



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT BELL

C2022/4898

s.739 - Application to deal with a dispute

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and
Allied Services Union of Australia
and
Alcoa Portland Aluminium Pty Limited T/A Portland Aluminium
(C2022/4898)**

Portland Aluminium (Trades) Agreement 2021

Melbourne

10.00 AM, THURSDAY, 9 FEBRUARY 2023

PN1

THE ASSOCIATE: In the matter of C2022/4898, CEPU v Alcoa Portland Aluminium Proprietary Limited, for hearing.

PN2

THE DEPUTY PRESIDENT: Good morning, everyone. I might just do a run-around and just confirm appearances and that everyone can see and hear each other and I can see and hear everyone as well. Starting on the applicant's team, Ms McGrath, your computer's working. Can you hear me now?

PN3

MS McGRATH: Yes, thank you, your Honour. Apologies for the delay caused by a - - -

PN4

THE DEPUTY PRESIDENT: You don't need to apologise. That's just, I suppose, part and parcel of the world we live in. The alternative here was an in-person hearing and so whatever that - the downsides of the online format. I think it still outweighs either me trekking to you or you all trekking to me. So it is what it is today.

PN5

MS McGRATH: Thank you, Member.

PN6

THE DEPUTY PRESIDENT: I'll just go through to Mr Vallence as well. So, Mr Vallence, good morning.

PN7

MR VALLENCE: Good morning, your Honour. Thank you. I seek to appear on behalf of the respondent with your permission.

PN8

THE DEPUTY PRESIDENT: I might just go do a couple of housekeeping matters first, then I think there's just a couple of issues about whether witnesses are in as witnesses, and so forth. Just before I get to those, can I just confirm everyone's got a copy of the court book, the digital court book?

PN9

MS McGRATH: Yes, thank you, your Honour.

PN10

MR VALLENCE: I can confirm that's the case for the respondent. Thank you, your Honour.

PN11

THE DEPUTY PRESIDENT: Excellent. And the relevant witnesses, so far as they're going to be cross-examined, they've got a copy as well?

PN12

MR VALLENCE: That's correct, your Honour.

PN13

MS McGRATH: Yes, your Honour.

PN14

THE DEPUTY PRESIDENT: Excellent. If I can ask as best as you can try and sort of pinpoint witnesses and, indeed, me to pages in the court book. I know some of the material that you've probably been highlighting and putting sticky notes on might have been done on a version before the court book was prepared but if I can just ask to do your best that would be appreciated. Now, Ms McGrath, I've got an email from you I think just overnight or this morning as it was. No, last - yesterday evening. Can I just - I've got that. Mr Vallence, you've got a copy of that?

PN15

MR VALLENCE: I confirm we received that, thank you.

PN16

THE DEPUTY PRESIDENT: That's good. I think there was a couple of queries that might have been about to be raised for witnesses in or out as is probably usually the case. Who wants to - well, before we get there, have the parties had any discussion as to the arrangements? My thinking is that we just deal with the evidence up front and then because there's been some pretty comprehensive written submissions filed, and I can indicate I've gone through those, but unless there's sort of a reason not to, it seems convenient to me to deal with all the witnesses as soon as we can and that way once they're done they can all be sitting in the room listening to what's going on as well from that point in time. Does anyone have any views on that?

PN17

MS McGRATH: If the applicant is allowed, we don't intend to cross-examine Alcoa's witnesses. So I imagine Mr Beasley will be the only cross-examined witness today.

PN18

THE DEPUTY PRESIDENT: All right, then. Well, that probably simplifies things even further. I guess, Ms McGrath, then I'm a little bit in your hands. Well, were you intending, Ms McGrath, to do an opening at all?

PN19

MS McGRATH: I wouldn't mind doing an opening address, your Honour, and then going into Mr Beasley - introducing Mr Beasley and have him cross-examined, and I imagine it will just lead to closing addresses.

PN20

THE DEPUTY PRESIDENT: All right. And I understand there might have been an issue, Mr Vallence, about whether Mr Beasley just stays in for the opening. Is that correct?

PN21

MR VALLENCE: Yes, your Honour. The respondent had intended to simply work through some cross-examination with Mr Beasley and then as part of its

case present the evidence that it's leading for you, and make a closing submission given that the parties have put in extensive submissions in writing to this point in time. I think my preference in that space, if you're amenable to it, is to actually not have Mr Beasley there for the opening submission. I don't intend to ask many questions of Mr Beasley but I think it would be appropriate if he wasn't in the room for the purposes of that opening submission.

PN22

THE DEPUTY PRESIDENT: All right.

PN23

MS McGRATH: We have no objection.

PN24

THE DEPUTY PRESIDENT: Sorry, Ms McGrath, I couldn't quite hear what you just - - -

PN25

MS McGRATH: We have no objection to Mr Beasley not being included in the opening submissions.

PN26

THE DEPUTY PRESIDENT: That's fine. Can I just ask, then, what about the other witnesses? I think I've got a couple on - and I'm just trying to work out whether they're in by telephone or they're listening but with screens off, I think it is.

PN27

MR VALLENCE: Your Honour, I have on the line, Ms Courtney Alexander who is the HR Manager for the respondent. In the usual course Ms Alexander would provide instructions to me, but she is a witness in this matter, as you would be aware. On the basis that she's not being cross-examined and we don't intend to ask any questions beyond having her evidence sworn to in examination-in-chief, I would request that she be allowed to stay in the room. Ms Narelle Burns is not in the room at the moment but she is available to give evidence when the time arises.

PN28

THE DEPUTY PRESIDENT: All right. Ms McGrath, given that there's not going to be cross-examination, any difficulty with that?

PN29

MS McGRATH: No difficulty at all, thank you, your Honour.

PN30

THE DEPUTY PRESIDENT: I think then where we're up to - Mr Beasley, we're about to evict you just for a short period, and then you'll be called back in. Just to give you an indication, Ms McGrath, how long do you anticipate just with the initial opening?

PN31

MS McGRATH: Between five and 10 minutes.

PN32

THE DEPUTY PRESIDENT: There you go, Mr Beasley. So don't go too far, you'll be back on the screen in about five or 10 minutes by the sounds of that.

PN33

MR BEASLEY: No worries, your Honour.

PN34

THE DEPUTY PRESIDENT: Mr Beasley, someone from your side, I'm assuming, will contact you and just ask you to re-join the link once you're ready to be brought back in.

PN35

MR BEASLEY: Okay. No worries.

PN36

MS McGRATH: I will do that, thank you, your Honour.

PN37

THE DEPUTY PRESIDENT: Excellent. Thanks. Thanks, Mr Beasley, if you can jump off now. All right. I think we're ready to go, then.

PN38

MS McGRATH: Thank you, your Honour. This is an application under section 739 of the Fair Work Act. This dispute is about whether shift workers are entitled to additional public holidays that will become declared by the Victorian government. The applicant has described the early discussions between the parties at around paragraphs 14 to 19 in our submissions dated 28 October. That's the first set of submissions from the ETU. And as the respondent claims at paragraph 5 of its submissions, there's no argument or contest in this matter concerning whether the Commission has jurisdiction to deal with this dispute.

PN39

I apologise that there was a drafting error regarding the question for determination in the applicant's submissions but the question that is set out in Alcoa's submission at paragraph 33 is the correct question. I will just briefly address the structure of our submission in that form. I'll talk about the construction - briefly about our argument concerning the construction of clause 17. The history and context of the shift allowance, how there are very specific amounts in that allowance. The common intention of the parties and our argument that it's not making an extra claim.

PN40

So, firstly, to focus on a proper construction of clause 17, we demonstrated in our submissions that the allowance provides compensation for employees who are rostered to work on any of the public holidays that are specific above. The clause does not say on any of the above public holidays, as the respondent suggests at paragraph 40(v), court book 271 of its submissions. Nor does the clause say the allowance compensates for every class of the public holidays mentioned in the preceding clauses, as the respondent suggests at paragraph 40(vi).

PN41

We say that to impute such words or concepts into clause 17(d) would be to rewrite the clause, and this would be in contravention to the advice that the case of AMW Berry gives us at paragraph 14 - one-four - where (indistinct) said:

PN42

The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as just or fair.

PN43

That's in the court book at page - helpfully put in the court book by the respondent at page 267. Nor can the respondent's argument be sustained in terms of the context of the clause. As the applicant states at paragraph 5 of its earlier submissions - sorry, its submissions in reply dated 15 September at court book 36, the Full Bench in the (indistinct) case advises that:

PN44

A purposive approach to a (indistinct) interpretation is appropriate.

PN45

When looking at the purposive approach at the subclauses around 17(d), we can note the following. That the purpose of 17(a) is to specify or prescribe a list of public holidays. The purpose of 17(b) is to set out a procedure to follow when public holidays fall on a weekend. And the purpose of 17(c) is to provide a procedure for adding or subtracting public holidays in accordance with government declarations.

PN46

I will briefly then now turn to a history. An examination of the history and the context of the allowance as set out in our submissions, our original submissions, at paragraphs 5 to 12, and in the statement of Mr Beasley at paragraphs 13 to 22. The evidence in submissions here demonstrate that through the various iterations of the agreement the parties have been meticulous in calculating the exact value of the components that are compensated for in the allowance.

PN47

Mr Beasley has led evidence of the document tabled at an Alcoa meeting prior to negotiations for the 2016 agreement, that sets out exactly what the various components of the allowance, including public holidays, overtime and weekend work is valued at in dollar terms. And we submit that it's incomprehensible that a company that was so precise in calculating the exact amount of each component that was covered in the allowance would then turn around and say, but, of course the allowance also covers any additional public holidays that the parties have not even contemplated that may come into existence in the future.

PN48

As for the submission of Mr Vallence at paragraph 47(a) that the shift allowance had not been the subject of modification during the term of the agreement, it's not really telling the Commission the whole picture. Yes, it's not the case that the shift workers did not expect payment for the additional grand final leave holiday when it was declared in 2015. Mr Beasley leads evidence at paragraph 23 of his

statement that the workers did expect payment for that additional holiday. they did not couch the expectation in terms of a claim for expansion of the allowance because it was not an extra claim. It was in the construction of the agreement that the grand final day was not covered by any allowance.

PN49

We need to remember that Mr Beasley, like many of the workers in the Portland smelter are locals to Portland. They have a long history of employment in that area. In the case of Mr Beasley, he's worked there for in excess of four decades. And they have very good local memories of what they've been told about the components in the agreement. As Mr Beasley has given evidence, he was told it was 10 public holidays. He's the delegate and he has told all the workers that that's what it encompasses. So it wasn't the case that they were asking for an extra claim. They said, you know, 'We know what's the allowance, it's 10 public holidays. Now the government's declared this extra one, we want to be compensated for it', and they were.

PN50

There was an agreement reached between the parties three years prior to the 2018 agreement, that that holiday would be compensated for and it was. In the 2018 agreement it was put into the agreement as a legislated entitlement. But it did exist and it was paid for prior to that. This leads to my discussion of the common intention between the parties. The evidence goes to demonstrate the parties' common intentions.

PN51

We would argue there is really only one piece of evidence that demonstrates the common intention between the parties, and that is the statutory declaration that has been provided by Mr Pethebridge. So Mr Pethebridge sets out in an email, prior to the trades employees voting up the 2018 agreement, which is in the court book at 306 - in this email he says that:

PN52

The documents attached will provide a detailed explanation of the terms of the agreement and their effect.

PN53

When he was describing the effect of clause 17(d) in that document he states:

PN54

This clause provides that compensation for shift workers rostered to work on public holidays -

PN55

and then he puts in a parenthesis -

PN56

(that is as listed in 17(a)) is provided for in the relevant shift allowance.

PN57

Now, Mr Pethebridge could not have stated the effect of the clause any clearer than that. As the case of Berry reminds us at paragraph 13 - which is in the court book, page 269 - evidence of what the parties were talking about during the course of negotiations or pursuant to 180(5) of the Fair Work Act, which as we know are the statutory requirements for requesting people to vote, is that you sit down and you tell them what the clauses are in the agreement and what the effect of those clauses is. And Berry is telling us that that's far more assistant than evidence in positions that have been taken.

PN58

So here we have Mr Pethebridge assuring the workers just days before they're about to vote on the agreement that only the public holidays specified in 17(a) are the ones that are covered in the allowance. And here we have the temerity of Alcoa today to say those words of Mr Pethebridge, which were put down in a statutory declaration, are not true.

PN59

So we say in accordance with the plain meaning of the words, the history and the context of the agreement in the sense that there's no extra claim and looking at the common intention of the parties, that it has to be read that 17(a) is those specified agreements, those specified holidays that the allowance encompasses, and not other public holidays. So that would be our introductory words, thank you, your Honour. If you like I will now go to calling Mr Beasley to give his evidence.

PN60

THE DEPUTY PRESIDENT: Certainly. Well, I think just before I do that, just out of caution, Mr Vallence I didn't perhaps quite close the loop on your intentions. Are you content to make your submissions at the end after evidence or did you want to - I mean, in a sense ordinarily a party would make opening submissions when they're opening their case and your case won't actually open until Mr Beasley has done so. I think your opening and your closing is going to look pretty similar there, but I just wanted to get some clarity there before I move on and we call Mr Beasley.

PN61

MR VALLENCE: Thank you, your Honour. It was certainly the case that I was intending to actually not make much of an opening at all. I was intending to present the evidence on behalf of the respondent and then make a comprehensive close in relation to the matters that were raised by applicant in the reply submissions which we hadn't responded to at this point in time, and in respect of the evidence that's left.

PN62

THE DEPUTY PRESIDENT: All right. I understand all that. I think on that basis, then, Ms McGrath, would one of your team give Mr Beasley a call and ask him to log back on, please.

PN63

MS McGRATH: Yes, Ms Hill is contacting Mr Beasley as we speak.

PN64

THE DEPUTY PRESIDENT: Thanks, Ms Hill.

PN65

MS McGRATH: He should be joining now, your Honour.

PN66

THE DEPUTY PRESIDENT: Thank you. All right. Welcome back, Mr Beasley. Just to confirm, can you see and hear me all right?

PN67

MR BEASLEY: Yes, your Honour.

PN68

THE DEPUTY PRESIDENT: Excellent. So in a moment you'll be sworn in by my associate and then I'll hand you over to Ms McGrath who will take you to your statement.

PN69

MR BEASLEY: Okay.

PN70

THE DEPUTY PRESIDENT: Thank you. We'll have you sworn in.

<DAVID HENRY BEASLEY, AFFIRMED [10.20 AM]

EXAMINATION-IN-CHIEF BY MS MCGRATH [10.20 AM]

PN71

THE DEPUTY PRESIDENT: Ms McGrath.

PN72

MS McGRATH: Thank you, Mr Beasley. Can you please state your name and address for the Commission?---David Henry Beasley, (address supplied).

PN73

Thank you, Mr Beasley?---My occupation is electrician.

PN74

Thank you. Have you made a statement dated 28 October 2022, and is that statement 24 paragraphs as set out in the court book at page 14?---Yes.

PN75

Have you read this statement recently and is it true and correct?---Yes, I've read the statement, it is true and correct.

PN76

Is there anything further you wish to add to the statement?---Yes, there is.

*** DAVID HENRY BEASLEY

XN MS MCGRATH

PN77

Yes?---Mention is made in paragraphs 18 and 19 of the statement of the allowance component document which is the calculations for the 44 and 11 per cent. That document I believe was sent through email last night by the ETU to the parties. I'd like that document put in my evidence, please, on my statement.

PN78

Yes, thank you. I'd just like to - is there anything else you'd like to add, Mr Beasley?---No, that's fine. Thanks.

PN79

Can I just take you to page 23 of your submission - your statement?---Page 43?

PN80

Sorry, paragraph 23 on page 44 of the court book?---Right. Yes.

PN81

In paragraph 23 you talk about the introduction of the grand final week public holiday in Victoria, and you say:

PN82

The unions initially led by the AWU approached Alcoa to provide compensation for those who had to work grand final day, and agreement was reached that those workers would receive time in lieu for working that day.

PN83

So over how many years prior to the 2018 agreement coming into effect was that public holiday compensated for?---Right. So that approach was in 2015. We then made an approach in 2016, 2017 and 2018 before - obviously before the EBA because our EBA would have run out the end of October. The approach was made in September. So over those four years, time in lieu was granted hour for hour for the guys that worked on those shifts.

PN84

Thank you. I have no further questions, no further examination-in-chief, for Mr Beasley?---Okay.

PN85

THE DEPUTY PRESIDENT: All right. So I'll mark then as tendered the witness statement of David Beasley and the exhibits which comprises pages 43 to 253 of the court book, and I'll mark that as exhibit 1.

**EXHIBIT #1 WITNESS STATEMENT OF DAVID BEASLEY
INCLUDING EXHIBITS COMPRISING PAGES 43 TO 253 OF THE
COURT BOOK**

PN86

Then - I don't think there's any controversy in identify it - I'll mark as exhibit 2, the two-page attachment sent through by email on 8 February 2023 at 6.16 pm to chambers, copying in the respondents, and I'll mark that document as exhibit 2.

*** DAVID HENRY BEASLEY

XN MS MCGRATH

EXHIBIT #2 TWO-PAGE EMAIL DATED 08/02/2023

PN87

I think on that basis, Mr Vallence, we're up to you to ask any questions. Mr Beasley, just before Mr Vallence starts, Mr Vallence is going to ask you some questions. You don't need to worry about what the questions are other than doing your best to sort of listen to the question and answer that question as best as you can. If there are objections to it you are in Ms McGrath's competent hands there. But of course if you don't understand the question or it's not clear, just say so and I'm sure Mr Vallence will have a go at reformulating it, if need be, to put it into a different way that might make a bit more sense for you?---Okay. That's clear, your Honour, thank you.

PN88

Thank you. Mr Vallence.

CROSS-EXAMINATION BY MR VALLENCE

[10.25 AM]

PN89

MR VALLENCE: Thank you, your Honour. Mr Beasley, you've still got a copy of your statement in front of you?---Yes, I have.

PN90

Could I ask you to turn to paragraph 15 of that statement, page 42 of the digital court book?---Yes.

PN91

You say there that a 44 per cent shift allowance was provided for with the introduction of a 12-hour seven-day roster, and that that allowance was implemented at the commencement of the 1994 agreement. So to confirm that shift allowance was linked to a roster change; is that correct?---Yes, to the best of my knowledge, yes.

PN92

It was a negotiated arrangement to the best of your knowledge?--- Yes.

PN93

If I can ask you to turn to paragraph 16 which is on the same page as the digital court book but progresses to page 43, you say there was a change to the rostered hours of work for some electricians and fitters that involved a change to 10-hour days over seven days of the week. And you say that as a consequence of that roster change there was a shift allowance modification from 44 per cent to 26.5 per cent?---Yes, that's correct.

*** DAVID HENRY BEASLEY

XXN MR VALLENCE

PN94

Then you say that that new rate was included in the 2006 agreement. Is it correct that the changes were made as a matter of negotiation for the new agreement?---That - there was no negotiation there. That was a wish by the company to take us off that particular roster and put us on the other roster. The reason the drop wasn't all that much, from 44 to 26, was the fact that we still

worked weekend work. We didn't do night shifts but we still did 10-hour weekend work. But in answer to your question fully, the request was from the company but, yes, it was a negotiated position to get to that 26 per cent.

PN95

That was included in the 2006 agreement, correct?---Correct.

PN96

Do you recall whether the negotiated changes commenced from the start of the 2006 agreement?---No, I can't recall. They may have started before that but I'm pretty sure it was around that time of the start of the agreement.

PN97

If I could ask you to turn to paragraph 17 of your statement which is on page 43 of the digital court book?---Yes.

PN98

You say that in 2013 Mr Jorgenson proposed a roster change for some employees to work a 10-hour four-day roster which resulted in the shift allowance for those employees being reduced to 11 per cent. Is it the case that that was a matter that was the subject of negotiations for the 2014 agreement?---Correct. It actually - that transfer happened a bit before the 2014 agreement. So the discussion started and, yes, the 11 per cent was calculated by the company. I must say we had no input into that calculation. That was a figure deemed by the company to be like a bit of a carrot, I suppose, to come off that roster and go to the other roster so - yes.

PN99

So that arose as a result of a roster change?---Yes.

PN100

And at paragraph 20 you refer to a change to the shift allowance for WDC personnel from 11 per cent to 3.9 per cent, and you state that that was included in the 2018 agreement?---Correct.

PN101

Was that the case that that was a negotiated change?---That change and the one we just discussed before, there was really no negotiation. It was the change is going to happen so really it was this is the figure we think you're going to get. There wasn't a lot of discussion on the matter. That's what the company deemed.

*** DAVID HENRY BEASLEY

XXN MR VALLENCE

PN102

The requirement to - or the outcome of that discussion which you say wasn't a negotiation, that involved the continued payment of a 3.9 per cent shift loading, didn't it? Shift allowance I should say?---Yes, it's not - just to be clear there, it's not a shift allowance, as such, and we still get that allowance today. It's an extra duties allowance. It doesn't cover any shift penalties or - because we are straight day shift now, a 38-hour week, Monday to Friday. So the 3.9 per cent was given to keep us happy, I suppose, as good as we could be happy, the fact that they'd taken us off yet again another roster and put us onto day shift. So the 3.9 per cent

is not so much a shift allowance; it's an extra duties allowance for those willing to look after contractors and do extra work.

PN103

That allowance is recorded in the same location as the shift allowances for other work groups in the agreement?---Yes, there is. There's quite a few allowances in there though. There's also a gas allowance. Any other site allowances that we have are all recorded in that same section.

PN104

At paragraph 22 of your statement - I should say page 44 of the digital court book?---Yes.

PN105

You explain that changes were made to the 44 per cent shift allowance as a result of a claim to move five per cent of the shift allowance into the base salary for employees?---Correct, yes.

PN106

Would it be correct to say that the change to the shift allowance in those circumstances was to provide for an improved benefit for employees?---Yes.

PN107

That didn't relate to the roster that was being worked. That was a remuneration benefit; is that right?---That's right, and it was a discussion - the AWU, they have a different EBA to us. They had already sort of gone in that direction with the company and their EBA, so the same offer was made to us which the other reason for that move was that there was all these different base rates existing in the EBA. So what that did was put the shift guys in line with the rest of us day-workers, if you like. So all the base rates became the same. That's why it's a bit of a random figure. It wasn't, like, five per cent or - it was a - what was it? Four point something that went across. Yes, that was the intent to make the base rates all the same, and of course it helped the buys on shift with a better base rate for their superannuation. So, yes, that was a win.

PN108

So the benefit was that a component of the money came out of the shift allowance and was put into the base salary, and those employees received the benefit of superannuation on that component that had been moved across?---That's correct.

PN109

That change was not related to a roster change or, I believe that's correct?---That's correct. There's been no change of rosters for those guys, no. It was just purely to move a percentage from their base to - from the shift penalty to the base.

PN110

So that change didn't involve a recalculation of the components of the shift allowance? It was basically just a transfer from the shift allowance to the base salary?---Correct.

*** DAVID HENRY BEASLEY

XXN MR VALLENCE

PN111

So any prior calculations that had been made to calculate the 44 per cent shift allowance weren't after that point actually relevant to the shift allowance, were they?---Sorry, can you repeat that question?

PN112

So you refer at paragraph 19 to - of your statement, and the document that was sent through last night - - -?---Yes.

PN113

- - - covers the detail as well, and it talks about which components that were included for the purposes of calculating the 44 per cent shift allowance?---Correct.

PN114

If the value of - and I'll use the figure to five per cent, though I accept that it could have been marginally different to that, once that component is removed it doesn't align with that formula within (indistinct) the shift allowance?---I see that it does. It's just taken a percentage out of the shift allowance and put it in the base. I still see that figure as being the 44 because to me it's still made up of the same things. It's just that a part of that payment is now in the base. So when I talk to the guys about that it is to me still a 44; it's just that five was removed. So to me the make up of the 44 is identical as per that document we got back in 2014.

PN115

So if I understand the point that you're making correctly, you still say that you receive the benefit of a 44 per cent shift allowance, it's just that it's split between the actual shift allowance and the base salary. Correct?---Correct.

PN116

But it is the case that the shift allowance is no longer 44 per cent in and of itself, is it?---Correct, yes, the figure paid is different to 44. It's 38 point whatever.

PN117

And - - -?---Two-six.

PN118

Mr Beasley, am I correct that the only changes to shift allowances here that relate to public holidays in your evidence relate to the changes that are referred to at paragraph 23 and 24 of your statement, that being in relation to the introduction of AFR - the Friday before AFL grand final day, and Easter Sunday?---Yes. Yes. Correct.

PN119

And in that case, just so I make sure that I understand the evidence correctly, there was no adjustment made to the actual shift allowance in relation to those public holidays until it was negotiated for inclusion in the 2018 agreement?---Correct. There was just time in lieu given at the request of the unions to the company to compensate for that grand final public holiday.

*** DAVID HENRY BEASLEY

XXN MR VALLENCE

PN120

The agreement that was reached in relation to the time off in lieu that you do refer to at paragraph 23 - - -?---Yes.

PN121

- - - that was a negotiated outcome that applied until the 2018 agreement commenced. Correct?---Yes, correct. I've got emails here where there's four years where we just kept going back every year saying is the time in lieu going to be honoured again this year. We just kept going. We had a succession of maintenance managers and they would go back to the HR people and I would get an email back saying, 'Yes', and then the guys would just claim hour-for-hour that they worked that day. So it was a year-by-year proposition until 2018. So 2015 to the EBA in 2018, it was just a year-by-year request from the union to the company.

PN122

Okay. So albeit that it might have been pretty cursory in nature for each year before the 2018 agreement, bedded down what would be an arrangement going forwards. There was a negotiation, will we honour the - will the time in lieu continue for the shift?---Correct.

PN123

And just in relation to those time in lieu arrangements, I just want to be really clear on this - - -?---Yes.

PN124

- - - they applied only to those employees that actually worked on those days. Is that correct?---Correct, yes. It was specifically even hour-for-hour. So if the night shift people sort of started the night before - 8 to 8 are our shift roster. So if they start at 8 o'clock the night before the grand final public holiday and they worked until 8 the next morning, they would get four hours off. And then the day shift would be the 12 hours, and the next shift coming in would get the other four hours. So the agreement was if you weren't at work you didn't get it. So you had to be physically attending site, working a roster for that day, and hour-for-hour.

PN125

No further questions. Thank you, your Honour.

PN126

THE DEPUTY PRESIDENT: Thank you, Mr Beasley. I'll just ask Ms McGrath if she's got any questions that arise in reply.

PN127

MS McGRATH: Yes, thank you, your Honour.

RE-EXAMINATION BY MS McGRATH

[10.37 AM]

*** DAVID HENRY BEASLEY

RXN MS McGRATH

PN128

MS McGRATH: So the workers that were asking to be paid on that grand final day, did they see themselves as asking for something extra or did they think they

should be paid for that day because it wasn't compensated in the allowance?---No, they seen it as they should be compensated.

PN129

They didn't see that they were asking for something - an extra - what we might legally - or we might refer to an extra claim. Something extra that they weren't entitled to get?---Well, it was a new public holiday, so it was outside the scope of what was included in the shift penalty, so it was just naturally assumed that there should be a payment for it, as per the mourning day this year for the Queen.

PN130

Thank you?---Last year, sorry.

PN131

And Mr Vallence took you through those paragraphs where the shift allowance stayed at 44 per cent and it covered 10 public holidays. Is that correct?---Yes, to our knowledge, as per the document filed last night, yes.

PN132

Yes. Yes. In that document that said it was 10 public holidays, everybody accepted that it was 10 public holidays until the grand final eve holiday came along?---Yes.

PN133

Is that the reason they thought they should be paid extra for that because it wasn't within those 10 holidays?---Yes, the feeling clearly is that it's outside the 44 per cent allowance or that 26.5 for the 10-hour guys.

PN134

And the 44 per cent has - Mr Vallence talked you through those negotiations and you seem to be saying that perhaps negotiation isn't quite the right word. They were just kind of saying, 'Well, this stuff's been ripped out of your allowance, you don't have to work on weekends anymore, or you don't have to do overtime anymore, and accordingly we've calculated what the components are worth, so you need to agree to this.' Is that more what was being put to you in those negotiations? Like, you couldn't have said, 'Hang on, we think public holidays are worth a bit more than that.' Were you putting those sort of arguments or were you just accepting the company's position of what those components were worth?---Look, I believe there was calculations done at the time. I can't recall but it was more the sake that this is going to be a new roster. The best that we can come up with is this figure. So it was like a compensation for removing off one shift to another.

PN135

But the figure was to represent the precise components of the allowance?---Yes, yes, as detailed in the sheet there particularly, yes.

PN136

Yes. No further questions of Mr Beasley.

*** DAVID HENRY BEASLEY

RXN MS MCGRATH

PN137

THE DEPUTY PRESIDENT: All right. Thank you very much. I think then, Mr Beasley, you're excused then from wearing your hat as a witness so that's always good news because you're no longer on oath and I'm assuming that you're going to be staying in the proceedings, in which case you get to sit here wearing your hat as an observer. So unless you were heading off, in which case you're free to leave but otherwise we're sort of working on the assumption you're going to stay there. So thank you, Mr Beasley?---Thanks, your Honour.

<THE WITNESS WITHDREW

[10.40 AM]

PN138

THE DEPUTY PRESIDENT: I think then, Ms McGrath, that's certainly the close, am I correct, of your evidentiary case?

PN139

MS McGRATH: Correct, your Honour.

PN140

THE DEPUTY PRESIDENT: Given that as well, I think we're turning to Mr Vallence to open his case.

PN141

MR VALLENCE: Thank you, your Honour. I was waiting to see if Ms McGrath had something to add in, I suppose. I would call Ms Courtney Alexander. Thank you.

PN142

MS ALEXANDER: Hello. Do I need to put my camera on?

PN143

THE DEPUTY PRESIDENT: I think that would be best if you can, Ms Alexander, yes.

PN144

MS ALEXANDER: Okay.

PN145

THE DEPUTY PRESIDENT: All right. Good morning, Ms Alexander. You've probably been following what's going on, so we'll be adopting a similar process for you. I'll have my associate affirm you shortly. Mr Vallence will take you to your statement and at last check there weren't going to be any questions in cross-examination but once there aren't questions then you'll have that confirmed. So I'll go to my associate first.

PN146

MS ALEXANDER: Thank you, Deputy President.

<COURTNEY ALEXANDER, AFFIRMED

[10.41 AM]

PN147

THE DEPUTY PRESIDENT: Ms Alexander, I'll hand you over to Mr Vallence.

PN148

MR VALLENCE: Thank you, your Honour. Ms Alexander, can you please state your name and address for the tribunal?---Courtney Ann Alexander of Quarry Road, Portland.

PN149

Can you please tell us your position with the respondent?---I'm the human resources manager at Portland Smelter.

PN150

Have you prepared a witness statement in relation to this matter?---I have.

PN151

Do you have a copy of the digital court book with you today?---Yes, I do. I have it up electronically, just so you're aware.

PN152

Can I ask you to turn to page 277 of the digital court book?---Yes, 277. Yes, that is my witness statement.

PN153

That's the first page of your witness statement that is five pages long and contains 29 paragraphs. It also has one attachment of two pages. Is that a copy of the witness statement signed by you on 23 November 2022?---Yes, it is.

PN154

Is it your belief that that witness statement is true and accurate?---Yes, it is.

PN155

I seek to tender that witness statement, your Honour.

PN156

THE DEPUTY PRESIDENT: All right. I think I was up to exhibit 3. So I'll mark as exhibit 3 the witness statement of Courtney Ann Alexander and the exhibits which is comprised at pages 277 through to 284 of the court book.

**EXHIBIT #3 WITNESS STATEMENT OF COURTNEY
ALEXANDER INCLUDING EXHIBITS, COMPRISING PAGES 277
TO 284 OF THE COURT BOOK**

PN157

MR VALLENCE: Thank you, your Honour. No further questions.

*** COURTNEY ALEXANDER

XN MR VALLENCE

PN158

THE DEPUTY PRESIDENT: Yes. Ms McGrath, just to confirm, were there no questions in cross-examination?

PN159

MS McGRATH: No questions from the applicant, thank you, your Honour.

PN160

THE DEPUTY PRESIDENT: Thank you, Ms Alexander. You are excused from wearing your hat as a witness?---Thank you, Deputy President.

<THE WITNESS WITHDREW

[10.44 AM]

PN161

MR VALLENCE: In which case, your Honour, I would seek to call Ms Narelle Burns.

PN162

THE DEPUTY PRESIDENT: Yes. Well, if I might ask, unless there's anything further, I mean, one option is that we can just have the statement tendered if, Ms McGrath, you don't object, without the need to formally put someone in the witness box, unless there's a question that's sort of arisen.

PN163

MS McGRATH: No, we have no objection, thank you, your Honour, to just it being accepted as evidence.

PN164

THE DEPUTY PRESIDENT: Yes, are you content on that basis, Mr Vallence?

PN165

MR VALLENCE: I'm content to proceed on that basis, your Honour.

PN166

THE DEPUTY PRESIDENT: All right, then. In that case I'll mark as exhibit 4 the witness statement of Narelle Casey Burns, and the exhibits, which together comprise pages 285, I think all the way through to 479. Is that - that's correct, isn't it? The exhibits go all that distance, don't they, Mr Vallence?

PN167

MR VALLENCE: That's correct, your Honour.

PN168

THE DEPUTY PRESIDENT: Yes. In that case 479 of the court book, and that's exhibit 4.

**EXHIBIT #4 WITNESS STATEMENT OF NARELLE BURNS
INCLUDING EXHIBITS, COMPRISING PAGES 285 TO 479 OF
THE COURT BOOK**

*** COURTNEY ALEXANDER

XN MR VALLENCE

PN169

I think then that's your evidentiary case, as I understand it, dealt with. Is that correct, Mr Vallence?

PN170

MR VALLENCE: That's correct, your Honour. Thank you.

PN171

THE DEPUTY PRESIDENT: I think putting aside what the arrangements we might otherwise make, I think it's probably best to hear from you now, and then we'll get to hear from Ms McGrath afterwards. I think that's just a bit more sensible. I mean, ordinarily, you know, one person would go first and possibly the applicant but, Ms McGrath, I've heard from you a little bit so it just might be that it's more sensible to hear from Mr Vallence now. All right. Mr Vallence.

PN172

MR VALLENCE: Thank you very much, your Honour. So, your Honour, the task before you in relation to this matter is one of interpreting the Portland Aluminium Trades Agreement 2021. We submit that the matter to be determined in this instance is the agreed question for determination as filed by the applicant on 20 October 2022 which is as follows:

PN173

In the event that in the State of Victoria a public holiday is declared or prescribed on a day other than those set out in sub-clauses 17(a) and 17(b) of the Portland Aluminium Trades Agreement 2021, are employees engaged to perform shift work on such additional public holidays entitled to time off in lieu or financial equivalent, in compensation for the performance of such work on that additional day?

PN174

The applicant has at paragraph 21 of its outline submissions, which is contained on page 29 of the digital court book, presented an alternative question for determination. That being:

PN175

On a proper construction of Portland Aluminium Trades Agreement 2021 are workers entitled to the benefit of additional public holidays that are declared by the Victoria government?

PN176

THE DEPUTY PRESIDENT: Could I just intervene there? Sorry to sort of interrupt your flow but as I understood what Ms McGrath said before was that that was - well, in essence, a typo and she accepts that the correct question is the one described in paragraph 3 of your submissions. Ms McGrath, can I just confirm that understanding again?

PN177

MS McGRATH: That understanding is correct, your Honour. It was just a bookmarking and I didn't get back to changing it over.

PN178

THE DEPUTY PRESIDENT: Understood. Thanks, Ms McGrath. So, Mr Vallence, that might give you some assistance.

PN179

MR VALLENCE: Yes.

PN180

THE DEPUTY PRESIDENT: Or perhaps in short-cutting if you had something to say about that as well.

PN181

MR VALLENCE: That's fine, your Honour, thank you. I had heard that there was some commentary made about that by Ms McGrath in her opening. I've missed exactly what was said because it was quite quick, but I'm content to leave that matter alone on the basis that the issue is resolved.

PN182

THE DEPUTY PRESIDENT: We can record then at least the parties are in agreement on one thing which is the question.

PN183

MR VALLENCE: Okay. Correct, your Honour. In closing, I intend to briefly address you in respect of the evidence and also address you in respect to the matters that have been raised in the applicant's reply submissions dated 15 December 2022. In respect of the evidence before you our primary submission is that there's actually no need to consider the evidence on the basis that the agreement has a plain meaning. And the respondent has set out in detail in its outline of submissions at paragraphs 38 to 41, which start at page 269 of the digital court book, the reasons for that.

PN184

But, in summary, it's clear that the respondent's position is that there's no terms within the agreement which expressly or otherwise provide employees with an entitlement to time off in lieu or any other financial benefit in circumstances where a new public holiday is declared in the State of Victoria. There are conversely though, terms within the agreement which weren't clear that the remuneration provided to employees is paid in satisfaction of, amongst other things, the requirement to work on any public holiday.

PN185

Those clauses include: clause 9(a)(i), at page 55 of the digital court book; as well as clauses 9(a)(iv)(1) at page 36 of the digital court book; and clause 17(d), in our submission, of the agreement, at page 71 of the digital court book. I won't traverse those in detail because they have been addressed in the respondent's outline of submissions. And we say that as a result the agreed question can be determined on that basis, that being that employees engaged to perform shift work on an additional public holiday are not entitled to time off in lieu or any other benefit from the performance of work on an additional public holiday.

PN186

However, should it be the case that you consider that there is some ambiguity it's necessary to consider the evidence of surrounding circumstances. We submit that there is only limited objective background facts that go to the intentions of the parties as to whether there is only limited objective background facts that go to the intentions of the parties as to whether there is an entitlement under the agreement to an additional benefit in those circumstances.

PN187

May I relate it to the conduct of the parties that when there was a change to the public holiday entitlement due to the introduction of Friday before AFL grand final day and Easter Sunday. And those facts are these. In August 2015, the Friday before AFL grand final day and Easter Sunday were included in the Victorian Public Holidays Act 1993. The 2014 agreement which for relevant purposes was in terms consistent with the current agreement, the 2018 agreement, was the operational agreement at that time.

PN188

There was no automatic adjustment made to the shift allowance payable to employees in 2015, nor was there an automatic entitlement to time off in lieu. Instead, the parties in response to those changes to the Public Holiday Act negotiated arrangements that would be applied to the affected employees, and that was confirmed by Mr Beasley in his evidence this morning. And that involved an initial negotiated outcome repeated on a year-on-year basis whereby employees that actually worked on the Friday before AFL grand final day, and Easter Sunday, were provided the time off in lieu.

PN189

That's interesting in itself in the sense that elsewhere within the agreement the entitlements that are provided to employees are provided globally, provided to all employees within a specific classification. The entitlements related to public holidays don't vary based on whether an employee themselves has actually worked it. But this was an arrangement that was discussed, negotiated, agreed and implemented, and then repeatedly so up until the 2018 agreement, at which time through the course of negotiations for a new enterprise agreement the shift allowance that was paid to employees was adjusted and it was recorded within the agreement that additional components were paid in respect of the AFL - the Friday before AFL grand final day and Easter Sunday.

PN190

That only came into effect once the 2018 agreement commenced at which point in time the time off in lieu arrangements ceased to apply. That evidence was demonstrating only that parties negotiated arrangements to respond to the introduction of those public holidays prior to the introduction of the 2018 agreement. That is in our submission of some value to your deliberations.

PN191

The evidence of shift allowance adjustments through negotiations for the 2018 agreement and the temporary provision of time off in lieu until that time, ought to be concluded as evidence of matters in common contemplation constituting a common assumption insofar as it demonstrates an acknowledgement by the parties that there was no automatic entitlement to time off in lieu. There was no

automatic entitlement to an adjustment of shift allowance pursuant to the terms of the 2014 agreement which, as I've noted for relevant purposes, are in the same terms as the existing agreement that you're considering as part of this dispute.

PN192

And that outcome is consistent, as I noted in Mr Beasley's evidence, that the shift allowance has been clearly changed through the years as a result of negotiations for a new or collective agreement. Now, I note that in re-examination my friend asked Mr Beasley about the negotiations for new agreements, and Mr Beasley during the course of giving evidence also made note that on a number of occasions he felt as though there was not a negotiation.

PN193

But it needs to be borne in mind that the evidence before you is that these outcomes were outcomes that were recorded in new enterprise agreements that were the subject of negotiation processes. To suggest that the applicant's members and delegates or officials didn't have a choice, is not correct. The whole scheme of the negotiation process is to provide them with an opportunity to have input. They may not have necessarily liked the outcome but it was an outcome that was negotiated and ultimately agreed with the employees.

PN194

There is no evidence before you of negotiations for the 2021 or 2018 agreements. They have indicated an objective intention to provide for an automatic adjustment to shift allowances paid to employees in circumstances where an additional public holiday is recognised or for time in lieu. And that is the essential issue here. Well, might there have been in the past examples where the business agreed to make provision for alternate arrangements in response to Friday before AFL grand final day, or for Easter Sunday, well, might it have agreed to time in lieu arrangements as part of that as well as the shift allowance adjustments.

PN195

But there's no evidence that there has been an automatic increase or an automatic outcome that flows from that change, albeit that it's been described the employees had an expectation. In fact, it's clear that aside from recording those adjustments for the Friday before AFL grand final day and Easter Sunday and to provide - and I think this is important - and arbitrary adjustment to the existing 44 per cent shift work has occurred subsequent to Mr Jorgenson providing the document that is asserted to have been provided in respect of the 2014 negotiations and which did cause it to lose relatively with earlier calculations, there's been no change made to recognise the potential for new additional public holidays at all.

PN196

The only change that was made in relation to additional public holidays subsequent to those changes being made, has actually been included in subclause 17(c), a new term which essentially allowed the business to not recognise public holidays that were removed from being declared (indistinct). Similarly, there's no evidence of any other notorious facts of which knowledge can be presumed, though we submit that the parties' conduct in negotiating changes arising from the introduction of those public holidays in 2015 could reasonably be characterised as

evidence in the parties considering it a fact that the agreement didn't provide for an automatic adjustment in the shift allowance in the event of an additional public holiday being declared.

PN197

There is simply no evidence before you of an intention that the parties intended an outcome of automatic adjustment. Your Honour, unless you have any questions of me regarding the evidence before your Honour, I was proposing to respond to the applicant's reply submissions.

PN198

THE DEPUTY PRESIDENT: Look, I think that's convenient. You keep going if you're going to reply - address the reply submissions.

PN199

MR VALLENCE: Thank you, your Honour. I will move through those in order. Those reply submissions are within the digital court book at page 35. In respect of the contentions contained at paragraphs 2 and 3 the respondent doesn't dispute those but we do observe that relevantly those observations don't have any impact on the matter to be determined by you. In respect of paragraphs 4, 5 and 6 of the applicant's reply submissions, the applicant reiterates its position that the words 'specified above' as included in clause 17(d) contain or in other words limit the category of public holidays which can be absorbed into the shift allowance.

PN200

The respondent at paragraph 40 of its outline of submissions, which is contained at page 270 of the digital court book, has set out its submission as to why it contends that the language used in clause 17(d) of the agreement in referring to - and I quote - 'any of the public holidays specified above' ought to be read in reference to public holidays contemplated in similar clauses in 17(a), (b) and (c) of the agreement.

PN201

The respondent relies on those submissions but to add to that, subclause (a) includes a list of named public holidays. Subclause (b) includes arrangements for the substitution of public holidays by express reference to some named public holidays and by including broader reference to other public holidays that can be substituted by agreement. Subclause (c) relevantly contemplates the existence of additional public holidays that may yet be declared or prescribed, which we note is the entire purpose of the clause is to capture something which hasn't occurred at that point.

PN202

They do therefore each, despite the assertions of the applicant contemplate specific public holidays. And that accords with the ordinary meaning of the language used in clause 17(d) which in context is also physically located immediately below subclauses (a), (b) and (c). And to include it on that basis would be reflective of a practical bent of mind.

PN203

The converse interpretation, which is the interpretation of the applicant, that clause 17(d) is intending to refer to public holidays only as specified in clause 17(a) would have an outcome where the shift allowance paid to employees pursuant to clause 9(b) would not include compensation for substituted public holidays. That's not industrially sensitive, and supports a conclusion that the applicant's interpretation is incorrect.

PN204

It is relevant to note, however, that even if you conclude that clause 17(d) does not contemplate additional public holidays to be recognised pursuant to subclause 17(c), it remains the case - and this is critical - there is no express term in the agreement that provides for an adjustment of shift allowances which are fixed allowances that are the subject of negotiation at each time that the agreement comes into effect.

PN205

Clause 9(a)(i) in that respect describes the salaries as being paid for all circumstances, conditions of employment and hours worked under annualised salary arrangements. And it provides that no allowances, loadings, penalties or premiums will be paid except where provided for in the agreement. And that's a really important set of words, and the reason why I say that, and perhaps, sir, I have neglected to take you to that particular paragraph which appears on page 55 of the digital court book, because it provides for a positive obligation. It says, and I'll quote:

PN206

Except where otherwise provided for in this agreement.

PN207

Which means that there must be an obligation or there must be a right or an entitlement that's built into the agreement to overcome the description that the salaries are paid in satisfaction of all circumstances, conditions of employment and hours worked. Similarly, clause 9(a)(iv) does provide that the shift allowances are payable for the working of regularly rostered shifts on weekends and public holidays, and it doesn't have any distinction in that location as to whether those public holidays are those that are recognised pursuant to clauses 17(a) or 17(c).

PN208

In respect of paragraphs 7 and 8 of the reply submissions, the applicant asserts the relevance of public holiday entitlements of the incorporated award whilst recognising that the agreement prevails to the extent of any inconsistency. The respondent submits that the existence of the incorporated terms does not in any way support a contention that additional public holidays are to be compensated separately or on the basis of some automatic adjustment.

PN209

The terms of the agreement which prevail are clear that the shift allowance is paid to employees for the working of regularly rostered shifts on weekends and public holidays, and without distinction as to the nature of those public holidays. Clause 9(a)(i) which I referred you to just a moment ago on page 55 is directly

inconsistent with the applicant's contention in this case. And it's certainly not the case that the parties have recognised that there are separate entitlements to be provided in circumstances where a new public holiday is declared, described as asserted at paragraph 8 of the applicant's reply submissions.

PN210

There's no evidence of that in the agreement and the conduct of the parties in response to the introduction of Friday before AFL grand final day and Easter Sunday, demonstrate the opposite. That is that there was a need to negotiate agreed arrangements in respect of those changed circumstances. In respect of paragraphs 11 to 13 of the reply submissions, the applicant makes observations related to the PowerPoint presentation presented to employees, and my friend went to that in her opening submission today.

PN211

Whilst an observation is made regarding the summary provided to employees relating to sub-clause 17(d), it ignores other aspects of the presentation which are very important. In respect of clause 9(a) in particular, which can be seen at page 406 of the digital court book, it can be seen on that page that the presentation provided to employees makes very clear that the salaries and other payments expressed in clause 9 provide for all circumstances, conditions of employment and hours worked under annualised salary arrangements unless otherwise provided in the agreement.

PN212

And that the total salaries include a shift loading in compensation for, amongst other matters, for working at regular rostered shifts on weekends and public holidays. Those statements made clear to employees, salaries that are paid – the salaries that were paid were total salaries and are paid for working regular rostered shifts on public holidays, without any distinction. Further, the presentation does not – as it is the case with the agreement – make any reference to time off in lieu being (indistinct) or any other benefit being provided for a change to public holiday arrangements. In fact, the only reference to a modification to a shift allowance during the nominal life of the agreement, (indistinct words) relates to the implementation of new shifts as can be seen on page 415 of the digital court book, which is contained within clause 9 of the agreement.

PN213

Finally, in respect of paragraph 14 of the reply submission, the applicant asserts that there is no express or implied wording within clause 9A(iv)(i) to indicate that the allowance will compensate for any public holiday that may come into existence. We submit that assertion is correct. In terms of the parties, it's made clear and regard is had for that – for the full sentence in that subclause and the preamble wording at subclause 9A(iv). That is the total salaries prescribed by subclause (indistinct), also include the shift allowance in compensation, (indistinct) where applicable for the following – and that is to be read in conjunction with subclause 9, which states:

PN214

In regard to all shift workers, all disabilities and disturbances associated with the (indistinct) and the working of regularly rostered shifts on weekends and holidays.

PN215

That language clearly contemplates the payment of the total salary, which includes compensation for regularly working rostered shifts on public holidays. It's all encompassing, does not include – contemplate any exclusion. To achieve the outcome that the applicant is suggesting that you arrive at, it would require the inclusion of wording that is simply not there to have that fact, to build in some sort of exclusion within clause 9A(iv)(i). We say also that when you have regard for clause 9A(iv) of the agreement, which provides for the salaries and other payments to provide for all circumstances for conditions of employment (indistinct) and clause 6C of the agreement, which sets out essentially a no-extra-claims commitment. Then for lack of any express entitlements on an additional benefit called additional public holidays, it's clear that there was no intention to provide access to additional compensation for (indistinct) to work on those (indistinct). If the parties had intended otherwise, they would have said so but they did not. There are other examples within the agreement, where the parties have recorded their changes will be made to shift allowances. Those include the annual increases; those include changes in relation to the implementation of new shift systems.

PN216

There are changes which are contemplated expressly in relation to public holidays; that is the introduction of new public holidays, which will be recognised. But that's where their obligation ends. There's terms in there that talk about when an additional public holiday no longer needs to be recognised. Again, that's where that ends. If the parties had intended for there to be some form of automatic adjustment - that's what's being asked for here, some form of automatic adjustment – the parties would have made that clear because they made clear in clause 9A(i) that any other adjustments to total salaries would be provided for elsewhere in the agreement. It just simply doesn't exist.

PN217

We say for the reasons set out in the respondent's outline of submissions and our closing submissions, the Commission as constituted ought conclude that the answer to the agreed question is known. I might just take a moment, Your Honour – I just want to make sure that I've addressed all of the matters that have been raised by the applicant in opening to ensure that I've adequately addressed those. There's probably only two matters which I think I need to address in that space. The first is that my friend made reference to the respondent's outcome involving a need to impute language into the agreement or otherwise require a rewriting of the agreement which would be inconsistent with the principles in Berri (indistinct) and I agree. It's very clear from Berri that it's not – the interpretation process isn't to result in rewriting.

PN218

But in this particular case there's no need to. The words themselves are abundantly clear and that's why we say there is no need to resort to the evidence, because there is no ambiguity in the agreement about what employees are entitled

to whilst that agreement is in operation, particularly in respect of public holidays. There is no need to rewrite anything into the agreement that would allow the respondent's interpretation to succeed. Conversely, though, in respect of the applicant's position, they are asking you to build something into the agreement which doesn't exist: that is, an entitlement to have the shift allowance recalculated in the event that circumstances in clause 17C can't suffice because that simply not there. The second matter that I think was appropriate to address is the – just very briefly because I have touched on it – is that historical context, while the parties in their negotiations and the various iterations of shift allowances have been changed over time. The evidence is very clear from Mr Beasley, and he's the only person who was (indistinct) apart from some commentary by Ms Byrnes.

PN219

But the roster arrangements that resulted in change to the working hours for employees and the corresponding adjustment to shift allowances it would seem on the evidence – I think this is open to conclude this – was entirely linked to enterprise agreement negotiations. I separate out public holiday changes in 2015 because they didn't involve a roster change. They just involved a change to the public holidays recognised in the state of Victoria. But in respect of the other changes made to shift allowances, we say that they aren't relevant, to the extent that they don't involve changes to public holidays, which is the real (indistinct). In any event, to the extent that they are, they indicate an ongoing common acceptance that the shift allowance is something which is changed as a consequence of industrial negotiations in the context of (indistinct words).

PN220

And so we say in that space that historical context that has been given by my friend isn't relevant to this matter. To the extent that you do conclude that there is some ambiguity or uncertainty as to the language of the agreement which we – as we've submitted – disagree with. Unless you had any further questions of me, Your Honour, that ends my closing submission.

PN221

THE DEPUTY PRESIDENT: I think you probably addressed a couple of things I might have had on my list anyway. One that I think might have snuck through, which relates to – and I can just ask you to go to court book 440 and 441 and in particular at 441, the opening sort of dot point is relied on by the applicant there, as an indication that clause 17D is targeted at – and only at, I guess – clause 17A. Is that – what do you wish to say about that?

PN222

MR VALLENCE: In relation to that matter, Your Honour, I can't say that it doesn't say what it says. It clearly does refer to, '(i.e. as listed in clause 17A)'. What I would say in relation to that though is that there is every chance – and I acknowledge that this is a submission – every chance that there was simply an error, that instead of e.g., i.e. was included. What I would say conversely – and I've touched on this in my closing submissions – it needs to be read in the context of the whole of the document which does make abundantly clear that the arrangements for total salaries for clause 9A and the total salaries paid in compensation for all circumstances, and clause 9A(iv)(i), which makes clear that the payment of shift allowances is for public holidays without any form of

extension being included there and I think most critically again, the fact is that there is nothing within this presentation at all that contemplates an adjustment to shift allowances in the context of any additional days being declared (indistinct).

PN223

There's already time in lieu arrangements that might apply in those circumstances and that is, as I say, most critical because clause 9A(i) does provide that – does provide for a positive obligation for there to be something in the agreement that does that, if there is something to result in a change to the salaries and entitlements that are contemplated by clause 9B.

PN224

THE DEPUTY PRESIDENT: Thanks, Mr Vallence. Ms McGrath.

PN225

MS McGRATH: Yes, thank you, Your Honour. With our friend's submission that, you know, there needs to be something positive about adjustments to the allowances or time in lieu that's got to be written into the agreement – we would say there is a bucket of money that encompasses what people are giving up. They're giving up overtime, they're giving up weekend work and they're giving an amount of public holidays. Now, that bucket of money has to be specific. It relates to real wages, real values – these people have got livelihoods. You can't, for example, you know, suddenly say, 'There's a whole lot of new public holidays but you're not getting any of them because 20 years ago we said it was worth this much'.

PN226

The history and context is important. It shows that for the last 20 years they've been sitting down with these workers and telling them, 'Your overtime is worth this'. Look at that document table by Mr Jorgensen: 'Your overtime is worth this amount of money. Your public holidays are worth this amount of money. Your weekend work is worth this amount of money'. When we add all that up, that's equal to 44 per cent or whatever it is. I mean, that was what the 44 per cent was. I mean, for Mr Vallence to say this is about a negotiation of a roster change – that's not what is important, was a roster change. It's the fact that the roster is changing in accordance with what the workers are required to do. It's not just a roster change. It's, 'You're not working weekends anymore so we have to take that bucket of money that pays your weekends out of your allowance. In this roster change you won't be doing night shift anymore so we take that bucket of money out of your allowance'. Or, 'You'll be working only public holidays that don't (indistinct)'. These are meticulous calculations that have gone on for 20 years. There's no point to say there is nothing in the agreement that says the shift allowance has got to be adjusted every time something else happens. That's not the way it works. It words the opposite way.

PN227

It works a contained bucket of money. This is in it, this is in it, this is in it. We've told you in tables before the 2014 agreement, we've come to the 2018 agreement table and we've told you a week before all your workers were about to vote on it, what is contained in this bucket of money? It contains these holidays as set out in 17A. Now, that wasn't an abstract sort of mistake or abstract question that nobody

was thinking about. They've been talking about this for three years because of the Grand Final public holiday. It's interesting to note that prior to 2018, there hadn't been any new public holidays. There was 10 public holidays until the 2015 ones from the time the agreement started, from the time of the award.

PN228

It's a 20-year history, but there's only 10 and they knew what those 10 were worth and they calculated them meticulously time and time again, explaining to workers each dollar value of it. That's why it's worth 44 per cent rather than 40 per cent, because it all has a dollar value. I just briefly touch on 9A, that my friend has taken you to: as he states that the allowance is loading, it covers allowances, loadings or penalties, except whether otherwise provided for in this agreement. Well, this agreement provides for which public holidays are in that bucket of money. They're those specified at 17A and as Mr Pethebridge said, that's what the agreement provides. It's going to cut your overtime, your weekend work and these public holidays.

PN229

Mr Beasley gave evidence that they didn't consider it an extra claim. They wouldn't say, 'You know, we've got these things. We've got this bucket of money'. They want a bit more. We want our allowance adjusted. They didn't say that at all. They said, 'The allowance covers this'. It doesn't cover that so you can go jumping in (indistinct) because it's not in the bucket. It's either in the bucket or it's not in the bucket. Now, what is in the bucket has to be expressed. You can't make up things in the bucket. You can't say, well, suddenly the bucket is going to include your overtime or your bonuses. I've just done it, that's all going into the bucket. You can't do that to them. They've been told all the way through for 20 years of history of negotiation what is in the bucket and what it's worth. It doesn't make any sense to now say, 'Anything that comes along – if you've got to do another 60 hours of overtime or you've got to do another 20 hours (indistinct), that's going to go in the bucket too'. They have meticulously calculated what's in the bucket.

PN230

They would have thought that that bucket is going to cover any eventuality that is ever going to happen. The reason why there was no claim or no expectation of being paid extra public holidays is because there weren't any up until 2015. It wasn't even contemplated. They went (indistinct) along for 20 years with 10 public holidays. They didn't expect any more because for 20 years there's been no introduction of new public holidays. It was only the introduction of a Labor government where Dan was a bit worker friendly that he started bringing in new holidays. Prior to that there just wasn't any. So they were pretty clear about what the bucket of money contained and it didn't – it contained what was in 17A.

PN231

So it's inverse to say there has got to something in the agreement that says that the shift allowance will be adjusted every time different things happen – no. The allowance is the allowance. It's a set component we've meticulously calculated entire (indistinct). Can I just go back to another thing that Mr Vallence referred to? So I've talked about 9A and I've talked about 9A(iv), where it says the total salaries in regard to shift workers will compensate all disabilities and disturbances

with shift work. That stands – that's the first phrase in that sentence: 'All disabilities and disturbances (indistinct) shift work'. It all doesn't refer to public – the regular rostered weekends. It all refers to the disabilities and disturbances of shift work – all of those: getting up in the middle of the night to be at work. It covers all of that and the working of regularly rostered shifts.

PN232

No one is denying that the bucket of money covers the working of regularly rostered shifts on weekends and public holidays. All we're saying is that they were told. They were told to the nth degree what those covered, how many public holidays there were and what they were worth. So Mr Vallence took you to his – court book page 271, so I'll just briefly go to what's there at 271. That's my phone, Your Honour – I'm so sorry.

PN233

THE DEPUTY PRESIDENT: If it's any consolation, I didn't hear it so you inadvertently self-reported there.

PN234

MS McGRATH: I apologise – 271, so he took you to his submissions at 271, so that is clause 40(v), where he says:

PN235

The language in 17D does not contain any limitation on the application of the term so far as it does not refer to a particular class of public holidays other than any of the above public holidays.

PN236

Well, if we look at clause 17, it doesn't say that. You look at clause 17, it doesn't say, 'Any of the above public holidays'. It says – sorry, clause 17D – it says: 'Compensation for shift workers who are rostered to work on any of the public holidays specified above' – not, 'any of the public holidays above', 'any of the public holidays specified above is provided for in the relevant shift allowance'. I've taken Your Honour to my submissions about what is specified above, so I won't go over that again.

PN237

THE DEPUTY PRESIDENT: Can I ask a question? Let's say you're right about that, you're right about the bucket and when I said (indistinct) you're right about 17D points only to 17A, what Mr Vallence then says is that there is just no clause dealing with any mechanism for (a) either a payment or a time off in lieu entitlement or the public holidays not listed in 17A. What are the clauses that you rely on?

PN238

MS McGRATH: Well, it's not true that there is no mechanism to pay them time in lieu, because they did pay them time in lieu. They paid them time in lieu for the Grand Final so (indistinct) no mechanism or no way of working out what they should be paid.

PN239

THE DEPUTY PRESIDENT: I understand that factually happened but under the current agreement, what is the clause relied on?

PN240

MS McGRATH: I don't think there needs to be, Your Honour, in the sense that if you're going to take away public holidays, that's an NES entitlement, that's what's got to be clear: what are taking away? You've got it – they're the important things that need clarity, so they're telling them what they're taking away from them. You're going to take away more public holidays than what you're telling them, you have to be pretty clear about that because these are sanctioned NES entitlements. We don't need to say, 'We want adjustments because we're going to take more from you than what we told you we were going to take from you'. We say, 'We're going to take from you what we said we were going to take from you. We're going to take away your entitlement to overtime and weekend work and a certain amount of public holidays. We're going to take that away from you and we're going to give you this (indistinct)'. That had to put in the agreement – everything else is in the agreement. The award's in the agreement. The default position is you can pay for all these things unless someone takes it into a bucket of money. Otherwise, there are provisions in the incorporated award or in the agreement that covers all this. What they're doing is taking them out of the agreement (indistinct) - - -

PN241

THE DEPUTY PRESIDENT: Sorry – I just want to understand, what's the – what do you say should have happened and what clauses of the agreement or other instrument are you relying on for whether it's a payment or a time off in lieu equivalent?

PN242

MS McGRATH: Well, they're entitled to public holidays, yes? Because they're not taken out of them if they're not cut off by being isolated in this bucket, then they're entitled to the public holidays as set out. You know – they're entitled to them.

PN243

THE DEPUTY PRESIDENT: Sorry – that's an NES point, is it?

PN244

MS McGRATH: Well, it is an NES point, you're entitled to public holidays, but they're also entitled to them under the agreement, where it says, 'You'll be given additional public holidays', as they're declared.

PN245

THE DEPUTY PRESIDENT: I see. So your point is that in the absence of some other arrangement that is put, they just have the public holidays off?

PN246

MS McGRATH: Yes, yes – our point is that if you're taking entitlement away, you're taking people's – all their penalty rates, all their double-time, you've got to be pretty clear about what you're taking because this is money out of their pockets. You can't suddenly say, 'It also incorporates this stuff we never thought

about', because they're all got a monetary value. That's what's been clear throughout the history of all of this. It's worth something – it's not an amorphous amount, as my friend keeps saying: 'It's just this shift allowance and they didn't adjust it and they didn't adjust it there'. (Indistinct) meticulous – they didn't give 1 per cent or something for Grand Final leave and for Easter Sunday. They gave something like 0.41 for Grand Final leave and 0.14 for Easter Sunday, or the opposite. It's meticulously calculated, what these days are worth. Then they adjust it as soon as they work that out. But there was never any sense that these workers that they weren't entitled to them or that it was an extra claim and Mr Beasley had evidence of that. I said were they asking for something extra – no, they weren't asking for something extra. They were just asking for these days in lieu because they were public holidays that weren't covered in the bucket of money. They knew they weren't covered because they'd been told. They'd been told before the 2016 agreement, they'd been told before the 2018 agreement. These holidays aren't in the bucket of money, they'd been told specifically.

PN247

I could take you to – I was going to take you to (indistinct), Your Honour, which I'm sure you're familiar with, which – sorry, I just – says how valuable it is to study the history or context of a provision. So I'll just get that – this is quoted from *King v Vicentre Swimming Club* and I can get Ms Hill to send you this. Wheelahan J made the following observations in respect of the significant history and context when construing an agreement where the circumstances of the court allow and I don't think we can sustain an argument that it's not capable of more than one meaning, or what are we doing here? The case authority says it was capable of more than one meaning and we can look at these things.

PN248

I don't think there is a sustainable argument that it's not. So in this *King v Swimming Centre*, the history, the significance of history of context as aid to construction was referred to in short in (indistinct). This is where the circumstances allowed a court to conclude that:

PN249

A clause in a word is the product of history out of which it grew to be adopted in its present form. Only a kind of wilful judicial blindness would lead the court to deny itself the right of that history and to prefer to peer unaided into some obscurity in the language.

PN250

These workers have been there, in the case of Mr Beasley, for 40 years. They know everything that they're paid for. They know the value of it all. They're all very local workers. It's not some amorphous thing for them. It's their day-to-day lives for decades. Then it goes on to say:

PN251

The authorities relating to the construction of industrial instruments illustrate that context may shed light on the proper meaning given to expressions that take their colour from the industrial context. The history of provisions of an

industrial instrument may demonstrate that particular expressions have been subject to interpretation.

PN252

The history of the clause shows that this bucket of money – Mr Vallence is saying it changed according to the roster but that's not the relevant thing, the roster change. It changed according to what components they were – it's not like, 'Oh, we'll give you 40 per cent for this bucket of money, this agreement and then we'll get that up to 45 per cent'. That's not how that works. The bucket of money is related to what they were doing so that Mr Beasley's evidence shows that when he first started working he was working 24-hour shift work and doing all the disabilities of night shift. Now, that group of workers, they were taken out of doing that. They weren't doing weekend work. So their shift allowance was adjusted to reflect that that component was taken out.

PN253

Then they didn't have to work public holidays. That component was taken out. It's not a – when we question Mr Beasley, saying, you know, 'Did you have any input into the negotiations for the bucket of money', sure, they were negotiating the agreement. They were negotiating (indistinct) but they won't negotiate the bucket of money. They were told by Alcoa what by the bucket of money was worth and what the components in the bucket of money were worth and they've always been told that. Mr Jorgensen told them that to the nth dollar. Mr Pethebridge told them what's in the bucket of money. We know what's in it. They're not asking for some trigger or some clause in the agreement, 'This is all going to be adjusted'. Nothing is going to be adjusted. If it's not in the bucket of money, they're got to be paid for it.

PN254

I could go through a bit more of the changes to the roster. Yes, (indistinct) – yes, so, as I say Mr Beasley is saying there really wasn't any negotiation on that point. They trusted the company that this is what their times are worth, this is what their dollar value is. This is what, you know – they trusted them. I put it, you know – they trusted them, 0.41 per cent was the direct amount of money for working on an Easter Sunday public holiday. That's what the company told them. It's a very, really specific percentage amount.

PN255

THE DEPUTY PRESIDENT: Do all workers work on Easter Sunday holiday or some do and some don't?

PN256

MS McGRATH: No workers work on every public holiday at all. You only work on the public holiday on your roster. So there's rosters that there'll be sort of seven days on, seven days off. So, no, you know, there's not going to be any worker that works the 10 public – sets of public holidays or anything like that. They'll all work according to what falls on their roster.

PN257

THE DEPUTY PRESIDENT: Thank you, I understand.

PN258

MS McGRATH: Yes, so when Mr Beasley – sorry, when Mr Vallence talked about, you know, there was an adjustment made to the allowance of the 5.6 per cent recently – well, that was nothing to do with any of the components. That was just because the AWU workers wanted to improve their superannuation by having a portion of that, the bucket, the monetary value of (indistinct) put in their base salary. It has nothing to do with re-adjusting in accordance with what the components of the allowance were worth.

PN259

It was just a claim to put something of the bucket of money, add to the base salary to improve their super. So the bucket of money has stayed the same but it was adjusted when these new public holidays came along and when they came along, the workers said, 'Hang on, we're meant to be paid for that because it's not in the bucket'. And they were paid for it. Evidence and matters in common – I think I've taken Your Honour to that enough. To say there's no notorious facts – I don't think that's a sustainable argument.

PN260

THE DEPUTY PRESIDENT: Sorry, I didn't quite hear that. To say - - -

PN261

MS McGRATH: My friend has argued when you talk about common intention, there's no notorious facts – like, there's no facts that are known to everybody. I think those flyers that are given out to the entire workforce, they're notorious facts. Everybody knows what those flyers said, you know? So I think they are notorious facts that we can look at. Sorry, I'm just going through my notes to see if there - - -

PN262

THE DEPUTY PRESIDENT: No, no, that's okay, I understand.

PN263

MS McGRATH: My friend did talk about, you know, that he agreed that Berri says you can't rewrite the agreement. Well, he is in a sense attempting to do that, (a) in that submission I took you to, where he's saying that the agreement, that clause 17D says it refers to, 'any of the above public holidays'. Well, I've taken you to that. It doesn't refer to that. But he's also kind of saying that the 17D refers to the classes of the public holidays above. Yes? The agreement clearly says the public holidays specified above. It doesn't refer to classes of public holidays. I think by taking you to that in submissions what 17B and 17D – you know, if we have a purposive approach to those clauses, they're to specify holidays. They're to either accommodate where new holidays come into existence or where there's a substitution of a day – that's where if we have a purposive approach to reading clause 17, that's what those clauses are for. They're not to specify dates. They don't specify public holidays.

PN264

I just wanted to just perhaps take you to Ms Narelle Byrne's evidence just for a moment, Your Honour. From paragraph 23, she suggests that some sort of catastrophic outcome but she doesn't really suggest how the catastrophic outcome

could occur. She says the smelting process is a continuous (indistinct words) process can become very unstable very quickly and then a disruption, for example, and where there's a loss of power, it could be necessary to move 380 pots of service. A disruption of that magnitude would significantly impact not only Portland Aluminium but also the local community. I mean, Ms Byrnes doesn't give any connection between the fact that people are going to get the odd day in lieu or payment thereof, is going to have this catastrophic effect. I notice that, you know, Mr Vallence didn't put anything in his submissions so I'd urge Your Honour to take the expression of that catastrophe with a grain of salt, given that there are no dots joined there.

PN265

THE DEPUTY PRESIDENT: I think you're probably right on that paragraph and I did note that Mr Vallence didn't go to it. So I don't think we need to spend too much further time on that particular paragraph.

PN266

MS McGRATH: So if Your Honour has no further questions, I think – or is there anything else you'd like me to go through in the agreement or - - -

PN267

THE DEPUTY PRESIDENT: No, look, I didn't. I think my primary question was the one posed by Mr Vallence, just so I was clear as to that, which is if 17D operates in the way you say, confined to 17A, then what happens? I think you've given me an indication as to that.

PN268

MS McGRATH: You get everything else that's in the agreement, if it's not in that pocket, and I think I made the point that if you displace an NES entitlement, you've got to say you're doing it. They've told the workers what entitlements they're displacing: they're displacing overtime, they're displacing weekend work and they're displacing these public holidays. If you're going to displace one single more public holiday, you're breaching the NES. You can't do that without telling people what you're doing. You need to say that expressly: 'Now we're going to include that, so you won't get paid for that either'. If you want to do that to a worker, you need to tell them.

PN269

THE DEPUTY PRESIDENT: Yes, I understand. Thank you. I think, Mr Vallence, it's probably fair to give you a short right of reply although I'd encourage you to keep it on reply there.

PN270

MR VALLENCE: Yes, Your Honour, certainly. Thank you, Your Honour. I think I put to you everything I wanted to in relation to a substantive question that's for you to determine through this proceeding. One matter that I will raise is probably just that last matter that you discussed with Ms McGrath, which was the relevance of the information that had been provided by Ms Byrnes in relation to the potential issues that could be experienced by the plaintiff. Just to provide some context, perhaps we can make that clearer than the submissions at first instance: one of the submissions made by the applicant is in the initial outline of

submissions was that if there is some breach of the agreement in not making payment then it would be unreasonable to require employees to undertake work on a public holiday pursuant to the terms of the National Employment Standards, which contemplates a range of criteria which are used to determine whether working on a public holiday is – (indistinct) to work on a public holiday, I should say, is reasonable or not. That is addressed in passing that paragraph 45E of the respondent's outline of submissions, where the respondent talks to it being – it not being unreasonable for the respondent to require shift worker employees to work on additional public holidays in a range of circumstances and it's intended that the information provided by Ms Byrne contemplated in that context that if the employees on a whole shift decided that it was unreasonable for them to be required to work on an additional public holiday, it could have serious and very financially costly implications for the business.

PN271

So it was just put forward in response to that submission that had been made by the applicant at first instance. I do acknowledge that it's not really on point with the matter that is being determined, which is about whether there is an additional entitlement that should be provided to employees in the form of time in lieu or some other financial equivalent for – to compensate for additional public holiday. I just wanted to touch on that just so – to provide some context - - -

PN272

THE DEPUTY PRESIDENT: I understand that a little bit better now, thank you.

PN273

MR VALLENCE: Thank you.

PN274

THE DEPUTY PRESIDENT: I think then – was that it, Mr Vallence?

PN275

MR VALLENCE: It is, Your Honour, thank you.

PN276

THE DEPUTY PRESIDENT: I have no further questions of anyone else. So I think on that basis, it now falls to me to do my work. I would record at this point I would thank the quite extensive work that the parties have put in, particularly to the written submissions and further address me on these this morning, so I have been assisted by that. I'm going to have to obviously go away, look at it all carefully again. I should indicate I looked at it pretty carefully before today but I've been assisted further – and then write it up. I am a little bit loathe to give you a promise on an outcome. I think I'll struggle to get something done within three weeks but I'll be certainly aiming for sort of four or five weeks to get out a published decision.

PN277

But I'd perhaps just ask to be generous, if you haven't got an email from me at that stage, just falls in making immediate inquiries if the clock strikes midnight at five weeks' time and you haven't received anything. Maybe at least wait three days, perhaps. Other than that, thank everyone for their assistance and I think we're in a

position now where we can adjourn and on that basis I'll ask my associate to adjourn.

ADJOURNED INDEFINITELY

[11.06 AM]

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