TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT O'NEILL
COMMISSIONER BISSETT

C2022/8109

s.604 - Appeal of decisions

Appeal by Construction, Forestry, Maritime, Mining and Energy Union (105N) (C2022/8109)

Melbourne

10.00 AM, TUESDAY, 21 FEBRUARY 2023

PN1

DEPUTY PRESIDENT GOSTENCNIK: Good morning. Mr Boncardo, you're seeking permission to appear for the appellant?

PN2

MR P BONCARDO: I am, Deputy President, yes.

PN3

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. And Ms McMahon, Ms O'Conner, you're both appearing for the respondent?

PN4

MS C McMAHON: Yes.

PN5

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning.

PN6

MS McMAHON: Good morning.

PN7

DEPUTY PRESIDENT GOSTENCNIK: I gather the written submissions that the respondent has filed, the respondent opposes the grant of permission to the appellant to be represented by a lawyer? That continues to be the case?

PN8

MS McMAHON: Yes, it does.

PN9

DEPUTY PRESIDENT GOSTENCNIK: Mr Boncardo, you will have seen the respondent's submissions. Do you want to say anything in addition to your written submissions in the past?

PN10

MR BONCARDO: Just very briefly, Deputy President. Contrary to what is set out in those submissions, the matter does have some complexity to it given that it is incumbent upon my client to establish error of the kinds set out in House v The King, or as we contend, a jurisdictional error by reason of the denial of procedural fairness.

PN11

Those matters are in and of themselves complex, and it would, in my respectful submission, be more efficient for counsel to be permitted to represent the appellant and that the Full Bench can be comfortably satisfied that the pre-condition under section 596(2)(a) is made out, which is, in my submission, a powerful reason for the grant of permission under section 596(1).

PN12

Whilst I appreciate the respondent has determined not to seek legal representation, in my submission there is no relevant unfairness, given that the respondent's submissions make very clear that they are well-apprised of the issues in the case,

and that Ms McMahon has been able, with respect to her, to compose an articulate and erudite response to my client's outline of submissions.

PN13

In those circumstances, the fact that the respondent has determined not to engage a lawyer is a matter of no great moment in determining whether or not the discretion under section 596(1) should be exercised.

PN14

DEPUTY PRESIDENT GOSTENCNIK: Ms McMahon, as their client, do you want to say anything in addition to your written submissions, taking into account the (indistinct) by Mr Boncardo?

PN15

MS McMAHON: There's a very big difference between a barrister and a general workplace with knowledge of the law and the clauses that he just basically referred to, which doesn't really – you know, we don't have the full knowledge of. Our thoughts were that the CFMMEU had the legal capabilities of being able to represent themselves and would still be at an advantage over us as we stand at this point.

PN16

To put a document together over a time period is very different than being able to come forward with details in a situation like this.

PN17

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. Thank you. Well, we're satisfied taking into the account the complexity of the matter that the matter will be dealt with more efficiently if we were to grant permission to the CFMMEU to be represented by a lawyer, and we do so.

PN18

We should indicate, Ms McMahon, Ms O'Conner, that to the extent that there's any perception of any disadvantage because you're not legally represented, it's our role to ensure that this proceeding is conducted fairly and that you'll be given every opportunity to understand the issues that arise and to respond to them accordingly. So you needn't concern yourself about those things.

PN19

Mr Boncardo, the appellant has filed two witness statements of Ms Read, which I take the appellant wishes to rely on for the purposes of the question of whether additional time should be allowed for the filing of the appeal?

PN20

MR BONCARDO: That's so, Deputy President.

PN21

DEPUTY PRESIDENT GOSTENCNIK: Ms McMahon, Ms O'Conner, does the respondent wish to ask any questions of Ms Read – cross-examine Ms Read in relation to her statement, or her two statements?

PN22

MS McMAHON: No.

PN23

DEPUTY PRESIDENT GOSTENCNIK: But you have those statements I take it?

PN24

MS McMAHON: Yes.

PN25

DEPUTY PRESIDENT GOSTENCNIK: The statements address the circumstances in which the appeal was lodged and the delay. You understand that?

PN26

MS McMAHON: Yes. I think everything that we wanted to discuss was actually put into our statement that was lodged as far as the ability for this to be put through to another (indistinct) member to take up, and not have the delays in the timeliness of our response was what we were basically - - -

PN27

DEPUTY PRESIDENT GOSTENCNIK: I understand. The submission you make, as I understand it, is that the fact that Ms Read was ill for a period of time and unable to attend to her duties is not an explanation for the delay. Since the union's a large union, there are other officials that could've taken on the duties. That's essentially the point you make?

PN28

MS McMAHON: Yes. And the member that was actually going on leave actually sent the request through to her to take that on, which we would assume would know where his other co-workers were not available and could've sent it to another member.

PN29

DEPUTY PRESIDENT GOSTENCNIK: Yes. I understand that, but is there any objection to the Commission receiving the statement?

PN30

MS McMAHON: No.

PN31

DEPUTY PRESIDENT GOSTENCNIK: Mr Boncardo, we might just mark the statement, beginning with the statement of 8 December. We will mark the statement of Rosalind Read, comprising 18 paragraphs, dated 8 December 2022, together with the annexure thereto, as exhibit 1.

EXHIBIT #1 WITNESS STATEMENT OF ROSALIND READ DATED 08/12/2022 PLUS ANNEXURE

PN32

MR BONCARDO: Thank you, Deputy President.

PN33

DEPUTY PRESIDENT GOSTENCNIK: And we'll mark the further witness statement of Rosalind Read, comprising seven paragraphs, dated 19 January 2023, together with the annexure thereto, as exhibit 2.

EXHIBIT #2 FURTHER WITNESS STATEMENT OF ROSALIND READ DATED 19/01/2023 PLUS ANNEXURE

PN34

MR BONCARDO: Thank you, Deputy President.

PN35

DEPUTY PRESIDENT GOSTENCNIK: I should indicate that members of the Bench have read the submissions that both parties have filed.

PN36

MR BONCARDO: Thank you - - -

PN37

DEPUTY PRESIDENT GOSTENCNIK: Yes, Mr Boncardo.

PN38

MR BONCARDO: Deputy President, there's one further preliminary matter, and that is that we have sought to rely upon an amended notice of appeal, which adds a second ground of appeal concerning the application of the better off overall test. That was filed together with our written submissions and I think I need to seek the Full Bench's leave to rely upon that on the appeal.

PN39

DEPUTY PRESIDENT GOSTENCNIK: Yes. Apology, I should have raised that myself. Ms McMahon, Ms O'Conner, have you seen the amended notice of appeal filed by the appellant?

PN40

MS McMAHON: Yes.

PN41

DEPUTY PRESIDENT GOSTENCNIK: Do you have any objection to the request that we allow the appellant to amend its notice of appeal?

PN42

MS McMAHON: The submission as far as the BOOT test, our understanding is that everything that was approved by the Commission definitely passed the BOOT test. The particular clause that was brought up is actually (indistinct) it should have been included within the agreement, when we have gone through other industry-based agreements were (indistinct) as an example, that isn't included in their agreements. And within our submissions, we covered our processes and think that we actually do, and have done so, over the last quite a few years.

