



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT EASTON**

**C2024/404**

**s.526 - Application to deal with a dispute involving stand down**

**Association of Professional Engineers, Scientists and Managers Australia  
(Collieries' Staff Division) T/A Collieries' Staff and Officials Association  
and  
Wollongong Resources Pty Ltd  
(C2024/404)**

**Sydney**

**10.06 AM, THURSDAY, 22 FEBRUARY 2024**

**Continued from 09/02/2024**

PN1

THE DEPUTY PRESIDENT: Good morning. Appearances are the same. Any housekeeping matters, Mr Coluccio?

PN2

MR COLUCCIO: Just one. There is one witness that will be appearing by teleconference, Mr Stewart, which is agreed by the respondent. That will be at around 12 pm and depending on where we are at that point we might need to make some decisions about whether the evidence might fall.

PN3

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

PN4

MR SECK: No, Deputy President.

PN5

THE DEPUTY PRESIDENT: Okay. Mr Coluccio.

PN6

MR COLUCCIO: Thank you, Deputy President, we propose to call Cheyne Nisbet.

PN7

THE ASSOCIATE: Can you please state your full name and address, a business address is fine.

PN8

MR NISBIT: Cheyne Geoffrey Nisbet, (address supplied).

**<CHEYNE GEOFFREY NISBET, AFFIRMED [10.08 AM]**

**EXAMINATION-IN-CHIEF BY MR COLUCCIO [10.08 AM]**

PN9

MR COLUCCIO: Sorry, just to repeat for the record, your name is Cheyne Nisbet?---Yes, that's correct.

PN10

And you reside at (address supplied)?---Yes, that's correct.

PN11

And you provided a witness statement in these proceedings?---Yes.

PN12

That is a statement dated 16 February 2024, which has 10 annexures?---Yes.

PN13

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

PN14

And do you say the contents of that statement are correct, to the best of your knowledge and belief?---Yes.

PN15

Deputy President, I tender the statement of Mr Nisbet, dated 16 February.

PN16

THE DEPUTY PRESIDENT: Thank you. Is there any objections?

PN17

MR SECK: Other than to note, Deputy President, that there's a section in Mr Nisbet's statement, from paragraphs 80 to 88, which is dealing with useful work. You may have seen that Deputy President. As you appreciate, the application sets out the grounds for which the orders are sought and we didn't apprehend that the question of useful work was an issue so we hadn't addressed that in our evidence. It wasn't addressed in the primary evidence.

PN18

Now, that obviously puts us at a disadvantage, given the timetable and the truncated way in which the matter's arisen, given that we weren't given any advance notice of this particular issue.

\*\*\* CHEYNE GEOFFREY NISBET

XN MR COLUCCIO

PN19

I simply note that objection because we are at a practical disadvantage. I intend to elicit evidence in response, from Mr Vatovec, on that particular point. But, other than that issue, Deputy President, I can obviously make submissions as to the weight that should be given to that material.

PN20

THE DEPUTY PRESIDENT: So you're not objecting to the paragraphs, you're just foreshadowing that you'll seek leave to ask Mr Vatovec some additional questions in chief?

PN21

MR SECK: Yes.

PN22

THE DEPUTY PRESIDENT: Okay, thank you.

PN23

MR SECK: May it please.

PN24

THE DEPUTY PRESIDENT: So Mr Nisbet's statement will be exhibit A4 in the proceedings. I have a system, and it's the fourth statement, in the order that they appear in the court book. So, Mr Edwards' two statements and Mr Stewart's statement will be exhibits A1 to 3 and Mr Nisbet is A4. Thank you.

**EXHIBIT #A4 WITNESS STATEMENT OF CHEYNE NISBET**

PN25

MR COLUCCIO: Thank you, Deputy President, that's the evidence-in-chief of Mr Nisbet.

PN26

THE DEPUTY PRESIDENT: Thank you.

PN27

MR SECK: Thank you, Deputy President.

**CROSS-EXAMINATION BY MR SECK**

**[10.10 AM]**

PN28

MR SECK: Mr Nisbet, you say, in your statement that you have a current practising certificate to undertake the role of a deputy, that's right?---That's correct.

PN29

In order to have a current practising certificate there is competency training that you must undertake?---Yes, that's correct.

PN30

And that's on a continuing basis, obviously, yes? You just have to say it, for the record?---Yes, that's correct.

\*\*\*

CHEYNE GEOFFREY NISBET

XXN MR SECK

PN31

And you have held the role as a deputy, in the various locations, including at Dendrobium Mine, that's right?---That's correct.

PN32

Dendrobium Mine is also in the Illawarra area, that's right?---That's correct.

PN33

And it also is an underground mine?---That's correct.

PN34

You've had a deputy's ticket since 2012. You've had training, since 2012, in the safe working methods in a mine, that's right?---That's correct.

PN35

Do you have any formal qualifications, beyond your current practising certificate, in the area of mining?---Sorry, what's the - - -

PN36

Do you have any formal qualifications, beyond having a current practising certificate?---I've got the Cert IV in underground mining and the other - like the prerequisites for getting your deputy's ticket and therefore you can apply for your practising certificate.

PN37

When you say 'prerequisites', you mean there's certain training you have to do before you get your deputy's certificate, that's right?---That's correct.

PN38

Right. And you've done that minimum training, in order to obtain your deputy's certificate, that's right?---That's correct.

PN39

You don't have any university qualifications in the area of mining engineering or similar areas?---No.

PN40

Right. Now, when you were deputy, in your role as a deputy at Russell Vale Colliery, did you participate in any vote for health and safety representatives at the site?---Did I vote?

PN41

Yes?---No.

PN42

Were you aware there was an opportunity to vote for an HSR representative?---I was aware, after the fact.

PN43

Right?---Yes.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN44

Do you know who your HSR representative is, at the moment?---No. As far as I was aware they didn't actually have - they put out a tender for people to become representatives and then that was squashed because of lack of people wanting to do it.

PN45

All right. So your understanding is that there was a lack of volunteers amongst deputies to be a health and safety representative, that's right?---No, not - that's across the board. That's - - -

PN46

Right?---Yes.

PN47

In all roles, including deputies, correct?---That's correct.

PN48

You didn't put your hand up to be a HSR representative?---I - I was looking to it in the second lot, when they tried to do it again, and, yes, I - - -

PN49

Your understanding is that one aspect of being an HSR representative is the ability to represent the workforce, in relation to health and safety issues in the workplace, correct?---That's correct.

PN50

And if there are any concerns about health and safety issues in the workplace, one of the mechanisms available for raising those issues is to do it through your HSR representative, that's right?---If there is one.

PN51

Yes. If there isn't an HSR representative available then you understand there are mechanisms within the workplace to raise health and safety issues with management, that's right?---That's correct.

PN52

And, indeed, you have an obligation to take reasonable care for your own health and safety in the workplace, do you agree?---That's correct.

PN53

And if you have any concerns about the safety of any working methods at the mine, you had an obligation to raise it with your employer, that's right?---That's correct.

PN54

You took the obligation to raise these issues seriously, yes?---Yes.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN55

All right. If you had any real concerns about health and safety in the workplace, you would have raised it with Wollongong Resources, in accordance with your obligations?---As I have with my under manager.

PN56

Right. And you would have raised it - so you agree that you would have raised it?---I agree I have raised them.

PN57

Yes. Now, you aware, at Wollongong Resources, there is a safety management system in place?---Yes.

PN58

And there are risk assessments?---Yes.

PN59

There are also particular safe working procedures, that's right?---Yes.

PN60

One of the safe working procedures you're aware of is the mining across boreholes procedure?---Yes.

PN61

You refer to the permit to mine document in your statement, that's right?---Correct.

PN62

And you have, annexed to your statement, a permit to mine for a particular - for Russell Vale Colliery, that's right?---Yes.

PN63

And if you go to - do you have your statement with you, Mr Nisbet?---Yes, I do.

PN64

I'd like you to go to the first annexure or attachment, it's CN1 to your statement. If you're using the hearing book, Deputy President, it's at page 83.

PN65

THE DEPUTY PRESIDENT: Yes.

PN66

THE WITNESS: CN1 is the permit to mine?

PN67

MR SECK: Yes. So it's got a number of pages, and tell me if you recognise that, did you find it?---Yes.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN68

So at the front you'll see that it deals with intersection of in-seam boreholes, at the top of the page? So this is the very first page of CN1 and it says 'Russell Vale Colliery'?---Yes.

PN69

So in red, so you'll see, in the top left-hand corner, Mr Nisbet, 'Intersection of in-seam boreholes'?---Yes.

PN70

Yes. And it refers to an intersection management table, on the reverse side of the PTM for all boreholes that may be intersected with the PTM area, do you see that?---Yes.

PN71

You understand PTM means 'permit to mine'?---Yes.

PN72

It says:

PN73

*Each intersected borehole shall be recorded in the crib room permit to mine and returned to the mine surveyor once mining is completed with in the PTM area.*

PN74

?---Yes.

PN75

And then it says:

PN76

*Intersection of boreholes is to be managed as per the safe work procedure RBCMINSWP051, mining across boreholes.*

PN77

?---Yes.

PN78

You're familiar with the safe work procedure for mining across boreholes, that's right?---Yes.

PN79

As part of completing or going through the PTM, you know that you have to follow the safe work procedure, that's right?---Yes.

PN80

You've been trained in that safe work procedure, would you agree?---Yes.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN81

In receiving training in these methods, you've been specifically trained as to how to hold it in the bag?---Not from Wollongong Resources, no, it's only from other - training from other pits.

PN82

So other pits use the bagging method and you've been trained in how do to that properly?---Yes.

PN83

Have you also been trained in how the holes are to be closed?---Not from Wollongong Resources, no.

PN84

But in your previous job?---Yes.

PN85

And that's at Dendrobium Mine?---Yes, and Tahmoor.

PN86

And, sorry?---And Tahmoor.

PN87

Tahmoor, T-a-h-m-o-o-r, just for the record?---Yes.

PN88



You worked at Tahmoor Mine prior to working at Dendrobium Mine, is that your evidence, Mr Nisbet?---Yes.

PN89

The method of mining used at Russell Vale Colliery, is that similar to what's used at Dendrobium and Tahmoor?---No, not entirely. Several - there's two methods of mining used at Russell Vale and there's two methods of mining used at Dendrobium. Only one of them - so there's only the cut and bolt one that's the same. So we use - the other one we use is place change, at Russell Vale, and they use long bore mining. Yes.

PN90

I understand, we'll come back to that shortly, in more detail. Can I then deal with - are you aware that the PTM document was developed in conjunction with the workforce?---Yes.

PN91

And that one of the reasons why the PTM document was developed was because the workforce complained that they wanted something which was a shorter, easier reference document, rather than lengthy cumbersome paperwork?---I've read that in the statement. Other than that, I was not aware.

PN92

And a PTM document is discussed at the commencement of every shift, in your experience?---Yes.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN93

And that usually takes up about the first 30 minutes of each shift, or thereabouts?---It would not take that long.

PN94

All right. How long does it usually take?---Probably - roughly half an hour, 15 minutes.

PN95

All right. And - - - ?---Depending on - sorry, I didn't mean to cut you off - - -

PN96

That's all right?--- - - - but depending on, you know, what type of mining we're doing and the risks involved but, generally, it would be 15 minutes.

PN97

Right. And during that discussion, workers are made aware of any boreholes in that particular PTM location?---Yes, that would - - -

PN98

And that's so you know which boreholes may be intercepted during that particular shift?---Yes.

PN99

All right. Then that's to tell you whether or not those boreholes should be bagged or hosed, that's right?---Yes, given the information that we have, yes.

PN100

As the deputy, you're the one responsible for deciding whether or not to bag or hose the borehole that's intersected?---We can't really make a - we can only go by what's on the permit to mine, which only encompasses our panel. The deputy can only be responsible for what's encompassed by the permit to mine. So we can only go off what we see on this permit to mine.

PN101

So the permit to mine basically gives you the guide as to what you should be doing, in terms of hosing or bagging, correct?---That's right, from the information on the permit to mine. That's not with strict direction though, that is basically up to the deputy to see fit how they do it.

PN102

Right. So, in other words, there is a judgment that the deputy exercises, in terms of when to do it?---For his shift, yes.

PN103

For his shift?---That's correct.

PN104

So, ultimately, if you were the deputy on shift, it would be your call as to whether or not to bag it or hose it?---That's correct.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN105

You obviously call upon your competency and experience in making that judgment, do you agree?---Yes, that's correct.

PN106

It's something which you've done, not only at Russell Vale Colliery but in your previous roles as a deputy at other mines, including Tahmoor and Dendrobium?---I was not a deputy at Tahmoor, I was underground. But, yes, I've been involved in the bagging and hosing off.

PN107

And at Dendrobium that was a judgment you would exercise, based on a similar document to the PTM?---At Dendrobium?

PN108

Yes?---No. We were given more information on what to do with the holes, at Dendrobium.

PN109

All right. Here you were given more responsibility to make your own judgment, based on your experience?---That's correct.

PN110

Can I then deal with garbage bag testing? You raised garbage bag testing, at paragraph 26 to 39 of your statement, Mr Nisbet?---Yes.

PN111

Tell me if I'm right on my understanding of garbage bag testing, based on the evidence. What it's designed to do is to detect whether or not there's any gas flowing in from the borehole, by putting a bag, a garbage bag - - -?---Out of the borehole, yes.

PN112

Out of the borehole?---Yes.

PN113

And if there is gas coming out through the borehole then it will inflate the garbage bag?---That's correct, yes.

PN114

So it's kind of - it's a method for determining whether or not there's gas there and the speed of the gas flow?---That's right, the flow rate.

PN115

The flow rate, you call that the flow rate?---Yes.

PN116

Now, in your experience working at Dendrobium and other places, the flow rates are going to differ between mine to mine, would you agree?---Yes. They're different between hole to hole.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN117

Hole to hole, and that depends on a whole lot of geological characteristics?---Yes.

PN118

And that's why you're doing the test, because it may differ from hole to hole, from mine to mine?---That's correct.

PN119

Would you agree with me that Russell Vale Colliery generally doesn't have holes that generate more than 75 litres per second?---Yes.

PN120

And that - - -?---That's going by the current testing.

PN121

Okay?---To be honest, I don't know. I don't really know because I can only go off the values which are given by garbage bag.

PN122

What it's giving you is just a kind of an indication of whether or not the gas - it's not giving you precise measurements, correct?---That's correct.

PN123

And if the gas comes through and inflates the garbage bag, that will alert you to take further steps to deal with the gas flow, that's right?---That's correct.

PN124

Okay?---This is done by the out by(?) deputy too, so it's not done by the panel deputy, it's done by an out by deputy. So I, myself, have done a couple of them, when I've been put out by, but it's generally done by the - or an under manager.

PN125

All right. You've never complained about the gas bag method to anyone within management?---Yes.

PN126

You have?---That's correct.

PN127

Have you complained of it to Mr Vatovec?---I haven't had, yes, Mr Vatovec in that capacity.

PN128

Who did you complain to?---It was Jono Caunt, he was the - I'm not quite sure, I'm not entirely - I think he was the under manager at the time, I'm not really sure, depending on the timeframe, because he's exercised quite a few different roles throughout that time.

PN129

So John O'Caunt?---Jono Caunt.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN130

Can you spell that?---Jono, so Jono, Caunt, C-a-u-n-t.

PN131

Right. And you said he was the under manager?---I think he was the under manager at the time.

PN132

Just so I understand the term under manager, do you mean underground manager, is that what it stands for?---That's correct.

PN133

All right?---He encompasses the shift, but that's also above ground, so the surface work, but it's at an underground mine.

PN134

All right. Now, can I go to the method of mining, which you've raised in your statement. The method of mining which is used is place change mining?---Place change mining, that's correct, and also there is also cut bolt mining.

PN135

Cut bolt mining?---Yes, done with a miner, with bolting rigs.

PN136

So you're saying cut bolt mining is also used at Russell Vale?---That's correct.

PN137

When you joined, commenced employment with Russell Vale Colliery, you were aware that place change mining was the method of mining used there, correct?---That's correct.

PN138

So you went there in the belief that place change mining was a safe method of work because you chose to be employed working at that mine with that mining method in place, correct?---I was interested in going there so I could learn place change mining.

PN139

When you say you could learn place change mining, you understood that place change mining can be a safe method of mining?---In the right environment, yes.

PN140

And you're aware that the method of mining has to be approved by the New South Wales government?--- Yes.

PN141

Yes?---I believe all mining has to be approved.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN142

And place change mining is used, amongst other things, to mitigate subsidence?---That's correct.

PN143

And in mitigating subsidence, that's often a function of the geographical, geological features of where the mine's located?---That's correct.

PN144

So if that's the method of mining which has been approved by the New South Wales government, that's the mining method you have to use, do you agree?---I agree, yes.

PN145

You've seen that the government - I withdraw the question. Just hold on one second, Mr Nisbet. Now, Mr Nisbet, you talk about other useful work you think that the workforce could do, in your statement, do you see that?---Yes.

PN146

You refer to strata advices, which have been issued by the geotechnical officer?---Yes.

PN147

Just so we're all clear, what is a strata advice?---So part of our inspections includes looking at the roof, roof and rear bin, making sure that it appears safe and there's no defamiation happening. If we've identified areas which seem to be taking weight, then we make a note of it in our - we may have to make the area safe, so if we deem it bad enough it we can no road it and barricade it and then we then get the expert advice from the geotech. He'll come down and make an assessment on what extra work needs to happen there. So he has seen that area and said that we need to no road it and those areas need to have a support, an amount of extra secondary support applied to it.

PN148

You say, in your statement, that there are dangerous areas which require urgent attention. These stratas which require secondary and additional support, I assume that there's going to be ongoing mining taking place, correct?---That's correct.

PN149

Are you aware that there's been a decision to close the mine, that's right?---That wasn't made when the stand down was initially done.

PN150

You're aware there's been a decision made to close the mine, correct?---Eventually they did make that decision. Yes, that's correct.

PN151

You know that there were steps being taken to try to life the prohibition notice, correct?---That's correct.

\*\*\* CHEYNE GEOFFREY NISBET

XXN MR SECK

PN152

You say that you're aware that strata advices have been issued by the geotechnical officer. You haven't checked the specific strata advices which have been issued recently, have you?---No.

PN153

No further questions.

**RE-EXAMINATION BY MR COLUCCIO**

**[10.37 AM]**

PN154

MR COLUCCIO: Just a couple of quick things. Mr Nisbet, you were asked about raising concerns for the roles of deputy, you recall those questions?---Yes.

PN155

Why didn't you raise issues, in relation to PC22, specifically, in your role as deputy?---Sorry, can you repeat that?

PN156

In relation to PC22, specifically, why didn't you raise any concerns about the safety aspects?---That's not my panel. My panel was Wonga Mains, which is a different panel. I'm not privy to - the responsibility of that is a different deputy at the time.

PN157

You were also asked some questions about the permit to mine, and deputies being able to make decisions, based on looking at that permit to mine, do you recall those questions as well?---That's correct. Yes, that's correct.

PN158

Can I just get you to look at the permit to mine again, specifically the third page of it which lists the boreholes?---Yes.

PN159

Now, does this permit of mine - sorry, could you identify, for the Deputy President, which hole is the hole that was intersected, leading to the frictional ignition event? So I'm looking here, not at the map but at the table on the third page, which has a sequential listing of flow rates of the different holes?---Yes. So it's S7-2 branch A.

PN160

That's the hole at the bottom of that page, isn't it?---Yes.

PN161

Does that hole list that that particular hole is bagged?---No.

PN162

Does the permit to mine have a borehole intersection notice attached to that hole?---No.

\*\*\* CHEYNE GEOFFREY NISBET

RXN MR COLUCCIO

PN163

So, in your opinion, would a deputy be able to make a judgment call, based on the information in the permit to mine, about whether that hole was safe to be intersected?

PN164

MR SECK: I object. How does this arise in re-examination?

PN165

MR COLUCCIO: Well, the question's been put that deputies are able to rely on this document in order to make decisions about mining. The question, quite simply, is whether or not there's sufficient information in that document to be able to make those decisions.

PN166

THE DEPUTY PRESIDENT: You have to ask some other questions before you could ask that question. You'd need to make clearer the link between what you're asking about and what fell in cross-examination.

PN167

MR COLUCCIO: So it was put by my learned friend to you, Mr Nisbet, that you would be able to use this document, the permit to mine, to determine whether a borehole is safe to be intersected, do you agree with that?---Yes.

PN168

Do you believe that there's sufficient information for you, as deputy, to be able to make that determination?---I do.

PN169

MR SECK: I object. I think the link hasn't been sufficiently established. I didn't ask him whether or not this was a document which was used in relation to the incident. There's no evidence to suggest that he was the one responsible or he was the responsible deputy for that particular incident. So I don't think the foundation has been adequately established, even if it could be asked to ask the question that's been put.

PN170

MR COLUCCIO: I'll withdraw.

PN171

Can I ask you this, what information would you expect to see on a permit to mine, in order to make a determination about what information you would need, in order to intersect a borehole?---You'd need to know the flow rates. Pretty much all the information that's on there at the moment, as long as it's correct. So you're going to need to know the flow rates at the collar, and that's depending on whether - that's with the assumption that it is hosed all the way in there, all the way to the collar. But the permit to mine itself, for intersecting boreholes, should be complete. So that's the information. Like if there was an issue with the borehole then they would have a borehole in a section notice issued. So that's the information you would get.

\*\*\* CHEYNE GEOFFREY NISBET

RXN MR COLUCCIO

PN172

Just one final point. You were asked some questions about whether you ever complained to management about the gas bag test, and you said words to the effect that you had complained to Jono Caunt. Could you tell the Deputy President about the circumstances of that complaint?---It was - to be honest it wasn't so much as a complaint as a - as a concern as to how well this procedure of doing it was and how accurate it was. On the permit to mine we actually list a value, we're given a value that we have to use and I don't - like understand how that value, as an accurate value, can be put on there when it's - you know, I could understand high, low, but not a value written on there, as a way to - so that's all I can express to him, that it wasn't - yes, a correct value. It's not an accurate value so it can't be used as a way to measure. He said back to me that it was - it was a discussion, it wasn't a complaint, it was a discussion and he said that through talks with their experts that they've been told that that's the best - that's actually a very accurate system, which I disagreed with, but that's as far as it went.

