TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT MASSON

C2023/7904

s.604 - Appeal of decisions

Appeal by Shop, Distributive and Allied Employees Association (006N) (C2023/7904)

Sydney

2.00 PM, FRIDAY, 12 JANUARY 2024

PN1

JUSTICE HATCHER: Good afternoon. I'll call the RK & NK appeal first, which is listed for directions. That's matter C2024/157. So in that matter, Mr Dean, you appear for the appellant, the SDA, correct?

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MR DEAN: With leave of the Commission, (indistinct).

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JUSTICE HATCHER: Yes, all right. Mr Catharcane, you appear for the respondent, RK & NK Pty Ltd?

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MR CATHARCANE: Yes, sir.

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JUSTICE HATCHER: All right, look, I called this matter on. I think at least as the SDA knows, and maybe you know, Mr Catharcane, there's another appeal about a very similar ground which we're about to hear this afternoon. Would it be appropriate if we stand over this appeal until this afternoon's appeal - that's matter 7904 of 2023 – is determined? That would give the parties some clear guidance as to how they should proceed and might lead to an agreed outcome. Mr Dean.

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MR DEAN: If I understand, is the proposal that the appeal proceed today and then the other appeal be held over until a decision in this appeal? If it is, that would be – the SDA would - - -

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JUSTICE HATCHER: Yes, so we'll proceed with the Allens appeal and determine it and then what I'm proposing is that the RK & NK appeal is stood over until the Allens appeal decision is issued and at that point, we can then consider the position with respect to the RK & NK appeal, since it's obviously in relation to a very similar agreement.

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MR DEAN: I'm instructed that the SDA would support that position.

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JUSTICE HATCHER: All right, and Mr Catharcane, do you support that position?

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MR CATHACANE: Yes, sir.

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JUSTICE HATCHER: All right, well, in that case I'll stand that appeal over and I'll relist it upon the decision in the Allens appeal being issued. Unless you wish to stay, Mr Catharcane, you're free to go now, which means you can simply disconnect if you wish.

PN12

MR CATHACANE: We'll stay.

PN13

JUSTICE HATCHER: Yes, all right. There's no need to turn – leave your camera on so can I ask you to turn your camera off, please? All right, so we'll now call on matter 2023/7904. This is the appeal by the SDA in respect of the Allens agreement. Mr Dean, you appear for the appellant?

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MR DEAN: Yes, President. We seek leave to appear under section 596.

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JUSTICE HATCHER: Mr Allen, Ms Kite, you appear for the respondent, Allens?

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MR ALLEN: Yes, we do.

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JUSTICE HATCHER: Yes, all right. Is there any opposition to the SDA being granted permission for legal representation?

PN18

MR ALLEN: No.

PN19

JUSTICE HATCHER: Yes, all right. We grant that permission, Mr Dean. Just before we start, Mr Allen, Ms Kite, I hope you would have understood from the SDA's materials that there are two issues. There's the better-off-overall test issue and there's the genuine agreement issue. In respect of the first issue – that is the better-off-overall test issue – you've filed submissions in which you propose some undertakings, which would deal with that issue if we were to uphold the SDA's point and I understand the SDA, in turn, accepts that if we got to that stage, the undertakings would cure the difficulties that it's identified.

PN20

So, Mr Allen, Ms Kite, do you wish to be heard against the proposition that the approval of the agreement on the basis that it pass the better-off-overall test was incorrect? So I'll just try and step that through.

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MR ALLEN: Yes, sorry.

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JUSTICE HATCHER: At the hearing before the Deputy President, it was found that your agreement passed the better-off-overall test.

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MR ALLEN: Yes.

PN24

JUSTICE HATCHER: The SDA contends in its appeal that that decision was incorrect and that the agreement does not pass the test. But it accepts that if the appeal is upheld on that basis, the undertakings you propose would cure the problem.

PN25

MR ALLEN: Yes.

PN26

JUSTICE HATCHER: So if we accepted the undertakings, it would pass the better-off-overall test.

PN27

MR ALLEN: Yes.

PN28

JUSTICE HATCHER: In those circumstances, do you wish to be heard against the proposition that in its current form the agreement did not pass the better-off-overall test, noting that Mr Dean accepts there is a solution to that problem by way of the undertakings that you have proposed?

PN29

MR ALLEN: I think I understand what you're saying. I guess the bottom line is that we didn't do any of the calculations towards the better-off-overall test. That was obviously supplied – in our capacity we're obviously not that still in that area. So we went in that with all good faith but that was passing the better-off-overall test. If we had any inclination at all that it wasn't, we obviously wouldn't have agreed to go through with it. So, yes, we understand that these proposed undertakings possibly cures that. But again, we were completely unaware that that was an issue at all. That's what I would like to say about that, I suppose.

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JUSTICE HATCHER: And beyond that, do you wish to say anything in response to the SDA's submissions about the better-off-overall test?

PN31

MR ALLEN: Nothing further than what's already been said, no.

PN32

JUSTICE HATCHER: All right, Mr Dean – first of all, we grant the SDA permission for legal representation. Secondly, I think in the circumstances we've now identified it's sufficient for you simply to address the genuine agreement point. We don't need to hear from you further on the better-off-overall test.

PN33

MR DEAN: Thank you. Can I just – in relation to the better-off-overall test, just for the avoidance of any ambiguity – there was an undertaking proffered at first instance as well and it's on the basis of that plus the additional undertakings that (indistinct) - - -

PN34

JUSTICE HATCHER: Yes, yes, is that right, Mr Allen and Ms Kite? The new undertakings are in addition to the existing undertakings? Is that correct?

PN35

MR ALLEN: Yes, it was one at the time of the approval.

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JUSTICE HATCHER: Yes, thank you. All right, Mr Dean.

PN37

MR DEAN: Thank you. In relation to the genuine agreement issue, we've set out in our submissions essentially the bases upon which it's contended genuinely the Commission ought not be satisfied that genuine agreement was reached. I just wanted to address some of the factual matters in relation to the negotiation or I should say the approval of the agreement rather than negotiation, with reference to some of the material.

PN38

JUSTICE HATCHER: I think before we go further, you rely upon the affidavit of Ali Amin, which he swore on 5 January 2024, do you?

PN39

MR DEAN: We do.

PN40

JUSTICE HATCHER: Yes, all right. Mr Kite, Ms Allen – I got that the wrong way around.

PN41

MR ALLEN: Wrong way around, yes.

PN42

JUSTICE HATCHER: Mr Allen and Ms Kite, do you wish to ask Mr Amin any questions in relation to his affidavit?

PN43

MR ALLEN: No.

PN44

MS KITE: No.

PN45

JUSTICE HATCHER: All right. We'll mark that affidavit exhibit 1 for the purposes of the appeal, Mr Dean.

EXHIBIT #1 AFFIDAVIT OF ALI AMIN, DATED 05/01/2024

PN46

MR DEAN: Thank you. If I could just turn perhaps to the parties first, I think it's uncontroversial – I hope it's uncontroversial – that the SDA is entitled under its rules to represent the industrial interests of the workers in the fast food industry and that's the award against which the agreement that forms the subject of this

appeal was BOOT-tested and the employees that are engaged pursuant to that – pursuant to the agreement, which has been approved, operate in the or perform work in the fast food industry across six stores and two states, each of those stores operated by the respondent.