PN43

MS O'CONNER: I think also when you're talking about – sorry – the actual form that was submitted, the second amended form, that appeal is already lodged late,

which is one of our major concerns obviously. Ms Rosalind Read had tried to then brief counsel before lodging the appeal form another nine days after they have apparently found out about it, and then they had with the amended form another, you know, month or so, two months – sorry if I'm not getting my dates specifically correct – to then add further concerns about the appeal. So it's just extending that timeframe, that we're very concerned that they've had all this time, for such a big organisation, and can't get these things right the first time.

PN44

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. Mr Boncardo, what we might do is deal with the question of the amendment to the notice of appeal as part of our consideration of the grant of extension of time, but for present purposes you can proceed upon the basis that you should address all matters, including those matters that are in the amended notice.

PN45

MR BONCARDO: Yes. Thank you, Deputy President. Deputy President, in terms of my oral address today I will endeavour not to repeat what is in the written submissions, but I was going to deal with four matters: firstly, the issue as to whether or not my client is a person aggrieved by the decision for the purposes of section 604(1) of the Fair Work Act.

PN46

I was then going to say something additional about the application for the extension of time, and then deal with the procedural fairness ground and the proposed BOOT ground by way of reply to the submissions that have been filed by Patches.

PN47

Can I turn first to whether or not my client is a person aggrieved and has standing to appeal the decision, which is a threshold matter raised in Ms McMahon's submissions at paragraph 17 to 23? My client relies on its rule 2(E)(a) to contend that it can in fact represent under its rules the industrial interests of categories of employees who are covered by the agreement.

PN48

The Full Bench is no doubt well familiar with rule 2(E) of the CFMMEU's rules, which is the old FEDFA rules. These are contained at page 9 of my client's rules, and I understand a copy of those rules has been resent to the Commission this morning. A copy was attached to Ms Read's second statement, but a further copy has been sent through, which perhaps is more easy to navigate.

PN49

Rule 2(E), as the Full Bench will see, is at page 9, and it provides amongst other things that the appellant is able to role all classes of engine drivers. The concept of an 'engine driver' encompasses the operators of plant, including plant that is captured by the classifications set out in the enterprise agreement. Those classifications relevantly are at appeal book pages 18 through to 20, at clause 23 of the agreement.

PN50

The Full Bench will see at clause 23 a wage classification structure, and there are some seven (audio malfunction) classification, and the positions of employees employed in those classifications are set out.

PN51

Can I draw attention to a number of those positions in respect to level 2, which the Full Bench will find on page 90 of the appeal book. The Bench will see a reference to (audio malfunction), and a (indistinct) operator.

PN52

In relation to level 3, the Full Bench will see at the fourth dot point a reference to a 'front end loader', a 'skid-steer and tractor broom operator.' The final dot point in respect to level 3, there's a 'bitumen sprayer trainee operator.'

PN53

Under level 4 there's a reference in the second dot point to a 'paver operator', the third dot point a 'profile operator', a 'suction (indistinct) operator', and a '(indistinct) driver.'

PN54

Level 5 also makes reference to a 'sprayer operator', and level 6 captures 'senior bitumen sprayer operators.' Those positions are positions involving operation of plant, and they uncontroversially, in my respectful submission, fall within rule 2(E).

PN55

The respondent's submissions in this regard are premised on (audio malfunction) reads an industry rule, but it's not; it's an occupational rule, and to make good the proposition that has it has been uncontroversial for decades, my clients (audio malfunction) plant operator (audio malfunction) those rules.

PN56

Can I take the Full Bench very briefly to one of the decisions in the bundle of authorities that the appellant has filed, which is at tab (audio malfunction) at page 76 of the bundle of authorities, being a decision of the *Industrial Commission of NSW in Re Federated Engine Drivers' and Fireman's Association of Australasia (Coast District)* [1958] AR (NSW) 689?

PN57

This was a decision of the Full Bench of the Industrial Commission in respect to an application by FEDFA for re-registration after it had been deregistered in 1955 as a result of its members engaging in what I understand to have been a series of wildcat-style strikes. Following its deregistration, the Australian Workers' Union had involved plant operators as members and sought to protect their industrial interests. The AWU intervened in - - -

PN58

DEPUTY PRESIDENT GOSTENCNIK: I'm sorry, Mr Boncardo, we just lost audio with you for about 20 seconds, so you might just rewind.

PN59

MR BONCARDO: Yes, certainly. Relevantly, the Australian Workers' Union intervened in the proceedings in opposition to FEDFA being re-registered, and contended that the eligibility rule of the FEDFA, which is found at the 2E client's rule, did not permit it to enrol plant operators.

PN60

The Full Bench will see that contention set out at page 80 of the authorities book and page 693 of the report of the decision. The Full Bench will there see that the ground of objection raised by the AWU at about 0.6 of the page, and there's four awards stipulated towards the end of the page, and before those awards are set out, the Bench notes:

PN61

The purpose of the objection was to exclude the association's register from obtaining members and representing certain classifications of employees whose employment was regulated by the following awards.

PN62

The relevant rule of the association is then set out, and the submission of the AWU is detailed over the page at page 694 of the report at about 0.8 of the page in the second last paragraph where it set out:

PN63

The AWU submitted that the rule was not wide enough to cover what are now called 'plant operators'.

PN64

That rule, for the consideration of what a plant operator was, commences at the end of page 694 where the Full Bench refers to a number of dictionary definitions of 'engine', and over the page at 695, the second sentence, the Full Bench notes that the dictionary also states that 'it is applied to various other machines analogous to steam engines i.e. to machines including in themselves immense generating power.'

PN65

They go on to note that it includes 'mechanical contrivances' and conclude by saying:

PN66

It's sufficient to say the word, 'engine', has a (indistinct). Indeed, it cannot be limited to stationary steam engines and locomotive engines.

PN67

And in the third paragraph they resolve, relevantly, in the second sentence of that paragraph, that:

PN68

Here on an examination of the award history of plant operators that they have always been regarded as covered by the term, 'engine drivers'.

PN69

And that was regarded by the Full Bench as a relevant fact in ascertaining the class of person who fell within the relevant rule and consequently the AWU's objection was dismissed.

PN70

Now, most recently the question of plant operators and whether or not they fall within all classes of engine drivers set out in rule 2(E) has been considered by the Industrial Commission of Queensland, or I should say the Industrial Court of Queensland, in a decision which is at tab 3 to the appellant bundle of authorities.

PN71

It's a decision of Davis J, the President of the Industrial Court, in *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2021] ICQ 15. That commences at page 34 of the bundle of authorities. This was an appeal from a decision in respect to a dispute as to the exercise, or a purported exercise, of entry rights under sections 117 to 188 of the Work Health & Safety Act of Queensland.

PN72

One of the issues in the proceedings was whether or not there was a right of entry given the suspicious, suspected contraventions of the work, and the Act was said to apply to categories of workers who were not covered by the CFMMEU under its rules.

PN73

The CFMMEU relied upon, amongst other things, its rule 2(E) to contend that it did have coverage of bobcat steer operators. The Full Bench will see that at paragraph 31 of the decision, which is at page 42 of the authorities.

PN74

One of the issues on appeal, which the Full Bench will see at page 44 of the book of authorities at point (c) on that page, was whether the Commission erred in law in interpreting the union's rules by finding that workers employed by the employer in that case who operated a 'skid steer' machine as an incidental activity in the course of their general duties are within the category set out in rule 2(E).