PN173

When would that have occurred, roughly?---Again, it was - it would have been - it was after the third incident.

PN174

Nothing further.



PN175

THE DEPUTY PRESIDENT: Thanks, Mr Nisbet, thank you for your evidence. You're free to stay and watch the rest of the proceedings, if you want to, or you're free to go about your day?---Okay. Thank you.

<THE WITNESS WITHDREW

[10.44 AM]

PN176

MR COLUCCIO: I might seek to tender the two statements of Mr Edwards now. I understand he's not required for cross-examination.

PN177

THE DEPUTY PRESIDENT: Okay. Any objections, Mr Seck?

PN178

MR SECK: There's been an agreement between the parties that Mr Edwards would not be required for cross-examination if Mr Greg Pawle from the respondent was also not required for cross-examination. As you may have remembered, Deputy President, there's a contested conversation which is alleged to have occurred between Mr Edwards and Mr Pawle. The basis upon which we have come to that agreement is that no *Browne v Dunn* point will be taken.

PN179

THE DEPUTY PRESIDENT: Okay. Thank you. I'm fine with that. And there's no specific objections to any parts of Mr Edwards' statements?

\*\*\* CHEYNE GEOFFREY NISBET

RXN MR COLUCCIO

PN180

MR SECK: No other objections.

PN181

THE DEPUTY PRESIDENT: Okay. So Mr Edwards' first statement starts on page 37 in the court book, is exhibit A1 and Mr Edwards' second statement starts on page 60 in the court book, is exhibit A2.

**EXHIBIT #A1 FIRST STATEMENT OF MR EDWARDS**

**EXHIBIT #A2 SECOND WITNESS STATEMENT OF MR EDWARDS**

PN182

MR COLUCCIO: As we foreshadowed, Mr Stewart won't be available till 12, so given the time, I'm hoping we could perhaps hear Mr Vatovec's evidence and return to Mr Stewart, if that's agreeable.

PN183

THE DEPUTY PRESIDENT: Okay. Thank you. Mr Seck.

PN184

MR SECK: May it please, Deputy President. Perhaps I can identify the four statements of Mr Vatovec whilst he's being asked to come into the room. Mr

Vatovec has filed four statements, the first one being under tab 10, which is dated 31 January 2024. There's a second statement dated 9 February 2024, under tab 11. The third statement of Mr Vatovec, under tab 12, dated 16 February 2024 and a fourth statement, dated 21 February 2024, under tab 13.

PN185

THE ASSOCIATE: Can you please state your full name and address, a business address is fine.

PN186

MR VATOVEC: William Roman Vatovec, and business address is Princess Highway, Corrimal.

**<WILLIAM ROMAN VATOVEC, AFFIRMED** [10.47 AM]

**EXAMINATION-IN-CHIEF BY MR SECK** [10.47 AM]

PN187

MR SECK: What is your full name?---William Roman Vatovec.

PN188

And what is your current work address?---It's Princess Highway, Corrimal.

PN189

What is your current occupation?---General manager, operations and manager of mining engineering.

\*\*\* WILLIAM ROMAN VATOVEC

XN MR SECK

PN190

Mr Vatovec, you have prepared four statements in these proceedings, that's correct?---Yes.

PN191

I think you have a folder in front of you, of documents, is that - sorry, you have your four statements in that folder?---I have my statements.

PN192

Yes. The first statement that you prepared is dated 30 January 2024, correct?---Yes, correct.

PN193

Is the second statement you have with you dated 9 February 2024?---Correct.

PN194

Is the third statement you have before you dated 16 February 2024?---Correct.

PN195

And you have a fourth statement, which is dated 21 February 2024?---Correct.

PN196

Have you read those statements recently?---Yes.

PN197

Do you wish to make any changes to any of those statements?---No.

PN198

Are the contents of each of those statements true and correct, to the best of your knowledge and belief?---Yes.

PN199

I tender each of those statements, subject to any objections.

PN200

THE DEPUTY PRESIDENT: Thank you.

PN201

MR COLUCCIO: No objection.

PN202

THE DEPUTY PRESIDENT: Thank you. Okay, so Mr Vatovec's first statement starts at page 186 in the court book is exhibit R1. Second statement starts on page 230 is exhibit R2. His third statement, which starts on page 496, is exhibit R3. And then Mr Vatovec's final statement starts on page 617 is exhibit R4.

**EXHIBIT #R1 WITNESS STATEMENT OF WILLIAM VATOVEC  
DATED 30/01/2024**

\*\*\* WILLIAM ROMAN VATOVEC

XN MR SECK

**EXHIBIT #R2 WITNESS STATEMENT OF WILLIAM VATOVEC  
DATED 09/02/2024**

**EXHIBIT #R3 WITNESS STATEMENT OF WILLIAM VATOVEC  
DATED 16/02/2024**

**EXHIBIT #R4 WITNESS STATEMENT OF WILLIAM VATOVEC  
DATED 21/02/2024**

PN203

MR SECK: May it please the Commission, no further questions in chief for Mr Vatovec?

PN204

THE DEPUTY PRESIDENT: Okay. Mr Seck, you - - -

PN205

MR SECK: Yes, sorry.

PN206

THE DEPUTY PRESIDENT: Weren't you going to ask him about - - -

PN207

MR SECK: I was going to ask him. I've just been reminded that I should, that is absolutely my fault, I apologise to my learned friend.

PN208

MR COLUCCIO: We would object to this evidence being led, in relation to what Mr Seck's put previously. This evidence, in relation to the useful work was filed by us, in accordance with the directions and the respondent was given an opportunity to respond to that evidence. Now we'd say, in relation to how this matter is determined, it's for the respondent, and the burden is with them, to establish each of those elements. But to the extent that they say the matter's not been brought, that's a matter for submissions. As to the evidence that goes to that point, the opportunity has come for them to be able to put that evidence on, but there was useful work, it has come and past, and we should say that they wouldn't be entitled to lead more evidence today on that point.

PN209

MR SECK: Obviously the issues that have come before this Commission have come on very quickly, but the parameters of those issues are articulated, at least at the start, in the application itself, Deputy President, which is the form F13.

PN210

The form F13, which is under tab 1 of the court book, sets out the basis upon which the applicant asserts that the stand down was unlawful. That is set out, just looking at the court book page numbers, at page 11 of the court book, page 5 of 7 of the application.

\*\*\* WILLIAM ROMAN VATOVEC

XN MR SECK

PN211

The basis for the claim that the stand down was unlawful solely on the ground that the circumstances in section 524(1)(c) of the Fair Work Act had not been invoked. That is:

PN212

*A stoppage of work for any cause for which the employer cannot reasonably be held responsible.*

PN213

That is usually underlined, as the basis upon which the applicant claimed the stand down was unlawful. Then there's references, in paragraphs 16 to 19 to the claim that the respondent failed to implement sufficient controls to eliminate the minimum frictional ignition events. No other grounds were raised in the application.

PN214

Now, when there was supporting evidence put on, in support of the application, by Mr Edwards, at tab 3, which was considered the evidence-in-chief, Mr Edwards' statement, dated 31 January 2024, refers to various factual circumstances which justified the making of the orders in the application.

PN215

Nowhere is it to be found that there's any reference to the claim that the employees could be usefully employed doing the work, other than the work for

which they were employed to perform. Because of the nature of the directions that were filed, we weren't to respond to the applicant's case on the issue.

PN216

You would have read, from our written submissions, we had identified, as the sole issue, as we understood it, to be whether or not the respondent could be reasonably held responsible for the stoppage of work, for the call for the stoppage of work.

PN217

Now, it's been raised, in evidence, that we've received in reply. We've obviously sought to address it as quickly as we can but given the speed at which things occur, we obviously can't address every point. I'm just seeking a very minor indulgence to break to elicit this evidence from Mr Vatovec, in chief, with leave of the Commission. My learned friend will have the opportunity to cross-examine Mr Vatovec on those particular issues. There's no prejudice in those circumstances.

PN218

MR COLUCCIO: We'd simply say the majority of what's been put are matters for submissions, as to why the Commission would or would not consider the presence of useful work as a reason why it would make its determination.

\*\*\* WILLIAM ROMAN VATOVEC

XN MR SECK

PN219

As to whether evidence should be put on to that point, Mr Vatovec provided a witness statement subsequent to the evidence that was put by Mr Nisbet that indicated there was useful work. Mr Pawle provided a witness statement which goes to that issue as well. So there has been that opportunity for evidence to be put. It wouldn't be appropriate for that evidence to now be led in circumstances where there was ample opportunity for those matters to be put and the applicant not have notice of that evidence in advance.

PN220

THE DEPUTY PRESIDENT: I'm going to allow the additional questions in chief and if evidence comes from that which catches you by surprise, Mr Coluccio, or opens up something that you could not reasonably have anticipated, or is just something that you want to pause and reconsider and sharpen your knives before you start cross-examining Mr Vatovec, then I'll give you time for that.

PN221

MR COLUCCIO: May it please.

PN222

THE DEPUTY PRESIDENT: If that's five or 10 minutes, so be it. If it's a couple of hours then we'll deal with it if it comes. Mr Seck.

PN223

MR SECK: May it please, Deputy President.

PN224

Mr Vatovec, have you read the statement of Mr Cheyne Nisbet?---Yes, I have, Mr Seck.

PN225

Mr Nisbet - I want you to respond to some points which Mr Nisbet raises in his statement, and I'll take you to them. Mr Nisbet says, in his statement, you don't have to have it in front of you, that he believes there's sufficient useful works to be undertaken during the period of this - during the period of the stand down, by some or all of the workforce. Now, the first thing he identifies are strata advices, which he says identifies parts of strata that require secondary or additional support.

PN226

*These are dangerous areas which require attention. There has been no labour on site to be able to complete this work.*

PN227

He says:

PN228

*The strata advices have been issued by the geotechnical officer.*

\*\*\* WILLIAM ROMAN VATOVEC

XN MR SECK

PN229

Can you tell the Commission whether or not there have been strata advices issued by the geotechnical officer, which could be useful work performed by the workforce?---Deputy President, the strata advice is provided throughout the mine. There's no evidence there of specific areas of concern. There is no areas that would consider the operation to address any specific strata advices. We had a comprehensive assessment on all strata conditions and we have the necessary resources to deal with all of those specific issues. Mr Nisbet's statement is not totally correct. We address those based on the specifics and none of those strata advices that come to my attention would be considered of a risk to the people or the operation.

PN230

Mr Vatovec, Mr Nisbet also says there is clean up and maintenance work which could be done at the mine and that members of APESMA could be usefully employed in doing that work, including stone dusting and equipment removal. Can you tell the Commission whether or not there is clean up and maintenance work that could be done by members of APESMA?---Deputy President, since the announcement of closures the operation has set up suspension - safe suspension of all operational requirements. I heard about - stone dusting needs to be completed every 24 hours and so that was completed. In regards to tidying up and so forth, we have sufficient labour in place to - to undertake any of those activities, but we do it on the basis that if it's impacting on the safety and the risk of the employees then we'll attend to it.

PN231

Mr Vatovec, you said you have sufficient labour in place to do that cleaning work  
- - -?---That's correct.

PN232

- - - who are you referring to when you - - -?---With the current employees that we have that had been employed to look at the removal of machinery and to stabilise the activities underground.

PN233

You said that there'd been a decision to - from the time of the decision to close the mine, there was a period of time between the time of the issuance of the prohibition notice to the time of the decision to close the mine, was there any useful clean up and maintenance work that could have been done by members of APESMA during that period?---No.

PN234

Can you explain why, to the Commission?---Deputy President, the main areas that we do that, based on inspections that current members of APESMA undertake. Any issues that are brought to my attention, then we will deal with them. None of those - attention particularly on maintenance because we'd stopped operations. Everything had been shut down and there was no necessary requirement for any additional work or maintenance or tidying up.

\*\*\* WILLIAM ROMAN VATOVEC

XN MR SECK

PN235

Lastly, Mr Vatovec, Mr Nisbet says that he understands Wollongong Resources had intended or has intended to implement new and further controls against the risks and hazards identified by the regulator. Can you confirm whether or not Wollongong Resources has such an intention?---Yes.

PN236

Can you explain to the Commission what new and further controls are going to be put in place, in the time period?---Deputy President, we - from the events that transpired, particularly with the frictional ignitions, we've had a continual process of improvement in regards to understanding the frictional ignitions themselves. But, more importantly, since the last event, we've introduced some independent experts to better understand our controls. We have a very good understanding of our controls and we will continue to improve. Some of those have been readily implemented, some of them are longer term and require time and resources to complete. However, we - in regards to dealing with those frictional ignitions and those critical controls, it is a continual focus and process. So the simple answer is, yes, we will continue.

PN237

In dealing with that continual process, Mr Vatovec, Mr Nisbet says that:

PN238

*The instruction and training against these risks is a task that could have occurred during the stand down period, to ensure that the workforce was*

*sufficiently trained and capable of implementing those processes, upon proposed recommencement of production.*

PN239

Can you advise the Commission of your view as to whether or not instruction and training against those risks could have occurred during the stand down period?---Deputy President, those instructions were done way before the stand downs occurred. Mr Nisbet and other members of APESMA had to undertake a quarterly training, which occurred in October. They also had to undertake, after this previous fourth event, a competency based training. Under that competency based training every deputy, every under manager, key miner drivers and operators, required specific areas which they were tested and that was put on their training records. So to say that we need to continue on with it is incorrect. Obviously with this fifth event, with the remaining workforce, we'll continue on with retraining in the new specific areas.

PN240

When you say you will continue on with retraining in the new specific areas, which cohort of employees are you referring to?---The remaining employees.

PN241

Right. When you say 'remaining employees', you mean those who are engaged to retrieve the equipment?---Yes.

PN242

Right. No further questions in chief.

\*\*\* WILLIAM ROMAN VATOVEC

XN MR SECK

PN243

THE DEPUTY PRESIDENT: Thank you. Are you good to go, Mr Coluccio, or do you want to have a - - -

PN244

MR COLUCCIO: I think we'll just proceed, thank you, Deputy President.

PN245

THE DEPUTY PRESIDENT: Right.

**CROSS-EXAMINATION BY MR COLUCCIO**

**[11.06 AM]**

PN246

MR COLUCCIO: Mr Vatovec, I've had the opportunity to read your statement and obviously you've set out quite a wealth of experience you have in the coal mining industry, 25 years experience, and I won't go through every position, but it'd be fair to say you've got a fairly high level of expertise and experience in the industry, is that right?---That's correct.

PN247

At Russell Vale part of your role, from the regulation, is implementing specific control measures against risk and hazards on the site?---That's correct.



PN248

And monitoring and auditing and reviewing safety management systems, that's another part of that, isn't it?---Yes.

PN249

Those are duties under the Work Health and Safety (Mines and Petroleum Sites) Regulation, aren't they?---Yes.

PN250

So in your role you essentially take all reasonable steps to ensure the controls are as good as they can be. That's a fair summation of part of the work you do, isn't it?---Yes.

PN251

And you stay up to date with the best practice controls in the industry?---Yes.

PN252

So when you're carrying out your statutory function to implement those controls, you'd have regards to what the current best practice is, either in theory or other mine sites or wherever it might be?---Yes.

PN253

And really, if you weren't looking at industry standards and you weren't looking at what other sites were doing, you might miss out on controls that could effectively control hazards and risks, as they arise at Russell Vale?---No.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN254

No? So if you didn't look at other mine sites and what they were doing, there's no chance that you might not become aware of a control method that they're using that might be useful at Russell Vale?---Mr Coluccio, if you could just step back a few steps. I believe what you asked me was, do I look at other mines or other areas to improve. The answer is, yes.

PN255

Yes. What I'm putting to you is that if you didn't do that work, there's a chance, and you'd have to agree with me there's a chance, that you might miss out on controls that could be effective at Russell Vale. That's just common sense, isn't it?---I don't know.

PN256

So Russell Vale has suffered five frictional events in that 18-month period, you'd agree that that's a high amount of frictional ignition events to happen in a short period of time, wouldn't you?---Yes.

PN257

Would you describe it as an unacceptable amount of frictional ignition events?---Yes.

PN258

And frictional ignition events can lead to pretty catastrophic outcomes, can't they?---That's difficult to answer. I would say, yes.

PN259

Well, it could lead to an explosion of the panel, killing the men at that panel, couldn't it?---No.

PN260

You're saying that the methane in that panel could not be ignited to a point where it explodes?---That's correct.

PN261

If there were issues with stone dusting and a frictional ignition event occurred, then the coal dust could ignite and explode, couldn't it?---Yes.

PN262

Russell Vale was issued with an improvement notice, in January, at the time of the frictional ignition event, saying that it was not meeting a legally required minimum for stone dusting, wasn't it?---I'd need to refer - I do recollect, yes.

PN263

So those tests showed that there wasn't enough inert materials mixed in with the explosive coal dust to meet those requirements. That's effectively the long and short of what that was, wasn't it?---No.

PN264

No?---No. The reason is, is because the testing regime by the inspectorate, which I've raised with the inspectorate, is incorrect.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN265

So in the materials there's a test from Mine Safety Laboratory, which says:

PN266

*Total incombustibles 77 per cent. Required incombustibles 85 per cent. Compliance fail.*

PN267

That's at test dated 9 January, so just after the frictional ignition event. So do you say that those results were wrong?---Those results are correct.

PN268

So there was an issue with stone dusting at the time of the frictional ignition event?---In the specifics, Mr Coluccio, 77 per cent is only 3 per cent below the 80 per cent incombustible requirements.

PN269

And that 80 per cent, that's a requirement of the regulations?---That's correct.

PN270

So it's 3 per cent of what's required of you, by law?---Yes.

PN271

Okay. So it was not meeting a legal standard, at the time of the frictional ignition event. I'm just trying to put those pieces together. That's right, isn't it?---Yes.

PN272

Okay. So does that make you rethink your earlier statement to me that a frictional ignition event could not result in an explosion which would kill men? Because you've clearly got an issue with stone dusting here, where it could ignite, couldn't it?---No. The reason is, is that there's a significant amount of safety factors built into the incombustibles. To have anything which is 95 per cent of the 80 per cent is considered still safe. Yes, I do agree that it should have been to the 80 per cent, however the risk of a propagation of the explosion is very remote.

PN273

Very remote, so it could happen?---It's very remote.

PN274

I'll just get you to answer my question. It could happen?---No.

PN275

So - okay. You say the risk is very remote, but it could not happen?---If the - if it was not stone dust it would - stone dust has a retardant ability so I can't conclusively say yes or no.

PN276

Well, what I've identified for you here is that Russell Vale did not meet the stone dusting requirements, set out by law, at the time of the last frictional ignition event, isn't that right?---That's correct.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN277

The reason that that standard exists, at law, is to make sure that if something like this does occur that there's enough incombustible material in the atmosphere so that that explosion couldn't propagate and go throughout the mine. That's a very high level summary, isn't it?

PN278

MR SECK: I object. How can Mr Vatovec give evidence as to why a standard is in place, or not?

PN279

MR COLUCCIO: It's a very simple question and I would have thought the general manager of a coal mine could reply.

PN280

THE DEPUTY PRESIDENT: I think you're entitled to ask the question, see if he knows. But it was a very long question.

PN281

MR COLUCCIO: I'll put it this way. Do you know why the Act requires 80 per cent combustibles to be the minimum requirement - incombustibles, to be the minimum requirement, in relation to stone dusting?---Yes.

PN282

Is it so that an explosion does not propagate throughout a mine, if there is an ignition?---It - no.

PN283

Is that one of the reasons?---That's one of the reasons, yes.

PN284

Okay. So these frictional ignition events, which you agree it's an unacceptable amount in such a short timeframe, they keep happening. So, as a general manager and the mining and electrical manager, you'd do everything in your power to really make sure that that doesn't keep on happening, wouldn't you?---Absolutely. Yes.

PN285

You'd want to give it top priorities?---Yes.

PN286

Now, you'd agree with me, and leaving aside the question of responsibility and all of that, but you'd agree with me that the controls of Russell Vale could be improved, couldn't they?---Yes.

PN287

Again, leaving that question aside, you'd agree that fixing some of those issues would make frictional ignition events less likely in the future?---Yes.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN288

The work that - you've put some significant evidence on about this - the work you've done after the fifth frictional ignition event, speaking with experts and what not, that was the work you were undertaking to try and fix these efficiencies and controls to make frictional ignition events less likely in the future?---Yes.

PN289

Now, I want to ask you some questions about the Polaris report, issued way back in October. You're familiar with the contents of that report, aren't you?---Yes.

PN290

I'm looking at a page, I believe, 109 in the court book, for your information, Deputy President. That document made nine recommendations, didn't it?---Yes.

PN291

So looking at that report, and looking at recommendations 5 to 9 here, that work, at a very high level, is:

PN292

*To undertake risk assessments, conduct an engineering review, and review the frictional ignition management systems.*

PN293

Is that a pretty fair summation of what that work was recommended by that report?---Yes.

PN294

In your third statement you say, in relation to those items, 5 to 9:

PN295

*The work required to address recommendations 5 to 9 would take up to six months and we anticipated the work to be completed in the second quarter of 2024.*

PN296

That's correct, isn't it?---Yes.

PN297

All right. I want to turn then to the report you had commissioned by Mr Duncan Chalmers, this is page 594 in the court book. So this report is titled, 'An investigation into the adequacy of controls to mitigate and control frictional ignitions', that's right, isn't it?---Yes.

PN298

That's a fair summary of what Mr Chalmers was employed to do, isn't it, or he didn't go out on a limb by having to put that title to you?---Yes.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN299

Now, if I turn to page 597 of that report, there's an extract here, which is an email, or otherwise, from you to Mr Chalmers, instructing him on what you were looking for, from this report. The first point you put to him is that you want to determine the WRLRVC current systems, including any improvements to mitigate and control the probability of future frictional ignition events, that's right, isn't it?---Yes.

PN300

On the next page, at page 46, you say, in regards to this task, you're seeking a 14 day completion, once you have been formally engaged. So Chalmers is to put his report out to you in 14 days after you engage him?---Yes.

PN301

The purpose of getting this report was so that you could put it to the regulator, wasn't it?---Yes.

PN302

So you're getting this report so you can put it to the regulator so you can get the prohibition lifted and you can start operations again, that's the general (indistinct)?---Yes.

PN303

So considering that, I'll flick back to the Polaris report, recommendation 8 of that report is, 'A review of the current frictional ignition management systems should be undertaken', no quibbles with that, right?---No.

PN304

And that's the work you said that would take you six months?---No. The - Mr Coluccio, there was other specifics that were longer term.

PN305

That's all right. My question is, that's the evidence you've given in your report, you said that the recommendations 5 to 9 would take you up to six months, that's the correct - - -?---That's correct.

PN306

Okay. So you then take Mr Chalmers investigation into the adequacy of controls to mitigate frictional admissions, and you tell him that he has to get it done in 14 days, that was the instruction to him, wasn't it?---That's incorrect. The - - -

PN307

Sorry, I'll - - -

PN308

MR SECK: Hold on.

PN309

THE WITNESS: Yes, it's incorrect. Your question - - -

PN310

MR SECK: He should be allowed to answer the question.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN311

MR COLUCCIO: I'm asking a yes or no question.

PN312

MR SECK: No.

PN313

THE DEPUTY PRESIDENT: It's not a yes or no question?---It's not.

PN314

MR COLUCCIO: My question was whether or not he had a 14-day timeframe, which is - - -?---The specifics are incorrect. The Polaris report, six to nine months, were long-term items of engineering requirements. The 14 days was to do with a report, not an implementation of actions.

PN315

Sorry, again I'm going to compare these two statements for you. Recommendation 8 of the Polaris report, 'A review of the current frictional

ignition management systems should be undertaken'. So a review of frictional ignition controls?---Yes.

PN316

Mr Chalmers' report, 'An investigation into the accuracy of controls to mitigate frictional ignition events'.

PN317

MR SECK: Well, I object. I think, to be fair, I think Mr Coluccio needs to read out all of recommendation 8, and not just the first sentence.

PN318

MR COLUCCIO: The residue of recommendation 8 is the contents of that review, and I don't say that it adds anything and I don't believe it necessarily be brought up in my cross-examination here. My point is that these are the two - you're asking the same task, aren't you?---No.

PN319

I will let the witness answer the question.

PN320

MR SECK: It's not a fair question if you're not putting the full recommendation.

PN321

MR COLUCCIO: The residue of the recommendation, and you can make that submission, is that it's with consideration to the risks. Now, those are simply considerations to risks of (indistinct) rock and methane gasses experienced.

PN322

MR SECK: No. With respect, it's got a second sentence, 'The mine should consider whether this is, in fact, the principal hazard for the mine'. So there's two parts to the recommendation.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN323

MR COLUCCIO: And if you want to make the submission - - -

PN324

MR SECK: No, it's an unfair question.

PN325

MR COLUCCIO: It's not an unfair question. It's a ridiculous objection. If you wish to put a submission that that was an inherent part of this review, then you can put that at the appropriate time.

PN326

MR SECK: I object to the question as it's been put, because he's asking the witness to compare recommendation 8 and the time period that's been assigned to it, to the time period of the 14-day period to produce the report. Now, if he's going to compare time periods, then he needs to fairly put the entirety of the

recommendation. It's not a submission point, it's a matter of fairness to the witness.

PN327

MR COLUCCIO: That's incorrect.

PN328

THE DEPUTY PRESIDENT: Well, hold on. If you're asking Mr Vatovec to compare the estimate given by the respondent, of how long it would need to fulfil recommendations 5 to 9, compared to how much time it gave Mr Chalmers to provide a report, the numbers are obvious. Meaning, Mr Chalmers has been asked to give a report in 14 days and the respondent has told the regulator it needs six or nine months to implement recommendations 5 to 9.

PN329

What you're getting at, and what you're, in substance, asking Mr Vatovec about and what I think he's answering is why there is a difference between the two time periods.

PN330

Now, Mr Seck's concern is, in one sense, going to part of the answer, because it's going to the nature of one of the recommendations in the group of five that the respondent has said it's going to take some time to deal with.

PN331

But what Mr Vatovec, I think, is planning to talk about, in answering the question, is the differences between the two tasks. That's not a simple yes or no question. The numerical comparison of the dates is irrelevant, it's obvious that six months is longer than two weeks. But you can ask questions about whether it's the same task, whether it's a different task, et cetera, et cetera.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN332

MR COLUCCIO: I might approach it this way. Of recommendations 1 to 9, you say that the mine site has implemented recommendations 1 to 4, that's correct?---Yes.

PN333

So you're not saying that the recommendations have to be implemented, in full, at the same time, you're able to kind of go through and pick out the bits and pieces that you could do, in an earlier timeframe than six months, that's right?---Yes.

PN334

On recommendation 8, that second line, 'The mine should consider whether this is, in fact, a principal hazard for the mine', that has occurred, hasn't it?---Yes.

PN335

And there's a principal hazard management plan in place for frictional ignition events?---Yes.

PN336



So to the extent that recommendation 8 has this second line about considering whether this is, in fact, a principal hazard, that's happened?---You need to point out, in my statement, where - - -

PN337

I'm saying, if recommendation 8, where it says, 'The mine should consider whether this is, in fact, a principal hazard for the mine', the mine has done that work?---On what page, please?

PN338

Page 109 of the court book. I could be mistaken on that, I'm working off - - -

PN339

MR SECK: I've got from 186.

PN340

MR COLUCCIO: The question, it appears a few times in the court book.

PN341

THE DEPUTY PRESIDENT: It's page 6 of 32 of the Polaris report, and on page 109 in the Commission is the nine recommendations.

PN342

MR COLUCCIO: So do you have that in front of you, Mr Vatovec?---Yes, I do.

PN343

So recommendation 8, the second sentence, 'The mine should consider whether this is, in fact, a principal hazard for the mine', that work is done?---Number 8, recommendations, is it?

PN344

Recommendation 8, do you see that there?---

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN345

*A review of the current frictional ignition emergency system - - -*

PN346

Yes?---

PN347

*should be undertaken with consideration to the risks associated with the incentive rock and methane gasses. The mine should consider whether this is, in fact, a principal hazard for the mine.*

PN348

So the second sentence of that, 'The mine should consider whether this is, in fact, is a principal hazard for the mine' that work has been done?---Yes.

PN349

So the outstanding work that you say in your statement needs to take the next six months, in respect of recommendation 8, is the first sentence. That's the bit that's outstanding?---No, it's in reference to recommendation 6.

PN350

You don't say, in your statement, that a review of recommendations 5 to 9 will take six months and will be completed in the second quarter of 2024?---It was specific to recommendation 6 and 7.

PN351

So that's not what you said in your statement, though, is it?---My statement mentioned that it would take six to nine months and they were specific to the recommendations 6 and 7.

PN352

You say that - you specified:

PN353

*The work required to address recommendations 5 to 9 would take up to six months, and we anticipated the works would be completed in the second quarter of 2024.*

PN354

?---Yes.

PN355

Okay. I want to ask you some questions, Mr Vatovec, about the permit to mine. The permit says, I'll refer to annexure C1 of Mr Nisbet's statement, do you have that there with you?---Yes.

PN356

THE DEPUTY PRESIDENT: A page reference, Mr Coluccio?

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN357

MR COLUCCIO: Eighty-three. We've got a four-page permit to mine here.

PN358

MR SECK: I don't think he has a copy of that.

PN359

THE WITNESS: I don't have a copy.

PN360

MR COLUCCIO: You don't have a copy of that? Okay. I'll hand up a copy of the permit to mine, if you would look at that?---Thank you.

PN361

So this permit to mine, are you familiar with this document?---Yes.

PN362

This permit to mine had been in place, in respect of PC22, since November 2023, that's right?---Yes.

PN363

And on the third page of that document, the borehole we're talking about is that one down the bottom, isn't it, the WCLS72 branch A, that's the one that was intersected at the fifth frictional ignition event?---Yes.

PN364

And on that line the document shows that borehole as having no flow, doesn't it?---Yes.

PN365

If a borehole is showing no flow, that usually means it's either drained or it's blocked, that's usually right, isn't it?---Yes.

PN366

Apologies, I do want to look at the mining across boreholes procedure, and I appreciate you don't have that in front of you either. I might hand up a copy of that as well. It's the next annexures in Mr Nisbet's statement. So looking here at, for the Deputy President's reference, looking at pages 80 in the court book onwards.

PN367

If you look at the third page of that document there's a title saying, 'High risk borehole intersection controls', do you see that listed there?---Yes.

PN368

That document says that, 'A high risk intersection includes', and it has three dot points there, about halfway down the page. The second of those dot points is, 'Hole flow data that indicates the bore hole is blocked'?---Yes.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN369

So if you've got flow data which shows the borehole might be blocked, that's going to be a high risk intersection, isn't it?---Yes.

PN370

And if you back to the top of the page, it says, 'Boreholes will be assessed during the PTM process and the PTM team will consider if a borehole is a high risk intersection', that's the process, isn't it?---Yes.

PN371

And you're part of that PTM team?---Correct.

PN372

So on that permit to mine, where it showed that there was no flow, in accordance with this procedure, that borehole should have been assessed and considered as to whether it was a high risk intersection?

PN373

MR SECK: I object. I think part of the problem might be that my learned friend hasn't put to the witness yet whether or not this is the procedure that applied at the time because, as you may see from the top right-hand corner, the date published is 16 January 2024. The premise of the question which has been asked is on the assumption that this was the procedure applicable in relation to the fifth ignition event, then I think it's an unfair question, at least based on the face of the document, unless you ask some further questions.

PN374

MR COLUCCIO: Do you agree that the document I'm referring to, the mining across boreholes policy, is, with a few minor amendments relating to gas bagging, the document that was in force at the time of the intersection?---No. I have to refer back to what my statement is, on page 618, clause 11. How the PTM works and the high risk intersection controls is that each end of the section boreholes shall be recorded on the crib room PTM and returned to the mine surveyor, once mining is completed within the PTM area. Each hole also needs to be examined by the deputy and we also have work orders, on a weekly basis, that generates and updates the gas flow data.

PN375

So my question was, is this the policy, with a minor amendment about gas bagging, that was in force at the time of the frictional ignition event?---Yes.

PN376

Those clauses I read to you, about, 'Boreholes will be assessed during the PTM process. The PTM team will consider if a borehole is a high risk intersection', those were the clauses that were in effect at the time of the frictional ignition event?---Yes.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN377

So the PTM team did not consider whether this borehole was a high risk intersection, did it?---That's incorrect. It's incorrect, but you have to read the entire procedure and specifically procedure, item 2 'Standard borehole' in this section of controls, where each hole, it is a standard procedure that the deputy must follow, not the permit to mine team. So your reference, Mr Coluccio, in regards to whether or not the permit to mine team is responsible for that actual hole is incorrect. It needs to be taken into context in the entire procedure for mining cross boreholes.

PN378

Well, let's look at clause 2 then. So the first point, in clause 2:

PN379

*The deputy must review the permit to mine each shift with the crew, so they are aware of any precautionary zones and the distance to intersect the borehole.*

PN380

That's right?---Correct.

PN381

So the deputy relies on the PTM for their understanding of the mine, the borehole, the flow rates, the decay curve, the treatment of that borehole, all matters to do with that borehole?

PN382

MR SECK: I object. That question is way too - - -

PN383

MR COLUCCIO: I'm quoting from this policy, which refers to those matters, the hole flow data, the drainage time decay curve and the borehole, if it's believed to be blocked. Those matters in the policy are things in which you would expect to see in a PTM, isn't it?---Yes.

PN384

So the deputy relies on the information in the PTM?---Yes, he does, and we also rely on the feedback from the deputy to update the survey plan and also the PTM.

PN385

But the PTM team is the one who puts the PTM together, isn't it?---Yes.

PN386

The PTM team is responsible for that plan?---Yes.

PN387

And under point 3, as we observed before, the PTM team will consider if a borehole is a high risk intersection?---At the time, yes.

PN388

Yes. If it is a high risk intersection, a borehole intersection notice is issued?---That's correct.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN389

A borehole intersection notice includes that date that we referred to before, including the hole flow data, range time, decay curve, and if the borehole is believed to be blocked?---That's correct.

PN390

And there was no borehole intersection notice issued in relation to this hole, was there?---It wasn't deemed necessary at the time.

PN391

You didn't deem it necessary at the time?---The team didn't deem it necessary at the time.

PN392

Having reviewed the information available to it?---Yes. We considered, at the time, that the hole was dead and that was confirmed, from the latest data that was presented to us.

PN393

And that later turned out to be incorrect, because that hole was bagged?---That's - that's incorrect.

PN394

Looking back, would you agree that this was a high risk intersection?---No.

PN395

Would you agree that the permit to mine should have noted that the hole was bagged?---No.

PN396

Do you believe the hole was drained?---Yes.

PN397

So do you disagree with findings made to the contrary by the regulator?---The investigation also found that there was an incorrect bagging of the hole, which was done incorrectly by one of the deputies, which may have caused an issue of blockage and pressurisation that was also found in the investigation and the ICAM following the event.

PN398

So the hole was bagged?---It was bagged, but it was supposed to be hosed.

PN399

But you just told me it wasn't bagged?---I said that it was bagged incorrectly.

PN400

I asked you the question of whether the hole was bagged and you told me it wasn't?---Sorry, I said that the hole was bagged, versus it to be hosed.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN401

That's not what you said, Mr Vatovec, but we'll move on. It doesn't list, on the PTM, that the hole was bagged, does it?---Mr Coluccio, at the - it relies - the PTM relies on the best information, as a guide for the deputies to update. It's a living model and plan that the workforce and the deputy rely on.

PN402

I appreciate that. But what I'm asking you is whether or not the PTM says that the hole is bagged?---That's - - -

PN403

I'm not asking whose fault it is, just whether it was bagged?---I can't answer that.

PN404

You can't? I mean I think it's fairly clear, on the face of the document, that it doesn't include that treatment, doesn't it?---Mr Coluccio, the PTM is a guide, the actual intersection of a hole, due to mining activities will change the actual hole condition.

PN405

So it's only a guide?---That's correct.

PN406

It's not to be taken at face value as being exhaustive of all the potential treatments for that hole?---It's a guide and so are other procedures, other tarps, other management requirements, training and systems that support the PTM.

PN407

Right. So what document do you say that deputies would have in front of them, before intersecting the borehole that would indicate to them that the hole was bagged, if not the PTM?---The frictional ignition tarp. Their reports, their statutory reports. Their crossover and changeover of information from one shift to the other, other evidence.

PN408

So crossover from one shift to another, that's not going to provide the information about a hole that's bagged 12 months ago, though, is it?---Again, I'm finding it difficult to, in your line of questions and the reason is the PTM is a guide for the deputy and crews to work and it moves and it changes, specifically due to mining activities either intersecting the holes and decisions are made, on the shift, by the deputy and sometimes the under manager, in regards to either bagging the hole or hosing the hole to remove any risk of gas, or to ensure that the borehole continues to flow.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN409

So then a deputy can't just pick up a PTM and with that document alone, make a decision about whether a borehole is safe to intersect, can they?---Mr Coluccio, you're asking me that the PTM is the sole decision process for a deputy, and that's not correct. The PTM is a guide and there are other procedures, including the one that I have in front of me, safe work procedure about mining across boreholes, the training, the statutory reports, and their experience, in regards to dealing with the holes. Because mining, in the PTM, authorises an area for the mining to occur safely and it changes each time a miner crosses or intersects a hole.

PN410

So the information within the PTM shouldn't be taken as gospel, it's just a guide. Deputies should rely on their own inquiries?---It's a very critical guide and process that gives important information to the deputy and their crew.

PN411

But the information in it can't be relied upon without further inquiries, that's fair to say, isn't it, from what you're saying?---Yes, because it's reliant on what I had explained previously.

PN412

Okay. So looking at that PTM, it has one flow rate per hole, that's right, isn't it?---Yes, and it's measured continually, yes.

PN413

Measured continually? How often is it measured?---On a weekly basis.

PN414

Okay. This was the document you submitted as being the up-to-date PTM, following the fifth frictional ignition event, that's right?---No. That's correct, yes.

PN415

So looking at that fifth column, it lists the date measured for each of the holes and it says 22 November 2023?---Mm-hm.

PN416

So it doesn't list those weekly measurements you just referred to, does it?---On the PTM, again, it goes as a guide and what we do, it is if you refer back to my statement, on page 618, clause 11, it is reliant on the deputy to record any changes on the boreholes and to submit that to the mine deputy. There's also a work order that is presented for the constant weekly review of the borehole flow rates. With that information, if there are any significant changes in the flow rates, that is brought to the attention of the PTM committee.

PN417

So how often do you review a PTM?---We review it on a required basis, where we authorise a section of the panel and if there are any abnormal information that we're required to consider, as I just explained previously. For example, if there's abnormal increases in flow rates of boreholes, if there is boreholes that require a BIN(?) statement or of risk that has been identified by the deputy or crew or the under manager.

PN418

So when was the last time you'd looked at this PTM, prior to the fifth frictional ignition event?---I was - only recently, because I was on leave from 18 December to 8 January.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN419

So between the date the PTM was issued and 18 December, you would not have looked at this?---Yes, I look at this on a daily basis.

PN420

You review the PTM on a daily basis?---Yes, because each - each day and each shift there are - I look at the statutory reports because it's in alignment to the PTM, if there's any changes in regards to boreholes or conditions in the panel in that PTM area. That's presented to me by the statutory reports that are submitted to myself, as the mine manager.

PN421

Okay. So you're getting these weekly readings of the flow rates for these boreholes, from deputies, and you're reviewing the PTM daily, but those flow rates aren't being put into the PTM, are they?---I'm reviewing the - any significant changes to the boreholes, not every single weekly rate, but I have got submissions by - in our technical services department, of the weekly flow rates, which are submitted to me on a weekly basis, not on a daily basis.

PN422



But what I'm saying to you is, you get that information but it doesn't make its way into the PTM, does it?---Only abnormal information does.

PN423

Right. So the deputy who gets this PTM can't pick it up and have the benefit of all those weekly readings that you're talking about that you've been able to review, can they? They can only go on what's in the PTM?---No, that's not correct.

PN424

Right. So you'd agree with me that the flow rate isn't the only important factor when you're measuring a borehole, it's also the trend in the flow rate, isn't it?---That's correct, yes.

PN425

And the trend's important because it shows whether or not, you know, if it's dropped off overnight that might indicate a blockage, whereas if it's decayed over time, that might mean it's drained and safe to mine, that's - - -?---That's correct.

PN426

And that decay curve I've just referred to, that's something you'd include in a BIN, isn't it?---If it's an abnormal change it would be, and it would be brought back to the attention of the PTM.

PN427

So if you want to identify a trend you need good data, don't you?---Yes.

PN428

That data needs to be precise?---Yes.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN429

So in your statement, from two days ago, you suggest that the flow rate trend is - you suggest that the question, when you're measuring flow rate, is whether the gas is flowing, that's the big question when you're measuring a flow rate, isn't it?---That's correct.

PN430

You say because of that you don't need to be precise because you just need to know if it's flowing or not?---That's correct.

PN431

Okay. Well, you've just put to me that you do need to be precise when you're analysing a trend?---Your question said that whether or not I needed it to be precise, and that was my best answer that I could give, because it's not that I need to measure a flow rate by 0.1 to 1 litre per second, I need to have an indication that it flows to a range that we consider, that we can measure a trend.

PN432

Are you aware of how they measure flow rates at other mine sites?---Yes.

PN433

Do you know how they measure the flow rates in Appin Mine?---Yes.

PN434

What's your understanding of how they do that?---There's a distinct difference between Appin. From my management of Appin, for over five years, I was the general manager of Appin. When we commenced - when I was in charge of Appin Colliery, they have significant gas flows from their boreholes because of different conditions, permeability is one of them, and different seam. Back in 2001 we would have used a garbage bag system and obviously that's increased to flow meters. So the comparisons between Appin and Russell Vale are stark.

PN435

Sorry, the answer to my question is that they have flow meters installed at each borehole, is that right?---No. They have - that's not totally correct.

PN436

Would you agree that a flow meter is a more precise method of calculating flow?---Yes.

PN437

And you'd agree with me that had you been able to identify the trend, in relation to a borehole, it might have prevented this incident from occurring?---A flow meter would not have made any difference.

PN438

My question was whether or not if the trend had been identified?---That's correct.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN439

So the trend would have likely have prevented this frictional ignition event, that's not controversial, is it?---Not on this occasion. Again, I'll refer back to the ICAM investigation and the investigation based on what occurred. It was not due to the flow rate, it was due to the incorrect bagging of the hole which caused the pressure.

PN440

Which could have been identified by the trend being identified?---No. That is identified because there was an incorrect placement of the bagging of the hole, after it was intersected, the cause of the pressurisation had nothing to do with the flow rate.

PN441

What I'm putting to you, Mr Vatovec, is that if you had the measurements of the flow rate in this hole, over time, you'd be able to see it go from a positive flow point rate of 1 point, in one measurement, to the next measurement, after it got bagged, it dropped to nothing. You'd be able to see that precipitous drop, wouldn't you?---Mr Coluccio, we need to put it in context. When the borehole is intersected sometimes the hole requires to be hosed, so that it can continue to be flowing. If it is bagged, it will cause pressurisation. From the investigation there was an incorrect bagging, as opposed to hosing the intersected borehole, that caused the pressurisation, not because we were continuing measurement of the

flows. So we have to put it in context of the immediacy after the borehole had been intersected.

PN442

What I'm putting to you, Mr Vatovec, is that if attached to this borehole was a history of the flow rates for that borehole, there would be a point of time at which the gas flow would abruptly stop, when the hole was bagged, and then would read that no flow from that point in time. If you had that available to you, you would be able to identify that the hole was blocked?---What you're suggesting, Mr Coluccio, is that it's not my responsibility, in the PTM, of the actions of the flow rate of the hole. It is the responsibility of the deputy to correctly treat that hole after it's been intersected. The investigation had found that there was an incorrect treatment by one of the deputies, in the bagging of a hole, that caused the pressurisation of the hole.

PN443

I'm not talking about the cause of it, what I'm talking about is your ability to identify that cause, that's the control measure that happens after the incident has occurred. So the cause was the bagging, I'm asking if there's a control in place to be able to identify that bagging. What I'm putting to you is that the recording of trend data would have identified that. That's correct, right? That's not controversial?---The answer to that goes back that we are reliant upon the deputy when they intersect a hole, as page 618 and clause 11, that they must record it and send that to the mine surveyor to update and complete that within the PTM.

PN444

Okay. I'm not asking whose job it was, I'm just asking you if that data would have identified the blockage?---That's the - the data is reliant on our knowledge, passed on by the deputy's actions, not on the weekly trend.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN445

The data would have identified the blockage?---The data would - that's - again, it is dependent on where and how the bore hole has been intersected. A weekly trend is on a static borehole. When we do mine and intersect a borehole, we're reliant on the deputy to identify, after they've intersected the borehole, what actions they've taken so that we can have the most up-to-date information on that borehole.

PN446

All right. So you'd agree with me that having the most precise readings for gas flows in these boreholes is a good thing, right?---Yes.

PN447

It gives you better information and, you know, in certain circumstances, I'm not necessarily saying this one, but in certain circumstances might alleviate some of the risks relating to frictional ignition events?---Yes.

PN448

MR SECK: I object.

PN449

MR COLUCCIO: Well, the question's been answered as 'Yes'. So given that you accept a flow rate meter, like the one that have with Appin, with precision, might alleviate some of those risks, shouldn't that have been implemented at Russell Vale?---Mr Coluccio, I have to go back to my earlier statement. There's a distinct difference between the flow rate at Appin and the flow rate at Russell Vale. Technically they are two different seams. Bulli Seam is much more permeable and has high flow rates. So the requirement of flow meters is a better control, compared to the lower flow rates that we have and the lower permeability on the Wongawilli Seam, at Russell Vale, where we depend on whether or not the accuracy of flowing, not the measure of the flowing, is a much more important measure.

PN450

THE DEPUTY PRESIDENT: When you say the accuracy of flowing, do you mean just the fact that it's flowing?---That's correct.

PN451

All right.

PN452

MR COLUCCIO: So you say it's the responsibility of the deputies to measure these flow rates and feed that back into the system?---There's not only the panel deputy, there are - there is a work order that is developed where we either have another mining supervisor or other technical staff that do flow measurements, on a regular basis.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN453

Not a specific gas and drainage person?---It's - it's not a gas and drainage qualified person.

PN454

Okay?---That's not necessary.

PN455

So you say it's not necessary, if the regulator suggested it as a control that would improve things, would you accept that?---Where are you referring to specifically, where the regulator has suggested that?

PN456

Well, I may refer to your statement, in which you said, and I'll bring a pinpoint for yourself in a moment, Deputy President, but you said that you had taken steps to appoint a gas and drainage superintendent, is that correct?---Yes.

PN457

And that person hadn't been appointed at the time the frictional ignition event happened?---Which frictional ignition event happened?

PN458

Well, any?---Mr Coluccio, we have to refer back to the Polaris report and we also have to refer back to a 191 improvement notice and also a 155 notice by the resource regulator, on the fourth incident. What we had done is, in September 2023, we identified and we interviewed a Mr Sam Bray, to become the ventilation officer and also the gas drainage coordinator, before the fifth event. We continued on with that appointment and there have been some changes in the management structure post September, including in October and in November, and into January, where Mr Caunt, Jono Caunt was then made the appointment as the gas drainage and ventilation officer. Due to unforeseen circumstances with the prohibition and the stand down, that didn't occur.

PN459

If I can ask you about that then.

PN460

MR SECK: Hold on, he needs to finish.

PN461

MR COLUCCIO: I'm not sure much of it was responsive to my question, but if we could talk about Mr Caunt.

PN462

MR SECK: Hold on, let him finish.

PN463

THE DEPUTY PRESIDENT: Did you finish your answer, Mr Vatovec?---Sorry.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN464

Had you finished your answer?---No, I haven't, Deputy President. The answer to your question is that we started a process of engaging a gas and ventilation officer, expert, in September 2023. We made the appointment in October of 2023, of Sam Bray. Between Sam Bray and Jono Caunt, they were the respondent responsible and accountable persons, up to January.

PN465

MR COLUCCIO: What was Sam Bray's job title?---He's ventilation - in October 2023 he was the ventilation officer, and also responsible for gas drainage and also responsible - he also had duties to be the standby or spare under manager.

PN466

So his job title was ventilation officer?---That's correct, yes.

PN467

Okay.

PN468

THE DEPUTY PRESIDENT: Mr Coluccio, I'm watching the time. Did you want your other witness?

PN469

MR COLUCCIO: My understanding is Mr Stewart is largely available from now, so I don't think - - -

PN470

THE DEPUTY PRESIDENT: All right.

PN471

MR COLUCCIO: I will try not to be too much longer.

PN472

THE DEPUTY PRESIDENT: No, no. I'm not hurrying you up. It's just that it's your witness that - - -

PN473

MR COLUCCIO: Sure.

PN474

THE DEPUTY PRESIDENT: That I thought was needing to come at 12.00.

PN475

MR COLUCCIO: I imagine that Mr Stewart will have to wait.

PN476

MR STEWART: Yes. Yes, yes.

PN477

MR COLUCCIO: So, just, Mr Vatovec, referring to Mr Caunt, I'm looking at your fourth witness statement here which is page 620 in the court book?---M'mm.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN478

You say, 'In early 2024 due to management instructions I decided to appoint Johnno Caunt as the ventilation officer and gas and drainage superintendent. This was due to occur when Johnno Caunt returned form leave in 2024. However, the fifth frictional ignition event occurred prior to that.' Do you see that?---You said page 620?

PN479

620 is the last page of your last statement?---Yes.

PN480

So, the fifth frictional ignition event occurred prior to that. So, what date did the frictional ignition event occur?---5 January.

PN481

Right. So, when you say that you made this decision in early 2024, but then it was overtaken by the fifth frictional ignition event. What you mean is actually the period between 1 and 4 January you made that decision. Is that right?---No. That's not correct.

PN482

So, you made the decision after 4 January?---No. I'll clarify. In the middle of November 2023 I made a decision to remove Johnno Caunt as the production manager. And then I appointed Sam Bray as the production manager. And so there was a changeover in their roles and responsibilities. In around 18 December 2023 I went to leave and I didn't return back until 8 January 2024. In between 18 December and 8 January 2024, Mr Caunt was appointed as the statutory mine manager in my absence. So, after I returned back on 8 January 2024 Mr Caunt went on leave, went on leave for a period of two weeks. So, in my statement I didn't put all that detail. I decided to appoint Johnny Caunt as the ventilation officer after he returned back from leave.

PN483

When did you make that decision?---That would have been two weeks after 8 January 2024. So, around the 22nd.

PN484

You decided on 22 January that you were going to appoint him to that position?---I'll clarify the reasons why it didn't occur, was due to the prohibition notice on 18 January 2024 by the chief inspector which caused the total prohibition of coal cutting at the operation. And so that those events caused other priorities to be focused on. And so that wasn't the reason not to appoint Johnno Caunt. And in fact after 18 January there was a stand-down of the workforce and that also included Mr Caunt.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN485

Sorry, I'm just getting confused on when you say this decision happened. You just said it happened on the 18th or thereabouts in January. Is that right? That was when you decided to appoint him then?---It was to be done when Mr Caunt returned from leave in 2024. But Mr Caunt couldn't return back from leave in 2024 because he was subsequently stood down with a lot of other people in the workforce due to the prohibition notice on 18 January 2024.

PN486

No, I appreciate why it didn't happen. What I'm asking is, you're saying in your statement that you made that decision and then other events occurred which mean that it couldn't happen. So, your evidence just now was that it happened on or about 18 January. Is that the date that you say that that happened?---That could be correct. But the – yes, the relevancy of his appointment was that that was based on an ongoing concern, and due to the prohibition notice on 18 January we had other matters to contend with. And Mr Caunt – that was the intention to appoint. It wasn't that I was going to make the decision on 18 January.

PN487

Right. So, you made that decision on the same day the prohibition notice was issued?---No, that wasn't anything to do with the decision made on who would be the gas drainage and ventilation officer. The prohibition notice had no impact on my decision.

PN488

I'm not saying it didn't(sic). Really, I'm just trying to get to the bottom line of what day you say that that decision was made. Because again what I'm getting at in your statement is that you said, 'This was due to occur when Johnno Caunt returned from leave in 2024. However, the fifth frictional ignition event incident occurred prior to that. So, you're saying you couldn't implement that decision because the fifth frictional ignition event occurred?---No. Because Mr Caunt was the acting mine manager at 5 January – I didn't return until 8 January.

PN489

Mr Caunt went on leave on 8 January for two weeks.

PN490

I get that. But what I'm putting to you is that if the fifth frictional ignition event on 5 January changed your mind about this appointment, clearly you had to have made the decision to appoint him prior to 5 January?---Mr Coluccio, you're suggesting that the decision was made after 5 January, which is not correct. If you look at my previous answer in regards to the appointment of a gas and ventilation – with regards to who the person is, we were making the steps from September 2023. So, it's immaterial who that person was. The position was always going to be occupied by either Mr Bray or Mr Caunt.

PN491

And you say you appointed Mr Bray to the production manager role?---That's correct.

PN492

And when did you say that that occurred?---It was about mid November 2023.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN493

And that took over as his primary function from the ventilation officer role?---Yes. And then I appointed Johnno Caunt as the ventilation officer.

PN494

Right. So, who do you say was in charge of gas and drainage at that point?---It was still Johnno. He was the person that was occupying the ventilation officer role. So, there was changes in the structure but the – only the names changed for the position, and the responsibility still remained.

PN495

THE DEPUTY PRESIDENT: You mean the titles?---That's correct. Yes.

PN496

MR COLUCCIO: So, when do you say Johnno Caunt started as ventilation officer?---It was in around the 15th, the middle of November. I can't remember exactly what the date is.

PN497

And so how does that accord then when you say in your statement, 'In early 2024, due to management restructures I decided to appoint Johnno Caunt as the ventilation officer and gas and drainage superintendent.' Why would you need to



decide that in early 2024 if it had already happened on 15 November?---Mr Coluccio, again, it's the position that I stated that Sam Bray was appointed in around October. There were changes in November with the restructure of the business and also that he – from the production manager, where Sam Bray became the production manager. And then there were periods, as I explained previously, that where I've been on leave and it hadn't – no material reasons why those positions – when I appoint a person I don't appoint the person when they're on leave. I appoint the person because I sit down and discuss their roles and responsibilities. And that was to be done when Johnno Caunt returned back from leave in 2024.

PN498

All right. Look, I'm not sure that I'm totally across that timeframe myself. But it is fair to say it's a little bit murky between that period of time to the frictional ignition event about who was really in charge of gas and drainage?---No, that's not the case. We had a structure in place. My manager at the time was Johnno Caunt. And the ventilation officer of gas drainage at the time of my absence was Sam Bray, in addition to his production manager responsibilities. That's what you do in regards to helping out to support staff in times of absences.

PN499

I just want to ask you about the next paragraph, as well, in terms of overextending panels. This is referring to some statements made in the Nisbet statement which, if I can generally paraphrase, and tell me if you don't agree with my paraphrasing, is that if you work less faces, those faces get more ventilation. Do you agree that's a very high level of summary of - - -?---No. That's an incorrect statement.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN500

You say, 'I disagree with these paragraphs.' What do you disagree with in Mr Nisbet's statement?

PN501

THE DEPUTY PRESIDENT: Mr Coluccio, why don't you take him to the specific paragraphs if you're going to ask him what he disagrees with.

PN502

MR COLUCCIO: So, this hand-up page has those two paragraphs I referred to. Page 76 of the court book for the Deputy President's reference. So, looking at para 53 each panel that is being worked draws on the ventilation system. 'Consequently, the total ventilation is naturally divided between the total panels being worked.' Do you agree with that?---Yes, that's correct. Yes.

PN503

You say that Russel Bell(?) has made a decision to reduce the number of panels being worked from three panels to a maximum of two. Is that correct?---Yes.

PN504

That would result, all other things being equal, in ventilation to each of those panels being improved, wouldn't it?---Yes.

PN505

And that would improve the likelihood of frictional ignition events from occurring, wouldn't it, if there was better ventilation?---Yes.

PN506

So, that was always an option that was available, wasn't it, to reduce the number of panels being worked?---No. That's incorrect.

PN507

You could not reduce the number of panels being worked because that was not open to Russell Vale?---Mr Coluccio, we have to put it in – the reasons after the 5 January frictional ignition – we identified that one of the key critical controls from our ICAM investigation was that ventilation was a key control in reducing or mitigating frictional ignitions. Consequently after 5 January, on 8 January myself and the owners decided that we required to restructure the business based on our inability to provide ventilation to the sufficient quantities based on our inherent system. So, consequently we sought to reduce from three panels to one panel, or one and the spare panel, and also increase the ventilation quantity to better manage the ventilation and gas being emitted from the working bases.

PN508

You say that the ventilation was available wasn't sufficient for three panels and that's why you made that decision you just referred to?---That's correct.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN509

And that decision you were referring to, to reduce from three to either two or one, you could have done that a year ago if you wanted to, couldn't you?---No, we did it on the basis that after reviewing the four previous frictional ignition events, on reviewing all the improvement notices provided by the resource regulator, based on the information that the last report provided us. By the advice of our internal ventilation advisor and also our gas drainage advisor we had identified that there was a lack of our ability to ventilate three panels with sufficient quantity to reduce the risk of frictional ignitions.

PN510

Sure. But I'm not saying what the causes were. What I'm saying is that that option was available to you at any point in the past, wasn't it? You could have reduced the number of panels that you were working?---After 5 January.

PN511

You're saying that you could not have reduced the number of panels being worked before 5 January?---Mr Coluccio, we have to look at the continuous improvements that we've made in regards to reducing the risk of frictional ignition. And after the review on those four previous events, and now the fifth event that occurred we made that decision based on the best knowledge at the time. And that was done after 5 January. So, for you to suggest that I had that option from the first or second, third or fourth event is not correct.

PN512

You're saying that you could not have made the decision? You lacked the authority at Russell Vale Colliery to say – or anyone at Russell Vale Colliery had lacked the authority to say we're only going to mine one or two panels from now on?---That's incorrect.

PN513

So, you did have that ability?---I've always had that ability.

PN514

Thank you. I just want you to look at two documents for me. These are ICAM reports that you provided, I believe, in your first statement. I'll hand up copies of these unless - do you have those with you, the ICAM reports?---No, I don't. Which one are you referring to, Mr Coluccio? I've got one on - - -

PN515

I've got to take you to the third and the fourth ones?---Okay.

PN516

So, the first of these is on page 276 of the court book?---276, yes. Thank you.

PN517

That's the (indistinct)?---Okay. Yes.

PN518

Yes?---I see that one, yes.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN519

So, at the middle of the page there there's action points here. 'Develop a gas drainage management plan for the mine including but not limited to branching standards, whole design of the plant intersections, gas reservoir calculations, whole fully monitoring of decay analysis, length of coal per stand pipe.' Do you see that now?---Yes.

PN520

And the completion dates for that is, it's to be completed by 30 July 2023?---That's correct.

PN521

If I take you next to page 307?---M'mm.

PN522

Now, this is the ICAM from the fourth frictional ignition event?---M'mm.

PN523

So, this is back in July before and now in September. At 307 there, the second-last dot point. 'The mine needs to develop a gas drainage management plan for the mine including but not limited to branching standards, whole design panelling sections, gas reservoir calculations, whole fully monitoring of decay analysis, length of coal per standpipe.' Do you see that there?---Yes.

PN524

You'd agree that's the same bullet point from earlier, isn't it?---That's correct.

PN525

So, that hadn't been implemented between the third and the fourth friction ignition event, had it?---That – I can't answer that.

PN526

I just have a couple more questions and I'll be done. I just appreciate your patience, Mr Vatovec. The last document I want to take you to is the assessment report of the regulator issued on 6 January of the frictional ignition. This is at page 136?---M'mm.

PN527

Do you have a copy of that?---Page 136.

PN528

Yes?---It's the improvement notice, is it, Mr Coluccio?

PN529

No, 136. It's a blue titled page listed, 'Assessment Report (indistinct).' Do you have that there or - - -?---No, I don't have the page 136.

PN530

So, we're going to look at page - - -?---Thanks.

PN531

Page 142 of that document which is your reference to the matter at page 6, I believe that's listed there?---Yes.

\*\*\* WILLIAM ROMAN VATOVEC

XXN MR COLUCCIO

PN532

Now, this is a review of the regulator following the fifth frictional ignition?---M'mm.

PN533

And at the bottom of that page you'll see it says, 'Was there any industry standards not implemented?' Do you see that there?---Yes.

PN534

And it says on the side, 'Common control measures used at other collieries but are not in use at Russell Vale Colliery from observation'?---M'mm.

PN535

And it lists four on the next page?---M'mm.

PN536

'The recording of whole intersections and subsequent treatment to ensure holes are hosed over or bagged as appropriate including the location in relation to the colliery of the hole.' Do you see that?---Yes.

PN537

'Maintaining of records of hole intersections information for future use.' Do you see that?---Yes.

PN538

'Ensuring gas bags(?) are installed far enough from the bore hole to cover the next distance of the cut-out to be taken?---That's correct.

PN539

And 'matching flight plans to the mining designs so the holes are not running along headings or cut-through'?---Yes.

PN540

And this is issue about hole intersections and the flight plans, that's an issue that we just canvassed with the previous ICAMs, wasn't it, about the gas and (indistinct) plans?---Yes.

PN541

So, on 6 January the regulator is saying these are controls that we aren't seeing in Russell Vale but we are seeing in other mines?---Yes.

PN542

Nothing further. Thank you.

PN543

THE DEPUTY PRESIDENT: Thank you. Mr Seck?

**RE-EXAMINATION BY MR SECK**

**[12.28 PM]**

\*\*\* WILLIAM ROMAN VATOVEC

RXN MR SECK

PN544

MR SECK: Just stay on that page, Mr Vatovec, where the common controls industry standards have not been implemented. Can you explain to the Commission why any of those control measures used at other collieries are not used at Russell Vale?---Mr Seck, we have to put this into perspective that at the time we were addressing these specific areas based on the advice that the resource regulator provided to myself in January, and Mr Sam Bray that we required to lift the prohibition notice. That was the 5 January prohibition notice which was notice 13441. So, in and around 18 January I had addressed all those particular issues in a series of procedures that would accommodate a letter that was drafted to be sent to the inspector to lift the prohibition notice. However, in the afternoon of 18 January we received a new notification from the chief inspector, 13491 which superseded the 13441 notice. And consequently we did not fill that obligation in regards to the specific actions and requirements as specified by the resource regulator due to that prohibition notice being superseded by the chief inspector's prohibition notice.

PN545

Thank you, Mr Vatovec. Just bear with me. No further questions in re-examination.

PN546

THE DEPUTY PRESIDENT: Thank you. Thank you, Mr Vatovec. That's the end of your evidence. Well done. You're free to stay if you want to, or you're free to run for the hills. It's a matter for you.

**<THE WITNESS WITHDREW**

**[12.31 PM]**

PN547

THE DEPUTY PRESIDENT: Now, it's Mr Stewart?

PN548

MR COLUCCIO: Can I ask just for a five minute break, Deputy President?

PN549

THE DEPUTY PRESIDENT: Not a problem, at all. So, we'll line up Mr Stewart to give his evidence at say, 12.40.

PN550

MR SECK: Could I just ask, do you have an intention of how long you might be with Mr Stewart? I'm just wondering whether he should be first or?

PN551

MR COLUCCIO: No, he'll be done before lunch.

PN552

THE DEPUTY PRESIDENT: We'll adjourn till 12.40, thanks.

**SHORT ADJOURNMENT**

**[12.32 PM]**

**RESUMED**

**[12.43 AM]**

\*\*\* WILLIAM ROMAN VATOVEC

RXN MR SECK

PN553

MR COLUCCIO: We call Daniel Stewart

PN554

THE DEPUTY PRESIDENT: Mr Stewart, it's Deputy President Easton here. We have got you on a speaker in the court room, here in the Fair Work Commission. Thank you for participating today. If you were here with us in the court room this would be the moment where you would move from the back of the room to the front and you'd be asked whether you want to take an oath or an affirmation. Assuming you don't have a religious text handy are you content to give an affirmation, which means you can promise to tell the truth as you give your evidence?

PN555

MR STEWART: Yes, I do.

PN556

THE DEPUTY PRESIDENT: All right. So the next voice that you will hear then is my Associate and she will step you through the affirmation.

PN557

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

PN558

MR STEWART: Daniel Matthew Stewart, (address supplied.)

**<DANIEL MATTHEW STEWART, AFFIRMED [12.44 PM]**

**EXAMINATION-IN-CHIEF BY MR COLUCCIO [12.45 PM]**

PN559

MR COLUCCIO: Mr Stewart, can you hear me? It's Robert Coluccio, the lawyer from the APESMA?---Robert Coluccio, I can hear you Robert.

PN560

Thank you. I just have a few quick questions for you before I will hand over to the lawyer for the employer who will have some questions to ask you as well. That's just to confirm again for the record, your name is Daniel Stewart?---Daniel Matthew Stewart.

PN561

Yes, and you reside at (address supplied)?---Correct.

PN562

And you have provided two witness statements in these proceedings?---Correct.

PN563

And the first of those is a statement dated 16 February 2024?---16 February. Correct.

\*\*\* DANIEL MATTHEW STEWART

XN MR COLUCCIO

PN564

And the second is a statement dated 21 February 2024?---Correct.

PN565

And are the contents of those statements true and correct, to the best of your knowledge and belief?---Correct. To the best of my knowledge and belief.

PN566

Deputy President, I will tender the two statements of Daniel Stewart.

PN567

THE DEPUTY PRESIDENT: Thank you. Any objections, Mr Seck?

PN568

MR SECK: No, Deputy President.

PN569

THE DEPUTY PRESIDENT: Okay. So Mr Stewart's first statement will be exhibit A3 and then his second statement will be exhibit A5.

**EXHIBIT #A3 WITNESS STATEMENT OF DANIEL MATTHEW STEWART DATED 16/02/2024**

**EXHIBIT #A5 WITNESS STATEMENT OF DANIEL MATTHEW STEWART DATED 21/02/2024**

PN570

MR COLUCCIO: That is the evidence-in-chief for Mr Stewart. I will now hand over Mr Stewart to the lawyer for the employer.

PN571

THE DEPUTY PRESIDENT: Thank you.

**CROSS-EXAMINATION BY MR SECK**

**[12.46 PM]**

PN572

MR SECK: Mr Stewart, my name is Michael Seck. I am the barrister appearing for Wollongong Resources. And I am going to ask you some questions about your statement?---Yes, your last name, sir? Your last name, sir?

PN573

So, my name? It's Seck, spelt S-e-c-k, Mr Stewart?---Thank you.

PN574

Now, do you have your first statement in front of you, Mr Stewart?---Yes, I do.

PN575

Exhibit A3, you say you started working at Russell Vale Colliery in 2011. That's correct?---Yes, I did. Yes.

\*\*\* DANIEL MATTHEW STEWART

XXN MR SECK

PN576

Have you remained employed at Russell Vale Colliery since 2011?---Yes.

PN577

When were you appointed as a deputy at Russell Vale?---Russell Vale Colliery, I was initially - 2011 or thereabouts.

PN578

So you were a deputy from around the commencement of your employment at Russell Vale?---Correct.

PN579

Now, did you work as a deputy prior to working at Russell Vale Colliery?---Correct.

PN580

Which other mines did you work as a deputy?---Number 4 Shaft, Bulli Seam.

PN581

So just No.4 Shaft Bulli Seam, is that what you said?---Correct.



PN582

All right?---Correct.

PN583

And how long were you in that working as a deputy at the No.4 Shaft Bulli Seam?---2009 before I was transferred to Russell Vale in 2011.

PN584

And pardon my ignorance, Mr Stewart, what was the colliery you were – what was the colliery you were working at where No.4 Shaft Bulli Seam was located?---It was Picton Road. It was called No.4 Shaft Bulli Seam.

PN585

Got it. Now - - -?---NRE.

PN586

Sorry, what was that last answer? I missed it?---N-R-E.

PN587

All right. Now, in becoming – in working as a deputy, Mr Stewart, you have undertaken training to be certified to be a deputy, that's correct?---As a deputy. Yes.

PN588

And you undertake training on a continuous basis to maintain your certification?---Yes.

\*\*\* DANIEL MATTHEW STEWART

XXN MR SECK

PN589

And do you have any other qualifications in the mining industry besides training to obtain a certification as a deputy?---As an operator, I have.

PN590

And what training did you obtain as an operator?---General underground as a labourer, a shuttle car driver, an LHD operator, a FMV operator, a hand bolting operator, TDF bolter operator.

PN591

So that was training that you obtained as part of working in each of those jobs?---Each, correct.

PN592

Did you obtain any qualifications – post-secondary qualifications in the area of mining?---No. Only deputy.

PN593

Okay. When you were – when you have been working at Russell Vale Colliery, Mr Stewart, have you been appointed as a health and safety representative?---As far as it – not as health and safety representative, only in the capacity of a deputy.

PN594

Have you been involved in voting for the appointment of a health and safety representative at Russell Vale Colliery?---Yes. I believe so. Some time ago.

PN595

Right. And you understand that health and safety representatives have, as part of their responsibilities amongst other things, consulting on behalf of the workforce with the company about health and safety issues at the mine?---I believe that has been their role, yes.

PN596

And when you have had health and safety issues, which arose at the mine, you would have passed them on through your health and safety representatives, correct?---Initially, on my report and then (audio malfunction).

PN597

Sorry, I missed your last answer, Mr Stewart? Could you just repeat that, please?---Yes – yes – you're breaking up as well. Yes, through - initially through my immediate supervisor. Also on my report and then with the health and safety rep.

PN598

Right. So there were two – two pathways, in effect, for you to report safety issues to your immediate supervisor and through your health and safety representative?---And my statutory reports.

PN599

On your statutory report. And if there were safety issues, it would usually go through one or more of those three pathways?---Yes. I believe so.

\*\*\* DANIEL MATTHEW STEWART

XXN MR SECK

PN600

Yes. Now, can I take you to your statement. One of the duties that you have identified includes doing daily inspections and taking gas flow readings on a regular basis?---Correct. Yes.

PN601

And those gas flow readings and inspections would include gas bag, gas flow inspections, correct?---Yes. Weekly, gas flow inspections, weekly on a work order. With a garbage bag.

PN602

Or garbage bag, sorry. I said gas bag. Garbage bag?---Correct.

PN603

Now, the garbage bag test is where the bag is held over borehole and you observe how long a bag may inflate as a result of gas being released into the bag, correct?---How – how long it takes to fill, correct.

PN604

That's a method that is being used in your experience at Russell Vale Colliery since 2011?---No.

PN605

Oh, right?---I have only used that gas bag – sorry, garbage bag test for the last three to four months.

PN606

Right. Sorry, if I use gas bag and then garbage bag. It's again, my fault. The - - - ?---Hello?

PN607

No, sorry, just bear with me, Mr Stewart, I am just looking at my notes. The garbage bag test involved determining whether or not there was any gas flow or not, correct?---Yes.

PN608

And if there was no or low gas flow, then this would – is either a potentially a blockage or a build up of gas pressure?---That's possible.

PN609

And you understood that the test was to allow the company to understand whether or not there was a black blockage or a dangerously high flow of gas coming through?---As I said, possibly, yes.

PN610

When you say, 'Possibly, yes', that's the main purpose of the garbage bag test, would you agree?---Or it could be that the flow is being exhausted.

\*\*\* DANIEL MATTHEW STEWART

XXN MR SECK

PN611

In other words, there was the gas has escaped and there's no gas left in the borehole, correct?---In the – possibly in that particular hole.

PN612

All right. Now - - -?---Hello?

PN613

Yes, sorry, just – sorry, I apologise, Mr Stewart, I am just looking at my notes, so just bear with me whilst I look at it. You didn't ever raise a complaint about the use of the garbage bag test method to anyone whilst it was being used. Is that correct?---Yes, I did.

PN614

To whom did you complain?---My supervisor. Immediate supervisor.

PN615

And who was your immediate supervisor?---I believe at the time it would have been Sam Bray.

PN616

All right?---As I stated it's not a – yes, effective way to give a recording. Not a very efficient.

PN617

And did Mr Bray tell you, give you a response to that as to what he would do, or what would happen?---Indicated to me that that's what we were using. Just use a garbage and that will do.

PN618

Did you complain to anyone else?---I believe it was on one of my reports, my stat reports. I am not 100 per cent sure there.

PN619

Now, if you have any – you said there were other pathways of claiming within – to your statutory report or to a HSF representative. Did you complaint to either of those persons about the garbage bag test method?---No, I don't recall because our representative isn't always available or not on our shift.

PN620

All right. Now, you also refer to gas drainage and ventilation in your statement, Mr Stewart?---Yes, what point – what number are you on, please?

PN621

So paragraph 24 onwards?---Yes.

PN622

You say that there is no gas drainage plants at Russell Vale Colliery? See that?---Correct.

\*\*\* DANIEL MATTHEW STEWART

XXN MR SECK

PN623

Your suggestion is that at paragraph 28, there should be a gas drainage plant in place and a gas drainage expert engineer, correct?---(Indistinct) correct.

PN624

The issue of a gas drainage plant, have you made enquiries – have you ever raised that as an issue with anyone?---I believe I have in the past, made a statement off – off the cuff, we should have a drainage plant here.

PN625

When you say off the cuff, would that indicate that you haven't complained about it, it was a comment you may have made to someone?---Yes, I believe the supervisors.

PN626

Right. So a gas drainage plant is a separate facility, right? Which would drain the gas from the bore holes. Is that what you're intending to mean?---It – it would suck the – it would suck the flow out there - out of the mine.

PN627

Right. And so that would in effect require a completely new facility to be built in order to do that, correct?---I believe it would, yes.

PN628

Have you ever enquired as to the costs involved in building such a plant?---No, I have not.

PN629

Have you ever enquired as to what regulatory approvals would be required to instruct and implement such a plant?---No, I haven't enquired, but I do know it would have to be – they would have to go through the regulator, yes.

PN630

Now, you also refer to in your statement, Mr Stewart, ventilation. You say that the brattice for ventilation is not the most efficient ventilation system. Correct?---Yes.

PN631

And you say that an auxiliary fan and having vent tubes would be better?---Yes.

PN632

Now, again, have you ever raised with anyone that auxiliary ventilation fans should be used?---Yes.

PN633

To whom did you raise that?---Immediate supervisor.

PN634

Right. Anyone else?---Not that I can recall. Maybe to the CEO when he's done shift talks maybe.

\*\*\* DANIEL MATTHEW STEWART

XXN MR SECK

PN635

When you say maybe, you're not sure?---No, I am not sure. No.

PN636

Now, am I right in saying auxiliary ventilation as you understood it and understand it requires ventilation tubes to be installed which go all the way up to the coal face?---Yes, as close as practical to the coal face.

PN637

And they would have to be, sorry, I withdraw that question. Just hold on a second. Have you ever investigated the costs involved in putting in place auxiliary ventilation?---No, I haven't, but we do have some auxiliary fan ventilation underground at Russell Vale.

PN638

Right. To put in auxiliary ventilation, that would require some large equipment, correct?---Yes. And we do have some of that on site.

PN639

And you would have to continuously move around the panel, do you agree? In order for it to work?---Not the fan. The auxiliary fan.

PN640

Okay?---That stays in – the fan stays in one area and the tubes are placed along the roof as you advance.

PN641

Yes, sorry?---And you have TP. So the auxiliary fan stays in – the auxiliary fan stays in one place until you advance a pillar or two and then you move the auxiliary fans.

PN642

But you also have to use – move the vent tubes, wouldn't you?---You – you would, yes.

PN643

And so there would be practical issues in moving the vent tubes as you move around the panel?---Yes. Same as other mines.

PN644

Right?---That can be managed.

PN645

Right. Are you aware that Wollongong resources uses a gas Venturi system?---At the end of the gas pipeline? Yes.

PN646

And it's in effect, a vacuum system which uses negative pressure to create a natural vacuum effect to drain the gas, correct?---Yes. But it's not very efficient.

\*\*\* DANIEL MATTHEW STEWART

XXN MR SECK

PN647

Now, you have not done any studies as to the efficiency between either of those – between the gas Venturi system or an auxiliary ventilation system. That's correct?---Sorry? Repeat that question, please?

PN648

So you haven't done any analysis or study about the efficiency or effectiveness of the gas Venturi system versus the auxiliary ventilation system?---No, I haven't. But that's - a gas drainage plant is different to auxiliary air vents.

PN649

Now, hold on, Mr Stewart?---Yes?

PN650

No further questions. Thank you.

PN651

MR COLUCCIO: Nothing from me.

PN652

THE DEPUTY PRESIDENT: Mr Stewart?---Yes?

PN653

That's the end of your evidence. Thank you very much. There is no more questions from either of the lawyers for you, so thank you for participating today and giving your evidence. And you are free to go about your day now. We're going to disconnect the call, because we're about to break for some lunch. So thank you for your time today?---No problems. Thank you very much.

PN654

All right?---Bye.

**<THE WITNESS WITHDREW**

**[1.06 PM]**

PN655

THE DEPUTY PRESIDENT: So how long do you think - - -

PN656

MR SECK: Well, at least from my part, Deputy President, we have obviously put into writing the substance of our position. I am not going to take you through all the evidence and the vast amount of material because we cross-referenced it to our submissions. But there are some points I want to emphasize. I have had a discussion with Mr Coluccio and he feels that we can be done in up to an hour. I think I can probably be the same. He made need time to reply, but hopefully he doesn't. That may take us around two hours based on that estimate, so if we come back at two, we should be done hopefully by 4 but slightly after 4. So it's – I am in your hands as to whether or not you want to start earlier, prior to two or start at 2 with the possibility we may go beyond 4.

\*\*\*

DANIEL MATTHEW STEWART

XXN MR SECK

PN657

THE DEPUTY PRESIDENT: Mr Coluccio, anything?

PN658

MR COLUCCIO: Nothing to add.

PN659

THE DEPUTY PRESIDENT: All right. Yes, that – let's resume at 2 and we will go from there.

PN660

MR COLUCCIO: As it pleases.

PN661

THE DEPUTY PRESIDENT: Thanks.

**LUNCHEON ADJOURNMENT**

**[1.07 PM]**

**RESUMED**

**[2.04 PM]**

PN662

THE DEPUTY PRESIDENT: Mr Coluccio.

PN663

MR COLUCCIO: Look, I will see if we can get things out of the way. Deputy President, we have obviously filed some fairly extensive written submissions in this matter, which we will rely upon whilst outlining some of the salient factors here. Those matters that we have outlined in our written submissions are, in some points, lengthy, and I will try to cut those down as we go along, but you might have to indulge me on that basis.

PN664

We would say that the starting point of this inquiry is to note that, whilst APESMA is the applicant in the matter, the burden rests with the respondent to demonstrate the stand-down was within the requirements of section 524. Now we rely upon the authority of *Qantas Airways v Australian Licensed Aircraft Engineers*, in which Flick J says, not surprisingly, the onus rests on the employer to establish that it brings itself within the power to invoke such provisions. I don't intend to take you to that authority as I understand the respondent hasn't argued that point, but, if need be, we can move into that in reply.

PN665

What we would say, though, is that the result of that is that, in making findings in this case, the applicant does not need to demonstrate to you, Deputy President, that the respondent is reasonably responsible for the stoppage; rather, the respondent must demonstrate to your satisfaction that they are not reasonably responsible, or else you should make a finding that section 524 does not apply to the stand-down.

PN666

I will turn to the orders that we seek in this matter towards the end of my submissions, as there is some complexity with that.

PN667

We have set out, in our written submissions, the approach the Commission would take in determining compliance with section 524, and we adopted the language used in the case of *Independent Education Union of Australia v The Peninsula School*, which is not in the bundle, but I understand my learned friend has included it in some additional authorities this morning.

PN668

Again, I don't believe it's necessary to take you to it, but, simply put, we say there's a cascading series of considerations, which is whether there is a stoppage, if so, was it for a cause for which the employer cannot be held reasonably responsible and, if so, could employees be usefully employed because of that stoppage.

PN669

Again, we say the burden rests with the respondent to satisfy you of each of those matters, Deputy President. In relation to the first, we do not believe there will be much trouble for the Deputy President to determine that there was a stoppage of work, but, again, we note that, in relation to that last point about whether there is useful work to be done, that's a question for the respondent. It's not a matter of the grounds that have been advanced in this application; it's simply a matter for, in this Commission, you to be satisfied that the respondent has discharged its burden



that each of those requirements needs to be met, and that's a matter for the respondent to establish to your satisfaction.

PN670

For the moment, I wish to consider the second matter, being whether or not it was a cause for which the employer can be held reasonably responsible. I want to turn first to the case of *Australian Licensed Aircraft Engineers v Qantas Airways*, which is a 2022 case of the Full Court of the Federal Court, which is included in the bundle at paragraph 628, I believe. At paragraph 51 of that decision, Besanko J says, on the issue of causation and responsibility:

PN671

*It seems to me that it would be inconsistent with the express - - -*

PN672

THE DEPUTY PRESIDENT: Sorry, what paragraph was that?

PN673

MR COLUCCIO: Paragraph 51:

PN674

*It seems to me that it would be consistent with the express terms of the stand down provisions to conclude that the causation and responsibility analysis demanded by the clauses concludes with the identification of the immediate or direct cause. To my mind, to focus only on the immediate or direct cause would give the provisions an arbitrary operation which ignores the real, substantial or effective cause of the stoppage of work.*

PN675

It goes on to that point and notes at the end there that the construction of those clauses is supported by the authorities, but this discussion of the dual and the related inquiries of the cause and the notion of reasonable responsibility is what the Commission is here to determine.

PN676

His Honour says the real inquiry is for the real and substantial or effective cause of the stoppage at work and rejects this notion of the immediate or direct cause.

PN677

The respondent, in this case, submits that the prohibition notice was the reason for the stoppage at work and that the inquiry should end there. Now, we say that, based on the authority I have taken you to, and the well-accepted line of authorities, that that approach should be immediately rejected.

PN678

There is no cause to say that the prohibition notice, being the last in the line, or the 'but for' cause of the stoppage of work is what you are, Deputy President, required to consider to be the cause of that stoppage. The focus of this broad-based approach to causation, rather than a narrow or arbitrary line, is well accepted in the case law, which we would say makes that contention unsustainable.

PN679

In addition to this notion of a real, substantial or effective cause, the authorities also rely on the notion of natural and probable consequence. In the case of *Qantas Airways v Australian Licensed Aircraft Engineers*, which is at page 768 of the bundle, I will go to paragraph 19 on page 781 of that decision. In that case, Flick J considered that test and said:

PN680

*When identifying the cause of the stoppage at work, it is accepted that the search is not for the immediate cause of the stoppage but rather a more broadly based factual inquiry directed to the sequence of events which ultimately led to the stoppage of work.*

PN681

At 20, his Honour went on to say:

PN682

*A more broadly based review of whether it was the natural and probable consequence of the employer's conduct which caused the stoppage, rather than a confined inquiry directed to the immediate cause of the stoppage, is essentially a question of fact.*

PN683

So again we can see from this authority that the inquiry is a broad-based approach, not confined to the immediate cause, but what his Honour describes as 'the natural and probable consequence', which he also notes is a question of fact to be determined case from case.

PN684

It is also reasonable at this point to consider the next paragraph, 21, where his Honour goes on to say:

PN685

*These two questions of causation and reasonableness of conduct nevertheless remain separate components of many stand-down provisions. Consistent with the Industrial Court's conclusion in Ford Motor Co, if not explicit in its reading, the question as to whether the cause of the stoppage of work can be one for which an employer can reasonably be held responsible depends, again not surprisingly, upon an assessment of the conduct of a reasonable employer.*

PN686

Again, what we see here is that we have the consideration of the cause and the related inquiry of reasonable responsibility, and both of those factors, we say, require a broad-based approach and also consideration of what a reasonable employer in the position of the respondent would do.

PN687

His Honour went on to quote from the oft-cited case of Ford Motor Co, in which that case considered a clause which said 'reasonably prevent' rather than 'reasonably responsible', which we would suggest are similar, but 'reasonably

prevent' possibly is a bit more limited in application, but I don't say anything turns on that.

PN688

If we look at that quote in paragraph 21, about halfway into the quote from Ford Motor Co, there's a quote about the inquiry that's made which says:

PN689

*Either the stoppage or the cause of the stoppage, it matters not which, could not have been prevented by the employer by using any of the means which a reasonable man might be expected to employ in such circumstances.*

PN690

So again, that's a sort of inquiry that's more aimed at this notion of reasonably prevent, but we would say that it informs the Commission's task as to the actions of a reasonable person in the position of the employer.

PN691

The final authority we want to seek to rely upon in terms of this question is the High Court case of *March v Stramere*, determined in 1991, which is extracted at page 699 of the court book. This case extensively considered matters of causation and ultimately held that the use of common sense principles and value judgments having regard to public policy was how matters of causation should be resolved.

PN692

On page 515 of that decision, which is, I believe, 708 of the court book, Mason CJ says:

PN693

*The common law tradition is that what was the cause of a particular occurrence is a question of fact which 'must be determined by applying common sense to the facts of each particular case'.*

PN694

He goes on to say, about halfway down that page, and apology for speaking to a longer quote here, but he says:

PN695

*Commentators subdivide the issue of causation in a given case into two questions: the question of causation in fact - to be determined by the application of the 'but for' test - and the further question whether a defendant is in law responsible for damage which his or her negligence has played some part in producing.*

PN696

*It is said that, in determining this second question, considerations of policy have a prominent part to play, as do accepted value judgments. However, this approach to the issue of causation (a) places rather too much weight on the 'but for' test to the exclusion of the 'common sense' approach which the common law has always favoured; and (b) implies, or seems to imply, that value judgment has, or should have, no part to play in resolving causation as*

*an issue of fact. As Dixon CJ, Fullagar and Kitto JJ remarked in Fitzgerald: 'It is all ultimately a matter of common sense.'*

PN697

What we are getting at in terms of this submission, Deputy President, is that there are different conceptions of how this question of responsibility and causation can be approached. The High Court authority boils it down to common sense. We say, though, that if you apply these various tests, you know, the illusive hunt for causation can variously be described as 'real and substantial effective cause' or 'natural probable consequence'.

PN698

All of these tests, we say, lead to the same conclusion in this instance, which is that the mine was shut down due to a prohibition notice, and that prohibition notice specifically calls out the ineffective controls at that mine site, which are controls that both sides have provided evidence of in this proceeding as to the inefficacy of those controls.

PN699

Now, in those circumstances, we say the respondent cannot reasonably say the cause was just a prohibition notice alone. We say that that would be a nonsensical approach which would ignore the reality of the situation that the prohibition was noted due to specific circumstances.

PN700

We draw an example in the written submissions of a coal mine operator in the position of a respondent who decides to intentionally light fires underground, and then, when a prohibition notice is subsequently issued, says that they are not responsible for that action because a prohibition notice is the legal enforcement document. That contention, obviously, could not be sustained, and it should not be in this instance either.

PN701

In terms of the case as to why we say the applicant says the respondent is reasonably responsible, which we note is not the burden for us to discharge, we say the evidence is voluminous and it's robust.

PN702

We say we can summarise it as follows: firstly, that the regulator did issue the prohibition notice against the respondent; it called out several grounds for why it was issued, which included the fact that there was a total of five frictional ignition events since July 2022, with four occurring since April 2023; that an assessment of those events identified a range of causal factors, with the most recent one having causal factors not previously identified, but, perhaps most importantly, the regulator said that:

PN703

*Existing controls have proven ineffective in eliminating or otherwise minimising the occurrence of frictional ignition events at the Russell Vale Colliery.*

PN704

Finally, and equally importantly:

PN705

*The number of frictional ignition events and their different causal factors causes me to believe the mine operator has not, or may not have, identified and implemented all reasonable practicable controls to eliminate, or otherwise minimise, the occurrence of frictional ignition events.*

PN706

In our written submissions, we describe this as our prima facie case. We would submit that you would be entitled to have solely relied upon the prohibition notice, Deputy President, and, indeed, you are entitled to solely rely upon that prohibition notice to determine that the respondent cannot satisfy you that it is not reasonably responsible for this case.

PN707

This is not a situation in which the prohibition notice has been issued as a result of some act of God, or an earthquake, as the respondent invokes in its written submissions. It was issued for specific reasons, which are pointed at the controls of the respondent, which it says are ineffective.

PN708

Now, in circumstances where the respondent is an employer in the heavily regulated coal industry, where it has already experienced four frictional ignition events, where it either knows, or ought to have known, about controls that would ameliorate the risks of frictional ignition events, the Commission would simply not go behind the decision of the industry safety regulator to find that their assessment of the causes of this fifth event were wrong.

PN709

The notice not only shows the respondent's controls were the cause, but, in the circumstances I have just outlined, that a reasonable coal mine operator in the position of the respondent would have taken action. This is compounded by the fact that the decision of the regulator was affirmed on internal review with significant documentation, findings and reasoning again blaming the respondent's controls.

PN710

In earlier proceedings, the respondent warned of the dangers of potential embarrassment. Here, the respondent is now asking you to make a decision which would necessarily require you to disagree with the expert industry watchdog. We would suggest the Commission, on the evidence before it, would be slow to do that.

PN711

In addition to what I have just outlined, which we have described as our prima facie case, we say there is substantial evidence which demonstrates there were available controls to the respondent which could have mitigated or prevented the frictional ignition that has led to the stoppage of work.

PN712

The evidence, we say, shows the respondent, in some cases, knew about these controls or recommendations and did not implement them. We say that, in others, the controls are so reasonable that a coal mine operator in the position of the respondent, with its resources and knowledge and having experienced four events to date, would have implemented those controls.

PN713

I want to reflect on some of the evidence presented in the Commission today. We would say, based on the evidence provided today, that the Commission would prefer the evidence of Mr Stewart and Mr Nisbet. We say that they presented as reliable witnesses. They gave direct answers to the questions posed, and those questions were directly relevant to the inquiries being made of them.

PN714

Now, where those inquiries were against them, they made appropriate concessions. Mr Stewart acknowledged that he had not costed the gas drain in each planned proposal he referred to in his statement. When he was asked who he had raised the idea of an auxiliary fan with, he noted his direct supervisor was one person and noted he may have informed Mr Pawle, but he wasn't sure. He did not embellish and say that he could have, or that he did, inform Mr Pawle. He noted that he wasn't sure on that, and then confirmed that to opposing counsel.

PN715

Similarly, Mr Nisbet also acknowledged that he didn't have knowledge of the SHR election processes and hadn't been involved in that. He did not try to hide any deficiencies in his evidence.

PN716

Now, what both deputies raised, when asked by my learned friend, was that, when they were asked if they had raised issues to their supervisors and potentially other people, they identified that Sam Bray, the ventilation officer and production manager, as it turns, was identified as a person to whom these issues were raised.

PN717

Now, as a senior official in the mine, it is reasonable to consider that that is sufficient. These issues have been raised with a senior official of the mine, who signs off on the PTM, and the respondent shouldn't be able to, in those circumstances, be able to reasonably deny knowledge of those controls. It is not for the deputies in this case to continuously escalate these matters past senior officials in the mine, such as the production manager, one of the highest officials in the mine, until they receive that satisfactory answer. In any event, the respondent - - -

PN718

THE DEPUTY PRESIDENT: Am I to assume that if these matters were raised, or because these matters were raised, if the respondent had acted on them, then the notice would not have been issued?

PN719

MR COLUCCIO: Very possibly, Deputy President, because the matter that was raised, according to Mr Nisbet and Mr Stewart, was the issues with the garbage bag test. I will come to it in a moment, but Mr Vatovec talked about how that test applied to other mine sites and how that test is more precise at other mine sites, but declined to agree that it should be implemented at Russell Vale Colliery.

PN720

Now, in our submission, we have made the point over and over again that the trend for these holes is what is important, in addition to knowing the flow, of course, but the trend reveals whether or not there is a drainage or a blockage of that hole, and had accurate trend data been collected, it would have identified the hole as bagged, that would have been noted on a control document - perhaps not the PTM in light of the evidence of Mr Vatovec - but it would have been noted, and, if that were the case, then it would not have been intersected in the way it was.

PN721

Where that leads to is that, had the garbage bag test been replaced with the more precise flow readings, as suggested by both witnesses for the applicant today, you would have had a more automated and a more precise method of that readings, which would have been on a system that is not counting your watch with a garbage bag, and that could have been recorded in a manner that would have prevented the frictional ignition event from having occurred.

PN722

So what it suggests is, not only there's a causal link, but it can also go to this matter more generally of a reasonable responsibility, because, while they are related, there is a slight nuance to them. The causal link shows that A led to B. Reasonable responsibility goes to what an employer in those circumstances might have done.

PN723

Now, if you have a system with necessary holes in it, as is identified here, it may be the case that, whilst it might not have been the one that caused this particular incident, it's part of a broader framework in which the respondent is shown to have not instituted all reasonable controls and, for that reason, should be held to be responsible. I do want to contrast that - - -

PN724

THE DEPUTY PRESIDENT: Is there any evidence of the regulator raising concerns about the garbage bags?

PN725

MR COLUCCIO: I do not believe so, Deputy President. Obviously, the evidence of the regulator has largely been provided in the week or two following on from the incident. It's largely, for that reason, going to be not as fulsome as it might later become as to the immediate causes of these things. What it does note is the more broader capturing of how these matters are reported. We would say that if a control that the regulator says needs to be put into places that you have borehole flow data recorded in a fulsome manner, then a necessary component of recording that data is recording it in a precise way.



PN726

So whilst it's not specifically called out, and we do concede that, we're saying that that is part of this process and having those type of recording implements, which would necessarily have to have a process along with them, would have created more of a procedure that would have identified those issues.

PN727

THE DEPUTY PRESIDENT: Are you saying that bore flow data was called out, but just garbage bags weren't called out?

PN728

MR COLUCCIO: We do say that, Deputy President. Give me a moment. I might look to - if I can take you to page 143 of the court book, this is the assessment documents taken the day after the fifth frictional ignition event and made on 6 January. If you look at page 142, the bottom point in this is:

PN729

*Was there any industry standards not implemented? Common control measures used at other collieries, but not in use at Russell Vale Colliery from observation.*

PN730

The first of those is:

PN731

*The recording of hole intersections and subsequent treatment to ensure holes are hosed over or bagged, as appropriate, including bag location in relation to the whole of the hole.*

PN732

The second is:

PN733

*Maintaining of records of hole intersection information for future use.*

PN734

Now that's essentially the use that occurred here. There was no record of the treatment in relation to that. These were poor record-keeping structures which could have been ameliorated in relation to the permit to mine, which was exported to Mr Vatovec.

PN735

I do want to compare the evidence of Mr Nisbet and Mr Stewart to the evidence of Mr Vatovec. In our respectful submission, we say Mr Vatovec did struggle to answer the questions put to him with a direct answer. He repeatedly sought to contextualise simple questions and avoid simple answers that were damaging to the respondent's case.

PN736

For example, when I put to him that if he didn't look at other mine sites, he might miss available controls, he denied this on several occasions. He denied repeatedly



that a frictional ignition event could lead to an explosion. When I put to him that substandard stone dusting could lead to an explosion, and that had been the case that there was substandard stone dusting at the time of the incident, he said that the risk was very remote, and when I asked if that meant it could happen, he said, 'No'. Then, when I pointed out that the stone dusting at the time of the incident was found to be below the requirement of 85 incombustibles under the regulation, he said that even though it was below, it was safe and the testing regime of the regulator was the issue. That quote that we took, he said 95 per cent or 85 per cent is still safe. I appreciate that and the transcript will reflect if that's the direct quote.

PN737

What we say is that that's an unsafe attitude and it's directly in contravention of the regulations. The 85 per cent is not an industry standard, it's one that comes from the standards, but what we say more broadly is that it reflects poorly on Mr Vatovec's value as a witness.

PN738

When I asked Mr Vatovec about the appointment of a gas and drainage expert, he provided a series of inconsistent statements. He said that the decision to appoint John Caunt was made in early January in his statement. I pointed out to him that the event occurred on 5 January and he was on leave until 8 January. He then said the decision was made around 18 January, at which point I pointed out the prohibition notice was issued on that day.

PN739

He then referred to a history in which the decision had actually been made back in December and that Sam Bray had filled the position through to November. However, he also seemed to say that Mr Bray went from being ventilation officer to the production manager in around October, at which point either Mr Bray or Mr Caunt filled the roles.

PN740

That series of statements appears confusing at best, but more likely is inconsistent, and what we would say is that it's not something that the Commission should apply significant weight to. We say that it's evidence that appears to show that there were not serious steps taken to have a gas and drainage expert and rather simply give that title to somebody who was already working at the mine in addition to their substantive role, and we suggest that it's largely a recharacterisation of past events for the purposes of this hearing.

PN741

THE DEPUTY PRESIDENT: Is the evidence on all of that that from October onwards, somebody was assigned to the responsibility of ventilation and gas?

PN742

MR COLUCCIO: That's not the evidence specifically given in circumstances where he says that Mr Bray moved from his role to the production manager role and then Mr Caunt took on this role, but in other evidence said that the decision to appoint Mr Caunt was an appointment decision he made in early January and then changed on that day.

PN743

THE DEPUTY PRESIDENT: You asked him a lot of questions about the timing of the decision, and it seemed to me what he was saying is that there's at least a couple of dimensions to that history. One is when Mr Caunt could do the work because, while Mr Vatovec was on holidays, he was the production manager, I think, and then Mr Vatovec was back, and then he was off, and so he wasn't going to put him into the position until he'd spoken to him, et cetera. Those are all matters of timing of when a decision was made that was never actioned because of the combination of leave arrangements and then the prohibition notice 18 January.

PN744

MR COLUCCIO: Yes, we would say the substantive point of all of this is that this person was not appointed and that it would be reasonable to have this type of expert, which is conceded to be what other mine sites have in place.

PN745

THE DEPUTY PRESIDENT: That's what I mean. Isn't the evidence that somebody was doing that, somebody was assigned to that function?

PN746

MR COLUCCIO: Well - - -

PN747

THE DEPUTY PRESIDENT: Somebody was specifically looking at those things from October onwards?

PN748

MR COLUCCIO: The evidence is that Mr Vatovec says, as a bald assertion, that Mr Bray was looking at that at that point in time. It was not his job title. His job title was a ventilation officer, and then he became the production manager, which would necessarily mean that that role had ended, and then it appeared that there was a bit of a retconning of that evidence in which Mr Caunt became the new gas and drainage person back in October or so last year, which is inconsistent with what he said in his statement, which was that that appointment was one that he had proposed to make from January. He did not speak to Mr Caunt doing this role beforehand until he was pressed on it here today.

PN749

THE DEPUTY PRESIDENT: Are you assuming that if no one has 'ventilation' in their job title at a particular point in time, then there's nobody looking at ventilation issues?

PN750

MR COLUCCIO: Certainly not.

PN751

THE DEPUTY PRESIDENT: I mean the respondent's evidence is that they're doing a whole range of things to comply with the various prohibition notices and the Polaris report and everything like that, and presumably, in the course of doing all of that, they are looking at ventilation and gas and everything else.

PN752

MR COLUCCIO: Certainly, and ventilation - - -

PN753

THE DEPUTY PRESIDENT: What difference does it make if, you know, at 1 December, nobody within the organisation chart had a 'V' in their title for 'Ventilation'?

PN754

MR COLUCCIO: A ventilation officer is a statutory role which is required in mine sites.

PN755

THE DEPUTY PRESIDENT: Okay.

PN756

MR COLUCCIO: The point of what we're saying is that a reasonable control is that - and this is what comes out in the reports - is that a gas and drainage expert and someone specifically for that role to monitor these functions should be a specific individual role. What Mr Vatovec seems to suggest is that these roles were assigned here and there to the ventilation officer and whatnot, that these roles being given to the ventilation officer would be the normal course of events without that additional control in place.

PN757

What we say is that if you have a mine where you have four frictional ignition events and you are on a gassy seam, like the Wongawilli Seam is, what's necessary is that you take, before the fifth one, additional steps to have someone who is specifically having their job be to manage this, as occurs at other mines. That's what didn't occur.

PN758

If I can turn to Mr Vatovec's second statement on page 237 of the court book, the one point I just note from that is that the step that he says was taken at 18 January was to take steps to appoint a dedicated gas and ventilation officer. So what that reveals is that it hadn't occurred, which is our first point, but also, secondly, that it is recognised that having a dedicated gas and ventilation officer, as opposed to this role sitting with a ventilation officer or someone else, as would be the normal course, is a desirable thing. It's a reasonably practicable control that, after four frictional ignition events, should have been obvious to the respondent.

PN759

Did you have any questions on that point, Deputy President, before I move on?

PN760

THE DEPUTY PRESIDENT: I'm looking at 237, paragraph 25 of Mr Vatovec's second statement.

PN761

MR COLUCCIO: Paragraph 25(c)?

PN762

THE DEPUTY PRESIDENT: Yes, which is Mr Vatovec saying they commenced actioning the concerns raised in the 6 Jan prohibition notice, including they'd taken steps to appoint a gas and ventilation officer.

PN763

MR COLUCCIO: Yes. So what we say from that is there's no contest that there was no dedicated gas and ventilation officer at that point in time, but what we also say is that that is a reasonably practicable and, in our submission, obvious control that would have been available to the respondent, having suffered four frictional ignition events prior. It is a control at other mine sites, it is a control of which the deputy said would be a reasonable control, and has been at other mine sites in their statements, and it's a control which could have been implemented.

PN764

THE DEPUTY PRESIDENT: The 6 Jan prohibition notice is at page 223. It's not jumping out at me, but is there any reference here to a dedicated person in the role?

PN765

MR COLUCCIO: I suspect where the reference is is in the advice given to Mr Vatovec on or about 12 January, which I recall in the internal review. I will see if I can find that document.

PN766

MR SECK: Page 576, paragraph 26 - sorry, 32, page 579.

PN767

MR COLUCCIO: Thank you to my friend. That's correct. With regards to the permit to mine, Mr Vatovec did make a significant concession, which we would say is contrary to his evidence to this point, which was that the permit to mine was, in his words, 'just a guide', and he agreed that deputies could not rely on the information in it as being accurate alone.

PN768

This isn't the process that we say Vatovec speaks to in his statement. He says that deputies spend the first half hour of shift meetings discussing the PTM. Effectively, it's a source of truth. So his evidence that the PTM is just a guide and that deputies need to rely on other information gives an indication that this is a poor control method. If we have a permit to mine which is three months out of date, contains one flow reading for each hole which is three months out of date, does not contain any notion of the treatments for those holes, then it cannot be held up as a proper record-keeping device for the boreholes, as is suggested by Mr Vatovec.

PN769

The other key concession that we would say Mr Vatovec made was at the end of his evidence. I took him through a series of recommendations contained in the ICAMs, being the third ICAM after the third frictional ignition and the fourth ICAM after the fourth frictional ignition, in which there was an identical recommendation to develop a gas and a drainage management plan not limited to

branching(?) standards, hole design with (indistinct) intersections, gas reservoir calculations and hole flow monitoring and decay analysis. I will have that direct reference in a moment for you, Deputy President, but - - -

PN770

THE DEPUTY PRESIDENT: 276 and 307.

PN771

MR COLUCCIO: So those two there show the same recommendations and it wasn't actioned, but what Mr Vatovec then went on to concede was that, in the assessment report I took you to earlier, issued the day after the frictional ignition event on 6 January, that the recommendations in that particular report about common controls that are in the industry, but not at Russell Vale, relating to borehole management, that those controls were similar, if not the same, as what was being recommended in the third and the fourth ICAMs. That was a concession that he agreed with.

PN772

So what this shows is that we have a through line of recommendations of a common control dating back to the third frictional ignition event that is still not implemented by the time of the fifth, and we would say that that is quite a striking matter as to whether or not the respondent should be held reasonably responsible.

PN773

I do want to reflect briefly on that Polaris report and the recommendations that weren't put into place, which is a matter that was discussed at some length with Mr Vatovec. On page 505 of the court book I believe is the relevant point. Yes, so page 505 is the nine recommendations of the Polaris report, which was issued on 12 October, being three months before the fifth event. Now the recommendations, which have still not been implemented in full, are recommendations 5 to 9 and, according to Mr Vatovec, they would take six months, and that is the word we have to rely upon - obviously that's unable to be tested - but that was the time frame that he gives. We spoke at some length about recommendation 8 of that report.

PN774

THE DEPUTY PRESIDENT: There's more information about that in one of the other annexures because the respondent, in answer to one of the improvement notices, or something similar, provides a response to the report.

PN775

MR SECK: It's page 540 onwards is the response.

PN776

THE DEPUTY PRESIDENT: Yes, and it deals recommendation by recommendation.

PN777

MR COLUCCIO: Yes. Our point, quite simply, is this, and we don't believe it should be a controversial one. Recommendation 8 contains two parts, as was pointed out. The second part, that the mine should consider whether this is, in

fact, a principal hazard for the mine, has been dealt with, and that was agreed by Mr Vatovec. The first part of that recommendation is that:

PN778

*A review of current frictional ignition management systems should be undertaken with considerations to the risks associated with (indistinct) rock and methane gas, as experienced.*

PN779

Now we say that there is no substantive difference between that recommendation and the report that was required to be produced by Mr Chalmers(?) in response to the prohibition notice being issued.

PN780

The respondent was able to conduct two high quality reports, which provided findings, recommendations, and other associated bow tie analysis within that 14-day period from the date that they were engaged. To the extent that there are any differences in these reports noted, it should certainly not be held that, if the respondent is able to obtain the information that it was able to from those experts within 14 days, that it could not have reasonably got that information from - in response to the October Polaris report in a similar time frame.

PN781

We would say that the big difference in circumstances between those two incidents is that the Polaris report was issued in circumstances where operations were allowed to continue, and we would say that that meant that there was no pressing need for it compared to when operations were prevented by the prohibition notice. One of those issues was hurting the company's bottom line, and we would say that the Commission would be slow to make a finding that the deficiency of the respondent in failing to address that report in a timely manner would protect it from a finding of reasonable responsibility in circumstances where it could obtain, if not identical, a substantially similar report in 14 days when their ongoing ability to produce coal depended on it.

PN782

THE DEPUTY PRESIDENT: Mr Vatovec says that the response to the Polaris report was sent to the regulator and then nothing else happened. I assume that they assumed - 'they' as in the respondent - assumed that the regulator was content with the respondent's response to the Polaris report. Do you see that I need to disagree with the regulator about that?

PN783

MR COLUCCIO: I don't believe that it is the contention of the respondent that they had completed that review at the time of 18 January, and I believe that's the evidence of Mr Vatovec. His evidence is that it hadn't occurred, that it would take six months to occur. That's what he put. So whether or not there was a response that - they did not get a response from the regulator and therefore the matter fell off the radar, so to speak, that doesn't absolve them of their responsibility.

PN784

THE DEPUTY PRESIDENT: Your overarching submission is that the prohibition notice was the cause of the shutdown, the lockdown, but that the respondent's inadequate responses and control measures over the five ignition events are such that I should find that the employer can be reasonably held responsible for the fact that the prohibition notice was issued, and one of the arguments that you're advancing is that the respondent's response to the Polaris report was inadequate and too slow.

PN785

But the respondent did what it said it was going to do in response to the Polaris report, i.e. it did recommendations 1 to 5, and told the regulator that - maybe it's 5 to 9 - 1 to 4 and 5 to 9 - and told the regulator that, 'We will be adopting all of the recommendations of the Polaris report, but the last five are going to take up to six months' and, by the silence of the regulator, that is understood to be - by the respondent at least understood to be - a reasonable measure.

PN786

MR COLUCCIO: Certainly. I appreciate your point, Deputy President, and (indistinct) apologise for that. What we would say is that the key point there is that there is a difference in tests. The regulator's job is to say that there is this risk, a reasonably obvious risk, to work health and safety, with some, you know, stronger language that I'm using there, but, off-handedly, that's their job. That's not the same test as reasonable responsibility.

PN787

What we will be saying is that, even in circumstances where they are allowed to continue their operations, that does not mean that them undertaking this review in a drawn-out matter would mean that, because the regulator hasn't shut them down at that point in time, that they are somehow let off the hook for responsibility. What it means is that they are effectively running that risk that that does occur. So the risk is not the same as the risk required under section 195, that there will be that immediate risk there; the risk is that issues will occur which result in a prohibition notice.

PN788

They are two different tests, and I appreciate that there is similarity in where it gets to, but I guess what I'm saying is that the respondent shouldn't be able to rely upon the regulator's, you know, actions in carrying out its statutory function to say that anything that it hasn't done is no longer its responsibility, because what that would effectively do is mean that, given the regulator is working quite closely with the respondent, it would effectively give the respondent carte blanche to say that nothing is effectively their responsibility because the regulator has seen everything, and I don't think that that would be a public interest argument.

PN789

THE DEPUTY PRESIDENT: But the terms of the prohibition notice are way more complicated than that, aren't they, in the sense that it's the second prohibition notice issued after the ignition event on 5 January, and, by my reading of the terms of the second notice, what drove the inspector to issue the notice was a stepping back and taking a two-year perspective on a series of five ignition events and saying that all the control measures and the research that the respondent has



done to date has, in the inspector's view, left a gap, there remains a deficiency or a failure to, you know - I mean, the inspector uses the words 'eliminate the risk' - but it leads to a shortfall.

PN790

All of the steps that the respondent has taken to identify risks and put control measures in place have fallen short; therefore, in the inspector's view, the mining activity needs to stop and the respondent needs to conduct a better assessment of the risks.

PN791

So that calls into question, not whether the respondent did anything that left open the possibility that there would be an ignition event on 5 January, it goes to the question of whether the respondent's actions over an 18-month period adequately identified the risks and the reasonable control measures for those risks.

PN792

MR COLUCCIO: I think that's both, I guess, the close-up and the long-shot of the same issue. It's the controls that led to the fifth event, but it's also considered in the context of the five events that have occurred and the controls that haven't been put in place over that time. So I don't disagree with what you have put, Deputy President, but it's just - - -

PN793

THE DEPUTY PRESIDENT: And the risk of the seventh ignition event.

PN794

MR COLUCCIO: That's correct.

PN795

THE DEPUTY PRESIDENT: But coming back to then my concern about your criticism of the respondent's response to the Polaris report, the regulator commissions a report and then issues a notice requiring the respondent to consider the report, and so the respondent does that, tells the regulator what it's going to do, after it's considered the report and the recommendations, and tells them what it's going to do and the time frames it was going to do it all in, in order to identify the risks and the reasonable control measures.

PN796

The regulator doesn't say, 'That's all rubbish, you can get an expert in two weeks to do a report, so we're not satisfied with your response sent to us in October; you're not moving fast enough', and so one necessarily infers that the regulator was comfortable with the pace that the respondent was moving at vis-à-vis the Polaris report.

PN797

My question a little while ago to you was, well, to the extent that you are criticising the respondent's response to the Polaris report and saying they should have done things much faster than they did - obviously there's a hindsight factor there - but, in essence, you're inviting me to disagree with the regulator's



satisfaction with the respondent's response. And if anyone types up that sentence, they will shake their head, but I think you know what I mean.

PN798

MR COLUCCIO: I do, and I say it's not necessary to require that because, again, the regulator isn't co-running this business, the regulator has specific statutory functions about what it can require and what it can say. Ideally, yes, the hindsight elements, it could be said, might be from the regulator saying, 'Maybe get a move on with that particular review', but, if it's not going to put an improvement notice to mandate it, or a prohibition notice precluding operations until it's done, it's not running the business, and, to that extent, even if the regulator has not undertaken best practice, that doesn't absolve the coal mine operator's responsibility because the coal mine operator has that as their primary responsibility.

PN799

That's what's made clear in the WHS Act and the WHS(MPS) Act. The WHS(MPS) Act specifically talks to, when you have a notifiable incident, which a frictional ignition event would constitute, there is a requirement to review the control measures that are in place.

PN800

THE DEPUTY PRESIDENT: But aren't you applying a whole different test there? In essence, what you are saying is that the respondent can be reasonably held responsible for the prohibition notice because it had not taken all reasonable steps to introduce control measures for identifying risks.

PN801

MR COLUCCIO: Well, that's part of it.

PN802

THE DEPUTY PRESIDENT: Simpliciter. So, irrespective of what the regulator does, the respondent's control measures were inadequate and, therefore, it can be reasonably held responsible for the prohibition notice?

PN803

MR COLUCCIO: Simply put, that's right. I mean, if we were to boil it down, we would say that you have a report in October which says, 'Undertake a review.' The evidence before you shows that that review, or some form of it, can be done quickly. The respondent elected not to do that and, having not done that and not identified the controls that could have prevented further events in the context of four having already occurred, it is responsible for the ones that come next.

PN804

If this was a negligence case, perhaps there might be some sort of discussion of contributory negligence on the part of the regulator diminishing the responsibility of the respondent because they didn't come in and say, 'You should speed that process up', but that's not what the question is before you, Deputy President.

PN805

The question is whether or not they are responsible, and I don't think that the fact that they chose not to do this review as quickly as they could and then was not rapped on the knuckles by the regulator for doing that, I don't believe that that absolves them of responsibility. It remains an option that was known to the respondent that they could have done quite quickly, and they elected not to.

PN806

THE DEPUTY PRESIDENT: But this is the thing: responsible for what? You see, the question that I need to determine is whether they are responsible for the stoppage of work, whether they can reasonably be held responsible for the stoppage of work, but that's not a question about - that's not the same question as, 'Can the respondent be reasonably held responsible for the fifth ignition event?' because that doesn't get you home in terms of the responsibility for the stand-down because the prohibition notice was a week and a-half after the ignition event, and it didn't cause the stoppage of work, for example, but, if that's what you say they can be reasonably held responsible for, then, you know, that's one thing, or it could be that they are reasonably held responsible for the fact that the regulator issued a prohibition notice, or it could be that they are reasonably responsible for any, and every, control measure that they have taken, or not taken, which has, you know, something that could have improved ventilation, or safety more generally.

PN807

This isn't a negligence case, this isn't a health and safety prosecution, this isn't an external review of the prohibition notice, but there's elements of all of those factors that go into the stoppage of work and the degree to which the respondent can be held responsible for that.

PN808

MR COLUCCIO: Well, I suppose I would formulate it like this. The prohibition notice is issued for, really, as you boil down to it, two sort of lines, one being ineffective controls on the part of the respondent, the other being that it keeps on reoccurring and it has not been controlled - related but distinct.

PN809

The fifth frictional ignition event is essentially evidence to those points. So it's not - it may be the cause of the second one, in that it's the fifth one that's occurred and it's the straw that broke the camel's back in relation to saying, 'This is an unacceptable level and we're shutting this down', but, in relation to ineffective controls, it's evidence of ineffective controls.

PN810

What we say is that, if you go back to October and a recommendation after the fourth one to go and review those controls and you do it in a six-month time frame and not a two-week time frame, which you obviously can do, then if you have those ineffective controls in place and those ineffective controls lead to the prohibition notice, you are responsible for those ineffective controls being in place. That would be the throughline, as we have suggested.

PN811

We would also suggest that a fifth frictional ignition event, to the extent that it's evidence of that, it's evidence of the proposition, and it's also those ineffective controls leading to the fifth frictional ignition event provides another throughline in the sense that, like I said, it's the fifth in a series of unacceptable events that has led the pit to be shut down.

PN812

I am mindful of time. There are other matters which I propose to canvass - - -

PN813

THE DEPUTY PRESIDENT: It's a significant matter, Mr Coluccio, so take whatever time you need, and we'll just deal with it. We will just either sit until we finish or we'll finish it by phone in the next few days. I don't want you to cut short whatever you want to say.

PN814

MR COLUCCIO: I might have a look at the permits of the mine at this stage. So looking at page 85 of the court book, this is the page of the court book - I'm sorry, of the PTM - which canvasses the different holes and the flow rates and the treatments of those holes. Now you can see on the left side of the page, there is some data, but there is no information anywhere on the right.

PN815

It has been suggested that this is a live document - that was the evidence that Mr Vatovec gave - which is supposed to capture up-to-date information about these boreholes, but you can see that this certainly isn't the case here, and this is the up-to-date permit to mine in place at the time of the intersection, which is evidenced later on page 87.

PN816

You will see on that page, bullet point 2 in that email from Mr Vatovec to Justin Quinn, that was the permit to mine that was in effect at the time of the incident. So the permit to mine at the time of the incident is one which is most recently dated in November, compared to the January incident.

PN817

If I can go to the page in between those two, page 86, you will see, in the bottom right-hand corner, there are a number of officials who have signed off on the PTM, which includes Mr Vatovec, as the manager of mining engineering, which he holds as a dual role with his general manager position. So you can see that this is a document which is signed off at the very highest levels of the mine, and that date of that signature is 25 November 2023, being six weeks before the event.

PN818

Returning to page 85, you can see the problems with the PTM approach being the method for how information regarding boreholes is recorded. For each borehole, we have one flow rate listed for each borehole and, for each borehole, it's listed as having been measured on 22 November 2023, except, coincidentally enough, the borehole in question, which has no date assigned to it. So we would have thought that there being no date assigned to that borehole's reading would have raised

immediate red flags for the PTM team that this is a reading that should be questioned.

PN819

In any event, they are relying upon six-week old information when looking at this document, so deputies mining in January 2024 simply have no up-to-date knowledge about the flows in each of these holes.

PN820

THE DEPUTY PRESIDENT: What does 'hole open' mean?

PN821

MR COLUCCIO: I believe that that refers to the other heading of the hole, as in another area where the hole escapes, and the hole being open meaning that it is being able to vent into the return, so it's not closed on that side. Apologies if that's incorrect. But the point there is that they say that this hole's open and that it's venting into the return, but there is no flow coming from that hole.

PN822

So deputies, looking at this PTM in the 15 minutes, as Mr Nisbet put it, or 30 minutes, as Mr Vatovec puts it, at the start of shift, simply have no information as to what's going on with these holes. It's six-week old data which couldn't reliably be relied upon. Mr Vatovec says as much himself by saying it's simply a guide and should not be relied upon without consultation of any other documents.

PN823

Given there's only one flow listed on this document, there's simply no way to say whether those readings are increasing, decreasing, staying static, or the rates at which they drop, which would obviously tell you if those holes are blocked or if they are naturally draining. So deputies don't know the trend of flow from this document, which are still rejected as an issue by Mr Vatovec in his evidence today.

PN824

What we would say is that Mr Nisbet, in his evidence, speaks to the unsatisfactory nature of having a PTM be your key document for listing flows with regards to boreholes and why it's not a good record-keeping measure. It's something that, in that 6 January assessment report, is again canvassed as a common control over collieries, but, what we see here is a document that provides little assistance to deputies whatsoever, and it appears, given that this is six weeks' old, that it's not updated by the PTM at any point in time.

PN825

The other point that goes along with that is that, if you skip forward to the Mining Across Boreholes Policy, specifically to page 92 of the court book, that section says that:

PN826

*A high risk intersection will include hole flow data that indicates the borehole is blocked.*

PN827

Now no flow data is data that indicates the borehole is blocked, which would take us back to the start of that paragraph, which says:

PN828

*Boreholes will be assessed during the PTM process. A PTM team will consider if a borehole is a high risk intersection.*

PN829

What we see here is that you have a PTM that says there's no flow. There is no subsequent investigation as to why there is no flow, because no flow out means that it's drained, which is great, or that it's blocked, which is a risk of pressurisation and, if intersected, can lead to a frictional ignition event, as has occurred in this instance.

PN830

THE DEPUTY PRESIDENT: Mr Vatovec says he assumed it was drained and, if there was an investigation into why there was no flow, it doesn't seem immediately apparent that this document, as in page 85, would say anything at all about that investigation, it would just say 'no flow'.

PN831

MR COLUCCIO: Yes, well, I mean the point of that, that investigation did not occur. There was an assumption made that the hole was drained, and that is inconsistent with what this policy, on page 92, says.

PN832

THE DEPUTY PRESIDENT: Is that in evidence?

PN833

MR COLUCCIO: That there was no investigation?

PN834

THE DEPUTY PRESIDENT: Yes.

PN835

MR COLUCCIO: I believe that was conceded by Mr Vatovec, yes. He said that he assumed that the hole was drained.

PN836

THE DEPUTY PRESIDENT: Yes.

PN837

MR COLUCCIO: So if you look at page 92, the first ones:

PN838

*Boreholes will be assessed during the PTM process. The PTM team will consider if a borehole is a high risk intersection.*

PN839

In circumstances where the borehole on page 85 doesn't even have a date listed as to whether that no flow is read, there's fairly ample grounds to say that more work

needs to be done. At the very least, you would expect that that reading would be made to say when that date occurred.

PN840

THE DEPUTY PRESIDENT: I thought Mr Vatovec's evidence today was that he didn't regard this intersection as being a high risk intersection because he assumed the bore had been drained.

PN841

MR COLUCCIO: Then, I guess, repeatedly sought to rely on the fact that deputies provided the information to the PTM team, but I guess the overall point is that an investigation should have been taken under this policy as soon as you see that 'no flow' remark there. It's not enough to say, 'We assume that it's drained.' It basically puts you into a situation where - I won't give you the probabilities - but it's either drained or it's not, and one of those things can lead to a catastrophic outcome, and in circumstances where there is no - - -

PN842

THE DEPUTY PRESIDENT: Yes, but one of them would lead to - or one of them wouldn't lead to a high risk intersection if it's drained.

PN843

MR COLUCCIO: Correct.

PN844

THE DEPUTY PRESIDENT: And we don't know - well, it ignited, so we know that, at some point, it wasn't drained, but we don't know, for example - I'm not sure whether it's in the evidence or not - that, at some point prior to 5 January, that anybody had - or 22 November - that anybody had tested it to see whether it was drained or what.

PN845

MR COLUCCIO: We would say that that is on the PTM team, according to the policy, which says the PTM team will consider if the borehole is a high risk intersection.

PN846

THE DEPUTY PRESIDENT: You see, your submission is, as soon as someone sees - on page 85, as soon as someone sees the words 'no flow', that should be ringing alarm bells, I think you said, or a red flag, or something like that, but there's a possibility, isn't there, that 'no flow' just means that it's been drained?

PN847

MR COLUCCIO: Absolutely, and that's why that consideration needs to be made, because it's a 50/50 between, essentially, the best outcome for a hole and the worst outcome for a hole, and if that consideration is not made, then you are put into a position where you do not know whether this is a high risk intersection or not, and in

PN848

terms of whether or not that consideration is made, if you look at the document on page 85, it does have space for a number of additional columns.

PN849

It talks about 'Comments' on the far right there. You would expect that, if it says 'no flow' and there is no reading as to the date and you are asking a deputy to make decisions about whether or not to mine that hole based on this document, it would be reasonable for there to be enough information on here to say whether or not there is that potential, so a comment could be included in there to the effect that, 'This has been considered, it has been investigated on such and such a date and was found to have no blockage', or, 'It has been found to have been bagged.' The reason why we know that no such investigation occurred is because it was bagged, and that wasn't determined until the event occurred.

PN850

In any event, I suppose the overarching point that comes from this is that this is not an effective control. If it could be the case that Mr Vatovec either has considered this in accordance to the policy and has come to the wrong conclusion, or, alternatively, the PTM team hasn't considered this in accordance with the policy and therefore has not made that assessment, in any event, there's no paper trail of that, there's no documentation on how that's occurred.

PN851

There's been a six-week period in which Mr Vatovec says he has reviewed this PTM daily and looked at those figures daily and seen them being listed from 22 November for the others and for the no flow one to have no date attached to it, which he has been happy with that document. Clearly it's a control that's failed. The question of that is whether or not it would have been reasonably practicable for the respondent to have improved that process and would have avoided that result. We say that they reasonably could have.

PN852

I do want to talk about the infamous garbage bag test briefly. Whilst other sites have static or at least professional electronic readers in place, staff here use a garbage bag, which is not a specific type of garbage bag, it is a generalised garbage bag, where they try to scrunch up the giant hole at the top of the bag over the valve as best they can and then count on their watches to determine gas levels.

PN853

What I've just described is as generous as can be in the sense that there is no policy or procedure that governs that test. It is not written down anywhere, you will not find training on it, it doesn't exist. Some staff might use watches, some might say, 'One Mississippi, two Mississippi'. There is no standardisation of this test, and what the evidence of Mr Nisbet and Mr Stewart goes to is that they have seen different holes have different requirements in how you might need to do that test. So there is not going to be consistency between two deputies doing the same test on the same hole, or the same deputy doing the same test on different holes, or even the same deputy doing the same test on the same hole, so, because of that, it does create concerns about the trend.

PN854



Some of the evidence of what we have heard is that the gas flow is actually relatively low for a lot of these boreholes and, because of that, this is less of an issue. We would say that creates more of an issue as to why precision is required because if it's going to be a more subtle movement from gas flow from one day to another, you need to have a system in place which is able to capture that trend.

PN855

If you have a system which is based on looking at seconds on a watch, depending on when you grabbed and opened the valve, whether or not you started looking at it when you put the bag on the valve or when you opened it up, or whatever it might be, that's not a sufficient safeguard, and we would say it's the reason why no trend was able to be identified on this hole. We would say that if the trend - if you had electronic, digital, specific high tech readers that could give a precise reading, as opposed to the subjective reading of a deputy, you would be able to look at the trend that occurred when the bagging happened approximately 12 months ago and you would watch that figure fall off from one day to the next. It would also, in the other circumstance, show that gradual drop off. So we say this is an ineffective control and one that the respondent is reasonably responsible for.

PN856

There is significant evidence before the Commission and it is fairly well traversed in our submissions, so I don't propose to go over this too significantly, but it should be noted that, in addition to the other evidence that has been put in the assessment report and otherwise, the regulator issued a series of 11 recommendations to the respondent before the prohibition notice was issued. Those were given verbally to Mr Vatovec and are contained within the internal review.

PN857

Additionally, we also note that the two experts engaged by the respondent issued a series of recommendations to improve the performance of the mine against frictional ignition events, and one of the primary recommendations that came out of that was reviewing and strengthening the frictional ignition TARP, TARP being trigger action response plan.

PN858

Now when I questioned Mr Vatovec today on the PTM and the value of the PTM as a control document and he told us that it was simply a guide and deputies should have regard to other documents, the primary other document that he referred to was the frictional ignition TARP. Despite that, the frictional ignition TARP and strengthening and improving that TARP is one of the main recommendations that come out of the two experts that the respondent has previously put on themselves.

PN859

What we would say is that if you have had four frictional ignition events at your mine site, it's inconceivable that you could go, having had a fifth one, and say, 'This is my primary document that we rely upon to control these type of incidents' and have, and still have, these holes in it. We would say that it's something that you would normally do before - given the catastrophic nature of these incidents,



it's something that would happen before the first frictional ignition event; it would happen after the first frictional ignition event, and after each time.

PN860

After the fifth one, if you are still getting experts in who say, 'Your frictional ignition TARP, your primary document for controlling these type of incidents, still has holes in it', there's simply no grounds, and it would be quite, we would say, against public policy to let the respondent say, 'We're not responsible for that.' We would say that the Commission would find them reasonably responsible.

PN861

What we say is the matters that I have outlined are not exhaustive, but what it does reveal is that there is a wealth of materials before you, Deputy President, whether it's the prohibition notice itself, the internal review result, the regulator's assessment report, the expert reports, the Polaris report, or the advice from the regulator to Mr Vatovec, which shows that there are a number of ways in which frictional ignition events could have been protected against at this mine, there were ineffective controls in place, and, in our submission, the respondent knew of some of them, or at least ought to have known of some of them, and a reasonable person in their position would have implemented those controls.

PN862

The cause of the stoppage at work under the prohibition notice was the ineffective controls, and we say that the respondent was reasonably on notice, or should have been reasonably on notice, of the fact that there were methods for improving the controls at their workplace, as I have outlined previously. On that basis, we would say that the requirements of section 524 are not met.

PN863

Before I turn to the matter of what we are seeking, I just want to briefly address this issue of useful work. Again we say that this is for the respondent to demonstrate to the Commission. Mr Nisbet speaks to a number of types of work that can be done, including maintenance work, and he identified issue with strata. There was some discussion on that earlier today, but I suppose that one point that becomes relevant in that is that some of the strata work was considered to be unnecessary by the respondent because they had made a decision to close the mine. That obviously only impacts the respondent as of their decision to close the mine. At all material times before 5 February, the position of the respondent was they were going to reopen this mine site.

PN864

So to the extent that you have parts of the mine site no-roaded, that is to say inaccessible because of the strata deficiencies, and there is work that can be done in order to fix that, that would have been useful work that could have been done prior to the decision to stop work.

PN865

Similarly, the evidence reveals that approximately half of the workforce has been called back to work now in order to retrieve equipment from underground. That is as a result of the decision to close the mine. Now, given the respondent knew

about the closure from at least the date of 5 February, and likely beforehand, the closure would obviously mean that it would be to remove its million dollars of equipment from underground, which means that from the date of the closure, or beforehand, when it made the decision, there was useful work that it would require to be done as of that point of time. There wasn't a need to wait when it had made that decision to close the mine, and there is no evidence as to why that would be the case.

PN866

What we would say, I guess, generally with this matter of useful work, we would say it's useful towards a finding against the lawful exercise of section 524, but we would also say, if you are not satisfied on the evidence before you, Deputy President, that it would go so far as to support such a finding based on the evidence you have, we would say that it would be relevant as a matter when considering the fairness pursuant to section 526(4) when determining the quantum of any order that the Commission would make, should it decide to do so.

PN867

As I will discuss in a moment, the Commission can make orders of monetary payments having regard to fairness between the parties and, in our respectful submission, the existence of at least some work, and perhaps significant amounts of work, that the workers could have done during the stand-down period and were denied is a factor that would weigh in favour of the employees and any consideration of fairness between the parties.

PN868

The rest of my submissions relate to what the respondent refers to as the jurisdictional question, in terms of the orders sought by the applicant. Again, this is something that is extensively canvassed in our submissions, but, to go into our position on this, we seek orders that we say would be within the arbitral power of the Commission.

PN869

Firstly - and this is not the same order as referred to in the written submissions, so I apologise for this - but, firstly, as a safety measure, we say that, to the extent that any employees remain stood down, and we don't know if that is the case, they should be permitted to return to work. That is clearly within your power to order, Deputy President, and I don't believe that would be contested as outside of your power.

PN870

Secondly, we would seek that you make a finding that section 524 has not been  
- - -

PN871

THE DEPUTY PRESIDENT: Just on that, how does it follow that I've got a power to order the employer to let someone back at work?

PN872

MR COLUCCIO: I believe that has been in the cases. I will say I have not got those authorities in front of me. I could do that in reply if it is contested by the respondent, but I - - -

PN873

THE DEPUTY PRESIDENT: I mean, that might be - the practical consequences, you know, taking the prohibition notice and the decision to close the mine out of the equation, if the employer has stood down workers because it believes it is entitled to and there's a dispute about that, and the Commission, for example, makes an order that they be paid for the time that they have been stood down so far, the practical consequence is that the employer might put the people back at work because it knows it has to pay them, but aren't the stand-down provisions essentially about work - sorry, about payment for the fact that someone has been stood down, as in the range of - we're looking into the reasons why, looking into the consequences for leave accruals, et cetera, that it isn't only about the money?

PN874

MR COLUCCIO: My understanding is that you would be entitled to order that employees are able to return to work as a future matter. This may not be the most important point if my learned friend tells me that there are no employees in this category, or otherwise contested per se. Perhaps that might be a matter that I can, rather than address significantly now, I can find those authorities, if required, and return on that point, depending on what my friend has to say.

PN875

The second thing we seek is that you make a finding that the stand-down, in your opinion, did not comply with section 524. We would suggest that the ability, again, is non-controversial and is evidenced in case law. I do not understand the respondent to dispute the ability for you to make a non-binding finding on your way to a decision, but I can return to that later, if required.

PN876

THE DEPUTY PRESIDENT: You are not using the 'D' word?

PN877

MR COLUCCIO: I am not using the 'D' word, no. We are seeking a non-binding, simply finding that would be a component of the order that we seek, being the third order that I refer to now.

PN878

So the third order that we would seek is that the Commission order the respondent to make a monetary payment to the employees of the respondent. We say that that is within the power of the Commission in light of the Full Bench decision in *Carter v Auto Parts Group* of 2021, which is at page 681 of the court book, and I might take you to now, Deputy President.

PN879

At paragraph 17 of that decision, which is page 687, the Full Bench says, in relation to your power under section 526:

PN880

*Section 526 of the FW Act authorises the Commission to deal with disputes about the operation of the stand down regime in Pt 3-5 of the FW Act, including by arbitration. The purpose of this conferral of power is, it can readily be inferred, for the Commission to resolve such disputes. Although it is not directly stated what remedies or relief the Commission may grant in the exercise of its arbitral power, s 527 makes it apparent that the Commission is empowered to make orders binding on the parties to the dispute which are enforceable in a relevant court. The paramount consideration which the Commission must take into account in deciding whether to make any such order and, if so, the terms of such order, is 'fairness between the parties concerned.*

PN881

The Full Bench then continues, at paragraph 18, to say:

PN882

*There is nothing in the text of Pt 3-5 of the FW Act which precludes the making of a monetary order.*

PN883

And they look at this illustrative example from the Explanatory Memorandum to the Fair Work Act, in which the example talks about an employee stood down for three days and ends by saying that Fair Work Australia, as it then was, could make an order that the employer pay the employee for those two days, or, alternatively, it could make an order to re-credit the employee with two days of annual leave.

PN884

So the Explanatory Memorandum talks about two powers there: the ability to re-credit leave and the ability to make a monetary payment, but both refer to that last sentence I read from paragraph 17, which is that the paramount consideration is taking into account fairness between the parties concerned.

PN885

The Full Bench then concludes this thought by saying:

PN886

*We consider that the above extract confirms what we regard to be the ordinary meaning of s 526, namely that the Commission may, taking into account fairness between the parties concerned, make an order requiring the payment of a monetary amount in the exercise of its arbitral power to resolve a dispute concerning the operation of Pt 3-5.*

PN887

In short, Deputy President, you are entitled to make an order requiring the payment of money from the respondent as part of your arbitral power.

PN888

As to the quantum of any such order, as stated above, the paramount consideration is fairness between the parties concerned. The quantum we say that you would reach, Deputy President, can, and likely should, be calculated with reference to lost wages. We say that this is not an enforcement of those wages, but rather an

arbitrated outcome based on fairness, and fairness has regard to the wages that would have been earned during the period of time.

PN889

The authority for that proposition is varied, but the first does come from the Explanatory Memorandum, which does give us an example of payment being two days' pay, so that is a direct reference to an amount of wages being lost rather than a number being picked out of the air, or using a standardised table like a speeding fine. It takes from the actual lost wages of that employee.

PN890

At paragraph 31 of Carter, the Full Bench does expand on that point and it says:

PN891

*An approach whereby a dispute concerning a stand down is resolved by the making of a compensatory order consequential upon the formation of the opinion by the member that the stand down was not authorised by s 524(1), and which is made taking into account the business circumstances of the employer at the time of the stand down, any loss of income suffered by the employee, the efforts made by the employee to mitigate their loss, the current financial circumstances of the employer and employee and any other matter bearing upon the paramount consideration of fairness between the parties, would in our view be available as a matter of power under s 526.*

PN892

So this approach calls out several factors to determine fairness, but notably includes the loss of income suffered by the employee. Importantly, this power does not seek to weigh the importance of those particular factors, and nor does it limit. It says that it can be any other matter bearing upon the paramount consideration of fairness. So you would be entitled to exercise your discretion, Deputy President, having regard to those matters, or any other matter that weighs upon fairness, and weighing them as you see fit relevant to the particular circumstances.

PN893

For that reason, the applicant, in our written submissions, made possibly the somewhat striking submission that the Commission would not be limited to an order that it is limited to the wages lost, but it could in fact exceed the value of the lost wages, which, as I said, might be striking, but really should not be controversial because that idea of fairness must cut both ways for it to fall within the arbitral power. If the employer wishes to say that it is entitled to a discount on that rate for one factor, then the employee surely should be entitled to argue that fairness would dictate that it be entitled to argue factors which aggravate the situation in their favour.

PN894

An example of this might be a loss of opportunity. A stood-down employee close to retirement is required to cash in a long-term investment earlier and lose on the significant upside in order to maintain their financial circumstances; an employee being left with no leave to attend a vocational course later in the year. These are matters in which, because the paramount consideration is taken away from the

enforcement of a past right and put into your hands as a discretionary payment based on fairness, you are entitled to look at all relevant factors.

PN895

In all those circumstances, the unfairness goes beyond the mere value of the wages, and so it wouldn't be unreasonable for the Commission to consider that as being a matter related to fairness, which would go to demonstrate the distinction from that judicial power.

PN896

We say there is also a public interest ground in relation to taking such an approach because if the Fair Work Commission system is effectively capped at the value of lost wages, then an employer is effectively incentivised to run the gauntlet of any matter that is brought in the Fair Work Commission knowing that they might get a discount on those wages that they would have otherwise had to have paid to an employee, so that approach would disincentivise the utilisation of the Fair Work Commission process and the cheap informal access it provides and rather incentivise going to the Federal Court. We say that, again, the Commission should incentivise resolution to these matters noting that an arbitral power is simply not limited in the way that it values the wages potentially lost.

PN897

Turning to a further proposition that the order can be made with reference to wages, we can see this in other decisions of the Fair Work Commission. I want to briefly turn to the case of *Chua v H&T Brisbane One Pty Ltd*, which is a 2021 case, at page 698 of the court book.

PN898

THE DEPUTY PRESIDENT: Yes.

PN899

MR COLUCCIO: It is obviously a very short decision, but what we can see here is that the resolution to this matter is that the respondent is to pay the applicant 12 weeks' compensation. So again a direct reference to the wages that would be payable to an employee, and if you note the footnote to that 12 weeks' compensation, it recalls the case of Carter, stating:

PN900

*The Commission is capable of making an award that is fair in the circumstances, provided it is an exercise of arbitral power.*

PN901

So this order, again, was not of a specifically outlined monetary amount per se; it was specifically with reference to a number of weeks' wages for that employee.

PN902

Another example comes from the case cited by the respondent of *CFMEU v DP World*, which is at page 899 of the bundle. If I take you to the end of that decision, Deputy President, to paragraph 142, which is on page 930, you will see the third dot point requires employees to be compensated by receiving payments equivalent to 50 per cent of the pay that was deducted from them, again not a

monetary figure but a percentage based on the wage with a discount applied. This is notably in a case where the employer was not found reasonably responsible for the stoppage, nor to have (indistinct) work.

PN903

This, we say, should settle the wide discretion of which the Deputy President is entitled to make an order, having regard to the fairness, which may discount or exceed the rate of wages earned. We say there are a number of matters with regards to fairness that would weigh in favour of the applicant, which are outlined in our written submissions and also largely attested to in the unchallenged evidence of Mr Edwards. These include that, should you find this to be the case, the primary starting point is that if the stand-down is not authorised by section 524, this is a factor weighing in fairness of an award to the employees.

PN904

We would say that that is exacerbated in these particular circumstances given the lengthy history of frictional ignition events, the abundance of controls available to the respondent and the dilatory nature in which the respondent has addressed those controls. In effect, we would say this is a case in which the respondent's conduct exacerbates its responsibility, which is a factor in favour of fairness being exercised in favour of employees.

PN905

Additionally, we would say employees have suffered financial loss in the form of lost wages and utilisation of leave that would have otherwise have been payable on termination. The evidence shows employees have cancelled annual leave because they can't afford it given their loss of employment, their uncertainty regarding their position, or because they have had to use that leave. The evidence shows that the vast majority of workers didn't have sufficient leave to cover the stand-down period, and so not only were left without money for that period, but then were left without a job when they were terminated a few weeks afterwards.

PN906

In terms of that requirement to find new employment, as previously submitted, there is a relative scarcity of alternative employers in the coal mining industry, which might mean that employees would likely need to relocate in order to find new work if they can't at one of the two close by coal mines, so that might mean uprooting their entire family to a different region, possibly in regional New South Wales or otherwise Queensland.

PN907

THE DEPUTY PRESIDENT: Aren't we capped to the four-week period, or thereabouts, to 15 Feb?

PN908

MR COLUCCIO: What we say is that there were employees who were unable to cover that stand-down period and had to resign in order to find new employment and are now in a situation where they are looking for work. That is, generally speaking, the position of employees generally.

PN909



THE DEPUTY PRESIDENT: How would I sort those ones out from everybody else who's finished up on the 15th, or everybody else who was waiting on the redundancy that they had been told about on 17 January, or thereabouts?

PN910

MR COLUCCIO: Certainly. We would say that there would not be a need to distinguish them. We would say that everyone is now in the same bucket, everyone is now looking for work, and when we consider fairness between the parties, this idea of fairness is not limited to the fact that one detriment is caused by the other party. So the detriments to employees to now have to look for work on the very basic level might be said to say they are out of work and it is in the interests of fairness that an award is made to them which is at their full salary rate, for example, rather than a discount that you might afford to them had it been for a period of time limited to three weeks and then been put back to work.

PN911

THE DEPUTY PRESIDENT: Is there any suggestion that they are not going to get redundancy entitlements?

PN912

MR COLUCCIO: They are outside of the fact that there's a potential for the respondent to cease operations otherwise, and there isn't, but, again, that's - - -

PN913

THE DEPUTY PRESIDENT: And the redundancy payments would be a fixed sum to compensate for the particular consequences of redundancy?

PN914

MR COLUCCIO: Certainly. We simply note that these are people put into a harsh situation. We would say that the redundancy payment does go towards that point, but it shouldn't take away from the fact that the Commission can consider the position of employees otherwise, because employees in the normal course of events who undergo a redundancy are able to have earned their salary up until their termination date, which can sustain them until their termination date, and the redundancy package can then compensate for the time moving forward, the time to find a new job, et cetera.

PN915

In this situation, these employees are effectively having to pay back their debt they incurred during the stand-down period with their redundancy money. So they are in a position where they're looking for new work, which inherently puts them in a financially insecure position, and because of what we say was an unlawful stand-down, they're on the back foot when they start that off.

PN916

The other point, I suppose, that goes along with this on a more significant level is that the respondent blames the regulator's decision to put the prohibition notice in, and this more general concept of lack of regulator support has been the reason why the mine is being closed, so it's a bit of a responsibility causative link, I suppose, but if you say that the respondent is responsible for the prohibition notice being put into place and then the respondent says, 'Well, the prohibition notice is



the reason why we're closing up operations', if they are responsible for the prohibition notice, then they are effectively blaming themselves for the closure of the mine.

PN917

It sounds glib, but I think it's a reasonable point. Our submission would be this mine is closing because the respondents do not know how to control it properly and have got to a point where their investors, after seeing five frictional ignition events, have said, 'No more.' However it is dressed up, that's where it's got to, and in a finding of responsibility against them, I don't think that the employees should bear the brunt of having to lose their jobs without kind of considering what the substantive reason why that's occurring might be.

PN918

We also say that another issue of fairness is that there are particular levels of stress and anxiety to workers that have been attested to by Mr Edwards resulting from this particular dispute, in addition to the simple ones that go along with, I suppose any stand-down. They are obviously exacerbated, as I refer to now, by this issue of losing their employment, but it's also in the context of what employees have had to deal with for the past 18 months, that they've been going into an underground mine where there's abnormally high instances of frictional ignition events hanging over their heads and, you know, there's always dangers in coal mining, but these are employees which have told Mr Edwards that there is significant psychological stress.

PN919

THE DEPUTY PRESIDENT: I think you've gone a bit too far from the root cause of your members' problems.

PN920

MR COLUCCIO: Well, everything is - - -

PN921

THE DEPUTY PRESIDENT: If you're suggesting that I should adjust upwards the amount that I order the employer to pay because of the fact that they've worked for 18 months in a place where there's been the ignition events, that's a long way from taking into account the factors of the stand-down.

PN922

MR COLUCCIO: Well, they are, to an extent, two separate considerations because fairness has regard to all the factors in terms of how you resolve the dispute. Now the regulator says, 'The reason we're shutting you down is that you've had five frictional ignition events.' I don't think it's out of place to really think about the human impact of what that means for people working in those situations. These are effectively fires in an underground mine that - - -

PN923

THE DEPUTY PRESIDENT: But that's the thing, we're not compensating employees for working in an environment where there has been ignition events. That's not a purpose of the stand-down provision, surely.

PN924

MR COLUCCIO: It's not, but it informs the stress and anxiety that members now are under as a result of those events which are the ones for which the stoppage of work has occurred. I will move on because I can understand that you are not taken by my thrilling submission, Deputy President, but it might grow on you. Who knows? I am nearly done, mercifully.

PN925

The other point I want to raise is that the evidence of Mr Nisbet and Mr Stewart speak to some comments made by Mr Pawle and how he has dismissed risks associated with underground fires, saying they would simply burn out. Mr Pawle has given another statement, which is similar to his previous statement, in which he gives a highly verbose recollection of his words in that which would not be out of place in my obnoxious written submissions, but what we would say is the Commission should accept the evidence of Mr Nisbet and Mr Stewart, which is that Mr Pawle has said words to the effect that a fire underground in a borehole will simply burn out. We would say that is a laissez-faire attitude of management towards an ongoing risk, particularly in light of the fact that four ignition events had occurred at that point in time, and it's one which should also be considered in how the regulators refer to it.

PN926

In the minutes of the meeting on 30 January, the attitude was poor enough that the minutes end by the regulator saying to Mr Pawle that Mr Pawle should rethink around the narrative of having a catastrophic event, as Mr Pawle denies that this is a catastrophic event, or has that potential.

PN927

Again, this may seem like a normal, if direct, reminder, but it's given to a CEO who has overseen five frictional ignition events and maintained an attitude that they lack the capacity for catastrophic consequences, so our submission in relation to this quite simply is that there does appear to be, at least from Mr Pawle, this cavalier attitude towards safety and this idea that a frictional ignition event can't go any further at Russell Vale because there's simply not enough gas for it to blow up and then turn into a (indistinct) like explosion, which, as Mr Vatovec eventually conceded today, if the circumstances are right and the stone dusting requirements aren't there, it absolutely could happen.

PN928

Mr Pawle's attitude there is an aggravating factor in favour of fairness being afforded to the applicants and to the employees because it exacerbates their responsibility in this matter.

PN929

That's my final submission in relation to fairness and those are the reasons why I would say that those orders should be made, so unless I can assist further, those are my submissions.

PN930

THE DEPUTY PRESIDENT: Thank you. What I suggest we do from here is that we finish shortly and then finish the hearing at a convenient time next week

by telephone, rather than bringing everybody in to do that, so that Mr Seck is not rushed in his submissions either. What I had in mind was ignoring the last thing you said, Mr Coluccio, about not having anything further to say and leaving you the option of continuing your closing submissions when we resume next week, so that you have the same opportunity as Mr Seck to, you know, mull over what's occurred today before you finish your closing submissions next week.

PN931

I am going to give you some homework as well because it's something that I'm still pondering, and that is the question of onus. What I'm pondering about that is that Flick J's findings/observations about onus in the earlier cases, they all make perfect sense because he's a judge in a court and he's dealing with the specific question of whether, you know, Qantas or the employer was required to pay wages for employees that were stood down, or whether section 524 comes to the rescue for the employer and removes that obligation to pay.

PN932

To the extent that it's, for want of a better term, an enforcement proceeding, then it's entirely unsurprising that the employer in that enforcement proceeding, if they want to rely on the provisions of section 524, then they carry the onus of establishing that the conditions for 524 are met. That makes perfect sense.

PN933

But, I am not hearing an enforcement case; I'm hearing an application for orders because there's a dispute about a stand-down, and the application for orders relies on me being satisfied that, after taking into account matters of fairness between the parties, the employer should be ordered to do certain things, which, as an arbitral power, may or may not do away with notions of onus because it's a question of satisfaction, and for a tribunal where the rules of evidence don't apply, there are notions of evidentiary burdens, which are similar to onuses but not the same, and in the ordinary course, the applicant carries the evidentiary burden of establishing or providing whatever evidence they can provide to satisfy the Commission that an order should be made.

PN934

Then when you get to questions of whether the employer can be reasonably held responsible for the stand-down, in the context of an application for an order based on fairness, then I'm not so sure that the notion of onus applies as opposed to evidentiary burden, and then, if the evidentiary burden is on you, Mr Coluccio, then I would look at - you know, it may be that I look at the evidence in a different light to how you are urging me to look at it in terms of the employer carrying the onus to prove that 524 is engaged.

PN935

The particular Full Bench authority on that escapes me at the moment. I'm not sure if it's Navitas or another. I will send you the case I'm thinking of that deals with the notion of evidentiary burden as opposed to onus. I think it's in the genuine redundancy space. The same kind of thing applies because if, you know, you're relying on the authorities that say that the Commission can use its arbitral power as opposed to a judicial power, but on the way to a result is exercising the arbitral power, the Commission can look at whether the terms of 524 are satisfied,

but that would lead right into a significant question mark as to how I would look at the terms of 524 in that point.

PN936

That's something for both of you, obviously, to think about, but more tying into my second-last point, Mr Coluccio, about leaving your closing submissions at this point for anything else you want to say before we do that.

PN937

Mr Seck do you have any concerns about that approach?

PN938

MR SECK: No. I am assuming what's being left for Mr Coluccio to deal with is merely this question of evidentiary burden. If there's anything else he wants to say beyond that, then I would appreciate being given a heads up so I can deal with it, but I've got no difficulty with that general approach, Deputy President. I certainly understand the point that you wish to raise and will address you on that point because it's an important point.

PN939

It may be relevant in terms of how much time we need to deal with the issue, and it's not a criticism of Mr Coluccio, but he has raised a lot of points this afternoon, some of which I think weren't the subject of his closing written submissions, which I will need to deal with orally, that may require a bit more time than I had anticipated, but if you're thinking, Deputy President, an afternoon or a morning, then I've got my diary here and we can try to work out the best time.

PN940

I'm content to do it in person or by telephone, Deputy President. Certainly for my part, and this is only my view, I prefer advocating in person rather than doing it over the telephone. I just find the rapport's a lot easier and it's easier to engage with you on any questions you have, rather than doing it by video or telephone, but it's a matter for the Commission as to the preferred mode.

PN941

THE DEPUTY PRESIDENT: Next week, I've got Monday afternoon, any time Tuesday, Wednesday morning, or Friday afternoon by phone or video.

PN942

MR SECK: Can I choose Friday afternoon?

PN943

THE DEPUTY PRESIDENT: Yes.

PN944

MR SECK: I have a hearing - Mr Coluccio may have a different view - I only say that because I've got hearings next week. I am potentially in Melbourne in the morning, but I suspect that's going to be just a short case management hearing by video, so any time in the afternoon would suit me.

PN945

MR COLUCCIO: Friday would be the one day I would not be available, Deputy President, to be helpful.

PN946

THE DEPUTY PRESIDENT: All right. The next week is really clear for me. The other thing - this might factor into the mix - is, if we haven't ordered it already, I am going to be ordering the transcript for today, and it doesn't seem to be the kind of matter that needs any faster turnaround than the five-day cheapest option, but if we're going into the week after next, then I'll get the transcript out to both of you as quickly as I get it, which brings me back to a comment from you, Mr Seck, that, yes, Mr Coluccio is able to address the onus question, but I also left open for him, you know, any further thoughts that he might have because you will have the luxury of going away and pondering the events of the day and everything else, so I want to leave him with that option as well. Hopefully he won't cook up a whole new case that catches you by surprise.

PN947

MR SECK: No, I'm sure it will be enhancements of the existing case.

PN948

Looking at the week starting 4 March, Deputy President, you said you had most of the week free?

PN949

THE DEPUTY PRESIDENT: Yes.

PN950

MR SECK: Certainly from my point of view, either the Monday or the Friday would be preferable

PN951

MR COLUCCIO: Yes, I believe we could accommodate the Monday probably most easily, Monday the 4th.

PN952

THE DEPUTY PRESIDENT: All right. Let's go with 10 o'clock then on the 4th. Mr Seck, your preference is in person?

PN953

MR SECK: Yes.

PN954

THE DEPUTY PRESIDENT: So you can see the shrugs and the - - -

PN955

MR SECK: I can see the shrugs and you can interrupt me when I need to be interrupted more easily, Deputy President. It's harder over the phone, I know, and I can react to the shrugs and raised eyebrows. It's a matter for Mr Coluccio whether or not he wishes to be here or not. I'll leave it up to him, but certainly if you are prepared to do it in person, Deputy President, I would prefer it to be here in front of you.

PN956

THE DEPUTY PRESIDENT: Well, it's not a democracy in my chambers, so I'm open to coming in person. What's your preference?

PN957

MR COLUCCIO: I can certainly accommodate in person, Deputy President.

PN958

THE DEPUTY PRESIDENT: All right. 10 o'clock on the 4th then and I will get you the transcript. Hopefully, it should come in fast. If we haven't ordered it, then I might order a three-day priority, not five. We will get it to you as soon as it comes in.

PN959

MR SECK: Thank you, Deputy President.

PN960

THE DEPUTY PRESIDENT: All right. Anything else we need to cover off today?

PN961

MR SECK: No, may it please the Commission.

PN962

THE DEPUTY PRESIDENT: Thank you. We are adjourned.

**ADJOURNED UNTIL MONDAY, 04 MARCH 2024**

**[4.11 PM]**

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