TRANSCRIPT OF PROCEEDINGS
*Fair Work Act 2009*

**COMMISSIONER CIRKOVIC**

**C2023/5155**

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

**United Workers' Union**
**and**
**Metcash Trading Limited T/A Metcash**
**(C2023/5155)**

**Metcash Trading Limited Victoria Perishable Warehouse Operations Enterprise Agreement 2022**

**Melbourne**

**10.00 AM, TUESDAY, 20 FEBRUARY 2024**

PN1

THE COMMISSIONER: Good morning, parties. I will take appearances, please.

PN2

MR R WYLLIE: Thank you. If it pleases the Commission, Rhyss Wyllie for the applicant, and my colleague, Liana Tomassini.

PN3

THE COMMISSIONER: Good morning. Thank you.

PN4

MR M MEAD: Good morning, Commissioner, may it please, my name is Mead, initial M, and I have with me Mr Burton, initial X, appearing, with leave, on behalf of Kingston Reid for Metcash, and with me is also Ms Edwards, initial K, on behalf of Metcash.

PN5

THE COMMISSIONER: Thank you. Mr Mead, permission was granted at a conference before me earlier, was it not? It was granted to Mr Burton, as a secondee, if I recall, for Kingston Reid; is that correct?

PN6

MR MEAD: I understand that to be the case.

PN7

THE COMMISSIONER: Yes, all right, thank you. So, Mr Mead, permission is granted for today's purposes.

PN8

MR MEAD: Very well. Thank you, Commissioner.

PN9

THE COMMISSIONER: You are content with that, Mr Wyllie, I take it?

PN10

MR WYLLIE: Yes.

PN11

THE COMMISSIONER: Thank you. All right, we can proceed then. I will just confirm that the parties have the digital hearing book prepared by my chambers and forwarded to the parties. Are you both content to rely on that for the purposes of the hearing and my decision?

PN12

MR WYLLIE: We are, yes.

PN13

THE COMMISSIONER: Mr Mead?

PN14

MR MEAD: Yes.

PN15

THE COMMISSIONER: Thank you. I also have a list of authorities, I believe from the respondent. Mr Mead, is that correct?

PN16

MR MEAD: Yes, I do understand it includes the authorities that are referenced by my friend in his submissions also.

PN17

THE COMMISSIONER: Yes, I can see it does. You are content with that?

PN18

MR WYLLIE: Yes.

PN19

THE COMMISSIONER: Thank you. If there's nothing further, we have one witness for the respondent, no witnesses for the applicant; is that right?

PN20

MR WYLLIE: Yes.

PN21

THE COMMISSIONER: Thank you. So over to you.

PN22

MR WYLLIE: Thank you, Commissioner. We have had the benefit of providing two sets of written submissions.

PN23

THE COMMISSIONER: Yes.

PN24

MR WYLLIE: So we will keep our opening fairly short and sweet.

PN25

THE COMMISSIONER: Thank you.

PN26

MR WYLLIE: We see today's purpose is really about the respondent fleshing anything out that they haven't so far.

PN27

THE COMMISSIONER: Yes.

PN28

MR WYLLIE: This is a dispute application brought pursuant to section 739 of the Fair Work Act under the dispute settlement procedure of the Metcash Trading Limited Victoria Perishable Warehouse Operations Enterprise Agreement 2022, which we will be referring to as 'the agreement'.

PN29

The parties agree the Commission has jurisdiction to determine the dispute, which is in the statement of agreed facts at page 4 of the court book.

PN30

The dispute relates to clause 9.6 of the agreement, which provides for breaks between shifts, and that is on page 21 of the court book in our submissions. In summary, the clause provides that an employee must receive a break of 12 hours between shifts. However, they can agree to return to work with less than 12 hours' break, but no less than 10 hours. If an employee does not receive a 12-hour break between shifts, they are entitled to overtime payments until they do receive that 12-hour break.

PN31

The dispute really seems to centre on the term 'shift' in the clause. We submit that the term 'shift' in the clause refers to a continuous period of work or duty. The respondent contends that it only applies and refers to ordinary hours.

PN32

We essentially submit that the clause operates most effectively in accordance with its purpose if you get a 12-hour break from work, and that 12-hour break is a break between shifts, because shift is all work and not just ordinary hours. So the question for determination is contained on page 24, and we submit that the limits and obligations of clause 9.6 apply to all periods of work and not just ordinary hours. Moving to - - -

PN33

THE COMMISSIONER: Do I take it your proposition is that it's all work, regardless of whether the hours performed are ordinary or overtime within a particular shift? So I take it, if, for example, the ordinary hours were 7.5 per day with regular overtime of, say, two hours per day, you would be saying, 'That's your shift'?

PN34

MR WYLLIE: It could be.

PN35

THE COMMISSIONER: Or it could be in those circumstances?

PN36

MR WYLLIE: The use of the term changes throughout the agreement, which is not particularly helpful, but, yes, essentially shift is the period of continuous work that you are doing at work. It could include some overtime or it could be just ordinary hours.

PN37

THE COMMISSIONER: But in interpreting the word 'shift', are you saying it's the actual work performed on a regular basis, or do you say it's - how do you - - -

PN38

MR WYLLIE: Essentially - and I can go to - so the term 'shift' is used throughout the agreement. Sometimes it's referring to a rostered shift of ordinary hours,

sometimes it's referring to a penalty shift that attracts a shift loading, and twice in the agreement it's referring to a shift which is, fully or partly, consisting of overtime. So, at its core, 'shift' means a period of continuous work. There may be overtime in that, there may be ordinary hours.

PN39

Our submission with clause 9.6 is if 'shift' only means ordinary hours in that clause, what precedes - I will take you to clause 9.6(1). That requires a clear break from work of 12 hours between shifts. So we see that as having two limbs, essentially: a clear break from work of 12 hours, and then a clear break of work of 12 hours between shifts. In our view, the most harmonious way to interpret that clause is to say a clear break of 12 hours from work is a clear break of 12 hours between shifts because 'shift' means any work.

PN40

In the respondent's view, which is that the shift only refers to ordinary hours, you could have a 12-hour break between shifts, you know, so you finish your ordinary shift at 7 pm, then you work four hours of overtime till 11 o'clock, your ordinary shift the next day will be commencing at 9 am, which is only 10 hours, so you've had - what is it - 12 or 14 hours between shifts, but only 10 hours between shifts of ordinary hours.

PN41

So for clause 9.6(1) to operate harmoniously and to give, you know, the real effect to the words, which is 'a clear break from work' - and emphasis on 'clear break' as well - it's not a break from shift, it's a clear break from work - we think that, logically, therefore, 'shift' has to mean a period of continuous duty. Otherwise, you're not getting a clear break from work of 12 hours.

PN42

We also submit that the purpose of the clause is only met if 'shift' in this clause means all work. So this is a work site where they work 10-hour shifts as a standard, they perform work in a chilled environment, they're using forklifts and other machinery, so it stands to reason that you need to be preventing fatigue, you need to be given adequate breaks. Work performed on overtime is, realistically, probably more arduous than ordinary hours. It means you're either working in excess or outside the span hours, so fatigue is probably a larger consideration there.

PN43

The respondent's view says that the agreement does not regulate breaks between overtime. Our view says that this clause regulates breaks between overtime, ordinary hours, and no matter what the work is constituted by, the 12-hour break is required, and that will prevent fatigue and it will mean that employees - - -

PN44

THE COMMISSIONER: It's a break from work, isn't it? It's not sort of - it doesn't contemplate whether that - what sort of hours you're working, whether they are ordinary or - - -

PN45

MR WYLLIE: No, it's a clear break from work.

PN46

THE COMMISSIONER: - - - it's a break from work in the ordinary meaning.

PN47

MR WYLLIE: And the respondent did say it was a trite observation, that a break from work essentially involves a break from work, but their submission is that actually this clause should say, 'A clear break from ordinary hours' or 'the performance of ordinary hours'. Look, it's not the simplest one; it does get quite technical. We believe our interpretation is superior because it meets the purpose and it conforms with the plain meaning of those two limbs of clause 9.6(1): a clear break from work, and a clear break from work between shifts.

PN48

The term 'shift' is used - I did touch on this earlier and I will probably touch on this more in the closing, I think - the term 'shift' is used in several different ways.

PN49

THE COMMISSIONER: Yes.

PN50

MR WYLLIE: There are reference to shifts that include ordinary hours, penalty shifts, and there are two clauses which specifically contemplate a shift that is overtime. Our view is that the term 'shift' means different things throughout the agreement. At its core, it always means a continuous period of duty. So really clause 9.6 has to be interpreted really looking at that clause itself and going back to the evident purposes.

PN51

I will just touch on briefly, but I will go to it more in closing, the award incorporation argument, which I believe the respondent will be dealing with quite extensively. In short, the respondent alleges that the award was incorporated into the previous agreement, so the 2019 agreement, so the award therefore regulated breaks between overtime and ordinary hours, and the agreement clause, which was 25.1, now 9.6, regulated breaks between shifts of ordinary hours.

PN52

So we don't accept that there was a common and objective understanding between the parties in the 2019 agreement, that there was this two-tiered system of breaks. We don't believe that there is actually any evidence that the United Workers' Union, as a party to that agreement, was aware of this. We also don't believe Mr North's evidence shows that and, regardless of that - - -

PN53

THE COMMISSIONER: Where does the argument take us, though?

PN54

MR WYLLIE: So the argument takes us to - look, the end of the argument is that the 2019 agreement and the award don't assist in interpreting the 2022 agreement. The award has been unincorporated. Clause 5(2) says the agreement

operates to the exclusion of the modern award, so essentially it's a moot point and it doesn't assist us in interpreting clause 9.6. So we need to go back to the purpose, the plain meaning of the words, and the use of the term 'shift', which is a generic term throughout the agreement.

PN55

I might leave it there and let the respondent have a go.

PN56

THE COMMISSIONER: Thank you.

PN57

MR WYLLIE: Thank you.

PN58

THE COMMISSIONER: Thank you, Mr Mead.

PN59

MR MEAD: Thank you, Commissioner. Look, I'll be brief just before we call Mr North to give evidence. Commissioner, you asked my friend the very direct question, 'Where does this all lead?' To the extent that a part of our submission, and a part of our submission is, in fact, the relevance of the 2019 agreement and the terms of the Storage Services Award 2010 that was incorporated by reference into that instrument. That is unquestionably a part of the argument we advance, but not the totality of it.

PN60

On that specific point, the reason why we say the 2019 agreement is part of the context for which the Commission should have regard when interpreting the clause in dispute is that the 2019 agreement and the relevant clause, clause 9.6 from the current agreement, has lineage and its parentage comes from the drafting of the 2019 agreement. So it first appeared in terms that we say are, in all material respects, identical to the clause that's in dispute in the drafting of the 2019 agreement.

PN61

The agreement that predated that, the 2015 agreement, and in our submissions we have extracted that clause as well only to address a submission that was made by the United Workers' Union at first instance that there is commonality between the 2015 agreement and the 2019 agreement and the 2022 agreement, but we have addressed that, and I will take you to the specific clause in detail in my closing submissions after we have dealt with Mr North.

PN62

Effectively, our submission can be brought down to, on this point, three critical issues. The first issue is that if the Commission accepts that the relevant clause that is subject to dispute has lineage from the 2019 agreement in that it is directly drawn from the terms of that instrument, that instrument and the way in which the clause operated under the terms of that agreement does have relevance in construing the term that is subject to the dispute. There is authority for that proposition in the decision *Short v Hercus*, *James Cook University v Ridd*, the

idea that if you can identify lineage in a particular term, that may in fact have work to do in trying to understand the context and purpose of a clause that is subject to dispute in a present instrument.

PN63

My friend, in his submissions, has taken issue with that proposition and has identified that our reliance on the 2019 agreement is in some way extraneous material. We say it's not and that submission doesn't line up with the authorities, but our starting proposition is that it's part of the context that you ought look at.

PN64

The second proposition is that, to the extent that under the 2022 agreement, the award ceases to be incorporated, there is nothing in that cessation of incorporation that moves the dial in terms of the attributable meaning of what was clause 25.1 in the 2019 agreement and that is clause 9.6 in the current agreement in relation to how the terms 'break from work' - or rather I'll read directly - how the phrase 'clear break from work of 12 hours between shifts' is intended to operate. It is - - -

PN65

THE COMMISSIONER: Why can't it operate just in a very sort of straightforward way, and looking at the ordinary meaning of these words, 'a break from work'?

PN66

MR MEAD: What we say is the phrase 'break from work' is effectively - has no material work to do, and the reason we say that is that, self-evidently, an employee is attending the workplace, attending their shift to perform work, so a break from work - - -

PN67

THE COMMISSIONER: Means that you don't perform any work, you're not required to, doesn't it?

PN68

MR MEAD: Yes, but the phrase 'between shifts', which is how the clause ought be read in its context, is a relevant feature of the term and qualifies the nature of the break that's being discussed. We say that there is material that supports that, not just in the history of the 2019 agreement, but also in the text of the 2022 agreement. Effectively what - - -

PN69

THE COMMISSIONER: The term 'shift' is not defined. I think that's not defined, so it's a break from work, I think you've agreed.

PN70

MR MEAD: Between shifts, yes.

PN71

THE COMMISSIONER: That means you're not performing work.

PN72

MR MEAD: Yes.

PN73

THE COMMISSIONER: Between shifts, which is not defined and it doesn't sort of say anywhere, from what I could see, that they are either confined to ordinary hours or overtime hours, or any other form of hours. It's potentially your rostered hours? Could that be - - -

PN74

MR MEAD: Yes, well, that's the submission that we effectively make, that, whilst we've couched it in the term 'ordinary hours' within our material, the way that it works is effectively hand in glove with the rostering provisions in clause 8 of the agreement. We see that the effect of clause 9.6 is effectively a rostering protection to ensure that, having regard to the operation, which has day shift, afternoon shift and night shift, that the rotation of that pattern of work for any individual employee ought not intrude as a rostering structure on less than 12 hours between shifts.

PN75

We say that is the way in which that clause is intended to operate and, as I have said already, the support for that also comes with an understanding of the fact that the award, as incorporated in the 2019 agreement, protects the ground that my friend has indicated he is concerned with, we say. So clause 24.4(b) of the award deals with, in a fairly conventional and traditional way, the manner in which an employee should be protected when working overtime hours from a break that is insufficient prior to the commencement of their next ordinary shift. That is the - - -

PN76

THE COMMISSIONER: The protection is also, though, it's not just the rate, it's the protection is a protection from, as was put by Mr Wyllie, of fatigue, that there is a break from work. It's not just, as I see it, intended to their financial protection, in a sense.

PN77

MR MEAD: Well, Commissioner, we think there's a couple of layers to that. First of all, if the clause were to work the way that the union contends, we say that, correctly read, even on that construction, there is a financial compensation that exists through the operation of clause 9.6(3) that permits the break from work not being discharged and instead a payment of a penalty to be made. So the proposition that a break from work to manage fatigue is a necessary element of the operation of the clause, well, that has some work to do, but we say that's not the whole story. The second - - -

PN78

THE COMMISSIONER: I accept that. Certainly from 9.6(3), that's clear.

PN79

MR MEAD: Sorry, Commissioner?

PN80

THE COMMISSIONER: I have understood that point.

PN81

MR MEAD: The second thing that we would say just in relation to the question of a break from fatigue, and this is not a point we wish to overstate, but just we say a relevant consideration is that, to the extent that the agreement doesn't afford the protection that my friend says it ought to because it works the way we say it should and not the way the union says it should, those matters may be relevant to fatigue management, they may be relevant to considerations about how the respondent ought manage their operations and the hours of work that they are allocating to employees, but that an agreement would not provide for anything in that space is not, we say, as fatal as the union would suggest, nor is it as fundamentally flawed, leading to a series of unreasonable or unacceptable consequences, as outlined in the union's submissions.

PN82

The reason we say that is that, obviously, the regulation of hours of work, the regulation of fatigue management, there are statutory obligations that sit separate and apart from the realm of enterprise agreement negotiations and enterprise agreement terms. The enterprise agreement in that regard is not the one-stop shop for leaving to manage and regulate hours of work on that specific point.

PN83

The third thing that we would say, and this does go to, I guess, the submission that we will develop in due course in relation to construction and history, is that just because the award has ceased to be incorporated into the 2022 agreement does not mean that that leads to a conclusion that the operation of clause 9.6 has shifted from how it applied under clause 25.1 of its predecessor.

PN84

THE COMMISSIONER: Is a copy of that provision in the - - -

PN85

MR MEAD: Yes, it is, Commissioner. It's most easily accessed in the authorities book that we provided by email.

PN86

THE COMMISSIONER: No, the provision in the award. I'm trying to work out how you - 24 point, did you say?

PN87

MR MEAD: I think it's at page 485 - - -

PN88

THE COMMISSIONER: 4 and 5, is it?

PN89

MR MEAD: - - - of the authorities book. It's extracted in our submissions, Commissioner, so perhaps whichever volume you have to hand. Commissioner, I can take you to it in our submissions, if that would assist.

PN90

THE COMMISSIONER: I've got it.

PN91

MR MEAD: So you'll see there, if you're at page 62 - - -

PN92

THE COMMISSIONER: I am, yes. Rest period after overtime.

PN93

MR MEAD: I think it would be fair to say, whilst in creating the various modern awards, the Commission did not adopt a template approach to this particular proposition, what's reflected in subclauses (a), (b) and (c) has some conventional and fairly commonplace application across a range of modern awards, including this one.

PN94

There is an important feature of this clause, Commissioner, which may also go in part to explaining why we say the union's contention breaks down, and that is that, Commissioner, you will see that clause 24.4(b) effectively conveys a proposition that where the 10-hour break that is effectively prescribed by 24.4(a) might be intruded into because an employee works so much overtime they can't have the break before the commencement of their ordinary hours, that, effectively, the employee is able to access the break without effectively loss of pay of those ordinary hours that ought to have been worked.

PN95

So there's a preservation in the award term that specifically, we say, countenances the nature of overtime work that might occur on an ad hoc basis and, therefore, because of that ad hoc nature, intrude on ordinary hours in the next day so employees don't fall behind in respect of their ordinary hours.

PN96

One of the significant challenges we say that clause 9.6 has, if it were to be applied in the way that the union contends, i.e. that it applies in respect of overtime and not as a rostering protection, is that if the respondent were to give effect to the 12-hour break obligation such that an employee's ordinary hours on the next day were compromised, there is no make good proposition in the clause that's operating under the terms of the agreement. So there's an effect that would be discharged as a result of the respondent complying with 9.6(1) and conferring the 12-hour break, which is that, if it was a full-time employee working a structure that is presumed under the agreement of four times nine and a-half hour days, that to give the break would result in that full-time employee, if they could not perform the ordinary hours on the following shift after overtime, ceasing to be a full-time employee because they haven't met the threshold of an average of 38 ordinary hours in their week.

PN97

We say that that's a significant problem in relation to how the clause would in effect work if it intrudes on overtime. It's a problem that doesn't exist if you interpret it as a rostering structure because the rosters are developed with that

break countenanced and, if not, the employee still performs their ordinary hours, but just does so at a penalty in accordance with 9.6(3).

PN98

Now, the answer that's been put on that point from the union is - paraphrasing - it's effectively up to Metcash to manage its overtime hours and ordinary hours so that that thing doesn't occur, or, in the alternative, just have the employees work additional ordinary hours the following week to pick up those hours that they lost as a result of having the break.

PN99

But, it's not that simple, sadly, and the reason it's not that simple is, effectively, for two critical reasons. The first is that the agreement - and I can take you to the specific terms, Commissioner - but, effectively, if you go to the authorities book, and it's clause 6 as it relates to day workers, so sitting on page 412 of the authorities book.

PN100

THE COMMISSIONER: Just a moment. You are taking me to the agreement that's currently in dispute?

PN101

MR MEAD: Yes, the current agreement, yes.

PN102

THE COMMISSIONER: Thank you.

PN103

MR MEAD: Whilst I am taking you to the terms of the 2022 agreement, might I just note that we say these submissions have equivalent force in relation to the 2019 agreement, so the clauses I will take you to are identical in the 2019 agreement also.

PN104

The important thing to note in relation to clause 6, we say, is that the 38-hour week, whilst not exclusively described as a rostering arrangement that can only be worked by four nine and a-half hour days, there is an appreciation, we say, in that first sentence of clause 6 that that is the structure by which day work is being performed. So, too, in relation to shift work at clause 7.1(1), which is over the page at page 413 of the authorities bundle. Having regard to the fact that that is the structure that is presumed, but not mandated, for ordinary hours for both shift work and day work, then, Commissioner, if I could just ask you to cast your eyes slightly upwards on the page to what is subclause (3) of clause 6, that prescribes the maximum number of ordinary hours at nine and a-half in a day.

PN105

We say the combined effect of those three clauses that I have taken you to means that, if there is a shortfall, it can't simply be made up in the next roster period that is based on nine and a-half hour days because once you get past nine and a-half hours, you intrude into what would be characterised as overtime and not ordinary

hours. So there's a mathematical breakdown with that submission on behalf of the union.

PN106

The second problem is that whilst it might be put, at least at a conceptual level, that that issue is not problematic and the way you solve the problem is to then effectively just have the employee work on the fifth day to make up their ordinary hours, the problem is that that fifth day is characterised as effectively an RDO or leisure day under the terms of the agreement, and if you go to clause 9.5, there's a provision there that deals with, effectively, voluntary work on an RDO, so how what otherwise would be characterised as overtime might be dealt with if it's discharged on a voluntary basis.

PN107

THE COMMISSIONER: What paragraph are we on?

PN108

MR MEAD: Sorry, Commissioner?

PN109

THE COMMISSIONER: Where are you at? Did you say 9?

PN110

MR MEAD: I was at 9.5.

PN111

THE COMMISSIONER: 9.3:

PN112

*No employee shall be required to work more than 14 hours in any one day.*

PN113

MR MEAD: That's right. So that would include a component of overtime, so 9.5 of ordinary and up to five and a-half hours of overtime is available. But that doesn't breach the divide between how you account for a shortfall in ordinary hours by giving effect to the 12-hour break. You're still stuck, we say, in a structure where 9.5 ordinary hours is the maximum, and that is the presumed rostering pattern that the agreement operates to, and working on an RDO would also, by itself by definition, be an overtime shift such that you end up in this peculiar situation where the granting of the break turns a full-time employee into something other than a full-time employee because they can't meet their ordinary hours' threshold in that circumstance.

PN114

We say that would be a very unusual consequence for the operation of a term of any enterprise agreement, and it's a consequence that can't be solved by any of the submissions that have been advanced by the union. It's also, as we said earlier, not a consequence that is created if you regard the operation of the breaks provision, the 9.6 clause, as a structural protection for the rostering of ordinary hours.

PN115

Commissioner, if you have further questions about any of those matters, I am happy to address them now, or, equally, perhaps we can deal with Mr North and then I might rise to address you on some other matters.

PN116

THE COMMISSIONER: Thank you. Are we dialling Mr North in, are we?

PN117

THE ASSOCIATE: Yes.

PN118

THE COMMISSIONER: Is Mr North on video link?

PN119

THE ASSOCIATE: Mr North, can you hear me?

PN120

MR NORTH: (Indistinct.)

PN121

THE COMMISSIONER: Good morning, Mr North, it's the Commissioner. Can you hear me and see the Commission?

PN122

MR NORTH: (No audible response.)

PN123

THE COMMISSIONER: Mr North? Good morning, Mr North. Can you hear me? It's the Commissioner speaking.

PN124

MR NORTH: (Indistinct.)

PN125

THE COMMISSIONER: Mr North, could you speak up. I'm not sure where your volume is coming from, but do you have - is there a microphone near you?

PN126

MR NORTH: Yes, I've got it on maximum. Can you hear me now?

PN127

THE COMMISSIONER: If you don't mind saying something else.

PN128

MR NORTH: Hello, good morning.

PN129

THE COMMISSIONER: Terrific. Thank you. Good morning. Yes, I can hear you. Thank you. I will hand over to - Mr Burton is going to ask you some questions, I think.

PN130

MR BURTON: Mr North, can you hear me?

PN131

MR NORTH: Yes, I can.

PN132

MR BURTON: Have you prepared a statement in relation to this matter?

PN133

THE COMMISSIONER: Just a minute, Mr Burton. Sorry, Mr Burton - - -

PN134

MR NORTH: Yes, I have.

PN135

THE COMMISSIONER: My associate will need to swear - just a moment, Mr North.

PN136

THE ASSOCIATE: Mr North, can you please state your full name and business address.

PN137

MR NORTH: Andrew John North, 75 Fitzgerald Road, Laverton North - Metcash.

**<ANDREW JOHN NORTH, AFFIRMED [10.43 AM]**

**EXAMINATION-IN-CHIEF BY MR BURTON [10.43 AM]**

PN138

THE COMMISSIONER: Thank you, Mr North. Could you please state your full name and address for the record?---Yes. Andrew John North, (address supplied).

PN139

Thank you very much. I will hand over to Mr Burton now.

PN140

MR BURTON: Mr North, I already asked you this question, but I'll ask you again. Have you prepared a statement in relation to this matter?---Yes.

PN141

Do you have a copy of that statement in front of you?---I do.

PN142

Is that statement 34 paragraphs long?---Yes.

PN143

And dated 17 January 2024?---That's correct.

PN144

Is that your signature on the fourth page of the statement?---Yes, it is.

PN145

Commissioner, I read the statement of Andrew North dated 17 January 2024.

PN146

THE COMMISSIONER: Thank you. Mr North, do you wish to adopt this statement as your evidence today?---Yes.

PN147

Thank you. Are there any attachments to this statement?

PN148

MR BURTON: Yes, Commissioner, there are - - -

PN149

THE COMMISSIONER: Is it five?

PN150

MR BURTON: Eight annexures, Commissioner.

PN151

THE COMMISSIONER: Eight annexures. So the statement, Mr North, and eight annexures?---Yes.

PN152

Thank you. You wish to tender that?

PN153

MR BURTON: Yes, Commissioner.

PN154

THE COMMISSIONER: Any objection?

PN155

MR WYLLIE: No.

PN156

THE COMMISSIONER: Thank you. I will mark the statement of Mr Andrew North of 34 paragraphs, dated 17 January 2024, with eight annexures, exhibit R1.

**EXHIBIT #R1 WITNESS STATEMENT OF ANDREW JOHN NORTH DATED 17/01/2024 WITH EIGHT ANNEXURES**

PN157

Thank you.



PN158

MR BURTON: Commissioner, while we have Mr North under oath, I would seek your leave to ask Mr North one or two other questions in relation to a very discrete point, which has arisen from the union's submission.

PN159

THE COMMISSIONER: Thank you. Go on.

PN160

MR BURTON: Mr North, at paragraphs 30 to 33 of your statement, you explain a practice which occurs on site which you refer to as 'a single shift variation'. Do you know where I'm speaking of?---Yes, I do.

PN161

Can you explain to the Commission the type of circumstances in which a single shift variation arises?---Yes. Probably a couple of times a week, there will be some personal reasons that a team member will come to their supervisor and seek some relief to either start an hour early or to finish an hour early, to perhaps pick up a child from school, go for an appointment and, on the odd occasion, start early to finish earlier to do overtime the next day. In all cases, it's for personal reasons, supporting a team member.

PN162

Mr North, is it the case that when someone enters into a single shift variation agreement, their shift changes in length, or is it the case that it's just moved forward or back to deal with those personal circumstances?---Always moved forward or back only. It doesn't change in duration.

PN163

That's all, Commissioner.

PN164

THE COMMISSIONER: Thank you.

PN165

MR BURTON: Thank you, Mr North.

PN166

THE COMMISSIONER: Mr Wyllie, do you wish to cross-examine?

PN167

MR WYLLIE: Mr North may not be able to answer this.

**CROSS-EXAMINATION BY MR WYLLIE [10.47 AM]**

PN168

Mr North, do you know what part of the enterprise agreement the respondent relies on to enact these single shift variations?---Not without going through it, offhand, no.



PN169

I may as well end it there.

PN170

THE COMMISSIONER: Thank you. Anything arising?

PN171

MR BURTON: No questions, Commissioner.

PN172

THE COMMISSIONER: Thank you very much for your evidence, Mr North. You are excused?---Thank you.

**<THE WITNESS WITHDREW [10.48 AM]**

PN173

MR MEAD: Commissioner, with the benefit of our earlier discussion, there are effectively four substantive submissions that we would seek to make, and they traverse the areas of, effectively: the extraneous materials submission that the United Workers' Union puts against us; what we have couched as the textual submissions, so looking at the text proper of the 2022 agreement, including where it sits structurally within the instrument and its surrounding terms; the third is the historical submissions in relation to the 2019 agreement; and then, finally, we just seek to address you on 'Did the meaning change?' We accept that - - -

PN174

THE COMMISSIONER: What was the last one?

PN175

MR MEAD: Did the meaning change?

PN176

THE COMMISSIONER: From 2019 to 2022?

PN177

MR MEAD: Exactly. We accept that, to the extent that part of our case is built on an interpretation of the effect of what was clause 25.1 in the 2019 agreement, supported by the manner in which the Storage Services Award was incorporated, that, relevantly, whilst the clause has parentage from the 2019 instrument, the nub of the issue will ultimately be: did the meaning change as a result of anything that changed in the 2022 agreement? For that, we would need to convince the Commission if, in fact, you are with us on the earlier submissions about how it all worked in the predecessor instrument - - -

PN178

THE COMMISSIONER: Before you do that, can I find in your favour without going to the 2019 agreement and accepting your submission about clause 25.1 and what it means today?



PN179

MR MEAD: Yes, we think you can, we think you can. We think that, whilst the agreement is a little bit unwieldly in relation to how the language 'hours of work', 'overtime', 'breaks' and the shift provisions are expressed - and it's unwieldly in the sense that there is, we accept, some inconsistency in the way in which the term 'shift' is used at various points within the instrument - we do say that, on a fine balance, there is enough, just in the textual indicators, that would support the construction that we advance, there is enough, both in the textual indicators and also what we say is the substantial problem with the inability to make good ordinary hours that are lost as a result of application of the break in the context of overtime having been performed, and that those two factors, if you are with us on those, is enough to find in our favour.

PN180

But the third element, which is what to do with the historical context and how does that lead the Commission to be illuminated on precisely the purpose of this clause as against other clauses that did related, but different, work, we say that that, effectively, buttresses the other submissions that we have made.

PN181

Commissioner, just in terms of the context - and when I say 'context' I mean looking at, I guess, a global observation of the agreement itself - we would submit that what one can glean from the terms of the Metcash 2022 agreement is that it is an instrument that is built on the foundation of its predecessors, and that, on one view, is a not unremarkable submission that enterprise agreements iterate and, as they iterate over time, they sit on the shoulders of oftentimes the instrument that preceded it.

PN182

But there are particular features of, in particular, the way hours of work provisions operate within the current agreement that really do serve to reinforce that there is some legacy that comes with an interpretation of these terms, and that's not to say that legacy is determinative, but only that one needs to just simply look at clause 6(2) and 6(1) to identify that, structurally, the agreement uses, as a reference point, an historical temporal reference to articulate the way in which ordinary hours may be worked for day workers.

PN183

In an analogous way in respect of work rosters at clause 8(2), there's an additional date that is referenced by virtue of December 1993 as a temporal period in which certain obligations regarding consultation for various rosters might need to be discharged by employee representatives. There is nothing specific in those dates, Commissioner, that is material to the dispute, other than to say that, consistent with the submission that we make about the 2019 agreement, this is an instrument where there are some historical features that interweave themselves into the way in which the agreement operates.

PN184

The other broadbrush observation that we make, and I have already alluded to this, is that the hours of work terms, the rostering terms, overtime and rest breaks, they are, to a certain degree, inelegant in the way in which they mesh together. They are not - - -

PN185

THE COMMISSIONER: A very polite way of putting it.

PN186

MR MEAD: What's that, Commissioner?

PN187

THE COMMISSIONER: A very polite way of putting it.

PN188

MR MEAD: I wasn't responsible for the drafting, but I'm conscious I'm on record.

PN189

THE COMMISSIONER: We are on the record, yes. So am I.

PN190

MR MEAD: This inelegance does create some challenges in terms of construction, but it is pertinent, we think, to note that if one look at the work rosters clause at clause 8 and specifically the way in which day shift has been described, effectively what we see there is the concept of day shift appropriating the span of hours that applies for day work in clause 6(1), but just under a different label.

PN191

Each of the terms, or, rather, the enumerated hours under hours of work, work rosters, we say lines up in respect of the day shift proposition with the construction for ordinary hours for day work; for night shift, it lines up with the ordinary hours' construction of night shift at clause 7.2(1)(b). On afternoon shift, it is a little bit different. You will see that the conclusion time of 1 am lines up with 7.2(1)(a), but that afternoon shift, for whatever reason in this instrument, has a definition or construct that deals with when the shift might conclude as opposed to when it might commence. So for the purpose of establishing a work roster through the work rosters provision of the agreement, it identifies 1 pm as a start time, 1300, but that is the only effective departure from the way in which those shifts are so described and the way in which 'shift' is then used in the shift work clause and the description of ordinary hours in clause 6(1).

PN192

That, to a certain degree, does work to underpin - what we accept is that the term 'shift' is not readily and obviously signposted in the instrument. You have already identified that there is no definition and, indeed, if there was, this would be a simple task, potentially, in terms of interpreting clause 9.6.

PN193

THE COMMISSIONER: Aside from the entirety of clause 7, which is sitting there, describing shift work and shift work times.

PN194

MR MEAD: Yes. Where else might it engage as a concept for ordinary hours?

PN195

THE COMMISSIONER: Yes.

PN196

MR MEAD: So we say that clause 7 does it. My friend draws a distinction between ordinary hours for which a penalty or loading is payable in clause 7, and seemingly ordinary hours otherwise. With the greatest respect, we say that's a distinction without any true meaning. Whether there's a penalty or loading gets paid because of the inconvenience of the time at which the hours are worked, which is effectively what the loadings and penalties do - - -

PN197

THE COMMISSIONER: For afternoon shift and night shift, you're saying?

PN198

MR MEAD: That's correct. Yes, for clause 7. There is a coupling in our view between the hours that are described as shifts and shift work in clause 7 and the concept of ordinary hours, and this idea that just because a penalty might be paid for it means that it sits in a different category has no weight.

PN199

We say that clause 8 also deals with the concept and the term 'shift' with reference to ordinary hours alone, and the reason we say that is because of the alignment between the day shift span of rosters and the day shift ordinary hours specified in clause 6(1) and 6(2) and, as I said, for night shift and afternoon shift, the carriage forward of that parallel concept that aligns them, we believe that 'shift' is used in that vernacular also to describe ordinary hours. Sorry, I will just say then, for completeness, clause 6, and 6(3) in particular, and there's been some debate in the submissions about the operation of that term, but we say that that also engages with the way in which ordinary hours on a day or shift shall be so limited.

PN200

The union's submissions segment the second part of that clause and effectively - I'm paraphrasing - say that because 'ordinary hours' is not used in the second sentence to describe minimum engagement, that - - -

PN201

THE COMMISSIONER: In the second sentence?

PN202

MR MEAD: The second sentence.

PN203

THE COMMISSIONER: The minimum engagement?

PN204

MR MEAD: Yes.

PN205

THE COMMISSIONER: Yes.

PN206

MR MEAD: Their submission is effectively that 'day or shift' must mean something else, which includes the potential for overtime hours to infect or to attach to that term, and we just don't think that interpretation of that clause is right. The reason why we don't think it's right is because it doesn't have regard to the fact that the second sentence is effectively the other side of the coin, with the first sentence setting up the maximum ordinary hours on a day or a shift and then the second sentence indicating its counterpoint, and it would be a fairly uncommon convention then, in that context, having already characterised the nature of the clause in the first sentence, to need to do anything to reinforce it in the second sentence.

PN207

In addition to the reason why we say that the second part of the sentence doesn't engage with the overtime hours proposition is that it doesn't need to, and it doesn't need to because the agreement, at various other places within the instrument, already prescribes the minimum number of overtime hours as for across weekends, public holidays and also voluntary work on RDOs. Commissioner, I think that's important, so I will take you specifically to those references in the instrument.

PN208

The requirement that there is not less than four hours to be worked for overtime performed on Saturdays and Sundays is found at clause 9.2(6), which is on page 415 of our authorities book. I will read it directly.

PN209

THE COMMISSIONER: 415?

PN210

MR MEAD: 415, Commissioner:

PN211

*An employee called upon to work overtime on a Saturday or Sunday shall receive a minimum of four hours work or be paid at the appropriate rates.*

PN212

THE COMMISSIONER: Isn't it 9.1? No. Sorry.

PN213

MR MEAD: No, that's okay, Commissioner.

PN214

THE COMMISSIONER: Where are you reading from?

PN215

MR MEAD: So I'm at 9.2(6). 9.2(1) sets the differential of time and a-half for the first four hours and double time thereafter.

PN216

THE COMMISSIONER: Yes.

PN217

MR MEAD: And the minimum engagement for overtime work on a Saturday or Sunday is at 9.2(6). The point we are making is that the requirement for clause 6(3) to set any minimums with respect to overtime hours, by the omission of the term 'ordinary hours' in the second sentence, in our view is a non-starter because we've already got provisions that do that work, and 9.2(6) is the one that applies in respect of Saturday and Sunday work that might be performed.

PN218

For work that might be voluntarily undertaken on a leisure day or an RDO, that's 9.5(2), which is equally on page 415, and, indeed, there's also an equivalent provision at clause 20.1(3), which is page 428 of the authorities book, Commissioner, which just addresses how the minimum payment should be discharged for public holidays as well when they are worked, to the extent that that is dealt with as a different species of hours that sit outside of the ordinary hours construct.

PN219

The other thing, just as a further contention, just to answer a problem that I anticipate my friend will rise to raise, is that, on the union's interpretation, they say that clause 7.1, that's shift work, is effectively limited to Monday to Friday hours. They do that because they are looking at the clause 7.1(1) that says:

PN220

*The Company may require any employee to perform his or her work in shifts, Monday to Friday worked as four x 9.5 hour days.*

PN221

We say that that is not a term of limitation, that's a term of permission, so it contemplates one mechanism by which the hours have been worked and, indeed, that's the conventional mechanism.

PN222

THE COMMISSIONER: So it's not the only mechanism?

PN223

MR MEAD: That's right.

PN224

THE COMMISSIONER: Is that the point?

PN225

MR MEAD: That's right. The reason we can make good that submission, we believe, Commissioner, is by virtue of clause 8(3). That does provide for recognition of Saturday, when it forms part of a normal roster, to be paid with a 50 per cent loading. The reason that we separate that from Saturday being an overtime shift and not a reference to ordinary hours, which we say that clause 8(3) contemplates, is that you have a specific penalty that is required for Saturday overtime, and that's reflected in clause 9.2(1).

PN226

THE COMMISSIONER: Clause 6, really, and 7 is also - you've got clause - I think that bolsters the point you're making. Clause 6 is the hours of work, and then you've got this other notion of the shift work in clause 7.

PN227

MR MEAD: Yes.

PN228

THE COMMISSIONER: Which is also - I'll leave it at that.

PN229

MR MEAD: As I said, inelegantly drafted, but we think that there is enough in the aggregate of those concepts for you to be with us that clause 9.6 works to protect a roster pattern as opposed to overtime hours worked.

PN230

If I could turn then to the context and purpose as framed by the historical documents. Commissioner, I don't know if you need me to make good the submission about *Short v Hercus* and whether, in fact, in the appropriate circumstances, historical context can be used in order to interpret the terms of an existing agreement. I don't propose - - -

PN231

THE COMMISSIONER: You don't need to take me to those authorities, but what I would like to hear from you is what you say I should make of it if I do accept the proposition.

PN232

MR MEAD: Yes, I understand. Very well, in that case, Commissioner, we will just turn to deal with the effect of the historical context. The starting position for us is that, in our submission, the award term 24.4 covers a large part of the field that the applicants seek to have invoked under the operation of clause 9.6, or, as it then was, clause 25.1.

PN233

The applicants have, just in relation to the equivalence that we seek to draw between 9.6 and 25.1, in their submissions identified - and this is self-evident, but, we say, takes us nowhere - self-evident that 9.6 is broken up into subclauses and 25.1 in the 2019 agreement was a single paragraph.

PN234

Now what the union seeks to make of that is that, effectively, 9.6 operates as three independent and separate obligations that aren't read with any contextual interlinking, that, essentially, 9.6(1) sets out the requirement for the 12-hour break, as recast; that 9.6(2), separately and distinctly, doesn't refer to a 'shift', so it is just bare in the obligation of a break from work, which can be reduced from 12 hours to 10 hours, albeit by mutual agreement, and they say that clause 9.6(3) then operates as its own independent obligation that, irrespective of whether, in fact, an agreement has been reached under 9.6(2), that a penalty needs to be paid and that the penalty is not narrowed by, effectively, the facilitated agreement within 9.6(2).

PN235

We believe that that just isn't a sensible reading of the clause, that, on its terms, 9.6(1) sets the starting proposition that then, exclusively through mutual agreement, can be narrowed, and then we say that, if the matter is so narrowed, then that has an effect on whether, in fact, the penalty is paid.

PN236

Now, whether, in fact, that is exactly how it works is not material to the dispute in question because the premise behind separating out the clause in the way in which the union has is to say, well, there's no use of the word 'shift' in 9.6(2) and that, therefore, infects the rest of the clause, and it must mean something broader to the interpretation that we apply to it.

PN237

Simply, we say that those things all need to be read in a context that flows naturally, and that the subclause segmentation doesn't give rise to separate and distinct obligations. Apart from that segmentation, that is the only difference between the clause in the 2019 agreement and the 2022 agreement.

PN238

We are going to ask that you come with us and take one iteration of agreement step backwards and have a look at the 2015 agreement because we think that there is a strong support for the understanding of at least how the agreement that led into the drafting of the 2019 agreement operated.

PN239

We have the 2015 agreement in the bundle of materials and, as I said, we have referred to it in our submissions, but it, too, had a clause 25.1, Commissioner. I will take you to what is page 311 of the authorities book. If you're there, Commissioner?

PN240

THE COMMISSIONER: Yes, I am, 311.

PN241

MR MEAD: Thank you. At 311, you will see, at 25.1, there is a clause that effectively bears the same name as clause 25.1 in the 2019 agreement but operates materially differently. We say that that clause - and the reason why this is important is that, given that the 2015 agreement also incorporated the award, we say that going into bargaining for the 2019 agreement, the operation of the two provisions, the award provision and the agreement provision, is difficult to doubt, difficult to doubt, Commissioner, because of the narrowness of 25.1.

PN242

It could not be said, we say, on any plausible reading, to have covered the field of the area in which the overtime protection clause in the Storage Services Award applies. The reason we say that is, first of all, you will see, on the first line, the clause excludes employees working on night shift, so it has no application to those employees. Secondly, the clause only operates where a minimum number of hours have been worked past midnight, being two hours, and then they need to be

continuing to work on the following day, and that's when particular penalties apply.

PN243

This clause, we believe, only applied in respect of afternoon shift workers. It can't apply in respect of day shift workers because, with a maximum of 14 hours available under this instrument also to be worked on any particular day, and a nine and a-half hour shift arrangement means that the 14 hours elapses at 1 am, not 2 am, as required by the clause.

PN244

So the history that leads us into the 2019 agreement, from our perspective, is that there were two clauses carrying the burden in relation to how breaks ought be dealt with, or compensated, where they weren't provided: 25.1, which protected the afternoon shift workers only and didn't do anything for night shift workers or day shift workers, and then the award clause.

PN245

If we start there, that then takes us to the issue of, well, how do we countenance the operation of the 2019 agreement.

PN246

THE COMMISSIONER: The 2019?

PN247

MR MEAD: The 2019 agreement. So now we're at - - -

PN248

THE COMMISSIONER: 25.1? Now we're at - - -

PN249

MR MEAD: Now we're at the instrument that introduces the clause that is relevant, and it then turns on, well, what is the correct interpretation of that clause.

PN250

There is a document that I would seek to hand up as an aide-memoire, Commissioner, and, hopefully, it will save some time insofar as me not needing to take the Commission at exhaustive lengths to a comparison between the hours of work break and overtime terms between the 2019 and the 2022 agreement. I have already provided a copy to my friend.

PN251

Effectively, what we seek to do with this document, Commissioner, is we have lined up the term from the 2019 agreement, we have lined up what is the equivalent term from the 2022 agreement, and then we have identified where, if at all, there was a change, and, to the extent that there was a change, we have then sought to try to describe it for the assistance of the parties and the Commission.

PN252

Why is this document relevant to the submission about the 2019 agreement? It's a document that will swing both ways for us in relation to the submissions that we

have already advanced, and will advance in due course, about whether, in fact, there was a material change in the 2022 agreement that - - -

PN253

THE COMMISSIONER: I mean, ultimately, is it not the case I need to be satisfied about what the agreement before me means ultimately?

PN254

MR MEAD: That's - - -

PN255

THE COMMISSIONER: I hope somewhere you will take me to how this - how you say that the 2019 - the differences between the 2019 agreement and the 2022 agreement, which is the one before me, and clause 9.6 in particular.

PN256

MR MEAD: Yes. I can do that directly. Commissioner, we say that the differences between clause 9.6 and 25.1 are nought.

PN257

THE COMMISSIONER: Are what?

PN258

MR MEAD: Are nought. There are no differences. With the exception of - - -

PN259

THE COMMISSIONER: All right.

PN260

MR MEAD: - - - the subparagraph referencing, all the text is identical.

PN261

THE COMMISSIONER: So why am I looking at it then? Why are you bringing up the 2019 agreement?

PN262

MR MEAD: Because we say that the 2019 agreement can give you some assurance about what clause 25.1 was intended to cover and operate on, and it was intended to cover and operate in respect, we say, of rostering protections because there was already a provision incorporated from the award that protected the overtime circumstance that my friend has indicated concern towards.

PN263

THE COMMISSIONER: So 25.1 of the 2019 agreement?

PN264

MR MEAD: Yes. Unhelpfully, that's on the last page, page 9, Commissioner.

PN265

THE COMMISSIONER: I've got it. So you're saying there's no substantial change there, no substantive?

PN266

MR MEAD: There's no change.

PN267

THE COMMISSIONER: No change.

PN268

MR MEAD: Unless you were to accept the union's submission that the subparagraphing of the clause - - -

PN269

THE COMMISSIONER: Understood.

PN270

MR MEAD: - - - changes its operation.

PN271

THE COMMISSIONER: Yes, I understood that. All right. So where does that then take us in terms of where does that proposition take me in terms of your submission?

PN272

MR MEAD: Where that takes you is that, if you can find meaning in how the clause operated in the 2019 agreement, we say that meaning can be attributed to the clause in the 2022 agreement. So if we work out how it operated in the context in which it was created, that context can be transposed into the operation of the term under this agreement.

PN273

THE COMMISSIONER: But we don't need to do that, you're saying as a primary position?

PN274

MR MEAD: Well - - -

PN275

THE COMMISSIONER: We can just look at the one that's before me and come to the same conclusion?

PN276

MR MEAD: There are three limbs to our construction.

PN277

THE COMMISSIONER: Yes.

PN278

MR MEAD: Textual, the ordinary hours deficiency, and this one. You don't need to find in favour of this one for the other two to survive, but we think that all three are available.

PN279

On the proposition that why can you find some comfort in carrying forward whatever is the meaning of clause 25.1 into the new agreement, we believe that this document assists in providing that comfort, and the reason it does, Commissioner, is that we would contend that, on the material terms that deal with hours of work, shift work, and working rosters, and all of the things that inform, from our perspective, the textual considerations that would allow you to find the construction that we endorse, there has been either no change, or no material change, between the 2019 agreement and the 2022 agreement. So it sits on the same footing, it sits on all fours.

PN280

THE COMMISSIONER: All right. If I were to accept that proposition, what's the relevance of that?

PN281

MR MEAD: If you accept that proposition and then, as an adjunct, you accept that the 2019 agreement, correctly interpreted, had two streams of protection for breaks between working periods, the one conferred under the clause 25.1 for rostering and the one conferred by the award for overtime, it means that the clause that remains doesn't change its meaning simply because the award falls away. It has the same meaning.

PN282

The union has, not incorrectly, identified that there are circumstances where minor changes in drafting, changes in terms, end up having a knock-on effect that the parties did not anticipate. That is a fair submission to put, but it's not a submission, we say, that's applicable here because there is nothing in the award itself that was relied on as part of the definitional construct for the term 'shift' or the way in which clause 25.1 operated. Instead, we had, from our submission, two independent streams of protection, and now we've just lost one.

PN283

THE COMMISSIONER: What page is the award on?

PN284

MR MEAD: We've got it at page 65 of the court book.

PN285

THE COMMISSIONER: Of the digital hearing book, is it, page 65?

PN286

MR MEAD: Of the digital hearing book, yes.

PN287

THE COMMISSIONER: It doesn't appear to be at my 65.

PN288

MR MEAD: I apologise, 62, Commissioner. My mistake.

PN289

THE COMMISSIONER: So the award's distinguishing between the ordinary - I take it your point is the ordinary time and the overtime?

PN290

MR MEAD: Yes, that's precisely the case. The award - - -

PN291

THE COMMISSIONER: And so you say that should inform, to some extent, how the 2019 agreement is - - -

PN292

MR MEAD: Interpreted.

PN293

THE COMMISSIONER: - - - interpreted. If you accept the proposition that the 2019 agreement and the 2022 agreement before me are substantively the same, then it should inform my interpretation of the 2022 agreement is how you put it?

PN294

MR MEAD: Yes. In short form, that is the nub of the submission.

PN295

THE COMMISSIONER: Thank you.

PN296

MR MEAD: The only other thing, therefore, that we would care to highlight for the Commission, unless there are any other questions, is the submission that has been put against us by the union to the effect that it's not apparent from the material that anyone realised that by removing the award from incorporation, that it would change a material term of the agreement. We accept that that was not put in any of the explanatory material. The highest Mr North's evidence goes, however, to that point is that he's not aware if any analysis at all was done before that claim was advanced in the bargaining room and ultimately endorsed and formed part of the agreement proper.

PN297

THE COMMISSIONER: Really there's no evidence before me as to what the bargaining - - -

PN298

MR MEAD: Yes, and the only submission that we would make is that it is largely an inconsequential submission that is being put against us. I don't mean that critically, I mean that from the perspective of, at its highest, it is a subjective interpretation of one of the parties in the bargaining room that it either had work to do or didn't have work to do. We say it did, the award clause, and that, effectively by mistake, it has now fallen away, but that mistake doesn't mean that obviously the clause gets to be rewritten or its operation, as originally intended gets to change, it just means that the parties, in drafting this agreement, excluded the award and there was a consequence that means that a relevant term fell out.

PN299

The practical consequence we don't think is particularly material because of the health and safety legislative regime that we have already referred the Commission to and, not to overstate this position, but, quite clearly, the function of the Commission as presently constituted is not to rewrite the agreement but to give effect to its terms on their face. We say that the terms, appropriately interpreted having regard to that historical context, need to be in favour of the respondent's position and that this is rostering protection and no more, and therefore only attaches to ordinary hours and not otherwise.

PN300

Commissioner, if there's anything else I can assist you with, those are the submissions of the respondent.

PN301

THE COMMISSIONER: Thank you. Thank you, Mr Wyllie.

PN302

MR WYLLIE: Thank you, Commissioner. You will have to bear with me. There's a lot - and I've jumped around in my notes quite a bit.

PN303

THE COMMISSIONER: Take your time.

PN304

MR WYLLIE: Thank you.

PN305

THE COMMISSIONER: Do you need five minutes? Would you like a short adjournment to collect your thoughts?

PN306

MR WYLLIE: That would be helpful actually.

PN307

THE COMMISSIONER: Okay. We will take a short adjournment and reconvene at 11.45.

PN308

MR WYLLIE: Thank you.

**SHORT ADJOURNMENT** **[11.29 AM]**

**RESUMED** **[11.45 AM]**

PN309

MR WYLLIE: Thank you, Commissioner. I might just try and go through methodically through each of their arguments.

PN310

THE COMMISSIONER: All right.

PN311

MR WYLLIE: And then finish on my own arguments.

PN312

In terms of the award incorporation, we see the intention coming from clause 25.1 in the 2019 agreement to essentially be directly imported into the current agreement as a bit of a Trojan horse to get around the fact that the award was unincorporated.

PN313

THE COMMISSIONER: In the 22?

PN314

MR WYLLIE: In the 22, yes. So clause 5(2) of the 2022 agreement says the agreement operates to the exclusion of the modern award, so whether there was a two-tiered system of breaks is kind of immaterial. There definitely is not in the current award. So the respondent then is saying, 'Well, it's not about the actual legal effect of the award being incorporated, it's about the intention coming from the 2019 agreement that should not be disturbed.'

PN315

Firstly, applying clause 5(2) that says the award is excluded, that has an effect. If the incorporation of the award created a two-tiered system of breaks, it's clear that this new clause and the unincorporation has destroyed that system of breaks, so we need to look at this clause with fresh eyes.

PN316

Going back to the actual intention of the clause, the only evidence is from Mr North and it's very subjective. We detail it in our submissions, so I won't go into too much depth, but, for example, on page 199 of the court book, there's a memo being disseminated to employees that says:

PN317

*The agreement contains all terms and conditions of your employment.*

PN318

We think that's pretty clear that no one had any understanding that there was this intention in the 2019 agreement to have this two-tiered system. We have also been dealing with this dispute since April last year and the first that it was raised with us was in the respondent's submissions, so we believe it was a creative argument created by the respondent's lawyers, and it is a creative argument, but it no longer really has any effect.

PN319

The primary focus is for us to look at clause 9.6 and the award clause and the previous understanding of the clause is no longer really relevant. It was the respondent's decision to unincorporate the award. If they were so enamoured with this two-tiered system of breaks and they understood clause 25.1 to operate the way they said it did, then they wouldn't have unincorporated it, or, if they did, they would have changed clause 9.6 to reflect that. The end result of that is the 2019 agreement doesn't have work to do. The respondent wants to have the award incorporated, but, unfortunately, it's not, so we need to look at it with fresh eyes.

PN320

In terms of the ordinary hours deficiency, so the fact that if you worked overtime on one evening, you wouldn't be able to start your ordinary hours the next day, firstly, with clause 7.1(2), which is one of the shift work clauses that says rosters will be only altered with a week's notice, look, it is peculiar that apparently you can't agree to change your roster, but, regardless of that, it actually is clear that you can.

PN321

Mr North said, in response to Mr Burton's questions, personal reasons will allow you to move the shift earlier or later, or to finish early to do OT the next day. So that's the same as doing OT - overtime - on one day and then having your shift changed the next day to enable you to start your ordinary hours.

PN322

THE COMMISSIONER: My memory of his evidence, though, was also that, whilst you can move it now each way, the actual hours don't change. I think that was the point he was making, that the ordinary hours don't change, the actual amount of the hours, I think was the point he was making.

PN323

MR WYLLIE: Yes, so the amount doesn't have to change. Say, for example, that you usually start your rostered shift at 8 am and, because you've worked overtime after that shift, you now cannot start at 8 am, you can start at 10 am. That can be moved two hours and you can still perform the same number of ordinary hours.

PN324

THE COMMISSIONER: Correct.

PN325

MR WYLLIE: Mr North's evidence, I think, assists us and shows that there is that inbuilt flexibility. His evidence also seems to say that clause 7.1(2), which says you can't change a roster, or change any hours, unless you give a week's notice, that's not applied that way by the respondent, and I understand why because that would be very difficult. We know that modern awards allow you to change rosters by agreement, so we haven't looked super deep into that issue, but it stands to reason that there must be a degree of flexibility, which is reflected in what Mr North has said.

PN326

The fact that also you can agree to return to work with just 10 hours' break, that flexibility also assists the respondent to properly manage someone's ordinary hours, so they can't compel them to return at 10 hours, but they could say, 'Well, we can either move your shift back two hours or you can start with a 10-hour break. There is that inbuilt flexibility, so we believe it's kind of a moot point, that essentially there is no barrier to performing your ordinary hours, you just may need your ordinary hours to be moved back an hour or two.

PN327

Considering you're limited to 12 hours' overtime in a week, it seems unlikely that you are going to be performing four hours of overtime after every shift to the

point where then you have to put your next shift back two hours and then the next day move it back two hours, and it's obviously incumbent on the respondent to see that that's what an employee's roster pattern might be doing and to say, 'No, sorry, we can't have you work overtime right now' or 'You could work two hours of overtime.' They work four shifts a week, so between a mix of working two and three hours of overtime, they could still hit that limit, if that's what they want to do.

PN328

I think this is just a story of an employer having to balance competing considerations and, at the end of the day that comes back to the purpose of the clause, which is to provide an adequate break. We submit that it's more important to give an employee an adequate break from work than to concern yourself with potential difficulties with moving someone's ordinary hours by an hour or two here or there, which would be by agreement. Let me just confer with my notes. Sorry. That's that.

PN329

In terms of the kind of textual features argument that the respondent has put forward, there is one point that we need to make with respect to clause 8. I don't have that in front of me, sorry.

PN330

THE COMMISSIONER: Was it clause 8, did you say?

PN331

MR WYLLIE: Clause 8, yes. It's the work rosters one.

PN332

THE COMMISSIONER: That's at 413 - you may not have it.

PN333

MR WYLLIE: Great, thank you. We have got it, thank you, Commissioner.

PN334

Firstly - well, actually, I might just quickly jump up to clause 7.2, which is the shift work times. The respondent has said that these afternoon shift work times and night shift times, these are essentially a span that then work kind of parallel with the work rosters. These aren't a span of hours, these are a time at which a shift may start or end that then deems that to be an afternoon or night shift. That is distinct to a span. So the respondent's argument that there's this kind of synonymous understanding of shifts and rosters that conform with the span of ordinary hours for each shift is not quite there.

PN335

But the broader point is with these work rosters, you can see, yes, day shift, night shift, afternoon shift. We take the respondent's point that ordinary hours can be worked on Saturday by some employees. They are not ordinary hours for those engaged prior to May 1998 for day work, but, obviously, it can be worked. It is indisputable that Sunday is not part of ordinary hours for any worker under this agreement, and we can see with these night shift rosters, they commence at

8 o'clock on Sunday, so if that's a night shift roster and that's their ordinary hours, they are starting with four hours of overtime.

PN336

That goes back to our major point that the term 'shift' is a bit of a mess in this agreement and we need to look at it in each clause - start there - and then we can look at the other features of the agreement to try and inform it, but the respondent's argument comes up against the evident purpose of the clause, which, therefore, in their view, would not give an employee a significant break if they are working overtime before or after, or both before or after, their ordinary shift.

PN337

So the utility of the term 'shift', when we pull it back to what is consistent in the agreement, is that it is referring to a period of work, and in this night shift roster, there's four hours of overtime to commence with, so whether someone starts at 8 o'clock or whether they start at 11 o'clock, that's still overtime, so if that's night shift, and that must be rostered, otherwise these night shift workers are just turning up early on the Sunday. That's part of it, that the term 'shift' is, you know, kind of ambiguous throughout. Let me just go back to some notes.

PN338

In terms of the way the term is used throughout the agreement - so we're already there - so clause 6(3) is determining that a shift or a day can have a maximum of 9.5 ordinary hours in it. We submit that's not saying that that is synonymous with a shift; that's saying that a period of duty at work can only have nine and a-half ordinary hours in it. We think that's an easy way to understand it and conforms with our interpretation of clause 9.6.

PN339

Clause 7 obviously is dealing with the term 'shift' with respect to an afternoon or night shift. Look, they are all ordinary hours, but the difference between afternoon and night shift is that that's outside the span and attracts a penalty. So if we were to put that into clause 9.6, then it's only regulating breaks between shift work, which we know it's not doing. So there's a lot of ambiguity there. Clause 8 I've dealt with.

PN340

Going on to another clause that uses 'shift' to refer to overtime - and this is, apologies, not in the written submissions - is clause 9.2(3). This clause requires payment at double time for a shift that finishes either after 1 am on Saturday and/or before 9.15 pm on Sunday. So again that's a shift that is inevitably going into a Sunday, which is overtime. It really begs the question of what would you call a continuous period of work if you did not call it 'shift'? It would be cumbersome and it would make a messy agreement even worse. So we don't think there's a great deal to read into the use of 'shift' when it's specifically referring to ordinary hours because we can see it refers to, at its core, a period of work that could be overtime and could be ordinary hours.

PN341

There is also clause 15(2), which refers to a leisure day shift, which is a day of work on someone's day off. Again, it's odd to see that being an overtime shift but

called 'shift' if the respondent's interpretation were correct. Our interpretation says 'shift' is a lot broader and operates a lot more harmoniously throughout the agreement.

PN342

In terms of the textual features also, the respondent did kind of refer to the separation of the clause into subclauses, and I'm going to be honest, this is not a major point, but I think when you're comparing two clauses and one is enumerated into subclauses and one is not, all things being equal, that is something that you could consider.

PN343

With clause 9.6, arguably the first two clauses are in accordance with the respondent's view, are more to do with rostering, so they are apparently providing a break. If the respondent was correct that they were essentially rostering provisions, it is odd that they are in clause 9 because that's dealing with overtime. We've got clauses 6, 7 and 8, which deal with rostering. You would reasonably expect that, you know, having redrafted this agreement, they may have considered putting that in those rostering provisions, if that's what was truly intended.

PN344

It's not there, so I think we do need to look at that and say that it's in the broader overtime clause, that's relevant to construing it, and that overtime and the performance of overtime is actually relevant to when these breaks are required.

PN345

I think, look, our argument is trying to conform with the plain language of the clause: 'a clear break from work of 12 hours between shifts.' We believe that the respondent's is more technical and more pedantic and kind of overly literal and ascribing a view to 'shift' that is not actually consistent with how 'shift' is used throughout the agreement.

PN346

We think that the purpose of the clause is the primary consideration, unless the words don't enable that purpose to be met. We have a consistent and easily understood interpretation that requires a 12-hour break from work between shifts of work. That can be varied to 10 hours by agreement. Considering that our interpretation - - -

PN347

THE COMMISSIONER: Sorry, Mr Wyllie, while you are on this point, though, do you accept that there's some apparent distinction, I think, in the agreement between the hours of work and shift work? It's like almost there's some particular meaning to shift work and that the hours of work clause at clause 6 specifically is referring to the ordinary hours of work.

PN348

MR WYLLIE: Yes, well, we see 6 as referring to the ordinary hours of day workers.

PN349

THE COMMISSIONER: Yes, okay, ordinary hours of day workers.

PN350

MR WYLLIE: And then that's - - -

PN351

THE COMMISSIONER: Then you have the shift work clause, shift work general, that appears to suggest that the company can, if they wish to, employ - Monday to Friday 9.5 hours, that's sort of suggestive that that can form a particular shift, and then it goes to - you know, 7.2 deals with the afternoon and night shift only. Does that not sit with an interpretation, potentially, that 9.6 really, you know, is sort of referring to - - -

PN352

MR WYLLIE: To those shifts.

PN353

THE COMMISSIONER: - - - to those shifts?

PN354

MR WYLLIE: Well, if there were no other clauses in the agreement that kind of referred to 'shift' as an overtime shift and used that terminology, then I think that argument would hold water. I think the issue is when you take that to its logical conclusion, you're saying, 'Well, this is the totality of the shifts in the agreement', but it's not. There's two other clauses that refer to a 'shift' which either consists of, partly or entirely, of overtime.

PN355

THE COMMISSIONER: Which are?

PN356

MR WYLLIE: Which are 15(2), which is - - -

PN357

THE COMMISSIONER: 15(2)?

PN358

MR WYLLIE: Yes, clause 15(2), which is a leisure day shift, so that shift is entirely overtime, and clause 9.2(3), which refers to a shift which may finish on Sunday. So that shift can't be ordinary hours if it's finishing on a Sunday because that is overtime. Then that takes us back to: is this a generic term? It essentially is a generic term and, when it's used in clause 6 and 7, it's pretty clear what it means - it's referring to that shift of ordinary hours - but clause 9.6 is not in clause 6 or 7. It would be very assistive for the respondent if it was because they allege it deals with the rostering of ordinary hours. If it was there, we wouldn't be having this dispute, but it's not there, it's in the overtime provisions.

PN359

If we were to look at clause 6 and 7 and say that 'shift' has this very specific meaning and it's only a shift of ordinary hours, then we are left with

circumstances where an employee could work four hours of overtime after their ordinary shift and then they could commence work the next day, potentially eight hours later, on more overtime. Particularly for those workers who don't have Saturdays as part of their ordinary hours, so workers employed before May 1998, you could feasibly finish work at, you know, 8 o'clock at night on a Friday and then commence overtime at 12.01, because there's no requirement for you to have a break because Saturday is not ordinary hours.

PN360

The logical extent of that is that this clause provides no protection for workers who are performing excessive hours or hours outside the span. Particularly with the unincorporation of the award, which allegedly dealt with this topic, it's now just a complete gap. I know that the respondent did refer to - I think they alluded to, obviously, that overtime, you know, has to be reasonable and - - -

PN361

THE COMMISSIONER: Under legislation, I think are the provisions.

PN362

MR WYLLIE: Yes. I think that's where we were getting at. I think we understand that as like a reasonable request, but there has to be a reasonable refusal. Sometimes there's employees who maybe don't have a reasonable excuse to not work overtime, and now we're saying the enterprise agreement also doesn't afford them any entitlement to a break.

PN363

I think we can also accept that, with the cost of living crisis particularly, workers are wanting to work more overtime. Workers are trying to earn more money. We know that workers often push themselves to work unsociable hours or excessive hours - I'm sure Mr Mead has had some very long days - but, you know, it's what you do. So I think this regime of protections is not really there, and particularly without the work of the award, there is really no protection to someone then performing more overtime.

PN364

On that basis, we think that a generous and liberal interpretation of 'shift' that accords with the reference to 'a clear break from work' is the most logical interpretation, and we don't want to get too in the weeds or too pedantic trying to determine exactly what 'shift' means because, at its core throughout the agreement, it's used consistently to refer to a period of duty at work that might be rostered, that might not, that might be ordinary hours, that might be overtime, it might be opening on a Sunday.

PN365

We think it's kind of, all things being equal, we have to go back to the purpose of the clause. If the award was incorporated in this agreement, we'd probably be having a different argument, but it's not, and we have to give clause 5(2) the work to do. It says that the agreement operates to the exclusion of the modern award. We need to give that work to do, which is that we're looking at clause 9.6, not in a vacuum, but much closer to a vacuum than what we were in the 2019 agreement.

PN366

That's probably the sum of our submissions, unless you have any questions.

PN367

THE COMMISSIONER: Thank you.

PN368

MR WYLLIE: Great. Thank you.

PN369

THE COMMISSIONER: Did you want to say anything briefly by reply?

PN370

MR MEAD: I don't want to rise unnecessarily, but I might just say two things, if I might. I am not sure that my friend's submission about the Sunday ordinary hours for shift workers is accurate. I understand how he gets there, but I guess it all rests on whether clause 7.1(1) describes one possible structure of hours, i.e. may require Monday to Friday at 9.5, or whether that's a term of limitation. We say it can reasonably be read that it's not.

PN371

The other point is - and this would not be an industrially uncommon circumstance, but we only put it that highly - that a night shift leading into a day on a Monday to Friday day can, in some circumstances, be regarded as part of the following day's work, notwithstanding that it might start on a Sunday, and it's just a posit, we say, that, you know, the way in which the description of the span of hours in 8(1) is directly lined up with the description of the commencing and finishing times for a night shift in 7.2(1)(b) that may support that industrially common, we contend, arrangement in which hours might be performed.

PN372

Those are the only two submissions that we would seek to make additionally. Thank you, Commissioner.

PN373

THE COMMISSIONER: Thank you.

PN374

MR WYLLIE: We do have one point to make to that.

PN375

THE COMMISSIONER: You wish to make one more point, did you say?

PN376

MR WYLLIE: Just because I think that's not right.

PN377

THE COMMISSIONER: I'll allow it.

PN378

MR WYLLIE: Just in terms of the Sunday, if we go to clause 9.2(2), which is talking about weekend overtime.

PN379

THE COMMISSIONER: Yes.

PN380

MR WYLLIE: Considering that Sunday is not really mentioned elsewhere, but it is mentioned here:

PN381

*Work performed on Sundays shall be paid at the rate of double time.*

PN382

And that's under a weekend overtime clause. Contrast that with subclause (1), which talks about overtime on Saturday. That contemplates a situation where Saturday may be overtime or may not be because it's specifically calling out the overtime being paid at a certain rate, but, for Sunday, there is no distinction. I have seen awards do that, too, where they don't refer to ordinary hours or overtime on a Sunday, they just say 'all work' because it is all overtime. On that basis, we would say that Sunday probably is outside the span of ordinary hours for everyone.

PN383

Thank you.

PN384

THE COMMISSIONER: Thank you. I will reserve my decision, of course, and we will adjourn now.

**ADJOURNED INDEFINITELY** **[12.11 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**