PN75

That contention was resolved by Davis J at paragraphs 110 through to 115, which commence at page 64 of the book of authorities – I'm sorry, they commence at paragraph 108.

PN76

Paragraph 109, which is on page 65, there's discussion of the NSW Industrial Commission case, which I took the Full Bench to a moment ago.

PN77

At paragraph 111, Davis J observes that the bobcat skid-steer – and I note that the skid-steer is one of the (audio malfunction) that have been captured in the classification structure – be caught by rule 2(E) on the understanding of that rule as detailed by the Industrial Commission, but the employer submitted that what

had been cited by the Industrial Commission had been overtaken by the High Court decision in Re Coldham.

PN78

There's then discussion of Re Coldham at paragraphs 111 through to 114. At paragraph 114, the submission in respect to Re Coldham is rejected and Davis J sets out that that case didn't limit the term, 'engine drivers', to the classes of engine drivers specified in the rule, and rather made clear that 'all classes of engine drivers' are captured by the rule.

PN79

And at paragraph 115, Davis J concludes that 'engine driver' encompasses plant operators and therefore the operator of the bobcat skid-steer, but in my submission, it is plain that my client is able under its rules to represent the industrial interests of the plant operators employed under (audio malfunction), and consistently with authority, including the authority we have set out in tab 2, being CFMEU v CSRP Pty Ltd.

PN80

My client is a person aggrieved by the decision, notwithstanding that none of the employees of the voting group were members, and it was not a bargaining representative for any of those employees.

PN81

Now, it has interests beyond that of an ordinary member of the public in the subject matter of the decision, because it is certainly possible, and indeed likely, that the employees who may be employed under the agreement can be members of my client, and for those reasons the respondent's instruction to my client being a person aggrieved should be rejected.

PN82

Can I turn next to the question of extension of time, and McMahon in her submissions raises at paragraph 23 four discrete matters pointing against the grant of an extension of time. One of those is my client is a person aggrieved by the decisions. I've dealt with that.

PN83

Can I deal next with the contentions made by the respondent about the explanation for the delay given by (audio malfunction)? There is criticism levelled at Mr Fisher for not following up the Commission at paragraph 26 of the respondent's submissions. In my submission, that criticism is both unwarranted and (audio malfunction) when (audio malfunction) the communication that was made to a member of the Commission's staff.

PN84

The Full Bench will see at page 36 of the appeal book Mr Fisher's correspondence to Boyce DP's Chambers after becoming alerted to the approval document, and at the base of that page the Full Bench will see that Mr Fisher had notes that there be no further contact from the (audio malfunction).

PN85

He's talking about the email. It indicated that he wished – that we wished, that is, the CFMEU wished to be heard in respect to the matter. That email correspondence is found at page (audio malfunction) of the appeal book.

PN86

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr Boncardo, you're cutting in and out. Page what?

PN87

MR BONCARDO: Page 37 of the appeal book.

PN88

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN89

MR BONCARDO: Mr Fisher in his email requests – or I should say that the CFMMEU wishes to be heard. Turning back a page, the Full Bench will see an email from an officer working in the member assist team to reply to Mr Fisher's email.

PN90

In the officer's correspondence to Mr Fisher in the third last paragraph, the officer points out a number of things, including that the union wasn't listed as a bargaining representative, and:

PN91

> *Should it not be able to establish the status of the bargaining representative for the agreement, or the union is not otherwise permitted by the Presiding Member to be heard or to make submissions, no further correspondence will be sent to the union.*

PN92

In the final paragraph, it set out that Mr Fisher's request to be heard would be placed on the file and brought to the attention of the relevant Commission member. Mr Fisher, in my submission, quite reasonably relied upon what was said by the officer (audio malfunction), presumed reasonably, that (audio malfunction) – I'm sorry, Deputy President, there does appear to be some background. Is that interfering with the Full Bench's ability to hear?

PN93

DEPUTY PRESIDENT GOSTENCNIK: I'm not sure what the problem is, Mr Boncardo, but you do tend to come in and out, and my observation of the screen is it tends to happen when you move away from the microphone.

PN94

MR BONCARDO: I understand. I'll remember to stay still, as best I can. Thank you.

PN95

Mr Fisher, in my submission, was entitled to rely on what the officer had told him, namely, that requests had been placed with the Presiding Member and would be

determined by that Presiding Member. Ordinarily that would involve the Presiding Member contacting a union and asking that union what it wanted to be heard about and why it should be heard.

PN96

The officer did in fact place Mr Fisher's request on the file. We have noted that Mr Fisher's email was in fact in the file produced by the Commission after we had filed the appeal, but there was also specific mention made of Mr Fisher's email request in a document prepared by the Commission staff for the Deputy President. If I can take the Full Bench to that document at court book - - -

PN97

DEPUTY PRESIDENT GOSTENCNIK: That's 88, because I read your list, Mr Boncardo, rather than (indistinct).

PN98

MR BONCARDO: It's court book page 88. The Full Bench will see a document entitled, 'Single enterprise agreement legislative checklist.' There's then a summary of issues with the application. The checklist you will see has been prepared by the Commission's administrative staff. There's reference to the matter being allocated to Boyce DP, and in section 1 of the summary of issues, reference to the CFMMEU's request.

PN99

Notwithstanding that, that matter appears to have escaped the Deputy President's attention, as he sets out in his email to Mr Fisher back on page 36 of the appeal book, where after Mr Fisher has contacted the Commission on 30 November after being alerted to the decision and the approval of the agreement, the Deputy President's Chambers writes to Mr Fisher and sets out that the Deputy President was unaware of Mr Fisher's 29 September email, but nonetheless isn't able to rectify the situation given section 603 of the Act.

PN100

In my submission, the criticism levelled at Mr Fisher for not following up the Commission is not something which counts against there being a satisfactory explanation for the delay, given that Mr Fisher was entitled to rely upon (audio malfunction), then said by the officer of the Commission in the correspondence with him.

PN101

There's then further criticism in the respondent's submissions of Mr Fisher and the suggestion that he only became – or must have become aware of the decision sometime before 30 November. That is a submission without any evidentiary foundation and should be rejected.

PN102

The sole evidence, uncontested before the Full Bench, is that Mr Fisher and my client only became aware of the decision on 30 November, as is apparent from Mr Fisher's email to the Deputy President's Chambers.

PN103

There's then further criticism levelled at Mr Fisher and Ms Read for the delay between 30 November and 8 December in filing the appeal. That criticism is, in my submission, also unwarranted given Ms Read's affliction with COVID and its impact upon her.

PN104

In my submission, there is a satisfactory explanation for the delay, which points in favour of the grant of an extension. The grant of an extension is for a period of 35 days, or the grant of extension required is 35 days I should say, and there is no relevant prejudice to Patches in (audio malfunction).

PN105

Prejudice, in my submission, in the context of a consideration for an extension of time, should focus on the capacity or otherwise of the (audio malfunction) to deal with the appeal. That appears to be the view which was taken by the Full Bench in the decision, which is the first of this bundle of authorities, being the *Australian Workers' Union v Baiada Farms Pty Ltd* [2021] FWCFB 6029; 311 IRC 289.

