



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT EASTON

C2022/2296 C2022/2865

s.739 - Application to deal with a dispute

**Construction, Forestry, Maritime, Mining and Energy Union
and
Svitzer Australia Pty Limited
(C2022/2296 C2022/2865)**

Sydney

10.00 AM, THURSDAY, 6 OCTOBER 2022

PN1

THE DEPUTY PRESIDENT: Can I get the appearances.

PN2

MR A NEAL: Thank you, your Honour, my name is Neal, initial A, appearing on behalf of the Construction, Forestry, Maritime, Mining and Energy Union, MUA Division, of course, and with me today is Ms Carr of the MUA Division of the applicant. Thank you.

PN3

THE DEPUTY PRESIDENT: Mr Neal.

PN4

MR N NIVEN: If the Commission pleases, Niven, initial N, for AIMPE.

PN5

THE DEPUTY PRESIDENT: Mr Niven.

PN6

MR J MORAN: Moran, J, for AMOU.

PN7

MR L IZZO: Your Honour, Mr Izzo, initial L, with Ms Mamblona, initial M, for the respondent. Also with me is Ms James, initial F, but she's just stepped out temporarily, but she is with us here today as well.

PN8

THE DEPUTY PRESIDENT: Okay. Thank you, Mr Izzo. Any housekeeping matters?

PN9

MR NEAL: There are a number of them, your Honour. The first is the court book. A copy of the court book was filed in accordance with the directions and, on perusing it, I noticed this week that there are a few documents that were missing. As a consequence of that, my instructor raised the missing documents with the respondent, who prepared an updated court book which arrived late yesterday.

PN10

THE DEPUTY PRESIDENT: Yes.

PN11

MR NEAL: The difficulty with that is that I had prepared my case - you understand the difficulty - and the documents that are in the updated court book - there are not many, there are only a few - they are basically attachments to the application of AIMPE, AMOU and some attachments to their witness statements. What I propose, if your Honour finds it suitable, is that we refer to the initial court book save for any references required to the documents that have been updated in the updated court book, of which there are only a few and may not even need to be referred to. If we don't follow that course, my concern is that all the references that I'm shooting out during the hearing will be three to six pages

off and it will be a laborious task to then locate the exact page numbering in the new court book.

PN12

THE DEPUTY PRESIDENT: All right.

PN13

MR NEAL: If that's suitable to my friend.

PN14

MR IZZO: I want to try and resolve this as easily as we can. My issue is that I've got the revised court book here, so I'll be referring to, presumably, differently paginated documents. I wonder, depending which court book the Deputy President has, I mean we could refer to two court books, we could have court book A and court book B. The only difficulty with that would be for the actual purposes of the hearing if you refer to a page number that the Deputy President hasn't, we just have to find where it is, but I think that's what we would need to do. Otherwise, for the transcript, there's going to be issues, but we could call it court book A and court book B and that might alleviate Mr Neal's concern but mean that I can still refer to the one I have. I don't know what your views are, your Honour.

PN15

THE DEPUTY PRESIDENT: I have drawn electronically over the revised version, but I go more by the bookmarks anyway to navigate between documents.

PN16

MR NEAL: Okay. We'll do our best.

PN17

THE DEPUTY PRESIDENT: So, if you're taking, for example, a witness to page 3 of a particular POP, then we can get to that reasonably efficiently, I think, rather than referring to a page number in the court book. Try as best you can.

PN18

MR NEAL: Okay.

PN19

THE DEPUTY PRESIDENT: If it comes to it where there's documents that are, you know, sizeable documents that don't have their own pagination as opposed to the court book pagination, then we might do it the old-fashioned way and start looking at, you know, there's a page that's got a coloured drawing on it and then three pages after that, et cetera.

PN20

MR NEAL: Okay.

PN21

THE DEPUTY PRESIDENT: But let's go with that. So, I've got the updated version, but, as problems go, it's not the worst one.

PN22

MR NEAL: Thank you, your Honour. The next issue is that we have two witnesses who are appearing remotely via Teams. One of them is overseas in Indonesia, I believe.

PN23

THE DEPUTY PRESIDENT: Yes.

PN24

MR NEAL: That's Mr Ball. We are wondering whether or not it would be possible to schedule a time in order to deal with his evidence and we could then communicate with him that time and proceed on that basis.

PN25

THE DEPUTY PRESIDENT: Sure.

PN26

MR NEAL: We were wondering, if it's suitable to the Commission and my friend, 12 noon perhaps? He is one of our four witnesses. That makes it about 9 am his time in Indonesia.

PN27

THE DEPUTY PRESIDENT: Sure.

PN28

MR IZZO: I'm not going to be that long with the witnesses, so even if you want to - I anticipate being about 20 minutes with Mr Garrett and 10 minutes - you never know, but not very long - so maybe even if you make him 11.30, just in case, or we can have a short break, I don't know. Can he do 11.30?

PN29

MS CARR: Probably, yes.

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MR IZZO: Maybe see if we can do that, just in case, so we make best use of the time.

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MS CARR: And we've got Mr Steen as well.

PN32

MR NEAL: Yes, I will mention that. We have another witness, but he's in Brisbane, so it's not such an issue, but if we can just schedule that time for the witness in Indonesia and my instructor will go about trying to do that as we go along this morning, thank you, your Honour.

PN33

The third matter is my friend wishes to lead an additional statement. He has raised that with us. I'm not sure if that's been filed in the Commission; I think it has. For our part, we have no objection to that, your Honour. However, my friend for AIMPE, I think, has something to say in relation to that. That's the statement of Ms Divya.

PN34

MR IZZO: Ms Gomes.

PN35

MR NEAL: Yes, Ms Gomes.

PN36

THE DEPUTY PRESIDENT: An additional statement of Ms Gomes or a statement?

PN37

MR IZZO: Yes, a supplementary statement of Ms Gomes that was filed last Friday. It should be the very last document in the court book.

PN38

THE DEPUTY PRESIDENT: Yes.

PN39

MR IZZO: Tab 34.

PN40

THE DEPUTY PRESIDENT: Mr Neal, you're okay with that?

PN41

MR NEAL: I'm fine for that to go in, your Honour.

PN42

THE DEPUTY PRESIDENT: All right. But you have got a concern?

PN43

MR NIVEN: I have an objection to that, yes.

PN44

THE DEPUTY PRESIDENT: Should we deal with that now, the objection?

PN45

MR IZZO: Yes, I think we should, your Honour, because if it is allowed, then it may be that some of the parties want to lead some additional evidence in response, and so I think it is prudent to deal with it now.

PN46

THE DEPUTY PRESIDENT: Okay. Let me just read the supplementary statement. Yes, Mr Niven.

PN47

MR NIVEN: Thank you, Deputy President. My objection to admitting this supplementary witness statement goes to the reasons for it. It was outlined that it was being placed on the record as new information that had recently come to their attention. My concern with that is that I don't think it is new information because the only change really is the statement at paragraph 4(b) and then, at 5, they refer to the attachment DG9, but DG9 is dated 14 June, whereas the original statement was 11 August. So, in my way of thinking, this was information that was

available to Ms Gomes at 11 August and should have formed part of her statement on 11 August and it's not new information. This was referring to a notice that went out to employees on 14 June, so to raise it at the last minute I think has actually been done to effectively be a submission in reply to the unions' reply submissions.

PN48

THE DEPUTY PRESIDENT: Assuming that's right, that it is information that could have and should have been filed earlier, do you say that that causes you a prejudice in how you now present your case?

PN49

MR NIVEN: No, no, your Honour. It just would have been nice if we had had more time to consider that rather than it being (indistinct) on last Friday afternoon while I was still on annual leave.

PN50

THE DEPUTY PRESIDENT: All right, thank you. Mr Izzo.

PN51

MR IZZO: Thank you, your Honour. Mr Niven is correct in identifying the actual only new information is at 4(b) of that statement; the rest is really just introductory language. There is also an annexure. This information actually came to my awareness during the course of last week. I would say two things. The purpose for which fixed-term engagements have been used is something that has changed since this dispute was first filed, so it is a fluid scenario.

PN52

It is the case that a communication was sent to the workforce in June 2022, and that's the annexure that we have attached, but, even since then, there have been internal discussions about what fixed-term engagements are being used for, and my instructions are that the decision-making about what they will be used for is something that has recently evolved, which is what Ms Gomes is talking to, and that's why it wasn't raised with me when we prepared our evidence. When it came to my attention, I sought to put on the statement.

PN53

The reason we are seeking to file it outside the time frame is the instructions have changed because we say that the scenario that we are debating has actually evolved and that's why we are putting it on now. We sought to put it on last Friday to minimise the prejudice so that the parties at least had a week to consider it and, if they wanted to lead additional evidence about this very discrete matter, they could.

PN54

On that basis, we do seek to file outside of the time frame and we say that the Commission should exercise its discretion to grant it because the prejudice is effectively nil. Mr Niven has already conceded it's nil. On that basis, the balance would favour admitting the evidence in so you have all the relevant information in front of you.

PN55

THE DEPUTY PRESIDENT: It's a very brief statement at 4(b). It's essentially a submission, isn't it?

PN56

MR IZZO: It's a little more than a submission because it goes to why fixed-term engagements are being used, which is actually an evidentiary matter about the purpose they are being used for by Svitzer, so it's more than a submission and we will seek to rely on it as actually evidence of what the intention is, but it is very brief, and that's why we say it causes very little prejudice.

PN57

THE DEPUTY PRESIDENT: It's not a wholly new argument because I recall at a directions hearing a long time ago Svitzer's representative referring to, you know, the length of contracts in particular ports and so on, and it's not said by this evidence, or is it, that any particular position has been offered on a fixed-term basis because of a particular looming end of a contract or anything like that, is it?

PN58

MR IZZO: No, this evidence goes to the basis upon which Svitzer is presently seeking to use fixed-term engagements. It does not talk to historical engagements, no. The evidence does not go that far.

PN59

THE DEPUTY PRESIDENT: I guess what I'm - yes, because to the extent that there might be, for example, a port that's under risk of competition from another operator, that proposition is being put in a general term to support Svitzer's general approach now of offering only fixed-term contracts across the country. Is that what I glean from that?

PN60

MR IZZO: That's correct. That is the basis upon which it intends to offer fixed-term engagements going forward. It does not talk to the historical practice. We are going to have a debate in this hearing about whether Svitzer can or can't put people on fixed-term contracts, and the reason that this is relevant is - I think it's more in response to some of the union arguments - but motivations or purpose for the engagement may, I think, become a relevant consideration about whether something is permissible or not. We are going to develop this during the course of the hearing, but that's why it's been filed.

PN61

Now, in terms of why previous fixed-term contracts had been utilised, there's actually very little evidence on that. There's not really any filed by Svitzer and there is very limited evidence on that by the unions and that's the state of the evidence, but about our present intentions and going forward, that's what it goes to.

PN62

THE DEPUTY PRESIDENT: Is there an argument that Svitzer's intention is relevant in any event to interpreting either the agreement or any particular POP?

PN63

MR IZZO: I think there is for this reason, Deputy President: what we will advance as an argument is that the unions actually contend historically that fixed-term contracts can be used for certain purposes, and in fact we will demonstrate that there has been significant usage of fixed-term contracts historically for certain purposes, and so certain purposes are permissible, it seems to be agreed between the parties, and that's why intention becomes relevant because this purpose may be a new purpose, but then what we are going to ask the Commission to consider is, well, why is this purpose not permissible but others are, and that's why it is relevant and that's why it's been filed, yes.

PN64

THE DEPUTY PRESIDENT: All right. Mr Niven, I will let it in, but you, if you need to, have liberty to ask your witness any additional questions in chief to deal with that material that you didn't otherwise have an opportunity to file written evidence about. If it makes a difference to when you call your witness, you are able to open up in chief any additional evidence that you think you need to lead to deal with what's in this supplementary statement and, of course, the same for you, Mr Neal.

PN65

MR NEAL: Thank you, your Honour. Your Honour, there is one final issue, from our side anyway, by way of housekeeping and that's the question of the question, if I can put it that way.

PN66

THE DEPUTY PRESIDENT: Yes.

PN67

MR NEAL: It would seem that the parties are unable to agree, though I think we're close - perhaps we're close in relation to the entire dispute - but we are close on the question; I know that much.

PN68

THE DEPUTY PRESIDENT: Yes.

PN69

MR NEAL: But we are in your hands as to where we go.

PN70

MR IZZO: I'm happy to dispense with this. We wanted to make a point that there's certain things assumed in the questions posed by the unions that we say should not be assumed, but, as I think the MUA makes clear in its submissions, we can make all those points and we can advance our arguments and have their question answered in the way we want and the matter can run and I don't think there's prejudice to us. So, whilst we don't agree with some of the assumptions in their questions, I don't think we need to be too caught up with that. We can try and answer the unions' questions, and we have made the point that there are certain assumptions in there that shouldn't be assumed, and so be it. If our case is accepted, I think you will answer the question in the way we say, Deputy

President; if our case isn't accepted, then you will answer the way they say. So, I don't think we need to - well, I'm happy to proceed on the basis of their questions.

PN71

MR NEAL: I thank my friend for that concession, if I can put it that way, but there, of course, are two questions presently from the unions, one from the MUA/CFMMEU and one from AIMPE/AMOU. My friend has informed me he is content to proceed with the MUA question, which is at court book - in both court books - 237. That's at 237. We will need to make some small amendments because the question at 237 being the MUA question, as it were, does not encapsulate the ports the subject of the dispute filed by AIMPE and AMOU and that's Westernport and the Port of Sydney. So, it's the second line, your Honour, the ports of Brisbane, Newcastle, Sydney, Westernport and Melbourne, and then, of course - apologies for the typo in these submissions - the word 'Svitzer' needs to be inserted before 'Australia', of course, for the name of the agreement.

PN72

THE DEPUTY PRESIDENT: Apart from that, it's perfect.

PN73

MR NEAL: Thank you, your Honour, I appreciate that comment. As my friend says, I think we all know where we are in terms of the terminology used, et cetera, and your Honour can decide the matter, I think, within the ambit of that question quite appropriately addressing both sides of the argument, as it were.

PN74

THE DEPUTY PRESIDENT: I don't think I'm confined to a particular question. I am confined to determining a dispute because that's all I've got power to do, but I think the dispute itself is encapsulated in the materials that the parties have filed.

PN75

MR NEAL: Indeed.

PN76

THE DEPUTY PRESIDENT: And so the slightly different forms of the question I think each make clear what the dispute is and I don't see that anyone is being misled or there's any ambiguity about what the dispute is at the moment.

PN77

MR NEAL: No, no.

PN78

THE DEPUTY PRESIDENT: So I'm content to proceed on that basis. In the way that I determine the dispute, if it becomes necessary that I need to make a distinction between the particular questions, well then I'll just answer them all.

PN79

MR NEAL: If your Honour pleases.

PN80

THE DEPUTY PRESIDENT: Yes.

PN81

MR NEAL: Thank you.

PN82

THE DEPUTY PRESIDENT: Doing that I can't see would cause anyone a prejudice.

PN83

MR NEAL: I think we all know what's in dispute at the end of the day and that's the point your Honour makes.

PN84

THE DEPUTY PRESIDENT: Yes.

PN85

MR NEAL: So we are content to follow that course.

PN86

Your Honour, we have all filed extensive submissions in this matter. I have spoken with my friend with AIMPE and we don't intend to go into an opening and it's our preference to go straight into the evidence, if that's suitable to your Honour.

PN87

THE DEPUTY PRESIDENT: Absolutely.

PN88

MR NEAL: Indeed, your Honour, well then I'll call the first witness for the CFMMEU, if that's suitable, your Honour?

PN89

THE DEPUTY PRESIDENT: Yes.

PN90

MR NEAL: I call Mr Paul Garrett.

PN91

THE ASSOCIATE: Mr Garrett, can you please state your full name and address. Your business address is fine.

PN92

MR GARRETT: Paul Garrett, 365 Sussex Street, Sydney.

<PAUL GARRETT, SWORN

[10.31 AM]

EXAMINATION-IN-CHIEF BY MR NEAL

[10.31 AM]

*** PAUL GARRETT

XN MR NEAL

PN93

I will just get Mr Garrett a copy of his statements, your Honour. You have them? Indeed, thank you. Mr Garrett, you've made a statement in these proceedings dated 10 June 2022?---Yes, I have.

PN94

Do you have a copy of that statement with you?---Yes, I do.

PN95

Are the contents of that statement true and correct?---Yes, they are.

PN96

You don't require to make any amendments to that statement?---Sorry, they are correct, I just need to make amendments to two paragraphs.

PN97

Thank you?---Paragraph 52, I make reference to 13 September 2022. That should be 13 September 2012. It was a typographical issue. The same for paragraph 53. I make reference to 13 September 2022. It should have been 13 September 2012. It was a typographical error.

PN98

Thank you, Mr Garrett. Your Honour, I tender the statement of Paul Garrett dated 10 June 2022 with those amendments.

PN99

THE DEPUTY PRESIDENT: Thank you. Any objection, Mr Izzo?

PN100

MR IZZO: There is, your Honour, and we have exchanged some positions with the union parties about that.

PN101

THE DEPUTY PRESIDENT: Yes.

PN102

MR IZZO: Perhaps I can take you to those objections. I want to say at the outset, your Honour, we are mindful that the Commission isn't strictly bound by the rules of evidence and we have taken that approach, but there are some matters that we think are quite important to have struck out and I'll explain why. The first is paragraph 37, the third sentence.

PN103

THE DEPUTY PRESIDENT: When I look at the table of objections that was provided and it says in bold, for example, in that first box about paragraph 37, 'Matter of weight to be given to the evidence by the Commission', is that - - -

PN104

MR IZZO: That's the unions' response, yes.

*** PAUL GARRETT

XN MR NEAL

PN105

THE DEPUTY PRESIDENT: That's the unions' response? Okay.

PN106

MR IZZO: I wouldn't have intended to present it this way, but the way it evolved is that the unions' response is in the column where our objection is outlined.

PN107

MR NEAL: I would like to be heard. That was done late at night in a flurry, so I have more to say than what's involved, or what's involved from me, but there's more to come, your Honour, so, with that caveat - - -

PN108

THE DEPUTY PRESIDENT: Thank you.

PN109

MR IZZO: So that is, yes, the objection. The objection is not actually pertaining to a rule of evidence, it's actually about what the Commission is permitted to take into account in constructing the relevant terms of the EA and the POPs. The statement there, 'It was also agreed that Port Operating Procedures should specifically identify crew numbers and types of employment at clause 41.2 of the 2013 agreement', that is Mr Garrett's subjective view of the deal that was done to make the 2013 EA, and we say that is effectively his subjective intention of the agreement, which is something the Commission is not permitted to take into account in accordance with the principles outlined at *AMWU v Berri*.

PN110

Just to make that point good, Deputy President, I'm sure you're well aware of the principle that subjective intentions are not relevant. I am not sure if, Deputy President, you have a copy of the Berri decision handy. I actually want to take you to the specific evidentiary point that was considered in Berri.

PN111

THE DEPUTY PRESIDENT: Sure.

PN112

MR IZZO: It's at paragraph 82 of the judgment. While you're looking for that, Deputy President, just by way of background, Berri related to an EA which had a laundry allowance clause in the schedule but nothing in the text of the agreement that told you who got it, or how, or how it applied and the argument by Berri was that this was a relic that had just somehow been transplanted from EA to EA over time and, in fact, the intention of the parties was it was to have no effect.

PN113

Mr Burton gave evidence, and this is at paragraph 82, that the agreement that was made back in 1999 was that the laundry allowance was exchanged in exchange for a wage increase, that is, it was traded off. That evidence was relied on at first instance by Lawrence DP and the Full Bench found that Mr Burton's evidence that there was an agreement back in 1999 that the laundry allowance was swapped out for a wage increase, this is his subjective view of the deal that was done.

