



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER RYAN

AG2022/4745

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

**Application by Southern Cross University
(AG2022/4745)**

Sydney

10.00 AM, MONDAY, 6 MARCH 2023

Continued from 03/03/2023

PN1

THE COMMISSIONER: Good morning. I'll take the appearances. For the applicant?

PN2

MR DALTON: If the Commission pleases, I appear with my learned friend, Mr Birmeister, for the applicant.

PN3

THE COMMISSIONER: Thank you, Mr Dalton. For the NTEU?

PN4

MR DOWLING: Good morning, Commissioner. Mr Dowling for the NTEU.

PN5

THE COMMISSIONER: Thank you, Mr Dowling. And for the CPSU?

PN6

MR KEATS: Good morning, Commissioner. My name is Keats, initial M., I appear for the CPSU.

PN7

THE COMMISSIONER: Thank you, Mr Keats. And for the record, I note permission has been granted to parties on a prior occasion. Well, this matter has been set down for hearing; I note the parties have circulated a proposed time table for the order of today. Do any of the parties wish to comment on that before we begin?

PN8

MR DOWLING: No, Commissioner.

PN9

MR DALTON: Commissioner, there is one thing that we will probably need to deal with, in anticipation of cross-examination by my learned friend of the SCU's witnesses, to the extent it broaches information derived from the confidential document that was made available to the legal representatives of the NTEU on Friday, pursuant to your order. I've raised that with my learned friend this morning, I can say that my instructions are to preserve the confidentiality regime that's inherent in the order that you've made. And so to the extent that my learned friend proposes to refer to that confidential information in the hearing, we would ask for a confidentiality order to protect that confidential information. So that order would require that the persons in the court room, other than those who have been permitted to have access to that confidential document be removed from the court room; that the transcript of that evidence not be made available to persons other than those entitled to access the confidential information the subject of the order. That would probably do for the moment, but then there may be some issues in terms of managing a publication of any such information. That will depend on what my learned friend proposes to do in terms of any submissions that he would be making in relation to that evidence, and whether there's a prospect of

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PN10

THE COMMISSIONER: So in relation to any subsequent or ultimate decision of the matter?

PN11

MR DALTON: Correct. But perhaps we'll visit that if and when we need to.

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THE COMMISSIONER: Yes. Well, thank you for raising the issue, Mr Dalton; perhaps it's something we can deal with when we get to (indistinct).

PN13

MR DALTON: Or Ms Farquhar.

PN14

THE COMMISSIONER: Or Ms Farquhar, yes.

PN15

MR DALTON: Commissioner, my learned junior's just drawn to my attention, it appears that the clock is not on, which may indicate that the transcript's not recording.

PN16

THE COMMISSIONER: Associate, can you just confirm we are on record?

PN17

ASSOCIATE: Yes.

PN18

MR DALTON: That's the only matter I wanted to raise at the outset. In terms of the order of play, we've got - you've got a court book. Are you working off a hard copy or an electronic form?

PN19

THE COMMISSIONER: I'm working off a hard copy at the moment, and I'm trying to get access to an electronic copy.

PN20

MR DALTON: Yes.

PN21

THE COMMISSIONER: But I do have the hard copy, and I note the page numbers are the black page numbers in the bottom right-hand corner, and it appears that - - -

PN22

MR DALTON: Yes, the small numbers in the bottom right-hand corner. Yes.

PN23

THE COMMISSIONER: There may have been some duplication of some of the materials from late last week.

PN24

MR DALTON: Yes. So Commissioner, one thing to bear in mind, if you're working off the electronic version, the page numbering is altered by virtue of the fact that pages 1 to 6 of the electronic is the index, whereas the actual hard copy document, and similarly the PDF document recording the page numbers, starts from page 1, which is page 7 of the electronic copy.

PN25

THE COMMISSIONER: The PDF page reference would be five or six pages different to the actual bottom.

PN26

MR DALTON: It's six, yes. So if you're plugging in a page number, you know, in the top-left corner - - -

PN27

THE COMMISSIONER: Add six to it.

PN28

MR DALTON: Just add six to it, yes. Thank you, Commissioner.

PN29

THE COMMISSIONER: Okay, very well. So I understand the order will be, the NTEU will provide an opening address, and is it anticipated that the university and the CPSU will make any opening submissions as well?

PN30

MR DALTON: Not proposing to, unless you would gain particular assistance from that. At this stage, we're content to rely on our written outline and, of course, we'll address you more fully in final closing on Friday.

PN31

THE COMMISSIONER: Okay, thank you.

PN32

MR KEATS: The CPSU adopts the same approach, Commissioner. Might I note, whilst I'm on my feet, that there was talk about confidentiality and those that are not in the order would be asked to be removed from the court room; I just note that I'm not in that order, and so that when we come to that point in time, there might need to be some changing to the order so that I could remain in the court while that cross-examination occurs.

PN33

THE COMMISSIONER: Yes. Well, when we get to that stage, I'll hear from the parties how we best deal with the issue of confidentiality, going forward.

PN34

MR KEATS: Thank you, Commissioner.

PN35

THE COMMISSIONER: Thank you. Mr Dowling, just as part of your opening, I note on the 20th, I think it was, of February, at a conference, your instructing

solicitor Mr Kennedy appeared and indicated that a number of the issues have fallen away or are not pressed, due to information provided or because of proposed undertakings that might be provided by the applicant. It might just be helpful, as part of your opening submissions, if you can confirm the issues that have fallen away - supposedly fallen away.

PN36

MR DOWLING: Yes, I intend to do that, Commissioner. Thank you. Commissioner, before I commence, can I just confirm that you have received a bundle of documents described, I think, as the NTEU supplementary hearing documents, it only contains four documents.

PN37

THE COMMISSIONER: They were the - there were documents provided and they were the, I understand, the enterprise agreements, awards, and the like?

PN38

MR DOWLING: Yes. The two awards that are the subject of the better-off-overall test, the 2008 agreement, which is the present agreement, at 2018, and the division 4 of part 2 of the Fair Work Act accompanying provisions - - -

PN39

THE COMMISSIONER: Yes, I have that. I have that.

PN40

MR DOWLING: Would it assist if we provided you with a hard copy, Commissioner?

PN41

THE COMMISSIONER: If you have one.

PN42

MR DOWLING: We do. Thank you, Commissioner. Can I confirm that, as everybody knows, the university, the Southern Cross University, makes application for approval by this Commission of the Southern Cross University enterprise agreement 2021, and that approval is opposed by my client, the National Tertiary Education Industry Union. It is not in contest, as far as we are aware, that the applicant, the university, bears the onus of satisfying you, the Commission, that the requirements for approval contained within the Fair Work Act, which I will come to, have been met.

PN43

The agreement itself, the proposed agreement, is contained within the Commission hearing book, you will have seen, behind tab 1, starting on page 7 of the PDF; one of the numbers in the bottom right-hand corner - I don't need to take you to it, but can I tell you at this stage, for information, that page 3 of the agreement and page 9 of the PDF contains clause 3 of the agreement, proposed agreement, and identifies that 'the agreement will apply to the university and employees employed by the university in the classifications detailed in schedule 1, 2, and 3'. Those schedules are on page 58 of the agreement, and we can tell you, in summary, what they include. They identify firstly in schedule 1, the academics

at levels A, B, C, D, and E. Commissioner, if you are not aware, level A is the lowest in terms of pay and hierarchy, and level E, the highest. By schedule 2, professional staff, and they are described as HEW levels 1 through to 10, HEW being an acronym for 'higher education worker', commissioner, and level 1 being the lowest and level 10 being the highest in terms of entitlements. And in terms of schedule 3, casual academics, and they are identified to include lecturers, tutors, markers, and other academic activities.

PN44

I will return to the agreement, or the proposed agreement, commissioner, but can I tell you, in terms of the access period and the voting period, there isn't a dispute between the parties that the access period ran from 26 October of last year, 2022, until 1 November 2022, inclusive. And the voting period ran from 2 November to 4 November, again inclusive, 2022. During that period, the applicant's proposed evidence tells you that 1,289 employees voted. The applicant, in its material submitted so far, accepts that there were three categories of employees who were asked to vote but were not valid members of the voting cohort.

PN45

There's an acceptance, that is, a-c-c, that those errors were made in at least these three categories: employees who were employed during the access period but had their employment end shortly before the end of the voting period; the applicant says there were 13 of those employees, that group will be the subject of some evidence - those 13 are conceded as having voted - 16, my apologies. The second group, employees who were asked to vote despite not falling within the scope of the enterprise agreement; again, it's accepted that those people should not have voted and, at the moment, it is accepted that 16 people fell into that category, and again, there will be some evidence about that group of employees.

PN46

And thirdly, it's accepted that there was an employee who was scheduled to commence employment during the voting period and was not contracted to perform work during the access period. And again, it's accepted that that employee should not have voted. It's also accepted by the applicant, so far at least, that there were two employees who commenced employment after the start of the access period and were not added to the voting cohort and denied a vote when they should have received one. My apologies, I said two; that statement was amended on Friday, it's now accepted there are six people that fall into that category.

PN47

The applicant posits in their submissions now that, even assuming the 38 employees that should not have voted, had voted yes and their votes were removed, and that the two employees that should have voted but were not included had voted no, then that would put the results at 648 in favour and 606 against. Meaning, of course, Commissioner, that if just 21 employees changed their vote or were misled as a result of matters we will come to, the vote would not have succeeded. Now, we also know from the evidence proposed to be called that by far the largest group within the voting cohort are casual employees. And this, Commissioner, we'll say is particularly pertinent to what we will point to as misleading statements that were made during the voting period.

PN48

Now, before we come to the reasons and topics by which we submit the agreement should not be approved, can we identify for you, just by way of introduction, the salient aspects of the legislative scheme which we draw your attention to. And you will find these - Commissioner, you will be familiar with them, but you will find these in the supplementary court book behind tab 4, where we have included all of division 4. Can we just firstly bring your attention to section 181. And 181 relevantly provides that an employer that will be covered by a proposed agreement may request the employees employed at the time – and we emphasise those words – who will be covered by the agreement to approve the agreement by voting for it. We will return to that concept of, 'employed at the time'. Section 182 that follows is only important for this reason, by way of introduction, Commissioner: it provides that the agreement is made at the time at which it is voted upon in contradistinction to when it is approved by the Commission. Under section 182 it is made when a majority of those employees who cast a ballot vote to approve the agreement. Now, Commissioner, you of course will be familiar with the obvious difference between the vote or the approval or the endorsement by the employees on the one hand and the approval by the Commission on the other, as part of this application.

PN49

But again, we would say that is relevant for some for the statements made during the voting period. Can we next take you to section 186? It relevantly provides what it describes as the basic rule that if an application for the approval of an enterprise agreement is made under section 182(4) or 185, the Commission must approve the agreement under this section if the requirements set out in this section – being 186 – in section 187 are met. Now, just going back and interpolating one moment: here you are dealing with an application made under section 185. As to the requirements set out in section 186, the salient requirements that are set out in subsection (2) are these: the agreement has been genuinely agreed to by the employees covered by the agreement and there is a dispute between the applicant and the NTEU as to whether there has been genuine agreement. Secondly, the terms of the agreement do not contravene section 55, dealing with the interaction between national employment standards and the enterprise agreements. We do not need to trouble you about that requirement. Thirdly, the agreement passes the better off overall test.

PN50

Again, there is a dispute between the applicant and the NTEU about whether the proposed agreement passes the better off overall test. Can we next take you to section 187? We do this very much for completeness because I just referred to it in section 186 and 187 provides the additional requirements that must be met before the Commission can approve an enterprise agreement under section 186. Can I comfort you, Commissioner, by telling you we do not presently need to trouble you with those additional requirements set out in section 187. Next in section 188, it importantly describes when employees have genuinely agreed to the enterprise agreement. Firstly, the employer – here the Southern Cross University – must have complied with all of the relevant procedural steps as to the timing of the notice of employee representational rights. Secondly, the agreement must have been made here relevantly in accordance with 182(1) and thirdly, there

must be no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees. That is 188(1)(c).

PN51

Can we just say this about 188(1)(c) as an introduction, so, Commissioner, you have the framework when you're considering what it is we say about at least the misleading statements – it provides for, as I said, no other reasonable grounds. If you, Commissioner, are satisfied that there is, for example, one other reasonable ground such as the misleading statements, then you cannot be satisfied that the employees have genuinely agreed to the agreement. That is the way the section operates. There are to be no other reasonable grounds. Second-last, Commissioner, can we just identify to you section 190? There is no dispute between the parties that section 190 provides relevantly that the Commission may approve an enterprise agreement with undertakings and I will come to and identify them for you but you will see in respect of some for the criticisms we make, an undertaking has been offered and we'll identify how we say that undertaking is adequate or inadequate and whether it meets the criticism. I will identify them for you.

PN52

Lastly then, can we taken you to, please, section 193, which takes us back to section 186, because you will remember those requirements in section 186 at 2(d) relevantly provides that the agreement must pass the better off overall test and section 193 provides for the passing of the better off overall test. As I indicated, there is a contest about whether the proposed agreement relevantly does. But, Commissioner, you'll be familiar with the test. But in summary, if the Commission is satisfied at the test time that each award-covered employee and each prospective award-covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee, it passes the better off overall test. Section 193 provides a definition of award-covered employee and prospective award-covered employee and the test time.

PN53

That leads us to the identification of the two modern awards. They are identified by the applicant in its form F17, which is behind tab 3 and they are the two awards, the Higher Education Industry Academic Staff Award 2020 and the Higher Education Industry General Staff Award 2020. As I indicated earlier, both of those awards are provided in the NTEU supplementary hearing documents, the academic award behind tab 1 and the general staff award behind tab 2. Now, whilst the better off overall test is an overall weighing exercise, you should note, Commissioner, that in question 12 of the application, the form 17, page 101 of the hard copy and 107 of the PDF, the applicant concedes that the proposed agreement contains terms and conditions that are less beneficial than the equivalent terms and conditions in the modern awards and it sets those out at attachment O, which you'll find at page 2013 of the Commission hearing book and significantly – and I'll come to it – one of those relates to fixed-term employees.

PN54

The applicant also concedes that the agreement admits that the modern award provides – sorry, omits entitlements. The proposed agreement omits entitlements

that the modern awards provide and you'll see that in answer to its question 13 at F17 on 107 or 101 of the hearing book. It details those in attachment P. Again, one of those relates to fixed-term employees and the removal of the restrictions on the use of fixed-term employees as provided for by the higher education awards and the present 2018 agreement. To complete that narrative, question 14 of the F17 also concedes that the agreement contains terms and conditions different to those under the modern award, not already identified in the two questions I've already taken you to. They are set out in attachment Q.

PN55

There'll be submissions about those three attachments and whether they are complete and accurate but there is at least those concessions. Now, in that introduction I identified for you the reference to fixed-term employees. Can I explain the dispute between the parties in respect of those employees? Both of the awards and the present agreement – the 2018 agreement – provide restrictions of the use of fixed-term employment. I should tell you that the two awards are not identical but they are very, very similar. If I can take you to clause 11 of the Higher Education Academic Staff Award, which you will find at page 10 of the NTEU's supplementary hearing documents, Commissioner, you will see there that fixed-term employment is defined to mean full-time or part-time employment for a specified term or ascertainable period for which the instrument of engagement will specify the starting and finishing dates of that employment.

PN56

Just one aside, Commissioner: you should understand that the applicant here in its proposed evidence describes four categories of employees: full-time and part-time employees that are ongoing, commonly referred to by the parties in their submissions as ongoing; full-time and part-time employees that are fixed-term, those that I've just described, those to which this clause that I've just taken you are directed; thirdly, casual academic employees who might be teaching or marking, amongst other things and fourthly, casual professional employees, those casual employees who are engaged in student support or general administrative duties for the university. They are the four categories that are described. But if you collapse the last two, you have ongoing employees, fixed term employees, and casual employees.