PN106

This was an appeal by the AWU of a decision of Johns C, who had noted the AMIEU as an industrial association covered by the agreement. The AWU's appeal was out of time and they required an extension of some 24 days. At paragraph 26, which is tab 11 of the authorities bundle and page 2989 of the report, the Full Bench sets out, amongst other things, that the grounds of appeal have substantial merit, and they then say this in the second sentence:

PN107

> *It is also clear that the delay has not caused any prejudice to the AMIEU's capacity to respond to the appeal. Having regard to all these matters, we consider that the AWU should be granted an extension of time until 6 August 2021 to file its appeal.*

PN108

In my submission, there is no prejudice to the respondent in its capacity to reply to the appeal here, and that matter can be put to one side.

PN109

To the extent that it is asserted in Patches' written submissions at paragraphs 35 through to 37 that, 'There is prejudice to it because it has submitted tender proposals and quotes on the basis that the agreement was validly approved', can I make two points?

PN110

One, there's no evidence that that occurred before the Commission. We just have bald assertions. And two, there's nothing before the Commission indicating that that happened in the 35-day period, (audio malfunction) should have been filed on 8 December when it was filed, and the question of prejudice, in my submission, does not weigh against an extension being granted.

PN111

One final matter that I can deal with relatively quickly is the reliance by Patches on an email they sent to what appears to be an email address associated with the NSW branch of my client prior to bargaining commencing.

PN112

That email is immaterial to the question of whether an extension of time should be granted. The focus of the Commission in determining whether an extension of time should be granted is of (audio malfunction) if there's a satisfactory explanation for the failure to file an appeal within 21 days, after it has been issued, plus all the usual factors. What occurs before bargaining commences is irrelevant to that issue.

PN113

Those are the matters I wished to raise further to the question of extension of time. Can I turn now relatively briefly to the procedural fairness point? There is no explicit engagement with this ground in the respondent's submissions, other than some aspects of those submissions which cavil with our analysis of the question.

PN114

What I wanted to do orally was draw the Commission's attention to a relevantly identical situation (audio malfunction) by the Full Bench in the AWU v ACE Citrus case, which is at tab 6 of the bundle of authorities, (audio malfunction) of those authorities.

PN115

DEPUTY PRESIDENT GOSTENCNIK: Mr Boncardo, you seem to be frequently cutting out and it's not just because you're moving away. What we might do is we might adjourn for a few moments and we might try and reconnect this, see whether that improves things.

PN116

MR BONCARDO: Certainly. I do apologise, Deputy President.

PN117

DEPUTY PRESIDENT GOSTENCNIK: It's a question of technology, Mr Boncardo, not anything that you're doing or not doing, but I'm not sure whether it's our end or your end, so I won't distribute blame just yet.

PN118

MR BONCARDO: Thank you, Deputy President.

PN119

DEPUTY PRESIDENT GOSTENCNIK: We will adjourn.

SHORT ADJOURNMENT **[10.46 AM]**

RESUMED **[10.52 AM]**

PN120

DEPUTY PRESIDENT GOSTENCNIK: Yes, Mr Boncardo.

PN121

MR BONCARDO: Thank you, Deputy President. I have the disadvantage of not presently seeing the Members of the Full Bench. It depends on your perspective I suppose, Deputy President, but I can certainly hear you. I can, however, only see a large M.

PN122

DEPUTY PRESIDENT GOSTENCNIK: There we go. Is that better? No?

PN123

MR BONCARDO: No, it's not. I'm happy to continue if that's convenient.

PN124

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right.

PN125

MR BONCARDO: Thank you. *The Australian Workers' Union v ACE Citrus Pty Ltd as trustee for the Ashley Meyer Family Trust* [2019] FWCFB 5722 at page 93 of the bundle of authorities concerned, as I said before, a relatively analogous situation to the situation in the present matter, and the Full Bench will see at paragraph 5 of that decision on page 94 of the bundle of authorities that the AWU had, similarly to Mr Fisher, emailed the registry of the Commission requesting relevant documents and seeking an opportunity to be heard on the application.

PN126

That email was unfortunately overlooked by the Commissioner's Chambers and the request to be heard was not dealt with, and the agreement was approved without the AWU's knowledge. At paragraph 6 the Full Bench points out, similarly to my client in the present case, that:

PN127

> *the AWU was denied an opportunity to make submissions in support of its request to be heard on the application for approval of the Agreement. No decision was made in relation to the union's request to be heard because the Commissioner was not aware that such a request had been made until after the Agreement had been approved.*

PN128

That similarly is what appears to have happened here, according to the Deputy President's Chambers' correspondence.

PN129

At paragraphs 14 to 15, which are at page 97 of the book of authorities, the AWU's ground of appeal concerning a denial of procedural fairness was dealt with by the Full Bench. AT paragraph 14 the Full Bench observes that, like my client, who was not a bargaining representative for the agreement, 'The AWU did not have a right to be heard.'

PN130

At paragraph 15, section 590(1) is referred to, and the breadth of the discretionary power is noted, and in the second sentence the Full Bench points out that:

PN131

> *If an organisation seeks to be heard, it is entitled to be given 'a proper opportunity to develop its argument on the question [of] whether it should be heard'.*

PN132

And it was clear in that case the AWU was inadvertently denied that opportunity. That was, the Full Bench explains, a denial of procedural fairness. That is, in respectful submission, precisely the case here.

PN133

At paragraph 16, the Full Bench goes on to observe in language which is redolent of the principle of materiality that the High Court has articulated that 'not every denial of procedural fairness that will entitle an aggrieved party to a new hearing', and what needs to be demonstrated, including what needs to be demonstrated in this case, is that the denial of procedural fairness deprived my client of the possibility of a successful outcome.

PN134

That is established by demonstrating that the Commissioner, or in this case the Deputy President, could have reached a different result in respect to two matters: one, that he could have determined to hear from my client, and two, that he could have analysed the BOOT in a different way to that which he did, which, in my submission, was to focus on purely financial matters rather than non-financial matters, and otherwise to discount a number of less beneficial and detrimental provisions or otherwise not consider less beneficial and detrimental provisions, and he could have sought additional and supplementary undertakings to those which he did.

PN135

In my submission, that test is surmounted in the circumstances of the present case because of the factors that we have identified at paragraphs 25 to 26 and 28 of our written submissions where we catalogue an array of provisions under the enterprise agreement and under the reference award being the Asphalt Industry Award which were not considered or identified by the Deputy President. So much as, in our submission, plain from the undertakings that he sought from the respondent and which had they been identified and my client's evidence in this reads uncontested statement – is that the CFMMEU would have pointed these provisions out to the Deputy President had it been heard from by him were matters that could have resulted in a different outcome at first instance. And there was, in my submission, a material denial of procedural fairness in those circumstances which warrants the quashing of the decision.

PN136

If the Full Bench is with us in respect to ground one of the appeal the matter can be dealt with in two ways. The Full Bench could quash the decision and rehear the application itself, which would involve a re-exercise of the better off overall test. Or, alternatively, the Full Bench could remit the matter to the Deputy

President or another member of the Commission for a rehearing in respect to the better off overall test.

PN137

In such a rehearing my client would seek an order under section 607(3)(ii) that it be heard on the question of the better off overall test. Such an order was made in an analogous situation in the CFMMEU v CPB Contractors which is at tab 11 of my client's bundle of authorities commencing at page 274. That's the decision which is reported in Volume 282 of the Industrial Reports at paragraph 408.