PN47

Perhaps I won't take the Commission to the basis for this. It appears in footnote 2 at paragraph 4 of our submissions but the evidence of Mr Ali is that the employees in the cohort – and I should say that when we received the Commission's material from the Commission (indistinct) the demographics of the workforce were redacted but the evidence of Mr Ali is that employees in the fast food industry are likely to be young, and in many cases not only inexperienced in bargaining but also newcomers to the labour market in the sense that they haven't previously had employment of any kind.

PN48

It's on this basis that we say genuine agreement should be assessed: that is, that the cohort is likely to be young, inexperienced in the labour market, simplicitas, and a fortiori, I think, inexperienced in enterprise bargaining; in fact likely to have no experience in relation to the process of agreement-making. The next proposition that I want to take the Commission to is the SDA's status as a bargaining representative and perhaps to that end, if I could ask – having addressed the issue in relation to coverage of the SDA via its rules, if I could take the Commission to the appeal book – sorry, to the affidavit of Mr Amin and in particular to paragraphs 17 to 21 of that affidavit.

PN49

The affidavit of Mr Amin deposes to a conversation with a Tracy, and I'll return to Tracy's role in bargaining in the course of these submissions, on 3 April and then an exchange of correspondence between Tracy and the SDA. AA1 – that is annexure 1 to the affidavit of Ali Amin – is an excerpt from the rules of the SDA;; AA2 appears on page 15 of the Amin affidavit, and perhaps if I could ask the Commission to turn to that.

PN50

JUSTICE HATCHER: Yes.

PN51

MR DEAN: If I could ask the Commission to infer that the Lindsay that's being referred to there is Mr Lindsay Allen, this is an email from Ali Amin, introducing himself as an industrial officer of the SDA union and importantly, he says, the union for Subway workers, and asking Lindsay to confirm that they are the owner of the Allen Family Pty Ltd Subway in Cardina, Broken Hill. That's a reference to the respondent in this matter. Mr Amin deposes that following contact via that form, he exchanged an email correspondence, appearing at page 16 – or he engaged in a telephone call with Ms Tracy – with a Tracy of the respondent or on behalf of the respondent.

PN52

Appearing on page 16 is an email that was sent, Mr Amin deposes, following that conversation in which he describes the impact of the Fair Work legislation

amendment, Secure Jobs, Better Pay Act, in particular in relation to the automatic termination of agreement-related instruments made prior to the Fair Work Act during the bridging period and says: 'As such the agreement will automatically expire on 7 December unless you apply for and are granted an extension', asserts that the agreement is sub-par compared to the relevant modern award, which is the Fast Food Industry Award, and asks the respondent to communicate its intention regarding the agreement and whether it intends to negotiate a new agreement, apply for an extension or do nothing.

PN53

The reply to that email appears on the next page, at page 17, in which a Ms Tracy Avis – and for reasons that become more relevant, the email account for that is tracy@allsub.net.au - described in the email signature as the authorised representative of the Kadina in Broken Hill Subway stores, says to the FDA, 'We have considered our position moving forward and do not intend to enter into a new agreement', but then goes on to say that the terms of the fast food award will be applied from the first full pay cycle of 1 July of 2023. So that's the extent of the communication or the relevant communication, we say, between the respondent and the SDA prior to the matters that give rise to this appeal: that is the making of an enterprise agreement and then an application on behalf of the respondent seeking to approve that agreement.

PN54

The SDA's understanding at that time was that the respondent had no intention or no interest in bargaining and would proceed to apply the award. However, the respondent then provided – subsequently provided – a series of documents to its workforce and I think the simplest way to chase through this chronology is to turn to page 48 of the appeal book. This is from the employer's form F17B.

PN55

JUSTICE HATCHER: So this is five or six months later?

PN56

MR DEAN: Yes, this is five or six months later. There is no evidence of any communication. I should say the original communications refer to the expiry in July. There's no subsequent contact and then on 9 October, according to this sworn statement, form F17B – declaration, I should say – on 9 October the chronology kicks off with the employer sending an email to employees containing a full copy – what's described as a full copy – of the agreement and a notice of employee representational rights and an employee Q&A document. What's absent from the form F17B, with the exception of two matters that I will take the Commission to, is any evidence of any bargaining meeting, any evidence of the provision of any information other than the explanation for the full copy of the agreement, any negotiations with the SDA or discussions even with the SDA as a bargaining representative.

PN57

JUSTICE HATCHER: Why would the employer consider the SDA to be a bargaining representative at that point in time?

PN58

MR DEAN: All we can (indistinct) in that regard is the SDA's default status as a bargaining representative and the communications that it had received, saying that the SDA sought to negotiate a replacement agreement. Mr Ali's evidence is that in fact the SDA did have – at all relevant times – at least one member.

PN59

JUSTICE HATCHER: Yes, but what's the basis for the employer to know that?

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MR DEAN: Look, we would say, President - - -

PN61

JUSTICE HATCHER: Do the early communications indicate that the SDA had members with this employer?

PN62

MR DEAN: Perhaps if I could just turn to that in one moment? Sorry, President – I'm just turning to the affidavit of Mr Amin to get the best answer on the evidence before the Commission. Paragraph 14 of the affidavit of Amin at page 2 - and I appreciate this is undated – refers to – paragraph 16, sorry, of page 2 refers to a deposition from or records a deposition from Mr Amin that the advice to Ms Avis was that the SDA sought to negotiate a new agreement on behalf of its members.

PN63

JUSTICE HATCHER: Is that recorded in the note of the conversation?

PN64

MR DEAN: It is not recorded in the note of the conversation.

PN65

JUSTICE HATCHER: Yes, all right.

PN66

MR DEAN: What occurred on that – or to commence the bargaining, appears on page 48 of the appeal book, as we have it from the employer, which is the circulation of the notice of employee representational rights with the full copy of the Allen's enterprise agreement and then the employee Q&A document and the employee Q&A document appears on page 67 of the appeal book.

PN67

JUSTICE HATCHER: Yes.

PN68

MR DEAN: This contextualises, I think, what happens next, which is the only thing that could be described as approaching bargaining, which I'll take the Commission to. But the document is headed: 'The purpose of this Q&A document' – sorry, the first sentence – 'The purpose of this Q&A document is to explain the key features of the agreement and your role in its implementation'. Then on page 68, I say in fairness to the respondent there is a bolded question:

PN69

Can I suggest or negotiate any variations to the enterprise agreement? Yes, any proposed variation will be considered by Allen Family Pty Ltd.

PN70

And it continues to refer to individual flexibility agreements. We will say that in the absence of any – there was an absence of an authentic agreement-making process in this case and that the circulation of the NER, together with a proposed agreement, together with a Q&A document which begins by advising the relevant cohort that it is explaining the role in the implementation of an agreement, that at that stage were a proposed agreement not described as a proposed agreement, I should say, at the top of page 67, with a cohort of unrepresented young workers, inexperience in the labour market, was insufficient to give rise to any real opportunity to bargain and in fact that no real bargaining ever occurred.

PN71

I might return to that in the course of these submissions unless there are any questions, President, Members.

PN72

JUSTICE HATCHER: Go on.

PN73

MR DEAN: Sorry?

PN74

JUSTICE HATCHER: Go on.