PN57

Of the voting cohort can we tell you that the casual employees make up the largest proportion? The casuals and the fixed-term together significantly outweigh the ongoing employees to a measure of two thirds to one third, approximately. But returning to clause 11, and the fixed-term employees, you will see by clause 11.2(b) – and we are back to the general academic staff award – that fixed-term employee must be limited to the employment of an employee engaged in work activity that comes within the description of one or more of the following circumstances that are identified thereafter. We can summarise them this way, Commissioner: a specific task or project, firstly; secondly, research; thirdly, a replacement employee; fourthly, recent professional practice requirement; fifthly, a pre-retirement contract and sixthly, a fixed-term contract employment subsidiary to studentship.

PN58

Now, you will see those relevantly repeated in the general staff award with some variation, as I indicated, but you will also see them for reference repeated in clauses 34 to 42 of the current enterprise agreement of the university, Southern Cross 2018 agreement. That, as I indicated earlier, is also in the supplementary hearing documents behind tab 3 but what is in contest is the consequences of the fact that those restrictions contained in the current agreement – the 2018 agreement and in both awards – are removed in the proposed agreement that's here before you for approval. We say there will be evidence that that is a significant protection for staff against the use of fixed-term employees in lieu of ongoing employment. You will hear evidence about the removal of the protection and what that means and why we say it's relevant to whether you can be satisfied the agreement passes the better off overall test.

PN59

Whilst dealing with the fixed-term employees, can I also tell you that not only are there the removal of the restrictions in respect of the fixed-term employees, but the proposed agreement also does not contain the provision for the payment of severance to prospective fixed-term employees employed after its commencement. Clause 13.4 – I don't need to take you to it, Commissioner – of the academic staff and general staff awards respectively provides such severance entitlements where there is a non-renewal of a fixed-term contract in certain circumstances. Not only will that lost severance payment mean that such employers will be worse off financially but we say it also leads to the conclusion that their employment is less secure.

PN60

So it is in those two important ways in respect of fixed-term employees that we say the proposed agreement is worse than the two awards that we have identified for you and for those reasons – and of course we will expand on it in closing submissions – but we say the proposed agreement will fail the BOOT in respect of that item by itself. Can I, for reference, just identify to you where we address the fixed-term employees in our primary submissions: it's paragraphs 18 to 22 and 25 to 31 and in our reply submissions at paragraphs 4 through to 13.

PN61

THE COMMISSIONER: Sorry, what was that second reference, Mr Dowling?

PN62

MR DOWLING: The reply submissions at paragraph 4 through to 13.

PN63

THE COMMISSIONER: Thank you.

PN64

MR DOWLING: That is in summary what is in dispute between the parties about the fixed term employees. Can I just identify for you then the remaining categories of matters in dispute and say something about them?

PN65

Firstly, we will say that you cannot be satisfied that the voting cohort properly included, or excluded, on the evidence before you the relevant casual employees,

noting as we have already said that they are the largest cohort of employees. That's a voting cohort issue, the first of them.

PN66

The second, and significantly, that casual employees being engaged on an hourly basis, we will submit, should have been working at the time of the access period and of the voting, and there's a significant argument between the parties about that.

PN67

They are the voting cohort issues. There are two other issues about process – no, sorry, one other issue about process, and that is a complaint that no reasonable steps were taken to identify to the votership the reference material referred to in the agreement. That's a proposition that's maintained.

PN68

There was, I will tell you now, a further complaint made in the primary submissions at paragraph 50 to 53 about a failure to explain terms. That's not pressed. So that is, the submission at paragraphs 50 to 53 of the failure to explain terms is not pressed by the NTEU.

PN69

But the last category, and I've made some reference to it already, is misleading statements, which we say will provide a reasonable ground for believing that the agreement has not been genuinely agreed to by the employees, remembering as I highlighted a moment ago that 188(1)(c) says that there can be no other such reasonable grounds.

PN70

Now, can I deal with the first of those, and that is the casual voting cohort? We have already identified in summary, and the applicant has already conceded, that there were errors as to the process. There were, as I identified, already at least three categories of errors of employees who were asked to vote but should not have been asked to vote, and were not valid members of the voting cohort, and employees who commenced after the start of the access period that were included in the voting cohort.

PN71

We will direct you to what we say are other errors in the process, but fundamentally, the concessions combined with the other errors that we will point to means you cannot be satisfied on the material before you of the accuracy of the voting cohort, and once you reach that point, Commissioner, you cannot be satisfied of the genuine agreement required by section 188.

PN72

Can I put in context the second of the voting cohort issues? A person who is a casual employee but who is not working on a particular day or during a particular period, we say, is not relevantly employed on that day or during that period for the purposes of section 181(?), which is the first of the sections I took you to that provides only employees employed at the time are entitled to vote.

PN73

We need to introduce you to at least these three concepts about the casual employees: the casual employment contracts before you make clear that the employment of each casual is terminable on one hour's notice; they make clear that the number of hours specified are estimated maximums and that the hours of actual work may vary; and significantly, by operation of the present agreement, the 2018 Southern Cross Enterprise Agreement, under which the employees were covered at the time of the access period and the vote, and under which they are covered now, unequivocally describes that the casual employees are engaged by the hour.

PN74

Now, if we can take you to briefly clause 28 just to bring that to your attention, clause 28 of the 2018 enterprise agreement, and the PDF page reference – I'm sorry, I'm now working off the hard copy – it's on page - - -

PN75

THE COMMISSIONER: 164?

PN76

MR DOWLING: Thank you. And you will see there, 'Casual employment will mean a person engaged by the hour and paid on an hourly basis' – engaged by the hour and paid on an hourly basis, and it includes a loading, et cetera. Again, noting that this is the largest cohort, and noting something we will come to about the \$750 sign-on bonus.

PN77

The applicant needs this contention to introduce you to the contest, Commissioner, by saying that if the employment contract spanned the access period and the voting period, regardless of whether the employees were actually employed on that hourly basis and whether they were actually working on that hourly basis, then they're entitled to vote.

PN78

It does so in part by reliance on *WorkPac v Rossato*, and there will be a debate between us, but can we tell you, in that case, with which you will be familiar, what was determinative was the terms of the contract and the contractual status of the employees considered there.

PN79

What it did not do is lay down a test for all casual employees in the context of the entitlement to vote on an enterprise agreement, and especially so when their terms here, unlike there, expressly provided for employment on an hourly basis, whereas they're employed in respect of an assignment, but the parties will come to it but I want to frame it for you.

PN80

Importantly, we say, accepting as you must that employees here were engaged by the hour, you will see there is no evidence to satisfy you in respect of the significant casual voting cohort as to how they were engaged during the access period or the voting period. No effort is made to do that, and indeed whether they

were engaged in the access period and voting period, and how you can be satisfied that they are properly included in the voting cohort so as to lead to there having been a genuine agreement.

PN81

As I indicated, the exercise, and the only exercise undertaken by the applicant in response to our criticisms was to identify start and end dates of contracts of employment, but that doesn't answer the fundamental concern, we say. That's as much as we need to tell you about the two voting cohort issues.

PN82

Can we introduce to you the reference material and what it is we say about the reference material? You will see this in our primary submissions at paragraph 41 through to 49, and I'll not go through those paragraphs, but I want to introduce you to the issues so you understand it and you can put all of the relevant evidence in context.

PN83

Section 180(2), which is not one of the sections I took you to, makes clear that where a proposed enterprise agreement contains material incorporated by reference in the agreement, or entitlement or obligations derived from an internal document, that document is to be provided to the employees to be covered by the agreement before they vote upon it so they know what the contents of those entitlements or obligations are when they consider whether to approve the agreement.

PN84

It is evident, we say, that a number of documents were referenced in the proposed agreement, or are referenced in the proposed agreement creating such entitlements or obligations and were not provided to the employees.

PN85

I identify for you they are: long service leave procedure by clause 81 – we'll do this by reference only; the university's policy on study assistance by clause 377; the complaint policy by clause 333; the computing conditions of use policy by clause 461; the code of conduct by clause 461; and the university's timetable policy by section 463.

PN86

What was missing here was clear information from the applicant that that material should and could be accessed elsewhere, and importantly, we will submit, that the requirement is to take reasonable steps, and the evidence will demonstrate here, we say, that no steps were taken at all.

PN87

This criticism is met by saying they are there and they are available, not the taking of reasonable steps to bring them to the attention of those considering the agreement and voting on it.

PN88

Can I then come to the questions of the misleading statements, before I identify for you those matters met by the undertaking and the evident that will be relied upon? Commissioner, as you've heard, the voting period ran from 2 to 4 November inclusive. There was information in the period leading up to the vote about the \$750 bonus that would be paid on the commencement of the agreement. That is not the subject of the criticism.

PN89

What is the subject of the criticism is the communications by the applicant to employees on 3 and 4 November, and can I put this proposition in context by taking you to one of those? If you go to the Commission book, the hearing book, tab 10 contains the statement of Sean O'Brien, and subtab 10(d) contains Annexure SO4, and on page 356 of the hard copy and 362 of the PDF you will see there the email from Mr Nelson, and what we draw your attention to particularly are those words that appear under 'Casual staff':

PN90

All casual staff with a current contract are entitled to vote, so please take this opportunity to have your say.

PN91

Do you have those words, Commissioner?

PN92

THE COMMISSIONER: Yes, I do, Mr Dowling.

PN93

MR DOWLING: Thank you.

PN94

All casual staff salary rates will increase, and all casual staff with a current contract will receive the \$750 sign-on bonus (if the agreement is endorsed by a majority of staff).

PN95

Now, as best as we can tell, there's no contest about the circulation of that email, or text messages to a similar effect, or pop-ups that appeared in respect of payroll.

PN96

There are two significant ways we want to identify to you that we say this was misleading. Firstly, it describes that the bonus is available to every current casual staff member, namely, or clearly enough indicating to those who read it, that those employed at the time of the vote are entitled to the \$750. That is not so.

PN97

For a casual employee who voted but is not now employed, Commissioner, if you were to approve the agreement, not employed at the time the Commission approves the agreement and at the time it commences operation, they will not be entitled to the \$750.

PN98

It is obvious, we say, that a casual staff member may have been misled to believe that as a casual staff member employed at the time of the vote, he or she would have received the \$750. Secondly, that email and the other messages to which we will come describe the entitlement arising – the entitlement for the bonus arising should the agreement be endorsed by the majority of staff. Now, that we read on its plain terms as if the vote is successful, or as we saw in the context of section 182, when the agreement is made. Remembering that we were in November, no dispute could be that there were difficult times in terms of the costs of living, casual employees who earn very modest incomes are being told that they will be entitled to \$750 if the agreement is endorsed by the majority of staff. In other words if the vote gets up, which they know ends on 4 November. They are being told come 4 November if the vote is successful you will get your \$750 in November and before Christmas. When of course that was not accurate and was not the case, of course the employees have still not got the \$750 because it doesn't operate in the way described.

PN99

The applicant it seems responds to the second of those propositions by saying, 'Oh well there was a certification process running together with the voting process.' But, in our submission, that damnably makes the position worse. Knowing the distinction between the vote and the approval by the commission, the applicant chose to communicate that the entitlement would arise, not when the agreement was approved by the Commission but, in its words, 'when it was endorsed by the majority of staff.' Remembering back to where we started, Commissioner, on the applicant's conceded errors, subject to the numbers we'll come to, but on the numbers where we sit at the moment if that – those misrepresentations misled 21 people from a 'No' to a 'Yes' the vote would not have succeeded. And we say that falls into the category described by 188.1(c), another problem which leads to the conclusion that there was not genuine agreement.

PN100

Now, can we identify for you those four issues raised by us that are met by the proffered undertakings. The first is dealing with apprentices, and fixed term employees and their terminations before the end of term. Subject to any debate between us about the terms of the undertaking, we say that can be met by the undertaking proffered. The second is the prospective engagement of apprentices, and again with the same caveat we say that can be met by the undertaking. The third is the minimum engagement of casuals which you might have noted, Commissioner, provided for is one hour in the agreement but two hours in the award and there's an undertaking that it would be two hours. So again we say that can be met by the preferred undertaking. And the fourth is the casual – quite a specific circumstance – that the casual indigenous studies support officers in schedule 4, and again we say that can be met by the undertakings that are proffered.

PN101

Subject to we might have some submissions to make about the form of the undertaking and how they're made and how they fit in the balance. But those four issues discreetly, we can, can be met by the undertakings. There is no undertaking offered with respect to the fixed term employees and the removal of the

protections, and no attempt to deal with that via way of undertakings. So it is in all of those circumstances we say, Commissioner, that you cannot be satisfied that the agreement passes the better off overall test, and or that the was a genuine agreement as required by the Act. Now can I next identify - - -

PN102

THE COMMISSIONER: Sorry, Mr Dowling, what do you say about the rates of pay issue starting at paragraph 23 of your submission in chief? Has that fallen away?

PN103

MR DOWLING: Yes, that issue has gone away. It was an issue about the date of the probation. And the date has passed, so it doesn't have any work to do. I should have clarified that, I'm grateful Commissioner.

PN104

THE COMMISSIONER: And the part time and casual employees issues at, I think you've dealt with the minimum engagement at 37 of the submissions, but the issue at 36.

PN105

MR DOWLING: That's the part time employee?

PN106

THE COMMISSIONER: Yes.

PN107

MR DOWLING: That is not pressed, Commissioner, thank you again. My apologies for not making that clear.

PN108

THE COMMISSIONER: And the last one was the NES hours averaging of 40.

PN109

MR DOWLING: Yes, again, the same, not pressed.

PN110

THE COMMISSIONER: Not pressed, thank you.

PN111

MR DOWLING: Now, that's as much as I wanted to say by opening and I think we're running three minutes ahead of schedule let's hope we can keep to that, Commissioner.

PN112

THE COMMISSIONER: Yes, well that brings us to then the tender of the NTEU evidentiary materials of objection, so.

PN113

MR DOWLING: Yes.

PN114

THE COMMISSIONER: Can I take it reading through that schedule that none of the NTEU witnesses are required for cross-examination?

PN115

MR DALTON: That's correct.

PN116

THE COMMISSIONER: Thank you.

PN117

MR DOWLING: I should perhaps first identify before we come to the witnesses, I'm not sure what, Commissioner, your practice is with respect to the submissions but the two sets of submissions the primary submissions to which you have just referred are found behind tab 6 of the commission hearing book. And the submissions in reply are found behind tab 18 of the commission hearing book. We're happy for those to be marked or not marked, we don't have a strong opinion.

PN118

THE COMMISSIONER: We generally don't mark submissions unless there's a specific requirement or need for it, so.

PN119

MR DOWLING: We don't think there is, so we're content with that approach, thank you. I know my friend has some objections with respect to the material, perhaps I'll just firstly list what there is and then we'll go back and deal with each one and the objections. The following statements are relied upon, Commissioner, the statement of Andrew Crichton and the attachments and they are behind tab 7 of the hearing book. The statement of Dr Christina Kenny which is behind tab 7 – 8, my apologies, I'm grateful to my learned friend. The first statement of Mr Ken McAlpine, which is behind tab 9. The first statement of Mr Sean O'Brien which is behind tab 10. The first statement of Ms Suzanne Rienks behind tab 11. And the first statement of Ms Jubilee Smith, behind tab 12. And the statement of Ms Alison Watts behind tab 13. That concludes the primary statements. There are four statements in reply, the statement of Mr McAlpine behind tab 19, the reply statement of Mr O'Brien behind tab 20, and the reply statement of Ms Rienks behind tab 21, and the reply statement of Mr Smith behind tab 22. Subject to the objections they are all of the statements relied upon by the NTEU.

PN120

THE COMMISSIONER: In terms of the tender of those documents then, Mr Dalton, do you have objections to all of those statements or are there just some?

PN121

MR DALTON: We have objections to all statements. Some of the objections do not press it at a level of the entirety of the statement. Now being cognisant of the Commission's approach to these matters generally and given it's more relaxed approach to evidence of course it's common for the Commission to accept the tender of the materials and leave it to a question of weight and have the advantage of hearing full and final submissions of the parties as what, if any, weight should be attached to it. And I think as a broad approach we wouldn't stand in the way of

that, but we have a table of objections, we've served that on the union – I should provide you with a copy of that.

PN122

THE COMMISSIONER: Yes, if you could. With a copy handed up.

PN123

MR DALTON: So, Commissioner, what I propose to do is really go through this briefly to give you a feel and a flavour for the position that we're taking in relation to this material. And of course we can revisit the matter with more concerted submissions in closing as to the weight, if any, to be attached to this material.

