



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT BELL**

**AG2023/5039**

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

**Application by Grant Dreher T/A TastTAFE  
(AG2023/5039)**

**Melbourne**

**9.30 AM, TUESDAY, 23 JANUARY 2024**

**AUDIO RECORDING COMMENCES**

**[9.30 AM]**

PN1

THE DEPUTY PRESIDENT: That is sorted out then. Thank you to the parties on that one. I think on that basis then Mr Spargo, I think – well, actually, maybe I distracted myself. I've just got to double-check: there were no other housekeeping matters, I think? Mr Spargo, that was your one?

PN2

MR SPARGO: Yes.

PN3

THE DEPUTY PRESIDENT: Yes, all right. I think that's all fine. Why don't we then get on with things and call Mr Foot.

PN4

MR SPARGO: Yes, thank you, Deputy President. I do so call Mr Foot and he should be joining shortly. I note that Mr Foot's first statement commences at page 508 of the court book.

PN5

THE DEPUTY PRESIDENT: Mr Spargo, just while we're waiting for your witness to attend, can I just confirm: does he have a copy of probably the digital court book or the court book with him in the - - -

PN6

MR SPARGO: (Indistinct) that he does, Deputy President, yes – not just his witness statement. He should have access to everything.

PN7

THE DEPUTY PRESIDENT: All right, that's fine, so thanks. That all just for Mr Gill no doubt.

PN8

MR SPARGO: Yes.

PN9

THE DEPUTY PRESIDENT: All right, Mr Foot, good morning. I'm Deputy President Bell. Can I just perhaps confirm at the get go, can you see and hear me okay?

PN10

MR V FOOT: I can, Deputy President. Can you do the same?

PN11

THE DEPUTY PRESIDENT: Yes, that's all good. You're about to be affirmed by my associate because you've prepared a couple of witness statements. Once that's done, your solicitor or TasTAFE's solicitor, Mr Spargo, will take you to your statements. Can I just confirm, do you have a copy of what I'm calling the digital court book, either in hard copy or electronic?

PN12

MR FOOT: I've got an electronic copy here.

PN13

THE DEPUTY PRESIDENT: All right, and is that on a different screen or device to the one you're looking at, or it's sufficiently navigable?

PN14

MR FOOT: It's sufficiently navigable, very large screen.

PN15

THE DEPUTY PRESIDENT: Thank you. Then once you're sworn in and Mr Spargo's taken you to your statements, Mr Pill will have some questions for you. It's possible I might have some questions for you in the journey but when you're being asked those questions, just do your best to listen carefully to those questions, answer that question. If you don't understand it or it's unclear, just tell Mr Pill when he's – if he's asked a question and you don't understand it, and I'm sure he'll do his best to repackage it up. You don't need to worry about objections. You've got Mr Spargo there for that and obviously I'm here to resolve any disputes about those matters.

PN16

So other than that I think then, Mr Spargo – well, actually, sorry, Mr Foot. I'll hand you over to my associate now and we'll have you affirmed and then I'll take you to Mr Spargo.

PN17

MR FOOT: Thank you, Deputy President.

**<VIVEK FOOT, AFFIRMED**

**[9.34 AM]**

**EXAMINATION-IN-CHIEF BY MR SPARGO**

**[9.34 AM]**

PN18

THE DEPUTY PRESIDENT: Thanks, Mr Foot. I'll hand you over to Mr Spargo?---Thanks, Deputy President.

PN19

MR SPARGO: Thank you, Mr Foot. Could you just tell us your first name again?---My first name is Vivek, V-i-v-e-k.

PN20

And, Mr Foot, what is your current position of employment?---I'm currently a senior industrial relations specialist at TasTAFE.

PN21

How long have you been doing that for?---It's been up to – getting towards a year and a half now.

\*\*\* VIVEK FOOT

XN MR SPARGO

PN22

Mr Foot, you've prepared two witness statements in connection with these proceedings, is that right?---That is right.

PN23

The first one, titled, 'Statement of Vivek Satya Narayan Foot' – do you have a copy of that available to you?---Yes, I do.

PN24

And have you recently had an opportunity to review that statement?---Yes, I have.

PN25

Does that statement have 95 paragraphs in total?---Let me scroll down, but I believe it does – yes.

PN26

It does?---It does indeed, 95.

PN27

Does it refer to a number of attachments, identified from VF1 through to VF32?---Yes, it does.

PN28

Are the contents of that statement true and correct to the best of your knowledge and belief?---Yes, they are.

PN29

Thank you. Mr Foot, if I can ask you to navigate to your second statement, which is titled, 'Further statement of Vivek Satya Narayan Foot'?---Yes, I have done that.

PN30

Thank you. Does that statement have a total of 32 paragraphs?---It does, yes.

PN31

And it refers to a number of attachments labelled VF33 through to VF38?---Yes, it does.

PN32

And have you had a recent opportunity to review the contents of that statement?---Yes, I have.

PN33

Are the contents of that statement true and correct to the best of your knowledge and belief?---Yes, they are.

PN34

Mr Foot, do you wish to adopt the content of each of those statements as your evidence in these proceedings?---Yes, I do.

PN35

Deputy President, I seek to tender each of those statements and their annexures.

\*\*\* VIVEK FOOT

XN MR SPARGO

PN36

THE DEPUTY PRESIDENT: All right, thank you. Mr Pill, noting that you'll probably have some comment at the end on submission as to weight or anything, are there any objections as at the threshold stage? Otherwise I'll - - -

PN37

MR PILL: No, there are no objections, Deputy President.

PN38

THE DEPUTY PRESIDENT: All right, thank you. I'll mark then Mr Foot's first statement, comprised of pages 508 through to 1076 of the court book as exhibit A1.

**EXHIBIT #A1 WITNESS STATEMENT OF VIVEK FOOT**

PN39

And I will mark as exhibit A2 his further statement, comprised of pages 1077 through to 1137 of the court book.

**EXHIBIT #A2 FURTHER STATEMENT OF VIVEK FOOT**

PN40

No questions, Mr Spargo?

PN41

MR SPARGO: Just a brief question or two to clarify something in relation to one of these attachments, if I may, Deputy President.

PN42

THE DEPUTY PRESIDENT: Yes, go ahead.

PN43

MR SPARGO: Thank you. Mr Foot, can I ask you to go to VF32, which commences on page 1059 of the court book, but perhaps keep going until page 1074 of the court book. This is a bundle of emails and flyers from the union parties in relation to their No campaign that you say you received?---Yes, I'm there now at page 1074.

PN44

Yes, and this document at page 1074 responds to an email from TasTAFE's CEO which the union parties in these proceedings said contains misrepresentations. Is that right?---Yes.

PN45

And are you aware, Mr Foot – I think you give evidence to this – that the email from the CEO was sent on 16 November?---Yes, that is my recollection.

PN46

So this particular piece of communication from the union must have been sent on or after 16 November. Would that be right?---Yes.

\*\*\* VIVEK FOOT

XN MR SPARGO

PN47

And can I take you to the statement of Lynne Dacey filed in these proceedings, and particularly LD11 on page 1194 of the court book?---One thousand, one hundred and ninety-four?

PN48

Yes?---Yes, LD11, yes, I'm there.

PN49

Can you have a look at the document that's there?---Yes.

PN50

And does that appear to be the same document as that which I just took you to in your statement?---Yes, from 1195 onwards, yes.

PN51

Yes, well, at 1194, that's the covering email to that document. Does that appear to be the case?---Yes.

PN52

And, Mr Foot, that covering email is dated 22 November so did you receive that document on the same day?---In terms of the email itself, yes.

PN53

Yes, and, Mr Foot, you mentioned flyers in your witness statement. Did you also see this document as a flyer posted at your place of work?---Yes, I did.

PN54

Thank you, Deputy President. There's nothing further.

PN55

THE DEPUTY PRESIDENT: All right, thank you. Mr Pill.

**CROSS-EXAMINATION BY MR PILL**

**[9.41 AM]**

PN56

MR PILL: Yes, thank you, Deputy President. Mr Foot, I might just start by asking you a few questions about the access period. Now, in your supplementary statement at paragraph 4 - - -?---Could you provide a page number, sorry?

PN57

And I will do so – in your supplementary statement at paragraph 4 at 1077 of the appeal book - - -?---Yes.

PN58

- - - you say that TasTAFE – you mention at paragraphs 4 through 7 that it was brought to your attention that the access period didn't go over seven clear days. Can you explain how that came to occur?---In terms of my awareness, it was brought to my attention via the associate of chambers, who raised it through the approval process.

\*\*\* VIVEK FOOT

XXN MR PILL

PN59

So you became aware of that after the access period had already concluded?---The issue of seven clear days, yes.

PN60

Who made the decision to run the access period in the way that it was run?---The decision would have been made in conjunction with the steering committee in relation to I suppose availability and the broader operational calendar.

PN61

Were you a party to that steering committee?---At times, yes.

PN62

To your recollection, was the issue of the seven-day access period discussed by the steering committee?---The issue of the access period was discussed.

PN63

But not the requirement of seven clear days, is that correct?---No, well, it's not correct in that regard. My recollection is there was discussions around the access period. There were discussions around the access period, discussions in relation to the scheduling and that it would be seven days. I have no recollection around the seven clear days in particular, however.

PN64

So to your knowledge, there was no deliberate attempt to run a shorter-than-usual access period?---No.

PN65

But the access period was shortened based on what you've described inadvertently. Is that correct?---There was not seven clear days, no.

PN66

And I guess the question that I want to ask you is how that came to be. Was it intentional, was it a mistake, was it an oversight?---I think it was an inadvertent error.

PN67

Thank you. I'll take you to page 1021 of the court book?---Yes, I'm there now.

PN68

And that is a document which is a representation by TasTAFE sent out on 9 November and at page 1021 below the bolded phrase, 'Say yes to', the third line is: 'No cap on personal leave accrual'. Can you see that?---Yes.

PN69

I'll take you further to the next page, which is page 1022?---Yes.

\*\*\* VIVEK FOOT

XXN MR PILL

PN70

And that is a further email from TasTAFE of 13 November and if you go immediately over that page to 1023, the top line reads: 'No cap on personal leave accrual'. Can you see that?---If you could bring me to that again specifically?

PN71

So there's the very first line of the court book at page 1023?---Ten twenty-three, sure – yes, 1023, yes.

PN72

'No cap on personal leave accrual'?---Yes.

PN73

And then if we could move on to attachment VF30 at 1049?---Yes.

PN74

And that is further correspondence from TAFE which takes place on 14 November and if I can take you halfway down the page you'll see a bolded sentence: 'Say yes to', and then the third line after that is, 'No cap on personal leave accrual'. You can see that?---Yes.

PN75

If I could take you then to page 1056 of the same document?---Yes.

PN76

That's an email of 17 November from TAFE and you can see that the same phrase appears about halfway down below, 'Say yes to', and again, 'No cap on personal leave accrual'. You agree?---I wasn't sure about the question – yes, yes, I do.

PN77

And also at page 1052 of the book, there's an email from 16 November 2023 and about two thirds of the way down the page, the same phrase appears again. Can you see that?---Yes.

PN78

So there are, on your evidence, five references from TAFE to this idea of no cap on personal leave accrual. You agree with that?---Yes.

PN79

Can you explain what is meant by that phrase, in the context of this bargaining?---In the context of bargaining – that there would be no cap on personal leave in the proposed EA.

PN80

Was that a term which was meant to compare or contrast the terms in the new agreement with any existing terms?---Could you – sorry, rephrase that?

PN81

Was there at the time that this correspondence went out between 9 and 17 November an existing cap on personal leave accrual?---Yes.

\*\*\* VIVEK FOOT

XXN MR PILL



PN82

I put it to you that the cap had already been removed by way of undertakings in the Fair Work Commission. Do you agree with that?---No, that's not my understanding. The matter of the personal leave cap, to my knowledge, was never raised until the provision of F18s from I think the AEU.

PN83

So your evidence is that the cap on personal leave that's mentioned five times throughout bargaining was something that was actually operational at the time that bargaining was going on and in the pre-existing award?---At the time of bargaining going on the personal leave cap was in place, yes.

PN84

(Indistinct) and your intention there was to convey to the workforce that the cap on personal leave was actually being removed at the time. That's your evidence?---At which time?

PN85

Sorry, I will rephrase that. The intention of those communications was to explain to the workforce that the proposed agreement would have the effect of removing that cap?---The proposed agreement would have no personal leave cap in it, is the intention of the communications.

PN86

Thank you. I'll take you to page 520 of the appeal books?---Yes.

PN87

And you mentioned in the final paragraph of your statement – you mentioned that Mr Dreher's statement is not correct in relation to overtime meal allowances. How did that representation come to be made if it was incorrect?---I suppose the response with that phrasing would be that we did not make any representations in relation to specifically overtime meal allowances. We said there were no changes to evening meal allowances.

PN88

So what you're acknowledging there is an ambiguity. Is that right?---I think it is consistent with the submissions, potentially could be viewed as an ambiguity.

PN89

Thank you. I'll take you to clause 6.1, the disputes provision of the general agreement. I'll give you the specific court book number?---Thank you.

PN90

It's at the top of the page at page 1226 of the court book?---Sorry, 1226 - I've got 1225 pages in my document.

PN91

No, my apologies. My apologies. It's page 42?---Yes.

\*\*\* VIVEK FOOT

XXN MR PILL

PN92

Now, I want to take you to subclause C, which deals with disputes. And you say – and I'd like you to have a look at subclause C and subclause C(i) and C(ii) and I'd like you to explain to your understanding what the effect of those terms is?---My understanding is it's reflective of the modern award escalation process with Roman numeral, I suppose, (i) detailing step 1 in terms of mediation, conciliation and arbitration and step 2, detailing that if the dispute remains unresolved the Fair Work Commission can use any dispute resolution method permitted under the Act, so - - -

PN93

And what's the practical effect of that clause, when it comes to arbitration? Who is allowed to bring on arbitration?---Well, I suppose my position would be it depends on which stage of the clause we're at, or the escalation process.

PN94

If we look at clause C(ii), that clause provides that the Fair Work Commission would be, in the proposed agreement, allowed to use any method of dispute resolution that it was permitted to under the Act?---Yes.

PN95

To your understanding, is the operation of subclause C to allow for arbitration if both parties consent or is it to allow for arbitration unilaterally by either party?---I suppose my understanding would be slightly different to that characterisation. It would be at (i) at the first stage the options listed and at the second stage, the Fair Work Commission would be able to use any powers it has under the Act.

PN96

So is your position that if one party wanted to arbitrate and the other party did not consent to it, then that arbitration wouldn't be permitted?---I suppose my understanding would be (ii), the Fair Work Commission could determine arbitration may apply, given the circumstance.

PN97

Sorry, could you repeat that answer?---Roman numeral (ii), my understanding would be the Fair Work Commission could determine that arbitration may apply in a given circumstance.

PN98

So your position in regard to the effect of this is that the agreement effectively allows for either party to call for arbitration, even when it's not by the consent of all parties?---I mean, I don't fully agree with that characterisation. I suppose I'd take it as it is written, which would be there is an option in terms of mediation, conciliation and consent arbitration, (i). If that is unsuccessful and unresolved, the Fair Work Commission would be able to use its arbitration powers in order to determine the outcome.

\*\*\* VIVEK FOOT

XXN MR PILL

PN99

And your understanding is that that would be the case, for instance, whether a worker or a party to the agreement wanted to arbitrate or not?---Yes, I think the implication for (ii) is any powers under the Act, so conceivably.

PN100

So your evidence is that this agreement allows for arbitration by consent, correct?---Sorry, is that a question?

PN101

MR SPARGO: Sorry, Deputy President, but we've been over this ground. Mr Foot has explained his understanding of the clause and secondly, his subjective understanding of the clause is not really relevant in any case.

PN102

THE DEPUTY PRESIDENT: Yes, although I suppose it's potentially relevant to whether an undertaking might be proffered in the event that TasTAFE accepted the AEU's construction is correct. I agree with you otherwise on the – on his interpretation of the clause. Mr Pill, I suppose, does that provide some assistance or guidance there?

PN103

MR PILL: Yes, thank you, Deputy President. I want to take you through, Mr Foot, to the explainer document which is attached to your statement and I'll provide you with a page of the court book. So I'll take you to page 136?---One hundred and thirty-six, yes.

PN104

So you'll see at page 136 - - -

PN105

MR SPARGO: Are we talking about 1036?

PN106

THE DEPUTY PRESIDENT: Possibly.

PN107

MR PILL: No.

PN108

THE DEPUTY PRESIDENT: Actually, no, in fairness there's – it lives in two locations. It was attached to – I think Mr Pill's directing attention to the version that was attached to the – I'm going to say F17 but F17A.

PN109

MR SPARGO: Apologies, Deputy President. I thought it was the version attached to the statement but I assume they're both the same.

PN110

THE DEPUTY PRESIDENT: Yes.

\*\*\* VIVEK FOOT

XXN MR PILL

PN111

MR PILL: Yes.

PN112

THE DEPUTY PRESIDENT: Mr Pill, I don't know whether it's going to affect your flow or not, but I think where Mr Spargo was going was he was looking – I should say I was looking – initially at VF27, I think is at page 1024.

PN113

MR PILL: Yes, thank you, Deputy President. I've been waylaid by a second copy of the same document, as you can see. Taking you through then, Mr Foot, to page 1036?---Yes.

PN114

The second row of that table outlines grievance and dispute settling procedure and then it says in the right-most column, the fifth column: 'Changes to dispute resolution, introducing escalation processes to FWC for conciliation, recommendation and consent arbitration'. Can you see that phrase there?---Yes.

PN115

That's inconsistent with the understanding that you've just detailed. Would you agree with that proposition?---No, no.

PN116

It seems to suggest, though, doesn't it, that the effect of clause 6.1 was to allow for consent arbitration only. Would you agree with that?---No, I would not.

PN117

Could you take me to the sentence, paragraph or phrase within that explainer document where it's referenced that arbitration can be by consent or without the consent of the parties?---That is not specifically referenced. But the escalation process, which would be inclusive of (ii) in the dispute resolution procedure, would be inclusive in terms of the explanation given.

PN118

So your evidence is that the operation of that provision, clause 6.1, isn't really dealt with in the explainer document at all?---No, it is simpler than the full clause. The difficulty with any explanation is trying not to copy and paste the clause in its entirety but only to that extent.

PN119

So your evidence is that it's ambiguous on that phrase whether arbitration other than by consent is permitted?---No, I wouldn't say it's ambiguous. I would say that it is an explainer and it is a simple explainer that doesn't detail the entire clause or escalation process.

\*\*\* VIVEK FOOT

XXN MR PILL

PN120

I put it to you that you could go further than that. I put it to you that you could actually say that what's being outlined here in the second row is completely at odds with the evidence you've given?---I would not agree with that statement.

PN121

I put it to you that in fact throughout bargaining, the form of the dispute resolution clause was a major sticking point between the parties. Would you agree with that?---Various aspects of the dispute resolution clause were, you know, not liked by some union representatives, for sure.

PN122

I put it to you that TasTAFE's position, which was put repeatedly to the bargaining reps, was that arbitration was to be by consent only. That was TasTAFE's very clear position throughout bargaining?---No, I would disagree with that. Our position was always that we would insert the modern award process and that's what we sought to do. I understand it wasn't popular, necessarily, but that was what we sought to do.

PN123

Mr Foot, I put it to you that the position of the AEU that's been put the Commission here is not the position that was put to the workers in the vote. Would you agree with that?---Could you – I'm not certain. Could you repeat the question?

PN124

I put it to you that the position which you've put in your evidence in regard to the effect of 6.1 is different from the effect of the clause as it was put to the workers?---No, I don't think I'd agree with that statement.

PN125

I put it to you that Mr Dreher's statement at - - -

PN126

THE DEPUTY PRESIDENT: If it assists, I'm looking at the version at 1054, although it might appear in some other places.

PN127

MR PILL: I put it to you that Mr Dreher's statement at 1054 is actually misleading. You agree with that?---Sorry, I'm just bringing myself to the relevant part.

PN128

That's okay. I'll take you to page 1054. Tell me when you've got that?---Yes, yes.

PN129

And then halfway down, under the bolded heading, 'Independent arbitration remains', Mr Dreher says: 'This is already the case. Disputes are currently dealt with by the Fair Work Commission. The Fair Work Commission is an independent party and arbitration remains open'. I put it to you that that's misleading?---Sorry, it states an option, not open, and I wouldn't agree that it's misleading.

\*\*\* VIVEK FOOT

XXN MR PILL

PN130

You don't see any inconsistency between his use of the phrase, 'arbitration remains an option', and the explainer's use of the phrase, 'consent arbitration'?---I would point to the entirety of the explainer in terms of what is put there as well as the dispute resolution clause itself.

PN131

Mr Foot, I put it to you that the access period was shortened. I put it to you the effect of the shortened access period was that workers had less time to consider the material in front of them?---No, I don't believe it would have made any practical difference.

PN132

I put it to you that TasTAFE's efforts to explain the terms of the agreement were at best ambiguous and confusing and at worse misleading?---I wouldn't agree with those statements.

PN133

I put it to you that there was a real potential for confusion, reading the materials that you put before the workforce as to what members were voting on?---No, I disagree with that characterisation.

PN134

And in fact, members really had no idea of the operation of much of the agreement they were voting on. You agree?---No.

PN135

In fact, it appears that even in the evidence you've given today there's confusion about the effect of some of these clauses. Would you agree?---No.

PN136

I don't have any further questions, Deputy President.

PN137

THE DEPUTY PRESIDENT: All right. Thank you, Mr Pill. Mr Foot, I've just got a couple of questions. It's about the explainer document. Just for your reference – sorry, the explainer document I'm looking at is the one at page 1024?---Yes.

PN138

VF27 in your first statement?---Thank you.

PN139

Now, I just want to take you back a document to VF26, which is at page 1022?---Yes, I'm there.

PN140

And you'll see about two thirds down the page there's a heading, 'Here is a link to the full proposed EA, incorporating material, fact sheet, explainers', and then there's a link?---Yes.

\*\*\* VIVEK FOOT

XXN MR PILL

PN141

I don't have access to that link but was that link – would that take you to that explainer document?---The explainer document? Yes, all materials are on the home page, one-stop shop. That would have been there.

PN142

That's In Focus, is it?---Yes, In Focus had access to all materials including the explainer.

PN143

Yes. And how long had In Focus – or how long had the explainer document been on In Focus for?---My understanding is – and I will admit there's a little bit of uncertainty in terms of the operation of the system, specifically – but my understanding is it was placed there shortly before the access period and there was a subsequent update on the day the access period opened but only shortly before the access period.

PN144

What does the In Focus web page or intranet page look like if you were to have clicked the link on this email at court book 1022? Do you know the answer to that?---I suppose my recollection – I mean, we still have a page but it would be a different version by now – is there is a record of all communications that have been put forward on the left-hand side. Subsequent to that there is a list of links to – or a list of explainers or fact sheets that further explain the content of the EA. That's what it would have looked like at the time.

PN145

Did you record or interrogate any sort of data metrics for views or access to these pages?---No, our system is a bit more antiquated than that, unfortunately.

PN146

Right, so you've got no idea whether it was accessed - - -?---One or 1000 times.

PN147

(Indistinct), I understand, thank you. Nothing further from me. Mr Pill, I don't know whether that's prompted you to ask anything or not.

PN148

MR PILL: Nothing arising.

PN149

THE DEPUTY PRESIDENT: Nothing arising, all right – Mr Spargo.

PN150

MR SPARGO: No, thank you, Deputy President.

\*\*\* VIVEK FOOT

XXN MR PILL

PN151

THE DEPUTY PRESIDENT: All right. I think then, Mr Foot, you are excused in respect of wearing your hat as a witness and if you're intending to stay in the

room, I'd just ask you turn your screen off and just put yourself on mute?---Shall do, thank you, Deputy President. Thanks, everybody.

<THE WITNESS WITHDREW

[10.14 AM]

PN152

All right, thank you. Now, I think, Mr Spargo, that's your evidence, although I'm prompted now to ask, given that we were taken to a document in the F17A and some of those – some of the parties' documents that have been filed before the Fair Work Commission as part of the application process, from your perspective, Mr Spargo, are there any of those documents that need to go into evidence that aren't already swept up in probably one or more of Mr Foot's statements? I can probably take the agreement, the enterprise agreement itself. That's just part of the application so I don't think we need to specifically tender that but I just thought I'd check.

PN153

MR SPARGO: Deputy President, I think they are all swept up but I would also submit you can have regard to them in any case. They are forms – they're documents of the Commission, effectively. They're forms that you must file when making this type of application. They're statutory declarations and when these things are uncontroversial, of course, that's all the material that members have. So you can have regard to anything that is in there without it being separately tendered, in my submission. But I cannot think of anything that's not – that's important that's not covered in the numerous annexures to Mr Foot's statements.

PN154

THE DEPUTY PRESIDENT: I think you're right. I think they are swept up. Mr Pill, do you have any difficulty with what Mr Spargo just said about those documents?

PN155

MR PILL: No, I don't.

PN156

THE DEPUTY PRESIDENT: All right. I don't think I'll tender them but they're in the court book and if I need to have regard to them I will. But unless the parties are taking me to one specifically I'll focus on what the parties are saying. I think then, Mr Spargo – sorry, I might have distracted myself – that is it for your evidence, that's correct?

PN157

MR SPARGO: That is our evidence, yes, thank you, Deputy President.

\*\*\* VIVEK FOOT

XXN MR PILL

PN158

THE DEPUTY PRESIDENT: I think then, Mr Pill, we're dealing with your evidence which I understand from your perspective is probably running a little bit more smoothly but we - actually why don't we just double-check that. Mr Spargo, you would put a faint marker in the sand that you might require one of Mr Pill's



witnesses to be asked some questions. Is it the case that you require anyone or not?

PN159

MR SPARGO: No need for any of the witnesses for the AEU to be cross-examined.

PN160

THE DEPUTY PRESIDENT: All right, that's fine. Mr Pill, do you want to go for a mark then? Well, Mr Spargo, I'm not intending to require Mr Pill to put his witnesses in the witness box for the formality of tendering the statements unless there's any difficulty. Mr Pill, unless you have anything further – I suppose you -  
- -

PN161

MR PILL: I don't.

PN162

THE DEPUTY PRESIDENT: No? Do you want to just tender those? Do we want to go through and tender those statements, then?

PN163

MR PILL: Yes, thank you, Deputy President. I tender the statement of Mr Nilssen and the attachment PN1.

PN164

THE DEPUTY PRESIDENT: Yes, we'll mark that as R1 and the parties can just take it as a given I'm working off the index of the court book so it's just the statement and the exhibits referred to in those statements.

**EXHIBIT #R1 WITNESS STATEMENT OF PAUL NILSSEN**

PN165

MR PILL: Thank you. I tender the statement of Ms Gill and the attachments thereto.

PN166

THE DEPUTY PRESIDENT: Yes, statement of Emma Gill is R2 with attachments.

**EXHIBIT #R2 WITNESS STATEMENT OF EMMA GILL**

PN167

MR PILL: And I tender the statement of Ms Lynne Dacey, with attachments.

PN168

THE DEPUTY PRESIDENT: Thank you. Statement of Lynne Dacey with attachments is exhibit R3.

**EXHIBIT #R3 WITNESS STATEMENT OF LYNNE DACEY**

PN169

Just to double-check with you as well, Mr Pill, that's it from your evidentiary case, is it?

PN170

MR PILL: Yes.

PN171

THE DEPUTY PRESIDENT: Thank you. Well, why don't we go to submissions. I'm mindful of the time. I think we've got a bit of time up our sleeve. In terms of submissions I was intending – unless there's been some discussion to the contrary – Mr Spargo, you would go first. Mr Pill, you would reply and then there would be, I suppose, a final five or 10 minutes, Mr Spargo, if there was anything arising that you need to address by way of reply.

PN172

MR SPARGO: Seems appropriate given we are the applicant, Deputy President, yes.

PN173

THE DEPUTY PRESIDENT: All right.

PN174

MR PILL: Thank you, Deputy President. If I may seek your indulgence for a 10-minute recess, just to confirm my instructions?

PN175

THE DEPUTY PRESIDENT: Sorry, just a – how long?

PN176

MR PILL: If I may seek your indulgence for a 10-minute recess, just to confirm my instructions?

PN177

THE DEPUTY PRESIDENT: Look, that's – I think we've got a bit of time up our sleeves. I'm content or content enough for that. Mr Spargo, do you have any difficulties?

PN178

MR SPARGO: No, Deputy President, that's fine, yes.

PN179

THE DEPUTY PRESIDENT: All right, that's fine. We'll adjourn then for 10 minutes. My clock says 10.40 so we'll resume at 10.50.

PN180

MR PILL: Thank you.

**SHORT ADJOURNMENT**

**[10.40 AM]**

**RESUMED**

**[10.50 AM]**

PN181

THE DEPUTY PRESIDENT: All right, welcome back, everyone. Mr Pill, was that enough time for you?

PN182

MR PILL: Thank you, yes.

PN183

THE DEPUTY PRESIDENT: Yes, all right. Thank you. Mr Spargo, then, returning back to you.

PN184

MR SPARGO: Thank you, Deputy President. Deputy President, this is an application pursuant to section 185 of the Fair Work Act for approval of TasTAFE's general staff agreement. It is the first agreement that TasTAFE has made in the Commonwealth system and under Commonwealth rules, which is of some significance in this case. The entity was previously part of Tasmania's state system and it was spun out of that system and into the Commonwealth's ambit via legislation last year. It is not controversial that 336 out of a total of 418 employees on the role cast a valid vote and 197 of those 335 voted yes for this agreement.

PN185

That is a substantial majority and it is particularly substantial majority in the context of a strong no campaign by the three union parties to the agreement. The employees having exercised their democratic rights and elected to vote up the agreement by a significant majority, the union parties are now seeking to find fault in the terms of that agreement and the process engaged in by TasTAFE. In my submission, what is going on really with respect is nitpicking and the union parties are seeking to apply a very high and very technical and very strict standard to documents published by TasTAFE prior to the vote and almost taking the position that if there is any potential ambiguity in any part of those documents seeking to explain the vast number of terms within the agreement, that therefore genuine agreement cannot be said to have occurred.

PN186

It's just too high a standard that they are seeking to apply, putting to one side whether or not there is in fact ambiguity or misrepresentation. It is contrary, in my submission, to the looser and more generous approach that we take to the interpretation of enterprise agreements proper once they're approved, noting the practical nature of negotiations and the drafters of those agreements. But as I will also explain, we will submit that on a proper reading of the relevant documents put out by TasTAFE it did comply with its obligation to take reasonable steps to explain the agreement and there were no misrepresentations that are likely to have induced the employees to be covered by the proposed agreement to vote yes when they otherwise would have voted no.

PN187

In relation to the meaning of certain terms of the agreement, which the union parties say are a problem, they are again, with respect, contorting themselves into a position that would be contrary to their interests at any other time or if the agreement is made and this is particularly evident with respect to coverage. The

AEU now says that a large number of roles – that those who had the opportunity to vote on the agreement were not covered by it, that is just contrary to the – well, firstly the words of the agreement when read as a whole and also the whole history of the coverage of this general staff agreement and its predecessors at TasTAFE that the fundamental basis or the underpinning basis on which bargaining was taking place.

PN188

And it is noteworthy that the CPSU did not join the AEU and the UWU – not explicitly, at least – in making that objection and in my submission that's likely because the people now said not to be covered are their members who they were representing in bargaining. We say it again effectively that the unions are adopting these positions because it is convenient. They're trying to have the agreement, the application for approval dismissed. But they are not borne out when you read the agreement as a whole and having regard to its history. I might start in terms of the detail, Deputy President, just in looking at the coverage issue in some more detail.

PN189

The AEU in their submissions at paragraph 12 in particular say that the number of roles who were given the opportunity to vote are not covered. Ms Gill, lead organiser for the AEU, gives evidence in her statement that she has reviewed the spreadsheet of people who had the opportunity to vote and in her view a number of them are not covered by the agreement and she refers at paragraph 32 of her statement to people in roles in human resources and industrial/employee relations, business analysts, systems officers and marketing and general senior managerial positions.

PN190

More generally, she says, employees who work in professional positions. And this is essentially the argument of the AEU, that because the descriptor of coverage in the agreement does not refer to professionals, therefore all these people are not covered. The reliance on the absence of a reference to professionals in the agreement ignores the history of what, 'professional', has meant in the context of the Tasmanian state system from which this agreement has evolved and particularly the instruments that have applied to TasTAFE.

PN191

When you read that coverage clause as a whole, particularly with the classification descriptors contained in the agreement, we say it's plain that consistent with the name, 'General agreement', there is an intention to cover all roles at TasTAFE other than those which are carved out and that the words in clause 1.1 of the agreement, referring to the types of roles that are covered, must be interpreted broadly. If I take you, Deputy President, to the agreement – so beginning on page 10 of the court book, clause 1.1(a) outlines or includes a description of the type of roles which TasTAFE says are covered by this general agreement.

PN192

It refers to employees who are engaged to perform clerical, administrative, technical, librarian, shooter or an instructor roles. The last three do refer to particular roles. The first three – clerical, administrative and technical – are

clearly broader in nature. Essentially the union urges a narrow reading of those descriptions and that is what I say cannot be right when you have regard to relevant context. We particularly emphasise the importance of the word, 'administrative', in that clause. Administrative, can, in my submission, have different meanings in an industrial relations context. It is used sometimes to refer to more menial roles as something which is adjacent to clerical, which also appears in this coverage clause.

PN193

But in my submission, it can also mean, as a broader meaning of that which relates to almost any aspect of running an organisation and when we go through this agreement and its history, we can see that that is the meaning which administrative has here. It is in fact very broad. The first bit of relevant context appears from the carveouts that appear later in clause 1.1 and essentially the people who are carved out are very senior managers and the executive and employees who are covered by another enterprise agreement, and that is relevantly at the moment teachers. And you will have seen in the materials, Deputy President, there's an agreement at the request of the UWU to a separate enterprise agreement in relation to education facility attendants as well who initially won't be covered by this agreement.

PN194

In my submission to understand why these carve-outs were necessary and given some work to do that necessitates a broad reading of the list of role types that are covered by this agreement. It simply would not have been necessary for TasTAFE to carve out executive employees and very senior managers if the narrow reading of clerical, administrative and technical that's urged by the union was correct.

PN195

Indeed, in my submission, the fact that the only people who are carved out are those covered by another agreement and very senior people within the organisation is consistent with TasTAFE's position that this general agreement is intended to - it really is a catchall agreement to cover everyone else who is not carved out.

PN196

Further context which supports that idea appears throughout the agreement, and particularly in relation to the classifications I should say, Deputy President, and if I go to page 14 of the agreement, clause 2.3.2, classification descriptors; 2.3.2.1:

PN197

*The purpose of classification descriptors is to categorise the wide range of occupations and different types of work across TasTAFE in distinct work value levels to which salaries are alike.*

PN198

That is the reference to the wide range of occupations and different types of work across TasTAFE that are covered by the classification descriptors, and this agreement is consistent with the idea that a broad reading needs to be given to the coverage clause in this matter.

PN199

THE DEPUTY PRESIDENT: So can I just get you to give me a court pinpoint for that, please.

PN200

MR SPARGO: Court book 14. Page 14 of the court book.

PN201

THE DEPUTY PRESIDENT: Okay. Thank you.

PN202

MR SPARGO: Clause 2.3.2.1.

PN203

THE DEPUTY PRESIDENT: Yes. Thank you.

PN204

MR SPARGO: Over the page on page 15, Deputy President, at 2.3.2.4, qualifications and essential requirements, is further context of some relevance, and that is:

PN205

*TAFE may determine that a qualification is essential according to the nature of the work to be undertaken.*

PN206

And then relevantly:

PN207

*The qualification may be provided by a university, vocational education organisation or a registered and accredited training provider.*

PN208

Again I say that the reference to university qualifications has been potentially required of the employees who are covered by this agreement is consistent with my submission that a broad agreement needs to be applied to the coverage clause, and particularly the words 'clerical, administrative or technical.'

PN209

The bottom of that page tells us that the full classification descriptors are contained in schedule 3 of the agreement, and if I go there now, that is page 58 of the court book - - -

PN210

THE DEPUTY PRESIDENT: Yes, I've got it.

PN211

MR SPARGO: Thank you, Deputy President. I am going to take the Deputy President to certain parts of these, but while acknowledging the length commend the full text to the Commission, and submit that when you read how broad these classification descriptors are you can see that the union's narrow proposed approach interpretation of this agreement simply does not stand up. If we start on

page 58 the agreement is summarising the differences between levels. There's one to seven levels, but even if we look at work that is described in terms of the difference between Level 3 and Level 4 the agreement says:

PN212

*Level 4 work is directed at coordinating and integrating the operational procedures to be undertaken. That is the systems and processes with program service delivery within which a multitude of tasks are performed. High level specialised skill and expertise in a particular discipline or field of activity are required.*

PN213

Already it can be seen that AEU's position that essentially corporate services roles, (indistinct) professional roles, advisory roles are carved out, and management roles are carved out cannot be right, and that becomes clearer as you look through what is said to be the differences between the higher levels. And if we go to the end and look at what is said about Level 7:

PN214

*Level 7 work leads a complex, functional or program unit and develops program strategies, policies and operational approach. The outcomes of the functional program or activities have a direct and significant effect on the achievement of organisational objectives.*

PN215

We're talking about very senior employees there. It cannot be talking about someone who performs a clerical or administrative role in a narrow sense, in the sense of more menial duties.

PN216

And I would just take you as well, Deputy President, to page 67 of the court book, and this is - - -

PN217

THE DEPUTY PRESIDENT: Fifty-seven or 67?

PN218

MR SPARGO: Sixty-seven, Deputy President.

PN219

THE DEPUTY PRESIDENT: Yes.

PN220

MR SPARGO: And we have the classification descriptor for Level 7, which is the highest role covered by this agreement. It stands to reason that lower roles, or lower positions in the organisation would also be covered. If we look at what is said to be the focus of Level 7 roles it's significant to note a couple of things. Firstly, how senior these roles are. It refers to essentially a relatively, at least a mid level manager in charge of a function, or leading a functional program unit.

PN221

Then there's a reference to specialist positions in the second sentence. But what's particularly noteworthy about the second sentence is the way in which the words 'technical, administrative and clerical' are applied in the classification descriptors which sheds light on what they mean in clause 1 of the agreement as well. The second sentence says:

PN222

*Technical, administrative and/or clerical specialists responsible or involved with a highly specialised program contribute to the strategic planning and decision making process.*

PN223

So we're talking about people who are involved in the organisation decision making process and strategy. That clearly necessitates a broad reading of what technical, administrative and/or clerical means in that context. And it says:

PN224

*This involves developing and/or modifying operational programs strategies, policies and rules and supporting systems and procedures to achieve specified outcomes.*

PN225

These classification descriptors are intentionally very broad because of the fact that so many different types of roles are covered. But despite the broadness of it and the lack of specificity in terms of particular tasks it is clear that by the time you get to Level 7 and even well before that, in my submission, if you read back through the descriptors, we are talking about the very senior people within the organisation.

PN226

In my submission when you read those classification descriptors together with the other context I referred to there is no basis for the AEU's proposed narrow reading where all of these roles that can in a broad sense be said to relate to the administration of the organisation are excluded.

PN227

Indeed the AEU in filing their evidence seem to implicitly contradict their position that managers are excluded because they have filed a statement from a Mr Paul Nilssen who is an education manager, and his statement seems to proceed on the basis that he would be covered by the proposed agreement. So we say this is merely a position of convenience that they are adopting to try and have the application for approval of the agreement dismissed.

PN228

If there be any doubt about coverage having regard to the words of the agreement below we say, Deputy President, that the history of the agreement is decisive, and I apologise if this is a bit tedious, but I am going to take you to some of the history. Of course I don't think it will be controversial to say you're entitled to have regard to the history of the agreement as part of the industrial context out of which it arose, and having regard to its purpose, and we referred - I mean there's



many, many cases which make that clear, Deputy President - we referred in our submissions to the Federal Court decision in *James Cook University v Ridd* where it is said that where circumstances allow the court to conclude that an award is the product of history out of which it grew to be adopted in its present form you may have regard to that history. In my submission that's plainly the case here.

PN229

Deputy President, in terms of that history, again this is not controversial, before or currently until this proposed agreement is made, if it is made, all relevant employees are covered by the Tasmanian State Service Award, including non-transferring employees as a result of Commissioner Lee's decision which is referred to in the submissions of the parties. That award commences at page 522 of the court book, and I will go to page 523 first, and if we look at clause 2 on page 523, 'Scope':

PN230

*This award is to apply to all persons employed under the State Service Act and for whom a classification is contained in this award.*

PN231

I don't think it's controversial to say that the AEU would accept that all persons other than the executive and teachers currently employed at TasTAFE are underpinned by this document, and when you have regard to its terms that clearly must be the case.

PN232

So that is the relevant starting point, Deputy President, and all the general staff who we say are to be covered by what is called the general agreement are currently covered by this instrument. This instrument has two streams; general and professional. And if you go to appendix 1 on page 675 of the court book it makes it clear by showing how they translate to this award. It makes it clear that there were three predecessors to this Tasmanian State Services Award; a technical award, an operation award and the Administrative and Clerical Employees Award, which are all translated into the general stream of the Tasmanian State Service Award, and that there is a Professionals Award which translates to the professional stream of this award, and I won't take you through it in detail now, Deputy President, but that is all apparent from appendix 1.

PN233

The AEU as I mentioned earlier argues essentially that the absence of a reference to professionals in clause 1 of the proposed agreement now is the reason that the roles identified in the statement of Ms Gill do not apply. But that ignores the very narrow coverage of the Professionals Award and a professional stream under the current instrument, Tasmanian State Service Award.

PN234

At paragraphs - and again I won't take you through them, but just to note them - at paragraphs 28 and 80 of Mr Foot's initial statement he gives evidence unchallenged that the Professionals Award was only applied historically to librarians in terms of employees at TasTAFE, and that other employees, including those the AEU now says are professionals and are excluded from coverage of the

proposed agreement, are covered by the general stream of the Tasmanian State Service Award.

PN235

If we look at the Professionals Award itself, predecessor to the professional stream in the Tasmanian State Service Award, that is consistent with Mr Foot's evidence, and that appears at BF35 to Mr Foot's further statement commencing at page 1087 of the court book. Sorry, Deputy President, just one moment.

PN236

THE DEPUTY PRESIDENT: No, that's fine.

PN237

MR SPARGO: Apologies, Deputy President. If I can take you to page 1095 of the court book, and if you look first at the definition of what work of a professional nature means. In my submission there's an emphasis on requirement for higher education, which is not (indistinct) in any of the positions that the AEU has identified as not being covered by the proposed agreement, and there's an emphasis on scientific and medical work.

PN238

But more importantly, Deputy President, if you go to page 1096, subparagraph (c), 'Qualifications', the chapeau to that subclause says:

PN239

*An employee is only to be classified under this award if the following conditions are met.*

PN240

And (i) there says:

PN241

*If the State Service Commission has deemed the position requires an essential educational qualification in accordance with section 37(5) of the State Service Act 2000.*

PN242

And, Deputy President, my instructors do not know of any such deeming. We have not been able to locate one, and all we were able to locate was another case in the Tasmanian tribunal where the member said, 'Neither of the parties were able to tell me anything about this.' So I apologise that we (indistinct), we cannot help you more with what that means, or point you to any particular deeming - but I think relevantly if you go to (ii), which is historical in the sense that it outlines coverage to those employees who were employed prior to 7 March 1996, there is again the requirement, the statutory requirement for employees to have professional qualifications, the first dot point.

PN243

But the second dot point is consistent with Mr Foot's evidence. So it says that the professional qualification of the occupation was defined by one of the awards listed in paragraph 2, and that seems to refer to the various award that then are

listed below, and there's a reference to statutory requirements for qualifications first. Then there's a reference to award requirements for qualifications. And then there's a reference to former award requirements for qualifications.

PN244

Two things emerge from that, Deputy President. The first is the list of job types that seem to require a professional qualification and therefore are covered by this award is quite narrow. None of them would obviously have any application to that statement, and except for the reference in the third dot point under paragraph 3 there to librarians and archivers, which is consistent with Mr Foot's evidence that traditionally librarians are the only people who would be covered by the professional stream of the current instrument that applies, and are called out by a job title in the coverage clause.

PN245

And certainly there's not reference to an award that would cover the sort of general corporate services employees who the AEU now says are excluded from the coverage in the proposed agreement because of the absence of a reference to professionals.

PN246

So we say that the general stream in the current instrument, the Tasmanian State Service Award, applies to all employees to be covered by the proposed agreement other than librarians, including those persons that the AEU now says is excluded. And that is the starting point and we say there's no evidence of any intention to depart from that starting point. On the contrary the changes to the agreement suggest just a minor tweak to increase the number of senior managers who are carved out.

PN247

Deputy President, the classification descriptors for the general stream of the Tasmanian State Service Award as applies currently begin on page 523 of the court book. I ask you please to turn there. My apologies, 563. Now, they begin with Band 1. Band 1 is not relevant, because as explained at the various points in the TasTAFE materials relating to the agreement Band 1 from the TSS Award was removed.

PN248

So what I would, without taking you through it line by line, respectfully request that you do, Deputy President. If you have a look at Band 2, Band 2 to Band 8 in the general stream of the TSS Award, the Tasmanian State Service Award, and you compare them to Band 1 to 7 in the classification descriptors for general agreement, and you will see that the classification descriptors in the proposed agreement are lifted word for word from the Tasmanian State Service Award which, in my submission, allows for an inference that the current proposed agreement is a product of the history, and a history in that the general stream of the Tasmanian State Service Award applies to all employees who the AEU now says are excluded.

PN249

As I said I won't take you through that, Deputy President. I'm mindful of not taking up too much time, but if you can start with Band 1 focus compared to - sorry, Level 1 focus in the proposed agreement compared to Band 2 focus in the award they are word for word the same. That general stream itself grew out of three prior awards, the Technical Award - and this is again - I refer back to appendix 1 which is where this is clearest to the Tasmanian State Service Award at page 675 of the court book - the Technical Award, an Operational Award, which is on page 1109 of the court book, and without taking you to it was a catchall award. The role was not covered elsewhere. And an Admin and Clerical Award, which is at page 1099 of the court book.

PN250

I will just briefly take you to that, Deputy President, given my submissions about the meaning of the word 'administrative' in the proposed agreement. And perhaps if I take you first to page 1104 of that award, and at the end of the classifications there are some definitions, and the first definition is that of administrative work, and it says:

PN251

*Administrative work means the exercise of an appropriate level of responsibility and discretion in undertaking functions of an administrative nature where administration is concerned with the achievement of an organisation's corporate goals through planning, organising, directing, controlling resources or activities. Administration is also concerned with the development and implementation of policy to achieve set objectives and desired outcomes.*

PN252

So it's very broad, Deputy President. It can be seen that administration there, as in my submission is the case in the proposed agreement, and as has been the case all through the history of the industrial instruments applying to TasTAFE is used in a very broad sense to cover essentially all aspects of work relating to the running of an organisation.

PN253

I won't take you through the classifications which appear above that definition in any detail, but I note a couple of things. First I would say that if you look at it again you will see that they cover very, very senior managers, very, very senior principal advisers to government, and in my submission that clearly has capacity to apply to the types of roles that the AEU has said are excluded, and this is the history from which the administrative aspect of the general stream in the current instrument has developed. Particularly Ms Gill has said that, 'All our human resource management employees and marketing employees as being professionals were not covered by the proposed agreement.'

PN254

There are various references to human resources employees and marketing employees which appear in these classifications, and for example Level 7 classification on page 1103. This is the big point of the classifications. They're not a particularly senior level in the context of the scope of this instrument. It says:

PN255

*The positions require a high degree of proficiency in the use of established administrative or managerial skills such as human resource management or accounting.*

PN256

I might just mention in Level 8 classification standard the fourth sentence there, which begins, and this is a supervisory role, it says:

PN257

*In other circumstances supervision may involve the exercise of technical or professional skill and judgement.*

PN258

Again fairly capable of applying to the types of professionals to which the AEU (indistinct) are excluded. And if you look at the Level 10 classification standard on page 1104 of the court book it refers in the final sentence to:

PN259

*Highly developed marketing, conceptual and strategic skills are required for positions at this level.*

PN260

So having regard to that history there's no warrant to any administrative in a narrow way. In fact you have to read it in a very broad way, and that is consistent with the words of the proposed agreement when read as a whole, particularly the classification descriptors, and plainly there is capacity and an objective intention for the proposed agreement to apply to all of the roles that the AEU now says are excluded on that basis.

PN261

You don't need to go, in my submission, Deputy President, to any other surrounding circumstances, but if you feel that there is any ambiguity or if you want to have regard to the surrounding circumstances to determine if there is ambiguity, which Berri says, the decision in Berri which is in our authorities and (indistinct) says you can do, then that conclusion is just (indistinct) further when regard is had to the objective facts known to all the parties, and they're in our written submissions at paragraphs 68 to 74.

PN262

But in brief summary they include that TasTAFE communicated to all employees and the unions that it wanted an agreement to cover teaching staff and general staff, everyone else, and only later at the request of the UWU was there an agreement to pursue another enterprise agreement for education facility attendants.

PN263

As we set out in our submissions and the evidence of Mr Foot the unions were informed of the intention to take classifications from the Tasmanian State Service Award and transplant them into the proposed agreement. The only discussions about scope were about education facility attendants and further reducing the

application of a proposed agreement to senior managers as well as the executive. And the unchallenged evidence of Mr Foot is that the AEU objected vehemently to that course and said it was extraordinary that the institute was proposing to carve out anyone other than senior executives from the agreement, despite their position now that such employees were never covered, never within its proposed coverage.

PN264

The objective facts also relevantly include that there's no objection to the involvement in bargaining of various people as bargaining representatives who hold the roles which the AEU now says were always excluded from coverage of this proposed agreement. So to the extent you need to go to them, Deputy President, we say the objective background facts support TasTAFE's construction of the coverage clause of the agreement.

PN265

THE DEPUTY PRESIDENT: Thank you, Mr Spargo.

PN266

MR SPARGO: In relation to the union's misrepresentation argument we accept of course that a false representation or a material non-disclosure by an employer may constitute a basis for believing under section 188C of the Act that an enterprise agreement has not been genuinely agreed if it could be reasonably expected to have had the effect of deceiving employees into voting for something which if they had known the true position they would not have voted for. But it's important to say two further things which somewhat qualify that statement of the law, and the first is that of course in assessing whether information is misleading in a genuine agreement context it cannot be read in isolation. It must be read with all other information that is provided, and so a short summary document might be read in the context of a longer explanatory document and the agreement itself.

PN267

The second proposition is that what is relevant is what is known at the time of the vote, and that includes what has been put by the unions. It's appropriate for the Commission to have regard to material that has been put by the unions in assessing whether the employees have genuinely agreed to the agreement.

PN268

Just to make good those submissions, Deputy President, I will go first to a case which is referred to in the AEU's submissions and it's in our list of authorities filed this morning, and that is the *ASU v Yarra Valley Water Corporation* [2013] FWCFB 7453. At paragraph 28, or paragraphs 28 to 30 we say are relevant, and paragraphs 28 and 29, in my submission, make it clear that you should not review information which is said to be misleading in isolation from other information that has been provided. And then in paragraph 30 it is said, and citing another case that:

PN269

*Because the issue of genuine agreement - - -*

PN270

And I'm paraphrasing.

PN271

*- - - is to be assessed by reference to the relevant circumstances at the date the employees voted for the agreement it is necessary to take into account information supplied to Yarra Water Water's employees after the allegedly misleading emails and the table in determining whether they were misled in a way which affected their voting decisions. We consider that the robustly expressed ASU leaflets, which strongly urged rejection of the agreement on the ground that it reduced entitlements, and mentioned in that connection some of the changes contained in the table, was sufficient to alert employees to the need to carefully consider all the provisions of the agreement.*

PN272

And that was a key basis on which the reason why the Full Bench in that matter found that information which was said to be misleading did not prevent the agreement from having been genuinely agreed; the union rebuttal material in short, Deputy President.

PN273

I also refer to, which again is in our list of authorities, the decision of Deputy President Gostencnik in *BGC Contracting Pty Ltd* [2018] FWC 1466 at paragraph 158. The Deputy President's comments there support the view that you cannot read information that is said to be misleading in isolation.

PN274

Against that background there are three matters about which the union alleges employees were misled by TasTAFE. The first is the question of whether employees were losing a right to unilateral arbitration. The Commission has heard the evidence of Mr Foot today that he doesn't agree that there's no ability for unilateral arbitration to occur under the proposed agreement, albeit that would be a second stage, and only consent arbitration is available at the first stage.

PN275

If that's right, and I think, Deputy President, you expressed a preliminary view that you agreed with that interpretation of the agreement, although I could be verballing you there.

PN276

THE DEPUTY PRESIDENT: I must be (indistinct) verballing you, because I am not sure I expressed the view. Can I just clarify - putting aside what Mr Foot's views are can I look at paragraph 43 of your initial subs. That's where that sets out what TasTAFE submits is the correct interpretation of the clause, and then it says 'as follows'.

PN277

MR SPARGO: Yes, Deputy President.

PN278

THE DEPUTY PRESIDENT: Then subclause (a):

PN279

*Arbitration can only occur as a first form of dispute resolution where the parties consent.*

PN280

And then (b) I think is where the rubber hits the road.

PN281

MR SPARGO: Yes.

PN282

THE DEPUTY PRESIDENT: Are you saying from (b):

PN283

*If after an initial dispute resolution, presumably something other than arbitration, the Fair Work Commission may then arbitrate the dispute with or without the consent of the parties.*

PN284

I am assuming that's a reference to joint consent. Does that (b) imply that your legal position is that a party has a unilateral ability to request that the matter proceed to an arbitration?

PN285

MR SPARGO: Yes, those are our instructions of TasTAFE's interpretation of the agreement, that consent arbitration is only available as a first step, but if after the first step no resolution has been reached then the Commission may exercise any of the powers to resolve a dispute available to it under the Act, and that includes the power to arbitrate without consent of the parties.

PN286

I understand the AEU will say that it doesn't explicitly refer to arbitration, and maybe then there's some doubt, and we could go around in circles like that, but a couple of things. First, you mentioned I think the potential ground and (indistinct) to be given, or I suppose there are other ways of resolving ambiguity potentially there to make it clear that TasTAFE's position, which based on the union's materials appears to be their preference, is the case. I would need to seek final instructions, but I think TasTAFE would be amenable to that.

PN287

THE DEPUTY PRESIDENT: Yes. Because I am just trying to work out where I land, or what I am being asked on this, because - - -

PN288

MR SPARGO: Yes.

PN289

THE DEPUTY PRESIDENT: - - - as I have understood it, and actually I know these are your submissions, Mr Spargo, but it's probably a convenient spot where I ask Mr Pill. As I understand it the AEU's position is that it desires the disputes clause to give a party a right to request an arbitration and for that arbitration to



occur whether it's by consent or not jointly between the parties. Mr Pill, is that correct?

PN290

MR PILL: Yes, that's my client's position.

PN291

THE DEPUTY PRESIDENT: Yes. And, Mr Spargo, from what I have just heard from you that's your client's instructions to you.

PN292

MR SPARGO: Yes.

PN293

THE DEPUTY PRESIDENT: Or am I now verballing you?

PN294

MR SPARGO: No, you're not, they are.

PN295

THE DEPUTY PRESIDENT: Which leaves us with the potential issue, which I would need to grapple with and maybe, Mr Pill, take this on notice, but let's just say, Mr Spargo, I agree with the AEU's complaints that you didn't convey that well, then that's why I flagged the issue that in circumstances where everyone appears to be in heated agreement about what the clause should do if there was some doubt about it, perhaps from my perspective, that it could be capable of being resolved by an undertaking.

PN296

MR SPARGO: An undertaking or varying the agreement to resolve ambiguity I suppose. Deputy President, I think I heard you say there, you know, they may still be a question about whether that was adequately explained. That though would not be a problem in terms of the agreement being genuinely agreed, because the union's complaint is that you are taking something off us and you weren't upfront about that, and what you were taking off us and our members was a right of unilateral arbitration. And suggesting that you were taking that off us they say might have induced people to vote 'Yes' when otherwise they would have voted 'No'.

PN297

Now, we never took it off them. Even if we weren't as clear as in a perfect world we might have been there's no disadvantage, there's no reason to think then that the union's argument that the agreement wasn't genuinely agreed can be made out. And if an undertaking may resolve everything I think I should seek a formal instruction to do that, Deputy President, given it's come up in the hearing.

PN298

THE DEPUTY PRESIDENT: Yes.

PN299

MR SPARGO: But that may resolve everything and I don't need to trouble you, I guess, with my alternative submission about all of this.

PN300

THE DEPUTY PRESIDENT: Can I just say perhaps this, is that in terms of this clause, and I think it was said in the submissions, and I have checked in a cursory way, that it was more or less lifted word for word, or close to word for word from the relevant Education Modern Award. It's my understanding that awards, modern awards in the usual disputes clause don't provide for unilateral arbitration, but for arbitrations to occur in a dispute that they would need to be by consent. And I think that's because in the back of everyone's mind that there's possibly a boilermakers or judicial power issue if arbitrations can be imposed.

PN301

MR SPARGO: Yes, but that doesn't apply when - that concern isn't there when you put it into an agreement and when words in the agreement say any of the powers under the Act. We say that's broad enough on a normal reading, on a plain reading to include arbitration. But I accept what you say about the clause, Deputy President. We (indistinct) authorities, but it probably doesn't take us very far.

PN302

Just in short compass what our position otherwise would be is that if you look at the Dreher email, and I might just not go into the detail of this, because it will probably be resolved by an undertaking, but if you look at the detail of the Dreher email it doesn't positively assert that you continue to have a right to unilateral arbitration, and first arbitration being an option. The explainer documents that you have to read together with that does put emphasis on consent arbitration, and the union in the response document, its rebuttal, the union parties, the document that I took Mr Foot to, which is in both his statement and Ms Dacey's statement that's been emailed to staff and put up as a flyer, says this is wrong, they are taking away your right to unilateral arbitration, which as I said you have to have regard to in considering whether the agreement was genuinely agreed.

PN303

And where all of that takes you having regard to the ASU decision is what would be, in my submission, a conclusion that the employees must have known that they had to read that term of the agreement carefully and make up their own minds whether they wanted to vote for it or not. But it may be that just all of that falls away if I can obtain instructions to provide an undertaking, because then no one can say there's been any disadvantage to the employees in the way it's currently suggested by the AEU.

PN304

THE DEPUTY PRESIDENT: It might, and I say that perhaps with an asterisk next to might, because we will just hear from Mr Pill in due course about this issue. I think it's probably more efficient to move on to the next issue in light of where you anticipate it might be going, but we will hear from Mr Pill and if we need to come back to it we will.

PN305

MR SPARGO: I can take you through the documents I refer to very quickly then if we need to come back to it, Deputy President. The next issue is the evening meal allowance, and Mr Dreher's email refers to an evening meal allowance not changing. Mr Foot has given evidence that that was intended to refer to evening meal allowances while travelling, and that they are staying the same, and that was what the employer thought it was responding to.

PN306

THE DEPUTY PRESIDENT: Do intentions matter?

PN307

MR SPARGO: No. No intentions don't matter, but just by way of explanation. I suppose that's relevant to the AEU's reply submissions to say, well the plural evening meal allowances was refused and clearly that encompasses overtime meal allowance as well as evening meal allowances while travelling. Equally we might say, well it could just refer to the fact that there might be multiple evenings where you have a meal, but it doesn't matter what the intention was.

PN308

It is an objective test, and I would accept that that statement in isolation is not perfect because it doesn't include the nuance in relation to the changes to overtime meal allowances. But as I said you cannot read it in isolation, and in my submission the Commission should be a little bit careful about imposing too high a standard in terms of the level of detail that needs to go into these summary documents, or otherwise many employers would potentially not be able to get their agreements up when they are faced with a fairly onerous task of explaining all changes in a proposed enterprise agreement.

PN309

What I point to particularly here is the explainer document, the version at page 1028 of the court book, particularly page 1028 the bottom two items there deal with meal allowances while working overtime and travel allowances which includes the travel evening allowance, and they do accurately convey what is changing. So when you read the Dreher email in context with the explainer and the terms of the agreement then, in my submission, there is no misrepresentation, certainly not one that could be reasonably apprehended to induce employees to vote for an agreement which they otherwise might not vote for.

PN310

In relation to overtime meal allowances it's relevant to note there are swings and roundabouts. So while there is a reduction to the rate there is an additional meal allowance for overtime now to be paid where overtime exceeds four hours. So there are some swings and roundabouts for employees now, but ultimately we're talking about an allowance that is - it can go to a relatively small number of people, and we're talking about relatively small monetary value, and if you work four hours of overtime then you would be better off under the new agreement.

PN311

THE DEPUTY PRESIDENT: I mean you said a small monetary value. What is the reduction in the rate for those changes, and you might not have that at your fingertips, but - - -

PN312

MR SPARGO: I am just confirming before I guess, Deputy President. So it was \$28, and it has - my guess is it's going to be \$9. It has reduced to \$18.23, so a little bit over \$9, and at clause 3.5.6 of the proposed agreement is the new rate, which is at 25 of the court book, and then 316 of the court book is where the current allowance is, reducing 6, but of course if you work four hours of overtime then you will now be better off because you will get two meal allowances.

PN313

THE DEPUTY PRESIDENT: Understood.

PN314

MR SPARGO: Again I say the union materials are relevant having regard to the ASU decision to which I referred to, and I will go to them, but I just briefly deal with the alleged personal leave misrepresentation first. This is explained in more detail in our written submissions, Deputy President, but in brief there are currently two personal leave schemes in place; the accumulation scheme and the training scheme, and there is a cap on accrual once you get to 1911 hours or 1976 hours for employees who work a 38 hour week. It's 260 days. That is a full year's entitlement to personal leave.

PN315

So that cap is not carried over into the agreement, and it is said that TasTAFE's pointing that out was a misrepresentation, and it's said that that's a misrepresentation because of the effect of section 96(2) of the Fair Work Act, which once TasTAFE joined the Commonwealth system has the effect that - well, potentially that cap or an aspect of it might not be enforceable.

PN316

We say that wasn't a misrepresentation for a few reasons. The first is that the obligation is on an employer in terms of explaining the proposed agreement is to explain the changes that the proposed agreement will make by reference to the agreement currently in place, and this is a change. But we also note that the entitlement to personal leave at TasTAFE is 20 days of personal leave per year, rather than 10 days personal leave under the Act.

PN317

So as well as explaining just what on the face of the documents is a change, it is a real change and a real benefit to employees that there is no cap now, because given the 20 days per year entitlement TasTAFE could have maintained a cap, at least in respect of the extra 10 days per year that you've got, and there's various ways it could have structured that to essentially have the effect that until an employee based on an accrual rate of 10 days per year reaches 260 days of personal leave that no cap would have applied. So it is a real change.

PN318

In terms of its likelihood - or in the alternative if there was a misrepresentation, which I say strongly there wasn't, in terms of the likelihood that that would induce someone to vote on the agreement there's no evidence, but it can be expected that there's a relatively small number of employees who would have 260 days of personal leave accrued. Further, all we're telling people is it's something they

have already got, and there's no particular disadvantage to them. There's no particular reason to think that that very fringe issue would have changed someone's mind about how they would have voted on the agreement.

PN319

I would now go to the union flyer and email, which as I said is in the annexures to Mr Foot's statement, and it appears at page 1074 of the court book, and it's also in the evidence of Lynne Dacey, the bargaining representative for the AEU who received this email from the CPSU as did Mr Foot and other employees, and it was also put up as a flyer. The date of that email and Ms Dacey's statement is 22 November, so before the vote. So employees had the benefit of this union material before the vote.

PN320

You can see that it goes through line by line Mr Dreher's email which is said to contain misrepresentations, and it rebuts the parts that the union does not agree with, and they include all of the parts that it says are a misrepresentation. On page 175 at the top you can see that it takes issue with the union's view that there's a unilateral right to arbitration, and it says, 'Is it a right if we need to consent to it?'

PN321

Then further down the page on the left-hand side there are two speech bubbles. The second bubble points to the removal of the cap on personal leave, so that the 20 days entitlement would now continue to accrue, and it says, 'Something we already have to do', and references the (indistinct) which is now the basis for the union saying this is misrepresentation and induce people to vote 'Yes', may have induced people to vote 'Yes' on the agreement.

PN322

And then directly opposite that on the other side of the page there's the reference to cutting evening meal rates by about \$9, although they don't reference the fact that travelling evening meal allowances aren't the same, the same same. That material as well as other material which appears earlier under the same annexure to Mr Foot's statement clearly puts employees on notice to the union's position.

PN323

It puts employees on notice of the union's view that they can vote 'No', because these are cuts to their conditions, and this was available to them before the vote, and in that context it cannot be concluded, in my respectful submission, having regard to the ASU decision in particular that the employees would have been induced to vote 'Yes' when they otherwise would have voted 'No' by any misrepresentation that TasTAFE did make, if it made one, which is denied. As was the conclusion of the Full Bench in ASU it would seem that there was enough debate and dispute to have regard to the actual terms of the agreement.

PN324

Just finishing off on this topic, Deputy President, there is evidence from Ms Dacey and Mr Nilssen of what they understood the Dreher email to mean. That's consistent with the AEU's position in submissions. They're subjective understanding is not relevant. This is an objective test of whether there was a misrepresentation that was likely to deceive employees into voting 'Yes' when

they would otherwise have voted 'No', and particularly no weight can be placed on that evidence in circumstances where neither Mr Nilssen nor Ms Dacey actually say that they did vote 'Yes' or were induced to vote 'Yes' by these statements.

PN325

And of course it would be surprising if Ms Dacey voted 'Yes' given she's the bargaining representative of the AEU and the key player in the 'No' vote campaign. Also though what is of some relevance is Ms Dacey's evidence that she did receive the union rebuttal material, which is at LD11 to her statement.

PN326

Just dealing briefly, Deputy President, with the question of whether all reasonable steps were taken to explain the terms of the agreement, or the changes that have been brought about by the post agreement to employees. We rely principally on our written submissions at paragraphs 11, 33 of our initial submissions. I note that in the AEU's reply submissions they continue to say it was unacceptable for TasTAFE not to name what we have shortened to the PSUW Award which was an award that interacted with the Tasmanian State Service Award and dealt with a small number of issues.

PN327

We just say that that cannot be right. The focus of the obligation to take all reasonable steps to explain the agreement to employees is on changes to the substantive terms and conditions, and for the reasons set out in our submissions all substantive changes to terms and conditions, including changes from the PSUW Award, were explained to employees without naming it, and indeed it may have confused people to name it.

PN328

Just very briefly that occurred in part because the PSUW Award dealt with wages, but those wages were not longer relevant. Wage increases had occurred, and no doubt if TasTAFE were now to base its percentage increases on what was in the PSUW Award, and in doing so artificially inflate them, no doubt it would be said that that was a misrepresentation.

PN329

There was a sick leave explainer reference in our materials that dealt with changes to sick leave that are in the PSUW Award, and in some cases terms from the PSUW Award were substantially identical to those in the TSS Award, which the explainer document deals with. So there's no gap in terms of TasTAFE explaining changes to substantive terms and conditions to employees which arose because it did not name this sort of side award which had some application.

PN330

I maintain our submission that the union's position that we had to explain changes from the modern award in circumstances where it didn't apply to any of these employees just must be wrong when you have regard to the cases that we have referred to in our submissions that you look at the instrument which applies at the time. The union in its reply submissions says, well how are employees to know if the agreement passed the BOOT. With respect that's not their job. That is the Commission's job. The obligation on employers is to explain the agreement, you

discharge by explaining changes to terms and conditions from those which applied at the time a post agreement is voted on.

PN331

Just in relation then to the amount of time for which employees had access to the explainer document and other materials. It is clear that the employer discharged its obligation to inform employees of the time and method of the vote before the access period started. I think there has been some doubt about that at the points in this proceeding, but that is clear from the 9 November email, which is at annexure VF25 to Mr Foot's statement.

PN332

The access period then commences on Monday 13 November, and there is the email that we went to in Mr Foot's evidence, which includes a link to a page with the agreement, the explainer and incorporated materials it is described as. That went to employees at 9.10 am, and then there was a vote seven days later commencing at about 9 am.

PN333

That means that there is a minor error in terms of TasTAFE not ensuring that employees had access to the explainer document and the terms of the agreement for the entire access period. And I should say we don't know, and you went to this in your questions of Mr Foot, Deputy President, we don't know exactly when those documents were uploaded to the web page, and employees had been sent the link to that web page earlier, including in the 9 November email. But the first time they received an email drawing their attention to the fact there was an explainer document, the full text of the agreement in that hub, was very shortly after the access period commenced.

PN334

But in my submission there's no reason to think and there's no evidence that there was any substantial disadvantage to any employees as a result of that short delay. There's a significant union presence. The unions were campaigning during the access period about their view of the terms of the agreement. In those circumstances it is appropriate to characterise that short delay in making it very clear to employees where the explanatory materials were as a minor or procedural error, in my submission.

PN335

There were some questions about the link in the email. In my submission it is a very conventional way of providing employees with explanatory materials, the full terms of the agreement, and people (indistinct) material just to email them a link to a hub where all those documents are accessible. In my submission with this type of workforce who use their email that discharges the obligation to take all reasonable steps.

PN336

In respect to the NES issues that are raised we rely on our written submissions and particular clause 1.3, the NES precedence clause, and unless you have any questions about what the union says about those matters, Deputy President, I have nothing further on that point, and more broadly unless you have any questions I

have no further submissions at this stage, but I will take instructions if I don't already have them on the undertaking point.

PN337

THE DEPUTY PRESIDENT: All right. Thanks, Mr Spargo. Mr Pill?

PN338

MR PILL: Thank you, Deputy President. The matter that I intend to focus on in these oral submissions is the question of genuine agreement. Obviously I rely on our submissions as to the other matters. On the question of genuine agreement my submission is this, that section 180 requires the applicant to take all reasonable steps to ensure that the proposed agreement in (indistinct) was properly explained.

PN339

The steps to be taken need to be reasonable in the circumstances and they need to be all of the reasonable steps that should be taken in the circumstances. The object of reasonable steps is to ensure that the terms of the agreement and their effect are explained to the relevant employees, and an omission is of particular significance in circumstances where there are material differences between an old and new agreement.

PN340

The crux of my submission on this point is that it's the job of the applicant to explain the agreement, and we say that they aren't in a position to do that if they don't understand portions of the agreement themselves. We say the failures to explain are manifold. The explanation with regard to the meal allowance: it's conceded that the meal allowance wasn't communicated with clarity, and it certainly put workers in a circumstance where they were going to end up with a shortfall in terms of their overtime meal allowance.

PN341

With regards to the question of the sick leave explainer the triennium sick leave is a relatively complex scheme and its removal and transferring on to the national scheme terms causes significant upheaval for members. And we say that the explanation that was given in Mr Foot's evidence, which was effectively that workers were labouring under a capped triennium scheme at the time of voting, and that the intention of the communications from the applicant were to inform them that they would be taken off that capped scheme, it's simply in error.

PN342

It's clear in section 96(2) of the Fair Work Act that there isn't an enforceable cap on personal leave accruals, and in fact that was the situation of the workers who were under the scheme at the time that voting occurred. So what they were being sold with regards to the representation that was made in Mr Foot's evidence on five occasions was they were being sold a benefit from this agreement which didn't actually flow. They were being sold a benefit which they already had in terms of having an uncapped personal leave accrual.

PN343

In regards to the disputes term, and subject to any instruction as to undertakings - subject to any offering of any undertaking - I won't labour the point, but it's in my



opinion clear, and it's clear from the materials that are referenced throughout bargaining, that the position of the parties was respectively that the applicant didn't want a term other than a consent arbitration term in the agreement. The union considered that to be a major disadvantage and made representations accordingly. And then after the matter moved on to the registration stage it appears from the evidence that the position of the applicant has changed and they now are contending that it has a meaning, which is that it is - and I will borrow Mr Spargo's term - a unilateral arbitration clause.

PN344

Again my submission is that it's simply to the extent that Mr Foot gave evidence that that was his understanding it's simply misapprehension. The effects of section 739 of the Act make it very clear that an arbitration clause will only be unilateral where that's made explicit, and that's simply not present in the words of clause 6.1.

PN345

So my submission is that the materials that have been put before the eligible employees were misleading, were ambiguous at many a point, and were confusing in a manner that would confuse anyone. But the relevant test is whether they would reasonably expect to confuse or mislead the eligible voters, and my submission is that it's plain on its face that they would. That confusion, that misleading, that failure is then compounded by a shorter than normal access period, which on Mr Foot's evidence was unintentional. But nonetheless, in my submission, combined with a range of misapprehensions which have been created, whether unintentionally, intentionally or some combination thereof, by the applicant, have created a situation where the employees really couldn't have been properly appraised of what they were voting on, couldn't have been properly informed of what they were agreeing to, and as such there isn't genuine agreement.

PN346

I draw your attention, Deputy President, to the case of *National Tertiary Education Union v Southern Cross University* [2023] FB 200. In that case there were errors in representations made during bargaining. Those errors were made in correspondence which was encouraging people to vote. It concerned a term which applied to casual employees who constituted about 50 per cent of the eligible workforce, and there were steps throughout the bargaining process to correct those representations, and ultimately it was found that that situation led to a lack of genuine agreement.

PN347

I draw some parallels in this case. We have errors made in at least three areas of significance; done in correspondence which encouraged people to vote, and with regards to the triennium sick leave question done no less than five times between 9 and 17 November. With regards to the extent to which they impacted on the workforce, well to take the disputes clause, that's a term which would affect 100 per cent of the eligible employees. And finally the errors were really never corrected, and it appears at least as to the disputes term the position which is in error is being maintained even here.

PN348

So I would suggest, in my submission, that the circumstances here are even more compelling against approval than they are in the NTEU case. Workers were at serious disadvantage by a number of communications which came from the applicant, which have led to a situation where they could reasonably have a misapprehension of any number of terms, and on that basis I would say that the factors well and truly militate against approval. Those are my submissions.

PN349

THE DEPUTY PRESIDENT: Yes, thank you. Can I just ask though about the disputes clause, because I mean on one view strictly speaking if you were seeking to hold TasTAFE to what you assert was the correct legal position, then to be clear in my understanding that's actually not something that you want at all.

PN350

MR PILL: I think it's a question of law, Deputy President. If this agreement is approved on the basis that the term which is included at 6.1 as an operation which allows for unilateral arbitration, my submission is that that's possibly in error, and my client is at risk of having an agreement which could ultimately be found to have no consent, have no unilateral arbitration terming, if not by yourself, then by the Full Bench six months down the track.

PN351

THE DEPUTY PRESIDENT: No, I understand that. If there's to be an undertaking it's my understanding the undertaking is to put it beyond doubt that there would be a right for unilateral arbitration. And just to clarify that from your perspective that I understand was your preferred position.

PN352

MR PILL: That if such an undertaking were given it would cure that deficiency I'd concede that.

PN353

THE DEPUTY PRESIDENT: Yes. When we talk about the deficiency, the deficiency by the email on 16 November, which on your position suggests that there would be unilateral arbitration when you say the true position is that there's not?

PN354

MR PILL: Yes.

PN355

THE DEPUTY PRESIDENT: Okay. I understand that. I just wanted to clarify that you weren't asking to hold TasTAFE to what you understand the true legal position, which is that there is no unilateral arbitration?

PN356

MR PILL: No. My submission is that the agreement shouldn't be approved because of that misrepresentation.

PN357

THE DEPUTY PRESIDENT: Yes, I understand that. I understand that. Yes, all right, thank you. In which case, and I'm not derogating from the other issues you raise, but I just wonder if I am capable of doing so, potentially simplify what's on my list, just clarify that subject to a suitable undertaking that the bargaining reps might be provided, if at least that undertaking dealt with the question of ensuring that there is in fact a right of unilateral arbitration that would cure that element of the 16 November email.

PN358

MR PILL: I would have to take instructions on the terms of the undertaking, but I can see it's possible.

PN359

THE DEPUTY PRESIDENT: (Audio malfunction).

PN360

MR PILL: Yes.

PN361

THE DEPUTY PRESIDENT: And you and other bargaining representatives for that matter. I suppose for avoidance of doubt obviously your client, but all bargaining representatives would require to be given an opportunity in any event. No, I understand. Thank you, Mr Pill, that's helpful. I think you had indicated you were finished up unless there was anything that I have just asked, but I think you've answered my questions.

PN362

MR PILL: Thank you, Deputy President, that concludes my submission.

PN363

THE DEPUTY PRESIDENT: All right, thanks, Mr Pill. Mr Spargo - - -

PN364

MR SPARGO: Very briefly, Deputy President. There seems to have been some doubt (indistinct) between us about the appropriate test when it comes to misrepresentation and its impact on genuine agreement. The test is not did the employer do or say anything that is liable to mislead or confuse employees about the terms of the agreement in some way, full stop. This is not a case of misrepresentation of workplace rights under section 345, and if it was then intent would come into it, was knowing or reckless.

PN365

Rather the test is as set out in the ASU decision, which I have referred to, which was also cited in the union's submissions, that there was a misrepresentation and it could reasonably be expected to have the effect of deceiving employees into voting for something which had they known the true position they would not have voted for. So you don't need to shoot down an agreement just by pointing to some infelicity in drafting that might be a bit confusing in an explanatory document. If you could, Deputy President, then in my submission very few agreements would be approved. And what that full test brings in is that you do look, apart from anything else, at the AEU response, and maintain that position - maintain our

submission that in context with the explainer document and the terms of the agreement there was no misrepresentation.

PN366

Briefly in relation to sick leave we don't accept, I should make clear, that the effects of section 96(2) is that the cap that currently applies has no work to do in a context where the base personal leave entitlement is 20 days per year, not 10 days. But in any case even if the employer failed to explain that nuance, and it should have, in our submission it's very unlikely that employees thinking that they were getting a little bit more benefit there than perhaps they would have in the context of a cap on a year's sick leave would overcome a concern they had about wages and some more fundamental concern in the agreement.

PN367

Just in terms of arbitration I do have instructions to provide an undertaking. Of course it's reasonable for Mr Pill to say he needs to see the words of that undertaking, but the intention is to make it clear that the reference to the Commission exercising any of its powers in the second stage of the dispute resolution clause would include in exercising an arbitration power if requested to do so by the person or entity making the application.

PN368

If that's right then there can be no question that there's been any representation made to employees that they would have a right to independent arbitration that induced them to vote 'Yes' on the agreement when in fact that's not the case, because it will be the case. So logically that can no longer be an issue, and I don't need to focus on our sort of alternative position around all of that.

PN369

THE DEPUTY PRESIDENT: Yes, I understand. On noting those instructions do you anticipate being able to circulate something to the bargaining reps by the end of maybe tomorrow or something?

PN370

MR SPARGO: Yes, Deputy President.

PN371

THE DEPUTY PRESIDENT: All right.

PN372

MR SPARGO: And your chambers, Deputy President?

PN373

THE DEPUTY PRESIDENT: Yes. Well, actually I think it's probably prudent to just wait until anyone has had a chance to comment, because there might be some edits. I don't know, there may or may not be, but just after that consultation process if there are any changes. I don't need to see all the back and forth-ing of that.

PN374

MR SPARGO: Thank you, Deputy President.

PN375

THE DEPUTY PRESIDENT: All right. Thank you, Mr Spargo. While, Mr Pill, I did indicate that Mr Spargo is going to get the last two cents there, but just in case given that we're all here was there anything of a burning nature that Mr Spargo has just said, or you're content with - - -

PN376

MR PILL: No, nothing arising, thank you, Deputy President.

PN377

THE DEPUTY PRESIDENT: All right. Thank you very much everyone. Thank you everyone for putting your material together at relatively short notice on a generally speaking unsociable time of the year in which these things were being asked to occur. It's not lost on me. I have obviously got a bit to think about it. I have been assisted by everyone's written submissions and their oral submissions in the conduct of the matter today. So thank you. I have got to obviously go away and re-look at everything and in light of everything that has been said, and I will get a decision out. You're probably not going to get something in a week if that's what your hopes or expectations were, so apologies in advance for that.

PN378

I will be ordering a transcript and at least the parties here will get a copy of that. Our turnaround is hopefully five days. I don't know whether because I'm making a request from Melbourne I lose a public holiday or anything. We will wait and see, but you will get a copy of the transcript as well. Otherwise if there's movement on an undertaking if I can just be provided a copy of that and the parties' views on that if parties are providing views on that in due course I would appreciate that. In the absence of all that thank you again and I will now ask my associate to adjourn.

**ADJOURNED INDEFINITELY**

**[12.34 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**VIVEK FOOT, AFFIRMED ..... PN17**

**EXAMINATION-IN-CHIEF BY MR SPARGO ..... PN17**

**EXHIBIT #A1 WITNESS STATEMENT OF VIVEK FOOT ..... PN38**

**EXHIBIT #A2 FURTHER STATEMENT OF VIVEK FOOT ..... PN39**

**CROSS-EXAMINATION BY MR PILL ..... PN55**

**THE WITNESS WITHDREW ..... PN151**

**EXHIBIT #R1 WITNESS STATEMENT OF PAUL NILSSEN..... PN164**

**EXHIBIT #R2 WITNESS STATEMENT OF EMMA GILL ..... PN166**

**EXHIBIT #R3 WITNESS STATEMENT OF LYNNE DACEY ..... PN168**