PN75

MR DEAN: The next event is the voting process and the process of rolling out the agreement but I'll return to that. What happens next that explains how we end up at appeal is that the FWC asks the respondent to serve a copy on any known bargaining representatives, for the reasons that we've discussed. Unsurprisingly, no copy of that is served. When we say it ought to have been or investigations ought to have been made by the respondent in light of the correspondence that same year, requesting to negotiate on behalf of its members by the SDA, and the respondent does not in fact serve any document and that's made good by the paragraph 23 of the affidavit of Mr Amin and explains the non-participation of the SDA in relation to the initial approval. It's in that context that the SDA seeks to appeal the decision. There is the contentions regarding the better off overall test, and there are the contentions regarding genuine agreement. It is of course the SDA's position that the agreement, without the undertakings, did not meet the better-off-overall test for the reasons (indistinct) in the submissions but I do not propose to address them in light of the guidance we've been given moments ago.

PN76

I don't know how useful it is for me to address part B of our submissions, which are the standing of the SDA and the basis upon which we say leave ought be granted.

PN77

JUSTICE HATCHER: It's probably not necessary at this stage. I think we'd like you to focus upon why the facts you've identified would lead to the conclusion that there has not been genuine agreement.

PN78

MR DEAN: At part C of our submissions, we address the nature of the task before the Commission in determining whether there is genuine agreement, accepting – and this is at paragraphs 14 to 17 – in effect that it is an evaluative determination for the Commission and that it's not a jurisdictional fact in the true sense but nonetheless, with reference to the decision in One Key Workforce and the decision at paragraphs 109 and 111 to 113, we say that there must be sufficient information before the Commission to inform that evaluation. I don't propose to go through that. I think that's probably an uncontroversial proposition.

PN79

But we say there must be evidence that would allow the Commission to affirmatively and rationally reach satisfaction of genuine agreement. At paragraph 21, we pick up where or how we say genuine agreement must be determined, and that's with reference to a number of provisions of the Act and a number of provisions of the statement of principles, promulgated pursuant to section 188(1) and perhaps if I could ask the Commission to turn to the statement of principles to identify the principles that we say are relevant to the determination of whether there has been genuine agreement in this matter.

PN80

The statement of genuine principles appears at item 5 on our list of authorities. We say the relevant principles include principle 14, which refers to section 185(b) of the Fair Work Act. And it refers to the requirement to take into account the explanation of the agreement being provided in an appropriate manner having regard to the circumstances and needs of the employees. Section 180(5) of the Fair Work Act requires that – sorry, section 186 of the Fair Work Act requires that without limiting the particular circumstances that have to be taken into account, section 186(b) requires attention to whether there are young employees in determining that and section 186(c), attention to be paid to employees who did not have a bargaining representative for the agreement.

PN81

Now, of course we say the SDA was a default bargaining representative but we say that nonetheless, that's a consideration that can be taken into account under section 185(b), the fact that functionally, whether or not there was a statutory bargaining representative, functionally the workforce, comprised, as we say, of young people, was deprived of a bargaining representative in the course of the process that led to the application for approval. The next principle that we say is relevant from the statement of principles is principle 15 and in particular 15(a), which refers to the reasonable opportunity to vote in a free and informed manner.

PN82

This should include a voting process that ensures the vote of each employee is not disclosed to or at ascertainable by the employer, and I'll return to that when we examine the voting process that was adopted by the respondent in this matter and

principle 18, upon which significant reliance will be placed by the SDA, which refers or which reads that:

PN83

An enterprise agreement will generally not have been genuinely agreed to by the employees covered by the agreement unless the agreement was - - -

PN84

And we say it contains two in effect distinct requirements. The first is that the agreement was the product of an authentic exercise in agreement-making between the employer and employees in Walla Walla Enterprises and the second requirement embodied in principle 18, that the employees who voted for the agreement had an informed and genuine understanding of what was approved. Finally, we note that in relation to section 180(5) the effect of section – that is the requirement to explain - the employer take all reasonable steps to explain the agreement, section 188(4A) makes clear that a failure to observe this obligation has the effect that the FWC cannot be satisfied that the agreement has been genuinely agreed.

PN85

That is in the absence of compliance with section 185, it's not just an evaluative factor to be weighed in the mix. It's in a preclusion on the FWC's ability to be satisfied the agreement has been genuinely agreed. So we would say this in effect requires strict compliance with section 185 as a precondition to approval. That is, we say, the effect of section 188(4A).

PN86

JUSTICE HATCHER: That's subject to subsection (5), though.

PN87

MR DEAN: Yes, that is expressly subject to subsection (5). We accept that if that error is minor within the purview of that section, compliance would be excused. So those are in effect the legal principles or in some cases constraints and in other cases considerations against which we say genuine agreement must be assessed. And that's in this context that we pick up at paragraph 39 of the submissions appearing on page 7 with an analysis or submissions as to whether there was genuine agreement in this case.

PN88

We say that in relation to principle 18 – and that is that there must be an authentic exercise in agreement-making – there was no authentic exercise in agreement-making in this case. When we say that for the reasons – personally for a reason that I've taken the Commission to which is that the NERR was circulated concurrently with an agreement, the full agreement, and that the Q&A document explains that its purpose is to advice employees as to their role in its implementation. It's instructive, we say, to bear in mind at all times that one is not dealing with an industrially-sophisticated workforce who might be perhaps expected to read beyond or to understand their role in bargaining in that context.

PN89

One is dealing with a workforce that has perhaps no experience in the labour market, which is very young and which is extraordinarily unlikely to have ever had any experience in bargaining before. It is presented with, concurrently, a full agreement before any meeting or discussion and an explanation as to the role of the employees in the implementation of that agreement. In that sense, we suggest it was highly likely to be understood as a fait accompli and in any event, not a document about which there could be a potential for any serious haggling of the kind that might be expected, we say, or contemplated by principle 18: that is an authentic agreement-making process. The F17 - - -

PN90

JUSTICE HATCHER: Your client claims membership amongst the workforce. Could it not have brought before us evidence about these matters, rather than engaging in an exercise in speculation?

PN91

MR DEAN: Can I say two things about that, respectfully? The first is an evidentiary point – or the first is really that this matter has been expediated to hearing and I appreciate that's by no means a full explanation. The second is that the affidavit of Mr Amin deposes to some of the difficulty that the SDA had in accumulating evidence and that appears at page 11, at paragraph 68 and 69 of Mr Amin's affidavit. Mr Amin annexes a text message received from workers and says that as a consequence of that, the SDA has met significant hesitation from employees to provide further evidence in relation to the genuineness of agreement.

PN92

That text message, which appears at page – or which appears at AA9 from Lindsay and Lee, refers to receiving – well, it states in its own terms: 'We've been notified that the SDA have appealed on our enterprise agreement', and it provides: 'If any media or SDA contact you or the store, we have been advised to make no comment (best to leave it to the professionals)'. So we say that in part explanation and the third thing we say is that fundamentally, for the reasons I hope addressed in our submissions, it is for the applicant for the approval of agreement to establish to the requisite satisfaction of the Commission that there has been genuine agreement. Ultimately there must be affirmative satisfaction. We say all of these factors cut against a holding of affirmative satisfaction.

PN93

JUSTICE HATCHER: They have demonstrated it. That's why the agreement was approved. It's now your job to establish that there was some error on the part of the decision-maker.

