



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER JOHNS

B2023/275

s.229 - Application for a bargaining order

**Health Services Union Victoria No. 3 Branch T/A Victorian Allied Health Professionals Association (VAHPA)
and
Cabrini Health Limited T/A Cabrini Health
(B2023/275)**

Melbourne

4.30 PM, THURSDAY, 30 MARCH 2023

PN1

THE COMMISSIONER: Mr Fooks, can you hear me?

PN2

MR T FOOKS: Yes, Commissioner.

PN3

THE COMMISSIONER: Just (indistinct) calling up the appearances. Mr Shepherd, can you hear and see me?

PN4

MR A SHEPHERD: Yes, I can, Commissioner.

PN5

THE COMMISSIONER: And Mr Leszczynski?

PN6

MR A LESZCZYNSKI: Yes, I can, thank you, Commissioner.

PN7

THE COMMISSIONER: Can I thank you for the materials which have been filed during the course of the day. I've had an opportunity to briefly read them, so I have some questions. Mr Shepherd, have you had an opportunity to read what's been filed by the union?

PN8

MR SHEPHERD: I made my way through quite a bit of it, but I did some engagements today which I couldn't shake off, so I haven't actually made it to the end.

PN9

THE COMMISSIONER: Mr Fooks, am I right that the union contends that in the draft agreement there are clauses which cause a reduction in terms or conditions for employees as compared with the current agreement?

PN10

MR FOOKS: That's correct, Commissioner.

PN11

THE COMMISSIONER: Yes, all right. Mr Shepherd, do you agree that the proposed agreement contains terms and conditions which reduced terms and conditions as compared to the current agreement?

PN12

MR SHEPHERD: I don't think I do, Commissioner.

PN13

THE COMMISSIONER: All right. We are going to have to go through these, because I note that in the correspondence to employees sent on 22 March at 5.22 pm where the agreement is distributed, or access to it is provided, and the information is given about the conduct of the vote, there is from you at page 17 of

the digital tribunal book a list of what's called improved conditions in the proposed agreement, and there's no list of any reduction. And so we're going to have to go through this because if there are reductions in the terms and conditions I think that causes some difficulty in terms of whether or not the hospital is engaging in capricious behaviour.

PN14

It also presents more likely a very difficult barrier to approval of the agreement if the hospital has not properly explained to employees the relevant reductions in addition to promoting what it says are the advantages. You will be aware that under the Fair Work Act a company is required to take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to employees under section 180(5), and if it's the case that there are significant changes or reductions that's going to present an enormous barrier to Cabrini to even get this agreement approved, even if it gets voted up.

PN15

Let's start with what you say are the reductions in terms, Mr Fooks. I have in front of me your document which is headed '(Indistinct) concern.' Can you take me to the first one which represents a reduction in terms and conditions compared to the current agreement, please.

PN16

MR FOOKS: Thank you, Commissioner. Just so I can be clear, Commissioner, there are a number of the provisions in that document that differ from the current enterprise agreement or proposals that were made. It's not necessarily clear whether all of them could be described as reductions, but they vary. But I will take the Commission - - -

PN17

THE COMMISSIONER: I understand there might be some tidying up the wording. I know that there was an intention to use more plain English. I'm not troubled by that. I will be troubled if you can take me to a couple of examples where there is a reduction in a term and condition as compared to the current agreement, because Mr Shepherd has gone out to the world and said this is fantastic, great deal, only got improvements in it. That's what he's represented to employees. Take me to examples where there are reductions, please.

PN18

MR FOOKS: Thank you, Commissioner. May I turn the Commission to page 88 of the digital tribunal book, please.

PN19

THE COMMISSIONER: Thank you, I have that, yes.

PN20

MR FOOKS: Fixed term and maximum term employees, which is at clause 12 of the new agreement and clause 29 of the current agreement. So we say that at clause 12(a) the new EA provides for employment of fixed term employees for a specified purpose with no limits on the nature of such employment. Whereas the current clause states fixed term employment for a specified purpose is only

available in circumstances where such employee is replacing a person on parental leave or other long term leave.

PN21

So we say the new provision would enable unfettered capacity for Cabrini to employ people on fixed term employment for a specified purpose. Whereas under the current agreement if they weren't replacing somebody on parental leave or other long term leave such employee would need to be provided continuing employment whether on a full-time or part-time basis.

PN22

THE COMMISSIONER: Yes, all right. Mr Shepherd, what do you say about that? It's put against you that the current EA has a fetter on it in that it's limited to replacing a person on parental leave or other long term leave, and that that fetter has been removed in clause 12(a) of the new EA. Do you concede that?

PN23

MR SHEPHERD: The clause 29(a), or clause 29 of the current agreement is a very confusing clause.

PN24

THE COMMISSIONER: Hang on, before you start I'm going to have it brought up. Just bear with me.

PN25

MR SHEPHERD: Yes, we're all probably going to have to jump around.

PN26

THE COMMISSIONER: So it says:

PN27

As a fixed term limited tenure employee who is employed for a specific period, or in the case of employee replacing a person on a parental leave or long term leave for a specified purpose.

PN28

Bear with me. It is a different (audio malfunction), Mr Shepherd.

PN29

MR SHEPHERD: I beg your pardon, Commissioner?

PN30

THE COMMISSIONER: I said the new provision is quite different, isn't it?

PN31

MR SHEPHERD: Yes. There's a lot of change to the wording in the document, and if I can draw your attention to the documentary evidence CH2, which is the explanatory document that went out with the new agreement, I'm quite happy to be able to report that of all the items I've worked through in Mr Fooks' list of stuff that changed that they weren't happy about, it's all picked up in that explanatory document.

PN32

So I can assure the Commission and Mr Fooks I was not being sharp or slippery. In fact I was being rather course and blunt. A great deal of time was spent in creating that explanatory document and pointing out where stuff had changed. So we were not trying to smuggle things over the border. We really have spent a great deal of time as the access period requires, giving people an opportunity to decide whether they will vote yes or no knowing what's in and out, what's changed, and what questions to ask about it as well during the one week period.

PN33

So homing in on that clause, if we're doing that now, you had a chance to see it in its natural state in the current agreement. Straight away it talks about things called limited tenure and temporary employees, which I'm not quite sure what they are or how they differ from fixed term or max term. So the intention of the alteration to that clause was to take out the limited tenure and temporary and - - -

PN34

THE COMMISSIONER: Mr Shepherd, maybe we're at cross purposes. I don't think that that's the criticism being made. The criticism being made is that in the current agreement specific purpose employment can only occur when an employee is replacing a person on parental leave or long term leave.

PN35

MR SHEPHERD: Other than a temporary employee below for any reason for a period of three months or less, if that's what it means, I think.

PN36

THE COMMISSIONER: The current clause limits specific purpose employment for circumstances where a person is replacing someone on parental leave or long term leave. What is said against you is that you're expanding the opportunity to use specified purpose employment beyond those two categories, and I can't see that explained on page 52 of the digital tribunal book.

PN37

MR SHEPHERD: Yes. Well, the intention was to remove the confusion, and if it's possible to employ somebody for any period of time for any reason under fixed term, just by naming the period - - -

PN38

THE COMMISSIONER: We're not talking about fixed term or maximum term. We're talking about employment for a specified purpose. That's all we're talking about. And the current agreement limits the hospital to only employing people for a specified purpose when they are replacing someone on maternity leave - what does the provision say - where the person is on parental leave or on long term leave, and it now seems that the hospital is proposing that it could use specific purpose employment for a broader range of circumstances, not just those two, but I can't see that explained on page 52 of the digital tribunal book.

PN39

MR SHEPHERD: No, I don't think it is, although - - -

PN40

THE COMMISSIONER: You're increasing the scope of the hospital to have people employed for a specific purpose, but you're not telling employees that you're doing that.

PN41

MR SHEPHERD: We can already employ employees for a specific period.

PN42

THE COMMISSIONER: No, we're not talking about - Mr Shepherd, for some unknown reason you're at cross purposes. We're not talking about period, time, we're talking about purpose.

PN43

MR SHEPHERD: Yes.

PN44

THE COMMISSIONER: And so what the current agreement says you can only employ someone for a specific purpose in two circumstances; when they're replacing a person on parental leave or on other long term leave. So the only times you can use specific purpose employment. And in the new agreement those two limits are no longer there it seems. Correct me if I'm wrong.

PN45

MR SHEPHERD: No, they're not.

PN46

THE COMMISSIONER: So you're expanding the capacity of the hospital to have specific purpose employment, which is a detriment to employees because currently they have a protection in the current agreement, 'I can only be employed for a specific purpose if I am replacing a person on parental leave or on long term leave.' You're increasing the opportunity for people to have precarious employment based on specific purpose. Can't you see that?

PN47

MR SHEPHERD: I can, but if I can - - -

PN48

THE COMMISSIONER: So why is that not explained on page 52 of the digital tribunal book? Why haven't you told employees, 'We're expanding the right of the hospital to have insecure employment beyond the limits in the current agreement', why haven't you said that?

PN49

MR SHEPHERD: Because if I can employ a person for a specific period for any reason then I could employ that same person just for a specific period. The person coming in for mat leave could just come in for six months and cover - - -

PN50

THE COMMISSIONER: No, because if the person they're replacing is on parental leave or long term leave you can only use specified purpose leave. You

can't use fixed term leave or maximum term leave, because of the express use of the phrase, 'Whenever any person is on parental leave or long term leave you can only use specified purpose leave.'

PN51

MR SHEPHERD: Well, I can't answer that then. That certainly wasn't the intention to mislead any of the employees. The understanding was that because there was no fetter on specific period then it was already available to Cabrini to bring in someone for a period of time whatever the reason, even if they did happen to be doing a particular project or covering part of a maternity leave or part of a long service leave or whatever. And if that's the case then we haven't watered down or changed something that wasn't already there.

PN52

THE COMMISSIONER: On face value it looks as though you have, and you haven't explained that to your employees. What's the next example, please, Mr Fooks?

PN53

MR FOOKS: Thank you, Commissioner. Sorry, I'm just going through the document, please bear with me.

PN54

THE COMMISSIONER: No, that's all right, we have time.

PN55

MR FOOKS: May I turn the Commission's attention to page 90 of the digital book, and specifically refer to uniform and laundry allowance.

PN56

THE COMMISSIONER: All right. Mr Shepherd, it's said that the current EA provides for a uniform allowance to be paid to employees in certain circumstances. The new EA removes it in its entirety. Is that correct?

PN57

MR SHEPHERD: Yes, Commissioner, but it's replaced it with the obligation to provide the uniform, which is the practice anyway. No one gets uniform allowance because everybody gets a uniform. The current wording is, 'If you don't get a uniform you get the allowance.' New wording is, 'We will give you the uniform, so there's no need for the allowance.' We don't think we've made employees worse off, and we did call it out in the CH2 explanatory doc, explained it, as I just have.

PN58

THE COMMISSIONER: Was this discussed in bargaining?

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MR SHEPHERD: No.

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THE COMMISSIONER: Is there a reason for that?

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MR SHEPHERD: Yes. We spent eight long months working through the union log of claims and got down to two remaining items which are the impasse items referenced in Cabrini's submissions, and as the Commissioner is aware of from this morning those two items brought us to an impasse. We couldn't proceed beyond that. Industrial action escalated and - - -

PN62

THE COMMISSIONER: Yes. I'm sorry, Mr Shepherd, I didn't ask you about that. I asked you a very simple question, why didn't you tell the union that you were going to remove the allowance?

PN63

MR SHEPHERD: Because we went to the vote - - -

PN64

THE COMMISSIONER: You had eight months of meeting. When did you first come up with this idea?

PN65

MR SHEPHERD: Partway through it. On day one we provided them with CH3 and made clear that we were going to clean up the enterprise agreement, how we were going to lay it out in the same format as the Support Services Agreement. We're going to swap some clauses over and generally do editing and make plain English drafting and remove superfluous bits and pieces. If the practice is to always give the uniform and not pay the allowance then we've committed to do what we will be doing. I can't tell you what moment in time it was noticed and picked up. But the reason it wasn't discussed is because we went to the vote in a hard place.

PN66

We reached an impasse. We were never going to agree. All of these items that have been put in which hadn't been discussed yet, whether or not they're agreeable, we're never going to agree on the enterprise agreement. We didn't want to get beaten up any more with the industrial action, so when we've drafted it we put in the stuff that we wanted. We haven't tried to mislead the workforce. It's been in keeping with what we said - - -

PN67

THE COMMISSIONER: But you've had months to tell the union the things you wanted, and you haven't done it. You haven't told them at any point, 'Look, because we provide a uniform we want to remove the allowance from the agreement.' You never told them that.

PN68

MR SHEPHERD: Yes, we see, Commissioner, that's exactly the purpose of the access period. That's why we called it out in that explanatory document.

PN69

THE COMMISSIONER: No, that's not the purpose. The access period is so people can look and consider whether or not they want to vote for a referendum.

PN70

MR SHEPHERD: Yes.

PN71

THE COMMISSIONER: What I'm talking about is whether you've engaged in good faith bargaining, whether you told the union what your claims are. One of your claims, surprise surprise through the access period we find out, is to remove an allowance. You never put them on notice about it as I understand it.

PN72

MR SHEPHERD: Again we respectfully point out that is the purpose of the access period. If you're an employee you won't ever even hear or see any of the bargaining. All you see before you is the old agreement and the new agreement and you've got one week to compare one with the other and form an opinion - - -

PN73

THE COMMISSIONER: So what's the purpose of bargaining then? What's the purpose of bargaining if the employer gets to keep up its sleeve all the changes it wants to make to the agreement and not share them with the union? What's the point of bargaining if that's your behaviour?

PN74

MR SHEPHERD: Well, like I said the point of bargaining is to work through the claims, but we'd reached a point - - -

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THE COMMISSIONER: Why didn't you work through your claims? One of your claims was remove the allowance, wasn't it?

PN76

MR SHEPHERD: Yes. Yes, absolutely.

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THE COMMISSIONER: And you never worked through that claim with the union, did you?

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MR SHEPHERD: We never made it to - no, we didn't.

PN79

THE COMMISSIONER: Yes, all right. What's the next example, Mr Fooks?

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MR FOOKS: Thank you, Commissioner.

PN81

THE COMMISSIONER: That's not good faith bargaining when you keep things up your sleeve, don't tell the other party this is our claim, this is the change we want to make, and then you slip it into the agreement at the last moment and put it out to a vote. That's not good faith bargaining.

PN82

MR SHEPHERD: You've mentioned slipping and sharpness a few times, Commissioner. I spent hours creating that piece of evidence at CH2 to explain and call out to employees these changes had occurred. Now, if I was trying to be sharp or slippery or fast and loose I wouldn't have done that. So we are not trying to smuggle things over the border. We've called them out. We reached a point in bargaining where we were at an impasse. These other items hadn't been tabled yet and we've already hit an impasse, and we were trying to get out of it and go to the vote because we thought employees would vote 'Yes'. So we put them in and we called them out, and that was our motivation and that's why we hadn't discussed it yet because we hadn't got round to it. Many of them - - -

PN83

THE COMMISSIONER: You had eight months.

PN84

MR SHEPHERD: Yes, and that shows you the speed we were going.

PN85

THE COMMISSIONER: You had eight months and you haven't in eight months (indistinct) them in, 'Look, we want to remove the allowance.'

PN86

MR SHEPHERD: No, because we were working through their claims. There are 51 that they showed up with, multi part claims. Their approach to bargaining was to ask everyone who wants something - - -

PN87

THE COMMISSIONER: That doesn't excuse you not telling the other party the changes you want. It doesn't. You don't get to sit there in silence, you know, keeping in the back of your mind, 'Look, I'll just put this out during the access period, I'm not going to tell them.' That's not - - -

PN88

MR SHEPHERD: Yes, well that's not what we were thinking. No, it's not what we were doing at all. Had we - - -

PN89

THE COMMISSIONER: All right. What's the next example? Mr Fooks, what's the next example?

PN90

MR FOOKS: Thank you, Commissioner. If I can move to the next part on the same page regarding qualifications allowance.

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THE COMMISSIONER: Yes.

PN92

MR FOOKS: So the current clause at 18(a)(ii) and (iii) if you can be drawn to that, please, Commissioner.

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THE COMMISSIONER: Yes, I've got the current agreement in front of me.

PN94

MR FOOKS: Thank you. And then if we compare that to clause 32 in the new agreement. What we say, and this is a very significant difference and loss of allowance for many people, the current agreement at (i) provides the allowance to people with a graduate certificate which is held in addition to the qualification that entitles the employee to practice in their profession. However, (ii) and (iii) provide the allowance to employees with postgrad dip, masters, fellowship, doctorate to employees with such qualification.

PN95

That is (ii) and (iii) are absent the provision that the qualification must be held in addition to the qualification that entitles the employee to practice. So what we say is under the current agreement anybody with a masters gets the allowance. But if you've got a grad cert it's only if it's above your other qualification entitling you to practice. So if you've got a masters and that is your degree that entitles you to practice in your profession currently you are still eligible to receive the qualifications allowance.

PN96

However, when we look at 32 of the new agreement they've separated out and added the aspect of the provision regarding qualification held in addition to the qualification entitling the employee to practice to all three levels of qualification. I hope I articulated that so it can be understood, Commissioner.

PN97

THE COMMISSIONER: Yes. So the qualification which appears in current 18(a)(i) has now been uplifted to apply to graduate certificate, graduate diploma, and fellowship or doctorate as well?

PN98

MR FOOKS: Yes, which means that a lot of people who have those qualifications - if that's their only qualification entitling them to practice their profession - would now lose that allowance, in the new agreement.

PN99

THE COMMISSIONER: Do you accept that, Mr Shepherd?

PN100

MR SHEPHERD: Yes, that's the correction. And we called it out in the explanatory doc. The practice is - and this is why you get an increased starting salary - if you come in with a postgrad qual, be it a masters or PhD, we actually increase where you start on the first step of your pay scale; you start higher up. This clause has always been intended to give you extra pay for additional qualifications on top of the one that is used to get you into your profession. It's an error that it was missed out of 2 and 3. That's not the practice, and so we fixed it. It's the same in all the other agreements. It's the same in the public sector. That's an error which we've fixed, and we've called it out. You don't get both. You don't get to come in at a higher starting point and get the qual

allowance for having a Master of Psych, say, for instance. Not that psychs are covered - - -

PN101

THE COMMISSIONER: But you would under the - how the current agreement is written, wouldn't you?

PN102

MR SHEPHERD: Well, you - you shouldn't; that's an error. The current agreement is written - - -

PN103

THE COMMISSIONER: Yes, but - - -

PN104

MR SHEPHERD: - - - incorrectly.

PN105

THE COMMISSIONER: Well, how long has it been like that?

PN106

MR SHEPHERD: Well, I don't know.

PN107

THE COMMISSIONER: Why have you never made any application to correct an error in the agreement?

PN108

MR SHEPHERD: I don't know that answer, either. We've fixed it now.

PN109

MR LESZCZYNSKI: Commissioner, may I please speak? I don't want to, necessarily, interrupt, but - - -

PN110

THE COMMISSIONER: No, that's all right, yes.

PN111

MR LESZCZYNSKI: Look, we fundamentally disagree that it's correcting an error. And, I suppose - Mr Shepherd has made reference to the public sector agreement. And, look, I suppose, the - and someone who has actually looked at this in quite a lot of detail - the actual - where this entitlement has come from, in terms of those, sort of - the various distinctions, was from the pre-reform awards. And under the pre-reform award, there was a distinction between those qualifications that - where it had to be additional, and those that it did not have to be additional.

PN112

And so the wording that was included in the Cabrini enterprise agreement, as Mr Fooks has pointed out, when it comes to the graduate certificate, it's a requirement that it's additional, whereas when it's - for the other qualifications, there's not a requirement for additional. And while we note that Cabrini has made

reference to - they've explained this in the enterprise agreement; they say it's clarified, whereas, from our perspective - and again, looking at the history of the clause - it's not a clarification; it is a change in entitlement. The current enterprise agreement does not say that, for a postgraduate diploma, masters, fellowship or doctorate, it needs to be additional.

PN113

THE COMMISSIONER: Yes, all right. What's the next example, please?

PN114

MR FOOKS: Thank you, Commissioner. If I turn the commission's attention to page 91 of the bench - the digital tribunal book, in relation to family and domestic violence leave. So there is an existing provision around this, at clause 57. And this has been altered in the agreement, without being raised with the union. And a couple of matters where we say it's detrimental.

PN115

The definition of family violence has been changed. And we say that definition is narrower in the new agreement, which may result in some employees experiencing family violence, under the definition in the current agreement, losing access to - - -

PN116

THE COMMISSIONER: I've got in front of me the current agreement, 41A. Is that what that is?

PN117

MR FOOKS: 57, Commissioner.

PN118

THE COMMISSIONER: 57; sorry. 41A in the current agreement. All right, what's the difference?

PN119

MR FOOKS: You see that the current agreement references the Family Violence Protection Act in Victoria, which has a - we believe - has a broader definition. I will confess to not understanding exactly where the new definition has come from, and it's difficult to give a blow-by-blow description, and I will put my hand up to that, Commissioner.

PN120

However, what we say is that what has long been the standard in the Victorian legislation is stronger than what's here, where we're unsure what it is, or whether it refers to the Federal legislation - as, of course, it's relatively new in the Fair Work Act, family violence - and we've - the union has long held a view that the State - the pre-existing State Act is a stronger piece of legislation, with respect.

PN121

THE COMMISSIONER: Following up the Act. Mr Shepherd, what did you want to say about that?

PN122

MR SHEPHERD: Well, we've doubled the leave. So - well, clearly, we haven't reduced it. This one was drafted by the lawyers, so I'm probably with Mr Fooks here; I'm not that familiar with the various definitions. There has certainly been no intention - and really - do you think we're really trying to reduce the scope of family and domestic violence leave? Of course we're not. In fact, we probably give it for a broader range of reasons than that, anyway.

PN123

So there's not a great deal I can say on that one, other than, I don't think anybody under the agreement is not going to get it if they ask for it because we've switched from that definition to whatever is in the Family Violence Protection Act. And we did double it, from five days to 10 days. As is the requirement, yes, Tom, I know, but it has gone up.

PN124

MR FOOKS: Commissioner, may I briefly respond to that?

PN125

THE COMMISSIONER: Yes.

PN126

MR FOOKS: Despite our differences, and obviously that it has moved from five to 10, providing the bare minimum, I will leave that alone for now. However, yes, if we look at 41A of the agreement, on the definition - and it includes 'family violence' defined as:

PN127

violent, threatening behaviour [et cetera; and then it says] that has been reported to the police and/or may be the subject of an apprehended violence order.

PN128

My reading of this clause states that family violence leave is only available where the family violence has been reported to the police or be the subject of an AVO. To me, that clearly diminishes the eligibility to be able to - for an employee to access family violence leave. It's - I'm trying to be somewhat dispassionate - - -

PN129

THE COMMISSIONER: Yes.

PN130

MR FOOKS: - - - on this, but it's quite offensive that an employee should have to make a report to police, when they're experiencing family violence, in order to access leave, according to the agreement. And Mr Shepherd may well be right that Cabrini may provide the family violence leave, but we're talking about what's written in the agreement here.

PN131

THE COMMISSIONER: Yes, and I note that in the Family Violence Protection Act 2008, it says, at paragraph 3, in the definition of family violence, 'to remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.' You wouldn't need to report it to police to be able to claim it under the Act. Now you do. Has that been explained?

PN132

MR SHEPHERD: No.

PN133

THE COMMISSIONER: Mr Shepherd.

PN134

MR SHEPHERD: The intention for Cabrini was not to reduce that - that scope of the coverage.

PN135

THE COMMISSIONER: It doesn't matter what the intention is; this is what the plain language of this agreement says.

PN136

MR SHEPHERD: Yes. So, therefore - - -

PN137

THE COMMISSIONER: And, Mr Shepherd, you - - -

PN138

MR SHEPHERD: - - - no, it hasn't been explained.

PN139

THE COMMISSIONER: Well, that's a problem for you.

PN140

MR SHEPHERD: Yes, I'm realising that.

PN141

THE COMMISSIONER: You know, the way you avoid problems like this is, when you've got an agreement drafted and you've prepared your explanations, you might sit down with the union and say, 'Have we got all this right?' I mean, you don't have to agree with them, but they might have been able to say to you, 'Hey, you might have picked up the fact that under the current family violence agreement, you don't have to report things to the police, and now you're saying people do.' That would have required, what, a meeting - one meeting - to try and get across this stuff.

PN142

MR SHEPHERD: Yes, and I did offer to hold those meetings with Mr Fooks, and - - -

PN143

THE COMMISSIONER: During the access period. That's too late.

PN144

MR SHEPHERD: Well, no, it - - -

PN145

THE COMMISSIONER: You didn't have - - -

PN146

MR SHEPHERD: - - - isn't, Commissioner, with respect.

PN147

THE COMMISSIONER: - - - this agreement ready - sir, you didn't have this - - -

PN148

MR SHEPHERD: On this - - -

PN149

THE COMMISSIONER: - - - agreement ready - you didn't have this agreement ready until the 22nd. You couldn't have had a meeting with him about what's in the agreement until you had the agreement. That's - - -

PN150

MR SHEPHERD: Well, we had a lot of it. We hadn't had it finished until the 22nd.

PN151

THE COMMISSIONER: You've never put this clause to him, had you?

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MR SHEPHERD: No.

PN153

THE COMMISSIONER: And so the only opportunity he had to see it was during the access period.

PN154

MR SHEPHERD: No, I offered to meet with him on 8 March.

PN155

THE COMMISSIONER: You hadn't had the agreement ready by 8 March; you said, you didn't - - -

PN156

MR SHEPHERD: Finished.

PN157

THE COMMISSIONER: - - - finish it until 22 March.

PN158

MR SHEPHERD: Yes, but to finish is to put the final layer of paint on the top. If it has already made its way in there by then, then it may well have been - - -

PN159

THE COMMISSIONER: When - - -

PN160

MR SHEPHERD: - - - drafted by that point.

PN161

THE COMMISSIONER: When was this clause drafted? When did you have this clause ready at hand?

PN162

MR SHEPHERD: Pooh, I'd have to go looking into the Word tracked docs to figure that out for you, Commissioner. I - I don't have that in my mind right now. So I - I don't know. But the last change was made on 22 March, and that was because we had spotted, we had missed out one thing we had offered to do, and hadn't confirmed - - -

PN163

THE COMMISSIONER: We're going to take - Mr Shepherd, we're going to take an adjournment for five minutes; you're going to go and find for me the earliest draft that you had of this agreement - proposed agreement - which had that clause in it. I want to know the date where you first saw that clause, 41, in that form.

PN164

MR SHEPHERD: Okay, I will go look for it.

PN165

THE COMMISSIONER: We will adjourn for five minutes, and you will go and find it, and you will email that draft to my chambers and to Mr Fooks, thank you.

PN166

MR SHEPHERD: No problem.

SHORT ADJOURNMENT

[5.17 PM]

RESUMED

[5.27 PM]

PN167

THE COMMISSIONER: Yes. Mr Shepherd, how'd you go finding the document?

PN168

MR SHEPHERD: Yes. I located it, Commissioner. Fortunately, every time we did a variation, I kept the track changed version and copied it and then pulled the new one. So, I've got a pretty good record of how we went, but it was going to and for between me and our lawyers including in the commentary as well as the changes, there's conversations, and I don't particularly want to share with Mr Fooks, and I think - - -

PN169

THE COMMISSIONER: I'm not going to require you to waive privilege. I can't do that.

PN170

MR SHEPHERD: Okay.

PN171

THE COMMISSIONER: It's a matter for you whether you want to.

PN172

MR SHEPHERD: So, no, I don't, but I can give you the date for sure. It was 1 March, Commissioner, when – the request was made 27 Feb to swap with the support services wording. So, I've recalled now where it came from. It's as per the support services agreement which is the agreement we're trying to replicate, and it was swapped in on March 1 in draft 3.

PN173

THE COMMISSIONER: But it doesn't appear to reduce the right.

PN174

MR SHEPHERD: Yes, and funnily enough, my commentary on 27th says, 'Swap with SS version, but check without taking anything away', and if we have, it was unintentional.

PN175

THE COMMISSIONER: But it's in the document, and it's not explained to employees.

PN176

MR SHEPHERD: Yes.

PN177

THE COMMISSIONER: And then we come to – it's – the other one that I think where it is also plainly the case there's been a reduction is in the cultural and ceremonial leave currently at 55A obiter refers to 'leave may be given', and in the new draft at 45A, it's limited to unpaid leave. So, there's a reduction and entitlement there, and then when you look at your explanation document, it says in respect of that, cultural and ceremonial leave remains the same. That's not the case.

PN178

MR SHEPHERD: Well, is it unpaid leave at the moment?

PN179

THE COMMISSIONER: No, but in 55A in the current agreement, it says Cabrini may approve leave, and in the new agreement at 45A, Cabrini may approve unpaid leave.

PN180

MR SHEPHERD: Well, I'm sure we can approve paid leave as well if we want to, and there's 'may' there - - -

PN181

THE COMMISSIONER: If it's a reduction – it is a reduction from the current agreement to the proposed agreement and in circumstances where your explanation document says it remains the same. That statement is inaccurate.

PN182

MR SHEPHERD: We said swap with the SS version as well on the assumption it was the same leave. I don't know if it's paid or unpaid at the moment.

PN183

THE COMMISSIONER: Well, it doesn't matter whether it's paid or unpaid at the moment. The legal entitlement at the moment is paid or unpaid, and the legal intent of the new drafting is to limit it to only unpaid. That is a reduction in a term in circumstances where you say it remains the same. It's just not a factually correct statement. So, there's two examples. What's the next, Mr Fooks?

PN184

MR FOOKS: Thank you, Commissioner. If I can turn the Commission's attention to page 93, please, of the digital book and specifically with reference to progression through pay points.

PN185

THE COMMISSIONER: Yes.

PN186

MR FOOKS: So, this can be seen there. In essence, the current agreement says that when you move up a grade, you go to a level within the grade immediately above your previous rate of pay. Your new agreement says you move to a rate no less than the previous rate of pay. What we have in the pay tables in the agreement is that the top of grade 1, grade 1 year 7, is at the same rate as a grade 2 year 1.

PN187

So, we say under the existing agreement, if you got promoted from grade 1 to grade 2, you would automatically move to grade 2 because you must be paid at a rate immediately above. Whereas the new agreement, you would move to grade 2 year 1 because that is no less than your previous rate of pay, and you'd be stuck on the same rate of pay for a year even though you're doing a higher-level job.

PN188

THE COMMISSIONER: Yes. And do you accept that that's the effect of that change, Mr Shepherd?

PN189

MR RUSH: (Indistinct) the difference between saying 'no less than' and it can move into the immediate above previous rate of pay.

PN190

MR FOOKS: Yes. We actually increased the rates of pay. So, for the group 1 cohorts, Tom, their rates of pay at grade 2 year 1 is less than grade 1 year 7. It actually goes down. We increase them all. So, we actually bumped up the pay rates of grade 1 year 7 – sorry, we bumped up the pay rates of grade 2 year 1 to

bring them up to grade 1 year 7 because we thought we were doing the right thing, and that would remove any hint of anybody going down a pay grade for getting promoted. And whilst we did it, we've changed the wording to make clear, 'and you don't get paid any less than what you were already on.'

PN191

THE COMMISSIONER: And in your document, your explanation document, where is all that explained?

PN192

MR SHEPHERD: CH2, supervision - it will be - maybe it will be classifications, down the bottom. Yes, okay, so it talks about some of the changes, but we didn't mention the pay rise there.

PN193

THE COMMISSIONER: Or the change from 'no less than' - sorry - the change from 'immediately above their previous rate of pay' to 'no less than their previous rate of pay'. You don't explain - - -

PN194

MR SHEPHERD: That's right. No, I don't - we weren't intending for it to make anybody worse, so it wasn't mentioned. In fact, as I said, we've just uplifted the salaries to avoid anybody getting paid worse. At grade 1.7.

PN195

THE COMMISSIONER: But it's a material change. And it's not explained. Mr Fooks, what's the next one?

PN196

MR FOOKS: Commissioner, just further below on page 93, the entirety of the descriptions for each profession has effectively been removed. I mean, there could be an argument as to whether that's a - in and of itself, is a reduction. Our members certainly feel that their jobs are better described when it says, for each profession, what they do in their profession, not just 'You're an allied health professional', and much more generalised terms. It's somewhat difficult to put more concretely than that.

PN197

But, to make perhaps the best - well, one other example is, if we look - is at - is in point 89 on clause 93 - if we look at an employee who is classified at grade 3. The new agreement lists the requirements there, and one of those is that the employee has at least seven years postgraduate experience - post-graduation experience; sorry - whereas the current clause 4.13 of the schedule talks about a grade 3 having at least five years of experience. I mean, that seems pretty clear that it's making it, potentially, more difficult for an employee to reach grade 3.

PN198

THE COMMISSIONER: Was that explained, Mr Shepherd? Change from five years to seven.

PN199

MR SHEPHERD: I don't think the five to seven was explained, Commissioner.

PN200

THE COMMISSIONER: Is there anything further, Mr Fooks?

PN201

MR FOOKS: If it please the commission, there is one more matter that was not included, that has recently been picked up by my colleague Mr Leszczyński.

PN202

THE COMMISSIONER: Yes.

PN203

MR FOOKS: I'm aware, obviously, it's without notice. But given the timeframe, we would appreciate if the commission could provide us a little leeway to at least explain - - -

PN204

THE COMMISSIONER: Yes, I'm happy to hear that.

PN205

MR FOOKS: If - yes. Mr Leszczyński can explain that, please.

PN206

MR LESZCZYŃSKI: Yes. Thank you, Mr Fooks. And thank you, Commissioner. One - it sort of has - in our submissions, was sort of dealt with in a roundabout way, and that is, the grade 1 classification, as to how someone is classified as a grade 1 in the various professions, has changed under the proposed new enterprise agreement. So, if you go to the definition of - if someone at grade 1 is someone who is fully qualified, and at clause 5 of the current enterprise agreement, "fully qualified" means holding the' - I'm sorry; I'll wait until people can get to the - clause 5. The commission - - -

PN207

THE COMMISSIONER: What clause in the current agreement? Did you say 5? That's the - - -

PN208

MR LESZCZYŃSKI: No, sorry; in the new enterprise agreement, it's clause 5. In the current enterprise agreement, you need to go to the classification descriptors at the back of the enterprise agreement: so that is, I think, schedule A. Yes, schedule A, and then it's page - for example, probably the most relevant one is if we go to page 65 of the current enterprise agreement, which is the exercise physiologist, grade 1.

PN209

THE COMMISSIONER: I can see that.

PN210

MR LESZCZYŃSKI: So, in terms of the definition of 'fully qualified', it talks about -

PN211

means holding the necessary qualifications and satisfying all other prerequisites required to practice in a profession as prescribed by the relevant governing body.

PN212

And then it says:

PN213

A student, trainee or intern practitioner is not fully qualified.

PN214

So, under the enterprise agreement, there's broadly two - - -

PN215

THE COMMISSIONER: Sorry - sorry. Sorry to interrupt. Page 65, where am I? I'm looking at - - -

PN216

MR LESZCZYNSKI: If you look at - - -

PN217

THE COMMISSIONER: - - - exercise physiologist.

PN218

MR LESZCZYNSKI: Yes - exercise physiologist. So the grade 1 exercise physiologist there, where it says - - -

PN219

THE COMMISSIONER: (reads)

PN220

A person who has a bachelor degree in exercise and sports science or other qualification deemed equivalent by Cabrini.

PN221

MR LESZCZYNSKI: Yes. So there's not that reference to the - a governing body there currently. And, I suppose, broadly, there's two types - - -

PN222

THE COMMISSIONER: Sorry; so the governing body is in the - referenced in the new one, is it? Where is the new - - -

PN223

MR LESZCZYNSKI: Yes. So, in terms of - the definition of 'governing body' - then if you go to schedule A, page - - -

PN224

THE COMMISSIONER: No, I've got schedule A.

PN225

MR LESZCZYNSKI: Yes. So - - -

PN226

THE COMMISSIONER: What page am I looking at in the - what page am I looking at in the new agreement?

PN227

MR LESZCZYNSKI: 72. Page 72 in the new agreement. So schedule A in the new agreement, page 72, it makes reference to 'fully qualified' there: 'A grade 1 employee is a person fully qualified'. And that definition, as I said earlier, made reference to the governing body.

PN228

MR SHEPHERD: It's in the definitions, Commissioner, of the new agreement.

PN229

THE COMMISSIONER: What page of the new agreement should I be looking at, please?

PN230

MR LESZCZYNSKI: So it's - unfortunately, they're sort of at opposite ends. So at - on - page 72 makes reference to grade 1 being fully qualified; and then the definition of 'fully qualified' is page 5.

PN231

THE COMMISSIONER: So it goes from 'a person who has a bachelor's degree' - - -

PN232

MR LESZCZYNSKI: Yes.

PN233

THE COMMISSIONER: - - - to 'a person who has the necessary qualifications as prescribed by the relevant governing body'. Is that the point you make?

PN234

MR LESZCZYNSKI: Yes. And, I suppose, to give an example of the exercise physiologist, if by 'governing body' - because, look, Commissioner, there's two types of health professionals covered by this agreement: those ones who need to be registered with a specific body, which is generally the Australian Health Practitioner Regulation Agency, which is for occupational therapists, physiotherapists, podiatrists, medical imaging technologists, and nuclear medicine technologists; and then there's also sonographers, who is the Australian Sonography Accreditation Registry.

PN235

For other professions, there is not that specific requirement to actually register with them to practice, under the national law. So, in the cases of exercise physiologists, you know, they are not required to be registered with AHPRA or another specific body. And, I suppose, if we're talking about 'governing body', I'm assuming - and this - again, this is what's not clear in the enterprise agreement.

PN236

In the case of exercise physiologists, for example, is Cabrini making reference to the professional association, Exercise and Sports Science Australia, who is a professional association that covers exercise physiologists? And if you then go to what, for example, is their definition of a full membership for someone, it is someone who has a bachelor degree, and have completed the equivalent of one year full time - one full-time year of an exercise and sports science qualification, and - but, I suppose, the difference - and here's the difference - is, 'and have completed a minimum of 80 hours' industry experience in the exercise and sports science field'.

PN237

So, probably the big difference between the current - in relation to exercise physiologists - the current enterprise agreement and the proposed one is that requirement to be at that grade 1 is, you would now need 80 hours' industry experience in the exercise and sports science field. And if someone did not have that, then they would not be covered by the classification in the new agreement, until they've got that 80 hours; whereas under the current enterprise agreement, that is not a requirement.

PN238

And so it actually - potentially, the change that is being made there could actually exclude some people from the coverage of the enterprise agreement.

PN239

THE COMMISSIONER: Yes. What do you have to say about that, Mr Shepherd?

PN240

MR SHEPHERD: Yes, that's not a worsening of conditions. If you can practice, then you can practice. The problem in the current agreement is that for each qualification - cohort, be they physios or sonographers or speech therapists, there's a separate set of conditions described regarding what qualification, and which industry body, and what level you need to be covered by this agreement. And they all go in and out of date, as those prerequisites change with that body.

PN241

And we've got a process for keeping up to speed with that. It's in policy, and it's outside of the agreement. So, rather than try and write it into the agreement once for everyone, knowing it's going to be changed and probably wrong - and so the issue Alex said just now may already exist for some people, if right now the agreement is describing a set of prerequisites that are actually different from what's really required for them to practice - we just put in this 'fully qualified' meaning, if you're permitted to practice, then you're permitted to practice, and that's the definition for it.

PN242

I don't think it has made anything worse; I think it has made it easier. And we don't have to keep up to date with the changes, now, going on outside of the enterprise agreement, knowing that we've got an incorrect and out-of-date prerequisite built into the enterprise agreement; we've just said, you just got to be fully qualified. And so - - -

PN243

THE COMMISSIONER: But on the - I think, what is said is that if I am an exercise physiologist - - -

PN244

MR SHEPHERD: Yes.

PN245

THE COMMISSIONER: - - - if I have a bachelor degree in exercise and sports science, under the current agreement, I'm grade 1; under the proposed agreement, I'm not grade 1 until I've, in addition, had 80 hours of industry experience. Mr Leszczynski, is that - have I got it right?

PN246

MR LESZCZYNSKI: Yes, thank you, Commissioner.

PN247

THE COMMISSIONER: Yes. So the - - -

PN248

MR SHEPHERD: Well, that - we - - -

PN249

THE COMMISSIONER: - - - new agreement, by calling up the relevant governing body, which is not called up in the current agreement - by calling up the relevant governing body in the new agreement, additional requirements are imposed before you are grade 1.

PN250

MR SHEPHERD: If, indeed, you are required to have 80 hours of practice, then we couldn't possibly hire you into that grade, anyway, if that's the requirement. You know, we're a hospital; we have to stick very carefully to what's required to allow you to practice. So I don't know off the top of my head what exercise physiologists have to do to tick the 'permitted to practice' box, but we can't employ them unless they do. So I still say this clause has not made anybody worse off. If you can practice, then great; we can hire you. If you can't practice, we can't hire you, regardless of what the current wording says there as to only needing a bachelor's. If you also need so many hours, then we can't hire you in the job unless you got them.

PN251

THE COMMISSIONER: Mr Leszczynski.

PN252

MR LESZCZYNSKI: What Mr Shepherd is - sorry - what Mr Shepherd is - as I said - if I comprehend - is that there's actually different requirements for different professions. And so there are the AHPRA registered professions, where you actually do need to meet specific requirements to practice in that profession, and to use that name, and so those are occupational therapists, physiotherapists, podiatrists, medical imaging technologists, and nuclear medicine

technologists. There's also sonographers, with the Australian Sonography Accreditation Registry.

PN253

For the other professions, that is actually not the case, under the national registration law, the health practitioner law. And, I suppose, that's where - you know, again, from the perspective of Mr Shepherd, of saying that, 'Well, if they don't meet the requirements, they can't practice currently', well, actually, they can, because there is not that requirement under the national law, unlike with the other registered professions. And so, by - - -

PN254

MR SHEPHERD: Well - well - - -

PN255

MR LESZCZYNSKI: - - - changing it, they've changed the entitlement.

PN256

MR SHEPHERD: We haven't. If you don't - you're the one who brought up the fact that you have to do so many hours of practice to be a sports physiologist - exercise physiologist. If it turns out, now, that you're saying you don't, well, then the 'fully qualified' definition is not compelling you to do it. It's just saying, whatever the - whatever the prerequisites happen to be for your profession, you got to have them. It's not saying, 'Go get 80 hours of - of training', or, 'Go get a particular qualification.' Maybe there's a different - maybe there's a master's qualification that will allow you to practice. The new wording can cope with that quite easily, because it's not a bachelor's. I think we've expanded it. Just saying, if you can practice, you can practice, and we'll hire you. And, of course, if you - if you can't practice, we were never going to hire you into the job anyway. I - I'm not sure why we're arguing over this one.

PN257

MR LESZCZYNSKI: Because, if you're saying that's not the governing body that determines things, then, effectively - well, then, how does someone, in the case of exercise physiologists, become qualified? Because the definition of 'fully qualified' is 'as prescribed by the relevant governing body'. And so, if there's no relevant governing body, then how - - -

PN258

MR SHEPHERD: Yes.

PN259

MR LESZCZYNSKI: How do you determine whether someone is required to practice in a profession 'as prescribed by the relevant governing body'?

PN260

MR SHEPHERD: Okay, well, if there's no relevant - if there's no governing body, there's no relevant governing body.

PN261

THE COMMISSIONER: Okay, but if - - -

PN262

MR SHEPHERD: And if there is - - -

PN263

THE COMMISSIONER: Okay, so let's just - sorry - let's just work this through. If there's no - - -

PN264

MR SHEPHERD: Yes.

PN265

THE COMMISSIONER: - - - governing body for an exercise physiologist, if I'm an exercise physiologist, how could I ever fall within the definition of 'fully qualified'?

PN266

MR SHEPHERD: Well, how do you - how do you now? You need to have a bachelor's degree.

PN267

THE COMMISSIONER: Yes, but that has - - -

PN268

MR SHEPHERD: So you would have - - -

PN269

THE COMMISSIONER: - - - changed, hasn't it?

PN270

MR SHEPHERD: - - - a bachelor's degree.

PN271

THE COMMISSIONER: But that has - - -

PN272

MR SHEPHERD: No.

PN273

THE COMMISSIONER: - - - changed, hasn't it?

PN274

MR SHEPHERD: No, it hasn't. If all you need is a bachelor's degree, then this definition copes with that perfectly. There's no governing body. Someone, somewhere, has decided, all you need is a bachelor's degree. Then, fine; you're in.

PN275

THE COMMISSIONER: Well, on 72, it says, 'grade 1 qualified':

PN276

A grade 1 employee is a person fully qualified -

PN277

So that takes you back to the definition of 'fully qualified'.

PN278

MR SHEPHERD: Yes. Which is suitably wide in its scope to cope with the fact there's no governing body, if indeed that's the case. And if all you need is a bachelor's in exercise - a bachelor's degree in exercise and sports science, then that 'fully qualified' definition copes with that. No one is going to be ejected from grade 1.

PN279

MR LESZCZYNSKI: I disagree. If it said, in 'required to practice in a profession', you know, 'where relevant, as prescribed by the relevant governing body', but it makes reference to needing to, 'as prescribed by the relevant governing body'. So if there's no relevant governing body, then how does someone ever meet that definition of 'fully qualified'? Because the definition of 'fully qualified' makes reference to 'relevant governing body'.

PN280

MR SHEPHERD: And there is none. So you can't possibly - - -

PN281

MR LESZCZYNSKI: So you can't ever be - - -

PN282

MR SHEPHERD: - - - fail.

PN283

MR LESZCZYNSKI: No, you can't ever be classified - - -

PN284

MR SHEPHERD: Clearly that's - - -

PN285

MR LESZCZYNSKI: You can't ever be classified, because the way 'fully qualified' is defined is 'as prescribed by the relevant governing body'. It doesn't - if it said something like, you know, 'where relevant, as prescribed by the relevant governing body', that would have addressed the issue, because it - - -

PN286

MR SHEPHERD: Well - - -

PN287

MR LESZCZYNSKI: - - - indicates a situation where it may not be relevant, the governing body. But your only reference there is made reference to 'the relevant governing body'.

PN288

MR SHEPHERD: Come off it. Do you seriously think all of our exercise physiologists are suddenly going to get booted out of the agreement? If there's no governing body - and I'm - I don't know if that's correct - then there is no relevant governing body, so 'the relevant governing body' doesn't exist, so you can't possibly fail to meet its criteria, because there are none, because there is no body.

PN289

MR LESZCZYNSKI: But that's not the way it's worded there. And, as I said, that may not be your intention, but again, that's not the way it's worded there, and that is the concern.

PN290

MR SHEPHERD: Pooh. Well - well, that can be a concern, but - it's not a worsening of an entitlement, by a long shot. In fact, it's - it avoids having to keep up, on a monthly basis, with what has changed, and, in theory, go and vary the agreement. It's - there's whole departments of quality and compliance who deal with this kind of stuff. We're only going to hire someone into any of the health professional roles if they meet that policy requirement that's outside of the agreement. Trying to build in, once every three years, and figure out what's the current qualification, and what's the current requirement, and who's the current governing body, is really a big waste of time. So we've just said, just be fully qualified, and it's in policy, that - the clinical and quality teams keep that updated, because - from time to time. Not build it in.

PN291

MR LESZCZYNSKI: The policy is not part of the enterprise agreement, so that's irrelevant, as I said. If there's - - -

PN292

MR SHEPHERD: Yes, okay, so - - -

PN293

MR LESZCZYNSKI: The reference is to 'the relevant governing body', and, as I said, if there's - - -

PN294

MR SHEPHERD: Yes.

PN295

MR LESZCZYNSKI: - - - no relevant governing body, someone can't - - -

PN296

MR SHEPHERD: Yes.

PN297

MR LESZCZYNSKI: - - - meet that requirement. So, you know, again - - -

PN298

MR SHEPHERD: They can't - they - - -

PN299

MR LESZCZYNSKI: - - - that's the - - -

PN300

MR SHEPHERD: No, they can't fail it. Are you saying - - -

PN301

MR LESZCZYNSKI: How would they - - -

PN302

MR SHEPHERD: - - - they can't meet it? They can't - how can you fail it, if there is no prerequisite required to practice, because there is no governing body? You - you can't fail it.

PN303

MR LESZCZYNSKI: But the way it's worded is, you have to meet the requirements 'as prescribed by the relevant governing body', as - - -

PN304

MR SHEPHERD: Yes.

PN305

MR LESZCZYNSKI: If the wording made - - -

PN306

MR SHEPHERD: And there isn't one.

PN307

MR LESZCZYNSKI: - - - reference to 'where relevant, as prescribed by the relevant - - -'

PN308

MR SHEPHERD: No.

PN309

MR LESZCZYNSKI: '- - - governing body', that would be - - -

PN310

MR SHEPHERD: Come on.

PN311

MR LESZCZYNSKI: - - - a different matter.

PN312

MR SHEPHERD: Come on, Alex. That's - all right, well - - -

PN313

MR LESZCZYNSKI: That's what you've got, what you've written there.

PN314

MR SHEPHERD: Yes, and it copes perfectly well with this scenario.

PN315

MR LESZCZYNSKI: It does not cope with it.

PN316

MR SHEPHERD: It does.

PN317

THE COMMISSIONER: All right, is there anything further that the union wanted to bring to my attention in terms of diminution?

PN318

MR FOOKS: No, Commissioner. That's all we have in terms of provisions that we say are less in the - sorry - in the new agreement. (Indistinct) in summary.

PN319

MR LESZCZYNSKI: Sorry, Commissioner.

PN320

THE COMMISSIONER: Yes, sorry, Mr Leszczynski.

PN321

MR LESZCZYNSKI: Sorry. It's - and, look, it - it was something we sort of skipped over. When it comes to the family and domestic violence leave clause, there's another part of the clause that changes the current entitlement, as well. And that is the - in relation to - if we - again - if we go back to the clauses; it's clause fifty - I think - seven of the current enterprise agreement. I apologise, Commissioner; just going to the clause.

PN322

THE COMMISSIONER: Yes. Clause 7 of the current enterprise agreement; I've got that in front of me.

PN323

MR LESZCZYNSKI: Sorry; the - sorry, no; I think I've given you the wrong reference. It's clause - yes, clause 57 of the current enterprise agreement.

PN324

THE COMMISSIONER: Which is page?

PN325

MR LESZCZYNSKI: It's going to be page 57.

PN326

THE COMMISSIONER: Thank you; I have that.

PN327

MR LESZCZYNSKI: And clause 41 of the new enterprise agreement, which is page 38. Yes, and it's the circumstances in which family and domestic violence leave can be used. So, in terms of the current enterprise agreement, at clause 57(b), it makes reference to some specific things: 'for the purposes of attending medical appointments, legal proceedings, safe housing', and then it has got the all-encompassing 'or other activities related to dealing with domestic violence'. So it's broad, that it covers any other activities related to dealing with domestic violence.

PN328

Whereas clause 41(b) of the current enterprise agreement makes reference to medical or - appointments with a -

PN329

legal proceedings, counselling, appointments with a medical or legal practitioner, and relocation and safety activities directly associated with relieving the effects of family domestic violence.

PN330

So it is specified only that it's only those things listed there that you can use the family and domestic violence leave for, whereas under the current enterprise agreement, there is the broader entitlement to - for, you know, other activities.

PN331

Sorry; I've just lost the page of the - the current - yes - the current enterprise agreement has a broader 'or other activities related to dealing with domestic violence'. So it actually has a broader scope in terms of when someone can use the family and domestic violence leave, the current enterprise agreement; whereas the new enterprise agreement is specific to those things listed there only.

PN332

THE COMMISSIONER: Mr Shepherd.

PN333

MR SHEPHERD: So 'other activities', in current wording, versus 'safety activities directly associated with relieving the effects of family domestic violence'. I think that's sufficiently broad to cover other activities. And, as we've already said, the allowance is doubled, so it's not - - -

PN334

THE COMMISSIONER: That's not the point. It doesn't - no point - no point heralding the doubling of the allowance, if you narrow the scope of its ability to - people to use it.

PN335

MR SHEPHERD: Well, we haven't narrowed the scope.

PN336

THE COMMISSIONER: Well, you have. You have, in two instances.

PN337

MR SHEPHERD: Pooh. 'Relocation and safety activities'. 'Safety activities' - I mean, the point - the clause is 'family and domestic violence', so it's all a safety activity.

PN338

THE COMMISSIONER: Yes, but - - -

PN339

MR SHEPHERD: I think, if we say 'safety activity', it's just as broad as 'other activity'.

PN340

MR FOOKS: May I briefly touch upon that point, because I disagree with Mr Shepherd.

PN341

THE COMMISSIONER: Certainly.

PN342

MR FOOKS: What it says there: it's actually 'relocation and safety activities'; it's not 'safety activities' its own. Because, when we look at it, if we're going to parse this term appropriately, I say, 'attend legal proceedings', comma, 'counselling', comma, 'appointments with a medical or legal practitioner', and then 'and relocation and safety activities'. That last one goes together; it's 'relocation and safety'. That is one specific phrase.

PN343

THE COMMISSIONER: Yes, it's limiting it. So that last one is only - that is just 'and relocation and safety activities', whereas the current one has 'seeking safe housing, or other activities'. So it is broader.

PN344

MR SHEPHERD: That's a safety activity. How is that not - - -

PN345

THE COMMISSIONER: No, no, no.

PN346

MR SHEPHERD: - - - 'relocation and safety activities'?

PN347

MR FOOKS: No, there is no - - -

PN348

THE COMMISSIONER: 'Relocation and' - yours is limited to relocation and safety activities; the current agreement doesn't so limit it to relocation and safety activities; it refers to 'other activities related to dealing with domestic violence'. It is a broader term. Your term - - -

PN349

MR SHEPHERD: Could someone - - -

PN350

THE COMMISSIONER: - - - is narrower.

PN351

MR SHEPHERD: - - - give me an example.

PN352

THE COMMISSIONER: What's that?

PN353

MR SHEPHERD: No, it's not safety - could someone give me an example where they think it would be picked up by the current wording, but excluded by the proposed wording, because I think 'relocation and safety' covers the field.

PN354

MR FOOKS: It would have been easier if we had some time to consider this, which is the point of bargaining. This goes to our point that the employer has not been bargaining in good faith, when it throws things in and commences the access period, and denies the union the opportunity to properly consider the clause. It may be the case that Mr Shepherd is right; it may not be. It's very difficult to come up with examples right on the spot.

PN355

This is the whole purpose of bargaining. So you provide the clauses; you make proposals; we consider them; we provide our proposals; and the company is obliged to genuinely consider them, and make responses - - -

PN356

MR SHEPHERD: Yes, which is what - - -

PN357

MR FOOKS: - - - including reasoning - - -

PN358

MR SHEPHERD: - - - we've been doing for eight months. And at the point at which - - -

PN359

MR FOOKS: And this was not raised once.

PN360

MR SHEPHERD: - - - we moved - no, it hasn't been. It hasn't got - - -

PN361

THE COMMISSIONER: All right. Gentlemen - - -

PN362

MR SHEPHERD: It hadn't got that far.

PN363

THE COMMISSIONER: Gentlemen, look. We've been through the list. It's very clear to me that, in relation to fixed term and maximum term, but more particularly in relation to specific purpose employment, there is a change, a reduction in entitlement, that is not explained.

PN364

In relation to the uniform allowance, there has been a change. I'm not overly troubled with it; it's not material, but it has been that there's a change, and it is explained.

PN365

The qualifications allowance: that is a change, and it is not explained, and it is a diminution.

PN366

The family and domestic violence leave: there is at least one certain change which reduces the entitlement, that is not explained.

PN367

In relation to cultural and ceremonial leave, there is one change, which is a reduction, that has not been explained; in fact, it's promoted to employees, there has been no change.

PN368

In relation to the progression through pay points, there is a change in the wording of the language from 'immediately above their previous rate of pay' to 'no less than their previous rate of pay'. That is not explained, and it could have an affect(sic) on employees' wages.

PN369

In relation to the general grade descriptions, there is a change in relation to the grade 3 expert from five years to seven years. That is not explained.

PN370

Mr Shepherd, I am going to have an adjournment for five minutes, and maybe you can speak to whoever you need to. I think all of these matters - if the vote goes ahead, and the vote gets up, those five matters present an enormous barrier to approval, because there has not been explained the effect of those changes, and that is a prerequisite to approval of an agreement. So, even if you get through this, the approval process might be very, very difficult.

PN371

I am concerned, with those five examples, where there has been a diminishing of employees entitlements, and that is not explained to them how that could be seen as anything other than unfair behaviour, or capricious behaviour. And I want you to address me on that. It might be that we have an adjournment, and you speak to whoever you need to, and the hospital might want to withdraw the access period of its own volition. We will otherwise come back in five minutes for closing submissions. Thank you.

PN372

MR FOOKS: Thank you, Commissioner.

SHORT ADJOURNMENT

[6.06 PM]

RESUMED

[6.28 PM]

PN373

THE COMMISSIONER: Mr Shepherd.

PN374

MR SHEPHERD: Yes.

PN375

THE COMMISSIONER: Is it the intention of Cabrini to continue with the access period?

PN376

MR SHEPHERD: No, Commissioner. We're willing to, I guess, maybe here, agree just what we're going to do, but we're happy to – thank you for pointing out

the – some of the evidence that had slipped in which were clearly unintentional. Some of them we don't particularly want to keep in the agreement as they are. So, we do intend to end the - I mean, the access period ends at midnight anyway. I have the phone number of the returning officer for the vote which was due to automatically kick in at midnight tonight.

PN377

I can call him after this call, and he will turn off, if that's the right terminology, the vote. So, it should not start. If something goes wrong, and it does, then that's a mistake, and we'll fix it in the morning, but before I came on to this call, I did speak with CorpVote to discuss, you know, if we lose, how do we turn it off, and, so, that's the plan. I'm to phone a number. You know, while we speak, I'll just make sure they sent it to me. Otherwise, that would be a bit embarrassing.

PN378

THE COMMISSIONER: So, can I assume from that, then, that you're giving an undertaking to the Commission that Cabrini Health Limited will take all reasonable steps to terminate the access period and will not conduct a ballot of employees for an agreement to replace the Cabrini Health Professionals Agreement 2019?

PN379

MR SHEPHERD: Yes. I've got the number. So, I'll just narrow that slightly. We won't go to the vote on Friday tomorrow, and the access period will run out tonight anyway. We intend to resume talks with Mr Fooks, and we do intend to still go to the vote shortly, but we haven't got a date in mind. On that point, you asked for two weeks, Tom, to look it through and meet up again. You've had one very hectic week already.

PN380

So, we're assuming one more week, and we're available to talk from now on, by the way, but we're going to give you another week from now, certainly, before we decide whether or not we'll start an access period all over again. So, I will give an undertaking, Commissioner, that for the next week, we will not recommence another access period.

PN381

THE COMMISSIONER: Yes. Mr Fooks, in the face of that undertaking given to the Commission which has the status of an order of the Commission, does the union discontinue the application before me in V2023275?

PN382

MR FOOKS: Thank you, Commissioner. With respect, the proposal that Mr Shepherd's put I don't feel is satisfactory. Although he has advised that we have had one week to look at it, a large portion - - -

PN383

THE COMMISSIONER: No. I'm not - - -

PN384

MR FOOKS: Sorry.

PN385

THE COMMISSIONER: I have before me an application for interim orders. Mr Shepherd has just given an undertaking to the commission – I mean, all that I could do with those interim orders is stop the access period – is to restrain Cabrini Health from conducting a ballot – sorry. I could prevent Cabrini Health from conduct a ballot and restrain it from requesting its employees to vote. They are the only two things that I could have done on an interim junction application.

PN386

Mr Shepherd's just given an undertaking to the Commission that Cabrini will not – well, will end the current access period, if you like, and not go out to another vote at least for another week. Now, that might not be acceptable to you, but I have an application before me, and I need to know what to do with that application, and it seems to me in the face of that undertaking, I couldn't issue interim orders of the nature that I could otherwise issue, and, so, I'm inviting you to discontinue the application for interim orders.

PN387

Then what does that mean in terms of the substantive application? That might be something what you think about, what you want to do with that. Well, I'm not asking you to tell me what you want done with the substantive application right now. I'm asking you do you discontinue the application for interim orders now. Do you want to have a short adjournment so you can speak to Mr Leszczynski?

PN388

MR FOOKS: Yes, please. That would be appreciated.

PN389

THE COMMISSIONER: So, there's two things. Okay. We've got the interim injunction application before me right now, and there's also a substantive application for good faith bargaining orders. I could program that for hearing and so forth, but, at the moment, I'm dealing with the interim injunction applicant. As I say, in the face of the undertaking given to the Commission by Mr Shepherd just now, I don't know that there's much life left in that particular application, and I'm inviting you to discontinue it, but we'll adjourn for five minutes so you can confer with your colleague. Thank you.

PN390

MR FOOKS: Thank you, Commissioner.

SHORT ADJOURNMENT

[6.34 PM]

RESUMED

[6.38 PM]

PN391

THE COMMISSIONER: Sorry. This new remote call room is causing us no end of trouble. Mr Fooks, what do you want to do with the application for an interim injunction that's before me presently?

PN392

MR FOOKS: Thank you, Commissioner, for the opportunity for that adjournment. Given what has been stated, if an undertaking is to be provided by Cabrini, then the HSU will withdraw its application for an interim audit to be made.

PN393

THE COMMISSIONER: Yes. Mr Shepherd has already made the undertaking to the Commission on behalf of Cabrini. So, from what you've just said then - - -

PN394

MR FOOKS: We would seek - - -

PN395

THE COMMISSIONER: Yes. Sorry, Mr Fooks.

PN396

MR FOOKS: Thank you. The HSU would seek that that undertaking be put in writing and provided to the Commission and the HSU, if it's possible.

PN397

THE COMMISSIONER: Mr Fooks, I'm going to request the transcript on urgent turnaround, and you'll have the undertaking that he's given in transcript to the Commission. I'm not going to require him to put it in writing. You'll have the words in transcript. We'll request that urgently from – I'll get my associate to do that.

PN398

MR FOOKS: Thank you, Commissioner.

PN399

THE COMMISSIONER: On that basis, you discontinue the application for an interim injunction.

PN400

MR FOOKS: For an interim order.

PN401

THE COMMISSIONER: Yes. Well, I accept that oral discontinuance, and I waive compliance with the rules. In relation to the substantive application for good faith bargaining audits, what I propose to do is adjourn that matter. I recommend that there be some discussion between the parties, and early next week, you need to tell my chambers what you want me to do with that substantive application, whether you want me to program it for a hearing, or whether you want to discontinue it.

PN402

MR FOOKS: Yes. Thank you, Commissioner. If I may briefly state that given Mr Shepherd stated that from what my understanding about that won't be acceptable, and we may very well find ourselves in a hearing for the full application given that he stated – that Mr Shepherd stated – well, Cabrini stated that they intend to go to vote in one week. We don't think that's sufficient

time. He also stated that he will resume talks with me personally, and I'm not sure if that was intentional or just – or not, but we don't find that acceptable.

PN403

We seek bargaining meetings between the two bargaining representatives being the Health Services Union Victoria No. 3 Branch and Cabrini Health Limited, not a discussion between Mr Shepherd and I, and I make this point because it's been put in much of the correspondence that has been provided to the Commission of these private meetings happening and not much coming of them. We seek proper bargaining to be continued. So, I note this is not the prevail of the Commission right now, but I just wish to foreshadow that.

PN404

THE COMMISSIONER: Well, you've, you know, indicated to Mr Shepherd, and if that doesn't happen, then you might press the substantive application, but I just encourage whoever needs to get in the room, bargaining reps and the like, get in the room in the next week, and, you know, if either party comes here, you know – if the substantive application is to be fought out, the party who wins will be the party who comes with the cleanest hands. You're going to have to make yourself look like the Archangel Gabriel.

PN405

MR FOOKS: Thank you, Commissioner. Understood.

PN406

THE COMMISSIONER: All right. We're adjourned.

ADJOURNED TO A DATE TO BE FIXED

[6.42 PM]