



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK

AG2023/2387

s.185 - Application for approval of an enterprise agreement

**Application by OMSB Pty Ltd (Formerly Onslow Port Services Pty Ltd)
(AG2023/2387)**

Melbourne

2.00 PM, TUESDAY, 19 SEPTEMBER 2023

PN1

THE DEPUTY PRESIDENT: Yes, good afternoon. Ms Klimczak, you're appearing for the applicant?

PN2

MS KLIMCZAK: Yes, thank you, Deputy President – I seek permission to appear and represent the applicant.

PN3

THE DEPUTY PRESIDENT: Yes, thank you. Mr Edmonds, you're appearing for the CFMMEU?

PN4

MR EDMONDS: I am, thank you, Deputy President.

PN5

THE DEPUTY PRESIDENT: Presumably there's no objection to the application for the applicant to be legally represented?

PN6

MR EDMONDS: No, we accept there's some complex issues that arise in relation to this application that probably need assistance from counsel for the applicant at the very least.

PN7

THE DEPUTY PRESIDENT: Yes, thank you, Mr Edmonds. Ms Klimczak, permission is granted.

PN8

MS KLIMCZAK: Thank you.

PN9

THE DEPUTY PRESIDENT: Have the parties had an opportunity to have a discussion about how the matter should proceed this afternoon? No? Well, Ms Klimczak, is there any intention for there to be any cross-examination of the respondent's witness?

PN10

MS KLIMCZAK: Yes, thank you.

PN11

THE DEPUTY PRESIDENT: You wish to cross-examine the respondent's witness?

PN12

MS KLIMCZAK: Yes, thank you.

PN13

THE DEPUTY PRESIDENT: Okay, in that case, Mr Edmonds, shall we deal with your witness first?

PN14

MR EDMONDS: That seems like a sensible course, thank you. Is it appropriate now just to make a few comments before we start?

PN15

THE DEPUTY PRESIDENT: I'm happy for you – you want to say something by way of opening?

PN16

MR EDMONDS: Yes.

PN17

THE DEPUTY PRESIDENT: All right.

PN18

MR EDMONDS: I suppose, Deputy President, this application was made on 13 July of 2023, to approve the OMSB enterprise agreement of 2023. We say that the task for the Commission today seems relatively clear, although some complexity arises in relation to the application of the agreement itself. The agreement itself applies to employees of the company engaged to perform work at the OMSB, which is the Onslow Marine Support Base, which is found at the Port of Onslow, and the Port of Ashburton, which is a separate port to the Port of Onslow. Of course my friend contends – or the applicant, rather, contends – that the relevant award for the purpose of the BOOT is the Port Authorities Award of 2020.

PN19

THE DEPUTY PRESIDENT: On the basis that it's a port operator?

PN20

MR EDMONDS: Yes, yes.

PN21

THE DEPUTY PRESIDENT: In relation to the Port of Onslow at Beadon Creek and your point is – which was an issue that I was going to raise in any event – that whether or what capacity does the applicant operate at the other place identified in the agreement.

PN22

MR EDMONDS: Yes, and that was certainly something that we intended to raise in cross-examination. It's not clear from the award, how that ought be treated, although I think it would be implied or indeed clear from the Port Authorities Award that one simply couldn't be a port authority at one port and then sell all sort of other services at other ports and other enterprises around the country and simply rely upon the Port Authorities Award to provide you the coverage and the exclusion from the operation of the Stevedoring Industry Award.

PN23

It's not clear and I can't find any authorities on that point as to how that ought be treated, although I think that's a difficulty for the applicant, in that respect. At least insofar as the Port of Onslow is concerned, though, we accept that if the Port

Authority – sorry, if the Port Authorities Award applies to the applicant's operations in the Port of Onslow, then that excludes the stevedoring award at the very least from the Port of Onslow.

PN24

THE DEPUTY PRESIDENT: All right, let me ask you this, Mr Edmonds: do you accept in light of the gazettal and the terms of the Maritime Transport Offshore Facilities Securities Act and in particular the definition of port operator in s14 thereof that the applicant is, visa vis that port, a port operator as such that the Ports Award would apply?

PN25

MR EDMONDS: I don't, Deputy President, and the reason why I don't is that the question of whether or not the Port of Onslow is a port and whether the applicant is a port operator, doesn't turn on the notices given by the federal government in that respect. That simply, I suppose, gives permission or provides a basis for vessels which are caught by the Maritime Transport and Offshore Facilities Security Act 2003, to call that the supply base found at Port of Onslow, Beadon Creek. That doesn't mean that they're a port operator for the purposes of the Port Authorities Act or the Department of Transport in Western Australia.

PN26

It certainly doesn't establish that for the purposes of the award, that they're a port operator. The definition of, 'Port operator', at clause 4.2 of the Port Authorities Award does not refer to the government gazette and doesn't refer to the MTOFS.

PN27

THE DEPUTY PRESIDENT: Well, what it refers to is whether relevantly the operator has a statutory right to manage and control, et cetera.

PN28

MR EDMONDS: Yes.

PN29

THE DEPUTY PRESIDENT: Doesn't the appointment under s14 of the Maritime Transport Offshore Facilities Securities Act give such statutory authority to manage that port if that port be a port? Do you accept that much?

PN30

MR EDMONDS: No, I don't, because it's no different to a stevedoring operator or someone else who has got authorisation to control access to their particular berth within a port. It certainly doesn't give the applicant the statutory or contractual right to control the entire port, just part of that port.

PN31

THE DEPUTY PRESIDENT: Perhaps there seems to be a dispute about whether or not the particular facility, the Beadon Point Port, is a port at all. If it is a port, do you accept that the appointment under s14 constitutes the relevant statutory authority, if it be a port?

PN32

MR EDMONDS: If the supply base is a port, is it separate, as a separate facility, is that separately considered to be a port?

PN33

THE DEPUTY PRESIDENT: If it's a port, yes.

PN34

MR EDMONDS: Then that may well be the case.

PN35

THE DEPUTY PRESIDENT: All right.

PN36

MR EDMONDS: It's not clear what the statutory or contractual right means. But if the supply base itself as a separate facility is a port, then perhaps it is the case that they have a statutory or contractual right to manage or control that particular area.

PN37

THE DEPUTY PRESIDENT: Yes, all right.

PN38

MR EDMONDS: But we say in any event, of course, the applicant in this matter is not a port operator at Onslow Port, Beadon Creek, and is not a port operator at Ashburton and doesn't appear to be any suggestion that they are a port operator at Ashburton. So we say in any event, the Port Authority Award does not apply. Of course, the application of the Port Authority Award as a question of fact turns on, as you've identified, Deputy President, whether or not the applicant has a statutory or contractual right to manage or control a port, whether they provide access to that port and whether they provide port services. We say that all three of those boxes need to be ticked. It's not enough to tick one or two of them. All three of those boxes need to be ticked.

PN39

We say that the applicant's evidence in this matter rises no higher than showing they've got a right to control access to their supply base and contractual and statutory right to run their supply base and to provide port services but only about that supply base. If the Commission is with us in relation to the Port Authority Award not applying in relation to the Onslow Port Supply Base, or indeed the Ashburton port aspect of the operation, then we say the correct course of action to take today is to not necessarily dismiss this application but rather to give the applicant a further opportunity to address the Commission in relation to the application to the Stevedoring Industry Award or other awards that might apply for the purposes of the BOOT.

PN40

So we say that's a preliminary question, I suppose, that needs to be determined. If the Commission is not with us on that, if the Commission finds that the Port Authority Award applies to both operations, then that probably concludes our part of this hearing. On that basis, unless there are any questions, Deputy President, we'd seek to call Mr O'Brien.

PN41

THE DEPUTY PRESIDENT: Yes, call Mr O'Brien. I'll have my associate administer an affirmation or oath.

PN42

MR EDMONDS: Yes.

PN43

THE ASSOCIATE: Mr O'Brien, can you please state your full name and address for the record?

PN44

MR O'BRIEN: Yes, Joel Vincent O'Brien, (address supplied).

<JOEL VINCENT O'BRIEN, AFFIRMED [2.12 PM]

EXAMINATION-IN-CHIEF BY MR EDMONDS [2.12 PM]

PN45

MS KLIMCZAK: Deputy President, if I can just ask briefly before we start whether Mr Veder, who is also present in the room, whether you would like him to be excused.

PN46

THE DEPUTY PRESIDENT: Mr Edmonds?

PN47

MR EDMONDS: I don't think so, Deputy President – I don't think much turns on it.

PN48

MS KLIMCZAK: Thank you.

PN49

THE DEPUTY PRESIDENT: Thanks. Yes, Mr Edmonds.

PN50

MR EDMONDS: If I could just clarify, Mr O'Brien – there's a witness statement filed in these proceedings in your name. Have you got that in front of you?---Yes.

PN51

It runs to some 14 paragraphs and is dated 15 August 2023?---Correct.

PN52

And includes two attachments, which is two maps?---Correct.

PN53

And is that your evidence in this proceeding?---Yes.

*** JOEL VINCENT O'BRIEN

XN MR EDMONDS

PN54

Thank you, Your Honour – there's nothing further for this witness from the CFMMEU.

PN55

THE DEPUTY PRESIDENT: Yes, thank you. Is there any objection to the tender?

PN56

MS KLIMCZAK: No.

PN57

THE DEPUTY PRESIDENT: Thank you. I will mark the witness statement of Mr Joel O'Brien, dated 15 August 2023, comprising 14 paragraphs and two annexures there to as exhibit 1.

EXHIBIT #1 WITNESS STATEMENT OF JOEL O'BRIEN DATED 15/08/2023

PN58

Yes, Ms Klimczak.

PN59

MS KLIMCZAK: Thank you.

CROSS-EXAMINATION BY MS KLIMCZAK

[2.14 PM]

PN60

Mr O'Brien, you have no basis to contradict any evidence in relation to the bargaining process that occurred in relation to this agreement, do you?---Can you say that again?

PN61

You have no basis to contradict any evidence in relation to the bargaining process. You weren't involved in the bargaining process, were you?---So by contradict, what do you mean?

PN62

Were you involved in the bargaining process?---Sorry – simply, yes. No, I wasn't involved in the bargaining process.

PN63

Thank you.

*** JOEL VINCENT O'BRIEN

XXN MS KLIMCZAK

PN64

THE DEPUTY PRESIDENT: The point being made, Mr O'Brien, just to be clear, is that the applicant has filed a number of documents including statutory declarations in support of its application. In that statutory declaration there are contentions about what happened for the purposes of approving the agreement and so forth that is part of the matters that I need to consider. What's being put to you by Ms Klimczak is that you don't have basis to dispute any of that, do you, not

being involved in the bargaining?---No, I wasn't involved in the bargaining, but I obviously didn't become aware of this until I was talking to the employees after the agreement had been lodged, yes.

PN65

Yes, Ms Klimczak.

PN66

MS KLIMCZAK: You don't have any members who were covered by the proposed agreement during the time of the bargaining?

PN67

MR EDMONDS: I object to that question.

PN68

THE DEPUTY PRESIDENT: On what basis?

PN69

MR EDMONDS: Well, there's no assertion where – we're asserting (indistinct) bargaining representative for the purposes of this agreement.

PN70

MS KLIMCZAK: Thank you.

PN71

THE DEPUTY PRESIDENT: It's not in dispute.

PN72

MS KLIMCZAK: Thank you.

PN73

THE DEPUTY PRESIDENT: That issue.

PN74

MS KLIMCZAK: Okay, thank you. You state that the facilities at Beadon Creek are overseen by the Department at paragraph 6 of your statement. Have you got a copy of your statement in front of you?---Yes.

PN75

You also state at paragraph 14 that the Beadon Creek facilities within Onslow Port are managed by the Department of Transport. You don't have any direct knowledge of the operations of the Department of Transport, do you?---No, look, I guess I've reached out to them. So I went and saw them or their harbour master at Onslow about five weeks ago, I think, approximately, and her comments were something along the lines, you know, whilst OMSB like to think they run the port, we do. So I said, 'That's interesting. So essentially you're saying you've got total control of the port'? She said yes. So I'd then been referred to someone based in Karratha and I was waiting for some correspondence to come back, I guess, signalling that. But to date I haven't gotten any correspondence. So there's nothing I can really put forward in regard to that, that would back that in.

*** JOEL VINCENT O'BRIEN

XXN MS KLIMCZAK

PN76

Thank you. The question was you don't have any direct experience in relation to the Department of Transport. Can you confirm your answer to that question?---What do you mean by direct experience?

PN77

As in personal experience in relation to the operations of the Department of Transport – your own, personal experience?---As – I've been involved with the Department of Transport. Is that what you're saying?

PN78

In relation to the operations of the Department of Transport in that are?---Not that I've seen in writing, no, because – only based on the OMSB handbook and what's legislated, that's it.

PN79

You also don't have any firsthand knowledge of the operations of the applicant, OMSB, do you?---What do you mean by firsthand?

PN80

As in your own personal – in your own personal knowledge and your own personal experience?---Nothing more than that I've seen.

PN81

You say that the OMSB are simply one of the tenants of the Port of Onslow. You're not aware of any commercial arrangements between the Department of Transport and OMSB or its parent entity, are you?---In what respect?

PN82

Are you aware of any commercial arrangements?---I wouldn't be privy to that sort of information, no.

PN83

Thank you. You don't disagree with the designation, 'Under the Maritime Transport and Offshore Facility Securities Act', of the Port of Onslow, Beadon Creek, as a security regulated port. Have you seen the gazettals that have been attached to the statement?---Yes, I've seen the gazettes, but - - -

PN84

You don't dispute those gazettals?---Well, for the purposes of security, no.

PN85

And you don't dispute the gazettal which appoints and designates the applicant as the port operator?---Hold on a second, let me have a look. Which page is that on? Or is it the declaration in general, you mean?

PN86

The gazettals?---Yes.

*** JOEL VINCENT O'BRIEN

XXN MS KLIMCZAK

PN87

Have you seen a copy of the gazettals?---Yes. Which one is it? There's a few different pages in there.

PN88

Yes, so it's the one that refers to the applicant being the port operator?---Yes, which page is that, sorry? There's 22 pages, I just want to - - -

PN89

That is the first – the first page is the declaration of the security regulated port and it has a map of the port on the second and third page?---Yes.

PN90

Then on the fourth page it says: 'Designate Onslow Port Services Pty Ltd', which is the applicant, 'as the port operator of the Port of Onslow, Beadon Creek'. Have you got that page 4 there?---Yes, I'm looking at it – yes.

PN91

Can you see that (indistinct)?---What was your question, Ms Klimczak?

PN92

You don't dispute that fact, that – of that gazettal, do you?

PN93

MR EDMONDS: I object to that question, Deputy President?---Well, look - - -

PN94

I'm not sure – I mean, the record is what the record is. I mean, asking Mr O'Brien if he's raising some sort of statutory challenge to that is a strange question.

PN95

THE DEPUTY PRESIDENT: Ms Klimczak.

PN96

MS KLIMCZAK: I'm simply asking if the witness disputes the designation of the applicant as the port operator?---So designated as the port operator for the purposes of that legislation – when you say Port of Onslow Beadon Creek, I mean, they could have called it anything they want, really. You know, the actual port is Port of Onslow. They're within Port of Onslow. But, yes, port operator for the purposes of that legislation which is the basis of security – it's not about anything else.

PN97

There is a map on the second page?---Yes.

PN98

And on the third page?---Yes.

*** JOEL VINCENT O'BRIEN

XXN MS KLIMCZAK

PN99

That is the designation – that is the map, the port boundaries. Do you accept that that is the port boundaries of the Port of Onslow, Beadon Creek?---For the purposes of the security, yes.

PN100

In relation to the access that's provided to the Port of Onslow, Beadon Creek, you don't have any direct knowledge of the applicant's – the OMSB's – responsibilities in relation to access and its rights in relation to access to the waterways and landside, do you?---Look, I'm still waiting for that correspondence from the DOT. I had spoken to the master on the Svitzer tugs that transmit between the sticks up the creek and out to Onslow Salt.

PN101

Sorry, I was asking if you had any direct experience, not if you have any direct hearsay. I was asking if you have any direct experience?---So what's direct experience?

PN102

As in your own personal experience in relation to the access provided to the Port of Onslow, Beadon Creek?---(Indistinct) - - -

PN103

In relation to the facility, the waterways?---No, I don't operate vessels in that port so no.

PN104

Thank you. No further questions.

PN105

THE DEPUTY PRESIDENT: Yes, all right – any re-examination, Mr Edmonds?

PN106

MR EDMONDS: No, there's not, thank you, Deputy President.

PN107

THE DEPUTY PRESIDENT: Thank you. Mr O'Brien, thank you for your evidence. You're excused?---Thanks.

PN108

Good day.

<THE WITNESS WITHDREW

[2.23 PM]

PN109

Is that the sum of the respondent's or the CFMMEU's evidence, Mr Edmonds?

PN110

MR EDMONDS: It is, thank you, Deputy President.

*** JOEL VINCENT O'BRIEN

XXN MS KLIMCZAK

PN111

THE DEPUTY PRESIDENT: Yes, all right. Ms Klimczak.

PN112

MS KLIMCZAK: Thank you, Deputy President. The matter concerns an application for approval of the enterprise agreement made by the applicant with its employees. For the purposes of this hearing, if the Commission is satisfied of the matters set out in section 186 and 187 then it must approve the proposed agreement. We understand that the only issue in contention that the CFMMEU has raised is whether the relevant award for the purposes of the agreement is the Port Authorities Award or the Stevedoring Award.

PN113

Obviously there are a number of other matters that the Deputy President must be satisfied of. If there is anything that I can assist you in that regard then I'm happy to do so but for the purposes of this hearing I propose to simply focus on those issues, unless there is anything that you'd like me to address in addition.

PN114

THE DEPUTY PRESIDENT: Well, there are several matters that I will need to have addressed, assuming that the Ports Awards applies. But I can raise those either at a later stage – but relevantly I am interested in how, for the purposes of assessing the better off overall test, I would confine my examination to the Ports Award in light of the agreement, purporting to operate at the Port of Ashburton at which the applicant is not a port operator.

PN115

MS KLIMCZAK: Yes, that's right, and so the applicant's case is that it is a port operator at the Port of Onslow Beadon Creek, which is where the OMSB facility is located. But it accepts that it's not the port operator for the Port of Ashburton. Indeed, under the Port Authorities Act the Port of Ashburton is designated as a port and the Pilbara Port Authority is designated as the port operator under that Act.

PN116

THE DEPUTY PRESIDENT: Yes, I'm - - -

PN117

MS KLIMCZAK: So we accept that.

PN118

THE DEPUTY PRESIDENT: Yes, and so for the purposes of any work performed under the agreement by employees at the Port of Ashburton, the relevant instrument for the purposes of assessing whether or not such employees are better off overall is the Stevedoring Award. Do you accept that?

PN119

MS KLIMCZAK: No, we don't accept that, and the reason for that is the coverage clause in the Stevedoring Industry Award. clause 4.1 of the Stevedoring Award provides that:

PN120

The award covers employers throughout Australia engaged in the stevedoring industry and their employees in the classifications listed in clause 13, to the exclusion of any other modern award.

PN121

But then there is a further sentence and that says: 'The award does not cover employers and employees wholly or substantially covered by the following awards', and the first one under paragraph A is the Port Authorities Award 2010, which has been replaced by the Port Authorities Award 2020. Now, in our submission that particular sentence provides that the applicant can be wholly or substantially covered by the Port Authorities Award but does not need to be exclusively covered by the Port Authorities Award in order for that exclusion to apply.

PN122

In our submission, the Port Authorities Award applies in respect of all of the operations because at the moment, at the test time, there are no operations that are being conducted at the Port of Ashburton. So at the moment, the applicant is wholly a port operator because all of its operations are carried out at the port of which it is a port operator but during the life of the agreement it is excepted and anticipated that there may be some ancillary services provided from time to time at the Port of Ashburton and Mr Veder can expand on that. It is covered in this statement but he can expand on that for the benefit of the Commission.

PN123

So during the life of the agreement, it may be the case that the employer and employees are substantially covered by the Port Authorities Award but that exclusion continues to operate, given the nature of the services are only ancillary and that the port operator, the employer and the employees will still be substantially covered by the Port Authorities Award and those are the submissions on that point.

PN124

THE DEPUTY PRESIDENT: Yes, all right – I understand the submission.

PN125

MS KLIMCZAK: So relevantly, the key point in terms of the Port of Onslow – because the CFMMEU has not accepted the gazettal documents in terms of the Port of Onslow Beadon Creek being a separate port and the applicant being a port operator, I will address the Commission on that and I can do that in a bit of detail now if you prefer, or for closing submissions. But broadly speaking, obviously the definition – there is no definition of port under the Port Authorities Award but the definition of port operator does include mention of the Port, in the sense that one of the limbs of the definition of being a port operator is that the employer must have a statutory or contractual right to manage or control a port.

PN126

We say that this was deliberately left to the ordinary meaning of the words because there is a vast number of legislation, both at a federal level and at a state level, which designates various ports and that's liable to change over time. Therefore, rather than linking directly to any particular statutory statute,

such as the Port Authorities Act, which was mentioned by my friend, it leaves it open to simply the ordinary meaning of the word. The definition of, 'Port', in the maritime legislation is the same as the ordinary meaning, in our submission.

PN127

We say that the Port of Onslow Beadon Creek is a port within its own right and it is found within the boundaries of the broader Port of Onslow, which is regulated by state legislation. But if (indistinct) of itself is also a port as a separate port that is regulated by the federal legislation and there is nothing in the definition of, 'Port', which limits the language of the Port Authorities Award, that it's not capable of finding that both the Port of Onslow Beadon Creek and the Port of Onslow more broadly can each be a port for the purposes of the Port Authorities Award. There is nothing in the legislation or the award which limits the definition of, 'Port'.

PN128

I might just provide a bit of context from the statutory basis in Western Australia in relation to ports. First of all, there is the Port Authorities Award which designates certain Port Authorities as port operators because it provides specifically that they can manage and control certain ports that are listed in a schedule. That schedule has seven ports in it. Secondly, there is the Shipping and Pilotage Act, which also designates certain ports under the regulations. Then separately there is the federal legislation, which is referred to in our submissions, which also designates certain ports and port operators. So there are a number of pieces of legislation which provide a statutory right to port operators to manage ports and which designate ports.

PN129

In our submission, it's not inconsistent that there is an obligation under state legislation in relation to the broader Port of Onslow area, and that the Department of Transport manages and controls the broader Port of Onslow area and that the federal legislation designates the Port of Onslow, Beadon Creek, with particular mapped boundaries that we have put in evidence in the gazettals and that that area is managed and controlled by the port operator. There is nothing in the Port Authorities Award which affects that interpretation. I might call a witness now unless Your Honour has any further questions because it might enlighten the position.

PN130

THE DEPUTY PRESIDENT: Yes, go ahead.

PN131

MS KLIMCZAK: Thank you. I call Mr Andre Veder.

PN132

THE ASSOCIATE: Mr Veder, can you please state your full name and address for the record?

PN133

MR VEDER: Andre Veder, (address supplied).

<ANDRE VEDER, AFFIRMED

[2.32 PM]

EXAMINATION-IN-CHIEF BY MS KLIMCZAK

[2.32 PM]

PN134

MS KLIMCZAK: Thank you. Mr Veder, have you prepared a witness statement dated 21 August in these proceedings?---Yes, I have.

PN135

And you have a copy of that with you?---Yes.

PN136

Have you reviewed the statement in the lead up to the hearing?---Yes, I have.

PN137

Are there any corrections or amendments or updates that you wish to make?---No, there is not.

PN138

Thank you. Are its contents true and correct to the best of your knowledge?---Yes, they are.

PN139

You've seen the attachments that are referred to in the affidavit?---Yes, I have.

PN140

And they are true and correct attachments to your statement?---Yes, they are.

PN141

Thank you, and before my friend asks you some questions, I've just got some further questions as well. Can you please explain your current role and your current duties?

PN142

THE DEPUTY PRESIDENT: Before we do that, Ms Klimczak, do you want to tender the statement?

PN143

MS KLIMCZAK: Yes, thank you – I will tender the statement and the attachments.

PN144

THE DEPUTY PRESIDENT: Yes, any objection to the tender, Mr Edmonds?

PN145

MR EDMONDS: No, there's not, thank you, Deputy President.

*** ANDRE VEDER

XN MS KLIMCZAK

PN146

THE DEPUTY PRESIDENT: Thank you. I'll mark the witness statement of Mr Andre Maxim Veder, comprising 37 paragraphs, dated 21 August 2023 together with the annexures there too, as exhibit 2.

EXHIBIT #2 WITNESS STATEMENT OF ANDRE VEDER DATED 21/08/2023

PN147

MS KLIMCZAK: Thank you. So, Mr Veder, can you please explain your current role and duties?---Certainly: I'm the general manager of company operations with OMSB and that entails supporting the company operations in delivering services at the Port of Onslow Beadon Creek.

PN148

Thank you, and can you explain to me in your own words what the Port of Onslow Beadon Creek entails?---Certainly: so OMSB's context within the Port of Onslow Beadon Creek is as a port operator, which is a designation that we received through the Maritime Transport and Offshore Facilities Securities Act designation and the port itself, the Port of Onslow Beadon Creek, again was considered and defined under the same legislation at the same time as our appointment as the port operator was given. Day to day at – so our requirement to operate the port has come contractually as well from our operator agreement with the infrastructure owner and then of course statutory designation under (indistinct) legislation.

PN149

And what is the day-to-day operations of OMSB?---So OMSB manages all of the port infrastructure, including the channel, where it undertakes maintenance dredging, including the maintenance of the navigational aids in and around the channel. We also control logistics at the base from quay side all the way to third party delivery areas. Part of that is the management of base streams and other things from offshore vessels and we manage the overall security of the base as well, whether it's the defined boundaries of the land sight facilities or the waterway requirements as well.

PN150

How do you compare the role of the Department of Transport as against OMSB in relation to the Port of Onslow Beadon Creek?---So part of OMSB's role within the Port of Onslow Beadon Creek is to secure regulatory approval for arranged different activities in and around the port. One example of this would be our recent prescribed premise license being secured from (indistinct). They've allowed us to accept a wide range of waste products into the port and to the facility. Another type of, you know, designation or approval would be that of the harbour master, which allows us to have vessels of a certain size or a certain draft call into the facility and once that approval is then given, we're able to support the booking of those vessels and through our contracted pilot service and contracted towage service, facilitate those vessels to come from the pilot boarding ground to the berth line and then be tied up alongside and discharged and secure any services that they might need.

*** ANDRE VEDER

XN MS KLIMCZAK

PN151

And in relation to access to the facility, can you take me first in terms of the land side premises, how access to the facility operates?---Certainly – so the facility is gated and all access to and from the land side facility is controlled by our people and no one's allowed on the base without our express approval and under the (indistinct) legislation and the associated maritime security plan the area is actually defined as requiring MSIC cards for certain activities when the international vessel is alongside.

PN152

Just for the purpose of the transcript, can you explain what MSIC means?---It's a maritime security identification card for individuals working in and around the port and it's associated with the MSIC requirements, which is a security rating of security standing of the ports around Australia, set by the federal government, I believe, and the boundaries of our land side facility align to that of the associated requirements for both of those: the MISC and the (indistinct) conditions.

PN153

In relation to the waterways, can you explain the access requirements for the waterways to the port?---Certainly – so subject to relevant approvals, all the designations for vessels to call in – one such designation would be approvals that we are finalising under the Biosecurity Act for international vessels to call into the port. We would accept a booking directly from the vessel and then based on that booking we would arrange for pilots to meet the vessel at the designated time at the pilot boarding ground and then depending if the vessel requires towing support or not, also support the vessel with towage assets to bring the vessel alongside the facility.

PN154

Can the Department of Transport require the applicant to accept a vessel at the port?---Not to my knowledge.

PN155

THE DEPUTY PRESIDENT: Just to be clear, I thought that the relevant port authority for Port of Onslow more generally was the Pilbara Ports Authority.

PN156

MS KLIMCZAK: That's the Port of Ashburton.

PN157

THE DEPUTY PRESIDENT: Yes, but doesn't it also control, amongst others, the Port of Barrow Island, Port of Cape Preston, Port of Onslow, et cetera? Wasn't there a transfer based – I think there was provision in the ports legislation and then the deal of 2017 was the Australian legislation which came into effect in February of 2019, which transferred the facilities from the Department to the Pilbara Ports Authority?---Deputy President, to the best of my knowledge the transfers of the assets that you've just mentioned have not occurred as of yet and that the Port of Onslow is still under the control of the Department of Transport, as is Barrow Island and as is Cape Preston.

*** ANDRE VEDER

XN MS KLIMCZAK

PN158

Right, so the legislation has passed but the transfer hasn't happened. Is that the position?---Yes, that's correct.

PN159

All right. Yes, all right.

PN160

MS KLIMCZAK: Can you please explain how the boundaries of the broader Port of Onslow interrelate with the boundaries of the Port of Onslow Beadon Creek?---Yes, certainly – so in a similar nature to the Onslow Salt facility, which is highlighted in Mr O'Brien's evidence, the Onslow Salt facility is designated as the Port of Onslow Beadon Point and their waterway and land side is fully contained within the Port of Onslow, which is governed by the Department of Transport, the same way our facility and port, which is the Port of Onslow Beadon Creek, is contained within - and that's waters and land – contained with the Port of Onslow as well.

PN161

Thank you. What are the operations that are currently being undertaken by OMSB at the Port of Ashburton?---We don't have any active operations at the Port of Ashburton.

PN162

Are there any planned to be undertaken during the life of the agreement?---Yes, there are plans to undertake operations in the Port of Ashburton but the operations are very much ancillary to our operations of our port. The operating model would be that the only fixed infrastructure that we'll have in Onslow will be at our facility and the activities at the Port of Ashburton will just be ad hoc and ancillary as required.

PN163

What do you mean by that word, 'ancillary'?---It's expected that the scale of work at the Port of Ashburton will not be greater than 10 per cent of our overall activity profile and at no time would there be an employee that would be exclusively employed to operate out at the Port of Ashburton. In fact, all employees will be employed at our port and then when required, deployed to the Port of Ashburton.

PN164

And so in terms of the percentage for OMSB, you mentioned that percentage of not more than 10. What about in relation to an employee? What percentage of their work might be expected or is anticipated at this time in the life of the agreement to be performed at the Port of Ashburton?---Over a 12-month period it would be approximately the same proportion.

PN165

Thank you, no further questions at this stage.

*** ANDRE VEDER

XN MS KLIMCZAK

PN166

THE DEPUTY PRESIDENT: Thank you. Cross-examination, Mr Edmonds?

CROSS-EXAMINATION BY MR EDMONDS

[2.45 PM]

PN167

MR EDMONDS: Yes, thank you, Deputy President. I only have a few questions. So if I could just clarify, Mr Veder, you were involved in the discussions for this enterprise agreement. Is that correct?---Yes.

PN168

So you're aware of the scope of the agreement itself, you're aware of the rates in the agreement?---Yes.

PN169

These rates - - -?---Yes.

PN170

- - - in the enterprise agreement are the rates that will apply to employees who are covered by the agreement. Is that correct?---Yes.

PN171

So they will be paid those rates. They won't be paid a further amount under a contract of employment or anything like that?---Those rates are as outlined in the enterprise agreement.

PN172

The agreement applies at the supply base at Onslow Port, Beadon Creek and also applies at the Port of Ashburton. That's correct?---yes.

PN173

You've already agreed that you're not a port operator or not the port authority at Ashburton?---Yes.

PN174

You've given evidence that the work you're going to perform at Ashburton is going to be about 10 per cent of the total work performed under the life of the agreement?---By the company, yes.

PN175

So with respect to the work that's going to be performed at the Port of Ashburton, that will be work involved in the stevedoring work, won't it, the loading and unloading of ships, providing supplies to vessels, taking stuff off vessels? That's correct, isn't it?---Not completely. So the potential scope at the Port of Ashburton includes the provision of landside infrastructure for storage areas and also the associated logistics to support those storage areas.

*** ANDRE VEDER

XXN MR EDMONDS

PN176

I thought you'd said that the only fixed base was going to be at Onslow. You weren't going to have anything at Ashburton, you're simply going to be providing labour?---That still stands as correct. Any infrastructure that will be required out there will be driven by clients' needs and not be fixed in nature. Although it might

be fixed for the campaign, the campaign will also pay for the infrastructure to be removed.

PN177

So essentially that will be involved in the loading and unloading of vessels and receiving freight, receiving cargo, and holding onto that to either load onto vessels or to take off vessels and take somewhere else?---Yes.

PN178

So essentially stevedoring work?---Not in its entirety.

PN179

But certainly a large amount of stevedoring work. You'd agree with that, wouldn't you?---I wouldn't agree with that, but it's how you have characterised it.

PN180

Just to look in your operations at Onslow in particular, I wonder if you can look at Mr O'Brien's statement and JOB2 attached to that statement. Have you got that in front of you?---Yes.

PN181

I'm just trying to get a sense as to the work that you perform out there. Is that an accurate map of the Onslow Port, or the landside operations of Onslow Port?---Yes.

PN182

So when you talk about excluding people from the supply base and requiring people to have an MSIC, that's only in relation to that area that's marked OMSB, isn't it?---Yes, that's correct.

PN183

It's not the whole facility?---Yes, you're correct, it's just the area marked in this map OMSB.

PN184

That's bordered by that road you can see there that starts off as tarmac and ends up as orange?---The site is actually delineated by a fence.

PN185

Yes?---So a chain mesh fence and gates.

PN186

So when there's a foreign vessel alongside, you need an MSIC to get through those gates?---That's right.

PN187

And when there's no foreign vessel alongside, you don't need an MSIC to get through the gates?---No, but we still have access control to and from the facility.

*** ANDRE VEDER

XXN MR EDMONDS

PN188

Sure, in the same way as, for example, my employer has got access to control to the MUA building here in Perth. We can certainly exclude people from that, but it's just simply saying you can exclude people from the workplace. That's right, isn't it?---I wouldn't characterise it like that. We operate a port facility and we have security requirements in various legislative instruments that require us to manage that land site in a secured way.

PN189

Sure, and that's probably, for example – perhaps a more accurate example would be in the same way as Patrick Stevedores have got the capacity to exclude people from their port operations?---I apologise, I don't have any working understanding of Patrick Stevedores' operations. What I will say is that the facility, landside facility, is part of the landside restricted zone as designated under our gazettals under the Maritime Transport and Offshore Facilities Act.

PN190

Okay?---Security Act, sorry.

PN191

So if there was a foreign vessel alongside your facility, you couldn't exclude people from the public boat ramp, could you?---No.

PN192

And you couldn't exclude people from the Department of Transport wharf, as you can see in this map?---It's probably pertinent to note that the Port of Onslow, Beadon Creek, which is the port in which we operate, actually ends at the southern boundary of our landside facility and runs across the creek, as depicted in the maps associated with the designation that were attached to my affidavit.

PN193

But that's just your facility, though, isn't it? That's the area you lease?---Sorry, I don't understand the question.

PN194

You say that the security designation ends at your facility. That's the area that you lease from the Department of Transport, isn't it?---Yes, which then is - - -

PN195

So that's just - - -?--- - - - the port (indistinct).

PN196

- - - you saying, 'Under our transport plan, our transport plan ends at the edge of our facility and we don't control transport for the rest of the port.' That's true, isn't it?---Due to the fact that the Port of Onslow, Beadon Creek, sits within the Port of Onslow there is movement of vessels in and around the area that are outside of our scope.

*** ANDRE VEDER

XXN MR EDMONDS

PN197

Yes. Port of Onslow, Beadon Creek, is your trading name, isn't it?---No, it's the designated port name.

PN198

Designated by whom?---By the Maritime Transport and Offshore Facilities Security Act.

PN199

Subject by an application by yourselves to have that area marked as a security zone under that Act, isn't it?---Yes, that's correct.

PN200

So if someone else was to make an application, TAMS or Bhagwan or someone, then that would apply to their operations in this area, wouldn't it?---I couldn't speak to that, because I have no working knowledge of TAMS or Bhagwan's operations, but I do note that as the designated port operator of the Port of Onslow, Beadon Creek, we're the only operator of the Port of Onslow, Beadon Creek.

PN201

So you're the only operator of your operations?---We're the only operator of our port, which is waterside and landside activities.

PN202

So if a vessel was moving through your operations, or moving through your area, and going to the TAMS wharf, they wouldn't need your permission, would they?---If it's over 35 metres in length and requires the use of the navigational aids in the channel, then there is a requirement. Also the fact that the area south of our facility has draft restrictions, only certainly vessels can go there.

PN203

I'll ask you another question. Do TAMS require your permission to move in and out of the wharf there?---In and out of our wharf?

PN204

No, in and out of the port, rather, I mean?---No. TAMS's operations and activity is further – as noted in the map titled 'Job 2' were existing before the infrastructure was upgraded.

PN205

And Bhagwan Marine doesn't need your permission to move in and out of the port, does it?---It doesn't move in and out of our port. It operates within the Port of Onslow.

PN206

And the tourism service Mackerel Islands don't need any permission to move in and out of the port and venture out in the ocean, do they?---So again, they don't operate within our port, they operate within the Port of Onslow.

*** ANDRE VEDER

XXN MR EDMONDS

PN207

Yes, but to move out into the broader Port of Onslow to go out to Thevenard or somewhere out there, you've got to move through your facility, or through the waters that you lease. Is that right?---Yes. That is correct, yes.

PN208

And they don't need your permission to do so, do they?---Unless they're over 35 metres in length.

PN209

Yes, but if they're smaller than that they don't need your permission?---And the same would be said for recreational vessels as well.

PN210

You talked about providing pilot services and contracted towage services. Those services aren't provided by you, are they? You just engage someone else to provide those services, don't you?---We contract those services, yes.

PN211

From different operators?---From different service providers.

PN212

So who provides the pilot services?---Auriga Port Services.

PN213

And the towage services, is that Svitzer, is it?---No. So TAMS are under contract to provide towage support.

PN214

Anyone else can use Auriga and TAMS, can't they? It's not exclusively contracted to you, is it?---In our port they are the providers. In other ports I couldn't talk to their arrangements or the ability of other ports to engage them.

PN215

They don't have an exclusive contract with you to provide those services, do they?---Auriga has an exclusive contract to provide pilotage within our port.

PN216

Within your port, but within the broader Port of Onslow?---I'm not aware of the arrangement within the broader Port of Onslow.

PN217

If you'd just bear with me for a moment, Mr Veder. You lease your premises from the Department of Transport, don't you?---Yes.

PN218

You lease the seabed as well around your facility?---Yes, and out to sea.

PN219

In terms of who's got the capacity to deny people access to the broader Onslow Port, that's the Department of Transport, isn't it, that's not you?---The broader Onslow Port is under the control of the Department of Transport.

*** ANDRE VEDER

XXN MR EDMONDS

PN220

So when you say OMSB Beadon Creek, you just mean the part around your facility, don't you, your supply base?---So when I refer to the Port of Onslow, Beadon Creek, I refer to the designated waters and the landside area, which includes the anchorage locations and the marine channel as gazetted in the documents I attached to my affidavit.

PN221

Thank you. There's no further questions, your Honour.

PN222

THE DEPUTY PRESIDENT: Yes, thank you. Any re-examination?

RE-EXAMINATION BY MS KLIMCZAK

[2.59 PM]

PN223

MS KLIMCZAK: If I can just ask, in relation to the attachment to Mr O'Brien's statement can you please explain to the Commission the difference between the boundaries of the Port of Onslow, Beadon Creek, as you've just described, as designated into the (indistinct) as opposed to the broader Port of Onslow, by reference to that map?---Certainly. So the Port of Onslow, which is operated by Department of Transport, exists up until the high-water mark across the waters, you know, in this image here, and then the Port of Onslow, Beadon Creek, which is the port that we operate, if you were to draw a line from the southern boundary of our landside facility across the creek, goes north or to the left of the page from that locating.

PN224

So the Port of Onslow, Beadon Creek, doesn't cover the other facilities that are listed on that page?---No, not at all.

PN225

And in terms of the navigational aids and the infrastructure in the waterways, who has control and management of those navigational aids?---So we installed and paid for and have the responsibility to maintain those navigational aids.

PN226

No further questions.

PN227

THE DEPUTY PRESIDENT: Yes, thank you, Mr Veder, for your evidence. You're excused?---Thank you.

<THE WITNESS WITHDREW

[3.01 PM]

PN228

THE DEPUTY PRESIDENT: All right. Who wants to go first?

PN229

MR EDMONDS: I'm happy to go first, your Honour.

*** ANDRE VEDER

RXN MS KLIMCZAK

PN230

THE DEPUTY PRESIDENT: (Indistinct) Mr Edmonds.

PN231

MR EDMONDS: I'll only be very brief, your Honour. We filed some submissions in response to this application. I think the issue that's emerged is in relation to the operations of the Port of Ashburton.

PN232

With the greatest of respect to my friend, I think the submission that's been made is not satisfactory in that respect, insofar as the exclusion that exists in the Stevedoring Industry Award surely applies to the port operator operating at the port at which they're a port operator and not at large, effectively able to provide services – certainly provide stevedoring services at other ports at which they're not the port operator and undercut the stevedoring operators that do exist at those operations.

PN233

The reference in the Stevedoring Industry Award to the Port Authorities Award should be read in such a way as to only exclude them at the port where the port authority is the port operator and not at every other port at large. So on that basis we say, at least in relation to the Port of Ashburton operations, it's clear that the stevedoring award is a relevant award for the purposes of the BOOT.

PN234

In relation to the Port of Onslow, Beadon Creek, we simply say you can't divide the port, if you will, between the applicant's smaller operations which are found within the confines, essentially, of their supply base, and say, 'Well, this is a port unto itself and we provide port services within our port of which we have exclusive control, therefore we're a port operator and able to avail ourselves of the rates found in the Port Authorities Award.'

PN235

If such an interpretation were to be allowed, then we certainly submit it would be open to every other stevedoring operator around the country to simply assert that they were a port operator because they provide port services within the confines of their particular operations or their supply base or their lease and as such they would also be considered a port authority because they're a separate entity unto itself.

PN236

We say such an interpretation is undesirable and inconsistent with Port Authorities Award and indeed the Stevedoring Industry Award, so on that basis we say the Commission should find the Stevedoring Industry Award is a relevant award for the purposes of the BOOT and should invite the applicant to make further submissions in that respect.

PN237

THE DEPUTY PRESIDENT: Yes, all right. Ms Klimczak?

PN238

MS KLIMCZAK: Thank you, Deputy President. We rely on our submissions of 21 August, and I think the key points, from the applicant's perspective, are, first, that it is important to return to the principles that apply to the interpretation of modern awards, which is that you look to the language of the award.

PN239

In particular, in terms of the Port Authorities Award the key relevant section of that award is the definition of 'port operator', which means an employer that has a statutory or contractual right to manage or control a port, provides access to the port and that provides port services. It's not in dispute that the applicant provides port services, but what is in dispute is whether or not they have a statutory or contractual right to manage or control a port and whether they can provide access to the port.

PN240

Then, further, a subsidiary question is what is a port for the purposes of the award? We say that there is nothing inconsistent in having a port within a port and that that is still a port for the purposes of the Port Authorities Award.

PN241

We say that very clearly the ordinary meaning of a 'port' is an area of water or land with various installations on it which is intended to be used in connection with the movement, loading and unloading of vessels. That is the ordinary meaning of the word. It is also the definition of 'port' under the federal legislation that has been referred to in the course of this proceeding.

PN242

That legislation specifically designates the Port of Onslow, Beadon Creek, as a port, with the applicant as a port operator. As was noted also by Mr Veder, there is another entity, Onslow Salt, which also has an area that's designated as a port, which is the Port of Onslow, Beadon Point, as distinct to Beadon Creek, and that area is also a port within the broader Port of Onslow.

PN243

So the Port Authorities Award did not limit and has not got a definition of 'port' within the language of the Port Authorities Award and the ordinary meaning of 'port' covers the Port of Onslow, Beadon Creek, given the nature of the operations as set out in Mr Veder's statement.

PN244

As has been set out very clearly in Mr Veder's statement, not only does the applicant have a statutory right to manage and control the port under the federal legislation, it also has a contractual right to do so in terms of its lease arrangements as well as its operations agreement, and on that basis we say that the Port of Onslow, Beadon Creek, is a port for the purposes of the Port Authorities Award and that the applicant is a port operator for the purposes of the Port Authorities Award.

PN245

The evidence clearly shows that the applicant manages and controls the port. The applicant has the responsibility to ensure that the vessels come to and from its

port. It is the one that ensures that all of the operations occur at the port in relation to the loading and unloading of the vessels, but also in relation to management of the waterways in terms of the matters that Mr Veder spoke to in terms of sewerage, in terms of the navigational aids, in terms of managing the dredging within the port and installation of the infrastructure. It is responsible for all of the matters relating to the Port of Onslow, Beadon Creek, as set out in his statement.

PN246

In addition, as explained today in examination, as well as in relation to his statement, the applicant is the one that provides access to the port in terms of the fenced area on the landside as well as having a responsibility to provide access and give permission to access its waterways for particular ships.

PN247

It is a dual control, and there's nothing in the Port Authorities Award which says that it needs to be the exclusive controller or providing exclusive access to that port, but in any event, the Department of Transport cannot require the applicant to provide access to its port.

PN248

Mr Veder very clearly said that in terms of accessing the port facilities, the applicant is the one that needs to approve the access to the facilities. So in those respects, our submission is that not only is the applicant a port operator but also that the Port of Onslow, Beadon Creek, is a port.

PN249

In relation to the Port of Ashburton, it's trite to say that an employer can be covered by multiple awards and the nature of the award modernisation process was to delineate the coverage of the various employers that might fall within the ports or maritime industry, and it very carefully set out which awards applied to which employers.

PN250

The exclusion in relation to the stevedoring award excludes the Port Authorities Award in its entirety from any employers who might be wholly or substantially covered by the award. So although OMSB, as the applicant, may well fall within the first sentence of the stevedoring award and may also be a port operator under the Port Authorities Award, because of the operation of the second sentence, which does not cover employers wholly or substantially covered by the Port Authorities Award, it contemplates that the Port Authorities Award may also not exclusively cover the applicant.

PN251

On that basis we say that at the moment, currently, the applicant is wholly covered by the Port Authorities Award and therefore falls within the exclusion of clause 4.1, that is, at the test time of the approval of the agreement, but in any event, even during the life of the agreement, the employer will still remain substantially covered by the Port Authorities Award in relation to - - -

PN252

THE DEPUTY PRESIDENT: Ms Klimczak?

PN253

MS KLIMCZAK: Yes?

PN254

THE DEPUTY PRESIDENT: The purpose of the test time is the anchoring of the instrument, so it's the award or relevant instrument as at test time. It's not necessarily concerned with what the employer's operation looks like at test time, because otherwise, for example, applying the same test to a greenfields agreement, makes it impossible to apply since at test time there is no operation, by definition.

PN255

So here we're concerned with the fact that the agreement applies to work at this other facility, and so that I accept that there are no current employees who are covered by the agreement working at the facility, but I'm also required to assess the position of prospective employees and make an assumption that a prospective employee will work at the facility.

PN256

The issue is then which instrument do I assess the agreement against? It's not just the employer that needs to be wholly covered, it's the employee as well, it's both, in order for the exclusion to operate.

PN257

MS KLIMCZAK: Yes, that's right, and that was the next part of my submission, which is during the life of the agreement the evidence shows that the operations at the Port of Ashburton will be ancillary and therefore the employer will continue to be substantially covered by the Port Authorities Award, but also Mr Veder gave evidence in relation to the work of the employees which will also be substantially covered by the Port Authorities Award.

PN258

THE DEPUTY PRESIDENT: Let me just test that proposition. The agreement provides for casual employment. By its nature that could be anybody that is picked out, suitably qualified, and assigned to work one or two shifts at the other facility. There's nothing in the agreement to stop that and it's wholly consistent with the nature of casual employment, and in those circumstances, which award instrument would apply to that prospective employee?

PN259

MS KLIMCZAK: An award needs to cover both the employer and the employee. The relevant provision of the coverage clause in the Port Authorities Award covers a port operator, which wouldn't apply at the Port of Ashburton, but in relation to a casual employee it would potentially depend on whether or not that casual employee has ongoing work and whether the nature of their work is wholly or substantially covered by the Port Authorities Award - - -

PN260

THE DEPUTY PRESIDENT: I'm talking about a casual employee who's engaged for the first time and is assigned to work at the other facility. That's the prospective employee that I'm considering. There's nothing in the agreement to prevent any of that happening.

PN261

MS KLIMCZAK: Yes, and I think the applicant would be prepared to provide an undertaking to assist with that. To the extent that that was a concern, the applicant has considered whether or not it might give an undertaking that during the life of the agreement both its operations and the work of employees would be wholly or substantially covered by the Port Authorities Award and wholly or substantially be located at the port operations at the OMSB and is prepared to give that undertaking, if that would assist the Commission.

PN262

THE DEPUTY PRESIDENT: I can say this much, Ms Klimczak, that the issue of the award coverage at the other facility is an issue that is concerning me and I consider that at least in respect of some prospective employees the stevedoring award is likely to be the relevant award, so that if you want to give an undertaking to address that concern – because it's evident that in some respects the agreement won't pass the better off overall test in relation to a casual employee covered by the Stevedoring Industry Award, as an example.

PN263

So if your client wants to frame an undertaking to address that concern, I'm happy to consider it, but I need to see what precisely it says, and obviously I don't want you giving these things on the run, so if within the next say seven to 14 days – well, the next seven days, if you want to provide my chambers with a draft undertaking, then I'll obviously consider it in the overall scheme of things.

PN264

MS KLIMCZAK: Thank you. We would appreciate that opportunity.

PN265

THE DEPUTY PRESIDENT: Yes, all right.

PN266

MS KLIMCZAK: Are there any other matters of concern in relation to our submissions that you'd like me to address on these points?

PN267

THE DEPUTY PRESIDENT: No, but may I just raise with you these matters. Assuming, in relation to the – just bear with me. Yes. The agreement provides for particular rosters and working arrangements and also provides for part-time employees and it also provides for Saturday and Sunday penalties at 125 per cent.

PN268

Let me just give you a couple of examples where I have some concerns. Let's assume – sorry, and the agreement isn't entirely clear on whether a part-time

employee would be entitled to overtime. There's a TOIL arrangement, but that appears to operate on the basis of time for time.

PN269

So just taking as an example a general hand working two 12-hour shifts, which included a Saturday and one shift of eight hours of overtime, so ordinary hours of 12 on a Monday to Friday, overtime hours of 12 on a Saturday plus eight hours. So let's assume the agreed hours under the award would have been 24, two lots of 12, and they work a further eight hours which is an overtime shift under the award.

PN270

Based on that configuration – and again, there's nothing in the agreement which would prevent that working arrangement – the employee receives an overall payment including taking into account annual leave loading, et cetera, of an amount of \$12.29 less a week than they would under the award.

PN271

And there's a couple of scenarios which deal with both part-time and casual employees. What I'm going to do – again, I don't expect you to answer this on the hop, but what I'm going to do is to send you these modelling – or these calculations that have been performed in relation to part-time and casuals in particular and give you an opportunity to consider them and you can make a response. This is on the assumption that the ports award applies.

PN272

MS KLIMCZAK: Thank you. Thank you for the opportunity.

PN273

THE DEPUTY PRESIDENT: So I'll send that through. I'll send you a copy also, Mr Edmonds.

PN274

MS KLIMCZAK: Thank you. In relation to part-time employees we will also consider, if there are any concerns, whether they might be facilitated on an undertaking or - - -

PN275

THE DEPUTY PRESIDENT: Well, all of those matters about the rates of pay can be resolved by an undertaking, on the assumption that the ports award applies. I caveat that on the assumption - - -

PN276

MS KLIMCZAK: Yes.

PN277

THE DEPUTY PRESIDENT: I've done some modelling on both and there are more difficult issues which would confront the applicant in relation to the stevedoring award, as I think Mr Edmonds has highlighted in any event, but I'll have this modelling sent to you in the next day or so for your consideration and a

response and perhaps you can provide something at the same time as you provide a draft undertaking in respect of the other matter.

PN278

All right. I don't have any other issues for you at the moment. Let me just check on more thing. Apologies. the other issue, which is of no particular moment other than it will have the consequence of inserting the model consultation term, it doesn't appear to me that clause 27 of the agreement which deals with consultation complies with the statutory requirements.

PN279

There's nothing that can be done about that issue. It either complies or it doesn't. I'll have a closer look at it before I finalise any approval, if I do approve the agreement, but if I do approve the agreement it's likely that the model consultation term will be taken to be a term of the agreement for that reason. Other than that, I have nothing further. Mr Edmonds, is there anything you want to say by way of a reply?

PN280

MR EDMONDS: There's not, thank you, Deputy President. You've identified the concerns that we held, especially in relation to casual employees and the operation of the Stevedoring Industry Award. We're satisfied to leave it at that.

PN281

THE DEPUTY PRESIDENT: All right. Unless there's anything else, I will reserve my decision. I'll await any further correspondence by way of undertaking or proposed undertaking from the applicant and that response to the modelling issues and I will publish my decision in due course.

PN282

MS KLIMCZAK: Thank you, Deputy President. I wonder if you are against us on the decision in relation to the Port Authorities Award

PN283

THE DEPUTY PRESIDENT: Yes, you will get another opportunity to address the stevedoring – yes. Yes, you will. All right.

PN284

MS KLIMCZAK: Or to withdraw the application, if that is something that the applicant wishes to do, but if we – yes, that is something - - -

PN285

THE DEPUTY PRESIDENT: I will give you an opportunity. I will decide the issue of coverage first and then we can discuss what happens from there.

PN286

MS KLIMCZAK: Thank you.

PN287

THE DEPUTY PRESIDENT: All right. Thanks very much. Have a good day.

PN288

MS KLIMCZAK: Thank you very much.

PN289

THE DEPUTY PRESIDENT: We're adjourned.

PN290

MR EDMONDS: Thank you.

PN291

THE DEPUTY PRESIDENT: Thank you.

ADJOURNED INDEFINITELY

[3.25 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

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