PN94

MR DEAN: All I can identify in relation to the genuine agreement is the chronology and I appreciate that in all cases it might not be the case that that would be sufficient but we say that the provision of a full text of an agreement concurrently with the NERR, concurrently with an explanatory document, suggesting an explanation of the role of the employees in the implementation of the agreement in the circumstances of the demographics of the cohort, the lack of

experience of the cohort and the absence of a bargaining representative rise to the level that should give concern to whether principle 18 has been observed.

PN95

JUSTICE HATCHER: Thank you.

PN96

MR DEAN: I just make the point that in relation to bargaining, what we know about bargaining comes through or what is before the Commission in relation to bargaining is in the employer's F17B. I don't want to shy away from that. It does refer to meetings with employees in the context of that Q&A document having been released and what it refers in that context is a number of meetings at which queries were raised but there is nothing, we say, that amounts to an actual process of bargaining. There were no – according to the employers – application of bargaining representatives and there's no evidence, we say, of any negotiation whatsoever that would - - -

PN97

JUSTICE HATCHER: Well, I mean, it seems to me that negotiation would be difficult in circumstances where no employee who is a member of the SDA takes steps to involve the SDA and apparently no other employee nominates a bargaining representative; that is unless you try to engage simultaneously in bargaining with the whole workforce. It seems to me that's a bit difficult.

PN98

MR DEAN: All I can say to that is there was no call for the appointment of bargaining reps, beyond the NERR and understood in the context of the cohort we're dealing with, there was no call for any appointment of any bargaining representative, nor were there any bargaining meetings. And we say that's not really surprising, given that employees were provided with a full comprehensive agreement and provided with information about their role in its implementation.

PN99

JUSTICE HATCHER: The whole purpose of the NERR was to advise employees of their representational rights. If, having been advised, they don't choose to exercise those, that can't be sheeted home to the employer, can it?

PN100

MR DEAN: Well, I think that's a matter that could be taken into account, respectfully, in relation to – I think the cohort that one is dealing with is a relevant matter. If one was dealing with industrially sophisticated parties, that might be a very different situation from a situation in which one is dealing with a group of people in respect of many of whom they will be minors and have had no experience in the labour market whatsoever.

PN101

DEPUTY PRESIDENT MASSON: But those demographics you refer to are certainly relevant in the circumstances of the explanation and that's made clear. Where would it be clear that those demographics are relevant in terms of the nomination of bargaining representees?

PN102

MR DEAN: We can only rely on principle 18, which refers to an authentic agreement-making process. What I suppose I'm trying to resist, respectfully, is the suggestion that because a person hasn't – because a 17-year-old, maybe their first job, hasn't engaged a bargaining representative, it doesn't necessarily give rise to the suggestion – I would respectfully suggest - that they've made a forensic election in relation to the negotiation of the agreement or that they nonetheless genuinely agreed or are part of an authentic agreement-making process. It's just as likely, and we would submit more likely, that they were simply complying with what they understood to be their employer's – they were simply going through the motions of exercising their role in the implementation of an agreement that was put before them.

PN103

JUSTICE HATCHER: Well, in the principles, principles 1, 2 and 3 deal with representational rights or informing of representational rights. Principle 2 says that where it's applicable provision of the NERR satisfies the obligation to notify employees of their representational rights and principle 3 indicates an employer should not mislead employees about these matters. There's no reason for us to conclude that those principles were all satisfied (indistinct)?

PN104

MR DEAN: We do not make the submission that employees were not apprised of their representational rights under the Act.

PN105

JUSTICE HATCHER: And again, I might have put this to you already – but having done that and apparently confided with at least those principles, it was then for the employees to arrange representation, either by the union or by anybody else.

PN106

MR DEAN: In respect to that we say two things: I don't want to labour the point about our suggestion that the employer should have been well aware that the SDA was a bargaining representative, because I think that's been traversed. But the only point I make is that the demographics, we say, are relevant to that. It can't be the case, we would suggest, that you could give, for example, a workforce entirely comprised of 14 or 15-year-olds with a notice and then say, 'Well, that automatically gives rise to an inference of an authentic agreement-making process', notwithstanding that the NERR requirements have been complied with.

PN107

It must be a contextual matter, the demographics of the workforce, just as it would be if the employees were predominantly composed of persons speaking a language other than English.

PN108

JUSTICE HATCHER: I don't think there'll be any reasonable opposition to this but I should indicate that the F17 which was filed indicated that of the employees 84 were female, six were non-English speaking background, six were Indigenous,

one was disabled, 13 were part-time, 89 were casual, 57 were under 21 years of age and four are over 45.

PN109

MR DEAN: I think there were 108 employees in the cohort or there might be 104. In any event, that would suggest that 57 - - -

PN110

JUSTICE HATCHER: About half.

PN111

MR DEAN: Yes, are minor – are under the age of 21.

PN112

JUSTICE HATCHER: Right.

PN113

MR DEAN: So what we say is that those are relevant to determining – and I've been unable to locate an authority in relation to principle 18 as to what an authentic agreement-making process is but we would submit that whatever it is, it's not what occurred here. There were no negotiations to speak of, there were no bargaining meetings, whether with the SDA or with the workforce and there was a completed agreement circulated concurrently with the NERR.

PN114

JUSTICE HATCHER: Well, it was authentic in the sense that it wasn't a sham or a device ruse as we've seen in a number of cases: that is this was a genuine enterprise with an existing workforce and with an agreement that is intended to set the conditions for that workforce.

PN115

MR DEAN: It is not a – we would accept it's not a One Key type situation. It's not a greenfields with 3 employees or anything of that nature. But as I say, we were unable to locate any authority on what an authentic agreement-making process is but we would suggest that regard should be had to the authenticity of the process, not just the exercise. The second component – that is not just the creation - - -

PN116

DEPUTY PRESIDENT MASSON: So, Mr Dean, just so I'm clear: your view of authenticity in agreement-making includes the bargaining that led to the making of the agreement?

PN117

MR DEAN: My view is that that is the natural reading of the words, 'Authentic exercise in agreement-making'. It is the process of making the agreement that must have and hold authenticity. The second component of principle 18 is that employees have an informed and genuine understanding of what's being approved and it's in that context that I'll turn in a moment to what the explanations were, in particular having regard to the written material that was submitted concurrently with the agreement. Before I did that I wanted to address the role of Tracy Avis,

Ms Tracy Avis in the agreement-making process and I wanted to do that – the Commission may recall at the commencement of these submissions we identified correspondence from Ms Avis that was sent to the SDA in respect of which we say the respondent should have been aware about the applicant's status as a bargaining representative. The Commission may recall that in that correspondence Ms Avis was described as the authorised representative in dealings with the SDA in respect of certain of the respondent's stores.

PN118

Ms Avis re-enters the picture – perhaps if I can ask the Commission to turn to page 57 of the appeal book. So Ms Avis had previously, as authorised representative, inferentially of the employer, we say, advised Mr Amin that the respondent had no intention of negotiating a new enterprise agreement and of course without further notice a new enterprise agreement was subsequently, we would say, rolled out. But at page 57 of the appeal book – and this is part of the signed declaration from the respondent – in answer to question 26.1, describe the voting process for the agreement, the respondent says:

PN119

Employees who were not able to vote on the voting dates were invited to vote by email to Tracy@allsub.net.au, who was an employee representative (that's employee representative, not employer representative) and who would then make the secret vote on behalf of the employee.

