TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT ASBURY
DEPUTY PRESIDENT HAMPTON
COMMISSIONER MCKINNON

C2023/435

s.604 - Appeal of decisions

Appeal by Construction, Forestry, Maritime, Mining and Energy Union (105N)
(C2023/435)

C2023/437

s.604 - Appeal of decisions

Appeal by Australian Institute of Marine and Power Engineers & Australian Maritime Officers' Union
(C2023/437)

C2023/438

s.604 - Appeal of decisions

Appeal by Svitzer Australia Pty Limited T/A Svitzer
(C2023/438)

Sydney

10.00 AM, WEDNESDAY, 22 MARCH 2023

PN1

THE ASSOCIATE: The Fair Work Commission is now in session in the matter C435 of 2023, C437 of 2023, C438 of 2023, Svitzer for appeals. This is a hearing before the Full Bench.

PN2

DEPUTY PRESIDENT ASBURY: Good morning. Could we take the appearances, please?

PN3

MR NEAL: Thank you, your Honour. My name is Neal, N-e-a-l, initial A. Appearing on behalf of the Construction Forestry Maritime Mining and Energy Union. I'm not sure how we deal with that today, you might want to say the tall Neal. That would be quite obvious. Or Neal for the Union.

PN4

DEPUTY PRESIDENT ASBURY: Perhaps initials.

PN5

MR NEAL: Yes. And I seek permission to appear for the Union.

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DEPUTY PRESIDENT ASBURY: Thank you.

PN7

MR NEAL: Thank you.

PN8

MR FAGIR: May it please, I seek permission to appear for AMP and the AMOU.

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DEPUTY PRESIDENT ASBURY: Thank you.

PN10

MR NEIL: The Commission pleases, I appear for the Svitzer Australia Proprietary Limited in each of the appeals for the purpose of seeking permission to appear with me and instructing me, is Mr Izzo of Australian Business Lawyers and Advisors.

PN11

DEPUTY PRESIDENT ASBURY: I don't think there's any issue with permission being granted, given the complexity of the matter and all parties are seeking to be legally represented. So permission is granted. Thank you. How would you propose to proceed?

PN12

MR NEIL: Well, perhaps it falls to me to answer. We have had some discussion about it and of course we're entirely in the hands of the Full Bench about this, but someone must go first, and I am happy to do so. This is what we had thought to suggest. I go first, making my submissions in support of Svitzer's appeal. Then my learned friends would make their submissions. First or, one, in response to

my appeal, and then their submissions-in-chief in support of their appeals. Then I would pop up again, reply in my appeal and respond in the other appeals, and then to the extent necessary my learned friends could reply.

PN13

DEPUTY PRESIDENT ASBURY: Yes.

PN14

MR NEIL: So there's a bit of chopping and changing there, but that seems a way to keep distinct the issues raised by the effectively two sets of appeals.

PN15

DEPUTY PRESIDENT ASBURY: Everyone's content with that approach? Okay. Thanks. We are too. Thanks.

PN16

MR NEIL: If the Commission pleases, then, I would turn if I may to make some oral submissions by way of supplementing that which we have put in writing. Our - I withdraw that. Before I come to that, could I deal with two incidental matters. The first relates to the documents that appear at pages 86 and following of the court book. This is something, a table of objections below, and the Full Bench would have seen how this relates to a point made against us in the Unions' appeal. At pages 86 and following is a document that did not make its way into the appeal book, and we wondered whether we needed to seek leave to supplement the appeal book to include that.

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DEPUTY PRESIDENT ASBURY: Yes. No problem at all - - -

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MR NEIL: Thank you.

PN19

DEPUTY PRESIDENT ASBURY: - - - with leave being granted.

PN20

MR NEIL: And the second matter relates to our list of authorities. We've furnished a list with hard copies of the authorities, but behind tab 5 we'd included an unauthorised version of *Blackley v Devondale Cream*, and we wondered whether we might hand up a copy of the authorised reports. Those are the two incidental matters I wish to deal with.

PN21

DEPUTY PRESIDENT ASBURY: Thanks.

PN22

MR NEIL: I turn then to the submissions we make in our appeal by way of supplementing that which we have put in writing. Our written submissions on our appeal appear in the court book beginning at page 67. Our appeal, as indeed is so of the Union's appeals, turns on the construction of the Svitzer Australia Proprietary Limited National Towage Enterprise Agreement. It is common

ground that the correctness standard applies to our appeal and to the Unions' appeals.

PN23

The enterprise agreement is reproduced in volume 3 of the appeal book behind tab 23. The Full Bench will have seen that the agreement, the enterprise agreement, authorises the making of port operating procedures, conventionally and rather engagingly known as POPs. Those procedures apply in each port in which Svitzer employs crew to operate tugboats under the enterprise agreement.

PN24

Clause 41.2 of the enterprise agreement stipulates the subject matters with which the POPs might deal. Clause 41.2 appears on page 1134 of the appeal book. If I draw attention first to the terms of clause 41.1 perhaps by way of making good the observations that we've already made. I then draw attention to the chapeau to clause 41.2, from which the Full Bench will see that the work that clause 41.2 does is to identify various subject matters in relation to which POPs will set out details.

PN25

One of those subject matters relates to port rosters, that's the subject of clause 41.2.1. Particularly significant in this appeal is subclause (ii) which deals with the subject of rosters. We should also, while the Full Bench has clause 41 open, just invite attention to clause 41.4, which also it deals with the subject of making changes to port operating procedures, also illuminates the process by which the POPs are made in the first instance.

PN26

And, amongst other things, identifies that the parties to the POPs are Svitzer on the one hand and the Unions who are party to - or that are party to the enterprise agreement, on the other. POPs are not certified under the Fair Work Act, but by clause 5.3.1 of the enterprise agreement they are incorporated as terms of the enterprise agreement for the particular port concerned. Clause 5.3.1 appears at page 1193. Sorry, that's not right. It appears at 1093. I can't read my own notes, I'm so sorry. One-zero-nine-three. 5.3.1 is the provision to which we are presently drawing attention. The first sentence has the effect that the POPs are incorporated as a term of the agreement for the particular port concerned. And then these words appear:

PN27

> *However, this agreement prevails over applicable port operating procedures which have no effect to the extent of any inconsistency with any term of this agreement.*

PN28

And that sentence is of course central to Svitzer's appeal. With that in mind, that provision in mind, may we next invite the Full Bench's attention to clause 15 which deals with the topic of categories of employment and engagement. Clause 15.1.1 is important in the Unions' appeals, but is significant too in Svitzer's appeal, because the content in the underlying dispute, the dispute that was arbitrated, was relevantly - that is relevantly for the purposes of the present appeal

- was relevantly whether the POPs that applied to the ports of Melbourne and Brisbane operated to preclude the employment of fixed term employees, employees engaged for a specified period of time/task - to use the language of the third dot point in clause 15.1.1. Whether those POPs operated to preclude the employment of fixed term employees to fill vacant permanent positions.

PN29

As the dispute developed, at least so much of it is the subject of the present appeal, the essential issue became whether the POPs that apply to the ports of Melbourne and Brisbane, fettered Svitzer's discretion under clause 15.1.1 to employ fixed term employees. The resolution of that issue relevantly turned on the operation and effect of clause 5.3.1.

PN30

May we shortly - before we turn to develop our submissions about that and by showing the Full Bench how that issue was resolved in the primary decision in identifying what we contend are the errors in that resolution. Before we do that may we just shortly remind the Full Bench of the provisions of clause 10, being the provision under which the dispute was arbitrated. The relevant provisions are clauses 10.2.5 and 10.3. That's on page 1096.

PN31

The primary decision appears in volume 1 of the appeal book behind tab 4. In the primary decision - and we'll show the Full Bench shortly where these findings are located. In the primary decision the learned Deputy President found that the POPs in question, the POPs that applied at the ports of Melbourne and Brisbane, contained specific limitations on the use of fixed term employees that operated to fetter Svitzer's discretion under clause 15.1.1.

PN32

If the Full Bench will be good enough to go first to page 48 of the appeal book, behind tab 4, volume 1. May we draw attention first to paragraph 120. Then turning to what the Deputy President called the Brisbane POPs, that's the treatment - the Deputy President's treatment of that begins at paragraph 121. The provisions of the Brisbane POPs are set out in paragraph 121. The conclusions of the Deputy President are relevantly in paragraphs 125 and 126. Those are the conclusions in relation to the Brisbane POPs.

PN33

Then as to the Melbourne POPs, the Deputy President's treatment of that begins at paragraph 127. And we draw attention to paragraph, first, 125 - 129, I'm sorry. And then 131 overleaf, the top of page 50. And then the third point at which the relevant findings are located begins at page 51, paragraph 141, particularly paragraphs (a), (b) and (d). And then the ultimate conclusion is set out in paragraph 142, in the answer to the question so far as it applies for present purposes to the Brisbane and Melbourne POPs.

PN34

Now, as the Full Bench will have seen, in this appeal, Svitzer does not challenge the holding that the two POPs in question, the Brisbane and Melbourne POPs, contained the limitations identified in the primary decision at the points that we've

identified. We do not challenge those findings. Instead, Svitzer seeks permission to appeal against the holdings in the primary decision, and we'll come to identify those in a moment, first, that those limitations were not inconsistent with clause 15.1.1.

PN35

Second, such that they did not engage clause 5.3.1. And, third, that they therefore operated and had effect relevantly to fetter Svitzer's discretion under clause 15.1.1 to employ fixed term employees. That's the focus of the appeal, those three ultimately conclusions. Could we note, and this would appear to be common ground or at least not controversial, that the appeal for which we seek permission is authorised by clauses 10.2.5 and 10.3 of the enterprise agreement, and by sections 604 and 739 of the Act.

PN36

Now, we next turn by way of developing ground 1 of the appeal, the notice of appeal or our notice of appeal, is set out on page 32 of the court book or begins at page 32 of the court book. The first part of that ground looks at the construction of clause 15.1.1, the way in which the Deputy President dealt with that. Svitzer's case on appeal is that the correct construction of clause 15.1.1 of the enterprise agreement is that it confers an unqualified, or to use the language adopted by the Deputy President, an unfettered discretion on Svitzer to engage employees in any one of the four identified employment categories.

PN37

If that construction is accepted, as Svitzer contends it should be - if that construction is accepted as being correct, then it necessarily follows in Svitzer's submission, that any provision of the POPs that qualifies or fetters that discretion, is inconsistent with clause 15.1.1. That is, it is inconsistent with clause 15.1.1 within the meaning of clause 5.3.1, and by the operation of that latter provision is thereby rendered of no effect.

PN38

Svitzer's case on appeal is that the Deputy President's contrary conclusions and constructions are incorrect. May I take a moment to show the Full Bench where they are or remind the Full Bench where they are located. First on page 42 of the appeal book. While that page is open may I first invite attention to paragraph 66, which is of course uncontroversial and correct. We adopt the first part of paragraph 67 but depart from or ask the Full Bench to depart from the Deputy President's analysis, so far as paragraph 67 continues after the hyphen or the dash.

PN39

So too paragraph 68. The first part of paragraph 68 we accept as correct, but the second part is an aspect of the Deputy President's reasoning with which we take issue, and that we seek to challenge in the proposed appeal. So that's the first location of the error to which we point in ground 1. Then could we just invite the Commission to drop down to the first sentence in paragraph 74. That's the second location. And then the third location is a provision to which we've already drawn attention, or an aspect of the primary decision to which we've already drawn attention, paragraph 141, page 51 of the appeal book. So paragraphs (a), (b) and (d).

PN40

Our submission is that the findings of each of those three points are incorrect, and it follows on Svitzer's case, that the ultimate conclusion that is set out in paragraph 142 is also incorrect because it - insofar as that conclusion pertains to the Brisbane and Melbourne POPs because that ultimate conclusion necessarily depends on the antecedent error. The source of that error - in our written submissions we called it the heart of the error but perhaps source is a better expression. The source of the error, in our submission, is back on page 42 in paragraph 70, the first sentence. And then the second sentence in paragraph 74.

PN41

We submit that what appears there, and the use that the Deputy President makes of it, inverts the correct analysis. The reasoning seems to be that because the possibility that other provisions of the enterprise agreement might fetter the discretion in clause 15.1.1, because that possibility has not expressly been excluded by clause 15.1.1, that renders the fetter that the Deputy President ultimately found to have been imposed by clause 41.2, somehow more likely to be real.

PN42

We use the concept of reality because of the way in which the Deputy President describes the operation of - or his Honour's conclusions as to the operation of clause 41, in paragraph 71. So the reasoning with that mind, perhaps the reasoning might be expressed in this way, that because there is at least a theoretical possibility that other provisions of the agreement might fetter the discretion conferred by clause 15.1.1, and that theoretical possibility has not expressly been excluded, that latter circumstance somehow renders the potential fetter in clause 41 somehow more likely to be real.

PN43

The focus of course, as the Full Bench will have seen and as we'll come shortly to remind your Honours, the focus of course was on the fetter or the so-called fetter, the potential fetter in clause 41 - and just while the Full Bench has this page open, could we draw attention to another peculiar feature of the - what we submit with respect is a peculiar feature of the Deputy President's reasoning. One which will become relevant not just in this appeal but also in the Unions' appeals.

PN44

The feature to which we draw attention is also in paragraph 71, where the Full Bench will see that the Deputy President referred to an express fetter within clause 15, relating to part-time conversion. What the Deputy President had in mind, we would submit, are the provisions of clause 15.3.4, page 1102 of the appeal book volume 3. 15.3.4. Now, whatever one might otherwise say about the effect of clause 15.3.4, it was not an extraneous express fetter on the discretion conferred by clause 15.1.1 because it was itself incorporated in clause 15.1.1 and expressly so. It was a part of, an inextricable part of that discretion, and one gets that from the concluding words, from the last line of clause 15.1.1, page 1101 of the appeal book.

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So that in our submission 15.3.4, along with all of the other provisions referred to from clauses 15.2 to 15.6, are all expressly elements of the discretion. So, properly understood, the discretion that clause 15.1.1 confers on Svitzer's case is a discretion to employ - an unqualified, unfettered discretion, to employ employees in any one of the four identified employment categories, but only in accordance with clauses 15.2 to 15.6. That includes clause 15.3.4. It also includes clause 15.4, which is something we'll come to more in connection with the Unions' appeals.

PN46

Could we next say something about this concept of fettering the discretion. The Deputy President's characterisation of the POPs in question, the Melbourne and Brisbane POPs, as fettering the discretion conferred by clause 15.1.1, has, in our submission, rather underplayed the extent of the inconsistency between those POPs and clause 15.1.1. Svitzer's contention is that clause 15.1.1 operates expressly to authorise Svitzer to choose on which of the four identified employment categories it employs its crew in accordance with clauses 15.2 to 15.6 as they may apply to each category.

PN47

The POPs, as the Deputy President found, operate relevantly in circumstances that were in issue, to remove that discretion entirely or to disentitle Svitzer to its exercise. That's what fettering really means, in our submission, and we make that point by way of emphasising the extent of what Svitzer contends is the inconsistency between those aspects of POPs as found by the Deputy President in the unchallenged findings to which we've drawn attention, and clause 15.1.1.

PN48

Now, as the Full Bench will have seen in our written submissions, we or Svitzer submits that there are two textual considerations that lead to the conclusion of which Svitzer contends that clause 15.1.1 expressly confers on Svitzer an unqualified, unfettered discretion to choose in which of the four employment categories it employs any crew member. Two textual considerations.

PN49

The first is the use of the word 'may' used in the clause 15.1.1, and the chapeau to that provision, without qualification. Without any express qualification. The use of that word, so used without qualification, in Svitzer's submission indicates an unqualified, unfettered, absolute discretion. We referred in our written submissions to a number of authorities that supports the proposition that the word 'may' ordinarily has a permissive meaning, and that the onus lies on those who would seek to give it a different meaning to demonstrate why that is so, having regard to objective indications of statutory -of intention.

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And it's with those submissions and those textual considerations in mind that we made the submission we made a little earlier, which is to support the correctness of the first part of paragraph 67 of the primary decision. But to depart from the Deputy President's reasoning, or to seek to persuade the Full Bench to do so, so far as the second part is concerned, because there is nothing textual or otherwise

which indicates why the word 'may' would not have its ordinary meaning in this case. Its ordinary permissive meaning in this case.

PN51

And then of course the second textual consideration we've already adverted to, when one looks at the language of clause 15.1.1 one can find no objective indication of an intention to qualification or fetter the discretion in any way. It is entirely absent. Those textual considerations of course, as the Full Bench will have appreciated, all turn on the express language of clause 15.1.1. It is not permissible, as the Full Bench will be aware, it is not permissible to depart from or add to the express language of an enterprise agreement by a process of implication.

PN52

At one time, of course, it was thought that that might have been an appropriate constructional exercise in the case of an enterprise agreement, at least in some cases. That is, as the Full Bench will be aware, that is no longer the law. In that regard we've reminded the Full Bench, in connection with the Union's appeals, and it applies equally of course here, of a decision of O'Sullivan J in *Delpachitra v the University of Technology Sydney*, which is in our list of authorities behind tab 7. And the relevant passage - this is an authority and a passage that I had the opportunity of addressing the presiding member on in another matter recently.

PN53

The question here - this is a pleading question in essence. And the applicant in this case had pleaded the implication of a term in an enterprise agreement, relying on, as you'll see on page 10, paragraphs 59, 60, 61, on the conventional authorities that deal with the requirements for the implication of a term in a contract. Then the submission that was made by the respondent resisting the legitimacy or the validity of that pleading, the availability of that pleading, the respondent submitted that it was not permissible to import or imply terms into an enterprise agreement. You can see that first sentence at paragraph 62.

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And then at paragraphs 63 and 64, the Full Bench will see that submission the respondent relied upon the proposition - now, it's well-established in a series of decisions of Full Court of the Federal Court - that an enterprise agreement is not a contract, as such, but has a legislative character. Paragraphs 63 and 64. That submission - sorry, paragraph 63. Paragraph 64, the applicant referred in reply to some of the older authorities. Then paragraph 65, those authorities were - well, the submission based on those older authorities was not accepted, having regard to the Full Court authorities referred to in paragraph 63, and then in paragraph 65 itself.

PN55

Paragraph 66 was rejected, the proposition that there was any uncertainty about the law as to the implication of a term in an enterprise agreement. It was simply not available, not arguable, paragraph 67. So we've reminded the Full Bench of that authority because it's a recent and convenient pace to collect the authorities in this area, but the effect of those authorities is very clear, in our submission. It is not permissible, as a process of construction, to import or imply a term into an

enterprise agreement. There are very good reasons for that, and they're explained in the authorities collected in Delpachitra.

PN56

That possibility can be put right out of the way, in Svitzer's appeal and in the Unions' appeals. All that one is concerned with is the express language of the relevant provisions. Now, and circling back to where we embarked on that analysis, that is why the two textual considerations that we identified in support of the construction for which Svitzer contends, all turn on the express language of clause 15.1.1.

PN57

Now, of course, context is always important, and as the Full Bench will have seen it is also Svitzer's submission that the construction of clause 15.1.1 for which it contends, is reinforced by the context. Clause 15 provides that context. Context which is expressly drawn into - in the way that we've already addressed, expressly drawn into clause 15.1.1. Clauses 15.2 to 15.6 - perhaps 15.5 as well. Clauses 15.2 to 15.5 deal comprehensively with what the enterprise agreement wished to say about the incidents of each of the four employment categories identified in clause 15.1.1.

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COMMISSIONER HAMPTON: Mr Neil - SC, I should say.

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MR NEIL: The shorter one.

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COMMISSIONER HAMPTON: I wasn't going to go there.

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MR NEIL: I fear I can't resist that.

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COMMISSIONER HAMPTON: I just might explore the difference between the implying terms - and I understand what you say about that. The difference between implying terms and having regard to the terms of an agreement as a whole, to discern this mythical objective common intention between the parties.

PN63

MR NEIL: It's a different process, in our submission. It is of course conventional and axiomatically correct that in construing the language of any provision of an enterprise agreement, one must look at that language as it is used in the instrument as a whole. The way in which it is put in Berry, for example, and we have in mind the first principle - we didn't include Berry in our list. Perhaps I - - -

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COMMISSIONER HAMPTON: It's certainly well known.

PN65

MR NEIL: Yes. Very well. The first principle that's identified in paragraph 114 of Berry - Berry is reported in 268 IR 285. And paragraph 114 is the celebrated and oft-relied-upon collection of principles that apply to the construction of the single enterprise agreement. And the first principle is that:

PN66

The construction of an enterprise agreement, like that of a statute or contract, begins with the consideration of the ordinary meaning of the relevant words.

PN67

That's the express language:

PN68

The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose.

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Which is the second element we have been addressing:

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Context might appear from: (1) the text of the agreement viewed as a whole; (2) the disputed provisions place an arrangement in the agreement; and (3) the legislative context under which the agreement was made and in which it operates.

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Legislative context doesn't have much part of play in the construction of 15.1.1, except as we've identified in our written submissions:

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The disputed provisions place an arrangement in the agreement.

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And:

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The text of the agreement viewed as a whole.

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That's why we've invited the Full Bench to look at 15.1.1 in the context of the whole of clause 15, including the provision in 15.2 to 15.5.

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COMMISSIONER HAMPTON: Are you saying the Deputy President relied on implied terms?

PN77

MR NEIL: No, we are not. Some of the submissions put against us stray into that kind of country. And it - perhaps we're making the submission rather prophylactically and inviting the Full Bench to focus, as we submit is correct, on the actual language of 15.1.1. Not viewed in isolation, that would be wrong. But viewed in the context of the whole of the agreement and, particularly, clause 15.

PN78

COMMISSIONER HAMPTON: Perhaps I've interrupted you. Clause 15.1 - I mean, you place a lot of emphasis on the 'may'. One way of looking at 15.1 is what it's merely doing is setting out the categories of employment that are contemplated and permissible under the agreement.

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MR NEIL: Correct.

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COMMISSIONER HAMPTON: Why wouldn't it be read like that? Why wouldn't it be read as having more work to do than that?

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MR NEIL: If one put a full stop after what you have said, Deputy President, we would agree with that. We would accept that. But what that means is that except insofar - what that means is that within the boundaries of 15.1.1, doing that work, there is no qualification, no fetter, on the - on Svitzer's capacity to employ a crew member in any one of those four identified capacities. We use the word 'discretion' but that, in our submission, is an apt way to describe the work that clause 15.1.1 does. But it's not necessary to our argument.

PN82

Essentially what the word 'may' tells one about the work of 15.1.1, is that it's operating permissively. By its - by that provision, Svitzer is permitted to employ a crew member in any one of those four identified categories, provided it complies with 15.2 to 15.5 relevantly. Central to the argument is that within that permission or discretion or allowance, whatever language one uses, there's no qualification and no fetter. That's the essential proposition.

PN83

If there is to be a fetter on that permission or discretion or allowance, it must come from somewhere other than clause 15.1.1. It can come from 15.2 to 15.5, but there's nothing relevantly there that operates as a qualification or fetter. In fact, as you will have seen, Deputy President, 15.4 reinforces that construction of 15.1.1.

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COMMISSIONER HAMPTON: But it could come from another term of the agreement.

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MR NEIL: Correct. Correct. What it can't do, though, is come from a POP, because of the operation of clause 5.3.1. That there, Deputy President, with respect, has been exposed the real nub of Svitzer's appeal.

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COMMISSIONER HAMPTON: That depends on what inconsistency means, though, doesn't it?

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MR NEIL: Yes.

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COMMISSIONER HAMPTON: I mean, there are various notions of inconsistency and direct inconsistency and the capacity to read - - -

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MR NEIL: Overlap the - - -

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COMMISSIONER HAMPTON: You're probably going to come to that in due course but - - -

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MR NEIL: Yes. We've developed - we've set out some of the authorities about that.

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COMMISSIONER HAMPTON: Yes.

PN93

MR NEIL: And some of the different types of inconsistency - - -

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COMMISSIONER HAMPTON: Yes.

PN95

MR NEIL: - - - in our written submissions. But here it doesn't much matter because if you start with the proposition that clause 15.1.1 is unqualified, the permission that it grants, the discretion it grants - again, it doesn't matter what word you use - the permission or discretion or allowance conferred by clause 15.1.1 is unfettered. Then any fetter will necessary be inconsistent with that.

PN96

The consequences of such a fetter, depend on where it comes from. If it comes from another term of the agreement, then arguably it might be effective. But if it comes from a POP, then clause 5.3.1 tells you that it will be of no effect. Sorry, I'm leaping ahead but perhaps it's, I hope, a convenient time at which to deal with this. Central to the success of our appeal is the two propositions. One, the unqualified, unfettered operation of clause 15.1.1, which we've so far addressed.

PN97

The second proposition is that the fetter found by the Deputy President had its location in the Brisbane and Melbourne POPs, and not elsewhere. Not in clause 42, to be more precise. Because that fetter had its location in the Brisbane and Melbourne POPs, that engaged clause 5.3.1 with the result that the fetter was of no effect by the operation of clause 5.3.1.

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DEPUTY PRESIDENT ASBURY: Are they inconsistent if they're both capable of concurrent operation?

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MR NEIL: Yes. Yes. Having regard to at least one sense in which inconsistency is understood. Blackley is a good example of that, the authority that we - a proper copy of which we handed up a little earlier. And that deals with the concept of - I'll just remind your Honours where that is. That deals with the inconsistency between Federal and State provisions, provisions of a Federal and a State law. So insufficiency in a constitutional sense.

PN100

And the relevant passage of which we wish particularly to remind the Full Bench of is at page 272. This concerned a federal law that fixed minimum rates of pay and a state law that fixed - by virtue of an award, and a state law that fixed other minimum rates of pay for the same employees. Page 272 about half a dozen lines down or four lines down:

PN101

The point now to be determined, as it appears to me, is simply whether this obligation under federal law is exclusive and exhaustive. The appellant contends that it is not and that State law can validly impose different and more onerous obligations upon employees than those imposed by federal law, so long as there is no actual contradiction of federal law by State law. It was pressed upon us that the respondent here in paying the minimum rate of wages determined by the State determination -

PN102

which was higher -

PN103

would also be fulfilling his obligation under federal law to pay the minimum rates fixed by the award. This of course is true enough but to my mind it is not decisive. The problem here arises in different circumstances, namely, where the payment of wages at a particular rate would meet the employer's obligations under federal law but would not meet its obligations under State law, if applicable.

PN104

Then just passing over the first sentence of the next paragraph:

PN105

Thus, if minimum prices were to be fixed under a valid law of the parliament -

PN106

that is the federal parliament -

PN107

could a State by its legislation fix higher minimum prices? Again, if minimum insurance rates were to be fixed under a valid law of a parliament could a State fix higher minimum rates? Finally, could a State fix a higher minimum age for marriage than that fixed by Commonwealth law? In general there is little doubt that a negative answer should be given to each of these questions notwithstanding that it would be possible to obey both laws. Such laws would fail for inconsistency on the simple ground that the Commonwealth law was

intended to be exhaustive and exclusive leaving no room for any State prescription.

PN108

And we say exactly the same of clause 15.1.1. So, yes, we would accept on one view of it it might be possible to comply with both the POPs and 15.1.1, but properly understood the two provisions are inconsistent. Inconsistent because - I withdraw that. I'll go back a step. It would be possible for Svitzer to comply with both 15.1.1 and the Brisbane and Melbourne POPs, by complying with the fetter that the POPs employ. But that would not be - that would not exclude the inconsistency between the POPs and 15.1.1, because of the POPs cut-down effectively in relevant circumstances to nothing the discretion, the omission, the allowance, conferred on Svitzer by clause 15.1. That's the way the case is put.

PN109

DEPUTY PRESIDENT ASBURY: Mr Neil, can I just understand, if your argument is correct - and maybe this is taking it to the nth degree, but if your argument is correct and there's an absolute right under clause 15.1 to employ people in any of the categories of employment in 15.1.1, then essentially take the Brisbane POPs, for argument's sake, where it deals with rosters and crewing, then it applies with respect to casuals; doesn't it? So essentially, it's meaningless to say there'll be 15 permanent full-time equivalent rostered - - -

PN110

MR NEIL: In the POPs?

PN111

DEPUTY PRESIDENT ASBURY: Yes.

PN112

MR NEIL: Yes.

PN113

DEPUTY PRESIDENT ASBURY: So you could completely disregard the POPs and say we're just going to have casuals in those roles? That's taking it to the nth degree, I accept, but the - - -

PN114

MR NEIL: Of course, you'll understand of course, Deputy President - - -

PN115

DEPUTY PRESIDENT ASBURY: - - - ultimate position that you're putting is that that would - to read it any other way would cut down Svitzer's right to employ all casuals, if it wants to, in a particular port.

PN116

MR NEIL: Correct. The only qualification that I put to that is that there may be, in relation to casual employees, some other constraints in the enterprise agreement itself, not in the POPs, that might cut down that discretion, and I haven't looked for that. But putting that possibility to one side, the - - -

PN117

DEPUTY PRESIDENT ASBURY: It would have to be in the agreement though, not in the POPs.

PN118

MR NEIL: Yes, not in the POPs.

PN119

DEPUTY PRESIDENT ASBURY: Yes.

PN120

MR NEIL: Not in the POPs.

PN121

DEPUTY PRESIDENT ASBURY: So what - given that one of the principles of construction is that you try to give provisions work to do, well, what work do the POPs do in that case?

PN122

MR NEIL: The answer is located in clause 5.3.1 because whatever else one says about clause 5.3.1 - the second sentence of clause 5.3.1 - it takes as its starting point, the possibility that there might be in consistency between the enterprise agreement and the POPs. That's the very subject matter that it is addressing. And then it goes on to say what the result of that inconsistency will be. So, yes, it is true that it follows from our argument that the parties to a POPs might make - and solemnly make agreements, that will be of no effect, the Brisbane and Melbourne POPs, insofar as they are the subject of this dispute, fall into that category.

PN123

DEPUTY PRESIDENT ASBURY: But on your argument, any POPs that fettered the capacity of the old Svitzer 2 engaged people in any of the four categories of employment would be of no effect.

PN124

MR NEIL: Yes, and we would have to accept, for the purposes of the argument, that that consequence might not be consonant with the will of the people who made a particular POPs.

PN125

DEPUTY PRESIDENT ASBURY: Or who made an agreement that says the POPs are incorporated as a term of the agreement.

PN126

MR NEIL: But it would be entirely consonant with the objectively manifested intention of the parties to the enterprise agreement. They turned their mind to this problem. The problem that would be posed if, some time after the making of the enterprise agreement, a POPs was made that was inconsistent with the enterprise agreement. They turned their mind to that problem, expressly.

PN127

They may not have known how the problem would manifest itself, but they identified the potential for that problem and they made an agreement that resolved that problem and resolved that problem by giving primacy to the enterprise agreement by saying, in advance, that the making of any POPs, if you make a POP or a POPs, which is inconsistent with the enterprise agreement, then you're doing something which has no effect.

PN128

DEPUTY PRESIDENT ASBURY: Well, sometimes - - -

PN129

MR NEIL: That's the - if you understand - I'm sorry, Deputy President.

PN130

DEPUTY PRESIDENT ASBURY: Go on.

PN131

MR NEIL: That's the way in which you read, to the extent that it's necessary to do so, that's the way in which you read the enterprise agreement and the POPs harmoniously.

PN132

Another way of looking at it is, the possibility of disharmony was expressly contemplated by the makers of the enterprise agreement. Perhaps naturally so, because the POPs would have been made, in effect, by not all of the parties who were involved, in - I withdraw that. The POPs would be made to cover, in the case of each POP, only some of the employees who were covered by the enterprise agreement and would be made at a different point in time, later, perhaps in different circumstances than the making of the enterprise agreement. So the possibility of disharmony was, no doubt, a real possibility, something naturally to be borne in mind by the makers of the enterprise agreement. They decided this is how the two instruments will be made harmonious one with the other.

PN133

DEPUTY PRESIDENT ASBURY: Mr Neil, speaking for myself and not wishing to frolic off into some error, I really struggle with the proposition that those represented by your learned friends, on the other side of the Bar tale, would have sat in negotiations for an agreement and accepted, had it been put directly to them, that regardless of what the POP says, we can employ all casuals in a port, or all - I really struggle with that proposition that that was at the forefront of people's minds when - - -

PN134

MR NEIL: We would accept that at least the theoretical possibility that the subjective intention of the people who negotiated and entered into the Brisbane and Melbourne POPs was that every provision of those POPs would be of effect, so we can accept that as a possibility, that must be so.

PN135

DEPUTY PRESIDENT ASBURY: Then those that you represent have got a right, under the agreement, to give notice to change the POPs, even though the

union parties don't agree, and do it on a number of occasions. So what's the point of that provision, if the POPs - you know, it might be a case of careful what you wish for because your clients use that provision, perhaps not your clients specifically, but it's quite common that these kinds of agreements have a provision that allows for the POPs to be unilaterally changed, by the giving of notice, if the other party doesn't agree.

PN136

MR NEIL: Yes, this enterprise agreement is not quite such a character.

PN137

DEPUTY PRESIDENT ASBURY: It's got a provision, from memory, that allows - - -

PN138

MR NEIL: At 15 point - - -

PN139

DEPUTY PRESIDENT ASBURY: - - - the POPs to be changed - - -

PN140

MR NEIL: 41.4.

PN141

DEPUTY PRESIDENT ASBURY: - - - by the giving of notice, when the other party doesn't agree, I think. Then it comes to the - - -

PN142

MR NEIL: There's a process, but it's not - - -

PN143

DEPUTY PRESIDENT ASBURY: - - - obviously it comes to the Commission, I'm fully - I accept that.

PN144

MR NEIL: It's not a process of unilateral – - -

PN145

DEPUTY PRESIDENT ASBURY: Yes, but Mr Izzo, you might be ducking under the Bar table over there, because I know you've run that argument. 'We've done it anyway and here we are'.

PN146

MR NEIL: Mr Izzo is incorrigible, but - - -

PN147

DEPUTY PRESIDENT ASBURY: And Ms Carr I can see, looking around from the back, having dealt with that.

PN148

MR NEIL: Yes, yes, yes. So it's not a process where we can just unilaterally depart from or abandon a POP. There is a process for dealing with that, which

starts with agreement and so on and if agreement can't be reached there's then a process for having it dealt with under the dispute resolution procedure. That's 15.4(v).

PN149

DEPUTY PRESIDENT ASBURY: So let's assume, for argument's sake, Svitzer's argument now, and I'm sorry again I'm frolicking off, but Svitzer's argument is, 'Okay, we're just going to employ 15 causals as masters or ratings or whatever we're going to do, and we don't have to change the POPs to do that, we're just going to do it'?

PN150

MR NEIL: Because that part of the POP has no effect.

PN151

DEPUTY PRESIDENT ASBURY: Yes.

PN152

MR NEIL: That's the exercise, nothing more or less, that's the exercise of a right that is conferred on Svitzer, as a consequence of the enterprise agreement made between it and all of the other parties to that agreement.

PN153

DEPUTY PRESIDENT ASBURY: So everywhere the agreement says 'may', it's to be read as being a right, as opposed to a permissive 'may'?

PN154

MR NEIL: With respect, I'd have difficulty adopting a proposition as large as that, without looking at the context in which each of those words were used, in which that was used, in each case.

PN155

DEPUTY PRESIDENT ASBURY: But, on your argument, context can only be found within the four corners of the agreement and not the POPs.

PN156

MR NEIL: Correct.

PN157

DEPUTY PRESIDENT ASBURY: Okay, I understand, thank you.

PN158

MR NEIL: Context can't be supplied by something that didn't exist at the time the enterprise agreement was made.

PN159

DEPUTY PRESIDENT ASBURY: We don't know - do we know, without looking into detail, do we know what the POPs looked like at the time the enterprise agreement was - - -

PN160

MR NEIL: I don't think there's any evidence about that.

PN161

DEPUTY PRESIDENT ASBURY: Well, they're dated, aren't they?

PN162

MR NEIL: But what form they were in, at any particular time. I suppose one could go back and do the exercise - - -

PN163

DEPUTY PRESIDENT ASBURY: Well, they have to be reviewed every year, don't they?

PN164

MR NEIL: They do, and I'm not sure that the - so, yes. So one would have to trace through the whole history.

PN165

DEPUTY PRESIDENT ASBURY: Well, I think there's a statement where someone has, isn't there, in Newcastle, the Newcastle statement. Anyway, I don't want to diverge, but it's in the Newcastle witness's statement, I think, 'This was the POPs at this time. This was the POPs at that time'.

PN166

MR FAGIR: I think it's Brisbane as well, your Honour.

PN167

MR NEIL: I suppose the answer that we would make, Deputy President, to the conundrum that you have posed for us perhaps, if we could so describe that, we accept - we do accept the possibility that the objective intention of the parties who make a POP may be to include a provision which is inconsistent with a term or terms of the enterprise agreement. But the enterprise agreement deals with that possibility, expressly turned its mind to it. The very starting point of the second sentence of clause 5.3.1 is the existence of that possibility and then the enterprise agreement resolves it.

PN168

It is a necessary consequence of the operation of clause - wherever, in every instance in which clause 5.3.1, the second sentence of clause 5.3.1 actually operates, it is a necessary incident of that operation that a provision that was agreed to in a POPs will, by the operation of clause 5.3.1, be deprived of effect.

PN169

DEPUTY PRESIDENT ASBURY: But is it also permissible to infer that the parties who agreed on this clause intended to have POPs, they intended to have POPs that operated, they intended to have POPs that set out mutual rights and responsibilities, they intended to have a provision to vary them and to have them incorporated as terms of the agreement, so that you can strew the agreement to give effect to the POPs, to the extent it's possible to do so without some complete and utter absurdity?

PN170

MR NEIL: No, that's not a permissible process of reasoning. Inconsistency is inconsistency. There's no special test.

PN171

DEPUTY PRESIDENT ASBURY: But it requires - the inconsistency you point to requires 'may' to be read a particular way.

PN172

MR NEIL: That's an essential element of this part of the argument.

PN173

DEPUTY PRESIDENT ASBURY: Yes. So it's possible to construe 'may' as meaning a variety of things?

PN174

MR NEIL: Well, not in our submission.

PN175

DEPUTY PRESIDENT ASBURY: Yes, I understand your - - -

PN176

MR NEIL: All of the variety of - (1) not in this case, (2) if you look at any of the other possible varieties, you can't cut it down.

PN177

Turning to - we don't understand the argument put against us really to focus on the word 'may' and some other than permissive connotation for that word. The argument, rather, seems to focus on the proposition that - excuse me for one moment.

PN178

The proper construction of clause 15.1.1 is that each - I'm rather hesitating because this strays a little into the union's appeal rather than into our appeal and I don't want to confuse the two issues.

PN179

DEPUTY PRESIDENT ASBURY: I don't want to lead you somewhere you don't want to go. But one way to read it is that you can employ people in any category you want, but in a particular port how you deploy them on a roster is subject to the POPs. You can employ as many casuals as you want, you can have them on your books, you can have fixed-termers, as many as you want, but the way that you are required to deploy them is subject to the POPs in that particular port, which is, you must have a roster that says X. You must have this many crews available, leave and running, can't be or - you know, all of those things. That's one way of reading it.

PN180

MR NEIL: And we've identified the two reasons why one would not adopt that construction, we hope.

PN181

DEPUTY PRESIDENT ASBURY: I understand. Thanks.

PN182

MR NEIL: The second reason is - yes, that's the answer we would give to that proposition.

PN183

We do need to develop this - the second aspect - the second element of our case, I'll take a moment just to regroup the argument. The first element focuses on the unqualified discretion or permission conferred by clause 15.1.1.

PN184

Then the second element looks at the source or the location of the fetter identified by the Deputy President, on that discretion. The fetter has it's exclusive source in the POPs, that is the second element of our case. Exclusive because it is not authorised by any provision of the enterprise agreement. Insofar as the POPs impose that fetter, the imposition of that fetter in the POPs is not authorised by the enterprise agreement.

PN185

DEPUTY PRESIDENT ASBURY: Therefore your argument is it's inconsistent and therefore it can't stand in the face of the agreement.

PN186

MR NEIL: Correct.

PN187

DEPUTY PRESIDENT ASBURY: I understand.

PN188

MR NEIL: Correct. We just need to - if we could just take a moment to develop that one aspect of that submission, by reference to the primary decision, page - and the way in which the primary decision dealt with the effect of clause 41.2.

PN189

May we invite the Full Bench to turn, first, to page 43? Paragraph 80 refers to subclause (ii) of clause 41.2.1, that's the provision which, in the enterprise agreement, appears, in the copy that the Full Bench has, that appears on page 1134 of the application book.

PN190

Then paragraph 83 of the decision, talking about the language of clause 41.2.1(ii), we invite attention to paragraph 83. Paragraph 83 is the point, as we read the primary decision, where the Deputy President linked the relevant content, the fettering content of the POPs to the enterprise agreement. That link turns on the construction of clause 41.2.1(ii) that is set out in paragraph 83. That construction is wrong, in our submission. The link is manifest but the way in which that link operates is made manifest in paragraph 88, page 44 of the appeal book.

PN191

We've identified, in our written submissions, and if we may take a moment to emphasise, that the respects in which, in our submission, those holdings are incorrect.

PN192

First, clause 41.2.1(ii) does not require that the number of crew on duty and on leave be included in the POPs. It merely authorises that POPs may include details about the subject matter of clause 41.2.1(ii), which includes that, 'Rosters will, as far as practicable, contain certain stipulated content'.

PN193

DEPUTY PRESIDENT ASBURY: Doesn't that mean when they do they're not inconsistent?

PN194

MR NEIL: No. At least not relevantly, we would say. We'll develop that in a minute, if we may. The starting point is - the first proposition is that clause 41.2.1 doesn't, itself - it doesn't provide that the rosters themselves should be included in the POPs, the rosters are another instrument that are the subject of the details that can be included in a POPs.

PN195

Then you look at what clause 41.2.1(ii) actually authorises. What it actually authorises is that, as far as practicable, rosters will include these things: (1) the detail of work days; (2) the component of predictable leave days; (3) the number of crews on duty and on leave required to man the roster. Absolutely nothing, nothing, said about the categories of employment of any employee identified in the roster. No reference to categories of employment in clause 41.2.1(ii). Certainly not expressly and one can't imply into that language, for the reasons we've already developed. It would be entirely possible to create a roster that had in it all of the details - any details authorised indirectly by clause 41.2.1(ii), without mentioning categories of employment at all.

PN196

So if one is looking at, in the way your Honour the presiding member has suggested, if one is looking at a location, source of authority, for a fetter, the width of clause 15.1.1 in the enterprise agreement then, contrary to the approach of the Deputy President, clause 41.2.1(ii) is not it. No permission given. No contemplation in clause 41.2.1(ii) that the POPs or the roster could override or intrude upon clause 15.1.1 at all.

PN197

That's what we wanted to say about the second element of our contentions. The correct conclusion, for all of those reasons, we submit, is that on the proper construction of the enterprise agreement the Deputy President should have found that the limitations on the making of fixed term engagements in the Melbourne and Brisbane POPs were inconsistent with clause 15.1.1 and, thus, by the operation of clause 5.3.1, of no effect.

PN198

Now, could we say something very shortly about grounds 2 and 3? That's what we wanted to say about ground 1, if we may. Grounds 2 and 3. Primary decision, in the appeal book page 41, paragraph 64(d) and (e) correctly identify, in our submission, that there's - what we characterise the now written submissions, is a boundary of matters that may be dealt with by the POPs and other core matters

that are quarantined to the enterprise agreement. The effect of that, in our submission, is that clause 41.2 operates to define the outer limit of the subject matters that can be dealt with by the POPs, that can lawfully, properly be dealt with by the POPs.

PN199

In the primary proceedings Svitzer submitted that the enterprise agreement, clause 41.2, did not permit POPs to include terms proscribing the employment status or employment categories of employees in a particular port. The submission, in that effect, is - we won't ask the Full Bench to turn to it now, but it can be found in the appeal book, volume 3 page 1054 and following, section 6 of the written submissions made by Svitzer below.

PN200

It followed, on that submission, that the terms of any POP that purported to cover the subject matter of the employment categories of employees in a particular port, were not authorised by clause 41.2.

PN201

The Deputy President identified this submissions, as we would understand it, in paragraph 53 of the primary decision, page 39, but it was not otherwise addressed or resolved.

PN202

That was an error, of course, in its own right and the effect of that error is that the matter was decided in reliance upon provisions in the POPs that were not authorised by clause 41.2. Because they were not authorised by 41.2 and they intruded upon clause 15.1.1 then they were of no effect.

PN203

Now, if it please, that's all we wished to say, by way of supplementing that which we put in writing, in relations to ground 2 and 3. We've dealt with the question of permission to appeal in our written submissions. It is, we would respectfully submit, axiomatic that a question of construction, of the kind that is presently being raised, is appropriate for permission, certainly when one is looking at an important - obviously important enterprise agreement of this kind.

PN204

DEPUTY PRESIDENT HAMPTON: And when each party to the dispute is advancing an appeal themselves.

PN205

MR NEIL: Correct. Correct. It would seem sauce for the goose and sauce for the gander, perhaps.

PN206

Unless the Full Bench had anything more to ask of us in particular, that's what we'd wish to say, by way of supplementing our written submissions on our appeal.

PN207

DEPUTY PRESIDENT ASBURY: Thanks. Mr Fagir?

PN208

MR FAGIR: Mr Neal, parenthesis union, has volunteered me to go first. Could I just check that your Honour and Commissioners don't intend to break?

PN209

DEPUTY PRESIDENT ASBURY: How long are you going to be, dare we ask?

PN210

MR FAGIR: Not as long as Mr Neil, parenthesis Svitzer.

PN211

DEPUTY PRESIDENT HAMPTON: Perhaps we can talk about height, if we wish.

PN212

DEPUTY PRESIDENT ASBURY: Or initials, Mr I Neil.

PN213

MR FAGIR: I think I'll be an hour, but - - -

PN214

DEPUTY PRESIDENT ASBURY: Yes, we might just have a short break of, say, maybe make it 10 minutes.

PN215

MR FAGIR: Commission pleases.

PN216

DEPUTY PRESIDENT ASBURY: Thank you.

SHORT ADJOURNMENT **[11.37 AM]**

RESUMED **[11.53 AM]**

PN217

MR FAGIR: I thank your Honours.

PN218

The written submissions filed, and the submissions made today suggest that this is an arid dispute about some dry questions of construction, and it is, in the course of an industrial dispute that was brought to the Commission for resolution. That being the case, it might be useful to say, briefly, some general things about the context of this dispute and the implications of the position which Svitzer put below and maintains on appeal.

PN219

The first contextual matter I wish to identify is that the catalyst for this dispute is Svitzer's decision, unilateral decision, to begin replacing permanent employees with fixed term employees.

PN220

Now, there's some complaint, in Svitzer's submissions, about the way that we've characterised this, but that is, in my respectful submission, the plain effect of the evidence. There were some vacuous phrases used, to the effect that 'We're not doing it everywhere, we're only doing it in cases where there's a threat of increased competition', or slogans along those lines, but the reality is, as we would put it, Svitzer has simply decided to start replacing departing permanent employees with fixed term employees, wherever it considers it commercially or operationally expedient to do so.

PN221

Second, that development occurs in the context where each of the sets of port operating procedures, in different ways, but each of them deals with the question of minimum numbers of employees, minimum numbers of employees in particular categories. All of them deal with that. Most or all of them deal with other matters which don't, on the face of it, fall squarely within the parameters of enumerated items in 41.2.1.

PN222

For example, the Newcastle POPs, Mr Moran reminded me just a few minutes ago, deal with the provision of eTags for employees travelling to work. That's one example. I think a better example is that the Brisbane port operating procedures requires Svitzer to supply tea and Milo, in particular circumstances. There are others.

PN223

The significance of that is, that what the Commission is being invited to find is that Svitzer, for many years, and I'll deal with this in just a moment, but for many years has negotiated, run disputes about, applied, debated port operating procedures which, on its view of things, are either wholly ineffective or largely ineffective. So all of the provisions about workforce composition, that seems a void; provisions about eTags, void; Milo, don't have to provide that. The whole thing was some kind of long-term, very expensive charade.

PN224

The third point we would make about the POPs is, as we read them they don't, or at least most of them, do not prevent Svitzer from hiring fixed-term employees. They specify minimum numbers of employees in particular categories, including permanent full-time and permanent part-timers.

PN225

At least, as my client see it, that doesn't stop Svitzer from going out and hiring what we would describe as - sometimes describe as supernumeraries. As long as you've got the minimum number of permanent part-time, permanent full-time employees required by the POPs, if Svitzer chose, for whatever reason, to go out and hire supernumerary fixed-term or casual employees, the POPs would not prevent that from happening. That's relevant to this question of whether the POPs fetter an alleged discretion.

PN226

The fourth point, as your Honour, the presiding member, pointed out, is that these POPs are not set in stone. They can be altered by Svitzer, or by the unions, on

notice, subject to a right of the counterparty to apply to the Commission to prevent the change.

PN227

On one view of things, the industrially proper thing for Svitzer to do, if it decided that there were genuine, legitimate, compelling commercial reasons for the change in workforce composition would be to give notice for change to the POPs and, assuming, as we would accept is likely, that the Commission - the unions brought the matter to the Commission, defend its position and explain why it was commercially necessary or otherwise appropriate for the change to be made. Instead, the approach that it took was to say, 'We're just going to do this and, to the extent that both parties have treated themselves as bound by the POPs, we were wrong all along'.

PN228

Finally, the - and this really arises from something that your Honour, Asbury DP, raised with my learned friend, that is that the enterprise agreement that the Commission is concerned with was negotiated and made, in the context of existing port operating procedures in very similar or identical terms, in the context of identical or very similar language in a previous enterprise agreement.

PN229

Could I - I don't like to do this, but could I ask your Honours and Commissioner to turn to page 375 of the appeal book? This is the 2013 MUA and Svitzer Enterprise Agreement, and I interpolate that there have been separate agreements for the separate unions, pre 2016. The language, your Honours will see, is familiar:

PN230

There will be a set of port operating procedures in each port, the port operating procedures will set out details in respect of the following subject matter.

PN231

And you will then see the same list of items which appear in the agreement, subject of the dispute today.

PN232

Could I then ask your Honours and Commissioner to turn to appeal book 716? I'm doing this as quickly as I can, just to make sure that we finish in a timely way. If I'm moving over this too quickly of course your Honours will slow me down.

PN233

Page 716, at the top of the page, identifies these are the Newcastle POPs, dated 13 May 2013:

PN234

Stage 1 - 28 permanent crews split roster. The company will, from 1 January 2013, employ X number of permanent crews, X number of permanent part-time crews.

PN235

Et cetera. On the next page, 717, is language which is, relevantly we would say, identical to the key provision of the current Newcastle POPs, which we extracted on the first page of our original submissions, on the second page of our original submissions, although the numbers are slightly different, increased thankfully, as Newcastle flourishes, but the provision, otherwise, appears to be the same.

PN236

So we had anticipated that one of the points made against us is that these port operating procedures are post agreement conduct, which is inadmissible, there was a question about that, but we don't need to grapple with that academically interesting point because we know that the parties have made very similar or the same port operating procedures, under a very similar or identical agreement provision, and all of that is, in my respectful submission, plainly relevant and admissible on a question of construction, including, as part of the industrial history of the instrument, part of the industrial background of the dispute, and relevant to the content for the understanding, in this enterprise, of particular concepts, for example, what a roster is and what a roster comprehends.

PN237

DEPUTY PRESIDENT ASBURY: Do you agree that that's the only POPs in evidence that was in existence at the time the agreement was made?

PN238

MR FAGIR: I agree that it's the set of POPs that was then in existence which I was able to find, after what her Honour made what, in hindsight, seems an obvious point, or raised an obvious question. I'm sure those behind me are diligent - their arms are crossed just right now, but I'm sure they will diligently search through the materials. Certainly that's the only version that I was able to turn up.

PN239

There are earlier versions of the agreements, going back to 2006. The only change that we've been able to identify is that the POPs were not previously expressly incorporated as terms of the agreement, but the inconsistency provision has been the same since at least 2006. I don't ask your Honour to turn to it, but it's at page 229 of the appeal book and the provision for POPs or port practices, Port Practices Agreement, also seems to be a very long-standing.

PN240

Before coming directly to what Svitzer says about inconsistency and just while we're on AB716 and 717, can I just flag something that I'll come back to. That is, the proscription of the numbers of permanent employees or permanent crews falls under the headings on 716, of 'Permanent crew split roster' and, on the next page, '28 crew, 8 ppt', permanent part-timer, '12 hour roster'. The point which I'm just foreshadowing now, but I will come to, is that in the context of Svitzer, when one talks about a 'roster' we're not talking about the basic one pager pinned to the cork board in a café, it's something that's more complex. It deals with a variety of matters which, effectively, the only hours regime.

PN241

The agreement is very sparse in terms of spans of ordinary hours and so on. The rosters supply all of that and the point that I will make, in due course, is that even if one accepts that 41.1.2 is an exclusive statement of the matters that can be dealt with on the POPs, these matters fall certainly within the concept of a roster, as it's understood at Svitzer. If we're wrong about that, they certainly fall under the heading or the aegis of other operational issues, relief arrangements, et cetera, but I'll come back to that.

PN242

Could I - I'm sorry, I should pause, is there - can I assist your Honours and Commissioner with any of those background issues, before I raise the - – -

PN243

DEPUTY PRESIDENT ASBURY: You're going to come back to the rosters?

PN244

MR FAGIR: Yes.

PN245

DEPUTY PRESIDENT ASBURY: All right.

PN246

MR FAGIR: Perhaps I'll deal with it now. I'll deal with Svitzer's second point first and then I'll come to the inconsistency issue.

PN247

Clause 41.2, I think I said 41.1.2, 41.2.1 and following, set out a series of matters. 41.1 provides there'll be a set of port operating procedures. 41.2 provides that the procedures will set out details in respect of the following subject matter.

PN248

Now, it would have been a relatively straightforward drafting exercise for the provision to say, 'The POPs will deal only with the following matters. The content of the POPs will be (a), (b), (c), (d), (e)'. The formula actually adopted is that, 'The POPs will set out details in respect of the following matters, which provide a foundation for guidance to the parties in developing port operating procedures'.

PN249

Properly read, the provision requires that the port operating procedures deal with, at least, those matters but without preventing the procedures from dealing with other matters. That is why the formulation will set out details in respect of the following subject matters adopted and it is confirmed by the indication that these matters provide a foundation for the guidance to the parties in developing the procedures. It is not, 'These are the matters to be dealt with', these matters provide a foundation for guidance.

PN250

Increasingly, (indistinct) general terms, this is the starting point, the minimum starting point for the procedures which are to be developed. That, in my

respectful submission, is not only the most obvious literal reading of the provisions but it makes particular sense, in the context of this enterprise agreement which, as I said, includes no daily span of hours, there are no daily, weekly, or monthly maximum ordinary hours. There are maximum weekly hours of 91, but setting aside ordinary hours, there are no maximum working hours, aside from a maximum of 91 a week. There are no shift loadings, weekend penalties, public holiday penalties or penalties for long shifts, unless there has been either 12 or 14 hours worked.

PN251

So the agreement itself provides a completely bare bones framework and all of those matters which are, of course, critically important, are to be dealt with in the port operating procedures.

PN252

The function of 41.2 is to ensure that whatever procedure is developed deal with whatever the parties think is appropriate, but it must, at least, deal with rosters, off duty periods, leave, fatigue management and the other absolutely basal matters which are not dealt with in the agreement.

PN253

Now, if we are right about that, Svitzer's second appeal point falls away immediately, because the matters identified are not exclusive, other matters can be dealt with.

PN254

I observe, in passing, that the current iteration of the POPs deal with things like workers compensation, meal breaks, Brisbane Transport, bay strandings, refreshments, including Milo, consultation and so on; all consistent with the view that we have just put.

PN255

If we're wrong about that, and the POPs can deal only with the matters which are identified within the Svitzer world, in the context of this particular enterprise, for the reasons that I gave and I probably can't put it any better than I already did, when one speaks of a roster at Svitzer, one sees this in the POPs, all of them, talking about a complex beast which sets the whole framework, really, for hours of work and terms and conditions beyond salaries and some other matters dealt with in the enterprise agreement. It deals with captive work, primary work, relief, minimum numbers of crews, types of employment and so on; all of them integers, all of them components of a scheme which ensures that people work in a way which meets Svitzer's operational requirements but also ensures that there is sufficient capacity to ensure that people can take leave, that sick leave is covered, that emergency work is covered, and all the rest of it.

PN256

Now, it was put, from the Bar table today, that all of those things could be achieved without specifying mode of engagement. Well, it's all well and good for that to be said from the Bar table, but the way the parties have approached it is to treat all of the matters that appear under those headings in the POPs as being components, presumptively necessary components, in the operational scheme,

which meets both sides' requirements, in terms of getting the work done but in circumstances where people have a reasonable amount of leisure and where work, including the antisocial work of a 24/7 operation, is shared around equitably.

PN257

Could I then - again, I'll do this as quickly as I can, could I ask your Honours and Commissioner to turn to the Brisbane POPs, just to use as an example. They begin at 1201 of the appeal book.

PN258

There are some definitions and some background:

PN259

Port operating procedures developed pursuant to the current enterprise agreement.

PN260

Incidentally, recording what's otherwise obvious, which is that the parties regard these pops as being consistent with the enterprise agreement.

PN261

Clause 1 is 'Rostering arrangements'. 1(a) 'General rostering matters'. 2 'Rosters and crewing', and it is under that heading of 'Roster arrangements', subheading 'Rosters and crewing' that one finds the proscription of the modes of engagement of the particular crews.

PN262

I note, incidentally, that (b)(i) indicates that:

PN263

The purpose of the provision is to enable permanent and fixed-term employees to receive their leave entitlements in the EA.

PN264

So one thing can be put from the Bar table, but the document which records the parties' actual view indicates that the structure which is set out is required to enable permanent and fixed-term employees to receive their leave entitlements.

PN265

The Melbourne POPs, I promise I'm not going to go through all of them, I'm just using a couple of examples.

PN266

DEPUTY PRESIDENT ASBURY: I'm sorry to interrupt you, but leave, in this context, is not just annual leave, long service leave, it's the days off in the roster?

PN267

MR FAGIR: Yes, quite. I suspect at least some of the members of the Bench know more about this that I do, but this is an unusual type of working arrangement where there's a minimum number of days, or a maximum number of days to be worked each year, and time off duty and so on. But that concept leave,

it's not just, 'How do I apply for leave at Christmas', it's much more fundamental to the working and personal - - -

PN268

DEPUTY PRESIDENT ASBURY: Which days off. The days off the roster, yes.

PN269

MR FAGIR: Exactly, it's not you're working Monday to Friday and then you've got to work out when you can get longer breaks, it's when you're not at work.

PN270

The Melbourne POPs, they begin a little bit earlier, but at 1175 perhaps is the starting point. There's some terminology, some definitions at 1175, at the bottom. Over the page, a specification of the tugs and then permanent crews and a structure, a captive and non-captive rostered leave, Victorian leave, in the table in the middle of the page. There is then a designation of the various crews, M1D1, M2D2. I hope there will be no follow up questions about exactly what that means but, presumably it's night and day. Then, over the page, is the way that the designated crews fit into the roster.

PN271

So, structure for permanent crews, designation and then clause 1, rosters for PFT, permanent full-time crews, designated, as they are on the previous page, and then working arrangements, which again flow from the structure that's adopted in the previous provisions.

PN272

So, again, at the risk of boring everyone and repeating myself, the way that the arrangements operate here is that all of these factors, the type of crew, the rosters, designations, all the rest of it, comes together to form the roster and if that is right then even if 41.1.2 is an exclusive catalogue of the matters that can be dealt with, the (indistinct) provisions fall within it.

PN273

DEPUTY PRESIDENT ASBURY: Can I just ask about the Melbourne POPs, how one would employ a fixed-term employee in Melbourne, if the Deputy President is right about how that limits the engagement?

PN274

MR FAGIR: There's a simple answer and a slightly less simple answer. One is that assuming that the proscribed number of permanent full-time crews, permanent part-time crews is employed, then it's a matter for Svitzer if it wants to employ supernumeraries.

PN275

The second point, and there was evidence about this below, is that in practice, fixed-term employees were used in what my client would regard as appropriate circumstances, where there was a fixed piece of work, or some other legitimate need.

PN276

Now, it was put against us that that demonstrates that this doesn't operate in the way that we say it does, because that would be inconsistent with these provisions. Firstly, as I've said, you can hire supernumeraries if you want. If someone resigns today you might not be able to replace them, as a permanent, tomorrow, bearing in mind the agreement deals with recruitment and selection. What we would say is that that demonstrates that the parties operated in a practical way. That even if, strictly speaking, my clients were entitled to object to the deployment of fixed-term crews in that way, but they didn't. That's not something to be held against them, that's a sensible, practical industrial approach to the matter. It does not demonstrate that there was some other view about the way this scheme worked. It demonstrated that - I'm talking about, largely, as I understand it, members and delegates, sometimes union officials, who effectively police these provisions, who may have - there's a degree of speculation involved, but might quite legitimately have decided, 'We could complain about this because we're one person short on PFT crew whatever, M1, but there's some reason for it so we'll let it go through to the keeper'.

PN277

DEPUTY PRESIDENT ASBURY: Isn't that the same argument that Svitzer are putting, in relation to the practical operation and effect that that has on the interpretation of the agreement, 'Just because we've operated in a certain way doesn't mean, under the agreement, we weren't entitled to do something different'.

PN278

MR FAGIR: Perhaps, but there is a difference of such scale as between a fixed-termer being used, from time to time, in circumstances where there's not explicit provision for it in the POPs, as opposed to a multi-year history of detailed, carefully negotiated, sometimes hotly contested procedures, which had serious operational implications for Svitzer, having been employed over a series of years, supposedly voluntarily.

PN279

DEPUTY PRESIDENT ASBURY: So just one further question on that, do you say that the Melbourne POPs roster is limited only to ongoing permanent full-time employees, but they can - that Svitzer can hire fixed-term employees, outside of the POPs?

PN280

MR FAGIR: Yes. I say that with a little bit of hesitation because this is a complex world and I picture, in my mind, a dispute three years from now where someone from Svitzer comes along and says, 'You said, three years ago, that we could hire as many fixed-term employees as I want'. That is my submission, yes.

PN281

DEPUTY PRESIDENT ASBURY: Is it because, conceptually sometimes, that there the parties have considered that the positions on the crew might be separate from the people who occupy them? So the crew must comprise X number of permanent full-time positions, or permanent part-time, but that occasionally a member of the crew will be absent and the position might be temporarily filled by, like a workers compensation absence, or some other absence, and the position might be filled by, arguably, a supernumerary person and that that's understood

because it's the - it's changing the composition of the crews, in terms of the permanency of the positions, that's the issue, not replacing, occasionally, a person in that position with a supernumerary?

PN282

MR FAGIR: Yes. Now, the POPs deal with the matter in slightly different ways. Generally they deal with crews, as opposed to individuals, although some specify X number of masters, X number of engineers, et cetera. Some of them name individuals, so it would be possible to find, in the POPs, exceptions to the general proposition your Honour has just put. But in terms of the basic concept, we would embrace what your Honour has said. That is, 'This is the structure that's to operate in the port'. Obviously if someone falls off the edge of the earth or resigns on short notice, or whatever it is, it might not be possible to maintain that precise structure every single shift, but that is how it should operate and the parties, taking a sensible industrial approach, it was contemplated that there might be occasions where casuals or fixed-term employees deal with it.

PN283

Mr Neal has given me - I think it's supposed to be English, but it just looks like drawings on the page, but perhaps he can make the point, whatever it was.

PN284

MR NEAL: You've made it.

PN285

DEPUTY PRESIDENT ASBURY: Sometimes they're expressed as tug boats, they're not crews, they're Tug 1, Tug 2, whatever, and the crew goes with the tug boat.

PN286

MR FAGIR: Yes. As I understand it, that is normally what happens, is that the team operates as such, it's not a different master or a different engineer and so on. But there can be re-combinations, but, typically, it's a tug and its crew travel together.

PN287

DEPUTY PRESIDENT ASBURY: Through the roster.

PN288

MR FAGIR: Yes.

PN289

Now, there might be occasions where a different approach was taken, and that would be quite legitimate. But the point is that when this agreement talks about a roster, it contemplates that sort of structure that I've just been describing. Sometimes it may not be necessary, things might be simpler in smaller ports or under particular contracts or in particular commercial scenarios, but the structure of the kind that we've just been discussing is the usual approach and certainly an available approach under the agreement.

PN290

Subject to dealing with any other questions, they're the matters that I wish to deal with, in terms of Svitzer's second and third grounds. Could I then deal with the inconsistency question? I propose to deal with this quickly, frankly, with the greatest of respect, because we think there's not much to it.

PN291

The argument, as we understand it, is that the agreement, because it says, 'You may employ persons in one of four categories', there is an absolute unfettered whatever it is, unqualified discretion to hire as many employees as Svitzer chooses, in whatever categories it chooses.

PN292

In our written submission we said three things about this. I'll repeat them briefly and then add one point. The first is that the agreement doesn't actually grant any discretion, it limits Svitzer's discretion. The starting point, as a matter of contract, is that Svitzer can employ any person on whatever conditions it wants. It doesn't have to call them permanent, part-time, casual or anything else. It can offer whatever conditions it chooses and an employee can choose to accept them or not. That's the stating point, if there were no Fair Work Act, no enterprise agreement or no award.

PN293

There's no need for a provision of an enterprise agreement to authorise Svitzer to hire employees. That is not what this provision does. It limits Svitzer's otherwise general discretion, and the agreement does this in a number of ways. 15.1.1 does that specifically by requiring that, 'Any employee being engaged in one of four categories and' as a corollary, 'that the particular obligations and entitlements that attach to that category be extended to the employee'.

PN294

So the starting point or the foundation for the analysis is wrong, there is no grant of a discretion, there's a restriction of a prima facie discretion to hire employees on whatever terms are regarded as appropriate.

PN295

Now, I'll then deal with what we say happens if there is potential inconsistency because this is some sort of grant of permission. But before I do that, as we understand it, the argument that's put depends on the use of the word 'may', which is said to grant an unfettered discretion. Many authorities are cited, all of them to the effect that, ordinarily, although not always, 'may' is permissive.

PN296

We don't say there's some exception here, in fact it's all a statement of the obvious, but it takes us nowhere. Svitzer may employ and employee. If Svitzer wants to go out and hire someone, hire a hundred people, it can do that, as long as they fall into one of the four categories and as long as there's compliance with the many other proscribed rules, both within 15.1 and elsewhere in the enterprise agreement.

PN297

Hire whoever it wants, it's permitted to do that, but there are a series of other provisions within the same clause and elsewhere in the agreement, which attach to the hiring.

PN298

These are statements of the obvious but, for example, clause 16 deals with selection and recruitment. If that, for example, limits Svitzer's rights to hire whoever it chooses, because it's required to recruit, following advertisement and a particular process for recruitment, which is proscribed there.

PN299

15.3.4 has been mentioned, permanent part-timers converting to permanent full-timers. If there's a case where Svitzer has decided it wants a part-time employee but, by operation of the agreement, might be required to convert them and continue to employ them as a permanent full-timer. Any number of examples could be given. Innumerable rules, in this instrument and in others, limit the employer's prima facie right, as a matter of contract, to employ whoever it wishes on whatever terms its able to negotiate.

PN300

The POPs are no different. They limit the entitlement. Well, not really, because they don't stop you from hiring a fixed-term employee if you want to hire a fixed-term employee. But even if they did, that's merely one of a whole series of sets of obligations that apply, in relation to hiring, in relation to employment, in relation to termination. It is utterly conventional, that's what awards and enterprise agreements are. They're a series of parameters hedging the employer's contractual rights to negotiating employment on whatever terms it wishes. Of course, one doesn't look to one clause of the agreement and close ones eyes to the rest of it. Axiomatically, one reads an agreement as a whole and sets out, as far as humanly possible, to give effect to all of its provisions.

PN301

In this case, the position is particularly clear because the parties have expressly incorporated the POPs as a term of the agreement. They're not some other instrument. There is specific language that appears to have been negotiated, either in the last agreement or the one before, I'm sorry I should have checked, and I will, which specifically incorporates them as terms of the agreement and puts, beyond doubt, that what we are construing is one single instrument.

PN302

So there, can we say, the foundation for the argument is unsound. If we're wrong about that, I've made this point already, if 15.1.1 is some grant of a licence to hire at will, the POPs don't stop that from happening and I've said what I can usefully said about that.

PN303

Third, in a way this is another dimension of the first point. Even if there were potential inconsistency, it is well-established, beyond room for any argument, that potential inconsistency is to be resolved, if possible, in the first instance, for a process of construction, which gives the potentially inconsistent provisions, each

of them work to do, and the conventional approach is to do that by taking one provision as qualifying the other.

PN304

We've dealt with it in our written submissions. We've extracted some of the quotes. The principles holds true across any number of instruments and, as it happens, the keystone High Court authority is a case about industrial award. It wouldn't really matter because all of this flows from a common sense assumption that where parties negotiate an instrument they intend for all of it to have work to do, they don't want to negotiate it for nothing, and they intend for all of it to work together as a coherent scheme, as far as possible. Sometimes they don't manage it, but that is the operating assumption.

PN305

This isn't a matter of subjective intention or tying to work out what someone was actually trying to do, this is a working hypothesis employed in the construction of instruments of all sorts.

PN306

Can I then - I think this is the last thing I need to say about Svitzer's appeal, is that a number of authorities have been cited, all of them dealing with conflict between different instruments, as opposed to potential inconsistency within the same instrument. All of that, in my respectful submission, is beside the point. Section 109 cases about conflict between Commonwealth and state legislation are inapt because here we are talking about terms of the one instrument, as opposed to different instruments.

PN307

Can I just explain why this is a matter of basic principle? We say that there's an easy answer because the POPs are incorporated in the agreement. But there's an answer that depends on more fundamental considerations, which are these.

PN308

The approach to internal inconsistency, as I've said, depends on a working assumption that when parties negotiate an instrument they do that for a reason so that it all operates and that it operates in some sort of sensible and harmonious way. That assumption is obviously apt in this case, in my respectful submission. As I've said, the parties have spent considerable time, effort, in Svitzer's case probably money and lawyers and such, negotiating POPs. As a matter of what the objectively likely intention is, not subjective intention, as a matter of what is objectively likely, it goes without saying, in my respectful submission, that the parties intended that the POPs operate and that they operate harmoniously with the enterprise agreement.

PN309

The facts of this particular case demonstrate that that working assumption has particular force here. They got together, they negotiated the agreements, for a reason. It wasn't because they like spending time together, it's not because they like having fights about how many permanent - maybe some of them do, I shouldn't say that.

PN310

DEPUTY PRESIDENT HAMPTON: Yes, I'm not sure about that.

PN311

MR FAGIR: At one time perhaps they did enjoy spending time together, perhaps now they've spent too much time together.

PN312

In any cays, the particular facts here underline the cogency of that usual assumption. The alternative, in my respectful submission, is absurd, which is the parties should be taken to spend all this time, invested considerable resources in draft - carefully drawing these port operating procedures, all in circumstances where they knew or should have known that it was all for nought and these were nothing more than gentleperson's agreements.

PN313

Finally, if we've understood the point correctly, it's said that there's direct inconsistency and indirect inconsistency in play here. Both of them arise in the context of different instruments, as opposed to the same instruments, which I've said in inapt.

PN314

Can I just say about that, firstly, in terms of direct inconsistency, it's perfectly possible to comply with both provisions, in my respectful submission. Svitzer has the right to hire wherever it wishes, within those four categories. It, separately, has an obligation to hire at least X number of permanent, full-time permanent, part-time, et cetera, crews.

PN315

In terms of indirect inconsistency, can I just point out that this is an unusual beast and can I just do this by reference to the Devondale Cream decision. The report was handed up and could I just - I'll deal with the decision of Kitto J first, at 262. In the second paragraph his Honour points out that:

PN316

The laws, there in view, were susceptible of obedience at the one time.

PN317

That is, there was no direct inconsistency, we would interpolate. The question was, then, whether there was indirect inconsistency. In that respect his Honour said, in the next paragraph:

PN318

Identification of the question to which the respective laws address themselves is all important and the effect of the authorities -

PN319

His Honour says is:

PN320

There's no inconsistency between them unless the federal law intends to lay down the only rule upon the subject for which the state law purports to proscribe a rule of its own.

PN321

That is, you have indirect inconsistency where the one source of right or obligation intends to dominate the field. To like effect, on page 272, Menzies J says:

PN322

The point now to be determined, it appears to me, is simply whether this obligation, under federal law, is exclusive and exhaustive.

PN323

I'll just read this quickly, it's halfway down the second paragraph:

PN324

Such laws would fail for inconsistency on the simple ground that the Commonwealth law is intended to be exhaustive and exclusive, leaving no room for any state proscription.

PN325

So we say two things. Firstly, this entire mode of analysis fits very awkwardly with the case where we're talking about the same parties. It really only operates where there are competing sources of obligations and where one is entitled to prevail over the other.

PN326

Secondly, in that scenario, if it is possible to comply with both sets of rules at once, there is only indirect inconsistency if there's an intention of the predominant source to completely cover the field. That means, in this case, if we're wrong about everything else we've said, and there's a question of indirect inconsistency, the question would be, did the parties intend, in 15.1.1, that that clause would be the sole word, the only word on that issue, such that no other provision could be made in that field? And the answer, we would respectfully suggest, is obviously no. It's a completely orthodox provision, requires hiring employees in particular categories and is one of a whole series of rights and obligations, under the enterprise agreement.

PN327

I said that was the last point on Spitzer's appeal, this is the last point. Construction, by reference to consequences isn't always useful, but can we point out one consequence of what Svitzer says today?

PN328

The enterprise agreement provides that there are effectively a maximum of 91 hours a week. It doesn't say that, but it says there have to be at least 77 rest hours each week. If the logic that's put against us is right, any provision of a POP which prevented Svitzer for rostering people for up to 91 hours would be inconsistent with the agreement and void. That might well mean that a roster that provided for 50 hours, or an average of 38 hours over an extended period, or 40 hours or

whatever else, on this quite extraordinary concept of inconsistency, that kind of provision, a roster that says someone's only working 50 hours this week, and not the full 91 that you're entitled to require them to work, would be voided for inconsistency.

PN329

It's not a point that is going to carry the day. It's not at the centre of our case, but it demonstrates, we would say, the problem that the logic of this inconsistency points.

PN330

If I've understood the proposal correctly, I would now deal with our appeal point, which is short and Mr Neal, perhaps after lunch, would say whatever he has to say and Mr Neil would respond to our appeal contentions and reply on his own appeal.

PN331

In terms of our appeal, our challenge to the Deputy President's conclusion that fixed term employment is a subcategory or a species of permanent employment. We can't say much more than what we've said, in writing. At the risk of stating the obvious, construction is a process of assigning meaning to words. The meaning is drawn from, potentially, a number of sources. The ordinary English meaning of the word is the staring point, context will always be relevant, extrinsic material is sometimes relevant. But, at the end of the day, the meaning assigned to the text has to actually make sense, as a matter of English language. In my respectful submission, with very few exceptions, the meaning assigned to the words has to be compatible with the English meaning of the words.

PN332

The way that it was put by French J, in *Wanneroo v Holmes*, is:

PN333

> *'Awards' should make sense, according to the basic convention of the English language, regardless of industrial history, context and all the rest of it.*

PN334

Now, that usually doesn't take us very far because, in most cases, the language - at leas the language that ends up in a dispute, is capable of multiple meanings. The question is, which of the various constructional choices should be adopted by the tribunal.

PN335

This case is in that relatively small category of cases where there's a complete answer, on the face of the words themselves. We make two points about that.

PN336

First, as we said in our written submission, the dictionary meaning of 'permanent' is, 'Intended to last indefinitely'. That is what being permanent is, something that has no fixed end point. It doesn't mean it's eternal, it means there is no known end point.

PN337

Conversely, the essence of fixed-term employment, is that it has a fixed end point. Either a point in time or, occasionally, in the case of employment for a fixed task, the end of some event, the end of a piece of work, whatever it might be. But the essence of it is that it does have a known fixed end point.

PN338

It is not possible, in my respectful submission, as a matter of basic English language, to say that which is for a fixed term is permanent. They're not only different things, they're opposites. Their essence, one is no fixed end point, the other there is an end point, and there is no way around this. It doesn't matter what one says about context or all the rest of it, it is not possible to sensibly say that which has a fixed end point is permanent and that, in my respectful submission, is enough to dispose of our appeal, obviously by uploading it.

PN339

If we're wrong about that, the point is put beyond doubt by the particular language of 15.1.1.

PN340

An employee under this agreement -

PN341

At appeal book 1101:

PN342

may be engaged in one of the following employment categories: permanent full-time, permanent part-time, employee engaged for a specified period of time/task, or casual employment.

PN343

Again, that's intractable. They cannot be sensibly read, as a matter of basic schoolboy English, as anything other, you're engaged in one of them or the other. It is not possible to read these words so as to produce a result that you can be engaged in two categories. That is precisely what was put to the Deputy President below and that is what he accepted and that is, in my respectful submission, wrong.

PN344

In our writing we've said some other things, which support that view. I don't need to pause on them. If what I've just said doesn't carry the day, perhaps those other things won't, but, in any case, they're fairly brief.

PN345

We point to clause 24.3, 41.2.1 for the Deputy President finding about the parties actual mutual intention and then the terms of the POPs themselves, which, in my respectful submission, distinguish carefully between permanent or full-time, or permanent full-time employees and crews, on the one hand, and fixed-term crews on the other.

PN346

The Deputy President came to a different view on this issue, by reference to clause 15.4. As we've said, in writing, 15.4 does not, with the greatest of respect, deem a fixed-term employee to be permanent or part-time. It provides that:

PN347

An employee engaged on a fixed-term basis works on either a permanent full-time or permanent part-time basis.

PN348

It is while they're working, not when they're dismissed, not in terms of their notice entitlements or redundancy entitlements, not when they're being hired, but while they're working they work on the terms and conditions that would apply to a permanent full-time or permanent part-time equivalent. That's all 15.4 does.

PN349

Even if 15.4 could be read otherwise, for the reasons that we've given, 15.1.1 leaves no room for manoeuvring. Even if there was some possibility of reading 15.4 differently, for it to operate concurrently and harmoniously with 15.1.1, it's necessary to construe it as dealing with terms and conditions during employment, as opposed to mode of engagement or post termination.

PN350

DEPUTY PRESIDENT ASBURY: Because, arguably, otherwise if not for 15.4 they could arguably be engaged on a casual basis.

PN351

MR FAGIR: They could be engaged on a casual basis and there would be a question as to what entitlements - it's really, perhaps, a different way of saying the same thing. It makes clear what probably would be assumed anyway, but makes clear that, in terms of the currency of the work, whatever is entitlements attached to permanent full-time and permanent part-time employees attached to fixed-term employees which, of course, is the conventional, although not invariable, approach.

PN352

It deals with something different to 15.1.1, which is about mode of engagement, this is about terms and conditions during employment.

PN353

Excuse me for a moment. Unless I can assist your Honours and Commissioner further, they're my submissions.

PN354

DEPUTY PRESIDENT ASBURY: Just one question, clause 16, on your submission, it wouldn't have any work to do, in relation to fixed-term employees?

PN355

MR FAGIR: Yes, I think I have to accept that.

PN356

MR NEAL: For my sins, perhaps, I've been in this matter, I think I'm the only one here today who's been in this matter from the get go. One of the reasons that I suggested to my friend that he go first was to avoid a doubling up, as it were, of our submissions, which I think you' find, from our outlines, pretty much mirror each other, with some minor differences.

PN357

On that basis, I only have a few additional points that I wish to make, and I wonder if it might be more convenient for me to proceed and do that now. It won't take long, I don't think. Then we can move into Mr Neil's submissions after lunch.

PN358

DEPUTY PRESIDENT ASBURY: Assuming there's no inconsistency in your views and whether we should have lunch or not.

PN359

MR NEAL: The inconsistency wins the day. Just on that, what I've been saying from the outset is something that I think his Honour Hampton DP picked up on during the Mr Neil, initial I's, submissions earlier today. That is that it's always been our position that there is no fetter on the discretion. The discretion available, under 15.1.1 is and has been exercised by Svitzer for some time, for some years. The only qualification on it is that once that discretion has been exercised and a complement or a staffing complement of employment categories have been agreed in a POPs, those employment categories are locked in, as it were, until such time as your Honour Deputy President, pointed out earlier, one or other of the parties wishes to give notice in order to try and change that agreement. And so on that basis we say the discretion has been exercised. In accordance with clause 41.2(ii) the rosters in POPs required a staffing complement or employment categories to be agreed in the POPs. That's by agreement. That has occurred. The discretion having been exercised, the outcome having been locked in. It's then, of course, again open to Svitzer to come along under 41.4 and give notice of intended change.

PN360

And so that's why we say in our reply submissions to Mr Neil's submissions that in our submission clause 5.31 is not engaged. And I think if you trail through the appeal book you'll find that I have been making that submission, as I say, from day one and I continued to suppress it.

PN361

In terms of the modes of engagement and whether or not they can be included in the rosters in a POPs or in the POPs generally, in accordance with the provisions of the agreement we have all looked at this agreement ad nauseum. My friend, Mr Fagir, in his written submissions as have I have pointed to the clauses that we say, in addition to 41.2(ii) allow for or, indeed, require the employment categories to be included in the POPs and specifically in the rosters.

PN362

There are a couple that haven't been mentioned and, indeed, there's one in particular that hasn't been mentioned by myself, despite having been in this matter

since day one. And that is clause 42. If I could just take the Full Bench to that clause, which is at appeal book 1138?

PN363

Now you will see there that this clause is about leave and it touches on a matter that your Honour, Deputy President Asbury mentioned earlier in terms of the leave day, not being a leave day in the ordinary sense of the word. And you will see there at 42.2. The roster that prevails in the port under the applicable port operating procedure.

PN364

Now, in my respectful submission that's highly suggestive of the fact that the POPs will include rosters as per we say, clause 41.21. And further that the rosters will provide for the number of days free of duty set out in clause 42.3 averaged over the applicable roster cycle.

PN365

Now we look at 42.3 what do we see? Entitlement to leave. 42.3.1, a permanent full-time employee will be entitled to. 42.3.2, a permanent part-time employee will be entitled to.

PN366

42.3.3, an employee who is engaged for a specified period of time or specified task, et cetera.

PN367

And so, clearly, they are matters that the agreement, which as my friend, Mr Fagir, has pointed out is to be read as a scheme going to the inconsistency point that's made against us. Clearly, the agreement contemplates the employment categories be included – being included in rosters in a POPs.

PN368

And as I say there are various other provisions. For example, 41.2.7 which I will quickly take you to, and this is one that I have mentioned in my written submissions but that's an order of pick for relief. And that reads, 'Relief arrangements to be utilised in the port and casual usage. Relief work requirements that supplement the roster will usually be covered by permanent part-time employees, casual employees, permanent full-time employees.'

PN369

Now, not forgetting that 41.27 tracking back is clearly a matter that sits under 41.2 which provides that the POPs will set out details in respect of the following subject matter.

PN370

So, in my respectful submission, there are a number of textural considerations which support the highly uncontroversial proposition that rosters in a POPs will include necessarily the employment categories.

PN371

DEPUTY PRESIDENT ASBURY: And that there's a distinction between the employment categories of permanent and the employment category of fixed term.

PN372

MR NEAL: Exactly. Which leads me to our appeal. And thank you, your Honour, for the appropriate segue. Now, the finding that we take issue and I got slightly excited about in terms of the enumerated appeal grounds in mine. I think there are 13 of them all-up in my notice of appeal. I'm much more junior than my friend so I'll get there eventually. But the finding that we really take issue with and which concerns my appeal grounds one to six, is this finding that somehow fixed term employment is a subcategory of permanent employment for the purpose of the agreement.

PN373

Now, as I say, Mr Fagir this morning, despite my youthful appearance it was some time ago that I studied labour law before Professor Ryan McCallum at Sydney University and one of the first things that we were taught was that there are three categories – four categories, really, of employment. Permanent employment, fixed term/task and casual.

PN374

So on first principle we say the notion that somehow fixed term employment fits within the category of permanent is, as I have said at the beginning, at the risk of being too humorous it is an oxymoron. They are simply two complete opposites and one is exclusive of the other.

PN375

Now the distinction that his Honour uses in paragraphs 94 through 96 of the decision is ongoing for a day – well, ongoing for more than a day versus non-ongoing. In my respectful submission that's the wrong distinction. The correct distinction, as my friend in part points out – Mr Fagir – in his written submissions by the use of the Oxford Dictionary definition of 'permanent', the relevant distinction is between permanent and temporary.

PN376

Now, temporary can be ongoing but it's not permanent. And that is the appropriate distinction. And, indeed, somewhat curiously his Honour, I contend, makes that distinction elsewhere in the judgement which I'd like to take you to at paragraph 106. And you will see at the bottom of the paragraph – the last sentence, rather, of the paragraph – this is Appeal Book 46.

PN377

'Implicit in the notion of engaging an employee for a specified period of time or task is that there be some connection between the basis of the engagement and the period of time or the specified task. That is, an employee engaged for a specified period of time is engaged on the basis of being engaged on the basis of a period of time as defined, i.e. a temporary versus permanent period.'

PN378

Similarly, the Full Bench will see at paragraphs 56 that Svitzer itself recognised. And it's the first sentence of paragraph 56. Svitzer argued that clause

15.41 allows fixed term employees to form part of the broader category of permanent full-time, save that the fixed term employees are engaged for a limited period.

PN379

And so I come back to what I said at the outset about this point. The distinction is the limited period of engagement, versus the indefinite period of engagement or permanent period of engagement of a permanent employee.

PN380

The final point that I wish to make about the distinction that we say is erroneously made by his Honour in the judgment relates to a finding, again somewhat curious we've raised with respect to the Brisbane POPs, which is set out at paragraph 123 of the decision. And that's at Appeal Book 49.

PN381

And so you will see there – this is talking about the Brisbane POPs and his Honour finds, 'The reference to a 'suitable number of permanent and fixed-term employees shall be engaged' suggests that the framers are referring to two different types of employees. The references to permanent employees in this regard are references to employees who have ongoing employment, and who are not engaged for a specified time or task.'

PN382

Now, in my view, that finding of his Honour – I should say in my submission – that finding of his Honour is inconsistent with the finding elsewhere at 94 to 96, that the relevant distinction is ongoing for more than one day versus non-ongoing.

PN383

In other words, his Honour got it right at 123 but got it wrong at 94 to 96. And taking it one step further, the distinction in the Brisbane POPs between permanents and fixed termers, in terms of the structure and the language, is no different to the structure and language of clause 15.11 and clauses 15.2 to 15.6.

PN384

So, in my view, that points to an error in his Honour's – pardon me, in my submission, that points to an error in his Honour's decision – which he effectively acknowledges at paragraph 123 in his finding in relation to the Brisbane POPs. Again, I make the point respectfully, but it just seems to me that he's somewhat obvious. Just one moment.

PN385

DEPUTY PRESIDENT ASBURY: But isn't he saying that the way that it's expressed in the Brisbane POPs is different?

PN386

MR NEAL: Well, he's saying the reference to a suitable number of permanent and fixed term employees but he doesn't go any further than noting that there's a distinction between permanent and fixed term employees in that sense, or in that manner. And that's exactly the manner in which the distinction is made, in my

submission, in clause 15.11 when the four categories of employment are listed therein.

PN387

I can't see any substantive difference between the way that it's expressed. There is a substantive difference, for example, to take your point, your Honour, in the Melbourne POPs which refer to permanent full-time employees engaged in accordance with clause 15.2 and permanent part-time employees engaged in the clause. That is a different distinction. That is definitely. But there the distinction made is just the use of the words 'permanent' and 'fixed-term' in opposition to each other, which is exactly the way that they're used in clause 15.11.

PN388

And so I can't put it any higher in that it seems to me an internal inconsistency in his Honour's reasoning process and I think it's one that's infected it and it's caused him to give the erroneous interpretation to clause 15, so far as the nature of permanent employment is concerned.

PN389

And just one last clause going to the issue of the distinction between permanent and fixed terms that I would like to take the Full Bench to, and that's clause 15.6. And that's at Appeal Book 1103. And you will see there that this concerns trainees. 'A person may be engaged as a trainee. Remuneration and conditions of trainees are as set out in clause 24.5.' I don't need to take you there.

PN390

'When trainees satisfactorily complete their traineeship they will become eligible to apply to Svitzer for available employment as an employee under one of the employment categories specified in clauses 15.2 to 15.5.'

PN391

In my view, in my submission, another indication that fixed term is a separate category to permanent full-time, permanent part-time and casual employment. Once a trainee completes their traineeship they can be employed in one of the categories, 15.2 to 15.5, and it is clear there that the agreement is not including in the permanent full-time category the category of fixed term employment, in my respectful submission. Just one moment please. They're all the submissions I wish to make, unless there are any questions?

PN392

COMMISSIONER McKINNON: I've just got one question about the Brisbane POPs.

PN393

MR NEAL: Sure.

PN394

COMMISSIONER McKINNON: One potential way of reading subclause 1(b)(1) on page 1202 of the book – is that the POPs contemplates that fixed term employees will be part of the roster. Because, for example, the purpose of (b)(1) is to enable those people to receive their leave entitlements. And then subclause

(2) provides for additional fixed term employees to supplement permanent employees.

PN395

MR NEAL: I understand that. I mean obviously I would say that what that – how that should be read is that additional employees who are fixed term employees may be engaged to supplement the employee categories that have been included in (b)(i) which are the rostered crew members who make up the roster, additional to the employees who make up the roster, fixed term employees may be engaged from time to time to supplement permanent employees to provide relief. So I think it's clearly for the purposes of relief, not for fulfilling the minimum or maximum requirements – however, you want to describe it – of the roster as set out in (i) of subclause (b) – for the purposes of relief.

PN396

There's nothing further? Thank you.

PN397

DEPUTY PRESIDENT ASBURY: Would half an hour be sufficient for a break? So we'll adjourn and we'll come back at 20 to. Thanks.

SHORT ADJOURNMENT **[1.10 PM]**

RESUMED **[1.48 PM]**

PN398

DEPUTY PRESIDENT ASBURY: Mr Neil?

PN399

MR NEIL: It falls down to me, thank you, your Honour. May I deal first with our reply? The submissions put against us in our appeal. Then when I have dealt with that move to respond to the submissions made in connection with the union's appeal. The latter will be relatively short, given the way that the oral submissions were developed this morning.

PN400

Very well, our appeal. The content first. The content of the Melbourne and Brisbane POPs that is in issue here was variously identified. First, the minimum number of employees in particular categories. Then, in the second formulation different in expression but similar, in effect, work for composition is a second way in which the subject matter was described.

PN401

These three things we say about that. First, neither – not one of those subject matters – neither of those subject matters, however expressed, is mentioned in clause 41.2 Second, neither of those subject matters is authorised by clause 41.2 as a subject matter with which a POP may supply details, about which a POP may supply details.

PN402

Third, no legally cognisable or recognised mechanism for giving was identified that could give effect to POPS dealing with those topics, at least two give POPs dealing with those topics primacy over an inconsistent provision in the enterprise agreement, being clause 15.1.1.

PN403

The best that could be done was to thankfully suggest that the word 'roster', as it is used in clause 41.2.1(ii) ought to be construed – I'm sorry – as something that encompassed those subject matters. How that was so was not identified, other than vaguely by reference to past custom and practise, that is pre-agreement conduct.

PN404

There are two difficulties with that. The first is that if one looks at such evidence as there is of conduct of that kind then it demonstrates that the parties conducted them or parties to POPs or enterprise agreements – both – conducted themselves in a way that did not incorporate the concept of workforce composition or minimum number of employees or even employment categories in a roster.

PN405

Appeal book volume two, page 720. This is the roster – a roster employed in connection with the Newcastle POPs in 2013. That was the one earlier POP that we pointed to. And one can look at it here – not a single word about employment category in this roster. Next, page 1199.

PN406

DEPUTY PRESIDENT ASBURY: Sorry. Not a word about employment category. What does the heading – 28 perm plus eight PPT crew roster – and then wouldn't you think that where there's two names on a line of the roster that means that they're probably part-time?

PN407

MR NEIL: Who knows?

PN408

DEPUTY PRESIDENT ASBURY: Well - - -

PN409

MR NEIL: What one doesn't say is that this doesn't tell you – this doesn't prescribe a break-up of workforce composition of the kind that our learned friends are contending for – certainly not as we see this roster. Then page 11 – Volume 3.

PN410

DEPUTY PRESIDENT ASBURY: Sorry, 113?

PN411

MR NEIL: 1199.

PN412

DEPUTY PRESIDENT ASBURY: Sorry, 1199.

PN413

MR NEIL: Which is in Volume 3.

PN414

DEPUTY PRESIDENT ASBURY: Yes. Mine's been jammed into two. I'm sorry, Mr Neil. 1199.

PN415

MR NEIL: 1199. So far as I can tell this is a Newcastle POP 2019 – the same point. Then 1213 to 1216. This is a Brisbane POP and that there's some – and, again, the same point.

PN416

DEPUTY PRESIDENT ASBURY: Yes.

PN417

MR NEIL: So that's one answer that we make to the proposition that some place some enorminant mechanism the word 'roster' ought to be construed to mean something that includes categories of employment – workforce composition – minimum numbers of employees in particular categories.

PN418

DEPUTY PRESIDENT ASBURY: But it says – take the Newcastle one – on page 1199. Well, on 1198 it's got the 32 full-time crew, 12-hour nine tug roster. And it says, 'The following permanents will be employed in Newcastle, 32 masters, 32 engineers, 32 general purpose hands.' And then it also says the PPTs the page before. So that to - - -

PN419

MR NEIL: Sorry. I just need to catch up. I'm sorry.

PN420

DEPUTY PRESIDENT ASBURY: Sorry. It's page 1198. So to make that 32 crew full-time crew roster work that's the manning that you need.

PN421

MR NEIL: That's part of the POP, not the roster.

PN422

DEPUTY PRESIDENT ASBURY: Well - - -

PN423

MR NEIL: The roster is on 1199.

PN424

DEPUTY PRESIDENT ASBURY: Yes, but it would all be in the same document – the page after. Like that's what they look like. So that would be on the page before the roster. So it would essentially – it's in the POPs – that that's how they make up the roster.

PN425

MR NEIL: The POP tells you how – according to clause 41.2 – the POP tells you what the roster must contain.

PN426

DEPUTY PRESIDENT ASBURY: Yes.

PN427

MR NEIL: We read this – 1198 which is the POP.

PN428

DEPUTY PRESIDENT ASBURY: Yes.

PN429

MR NEIL: Even at one, two, three, four – the fourth last dot point – the roster that applies will be a roster in attachment one and two and then so that would indicate that what one sees at 1198 is not the roster. The roster is what follows.

PN430

DEPUTY PRESIDENT ASBURY: Yes. But then the agreement says that 'Port rosters will as far as practicable include the detail of work days, the component of predictable leave days and the number of crews on duty and on leave required to man the roster.'

PN431

MR NEIL: And that it does all of those things. The actual roster – the simple point we're making – when one looks at the actual roster it can be seen it does all of those things without descending to dealing with workforce composition, minimum number of employees in employment categories or employment categories at all.

PN432

DEPUTY PRESIDENT HAMPTON: So you say the roster is the table?

PN433

MR NEIL: Yes.

PN434

DEPUTY PRESIDENT HAMPTON: In effect.

PN435

MR NEIL: Yes. One can't read that fourth last dot point on 1198 in any other way we would suggest.

PN436

DEPUTY PRESIDENT HAMPTON: But you accept that the POPs, nevertheless, contained these provisions – some of them at least contained provisions of this kind that - - -

PN437

MR NEIL: Yes. Yes.

PN438

DEPUTY PRESIDENT HAMPTON: - - -purported to establish employment categories.

PN439

MR NEIL: Correct. Correct, we do. The second point we make of that is this notion that rosters – the word 'roster' in 41.2 ought to be construed to mean something that includes categories of employment is to say that if that were true, that is, if the word 'roster' was to be construed to accommodate to include everything that rosters conventionally dealt with or that Svitzer's rosters dealt with.

PN440

And taking – and assuming against us that the rosters do, in fact, say something about employment categories, then one would ask what is the point of the rest of clause 41.2.1(ii)? Why would it be necessary for the enterprise agreement to go on to say anything at all about rosters if the word 'rosters' incorporated everything that would be – that was conventionally included within a roster at Svitzer. Each of the subject matters that clause 41.2.1(ii) goes on to identify are actually dealt with in the rosters.

PN441

Next point, it was put against us that there was no inconsistency here, because nothing in the POPs as they were construed by the Deputy President, in findings with which we don't take issue, nothing in the POPs prevented us from engaging fixed term employees. The difficulty, of course, is that as the Deputy President found in paragraphs 125 and 126 in relation to the Brisbane POPs, in paragraph 129 and 131 in relation to the Melbourne POPs, if we could employ fixed term employees we couldn't employ them and roster them to do any actual work.

PN442

One asks if that's the effect of the POPs as it is, then where does one find that prohibition reflected anywhere in the language of the enterprise agreement? How can one accommodate that with – of the permission granted by clause 15.1.1. Where does one draw the line – one might ask rhetorically? Does it all depend on the purpose for which Svitzer engages the fixed-term employees?

PN443

Questions about Svitzer's motivation colourfully opened to submissions for the AIMPE and the AMOU. The POPs say nothing about that. Nothing at all about that. No prohibition of the suggested nefarious purpose for which Svitzer was engaging the fixed term employees whose employment generated this dispute.

PN444

There is evidence – Volume 1 of the Appeal Book – behind tab seven, at page 221 of the Appeal Book, that for a long time Svitzer had engaged fixed term employees for all sorts of purposes. Paragraph 47, on page 221. That evidence was not challenged.

PN445

Where does one find in the enterprise agreement any suggestion that these purposes are authorised but other purposes – for the employment of fixed-term employees – but other purposes are not? Next point: it was put against us that clause 41.2 was not exhaustively or exclusively prescriptive of the subject matters with which POPs could deal. We submit that or Svitzer submits that clause 41.2

read together with clause 41.1, and clause 5.3.1, ought not to be read in that way. Clause 40, the scheme we submit works in this way: clause 41.1 authorises the making of POPs to apply at particular ports. Clause 41.2 tells one that those POPs will - that is mandatory - will deal with particular subject matters.

PN446

The POPs that are so described and delineated in clause 41.2 are the POPs that are authorised by clause 41.1. Then the next part in the scheme, clause 5.3.1, takes up the POPs so authorised – authorised in clause 41.1, delineated in clause 41.2, and incorporates them into the enterprise agreement in the first sentence and then by the second sentence, provides for a mechanism of harmonising the two instruments. We'll come back to that in a moment. The word, 'will', in clause 41.2 in our submission is mandatory. It introduces an exhaustive list of the subject matters with which - - -

PN447

DEPUTY PRESIDENT HAMPTON: Which provide a foundation for the guidance.

PN448

MR NEIL: Correct.

PN449

DEPUTY PRESIDENT HAMPTON: To the parties, in developing port-operated (indistinct) - - -

PN450

MR NEIL: Correct – it's an instruction; 41.2 is an instruction.

PN451

DEPUTY PRESIDENT HAMPTON: That's a very unusual way of - - -

PN452

MR NEIL: It is. It is.

PN453

DEPUTY PRESIDENT HAMPTON: - - - expressing an instruction.

PN454

MR NEIL: It is. But - - -

PN455

DEPUTY PRESIDENT HAMPTON: Why would we read it - - -

PN456

MR NEIL: Well, it's unusual in this respect, in that it doesn't contain a mandatory instruction about how the particular subject matters will be dealt with or what details will be provided in relation to the subject matters but it is a mandatory list of the subject matters that a POPs will deal with. That's how - - -

PN457

DEPUTY PRESIDENT HAMPTON: That doesn't automatically mean it's an exclusive list.

PN458

MR NEIL: In our submission, that is the only sensible way to read it because of the significance that the – the point that reinforces that is the significance that the enterprise agreement itself attaches to the POPs and that does so by means of the first sentence in clause 5.3.1. Clause 41.2 falls to be construed against a background where the subject – the way in which a POP deals with a particular subject will become a term of the enterprise agreement, subject to the second sentence in clause 5.3.1. So there is a high significance to the – what the POPs are going to do.

PN459

It would be odd in a constructional sense, in our submission, if clause 41.2 was not construed in a mandatory way as an exhaustive list of subject matters because otherwise, clause 41.1 would be in effect an invitation at large to make POPs about any subject matter. Which POPs would then be invested – after made – with the significance of a term of the enterprise agreement? That would not be a sensible construction, in our submission.

PN460

DEPUTY PRESIDENT HAMPTON: It's subject to the express terms of the agreement proper and any inconsistency.

PN461

MR NEIL: Correct, correct – the point of resolution is of course always – or the point of harmonisation, and this is really the heart of our case, is the second sentence of clause 5.3.1.

PN462

DEPUTY PRESIDENT ASBURY: Mr Neil, I don't want to go frolicking off again but the two matters that you said – that the minimum number of employees in categories in the workforce composition – if you look at 41.2.7, even, as an example of how this works – and again, my understanding and I'll stand to be corrected – is essentially that the POPs is requiring crews to be available. That's one of the things that it does. So when there is shipping, there shall be crews and if we need crews and we don't have them, this is what we're going to do. So first call is this group, second call is that group, third call – they have to come. They have to come and if there's a leave-in running arrangement they have to come. They can't' even predict their leave, they just have to come and so why wouldn't it necessitate for the employees to accept there's an order of call and we have to respond – why wouldn't it be part of the bargain that you have to have sufficient people in those categories to make the thing work so that we can work within our fatigue requirements, we can meet the shipping, we can – because there's fatigue requirements, there's all kinds of other things.

PN463

So I'm just not understanding why you would say that the numbers in the categories – because if the first call is permanent part-time employees and the exception to that is other than during an off-duty period, then that requires you've

got to have enough of them to make it work and then you can only go to the second call when the first call is exhausted and the third call when the first and second call is exhausted.

PN464

MR NEIL: One could have none in the first call, and none in the second.

PN465

DEPUTY PRESIDENT ASBURY: Yes, but then you can call people off leave. So if that's the case, why wouldn't part of the bargain be you've got to have enough people so you're only calling us off leave in really - - -

PN466

MR NEIL: Well, that's – that might be numbers of employees but that's a different subject matter altogether. This is not what the Deputy President was talking about when he held in the findings we're not challenging that the rosters – that what the POPs said about the rosters, the content of the rosters, was a fetter on our power to employ people in particular categories of employment, such that we could not employ fixed-term employees to work on the rosters. Now, 41.2.7, as we read it, is not dealing with those subject matters at all. The number of employees we have in particular categories is not doubt, on our compliment, no doubt a matter for us.

PN467

DEPUTY PRESIDENT ASBURY: I accept - - -

PN468

MR NEIL: But that's not what this dispute is about.

PN469

DEPUTY PRESIDENT ASBURY: It doesn't specify the numbers but arguably because of the way that the – it all operates in uniformity, the POPs and the agreement, you need to have sufficient and that's why they've agreed on numbers of crews and numbers of - - -

PN470

MR NEIL: I don't know that we would speculate about that, with respect.

PN471

DEPUTY PRESIDENT ASBURY: I don't know I am speculating when that's what all the disputes are about.

PN472

MR NEIL: No one has ever linked – sought in any evidence to link the operation of 41.2.7 with the gravamen of this dispute.

PN473

DEPUTY PRESIDENT ASBURY: But you construe an agreement on the basis of the four corners of it. Everything - - -

PN474

MR NEIL: Of course but the point I suppose I'm making, with respect, is that one is only speculating about whether the resolution of this dispute one way or the other would have any bearing on the practical operation of 41.2.7. No one has any idea about that.

PN475

DEPUTY PRESIDENT ASBURY: But we can assume that the parties when they negotiated the POPs, did that – took care of that.

PN476

MR NEIL: If they dealt with this subject matter in a particular POP.

PN477

DEPUTY PRESIDENT ASBURY: The order of call is – I've yet to see one that doesn't deal with it because that's the essence of what they do. They make crews available when they're shipping. That's what the whole point of the exercise is.

PN478

MR NEIL: Perhaps I'm missing the point, which of course is my difficulty. But the subject matter of 41.2.7 is what happens – at least the first part of it – to supplement the roster, not what's in the roster. That's a different topic.

PN479

DEPUTY PRESIDENT ASBURY: But it's why you have the preamble to the roster with the number of crews – that part on the preceding page before the roster. That's why it's in the POP so it's why you have 1198.

PN480

MR NEIL: Sorry, could you just please excuse me for a moment?

PN481

DEPUTY PRESIDENT ASBURY: Certainly.

PN482

MR NEIL: Well, I must say that does not appear to (indistinct) from 1198 and I stand here now I'm not aware of any evidence that would tell me anything that appears on 1198 was informed by consideration of any matter dealt with in 41.2.7. There's just nothing to draw the connection.

PN483

DEPUTY PRESIDENT ASBURY: Well, I bet if I counted the crew roster I'd find that number of people on it to the nth degree. I bet if I counted the names on it and the hours on it and where there's two of them, I bet they're part-timers and they're sharing a line on the roster because that's how it works.

PN484

MR NEIL: This particular POP deals with the clause in clause 1195 and - - -

PN485

DEPUTY PRESIDENT ASBURY: But to make it – to mean that you get – you don't have to pull the permanent, full-time employees off their rostered leave on

every single occasion. You need the numbers of people and that's why they talk about that in the POPs.

PN486

MR NEIL: In clause 16, not in the roster – it's the roster rather than clause 16 which is said to be the fetter.

PN487

DEPUTY PRESIDENT ASBURY: Okay.

PN488

MR NEIL: I suspect I'm beginning to repeat myself.

PN489

DEPUTY PRESIDENT ASBURY: I understand your submission.

PN490

MR NEIL: The next point that we'd wish to deal with concerns the straw man that was raised against us, suggesting that we were contending that clause 15.1.1 gave Svitzer an absolute discretion, unqualified and unfettered. We were at pains instead to point out that the discretion that clause 15.1.1 conferred was a discretion to employ employees in any one of the four identified categories in accordance with clauses 15.2, relevantly to 15.5. Put in that way, the starting point of our argument acknowledges that clause 15.1.1 is a limitation on what at common law would be our absolute discretion to employ anyone we like in any category we liked on any terms we liked.

PN491

The real point is that once we pass through that limitation then there is an absolute, unqualified and unfettered discretion to employ employees in any category nominated in clause 15.1.1 in accordance with the provisions of clauses 15.2 to 15.5. Next, it was suggested or put against us that the tests of inconsistency that Svitzer relied upon were inappropriate, because in this case, one was construing a single instrument. Could we start for a moment by drawing attention to the proposition that what is being construed here is a single instrument. It is an instrument – namely, the enterprise agreement – that includes clause 5.3.1. The idea that one must give every – or the proposition that one must give or seek to construe, to give meaning and effect to every provision in an instrument and give that provision some work to do, harmonious with the other – harmoniously with the other provisions in that instrument. All of that is a principle of construction. It's not a principle of construction with which we seek to take issue but it's not a principle of construction that tells you anything about how to apply clause 5.3.1.

PN492

Clause 5.3.1 is the mechanism by which this instrument achieves harmony between the enterprise agreement and the POPs. In that regard, one might reflect on the – we submit with respect – on the width and the generality of the language employed in the second sentence of clause 5.3.1. Any inconsistency, any term of a POP – you don't have to give meaning and effect to the term. There's no requirement, no injunction, no need to give – to strain to give meaning and effect

to every term of a POP if to do so is to avoid the operation of clause 5.3.1. The next point we make is to submit that contrary to the way the case was put against us, for the purposes for the second sentence of clause 5.3.1, the Commission is effectively dealing with two different instruments, not one.

PN493

Although the first sentence has the effect of incorporating the terms of the POPs into the enterprise agreement, the whole construct of the second sentence is to require a comparison between the terms for the enterprise agreement and the terms of the POPs – two different things. And then it tells you now to resolve any inconsistency identified by that comparison. Next, can we – may we say something about the submissions made in relation to the concept of inconsistency? In our submission, taking up the language of Blakely, to which our learned friend Mr Fagir referred, clause 15.1.1 manifests an intention by its language, manifests an intention to deal exhaustively with the topic of employment categories – the categories in which Svitzer can employ people. One cannot find in the enterprise agreement any other provision that manifests an intention to deal differently with that topic.

PN494

The extent of the inconsistency between the provisions of the POPs in question here and clause 15.1.1 is demonstrated by – may we say, with respect – a proposition that Commissioner McKinnon raised with our learned friends, which was to ask how can one fit fixed-term employees into the Melbourne POPs – into the language of the Melbourne POPs? And the answer is, of course, one cannot. Flatly, one can't do it, as the Deputy President found in paragraph 129 of the primary decision. The only answer to that conundrum that our learned friends were able to come up with was to point to some vague custom and practice of acquiescence or understanding that fixed-term employees could be employed in this way. It suggested the kind of thing that the parties have let go through to the keeper. That's not a principle by which one can construe an instrument of this kind. That is not an approach which, in our respectful submission, would illuminate the construction and application of these provisions.

PN495

Now, if it please, that's what we'd wish to say by way of reply in connection with our appeal. Can we turn to the – our response to the union's appeal? Just there, the two – the unions having each relied substantially on what they have put in writing, we will do the same. We did, however, wish to make three short points. The submissions for the AIMPE and AMOU started with the dictionary meaning of the word, 'permanent', and suggested that that provided the whole answer to the question. The difficulty with that is that – in our submission – that it elevates the dictionary meaning of that word over the way in which the word is used in the enterprise agreement, including, in clause 15.4. As the Deputy President found, we submit correctly, in paragraphs 100 to 105 of the primary decision, the concept of fixed-term employment, employment for – to use the precise language – or engagement or a specified period of time/task.

PN496

That concept was a subset of permanent employment in either of the two categories mentioned in the first two dot points in clause 15.1.1. The reasoning,

as we say at paragraphs 100 to 105, it's perhaps best put in the paragraph 105, in the second, third and fourth sentences – all but the first sentence of paragraph 105, which we would adopt as correct. So of course it is now accepted that the utility of relying upon the dictionary meaning of words is questionable. Dictionaries can be helpful in identifying the range of possible meanings of a word but not whether the word has that particular meaning, has any particular meaning in a particular instrument in a particular context. Could we just – sorry, I didn't have time to have this copied but could we give a reference to TAL Life Ltd v Shuetrim, volume 91 of the New South Wales Law Reports at page 439. The relevant passage is at paragraph 80.

PN497

If it would assist I can have a copy sent later this afternoon.

PN498

DEPUTY PRESIDENT ASBURY: Thank you.

PN499

MR NEIL: In any event, even if the dictionary meaning has some – or recourse to the dictionary meaning has some utility, then that is subject to the proposition, now conventional, that the ordinary and natural meaning of a word or expression may be displaced where it clearly appears that the word or expression has been used in a special sense, peculiar to the making of the – makers of the document. And that's what's happened here – they've used the concept of permanent employment in a way that allows fixed-term employment under the enterprise agreement to be a subset of permanent employment. The critical distinction in the enterprise agreement, as we've submitted in writing, is not between permanent employees and fixed-term employees. It's between permanent employees of whom fixed-term employees are a subset, in this enterprise agreement, on the one hand, and casual employees on the other hand. We've made some submissions about that in writing.

PN500

The second and last point we wish to make in this part of our submissions, our response to the unions' appeal, is to take up if we may, with respect, another question asked by Commissioner McKinnon, this time about clause 16 of the enterprise agreement. And the question as the Full Bench will recall was whether fixed term employees were encompassed in any way in that provision, and the answer in the end was, no, they were not. With the result, it must be said, if the unions' construction were to be accepted, the result would be that the whole topic of selection and recruitment, the whole regime established by the enterprise agreement in relation to those two topics, topics critical to any employment relationship, we might submit, the whole of the regime was one from which fixed term employees were excluded, nothing was said in the enterprise agreement about fixed term employees in relation to that topic.

PN501

And that's not the only provision of this enterprise agreement about which that could be said. Other provisions were identified to the Deputy President, and this is recorded in paragraph 56 of the primary decision, page 39. The Deputy President dealt with the topic at length in paragraphs 92 through to 95 of the

primary decision, pages 44 to 45, in ways that we submit, with respect, are correct.

PN502

In the appeal book at pages 1051 to 1053 the Commission will find, 1051 to 1053, a list of other provisions that fall into exactly the same category as clause 16, and the significance of that of course is, as we have submitted in writing relying on Amcor, that it is not industrially sensible to have an enterprise agreement construed in a way which excludes a whole recognised category of employee from the operation of provisions of this kind.

PN503

There are two exceptions to this, and really only two to this proposition. One is clause 42 that our learned friend Mr Neal addressed immediately before lunch. That's the question of leave, and that does deal specifically with fixed term employees and does so differently than it deals with other permanent employees. In our submission it's easy to see why that is so given the relationship between fixed term employment and leave, and the Deputy President correctly recognised that in the paragraphs to which we have earlier drawn attention, paragraph 92 for example.

PN504

As the Deputy President acknowledged in that same paragraph, paragraph 92, there's another exception to that general rule, the general rule being that the enterprise agreement treats fixed term employees as a subset of permanent employees. The other exception is redundancy. That's clause 21.1 on page 1115. That's a provision, I'm sorry, that I hadn't drawn to the Commission's attention earlier. And again it's easy to see why a redundancy provision would deal separately and differently with fixed term employees, because of course fixed term employees don't have the expectation of continuing employment, which is the touchstone of an entitlement to redundancy as conventionally understood; Berkley Challenge in the Federal Court and so on.

PN505

DEPUTY PRESIDENT ASBURY: Is it treating them as a subset or is it just saying some things they get and some things they don't?

PN506

MR NEIL: As a subset. That's the proper - - -

PN507

DEPUTY PRESIDENT ASBURY: Is that necessarily - - -

PN508

MR NEIL: That's our submission.

PN509

DEPUTY PRESIDENT ASBURY: I understand.

PN510

MR NEIL: And that flows, we submit, not just from a consideration of all of those provisions as a whole, but also from the language of clause 15.4. This, with respect, is the last point we wish to make having a look at the time. As we point out in writing the unions, appellants in this part of the case, would have it that clause 15.4 is only a kind of a deeming provision or a provision that just says you can treat fixed term employees for certain purposes as though they are permanent employees.

PN511

Two points we make about that. One is that that is to construe clause 15.4 without the purposive generosity that is appropriate to the construction of an enterprise agreement. The second is that when one looks at the actual meaning that's not the concept that clause 15.4 is seeking to lay down, but the link is the word 'is' in clause 15.4, and what it is saying is that there is a direct immediate and complete coincidence between fixed term employees and employees employed on a permanent basis. They are the same thing. Not deemed to be the same thing, they are the same thing. That's the submission. Unless the Commission has any more of us at this stage that's what we wish to say by way of reply in our case which completes the submissions on our appeal and response in the unions' case.

PN512

DEPUTY PRESIDENT ASBURY: Thank you.

PN513

MR NEAL: Thank you, your Honour. If I might work backwards. There are three provisions, not two, in the agreement to make the distinction between permanent employment and fixed term employment. The third that my friend failed to mention is a critical one, and that's clause 24.3 which is at appeal book 1120, and this concerns the salaries that are payable to an employee employed in the specified period of time or specified task category. And you will see there that the clause reads:

PN514

Employees engaged for a specified time or task will be paid as a permanent full-time employee or as a permanent part-time employee.

PN515

Again consistent with the unions' contended construction that clause 15.4 is a deeming provision, which for the purposes of terms and conditions of employment fixed term employees under the agreement deems a fixed term employee either a permanent full-time or permanent part-time employee again only for the purposes of terms and conditions of employment.

PN516

And just on that in relation to the terms and conditions of employment set out at paragraph 56 of the decision, which is clause 39 of the court book, it should come as no surprise that those terms and conditions don't mention fixed term employees, because of course the entire weight of the evidence in this case, and indeed concluded by his Honour at paragraph 26 of the decision, which is - sorry to jump around a bit - pardon me, 28, almost there, which is at paragraph 34 of the appeal book, is as follows:

PN517

None of Svitzer's evidence displaced or disproved the assertion in the unions' case that prior to 2022 Svitzer has only ever utilised employees on fixed term contracts to cover temporary absences or temporary circumstances.

PN518

And of course those temporary absences are absences in permanent full-time or permanent part-time positions. And so in circumstances where the weight of the evidence is that those are the roles that are being filled by permanent fixed term employees it was almost the notorious fact in terms of the principles stated by the Full Bench in Berri it should come as no surprise that those terms and conditions listed at paragraph 56 make any differentiation, because nine times out of ten a fixed termer is working in a permanent full-time or permanent part-time role on a temporary basis. That's all I wish to say in relation to the terms and conditions that are pointed to as proof positive that a fixed termer is indeed a permanent employee for the purposes of the agreement. The other matter that I wish to raise - - -

PN519

DEPUTY PRESIDENT HAMPTON: But how does that overcome the point?

PN520

MR NEAL: Well, it overcomes the point because the fixed termer remains a fixed termer. They're in a substantive role which is a permanent full-time or permanent part-time role, but they remain a fixed term employee whilst in that role. They receive the terms and conditions of a permanent full-time or a permanent part-time employee, and so that is why the drafters of the agreement in relation to those terms and conditions have not seen it as a necessity to make a distinction. If you're working in a full-time role, if you're engaged on a contract of which there are some in the appeal book, on a fixed term basis, you are as I say the weight of the evidence is that nine times out of ten you're filling a permanent full-time or a permanent part-time role.

PN521

The agreement describes to employees filling those roles certain terms and conditions. If you happen to be filling that role on a temporary basis it naturally follows that unless the agreement says otherwise you receive those terms and conditions, and that's consistent with what we say, if I can just try and explain slightly further. That's consistent with what we say about clause 15.4 which is at appeal book 1103, and just to revisit the language there that my friend Mr Neil spoke of earlier.

PN522

An employee engaged for a specified period of time or a specified task is an employee who works on either a permanent full-time or permanent part-time basis, but is engaged for a specified period of time.

PN523

The engagement is for a specified period of time. They naturally work on a permanent full-time or permanent part-time basis because they're filling such a role. There are terms and conditions throughout the agreement that are ascribed to

a permanent full-time or permanent part-time role, and they receive those terms and conditions while they're in the role. I think that closes the circle, and that's all I wish - - -

PN524

DEPUTY PRESIDENT HAMPTON: I will need to think about that.

PN525

MR NEAL: Sorry?

PN526

DEPUTY PRESIDENT HAMPTON: I will need to think about that.

PN527

MR NEAL: In my submission that closes the circle.

PN528

DEPUTY PRESIDENT HAMPTON: All right. Thank you.

PN529

MR NEAL: Of course you will. Thank you. Unless there is anything further. Thank you.

PN530

DEPUTY PRESIDENT ASBURY: Thank you.

PN531

MR FAGIR: I have three short points. One is definitely in reply; one's a correction, perhaps just drawing your Honours attention to something that may have been misstated; and the third probably isn't required if Mr Neil said he wants to say something about it. I wouldn't be heard to gainsay that.

PN532

Could I firstly just point that the Bench was taken to page 720 of the appeal book, and if I was following correctly and I may well have got this wrong, but it was said that this roster says nothing about types of employment. But I just point out that beyond what your Honour Deputy President Asbury pointed out the title of the roster is that it's a 28 crew plus permanent part-time.

PN533

There are a series of entries in the second category which refer to PPT crews 1 and 2, 3 and 4, 5 and 6, and 7 and 8, and perhaps it's a matter of inference, but an obvious one that PPT refers to permanent part-time crews, and this illustrates again how the mode of engagement is a critical part of the construction of the rosters. It might be possible to construct them out of one mode, but here for these 2013 Newcastle POPs there seem to have been three types of rosters built of different building blocks. In this case the building blocks included eight permanent part-time crews.

PN534

The second point that I wanted to make, and this is the width of the staircase, which (indistinct) the point that you should have made and then remember it on

your way out of the dinner party. When Commissioner McKinnon asked me about how fixed term employee might be accommodated within a particular POP beyond what I already said I should have said that the fact that it would be - there was no obvious way to accommodate a fixed term employee or crew in a base roster it would not be surprising. It's not something that suggests a problem with the position my clients advance, and I say that in particular for this reason, that the agreement expressly indicates in clause 41.2.1(iv):

PN535

The agreement expressly provides that permanent full-time employees are the main source of crewing for the port roster and permanents supplement the roster.

PN536

That is not just what my clients would prefer, obviously it is, but that is the bargain that was struck in the agreement. The fact that the basic structure of a roster or working arrangement in the port doesn't obviously accommodate fixed term employees is not unusual.

PN537

While I'm on this point could I just point out that at first glance the fact that this provision appears under the heading 'Port rosters' would be strange. Ordinarily we will deal with this sort of issue not under a heading of 'Rosters' but some other part of the agreement, but it's in here because this issue of rosters and types of employment are completely bound up together in this particular structure.

PN538

The last point, and this may actually be in reply, in terms of dictionary definitions your Honours and Commissioner referred to a decision of the Court of Appeal in TAL Life Limited. In dealing with the issue it was said the idea that the meaning has to be consistent with the basic English language meaning of the word often doesn't help us because there's a range of meanings that can attach to a word or to a phrase. That is what the Court of Appeal pointed out in TAL.

PN539

It said there the word in issue was 'unlikely', and the point that was being made is the word unlikely in different context could have a whole range of meanings. So simply saying the dictionary says unlikely means one, two, three, four, five, doesn't help you very much because you've still got to work out which of those options should be taken up.

PN540

The point we make about the word 'permanent' is that it is in a different and unusual category, which is there is no - it doesn't matter how many dictionaries you look at you're not going to find a meaning of the word 'permanent' which accommodates the idea of something with a fixed end point being permanent. It's pretty unusual. It doesn't help us all that often. That's why some of us have rooves over our heads because there are so many choices to be made in interpreting meaning, but this is different. There's no version of the meaning of the word 'permanent' that comprehends a thing with a fixed end point. If the Commission pleases.

PN541

DEPUTY PRESIDENT ASBURY: Are you going to take up - - -

PN542

MR NEIL: I am, but I'm going to keep it very short.

PN543

DEPUTY PRESIDENT ASBURY: I would have had a big bet on that, Mr Neil, if I had an opportunity.

PN544

MR NEIL: Your Honour knows me too well. The short point that we did wish to make about the point, not in reply, concerns clause 41.2.1(iv) and the reference there to permanent full-time and part-time employment. That was raised as a means of indicating why it was that the Melbourne POPs would not accommodate fixed term employees. The difficulties that the argument is perfectly circular because this provision appears in an enterprise agreement, which as the Deputy President found, we submit correctly, encompasses fixed term employees within the concept of permanent employees. That's the only point we wish to make.

PN545

DEPUTY PRESIDENT ASBURY: Thank you for your submissions, they've been very comprehensive and helpful, and we will reserve our decision and issue it in due course, and we will adjourn.

ADJOURNED INDEFINITELY **[2.48 PM]**