PN124

THE COMMISSIONER: Okay. Very well.

PN125

MR DALTON: So starting with tab 7, we've got a witness statement of Andrew Crichton. Commissioner Mr Crichton is an employee of a different university, the University of New England, a permanent full time role as a research outputs officer. Now in his witness statement he recounts his employment with the University of New England in the period from around 2018 on various casual and fixed term contracts. The point of it seems to be captured in, for example, paragraphs 31 through 33 where the individual speaks of the significant stress at the lack of job security, the lack of certainty as to renewal and extension of his employment. And then at 34 and 35 he says he applied for conversion in May 2022, and that was accepted in November 2022. So, Commissioner, our position is that this statement is not relevant to anything in issue in this case. It could only conceivably go to the boot, presumably because the union wants to say that fixed term is just an inherently inferior form of employment as compared to other forms of employment that are available. But while that's all very interesting, and it might be relevant if the Commission were sitting in an industrial arbitration in deciding what should be the prescriptions in relation to form of employment, the only issue it can conceivably bear upon here is the boot test, and that involves the comparison of instruments, it's not a comparison of personal experiences. It's not a comparison that's to be approached through the prism of subjective value judgements. Now it may be accepted in the abstract that casual and fixed term employment is not as secure a form of employment as permanent ongoing continuous employment. We don't need Mr Crichton to tell us that, and beyond that his statement just deals with his personal experiences in his employment, at a different university, and the subjective feelings that he has around fixed term employment and casual employment. That provides nothing to the Commission to equip the Commission or assist the commission in applying the boot analysis. So our position is that that statement is irrelevant and should be given no weight. At tab 8 there is a witness statement of a similar kind. This one is from a Dr Christina Kenny. She is a lecturer in sociology in the humanities faculty at, again, another university, the University of New England. She is on a continuing employment contract and that's set out at attachment 8 of her statement and she's been in continuing employment since September 2022. Again, like Mr Crichton, her witness statement recounts various fixed-term contracts that she was employed on in the years from 2015 until last year's offer of continuing employment. Again, like Mr Crichton, the gist of her statement is to recount her

personal experiences and anxieties, balancing work and family, balancing her academic career with her partner's academic career.

PN126

Again, what has this got to do with SCU and what has it got to do with the Commission's task in comparing terms and conditions that are specified in instruments as part of the application of the BOOT? So again, our position in relation to this statement is that it's entirely irrelevant and it should be given no weight. We also have specific objections to parts of that statement in their own right as being just straight out submission and opinion. They are itemised in a table. I don't take you to the details of those at this stage. The next statement at tab 9, that's a statement from Kenneth McAlpine. Mr McAlpine is an industrial officer of the union. He has been for many years. We'll develop this in detail in closing submissions but our overall objection to this witness statement is again on relevance grounds and the same applies to his reply statement.

PN127

What you said in Mr McAlpine's statements are wide-sweeping, value-laden opinions and conclusions about fixed-term employment being inferior as compared to other forms of employment, being continuous or casual employment. Again, such values are subjective and they don't find any legitimate way into the BOOT analysis. Again, Commissioner, we've got some specific objections to parts of Mr McAlpine's witness statement. Could I just go to a couple of paragraphs, just to give you an indication of the sort of objectionable material in his statement? So if you could start with paragraphs 10 and 11 of his statement – that's behind tab 9. It's page 311 of the court book. So paragraph 10 is the primer and so it's only there to the extent it supports paragraph 11 but if you read paragraph 11 it's just a straight-out opinion conclusion and submission and value-laden again. We object to that. It's just not evidence. Paragraph 42 – this is on page 319 of the court book. The third sentence there – this is just another example of him making a very broad submission that reflects his view of the world. There is a far greater substitutability between fixed-term, et cetera. If he wants to put statistics and surveys he can do that. He's done that, if his statement is otherwise relevant. But to make these broad-brush submissions about what you make of that statistical material is objectionable. At paragraph 44 again, this is to support some broad-brush, value-laden views about the inferiority of fixed-term employment by reference to surveys. Doesn't give us any information about the date, the nature of the surveys or the contents of the surveys so that should be read as a straight-out submission and we object to it.

PN128

Paragraph 61, the end of that paragraph – again this is a good example of where he's referred to material which, Commissioner, you can look at and they can make submissions about it. The witness shouldn't be the advocate but there you'll read in terms him saying the fact is that the statistics cited above show that they have not and that they do not. That's just submissions, not evidence, and we object to it. Paragraph 64 is objectionable as a submission. It purports to just put in a previous submission that the union made about this issue, their views on insecure employment, particularly fixed-term employment in a document in a submission

that was provided to the productivity commission some time back. Again, manifestly that's a submission and we object to it.

PN129

Similar objections we make to aspects of his reply statement and we've set them out in the table: in particular paragraphs 14 and 22 and 21, references to, 'In my experience', without explaining it and then basically just making a submission. Next is Sean O'Brien. So his witness statement in chief is at tab 10. His witness statement goes to this \$750 bonus issue and communications around that. Our objections are largely hearsay and we will deal with that more fully in closing submission as to what we can make of that and we say – we're going to say a number of things about that, in particular this idea of just unidentified employees, not calling them and relying on this material, which presumably is for a hearsay purpose, to point to an email or some other communication to which Mr O'Brien refers as proof of the truth of what is represented to him.

PN130

So we object to that. There should be little weight attached to that material and we'll make some other submissions about the significance of that in the context of the argument that's being put by reference to section 188(c) on that issue. Suzanne Rents, you'll find her statement in chief at tab 11. I should take you to this, just to be clear. Mr O'Brien's reply statement – again, hearsay objections of the same nature. So what I've said in relation to this statement in chief applies equally to his reply statement.

PN131

Now, tab 11 of the court book you'll see the statement in chief of Ms Rienks. If you go to paragraphs 9 and 10, so our submission would be that this is – it's so untethered to any stated observational experience and it's not referred – it doesn't make any reference to any individuals or any reference to her specific experience such that you could conclude that she's observed some practice, that this is a straight-out expression of opinion, implicit hearsay and it should be given no weight at all. These are very broadly-cast opinions about so-called, 'accepted practices', et cetera, so we object to 9 and 10. If they're not disallowed up front they certainly should' be given any weight.

PN132

Paragraph 21, same thing – stating her understanding at a broad and untethered level to her experience that not many casuals being employed between terms, et cetera. Little or no weight should be attached to such evidence. Similar objections are made by us in relation to her reply statement which is found behind tab 21 and you'll see in our table we object to specific paragraphs there. Again, the objections, as I said, are of the same nature. Jubilee Smith – her statement in chief is at tab 12. If you go to page 385 of the court book, you can see paragraph 12 and following. Again, similar sort of, 'evidence', of the kind that I referred to in the witness statement of Ms Rienks. There's incredibly broad-brush references to an understanding and then stating that casual employees are generally not engaged to work during O Week.

PN133

There is just no tying of that to how it is that she has that understanding, what observations she's made, the extent of that understanding. So casting this in this untethered way at such a broad level, the Commission should attach no weight to it at all. There are other hearsay objections that we make. Again, I don't go through the specific details of that but we rely on them on the question of weight. Her reply statement – again, similar objections: hearsay or broad-brush submission, opinion, conclusion. So that's an outline for the objections that we make to the material. That informs and explains why we've not required these witnesses for cross-examination and we will be making more detailed and concerted submissions.

PN134

THE COMMISSIONER: There was Alison Watts as well, Mr Dalton.

PN135

MR DALTON: Yes, Ms Watts – we object to paragraphs 12 to 13. You'll see that at the bottom table. I can take you specifically to that. It's at tab 13. Yes, so the gist of this objection is that it's cast in the present tense so paragraph 13 is her current expectation. I'll just circle back to the second statement of Mr O'Brien. You'll see at item 49 of our table of objections we do object to the entire statement on the basis that it's not reply evidence as well. If the Commission please.

PN136

THE COMMISSIONER: Thank you. Mr Dowling, what do you wish to say about the statements of Mr Crichton and Dr Kenny?

PN137

MR DOWLING: Thank you, Commissioner. Can I firstly clarify that we ourselves will be content to adopt the primary position that my learned friend spoke of before he addressed the specific ones, and that is to allow the tender of the material and have the parties address you on weight. Not an unusual course.

PN138

THE COMMISSIONER: I might say, just for the parties, that's the position that I'm minded to adopt, but I did want to hear from you upfront just on the statements of Mr Crichton and Dr Kenny, and the reply statement of Mr O'Brien.

PN139

MR DOWLING: Thank you. I'm content to do that. I should identify, sorry, for completeness back to the first issue, if, Commissioner, you adopt that approach there's a number of objections to Ms Farquhar that we would identify for completeness only, but there are some criticisms that are made in respect of our witnesses that equally apply to Ms Farquhar.

PN140

But to address you specifically in respect of Mr Crichton and Ms Kenny, firstly, what should be clear by now is that we contend that the removal of the restrictions on the use of fixed term positions is a detriment to award-covered employees or proposed award-covered employees, because, and including because, it is less likely that they will go from full term to ongoing, and in respect of prospective

employees it is less likely that they will be offered ongoing employment. As part of that detriment in the removal, it is our contention that fixed term is inferior.

PN141

There seems to be some concession of some sort that that is so, but what you are required to do, Commissioner, is to assess the level of that detriment in the weighing exercise that is the better off overall test. You've got to look at the removal and look at the detriment and weigh that with all of the other benefits that you might ascribe to the agreement, and that's the process that we're concerned about, that weighing exercise in respect of the detriment for the purposes of the BOOT, and it's in that weighing exercise that we say the evidence of Mr Crichton and Dr Kenny goes to why it is that fixed term employment is inferior.

PN142

It doesn't have to be a fixed term at Southern Cross. If you're given information - the restrictions haven't been removed of course at Southern Cross, but it doesn't have to be at Southern Cross - if you are provided with information to enable you to assess and value the removal of the restrictions because of the inferiority of fixed term employment, that is instructive and informative of your task in that weighing exercise, and that's where we say it is clearly relevant. That's why we say it would be an error to exclude it.

PN143

We accept of course that there can be submissions on weight, how much should I value, what it is that Mr Crichton and Dr Kenny say, but that's what it's directed to, that weighing exercise and valuing the detriment, and that's why we say it's relevant.

PN144

Now, it was the second of those matters upon which you wanted to hear from me.

PN145

THE COMMISSIONER: Mr O'Brien's reply.

PN146

MR DOWLING: Yes. Can we make clear in respect of Mr O'Brien that what we are talking about is, and includes at least, the fact of the complaints itself is instructive to you in determining the likelihood of the statements being misled.

PN147

Now, our friends might complain about the truth of the contents, but we rely upon them, at least as well, for the non-hearsay purpose of the fact of the complaints being made, but adopting the approach that you have indicated to the parties we would say they can make submissions of course.

PN148

I think in respect of the reply, what it does is address at least the submissions and the comments of Ms Farquhar about the fact that there wasn't misleading and it couldn't be misleading, and particularly the submissions address those issues, and it further elucidates the primary statement as to the processes that were adopted

and the conduct engaged in by staff members, which we say corroborates the submission that we will make about how it falls into that category of 188(1)(c). That's why we say it's relevant.

PN149

MR DALTON: Just to be clear on that, Commissioner, the objection at that level in relation to the reply statement of Mr O'Brien is not on relevance; it's that it's not reply. All of that material manifestly was available to Mr O'Brien at the time that he prepared his statement in chief. He makes references to conversations in November and he makes references to emails in November. It's not reply.

PN150

THE COMMISSIONER: Yes. Mr Dowling, that was the nature of the objection for the reply statement.

PN151

MR DOWLING: Well, what there is, Commissioner, is a submission that the proposition contended for by the NTEU must fail, because there was no evidence, and Mr O'Brien responds to that with more particularity and says here you are. He can hardly be criticised for that when it's the applicant itself that contends you haven't – we criticise you and what Mr O'Brien has done for the lack of evidence, and we say it's not right, but that's the criticism and that's what Mr O'Brien meets by his further statement; nothing extraordinary about that, we say.

PN152

THE COMMISSIONER: Very well. As I indicated, I'm minded to allow the admission of the witness statements, but the objections will be noted and I will hear from the parties in closing submissions as to the weight that should be afforded.

PN153

In terms of the marking of those statements, I think that's perhaps just a timely way to deal with it, because otherwise we'll be sitting here all afternoon striking out paragraphs of the statements.

PN154

MR DOWLING: We accept it's certainly the most efficient way of dealing with it.

PN155

THE COMMISSIONER: The witness statement of Andrew Crichton dated 4 January 2023 and the annexures set out at pages 247 to 275 of the hearing book will be exhibit 1.

**EXHIBIT #1 WITNESS STATEMENT OF ANDREW CRICHTON
DATED 04/01/2023 PLUS ANNEXURES**

PN156

The witness statement of Christina Kenny dated 5 January 2023 and along with its annexures and set out at pages 276 to 309 of the hearing book will be exhibit 2.

**EXHIBIT #2 WITNESS STATEMENT OF CHRISTINA KENNY
DATED 05/01/2023 PLUS ANNEXURES**

PN157

The witness statement of Kenneth Milton McAlpine dated 6 January along with its annexure, set out at pages 310 to 336 of the hearing book, will be exhibit 3.

**EXHIBIT #3 WITNESS STATEMENT OF KENNETH MILTON
McALPINE DATED 06/01/2023 PLUS ANNEXURE**

PN158

The witness statement of Sean Raymond O'Brien dated 4 January 2023 along with any annexures, set out at pages 337 to 370 of the hearing book, will be exhibit 4.

**EXHIBIT #4 WITNESS STATEMENT OF SEAN RAYMOND
O'BRIEN DATED 04/01/2023 PLUS ANNEXURES**

PN159

The witness statement of Suzanne Rienks, dated 5 January 2023 and set out at pages 371 to 383 will be exhibit 5.

**EXHIBIT #5 WITNESS STATEMENT OF SUZANNE RIENKS
DATED 05/01/2023**

PN160

The witness statement of Jubilee Smith dated 5 January 2023 and set out at pages 384 to 388 of the hearing book will be exhibit 6.

**EXHIBIT #6 WITNESS STATEMENT OF JUBILEE SMITH DATED
05/01/2023**

PN161

The witness statement of Alison Watts dated 6 January 2023 and set out at pages 389 to 401 will be exhibit 7.

**EXHIBIT #7 WITNESS STATEMENT OF ALISON WATTS DATED
06/01/2023**

PN162

MR DOWLING: I think what comes next, Commissioner, is Mr McAlpine's reply at tab 19.

PN163

THE COMMISSIONER: The witness statement titled, 'Reply statement of Kenneth Milton McAlpine', dated 2 March 2023 and set out at the hearing book at pages 806 to 810 will be exhibit 8.

**EXHIBIT #8 REPLY STATEMENT OF KENNETH MILTON
McALPINE DATED 02/03/2023**

PN164

The witness statement titled, 'Reply statement of Sean Raymond O'Brien', dated 2 March will be exhibit 9. I note there is an unsigned version of that witness statement at pages 811 to 816, but the signed version was provided to my Chambers early this morning I think, yes.

PN165

MR DOWLING: It was. Thank you very much, Commissioner. I've got a hard copy of that, if that will assist.

PN166

THE COMMISSIONER: Thank you. I've got a hard copy, thank you, Mr Dowling.

**EXHIBIT #9 REPLY STATEMENT OF SEAN RAYMOND O'BRIEN
DATED 02/03/2023**

PN167

The witness statement titled, 'Reply statement of Suzanne Rienks', dated 2 March and set out in the hearing book at pages 817 to 818 will be exhibit 10.

**EXHIBIT #10 REPLY STATEMENT OF SUZANNE RIENKS DATED
02/03/2023**

PN168

And the witness statement titled, 'Reply statement of Jubilee Smith', dated 2 March and set out at pages 819 to 820 will be exhibit 11.

**EXHIBIT #11 REPLY STATEMENT OF JUBILEE SMITH DATED
02/03/2023**

PN169

Just in terms of the applicant's objection to the NTEU's evidence, given the approach I've taken with the witness statements I'll mark that document. So the document titled, 'Applicant's objections to NTEU's evidence', which comprises 10 pages, will be exhibit 12.

