEIL: Six-one-three, right at the end of volume 1. Six-one-three, third dot point on that page.

PN246

Then there was some discussion of that topic, in that audio element of the video, page 728. On that page you'll see, Deputy President, that what the video was addressing, specifically addressing, was what had been discussed in focus group

sessions. That's at about point 4, or thereabouts, on page 728. A reference to changes to the work passage, number 4 on that page, about the middle of the page.

PN247

Exactly the same point is made on page 730, in the penultimate dot point. These are all things in this dot point that, as you'll see in the chapeau, on page 729, are said to be matters that are included in the EA. Seven hundred and 36, under the heading 'Rosters', you see there's a great deal about hours of work, including item 3. That's what we wish to draw attention to, by way of supplementing what we've put in writing.

PN248

The next particular criticism related to clause 10.3, public holidays. There's material about that on pages 43 and 44. Then in the video, the screenshot, page 616, towards the end of volume 1.

PN249

THE DEPUTY PRESIDENT: Sorry, the page number again?

PN250

MR NEIL: Six-one-six.

PN251

THE DEPUTY PRESIDENT: Yes, I see it.

PN252

MR NEIL: That's what we'd wish to say in relation to that criticism, by way of supplementing that which we have put in writing.

PN253

Now, the next topic is the - would your Honour just excuse me for a moment. For completeness, if I can just go back to public holidays? I'm reminded I've given you a reference, Deputy President, to pages 43 and 44. I should also have given you a reference to, in relation to the comparison with the Mining Industry Award, page 54, the third row. You'll see that that's a part of a table that concerns matters in the terms of the proposed agreement that are not in the Mining Industry Award. Then, in relation to the Black Coal Industry Award, page 62, the last row in table C, which is headed 'Terms of the proposed agreement which are less beneficial than the Black Coal Mining Industry Award', last row.

PN254

You will have noticed, Deputy President, that each of those last two references contains an explicit statement that the provisions of clause 10.3 are subject to section 114 of the NES. The employees had that section available to them, on the hub.

PN255

Now, could we next turn to the 'Above award guarantee', clause 7? We start by going to reminding you that there is - that an explanation was given about that topic. First, on page 40, it's in the middle of the section headed 'Remuneration'. There are some - the first two paragraphs are contextual and then,

Deputy President, would you be good enough to note the paragraph that begins, 'This clause 7 of the proposed agreement will guarantee that'. This is on page 40, section 7, 'Remuneration' headed, 'Annual salary and above award guarantee'.

PN256

The first two paragraphs talk about the annual salary and then there's a paragraph that begins, 'This clause 7 of the proposed agreement will guarantee that', then there are two relevant but - important, but not presently relevant for this topic, guarantees in 1 and 2 and then 3 introduces the above award guarantee. Then that subject is discussed in the next paragraph, which begins with the words 'The above award guarantee is a guarantee', et cetera. We point to the whole of that paragraph, all the way to the last - all the say to the end of the paragraph.

PN257

Then you'll see, Deputy President, that the above award guarantee runs through the rest of the discussion, in relation to clause 7, particularly in relation to unrostered overtime, and we draw attention to the third paragraph, 'The above award guarantee hourly roster rate'. We don't want to diminish the significance of the way the guarantee runs through the whole of the explanation but they are, having regard to the criticisms made, particularly important passages.

PN258

Then, at page 50, this is in the comparison between the proposed agreement and the Mining Industry Award. Table A, 'Terms more beneficial'. The first row you will see, Deputy President, concerns a discussion of clause 7 and the above award guarantee is discussed, particularly after the first paragraph and compared to the Mining Industry Award.

PN259

Then there's a similar discussion, on page 58, in relation to the Black Coal Mining Industry Award, and a table with, materially, the same heading. Then, still with this document, page 66, and here are some indicative examples provided to enable employees to understand how it actually works.

PN260

You'll appreciate, from the written submissions, Deputy President, that the position taken by the company, at the time, and in this litigation, is that the actual - that the product of the application of the over award guarantee is a function, in each case, of a number of variables, including, for example, the particular roster that an employee is working the shifts and so on, such that a calculation, in real time, of how much it might actually result in, for any particular employee, was only theoretically possible and likely to be misleading. That's why, throughout, the applicant took the course of explaining exactly - the simple concept of what the guarantee was and then providing some - what were expressly described as indicative examples to illustrate how that would work.

PN261

Next, may we ask that you turn to page 609, this is screen shots from the video. This is a screen that deals with the subject of salaries generally and is a convenient place to make the obvious point, by way of reminder, that the over award guarantee was an element in a whole suite of provisions relating to salaries,

which included, for example, as one sees in the left-hand column, a guarantee that employees contracts will not be reduced unless they change rosters or classifications and that their salary, subject to that, would only go up, never down. Then there was the above award guarantee that sat alongside that. We rely upon the contents of the whole of the right-hand column.

PN262

There was some discussion about that in the audio element of the video, page 731. If you have that Deputy President, the discussion of salaries begins at about the middle of that page, with the words, 'The main way'. Specifically, the above award guarantee, item 3 on page 731. Then top of page 732 you'll see the indicative examples that accompanied - a reference of the indicative examples that accompanied the explanatory memorandum. Then there's an explanation of that, 'We have made an assumption for illustrative purposes'. Then the assumption is set out and the workings out are demonstrated at page 732, all the way through to the end of the first paragraph, on 733. Employees were actually stepped through the way in which the illustrative or indicative examples were worked out.

PN263

Then, and I'm sorry to ask you to do this, back to page 602 is AC6. This was issued in July.

PN264

THE DEPUTY PRESIDENT: When you say, 'it was issued', as I read the statement, it was available but wasn't provided as part of the package. So the packages said, 'Here's the document, the explanatory document, and if you want to know more you can go through these', and this appeared on two of those websites.

PN265

MR NEIL: Yes.

PN266

THE DEPUTY PRESIDENT: So that's how this was distributed.

PN267

MR NEIL: Yes. Thank you. That's correct.

PN268

Of course, we rely upon the whole of this document. Now, validly, it is exactly what it says it was. It wasn't an individual calculation in real time, for each employee, changing according to whatever roster, shifts and so on they actually worked. It was prepared, as item 3 indicates, to assist employees to understand how it operated in practice, by reference to rosters and calculations based on assumptions. The assumptions are those that are set out in the attached charts, you see that in item 4. And if you turn the page, Deputy President, you'll see, for example, page 603, immediately under the heading, item 1:

PN269

The table below sets out the above award guarantee that the company will apply for the below rosters, based on the current award rates. The following assumptions are used in these calculations.

PN270

And the assumption are identified in each case. There's an analogue for each table.

PN271

Then employees are told, in items 5, 6, 7 and so on, how, if they want to do an actual calculation for themselves they can do it, accepting, of course, that that calculation is and would necessarily be relevant only at a particular point in time.

PN272

The Commission can comfortably act on the understanding that all employees would appreciate that their actual rates of pay go up and down, depending on the rosters they actually perform, from time to time. Nothing unusual about that.

PN273

Now, in a slightly different but, in our submission, illuminating concept, Saunders DP looked at exactly the same - a guarantee in exactly the same terms, in relation to the Operations Services Repair Centres Agreement. Now, that's the loose decision we handed up, without disrespect we hope. Paragraph 5. The concept, at paragraph 5, is the BOOT, of course, but the approach that his Honour took, in our submission, is relevant.

PN274

THE DEPUTY PRESIDENT: I don't understand it's put against you, the BOOT's put against you, in relation to all of this, it's just it's so damn confusing, how can you say employees understood it.

PN275

MR NEIL: Well, we would take issue with that proposition that it's confusing.

PN276

THE DEPUTY PRESIDENT: A hundred and five percent damned confusing, not just confusing.

PN277

MR NEIL: Well, we would take issue with that as well. It's a prelusively simple concept.

PN278

THE DEPUTY PRESIDENT: That's what I want to test. So if I'm, in your example, Zemera, this is page 468, and I get these documents during the access period, and I want to work out if I vote for this agreement what will happen to my salary, just run through for me what I have to do.

PN279

MR NEIL: Sorry, I'm not following - - -

PN280

THE DEPUTY PRESIDENT: If you go to 468 of the court book you'll find - these are indicative examples, they're in a number of places. The print's biggest on this page, that's why I choose it.

PN281

MR NEIL: I've got it. Just the page number, not the example.

PN282

THE DEPUTY PRESIDENT: That's right. Example 3 I'm looking at. So I'm just sort of taking you to the access period. In the access period I get all of these documents and access to these charts at page - I'm not sure which is the relevant one, but starting at page 461. What's the exercise that Zemera had to do to work out if she voted up the agreement what her salary would become?

PN283

MR NEIL: The answer is, her salary would comfortably satisfy and meet the above award guarantee.

PN284

THE DEPUTY PRESIDENT: So she wouldn't get a pay rise?

PN285

MR NEIL: She would not. So she knows - she would know, from the work in red, at the top of the page, what the award - the shift the award rate was $150,000. She would calculate what 105 per cent of that is, to provide the guaranteed amount is there identified. Her salary is $165,000, so she's above the guarantee. That fact is made explicit to her, in row 4.

PN286

THE DEPUTY PRESIDENT: And what about Lochie?

PN287

MR NEIL: Same result. Again calculated in the same way and the result is made explicit in row 4.

PN288

THE DEPUTY PRESIDENT: And Maggie, the same?

PN289

MR NEIL: Different result, because her salary would not satisfy the - would fall below the guaranteed amount. So her new salary goes up to - her salary, as at 30 June is $158,000. She's shown, in the calculations, why that wouldn't meet the above award guarantee and then she's told what her - in the fourth row, what her new salary would be. Then everyone is told, looking forward, what would happen as a result of the increases in the award rate. And, in the case of Maggie, her salary would go up again, as a consequence of the guarantee.

PN290

THE DEPUTY PRESIDENT: I don't see anything in the evidence that provides us with details as to how many fall into Maggie's category and how many fall into Lochie's category or how many fall into Zemera's?

PN291

MR NEIL: No, there's no evidence about that. That's because it would all - it would all depend on the rosters they were working, the actual work that they had performed. What they would get in any period.

PN292

THE DEPUTY PRESIDENT: So as best as we can get it to certainty for the employees as to whether they're going to get a pay rise as a result of this agreement being made and approved, is that seven days after I approve the agreement there'll be a change, or the first pay packet after that, there'll be a change in their payments and they'll be able to say, 'I've got a pay rise because of that agreement'. Put the $5000 aside.

