



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT CROSS**

**C2023/6548 C2023/7155**

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

**Australian Rail, Tram and Bus Industry Union  
and  
Sydney Trains  
(C2023/6548)**

**Mr/Ms National Secretary  
and  
Rachael Kelly  
(C2023/7155)**

**Sydney Trains and NSW TrainLink Enterprise Agreement 2022**

**Sydney**

**10.00 AM, WEDNESDAY, 28 FEBRUARY 2024**

PN1

THE DEPUTY PRESIDENT: Yes, good morning. Can I take appearances.

PN2

MR J. MARTIN: May it please the Commission, Martin, initial J, and I appear for the AMWU.

PN3

THE DEPUTY PRESIDENT: Thank you.

PN4

MR J. HART: Good morning. May it please, Hart, initial J. I appear for the RTBU. Deputy President, Mr Martin, for the sake of efficiency will be doing the advocacy on behalf of the joint unions today.

PN5

THE DEPUTY PRESIDENT: Okay. Thank you.

PN6

MR SECK: May it please the Commission, Seck, initial M and I appear with Ms Mendis, initial E, for the respondent. I understand that permission has already been granted for lawyers to appear.

PN7

THE DEPUTY PRESIDENT: It's been dealt with.

PN8

MR SECK: May it please.

PN9

THE DEPUTY PRESIDENT: Mr Martin.

PN10

MR MARTIN: Thank you, Deputy President. In terms of preliminary matters only Mr Lang is required insofar as the applicant's evidence is concerned. So, what I propose to do is that we admit the evidence for the remaining witnesses at this particular stage and we can deal with Mr Lang's evidence.

PN11

I hadn't proposed to open, Deputy President. I've had the benefit of the very detailed submissions and I have spoken to my friend and I think we can quite comfortably get this dealt with in one day. So, in those circumstances if you're content with me to proceed on that basis I might deal with the statement of David White dated 19 January 2024.

PN12

THE DEPUTY PRESIDENT: And there are no objections to any of these?

PN13

MR SECK: No, Deputy President. As you appreciate it's probably some hearsay and some opinions expressed but I can make submissions on that (indistinct), so no objections.

PN14

THE DEPUTY PRESIDENT: Thank you. Exhibit A1.

**EXHIBIT #A1 WITNESS STATEMENT OF DAVID WHITE DATED 19/01/2024**

PN15

MR MARTIN: Just the statement of Bronwyn Kelly, dated 19 January 2024.

PN16

THE DEPUTY PRESIDENT: Exhibit A2.

**EXHIBIT #A2 WITNESS STATEMENT OF BRONWYN KELLY DATED 19/01/2024**

PN17

MR MARTIN: There's also a reply statement of Ms Kelly, dated 23 February 2024.

PN18

THE DEPUTY PRESIDENT: Exhibit A3.

**EXHIBIT #A3 REPLY STATEMENT OF BRONWYN KELLY DATED 23/02/2024**

PN19

MR MARTIN: The statement of Kerry Williams, dated 9 December 2023.

PN20

THE DEPUTY PRESIDENT: A4.

**EXHIBIT #A4 WITNESS STATEMENT OF KERRY WILLIAMS DATED 09/12/2023**

PN21

MR MARTIN: The statement of Luke Warwick Smith, dated 19 January 2024.

PN22

THE DEPUTY PRESIDENT: A5.

**EXHIBIT #A5 WITNESS STATEMENT OF LUKE WARWICK SMITH DATED 19/01/2024**

PN23

MR MARTIN: The statement of Michael Sullivan, dated 19 January 2024.

PN24

THE DEPUTY PRESIDENT: A6.

**EXHIBIT #A6 WITNESS STATEMENT OF MICHAEL SULLIVAN  
DATED 19/01/2024**

PN25

MR MARTIN: The statement of Ricky Kean, dated 19 January 2024.

PN26

THE DEPUTY PRESIDENT: A7.

**EXHIBIT #A7 STATEMENT OF RICKY KEAN DATED 19/01/2024**

PN27

MR MARTIN: And the statement of Steve Hatford(?) dated 19 January 2024.

PN28

THE DEPUTY PRESIDENT: That'll be A8.

**EXHIBIT #A8 WITNESS STATEMENT OF STEVE HATFORD  
DATED 19/01/2024**

PN29

I've got a reply statement of Ms Kelly – I see, Mr Lang is the only other reply.

PN30

MR MARTIN: Yes. So, in those circumstances I will call Mr Lang.

PN31

THE DEPUTY PRESIDENT: Yes, thank you.

PN32

THE ASSOCIATE: Please state your full name and employment address.

PN33

MR LANG: Keith Courtney Lang, and it's Parramatta Road Auburn.

**<KEITH COURTNEY LANG, SWORN** [10.08 AM]

**EXAMINATION-IN-CHIEF BY MR MARTIN** [10.08 AM]

PN34

MR MARTIN: Mr Lang, you've given a statement in this matter, dated 19 January 2024?---Yes, I have.

PN35

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

PN36

And does that statement consist of 12 pages, 57 paragraphs and 31 annexures?---Yes, I believe it does.

\*\*\* KEITH COURTNEY LANG

XN MR MARTIN

PN37

Are there any errors or omissions in that statement?---Not to my knowledge.

PN38

Is the statement true and correct to the best of your knowledge and belief?---Yes.

PN39

I tender Mr Lang's statement, dated 19 January 2024.

PN40

THE DEPUTY PRESIDENT: No objections?

PN41

MR SECK: No.

PN42

THE DEPUTY PRESIDENT: I think that is A9.

**EXHIBIT #A9 WITNESS STATEMENT OF KEITH COURTNEY  
LANG DATED 19/01/2024 INCLUDING 31 ANNEXURES**

PN43

MR MARTIN: And Mr Lang, you've also given a statement in this matter, dated 23 February 2024? That's your reply statement?---That is correct.

PN44

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

PN45

Does that statement consist of two pages, five paragraphs and one annexure?---It does.

PN46

Are there any errors or omissions in that statement?---Not to my knowledge.

PN47

Is the statement true and correct to the best of your knowledge and belief?---Yes.

PN48

I tender the reply statement of Mr Lang.

PN49

THE DEPUTY PRESIDENT: That will be exhibit A10.

**EXHIBIT #A10 REPLY STATEMENT OF KEITH COURTNEY  
LANG DATED 23/02/2024 INCLUDING ONE ANNEXURE**

**CROSS-EXAMINATION BY MR SECK**

**[10.10 AM]**

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN50

MR SECK: Mr Lang, you're an elected health and safety representative for a work group at Sydney Trains?---That's right.

PN51

And that's the heavy plant and resurfacing worker group at Auburn?---That is correct.

PN52

As a health and safety representative you're aware that there are particular rights and obligations that exist under the Work Health & Safety Act?---Yes, I am.

PN53

Now, I'm going to ask you about some of those obligations and rights. One of those powers that a health and safety representative can exercise is to investigate complaints from members of the work group relating to work, health and safety. Do you agree?---Yes, I agree.

PN54

And it's also to monitor measures which are taken by an employer or the person conducting the business undertaking in relation to compliance with the Work Health & Safety Act?---I would disagree to some extent. The obligation to monitor is on the employer.

PN55

I'm not saying it's an obligation but it's a power and function that you have, correct?---Yes.

PN56

And when you say the obligation to monitor, your point is that the obligation to ensure, so far as is reasonably practicable, the health and safety of workers relies upon the employer, correct?---I suppose it's a dual responsibility on the employer and the employees.

PN57

Yes. And an employee has an obligation to take reasonable care in the performance of his or her duties, correct?---Can you repeat that?

PN58

An employee has an obligation to take reasonable care in relation to the performance of his or her duties, correct?---That's correct.

PN59

And to co-operate following any reasonable instructions amongst other things an employer might give in relation to health and safety. Is that so?---Yes, that is correct.

PN60

You're also the state president of the AMWU?---That's correct.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN61

Would it be fair to say that one of the main priorities of the AMWU is to ensure the employers comply with their obligations under the work health and safety

legislation?---I'll say that we represent our members and assist our members in achieving those objectives.

PN62

But let me ask the question, again. Would you agree that one of the main priorities of the AMWU is to ensure that employers who employ members of the AMWU comply with their obligations under work health and safety legislation?---It's one thing that we do, yes.

PN63

Not only one thing, it's one of the main priorities of the AMWU?---We do have a very strong occupational health and safety profile, yes.

PN64

Would you also agree, Mr Lang, that one of the obligations that are placed on Sydney Trains is to consult with health and safety representatives about work health and safety matters?---I agree.

PN65

And that includes consulting with representatives for a particular work group, that's right?---Yes.

PN66

There are also corresponding powers which are placed on health and safety representatives to, for example, issue notices if they don't believe it's compliance with the Act?---There are powers that can be enacted under the Act.

PN67

And you obviously take the exercise of those powers seriously?---Absolutely.

PN68

In which then your obligation as a HSR rep, do you agree, is to exercise those powers in a responsible manner?---That is correct.

PN69

That requires you to be trained on work health and safety matters, do you agree?---It does, yes.

PN70

As a health and safety representative you've attended training sessions on a variety of health and safety issues, correct?---Correct.

PN71

Both external to Sydney Trains, as well as internal?---Correct. Yes.

PN72

You said beforehand that you've said it's a joint responsibility between employers and employees in ensuring work health and safety obligations are complied with?---Yes.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN73

Do you also accept that it is a responsibility of the unions to ensure that cooperation is secured?---I would say that as a worker representative I'm there to represent the workers but in a capacity as a work health and safety representative and as a union delegate.

PN74

Now, as a work health and safety representative and as the state president of the AMWU, Mr Lang, would you agree with me that firstly, in order to ensure that any risk to work health and safety is eliminated or minimised, the first thing you do is identify the hazards in the workplace?---That is definitely the first part of the process in a risk assessment, is to identify what risk needs to be assessed.

PN75

And in identifying the risk to be assessed you obviously need to take a risk assessment?---Well, you identify it. That's part of the process. It's part of the risk assessment process.

PN76

It's the beginning point of the process, do you agree?---It can be.

PN77

And then once you've identified the hazard you have to work out ways to either eliminate and if you can't eliminate, minimise the risk to work health and safety, correct?---Yes.

PN78

And there is, under the Work Health & Safety Act, and work health and safety regulations, a structured process to enable for those hazards to be identified and to work out ways to manage those particular risks?---Yes, that is correct, with PPE being the lowest form of control risk.

PN79

Yes. I think, implicit in your answer, Mr Lang, is that there is a hierarchy of control that must be applied?---That is correct.

PN80

And you understand the concept of hierarchy of controls deriving from the workplace, being derived from the work health and safety regulations. That's so, isn't it?---That is correct.

PN81

And I think you went to PPE as being the least effective control measure, that's right?---That is correct.

PN82

When you say PPE, just for the record you mean personal protective equipment?---Yes.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN83



Yes. That would include any clothing that an employee might wear in the workplace to minimise the risk of exposure to any risk to health and safety?---Yes, it may include any clothing and it may not.

PN84

It may not. And that's because there may not be any clothing you can wear to minimise that risk?---Well, it might also be the fact that any clothing that is worn is not considered PPE and it's not minimising or controlling a particular hazard.

PN85

There's obviously a process that needs to be worked through to go through the identification of those hazards and then identifying control measures to eliminate or minimise those risks, do you agree?---I do agree.

PN86

And that needs to be done for each work group. Is that correct?---I think it needs to be done for – yes. Yes. Well - - -

PN87

Each work group is a good way to start. But obviously that needs to be done at a more granular level to look at the particular tasks and duties which are undertaken by employees. Do you agree?---I do agree.

PN88

And so it can be often a lengthy process in order to work through that risk assessment before any decision is made to implement a change which may impact upon work health and safety in the workplace?---It depends where you start.

PN89

When you say it depends where you start, obviously the starting point is to look at the hazards which exist in the workplace, correct?---I would agree with that.

PN90

And then look at any existing control measures?---Yes.

PN91

Then determine whether or not those existing control measures, having regard to the hierarchy of controls, either eliminate, and if not eliminate, minimise that risk, correct?---That's one approach to look at it, yes.

PN92

But not one approach. It is in fact the approach which is mandated under the workplace regulations, don't you agree?

PN93

MR MARTIN: Objection. Mr Lang can't give evidence about what the obligation is under the Work Health & Safety Act. It's a legal submission. If my friend wants to make that as a submission he can do that but there's no relevance to Mr Lang's answer to that.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN94

MR SECK: Your understanding, Mr Lang, is that the work health and safety regulation mandates a process where you go through the hierarchy of controls, that's right?---Yes. That's my understanding.

PN95

You're not suggesting as the national president of the AMWU that Sydney Trains ought not to comply with its work health and safety obligations under the Work Health & Safety Act, correct?---I'd suggest that Sydney Trains has to comply with their obligations under the work health and safety legislation.

PN96

In fact, it's got no choice, correct?---That's correct.

PN97

Can I take you to your statement, Mr Lang, your first statement which is exhibit A9, sorry. A9. You say that a big ticket item for the combined rail unions in negotiating the 2022 Sydney Trains & New South Wales Trains in its enterprise agreement was the insertion of clause 32.1 of the agreement, correct?---Whereabouts did I say that?

PN98

Paragraph 5?---Paragraph 5. Yes.

PN99

That's correct?---That is correct.

PN100

You were the national president of the AMWU at the time of negotiating the 2022 agreement?---No, I was not. I was the state president.

PN101

State president, sorry. My apologies, state president. And you obviously, when you say it was a big ticket item, sought the views of your members in identifying the level of importance of clause 32.1, correct?---Yes.

PN102

All right. And the words which were inserted into 32.1 compared to the predecessor provision, and understand I'm paraphrasing this, that the employer will provide employees the option of wearing shorts and other uniform items suitable for hot weather conditions other than in circumstances where there is an unacceptable risk to safety?---That was one of the many changes in clause 32.

PN103

It's the main one, correct?---No.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN104

What are the other main ones that you say were - - -?---It is the main one subject to this hearing. There were major changes to clause 32, that being the provision of prescription safety glasses and other medical aids as appropriate; the

alternation, the reasonable alteration of uniforms and PPE is another one; the provision of orthotics at no cost to the employee; making sure that any PPE that was provided was fit for purpose; being fit for the task; fit for the individual; and at no cost to the employee.

PN105

I think what you might be referring to is other parts of clause 32 but not 32.1, do you agree?---I agree.

PN106

Yes, okay?---You did ask about clause 32.

PN107

I think I said, '32.1' but I'm not quibbling with you on that issue. The phrase, 'unacceptable risk to safety' - - -?---Yes.

PN108

Was that language that you came up with this time?---No.

PN109

Do you know who came up with that - - -?---No, I don't.

PN110

That wording?---I wasn't part of the working group that was working on that clause.

PN111

To your understanding, and I'm only asking your understanding, in order to work out whether or not there is an unacceptable risk to safety you would agree that there needs to be followed, a risk assessment process, correct?---I'd suggest that that would be the appropriate measure moving forward, yes.

PN112

And that's to identify the hazards, correct?---Correct.

PN113

Identify the particular circumstances where long trousers are the existing control measure?---Yes. That was one thing that was of discussion. But it is not the only thing that should be considered. If I may elaborate - - -

PN114

No. Let me just – I'll take you through it shortly and I'm sure Mr Martin will ask you questions in re-examination. I don't want to cut you off but let me just work through that with you. In determining, would you agree, whether or not the option to use shorts would create an unacceptable risk to safety, one of the steps is to look at where the use of long trousers is used as an existing control measure?---That is one thing that needed to be looked at, yes.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN115

And then to work out whether or not the removal of an existing control measure, that is, the use of long trousers, would create that unacceptable risk to safety, correct?---No.

PN116

You say that's not the process that ought to be followed?---I would suggest that if the removal of long pants presented an unacceptable risk then the removal of the pants should not be undertaken.

PN117

So, let me understand your answer. You say it's the removal of the pants. If that creates an unacceptable risk to safety then it shouldn't be an option?---In this circumstance, yes.

PN118

Which therefore means what you have to assess is the existing hazard or risk to health and safety to which the use of long pants is directed. Do you agree?---Look, what I will say in this instance is that when we're looking at the task that has been undertaken and the risk that that task presents, then the control measures in their entirety need to be looked at. And they need to be looked at as potential controls that have been implemented or taken away, and what impact that will have in its entirety. So, to look at long pants, singular, and say that it has absolutely no effect on any other aspect or the task, is an incorrect assertion.

PN119

And when you say, look at it in its entirety, what you're looking at is other potential control measures that can be put in lieu of the use of long pants, correct?---That's one option.

PN120

Or whether or not long pants is even necessary for that one aspect of the job being performed by the employee, correct?---Correct.

PN121

And so, to use a practical example, if an employee is sitting at his or her desk for one part of the day, it may not be necessary for that employee to be wearing long pants, as opposed to when they're in a rail corridor where they might be exposed to UV radiation?---There's a whole range of aspects that need to be taken into consideration. I mean, the rail corridor is a large expanse of land and has many differing aspects to it. So, even down to the location of the work needs to be taken into consideration.

PN122

And so, all these issues need to be worked through as part of the risk assessment process, correct?---Yes.

PN123

And as part of assessing the risk there needs to be consultation with the workforce, correct?---Yes, with the affected workers.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN124

And ultimately would you agree that it's Sydney Trains who has to form the view as to whether or not after following that process the option of wearing shorts creates an unacceptable risk to safety. That's your understanding?

PN125

MR MARTIN: I object to the question. It's Mr Lang's objective understanding of what clause 32.1 means. My friend makes submissions about this. Again, if he wants to make submissions about that he can do it. But putting the proposition to Mr Lang doesn't assist his case.

PN126

MR SECK: Now, Mr Lang, let me go to your statement where you state opinions on this. If you go to paragraph 26 of your statement, or perhaps paragraph 27, there's a reference to five meetings taking place. That's a reference to the five hot weather uniform review meetings, correct?---If that's how it's been articulated in my statement, yes.

PN127

But I don't want to put words in your mouth. This is your statement. So, when you're referring to the five meetings I think you were referring to the five meetings which are described earlier in the statement. Do you agree?---Do you want me to double check?

PN128

That's okay. Have a look at it. But the five meetings start at paragraph 8, onwards?---Yes.

PN129

Right. And in paragraph 27 you state about five lines down that the fact that Mr Nicholls had said there would be particular areas considered first for risk assessments, and more contentious areas considered at a later point was a source of frustration to you. Do you see that?---Yes, I do.

PN130

Then in the next sentence, and I just wanted to test you and wanted to ask this, you say, 'It was the CRU position that everyone was entitled to wear shorts, as long as there was(sic) an unacceptable risk, and that in order to determine whether or not there was an unacceptable risk would arise, risk assessments will need to be conducted in consultation with HSR's and affected workers', yes?---No. You missed out the 'no unacceptable risk.'

PN131

Sorry, pardon me. That wasn't deliberate. 'There was no unacceptable risk', yes?---Yes.

PN132

Now, the CRU position, and I think 'CRU' stands for combined rail unions - - - ?---That is correct.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN133

As state president of the AMWU, you're in a position to understand the position of the other unions which form part of the CRU?---At times.

PN134

Well, you're stating here this is the CRU position. So, you understood the CRU's position on this point, correct?---It was my understanding - - -

PN135

Yes?---Coming out of the meetings where the CRU was present.

PN136

All right. And so, you would agree then based on the CRU -position that risk assessments would need to be conducted in consultation with HSR and affected workers, about whether or not shorts posed an unacceptable risk to health and safety or not, correct?---That was one way of looking at it, yes.

PN137

Yes. And that what followed, and I'm asking for your understanding of this, from the conduct of the risk assessments in determining whether or not the wearing of shorts posed an unacceptable risk, is that Sydney Trains would evaluate the outcome of those risk assessments and make a determination on the issue, correct?---Not necessarily.

PN138

When you say, not necessarily, do you say that it wasn't Sydney Trains' decision to make (indistinct) risk assessments?---The risk assessments had to be undertaken.

PN139

Right?---They had to be undertaken in consultation with the affected workers and the HSR, and following on from that those risk assessments would need to be reviewed and endorsed by the company or by the PCBU.

PN140

Right. So, it's ultimately the PCBU which endorses those risk assessments at the end of the process, based on your understanding?---After providing feedback, yes.

PN141

Now, you also refer to at paragraph 31 that Sydney Trains - that Mr Warnes responded to the email, and I'll take you to the email if necessary, that Sydney Trains have applied a blanket approach to its implementation of shorts. Do you see that?---Yes.

PN142

Now, you know Mr Warnes as being Mr Toby Warnes, correct?---That is correct.

PN143

And he is a senior official with the RTBU?---That's right. That's my understanding.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN144

If you go to KL21 which is part of your affidavit or statement, 354 shows an email chain, and the email from Mr Warnes is at page 356. Do you see that about half way, down the middle of the page, Mr Lang?---Yes.

PN145

Now, you were sent this email by Mr Warnes, you'll see on 7 September 2023, and your name is identified as one of the recipients?---I've been identified as two of the recipients.

PN146

You're there twice, both at your AMWU address and the transport address. There's not two Keith Lang's, I assume. You're one and the same person. Now, when Mr Warnes sent this email did he speak to you about sending this email beforehand?---I don't recall.

PN147

It says in the second paragraph, 'Clause 32.1' – this is in the last sentence, 'cannot and should not be applied as a blanket approach.' Do you see that?---I do, yes. Yes.

PN148

That's the language you picked up in your statement, correct?---Yes. I did pick up the language of 'a blanket approach.'

PN149

Yes?---But it wasn't because of that email.

PN150

Right. Well, if you go back to your statement at paragraph 31, page 66 of the court book, you actually – you might have said it elsewhere, Mr Lang, and I'm not saying you haven't said it elsewhere – you're actually referring to Mr Warnes' email, correct, where he refers to a blanket approach?---Yes.

PN151

Yes. Now, in terms of a blanket approach is your understanding of the used of that expression by Mr Warnes that Sydney Trains had taken an approach where every employee in relation to every activity would need to wear long pants and not shorts?---My understanding of that is that the particular cohort of workers were in a geographical area in the workforce, i.e., the rail corridor. It had been identified as an area where a blanket would be applied where their shorts must be worn – sorry, pants must be worn, long sleeves must be worn, safety glasses must be worn and hard hats to be worn at all times, regardless of any risk that has been identified by the work group.

PN152

So, you understood Mr Warnes' comment being limited to the rail corridor?---No, I understood Mr Warnes' comment about a blanket approach being to mandated positions from management.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN153

In relation to a particular work group, mainly if you're working - - -?---Well, in the application of - - -

PN154

Yes, let's call it a geographical location, and the geographical location, to be clear, is the rail corridor?---Yes, correct.

PN155

And what you're not saying is that a blanket approach is taking across the entire workforce?---To have it take effect across the entire workforce would mean the train crew, station staff, et cetera, would be included in that. The directive came from the director for - sorry, not the director, the executive director, for engineering and maintenance branch and my understanding is that it applies to engineering and maintenance.

PN156

When you say the director, do you mean Mr Neville Nicholls?---That is correct.

PN157

And when you talk about engineering and maintenance you're talking about the geographical area which comprises the rail corridor?---No, I'm talking about the organizational structure.

PN158

I understand. So, what you're not saying is that there weren't other parts of the Sydney Trains' workforce who were allowed to wear shorts following risk assessments?---There were, which is the subject of my evidence that has been put on.

PN159

Okay. If we go back - - -?---But - - -

PN160

Please answer the question. Yes, go on?---Because effective risk assessment processes had taken place.

PN161

Now, if you go back to KL21 which is page 354, and then the particular email from Mr Warnes is at page 356. After Mr Warnes refers to clause 32.1 cannot and should not be applied as a blanket approach, on the next page he says:

PN162

*We will proceed on the basis that members are entitled to wear shorts at all times, and if an event that poses an unacceptable risk arises local management can raise the issue with the HSR or union delegate and it can be dealt with on a case by case basis.*

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN163



This is Mr Warnes' to the RTBU. On behalf of the AMWU do you endorse Mr Warnes' approach there?---I would say that it would never get to a position where a worker is put at risk.

PN164

In other words, you don't endorse what Mr Warne says there, correct?---I'm not saying that.

PN165

So, you do endorse it?---I'm not saying that either.

PN166

Well, let me ask you the question in a different - - -?---I'm saying I don't have an opinion.

PN167

But is the reason why, is because you understand that a worker will never be put in that position unless and until a risk assessment is completed and is either endorsed or not by Sydney Trains?---No. I'm saying that because there are process in place that would not give rise to that situation occurring. In these situations there is a pre-work briefing and induction at the beginning of each task. And that in itself is a risk assessment process that is engaged in by the work group. It is a two-way conversation between the workers and the supervisor, and at any point any worker can raise any concerns and have them discussed prior to the task being engaged.

PN168

Would you also agree with me that it could not ever get to that stage because the AMWU, based on their evidence takes the view that all this needs to follow from a risk assessment process, and then Sydney Trains deciding after that risk assessment process whether or not shorts poses an unacceptable risk to safety?---It was definitely the approach that we were taking at that point in time that a risk assessment would be the mechanism for identifying whether there was unacceptable risk or not.

PN169

If you got to the next paragraph in Mr Warnes' email it says:

PN170

*It's a genuine shame that despite the change in attitude we have seen across the rail agencies over the past few months, the engineering and maintenance branch remains stuck in the ideological zealotry of the past decade.*

PN171

Firstly, did you have an understanding as to what Mr Warnes meant when you read it, when he used the words, 'Ideological zealotry of the past decade'?---I made an assumption of what it meant.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN172

What was the assumption?---We'd definitely been through a period of disputation over collaborative work approaches.

PN173

When you say you've been involved in disputation about collaborative work approaches what you're referring to is that there might have been differences of opinion about the length and extent of consultation over the introduction of change in the workplace?---No. What I would suggest is that consultation had always failed to the point that it ended in disputation.

PN174

When you say consultation has failed, because it didn't produce an outcome that the union's wanted?---No. It failed because there was no genuine engagement.

PN175

Right?---And that's my opinion.

PN176

And so that's what you think Mr Warne is referring to in using the expression, 'ideological zealotry'?---Yes.

PN177

Not referring to the fact that Sydney Trains takes a vigilant and serious view as to compliance with its safety obligations, for instance?---No.

PN178

So, that you didn't view the use of the expression, 'ideological zealotry over the past decade', as Mr Warnes referring to Sydney Trains taking out a vigilant and serious view as to its work health and safety obligations?---I would say that there's plenty of evidence out there to suggest that Sydney Trains failed on many occasions to engage in consultation appropriately.

PN179

Right. If you go to the response from Sydney Trains to Mr Warnes' email, it's from Ms Jessica Drebber(?) and it's at page 354 of the court book. Do you see, and I won't read it all out, that Sydney Trains refers to legal advice it obtained? Do you see that?---Yes.

PN180

You referred to this legal advice in your evidence, correct?---Yes.

PN181

You've read that legal advice?---Yes, I have.

PN182

You understand that Sydney Trains acts upon its legal advice, correct?---I hope they acted upon sound and legal advice.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN183

And you would not expect Sydney Trains to act contrary to legal advice?---I would expect that they would go and seek legal advice.

PN184

And you would not expect Sydney Trains to act contrary to legal advice, correct?---I would suggest that if they had any question about it they should seek a second opinion.

PN185

But if they didn't have any questions about it you would expect Sydney Trains to comply with that legal advice?---That's a choice for them.

PN186

Right. Now, Mr Lang, I took you to the five hot weather meetings that took place – or hot weather uniform review meetings that took place in 2023. You attended each of those meetings, that's correct?---I attended the ones that I identified in my statement that I attended.

PN187

You understood those review meetings were to work through at a conceptual level, whether or not the use of long pants was an appropriate measure, or composed an unacceptable risk to safety, correct?---Sorry, say that again?

PN188

It's my fault. I didn't express it correctly. The purpose and content of those meetings was to address conceptually whether or not the use of shorts may pose an unacceptable risk to safety, correct?---I think the aim of those meetings was to establish at a much – at a higher level the engagement that was to occur around the risk assessment process and then the single point where the information was fed back out of those various - - -

PN189

And there would be a risk assessment process which would occur at a work group level which followed those meetings, correct?---Where it was appropriate, yes.

PN190

Yes. And there were a number of priority areas identified for staff where risk assessments could take place. Do you accept that?---Yes, I do accept that.

PN191

All right?---That was based upon the ease of getting through the process and to establish whether the process was going to be robust enough to enable the business to meet those obligations moving forward.

PN192

And it was expected that after those priority areas were done then other areas would follow?---Yes.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN193

Part of the process where you had hot weather review meetings was to get a better understanding of the typical risks in not wearing long pants, especially in the rail corridor, correct?---Sorry. Say that, again?

PN194

Part of the hot weather uniform review meetings was to get a better understanding of the health and safety risks associated with wearing shorts, especially in the rail corridor?---There was a least one meeting there that was an education focus around different hazards that might be addressed.

PN195

And it was to identify – there were, in effect, experts invited in to give presentations on the particular hazards, correct?---Yes.

PN196

That included Safe Work New South Wales?---That's my understanding.

PN197

And the Cancer Council of New South Wales?---Yes.

PN198

And internal representatives from Transport New South Wales, correct?---Yes. That's my recollection.

PN199

And it not only identified the potential hazards where the use of long pants may be a control measure, but also identified the extent of harm that they follow if that control measure of long pants is not put in place?---There was definitely education provided with the intent of putting everybody on the same page so that we could talk from an educated position and informed.

PN200

And when you say everyone on the same page talking from an educated position, it meant that everyone understood what are the reasonably foreseeable risks associated with not wearing long pants?---I'd say that is an opinionated position.

PN201

When you say opinionated position, you mean an opinionated position from those particular experts who gave the presentation?---I'd say that the foreseeable nature would be opinion but the risks were definitely there and the education around potential consequences was part of the education.

PN202

And based on that education, that assisted at least you as a HSR, to understand better the effectiveness of any control measures that might be put in place to deal with those potential hazards, correct?---What it did for me as a HSR was start looking at what control measures might be able to be implemented moving forward, to work away from the lowest form of control measure being PPE.

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN203

Now, you work in a heavy plant and resurfacing depot work group, correct?---Yes.

PN204

And you attended a number of the risk review meetings that were conducted in that work group in relation to the potential introduction of shorts?---Yes.

PN205

As part of that process there was a risk assessment prepared?---I daresay it's in draft, still.

PN206

A draft risk assessment. And there's been - - -?---It's still being discussed and populated but yes.

PN207

And there's been consultation on that draft risk assessment, correct?---That draft risk assessment has been populated and developed in consultation with the affected workers and the HSR's on that site and it's not yet in completion.

PN208

And so, it's still an ongoing process, do you agree?---If you define 'ongoing process' as the last meeting several months ago.

PN209

What you understand is that the determination of whether or not the use of shorts in that work area poses an unacceptable risk to safety hasn't yet led to a final decision has - - -?---It has not led to a final decision yet.

PN210

No further questions.

PN211

MR MARTIN: I don't have any re-examination thank you, Deputy President.

PN212

THE DEPUTY PRESIDENT: Thank you, very much for attending. You're free to resume your seat. Thank you?---Thank you.

<THE WITNESS WITHDREW

[10.54 AM]

PN213

One matter that was raised earlier in this matter is the question of whether in fact the matters have got to a stage of finalisation of risk assessment, so that was a refinement of what it might be that was in issue. I take it from those last few answers that there's been no further crystallisation?

\*\*\* KEITH COURTNEY LANG

XXN MR SECK

PN214

MR SECK: I think the answer is, for some work groups a decision has been made but for other work groups there's only a draft risk assessment which still is the

subject of consultation. So, it really depends on the particular work group. Shorts have already been endorsed for certain jobs and certain work groups, Deputy President, but others, it's an extant process.

PN215

THE DEPUTY PRESIDENT: Okay.

PN216

MR SECK: Subject to anything further that the union wish to raise, Deputy President, I'm in a position to open my case. I'm not going to open in the sense of giving you an opening but I should read the evidence or tender the evidence, subject to any objections and amendments.

PN217

THE DEPUTY PRESIDENT: Yes.

PN218

MR SECK: The first witness we are proposing to call is Mr Mitchell Gaskin. His statement was made on 9 February 2024 and is found at page 547 of the court book.

PN219

THE DEPUTY PRESIDENT: I note there's objections?

PN220

MR SECK: There are two objections, so I might let Mr Martin - - -

PN221

MR MARTIN: Thank you. I've discussed with my friend, beforehand and I my understanding is that my friend is happy for all of those objections that I've referred to, to be admitted on the basis of that it's limited to his understanding, for both Mr Gaskin and Mr Nicholls. I may as well just deal with them both. If it's on that basis I don't press the objections.

PN222

MR SECK: That's the basis. They obviously can't express concluded views on individual matters, Deputy President. That's a matter for you, ultimately.

PN223

THE DEPUTY PRESIDENT: Yes.

PN224

MR SECK: So, we don't press it on the basis of him advancing the truth of the matters or expressing an opinion (indistinct).

PN225

THE DEPUTY PRESIDENT: Okay. On that basis there is no objection. So, we'll make Mr Gaskin's statement that goes from page 547 to 1138 of the court book, exhibit R1.

**EXHIBIT #R1 WITNESS STATEMENT OF MITCHELL GASKIN  
AT PAGES 547 TO 1138 OF THE COURT BOOK**

PN226

MR SECK: I call Mitchell Gaskin.

PN227

THE ASSOCIATE: Please state your full name and employment address.

PN228

MR GASKIN: Mitchell Gaskin, 231 Elizabeth Street, Sydney.

<MITCHELL GASKIN, SWORN [10.59 AM]

EXAMINATION-IN-CHIEF BY MR SECK [10.59 AM]

PN229

THE DEPUTY PRESIDENT: Thank you. Please be seated.

PN230

MR SECK: Please state your full name for the record?---Mitchell Rohan Gaskin.

PN231

What is your current work address?---231 Elizabeth Street, Sydney.

PN232

What is your current occupation?---Director, Safety, Environment, Quality & Risk – Engineering & Maintenance, Sydney Trains.

PN233

Mr Gaskin, you have made a statement in these proceedings dated 9 February 2024, that's correct?---Yes.

PN234

Do you have a copy with you, at the moment, of that statement?---Yes.

PN235

Does the statement in front of you comprise six paragraphs, 20 pages?---Yes.

PN236

And does it have 32 attachments identified MG1 to MG32?---Only to MG30.

PN237

THE DEPUTY PRESIDENT: There is MG31 in there. It's just not very well marked?

PN238

MR SECK: MG31. I think it's at page 1076 of the court book (indistinct)?---Yes.

PN239

And do you have MG32 which starts at page 1107?---Yes.

\*\*\* MITCHELL GASKIN

XN MR SECK

PN240

All right. Have you read your statement recently, Mr Gaskin?---Yes.

PN241

Do you wish to make any changes to your statement?---No.

PN242

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

PN243

I tender the statement of Mitchell Gaskin dated 9 February 2024.

PN244

THE DEPUTY PRESIDENT: Thank you. That's been marked as exhibit R1.

PN245

MR SECK: May it please. No further questions in chief.

**CROSS-EXAMINATION BY MR MARTIN**

**[11.02 AM]**

PN246

MR MARTIN: Mr Gaskin, I'm just going to ask you a few questions. I certainly won't be long. Now, you've said before you're currently the Director of Safety, Environment, Quality & Risk, Service Delivery, Engineering & Maintenance. That's correct, isn't it?---Yes, that's correct.

PN247

Just for your benefit, Mr Gaskin, you don't have to lean into the microphone and it'll pick up, just so you don't have to keep doing it. Safety, Environment, Quality & Risk, that's commonly referred to in the statement as SEQR, just for the Deputy President's benefit?---Yes.

PN248

So, if I can just take you to paragraph 23 of your statement. It's on page 552 of the court book. Just let me know when you have it?---Can you give me the paragraph number again, please?

PN249

Yes, sure. It's number 23?---Yes.

PN250

And you say there, as part of your view, and this is your preliminary view of the priority areas:

PN251

*Sydney Trains' consider the residual risks associated with the removal of the existing control measure of long pants having regard to the tasks, areas, roles that are proposed by the unions. These risks include UV exposure; visibility of traffic; cuts and abrasions; slips and trips; electrical hazards; chemical hazards; (indistinct) and (indistinct) hazards.*

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN252



MR SECK: Do you see that?---Yes.

PN253

And you'd agree with me, wouldn't you, that those risks as you've identified in paragraph 23 were the main concern of you, in terms of whether employees should be given shorts or not?---Yes.

PN254

And if I can just take you back to paragraph 16 of your statement which is on page 550 of the court book. You say there:

PN255

*On 30 March 2023 during the first hot weather uniform meeting Sydney Trains explained that the proposed shorts review process that the SEQR team would undertake in determining whether it was feasible to assess whether infrastructure workers in EMB could wear shorts and other hot uniform -*

PN256

et cetera, et cetera. So in your opinion, it was the SEQR team's determination as to whether people should be able to wear shorts or not? That's ultimately who it rested with?---No.

PN257

Whose was it then?---The duty holder.

PN258

The duty holder? But the SEQR team would report to the duty holder, being Mr Nichols; that's correct, isn't it?---That's correct.

PN259

And Mr Nichols would ultimately make that decision based on your advice?---In relation to further exploration of feasibility, yes.

PN260

Sure, but my point being is that the SEQR team would make an assessment; that's correct, isn't it?---Yes.

PN261

Then they would relay that advice to Mr Nichols?---Yes.

PN262

Based on that advice, he would either accept, or not, that advice that you give to him?---Yes.

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN263

Going down to paragraph 17 of your statement, the proposed process included utilising a number of different measures. If I can just jump down to paragraph 17(d), you will see you considered other guidelines, benchmarks, codes of practice, Australian Standards, and other relevant materials concerning the risks

posed to employees, and that included, for example, Australian Standards, Safe Work documents and Cancer Council. Do you see that there?---Yes.

PN264

Sydney Trains obviously utilised these particular documents to inform its approach as to whether employees should be allowed to wear shorts?---No.

PN265

Well, what was the basis of these documents then?---It was for the initial feasibility, whether we would progress to formal risk assessments and reviews, as per our safety management system.

PN266

Sure, but these would ultimately inform whether you went to a risk assessment or not?---Yes.

PN267

If I can just take you to paragraph 49 of your statement, you say there:

PN268

*At the meeting on 21 August, the unions had also requested that Sydney Trains provide its position in writing regarding the wearing of shorts for infrastructure workers within the rail corridor.*

PN269

See that?---Yes.

PN270

If I can then just take you to page 959 of the court book. Do you have the red markings at the bottom of your statement, Mr Gaskin?---Yes.

PN271

It's down the bottom. Just let me know when you have it?---Could you repeat the page number, please?

PN272

Yes, sure, it's 959. It should be an email from Ms Drebber. Do you have that?---Yes.

PN273

You will see at the top of that email, it says:

PN274

*Hi All*

PN275

*Thank you for attending the last hot weather uniform review meeting.*

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN276

Then proceeding down to about halfway down the page, you'll see a paragraph beginning, 'With regard to any risks areas, tasks', et cetera. Do you see that?---Yes.

PN277

It says:

PN278

*With regard to any areas, tasks, roles beyond the priority areas...*

PN279

- those are the initial areas that had been agreed as - or the 'no brainers':

PN280

*...we have sought to understand both the potential risk and mitigations through the workshop held on 5 June 2023 with the unions and relevant independent experts, which provide up to date evidence and information, as well as to understand our obligations as the duty holder by seeking legal advice from Ashurst. The union has been provided a copy of that legal advice.*

PN281

Ultimately, towards the end, you say, having regard to that legal advice, you would only be willing to provide further risk assessments to fleet maintenance centres within the confines of the maintenance shed structures themselves, and similarly with heavy plant and fleet servicing structures. Do you see that?---Yes.

PN282

Apologies for one second. At that stage, had you conducted a risk assessment of the - sorry, you said:

PN283

*The further risk assessments will be conducted within the confines...*

PN284

Had you conducted a risk assessment at that stage outside of the structures?---I don't know.

PN285

You don't know? Your understanding is that the reason for why Sydney Trains wouldn't conduct a risk assessment outside of the structures was largely due to UV risk? Is that your understanding?---No.

PN286

What was your understanding?---It was in relation to other hazards within the rail corridor more broadly beyond just UV exposure.

PN287

Okay. I just want to make sure I've got the page reference before I make you go to it. If I can just take you to page 607, which is annexure MG4 of your statement. It should be the Australian Rail PPE Minimum Requirements.

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN288

THE DEPUTY PRESIDENT: What's the page number?

PN289

MR MARTIN: Sorry, 607, Deputy President.

PN290

Do you have that?---Yes.

PN291

If I can then take you to page 618 of that document - apologies, if I could initially take you to 612, then I will take you to 618. Apologies, Mr Gaskin. You will see at the top of that document, it says:

PN292

*This standard outlines the minimum requirements for PPE when accessing the rail corridor. The standard aims to establish standardisation of PPE within the Australian rail industry.*

PN293

If I can then take you to page 618, and in particular paragraph 2.4.2, which talks about sun-protective clothing. It says that:

PN294

*Where required, sun-protective clothing shall be worn and be rated at UPF 50+ in accordance with...*

PN295

the Australian and New Zealand Standard:

PN296

*Sun-protective clothing would include long-sleeved shirts and long pants.*

PN297

Then finally:

PN298

*When sun protection clothing is worn in the rail corridor, consideration should also be given to other risks such as heat exposure. A risk assessment should be undertaken to determine fit for purpose sun protection PPE suitable for the conditions of the specific location.*

PN299

You see that, don't you?---Yes.

PN300

And you've seen before that this establishes minimum requirements in relation to your obligations as an employer. Do you agree with that?---Yes.

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN301

So on what basis has a risk assessment not been conducted outside the rail corridor having regard to this particular document?---Can you repeat the question, please?

PN302

Well, you would agree with me that the rail standards here are important and it's important to comply with them, wouldn't you?---Yes.

PN303

In doing so, one of the obligations that it suggests is that, in dealing with the rail corridor in determining the appropriate PPE, a risk assessment should be conducted. You see that, don't you?---Yes.

PN304

And you've just accepted before that no risk assessment has been conducted outside the rail corridor; that's correct, isn't it?---I said I don't know.

PN305

You don't know? Well, you would agree with me then, in circumstances where it hasn't, that a risk assessment should be conducted to determine whether shorts should be allowed?

PN306

MR SECK: I object. He says he doesn't know. I don't know how you can kind of ask a hypothetical question like that.

PN307

THE DEPUTY PRESIDENT: He doesn't know about whether a risk assessment has been undertaken. That's the level of disagreement. I will allow the question.

PN308

MR MARTIN: In circumstances where it hasn't been done, you'd agree with me, wouldn't you, that a risk assessment should be done outside the rail corridor? Sorry, in the - I'll rephrase the question. In circumstances where a risk assessment has not been done, you'd agree with me that a risk assessment should be done outside of the structures for those particular workers?---In relation to PPE requirements?

PN309

Yes?---Yes.

PN310

Yes, and that would include wearing shorts?---I'm not sure, given that the standard doesn't reference shorts.

PN311

Sure. If I can just take you back to page 50 of your statement, which is on page 561 of the court book, you say there:

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN312

*In respect of other areas beyond the priority areas identified and assessed, Sydney Trains confirmed with the unions by email that it would support further risk assessments in fleet maintenance centres within the confines of the maintenance shed structures and heavy plant and fleet depot structures.*

PN313

That's what we have just discussed, but you see that. Are those the only other areas that you've considered and are willing to consider outside the risk assessments that have been done for the priority areas?---Sorry, could you repeat that question?

PN314

Outside of the five - the priority areas that Sydney Trains and the unions have gone through, are there any areas other than heavy plant and fleet maintenance within the structures that Sydney Trains is going to consider for shorts?---Hypothetically, yes.

PN315

Hypothetically, yes, but, at this stage, no consideration has been given to it, as far as you're aware?---As far as I'm aware, no.

PN316

If I can then just take you to paragraph 33(d) of your statement.

PN317

THE DEPUTY PRESIDENT: Sorry, which one was that?

PN318

MR MARTIN: 33(d). It's on page 555 of the court book.

PN319

This particular paragraph broadly pertains to the meeting where the experts had presented one of those, in this case, Tony Robertson from Transport for New South Wales, regarding the number of injuries in the engineering and maintenance branch between 2019 and 2023?---Yes.

PN320

You say in that statement there's 179 injuries that had occurred during that period attributed to lacerations or open wounds, contusions, bruising and superficial crushing, et cetera?---Yes.

PN321

Those were some of the other areas that you were concerned about, say, for example, in relation to the rail corridor, that would need to be considered in terms of whether people can wear shorts?---Yes.