**EXHIBIT #12 THE APPLICANT'S OBJECTIONS TO THE NTEU'S
EVIDENCE**

PN170

Sorry, I should have just indicated, Mr Dowling, is there any objection to the tender of that objection to evidence as an exhibit?

PN171

MR DOWLING: No.

PN172

THE COMMISSIONER: Does that deal then with the tender of the NTEU evidentiary materials and objections?

PN173

MR DALTON: It does from our perspective, Commissioner, yes.

PN174

THE COMMISSIONER: I think at this stage we're now about 25 minutes ahead of time. We might need to deal with the issue of confidentiality and the exhibit. Firstly, Mr Dowling, you were provided with a redacted version of that document - or your instructing solicitors were provided with a redacted version of that document on Friday morning. The unredacted version was provided following the issue of the order on Friday afternoon.

PN175

MR DOWLING: Yes.

PN176

THE COMMISSIONER: Are you intending to tender the unredacted version?

PN177

MR DOWLING: Yes.

PN178

THE COMMISSIONER: We're going to need to deal with the issue of how we proceed then. I have heard Mr Dalton's remarks about how we might need to deal with this, but is there anything you wish to say?

PN179

MR DOWLING: No. My friend was correct when he said there were discussions this morning before Court. There were, and we are, for our part, happy to be as cooperative as we possibly can, and we think the questioning of the applicant's witnesses can be done whilst maintaining the confidentiality issue that our friends are concerned about, and we would not oppose an order under 593 or 594 if it is directed at the personal details of those people who appear on that list, which I think is what my friend was contemplating.

PN180

THE COMMISSIONER: In terms of more broadly persons in the hearing room and the provision of that document to - either the provision of that document or the attendance during that cross-examination of the other party that appears here, is there anything you wish to say about that?

PN181

MR DOWLING: Only this, Commissioner. The attendance in the court room might create some difficulty. We might - with our friend's cooperation there might be one exception, which is Mr Garver, who is behind me and instructs me on behalf of my client, that I would anticipate that I would need someone to provide instructions from the client. He would be the only person that we would request might be an exception. And then we've heard from the CPSU. They might need to be an exception as well.

PN182

Save those two exceptions, we would be content that everyone else be out of the court room. I notice there are three people observing. I can tell you, Commissioner, that one of those is Ms O'Brien from my instructor's office, so she would fall within - - -

PN183

THE COMMISSIONER: The order, yes.

PN184

MR DOWLING: - - - the order as it is. The other two I'm not familiar with, so I can't say. I hope that assists.

PN185

THE COMMISSIONER: Yes. Thank you. Mr Dalton, I might just come to you in terms of the attendance and/or the provision of that document of the CPSU and other persons in the hearing room.

PN186

MR DALTON: We would oppose any relaxation of the regime that's in here and in your order. That regime limits access and use of the confidential document to external legal representatives. My only qualification or exception to this would be in respect of the external legal representative for the CPSU. So that would be consistent with the regime established by the order to include Mr Keats as a legal practitioner who is representing the CPSU and he could be included in that definition of 'external legal representatives'.

PN187

We would oppose any relaxation of this regime to allow Mr Garver, for example, to be sitting in and hearing any cross-examination or any submissions that is revealing information that's in the Excel spreadsheet documents that's identified in the order as a confidential document.

PN188

Now, if that presents a particular difficulty for Mr Dowling in terms of needing to get instructions then that can be dealt with at the time, but we would oppose a relaxation at this time, a relaxation being the default, whereas we say the default should be maintaining the intent and purpose of the confidentiality regime, and then if Mr Dowling wants to a relaxation of that it can be done in the particular context in which that matter arises. If the Commission pleases.

PN189

THE COMMISSIONER: Thank you. Mr Keats, is there anything you wish to say about access to the confidential document?

PN190

MR KEATS: I would seek access to the confidential document so that I could follow the cross-examination as about to occur in relation to the witnesses, because it might affect submissions the CPSU ends up making.

PN191

THE COMMISSIONER: I think given we have a little bit of time I'm going to take a short adjournment and just consider how any relaxation or variation of the confidentiality orders may be made. The Commission will adjourn.

SHORT ADJOURNMENT

[11.40 AM]

RESUMED

[11.52 AM]

PN192

THE COMMISSIONER: Thank you. I've given the matter consideration. Firstly, I will grant access to the external legal representatives of the CPSU, but they will be subject to the same confidentiality requirements as the legal representatives of the NTEU. The proceedings, insofar as any cross-examination or submissions are made about the contents of that document - and I note it hasn't been tendered as an exhibit at this stage - will be confidential, and the hearing will be limited to persons - I might go the other way - persons other than the applicant and the external legal representatives of the other parties will be excluded, and that will include the NTEU internal legal representatives and/or employees, to the extent an issue arises where you need to seek the instructions of the NTEU, Mr Dowling, I'll hear from you at that particular point. Now, in terms - I'm not suggesting through that order that the entire cross-examination of the respondents witnesses be done on a confidential basis; however, cross-examination in relation to the confidential document will be. So if there is a way that you can structure your cross-examination in the different subject areas, I'll deal with that issue first and then move into other areas, or we'll deal with other areas first and then move into that area. I'll leave it to - how you may wish to do that, if you wish, for the NTEU instructor to remain in the room for those parts.

PN193

MR DOWLING: Yes.

PN194

THE COMMISSIONER: What I'm proposing at this stage is - and I note the time table that's been provided to my chambers by the parties - but given the time, it might be convenient to have the luncheon adjournment early. I'd prepare the terms of that order and publish that order, and then the proceedings can continue after lunch with the evidence of Ms Farquhar and Ms Lisetto. Do the parties have any objection to that course?

PN195

MR DALTON: No.

PN196

MR KEATS: No, Commissioner.

PN197

THE COMMISSIONER: Very well. Is there anything further that the parties need to raise with me before lunch?

PN198

MR DOWLING: Not from us, Commissioner, thank you.

PN199

MR KEATS: No, Commissioner.

PN200

MR DALTON: Just how long is the luncheon adjournment?

PN201

THE COMMISSIONER: Yes. The parties have indicated, I think, you allowed for one hour during the - in the time table. I'm in the hands of the parties. I think we'd need at least 45 minutes, but if the parties wish to have an hour, I'm open to that as well.

PN202

MR DOWLING: One o'clock, Commissioner?

PN203

THE COMMISSIONER: One o'clock. And Mr Keats, you're - - -

PN204

MR KEATS: I'm content with that.

PN205

THE COMMISSIONER: Okay, thank you. The Commission will adjourn until 1 pm.

LUNCHEON ADJOURNMENT

[11.56 AM]

RESUMED

[1.01 PM]

PN206

THE COMMISSIONER: In the intervening period, my chambers has issued that confidentiality order. I think the parties should have that, and I think, Mr Keats, you would have received access to that document now.

PN207

MR KEATS: Yes. Thank you. I certainly have. Thank you, Commissioner.

PN208

THE COMMISSIONER: Thank you. That brings us now to the evidence of Ms Farquhar. Is that correct, Mr Dalton?

PN209

MR DALTON: Yes, Commissioner. In terms of the applicant's evidentiary case, we have the proposed enterprise agreement in the F16 and the F17. It's found in Part A of the court book. We rely on that material as part of our evidentiary case, of course. I don't know whether you intend to mark that material or just take that as material that's been filed in accordance with the forms under the rules.

PN210

THE COMMISSIONER: Do the parties consider that material should be marked as an exhibit?

PN211

MR KEATS: I think that it should be for clarity's sake, for the record.

PN212

THE COMMISSIONER: Yes. Is there any opposing positions?

PN213

MR DOWLING: No, not from us, Commissioner. Thank you.

PN214

MR DALTON: No, Commissioner.

PN215

THE COMMISSIONER: I think we're at 13, are we? So, they would be the three documents. Is that correct, Mr Dalton?

PN216

MR DALTON: Yes, Commissioner.

PN217

THE COMMISSIONER: The proposed agreement, the F16, the F17.

EXHIBIT #13 F16 APPLICATION FORM

EXHIBIT #14 F17 DECLARATION

**EXHIBIT #15 PROPOSED ENTERPRISE AGREEMENT LODGED
AS PART OF THE APPLICATION**

PN218

MR DALTON: Thank you, Commissioner, and just to be clear for the record, the form F17 that's marked as exhibit 14 includes all of the attachments to that statutory declaration which take us through to page 217 of the court book.

PN219

THE COMMISSIONER: Yes. I might just indicate for the record the F17 is – which comprises exhibit 14 is set out at pages 94 through to 217 of the hearing book, and just going back to exhibit 13, the application form as set out at pages 88 through to 93 coming back to exhibit 15 of the proposed agreement is set out in the hearing book at pages 1 to 87.

PN220

MR DOWLING: Thank you, Commissioner. I call Sharon Anne Farquhar is being retrieved, I wonder if I might just for the record note the objections we have to her statement lest there be any later criticism if we make some submissions about them and get them relatively confined, and I'll just identify them for the record. They are paragraphs 35 through to 39 on the basis of speculation and opinion. Paragraph 72 on a hearsay basis. Paragraph 94 on an opinion basis. Paragraph 96 on the basis that it is speculation and opinion and paragraph 99, 125 and 126 on the basis that they are hearsay, but I don't propose to do anything further than identify them for you, Commissioner.

PN221

THE COMMISSIONER: Yes, and the same ruling as earlier. They'll be admitted, but subject to any submissions on weight.

PN222

MR DOWLING: That's what we encourage, adopt the same approach. Thank you.

PN223

THE COMMISSIONER: Thank you.

PN224

MR KEATS: Well, Commissioner, we have our witness ready to give evidence. We need a short adjournment to consider those objections because it may be that our response to it is that we seek to call additional evidence to clarify a particular matter which resolved an objection. We just seek the matter be stood down for – I think we could work this out in five minutes, 10 minutes.

PN225

THE COMMISSIONER: How about we take an adjournment until 1.15 pm?

PN226

MR KEATS: Thank you, Commissioner.

PN227

THE COMMISSIONER: Thank you.

SHORT ADJOURNMENT

[1.06 PM]

RESUMED

[1.09 PM]

PN228

THE COMMISSIONER: Mr Dalton.

PN229

MR DALTON: Thank you, Commissioner. Having now had the time to look at that material there won't be a need for us to apply for leave to educe further evidence. We'll deal with the merits of the objections on Friday. So, I call Sharon Ann Farquhar.

PN230

THE COMMISSIONER: Thank you. Can you administer the affirmation, Associate.

PN231

THE ASSOCIATE: Please state your full name and address, business address is fine.

PN232

MS FARQUHAR: Sharon Ann Farquhar, Military Road, East Lismore.

<SHARON ANN FARQUHAR, AFFIRMED

[1.19 PM]

EXAMINATION-IN-CHIEF BY MR DALTON

[1.20 PM]

SHARON ANN FARQUHAR

XN MR DALTON

PN233

THE COMMISSIONER: Mr Dalton.

PN234

MR DALTON: Ms Farquhar, could you please state for the purposes of the transcript recording, your full name and work address?---Sharon Ann Farquhar, Military Road, East Lismore, New South Wales.

PN235

Thank you, and you're employed by the University as the Director of Human Resources?---Yes.

PN236

And you've prepared a statement for the purposes of this proceeding?---Yes.

PN237

Now, you've got two folders there. Could you go to the second volume, Volume 2, and turn up tab 15, and I'll ask you to confirm that the document behind that tab 15 is your witness statement dated 10 February 2023?---That's correct.

PN238

And that it contains some 22 attachments running from tabs A through to V, and if you'd go to the end of that tab and confirm that that takes us through to page 780 of the court book. The page numbers are down the bottom right?---That's correct.

PN239

Thank you. I understand that there is one change that you wish to make to your statement, and that is to change the order in which a paragraph appears in the statement, paragraph 66?---Yes, that's right.

PN240

Could you explain to the Commission what changes you wish to make there to the order?---Yes, certainly. On reflection, on re-reading the statement I think there's a – paragraph 66 is out of order. It belongs, more appropriately, after paragraph 68.

PN241

So that's paragraph 66, including the italicised words - - -?---Yes.

PN242

Attached to this statement and marked, SF14?---That's right.

PN243

Yes, all right. With that change noted, are the contents of your statement with the annexures thereto, true and correct to the best of your knowledge?---That's right, yes.

PN244

I tender that statement.

*** SHARON ANN FARQUHAR

XN MR DALTON

PN245

THE COMMISSIONER: Thank you, and noting the objections earlier?

PN246

MR DOWLING: Yes, without any other objections to those we notified, thank you, Commissioner.

PN247

THE COMMISSIONER: The witness statement of Sharon Farquhar dated 10 February 2023, as set out at pages 428 to 780, will be exhibit 16.

**EXHIBIT #16 STATEMENT OF SHARON FARQUHAR DATED
10/02/2023 AS SET OUT AT PAGES 428 TO 780**

PN248

MR DALTON: If the Commission pleases. Commissioner, I have had a discussion with my learned friend before the hearing and he's agreeable to me leading some short examination-in-chief, just to clarify a couple of matters in Ms Farquhar's statement, so I would seek leave to do so.

PN249

THE COMMISSIONER: Yes. Mr Dowling?

PN250

MR DOWLING: Yes, provided it's within the confines of the discussion my learned friend and I had that we agreed.

PN251

THE COMMISSIONER: Very well.

PN252

MR DALTON: Yes, of course. Ms Farquhar, could I take you to paragraph 26 of your witness statement, and submission-paragraph (c). There you'd got a list of categories of casual academic employees and you provide what you've described as a pro forma, and a redacted example of contracts for each of those kinds of casual academic employees. I just want to clarify by reference to SF5, if we could, what is the pro forma template, and what is the redacted example. So, if we go to SF5 to tab 15E, page 550 of the court book?---Yes.

PN253

Which pages are the pro forma template on?---The pages that constitute our template starts at page 550, and ceases on page 554, which is the checklist. That's the final document of that template.

PN254

Thank you, and then the rest of that exhibit, what's the redacted example contract? Is it the rest of the pages of that exhibit?---That's correct. So, starting at page 555 - - -

PN255

Yes?---And, again, through to page 558, which is the checklist.

*** SHARON ANN FARQUHAR

XN MR DALTON

PN256

Yes?---That is an example of an actual contract, redacted.

PN257

Right, and without going through all the other contracts, they appear to be using, sort of, equivalent pages of the – the structure is the same. The first pages, up to check list is the template?---That's correct.

PN258

And then the pages that follow is the redacted example. Just to be clear in terms of redactions, we can see in the 'Casual contract academic teaching', starting at page 555 of the court book, some information is included but some is not. Are the redactions the blank spaces in the employee information?---That's correct. So, it's been redacted with a white box, so it's not clear but in some of those fields you can see where the redaction has occurred, and we've taken out personal or identifying information.

PN259

Thank you. Now while we're on page 555, looking down there you will see a table that sets out some information around the unit code, term, student cohort, et cetera. Again, just for the assistance of the Commissioner to navigate the document and equivalent information in tables in the other contracts you've attached. Could you just explain what each of these signifies? So, unit code, and then you've got some codes like 'FIN C3003', what's that?---That's the unit of study.

PN260

Right?---So, it would be a financial unit in our Business School, for example.

PN261

Yes?---The term, column - - -

PN262

T5?---Yes, term 5, that's correct.

PN263

Yes, and then 'student cohort location', there's a ref to you and there's a ref to GCB?---That's correct. So, 'U' refers to an online delivery, and GCB is our Gold Coast campus.

PN264

Okay. 'Classification', so there's different classification codes, by the look of that. So, 'OTH2', what does that signify?---That's a category, or an activity code, as you say, that relates to other activity, where that is defined in our enterprise agreement, the types of teaching related activity that falls under that code.

PN265

Yes. TUT2?---That's a tutorial.

*** SHARON ANN FARQUHAR

XN MR DALTON

PN266

Then there's 'MAR3', is it, or M-A-R - - -?---Yes, that's marking.

PN267

And the 3 signifies a particular kind of marking - - -?---Rate.

PN268

Or a rate that applies?---Yes.

PN269

Yes. 'WSHP'?---That is for a workshop, which is another form of teaching delivery. That's not a lecture and it's not a tutorial.

PN270

Okay, and then there's 'TUTR2'?---Which is a repeat tutorial.

PN271

The 'R' being the repeat?---The repeat, yes.

PN272

Thank you, and then I'll just move over a bit, 'Estimated maximum hours', and then you have figures for those hours. The hourly rate, that seems to be quite different for some of them. So, for example, 'other', there's an hourly rate of \$57.76, but the hourly rate for TUT2, for tutorials, is a lot higher than that, and there's also quite a high rate for workshop. Could you just explain to the Commissioner what those hourly rates represent?---Certainly. The OTH2, for example, is an hour for hour, so it's one hour for one hour of work. However, when it comes to teaching delivery, so whether that's the tutorial, the repeat tutorial or the workshop, they are what we call loaded rates, so it's for each hour of delivery there might be one hour, two hours or three hours of associated working time. And so there's a multiplier effect on the hourly rate.

PN273

So, when we've got twelve hours estimated at the maximum hours for tutorial activity, does that include the associated work time, or is that just for the delivery hours?---That's just the delivery. So, there's an implied 24 additional hours, for example, of associated working time.

PN274

Yes, all right. So, that 173, do you know off the top of your head what multiple that includes, in terms of the hours of associated work time per hour of delivery of tutorial?---That rate is derived from – the basis of all our casual academic rates, which are based on either a Level A Year 2 single casual rate, Level A Year 6 single casual rate, which is where somebody is either a unit assessor or has a PhD in undertaking that work, or a Level B academic Year 2 for lecturing activities. So, in the case of the Tutorial 2, that means that the tutor has a PhD or is a unit assessor, and you'll see from the 'OTH2' classification above that this individual is in fact a unit assessor, so there would be two hours of associated working time for each hour of delivery, and that's where that hourly rate is derived.

*** SHARON ANN FARQUHAR

XN MR DALTON

PN275

Yes, and looking down at the Workshop Activity, again that looks to be what you've described as a loaded rate there, with the \$201.75. Do you know off the top of your head, how many hours of associated work time that incorporates?---My understanding is three hours of associated work time for each hour of delivery.

PN276

Yes, thank you. I'll just finish that table and I'll just ask the same question in relation to the TUTOR2 code. I think you described that as a repeat tutorial. Again, there's an hourly rate there that looks high. What does that represent?---It represents the associated working time that's built in. So, it would be one hour of associated working time.

PN277

Yes. Thank you, there's no more questions.

PN278

THE DEPUTY PRESIDENT: Is that because it's a repeat tutorial?---That's right.

PN279

And the relevant employee has already done the preparation when they've delivered it in the first instance?---That's right.

PN280

MR DALTON: Yes, thanks, Ms Farquhar, no more questions.

PN281

THE COMMISSIONER: Thank you. Mr Dowling?

CROSS-EXAMINATION BY MR DOWLING

[1.32 PM]

PN282

MR DOWLING: Ms Farquhar, your evidence is you are currently employed as the Director of Human Resources?---That's correct.

PN283

And you've held that position for 16 years?---Yes.

PN284

But your evidence is you've been employed by the university for 27 years?---Yes, that's right.

PN285

In your capacity as Director of Human Resources, have you been involved in bargaining for enterprise agreements, prior to the one the subject of this application?---Yes, I have.

PN286

The one that precedes this application, the 2018 agreement, were you involved in that?---Yes.

PN287

And the one before that was the 2016, you were involved in that?---Yes.

PN288

The one before that was 2010. Were you involved in that?---Yes.

PN289

Sorry to date you but the one before that was 2005, were you involved in that, as well?---Not directly.

PN290

Okay, so at least the 2010, 2016 and 2018?---That's right.

PN291

And for each of those, I take it, in your capacity as Director of Human Resources?---I'd have to check on the very first example that you posed.

PN292

That was 2010, that one, so we're still within 16 years?---Yes, that could be correct.

PN293

So can we safely assume, as the director?---Yes.

PN294

All right. And in dealing with those agreements that you were - 2010, 2016,2018 - you were familiar with the steps required for certification of those agreements?---Yes.

PN295

All right. And you understood in respect of each of those, there was a process by which the employees voted, yes?---Yes.

PN296

Sorry, you just nodded to me, which is a normal response, but you'll need to say 'yes' for the transcript. And if that vote was successful, there was then a process by which the agreements were lodged with the Commission for approval; yes?---Yes.

PN297

All right. And you knew that, in respect of each of those agreements, if the vote was successful, that did not necessarily mean the agreement would be approved by the Commission?---That's correct.

PN298

Those two things were different: the vote by the employees, and the approval by the Commission?---Yes.

PN299

You knew and understood those two things were different?---Yes.

PN300

All right. Now, I just want to confirm some dates failure you. Everybody seems to be agreed that the access period was between 26 October and 1 November 2022; that's as you understand it?---Yes.

PN301

And the vote was from 2 November to 4 November?---That's right.

PN302

All right. And just to put those dates and some surrounding times in the context of teaching and terms, is it right that the week beginning 3 October was the final teaching week of Term 4?---I'd have to look at a calendar.

PN303

All right. Do you have any reason to disagree with that proposition?---No.

PN304

All right. And the week beginning 10 October 2022 was the assessment and grading week of term 4; does that accord with your recollection?---It does.

PN305

All right. The week beginning 17 October 2022 was a teaching-free week?---Yes.

PN306

All right. And the week beginning 23 October was the orientation period for term 5?---Yes.

PN307

All right. And then, the week beginning 31 October and all the weeks in November 22, were the teaching weeks for term 5?---Yes.

PN308

All right, thank you. Now, I asked you about your involvement in the 2010, 2016, 2018 agreement; are you covered by the 2018 agreement?---No.

PN309

All right. And should I understand from that, then, that if there is information provided by the university that identifies you as covered by the Southern Cross University enterprise agreement of 2018, that that would be incorrect, that information?---Yes.

PN310

All right. Now, you give some evidence about the categories of employees, and is it fair to summarise those categories as ongoing employees, fixed-term employees, and casual employees?---That's probably right.

PN311

I think you divide the casuals into casual teaching and casual professional, but I'll collapse them for the moment, and they're the three categories?---Yes.

PN312

All right. Is it fair to suggest that the preference among staff, generally speaking, is for ongoing employment?---Yes.

PN313

All right. And of the three types that I've identified, it's fair to say that the ongoing employment is considered by employees to be the most valuable?---I can't make that statement categorically. Many of our casual employees have other primary employment.

PN314

All right, well, let's see if we can go back one level. As a general proposition, you'd accept that the employees of the university would value ongoing employment most highly; there might be some exceptions, but as a general proposition. Do you agree?---Yes.

PN315

All right. And if we look for a moment at the proposed agreement, is it fair to say, looking at the proposed agreement - there are several reasons why you might value ongoing employment more highly and I want to put each one to you. You accept that under the proposed agreement, that the ongoing employees will get redundancy, whereas the fixed-term and the casual will not?---Yes.

PN316

The ongoing employees will get a minimum of six months' notice whereas the fixed-term and the casuals will not?---In what circumstances? Any circumstance?

PN317

Yes, in any circumstance, the ongoing employee is required to be given - say for serious misconduct, is required to be given six months notice. Do you accept that proposition?---No, I don't.

PN318

All right?---I can't answer that.

PN319

Okay. Well, let's put the proposition a different way. You accept that there is no obligation to give the fixed-term contract employees and the casual employees six months' notice?---Certainly, the casual employees, that's correct.

PN320

Yes?---It would depend on the circumstances for the fixed-term.

PN321

Are you saying in some circumstances, there is an obligation on the university, under the proposed agreement, to give fixed-term employees six months' notice?---I'm saying that without that agreement in front of me and considering every potential scenario that might arise where notice is given, I cannot give a categorical answer to that question.

PN322

All right. Would you - we might put the agreement in front of you?---Yes.

PN323

To be fair to you. I don't know whether - and you'll see behind tab 3 in that folder is the 2018 agreement. Tell me if you want to be given the opportunity; do you want to point me to a clause in the proposed agreement that requires the university to provide to fixed-term employees six months' notice of their termination?---Sorry, I thought your question referred to the proposed agreement.

PN324

Well, yes, I'm starting with the 2018 - well, do you want to go to - I wanted to do it in two steps?---Right.

PN325

But if you would prefer to go to the proposed agreement, which you will find in folder number 1. You can put that to one side; that might assist you. If you don't think it will, that's fine. You will find the proposed agreement behind tab 1 in folder 1. Does that assist? I took it from your evidence that you were suggesting that there might be some circumstances where the proposed agreement provides an obligation upon the university to give fixed-term casuals - sorry, fixed-term employees and casuals, six months' notice?---I'm not aware of any obligation, but I cannot answer that definitely.

PN326

Okay. Should we also understand that, considering the proposed agreement, that ongoing employees will have unfair dismissal entitlements when their employment comes to an end, whereas casuals will not? Do you agree with that proposition?---That's correct.

PN327

And fixed-term employees will not, if their employment comes to an end as the result of the end of the contract arriving; do you agree with that proposition?---That's my understanding. I agree.

PN328

All right. Now, in respect of the three categories, although you describe each of the three categories, you do not give any evidence about how many of the university's employees fall into each of the categories?---That's right.

PN329

Do you know - are you able to say approximately how many fall into each category?---No.

PN330

All right. Perhaps I can put some figures to you, and you can tell me whether it accords with your understanding. Would it be fair to suggest that, if we combined fixed-term and casual - - -

PN331

MR DALTON: Perhaps just in terms of - it sounds like this is going to disclose some information that's drawn from the confidential document. Now, now is the time to foreshadow that, because under the order, people should be out of the hearing room at this point.

PN332

THE COMMISSIONER: I don't know if it was getting that close.

PN333

MR DALTON: He was about to put some numbers.

PN334

THE COMMISSIONER: Numbers.

PN335

MR DALTON: That's drawn from the confidential document and nowhere else.

PN336

THE COMMISSIONER: Mr Dowling?

PN337

MR DOWLING: I was starting with a general proposition so as to avoid things, but Commissioner, if you're content for me to put a general proposition and then, depending on the answer, I might go to the specifics, but only if I go to the specifics will I flag that we might need to make arrangements.

PN338

THE COMMISSIONER: I'll allow the question, and depending how we go and what the answer is, we'll go from there.

PN339

MR DOWLING: I'm trying to avoid as much inconvenience as possible by phrasing the questions, or re-phrasing the questions. Do the best from your recollection, Ms Farquhar. Would it be fair to suggest that if we combine the categories of fixed-term and casual, they would make up approximately two-thirds of the staff, and ongoing would make up a-third?---Are you referring to the final number, as at the access period or the vote date?

PN340

Yes, I am?---I can't answer that, because I don't know the numbers of our fixed-term staff, categorically.

PN341

All right. I'm not asking you for the numbers, categorically; I'm asking whether, from the best you can do, it would be fair to say that the fixed-term and casuals, together, make up two-thirds and the ongoing make up a-third; are you able - - - ?---I think that's - I think that's too high a number.

PN342

All right, well, perhaps I'll put the specifics, Commissioner.

PN343

THE COMMISSIONER: Okay. We're going to need, then, anyone associated with the NTEU or the CPSU to vacate the hearing room.

CONFIDENTIAL TRANSCRIPT FROM PARAGRAPH 344-363

PN364

THE COMMISSIONER: I might just pause for a while.

PN365

MR DOWLING: Very well. Thank you, Commissioner.

PN366

THE COMMISSIONER: Do you have some water there, Ms Farquhar? Just while my associate is retrieving the persons outside, the document the staff list for vote 25 October 2022 final has not been tendered at this stage.

PN367

MR DOWLING: No.

PN368

THE COMMISSIONER: Would now be a convenient time or?

PN369

MR DOWLING: It would, yes.

PN370

THE COMMISSIONER: Any objection, Mr Dalton?

PN371

MR DALTON: Well, it seems a very early stage to be tendering and it's not apparent to me, the relevance of the document is and why all that, the document needs to be tendered in the Commission. And so at this stage, we would object. It doesn't seem to be necessary to tender the document, at least not all of the contents of it. And given that it's a confidentiality order, the Commission shouldn't be receiving it and accepting it on the file until satisfied that it's relevant and required.

PN372

THE COMMISSIONER: Well, I was attempting to seize the break, but I'm happy to leave it for now and see what happens, through the course - - -

PN373

MR DOWLING: I'm happy to. It's going to become inevitable and – but if my friend (indistinct) - - -

PN374

THE COMMISSIONER: And the confidentiality order will extend to the Commission's file as well. If that needs – if the confidentiality order needs

amendment to give that comfort to – and that can be amended, yes. Please continue Mr Dowling.

PN375

MR DOWLING: Thank you very much, Commissioner. Now, we've just been dealing with the break down in respect of those three categories as at the access period and the voting time, you understand? Yes?---Yes.

PN376

All right. Now, I want you to do the best you can from your recollection, given your considerable experience with the university. Is it accurate to say that in 2003 for example, the number of ongoing employees represented a greater proportion at that time than the one-third that they – or thereabouts, that they represent now?---I can't answer that.

PN377

You have no recollection at all?---No.

PN378

All right. And let's go a little more recently. Is it fair to say that in 2013 the proportion of ongoing employees represented a greater proportion than they do now?---I don't know.

PN379

You have no recollection?---No recollection.

PN380

And perhaps we can go back five years. Are you able to say going back five years whether the proportion of ongoing employees represented a greater proportion than they do now?---No. I cannot say.

PN381

All right. In preparing your statement, did you read the two statements or the statement of Mr McAlpine?---Yes.

PN382

All right. And you do not, as part of your statement challenge the accuracy of the statistics that Mr McAlpine sets out, do you?---No.

PN383

All right. Now, you're aware that one of the disputes between the parties is the restrictions that the current agreement, the 2018 agreement imposes upon the use of fixed term contracts?---Can you repeat that?

PN384

You're aware that one of the issues between the NTEU and the university is that the current agreement removes the restrictions for the use of fixed term employees?---The proposed agreement?

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN385

Yes?--- Yes, not current. Proposed.

PN386

Yes. Sorry?---Yes.

PN387

It removes it from what is in the current agreement and in the proposed agreement?---Yes.

PN388

Those protections are not included?---That's right.

PN389

All right. And as one of those who was involved in the negotiation for the 2018 – sorry for the proposed agreement, that is something that was actively sought? The removal of those restrictions, yes?---Yes.

PN390

All right. And ultimately, they are no longer contained in the proposed agreement, yes?---Yes.

PN391

All right. Are the annual reports of the university something that you have a role in?---Yes.

PN392

All right. And did you see the – or were you provided with or did you have an involvement in the 2021 annual report of the university?---Some involvement, yes.

PN393

All right. And do you recall that annual report advised of a \$10.6 million operating profit?---No. I'm not aware.

PN394

Okay. Are you familiar with the description in that report that provided looking to 2022 persistent in material structural challenges, confront the Australian University sector and these will continue to weigh heavily on the university's financial outcomes. Are you aware of that being stated in the annual report of 2021?---Yes.

PN395

All right. And those persistent and material structural challenges were they in your mind relevant to the negotiations that sought the removal of the restrictions on fixed term employees?---I can't make that link.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN396

Well, did you personally, as one of the negotiators, knowing that the university would have persistent and material structural changes in negotiating for the

removal of the restriction, did it factor in your mind?---I wasn't one of the negotiators. I was on the steering committee. But yes, it was certainly a factor.

PN397

It was a factor in your mind as a member of the steering committee?---Yes.

PN398

All right. I take it, I've been talking about the current agreement, the 2018 agreement and the restrictions it contains about the use of fixed-term employees. Can I assume that you are familiar with the terms of the 2018 agreement and the restrictions that it includes?---Yes.

PN399

And you say, do you that the removal of those restrictions means that you will be able to use fixed-term contracts in a broader variety of circumstances, yes?---Yes.

PN400

And that is what the university wants. To be able to use them in a broader variety of circumstances?---That's right.

PN401

All right. Now, in terms of classifications, the academic positions are classified in the current agreement as levels A, B, C, D and E?---Yes.

PN402

And E being the highest and that being most commonly a Professor, yes?---Yes.

PN403

All right. And you gave some evidence earlier today in answer to Mr Dalton's questions about the casual rates that are set by the university and I understood you to say the casual rates are set by reference to levels A and level B?---That's right.

PN404

All right. And just going through the levels, Level C is most commonly a senior lecturer?---Yes.

PN405

Level D most commonly an associate professor?---Yes.

PN406

And then as we've said Level E most commonly a professor, right?---Yes.

PN407

There are no casual rates linked to a Level C, D and E, that's correct?---Yes.

PN408

And I take it that's because those levels C, D, and E, are very rarely, if ever engaged as a casual, yes?---We have a single rate casual format where if we are engaging somebody of that level to undertake casual work for us, that we would use that rate.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN409

All right. But perhaps in answer to my question, is it correct to say that it is very rare that casuals are engaged at Levels C, D and E?---Yes.

PN410

All right. They are going back to our three categories, most commonly ongoing employees? Yes?---Yes.

PN411

All right. There would be certainly nothing stopping the university if the restrictions on the use of fixed term employment were removed, that you could also engage those three positions as fixed term, yes?---Yes.

PN412

All right. And that's the choice that the university wants, is it? It wants to be able to – amongst other things, it wants to be able to appoint those Level C, D, and E as fixed term positions?---That's not the intention.

PN413

That's a possible consequence, you accept?---It's a possible consequence.

PN414

All right. And I think from what we've already said, you would accept that an academic who might otherwise have been an ongoing employee who's appointed as a fixed term employee would be worse off?---You'll have to repeat that, sorry. I don't understand.

PN415

What – we've got a role, let's say it's a C, D or E. most commonly, you've accepted is ongoing. You've also accepted that it's possible that it might be a fixed term position under the proposed agreement and what I'm suggesting to you is that, that employee that might have otherwise been ongoing, that is now fixed term, would be worse off?---No, I don't agree with that.

PN416

You don't accept that?---No.

PN417

All right. But I think you did accept before that that employee, as an ongoing would have got redundancy but as a fixed term and casual will not, under the proposed agreement, correct?---Yes.

PN418

That employee as an ongoing would have got a minimum of six months in the circumstances described in the current agreement whereas as a fixed term and casual, they will not. Agreed?---(No audible reply)

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN419

That employee, as an ongoing would have had unfair dismissal entitlements at the end of their employment, but a casual would not, and a fixed term, if it ends at the

termination of the contract period would also – would not have an unfair dismissal rights. You agree with all of those propositions?---Yes.

PN420

Can I ask you reconsider your answer, knowing at least those three significant differences, the employee that is employed as a fixed term as opposed to an ongoing would be worse off?---No, because we might be paying out the entire residual term of the contract. So I can't agree with that statement.

PN421

You might be. You might be. And is that the only circumstance in which you say that employee would be better off if they are terminated and paid out the balance?

PN422

MR DALTON: Just I've got to object at this point.

PN423

MR DOWLING: Why?

PN424

MR DALTON: Worse off / better off, compared with what? That's not been clearly marked out in this question. And of course, there's only one relevant comparison here that the question can go to, so that in fairness should be made clear to the witness.

PN425

THE COMMISSIONER: Mr Dowling?

PN426

MR DOWLING: Well, the witness didn't seem to have any trouble understanding the question. We were comparing a role that might be an ongoing position or might be a fixed term position and the difference between those two positions.

PN427

MR DALTON: Then I object to it on relevance grounds. It's irrelevant cast at that general level.

PN428

MR DOWLING: No, it's not. The test – the test – sorry, Commissioner, I should have let you - - -

PN429

THE COMMISSIONER: Go on.

PN430

MR DOWLING: The test is each prospective award covered employee and we are talking about a prospective award covered employee that might be offered a position either as a fixed term or as ongoing.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN431

MR DALTON: Award can't be – he's obscured the reference in the questioning, he has not made it clear to the witness the relevant comparison in working out better off/worse off including all of the things that are under the respective instruments. It's a comparison with the hypothetical ongoing employee who is employed under the terms of the award.

PN432

THE COMMISSIONER: Well, the witness didn't appear to have any difficulty understanding - - -

PN433

MR DALTON: She didn't have any difficulty in understanding the question and she doesn't – she doesn't know whether that's – the question is allowed. She understands the question. My objection is that the question hasn't been framed by reference to the award. It's not for the witness to decide that, as to whether it's a relevant or proper question, so I've stood up at the time where it gets to the point where the witness is being pressed on whether she holds the opinion as to whether the hypothetical employee is going to be better off or worse off but we don't have the relevant reference point that's been made clear in the questioning. So for that reason, I press the objection.

PN434

THE COMMISSIONER: Mr Dowling, perhaps you can rephrase the question.

PN435

MR DALTON: Yes. We are talking about a prospective employee who we know is at least covered by the award. That prospective employee, I'm suggesting to you, will be worse off if they were offered a fixed-term contract than they would have been had they been offered an ongoing role with the university. Do you agree with that proposition?---I don't.

PN436

All right, and do we understand from the answer you gave that you don't agree with that proposition because it might be that that employee who is a fixed-term might at some point be paid out the balance of their contract. Is that right?---That's one reason. I'm not agreeing with your statement.

PN437

All right, and is that something that is common, the university pays out the balance of a fixed-term contract?---It's not common.

PN438

All right. Now, at paragraph 117 of your statement – I don't need to take you to it unless you would be assisted – you say that you envisage the university using the fixed-term contracts when you have, in your words, not identified an ongoing need for the particular role and therefore ongoing part-time or full-time would be unsuitable. Do you recall saying that?---Yes.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN439

So you say in that circumstance, that's something that the university will use the new – under the proposed agreement – the new unrestricted access to fixed-term for that scenario, yes?---Yes.

PN440

Can you describe to us what circumstance you mean, what role you are referring to, that can't be provided for under the current restrictions in the 2018 agreement that you want to use in the 2021 proposed agreement?---That's a difficult question to answer on the run.

PN441

Well, it's not on the run. You've given your evidence. You gave it some time ago. I assume you've reread your statement, yes?---Yes.

PN442

All right, well, it's you that says this is the situation in which we're going to use it, when we've not identified an ongoing need. I want you to identify for the Commission – what situation that is that is not provided for by the current restrictions or could not be accommodated by the current restrictions in the 2018 agreement?---Okay, I will offer this to the Commission: it could be that we choose to trial a new partnership arrangement with an education provider. It's not a completely new organisational unit but it's an area that we are trialling to see whether or not it's something that the university can engage in over the longer term and under the current restrictions, I don't believe there would be a category under which that type of employment would fall.

PN443

Has this trial you describe ever happened before?---Yes, numerous occasions.

PN444

All right, okay – under the current agreement?---Yes.

PN445

So were you able to accommodate the employees under the current agreement?---Not on a fixed-term contract.

PN446

All right. Does that mean you put them on on an ongoing basis?---I don't know. I think in my statement I talk about casual employment as well.

PN447

Well, let's focus on your example that you have provided the Commission. Is it your evidence that you don't – when that situation arose, you didn't know the basis upon which those people were engaged?---My understanding is casual employment.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN448

When you say, 'your understanding', you didn't have one a moment ago. You have one now. Where does that understanding come from?---When did I not have an understanding, sorry?

PN449

You said you weren't sure a moment ago?---I wasn't sure.

PN450

But you are now sure?---It's my understanding. Sorry, this question has just come as a bit of a surprise and I'm trying to think of the specific example, which I've done. So I'm now trying to rely that example to what's then happened as an outcome of that situation. My understanding is casual employment would have been offered.

PN451

But should we take it from the deliberate use of, 'understanding', that you're really not sure, you can't be certain?---I can't be certain but I'm reasonably certain.

PN452

Is that the only circumstance you can provide to the Commission?---That's the best example I can provide at the time.

PN453

Is it the only example you can provide?---No. No, it wouldn't be.

PN454

Okay, can you provide another one?---No, not – I can't. I'd need time, so if you're prepared to give me time - - -

PN455

How much time would you like?---I don't know. How much time can I have?

PN456

Have you not thought about this issue before, Ms - - -?---No, no, I haven't.

PN457

Isn't it important, because the university says, 'We want to be able to use these things', as you say, 'in circumstances where we've not identified an ongoing need'. But is it your evidence that you haven't turned your mind to what those particular circumstances will be?---I have turned my mind to it. There's an array of circumstances that can arise.

PN458

But you're not able to come up with more than the one you've described so far today?---In time I can.

PN459

I take it there's no dispute that the removal of the restrictions would enable the university to engage employees as fixed-term contractors that it might otherwise, prior to the restrictions being removed, have engaged as ongoing employees?---Can you repeat that?

PN460

I think we went through this a little earlier?---Yes.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN461

So I want be fair to you and give you an opportunity but the ongoing positions that we described earlier – level C, D and E – it's your position that those ongoing positions after the removal of the restrictions are able to be engaged as fixed-term contract positions, yes?---Able to.

PN462

All right. Do you say that they might not be because I think as you say in your statement, 'We would only do it in appropriate circumstances'?---That's right.

PN463

Have you described to the NTEU or anybody what you say are the range of appropriate circumstances?---I haven't provided that to you.

PN464

Have your lawyers asked you to identify or define what is appropriate and what is inappropriate?---I'm not in a position to answer that.

PN465

Is that a no or is that a, 'I don't know', or is that a - - -

PN466

MR DALTON: I object to the question. I mean, frankly, it's difficult to see how it can be answered without disclosing privileged communications.

PN467

THE COMMISSIONER: Yes, Mr Dowling.

PN468

MR DOWLING: That depends on the answer a little but I'm happy to phrase the question a different way.

PN469

THE COMMISSIONER: Very well.

PN470

MR DOWLING: Have you made any effort yourself to define and identify what you consider are appropriate circumstances and what you consider are inappropriate circumstances for the use of fixed-term contracts?---I've certainly turned my mind to that.

PN471

All right, and have you recorded that in a document anywhere?---No.

PN472

To the best of your knowledge, has anybody else recorded that in a document?---No.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN473

Are you aware that as part of this proceeding undertakings have been offered to deal with other complaints that the NTEU has made? Are you aware of that?---Yes.

PN474

Have you turned your mind to an undertaking that could be offered to confront the criticisms that the NTEU make about the use of fixed-term contracts?---I can't answer that.

PN475

I don't understand what you mean by you, 'can't answer it'. Have you - - -?---I don't understand your question.

PN476

Okay, that's my fault then. Undertakings have been offered – sorry, let me go back one step. The NTEU have made some criticisms about the proposed agreement. I'll give you an example. One of the criticisms they make is that the proposed agreement provide for a minimum engagement of one hour. You're aware of that?---Yes.

PN477

One of the undertakings that was offered was, 'We will have a minimum engagement of two hours', which is consistent with the award. You see, so an undertaking was offered to deal with the criticism?---Yes.

PN478

And here you understand one of the criticisms of the NTEU is that this is a reduction in entitlements, the use of fixed-term contracts in an unrestricted way, and for that reason it doesn't pass the better off overall test. You understand that?---That's the assertion.

PN479

Yes, just as they complained about one-hour minimum engagement?---Yes.

PN480

Okay. Have you in the same way that I described the one-hour minimum engagement, turned your mind to an undertaking that could be offered to assure the NTEU what you mean by, 'appropriate', and how fixed-term contracts will only be used in appropriate circumstances? Have you done that exercise?---I haven't.

PN481

You have not, okay. Has anyone, to your knowledge, done that exercise?---No.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN482

Having read Mr McAlpine's statement, I take it you are aware that between 2005 and 2008, when the restrictions in relation to fixed-term contract use were removed, that there was a significant increase in the use of fixed-term contracts at the expense of ongoing positions. Are you aware of that?---Am I aware of the statement or I'm aware of - - -

PN483

Let's do one at a time?---Yes.

PN484

Are you aware of that statement being made?---No.

PN485

And I take it – and you're aware of that circumstance in 2005 to 2008?---The circumstance were the fixed-term restrictions were removed?

PN486

Yes, yes?---I'm aware of that.

PN487

And are you aware of the consequences after that removal for your university?---No, I'm not.

PN488

All right. Now, at paragraph 114 of your statement, one of the things you say is that the conversion clause within the proposed agreement provides an appropriate pathway to continuing employment in appropriate circumstances. Do you recall giving that evidence?---Yes.

PN489

And you understand that the way the proposed agreement operates is that there needs to be at least continuous contracts for a period of at least three years?---Yes.

PN490

All right. You accept of course that in relation to fixed-term employees not all contracts are continuous?---Yes.

PN491

If there are multiple contracts they don't always continue directly. You accept that proposition?---Yes.

PN492

Have you seen in your experience with the university the practice of 364-day contracts?---No.

PN493

But I take it from the answers you've just given that you accept that if there are multiple contracts yet they are not continuous and there is a break in between them the person would not have the benefit of the pathway that you describe for conversion, yes?---That could be an interpretation.

PN494

Is there another interpretation?---Well, we can convert a fixed-term employee at any time, regardless of whether the three years has been served or not.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN495

Of course. But you are describing in your evidence the conversion clause, so that's why I'm focusing on the conversion clause. Ultimately you have a discretion?---Yes.

PN496

But let's focus on the clause. That's what the clause requires. So that would obligate you and what I'm suggesting to you is if there are multiple fixed-term contracts that are not continuous the clause would not obligate it of the university, correct?---It would not obligate it.

PN497

All right. At paragraph 115 of your statement, you say there that there are part-time fixed employees who work additional hours, who can be compensated and have their workload reduced. You recall giving that evidence?---What clause is that?

PN498

Paragraph 115 of your statement?---Do you have a - - -

PN499

THE COMMISSIONER: Page 445.

PN500

MR DOWLING: Do you see paragraph 115?---Yes.

PN501

You're responding to Mr McAlpine?---Yes. Sorry, academic - I didn't hear you say 'academic employees'. So that's critical to my understanding.

PN502

Yes, do you want to read your paragraph - - -?---Yes.

PN503

- - - there to yourself, paragraph 115?---Yes.

PN504

Can you tell me firstly how common it is that a person's workload has been reduced in consideration of them having worked additional hours?---It happens on a regular basis.

PN505

I didn't ask whether it happens; I'm asking how common it is?---Well, I can't tell you how common it is. All I can tell you that it happens on a regular basis.

PN506

All right. And how do you work out the additional hours that have been worked so as to assess that against reducing the workload?---We have a formula-based workload calculation tool, so it's very easily done.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN507

All right. And can you provide - is that set out in the document?---The workload?

PN508

The formula that you've - - -?---The formula - - -

PN509

- - - just described, yes?---No, it's - it's a data - it's a tool - it's a database. Actually, we have a workload framework model, so it would be - it would be available.

PN510

All right, so you - that's a document that you could find for us?---Yes.

PN511

All right. Could you do that, please, when you get an - not now?---Yes.

PN512

When you get an opportunity, after court today?---Sure.

PN513

If - just to complete this scenario - if the employee works additional hours, then leaves for any reason prior to being compensated by a workload reduction, there's no entitlement for those additional hours under the proposed agreement; that's correct?---No, that's not correct. There's other methods for compensating that employee.

PN514

Under the proposed agreement?---Under the proposed agreement.

PN515

All right. Can I just go back for a moment to - I asked you right at the outset about the ballot process. Now, you give some evidence about, prior to the access period, some online forum - forums that were conducted; do you recall that?---Yes.

PN516

All right. And you give some evidence about three sessions that were conducted by the vice-chancellor; do you recall giving that evidence?---Yes.

PN517

And I think your evidence is that you only attended one of them?---Yes.

PN518

All right. And I think Professor Carlin and Mr Pearce attended at all three?---And Mr Heid.

PN519

And Mr Heid. Is there any reason that the three of those people can't give evidence before this Commission that you are aware of?---Not for me, that question.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN520

All right. Sorry; I should have been clearer. As far as you're aware - you personally - is there any reason why those three people cannot give evidence before the Commission?---Is there reason? I'm not aware of any.

PN521

All right. And then I think you say there was a Q and A information session on or about 31 October - a session, sorry, between 31 October and 1 November?---Yes.

PN522

Do you recall that?---Yes.

PN523

And, doing the best you can, from - only from those where you were present or have personal knowledge - was the information provided to those employees that they would be entitled to the \$750 bonus when the enterprise agreement commenced operation after being approved by the Commission?---That's my understanding.

PN524

All right. Now, you are aware that the NTEU have provided - sorry; can I go back one step. And you have set out all of that information, and I think, in your statement, you said words to the effect that that is all of the communications to the employees relevant to the making of the proposed agreement; yes?---Yes.

PN525

All right. You know, of course, now, having seen the material filed by the NTEU, that they provided to the Commission emails that were sent on 3 November, text messages that were sent on 3 and 4 November, and information that arises on the payroll portal on 3 and 4 November. You've seen that information?---Yes.

PN526

All right. And is there a reason that you did not include that information in your statement?---I didn't think it was relevant.

PN527

You didn't think it was relevant. Did you ask - did you bring it to people's attention and ask them whether it was relevant, or you just made a decision yourself that it wasn't?---It was something that we discuss collectively.

PN528

All right. And a decision was made to exclude it?---I - I don't believe it was part of the formal communications explaining the changes in the enterprise agreement.

PN529

That's the justification that you had in your mind for not including it in your material?---As well as the discussions that we had at the university.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN530

All right. And who were those discussions with?---Excuse me. Professor Carlin, Mr Pearce and Mr Heid.

PN531

So the four of you discussed whether we should include in your statement those communications on 3 and 4 November to the voters?---We talked about the provision of information generally, not that in - in that specific example.

PN532

I see. Can I ask you, then, to go to tab - sorry - volume 1 of the folder that you have before you, and tab 10. You have tab 10?---Yes.

PN533

And then there are a number of exhibits, and I'm working - - -

PN534

THE COMMISSIONER: Mr Dowling, can I get a page reference, please.

PN535

MR DOWLING: Yes. Of the PDF, 362 of 826, meaning the actual page is 356. If you could go to SO4, which has a number 356 down the bottom right-hand corner. Do you have that page?---Yes.

PN536

And you will see - if you go to the top of the page - you will see, this is an email from Mr Nelson; yes?---Yes.

PN537

And it directs itself to - separately, it appears - to casual staff and to all staff; you see that, with the headings - - -?---Yes.

PN538

- - - partway down the page? And to casual staff, it provides:

PN539

All casual staff with a current contract are entitled to vote, so please take this opportunity to have your say. All casual staff salary rates will increase, and all casual staff with a current contract will receive the \$750 sign-on bonus if the agreement is endorsed by a majority of staff.

PN540

Do you see that?---Yes.

PN541

Did you see that prior to its going out?---No.

PN542

All right. Do you know who authorised its sending?---Mr Nelson.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN543

All right. And he didn't discuss it with you?---No.

PN544

Do you know whether he discussed it with Professor Carlin - - -?---No.

PN545

- - - or Mr Pearce - - -?---I don't know.

PN546

- - - or Mr Heid?---I don't know.

PN547

All right. You know he didn't discuss it with you?---No.

PN548

All right. Do you accept, seeing it now, that it is not accurate to say that, on 3 November of 2022, that 'all casual staff with a current contract will receive the \$750 sign-on bonus'?---What's your question?

PN549

Do you accept that that is - that the sentence I just read - - -?---Yes.

PN550

The emboldened - the second emboldened one under Casual Staff, 'all casual staff with a current contract will receive the \$750 sign-on bonus', is not accurate?---It can be interpreted differently to what was intended.

PN551

Well, you're not able to say what was intended, are you? Because you didn't speak to Mr Nelson before it was sent?---No.

PN552

And he didn't discuss it with you?---No, that's right.

PN553

You can't speak for his intention?---I can - I can see a - a way of interpreting that.

PN554

Well, I don't want you to try and interpret, or put yourself in Mr Nelson's mind. What I'm asking you to do is assess it yourself?---Yes.

PN555

It's not accurate to say that 'all casual staff with a current contract will receive the \$750 ... bonus', is it?---That's right.

PN556

You agree with me, it's not accurate?---It's not accurate.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN557

And it is also not accurate to say that you would receive that bonus as the point in - at the point in time in which 'the agreement is endorsed by a majority of staff'?---That's true.

PN558

You agree that that's not accurate, either?---Yes.

PN559

All right. Certainly for your part, you knew the difference between a vote of staff and the approval of this Commission, didn't you?---Yes.

PN560

And you knew at least because you had been involved in a number of agreements before this one?---That's right.

PN561

I take it that you wouldn't send an email in those words?---I don't - I don't know.

PN562

Have you read Mr O'Brien's statement?---Yes.

PN563

Both of them? He has two - he had two statements?---Right.

PN564

Have you read both of those?---I believe so.

PN565

You will have seen, having read them, that various casuals communicated with him about the issue of the sign-on bonus. Did you see that?---Yes.

PN566

And you understood from that that employees were raising the fact that they had not received it in November?---With that particular person, yes.

PN567

Yes. You understood that it was being raised. Yes?---That - from what I've read.

PN568

Did anyone raise with you, in November of 2022, that there were casual employees concerned about not having received the \$750 bonus?---I would have to go back to my notes, but I think we had one, possibly two, inquiries.

PN569

You personally?---No.

PN570

All right. Your office?---My office.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN571

All right. And those inquiries, again - are they - were they in writing?---Yes.

PN572

And are they something you could easily locate?---Yes.

PN573

All right. Could you locate those two inquiries for us, too, please, after court today. Now, I just want to be clear about a response you make to Mr O'Brien. And you do this at paragraph 130. Do you have that page - paragraph of your statement? It's the very last paragraph of your statement?---Yes.

PN574

And I think - if I understand your response correctly, one of the things you're saying is that the unnamed employee was responded to by Mr Heid, who advised him or her that the \$750 will be automatically paid to all colleagues when the enterprise agreement is approved by the Fair Work Commission. Do you see that?---Yes.

PN575

All right. I take it that you're not contending – I withdraw that. The date of that reply was 14 November?---Yes.

PN576

No doubt in your mind that the person, had they voted, has already voted by now?---Yes.

PN577

All right. So, if they voted based on the information that I've taken you to in respect of Mr Nelson's email, it's too late by the time Mr Heid sends them this one?---Yes.

PN578

All right. I need to ask you some questions about – sorry, Commissioner. I keep looking up to the clock to see how we're tracking for time, and it's of no assistance to me. In respect of casuals – sorry. Can I go back one step for the moment back to the voting. The evidence before the Commission is that the vote was conducted by BigPulse?---Yes.

PN579

Have you dealt with them before?---Yes.

PN580

So, had you dealt with them in the previous agreements?---Yes.

PN581

2018?---Yes.

PN582

And the one before that or - - -?---I do not recall who we used for the previous agreement.

PN583

Okay. But you certainly used them in 2018, yes?---Yes.

PN584

And some of the evidence that will be called, as we understand it, says that there was some changes made to the voter role through what's described as the BigPulse dashboard. Do you know about the BigPulse dashboard?---No, I don't.

PN585

All right. Did you have any – excuse us one moment. Did you have any communications with BigPulse prior to the vote?---No.

PN586

Sorry?---No.

PN587

Right. And did you have any communications with them during the vote?---Not me personally, no.

PN588

Did anyone communicate to you their communications with BigPulse during the vote?---Yes.

PN589

All right. Is it correct, from your experience dealing with BigPulse, that one of the things they are able to do is monitor the vote as it's going?---I wasn't aware of that.

PN590

All right?---But it wouldn't surprise me.

PN591

Okay. You don't recall that from prior to 2018?---No. No.

PN592

And did you have any communication with anyone during this vote that what the running numbers were of the vote between the start of the voting period and before the end of the voting period?---Are you talking about how many people had voted?

PN593

How many had voted, yes?---Was I aware of how many people had voted? Not - no, not directly.

PN594

Did anyone come to you and say, 'Well, we've spoken to BigPulse, and BigPulse tell us this number of people have voted'?---No.

PN595

All right. Did anyone come to you and say, 'We've spoken to BigPulse, and we know the vote is falling this way at the moment'?---No.

PN596

All right. And did you seek that information out?---No.

PN597

All right. Okay. Now, just – we had been talking about casuals at various stages this afternoon, and you are aware of positions described – sorry. You've read the statement of Ms Rienks?---Yes.

PN598

All right. And you are aware of positions described as 'learning coaches'?---Yes.

PN599

And they are most commonly engaged as casual employees?---Yes.

PN600

Are you aware recently of a large group of those learning coaches not having had their contracts renewed?---Yes.

PN601

All right. And is it fair to say that the casual contracts in respect of those learning coaches ends at the end of each semester?---Sorry. Can you repeat that?

PN602

Is it accurate to say that the contracts in respect of those casual learning coaches positions ends at the end of each semester?---We don't have semesters. So, are you referring to - - -

PN603

Terms, sorry?---No. I'm not aware of that.

PN604

All right. You don't know one way or the other?---Well, nothing that I've seen in terms of our casual cohort has a firm start or end date based solely on term periods.

PN605

All right. But can you speak to the position in respect of learning coaches, or you don't know?---No, I can't.

PN606

All right. Sorry. These questions are a little obvious, but necessary. In respect of the casuals that we're describing, and that is the whole body of casuals, no don't work alongside or personally with any of those casuals when they're in their faculty, of course?---No.

PN607

All right. You don't see what they do on a daily basis?---No.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN608

All right. One thing that might tell us what they do on a daily basis is their timesheets, yes?---Yes.

PN609

All right. So, if we wanted to see whether the casuals were working during the access period or the voting period, we could assess that by looking at their timesheets?---Yes.

PN610

Were you asked to do that as part of this exercise?---This exercise in - - -

PN611

As part of this proceeding?---No.

PN612

All right. At paragraph 35 of your statement, you say this. I don't need you to look at it, but you should feel free to look at it, if you want to, 'Casual teaching academics are generally engaged over much longer periods of time during which they have significant autonomy to perform work at a place and time of their choosing subject to meeting specific obligations such as attending a lecture or providing marking within a deadline', and you give four examples?--- Yes.

PN613

The examples you give – I just want to give you an opportunity to answer this. The casual teaching academic contract at SF5 provides for 87 total estimated hours of work over just under 18 weeks. So, under – about 4.9 hours a week?---Right.

PN614

Yes. Does that sound accurate to you?---I'd have to do the maths.

PN615

All right. The second, the casual single rate academic at SF6, provides for 400 estimated maximum hours over 31 and a little bit – a bit more weeks at about 12.8 hours per week. Does that sound right? Subject to testing the maths?---Yes, yes.

PN616

The third English language casual contract at SF7 provides for 380 total estimated hours is the description over 17.7 weeks or about 21 hours a week, and the fourth, the casual professional contract is 250 estimated maximum hours over 48.57 weeks, about five hours a week?---Right.

PN617

All right. The total estimated hours or estimated maximum hours is a common expression used in the casual contracts?---Yes.

PN618

The employees that you describe and the autonomy that you describe, they have no guarantee of hours, do they?---Not – not up front, no.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN619

All right. And the 2018 agreement provides that their employment is terminable on one hour's notice?---Yes.

PN620

And the university has discretion as to what hours they work in circumstances where the hours in the contract are described as an estimated maximum. Is that correct?---Can you repeat that?

PN621

The university has a discretion as to the hours those work – they work because the contract only provides for estimated maximums, correct?---Yes.

PN622

And I think you've already agreed with me that if those casuals are on segmented contracts with brakes in between, they wouldn't have an entitlement to conversion under the proposed agreement?---Casuals.

PN623

Yes?---It would depend on the length of break.

PN624

I'm talking about an entitlement. Let's say the break is a week. That would not be a continuous contract for the purposes of the conversion clauses?---It would depend on that break and the length of the break.

PN625

Okay. And, so, how long does the – how long can the break be? Can someone still be described as continuous?---Well, the university closed for two weeks over December/January, for example, and that could be a break that we don't deem to be a break in service.

PN626

Okay. Is it your evidence that that period of two weeks would be considered continuous service?---Yes.

PN627

All right. And are there other periods that would be considered continuous service that you can describe for the Commission?---If we're talking about casuals, I'm not across the detail of the casual conversion procedures, but there's a two-month break that we've always looked at for the purposes of the continuous service.

PN628

And what about the fixed terms? Are there periods where despite it being a break, the university would treat it as continuous?---Yes.

PN629

All right. And is that the two weeks over Christmas?---Yes.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN630

And are there other periods that the university would treat as continuous?---Well, on a case-by-case basis, there could be circumstances that we take a very sympathetic view to.

PN631

I see?---But not obligated.

PN632

Well, I understand. Sorry. I didn't mean to interrupt you. I want you focus as much as you can on what gives rise to an obligation, not just what discretion might be exercised. So, are there circumstances where there's a break, but you say the university has an obligation to treat that as continuing and the flow-on effects for conversion?---There could be some circumstances of leave that we would not treat as a break in service.

PN633

And have an obligation to not treat as a break in service. That's your evidence?---Yes, I believe so.

PN634

And are you able to describe those circumstances?---It could be a break on compassionate leave circumstances, as one example.

PN635

I just want to be clear. Are we describing where discretion might be exercised, or are we describing a circumstance where you say the university has an obligation to treat that as ongoing?---Discretion.

PN636

I see. Now, can I deal with quite a specific circumstance that you describe in respect of Mr Foster at paragraph 126 of your statement, and you refer to the assessment and grading week for term 5, and is it correct that that assessment in grading week would have been the week of 12 December?---Without looking at the calendar, yes.

PN637

All right. And would you accept that most of the work that Mr Foster would have performed around that time would have been in that week of 12 December 2022?---Under that particular contract?

PN638

Yes?--- Yes.

PN639

All right. And whilst the contract period is 26 October 22 to 31 January of 23, you would not expect that Mr Foster would actually be performing work – while we're dealing with Mr Foster – in the month of January?---Sorry. What was your – can you repeat that?

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN640

The contract runs from 26 October 22 to 31 January of 23?---Right.

PN641

And I'm just trying to deal with weeks at a time, and I'm suggesting to you that most of Mr Foster's work would have been performed in the week of 12 December 22?---12 December.

PN642

Yes?---No. I can't comment on that.

PN643

Okay. Well, I'll just go back one step?---Yes.

PN644

You remember that you agreed with me that the assessment - the work that has been done is assessment and grading for term 5?---Do we have a copy of that contract? Am I able to refer to that?

PN645

Yes, we do. You can find that at SO3. So that's behind tab 10 in volume 1, the third exhibit?---SO3?

PN646

Yes?---Yes.

PN647

Do you see that?---Yes.

PN648

All right. What I'm suggesting to you - take as much time as you need - that what Mr Foster is doing is assessment and grading work in respect of term 5, and that most if not all of his work would have been done in the week of 12 December of 2022, the grading week for term 5?---Other than the preparatory work and the associated work that markers are engaged in, the - the majority of the work would have been in - well, there could have been assessments throughout the course of the term, so I can't make that statement. I can't - - -

PN649

All right?--- - - - verify that.

PN650

I'm suggesting to you that he wasn't performing work during the access period or the voting period; do you know?---What? Mr Foster had several contracts in play at the time. So this is - - -

PN651

Well, let's - - -?--- - - - bar one - but one.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN652

Let's focus on what's in front of us?---Yes. Well, this particular - - -

PN653

Under - under - - -?--- - - - contract - - -

PN654

Under this contract - - -?---Yes.

PN655

- - - do you agree with me that Mr Foster would not have been performing work during the access period or the voting period?---No, I don't agree with that.

PN656

All right?---He would have been liaising with the unit assessor and getting prepared for the assessments that are coming in that term, in the - in the unit that he's marking in.

PN657

All right. That are to come to him on 12 December?---If the assignments were all done at the one point in that term, then that's when some of that marking hour - those marking hours would have been performed.

PN658

You don't know; you're speculating, yes?---I know, based on my experience managing the offering of casual academic contracts for the entire university, that a marking contract needs to - the work associated with marking a unit starts at the beginning - - -

PN659

But you don't know - - -?--- - - - of the - the term.

PN660

- - - what Mr Foster was doing for the access period or the voting period?---Not specifically.

PN661

And you could have a look at the timesheets to determine whether Mr Foster was working at that time or not - - -?---That would be one - - -

PN662

- - - and whether he - - -?--- - - - indicator, but wouldn't be, necessarily, an accurate indicator.

PN663

Did you do that exercise?---No.

PN664

All right. Were you asked to do that exercise?---No.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN665

All right. Is it your evidence that for the month of January - remembering, his contract goes to 31 January of 2023 - he would also have been doing work?---Possibly.

PN666

You don't know?---I don't know.

PN667

All right. You do accept, though, that the period 26 October to 31 January, when we're talking about the period for these casuals, doesn't indicate that they are working throughout that entire period, does it?---No.

PN668

Now, there's - I asked you some questions about the staff list and the voter rolls. Well - sorry. I asked you questions about the staff list before; do you recall those questions?---Yes.

PN669

All right. And do you understand - I don't think everybody needs to be too concerned that we're straying somewhere where everybody needs to go, or - - -

PN670

THE COMMISSIONER: Does not need to be concerned, or - - -

PN671

MR DOWLING: Need not be concerned. We might get there, but these questions will tell us. Is it your evidence that you didn't play any role in preparing the staff list?---That's right.

PN672

Did you play any role in checking the accuracy of the staff list?---I played a role in making decisions around that list.

PN673

Did you check the accuracy of the staff list?---Not - no.

PN674

All right. Did you play any role in preparing the first voter list that went to BigPulse?---No.

PN675

Did you play any role in checking the accuracy of the first voter list that went to BigPulse?---No.

PN676

Did you play any role in preparing the final voter roll?---No.

PN677

Did you play any role in checking the accuracy of the final voter roll?---No.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN678

Just excuse me one moment, Ms Farquhar. Now, I'm sorry to take you out of order, but I want to take you back to paragraph 38 of your statement. There you say that:

PN679

Casual teaching academics are paid to perform administrative work shortly following the contract's commencement date at a time of their choosing but within the initial seven-day period from the start date in their contract.

PN680

Do you see that?---Yes.

PN681

Do you accept that the contracts in evidence in this Commission do not provide any contractual obligation on them to perform that work that you describe?---I don't accept that, in some circumstances.

PN682

What I'm describing is - sorry; I'm - perhaps I might need to be clear?---Yes.

PN683

What I'm putting to you is that the contracts that are in evidence in this Commission do not provide an obligation on those employees to do that work that you describe in that paragraph. Do you agree with that or not agree with that?---I can't agree with that, no.

PN684

All right. Do you want an opportunity to show me where in the contract that those - that obligation is created?---It's created in the associated working time.

PN685

I'm talking about, in the contracts - - -?---Yes.

PN686

- - - where it provides that that work must be carried out?---Yes. Well, I can.

PN687

All right?---Yes.

PN688

Could you do that for us?---Can you give me a number?

PN689

Well, it's entirely up to you. You've put in the casual contracts; do you want to - - -?---Okay.

PN690

- - - choose one of your own, and - - -?---So one of the - the contracts - the casual academic teaching contract - has hours allocated for unit assessor work.

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN691

Yes?---And the role of the unit assessor specifically refers to preparation.

PN692

Is that in - - -?---It commences - - -

PN693

- - - the contract?---It's not in the contract, but it's part of the role of a unit assessor.

PN694

THE COMMISSIONER: Ms Farquhar, are you referring to a specific page in the court book?---Sorry; page 555.

PN695

Page 555. That's the one you were - - -?---Yes.

PN696

- - - taken to before, yes?---Sorry.

PN697

MR DOWLING: You're on page 555?---Five, yes.

PN698

And so is it your evidence that there's a rate there, and it's referable to a position description, and a position description has certain duties in it?---That's right.

PN699

Is - does the position description form part of the contract?---Well, they're appointed as a unit assessor.

PN700

I'm sorry, Ms Farquhar - always have a habit of getting technical all of the time?---Yes.

PN701

But what I'm asking you is, does the contract create the obligation? You accept that a position description isn't part of the contract, don't you?---Yes.

PN702

And what you're pointing to is something that you say is in a position description, that the Commission doesn't have. I'm asking you where the - to identify in the contract where that obligation is found. Can you do that for us?---On the document that's provided, it's not set out in detail.

PN703

No further questions, Commissioner.

PN704

THE COMMISSIONER: Thank you. Any re-examination?

*** SHARON ANN FARQUHAR

XXN MR DOWLING

PN705

MR DALTON: Thanks, Commissioner.

RE-EXAMINATION BY MR DALTON

[2.59 PM]

PN706

MR DALTON: Ms Farquhar, could I take you to SF5?---Yes.

PN707

Tab E, casual contract, academic teaching. And - - -?---Yes.

PN708

- - - you've been referred to this contract earlier in your evidence. Going to the redacted example contract, on page 555. Just got a couple of questions that arise from the cross-examination. You will recall, you were asked in cross-examination some questions referable to the total estimated hours of 87 hours?---Yes.

PN709

And then it was put to you that that's the total estimated hours of work for the casual employee the subject of this contract. Then you were taken to the start date and end date, which is a period of about 16 weeks, and so that came to around - a little over four hours a week. Now, you will recall that I asked you some questions around the estimated maximum hours and also the hourly rate?---Yes.

PN710

And you gave some evidence about the hourly rate incorporating some hours for associated work time. So, just focusing on the table that says the estimated maximum hours and the total estimated hours, could you just explain to the Commissioner how that works in terms of the actual hours that are anticipated under this contract?---Yes, certainly. The unit assessor is the overall coordinator of the unit. So there's - there's a role - there's a role that requires seven hours a week, over a - well, it could be greater than seven hours a week, or less than seven hours a week, but it's based on a six-week term, so that's where that number comes from. The tutorials is 12 hours of face-to-face delivery, but there's associated working time of two hours attached to each hour of delivery.

PN711

So, just in terms of working out the hours - - -?---Yes.

PN712

- - - where it says 12, what - - -?---It's actually 36.

PN713

- - - does that mean? Right, and then - - -?---Yes, so the employee is actually paid for 36 hours of work.

PN714

Yes?---15 hours of marking is 15 hours of marking.

*** SHARON ANN FARQUHAR

RXN MR DALTON

PN715

Yes?---Six hours of workshop - I think there's two hours of associated working time, so that's, again, 18 hours of work.

PN716

I think your evidence-in-chief was, there's three hours?---It might have been three, and I apologise. I - I honestly don't know whether it's two or three.

PN717

All right, but it's a factorial of two or three - - -?---Yes.

PN718

- - - on that one?---Yes.

PN719

So it would be 18 - - -?---Yes.

PN720

- - - or 24, as the case may be?---That's right.

PN721

And 115 - I think your evidence there was, it's one hour for - - -?---That's right, so it's 24 hours - - -

PN722

- - - a repeat tute, so that would be doubled - - -?---Yes.

PN723

- - - 12. Thank you. Now, if you could go to the next page. I beg your pardon; two pages down. There's a page - this is page 557. You see, there's a heading, List of Duties?---Yes.

PN724

And it lists the duties - a summary that appear to be referable to the sort of information that's in the table. But at the top line, it says, 'For an explanation of the duties listed below, refer to the casual academic duties page', and it looks like there's a hyperlink there. Do you know what that document is?---Yes, that's actually a link to a website that describes in full the - the description of each of those activities, from unit assessing through to - to marking.

PN725

Yes. Well, you were asked by Mr Dowling if you could identify any part of the contracts that might support your statement in paragraph 38?---Yes.

PN726

Just explain the casual academic duties link there, and - - -?---Yes.

PN727

- - - what that - - -?---Yes.

*** SHARON ANN FARQUHAR

RXN MR DALTON

PN728

- - - provides in terms of duties that are expected and required of employees?---Well, in my mind, that's the reference within the contract to a duty statement that would cover the unit assessor work and the requirement to do work prior to the beginning of a teaching term.

PN729

All right. And what about more generally for casual academics teaching who aren't employed as unit assessors?---Again, that - - -

PN730

Again, getting back to the question that was put to you in cross-examination, in effect saying that there's nothing in the contracts - - -?---Yes.

PN731

- - - that would support what you've said in paragraph 38. So just moving past unit assessors - - -?---Yes.

PN732

- - - and just to standard casual academic teachers - - -?---Yes.

PN733

- - - what do you say in response to that?---Well, that casual academic duties page would also list the requirements of somebody engaging in casual lecturing, casual tutoring, or delivery of a workshop. So it would have the - a fuller description of the requirements that would go to things like associated working time.

PN734

Yes, thank you. Now, it was also put to you, I think, in response to answers you gave referable to duties in a position description for unit assessors, and it was put to you that you can't identify where that is, et cetera. Could I just - just to be clear - if we go to your statement, attachment 9?---Thank you.

PN735

It's on page 582 of the court book?---Yes. Thank you.

PN736

Just for the Commission's benefit, just describe this document for us?---The unit assessor document at page 582 is a two-page document that is a description of what the key responsibilities are of our unit assessors at the Southern Cross University.

PN737

Yes. And is that made available to the employee?---Through the hyperlink, yes.

PN738

Yes, the hyperlink - - -?---In the contract.

PN739

- - - in the contract?---Yes.

*** SHARON ANN FARQUHAR

RXN MR DALTON

PN740

Yes, thank you. No more questions.

PN741

MR DOWLING: Commissioner, I just wanted to note that there were two documents called upon. I'm happy for Ms Farquhar to be excused, but we just reserve our right with respect to anything that might arise. We will do our best not to inconvenience everyone, but - about anything that might arise from the two sets of documents called upon. The first was in relation to the workload formula that Ms Farquhar gave evidence about, and the second was the inquiries made to her office, or in her area, about the - - -

PN742

THE COMMISSIONER: The \$750.

PN743

MR DOWLING: - - - \$750.

PN744

THE COMMISSIONER: Yes. So there's a call for those documents, and depending on what's in those, there may be an application to recall - - -

PN745

MR DOWLING: We just need to - - -

PN746

THE COMMISSIONER: - - - the witness.

PN747

MR DOWLING: - - - reserve our position in respect of it, yes.

PN748

THE COMMISSIONER: Thank you. Okay.

PN749

MR DOWLING: Thank you, Commissioner.

PN750

THE COMMISSIONER: Well, thank you for your evidence - - -?---Thank you.

PN751

- - - Ms Farquhar?---Okay.

PN752

You're excused, and subject to any recall application?---Great. Thank you.

<THE WITNESS WITHDREW

[3.06 PM]

PN753

MR DALTON: I call Deborah Lee Lisetto.

SHARON ANN FARQUHAR

RXN MR DALTON

PN754

THE DEPUTY PRESIDENT: Just before we move to Ms Lisetto, Mr Dalton, I just wonder if it might be a convenient time for a short, 10-minute adjournment.

PN755

MR DALTON: Of course.

PN756

THE COMMISSIONER: The Commission will adjourn.

SHORT ADJOURNMENT

[3.07 PM]

RESUMED

[3.23 PM]

PN757

THE COMMISSIONER: Thank you, Mr Dalton.

PN758

MR DALTON: Thanks, Commissioner. I call Deborah Lee Lisetto.

PN759

THE ASSOCIATE: Please state your full name and address. Your business address is fine.

PN760

MS LISETTO: Deborah Lee Lisetto, Military Road, Lismore, New South Wales, 2480.

<DEBORAH LEE LISETTO, AFFIRMED

[3.23 PM]

EXAMINATION-IN-CHIEF BY MR DALTON

[3.24 PM]

PN761

MR DALTON: Ms Lisetto, could you please state for the transcript record your full name and work address?---And work address? Deborah Lee Lisetto, and it's Military Road, Lismore, New South Wales, 2480.

PN762

You're employed by Southern Cross University as the manager, client services, remuneration and HRIS?---Correct.

PN763

You have prepared a witness statement?---Yes.

PN764

You have made some amendments to that witness statement late last week?---Yes.

*** DEBORAH LEE LISETTO

XN MR DALTON

PN765

If I could hand you a hard copy of that amended witness statement and I have a copy for Commission, as well. Commissioner, while attending to this, the court book contains the witness statement of 10 February.

PN766

THE COMMISSIONER: I understand the amended witness statement is amended in mark-up.

PN767

MR DALTON: It's marked up.

PN768

THE COMMISSIONER: Yes.

PN769

MR DALTON: That's the amended witness statement of 3 March 2023, so I'll ask the witness to identify that and that's the witness statement we will tender.

PN770

THE COMMISSIONER: You're not seeking to tender the original statement?

PN771

MR DALTON: No.

PN772

THE COMMISSIONER: Just the amended, yes.

PN773

MR DALTON: Ms Lisetto, can you confirm that the document you've just been handed is your amended witness statement, dated 3 March 2023?---Yes.

PN774

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

PN775

I tender that witness statement.

PN776

THE COMMISSIONER: Mr Dowling, any objections?

PN777

MR DOWLING: No, Commissioner.

PN778

THE COMMISSIONER: The document titled 'Amended witness statement of Deborah Lee Lisetto', dated 3 March 2023, will be exhibit 17.

EXHIBIT #17 AMENDED WITNESS STATEMENT OF DEBORAH LISETTO DATED 03/03/2023

*** DEBORAH LEE LISETTO

XN MR DALTON

CROSS-EXAMINATION BY MR DOWLING

[3.26 PM]

PN779

MR DOWLING: Ms Lisetto, your evidence is you are employed in the position of client services manager?---Yes.

PN780

Your evidence is also that you have been employed by the university for 14 years?---Yes.

PN781

Are you able to tell the Commission how long in the position of manager, client services?---Yes, it has been about seven years.

PN782

You were the person responsible for preparing the voter list in respect of the proposed agreement, yes?---Yes.

PN783

Should we understand, given your long service, that that is a task you have prepared before for for earlier agreements?---Yes.

PN784

So was that a task you carried out in respect of the 2018 agreement; the present one?---Yes.

PN785

The 2016?---Yes.

PN786

The 2010 agreement?---No, I don't believe so.

PN787

All right. You were involved in the 2016, the 2018 and this one, the proposed agreement?---Yes.

PN788

Thank you. I take it from your involvement with those previous two agreements – 2016 and 2018 – you were somewhat familiar with the steps required for approval or certification of those agreements by the Commission?---Yes.

PN789

You understood at least that there were two parts to the process whereby employees would vote as to whether they approved the agreement, yes?---Yes.

PN790

And then after that, and only if it was successful, the agreement would be submitted to the Commission for its approval or certification; correct?---Yes.

*** DEBORAH LEE LISETTO

XXN MR DOWLING

PN791

You understood they were two separate and discrete processes?---Yes.

PN792

All right. Now, in your witness statement you describe the circumstances or the steps you took to prepare the short list and ultimately the voter roll. Just so we're clear, if you could look at paragraph 22, please, after preparing the short list when you came to prepare your statement - the first statement on 10 February – you checked the voter roll and you discovered a number of errors; correct?---That's correct.

PN793

They are the errors that you set out originally in paragraph 22, those that you discovered on 8 February?---Correct.

PN794

All right. Then as the result of your amended statement you did a further check, I take it, on or about 3 March; is that right?---No.

PN795

This amended statement that you've provided today is dated 3 March?---Yes.

PN796

You understand that. Some of the numbers that you provided in your original statement of 10 February were changed?---Correct.

PN797

So should we understand there was a process in February where there were some corrections and then there was a further review, and there were some corrections to the corrections, if you like?---Yes.

PN798

All right. When you did the second set of corrections, when did you do the checking then?---It would have been on or around the March date when we reviewed those – made those amendments.

PN799

I see. So you did the initial process from 25 October. Your first check on 8 February discovered some errors and then your second check on or about 3 March discovered some additional errors or some errors on the errors?---Yes.

PN800

Thank you. Now, this is the point at which I want to take Ms Lisetto to the staff list and so we will need to make arrangements in respect of the confidentiality, Commissioner.

*** DEBORAH LEE LISETTO

XXN MR DOWLING

PN801

THE COMMISSIONER: Yes, so again anyone in the back of the hearing room that is not an employee of Hall Payne or the law firm representing the CPSU or otherwise associated as a representative of the applicant will need to vacate the

hearing room. Associate, are you making arrangements for – you will need Mr Alpine to exit the hearing room – or online.

CONFIDENTIAL TRANSCRIPT FROM PARAGRAPH 802-1011

ADJOURNED UNTIL FRIDAY, 10 MARCH 2023

[4.34 PM]

*** DEBORAH LEE LISETTO

XXN MR DOWLING

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