PN293

MR NEIL: Yes. There's no difficulty in answering that question, but it's necessary, of course, to remember that the answer to that question, for each employee, would not just be a function of the above award guarantee. The above award guarantee is a safety net. There are other provisions in the award that deal with salaries, captured, for example, on page 609. There was provision in the agreement for actual increases in actual salaries, annual steps. That's the last dot point in the left-hand column.

PN294

THE DEPUTY PRESIDENT: Is that the 4 per cent?

PN295

MR NEIL: Yes.

PN296

THE DEPUTY PRESIDENT: So is there a 4 per cent increase from the moment of approval?

PN297

MR NEIL: 1 September. That's in the indicative examples. The workings out, of course, for all of these that we've just gone through, for each of Maggie, Lochie and Zemera, are discussed on pages 732 to 733, in the same terms that I have been putting to you, in the transcript of the video.

PN298

Before we leave this area, may we say this; that - and this adds to what we have put in writing. In the event that, notwithstanding what we have submitted, the Commission has a residual concern, in relation to this issue, then we would wish to be heard as to whether and, if so, in what terms an undertaking or undertakings would resolve those concerns.

PN299

The last area of particular complaint made against us relates to the so-called hubs clause, clause 6. Can we just remind you, Commissioner, where that's dealt with in the explanatory material? First of all, pages 39 to 40, the hubs issue begins right on the last line of page 39 and goes all the way to the end of that section, section 6.

PN300

Then it's dealt with again, in the particular context of redundancy, which is one of the, we would say, red herrings raised against us, on page 48. The concept of redundancy, section 25, the concept of redundancy is discussed in the first two paragraphs in that section, as you will see, Deputy President. Then there's this:

PN301

For the avoidance of doubt where work at one site within a hub ends but work remains at another site within the hub that employee can perform and the employee's employment is not terminated, their employment will not end by reason of redundancy.

PN302

Paragraph 53, in a section - a table dealing with terms in the proposed agreement that are not in the proposed - expressly not in the Mining Industry Award. The hubs issue is in two. The comparable table, for the Black Coal Industry Award, turns not in the Black Coal Industry Award, page 60, again row 2.

PN303

Hubs were discussed in the video screen shots. First of all, page 611 and 612 is also relevant, as you'll see, Deputy President, from the first - 612 concerns travel and accommodation entitlements, but that's specifically tied to hubs, as you'll see in the first block, at the top of page 612. So 611 introduces the hubs concept and then 612 deals with travel and accommodation entitlements, including, specifically, in relation to hubs, which is one aspect of the hubs clause that is criticised. You'll see that in the first box, at the top.

PN304

Then there was discussion that's recorded in the transcript, pages 733, second full paragraph of 733, introduced by the words, 'The hubs are an important part of our business model'. The discussion about hubs and travel and accommodation consequences and so on, continues on 733, 734. Seven-three-four there a reference, just above the table:

PN305

In this package we've heard concerns from you and your bargaining representatives that you want travel arrangements locked in, including for work within hubs.

PN306

That's then discussed.

PN307

I'm sorry, I should have drawn attention, on 733, in the first paragraph dealing with hubs, it ends with this sentence:

PN308

Employees will still be employed to work within a hub, as directed by the company, from time to time. That means that if a requirement for work at one location in the hub ends, if there's another location that an employee can be

deployed to in the hub their existing employment will continue. If employment continues no redundancy occurs.

PN309

The hubs discussion goes, really, all the way through to the middle of 736.

PN310

Could we, next, Deputy President, ask that you - would you be good enough, just for the moment, to turn to our written submissions, tab 4, paragraph 49, which is on page 129 of the court book? We need to focus on the last sentence of paragraph 49 and give it an explanation of what we meant by that.

PN311

As you will see, from paragraphs 141 to 144 of the MEU's written submissions, original written submissions, at page 655, that the relevant provisions of the award turned on an employee's ordinary location. The union concedes that, under the award, an employee's ordinary location is a question of fact. What we meant to communicate, or convey, by the last sentence in paragraph 49 is that as a matter of fact, clause 6 in the proposed agreement delineates employees ordinary location as the hub. That's what we wish to say by way of supplementing that which we put in writing.

PN312

In our written submissions we've also dealt with a criticisms made about whether the agreement could be said to have been genuinely agreed to, because the voting cohort consists predominately of employees covered by the Black Coal Industry Award, in circumstances where it also applied to employees who would otherwise be covered by the Mining Industry Award. We've dealt with that in our written submissions and we don't have anything we wish to say to supplement that, unless you have anything particular of us. Of particular significance, in that respect, is the earlier litigation concerning the scope.

PN313

Then, finally, in our written submissions, we've given an answer to five particular questions that the Commission had raised of us. Again, unless you have anything more of us, we don't wish to supplement what we there put.

PN314

Now, there was one question - to matter we said we would look into. It does not appear that there is any evidence as to the number of employees who would otherwise have been covered by the - in the voting cohort, who would otherwise have been covered by the Black Coal Industry Award, as opposed to those covered by the Mining Industry Award. If it matters, we could say something about the size of the majority, amongst Mining Industry Award employees, but I'd have to say that from the Bar table. I don't have any evidence of it.

PN315

I shouldn't be coy about it, perhaps, the majority was greater than 21 amongst those employees. So that the - which reflects back on the potential transferring instruments issue.

PN316

The other question that we took on notice was whether there was any evidence about how widely the MEU's no case flyer was distributed. We cannot see any evidence of that.

PN317

Unless the Commission has anything more of us, then those are the submissions that we wish to put, by way of supplementing our written submissions.

PN318

THE DEPUTY PRESIDENT: No. Thank you, Mr Neil.

PN319

MS HOWELL: Deputy President, could I trouble you for a short adjournment before I commence my submissions?

PN320

THE DEPUTY PRESIDENT: That's fine. 12.30?

PN321

MS HOWELL: Thank you.

PN322

THE DEPUTY PRESIDENT: We'll adjourn for 10 minutes.

SHORT ADJOURNMENT **[12.16 PM]**

RESUMED **[12.29 PM]**

PN323

MS HOWELL: Thank you, Deputy President. I also propose to supplement our written submissions and it's convenient to start at the same place as OS did, which is the issues of the transferring instruments.

PN324

The relevant instruments are found or listed at page 137 of the OS submissions. And can I say, Deputy President, that is the first time we knew what the relevant instruments were, so the matter is dealt with, in our submissions in reply, at paragraphs 2 to 8.

PN325

I do have to say that the way the issue has been developed by our friends this morning is significantly different to the way it was dealt with in the written submissions of OS, at paragraphs 50 to 55. In particular, the issue of section 180(5) is not dealt with at all in the written submissions. There is no reference to minor procedural or technical error and the first thing we knew that Huntsman was being relied on was when we got the list of authorities this morning.

PN326

So I say that, not to have a general whinge, but - only partly anyway, but more to say we really cannot address the issue of minor procedural or technical error,

without reference to some further authorities. I can do some submissions on the issue, but it may be helpful to deal with that collectively, in a supplementary note.

PN327

MR NEIL: We wouldn't oppose that course.

PN328

THE DEPUTY PRESIDENT: I think it's probably best to deal with it that way, Ms Howell.

PN329

MS HOWELL: Thank you.

PN330

MR NEIL: I must say, we say that without making any concessions as to the premise. But if our learned friend feels more time is needed then we would not oppose that.

PN331

THE DEPUTY PRESIDENT: And I'd appreciate it, Mr Neil, if I had a more considered response, if that's (indistinct). Shall we set a timetable now for that, because I'll forget otherwise.

PN332

MS HOWELL: That's convenient to me. Maybe a week?

PN333

THE DEPUTY PRESIDENT: A week.

PN334

MR NEIL: May we have a further week?

PN335

THE DEPUTY PRESIDENT: So that takes us to the 26th and then 4 March.

PN336

MR NEIL: If your Honour could just excuse me one moment. I wonder if you could just make it 5 March, I've got a particular - and if our learned friends wants to have a little extra time, that would be fine.

PN337

THE DEPUTY PRESIDENT: Would you like 27 February and 5 March then.

PN338

MS HOWELL: Thank you. Yes.

PN339

THE DEPUTY PRESIDENT: I won't issue directions to that effect, it's understood. Thank you.

PN340

MS HOWELL: Thank you. So I can then turn to the specific complaints which we have about failure to take all reasonable steps to explain particular terms of the agreement. We accept, of course, that contextual matters are relevant in an assessment of what steps are reasonable.

PN341

In paragraph 7 of our submissions, and I don't need to take the Commissioner to this, we set out some contextual matters which we say are relevant. One of those is the sign on bonus of $5000, which obviously constitutes an inducement for employees to vote for the agreement. In that circumstance, we say the need to identify detriments, and that's really a large part of our case, the need to identify detrimental terms, compared to the existing instruments is elevated.

PN342

Now, turning, first, to our complaints about the general communications, that's exactly what the complaint is. That the detriments were never identified by the respondent, sorry, by OS, in any way, shape or form that we can see, save for the tables which the Commission has been taken to, and which I will come back to.

PN343

But, in terms of our general complaint, we say that OS did not communicate either the existence of or the nature of detriments, in a time and in a form that would enable employees to understand the existence and nature of those detriments.

PN344

Looking at the communications made by OS, some of which the Commissioner has been taken to this morning, employees could fairly be expected to understand that there were no disadvantages at all to this agreement because nothing in the materials, again leaving aside the comparison tables, would point to the fact that there were significant disadvantages in the agreement, compared to the then applicable awards and, indeed, compared to the transferring instruments. So we say a reasonable step that was not taken was to provide clear and direct information about disadvantages.

PN345

The F17A form, at case book 54 and 61, I don't need to take the Commission to these, has table C is in respect of each award, which identifies what OS say is either disadvantages or less favourable terms. The employees would have had a copy of those tables, on 7 July, with the ballot pack. But nowhere in the communications before that time is there any identification of any detriments. Of course we say that the table Cs are not complete, there were additional import disadvantages in the agreement, compared to the awards. But even on OS's own material, there were disadvantages which were never communicated. Of course, the additional ones, which are in dispute between the parties, of a shift length issue and the public holidays.

PN346

Our case is characterised as being that the employer was too enthusiastic in promoting the benefits, well, that's not really accurate. We certainly say that OS was enthusiastic in promoting the benefits but had that been balanced with some identification of the downside, the criticism would have no great force. But it

wasn't, it was all one-way traffic. And can I say, OS relies on the fact that the union was putting out materials in opposition to the agreement. Well, there's no evidence as to the percentage of relevant employees who are members of the union, and those communications were targeted to union members and addressed to union members. So, in my submission, that - the fact that those communications were being made does not detract, in any way, from the steps required of OS to comply with section 188(5).

PN347

The Commissioner's been taken to the various handbooks, I think, which are exhibit - sorry, Annexures 5, 6 and 7 to Ms Sarlos' statement. Can I just take the Commission to page case book 681, which is Ms Sarlos' statement?

PN348

THE DEPUTY PRESIDENT: Yes, I have that.

PN349

MS HOWELL: Yes. I think all the versions of the handbook, for the present purposes, are the same. The Commission will see that right up front here, in the headlines, are all the benefits of the agreement, or the substantial ones. Then there is an invitation, 'Let's dive deeper'. What we then have is a deep dive into the benefits but, again, nothing about the other side of the equation.

PN350

The next document I just want to draw the Commission's attention to is attached to the F17A, and it's at case book page 64. This is a letter to the team, from Dave Oliver(?), who I think is the senior manager, I'm not sure of his exact - - -

PN351

MR NEIL: General manager, production, page 35.

PN352

MS HOWELL: General manager. Thank you.

PN353

Just below the dot points on that page, Mr Oliver refers to the entitlements that will be secured for four years. Mentions the sign on bonus and the two lines starting, 'Remember', he says:

PN354

> *Remember, every vote counts and a majority yes vote will lock in these benefits. Please take the time to review these documents so you are ready to vote.*

PN355

I think that fairly characterises a degree of enthusiasm to promote the agreement. And, as we say, that wouldn't be a problem if it wasn't for the fact that none of the detriments in the agreement are mentioned, in any of OS's communications. The same can be said for the video, which is transcribed from case book 728. I don't need to take the Commission to that. Again, refers, in some detail, to the benefits but no mention of the detrimental provisions.

PN356

So then we come to look at the ballot pack, and the tables which are attached. Can I ask the Commission to turn to page 38, it's the one copy I've got marked up. So, essentially, what we say about this is there are some detriments referred to, but the explanation in here is much too little too late and in a completely inaccessible form for employees. It's the document which is relied on, by the company, to respond to the questions in the F17A. But assuming the employees got so far as the first page of this 28 pages, or something of that nature, 29 pages, there's no index. There's nothing to tell the casual reader that there's something in here that will tell you, 'You are disadvantaged in certain respects by this agreement'.

PN357

So if you're a black coal mining industry employee, you would have to read through this document very carefully and come to page 24 and then see the heading, on table C, the terms of the proposed agreement which are less beneficial than the term in the black coal mining industry, and there are a few of them.

PN358

But there's no introductory words to that document which would identify and tell employees where to look because that's not really its purpose. It's purpose is really to meet the requirements of the F17A and, for that purpose, the format is unexceptional.

PN359

So, in our submission, it's highly unlikely that employees would have read through that document in the form it is and got to the point of identifying even the existence of any detriments, let alone the nature of those detriments.

PN360

When one looks at the actual descriptions, what one finds is, essentially, the two instruments - the different provisions set out, side by side, and there has been some criticism of that approach in the case law, because it's not an explanation, it's just a setting out the provisions so that the employees themselves have to read and compare and divine the nature of the detriment. Of course, the only evidence about whether employees read this document is that of Mr Wiseman, and he said he didn't read them, rather unsurprisingly. That's at case book page 849.

PN361

So, in summary, on the general communications, we say two reasonable steps were not taken. Identifying and explaining the detriments, in any communication prior to 7 July 2023, and that occurring in the context of a very large amount of promotional material identifying the benefits.

PN362

Secondly, the only place where any reference to detriments does appear, it's not in an appropriate form and OS should have taken the reasonable step of providing a simple and concise comparison document, which clearly identified and explained, in simple terms, the effect of the agreement, compared to the then applicable terms, under the award, or the other instruments which applied to employees.

PN363

Can I turn then to the specific terms, which we say were not properly explained? The first is clause 3.3, the NES clause. Ordinarily this clause might not attract that much attention but the context is, the Full Bench decision, on the old agreement, being the 2020 agreement, which specifically identified at least two clauses which were contrary to the NES or, arguably, inconsistent with the NES. The failure which we say occurred was that - well, first of all, if I can just go to page 38 of the case book. I think the Commission's been taken to this.

PN364

The first criticism we make is that the clause is described as an NES preservation clause, which we say is misleading because, absent that clause, the NES would still apply, so the clause is not preserving anything. But the wording of the clause, 'If at any time a clause in the proposed agreement is inconsistent with the NES it will not apply', and then the proviso to the extent that, 'Except to the extent that the clause provides for a more beneficial outcome'. Now, that sounds superficially simple, but when one tries to apply it to any clauses, how it applies in practice is, in my submission, far from simple.

PN365

But the first question is, which clauses does it apply to? Now, OS knew about the Full Bench decision, it's at least two clauses that it was directly relevant to, and that is the public holidays and the shift plans, or the rostered hours. The second question is, well, if it applies to those clauses, which NES are relevant, and how do they qualify the clauses in the agreement?

PN366

The relevant decision of the Full Bench is at tab 7 of our bundle. It might be helpful if I hand up the bundle. At paragraphs 380 to 381 - - -

PN367

THE DEPUTY PRESIDENT: Which tab are we at?

PN368

MS HOWELL: Tab 7, please.

PN369

THE DEPUTY PRESIDENT: And paragraphs?

PN370

MS HOWELL: Sorry, the paragraphs are 84 to 86, inclusive, for the hours of duty and 87 and 88 for the public holidays. So having considered the relationship between the - I'll come to this in more detail with the specific clauses but the point being, the company knew very well, in putting this clause in, that there was some real concerns about consistency with the NES because the Full Bench has said so. Indeed, this clause wasn't in the agreement which was before the Full Bench.

PN371

So a simple step and a reasonable step would have been to say, these are the clauses we think this applies to and this is how they will affect the operation of - clause 3.3 will affect the operation of those clauses. I emphasise, when you say

that a clause doesn't apply, that's quite a complicated test to apply, when you're trying to say, well, which parts of the clause don't apply and which parts are beneficial, so they continue to apply?

PN372

I think, if I can go on now to the issue of hours of work, that really provides a bit of an illustration of the difficulty of just simply saying the NES don't apply unless they're more beneficial than the clause, because it's not a simple matching exercise at all.

PN373

So turning to the issue of hours of work, the production agreement is behind tab 3, and it's probably useful to look at the agreement, if it please the Commission. 9.3 appears on page 101 and the key provision is 9.5. That's really the provision that causes a dispute in these proceedings. It's the MEU's submission that OS did not explain the effect of this clause, both by reference to the NES and, perhaps more importantly, by reference to the award.

PN374

I think my friend, Mr Neil, took the Commission to the explanation of the public holiday's clause, and we deal with that in our submissions, at paragraph 39 to 52. Your Honour, you will recall, Deputy President, that section 62 provides that, 'Weekly hours will not be more than 38 hours unless such hours are reasonable', whereas clause 9.5 of the agreement, in effect, we say, gives the company the absolute right to determine rosters and hours, starting and finishing times, and starting and finishing places. So, subject to minor limitations, that obviously includes the 12 and a half hour shift length.

PN375

So, as the Full Bench noted, in paragraphs 85 to 86, those two provisions, on their face, appear to be inconsistent. So when it comes to the explanation, nothing in what you've been taken to, or any of the material provided to employees, identified and explained the clear inconsistency between the two instruments. Or, importantly, it wasn't explained what the effect of the clause was, once you read it down, by reference to section 114.

PN376

So an employee looking at the explanation would be completely in the dark about how a section of the Fair Work Act operated to require a reading down, in unspecified ways, of clause 9.5.

PN377

To understand exactly how that operates is not an easy exercise, because of the wording of clause 3.3 there is inconsistency. Does that mean that clause 9.5 doesn't apply at all, because that's what clause 3.3 says, 'Where there's an inconsistency, the clause of the agreement will not apply'. If that's not correct, exactly how do the two instruments interact? The only explanation the company gives, at case book page 42, is to say that the clause is subject to the NES.

PN378

So, in our submission, the true effect of clause 9.5 was never explained. I think the OS says, 'Well, it doesn't matter because the NES is more beneficial, so it's - the operation of the NES is actually better for the employees than the clause'. Well, with respect, that misses the point, which is, the effect of the terms have to be explained. It may be that OS didn't particularly want to explain that the clauses advanced were less beneficial than the safety net in the Fair Work Act. But whatever the reason, the fact that the NES improved the clause somewhat doesn't remove the requirement for a proper explanation of the effect of the clause and the meaning of the words, 'Subject to the NES'.

PN379

The same point can be made about clause 9.4, which is the deemed reasonableness of the hours required by OS. This provision, I think, was reproduced, or paraphrased in the explanation. But there was no explanation of the fact that clause 9.4, the deemed reasonableness clause, would, on OS's own case, be relied on by OS to defeat any employee claim, under section 62, the reasonable hours provision. So, again, we say it would be reasonable to explain the effectiveness of clause 9.4, which is a detrimental effect and it wasn't listed in the detriments in table C.

PN380

So then I come to the comparison between clause 9 of the agreements and clause 15 of the Black Coal Mining Industry Award. I note that the company has not addressed this issue, either in its written submissions or its oral submissions. If it's addressed to any degree - so we essentially don't know what the company's position is, in any detail. I'll come to their submissions but, generally speaking, we say this argument has been barely touched upon by the company.

PN381

So going back to the Award, sorry, going for the first time to the award, I should say, clause 15.1 is the relevant provision of the award.

PN382

THE DEPUTY PRESIDENT: Is the award in all of this material?

PN383

MS HOWELL: No, but I can hand up a copy.

PN384

THE DEPUTY PRESIDENT: Thank you. I think there might be an historical version of he award in there somewhere. Thank you.

PN385

MS HOWELL: So it's page 12, Deputy President, there's the rostering arrangements. Clause 15.1 is the critical provision and, as you would be aware from the material, the submissions, Deputy President, the parties are at odds on the proper construction of clause 15.1(b), in particular. We also say clauses 15.2 and 15.3 were not adequately explained. Again, you'll find they're reproduced or paraphrased but not explained.

PN386

Whether clause 15.1 was properly explained depends on the proper construction. And, in our submission, if the MEU construction is correct then it cannot be disputed that OS failed to explain a very important effect of the agreement, compared to the award.

PN387

THE DEPUTY PRESIDENT: Has there never been a case on that question?

PN388

MS HOWELL: Well, there sort of has, and I'm going to come to it. There's a decision of Bacon C, interestingly enough, which deals with the company's argument, which was advanced before him, but I have to say, in my submission, it's probably so obvious it goes without saying. That's our submission that when you look at the constructions, particularly when you look at the history of the agreement, it couldn't possibly be said that this clause means what OS says it means and that's what I want to develop now.

PN389

At paragraph 56 of our submissions we say, or we submit that the critical differences between the two instruments are that the agreements permit shifts of up to 12 and a half hours, rather than 10 hours under the award. It allows the company to unilaterally determine start and finish times, in the case of shifts over 10 hours, and it allows OS, unilaterally, to determine designated starting and finishing places of the shift.

PN390

Point (c) is not connected to the construction dispute. That arises independently of whether we're talking about permissible or the dispute about permissible shift lengths, I should say.

PN391

THE DEPUTY PRESIDENT: I note the time, Ms Howell.

PN392

MS HOWELL: That's a convenient time. Thank you.

PN393

THE DEPUTY PRESIDENT: We'll adjourn till 2.

PN394

MS HOWELL: Yes. Thank you.

LUNCHEON ADJOURNMENT **[1.03 PM]**

RESUMED **[2.02 PM]**

PN395

THE DEPUTY PRESIDENT: Yes, Ms Howell.

PN396

MS HOWELL: Thank you. I was just addressing the parties competing constructions of clause 15.1 of the Black Coal Mining Industry Award. The MEU advances the construction that clause 15.1(b) provides that:

PN397

An employer may determine shift length, up to 10 hours. Any shift longer than 10 hours must be, either by agreement or by arbitration, pursuant to subclause (c).

PN398

The company's position is set out in their submissions, and I don't need to take the Commission to this, at paragraph 35(b)(i) at case book page 125 and, as we understand their submission, it is said that the clause only relates to the way in which hours of each shift are remunerated. That is, any hours in a shift which are in excess of 10 must be remunerated at overtime rates, unless there is agreement or arbitration.

PN399

So, in substance, what OS is saying is that clause 15.1(b) places no limit whatsoever on the length of a shift which can be rostered, so long as hours over 10 are paid at overtime rates and not ordinary rates. So that's a stark difference in the competing constructions.

PN400

OS's construction, as we understand it, relies entirely on the use of the word 'ordinary', so that, in subclause (b), 'Where the ordinary hours of the shift do not exceed 10 hours', and we say that the word 'ordinary' and this will become clearer when we look at the history, only means that having regard to the 35 hour week, the employer can, nevertheless, roster the full shift of 10 hours, as ordinary hours, for the purpose of remuneration. So that's the real difference between the parties. As far as the explanation goes, really that depends - whether the explanation is adequate depends, largely, on the proper construction of the clause.

PN401

I will just refer to one part of the explanation, which is the video which is attached in the Sarlos statement. It's page 736. The transcript shows that it is asserted that the maximum shift length is reduced from 12.75 to 12.5. I'm not sure where that 12.75 figure comes from. But employees reading that would think they'd had a win on shift length, in my submission. So if we are right, that just emphasises the misleading nature of the explanation. And if we are right, the lack of explanation is amplified because the company has been operating on 12.5 hour shifts and there is no suggestion that there's been any agreement or any arbitration which would permit that. So that's obviously an additional factor which would go the adequacy of the explanation.

PN402

So can I come to the construction issue? And can I also say that the similar issues apply with respect to clause 12.5 of the Mining Industry Award. Although that clause is in different terms, similar issues arise and we have addressed that in our submissions. I should say that we incorrectly referred to clause 12.4 and not 12.5,

at paragraph 63, so if you could note that, Deputy President. Otherwise, the submissions on the MIA are exactly the same.

PN403

So we've set out, in our submissions, the relevant principles, and I don't think I need to - - -

PN404

THE DEPUTY PRESIDENT: Sorry, I wonder if I could just interrupt. We've received a message to say, from Mr Coonan, to say that the sound is not going through to the other - to him or, perhaps, even to others on the feed.

PN405

Mr Roulstone, can you hear me?

PN406

MR ROULSTONE: I'm sorry, Deputy President, really quite. There's some difficulty here. If I listen closely, I can, sorry.

PN407

MS HOWELL: Is it me and my microphone? Is it just me or is it everyone, Mr Roulstone?

PN408

MR ROULSTONE: It's just Ms Howell, your Honour. We can hear Mr Neil quite clearly.

PN409

MS HOWELL: Okay.

PN410

So in terms of construction, we've referred to the authority of *Biogene v Mullen*, which is behind tab 3. I don't need to take the Commission to that, the principles are probably well known by everyone. You just emphasise what was said, at paragraph 26, by Charlesworth and Snaden JJ, they both summarised, in very short form, the principles, three points:

PN411

> *To divine and give effect to the meaning that their authors intended them to carry. The terms of the award must be understood in light of their context and purpose and they must not be construed in a vacuum, divorced from industrial realities.*

PN412

Nothing surprising in that. Of course, the text must be construed in its context, regardless of whether a perceived ambiguity is identified.

PN413

So with that qualification and just looking, first of all, at the text of clause 15.1 itself, in my submission, everything about that text supports the proposition that this is a clause about shift length, not about how hours of a shift will be remunerated. The first point about that is the subheading, 'Rostering of hours and

length of shifts'. The use of the words 'length of shift' gives a clear indication of the subject matter of the clause.

PN414

The second point to emphasise is - well, first of all, the words of clause (b) itself, the shift length is referred to, not the ordinary hours. The ordinary hours, which appear as a qualifier, in clause (b), is, as we submit, a reference to the fact that the entire 10 hours of a shift can be payable at ordinary rates, rather than overtime rates. The subject matter is the shift length. That is reinforced, again, by the introductory words to subparagraph (c), 'A shift may be longer than 10 ordinary hours'. Again, the subject matter is shift length.

PN415

As far as subparagraph (c) is concerned, if the respondent's construction was right, and this was about how many hours of an unlimited shift must be paid at overtime rates, then there would be nothing for a dispute settlement procedure to work on, or, indeed, for agreement to be reached. Nothing of any substance. I mean what would the Commission decide?

PN416

So the existence of a dispute settlement procedure at all, or a arbitration provision, shows that - I'll withdraw that - reinforces our proposition that what this clause is about is actual shift length. As we say, a similar analysis can be made of the clause 12.5 of the Mining Industry Award.

PN417

So I now turn to the history of the clause. In my submission that history is entirely supportive of the MEU's construction and there is nothing that the Commission will find in that history which supports the proposition that this clause is just about how the hours of a shift will be remunerated. And there's nothing to support OS's proposition that it already has a right to determine shift lengths, without restriction, as long as it pays hours above 10 as overtime rates.

PN418

So I'm going to take the Commission through the award restructuring decision of 1988 and then the award simplification decision, the year of which I forget. But before I do that, I'd like to take the Commission to the provisions which apply before the award restricting case. This is attached to Mr Pearce's statement which is behind tab 11. I must take the Commission to page 860, if I can.

PN419

The document starts at page 857 and it's the Coal Mining Industry (Miners) Award 1982 Queensland, and it's simply to show the Commission what was in place before the award restructuring decision of 1988. Clause 9 is page 860:

PN420

The ordinary hours of work for employees covered by this award shall be 35 per week, to be worked in shifts of 7 hours each, bank to bank.

PN421

So we say, prior to this decision, there was a hard limit of 7 hours a day, subject only to subclause (d), over the page:

PN422

The duration, number and spread of ordinary shifts, as -

PN423

And I note the word, 'ordinary shifts' doesn't have anything to do with the meaning advanced by OS.

PN424

The duration and number and spread of ordinary shifts, as prescribed in subclause (a) hereof, may be varied by agreement between management and the employees, or by ordinary of an appropriate industrial authority, provided that the duration of any ordinary shift does not exceed 8 hours and further provided that the average weekly spread of ordinary hours in any period of four consecutive weeks does not exceed 35 hours.

PN425

So, in my submission, it was not - it had some of the characteristics which appear in the present clause, which is a hard limit of seven hours, but in this case could be increased to eight, by similar mechanisms. That was the context that was the main Black Coal Mining Award, as you'd probably be aware, Deputy President. It was in that context that employers in the black coal mining industry made their application, which led to the 1990 award. The decision of the Coal Industry Tribunal starts at page 899.

PN426

In this decision, Deputy President, I'm not sure if you would recall it, the - - -

PN427

THE DEPUTY PRESIDENT: Unfortunately, I do. If you're trying to make me feel old it's working.

PN428

MS HOWELL: All right. I've made myself feel very similar in this exercise, Deputy President.

PN429

So the starting point of the analysis is the claim which was filed by the employer in this case. That's found at page 982 as one of the appendices to the decision. It's a fairly brief outline of proposals, at 0.9 hours. This is the claim:

PN430

Shift duration may be up to nine ordinary hours. The 35 ordinary hour week will be retained.

PN431

And it can be seen from that why the word 'ordinary' appears in the clause, because if you have a 35 ordinary hour week then you have to indicate how hours

above the average of seven will be treated. In this case the claim is for them to be treated as ordinary hours, not overtime hours.

PN432

Then, at page 961, there is a summary of the Queensland Coal Association's submissions, made by Mr K Bacon. The bulk of the submission goes to the increased flexibility which is required and which will be provided. Then I particularly draw the Commission's attention to page 962, on the case book, about two-thirds to three-quarters of the way down the page:

PN433

So far as the claim for a nine hour shift was concerned, Mr Bacon said it was not an attempt to make mine workers better off, but simply the claim to allow flexibility to work patterns which may, in fact, suit the workforce.

PN434

He said:

PN435

There are roster systems available which require longer than an eight hour shift and a nine hour shift would extend the options available.

PN436

So, again, very clearly, the claim is targeted to actual shift length and the purpose of the increase is to increase the flexibility of employers to introduce a range of different rosters.

PN437

Then, briefly, if I can ask the Commission to look at page 965? Starting at 963 it can be see that the submissions are the New South Wales Coal Association and, relevantly, at page 965, actually, starting at the foot of page 964, the submission addresses the heath and safety issues arising in the context of this particular claim. Now, it's obvious, in my submission, that if the clause was as suggested by OS, there would be no health and safety issues because it would simply be about how the different hours of the shift were remunerated. And on OS's contention, there's already no limit on length of shift. So all of the discussion in this decision about health and safety issues would be completely otiose.

PN438

Just about a quarter of the way down the page, the submission emphasised that:

PN439

Nine hour shifts, by right, are essential to the application and one of the more crucial factors that the tribunal needed to determine.

PN440

That's not a submission about how hours in excess of 10 should be remunerated, or eight, in this case.

PN441

Failure, particularly for the underground sector, to get nine hour shifts of rights, will effectively mean there will be little or not change implemented in the sector that is most in need of change.

PN442

I don't need to read anymore, but the entirety of the submissions in this case were directly towards shift length and the factors which arise, in consideration of shift length and, particularly, occupational health and safety.

PN443

The tribunal considered the issue, at page 906 of its decision. Can I just check that I'm being heard, at this change. No one's complained.

PN444

THE DEPUTY PRESIDENT: There's a thumbs up from Mr Roulstone.

PN445

MS HOWELL: Thank you.

PN446

MR ROULSTONE: Yes, thank you.

PN447

THE DEPUTY PRESIDENT: Thank you.

PN448

MS HOWELL: Thank you.

PN449

So under the heading, 'Spread of hours' the tribunal made a number of observations, all of which confirm the proposition put by the MEU, starting at the first paragraph.

PN450

The current standard daily hours in the coal mining industry is seven.

PN451

Then, going on to the second paragraph:

PN452

Both applications seek an award right to nine hour shifts, an increase of two. Both intend to maintain the 35 hour week.

PN453

And then goes on to discuss how that will be achieved. Then in the third paragraph, last sentence:

PN454

In submissions Mr Davies, of the New South Wales Coal Association, stated that the nine hour shift was the centrepiece of the whole package of changes.

PN455

Then, again the tribunal, in the last paragraph on that page, discusses health and safety issues and says that:

PN456

The union's themselves offer an eight hour shift in the nine day fortnight.

PN457

Then, halfway through that paragraph, the conclusion is:

PN458

However, when exhibit C6 is considered, I believe that fairness and equity require that the compulsory nature of the claim for a nine hour shift be rejected. Exhibit C6 indicates that there is, in extracted industries, a common award limitation of eight hours per day, with provision by extension for agreement.

PN459

Then over the page, the final paragraph:

PN460

The tribunal expresses the view that it's not fair to take the compulsory nature of the award beyond common standards.

PN461

Then, in the last sentence:

PN462

This will, in any event, be implicit in the award provision contemplated, which will recognise the right of an employer to an eight hour shift and provide for extension beyond that, by agreement. There will be no limit on what can be achieved by agreement.

PN463

Again, in my submission, there can be no doubt what those passages are talking about, and that is length of shift, not the distribution of hours between overtime and ordinary pay rates.

PN464

THE DEPUTY PRESIDENT: Ms Howell, to assist you, I'm with you 100 per cent on all of this. My understanding of this award has always been the beyond 10 hour shifts needs to be by agreement or to be arbitrated. If we get to the award simplification process, in the Australian Industrial Relations Commission, where it says that the same things are said. My recollection is that those issues went to a full Federal Court at one stage, the question of shift lengths, and I think it's all going to be on you, Mr Neil, to convince me otherwise. But in terms of, certainly the history of these hour agreements - - -

PN465

MR NEIL: We would just focus on the language of the award. For example, clause 15.2(b), 'In terms of shifts longer than 10 ordinary hours'.

PN466

THE DEPUTY PRESIDENT: I understand that's your argument and if you don't want to address me on these other matters - there's no need to, but I'll certainly give you an opportunity, now that you know that my view is that this is not about ordinary hours, it's about shift lengths, that clause is. And the history certainly makes that good and a number of decisions. My recollection is, 12-hour shifts were first in the coal industry in Queensland in the Hincham(?) case, which would have been a Coal Industry Tribunal dispute. The next incident of it would have been (indistinct) and the 170MX Award, that I had the honour of losing before a Full Bench of the Australian Industrial Relations Commission. The award simplification process, I think, came next, with the full Federal Court's consideration of this issue. That's just from my memory. And I don't want to decide this on - - -

PN467

MR NEIL: I know. You're the person who has the advantage of me, in points of experience, at least. This may be something we'll have to think about, perhaps deal with by a note, if it's regarded as an important issue. I can't deal with that level of history on the run.

PN468

THE DEPUTY PRESIDENT: No. We might add that to what's to be dealt with in the notes on the timetable we dealt with earlier. Mr Neil, I do want to give you an opportunity to address me on that, but I'm with Ms Howell on this, heading to the timetable. Thank you.

PN469

MS HOWELL: We'd also seek to reply to anything the company puts on there, if you could accommodate that. In light of what you've said, Deputy President, I won't take you to the further cases.

PN470

Behind tab 2 is the award simplification decision. The relevant paragraphs are from 44 to 55, and all of those are consistent with the submissions I've already made about what the clause is about.

PN471

MR NEIL: I understand the point my learned friend makes, but if there's any particular passage in the authorities that our learned friend's argument depends on, if it could just be identified to us now, and we'll build that into our note.

PN472

MS HOWELL: Well, all of those paragraphs I've just identified, which are only about nine paragraphs where the award simplification bench, essentially in that case, had an application for 12-hour shifts and they was declined, but the current provision for 10 hours was put in. Everything about those passages, from 44 to 55, reinforces the submission I've already made, about what the subject matter of the clause is.

PN473

THE DEPUTY PRESIDENT: I wonder, Ms Howell, if I might give you the opportunity, because I'm certain that that went to a full Federal Court.

PN474

MS HOWELL: I'm sorry if I missed that.

PN475

THE DEPUTY PRESIDENT: No, that's fine. But I'll, again, we shouldn't go on my memory, but that's in your initial note, if you want to identify any of the authorities that support your contention, as to the history of the clause, for the purpose of the construction exercise that appears to have - or clearly arises from the arguments we're having about the explanation of clause 15, in particular in the explanatory material.

PN476

MS HOWELL: Thank you. I'll just hand up a copy of the decision of Bacon C, which was the one I sort of did.

PN477

This decision of Bacon C, I think it's fair to characterise, was an extension of the award simplification process to the Supervisory Awards. The relevant discussion starts at paragraph 72 and the Staff Awards were in similar terms, at that time, to the Production and Engineering Awards, as a result of the award simplification.

PN478

The Commissioner, Bacon C, set out the position then applying, at paragraph 72 and it's exactly, unsurprisingly, what we submit, that the limit to eight hours of the length of shift is the limit. Sorry, I'll withdraw that.

PN479

The Staff Awards currently limit to eight hours the length of a shift which is able to be determined by the employer.

PN480

So there's a clear understanding, by Bacon C, the person who advanced the claim in a different capacity, in the award restructuring proceedings, as to what the then position was.

PN481

At 75 the Commissioner cites the award simplification decision and he cites three of the paragraphs I've referred the Commission to. And at 76 the Commissioner summarises the effect of that decision, which was to grant employees the right to determine shift lengths of up to 10 ordinary hours. In 77 he adopts the findings of the Full Bench. Then, interestingly, it's paragraph 78, the Commission sets out an argument advanced by the employers, which is exactly, as we read it, the argument advanced by the company in this proceeding. Just looking at the last couple of sentences:

PN482

Thus argue the employers, a shift length of 10 ordinary hours, plus rostered overtime of one or two hours, or more, presumably, can be determined by the employer. That is, the Full Bench decision has no practical effect if it was intended to require employee agreement before the working of any shift lengths greater than 10 hours.

PN483

And at paragraph 79 Bacon C says:

PN484

The employers propose a similar outcome for the Staff Awards.

PN485

And he says:

PN486

There is no point in entering the controversy, if that is the appropriate description.

PN487

Your Honour, I think that's an indication of the way in which the Commissioner viewed the arguments but he says:

PN488

If that was what the Full Bench intended, I propose to take a different approach.

PN489

Then, more to the point:

PN490

On any fair reading of the Full Bench decision it is more likely the Full Bench intended that employers required the agreement of the majority of affected employees before shifts of greater of 10 hours, irrespective of the hours being ordinary or overtime, or a combination thereof, could be introduced.

PN491

The Commissioner goes on to say, 'Well, I'll put it beyond doubt and take out the word 'overtime'. If we went to the award you saw ordinary hours, if you want to the ward you'd find in those historic awards, the word 'ordinary' doesn't appear. However, I think all these awards were merged in the 2010 award modernisation process and this amendment wasn't picked up and it reverted to the Production and Engineering wording. But the significant point is, his decision - his decision was not appealed. If he was wrong about the proper construction of the Production and Engineering Award and, indeed, the awards he was considering, then what the effect of his decision would have been to take away a massive degree of flexibility that the employers had because under that argument, OS's argument, there was no limit on shift length, under the restructured award, arising from the award restructuring process or the award simplification process. So no one appealed, no one challenged it, and the agreement - I withdraw that. The argument now raised, as far as I'm aware, disappeared completely and never appeared again, until is was resuscitated in these proceedings.

PN492

THE DEPUTY PRESIDENT: This decision of Bacon C, is that a print number? The version I've got doesn't appear to have one.

PN493

MS HOWELL: It does have a print number. Can we give you a notice of that, because I know it has, but it doesn't appear on the face of it.

PN494

THE DEPUTY PRESIDENT: Thank you.

PN495

MS HOWELL: I have the decision. I have the decision number here. It's PR98914 (indistinct). I've just been told that there is a Federal Court decision which touches on the issue, but it doesn't directly address this question. But we'll refer to that in our note.

PN496

So, in summary, it's our position that the clause, clause 15 of the award, deals with shift length and it provides that a shift length cannot exceed 10 hours, unless there is agreement or some form of dispute resolution. So that was a very significant benefit, in my submission, that the agreement took away, because the agreement does give unlimited discretion to the employer, subject only to the NES, to introduce any shift length it chooses, up to 12 and half hours.

PN497

THE DEPUTY PRESIDENT: If the applicant here proceeded on the basis that the interpretation of the award clause was that there was no restriction on a shift length, only on ordinary hours, then that would be an inadvertent error in the explanation, for the purposes of section 180(5). I suppose the question then is whether that's a minor error, first of all and then, second of all, whether it disadvantaged employees, for the purpose of section 188(2).

PN498

MR NEIL: We would adopt that, Deputy President, and could we add this, so that our learned friend, in the preparation of the note is not taken by surprise and can deal with everything. We will also wish to raise the argument that even if it turns out that we - and the Commission, as presently constituted, finds that we were wrong in our construction of clause 15 of the Black Coal Award, then it could hardly be said, we will submit, that our construction was unreasonable and so we will go on to submit that it was not unreasonable, in the statutory sense, in that for the purposes of subsection (5) of section 180, for us to give an explanation predicated upon a reasonable construction.

PN499

In other words, for present purposes the inquiry may not be resolved by determining that the construction we've adopted was wrong. There's another statutory test. So that would be a third argument we would raise.

PN500

MS HOWELL: I don't think we would be in a position to anticipate what OS may say about this. They've had the opportunity to say something about it, and - - -

PN501

MR NEIL: Well, I've just said what we're saying about it.

PN502

THE DEPUTY PRESIDENT: I think it's a significant issue and I must say that, and this is to assist both of you as well, it seems to me that these employees didn't know that they were in a bargaining position where to extend shifts from 10 hours to 12 hours was something that they were trading off, then that would be a significant disadvantage to the employees.

PN503

I say that because, as I understand it, one of the main bargaining chips in the coal mining industry, when enterprise agreements are entered into, is to trade off shift lengths to provide employers with the capacity to run their business 24 hours a day, on two shifts. That was part of the debates in those early disputes. Vickery was another one. Bench and Vickery, Kurra(?), in the 1990s. So I just want to be open about that, if that's a significant thing. And I appreciate that this is developing as we go and that both parties may want to consider those things.

PN504

Fortunately we have already put in place a timetable for notes to be provided and if this topic can be addressed. I just indicate to you that that's where my thinking is at the moment, in terms of satisfaction, for the purpose of section 180(5), it's a significant matter.

PN505

MR NEIL: In light of those observations, might I ask for the timetable to be extended somewhat, but may I just think about that?

PN506

THE DEPUTY PRESIDENT: Yes.

PN507

MS HOWELL: I think the parties need to discuss the timetable, Deputy President, because I think we will need to reply to some of the material which has been foreshadowed.

PN508

In our written submissions we also deal with the failure to explain the changes which gave the employer complete discretion as to start and finishing times and locations. The locations is in a category of its own because it's not dependent on construction. We say, again, buried somewhere in the table you might find reference to that, but it's a significant issue because, as the evidence shows, and it's referred to in our written submissions, there have been disputes about starting and finishing locations, and it affects the amount of, effectively, working hours, if the starting and finishing locations are changed. The agreement gives the employer total discretion, whereas the award requires any changes to be by agreement.

PN509

Starting and finishing places are dealt with in clause 15.4 and must be agreed or arbitrated if there's any dispute. That's the open cut mines. Underground mines, the designated starting and finishing placer is on the surface. So we rely on our written submissions on those issues.

PN510

I now turn to the public holidays issue, which is not dissimilar to the length of shift issue. The agreement provision, clause 10.3, is found in the case book at page 101.

PN511

The important part of this clause is at clause 10.3. The Commissioner will see that the preparatory words are, 'Subject to the NES', and then subclauses (a) and (b) essentially give the company the unqualified right to work - require employees to work any public holiday which they are rostered to work and no additional days are set aside for public holidays. So, in effect, it's a 365 day a year roster and no provision is made for employees to have any days off, on account of public holidays.

PN512

OS contends that that is what the award provides, so there is no change to the position, through clause 10.3, or no material change.

PN513

The MEU submits that both with respect to the NES and with respect to the Black Coal Mining Industry Award there was a failure to explain the effect of clause 10.3, as the agreement. Again, with respect to the award, there is a substantial construction issue.

PN514

In our written submissions, at paragraph 66 to 77, we address the issue of the NES, in section 114. They are similar to the position on section 62, the hours of work, so I don't propose to go far beyond what we've said in our written submissions. But, again, the important factors that the Full Bench, in the decision referred to, found that a similar clause was arguably inconsistent with the NES, and that's behind tab 7, paragraph 88, I think.

PN515

So it's clear, in light of the Full Bench's observations in that case that this clause is strongly, arguably, at least, in consistent with the NES, and that's no doubt why the words 'Subject to the NES' were added. But the question then arises, what is the effect of the clause if it's subject to the NES? What is the employee supposed to understand about his or her entitlement to public holidays when he's simply told, 'This is the clause. Under this clause you don't get any provision for public holidays'. There's one small qualifier to that, which I'll come to. But, if you're rostered on you have to work and you don't get any additional days off for public holidays. It's OS's contention that that's exactly the effect of the award.

PN516

The qualifier is that you must be rostered off for at least two days, on your ordinary roster. But given that there are 11 public holidays, or approximately 11, there's no roster which doesn't have the effect that you're not rostered on for at least two public holidays, so that's a really hypothetical and academic qualification on the effect of the award clause.

PN517

So the relevant clause of the award is clause 29 and, in particular, clause 29.4, sorry, 29.5, I'm sorry. 29.5(a):

PN518

On the days agreed the employer will nominate which public holidays will be worked in the following 12 months by employees, provided that work will not be carried out on two such public holidays.

PN519

That's the provision that OS says, 'As long as you're not rostered on for two days in a year, the requirements of that provision (indistinct)'. We say, looking at the text and looking at the context in which the text was developed, that cannot be a correct construction.

PN520

The MEU contends, if I haven't made it clear, that there have to be two days, under that clause, on which the rosters do not apply. So everyone gets a public holiday on two days a year. We do say - we make some arguments, at paragraph 87 to 92 of our submissions, and I don't repeat those, but the ordinary meaning of the words used in that clause. First of all you have to have agreed says on which public holidays will be nominated. That has to be public holidays for everyone, it wouldn't make sense otherwise, and the agreed date is a single date for everyone. That would make no sense if the whole question simply depended on individual rosters.

PN521

Then, 'Public holidays will be worked in the following 12 months'. So it's not talking about whether you've been rostered on or rostered off, but which public holidays will be worked. So it then goes on to say, 'Provided that work will not be carried out on two of such holidays', the 'two of such holidays' is clearly a reference to the public holidays falling within the following 12 months. Two of those will not be worked.

PN522

THE DEPUTY PRESIDENT: Is that an issue, Ms Howell, though, because we're now dealing with award rights, those are award rights that may have been inadvertently traded away, but they were indeed traded away and brought out, in a sense, by the 5 per cent over award, in respect of the remuneration.

PN523

MS HOWELL: If that were so, and I'd have to think about that, there would be no explanation of what was being traded away.

PN524

THE DEPUTY PRESIDENT: No, the explanation is not there, so I'm thinking more of if I get to 188(2)(b) and the question of disadvantage, that that might be addressed by saying that may have been an error, it may have been a minor technical error, or otherwise been an error, but it didn't disadvantage anyone. Mr Neil, I think, would also add that it wasn't unreasonable to have done that, given the - - -

PN525

MS HOWELL: Again, no such argument has been suggested. It's simply been, in our construction, wrong, so it doesn't matter. So we'd need to hear the argument but it's not just a matter of - it's a very substantial issue, because it's two extra days of leave a year. It's not just that you get a public holiday, it's that you get two additional days of leave. And if you've traded that off without knowing it, it's a very big matter. Public holidays are contentious. There has been Federal Court litigation about public holidays.

PN526

So we would say obvious disadvantage to employees. Either we're right or we're wrong and, as we see it, if we're right then it's staple to the case. There can't be a subject to any undertakings on public holidays, I suppose, but it couldn't be characterised as not disadvantaging employees, or a minor procedural or technical error.

PN527

THE DEPUTY PRESIDENT: Can it not be subject to an undertaking?

PN528

MS HOWELL: Possibly.

PN529

THE DEPUTY PRESIDENT: I think it might be able to be subject to an undertaking, so it might be something I can give an opportunity to address, if we get that far.

PN530

MS HOWELL: Theoretically I think it probably could be, because you'd simply say the award provision on public holidays, granting two whole public holidays a year applies. But that's not the position of OS.

PN531

THE DEPUTY PRESIDENT: Not yet.

PN532

MS HOWELL: If OS's construction is correct, what the provision would say is something along the lines of, 'All employees shall have at least two public holidays per year when they are not rostered to work'. That's, essentially what OS says the clause means.

PN533

Can I take the Commission briefly to the history of the clause? Again, the starting point is the award restructuring decision. The situation, prior to the award restructuring decision, was simply that employees got all four public holidays, that they didn't have to work any public holiday. And the Queensland award, at page 863, I don't think the Commission needs to go to that.

PN534

THE DEPUTY PRESIDENT: What clause is this?

PN535

MS HOWELL: Clause 12(e), it's clear that at that stage, before the award restructuring, everyone got all public holidays. I think there were a few statutory exceptions which you would be familiar with, Deputy President, relating to safety.

PN536

So if one accepted OS's submission, the position went from employees having all public holidays, prior to award restructuring, to having no public holidays after award restructuring.

PN537

If we could go back to page 981 of the case book, point 6 of the Queensland Coal Association claim, statutory public holidays:

PN538

When new rosters are introduced agreement will be negotiated at site level as to which holidays will be worked. Two holidays per year will not be worked, as per the current practice with drag lines.

PN539

That was the claim that was being arbitrated and, in my submission, couldn't be clearer. There would be no negotiations at site level if the claim was simply everyone has to be rostered off at least two public holidays. But it's which holidays will be worked, with two public holidays not being worked.

PN540

Turning to page 961, at the foot of the page Mr Bacon advances the submission:

PN541

Finally, when new rosters are introduced QCA seeks to work all public holidays, by agreement at site level, with the exception of two. This is the current practice with drag lines.

PN542

So, again, language only consistent with maintaining two public holidays. With reference to the 'consistent with current practice in drag lines', at paragraph 98 of our submissions we make reference to the evidence we advance as to what was then the current practice in drag lines, which was that those employees on drag lines worked all public holidays except two, which was Christmas Day and Boxing Day.

PN543

The tribunal dealt with that claim at page case book 909. This is an important paragraph, short though it is. This is just above the heading, 'Rosters type':

PN544

That type of the QCA claim which seeks the working of rosters on statutory public holidays, with two exceptions, is also granted and is also available in New South Wales.