*** PAUL GARRETT

XN MR NEAL

PN114

The evidence is the same as what's been given here. What's been given here is that it was agreed that X, Y and Z. It's the same evidence that the Bench criticises at paragraph 82 in Berri, and so we say the Commission is not permitted to have regard to it. So, when it comes to the objection, it's not really a matter we can say should be given just little weight, but the Commission will lead itself into error if it has any regard to this evidence.

PN115

This point is going to come up again and again about the same Berri point, so I think it would be imprudent for the Commission to say, 'Well, this is subject to weight', because that then infers you are going to give it some weight and, if you give it some weight, that would in fact be in error. That's why we maintain that objection, and you are going to see a similar flavour of objections about the evidence on this point, Deputy President. That's what we would say about that sentence.

PN116

THE DEPUTY PRESIDENT: When I was looking at your objections this morning, I went back to Lawrence DP's decision in Berri and saw who appeared. The problematic conclusion seems to me - well, the conclusion that Lawrence DP drew that the Full Bench seemed to find problematic was he found that the allowance had been bought off by that particular deal in 1999, if that's what it was, and then the Full Bench's comments at paragraph 82 make the distinction between one particular proposal put in a bargaining process and the whole deal and someone's opinion about how one particular proposal fits into the whole deal.

PN117

That, as I am understanding your point, is to the extent that that last sentence in paragraph 37 is Mr Garrett's subjective opinion about how that issue fits within the deal that was made in 2013, it's only his subjective interpretation, but, in reading the sentence again just now, it causes me to wonder what ended up in the 2013 agreement. Because of the reference to clause 41.2, was it the case that in the 2013 agreement, for the first time, a clause of the kind of 41.2 appears, and so, to the extent then that what Mr Garrett is saying is it's agreed that a clause like 41.2 should be inserted, that's not an opinion about what the deal was, it's essentially a drafting choice, if you know - and I can then look at the clause in a particular light because it couldn't be controversial. If all that Mr Garrett is saying in that sentence is, 'It was agreed in the 2013 process that a sentence be included in clause 41.2 of that kind', well, that's not controversial.

PN118

MR IZZO: If I can respond to that before Mr Neal responds?

PN119

THE DEPUTY PRESIDENT: Yes.

*** PAUL GARRETT

XN MR NEAL

PN120

MR IZZO: I think the difficulty I have with that, Deputy President, is everything you said probably applies to the reference to crew numbers in that sentence, but he goes on and says, 'It was agreed that Port Operating Procedures should specifically identify crew numbers and types of employment.'

PN121

THE DEPUTY PRESIDENT: Okay.

PN122

MR IZZO: Now, we have a significant disagreement about that 'types of employment'. I am having my associate bring up the 2013 agreement, but I suspect the 2013 agreement will not say 'types of employment' and we take issue with that. In fact, that is an issue of contention between the parties, is whether the POPs can or can't deal with types of employment. I don't think it is uncontroversial where he refers to 'types of employment.' It may be the case, and I'm just pulling up the 2013 agreement, that it could be the first time they identified crew numbers and, if that's the case, I don't think the statement is objectionable, but it is to the extent it refers to types of employment.

PN123

THE DEPUTY PRESIDENT: Okay, thank you.

PN124

MR NEAL: Your Honour, this is not about the admissibility or otherwise of the evidence; this is about what you do with the evidence, as I understand my friend's submissions, and that's a matter ultimately for your Honour to determine in giving judgment, not in whether or not the evidence is admissible. It seems to me that my friend's submissions go to, 'Ah, well, this evidence shouldn't be used against us in this way or that.' He can make that submission once the evidence has been put on. On my friend's own admission, there's no rule of evidence that he points to to prevent this evidence going in. It's more an argument about what you can or can't do with it, as I understand what he says, and that's a matter for your Honour to determine in the process of coming to a decision in this matter.

PN125

THE DEPUTY PRESIDENT: I think you're kind of right about that, but not quite, Mr Neal, in the sense that Mr Izzo is saying I shouldn't let it in because there's no use that I can make of it.

PN126

MR NEAL: Yes.

PN127

THE DEPUTY PRESIDENT: Which is not the same as an argument about, 'Just let it in and then think about whether you can use it at all.' It's a tougher ask for him at this point because, you know, it's akin to a strike-out application where you just say, 'Well, look, no matter how you cut the contest in this case, that sentence or that part of the evidence or that line of enquiry could never be relevant.' Mr Niven, do you want to weigh in?

*** PAUL GARRETT

XN MR NEAL

PN128

MR NIVEN: No, your Honour, I'm happy to rely on Mr Neal's submissions in that matter.

PN129

THE DEPUTY PRESIDENT: Sure. All right. I am going to let it in, which is not to say that I'm then going to place any weight on it. It is a matter of - it's possibly relevant if there is some ambiguity in a term of the agreement and, on some of the authorities, more in the Federal Court than Berri, the history of agreements and instruments might become relevant in that sense.

PN130

Your point, Mr Izzo, is clear, though, particularly in relation to the types of employment argument. I am not going to take that sentence on its face to be a statement that Mr Garrett and Mr Umansky, for what it's worth, agreed on, including the types of employment, as one of the matters that has to be covered in a POPs.

PN131

I think the more cautious approach is to admit it into evidence and then carefully consider after that whether it's of any use to the interpretation question. Thank you.

PN132

MR IZZO: I think, Deputy President, we have similar objections to other paragraphs.

PN133

THE DEPUTY PRESIDENT: Yes.

PN134

MR IZZO: And I'm starting to anticipate what your ruling on them might be. I suppose the prudent course of action, assuming that you would make a similar ruling, is we do press all those objections, we note that your ruling is likely to be the same, in which case we don't need to have the argument necessarily, as long as it is admitted subject to our objection.

PN135

I think then the only question is, is there any other different kind of objection in relation to Mr Garrett's evidence, and if you bear with me one moment - - -

PN136

THE DEPUTY PRESIDENT: Before you do that, and this is just so I don't forget, did you find the reference in the 2013 agreement to the particular clause?

PN137

MR IZZO: My understanding is in the 2013 agreement, it is the POPs clause and, yes, bear with me one moment, I can draw your attention to it.

*** PAUL GARRETT

XN MR NEAL

PN138

THE DEPUTY PRESIDENT: The agreement is annexure PG4.

PN139

MR NEAL: Page 390 of the court book, I think, Mr Izzo and your Honour, 390.

PN140

MR IZZO: Or 415 of the revised copy, I'm told.

PN141

MR NEAL: It's going to be a long day.

PN142

MR IZZO: We would say that where - so, clause 41.2 commences and it sets out the Port Operating Procedures will set out details in respect of the following subject matter, and it goes through a range of subject matter. I believe what's being referred to, the closest we will get is 41.2.1 where it talks about - see, we see quite clearly there's a reference to number of crews on duty, so 41.2.2(ii) talks about the fact that the POPs will deal with number of crews.

PN143

We say that that whole - there will be no 'types of employment' phrase in that whole 41.2 and, in fact, this clause reflects largely the existing clause in the 2016 agreement and, in fact, it is our argument - the reason I say this with confidence that there's no reference to 'types of employment' is because we have scoured over it and we know it doesn't have the phrase 'types of employment' in 2016.

PN144

I believe what is being referenced there is 41.2.1 and, more specifically, (ii). As you will see, number of crews is quite uncontroversially there; the types of employment is not.

PN145

MR NEAL: I beg to differ, your Honour, and I think that's at the centre of the legal argument, or one of the central issues of the legal argument in this dispute. You will recall from my submissions and also the submissions of my friends from AIMPE and AMOU that we say that the word 'man' imports a requirement for manning, which imports a requirement for types of employment. I have made that submission ad nauseam in my written submissions. I wish to advance it in this case and so, in response to my friend, I say that that, in our submission, is a reference to types of employment, and that's an argument we wish to make.

PN146

THE DEPUTY PRESIDENT: Sure.

PN147

MR NEAL: Which is why it's in Mr Garrett's evidence.

*** PAUL GARRETT

XN MR NEAL

PN148

THE DEPUTY PRESIDENT: We can have that argument. I was just thinking, if you had found the cross-reference, I was going to note it next to the paragraph in Mr Garrett's statement, that's all.

PN149

You were going to take a moment, Mr Izzo, to have a look for other - - -

PN150

MR IZZO: Yes, just bear with me a moment.

PN151

THE DEPUTY PRESIDENT: Different kinds of objections. While you are doing that, I shout out to Rose, who is typing this up today, a Mr Umansky was referred to earlier - U-m-a-n-s-k-y.

PN152

MR IZZO: In relation to the Berri objections, there is a slight addition in relation to paragraph 38(i). You will see there he says:

PN153

I observe that in POPs, language such as permanent full-time and part-time was interchangeable and meant the same thing.

PN154

Then he says:

PN155

It was my observation that Mr Umansky had the same understanding of these terms.

PN156

It is the same point as the Berri point, but the additional point that I wish to raise here is not only is it the subjective intention of a deal that was done, but also there's no direct evidence of what was said, it's simply a conclusion, that is, these things were dealt with interchangeably. We have no direct evidence of what was said by Mr Umansky that infers that these things were interchangeable; equally, we have no evidence of what was said by Mr Garrett that demonstrated that these concepts were or were not interchangeable. And so, in addition to the objection we raised about the admissibility from a Berri perspective, the evidence is also deficient in that respect. Now, that is a matter you can give weight to, yes, but we want to draw that there is a separate objection to the way the evidence has been put and the disadvantage that puts us to, particularly when Mr Umansky is no longer employed by Svitzer.

PN157

THE DEPUTY PRESIDENT: How you are understanding the second sentence of 38(i) is Mr Garrett's subjective understanding of Mr Umansky's subjective understanding? Is that - - -

*** PAUL GARRETT

XN MR NEAL

PN158

MR IZZO: Yes, and without any actual direct kind of references to what was said by anyone, just everything was interchangeable, which is not actually direct evidence of what was said. So, there's that additional complication with that type of evidence.

PN159

THE DEPUTY PRESIDENT: Mr Neal?

PN160

MR NEAL: All I have to say about it, your Honour, is what you have already said, which is it is simply his understanding, and so that's why I've said in the bold it's a matter of weight that you wish to give to it if you let it in.

PN161

THE DEPUTY PRESIDENT: Mr Niven, nothing to add?

PN162

MR NIVEN: No.

PN163

THE DEPUTY PRESIDENT: I can't see how that could be relevant to any matters that - - -

PN164

MR NEAL: If the Commission pleases.

PN165

THE DEPUTY PRESIDENT: I will strike out the last sentence of 38(i).

PN166

MR IZZO: The same objection arises, Deputy President, at 38(iii), the first and second sentences.

PN167

THE DEPUTY PRESIDENT: If we work backwards from the last sentence of 38(iii), you are not objecting to that sentence?

PN168

MR IZZO: Not the last sentence, no.

PN169

THE DEPUTY PRESIDENT: If the first half of the first sentence is read to essentially inform the last sentence, i.e. 'Mr Umansky and I spoke about a number of things and at no time did we ever discuss the use of a fixed-term contract' - - -

PN170

MR IZZO: There would be no objection to that.

*** PAUL GARRETT

XN MR NEAL

PN171

THE DEPUTY PRESIDENT: Yes. Mr Neal, if you were to not press the second line and the third line through to the end of the second-last sentence - - -

PN172

MR NEAL: Do you mean the sentence, 'It was my observation that this was a point of commonality', et cetera, 'between Mr Umansky and myself'? That's the sentence in question, isn't it, your Honour?

PN173

THE DEPUTY PRESIDENT: I think if we can just confine it to, 'Mr Umansky and I regularly spoke about the POPs needing to be simplified' and then the last sentence, 'At no time did we ever discuss the use of fixed-term contracts to replace', et cetera.

PN174

MR NEAL: Well, I press the first sentence, your Honour, in full. It's simply evidence about a discussion that he had and what the discussion was about. It doesn't actually go to any agreement. On that basis, I won't press the second sentence, if your Honour understands me.

PN175

THE DEPUTY PRESIDENT: Yes.

PN176

MR NEAL: But I do press the first and last.

PN177

THE DEPUTY PRESIDENT: All right.

PN178

MR IZZO: Could I just be heard on one further - - -

PN179

THE DEPUTY PRESIDENT: Yes.

PN180

MR IZZO: I think it does go to agreement. It says, 'Mr Umansky and I regularly spoke about...' If that's all it said, that would be fine, but then he says, 'and needing to be simplified', which I don't take issue on, 'and cover'. I have issue with 'and cover' because then that suggests there was an agreement that it should deal with, and then we have it again, types of employment, permanent part-time, permanent full-time. So, it's giving evidence about what Mr Umansky - again, it's the type of Berri point saying, 'This is what he agreed to and Mr Umansky was in agreement that we should deal with these things.' The words 'and cover' is what particularly causes me concern. If it said, 'They need to be simplified', then these words were used, I mean that would be less concerning, but this seems to me to give evidence of some subjective agreement on Mr Umansky's part that we should deal with types of employment, effectively.

*** PAUL GARRETT

XN MR NEAL

PN181

MR NEAL: It's evidence of what they spoke about, your Honour.

PN182

THE DEPUTY PRESIDENT: I think - I mean it's not good evidence.

PN183

MR NEAL: Indeed.

PN184

THE DEPUTY PRESIDENT: But it's evidence. I think if there was a reference in the italics to types of employment, for example, which is coming back to that issue in paragraph 37, that would be understandably problematic because that's part of the contest that we have today, but the matters that are referred to in the italics, they are not controversial things, are they?

PN185

MR IZZO: Well, I think they are because the statement there is whether they are permanent full-time or permanent part-time and we say the POPs don't need to deal with that, or shouldn't need to deal with that, and the EA doesn't contemplate dealing with that, and the statement here is suggesting that Mr Umansky, on behalf of Svitzer, agreed that they should deal with that. So, it is a matter that is squarely in dispute between the parties.

PN186

THE DEPUTY PRESIDENT: I am reading 'permanent full-time or permanent part-time' to include fixed-term.

PN187

MR IZZO: Well, that's our case, Deputy President.

PN188

THE DEPUTY PRESIDENT: That's right.

PN189

MR IZZO: But I think the difficulty might be - well, they will say you should read it differently, but certainly, if that's our case, then it's not controversial. I suppose if that's the way it's read, we don't have any objection.

PN190

MR NEAL: Well, we have. We obviously say that's not how it should be read, but I repeat myself. It's spoken about; it doesn't say, 'We agreed.'

PN191

THE DEPUTY PRESIDENT: Yes.

PN192

MR NEAL: It says, 'We spoke about the POPs needing to be simplified and cover...' It doesn't go on to say, 'and agreed that that be encapsulated in clause 41.2(i) of the agreement', et cetera.

*** PAUL GARRETT

XN MR NEAL

PN193

THE DEPUTY PRESIDENT: Right.

PN194

MR NEAL: So, on that basis, given I'm not pressing the second sentence, I can't see - the controversy - - -

PN195

MR IZZO: Perhaps I can - - -

PN196

MR NEAL: Sorry, I haven't finished. The controversy escapes me. It's simply evidence about a conversation. As you said, it's not great evidence, but it's evidence about conversation of matters that are in dispute, but not about any final agreement or, indeed, any subjective intention to make an agreement.

PN197

MR IZZO: Perhaps I can deal with it this way. If it's admitted on the basis that it is not purported that Mr Umansky agreed that these things need to be in the POPs, then it doesn't cause that offence to us. If that is the basis upon which it is put, it becomes less offensive, Deputy President. I'm reading it to say more than that, but Mr Neal is saying it doesn't go that far, so perhaps that's a different way of dealing with the controversy.

PN198

THE DEPUTY PRESIDENT: If the first sentence is going to be relevant, i.e. the scope of matters that were discussed in the course of bargaining for the 2016 agreement and before, its relevance, to the extent the evidence is in the form that it's in, would be miniscule. The last sentence is a bit different, possibly, in terms of relevance of not discussing a particular point. It's going to be less miniscule than the first part. I think I'll let it in with that rider on it, that my concern is that, to the extent that it purports to be evidence describing, you know, the scope of discussions, it's not likely to be of any substantive relevance to the case, but it makes more sense than of the last sentence.

PN199

MR NEAL: Thank you, your Honour.

PN200

THE DEPUTY PRESIDENT: So the middle sentence is not pressed?

PN201

MR NEAL: That's correct, your Honour.

PN202

THE DEPUTY PRESIDENT: Yes.

PN203

MR IZZO: Just bear with me and I'll see if there's any - - -

*** PAUL GARRETT

XN MR NEAL

PN204

THE DEPUTY PRESIDENT: Sure.

PN205

MR IZZO: The balance of the objections, save for one, they are really about the Berri point, so we will assume that your Honour's first ruling will apply to those objections, Deputy President.

PN206

The final paragraph - I just want to note it is a different objection - at paragraph 49, Mr Garrett says he observes that the practice of replacing crew vacancies at Svitzer Australia has been a like for like basis. Now, we simply make the point again this is no real direct observation of any particular vacancy being filled. The purpose for which crew vacancies are to be filled is a matter of contention in these proceedings and it does reach a conclusion or submission, so we object on that basis and it's a matter of whether you strike it out or give it less weight.

PN207

THE DEPUTY PRESIDENT: I will leave that in there, I won't strike it out, but your point is noted that it's only an observation of Mr Garrett and there's other evidence - - -

PN208

MR NEAL: It's his understanding/observation, which may or may not be in my bold comment that is with you at the moment, your Honour.

PN209

THE DEPUTY PRESIDENT: And it's not a Berri point because it's Mr Garrett's observations of what happens at Svitzer as opposed to any bargaining issue.

PN210

MR NEAL: Yes, indeed.

PN211

MR IZZO: They are the objections to that statement.

PN212

MR NEAL: To that statement, yes.

PN213

THE DEPUTY PRESIDENT: It is, I suppose, a Berri point in terms of whether it fits into the basket of conduct after the agreement is made, et cetera, but we'll see how that plays out.

PN214

MR NEAL: And there's another Full Bench decision on that which throws all of it into - it's the Orica decision that's in my list of authorities, your Honour, which says that post-agreement conduct is out, full stop, a Full Bench of this Commission.

*** PAUL GARRETT

XN MR NEAL

PN215

THE DEPUTY PRESIDENT: Yes, well, there's another one - - -

PN216

MR NEAL: More recently, is there?

PN217

THE DEPUTY PRESIDENT: Well - - -

PN218

MR NEAL: Going the other way?

PN219

THE DEPUTY PRESIDENT: It's an appeal of a decision of mine. I don't know which way it's going to go.

PN220

MR NEAL: No.

PN221

THE DEPUTY PRESIDENT: But it's due about now.

PN222

MR NEAL: I'm still waiting for Mr Brown's table in that one, but, anyway, that's another - - -

PN223

THE DEPUTY PRESIDENT: That's the one, yes.

PN224

MR NEAL: Yes, well, he's two weeks late. I've got my instructor busily chasing
- - -

PN225

THE DEPUTY PRESIDENT: All right.

PN226

MR NEAL: But, anyway, here we digress; I apologise, your Honour.

PN227

THE DEPUTY PRESIDENT: Okay.

PN228

MR NEAL: Mr Garrett, have you made a reply statement in these proceedings dated - - -

PN229

THE DEPUTY PRESIDENT: Hang on a sec.

*** PAUL GARRETT

XN MR NEAL

PN230

MR NEAL: Sorry, your Honour, you haven't marked it.

PN231

THE DEPUTY PRESIDENT: That's all right. We will mark Mr Garrett's statement as exhibit A1.

**EXHIBIT #A1 WITNESS STATEMENT OF PAUL GARRETT
DATED 10/06/2022**

PN232

I won't go through the page numbers of the court book that are covered by exhibit A1 because that's too controversial.

PN233

MR NEAL: Thank you, your Honour.

PN234

Mr Garrett, have you made a reply statement in these proceedings dated 5 September 2022?---Yes, I have.

PN235

Do you have a copy of that statement with you?---Yes, I do.

PN236

Are the contents of that statement true and correct?---Yes, they are.

PN237

Your Honour, I tender the reply witness statement of Mr Paul Garrett dated 5 September 2022.

PN238

THE DEPUTY PRESIDENT: Mr Izzo?

PN239

MR IZZO: Yes, Deputy President, so there's two objections to this statement. Again, if they - just bear with me. They are both the Berri point, so, obviously, I would usually be content to just have that first ruling stand, but let me just see, I think, whether there's any additional concern for both of these.

PN240

THE DEPUTY PRESIDENT: Sure.

PN241

MR IZZO: Just bear with me for one moment.

*** PAUL GARRETT

XN MR NEAL

PN242

THE DEPUTY PRESIDENT: Again just while you are doing that, Mr Izzo, Mr Moran, I have largely ignored you up the back there, noting that you are appearing in the matter, so if I forget you again and if you have anything to say about the

objections and the evidence and the like, feel free to stand up and then I'll bring you up to a microphone.

PN243

MR MORAN: I am content so far.

PN244

THE DEPUTY PRESIDENT: Thank you.

PN245

MR IZZO: The biggest concern I have is with paragraph 15, the second sentence, Deputy President. The Berri objection stands on both, but in terms of the second sentence of paragraph 15, he says:

PN246

My understanding from discussions and negotiations with Mr Umansky between the 2013 agreement and the 2016 agreement is that back-filling on a temporary basis is the intent of the fixed-term employee provisions in the 2016 agreement.

PN247

Again, not only is it evidence of the deal that was done, it's purporting to be evidence of what Mr Umansky said without any actual direct evidence of what Umansky said. It's also a conclusion, so there's that additional disadvantage. It's really purporting to give evidence about what Mr Umansky said, so I think it has both those problems, and so that's why that's pressed on that basis.

PN248

THE DEPUTY PRESIDENT: Mr Neal?

PN249

MR NEAL: Are you shaking your head at me, your Honour, or the evidence? Shall I just sit down?

PN250

THE DEPUTY PRESIDENT: The transcript doesn't record shakings of head.

PN251

MR NEAL: Can I shake back? No, your Honour, I fail to see how that is a conclusion. I mean, I know that I might be getting a bit long in the tooth, but I fail to see how that is a conclusion. 'My understanding from discussions with Mr Umansky is that the intent', et cetera, it's his own understanding of the discussions with Mr Umansky. It's pressed on that basis. How far it takes the matter is a different question, but I think it's largely - subject to the Berri point, I think it's largely uncontroversial.

*** PAUL GARRETT

XN MR NEAL

PN252

THE DEPUTY PRESIDENT: To the extent that we are getting into territory like Alphapharm, and so on, of looking at representations made prior to an agreement being reached about something, and if we look at that from - if we use that kind of

analysis with enterprise bargaining, then query how useful it is, but, to the extent that we do it, all that we could usefully look at would be the representations made by one party in the negotiating process and what a reasonable person receiving that representation or hearing would understand by it.

PN253

That's putting aside the other questions about, well, representations made by one party in a bargaining process are only of a certain utility, but, that sentence doesn't even go to what Mr Umansky has ever said that gives Mr Garrett that understanding of what the intent of fixed-term employees, et cetera, is, so I don't think it gets as high as being evidence that could be relevant or probative to a point, so I will strike that sentence out.

PN254

MR NEAL: If your Honour pleases.

PN255

THE DEPUTY PRESIDENT: That's the second sentence of paragraph 15.

PN256

MR IZZO: The final objection is paragraph 10, the third sentence. Again, my sense is that this is trying to do two things. It's trying to give the subjective intention of a deal that was done and, in my view, you have already ruled on that and we have accepted that ruling, Deputy President, so we don't disagree with that, but then I again have this concern that it goes further than that.

PN257

It's trying to put certain representations in the mouth of Mr Umansky without actually saying what was said. Otherwise, I don't even understand why there is even reference to Mr Umansky. It could just say, 'My understanding of the deal was X', but, instead, we keep seeing these references to Umansky, which is trying to suggest there's some representation, but we don't know what it is. Well, we know what the summary of it is, but we don't actually have any words or any description of what Umansky said, and so I think it's the same objection again, Deputy President.

PN258

THE DEPUTY PRESIDENT: Mr Neal, it's different to one of the earlier sentences we were talking about where Mr Garrett lists the kinds of things that he discussed with Mr Umansky. It's a whole lot more loaded in its terminology in that sentence, i.e. the discussion that it's - - -

PN259

MR NEAL: Permanent full-time employees - - -

PN260

THE DEPUTY PRESIDENT: - - - the main source of crewing.

*** PAUL GARRETT

XN MR NEAL

PN261

MR NEAL: Well, I mean, it is effectively - all I can put is it's the same, effectively, as the last sentence objected to, which is it's evidence about his discussion with Mr Umansky.

PN262

THE DEPUTY PRESIDENT: But it's only evidence of Mr Garrett's impression of the discussion.

PN263

MR NEAL: Understanding of the discussion, yes. I don't press it any further than that, your Honour.

PN264

THE DEPUTY PRESIDENT: Thank you. I will strike that sentence out.

PN265

MR NIVEN: Deputy President, I just make the observation - I understand that you have struck it out, so this probably won't change your view, but - - -

PN266

THE DEPUTY PRESIDENT: No, no, there's always time.

PN267

MR NIVEN: - - - I just make the observation that that statement, full-time employees being the main source of crewing in the various ports with part-time employees supplementing the roster, those words actually form part of the agreement. I know there may be some debate about that, but - so, to that extent that the words in that sentence within that paragraph actually fell into the agreement and Mr Garrett had really only used the words that are part of the agreement, so I find it unremarkable that it wasn't discussed if it could actually form a clause within the agreement.

PN268

THE DEPUTY PRESIDENT: From an evidentiary point of view, you have got the sentence in the agreement, and I know the sentence you are referring to is 41.2-something there, and you have made submissions about the importance of that sentence anyway.

PN269

MR NIVEN: Yes.

*** PAUL GARRETT

XN MR NEAL

PN270

THE DEPUTY PRESIDENT: So, from an evidentiary point of view, the sentence is there in the agreement and it means what it says. If there's some ambiguity about it, that means we need to look behind it, but then the sentence in Mr Garrett's second statement doesn't take the matter any further because all he's saying there is, 'We had discussions' - to the same effect, in effect, but it doesn't say what the discussions are. So, yes, I don't think it's going to be relevant to - I don't think it's possible for it to be relevant to a matter in dispute, particularly given that the sentence is there.

PN271

MR NIVEN: Thank you, but I just make the comment that really the fact that he's claiming that they discussed it and then it is part of the agreement is really quite unremarkable.

PN272

THE DEPUTY PRESIDENT: Yes.

PN273

MR NIVEN: Thank you.

PN274

THE DEPUTY PRESIDENT: Which is similar to something we were discussing earlier about crewing levels, I think, being included in - - -

PN275

MR NIVEN: Yes.

PN276

THE DEPUTY PRESIDENT: All right, thank you. So that's the objections?

PN277

MR IZZO: They are the objections.

PN278

THE DEPUTY PRESIDENT: Okay, so that will be exhibit A2, the second statement of Mr Garrett.

**EXHIBIT #A2 WITNESS STATEMENT OF PAUL GARRETT
DATED 05/09/2022**

PN279

MR NEAL: That's the evidence of Mr Garrett, your Honour.

PN280

THE DEPUTY PRESIDENT: On Mr Izzo's estimate, the cross-examination might take less time than the objections.

PN281

MR NEAL: I have been watching the clock and thinking exactly that, your Honour.

PN282

MR IZZO: Representatives are notoriously bad at estimating anything. You should know that, Deputy President.

PN283

THE DEPUTY PRESIDENT: I didn't believe you the first time.

CROSS-EXAMINATION BY MR IZZO

[11.12 AM]

*** PAUL GARRETT

XXN MR IZZO

PN284

Mr Garrett, thank you for your patience. Could I ask you, if you don't mind, could you turn to paragraph 31 of your primary witness statement. I am just going to turn to it as well?---Yes.

PN285

In that paragraph, you say:

PN286

During the negotiation meetings, there was no discussion about Svitzer engaging ratings as fixed-term employees in lieu of permanent employment.

PN287

Do you see that statement there?---Yes.

PN288

What I want to put to you is that, whilst that may be the case, it is in fact the case that fixed-term employment as a concept was not really discussed much at all in the bargaining; that's the case, isn't it?---Yes, it was. There's been changes over the years to that clause and fixed-term had been discussed, but it was always discussed in light of temporary work, never to actually replace permanent jobs, and we've dealt with this with different examples during the course of negotiations on fixed-term contracts.

PN289

You say in relation to the 2016 EA that there were - sorry, I withdraw that. There were discussions about fixed-term being used as temporary, but you haven't given any evidence of what was said by any of the parties in the negotiations; that's right, isn't it?---No, I haven't given any evidence on that, no.

PN290

If I could now talk to you about paragraph 39 of your statement. You talk about the provision whereby full-time permanent employees are the main source of crewing the port roster and permanent part-time employees supplement the roster. You see that? That's kind of - on the ninth page of your statement, you refer to that clause?---Yes.

PN291

I think, as Mr Niven has pointed out quite uncontroversially, that is actually a clause that ended up in the 2016 EA; you obviously agree with that?---Yes.

PN292

The changes that brought about this coming in, they were all part of negotiations to do with your part-time employees getting more predictable leave; that's correct, isn't it?---Absolutely, yes.

*** PAUL GARRETT

XXN MR IZZO

PN293

So, the reason that this was introduced is because there was a bargaining claim, if you like, which was, 'We need better leave or off-duty periods for part-timers' and,

as the drafting for that evolved, this clause got put in with those bundle of changes; that's right?---Yes.

PN294

Okay, thank you?---But, just with context too, it was about ensuring the permanent full-time was a main source and it didn't go to part-time and move beyond to casual and other forms of employment. It was about securing part-time as a principal source of employment for the rosters in the ports.

PN295

But you didn't have exchanges saying that when you brought that in, did you?---Didn't have exchanges?

PN296

Yes, sorry, I will rephrase that question. You have just said then that this is about permanent part-timers being used, or predominantly used, but when this clause was brought in in the negotiations, all the discussions that preceded this clause going in were about ensuring off-duty periods for part-time employees; there weren't discussions held about needing to ensure that only permanent full-time and part-time employees were the ones being given appointments at the various ports?---Yes, there were discussions and negotiations. Negotiations don't take place over five minutes and aren't transcribed, but there were certainly discussions on it and the general line was we don't want to casualise the industry.

PN297

If I could take you to the statement of Ms Gomes. You may not have a copy of this. I take it you don't have access to the court book?---I've got a copy of court book A on my iPad. I'm not aware of court book B and I'm struggling, respectfully.

PN298

That's all right, we'll get there. Can you find in your court book the statement of Ms Gomes?

PN299

THE DEPUTY PRESIDENT: We have got a hard copy of - - -

PN300

MR NEAL: The old one?

PN301

THE DEPUTY PRESIDENT: - - - the latest one.

PN302

MR NEAL: Oh, righto.

PN303

THE WITNESS: I've just won the jackpot, I've got the - - -

*** PAUL GARRETT

XXN MR IZZO

PN304

MR IZZO: Excellent. If I can take you - and I'll let Mr Neal let me know when he gets to it because I will give you a page reference - - -

PN305

MR NEAL: I only have the one book, which is the old book, so we are just going to have to deal with it.

PN306

THE DEPUTY PRESIDENT: Maybe it should be court book A and court book 1.

PN307

MR NEAL: We'll get there.

PN308

MR IZZO: If I can take you to annexure DG5 - - -?---Could I respectfully ask for a page number, please?

PN309

Yes, you can, it's 974 in the premier court book?---Thank you.

PN310

MR NEAL: 949 of the premier?

PN311

MR IZZO: Or 949 in the earlier version.

PN312

THE WITNESS: Sorry, 974? I apologise, I'm just following - 974?

PN313

MR IZZO: At 974, yes?---Yes.

PN314

At DG5, and perhaps I should let you read this email from Mr Greg Yates, representing AIMPE, and I will let you also have a flick through the document that sits behind it, which is 976, which is an attachment to DG5?---Yes.

PN315

If you look at the attachment, Mr Garrett, you will see that, at 976, there's the words - there's some drafting for the Port Operating Procedures clause and it's headed, 'PPT Predictable Days Free of Duty' and then it's got a clause and it's got the reference to that statement that you refer to in your evidence, which is the primary means of manning the port roster will be full-time and PPTs shall be used to supplement, and then what follows is some other parts of the clause dealing with days off, leave days off, et cetera?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN316

What I want to put to you is that this is the drafting that was put to Svitzer seeking to amend the part-time employment provision in the EA at clause 42 and nowhere in this correspondence does it reference anything to do with trying to ensure only

permanent full-time or part-time employees were given engagements. Instead, the focus of this appears to be on providing predictable leave?---You know I'm Paul Garrett, don't you? That's Greg Yates' email.

PN317

I understand that. What I want to put to you, firstly, is that the drafting that was amended in the EA was actually proposed by AIMPE, not by yourself, so this is the document or this is the email that proposed the variation to the drafting; do you accept that?---I reject that.

PN318

So, if you reject that, are you saying you separately proposed drafting to Svitzer?---No, I reject that. The drafting process took place in a set of negotiations. It was done on a big screen and we all done it together. It wasn't done by email correspondence back and forth. At that time, there was a significant dispute between the Australian Institute and (indistinct) and engineers in Svitzer in regards to the agreement, which some people are aware of, and Mr Yates asserted a number of different points, but, you'd note I'm not a recipient of that email and I note I'm not cc'd into it, and that was the institute, as they're colloquially known as, representing their members there, but in regards to me saying that those words purported what the MUA put during negotiations, no, the problem is that the process took place over a number of hours over a number of days across a screen and we worked together through the words, we didn't go back and forth on emails, so I don't have a litany of - an armada of evidence on emails because we didn't do it via email, we done it face to face in a room.

PN319

Okay, I understand that. If I could then take you - I withdraw that. Do you accept it was not one of your claims in your log of claims that there should be a prescription that only permanent full-time or part-time employees serve the roster? You accept that wasn't one of your claims in the bargaining?---I'd have to go back to my claims.

PN320

If I can take you to DG1, which is at page 953 of the newer court book, so it's annexure DG1 to the Gomes statement. Apologies, I said 'DG1' - DG2, so it's page 953.

PN321

?---Can you ask your question again, please?

PN322

Yes, that it wasn't part of your log of claims that the rosters should only be served by permanent full-time or permanent part-time employees?---No, but what it was claimed at 13 was work arrangements for PPTs to be revisited, including, but not limited to, ensuring adequate leave being rostered. That was pretty much the genesis of those changes that you referred to in Mr Yates' email.

*** PAUL GARRETT

XXN MR IZZO

PN323

Yes, because there was a big focus on leave not being satisfactory?---That's right.

PN324

Or leave rates not being satisfactory?---The concern of the union at the time, though, I mean, what we put in writing to management and what we discussed in caucus can sometimes have some difference, but the concern at the time was we wanted to lock it down and not seek casualised. In representing that, you know, the email was from me, I was responsible for leading the negotiations and we thought it best served and we can fix the problem by ensuring that the leave was secured through the PPT arrangements and, generally in the process of negotiations, we don't act as a single bargaining unit, we prepare our claims, the Australian Maritime Officers' Union prepare theirs and the Institute prepare theirs, and then we work together through negotiations.

PN325

You said that it was a focus that there wasn't this increased casualisation. There's no claim that you put in writing to that effect; you're saying it was all done verbally?---Yes, that's correct.

PN326

If I can take you to annexure DG8, which starts at page 958 of the newer court book. If you can just bear with me one moment. Bear with me.

PN327

THE DEPUTY PRESIDENT: DG8 - that's page 1048.

PN328

MR IZZO: It's a multi-coloured - it might not be coloured, but it's kind of a spreadsheet of different claims. Sorry, bear with me, I have got the wrong reference. Yes, it's DG4 - apologies for that.

PN329

THE DEPUTY PRESIDENT: 958.

PN330

MR IZZO: Yes, it's a spreadsheet.

PN331

MR NEAL: I know, but the page numbers are - - -

PN332

MR IZZO: I will just wait for Mr Neal.

PN333

MR NEAL: Thank you, thank you. Okay.

PN334

MR IZZO: This document - I just want to ask have you seen this document before, Mr Garrett?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN335

It appears to me to be a summary of the claims and positions of the various parties during the course of bargaining. It appears to be a Svitzer document, but that was prepared and shared with the unions; would you agree with that?---Yes.

PN336

I will let you look through it to the extent you need in a moment, but I would draw, firstly, your attention to a couple of provisions. On page 4 of this document - so 4 of 15 - there's a reference, at A1, which says, at item number A1, 'Permanent part-time engagement.' Do you see that row?---Yes.

PN337

Then it says, 'Rewrite rules pertaining to PPT employment'?---Yes.

PN338

Then, if you go further down, the next row says, 'Work arrangements for PPT to be revisited, including, but not limited to, inadequate leave being rostered'?---Yes.

PN339

Then you will see the company's formal response was to refer it to a separate sub-committee?---Yes.

PN340

What I want to put to you, that in this entire - so that's where we say it deals with the PPT claims and, by way of background, and I will put to you a question in a moment, we say the real focus here was ensuring appropriate leave for off duty periods. What I want to put to you is that in this summary of all the claims that have been put backwards and forwards as at 29 October 2015, there had been no claim recorded that there was to be an exclusive allocation of port work to permanent full-time or part-time employees. That is not recorded as a claim that had been exchanged or negotiated between the parties in this document. Now, you may need to go through it, and I'm happy for you to do that, but that seems to be the position of the parties in this document. You may need to go through it to answer that question?---I'm just trying to absorb the question. The problem in answering it, and I'm not trying to be evasive, but the problem in answering it, it wasn't broke, so it didn't need fixing. There was a common understanding in regards to the base - I haven't put evidence on it, and I notice that everything's being objected to, but there was never a concern between the parties either way in regards to fixed-term employees, and we didn't need to make a claim because it wasn't a problem. It was very much clear what it was. Permanent part-times, which had wavered very heavily, has been problematic through the entirety of negotiations and how they have operated, and we worked together through the negotiations to resolve that.

PN341

No, there wasn't a claim - there wasn't a need to - nor was there a claim that people needed to wear their wet weather gear when it was raining; it was just assumed they'd put their jackets on. There's never been a problem to that extent.

*** PAUL GARRETT

XXN MR IZZO

PN342

MR IZZO: So it wouldn't have been the subject of discussions?---Fixed terms were, my oath they were, because we were - - -

PN343

But the problem you are identifying - - -?---Can I answer the question?

PN344

Yes?---So, in regards to the fixed-term situation, we were going through extensively a position with the Port of Whyalla and had to deal with a whole host of issues that were going on with the Port of Whyalla, which dealt with another contract altogether. So, there were discussions about fixed-term, the words 'fixed term' were used in the negotiations, but they weren't subject to any specific claims because there wasn't a need to make a claim about them. Their use was uncontroversial and it was as per the understanding of the parties.

PN345

You ultimately succeeded in changing the leave arrangements for permanent part-time employees; that's correct?---Well, ultimately, the members endorsed the document that had it, yes.

PN346

And that success is embodied in the agreement itself. If I could take you to your court book, that is the latest court book, at page 1196. So, it is clause 41.2.1(iv) of the EA, the change to the off duty periods for part-time employees that was ultimately improved by the workforce are embodied at 41.2.1(iv)?---Yes.

PN347

Okay, thank you. Can I just ask, just on a different topic now, you accept that, in all ports you have exposure to, casuals are engaged from time to time?---Yes.

PN348

And you agree that fixed-term employees have historically been engaged from time to time?---Yes.

PN349

If I can go now to - I've just put away your statement - no, I withdraw that. Just bear with me a moment. At paragraph 47 of your statement, you set out some of the purposes for which fixed-term engagements have previously been used?---Yes.

PN350

You accept that some of the durations of those fixed-term engagements could be quite extensive, for instance up to 12 months or more?---Yes.

PN351

You accept that casuals will occasionally work in the place of permanents when the permanents are unavailable?---Yes.

*** PAUL GARRETT

XXN MR IZZO

PN352

And your position is that this is consistent with the Port Operating Procedures in the ports that are subject to the present dispute?---Yes.

PN353

I have no further questions, Deputy President.

PN354

THE DEPUTY PRESIDENT: Mr Niven, any questions for Mr Garrett?

PN355

MR NIVEN: No, your Honour.

PN356

THE DEPUTY PRESIDENT: Mr Moran? No? Thank you. Mr Neal?

PN357

MR NEAL: Nothing in re-examination, your Honour.

PN358

THE DEPUTY PRESIDENT: Great. Thank you, Mr Garrett. Is that right, nothing in re-examination, full stop?

PN359

MR NEAL: Yes, indeed, nothing in re-examination.

<THE WITNESS WITHDREW

[11.32 AM]

PN360

MR NEAL: I was just going to move on to the next witness, your Honour.

PN361

MR IZZO: I note it's 11.30 as well.

PN362

MR NEAL: Yes, and that's what I was going to touch on. The next witness is downstairs. I wonder whether or not that would be an opportune - I'm sorry, Mr Ball in Indonesia is lined up, as I understand it, on Teams for now, so I will proceed with him, if that's suitable, your Honour.

PN363

THE DEPUTY PRESIDENT: Certainly.

PN364

MR NEAL: What do you require us to do to connect with Mr Ball, as it were?

PN365

THE DEPUTY PRESIDENT: Be patient, I think.

PN366

MR NEAL: Other than be patient?

*** PAUL GARRETT

XXN MR IZZO

PN367

THE DEPUTY PRESIDENT: I'm just assuming that will be required. We're still in that awkward face of in person hearings but also Microsoft Teams, as opposed to the old facilities that required cameras and courtrooms to have people giving evidence.

PN368

MR NEAL: Will Mr Ball appear on one of the - - -

PN369

THE DEPUTY PRESIDENT: Yes.

PN370

MR NEAL: Okay, thank you, your Honour.

PN371

MR IZZO: Anything would be an improvement on the old facilities, your Honour, so Teams is progress.

PN372

THE DEPUTY PRESIDENT: Yes.

PN373

MR NEAL: You've reminded me of how bald I am with that angle. Horrible. Please don't use that angle. No one usually can see up this high.

PN374

THE DEPUTY PRESIDENT: You are very close to the camera there.

PN375

MR NEAL: Indeed, I'm sure I am, your Honour. I'm very close to the ceiling, your Honour. He's waiting to join, apparently. There he is.

PN376

THE DEPUTY PRESIDENT: Good news. Mr Ball, we can see you. Can you see and hear us?

PN377

MR BALL: Yes.

PN378

THE DEPUTY PRESIDENT: I understand you can't see me. I'm Deputy President Easton and you're appearing on a screen in the courtroom here in Sydney in the Fair Work Commission and you are about to give some evidence. If you were here in the courtroom, you would be asked whether you want to take an oath or an affirmation. Assuming you don't have a Bible handy, we will go with an affirmation. Are you content to give an affirmation to tell the truth as you give your evidence?

PN379

MR BALL: Yes.

PN380

THE DEPUTY PRESIDENT: Great, thank you. So, the next voice you will hear will be my associate and she will step you through the affirmation.

PN381

MR BALL: Sure.

PN382

THE ASSOCIATE: Mr Ball, can you please state your full name and address. A business address is fine.

PN383

MR BALL: David Peter Ball, 46-54 Ireland Street, West Melbourne, Victoria.

<DAVID PETER BALL, AFFIRMED [11.37 AM]

EXAMINATION-IN-CHIEF BY MR NEAL [11.37 AM]

PN384

Mr Ball, it's Aaron Neal here; can you hear me?---Sure. Hi Aaron.

PN385

Thank you, Mr Ball. Mr Ball, you have made a statement in these proceedings dated 10 June 2022; that's correct, is it?---Yes.

PN386

Do you have a copy of that witness statement with you?---I do.

PN387

Are the contents of that witness statement true and correct?---Yes, they are.

PN388

Yes, thank you. Your Honour, I tender the witness statement of Mr David Ball dated 10 June 2022.

PN389

THE DEPUTY PRESIDENT: Thank you.

PN390

MR IZZO: No objections.

PN391

THE DEPUTY PRESIDENT: That is exhibit A3.

**EXHIBIT #A3 WITNESS STATEMENT OF DAVID PETER BALL
DATED 10/06/2022**

PN392

MR NEAL: Thank you, your Honour.

*** DAVID PETER BALL

XN MR NEAL

PN393

THE DEPUTY PRESIDENT: You're right to go, Mr Ball?---I am. It just looks like sometimes my internet's dropping out, but I am trying.

PN394

MR NEAL: That's the evidence of Mr Ball, your Honour.

PN395

THE DEPUTY PRESIDENT: Mr Ball, Mr Izzo is going to ask you some questions in cross-examination. Just let me give you a slight tip, and that is as you're watching the screen and you can see Mr Izzo asking you questions, if Mr Neal behind him moves suddenly or looks like he's going to stand up to object to the question that's being asked, then you just pause and wait and see if Mr Neal does actually get up and make an objection and, if he doesn't, then you need to answer the question as best you can. Thank you, Mr Izzo.

CROSS-EXAMINATION BY MR IZZO

[11.39 AM]

PN396

Mr Ball, in your statement, you say that fixed term contracts have historically been used to cover absences on a temporary basis. You recall saying that?---Yes.

PN397

Do you agree that casual contracts have also been used for this purpose?---My understanding is that casual contracts have only been used for this purpose for PPT positions, not for permanent positions.

PN398

Okay. Thank you. When fixed term or casual employees are used to cover absences, they will be of varying durations, won't they? That is, the fixed term casual uses will be for varying durations, yes?---Yes.

PN399

Some might be a couple of months or others could be as much as six or 12 months or more. Do you agree with that?---That could potentially be the case, but it hasn't been the case while I've been the official responsible for the Victorian operations.

PN400

How long have you been the official responsible for the Victorian operations?---Since 1 July 2019.

PN401

Bear with me one moment. I'm just going to pause for a moment, Mr Ball. Are you aware of the engagement of a Mr Murray Geddes by Svitzer, Mr Ball?---I'm aware that Murray Geddes works for Svitzer, yes.

PN402

Are you aware that he was on a fixed term contract from September 2018 all the way through to the end of 2019?---No, I am not.

*** DAVID PETER BALL

XXN MR IZZO

PN403

I take it you don't deny that he was on a fixed term contract for that period, you just weren't aware of it?---Yes, I wasn't aware of it. I have no knowledge of that contract.

PN404

Just bear with me one moment. Mr Ball, I think you gave evidence that - - -

PN405

MR NEAL: Well, I object, your Honour. I think he either did or he didn't.

PN406

THE DEPUTY PRESIDENT: Keep going, Mr Izzo. Wait for the question.

PN407

MR IZZO: My recollection is you gave evidence that only permanent part-time employees have filled the role of permanent fixed term positions. Do you recall giving that evidence?---Yes.

PN408

Are you aware of a Mr Andrew De Silva in Melbourne who was a casual that then took on a fixed term employment contract in a permanent full-time role in Melbourne in 2019?---No, I'm not.

PN409

Okay?---No, I'm not.

PN410

Thank you. Are you aware of another casual employee, Mr Christian Messer, who commenced employment in 2016 as a casual and in 2019 commenced as a fixed term employee – I apologise, he commenced as an 80 per cent fixed term employee, so you would say 80 per cent is a part-time position. Is that right, Mr Ball?---Yes.

PN411

Yes, okay?---I'm not aware of that, but - - -

PN412

All right. Bear with me one moment. Are you aware of a Mr Viren Herrera, again in Melbourne, who started as a casual in 2018 – in December 2018 he was fixed term part-time and by 2019 he has entered a fixed term full-time contract. Are you aware of that?---No, I am not.

PN413

I have no further questions for Mr Ball, Deputy President.

PN414

THE DEPUTY PRESIDENT: Mr Niven, Mr Moran?

*** DAVID PETER BALL

XXN MR IZZO

PN415

MR NIVEN: I don't have any questions for Mr Ball. I was just going to point out that two of those names that were questioned about were actually interviews - - -

PN416

THE DEPUTY PRESIDENT: Well, ask him questions or make submissions later. Mr Moran?

PN417

MR MORAN: No, thank you.

PN418

THE DEPUTY PRESIDENT: Mr Neal?

PN419

MR NEAL: No re-examination.

PN420

THE DEPUTY PRESIDENT: Mr Ball, thank you for your evidence. That's the end of your evidence. That's all you're required to do, so feel free now to disconnect and go about your day while we sit in the rain here in Sydney, but thank you for giving your evidence today. You can now disconnect. Thank you?---Thank you, Deputy President.

<THE WITNESS WITHDREW

[11.46 AM]

PN421

MR NEAL: Your Honour, the next witness is downstairs. I wonder if we could have a five-minute adjournment in order to get hold of him, bring him up here and have him ready to give evidence.

PN422

THE DEPUTY PRESIDENT: Sure, not a problem. Are we likely to finish the whole case today?

PN423

MR NEAL: I put my mind to this and I - - -

PN424

THE DEPUTY PRESIDENT: I don't want to start up a discussion that will mean that you're - - -

PN425

MR NEAL: No, no, no, there's not going to be a discussion. I have a proposition. I have a proposition.

PN426

THE DEPUTY PRESIDENT: Yes.

*** DAVID PETER BALL

XXN MR IZZO

PN427

MR NEAL: To my way of thinking this is a matter that might be best suited – or at least it will be my preference – to do a written closing as opposed to an oral closing with reference to the evidence.

PN428

THE DEPUTY PRESIDENT: All right.

PN429

MR NEAL: Now, on that basis I think we could finish today. If that's not the case, I'm not sure that we can. That's a proposition that I put both for my friends' consideration and your Honour's.

PN430

THE DEPUTY PRESIDENT: Okay, we'll cross that bridge later on.

PN431

MR NEAL: I think we need to finish the evidence.

PN432

THE DEPUTY PRESIDENT: We will either move as quickly as possible through the witnesses so that we definitely get all the evidence done today and then work out the rest – all right, let's adjourn for five minutes.

PN433

MR NEAL: Thank you, your Honour.

PN434

THE DEPUTY PRESIDENT: We will reconvene at 11.55.

SHORT ADJOURNMENT

[11.48 AM]

RESUMED

[11.59 AM]

PN435

MR NEAL: I call Mr Glen Williams, your Honour.

PN436

THE DEPUTY PRESIDENT: Thank you. Mr Williams, come on up. Have a seat over here, Mr Williams, or come and stand while we take an oath or an affirmation. Do you want to take an oath or an affirmation? An oath is where you swear on the Bible, an affirmation is where you just promise to tell the truth.

PN437

MR WILLIAMS: Affirmation.

PN438

THE ASSOCIATE: Mr Williams, can you please state your full name and address. Your business address is fine.

PN439

MR WILLIAMS: Glen Williams, 406-408 King Street, Newcastle West.

<GLEN WILLIAMS, AFFIRMED

[11.59 AM]

EXAMINATION-IN-CHIEF BY MR NEAL

[12.00 PM]

PN440

THE DEPUTY PRESIDENT: I can see you have got a folder there and I imagine it's open at your statement?---Yes.

PN441

Thank you. Mr Neal?

PN442

MR NEAL: Mr Williams, you have made a statement in these proceedings dated 10 June 2022?---Yes.

PN443

You have a copy of that statement with you?---I do.

PN444

Are the contents of that statement true and correct?---They are.

PN445

Your Honour, I tender the witness statement of Mr Glen Williams of 10 June 2022.

PN446

THE DEPUTY PRESIDENT: Mr Izzo?

PN447

MR IZZO: No objections. Thank you.

PN448

THE DEPUTY PRESIDENT: That will be exhibit A4.

**EXHIBIT #A4 WITNESS STATEMENT OF GLEN WILLIAMS
DATED 10/06/2022**

PN449

MR NEAL: Thank you, your Honour. That is the evidence of Mr Williams.

CROSS-EXAMINATION BY MR IZZO

[12.00 PM]

PN450

MR IZZO: Mr Williams, thank you. I've just got a few questions, not too many, for you. Your statement I think you have in front of you?---Yes.

*** GLEN WILLIAMS

XN MR NEAL

*** GLEN WILLIAMS

XXN MR IZZO

PN451

If I could ask you to turn to paragraph 24 of that statement. You say in paragraph 24 that the permanent full-time employees are – in fact I may have the

wrong statement. Just bear with me one moment. Sorry, paragraph 22. I apologise for that. You state that the permanent full-time employees are all identified in the roster that is attached to the Newcastle POPs. That is one of the effects of that paragraph, the statement you make; that's correct?---Yes.

PN452

You accept obviously that a permanent employee may resign from time to time?---Yes.

PN453

You don't say that it's required that a formal POPs change is needed every time someone resigns to remove that person's name from the roster and put someone else into that role?---I would imagine it would be updated.

PN454

The roster would be updated?---To request a new person, sure.

PN455

There wouldn't need to be a formal variation to the POPs in order to take one permanent full-time employee out and replace them with another?---I wouldn't imagine, but it's a noncontroversial change so the – they're changed by agreement so it wouldn't be an issue.

PN456

You don't necessarily agree on who the permanent employee is that replaces the permanent that has just resigned?---No.

PN457

Now, if I could take you to paragraph 24. You say that fixed term contracts have historically been used to cover absences on a temporary basis. Do you agree that casual contracts have also been used for this purpose?---Yes. We have not had casuals – we have only used casuals in Newcastle probably the last probably four to five years since we've had the 32 crew. Prior to that there weren't casuals in the port.

PN458

These periods of coverage, I assume they are of varying durations, so a fixed term or a casual might be used for a few months but for others six or 12 months or more?---Potentially, yes.

PN459

I think you say ordinarily permanent full-time positions are filled by PPTs, but that hasn't always been the case. What I want to put to you is that sometimes fixed term opportunities for full-time work has been offered to casuals. Do you agree with that?---In what regard? How would that work?

PN460

So a full-time role, so a role that involves full-time load - - -?---Yes.

*** GLEN WILLIAMS

XXN MR IZZO

PN461

- - - is offered - - -?---So a vacancy?

PN462

So a vacancy is offered - - - ?---Yes.

PN463

- - - on a fixed term basis to a casual employee. Do you accept that that has happened in the past?---No.

PN464

Bear with me one moment?---Not that I'm aware of, anyway.

PN465

How long have you been in the Newcastle port, Mr Williams?---Branch secretary for just over 11 years.

PN466

Okay. Are you aware of the employment of Mr Cody Hughes – an employee called Mr Cody Hughes?---Sure, yes.

PN467

Are you aware that he started as a casual in 2019 and then was offered fixed term part-time employment subsequent to being casual? Does that sound right to you?---Probably, yes.

PN468

Are you aware that his transition between casual and fixed term part-time on an on and off basis was at the beginning of 2019 to pretty much the end of 2020?---Yes, so that was covering a leave without pay position.

PN469

I think at the end of 2020 he became permanent part-time?---I'm not sure.

PN470

Okay?---So there was two casuals alternating between doing six months each while that person – one of the PPTs took leave without pay for initially 12 months, then that was extended, so Cody Hughes would have filled six months of it and Scott Henderson would have filled other six months, and then either/or had done another stint and then that position was vacated.

PN471

Are you aware of a Mr Jason Coppola that works in Newcastle?---Yes.

PN472

He also started as a casual – or I'll put this to you and you can tell me if you're aware of this or not. He started as a casual in October 2015, but performed - - - ?---I don't think he was a casual.

PN473

You don't think he started as a casual?---I don't think he did.

*** GLEN WILLIAMS

XXN MR IZZO

PN474

So I might ask you, have you got the court book in front of you?---Sure.

PN475

I don't know if you've got the whole court book?---Which one is - - -

PN476

MS CARR: The second - - -

PN477

MR NEAL: That's the one we moved - - -

PN478

MR IZZO: Yes.

PN479

I would like to take you to annexure SL1, statement of Sarah Lacey?---I could be wrong, but I know that Jason moved across from Smit towage when that – when they exited the port and he went into a – not into the roster, he was a part of what we were calling at the time flying gang. I'm only assuming that he was in a full-time – a permanent position.

PN480

Okay?---I'm not aware that he was casual.

PN481

In terms of the court book in front of you, you've only got your statement?---Yes.

PN482

Ms Carr is going to hand you annexure SL1. So what I'm going to do – and I've just lost the reference to Mr Coppola, so just bear with me. If I could take you to page 4 of that annexure SL1, which is in the new court – - -

PN483

MR NEAL: What name?

PN484

MR IZZO: The name is Jason Coppola.

PN485

MR NEAL: Yes.

PN486

MR IZZO: It's 1066 on the new court book, but it's the fourth page - - -

PN487

MR NEAL: 1041.

PN488

MR IZZO: - - - of annexure SL1?---1041, yes, Jason Coppola.

*** GLEN WILLIAMS

XXN MR IZZO

PN489

This document is effectively an extract from Svitzer's records - - -?---Okay.

PN490

- - - of the engagement types offered to various employees?---Sure.

PN491

It records Mr Coppola starting as a casual in October 2015 and then being offered fixed term part-time employment from April 2017; do you see that?---I do.

PN492

Then it has got him as a full-time part-time employee all the way until what looks like July 2018, at which point he actually converts to permanent part-time employment?---Sure.

PN493

You have no reason to dispute that?---No.

PN494

Similarly, just beneath Mr Coppola there is actually the employment of Shane Suska mentioned there?---Yes.

PN495

Newcastle Towage. Similar scenario; he starts as a casual in October 2015, but then from April 2017 to July 2018 he is actually on fixed term part-time employment contracts?---Yes.

PN496

Some of these permanent roles, you accept, have been filled by casuals in the past?---Well, no. Both of those guys weren't in the roster. They weren't working harbour towage, they were working, like I said, what's called the flying gang initially. I would have to go – you know, we would have to have a look to see exactly where they were, but when they moved across from PB Towage they were in flying gang, which they did tug movements around the country. They weren't used for harbour towage.

PN497

Were they working in Newcastle?---They were based in Newcastle. They both lived there.

PN498

Do you contend that the Newcastle POPs applies to their engagements and the work that they do?---At what point? When they were in the flying gang.

PN499

When they were engaged as fixed term employees?---Well, again, I'm not really sure what the dates were that they were in those. Initially when they moved across from PB, as I said, they weren't in the roster. They didn't work harbour towage.

*** GLEN WILLIAMS

XXN MR IZZO

PN500

Do you accept that they were working out of the Newcastle port?---Look, to be honest - it's a while ago - I don't remember what agreement they worked under, because they flew around the country moving tugs. Rather than having - you know, what they do right now with - a couple of people from each port will move the tug from port to port. We had a dedicated flying gang that ran around and done all sorts of stuff; like, they went to dry docks and done maintenance, they done all those types of things. Look, I'm not trying to be difficult, I just can't remember the dates and how long that went for or what the employment instrument actually was that they were paid under. Whether that was Newcastle or not, I don't - I just - yes, I can't recall.

PN501

All right. I have no further questions.

PN502

THE DEPUTY PRESIDENT: Mr Neal?

PN503

MR NEAL: No re-examination, your Honour.

PN504

THE DEPUTY PRESIDENT: Thank you very much?---Thank you.

<THE WITNESS WITHDREW

[12.10 PM]

PN505

MR NEAL: We now have Mr Steen who is in Brisbane on Teams, so we'll just connect him.

PN506

THE DEPUTY PRESIDENT: All right.

PN507

MR NEAL: Thank you, your Honour. I note that my friend has an objection to one paragraph of Mr Steen's statement. I wonder whether it might be convenient to deal with that now while we're waiting.

PN508

THE DEPUTY PRESIDENT: That makes sense.

PN509

MR NEAL: Thank you, your Honour.

PN510

MR IZZO: It's the second sentence of paragraph 28, your Honour.

PN511

THE DEPUTY PRESIDENT: Yes. Mr Neal?

*** GLEN WILLIAMS

XXN MR IZZO

PN512

MR NEAL: It is his understanding/observation, not a conclusion. That's all I have to say on it, your Honour.

PN513

THE DEPUTY PRESIDENT: I think I will strike that sentence.

PN514

MR NEAL: Thank you, your Honour.

PN515

THE DEPUTY PRESIDENT: The second sentence, right?

PN516

MR IZZO: Yes.

PN517

MR NEAL: Second sentence.

PN518

THE DEPUTY PRESIDENT: Not the whole paragraph.

PN519

MR NEAL: Thank you, your Honour.

PN520

THE DEPUTY PRESIDENT: Of course assuming he affirms it, it will be exhibit A5.

PN521

MR NEAL: Thank you, your Honour.

PN522

THE DEPUTY PRESIDENT: How long, Mr Neal, do you think you'll be in cross-examination of the respondent's witnesses?

PN523

MR NEAL: I might be able to get it in before 1 o'clock lunch adjournment.

PN524

THE DEPUTY PRESIDENT: Fantastic.

PN525

MR NEAL: I might.

PN526

THE DEPUTY PRESIDENT: All right. I take it we've got Mr Roscoe before - - -

PN527

MR IZZO: We're not cross-examining Mr Roscoe. There is one objection, I think.

PN528

THE DEPUTY PRESIDENT: Excellent. Good news.

PN529

MR IZZO: We will deal with the process later, Deputy President. I have a different view on how we should close, but I understand you're going to deal with that later.

PN530

THE DEPUTY PRESIDENT: Yes, sure.

PN531

MR IZZO: I just thought I'd note that now.

PN532

THE DEPUTY PRESIDENT: Yes. I take it Mr Steen is trying to join the call.

PN533

THE ASSOCIATE: It does not look like he is in the lobby.

PN534

MR IZZO: There is a single objection to the Roscoe statement we could deal with, if it's convenient.

PN535

THE DEPUTY PRESIDENT: Okay.

PN536

MR NEAL: Yes.

PN537

THE DEPUTY PRESIDENT: Yes.

PN538

MR IZZO: We just object - the Roscoe statement.

PN539

MR NIVEN: Yes, yes. Sorry, yes.

PN540

MR IZZO: So the objection is to paragraph 10, the second sentence. I just need to pull that statement up.

PN541

THE DEPUTY PRESIDENT: It's 227.

PN542

MR IZZO: Thank you.

PN543

THE DEPUTY PRESIDENT: I've got the book that you and I are using.

PN544

MR NEAL: So will my witness.

PN545

MR IZZO: The first sentence we haven't objected to is:

PN546

I was bemused to learn that Svitzer are now inferring that the POPs can't be in force in relation to the number of full-time crews in the port.

PN547

The second sentence is the one that concerns us, Deputy President. That seems to me to be the opposite of what Svitzer were insisting was the situation in early 2020. This is just terribly vague for me to respond to. Not only is it a conclusion or summary of something that has happened in the past, there is no particulars of what was being insisted. The response by AIMPE – and I'm sure they will address it in a moment – is, well, he goes on to explain his point.

PN548

If that's the case, I kind of maintain my objection to the second sentence because I don't know where it takes us. It's an introductory sentence. It's not necessary and it's causing me confusion as to what I'm meant to be responding to, and puts me at quite a considerable disadvantage to understand what we are meant to be insisting and how to dispute that contention; so I think it's quite prejudicial to us, Deputy President.

PN549

THE DEPUTY PRESIDENT: Mr Niven?

PN550

MR NIVEN: Yes. Thank you, Deputy President. As per our response it wasn't a conclusion, it was an introduction to the point that Mr Roscoe was making in paragraph 11 where he is referring to the attachment at W2. That explains, I guess, the writing of that paragraph in his statement. I think the important part is actually paragraph 11 and the attachment at W2 rather than that second sentence, so I don't think that prejudices the case if that statement is taken out.

PN551

THE DEPUTY PRESIDENT: Yes.

PN552

MR NIVEN: But I think, yes, it's really an introduction rather than a conclusion.

PN553

THE DEPUTY PRESIDENT: Well, it's an introductory paragraph but it states a conclusion about how to measure one view from Svitzer against another. I think if we delete the second sentence of 10, then you still have your paragraph 10 first sentence setting up the significance of paragraph 11.

PN554

MR NIVEN: Yes, that's right. Paragraph 11 really explains that part - - -

PN555

THE DEPUTY PRESIDENT: Yes.

PN556

MR NIVEN: - - - so I don't think it makes any difference.

PN557

THE DEPUTY PRESIDENT: All right. When we come to that, when you come to tender it, I'll strike out that last sentence in 10.

PN558

MR NIVEN: Okay.

PN559

THE DEPUTY PRESIDENT: It's kind of messy but it's not a great problem; why don't we tender that now if Mr Roscoe is not required for cross-examination and we're still waiting on Mr Steed.

PN560

MR NIVEN: Deputy President, I would like to tender the statement of Warwick Roscoe. Warwick is unable to be present because I was advised on Tuesday that he had to undergo a surgery today in the hospital.

PN561

THE DEPUTY PRESIDENT: All right.

PN562

MR NIVEN: He could perhaps have been available late tomorrow afternoon depending when the surgery finished today, because there will be a 24-hour caveat on signing legal documents, et cetera, and I'm assuming that that extends to answering 50 questions from lawyers. I have noted that they didn't want to cross-examine him, but hopefully we can just tender that statement and mark it.

PN563

THE DEPUTY PRESIDENT: Yes, I'm content to do that. We'll make that exhibit A6 just to keep the numbers neat and A5 will be Mr Steed's statement once he affirms it.

PN564

MR NIVEN: Thank you, your Honour.

EXHIBIT #A6 WITNESS STATEMENT OF WARWICK ROSCOE

PN565

MR NEAL: Apparently he has been waiting in the lobby, your Honour.

PN566

MS CARR: He's waiting to be - - -

PN567

THE DEPUTY PRESIDENT: Ms Carr, can you send my associate an email, cc'd to Mr Steen, so that we can then send Mr Steen the link again just to be quadruple(sic) sure. If you send my associate an email, cc'd Mr Steen - - -

PN568

MS CARR: With the link?

PN569

THE DEPUTY PRESIDENT: No, no, just an email, then my associate can reply to your email with the link, then we're all using the same link. Do you have objections to the respondent's material, Mr Niven? Do you have any objections to the respondent's statement that we can sort out at the moment?

PN570

MR NIVEN: No.

PN571

THE DEPUTY PRESIDENT: No? Okay. Mr Moran, I assume no objections from you to the respondent's statements?

PN572

MR MORAN: No.

PN573

MR IZZO: If it helps, I'm happy to do it by phone, as well, if that is of any assistance.

PN574

THE DEPUTY PRESIDENT: Okay. Thank you. We will briefly go off record.

OFF THE RECORD [12.24 PM]

ON THE RECORD [12.29 PM]

PN575

MR NEAL: Your Honour, I note there is someone else in the room with Mr Steen. We might have him leave, if appropriate, for the witness to give his evidence.

PN576

THE DEPUTY PRESIDENT: Sure. Thank you.

PN577

MR NEAL: I don't know if you want to make that direction, your Honour, or do you want me to - - -

PN578

THE DEPUTY PRESIDENT: It looks like he has understood.

PN579

MR NEAL: He has understood. I think he got a text message. Thank you.

PN580

THE DEPUTY PRESIDENT: So, Mr Steen, you can see and hear us okay? Maybe.

PN581

MR NEAL: That's a no.

PN582

MR STEEN: Yes. Good afternoon – or good morning, I should say.

PN583

THE DEPUTY PRESIDENT: Good morning to you. That would mess with my head if you couldn't hear me because obviously the other guy got up and left because he could hear us. All right, thank you, Mr Steen, for giving your evidence today. We have you on a screen here in the hearing room in Sydney and you're now going to give your evidence.

PN584

If you were here with us in the room the first thing that you would be asked is whether you want to take an oath or an affirmation as you give your evidence. Assuming you don't have a Bible handy, we'll go with an affirmation. Are you content to give an affirmation where you promise to tell the truth as you give your evidence?

PN585

MR STEEN: Yes.

PN586

THE DEPUTY PRESIDENT: Thank you. I should just say I'm Deputy President Easton and I understand you probably can't see me, but you can see the bar table; is that right?

PN587

MR STEEN: Yes, that's correct, Commissioner.

PN588

THE DEPUTY PRESIDENT: All right. Thank you. So the next voice that you hear, that will be my associate and she will step you through the affirmation.

PN589

MR STEEN: Okay.

PN590

THE ASSOCIATE: Mr Steen, can you state your full name and address. A business address is fine.

PN591

MR STEEN: Yes, Jason Steen, (address supplied).

<JASON STEEN, AFFIRMED

[12.31 PM]

PN592

MR NEAL: Mr Steen, it's Mr Neal here. I'm the barrister for the CFMMEU. Can you hear me?---Yes, yes, I can hear you, Mr Neal.

PN593

Thank you, Mr Steen. Have you made a witness statement in this proceedings?---Yes, I have, yes.

PN594

Is that dated 10 June 2022?---Yes, I believe so - yes.

PN595

Yes, and do you have a copy of it with you?---Yes, I have a copy of it, yes.

PN596

At paragraph 1 of that statement you say:

PN597

I am acting as a relief official of the Queensland divisional branch.

PN598

Is that still the case?---No. I was just a relieving official at the time.

PN599

Can you tell the court when you finished in your position as a relieving official?---That would have been about a week after that, I would say.

PN600

A week after you made the statement?---I believe so.

PN601

June 2022?---Yes. I would have to check the dates for you, Mr Neal, to be certain, but - - -

PN602

That's fine. Your Honour, I tender the statement of Mr Steen, dated 10 June 2022, noting the evidence-in-chief; that he's no longer a relieving official of the Queensland branch of the union.

PN603

THE DEPUTY PRESIDENT: Okay. Thank you. I'll mark that as exhibit A5 in the proceedings.

**EXHIBIT #A5 WITNESS STATEMENT OF JASON STEEN DATED
10/06/2022**

*** JASON STEEN

XN MR NEAL

PN604

Mr Steen, just for your information there is one sentence in your statement that is not being pressed and that's on page 5; it's in paragraph 28. If Mr Izzo asks you some questions about the things that you're talking about in paragraph 28, then we'll make it clear which sentence has been pulled out, but otherwise that's really just to let you know. The other question I have for you, Mr Steen, is you look like you've got a few papers there near you, as well as your statement?---That's right.

PN605

Can you move basically everything away from your field of view except your statement and then Mr Izzo is going to ask you some questions?---Okay.

PN606

One other tip for you is as you're watching the screen and you're watching Mr Izzo asking you questions, keep one eye on Mr Neal. Watch out for sudden movements and if he looks like he's going to object to a particular question, then he's going to stand up to make that objection. If you see him move and looking like he's about to stand up, then just wait before you answer the question and if he objects then you hold off. If he doesn't object, then you need to answer each and every question that you're asked to the extent that you're able to. All right?---Okay.

PN607

Over to you, Mr Izzo.

CROSS-EXAMINATION BY MR IZZO

[12.34 PM]

PN608

MR IZZO: Mr Steen, I've got a few questions for you but hopefully won't keep you too long. In your witness statement at paragraph 19 you state that the use of fixed terms contracts is incredibly rare and that you can only recall one time that it has occurred, and the POPs was varied by agreement after extensive consultation to allow for it. You see that statement?---Yes, yes, paragraph 19.

PN609

What I want to put to you is that in fact it has happened a number of times historically. That is, fixed term contracts have been used to engage people in the port of Brisbane where you work on a number of occasions. Do you agree with that statement?---Well, as a delegate for the MUA in Brisbane, I can only comment on my department. I don't really know the business and the ongoing day-to-day of the other two unions; what's going on with their employment status and contractwise. I was speaking for my department, the MUA in Brisbane, as a delegate.

PN610

Right, and how long have you been in Brisbane? Sorry, I'll - - -?---I've been in Brisbane probably 17, 18 years with Svitzer.

*** JASON STEEN

XXN MR IZZO

PN611

Thank you. You've answered the question. I didn't ask it very well, but you've answered what I was seeking to have you answer. Mr Steen, I might just take you

through some engagements and see if you recall these or don't. For your benefit, I might take you to the witness statement of Sarah Lacey. Now, I asked if you could have that assessable to you. Do you have the statement of Sarah Lacey and its annexure accessible to you?---Yes, I do, yes.

PN612

Can I take you to annexure SL1 - - -

PN613

MR NEAL: That will be page 1308.

PN614

MR IZZO: - - - at page 1038 of your document and 1063 of the new court book?---I'll have to get that up on the email; is that okay?

PN615

THE DEPUTY PRESIDENT: Yes, thanks, Mr Steen?---That's okay.

PN616

Mr Steen is opening something that was an attachment to an email.

PN617

MR NEAL: Which is Ms Lacey's statement that she sent in.

PN618

THE DEPUTY PRESIDENT: Just her statement?

PN619

MR NEAL: Just her statement as filed.

PN620

THE DEPUTY PRESIDENT: It's not the whole court book?

PN621

MR NEAL: Correct, so there is no court book number.

PN622

THE DEPUTY PRESIDENT: Right, okay.

PN623

MR NEAL: Yes.

PN624

THE DEPUTY PRESIDENT: All right.

PN625

MR IZZO: Do you have annexure SL1 in front of you? It should look like a printout from a spreadsheet?---Yes, what page was that on again, sorry?

*** JASON STEEN

XXN MR IZZO

PN626

So you've got Ms Lacey's statement which will be a few pages long - - -?---Yes, I've got - - -

PN627

- - - and then after that there should be a document headed 'SL1'.

PN628

THE DEPUTY PRESIDENT: It should be about page 5 in the .pdf that you've got, if the .pdf is only Ms Lacey's statement.

PN629

MR NEAL: Page 6.

PN630

THE DEPUTY PRESIDENT: Page 6, there you go?---Page 6, let's have a look.

PN631

MR NEAL: It's a separate annexure, Mr Steen?---Okay.

PN632

You may have been sent in the email a couple of documents. That should be a .pdf annexure; the first page says 'SL1'?---Yes, Sarah Lacey, SL1. Yes, I've got that now.

PN633

Excellent. If I can take you to the third row on SL1, it refers to a master in Brisbane, John Sutherland. It refers to, in the third column, him starting as a casual in 2013, moving into fixed term engagements for - - -

PN634

MR NEAL: I object to the question, your Honour. The witness has already given evidence that he is only responsible for the MUA and the MUA's members. The MUA's members are deckhands and ratings. He has admitted from the get-go, as it were, that he has no knowledge outside of his area of responsibility. Masters are members of another union represented here today. I don't think in that circumstance it's an appropriate question to ask of him.

PN635

THE DEPUTY PRESIDENT: I think it's an okay question to ask - I mean, I haven't heard the whole question yet – given that Mr Steen is in the same port, I assume, as this master. If Mr Steen knows anything about Mr Sutherland, then he has got to answer the question. If he doesn't, then he'll tell us.

PN636

MR IZZO: Do you know Mr Sutherland, Mr Steen?---I knew Mr Sutherland. He has passed away, unfortunately, a couple of months ago.

*** JASON STEEN

XXN MR IZZO

PN637

I'm sorry to hear. Now, did you know that he was engaged initially as a casual but then spent a period of time through 2015 and '16 as a fixed term employee in

Brisbane?---I knew something of it. I didn't know the full details of his contract of employment. I believe that he was job-sharing with another skipper in the place.

PN638

Thank you. What about Mr Egan, do you know him?---I'm overseeing him, yes.

PN639

So in the row below there is reference there to him being a casual and then from 2015 through to early 2018 he is on fixed term contracts. Is that something you were aware of?---I didn't know he was on fixed term contracts, no.

PN640

Thank you. Another, this time an engineer, Mr Lemm. He's just towards the bottom of your document. Do you know Mr Lemm?---I do know Mr Lemm and again I don't know his contract of employment.

PN641

Okay?---It wasn't my department.

PN642

Understood. There is another engineer, Mr Larkin, who starts as a casual – this is the bottom of the first page of SL1 – in 2015. He's on a fixed term contract from March 2016 all the way through to July 2017. Are you aware that he was a casual that had been moved across to fixed term employment?---No, I wasn't, no.

PN643

Further down on the same page there is a reference to Mr Prinsloo. He is a deckhand and he started as a casual, according to this document, and was a fixed term employee for in excess of 12 months from August 2019 to September 2020. Were you aware of that?---Yes, I believe so. That one with Mr Prinsloo – I've just got to find where we're at. Is that on page 2?

PN644

Yes, it's on page 2 and it's two-thirds of the way down?---Right, there we are. Okay, so that – yes, so he started as a casual in 2016, then he went to a fixed term contract. That's when we had the Fair Work sit-down with Booth DP regarding a 16th crew in Brisbane. It was agreed, as per the POPs, it was a trial. So he went into a fixed term contract and then after the company reneged with their agreement to have a 16th crew for the term of the SLA, the Smit Lamnalco agreement – so this is after the company reneging – it went to a hearing here in Brisbane with Asbury C and then Mr Prinsloo was made a permanent 38 per cent. So it went from 16 crews after the company reneged down to 15.38 and Tony was in that slot then.

*** JASON STEEN

XXN MR IZZO

PN645

Do I take it from your evidence there, Mr Steen, that the company's position at that time, and perhaps presently, is that they only need 15.38 crews to man the demand in Brisbane? Is that essentially the current arrangement?---Well, that's what the company believe, but I think common sense prevails that they actually

need more than 15.38. We've gone from a harbour with six tugs and 18 crews to a harbour with five tugs and 15.38 crews, and more shipping, so - - -

PN646

Your position is there should be 16 crews in Brisbane; is that right?---Well, at the very least. The numbers have increased in towage since the SLA got set in place; the SLA being the Smit Lamnalco agreement. The numbers have skyrocketed, the towage numbers, and I think anyone with a computer can probably go into QSHIPS – into the government web site QSHIPS – and see it for themselves.

PN647

Thank you. Then at the bottom of that page that you're looking at there is another master reference; Mr Brennan Rule. Do you know him?---I know Brennan. Yes, I know Brennan.

PN648

Now, there is a reference in this document to him working a fixed term contract in February 2019, again in May 2019, again in October and then from February 2020 until August 2020. Were you aware of any of that?---I wasn't aware of his contract arrangements again. I know he was filling a few gaps here and there, but I wasn't aware of the full circumstances of it.

PN649

Then on the next page there is a reference to another master, Mr Brooks. It's the third row. Do you know Mr Brooks?---Yes, I know Mr Brooks and again I wasn't – I'm not aware of his contractual agreement with the company.

PN650

Then there is a Mr Thomas a couple of rows down who is an engineer. Do you know him?---Thomas, Thomas – yes, I know Mark, yes, Mark Thomas.

PN651

He has a range of fixed term engagements through 2020 in the spreadsheet. Were you aware of those engagements?---No, I'm under the understanding he was job-sharing with another engineer, so it's not really saying – 'right to return a casual' – it hasn't got percentages on that information there, so if he's job-sharing – if he was doing anything other, I'm not aware of it.

PN652

Is it your view that if he's job-sharing it might be a different scenario and that it's okay to have him as a fixed term employee?---Well, the MUA in Brisbane has never job-shared, so I couldn't go right into that with you. I know the skippers and engineers have, but I wasn't aware they were on fixed term contracts while they were doing it.

PN653

Mr Handicott is the last one I want to ask you about. He's an engineer. Do you know Mr Handicott?---Yes, I know Geoff Handicott, yes.

*** JASON STEEN

XXN MR IZZO

PN654

He has got fixed term engagements, according to this document, in 2019 and he kind of reverts to in and out of casual employment. He has got then a fixed term contract - the second last row - from February 2021 through to March 2023. Were you aware of any of those fixed term engagements?---I'm just reading the first line there where he started as a casual and then it has got fixed term contract from 20/09/2019 to 28/09/2019, so that's a week, isn't it? I don't know if that's – you know, I don't know what's going on there, but, no, again I was – I knew he was a casual in the place, but was not aware of his, you know, contract with the company and so on.

PN655

I take it you do accept though, Mr Steen, that casuals occasionally work in the place of permanents, as well, when the permanents are unavailable; that happens?---Yes, when permanents are unavailable, yes, we've got a casual pool, again speaking for myself and our own department.

PN656

Thank you. They are all the questions I had.

PN657

THE DEPUTY PRESIDENT: Thank you. Mr Niven, nothing?

PN658

MR NIVEN: Nothing, your Honour.

PN659

THE DEPUTY PRESIDENT: Mr Moran?

PN660

MR MORAN: Thank you, your Honour.

CROSS-EXAMINATION BY MR MORAN

[12.50 PM]

PN661

MR MORAN: Mr Steen, Jarrod Moran is my name. I'm an official with the AMOU. I just want to clarify some of the evidence that you have given. Mr Izzo asked you a number of questions about masters and their employment conditions - - -?---Yes.

PN662

- - - and their employment status; casual, fixed term or otherwise. I heard that your evidence was that you have no knowledge of any of the employment relationships of the masters; is that right?---Yes, I don't ask people how much money they're earning and what kind of contract they're on.

PN663

I mean specifically with the AMOU members who are employed as masters; you have nothing to do with their employment conditions or any discussions with you about how they're employed?---No, that's right. Yes, nothing to do with me.

*** JASON STEEN

XXN MR MORAN

PN664

Thank you, your Honour.

PN665

THE DEPUTY PRESIDENT: Mr Neal?

PN666

MR NEAL: No, re-examination.

PN667

THE DEPUTY PRESIDENT: No re-examination.

PN668

That's the end of your evidence, thank you, Mr Steen, and you're free now to go about your day and disconnect from these proceedings. Thank you very much for your time today?---Okay, thanks.

PN669

If you want to stay and watch the proceedings you're welcome to do that, as well. I just ask that you turn your camera off and make sure that you're on mute?---Okay. Thanks very much.

<THE WITNESS WITHDREW

[12.51 PM]

PN670

MR NEAL: That's the applicant's case, your Honour.

PN671

THE DEPUTY PRESIDENT: That's the applicant's case – that's one of the applicants' cases.

PN672

MR NEAL: Pardon me, that's the CFMMEU's case, your Honour.

PN673

THE DEPUTY PRESIDENT: Yes, all right. Now, we've tendered Mr Roscoe's statement, haven't we?

PN674

MR NIVEN: Yes.

PN675

THE DEPUTY PRESIDENT: Is there any other evidence that you're wanting to rely on?

PN676

MR NIVEN: No.

*** JASON STEEN

XXN MR MORAN

PN677

THE DEPUTY PRESIDENT: No, okay. Thank you. Mr Moran? All right. Mr Izzo?

PN678

MR IZZO: Thank you, your Honour. We have two witness statements and both witnesses are here today. We're going to seek to tender the statement of Ms Divya Gomes first, so shall we make arrangements for her to come into the courtroom, noting the time?

PN679

THE DEPUTY PRESIDENT: Let's work out how we're going to spend the day. Mr Neal?

PN680

MR NEAL: Okay, I'll start at the end. With the closing submissions that I understand my friend has a different view on, two things I want to say. The first is a difficulty I have is I have about a 20-page floating submission which is referenced throughout with the old court book and we are currently – I've worked it out – about 37 to 40 pages apart with the references.

PN681

THE DEPUTY PRESIDENT: Right.

PN682

MR NEAL: So if we proceed with oral submissions I will be required to constantly stop and correct those references. That's the first thing I want to say. The second thing I want to say is I would appreciate if we could have a lunch adjournment before my cross-examination of Ms Gomez and Ms Lacey. I anticipate that my cross-examination of those two witnesses will take anywhere between – again estimates are often inaccurate, but it could be anywhere between 45 minutes to an hour and a half depending on how it goes.

PN683

So in those circumstances if we start at 2 o'clock or 2.15, I don't think I can usefully do anything further today given what I've said about my closing submissions.

PN684

THE DEPUTY PRESIDENT: Yes.

PN685

MR NEAL: If my friend wants us to come back tomorrow and do oral closing submissions, and giving me an opportunity to correct all of my references overnight, then that may be one way forward. The other way forward, which is my strong preference – particularly given the mix-up with the court books and in order to make the references accurate – is to put on written submissions in closing.

PN686

THE DEPUTY PRESIDENT: Right.

PN687

MR NEAL: In terms of how we proceed, that would be my preferred course.

PN688

THE DEPUTY PRESIDENT: Right, okay. Thank you. Certainly from what you've said we'll take a lunch break, because if you were going to say that in totum you think you would be about 15 minutes in cross - - -

PN689

MR NEAL: No.

PN690

THE DEPUTY PRESIDENT: - - - well, then we would press on, so we'll take the luncheon break. How long do you think your oral submissions would be?

PN691

MR NEAL: An hour and a half perhaps. It's 20 pages. I think there will be some two-way – I anticipate that, your Honour.

PN692

THE DEPUTY PRESIDENT: You're politely telling me to slow down in asking questions?

PN693

MR NEAL: I enjoy it, your Honour. No, no, I enjoy it, I enjoy it.

PN694

THE DEPUTY PRESIDENT: All right.

PN695

MR NEAL: But I will not be able to finish them today, I don't think. Well, if I do, it will be late today.

PN696

THE DEPUTY PRESIDENT: Right, okay. I take it, Mr Izzo, your preference is to finish the hearing today or tomorrow - - -

PN697

MR IZZO: Yes, well, it doesn't have to be today or tomorrow, but my preference is for us to have oral closing submissions and I think there is convenience to doing it whilst we've set down the time.

PN698

THE DEPUTY PRESIDENT: Yes.

PN699

MR IZZO: I say that because there is already a considerable amount of written material before you and I think because this is a question of construction, as well, that there would be benefit to having exchanges with the Bench to assist the advocates in making their submissions. It sounds like if we're going to do that it would be tomorrow, in which case Mr Neal would have the opportunity to address whatever issue arises with the court book references.

PN700

For my part, I thought I would say an hour maximum, but given what I've just heard from Mr Neal - he's going to go first, so there may be more to respond to, so maybe I will be an hour and a half. We could comfortably finish that tomorrow. If Mr Neal needs a slightly later start tomorrow to deal with any referencing, we could accommodate that, as well, but I think our preference would be to use tomorrow for the oral submissions.

PN701

THE DEPUTY PRESIDENT: All right. Thank you. I'm really feeling out those issues now to see whether each of you are going to go to the lunch break knowing that you're going to be called on to do your oral submissions this afternoon, but it seems from what you've said that the most logical course – because we're not going to be able to finish the whole case today one way or the other – would be to have the oral submissions tomorrow; get the witnesses done today and have the oral submissions tomorrow. Mr Niven, is there anything you want to say to add to the mix of these programming questions?

PN702

MR NIVEN: I guess in relation to the cross-examination I have some questions, as well.

PN703

THE DEPUTY PRESIDENT: Yes.

PN704

MR NIVEN: The length of time that will take really depends on the question of my friend who goes first.

PN705

THE DEPUTY PRESIDENT: Yes.

PN706

MR NIVEN: I won't ask the same question twice.

PN707

THE DEPUTY PRESIDENT: Yes.

PN708

MR NIVEN: So I may have zero questions, I might have a dozen questions.

PN709

THE DEPUTY PRESIDENT: Yes.

PN710

MR NIVEN: In relation to the closing submissions, yes, I'm in a similar position to my friend Mr Neal in relation to the numbering of the court book.

PN711

THE DEPUTY PRESIDENT: Sure.

PN712

MR NIVEN: I'm relaxed with the prospect of doing a closing submission by written submission.

PN713

THE DEPUTY PRESIDENT: Yes.

PN714

MR NIVEN: The rest of the submissions have been in writing. We did have tomorrow programmed, so I'm in your hands as to how you best want to use tomorrow. I'm really in your hands as to how you want to deal with tomorrow's time.

PN715

THE DEPUTY PRESIDENT: Okay. All right. Thank you, that's helpful. Mr Moran, anything to add?

PN716

MR MORAN: No.

LUNCHEON ADJOURNMENT [12.58 PM]

RESUMED [1.55 PM]

PN717

MR IZZO: I would like to call Ms Divya Gomes to the witness box.

PN718

THE ASSOCIATE: Ms Gomes, can you please state your full name and address. Your business address is fine.

PN719

MS GOMES: Divya Gomes, 99 Koorringa Way, Port Melbourne.

<DIVYA GOMES, AFFIRMED [1.56 PM]

EXAMINATION-IN-CHIEF BY MR IZZO [1.56 PM]

PN720

MR IZZO: Ms Gomes, you have signed a statement in these proceedings which I believe you have in front of you?---That's right.

PN721

That statement is a total sum of three pages long and has a series of annexures. I understand you want to make a correction to that statement which relates to the first line of paragraph 16?---That's right, the date is incorrect. It should read September 2015, not '19.

*** DIVYA GOMES

XN MR IZZO

PN722

September 2015. Okay, thank you. Subject to that correction is the evidence given in that statement true and correct to the best of your knowledge and belief?---It is.

PN723

Thank you. We would seek to tender that, Deputy President.

PN724

THE DEPUTY PRESIDENT: Mr Neal, any objections?

PN725

MR NEAL: No objection, your Honour.

PN726

THE DEPUTY PRESIDENT: Mr Niven?

PN727

MR NIVEN: No objection.

PN728

THE DEPUTY PRESIDENT: Mr Moran, no? Thank you. That will be exhibit R1.

EXHIBIT #R1 WITNESS STATEMENT OF DIVYA GOMES

CROSS-EXAMINATION BY MR NEAL

[1.57 PM]

PN729

MR NEAL: Thank you, Ms Gomes. My name is Mr Neal and I'm just going to ask you some questions about the evidence you have given in this proceeding. You have a copy of your witness statement with you?---I do.

PN730

I'll just take you to paragraph 11 of your statement?---Mm-hm.

PN731

You say there:

PN732

Usually when a full-time employee goes on a period of leave or is unavailable for a temporary period –

PN733

et cetera –

PN734

Svitzer's casual employees will be offered fixed term contracts to cover the temporary absence.

*** DIVYA GOMES

XXN MR NEAL

PN735

So you're talking there, aren't you, about temporary absences being covered by casual employees, not permanent vacancies?---In this specific sentence, yes.

PN736

Yes. It's your evidence, isn't it, that fixed term appointments are used by Svitzer to cover temporary absences only?---No.

PN737

I take you then to paragraph 15 of your witness statement. You say there again:

PN738

In my experience when fixed term employees have been appointed to cover temporary absences.

PN739

So again you're talking about temporary absences, not vacancies in permanent positions?---Can I just have a read of paragraph 15?

PN740

Yes?---Yes, I'm talking about temporary absences.

PN741

Temporary absences, thank you?---Yes, here.

PN742

You go on and say:

PN743

When employees are selected for relief work, full-time fixed term employees are utilised and picked for the relief work in the same way as permanent full-time employees.

PN744

That's correct?---Yes.

PN745

That's because they are filling a permanent position on a temporary basis, isn't it, not because they're permanent employees themselves?---It's because they're filling a full-time position.

PN746

Correct, temporarily?---Not always.

PN747

Not always?---No.

PN748

Okay. Can I take you then to DG1 to your statement – annexure DG1. It's at the end of your statement?---I don't have the - - -

*** DIVYA GOMES

XXN MR NEAL

PN749

MR IZZO: Do you have your own annexures?

PN750

THE WITNESS: No, I don't.

PN751

MR IZZO: Okay. Is there a court book there?

PN752

THE WITNESS: Page what, sorry?

PN753

MS CARR: 951.

PN754

THE WITNESS: 95?

PN755

MR IZZO: 951.

PN756

MR NEAL: 951.

PN757

MR IZZO: Just an interruption – I don't want to take away from Mr Neal's – I did omit to tender the second supplementary statement, but I would just seek to do that after the cross-examination.

PN758

THE DEPUTY PRESIDENT: Yes, all right.

PN759

MR NEAL: I have no issue with that.

PN760

THE DEPUTY PRESIDENT: Okay.

PN761

MR IZZO: Yes, we'll just do it at the end.

PN762

THE DEPUTY PRESIDENT: I will take that as confirmed, yes.

PN763

MR NEAL: There's no objection.

PN764

Do you now have DG1?---Yes, I've got DG1 in front of me.

*** DIVYA GOMES

XXN MR NEAL

PN765

Did you prepare this table?---Yes, I provided this table.

PN766

Did you prepare the table?---No, I didn't prepare it myself.

PN767

Okay. Who prepared the table?---Someone from the team prepared the table, but I did review the table.

PN768

Someone from what team prepared the table?---From the HR team prepared it.

PN769

From the HR team. When you say 'reviewed', how did you review it?---Made sure that the information in here was correct.

PN770

There are no deckhands or integrated ratings on that list, are there?---(No audible reply)

PN771

Only masters and engineers?---From what I can see, yes.

PN772

Can you tell the court exactly what this table shows; the data in it. What does it show?---It shows the details of employees we've engaged on fixed terms contracts.

PN773

For what period?---Different periods of time.

PN774

Do you have a start and end date or - - -?---There are a range of start and end dates.

PN775

Yes, but do you know when the first engagement of a fixed term contractor was as listed in the table?---It's in the table.

PN776

What is the date?---Which employee are you referring to?

PN777

Well, it's your table, so what I'm asking you is can you tell the court the date of the first engagement of a fixed term contract employee in the port of Sydney which you've given evidence about?---There is reference here to Ron Newland, started on 3 September 2013.

*** DIVYA GOMES

XXN MR NEAL

PN778

Right, so that was the first engagement of a fixed term contract employee and again that's an engineer?---That is an engineer.

PN779

If we look at that entry in particular we will see there, you would agree, that he started on a fixed term contract from 3 September 2013 to 23 September 2013?---Mm-hm.

PN780

He then reverted to a casual?---That's right.

PN781

He then started on another fixed term contract?---Mm-hm.

PN782

Again for a fairly short period; 15 October 2013 to 13 October 2013?---Mm-hm.

PN783

Then reverted to casual?---Mm-hm.

PN784

So on and so forth until we get the entry, 'New casual employment date'?---Yes.

PN785

You see that there?---Mm-hm.

PN786

Although there is actually no date assigned. That is correct, isn't it?---That is right, yes.

PN787

Then we have a fixed term contract again from October to December 2019?---Mm-hm.

PN788

Reverted to casual?---Yes.

PN789

Fixed term contract 15 March to 31 May 2021, reverted to casual?---Mm-hm.

PN790

So it's fair to say, isn't it, that those occasions on which that employee was on a fixed term contract were for a short period?---That's right.

PN791

You would agree with that?---Yes.

PN792

And they certainly weren't to fill a permanent role, were they?---This specific engagement, no.

*** DIVYA GOMES

XXN MR NEAL

PN793

No. What about the next one, Jason Sellars? Again we'll see there start date 16 November 2014?---Mm-hm.

PN794

Fixed term contract 16 November to 14 and 16 March 2015?---Yes.

PN795

Fixed contract extended to 31 December 2015 and then we have converted to permanent full-time. So again you would agree, wouldn't you, that those engagements on a fixed term contract were for a short period?---That's right.

PN796

And they weren't to fill a permanent vacancy?---No.

PN797

Where the table says, 'Converted to permanent full-time', you're talking there, are you – or the table is trying to express that that employee's employment was converted to permanent full-time employment following employment on a fixed term contract. That's correct, isn't it?---His contract type would have changed.

PN798

Well, he went from being a fixed term to a permanent employee?---Yes, so he would have been on a fixed term contract and then employed on a permanent contract.

PN799

So Svitzer does not consider fixed term contract employees to be permanent, does it?---We treat them the same as permanent employees.

PN800

No, no, but – okay, you treat them the same, but your table makes a distinction between fixed term contract employees and permanent employees?---Between the types of contracts, yes.

PN801

Between the types of contracts or the types of employment?---The types of contracts that they're on.

PN802

Okay. We'll go on to the next entry, Ravindra Pandarak. Start date casual, fixed term contract December 2015 to January 2016; fixed term contract extended to February 2016; fixed term contract extended to April 2016; fixed term contract extended to October 2016; then fixed term contract extended to 31 December 2016. Did that employee's end in December 2016?---No.

PN803

Well, where is the next entry in the table?---He's no longer employed with us.

*** DIVYA GOMES

XXN MR NEAL

PN804

Yes?---His position was made, yes, redundant in 2020. This is just a list of all his fixed term – all the fixed term contracts - - -

PN805

Well, all the other entries seem to – correct me if I'm wrong – provide a complete history of the relevant employee's employment. Is that correct or not?---It could just be that we missed providing the details of his next contract.

PN806

So the table is incomplete?---Well, his data in particular is.

PN807

In particular in relation to him, but we'll deal with the rest later. So the data in relation to him is incomplete, but the last entry is a fixed term contract extended to 31 December 2016. You would agree, wouldn't you, that each of those engagements – I think there is, just in fairness, pardon me, one, two, three – there are five of them. Each of those engagements on a fixed term contract was for a short period; that's correct?---Yes.

PN808

You agree with that, yes?---Yes.

PN809

Thank you. We might try now Mr Mace. So start date flying squad – can you tell the court what the flying squad is – the Commission rather, what the flying squad is?---Look, I can't really comment on the flying squad because I wasn't around at the time, but from what I do know the flying squad was a group of employees who were utilised to, yes, basically work across different ports.

PN810

On a short term basis?---I could not tell you, sorry. I don't have the details.

PN811

Well, if we look at the table you can see there the first entry, Fixed term flying squad from 1 October 2015 to 30 September 2016, then moves to a fixed term 75 per cent part-time contract – two of them in a row – the first being 1 October 2016 to 31 March 2017 and then 1 April 2017 to 31 March 2018. They are short periods, you would agree, wouldn't you?---Yes.

PN812

That employee would be filling temporary absences, would he not, that is why he is changing from one contract to the next; is that correct?---I could not comment.

PN813

But you compiled the table?---I could tell you what contracts he was on, but I couldn't tell you exactly what he was doing during that time.

*** DIVYA GOMES

XXN MR NEAL

PN814

So, in other words, can you tell the Commission what any of the employees on these fixed term contracts – what roles they were actually filling or have you just

simply gone through and listed the contract dates?---Well, I have listed all the contract dates here. My witness statement makes detail of the employees that I have direct knowledge of and their details are in my statement.

PN815

So you don't have direct knowledge of employees - - -?---I would - - -

PN816

Sorry, if I can just ask the question?---Yes.

PN817

You don't have direct knowledge of all the details of the employment of all the employees in the table, only those that you refer to in your witness statement?---I can tell you that these were the contracts they were on, but I could not tell you specifically what they were doing and what absences they were filling.

PN818

Yes, and so you couldn't tell the court whether or not they were filling a permanent role, for instance; a permanent vacancy?---Not every one of them, no.

PN819

Thank you. Well, look, we might just go back to your statement?---Yes.

PN820

The body of your statement. Can we go to paragraph 13 which is where you do, as you say, give some detail about some of the employees in the table?---Yes.

PN821

We'll start with Mr Bradley Green. Mr Bradley Green was employed, according to your evidence, as a casual master?---Mm-hm.

PN822

Then appointed to a fixed term full-time master contract, then reverted to a casual as of 10 May 2022. Now, when you say 'full-time master contract' you don't mean permanent full-time master contract, do you?---I have said a fixed term contract.

PN823

Correct, but just to be clear when you say 'full-time' you mean fixed term full-time, not permanent full-time?---I've said fixed term full-time in my statement.

PN824

Yes, and that's why Mr Green reverted to a casual, because he wasn't filling a permanent position on a full-time contract. That's correct, isn't it?---I know for a fact he was not filling a permanent vacancy.

PN825

Thank you very much. Mr Rory Sane, employed as a casual engineer, then appointed to a fixed term full-time engineer contract. Then again Mr Sane is reverted to casual as of 12 July 2021?---Mm-hm.

*** DIVYA GOMES

XXN MR NEAL

PN826

So again can you tell the court - or confirm to the Commission that Mr Rory Sane was not filling a permanent position when employed on a fixed term full-time engineer contract?---A permanent vacancy do you mean?

PN827

Permanent vacancy appointment?---No, he wasn't.

PN828

Again, Mr Jye Chad employed as a casual engineer, appointed to a fixed term full-time engineer contract, then reverted to casual, so again fixed term full-time engineer contract, not permanent; correct?---No.

PN829

Thank you. Now, you have also given evidence at - - -

PN830

THE DEPUTY PRESIDENT: Sorry, when you said, 'No', then, you're agreeing with Mr Neal?---He was not filling a permanent vacancy, yes.

PN831

MR NEAL: That's how I understood it. Thank you, your Honour.

PN832

THE DEPUTY PRESIDENT: Yes.

PN833

MR NEAL: If I can just then take you to paragraph 15 again and you say there:

PN834

In my experience when fixed term employees have been appointed to cover temporary absences they are referred to by the relevant port manager as 'permanent employees'.

PN835

That's your evidence?---That is right.

PN836

Have you read the witness statement of Mr Paul Garrett filed in these proceedings?---I have, yes.

PN837

I might just take you to an annexure to that statement – and I apologise, I can't give you a court book reference, but I can actually provide you with a copy of the annexure.

PN838

THE DEPUTY PRESIDENT: That's okay, she has got the book there. I can give her a page number.

*** DIVYA GOMES

XXN MR NEAL

PN839

MR NEAL: She has got the new court book. I don't have the reference - - -

PN840

THE DEPUTY PRESIDENT: Yes, but I can give her a page number.

PN841

MR NEAL: I'll give you the annexure; it's PG10.

PN842

THE DEPUTY PRESIDENT: PG10 starts at page 530.

PN843

MR NEAL: Thank you, your Honour.

PN844

Just in fairness when you say – again back at paragraph 15:

PN845

In my experience when fixed term employees have been appointed –

PN846

et cetera, you're talking there about the port of Sydney, aren't you?---No, I'm not just talking about the port of Sydney.

PN847

Okay, so even though the heading on the previous page, if you just turn back, above paragraph 10 and what follows is, 'Fixed term employment at the Sydney Port' - you can see that?---Yes.

PN848

So when you get to paragraph 15 and say:

PN849

In my experience when fixed term employees have been appointed to cover temporary absences they are referred to by the relevant port manager as permanent employees –

PN850

what ports are you talking about?---I'm talking about Melbourne, as well.

PN851

Okay. Just going back to PG10 – if you can just go back to PG10?---Yes.

PN852

You will see there – you will agree, won't you, once you've had a moment to read just the first paragraph - - -?---Mm-hm.

*** DIVYA GOMES

XXN MR NEAL

PN853

You would agree with me, wouldn't you, that that is an offer of fixed term employment in Sydney?---That's right.

PN854

You see the first day of engagement there, 24 September 2012, engaged in the 17th crew. Do you know what the 17th crew was?---No.

PN855

Okay?---It's 2012.

PN856

It then says:

PN857

If, however, you gain permanent employment within Svitzer.

PN858

It's an offer of fixed term employment which then goes on to say:

PN859

If, however, you gain permanent employment with Svitzer.

PN860

So Svitzer doesn't consider fixed term employment permanent employment, does it?---I can't comment on this contractor. This is in 2012.

PN861

No, but I'm putting to you that consistent with this offer of employment, Svitzer – or Svitzer management – do not consider fixed term employment permanent employment; yes or no?---Fixed term contracts are different to permanent contracts.

PN862

Thank you very much. If the witness could now be taken to DB4, which is an annexure to the witness statement of David Ball. Again I apologise, I can't give you a page number. Perhaps his Honour or my friend can assist.

PN863

THE DEPUTY PRESIDENT: 902.

PN864

MR NEAL: Thank you, your Honour.

PN865

THE DEPUTY PRESIDENT: 902?---Thank you, your Honour.

PN866

MR NEAL: Now I will have to find it. Do you have that – pardon me. Just take a moment to read the first two paragraphs if you could, please?---Mm-hm.

*** DIVYA GOMES

XXN MR NEAL

PN867

Have you read that?---Yes, I've read it.

PN868

Thank you. So you would agree that's an offer of fixed term employment in the port of Melbourne?---That's right.

PN869

Which you have already given evidence that you have knowledge of?---Mm-hm.

PN870

Port of Melbourne – and that it's initially on an 80 per cent part-time basis?---That's right.

PN871

Not permanent part-time, part-time?---Part-time.

PN872

Yes. Then it goes on to say:

PN873

Your fixed term employment will automatically come to an end at the date outlined in item 2 of schedule 1 –

PN874

et cetera?---Mm-hm.

PN875

So again that employment will come to an end upon the relevant period of employment fixed term expiring and that is not an offer of permanent employment, is it?---No, it's an offer of fixed term employment.

PN876

Yes. Thank you. Again, Svitzer distinguishes between permanent employment and fixed term employment?---They are two different – yes – categories.

PN877

They're two different things. Thank you. Just one moment, your Honour. Nothing further.

CROSS-EXAMINATION BY MR NIVEN

[2.15 PM]

PN878

MR NIVEN: Thanks, Divya. I'm Nathan from AIMPE. I think you know of me from yesterday. I have just got a couple of further questions to ask you and I apologise if this seems a bit repeated, but if I can give you to paragraph 13 of your statement?---Mm-hm.

*** DIVYA GOMES

XXN MR NIVEN

PN879

In (a), (b), (c) you list Bradley Green, Rory Sane and Jye Chad as fixed term employees. Did I hear correctly that you can't say what the absences were they were filling?---No, I know the absences they're filling.

PN880

Right?---Yes.

PN881

Can you - - -?---I know they were filling absences in the roster in Sydney.

PN882

Do you know who was absent and for what reason the absence arose?---I couldn't tell you exactly. I know Brad Green was, you know, filling a master on long-term sick leave. The other two, I couldn't tell you specifically who they were covering.

PN883

Okay, so one term sick leave for Brad Green. Jye Chad at (c), in the last sentence you say:

PN884

In July 2022, Mr Chad reverted back to full-time fixed term employment with a contract ending 17 July '23.

PN885

Is he filling the 15th full-time position on the roster currently? Is that not the position that gave rise to this dispute?---Yes, I believe he was just offered a contract, yes.

PN886

Yes, okay, so it's part of this dispute. If I can take you back to your exhibit on page 951, again this is in relation to Mr Bradley Green, the master?---Mm-hm.

PN887

On the table, Sydney Towage New South Wales. Sydney Towage, is that his home port, in column 1?---That's right.

PN888

Yes, okay. So reading into column 2 you've got the date 05/12/2019 start date, then at the end it's in brackets, 'Whyalla'?---He was a Whyalla employee. He was employed in Whyalla.

PN889

Was he employed in Whyalla and then came to work in Sydney or was he - - - ?---That's right.

PN890

Right, so Whyalla was where he came from, is it?---He came from Whyalla, yes.

*** DIVYA GOMES

XXN MR NIVEN

PN891

Then 21/09/21, fixed term 80 per cent part-time contract, September '21 to 21 September '22, Darwin. What is Darwin referring to?---Look, he went to Darwin for a short period of time, but then chose to come to Sydney when the vacancy arose; so he didn't actually end up being in Darwin for long.

PN892

Right, okay. So he wasn't filling any permanent vacancies in Darwin then?---I couldn't tell you. I don't know.

PN893

No, okay. All right. Now, just back to your statement at 15(c), you say:

PN894

Fixed term employees are entitled to take leave in the same way that full-time and part-time employees can.

PN895

?---That's right.

PN896

Is that all forms of leave?---All forms of leave, yes.

PN897

So would that include long service leave?---Well, if they were entitled to it at some point.

PN898

Would employees on fixed term contracts for 18 months or 24 months ever be entitled to long service leave?---Well, if their contracts were extended.

PN899

What, for 10 years?

PN900

MR IZZO: I object. It now seems to be he's asking a question about the application of statutory long service leave entitlements to a particular category of employee. I'm not sure that's a matter that the witness should be giving evidence about. It's a legal question really.

PN901

THE DEPUTY PRESIDENT: It is, but I think each answer that you've got so far of the long service leave question had a massive qualification to it - which I'm not criticising you. You're essentially saying if they're entitled to long service leave, then they're entitled to long service leave?---That's right.

PN902

So if you're asking questions about what the entitlement is to long service leave, I'm not sure that Ms Gomes knows what it is.

*** DIVYA GOMES

XXN MR NIVEN

PN903

MR NIVEN: No, I withdraw that question.

PN904

One of your earlier answers, you said fixed term contracts are different to permanent employment and I didn't quite pick up the last word you said; whether it was employment contracts or employment arrangements?---Sorry, which paragraph are you reading from?

PN905

One of your answers to my friend's earlier question. You were asked whether - - - ?---I said the contracts are different. A fixed term contract is different to a permanent contract.

PN906

To a permanent contract, okay. All right. I'm just trying to make sure I got my wording correct, but you still agree that they're two different things?---They are two different contracts.

PN907

Yes, two different contracts. No further questions.

PN908

THE DEPUTY PRESIDENT: Mr Moran, nothing in cross-examination? Anything in re-examination?

PN909

MR IZZO: No, other than to seek to tender the supplementary statement of Ms Gomes.

PN910

MR NEAL: No objection.

PN911

THE DEPUTY PRESIDENT: Mr Niven, no objection?

PN912

MR NIVEN: No objection.

PN913

THE DEPUTY PRESIDENT: Thank you. I'll mark the second statement – well, the supplementary statement that you made in these proceedings, is that statement true and correct to the best of your knowledge and belief?---It is true, your Honour.

PN914

Thank you. I'll mark that as exhibit R2.

EXHIBIT #R2 SUPPLEMENTARY STATEMENT OF DIVYA GOMES

*** DIVYA GOMES

XXN MR NIVEN

PN915

Otherwise, Ms Gomes, thank you for your evidence?---Thank you.

PN916

You're free to stay, you're free to go. It's a matter for you?---Thank you.

<THE WITNESS WITHDREW

[2.22 PM]

PN917

THE DEPUTY PRESIDENT: One to go.

PN918

MR IZZO: Yes.

PN919

THE ASSOCIATE: Ms Lacey, can you please state your full name and address. Your business address will be fine.

PN920

MS LACEY: Yes, Sarah Therese Lacey, (address supplied).

<SARAH THERESE LACEY, SWORN

[2.23 PM]

EXAMINATION-IN-CHIEF BY MR IZZO

[2.24 PM]

PN921

MR IZZO: Ms Lacey, you have given a statement in these proceedings which is five pages long and has two annexures to it; SL1 and SL2. You know the statement I'm talking about?---Correct.

PN922

Is that statement true and correct to the best of your knowledge and belief?---Yes.

PN923

We would like to tender that statement, your Honour.

PN924

THE DEPUTY PRESIDENT: Thank you. Mr Neal?

PN925

MR NEAL: No objection to that course, your Honour.

PN926

THE DEPUTY PRESIDENT: Mr Niven, no? Mr Moran, no? All right, that will be exhibit R3.

EXHIBIT #R3 WITNESS STATEMENT OF SARAH LACEY

*** SARAH THERESE LACEY

XN MR IZZO

PN927

It should be in the folder in front of you, starting at page 1058. I'm not sure if anyone wants to ask you questions about your statement exactly, but - - -?---I'll get it ready just in case.

PN928

Just in case. Thank you, Mr Neal.

PN929

MR NEAL: Thank you, your Honour.

CROSS-EXAMINATION BY MR NEAL

[2.25 PM]

PN930

MR NEAL: Again, Ms Lacey, my name is Mr Neal. I'm just going to ask you some questions about the evidence that you've given in these proceedings. As his Honour has confirmed, you have a copy of your witness statement with you?---Correct.

PN931

Just before I start, do you have a copy of the annexures, as well? In particular, SL1?---Yes, I do.

PN932

Okay, fantastic. Now, you have given evidence at paragraph 6 of your statement onwards about fixed term employment at the Newcastle port. That's correct, isn't it?---It is, yes.

PN933

You say at paragraph 6(b):

PN934

When it comes to the order of pick the selected employees for relief work under clause –

PN935

et cetera -

PN936

of the EA, full-time and part-time fixed term employees are utilised in the same way as permanent full-time and permanent part-time employees respectively.

PN937

?---Correct.

PN938

That's because the fixed term employee is temporarily filling a permanent role, isn't it?---No. I say that because they are treated in exactly the same way as any employee regardless of their engagement.

*** SARAH THERESE LACEY

XXN MR NEAL

PN939

Yes, and they're treated in exactly the same way as a permanent full-time employee and a permanent part-time employee whilst filling a temporary vacancy in a permanent full-time or permanent part-time role, aren't they?

PN940

MR IZZO: I object. I think that's a question she has just answered, your Honour.

PN941

THE DEPUTY PRESIDENT: It's the second part of the question, so Mr Neal is entitled I think to really put that because I'm not sure that the answer went to the second part of the question. Maybe just re-ask the question if you can.

PN942

MR NEAL: What I'm trying to establish is - you make a statement at paragraph 6(b) that fixed termers are effectively treated the same way when it comes to order of pick for relief work?---Yes.

PN943

What I'm trying to elicit from you is whether or not that's the case only when they're filling a permanent part-time or permanent full-time position in the port of Newcastle or when they're engaged on a short-term fixed term contract?---I would say it's whenever they're engaged irrespective.

PN944

Okay. Thank you. Can I take you to paragraph 12(b) of your statement?---Mm-hm.

PN945

You say:

PN946

When permanent part-time employees or casual employees cover for a permanent full-time role the covering employee is engaged on a fixed term basis with their employment in the full-time role being for a limited duration.

PN947

?---Correct.

PN948

So it's your evidence, is it, that typically a fixed termers is engaged for a short period of time - or a fixed term basis, I should say, by way of a secondment into a permanent role?---Correct, usually once they have been in casual employment.

PN949

Thank you. I'll take you back now and I'm sorry for jumping around your statement?---That's okay.

PN950

But I take you back now to paragraph 6 of your statement. You say there:

*** SARAH THERESE LACEY

XXN MR NEAL

PN951

In my dealings with managers in Newcastle I have observed that fixed term employees, whether employed on a part-time or full-time basis, are referred to and treated in an equivalent manner to permanent employees.

PN952

?---Correct.

PN953

Thank you. Have you read the witness statement of Mr Glen Williams in this proceeding?---Yes.

PN954

Do you have a copy of the court book there or - - -?---I'm not sure.

PN955

I want to take you to annexure GW7 of Mr Williams' statement?---Do you have the number that that would be?

PN956

I don't, unfortunately, I'm sorry. All I can give you is GW7.

PN957

THE DEPUTY PRESIDENT: GW7, page 666.

PN958

MR IZZO: Yes, it's page 666. That's right.

PN959

MR NEAL: 666?

PN960

MR IZZO: Yes.

PN961

MR NEAL: It's 641 in the old one.

PN962

THE WITNESS: Sorry, what was that number, 616?

PN963

THE DEPUTY PRESIDENT: Ignore him.

PN964

MR NEAL: Most people do. Thank you, your Honour.

PN965

THE WITNESS: Sorry, I'm open to a contract of employment - - -

*** SARAH THERESE LACEY

XXN MR NEAL

PN966

THE DEPUTY PRESIDENT: Hopefully 666, yes, GW7 at the top.

PN967

MR NEAL: GW7. Do you have that?---Yes, which is the contract for Jason Coppola?

PN968

That's correct, yes?---Yes.

PN969

Can I just get you to take your time and read the first two paragraphs of that. That's the letter of offer?---Mm-hm.

PN970

Have you read that?---I have, yes.

PN971

So you would agree, wouldn't you, that that is an offer of fixed term employment in the port of Newcastle?---I would actually disagree in terms of it being fixed term, in that his employment would cease at the end of that engagement because his substantive terms and conditions of employment is a permanent part-time as you can see in paragraph 2.

PN972

Well, I'll just get you to read the first sentence of the next paragraph – or in fact I'll read it for the benefit of all:

PN973

Your fixed term employment will continue until 6 November 2022.

PN974

So you would agree, wouldn't you, that in line with this letter of offer, contract of employment, however you wish to describe it, the fixed term employment ends on 6 November 2022?---In terms of - - -

PN975

In relation to this letter of offer and this contract?---In terms of the full-time engagement, which is what we would typically call secondment.

PN976

Yes –

PN977

and then after which point you will return to your current permanent part-time position.

PN978

Correct?---Correct.

*** SARAH THERESE LACEY

XXN MR NEAL

PN979

So Svitzer is making the distinction there between fixed term employment and permanent part-time employment, isn't it?---I would disagree.

PN980

Okay, can you explain your disagreement?---I absolutely can.

PN981

Please do?---Fixed term full-time employment, meaning that he is moving into a full-time position for a specified period of time - - -

PN982

Yes, on a fixed term contract?---You could call it a fixed term contract, correct, yes, but - - -

PN983

I apologise - - -

PN984

MR IZZO: I think she was answering the question.

PN985

THE DEPUTY PRESIDENT: Let her answer the question.

PN986

MR NEAL: I apologise?---At the end of that arrangement he returns to a permanent full-time position, so he's essentially seconded into a full-time role.

PN987

For a fixed term?---Yes.

PN988

After which he returns to his permanent part-time position?---Correct.

PN989

Thank you. Can I take you now to annexure JS6 to the witness statement of Mr Jason Steen and, I apologise again, I don't have a court book reference.

PN990

THE DEPUTY PRESIDENT: 791.

PN991

MR NEAL: I have an old court book reference, 766, sorry?---Would that be the contract for Mr Desmond Finch?

PN992

You have it, thank you?---Lovely.

PN993

Again I'll just get you to read the first two paragraphs of that contract or letter of offer?---Thank you.

*** SARAH THERESE LACEY

XXN MR NEAL

PN994

You would agree that that's a letter of offer or a contract of employment, however you wish to describe it, for employment for a specified term or a fixed term on a 100 per cent full-time basis?---Correct.

PN995

Not a 100 per cent permanent full-time basis?---Correct, as the engagement is fixed term.

PN996

Thank you, and the two are different?---(No audible reply)

PN997

Sorry, you're nodding your head. Just for the transcript?---Sorry, yes.

PN998

Yes, thank you. Again your fixed-term employment would automatically come to an end at the date set out at the back of the contract?---Mm-hm.

PN999

So again not permanent employment?---No.

PN1000

And Svitzer doesn't consider fixed-term employees permanent employees, does it?---No.

PN1001

No. Thank you. If I can now take you to paragraph 14 of your witness statement. You say there:

PN1002

To my knowledge fixed-term employments are utilised for the purpose of backfilling business needs including

PN1003

and then you set those reasons out. They're all reasons requiring temporary backfilling, aren't they?---Correct.

PN1004

Thank you. Or alternatively, it's your evidence fixed-termers are used for provision of relief like the flying squad?---Yes.

PN1005

Paragraph 18 of your witness statement?---Yes.

PN1006

All covering employees on worker's compensation or long-service leave, et cetera?---Yes.

*** SARAH THERESE LACEY

XXN MR NEAL

PN1007

But they're all for temporary periods of time, aren't they?---Yes.

PN1008

And none of those fixed-term appointments that you're talking about in your evidence have been to permanently replace a vacancy in a permanent role?---Not that I'm aware of.

PN1009

Not that you're aware of. Thank you. I will just now take you to paragraph 22 of your statement. You say there that the usage of fixed-term contracts are not rare at Svitzer?---Correct.

PN1010

That's your evidence?---Yes.

PN1011

Okay. I will just now ask you to go to SL1, annexure SL1 that is to your statement?---Mm-hm.

PN1012

Just for the sake of completeness, you prepared this statement?---I did, yes.

PN1013

Okay, thank you. Can you tell the Commission the earliest engagement of a fixed-term employee recorded in the table?---I believe it was some time in 2013.

PN1014

Perhaps could it be 12 November 2005, Mr Shane Cusack, a master in Newcastle, and that's on the second page of SL1. You'll see there it's a little bit over halfway down?---Yes.

PN1015

That date there, 2005, I'm just interested in the dates in this table. You'll see that there is a column in the case of Mr Cusack which records the date of 12 November 2005, but then if you just go over to the right you'll see:

PN1016

2016 fixed-term part-time contract from 8 August 2016 to 31 July 2017.

PN1017

So I'm just wondering what that 2005 date is?---I believe that would have been his initial engagement with Svitzer. The nature of his contract I can't comment to as I don't that information.

PN1018

You don't that information but what is the table then supposed to tell us, only the fixed-term engagements and not any other engagements?---Correct, except for - sorry - casuals.

*** SARAH THERESE LACEY

XXN MR NEAL

PN1019

I was about to say, the problem with that, isn't it, the rest of the table for all other employees sets out things like casual employment, conversion of permanent employment, et cetera. So it's the case, is it, that this table is incomplete?---I would say in the case of Mr Cusack, correct.

PN1020

At least in the case of Mr Cusack. When this table purports to tell us - let's take another example on the first page for convenience, Mr Peter Egan, it says:

PN1021

Start date casual 8 November 2013. Fixed-term full-time contract from 20 August 2015 to 24 July 2016.

PN1022

The table does not tell us, does it, the role that that employee was filling on a fixed-term contract?---No.

PN1023

And it doesn't tell us, for example, whether or not the role was a permanent role, a permanent part-time role, permanent full-time role?---Correct.

PN1024

It simply tells us that they were engaged on a fixed-term contract?---That is correct.

PN1025

You say that you prepared the table. Have you had a chance to go through and determine how many employees have been engaged on fixed-term contracts for the period covered by this table?---I believe that is annexure SL2.

PN1026

Yes, indeed. Can we go to SL2?---Mm-hm.

PN1027

Can you just explain to the Commission what this table represents?---So this table represents on a month by month basis the fixed term engagements that we had active in Svitzer throughout this historical period from September 2013 onwards.

PN1028

Let's take January 2022 as an example. You're saying there that there's a little more than 15 employees, is it - correct me if I'm wrong - 15 employees on fixed-term contracts in January 2022?---Correct.

PN1029

That's pretty rare, isn't it, compared to the engagements of permanent employees at Svitzer?---I would see based on the graph that you can see in front of you that there has certainly been an increase.

PN1030

Sorry, that wasn't the question?---Oh, apologies.

*** SARAH THERESE LACEY

XXN MR NEAL

PN1031

That's okay. The question was: in January 2022, there's a little more than 15 employees who you say have been engaged nationally on a fixed-term contract?---I will just confirm that it is for the ports that are in dispute, so Melbourne, Newcastle, Sydney, Brisbane.

PN1032

I say 'national', I beg your pardon. For the four ports that the graph represents?---Correct.

PN1033

So 15 for those four ports, and I'm putting to you that 15 employees engaged on fixed-term contracts compared to the number in the total workforce of Svitzer working on tugs is a very small proportion; that's correct, isn't it?---Correct.

PN1034

I would now like to take you to - and again, I apologise, I don't have the page reference - it's the second page of SL1 and the entry for Mr Jeremy Hurst. You see that entry there?---Hurst?

PN1035

Hurst, Jeremy Hurst?---Yes.

PN1036

You have given evidence about Mr Jeremy Hurst in your witness statement, haven't you?---I'm sorry, I don't recall.

PN1037

Perhaps you would like to have a look at paragraph 25(c) of your witness statement. You say there that:

PN1038

The first fixed-term contract used to fill a permanent position in the Port of Melbourne was offered to Mr Jeremy Hurst on or around July 2016 on a part-time basis.

PN1039

Do you see that?---I do, yes.

PN1040

So it's your evidence that Mr Hurst filled a permanent position on a fixed-term contract; is that correct?---Yes.

PN1041

Can you tell the Commission what the vacancy that he filled was, what role?---I do not know the nature of Mr Hurst's engagement.

*** SARAH THERESE LACEY

XXN MR NEAL

PN1042

Can we just have a look at the first entry for Mr Hurst, and you will see there that we have start date, fixed-term part-time contract from 29 July 2016 to 28 July 2017?---Mm-hm.

PN1043

That's the engagement that you're referring to, is it?---Correct.

PN1044

But if we can just then have a look at the second entry, we see fixed-term 80 per cent part-time contract from 25 July 2017 to 31 January 2018?---Mm-hm.

PN1045

Now, the first period ends on 28 July 2017 and the second period starts on 25 July 2017, so Mr Hurst is performing two roles, is he?---No, there's an overlap of three days.

PN1046

Yes?---So the initial contract that I was referring to with the fixed-term part-time contract, which is line 1, would have had the dates of 29 July 2016 to 28 July 2017, and then, prior to the end of that contract, he was then engaged on a new contract, which is the fixed-term 80 per cent part-time, which then commenced on 25 July.

PN1047

So, on 25 July, what position was he filling, the 80 per cent part-time?---Correct.

PN1048

And so the table is incorrect to say that he continued in his employment until 28 July 2017 in the initial fixed-term part-time contract, is it?---I disagree that it's incorrect. I'd say it's factually - - -

PN1049

I know I said - that is a question, sorry. Is it - - -

PN1050

MR IZZO: If she can just finish the question, Mr Neal.

PN1051

THE WITNESS: I'd say it's factually incorrect that - - -

PN1052

THE DEPUTY PRESIDENT: Slow down. Let her answer the questions one by one.

PN1053

THE WITNESS: It is factually incorrect - sorry, factually correct that the contract of employment that I refer to would have listed out those dates.

*** SARAH THERESE LACEY

XXN MR NEAL

PN1054

MR NEAL: Yes, I understand that, but what I'm trying to ascertain is what role was Mr Hurst in on 25 July? Was he in the role that you say was permanent or was he in the role that you say is recorded in the second line for Mr Hurst?---I don't say that he's permanent, sorry.

PN1055

You don't say that he's permanent?---I say that he was filling a full-time position.

PN1056

Yes, this is what I'm - - -?---And then he was in an 80 per cent part-time role.

PN1057

So it's not your evidence that that full-time position that he was filling was permanent?---Not necessarily, not without that information in front of me.

PN1058

Well, if I just take you back to paragraph 25(c) of your statement, you say:

PN1059

The first fixed-term contract used to fill a permanent position.

PN1060

?---Being a full-time role, yes.

PN1061

I will just stop you there?---Sorry.

PN1062

That's okay. You would agree that there is a distinction then between a fixed-term full-time vacancy or position and a permanent full-time position?---I would disagree.

PN1063

Okay?---I would say that there is - where there is a permanent requirement for a role, then that is the full-time position.

PN1064

What do you mean by 'permanent requirement'?---So, depending on the port requirement, so what we are contracted to complete. So, for example in Newcastle, where we have 32 crews, there's a permanent requirement for 32 crews.

PN1065

Right. So when you say that Mr Hurst filled a permanent position, do you mean that he filled a position on a fixed-term basis or on a permanent basis such that his employment would not end until he either resigned or was terminated or made redundant?---His engagement was into a full-time position on a fixed-term basis.

*** SARAH THERESE LACEY

XXN MR NEAL

PN1066

So that wasn't for a permanent period of time, it wasn't a permanent vacancy that he filled on the fixed-term contract?---I couldn't say with any clarity without having that information in front of me.

PN1067

You didn't have that information in front of you when you prepared the table at SL1; is that correct?---I believe I did, but I don't have his contract of employment in front of me at this time.

PN1068

I just want to ask you now about Mr Nathan Jones?---In reference to SL1?

PN1069

Yes, in SL1, and I'm just trying to find him for you?---He's on page 2.

PN1070

Thank you. Just one moment, please. Now, it's your evidence, and please refer to your witness statement at paragraph 25(d), that Mr Nathan Jones filled a permanent vacancy in or around July 2017 on a fixed-term contract. By that, do you mean that he temporarily filled the permanent role on a fixed-term contract?---I would say so based on the engagement as I've listed in line 2 of his area on the table.

PN1071

Are you able to tell the Commission in relation to all of the records of fixed-term engagements in SL1, are you able to tell the Commission whether or not those engagements were to fill a permanent vacancy or a temporary vacancy? Are you able to make that distinction?---Not necessarily.

PN1072

Not necessarily? Is that 'No' or - - -?---No.

PN1073

Okay, thank you. I might now just take you to paragraph 23 of your witness statement. You are responding here to the witness statement of Mr Steen?---Mm-hm.

PN1074

You say there that:

PN1075

There is a well-established practice of covering employees on workers compensation or long service leave with an employee who is assigned a fixed-term contract to the permanent position. It may be that the employee is a casual employee who is placed on a fixed-term contract for the duration of the leave and reverted back to casual upon the conclusion of the period of leave.

PN1076

Which is consistent with your evidence about the use temporarily of fixed-termers backfilling, et cetera. You go on:

*** SARAH THERESE LACEY

XXN MR NEAL

PN1077

As casual work is not permanent work as such, the replacement of permanent employees is not always by other permanent employees.

PN1078

Now, just when you say 'the replacement', you mean the temporary replacement of permanent employees, for example, to fill - backfilling temporary absences?---Correct.

PN1079

Nothing further, your Honour.

PN1080

THE DEPUTY PRESIDENT: Thank you. Mr Niven.

CROSS-EXAMINATION BY MR NIVEN

[2.47 PM]

PN1081

I am Nathan Niven from AIMPE. That last question you just answered from my friend Mr Neal was in relation to paragraph 23 of your statement?---Yes.

PN1082

If I can just take you to paragraph 19 of your statement. It's essentially the same question. In response to paragraph 49 of, I think it was Paul Garrett's statement:

PN1083

I say that permanent crew vacancies are on occasions filled by a fixed-term employee.

PN1084

Again, is that temporary permanent crew vacancies?---Sorry, can you just repeat that question?

PN1085

At paragraph 19, you say:

PN1086

In response to paragraph 49, I say that permanent crew vacancies are on occasion filled by a fixed-term employee.

PN1087

That's on a temporary basis?---Insofar as the fixed-term engagement comes to an end?

PN1088

Well, the filling of the permanent crew vacancies by fixed-term employees, that's on a temporary basis, is it?---It would be on a temporary basis in terms of their employment coming to an end at the end of the fixed-term engagement, yes.

*** SARAH THERESE LACEY

XXN MR NIVEN

PN1089

Thank you. No more questions, your Honour.

PN1090

THE DEPUTY PRESIDENT: Mr Moran? Nothing there? Mr Izzo, any questions in re-examination?

PN1091

MR IZZO: Only two questions, your Honour.

RE-EXAMINATION BY MR IZZO

[2.49 PM]

PN1092

Ms Lacey, you were asked by Mr Neal about an employee Mr Hurst and - I don't think I need to take you to the annexure - you were asked about the position he was required to fill. You may recall that?---Yes.

PN1093

Your response was that Mr Hurst was engaged in a full-time position on a fixed-term basis. Do you remember giving that evidence?---I do, and I've just realised my mistake. I apologise.

PN1094

THE DEPUTY PRESIDENT: Wait for the question.

PN1095

MR IZZO: My question was what you mean by 'full-time position'. That's what I was going to ask you. When you say someone's engaged in a full-time position, what are you referring to? That's all I was going to ask?---Yes, sorry, and the mistake that I've made is that the initial engagement was a part-time contract, although I've not listed the percentage of that part-time contract.

PN1096

I see, yes, so you're saying there that it wasn't full-time in any event. In any event, when you refer to someone filling a full-time position on a fixed-term basis, can you just explain what you mean by a full-time position, what you mean that that is?---Yes, so it's a vacancy, for whatever reason, whether it be temporary or ongoing, where there is a permanent requirement for the port to have a crew member in that position.

PN1097

Thank you. A further question - obviously the proceedings relate to the interpretation of Port Operating Procedures in five ports. They are Sydney, Melbourne, Westernport, Newcastle and Brisbane. Were you involved in the drafting or negotiation of the Port Operating Procedures in those ports?

PN1098

MR NEAL: I object, your Honour, on this basis: I'm just wondering out of what evidence this is re-examination. I'm just wondering out of what evidence that question arises. That's all.

*** SARAH THERESE LACEY

RXN MR IZZO

PN1099

THE DEPUTY PRESIDENT: Thank you. Mr Izzo?

PN1100

MR IZZO: It arises from a question that was asked by Mr Neal about Svitzer's views about distinctions between permanent and fixed-term engagements. A response was given in relation to that question. That's the evidence, and the evidence in reply I'm seeking to adduce is the extent to which the person who has just given that view was involved in the drafting of the documents that are the subject of the question of construction we are involved in. So, a view has been given or sought by Mr Neal on a particular question that goes to the construction of these documents and I am seeking to clarify the witness's involvement in the preparation of those documents. So, it arises from that question, Deputy President.

PN1101

THE DEPUTY PRESIDENT: I don't think you need to ask that question because we've got paragraph 2 of Ms Lacey's statement saying that she has only been in the position since around 2019, so it's not possible that she was involved in any of the negotiations for the 2016 agreement.

PN1102

MR IZZO: No, that's correct, I wouldn't need to ask in relation to that. I'm just wondering whether any of the Port Operating Procedures post-date 2019. Some may.

PN1103

MR NEAL: Well, even if they do, I didn't question the witness about the Port Operating Procedures, your Honour, and I don't think it properly arises in re-examination.

PN1104

THE DEPUTY PRESIDENT: Yes, I don't think it does.

PN1105

MR NEAL: Thank you.

PN1106

THE DEPUTY PRESIDENT: What you are really asking about is some consequences for an answer, or some possible consequences of an answer, that Ms Lacey gave, which is a different thing to asking questions that might clarify the evidence that she gave, so I won't allow that one.

PN1107

MR IZZO: May it please, there are no further questions.

*** SARAH THERESE LACEY

RXN MR IZZO

PN1108

THE DEPUTY PRESIDENT: Thank you, Ms Lacey, that's the end of your time. You are welcome to stay and watch - not much actually - but you're

welcome to stay. We're almost done for the day, I think, but thank you for your evidence?---Thank you.

<THE WITNESS WITHDREW

[2.53 PM]

PN1109

THE DEPUTY PRESIDENT: Mr Izzo, is that the evidence for the respondent?

PN1110

MR IZZO: That is the case for the respondent, your Honour.

PN1111

THE DEPUTY PRESIDENT: Great, thank you. Nothing in reply, I take it, in terms of evidence?

PN1112

MR NEAL: No.

PN1113

THE DEPUTY PRESIDENT: All right.

PN1114

MR NEAL: I see that I, thankfully, was within the range, your Honour, by five or 10 minutes.

PN1115

Your Honour, you posited a question prior to the lunch break about whether or not we would be content to appear by Teams. My friend and I are content to do so. It's a matter for Mr Izzo, but we are certainly content and able to do that tomorrow at 10 am.

PN1116

THE DEPUTY PRESIDENT: You've got two friends.

PN1117

MR NEAL: Pardon me. I think Mr Moran - - -

PN1118

MR MORAN: I took it as - - -

PN1119

MR NEAL: He's content as well.

PN1120

MR IZZO: The company's preference is to do it in person, but obviously we are in the hands of the Commission.

PN1121

THE DEPUTY PRESIDENT: I'm just looking at the weather, frankly.

*** SARAH THERESE LACEY

RXN MR IZZO

PN1122

MR NEAL: Yes, I'd really rather do it from the home office.

PN1123

MS MAMBLONA: I just want to get out of the house. I've got twins at home.

PN1124

THE DEPUTY PRESIDENT: Look, I think we're better off on Teams. I don't think we are going to have - I don't think that's going to compromise anyone's submissions and it just becomes eminently more practical given the circumstances we are in. Is there anything else that we need to deal with today, Mr Neal, as far as you're concerned?

PN1125

MR NEAL: No. The only thing is I might seek a very small indulgence. I'm wondering if we can start at 10.30 or 11, because I have gone through the court book references that I need to correct overnight and there's a fair few of them, your Honour.

PN1126

THE DEPUTY PRESIDENT: Yes.

PN1127

MR NEAL: It's 3 o'clock now, so I'm wondering if it's possible for 10.30 perhaps?

PN1128

THE DEPUTY PRESIDENT: It doesn't cause me any difficulty to start later.

PN1129

MR NEAL: We will certainly finish.

PN1130

THE DEPUTY PRESIDENT: By the estimates that we have had, for what they're worth, we are still going to finish - - -

PN1131

MR NEAL: By lunch probably.

PN1132

THE DEPUTY PRESIDENT: Yes.

PN1133

MR NEAL: Yes, okay, if that's suitable.

PN1134

MR IZZO: No objection to that.

PN1135

MR NEAL: Thank you, your Honour.

PN1136

MR NIVEN: I have no objection.

PN1137

THE DEPUTY PRESIDENT: All right. Anything else that we need to deal with today, Mr Niven?

PN1138

MR NIVEN: No, your Honour.

PN1139

THE DEPUTY PRESIDENT: Mr Moran? Mr Izzo? All right. We will adjourn then until 10.30 tomorrow on Microsoft Teams. I will send out a link for the Teams for the morning and see you all online, safe and dry, tomorrow morning. Thank you.

ADJOURNED UNTIL FRIDAY, 07 OCTOBER 2022

[2.56 PM]

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