TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER McKINNON

C2022/1649

s.739 - Application to deal with a dispute

Health Services Union (051V)
and
DPG Services Pty Ltd T/A Opal HealthCare
(C2022/1649)

Sydney

10.30 AM, TUESDAY, 4 OCTOBER 2022

PN1

THE COMMISSIONER: Good morning, everybody – can I take the appearances, please? For the applicant?

PN2

MR C FRIEND: Yes, good morning, Commissioner – my name is Mr Friend, initial C. I'm joined today by Ms Kennett, initial E. Also in the room with me is Ms Barker, initial C.

PN3

THE COMMISSIONER: Thank you, Mr Friend. And for the respondent?

PN4

MR O FAGIR: If it please the Commissioner, I seek permission to appear for the respondent. My name is Fagir.

PN5

THE COMMISSIONER: Thank you, Mr Fagir. Mr Friend, you've made some submissions about objection to Mr Fagir representing the respondent. I'll give Mr Fagir an opportunity to talk to those in a minute but I think the difficulty with your submission is it's about who they can be represented by rather than the fact of representation and I'm not sure that there is any authority for that, Mr Friend.

PN6

MR FRIEND: Yes, look, we agree and conceded, Commissioner, that there isn't authority or scope within the Commission's powers to choose who would be represented and so on that basis we do oppose the respondent's application to be legally represented generally. We would say that the matter has been dealt with very ably thus far by people inhouse at Opal, who is a large national aged-care provider employing thousands of people with an inhouse legal team consisting of general counsel and other legal professionals. They have been ably represented throughout the dispute by Mr Hunter, the national people and culture manager, who is a senior employee for the company with, I believe, over seven years' experience, and that Mr Hunter is across the detail of this is well-placed to continue his representation.

PN7

We would also say that the criteria of section 596 have not been met, primarily that this is not a complex matter; that this is fundamentally about the way Opal Healthcare chooses to categorise its employees for the purposes of their own enterprise agreement and that the enterprise agreement is something the respondent is therefore entirely familiar with, as is the criteria that the respondent applies in order to categorise its employees as shift workers or otherwise. So aside from sort of some general unspecific generalisations that the matter is complex, the respondent's submissions requesting legal representation I don't think really meet the criteria set out in section 596 of the Act. They've said that they would be able to assist the process by martialling relevant factual material and present this in a logical and ordered manner and some other description of how they may assist but it's not supported by any evidence or any specific concern and the HSU would say that it's largely moot, given that detailed submissions in

the matter have already been prepared and filed and that is something that Mr Hunter and the inhouse legal team of the respondent are no doubt across.

PN8

So we would say that there is no need for the respondent to be legally represented. We would also say, considering the other parts of section 596 of the Act, that it would not be unfair to not allow Opal Healthcare to be represented. As the respondent is not coming up against a team of experienced industrial relations specialist lawyers here – for example, I personally have several years of experience as a union official. However, I have no formal legal training at all. I've never worked specifically as an industrial officer which is the common role for union lawyers. Personally I've appeared in less than half a dozen formal hearings over the course of my career and Ms Kennett, while admitted as a solicitor, was only admitted in August last year and has not had any experience in formal hearings thus far.

PN9

So the team representing the aged-care workers has significantly less experience and expertise than the team proposed to represent the employer and therefore we say it would not be unfair to deny the respondent to be legally represented and really, on the contrary, it would be far more appropriate and fair for the respondent to be represented by their national people and culture manager, Mr Hunter, and for HSU members to represented by myself. Just lastly on this matter, you know, if the Commission does find that one of the criteria under 596(2) has been met, the accepted interpretation of that part of the Act is that the decision to grant leave is a discretionary one and therefore we would ask the Commission to consider the teams, I suppose, of both sides.

PN10

On one hand you've got a team of multiple workplaces relations solicitors with – who are significantly more experienced and qualified than those in the union plus an experienced industrial relations specialist barrister and we would say that the Commission should have consideration of sections 577 and 578 of the Act, which require the Commission to take into account the fairness and the equality and good conscious and merits of the matter and therefore we'd submit that the respondent's application to be represented be dismissed and the parties continue to be represented by their equivalent inhouse representatives who have ably done so thus far.

PN11

THE COMMISSIONER: Okay, well, that's a lot more than I thought you were going to say and the difficulty, really, is that the purpose of asking you to prepare a short note was to put Mr Fagir on notice of the issues you were going to raise. Not only have you raised additional issues, you've changed your position entirely from not objecting to representation to objecting in full. So, Mr Fagir, are you in a position to respond?

PN12

MR FAGIR: Yes, thank you, Commissioner. Perhaps the first point to note is the thoroughness and elegance of the submission which was just put, which rather undermines the submission that this is all a group of amateurs dealing with some

overpowered team. But putting that to one side, firstly, Commissioner, you've seen the submissions, I expect. That seems to us obvious that this matter involves a nuanced question of interpretation of an enterprise agreement though the first – and perhaps this is sufficient – point to make is that the grant of permission, we submit, would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter, taking into account the difficulties in the question that's before the Commission and which to the best of our knowledge hasn't been squarely grappled with by the Commission or the court previously.

PN13

Additionally, the circumstances of the case include these: my client employs lawyers and it employs employee relations specialists but it doesn't employ employment lawyers or specialist advocates. This is a fairly high-stakes matter from my client's point of view, particularly if the HSU's case were accepted and all the costs would be significant. Until very recently, the union was represented by a lawyer who for whatever reason is not appearing today. As I understand it – I'll be corrected if I'm wrong about this – one of the attendees for the HSU today but not appearing, for whatever reason. Best not to speculate but for whatever reason not appearing is a lawyer. As you noted, Commissioner, until very recently the HSU's position was that permission to be represented would not be opposed and in fact it was positively put that the HSU's view was that representation by a lawyer would help facilitate resolving the dispute.

PN14

In that context, and bearing in mind the issues in the case and the stakes, the case from my client's point of view has been prepared on the basis that permission was likely to be granted, noting of course that ultimately it's a matter for the Commission but bearing in mind the absence of opposition we expected the permission was likely to be granted. In that context we say it would be unfair not to allow Opal to be represented because it's incapable of representing itself effectively for the two reasons: (1) that there's a shortage of specialist employment legal expertise and secondly, because the case has been prepared on a different basis as a result of the representations made by the HSU, if the Commission pleases.

PN15

THE COMMISSIONER: Thank you, Mr Fagir. Mr Friend.

PN16

MR FRIEND: Thanks, Commissioner. I would simply – to address the point of why Ms Kennett is not representing us it is simply that Ms Kennett has no experience running these matters, has never done so and it would be inappropriate from an employer point of view for me to ask her to do so in the first instance, you know, in something of this nature. I have marginally more experience than Ms Kennett but we are not talking about significant amounts more experience. The respondent is correct and as the Commission has noted that the HSU has changed its position on this. The reason for that is that we were not notified in the initial correspondence from the respondent's lawyers that they would be represented by a barrister in this matter.

PN17

It is only on subsequent investigation and understanding of the case law surrounding this very question of legal representation that we have fully understood and appreciated the nature of that part of the Act, that requires that we must oppose legal representation as a whole rather than a particular representative and I can only point to the lack of experience of myself and Ms Kennett for having not drawn that to our attention earlier. It's also clearly a reality of any party, when responding to something like this, that they will do so on the basis of the information that is in front of us. So when the respondent initially informed us that they would be represented by a law firm, that is a different question to pose to us than being represented by a law firm comprising two industrial relations specialist solicitors and an experienced barrister.

PN18

It was only after that was clarified by the respondent, which we clarified our position, that we opposed representation. Had that been put to us from the outset, the HSU would have opposed representation from that point.

PN19

THE COMMISSIONER: All right. Well, I hear what you say but it was only last Thursday that you didn't object to the respondent being represented, albeit objecting to counsel. But I hear what you say. All right, well, I will grant permission to the respondent to be represented by a lawyer and the reason for that is this: having reviewed the materials, this is not a straightforward question. It arises in a particular circumstances of the industry and it does require consideration of matters that go beyond the simple application of precedent or the text of the relevant provisions. So there is a degree of complexity. There has been a lot of work done by – I presume – lawyers supporting the respondent to prepare for the case today.

PN20

The respondent had understood that it was likely to be granted permission, given the lack of objection until today, notwithstanding the objection to counsel on Thursday last week. But in my view it would be more efficient if the respondent continues to be represented by a lawyer in the hearing today so for those reasons, permission is granted, Mr Fagir.

PN21

MR FAGIR: If the Commission pleases.

PN22

THE COMMISSIONER: All right, so let's deal with the preliminary issues. I understand there are some witnesses on the line. Are there some views about how those should be dealt with? Mr Friend, are you going first and who are you calling?

PN23

MR FRIEND: I think it's more appropriate in the circumstances if the respondent goes first as I am the only witness for the applicant. So it would probably be best dealt with if I was cross-examined – if cross-examination is required and then I would then be in a position to return to my role as a representative as well. Sorry, it's a little unusual.

PN24

THE COMMISSIONER: All right, so you haven't had any discussions with the respondent about who is required for cross-examination?

PN25

MR FRIEND: We did put this question to them last week but have not heard a response.

PN26

THE COMMISSIONER: Okay, so from their witnesses do you require - - -

PN27

MR FRIEND: We would require Mr Hunter for a brief cross-examination but we don't anticipate that would be more than 15 or so minutes.

PN28

THE COMMISSIONER: Okay, all right. Mr Fagir, do you wish to cross-examine Mr Friend?

PN29

MR FAGIR: Commissioner, we're in a slightly unusual position in that I do have some questions for Mr Friend but they don't need to be answered under oath. What I'd really be asking about or inviting is an explanation of the HSU's position in relation to various matters, for example – I'll just use this as one example – what is involved in the requirement to be regularly rostered to work outside day worker span of hours? Now, that may be something that Mr Friend intended to deal with in any case in his submissions or it might be a question that you would ask him, Commissioner. If that's the case, then – and I'll identify the other issues – if that's the case then they can just be dealt with in the submissions.

PN30

If Mr Friend wasn't planning to do that or is unwilling to do it for whatever reason, then I'll just put the questions in cross-examination. But for our part, we're content for them to be dealt with as a statement of the HSU's position and perhaps I should identify what the issues are, if I could.

PN31

THE COMMISSIONER: Yes.

PN32

MR FAGIR: One is that in Mr Friend's statement – I'll use the Commission's court book numbers, if that's convenient for everyone – at CB186, Mr Friend refers to what he describes as the alternative route to the extra week under the award and what we wish to understand about the HSU's view or Mr Friend's view is whether it accepts that the 10 weekends are an alternative route to the extra week under the award - that is whether the position in the statement remains the HSU's view.

PN33

THE COMMISSIONER: Which paragraph is that, Mr Fagir?

PN34

MR FAGIR: I'm sorry – it's paragraph 18, in the final sentence, or second sentence.

PN35

THE COMMISSIONER: Thank you.

PN36

MR FAGIR: There's a reference at the third-to-last line to the award including an alternative route, which is the four ordinary hours on 10 or more weekends. That's the first issue. Then on an allied point at CB193, there's an email from Mr Friend to Mr Hunter where there are some points helpfully set out under the heading, 'Aged Care Award 2010', and the first of the points is that the annual leave provision under the agreement is inferior to the Aged Care Award. We'd be interested to understand whether that remains the HSU's view or there is a different one. Back to the statement at CB187, paragraphs 20 to 22: if we're reading this correctly, it's effectively said that any shift work on the HSU's view gives rise to an entitlement to an additional week. Is that in the fact the position? Then finally, the issue that I already raised which is what does the HSU say is the threshold or the trigger or the criterion which gives rise to the entitlement to the extra week?

PN37

I'm sorry to do this in this unconventional sort of way but if it saves us having to swear Mr Friend in and him having to answer questions under oath perhaps there'll be some time saving.

PN38

THE COMMISSIONER: Thank you. Mr Friend, are those questions you are able to answer on behalf of the union rather than as a witness under oath?

PN39

MR FRIEND: Yes, I believe so. I would be happy to address them as part of – I think it's probably most appropriate, rather than – I don't want to miss something if it's not dealt with in submissions, so for the respondent's benefit I'd be more than happy to address them not under oath but as a representative of the union if Mr Fagir was happy to put those questions to me again just so I can have the documents in front of me and refer to them appropriately.

PN40

THE COMMISSIONER: Okay. So do we need then Mr Hunter to leave the room or is he able to stay? Anybody got any concerns?

PN41

MR FAGIR: Commissioner, I'm sorry to interrupt again. I was just going to say there is one document annexed to Mr Hunter's statement at annexure NDH30 at CB439. It's an email from a Mr Josh McDonald of the HSU to Mr Hunter. That's not in evidence. It's an annexure to Mr Friend's statement. I propose to tender that through Mr Friend – that is ask him whether he can identify the email, and if he tells me he does I'll propose to tender it through him. If that happens then I

don't propose to call Mr Hunter and it might be that we can move straight into submissions.

PN42

THE COMMISSIONER: All right, I think Mr Friend – Mr Friend, you had some questions for Mr Hunter.

PN43

MR FRIEND: Yes, I did.

PN44

THE COMMISSIONER: All right, well, Mr Friend, do you have any objection to Mr Hunter remaining on the line while you answer your questions?

PN45

MR FRIEND: No, Commissioner, I don't.

PN46

THE COMMISSIONER: Okay, and do you have a view about whether that document that Mr Fagir has just referred to can be tendered through you? Have you got it? It's page - - -

PN47

MR FRIEND: I'm just having a quick look at that document now.

PN48

THE COMMISSIONER: It's an email from Mr McDonald to Mr Hunter.

PN49

MR FRIEND: Yes, I mean, it's a document that I'm aware of so I'm more than happy for it to be tendered to the Commission for consideration. In terms of the most appropriate way of doing that I'm largely in your hands, Commissioner. But I have no issue per se with it coming from us. It's simply an email and it gets in either way, I think.

PN50

THE COMMISSIONER: Okay, well, I think in the circumstances Mr Hunter can stay. The email can either be tendered through him or Mr Friend because we're going to need Mr Hunter anyway because Mr Friend has some questions for him (indistinct).

PN51

MR FAGIR: Commissioner, just to be clear about that – if this document is tendered either by consent or in cross-examination of Mr Friend, I propose not to call Mr Hunter or rely on his statement. So he wouldn't be available for cross-examination, unless the Commission - - -

PN52

THE COMMISSIONER: I see. You don't wish to press his statement.

PN53

MR FAGIR: Yes.

PN54

THE COMMISSIONER: Okay. Well, Mr Friend, what does that do to you?

PN55

MR FRIEND: Could I just have one moment to consider this proposal?

PN56

THE COMMISSIONER: Yes, you can just put us on mute, if you like.

PN57

MR FRIEND: Sorry, Commissioner – could I just confirm the document that the respondent is describing – this is NDH30?

PN58

THE COMMISSIONER: Yes – court book 439, email from Mr McDonald to Mr Hunter regarding the HSU's position on 8 June 2021.

PN59

MR FRIEND: Thank you, my apologies – just one moment.

PN60

THE COMMISSIONER: That's okay – just so you know, Ms Jackson is not on mute. She may wish to be. You're on mute, Mr Friend.

PN61

MR FRIEND: Thank you for that moment, Commissioner. My apologies for the delay. Sorry, sincere apologies – just one moment. My apologies for that, Commissioner. Yes, we're happy for that document to be tendered either way. There's no concern with that.

PN62

THE COMMISSIONER: All right, okay – well, do you understand though you won't be able to ask questions of Mr Hunter?

PN63

MR FRIEND: Yes, we do. Yes.

PN64

THE COMMISSIONER: In that case, you can give what I think is the only evidence for the case, Mr Friend. There's no other witness?

PN65

MR FRIEND: I'm used to being the star, Commissioner, so I'm more than happy to.

PN66

THE COMMISSIONER: There are you. (Indistinct). Okay, well, I think because we're going to deal with the tender of that document, we will ask you to take the affirmation so please listen to my associate and give your answers.

PN67

THE ASSOCIATE: Please state your full name and address.

PN68

MR FRIEND: Yes, my name is Christopher Louie Friend, and my address is (address supplied).

<CHRISTOPHER LOUIE FRIEND, AFFIRMED [11.03 AM]

EXAMINATION-IN-CHIEF BY THE COMMISSIONER [11.03 AM]

PN69

THE COMMISSIONER: Thank you, Mr Friend. Do you wish to tender your statement?---Yes, I do, thank you, Commissioner.

PN70

Mr Fagir, any objection?

PN71

MR FAGIR: No, Commissioner.

PN72

THE COMMISSIONER: The witness statement of Christopher Louie Friend, dated 19 August 2022, will be exhibit 1.

EXHIBIT #1 WITNESS STATEMENT OF CHRISTOPHER FRIEND DATED 19/08/2022

PN73

Mr Fagir.

CROSS-EXAMINATION BY MR FAGIR [11.04 AM]

PN74

MR FAGIR: Thank you, Commissioner. Mr Friend, do you have the document referred to as the court book in front of you there?---It's very close to me. We're working on a small table. But yes, I have access to it.

PN75

Do you mind turning to page 439 of that court book, please?---Yes, I'll just go there. Just bear with me one moment, please. Thank you, sorry, I'm just going for that page. Thank you, yes, I have that now.

PN76

Do you see there a one-page document headed – it's some letters and numbers printed at the top, NDH30?---I do.

PN77

And the document itself is an email from a Josh McDonald to Neil Hunter, sent on 8 June 2021 at 9.43 am?---Yes, that's correct.

*** CHRISTOPHER LOUIE FRIEND XN THE COMMISSIONER

*** CHRISTOPHER LOUIE FRIEND XXN MR FAGIR

PN78

Josh McDonald is a member of your team, I take it?---Yes, he's an industrial services officer, which is effectively – or was at the time an industrial officer – effectively somebody working in our call centre.

PN79

You recognise this email as something that was sent by Mr McDonald on behalf of the HSU to Mr Hunter?---I can't say that I have reviewed it prior to this in great detail but I recognise the format of it and believe it to be an accurate description of – or believe it to be a true document sent from Mr McDonald to Mr Hunter on the basis of its appearance.

