



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER PERICA

AG2023/4493

s.185 - Application for approval of a single-enterprise agreement

**Application by McMahon Services Australia Pty Ltd
(AG2023/4493)**

Melbourne

10.00 AM, TUESDAY, 23 JANUARY 2024

Continued from 20/12/2023

PN1

THE COMMISSIONER: Good morning, everybody. Thank you and welcome to the new year. Mr Earls, can you hear me?

PN2

MR T EARLS: I can, thank you, Commissioner.

PN3

THE COMMISSIONER: Mr Liley?

PN4

MR J LILEY: I can, thank you, Commissioner.

PN5

THE COMMISSIONER: And we've got a special surprise guest this morning: Mr Bond.

PN6

MR C BOND: I can hear you.

PN7

THE COMMISSIONER: Good morning, Mr Bond.

PN8

MR BOND: Good morning.

PN9

THE COMMISSIONER: Some material has come in in the last five minutes - 10 minutes. Mr Earls, it's a payslip of Andrew Barmer(?); right?

PN10

MR EARLS: Yes, Commissioner.

PN11

THE COMMISSIONER: And the other stuff is the Ex Mem of the Secure Jobs Bill, and what was the other thing? The Statement of Principles?

PN12

MR EARLS: The Explanatory Memorandum and the Statement of Principles.

PN13

THE COMMISSIONER: Okay.

PN14

MR EARLS: And also the Building Award. None of those documents ought (audio malfunction).

PN15

THE COMMISSIONER: They don't need to be. No, they don't need to be. Mr Liley, you've sent in the predecessor agreement; is that right?

PN16

MR LILEY: That's right, Commissioner.

PN17

THE COMMISSIONER: Okay. It seems to me that the only thing that needs to be - what I will do, and tell me if I'm wrong - my associate has done the right thing and did a digital court book, and it might make it easier for our - I'll just mark all the applicant's and all the respondent's material in that book and then we can add, you know, A2, A3 from that point forward. So I will mark the contents of the digital report - it is your commission book - from the F16 application to the explanation document and the submissions, including the affidavit of Mr Bond, which we will get to in a minute. I'll do all of that as A1, just so it's before me.

EXHIBIT #A1 APPLICANT'S MATERIAL IN DIGITAL COMMISSION BOOK

PN18

And all the CFMEU's, which is 3 to 127 in the digital commission book, and then 147 until 198, I will mark as R1.

EXHIBIT #R1 RESPONDENT'S MATERIAL IN DIGITAL COMMISSION BOOK

PN19

And so the only other thing that I've got to mark is the Barmer - well, perhaps - what's going to happen, Mr Earls, is Mr Bond will explain to me what that is and why it's important; is that right?

PN20

MR EARLS: That's correct, yes, Commissioner.

PN21

THE COMMISSIONER: Okay. So that's A1 and R1 covered. What I hope to do is just to go through subject heading by subject heading and I could hear orally from you so I understand through more than once sense what you're talking about. I've read all the material, so that's fine.

PN22

Perhaps so Mr Bond can leave as quickly as possible and go back to his job, perhaps we might have him sworn in. As I say, it's already in evidence because it's already in the court book from 127 to 129, so it's in there, but he just has to adopt it, I suppose, and then he'll be available for cross-examination and whatever questions you might have in oral. So, Mr Earls, if you could attend to that. Rubin, are you there?

PN23

THE ASSOCIATE: Yes, Commissioner.

PN24

THE COMMISSIONER: Mr Bond, you'll have to take an affirmation because we can't provide a virtual Bible, or whatever is the thing you swore on, so you'll be

affirming the document you've already sworn, so that will be great. Okay, Mr Earls, over to you.

PN25

MR EARLS: Yes, thank you. Mr Bond, if I might just ask you, have you got a document entitled 'Digital Commission Book' in front of you?

PN26

MR BOND: Yes.

PN27

MR EARLS: Could I ask you to turn to page 127 of that digital court book.

PN28

MR BOND: Yes, I've got it.

PN29

MR EARLS: Could you just briefly familiarise yourself with that. Keep your finger at that page and flick all the way through to page 146. Take as much time as you'd like, but I just ask you to flick between those two pages, and when you've had an opportunity to do so, if you could tell us if you can identify that document.

PN30

MR BOND: Yes.

PN31

MR EARLS: What is that document?

PN32

MR BOND: It's an affidavit signed by myself and there's some supporting documents.

PN33

MR EARLS: Yes, thank you. Have you had an opportunity to review that today?

PN34

MR BOND: Yes, I have.

PN35

MR EARLS: Are you happy to swear that the contents of that affidavit are true and correct to the best of your knowledge and belief?

PN36

MR BOND: Yes, I do.

PN37

THE COMMISSIONER: I think we'd better get my associate to administer the oath or the affirmation.

PN38

MR EARLS: I do apologise, Commissioner. Sorry.

PN39

THE COMMISSIONER: That's okay. I understand. Rubin, please.

PN40

THE ASSOCIATE: Mr Bond, please state your full name and address for the record.

PN41

MR BOND: Craig Bond, (address supplied).

<CRAIG BOND, AFFIRMED

[10.05 AM]

EXAMINATION-IN-CHIEF BY MR EARLS

[10.05 AM]

PN42

THE COMMISSIONER: Mr Earls, you'd better just - so that - (indistinct) happen sequentially. Look, I'll do it perhaps.

PN43

Mr Bond, you've just taken yourself to your affidavit and supporting documents. Is that true and correct?---Yes.

PN44

All right, Mr Earls, over to you.

PN45

MR EARLS: Thank you.

PN46

Mr Bond, if I could ask you to turn to page 144?---Yes.

PN47

On that document, there is a table. Can you see that table?---Yes, I can.

PN48

The top line of that table has a series of headings starting with 'Entry Civil Employee' and so on?---That's correct.

PN49

The evidence you have given is that you provided this as a classification structure to employees on 21 June. If I could ask, how did you come up with those headings?---So, informally, the current pay rates had been in place in the - like outside the previous agreement, so we have tried to restructure and put those pay levels into the current agreement. So, informally, we paid them outside the previous agreement, and now currently we're trying to put them into the current agreement, so everyone falls under one of those levels and then that current line basically classifies what everyone is currently on.

*** CRAIG BOND

XN MR EARLS

PN50

Thank you. In your affidavit, you refer to - sorry, I've just got to find the exact paragraph just to not be unfair. Paragraph 14, you refer to a series of meetings on site on 22 and 23 June 2023, and you refer to, in general terms, that there were questions about the classification structure. How did you explain to employees what the classification structure meant to them?---I guess it wasn't really regarding the classification structure, it was more regarding what level each employee would be on. So if we refer back to that table, on the current levels that everyone's on, everyone would fall under one of those current pay levels now and they would automatically fall under the new levels in the proposed EBA.

PN51

So that's to say if someone was paid \$33.29, they would be considered a level 1; is that the - - -?---Yes, yes.

PN52

Thank you. Mr Bond, you should also have been provided with a payslip for a - my apologies, that's just been closed - a payslip document. Have you got that in front of you?---Yes.

PN53

If I might just ask you just to read, firstly, the top line. That's the name of the employee to whom the payslip relates?---Andrew Barmer.

PN54

Yes, and if I might also just ask you - this is only for the purpose of identifying the document to make sure we're all on the same page - there's a date of the payslip that appears about seven or eight lines from the top on the right-hand side. Could you just tell me what that date is?---It's the 4th of the 10th 2023.

PN55

Could I just ask you to identify what you think this document is?---So this is a payslip for Andrew Barmer, yes, outlining his hours worked ending in that pay week, his normal time, penalties and allowances.

PN56

Now could I just ask you to - - -

PN57

THE COMMISSIONER: Should I mark that?

PN58

MR EARLS: Yes, I seek to tender that, thank you.

PN59

THE COMMISSIONER: Okay. Mr Liley, I don't suppose you have a problem with that, do you?

PN60

MR LILEY: No, Commissioner.

*** CRAIG BOND

XN MR EARLS

PN61

THE COMMISSIONER: That will be A2.

EXHIBIT #A2 PAYSLIP OF ANDREW BARMER

PN62

MR EARLS: Thank you.

PN63

Now if I could just ask you to look below the line on the middle - in approximately the middle of the page, there's a line 'Normal Hours' and then there's a few further lines to the line in bold 'Additions'?---Yes.

PN64

Could I just ask you - there's two further lines, the two lines immediately below that. Could I ask you to identify what those lines relate to?---So they relate to crib allowances. So any hours worked over 10 hours in a Monday to Friday week, a crib allowance kicks in, so Andrew worked more than 10 hours for those three days, so he received three crib allowances, and then he worked over four hours on the Saturday, so he received another crib allowance.

PN65

Can I just ask, is there any intention - in relation to the new agreement, is there any intention to change that practice of paying crib allowance?---No, there's not.

PN66

Thank you. No further questions.

PN67

THE COMMISSIONER: Mr Liley.

PN68

MR LILEY: Thank you, Commissioner.

CROSS-EXAMINATION BY MR LILEY

[10.11 AM]

PN69

Mr Bond, I might start off where Mr Earls left you. You say that there's no intention to change the practice of paying crib allowance; is that correct?---That's correct.

PN70

Is there any requirement under the existing agreement to pay crib allowance?---No, it's not written in the agreement.

PN71

Is it written in the new agreement?---No.

*** CRAIG BOND

XXN MR LILEY

PN72

Thank you, Mr Bond. Now I'll move on to your F17B declaration, which you should have in front of you as part of the digital commission book. I'll just turn up the page. So it starts on, for you, page 10 - for all of us, in fact - of the commission book?---Yes.

PN73

Now I'll take you to question 6 of that declaration, which is on page 12 of the commission book. Have you got that there with you?---Yes, I have, yes.

PN74

At question 6 of this declaration, you refer to certain characteristics of the employees, so how many are female, how many are under 21. You see that there?---Yes.

PN75

How did you come to have that knowledge of the workforce?---Through our payroll system.

PN76

Would it be through the payroll system only or through your direct knowledge of the workforce?---It's through my direct knowledge through site (indistinct).

PN77

Are you familiar with other characteristics of the workforce more broadly beyond the listed demographics at question 6?---What are you referring to? An example
- - -

PN78

Would you be able to say roughly how long each worker had worked at the company?---Not off the top of my head, no.

PN79

Would you be able to say for any of them, you know, who's the longest serving, how long they've been around?---That would be a guess, I think.

PN80

Would you be able to say if there were any employees with more than five years' continuous service?---Again it would be a guess, as best of my knowledge, yes.

PN81

What's your best guess?---Of how many?

PN82

Or if there are any with more than five years' service?---Yes, there is. I would have to go through everyone to determine that. I don't have that list in front of me.

*** CRAIG BOND

XXN MR LILEY

PN83

That's okay, I don't need to know exactly how many if you don't have that front of mind. Do you know if there are any plant operators with more than five years' service?---At a guess, I would say yes.

PN84

This might be a little bit tedious, but would you be able to say if there are any plant operators with more than three years' service?---Potentially. Again it's just a guess.

PN85

Would that be more of those than with five years' service, or would you just be speculating?---I'd be speculating.

PN86

Right. I understand. I'll just ask you one more question before I move on. Would you be able to say if there were any plant operators with more than one year's continuous service?---So one or more?

PN87

One or more, that's right?---Yes.

PN88

Do you know how many, roughly?---No. Again it would just be a guess.

PN89

That's okay. Thank you. Now I'll take you back to the F17B. Staying on question 6, you say that there are 17 employees in the group who are over 45 years of age; is that correct?---Yes.

PN90

That's still the case, it's just 17?---I believe so.

PN91

Would you be able to say how many of those employees who are over 45 would have more than two years' service?---Not without information in front of me, no.

PN92

Do you know if any of them would?---Any of the 17 have more than two years' experience?

PN93

That's right?---Yes, there would be.

PN94

Of those, are any of them plant operators?---I believe so, yes.

PN95

Thank you, Mr Bond. Lastly, you say at question 6 that there are no part-timers under the agreement. Is that still the case?---That's still the case, yes.

*** CRAIG BOND

XXN MR LILEY

PN96

Now I might move on to the classification structure and I would like to take you to the 2019 agreement that applies to the Adelaide civil construction division. Have you got a copy of that with you?---Yes, I do.

PN97

Thank you, Mr Bond. Commissioner, do you have that with you as well?

PN98

THE COMMISSIONER: I have got a hard copy.

PN99

MR LILEY: Fabulous. I would like to tender that, if I could.

PN100

THE COMMISSIONER: That will be R2.

EXHIBIT #R2 2019 ENTERPRISE AGREEMENT

PN101

MR LILEY: Mr Bond, are you familiar with the 2019 agreement?---I am.

PN102

You gave some evidence earlier about this, but I take it you are familiar with the classification structure that currently applies under that agreement?---Yes.

PN103

So you'd be aware then that there's only one classification under that agreement, being civil employee?---There's two: senior civil worker and a civil employee.

PN104

I will just take you then to clause 5.1 of that agreement, which is on page 11?---Yes.

PN105

That says, doesn't it, that all employees - this is the first line under the heading 'Classification':

PN106

All employees are employed in the classification of civil employee.

PN107

Is that right?---Yes.

PN108

That's one classification - - -

*** CRAIG BOND

XXN MR LILEY

PN109

MR EARLS: Commissioner, I might just - I am concerned that these are questions asking my client to effectively give a legal opinion in relation to the

classification structure, which, with respect, speaks for itself. So if there's questions about how that is applied in the context of the explanation or the process, I'm more than happy for them to be asked. I don't want to get bogged down in - - -

PN110

THE COMMISSIONER: And I don't know what's the probity of guesstimates about the relevant employees and where they stand either, so, yes, Mr Liley, what's the point of this?

PN111

MR LILEY: The point, Commissioner, is that I will be taking Mr Bond to the changes in the classification structure between the old and new agreements, but I can move on.

PN112

THE COMMISSIONER: That would be a good idea, I think. No need to involve Mr Bond in that. That's something for the three of us, unfortunately, so, yes, you can make submissions on that, maybe.

PN113

MR LILEY: Thank you, Commissioner.

PN114

Mr Bond, you gave evidence before about the headings that are referred to in your letter to employees of 21 June. I won't take you to that document straightaway, but that classification structure is different than this classification structure under the existing agreement, isn't it?---Yes.

PN115

Just one last question on classification. You mentioned earlier in your evidence that the company currently pays certain employees in accordance with the proposed levels in the new agreement. The payslip of Mr Barmer, I think, is consistent with that. I will take you to the payslip again, if I might. Do you have that with you?---Yes.

PN116

At the top of that document, under Mr Barmer's name, it describes him as a senior skilled civil leading hand; is that correct?---Yes.

PN117

What level does that correspond with in the proposed agreement?---Level 1 in the new agreement.

PN118

Now I'd like to take you to your affidavit, if you've got that with you, and particularly annexure CB5?---Actually, apologies, that was level 2, 35.39.

*** CRAIG BOND

XXN MR LILEY

PN119

Thank you, Mr Bond. I would like to take you to your affidavit, which you should have in front of you as part of your commission book?---Yes.

PN120

And particularly page 146, which is annexure CB5?---146, yes.

PN121

That's a copy of the employee log of claims that was served on the company on 3 July 2023?---Correct.

PN122

At the top of the page there, it says, 'Classification - level explanation'?---Yes.

PN123

So that was the first item on the employee log of claims?---I guess it's not - they're not numbered - it's up the top, but it doesn't mean it's necessarily in order, but, yes, that's written information on a piece of paper.

PN124

Did bargaining occur between the company employees after this log of claims was served?---Yes.

PN125

Did that bargaining involve dealing with each of these employee claims one by one?---As a whole, yes.

PN126

How long did that bargaining process go for?---That happened on 3 July. I would say two months. I think the first vote was in October.

PN127

How many meetings is that?---How many meetings with myself and the team?

PN128

That's right. How many meetings in bargaining, I should say, between the company and employees?---We didn't have it as a whole. I dealt with the two representatives, so - in my written statement, I've obviously visited site several times to discuss with the work group. I would say several.

PN129

How long did bargaining continue before the employee claim that the company explain the classification structure was resolved?---That was basically resolved straightaway. This was issued on the 21st, and then when we visited site on the 22nd and 23rd, we explained to all the employees which level they would be classified under.

PN130

Mr Bond, this document was issued on 21 June or was it 3 July?---21 June.

*** CRAIG BOND

XXN MR LILEY

PN131

I will just take you to the body of your affidavit, Mr Bond. Paragraph 16 in your affidavit. It's on page 128 of the digital commission book. Do you have that there?---Yes.

PN132

There it says the company facilitated a meeting of - this is of work group employees among yourselves, which was held on 3 July 2023; that's correct?---Yes.

PN133

Then you say - skip two sentences:

PN134

At the end of that meeting on 3 July, the employees provided the company with a log of claims.

PN135

That's correct?---Yes.

PN136

So that document was provided on 3 July?---Yes.

PN137

And not 21 June?---No.

PN138

Having received that log of claims, which included the claim for an explanation of the classification structure, how much longer did bargaining progress before that claim was resolved?---I don't have a time frame, I guess, on it. It was resolved before the first vote.

PN139

Now I'll take you back to your F17B and particularly question 4, which is - bear with me - excuse me, I might have the wrong - - -

PN140

THE COMMISSIONER: I think it's 11 of the DCB.

PN141

MR LILEY: Thank you, Commissioner.

PN142

It's page 11, Mr Bond?---Yes.

PN143

At question 4, you have stated that the agreement does not cover all employees of the company; that's correct?---That's correct.

*** CRAIG BOND

XXN MR LILEY

PN144

The agreement only covers employees in the classifications in the classification structure, so it doesn't cover, for example, you?---No.

PN145

Because the coverage of the agreement is based on the classification structure, that means that when the employees required the company to explain the classification structure, does that mean they did not understand the coverage?---No, I don't believe so.

PN146

Now I'll move on to a couple of questions I have for you about the explanation that was provided of the agreement. Staying with the F17B, in that document you've said that there were a number of meetings - and you've mentioned this earlier - a number of meetings that were conducted to explain the agreement to employees; is that right?---Yes.

PN147

That includes a round of meetings that were conducted as a precursor to an earlier ballot that was unsuccessful?---Yes.

PN148

Did you attend these meetings?---Yes.

PN149

At these meetings, was it you who provided the explanation of the agreement?---Yes, and a colleague of mine, Stuart Gigg.

PN150

When you provided that explanation, did you explain the agreement by reference to the award?---What do you mean? I explained what was in the agreement and what the guys were voting on, yes.

PN151

In the explanation document, for example, it refers to a number of award clauses in relation to particular agreement clauses. That's what I mean by explaining the agreement by reference to the award. Did you refer to both the agreement and the award in the explanation?---I can't remember, I'm sorry.

PN152

That's all right. At any of those meetings, did you explain that under the award, it's only tradespersons and labourers who can be employed on a daily hire basis?---No, I did not explain that.

PN153

Therefore, I take it that you did not explain that this means that plant operators could not be employed on a daily hire basis under the award?---No, I didn't.

*** CRAIG BOND

XXN MR LILEY

PN154

I take it that that means that you didn't explain that under the award, this means plant operators are entitled to the more beneficial notice provision of the NES than those that apply to daily hire employees?---No, I didn't.

PN155

Did you explain that this might mean that some employees would be worse off under the agreement than the award?---No, I did not explain that.

PN156

That's all right. Moving on, at the meetings that you held to explain the agreement, did you explain that there are no first aid allowances under the agreement but that there are under the award?---No, I didn't.

PN157

Did you explain that this might mean that some employees would be worse off under the agreement than the award?---No, I didn't.

PN158

Did you explain that under the award, employees with responsibility of other employees operating the same item of plant are entitled to an allowance, but they are not entitled to an allowance under the agreement?---No, I did not explain that.

PN159

Did you explain that the agreement omits the award in charge of plant allowance in any other way?---No.

PN160

Did you explain that this would mean that some employees might be worse off under the agreement than the award?---No, I didn't.

PN161

Did you explain the differences between the distant work payment provisions in the agreement compared to the award?---We did discuss the living away and the travel allowances, yes.

PN162

What explanation did you give of the radial travel and the 50 kilometre radius?---So we - I explained the 50 ks from the GPA and then any further kilometres outside that 50 ks, we pay a kilometre allowance, and any time taken to travel in those kilometres.

PN163

That's different from the award, isn't it?---I'm not sure.

PN164

Did you explain the radial travel provisions of the agreement meant that some employees might be worse off under the agreement than the award?---I was not aware of that, no.

*** CRAIG BOND

XXN MR LILEY

PN165

Did you explain the dispute settlement procedure under the agreement at all?---No.

PN166

That's all right. So I take it then you didn't give an explanation of the clause of the agreement that says:

PN167

Where a dispute is decided by the Fair Work Commission, the outcome must be consistent with the 2016 Building Code.

PN168

?---No.

PN169

Lastly, and staying on the explanation that was given, did you explain the agreement by reference to the award because there are currently some employees who are covered by the award?---I didn't refer to the award, no.

PN170

Understood. Now I'd like to take you to the explanation document that was attached to your F17B. Do you have that with you?---I believe so. What page is that?

PN171

Sorry, Mr Bond, bear with me?---It starts at 91; is that correct?

PN172

You're moving faster than me, Mr Bond. My computer doesn't work when it's video-conferencing. That's right, it starts at 91. At the bottom of that page, it says:

PN173

Due to the company restructure, some employees may be covered by an award. However, the company has engaged employees on contractual terms consistent with the current agreement.

PN174

Do you see that there?---Yes, I do.

PN175

Was that statement included because there are some employees who are currently covered by the award?---Currently, there is no employees covered by the award; they're covered by the agreement.

PN176

Is that because the contract that they're employed under refers to the agreement or because they are caught by the agreement itself?---I'm not sure.

*** CRAIG BOND

XXN MR LILEY

PN177

Thank you, Mr Bond. I have no further questions, Commissioner.

PN178

THE COMMISSIONER: Re-examination?

PN179

MR EARLS: Nothing in re-examination, thank you, Commissioner.

PN180

THE COMMISSIONER: Mr Bond, thank you for your forbearance with all lawyers involved, including me. Thank you, you have been most helpful. The advocates from both sides will be contextualising the things I've just heard, so thank you very much. With that, you are excused?---Okay. Thank you.

PN181

Thank you.

<THE WITNESS WITHDREW

[10.31 AM]

PN182

THE COMMISSIONER: All right. How's the best way of going - given that you have brought up new material, what would be the best way of us going forward? Do we go through controversy by controversy or how do you want to do it? Do you want to make just unbroken submissions on the matters you put and the new matters, or what's your preferred way of doing it? Mr Earls?

PN183

MR EARLS: Yes, Commissioner, I'm very much in the Commission's hands. In term of the process, I would suggest - whether it's broken into bite-size chunks or as an entire submission - probably the most appropriate way would be for Mr Liley to make his submissions and then for us to finish in reply in circumstances where there's already been extensive submissions.

PN184

THE COMMISSIONER: Yes, yes.

PN185

MR EARLS: That would also give me a chance to - I still don't understand what we're talking about with these five-year people. It's a new point.

PN186

THE COMMISSIONER: Yes.

PN187

MR EARLS: That will give me a chance to consider that.

PN188

THE COMMISSIONER: And there's the new BOOT issues in the reply to the reply that we need to deal with. Perhaps, Mr Liley, are you comfortable with just going through one at a time the issues?

*** CRAIG BOND

XXN MR LILEY

PN189

MR LILEY: That's certainly all right, Commissioner, I'm happy to do that.

PN190

THE COMMISSIONER: Okay.

PN191

MR LILEY: I had in mind that I would start with the five years issue.

PN192

THE COMMISSIONER: Excellent.

PN193

MR LILEY: We have four objections altogether, or they can be gathered under four headings: the first is the issues with the notice of employee rep rights; the second is the issue of access to incorporated material; the third has to do with the explanation of the agreement, and the fourth is the BOOT, and that includes the issues with the employer's undertaking.

PN194

THE COMMISSIONER: Yes.

PN195

MR LILEY: I will deal with those in reverse order because I have more to say about the later ones.

PN196

Starting with the BOOT, your Honour has our calculations at attachment A of our reply submissions, which demonstrate the agreement doesn't pass the BOOT by virtue of the omission of the first aid allowance, the in charge of plant allowance, and the less generous radial travel provisions.

PN197

THE COMMISSIONER: Yes.

PN198

MR LILEY: You heard Mr Bond's evidence earlier about the company's practice of paying crib time, which it has engaged in under the current agreement and proposes to continue to engage in under the new agreement, but does not engage in that practice as a requirement of the agreement, either current or proposed.

PN199

THE COMMISSIONER: They pay crib allowance on grace and favour rather than in any regulated way?

PN200

MR LILEY: That's right, Commissioner, and that's why the calculations that have been provided do not include a crib time payment. I take it that Mr Earls may wish to make submissions about that and it may be that the calculations - well, there is still no obligation under the agreement to pay crib time. Mr Earls may wish to give an undertaking about that and that might fix some of the BOOT problems.

PN201

THE COMMISSIONER: Yes.

PN202

MR LILEY: Because (indistinct).

PN203

THE COMMISSIONER: Even the undertaking itself, it seems to be if you take away 'if required', your problem goes away in the undertaking.

PN204

MR LILEY: That's right, Commissioner. Our submission does - that's the Beechworth Bakery submission we have made about the - - -

PN205

THE COMMISSIONER: Anyway, look, I'm interrupting you. I'm sorry. As I say, I used to hate it when people would interrupt me in opening and now I do it all the time. It just proves you become what you despise. All right, look, yes, and I think on the BOOT issues that you raise - Mr Earls just came back from holiday yesterday. I think he'd need an opportunity to test and make submissions on the new BOOT things you raise in 45(a) to (h). What do you think about that?

PN206

MR LILEY: Commissioner - - -

PN207

MR EARLS: Can I just deal with the BOOT, just on that issue. Obviously, the purpose of providing that payslip was to demonstrate the crib allowance is paid. It's not provided for in the existing agreement, it's not provided for under the new agreement, and, look, it's intended, and without going into the depth of my submissions about the rest of the moving parts of those, it's intended, but we will provide an undertaking the crib allowance will be paid, and that wouldn't be a substantial change to the underlying agreement because the agreement (audio malfunction), it would actually be a problem for us to seek to walk back on the crib allowance, but there's no problem whatsoever in formalising an undertaking.

PN208

THE COMMISSIONER: All right. Mr Liley, please continue. So you were at the BOOT

PN209

MR LILEY: Thank you, Commissioner. Just to pick up on what Mr Earls was saying, before the undertakings can be submitted and accepted, you have to form a concern that the agreement doesn't pass the BOOT, and so we will deal with them sequentially.

PN210

THE COMMISSIONER: So I have to hand a decision on those - I have to indicate in a decision first; is that right?

PN211

MR LILEY: I don't know if you necessarily need to indicate on a decision.

PN212

THE COMMISSIONER: I just have to have a concern and that's it? Okay.

PN213

MR LILEY: That's right, Commissioner. Those concerns can be expressed in correspondence, and they routinely are.

PN214

Getting back to the BOOT, you've got those calculations. We have talked about the crib time payments. There's one further BOOT issue that I would raise, and this is where my questioning of Mr Bond was leading, and this is that under the award, plant operators and part-time employees can't be employed on a daily hire basis and are therefore entitled under the award to the more generous NES notice provisions.

PN215

I understand your Honour has a copy of the award that my friend provided earlier this morning. If your Honour goes to clause 9.1 of that award, the chapeau - singular.

PN216

THE COMMISSIONER: Yes, hang on. Scrolling slowly. I'm at 5. 9.1, okay, got it.

PN217

MR LILEY: Your Honour will see that that clause, the chapeau of that clause reads:

PN218

A daily hire employee means a tradesperson or labourer engaged subject to the following provisions.

PN219

THE COMMISSIONER: Right.

PN220

MR LILEY: And that is that not all employees under the award can be employed on daily hire; specifically, employees in classifications other than tradesperson or labourer cannot be employed as daily hire employees under the award. Relevantly, for the purpose of this agreement, that includes plant operators. So we say that that means that under the award, plant operator are entitled to the more generous notice provisions of the NES, and therefore this also means the agreement doesn't pass the BOOT.

PN221

Now the follow the job loading is relevant here. Under the award, the follow the job loading is paid to daily hire employees 'in respect of the incidence of lost wages for periods of unemployment between jobs'. That's award clause 19.3(a)(i). Staying with that clause, the follow the job loading is calculated

as 'a factor of eight days' or by multiplying the hourly rate and certain allowances by 52 over 50.4. That loading does not increase with each year's service, and that means that for plant operators with more than one year's service, the follow the job loading of eight days will be less than the NES notice entitlement that they would have under the award.

PN222

Now I note that the agreement also incorporates the follow the job loading in the rates of pay, your Honour. I will just turn up the clause that refers to it. It is clause 5.2.3 of the agreement, your Honour, the proposed agreement that is, that expressly refers to the follow the job loading. It's page 48 of the digital commission book.

PN223

THE COMMISSIONER: Hang on. 48? Okay, I've got it.

PN224

MR LILEY: I just note that in passing, your Honour, to indicate the follow the job loading is incorporated in the rates of pay.

PN225

THE COMMISSIONER: Where is it? You said 48?

PN226

MR LILEY: Page 48 of the digital commission book. It's clause 5.2.3, 'The rates of pay in clause 5.2.1...'

PN227

THE COMMISSIONER: On the top of the page, yes.

PN228

MR LILEY: That's right. '...include', yada, yada, yada, 'follow the job loading.'

PN229

THE COMMISSIONER: All right.

PN230

MR LILEY: So that's plant operators can't be employed daily hire. The same applies in respect of part-time employees. The award only provides for part-time weekly hire employment, and so that means, like plant hire operators - sorry, plant operators - under the award, part-time employees get the NES notice entitlements, and so, although Mr Bond's evidence is that there are no part-time employees, his evidence was that there are employees with greater than five years' service, so any part-time employee with, essentially, a greater NES notice entitlement than eight days is going to have - is going to be worse off under the agreement than they would be under the award when it comes to their notice.

PN231

That's the only new point I wish to raise. Mr Earls will probably want to make some submissions about that as well as the matters that are raised in the attachment.

PN232

THE COMMISSIONER: Yes.

PN233

MR LILEY: Commissioner, did you mean to suggest that he might make further submissions at a later date?

PN234

THE COMMISSIONER: Yes, yes, because it's new. I mean this is the first time he's seen it. Is that right, Mr Earls? Do you want to make - the matters that Mr Liley has just raised and the (a) to (h) BOOT failings that they refer to in their reply, do you need some time - you would need some time, wouldn't you, to consider those and to respond to those?

PN235

MR EARLS: I'm comfortable responding to them now.

PN236

THE COMMISSIONER: Okay.

PN237

MR EARLS: There's a few - there's probably three moving parts now that I've got to follow the job loading thrown in that I will deal with. It's not a particularly difficult or controversial issue.

PN238

THE COMMISSIONER: Okay.

PN239

MR EARLS: The first thing I want to deal with is a broad submission which will apply to all of my submissions moving forward, and that relates to the game we're playing right now, and the game we're playing right now is, 'Let's try and throw as much dust in the air to create as much confusion as possible.' This is expressly what the view - - -

PN240

THE COMMISSIONER: Your submission is it's a microscope where the naked eye would do?

PN241

MR EARLS: Correct. I won't go much further than that, other than to say it's an underlying submission of all of this.

PN242

THE COMMISSIONER: Yes.

PN243

MR EARLS: And particularly in respect of the BOOT game, and we're playing the BOOT game where we go and find some perverse permutation of work - - -

PN244

THE COMMISSIONER: I wouldn't say that was - on the submissions that have been put to me, I don't think 'perverse' is the way that I would put it, but, yes, okay.

PN245

MR EARLS: Once I've finished my submissions, you may change your view, if I'm sufficiently forceful in my submissions, Commissioner, but they are perverse, and it's important to understand how this agreement is structured and this classification structure.

PN246

THE COMMISSIONER: Okay.

PN247

MR EARLS: It does tie into the NERR issue, so perhaps we can deal with the NERR issue next.

PN248

THE COMMISSIONER: All right.

PN249

MR EARLS: But when one reads the classification structure in the agreement, and if we refer back to clause 5.1, the agreement is pretty clearly drafted - - -

PN250

THE COMMISSIONER: That's 46 of the court book?

PN251

MR EARLS: I've got 75. There's two copies of it in the book, so 46 may also be a copy.

PN252

THE COMMISSIONER: All right. Yes, 75. All right.

PN253

MR EARLS: The same clause, it is, yes, but both are the same.

PN254

THE COMMISSIONER: Yes.

PN255

MR EARLS: When you read what that classification structure says, it is absolutely intended to be an entry level position. Not only is it intended to be an entry level position, but Mr Bond's affidavit, at page 144, where there's that table that was first provided, literally says, 'Entry civil employee.'

PN256

THE COMMISSIONER: Yes.

PN257

MR EARLS: From that, you move to senior civil employee, level 1, 2, 3, 4, 5. When you go into the details of what a level 1 employee is, I would ask the

Commission to consider that, but consider that in light of the award, and in particular schedule A.2, and in particular schedule A.2.1(b).

PN258

THE COMMISSIONER: Right.

PN259

MR EARLS: Sorry, (c)(ii) and (d), which are skills and duties of CW1, and you'll note that - - -

PN260

THE COMMISSIONER: I've got it here. So A.2.1(b). What was the next thing you went to?

PN261

MR EARLS: No, no, not (b), sorry, (b) isn't relevant. So (c)(ii):

PN262

An employee at this level may be part of a self-directed WAT...

PN263

I can't remember exactly what that means - something team, work team:

PN264

... and may be required to perform a range of duties across the skill streams contained within this award. An employee at this level ...

PN265

There's five dot points.

PN266

THE COMMISSIONER: Yes.

PN267

MR EARLS: And those five dot points are reflected verbatim, just about, in the agreement.

PN268

THE COMMISSIONER: All right.

PN269

MR EARLS: Then, following the indicative tasks, you will note that the award has a longer set of dot points of indicative tasks, but that the six indicative tasks in the agreement are taken again almost verbatim from that, but, of course, the ones that aren't there are things like assisting a tradesperson, which is not relevant to civil construction. So what we've got in the classification structure of civil employee is a CW1.

PN270

It's my client's view that any dispute over this would be dealt with by the dispute resolution process, which is the normal way that classification disputes are dealt with.

PN271

THE COMMISSIONER: Yes.

PN272

MR EARLS: If the Commission is not satisfied about that, they are happy to give an undertaking to make that clear. It really shouldn't be a major topic of discussion. That particular classification is intended to be an entry level position, and the duties entirely fall within that classification of a CW1, which, for the Commission's benefit, is, of course, a labourer, and it's the labourer (a), (b), (c) and (d), (a) being a new entrant to the industry of three months, (b) being a new entrant to the industry of four to 12 months, (c) being a labourer with more than 12 months' experience in general. So the average shovel hand, for want of a better expression, never gets above level CW1(c). The level CW1(d) is then sort of semi-ticketed labourer, for want of a better expression.

PN273

My client has, in its Form F17B, out of an abundance of caution, suggested it might go up to CW2, and that's what the BOOT been conducted against, and my client would say that that's as far as it goes. Sorry, I beg your pardon, civil employee is CW1(a) to (d) is on page 14, and that is, with the greatest respect, exactly where that classification starts and ends, and so all of these permutations that my friend has given where we're comparing a civil employee to an off road over a heavy vehicle just simply don't apply and, like I said, if the Commission has any concerns about that, we will give an undertaking as to ensuring that it's clear that a dispute can be raised in respect of classification.

PN274

THE COMMISSIONER: Okay.

PN275

MR EARLS: So that's the first issue, and it does deal with most of what the union's had to say about that.

PN276

THE COMMISSIONER: So all their BOOT things in relation to classifications fall away because you say that the footprint of civil employee is exactly the same as CW1?

PN277

MR EARLS: Correct. And when you look at the senior skilled civil employee, we say that's sort of CW1(c) and (d) and CW2, and I think my friend in his submissions somewhere provided a - noted that you must have more than 12 months in the position. Well, that's exactly right, so to get to that higher level, you do need to have that 12 months, and that's a much, much higher level, that's \$5 or \$6 an hour base rate above the CW1 rate.

PN278

So really the sweet spot in industrial reality is that a new entrant is paid at a level which is still above CW1(d), so it's still above an experienced labourer, but the average experienced labourer is going to be paid well above that level. Then we move into the higher classifications.

PN279

What I might do for the sake of addressing these line by line is take the Commission through those permutations, just to describe it. I will email submissions.

PN280

The second issue is the crib break. My client pays it. I will email updated calculations for the Commission's benefit that show that just the addition of crib time into the agreement means that every single one of the permutations the union has provided still passes the BOOT.

PN281

THE COMMISSIONER: Right.

PN282

MR EARLS: The Commission can, of course, comfortably satisfy themselves line by line. If I just ask you to turn to page 170.

PN283

THE COMMISSIONER: Yes.

PN284

MR EARLS: Just below - there's sort of the eight hours' work, 10 hours, all those bits and pieces, and we get to the crib time line. The crib time line under the award in the first one is \$91.17.

PN285

THE COMMISSIONER: Yes.

PN286

MR EARLS: And you will see that right down the bottom on page 171, the amount needed to pass the BOOT is only \$14.83. So in other words, even if we just applied the award amount of \$91.17, it would then comfortably be more than that \$14.83 number.

PN287

THE COMMISSIONER: Okay.

PN288

MR EARLS: That, obviously, is not quite right because the value of crib time for employees under the agreement will be higher than the value of the award because the base rate is also higher. So that deals with that concept, and you can go through the following pages. \$25.28 is the amount required and that's substantially less than the \$91.17 allowed for, and going through each of them - and I'm not going to go through that laborious process - but going through each of those will come to that same result.

PN289

Now, importantly, Commissioner, in relation to the various permutations, I should note that the court book is actually missing a page of the union's submission.

PN290

THE COMMISSIONER: Is it?

PN291

MR EARLS: It is, which didn't help me when I was looking at this in Bali the other day, but that's okay.

PN292

If we go through the various permutations, most of them are civil employees and so most of them fall away as a result of that fact that it only is a CW1(b). I should flag - - -

PN293

THE COMMISSIONER: Mr Liley, did you notice that? I've got the - - -

PN294

MR LILEY: That there's a page missing, your Honour?

PN295

THE COMMISSIONER: Yes.

PN296

MR LILEY: I didn't notice it, your Honour, but I hadn't been studying my submissions again.

PN297

THE COMMISSIONER: It might be the one thing for you, Mr Earls, because I've got - there's a - - -

PN298

MR EARLS: No, it looks like one of my staff's lost it because it goes 167 to 169 in my book, so I think that is - - -

PN299

THE COMMISSIONER: Yes, so there's permutations, as you describe it, (a) to (h).

PN300

MR EARLS: Yes. So permutation (a) is a permutation where a junior burger, for want of a better expression, is also appointed as a first aid officer. So it's a pretty improbable one, but even that falls away in circumstances where crib break is paid.

PN301

Likewise, (b) is an employee who is placed in charge of plant, or a junior employee, somehow or another, gets placed in charge of plant. So there must be two junior employees, or a junior employee in charge of something where a senior employee is otherwise there. Again an extraordinarily improbable scenario, but even that falls away once crib break is provided.

PN302

THE COMMISSIONER: Okay.

PN303

MR EARLS: The same with - (c) is a combination of the two, and again it falls away as soon as crib is provided, and likewise (d), all civil employees of award classification of CW2 or higher simply falls away.

PN304

We then move into (e) and (e) has a series of submodels, each of which deal with this distant work allowance. Now the distant work allowance is an interesting one because it is a huge slug to the overall BOOT calculations. It's in the vicinity of hundreds of dollars per week, but even with those hundreds of dollars per week, and assuming they applied for the duration of an employee's employment, which it can't, and the reason we say it can't, Commissioner, is because the way that these distant work provisions apply, if you are first employed on a project that is more than 50 ks via road, you only get the base daily fares, so this is not a situation that could apply to a new employee, it is only a situation that could apply to an employee who is employed within that first 50 - within the radial area to start with and then subsequently works outside of the radial area and, of course, if it goes too far outside the radial area, well they've living away from home and it's a very different scenario.

PN305

So whilst the union's calculations assume this is a week in week out proposition, even then, once you throw crib time back in, the BOOT is passed on them. So we're dealing with absolute worst case scenarios and, even then, the agreement deals with it, and that's the same with each of the final levels of classification because each of them end up with this situation where we deal with various scenarios, each of which still passes the BOOT once crib time is thrown back in.

PN306

Now, if there is any scenario that the union can come up with beyond that to create some further confusion, we would be happy to address it by way of either evidence or undertaking, or, alternatively, simply assumption, because it is so far off what we would describe as the bell curve that could occur in reality here that they are non-events as far as the approval of this agreement goes, in our respectful submission.

PN307

THE COMMISSIONER: Okay.

PN308

MR EARLS: That then takes us - unless there's any questions about that issue?

PN309

THE COMMISSIONER: Look, I hate to put upon you, and you've put some submissions, and I know it's cruel and unusual punishment for you to be looking at this stuff in Bali, but could you just give me short submissions on those, something typed on the BOOT things?

PN310

MR EARLS: Yes, that's fine, and I'll provide the updated calculations.

PN311

THE COMMISSIONER: Yes. I'm getting my head around it, I'm going from one to another and if it's there in front of me, I'll understand it better, so that would be great.

PN312

MR EARLS: Yes.

PN313

THE COMMISSIONER: Thank you.

PN314

MR EARLS: Thank you. Then we finally get to this follow the job loading issue, and again we say it's not a BOOT issue, and the reason it's not a BOOT issue is because what my friend hasn't done is acknowledge that our client's calculations include the follow the job loading in the base rate of pay, whereas if the follow the job loading is removed, then the weekly hire - or the base rate of pay is reduced and it's reduced by a factor of eight days per year. So in the hypothetical scenario that's given by the union, an employee would be paid - so let's just say we get to the end of one year's service - right.

PN315

THE COMMISSIONER: Yes.

PN316

MR EARLS: So one year and one day, the employee under the National Employment Standards is entitled to two weeks' pay, they're entitled to two weeks' pay in the better off overall test sense at the award base rate, excluding the follow the job loading.

PN317

THE COMMISSIONER: Yes.

PN318

MR EARLS: But throughout that period of time, the employee has been paid a loading at least equivalent to eight days' pay on top. But that's not the correct marker; the correct marker is the differential between the employee's actual hourly rate and the employee's base rate of pay. So they get that for their ordinary hours. Now what's important about having the follow the job loading built into the base rate of pay is that they also get it on their overtime hours, they also get it on any other entitlement that uses that hourly rate.

PN319

THE COMMISSIONER: Yes.

PN320

MR EARLS: So the putative employee who worked ordinary hours only for that period would get eight extra days of pay as compared to what the weekly hire employee would have got, and if they're terminated, they get one extra day's pay, so we're up to nine days' pay. What my friend is suggesting is that that one extra

day's pay is some massive disadvantage. Now, we can't think of any practical circumstances where that would arise.

PN321

THE COMMISSIONER: Okay.

PN322

MR EARLS: If it did, it would be so trifling as to be minor and not to affect the BOOT when one takes it at an overall level in terms of the package. The same principle obviously applies to part-time employees, albeit that it's all pro-rated, but because it's pro-rated, the exact same principles apply, other than that the benefit of overtime with the loaded rate applies disproportionately in favour of the employee.

PN323

THE COMMISSIONER: Yes.

PN324

MR EARLS: So what we would say is once all these other benefits are thrown in, and you'll see from the calculations my friend has given that there's, you know, 10s, 20s, 50s, hundreds of dollars per week the employee's better off that, that one day's pay in that little window of time is simply not going to affect the BOOT at an overall level.

PN325

THE COMMISSIONER: All right. I understand that.

PN326

MR EARLS: Yes, thank you. I think those are all the submissions that I need to make in respect to the BOOT. I'm more than happy to provide them in written form, in a very brief form.

PN327

THE COMMISSIONER: Yes, sorry to do that. It's me reading - - -

PN328

MR EARLS: I appreciate that, Commissioner.

PN329

THE COMMISSIONER: All right. Mr Liley, I don't know whether you - I think it's too much to give you a right of reply. I understand your position on this. I don't know whether or not it's worthwhile giving you a right of reply on that or not. Have you got something short to say about those matters? I understand your position.

PN330

MR LILEY: Not off the top of my head, Commissioner. The points that Mr Earls has raised about the civil employee equating to CW1, we have already addressed in our reply submissions at paragraph 46 as reasons why there's not a perfect correspondence between the award and the agreement there.

PN331

In addition to those matters, firstly, progression is not automatic. You might find someone is started on civil employee despite objectively meeting the award requirements for CW2.

PN332

Second, those additional requirements that Mr Earls referred to, for example, the 12 months' industry experience that's required of a senior skilled civil employee, doesn't appear in the award. For example - and this is in our submissions - an employee with no experience but qualifications that meet the requirements for a CW2 will still be a civil employee under the agreement because they don't have that 12 months.

PN333

THE COMMISSIONER: Whereabouts is that?

PN334

MR LILEY: So this is 168 to 169 of the digital court book, paragraph 46 of our submissions. To illustrate that second point, a new entrant to the industry who's gone out and got themselves a traffic management ticket will be a CW2, but only a civil employee under the agreement. That's just an example. I'm not sure whether this agreement is proposed to cover traffic management employees, but similar qualifications will be in the same boat.

PN335

The other point of difference, or the complicating factor, is that the agreement that this agreement replaces had all of these employees under the one classification, civil employee, which is identically described as the new entry level position, so that it is clearly possible for someone to be employed in accordance with the terms of the proposed agreement 5.1.1.1 and yet be a CW4, 5, 6 and higher because that's what they're currently doing.

PN336

What I mean by this, Commissioner, is that you shouldn't be swayed by the fact that 5.1.1 contains nothing but verbatim extracts from the description of a CW1. The current agreement does the same thing, and the employees under the current agreement are employed in much higher grades than CW1 in accordance with the wording of an identical clause.

PN337

We say those are the three reasons that the classification matching exercise in the F17B should not be blindly followed, if you like.

PN338

As I say, this is all dealt with, apart from that point about the same clause in the old agreement being used to cover a much wider range of classifications, which supports the written submissions in 46(a) and (b).

PN339

THE COMMISSIONER: I get it, yes.

PN340

MR LILEY: I don't think we will need to reply. I think if Mr Earls provides the calculations that he says he - - -

PN341

THE COMMISSIONER: No, I think we'll be going for ever. We're at rebuttal and surrebuttal now. I don't think we can reply for ever on everything. All right, I get that. Thank you, Mr Liley, that's exactly what I had in mind - something short. Is that the BOOT issue?

PN342

MR LILEY: That, I think, is the BOOT for mine, Commissioner - - -

PN343

THE COMMISSIONER: All right. Now - - -

PN344

MR LILEY: - - - apart from the matters that Mr Earls is going to deal with and, like I say, I'm in your hands about that. The next point I was going to raise is the question of explanation, but I interrupted you there, Commissioner, I'm sorry.

PN345

THE COMMISSIONER: Yes. What about the - hang on, who did I say to go first? I think I've got Mr Earls to go first, so perhaps we might still follow that - - -

PN346

MR EARLS: Commissioner, on the basis - I understood you only got me to go first because I was responding to some fresh materials.

PN347

THE COMMISSIONER: Yes.

PN348

MR EARLS: For the sake of expediency, perhaps if Mr Liley addresses - like fully fleshes out his concerns, I'm prepared to respond to same.

PN349

THE COMMISSIONER: Yes. I was discombobulated concentrating on the BOOT so much. All right. What about the undertaking? The defects of the undertaking that you make out can be cured, can't they, by making it a requirement on your - - -

PN350

MR EARLS: Well, I think they are a requirement. I don't - this is an undertaking that's been accepted dozens of times, if not more.

PN351

THE COMMISSIONER: Yes.

PN352

MR EARLS: The undertakings have got to be read consecutively. The first one sets out the circumstances when it's required, and the second one says, 'When it's required, this is what we will do.'

PN353

THE COMMISSIONER: Yes.

PN354

MR EARLS: So it is enforceable. It is a clear obligation and it has clear triggers.

PN355

THE COMMISSIONER: Yes, when it is required. If it slips below the - - -

PN356

MR EARLS: If you want, we can really add something to avoid doubt: when it is required is the clause above. But I mean, really, we're splitting hairs at this point, and we have now got it on transcript that my client has made it clear that that's what it understands it to be - a mandatory term.

PN357

THE COMMISSIONER: Yes.

PN358

MR EARLS: If you want changes, we can make changes, but they are superficial, in my respectful submission.

PN359

THE COMMISSIONER: All right. And you say they are unnecessary?

PN360

MR EARLS: Yes, but if you want them, we'll make them. It's absolutely - - -

PN361

THE COMMISSIONER: No, no, I don't know if I do or not yet. I just want to see if we can reach some comity in some part of this matter, that's all. Mr Liley, what do you say about that?

PN362

MR LILEY: Thanks, Commissioner. I understand from what your Honour was saying earlier, if the phrase 'where required' were removed, the objection would fall away. I think that's correct. That phrase is surprising if Mr Earls' submission is correct that it is simply obligatory. The question arises what work that phrase has to do, if it is unnecessary to define a BOOT calculation in that way, to put some further issue of when it's required in the definition. The definition would be to the same effect if what Mr Earls is saying - if that phrase were removed, then it would avoid any question that there was an onus on an employee to require a BOOT calculation to be performed before the employer were obliged to do so.

PN363

MR EARLS: We are happy to remove it, honestly, if that's your wishes.

PN364

THE COMMISSIONER: All right. I have to do a direction, a further direction, so I will direct you - how long do you need on the BOOT summary, Mr Earls?

PN365

MR EARLS: Commissioner, having come back to something of a maelstrom in what is otherwise normally a quiet moment - - -

PN366

THE COMMISSIONER: Tell me about it, yes.

PN367

MR EARLS: - - - which I had to take leave in. Look, realistically, noting it's a short week, I think it's just too optimistic to say by Thursday, but perhaps close of business Monday.

PN368

THE COMMISSIONER: If we rephrase the undertaking and say you make the undertaking in relation to - well, we might as well take out the crib allowance issue, too, the crib allowance issue and taking out the 'as required'. Would that satisfy you on those two issues, Mr Liley?

PN369

MR LILEY: I'd need to see the wording in each particular undertaking, but I - - -

PN370

THE COMMISSIONER: Okay.

PN371

MR LILEY: I will need instructions, Commissioner. I don't have instructions to respond to undertakings I don't have.

PN372

THE COMMISSIONER: All right. Yes, of course. Well, I will propose undertakings and then you can have, you know, 48 hours to consider them and get - - -

PN373

MR LILEY: Thank you, Commissioner.

PN374

THE COMMISSIONER: All right. That deals with the undertakings and the BOOT.

PN375

The explanation of terms, Mr Liley, perhaps you might explain your position. I think I understand it, but just in summary form.

PN376

MR LILEY: In summary, Commissioner, we would say that the explanation that the employer - - -

PN377

THE COMMISSIONER: Is it this: the preceding agreement didn't cover everybody, and so the new agreement covers everybody, notionally, and so the people that are transitioning from the award to the agreement need to understand any deficits? Is that it? So there's a new element that needs to be included in the explanation? Is that it?

PN378

MR LILEY: That is part of it, Commissioner. To the extent that they were award-covered employees whose entitlements arise under contracts that are consistent with the current agreement, it was necessary to explain to those employees that, for the purpose of what they were being asked to vote on, is a comparison between the award and the agreement, and so less than actual terms of the agreement needed to be identified. That's the first point in relation to the explanation.

PN379

THE COMMISSIONER: Yes.

PN380

MR LILEY: The upshot of my discussion with Mr Bond was to flesh out that there might be some employees who were in that category. For example, Mr Barmer is employed in a classification that doesn't correspond to the current agreement. He is employed in a classification that corresponds to the new agreement, and so we would say that he is employed under the award, albeit with contractual terms that reflect the current agreement.

PN381

THE COMMISSIONER: Yes.

PN382

MR LILEY: So that's the first submission in relation to the explanation.

PN383

The second is that the employer gave a misleading explanation about the code and the clause that incorporates the code. That explanation sought to suggest that the code clause was redundant, or irrelevant, or somehow obsolete, but, in fact, the clause is effected to incorporate the code. It has to be given some work to do. It is not accurate, we say, to suggest that it's null and void just because the code has been repealed. It's possible to incorporate defunct legislation in a new agreement, and the employer's explanation, which your Honour has a copy of in the explanation document, was misleading.

PN384

Lastly, the submission is that the employer, to the extent that it did not explain any of the less beneficial provisions of the agreement compared to the award, as was Mr Bond's evidence, to that extent, it failed to take all reasonable steps to explain the agreement to employees.

PN385

Now I didn't put this to Mr Bond, but there's nothing in the explanation that deals with the fact that crib time is currently, and proposed to be, paid as a matter of

grace and favour and is not an enforceable entitlement, except as by custom and practice, but that also was a failure to take a step that it was reasonable to take in the explanation of the agreement. So those are the submissions - - -

PN386

THE COMMISSIONER: But it's like - I did an appeal on this in my other life, but it's like diminishing returns, isn't it? 'All reasonable steps' doesn't mean 'absolutely'. Like, for example, you could get a process server to give everyone a copy of the agreement, but that's not necessary. There's a series of steps to be followed. You don't have to do absolutely everything for all reasonable steps.

PN387

MR LILEY: That's right, Commissioner. I am endeavouring to focus in on the detrimental provisions that are material. Another one is the daily hire issue that was not explained.

PN388

So it's not just that there was, you know, this roaming inquiry that they should have, you know, spent nine hours in seminars with the employees going through each word of each clause.

PN389

THE COMMISSIONER: Yes.

PN390

MR LILEY: But that there are a handful of clauses that were not explained adequately and it was reasonable for the employer to have explained, and those are: the Building Code clause; the expansion of daily hire to classifications that can't be engaged daily hire under the award; the allowances that I have referred to in our submissions at paragraph 45, so radial travel, first aid, and in charge of plant, and lastly, the unenforceable nature of the employer's practice in relation to crib time. None of that was explained. Each of those terms were required to be explained as a reasonable step, and so the employer has not complied with section 180(5).

PN391

I might just say in relation to Mr Earls' overarching submission about the Secure Jobs Better Pay Act, section 180(5) hasn't changed at all in that time and should not be taken to require anything less than it did before 6 June 2023.

PN392

THE COMMISSIONER: Yes.

PN393

MR LILEY: That requirement is as it has been since the introduction of the Fair Work Act.

PN394

Moving on to the last two points. The incorporation material, your Honour has our written submissions about these. I don't have too much to add to that. For the reasons that are set out in our reply and our submissions, the policies that are

referred to and the code are incorporated, clearly incorporated. The employer's suggestion that it's only clauses which impose obligations on employees that incorporate material is an invitation to error and inconsistent with authority.

PN395

THE COMMISSIONER: Well, there would be a contest, wouldn't there, on what BCG means?

PN396

MR LILEY: Well, Commissioner, it's not just BCG - or BGC I should say - - -

PN397

THE COMMISSIONER: BGC - yes, sorry.

PN398

MR LILEY: That submission is inconsistent with the Full Bench in CFMMEU v Ditchfield, which is referred to at paragraph 38 of - - -

PN399

THE COMMISSIONER: You say - - -

PN400

MR LILEY: Sorry, I beg your pardon, that's a completely different point. I was just opening my submissions at random.

PN401

THE COMMISSIONER: So you say all documents referred to must be available, do you? All documents - whether or not it's a sort of a Ravenswood v McCormack style contract incorporation of reference, but a reference simpliciter, that they all need to be provided, or links? Is that what you're saying?

PN402

MR LILEY: No, Commissioner. It's possible for a document to be referred to in a strictly advisory way. That's BGC. The authority I was stretching for before and looking at the wrong paragraph, the authority is CFMEU v Sparta Mining Services that refers to the incorporation of documents in clauses that impose obligations or entitlements on employers or employees that operate by reference to the external document. So that where a document is referred to, but it doesn't do that, it's not incorporated, there's no requirement to provide that - - -

PN403

THE COMMISSIONER: Sorry, in your submissions, where's that reference to that case?

PN404

MR LILEY: That's at paragraph 22 of our submissions, of our reply submissions, I should say, your Honour, at 162 of our digital court book, footnote [14], CFMEU v Sparta Mining Services [2016] FWCFB 7057.

PN405

THE COMMISSIONER: Thank you. That's helpful.

PN406

MR LILEY: We go on in our reply submissions to deal with BGC. So that's the test. The test is in *CFMEU v Sparta Mining Services*. That's consistent with earlier Full Bench authority in the McDonald's case. So it's only where that test is satisfied that the obligation to provide the material arises, and your Honour will also be aware that there is authority to the effect - including in that McDonald's Full Bench decision - that the laws of a land, for example, don't need to be provided because employees may be taken to be aware of them - and I understand this is what Mr Earls' submission is getting at - not just the laws of the land, but the subsequent Full Bench authority in *Swinburne* that directs the Commission's attention to the particular characteristics of the workforce that might make it so that all reasonable steps do not require provision of a copy of the document.

PN407

In *Swinburne*, that was held, in respect of the cohort of professional academics, not to require the provision of awards because it might be - effectively, notice might be taken of the fact that that cohort would be able to access those documents without the employer leading them to it.

PN408

THE COMMISSIONER: All right. You're saying that's not a characteristic of this cohort?

PN409

MR LILEY: That's right, Commissioner. I would hesitate to suggest that this cohort was comprised of professional academics. Mr Earls has given evidence about their characteristics, from which I understand he submits that provision of each and every policy was not required.

PN410

We say that your Honour has seen which documents were provided and how in the explanation document. Some of them were provided, some of them weren't at all. For example, the explanation of the clause incorporating the health and safety policy as a condition of the employer selecting employees for redundancy doesn't provide a link to that policy or a copy of it, and so we would say that that is a failure to take all reasonable steps.

PN411

There is a link to the code in the explanation document, but we would say that the issue there is not with providing the document so much as explaining what the employer means by incorporating this historical document in its agreement.

PN412

I might leave the incorporating material issue there and move on to the matter of employee rep rights. Again, your Honour, you have got our written submissions there and I don't have a great deal to add, except to state the company's claim is that the employees understood coverage immediately but, evidently, didn't understand the classification structure for some time. It was a matter of bargaining, it was in the log of claims.

PN413

THE COMMISSIONER: The footprint of the structure and the levels are two different things, aren't they? You know what I mean? If people are asking the question, 'What level am I?' that's different to saying, you know, 'Whether I'm covered by the classification structure in some kind.' You know what I mean? That's two different things. So, if you say, 'Well, I should be - I'm not too sure, should I be level 1, level 2, level 3' - that's not to say - the assumption is that you're covered by it, and I think it's, and I don't want to put words in Mr Earls' mouth, but, as I understand the material he has proposed, it's that everyone knew what it was about, the cohort knew what it was about, and the fact that they didn't know whereabouts they resided in the classification structure is not denying what they thought the footprint of the structure was.

PN414

MR LILEY: I understand what you are saying, Commissioner. My submissions here are really that the employer's submissions are over-stating the effect of Mr Bond's evidence.

PN415

THE COMMISSIONER: Okay.

PN416

MR LILEY: And we set that out in our written submissions. For example - - -

PN417

THE COMMISSIONER: Yes, yes, yes, that's there, yes, I recall that stuff.

PN418

MR LILEY: Yes.

PN419

THE COMMISSIONER: All right, I understand that.

PN420

MR LILEY: I think, with that, Commissioner, those are the submissions for the CFMEU.

PN421

THE COMMISSIONER: Okay. Mr Earls, what do you say about - what are we dealing with - - -

PN422

MR EARLS: Yes, thank you, Commissioner, and thanks, Mr Liley.

PN423

There are three broad headings we are addressing. I just want to make sure I address each of them as sequentially as possible.

PN424

THE COMMISSIONER: Okay.

PN425

MR EARLS: Under the broad heading of 'Explanation of Terms', there is what I would describe as concerns about the substantive explanation. Within that, there is an issue about persons classified under the award; secondly, a potentially misleading explanation around the code, and then, thirdly, there was a series of concerns about less beneficial provisions and whether they were explained. I think that's the three headings, and Mr Liley can correct if I am wrong. I am more than happy to add.

PN426

THE COMMISSIONER: Okay.

PN427

MR EARLS: The second one relates to the provision of documents in the approval process, and then the final one is the notice of rep rights.

PN428

THE COMMISSIONER: Yes, that's it.

PN429

MR EARLS: So I will address those matters in turn.

PN430

The first one relates to the question of award coverage. Now, the evidence that Mr Bond gave in his affidavit was, at the time, there was no employees covered by the award, that they were all employees who fell within that Adelaide civil construction project cohort, and we would say that evidence should be accepted.

PN431

My friend has asked Mr Bond a legal question about whether it was by reference to contract or not - he wasn't sure, and nor should he be - but, with the fullness of time, he had that opportunity. Now the CFMEU hasn't been able to identify any evidence that would contradict that, and it ought to be accepted.

PN432

THE COMMISSIONER: Yes.

PN433

MR EARLS: In some ways, who cares? I'm just saying, at the outset, the facts are that this was a cohort of workers. In some ways, who cares, because the award was explained, and it was explained in great depth in the explanation document, but I will address that when we deal with the substantive issues that my friend has raised.

PN434

THE COMMISSIONER: Yes.

PN435

MR EARLS: Insofar as my friend's submission that Mr Barmer's EBA discloses that he was not a civil worker under the existing agreement, the existing agreement - and Mr Bond did give this evidence - the existing agreement does have two classifications. It has the classification of civil employee and then it has

the classification of senior skilled civil worker, and that is set out in clause 5.2 of the existing agreement, and senior civil worker is, in my respectful submission, where this classification structure is now extended. It hasn't changed the footprint, as the Commission mentions, but it has been extended and expanded and built upon.

PN436

THE COMMISSIONER: Yes.

PN437

MR EARLS: Mr Bond's evidence was that, informally, that classification structure had developed during the life of the agreement. Somewhat interestingly, had my client not expanded the classification structure, it might have fallen afoul of the new provisions about the level of moral authenticity about people voting on levels which don't reflect their actual rate of pay.

PN438

THE COMMISSIONER: Yes.

PN439

MR EARLS: And so my client has done the right thing in doing this, and so there's nothing untoward, there was no ulterior motive in respect of that. The reality is that there were no employees covered by the award, but, out of an abundance of caution, not only did my client, at the time, say some employees 'may' be covered by an award, out of an abundance of caution, with the explanation - because we've all played this EBA game for a few years now - it's done a good job of lining lawyer's pockets, but not a whole lot more in terms of respecting the democratic outcome of an agreement of 43 out of 45 employees - but, in any event, it doesn't mislead employees because it says some employees may be covered, and it goes no further than that, but it does go on to say, 'We are now going to explain how that might apply' - as irrelevant as that might be - 'to each of the individuals in terms of considering how their terms and effect might be perceived', and so the actual explanation of the award that we would submit is required is for the very altruistic employee who is concerned about other prospective employees and how they might be affected.

PN440

THE COMMISSIONER: Yes.

PN441

MR EARLS: In any event, that's the first step of that.

PN442

The second step of that is the code. My friend has made a significant amount of submission in relation to this, and that might be reflective of the CFMMEU's general abhorrence of the code. The difficulty with my friend's submissions is that he has left out a couple of critical words at the end of that sentence, and that is 'or its replacement', and so there is absolutely nothing in that document that suggests, on its terms, that it was intended to incorporate old legislation. That phrase is clearly intended to mean that whatever replaces it - - -

PN443

THE COMMISSIONER: Well - - -

PN444

MR EARLS: I still actually think, on the books, there is a slight version of the code still there, but only relates to the non-engagement of foreign workers. That was a clause - I think the CFMEU successfully lobbied Pauline Hanson to keep it in that lobbying, so, if there is anything in the code, we say it's moot. With the greatest of respect, we say that, to the extent the code exists, which it may or may not - I can't find it, and I thought in the back of my head - - -

PN445

THE COMMISSIONER: Yes.

PN446

MR EARLS: But, to the extent it exists, it was clearly intended to be the current code, or whatever that may be.

PN447

THE COMMISSIONER: But if it's been replaced by nothing, or it's not relevant to this employer, and then - - -

PN448

MR EARLS: Correct.

PN449

THE COMMISSIONER: - - - it's a nullity, as you suggest.

PN450

MR EARLS: Correct. And if any decisions - and it doesn't say that the code has got to apply other than that the decision - the decision of the decision-maker has to be consistent with the code. So it's clearly consistent with, well, nothing, as a determinating reference, and the idea that this was some deliberate choice by us compared to something that just simply went through to the keeper while you're making, you know, the fewest number of changes to a document that you recently made - - -

PN451

THE COMMISSIONER: Yes.

PN452

MR EARLS: In reality, that's the likely situation. So we say that doesn't become an issue.

PN453

THE COMMISSIONER: Okay.

PN454

MR EARLS: The next one relates to what my friend says was a failure to provide specific explanations about less beneficial provisions. Now, again, the overarching submission here is that, in respect of each of the workers who were considering this agreement, none of these issues apply. They are of academic

interest for those employees and, to the extent those employees might be exercising some altruistic measure of incoming employees and thinking how they might be different to me if they weren't in the Adelaide civil projects division, but each of them has been explained and, in our respectful submission, each of them has been explained appropriately.

PN455

I made submissions in respect of reading this explanation document and particularly the Square Ceilings decision, and the Square Ceilings decision related to the thoroughness of an explanation and, in particular, the phrase, which I don't have at my fingertips, but words to the effect of the explanation might be economical, but when you read the full explanation, it's sufficient because - and I'm trying to find my submissions here because these are quite important in terms of the full explanation.

PN456

THE COMMISSIONER: Yes.

PN457

MR EARLS: I should say, at pages 124 to 125 of the trial book, at paragraph 41 of my submissions, what we do is set out the preamble, and each of the explanations in the document needs to be understood by reference to that preamble. Is that the preamble? No, sorry, that's not it, I beg your pardon. Maybe I didn't put it out in full. I do apologise if I didn't.

PN458

THE COMMISSIONER: The Square Ceilings reference is at 37.

PN459

MR EARLS: 37, yes, but I haven't actually put it out in full what the explanation is.

PN460

MR LILEY: If I may, I think, Mr Earls, you are referring to paragraph 35. That's on 123 of the digital court book.

PN461

MR EARLS: It's sort of part of that, but it's actually more fulsome than that because (a) to (h) of the relevant lines in the preamble statement, and then reading that in conjunction with the smaller explanation - and I would add the (indistinct) decision was based on this explanation - (audio malfunction) the explanatory document, you know, that obviously evolves over time, but in similar sort of structure, but the point being that when you read through the whole explanation, there is a clear statement that says - and this is paragraph 45 - so if you read paragraph 41, I should say, of my submissions, you read all of that part of paragraph 41, and you (indistinct) paragraph 35, which talks about where you can go. It's not detailed, it's not comprehensive, 'You should review the document, ask questions', et cetera, et cetera, et cetera, et cetera. All of that then gets read with the rest of the explanation that follows.

PN462

Now my friend has raised five issues that were allegedly not explained. The first one was daily hire employment, and if I could ask the Commission to turn to page 116 - well, actually, page 115 to start with.

PN463

THE COMMISSIONER: Got it.

PN464

MR EARLS: Award omissions, and enterprise agreement displaces the operation of the modern award. It goes on to say that certain clauses in the award have been omitted. There follows a non-exhaustive list of clauses. 'You should carefully check the Building Award to see anything that matters.'

PN465

THE COMMISSIONER: Okay.

PN466

MR EARLS: That again is read with that - following on from the remainder of the explanation, and at the top of 116:

PN467

The proposed agreement does not provide for weekly hire employment.

PN468

And it provides hyperlinks to each of the clauses that are relevant to that.

PN469

THE COMMISSIONER: Okay.

PN470

MR EARLS: The second one is no first aid allowances. If I could ask the Commission to turn to page 105. 5.2, rates of pay, there's four paragraphs below that. The third paragraph:

PN471

The rates of pay are all inclusive and no allowances are payable to employees except as set out in the agreement.

PN472

And the employees received hyperlinks to the relevant clause references. That follows the in charge of plant allowance as well.

PN473

Distance allowance is explained far more fulsomely. If we turn to page 106, there's travelling outside radial areas and a whole series of dot points, which I won't take the Commission through, but it is explained very fulsomely in relation to that.

PN474

Then the final one was the Building Code, which I've already dealt with at length, so I won't deal with that any further.

PN475

So what we would say is that insofar as the union has raised these concerns, we're at that microscope level of trying to identify things, but when one takes a step back, it is very clear, in our respectful submission, that the employer has taken all reasonable steps.

PN476

THE COMMISSIONER: Yes.

PN477

MR EARLS: I won't go through line by line all of the opportunities that were put in writing to employees to raise questions, but they start on page 143.

PN478

THE COMMISSIONER: Yes.

PN479

MR EARLS: And there's an invitation to 'give us a call on the mobile'. This is on 21 June. It follows, shortly thereafter, that there was a meeting on site. After that, there was the employee meeting of their own; after that, there was bargaining and, importantly, after that, paragraph 20 of Mr Bond's affidavit also confirms that all of these documents that have been provided, this 30-odd page explanation document, et cetera, that whole process was gone through again, just three or four weeks earlier, so another full opportunity to get their heads around what the agreement was, and then we've got the actual documentation that you have.

PN480

So insofar as Mr Bond was questioned about what explanation he gave orally again doesn't matter. That evidence, in my respectful submission, can't be viewed as an isolated issue.

PN481

THE COMMISSIONER: No.

PN482

MR EARLS: It has to be viewed as the entirety of the steps, which includes a detailed written explanation and any number of opportunities to ask questions about an issue that was academic to the actual people who were asking those questions, other than to the extent of their altruism.

PN483

THE COMMISSIONER: Yes.

PN484

MR EARLS: So that's the first subject matter in relation to explanation.

PN485

The second one is the provision of documents. Commissioner, this is the one that I wanted to make submissions on in relation to the Explanatory Memorandum and the construction of the Statement of Principles.

PN486

THE COMMISSIONER: Yes.

PN487

MR EARLS: I won't go through it in great detail, but what my friend has put to you is that principles 5 to 7, which relate to the provision of the documents, create an obligation: if an employer has not done that, then they simply haven't complied with provision 4.

PN488

THE COMMISSIONER: Yes.

PN489

MR EARLS: In my respectful submission, that's not the correct construction of it. The correct construction is that principle number 4, which I wish I had to my fingertips, principle number 4 - - -

PN490

THE COMMISSIONER: Yes:

PN491

To provide employees a reasonable opportunity to consider a proposed enterprise agreement before voting on it so that employees can vote in an informed manner.

PN492

MR EARLS: Correct. That is the actual satisfaction you are required to reach.

PN493

THE COMMISSIONER: Yes.

PN494

MR EARLS: Principles number 5 to 7 set out what I would describe as a deemed to satisfy provision, that is to say, if you are satisfied that 5 to 7 have been met, that is an absolute ability. If not, if that hasn't been complied with, then that doesn't prevent you from forming satisfaction, it's simply that you need to be satisfied - - -

PN495

THE COMMISSIONER: So 4 is a necessary condition and 5, et cetera, is a sufficient condition?

PN496

MR EARLS: Correct.

PN497

THE COMMISSIONER: Yes.

PN498

MR EARLS: Correct. Now the support for that, if I might provide the support for that submission, and again I don't have the supplementary explanatory document, but give me one second - that's an easy one to find. The replacement explanatory

statement, if one goes to the applicable provisions in that statement, which is paragraphs 4 to 7, it says:

PN499

Paragraphs 4 to 7 relate to the prescribed matter of providing employees with a reasonable opportunity to consider the proposed enterprise agreement.

PN500

Paragraph 4 provides:

PN501

The employer should provide employees with a reasonable opportunity to consider a proposed enterprise agreement before voting on it, so that the employees can vote in an informed manner.

PN502

THE COMMISSIONER: Yes.

PN503

MR EARLS: And then 5 to 7 says that an employer 'may' satisfy paragraph 4. So that's simply explaining that that is one of the ways that an employer can satisfy you.

PN504

In my respectful submission, there was nothing in the change to the Act that suggested that it was intended to tighten the pre-existing provision. The pre-existing provision, if the Commission would recall, was that an employer either provided copies or provided ready access to those documents.

PN505

Now if I might just take you to the Explanatory Memorandum of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 and, in particular, starting at paragraph 697, which has, on the page at the bottom 125, although I think the PDF's got somewhat different - in mine it's page 179 of the PDF document.

PN506

THE COMMISSIONER: Yes, okay.

PN507

MR EARLS: And the overview is:

PN508

Paragraph 14 of the Bill would amend divisions 2 to 3 of the Act to simplify requirements which would be regarded as overly prescriptive and complex.

PN509

Paragraph 698 then goes on to say:

PN510

Various steps that an employer must currently take within the strict timeframes would be removed.

PN511

Then, in brackets, it gives a very prescient example, because the prescient example is:

PN512

For example, the requirement to take all reasonable steps to provide employees with access to the agreement during a seven-day access period.

PN513

And so it goes on to say - that's one of the ones that was exactly intended to be removed as one of the technical requirements that would prevent agreement - prevent an agreement from being removed. It doesn't, in any way, suggest that those requirements would, in fact, be tightened, or should in fact be tightened, so that the only way an employer can meet those requirements is to provide all documents of all types.

PN514

THE COMMISSIONER: Yes.

PN515

MR EARLS: Now we go on to paragraph 699, which my friend rightly notes relates to the NERR and that that continues to apply.

PN516

But 700 then gets into what the teeth of the code is, and supporting our submissions about necessary and sufficient conditions:

PN517

Where pre-approval requirements are removed, they will be replaced with one broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by employees covered by the agreement.

PN518

THE COMMISSIONER: Yes.

PN519

MR EARLS: That's the satisfaction here required. Then it says:

PN520

The intention is to simplify the pre-approval requirements while retaining sufficient safeguards for employees.

PN521

And, you know, goes on to talk about not having these arguments about minor errors or procedural deficiencies.

PN522

Then paragraph 702 talks about what the Statement of Principles means, and that is that the Commission must take it into account, and that's the only obligation of the Commission under the Statement of Principles. It's a discretion, it's a broad discretion. Of course, it needs to be exercised judicially.

PN523

THE COMMISSIONER: Yes.

PN524

MR EARLS: And, in doing so judicially in the face of the law and, in my respectful submission, that judicial discretion would include that one needs to consider what is - would include the requirement to actually give documents has been removed. There is no suggestion that there was an intention to prevent an employer from providing ready access to documents as an alternative to providing actual documents.

PN525

Then one goes on to paragraph 737, which talks about the Statement of Principles, and this is just reinforcing those submissions and making sure, for the sake of the fullness of the agreement - of the submissions, I should say - that 737 talks about that the Statement of Principles is guidance for employers, it's not a mandatory statement, and 741 deals with - sorry, 740 is interesting because it says what the Statement of Principles is required to deal with, and it doesn't, in any way, talk about providing documents as being one of the things that is required to be dealt with.

PN526

THE COMMISSIONER: Yes.

PN527

MR EARLS: Then 741 talks about what it is:

PN528

The Statement of Principles will guide parties as to how the FWC will consider particular issues when determining whether the proposed agreement has been genuinely agreed.

PN529

And it talks about scenarios, and the scenario, in my respectful submission, is there's sufficient conditions, but the necessary conditions are the more general. The only guidance in relation to this is what I have described: in the construction parlance, is it deemed to satisfy a provision, without undermining the general law relating to what you need to be satisfied about, did employees have a reasonable opportunity?

PN530

We have made extensive submissions about whether those documents are, in fact, incorporated by reference.

PN531

THE COMMISSIONER: Yes.

PN532

MR EARLS: In my respectful submission, to the extent the Building Code was, it was provided as a hyperlink in that document. To the extent policies and procedures were, they were provided, or at least ready access. The reason I say

that is because the explanation document - this is at the top of page 95. This clause refers to the company's policies and standards. These are available on SkyTrust: 'If you would like a hard copy, please contact' the contact person. So it's specifically directed to it, and Mr Bond's evidence is not merely that that was provided and the hyperlink was provided, but that employees had this in the palm of their hands.

PN533

THE COMMISSIONER: Yes.

PN534

MR EARLS: And not only did they have it in the palm of their hands, but the access to it is something that forms both an obligation of an employee and part of the employer's induction processes, such that the Commission must be satisfied that the employees had that document, with the greatest of respect, from an electronic perspective because it was in the palm of their hands at that time.

PN535

THE COMMISSIONER: Hyper-linked.

PN536

MR EARLS: That, in my respectful submission, should more than comfortably satisfy the Commission insofar as the provision of documents.

PN537

THE COMMISSIONER: All right.

PN538

MR EARLS: But to the extent that you were left with any doubt about that, we would be happy to make some sort of submissions or undertakings in relation to what's left. In my respectful submission, I can't see how that is not the provision of the documents or not sufficient to meet the Statement of Principles.

PN539

That then takes us to the final question, which is the notice of representational rights. The Commission has talked about the footprint of the structure. I was talking about the pie. Everyone knew what the pie was; the argument was about how it was getting cut up.

PN540

THE COMMISSIONER: Yes.

PN541

MR EARLS: And that's basically where the union has sought to create or conflate certain issues to create some confusion.

PN542

I acknowledge that the Commission may well find that that reference to the classifications probably does amount to a technical deficiency. It's an interesting one because there was sort of only one real classification - you're a civil worker - but to the extent that it did, I just want to talk through just how minor that is, or,

I'm sorry, I should say just to talk through whether it was in fact an error, but to the extent just how minor it is.

PN543

At the same time as receiving the notice of representational rights, employees receive a covering letter, which is proposed to cover - at the top of page 141, it says:

PN544

Proposed to cover employees that are employed while undertaking work in the civil projects unit.

PN545

And I accept that that doesn't fully explain it, but it does talk about - it does start to talk about who's being covered.

PN546

THE COMMISSIONER: Yes.

PN547

MR EARLS: The very next day - the very next day - the employees receive that classification structure and, within two days after that, they had had that explanation to explain that the pie, or the footprint, is settled and we're now talking about how we cut up the footprint and, as the Commission quite rightly notes, that is a matter for bargaining and, as I made those submissions earlier, in fact my client would have done the wrong thing under the new rules had it not expanded those classifications because it wouldn't have had that moral authority that is now required.

PN548

From that point, the employees then organised themselves., they knew exactly who was covered, but the important thing is that what my friend seeks to make a point about is that there was an expansion in terms of the business unit, but that is explained in the notice of representational rights, so the only deficiency, to the extent there is a deficiency, is not the business unit that's covered - that's clearly set out, the scope of the agreement is clearly set out - it's only those classifications, and in the common or in industrial reality, the idea that all your blue collar workers are going to be under the EBA is hardly surprising, and that's exactly what the workers understood it to be, and the evidence shows that they knew that too, and so it's a minor technical issue, to the extent that it is an issue, and we have made the submissions about what is expected in terms of the NERR under - sorry, I've got the other folder over here - what's expected in respect of the NERR and how that was dealt with in Huntsman.

PN549

The first thing I would flag is there are two requirements. I don't know that we made submissions in respect of both, so I just want to, for the sake of completeness, do so. This is table 2 at paragraph 74, the oft-quoted table in Huntsman.

PN550

THE COMMISSIONER: Yes.

PN551

MR EARLS: Again, without having the page number in front of you, there's a series of line items. The first one is 173(1), and that is the obligation to take all reasonable steps to give an NERR to each employee who will be covered by the agreement and is employed at the notification time for the agreement, and the disadvantages:

PN552

In the circumstances the NERR may be so altered that employees fail to understand and exercise their representational rights and effectively participate in the bargaining process.

PN553

THE COMMISSIONER: Yes.

PN554

MR EARLS: It is clear on the evidence that that was not the case, that employees understood that and organised themselves in the manner they sought fit, and ultimately 43 out of 45 of those employees agreed with the offer that was put following that bargaining process. There is absolutely no suggestion it wasn't genuine, and you can look at the initial offer that was made and see that those rates have changed, amongst various other things. So it was a clear situation where claims and counterclaims were made, concessions were made, a ballot was held and failed, and subsequently an improved offer succeeded. So it was very much genuine.

PN555

Overleaf, there are other issues that are raised - I'm sorry, overleaf on mine - but following that table down, there are other issues about the notice of rep rights. The 14 days is fine; that was dealt with.

PN556

THE COMMISSIONER: Yes.

PN557

MR EARLS: Then we talk about the issues with 174(1A)(a):

PN558

The NERR must contain the content prescribed by the regulations.

PN559

And the real disadvantage that could arise is:

PN560

In the circumstances the employer may have been incorrectly named within a complex group of companies thus creating...

PN561

and this is the -

PN562

...real confusion resulting in employees failing to effectively participate in the bargaining.

PN563

There was no real confusion. The evidence is clear about that, and the union hasn't been able to present any other evidence to suggest that there was anything other than a clear understanding of the group that was bargaining, and that really follows from the fact that we've got a pre-existing agreement, an existing workforce, and there are multiple generations of agreement before that.

PN564

THE COMMISSIONER: Yes.

PN565

MR EARLS: This isn't a second generation, this is a multiple generation. In fact, I traced it all the way back to my client being a named respondent in the Australian Workers' Union Civil Construction and Maintenance Award 2002. So this is a very well-settled cohort of workers where there is no confusion about it.

PN566

So to the extent that that was found to be an issue, which we acknowledge the Commission may find, given the (indistinct) use of that phrase 'classification structure', it didn't affect the understanding of the footprint.

PN567

Unless there's any other questions, those are my submissions.

PN568

THE COMMISSIONER: No, I've got no - all right, you have given me enough to go on with. Just about the short form of undertaking in relation to the crib allowance, would it be sufficient to say that 'as if it was part of the agreement'?

PN569

MR EARLS: Look - - -

PN570

THE COMMISSIONER: Perhaps you want time on that.

PN571

MR EARLS: I need to get some instructions on this. What my client (audio malfunction) is they said they have a rule that they follow. If that's the rule that they follow, my intention would be just to express that rule in full, and then the union would have an opportunity to consider that and see if there was any other parts of that that might raise concerns.

PN572

THE COMMISSIONER: Can you get that to me?

PN573

MR EARLS: Can I get that to you?

PN574

THE COMMISSIONER: Yes, the rule, just so I - - -

PN575

MR EARLS: I am hopeful - - -

PN576

THE COMMISSIONER: I've got, for my sins, four hours of a bullying conciliation this afternoon, so my capacity to do anything today is limited. Yes, look, I will just direct you by, you know, Monday to provide the submissions on the BOOT, and then if you could get that to me, I'll propose a couple of undertakings and then, you know, I'll give you time to correspond with me about those.

PN577

MR EARLS: I was just looking at my emails to see if it had come through because I had that email on my computer, but I haven't got that one. What was the timeline that you wanted?

PN578

THE COMMISSIONER: Any time.

PN579

MR EARLS: As soon as possible. Yes, that's fine. I'll talk to my client and we'll get that to you as soon as possible.

PN580

THE COMMISSIONER: Okay. I will do my darndest to get this decision out as quickly as possible, so if we could deal with the undertakings, that would reduce it a bit.

PN581

Mr Liley, is there anything else? You've muted yourself, mate.

PN582

MR LILEY: The computer's answered my question for me. Despite having muted myself, I do have three quick points to raise in response to what Mr Earls has just put.

PN583

THE COMMISSIONER: Okay.

PN584

MR LILEY: First, in relation to the code, where he draws attention to the rider 'or its replacement', this is a bit of a clue, I think, to why this clause is still in the agreement. It evidently envisages the resurrection of the code, and that can also be seen in the form of the incorporation of the code clause. This was, in terms, what was required by the Turnbull era Building Code, that there was a specific clause of that code - I think it was clause 11 - that required the outcome of an arbitrated dispute to be consistent with the code. The fact that the clause takes that form evidently indicates that there is an expectation that the Building Code

will come back during the life of the agreement and that requirement will be revived, and that is the replacement that will apply in that way.

PN585

THE COMMISSIONER: It's not on the plain English meaning of the words. There's no replacement. Yes, I get the point. I understand, yes. All right.

PN586

MR LILEY: This clause imposes the same restriction that applied under the Turnbull era 2016 Building Code, and it appears to be intended to pick that requirement up again, should it be imposed in the future.

PN587

Secondly, Mr Earls says that none of the BOOT issues that we have raised applied to the employees considering the agreement. There is zero evidence to that effect and no basis for you to draw that conclusion other than Mr Earls' assertion that there's somehow - - -

PN588

MR EARLS: Sorry, Commissioner, I'm sorry to interrupt Mr Liley. Unfortunately, we just cut out. I got up to - Mr Liley was referring to the code and replacement and - - -

PN589

THE COMMISSIONER: The Turnbull era thing and - yes, the question is that, you know, it's envisaging the glorious day when the Building Code comes back. That's the thinking on that. Now we're onto the BOOT issues. Perhaps you might start again from there, Mr Liley.

PN590

MR LILEY: That's all right, Commissioner. Just to confirm with Mr Earls, the point about the code is that it's, like the Commissioner says, envisaging a return to the Turnbull era Building Code, and that particular obligation of the code that arbitrated outcomes in disputes comply with the code returning in some form.

PN591

The BOOT point that I was getting to is that it was Mr Earls' submission that none of the BOOT issues that have been raised apply to employees considering the agreement. There is no evidence to that effect, and particularly where the description of the civil employee in the agreement includes a first aid qualification. It's not frivolous to suggest that an employee in that classification might be entitled to the award first aid allowance.

PN592

Lastly, Mr Earls said that the CFMEU couldn't point to any evidence that there were employees who may be covered by the award. As I mentioned in my earlier submissions, Mr Barmer's payslip seems to indicate that he has gone off scale in the current agreement and that, if that's the case, if the agreement no longer applies to him as a result, then he is covered by the award.

PN593

I just note Mr Earls just froze again and he might have missed some of that.

PN594

MR EARLS: I did. Can I just flag this, Commissioner. In respect of the BOOT, we will be making some further final submissions. To the extent that my friend's submission is accepted about how that classification structure operated, I have already suggested my client will happily provide an undertaking to make that clear. It really isn't something to get in the way of approval. It's not going to apply in practice. As I say, the intent of it is that civil worker is a new employee and that very quickly they will move up to that senior skilled, which is the sweet spot for what we would describe as a CW1(c) onwards, and then, of course, moving into those classifications.

PN595

Perhaps in light of my closing submissions on that issue, if the Commission does have concerns, they can be raised and addressed by way of undertaking, if appropriate.

PN596

THE COMMISSIONER: Okay. In that case - - -

PN597

MR LILEY: Mr Earls, I'm not sure how much you missed there or if you would like me to repeat what I just said again?

PN598

MR EARLS: All I got to was about, you know, the civil labourer, whatever it is, the civil worker, that the lowest classification doesn't, you know, expressly stop at CW1. I didn't hear the rest of it, sorry.

PN599

MR LILEY: I think what I was saying is the notion that the CW1 or a civil employee might satisfy the requirements for a first aid allowance is not outrageous given that the description of a civil employee in the agreement refers to a first aid qualification.

PN600

The last point was that Mr Barmer, on the evidence of his payslip, has gone off scale from the current agreement and so he's outside its coverage and so he's covered by the award.

PN601

Those are the only points that I wanted to raise, Commissioner, now that I've raised them several times each

PN602

THE COMMISSIONER: Yes, all right. Look, in order so we cover off, the civil worker is a new employee, the new shift work thing without the 'as required' and the third issue was the crib allowance, and I'm waiting for the document that you - so, look, I'll just ask for that document and then we can consult on the

undertakings and I'll get to and write a decision as quickly as I can. So that would be great. All right, Mr Liley - - -

PN603

MR EARLS: Sorry, did I miss something on the shift work? Was that something - - -

PN604

THE COMMISSIONER: No, no the undertaking that's already been sought, the amendment of the undertaking that's already been sought. That's what I mean.

PN605

MR EARLS: Understood.

PN606

THE COMMISSIONER: Mr Liley.

PN607

MR LILEY: I was just going to say, Commissioner, I understood that Mr Earls, in addition to those undertakings that you just referred to, would be providing further submissions about the BOOT.

PN608

THE COMMISSIONER: Yes, that's right. So it will be two directions. One is I get the document that - I'll say until Monday lunchtime he has to provide me with just a summary of the BOOT, so I've got it there in writing, and then the undertakings, you will provide me with whatever the document that the crib allowance is, so I can sort of refer to it by reference and everyone knows what I'm talking about if an undertaking is made, and then, once I get that, I will propose some undertakings to you both and you can, you know, cut and paste or amend, or whatever you want to do, and we'll see if we can reach comity on those things. All right?

PN609

MR LILEY: Yes, Commissioner.

PN610

THE COMMISSIONER: Thank you both.

PN611

MR EARLS: Thank you.

PN612

THE COMMISSIONER: That was very informative and detailed, and I didn't expect that Mr Bond was going to be recalled to give evidence, so that was a curve ball too, but, thank you, that has been very helpful to me. I'll get to issuing those directions probably before I step into this bullying complaint, and if I need anything further, I will let you know. Thank you very and we are adjourned.

PN613

MR LILEY: Thank you.

PN614

MR EARLS: Thank you, Commissioner.

ADJOURNED INDEFINITELY

[12.01 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #A1 APPLICANT'S MATERIAL IN DIGITAL COMMISSION
BOOK PN17**

**EXHIBIT #R1 RESPONDENT'S MATERIAL IN DIGITAL COMMISSION
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EXAMINATION-IN-CHIEF BY MR EARLS PN41

EXHIBIT #A2 PAYSLIP OF ANDREW BARMER..... PN61

CROSS-EXAMINATION BY MR LILEY PN68

EXHIBIT #R2 2019 ENTERPRISE AGREEMENT..... PN100

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