PN120

So my conceptualisation, what effectively happens is two stage: the employees provide their vote to – or an indication of how they intend to vote – Tracy, Allsub.net.au. Tracy is then in effect their proxy conducting the vote on their behalf.

PN121

JUSTICE HATCHER: Just to check again, the F16 indicated, did it, that there were no employee bargaining representatives?

PN122

MR DEAN: The F16 did make that indication. That appears on page 35 of the appeal book in answer to the question, 'Where there any employee bargaining representatives involved in the agreement-making process'? The answer is no. Yet on the form F17B, not only is there an employee representative – I'd query whether there's a distinction between employee bargaining representative or employee representative – but the employees apparently had a representative whose role was in effect as a proxy for their vote. If I could then ask the Commission to turn to perhaps an example of how this proxy voting system was implemented - - -

PN123

JUSTICE HATCHER: Sorry – so before you move on this point, how do we infer that the Tracy referred to is Ms Avis?

PN124

MR DEAN: I can take the – well, I think if we turn back to the affidavit of Mr Amin, remembering that the email account referred to in the form 17B is Tracy - - -

PN125

JUSTICE HATCHER: Okay, so let's cut this short: so the email exchange between her and Mr Amin uses this email address, does it?

PN126

MR DEAN: It uses Tracy@allsub.net.au.

PN127

JUSTICE HATCHER: I see.

PN128

MR DEAN: And then this is picked up at page 78 to 83 of the appeal book, which has a voting instruction sheet.

PN129

JUSTICE HATCHER: Yes.

PN130

MR DEAN: I'll cut this short: at page 78 of the voting instruction sheet – sorry, the appeal book – the voting instruction sheet advises:

PN131

If you cannot attend the meeting, you are invited to vote by emailing Tracy@allsub.net.au by specifying your full name and voting process.

PN132

And we say that this is inconsistent with – to return back to the principles – inconsistent with, I think it's principle 15 which refers to – at 15A – a voting process that ensures the vote of each employee is not disclosed to or ascertainable by the employer. And just to complete the loop on that, at the risk of stating the bleeding obvious that's because Ms Avis was the employer's representative in the prior dealings. There is further information in relation to Ms Avis's role in the employer submissions, which were filed in this matter. Those, we say, should be given no evidentiary weight but I don't want to obfuscate what's said about that.

PN133

She is referred to throughout the employer's submissions but perhaps the most relevant reference is at paragraph 31 of the employer's submissions, which state:

PN134

Tracy Avis is a clerk not covered by the proposed agreement. Therefore she was an independent employee to the process. Tracy did not act as the employer's representative at any stage during the EA bargaining and implementation process.

PN135

Can I just say perhaps in relation to the suggestion that Ms Avis is a clerk, not covered by the proposed agreement, in the form 16 – I'm just attempting to pull

this up now – in the form 16. I'm attempting to line that up. Perhaps I can return to it. I understand a representation was made that all employees were covered by the proposed agreement and that's – we don't know whether Ms Avis is an employee of the respondent in this matter. But she's of course not covered by the agreement or would not be covered by an agreement as an administrative clerk. She would appear to fall outside of the scope of the agreement.

PN136

But perhaps more pertinently, how she is or how she came to be – switched hats from being the employer's representative in dealing with the SDA to becoming the employees' representative, in what capacity, by what process, et cetera, is entirely unexplained and we say inconsistent with principle 15.

PN137

DEPUTY PRESIDENT MASSON: Sorry, Mr Dean, if we're with you on that point, in terms of it being inconsistent with principle 15, you say that's fatal for a conclusion to the conclusion that the agreement was genuinely agreed?

PN138

MR DEAN: We do say it's fatal, in the sense that there is no reliable information before the Commission that would explain the impact that that had on the vote. Can I say in fairness to the respondent, as I think I'm obliged to, there is a contention at paragraph 30 of the employer's submissions filed two days ago in the appeal - - -

PN139

DEPUTY PRESIDENT MASSON: The point I'm getting at – are you saying it's essentially a mandatory requirement, because a member is required to have regard to the statement of principles and are you saying that each of the principles in the statement of principles must be ticked, so to speak, in order - - -

PN140

MR DEAN: No, I don't think we can put it that highly. I think the principles are a consideration that forms part of the evaluative exercise that the Commission is obliged to observe and they may weigh less or more heavily in a particular case. We say that concerns of this kind weigh more heavily in this case because of the susceptibility of the employee cohort to influence and so if anything in a case such as this, the concern regarding whether employees – the votes are identifiable, might weigh more heavily and in another case perhaps with a highly-unionised and secure workforce where the employer conducts a show of hands, it may weigh less heavily. But we say it's a consideration or in this case, an important consideration. I just wanted, in fairness, to take the Commission to paragraph 30 of the employer's submissions filed in this matter, which suggests that of the 88 people who voted, 55 voted in person and 33 via email to the admin officer.

PN141

But we say that this untested and unsworn evidence supported by no documentation should not be accepted and should not surmount what is an important consideration in this matter, which is that there is a significant unexplained role for a person who cast proxy votes on behalf of employees,

allegedly, in connection with the approval of the agreement and that the requirement of employees to provide – it would be a concern in any case, we would say, if a person who had recently acted as a representative for the employer was allowed to cast votes on behalf of employees. That would be a concern in any case.

PN142

But in this case it goes further because the requirement on the part of the employee is to identify themselves with their full name to a person in that position, in particular in the context of the demographics of the workforce is, we say, significant. We accept and I think we're bound to accept that the proper legal position is that that's an evaluative consideration and not dispositive. I then wanted to turn to perhaps the third tranche of what we say are the issues in relation to genuine agreement. The first was we say that the agreement was presented as a fait accompli. The second is in relation to the Avis issue and the third is in relation to the explanations which were provided to the workforce.

PN143

A lot of the explanation or the issues concerning the explanation to the workforce, which are addressed at paragraph 46 and onwards, address concerns that were also raised in the written submissions in relation to the BOOT. What we say the nature of the exercise upon which the Commission is required to embark in this regard is actually quite different from the BOOT consideration. It's not just a matter of explaining which terms are better and which terms are worse. It's a matter of explaining the effect and import of those terms so that employees can make a rational decision about whether to, on the one hand, vote to approve the agreement or on the other, to vote no, including in the service of attempting to negotiate superior conditions. So it's about understanding, in our submission, what the quantum and the quality of the benefit to the employees is, not simply whether the terms are better or worse. At paragraph 46.1 we refer to the interaction between the part-time provisions and the – of the award and the agreement and these are what we would characterise as similar to the hyper-flexibility conditions considered in Apple.

PN144

I don't know whether the Commission's had a chance to review the terms of those comparator instruments but in effect, the agreement permits the employer to roster employees within nominated hours – nominated availability – and provides that if you work within that nominated availability in excess of what it calls guaranteed hours, you are deprived of overtime amounts that you would otherwise be entitled to as a part-time employee working in excess of your guaranteed hours under the award. The explanation of that is contained – on the evidence before the Commission – in the table circulated to employees and that commences on page 69 of the appeal book and as best as I have been able to identify, if I could take the Commission to that in row 2, there is a description of the guaranteed hours provisions or the model created by the agreement and a description of the award provisions.

PN145

In relation to part-time employees, what's said about the effect of the agreement is that hours worked in accordance with an agreed roster, effectively the penultimate

sentence of page 69, hours worked in accordance with an agreed roster based on provided availability will constitute agreement to work those hours as ordinary hours for the rest of the cycle. We say that's insufficient to explain to a workforce of this age and without any prior experience, many of whom would have had limited prior experience in the labour market, what it means to have your hours deemed ordinary hours: that is they would not understand or the Commission could not be satisfied that they did have a genuine understanding that they were by the approval of the agreement foregoing a potentially significant entitlement to overtime hours for working in excess of their guaranteed hours visa vis the award.

PN146

The next entitlement that we refer to is the value of the allowances. This is at 46.2 of our submissions. The value of the allowances calculated into the minimum wage, a feature of this agreement, as we addressed in our submissions relating to the BOOT, is that rolled-up wages which buy out or are said to buy out the value of allowances, replace those allowances or a higher base rate, (indistinct) of allowances. The explanation for that appears on page 74, which provides a comparison of the allowances that were payable under the award and the allowances or the absence of those allowances under the agreement. At page 74, for example, in relation to motor vehicle allowance it's said – sorry, in relation to Broken Hill allowances, it's said: 'NA: Broken Hill allowance calculated into the minimum wage rate'. Special clothing allowance calculated into the minimum wage rate – I should say the same applies as for annual leave loading. To use the example of annual leave loading, the same explanation being provided on page 76, annual leave loading has been calculated into the minimum wage rate payable to the employee.

PN147

There is no explanation of how it was calculated into the minimum wage. So there is no apples-to-apples comparison that can be made between foregoing the entitlement to 17.5 per cent or the penalty rate, whichever is greater, and provision of a higher rate and we say that's particularly relevant in this context. The employees, the young employees with perhaps limited experience, are not necessarily going to know what additional component of their wage is said to be compensatory for that. In order to evaluate whether it works for them or whether in fact, for example, they would seek to agitate for an increase in the wage to compensate for that.

PN148

We don't say that that's of its own dispositive but we do say that it's a consideration, particularly in light of the demographics of this workforce that may not have ever previously received annual leave or annual leave loading. They did not understand, we say, what they were trading off for the (indistinct) minimum rate and more pertinently, that the Commission ought not be satisfied that they had a genuine understanding of that. Can I just take this opportunity to withdraw 46.3 of our submissions, which suggests penalty rates – how penalty rates have been calculated into the minimum wage. That's my error. Penalty rates are of course payable under the terms of the agreement.

PN149

I should say also that as I said at the commencement, we say none of this is cured by the BOOT undertakings because it's not just a case of award compliance, it's a case of employees understanding what they were receiving and what they were trading away. A smaller point: the agreement makes changes to the superannuation entitlements of workers and the explanation for that appears at page 74 of the appeal book. Under the award, employees receive payment at the legislative rate for ordinary time earnings, paid leave and the first 52 weeks of work-related illness or injury. The agreement provides that that entitlement is payable in accordance with the superannuation legislation. Now, there is no suggestion that the superannuation legislation was distributed. But in any event it's difficult to accept that from that, employees – particularly this cohort – would know and genuinely understand the circumstances in which superannuation was being paid unless they had some familiarity with the superannuation legislation, which we'd suggest is inherently unlikely. Then perhaps more substantively, at paragraph 47 we address an interesting feature of this agreement, which if I could take the Commission to appeal book page 19 - - -

PN150

JUSTICE HATCHER: Sorry, before you go on, the clothing allowance referred to in the explanation, is that different to the laundering and uniform allowance or they're the same thing?

PN151

MR DEAN: Sorry, one moment – my instructor is helpfully telling me that under the award you receive reimbursement for your uniform and a laundry allowance under the laundering clothes whereas under the agreement you receive nothing because it's said to be loaded into your wage, although how it's loaded into your wage is, we say, unexplained to the workforce. I'm not sure whether that answers the question or whether I've misapprehended the question.

PN152

JUSTICE HATCHER: Well, you said that the undertakings don't cure the problem but I'm not sure about that. That is – there's authority for the position that there's something (indistinct) explained. It can be overcome by an undertaking which cures the misrepresentation or the failure to explain. So for example, the Broken Hill allowance that representation is – and you say it's not properly explained it's incorporated into your minimum rate. But if we accept the undertaking that we get the minimum rate you'll get the allowance. Then that effectively cures the problem.

PN153

MR DEAN: All I think I can submit about that without – on my feet – is that the employees, the undertaking would perhaps cure the effect of any misunderstanding in relation to the effect of removing the allowance. A core feature of the agreement is the loaded rate. All of these things are aggregated into the loaded rate so the employees also have to understand or have to have understood at the time they were voting how much of a wage premium they were receiving and there is simply no way to evaluate that wage premium because they're of course also entitled to bargain in addition to the wage premium as well.

PN154

JUSTICE HATCHER: I understand all of that but the point I'm making is that to the extent that – and you're right about that, that is it was not properly explained say in relation to the Broken Hill allowance. The undertaking given in relation to that – that is that we'll restore the allowance and they'll get the same minimum rate as everyone else – would mean that any failure to explain it is by the by. That is, it's effectively been cured because they're going to get the allowance, the undertaking (indistinct).

PN155

MR DEAN: Then if I can come at it, perhaps, a different way: then perhaps it's more correct to say the term that wasn't explained was the minimum wages that were payable because the representation is that workers are receiving a 2 per cent premium and they can't evaluate what that premium is without understanding the value of the underlying components.

PN156

JUSTICE HATCHER: That might be right but does section 180(5) require that? It says you need to explain the term and its effect. Its effect is that you're not going to get the allowance and you're going to get this loaded rate instead. Isn't that sufficient? Does 185 require you to explain the mathematics of it?

PN157

MR DEAN: I don't say that it requires in every case that but all I mean to submit is that the representation was made that employees were receiving a loaded rate and a wage premium. In order to understand the value of that wage premium and the loaded rate, they need to have an appreciation of what the value of what is being foregone. Now, perhaps not in every case: perhaps workers could have a more industrially sophisticated workforce could have an evaluation and could be said to have genuinely agreed. But in this case, we say that the explanation that was provided was insufficient because it doesn't allow the employees to really determine the value of the wages they're receiving – the premium under the award, I should say.

PN158

JUSTICE HATCHER: Thank you.

PN159

MR DEAN: We don't say it's dispositive. We just say it's a factor in the evaluative consideration. Of course, I should say that – can I correct that: it's dispositive to the extent that it's not a minor error in accordance with section 185 as an exception to section 184(a). If it's other than a minor error, we say it's – it would be dispositive in those circumstances and for the reasons that I've advanced it cannot be, we say, a minor error considered in the context of the demographics of the workforce. To round off this third tranche of what we say are difficulties with the agreement, I wanted to take the Commission to appeal book page 19, which contains paragraph 26 of the agreement, headed, 'Returning property'. If I can characterise that, it effectively provides at 26.1 for an obligation arising under the agreement to remove company property including tools, uniforms, keys and some other things, notably confidential information. That particular clause does not appear at all in the explanation provided to the employees and what it does in

our submission is create a potential liability for civil penalty exposure on the part of the workforce for a failure to return both real property and confidential information, what that means in the context of this agreement.