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN322

If I can then take you to page 639 of the court book, and you will see, for example, some skin cancer claims that are referred to, and these are some of the

issues that you rely upon in saying that there's a potential risk to people wearing shorts; that's correct, isn't it?---Yes.

PN323

If you just see each of these, there's four entries. In the first one, it says, 'Worked for 29 years in RailCorp'; the second one says, 'Physical injury, skin cancer, no provided nature and conditions'; the third one says, 'Employee sustained multiple skin cancers from long-term exposure to the sun', and another one just says, 'Skin cancer.' Based on this particular information, you couldn't possibly know whether shorts would have exacerbated that risk or not because you don't know, for example, where that skin cancer occurred, do you?---No.

PN324

They could have been wearing short-sleeved shirts?---Yes.

PN325

Based on this, insofar as UV exposure, the only evidence that you've relied upon is these four skin cancer claims to say that UV exposure is a risk; that's correct, isn't it?---No.

PN326

Well, what are the other areas that you pertained to other than this?---Published literature from industry bodies and organisations such as the Skin Cancer Council.

PN327

Sure. Was one of those the study that was conducted which said that - is that just in relation to melanoma in particular? Is that the study that you were just referring to?---The study that is contained within the statement.

PN328

Well, there's one study in particular that talks about the risk of wearing shorts and pants and increasing body temperature. Is that the one that you're talking about, or is it a different study?---No, I'm referring to the Skin Cancer Council study in relation to skin cancer exposure rates within Australia.

PN329

Sure. And it was those broader rates that informed your view, at a global level, that due to the risk of UV, that people shouldn't be able to wear shorts?---No.

PN330

Well, on what basis was it? It couldn't possibly have been the skin cancer claims, so what is the level of analysis that Sydney Trains has undergone specifically in relation to whether people can wear shorts, having regard to the specific UV risk for the particular task, other than the global assessments that Cancer Council New South Wales, or these particular industries listed, what, otherwise, has Sydney Trains done?---Followed our, so far, practices and principles, which incorporates a number of literature and published relevant information to inform the decision.

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN331

If you turn to the next page on to 640, you will see there is also a list of lower leg injuries. I won't go through all of these in detail, but, again, some of these are - these injuries are presumably relied upon by Sydney Trains as part of the reason - not the entire reason, but part of the reason - why shorts shouldn't be issued; that's correct, isn't it?---Yes.

PN332

For example, there are in this - I won't go through them line by line - but there are eight muscular stress injuries. How do you say that a muscular stress injury would have been exacerbated by wearing shorts as opposed to pants?---Sorry, can you repeat the question?

PN333

How do you say that someone that's suffered a muscular stress injury, how would that issue, that risk, be exacerbated by wearing shorts as opposed to long pants? How would there be any difference in a risk profile?---Um ---

PN334

The point is, Mr Gaskin, you don't know, do you?

PN335

MR SECK: Well, he should be given the opportunity to answer the question.

PN336

MR MARTIN: Sure.

PN337

THE DEPUTY PRESIDENT: Can you break the questions into parts, just so I can understand.

PN338

MR MARTIN: Perhaps I will simplify it.

PN339

What is the difference in the risk profile between wearing shorts and pants if someone suffers a muscular stress injury?---I don't know.

PN340

What is the difference in that same risk profile if someone, for example, steps into a hole?---Increased opportunity for cuts and abrasions. Given the exposed skin going into a place that it's not intended to go into, like a hole, would increase that possibility.

PN341

Well, that's your subjective view on it, but you couldn't say that for any certainty. What if someone falls from a height?

PN342

MR SECK: Hold on. There are two propositions. 'That's your subjective view on it' - I think if that's to be put as a question, you should - - -

\*\*\* MITCHELL GASKIN

XXN MR MARTIN



PN343

THE DEPUTY PRESIDENT: Well, so far, it's just a statement. Do you want to put it in your question or move on?

PN344

MR MARTIN: I can put it as a question.

PN345

That's your subjective view on it, isn't it?---Yes.

PN346

But, otherwise, you rely on these particular injuries, which, for example, insofar as the muscular stress point, you don't know whether that would contribute to, or exacerbate, the risk of injury by wearing shorts at all?---I don't know.

PN347

You don't know, but then you've relied on this as part of the basis for why people can't wear shorts; that's correct, isn't it?---Part of, yes.

PN348

Then if I can take you to page 765 of the court book. Now this goes back to the part of your statement before around the 179 injuries. You will see, at the top there:

PN349

*A review of (indistinct) claims data shows that between 2019 and the current year, there have been a total of 179 claims for injuries.*

PN350

If you turn over to the next page - - -?---Apologies, page number reference?

PN351

I do apologise. It's page 765?---765?

PN352

That's correct, yes. Just let me know when you have that, Mr Gaskin?---I have it.

PN353

You will see at the top there, that foreshadows that there's 179 claims that have been made in relation to injuries. Do you see that?---Yes.

PN354

When you say 'claims', is that workers compensation claims?---Yes.

PN355

If I can take you to the next page, page 766, that then breaks that down. It's not entirely clear, but you'll see, at the top of the page, in the very top table, you'll see engineering and maintenance branch, there's a count of claims for 2021, 2022, and it's cut out, but it should be 2023 as well?---Yes.

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN356

You will see that, if you add those all up, well, firstly, it's only between 2021 and 2023, whilst the previous page says between 2019 and the current year, so there's a difference in the range, but, totalling that up, 172, 250 and 345, that seems to be about 767 injuries. See that?---Yes.

PN357

You will see down the bottom right of that - the bottom right table, you'll see it says, 'Top bodily locations'?---Yes.

PN358

The very top of that - and again it's distributed across 2021, 2022 and 2023 - there's 34 total injuries across that span. Do you see that at the very top?---Yes.

PN359

You don't know, for example, whether those lower limb injuries that I'm just referring to here are inclusive of the 20 other leg injuries that I just took you to before? You don't know whether they're inclusive of that or not, or in addition?---I don't know.

PN360

No. And when it says 'lower limbs', you don't know whether that means their thigh or their calf?---No.

PN361

So in relying on this particular part, you couldn't be certain, insofar as at least it affects lower limbs, whether shorts or pants would create a greater or worse risk because you just don't have enough information, do you?---Sorry, can you rephrase the question?

PN362

In terms of these injuries that have occurred, 34 of which are lower limb injuries, you don't know whether wearing pants or wearing shorts would have changed the risk profile, i.e. whether it could have increased the risk of that injury or not, because there's simply just not enough information, it's just numbers?---No.

PN363

You don't agree with that?---No.

PN364

On what basis do you say that shorts would have exacerbated the injury, say, for example, in relation to these 34 lower limb injuries?---I don't think they would have necessarily exacerbated the injury.

PN365

That's just your subjective viewpoint based on the data?---Correct.

PN366

Sure. If I can just then take you back to paragraph 29 of your statement. It's page 554 of the court book, apologies, Deputy President.

PN367

THE DEPUTY PRESIDENT: Thank you.

PN368

MR MARTIN: You will see there it says, 'For remaining areas', that is, those that were not identified as the priority areas:

PN369

*...Sydney Trains proposed holding a workshop with internal representatives, unions and relevant independent experts in order to understand what considerations should be made.*

PN370

Has that workshop taken place yet?---Yes.

PN371

When has that workshop taken place?---I'd have to refer to the exact date within the statement.

PN372

If you can find it, sure?---It's in relation to the activities from paragraph 33 that contained attendance of industry experts.

PN373

Well, that was in relation to the priority areas, wasn't it? It was - sorry, I will let you answer the question first. Was that not in relation to the priority areas, this general educational workshop?---Yes.

PN374

Yes. What I'm asking about at 29, it's not in relation to the priority areas, it's slightly different. So what it's saying there is that, for the remaining areas, i.e. those that weren't the subject of this particular workshop, Sydney Trains proposed to hold a workshop - so again separate - with internal representatives, unions and relevant independent experts. So what I'm asking you, Mr Gaskin, is, outside of those priority areas, has any workshop actually been engaged in yet?---No.

PN375

When does Sydney Trains plan on actually engaging in this particular workshop?---I don't know.

PN376

Well, Mr Gaskin, you would agree with me, wouldn't you, that people are pretty keen to get their shorts, by the sounds of it?---I don't know.

PN377

That's the reason why we're here, isn't it?

PN378

MR SECK: Well - - -

\*\*\* MITCHELL GASKIN

XXN MR MARTIN

PN379

MR MARTIN: Well, he can answer the question.

PN380

MR SECK: How can he say that this is the reason why we are here?

PN381

MR MARTIN: The point is, Mr Gaskin, is that you don't have any idea when you're going to conduct this workshop. When are employees going to know, outside these priority areas, whether they can wear shorts?---Through our current existing arrangements to assess risk in the workplace.

PN382

Sure. No further questions, thank you.

PN383

THE DEPUTY PRESIDENT: Any re-examination?

PN384

MR SECK: Excuse me, Deputy President.

**RE-EXAMINATION BY MR SECK**

**[11.31 AM]**

PN385

Can you go to court book page 618, Mr Gaskin. You might recall you were taken to this particular section at point 2.4.2 in the middle of the page. It's Australian Standard 7471, 2019 Australian Rail PPE Minimum Requirements. Do you see that?---Yes.

PN386

Going back to page 618 You were asked, in particular, a question about the last sentence of paragraph 2.4.2, which says:

PN387

*A risk assessment should be undertaken to determine fit for purpose sun protection PPE suitable to the conditions at the specific location.*

PN388

Do you see that?---Yes.

PN389

Do you remember you were asked questions about that particular sentence? Do you see that?---Yes.

\*\*\* MITCHELL GASKIN

RXN MR SECK

PN390

Do you remember that? Can you tell the Commission your understanding of what's involved in undertaking a risk assessment to determine that PPE is fit for purpose?---So currently our safety management system outlines the minimum guideline requirements for personal protective equipment at Sydney Trains, which

forms a primary input to any risk assessments, revisions of Safe Work instructions or Safe Work method statements that might outline certain PPE requirements.

PN391

In the context of PPE requirements involving the use of long trousers or long pants, can you confirm whether or not risk assessments have been undertaken to determine whether or not long pants are fit for purpose at specific locations?---I don't know.

PN392

You were asked questions about your statement, and if you go to paragraph 29 of your statement, you were asked questions about this paragraph about areas which were not identified as priority areas and Sydney Trains proposing to hold a workshop with internal representatives. Do you remember that?---Yes.

PN393

My learned friend, Mr Martin, said to you that, other than the five priority areas and heavy plant and fleet structure, whether or not there was a proposal to hold a workshop, or undertake a risk assessment, I should say, for any of those areas, and you, in response, said, 'Hypothetically, yes.' Do you recall giving that answer?---Yes.

PN394

Can you explain to the Commission, when you said, 'Hypothetically, yes', what are the particular circumstances in which the risk assessment would be conducted for those other areas, hypothetically?---Hypothetically, any locations outside of the rail corridor would typically follow the same process that was applied to the priority areas, which involves subject matter expertise, line management representation, health and safety representation in accordance with our safety management system.

PN395

When will a risk assessment be considered appropriate for those other areas?---I'm sorry, the other areas being?

PN396

Outside the five priority areas and heavy plant and fleet structure?

PN397

MR MARTIN: Objection. I have already asked the witness this about when a workshop is proposed to be done and he says he doesn't know. It's already been answered.

PN398

MR SECK: I think the question was directed to risk assessments, as I've got down here.

PN399

When do you say, Mr Gaskin - - -

\*\*\* MITCHELL GASKIN

RXN MR SECK

PN400

THE DEPUTY PRESIDENT: 'When will it occur?' 'I don't know.'

PN401

MR MARTIN: Apologies, I misspoke. Yes, the risk assessment, he said he didn't know.

PN402

MR SECK: When, hypothetically, will be the circumstances which will trigger  
- - -

PN403

MR MARTIN: Objection. My friend has objected to me on the basis of hypothetical questions. It goes the same way.

PN404

THE DEPUTY PRESIDENT: In re-examination, it's a long bow.

PN405

MR SECK: I think the answer was, 'Hypothetically, yes.' I was just trying to explore in what hypothetical circumstances would a risk assessment be triggered.

PN406

THE WITNESS: So, and I - - -

PN407

THE DEPUTY PRESIDENT: Do you want to be heard on that?

PN408

MR MARTIN: Well, I don't see how that's of any relevance. What is the relevance of hypothetical scenarios?

PN409

THE DEPUTY PRESIDENT: If he's inquiring into what he meant regarding hypothetical, but not an expansion.

PN410

MR SECK: What did you mean when you used the word - when you said, 'Hypothetically, yes'?---Can I have the statement repeated, please?

PN411

You were asked a question by my learned friend, Mr Martin, about, outside the five priority areas and the areas of heavy plant and fleet structure, would there be a risk assessment undertaken for the use of shorts in substitution for long trousers, and your answer was, 'Hypothetically, yes.' My question is what did you mean by, 'Hypothetically, yes'?---If our internal processes are triggered, which is, as I've explained from a safety management system perspective, then, hypothetically, yes, we would trigger a risk assessment, not a workshop, so I think the explanation was in relation to a risk assessment, not a workshop.

\*\*\* MITCHELL GASKIN

RXN MR SECK

PN412

You were then taken, Mr Gaskin, to page 639 of the court book, which is the skin cancer claims?---Yes.

PN413

Sorry, just ignore that, I want to take you to another part. It's court book 765?---Yes.

PN414

You were asked questions by my learned friend about the number of workers compensation claims - do you recall - and there was a reference to the 179 claims?---Yes.

PN415

I think Mr Martin put to you that the information contained on that PowerPoint slide doesn't tell you whether the injuries were in the lower limbs or not. Do you recall him putting that to you?---Yes.

PN416

Then he said to you that you don't know whether or not it was on the thigh or the calf. Do you remember being asked those questions?---Yes.

PN417

Then he put to you that you don't know whether or not the use of long pants would have changed the risk profile in preventing those particular claims. Do you see that?---Yes.

PN418

Can you explain to the Commission, Mr Gaskin, the basis upon which you, in your position as director of safety, environment, quality and risk, formed the view that the use of long pants may avoid claims for leg injuries?---So through a number of different considerations, primarily current practice that is applied within our organisation, also looking at, again, other published industry standards and applicable documentation that suggests that the covering of skin provides risk mitigation against a multitude of hazards that could be associated with some of the injuries and claims that we see.

PN419

No further questions.

PN420

THE DEPUTY PRESIDENT: Just a few questions. You were questioned about paragraph 17 of your statement and you talked of initial feasibility if it went to formal risk review. Am I to understand that a preliminary assessment was done in relation to the areas that seemed to be the subject of these proceedings and that initial assessment was such that it wasn't considered that further risk assessment should occur?---That's correct, Deputy President.

\*\*\* MITCHELL GASKIN

RXN MR SECK

PN421

Okay. Am I correct in understanding that in these contentious areas - and I think we all understand what they are - there's been no risk assessments performed since 17 February 2022?---I don't know.

PN422

Well, do you know of any that have occurred in that period?---Not specifically focusing on shorts, but given that our safety documentation is primarily around the task area or activity, not specifically related to an item of PPE.

PN423

Okay. But in shorts, another answer you gave was, 'Through current existing work evaluation.' Tell me if I'm wrong, but is it the case that you relied on previous risk assessments that had indicated against the use of shorts and relied on those in dealing with the agitation for shorts in the areas of dispute?---Correct, yes.

PN424

Thank you. Any questions arising from my questions?

PN425

MR SECK: No.

PN426

MR MARTIN: No.

PN427

THE DEPUTY PRESIDENT: Thank you. You are free to go. Thank you for attending to give evidence.

**<THE WITNESS WITHDREW**

**[11.44 AM]**

PN428

THE DEPUTY PRESIDENT: Is that a convenient time for a break?

PN429

MR SECK: Yes, Deputy President.

PN430

THE DEPUTY PRESIDENT: We will resume at 11.50. Thank you.

**SHORT ADJOURNMENT**

**[11.44 AM]**

**RESUMED**

**[11.54 AM]**

PN431

MR SECK: Deputy President, we are in a position to call our next witness.

PN432

THE DEPUTY PRESIDENT: Mr Nichols?

\*\*\* MITCHELL GASKIN

RXN MR SECK



PN433

MR SECK: The next witness is Nev Nichols and his statement is found at page 1139 of the court book, 1144 of the PDF. I call Nev Nichols.

PN434

THE ASSOCIATE: Please state your full name and employment address.

PN435

MR NICHOLS: Neville James Nichols, 477 Pitt Street, Sydney.

PN436

THE ASSOCIATE: Do you wish to give an oath on a religious text or a non-religious affirmation?

PN437

MR NICHOLS: A non-religious affirmation.

**<NEVILLE JAMES NICHOLS, AFFIRMED** [11.56 AM]

**EXAMINATION-IN-CHIEF BY MR SECK** [11.56 AM]

PN438

Please state your full name for the record?---Neville James Nichols.

PN439

What is your current work address?---477 Pitt Street in Sydney.

PN440

What is your current occupation?---I'm the executive director for engineering and maintenance in Sydney Trains.

PN441

Mr Nichols, you have made a statement dated 9 February 2024?---Correct.

PN442

Do you have a copy of your statement in front of you at the moment?---I do, yes.

PN443

Does that statement comprise 49 paragraphs?---I don't know.

PN444

That's all right. Just go to page 9 and if you can just confirm that for me. Page 1147 of the court book?---That's correct, 49.

PN445

And there are 13 attachments to your statement marked NN1 to NN13?---That's correct.

PN446

Have you read your statement recently?--- Yes.

\*\*\* NEVILLE JAMES NICHOLS

XN MR SECK

PN447

Do you wish to make any changes to your statement?---No.

PN448

Are the contents of your statement true and correct to the best of your knowledge and belief?---That's correct, yes.

PN449

I tender the statement of Mr Nichols.

PN450

THE DEPUTY PRESIDENT: Thank you. That will be exhibit R2.

**EXHIBIT #R2 WITNESS STATEMENT OF NEVILLE JAMES NICHOLS WITH 13 ATTACHMENTS**

PN451

MR SECK: May it please, no further questions in chief, Deputy President.

PN452

THE DEPUTY PRESIDENT: Mr Martin.

PN453

MR MARTIN: Thank you.

**CROSS-EXAMINATION BY MR MARTIN**

**[11.57 AM]**

PN454

Mr Nichols, I am just going to ask you a few questions. I won't be too long. As my friend has just pointed out, you are the executive director for the engineering and maintenance branch; that's correct?---That's right, yes.

PN455

I think, as you put it in your statement, you're the risk owner; that's correct, isn't it, in relation to - - -?---That's correct, yes.

PN456

If I can just take you to paragraph 16 of your statement, which is on page 1141 of the court book. Broadly, these paragraphs between 13 onwards are talking about the first hot weather uniform review meeting, and you will see there, at paragraph 16, you say - sorry, I might take you to 15 first, actually?---Yes.

PN457

You say:

PN458

*In summary, Sydney Trains proposed that the SEQR would undertake a preliminary review of the priority areas provided by the unions to determine whether these areas could be progressed to a risk assessment process.*

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN459

Then you say there:

PN460

*The SEQR team are safety practitioners within Sydney Trains who have expertise in safety and in particular understand the risks posed to employees within EMB in performing their activities -*

PN461

et cetera, et cetera. It was on that basis, wasn't it, that the SEQR team would undertake the preliminary review, because of their expertise, as you put it?---That's correct.

PN462

The feasibility assessment that was to be undertaken by SEQR, you say at 16:

PN463

*...would have regard to the fact that the wearing of long pants is a current control measure which Sydney Trains has implemented to eliminate or minimise various risks to workers, including UV exposure, visibility of traffic, cuts and abrasions, slips and trips, electrical hazard, chemical hazards, flora and fauna hazards -*

PN464

et cetera. Do you see that?---That's correct.

PN465

Those risks in particular were the reason why, or these particular risks are the reason why, or the key considerations, I should say, in terms of whether people should be able to wear shorts or not?---They are examples of hazards that must be controlled.

PN466

Sure, but those are the only hazards that you've identified so far?---As examples.

PN467

I won't labour you by going through it, but you are aware, obviously, in your capacity as the risk owner and generally as the (indistinct), that the employer has to ensure, so far as reasonably practicable, to eliminate risk or otherwise minimise risk?---That's correct.

PN468

You are aware that the meaning of 'reasonably practicable' within the context of the Work Health and Safety Act includes, for example, the likelihood of the hazard and the risk concerned occurring?---Partly, yes, the likelihood.

PN469

That's one consideration?---One consideration.

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN470

I'll go through the other ones. The degree of harm that might result from the hazard or the risk?---Correct.

PN471

What the person concerned knows, or ought to know, about the hazard or the risk and ways of eliminating or minimising the risk?---That's correct.

PN472

And the availability and suitability of ways to eliminate or minimise the risk. So there's a number of considerations is what I'm getting at?---There's a number of considerations.

PN473

Sure. If I can then just take you to paragraph 18 of your statement. You say these risks, and I understand when you say:

PN474

*These risks are obvious and foreseeable ones for employees in EMB.*

PN475

I understand that you are referring to the risks that you are referring to in paragraph 16 of your statement?---As examples, but it's a holistic view that you must take.

PN476

Sure:

PN477

*They are capable of being minimised by the use of various control measures. One of them is wearing long pants, which minimises the risks.*

PN478

You will see, for example, at the bottom, the last sentence on that page says:

PN479

*Long pants also reduce the likely severity of cuts and abrasions if an employee slips, trips or falls and it reduces the risk of anaphylactic shock if an employee is exposed to flora and fauna.*

PN480

Just out of curiosity, how many instances of anaphylactic shock have there been?---I'm not sure; I can't comment; I don't know.

PN481

If I can take you to page 639 of the court book?---I'm sorry, I don't have that.

PN482

You don't have that available to you?---No.

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN483

I'm not sure if it's possible to be - I'm going from Mr Gaskin's statement.

PN484

MR SECK: Did you say 169?

PN485

MR MARTIN: Sorry, 639.

PN486

MR SECK: We will give Mr Nichols a copy.

PN487

THE WITNESS: Thank you.

PN488

MR MARTIN: You will see there - I think the other thing that you spoke to in paragraph 18 was a risk of flora and fauna. Again, how many incidents are you aware of involving flora and fauna?---I can't give a definitive answer, but I've certainly come across people who've had reactions to various flora and fauna attributes, such as spider bites, stings and reactions to vegetation.

PN489

Sure. The page number I have just taken you to, apologies, I think it was 640 is what I wanted to take you to, hopefully over the next page?---Yes.

PN490

You will see that that sets out a number of lower leg injuries. Presumably, as we have discussed before, this was one of the bases upon which Sydney Trains decided that shorts wouldn't be an appropriate control measure in certain areas; that's correct, isn't it?---I can't comment on that. I was not party to that, but it would form - - -

PN491

Have you seen this document before?---I've not seen this document.

PN492

Right?---In this context. I may have seen this historically, but I don't recall it.

PN493

But you would agree with me, wouldn't you, that you would need to be across the injuries across the board in determining whether shorts are an appropriate control measure?---I think, for me, it's about making sure that a holistic approach to a particular hazard, or group of hazards, is understood and controlled and discussed with the relevant people within the business to form an opinion. I don't think it's for me to say exactly this is a definitive list.

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN494

Sure. You will see at the fourth entry of that table - before you said, in terms, that you were unsure of any flora and fauna risks. Now, in terms of the lower leg

injuries, and this is about as detailed as it gets in terms of the evidence, you'll just have to take that from me, Mr Nichols, and it says here:

PN495

*Whilst accessing the rail corridor, it is required to walk through some stabling grass and access - as the grass was overgrown, I had to walk through it and I had a delayed reaction to the rash on my legs.*

PN496

That was one of the injuries that's relied upon in determining whether shorts are an appropriate measure. You would agree with me one control measure would be to just cut the grass, wouldn't you?---Various forms. Avoid the grass.

PN497

Sure. You would agree with me otherwise, let's say, for example, where there's an issue of muscular stress, you couldn't say that wearing shorts would exacerbate or reduce the risk; it would depend on the injury?---Sorry, could you just repeat that, please?

PN498

Whether wearing shorts or wearing pants, if there is a muscular stress injury involved, you don't know whether the risk profile is increased or reduced by wearing shorts?---That's correct.

PN499

Another point I think you said in relation to - I think it was back at paragraph 18, and I won't take you back there, but you talked about issues in relation to visibility on the track?---In 18, sorry?

PN500

I believe it was in 18. Apologies if I've got that wrong. Let me just find it in your statement. It might be 17. Thank you. I am indebted to my friend. It might be 17. I think 18 does deal with it at the back end. You will see at the end - and 18 was what I was directing you to?---Sorry, I was on the other page.

PN501

No, no, you're fine. You say:

PN502

*Long pants also acts as a protection when employees are required to remove wastes and chemicals used for graffiti and train cleaning. As the long pants are reflective UV tape, they also increase the visibility of workers when they are in the rail corridor.*

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN503

The last part there. What that is referring to is I believe there were some biomotion studies that were done throughout the process, and what you are suggesting is that by having the UV tape on the legs all the way down, that will create less of a risk. That's your understanding of it, at least, anyway?---I think I must just clarify it's a holistic view of all of the hazards.

PN504

Sure?---You can take an individual hazard about biomotion, but it's also what is the activity, what is the environment people are working. You have to consider all of that. To say one over another, I wouldn't find that an appropriate risk process to go through that would assure me.

PN505

When you say a 'holistic view', do you mean more of a high level global view?---No, no.

PN506

Or do you mean that you need to consider everything in detail?---The appropriate people who undertake the task, their representatives, the organisation, the professionals need to review all of the hazards and have a holistic view, apply controls so far as reasonably practicable to that outcome.

PN507

Yes?---So it's not just one or the other. That's what I'd like to clarify.

PN508

Yes, sure. In relation to the issue of reflective UV tape, you don't know, for example, that if, for example, UV tape was put on the hem of the shorts and then also on their socks and on their boots, whether that would make any difference to their visibility as opposed to if they just had the UV tape on their pants?---There are ways that you could achieve that and it might minimise risk in one regard, but you may introduce risks in other regards, such as having shorts with that on, someone may kneel in something, somebody might have an abrasion, so we have to also understand newly-introduced hazards or risks as part of that.

PN509

Sure?---Again, in isolation, it's a discussion, but it's the holistic outcome that's important.

PN510

Are you aware of any particular risk assessments that consider the difference between what I've just put to you insofar as having the UV reflective tape at different areas if you were to wear shorts as opposed to pants?---I am not, no.

PN511

You couldn't sit here right now - you don't know whether it would increase or reduce the risk if you were to wear shorts in those circumstances?---In isolation, no, but there would be other factors that we would look at.

PN512

I think you say as well, at paragraph 43 of your statement, which is on, I think, page 1146 of the court book:

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN513

*Being conscious of the obligations of Sydney Trains and as the risk owner, it would be inconsistent with Sydney Trains meeting its safety obligations to implement the option of wearing shorts.*

PN514

That is obviously your understanding, I take it?---Mm.

PN515

In relation to that, you, further down, say - about halfway down, it says:

PN516

*I was not prepared, as the risk owner and responsible senior officer, to implement such a change in those circumstances.*

PN517

Would it be fair to say that, in determining whether or not shorts were allowed, a significant consideration for you was your liability as the risk owner?---Look, there are - the law requires that you have individual responsibilities, but I also have obligations, as an officer, to Sydney Trains and an obligation to the employees who work for me, so it's a - - -

PN518

Sure, but if you can just focus on the question I'm asking you?---Okay, sorry.

PN519

What I'm asking is was it a significant consideration for you, in determining whether or not shorts would be allowed, that you were the risk owner?---Of course, because ultimately I would be signing off any process with a different outcome.

PN520

If I can then just take you to paragraph 45, you say:

PN521

*It's also possible that for certain workers the wearing of long pants is not a relevant control measure. For example, employees performing duties indoors with low or no exposure to UV and no exposure to other risks, for such employees, long pants is not a relevant control measure for that particular risk because the nature of their work means they are not exposed to it.*

PN522

Do you see that?---Following that assessment process, if that's the case, then it's about the process for me.

PN523

So you would agree with me someone, for example, working at night that isn't subject to UV rays, that wouldn't be a relevant - at least insofar as UV rays are concerned, it's not a relevant control measure?---Again I wouldn't look at it like that. It's a holistic view, working - - -

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN



PN524

Yes, sure, I'm only asking specifically with UV. I agree and I accept that it's a holistic view, but what I'm asking you is that, at least insofar as UV rays are concerned, you accept that someone working at night, it couldn't possibly be relevant?---It's not relevant in isolation, but it's very relevant in terms of additional and new hazards we would expose people to.

PN525

What do you mean by that? For someone working at night, what would be the other UV risks?---Not UV, sorry. I must clarify I didn't mean in a UV sense; I'm saying somebody working at night would come across other hazards. Maybe they're carrying a torch, or maybe they've only got one hand to support themselves and can't get three points of contact, something like that.

PN526

So is it your evidence then that, for example, if someone was wearing a torch, then, for example, you know, because they don't have the three points of contact, that someone there might have to wear shorts?---I was giving an example of we have to consider risks holistically. So I accept for UV at night, but what I can't do is not also go on to say there are other hazards that may be introduced and need to be considered.

PN527

I presume that you have had the opportunity to read the evidence in these proceedings?---I've received everything that is pertinent to my statement and the attachments.

PN528

Have you read the unions' statements in these proceedings?---I've read the letters from Mr Warnes and I've read Mr Lang's submission, and that's it.

PN529

When you say that, that's the statements you mean, and their annexures?---No.

PN530

So what have you read?---I've read my statement, I've read the letter from Mr Warnes, my response to that, and the attachments and the appendices.

PN531

Okay. So that's the email correspondence that you're referring to, is it?---Not the email correspondence, it's a letter - - -

PN532

A letter - - -?---A formal letter.

PN533

- - - that was sent by way of email?---Yes, it would have been.

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN534

What you are not referring to is the actual statements in these proceedings, for example, Mr Lang's statement, Mr Luke Warwick's - - -?---I've not seen - - -

PN535

You've not seen any of those? Yes, okay.

PN536

THE DEPUTY PRESIDENT: Sorry, you haven't seen any of the statements of the applicant?---Only the response that Mr Lang sent on two matters, one of wearing overalls, and the other was pre-work briefs, I believe.

PN537

MR MARTIN: So you've read his reply statement?---His reply statement.

PN538

He had two statements in these proceedings, just to be clear?---Yes.

PN539

So you've only read the reply statement?---That's correct.

PN540

The evidence that has been uncontested in this case, one of the issues is that there are cleaners that work at night, for example, who work between the hours of 7 o'clock and 3 am, they work inside the trains, they walk along paved surfaces. You would agree with me, wouldn't you, that they would be a serious category for being able to be considered to be wearing shorts?---I've always said that we're in a consultative process, we've had some successes, we have some reviews underway, which we continue to consult on, and we will move to other areas as we need to. I've always been committed to that. Again, the appropriate people need to be reviewing the risk assessment and satisfying that risks are managed so far, both individually and holistically.

PN541

Apologies, bear with me, Mr Nichols?---Can I get a drink?

PN542

Yes, absolutely. I'm not sure if you are able to give Mr Nichols other documents from about page 500 of the court book?

PN543

MR SECK: He's got them.

PN544

MR MARTIN: He has all of that there?

PN545

THE WITNESS: I've got all of this, yes.

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN546

MR MARTIN: Okay. Fantastic. If I could just take you to 520 to begin with. I do apologise, Deputy President, because I've lost those pages out of the court book, that's why I need to convert to a iPad.

PN547

THE WITNESS: You can have mine.

PN548

MR MARTIN: So it's the statement of Steve Hatcliffe. I might just take you through this because you haven't had the opportunity to read it. At paragraph 14, he says his responsibilities include fleet presentation, cleaning inside train carriages, picking up the rubbish, cleaning toilets. He's required to carry a backpack which contains all cleaning products, graffiti wipes, disinfectant, garbage bags, et cetera, and that weighs 15 kilograms. He has to work on the trains when they are not in service, so there's no air-conditioning on, and so the inside of the trains obviously become very hot and there's no natural ventilation because there are no windows that can be opened on the train carriage, and the ambient inside temperatures can become very hot due to the lack of ventilation and non-functioning of the air-conditioning system.

PN549

He says he normally works between 9 and 3 am and, typically, when he arrives at work, he walks along the station platform to the cleaners building, and this is a paved surface, and he otherwise hasn't had any issues in terms of - and the end of paragraph 25 - having slipped or fallen on any ballast, presumably because he works along the platforms.

PN550

Also, you will see, at paragraph 8 of that statement, which is on page 519, he says his work group has never been the subject of any risk assessment into the type of work and tasks required by cleaners. Currently, the basis is that he is required to wear pants. There has been no risk assessment that's been conducted.

PN551

You would agree with me, wouldn't you, that a risk assessment, particularly for someone like him, who seems to have relatively low risks, would need to be conducted pretty urgently, wouldn't you?---I've always maintained that we agree the list of activities to do as priority, which we have started to do, to show integrity in the system to change. If this comes up as a future, I'm completely open to that being reviewed against our safety management system, foreseeable risks and, if it is the case, then we will continue that dialogue around shorts.

PN552

We have accepted that in a number of locations already, and that should be presented through the professionals, and we absolutely commit to that and I haven't said otherwise. So the urgency was to get some risk assessments underway for the areas that we worked collaboratively to get. This may be in the next phase.

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN553

MR MARTIN: In his statement, I understand that he's normally been allowed to wear shorts and was subsequently told by his management, for example, that he no longer can wear shorts. He wasn't given a reason for that. Are you aware of why that's the case?---I'm not aware of that. I would assume - and, again, it's probably wrong for me to assume here - but our policies and procedures are clear, the PPE requirements are clear, and I would imagine it's a management conversation around those things. That does not prevent it from being considered as part of the risk assessment process going forward, which is ongoing.

PN554

I believe also, at paragraph 36 of your statement, but I won't take you there, and you are welcome to go there, but it's just in relation to the legal advice that you have been given by Ashurst?---Yes.

PN555

That's some two pages of advice, isn't it?---I'd have to - - -

PN556

Take it from me it is, it's two pages of advice, and that sets out your general obligations in relation to whether people can wear shorts or not, having regard to the particular risk assessments that have been conducted?---It's more advice around, I guess, duties, obligations, accountabilities and responsibilities of a PCBU and what the expectation of the various Acts, Work Health and Safety, Rail Safety National Law are, what the expectation is upon its officers. It's more advice around what we must be able to demonstrate.

PN557

And it's more of a - it's a high level advice in that sense; it doesn't go into specific detail about, say, for example, a cleaning attendant?---And nor should it. It sets out the backstop or the foundation on which legislation is based upon, which we must - we have an obligation to follow, and demonstrably do so.

PN558

Sure. But in the absence of undertaking a specific risk assessment in relation to a particular workplace that considers all of those holistic points that you've referred to, you would agree with me that the advice doesn't shed any light on that?---It does not; it was not required to.

PN559

Sure. I don't have any further questions, and I do apologise, Deputy President, for that issue.

PN560

THE DEPUTY PRESIDENT: You don't need to apologise.

PN561

MR SECK: No re-examination, Deputy President. Might Mr Nichols be excused?

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN562

THE DEPUTY PRESIDENT: No, I have just a few questions.

PN563

Mr Nichols, you gave some evidence previously about - and you repeated it a number of times in your answer - the nature of a holistic approach, a holistic view of all hazards, all professionals and representatives involved in a holistic review and, particularly then in relation to cleaners, in a consultative process, reviews underway, appropriate people in a risk assessment. Is there a reason why, for example, in relation to cleaners, a risk assessment hasn't occurred?---Yes, Deputy President. In this scenario, since the change to the enterprise agreement and the modification of the clause, it's about the application of resources to follow through and be successful in a number of scenarios that we worked on together, with future ongoing consultation and risk assessments to occur. My concern would be to do too many all at once and not achieve the outcomes in an expeditious way.

PN564

When you were asked a question about Mr Hatcliffe's statement and whether a risk assessment was needed urgently, I think, at the end of your evidence in response, you said, 'Maybe in the next space'?---Yes, sir. As it's ongoing, I'm more than happy for that to be considered in the next review of risk assessment with the appropriate people, and then the work health and safety consultation if there's any change required or agreed.

PN565

I think you accepted that there hadn't been a risk assessment in relation to cleaners?---I'm not aware of that.

PN566

I'm just wondering why one is not occurring as a matter of urgency?---I think there are - look, I take the point on that absolutely. There are a range of areas that we could look at, there's a range of activities and environments that we could look at. I'm happy for that to be prioritised going forward. The focus has been on the priority areas that we agreed together and then working through that to get an appropriate outcome and then progress.

PN567

I might be way off, but the priority areas, they're not the no brainers, are they?---They are the list that we worked together with our union colleagues to where do we want to look at first, what are the immediate opportunities.

PN568

Yes?---And that was the list that was jointly agreed by the teams.

PN569

I might be using a phrase that you've not heard of that was used in other statements that have been filed in this matter. Have you heard the term 'no brainers' before?---I have, yes.

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN570

Am I correct in understanding that what you refer to as a priority list is a no brainers?---That's correct.

PN571

But, if they're no brainers, it wouldn't take very long to work them out, would it?---Just the structured process of going through that and doing that in a considered way, in a structured way, to make sure all the relevant parties are there, it's not an overnight activity, there's a range of conversations and reviews, which are facilitated, and feedback, consultation, that goes on.

PN572

Anything arising from my questions?

PN573

MR MARTIN: No, thank you, Deputy President.

PN574

THE DEPUTY PRESIDENT: Mr Seck?

PN575

MR SECK: No, Deputy President, thank you.

PN576

THE DEPUTY PRESIDENT: Thank you. You are excused. Thank you very much.

<THE WITNESS WITHDREW

[12.27 PM]

PN577

MR SECK: Deputy President, that completes the respondent's evidence.

PN578

I have had a chat with Mr Martin as to the way forward. We could take lunch early and come back early, or come back at 2. Mr Martin tells me he thinks he will be about 45 minutes, I think I will probably about 45 minutes to an hour, so I'm optimistic that we can complete the matter by 4 o'clock, even if we come back at 2, but, for an abundance of caution, if you thought you wanted to make sure that we'd got it done by 4, we can certainly come back earlier. We are in your hands.

PN579

THE DEPUTY PRESIDENT: I can have faith in your estimates?

PN580

MR SECK: I think you can, Deputy President, so if you wanted to adjourn until 2, I think - - -

PN581

THE DEPUTY PRESIDENT: 2 o'clock.

\*\*\* NEVILLE JAMES NICHOLS

XXN MR MARTIN

PN582

MR SECK: May it please.

**LUNCHEON ADJOURNMENT**

**[12.28 PM]**

**RESUMED**

**[2.03 PM]**

PN583

THE DEPUTY PRESIDENT: Mr Martin.

PN584

MR MARTIN: Thank you, Deputy President. I think the question today really is, having regard to clause 32.1 in particular, section 19 of the Work Health and Safety Act, and section 52 of the Rail Safety National Law, is whether Sydney Trains can lawfully and reasonably direct employees that they perform their work wearing long pants where Sydney Trains has assessed that for those particular employees that the risk of them wearing shorts would pose an unacceptable risk. The question as we referred to in our submission poses an assumption that Sydney Trains can assess it, which we say is wrong for the reasons that I will foreshadow later.

PN585

In determining whether Sydney Trains can lawfully and reasonably direct employees to wear long pants there are essentially two key issues which we say need to be determined by the Commission. Firstly, the construction of clause 32.1, and secondly, whether Sydney Trains has complied with its consultation obligations.

PN586

It may just be useful if I take the Commission to court book 60, which is paragraph 4 of Mr Lang's statement. The reason for that, Deputy President, is just because it neatly sets out some of the history to this clause. You will see at paragraph 4 of Mr Lang's statement it provides that clause 32.1 of the 2018 agreement as it was prior to this provided:

PN587

*The employer will provide employees in operational roles, e.g. train crew, station operations, maintenance and infrastructure employees, with uniforms and where required protective clothing or equipment. These will be suitable and appropriate to the type of work activity being undertaken.*

PN588

If you flip over the page and go to paragraph 6 it says:

PN589

*As a result of the negotiations for the 2022 agreement clause 32.1 was amended and inserted into the 2020 agreement as follows.*

PN590

Largely the first sentence remains the same. It says:

PN591

*The employer will provide employees in operational roles, e.g. train crew, onboard service station operations, maintenance and infrastructure employees, with uniforms and where required PPE that will be suitable and appropriate to the type of work activity being undertaken and the risks involves in those type of work activity. Without limiting the generality of this clause as part of the employer's uniform offering the employer will provide employees the option of wearing shorts and other uniform items suitable for hot weather conditions other than in circumstances where there is an unacceptable risk to safety.*

PN592

It really is largely the last two sentences, if not solely the last sentence that's the subject of dispute. I should also note that this agreement represented the first time that employees have had that, what we say is an express right to wearing shorts other than in circumstances there is an unacceptable risk to safety.

PN593

The first issue that the Commission's attention needs to be directed towards is the meaning of work activity. This is as it turns out a very common phrase that's used in a workplace. If I can take you to the reply statement of Mr Lang, which is RKL1, annexure RKL1, which is at page 1383 of the court book. What you should have there, Deputy President, is a policy pertaining to pre-work briefings. Just let me know when you have that.

PN594

THE DEPUTY PRESIDENT: Please continue.

PN595

MR MARTIN: Thank you, Deputy President. You will see what this deals with broadly is pre-work briefings. You will see the scope there:

PN596

*This procedure is applicable to pre-work briefings conducted by Sydney Trains workers including contractors working in the Sydney Trains network or Sydney Trains workplaces.*

PN597

You will see there's a table which is in quite small font, but you will see that it says 'Pre-work briefings.' You have a start where it's conduct work, walk inspection prior to pre-work briefing. You prepare the briefing, document the briefing, deliver the briefing, review the briefing, manage safety briefing records. What this policy has simply done is go through each of those steps.

PN598

I don't intend to laboriously go through each of those steps in general. What it does give colour to is the words 'work activity.' You will see in these below the heading 'Process description.' Under the initial two dot points you will see:

PN599

*Pre-work briefings, communicate the safety hazards, risks, controls and work activities to be performed at location based on hazard identification and risk assessment.*



PN600

If one then goes down to the bottom of page 1383 it talks about 'Pre-work briefings should be developed by the responsible workplace supervisors.' And then over the page on 1384 under the heading 'Procedure', it says:

PN601

*Gather together the content about the work activities of the briefing, including controls in place, environmental conditions, communication methods - - -*

PN602

Et cetera. Then you will see on 1385, about halfway down the page you will see, 'The workplace supervisor is responsible to' - and then just going onto the second dot point:

PN603

*If nominating a team member to conduct a briefing involve the nominated team member in the preparation of the briefing, and determine the level of assistance and supervision to be provided based on the nominated person's experience, knowledge of the work activity and their ability to communicate with the team using the requirements of this procedure.*

PN604

The next dot point:

PN605

*Ensure the workers including contractors who arrive at a work location at a later time during the shift receive a pre-work briefing relating to the work activity before commencing work.*

PN606

And then finally on 1386 if you turn over, about a third of the way down the page under the heading 'Review the briefing' - - -

PN607

THE DEPUTY PRESIDENT: Which page, sorry?

PN608

MR MARTIN: Sorry, 1386, Deputy President.

PN609

THE DEPUTY PRESIDENT: Thanks. Sorry.

PN610

MR MARTIN: About a third of the way down the page you will see it says:

PN611

*The workplace supervisor is responsible for the following relating to the change; review the pre-work brief and assess the work activity.*

PN612

And then underneath that:

PN613

*Assess the work activity daily or a change of shift when the work activity continues for more than one day.*

PN614

I don't intend to go through that in any more detail, but the point of all of that is that that gives colour to what the work activity is, and we say viewed in that context it shouldn't be so broadly construed to be some overarching role or something of that nature. It needs to be a specific task at hand, and each person - and Mr Lang gives evidence of this - is required to attend a pre-work briefing, and that includes for example if they were to change - sorry, to change work location for example they need to go to another site.

PN615

The next part of - perhaps I might take you back, Deputy President, to court book 13 just so that you have the clause in front of you. It should be the enterprise agreement currently, if you've got that available.

PN616

THE DEPUTY PRESIDENT: Yes.

PN617

MR MARTIN: So after stating that it needs to be suitable and appropriate to the type of work activity the next thing that needs to be considered is that:

PN618

*The employer will provide employees the option of wearing shorts and other uniform items suitable for hot weather conditions.*

PN619

The key thing we say as part of that clause is that there is an option, it's something that can be chosen, and the latter part of that clause is then 'Other':

PN620

*Then in circumstances where there is an unacceptable risk of safety.*

PN621

And that is:

PN622

*Employees will only lose or have their right abrogated insofar as they wish to exercise the option of wearing shorts in circumstances where there is an unacceptable risk to safety.*

PN623

And where there is an unacceptable risk to safety, for the reasons I will shortly outline, is to be determined objectively, and doing so requires a risk assessment to be conducted. It should also be noted the words 'unacceptable risk to safety' would also give way to the Work Health and Safety Act in the sense that if for example wearing shorts did not pose an unacceptable risk to safety, but it would otherwise give rise to a breach of the Work Health and Safety Act then the option

to wear shorts would obviously be abrogated, because the employee can't be contracted out of those obligations.

PN624

Now, Sydney Trains construction is that the existence of an unacceptable risk must be determined by Sydney Trains subjectively, and there's three issues for this approach. I just wanted to hand up a case if I may. This is a decision of the Full Federal Court, Deputy President, *National Tertiary Education Union v Latrobe University* [2015] FCAFC 142. It is referred to in our submissions.

PN625

If I can take you to paragraph 5 of that decision. It's on page 3 of the decision itself. What this concerned was whether there was a breach of section 50 of the Fair Work Act insofar as there was a breach of clause 74 of this agreement which provides as set out in section 5:

PN626

*The university is committed to job security. Wherever possible redundancies are to be avoided and compulsory retrenchment used as a last resort. The university reserves the right to use the agreed redundancy procedures and provisions set out in this agreement when all reasonable attempts to mitigate against such action and to avoid job loss have been unsuccessful.*

PN627

The key issue in this case was whether there was a binding obligation on the university as a result of this particular clause. If one then turns to paragraph 108 of that decision, which is on page 33, this part of this extract of the decision is useful, and says:

PN628

*Although it may be a statement of the obvious, it is appropriate to keep in mind that the document which the court is asked to construe is an enterprise agreement made pursuant to the regime in part 2-4 of the Fair Work Act. It is in the very nature of these agreements that they are intended to establish binding obligations. The manner of making such agreements is subject to detailed prescription and their operation is contingent upon approval by the Fair Work Commission, the obtaining of which is itself a matter of detailed prescription. In my opinion, it is natural to suppose that parties engaging in this detailed process intend that the result should be a binding and enforceable agreement. To my mind, that is an important matter of context when approaching the construction of clause 74.*

PN629

He goes on to say at 109:

PN630

*That does not mean that parties to an enterprise agreement may not include in their agreement some matters which are in the nature of statements of aspiration or commitment and clearly not themselves intended to be enforceable obligations or entitlements. Clearly, they may. The 2014 agreement provides an example as the parties were agreed that the first*

*sentence is clause 74 is aspirational in nature. But it remains the fact that the 2014 agreement was plainly intended, at least generally, to create binding obligations and clause 74 is to be construed in that context.*

PN631

The relevance of this, Deputy President, is that where Sydney Trains says that it gets to subjectively determine whether an unacceptable risk exists, if it was the case that Sydney Trains could simply determine for itself whether an unacceptable risk existed it could simply avail itself of the express obligation to provide shorts to employees at its own election irrespective of whether an unacceptable risk actually exists objectively. This would have the effect of rendering the express terms of the agreement inutile.

PN632

The second point we say that it's a problem with this subjective approach to construction is that any unacceptable risk must exist as a matter of fact in order to abrogate an employee's express right to exercise the option of wearing shorts conferred by the agreement. It must be more than notional or theoretical, it has to exist. The fact that an unacceptable risk must exist is at least accepted at my friend's submissions at paragraph 53. But what we say is that in order for an unacceptable risk to exist as a matter of fact it must be determined objectively.

PN633

Following on from that the third point is whether an unacceptable risk as a matter of fact can only be determined by way of an objective enquiry regarding the obligations imposed on both employers and employees under the Work Health and Safety Act.

PN634

My friend's submissions at paragraphs 18 to 19 is that it can subjectively determine whether unacceptable risks exist due to its obligations to comply with the Work Health and Safety Act. But that submission fails to have regard to the fact that equivalent obligations are imposed on workers. In particular for example section 28 of the Work Health and Safety Act mandates that workers must take reasonable care for their own safety. Doing so would include minimising the risks of heat exposure and fatigue for example, which could of course be achieved by wearing shorts.

PN635

On Sydney Trains' approach to construction an argument could quite easily be made that employees as opposed to the employer may subjectively determine whether an unacceptable risk exists. Of course that is not the correct approach. The only way to balance these competing obligations is to ensure that the health and safety is objectively determined in construing whether shorts in specific circumstances presents an unacceptable risk, or would otherwise breach the Work Health and Safety Act.

PN636

Sydney Trains' point is also then that long pants are the starting point having regard to the obligations imposed by clause 32.1 and the Work Health and Safety Act. But what Sydney Trains seeks to do is essentially reverse the obligations of

clause 32.1. Instead of the starting point being that employees are entitled to wear shorts unless or other than in circumstances where there's an unacceptable risk, wearing long pants is the starting point, unless employees can demonstrate or convince Sydney Trains that there's no longer an unacceptable risk. So what Sydney Trains' approach to construction does is it completely flips clause 32.1 on its head and rewrites it to achieve what we may subjectively consider to be a just outcome.

PN637

The right to wear shorts is not something that hinges on employees or unions asserting that the right exists. It was enlivened once the agreement was approved. Sydney Trains' approach in that sense, the reverse onus approach if I can use it that way, is also circular and it suggests that, first, because Sydney Trains implemented or at least maintained the control measure of long pants in contravention of clause 32.1 of the agreement now it's become the status quo. And second, departing from that unlawful status quo through the provision of shorts would give rise to an unacceptable risk.

PN638

The next point that my friend makes is that Sydney Trains can exercise its managerial prerogative in determining whether employees wear long pants or shorts. In short the contention made by Sydney Trains is that employers have a right to manage its business, including by determining appropriate uniform (indistinct). We don't cavil with that general or broader proposition. And in doing so my friend relies upon the well known principles in the decision of Cram and XPT which are cited in his submissions. I won't go through those in detail.

PN639

The difficulty with that argument however is that those cases are not authority for the proposition that an express provision of an enterprise agreement gives way to managerial prerogative. The cases cited by Sydney Trains, in particular those two, deal with a situation where there was no express term. Here we have an express terms, and it confers employees with a right to wear shorts, and it is in that sense that it places significant fetter on any managerial prerogative; in fact it overrides it by way of the express provision, and it is only in circumstances where an unacceptable risk exists or would otherwise breach the work health and safety legislation that the right is revoked.

PN640

The next point is does wearing shorts actually pose an unacceptable risk objectively. I wasn't actually going to hand something up, but I will hand it up seeing as you got up, Associate. That's fine. These are in the submissions. This objective assessment that we say needs to be run through is by going through section 18 of the Work Health and Safety Act, which places a fetter on the overall right - sorry, the overall obligation I should say, to eliminate or minimise risk. You have to do it as reasonably practicable.

PN641

And what section 18 does, and we went through this with Mr Neville, is that it sets out a number of factors that need to be considered, for example the likelihood of the hazard or the risk concerned occurring, the degree of harm that might

result. All of these factors need to be taken into account in determining whether there is actually a breach of the Work Health and Safety Act, or otherwise there is an unacceptable risk. Our point is that this exercise has never been conducted, save for example in relation to some of the priority areas, which there are still issues with which I will come to.

PN642

I should also note, Deputy President, there's hasn't been much - much attention has been drawn to it, but there is an equivalent provision in the Rail Safety National Law, section 47, which identically deals with these particular provisions. I don't think that is an issue in dispute, but that is where the equivalent obligation arises under that law.

PN643

If I can then take the Commission to page 552 of the court book, which is Mr Gaskin's statement, you will see at paragraph 23, and this was dealt with in cross-examination, but what Mr Gaskin says, and Mr Neville says the equivalent in his statement, is that:

PN644

*As part of its review Sydney Trains considered residual risks associated with removal of the existing control measure of long pants having regard to the tasks, areas, roles, that were proposed by the unions. These risks include UV exposure, visibility of traffic, cuts and abrasions, slips and trips, electrical hazards, chemical hazards and (indistinct) hazards.*

PN645

The problem is, Deputy President, that's as high as the analysis got in many of the cases as to whether people wear shorts or not. The fact was that these risks exist in the ether, and so therefore they don't get to wear shorts. That high level global analysis fails to actually engage in the required detail that section 18 mandates.

PN646

For example the notional risk that an employee might fall over at any time is inherent in any workplace. I could do it right now. It doesn't follow however that allowing employees to wear shorts gives rise to an unacceptable risk or Sydney Trains would otherwise be in breach of its health and safety obligations. The considerations in section 18 need to be considered. And to that end there's no evidence for example that demonstrates how shorts would increase the risk of someone falling over in that particular instance, or that other available or suitable measures have been considered such as appropriate footwear minimising the risk of wet surfaces, and so on.

PN647

If I can then take you to page 639 of the court book, which is still behind Mr Gaskin's statement. Again this was dealt with in detail in cross-examination, so I don't intend to labour the point. There is simply a list of injuries which are relied upon by Sydney Trains; skin cancer claims, lower leg injuries. There's not actually any analysis of how these in particular would give rise to any issue in terms of wearing shorts. They turn on particular facts. Of course neither Mr Nicholls or Mr Gaskin could answer how a muscular stress injury would give rise

to any concern around shorts as opposed to wearing long pants. It's completely irrelevant.

PN648

The same can be said if one then turns to page 766 of the court book. Again this is just high level data which sets out, well there's been these injuries, and that formed part of the reasoning why people didn't get shorts. There's been no analysis of how wearing shorts would have made any difference to eliminate or minimising the risk of for example the lower limb injuries that Mr Gaskin was taken to, the 34 of them, and we don't know whether for example those injuries are inclusive of the other 20 injuries that were on the previous page that I took you to.

PN649

Of course the other point that needs to be considered - I won't take you back, but on the lower leg and skin cancer claims, there's also heat stress claims that are referred to in there which also form part of the assessment. If I can deal with the heat point for one particular matter. I take you to page 752. You will see it's referring to a study that was relied upon, I believe it was by the Cancer Council. It's not presently relevant. This was delivered to all employees, and you will see at the bottom of page 750 it says:

PN650

*Queensland Council workers, no significant difference in core body temperature when wearing long pants versus shorts.*

PN651

And on the next page it just extracts the objective, the methods and the results of that study. Then on the following page on 752 is the conclusion and the implications. If I can just hand up a printout of that study, and you will see at the top of that it says:

PN652

*Wearing long pants or working outdoors in the tropics does not yield higher body temperatures.*

PN653

If one goes to the first column and down the very bottom, three lines from the bottom, it says:

PN654

*Researchers previously identified that a greater surface area covered by clothing can actually promote more rapid increases in core body temperature during physical activity. The greater the surface area covered by clothing the more limitations are imposed on the physical laws governing thermal heat exchange. This presents an interesting challenge for policy development in relation to protective clothing and minimising the risk of developing heat related illness.*

PN655

In that particular study, if you can just go to the next page, Deputy President, on 71 you see 'Methods' under the heading 'Participants'.

PN656

*It involved 15 males employed by a regional council in tropical Northern Queensland.*

PN657

And about halfway down the page you will see:

PN658

*All participants completed two random - - -*

PN659

Sorry, when I say halfway down the page halfway down the paragraph, sorry, Deputy President.

PN660

*All participants completed two randomised crossover, repeated measures. Trials consisted of non-standardised occupational tasks typical of their vocations, once wearing standard issue pants and once while wearing standard issue knee length shorts. Vocations observed including gardening, whipper snipping, (indistinct), mowing and chainsaw operations and construction tasks such as plumbing, trenchwork, laying framework and concrete.*

PN661

Formwork, sorry. If one then goes to page 73 of that study you will see the discussion. Again this study has regard to the fact that:

PN662

*Previous research comparing the thermoregulatory demands of wearing long pants or shorts during physical activity has produced differing results. During light to moderate exercise higher core temperature and HR have been identified in those wearing coverall type clothing compared to shorts under hot drier thermoneutral or environmental conditions. However at higher workload intensities in a hot dry environment differences between wearing coverall type clothing and shorts appear to diminish. In contrast the current study found no differences in the core temperature of outdoor workers during very light to moderate intensity activities in a hot humid environment.*

PN663

If you then just go down to the next paragraph, and it says:

PN664

*In the present study workloads were predominantly classified as very light or light.*

PN665

The next sentence then says:

PN666



*The intermittent increases in metabolic heat production resulting from high intensity tasks such as trench digging and chainsaw operation appear to have been adequately interspersed with lower intensity tasks such as machining or standing rest, thereby allowing accumulated heat to dissipate sufficiently.*

PN667

So when one actually reads this study it doesn't stand for the broader proposition that core body temperature doesn't change if you're wearing shorts or pants. It turned on this particular study where people had tasks interspersed over a period of time. But what Sydney Trains has then done is circulated that to all employees and said, here you go, this study shows that it's unsafe to wear shorts, and that's the sort of rhetoric that has been going out from Sydney Trains unchecked and unanalysed.

PN668

Proceeding on with the issue of heat I might then just take Deputy President to court book 441 which is behind Mr Williams' statement. I might start at 440 actually, but you will see what Mr Williams has done is he has taken a screenshot from the day of a particular - when he was working. So in this case it was 29 degrees in Bombo. On the next page he's taken a radar shot of how hot it is on the tracks. So in this particular case it was 39.8 degrees.

PN669

If one then continues over onto - he's done the same thing a few times - if you then flip over to page 443 you will see that it's 49 degrees Celsius on the track. Then if you flip over again to page 446 you will see it's just under 60 degrees, it's 59 and a half degrees with a radar gun.

PN670

Suffice to say that it's not clear that these things have been considered either, the point is that there are obvious serious safety risks with someone working when it's 60 degrees, and again the problem is that Sydney Trains hasn't engaged in any analysis of these particular issues. What Sydney Trains decided was it was capable of determining the risk for itself, and that's how it was applied. And Mr Nicholls and Mr Gaskin's evidence unequivocally sets out their position that it was for the SEQR team to determine, because they are experts.

PN671

If I can take you then to page 958 under Mr Gaskin's statement, and the witnesses were taken to this particular email. This email is from Ms Drebber, and goes out to everyone after the final shorts review meeting. Basically what it says if one goes to about halfway down the page just after it starts at the paragraph beginning:

PN672

*With regard to any areas, tasks, roles beyond the priority areas, referred to as the remaining areas, we have sought to understand both the potential risk and mitigations through the workshop held on 5 June - - -*

PN673

That workshop to be clear was the educational workshop that for example that study was in.

PN674

*- - with the unions and relevant independent experts which provided up to date evidence and information, as well as to understand our obligations of the duty holder by seeking legal advice from Ashurst.*

PN675

Again this is the two page advice from Ashurst, and it is a very high level.

PN676

*The unions have been provided a copy of this legal advice, which ultimately sets out the removal of long pants as a control measure for certain workers which includes those within the rail corridor would pose an unacceptable risk to the health and safety of workers and expose Sydney Trains for liability. The advice also states that the obligations of the business as a primary duty holder cannot be delegated.*

PN677

So a significant reason why then Ms Drebbler says a couple of paragraphs below:

PN678

*Sydney Trains is willing to provide support of further risk assessments for fleet maintenance centres within the confines of the maintenance shed structures themselves, and similarly within the heavy plant resurfacing depot structures.*

PN679

A huge reason for that is this two page legal advice. Now, that two page legal advice couldn't possibly engage in a level of analysis that is required by section 18 about a work activity, i.e. the task. Of course it's useful to understand your general obligations. I understand that's why they sought that advice, but that can't then be used as a basis upon which to direct employees whether they can wear shorts without any further analysis.

PN680

I won't take you there, Deputy President, but at paragraph 30 of Mr Lang's statement he says none of the unions have agreed with this approach to confine the reviews to shed structures. What Sydney Trains has sought to do is they confine the scope of these reviews to the shed structures on the basis that any work performed outside would notionally pose an unacceptable risk to safety because of UV radiation.

PN681

Mr Hatcliffe who is the cleaning attendant who is required to wear a 15 kilo backpack and work inside the trains, he had been allowed to wear shorts for over 20 years as a cleaning attendant. However, on 3 January 2024 he received an email that all engineering and maintenance staff including fleet must adhere to the dress code of long pants and long shorts. I might take you to that particular email, which is at page 523 under Mr Hatcliffe's statement. You should hopefully see there an email from Mark Rivera who is the area manager in Illawarra. It says:

PN682

*Hi Illawarra team, I trust this message finds you well. I'd like to inform you that the matter regarding wearing shorts and short sleeve shirts is currently undergoing an industrial dispute process. As of now the established position is that all engineering and maintenance staff including fleet must adhere to the dress code of long pants and long sleeve shirts due to the risk profile associated with working in the rail corridor, including maintenance centres and stabling yard. I urge your cooperation adhering to this directive for your own safety. Continuous compliance with safety protocols is crucial in maintaining a secure work environment. CICs kindly ensure that you (indistinct) all to staff.*

PN683

Et cetera. Obviously this hasn't been done in consultation with the workforce. There's no risk assessment that's been done.

PN684

THE DEPUTY PRESIDENT: Apparently one might be coming along.

PN685

MR MARTIN: Hopefully. Mr Hatcliffe also gives express evidence that that group was never the subject of any risk assessment. In terms of other areas that haven't been subjected to a risk assessment, if one then goes to court book 70, which is Mr Lang's statement at paragraph 56. I do apologise for taking you back and forth, Deputy President, there is a lot of materials.

PN686

THE DEPUTY PRESIDENT: That's fine. Yes.

PN687

MR MARTIN: And you will see there that to the best of Mr Lang's knowledge:

PN688

*There are numerous areas in engineering and maintenance branch for which risk assessments have never been conducted, for example major works director of track, major works director of structures, major works director of civil mechanical, network maintenance director of civil, network maintenance director of (indistinct) mechanical, and fleet rail emergency train recovery unit known as RETRU.*

PN689

I then can take you to page 340, Deputy President. This should also be under Mr Lang's statement. You should have a document which says 'Update on priority areas.'

PN690

THE DEPUTY PRESIDENT: Yes.

PN691

MR MARTIN: And you will see that 'For the rail equipment centre, store personnel, NMD, SSFO, front of inspection, store personnel' - et cetera, it goes on. 'All of those particular locations roles, tasks, can shorts be used

safely?' 'Yes.' That's the third column there. So that should be feasibly the end of the matter. But as with this case it turns out it's not.

PN692

Mr Warwick Smith for example gives evidence at paragraph 21 - I won't take you there - of his statement that the rail equipment centre wearing shorts is on hold. Now, this is a priority area that they have already been told that they can use shorts.

PN693

THE DEPUTY PRESIDENT: Which paragraph of Smith?

PN694

MR MARTIN: Paragraph 21.

PN695

THE DEPUTY PRESIDENT: Thank you.

PN696

MR MARTIN: And paragraph 40 subparagraph (f) of Mr Gaskin's statement says that REC is continuing to work on the actions, and that's notwithstanding that this update of priorities which has been distributed to employees says that you can wear shorts.

PN697

You will also see at - I might just quickly take you there, Deputy President - to paragraph 43(e) of Mr Gaskin's statement which is in court book 559 to 560. It forms part of - it goes over the page. This paragraph as well as all paragraphs between 38 and 45 were the subject of an objectional basis. They're his understanding. So Mr Gaskin hadn't actually attended any of these meetings, but he does say at paragraph 43(e) in relation to network maintenance division, which again is a priority area, he says it's his understanding that shorts are now available for use in front of train inspections, at paragraph 43(e).

PN698

However, if one then goes to page 501 of the court book behind Mr Ricky Kean's statement you will see at paragraph 11 he says:

PN699

*On 18 December 2023 I received a copy of a newsletter issued by Mr Paul Bugeja - - -*

PN700

I hope I'm pronouncing that correctly. He's from Sydney Trains.

PN701

*- - - from one of our workplace delegates Mr Glen Moss. Mr Bugeja's newsletter advised recipients of the newsletter that risk assessments have been completed with the relevant HSR, union and management representatives as part of a review. Mr Bugeja's newsletter goes on to explain that it had been determined that the removal of long pants as a control measure for SSFO, SO*

*duties and front of train tasks does not present an unacceptable risk to safety. As such the wearing of shorts where the work (indistinct) for those duties now is permitted.*

PN702

If one goes to page 506 just quickly over you will see that that annexure, the update from Mr Paul Bugeja on page 506, has a heading called 'Hot weather clothing.' That extract that I have just referred you to is taken from there, I won't reread it.

PN703

On that basis if I can then take you to page 508. Mr Moss thought he'd order some shorts. And you will see at page 508 he says, 'Hi Brian, could you please order the shorts, please, times two.' Brian then comes back and says, 'Hi Glen, I don't think shorts have been approved for IWs.' Then Mr Moss says, 'Hi Brian, yesterday we got an email confirming we can have shorts from Paul Bugeja.' Brian then goes on to say, 'Gravesh is looking into it for me.' Michael Ryan then extracts that particular extract that we were just talking about before.

PN704

Then if one goes into page 513 Mr Moss then follows up. He's wanting to know, 'Did you have any luck in finding out whether shorts can be worn?' Then on page 514 Brian Wheatland says, 'Mike has advised me that shorts have not been approved to order as yet.'

PN705

The other issue, Deputy President, if one goes back to paragraph 30 of that statement on page 503 it says at paragraph 30 Mr Moss had a meeting, and then on 31 at this meeting Mr Moss was told:

PN706

*It was discussed that staff can only wear shorts for approved tasks which is currently front of train. Staff would need to carry at all times long pants in a backpack so they can be called to assist other teams as and when required (indistinct).*

PN707

Then finally if I can take you to court book page 46, which is Mr White's statement. You will see at paragraph 6 it says:

PN708

*On 16 June 2023 - - -*

PN709

And I should say as well this relates to the store personnel commercial and supply chain, which is again one of the priority areas. All the matters I have taken you to previously, Deputy President, are all priority areas just in case it wasn't clear. He says at paragraph 6:

PN710

*On 16 June I did a walk through of Sydenham Maintenance Centre to conduct a risk assessment with Mr Haines and Hussein Shahin. During that meeting Mr Haines advised me that he thought wearing shorts within the Sydenham Maintenance Centre should not be a problem.*

PN711

And there's a copy of the risk assessment. At paragraph 7:

PN712

*Since that time employees in the Sydenham Maintenance Centre have not been allowed to wear shorts. During a conversation with Ron Devitt in or around October or November 2023 Mr Devitt advised me that no one working in fleet maintenance could be allowed to wear shorts.*

PN713

Paragraph 8:

PN714

*In or around a similar time to when I had this conversation with Mr Devitt, I cannot recall exactly when, I asked Zeb Benarch, manager fleet supply chain store, what was happening with us being able to wear shorts. Mr Benarch told me that assessments were still being done. I understood this to mean that the relevant SEQOR officers of each area were undertaking these assessments.*

PN715

So even for all these priority areas these people still aren't being allowed to wear shorts. Apparently, at least in relation to Mr Bugeja's email, is that it's because there's an industrial dispute resolution process going on, (indistinct) industrial dispute process. What relevance that has is not entirely clear.

PN716

The other issue, Deputy President, if I may then take you to page court book 71, which is paragraph 57 of Mr Lang's statement, and you will see that Mr Lang says:

PN717

*Sydney Trains' approach to determining which employees can wear shorts in which circumstances have led to various inconsistencies such as train crew, so drivers and guards, can wear shorts in the maintenance sheds, whilst the fleet maintainers currently cannot. Infrastructures working on a platform cannot wear shorts, but train crew and customer service attendants working on the platform can wear shorts, and resurfacing employees transferring, i.e. driving a truck machine to move equipment throughout the network, must currently wear long pants, whilst train drivers performing largely similar work can wear shorts.*

PN718

We can see how the difficulties in Sydney Trains' approach has yielded these inconsistent outcomes, and otherwise even where people notionally have an entitlement to shorts they're still not getting it.

PN719

On that basis, Deputy President, there's nothing before the Commission that actually objectively demonstrates that there's a risk to wearing shorts at all, other than in the general notion that the sun exists and people might fall over.

PN720

Unless you had any questions, Deputy President, if I can then move to the consultation issue.

PN721

THE DEPUTY PRESIDENT: You don't put to me that it couldn't after appropriate inquiry be determined that a risk exists.

PN722

MR MARTIN: No. In terms of consultation, Deputy President, and this is set out in detail in our submissions, so I won't labour the point. They're in essence, focusing on the Work Health and Safety Act and the agreement, two separate obligations; those under section 47 to 49 of the Work Health and Safety Act, and clause 7 of the agreement.

PN723

What we say is that the evidence just demonstrates a complete failure to engage with the actual requirements of real and compliant consultation. For example Sydney Trains did not use the agreed procedures to consult about wearing shorts, relying instead on arbitrarily confined a risk assessment, such as the heavy plant and resurfacing being confined to the structures, because that was as determined by Mr Nicholls.

PN724

It did not involve relevant HSRs in the consultation process directly, and sometimes intentionally excluded HSRs such as Mr Warwick Smith from risk assessment processes, which is set out in his evidence, which led to him issuing a provisional improvement notice. Sydney Trains have not considered the possibility that employees who perform work outside the priority areas could wear shorts during the shorts review process.

PN725

In fact we have been told today that we don't know whether a risk assessment is going to be done in relation to those outstanding areas at all. It might happen. And otherwise Sydney Trains didn't respond to employee feedback as required under the enterprise agreement such as Mr Lang regarding the consultative process.

PN726

If I can take you to page 352 of the court book under Mr Lang's statement you will see that Ms Drebber has sent an email saying:

PN727

*Hi all, as discussed at our last meeting held earlier this month we are in the process of seeking legal advice from Ashurst regarding our (indistinct)*

*obligations. This advice has now been finalised and it is attached for your review.*

PN728

And so on. Mr Lang then responds to that email and says on page 351:

PN729

*Hi all, as discussed today at hot weather uniform work group meeting the AMWU would like to understand the following, noting the foreseeable risk what consultation occurred when determining that long pants are an appropriate control. Additionally section 4A identifies various SWMS including long pants as controls, they are mandated - - -*

PN730

And so on. He then proceeds to ask a number of questions around whether consultation needs to be an obligation on the Act. On page 350 Ms Drebber then says:

PN731

*Hi Keith, I'd like to confirm receipt of your email and advise that we will revert back shortly.*

PN732

No response was then received other than that particular email. There otherwise hasn't been any conducting of risk assessments that consider the potential for heat stroke and heat stress, noting that for example work on the train tracks can reach extreme temperatures of up to 60 degrees Celsius.

PN733

*Cleaning attendants are wearing 15 kilo backpacks containing various cleaning products and undertake cleaning on trains at night that are not in service and have no ventilation due to there being no air conditioning, no windows being open and carriage doors being closed.*

PN734

These go beyond defects in form. It's tolerably clear that the decision regarding wearing shorts by Sydney Trains was a fait accompli, notwithstanding that the unions were prepared to accept that certain tasks and duties may present an unacceptable risk to wearing shorts. This is plainly inconsistent with Sydney Trains' obligations under the Work Health and Safety Act and under its agreement.

PN735

There's a large debate about whether non-compliance with consultation obligations renders a direction unlawful. Even if it doesn't it renders the direction unreasonable. The deficiencies are also more than procedural in the sense that they have robbed employees of the right to properly be heard on a matter of great significance to them. The problem is compounded by the fact that it's continuing. Many employees who ostensibly were allowed to wear shorts still cannot.



PN736

The other point that's made by my friend, and this is an important point, is that the applications that are currently before the Commission are premature. Currently before the Commission the parties have competing positions as to whether shorts or long pants are the starting point, having regard to the obligations imposed by clause 32.1 of the agreement and the Work Health and Safety Act; whether the existence of an unacceptable risk is to be determined objectively or subjectively; whether Sydney Trains has actually demonstrated that wearing shorts presents an unacceptable risk to safety in the relevant circumstances and the particular circumstances, and whether managerial prerogative is enlivened, notwithstanding the express provisions of clause 32.1, and otherwise whether Sydney Trains complied with its consultation obligations. All of these matters go to whether Sydney Trains can issue a lawful and reasonable direction for employees to wear pants, and must be determined.

PN737

On Sydney Trains' construction the Commission can't intervene until Sydney Trains has gone through its so-called consultation process, and otherwise it could just avoid the jurisdiction of the Commission indefinitely. In some cases we don't know when these are going to occur. Declining to answer the question for determination is sought by Sydney Trains at paragraph 87 of their submissions. It would be industrially unsound and directly inconsistent with Full Bench authority as to the appropriate conclusion of arbitrated proceedings.

PN738

Now, this is dealt with in my submissions, Deputy President. I will just touch on them. We note that arbitration involves the making of a decision which conclusively establishes the rights of the parties as to the arbitrated dispute, and that is determining an industrial dispute by way of arbitration is as per the Full Bench decision in Falcon Mining at paragraph 75, intended to be more than simply expressing an opinion, and instead as was held in DL Employment at paragraph 84 as the Full Bench held:

PN739

*Once an opinion as to the correct result has been formed it remains necessary for a final determination with final orders to be made identifying the arbitrated outcome of a dispute since it is not the role of the Commission to declare the legal rights of the parties. Resolution of this dispute necessarily requires determination of the question before the Commission. Failure to determine the dispute to finality would give rise to error and not the other way around.*

PN740

So it follows that Sydney Trains cannot lawfully and reasonably direct employees that they perform their work wearing long pants where Sydney Trains has assessed, noting that implies that assumption, that the particular employees at the risk of them wearing shorts would pose an unacceptable risk to safety, and that is because employees are being required to wear long pants despite clause 32.1 expressly providing that shorts are the starting point.

PN741

The existence of an unacceptable risk is to be determined objectively. There's not a shred of evidence before the Commission that shorts presents an unacceptable risk in any specific circumstances, they are only global. Sydney Trains unlawfully relies upon managerial prerogative, notwithstanding the express provisions of clause 32.1, and has otherwise failed to comply with its consultation obligations.

PN742

Furthermore, the priority areas where employees are notionally entitled to wear shorts have now been revoked, for no apparent reason, we don't know, and there's still not any risk assessment been conducted allowing other people to wear shorts in the areas outside the priority areas. So in those circumstances we say that the Commission should resolve the dispute in the union's favour such as the answer to the question is 'No', and require that Sydney Trains go through its consultation obligations in compliance with its particular obligations under the work health and safety legislation and the agreement. Unless there's any questions, Deputy President, those are the submissions.

PN743

THE DEPUTY PRESIDENT: No. Thank you. Mr Seck.

PN744

MR SECK: Deputy President, can I just have a two minute adjournment. I just need to - - -

PN745

THE DEPUTY PRESIDENT: We will resume at - if you can advise my associate.

PN746

MR SECK: Three o'clock?

PN747

THE DEPUTY PRESIDENT: Yes, thank you.

**SHORT ADJOURNMENT**

**[3.00 PM]**

**RESUMED**

**[3.03 PM]**

PN748

MR SECK: Deputy President, I think it's important at the outset to try to focus on what we're dealing with at this phase of the resolution process. And as you may recall there was competing positions which were advanced by the unions and to be trained as to question for determination in the matter. And you, Deputy President, formulated a question for determination which, with respect, largely align with the position that was put forward by Sydney Trains.

PN749

That question for determination can be found, if you have it in front of you, in our written submissions at paragraph six. And without reading it out, Deputy President, the question says certain obligations have to have – or the operations

for certain clauses and certain obligations have to have regard to. And then a question posed in a hypothetical way, saying, 'Can Sydney Trains lawfully and reasonably direct relevant employees that they perform their work wearing long pants, where Sydney Trains have assessed for those particular employees the risk of them wearing shorts would pose an unacceptable risk to safety.'

PN750

Now, the reason why I have reminded you, Deputy President of the question for determination is that much of the submissions which are being put forward by Mr Martin on behalf of the unions this afternoon, appears directed to a much more granular evaluation of particular work areas and whether or not shorts should be allowed or not allowed.

PN751

However, the question that has been posed for determination in these proceedings are cast at a much higher level of abstraction. And what they do require is regard to legal obligations and then answering what is, in effect, a legal question. That is whether or not to be trained and make a lawful and reasonable direction. And it's based on a premise which may or may not be established that Sydney Trains has assessed that for those particular employees there's a risk in wearing those shorts.

PN752

Now, I think it's important to focus on that because that allows attention to be drawn to the constructional questions involved in determining the correct meaning of clause 32.1 based on certain assumptions being made. That is that Sydney Trains assesses the risk of whether or not particular employees, wearing shorts would pose an unacceptable risk to health and safety in a hypothetical sense.

PN753

What is not being asked to be resolved in the question for determination, with respect, Deputy President, contrary to what my learned friend says is a determination in relation to each and every type of work activity, and whether or not wearing shorts would be an unacceptable risk to safety in relation to that particular work – work activity.

PN754

THE DEPUTY PRESIDENT: But don't they stand as examples as to how this question itself is being answered in a practical sense?

PN755

MR SECK: It may be. But that doesn't answer the question. What it does is perhaps shed some light as to the kind of issues that will be involved in determining whether or not the directions, which is made by Sydney Trains is lawful and reasonable. And that still needs to be the question asked.

PN756

Now, answering this question for determination will mean saying either 'yes' or 'no'. Whether or not that resolves the underlying industrial dispute is another question. There might be further questions that flow on in answering this particular question.

PN757

THE DEPUTY PRESIDENT: Am I really bound to a 'yes' or 'no' answer? Can't they answer in circumstances where 'x', 'y' and 'z' has occurred? No. But in circumstance where 'y', 'z' has occurred – yes.

PN758

MR SECK: It may be Deputy President.

PN759

THE DEPUTY PRESIDENT: I means it's an evolving thing. It's a dispute. We have ample evidence before us.

PN760

MR SECK: I'm not saying that there can't be qualifications expressed or particular circumstances examined in the course of resolving that particular question and there's obviously ample evidence before you, Deputy President. What I was simply trying to do was to demonstrate that this question is cast at a much higher level of generality in answering this question.

PN761

There might be other issues which need to be worked through and I will go through them shortly. Because, at the moment, what you're being asked to do is to assess it for particular types of work activities. And the answer to the question might be, assuming that these things have occurred – yes. Assuming these things have not occurred – no. And I will seek to illustrate that by reference to the way the arguments have been made and the evidence has been elicited in this case.

PN762

Can I then direct attention to clause 32.1 itself? And it might be useful to do this in the context of the agreement. We have provided you with a bundle of authorities, Deputy President, but you might have the agreement separate to that.

PN763

Can I invite you to go to the enterprise agreement itself? And then I will take you to the text at 432.1 and then some of the contexts to seek to understand what's correct construction.

PN764

So the first thing is the enterprise agreement itself. Can I take you to clause 32, just to draw attention to some aspects? Now there are three sentences that comprise clause 32.1. The first is the obligation upon the employer to provide employees in operational roles and there are examples given with uniforms, and we're required, PPE.

PN765

So that is a distinct obligation itself that the Sydney Trains will provide those uniforms for employees in roles – operational roles. And it's clear enough that PPE is considered a subset of uniforms.

PN766

The second sentence then talks about these, and that necessarily would need to mean uniforms including PPE will be suitable and appropriate to the type of work activity being undertaken, and the risks involved in those types of work activities.

PN767

So the uniform is provided for an operational role and any PPE. It needs to be suitable and appropriate for the type of work activity being undertaken in those operational roles.

PN768

And then the last sentence contains the qualification,

PN769

*'Without limiting the generality of this clause, as part of the employer's uniform offering the employer will provide employees the option of wearing shorts and other uniform items suitable for hot weather conditions, other than in circumstances where there is an acceptable risk to safety.'*

PN770

Now, we would say that the words, 'As part of the employee's uniform offering', indicates the employer who is offering the uniform. And then the option of wearing shorts is obviously subject to the condition that it not be provided in circumstances where there is an unacceptable risk to safety.

PN771

Contrary to what my learned friend said today that is not an unfettered or unconditional right or an option to be exercised. It's actually subject to an important qualification. Namely, it's other than in circumstances where there is an unacceptable risk to safety.

PN772

The real question here is how does that condition operate in this particular case? And the language other than in circumstances where there is an unacceptable risk to safety, begs the question, how does one determine whether or not the risk to safety is unacceptable? What are the circumstances in which that risk is unacceptable?

PN773

And I think an important question, unacceptable to whom? Who gets to determine that? The agreement, at least, in literal terms is silent on each of those issues and it is therefore important to determine the meaning of that condition to the exercise of the option to wear shorts and other Summer uniform by reference to the context of the clause and the evident purposes of the clause.

PN774

Now, the first point to make is the reference to PPE in itself is indicative that the wearing of shorts or other uniforms suitable to hot weather conditions, other than in circumstances where there is unacceptable risk to safety is a safety question that is determined by reference to Work Health and Safety obligations.

PN775

There are a number of provisions which deal with safety in the enterprise agreement and they listed, in my respectful submission, what is meant by the condition in circumstances where there is an unacceptable risk to safety.

PN776

The first is clause 2, Deputy President, and can I invite you to go to clause 2 which are the objectives of the parties to this agreement. Necessarily, they expressed at a high level. Clause 2.2 said, 'The agreement is to provide a mechanism for ongoing change in order for the employer to meet its strategic objectives of a safe – et cetera – service.'

PN777

And then 2.3, in particular, deals with the question of safety. So it's to recognise safety as a fundamental contributor to successful operations to ensure that employment conditions and practises provide a framework within which the employer can achieve a safe environment.

PN778

Now we would focus on two things here. Firstly, the employment conditions provide the framework for determining the employee achieving a safe environment. So that framework has to be consistent in trying to achieve that fundamental objective of safety.

PN779

And, secondly, and more importantly it's the employer who is identified here as being the person achieving a safe work environment. So that is, in my respectful submission an indicator that what the agreement is designed to do is to provide that framework to facilitate the achievement of that objective employer that is Sydney Trains achieving a safe work environment.

PN780

Now that general objective, as you all know, Deputy President is consistent with general work health and safety obligations both under this agreement as well as under State Work Health and Safety legislation.

PN781

Can I direct you then to clause 35 of the agreement and that is under the heading, 'Work Health Safety and Environment'. The first sentence indicates that work health and safety of all employees, et cetera, is the primary concern of the employer. So, again, focusing that the employer who has the concern in ensuring work, health and safety for employees amongst other persons.

PN782

Then, in the second sentence, referred to the parties sharing an ongoing commitment to promote and facilitate to continuous improvement, acknowledging that both the employer and the employees have a joint interest in promoting work, health and safety.

PN783

And then the last part of that sentence says, 'Nothing in this agreement shall be designed or applied in ways that reduces or diminishes this objective.' In other

words, to the extent you're reading other clauses in the agreement that shouldn't be read as reducing or diminishing the primary concern of employers to ensure work, health and safety.

PN784

Now, then there's a reference to continuous improvement and that includes, amongst other things – (d) management of risks. So, in other words part of the objective here is to continuously improve processes, et cetera, to manage the risks to health and safety in the workplace. And that is re-enforcing the obligation which is set out in 35.2 in line with section 19 of the Work Health and Safety Act that the employer has the primary duty of care to the health and safety and welfare at work with all its employees.

PN785

Now that reason which I will come to shortly is a paraphrase of clause 19 of the Work Health and Safety Act. But it makes clear it's an employer to be trained as the PCBU, Person Conducting the Business or Undertaking, who has that particular duty of care. Now that is reinforced by 35.3 which says that the employee will also monitor and seek to improve systems and processes to ensure that both the safety obligations and objective agreements are met.

PN786

And then 35.4 and 35.5 place corresponding obligations upon employees in relation to their safety. We would emphasise that at 35.5 provides an employee must, while it would cooperate with reasonable instruction, policies or procedures relating to health and safety that has been notified to workers.

PN787

So that would suggest that the employer – in this case Sydney Trains which a PCBU notifies of reasonable instructions on policies or procedures to employees. And employees have to cooperate with what the employer notifies.

PN788

And that supports, in large part, the general thrust obviously of Work Health and Safety legislation, Deputy President, which places the obligations on PCBU to ensure the Work Health and Safety so far as reasonable and practicable.

PN789

THE DEPUTY PRESIDENT: What about the consultation obligation?

PN790

MR SECK: Consultation obligations would obviously also apply. But, ultimately, the decision as to what steps should be taken to ensure work health and safety is ensure it is placed upon the employer.

PN791

THE DEPUTY PRESIDENT: You seem to be developing an argument to support a submission that it's a subjective decision by Sydney Trains. Can you assist me in understanding how that fits with the evidence of your witnesses? Particularly, Mr Nichols.

PN792

MR SECK: Our argument – when we use the word 'subjective' – I know it's a word which has been put forward by the unions. We would say two things that ultimately the decision is one that Sydney Trains makes after consultation. And that consultation involves a risk assessment, a draft risk assessment being provided to workers, having review meetings and discussions with those employees to consult on the risk assessment measures and then as Mr Lang acknowledged the Sydney Trains ultimately are making the decision based on those consultation and risk assessments as (indistinct) or not. Particular control measures should be retained or altered.

PN793

I think your question, Deputy President, in terms of what Mr Nichols says is not inconsistent with that in my respectful submission. What Mr Nichols is saying is that there's been an ongoing process to undertake a review of – or sorry assessment of those particular risks by reference to particular agreed priority areas, no brainers and that is really a practical decision because it was based on the union's agreement identifying areas which should receive priority focus. And there are those five areas plus two other areas.

PN794

And there has been risk assessments developed for each of those areas some of which shorts have been approved in certain circumstances, some of which where the risk assessment is still ongoing and consultation is still taking place. So, in my respectful submission, and hopefully I am answering your question, Deputy President, Mr Nichols' evidence is consistent with Sydney Trains' view as to the proper construction of clause 32.1.

PN795

Can I note one more point about consultation, Deputy President, before I go to one or two other aspects of the enterprise agreement? 35.7 accepts consultation is a relevant aspect of Sydney Trains obligations under Work Health and Safety legislation. And, in fact, explicitly calls out that it will be done in accordance with the Work Cover New South Wales endorsed codes of practises and consultation. That may be now out of date given now it's called Safe Work. But, it's obviously a process of consultation. It's not a process of co-determination.

PN796

In other words the union and the employees get to express their views. It must be genuinely considered by Sydney trains as the duty holder, or the risk owner or whatever other expression you want to use. But, ultimately, Sydney Trains who has to form the final view as to whether or not there is an unacceptable risk to safety caused by – if shorts were used as part of the Summer uniform.

PN797

Now, 35A doesn't apply here, Deputy President. I should just make that clear where it refers to risk assessment process, and that's because 35A.2 only applies when it's related to a significant changes involving rollingstock, including procurement and involves significant alterations around infrastructure. I merely point that out to you, Deputy President, just to say that this clause is not invoked and relied upon by either party as part of understanding, or as part of the legal



obligations placed upon Sydney Trains in relation to assess the risk and determine whether or not there's an unacceptable risk to safety in employees wearing shorts.

PN798

However, it is a process if you go on to read in 35A.5 and 35A.6 that involves a risk assessment process, and that in our respectful submission is not a process which is inconsistent with what is provided for under the Work Health and Safety Act and the regulations.

PN799

Moving on from the agreement itself, Deputy President, given that the agreement itself and especially under 35.2 recognises that Sydney Trains, as the PCBU, has the primary duty of care. It is relevant to have regard to the content of those particular obligations. And can I invite you to go to the Work Health and Safety Act. I think we provided you with a bundle of material which includes the Act and that is contained under tab 33 of our bundle.

PN800

The primary duty of care, as my learned friend, Mr Martin, has noted is under section 19 of the Act, which is identified explicitly in clause 35.2 of the agreement. And without reading all that out, clearly, the primary duty is placed upon the PCBU being here Sydney Trains as both the employer but also the rail operator.

PN801

Now, the words which have been focused on by the unions have been the words, 'So far as is reasonably practicable.' We have a slightly different interpretation of what is meant and what I will do is seek to demonstrate that by reference to the language in section 18 and some of the case law on this point.

PN802

Section 18 defines 'reasonably practicable' as what is reasonable able to be done. So the criterion of 'reasonableness' is by reference to what can be able to be done, that is, what things can be done to ensure health and safety.

PN803

And then there are a number of factors that need to be taken into account in examining what is reasonably able to be done to ensure health and safety in the workplace.

PN804

Now, focusing on each of those factors, (a) is likely that a hazard or a risk concern occurring. So, you need to look at the hazard and assess what's the likelihood of this happening in the workplace. Then the degree of harm in paragraph (b) and paragraph (c), in my respectful submission, needs to be given significant weight because it referred to what the person knows or ought reasonably to know about the hazard and ways, in the manner and the risk.

PN805

Now, that's often referred to, Deputy President, as embodying the obligation or to examine and whether or not there are risks which are reasonably foreseeable, and

whether or not there are measures which can be taken to eliminate or minimise the risk. So that incorporates the notion of reasonable foreseeability.

PN806

Paragraph (d) then talks about availability and suitability of ways to eliminate and minimise that risk. And then paragraph (e) talks about assessing the extent of the risk and available ways of eliminating and minimising the risk. The costs associated with available ways or of eliminating or minimising the risk.

PN807

Now what the unions say with which we have a slight disagreement is that reasonable – the termination of what is reasonably practicable is an evaluative exercise which involves weighing up particular measures and seeing whether or not other measures might be implemented.

PN808

Now it is a weighing up exercise because that's what section 18 in fact says. But the question of weighing up are questions of degree, and if you know about or you ought to know about a particular hazard then you need to examine what kind of measures might be suitable or available to eliminate or minimise that risk. And in doing so you look at the likelihood and degree of harm.

PN809

What the words 'reasonable practicable' do not mandate, with respect, is that an employer or PCBU can form a view that that might be alternative measures available which are less effective in eliminating or minimising that risk. Where the weighing up process really bites is where it's set out in paragraph (e), that is, after accessing the extent of that risk and the available ways of eliminating and minimising it is the cost.

PN810

So to use a practical example there might be a way of eliminating or minimising that risk which is particularly expensive or cumbersome to impose and it's disproportionate to the potential harm that might be involved. And so the weighing up exercise occurs at that stage after you have assessed the risk and the ways that it can be eliminated or minimised.

PN811

Can I then go to – back to section 17 of the Act, Deputy President, which talks about the manner in which risks are to be managed. And there is no discretion in how this is done because the primary obligation is to eliminate the risk, so far as reasonably practicable, and if it's not reasonably practicable to eliminate the risk to health and safety, to minimise those risks so far as reasonably practicable. So it's not a matter of trying to choose between various measures which might minimise those risks. There is a sequence in which that needs to occur and that sequence is expanded upon in clause 35 and clause 36 of the Work Health and Safety regulations. And can I ask you to go to those clauses and that's under tab 34 of the bundle? And you'll see, Deputy President – pardon me whilst I navigate my way there – that clause 35 repeats just the language in section 17.

PN812

And then clause 36 refers to and identifies a hierarchy in which control measures are to be implemented. And subclause (3) says you need to do one of the following, (a), (b) or (c) – either substitute the risk, hazard giving rise that there isn't something else. It gives rise to a lesser risk, isolating the hazard of any person exposed to it or implementing engineering controls. And if the risk remains under subclause (4) so far as is reasonably practicable both from any administrative controls. And then one only gets to PPE where there's a residual or remaining risk by ensuring the provision and use is suitable personal protective equipment.

PN813

So it is not a matter of just simply selecting between particular measures as if they're equally available and then working out whether or not it's a reasonable substitute for that control measure. There's, in fact, a mandatory sequence in which control measures must be implemented in order to comply with the primary obligations placed on the PCBU.

PN814

And that's after – if you go to clause 34 – Deputy President the duty holder having identified reasonably foreseeable hazards that could give rise to risk to health and safety. So the risk assessment process, as I had put to Mr Lang, requires that a first be identification of those hazards and it's not hazards based on what had happened in the past, which seems to be the import of, at least, or the thrust of some of the submissions made this afternoon that you look at the injuries register and work out whether or not those hazards have been caused by, or could have been prevented by using trousers. The test is whether or not the hazards are reasonably foreseeable.

PN815

And, in my respectful submission, the word 'could' give rise to the risk to health and safety means that it could be hypothesising as to what those risks are as opposed to looking at what risks may have, in fact, resulted in injuries in the past.

PN816

That obviously then depends on gathering data, looking at and talking to experts and the like. It's not simply limited with respect to the dataset that might have arisen within the organisation.

PN817

Now, PPE in particular, Deputy President, is dealt with at clause 44. And subclause (2) talks about an obligation to provide PPE. Subclause (3) of 44 then requires that the PCBU must ensure that PPE meets certain standards and has to be suitable. This is paragraph (a)(1) so it's selected to minimise risk and health and safety, including by ensuring that the equipment is suitable having regard to the nature of the work, that any hazard associated with the work and a suitable size and fit.

PN818

So that suggests that the PPE has to be directed to the particular risk to health and safety. And then clause 46, lastly, deals with the views upon the worker to follow

reasonable instructions which mirrors what's contained in the enterprise agreement.

PN819

Similar obligations exist under section 52 of the Rail Safety National Law and I don't need to take you to it, Deputy President, but it's largely of the same substance and character.

PN820

Now, what the unions submit from their written submissions and what's been said today, though there might have been some backing away from it is that there is some modification or dilution of the statutory obligations and standards that are contained in the Work Health and Safety Act. Shorts can be worn where there might be other available control measures which can be used to minimise the risk that would otherwise be addressed by wearing long pants.

PN821

The unions appear to do this in three ways and I will take you to the written submissions to expand upon this. The first is by apparently defining the expression 'unacceptable risk' as meaning where there are – cannot be controlled by adopting some other alternative measure.

PN822

Secondly, that the expression 'unacceptable risk to health and safety' carried with the implication that there is an acceptable level of risk to health and safety. And, thirdly, by seeking to, in effect, ignore the hierarchy of controls that's prescribed under clause 36 of the Work Health and Safety regulations. And saying that clause 32.1, in effect, either abrogates or modifies that.

PN823

Now, can I show you where the thrust of this reasoning is put forward in the union's submissions, Deputy President, just to refute it. Can I ask you to go to the union's reply submissions? Starting at paragraph 14.

PN824

You will see at paragraph 14 there's an example used. And then in the second sentence beginning at say – it does not follow, however, that allowing employees to wear shorts gives rise to an unacceptable risk or Sydney Trains being in breach of its health and safety obligations.

PN825

The considerations in section 18 of the Work Health and Safety Act must be weighed in order to determine whether allowing shorts would give rise to a breach. To that end there is no evidence that demonstrates, for example, how wearing shorts would increase the likelihood more than employees slipping or tripping over, or other available suitable measures have been considered to eliminate or minimise the risk of slips or trips.

PN826

Paragraph (b), in particular, highlights what we would say is advice in the approach being advanced by the union. That is, they say, 'Look at other suitable

or available measures that might be available.' If there are other measures that might be available to deal with that particular risk then shorts should be allowed to be worn. And those other measures should be taken to eliminate or minimise the risk.

PN827

In my respectful submission, that goes against the obligation to eliminate the risk and then minimise the risk by adopting the hierarchy of controls which is set out in the Work Health and Safety regulations.

PN828

THE DEPUTY PRESIDENT: It's proposing a different hierarchy of controls?

PN829

MR SECK: Pardon me, Deputy President?

PN830

THE DEPUTY PRESIDENT: It's proposing a different hierarchy of controls.

PN831

MR SECK: Indeed. A different hierarchy to what we say is the mandatory hierarchy that exists under the regulation.

PN832

THE DEPUTY PRESIDENT: No, it's an application of the hierarchy of controls under clause 36 is it not? It's just making a proposal of a different measure. A different way of dealing with the risks. It's something that might arise in the conversations that have been foreshadowed and not how potentially. But it's not a different way – it is a different way but it's not impermissible. That's what I'm putting to you.

PN833

MR SECK: It's only impermissible if, in my respectful submission, it changes the hierarchy and it may change the hierarchy or it may not change the hierarchy. So can I use an example - - -

PN834

THE DEPUTY PRESIDENT: Well, until that discussion is had we might not know.

PN835

MR SECK: Well, indeed. And we would say that needs to be done by way of a risk assessment and through a consultation. So we don't argue the point that a risk assessment needs to consider those particular issues and there's consultation on those particular points. But what can't be done - - -

PN836

THE DEPUTY PRESIDENT: Any idea when that might occur?

PN837

MR SECK: Well, we say it has occurred in relation to particular areas, Deputy President, and I know there's - - -

PN838

THE DEPUTY PRESIDENT: And this is – sorry, to cut you off but this is - - -

PN839

MR SECK: That's all right.

PN840

THE DEPUTY PRESIDENT: - - -I just want to make sure I understand this. You say that you can rely on a risk assessment that's done – say prior to the commencement of the 2022 agreement?

PN841

MR SECK: The answer is 'yes' but they're obviously – we would say we could also rely upon risk assessments which have been initiated post the commencement of the agreement as well. But the answer is 'yes'.

PN842

THE DEPUTY PRESIDENT: Thanks. Sorry to interrupt.

PN843

MR SECK: That's all right. Can I expand upon that, shortly, Deputy President, because there's more I want to say about that. That's not to say that one which has been done prior to the agreement cannot be reviewed and done again. And obviously when you do a risk assessment it's not a static measure and time and resources have been devoted to certain areas. But if there is to be consideration of whether or not shorts should be used as an option or for, as appropriate, PPE in a particular area – a further risk assessment to be done which, in effect, replaces or supersedes the high risk assessment. But, obviously, all that needs to be done in a way which accommodates all the different things that are happening.

PN844

And what the evidence reveals, and I will take you to this shortly, is that this is not a closed process. We haven't come to a point in time where those risk assessments – a line has been drawn under and undertaken risk assessments. Quite the contrary.

PN845

What the evidence reveals is that it's been left open and the unions have been invited to identify other areas where they say shorts should be worn. And that that is a point of difference between the parties. The unions are saying, 'Well, you haven't undertaken these risk assessments.'

PN846

Our position is that there have been an orderly and systematic process for focusing on the priority areas and to other areas, initially, but there are steps to be taken in the future to identify other work areas where shorts might be worn as appropriate uniform in the workplace, so long as there's no unacceptable risk to safety. So this is certainly not an end to the process of shorts being considered as an option.

PN847

The second point we would make, Deputy President, is that in paragraph 17 of the union's reply submissions they say that there is an evaluative exercise to be undertaken under section 18. And that evaluative exercise is said to involve looking at paragraph 19, looking at alternative means of trying to address the risk.

PN848

So the examples used are long-sleeved shirts, broad brimmed hats and sunglasses at all times, an employee is outdoors to the existence of ultraviolet rays. That obviously deals with the torso and the head and eyes. But it doesn't deal with legs. And then knee pads, elbow pads, gloves – just in case they slip and fall over – which obviously doesn't deal with the parts which are not covered and the fact that there might be ultraviolet radiation or there might be cuts and abrasions to other parts of the upper or lower limbs of the individual.

PN849

And then what the union says in paragraph 20 is that all of these are high control measures than what Sydney Trains apparently requires and has minimised the risk when compared and simply not having these controls. That, of course, would be ludicrous and is not the test, despite Sydney Trains submissions the WHS, in fact, does not require an employer to adopt the highest possible control measure and only resile from that control when another measure minimised the potential risk at the same operating level.

PN850

If that were the case, no one outside would ever wear shorts. A high control measure could almost always be implemented. In my respectful submission that position is contrary to the Work Health and Safety regulations. You have to impose the highest possible control measure so far as is reasonably practicable.

PN851

What is being urged at paragraph 20 is that even if there is a higher possible control measure that you don't have to implement it. And with respect that's just plain incorrect and inconsistent with Sydney Trains obligations of PCBU.

PN852

Now in a sense I don't know how much disagreement there is, at least with the AMWU, because Mr Lang, and I cross-examined him on this particular issue accepted that in order to determine whether or not there is an unacceptable risk to health and safety there will need to be a risk assessment which is undertaken ultimately. And after consultation with the workers on the particular issue it is Sydney Trains who has to either endorse the use of shorts or not. That was the thrust of his cross-examination.

PN853

With respect we don't disagree with the approach that Mr Lang was actually advocating in the witness box. There might be questions of timing involved and how long that process will take. But in terms of the process we would agree that's what needs to happen.

PN854

THE DEPUTY PRESIDENT: That process it didn't sound very dissimilar to what Mr Nichols was generally outlining.

PN855

MR SECK: Yes. We would agree.

PN856

THE DEPUTY PRESIDENT: And you get down to the timing. Now this agreement has been in place for one year and 11 days. I am just wondering how long it would take to turn one's mind to risk assessments of all relevant areas.

PN857

MR SECK: Obviously it all can't be done in one day and if what you're saying to me, Deputy President, things should have done more quickly – then things can obviously be done more quickly. But we would say that there was a methodical and agreed process for dealing with these particular issues.

PN858

THE DEPUTY PRESIDENT: Well, now agreed process. One thing that is interesting is this. Clearly, the words from the 2019 agreement to the 2022 agreement changed in relation to clause 32.1. And it inserted that an option would be given to the employees to wear shorts, subject to the condition.

PN859

Now, if I was an employee voting on that I'd be thinking that I'm going to be given the option to wear shorts. Now if my option is then denied on the basis of existing risk assessments that were applying at the time I voted, would I not have concerns?

PN860

MR SECK: With respect the answer is 'no'. Because there is a procedure for changing control measures in place that needs to be followed.

PN861

THE DEPUTY PRESIDENT: But you told me that you can use past risk assessments. Now, assuming that would be incorrect, since the agreement has been made and approved there have, in areas, there haven't been assessments for one year and 11 days.

PN862

MR SECK: And with respect, Deputy President, that's because there was an agreed process to focus on priority areas first, by undertaking preliminary assessment, and then working through those areas which were going to be of importance. And that wasn't to close off the process and maybe I need to come to what the evidence says now, just to make it clear what we say that process was.

PN863

Can I invite you, Deputy President, to go to the court book and Mr Gaskins' evidence first? Excuse me, Deputy President, whilst I find that. So the process starts at paragraph 19 – sorry, I should say paragraph 16 – where there was a preliminary assessment and the elements of that process is expanded upon in



paragraph 17 where there needs to be a utilisation of the safety management system to work that through.

PN864

Now the unions were the one who then suggested that there be a proposed priority areas for review and that was agreed at the first hot weather meeting which is identified in paragraph 18. You will see that.

PN865

And so both the unions, the workers' representatives and the company said, 'We will go through these priority areas to review' – colloquially known as 'no-brainers' as he put to Mr Nichols. And then work through those priority areas first.

PN866

So this is not something which Sydney Trains decided to do off its own bat but this was done in agreement with the unions.

PN867

Now the unions then proposed – like priority areas that they need to be focused on. Paragraph 19, Mr Warnes, on behalf of the RTBU sets out a list of jobs which he says should be given priority. And that's listed in paragraphs (a) to (s) of paragraph 19 – subparagraphs (a) to (s).

PN868

And that's set out in an email which is MG6. And if you go to MG6, Deputy President, starting at page 652 this is an email from Mr Warnes to Sydney Trains identifying that list. Now that followed – this followed up by APESMA in an email on the 26 April 2023 at page 650 where some further areas are added, rail equipment sent to Clyde Warehouse Control Systems people at REC.

PN869

And then there's an email which follows from Mr Lang, at page 649 where he adds to that 'plant mechanics including maintenance workers'. So I think there was an acknowledgement and an agreement by all the parties that this was the process to be followed and they should be focused on these particular priority areas. This wasn't something which was arrived at unilaterally by Sydney Trains.

PN870

Now, after the unions had expressed their view as to the priority areas there was a preliminary assessment undertaken by Sydney Trains of those priority areas. And that's set out in paragraph 22 of Mr Gaskin's statement. And this is only the preliminary assessment and not the risk assessment, I should say. And that preliminary assessment results in – it follows from the processes being followed in paragraph 17 – that is going to the safe work management systems and the relevant procedures.

PN871

And then particular risks are identified in the preliminary review and those are set out in paragraphs 23(a) to (g).

PN872

THE DEPUTY PRESIDENT: In around April 2023.

PN873

MR SECK: Around April, yes.

PN874

THE DEPUTY PRESIDENT: At the end of April.

PN875

MR SECK: Yes. And so then as consideration was given to implementing alternate – I think it should say 'alternative control measures' for those particular five areas which are identified in paragraphs (a) to (e) in 25. So Clyde Warehouse, to all warehouse, REC, EMB, store personnel, inspections, front of train, and networking (indistinct) division and control systems.

PN876

And so for those priority areas of termination of whether wearing shorts as an option was subject to then a risk assessment. So there was a following process where a risk assessment was undertaken. And then Mr Gaskin identified the risk assessment which is undertaken, which is followed by further hot weather uniform or immunity. And there were five all up, Deputy President.

PN877

And so with respect this was a process that recognised that there are competing priorities involved. Resources and time had to be devoted by all parties to undertaking these priority assessments and then the risk assessments that followed that. And a practical and realistic choice was made to focus on those five areas without shutting out other areas for risk assessments to occur later on.

PN878

Now at paragraph – you will see, Deputy President, I won't read it all out – the risk assessment process for each of the areas are set out in paragraphs 35 – when I say each of the areas – each of the priority areas need two additional areas. All the way to paragraph 52.

PN879

But, importantly, at paragraph 50 and 51, there's a reference to an email which is sent by Ms Jessica Drebber on behalf of Sydney Trains to the unions. And the substance of it is set out in paragraph 51 but I will take you to the email shortly that request the union to provide any details on any further areas, tasks or roles outside the rail corridor that they would like reviewed in accordance with the process that had been established.

PN880

So, in other words, the unions were invited to say, 'Are there any other areas that you think you should be following these five priority areas, plus two areas for risk assessment?' And if you go to MG25, Deputy President, which starts at page – so is it MG25 – 24, at page 960 – there's an email chain and starting at the beginning of the email chain working backwards at page 958, you will see there's an email

from Ms Jessica Drebber sent on the 7 September 2023 to various individuals including the union, about the last hot weather uniform union meeting.

PN881

And if you go to page 414 at the top of the page, Deputy President, Ms Drebber says this –

PN882

*'It is requested to the unions that they provide details of any further areas/tasks/roles outside the rail corridor that they would like reviewed in accordance with the process already applied. The path forward for these reviews will be through the hot weather and heat exposure working group where they can allocate to the relevant health and safety giving structures as appropriate where they will undergo the same HSR union delegate line manager and SEQOR assessment as completed for the priority areas already assessed.'*

PN883

THE DEPUTY PRESIDENT: Which page are you reading from?

PN884

MR SECK: The top of page 960, the first substantive paragraph at the top of the page, starting, 'It is requested.'

PN885

*'As given the above we hold the view that we have met our obligations as set out in clause 32.1 and look forward to continue to work with the union and HSR to explore the opportunity for hot weather and heat management changes beyond shorts.'*

PN886

So what Ms Drebber is suggesting is that if there are other areas to be assessed that can be dealt with in the next phase of the review process which is the hot weather heat exposure which, in fact, meets. Now there's no identification and any further areas by the unions, and that's because, in part, Mr Warnes sends an email which is at page 957 on the 7 September, where he basically says 'Shorts is the right of all employees and they should be entitled to wear shorts.'

PN887

That's his response. Rather than coming back and saying, 'Let's do risk assessments.' So the RTBU at the very least and it sounded, at least, from Mr Lang he didn't necessarily agree with Mr Warnes' position, took the position that we can wear shorts and that's the end of it.

PN888

Ms Drebber then responds in the email which starts at page 955, responding to Mr Warne's email where she cites legal advice and then says, 'Sydney Trains' and refutes they're certain that Sydney Trains has taken a blanket approach. And that's apparent from the fact that, and I don't think there's disagreement on this, it's been assessed in the risk assessments that shorts can be worn as part of the Summer

uniform in particular areas. And that's set out in Mr Gaskins' statement where that's been allowed.

PN889

What follows from that, Deputy President, is that the process of the Hot Weather Uniform Review comes in effect or dovetails into or becomes subsumed in the Hot Weather and Heat Management Working Group.

PN890

If you go to paragraph 53 of Mr Gaskins' statement from 11 July 2023 onwards there are various meetings which talk about hot weather and heat management more generally and the issue of shorts becomes subsumed within this more general assessment of these broader issues. And I won't read – take you all through it – but there's various documents which demonstrate that consideration was given to the broader issue of hot weather.

PN891

And, in my respectful submission, when you look at that process more generally by reference to the correspondence it's clear enough that Sydney Trains hadn't formed or taken a concluded position on whether or not other areas needed to be looked at and, in fact, let it open for the unions to say, 'Are there other areas which are of concern and, if so, we will do that as part of this hot weather heat management working group', but no further areas, at least as part of this process, appeared to have been identified by the unions.

PN892

Now, to answer your question, Deputy President, beforehand, to say, 'Well, Sydney Trains, as an organisation, haven't given effect to that particular option'. Obviously, it does involve both parties working together to try to focus their attention and, by time and effort, to undertaking that risk assessment in the context of all the broader issues that are happening in relation to heat management in hot weather. We acknowledge there are areas where that hasn't occurred. Those areas haven't been, at least, identified formally through the process of the agreement between Sydney Trains and the unions. But the unions say to us, and I'll be blunt, 'We wish to have a risk assessment of this particular area to work out whether or not shorts can be worn, and does or does not pose an unacceptable risk to health and safety, given what Sydney Trains have said'. We will go through that process. That's why we say it's not a closed process.

PN893

THE DEPUTY PRESIDENT: Until you go through that process you're directing them to attend work in long pants.

PN894

MR SECK: Because there is a - we accept this, Deputy President - - -

PN895

THE DEPUTY PRESIDENT: Which gets back to the date of the risk assessment.

PN896

MR SECK: Yes. There's a pre-existing risk assessment which has said that the existing control measure of long trousers the appropriate control measure. And against the statutory background that applies to Sydney Trains, with respect, Deputy President, you don't deviate from that until a risk assessment is undertaken. You don't start from day 1 and say, 'There's a clean slate, there's an option to wear short'. It has to be against the existing safety systems that have already been put in place and the existing risk assessments that have already been undertaken.

PN897

Now, that can be reviewed, but a process for review has been put forward to the unions saying, 'Tell us which areas'. So if there's to be a resolution of this particular aspect of the dispute, and hopefully this is a practical way forward, Deputy President, if the unions say to Sydney Trains, 'Here are areas we want to have reviewed', there'll be a process for review. And if there's a recommendation to that effect, I don't think we could refuse to comply with such a recommendation, Deputy President.

PN898

Say the union put forward their list of any further areas they wish to have assessed, and Sydney Trains cooperate and put in place reasonable measures to ensure that a risk assessment occurs in a timely way, and consultation occurs in accordance with its legal obligations.

PN899

With respect, that would be a fair recommendation to make to resolve this particular aspect of the industrial dispute. If that was a (indistinct).

PN900

Now, that doesn't answer the question which has been posed for determination, which is, can we lawfully and reasonably do it. With respect, the answer is we can lawfully and reasonably do it but there needs to be, I think both parties accept it, a process that needs to be followed before we get to that point in time.

PN901

So perhaps the parties are, like ships in the night, passing each other as to what we say is the real issue in dispute and how it can be resolved.

PN902

If the issue is whether or not we have a legal entitlement to direct people to wear shorts, where there's an unacceptable risk to health and safety, clearly we do. The question is, how does that condition get resolved if there is a contest between the parties and the option is exercised by the employees to seek to wear shorts. That becomes a question of timing and - - -

PN903

THE DEPUTY PRESIDENT: Reasonableness.

PN904

MR SECK: - - - reasonableness and trying to practically - well, reasonableness, in terms of consultation, we accept that. But consultation has occurred, at least in

relation to those five priority areas and those two additional areas. To the extent that other areas need to be looked at, then there'll be further consultation to work out whether or not it's appropriate to wear shorts or not.

PN905

So that's an issue for the future, with respect, Deputy President, it's not an issue which where we've decided, forevermore, that shorts can't be worn. It hasn't been raised by the union as an option, as part of the agreed process, as reflected in the communication between the parties.

PN906

THE DEPUTY PRESIDENT: What do you say about the evidence where it seems, in certain areas, there has been a concession on shorts, that it was somehow revoked?

PN907

MR SECK: I think the evidence there, to be fair, Deputy President, and I note it differs, depending on the employees, that there was a concession or at least a decision made by Sydney Trains that shorts were available. I think, in one case, someone tried to order shorts but shorts couldn't be ordered on the system. I thought that was for - - -

PN908

THE DEPUTY PRESIDENT: I think there was an email before that, that indicated the ability to wear shorts, and that's why they got into the ordering process, and then there were questions as to who said that was okay?

PN909

MR SECK: That might be the case. If that's - if there is confusion about that then that can be sought to be resolved. I have read it, and I think you're probably right, Deputy President, that there may have been some miscommunication on that issue, but I would have to concede that to the extent that a decision has, in fact, been made that shorts can be worn, they should be allowed to wear those shorts. If there's been some error in the system where they can't order it, then that needs to be rectified.

PN910

I note the time, Deputy President.

PN911

THE DEPUTY PRESIDENT: I promise to be quiet.

PN912

MR SECK: I was just going to address you on three other points, without kind of traversing the details. I was going to do it in more detail but I probably can skip over it quickly.

PN913

You would have seen, Deputy President, there have been various presentations made by experts in the field, in relation to long trousers being an appropriate control measure. There being the hot weather uniform workshop, on 5 June 2023,

involved various experts in their field making presentations on the process to be followed and the basis for why long trousers is an appropriate control measure. I don't need to take you through all the details, other than to note that at page - it's in various locations, including as annexures to Mr Lang's statement, but I'm going to take you to the parts which are attached to Mr Gaskin's statement.

PN914

At Annexure MG10 are the materials and PowerPoint slides which were presented by the various experts in their field, in order to provide relevant information to those involved in the process to understand the potential hazards and risks and how they could be managed.

PN915

Now the ONSRR one, when I say ONSRR, the Office of the National Safety Rail Regulator, slides start at page 688 and they go through the statutory scheme. I don't need to take you through that Deputy President. I think what is worthwhile reading is the Cancer Council presentation. I don't know if you've had the opportunity to read that, Deputy President. It starts at page 706. But it clearly sets out data which emphasises the significant incidence of melanoma in Australia and the high risk of contracting melanoma, incrementally over time, if there is exposure to sun. The figures, with respect, are startling and underline the importance not to be complacent and to always be vigilant in ensuring that there are control measures in place to eliminate the risk of melanoma.

PN916

Now, it goes without saying that current times, this is a high area of priority, especially given, as you will know, Deputy President, the Australians of the Year, Professor Richard Scolyer and Georgina Long were awarded the award as Australian of the Year, due to their research at the Melanoma Institute of Australia. To quote their words:

PN917

*Our bronze Aussie culture is actually killing us. We must elevate sun safety to equal status with other lifesaving safety measures, like wearing a seatbelt or a helmet.*

PN918

Now, we would say that anything which minimises sun exposure, especially if you're working in the rail corridor, self-evidently is going to be important and the highest control measure will be the use of PPE to avoid exposure to the sun.

PN919

Other alternative measures which were perhaps being put forward, such as wearing hats and sunglasses, don't really direct attention to protecting the lower limbs and the use of sunscreen obviously involves a potential risk of human error, as is obvious. You need to, firstly, put it on and then, secondly, put it on properly.

PN920

The alternative measure, which seems to be suggested in some of the material, that is, you can wear overalls over the top, of course, itself involves human error, the potential for human error. That is, the individual concerned needs to have the

overalls present to put on, then make the effort to put it on, wear it for the particular time period and then take it off.

PN921

What the case law says, and we've cited the authorities in our submissions, that the obligation to ensure health and safety, so far as is reasonably practicable, under section 19, requires taking into account the potential for human error and to try and eliminate the circumstances where human error could be a potential issue where the optimal control measures are not put in place to ensure eliminating or avoiding any risk to health and safety. So I would urge you, Deputy President, to, if you haven't already, read that.

PN922

The biomotions study is another aspect which is worthwhile focusing on, Deputy President, at page 776. The thrust of that biomotions study is that high visibility clothing is an essential item of PPE and increases visibility of the wearer to train crew, train track drivers and plant operators, when they're self-evidently working in a dangerous environment.

PN923

The Australian standards in this area, for high visibility safety garments, says that:

PN924

*For optimum biomotion configuration there needs to be retroreflective strips on both the sleeves and the legs and they need to be around each leg, just about the knee and at each ankle.*

PN925

So wearing pants obviously ensures that occurs, wearing shorts may create potential problems. When one looks at the Australian standard for the PPE, and this is at page 781, there are a pair of long blue pants with reflective stripes below the knee and at the ankles.

PN926

Now, if you're wearing shorts, generally they're not going to be below the knee, they're going to be above the knee. So wearing shorts as a PPE, or uniform, would not comply with the Australian standards, in this particular area.

PN927

Then there's research which supports the importance of biomotion markers in ensuring that persons who are in the rail corridor and perhaps driving dangerous vehicles, such as a train, can spot people in the distance and that's because the biomotion PPE is easier to pick up and it's conspicuity and consistency allows persons to spot, as quickly as possible, the chance that someone might be on the tracks.

PN928

So I would say that those issues are important for this reason, Deputy President, that the seems to be a lot of focus on the rail corridor but what's an important element of determining whether or not there are steps, so far as - sorry, whether or



not ensuring that there is no - sorry, eliminate the risk to health and safety, so far as reasonably practicable, is the notion of reasonable foreseeability.

PN929

If there are known risks to Sydney Trains, of slips and falls, cuts and abrasions resulting potential illness arising from being exposed to flora and fauna, exposure to risks from being not seen on the tracks, in addition to the UV radiation issues, then it is incumbent upon Sydney Trains to take all - to ensure the health and safety of employees is protected by either eliminating all risks or to the extent they cannot be eliminated, minimising those particular risks.

PN930

Once the hierarchy of control measures is identified then, in my respectful submission, the evidence is actually quite strong and overwhelming, that the optimum control measure is the wearing of pants, long trousers, to deal with those particular issues.

PN931

The other point to note is that there is Australian standards for PPE, which is at court book 612 and at pages 614 to 618 the PPE in the rail corridor is dealt with and, in particular at page 618. Deputy President, the question of sun protection is dealt with and the Australian standard itself says that, 'Some protective clothing should include long-sleeved shirts and long pants'.

PN932

So the word 'should' is obviously indicative that this is what is recommended by the Australian standards as being the appropriate footwear, sorry, appropriate PPE.

PN933

Can I then deal with the question of, quickly, type of work activity and then the question of relief? Some focus was placed by the unions that the assessment of whether or not there's an unacceptable risk to safety is by reference to duties and a particular aspect of the duties and responsibilities of employees, as opposed to a work activity that might be conducted at an operational geographic level or by reference to the entirety of the job which is performed by the employee.

PN934

Now, there's an ambiguity, we would say, as to what is meant by 'type of work activity' in clause 32.1. Work activity can be work activity of the employer or it can be the type of work activity of the employee. Clause 32.1 does not specify that.

PN935

The way that the risk assessments have been done, as you will see, Deputy President, and I won't take you to it, is to look at area, job, task. That's because there are aspects of all three in looking at work activity. Work activity can embrace all three concepts and the way that the risk assessments have been undertaken is to look at those three issues.

PN936

So, with respect, we don't accept that the phrase, 'work activity' only and necessarily is limited to the idea that it's an aspect of someone's duties and responsibilities. Type of work activity is sufficiently broad enough to encompass all those three areas: geographic operational area, the job that is being performed or the role that's being performed, or particular aspects of the duties and responsibilities that might be performed, on a day-to-day basis.

PN937

It's, in my respectful submission, slightly artificial to try to segment them to only mean duties and responsibilities and assess them on a duty-by-duty basis. Because there's self-evident impracticality associated with that, that you would be wearing different uniforms for different aspects of your duties and responsibilities. If one was to bring a more practical approach to looking at it, it would mean that people could wear trousers for times that they sit at the desk. If they go outside they put on - sorry, shorts when they sit at the desk then when they're going outside they put on trousers. They could be doing other things where they're not exposed to the sun, they can put on shorts. That obviously brings with it the potential for human error and a high risk of impracticality.

PN938

Can I then deal with how this dispute can be resolved? The question, as I said at the outset, Deputy President, the question for determination, whether or not Sydney Trains can lawfully and reasonably direct employees, and perhaps I should use the words of the question. That they perform work wearing long pants, where Sydney Trains has assessed, for those particular employees, that the risk of them wearing shorts would pose an unacceptable risk to safety, in my respectful submission, should be answered 'Yes'. It can lawfully and reasonably direct those employees because it's formulated at a degree of generality.

PN939

Now, whether or not there have been risk assessments for those particular employees, that the risk of wearing shorts would pose an unacceptable risk to safety depends on the particular work area, because there have been, as the evidence of Mr Gaskin demonstrates, risk assessments, either in draft form or final form, which have been conducted for the five priority areas and the two additional areas, which is fleet maintenance and heavy depot, which I think are at a draft stage. That's only in relation to the sheds.

PN940

For the reasons which I've already identified, there are existing risk assessments in place for other areas but if there is an exercise of a choice by the employees to wear shorts in these other areas, as Ms Drebber has invited in her email, the unions can identify that and a risk assessment can be undertaken.

PN941

But because the question is premised on where Sydney Trains has assessed that for those particular employees, that the risk of them wearing shorts would pose an unacceptable risk to safety, that question carries with it the possibility that assessment of risk could have been prior to the enterprise agreement being made or after the enterprise agreement being made.

PN942

If you were to answer the question at that high level of abstraction, I think the answer is 'Yes'. But if you wanted to go into the particular circumstances of each particular area, Deputy President, the answer will be yes or no, depending on the particular area.

PN943

Now, in my respectful submission, it is unnecessary for you, as the Commission, to go through those particular areas to work out whether or not that's done or not, because there's a large agreement as to whether that's been done or not. But to the extent that it hasn't been done, as I said beforehand, the next step in resolving the industrial dispute would be for the parties to get together to identify those areas, and we will cooperate in that. Whether or not a recommendation to that effect will assist in that is a different point. We wouldn't oppose a recommendation being made in those terms, if you thought it was appropriate, in order to resolve the dispute.

PN944

That then focuses on questions of timing and practical resources and perhaps language, which was along the lines of the unions identifying those areas and then Sydney Trains taking steps to give effect to the assessment of those risks in a timely way and consult with employees would be the kind of recommendation you can make, in relation to those other areas.

PN945

What we say the Commission ought not to do here, and I'm not sure if this is being urged by the unions or not, is to, in fact, make a binding determination that Sydney Trains has or has not complied with clause 32.1 of the agreement, by reference to particular types of work activities.

PN946

That's a level of granularity, with respect, that you don't need to engage in, in resolving this particular phase of the industrial dispute, Deputy President. It may be that's something the union wishes to press at another stage and we can deal with that at another stage. But the evidence, quite frankly, doesn't allow you to make that evaluation as to whether or not there is, in fact, an unacceptable risk to safety or not. That would have to be done by reference to expert evidence, looking at each particular type of work activity and forming a view on those particular points.

PN947

Clearly, given the nature of the hearing today and the extent of the evidence that's been filed, it would be a significant and serious step to find that there is or there is not an unacceptable risk to safety, in relation to a type of work activity.

PN948

That is, in our respectful submission, ultimately why it's Sydney Trains who has the responsibility to determine whether or not it poses a risk, unacceptable risk to health and safety or not. It's not for the Commission to make that assessment and it wouldn't be appropriate for the Commission, with respect, to make that

particular assessment, given that there are obligations upon Sydney Trains, as the primary duty holder, under state and territory legislation, sorry, state legislation.

PN949

We otherwise rely upon our written submissions, Deputy President, unless you have any further questions.

PN950

THE DEPUTY PRESIDENT: Thank you. Mr Martin.

PN951

MR MARTIN: Thank you, Deputy President, I'll be very brief.

PN952

THE DEPUTY PRESIDENT: That's okay, take your time.

PN953

MR MARTIN: Perhaps I can just touch on the most recent point my friend dealt with. It might shock you to hear that obviously we'll seek a binding determination insofar as - but not insofar as the work activity is concerned. At the outset of my friend's submissions it was suggested, and we agree that this is a higher level dispute but the question - what we're saying here is that where the higher level process that's been engaged in by Sydney Trains, as to whether a risk assessment, first, has even been done at all and when it is being done when it doesn't actually engage with the work activity or the actual considerations, you can still make a determination as to whether that process is a lawful and reasonable direction.

PN954

For example, it seems to not be in dispute that an unacceptable risk requires a risk assessment. What Sydney Trains has been doing is determining whether an unacceptable risk occurs before a risk assessment happens. Now, the Commission can make orders that that is an unlawful unreasonable direction and what you suggested before, Deputy President, was this doesn't have to be a yes or a no answer and, quite correctly, because it may be, in certain circumstances, that Sydney Trains isn't issuing lawful and reasonable directions and perhaps others that it is.

PN955

It's the subjectivity that my friend refers to, for example, where the SEQOR team determines that there's an unacceptable risk to safety before a risk assessment has even happened, that would be, in our submission, an unlawful and unreasonable direction.

PN956

Similarly, where if Sydney Trains goes through the process, agrees that shorts should be issued and then suddenly reneges on that, for no reason, other than there's an industrial process that's going on, that, again, would be an unlawful and unreasonable direction. So in those particular circumstances the Commission can make orders.

PN957

What the parties need, going forward, is certainty as how does this process actually continue forward. In the absence of a binding determination, the parties will continue to have issues. Now, we're not saying here that you need to go into the level of work activity and whether a cleaner is allowed to wear shorts, that's not the issue that we're advocating for. What we're saying is that you need to have regard to the process that's being implemented and that is, necessarily, informed by clause 32.1 and the underpinning work health and safety legislation. The process by which Sydney Trains is making directions is both unlawful and unreasonable, in certain circumstances that I've just articulated.

PN958

If I can then take you to, perhaps briefly, just to - if I can then just take you to Mr Gaskin's statement. I think it was at paragraph 50 my friend took you to. It's page 561 of the court book.

PN959

THE DEPUTY PRESIDENT: Sorry, which - sorry?

PN960

MR MARTIN: It's paragraph 50 of Mr Gaskin's statement, on page 561 of the court book.

PN961

THE DEPUTY PRESIDENT: Okay.

PN962

MR MARTIN: It should just be noted he said:

PN963

*In respect of other areas beyond the priority areas identified Sydney Trains confirmed with the unions, by email, that it would support further risk assessments in the fleet maintenance centres, within the confines of maintenance shed structures and heavy plant.*

PN964

Mr Gaskin gave evidence that outside of that particular subarea, or those particular subareas, not other risk assessments or other areas have been considered at all.

PN965

If you then go to page 960, which my friend took you to, which is the email of Ms Drebber, I apologise. This is important and just a point that probably hasn't gone through in detail, Deputy President, is it says, in the second paragraph:

PN966

*It's requested to the unions that they provide details of any further areas, tasks, roles outside the rail corridor that they would like to be reviewed, in accordance with the process already applied. The path forward for these reviews will be through the hot weather and heat exposure working group.*

PN967

That is a different process.

PN968

If I can then take you to - and when I say that's a different process, that is a completely different process to the shorts review process. I just want to make out that point.

PN969

If I can then take you to paragraph 20 of Mr Lang's statement, which should be page 64 of the court book. Then you'll see he says there:

PN970

*The fourth review meeting was held on 11 July 2023. That meeting was largely a review of the previous meetings regarding the subject matter experts, an update on the no brainers areas and legal advice that Sydney Trains has sought from Ashurst. During this meeting it was discussed that a sub working group, focusing on hot weather and heat management would be established. This working group was separate to the hot weather uniform review, regarding wearing shorts, and was focused on controls outside of shorts or long pants.*

PN971

Now, if one then goes to page 310 of the court book, this is the hot weather uniform meeting that was referred to in Mr Lang's statement, just past the opening page and then you'll see, on page 322, what that says is:

PN972

*The proposal to establish a working group to specifically look at opportunities with hot weather and heat management controls, beyond shorts.*

PN973

So those four meetings that happened, in relation to the hot weather and heat management were never considering whether shorts could be worn at all. What those were considering were measures outside of shorts, because Sydney Trains had already completed its review process, in relation to shorts. So much is evident, there's never been another shorts review meeting since 21 August 2023 and the last email that went out, in relation to any other areas that would be considered, was Ms Drebber's email, on 7 September 2023, which talked about confining the risk assessment process to the shed structures for heavy plant and resurfacing, and the fleet maintenance as well. That is the last time that there's been a shorts review process. So any of these other meetings that are talked about, to the extent that it's been suggested otherwise, do not actually deal with shorts at all.

PN974

The other matter, we obviously dispute the fact that Sydney Trains can rely on pre-existing risk assessments, that were done prior to the negotiation of the enterprise agreement. We'd say that undermines the express words that 'Employees can now wear shorts', what would be the point of those words. In any event, there is no evidence of any existing risk assessments, regardless. There's

nothing that's been put before the Commission to demonstrate that anything has been done.

PN975

It otherwise shouldn't be an issue that the unions have to raise. This is a right that is abrogated in circumstances where there's an unacceptable risk to safety. These things should be implemented in a timely fashion, as soon as practicable.

PN976

I don't have anything further, Deputy President, unless there's any questions.

PN977

THE DEPUTY PRESIDENT: What do you say in relation to something that fell from the respondent, regarding a recommendation?

PN978

MR MARTIN: I think the difficulty with that, Deputy President, is that it doesn't deal with and give certainty to the points that I've just taken you to beforehand, around where, for example, Sydney Trains is assessing that particular area or a particular task has an unacceptable risk, without conducting a risk assessment. A recommendation, well, it won't be binding for one. It's just going to be a problem. It's more likely that we come back here with the same issues not being resolved because the process hasn't been followed correctly.

PN979

So what we would say is that there needs to be a binding determination, at least insofar as those particular issues that I've identified, around Sydney Trains being able to determine that an error or a task poses an unacceptable risk, before even a risk assessment has been done. Or, for example, in circumstances where the five priority areas, a number of which were approved for shorts and then reneged on, or areas that had already been allowed for shorts and then suddenly have been told that they can't, without a risk assessment. Those circumstances are clearly unlawful and unreasonable, in our submission, and an order needs to be made - sorry, a binding determination needs to be made in respect of those issues.

PN980

A further recommendation may also be of assistance, to the extent that the Commission considers it to be the case, in terms of the way forward. But, insofar as those particular issues that have been cavilled with today, a binding determination needs to be made.

PN981

THE DEPUTY PRESIDENT: But you don't discount the possibility, remote, that possibly further focus on these issues, between the parties, might lead to a resolution?

PN982

MR MARTIN: Sorry, if I can have the question again, sorry.

PN983

THE DEPUTY PRESIDENT: I'm probably being a bit vague. There's obviously been a ventilation of each party's evidence today, in their submissions which might provide parties with a better understanding of where each other is coming from. All I was putting to you was, do you agree that it can't be discounted the possibility of some resolution of the dispute between the parties, through discussion?

PN984

MR MARTIN: Simply arising from what's happened today?

PN985

THE DEPUTY PRESIDENT: Yes.

PN986

MR MARTIN: I mean to the extent that - I mean my friend made a number of points that where, for example, a cleaning attendant is being required to work and a risk assessment hasn't been done, then a risk assessment should be done. If undertakings are made, perhaps, that could be something that could be dealt with. I mean I couldn't sit here and be like, 'No, it's impossible that it could be resolved'.

PN987

THE DEPUTY PRESIDENT: I won't say it's certainly a possibility.

PN988

MR MARTIN: Having said that, these parties are continuously here, so who knows.

PN989

THE DEPUTY PRESIDENT: Thank you.

PN990

MR MARTIN: Thank you.

PN991

MR SECK: Can I just deal with two points, Deputy President. Sorry, I don't want to make this a tennis match.

PN992

I think my learned friend just pointed out the words, 'beyond shorts', in some of the documents. I think I read that, and certainly consistent with Ms Drebber's email, that it's not limited to shorts, but shorts are included. So the word 'beyond' has a slightly different meaning to what's being urged by my learned friend.

PN993

Can I just perhaps pick up what you made, the point you made to my learned friend? I think what's emerged from today's discussions, and I used the expression, 'like ships passing in the night', that there might be a better understanding of those particular issues, and it seems to be focused on the timing and the practical steps being taken to initiate risk assessment for other areas, beyond those five priority areas and the two additional areas. I pointed to where



Ms Drebbler had invited that and there was no response. Obviously the union now provides us with those particular areas they want assessed and we can then sit down with them and try to resolve that. So we certainly think that the submissions made today and the party's positions being articulated in the evidence may lead to better understanding of each other's positions and further resolution of the issues. A recommendation will facilitate that.

PN994

THE DEPUTY PRESIDENT: I don't think I need to make a recommendation. I think it's understood.

PN995

MR SECK: I understand.

PN996

THE DEPUTY PRESIDENT: I'm particularly not attracted to it at the conclusion of the evidence, but I encourage the parties to discuss their positions and the possibility of a resolution, partly or wholly.

PN997

MR SECK: May it please the Commission.

PN998

THE DEPUTY PRESIDENT: I thank the parties for their submissions and I'll reserve my decision.

**ADJOURNED INDEFINITELY**

**[4.41 PM]**

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