PN545

Why I say that's important, if it please the Commission, is because of the words, 'Working off rosters'. So the exception is to the working of rosters and, in my submission, that shows, conclusively, that what they were talking about was two public holidays on which rosters would not apply and everyone, subject to the statutory exceptions for safety positions, would get a public holiday.

PN546

The result of that reasoning was the clause which appears in the 1990 interim consent award. It's case book 1013. Deputy President, you'll see at page 1013, subclause (h) is virtually identical to the current clause. It hasn't changed since that time in any substantial way.

PN547

Most of that material was - in our submissions in-chief, the company hasn't addressed it at all. It only relies on a paragraph from a decision of Rangiah J in the case - which is tab 8, page 36, paragraph 156.

PN548

Essentially Rangiah J implicitly, I think it's fair to say, accepts what the respondents, or what the lass is contending, because he says, 'Because employee's got at least two days when they wouldn't be rostered to work, the award provision was satisfied.'

PN549

The context of this was consideration of the discretionary factors in section 114 of the Fair Work Act. That was what the claim was about, and the decision was overturned on appeal, and that was one of the matters which was appealed, but the Full Court didn't come to decide that because it upheld the appeal on other grounds, so it didn't come to that point.

PN550

The Full Court decision is also in our bundle of authorities, but I don't need to take the Commission to that, because the issue was not discussed.

PN551

With regard to the sentence from Rangiah J's decision, of course the decision as a whole was overturned. There are no reasons given for the observations, because it couldn't be considered - reasoned dicta, even if it could be considered dicta at all, and in our submission, it's not consistent with the ordinary meaning of the words used in clause 29.5, and it's certainly not consistent with the history and industrial context of the clause, and we say enlightens the absence of reasons for that paragraph. It should not be adopted.

PN552

If we are right in our construction, as we say, OS has failed to explain the effect of an important clause, and employees have been inevitably disadvantaged by that fact. That's all I wish to say on the public holidays issue.

PN553

The next thing from logically is the AAG, which I didn't propose to say anything further on, but if the Commission has questions then I'll sit down and someone else can answer them, because I don't understand it either.

PN554

THE DEPUTY PRESIDENT: Look, I think I understand that Ms Sarlos gives a different result to the tables provided, or that were available on the website. I'm not sure I need to delve into the reasons for that other than what's provided.

PN555

MS HOWELL: We do make submissions on the inadequacies of the explanation from paragraphs 105 to 125, and we rely on those.

PN556

With regard to the hubs in clause 6 of the agreement, that's dealt with in our submissions at 126 to 144. We don't say that the effect of the clause as it stands wasn't explained, but we say that the effect of the clause compared to the award certainly wasn't explained, because the effect of defining the workplace or the job to be the whole of the state means that you can be moved anywhere within a state, and there would be no possibility of getting redundancy, for example, if you moved from one end of the state to the other, and you had to move your whole family and that wasn't acceptable.

PN557

Under the award you would get redundancy, generally speaking, but under clause 6.3 your ordinary location is anywhere in the state. The comparison is with clause 34 of the award, which deals with redundancy.

PN558

I'm probably going too fast now and confusing you, Deputy President, and myself, but our submissions deal with the point quite comprehensively I think, from our perspective at least. It simply narrows the circumstances in which redundancy would be payable compared to the award.

PN559

THE DEPUTY PRESIDENT: I understand the issue. Do I need to go to the NES on that as well?

PN560

MS HOWELL: We haven't made any submissions on the NES. It would be potentially relevant to clause 3.3, because that's not a clause that should have been identified as one which might be affected by the NES.

PN561

The key clause in the award, as we identify – or there are two clauses I should say - as we identify in our written submissions are the definition in clause 34.2, and (a)(i) of that definition talks about the job no longer being required to be done, and we say that's normally a job at a pit or at the mine, but under the agreement it's a job anywhere in the hub, which is anywhere in the state of Queensland.

PN562

So it's a significant difference in the entitlement to the circumstances in which a redundancy payment will be attracted, and that is confirmed, in our submission, by the exemption in clause 34.5 where alternative work is found, work which an employee can remain in the same general locality as in their previous position.

PN563

Effectively that exemption, I suppose you could say, has been expanded in the agreement, or abolished in the agreement more accurately, because redundancy won't be affected in the first place if you're required to move, at least from the north to the south of Queensland.

PN564

And similar issues with temporary transfer allowances, and we deal with that in paragraphs 141 to 144. Under the award, if you were moving from one pit to a pit – to a mine a significant distance away, you would attract the benefits of travel time and temporary transfer benefits under the agreement, because you've got one workplace the size of a state, and there's no such thing as a temporary transfer within the hub, because you'd be moving to one of your job locations to another of your job locations.

PN565

I've only got a few observations I wish to add on the issue of genuine agreement. We summarised the law at paragraphs 145 to 149, and the leading cases obviously are the wonky workforce cases and the KCL case, all of which are in our bundle, and of course the requirement for genuine consent points to a requirement for informed consent.

PN566

At paragraph 150 of our submissions, we've set out our reasons for submitting there are reasonable grounds for believing the agreement was not genuinely agreed within the meaning of 188(1)(c). We rely on the matters which weren't explained, and we rely on the evidence of Mr Wiseman, who gives evidence of his lack of knowledge of some of the betterments which we say the agreement had compared to the award, and added to that is the lack of knowledge of the effect of the agreement on transferring instruments, employees.

PN567

So whatever we say about the section 188(5) issue in our written submissions, we would add that it's also relevant to genuine agreement, and we say it matters not that there are only 21 transferring employees, transferring instruments, employees.

PN568

It goes without saying that the Commission has to proceed on the basis that there were at least 21 such employees. It's perhaps surprising that the company can't tell the Commission what instruments apply to its employees, because presumably they have legal obligations to accord those 21 employees terms and conditions that they made.

PN569

But in any event, the fact that the employees generally didn't know what effect the agreement had on this particular cohort means that they weren't giving their

informed consent. It really is for the employer to show that given their default that had no effect on the quality of the consents given by the employees.

PN570

We have mentioned in our written submissions that there are some significant differences between the award and the – at least the BMA Agreement 2018, which has very different wage rates to the award. So if the employees generally didn't know about the potential losses which might be suffered by the 21 employees, then they couldn't give informed consent, in my submission.

PN571

Deputy President, you asked about the number of employees covered by the MIA versus the Black Coal Mining Industry Award. It was our estimate, and it's in the evidence, that out of 1467 employees eligible to vote – and that appears at page 22 of the case book – about 30 were covered by the Mining Industry Award, and those were the employees at Olympic Dam, and that appears in the Sarlos statement. I think it's paragraphs 29 and 31. I'll just confirm that, but I'm pretty sure it's those paragraphs.

PN572

So we have 30 employees who are under different terms and conditions and affected differently by the agreement. The Black Coal Mining Industry Award employees, there's no evidence they had any knowledge of the Mining Industry employees terms and conditions of their employment so that they could vote in an informed way, and indeed, I think it's Mr Wiseman gives evidence that he had no knowledge of any of those matters and would not have been in a position to cast an informed vote insofar as the agreement affected MIA employees.

PN573

Any changes which affected the MIA employees had no impact on the Black Coal Mining Industry employees. So the question then arises how would the interests of the MIA employees be protected, and the answer is they wouldn't be, and one of the relevant provisions which is different in the two awards is of course hours of work, because under the Mining Industry Award, in our submission, under no circumstance can a 12.5-hour shift be worked, even though the company is currently working and there's a hard limiting by agreement of 12 hours.

PN574

So that is an example of significant detriment, which Black Coal Mining Industry employees were highly unlikely to know or understand, and which the MIA employees were losing, which did(?) affect the majority. So I suppose we say in the end, it's a disjunction of the sort which was identified by the Full Bench in KCL at paragraph 132, and that authority is in our case book.

PN575

There's no evidence to suggest that BCMI, Black Coal Mining Industry employees had any appreciation whatsoever of the effect of the agreement on Mining Industry employees. It's the evidence of Mr Wiseman behind tab 10, is that he as

an employee had no such knowledge, understanding, and I think he – I won't take the Commission to it, but understandably he didn't consider those matters.

PN576

So we do say, for the reasons set out in our written submissions, that there were reasonable grounds to believe the agreement was not genuinely agreed within the meaning of section 188(1)(c). Other than that, if it please the Commission, we rely on our written submissions.

PN577

THE DEPUTY PRESIDENT: Just one point, Ms Howell, you don't take a fairly chosen point in this, do you?

PN578

MS HOWELL: We don't.

PN579

THE DEPUTY PRESIDENT: Thank you. Mr Roulstone, I think we come to you.

PN580

MR ROULSTONE: Thanks, Deputy President. From the AWU's point of view, we are supportive of the MEU's submissions. Our F18 fundamentally covered those off as well. All the points raised by the MEU are supported by the AWU.

PN581

THE DEPUTY PRESIDENT: I think in your F18, Mr Roulstone, you do take a fairly chosen point.

PN582

MR ROULSTONE: Of the subsequent discussion with the F18 - without the F18, without a legal department, Deputy President, we don't pursue that point.

PN583

THE DEPUTY PRESIDENT: Thank you. Thank you, Mr Roulstone. Mr Neil?

PN584

MR NEIL: If it please, Deputy President, we seem to be presented with something of a hotchpotch when it comes to the question of reply. We - - -

PN585

THE DEPUTY PRESIDENT: (Indistinct) nature in these sorts of matters, these 185 matters, Mr Neil.

PN586

MR NEIL: Yes. We rather thought – so, standing aside, we are waiting to see what the MEU says by way of responding to the submissions we've put on the potential transferring instruments issue, and then we'll reply to that, and we, for our part, had reserved a reply to the issues pertaining to the construction of clause 15 of the Black Coal Award and the consequences of that.

PN587

Just before I leave that, I want to – just so that I can cover off and perhaps ensure that we don't leave with a misleading impression - we don't want to concede that our explanation proceeded upon a misconstruction of clause 15. The argument that I mentioned earlier is an alternative to the proposition that we did not proceed on such a misconstruction.

PN588

The real issue may well be, for example, if one looks at page 61 and 62 of the court book, the last row in table C on page 61, a term 'less beneficial' – in the agreement – 'less beneficial than a term in the Black Coal Mining Award.

PN589

Your Honour will see a reference to clause 9.5 in the agreement, in the last row, and then there's an explanation of clause 15.1 of the Black Coal Award, which would rather seem to us to express exactly the position for which the MEU was contending, and raising clearly, if we can take up the point that your Honour made, that what was being traded off was an award position whereby shifts longer than 10 ordinary hours were permitted under the award only where a majority of the affected employees agreed, or the question was resolved under the dispute resolution provision.

PN590

So that may well be a focus. So we just wanted, before I left that point, to make sure that that was made clear. Against that hodgepodge there are a number of issues to which we can reply, and if it's convenient may we do so now to clear the decks?

PN591

THE DEPUTY PRESIDENT: Please do.

PN592

MR NEIL: The first of those topics relates to the criticisms of what we said and did by way of explaining the agreement and its effect, or the terms of the agreement and their effect, at a general level. The submission – and that was the set of submissions made against us immediately preceding the submissions that looked at particular provisions of the agreement and the explanations provided about those.

PN593

Now, at the general level, as we understand the submission put against us, it was something like this. In the material that the applicant provided to employees before the access period commenced, the applicant emphasised advantages offered by the proposed agreement and said nothing about disadvantages, and what the applicant later said about the disadvantages once the access period had commenced was too little too late and inaccessible in full. That's our appreciation of the submission put against us.

PN594

It was not submitted that there were detriments that the applicant had not identified and explained by the time fixed by section 180(1). That's not right I

hear from the Bar table - I didn't hear a submission to that effect. No doubt if I've missed something, somebody will draw attention to that.

PN595

It was not submitted that any explanation that we gave about those detriments was wrong, save for the matters that were the subject of particular criticism: the hours of work, the clause 15 issue, the public holidays issue.

PN596

It was submitted that it was highly unlikely that employees in the voting cohort would read far enough into the applicant's material to find the identification and explanation of the detriments.

PN597

In response to that, we point out that there is no suggestion anywhere that any employee in the voting cohort was labouring under a disadvantage of the kind recognised by the Act or anything analogous to that.

PN598

At bottom, this criticism, too little too late, inaccessible in form - at bottom, this criticism rested on a speculation that a material number of employees were influenced by the applicant's earlier statements not to actually read the explanatory material, not to read far enough into it, or a speculation that a material number of employees would have been sufficiently neglectful of their own interests not to actually read the material.

PN599

Our submission in response to that is that both speculations should be rejected. There's no basis for either of them. There's no evidence that our earlier statements were actually read by any employee. Mr Wiseman does not give evidence of having read them. Mr Wiseman, and no other witness, gives evidence that any of our earlier statements extolling the advantages of the proposed agreement actually operated on the mind of any employee in the way that the MEU now speculates they may have done.

PN600

As to the submission that employees who looked at our explanatory material would not have been led to those parts, the sections of the material that identified detriments, may we ask you for a moment, Deputy President, to look at page 38, the first page of the explanatory memorandum?

PN601

The first paragraph talks about the purpose of the document, immediately under 'Reinforcing', the heading in red. Then the second paragraph:

PN602

It is to be read in conjunction with the tables comparing the proposed agreement to the Mining Industry Award starting on page 13, and the tables comparing the proposed agreement to the Black Coal Award starting on page 21.

PN603

A plain, plain invitation to turn to those pages, to those parts of the document, and an explanation of why an employee might have wanted to do so, and then there's the final invitation to seek assistance that we've drawn attention to a number of times.

PN604

Then turning to the submissions made to support the criticisms made of the NES preservation clause. There may of course be many factual circumstances in which the comparison called for by the NES preservation clause might be difficult to make; many individual factual circumstances. It's necessarily a factor-specific inquiry.

PN605

In our submission, it is not contrary to section 180(5) not to explain in advance how that comparison might work out in each such individual factual circumstance, however hypothetical the later coming into being of that circumstance might be.

PN606

What employees reasonably needed to know, and what employees in fact were told, was this: here are the NES, here is where you can look at the text of the NES; this is what they say; look at them, read them, if you want to; the agreement will not take any of them away from you - it will not operate to take any of the NES away from you; however, to the extent that the agreement contains something that is more beneficial to you than the NES, then you will get that too. That's a reasonable explanation. The use of the word 'preservation' does not obscure that message.

PN607

Lastly, in relation to this topic, reference was made to the earlier Full Bench decision setting aside the approval of the earlier agreement and to passages about – I think it was paragraphs 86 and 87. We emphasise that the Full Bench's decision at that point was not about section 180(5). It was about section 55. There was no analogue of the NES preservation clause in the first agreement, if I can call it that.

PN608

I don't want to say anything more about the hours of work topic, because that issue has been reserved.

PN609

Public holidays, could we draw attention to page 63 of the court book, table D, the terms in the Black Coal Mining Industry Award that are not in the proposed agreement, and just draw attention to the contents of row four, which deals with clause 29.5 of the Black Coal Industry Award that bears on this question?

PN610

Looked at in context, that's a plain explanation, the clearest statement that there's no equivalent of that provision in the proposed agreement, of the provision there described, which in our submission is an answer to the propositions raised against us here, a complete answer.

PN611

Another answer is the decision of Rangiah J, which is behind tab 7 in our material. Paragraph 156 is indeed the portion of that decision we rely on. We've mentioned it in our written submission. The crux of it is the last two sentences.

PN612

The last two sentences can only be understood as implicitly rejecting the suggestion, as the union puts it, the MEU puts it here, that there must be a public holiday for everyone and it must be the same two days for everyone, and it's a rejection of that proposition which is integral to the final result. If it had not been so decided then his Honour would have found, as he did not, that the award had been contravened.

PN613

Next the hub clause, submissions about the hub clause. Could we just draw attention to, and once again to page 60? This is a comparison – table B – comparison, an identification of terms in the proposed agreement that are not in the Black Coal Mining Industry Award. We'd already pointed to the reference to the hubs clause there. That's a plain indication that there is no analogue in the award of the hubs for which the proposed agreement provides, and that's a theme that runs through the rest of the explanations, but we picked that as an example.

PN614

Now, apart from the matters that are reserved, those are the points we'd wish to make by way of reply. I wonder if the best course, if we may submit, with respect, is if, subject to anything that you may have of us, Deputy President, for the parties to discuss a timetable. I'm sure we could do so now, or communicate with your Chambers in due course, whichever is most convenient. I have some constraints over the next month and I may need to factor that in.

PN615

THE DEPUTY PRESIDENT: (Indistinct) discuss now. I'd prefer that I think.

PN616

MR NEIL: Yes. What we would think is, we still need to hear in full what my learned friend puts in relation to the transferring instruments issue, like, potential transferring instruments issue. If a week is enough for that we would not wish to be heard against it, but nor would we wish to be heard against the suggestion that it might be longer.

PN617

There are then two possibilities. Within the same period of time we deliver what we wish to say about the hours of work issue, and then a time is fixed for everyone to reply to all of that, or we do it both at the same time. We don't have a preference.

PN618

MS HOWELL: I think, sir, our preference is certainly that we address the transferring instruments issue, other things, a couple of other points in reply that we do need to address, because, for example, I think it was suggested that

somehow – the faint suggestion was made that Rangiah J's decision was obiter, or (indistinct) was the ratio for - a ratio for - - -

PN619

MR NEIL: No, not a faint. It is. That's our submission.

PN620

MS HOWELL: Okay. Well, that can be easily disposed of. There cannot be a ratio where there are not orders made, but it might be helpful if I just address that briefly in the submissions, and there's a couple of other points.

PN621

So if we could have leave to address a couple of those matters which Mr Neil has just raised, including that one, on the first round? OS would then address the issues to do with construction. I think those are the only issues, and we would need the opportunity to reply to that, because we haven't heard the case as yet.

PN622

MR NEIL: The only difficulty with that is we would need to hear – our learned friend puts in the submissions on the transferring instruments issue and the grab bag of other bits and pieces by the 1st. We then respond to that by the 15th and put in our submissions on the same day, put in our submissions on the construction issue, and our learned friend has whatever time she requires and you will allow to reply to that.

PN623

MS HOWELL: Sorry, could I have a moment? I'm sorry, Deputy President, I'm just running into a difficulty. My instructing solicitor is on leave for five weeks from the 12th and that stands to cause some difficulty with our reply I think.

PN624

THE DEPUTY PRESIDENT: What's the reply on – we'll get to that point, but I think you're only replying on the construction issue (indistinct) - - -

PN625

MS HOWELL: I think so. So I probably can do that without – yes. So if we could have two weeks for that?

PN626

MR NEIL: So, respectively, that would mean my learned friend's submissions on the transferring instruments issue, and the other bits and pieces she wishes to address, by 1 March. We reply to those submissions and make our submissions in reply on the construction issue, which is the issue that pertains to clause 15 of the Black Coal Mining Industry Award, by 15 March. My learned friend replies on that issue – well I think that's probably the end. I don't know that one gets a reply to the reply, but - - -

PN627

THE DEPUTY PRESIDENT: I think we get a reply on the construction issue, is what Ms Howell was asking for. It's only clause 15.

PN628

MS HOWELL: That's correct.

PN629

MR NEIL: I think that might be an extra reply, but I don't want to be heard against that.

PN630

MS HOWELL: On 29.

PN631

MR NEIL: By the 29th.

PN632

MS HOWELL: No, clause 29.5 of the award and clause 15 of the award, because – I mean it may not be necessary if my friend says they just rely on the text of the award. That's - - -

PN633

MR NEIL: We're content with that course. The only additional thing that we would ask is, if there are any authorities on the construction issue that our learned friend has not identified today, could she notify us of those authorities on the 1st, at the same time as the other submissions are delivered, just so that we know the bounds of the argument.

PN634

MS HOWELL: If it would be convenient, could I just ask that – I know I didn't speak up, but first, maybe I would like an extra few days on reflection. Sorry about that.

PN635

MR NEIL: What would you like? The 5th?

PN636

MS HOWELL: The 5th's good, yes.

PN637

MR NEIL: Could we make it then, respectively, the 5th, the 19th and 2 April?

PN638

THE DEPUTY PRESIDENT: Certainly. If there's nothing more (indistinct), I'll adjourn the proceedings on that basis. I thank counsel for their submissions, and I look forward to receiving your further written material. I'll adjourn the Commission on that basis.

ADJOURNED INDEFINITELY **[3.43 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs