



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER BISSETT**

D2023/1

s.94(1) RO Act - Application for ballots for withdrawal from amalgamated organisation

**Application/Notification by Jolly
(D2023/1)**

Melbourne

10.00 AM, MONDAY, 11 SEPTEMBER 2023

Continued from 06/06/2023

PN393

JUSTICE HATCHER: We'll take appearances. Mr Borenstein and Mr Bakri, you continue appearance for the applicant?

PN394

MR H BORENSTEIN: We do, your Honour.

PN395

JUSTICE HATCHER: And Mr Dowling and Mr Massy, you continue to appear for the RTBU?

PN396

MR C DOWLING: We do. Thank you, your Honour.

PN397

JUSTICE HATCHER: All right. So Mr Borenstein.

PN398

MR BORENSTEIN: Yes, your Honour. Your Honour, we have received notification from our friends made on Friday that they wish to cross-examine Mr Jolly on his statements, and it may be that we will want to cross-examine Mr Sharma, depending on what emerges from that cross-examination.

PN399

So can I start, your Honour, by – I don't need to remind the Bench about the history in this matter you've recorded in your recent decision in July, and so what I'd simply like to do at this stage, if the Commission pleases, is to indicate the documents that we've filed and then tender the witness statements, and then Mr Dowling can do his cross-examination, if that's a convenient course.

PN400

JUSTICE HATCHER: Yes.

PN401

MR BORENSTEIN: The Commission will recall that on 26 April of this year Mr Jolly filed an amended application, and that relied on the statement which he made on 3 April 2023. Part of that statement was disallowed in your previous decision, specifically paragraphs 86 to 222, and so we seek to tender that statement, subject to those disallowances.

PN402

JUSTICE HATCHER: Yes.

PN403

MR BORENSTEIN: We take it that it's not necessary to formally tender the outlines of submissions.

PN404

JUSTICE HATCHER: No, it's not.

PN405

MR BORENSTEIN: Then there is a second witness statement of Mr Jolly, which was filed on 6 September 2023, and we seek to tender that statement as well. We have no other evidence to tender at this stage.

PN406

JUSTICE HATCHER: The witness statement of Paris Jolly dated 3 April 2023, excluding paragraphs 86 through to 222 inclusive, will be marked exhibit A, and the further witness statement of Paris Jolly dated 6 September 2023 will be marked exhibit B.

**EXHIBIT #A WITNESS STATEMENT OF PARIS JOLLY DATED
03/04/2023 EXCLUDING PARAGRAPHS 86 TO 222 INCLUSIVE**

**EXHIBIT #B FURTHER WITNESS STATEMENT OF PARIS JOLLY
DATED 06/09/2023**

PN407

MR BORENSTEIN: Thank you, your Honour.

PN408

JUSTICE HATCHER: (Indistinct)?

PN409

MR BORENSTEIN: Yes, your Honour.

PN410

JUSTICE HATCHER: Do you want to call Mr Jolly now?

PN411

MR BORENSTEIN: Yes. Mr Jolly's in the court room.

PN412

MR DOWLING: Your Honour, could I just make one statement so that everybody's position is clear prior to Mr Jolly being examined? We have understood from paragraph 5 of Mr Jolly's statement and paragraph 50 of Mr Jolly's outline in reply that the applicant for present purposes and to avoid any overlap with the Federal Court proceeding does not contest our proposition that the 2017 resolution was passed in breach of the union rules, and that the payments made pursuant to it were also in breach of rule.

PN413

I wanted to put that on the record to make it clear that we have understood things correctly in respect of the concession made, and can I say that in those in circumstances, or in the circumstances of that concession, we do not propose to, because we do not need to, cross-examine Mr Jolly on the facts supporting why those payments were in breach of the union rules. I wanted to make that position clear before it was that my learned friend examined Mr Jolly.

PN414

JUSTICE HATCHER: Is that the position, Mr Borenstein?

PN415

MR BORENSTEIN: It is, your Honour.

PN416

JUSTICE HATCHER: Yes, all right.

PN417

MR BORENSTEIN: Our position is as spelt out in the documents that Mr Dowling's referred to in paragraph 5 of Mr Jolly's second statement and in the outline of submissions.

PN418

JUSTICE HATCHER: All right. Thank you. We'll swear Mr Jolly in.

PN419

THE ASSOCIATE: Can you please state your full name and your address?

PN420

MR JOLLY: Paris Martin Jolly, (address supplied).

<PARIS MARTIN JOLLY, AFFIRMED [10.08 AM]

EXAMINATION-IN-CHIEF BY MR BORENSTEIN [10.08 AM]

PN421

MR BORENSTEIN: If the Commission pleases, we have a folder which contains the copies of Mr Jolly's two statements, which we'd seek leave to show him so that he can affirm them.

PN422

JUSTICE HATCHER: Yes. Yes, we'll provide that to the witness, please.

PN423

MR BORENSTEIN: Mr Jolly, the folder we've handed to you contains two statements. Could you look at the first of the statements, which I think is – the first of the statements is a statement that's dated 3 April of this year and it runs into some 60 pages; do you have that there?---Yes.

PN424

Do you recall preparing that statement for this case?---Yes, I do.

PN425

Leaving aside paragraphs 86 to 222 of that statement, are you able to tell the Commission whether the contents of the statement are true and correct?---Yes, the contents are true and correct.

PN426

Can I then ask you to look at the second statement, which is dated 6 September 2023?---Yes.

*** PARIS MARTIN JOLLY

XN MR BORENSTEIN

PN427

Is that a statement that you prepared for this case in recent times?---Yes, it is.

PN428

Have you had a chance to look at that statement recently?---I have, yes.

PN429

Can you tell the Commission whether the contents of the statement are true and correct?---Yes, the contents are true and correct.

PN430

Thank you. Thank you, your Honour.

PN431

JUSTICE HATCHER: Mr Dowling.

PN432

MR DOWLING: Thank you, your Honour.

CROSS-EXAMINATION BY MR DOWLING

[10.11 AM]

PN433

MR DOWLING: Mr Jolly, the division employs amongst other people Ms Vardi as its lawyer?---Yes, that's correct.

PN434

And she is, I take it, essential to the proper functioning of the division?---She is, yes.

PN435

And without her you would not be able to properly promote and protect the economic and social interests of the members of the division?---She definitely assists us in doing that.

PN436

There are a number of other paid officials, is that correct?---That's correct.

PN437

And one of those is you?---Yes.

PN438

As the division secretary?---Yes.

PN439

And another is Mr Chrysostomou as the assistant secretary of the division?---That is correct, yes.

PN440

The division also has administrative staff?---Yes, they do.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN441

It has a Ms Ignatidis as the office and compliance manager?---Yes.

PN442

And recently Ms Vyndwinne as an administrative assistant?---Yes.

PN443

Until recently it also employed Mr Marotta as an executive officer, is that correct?---Yes, that's correct.

PN444

It sometimes pays its branch divisional committee members, is that right?---Yes.

PN445

What's the criteria as to when it pays them and when it doesn't?---The enterprise agreements allow for the companies to pay the representatives if they're on work time to represent the members, which happens most of the time, but if there's no rep available and the local reps are on a day off, then we will pay them for lost time.

PN446

So if they're not paid by the company, then the division will pay for their attendance at a committee meeting?---That's correct.

PN447

Should we understand that all of those people that we've just discussed are necessary for the proper functioning of the division?---They all definitely assist in the division running, yes.

PN448

And they all assist and are necessary to properly promote and protect the economic and social interests of the division members?---If there wasn't one particular one, depending on which one you're saying, there may not need to be all of them.

PN449

Well let's focus on the paid officials. They are essential to promote and protect the social and economic interests of the members, both you and Mr Chrysostomou?---Yes.

PN450

And the lawyer, Ms Vardi?---Yes.

PN451

There are other expenses I assume it is fair to say that are necessary to keep the division operating?---Yes.

PN452

That would include utilities, for example, electricity and water of course?---Yes, of course.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN453

Internet fees, yes?---Yes.

PN454

Petrol for the motor vehicles that are used by the division?---They're covered in the wages. So we have our own cars. We don't have cars anymore.

PN455

And those utilities and internet fees, for example, again are all necessary costs that must be incurred by the division to enable it to do the work it does?---Yes.

PN456

Presently, is it correct that many of the expenses of the division are paid for by the branch and then the branch invoices the division for its share of those expenses?---There's only a small percentage of those expenses are paid for by the branch.

PN457

You have attached I think what might fairly be described, at PJ41 to your second statement, and I'll take you to it in a moment, an account summary of what you described as the invoices that make up the invoices that you receive from the branch in respect of divisional share. Do you recall doing that?---Yes.

PN458

I wonder if I could show you a document, please. Do you have there on the first page an email from an address described as, 'RTBU Accounts', and addressed to you, do you see that, and it's dated 13 April of this year 2023?---Yes.

PN459

The subject matter is, 'March 2023 Branch Reimbursement', do you see that? I'm still on the first page?---Yes.

PN460

'March 2023 Branch Reimbursement', do you see that?---Yes, I do.

PN461

And it says, 'Please find attached correspondence and reimbursement information for March 2023'?---Yes.

PN462

And then behind that first page is a letter to you from Mr Sharma, do you see that?---Yes.

PN463

And then the next page is an invoice?---Yes.

PN464

Described as a 'Tax Invoice', and it's directed to 'The RTBU Vic Locomotive Division', do you see that?---Yes.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN465

And then the next page after that is a document which is headed at the top, 'Branch Allocation Locomotive Division for the month ended 31 March 2023?'---Yes.

PN466

And then behind that, if you go to the next page – I won't take you to every page, but if you can go to the next, there's a document from the State Revenue Office addressed to the Australian Rail, Tram and Bus Industry Union Victoria. Do you see that?---Yes.

PN467

There are three items for payroll tax. Do you see those?---Yes, I do.

PN468

The last of those items is identified as 'Payroll tax loco' and the amount is \$3,721.96. Do you see that?---Yes.

PN469

Do you understand that to be your share of payroll tax, or the share of payroll tax, of 3,700-odd payable by the locomotive division?---Yes.

PN470

Is it correct to describe what you have there before you, that pack of documents – and please feel free to go through the balance of the documents that I've not taken you to – are what the division receives from the branch each month to identify for the division its share of branch expenses?---Sorry, I'm just going through the document.

PN471

Certainly?---From what I understand, this is what's provided – or has been provided in the last few months, except for last month. It was slightly different to this as well.

PN472

Let's concentrate on the month we're looking at for the moment. This is the pack, if I can call it that, received by the division in April of this year in support of the March 2023 share of the division's expenses that it owed to the branch?---Yes.

PN473

Can I suggest to you that the practice now is that for each month the branch will provide to the division a pack similar to this, not exactly the same but similar, setting out the basis for their share of the branch's expenses?---Yes.

PN474

Can I please tender that, your Honour?

PN475

JUSTICE HATCHER: Any objection? We'll call this one – what shall we call this, Mr Dowling?

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN476

MR DOWLING: If we could call it the March 2023 shared expenses pack.

PN477

JUSTICE HATCHER: The March 2023 shared expenses pack bundle of documents will be marked exhibit C.

EXHIBIT #C MARCH 2023 SHARED EXPENSES PACK BUNDLE OF DOCUMENTS

PN478

MR DOWLING: Thank you, your Honour. Can I ask you to go back to your statement, please?---Sorry, the first or second?

PN479

The second?---The second.

PN480

Thank you. And to the exhibit PJ41. In PJ41 – do you have that?---Yes.

PN481

Thank you. You have attached as part of PJ41 the branch allocation document, which is one of the documents in the pack that we've gone to, for each of the six months of January, February, March, April, May and June of 2023?---Yes.

PN482

Could you go to March, please?---Yes.

PN483

That's a document headed at the top Branch Allocation Locomotive Division for the month ended 31 March 2023. Do you see that?---Yes.

PN484

That is the same as the document within the pack that we looked at. Do you agree with that?---If you say so. I would have to cross-reference it.

PN485

Trust me on that one?---Yes.

PN486

Thank you. You see under Operating Expenses the first item is 'Payroll tax'. Do you see that?---Yes.

PN487

You'll recall we went to a document from the State Revenue Office. Can I just ask you to clarify, please, that figure there you understand to represent the payroll tax payable by the division for the payroll of its employees?---Yes.

PN488

That's the figure of \$3,721.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN489

JUSTICE HATCHER: Employees within the locomotive division.

PN490

MR DOWLING: Yes?---Yes.

PN491

Do you understand that to be so?---Yes.

PN492

You see the next item, 'Affiliation fees and levies', \$7,188.68?---Yes.

PN493

You understand that to be the division's share of the affiliation fees and levies for affiliation with the ACTU and Trades Hall?---Yes.

PN494

The third item, 'Computer and technology costs', you understand that to be the division's share of the branch's total computer and technology costs. Yes?---Yes.

PN495

You understand all of those to be payable by the division to the branch?---That's correct.

PN496

Can you then go ahead in your PJ41 to April of 2023, and you see under Operating Expenses there's another payroll tax item?---Yes.

PN497

For 4,300, this time. The next item is 'Accounting and audit fees'. Do you see that?---Yes.

PN498

You understand that to be the division's share of the accounting and audit costs incurred by the branch as a whole?---The yearly audit that was conducted, yes.

PN499

Thank you. Then, the last item, there's another affiliation fees and levies. That's the same as the one we looked at in the past. That's the division's share of the affiliation fees paid by the branch?---Yes.

PN500

If you can go ahead to May, you'll see the operating expenses again in the May document?---Yes.

PN501

You see the first is payroll tax again, accounting and audit, affiliation fees, donations. Can I come to the one identified as 'Insurances and WorkCover'. Do you see that?---Yes.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN502

That's a figure of \$6,204.96?---Yes.

PN503

Again, you understand that to be the division's share of the insurances and WorkCover paid by the branch?---Yes.

PN504

The next item, 'Motor vehicle MM loco', do you see that?---Yes.

PN505

Should we understand that that is the division's share of motor vehicle expenses incurred by MM?---That's correct.

PN506

And MM would be Marc Marotta?---Yes.

PN507

Then the last item, 'Seminars, conferences, training and meetings', again, that's the division's share that it owes the branch for the total cost paid by the branch of seminars, conferences, training and meetings?---That the branch attended, yes.

PN508

Now if you can go then to June, so that's the last of your documents, headed Shared Expenses, Locomotive Division, for the month ended 30 June 2023 at the top. Is that the document you have?---Yes.

PN509

You will again see payroll tax, accounting and audit fees, affiliation fees, computer and technology costs, and this time there's an additional item that we haven't seen before, 'Land tax'. Do you see that?---Yes.

PN510

Again, you understand that to be the division's share of the land tax paid by the branch?---Yes.

PN511

So we've seen from this process that what the division receives is a letter, an invoice, an accounting spreadsheet, and then some additional documents, or primary documents, to make good the items that are listed as the expense. That's the process?---That's what they sent through this year, yes.

PN512

Then what happens is the division pays that invoice. Is that correct?---Yes.

PN513

At paragraph 17 of your reply statement, you have listed there for the years 20, 21 and 22, income and expenses and surplus. Do you see that?---Yes.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN514

If you look at 2022 for a moment, can I suggest to you that the division has not paid its share of the branch's expenses to a total of \$168,608.83. Do you know whether that's right?---I don't believe that to be correct. There is a portion that hasn't been paid.

PN515

Perhaps I can assist you. In 2022 there was an invoice from January to March of 12 and a half thousand. Do you recall whether that was paid?---Sorry, I missed that question.

PN516

Perhaps I can show you a document which might assist. What this is, can I suggest to you, is an accurate list of all of those invoices forwarded from the branch to the division that had not been paid, and we were talking about 2022 so let's start there. You see January to March of 2022 there was an invoice numbered 309 for 12 and a half thousand – 12,501.34. Can I suggest to you that that amount remains unpaid?---So prior to the end of this year I wasn't the secretary, so in terms of what invoices were paid, I'm not sure. I understand there was numerous disputes regarding invoices, and that went to employees and requests for information, and I understand there was numerous letters sent regarding further information for certain bills to be paid.

PN517

If we just focus on 2022, you see there are nine invoices that this document describes as outstanding, or with outstanding amounts. Are you able to say – sorry, there are 10. My apologies. Are you able to say whether that is accurate or not accurate?---If they're the figures that are in there and if they haven't been paid – if you're saying they haven't, I acknowledge that - - -

PN518

You have no reason to doubt that they're not paid?---I don't, no.

PN519

Tell us if you are not the best person to answer this question. Is there someone else from the division that might be better placed to describe whether these amounts have been paid or are unpaid?---So from what I understand is we did a - - -

PN520

Sorry, just deal with one question at a time?---Sorry.

PN521

Can you answer that question first? Is there someone better placed than you to say whether these invoices are outstanding or not?---I believe I can answer some of the questions, yes.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN522

So if you can answer the questions, can you tell us whether it is accurate that in fact those 10 invoices for 2022 are still unpaid?---I authorised some of the payment towards the start of this year, however what I understand is that there

was an issue with the banking that I've only just become aware of late last week, that they bounced. So there's a number of payments that bounced. One of those was the 2022 reconciliation, because we were waiting for numerous documents prior to being able to pay a lot of these bills.

PN523

Is it your evidence that in fact you endeavoured to pay those 10 invoices but you were just unsuccessful or that in fact some of them still remain outstanding, to the best of your knowledge?---In terms of the 10, I'd have to go back and check the documents, but there was a reconciliation that was taking place and we authorised payment of a lot of that. I won't say all of that, because there was still some dispute over employees. We were charged for numerous employees that weren't part of the branch, they were actually part of the rail division. We were charged \$2500 for a party in the middle of COVID – entertainment, I think it was classed as – in the middle of COVID, so we are still looking for further information on a lot of that. It was partially authorised - - -

PN524

Well, can I suggest to you - - -

PN525

JUSTICE HATCHER: Sorry, Mr Jolly, when you said payments that you authorised bounced, what do you mean by that?

PN526

THE WITNESS: So last week, when the compliance – it was either Thursday or Friday of last week when the compliance manager was going through a lot of the finances in preparation, she made me aware that there was – the December or the 2022 reconciliation that we were going to pay; she'd processed it, but it went to the bank and it didn't go through for whatever reason. There was another payment that that happened as well, however there was a payment in between that went through so we're still – we're not sure why they didn't go through.

PN527

JUSTICE HATCHER: Well, were there sufficient funds in the accounts to make the payments?

PN528

THE WITNESS: Yes, yes. Yes. \$2.6 million.

PN529

JUSTICE HATCHER: Well, you say there's a contest about some amounts. We started this exercise with March of this year. You're not aware of any reason that the branch should not pay its proportion of the payroll tax for that month of \$3721 that you saw on the state revenue office document?

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN530

THE WITNESS: No. There is some dispute about – and we've requested it, on numerous occasions, to provide more information regarding the wages because we

still have those concerns that we've been charged for people that aren't actually branch employees and we're not sure who. Up until, I think, it was last - - -

PN531

MR DOWLING: Are you saying, in respect of the March document from the state revenue office of \$3721, you have some basis for saying that the division shouldn't pay it?---If the revenue is just for our employees, no.

PN532

Well that's what it said - - - ?---We should pay it.

PN533

- - - didn't it?---That's – it didn't say – it's the shared expenses, yes.

PN534

It should be paid?---Yes.

PN535

You saw in March the affiliation and levies proportion of \$7188? There's no basis for not paying that amount either, is there?---No.

PN536

The computer and technology costs of \$2200, there's no basis for not paying that amount either, is there?---No, as long as they're just the membership database.

PN537

The insurances and WorkCover amount that we saw - - -?---Mm-hm.

PN538

- - - in respect of May for \$6200, there's no basis for not paying that amount?---No.

PN539

The land tax that we saw from June of \$7786, there's no basis for not paying that amount?---No.

PN540

So when, at paragraph 17 of your statement, in the year 2022 for starters, you identified \$1.545 million dollars in expenses, should we understand that you did not include in that the expenses that we're looking at because you haven't paid them?---Sorry, I missed the table that you were talking about in the response.

PN541

We are now at paragraph 17 of your statement?---Yes.

PN542

If you go to the top of page 5, there's a table there that you set out, and you see in the fourth column is the item 'expenses'?---Yes.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN543

The expenses that you have not paid for the 2022 year, they would not be included in that 'expenses' item of \$1.545 million, is that right?---That's correct.

PN544

If the evidence is that there's \$168,000 that remains unpaid in terms of expenses, we would have to add that to the 'expenses' column for 2022?---If that is the figure and if those payments are then authorised – if they're actually expenses that are incurred by our division – yes.

PN545

We would have to deduct it from the 'surplus' column?---That's correct.

PN546

You'll see from the last document that I handed you which is the 'Locomotive Division invoices and payments' document, or the document headed that way, it describes a total owing of \$267,759.88 as outstanding, do you see that?---Yes.

PN547

Are you able to say whether that is accurate?---With – I'm assuming those figures add up to that point, but whether they're amounts that the division should actually pay, depending on what the charges are. So, it would depend on if it's employees correctly been charged to us or particular bills that have been charged to us. So, some of the bills we were charged for were Rail Division t-shirts that had the Rail Division on it, expenses for the Rail Division organisers for motels, those sorts of things.

PN548

If you accept, for present purposes – for my question – that the \$267,000 is still outstanding, you accept that that should be added to the 'expenses' column for those years – '21, '22, and '23 – and would come off any surplus in respect of those same years?---Yes, if the payments are correct.

PN549

All right.

PN550

JUSTICE HATCHER: Surely not the whole of the amount of each of the years, the proportional amounts - - -

PN551

MR DOWLING: Yes, yes. No, no, that is right. I'm not suggesting that amount per year, that's a proportion over those three years. Now, some of the expenses we've looked at you have accepted, as I understand it, that they are shared expenses and your share of the total expenses incurred by the branch?---Some of those, yes.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN552

Yes. Of course, if the division was to operate as a separate union, you accept that, of course, it would still incur its own expenses, yes?---It would incur some expenses, yes.

PN553

Of the ones that we've been looking at, for example, it would continue to incur payroll tax, yes?---Yes.

PN554

It would incur fringe benefits tax?---Potentially. At the moment we've got no cars, so no.

PN555

It would certainly be required to pay insurance?---Yes.

PN556

By insurance, I include WorkCover premiums as well, yes?---Yes.

PN557

Public liability insurance?---Yes.

PN558

Offices insurance?---Yes.

PN559

Car insurance?---We've got no cars.

PN560

In that case – but do you intend to have cars if you were to operate as a separate union?---I utilise my own car and so does Mr Chrysostomou.

PN561

Sorry, I didn't - - - ?---I utilise my own car and so does Jim Chrysostomou.

PN562

Right, and that's what you propose, is it?---All right. You would expect that you would pay ACTU and Trades Hall affiliation fees?---That would be a decision for the union but, more than likely, yes.

PN563

Of course, you'd have to pay auditor expenses?---Yes.

PN564

Of course, you would have to add all of those expenses to the wages bill of the persons that we discussed at the very outset of my questions to you? At least you and Mr Chrysostomou, yes?---I'm not – I don't quite understand that question, sorry.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN565

If the division was to operate as a separate union, it would have a wages bill?---Yes.

PN566

It would employ, most likely, a secretary and would pay that secretary?---Yes.

PN567

An assistant secretary and pay that assistant secretary?---Yes.

PN568

We'd expect it, as it does as a division, would employ a lawyer and pay that lawyer?---Yes. Yes.

PN569

All right. It has, presently, two people in administrative roles. We'd expect that it would continue to have at least those two?---Yes.

PN570

So, it would have the wages bill of all of those people?---The same as it does now, yes.

PN571

Of course, in respect of those staff, does the division make provision for payment out of unused annual leave?---Sorry?

PN572

Does the division make provision for the unused annual leave that it is going to have to pay its staff if they are terminated or if their employment comes to an end?---Yes.

PN573

Does it make provision for unused long service leave?---Yes.

PN574

Does it make provision to pay out unused sick leave?---We have recently, yes.

PN575

When you say recently, you mean you've recently made provision or you've recently paid out unused sick leave?---Recently paid out.

PN576

Do the officials have an entitlement to be paid out unused sick leave?---An entitlement in terms of an enterprise agreement or - - -

PN577

Yes. Is there an enterprise agreement entitlement to be paid out unused sick leave for your officials?---Not for the union. The union officials, there's no enterprise agreement.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN578

Is it a contractual entitlement to be paid out unused sick leave?---I'm not aware of any contractual agreements that we've entered into apart from being voted into the positions.

PN579

But you say you've recently made provision for it? Should we understand that to mean you have also recently paid out unused sick leave, have you?---Yes.

PN580

Are you not able to point to – Was that a payment made to Mr Marotta?---Yes.

PN581

Was that a payment of \$67,000 for unused sick leave?---I'd have to check the figure, but that sounds pretty close, yes.

PN582

Are you not able to point to any contractual basis or enterprise agreement basis on which you paid that amount?---I'm not aware of any policies or procedures regarding our wages or leave.

PN583

Who should we speak to about that? Who is the proper person to speak to about that?---I haven't seen anything from a national level down regarding any of our wages. I understand that - - -

PN584

I'm asking about the division's wages and what the division does. Who is the person to speak to in the division about whether provision is made for unused sick leave?---Who – the committee.

PN585

All right, but nevertheless, of all of the things you are budgeting for, you are now going to budget for the payment out of unused sick leave; is that right?---It would be contained within the accounts.

PN586

Of course, on top of the expenses that I've identified and the wages bill, there's also the other items that we discussed at the start – utilities, electricity, water, internet; those things?---Yes, that's correct.

PN587

Now if we assume as you have, for the purposes of this case, that the moneys paid directly to the division by its members were paid in breach of the unions rules and should not be in your bank account; can I suggest to you that the result of that would mean that, when the division was to start operating as its own separate union, there would be no money in its bank account. Do you agree with that proposition?---If what you're saying is – that we didn't carry forward the money that we had, the membership subscriptions would then flow in and continue as an income stream.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN588

Well, listen carefully to my question. I'm suggesting to you that as at day 1 - if we're right and the money paid to you was paid in breach of the rule – as at day 1, there would be no money in your bank account, correct?---There'd be legal levy, I think, because that's not the subscriptions.

PN589

At this stage, you've just started day 1, you haven't levied anyone or sent anyone a subscription notice, here you are on day 1. There is nothing in your bank account as at that point, correct?

PN590

MR BORENSTEIN: Your Honour, I object to this. The witness is being asked to speculate about something that has much greater nuance than the way in which Mr Dowling is putting it to him, and you will have seen in our outline of submissions that we made submissions about how this money might or might not be treated on the withdrawal, having regard, in particular, to the role of the Federal Court under section 109. It is misleading and it is unfair to the witness to put a question to him ignoring all of that, and the answer to the question can't assist, in any event.

PN591

JUSTICE HATCHER: Yes, Mr Dowling, for myself, I'm not entirely sure the premise of that question is correct and is having regard to the role of the Federal Court under the Act to resolve difficulties that arise if the ballot went through and got up. I'm not sure that that would necessarily be the case.

PN592

MR DOWLING: Well, my question was carefully premised on the concession that is made in this case, in our learned friend's words, 'So as to avoid an overlap with the Federal Court proceeding.'

PN593

JUSTICE HATCHER: I'm not talking about the Federal Court proceeding, I'm talking about what would happen post the ballot, if there was one, and if it was in favour of dis-amalgamation in terms of division moneys and assets, and the role that the Federal Court might play in resolving any difficulties in that dispute.

PN594

MR DOWLING: Well - - -

PN595

JUSTICE HATCHER: That is, it might be that moneys are apportioned – if it is not resolved by agreement – there might be an order from the court that moneys are apportioned to the division, notwithstanding any issue about compliance or non-compliance with the rules previously. Is that a possibility?

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN596

MR DOWLING: That may be so, but the question is premised only on the concession made in this case and the concession made in this case and the premise

of my question is: if that result is right and no apportionment is made and all of the amount is in breach of rule then that's the scenario. That's the framework for the question, and having made that clear, we say it is a relevant and fair question.

PN597

JUSTICE HATCHER: All right. I think if you want to press the question you'll need to put it in a different form that properly makes clear all those aspects of the premise.

PN598

MR DOWLING: Can I just make clear, Mr Jolly, that the premise of my question is this, that you, through your lawyers and through your statement in this case, have accepted, for the purposes of this case, that any moneys paid to it as a result of the 2017 resolution is in breach of the rules of the union. That's the first part of my question. You understand that, and that's correct?---Yes.

PN599

My second is, in circumstances where those payments were made in breach of the rule, what I'm suggesting to you is one scenario, and it's the scenario on which I posit this question, is that the division ends up with no money in its account on day one. You understand that's the premise of my question. You understand that?---Yes.

PN600

Those two things being the premise of my question, what I'm suggesting to you is that on day one there's zero in the account. You understand?---Yes.

PN601

You have not on day one levied or sought dues because you haven't started operating. Do you follow?---Yes.

PN602

But on day one you will have all of the expenses that we have been discussing. You understand that?---They won't be payable – tax won't be payable straightaway, the phone bill won't be payable straightaway, the water bill won't be payable straightaway.

PN603

Wages will?---All those come afterwards so - - -

PN604

Wages - - -?---Yes. Wages will be, yes.

PN605

Wages will, won't they?---Wages will be.

PN606

People expect to get paid on day one?---No. You get paid on – either weekly or fortnightly. So you don't get paid in advance, you get paid after you've done the work.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN607

Are you a week in advance and a week in arrears, your current pay rate?---Sorry?

PN608

Is your current pay a week in advance and a week in arrears?---You get paid after you do it, yes.

PN609

I'm suggesting to you is it one week in advance and one week in arrears, or do you not know?---No. We get paid weekly at the moment, yes.

PN610

Let's get to the end of the first week then?---Yes.

PN611

Can I suggest to you that you will not be able to pay the wages at the end of week one?---With getting the membership base up really quickly, so to be set so that we've currently got a membership database, those payments would continue to flow through pretty much instantly.

PN612

You're not expecting that you would have got dues in by the Friday of the first week, are you?---It could be the case, yes, depending on what part of the month. So the dues are calculated on a fortnightly basis and they come in straightaway, and that would continue - - -

PN613

JUSTICE HATCHER: Just so I understand, fees are paid by payroll deduction on a fortnightly basis, are they?---The fees are paid straight from bank deductions.

PN614

Their bank?---Our fees are paid straight through. Yes. Some members pay cash and they'll come in and pay a lump sum for the year. So a member could come in in the first week and go, bang, 'Here's the yearly payment.' If not, it would just flow just straight on and you would be paid. So quite possibly we could have definitely the wages – the money there to pay the wages.

PN615

MR DOWLING: Can I suggest to you that in 2022 your monthly income from subscriptions was about 165,000? Does that sound right to you?---You'd have to take me to the document.

PN616

Are you able to say approximately or not at all?---It'd be approximately that, I think, yes.

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN617

Can I suggest to you that of the items that we have described, that that figure would be about \$140,000 of ongoing expenses? Are you able to agree or disagree with what your ongoing expenses might be on a monthly basis?---I think they

potentially would be less. We wouldn't have some of the fees that – of the shared expenses that the branch charges us.

PN618

Have you prepared a budget for what your annual subscriptions would be if you were to form your own union and what your annual expenses would be?---The expenses would be consistent with what the - - -

PN619

That's not my question. Have you prepared a budget as to what your subscription fees would be and what your expenses would be?---No.

PN620

From what you know about your existing subscription fees and your existing expenses, is it fair to say that those two figures are quite close? What you get in in a month is very close to what you would spend in expenses a month?---No. We normally run at a reasonable profit for the year.

PN621

What do you think that monthly surplus might be?---If we break down the figures in the table from the 2020, 21 and 22 at 17 by 12, that would give the monthly expenses. I haven't got a calculator to tell you exactly, but they're done on a 12-month basis.

PN622

But we know that surplus figure is inaccurate, don't we, because it doesn't include the expenses that are properly incurred but not paid. Is that right?---I'm not sure if they're properly incurred, but some of them aren't paid.

PN623

If, in circumstances where your subs are coming in to meet your expenses and the union was a respondent in a large piece of litigation, would it be fair to conclude that you would not be able to fund that litigation?---No.

PN624

Is it fair to suggest to you that in bargaining there is at least a prospect that you might face litigation from the employer?---We haven't before, the branch has, but it's possible.

PN625

Yes. That's certainly something that you'd have to budget for and factor in, the possibility that you are a respondent to litigation and you'd have to try and fund it in some way?---Yes.

PN626

And I'm suggesting to you that on the margins we're talking about at the moment, you would not be able to do so?---Starting at zero, are you saying, or - - -

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN627

Yes?---The membership money would still come in and we'd still have the buildings and rent coming in from the buildings, so I think we're in a very good financial position.

PN628

But you haven't carried out a budget to work out just exactly what that financial position might be?---No, but I understand what comes in and I understand what assets we do have and I understand what assets they bring.

PN629

What about a different set of circumstances, in which perhaps a member or a delegate was terminated and you wanted to initiate the proceedings? Is that something that you might have to not proceed with if you didn't have sufficient surplus to do so?---I think we would have sufficient surplus.

PN630

But you say that without having prepared a budget. Yes?---Yes. However, we would still be paying our in-house lawyer so we'd be able to proceed with it.

PN631

One of the things that you've described in your statement is that if you needed to, you would sell the assets of the division?---Yes.

PN632

Do you recall giving that evidence?---Yes.

PN633

Should we understand that if the division chose to sell the assets of the division, you would endeavour to get the highest price possible?---Yes.

PN634

You would certainly not sell below a fair market price?---No.

PN635

You certainly wouldn't engage in a fire sale?---No, you wouldn't think so.

PN636

So if you were not offered a fair market price, you would wait until you got one, even if that meant you were not able to sell property quickly. Correct?---It would depend on the situation.

PN637

So do you mean if the situation was dire and you had to sell quickly, you might sell below fair market price. Is that what you're saying?---There's a lot of hypotheticals in that question.

PN638

Is the answer to that question yes?---What was the question again, sorry?

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN639

If the situation is dire, you might sell property below a fair market price?

PN640

MR BORENSTEIN: Your Honour, I object to this. He's being asked to speculate on hypothetical on top of hypothetical. How is that of any probative value to anybody?

PN641

JUSTICE HATCHER: I understand the problem, but the (indistinct) is to determine what is likely. I think it's accepted that we have to make some sort of assessment as to the future, so don't these questions necessarily arise?

PN642

MR BORENSTEIN: So are we going to review the possibilities of the Reserve Bank increasing interest rates again and things of that sort? I mean, there's a limit to the amount of speculation that the witness can be asked to engage in, surely.

PN643

JUSTICE HATCHER: All right. We'll see how far this goes. You can continue for the time being, Mr Dowling.

PN644

MR DOWLING: Thank you, your Honour. Are you saying that if the situation required it, you would sell below a fair market price, you would sell the assets of the division below a fair market price?---We may, depending on the situation.

PN645

Thank you. And if you chose not to, is it fair to say that you might have to wait many months before you could realise the proceeds from the sale of any assets?---The penthouse floor of Kingsway is pretty popular.

PN646

Have you taken some steps to sell that already? Have you put in train some steps to sell that?---I haven't, but my predecessor did, yes.

PN647

Are there any steps presently in place?---No.

PN648

So again, if there were no offers at above a fair market price, you'd have to wait before you'd sell it and then wait for the proceeds, and that might be many months. Do you agree?---That's the normal process of selling something, yes.

PN649

Thank you. There's no further questions. Thank you.

PN650

JUSTICE HATCHER: Any re-examination, Mr Borenstein?

*** PARIS MARTIN JOLLY

XXN MR DOWLING

PN651

MR BORENSTEIN: Yes, your Honour.

PN652

MR DOWLING: Sorry, just one matter. I provided Mr Jolly with the document headed Locomotive Division Invoices and Payments. I don't propose to tender it through Mr Jolly in the circumstances, but I wonder whether it could be marked for identification, because we'll return to it.

PN653

JUSTICE HATCHER: Yes. The document headed Locomotive Division Invoices and Payments will be marked MFI 1.

**MFI #1 DOCUMENT HEADED LOCOMOTIVE DIVISION
INVOICES AND PAYMENTS**

PN654

MR DOWLING: Thank you, your Honour.

PN655

JUSTICE HATCHER: Mr Borenstein?

RE-EXAMINATION BY MR BORENSTEIN

[10.58 AM]

PN656

MR BORENSTEIN: Perhaps I'll start with the document that Mr Dowling just mentioned. You recall he gave you a list of expenses - - -?---Yes.

PN657

- - - running through from October 2021, apparently, to July of 2023, and he asked you whether you are able to confirm that those particular items, each one of them, are correct?---Yes.

PN658

Can you just remind us when you took up the position of the secretary of the loco division?---In December 2022, late December 2022.

PN659

So are you in a position, at least in relation to the invoices up to December 2022, to positively say that these figures are correct?---No.

PN660

Are you in a position, sitting here today, to say whether the figures from January 23 to July 23 that are in this document are correct?---Not sitting here, no.

PN661

You were shown a document that was received, a bundle of documents that was received from the branch in April of 2023?---Yes.

PN662

It's an email dated 13 April together with a letter from Mr Sharma.

*** PARIS MARTIN JOLLY

RXN MR BORENSTEIN

PN663

JUSTICE HATCHER: So this is exhibit C?

PN664

MR BORENSTEIN: Yes, exhibit C?---Yes.

PN665

Do you know whether any response has been made to this document by the loco division?---Yes.

PN666

Has there been a response?---I believe so, yes.

PN667

Can you tell the Commission what the nature of that response was?---It would have been requesting further information regarding a number of the wages and what the expenses are incurred for.

PN668

You mentioned the wages. How are they relevant to the claims that are made here?---In this, it doesn't set out who the wages are for for the shared expenses.

PN669

In relation to the payroll tax, which is the summary that's in this document, do you have any understanding about whether that payroll tax is a share which only represents the tax payable on the wages of the locomotive division or whether it's a share of the payroll tax paid by the branch for all employees in the branch, including the branch employees itself?---That's why we asked for the further information, so we can clarify.

PN670

Are you aware - - -

PN671

JUSTICE HATCHER: Sorry. Should we assume that at least some of it is the payroll tax owing on the division's direct employees?

PN672

THE WITNESS: Yes.

PN673

JUSTICE HATCHER: Right.

PN674

MR BORENSTEIN: Are you aware of whether any response has been received from the branch to the queries which you've raised?---No, I believe there's been no response back.

*** PARIS MARTIN JOLLY

RXN MR BORENSTEIN

PN675

All right. Thank you. You were asked some questions about the wages that the Locomotive Division would have to pay after withdrawal - - -?---Yes.

PN676

- - - and they included wages and other associated expenses - - - ?---Yes.

PN677

- - - concerning the operation of the division. One of the expenses that Mr Dowling mentioned was auditor expenses?---Yes.

PN678

Are you able to tell the Commission whether the division does or doesn't have its own accountants?---We do have our own accountants.

PN679

You were asked some questions about paying for technology, IT and so on?---Yes.

PN680

Can you tell the Commission whether the division has its own computer or internet service?---We do have our own.

PN681

Now, in terms of the expenses which the division incurs – if I can put it – internally, to operate itself, are you able to tell the Commission, looking at the table in paragraph 17 of your second statement, whether those operating expenses of the division itself are or are not included in the fourth column headed 'expenses'?---They are included.

PN682

In relation to the third column, the 'other income' column, can you tell the Commission what sort of income that is referring to?---That would be a make up of rent from buildings.

PN683

Anything else that you can think of?---I think that's the main part of that.

PN684

Just going back to the 'expenses' column, are you able to tell the Commission whether the figure that is in that column for each of the three years – you've told us it includes the internal expenses of the division itself, are you able to say whether that figure also includes the amounts that have been paid by the division to the branch as the division's share of the branch expense?---Yes, it is included.

PN685

You were asked some questions about whether or not the division had paid branch expenses for the 2022 year in the sum of \$168,000?---Yes.

*** PARIS MARTIN JOLLY

RXN MR BORENSTEIN

PN686

Are you in a position to say here whether you know if that is or is not correct?---No, I'm not.

PN687

The statement which we looked at right at the beginning which has the list of the invoices for '22 and '23 states that there is a grand total of \$267,759.88 owing by the division to the branch. Are you able to say here whether you know if that is or is not correct?---No, I can't say.

PN688

Now, towards the end of your cross-examination, Mr Dowling put some scenarios to you about the position that the division would be in on day 1 after the withdrawal and he suggested to you that the division would have no money, and asked you to comment on that, and you made a mention, I think, of something you described as a legal fund?---Yes.

PN689

Can you tell the Commission what you were referring to?---So the membership subscriptions are paid – there is a certain amount paid in membership subscriptions. Then there is another amount paid that sit outside the subscriptions, so they're paid into what we call a 'legal levy' to assist in processes like this.

PN690

Can I ask you, in your first statement at paragraph 82 which is on page 21 right at the bottom of the page - - - ?---Yes.

PN691

You refer there to a legal fund of some \$1,792,000?---Yes.

PN692

Is that the legal levy fund that you were referring to in your answer?---Yes, that's correct.

PN693

Can you tell the Commission whether that fund is used for any specific purposes?---It's used for legal proceedings.

PN694

For legal?---Proceedings.

PN695

You were asked some questions about the hypothetical sale of the division's property. Can you tell the Commission whether there is presently in existence any plan within the division to sell the property?---Not at the moment, no.

PN696

JUSTICE HATCHER: Is there some sort of book valuation of the property?

PN697

THE WITNESS: Sorry, your Honour?

*** PARIS MARTIN JOLLY

RXN MR BORENSTEIN

PN698

JUSTICE HATCHER: Is there a book valuation of the property in the division's accounts?

PN699

THE WITNESS: I think I included it. One of the up-to-date evaluations in my statement as an annexure, I think. I'm just not sure which one, your Honour. They were a couple of million dollars each level - or (indistinct). There's three - - -

PN700

MR BORENSTEIN: If I can assist, your Honour, exhibit PJ7 of Mr Jolly's first statement contains valuations of those. They are in December 2020. Have you had any valuations on these properties done since December 2020 to your knowledge?---I'm not sure. Not since I've been in as the secretary.

PN701

Thank you, your Honour. No further questions.

PN702

JUSTICE HATCHER: All right. Thank you for your evidence, Mr Jolly. You're excused, you can resume your seat.

PN703

THE WITNESS: Thank you.

<THE WITNESS WITHDREW

[11.12 AM]

PN704

MR BORENSTEIN: Your Honour, that's our evidence.

PN705

JUSTICE HATCHER: Right. Mr Dowling.

PN706

MR DOWLING: Thank you, your Honour. Can I just identify the documents and statements relied upon by the union. The first is the amended response dated 5 May 2023.

PN707

JUSTICE HATCHER: Yes, well, no need to mark that.

PN708

MR DOWLING: The second is the outline of submissions of the union dated 16 August 2023.

PN709

JUSTICE HATCHER: Yes.

*** PARIS MARTIN JOLLY

RXN MR BORENSTEIN

PN710

MR DOWLING: Also content not to mark. That only leaves the statement of Vikram Sharma also dated 16 August 2023.

PN711

JUSTICE HATCHER: Does he require a cross-examination, Mr Borenstein?

PN712

MR BORENSTEIN: I'm sorry, your Honour?

PN713

JUSTICE HATCHER: Is Mr Sharma required for cross-examination?

PN714

MR BORENSTEIN: Yes, we do want to cross-examine him.

PN715

JUSTICE HATCHER: All right. Well, if there's no objection, I'll mark the statement of Vikram Sharma dated 16 August 2023 as exhibit E.

**EXHIBIT #D STATEMENT OF VIKRAM SHARMA DATED
16/08/2023**

PN716

MR DOWLING: I didn't hear you, your Honour, sorry.

PN717

JUSTICE HATCHER: Exhibit D.

PN718

MR DOWLING: Thank you, your Honour. Now, can I just identify one matter, in case there is any dispute about it, before Mr Sharma makes his way to the witness box. There is one topic on which we will seek leave to provide some further evidence of Mr Sharma and it is in relation to MFI #1, and we make very clear, it is responsive to the second statement of Mr Jolly where he has identified the surplus and the expenses and, we say, failed to mention that a significant portion remains unpaid and so, we say, it is appropriate that we seek leave to lead some additional evidence-in-chief about that.

PN719

JUSTICE HATCHER: Mr Borenstein, will there be any objection to the ARTBIU tendering MFI #1 through Mr Sharma?

PN720

MR BORENSTEIN: No, your Honour.

PN721

JUSTICE HATCHER: Right. Well, let's go ahead. We grant that leave.

PN722

MR DOWLING: Thank you, your Honour. I call Mr Sharma.

PN723

JUSTICE HATCHER: Yes, come forward, Mr Sharma.

PN724

THE ASSOCIATE: Can you please state your full name and your address?

PN725

MR V SHARMA: Vikram Sharma, (address supplied).

PN726

THE ASSOCIATE: Do you wish to give an oath or an affirmation?

PN727

MR SHARMA: An oath, please.

<VIKRAM SHARMA, SWORN [11.15 AM]

EXAMINATION-IN-CHIEF BY MR DOWLING [11.15 AM]

PN728

MR DOWLING: Your Honour, we'll just provide to Mr Sharma a copy of his statement and the annexures. Mr Sharma, do you have there in front of you a document headed 'statement of Vikram Sharma'?---Yes.

PN729

That is a statement that has 9 pages and 48 paragraphs and is dated, on the 9th page, 16 August 2023. Is that correct?---Yes.

PN730

It has, together with it, 7 annexures; VS1 through to VS7?---Yes.

PN731

Was that statement prepared for the purposes of this proceeding?---Yes.

PN732

Are the contents of that statement true and correct?---Yes.

PN733

Thank you. If the witness, your Honour, could please be shown the exhibit marked for identification MFI 1. Thank you. Do you have a document there headed 'Locomotive Division invoices and payments'?---Yes.

PN734

Can you describe to the Bench firstly, what that document is?---It's a list of invoices which have been issued by the branch to the Locomotive Division including the payment – two of them, which have been made by them, and the total owing.

PN735

Can you say, please, how that document was prepared?---It was prepared by the branch accountants.

*** VIKRAM SHARMA

XN MR DOWLING

PN736

When was that done?---When?

PN737

Yes?---This was done last week.

PN738

Thank you. Are you able to say, as the secretary of the branch, whether that accurately records the total owing by the division to the branch for its share of branch expenses?---To the best of my knowledge, yes.

PN739

Thank you. We tender that, please, your Honour.

PN740

JUSTICE HATCHER: All right. The document headed 'Locomotive Division invoices and payments' will be marked exhibit E.

**EXHIBIT #E DOCUMENT HEADED 'LOCOMOTIVE DIVISION
INVOICES AND PAYMENTS'**

PN741

MR DOWLING: Thank you, your Honour. That is the evidence-in-chief of Mr Sharma.

PN742

JUSTICE HATCHER: Mr Borenstein.

CROSS-EXAMINATION BY MR BORENSTEIN

[11.19 AM]

PN743

MR BORENSTEIN: Thank you. Mr Sharma, can you just remind me, I think you said in your evidence to Mr Dowling that this document was prepared by the branch accountant?---Accountants, yes.

PN744

Accountants, plural?---Yes.

PN745

JUSTICE HATCHER: Sorry, Mr Borenstein, does the witness need access to the document for these questions?

PN746

MR BORENSTEIN: I beg your pardon?

PN747

JUSTICE HATCHER: Does the witness need access to the document for these questions?

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN748

MR BORENSTEIN: I thought he had it, I'm sorry.

PN749

JUSTICE HATCHER: No, I took it. I'll give it back.

PN750

MR BORENSTEIN: I apologise. Is it your understanding that this document is simply a list of the various invoices that were sent from the branch to the Locomotive Division on each of those months and accounting for payments that have been received?---Yes.

PN751

When do you say this document was prepared?---Last week.

PN752

Which part of last week?---Friday, I think. Thursday or Friday. Friday.

PN753

This document doesn't take into account, does it, the various queries that Locomotive Division had raised over the period that is covered by the document to items that were included in each of the monthly statements, does it?---Could you clarify what you mean 'take into account?'

PN754

It doesn't note anywhere that any of these invoices are, in whole or in part, objected to?---This document does not.

PN755

No. But it is the case, isn't it, that over the period that is covered by this document, the Locomotive Division has, on numerous occasions, raised queries about items that were being charged to it. Are you aware of that?---Yes.

PN756

You are aware of that. And, in fact, even in the course of this year, correspondence has been received by you from Mr Jolly raising questions including questions that go back to some of the accounts in 2022; correct?---I'm not sure if there were questions, I'm aware of one question which is who are the wages for and, I believe, they know the wages are for the branch secretary and two accounts people and that's whom the wages relate to. That's it.

PN757

But there are outstanding amounts, we've been told, for invoices that were rendered during last year, 2022?---Yes.

PN758

Questions were raised or queries were raised by the Locomotive Division about the accuracy of the amounts that were being allocated to them; are you aware of that?

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN759

MR DOWLING: With respect, the question needs to be much more specific for it to be fair. What query was raised and when? It's unfair at a general level - - -

PN760

JUSTICE HATCHER: Just stop. The question was whether questions had been raised by the division with respect to amounts said to be owing in 2022. Is that the question?

PN761

MR BORENSTEIN: Correct.

PN762

JUSTICE HATCHER: Yes, I'll allow that question.

PN763

THE WITNESS: I won't – I'm not sure if they can be classed as queries, they were more of statements saying, 'these relate to so-and-so's wages, we're not going to pay them.' That is what comes to memory.

PN764

MR BORENSTEIN: The Locomotive Division raised with the branch that it had the view that some or all of the items in these invoices were incorrectly charged to them; yes or no?---In the year of 2022?

PN765

Yes?---I can't recall.

PN766

You can't recall?---I can't recall.

PN767

Similar statements, to use your word, were conveyed from the Locomotive Division to the branch about items in the invoices that were sent to the division in 2023, do you recall that?---I'm not sure about the timeframes. In general, there have been letters sent in which they have raised objections to certain expenses in general, but I'm not sure about whether they were in 2021, '22 or '23.

PN768

Well, when you receive these letters, what do you do with them?---Depending on the letter.

PN769

Yes. What do you do with them?---So it depends on the letter, the content of the letter.

PN770

All right, okay. Can I hand you a copy of the letter which Mr Jolly sent you on 24 April of this year?---Thank you.

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN771

Do you see that letter?--- Yes.

PN772

Do you have any recollection of receiving that letter on or around 24 April this year?---I receive a million letters from then, it must have - - -

PN773

So you don't remember this letter specifically?---Not specifically, but sure, if it's there.

PN774

Now, you'll see that, in this letter, Mr Jolly raises issues about the expenses that were claimed by the branch going back to August 2022 and refers to a reimbursement review that was sent with this letter?---Sorry, which section of the letter do you refer?

PN775

Top two paragraphs?---Yes. Repeat the question, please?

PN776

Have a look at those two paragraphs first?---Okay. I have now.

PN777

Good. Having read this letter, does this bring back any recollection of having received it in the first place?---Yes.

PN778

Including the document that was attached to it, the review, which showed the specific issues that were raised?---I don't have a document.

PN779

I know you don't, I'm asking you whether you remember receiving it?---(No audible reply)

PN780

All right. Let me ask you another question since that's a problem for you. When you received this letter, what did you do with it?---I don't remember.

PN781

You don't remember?---I don't remember what did I do with it, but mostly, the practice is, if we receive a correspondence, we respond to it.

PN782

Okay. Do you know whether you responded to this letter?---I don't recall.

PN783

Would it surprise you to know that you didn't respond to it?---No, it wouldn't, because a lot of correspondence received by them – by me, from them is repetitive and it might have been a possibility that we responded to another letter which would have addressed these concerns raised in this, but I don't recall - - -

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN784

But you don't know whether you did or you didn't?---I don't remember, no.

PN785

Do you take seriously the recovery by the branch of the amounts that are claimed from the various divisions?---Yes.

PN786

Can I put to you that, if you did take it seriously, you would have a better understanding of whether you did or didn't respond to this correspondence?---Is there a question in that?

PN787

Yes?---What's the question, sorry, I - - -

PN788

That you don't really take it seriously?---Yes I do.

PN789

Well, you can't tell us whether you responded to it - - -?---I - - -

PN790

- - - and this raises questions about significant amounts of money that you've claimed from the division?---So the amounts which Locomotive owe to the branch; letters relating to that and supporting documents have been provided to the Locomotive in writing in those reimbursement packs and – so, I don't understand the - - -

PN791

We've seen the pack that you've provided this morning which is in March. This is a letter in April which raises a number of issues and you're not in a position to say whether you responded to this?---I don't remember, no.

PN792

No, no.

PN793

MR DOWLING: Well, your Honour, to be fair, what might be appropriate is that Mr Sharma be shown the attachment to the letter because he said that there are some issues that he had already responded to and it might be that the review outlines some of those issues that he has already responded to. So, to be fair, rather than just the letter, the witness should be shown the letter and the review.

PN794

JUSTICE HATCHER: He's being asked whether he responded to the letter. Either he did or he didn't.

PN795

MR DOWLING: Well, the letter attaches with it a review though, and the evidence is that it may have raised issues that are already dealt with, and so - - -

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN796

JUSTICE HATCHER: That's a different question, he wasn't asked that. He was asked whether he had responded to this letter.

PN797

MR DOWLING: Well, in our submission, the letter shouldn't be so easily divorced from the review itself which comes with the letter, but I've made my objection.

PN798

JUSTICE HATCHER: I mean, if that would prompt his recollection perhaps, but – do you have the annexure, Mr Borenstein?

PN799

MR BORENSTEIN: We do, your Honour. I'm not sure how much it will help, but we do have it.

PN800

JUSTICE HATCHER: All right, well perhaps that might be shown to the witness and see if that prompts any recollection on his part.

PN801

THE WITNESS: Thank you.

PN802

JUSTICE HATCHER: So Mr Sharma, do you recall that coming with the letter on 24 April?

PN803

THE WITNESS: Yes, your Honour. It does ring a bell.

PN804

JUSTICE HATCHER: And does that prompt your recollection as to whether you took any action upon receiving this letter?

PN805

THE WITNESS: Yes, your Honour. So this was analysed by the branch accountants as to whether Locomotive Division's claims in here are accurate or not. I can't remember whether was that relayed back to Loco Division in response to this particular letter or in general or if at all, but there was work done on it to analyse the claims.

PN806

JUSTICE HATCHER: Okay. Thank you.

PN807

MR BORENSTEIN: Can I ask you to have a look - - -

PN808

JUSTICE HATCHER: Should we mark that document?

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN809

MR BORENSTEIN: Yes please, your Honour. Sorry.

PN810

JUSTICE HATCHER: Yes, well if there's no objection, I'll mark the letter from the Locomotive Division to Mr Sharma dated 24 April 2023 together with the annexed spreadsheet, as exhibit F.

EXHIBIT #F LETTER FROM LOCOMOTIVE DIVISION TO MR SHARMA DATED 23/04/2023

PN811

MR BORENSTEIN: Could I ask you now, Mr Sharma, to have a look at this letter?---Thank you.

PN812

You see that letter?---Yes.

PN813

Could I ask you to look at the final paragraph, starting with the words, 'Finally'?---Yes.

PN814

You see that that says – Mr Jolly says in there that the Locomotive Division has not received a response to the letters of 24 April 2023 and 31 May, regarding expense reimbursements, et cetera?---Yes.

PN815

You see that?---Yes.

PN816

That seems to suggest that the letter I showed you a moment ago, exhibit F, hasn't been responded to by 28 July. Have you got any reason to say that's wrong?---No.

PN817

Now, you'll see in this letter of 28 July that there's a discussion in the second and third paragraph about the expenses that were claimed for May 2023?---Yes.

PN818

And that there's been a payment made?---Yes.

PN819

Then in the next paragraph, where it starts, 'As you know, in the past Locomotive Division has been allocated expenses of persons employed by Rail Divisions and performed work for Rail Divisions only, which caused considerable disputation'. You see that?---Yes.

PN820

Do you remember reading that when you got the letter?---Do I remember reading this line - - -

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN821

Yes, that there was a dispute in the past about the Locomotive Division being charged expenses for people who were working for the Rail Division?---I – I mean, I would have read the letter but I don't remember right now whether, you know, I read the letter and paid any attention to that particular paragraph.

PN822

Did you read the attachments to the letter when you read the letter?---I would have.

PN823

So do you see the first attachment is a letter from Ms Mogorovich, who's your predecessor, correct?---Yes.

PN824

On 10 December of 2021?---Yes.

PN825

And you'll see in the final paragraph she acknowledges that in preparing the response for Mr Marotta, it's come to their attention that some of the salaries of branch staff are incorrectly attributed to the Locomotive Division in some months?---Yes.

PN826

You see that?---Yes.

PN827

And Mr Marotta responds to that on 20 December, making reference, in particular, to charges that were attributed to the Locomotive Division for two branch employees and for Mr Altieri. Now, when you got this letter did you make any inquiries or ask any questions about this issue that was raised by Ms Mogorovich?---I don't remember, no.

PN828

Did you ask your staff or anyone in your office whether any steps were being taken to make sure that that sort of error wasn't being repeated?---So the steps we have put now in place are - - -

PN829

No, no, no – answer my question. when you got this letter on 28 July 2023 - - - ?---Yes.

PN830

- - including the correspondence from Ms Mogorovich and Mr Marotta, did you ask your staff whether any steps were being taken to prevent the same sort of error being repeated?---Yes, that's what I'm trying to explain, that we have put steps - - -

PN831

No, no, no – you're telling me what you've done?---Yes.

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN832

I'm asking you whether you asked your people whether they were taking any steps at the time?---So are you asking me when I received this letter on 28 July, did I ask the staff to make sure they should do stuff to ensure that that error doesn't happen again?

PN833

No, that wasn't my question. My question was when you got this letter on 28 July, did you go to your staff and say to them, 'Are you doing anything presently to avoid a repeat of what happened back then'?---I don't remember if I had a particular conversation on that day after reading that letter.

PN834

You don't remember whether you did?---I don't remember having a particular conversation about a particular document.

PN835

So does that mean that you don't remember that you did have a conversation?---About this particular thing, no.

PN836

Okay.

PN837

JUSTICE HATCHER: Mr Sharma, do you recall if any action was taken in response to the letter of 28 July?---No, Your Honour, I don't remember.

PN838

In the second-last paragraph, the second sentence, it was said that unless a response is received the Division will assume that those matters – that is the identified matters – are resolved. Are we to take it that the lack of response meant that these matters are resolved?---No, Your Honour. They're not resolved.

PN839

So what's being done to resolve them?---Well, this particular issue relates to amounts owing by the Locomotive Division to the branch and all the invoices, all the supporting documentation, they have been provided and they have been provided every month and what they claim is what the dispute is. For example, they say Locomotive Division will not pay for the branch secretary's wages. That is the statement they have made and therefore, that's in dispute. It is not an issue of whether more information is required or not. It is a position they have taken and that's why the amount differs in their claim as to what the branch issues them an invoice for.

PN840

Yes, so they send you correspondence saying, apart from the limited amounts they're not paying?---That's right.

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN841

What are you doing about it? It seems to me you can either take some sort of action to recover the payment or you can give up on it. So I'm just trying to work out what's actually being done about this issue?---So it requires courts intervention and that is a decision for the branch executive to make. Branch executive is aware of the situation, that there are hundreds and thousands of dollars owing, and it'll be up to the executive to decide whether, should we go to the courts and seek their intervention in the matter, because other than that I just don't see how else will the matters be resolved.

PN842

Have you referred this correspondence to the executive for action?---Not this particular correspondence but we produce a report for the branch executive in which we say – now we have adopted a new practice in which we say, well, these are the amounts owed by the Locomotive Division for the month of X, for example.

PN843

And the executive has not made any decision to – either to recover the money or otherwise resolve the dispute?---We are in the process of normalising the branch's financial affairs and that's a part of the bigger exercise and there are steps being taken to address some of those concerns and whether to recover the owed amounts or the decision to recover the owed amounts has not been taken yet, whether we're going to courts, for example, for that.

PN844

All right, thank you.

PN845

MR BORENSTEIN: Thank you. Can you confirm that in relation to this letter of 28 July 2023 no response was sent by you to the Locomotive Division?---I don't remember.

PN846

I'm sorry?---I don't remember if I responded to this particular letter or not.

PN847

You said in answer to the President's question that the Locomotive Division was raising queries about having to contribute to wages which were paid to the branch secretary. Is that what you say?---Yes.

PN848

And when do you say that the Locomotive Division raised that issue?---When?

PN849

When?---So I believe it will be right before or after my appointment in April last year.

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN850

Was that the occasion when you were appointed by a resolution of the branch executive and the Locomotive Division challenged the validity of that appointment? Is that what you're referring to?---Yes.

PN851

Yes?---And later by the branch council.

PN852

And their objection was that it should have been by the branch council and not the branch executive?---That's what their objection was.

PN853

That was the objection that they raised?---Initially.

PN854

It was on the basis that you said you hadn't been properly appointed that they should they shouldn't contribute to your wages, correct?---Properly appointed - sorry?

PN855

On the basis that they said that you had not been properly appointed as branch secretary because it had been done by the wrong committee?---I'm not sure if that was the objection. They objected that I shouldn't have been appointed by the branch executive.

PN856

Yes?---I'm not sure if that was their reason to not pay the wages because later on -
- -

PN857

Okay, so you're not sure?---I'm not sure about that and can I just say after that, because later on the branch council had ratified that decision and in December members of the union duly elected me in that role and they haven't – they've refused to pay the wages even then. So - - -

PN858

They refuse to pay what?---The wages, branch secretary's wages, despite me being elected by the members of the union.

PN859

They refuse to pay your ongoing wages?---That's right.

PN860

And has that refusal been put in writing anywhere?---There was a resolution passed by the Locomotive Division's committee in which they – the committee decided they were not going to pay the branch secretary's wages moving forward.

PN861

And do you recall when that was?---Before or after my initial appointment, not the elected - - -

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN862

And you're saying that it's still not being paid, your wages are still not being paid -
- -?---Nothing's being paid at the moment.

PN863

Sorry?---Nothing's being paid at the moment.

PN864

No, don't – I don't need a clever answer. Are you saying that the Locomotive
Division has told you in recent times that it is not going to pay a contribution to
your wages?---Well, with due - - -

PN865

It's a simple question, yes or not?---It is a simple question but with due respect,
counsel, it was not a clever answer. Nothing is being paid at the moment so that's
part of that.

PN866

It has been paid?---It is a fact.

PN867

It is being paid.

PN868

JUSTICE HATCHER: No, Mr Borenstein – the witness has said nothing is being
paid and ergo, the bit that goes to his salary is not being paid.

PN869

MR BORENSTEIN: And in any of the documents that have been sent to you,
correspondence like the letters I've shown you, are you saying that in any of those
documents the Locomotive Division has said, 'We are not paying because there is
an amount for your wages'?---Well, I would assume that the divisional
committee's motion stands because it has not been rescinded and the divisional
committee made that decision, whenever it did, and it remains in force.

PN870

And now can I repeat my question: in any of these letters that you've received
which take issue with the monthly statements can you tell us whether any one of
them has said, 'We are not paying a certain amount which represents our
contribution to Mr Sharma's wages'?---I don't recall, no.

PN871

Well, the fact is that there hasn't been?---I don't recall.

PN872

Could I please tender - - -?---Can I just - - -

PN873

- - - the letter of 28 July which I showed to the witness?

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN874

JUSTICE HATCHER: Yes, the letter from the Locomotive Division to Mr Sharma dated 28 July 2023 will be marked exhibit G.

EXHIBIT #G LETTER FROM THE LOCOMOTIVE DIVISION TO MR SHARMA DATED 28/07/2023

PN875

MR BORENSTEIN: Can I show you another of these? This is a letter dated 8 August 2023 from Mr Jolly to you. You see that there?---Yes.

PN876

Can I ask you to look at the final paragraph where Mr Jolly notes that he has at this stage still not received any reply to his letters of 24 April, 31 May and 28 July 2023?---Yes.

PN877

You can't dispute that that's correct, that you didn't reply to those letters, can you?---No.

PN878

Can I tender that, please.

EXHIBIT #H LETTER FROM THE LOCOMOTIVE DIVISION TO VIKRAM SHARMA DATED 08/08/2023

PN879

That letter refers to an earlier letter that Mr Jolly sent you on 31 May of 2023?---Yes.

PN880

Can I show you that letter, please. So you see in the first paragraph that Mr Jolly is referring to an expense reconciliation report for April 2023, and Mr Jolly has referred in the second paragraph to a document which is attached and you will see on the second page where queries are raised about items that were then claimed from the Locomotive Division. Do you see that?---The second page?

PN881

Yes?---Yes, I see that.

PN882

And you will see in relation to the payroll tax there is an issue raised about not knowing who in the branch office is being included for the payroll tax, and that harks back to the earlier letter. Do you see that?---Yes.

PN883

And then you see in the last item 'Branch other' there's an objection because of the lack of any detail. Do you see that?---Yes.

*** VIKRAM SHARMA

XXN MR BORENSTEIN

PN884

Now, I think you agreed a moment ago that this letter hasn't been replied to.

PN885

JUSTICE HATCHER: Sorry, just before we go on, the entry for 'Branch other' is that the amount from which the contributions were said to be salaries paid?---Yes.

PN886

MR BORENSTEIN: And you understand in relation to that issue that the president has just raised with you, you understand that the Locomotive Division's concern is that there are a number of people who are employed from time to time in the branch office, and they have been asking for identification who those people are and what they do?---They are aware of who this is for.

PN887

I'm sorry?---Locomotive officials are well aware of who this relates to.

PN888

Yes, but that's the query that they raised. You understand that, don't you?---That has been responded to. That query - there's so many different conversations.

PN889

Which letter?---I don't have the letter in front of me.

PN890

There is no letter, is there?---There might be, I'm not sure. There might be, but they are aware - counsel, this is a long standing practice. The branch secretary and the account (indistinct) under shared expenses, and that's all they refer to, and they are aware of that fact.

PN891

Can I tender that letter, please.

**EXHIBIT #I LETTER FROM THE LOCOMOTIVE DIVISION TO
VIKRAM SHARMA DATED 31/05/2023**

PN892

Your Honour, I have no further cross-examination.

PN893

JUSTICE HATCHER: All right. Thanks for your evidence, Mr Sharma, you're excused and you can resume your seat.

PN894

MR DOWLING: Sorry, your Honour, just two matters by way of re-examination.

PN895

JUSTICE HATCHER: I am sorry. Sorry about this, go ahead.

RE-EXAMINATION BY MR DOWLING

[11.53 AM]

*** VIKRAM SHARMA

RXN MR DOWLING

PN896

MR DOWLING: Thank you, your Honour. You were asked some questions about what advice you had given staff about ensuring that the practice was or wasn't in place that led to these issues raised in the letter - - -

PN897

MR BORENSTEIN: That's not the question I asked.

PN898

JUSTICE HATCHER: Can you repeat the question, Mr Dowling. Let's hear the whole question and then hear the objection.

PN899

MR DOWLING: There was a question raised to Mr Sharma about whether he had raised with his staff either why the errors had been raised or to ensure they weren't going to be repeated as I understood it.

PN900

MR BORENSTEIN: Your Honour, the question was whether he had enquired of his staff whether they were taking steps to avoid the repetition of the error.

PN901

JUSTICE HATCHER: Let's do the question again - - -

PN902

MR DOWLING: I'm grateful for that clarification. In endeavouring to answer that question you said that you had taken steps to put in place matters, and I think Mr Borenstein stopped you. Can you describe the steps that you had put in place?---Yes. So when I assumed the role of branch secretary I discussed with the accounts staff as to what the current practices were at that time, and as soon as I started in the role I received multiple letters from the local division officials raising many concerns. So the steps we had put in place was prior to me starting in this role there was not a practice of sending a reimbursement back every month to local division with all the supporting documents. So that was a step we put in place to ensure transparency and that all the information is being provided on a regular basis.

PN903

I wonder if the witness could be shown exhibit C, your Honour. You've described a disbursement pack I think were the words you used. Looking at that document does that match the description of the pack that you've described?---Yes.

*** VIKRAM SHARMA

RXN MR DOWLING

PN904

Thank you. In answer to one other question from Mr Borenstein you said that you were taking steps to regularise the affairs of the union. Can you describe to the Commission, please, those steps and when you commenced taking those steps?---Yes. So the steps taken to regularise the affairs of the union were passage of a motion which related to how the branch accounts and funds were structured, and to bring them in compliance with the rules. Also how the disbursements were being made. So prior to my election in the role certain rules were not being

followed and we had taken steps via the passage of the resolution to put in those measures in place. The signatories of the accounts have been changed to comply with the rules, and last month in the month of August we had also taken steps to bring the local shared accounts in compliance with the rules, which has now been objected to by way of a proceeding in the Federal Court. So there were several steps along the way.

PN905

In that answer you identified some resolutions. Can you date the first of those and the dates of those that followed?---I believe the first set of resolutions were passed in the month of June 2023, and then the second set in August 2023.

PN906

Thank you. Nothing further.

PN907

JUSTICE HATCHER: All right. Perhaps we will just get back exhibit C and then you're excused, you're free to go, Mr Sharma.

<THE WITNESS WITHDREW

[11.57 AM]

PN908

MR DOWLING: That's the evidence of the union. Thank you.

PN909

JUSTICE HATCHER: All right. When is it convenient for the parties to make their submissions? Do you want to start now or have a short adjournment?

PN910

MR BORENSTEIN: I think we'd prefer a five or 10 minute adjournment if that's feasible.

PN911

JUSTICE HATCHER: Let's resume at 12.15.

SHORT ADJOURNMENT

[11.58 AM]

RESUMED

[12.17 PM]

PN912

JUSTICE HATCHER: Mr Borenstein?

PN913

MR BORENSTEIN: Thank you, your Honour. Your Honour, following the previous ruling of the Full Bench on the respondent's strike-out application, there are, in our submission, six issues that remain to be resolved by the Commission, and if I might just identify them and then address them seriatim.

*** VIKRAM SHARMA

RXN MR DOWLING

PN914

The first issue is whether findings made in decisions of the Commission under section 418 of the Fair Work Act can constitute or form part of a record of not complying with workplace or safety laws for the purpose of subsections 94A(2)(a) and 94A(3).

PN915

Secondly, what number of non-compliances is required to constitute a record within the meaning of those two subsections?

PN916

Thirdly, does the RTBU have a record of not complying with workplace or safety laws for the purposes of those two subsections?

PN917

Fourthly, whether the locomotive division Victorian branch satisfies the requirements under section 94A(2)(b).

PN918

Fifthly, the proper construction of the word 'appropriate' in section 94A(1).

PN919

And finally, is it appropriate to grant the extension sought by the applicant under section 94A(1)?

PN920

Of course, if I can interpolate, that final question arises only if the applicant fails in his contention that the section 418 decisions are able to constitute a record of non-compliance, and then that would be decided under subsection (3).

PN921

Going to the first question, which is the situation of decisions under section 418, I don't want to unnecessarily take up the Commission's time. I'm conscious of the fact that the Commission's made a ruling on this in the Kelly matter.

PN922

Can I simply direct the Commission's attention to the submissions which we've set out in our outline at paragraphs 33 to 49 and in our reply submissions at paragraphs 7 to 18. We're conscious of the earlier decision, obviously, the earlier ruling of the Commission, but we seek to preserve our client's position, and then - - -

PN923

JUSTICE HATCHER: Mr Borenstein, the two decisions upon which you rely don't actually contain a finding of non-compliance or contravention, do they?

PN924

MR BORENSTEIN: I wasn't going to read the submissions, I was only going to take your Honours to the decisions and point out the passages which we say do constitute that. These two decisions are in the list of authorities which we've sent you this morning. They're also in Mr Jolly's statement. They're items 6 and 11, and if I can firstly go to the Downer - - -

PN925

JUSTICE HATCHER: Deputy President Colman's decision.

PN926

MR BORENSTEIN: Sorry?

PN927

JUSTICE HATCHER: Deputy President Colman's decision.

PN928

MR BORENSTEIN: Yes. Yes, sorry. That's the decision on 19 May 2017, and the passages that we wish to draw attention to in this decision start at paragraph 17, which is under the heading of Factual Findings. Paragraph 17, the first sentence, the Deputy President states:

PN929

The evidence before the Commission supported a finding that industrial action was being organised.

PN930

Then, in paragraph 20, in, I think, the third sentence, he says:

PN931

Rather, it appears to me that Mr Evans, as an RTBU office-holder, was organising a response by employees that would occur if the company did not change its mind and retract its decision to dismiss the two employees. That response would be to raise fitness for duty issues, namely non-genuine sick leave. This would constitute a ban, limitation or restriction on the performance of work and amount to unprotected industrial action.

PN932

Then, at paragraph 22, he says:

PN933

Accordingly, I was satisfied at the time of the order that industrial action was being organised by the RTBU officer-holder Mr Evans, and hence by the RTBU.

PN934

At paragraph 25 he says:

PN935

Finally, I found at the time of making the order that the industrial action that was being organised and threatened would not be protected industrial action for the purpose of part 3-3 of the Act.

PN936

Then, at paragraph 27:

PN937

I was satisfied at the time of making the order that unprotected action was being organised to take place.

PN938

The submission that we make in our written submissions, and I won't rehearse them now, is that these are findings that were made by the Deputy President. The explanatory memorandum makes reference to findings made by tribunals in relation to industrial action, and we say that insofar - - -

PN939

JUSTICE HATCHER: But surely it must be a finding of - - -

PN940

MR BORENSTEIN: I'm sorry?

PN941

JUSTICE HATCHER: Surely it must be a finding of non-compliance with a workplace law, and the mere taking of unprotected industrial action is not in and of itself unlawful, but it's unlawful in certain circumstances – the 417 circumstance, for example.

PN942

MR BORENSTEIN: Yes.

PN943

JUSTICE HATCHER: But Deputy President Colman made no such finding.

PN944

MR BORENSTEIN: Your Honour, he makes findings that it was unprotected industrial action and - - -

PN945

JUSTICE HATCHER: It might be unprotected industrial action because the requisite notice hasn't been given, for example. That wouldn't make the industrial action unlawful under the Act. It might have certain consequences.

PN946

MR BORENSTEIN: At paragraph 4 of the decision - - -

PN947

JUSTICE HATCHER: I note – yes.

PN948

MR BORENSTEIN: - - - he notes the existence of the - - -

PN949

JUSTICE HATCHER: He does note it, yes. I understand that.

PN950

MR BORENSTEIN: Yes, of the enterprise agreement. If your Honour is putting to me that he has to say in express terms, 'I make a finding that there's a contravention of section 417', for example, we would say that that's putting the hurdle too high.

PN951

We would say that the Commission is entitled to have regard to the findings that were made, and where findings are made that there was unprotected industrial action occurring, in circumstances where there is an existing enterprise agreement, we would say that it would be far too technical an approach to say, 'Well, unless the Deputy President said it's in contravention of section 417, we can't join the dots.'

PN952

JUSTICE HATCHER: But don't we have to place some weight upon the word 'record' that is – leaving aside the issue about the number of contraventions, 'record' suggests something on the face of a decision or order indicating non-compliance with a provision of the Fair Work Act or some other relevant Act?

PN953

I mean, it's one thing that – you seem to be asking us to say one plus one equals two, on the face of the decision, but that would be a finding by us, it's not a finding that the Deputy President ever actually made.

PN954

MR BORENSTEIN: No, respectfully, your Honour, it would be an interpretation by this Full Bench of the findings which the Deputy President made, and you would determine whether those findings were properly characterised as findings of contravention of a workplace law, i.e. in this case section 147, and on that basis it would constitute part of a record under the section in section 94A(2), we say.

PN955

JUSTICE HATCHER: That would require a finding by us, wouldn't it?

PN956

MR BORENSTEIN: A finding that the Full Bench would have to make is whether the findings that the Deputy President made constitute a non-compliance of the kind that's covered by subsection (2)(a).

PN957

JUSTICE HATCHER: Classic part of a record is more to the point, but - - -

PN958

MR BORENSTEIN: Well, that comes then to the - - -

PN959

JUSTICE HATCHER: But just as a matter of basic English, no such finding is recorded in the decision.

PN960

MR BORENSTEIN: I'm sorry, no such finding?

PN961

JUSTICE HATCHER: Of non-compliance is recorded in the decision.

PN962

MR BORENSTEIN: Not in those terms.

PN963

JUSTICE HATCHER: How is it part of a record of non-compliance?

PN964

MR BORENSTEIN: Your Honour, we say that if there is a finding of conduct which is non-compliant with the law, then that is a sufficient finding for the purpose of this provision. We recognise, of course, the analysis which your Honour puts to me, but we say that that is too narrow a construction of the way in which the section should operate.

PN965

We say that it's intended to capture behaviour of an organisation which is non-compliant with the legislation. It doesn't use the words 'in contravention of', and we say that's a significant contrast, and where you've got a decision which makes findings of conduct which is non-compliant on its face, then that decision can form part of the record.

PN966

We say it doesn't require a record like a notice of conviction or an order of imposition of a penalty or something of that kind. We say it's broader than that. That's our submission, your Honour.

PN967

JUSTICE HATCHER: So does that mean, for example, that any observation or finding of fact in any decision can be raised to support a conclusion of non-compliance?

PN968

MR BORENSTEIN: No, your Honour. There has to be a finding of conduct that is non-compliant, not just an observation or a passing comment. It has to be a finding, and what we've tried to do in these two decisions is to point to the paragraphs where the members actually make what they describe as findings.

PN969

We don't say that in every section 418 decision one will find findings that will satisfy the test, but we say that you can't rule out all decisions in section 418 cases as not meeting the test simply because they're section 418 decisions. We say you need to look at each one and see whether the relevant member has made findings about non-compliant conduct.

PN970

Of course, the question of record we've also addressed in our written submissions, and of course that also plays into the interpretation.

PN971

As your Honour has rightly said, record is not defined in the legislation, and our submission is that if the Commission accepts that the findings, in the way in which we put them, are satisfied, then we say that that should assist in interpreting the term 'record' and providing a record of the non-compliant entity.

PN972

There's also a submission that's raised by our friends in their written submissions about the number of non-compliances, if I can put it that way, that are required to constitute a record.

PN973

We've made written submissions about that, and in summary we say that in the same way as someone who's been convicted of armed robbery or of murder can, in common parlance, be said to have a record, a criminal record, because of that conviction, there is no reason why you would read 'record' as requiring any more than one – although it may, but you wouldn't necessarily require it to comprise more than one non-contravention.

PN974

And the other thing that we say, the other main point that we say about record is of course that in terms of the number of non-compliances we would submit that to suggest, as our friends do, and we have elaborated this in our written submissions, that you should treat that as meaning a, quote, 'significant number of non-compliances' would create an undesirable level of uncertainty, particularly when you are dealing with subsection (3) of section 94A, which is a mandatory provision which takes effect on the establishment of a record.

PN975

And it would, in our respectful submission, create an inappropriate level of uncertainty and ambiguity about the circumstances of the persons involved in the application where section 94A(3) gives no discretion to the Commission, unlike subsection (1) and (2), and we say that that weighs heavily in favour of giving the word 'record' a clear and unambiguous and indeterminate operation, such as would occur if you introduce words like 'significant' or 'substantial record'.

PN976

There's no guidelines for how you would determine what's significant or substantial in any particular case. And it's not as though the Commission is exercising the discretion under subsection (1) when you've got the use of the term 'appropriate' to make an evaluation of the non-compliances. Subsection (3) is a mandatory provision where the Commission must grant the extension if the record exists.

PN977

JUSTICE HATCHER: Taking these matters at their highest in your favour why do you say they contribute to a finding of appropriateness? That is having going to the fact it seems to me that (1) they were some years ago, (2) they had no pecuniary prospectus for the union, and (3) there's no evidence or suggest that they had anything to do with the desire of the division to (indistinct).

PN978

MR BORENSTEIN: The reason we raise them, your Honour, is subsection (3). Subsection (3) doesn't give the Commission a discretion like subsection (1). And so if we establish that there is a record of non-compliance then without any exercise of discretion the Commission must grant the extension.

PN979

JUSTICE HATCHER: So leaving aside subsection (3), if you fail on subsection (3) - - -

PN980

MR BORENSTEIN: That's right.

PN981

JUSTICE HATCHER: - - - then in effect it doesn't matter with subsection (2).

PN982

MR BORENSTEIN: If we fail on subsection (3) then it's a non-issue in subsection (2). So as I said the submissions are made - I don't want to diminish them by saying that they're made formally, but they're made cognisant of the Full Bench decision, but we seek to preserve our position.

PN983

Can I then go to the next question which deals with the proper construction of appropriate, which appears in section 94A(1). In the respondent's written submissions at paragraphs 19 and 20 they contend that the matters to be taken into account in determining whether it is appropriate to accept the application are firstly the matters in section 94A(2), and secondly in the context of section 94A(2) found in part 2 of chapter 3 in sections 94 and 94A.

PN984

Then in paragraph 20 they set out a number of matters on which they rely. We contest the proposition and we contest the utility of the matters which they have listed in paragraph 20, and I will deal with them specifically now. Firstly, in paragraph 20(a) the matter that they refer to or the contention they make is that the Act encourages amalgamations, and they refer to a passage in the Full Court's judgment in AMA, and that's at paragraph 5, and the court has that in the list of authorities which are friends have forwarded.

PN985

Our submission is that they have read far too much into what the Full Court said in AMA, and if I could take the Bench to paragraph 5 of that decision you will see that the court said in dealing with the question of outstanding civil penalties, which was an issue in granting or in exercising the discretion about the amalgamation of the CFMEU, they say in the second sentence:

PN986

When however one examines the legitimate statutory contextual material and the terms of various amendments made in 1990 and not thereafter relevantly altered one does find a relevant policy to assist in the ascription of meaning to the phrase 'Civil proceedings' in section 73(2)(c).

PN987

And the issue in the case was whether there were or weren't civil proceedings because that impacted on the exercise of the Commission's power.

PN988

The policy was to encourage and make easier the process of amalgamation of organisations. The removal of outstanding civil penalty proceedings as a bar to that process was one of the features of the 1990 changes to give effect to that policy. Once one appreciates the policy in the legislative history the giving of the phrase 'civil proceedings' a simple meaning of non-criminal proceedings becomes clear.

PN989

Our submission is that that paragraph of the Full Court's decision is focused on a particular part of part 2 of chapter 3. There is no mention and no reference to any of the provisions of part 3 that deal with withdrawal from amalgamation, and it's our submission that it is quite dangerous and unsound to try and extrapolate from a comment that's made in a specific environment and context to a more general statement.

PN990

We have given the Commission a reference to the decision of the Privy Council in an appeal from the High Court called *Ogden Industries v Lucas* which we have extracted in our written outline at paragraph 22 where the Privy Council says:

PN991

Their Lordships desire to reiterate, however what is so often being said before that in a common law system of jurisprudence, which depends largely on judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observations of the judge to the precise issues before him - - -

PN992

And we would say today 'and her'.

PN993

- - - and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him unless he makes it clear that he intended his remarks to have a wider ambit.

PN994

And we say that that's a very apposite caution in relation to the treatment which our friends seek to make of paragraph 5 of AMA. At paragraph 23 of our outline we also make the submission that even if encouragement of amalgamations was one of the purposes of the Registered Organisations Act at chapter 3, it's not the only purpose, and part 3 of chapter 3 indicates that it's not the only purpose because it provides a withdrawal from amalgamations. And there's a very useful passage from the judgment of Gleeson CJ in Carr which we have extracted at paragraph 23 where his Honour says:

PN995

The general rule on interpretation to apply a construction that will promote the purpose or logic of the Act, however may be of little assistance where a statutory provision strikes a balance between competing interests. And the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object under

the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which legislation pursues its purpose starting the purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation, and a purported exercise of judicial power for a legislative purpose.

PN996

And we say again that that's a passage that is directly apposite to the way in which our friends seek to put this submission. It's clear that there are other purposes to chapter 3, and the RTBU's submission fails to give attention to those and proceeds on the basis that there is only one purpose and the legislation is pursuing that purpose at all costs. And as Gleeson CJ said that is not an appropriate way to go about interpreting that type of issue.

PN997

Then moving to paragraph 20(b) in our friends' submissions they say that part 2 of chapter 3 sets out the mechanism by which that encouragement is effected. Again a very selective reading of the legislation overlooking all together the fact that part 2 is juxtaposed to part 3, which in fact makes provision for the mechanism to withdraw from amalgamations.

PN998

And we make the submission that given that the withdrawal provisions came into the Act later in time than the amalgamation provisions, and particularly so in relation to the 2020 amendments, there's no reason why they should be read down. We submit that they should be given their full effect, even if to some extent that might detract from some aspects of part 2, because that is what is to be inferred as the parliament's intention in enacting them on top of the existing part 2 provisions.

PN999

Then in paragraph (c) of paragraph 20 our friends say that section 94 imposes time limits on the withdrawal from amalgamations, the purpose of which is to create a period after which amalgamations become final, and they footnote a reference to the explanatory memorandum of the 1996 work choices legislation. Again it's submitted that that is a very one-eyed view of the legislation and completely ignores the existence and function of part 3, and we say that the proper characterisation of the circumstance is that the amalgamations remain in place subject to possible applications under part 3. It can't be said that they become final for all purposes.

PN1000

Then going to paragraphs 20(d) and (e) this deals with section 94A and firstly states that 94A is an exception to the time limit. And our response to that is without getting into semantic arguments about how to describe 94A we say that the better characterisation of it is that it is an extension of time of the limits under section 94(1), and to then go on to say that because of that and because it's an exception, and I'm reading from paragraph (e), that it should be effectively limited by reason of the time limits in section 94.

PN1001

Our submission in response to that is that the proposition gives no weight to the purpose and object of the 2020 amendments, which enacted 94A, which put it there and which made provision for an extension of time to the operating on top of the time limits in section 94(1) and the purpose and object of that amendment and the terms of section 94A do not lend support to any reading down of the term, 'appropriate'. We make the submission that the 2020 amendments were enacted for a beneficial purpose, as can be seen from the explanatory memorandum. We refer in particular to page 1 of the memorandum, under the heading: 'Overview of the bill', where it's said that the object of the amendment is to amend the Fair Work Registered Organisations Act to uphold the principle of freedom of association and provide constituent parts of registered organisations that are amalgamated with other organisations, the freedom to withdraw from the amalgamated organisation and become a new registered organisation outside the current time limited period of five years in specified circumstances.

PN1002

So we say that when looking at what is appropriate, it must be borne in mind that that beneficial purpose that's identified in the explanatory memorandum is not ignored and is given some effect. Now, our friends then go on in paragraph 21 of their submissions to make the comment that one would expect all administrative units of amalgamated organisations to be able to protect the economic and social interests of the members. Now, we say that the argument that's based on that proposition is at odds with the very position which the RTBU takes in this case, where it objects to the VLD on these very grounds and we say that that tends to undercut the position that they put.

PN1003

It also ignores the situation that under the definition of constituent parts in section 93, that definition is not confined to what's described as administrative units and the Commission will remember that under paragraph B of the definition of, 'constituent part', a designated number of the membership of the amalgamated organisation are able to apply for a withdrawal and we say that that creates a situation where unlike the position here the Commission might be confronted with an application where there is no existing organisational structure like you have in the Locomotive Division but you have a group of people who were eligible to be members of a former part of an organisation that was deregistered at an earlier stage in the history of an amalgamated organisation and that that part of the earlier organisation no longer exists as an administrative unit.

PN1004

Turning then to the argument that our friends advance about how to deal with the situation where there is no record of non-compliance. Our friends seek to say that that's something that should weigh in favour of – or should weigh against allowing an applicant for extension to be granted the extension in some way or other that should be treated as a positive. Of course – and it's not now able to be argued against – the legislation allows for an application to be made under section 94A, even if only one of the two matters in subsection (2) are present and that can be seen in paragraph 33 of the explanatory memorandum.

PN1005

We say that it's not open to our friends to argue against that political assessment and judgment that was made in the legislation to create that situation. Then at paragraph 23, our friends make a submission about the importance of certainty in the area of certainty for registered organisations and the need to preserve the time limits and give priority to the time limits in section 94(1) in order to preserve that certainty. Our submission in response to that is that the parliament has not given that aspect the same significance that our friends wish or the same extreme significance that our friends wish to attach to it and it's taken a much more pragmatic approach so that even though in 1996 the explanatory memorandum was in terms which our friends had extracted.

PN1006

In the Work Choices legislation in 2006, the parliament introduced section 94(1)(c)(i), which we've given a copy of to the Commission, which allowed for a ballot application to be made in respect of amalgamations which occurred before 31 December 1996 – that is before the enactment of the original Workplace Relations Act. And they were permitted to be made if the amalgamation had occurred within three years before 1996 and within three years after the commencement of the Work Choices legislation, which is in 2006. So that means that in 2006, the parliament allowed for a withdrawal application to be made during a period that was between 10 and 13 years after the amalgamation.

PN1007

Interestingly, the application was able to be made without any of the sort of conditions which you find in section 94(A)(2). So that's a significant indication, in our submission, that the parliament was prepared to take a broad view about circumstances which might justify withdrawal from amalgamations. Then of course, following that you have the 2020 amendments which also allowed for an extension of time but on this occasion, subject to one or other of two conditions being satisfied, and we say that those two exercises of legislative power by the parliament significantly diminish the argument which our friends seek to put about the finality of amalgamations and the importance of preserving the finality of amalgamations because it's apparent that the parliament didn't share that extreme view. Now, our friends then go on to say at paragraph 23 that the evident purpose of the amendment was to allow for withdrawal from amalgamations, where the amalgamated organisation had engaged in substantial unlawful conduct and that in those circumstances the disturbance of the settled status quo would be justified.

PN1008

In our respectful submission, if we can refer the Commission back to the explanatory memorandum and the first four pages where it discusses the purpose and the object of the legislation, it's clear that that isn't the focus of the legislation. The focus of the legislation is at least twofold and not confined simply to organisations that have a history of unlawful conduct. Our friends at paragraph 27 then make reference to the second reading speech of the Minister in introducing the legislation and we seek to say simply that the submissions they make about that are incorrect – that on a proper reading of what the Minister said, he was referring to two examples that might constitute a - sorry, that may move a constituent part to apply for a ballot.

PN1009

One is a record of non-compliance, and there's no argument about that. The other one is explained in the third paragraph of the extract, and what the Minister has said there is a reflection of what appears in paragraphs A and B of subsection (2) of section 94A. Our friends say that it's impermissible to use the Minister's second reading speech to substitute for the words of the legislation and our answer to that is that we are not seeking to do anything like that. What we are seeking to do is to confirm their interpretation which we advance and that is entirely permissible under the authorities and in addition we say that what the Minister has said in the second reading speech is reflecting the explanation which is to be seen in the explanatory memorandum as well.

PN1010

So in summary what we submit about, 'Appropriate', and the meaning of appropriate is that consideration of what's appropriate under section 94(1)(a) is whether the matters from subsection (2) are established and if they are, whether the acceptance of the application is fair and just – that's a phrase coming from the authorities – taking into account the purpose and object of the 2020 amendment, which enacted section 94A itself. As I've said, that purpose and object is identified in the explanatory memorandum to uphold freedom of association by allowing constituent parts to withdraw from amalgamations after five years and we say that that is what should be the guiding light for the exercise of what is appropriate. We say that that is so because you are exercising a power that is expressly provided for in 94A and 94A was enacted by the 2020 amendments and so the primary port of call for determining how you do that is what the purpose was for enacting 94A and to identify that, you go to the 2020 amendments and you can be assisted by the explanatory memorandum.

PN1011

JUSTICE HATCHER: You've got a while to go, Mr Borenstein, I assume?

PN1012

MR BORENSTEIN: I do, your Honour.

PN1013

JUSTICE HATCHER: Is it convenient if we break for lunch now and resume at 2 o'clock? We'll adjourn.

LUNCHEON ADJOURNMENT

[1.00 PM]

RESUMED

[2.02 PM]

PN1014

JUSTICE HATCHER: Mr Borenstein.

PN1015

MR BORENSTEIN: Thank you, your Honour. I have reached a stage where I'm up to the fourth item that I identified at the outset which is whether the Locomotive Division satisfies subsection 94A(2)(b), which is the likely capacity – to paraphrase – to service its membership. In the evidence that we filed from Mr Jolly in his first statement at paragraphs 83 and 84, he states to the effect that,

after the withdrawal from the amalgamated organisation, the new organisation is proposed, as far as possible, to maintain its structures and the business model of the existing Locomotive Division, but of course, independently from the RTBU.

PN1016

The RTBU has raised three issues about the finances which are the core of its opposition to the application for extension, and those three matters, as they appear in the response document, are: firstly, that it claims that the funds under the control of Locomotive Division have been paid to the Locomotive Division in breach of the rules - and this is to do with the 2017 resolution which you've read about in the material; secondly, it claims that the operation of rule 21.12 of the RTBU rules affects the ability of the Locomotive Division to service its membership because it limits the ability of the Locomotive Division to sell its real estate because it has to get approval of 70 per cent of its members; and then thirdly, it claims that, because of the number of members that the proposed organisation would have, it won't be able to generate enough income to be able to adequately promote and protect the interests of its members.

PN1017

So, if I can deal with those three matters in sequence. Firstly, the question of the VLD funds. So the RTBU submissions rely on assertions about the validity or invalidity of arrangements under which the Locomotive Division members paid their contributions to what is called a 'shared account' which was set up under a resolution of the branch executive in 2017. The contention is that the resolution was contrary to the rules and that, insofar as accumulated funds of the Locomotive Division contain funds collected under that resolution, they shouldn't be regarded as funds of the Locomotive Division that can be taken into account for the purpose of paragraph B of subsection 2.

PN1018

You'll have seen from the material in Mr Sharma's affidavit and in the submissions that attempts were made to undo the 2017 resolution and that proceedings were issued by Mr Jolly and others in the Federal Court that challenged the validity of that and other things, and as was indicated by our friend this morning, the applicant seeks to avoid any overlap between the issues in the Federal Court case and the issues that we ask the Commission to decide and essentially, they are about the validity or otherwise of the 2017 resolution and the attempts to undo it, and we don't seek to raise that, although we reserve our position to argue those matters elsewhere.

PN1019

So, dealing then with the first submissions that the RTBU makes, at paragraph 42 of its outline, it makes a submission that the Commission should give consideration to what might be done by the Federal Court in apportioning assets under section 109. Our response to that is two-fold: firstly, that the Commission should be very wary of predicting and trying, effectively, to pre-empt what the court might do, and that that isn't a proper part of the Commission's function under section 94(a).

PN1020

Secondly – and this was mentioned this morning – the court, under section 109(2)(ba), is required to have regard to what is described as 'arrangements, practices or understandings' in the amalgamated organisation relating to how assets have been held for the benefit of the constituent part. Our submission is that the phrase, 'arrangements, practices or understandings' are apt to capture the arrangements that were in place under the 2017 resolution and we say that that would be a significant matter for the court.

PN1021

We don't ask the Commission to speculate on the outcome of it, but we simply say that it would not be safe to assume, as our friends would have you do, that the court would apportion these contested funds to the RTBU rather than to the constituent part.

PN1022

The second thing that we want to say about this submission – this argument – is that it is based on the assumption that the accumulated funds would not have been held by the Locomotive Division but for the existence of the 2017 resolution, and we say that that is a wrong assumption and it is not borne out by the evidence. Specifically, if you go to Mr Sharma's affidavit, you'll see that the 2017 resolution is annexure VS2 at page 17. You will see that there are arrangements provided for in paragraphs 4 to 6 of the resolution that are comparable to the practices which the branch has in dealing with the members contributions to the Tram and Bus Division.

PN1023

Now, in paragraph 24(d) of Mr Sharma's statement, he explains how that works with the Tram and Bus Division and you will see that he says that – I should start with paragraph B:

PN1024

The subscriptions of members of the Rail Divisions and the Tram and Bus Division are paid into the Rail Division's account.

PN1025

Now, I interpolate here that the existence of that Rail Divisions account has been a matter of some angst to the Locomotive Division and Mr Sharma is attempting to regularise that because the rules require that the branch itself have a fund out of which it pays its operating expenses, and the practice seems to have been that they have used the Rail Division account instead of a separate branch account, but I'll leave that to one side – simply to explain what is meant by the 'Rail Division account.'

PN1026

So, it provides that the contributions to the Tram Division are paid into the Rail Division account, and then, in paragraph D:

PN1027

On a monthly basis after receipt of subscriptions, the accounting staff of the branch deduct, from the subscriptions received from members attached to the

Tram Division, the Tram Division's share of expenses and then remit the balance of subscriptions to the Tram Division.

PN1028

So, the process is: the branch collects the subscriptions, deducts the shared expenses, and then sends the balance back to the division whose members pay the subscriptions. The comparison with the position of the Locomotive Division under the 2017 resolution can be seen in items 4, 5 and 6 of the resolution. Item 4 provides that the Locomotive Division members pay their subscriptions into a shared account, which is meant to be controlled by both the branch officials and the Locomotive Division officials. And then Item 5:

PN1029

The Locomotive Division shall pay all shared costs as between the branch and the Locomotive Division on a monthly basis from the funds in the shared account.

PN1030

And then 6:

PN1031

All funds remaining in the shared account each month after payment of shared costs to the branch pursuant to clause 5 shall be transferred to the Locomotive Division general account.

PN1032

So the process is the same as for the Tram Division except for the fact of who collects the money in the first instance. With the Tram Division it goes into the branch account, with the Locomotive Division it goes into the shared account. In both instances shared expenses are allocated to the divisions and the balance is payable to the respective divisions.

PN1033

Now, Mr Jolly, in his second statement at paragraph 24, states that the practice that is applied presently to the Tram Division was the practice that was applied to the Locomotive Division before the introduction of the 2017 resolution, and so we say that, even if the 2017 resolution were invalid, the invalidity of it would, in any realistic sense, make no difference to the funds that are accumulated in the accounts of the Locomotive Division because, whether they come as the balance out of the shared account or the balance out of the branch account, there would still be a balance after the shared expenses that would go back to the divisions. And so, it is wrong to say – as was suggested by Mr Dowling in some of his cross-examination of Mr Jolly – that all that money would necessarily be allocated to the branch and that the likelihood is, or the potential is, that the Locomotive Division would start on day 1 as a new union without any of those accumulated funds in its account.

PN1034

The analysis of the situation, even allowing for the argument that the 2017 resolution is invalid, doesn't support that. The other thing, too, that we draw attention to – of course, and this came out of the evidence of Mr Jolly – is that the

subscription income which goes into the shared account is not the only income that the Locomotive Division receives, and you'll remember that Mr Jolly gave evidence that there is a significant amount of money – some hundreds of thousands of dollars – that is derived from rent from the real estate, and we also point to the fact that, in the monthly accounts which are attached to Mr Jolly's statement at PJ41, you will see an amount each month of contributions.

PN1035

Mr Jolly explains in his statement that not all Locomotive Divisions pay their contributions into the shared account, that there are a small number who pay them to the branch account, and so there's figures of 6, 7, 8, \$9000 each month that goes into the branch account which is entirely consistent with the legal proposition that our friends put.

PN1036

JUSTICE HATCHER: Mr Borenstein, I was left a bit unclear about that legal fund. How is that paid for?

PN1037

MR BORENSTEIN: How is that paid for?

PN1038

JUSTICE HATCHER: Where does the income for that derive and through what account does it derive?

PN1039

MR BORENSTEIN: The income, as I understand it, comes through the shared account. It is an amount that is paid in addition to the contributions. So, there's a figure for contributions and then there is a 'top up' if you'd like.

PN1040

JUSTICE HATCHER: It is a membership levy.

PN1041

MR BORENSTEIN: Sorry?

PN1042

JUSTICE HATCHER: It's a levy.

PN1043

MR BORENSTEIN: Effectively.

PN1044

DEPUTY PRESIDENT GOSTENCNIK: So would - - -

PN1045

MR BORENSTEIN: And that would never be caught by the rules that our friend rely on.

PN1046

JUSTICE HATCHER: That's what I was going to say: so, if the 2017 resolution is invalid, would it effect the extra subscription?

PN1047

MR BORENSTEIN: No, because it's not a contribution, and the rules that our friend rely on for their argument about the invalidity of the 2017 resolution is that it contravenes the rule which says contributions are to be paid to the branch secretary. So, if the payment is not a contribution, then that rule, we would say, does not apply to it. And so, you will have seen that the quantum of that figure - in paragraph 82 of Mr Jolly's statement - is quite substantial.

PN1048

So we say, on the argument about who will end up with the accumulated funds, our friend's argument doesn't stand up, and the Commission can safely be satisfied that a significant proportion, if not the entirety of the accumulated funds, can be taken into account in deciding whether the locomotive division will be able to meet its obligations under paragraph B.

PN1049

The second matter that is attacked by the RTBU about the financial position of the locomotive division is in relation to the real property. Now, it's not entirely clear what our friends seek to make about that, but they point to the fact that some time ago an attempt was made to sell some of the real property, and it failed because the requisite proportion of locomotive division members didn't endorse it. Now, that's a requirement under rule 21(12) of the current rules of the RTBU.

PN1050

We say that this argument is irrelevant to the exercise under paragraph B because, as the Commissioner has noted in the previous decision, that is a forward-looking provision. The Commission is looking forward as to what will be the likely position going once the new organisation is registered. We've made the submission in our reply that there is no equivalent to the present rule 21(12) in the rules of the new union.

PN1051

The rules of the new union, the relevant rules are rule 27 of the new union and they contain no restriction on the sale of the real property. Now, Mr Jolly was asked in cross-examination what he'd do if he had to sell the property and is he going to sell it, and has he got plans to sell it, and so on. We say that misses the point of the exercise all together. The commercial decisions that the new union might make in given, hypothetical situations is something that we can't speculate about. They're completely hypothetical, there's no concrete factual scenario against which you ought to assess them, and I think the only basis on which Mr Downing advanced it was, 'Well, if you've got none of the cash that's in the reserves now, what would you do? Would you be prepared to sell the real estate?', and so on. And we say that it's a completely unrealistic proposition to put to him.

PN1052

There are many options when one is the owner of property, if one needs to use the property to raise funds, and many options short of selling. And we say that it's not a subject that the Commission should speculate about; the Commission should be satisfied that there are these assets - we've given you a reference to the valuations; they're in the millions - and that the restrictions that our friends point to currently

will not apply in the future, and therefore we say that that weighs heavily in favour of the locomotive division's ability to service its membership.

PN1053

The third area of attack was identified in the RTBU's response but didn't form any part of their written submissions or evidence. The response says that the RTBU will not have sufficient numbers to generate a sufficient amount of subscription or contribution revenue to be able to operate, to enable the - to adequately promote and protect the economic interests of its members.

PN1054

Now, Mr Jolly has provided in his second statement data about the position of the locomotive division and the union which will replace it. In terms of the contribution (indistinct) it generates, there was no challenge to any of that, and there was non challenge to the figures which he nominated for other income, there was a challenge about the failure to pay some of the shared expenses that had been invoiced to them by the branch. The evidence about that, we would say, does not take the case anywhere. The picture which emerged from the evidence is that the apportionment of expenses by the branch, as between the various divisions, was contentious as between the branch and the division.

PN1055

You've seen correspondence where the division has raised issues, and you've heard Mr Sharma say that he didn't respond to those issues. Your Honour, the president asked him whether he'd taken it to the branch executive, and apparently he wasn't able to tell you that he had. And so we say that what you've got at the end of the day is a situation where claims are made, they are there to be resolved. If and when they are resolved and you see it from the correspondence, amounts are paid.

PN1056

Now, even if you take the situation at its worst, from the VLD's point of view on this point, in annexure E you've got a gross figure that is said to be owing from back in 2022 of \$267,000. And of course if that had to be paid, then that would have to go into the expenses column in the table which Mr Jolly put forward. Now, if you look at 2022 in that table in paragraph 17, you see that there are expenses of \$1.545 million and there's a surplus of \$644,000. We point to paragraph 19 where Mr Jolly identifies the quantum of capitation fees that are included in the expenses.

PN1057

Capitation fees are fees which the locomotive division is required to pay to the national office of the RTBU. The amount is \$214,000 and so we say that even if you take the figure owing at its highest against the VLD, according to exhibit E, it's \$267,000. And if you say, 'Well, okay, that should be added to the expenses for 2022 in the table in paragraph 17', then the answer is, you may have to add \$276,000 but you can deduct \$214,000 because you won't be paying capitation fees. And so the net difference is \$50,000 in expenses, and so the surplus, instead of being \$644,000 is something like \$590,000. And we say - - -

PN1058

JUSTICE HATCHER: Well, that would just be the first (indistinct), that is, it'd be a one-off payment to pay it off.

PN1059

MR BORENSTEIN: Yes.

PN1060

JUSTICE HATCHER: And then following that, it wouldn't even be in the - - -

PN1061

MR BORENSTEIN: Correct. Correct.

PN1062

JUSTICE HATCHER: So for following this, the circles would be even larger.

PN1063

MR BORENSTEIN: Yes, exactly. And so we say that all of this cross-examination really goes nowhere when you look at the big picture, and we say that the evidence contains no telling blow against the VLD's ability to generate sufficient revenue both from contributions and from income of the property, to adequately meet the various expenses which it has to meet to operate.

PN1064

JUSTICE HATCHER: the bigger question, isn't it though, is whether its financial resources would be sufficient to pay for what would be needed to operate as a standalone union?

PN1065

MR BORENSTEIN: Yes.

PN1066

JUSTICE HATCHER: That is, we can't assume that just because the expenses are 1.545 million as part of a bigger union, that you can simply maintain that level of expenses as a standalone union, or assume that the current staff levels of the division would be sufficient to maintain it as a standalone union.

PN1067

MR BORENSTEIN: Well, we submit, Your Honour, that you should comfortably draw that inference. Mr Jolly wasn't challenged in any detailed way on that, and he's given evidence in his statement - in his first statement about the various activities which the branch presently operates independently of the - I'm sorry, the division operates independently of the branch. And if you go to paragraph 62 of his first statement, you will see he says, 'In practice, the VLD finishes' - - -

PN1068

JUSTICE HATCHER: Just slow down Mr Borenstein.

PN1069

MR BORENSTEIN: Sixty-two.

PN1070

JUSTICE HATCHER: Yes.

PN1071

MR BORENSTEIN: You'll see that he identifies the various things that the VLD operates independently, and presumably for which it will have to be paid, it will have to continue to pay independently after separation. And you will see that it pays for its own subscriptions, it administers its own real property, it controls - I'm looking at paragraph J - controls and administers its own records and so on. And all of those expenses are included - and Mr Jolly gave this evidence - all of those expenses are included in that third column of the table. And so we say that, looking at that table, it's \$1.5 million which Mr Jolly says includes the money that they pay for their own expenses, plus the capitation fees plus whatever they have to pay for the branch shared expenses. And so we say that, where Mr Jolly's given evidence, that it's intended to continue to operate the new union in the same way; the same model as the existing division. We say that the Commission can be well satisfied that the \$1.5 million in expenses will be adequate to cover that because that's what it's covering now, plus covering payments that they make for capitation fees and whatever else.

PN1072

JUSTICE HATCHER: But 62 doesn't really deal with the functions of industrial representation advocacy legal representation, does it? It's more about financial and administrative matters.

PN1073

MR BORENSTEIN: That is dealt with in the statement, Your Honour. If I go on after 62, at 64, 'VLD administers and processes all membership functions including but not limited to applications', et cetera, et cetera. Then 65, 'In relation to industrial of VLD members, the VLD operates with a high level of autonomy such that its members are represented' - et cetera, et cetera. And Mr Jolly was cross-examined by Mr Dowling, and identified the various officials that were engaged, employed by the locomotive division presently, including solicitors, including the secretary and the assistant secretary and, for a period of time, Mr Marotta as an industrial officer.

PN1074

And so I think the Commission can be satisfied that the industrial representation which the locomotive division has been giving to its members up until now has been paid for out of the \$1.5 million, and therefore it's reasonable to assume that, going forward, that situation is likely to continue. That's a demonstrated capacity, to use the words in the ex-mem which can inform the decision about the likely capacity into the future. And indeed, at paragraph 74, Mr Jolly expresses the view that 'It's intended after withdrawal from the RTBU, the new organisation will be able to provide the same services to members but at a lower cost, as it would no longer incur the cost of capitation fees to the national office.

PN1075

Now, Mr Jolly wasn't challenged on that cross-examination and we say Your Honour should accept that evidence. As I say, the RTBU put no evidence on about this, and relies simply on the cross-examination of Mr Jolly which, as we say, really went nowhere. So we say that, on that analysis, the commission can be

well satisfied that the new organisation will be likely to be able to be adequately promote and protect the economic and social interests of its members under paragraph B.

PN1076

Then the question is whether it's appropriate to grant the extension sought by the applicant under 94(a)(1), and it is sought by the applicant relying on paragraph B of subsection 2. Now, the - it's our submission that, of course, paragraph A and B are intended to operate separately in the sense that it's not necessary to have both of them in order to get an extension under section 94(a)(1), and so much is made clear in the explanatory memorandum.

PN1077

Now, our friends make the submission that the absence of a record of noncompliance is something that should weigh in their favour and against the - well, it should weigh in their favour because they haven't got the noncompliance, and the submissions that they make in paragraph 35 of their outline, in our submissions, proceed wrongly on a assumption that there's a need for an applicant to justify the making of the application to withdraw. You have to justify it by demonstrating that the registered organisation in some way or other has acted improperly, and our answer to that is that the legislation doesn't call for any such justification. All that's required is for an applicant to satisfy the Commission of one or other of the two paragraphs in section 94A(2).

PN1078

Effectively, what our friends are saying is that if there is no history of or record of noncompliance they should get a credit simply because they have obeyed the law and we say that that's an inappropriate analysis and we say that it's wrong and that the Commission should not approach the matter in that way.

PN1079

The Commission, if it's satisfied that the locomotive division meets the criteria in paragraph (b), then the Commission should find that it's appropriate to grant the extension, having regard to the considerations which I outlined before lunch, and on that basis, the Commission should dismiss the objections that our friends raise and should grant the extension and receive the application which we make. Unless there are any other matters that I can assist the Commission with, they are our submission-in-chief.

PN1080

JUSTICE HATCHER: You might have already covered this, Mr Borenstein, but just getting back to the issue of whether there is a record of noncompliance. Does the assessment of that consideration involve an evaluative judgment on the part of the Commission; that is, is an assessment with a right or wrong answer or does it involve some sort of evaluative multifactor assessment?

PN1081

MR BORENSTEIN: It involves, in our respectful submission, two elements. Firstly, whether there is relevant findings of noncompliance, and secondly, whether, if there are, whether what is identified constitutes a record.

PN1082

In relation to the first of those, we say that what the Full Bench is required to do is to look at the events or the instances that are put forward to determine whether they do, in fact, constitute findings of noncompliance having regard to the decision that's put forward. Some will. Some won't.

PN1083

If the Commission is satisfied that there are instances of noncompliance, then the second question is whether the number of instances constitute a record, and our submission is that if there is one instance of noncompliance then that is a record, and we have made submissions this morning about the importance of that in relation to subsection (3) and the need for certainty.

PN1084

JUSTICE HATCHER: Well, if you look at subsection (3) it starts with the words 'if the Commission considers'.

PN1085

MR BORENSTEIN: Yes, but - - -

PN1086

JUSTICE HATCHER: And that, on one view, suggests that we're not talking about questions - the way you have put it - with yes or no answers, but something involving an evaluation and reaching of a state of satisfaction.

PN1087

MR BORENSTEIN: We have made a submission in our outline about 'considers' and our submission - I will just find it quickly. Mr Bakri's computer is going to help me. In paragraph 16 of our reply submissions we refer to the use of the term 'considers' in subsection (3) and we submit that that means that the Commission is of the view that there is a record as a matter of fact.

PN1088

Now, we weren't going to trouble the Commission with dictionary definitions of 'considers', but if the Commission is going to be assisted by it, we have definitions from the Macquarie and the Oxford which we can hand up.

PN1089

So if one can go, firstly, to the Macquarie one - I'm sorry - and looking at the second meaning 'to regard or as deemed to be' we say is the way in which it's used in this section, and then if you go to the Oxford dictionary, the second dot point in the first meaning 'believed to be or think' and we say that those meanings are the meanings that are appropriate in subsection (3), meaning that if the Commission considers that there is a record; that is, if the Commission believes there to be a record as a matter of fact, then that's satisfied.

PN1090

I mean it's difficult to give it an evaluative meaning in subsection (3) because subsection (3) is a mandated outcome where there is a record present and if you give 'considers' an evaluative task to fulfil it means that there is no certainty.

PN1091

There is no predictability about when a mandatory provision like subsection (3) will or won't apply, and we say that that would overlap with the sort of function which the Commission undertakes under subsection (1), which is framed in different terms and talks about whether it's appropriate, and in that section the Commission can look at the content of the record and make an evaluative judgment whether, having regard to other matters, orders should be made.

PN1092

JUSTICE HATCHER: Well, provisions of that nature are common in the Fair Work Act itself; that is, provisions which require the Commission to form an evaluative judgment, and if it forms a judgment of a certain nature, then it has a duty to do something. 418 is a classic example.

PN1093

MR BORENSTEIN: Yes.

PN1094

JUSTICE HATCHER: Why isn't (3) the same sort of thing?

PN1095

MR BORENSTEIN: Because we say that subsection (3) is different because it's mandatory. If something is there as a fact, i.e. a record of noncompliance, it is mandatory to allow the application. We say that's the critical difference.

PN1096

JUSTICE HATCHER: How is that different from say section 418?

PN1097

MR BORENSTEIN: Well, the Commission isn't bound to make an order under section 418.

PN1098

JUSTICE HATCHER: Yes, it is, if it appears to the Commission.

PN1099

MR BORENSTEIN: I'm sorry?

PN1100

JUSTICE HATCHER: Section 418 requires the Commission to make an order if it appears that unprotected action is occurring, and that's just one example. I think the provision considered in the Coal and Allied case was of the same nature; that is, a discretionary - and I might be wrong - but a discretionary judgment leading to a requirement to make an order if the state of satisfaction is reached.

PN1101

MR BORENSTEIN: Well, the only response - I'm sorry, I thought your Honour was going to say something to me.

PN1102

JUSTICE HATCHER: No.

PN1103

MR BORENSTEIN: The only response I can make is that which I have made, that in the context of section 94A, that that is the meaning which we say makes the most sense, and it may stand. It may be appropriate - I'm sorry to use that word - to contrast the way in which the Commission's function, the evaluative function is expressed in subsection (1) and then the way it's expressed in subsection (3), and we say that that's something that should be made of the difference in the way in which the two subsections are expressed.

PN1104

JUSTICE HATCHER: I'm sorry, I think I was wrong about Coal and Allied. I think that was a discretion provision. Yes.

PN1105

MR BORENSTEIN: I think that was a case about terminating industrial action.

PN1106

JUSTICE HATCHER: Yes. All right.

PN1107

MR BORENSTEIN: Thank you, your Honour.

PN1108

JUSTICE HATCHER: Mr Dowling.

PN1109

MR DOWLING: Thank you, your Honour. As the members of the bench are aware, the application by Mr Jolly seeks an extension of time of some 25 years for the application for a ballot to ascertain whether the locomotive branch division should withdraw from the union.

PN1110

We understand the case against us to be put this way, or with the case advanced by Mr Jolly. The primary case that the RTBU has a record of noncompliance within the meaning of 94A(2) and (3) and the Commission is bound to accept the application. If the union is found not to have a record of noncompliance, the applicant's alternative case is that the Commission should, nonetheless, be satisfied that it is appropriate to accept the application out of time.

PN1111

We have set out at paragraph 3 of our written submissions - and I won't repeat them - the bases upon which the union resists the application. As we understand the submissions made today and in writing by Mr Borenstein, there are, effectively, two issues which fall to be determined. I know Mr Borenstein has taken you to the six, we think the six. We don't have a significant variance between us, but we have approached it this way.

PN1112

Firstly, when considering an application under 94A, how should the words 'a record of noncompliance', a record of not complying with workplace or safety laws in 94A(2) and (3) be construed, and then the relevant question, does the

union have a record of noncompliance properly construed? That is the first of the issues.

PN1113

The second, then when considering an application under 94A, how should 94A(1) be construed and how should the word 'appropriate' be construed in light of 94A(2) and the Act as a whole, and then the related questions, in respect of that second proposition, is it appropriate, within the meaning of 94A(1) of the Act, to grant an extension of time when the union has no history of noncompliance with workplace or safety laws, firstly, and secondly, is it appropriate to grant an extension of time where the Commission cannot be satisfied that the division's likely capacity, or satisfied of the division's likely capacity to protect and promote the economic and social interests of its members?

PN1114

So we will deal with each of those two matters and there's questions beneath them in turn. We will endeavour, as we do so, to deal with the reply submissions of the applicant, but there are some parts where it leaves things a little disjointed, and where that's the case, we will save what we say in reply to the very end.

PN1115

Can we just start then by saying one thing about the question of legal principles. We have set out the authorities at paragraph 5. There's no significant contest between the parties in respect of those authorities about the proper approach to the task of statutory construction and we won't repeat those.

PN1116

Can we just, though, emphasise one matter and draw the Bench's attention to it, without taking you to it, and that is from the decision of *Certain Lloyd's Underwriters v Cross*, which we've provided in the authorities provided to the Bench this morning. The relevant words are those first appearing in paragraph 26, where the court there said:

PN1117

A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of the legislation must be derived from what the legislation says and not from any assumption about the desired or desirable reach or operation of the relevant provisions.

PN1118

We say that's particularly pertinent, and where we have endeavoured to ascertain the purpose, we've done so from the words of the section, and we'll have some criticism about what it is that our friends have done in that respect.

PN1119

So I won't say anything more about the principles, and can we turn then to the first issue, and that is whether the union has a record of not complying with workplace or safety laws and the construing of the phrase 'record of not complying with workplace or safety laws'.

PN1120

There seems to be now, within that question itself, two matters between the parties, and that is first whether 'record' means a finding of a court or tribunal within jurisdiction, and second, whether 'record' connotes more than one incident of non-compliance.

PN1121

Can I deal with the first of those, and here, we say, having regard to the context in which the expression is used and the particular context provided for by subsection (3), 'record' must mean a finding made by a court or tribunal with authority to decide whether the amalgamated organisation had complied with a workplace or safety law. Of course, if that were not the case, any record could safety the provision.

PN1122

JUSTICE HATCHER: So what do you mean by 'authority to decide'?

PN1123

MR DOWLING: That's the jurisdictional aspect of the definition, that it is something within their jurisdiction to determine, and perhaps 418 is the example, the relevant example, for present purposes.

PN1124

The Commission, in exercising its function under 418, does not have the jurisdiction to determine there was non-compliance with a workplace health or safety law. What it does do and what it is entitled to do is form an opinion about whether the requisite circumstances are satisfied in respect of 418, but what it doesn't do and what it doesn't have the jurisdiction to do is determine non-compliance.

PN1125

Just continuing to deal with that topic by reference to the exchange between your Honour and my learned friend Mr Borenstein about the decision of Deputy President Colman, one of the things that was said in support of that decision including a finding was that, well, in the first paragraph there's a reference to the enterprise agreement, and what we can conclude, therefore, is that any taking of industrial action would be in breach of section 417.

PN1126

There can be no dispute that the Commission did not have the jurisdiction to determine that there was non-compliance with section 417, and that, as we understand it, is the way our friends frame their reliance on that case to say, certainly from oral submissions today, that in effect there was a finding of non-compliance because there was a finding of a contravention of 417, ultimately.

PN1127

Now, that, we say, is clearly outside the jurisdiction of the court. Putting aside what are other and obvious considerations - that that matter was never argued before the parties is obvious from the decision, but the way our friends put it is that because of that you can be satisfied, and that is what we mean and that encompasses this idea of jurisdiction.

PN1128

JUSTICE HATCHER: When would a tribunal ever have jurisdiction to decide a question of compliance with the law?

PN1129

MR DOWLING: Well, a tribunal may not.

PN1130

JUSTICE HATCHER: That is, the applicant points to the reference in the explanatory memorandum to taking to - reference to tribunals and taking into account previous compliance with industrial action laws – I'm paraphrasing. What's a circumstance in which that would ever constitute a finding, on your analysis?

PN1131

MR DOWLING: It's certainly possible, your Honour, that the tribunal might have been given express jurisdiction under the statutory scheme to make a finding of a contravention, but absent an express statutory - - -

PN1132

JUSTICE HATCHER: What's an example of that? I mean, the explanatory memorandum contemplated that there would be possible cases where that would occur.

PN1133

MR DOWLING: Yes.

PN1134

JUSTICE HATCHER: I'm just trying to find out what that might be.

PN1135

MR DOWLING: Yes. Certainly under the Fair Work Act we don't say that this tribunal, the Commission, is given the jurisdiction to determine non-compliance with the workplace health or safety law.

PN1136

DEPUTY PRESIDENT GOSTENCNIK: For example, I'm certain that the South Australian – or at least it used to be the case, the South Australian Employment Tribunal had jurisdiction to determine contraventions of the Occupational Health and Safety Act in South Australia, at that stage a relevant law.

PN1137

MR DOWLING: Yes. I think it's one of those tribunals that has the ability to sit in court session as well.

PN1138

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN1139

MR DOWLING: And Mr Massy reminds me - - -

PN1140

DEPUTY PRESIDENT GOSTENCNIK: I think New South Wales used to have a similar jurisdiction.

PN1141

MR DOWLING: They did. They did. Mr Massy, who's from Queensland - - -

PN1142

JUSTICE HATCHER: And that was again sitting as a court.

PN1143

MR DOWLING: Mr Massy, who's from Queensland, reminds me that the Queensland tribunal has a similar ability in those circumstances. We don't point to anything in this Commonwealth Commission that has that circumstance, but - - -

PN1144

DEPUTY PRESIDENT GOSTENCNIK: No, it's just that the state occupational health and safety law is a workplace or safety law to which those other provisions related.

PN1145

MR DOWLING: Yes. Yes, you're quite right, Deputy President. So that would encompass that circumstance.

PN1146

I think where we get to in terms of the debate between the parties, firstly, one of the things we're criticised for is reading words in, and can we say, if it's not already obvious, that is not what we are doing. We are endeavouring, as both parties are, to try and construe 'record'.

PN1147

Our friends go this far, at least. They say 'record' should be read as a record of a court or tribunal. I think that much is accepted by their written submissions.

PN1148

If we were to be petty, we might say that's a concession that at least those words need to be read in, but starting from that point, that both sides agree that 'record' is a record of a court or tribunal, we say the next and necessary step is that it is a record consistent with their jurisdiction or made by them as part of their jurisdiction.

PN1149

Reference has been to the decision in Kelly. Can we just repeat that, for completeness, because it's a variation on the same theme that we're endeavouring to explain. That's in our authorities. I don't need to take the Bench to it, but can I just read paragraph 22, where the Bench there said:

PN1150

We should indicate, for completeness, that to the extent that the CFMMEU earlier submitted that any orders made by the Commission under 418 are to be

considered under 94(2)(a), that submission is rejected. When the Commission makes an order under 418 of the Act, it has not made a determinative finding of non-compliance within the Fair Work Act.

PN1151

Rather, the Commission has conducted an evaluative assessment as to whether it appears, by reaching a state of satisfaction, that industrial action by one or more employees or employers that is not, or would not be, protected industrial action is happening, threatening, impending or probable.

PN1152

There is a clear distinction between determining the existence of a jurisdictional fact grounded in the holding of an opinion or state of satisfaction and one grounded in whether that state of affairs actually or as a matter of fact exists.

PN1153

We put that another way by saying determining that the fact actually or as a matter of fact existed in the circumstances of the section 418 application would be to act beyond reasonable doubt jurisdiction. It's the same theme, the same proposition, but we describe it in the context of a question of jurisdiction.

PN1154

Can we say this also about 'record' to reinforce what we say by reference to 94A(3), and a reference has been made by Mr Borenstein about the mandatory nature of 94A(3).

PN1155

DEPUTY PRESIDENT GOSTENCNIK: Would a conclusion in a consent arbitration under a dispute settlement procedure of an enterprise agreement that one party breached the agreement be part of the record for non-compliance?

PN1156

MR DOWLING: My immediate response is that it would not, it would not be a determination. It might bind the parties because of their agreement in respect of the way the dispute is to be resolved. So it might bind the parties, but it wouldn't constitute a record of non-compliance.

PN1157

JUSTICE HATCHER: Similarly, would a right of entry dispute – might that involve a finding as to whether entry rights had been lawfully exercised and could be taken into account here?

PN1158

MR DOWLING: By that you mean in respect of an application for a permit, perhaps, and findings in respect of what had been - - -

PN1159

JUSTICE HATCHER: If there's a dispute about right of entry and it's found that an official of an organisation, for the purpose of resolving the dispute, did not

exercise rights lawfully, could that be sheeted home as part of the union's record if there was a finding to that effect?

PN1160

MR DOWLING: I think, in our submission, the Commission would need to be very cautious to determine that that was a record of non-compliance. Can I perhaps go back to Deputy President Gostencnik and the query about a consent arbitration.

PN1161

In a recent decision of Murphy J that went on appeal before the Full Court of the Federal Court, there was an outcome in respect of an arbitration - I can tell by the nodding you're familiar with it - in respect of air services and air traffic controllers, and I'll find the citation.

PN1162

The parties then went to the court and sought the imposition of a penalty, and that was met with an argument that, 'You can't come and seek a penalty because you've already got your finding', and the important distinction that was argued before the court was, no, all that the Commission did was make a conclusion with respect to the relevant circumstances and event, but what they didn't have jurisdiction to do was determine that there had been a contravention of the Act.

PN1163

That was the determination of the court, ultimately, that the court could impose the penalty because it was only for the court to determine a contravention of the Act, and so they then, despite the finding on the arbitration, said, 'We are entitled to impose a penalty.' I mean that long explanation as an answer to the tribunal hasn't found the record of non-compliance but the court has in respect of the finding of the contravention.

PN1164

Can I say this then about the decisions relied upon – and I think Mr Borenstein spent some time with the decision of Deputy President Colman in Downer and relied upon paragraphs 17, 20 and 22.

PN1165

Those are the paragraphs that – at 17 the Deputy President there uses the words 'supported a finding', and at 20, 'it appears to me', and at 22, 'I was satisfied'. Nothing in those paragraphs, we say, amount to a finding of non-compliance or the recording of non-compliance.

PN1166

As I said a moment ago, the other reliance that's placed on that decision is to say what was found amounts to a contravention of 417. What is clear from the decision itself is that the parties did not argue and were not heard on a contravention of 417, so it would be a very strange outcome to say that the Deputy President's decision amounts to a finding of contravention of 417.

PN1167

Rather, what our friends were proposing was that the Full Bench itself determined that there was a finding in contravention or a contravention of 417, and that is not a record of non-compliance established by the decision that's relied upon. That is all we need to say in addition to what we have put in writing about the first part of this part if you like, and that is how it is that a record of non-compliance does not include the two 418 decisions.

PN1168

Can we then turn to the question of whether the record connotes more than one instance of non-compliance, and can I just say what is likely obvious, but this second issue only arises if we were to lose the first. If you were satisfied there was no record of non-compliance then that issue insofar as the applicant is concerned is completely put to bed.

PN1169

But if you are satisfied that there is a record of non-compliance then and only then would you need to consider our second issue, and that is whether a record of non-compliance read properly encompasses more than one contravention. And as our friends would have it, it can be one or more, and you will have seen what we said in writing, that if that was what was intended the section itself would have used the expression 'one or more', and we say the word 'record' used in the circumstances of subsections (2)(a) and (3) strongly suggest that the record of non-compliance means some significant number of instances of non-compliance.

PN1170

Returning to something your Honour the president asked my learned friend at the very conclusion of his submissions, and that is the word 'considers' in 94A(3). In our submission that is a strong indication of an evaluative judgment. Nothing we have seen in the dictionary definitions that have been provided undermines that proposition; to contemplate mentally, mediate or reflect upon, to think about. Nothing in those definitions undermines the submission that it is and is intended to be an evaluative judgment.

PN1171

Those references are made to the Macquarie definition, but the Oxford also includes to believe to be or to think. All of that we say supports the proposition that it is an evaluative judgment, and that counts against the proposition that the word 'record' should be construed as meaning one or more. Read in an evaluative way that means it is more than one. Indeed if record was construed in the way that it meant one or more there would be no need for subsection (3) to be couched in an evaluative way. It would be black and white on our friends' construction. If there only needed to be one and there was one then there would be no need for the use of the word 'considers' and that evaluative approach that is clearly identified -

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PN1172

DEPUTY PRESIDENT GOSTENCNIK: Well, it might be necessary to assess the level of contribution by the division seeking (indistinct).

PN1173

MR DOWLING: Well, we would say, Deputy President, that that's contemplated by (2)(a), because it's (2)(a) that provides any contribution of the constituent part to that record. So that work might be done by 94(2)(a). That would still leave the evaluative approach by 94A(3) that we advocate.

PN1174

Can I just for completeness while we're dealing with the second issue say a couple of short things about the reply submissions of the applicant. At 14 they again make the complaints that we're reading the words into the statute, and again we say that is wrong and all we're endeavouring to do is give the word 'record' a meaning.

PN1175

Can we then return to something we say in our primary submissions in respect of this topic. At paragraphs 14 and 15 of our primary submissions we identify that the construction contended for by the union is consistent with the text of the second reading speech, and the complaint made against us is that we are misreading the extract of the Minister's second reading speech.

PN1176

Can we just make this clear; first, the union's submission is that its reading of the Minister's speech is more consistent with substantial non-compliance than a one-off contravention. And secondly, where the use of the word 'activity' - 'activities' plural, my apologies, is used at the end of the Minister's quote, that suggests that the Minister was referring to non-compliance in a plural sense, and that's as much as we take from the second reading speech, and we say all of that is consistent with the construction and the propositions we have put.

PN1177

All of that being so what we say the proper construction of 94A and 'record' it should be construed as embracing findings of a court or tribunal within jurisdiction, and a significant number of incidences of non-compliance. And if one or other of those constructions is accepted then the primary case of the applicant must fail. For completeness we should say on that proper construction it cannot be said in respect of the two 418 proceedings that there is any record of non-compliance.

PN1178

Now, that is as much as we want to say or need to say other than what's said in writing about the first part of our submissions. Can we then move to the question of appropriate, and construing both the word 'appropriate' and section 94A(1). This alternative case of the applicant depends on the Full Bench exercising the discretion conferred by 94A(1), and all of this requires the Commission to consider the proper approach to the exercise of that discretion.

PN1179

What is clear, in our submission, is that 94A grants the Commission a discretion to accept applications filed out of time, but in order to exercise that power the Commission must be satisfied that it is appropriate to do so, and we have drawn attention in our written submission to the well settled use of the word 'satisfied',

and we have by reference in a slightly different context referred to, as your Honour did, *Coal v Allied*, and you will see that footnoted in our submissions.

PN1180

And in respect of the use of the word 'appropriate' we have identified that that should be held to mean, and has been held to mean fair and just and requiring the striking of a balance between relevant considerations so as to provide an outcome which is fit and proper. And you will see we have referred in our written submissions to both *Nile v Wood*, at footnote 7 in our written submissions, and *Mitchell v The Queen*, which can I just quickly interpolate has a wrong citation at footnote 8 on page 5, and that should be volume 184 of the Commonwealth Law Reports starting at page 333 and relevantly at page 356.

PN1181

Can I just interpolate, and I will come to things we want to say in reply to some of the submissions that have been put, but just while introducing this topic what is important is this notion of striking the balance between the relevant considerations. The error that our friends make in respect of 94A(2)(a) and (b) is to treat those two subsections as jurisdictional prerequisites of some kind and to say, well that one's not there, but that one is satisfied and therefore the application should be granted.

PN1182

But that wrongly approaches the word 'appropriate' and 'satisfied', because when you view appropriate in the way for which we contend it's about the balancing of the considerations, and that's the exercise that needs to be undertaken in respect of 94A(2). It's to balance those two considerations. It's not to say they're prerequisite, that if one is not there the other is satisfied, but it's to balance them, and that's why it's important that we say, well when you don't have a record of non-compliance that's still a consideration and that has to be weighed. And that's where our friends say, well that's a prerequisite and it's not there, so you only need to worry about the other one. It's a weighing exercise and you've got to weigh them both.

PN1183

In terms of, and we have made this clear today and previously, but the matters relevant to the assessment we say are confined to this; the matters contained in 94A(2) and the context of 94A(2) found by part 2 of chapter 3, and sections 94 and 94A which are in part 3.

PN1184

At paragraph 20 of our submissions, and our friend went through them, and we will return to it when we say something in reply, but what we say those sections reveal is that the Act encourages amalgamations firstly. None of that is undermined what our friend says about there being some ability to seek an extension. That part 2 of chapter 3 sets out the mechanism by which that encouragement is to be effected. That 94 imposes time limits from the withdrawal from amalgamation, the purpose of which is to create a period of certainty.

PN1185

It must get out between the two and five year window, and that's designed to create finality and certainty. None of that is undermined by the introduction of 94A, which is an exception to the time limit. Our friend takes issue with it being properly an exception, but what is clear is the general rule, if we can phrase it that way, is the two to five year window, and 94A, in our submission properly described, creates an exception to that general rule.

PN1186

When the approach to what is appropriate is to be determined and how much weight is to be given to the considerations in 94A(2) that assessment must be carried out in the context that 94A provides for an exception to the general rule that I have just described. To approach appropriate more broadly we say would denude the operation of the time limit.

PN1187

And this perhaps is where in respect of our learned friend's submission the rubber hits the road, because in circumstances where the amalgamated organisation does not have a record of non-compliance and the new organisation has the capacity to protect the economic and social interests of its members, and we say as one would expect of most administrative units, a finding that that administrative unit was able to withdraw simply because of the capacity and nothing else, would, in our respectful submission, give the time limit no meaningful operation.

PN1188

Now, our friend's only response to that today is to say, well there might be some circumstances where the administrative unit doesn't have the capacity or there might be some challenge to the capacity, as there is here a challenge to the capacity. But still that doesn't answer the fundamental problem with the construction, and the fundamental problem with the construction is if all that is required is to establish capacity which we say if it isn't always present it is nearly always present.

PN1189

There's a rather peculiar set of circumstances here about breaches to rules, but if it is nearly always present whenever it is present that administrative unit will be able to get out regardless of the time limit in 94(1). The time limit that is being proposed and has existed since the time that the withdrawal from amalgamation provisions had existed would be completely denuded. All you would need to show is that question of capacity, and you could get out at any time. Twenty-five years later is fine, 30 years later is fine, you could get out at any time.

PN1190

The applicant then relies on the 2020 amending legislation, and we say the significant difference between us here is really whether the applicant, as we contend, has overstated the purpose. It is true to say that the purpose of the amending legislation was to expand the scope of entities that could apply; firstly by the definition of separately identifiable, that separately identifiable constituent part that was amended and that's been explained by this Commission in the Full Court in Kelly but secondly, the five-year time limit was made the subject of, we'd say, a narrow exception. If the matters described in 94(2)(a) and (3) were established then in respect to that narrow exception the application must be

accepted out of time. But if not, the Commission has retained the limited discretion which was to be informed by the exhaustive list of considerations in subsection (2).

PN1191

Nothing removes the rationale for the time limit. There was no intention in the amending legislation to remove the time limit – quite to the contrary. The time limit remains and must continue to have some function. If it was intended that 94A was intended to completely denude that time limit, that is something we would expect would have been made abundantly clear by the amending legislation and clearly has not been. We say the way the amending legislation creates an exception reinforces the continuing existence of the time limit. So when one has regard to the scheme as a whole, the evident purpose of the amendments was to introduce a mechanism where if the amalgamated organisation had engaged in substantial unlawful conduct, then the disturbance of the status quo would be justified.

PN1192

The power to grant that extension of time is a response to that unlawful conduct of the amalgamated organisation. That and those two considerations are what guide the proper operation of 94A(2) and (3). Now, can we just address the submission that is made by the applicant by reference to the explanatory memorandum at paragraph 33 and how it provides that it is not necessary for both of the matters listed in new subsection 94A(2) to be present. Can we say two things about that, and the first, we're content to rely on what we say in writing. The first is that on a fair and proper reading of the explanatory memorandum, paragraph 33 is I think we say confused writing because the two preceding paragraphs of the explanatory memorandum are dealing with 94A(2).

PN1193

Thirty-three then starts by addressing 94A(3) and partway through it seems to make a comment about the proper operation of 94A(2). Now, that is a very odd way of going about what might be said to be a normal way of dealing with the statutory provisions that are being explained. But as I say, we've done that in writing and you'll see that at paragraph 26 of our written submissions. In any event, and the more important point is the explanatory memorandum does not tell you anything about how to weight those two considerations. It endeavours to say that perhaps one can be present if one isn't but what it doesn't do, keeping in mind what we say is the proper construction, that these are considerations to be weighed. It doesn't tell you anything about how to weigh them. In that way it doesn't inform the proper approach or a contrary approach to what we can contend for of section 94A(2) and (3).

PN1194

That perhaps leads to – having dealt with that issue – what we described at the outset as the first of the related questions when it comes to the question of whether it is appropriate to grant the extension of time. That issue is whether it is appropriate to grant the extension of time where there is no record of non-compliance. This is consistent with the weighing exercise that I've described. This is where and why we say the absence of a record of non-

compliance is a positive factor which weighs heavily against it being appropriate to grant the extension of time.

PN1195

In the absence of a record of non-compliance, there is no conduct from the amalgamated organisation contributing to or otherwise justifying any reason for the constituent part to be permitted to withdraw from the amalgamation outside the permitted two to five-year window. Again, we repeat that's the error that our friends make in treating those two considerations as a jurisdictional fact. When you look at them as a weighing exercise, and in respect of (2)(a) say, 'Did they contribute? No? Well, that should be taken into account', the fact that there was no record and there was on contribution. That should be taken into account in a meaningful way in the weighing of the exercises to whether it is appropriate.

PN1196

Can we then turn to the second of the related questions to the approach to, 'appropriate', in 94A(1)? That is: is it appropriate to grant the application where the Commission cannot be satisfied that the new organisation will be able to promote and protect the economic and social interests of its members. Can we start this discussion by just firstly identifying for the Bench those parts of our written submission that we say make good the proposition that the new union, it should not be taken to have the assets and amounts for which it contends as a result of those amounts being paid in breach of the rules. You will see at paragraphs 38 through to 40 where we set out there by reference to the statements – the evidence, sorry – of the branch secretary, Mr Sharma, those matters that are established by his evidence and the paragraphs that follow to make good that the effect of that lack of compliance with the rules is that the amounts contended for by the division should not be accepted as held by them in circumstances where that as it did – as he did at the start of the day the applicant accepts that in order to avoid any overlap with the Federal Court proceeding that the 2017 resolution was not passed in accordance with the rules and therefore any payments made in accordance with it were not made in accordance with the rules and therefore the consequences for which we contend.

PN1197

JUSTICE HATCHER: The applicant submits that if the 2017 resolution had never occurred and if contributions had been paid into the correct account in accordance with the rules it would have made no difference – that is, the outcome would still have been that branch office expenses would have been deducted and the balance would have gone back to the division, so it's an academic (indistinct) question.

PN1198

MR DOWLING: Well, we need to make this position very clear, and this seems to be consistent with what the applicant says: the applicant's position is that it is no part of the Commission's duty to predict what might happen in the Federal Court proceeding.

PN1199

JUSTICE HATCHER: Well, we have to assess what is likely and if the new organisation's capacity is going to be affected by the apportionment of assets determined by the Federal Court, don't we have to take it into account?

PN1200

MR DOWLING: Can we describe it this way: it seems that both the applicant and the union say before you that you should not speculate about the Federal Court proceeding and so what we say – that assume in weighing the capacity of the applicant or the putative organisation there is a substantial chance that the Federal Court will determine that all of that money is not theirs, keeping in mind this is something for the applicant to satisfy you of but consistent with what the parties say to you, don't speculate. But what you should do in weighing their capacity is at least determine on what you have heard – and this is the most and least you can do – that there is a substantial chance that the court will determine that the money is not theirs.

PN1201

Of course part of those circumstances is, for present purposes, there's no dispute between us that the 2017 resolution was passed in breach of rule and the money is paid in accordance with it. We're in breach of rule.

PN1202

JUSTICE HATCHER: That might be true but I don't understand how it follows that the branch somehow gets all the money in circumstances where the rules would have required this same outcome. Maybe this division gets the money after the deduction of branch expenses.

PN1203

MR DOWLING: No, that might be what's between us, your Honour. The rules don't require that. What the rules require is that the money is paid to the branch -
- -

PN1204

JUSTICE HATCHER: Yes.

PN1205

MR DOWLING: - - - and then the branch executive determines what should happen with those amounts. Now, the only case that our friends describe today is that ultimately in the Federal Court it will say, well, as a matter of practice it's happened in a particular way since 2017 and it might continue to happen in accordance with that practice but that is not the same as what your Honour described, that the rules require – because they don't – that the monies received by the branch will be automatically or in some way pursuant to the rules paid to the division. That is not so.

PN1206

JUSTICE HATCHER: So what happened before 2017?

PN1207

MR DOWLING: Well, I'm not sure that's in evidence before you, save this – but again, save some practice of contributions flowing to the division but it should be

made clear that that's not put against us or not put in evidence as a contention that the rules required it. Can I summarise Mr Jolly's evidence in this way: what is clear from Mr Jolly's evidence is that he accepted that he has no plan or budget, at least, for the future operation of the division as a union and he seemed to respond to that concession in three ways – first, to say, well, the subs will cover the expenses but we know from the difference between the dues and the expenses and the calculations can be performed on the material provided – we say there is only a modest difference between the dues and the expenses such that the division would be effectively living hand to mouth and that's not even taking into account the doubt remaining about whether the expenses might be higher.

PN1208

They might be higher because they haven't properly paid some that they are due to pay or because economies of scale that they've had the benefit of now, they will not have the benefit as a standalone organisation. As your Honour the President noted, you cannot assume – should not assume, especially in circumstances where Mr Jolly has no budget or plan – that the same operating expenses will apply. The second answer seemed to be, 'Well, we could use the legal fund'. Now, Mr Jolly raised the legal fund directly in response to concerns raised about how you could meet the expenses. Can we say this about the legal fund: firstly, as we read the rules, there is no provision for a branch division to levy in this way. Rule 11(1) provides for national levies and branch levies and it provides for those levies to be paid to the branch. Rule 42(1) provides for a branch council to make a decision about a levy but those levies would be paid to the branch.

PN1209

So we do not – unless our friends can direct us to it – see in the rules any provision for the division to levy in this way. That might have at least one consequence, if the money was levied in breach of the rules. It might be that, in circumstances where there was no power to do so, it might still be held on trust for the members, but it would be held on trust by the union of course.

PN1210

But secondly, and in any event, it seemed to be suggested by Mr Jolly that, oh well, we could just meet the expenses by using the legal fund, and can we say, without knowing any more about how it was levied and whether it was in breach of the rules, in our submission, if it is levied as a legal fund, it could not then be used for a different purpose for which it was levied, which seemed to be the suggestion by Mr Jolly, that even though it's levied as a legal fund we'll use it to meet our ongoing operating expenses, and that, in our submission, would be, even accepting for argument's sake that it was a payment made consistent with the rules, would be an improper use of the money.

PN1211

The third answer seemed to be the - raised by the statement, or at least his second statement, was the question of the sale of assets, and the first and starting proposition is that that is contingent on having that real property in circumstances where it is not clear whether the Federal Court will agree it is theirs.

PN1212

There was no evidence about any timing or ability to sell, and Mr Jolly was unclear as to how that might happen, and it was certainly clear that no plans or preparation had been made about the sale of any assets if there was a question of meeting immediate obligations, expense obligations.

PN1213

Those three efforts to respond to the concerns and the criticisms just lead to this conclusion, that likely capacity is at least clouded, and we say of course it's a weighing exercise.

PN1214

JUSTICE HATCHER: Sorry, did I hear you say that the court would be unlikely to apportion the property assets to the division?

PN1215

MR DOWLING: We said it's unclear as to how they will. That's all we can say, and our friends say don't speculate, and we share that question of guidance, but we say it's unclear how they will, especially in circumstances where there might be moneys owing and there might be a question of whether the total of the moneys paid in breach of the rule exceeds what it is that the union has in its bank account.

PN1216

You will have seen the figures that \$10 million might have been paid in breach of rule, and \$6 million is what they hold. Now, that might give rise to some doubt about – sorry, that's not right. \$10 has been made in breach of the rule, \$6 has been made since the time has passed for the validation question. So there might still be some question about what happens to the assets, and as much as we say it is unclear - - -

PN1217

JUSTICE HATCHER: What's the validation period again?

PN1218

MR DOWLING: Four years. That is as much as we need to say about the question of the likely capacity, save that we say when the weighing exercise is conducted and you weigh the two considerations, and the capacity is at least clouded, and the lack of any record of non-compliance is weighed in favour of the union, we say that there's no basis for relevantly finding that it would be appropriate when the considerations are weighed.

PN1219

That then only leaves me to respond to some of the matters, just directly some of the matters that are raised against us in the reply submissions, but I deal with those relatively quickly, but these are not addressed in writing so I need to reference them as we go.

PN1220

At paragraph 20 of the reply submissions, the applicant makes a criticism that the matters relied upon have been selectively chosen - they are the matters in terms of construction – that they have been selectively chosen. There does not seem to be, as we read the submission, any identification of why they have been selectively

chosen or what other elements of the scheme might properly be drawn upon. There's just an adjectival criticism, but no substance as to why it was selective or which parts should have been included in the selection.

PN1221

For its part, the union accepts that the introduction of 94A is a provision which permits an extension of time to be granted. The union's point is simply that the mechanism chosen by parliament was a limited discretion to extend time rather than of course and obviously the abolition of the time limit, and that, as we said at the outset, suggests an exception to a general rule.

PN1222

At 21 to 27, the applicant's reply submission endeavours to develop why it is that the union's description of the scheme of the legislation is wrong. Can we just make these two observations?

PN1223

First, at 22, the applicant does not identify, and didn't we say with respect today, why it is that the Full Court's observation that the Act encourages amalgamations is not correct. We accept again that there is a limited provision for amalgamations to be withdrawn from. None of that detracts from the Full Court's findings that the scheme was to encourage amalgamations.

PN1224

And secondly, and contrary to the applicant's submissions at 23, the union does not submit that that encouragement is the only purpose. It is a purpose, but it is not our case that it is the only purpose.

PN1225

At 25 of his reply submissions, there's a debate that Part 3 of Chapter 3 provides a mechanism for withdrawal from amalgamations. Again, there's no dispute about that, but importantly, the mechanism is not at large and has a time limit subject to the exception within 94A, and that seems to be a fundamental difference between us, this notion that the scheme in some way should be seen by Part 3 to be at large and limited, and that's entirely inconsistent with the scheme of the Act.

PN1226

At 26 of the applicant's reply submissions, the applicant contends that the union submission that after the five-year time limit provided for in 94A amalgamations become final is, they say, in wilful blindness of Part 3 of Chapter 3. Of course we say, forgetting that, 94(1)(c), the time limit to which we point, is part of Part 3. Subject to the extension of time being granted under 94A, as the union describes in 20(d) of its submissions, there is no other mechanism for constituent parts to withdraw from the amalgamation, and they are final.

PN1227

At 27 of the applicant's submissions they deal with the 2020 amendments, and as much – and I've made some reference to this already, and it's enough to say that what those amendments did not do in any way is affect, or intend to, or expressly withdraw the time limitation provided for by 94(1)(c). They contained a provision

in no more that there might - relevantly no more - that there might be an extension by way of a discretion.

PN1228

They cannot be approached, and this is the fundamental difference between us, on the basis that the intention of parliament was to obviate the time limit. Nowhere is that said, and nowhere should it be understood.

PN1229

I need to clarify by reference to the applicant's submission at paragraph 28 that the union, despite what the applicant says, is not making any concession, but rather describing the operation of the statute.

PN1230

At 29, the same error that I've already identified is repeated that what the applicant is endeavouring to do is replace the words of the statute with the explanatory memorandum.

PN1231

And at 30 of the reply submissions, there's an effort to criticise the union's submission at 22, and again, it seems to us that apart from asserting the union is wrong, the applicant does not give any reason as to why the submission in 22 should not be accepted.

PN1232

32 to 33, it is important and I return to it because it and 32 and 33 allow me to return and underline what we said about Lloyd's Underwriters at the commencement of our oral submissions.

PN1233

There's an effort there to criticise the union's attempt to discern a rationale from the text of the legislation, and can we make clear that the mere fact that parliament has previously extended the period for which an application for withdrawal can be made is of no assistance in determining how an application for an extension of time should be granted in circumstances where the period applying for the withdrawal has passed.

PN1234

But the mistake our friends make is endeavouring to create some, or to locate some a priori assumption based on past extensions, or based on an explanatory memorandum, but what it does not do is what Lloyd's Underwriters' counsels, and that is to discern any purpose from the text of the legislation itself, and that's why we made an effort to reinforce that at the outset of our submissions and we continue to make that criticism.

PN1235

Just two last matters by way of reply. At 35 of the applicant's reply submissions – sorry, I withdraw that. I don't need to take you to that. It's really the same point that I've just raised in respect of 32 and 33.

PN1236

At 42 to 42 of the applicant's reply submission, the applicant responds to the union's substantive submissions as to the exercise of the discretion in all of the relevant circumstances, and again the error that is made there, and I've identified this earlier in the course of my submissions, is to treat the matters in (2)(a) and (2)(b) as jurisdictional prerequisites, as opposed to the proper approach that we say in that they are both considerations to be weighed.

PN1237

Accepting that as what we say must be the proper construction in terms of weighing those considerations, when it comes to the question of appropriate in this second half of the submissions we've been putting, where the union does not have a record of non-compliance with workplace safety laws, and where there is at least a cloud or a doubt in respect of the capacity of the union to promote and protect the economical and social interests of the members, the Commission cannot and should not be satisfied that it is appropriate.

PN1238

Those two things are weighed, and you might say, well we are very satisfied in respect of the record of non-compliance, we're a little unsure of what to do about capacity, but when you're weighing those two things in those circumstances, where the lack of the record of non-compliance is strong and weighs heavily, and the other still, we say, weighs in our favour but perhaps you might say less strongly - we don't concede that, but you might say that – still in that weighing exercise it is inevitably, and must be, that you could not be satisfied that it would be appropriate to grant the extension of time in all of those circumstances.

PN1239

Just excuse me for one moment. Unless there are any questions they are the submissions of the union.

PN1240

JUSTICE HATCHER: Thank you. Anything in reply, Mr Borenstein?

PN1241

MR BORENSTEIN: Thank you, your Honour. Can I start by replying to the earlier submissions which Mr Dowling made in relation to the question of record and the examples that we've given in the two decisions under section 418.

PN1242

Throughout his submissions Mr Dowling has misstated the requirement of the provision by continually referring to determinations, where the legislation only requires findings, and when you read our submissions you will see that we have been careful to express ourselves in terms of the existence of findings as opposed to determinations.

PN1243

JUSTICE HATCHER: Sorry, the - - -

PN1244

MR BORENSTEIN: The argument that our friend - - - - -

PN1245

JUSTICE HATCHER: The legislation doesn't use either expression, does it?

PN1246

MR BORENSTEIN: I'm sorry?

PN1247

JUSTICE HATCHER: The legislation doesn't use either expression.

PN1248

MR BORENSTEIN: No, but the explanatory memorandum, to which both parties have referred, does express itself, and I mentioned this this morning, in terms of findings 'in relation to industrial action'. We say that in those circumstances it would be wrong to find that the requirement is for a determination.

PN1249

Then the second point that we seek to make is to respond to our friend's argument - and we've done this in our outline in reply and I'll only take a moment to speak of it - that the making of findings by the Commission in relation to a proceeding where it's ultimately going to reach an ultimate conclusion about satisfaction or otherwise is clearly within jurisdiction of the Commission.

PN1250

The Commission is clearly entitled in the course of undertaking a proceeding such as 418 to make findings of fact, make findings of the existence of facts, upon which its satisfaction about other matters will be founded. Indeed, it might be criticised if it made a decision about its satisfaction without identifying the factual findings upon which it proceeded.

PN1251

The other thing that our friend conflates is the difference between a non-compliance with a contravention. Our friend speaks in terms of contraventions, whereas we say that what we're looking for is a record of non-compliance. We say that there's a significant difference between those, two terms, and it's on that basis that we say that our submission is correct.

PN1252

Our friend then made the submission in relation to the question of appropriate that we are putting it that the matters in paragraph (a) and (b) of subsection (2) are jurisdictional facts. We don't put that at all. What we do put is that when the Commission comes to consider what's appropriate under subsection (1), it has regard to whichever of the two matters in subsection (2) are there.

PN1253

So the process is not a matter of identifying jurisdictional facts, the process is a matter of identifying the matters that the Commission can take into account, and if (a) or (b) is established, that can be taken into account by the Commission in the exercise of its discretion

PN1254

But our friends want to say that even if one of those matters is not present, somehow or other it still gets taken into account by its absence, and we say that that is at odds with the way in which the Act is structured, it's at odds with the way in which the explanatory memorandum has explained it is intended to operate and it's effectively changing the test which parliament has posed and explained in the explanatory memorandum.

PN1255

It's for that reason that we've said in our written submissions that you can't seek a credit, so to speak, in the weighing up process for obeying the law and therefore not having a record that comes under paragraph (a) of subsection (2).

PN1256

There is either a record, which is something that does have to be taken into account because of subsection (2)(a), or there isn't. If there isn't, then there is nothing for the Commission to take into account under that paragraph, and if there is something under paragraph (b), that has to be taken into account in deciding whether it's appropriate or not.

PN1257

Again, in the written submissions and also in the oral submissions which our friend made, they put the proposition and represent the purport or the intent of section 94A as being a provision which is only designed to punish an organisation which has a record of non-compliance.

PN1258

Our submissions - and we develop this in writing. Our submissions are that that is not the intent. That is not the intent of the legislation. It is clear from the fact that the explanatory memorandum and the text don't require both matters to be present in order to exercise a discretion under subsection (1).

PN1259

Also, if one looks at the explanatory memorandum which I read to the Commission this morning, the object of the Act doesn't express itself as being one of punishment.

PN1260

The first and second paragraphs on page 1 seek to put in place a process where a constituent part of an organisation should be free to decide on the governance structure that will best – and I'm quoting now – that will allow them to best represent the interests of their members, and then going on to say:

PN1261

Over time, a constituent part of an amalgamated organisation may find that the organisation no longer represents the values and interests of the constituent part's members and may instead wish to withdraw from the amalgamated organisation and become a new registered organisation.

PN1262

Then it concludes by saying:

PN1263

Accordingly, the bill makes technical amendments to address the current limitations in the Act that place time limits on when a part can seek to withdraw from the amalgamation and provides a process for applying to undertake a ballot of constituent members on the question of withdrawal from the amalgamation.

PN1264

There's nothing in there in terms of indicating what the ex mem identifies as the purpose of the legislation about punishment. It's open. It says that the purpose of it is to give the opportunity for a constituent part, in the interests of allowing it to decide how it will best represent its members, to make an application outside the original time limit.

PN1265

Our friend says, well, you know, you've got to read 94A down because you've got this time limit that existed before 94A in – I'm sorry, in 94(1). You've got the five-year period.

PN1266

Our submissions are that that's the wrong way round. The way in which you approach 94A is to say that when the legislature came to this legislation and decided to pass the 2020 amendments, it was cognisant of the fact that there is a time limit of five years and it deliberately and explicitly said, 'We are going to allow you to get an extension if you meet certain requirements.'

PN1267

It's not a question of an open-ended extension. You have to meet certain requirements, and what our friends want to say is, 'Well, that should be narrowed down as much as you can, because 94(1), the time limits there should take precedence.'

PN1268

We say that as a matter of common sense statutory construction, the parliament has clearly indicated that it intends that the time limits in subsection (1) are to be extended. So it's not appropriate to say, 'Well, if that's the apparent purpose of it, we shouldn't give full effect to it.' You should give full effect to it, and particularly in view of the beneficial purpose that the explanatory memorandum identifies for enacting those extensions.

PN1269

Our friend criticised us for referring to some of the historical changes that were made to the legislation to allow for extensions of time. The only purpose of doing that was to provide a counterfactual to the sort of analysis which our friends put, which basically put the time limits in subsection (1) of 94 on a pedestal.

PN1270

We say that parliament hasn't done that and we say it's inappropriate as a matter of construction for the Commission to do that.

PN1271

With regard to the funds then, our friend made his submissions without really addressing the point that we made in our submissions, which is this, and which your Honour the President pointed out to Mr Dowling and for which he really didn't have an answer.

PN1272

There is evidence before the Commission, we've directed you to it in Mr Jolly's statement, to say that the practice with regard to the locomotive division before the 2017 resolution was the same as that which Mr Sharma explained applies presently to the tram division.

PN1273

You've seen that practice, and the practice is - whether it's in the rules or not, and it must have been approved by the branch executive, the practice is that after the branch collects the subscriptions, it takes its share of the expenses and the rest is remitted.

PN1274

If we are talking about the likelihood, we say that it's a compelling inference that if the 2017 resolution hadn't been passed, the previous practice, which seems to be continuing to be in place for the trams, would have been applied to the locomotive division.

PN1275

If that's right, then you can't be other than satisfied that a very large part, if not the whole of the accumulated funds which are presently held by the locomotive division, would nonetheless be held by them irrespective of the 2017 resolution.

PN1276

JUSTICE HATCHER: So am I right in saying notwithstanding the identification of the defect in the 2017 resolution and the new determination to, as it were, change the identification of the fund to become a branch fund, the practice is still continuing, albeit there's a dispute about the amount of the branch deductions? That is, the principle still is - - -

PN1277

MR BORENSTEIN: Does your Honour mean the practice with regard to the 2017 resolution or the practice for the - - -

PN1278

JUSTICE HATCHER: Well, regardless of the identification of the correct account in which the money is to be paid, there seems to be no desire to change the practice that after the deduction of branch office expenses, the rest goes back to the division.

PN1279

MR BORENSTEIN: Yes, that's right, and it's important to note that Mr Jolly deposed to the previous practice, wasn't cross-examined on it. Mr Sharma didn't say, 'We're going to change the practice as part of my new world order.' It wasn't an issue that was raised, and it's for that reason that we say that you should be

comfortable in finding that it's more than likely that that practice would have continued, and so if you - - -

PN1280

JUSTICE HATCHER: Well, it's continuing now.

PN1281

MR BORENSTEIN: Yes. And continuing now, yes.

PN1282

DEPUTY PRESIDENT GOSTENCNIK: Is there an undertaking governing that?

PN1283

JUSTICE HATCHER: Sorry, what's the undertaking?

PN1284

MR BORENSTEIN: The current practice that your Honour refers to – Mr Dowling prompts me with something. The current practice with regard to the locomotive division is the continuation of the arrangements under the 2017 resolution, but that's the subject of an undertaking in the court proceedings.

PN1285

We don't need to rely on that. Our position is that if the 2017 resolution was never passed, it is almost – well, it's undisputed in the evidence. The previous practice with regard to the locomotive division, which is the same as what is going on today with the tram division, would have continued.

PN1286

If it did continue, as I said earlier, the only practical difference between the ultimate outcome of how much money the locos had would be who collected it in the first place. That would be the only difference. It wouldn't affect the ultimate outcome, and I made that submission earlier and our friend really didn't respond to it.

PN1287

Our friend says you shouldn't speculate about what the court might do under section 109. We don't depart from that. We've made that point in our written submissions, but this submission isn't based on what the court would do. This is a submission based on the evidence you heard about what happens in the Victorian branch and what is likely to have been the outcome from what happens in the Victorian branch irrespective of the 2017 resolution.

PN1288

Other than that, if the Commission pleases, we seek to rely on the written submissions to deal with most of what Mr Dowling has had to say, and unless I can assist you any further, they're my submissions in reply.

PN1289

JUSTICE HATCHER: All right. We thank counsel for their submissions. We'll reserve our decision. We'll vacate tomorrow's hearing and we'll now adjourn.

ADJOURNED INDEFINITELY

[4.01 PM]

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