PN138

I should note for completeness that there was a judicial review of an aspect of this decision being the Full Bench's interpretation of one of the provisions of section 194, which was successful, that being a judicial review commenced by the employer but that didn't interfere with the relief that was ultimately granted by the Full Bench.

PN139

And the CFMMEU was the appellant in that matter, had not been heard at first instance and there was a direction at paragraph 34 or an order, I should say, at order number five that the CFMMEU be permitted to make submissions at the rehearing of the application for approval in relation to the matters raised by its ground of appeal. Such an order is, in my respectful submission, appropriate here in the event that ground one of the appeal is upheld and the proceedings are remitted for rehearing on the question of the BOOT and the question of undertakings.

PN140

In the event that the Full Bench determines to grant leave to my client to rely upon ground two and determine ground two can I just address relatively briefly the matters pointed out or raised by Patches in their submissions? And prior to doing that can I just note that on the question of leave that ground two was fleshed out in our written submissions. It was engaged with comprehensively by Patches at paragraphs 38 to 47 of their submissions and there is no relevant prejudice to Patches in this ground being raised on the appeal and leave being granted to my client to rely upon the amended notice of appeal.

PN141

Could I very briefly turn to what we say the error of the Deputy President was in undertaking the better off overall test? And, of course, the Full Bench is well familiar with what section 193 of the Act requires. That is the identification of provisions of the agreement and the Reference Award that are less beneficial or more beneficial. And the playing of those matters in conducting an overall evaluation, in our respectful submission, that is not what occurred here, given that the Deputy President missed a significant number of provisions that were detrimental or less beneficial to employees.

PN142

And if I can deal with some of those provisions and the respondent's responses to them in their submissions. Can I start with clause 28.1 of the agreement, which is at page 22 of the appeal book? Which it deals with ordinary hours between

Monday and Friday and it defines those hours as being from 5.00 am to 6.00 pm, whereas the award defines ordinary hours as being from 6.00 am to 6.00 pm.

PN143

The respondent's response to that relevant less beneficial provision is that clause 13.2(b) of the Award allows alteration of ordinary hours by agreement. That, with respect, is neither here nor there and no real answer to the point that we make, given that under the agreement, Patches can unilaterally roster someone on at five o'clock in the morning and not have to pay them the overtime rate prescribed by the agreement. That detriment was not identified or considered by the Deputy President.

PN144

Secondly, a clause 17.1 of the agreement which is at page 61 of the appeal book concerns employment categories. It's somewhat ambiguous in that it sets out that an employee not specifically engaged as a casual will be a permanent full-time employee unless otherwise specified.

PN145

That appears, on its face, to repose discretion in Patches to employ someone on a basis other than full time and appears to contemplate part-time employment. Now Patches says that they don't employ part-time employees and they don't anticipate employing part-time employees. That may be so but that is not, in our submission, an answer to the fact that on the face of clause 17.1 part-time employment is permittable and there are no protections as there under clause 10.3 of the award for part-time employees hours to be agreed in writing and for the hours in excess of those ordinary hours agreed to in writing to be worked as overtime.

PN146

The next matter that the respondents join issue with is clause 14.5 of the Award. That provision requires paid meal breaks of 20 minutes after two hours of overtime have been worked and then a meal break after an additional four hours of overtime of 20 minutes which is also paid. It seems to be uncontroversial that no such provision is provided under the agreement but the respondent says that it provides meal breaks. That may be so but that is not what is stipulated in the agreement.

PN147

And there is also, under clause 17.3(a) of the Award a provision for a meal allowance where employees work beyond their ordinary finishing time. Again, there is no equivalent provision under the enterprise agreement. Patches' response is that as a matter of practise it pays for its employees' meals. Again, that may be so but that is irrelevant to the undertaking of the BOOT.

PN148

There is then an issue raised about distance work and yet in its agreement clause 31 which is at page 18 of the agreement under the heading 'Overnight Travel', clearly contemplates employees travelling away for work.

PN149

Now, under the Award, under clause 17.3, in our submissions, we've erroneously referred to it as 17.2, then under clause 17.3(d)(i) employees are entitled to reimbursement for fares when they're required to travel for work at clause 17.3(d)(ii) they're entitled to travelling expenses to all meals, while travelling to distant work and clause 17.3 they're entitled to travelling time at ordinary rates.

PN150

Now, Patches' response to our submissions in this regard is that clause 26 which deals comprehensively with overnight travel provides an allowance of $20 per day. That is addressed in clause 26.3 to relate to toiletries, phone calls, et cetera and it is not, in our submission, in answer to the points that we raise. There is also no provision for travelling time to be paid and clause 26.2 provides that during the course of travel employees will provide their own meals and drinks, excluding dinner. That is disadvantageous as compared to the award. And, in our submission, Patches' response does not answer what we have said are relevant less beneficial provisions under the agreement compared to the award.

PN151

There's an appropriate acknowledgement in respect to job search entitlements which are not under the agreement which are contained in clause 30.2 of the award in respect to termination. And clause 31.2 in respect to redundancy and the respondent acknowledges that those are matters which could be the subject of an undertaking.

PN152

Also relevantly are a number of provisions which we have set out at paragraphs 28(a) to (e) which we contend propose obligations on breaches of which may sound in civil penalties under section 546 of the Fair Work Act. These are the kind of provisions which Commissioner Asbury, as she then was, considered in the Glen Eden Thoroughbreds decision which is in our book of authorities at – I'm sorry – tab eight and at paragraphs 53 to 59 which commence on page 169 of the book of authorities.

PN153

The Commissioner, as she then was, deals with provisions of an enterprise agreement which imposed in that case restraints of trade, prohibitions in respect to confidential information and intellectual property. And she observes at paragraph 53, page 169, that such provisions weren't found in the award nominated for the purposes of establishing whether the agreement was better off overall.

PN154

And after analysing some case law at paragraph 58 on page 170 she endorses what Commissioner Gooley, as the Deputy President then was, had said in another case and notes that provisions imposing obligations on employees which expose those employees to civil penalties is a relevant matter in considering whether or not the agreement passes the better off overall test.

PN155

We have identified in our submissions and I don't think it is in issue that there are a number of provisions of the agreement which impose obligations on employees, such as obligations to comply with all relevant laws applicable in the industry and

which Patches works and which apply throughout the Commonwealth to comply with Patches' policies which, if breached, could sound in the imposition of a civil penalty.

PN156

Patches' response is that these provisions are necessary and reasonable for the conduct of its business. That may be so, but again that is not a relevant answer to whether or not these provisions ought to have been taken into account in applying the better off overall test.

PN157

One matter that I do need to deal with concerns clauses 46.6 and 46.7 of the agreement and the Full Bench will find those provisions at page 28 of the appeal book. Under the heading (indistinct) which is clause 46. The Full Bench will see at 46.3 there's an obligation on employees to undertake training and retraining is deemed necessary by Patches.

PN158

At 46.6 where external training is booked and paid for by Patches and the employee notified and the employee does not attend the employee is liable for all costs of the training if the costs are not transferrable or refundable. Clause 46.7 is a provision dealing with a circumstance where an employee leaves his employment within 12 months of undertaking training or completing a course and requires the employee to pay back moneys expanded on that training and if the debt is greater than their relevant final paid earnings and the employee is required to do that within 10 weeks of the employment termination date alternatively those moneys can be deducted from the employees' final payment.

PN159

Now the Deputy President, this is a matter that Patches referred to in their submissions seems to have formed the view that such (indistinct) may not be enforceable because of section 324(1)(a) of the Act. Section 324(1)(a) prohibits a deduction from an employee's pay unless that deduction is authorised in writing. What the Deputy President appears not to have taken into account is section 324(1)(b) which permits terms of an enterprise agreement to provide for the deduction of moneys from an employee. And on its face clause 46.7 would fall under section 324(1)(b) and should have been a matter considered by the Deputy President in undertaking the BOOT as she would at clause 46.6.

PN160

DEPUTY PRESIDENT GOSTENCNIK: There's also the additional issue that to the extent that any of the final pay includes accrued annual leave or notice of termination paid in lieu the NES requires those amounts to be paid in full on termination.

PN161

MR BONCARDO: Precisely.

PN162

DEPUTY PRESIDENT GOSTENCNIK: And the provision would seem to be inconsistent with and possibly exclude contrary to section 55.

PN163

MR BONCARDO: Yes. Indeed. And that would be a matter which would and whilst it's not one of our grounds of appeal would entail that the Commission or the Deputy President shouldn't have been satisfied that the agreement did not contain terms which contravene section 55 for the purposes of section 186(2)(c) of the Act and was incapable of approval absent an undertaking dealing with that issue.

PN164

Another provision which is problematic for reasons similar to those that you have identified, Deputy President.

PN165

DEPUTY PRESIDENT GOSTENCNIK: (indistinct)

PN166

MR BONCARDO: Yes.

PN167

DEPUTY PRESIDENT GOSTENCNIK: We'll find that out but apparently it had been raised. The issue is the subject of an undertaking.

PN168

MS O'CONNOR: It was. And also he did clarify that we do have the NES provisions - - -

PN169

DEPUTY PRESIDENT GOSTENCNIK: Ma'am - Ms O'Connor. Ms O'Connor, please don't interrupt.

PN170

MS O'CONNOR: Sorry.

PN171

DEPUTY PRESIDENT GOSTENCNIK: You can get a chance in a moment. Right. Thank you. It appears to have been taken at least in respect of something that's set out in clause 19.

PN172

MR BONCARDO: Yes.

PN173

DEPUTY PRESIDENT GOSTENCNIK: But not directed before the - - -

PN174

MR BONCARDO: Yes, that's so. That's undertaking number five at page 34 of the appeal book. A similar provision or a provision which has similar problems is clause 29.5 and the Full Bench will find that at page 22 of the appeal book under clause 29 of the agreement and which is entitled, 'Time and Attendance'. Clause 29.5 provides that the failure to clock on or off correctly will result in the failure to record attendance and may result in the failure to be paid for the time worked.

PN175

Now that provision may well be contrary to section 323. Further problematic provisions are over the page, in particular, clause 29.7 which provides that 'Where an employee fails to clock in and out or fails to submit a leave application it will be assumed that the employee has taken leave without pay for that day.' There's two issues with that provision – one, it likely falls foul of section 323 because it provides that employees may not be paid for work that they have performed if they don't clock in and out. And, two, it may have the consequence that they are not paid for annual leave or personal leave that they are entitled to take which would, in my submission, also be contrary to section 55 of the Act. Clauses 29.8 and - - -

PN176

DEPUTY PRESIDENT GOSTENCNIK: So, Mr Boncardo?

PN177

MR BONCARDO: Yes.

PN178

DEPUTY PRESIDENT GOSTENCNIK: To the extent that provisions may be contrary to section 323 that's not a matter that's relevant for the purposes of (indistinct) the agreement is it? So it needs to be in connection with the BOOT. That is the - - -

PN179

MR BONCARDO: Yes. I accept that, Deputy President. The point is that these provisions to the extent that they are enforceable are provisions that are detrimental to employees as compared to the award.

PN180

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN181

MR BONCARDO: The final provision I wanted to take the Full Bench to which we've referred to in the written submissions and which Patches has given some response to is clause 11.9 under the dispute settlement procedure which commences at page 13 of the appeal book. The dispute settlement procedure from clauses 11.1 to 11.8 is conventional and unexceptional. Clause 11.9, however, which commences right at the base of the page is novel and unusual. It sets out somewhat anodynely that dispute resolution procedures are to be carried out as quickly and reasonably as possible.

PN182

And then turning over the page it says that a party to a dispute is not to commence an action to obtain a penalty under the Act or to obtain damages for breaches of the agreement or to otherwise enforce a breach of the agreement or the Act. So the prohibition isn't limited to what would be breaches of section 50. It's limited to any breach of the Act at all. It extends, I should say, to any breach of the Act at all unless a number of preconditions are satisfied, firstly, that the party initiating the action has genuinely attempted to resolve the dispute. And one of three circumstances are made out. Seven days it has to have elapsed in the period after

the party initiating the action gave notice that mediation is not requested, presumably under the dispute settlement procedure. Mediation was requested and the mediation hasn't been completed or another party to the dispute has not complied with this clause.

PN183

Now a provision restricting the capacity of an employee to enforce the agreement in court is a provision which is obviously not found in the award and is a relevantly less beneficial provision which escaped the Deputy President's attention. And for the reasons that I have set out in the written submissions and which I've elaborated upon today, in our submission, the BOOT assessment miscarried and it miscarried because the Deputy President did not properly identify provisions of the agreement which were relevantly less beneficial than those set out in the award. And that can be conceded as House v The King error on two bases. One, a failure to properly undertake the statutory task assigned to the Deputy President, or in the alternative a failure to take into account relevant considerations in performing the better off overall test.

PN184

One matter I need to clarify and I alluded to Ms McMahon's submissions being articulately erudite at the commencement, is that she is absolutely right in respect to what we say at paragraph 28(h) of our submissions and I need to withdraw paragraph 28(h) of my submissions. But otherwise, Deputy President, unless there are any questions we rely upon the matters that we have set out in writing.

PN185

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Boncardo.

PN186

MR BONCARDO: If the Commission pleases.

PN187

DEPUTY PRESIDENT GOSTENCNIK: Ms McMahon? Ms O'Connor? What would you like to tell us? Do you want a few minutes to gather your thoughts?

PN188

MS O'CONNOR: We'll commence and try and keep this very simple. During our bargaining process if the CFMMEU generally wanted to be bargaining representatives at that time they were invited to attend but no one responded.

PN189

None of our employees appointed them as a representative. The cases that have been mentioned may have had AWU members within their workforce but in a genuine interest within their industry. They are not associated with the asphalt and bitumen industry.

PN190

We're only a small business. We are not aware of all these case laws. We do stand by our submission which does cover these points. When the CFMMEU did become aware there was still a delay. We understand that Ms Reid had COVID but yet she still had time to brief counsel before submitting the appeal, 56 days

after the approval. What is the point of having timeframes in place? For a major organisation there should be things in place giving them alerts or timings to come back within the timeframes that are allowed.

PN191

With the appellant's ground for appeals we haven't gone through and addressed each one of these as he's spoken. We believe that we have covered these previously with the Commissioner and we had the same Commissioner in our agreement before this one. And we dealt with the AWU then. And all these concerns that he has raised have been addressed in those. And with this Commissioner, again, we have addressed the concerns raised by him in – sorry, was it page 88 of the appeal book that were brought up with the application. They were addressed with the Commissioner satisfactorily. It was unproved and the concerns raised by him show a lack of understanding for our industry.

PN192

Particularly, with like his concerns that our staff are not paid for travel time, when our staff clock on and clock off in our office. So their travel time is paid while they're in our company vehicles they're travelling to site. There is no travel to work outside of company time, other than to the office. He says - - -

PN193

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Ms O'Connor, can I just test that proposition?

PN194

MS O'CONNOR: Yes.

PN195

DEPUTY PRESIDENT GOSTENCNIK: The scope of the agreement as set out in clause three covers – by one covers the company and employees of the company were predominantly engaged in the asphalt industry to principally work in New South Wales and the Australian Capital Territory.

PN196

MS O'CONNOR: Yes.

PN197

DEPUTY PRESIDENT GOSTENCNIK: So the breadth of the agreement covers the entirety of New South Wales for example.

PN198

MS O'CONNOR: Yes.

PN199

DEPUTY PRESIDENT GOSTENCNIK: And where is your office?

PN200

MS O'CONNOR: In Queanbeyan, New South Wales.

PN201

DEPUTY PRESIDENT GOSTENCNIK: So if an employee was – if you had a job in somewhere in metropolitan New South Wales, it wouldn't be practical would it, for the employee to report to the office first and then travel?

PN202

MS O'CONNOR: Yes.

PN203

DEPUTY PRESIDENT GOSTENCNIK: That wouldn't happen would it?

PN204

MS O'CONNOR: I'll let Aaron address that.

PN205

MR HEWER: Yes, sorry deputy minister it's Aaron here. I'm the general manager – operations manager.

PN206

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN207

MR HEWER: So generally what happens is if we go away to distance like (indistinct) we always start in our depot and then when they go away they stay overnight in motels. They have a visitor clock-in the morning they start in the motels so they're still using our vehicles. Sorry. What's going on there. Did you have feedback?

PN208

DEPUTY PRESIDENT GOSTENCNIK: Mr Hewer, you might just mute your microphone. It might resolve the issue.

PN209

MR HEWER: How about now? Sorry. Now?

PN210

MS O'CONNOR: No. It's not working Aaron.

PN211

MR HEWER: Can you guys – you can explain at least. You can explain - - -

PN212

MS McMAHON: So if our employees if we had a job and where – you know – whether it's Wagga or Sydney Metropolitan our men do commence work in our yard. They then go in our vehicles to wherever the job is and they work there and they travel back to our yard. If they are staying away they are – they have clocked on from our yard. They're still in our vehicles. They work the day. We arrange all accommodation. We arrange all food. Meals throughout the day as well as dinner at night, breakfast, and then they commence their day.

PN213

The foremans organise the communications back to our office as to their start and finishing times and then once they've finished the work wherever they are they

then come back to our yard. They clock off in our yard and then they proceed in their own vehicles home.

PN214

DEPUTY PRESIDENT GOSTENCNIK: Yes, go on.

PN215

MS O'CONNOR: The vehicles are needed so they are taken in every instance.

PN216

DEPUTY PRESIDENT GOSTENCNIK: Sorry, continue.

PN217

MS O'CONNOR: We're also – so for the grounds of appeal while the appellant has said that in every case, yes, the Commissioner could have raised these concerns, seen these as a concern. We believe that he wouldn't have overturned or declined our enterprise agreement because of these (indistinct) or as is proven by him. We have passed the BOOT test.

PN218

Also with I know there (indistinct) – yes, so there was a concern raised where we addressed it with an undertaking but also we do have that provision on page nine of the appeal book that page four of our agreement that had the National Employment Standards saying that they prevailed in every case that may not – every clause that may not – may raise concerns that those NES standards would be compromised the NES standards would prevail over that.

PN219

MS McMAHON: We feel we have gone through the correct process as with the BOOT. We operate within the agreement that we have in place. This has gone forward for the last three to four months. We have - to vary this now would have a very big impact on us – like as we've said we have gone through and put tenders forward. Yes, you haven't received proof of that which I'm not quite sure how we would be giving you proof of our everyday running for tenders and those sorts of things which I think it would be unreasonable to submit to you. I think as an everyday business it would assume that that's what we do to have our pipeline of work going forward. And that's what we've based our costings on.

PN220

And we just feel that there isn't a genuine interest for the CFMMEU to really be part of the bargain – which was the bargaining process. I'm not quite sure what else we can say to this but - - -

PN221

MS O'CONNOR: We're not lawyers. We're just trying to go through it. We stand by our submission that we have, you know, we're in a better position to write back and take our time with that. But we're not (indistinct) or aware of them.

PN222

DEPUTY PRESIDENT GOSTENCNIK: May I ask you this question? And let me preface what I am going to say by indicating that this – you shouldn't take what I am about to ask as an indication that I have formed the particular view or that any member has formed a particular view. It's just a question of a procedural nature.

PN223

But in the event that we were to allow the union to lodge its appeal outside of the time prescribed and allow it to amend its notice of appeal, and we upheld its appeal in relation to the procedural fairness question as to the substantive complaints that are made by the union about the agreement not passing the BOOT, would you like to tell us whether you would prefer this Full Bench to deal with the matters on the basis of the material that we have before us? Or would you prefer that we send the matter back either to Deputy President Boyce or alternatively to a member of this Full Bench to redetermine?

PN224

MS McMAHON: If needed I honestly feel that we have addressed all the issues that have been raised and not just on this occasion but on the previous agreement as well. But if it was to go that way, going back to is it Commissioner Boyce – would be acceptable.

PN225

DEPUTY PRESIDENT GOSTENCNIK: All right. So just so that you're clear what that would involve if that occurred it would involve a longer period of time to determine this application than would otherwise be the case if we were to determine the matter by way of a rehearing. That is we would publish our decision and that would necessarily mean quashing the decision. So the decision – the agreement would no longer be in operation – and then the matter would go back to a single member, Deputy President Boyce perhaps, and then it would be a question of him finding the time to deal with the matter, including the real possibility of having to hear from the union about its concerns.

PN226

So I just want you to understand that the course that you would prefer and we'll obviously take your preference into consideration if we get that far but that course would involve a longer period than might otherwise be the case if we were to determine the matter.

PN227

MS McMAHON: Are you able to explain to us the process - - -

PN228

MS O'CONNOR: The processes.

PN229

MS McMAHON: - - - for either staying with this hearing? And the other - - -

PN230

DEPUTY PRESIDENT GOSTENCNIK: Well - - -

PN231

MS McMAHON: The other point too is the points that have been raised of concern how do we continue to put forward that they have been addressed and that all items that have been raised are not necessarily items that are included in, not just our agreement but the industry-like agreements across the board. And so we're not quite sure why there even is the need for the union to be included in the agreement. So there's things like that that we just need explanation I suppose and - - -

PN232

DEPUTY PRESIDENT GOSTENCNIK: Sure.

PN233

MS McMAHON: - - - understand the two different options if that was (indistinct) that way.

PN234

DEPUTY PRESIDENT GOSTENCNIK: Sure. Well, I'm speaking for myself. The issue that needs to be determined in relation to the agreement whether or not it should be approved is whether or not the agreement passed the better off overall test.

PN235

Now, you've made for example in answer to my question about the scope of the agreement and what happens with travel allowance. You made a number of assertions about the way in which you practise, that is that employees have company vehicles and so on. I'm not sure whether that's contested. Presumably Mr Boncardo will tell me there's no evidence for that proposition and it's something that we shouldn't rely on.

PN236

So there might be some advantage for you. And, again, I don't want to get ahead of myself because we mightn't do anything with this matter other than not grant an extension of time. But if we were (indistinct) the first appeal ground then it may be to your advantage that the matter go back to the single member so that you can put on some evidentiary material about your practises so that they can be properly taken into account.

PN237

I will you that – you might be – the travel allowance issue as an example might be a matter that's incidental in the overall scheme of things when balancing the detriments and benefits of the agreement in our assessment of the better off overall test. And you may be happy to just rely on everything that you've put in your material as it was before the Deputy President and is now before us. But I would – and speaking for myself and subject to speaking to my colleagues – but I would be inclined to allow you to have an opportunity to review the transcript and to put in writing any further answers that you may have to matters that Mr Boncardo has raised just as a matter of fairness to you, given that you're not represented and so forth. But subject to that we would then determine whether or not the second appeal ground, Mr Boncardo's point that the agreement doesn't pass the BOOT, whether that's made out.

PN238

If we were to form the view that it's not made out then the agreement could be approved, or alternatively, we might decide not to sit with the agreement side at all because the second appeal ground won't be made out. Or if we were to conclude that the agreement did not pass the BOOT then we will have set out why we came to that view, we would have to quash the decision and we would invite the employer to make or give undertakings to address the concerns that we have identified in our decision.

PN239

It's a quicker route to the end result but it may be that you would prefer to put up some more material in support of our application which, in case, a better course for you might be to send the matter back.

PN240

And I'm also mindful of this that because you are unrepresented, again speaking for myself and subject to talking to my colleagues I would not be unhappy to give you a bit of time beyond today to consider that question and advise us in writing if you wished.

PN241

Sorry, are you making a phone call to somebody else?

PN242

MS McMAHON: Sorry, we were just talking. Sorry, we were just talking to the general manager, Aaron. You were saying if we stick with this process we would have the ability to have more time to go through and include more documentation?

PN243

DEPUTY PRESIDENT GOSTENCNIK: Well, I would be inclined – again, subject to talking to my colleagues – I would be inclined to allow you some further time to respond to the matters that Mr Boncardo raised today.

PN244

MS McMAHON: Yes.

PN245

DEPUTY PRESIDENT GOSTENCNIK: And that would also empower me then – or us then allowing Mr Boncardo to put in a reply to those matters but, yes, we would give you that opportunity. Because, as I say, I don't want you to be disadvantaged or to feel disadvantaged because you have had to respond to these matters on the run today.

PN246

MS McMAHON: Okay. All right. So if we're wanting to think about which way we want to go when we would need to respond back to you?

PN247

DEPUTY PRESIDENT GOSTENCNIK: Well, as to that first matter I would think – what's today, Tuesday – if you're able to let us know by Friday. And,

secondly, we would give you say a week from Friday to respond to any matters arising from Mr Boncardo's oral submissions today. I will have my Associate organise the transcript on a relatively urgent basis so that you will have it before the end of the week. And then we will give Mr Boncardo a further seven days after that to file anything in reply to any written material that you file.

PN248

And look, I should indicate this, that we simply ask of your preference. The fact that your propose a particular course doesn't mean we'll adopt it. But I'm just giving you that opportunity to tell me what it is that you'd like to do if that circumstance arose.

PN249

MS McMAHON: When do we know when that circumstance arise?

PN250

DEPUTY PRESIDENT GOSTENCNIK: Well, once we – we have to consider whether to extend time or have to consider whether to allow an extension and left to consider whether the grounds of appeal are made out if we were to grant an extension of time. So that would be in our decision. But what I am asking you now is to indicate what you'd – just as Mr Boncardo has set out that we have a choice either to redetermine the matter for ourselves or remit the matter back to a single member, I'm just asking you for an indication as to which (indistinct) courses you would prefer if we were to get that far.

PN251

Because, as I say, our decision may be that we're not persuaded that we should extend time and that would be the end of that.

PN252

MS McMAHON: Okay. So we will stay with this process as long as we have more time to put the relevant documentation together.

PN253

MS O'CONNOR: If needed.

PN254

MS McMAHON: If needed.

PN255

DEPUTY PRESIDENT GOSTENCNIK: All right. Well, in that case we'll organise for a transcript to be prepared. And as I indicated earlier we'll give you till Friday week to file any further submissions in response to any matter that Mr Boncardo has raised. And we will give Mr Boncardo until Friday fortnight to file any reply material to any matter that's raised in your written material.

PN256

MS McMAHON: Is the decision made on the timeframe before or after that?

PN257

DEPUTY PRESIDENT GOSTENCNIK: Look, I told you what the timeframe will be. If you want us to determine the matter we're going to determine the matter and we'll determine it all in one decision.

PN258

MS O'CONNOR: Okay.

PN259

MS McMAHON: Right.

PN260

DEPUTY PRESIDENT GOSTENCNIK: So we're not going to issue two decisions. There'll just be one decision and it will either be Mr Boncardo fails because we haven't extended time or Mr Boncardo gets extension of time but fails because he hasn't made out his BOOT ground. So that's one possible outcome.

PN261

Another will be that he gets an extension of time. He gets up on his procedural fairness ground and he gets up on the BOOT ground. If we get to that point then we will probably set aside the decision and then we'll give you an opportunity to make submissions about or to offer any undertakings in order to – so look, on no occasion won't you get an opportunity to address any of the concerns that we identify. So if we are to set aside a decision which means that the agreement won't be in operation. Your application to have the agreement approved is still alive. It will be with us and we give you an opportunity to address any concerns by way of undertakings that will identify, if we think that the agreement doesn't pass the BOOT.

PN262

MS McMAHON: Okay.

PN263

DEPUTY PRESIDENT GOSTENCNIK: Is there anything else you want to tell us today?

PN264

MS O'CONNOR: No.

PN265

MS McMAHON: No. I think everything is – we understand everything now.

PN266

DEPUTY PRESIDENT GOSTENCNIK: All right. Mr Boncardo obviously you haven't responded to any matter that was raised so that – in light of the directions that we propose today (indistinct) reply in writing.

PN267

MR BONCARDO: Yes, I am content to pursue that course, Deputy President.

PN268

DEPUTY PRESIDENT GOSTENCNIK: All right. Well, very well. Look, my Associate will get you some written directions to the parties later today. We'll

also organise for a transcript to be available to the parties before the end of the week.

PN269

In the event for some reason the transcript is not available by the end of the week we will of course extend the time that we have given you (indistinct) a full week of the transcript (indistinct) you can respond to the matters. Once we have received the written submissions and the reply we will reserve our decision. That means we'll have a think about it and we will issue our decision in writing in due course.

PN270

And as I have indicated to the respondent's representatives, in the event that we were to uphold the appeal and set aside the decision and we have BOOT concerns we will identify those in our decision. And we'll give the respondents an opportunity to file or to give us any undertakings that it might wish to give to address those concerns. Right?

PN271

Well, thank you all for your attendance today. We will adjourn. Have a good day.

PN272

MR BONCARDO: If the Commission pleases.

ADJOURNED INDEFINITELY **[11.52 AM]**

LIST OF WITNESSES, EXHIBITS AND MFIs