



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK

AG2023/114

**s.182(4) - Application for approval of the Lofte Australia Pty Ltd Greenfield Agreement
2023**

Melbourne

10.29 AM, FRIDAY, 9 JUNE 2023

PN1

THE DEPUTY PRESIDENT: Let's begin and we'll see how we go. Yes, Mr Pollock.

PN2

MR POLLOCK: Thank you, Deputy President. Deputy President, in circumstances where you've had the benefit of written submissions filed by both parties, I wasn't intending to open. I'll proceed to call Mr Larsen and - - -

PN3

THE DEPUTY PRESIDENT: I'm grateful.

PN4

MR POLLOCK: Thank you.

PN5

THE DEPUTY PRESIDENT: Yes.

PN6

MR POLLOCK: I call David Larsen.

PN7

THE ASSOCIATE: Mr Larsen, please confirm your full name for the record.

PN8

MR LARSEN: David John Larsen, (address supplied).

<DAVID JOHN LARSEN, AFFIRMED

[10.30 AM]

EXAMINATION-IN-CHIEF BY MR POLLOCK

[10.30 AM]

PN9

THE DEPUTY PRESIDENT: Yes, thank you, Mr Larsen. Take a seat?---Thank you.

PN10

Yes, Mr Pollock.

PN11

MR POLLOCK: Thank you. Mr Larsen, just for the benefit of the transcript, can you please repeat your full name and your business address?---Yes. David John Larsen. Business address is level 23, 108 St Georges Terrace in Perth.

PN12

Thank you. And what role do you hold with the applicant, Lofte Australia Proprietary Limited?---I'm the managing director.

DAVID JOHN LARSEN

XN MR POLLOCK

PN13

I imagine we all understand broadly what that involves but just for the benefit of the transcript, what does your role involve on a day-to-day basis?---Running the business and being responsible for the execution of the business and everything to do with the operations.

PN14

And you've previously worked as a stevedore yourself; haven't you?---Yes, I started as a stevedore in 1997 in the Australian Vocational Trainee Program.

PN15

How long did you work as a stevedore?---Eight years.

PN16

Now, you've made a witness statement in this proceeding; haven't you?---Yes, I have.

PN17

Do you have a copy of that statement in front of you?

PN18

THE DEPUTY PRESIDENT: He will shortly.

PN19

THE WITNESS: Yes, I do. Thank you.

PN20

MR POLLOCK: Can I just get you to take a look at that document and just confirm that that document runs to 10 pages and 33 paragraphs?---Yes, it does.

PN21

And has five annexures labelled DL1 through to DL5 inclusive?---Yes, it does.

PN22

That's the witness statement that you've prepared in this proceeding?---It is.

PN23

You've had an opportunity to read that statement recently?---I have, yes.

PN24

Is the contents of that statement true and correct?---They are.

PN25

Do you wish to adopt that statement as your evidence in this proceeding?---Yes, I do, please.

PN26

I tender the statement and the annexures, Deputy President.

*** DAVID JOHN LARSEN

XN MR POLLOCK

PN27

THE DEPUTY PRESIDENT: Yes, thank you. Mr Edmonds, is there any objection to the tender?

PN28

MR EDMONDS: No, thank you.

PN29

THE DEPUTY PRESIDENT: Thank you. Thank you. I will mark the witness statement of Mr David Larsen dated 25 May 2023, comprising 33 paragraphs and five annexures, as exhibit 1.

**EXHIBIT #1 WITNESS STATEMENT OF DAVID JOHN LARSEN
DATED 25/05/23, TOGETHER WITH FIVE ANNEXURES**

PN30

MR POLLOCK: Thank you. Deputy President, I note also that Mr Larsen was the deponent to the F21 declaration. I recall your practice is not to formally tender that document.

PN31

THE DEPUTY PRESIDENT: No, that's part of the application and obviously the content of it will be taken into account, and if Mr Edmonds wishes to cross-examine him on any part of that, he can do so.

PN32

MR POLLOCK: Indeed. Thank you. I have nothing further in chief.

PN33

THE DEPUTY PRESIDENT: Yes. All right. Thank you. Mr Edmonds, cross-examination.

CROSS-EXAMINATION BY MR EDMONDS

[10.33 AM]

PN34

MR EDMONDS: Yes, thank you, Deputy President. Thank you, Mr Larsen. If I could just start with - perhaps look at the proposed business - what will become the enterprise agreement. You're familiar with the stevedoring industry; aren't you? You've worked as a stevedore, and you have worked as a manager, haven't you, in the stevedoring industry?---Yes, in several levels. As a stevedore, obviously through the period we just touched on.

PN35

Yes?---But, yes, at several different levels as a manager, yes.

PN36

Yes. And if you look at paragraph 29 of your witness statement, which you should have there in front of you, you identify different types of cargo handled by stevedores; don't you?---Yes, I do.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN37

So containerised cargo, containerised bulk which is things like iron ore, grain, fertiliser, that sort of product, is what you mean by (indistinct), grain, oil and gas, that sort of thing. And the bulk and general which is, for example, your cars, your farming machinery, turbines, other steel, that sort of thing. That's broadly the three types of cargo; isn't it?---In a broad sense, yes. Obviously there's a lot that comes through shipping but in a broad sense that's the high level categories.

PN38

THE DEPUTY PRESIDENT: It doesn't include drugs or anything like that?---Not that I've had to do in the past.

PN39

Yes.

PN40

MR EDMONDS: And even though there's those three different types of cargos, there's really two types of operators; isn't there? There's the container operators, and there's the bulk and general operators; isn't there?---Within the capital cities, yes. There's a container terminal, and bulk and general.

PN41

The container terminals in Fremantle Port, for example, is DP World and Patricks, and they've got quite a particular operation; haven't they?---They do. They deal with containers and the ad hoc break bulk components that come on container ships.

PN42

Yes, but they - so they operate with a Portainer which is a large crane that take the containers off. They've got port trucks or other sort of machinery that carries the containers off and moves them around the ports. And trucks come in and they take those containers away. That's broadly what it is; isn't it?---As a part of my time on the waterfront, as a stevedore, I was lucky enough to be trained up in all those parts of machinery including Portainers, so, yes, very familiar with that part - components of their operation.

PN43

And it's a different operation to the operation that's conducted at Fremantle port by LINX or Qube, for example; isn't it?---In Fremantle Ports and in other capital city ports, yes, you have a distinction between the two.

PN44

Yes. And - - -?---Just to clarify though, if I could, Mr Edmonds, it doesn't preclude the bulk and general operators from handling containers, though.

PN45

Yes?---And, similarly, it doesn't preclude the container terminals from handling break bulk.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN46

Yes. The container terminal operators don't handle, for example, grain or fertiliser, or those sorts of things, out of their operations, though; do they?---Only inside a container.

PN47

Yes, yes, but they don't, for example, empty a ship's hull of grain?---Not a current version of the container terminal, no.

PN48

Yes, and that can be contrasted in an operation by LINX or Qube at Fremantle Ports, that might load and unload grain or sulphur or fertiliser or something like that, but also cars and machinery and those sorts of things?---Yes.

PN49

Yes, and while the bulk and general operators might handle containers, they handle them without a ship's crane or a shoreside crane; don't they? They don't have any of the bigger - a Portainer; do they?---Look, if you take it outside of capital cities, they do. So, for example, Esperance has a Portainer crane and has an exchange of 2000 containers a month through that Portainer crane, on a similar line of services that go through Fremantle and other capital cities.

PN50

Yes. But in Fremantle Port, for example, certainly LINX and Qube don't handle the containers with a Portainer crane; do they?---No, not since the old crane at berth 1 and 2 was taken down, the FPA crane.

PN51

Yes?---Which is a good thing for everyone, in terms of that crane, I have to say.

PN52

And, sorry, I didn't hear that?---Sorry, in terms of that crane, that crane was a very old crane and the bulk operators did operate that. LINX or formerly P&O Ports and Patricks Bulk and General, they did operate that crane for periods in the past. But it's long gone now.

PN53

Yes, that's some years ago now?---Probably 15.

PN54

Yes?---Ten to 15.

PN55

Sure. And the Productivity Commission Report that's attached at annexure 5 to your witness statement, deals with the container terminals; doesn't it? The DP Worlds and the Patricks, and Hutchison type of arrangements; doesn't it?---Look, I think it deals with the industry as a whole, and I think there's components in there that relate to those operators, but I don't think it precludes everybody, in my opinion.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN56

It talks about Australia's container ports; doesn't it? The productivity at Australia's container ports. It talks about the rates of lifting containers. It doesn't talk about break bulk, for example, it doesn't talk about Lofte products; does it?---Does it define which container ports, though?

PN57

Well, that's the question I'm asking you. It deals with container ports; doesn't it? It doesn't deal with ad hoc containers using a fixed crane or a shorter crane; does it? It's talking about container ports; isn't it?---Well, I think that there is references in there to container ports but I would question what defines container ports on their own. And does it - in particular operators of container ports? Is it just capital cities?

PN58

Well, let's talk about your operation, then. Your operation isn't a container general; is it?---At this stage we're not an operator yet, but our intention is to operate within the stevedoring industry across products and cargos that are available to us.

PN59

You don't have any cranes or Portainers, or anything; do you?---Not at this point.

PN60

You don't have any berth space anywhere; do you?---No, but the berth space, as we know in the common user arrangements, which includes ports like Esperance that have a Portainer crane available for common user use, is not required to have that. So an operator - a stevedoring operator in most ports, aside from your capital cities that hold a lease, an extended period lease, they're the ones that have their own equipment on it. Aside from that, ports around the country that handle containers, Newcastle for example, the port authority own the shoreside cranes.

PN61

But you don't have a Portainer crane, you don't have a berth space, you don't have employees, you don't have lifting gear, you don't have chains, you don't have straps or anything like that; do you?---At this point we are getting ourselves ready to operate. Right at this point we don't hold any equipment for that operation yet.

PN62

Do you have employees yet?---No.

PN63

You haven't offered employment to anyone yet?---No.

PN64

You haven't entered into contracts with anyone or you haven't told anyone that a job would be available?---I've not entered into contracts with anyone. I've had many inquiries from experienced people that know me in the industry, about roles, but, no, we've not offered or afforded anyone the opportunity for a role.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN65

Your operation is directed at a more traditional bulk and general operation; isn't it?---I think a logical entry to the industry is to go for common user areas. An effective way to do that would probably include bulk and general stevedoring throughout. But I don't think it precludes us from any particular cargo. I think that, you know, notwithstanding trying to operate inside the lease areas of DP World or Patricks, I don't see how we would be precluded from any particular cargos overall.

PN66

But you agree it's directed at a bulk and general style operation; isn't it? It isn't a container style operation; is it?---It's not, in that sense of the capital city container terminals, no. It's an agreement for stevedoring of cargos across Australia.

PN67

Well, if I could ask you to look at paragraph 10 of your witness statement?---Yes.

PN68

Paragraph 10 reproduces the answers found at clause 2.6 on page 10 of the form 21B documents, in terms of identifying the appropriate agreements for comparison purposes; doesn't it?---Yes, it does.

PN69

And you've identified five agreements there. Can you see that?---Yes.

PN70

The Three Oceans, LINX Fremantle 2021, LINX Fremantle 2022, Townsville and Qube Ports, Port of Fremantle 2020. Those five agreements. They're bulk and general operations; aren't they? They're not container terminal operations; are they?---They are bulk and general operations, yes.

PN71

Sure?---They also handle containers.

PN72

So your operation is analogous to a bulk and general operation. It's not analogous to a container terminal operation; is it?---In this sense, yes.

PN73

That's why you've identified those five agreements?---We've identified those five agreements through the period of discussion with union in the negotiation period, of what was appropriate reference points in terms of this negotiation period.

PN74

And you picked those five because your business is analogous to bulk and general operations, and it's not analogous to a container terminal operation?---You'll have to excuse me, you'll have to define analogous for me. It's something I'm not aware of.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN75

Your operation is better compared to or is more like a bulk and general operation, rather than a container terminal operation?---Yes, the agreement that we put together will be more likely to be utilised across common user berth facilities that are generally used for bulk and general container operations. Yes, it is a bulk - in that sense, yes.

PN76

And you've put those five agreements for comparison purposes. Of those agreements how many of those are in term at the moment?---So you would have to tell me if I'm incorrect or correct here. I think the LINX Fremantle agreement is 2022 agreement, the Qube Ports 2020 is still in term. The Townsville Marine agreement, I believe is under negotiation for its extension at the moment. And the Three Oceans Maritime, I've been unable to get an update from the union what they are doing with that at the moment. So the current agreement available to compare that we utilised throughout the negotiation period for reference, was the Three Oceans Maritime and Maritime Union of Australia agreement.

PN77

The Three Oceans Maritime Agreement, the 2017 agreement, expired in August 2020; didn't it?

PN78

MR POLLOCK: No. Sorry, I object to the question. It's putting a proposition that quite clearly the agreement, unless it's been replaced by a subsequent enterprise agreement, it's not expired. It might have reached a nominal expiry date but it probably should not be put as that.

PN79

THE DEPUTY PRESIDENT: Yes.

PN80

MR EDMONDS: Well, the expiry date of the Three Oceans agreement was August 2020.

PN81

MR POLLOCK: Sorry, again, I object. The nominal expiry date.

PN82

THE DEPUTY PRESIDENT: It's all right. We don't have a jury here. I know what he's talking about, so - - -

PN83

MR POLLOCK: The witness might not, but I concede the issue.

PN84

THE DEPUTY PRESIDENT: The proposition that's been put to you is that the relevant agreements have a nominal expiry. So when Mr Edmonds is talking about expiry, he's talking about the nominal expiry. The agreement continues in operation unless it's terminated - - -?---Yes.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN85

- - - or replaced by another agreement?---That was my understanding.

PN86

Right?---So a nominal expiry date, I would expect that is true, Mr Edmonds.

PN87

MR EDMONDS: And the LINX Fremantle 2021 agreement expired on 30 June 2022, and has been replaced; hasn't it?---It has subsequently been replaced. During the negotiation period, that was certainly the active agreement.

PN88

Sure. But the LINX Fremantle 2022 agreement has taken the place of the LINX Fremantle 2021 agreement completely; hasn't it?---Yes, it would have.

PN89

So the better comparator in terms of the terms of the condition prevailing in the industry is LINX Fremantle 2022, rather than LINX Fremantle 2021. Would you agree with that?---The better comparator to?

PN90

THE DEPUTY PRESIDENT: Isn't that really a submission that you can make, Mr Edmonds?

PN91

THE WITNESS: Yes, I'm - - -

PN92

THE DEPUTY PRESIDENT: Rather than this witness answering the question. I mean, self-evidently if the 2021 agreement has been replaced, it's no longer in operation and so question whether it's a document that is a comparator of prevailing, which means current, conditions. You can make submissions about that.

PN93

MR EDMONDS: Yes.

PN94

THE DEPUTY PRESIDENT: But I assume if the agreement's been replaced, it's no longer in operation and, therefore, not a document that is relevant for the - - -

PN95

MR POLLOCK: That is so, Deputy President. To be clear, it's included in Mr Larsen's statement on the basis of - that that was an operative agreement during the course of negotiations.

PN96

THE DEPUTY PRESIDENT: I understand.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN97

MR POLLOCK: But I certainly won't be advancing a submission that that particular agreement ought form part of the prevailing conditions.

PN98

THE DEPUTY PRESIDENT: Yes. Thank you for that. Yes, Mr Edmonds.

PN99

MR EDMONDS: The Townsville agreement reached its expiry date in February of 2023; didn't it?---Yes, again was the active agreement during our negotiation period.

PN100

Sure. So the only two current agreements in that list is LINX Fremantle 2022, and Qube Ports Port of Fremantle 2020?---Yes, if that's - if that is the case, in terms of the submissions of what we utilised and what was used throughout the negotiation period, obviously this happened between June 14 last year and December, so they're relevant to what all discussions were throughout the whole negotiation period with the MUA representatives.

PN101

You say at paragraph 31 of your witness statement that your vision for your business was to offer services in a range of ports including the Port of Port Hedland and the Port of Dampier. Is that correct?---They are two that are listed within that list, yes.

PN102

I'm not sure if you have to hand the Qube Ports Port of Dampier agreement?---No, I'm pretty familiar with them, so - - -

PN103

I'm happy to ask you about them without having them to hand, if that helps, but I might identify the relevant clauses for the Deputy President.

PN104

MR POLLOCK: Well, if the witness is going to be cross-examined on the content of the document, he should have it in front of him.

PN105

THE DEPUTY PRESIDENT: I agree. Mr Edmonds, we might just adjourn for a few minutes to allow my associate to - - -

PN106

MR EDMONDS: Yes. Well, in fact, if I can just ask, Deputy President, that the witness also be given a copy of the LINX Dampier Port Hedland Enterprise Agreement 2022, the Qube Ports Proprietary Limited Port Enterprise Agreement, and the Stevedoring Industry Award 2020.

PN107

THE DEPUTY PRESIDENT: Yes. Okay. We'll just adjourn for 10 minutes or so, to enable those documents to be printed. Thank you.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

<THE WITNESS WITHDREW [10.52 AM]

SHORT ADJOURNMENT [10.52 AM]

RESUMED [11.21 AM]

<DAVID JOHN LARSEN, RECALLED [11.21 AM]

CROSS-EXAMINATION BY MR EDMONDS, CONTINUING [11.21 AM]

PN108

THE DEPUTY PRESIDENT: Yes, Mr Edmonds.

PN109

MR EDMONDS: Thank you, Deputy President. I'm sorry, that (indistinct) bit bigger than the circumstances, that that much time has been spent to actually find them, but I'll go to them anyway. If I could just ask Mr Larsen, you should have there the Qube Ports Port of Dampier Enterprise Agreement 2020, and the Qube Ports Port Hedland Enterprise Agreement 2020?---Yes, I do.

PN110

And you've got both of those there?---Yes.

PN111

You're aware of how the Qube Ports agreements are structured? There's a part A which is in common terms around the country. You're aware of that?---Yes.

PN112

And that applies to 20-odd agreements around the country. And there's a part B that applies to the particular port where the agreement applies. You're aware of that?---Yes.

PN113

For the Qube Ports Port of Dampier Enterprise Agreement, can I ask you to look at clause 16 in part B, which is found on page 56 of the Port of Dampier - Qube Ports Port of Dampier Agreement?---Yes, yes.

PN114

Now, clause 16 sets out a process for the payment of a North West allowance. You're aware of this?---Yes, I am.

PN115

And there's two options in the Port of Dampier Enterprise Agreement for the payment of the North West Allowance. That is the North West Expense Reimbursement, which is found at clause 16.3 of the agreement?---Yes.

PN116

You can see that?---Yes, I'm aware of these clauses.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN117

Yes, and that's up to a maximum of \$35,326 in the year, or an extra \$19.41 for each hour worked. That's one way of claiming the (indistinct). And then you'll see at clause 16.4, there's a North West Allowance. You can see that?---Yes.

PN118

Yes, and that's paid up to a maximum amount at the time the agreement was made, of \$40,000 in the year - \$40,178.79. You can see that?---Yes, I can.

PN119

And that's now grown to for the first full pay period on or after 1 July 2022 to \$42,212.84?---Yes.

PN120

Or an additional \$23.20 per hour worked. You can see that?---Yes, I can.

PN121

And that's paid to all employees covered by this agreement; isn't it?---Yes.

PN122

And if you see the Qube Ports Port Hedland, you've got that as well?---Yes.

PN123

I'm going to ask you to look at clause 15 of part B, which you'll find at page 57 of that agreement?---Yes, I have that.

PN124

Okay. And that's the same sort of clause, isn't it? 15.3 is the North West Expense Reimbursement. Again, \$35,326 in the year, payable at \$19.49 per worked hour, or at clause 15.4, the North-West Allowance, which at the time the agreement was made was \$40,178.79. That's grown to \$42,212.84 on the first full pay period on or after 1 July 2022. And from 1 July 2023, which is only a matter of weeks away, that will be \$43,206.16 payable as an extra \$23.78 per hour. Can you see that?---Yes, I can.

PN125

And if I can ask you to go to the LINX Port Hedland Enterprise Agreement, clause 70.3 in that agreement, that's seven-zero-point-three. Sorry, I need to ask you, you're aware that this Dampier Port Hedland agreement - this proposal at part A which includes common (indistinct) found in all the LINX agreements throughout the country. And a part B which just applies to Dampier. And a part C which applies to Port Hedland. Are you aware of that?---Yes, I am.

PN126

LINX don't have an operation in Port Hedland; do they?---As far as I'm aware, no.

PN127

Yes, but they do have an operation in Dampier, though; don't they?---They do.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN128

So if I could ask you to look at clause 70.3 of that LINX Dampier agreement?---Yes, I've got those.

PN129

Sorry, did you see that?---Yes.

PN130

Clause 70.3 has got a clause for North West Expense Reimbursement. An annual maximum from 1 July 2022 of \$45,472. You can see that?---I can.

PN131

And at clause 70.7 you can see there's a North West Allowance, and the agreement was made and employees were entitled to a North West Allowance of \$44,483.66 per annum, which is broken down to a weekly maximum and, indeed, an hourly rate. You can see that?---Yes.

PN132

From 1 July 2023, it will go up to an annual maximum of \$46,735.65 payable as an hourly rate of \$25.68. You can see that?---I can.

PN133

You're aware that that's payable to all employees employed by LINX to work in Dampier?---Yes, I am.

PN134

Okay. And there's various rules around the payment of it; isn't there?---Yes.

PN135

You're aware of those rules?---Yes, I am. I've got experience from when I was with Patricks Bulk and General, I was a project and contract manager. I've got exposure and experience to all these clauses.

PN136

Yes, and certainly you can agree those are substantial amounts of money; wouldn't you?---Yes, I think they are relevant to what those areas require.

PN137

Sure. Now, you say at paragraph 31 of your statement that it's sufficient for your organisation to offer services at a number of ports including the port of Port Hedland and Dampier. That's correct; isn't it?---Yes, should opportunities arise there.

PN138

Yes, but there's no equivalent provision in this agreement, is there, to the allowances that I've just taken you through for the LINX and Qube agreement; is there?---At this stage, no, but I think that if anyone wanted to operate in those areas - - -

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN139

That's okay. You don't need to go into a further discussion about it. There is no equivalent provision in your agreement; is there?---At this stage, no.

PN140

Now, if I could just take you specifically to the arrangements for casual employees. Could I ask you first about the Stevedoring Industry Award 2020. It should be in that bundle that you got handed?---Yes.

PN141

If I could ask you to turn to clause 11.1 of the Stevedoring Industry Award? Have you got that there?---I do. Do you happen to have the page number?

PN142

Page 11 of the award, clause 11.1?---11.1.

PN143

Yes:

PN144

The minimum payment for a casual employee will be for one shift on any one day that the employee is required to work.

PN145

You can see that?---I can see that.

PN146

And I can take you to clause 11.3 on page 12:

PN147

When a casual employee works overtime, they must be paid the overtime rates set out in clauses 21.4 and 21.6 -

PN148

of the award. You can see that?---I can see that.

PN149

If I can take you then to clause 21 of the award. That's on page 30 of the award. You can see that?---Yes.

PN150

Clause 21 of the award defines overtime for day employees and for shiftwork employees. You can see that at clause 21.1 and clause 21.2?---Yes.

PN151

Clause 21.4 and 21.6 set out the rates of overtime payable to casual employees for either employees doing day work or employees doing shiftwork. You can see that?---Yes.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN152

And you'd agree there's a connection between the definition of overtime in 21.1 and 21.2 for day work employees and shiftwork employees, and casuals who are employed to do day work at 21.4 and casuals employed to do shiftwork at 21.6.

PN153

MR POLLOCK: Deputy President, before the witness answers the question, it seems to be driving at asking a witness to construe the terms of the award. I'm not sure that what this witness might give as an answer will assist you in one way or the other.

PN154

THE DEPUTY PRESIDENT: I must admit, I am assuming, Mr Edmonds, that you're going to advance a proposition that there are no provisions dealing with these matters in the agreement, and how does it stack up from a BOOT perspective? Is that the kind of - - -

PN155

MR EDMONDS: It is. It is, Deputy President. That's where I intend to take this.

PN156

THE DEPUTY PRESIDENT: Right.

PN157

MR POLLOCK: If that's so, I mean, the question as asked - - -

PN158

THE DEPUTY PRESIDENT: Yes.

PN159

MR EDMONDS: Sorry, I - - -

PN160

THE DEPUTY PRESIDENT: The objection was that you seemed to be asking the witness to interpret the - rather than the provisions of the award but the proposition as I apprehend you were going to advance is that there are no comparable provisions in the agreement, and that that will affect the BOOT assessment. Yes?

PN161

MR EDMONDS: Yes. I was going to take the witness to the agreement and how those provisions apply to casual employees. It's not entirely - - -

PN162

THE DEPUTY PRESIDENT: Clear. Yes. No, I - it's an issue that I have on my list also, so go ahead.

PN163

MR EDMONDS: Yes. I'm not really asking the witness to construe the award. I just wanted to have an opportunity for him to see what the award says.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN164

THE DEPUTY PRESIDENT: Yes.

PN165

MR EDMONDS: And to then put propositions about how the agreement operates.

PN166

THE DEPUTY PRESIDENT: Okay.

PN167

MR EDMONDS: I'm happy to move onto that question, Deputy President.

PN168

THE DEPUTY PRESIDENT: Yes. Mr Larsen, you've read those provisions?---Yes.

PN169

Yes. All right.

PN170

MR EDMONDS: And just finally, just lastly, if I could ask you to turn to page 13 of the award, and in particular clause 13.3(d). It talks about the normal length of each shift for shift workers being seven hours, unless otherwise agreed?---Yes, I can see that.

PN171

So if I can ask you now to turn to your proposed agreement. Do you have the proposed agreement?---I don't. I've got a copy in that bag, of the agreement.

PN172

Sure?---The inside folder, at the bottom. Thank you. Go ahead, Mr Edmonds.

PN173

So if I could ask you to look at the clause 13.1 of the agreement. Clause 13 deals with casual employees. You can see that?---Yes.

PN174

Clause 13.1 says:

PN175

Casual employees will be subject to allocation to any shift on any days considered appropriate by Lofte to best meet its requirements in a (indistinct) manner.

PN176

Now, there's no minimum shift there; is there? Sorry?---No, no, I'm - - -

PN177

Sorry, I didn't hear that.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN178

THE DEPUTY PRESIDENT: He hasn't said anything yet. I think he's thinking.

PN179

MR EDMONDS: Sorry?---Just considering the question. In terms of 13.1 and references to minimum shift at this stage, there isn't.

PN180

So a casual employee could be engaged for one hour or 30 minutes or 15 minutes. Would you agree with that?---I wouldn't expect that any of that would be a reasonable application of engaging an employee or utilising them at all. So short answer, no.

PN181

Sure, but I might put it in a different way. Not you - a different employer - applying this agreement, could engage casual employees under that clause for one hour; couldn't they?---I wouldn't be sure about the legal application of that, but my view is that wouldn't be a reasonable application of allocating employees.

PN182

Well, there's nothing in that clause to prevent them from allocating them one hour; is there?---I couldn't tell you from a legal standpoint, whether they could or couldn't. But from my view that wouldn't be a reasonable way to utilise a casual employee, or clauses relating to that.

PN183

Well, you've drafted this agreement?---M'mm.

PN184

The application of the agreement is a matter for yourself - or the wording of the agreement is a matter for yourself. There's nothing in that clause that would prevent a casual employee from being allocated one hour; is there?---At this stage, from what you're saying, there is potential that could happen.

PN185

Okay. And, indeed, if I take you to clause 15.1 of the agreement - have you got that in front of you, that page?---I do, yes, yes.

PN186

15.1 provides that the shift commencement times and the particular lengths of the shifts is determined by Lofte in accordance with operational requirements. You can see that; can't you?---Yes, I can.

PN187

And there's nothing that requires agreement of shifts that are different to seven hours, for example?---No, I think it - - -

PN188

You agree with that; don't you?---I - - -

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN189

Sorry, I didn't hear that?---Look, I think that logical application of what a - what the agreement is structured on, around 35-hour working weeks for fulltime employees, 24-hour working weeks for GWEs, I think that it's rare that you'll have a casual not working in line with teams of the same ilk. So a casual employee would not regularly - or rarely work by themselves in an actual application of it. They would work within the team and the team would contain fulltime employees and GWE employees. So they would likely fall in line with what they would have to do across the board.

PN190

Yes, but there's nothing in the agreement that prevents casual employees from being rostered for one hour or two hours or 30 minutes or anything like that; is there?---By that interpretation, at this stage no.

PN191

And, indeed, there's nothing to prevent you from allocating a GWE or an FTE to a shift of one hour or four hours, or indeed anything up to 12 hours; is there?---Look, I appreciate the inference of what you're saying but I think that the actual application of that is not going to be - that's not a valid application of it. You're not going to employ a full-time employee or a GWE to work 35 separate one-hour shifts. There is an application that is logical across a working week, which the whole agreement is based on. It's based on a working week. So I think that the interpretation at a level like that, may be a point but I think that the reality of operating the agreement and the reality of actually providing a service to customers where you need to unload and load a ship, it's rare that an hour would be appropriate for any of those operations.

PN192

Okay. But you could certainly allocate them to seven five-hour shifts; couldn't you?---Again, I wouldn't see that as a reasonable application of the agreement.

PN193

That's because - it's not what the agreement permits though; does it? That's just it would be difficult for you to run your business if you did it that way. The agreement doesn't prevent you doing it?---I think it would be difficult to retain employees if you tried to do it that way. I think it would be difficult to appease members of the union if you did it that way. I think that there is a myriad of issues, if you try to take it down that path - and I think what we've done throughout this whole negotiation period is show that we are open, transparent and clear about what we're trying to achieve. This is a - we are not looking for the little wormholes where we can sneak something through. We're looking to apply a reasonable, logical agreement to a reasonable - in a reasonable way, to an operation that we think we have the expertise in.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN194

You could allocate your FTE employees to two 12-hour shifts, and a 10 hour shift in any three days; couldn't you, and still come in under the 35 hours?---So in any of the agreements you can work up to 14 days straight, for Qube or LINX at 12

hours, and have one day off and do another 14 after that. There is nothing restricting Qube or LINX doing a similar fashion of eight, 10, 12-hour shifts if they wanted to, in any format, and they lasted two days, three days or 14 days, they have the capacity.

PN195

Yes. Sure. And if you do that across the year, as soon as you got to 1820 hours, those employees could then have the rest of the year off, or work every hour after that as overtime; couldn't they?---And in a similar vein, for Lofte across the seven-day working week you could have reasonable overtime work plus time off after that, or you'd be on overtime from the 36th hour onwards.

PN196

Yes, but you couldn't have time off after that; could you?---Why not?

PN197

Well, because there's nothing in your agreement that allows employees to take time off after that; is there?---Look, specifically negotiated with Jeff Cassar was discussions around the five-day - and it's noted in my statement, around removing the five-day requirement for FTEs. And that was based around the fact that he - that the union did not believe the position of working 35 hours over a shorter period, you would still be required to be working across the five days. So if you were allocated three 12-hour shifts, you've received 36. The next two days you're over your hours. Now, you'd be applicable overtime, as per the agreement, to work those hours; or we would be in a position, if we left the five-day working week in there, for them to continue working, to make them work. In this format, it's just noted as reasonable overtime. Now, I'm not sure what rulings there are on reasonable overtime, but I don't think we can just start to allocate as much as we want. The difference between us and an 1820 hour work composite set-up, if you like, that is based on a whole 12 months. We've reduced that to a one-week period. So in any given working week the employees could work their 35 hours, or 40 hours, or do four 12-hour shifts, and be able to have the rest of the week off, or work overtime. That would be in their capacity. Now, I know in the industry it's very difficult to try and force stevedores to work, and I know the success rate of that is pretty low, from my experience. So being able to work with your team and allow them the opportunities, which they aren't afforded with Qube or LINX, to achieve overtime or extra payments during a seven-day period that re-sets on a Monday because those hours in the opposite, if they didn't work those hours in that working week, if they only worked two days and achieved 16 hours, they don't owe us the remaining 19 hours next week. It resets. If you look at the clause in the FTE clause, there is no counted hours and no payback, and that is the difference between us and an 1820 composite rate.

PN198

Mr Larsen, if you just try and focus on the questions and answer them, rather than giving big speeches, we will go much quicker, if that's all right?---Ready and raring.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN199

Could I ask you to turn to clause 20 in your agreement? That's the clause that sets out when overtime is payable. You can see that?---Yes.

PN200

And it says:

PN201

Overtime for FTEs and GWEs is any work performed before or after a shift during which the employee is allocated hours of work to perform, or in excess of the employee's ordinary hours worked.

PN202

When does a casual get overtime?---We would apply the same thing to a casual. It would be applying the allocated hours of work. It would be no different.

PN203

Sorry, when does the agreement say a casual gets overtime?---Well, are you putting to me that it doesn't? So - - -

PN204

Well, no, I'm asking you to show me the clause which sets out when a casual gets overtime?---Again, a reasonable application of it would - - -

PN205

I'm not asking you to make a reasonable - I'm asking you to show me the clause which sets out when a casual gets overtime?---At this stage the overtime clause reads as it is, and we would expect in operation of this agreement that we would apply - before allocated shifts - before or after allocated shifts, a similar vein to casuals.

PN206

There's simply not clause that sets out when a casual gets overtime. That's correct; isn't it?---Again, if that is the interpretation that you want to put on there, and then the wording of that, that's fine. But the application of it I think is more valid.

PN207

Well, if you just focus on the question. There's no clause in this agreement that sets out when a casual gets overtime; is there?---The overtime clause reads as it is, and if a casual has an extended shift or a shift where they're working hours outside of a shift they have been allocated, along with the team that they'd be working with, it would be applied in the same way. Again, the team - - -

PN208

There's no clause which sets out when a casual gets overtime; is there? This is a yes or no question. There's no clause that sets out when a casual gets overtime? Don't answer the way you would apply it; there is no clause that sets out when a casual gets overtime, is there?

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN209

THE DEPUTY PRESIDENT: Mr Larsen - - -?---Yes. Look, it - - -

PN210

- - - if I can assist a little bit. My reading of the draft - the agreement is that the circumstances in which overtime is payable are set out in clause 20.1. Do you agree with that?---Yes.

PN211

And reading clause 20.1, that's confined to particular classes of employees?---At this stage, yes.

PN212

Which doesn't include casual employees?---At this stage, that's how it's reads.

PN213

Yes. And so what you're saying is that you would apply clause 21 - sorry, 20.1 as though the reference to FTE and GWE would simply be a reference to any employee covered by this agreement?---I would.

PN214

But it doesn't say that?---It doesn't say that, no.

PN215

All right. Mr Edmonds, does that answer your question?

PN216

MR EDMONDS: It does, thank you, Deputy President. So just to follow on from that, Mr Larsen, you would apply it to a casual employee who is allocated outside of their ordinary hours of work, would get overtime. But there's no ordinary hours of work set out in the agreement for casual employees; is there?---Well, an ordinary hour of work for a casual employee is when they're allocated in flex - in the manner which is covered in the clause.

PN217

Yes, and indeed you could allocate them with five 12-hour shifts and that would be their ordinary hours, Monday to Friday, five 12-hour shifts; couldn't you?---I would suggest that that is exactly what happens in every other agreement.

PN218

Yes, but you could allocate a casual employee five 12-hour shifts, Monday to Friday, and that would all fall within their ordinary hours; isn't that correct?---It would, and turning to the clauses that actually defines when those ordinary hours of payments are, and the timeslots they're in, they would be paid that - the appropriate time that they'd be working.

PN219

Yes, so you could allocate them to - you could allocate a casual employee to five 12-hour normal day shifts, couldn't you, and not pay any penalties; isn't that right?---Well, no, the penalties are applicable to the times they've worked. So the penalties are the actual times that they work and the relevant shift.

PN220

Yes, but if you are allocating to a day shift, there would be no penalties attached to that; would there?---Well, yes, because if it was a 12-hour shift it would go past 3 pm, and as per the agreement they get the relevant rate past 3 pm. It is not the same as saying that they're on day shifts and they're on day shift all day. They go past that time slot and they get that appropriate rate. Much the same as FTEs or GWEs.

PN221

Yes. So a casual employee allocated to work 12 hours or a day shift, would start at what time?---They can start at any point of the day, as per the agreement.

PN222

They can start at 5 o'clock?---They could start at 5, they could - - -

PN223

To work a 12-hour shift?---Yes.

PN224

And they would finish at 5 o'clock that night?---M'mm.

PN225

And they would be paid two hours for the afternoon shift rate, and no hours of overtime. Would you agree with that?---Well, if it's an allocated shift, that's their allocated shift. The same as every other agreement.

PN226

So there would be no hours for overtime. You could work 60 hours in a week and none of those hours would be overtime?---It is what I would think is an industry standard, in an allocated shift. If it's an allocated shift, that is the case. So when you allocate eight hours, you're the same with FTEs and GWEs. It is the allocated shift.

PN227

So you could be allocated the 60 hours a week and none of those hours would be overtime?---Well, the overtime rate relevant to - they would still be achieving the penalty rates relevant to the times they were working.

PN228

Yes, but none of those hours would be overtime rates; would they?---Well, if you want to - I don't think this is a step apart from anyone else in the industry. I think this is the same.

PN229

It's certainly a step apart from the award though; isn't it?---Well, it's a step - not a step apart from anyone else.

PN230

MR POLLOCK: Sorry, Deputy President, if that proposition is going to be put, the witness should be taken to the particular provision in the award, and it should be suggested as to how it is different.

PN231

THE DEPUTY PRESIDENT: Yes.

PN232

MR EDMONDS: Well, a casual employee allocated to a 12-hour shift under the award, the first seven hours would be ordinary time, and the last five hours would be overtime. That's correct; isn't it?

PN233

MR POLLOCK: Again, Deputy President, the witness should be taken to the particular provision of the award that is said to stand for that proposition. It's not at all clear to me on a reading of the award, that that's so.

PN234

MR EDMONDS: Well, I thought I took my friend to it - sorry, I thought I took this witness to it when I took him to the award. I'm happy to go back to it. Clause 11.1 of the award:

PN235

The minimum payment for a casual employee will be for one shift on any one day.

PN236

One shift. Clause 13.3 sets out that the length of a shift is seven hours unless otherwise agreed. Clause 11.3 of the award sets out the payment for working overtime is in accordance with clauses 21.4 and 21.6. And you would agree that a casual employee is allocated to work a 12-hour shift, he would work seven normal hours and five hours of overtime. Would you agree with that?---I'm not sure I would.

PN237

Now, I'm going to take you to the rates of pay for a casual employee. The rates that are set out in the Lofte agreement, your agreement, the rates themselves are considerably lower than any of the rates set out in the LINX Fremantle and Qube Fremantle agreement; aren't they? The base rates?---Are you comparing that to the adjusted - - -

PN238

I'm not asking you to look at the grossed-up (indistinct) value, I'm just asking you to look at the rates set out in the agreement itself?---It depends. If you look at a Sunday or a Saturday or a night shift, then they're not.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN239

I'll take it - if you're a casual employee working a day shift Monday to Friday, the rates are significantly less than those rates that are set out in the LINX agreements or the Qube agreements; aren't they?---There are different sets of rates set out in

the Qube and LINX agreement. And the composite rates that are sitting in the LINX and the Qube agreement are different to the base rates plus penalties in our agreement.

PN240

Yes, but you don't get penalties for working 14 hours in a day shift; do you?---If you work the five - one of the five shifts out of 21 shifts in the week, on day shifts, then you get that appropriate rate of pay, which we've stated.

PN241

It's considerably less; isn't it?---It is the figure based on the format of this agreement.

PN242

Well you don't disagree with the proposition that the rates that are actually included in your enterprise agreement for working day shift Monday to Friday, are significantly less than the rates set out in the LINX agreement and the Qube agreement for casual employees working Monday to Friday; do you?---I think they are a different set of rates for different times, and the rate that is put in there for the day shift is the rate that it is. And, again, evenings, nights, weekends, they are different rates. It's a composite rate versus a base rate plus penalties.

PN243

So you can't even make that concession that for an employee working a day shift, Monday to Friday, that your rates are a good \$25 short? You can't even make that concession?---So for a casual working on a Sunday at \$129.47 for a team leader, I can make that comparison as well. I - - -

PN244

THE DEPUTY PRESIDENT: You've been asked a specific question?---Sorry.

PN245

MR EDMONDS: There's an opportunity for you to answer a question - - -

PN246

THE DEPUTY PRESIDENT: Just wait a moment?---Apologies.

PN247

Can you listen to the question asked, and answer the question?---Okay.

PN248

Repeat the question. Mr Edmonds, repeat the question.

PN249

MR EDMONDS: Yes, thank you. For a casual employee working day shift Monday to Friday, under your agreement they are paid significantly less than a casual employee working day shift Monday to Friday under the LINX agreement or the Qube agreement. That's correct; isn't it?---The base rate compared to the composite rate, yes, they are paid less for those shifts.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN250

Yes. And the composite rate includes allocations for penalties for working on weekends, it includes penalties for working on evening shifts and night shift; doesn't it?---The composite rate is designed to be an average rate applied if that - to across the year. And including those penalty rates, yes.

PN251

Yes. Yes. So an employee who's working day shift Monday to Friday, as a casual, they get a windfall because they get the composite rate which includes all those other penalties incorporated into there. That's right; isn't it?---In those five available shifts they would.

PN252

Yes, and when they work overtime, they get the benefit of the overtime being applied to those penalties as well. That's right; isn't it?---As per their agreement they get the overtime relevant to their agreement.

PN253

Yes. Yes, but they get the benefit of overtime being calculated on the composite rate, not on the base rate. You'd agree with that; wouldn't you?---I think you'd have to go agreement by agreement and it would have to refer exactly to the Qube Fremantle one to have that specific detail but they would get the relevant overtime rate for what they were entitled to there.

PN254

That's for a full-time employee or a guaranteed wage employee employed under the Linton agreement or the Qube agreement they get the benefit of the composite rate for overtime that they do as well. You'd agree with that, wouldn't you?---Their overtime is calculated on their adjusted award rate I believe.

PN255

Well, when I look at the overtime in your agreement if I could ask you to look at clause 20.5? When an employee in your agreement works overtime they either get the overtime rate or they get the shift loading applicable to the shift they're working, whichever is the higher. They don't get (indistinct) do they?---So in the
- - -

PN256

Just that?---Yes. So it doesn't double the penalty rate.

PN257

Yes. So you don't get time and time off do you?---On an evening shift you wouldn't get – get triple time.

PN258

Sorry?---On an evening shift it wouldn't double the time and a half. No. It would go to double time – 200 per cent.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN259

Yes. The base rate for the purposes of overtime for the Linton agreement and for the Hume Agreement which set out in our submissions that we filed the base rate for the purposes of calculating overtime is higher – significantly than the Linton's agreement and Hume agreement. You'd agree with that – wouldn't you?---I think there is a difference between the two and for those particular agreements there is a difference. And in multiple agreements of Qube's that vary across the country.

PN260

Yes. But for Linx and Qube are higher than your agreement aren't they?---Linx and Qube have a different rate to us, yes.

PN261

They're higher aren't they?---Well, yes. The mathematics are. They are a different rate to ours in their adjusted award rate which they apply to their overtime.

PN262

And when an employee under the Linx agreement or the Qube agreement takes annual leave they're paid their composite rate, aren't they?---I believe so.

PN263

When an employee under your agreement takes personal leave they're paid their base rate aren't they?---Are we taking – are we comparing personal and annual leave – sorry?

PN264

I just said personal leave. An employee employed under your agreement takes personal leave. They're paid their base rate for personal leave. Is that right?---They are paid their base rate of pay for the personal leave at this stage. Yes.

PN265

So employees taking personal leave in your agreement as compared to you've agreed with the Linx agreement that they are receiving a significantly lower rate of pay, would you agree with that?---They're receiving the rate of pay commensurate with our agreement.

PN266

Yes. Which is significantly lower?---But is different structure to the Qube agreement as we have discussed but in the composite rate versus our base rate plus penalties. But, yes – they would get the appropriate rate as noted in our agreement. They – if you take it as a singular there is a difference. If you look at the agreement as a whole there is the overall balance that I'm looking at.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN267

Yes. Of when an employee takes personal leave, under your agreement, they're only paid their base rate. When they take personal leave under the Qube agreement and the Linx agreement they're paid their composite rate and that's significantly higher than your agreements isn't it?---We pay their base rate and they are paid their composite rate, yes.

PN268

When an employee takes annual leave under your agreement they're paid their base rate plus a leave loading. Is that correct?---Correct. Annual leave, yes.

PN269

And notwithstanding the application of the annual leave loading there's still – they still receive more under the – I'm sorry they still receive high rate of pay under the Linx agreement or the Qube agreement. Would you agree with that?---Under the structure of what they are they are different. The relevant agreements to ours they run a similar model. We are the same. So your Kimberley Ports – your Kimberley Ports, Base Marine – we are the same – they've got the same structure – format.

PN270

Yes. I'm not asking you about that - - -?---Understood.

PN271

(Indistinct) Qube agreement and the Linx agreement?---Correct.

PN272

Superannuation under your agreements is paid on the base rate for your ordinary hours. Would you agree with that?---No. I believe it's paid on the hours worked.

PN273

You say your agreement pays superannuation on the full hours worked? Not just ordinary hours? And you've probably (indistinct) that sets that out?---Well, I'd like to say where – point me to the clause where it doesn't.

PN274

Well, I would say the clause that says it doesn't is 18.4?---I think on most employment scenarios your superannuation is paid on what the hours are worked.

PN275

I'm not sure that's correct?---Well, my interpretation as a managing director, is that the superannuation is paid on all hours worked.

PN276

Okay. But that's not set out in the agreement though is it?---Look, I'm not sure where it doesn't say that. But, look, that is absolutely, in my experience, and my understanding in the way I would apply business and the way that I read this is that superannuation is payable in the statutory requirements of the – a percentage – is a reference. And that it would be paid on the hours worked.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN277

But would you agree that – you'd agree that an employee, if receiving superannuation payable on the composite rates as opposed to the base rates receives a higher – makes a higher amount of superannuation wouldn't you?---Just the base rate – you're saying? So I just want to clarify. So the basis of the composite rate is the fact that employees might work 20 hours one week and 60 hours another. It goes up and down throughout. The reasoning for having a

composite rate, the same thing applies for team members of Lofte. Should they work 60 hours and they get paid their superannuation on 60 hours. Now, depending on the shift it maybe higher than the composite rate. There may be more superannuation earned depending on that particular week. I think across the board the intention and the mathematics that I am presenting is that it's the same, across the course of the year, is what they would work using the base rate as penalties and relating to super as well. It would become the same. That's the intention of it.

PN278

(Indistinct) new agreements is there? There's no PTOs set out in your enterprise agreement?---I think planned time off is a useful tool for very busy workplaces that require it and I think that's something that you'd work with your teams to develop based on the workplace, workforce and work type you were doing. I'm not sure.

PN279

Yes. But is that due to the planned time off in your enterprise agreement is it?---Yes. My view and my experience in the industry is that I'm not sure it needs to be an enterprise agreement specific clause. I think it needs to be relevant to where you work and what sort of work you do. At this stage we have not included planned time off in our EBA.

PN280

Sure. So with respect to the notifications to employees on shift?---Mm-hm.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN281

Linx Fremantle agreement provides that employees will be notified of a shift the next day by no later than four o'clock the day before. Qube provides that draft orders should be provided as early as possible with one orders (indistinct) no later than four o'clock. The Lofte provision provides best efforts to have the allocations provided by three o'clock the day before. There's no implications for Lofte though it would be – is ordered late – is there?---Yes. Well, I disagree there needs to be an implication. I think the smart management of the business is that you're ensuring that your communications with your clients is seamless and you have that information to allocate as early as possible. Instances of being allocated as early in the day result in many more people turning up at work on any given day. That's my experience in the industry. There is – we expect – and intend that all allocation orders will be done well before three o'clock. Now, there are cases where things change. The shipping industry is fluid and it's volatile. So there are things that can change. But in the instances of that it does go past three or four o'clock, you know, that would be the exception and I think that that's noted as a standard in the industry and despite any clauses that may have repercussions for employers, I think the standard remains. I don't – I haven't seen a lot in my experience. I haven't seen a lot of challenges with that, notwithstanding the Qube dispute last year. But a lot of challenges in that actually being applied on a day by day basis. In general, in the operations I have run and the operations I have worked in, the allocations are done seamlessly in and around that one, two o'clock

– PM – the intention is to have it all done by 3.00 pm so that people doing the allocations can go home too.

PN282

But none of that is set out in the enterprise agreement?---Look, we have given – you know – indications and we believe that they're fair and reasonable and repercussions of that I think are probably not reasonable.

PN283

You simply say at clause 16 (indistinct) is required – clause 16.1 – you can see that?---Yes.

PN284

Allocations made as soon as practicable as confirmation of work procedures follows?---Mm-hm.

PN285

Clause 16.2(b) says you use your best efforts but there's nothing to prevent you from allocating later than three o'clock?---Yes. It - - -

PN286

Four o'clock, five o'clock or six o'clock - - -?---It says, 'All parties recognise that some industry factors hinder Lofte's ability to achieve this timeline.' Like I've just (indistinct).

PN287

The Lix agreement and the Qube agreement make provision for employees to be paid if their shifts are cancelled?---Mm-hm.

PN288

You're aware of that?---I am.

PN289

There's no provision in the agreement put together for employees to be paid for cancelled shifts is there?---We don't intend to cancel shifts.

PN290

Okay. But there's no provision for employees to be paid for cancelled shifts is there?---Well, if they're allocated – they're allocated. But you can't cancel that for that. That's the way hours are structured.

PN291

But there's nothing in clause 16 that prevents you from cancelling shifts is there? Unless there's notification procedures?---I'm sure we would have another discussion if we did. But the intention is that we get our communications right and we plan for exactly what's going to happen and we wear the consequences if we don't.

*** DAVID JOHN LARSEN

XXN MR EDMONDS

PN292

Your provisions for long service leave provide that the – that you be paid in accordance with the State legislation. That would be under the Long Service Leave Act?---We've gone in line with agreements of a similar format. That's in Horizon, Kimberley Ports Base Marine, EC Stevedoring and Townsville.

PN293

But the Linx and Qube agreement provides that long service leave provision – longer than three weeks - (indistinct) whereas the Long Service Leave Act's provision (indistinct) for year of service. Do you agree with that, do you?---At this stage it does.

PN294

I don't have anything further, thank you, Deputy President.

PN295

THE DEPUTY PRESIDENT: Yes, thank you, Mr Edmonds. Mr Pollock? Any re-examination?

PN296

MR POLLOCK: Just a small brace of questions, Deputy President.

PN297

THE DEPUTY PRESIDENT: Yes.

RE-EXAMINATION BY MR POLLOCK

[12.15 PM]

PN298

MR POLLOCK: Mr Larsen, you were – you might recall earlier in the cross-examination you were asked some questions about the types of terminals across the country. It was suggested to you, in essence, that there were two types of terminals. There were container terminals and there were bulk general terminals. You agreed with that proposition in so far as it concerned capital cities?---Mm-hm.

*** DAVID JOHN LARSEN

RXN MR POLLOCK

PN299

I wonder could you tell the Commission a little bit about what that distinction looks like, if it at all, falls outside the capital cities?---I think there is multiple ports across the country that are endeavouring to establish themselves and continue to establish themselves as container operators and drawing more container traffic to them. Port Hedland has started a line of service with a couple of carriers through to Singapore. Through Esperance there is a monthly container exports going to Port Klang. Throughout – Bunbury has aspirations for to be a container terminal as an alternative to Fremantle. Newcastle has aspirations to be a container terminal as opposed to Port Botany. And they operate – and there's Gladstone – similar. It's to preclude – the container – in the industry, I think, it's a misgiving to say that the container terminals and the bulk terminals are separate because they both perform very similar tasks in reality. While the container terminals are set up to handle big ships on a regular basis. There is, in reality, when you talk about container terminals it just doesn't span the capital cities of Australia.

PN300

You might also recall you were asked some questions about the north-west allowances included in a handful of agreements coming down from Port Hedland?---Yes.

PN301

That my learned friend took you through. It was put to you that the agreement, at least in its current form, does not contain a corresponding allowance. And you were giving an answer to that in the context of – and I don't quite have the transcript before me – but you said something about retaining staff?---Mm.

PN302

But you were then cut off by my learned friend. Can you just – have the option to complete your answer now?---Thank you. One of the big things that we have promoted since the beginning of negotiations with the union is that we are trying to create a stable and skilled workforce to improve the delivery of service across the board. A stable and skilled workforce will come from engaged employees that we have a responsibility to and a mutual respect for and that we actually have to work with them. Living in Port Hedland I have spent a lot of time up there or living in Dampier and those types of ports should be given those opportunities. I don't think there's any success rate but it wouldn't have much success rate of time to employ people to work for you without applying an allowance that subsidises their living. It's an expensive town. We know that the rental rates can be volatile in some respects. While the houses are a reasonable price to buy. In general, the rental rates can average around \$1,300 per week for a normal house. So we understand that there is a need to apply some sort of subsidy and support. And I think the current format of the North-west allowance is something that's logical in industry. And I don't think that we do anything much different should we go there.

PN303

Thank you. You were also asked some questions about casual engagements under the agreement. And my learned friend suggested to you that there was nothing in the agreement here that would prevent a casual being called in for a period shorter than one hour. In your time as a stevedore, as a manager, across this industry for a range of employers, can you think of any examples of casuals being called in for say for 15-minute or 30-minute periods?---Look, in the cases where it was they would be paid their four hours or eight hours or seven hours or whatever is appropriate. And we would apply this in a similar way. I don't see – again, coming back to a stable and skilled workforce they have retained skilled and retained people that we can actually work with and actually deliver on our service. I don't see how that's a positive way to operate. I wouldn't hang around for that sort of jobs so I wouldn't expect someone else to.

*** DAVID JOHN LARSEN

RXN MR POLLOCK

PN304

And in your experience how frequently or rare would it be for a casual to be called in for 15-minute or a 30-minute period?---Never. Unless it was – yes, never. I couldn't see the scenario where that's going to happen. They're aligned with the team. A casual is generally not taking up the top skill of the team unless

they are required as a back-up. So they're going to be aligned with the team that's working a seven or eight-hour shift. But generally eight hours is my expectation.

PN305

Lastly, you were asked some questions about how personal leave is paid under the agreement and how annual leave is paid under the agreement. It's suggested to you that personal leave is paid at base rates?---Mm.

PN306

And that annual leave was paid at base rates plus a loading. Now, are you aware of any other enterprise agreements across the country covering stevedoring operations that adopt a base rate approach for the payment of leave?---Yes. So in similar formats of base rate plus penalties you have Kimberley Ports, Base Marine, Horizon and I believe EC Stevedoring, I think. Those are relevant agreements that run the similar format in terms of a base rates and penalty rates applied to shifts worked. Their leave provisions are we are the same, if not better, than those agreements overall.

PN307

Thank you. Nothing further, Deputy President.

PN308

THE DEPUTY PRESIDENT: Yes, thank you. Mr Larsen, thank you for your evidence. You're excused?---Thank you.

<THE WITNESS WITHDREW

[12.21 PM]

PN309

THE DEPUTY PRESIDENT: Yes, Mr Pollock?

PN310

MR POLLOCK: That's the evidence for the applicant, Deputy President. Certainly we're content to go straight into some short primary submissions with a further hope that we can all be done by lunch or thereabouts. I've had some discussions with my learned friend, he doesn't intend to be very long at all in closing. And I will attempt to keep it brief also. So unless you've got a contrary view I'd simply propose that my learned friend – he went first in writing and should go first here and we can get through it.

PN311

THE DEPUTY PRESIDENT: Are you ready to rock and roll Mr Edmonds?

PN312

MR EDMONDS: Is it possible to have some – I think maybe five minutes just to

- - -

PN313

THE DEPUTY PRESIDENT: A comfort break. Yes. Very well. We will adjourn for five or so minutes. Thank you.

*** DAVID JOHN LARSEN

RXN MR POLLOCK

SHORT ADJOURNMENT

[12.21 PM]

RESUMED

[12.27 PM]

PN314

THE DEPUTY PRESIDENT: Yes, Mr Edmonds?

PN315

MR EDMONDS: Yes, thank you, Deputy President. I don't have much to say in addition to our submissions that were filed under this. Now, of course, there's the three issues that we have raised on those submissions. The first issue is it complies with section 182(4)(b) of the Act which is the provision of the notice itself which (indistinct) bargaining.

PN316

I don't think the parties are a part of the facts in that respect. The point we make is that we say it doesn't comply with the provisions of the Act or the reasons we have set out in our submissions. We say and probably agree that is supposed to apply around the country and not just to a particular site or a particular State. We say that the requirement of the Act that that notice should be given either to the National office or to and in addition with each State that any agreements intended to apply. And we distinguish (indistinct) Deputy President in that respect. In that particular decision the agreement the subject of that decision only applied in the State where that relevant State official was given the notice.

PN317

I don't have anything more to add to that, Deputy President. That's our submissions on that point.

PN318

THE DEPUTY PRESIDENT: Yes.

PN319

MR EDMONDS: Under public interest point we say the burden is on the applicant in this matter a factor to establish in the public interest of the agreement be approved. To the extent that the applicant relies upon the Productivity Commission reports we say that it's clear from the material that's been filed, and indeed it's clear from the evidence given today that there's a fundamental difference, we say, between the operation that will be conducted by the applicant in this matter and the container terminals referred to in the Productivity Commission report. We say that the public interest test should not rely upon – or sorry the – we say that to the extent that the applicant relies upon the Productivity Commission report that reliance is misplaced and they should establish that and (indistinct) be made and we say they simply haven't met that within today. And we're happy to (indistinct) submissions in that regard.

*** DAVID JOHN LARSEN

RXN MR POLLOCK

PN320

And the (indistinct) Deputy President is the requirement set out by 187(6) of the Act which is the Fair Work Commission must be satisfied the agreement,

considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions with the industry for equivalent work.

PN321

Also the burden falls upon the applicant to establish that. We say that the applicant sought at the first instance to point to five agreements to identify the prevailing pay and conditions in the industry. Those five agreements were set out at paragraph 10 of Mr Larsen's statement and also set out in Form 21B at 246 of that document.

PN322

We say for the purposes of identifying the prevailing terms and conditions of those five agreements the Commission should look to the two in turn agreements and should not look to the agreement that expired some two and a half years ago in the case of the Three Oceans Agreement which expired earlier on this year in the case of the Townsville agreement or which expired on the 30 June last year and was replaced in the case of the Linx Fremantle 2021 agreement.

PN323

So we're on all fours with the applicant in so far as they identify the appropriate agreement for considering the prevailing terms and conditions within the industry to be the Linx Fremantle enterprise agreement 2022 and the Qube Ports Port agreement or enterprise agreement of 2020.

PN324

Now, we went to some great effort, Deputy President, to set out an attachment to our submissions which compared the proposed agreement and there's two Fremantle Linx agreement and the Qube agreement – proceeding on a line by line basis - but on an overall basis we compare those agreements. And we say that almost every point the proposed agreement in this matter are now at a lesser rates and conditions – and other terms and conditions than the Linx Fremantle, the Qube Fremantle agreements.

PN325

At best on certain conditions they're not worse in those agreements. But we say this no substantive condition where they're actually better than those agreements. But any part the applicant (indistinct) for those two agreements and says but you're not comparing apples with apples. You're comparing apples with oranges. And with the greatest of respect that the applicant makes. The prevailing terms and conditions in the industry are 'oranges' and this applicant seeks to tell the Commission on 'apples'.

PN326

We say that the use of a base rate plus penalties and overtime throughout the agreement, as opposed to the composite rate that's set out in the Qube agreement and the agreement to Linx, is the prevailing terms and conditions of the industry. The prevailing terms and conditions is their use of a composite rate (indistinct) to employees in circumstances where they're receiving overtime delivers fairness to employees in the circumstances where they're taking annual leave which delivers benefits to employees in circumstances where they're taking

personal leave which puts those benefits to employees where they're being paid superannuation.

PN327

So even on the rates of pay the proposed agreement does not in the prevailing terms and conditions in the industry. Even on the actual rates of pay they're behind. And that's without considering the other benefits of employment which arise from the two other comparative agreements, the Linx agreement and the Qube's agreement. And those are provisions, for example, around the way allocations are done to employees such that employees are given notice – certain notice by the previous day – from the way in the middle of the (indistinct) set out by Qube and Linx are provisions made for consecutive shifts being worked. Provisions made for planned time off. Provisions made for employees to be paid when their shifts are cancelled. Provisions around the order of PIC which is instructions in such a way to ensure that the full time employees will do (indistinct) and their guarantees first – receive their pay first. The way that rostering in those two agreements is set out to ensure that fatigue is managed properly. The way annual leave is accrued. The way personal leave is accrued. The way long service leave is accrued. (indistinct) under the Linx agreement and the Qube agreement at every point.

PN328

So we say we compared the way to comparing apples with oranges. We say the prevailing terms and conditions are oranges. We say when you compare the non-rate if you will, those other conditions that don't form part of the rate of pay, the Linx agreement and the Qube agreement are substantially better than the proposed agreement in this matter.

PN329

And we also say that the applicant in this matter has got problems with the agreement. There is a requirement that this agreement passed the limit. They have problems with the (indistinct). There is provisions that are set out for the engagement and the payment of casual employees are worse than the Award.

PN330

Shift lengths under this proposed agreement can be anything the employer determines. After to 12 hours and none of those hours can be paid at overtime – for casual employees. We say that the employer has got an obligation to satisfy the Commission that this agreement passes the BOOT and we say it obviously does not.

PN331

To the extent that the employer seeks to rely upon those agreements that sets out at its annexures to Mr Larsen's statement we say that none of those agreements have been tendered – that their obligation is to actually satisfy the condition that they meet the prevailing terms and conditions. Those agreements can be set out. Those calculations have not been properly set out.

PN332

The applicant simply tendered a 500-page Productivity Commission report but didn't set out or certainly didn't provide copies of any agreements. The agreement

that it provided in this matter had been provided by the CFMMEU and all of those agreements are more favourable than the proposed agreement in this particular matter.

PN333

To the extent that the applicant certainly criticised us for not hanging on to each of those agreements chapter and verse, we say that's not our obligation. The obligation is on the applicant to satisfy the Commission that this agreement meet the prevailing terms and conditions. And it's not enough to simply say, 'Oh, well I have done the calculations. And I can tell you that they are.' That's not how this works. It's got to be set out in a proper way and it's got to be set out in a way that should properly satisfy the Commission. And we say it hasn't.

PN334

Unless there are any questions, Deputy President, they are (indistinct) to our submissions and the annexure attached to our submissions.

PN335

THE DEPUTY PRESIDENT: Yes, thank you, Mr Edmonds.

PN336

MR EDMONDS: Thank you.

PN337

THE DEPUTY PRESIDENT: Mr Pollock?

PN338

MR POLLOCK: Thank you, Deputy President. I'll deal with those matters in the same order. Dealing, firstly, with the notice point. We deal with that, of course, at Part B of the written outline of the submissions commencing at paragraph five and then through to 10. We set out five reasons why that contention is without merit. I can perhaps boil it down very simply to this, Deputy President.

PN339

Our branch is not a legal person. We know that from that MWU and (indistinct) many other cases. There was no dispute on the facts that each of Mr Cassar and Mr Tracey were given the relevant notice. They are relevantly officers of the union whose acts and states of mind were attributed to the union by operation of section 793.

PN340

Insofar as any refuge is had on Rule 42 which appears to be that which the union relies in its written submissions. Put simply that rule doesn't apply to a document that is inter partes. It's a rule that applies to the lodgement or the service of documents lodged with the Commission.

PN341

That is a point that, Deputy President Masson grappled squarely within Randstad. It wasn't a point of significance that the agreement in that case was served on an officer from that relevant branch. The point that Deputy President Masson was grappling with and was determinative of was the fact that the rule,

being Rule 42, didn't apply in that context. So my learned friend's not advanced any case in answer to that.

PN342

The one which my learned friend would have it would be in the situation where the agreement has National coverage that this notice would need to have been provided many times over.

PN343

THE DEPUTY PRESIDENT: Well, isn't the starting point, Mr Pollock, that before we get to a point where the employer gives notice that it's going to treat the agreement as made and so forth. There are discussions.

PN344

MR POLLOCK: Of course.

PN345

THE DEPUTY PRESIDENT: For the making of a proposed enterprise agreement but those discussions logically occur with an organisation that's eligible to cover.

PN346

MR POLLOCK: Correct.

PN347

THE DEPUTY PRESIDENT: Presumably those discussions – appear to have been – or appear to have taken place with the very people - - -

PN348

MR POLLOCK: To whom the notice was given.

PN349

THE DEPUTY PRESIDENT: - - -to whom the notice was given - - -

PN350

MR POLLOCK: That's so.

PN351

THE DEPUTY PRESIDENT: And there doesn't appear to be – have at any stage – Mr Tracey or Mr Cassar saying, 'No, you're talking to the wrong people.' Unless you were talking to the National office.

PN352

MR POLLOCK: That's so. And in circumstances, again, where on Mr Larson's evidence significant discussions and repeated discussions occurred during the course of the notified negotiation period, having regard to the very purpose of that notice. That purpose was discharged.

PN353

THE DEPUTY PRESIDENT: Yes.

PN354

MR POLLOCK: Yes, thank you. That's all I need to say about the first point. As to the public interest question. My learned friend appears to place all of his eggs in the basket of the Productivity Commission report. Of course, as we've set out in Part C of the submissions we don't merely rely on that document. Mr Larsen gives evidence of a range of matters which engaged the public interest criterion. As that criterion has been understood in decisions of this Commission I have particular regard to the decision of Commissioner Booth in Abbey Group and the Commissioner's reference to, amongst others, the following factors – the extent to which are approved in the agreement might minimise the potential for industrial disputation, how the terms and conditions under the agreement compare with the relevant reference award, the public interest in eliminating lost time or productivity arising out of disputes or grievances and the public interest in assisting completion of a project in time of financial targets. And also to the decision of Commissioner Johns in (indistinct) contractors and his observation that it was clearly preferable to have a Greenfields agreement in place so that there's protection for industrial action during the performance of substantive works.

PN355

Now, Deputy President, none of that's controversial. Mr Larsen's evidence engages with those sorts of factors. In my submission, plainly the approval of a Greenfields agreement which would allow a new entrant into this industry and would allow them to engage employees on terms and conditions that would provide certainty – both to the employer and to employees – and thus to the customers of that operator and to the general public whose goods are loaded and unloaded by the operator, there is a clear public interest in avoiding delays, productivity issues arising from disputation which would occur were agreement not to be in place.

PN356

Now getting to perhaps the meat of my learned friend's objections which concerns the 187(6) point, before I touch on that, Deputy President, can I just observe – my learned friend seeks – raised for the first time in his closing submissions a BOOT concern. None of that's being telegraphed in writing. It appears to be based on a fairly opaque reading of what the casual provisions say in the Stevedoring Industry Award.

PN357

Can I just draw your attention because this, of course, wasn't the subject of any cross-examination. There are provisions in the Stevedoring Industry Award I have particular regard to. Deputy President, you have that to hand?

PN358

THE DEPUTY PRESIDENT: Yes.

PN359

MR POLLOCK: 14.1(b) an employer may agree with the union or a majority of affected employees at workplace the following. Subclause (2) – changes to the length of each shift provided that the ordinary hours of work will not exceed a weekly average of 35 hours. And what then follows – back to 13.3(d) – unless

otherwise agreed in accordance with 14.1(b)(2) the normal length of a shift will be seven hours.

PN360

Now, Deputy President, I simply raise those as preliminary observations that the argument my learned friend seems to be advancing for a BOOT concern is not one that is necessarily sustained on the face of the Award. I haven't had an opportunity to carefully consider what's been put in circumstances where it's being raised for the first time in closing submissions.

PN361

THE DEPUTY PRESIDENT: Yes. Well, Mr Edmonds can correct me if I am wrong but the concern in relation to the agreement passing the better off overall test seems to be confined to casual employees. I'll come back to the shift (indistinct) from it but casual employees, the fact that there is no minimum shift engagement length for casual employees, the fact that there doesn't appear to be any provision for the payment of overtime for casual employees and there's a more general concern about the capacity for the employer to unilaterally reduce shift lengths. There's no guaranteed minimum period of shift length. Is that right?

PN362

MR EDMONDS: Yes. That's two of the issues that arise. The third issue that arises, Deputy President, is that the position or the proposed change or the undertaking or whatever is described by the company in the witness box was that overtime would be paid for casual employees in the same way that was paid for FTE and GWE employees and that is that overtime would be paid when worked outside their ordinary hours. And what arose from the way the agreement was applied is that the ordinary hours can be any hours up to 12 hours in a day.

PN363

THE DEPUTY PRESIDENT: Yes. So that the agreement has a definition of what are ordinary hours and if - - -

PN364

MR EDMONDS: Yes.

PN365

THE DEPUTY PRESIDENT: - - -an undertaking were to be given and we didn't discuss whether or not Mr Larsen was proposing an undertaking. Simply he expressed his intention to how he thought he'd - - -

PN366

MR POLLOCK: I'll address that.

PN367

THE DEPUTY PRESIDENT: Yes. But there would need to be a corresponding amendment to the definition of ordinary hours in order to meet those two provisions work.

PN368

MR POLLOCK: Yes.

PN369

THE DEPUTY PRESIDENT: Yes. No, I - - -

PN370

MR EDMONDS: Well, I don't think that would deal with the problem because the problem under the Award is of course you get ordinary hours – sorry, you get overtime after seven hours on a 12-hour shift and you get overtime after 35 hours in a week. At some point (indistinct).

PN371

THE DEPUTY PRESIDENT: I do understand that issue.

PN372

MR EDMONDS: Yes.

PN373

THE DEPUTY PRESIDENT: And I should indicate, Mr Pollock, that the issue of casuals and overtime is something on my radar also.

PN374

MR POLLOCK: Yes. And, Deputy President, I must say having reviewed the overtime clause I had the same observation that a minimum the interaction between subclause (a) and subclause (b) – (a) being confined in terms to full-timers and GWEs and so forth be arguably extending more broadly – at the very least raises an ambiguity.

PN375

THE DEPUTY PRESIDENT: Yes.

PN376

MR POLLOCK: But I think we can – that can be and will be dealt with by way of an undertaking if that remains a concern.

PN377

THE DEPUTY PRESIDENT: Yes.

PN378

MR POLLOCK: So that's all I wish to say in terms of what appears to have been the BOOT concern. It can and, in my submission, will be dealt with by way of a provision of an appropriate undertaking if that remains a concern for you, Deputy President.

PN379

The thrust of my learned friend's submissions on 187(6) – well, perhaps I will make this observation – there's no – there appears to be no challenge or there was no challenge to the submissions we have advanced in writing concerning how section 187(6) ought be construed.

PN380

Now, those submissions relevantly are set out at – this is at Part D at paragraph 19 through to 22 and is set out at paragraph 21. Now what the ordinary meaning of the composite phrase consistent with the prevailing pay and conditions would be

in circumstances where none of those terms – well, the composite phrase – nor any of its component parts are relevant defined.

PN381

And we make three points at paragraph 22. The first being that the composite phrase doesn't impose a singular benchmark nor could – or could it sensibly. Rather, what he's talking about a range or I use the colloquial terms 'ballpark' that the relevant instruments providing the prevailing pay and conditions set. And that is – and the agreement was subject to the application must be consistent in the sense of it called compatible or not self-opposed with that range.

PN382

Secondly, that comparison is on an overall basis. So there may be overs and unders with respect to particular terms or particular classes of employees. And that dovetails into the third point. In contrast to the BOOT there's nothing in 187(6) that requires that the consistency established in relation to each employee and each perspective or with that employee.

PN383

Now, of course, Deputy President that must be so in circumstances where the BOOT remains a test that is required to be satisfied with respect to an agreement made in accordance with the notified negotiation period process. That is if the same – effectively the same test and the same rigour were applied to 187(6) – requirements that would adherence to a higher standard. There really would be no material work for the BOOT to do.

PN384

We haven't heard any again saying if those submissions, in circumstances where my learned friend had an opportunity to put in submissions in reply we take that to be agreed position, at least with respect to the relevant principles. That then turns us to the question of which are the relevant instruments to provide the prevailing pay and conditions.

PN385

My learned friend has spent considerable time on two instruments. The Linx and Qube Fremantle agreements. Deputy President, in circumstances where this agreement applies nationally and where Mr Larsen's evidence is that that will apply and certainly should his enterprise be established and when work intends to operate in ports around the country, whether containerised or non-containerised, a much broader analysis provides a better comparison and better picture and that's what Mr Larsen has done by way of annexures DL1 to DL4 of his witness statement. And you will see there comparisons to some 37 enterprise agreements nationally. Now - - -

PN386

THE DEPUTY PRESIDENT: So where am I looking?

PN387

MR POLLOCK: So this is annexures DL1 and through to DL4 to the Larsen statement. And what you will see there - - -

PN388

THE DEPUTY PRESIDENT: Yes.

PN389

MR POLLOCK: - - -are comparisons to – as I said – some 37 enterprise agreements each – you will – DL1 is a rate comparison full time employees. DL2 is a rate comparison for guaranteed wage employees. DL3 is a rate comparison for casual employees. DL4 a comparison of entitlements – annual leave, personal leave, long service leave and so forth. What Mr Larsen has set out there and taking DL1 for example you will see – and this is comparing the three relevant classifications. Operator 1, Operator 2 and team leader relevantly at levels 2, 4 and 6 for Award purposes. In the green, if where the rates – and I should say the composite that the aggregated built-up composite rates that Mr Larsen has calculated and he's set out in his statement in detail how he's gone about - - -

PN390

THE DEPUTY PRESIDENT: Unfortunately my Associate has been stingy and printed out in black and white so you will have to tell me - - -

PN391

MR POLLOCK: Printed it in black and white. Well, perhaps I can indicate – and you will see this in Chambers when you review it, Deputy President, Mr Larsen set out in his statement how he's gone about creating those aggregate rates. There was no cross-examination to suggest that the way in which he built those rates up was inaccurate. It is effectively an average – take all the hours – the available hours across the seven-day period and then average out the various shift penalties and so forth that apply, then create an aggregated rate on that basis.

PN392

The analysis is intentionally conservative in that it doesn't then include other penalties and allowances that might apply. But you will see or if you were seeing – if you're watching a technicolour, Deputy President, you would see that the comparison for operator 1, so G2, the vast bulk shown up in green. There is anywhere – somewhere between – well, the range appears to be between 49 per cent above and at worst 10 per cent below. But the vast bulk are above compared to those instruments.

PN393

The comparison for Operator 2 as a G4. It's around even. There's probably a few more in which it comes under, rather than over, and then at team leader level it's of the 37-odd it is above one – it's above about 10 of those comparator agreements.

PN394

You will see across comparing to the guaranteed wage employees and to the casuals – guaranteed wage employees, again, at the lower levels at the front of the pack. For the higher levels towards the back end of the pack. But in all cases higher than at least three other enterprise agreements – operating enterprise agreements I should say.

PN395

And when one examines casuals, subject of course to where things will land with undertakings concerning overtime, but looking at the built up rates substantially ahead on all of those three classifications to a majority of the comparator agreements.

PN396

What those analyses show and perhaps before making this observation there was some cross-examination, you will recall, questions in annual leave and personal leave. Now, true it is that personal leave is paid on base rates and annual leave is paid on a base rate plus loading. We accept, of course, that compared to the Linx agreement in Fremantle, and the Qube agreement, Fremantle, the payment of those two species of leave fall short of those two agreements.

PN397

But it is ahead of – you heard evidence from Mr Larsen that it's ahead of, I think, at least three or four other agreements that he referred to Kimberley Ports, Base Marine, Townsville Marine Logistics as I recall – there may be one other.

PN398

You put those things together, Deputy President. I'm not advancing a submission, nor could I sensibly advance the submission that this agreement exceeds leave for the front of the pack across the industry, nationally. I couldn't and I wouldn't. But 187(6) doesn't require you to reach anywhere near that state of satisfaction. It requires you, in colloquial terms to – based on the nature of the work and where it's performed – examine what's the ballpark of the pay and conditions that apply. And colloquially, Deputy President, are we in the ballpark?

PN399

We're certainly in the ballpark on rates of pay, on the payment of leave, yes – we're towards the back of the pack but we're not trying to and the fact that my learned friend's selection of two agreements leaves him to a submission that we fall short on just about every measure with respect, just doesn't grapple with the enquiry that you're tasked with here.

PN400

Perhaps, just lastly Deputy President, my learned friend seems to suggest that well we should have attended some 37 enterprise agreements and the analysis of those matters fall short. As to the first again, Deputy President, these are publicly available documents.

PN401

It's been apparent from the filing of our written materials that we were relying on those instruments. There was no cross-examination on Mr Larsen's analysis of those things. It was certainly open to my learned friend to have tested any of that in his written materials in reply. It was open to my learned friend to test that in cross-examination.

PN402

We see no impediment in relying on the analysis of those enterprise agreements. They are squarely, we say, relevant in the context of determining the prevailing pay and conditions.

PN403

Now, Deputy President, that's all I wish to say orally of course. You have indicated, at least on a provisional level, that there may be some areas of which you might have a pre-approval concern. You have heard from – perhaps speaking in less direct terms that Mr Larsen has indicated – but on several issues and casuals both perhaps questions around the North-west allowance there may be areas in which an appropriate undertaking can be fashioned. We would obviously seek the opportunity to provide that undertaking.

PN404

THE DEPUTY PRESIDENT: Yes. Although the issue of the North-west allowance really isn't a BOOT issue. So I'm not sure I'm capable of - - -

PN405

MR POLLOCK: It's not – it would not be a BOOT issue.

PN406

THE DEPUTY PRESIDENT: So I'm not sure I can accept an undertaking in relation to that because it's not a concern in the 186 or 187.

PN407

MR POLLOCK: That – well it would be under 187. If you were to form the view, Deputy President, that the non-provision of the North-west allowance was something that rendered this agreement, not consistent with the prevailing pay and conditions.

PN408

THE DEPUTY PRESIDENT: Yes.

PN409

MR POLLOCK: That would be a 187(6) issue and thus would be - - -

PN410

THE DEPUTY PRESIDENT: Yes. Sorry. Yes.

PN411

MR POLLOCK: - - - capable of undertaking. Now, of course, it may well be, Deputy President, that you form the view consistent with what I'd set out by way of the approach that there are overs and unders for - - -

PN412

THE DEPUTY PRESIDENT: Yes.

PN413

MR POLLOCK: - - -particular types of employees that it may rise to a level of giving you a concern.

PN414

THE DEPUTY PRESIDENT: Although in light of paragraph 31 of Mr Larsen's witness statement he clearly wants to – or he has a vision for his business to operate in those areas.

PN415

MR POLLOCK: Yes.

PN416

THE DEPUTY PRESIDENT: So it may be a material matter.

PN417

MR POLLOCK: Speaking frankly, Deputy President, if you were to form a concern about that I'd rather suspect that undertaking will be proffered. That's all I wish to say - - -

PN418

THE DEPUTY PRESIDENT: Yes.

PN419

MR POLLOCK: - - -unless there's anything else I can assist?

PN420

THE DEPUTY PRESIDENT: Yes. Thank you.

PN421

MR POLLOCK: Thank you.

PN422

THE DEPUTY PRESIDENT: Anything in reply Mr Edmonds?

PN423

MR EDMONDS: Not at this point, thank you, Deputy President other than to observe that if you were to form a view about certain matters that my friend would seek to provide (indistinct) we would seek to be heard in relation to that matter (indistinct).

PN424

THE DEPUTY PRESIDENT: Yes, I understand. Well, what I would propose to do is to give consideration to these matters after we adjourn, set out a decision on the issues that are in dispute, as well as the other matters about which I need to be satisfied and to see if there's any concern about a matter – an approval matter in 186 or 187 – I'll set those out in the decision. And as I do consistently in relation to other agreements I'd give the applicant an opportunity to furnish any undertaking that might assuage that concern. And in that process, Mr Edmonds, your views will be sought in that normal consultation process.

PN425

In short compass, if undertakings are proffered your views will be sought in the normal consultation process.

PN426

MR EDMONDS: Thank you. Yes.

PN427

THE DEPUTY PRESIDENT: All right. Is there anything else then by way of reply, Mr Edmonds? No? Thank you.

PN428

MR EDMONDS: Nothing further, thank you Deputy President.

PN429

THE DEPUTY PRESIDENT: Thank you. All right. Well, I thank the parties for the helpful written and oral submissions and I propose to reserve my decision. I will publish my decision as soon as practicable. We're adjourned. Have a good weekend.

ADJOURNED INDEFINITELY

[1.09 PM]

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