PN80

Thank you, Mr Friend. Commissioner, I tender the document which appears at court book 439.

PN81

THE COMMISSIONER: Thank you. The email from Josh McDonald sent on Tuesday 8 June 2021 at 9.43 am to Neil Hunter will be exhibit 2.

EXHIBIT #2 EMAIL FROM JOSH MCDONALD TO NEIL HUNTER ON 08/06/2022

PN82

MR FAGIR: Thank you, Commissioner. They're my questions of Mr Friend.

PN83

THE COMMISSIONER: Thank you, Mr Fagir. Mr Friend, you're excused from your affirmation.

<THE WITNESS WITHDREW [11.06 AM]

PN84

THE COMMISSIONER: Well, in that case, in which order do you wish to deal with those questions? Mr Fagir, do you want to ask them now or shall Mr Friend give his submissions first?

PN85

MR FAGIR: Since I kept interrupting the usual orderly progress of this matter could I do that one more time: there have been some discussions between the parties about this issue, which as we see it on any view is not clear-cut. There have been what seem to be reasonably genuine attempts to find some middle ground that will avoid the all-or-nothing result that might obtain if Commissioner, you're called on to deal with the question. From my side of the record, at least, there is some optimism that an agreement could be reached if a little more time was spent potentially with or without the benefit of your involvement, Commissioner, and it can be difficult sometimes because there then arises questions about whether the arbitration could continue and so on.

*** CHRISTOPHER LOUIE FRIEND XXN MR FAGIR

PN86

But in either case at least from our point of view, we think there is possibility that an hour or so dedicated to the discussions and in the context where everyone's mind is really focused on the issues and the risks might be useful. So we wouldn't suggest, Commissioner, that you force anyone into discussions but if there is some appetite for a discussion on the union's side, we for our part have people here that can conduct the discussions and in fact we'd suggest that all the lawyers might leave the room and turn it over to Ms Nielon and Mr Hunter, at least from Opal's point of view, to have the discussion. Given the efficiency with which the evidence has been dealt with this morning, if we spend an hour and we're unsuccessful, then we think we'd still comfortably finish the matter today but perhaps even before lunch.

PN87

So it's a matter for the HSU and if they think the discussions have been exhausted, then we wouldn't suggest that anyone's arm be twisted but if they think there is some value in a discussion, then certainly for our part we'd be open to that.

PN88

THE COMMISSIONER: All right. Mr Friend, would you like to try to resolve this matter before the formal proceedings continue?

PN89

MR FRIEND: Feels almost like a loaded question because we've been attempting to resolve this matter for over a year now. I've got to say I'm a little frustrated with the proposal, to be perfectly honest, because ordinarily such a proposal would come at the beginning of a proceeding, not after I have just given witness evidence so it's – it is quite unusual to propose this now. I can't really understand why this was not suggested at the outset other than to sort of put additional pressure on the HSU to concede something in discussions that have been taking place, as I said, for well over a year and were taking place as late as last Wednesday, when I attended a meeting with the respondent.

PN90

So we have tried very, very hard to settle this. It's been conciliated and gone through a matter with another Commissioner. I don't know how much utility there is, Commissioner, so I don't really wish to waste the Commission's time. Having said that, we're amicable people. We're always open to a constructive resolution if possible. So we are happy to try again though I'm not as optimistic as the respondent perhaps. Let's have a go.

PN91

MR FAGIR: Well, Commissioner, it's a matter for Mr Friend. We don't want to force him to do it. We don't want to give any sustenance to whatever conspiracy theory it is about a concession to the tender of an email that was sent to his own worker so if that's the view then perhaps it will be a waste of time. We don't want to force anyone to do anything that makes them feel frustrated or dissatisfied so it's a matter for you, Commissioner, anyway.

PN92

THE COMMISSIONER: All right. Well, let's give it a go. I always encourage parties to try and resolve matters if they can and you talked about another member

of the Commission and, Mr Friend, maybe I can assist. Does anybody have any objection to my involvement in the matter? Mr Friend?

PN93

MR FRIEND: No.

PN94

THE COMMISSIONER: Mr Fagir.

PN95

MR FAGIR: No, there's no objection from our side, Commissioner.

PN96

THE COMMISSIONER: We'll go off-record and just before we do, if there is any – if you get to a point in our discussions where you feel like it's going nowhere just let me know and we can come back. All right, so we'll go off-record.

OFF THE RECORD **[11.11 AM]**

ON THE RECORD **[2.03 PM]**

PN97

THE COMMISSIONER: All right, welcome back. Mr Friend, over to you.

PN98

MR FRIEND: Thanks very much – sorry, I'm getting a little feedback.

PN99

THE COMMISSIONER: Ms Kennett, if you could put yourself on mute, thank you.

PN100

MR FRIEND: Thank you – sorry. Is that – now I can hear, that's much better, thanks. Thanks, everyone – apologies. I'll keep this relatively brief, I think. The HSU relies on the written submissions that have been filed and served on the parties. We say fundamentally that this is a relatively straightforward matter. It's basically a matter about whether or not Opal HealthCare can change their practice of classifying aged-care worker employees as shift workers for the purposes of annual leave by effectively creating and applying a new threshold that 65 per cent of the total hours worked must fall outside the span of hours of a day worker, being 6 am to 6 pm, Monday to Friday. That's confirmed in the written submissions on behalf of the respondent at paragraph 2 in their written submissions.

PN101

We say that this gives rise to a number of concerning problems. The most obvious of which is if we accept that the submissions that have been put from Opal, you would be able to have someone who regularly works a particular day or time of the week – time of the shift – if they work at least two thirds of relevant days or times. So for example, somebody could regularly work a Thursday evening shift but not be considered a shift worker. That is inconsistent with the

terms of the enterprise agreement. We say it's inconsistent with industrial practice for the aged-care sector and the only basis that the respondent seems to be able to muster in terms of an industrial background to support its position is the misapplication of the Roy Hill decision, where they're trying to construe the term, 'regularly rostered', to mean something that it simply does not. The position of the respondent is not only unsupported by evidence in case law but it's also fundamentally unfair to the aged-care workers engaged by the employer and it would create an entitlement – I think it's fair to say – that is so restrictive that it's completely out of step with the rest of the aged-care industry.

PN102

In a somewhat strange turn of events, it would also be so out of step with Opal itself as an organisation where the enterprise agreements which are in place covering employees in other states would have a significantly more generous provision than the threshold now being applied here in New South Wales. We say that the HSU is simply pursuing an application of the plain and ordinary meaning of the agreement's terms as they are intended. Clauses 34.1B and 23A alone set the threshold that must be satisfied for the purposes of receiving an additional week of annual leave. Now, Opal may not like that. They may say that's not what they want to apply but that is what is written very clearly in the enterprise agreement.

PN103

The terms of the enterprise agreement are so clear and so specific that the drafters of the enterprise agreement saw it fit to specifically call out at clause 34.1B that something different was happening with this particular clause. They've deliberately chosen to use the words, 'For the purposes of this clause', to identify that something special is happening and then they have proceeded to refer directly in text and in cross-referencing to a definition of a shift worker which is someone who is not a day worker as defined in clause 23A. This is more than just, you know, potentially a cross-referencing error or something to that effect. This is a very deliberately chosen set of words to provide an entitlement which up until March of 2021 we had no problem with the way that was being applied.

PN104

But what has happened is the organisation has decided deliberately to apply this provision differently. They've conjured up a threshold that they're now sort of trying to jam into some sort of industrial history to give it legitimacy in creating the 65 per cent threshold and it simply does not accord with the words that are on the page. To put it very simply, a shift worker, for the purposes of the additional annual leave entitlement, is an employee that does not work ordinary hours between 6 am to 6 pm Monday to Friday. If we turn to the drafting principles of Berry – I won't go into extensive detail because it's canvassed in our submissions – but it's relevant or it's particularly relevant in this matter because there is such a divergence between what the employer was doing prior to March of last year and what the employer has sought to do from March of last year and they are attempting to re-write the entitlement and the way that it is applied which is specifically against the Berry principles of interpreting enterprise agreements or interpreting drafting, which talk about not involving rewriting the agreement to achieve what might be regarded as a fair or just outcome.

PN105

Whilst Opal may say what they're doing is simply to achieve what they view as a fair outcome, it is not appropriate to go and rewrite an enterprise agreement – or to re-interpret, rather – an enterprise agreement during the life of that enterprise agreement, I might add, to mean something completely different. Now, in the event that clause 23B is found to be relevant to clause 34.1B. The respondent is incorrect in its assertion that a worker must work 65 per cent of their total hours outside the span of Monday to Friday 6 to 6. This system of proportioning is absolutely baseless in the enterprise agreement. It's not what the enterprise agreement says, nor is the HSU aware of any other provider in the aged-care industry that applies this approach.

PN106

Further, the question of whether someone is regularly rostered to work as a day worker or a shift worker should not necessarily be mutually exclusive. For example, in the aged-care industry, it's common for staff to be regularly rostered to work outside the hours of a day worker - for example, someone who works every weekend – while also regularly being rostered to work inside the hours of a day worker – for example, someone who also picks up shifts Monday to Friday between 6 to 6. As a point of comparison the annual leave clause in the aged-care award does not require the employee to be exclusively or predominantly one over the other. You absolutely can be both. Opal's interpretation of the clause, however, totally forbids this, by assessing the total amount of work and determining the employee is either and only as one of a day worker or a shift worker.

PN107

Quite bizarrely – and this is unusual to the case – Opal's interpretation could also mean that an employee is neither a day worker or a shift worker. For an example, an employee who works 60 per cent of their total shifts as a shift worker would fall short of meeting Opal's threshold of 65 per cent but they would also not meet the same threshold of shifts, being day shifts, which is clearly just a preposterous outcome. I imagine Opal is not intending to – makes no sense, really. The respondent's submissions fail to adequately reconcile their position and the provisions of the agreement. Not only have they failed to justify their application of the agreement but the relevant authorities and industrial legislation actively exclude their application. The position asserted by the HSU is favourable as it abides to the plain and ordinary meaning of the relevant clauses. The position asserted by the HSU is favourable, as it abides to the plain and ordinary meaning of the relevant clauses, it gives rise to a common sense and purposive approach in awarding additional annual leave entitlements to workers who work outside of the ordinary span of hours.

PN108

It is supported and instructed by enterprise agreement interpretation authorities. It is what was intended by the parties at the time the agreement was drafted. It was how the agreement has been applied up until March of last year and it doesn't go below the threshold set in the award. As such we maintain our position that 34.1B and 23A alone set the threshold that must be satisfied for the purposes of receiving an additional week of annual leave and that a shift worker for the

purposes of the additional week of annual leave entitlement is an employee that does not work the ordinary hours between 6 am and 6 pm Monday to Friday. Thank you, Commissioner.

PN109

THE COMMISSIONER: Okay, (indistinct) clause 3.2 of the agreement, please.

PN110

MR FRIEND: I'm just going to grab that – clause 3.2?

PN111

THE COMMISSIONER: Yes, page 31 of the court book.

PN112

MR FRIEND: Clause 3.2 – sorry, I'm just finding it – yes.

PN113

THE COMMISSIONER: Okay – just have a look at that and then tell me what you think that means in the context of this dispute.

PN114

MR FRIEND: 'Where this agreement refers to an entitlement' – is that the clause we're talking about?

PN115

THE COMMISSIONER: Yes.

PN116

MR FRIEND: I believe that it's (indistinct) NES precedent clause that would say that the NES definition applies.

PN117

THE COMMISSIONER: Yes.

PN118

MR FRIEND: I may be missing the point, Commissioner. Would you be able to assist?

PN119

THE COMMISSIONER: Well, if you have a look at clause 32, clause 34 is dealing with an entitlement provided for in the NES, being annual leave.

PN120

MR FRIEND: Yes.

PN121

THE COMMISSIONER: So under clause 3.2: 'Where this agreement refers to an entitlement provided for in the NES, the NES definition applies'. So I suppose my question is, is there something in the NES that adds to how one might understanding operation of the additional week of annual leave for shift workers under the agreement.

PN122

MR FRIEND: I understand. I had hoped so, when I reviewed the NES in preparation for the case. My recollection off the top of my head is that the NES does not provide – I'll just bring it up – I don't think the NES provides a definition itself for – this is again just off the top of my head. I don't believe the NES actually provides a definition for – to access an additional week of annual leave. It simply refers an individual to either an award or an enterprise agreement, if there is one in place. And if not, if the person is an award-free employee, it then refers to the Fair Work Act definition, which is – was the subject of the Roy Hill matter.

PN123

So my understanding is that the NES provides no guidance on a definition of shift worker for the purposes of annual leave, which is a little frustrating. I had thought that that might solve some of our problems as well but - - -

PN124

THE COMMISSIONER: All right. Then if you can just come back to clause - - -

PN125

MR FRIEND: I'm happy to be corrected on that by the other side or anyone else.

PN126

THE COMMISSIONER: Don't worry, I'll give Mr Fagir a chance. Back to clause 23A – isn't the difficulty with your submission that 23B is irrelevant, effectively – that 23A doesn't define what a day worker is?

PN127

MR FRIEND: Well, it provides a span of hours that a day worker works and we say that the provision in the annual leave section has deliberately decided to define how somebody accesses the additional week of annual leave and has deliberately referred to working outside of that span of hours. Now, it could have been raised differently. It could have been constructed differently and said that someone who doesn't meet the definition of a day worker is a shift worker. It could have been structured differently but it was not and as I said in my submissions, the words were chosen incredibly deliberately to not just sort of cross-reference with 23A or 23B but to actually adopt the words of 23A. So I would argue that they have been very deliberately chosen for inclusion and I appreciate that the enterprise agreement could defined things differently but it didn't and that was Opal who drafted the enterprise agreement and it was Opal who had appeared applied the enterprise agreement without – we say – any faults up until March of last year.

PN128

THE COMMISSIONER: (Indistinct) not much turns on who wrote the text. It's what the parties agreed at the time and clause 34.1B refers to a definition and the only definition in clause 23 is the definition in clause 23B.

PN129

MR FRIEND: I mean, I think you could – it says, 'Not a day worker as defined in clause 23A', and clause 23A provides a span of hours that a day worker works so I

think if there was to be – if there was to be a confusion about which of 23A or B is being referred to, it is clearly not 23B, because it is seeking some of definition. I mean, if it wanted to refer to 23B then it simply should have done that. It shouldn't have included the words, 'Who is not a day worker', as defined in clause 23A. The parties couldn't – personally I was not at the bargaining table when this agreement was struck but the parties couldn't read that and assume that it actually means 23B because of a reference to a definition and that 23A is somehow irrelevant.

PN130

THE COMMISSIONER: 23A is not irrelevant because it is specifically referred to in 23B.

PN131

MR FRIEND: That's right. I mean, the annual leave provision could have referred – it could have used the words, picked up the words in 23B and adopted those and said, 'A shift worker for the purposes of annual leave is someone who is regularly rostered to work their ordinary hours'. It could have described it that way but it didn't. It chose to define it as not being a day worker, which I accept is perhaps a little clunky. But it's fairly explicit. I don't see how anybody could look at that and think that what is actually intended is for someone to be what is referred to in 23B. It is specifically not that way.

PN132

THE COMMISSIONER: All right. If I understand your submission correctly, it's that when 23B – assuming I'm allowed to look at it – says: 'A shift worker is an employee who is regularly rostered to work their ordinary hours of work outside the ordinary hours of work'. The reference there to, 'their ordinary hours of work', is not a reference to their total ordinary hours of work for the week but any ordinary hours that they work.

PN133

MR FRIEND: I think – yes, the fact that 23B is not included in the annual leave provision obviously means there is limited scope of applicability here but if it were something that needed to be considered then we don't say that – there is no amount there. It doesn't say it has to be 50 per cent or 65 per cent. It just says an employee who is regularly rostered to work their ordinary hours of work outside the ordinary hours of a day worker is a shift worker. So if somebody was regularly rostered, like our members, to work two days – being Saturday and Sunday – outside of the shift worker, outside of the ordinary hours of Monday to Friday, 6 to 6, I think they should qualify as a shift worker.

PN134

The problem with Opal's interpretation is it sets up this very awkward reality for people where, for example – and this is the real world example we've got – employees could work Saturday and Sunday but also pick up shifts during the week and Opal has, through the discussions, the respondent has said that if those people dropped their shifts during the week and therefore worked more shifts as a proportion of total work on the weekend than they did during the week, then they would qualify. I mean, that is clearly an absurd outcome. The disadvantage of somebody working every Saturday and Sunday is the same whether they work

every Saturday and Sunday and Monday, Tuesday, Wednesday, or whether they simply work every Saturday and Sunday.

PN135

This proportioning of total work sets up something that I'm not familiar with in any other environment – where somebody is disadvantaged for picking up work during ordinary hours. So yes, I think if we look at 23B a shift worker is someone who is regularly rostered to work outside of the ordinary hours but that could be as little as one shift per week. I don't think – you know, there is no guidance there. There is no – and it would have been perfectly possible for the employer to propose ultimate words, putting in a threshold to their employees, but they did not and they haven't operated that way since the enterprise agreement came into force. They've only operated that way in the last 18 months.

PN136

THE COMMISSIONER: All right, thank you, Mr Friend. Mr Fagir.

PN137

MR FAGIR: Thank you, Commissioner. It seems a long time ago now but I had invited my friend to deal with some questions that I posed which I could probably summarise as follows: does it remain the HSU's position that the enterprise agreement is different to the award in this relevant respect; does it remain the HSU's position that the extra week under this agreement applies to anyone who works any ordinary hours outside the day worker span and finally, the more general question was what is the HSU's view of the threshold or the trigger? If it is not 65 per cent of a worker's ordinary hours, what is it? I don't think I would now make Mr Friend deal with those questions but the fact that they haven't been dealt with is itself significant and I will say something about that in due course.

PN138

Could I otherwise begin by dealing with some of the more normative or general statements that were made about the fairness of the view adopted by Opal? Firstly, to the extent that it's said that there is, in this case, some departure from practice in the industry, there is no evidence of that. The statement was filed by someone apparently experiencing these matters who chose not to say anything about practice in the industry and the Commission should take it that the things said about that from the bar table are opposed. The second point is that to the extent that it's said there is some divergence between Opal's practice in New South Wales and Opal's practice in other states – well, to the extent that that's so, it reflects the difference in the language of the enterprise agreement.

PN139

It's quite unsurprising in the context of different agreement provisions that different entitlements would apply. Unless one actually goes to the trouble of comparing the rights and obligations of the parties under the different agreements, it doesn't take us very far to say they're different. Well, that's enterprise bargaining. That's the idea. You can come up with whatever arrangements suit you in your enterprise and in a particular section of your enterprise and the fact that if it is a fact that an entitlement in one subclause of an enterprise agreement differs from an entitlement which applies in a different state is quite immaterial and is certainly not proof of unfairness or unreasonableness.

PN140

To the extent that there has been any specific identification of unfairness it involves two employees who in effect work permanent weekends. No other employees or categories of employees, for example, have been given. Now, in relation to the two employees working permanent weekends, one might accept that they could be better off under the traditional formulation dealing with regularly being rostered to work Sundays and public holidays. Now, there is a question mark about that because we don't know what's happening with public holidays but if one assumes for the sake of argument that these employees regularly work public holidays so as to trigger an entitlement under the conventional formula, one might accept that they'd be better off under the traditional formula.

PN141

Conversely, there are employees who have the benefit of this particular provision who wouldn't get it under the more common provision which the cases dealt with. For example, employees working shift work Monday to Friday or Monday to Saturday would not under the usual formula be entitled to the extra week of leave. They might well, under this formulation. So again, it's not proof of unfairness or unreasonableness or any other consequence that might weigh against Opal's interpretation to say that the outcome is different. It's different because the entitlement is framed differently and if there is a concern about that, then it's something that could have been raised in enterprise bargaining and can be raised in enterprise bargaining or award review or through what other means, but again there's no point just saying it's unfair because it's different, that just doesn't follow, in my respectful submission.

PN142

Finally, before I move on and come to really the substance of the debate, can I just point out that it has been said that there's something outrageous or contumelious in Opal's view about the interpretation of this agreement, including the idea that the 23B requirement is in play. That's a little bit difficult to accept in circumstances where until very recently the HSU's own view, including as expressed in the email that I tendered earlier, but in a number of other documents, the HSU's own view was that there was a requirement of regularity, as we say, albeit of course there's been disagreement about what that imports, and in circumstances where the HSU's view seemed to be that the correct approach was to adopt the alternative route under the award and extend the entitlement to people who work 10 or more weekends.

PN143

Now, that might have been a pragmatic industrial solution, but it doesn't really sit with the idea that the words of this provision are so clear that it's outrageous or a sign of bad faith to purport to read them differently to the way that the HSU puts it today, although not the way that they put it a month ago.

PN144

Could I then say something about the principles of interpretation, and I will try not to bore everyone too much. We talk about these principles time and again, but there's some perhaps special utility in dealing with them in this case, because it is such an archetypical industrial instrument interpretation case where there's no

obvious answer and where the Commission is really forced to try to make sense of something that's not clear on its face.

PN145

One thing that's important to bear in mind as part of this process, and we say this in response to some things that were said in the HSU's written submissions, it's important to bear in mind the difference between extrinsic material and surrounding circumstances on the one hand, and contextual material on the other. Context is always relevant. Extrinsic material and surrounding circumstances are sometimes relevant if an ambiguity threshold is passed on at least some of the authorities.

PN146

Now, in this case there is essentially no extrinsic material relied on by either party. There was some evidence of bargaining minutes and so on that were annexed to a statement which ultimately wasn't admitted into evidence. Beyond that all the things that I am going to say about the agreement beyond the text are matters of context. In the industrial arena when we talk about context that incorporates a variety of things. One is the need to read the whole of the instrument. All of the enterprise agreement is part of the relevant context, and the goal is to read whatever provision is particularly in view in such a way that the agreement as a whole makes sense, and as far as it can be made to operate coherently to do so. So it is, in my respectful submission, never correct to approach an agreement on the basis that one looks at one sub-clause and ignores the rest.

PN147

Another aspect of context in relation to enterprise agreements is associated documents, and that potentially includes the industry award, although we don't say something about that, although not a great deal. A critical feature of the context when it comes to industrial interpretation is the assumption or the working hypothesis that the drafters of an industrial instrument intended a sensible common sense outcome, something that was reasonable and made sense within the particular industry, and that means that a reading of text which produces something which isn't logical or sensible or industrially reasonable is taken to be unlikely to have been intended.

PN148

That doesn't mean it's impossible, but to the extent the language permits one view or another where one is industrially sensible and one isn't, the preference is for the former, and that is as I say because there is an assumption which has been adopted for probably a hundred years that the goal was to produce something sensible as opposed to something that was arbitrary more unreasonable. And just to give an example of that principle in action we have referred to the decision of the High Court in one of the SDA v Woollies cases. Commissioner, I should have checked, do you have a bundle of our authorities with you?

PN149

THE COMMISSIONER: Yes.

PN150

MR FAGIR: The critical passage is at 403; 403 of the bundle I should say.

PN151

THE COMMISSIONER: Yes.

PN152

MR FAGIR: The decision itself is short. In fact perhaps I should start at 402, paragraph 11. The issue here was a question of payment of public holiday penalties, and on the SDA's view some employees got penalties for two different days, and the question was whether that was indeed the effect of the enterprise agreement or not. This was a decision of Justices Marshall, Tracey and Flick, three I might say very, very experienced industrial judges, and at 11 in the context of dealing with this question of interpretation they pointed out that:

PN153

It could not have been the intention of the parties to the agreement to allow employees who were expected to perform their ordinary duties on Sunday 25 April 2010 to have that day as a public holiday as well as the following day, Monday 26 April. Double dipping in respect of public holidays in that way would not have been within the reasonable expectations of the parties to the agreement or the arbitral body which certified it.

PN154

If we move forward to paragraph 16 their Honours explain why that is relevant, how that issue of double dipping being unlikely to have been intended comes into play. They explain at 17 having said something about the High Court's decision in Amcor they extracted some things that Justice Weinberg said in Lion Nathan Australia v Coopers, which was effectively determining the objective intention, which of course that's the goal. Regard has to be had to the words themselves, but also to the surrounding circumstances which include the underlying purpose and object of the transaction. Their Honours at 18 over the page say:

PN155

What is true of commercial contracts and their construction is also true of industrial agreements.

PN156

And here is the nub of the analysis:

PN157

The issue currently in contest between the parties may fairly be resolved by asking the following question: given the purpose of public holiday provisions and the purpose of creating additional public holidays, could it be reasonably intended by industrial parties to an industrial instrument that a person would be entitled to the benefit of a public holiday effectively on two days.

PN158

Their Honours go on to say, 'The answer is obvious and it must be no.' So that is as I say a pithy illustration of the way that that idea that one assumes that a sensible industrial result was intended operates really when the rubber hits the road and one deals with a specific provision and has to elect between two

possibilities. In this case on the face of it the SDA's view was probably the really obvious one; that is that you got a public holiday penalty twice, or public holiday benefits twice, but their Honours said could that be what the parties have intended, and if the answer is 'No' then that's decisive, the question of construction.

PN159

That mode of analysis really applies in relation to commercial contracts and a variety of other instruments, but it has particular force in relation to industrial instruments because everyone knows that these instruments are not always drafted with the care and attention that might attach to a commercial contract, something that was produced as a result of a precedent or whatever it might be.

PN160

We know these things are thrashed out often under difficult circumstances by people who are just trying to produce a reasonable result and aren't necessarily sweating over dotting every 'i' and crossing every 't' more often than they are able to, and that's why this focus on the assumption that a reasonable result is assumed to be intended the assumption could be displaced, but that's the starting point. It's particularly important in relation to industrial instruments.

PN161

Now, can I then come to the text of the agreement we are dealing with, and clauses 34 and 23 obviously are in play, and the first question is, as we explained in our written submissions and I won't tarry on this too long, the first question is whether clause 23B is in play. And as we noted in our written submissions and as you raised, Commissioner, with my friend today, the starting point or the starting difficulty in the assertion that this is absolutely crystal clear, that only 23A is in play, is that 23A doesn't actually define a day worker or a shift worker or anyone else.

PN162

It identifies a particular entitlement or a condition that applies to a day worker, which is that their standard hours is 6 am to 6 pm, and it's only when one has regard to 23B that one is able to understand who is a shift worker and who is a day worker. The shift worker is the person who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker, and everyone else is a day worker.

PN163

As a matter of purely textual analysis and looking only to clauses 34 and 23, in my respectful submission the position is as we put it, that is that the shift worker is a person described by 23B. Could I point out that the HSU in its written submissions and today is adamant that the contrary view is so obvious that it goes without saying. If one actually looks to their own submission at paragraph 25 - I don't think you need to turn to it, Commissioner, I will just read it out - the submission is that referring to 23 and 34 read together:

PN164

A shift worker for the purposes of annual leave is an employee whose ordinary hours of work are outside the hours of 6 am to 6 pm Monday to Friday.

PN165

That's what they say is the meaning of the agreement, but those words do not appear in the agreement itself. That is on the HSU's approach it's necessary to paraphrase the language to produce what they say is the relevant definition, and it's one which doesn't appear on the face of the agreement itself.

PN166

As we pointed out in our written submission another factor weighing in favour of the construction which we champion is that there would be very strange results obtaining otherwise, and as I pointed out the HSU so far studiously avoided dealing with this question of what is the threshold for the entitlement. But if we have understood correctly some of the things that have been said today it's that the additional week of leave is triggered by working one ordinary hour outside this span in a year, as far as we can tell.

PN167

If I'm wrong about this, well we will be told that that's the case, but that seems to be the situation now, and conversely the other strange result that flows from this view is that the entitlements to leave loading and meal allowance, which on any view are dependent on the clause 23B definition, are subject to a higher threshold of regularly being rostered, whereas the annual leave entitlement is on the HSU's view more easily won as I say on the basis of working any ordinary hours at all outside 6 am to 6 pm Monday to Friday.

PN168

The third factor we point to in support of our view on this question is that it's consistent with the industrial purpose of the additional leave entitlement, and I will come to the authorities dealing with this in just a moment, but the short point is that the extra week has never applied to shift work per se, it's applied to specific categories of shift work. And on the HSU's view there would be a different approach taken in this agreement, and probably in this award, which is that any shift worker whether they work Sundays and public holidays or not, whether they work any weekends or they work some tiny proportion of their ordinary hours outside the span, would be entitled to the extra week.

PN169

It is, coming back to the point that I was making about the assumption of industrial reasonableness, it's possible that the parties agreed that you'd get an extra week for working one hour outside the span, but it's pretty unlikely, and to the extent that the text admits of any different view a different view would be preferred; that is the result is so strange that it's highly unlikely that objectively assessed that it reflects the parties intention.

PN170

The fourth point that we would make about this, and I have dealt with this already, is that the HSU's view doesn't give us any clear or coherent or consistent criterion for the determination of when the extra week is earned. We know that because they just won't tell us. We know that because they previously were driven to import reading in totally extrinsic language about 10 weekends into it to identify a kind of workable threshold. And we know that it's very, very difficult or impossible to identify the sensible criterion on the HSU's view of things, because

they just won't do it, and even though we asked for it this morning and even though there have been two sets of written submissions and a set of passionate oral submissions just put, that simple question of when do you get it hasn't been answered so far by the HSU.

PN171

Finally, or two final points; one is that one would accept that the view for which we argue could have been more clearly reached otherwise, for example by cross referencing clause 22 or clause 22E specifically, but as the authorities have said time and again, and literally for a hundred years, precision in drafting isn't a feature of enterprise agreements and industrial instruments, and inconsistencies or infelicities to use the slightly outdated view that some of the cases adopt, are to be expected, and one truly astute not to make too much of those sorts of infelicities or inconsistencies.

PN172

Now, that's what we say about 23B in terms of its application to the annual leave entitlements. If, Commissioner, you accept what we say about that the question is then when is an employee regularly rostered to work their ordinary hours outside the ordinary hours of a day worker. There's no definition of course in the agreement, and therefore one looks to either the ordinary meaning of the words or in cases where there's some well-established industrial meaning to the industrial meaning.

PN173

I should firstly underline what we say at paragraph 30 of our written submission; that is the ordinary meaning of regular relevantly can be one of two things. The first is that it means something follows or is arranged in a pattern, or a second potential meaning is that something is done, the same thing is done often or happens frequently. We say that those are two of the possible views of the words that are taken; a concept of something happening in a pattern, or alternatively something happening frequently, and in our respectful submission it's the second of those ordinary meanings which is applied in the industrial arena. That is, and I will come to the cases in just a moment, when one talks about regularity of rostering in the context of industrial instruments we're not talking about something happening in accordance with a particular pattern. In fact there's authority to say there doesn't need to be a pattern. What we're talking about is a particular threshold of frequency.

PN174

Can I come to the authorities that we say give support to that view. I'm sorry, I will jump around a little bit here, but could I begin with the One Rail decision, and in particular I want to take you, Commissioner, to some of the things that are said at page 79 of our authorities bundle, and I will start at paragraph 53.

PN175

THE COMMISSIONER: Yes.

PN176

MR FAGIR: Here this is a decision of Commissioner Hampton, but it usefully identifies some analysis in a different authority, which is also relevant. Starting at

53 the Commissioner refers to the things that Deputy President Anderson had previously said; that is that the ordinary meaning of the phrase 'regularly working on Sundays and public holidays' was in the context of that particular agreement, not materially different to the way it was used in other industrial instruments, and the meaning was that the employee must work at least approximately 34 Sundays and six public holidays in a given year to be entitled to the extra week. And the analysis supporting that view follows where Commissioner Hampton quotes the Deputy President saying:

PN177

The phrase 'regularly works on Sundays and public holidays' is not unique to this agreement or unfamiliar to industrial regulation.

PN178

A view that we would of course embrace. The Deputy President pointed out:

PN179

The phrase has been the subject of past interpretation by the Commission and its predecessors including in the context of shift work and annual leave provisions.

PN180

There's a reference there to Roy Hill. If I pass down to quoted paragraph 55, I am now on page 80. 'The decision in Roy Hill' - the Deputy President said - 'and the line of authority it draws from' - and this is perhaps a relevant point, but the decision in Roy Hill referred to a series of earlier authorities and perhaps it drew some threads together. But it didn't invent the concept, it merely applied the existing authority in relation to the particular dispute. If I come back to the extract:

PN181

The decision in Roy Hill and the line of authority it draws from the Commission's predecessors and state tribunals suggests that the additional week of annual leave was not, in its conception at least, an entitlement that adhered to shift work per se, but rather served an identifiable purpose: it compensated employees for the inconvenience associated with working a substantial number of Sundays and public holidays.

PN182

In paragraph 58 the Deputy President said:

PN183

In the context of clause of that agreement the word 'regular' has a temporal meaning; it requires a level of frequency in the sense that the number of Sundays and public holidays worked in a given year must be of sufficient number to allow it to be objectively said that those days are regularly worked.

PN184

And consistent with what I have just said about the ordinary meaning which applies in this context the Deputy President said:

PN185

I do not interpret the word 'regular' so narrowly as to compel a systematic pattern of working Sundays and public holidays across given weeks or periods. Sufficient numerical frequency across a given year, even if the product of random or non-systematic patterns of work, would be capable of constituting regularly working, at least for the purposes of that agreement.

PN186

We then return to the Commissioner's own analysis. I will deal with this briefly, but at page 82 of our bundle beginning at paragraph 59 the Commissioner says something about the Full Bench decision in the *Registered and Licensed Clubs Award Decision*, and he accepts, as we do, that the effect of the Full Bench decision was that the two-thirds requirement doesn't necessarily apply in every context and has to be applied having regard to the circumstances of the industry or enterprise. I am sorry, at paragraph 62 the Commissioner says this:

PN187

The Full Bench decision reinforces that the meaning to be attributed to the general terms 'regularly works on Sundays and public holidays' should be understood in the industrial historical context of the instrument and the industry.

PN188

And at 63 he pointed out that the Full Bench said that the strict formula might not always be applicable in effect, and we accept all of those things, that it's not an absolute, that one has to have regard to the circumstance of a particular industry, and it's possible in a particular context that a different result would be appropriate.

PN189

Finally, in terms of this decision the Commissioner at 76, bundle page 86, points out that the phrase there 'regularly works on Sundays and public holidays' isn't defined by reference to a particular benchmark of days, but the Commissioner said:

PN190

The term is ambiguous and capable of various meanings. In that light, and although not by itself determinative, it is appropriate to recognise that part of the broader context is the long history of the provision - - -

PN191

Referred to in Roy Hill, adopted in Deputy President Anderson's earlier decision, and inferred, perhaps implied, in the *Clubs Award Decision*, and the Commissioner then applied that conventional analysis in the particular case before him.

PN192

Could I then - and I will deal with these other decisions more briefly - in paragraph 126 of our bundle is *AMWU v Wyoming Australia Pty Ltd.*

PN193

PN194

THE COMMISSIONER: Yes.

PN195

MR FAGIR: This was in fact a decision that Commissioner Hampton quoted from. At 53 as we noted the Deputy President pointed out that the phrase 'regularly works on Sundays and public holidays' has a long industrial history. At 55 again he pointed out that Roy Hill drew from a long line of authority, and again emphasised that it's not a matter of a pattern, it's a matter of frequency. And ultimately at 60 in the third sentence the Deputy President said:

PN196

Whilst there is an element of degree inherent in the word 'regularly', from purely a construction point of view a materially lesser amount - - -

PN197

Less than 34 and 6.

PN198

- - - would not constitute regularly working. For example, without particular evidence of unique context or common intention, working only one half or less of available Sundays and public holidays each year would not be working those days on a regular basis.

PN199

So the point - I am perhaps now labouring a little - is that it's not about pattern, it's about frequency, and that in the industrial context even if you worked for example half of the available Sundays in a year that would not be sufficient to be regularly working Sundays, at least not unless there was some indication that some departure from the usual approach was contended or was warranted having regard to the particular context of the enterprise agreement.

PN200

The last decision that I want to take you to, Commissioner, is *Leading Age Services*, and I want to start at paragraph 46 which is at page 312 of our bundle. I should start a bit earlier. At page 309 the Full Bench was dealing with the third variation sought to be made to the Aged Care Award, and at paragraph 40 the Full Bench reproduced the change that was proposed by the relevant party, and that was to define regularly rostered specifically to mean:

PN201

Rostered to work 34 or more calendar weeks in a year where any shift in a week is outside of the ordinary hours of work of a day worker.

PN202

And then there was a provision that dealt with those who worked less than a year, and it's effectively a pro rata requirement. So this is one of the many poor parties who came along and said, 'Can you please tell us what regularly rostered means.' They like all the others failed, but the point that I wish to underline is that at paragraph 46 the Full Bench refers to a submission from AFEI, a New South

Wales employer organisation of very long history. AEFI had submitted that if the change that had been proposed were made:

PN203

It would be sufficient to work one weekday shift a week outside of ordinary hours for 34 weeks to qualify for the extra entitlement, and the variation would have the likely effect of making a significant proportion of employees eligible for the entitlement and thus obviously increase significantly the costs of employers in the industry.

PN204

So that was the submission that was made at 46. The application was rejected on various grounds, bearing in mind that this was the award review and there was a particular threshold of cogent reasons and so on. But relevantly in the second part of paragraph 52, which appears at the top of page 314, the Full Bench said:

PN205

The AFEI analysis, which indicated that the variation would if granted have the effect of significantly expanding the proportion of employees who would be entitled to the extra week's leave was not responded to by ACS.

PN206

That was the proponent of the change. The Full Bench went on to say that they didn't consider in the circumstances that it would have been open - bearing in mind this was an appeal from a single member decision - they didn't consider it would have been open on ACS's evidentiary case for the proposed variation to be made. So the point that we seek to make there is that the view of the Full Bench, although expressed indirectly was clear enough, that is that if the provision were altered such that it was sufficient to work one shift a week for 34 weeks outside the ordinary span, if that change were introduced there would be a significant expansion in the entitlements.

PN207

And that's relevant of course in this case because we have here the HSU saying, if we've understood it correctly, that it's enough to work one hour outside the span, perhaps one hour in a year or maybe there will be some other formulation that's proposed. But to the extent that it said that it would be enough for there to be one shift as opposed to one day shift for 34 weeks the Full Bench said one of the reasons that we wouldn't accept that is that it would expand on the notion of what being regularly rostered to work outside day worker hours means.

PN208

So the conclusions or the propositions that we draw from those authorities which are probably tediously surveyed include at least these; firstly, the extra week is not an entitlement, at least traditionally, that adhere to shift work per se, it adhered to shift work of a particular character. That character involved regularity of work. The regularity that was required was not a pattern of frequency, and the conventional view was that the frequency required was two-thirds of the possible total days that could be worked. So if we're talking about Sundays it had to be two-thirds of Sundays. If public holidays were in the mix it had to be two-thirds of public holidays. And then finally the proposition as I said we draw from the

Leading Age Services case is that a move to a requirement of one non-day shift a week for 34 weeks would expand on the existing award entitlement.

PN209

All of that is really on our view the easy part of the case, and I will now try to deal with what we think is the hard part; that is how does one transpose the analysis that applies to the concept of being regularly rostered to work Sundays and public holidays into the context of this agreement and indirectly this award, which doesn't refer to Sundays and public holidays, but refers to working ordinary hours outside the day worker span.

PN210

And we have dealt with this at paragraphs 37 and 38 of our written submission, and the way that we put it - I must say this might just be my lack of arithmetical nous. It took me a bit of time to get my head around this concept, but we say it's right. Just dealing with a full-time worker for simplicity sake in the first instance the worker works 38 hours a week in the same way that the workers in the traditional cases work, potentially up to 52 Sundays, and the question that's assayed in those cases is how many of the Sundays have to be worked to be regularly working on them, and the answer is two-thirds. And we say the same analysis can be applied here.

PN211

If an employee works all 38 hours within the day worker span they're obviously not regularly rostered to work outside the span. If all of their hours are between 6 pm and 6 am and on weekends obviously they must be regularly rostered outside the span and they obviously are shift workers, and the point at which the line is to be drawn is two-thirds of the potential hours worked in a week. That is if two-thirds of your 38 hours are worked outside 6 pm to 6 am on weekends you're regularly working your hours, your ordinary hours outside the span. If you're working less than that then you don't meet the threshold of frequency which is called up by the requirement to be regularly rostered.

PN212

In the case of a part-time worker the same analysis applies, but by reference to the actual ordinary hours worked as opposed to the 38. Can I just for completeness point out that the way Opal applies this now is more favourable than what I have just said in that Opal treats a shift, any part of which falls outside the day worker span, as being completely counted in the analysis. So if you work seven hours within the span, one hour outside, Opal currently treats that as being eight hours outside the shift worker span. Now, as I am instructed there's no intention to depart from that, but in having this debate now we're trying to put the position, the strictly correct position as we understand it, and that is that it's an hour by hour calculation. I don't intend that to be a distraction, but I just wanted to make that point clear, and again as I said I don't have any instructions that there's any intention to depart from what we're doing now; quite the contrary.

PN213

Now, could I just add these points in relation to our analysis on this difficult issue and why we say it's right. firstly, we say the phrase 'regularly rostered to work their ordinary hours' - that is the workers' ordinary hours - 'outside the day worker

span' must mean something. These words were included. Even bearing in mind that these things aren't drafted with perfect precision they're in there for a reason. They import some sort of requirements. It can't be that it's enough to simply work some hours outside the day worker span. That's inherent in being a shift worker, that you're going to work some hours outside the span. It has to require something more, and as we have said that something more is a requirement of a particular threshold of frequency of work outside the day worker span.

PN214

The second thing is we understand it's put against us that this can't be right because it has unjust or unfair results; for example employees who consistently work Saturdays and Sundays don't get the extra week. I have dealt with that already as best as I can, which is that it's a different formulation, it will have some winners and some losers. There's no relative to the traditional formula. There's no evidence about exactly how many people fall into each category, but instinctively one would think that to the extent that the people that work Monday to Friday are ahead, that that might be a larger group, but we accept there is no evidence about that, it's a little bit speculative.

PN215

Finally, the award as Mr Friend explained in his statement sets out two parts to the extra week; the regular work outside ordinary hours or the certain number of weekends. If the HSU's view about this were right then the ultimate route would really be otiose; that is it would be very hard to see why you would need that requirement if it was sufficient to work any hours at all outside the ordinary span or to work some de minimis number of hours outside the span.

PN216

Before I stop talking, Commissioner, and invite you to start peppering me with questions I will just say this about the - this overlaps with things that I have already said, but the position that's put against us by the HSU to the extent we understand it seems to us to be wrong because it's inconsistent with the industrial common sense and with the industrial purpose, the traditional purpose of the extra week's leave, which is that it doesn't compensate merely for shift work, it compensates for shift work involving a particular frequency of hours worked outside sociable hours.

PN217

It is inconsistent with the authorities to which I have just referred, including for example in One Rail Commissioner Hampton ultimately found that there were employees in that particular context who were working 52 per cent of possible Sundays and public holidays. And the Commissioner pointed out that although 52 per cent is a degree of work which is not insubstantial it's not a level that's contemplated by the phrase 'regularly working Sundays and public holidays' when considered in its relevant industrial context, and it's also, that is the HSU's view is we would say incompatible with the view of the Full Bench in Leading Age Services.

PN218

The position that's put against us here would be even more generous than that which was the change that was proposed in Leading Age Services in which the Full Bench said would significantly expand the existing entitlement. Commissioner, could I just check that there's nothing else I need to deal with for our part before I deal with your - thank you, Commissioner, they're the things I wish to say.

PN219

THE COMMISSIONER: Thank you, Mr Fagir. Well, I might just ask you similar questions for those I had for Mr Friend. I mean it just seems to me that if you read 23B of the agreement you're talking there about an individual's regularly rostered ordinary hours. So a full-time employee would have regularly rostered 38 hours a week. A part-time employee would have regularly rostered ordinary hours of the minimum number that they have agreed to under clause 11.3. A casual employee we don't need to think about because they wouldn't have the entitlement to annual leave. But doesn't that give some flavour to the notion of regular roster of ordinary hours?

PN220

MR FAGIR: Well, we would say it does to the extent that it focuses attention on the hours that are worked by the employee in the way that they're arranged within and without the day worker span. That is one takes the hours that they're working and says - bearing in mind that this is about frequency - how many of them are within the day worker span, how many our outside, and that's we would say a function of the words of 23B which call up, or which as I say require attention and focus on their ordinary hours of work as opposed to any of the other notional reference points that might have been able to be adopted.

PN221

THE COMMISSIONER: Yes. And did you have any different (indistinct) Mr Friend on the import of clause 3.2 in this case, does it add anything?

PN222

MR FAGIR: Well, there's perhaps a difference insofar as we would say that the NES entitlement is far, far less generous than the entitlement that on any view of things arises from this analysis, given that you have to be working, rotating continuous shifts, that the really difficult structure where you're not only working unsociable hours but you're also changing from one shift to another where you really earn the extra week. So we would like to embrace the idea that the NES applies. Perhaps we should give this some more thought, but it seems to me that the NES applies only if you're award or agreement free; that is the default NES provision. Otherwise it just directs attention to the definition in the agreement. As I said it might be useful to give this a bit more time, but I think the answer to your question, Commissioner, is that it doesn't really produce any different result.

PN223

THE COMMISSIONER: All right. Thank you. Those were the questions I had. Mr Friend, anything in reply?

PN224

MR FRIEND: Yes, relatively briefly, Commissioner, but thank you for the opportunity. I wanted to touch on a couple of points that were made. Firstly - sort of where to start - the respondent has talked about infelicities and that these are not mere infelicities of - these could be mere infelicities of drafting or something like that. I think that's giving an incredibly generous view to something that is a very deliberate, very clearly constructed clause.

PN225

If it was the case that it was, you know, one error in wording I think there would be - you know, that argument would have more weight, but the way that the particular clause is structured at 34.1(b) is so deliberate and so purposeful that it cannot be a mere infelicity, or could not be something that just can be glossed over and say that we actually intended it to mean something quite different to what we have written in here. So I don't think any weight should be given to that sort of throwaway line about just being a mere infelicity.

PN226

The respondent also spoke about industrially sensible outcomes and wanting to ensure that there's an industrially sensible outcome and alluding to the concept or the idea that the position put forth by the HSU is one that is not industrially sensible. We say that the position of the HSU is the position that was being sensibly implemented by the respondent prior to March 2021. So we say that it is an entirely industrially sensible outcome. We did not have an issue with the way the enterprise agreement was being applied prior to March 2021, and we only have an issue now that the respondent is coming to the table, or has come to the table and has changed their view of the provision.

PN227

So I think, you know, there was an industrially sensible outcome, it was being implemented that way, and for it to continue to be considered that way would be absolutely adequate. What is not sensible is the outcome that will be achieved if our application is dismissed or if the Commission finds against us, because what will be achieved then, the industrial outcome that we will arrive at is one very unique where a shift worker's roster is weighted by how many shifts they do in one category versus how many shifts they do in another category.

PN228

And I will just turn briefly to the authorities, because I think a number of authorities have been cited there, and not one of those authorities deals with the issue or the question of a shift worker accessing that additional entitlement in the way that Opal is proposing, not one of them. None of them proportionalise it in the way that Opal is proposing. None of them say that we will analyse a total of your work and say you must work more in one arrangement than another. In fact most of them only will have the ability to work available shifts.

PN229

I think that was touched upon by my friend, that the days that could be worked - you know, in the case of Roy Hill - were the ones that were analysed. So only Sundays were looked at in analysing how many Sundays were needed to be worked in order to meet the threshold under Roy Hill. And I appreciate there are a range of authorities that came before Roy Hill that that was based on and a

similar analysis was done of those authorities. But in any event in all of those authorities the consistent approach is that we have only analysed the days that could be worked.

PN230

Opal's interpretation and application of this provision goes significantly further than that and says even if you are regularly working hours and days outside of Monday to Friday 6 to 6 we don't necessarily care about that because all we care about is how many hours you work as a proportion of your total work. So the person that would qualify under Roy Hill would not qualify under Opal's interpretation. It's clearly inconsistent with those authorities, and those authorities should not be given significant weight on the basis that they do not reflect the way that Opal is implementing their decision now, or implementing this enterprise agreement now.

PN231

My friend said that the same analysis can be applied here, but that is simply not the case. Opal is saying that the frequency is what is important, but frequency only insofar as your total proportion of work, or the frequency and total proportion of work both must be met as conditions to qualify as a shift worker for the purposes of annual leave, which is clearly not what's in the enterprise agreement and it's not what the authorities have determined is the appropriate way of applying similar questions around regularly rostered or regularly working.

PN232

I just wanted to deal very briefly with the authority that was referred to - the only one that was referred to from the aged care sector, which was this application or an appeal of an application by ACS - sorry, the matter in first instance was brought by ACS which is a peak body in the aged care sector, and it was appealed by another peak body in the aged care sector, there are only two, and it was appealed by the other peak body in order to try and give some - you know, this was an application to vary the award in order to provide some clarity around the provision in the award, not the enterprise agreement, but in the award about what regularly rostered meant.

PN233

And the respondent has made some points and seems to think that it carries quite a lot of weight that AFEI, who is an organisation with no connection to the aged care industry I might add and very little understanding of how the aged care industry would operate, having no members in the aged care industry as far as I'm aware, that their analysis said that the proposed variation which came from the aged care industry's peak body itself would have the effect of significantly expanding the proportion of employees who would be entitled to an extra week of leave.

PN234

Now, that analysis is from an employer peak body. I don't think it's fair to say that that was the view that the Full Bench took. The Full Bench was merely reporting the analysis of somebody else. What is relevant to examining this authority is why it was not accepted by the Commission in the first instance and by the Full Bench, and it was not accepted not because it didn't have value, but

because the Commission found that there was not enough evidence. If we look at that same decision of the Full Bench at paragraph 47 where the Full Bench summarises the Deputy President's rationale, which was that ACS had not provided significant evidence about the clause. There was not evidence of any disputation about the operation of the clause, which to me says that there isn't any broad concern with it. And the Deputy President then goes on to say that the Fair Work Act itself uses the term 'regularly rostered' at section 87(3), that it is something that need not be defined any further, that it was satisfied that it didn't need to go further.

PN235

So I think the weight that should be applied to that authority is very limited, because the reason that the application was rejected is not because one party to that dispute believed that it would have significantly expanded the proportion of employees who would be entitled to the extra week's leave as my friend has put it. That's not the reason. The reason that that was not accepted was because there was not enough evidence to say that it should be accepted by the Deputy President in first instance and then upheld by the Full Bench. So I just think it's important to clarify that.

PN236

Turning now to the question of the NES - sorry, how a shift worker should have access to the additional week of annual leave and why they should have access to the additional annual leave. Obviously the rationale historically has been to compensate people for working unsociable hours. I think that's not contentious and not disagreed, not contested by the parties. But the provisions that now exist in the Fair Work Act provide that an enterprise agreement must define, or describe I should say - it doesn't have to define, it can describe an employee as a shift worker for the purposes of the National Employment Standards, and that's at section 87 of the Fair Work Act.

PN237

So there is a requirement now to describe or define employees as shift workers for the purposes of the additional week of annual leave. That's a requirement that's conferred by the Fair Work Act, and that's a requirement was complied with by Opal when it proposed its enterprise agreement to employees, when those employees accepted the enterprise agreement by voting for it. That was a requirement that was complied with, and it was obviously approved by the Fair Work Commission, the enterprise agreement was approved by the Fair Work Commission noting that the requirement at section 87 had been complied with.

PN238

THE COMMISSIONER: What part of the agreement didn't?

PN239

MR FRIEND: The annual leave provision, clause 34.1(b). So that's why it specifically calls out for the purposes of this clause, this clause being the quantum of annual leave clause, that's the title of the clause, for the purposes of this clause a shift worker is an employee who is not a day worker as defined in clause 23A. It simply goes on to define or to describe how a shift worker is to be

considered for the purposes of this clause in compliance with section 87 of the Fair Work Act and its requirement to do that.

PN240

The other authority I would like to touch on quickly, as it had sort of unique relevance to the current matter, was the *SDA v Woolworths*. I would simply say with regard to that authority that was a decision that was issued prior to Berri, sort of the leading authority on interpretation of enterprise agreements. The matter was quite different. The matter was a question of double dipping and whether or not it would be reasonable to get an entitlement twice, which is quite different to this matter which is about how an entitlement should operate. This matter is unique in that people have to be described for the purposes of the Fair Work Act, for the purposes of the annual leave provisions of the Fair Work Act, have to be described as a shift worker, and that's exactly what this does.

PN241

Now, as I said earlier the respondent may not like what this means. They haven't argued, but they could have argued that it's not what they intended. That's not what they have said. They have sort of just glossed over this broadly and said that, you know, due to mere felicities what's written there is actually not what we meant and of course we never meant that.

PN242

Well, that's inconsistent with how they actually operated the enterprise agreement since it came into being, and to be honest Opal has not said anything at all really about how clause 34.1(b) as it is drafted here should be interpreted. They have just merely sort of glossed over it and said, well it couldn't possibly mean that because it would be quite outrageous. That basically says that the words that have been put on the page have no meaning, which is clearly not what's intended when we look at the principles around interpreting enterprise agreements. I think that was all I had. Unless the Commission have any further questions I think that was all from me.

PN243

THE COMMISSIONER: All right. Thank you, Mr Friend. Is there anything else anybody wants to deal with. Mr Fagir?

PN244

MR FAGIR: No, thank you, Commissioner.

PN245

THE COMMISSIONER: Thank you. Anything else, Mr Friend?

PN246

MR FRIEND: No. Thank you very much for your time, Commissioner.

PN247

THE COMMISSIONER: All right. Well, thank you, parties, I will reserve my decision and I will issue in due course. The average wait time at the moment is longer than five weeks, but sometime between five and 12. So if you resolve the matter before you get the decision let me know. All right, we will now adjourn.

PN248

MR FRIEND: Thank you.

ADJOURNED TO A DATE TO BE FIXED [3.57 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs