TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL

C2022/8478

s.604 - Appeal of decisions

Appeal by Health Services Union
(C2022/8478)

Melbourne

10.00 AM, THURSDAY, 23 FEBRUARY 2023

PN1

THE ASSOCIATE: Matter C2022/8478 section 604 appeal by Heath Services Union, for hearing.

PN2

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. Mr Saunders, you're seeking permission to appear for the appellant?

PN3

MR L SAUNDERS: Yes, your Honour.

PN4

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning.

PN5

Mr Fagir, you're seeking permission to appear for the respondent?

PN6

MR O FAGIR: Yes, your Honour.

PN7

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning.

PN8

We're satisfied, taking into account the complexity of the matters raised that the matter will be dealt with more efficiently with our permission, and we do so in both cases.

PN9

We should indicate to counsel that we have had an opportunity to read the submissions that the parties have filed including, Mr Saunders, your submissions in reply filed last night.

PN10

Yes, Mr Saunders?

PN11

MR SAUNDERS: Thank you, your Honour. In addition to last night's submissions some documents were sent through this morning, have they been received?

PN12

DEPUTY PRESIDENT GOSTENCNIK: We have those as well, Mr Saunders, thank you.

PN13

MR SAUNDERS: Excellent. The reason for filing reply submissions, absent a direction, was due to some concerns raised in the respondent's material about things being said in oral submissions that weren't canvased in written submissions. I can say it's almost inevitable that I will say something today that I haven't said in writing. If that causes my friend any difficulty whatsoever I have

no problem with a short note being provided later which would seem to deal with that.

PN14

Before turning to the decision under appeal, there are three slightly different causes dealing with the definition of a shift worker, both generally and specifically, within the aged care industry. It's useful to start with an examination of those, because it's the framework of what we're discussing today.

PN15

The starting point is section 87(3)(a), if the Commission has that convenient. We see what could be described as the generic or perhaps traditional definition of what a shift worker is. Very important features. It requires continuous rostering of shifts in the enterprise. It has to be what used to be described as a continuous process enterprise. The employee themselves has to be regularly rostered on those shifts, which means it would be conventionally interpreted as they are they truly a shift worker, they're not just a day worker across the seven days and, additionally, regularly works on Sundays and public holidays.

PN16

This reflects the definition of seven day continuous shift worker that developed over the last hundred-odd years, throughout, principally, the metal trades but also the health and nursing industries, to a degree. It is reflected in a variety of ways in various other awards of this Commission. If the Commission can go to the joint list of authorities, there's a handy summary in Re Award Modernisation [2013] 236 IR 359, starting at page 223 of the bundle.

PN17

After paragraph 155 we see definition of a shift worker. It's just a handy compilation of the way this same condition, a continuous seven day shift worker, is expressed in various awards. So we see, in the Cleaning Award, rostered over shifts over any seven days of the week and regular Sundays and public holidays.

PN18

Over the page, the Food Beverage and Tobacco Manufacturing Award, which has historical links to the Metal Trades Award is, of course, a seven day shift worker, so not defining it but picking up the historical concept, who is also regularly rostered to work on Sundays and public holidays. So seven day enterprise, weekend work and a continuous regularity. A person is actually a shift worker.

PN19

It goes on, I don't need to take your Honours through it, it continues for another couple of pages, but where, in a particular industry, this leave entitlement is attached to continuous seven day shift workers, this is the kind of language you see.

PN20

If we can go earlier in the joint bundle of authorities, to page 36, which is behind tab 1. I'm not sure if your Honours have tabs, this is the Aged Care Award - - -

PN21

DEPUTY PRESIDENT GOSTENCNIK: Not on my screen, Mr Saunders.

PN22

MR SAUNDERS: I'll stick with page numbers then. It's page 36 of the pdf. This is the Aged Care Award. This is 2010, the 2020 award is functionally identical and is, in fact, identical in respect of this clause. Of course this arose through, like every award, through an award modernisation process of consolidating pre-modern awards reflecting various standards across states into a compromise that more or less reflected this industry standard. As we see and as I've set out in the root submissions, it's quite different.

PN23

You do not have a reference to working seven days in the first entitlement. You do not have a reference to continuous process industries, in that classic sense, although, as a matter of reality most aged care providers will be, it's not necessarily so and it's not part of the requirement for this clause. You do not necessarily have the requirement to work on weekends or public holidays. There is no reference to a shift worker, but under the way this award is structured, anyone whose hours do fall outside the standard will be working one shift or another.

PN24

If we then go back to page 25? Like the agreement, the award defines a shift worker by reference to what they're not, 'Not a day worker', and it turns 22.2(a) into a definition, in that sense. 'Standard hours', if your hours are inside it you are a day worker and if you're not, you're not. If you are not, you are not performing day work and if that's what your roster has set, under the terms of this award, provides you are a shift worker, for the purpose of the week of annual leave.

PN25

If we could go now to the court book which, most conveniently, sets out the agreement clauses, at page 5, within the decision the subject of the appeal.

PN26

At paragraph 12(b), 'For the purposes of this clause a shift worker is an employee who is not a day worker, as defined in clause 23(a) "Standard hours"'. The only difference between that and the award clause is a missing comma, which the Commissioner below correctly identified as most likely an error. It's not a particularly grammatically significant comma, we would say, but it's that same issue, definition of - for the purposes of this clause, and this clause alone, it's language that indicates a specific mission, 'If you're not a way worker you get this entitlement'. The standard hours clause, at 23, is a few pages earlier, page 3, at paragraph 9.

PN27

Again, what we see is it doesn't perfectly replicate the award but it is, in function, identical. The changes are the kind of infelicities that one sees in enterprise agreement drafting where the parties - it reflects an intention by the parties to draw on those award provisions, it's not the kind of thing that would dramatically alter meaning. Again, it's 23(a), 'A day worker is 6 am to 6 pm, otherwise it is

shift work' and, for the purposes of the annual leave clause, we say you are a shift worker.

PN28

It is also useful, in the initial stages of considering the matter, to look at the dispute that brought the matter to the Commission, particularly since the part of the respondent's alternative case relies on the idea that there is an industrial understanding of has been and, as it was advanced below, that there'd previously been commonality of understanding between the parties.

PN29

Opal is a large aged care provider, it is a national operation. In New South Wales, the state to which this particular enterprise agreement relates, it operates 43 facilities. According to its evidence it has, across that, about 4600 employees, although it's not clear how many of those are covered by the agreement. We'd assume that it would be a substantial proportion, but it is not set out.

PN30

These care facilities do operate 24/7, peak rostering. The HSU's unchallenged evidence is it follows the industry standard whereas day work is the heaviest operating period and then afternoon shift and then, lower again, night shift. It's not staggered equally across the shifts, in the say that you would see, for example, in a continuous manufacturing process.

PN31

What that does mean, is a proportion of employees do have their ordinary rosters, set weekly or fortnightly, in accordance with the agreement structure so that some proportion of their ordinary hours falls routinely, as part of their ordinary plan, subject to permitted deviation, which I'll return to, falls outside that day work standard. Those shifts are not day work, they are shifts, for the purposes of the agreement. That is, either afternoon or night shift, on week days, or weekend work, which can, of course, also include afternoon or night shift.

PN32

Opal has, in its evidence, not set out, it's not something the union has perfect insight to, has not set out how many employees are rostered to work shifts, the proportion of employees that would be - that were affected by the change it implemented and that would be affected by the HSU's construction, which is significant when one considers how seriously to take the claims of dire industrial consequences. We don't know what they are, because Opal hasn't told us.

PN33

We've estimated, and this evidence was unchallenged below, the court book reference, I don't need your Honours to go to it, is at court book 194, paragraph 19 of Mr Friend's statement. We've estimated a couple of hundred workers work on weekends and have, historically, picked up shift work entitlements that way. There's no figure for afternoon or night shift, but it wouldn't be - as we understand it, it accords with the industry practice.

PN34

It is useful to consider an example. Could I ask the Bench to go to court book 197? Appeal book, I should say.

PN35

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN36

MR SAUNDERS: Yes. This is the only roster in evidence. It is, as Mr Friend - although it's the one employee, as Mr Friend's statement sets out, it reflects the actual work pattern of two employees who have been affected by what's happened today. Your Honours can see there that these workers work Monday through Sunday, seven hours on the week days, sorry, a hair under eight on the week days and - I apologise that must be right, seven hours on each of the week days and eight hours on the weekends. Either way, a fractional majority of their hours are on weekend work. They are unquestionably shift workers, under the award. They work this every week, so more than 10.

PN37

As one would expect, in that context, considering section 196 and the text of this agreement, historically they were treated as shift workers by Opal.

PN38

In March 2021 the workers to whom this timesheet relates, took leave and noticed that they were being paid a lower loading than they usually received, as well as the additional week. We're both referring to that principally, I think for convenience, but as well as the additional week there's an effect on leave loading of shift workers, for the purposes of the annual leave clause, are entitled to either the 17 per cent of, it it's higher, the loading they would have received. These workers weren't being paid that and did not receive that, which drew this to their attention and, correspondingly, to the union's attention.

PN39

What has happened is Opal has reviewed its payroll systems and redesignated a number of employees, adjusted accruals backwards for all it appeals and stopped paying shift loading on their leave.

PN40

That's the dispute. It is important, when reading Opal's submissions, when one considers previous agreement and industrial outrage, this isn't a new claim by the union, it never has been. This is Opal changing its mind on what was a previous practice. It doesn't take the interpretation very far at all, but neither do the submissions in the other direction, but it is altering it by a change.

PN41

Opal's explanation is at page 198. It's an email in response to Mr Friend, the HSU's relevant organiser. It is not terrifically illuminating. The full explanation is in the text, under the italicised extracts from the agreement. The payroll system is applying an interpretation, whether that's from a new payroll system or someone's entered new parameters into a payroll system, we don't know, but Opal has picked 65 per cent and it's done on a shift by shift basis. So 65 per cent is a

shift, but is not a day shift. If you're a shift worker and if not from this point forward.

PN42

It has never explained how it got to 65 per cent. It is not, in fact, a number that emerges from any historical analysis. It is, oddly, the precise percentage figure that the representative for aged care employers attempted to vary this award to include but failed, some years ago. The closest one gets to an explanation is in Mr Hunter's statement, at court book 237 at paragraph 3.6.

PN43

It's reviewed it and, based on something, changed it the 56 per cent formulation. It is a curiosity. The reason it matters is because it is an approach that is wholly different to the case that Opal now advances which, again, raises questions about how seriously one can say industry practice, industry understandings.

PN44

It's clearly a new idea. What makes that perfectly clear is, one of the documents that was sent this morning is the 2013 agreement for New South Wales, Domain Principal Group (NSW) Facilities Enterprise Agreement 2013, does the Bench have access to that?

PN45

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN46

MR SAUNDERS: If we go to page 22? I'm sorry, page 25, clause 22 I meant to say.

PN47

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN48

MR SAUNDERS: Identical standard hours clause. Clause 33 is at page 31. At 33.1(b), identical definition, down to the missing comma.

PN49

Returning to the appeal book, in Mr Hunter's evidence, Opal included not only the various links of negotiation, but various preapproval documents it provided, in respect of agreements.

PN50

The one is respect of this agreement can be found at court book 326, which is annexure NDH16. That becomes interesting and relevant with that page 3.

PN51

MR FAGIR: Sorry to interrupt my learned friend, but I can't help but point out that this statement wasn't actually entered into evidence. I don't want to be difficult about it, but if a submission is now going to be developed by reference to it, then it's something that becomes material.

PN52

MR SAUNDERS: My friend has the advantage of being that he was in the matter below. I'd rather taken that given it was in the court book that it had been filed. I'm sure he's correct. It's a short point, I'll make it while I seek some instructions on that, rather than forgetting to come back to it. But if my friend's right, then everything I say should be disregarded unless further leave to admit the evidence is given.

PN53

If we go to 338, one sees there question 3.7, 'More or less beneficial terms'. Appendix C is found, relevantly, at 352. Firstly, in respect of 24, nothing is noted as being good or bad, it's the same. But over the page, the annual leave clause is described in this statutory declaration that has already been provided the Commission, albeit some time ago, as more beneficial than the Nurses Award.

PN54

The Nurses Award is one of the documents that was provided. If your Honours go to clause 22.2 of that - - -

PN55

MR FAGIR: I'm sorry to interrupt your Honours but, presumably, those instructing my learned friend have had time to remind themselves that this material was not admitted into evidence, that's one point, and that should really be the end of this submission that's being made. Of course, you're in the circumstances where this is - it's exactly what we anticipated in the written submission, something coming out of left field, a point not made below, not made in the written submission, not made in yesterday's reply, not foreshadowed in any way, and the Commission is now being invited to trawl through material that's not in evidence and then travel to an award that has never ever been mentioned with, presumably, an invitation to me to deal with this (indistinct). That should not be permitted, in my respectful submission. The point about it not being in evidence is sufficient to deal with it but if the matter were otherwise finely balanced, the prejudice arising from the fact that this is all brand spanking new this morning answers the question, if the Commission please.

PN56

MR SAUNDERS: My friend's right, in respect of the if it's not in evidence point. I don't have those instructions yet, one way of the other. In respect of prejudice, of course there's no need to deal with it on the run. I said what I said earlier about making a note. It's something that's come to my attention later in the piece. It's of minor significance but the point is, this clause has been historically described as somewhat more beneficial than the Nurses Award, which is one of the references of this agreement. That is the end of the submission, in any event.

PN57

MR FAGIR: Can I assist my learned friend and those instructing him? If you go to appeal book at page 502, as is customary, there's a list of the material that was tendered into evidence. So perhaps if you set aside (indistinct).

PN58

DEPUTY PRESIDENT GOSTENCNIK: Mr Fagir, this is the transcript is it, the back of the transcript?

PN59

MR FAGIR: Yes, your Honour.

PN60

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN61

MR SAUNDERS: I now have those instructions, my friend is quite correct.

PN62

DEPUTY PRESIDENT GOSTENCNIK: All right.

PN63

MR SAUNDERS: It is one of the difficulties of dealing with remote hearings. In any event, I was attempting to move on when the final interjection came.

PN64

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. Thank you, Mr Saunders, we'll disregard the submission made.

PN65

MR SAUNDERS: The point can still be made with documents that cannot be objected to is that when we talk about industrial standards, the key thing is that the requirement to be a seven day continuous shift worker is not a standard in this industry and it is not, if one considers the enterprise agreements that otherwise apply, which have force by way of published decisions of the Commission, not this employer. I won't take your Honours to it, but the references are the Queensland agreement, at clause 29.1, simply requires workers to work the shift patterns set out in the rostering clause and the Victorian 2008 agreement, at 28.2, imposes a percentage requirement, but it's 45 per cent.

PN66

It's not a matter of particular significance, it is just because the alternative argument is so heavily predicated on the idea of this universal standard, universally understood, that applies at all, let alone here, that it is important to consider that surrounding context. Not this industry and not even this employer. We don't know why this change happened, and it's never been explained.

PN67

One would exercise real caution before embracing these sweeping standards that the notion of needing to be a continuous seven day shift worker, as opposed to a shift worker as specifically defined here, can be imported into aged care.

PN68

DEPUTY PRESIDENT GOSTENCNIK: Before you go on, Mr Saunders, can I just ask you a question? As I read the annual leave provision in the agreement, it's simply stating that annual leave is as provided in the NES and then clause 34.1

simply sets out what the NES standard is. Then paragraph (b) is what might be described as a shift worker definition, for the purposes of the NES, for the purposes of this clause, but this clause is simply explaining the NES.

PN69

So on the union's construction, a shift worker is a person who does not meet the description of a day worker, in paragraph (a) of clause 23?

PN70

MR SAUNDERS: That's right.

PN71

DEPUTY PRESIDENT GOSTENCNIK: That would, presumably, include a person who works on shift?

PN72

MR SAUNDERS: Yes.

PN73

DEPUTY PRESIDENT GOSTENCNIK: So when - sorry, under the NES annual leave accrues progressively and so in relation to that example, over a 12 month period, if a person worked outside the spread of hours on one occasion what leave accrues?

PN74

MR SAUNDERS: It depends on why they're working that shift, and this is where the rostering provisions of the agreement come into play. If I could take your Honour to those, which will take me a moment.

PN75

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN76

MR SAUNDERS: Yes, clause 27, it starts on page 25.

PN77

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN78

MR SAUNDERS: These are - I need to take a step back before I answer your Honour's question, but I'm not departing from it.

PN79

DEPUTY PRESIDENT GOSTENCNIK: No, go ahead.

PN80

MR SAUNDERS: This industry has, as well as an unusual definition of shift worker, it has relatively unusual, you do see it in some other caring industries, rostering provisions. We have a system whereby there is a requirement to have a fixed weekly or fortnightly roster. Then, if we go over the page, at (f), a significantly heightened ability to change rosters. So there is a real seven days'

notice, which is short, short in comparison to other industries and, more significantly, the ability to alter the roster at any time to meet emergencies.

PN81

One sees this, also, in industries such as child care. It's to do with - it's historical genesis is to do with staffing ratios and the particular need, legislatively and otherwise, to have staff at a certain level and it allows that reactiveness. It's highly unusual that any other workers roster could be changed at any time, in this clause, no notice to their ordinary hours to be swapped.

PN82

So there are two concepts for a rostered worker here. They have their roster that's set fortnightly, which is their ordinary hours that they are set to work and then they have the ability to change it. So in answer to your Honour Gostencnik DP's question is, it depends. If the worker in question's roster is altered once, to make them a night shift worker, and they work that, in accordance with their roster and then, for whatever reason, it changes back, they have an odd two week period where they accrue at the rate of a shift worker, which following on, would be done on a fortnightly divisor basis, so there's no obstacle there. If it's the worker who is a day worker but who, because of this clause, is called in to regularly, but within their rostered hours, a day, half a day, an hours' notice, work a night shift, they don't become a shift worker because it's not - they haven't been regularly rostered to do so.

PN83

I would observe, your Honour, there's always the ability to think of outlier situations - - -

PN84

DEPUTY PRESIDENT GOSTENCNIK: They're not a shift worker, for the purposes of paragraph (b) of 23, but are they not, nonetheless, a shift worker because they worked outside the span, for the purposes of (a), they're not a day worker.

PN85

MR SAUNDERS: Yes, they have not worked a day work shift, they've become a - they have a brief moment of being a shift worker, which means they attract the penalty, but they're not a shift worker, for the purposes of the annual leave clause, in that circumstance, which explains what otherwise looks odd, the reference back to 22(a), rather than (b), which would deal with shift workers. We would say to deal with this exigency, and it's this unusual rostering pattern and rostering control that's a feature of this industry, that drives the different entitlement.

PN86

It's also that irregularity that speaks to the more destructive it is the more one would, in the matter of industrial common sense, see higher and better bargains for compensatory benefits, which is how industrial standards develop.

PN87

DEPUTY PRESIDENT GOSTENCNIK: So on the union's construction the shift worker, for the purposes of the annual leave provision, is a person who is not a

day worker, but does not include a person who is not regularly rostered as a shift worker?

PN88

MR SAUNDERS: I think using the word 'regularly rostered' leads to the same difficulty as in the decision.

PN89

DEPUTY PRESIDENT GOSTENCNIK: I'm just using it because you used it, that's all.

PN90

MR SAUNDERS: It was a moment of self-criticism. Perhaps 'ordinarily rostered'.

PN91

DEPUTY PRESIDENT GOSTENCNIK: Okay.

PN92

MR SAUNDERS: The roster set. I don't want to suggest that anything other than what - - -

PN93

DEPUTY PRESIDENT GOSTENCNIK: Yes, because that then takes us back to Burger(?) and Burger's not engaged by the definition, on your construction.

PN94

MR SAUNDERS: That's right. That adds - - -

PN95

DEPUTY PRESIDENT GOSTENCNIK: All right.

PN96

MR SAUNDERS: That adds the potential difficulty that your Honour's observed. What I was saying though is, although it's possible to construct outliers, where things may seem just or unjust, on Mr Fagir's construction these two women who work every weekend and would otherwise be shift workers under the award are not shift workers and there's no reason for that.

PN97

On the Commissioner's construction, someone who only works afternoon shift is not a shift worker, for the purposes of annual leave, and there is no particular injustice, industrial justice in that. Looking at the fine ends is never that useful.

PN98

I took, your Honours and Commissioner, earlier to the trifecta of clauses, which is really 2(1) with a slight variation. The second trifecta in the matter is those three interpretations that I've just averted to.

PN99

Returning to the appeal book, if we go to page 2, the Commissioner helpfully summarises them at paragraph 3. The union's position is that it's a person who is

rostered to work, in accordance with those rostering clauses, which will not capture everyone who necessarily works a shift, due to variation, but who is rostered, in that sense, per clause 23(a). It says there, there is a threshold proportion of hours. The position below was 65 per cent. There's not much in it between 65 per cent and two-thirds, but when we turn to how the argument is put here, it's illuminating.

PN100

The Commissioner's view is the third option. The Commissioner requires - the Commissioner defines a person as a shift worker if, within their weekly or fortnightly roster, they regularly work one or more. It's a little difficult to see what 'regularly' is meant to mean there, shifts that fall exclusively outside the span of hours, Monday to Friday. The practical effect of this is to confine it to night workers, pure night workers and weekend workers. The people working 3 pm to 10 pm rather inexplicably miss out.

PN101

The formulation is put slightly differently, at the end of the decision, at court book page 10. We lose that reference to, at paragraph 40 we lose that reference to regularity and it turns into, 'At least one rostered shift in each roster cycle' one assumes across a year, 'is wholly outside of the day worker span of hours'. So three alternatives.

PN102

What that construction means is that a person who meets the 10 weekends threshold, quite low, not quite as low but close to your Honour's suggestion of the person who does it one week in the year, 10 weeks in a year is sufficient in this industry, that person is excluded, under the Commissioner's definition.

PN103

A person on permanent afternoon shift, we know from Mr Friend's statement that that - they tend to start - and also afternoon shift, they tend to start mid-afternoon, it's 3 pm to 10 pm, two-thirds of their hours outside, easily, they won't qualify, under the Commissioner's definition. It doesn't have a clear textual basis.

PN104

The curious feature of this appeal is, and my submissions will proceed now in two parts, is that while Opal appears to, as its primary position, urge the Commission to find that the decision below is correct, it doesn't advance, at least as I understand the submissions, any reason why we should do that. It also advances a substantially different alternative construction. I need to deal with both. I'll deal with the decision under appeal first.

PN105

While it's, of course, not a discretionary decision, the correctness standard applies. It doesn't mean that it's a wholesale rerun of the case or that the reasoning below is not relevant to the Commission's considerations. Looking at the underpinning rationale, if errors or issues arise in that, it is a strong indicator that the ultimate conclusion is wrong.

PN106

The Commissioner's reasoning starts at page 7. At clause 19 to 22 the Commissioner deals with the issue that your Honour Gostencnik DP was, to a degree, exploring with me a moment ago. What the use of clause 23(a), as a definition, does, why clause 34(b) of the agreement picks it up. There's some focus on the omission of a comma but, ultimately, what happens in those four paragraphs is that the phrase in 34.1 is rewritten to read, 'As defined in 23(b)', which would be anyone who happens to work a shift. Not our construction and not what it says.

PN107

It is wrong to start with the proposition that 23(a) is not itself a defining term. It's been made one, that's what clause 34(1)(b), in fact, does.

PN108

There's some further discussion of the clause, which I don't need to take the Commission to. We see, in 27, the ultimate conclusion of the consideration of this constructional issue, whether 33.1(b) says what it says, and the definition is, 'Not a day worker', or it should be read in some other way.

PN109

The Commissioner comes to the conclusion, in the final paragraph of 27, which is, 'For these reasons I do not read clause 34.1(b) as intended to replicate the definition of clause 23(b) of the agreement'. We say that's correct, it is a specific definition and that's what drives to our interpretation and removes this entire concept of regular rostering from the consideration at all.

PN110

The central part of the Commissioner's reasoning, however, that leads her to the conclusion that was ultimately reached, is found at paragraph 30, where a bright line is drawn between people who are wholly within the day worker span and those who are not. There is a conception there that one can only be a day worker or absolutely not a day worker, there's no halfway house, which is difficult when one considers the live and prevalent concept of afternoon shift, which is both contemplated by the agreement and in practice here. But it's pretty plainly that's where the full shift construction comes from, this idea that you can't be - you either have to be a day worker or absolutely not, as opposed to person who are working shifts that are not day work shift, notwithstanding that they contain some hours that fall within the span. This seems to be the central basis of the ultimate conclusion and it is in the context of the agreement providing for shift work that is not day work but touches those hours, unsustainable.

PN111

Thirty-one also turns to the purpose of interpretation, which whilst the correct approach, it is important not to confuse it with searching for notions of what the Commission might consider fair or just. It's described there, 'The purpose of the additional week of annual leave for shift workers', which is to compensate for the particular inconvenience of what might be called unsociable hours, nights and weekends.

PN112

This history is more complicated than that. Initially it was simply Sundays and, indeed, most of the jurisprudence developed Sunday attitudes towards working Saturdays have subsequently shifted, it's not an historical basis, either initially or in the more recent cases, for seven day continuous shift workers, that really is a focus on weekend and public holiday work. It's not the reason here. There's a specific delineation in this award between categories of those who simply are dislocated because they work outside the day work span and/or the second category, who work a certain, significantly lower than 10 weekends, amount of shifts on the weekend. Forty hours a year.

PN113

There's no principled reason as well to exclude the afternoon shift workers, as it would seem - I mean I touched on this a moment ago, but it's someone who works five days a week, 8 to 10, is dislocated much more than someone who works one pure night shift, the latter being entitled, under the Commissioner's construction, the former not.

PN114

It's a dangerous approach to the language. It's a real indication that the focus is on looking for a reasonable outcome than what the parties here have actually agreed, in their particular industrial context. The Commissioner does go on to note that there was little to now information in front of her about the history of this particular award and the industrial standard that underpins the agreement.

PN115

Over the page, to paragraph 32, this is wrong. The Commissioner's interpretation requires the weekend work to happen once every roster cycle. It can only be read as 'over the year'. That is a much higher threshold than the 10 hours the award requires. Again, it's suggestive that there is some error in the ultimate conclusion.

PN116

Thirty-six is within the consideration that it doesn't take the Commissioner very far because the parties (indistinct) thought about various industrial standards, but the - my friend, in his written submissions refers to it as the Commission's researches.

PN117

What it is, is a review of submissions made in the award modernisation process. Those are not - I think they can be obtained on request to the Commission, they're not generally available. The parties had no idea they were being considered and we don't actually know what the Commissioner looked at. It goes beyond the kind of legal research that would be done in Chambers to an inquiry that - we just don't know what's been taken into account, but the fact that one's looking at what various parties proposed and matters of industrial practice, that's an evidentiary inquiry that shouldn't have been made.

PN118

The following paragraphs are just the Commissioner setting out the absence of much information about the development in this particular industry, which is advice in the proceedings, they don't take the matter further.

PN119

There is no apparent textual basis for excluding - sorry, for the conclusion that the Commissioner's reached, that one needs to work wholly outside the day worker span. It forgets an entire class of people who are unquestionably shift workers and it runs squarely into the difficulty the Commissioner quite correctly identifies, posed by the approval requirements of section 196. It is very unlikely, very unlikely indeed, that an interpretation that is in any way more restrictive. It can be identical, not necessarily, but more restrictive than the award, given those approval requirements, very unlikely to be correct.

PN120

So for those reasons, we say the decision itself was wrongly determined. The Bench should, on that basis, grant permission to appeal. I don't think it is expressly agreed that the decision is wrong, but I don't hear much being advanced yet, which is another indicator that it should be - that permission should be granted.

PN121

Once permission is granted, of course, the Commission needs to turn to the alternative construction advanced by Opal. I should say, of course, I'm not dwelling on the HSU's construction, because its very simple, it's someone who is rostered to work - whose ordinary roster is not as exclusively a day worker, that's the end of that. Because of the specific definition in 33, I rely on the written submissions in this respect.

PN122

Opal's alternative interpretation, as advanced here, is that, correctly interpreted, two-thirds of all ordinary hours worked by any person have to fall outside of the day work span. It's different to the practice that triggered the dispute and it's not what, we understand it at least, the actual practice currently is and it is wrong for two reasons.

PN123

As I've said, firstly, the definition is, 'Not a day worker'. The Opal's alternative construction relies on the definition being, 'In accordance with 22(b)', they don't get there. With the way this agreement is structured and what's actually referred back to, deliberate choice reflecting the underlying award entitlement, is it's just not a day worker, it's anyone who's performing this dislocating work on a structured - to avoid the contested word - structured basis, as set out in their roster, as their employer is required to provide.

PN124

The second reason it's wrong is that it is error to import the industrial standard applied to seven day continuous process shift workers and its history, to this industry. Different language, completely different entitlement. There is no authority where it has been done. The only cases that have been referred to are all about continuous shift workers, which has driven where we get to the two-thirds aspect.

PN125

The central problem though, as set out in the reply submissions, and I should caveat that I've got some of the numbers wrong, but the standard threshold for regular rostering wasn't set as an answer to, let's find out what level is significant enough to count as regularly, in its meaning of frequently and how one gets there. It's about answering the question, is this person continuous? Is this person a true seven day shift worker rostered evenly? It's drawn from the idea of that continuous process and this continuous rotation of shift work. The 34 Sundays and six public holidays that's the higher threshold in the various cases, that is - sorry, I think we've just lost Mr Fagir.

PN126

DEPUTY PRESIDENT GOSTENCNIK: We seem to have.

PN127

MR SAUNDERS: He's in the room behind me. I can go and check if that would be convenient to the Commission.

PN128

DEPUTY PRESIDENT GOSTENCNIK: That's okay, Mr Saunders. My associate will chase him up. We might just adjourn until the technology is fixed up. We'll adjourn for a few moments. Thank you.

SHORT ADJOURNMENT **[10.47 AM]**

RESUMED **[10.49 AM]**

PN129

DEPUTY PRESIDENT GOSTENCNIK: Yes, Mr Fagir, we can hear you. Apologies.

PN130

MR FAGIR: Thanks. My apologies, your Honours.

PN131

DEPUTY PRESIDENT GOSTENCNIK: It's all right. These things happen, Mr Fagir. Mr Saunders, you're on mute.

PN132

MR SAUNDERS: Thank you. Yes.

PN133

DEPUTY PRESIDENT GOSTENCNIK: Your submissions then were never as eloquent as - - -

PN134

MR SAUNDERS: It would only improve matters but here we are.

PN135

DEPUTY PRESIDENT GOSTENCNIK: Right.

PN136

MR SAUNDERS: I'd just turned to why it's wrong to import the seven-day continuous shift worker into a completely different industry with completely different language in which there is no suggestion this order has ever been interpreted in that way. The starting point is understanding where those figures come from. There's a variety of them.

PN137

The more common evolution was 34 Sundays and six public holidays. That is not a standard that's been derived from some notion of how frequently is frequently enough. Volume - any such thing would be arbitrary which is why 65 per cent to an ordinary employee does feel a bit picked out of the air. What it comes from instead is a true continuous seven-day rotating worker if their shifts are spread evenly and this rationale is set out in the various authorities. I can take your Honour to the summary if you need but I don't think it's contentious.

PN138

A shift worker who works a perfect spread over every day and they're a shift worker in the sense they're not pure day workers, but that also varies industry to industry, will work 34 Sundays and six public holidays. It's said on average because there are just vagaries of when public holidays fall, but that's how you get that. It's a measure of a particular pattern, regularity in that sense, not an anteriorly derived notion of how much is enough to be regular in the happens a lot of the time sense that Opal prefers.

PN139

The focus is on even rotation. The development of continuous process industries is driving that and it's focused on weekend work. Weekend work is, as your Honours saw, a foundational requirement. They've got to be available all seven days and they've got to be rostered on the weekends. It is that dislocation rather than the dislocation of inconvenient hours, night shifts, that for a seven-day continuous process shift worker led to that entitlement to an extra week being developed. Mr Fagir is now here twice. I might just wait until this resolves. Excellent. The thing is Opal's - and I say conventions - I say the higher threshold - - -

PN140

DEPUTY PRESIDENT GOSTENCNIK: Mr Saunders, I think Mr Fagir is gone.

PN141

MR SAUNDERS: Yes. We'll adjourn again and there might be an alternative solution.

PN142

DEPUTY PRESIDENT GOSTENCNIK: We will. We'll adjourn. Thank you.

SHORT ADJOURNMENT **[10.52 AM]**

RESUMED **[10.55 AM]**

PN143

DEPUTY PRESIDENT GOSTENCNIK: Yes, take three, Mr Saunders.

PN144

MR SAUNDERS: I promise I haven't thought of another new idea in the intervening five minutes, my friend will be relieved I'm sure. I'd mentioned earlier that the standard was - and this is what's been referred to in Opal's submissions - the idea of 34 Sundays and six. That is the high watermark for a pure continuous shift worker. There are some decisions and standards because they vary. Vary in industry, vary State to State in particular, where that standard has been dealt with differently.

PN145

One is the 1976 annual leave case. It's just been drawn to my attention that the citation for that has not actually made its way into the reply submissions but I'll supply that by email later. It's a useful counterpoint. It's generally regarded as the most generous approach to this because what the bench did there was look at various categories of shift workers. The true perfectly rotating person which is increasingly hard to find and was hard to find by 1976, and people with a more varying roster.

PN146

What they did was track it, find that figure that expresses the particular pattern that makes someone a conventional, pure seven-day continuous shift worker, and then make an evaluative judgment that it would be fair to effectively deem some people who work slightly more sporadic patterns as continuous shift workers. The more irregular work, as it were, and they set it as 35 either Sundays or public holidays, which is why that figure's referred to in my submissions, but the point is basically the same.

PN147

It's not, and it's never been, these figures are high enough. It's these figures are what you get if you work a particular pattern that fits the definition of a continuous seven-day shift worker, a particular concept with a particular history. Opal's alternative interpretation goes further than simply adopting that definition, though. It extrapolates from it. The idea of two-thirds of all ordinary hours falling outside day workers found - my researchers have not been able to turn up anywhere where it's applied and I don't read any of the cases because they all deal with continuous shift workers as applying it in this industry.

PN148

It's not reflective of the actual practice. It's a mathematical development from it that Opal has done absent any guiding principles. The principle has never been two-thirds. It's mathematically not quite two-thirds. At the 40 level it's 60 per cent. At 34 it depends on how many public holidays are in a year. At 34 it's something like 53 but it's never been two-thirds. That language of two-thirds comes from obiter at best remarks in a relatively recent chain of commission authority.

PN149

The first is AWU v Genesee & Wyoming Australia which is in the joint bundle of authorities at - sorry, starting at page 68. The citation is [2019] FWC 2502. One will see that at paragraph 3 we are in the metal trades industry and we are talking about continuous shift workers expressly. The definition is the same and they're

described as that in the agreement. At page 175 - sorry, page 75, I should say, at paragraph 60 is where this two-thirds language comes from, from Anderson DP.

PN150

Now, I should say if one takes his Honour as referring there to 34 Sundays and public holidays in, as I did when I first read it, the New South Wales 1976 annual leave test case, that's 53 per cent. It is fairly clear, though, on reflection that there's a slight typographical error and his Honour means 34 Sundays and six public holidays as he refers to in the preceding paragraph, which takes us to 60 per cent, not quite two-thirds, however, but that's where it comes from. It's just a mathematical exercise that's been performed here. It's never been expressed, as far as I can see, like that in any way. And it distracts from what those figures are: an expression of a pattern.

PN151

This is picked up again in RTBU v One Rail [2021] FWC 3097, a decision of Hampton C. These are the authorities that Opal says this two-thirds concept comes from. We find the relevant passage at page 101 of the joint court book where the Commissioner simply cites Anderson DP. This is not to be critical of those decisions. They say what they say and they weren't - neither the Deputy President nor the Commissioner were required to engage in this level of analysis because those decisions - here we are in Freight Rail, both are concerning directly the question of identifying whether the relevant workers were, in fact, continuous seven-day shift workers.

PN152

Not shift workers for the purpose of the aged care work industry. Not shift workers for any other definition. But whether they - using their numerical frequency as a numerical frequency as an indication to see if they worked the right pattern to fit within that decision and with us regular in that sense. We can't derive from that, from the historical development of that identifying threshold, we can't derive from that a proposition that in every industry it has always been understood that two-thirds gets you there.

PN153

It's loose mathematically at best, depending on which State and what standard you apply, and it's just not what these authorities say. It's not what this chain of reasoning leads to. It's not even totally clear that it mathematically flows in the same way that someone working in that pattern, they wouldn't look the same necessarily. They could be working five days, they could be working seven. It's just a completely discrete concept, and so doing what Opal has done to extract it out and apply it in a completely different context just doesn't work.

PN154

The nature of a true continuous seven-day shift worker rostered with perfect regularity, i.e. in the right pattern, is such that they work at this threshold and, therefore, someone who works at that threshold, who hits that number of Sundays or whose roster means they will hit that number of Sundays and public holidays is, therefore, a seven-day continuous shift worker. But that's as far as it goes, it's not an industry standard for sufficient amount of dislocation. It's not an industry standard - it's not a global standard for anything, it is simply how you find out if

someone is working a pattern that means they are a continuous seven day shift worker. The extrapolation of that into a derived principle that can be applied outside correctly has never been considered by any tribunal before. It has no actual principle basis. The only time that the figure has been put before the Commission that 65 per cent, it was rejected, in leading aged care services. It's in the bundle, I don't need to take your Honours and Commissioner to it, but the reason it was rejected on appeal was a confirmation of the decision below that there was absolutely no evidence to support the change, so it doesn't take us far, in terms of the principled analysis, although it might be a hint as to where I got the idea from.

PN155

The award clause is worth returning to, at this juncture. Could I ask your Honours to go to page 36 of the appeal book?

PN156

DEPUTY PRESIDENT GOSTENCNIK: The appeal book or the joint bundle?

PN157

MR SAUNDERS: I'm sorry, the authorities.

PN158

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN159

MR SAUNDERS: At 28.2, 'Quantum of annual leave'. The only commonality between that and the NES, between that and the clauses, the historical collection of clauses that deal with continuous seven day shift workers, is the phrase, 'regularly rostered'. It doesn't mean it's an identical meaning and it's too far a leap, when one considers the surrounding clause.

PN160

It just cannot be, absent any history in this respect, sensibly read as an employee who was rostered to work two-thirds of their ordinary hours outside the ordinary hours work and/or an employee who works for more than four ordinary hours on 10 or more weekends. It gives - and in the conjuncting sentence, very little to do and it imports notions of continuousness, notions of need for weekend work and a need for consistency of pattern into this, which simply don't exist and are unlikely to exist, in an industry with rostering as volatile as the clauses in the agreement that I took you to which, for completeness, are replicated in this award.

PN161

Indeed, the lower threshold, in (b), which is completely separate to the conception of the amount of Sunday work that attract the entitlement for metals, et cetera, industry continuous seven day shift work, is a strong textual indicator that this has sprung from completely different ground. It is focused on completely different concerns. We don't know what they are, but there isn't a basis to say that, 'Actually what we mean is that much higher threshold of continuous seven day shift work'. It has never been read this way. It is an arbitrary threshold when it's applied non mathematically. It's not arbitrary in the seven day continuous shit

worker sense, because of that connection to pattern, but extrapolating it out here, where one doesn't have that need for continuousness, it is arbitrary.

PN162

The difficulty and the reason that it's significant is that one can't sensibly read the EA clause down, which is obviously, with minor drafting, intended to draw directly from it and mimic it. One can't read it down further. It is relevant that this would have led to the agreement offending - let me put it this way, if this - if Opal's interpretation had been advanced - no, I've got it the wrong way round. If the Commissioner's interpretation had been advanced, at the time the agreement was approved, it would have led to in approval obstacle, more complicated for Opal but, in some circumstances, the same situation exists.

PN163

If Opal had turned up and said, 'The definition means two-thirds', the Commission, confronted with this roster for two actual people who work every Saturday, every Sunday, unquestionably shift workers, under the award, could not have formed the relevant state of satisfaction. That is a factor which indicates that the interpretation is unlikely to be correct or, more correctly, one that doesn't create that retrospective difficulty doesn't invalidate the agreement, it's a state of satisfaction. I'm not putting it that high, but it is a difficulty. An interpretation that doesn't lead to that conclusion, had it been advanced at the time, is much more likely to be correct.

PN164

What the industry does have is, as I explored with your Honour, Gostencnik DP, earlier, is this relatively flexible rostering. It's not as fixed. It's not the kind of - it's unlike the industries which have this perfect continuing process, it's more volatile and, accordingly, it's not surprising to see an entitlement which is both different and more generous, in terms of the access it grants employees to extra leave than those industries. They're dealing with different industrial concerns.

PN165

But I said earlier what I wanted to say about the significance of the rostering clause, I don't need to rehash it. The simple answer is, the agreement language is perfectly plain. There is a specific definition, in clause 33.1. It is one which is consistent with the award, which allows employees who would be shift workers, under the award, to be shift workers, for the purposes of the agreement. It does not require alien concepts to be transplanted into this ground, following a process of mathematical extrapolation and it should be preferred.

PN166

Unless there was anything further, those are the submissions.

PN167

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Saunders.

PN168

Mr Fagir?

PN169

MR FAGIR: I thank your Honours and I apologise for the repeated technical difficulties. I think we've worked out what the problem is, which is that I don't have enough screens in front of me, (indistinct) things would have been different.

PN170

Could I begin on a slightly different footing, by saying this? A series of things have been said today, in submissions, about the nature of the industry and about the nature of rostering in it, most of them said without reference to evidence. Now, can I just say this about that, and leave it there? To the extent any factual propositions advanced without reference to evidence, it should be taken to be contested and should be disregarded, in my respectful submission. If there's some inference that's said can be drawn from the rostering clause, that's a submission that can be made. In the absence of any evidence whatever, from the organiser or anyone else to suggest that there is some volatility in rostering, submission wouldn't be accepted but it can be made. But to the extent that we're talking about an asserted fact, in my respectful submission perhaps some basis will be identified in the evidence in reply but short of that happening, those matters should be disregarded.

PN171

Could I start by saying something again, the risk of testing your Honours patience, about the correct approach to interpretation, the issue that was endlessly ventilated before the Commission and elsewhere.

PN172

I say these things in the context where the Commission's told that the agreement has a plain meaning but in circumstances where three different industrial parties, and I include the Commission in that, have come to at least four different views of the meaning of the clause, the meaning is fine. I say four, because the HSU had one view about this originally and by the time of the final submissions in the hearing below it had come to a different one. I don't say that to be critical and it wouldn't be the first time that that has happened, but it rather does highlight the factiousness of the suggestion that there is something self-evident about the operation of this clause and that matters of industrial context and industrial understandings of the key words are immaterial.

PN173

The true position, in my respectful submission, is that the Commission's confronted with at least two difficult questions of construction and perhaps with some sub-issues. The first is, what is the agreement's formulation, textual formulation of the definition of a shift worker, for the purposes of the extra week of leave? So far previews of this have been articulated. The first is, as the HSU would have it, that it's simply a person who works any ordinary hours - sorry, I withdraw that, I should be precise about this, who is regularly rostered to work any ordinary hours outside the day worker span, one, 10, all of them, it matters now.

PN174

Now, that submission has been made. There are a series of complications that flow from that, which haven't been addressed. For example, perhaps this has been addressed, how many hours does it need to be in a roster cycle? Is it one? Is it

one every two roster cycles? What if someone's rostered to work a couple of late shifts once every two or three months, to do a kitchen stocktake, or whatever it might be? What exactly is sufficient for those purposes?

PN175

In any case, that's the position that's put. It's enough to be - I keep getting this wrong, but your Honour's heard Mr Saunders, the position appears to be that if you're rostered outside the day worker span, maybe regularly maybe not, frankly we're still not clear about that - - -

PN176

DEPUTY PRESIDENT GOSTENCNIK: I think Mr Saunders referred to it by 'ordinarily'.

PN177

MR FAGIR: Yes. Now, where that word is taken from, apart from being a way of saying 'regularly' without adopting that phrase, is unclear, but the examination of these issues, and your Honour only asked one question about it, but it really drove my learned friend back to adopting some concept of regularity because the position is completely indefensible without it. Now, he said, 'ordinarily' as opposed to 'regularly', that just begs the question of what 'ordinarily' means. That's the first view of the matter.

PN178

The second view, which is the one that the Commissioner adopted, was that a shift worker, in the relevant sense, is a person who is not a day worker, insofar as they work at least one complete shift per roster, which is wholly outside the day worker span.

PN179

So thinking of that in practical terms, it's really people that do overnight shifts and people that work ordinary hours on weekends. That's the second view of the requirement.

PN180

The third, which is the position that my client advanced below, is that a shift worker, for the purposes of annual leave, is a person who's regularly rostered to work outside the daily worker span.

PN181

That's the first question. There is, and I'll say this a couple of times, the answer is not to be located in the text alone. There aren't many cases that end up in the Commission, that certainly end up on appeal, where the text provides the complete answer, and this is no exception.

PN182

If the Commission - I'm sorry, that's a question dealing with the entitlement to annual leave. There's a second question, which arises, in respect of annual leave, if my client's view about regularly rostered is accepted, but it arises anyway, because there is an issue about leave loading. Although the matter hasn't been dealt with at all by the appellant, so far as we can tell, the issue that actually drove

the complaints was not about accrual of leave but it was about leave loading for people who worked weekends. On any view of the matter, the relevant definition for that purpose is the definition which requires regular rostering of work outside the day worker span. So the regular rostering issue can't be avoided in any case because it arises in respect of the annual leave loading and it arises, on my client's case, if the view of the definition of shit worker, which we advanced below, was accepted.

PN183

There is, in my respectful submission, no point pretending the answer to any of these questions arises inexorably from the text, it doesn't. The text admits a variety of possibilities and the Full Bench is confronted, as was the Commissioner, with a series of constructional choices. There is, as we see things, no extrinsic evidence, in this case, which answers the question or points to the correct constructional choice.

PN184

That being the case, the questions are to be answered by considering, firstly, the language employed in the agreement, including any industrial usage or any industrial meaning which attaches to the words. This is a matter of textural interpretation. It isn't a matter of context, I'm talking about textural interpretation.

PN185

Secondly, the questions are to be answered by considering the industrial context of the agreement and the industrial context of the language used. And thirdly, the questions are to be answered by considering the consequences of the various constructional choices, including considering the likelihood that one or another result was objectively likely to have been intended by the parties.

PN186

That's not a matter, in this case, of some submission that there are dire consequences or that there will be some sort of industrial catastrophe. It's a matter of an entirely orthodox approach of considering, as part of the process of construction the potential outcomes, the consequences of adopting one view rather than another. That is wholly orthodox and wholly appropriate.

PN187

Bearing in mind that this process is to be entered into, in my respectful submission, bearing in mind that the ultimate goal of the exercise is to determine and give effect to the intention of the makers of the document as expressed in the document. But that meaning is the meaning conveyed to a reasonable person in the position of the industrial parties who have knowledge of the relevant context, including the relevant industrial context, and it is assumed as an incident of their reasonableness to intend a common sense or sensible industrial result, at least in the absence of clear textural indications to the contrary.

PN188

When I say this is an orthodox approach, one can point to many decisions which have taken that approach. This isn't an example of this category of case, but one can point to any number of cases where the construction ultimately embraced by the Court or by the tribunal is not the most obvious literal meaning of the words

used, but the construction was adopted because it gave effect to the presumed intention of the parties.

PN189

Without wanting to dwell too long on this, could I ask your Honours to turn to appeal book page 225. I'll do this quickly. Could your Honours turn to page 223. I'm just doing this because these are our submissions below. They set out some of the principles. This is a convenient way of dealing with them.

PN190

Your Honours will see at the bottom of 223 is the first of a series of propositions. The first is that in the context of industrial instruments, context includes the entire document of which a provision is a part, and then other documents associated with the instrument being construed including, in my respectful submission, an underpinning modern award.

PN191

Secondly - and a principle that's endlessly repeated in this context - one is to avoid too literal an adherence to strict technical meaning of words; must view the matter broadly; and, after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole of the award.

PN192

Again, that is entirely orthodox not only in this field, but in statutory construction, construction of contracts, and elsewhere on the basis that parties are assumed to have intended that all parts of an instrument be given effect, and that all parts of the instrument operate as a whole and in a consistent way.

PN193

The third relevant principle or range of principles your Honours can see, I just highlight halfway through paragraph 9 that:

PN194

It's justifiable to read an instrument to give effect to its evident purposes despite inconsistencies or infelicities of expression -

PN195

Very polite phrase -

PN196

infelicities of expression which might tend to some other reading.

PN197

Then:

PN198

Interpretation which accords with common sense will be preferred to one which does not.

PN199

Then finally, having probably bored your Honours with a series of propositions you know well, I specifically wanted to draw attention to the analysis in one of the many SDAA cases. Your Honours will see that there's an introduction to the quote at paragraph 11. This is a case where there was a question of whether an employee who worked a public holiday and a substitute public holiday should get public holiday penalties for both. And their Honours readily accepted that on a literal interpretation, the employee would. They dealt with that in paragraph 13.

PN200

I'm sorry I've extracted it, but it's to the effect that I've just described. Their Honours at 14 say something about principles and the fact that the High Court in Amcor embraced an approach consistent with what I have just said. At 18 their Honours say this – ignoring the first sentence:

PN201

> *The issue currently in contest between the parties may fairly be resolved by asking the following question: given the purpose of public holiday provisions and the purpose of creating additional public holidays, could it be reasonably intended by industrial parties from the industrial instrument that a person would be entitled to the benefit of a public holiday for Anzac day and on the very next day the provision of another public holiday for Anzac day? The answer is obvious and it must be no.*

PN202

This is analysis by Marshall, Tracey, and Flick JJ who might be thought to have a very good idea of what they were talking about. But it's analysis which is set to flow directly from the High Court's decision in Amcor.

PN203

So I keep talking about an orthodox approach because I want to make clear that, at least as we see things, to take into account industrial context and industrial usage and a result that is objectively likely to have been intended, that this isn't some – to use a technical term – loosey-goosey industrial approach being pressed in the Commission. This is the approach that's adopted by the Court of the land all the way to the High Court.

PN204

The position that was advanced by the union in this case is nowhere near as clear as a matter of language as was the position advanced by the SDAA in the proceedings before their Honours. But it's useful because here your Honours might, at the end of the day after dealing with quite a bit of detail, think that the correct approach is to ask, given the purpose of the grant of an additional weeks' leave in industrial practice and usage, could it reasonably have been intended by these industrial parties that a person would be entitled to the extra week if they worked as little as one hour each work outside the day worker span? As was the case in SDAA's in Woolworths, the answer here in my respectful submission is obvious, and it must be no.

PN205

Having said all that, can I hasten to say this doesn't mean that the parties are restricted in what they can agree to. If the parties want to create some brand new

entitlement, they can. One might point to cases where that has happened and where, for whatever reason, in the course of bargaining - or conceivably in the course of the creation of an award - there was a decision to take some novel approach. But if that were so, firstly, one would expect there to have some sort of indication that that was the case in extrinsic material or in the text of the instrument. But more importantly, one would presume that that novel or strange or unusually generous result would be reflected in clear language in the text of the agreement.

PN206

Here that hasn't happened, and that's because we say no one had set out to create this novel and extremely generous – I withdraw that - this novel and unusually generous benefit. No one intended to do anything unusual. In that context, the operating hypothesis is that, for example, where words that are well known in industrial parliaments (indistinct) have been employed, they've been used with their conventional meaning and in a conventional way.

PN207

Unless your Honours had any questions for me in relation to the correctness of the approach I have just suggested, could I deal briefly with the award. The relevant clause is to be found at page 25 of the joint list of authorities. Could I firstly draw your Honours' attention to clause 22.2; span of hours. At the risk of stating the obvious, the title is 'Span of Hours', and it shouldn't be overlooked.

PN208

22.2A identifies the ordinary hours of work for a day worker. 22.2B provides that:

PN209

A shift worker is an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of a day worker -

PN210

breath –

PN211

as defined in clause 22.2A

PN212

The point that I wish to make here is that it was suggested that this award defines a shift worker in contradistinction to a day worker. In my respectful submission, as the Commissioner pointed out, particularly with the use of the comma, it is clear that the reference is not to day worker as defined in clause 22.2A, but rather the ordinary hours of work of a day worker as defined in clause 22.2A.

PN213

That's the formulation in the award, and I'll come to this in due course. But the Commissioner found - and we respectfully say found correctly - that what was attempted in the enterprise agreement was to replicate the approach, albeit imperfectly, clumsily with some infelicity, however one wants to put it depending

on whether the person who drafted it is in the room with you when you're talking about it or not. However one puts it politely or bluntly, the point is the same.

PN214

The second award clause that I wish to deal with again briefly is clause 28 which appears at the bottom of page 36 of the joint bundle, in particular 28.2; quantum of annual leave. As has been pointed out to your Honours, the formulation of a shift worker for NES purposes in the award here is twofold. The first replicates the language covered in clause 23B of the enterprise agreement.

PN215

But here is the critical thing. This is put against us by reference to an approval difficulty, and I'll say something about whether that's a legitimate mode of reasoning in due course. But the point for these purposes is this; the fact that there is a separate provision which extends the entitlement to people who work a certain number of ordinary hours on weekends is consistent with my client's description of the language in 28.2A(i).

PN216

It was said that the approach in this industry is that if you work a small number of weekends you get the benefit. That's right as far as the award goes, but that objective has been achieved with separate and additional language. The only way that one can sensibly read that provision is to think that the drafter of the provision appreciated that the regularly rostered to work their ordinary hours outside the day worker span might not extend the benefit to some people who worked weekends. That perceived lacuna was addressed with additional language.

PN217

To the extent that it said 28.2A(2) weighs against my client's case, we respectfully submit that it suggests the opposite. The fact that that language was specifically included suggests that weekend work, or at least some varieties of weekend work would not be comprehended by formulation of regularly rostered to work ordinary hours outside the ordinary hours of a day worker. Could I then move to the agreement and at some risk of repeating that which we've said in our submissions, could I start with clause 34 and this can be seen:

PN218

Annual leave is provided for in the NES. Long term includes an additional benefit for fulltime shift -

PN219

space -

PN220

workers.

PN221

And then in (b):

PN222

For the purpose of this clause a shift worker -

PN223

no space -

PN224

is an employee who's not a day worker as defined in clause 23(a) standard hours.

PN225

Now, could I just point out, we don't say that anything turns on the slightly different formulations of the phrase 'shift worker' but it merely points up again the practical approach that was taken here and the imprecision that one finds in this agreement and in - as we all know, in most agreements. The reference to a person who is not a day worker as defined in clause 23(a).

PN226

As we've pointed out that creates an immediate constructional difficulty because 23(a) doesn't define any. It simply provides that a day worker is a person who works all their ordinary hours - I'm sorry 23(a) simply provides that the ordinary hours of work for a day worker will be between 6 am and 6 pm Monday to Friday. That's a description of a feature of the worker of a day worker. It is not a definition on its most natural reading, we would say.

PN227

Now, what's put against us is that 23(a) should be read in effect as though it said a day worker is a person who works all of their ordinary hours between 6 am and 6 pm. Now, is that nonsense, as a matter of interpretation of the language? No. But nor is it the most obvious or sensible reading, in my respectful submission, if that were what were intended and this clause were being drawn with care and attention and precision, that's what it would have said.

PN228

The better view, we say, is that clause 23 should be read as a whole and that reading it robustly and making due allowance for imprecision, that it should be read as indicating that a shift worker is a person who is described in 23(b), and that everyone else is not a shift worker for the purposes of additional leave. They might work shifts but that does not make them a shift worker for the purposes of the annual leave provision.

PN229

Now, again, is that a patently correct view of the words looked at in isolation from everything else? No. It would be fatuous - the word of the day - for me to suggest that there's only one way that this should be read, and that what we're saying about it leaps off the page as a matter of purely grammatical construction. It doesn't. We don't shy away from that and we say it's open on the language and it has a number of advantages from a constructional sense. It gives effect to the whole of the provision.

PN230

It makes sense of the reference to the definition to day worker in clause 23. It's consistent with the approach that was adopted in the award and although the approach didn't have to be replicated, we respectfully submit that it's evident from the text itself that that was what was being attempted, that the definition of a shift worker operates in a way that I have just outlined.

PN231

It also avoids a consequence which we would respectfully submit is strange and unlikely to have been intended which is that anyone who is not a day worker gets an extra week of leave but there is a different and higher threshold to get the benefits of the overtime meal allowance provision in 18.2(a)(i) and, more importantly, to get the benefits of the higher annual leave loading provision in 34.5(b). And that's important for people who work weekends because the annual leave loading is higher than the shift loading so it's not an issue for people working during the week. But for people who work on weekends if they're shift workers in the 23(b) sense, they get their weekend penalties; if they're not, they don't.

PN232

So it would, we say, be insensible and strange for there to be that arbitrary distinction with almost everyone or everyone who works a shift getting the additional week of leave, but then a small subset of those people getting the weekend loading benefit in respect of annual leave. Finally, it's relevant - it's not decisive but it's relevant until quite recently, the HSU's view was that the regularly rostered criterion was relevant to the entitlement.

PN233

We don't say that's decisive. It could get things wrong. People don't give things proper attention, whatever else - I'm not suggesting that one can't change their view about this or that they're held to it or anything else, but it is not irrelevant because it suggests that the parties who made this instrument understood that that was the way that it worked. To use the formulations that are about 100 years old now but is commonly replicated, the Geo Bond formulation, the terms were intelligible to the parties.

PN234

So that's what we say about the definition of shift worker. Can I now move to dealing with the concept of being reasonably rostered and just before coming to grips with the way it works in this agreement, could I take your Honours to the authorities and could I just indicate where I'm going with all of this. It's said against us that there's not much point walking a couple of single member decisions construing provisions in different enterprise agreements in different operating environments. And that, as we understand it, is said to me that those cases have nothing to tell us here and that they don't inform the approach for this agreement.

PN235

What we say about the decisions is both the outcomes but also the reasoning and the positions of the parties in the case, underline the fact that the concept of being regularly rostered or regularly working has a well-understood and well-entrenched industrial meaning. And we will say that when one comes as a matter of our

textual construction of clause 23(b), and when your Honours ask yourselves what is the import of the words 'regularly rostered' because in mind that the word 'regular' apart from anything else can connote a number of different things, that well-understood industrial meaning is the one that should be applied here.

PN236

That's why we go to these cases because they highlight, we say, the fact that there is a well-understood concept and it's one that keeps appearing again and again. It's dealt with in these cases. It appeared in the leading aged care case which I'll come to. It was raised in the Registered Clubs Award. Now, sometimes it's been embraced, sometimes it hasn't, but what is clear is that when industrial parties think about this concept they're thinking about the words two-thirds of the anti-social times. Traditionally two-thirds of Sundays and two-thirds of public holidays.

PN237

It has (indistinct) a bit differently here but that is, my submission will be, a well-understood industrial concept. And can I try to make that good by beginning at page 72 of the joint bundle with the decision of Anderson DP in the first of the - or in the AMWU case. There's some background set out in the lead-up. Consideration begins at paragraph 41, on page 72 of the bundle.

PN238

Firstly, could I point out that the formulation in that case was that the entitlement flowed to a continuous shift worker as defined. The first question the Deputy President came to grips with was whether the workers who worked the roster that was in place then were continuous shift workers. The definition's over the page, it's an employee who's continuously rostered to work shifts 24 hours a day, seven days a week. And regularly works on Sundays and public holidays.

PN239

Now, we accept that formulation is different but the critical phrase 'regularly works' there are slightly different variations. Sometimes it's 'regularly works', sometimes it's 'regularly rostered', but that is the key concept and the outcome in this case turned on that question, or the answer to that question. Your Honours will see at paragraph 46 the Deputy President notes the submission of the employer which was that consistent with what the employer said was a long-standing industrial history:

PN240

The composite phrase 'regularly works on Sundays and public holidays' means a minimum of 34 ordinary time Sunday shifts per year.

PN241

That was just a submission but, as I said, we say not only the outcome but submissions are relevant because they serve to underline the fact that parties across industries, across States, all approach the matter of regularly works or regularly rostered in the same or similar way. Now, having noted the key submissions of the union and the employer, his Honour said at 53, over the page:

PN242

The phrase 'regularly working on Sundays and public holidays' ... is not unique to this agreement or unfamiliar to industrial regulation.

PN243

His Honour noted that there'd been a discussion in O'Neill v Roy Hill Holdings. At 55, the Deputy President said:

PN244

The decision in Roy Hill and the line of authority it draws from -

PN245

and that's important because these cases weren't - the answers weren't plucked out of thin air. It's not just about the outcome in the particular case and whether Ms O'Neill got the extra week. The decisions were reached by reference to a long line of authority. Coming back to the paragraph the Deputy President said:

PN246

The decision in Roy Hill and the line of authority it draws from the Commission's predecessors and state industrial tribunals suggest that the additional week of annual leave was not, in its conception at least, an entitlement that adhered to shift work per se, but rather served an identifiable purpose: it compensated employees for the inconvenience associated with working a substantial number of Sundays and public holidays.

PN247

MR SAUNDERS: His Honour went on to note that the jurisprudence - not just Williams C's decision but the:

PN248

... jurisprudence establishes that a shift worker should work at least 34 Sundays and 6 public holidays to be entitled.

PN249

Assuming that the formulation - that the hook is Sundays and public holidays. Now, at 56 his Honour pointed out correctly, in my respectful submission, that:

PN250

The task of the Commission isn't to frame the policy intent of an industrial instrument.

PN251

And we'd embrace that without qualification. At 58 his Honour concluded that:

PN252

In the context of the agreement, the word 'regular' has a temporal meaning; it requires a level of frequency in the sense that the number of Sundays and public holidays worked in a given year must be of sufficient number to allow it to be objectively said that those days are 'regularly worked'.

PN253

So his Honour's plain view was that it's about frequency; not pattern. And I'll come back to what's said about the fact that the number is worked out by reference to a pattern. I'm not overlooking that. But can I finally in this decision point out that the ultimate conclusion was at 61, and that is that:

PN254

The ordinary meaning of the phrase -

PN255

his Honour found -

PN256

'regularly working on Sundays and public holidays', in clause 7 of the agreement is not materially different to its meaning in other industrial instruments that invoke that phrase. That is, an employee must work at least approximately 34 Sundays and six public holidays in a given year to be entitled to the (indistinct).

PN257

Now, that's what Deputy President Anderson said. Can I then ask Your Honours to turn to page 87 of the joint bundle, a decision of Commissioner Hampton – different union, seems to be the same employer but with a change of name. At the top of page 87 the Commissioner then extracts the continuous worker definition. At 23, the Commissioner summarises the position advanced by the RTBU, not the employer, the RTBU. The RTBU said in the context of the clause the word, 'regularly requires a level of frequency so it can be said that those days are regularly worked. However' – the union said – 'the word regularly should not be interpreted so narrowly or examined in comparison to a predetermined numerical figure'. That's the union's submission.

PN258

Over the page – I'm sorry, a couple of pages on at 91 – is the employer's position, 31, first dot point, the Commissioner points out that the phrase, 'regularly works on Sundays and public holidays', isn't defined but it's not unique to the instrument. It's one of longstanding industrial usage and has an accepted meaning, which I repeat. They also point out that the industrial history was consolidated and considered by Commissioner Williams in (indistinct) Hill. They said the line of authority consistent with what Deputy President Anderson said wasn't an entitlement that adhered to shift work per se, that served an identifiable purpose, which is again compensation for inconvenience associated with working a substantial number of Sundays and public holidays.

PN259

Again, the submission was that connoted a particular number. Moving on quite a few pages to 99 of the joint bundle, the Commissioner at 54 noted, ultimately with approval, in my respectful submission, what Deputy President Anderson had said about the phrase being familiar to industrial regulation, extract of some of what the Deputy President said. At 55 on page 101, the Commissioner said:

PN260

The Deputy President also considered whether surrounding circumstances might displace, render uncertain nor otherwise inform the meaning of the relevant phrase and held that it was a change in roster that led to the removal of the extra week of annual leave. There was no evidence of a common objective that the relevant phrase had been subject to specific negotiation or common intention.

PN261

MR FAGIR: Again, we would accept firstly that that sort of evidence, if there were some, would be relevant and that if it suggested that there had been some intention to depart from industrial usage, then that might be relevant and indeed decisive. Over the page the Commissioner at 59 dealt with a decision in registered Clubs award, which I will come to as well and at 62 on 103 of the Commissioner's (indistinct), the Clubs award decision reinforces that it's the modern award or enterprise agreement that specifies the meaning of shift worker. No disagreement from us. The Commissioner also pointed out that it reinforces the meaning to be attributed to the general term:

PN262

Regularly works on Sundays and public holidays should be understood in the industrial historical context of the instrument and the industry in which it operates.

PN263

MR FAGIR: And finally noted at 63:

PN264

By implication the Full Bench also indicated that a strict formula for the number of Sundays and public holidays could lead to inappropriate outcomes, depending on the circumstances of the workplaces being covered.

PN265

MR FAGIR: I'm almost done with this, I promise. At 106, at 77, it gives the conclusion that is the matter should be approached on the basis that – I should read this, actually: 'On that basis', the Commissioner said:

PN266

- - - it's appropriate to determine the proper application of the 2019 enterprise agreement to the depot – (indistinct) depot employees – on the basis that clause 7 should be considered with the following general approach in mind: shift work in the order of 34 Sundays and six public holidays may be required to constitute, 'regularly working'. Working approximately two thirds of available Sundays and public holidays is consistent with the notion of regularly working in the context of seven-day shift workers and a materially lesser amount would not meet the requirement without a particular alternative context or contrary common intention, working only half of the available Sundays and public holidays as part of the seven-day shift operation will then represent working those days on a regular basis.

PN267

MR FAGIR: So again, the clear acceptance that it might be a different context, it might be evidence of a common intention. We would add the text of the agreement itself might make it clear that a different result is intended but in the absence of any of those things, working half the relevant times didn't represent working on a regular basis. Again, the Commissioner here is concerned not with pattern but with frequency and I passed over this in Deputy President Anderson's decision. I won't torture Your Honours by taking you back to it. But I'll just note that Deputy President Anderson said for his part, he wouldn't consider that it was necessary that there be some immutable pattern as long as over the relevant period a sufficient number of the days were worked.

PN268

So Deputy President Anderson for his part simply rejected the idea that it's about, 'regular', in the sense of following a pattern and said it's regular in the sense of frequent. Now, it really doesn't make a difference to us whether it's both. On one view it might be both. But the point is, 'clear', on Deputy President Anderson's view by reference to the authorities, clear on Commissioner Hampton's view again by reference to a long line of authorities that it's about frequency. Maybe it's about that as well but it's at least about frequency. Finally, at page 110 the Commissioner said:

PN269

It's the general characterisation of the work having regard to the extent of Sunday and public holiday work rather than the application of a strict numerical formula that is relevant. However, while the degree of Sunday and public holiday work performed by the employees is not insubstantial, it is not at a level that is contemplated by the phrase, 'regularly working Sundays and public holidays', when considered in its relevant industrial context.

PN270

MR FAGIR: Again, it's about frequency and working half isn't enough and the provision is understood by reference to the long history, as it should be. Could I then deal with the case that addresses this industry directly? That is Leading Aged Services New South Wales. It starts at page 135 of my bundle and the relevant passage or the relevant analysis begins at 149. Towards the bottom of the page is a clause labelled, 'Variation 3'. I misdescribed this in my written submission, adversely to my interests. I'll correct that now. What was sought was a variation that would expressly define the critical phrase, 'regularly rostered', so that you'd be regularly rostered if you worked 34 or more calendar weeks in a year where any shift in a week is outside of the ordinary hours of work of a day worker. I'm just conscious of the time so I'll summarise this but a variety of submissions were noted. One was a submission by an organisation well known in New South Wales, perhaps not to Your Honours in Victoria, Employers First, the Australian Federation of Employers and Industries. Their submission is noted at 46, was that:

PN271

The effect of the variation if granted was that it would be sufficient to work one weekday shift a week outside ordinary hours for 34 weeks to qualify and therefore the variation would have the likely effect of making a significant

proportion of employees eligible for the entitlement and thus potentially significantly increasing costs for the employers in the industry.

PN272

MR FAGIR: Ultimately the Full Bench at 52, over the page at page 154 noted that:

PN273

The AFEI analysis which indicated that the variation would, if granted, have the effect of significantly expanding the proportion of employees who would be entitled to the extra weeks' leave.

PN274

MR FAGIR: It was not responded to by the proponent. The Full Bench said:

PN275

We do not consider in the circumstances that it would have been open on the proponent's evidentiary case for the proposed variation to be made.

PN276

MR FAGIR: So a couple of – two or three important observations: firstly, this is a different industry to the cases that we've just discussed, a different award, but again, the proponent of the variation was coming back to the concept of 34 Sundays. That's because we say – and I'm sorry to keep labouring the point – that that is a well understood concept and well understood to be the connotation of the formulation of, 'regularly rostered'. Now, the second point to make about the decision is that the variation which was said to have been – it was said would significantly expand the entitlement beyond what it meant, absent the new definition, was less generous than the view that the Commissioner adopted here and was far less generous than the view that the union promotes.

PN277

So the Full Bench looking at this phrase, 'regularly rostered', said if it were enough to work one shift outside the ordinary hours for 34 weeks, this would be – we say this was the effect of the view – that would be an unjustified expansion of the existing meaning of the concept, 34 times again, as opposed to here, where we have on the one hand, the Commissioner said it's enough if you work one shift in each roster cycle outside the day worker span. That could be as little as one shift every four weeks, 28 days being the (indistinct) roster cycle, let alone what the union says, which is you can work one hour outside the span every roster cycle and get the entitlement. So this decision, like the Registered Clubs decision, it's a little cryptic in a way because it doesn't tell us what precisely does it tell us in terms what precisely the phrase connotes.

PN278

But what it tell us clearly is that the threshold is something higher than simply working 34 shifts in a year outside the day worker span. So what it tells us is that the view adopted by the Commissioner would have been wrong, would have been unjustifiably generous in the context of the award and the view taken by the union is on a whole different planet. So if the Full Bench ultimately decides that the phrase used in the agreement is used in the same sense as the award then the Full

Bench's decision, although it leaves some questions unanswered, it certainly answers one question, which is, is the union's view right? No. Is the Commissioner's view right? It was probably too generous.

PN279

Now, (indistinct) if we don't come here to attack it. We say that permission to appeal should be granted because it's obviously wrong but that's the effect of the aforementioned decision in Leading Aged Care Services.

PN280

DEPUTY PRESIDENT GOSTENCNIK: Mr Fagir, a relevant consider construing these provisions is the statutory context in which the agreement is made. You accept that?

PN281

MR FAGIR: Yes.

PN282

DEPUTY PRESIDENT GOSTENCNIK: And is it safe for us to consider that the parties objectively an intention of these provisions was to have them comply with the approval requirement in section 196 because subsection (1) was engaged?

PN283

MR FAGIR: Yes, with a caveat.

PN284

DEPUTY PRESIDENT GOSTENCNIK: All right.

PN285

MR FAGIR: And the same caveat would apply if your Honour asked me whether one would operate as a matter of general hypothesis on the assumption that the Commission in approving the agreement turned its mind to the question of whether a shift worker definition compliant with the requirements of the Act and decided that it did.

PN286

DEPUTY PRESIDENT GOSTENCNIK: Yes. The Commissioner was required to render a previous agreement to turn his or her mind to that question, but that to one side I understand the point you're making. At the very least an intended operation of the shift worker provision was to have at least the same entitlement, the same conditions as that for which the award provides so that nobody misses out. And how does your construction stack up with the alternative basis in the award for obtaining leave, that is an employee who works more than four ordinary hours on 10 or more weekends, 10 being the minimum, which is nowhere near your 34 or whatever (audio malfunction)?

PN287

MR FAGIR: They got it wrong. If the parties thought about it they got it wrong. The Commissioner didn't pick it up. The agreement was approved.

PN288

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN289

MR FAGIR: There's nothing extraordinary about that, and your Honours will have your own view about this, but in my respectful submission your Honours will take judicial notice and form your own - - -

PN290

DEPUTY PRESIDENT GOSTENCNIK: I can certainly say from my own experience that the import of section 196 is often overlooked, a peripheral process.

PN291

MR FAGIR: Yes. I don't want to start - - -

PN292

DEPUTY PRESIDENT GOSTENCNIK: Sorry. Just so that I understand your position. Your position is that we shouldn't interpret, try and fashion the provisions of the agreement to fit what would have been otherwise the outcome had the parties turned their mind or the Commissioner turned their minds to the effect of 196, but rather determined that - - -

PN293

MR FAGIR: Your Honour has put it better than I did or would have. We say that that would be an incorrect mode of reasoning, because it starts with an assumption that the parties understood all the Act's requirements, they turned their mind to it - this is all a matter of presumption about what the reasonable person would do - it presumed that they thought about it and they got it right and they sent it up to the Commission and the Commissioner thought about it. His attention was drawn to it and read the provision in a way consistent with the parties' objective intention, which was that it was compliant. That involves a whole series of assumptions, which in my respectful submission are unsound and are demonstrably wrong.

PN294

And apart from anything else the fact that the validity of the approval is conditioned on satisfaction of various matters as opposed to the fact of them demonstrates that the legislation contemplates that sometimes people will get it wrong, and the agreements will (indistinct) to be invalid on that basis if in fact there were some objective error. Of course as we know state of satisfaction sometimes is unreasonably reached, and if the matter were highlighted or there were some frankly incorrect preparation, some frankly incorrect way, that would be one thing. But the fact that it's sufficient that the Commission is satisfied underlines the fact that there is a very practical assumption made in the new legislation that sometimes these things will be gotten wrong.

PN295

DEPUTY PRESIDENT GOSTENCNIK: And it seems, at least to me, Mr Fagir, from what you've said that you would also accept that the Commissioner's assessment at paragraph 32 of her decision about her (indistinct) construction aligning with the requirements of 196 would also be wrong.

PN296

MR FAGIR: Yes.

PN297

DEPUTY PRESIDENT GOSTENCNIK: And that might in part come from the Commissioner's summary in the second sentence where she uses 'and' rather than 'and/or'. She may well have thought that both were a requirement, in which case she would be right, she seems to be misreading the award.

PN298

MR FAGIR: Yes.

PN299

DEPUTY PRESIDENT GOSTENCNIK: Yes, thank you. Obviously Mr Saunders or the union's construction does have the benefit of meeting the award definition, the award description.

PN300

MR FAGIR: Yes. But that takes the matter nowhere.

PN301

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN302

MR FAGIR: As I said in the outset this issue really - it weighs in favour about you because the award separately provides for an entitlement for people who work on weekends, and that would be if not wholly otiose largely otiose certainly on the union's view and probably on the Commissioner's view as well.

PN303

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN304

MR FAGIR: Excuse me for a moment. Could I then finally in relation to the authorities deal with the Registered Clubs Award decision, and again I'm conscious of the time and I will try to do this briefly, but if I'm skating over something that matters I know your Honours will raise the point with me.

PN305

We don't shy away from the fact that the Full Bench said in that case that the conventional analysis might not hold everywhere, but it is derived from a seven day continuous shift process, and that in different industries there might be a different approach needed. But they didn't tell us what the approach was, and in fact it's not clear, at least to us, on reading the decision whether the Full Bench was suggesting that the threshold would be higher in the registered clubs industry or lower. As best as we read it the comment that with the preponderous of hours in registered clubs is on a weekend suggests that the threshold might be higher, (indistinct) less for public holidays, but higher for Sundays. But we would accept reasonable minds could differ about that.

PN306

So it in a sense creates an uncertainty. As Commissioner Hampton noted in his decision that this won't necessarily hold everywhere. I was going to say it's caused quite a bit of consternation among at least my clients, but it's bye the bye and there's no evidence about that in this case. In any case the point is the Full Bench said it's not going to automatically hold everywhere, we don't shy away from that, but the default position or the stand position as we have said is you've got to work on our view of it, you've got to work two-thirds of the anti-social period, whatever is nominated to be regularly working.

PN307

That brings me really to the crux of the case in relation to leave loading, and the crux of the case if your Honours are with us on the operation of 23B and whether it has something to do with this, that in my respectful submission there's one thing that both the parties before you agree on, and it's that there needs to be a principal approach in terms of giving content to this language. At the end of the day it's an agreement of the parties. There has to be some solid bedrock for the determination of what regular in this context means, and this is just where we are apart and this may be the start and the end of the case.

PN308

As we see it the only principal way to give content to the phrase 'regularly rostered' in this context is to read it as operating consistently with the line of authority which says you've got to do two-thirds of the relevant times to qualify. Here it's not Sundays and public holidays, it's work outside hours. In the cases that we have dealt with the question is how many Sundays are there and how many of them do you work? The answer is there's about 52. If you work 34 that's enough.

PN309

How many public holidays are there? Ten in New South Wales, a couple more in the socialist State of Victoria, and maybe some others around the country, but the point is again you've got to do two-thirds of the relevant touchstone period, and in this case that is, we say, how many of your hours are you doing outside the day worker span. If you get over that threshold two-thirds, you're regularly working outside the span. If you're doing less than that you are not regularly working in the relevant sense.

PN310

Now, it's said against us that we are dragging in a foreign concept derived from seven day continuous shift work and applying it to a different industry. We're not. The outcome is different. There are winners and losers on this industry's formulation as opposed to the Sundays and public holidays formulation. For example in the seven day continuous shift worker/NES approach if you worked overnight shifts every week night you wouldn't get the extra week. Here you would. Conversely here if you work Sundays consistently, but as a minor portion of the hours that you work overall, you don't get it, whereas you would have got it on the different formulation.

PN311

So the linchpin phrase is the same, but it applies differently. I think my friend said, quite fairly, we don't really know from the face of the award what the

particular concern was or why this different formulation was adopted and one could speculate about that, but it doesn't really take us anywhere. The point simply is that it's not a matter of imposing a seven day continuous shift work concept here, it's a matter of understanding that the key phrase has a well known meaning. Here the touchstone is work outside the day span as opposed to Sundays and public holidays, and applying that usual meaning in the context of this particular industry formulation gives us the result for which we contend. So that's our view of the (indistinct).

PN312

What's the alternative? What's put against us is that regular means in a pattern, and if you're working every Sunday or you're working till 9 pm every Friday or whatever it is, you are regularly working those hours. As a matter of pure language that is a reasonable view of the matter in circumstances where, as we pointed out, regular as a matter of dictionary definition, as a matter of ordinary language can mean in a pattern or it can mean frequent.

PN313

Here we say that that choice, does it mean pattern, does it mean frequent, is dictated by the long industrial history, which invariably so far as we can tell - I say so far as we can tell because Mr Saunders is apt to produce something from the arbitration reports, or the Commonwealth arbitration reports at any moment that says something different. There it is, it's being held up menacingly on the screen.

PN314

And there might be exceptions, but the vast preponderance of authority, and as I took your Honours through a tedious (indistinct) to try and emphasise the point which is key, is that it means frequent, it doesn't mean in a pattern, or at least it means frequent as well as in a pattern. And on that basis that choice between the union's construction and ours should be determined consistent with what we said, and the Commissioner's view of the matter, with the greatest of respect, suffers from the same problem. That's the first point.

PN315

The second point which we say weighs in favour of preferring our view over the alternative, is a consideration of the purpose of the entitlement, bearing in mind that the shift work, per se, is compensated for by shift loadings, and as we say and I took your Honours to the authorities, the additional week is associated with compensation for particularly anti-social hours. Not just shift work but particularly anti-social hours. Sundays, weekends or hours that are wholly outside 6 am to 6 pm on weekdays. So overnights and Sundays. They're the particularly anti-social hours to be worked in this industry and that is what the entitlement is pegged to here.

PN316

So as the Commissioner rightly pointed out, in my respectful submission, to say it's enough to work one hour 6 pm to 7 pm on a Monday or whatever it is - that's an extreme example but it wouldn't matter if it were a couple of hours or three or four, for that to be the criterion would disconnect the benefit from the purpose because, as a matter of industrial practice, as a matter of industrial convention, the

disutility associated with working to 9 pm on a Monday afternoon is compensated for by a shift loading not on the Monday evening, it's compensated for by a shift loading not by an additional leave benefit.

PN317

Finally, the third factor that weighs in favour of our view of the matter is the question or the approach that we started with which is to say bearing in mind that purpose, having regard to the industrial context that I have belaboured, would a reasonable person in the position of the industrial parties, could they reasonably have thought to have intended that working one hour or two hours or three hours outside the span on a weekday was sufficient to attract the entitlement and as your Honours might guess, we say the obvious is obvious and it must be no.

PN318

Are there winners and losers from that, compared to the conventional formulation by reference to Sundays and public holidays? Yes. But bearing in mind the different touchstone that is an approach that is entirely in accordance with the conventional approach and which has a logic to it which is that here the particularly anti-social times, the true overnight shifts, as well as the weekend shifts.

PN319

Finally - almost finally - could I just deal with what's been put against us as a suggestion that there's some reverse engineering involved in getting to this two-thirds figure because it was originally the number of Sundays that a person on a true rotating roster would work. That's where it came from. We accept that. In the mists of history and was it a 1927, a 1937 decision cited in the reply submissions, there's no doubt about that. But that might be the starting point and one might question the logic but it's by the by.

PN320

The industrial custom is now well-entrenched. It's embedded and that's why I took the slightly unusual approach of actually highlighting the submissions made by the employer and in one case a union and then an employer organisation and the leading aged care services case because it underlines the point that there is a notorious industrial usage of the phrase. We have a rail union, manufacturing industry employer, registered clubs association, an aged care association, all coming along and effectively indicating that they understand what regularly working or regularly rostered means in the context of Sundays, 34 out of 52.

PN321

Now, in this context we say the same logic applies but by reference to a different touchstone. Excuse me for a moment. I don't want to get hopes up too much but I think I'm about to stop talking. Yes, that's subject to Mr Moroney or one of those instructing me telling me that I've overlooked something, those are the things that we wanted to say. It really boils down to the question of how does one give content to the phrase 'regularly rostered' in a principle way. Not something that's out of left field. Not something that's foreign to the way that it's been approached.

PN322

Is the analysis we've advanced perfect in every respect? No. Could it be criticised in some respects? We accept that. But this is industrial relations. This is an enterprise agreement. That's really just how it is and at least relative to the other positions that have been put, it has a sound principled, logical basis in industrial custom and industrial usage, as opposed to leaving us in a position where if the union's construction is accepted we have a novel entitlement created in the absence of any clear language to suggest that there was some special approach being taken here. In the absence of any extrinsic material to suggest that there was some innovation intended, and in the context of language that looks like it sets out to reproduce the award albeit it imperfectly. Thank you, your Honours. Subject to any questions, they're our submissions.

PN323

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Fagir. Mr Saunders, anything in reply?

PN324

MR SAUNDERS: Yes, and I won't go for longer than half an hour.

PN325

DEPUTY PRESIDENT GOSTENCNIK: Right.

PN326

MR SAUNDERS: My friend's submissions towards the end devolved to a suggestion that this is all about night shifts and weekend shifts, that's the real disadvantage. Of course on his client's construction persons working pure afternoon shifts can get this entitlement. There's nothing necessarily principled about that. It's just identifying the difficulty with submissions about notions of fairness in an interpretation exercise.

PN327

It would be handy, I imagine, to have a modernised set threshold for regularly rostered. One that was determined, for example, in the context of the current Annual Leave Act which accrues progressively, as opposed to the end of the year which creates problems with the approach taken in the 70s and 80s. But that's an award modernisation case. The question here is what this enterprise agreement says.

PN328

In terms of creating a novel entitlement, again if we had turned up to vary the manufacturing award to have its clauses match this, that might be novel, but there's nothing novel about the impact of the HSU's interpretation in this enterprise. The only moment of novelty that's emerged here was in April 2021 when Opal, for reasons it has never explained, imported for the first time this 65 per cent concept. It was new then.

PN329

I'll take the matters in the order they were brought. In terms of making submissions without evidence what I said about rostering was, as my friend indeed observed, an inference to be drawn from the principle of the clauses of the award and the agreement that deal with the rostering powers that are available in

this industry. It's a basic tenant of construction that one reads the document in its context.

PN330

When you're looking at benefits, one looks at what the trade-offs might be and what they're directed at, and so it's the power to roster that I was referring to. I don't think I said anything apart from a broad overview of industry practice which is in the evidence, in the statement of Mr Frend about whether there's volatility at the site. But that's not the point. What you're looking at is what this agreement allows and what the countervailing thing is.

PN331

I did, I have to say, make some broad comment about the purpose of those rostering provisions. That was identical provisions were extensively explored in recent review decisions of the education award in which - sorry, the childcare award in which identical provisions were provided. That said, it was a passing comment. I don't ask the bench to take anything from it.

PN332

In respect of this question of leave loading being different and that meaning we have to regardless of anything talk about the regularly rostered piece. That is a point of disagreement between us. If the bench goes to 34(b), which we've been to on some occasions. The difference is whether when it says, 'For the purposes of this clause', it means clause 34 or it means subclause 34(1).

PN333

My friend's interpretation relies on the latter. The former would be preferred as it makes more sense and it's what it says, it says clause, not subclause. While we're on that clause, it should be observed that while the language is similar to the award - a matter I'll return to - it's not quite the same. These parties expressly decided to say not a day worker. Very difficult to walk away from that, to import not a day worker but only certain types of shift worker. As opposed to: are you this thing? If not, you get the entitlement.

PN334

In terms of the idea of an industrially sensible outcome, I've said what I want to say about the dangers of that in a constructional exercise. Views do differ as to what's sensible and to what's fair and to what's reasonable. If they didn't, Mr Fagir and I would be short of work. When we're talking though most of the injustice that's been identified is the idea of outliers, people who aren't inconvenienced very much by their set roster because they're only an hour out of the shift or whatever.

PN335

There's no evidence that any workers of that kind exist in this organisation. Opal elected to remain silent and the thing to remember with submissions in that respect is the employer controls the roster. Outliers don't arise magically that need to be dealt with. They're a product of decisions made by the enterprise which are made on business reasons. So it's not something that can go very far.

PN336

On that note, look, I did shy away from saying regularly rostered. The reason is because I just don't think it's a particularly helpful submission to say you are regularly rostered if you are working according to your regular roster. It's just an idea of avoiding the language that's in dispute. What I mean to say is that the roster that has been set in accordance with the requirements of the award and you otherwise ordinarily work, would fall within the meaning of your regular roster, and you are regularly rostered to work outside day workers found if that roster provides for it.

PN337

There is no broad industrial understanding, no established industrial practice, nothing at all that the phrase regular rostering means two-thirds. That's what the proposition distils down to. There is not a whisper of it. The only place one gets two-thirds from are two decisions of the Commission which I've taken your Honours to, one of which is quoting the other; both of whom are talking specifically about continuous seven-day shift workers and have not engaged, have not been asked to engage, have not been provided with any assistance and who are just looking to identify whether these people are continuous seven-day shift workers.

PN338

There is not a single person - my friend can't point to a single decision where outside of that it has been said, well, the regularly rostered is at two-thirds. Are you regularly rostered to work at a particular site? How often are you - this doesn't happen. It is a fiction. It would be - they would be compelling submissions in any variation application but it's not something that can drive interpretation. It is not an accurate reflection of the authority that comes before.

PN339

Similarly, one needs to be careful with ideas of purpose, the idea that there's unitary ideas about - these things evolve over time. We don't know what the purpose was in this industry. The difference in language suggests it's of benefit for employees and the ultimate purpose of leave is to provide leisure, but the idea that we can directly extrapolate the various purposes that informed the provision of the extra week or seven-day continuous shift workers over time should be treated with some caution. This short-hand is too glib.

PN340

I have a new Commonwealth arbitration case, I'm determined to get value for money out of (indistinct). The decision is the Amalgamated Engineering Union v (indistinct) & Ors [1927] 25 CAR 388 at 393 in which (indistinct) J again sets the hours of employment. Clause 4(c) reads:

PN341

At this time shift workers working eight hours per shift without any break for meals on six days in each week shall be deemed to work 44 hours per week provided that they are given one fortnight's holiday in each year on full pay as compensation for working Saturday afternoon, holiday and/or Sunday shifts.

PN342

So that's one version, and there's a lot going on there. There's the deeming to work 44 hours is because that continuous process rostering, with shift links, at the time, as this decision sets out, made it very difficult to fit into the then standard, important leave standards, to change 44 hour weeks, so the shift workers would work a little more, but they get the holidays, so the compensatory aspect is more complicated than that.

PN343

We then go to the, and I will provide the Commission with a copy of this, because it's quite difficult to obtain, but it's what I've been referring to as the 1976 Annual Wage case. It's a useful decision as far as the historical analysis goes, demonstrating there is actually complexity and variety here. The proper citation is Re Hospital Employees Conditions of Employment (State) Award [1976] AR 275 at 280. The Bench considers the history of what various people have said. At this stage the entitlement if four. We have, in the Firemen and Deckhands case, Beatty J saying:

PN344

> *The case for the extension of period of annual leave must be based on the fact that the employees are called upon to regularly work on Sundays and public holidays, there is no other ground.*

PN345

Who cares about night shift, who cares about Saturday afternoons. Similarly, in the shift workers case.

PN346

I just emphasise that these notions that there's this one set unified idea of what this entitlement if for, how it is calculated, how it is driven, such that it is even that coherent within the industries that have adopted it as a flow on from the engineering industries, is dangerous and more dangerous still is the idea that you can extrapolate it to other industries and then to the broader proposition apparently created by Opal, that it's just two-thirds of the dislocation, which is not at all what Anderson DP or Hampton C said. They were dealing with a completely different question.

PN347

The Leading Edge Care case, my friend made some lengthy submissions about that. The Full Bench in no way, in no way, in that decision, made any findings as to what the current meaning of the Aged Care Award is. It's a more complicated proposition than that.

PN348

Can I ask your Honours to go to page 153 of the joint authorities? Remembering that this is an appeal, so considering an application by ACS was rejected at first instance, principally because of the lack of evidence and the like. It may have had this view that Mr Fagir now relies on to show a general industry understanding, something I'll return to. He wasn't able to prove it, in any way, or put anything forward substantially.

PN349

At 51 the Bench identifies the general approach to variation applications taken at that time, which persists today, identified by Watson VP, in an earlier review, that if you've got a clause then substantial cogent reasons would be needed to change it, particularly when it's the same - that's the phrase at 51, 'cogent interests', particularly when it's the same parties agitating a new thing.

PN350

The central defect, as we read on to 52, is that ACS didn't do that. Not that the Bench agreed with AFEI's submission that this would widely expand the entitlement or engage with it in any way, the criticism we see, at 52, is that ACS didn't respond to it below. If it's just sitting in the decision below, the Commissioner notes it but doesn't make any - doesn't make any positive findings, one way or other, herself. It's a failure to make out a case, it's not the case being suggested being so outrageous that the threshold can't be imported and certainly no conclusions can be drawn. The Bench says nothing about what the clause, as it stands, means. It's only included in the bundle, from our perspective, because it does cast some slight light on the 65 per cent mystery, although not resolving it.

PN351

In terms of Clubs case, my friend's right, that the Full Bench there identifies that in a different industry a different approach will be needed. Of course the Full Bench didn't identify what that approach would be, industry to industry, because it varies industry to industry, depending on the clause, depending on the context, depending on the patterns of work in that industry.

PN352

If it was the case that there was a unitary established concept of, 'It's two-thirds of the disabling content', I repeat, a concept that has never emerged in any jurisprudence in this area before, Clubs is where we would expect to see that being reiterated. The fact that it's not, the fact that it is industry by industry emphasises the danger of embracing this approach.

PN353

Briefly, on the authorities, could I ask your Honours to go to page 72 of the court book? This is within AMWU v Wisey(?). The two clauses that are under consideration here matter and were rather relied in my friend's analysis. We see then you get the additional leave for continuous shift workers. The fact that phrase is being used at all is a signifier. Then, 'Continuous shift worker, as defined'. The definition is found on the next page, at the top. Two concepts, 'Continuously rostered as a rotating roster', day, afternoon, night, or day, night, depending on the enterprise, and 'regularly works'. Very different phrase to 'regularly rostered'. Even if we were embracing this proposition that 'regularly rostered' has an - it's not what these clauses say.

PN354

At 58 to 60, where his Honour discusses the need for frequency, again, this is because what is being put before his Honour is this number, the way you determine a continuous shift worker is you work this number. None of the analysis as to how that number has actually been derived or what it means. It is a mechanism by identifying someone who works a particular pattern, continuous, seven day, both requirements that are completely absent from the Aged Care

Award and completely absent from the agreement. You don't have to work rotating shifts, you don't have to work seven days a week. It is a fundamentally different entitlement, these principles can't be imported in.

PN355

The phraseology is the same in the Hampton C decision, 'Continuously rostered' and in O'Neill, which my friend referred to, it's not in the bundle, but can be provided if it would assist, the Commissioner there was interpreting the NES and, again, goes through that process of looking at, 'What have people said that someone is a continuous shift worker?' The numbers, the numbers, the numbers.

PN356

As to this idea that various recordings of submissions made by parties in decisions are of any utility to assessing general understanding, I'm reluctant to expressly say who cares what the RTBU things, but there is an aspect of that in this. Submissions advanced in a particular case reflecting a view at a particular time. It's not even the submissions, per se, it's a summary of them. It is a long bow to say that because in a particular case, concerning continuous shift workers, the RTBU accepted that the definition that applies to continuous shift workers, and only continuous shift workers, applies to everyone in Australia, across all industries, thinks that 'regularly rostered' a totally different phrase, means you work two-thirds of whatever it is. Detriment, benefit, location. It springs from nowhere.

PN357

In terms of the award, I think I said, in my primary submissions, but I may have missed it, of course section 196 is a state of satisfaction, but it's - and I don't say it compels a finding, but my friend and I are completely aligned on the approach to interpretation, which is why I didn't say anything about it in my opening submissions. You're looking at a reasonable person with the understanding of the actual context that existed at the time, practice the industry - the underlying industrial instruments, the predecessor agreements would think that the parties had intended.

PN358

What we have is language that is strikingly similar in structure to the award, it uses the same deemed definition mechanism. It's only variation is breadth, 'not a day worker', as opposed to the conditioning words of 'regularly rostered' within that clause. It encompasses both. It's capable of being read as encompassing both. There are no textual indicators that these parties intended to provide a lesser entitlement, and that is something in the context of employee benefits that one would see a hint of somewhere. You would see strikingly different language to the award entitlement from which you draw, noting that it's 'and/or' the first bracket is capable of encompassing but the second bracket falls within the first.

PN359

A reasonable person, in that position would, if there is an interpretation available on the text, which my friend concedes there is, at the HSU's, which allows for the award entitlement to be preserved, it would be preferred, it is more likely to be correct than the interpretation, which, unexpectedly and contrary to the practice on the site at the time, that's why it matters that this is a change, reduces, with no

indication that this is the intention, reduces the entitlement which, again, it's conceded both the Commissioners and Opal's does.

PN360

The award questioned the - so 116 question and actually the award entitlement doesn't take the matter nowhere, it's critical, it's one of the strongest textual indicators demonstrating that the restrictive interpretations, which knock out the two workers in the dispute, which knock out people who work every Saturday and Sunday, as part of their two week roster cycle, all year, who are unquestionably shift workers, under the award, it really demonstrates how wrong it is.

PN361

Unless there's anything further, those are the reply submissions.

PN362

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Saunders.

PN363

MR FAGIR: I'm very sorry to do this, there are two more things that I needed to say - - - -

PN364

DEPUTY PRESIDENT GOSTENCNIK: Perhaps, Mr Fagir, you might just hold on and you might have three things to say, after I ask my questions. But if your request is, you want to say something else, we'll accede to that, in a moment.

PN365

Mr Saunders, do I take it from - well, do I correctly understand the union's position to be this, that the shift worker, for the purposes of the additional week of annual leave, is a person who is not a day worker, as described, but one who is regularly rostered to work hours outside the day worker hours, where 'regularly' does not mean frequently?

PN366

MR SAUNDERS: Yes, where 'regularly' instead means as part of their ordinary pattern of the rostering - - -

PN367

DEPUTY PRESIDENT GOSTENCNIK: So that to take that, to try and give a practical example, a person who is, on one occasion, rostered to work shift work, say on a four weekly cycle, but on the other 11 occasions are rostered to work day work would not, on your construction, become entitled to annual leave for the additional work (indistinct).

PN368

MR SAUNDERS: Can I step out the example, to make sure I understand the question?

PN369

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN370

MR SAUNDERS: So if I can take a fortnightly roster, that's because what Opal provides, five day a week worker, your Honour's example is that for in their rostered hours set, for nine days they work day work and one day they work night work?

PN371

DEPUTY PRESIDENT GOSTENCNIK: No, no, I was thinking more of the example that for a whole fortnight they work hours, some hours - they are rostered to work some hours which are outside the day work hours, but for the remaining 26 weeks on which they're rostered, they're just rostered purely within the 6 to 6. That person, on your construction, would not be entitled to the additional weeks' leave?

PN372

MR SAUNDERS: That person would be a shift worker for the fortnight in which their roster makes them a shift worker and then when their roster changes to not include any non-day worker span they are not a shift worker.

PN373

DEPUTY PRESIDENT GOSTENCNIK: Which comes back to my original question about accrual. That person would only accrue a portion of the additional weeks' leave, in that fortnight. They wouldn't get five days additional leave.

PN374

MR SAUNDERS: Correct. It would accrue progressively, according to their ordinary hours of work. So when their ordinary hours make them shift workers and then changes.

PN375

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN376

Mr Fagir?

PN377

MR FAGIR: Thank you, your Honour.

PN378

Mr Saunders said that the definition, in clause 34.1, operates for the purposes of the whole of clause 34. Can I just point out that if that was right, the 23(b) definition would be effectively a dead letter. Not quite (indistinct) - - -

PN379

DEPUTY PRESIDENT GOSTENCNIK: If it assists you, a shift worker appears in the agreement five times. Once in the general definition, if you like, under the span of hours, once in relation to meal breaks and the other occasions I think in relation to annual leave.

PN380

MR FAGIR: Yes. So the sole function of the 23(b) definition would be to provide that shift worker with access to a overtime meal break in marginally

different circumstances to everyone else. So it's - you get the overtime meal break for shift workers if you do two hours of overtime. For everyone else if it's two hours beyond the usual finishing hour.

PN381

That would be the sole field of operation of the definition and that of course, invites one to ask what's more likely that this definition were reproduced to create this marginal difference in respect of the overtime meal break or was it intended as part of a package to mirror something closer to the award of be it leaving out one of the two (indistinct) or parts to the additional entitlement.

PN382

And something that doesn't arise from anything my friend said, I just overlooked saying it, on our reading of the Commissioner's decision that the Commissioner rejected our view about the role of 23(b) so that it doesn't come into play. The question is only whether you're a team worker or not. So there was no regularity required, it was just, 'Are you a day worker', and on the Commissioner's view, you were not a day worker if you had some shifts that were wholly outside the span.

PN383

Now, there's a little bit of a logical step there that's not obvious to us from the decision and one would ask if the requirement is that your ordinary hours are not within 6 am to 6 pm which is, on one view, a logical reading of the text alone, then why would the requirement be one shift a week wholly outside as opposed to all of your ordinary hours outside the span.

PN384

So I simply that because Mr Saunders in opening, I thought at one stage had suggested that the Commissioner accepted our view about regularly rostered in part, but as we read it, she said, 'It doesn't come into play at all.' Again, we point out that that leaves the provision effectively as a dead letter. Those were the additional points I wish to make if the Commission please and I'm grateful for the (indistinct).

PN385

DEPUTY PRESIDENT GOSTENCNIK: Anything arising out of that, Mr Saunders?

PN386

MR SAUNDERS: I regret, yes. I did say - there is some ambiguity in the Commissioner's decision. Her summary of her finding at 4 says, 'If they're weekly or fortnightly the roster regularly provides for them to work one or more shifts.' I don't think it matters terribly. I do - later in the decision the Commissioner does seem to accept that the definition is as set out in 33.1, that it's not a day worker.

PN387

The difficulty is there is no practical industrial (indistinct) for ignoring (indistinct) day shift workers. They are a category of worker within this organisation. They work asocial hours. The - just the vibe of the thing being nightshift is worse is not sufficient to justify this interpretation.

PN388

As to 23(b) being intended to mirror the award so accept be smaller, it has its difficulties in that it doesn't mirror the award. It also requires you to ignore the major textual deviation in 33(1)(b) not a day worker which seems unlikely but other than that, there was nothing.

PN389

DEPUTY PRESIDENT GOSTENCNIK: Yes. All right. Thank you. May we thank counsel for their helpful written and oral submissions. We propose to reserve our decision. We'll come to our decision in due course. So we'll adjourn the Commission and wish both counsel a good day. Adjourn the Commission, please.

ADJOURNED INDEFINITELY [12.52 PM]