PN160

We refer in our submissions to the decision of Application of Maurice Alexander Management, which is a decision of Deputy President Gostencnik at footnote 36 and can I say that in that decision, what was referred to or what was at issue was an obligation to comply with unknown company policies in relation to the – an agreement for a contractor of Qantas and it was noted at page 98 – sorry, at paragraph 91 of that decision:

PN161

Moreover, a breach of the obligation – that is the failure to comply with a policy as required by clause 18.6 – which would be a breach of the agreement which would expose the employee to civil penalties, presumably an application under section 50 of the Act. There is nothing in the materials which would suggest that this was explained.

PN162

And the circumstances, we say, are precisely analogous here. The creation of a civil penalty liability which doesn't exist under the award and in respect of which no explanation whatsoever was proffered. The significance of that – that is, we way, a significant term. There can be no basis, we suggest, for satisfaction on the part of the Commission that the workforce had a genuine understanding of the implications of that provision. We refer at paragraph 47 also to the employer deducting for a failure to serve out notice, which is for children. Can I just say in full fairness to the respondent, that is the subject of an undertaking so we'll move – (indistinct) rely on what was said about that earlier.

PN163

Then finally and perhaps less significantly but, we say, in aggregate an additional failure to explain was the meal allowance provision. The meal allowance provision or the explanation proffered for the meal allowance provision appears on page 74 of the appeal book: meal allowance as per the award. The meal allowance under the agreement is set at the rate in the award, not by reference to the award. But it's not indexed throughout the life of the agreement or no explanation but that's proffered and we suggest it's another disadvantage about which employees had no opportunity to assess because of the failure to explain. It's of course not a BOOT issue because of the test time issues.

PN164

So our suggestion is that the written explanation would not allow the workforce to make and understand an informed vote, including for the three reasons that I've identified and we say that the effect of that or the deficiencies in that regard are made substantially more grave given the cohort that one is dealing with here. We say that the Avis issue is in effect, whilst not dispositive, incredibly significant in the absence of a proper explanation of Ms Avis's role and finally that fundamentally this process was anything but a process of authentic agreement-making. It was the employer rolling out a completed agreement in effect and

asking the employees or advising the employees of their role in its implementation.

PN165

That is perhaps scarcely surprising in circumstances in which there was no representative for a group substantially comprised of inexperienced young people. Because or for those three reasons, we say that there should be no finding of genuine agreement, that the approval decision ought be quashed and be substituted with an order dismissing the application (indistinct). The only other issue I'd seek to raise is the employer or the union was not – the decision does not note the role of the SDA or it does not cover the SDA and that's a function of the SDA not being apprised of the first instance hearing.

PN166

But the SDA in the event that over its objections the agreement was nonetheless approved with undertakings, perhaps, the SDA would seek to be covered in those circumstances.

PN167

JUSTICE HATCHER: All right, thank you.

PN168

MR DEAN: Unless there are any questions, Members, those are the submissions on behalf of the SDA.

PN169

JUSTICE HATCHER: Thank you. Mr Allen and Ms Kite, do you want to respond to any of that?

PN170

MR ALLEN: Is there anything particular that we should be responding to or particularly not or - - -

PN171

JUSTICE HATCHER: Well, let's start off with the issue of Ms Avis and her involvement in the ballot. What can you say about that?

PN172

MS KITE: So we were advised by MST that we could – we wanted to make the voting process accessible to everyone and given the nature of our workforce, having an instore-only vote wouldn't have worked. So we were told we could have alongside that an online email vote as long as it was someone not affected by it, I suppose.

PN173

JUSTICE HATCHER: When you say you were told, told by who?

PN174

MS KITE: Advised by MST.

PN175

MR ALLEN: MST, the workplace lawyers.

PN176

MS KITE: Who had helped put it all together, I suppose. So, yes, I suppose that was why she was the email address given to the team. At no point do we know who voted or didn't vote. It was really just a process of her conducting alongside an instore vote to make sure that votes were not duplicated or scammed in any way, I suppose, and making it accessible to everyone.

PN177

JUSTICE HATCHER: Why was she described as an employee representative?

PN178

MR ALLEN: That is simply an old email signature from a previous clerk that we had. In that basis she acts – she pays payroll, she would take – she would pay our super and those sorts of things as an employee of us. So in this situation, yes, that was the logical person to take those votes, yes.

PN179

MS KITE: But she doesn't work - - -

PN180

MR ALLEN: We have no – we can't access them, we have no idea who, how, what, and that was the whole purpose of it, someone that wasn't covered by the agreement - - -

PN181

MS KITE: Yes.

PN182

MR ALLEN: - - - was really the bottom line to it, that has no - - -

PN183

MS KITE: Yes.

PN184

MR ALLEN: - - - that doesn't care if it goes ahead or not, basically, bottom line, and has no influence on it.

PN185

JUSTICE HATCHER: Yes, all right. It's suggested that there was a failure to properly explain a clause in the agreement relating to the return of property, including confidential information on termination of employment.

PN186

MS KITE: Yes. So we met with all of our current staff. I sat with them for about an hour, face-to-face, in paid time and we read through the proposed agreement and that's what we called it – the proposed agreement – and we went through those three documents. In particular we read the proposed enterprise agreement word-for-word. They were given an opportunity to ask any questions. They were given a hard copy of these three. They were encouraged to bring parents along or to get their parents to contact me personally with any questions or problems and in which case if there was any questions or problems that had raised, if we did need

to look at any undertakings – well, not undertakings, but make any changes and that process would have followed.

PN187

I mean, we've had – well, Lindsay's owned Subway stores for 20 years. I've worked with staff for 21. They're our most valuable asset and the last thing, you know, we wanted to do was sneak things by them. It was an agreement between both parties, if that makes sense. It wasn't us rolling something out and ticking boxes. So they were already aware pretty much of the fast food award conditions, even though we had a zombie agreement in place. We have been following most of the fast food award so they were aware of the differences in terms of allowances and pay and things like that versus what we were proposing as well.

PN188

MR ALLEN: Did they ask for questions, sorry, in relation to that specific point?

PN189

JUSTICE HATCHER: So in relation to the meal allowance, it's been put that that wasn't explained properly because you said it was as per the award when in fact it's a fixed amount for (indistinct).

PN190

MS KITE: So to double-check – is that the question and answer sheet that's being referred to as per the award or is that how it is viewed in the enterprise agreement?

PN191

JUSTICE HATCHER: I'm trying to paraphrase what Mr Dean put. I'm not saying it's my view. But as I understand he was saying is that when you say, 'as per the award', it suggests that you'll always get the meal allowance or the same amount as the award.

PN192

MS KITE: Yes, okay.

PN193

JUSTICE HATCHER: When it's in fact the case that the agreement specified the dollar amount and as I've (indistinct) that won't change during the life of the agreement.

PN194

MS KITE: Yes, yes. I think they're referring to a summary document which is that, just a summary, a side-by-side snapshot. The enterprise agreement, I believe – don't have it in front of me – I think explains exactly what those entitlements are and we went through that face-to-face.

PN195

MR ALLEN: Ultimately - - -

PN196

MS KITE: And if not, if any of the undertaking is made then we're happy for that.

PN197

MR ALLEN: Ultimately we, yes, are certainly not experts in the area and we provide the document as it was provided to us by MST, being the professionals in making these agreements so - - -

PN198

MS KITE: I mean, ultimately - - -

PN199

MR ALLEN: Was certainly no – nothing deliberate there obviously and we obviously are more than happy to pay everything that we are required to do.

PN200

JUSTICE HATCHER: All right, and when you say they provided you with this agreement, how did that work? Is this something being rolled out across Subway, is it? Is that – how did that all come about?

PN201

MR ALLEN: So, yes, it's all part of our submission, I suppose, but basically, yes, we had various – after the time we decided that we weren't going ahead, which was absolutely factual and as you pointed out, down the track five months later through really what happened, that pricked our attention for it again was a franchisee meeting in Adelaide in late July by which MST, the lawyers, made a submission or made a presentation, yes, on how things have slightly changed and how enterprise agreements are now a vital option again and that they could certainly assist with doing that and a policy wasn't just targeted at us. It was targeted at every franchisee.

PN202

There were some things in there and obviously as per, again, our submission that the fast food award is a little bit – can be a bit hard to decipher for us, let alone our employees. So we saw it as viable option for quite a few reasons. We knew it was going to be time-consuming. We knew it was going to be costly to our business to implement it, for a start, for actually doing all these paid meetings and all that sort of stuff. But we were happy enough that it was going to be a good thing for us and our employees and we certainly wouldn't have even considered it if we didn't think it was going to be something that they'd be happy with. We all the way along were more than happy to go down the process. We hummed and hahed over it.

PN203

We decided to do it but at the same time, hand on heart, more than happy if the employees didn't want it, at any point or even if we had, you know, some negative feedback at all from anybody we were more than happy to just stay on the fast food award. It was not something that we had a massive agenda to do. It was just something that seemed to be a good idea.

PN204

JUSTICE HATCHER: All right. We don't have any other questions but if there is anything else you want to say or respond to, this is your opportunity.

PN205

MR ALLEN: The only thing I would say is that, yes, the whole process was given to us by MST, the workplace lawyers. We followed that process exactly, including who and how the votes could be accepted. MST also did all the BOOT calculations, again, beyond their scope. We just relied on that being correct and ultimately the approval was given by the Fair Work Commission so that's all we really need to say about that. We've put the rest in about the SDA's involvement in that stuff early on and yes, again at no point in time did we ever consider that they needed to be a bargaining representative in the process.

PN206

Again, MST spoke to us about that post this appeal and saying the same thing again, that someone needed to actually put that in place and we weren't expected to know that that was going to raise its head or anything like that. We would not have gone down this process if we thought this was where we're sitting today. It's just not in our nature. We value ourselves on being good employers and it's been very stressful and we just would like to get on with running our business, quite frankly.

PN207

JUSTICE HATCHER: All right, thank you. Do you want to say anything in response to any of that, Mr Dean?

PN208

MR DEAN: Just two things: in relation to the – I (indistinct) to this earlier – in relation to the oral explanation that was provided to employees, to the extent that that might cure any deficiencies in the written explanation, statement of principle 12 suggests that it's appropriate for the Commission to have regard or the Commission is I suppose obliged to have regard by virtue of its appearance in the statement to paragraph 12(c) which says:

PN209

Regard may be had to oral explanations but the FWC may take into account where there is a written record or summary kept of the oral explanation.

PN210

We'd say in that regard that the only evidence properly before the Commission is the form 17(b) which refers to – in an entirely conclusory way – to the context of those oral discussions so in that regard, for example, we say it's an insufficient response to quell any concern in relation to, for example, the effect of the return of property clause, to say, 'We had oral explanations, everything was read through'. Then finally in relation to a question about I suppose the provenance of the text of the enterprise agreement and whether it's been rolled out generally, the SDA's experience – and I think that's borne out by the agreement and the consideration in the related appeal – is that enterprise agreements in very similar, not quite identical but very similar terms are appearing throughout the Subway franchise network.

PN211

JUSTICE HATCHER: All right. Can I just return to the undertakings and this is directed at both parties: we can only accept an undertaking if, among other

things, it doesn't result in substantial changes in the agreement. Did the parties say that these undertakings do not result in substantial changes? My focus in that regard is particularly in relation to the Broken Hill people that in effect what they agreed to was a loaded rate without the Broken Hill allowance and as I understand the undertaking it will now be that they'll get the same rate as everyone else if it's not the higher loaded rate and they'll get the allowance. Is that a substantial change or not?

PN212

MR ALLEN: It's certainly one that should be – yes, explained to those Broken Hill employees because, yes, there's a lot of them there, I assume, that are more than happy to get that extra loaded rate so they will be being told that they don't get that, that they get this instead. So yes, I would be - honestly I'd say that's probably significant but are they happy, would they be happy with it I would say most likely.

PN213

JUSTICE HATCHER: Sorry, the other thing is that it mustn't cause financial detriment so I'm just trying to work out in my head, were they better off with the loaded rate or are they better off with the allowance?

PN214

MR ALLEN: It will be – it would be detriment to some and an advantage to others, depending on how many hours a week they would do.

PN215

JUSTICE HATCHER: At least some employees will get less than what they thought they agreed to.

PN216

MR ALLEN: Yes.

PN217

JUSTICE HATCHER: All right. Mr Dean.

PN218

MR DEAN: I think this may actually turn on what the effect of the undertaking is or perhaps what the effect of the Broken Hill allowance is. So the undertaking in relation to the Broken Hill allowance is employees who work in Broken Hill are entitled to an allowance of $42.58 a week and what the agreement sought to do was break that up into working hours, so I think ratioed on perhaps, pro-rata on a 1 in 38 basis. The SDA's position is and has always been that that 42.58 is just payable for a week or work, whether you work three hours or 30. It's paid as a disutility allowance for – I don't know what the polite way to say this is – but residing in Broken Hill.

PN219

And so in effect it can't be compared in that way, we would say, to the hourly rate and therefore, on our interpretation of the undertaking, or on our construction of the undertaking, difficult to see how employees could be worse off because - - -

PN220

JUSTICE HATCHER: You might be worse off if you're working a lot of hours. That's the - - -

PN221

MR DEAN: If you're working more than 38 hours, perhaps.

PN222

JUSTICE HATCHER: Yes.

PN223

MR ALLEN: More than 38? Not more than 38.

PN224

JUSTICE HATCHER: That's presumably a point at which a loaded rate would make you better off than a flat amount.

PN225

MR DEAN: I think this is addressed in the affidavit of Mr Amin. It's 36 hours. All I can say perhaps on that is – I'm trying to think back to the demographics that were explained before from the redaction. But the overwhelming majority I think were part-time or casual employees.

PN226

JUSTICE HATCHER: Yes, all right. And I suppose we have to consider the undertakings cumulatively so there might be other also benefits from (indistinct), including the annual leave loading provision.

PN227

MR DEAN: That's right, and in effect, as I understand it what would be happening with the agreement as proposed in the undertakings is the employees would be getting a loaded rate plus the leave loading.

PN228

JUSTICE HATCHER: Yes, all right. Well, that's all we have to raise so if nobody has got anything they wish to add, what we'll do is now simply reserve our decision. We'll try to issue the decision in writing as soon as possible (indistinct) so we thank everyone for their attendance today and we'll now adjourn, which means you can simply disconnect.

PN229

MR DEAN: Thank you.

PN230

MS KITE: Thanks.

ADJOURNED INDEFINITELY **[3.36 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs