



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT GOSTENCNIK**

**RE2023/599**

**s.505 - Application to deal with a right of entry dispute**

**Mr Jeffrey Lapidos, Ms Amelia Tucker  
and  
Commonwealth Of Australian As Represented By The Commissioner Of  
Taxation T/A Australian Taxation Office  
(RE2023/599)**

**Melbourne**

**10.06 AM, FRIDAY, 5 APRIL 2024**

**Continued from 06/11/2023**

PN1

THE DEPUTY PRESIDENT: Yes, good morning. Mr Lapidos and Ms Tucker, you're appearing for yourselves as applicants?

PN2

MR J LAPIDOS: Yes.

PN3

THE DEPUTY PRESIDENT: Good morning. Mr Rawson, you're appearing for the respondent?

PN4

MR C RAWSON: Yes, Deputy President, and with me at the Bar table today is Mr Dieni from the ATO.

PN5

THE DEPUTY PRESIDENT: Yes, thank you. Well I have had the opportunity of reading the material that the parties have filed so I don't need an opening but I'm not going to prevent either party making an opening if that's what they wish to do. Is there an intention for cross-examination of the witnesses, any of them?

PN6

MR LAPIDOS: Yes, there is, Deputy President. Each of the witnesses, each of the respondent's witnesses, and they've advised us there's no need to cross-examine on Ms Tucker's evidence but it raises a question for us whether she needs to swear or affirm her evidence.

PN7

THE DEPUTY PRESIDENT: We'll come to that in a moment. Do I take it from that that you're required for cross-examination?

PN8

MR LAPIDOS: Me?

PN9

THE DEPUTY PRESIDENT: Yes.

PN10

MR LAPIDOS: I haven't made a statement.

PN11

THE DEPUTY PRESIDENT: You haven't – that's right, you haven't, sorry, yes. All right. Sorry, Mr Rawson, you were going to say something?

PN12

MR RAWSON: Yes, I just – yes, there's been an agreement between the parties that subject to an agreed tender of an email bundle that includes additional emails to those exhibited by Ms Tucker, that we won't require Ms Tucker for cross-examination.

PN13

THE DEPUTY PRESIDENT: Yes. Well perhaps – and the agreed bundle is to be part of Ms Tucker's statement? Is that - or separately?

PN14

MR RAWSON: As long as it's before the Commission, I don't mind whether it's part of Ms Tucker's statement or whether it's tendered as a respondent's exhibit.

PN15

THE DEPUTY PRESIDENT: All right. You're proposing to tender it, are you?

PN16

MR RAWSON: I'm content to tender it, yes.

PN17

THE DEPUTY PRESIDENT: Yes, all right. Well we'll deal with it as part of your case. All right. In those circumstances, I don't need Ms Tucker to swear her statement. We'll simply mark her two statements. Is there any objection to the tender, Mr Rawson?

PN18

MR RAWSON: No.

PN19

THE DEPUTY PRESIDENT: Thank you. I'll mark the witness statement of Josephine Amelia Tucker dated 12 December 2023 comprising 27 paragraphs together with the annexures marked A through G as exhibit 1.

**EXHIBIT #1 WITNESS STATEMENT BY JOSEPHINE AMELIA  
TUCKER DATED 12/12/2023**

PN20

THE DEPUTY PRESIDENT: And I'll mark the supplementary statement – I take it, Ms Tucker, that the reference to 2024 in paragraph 2 of that statement is intended to be 2023?

PN21

MS TUCKER: That sounds correct, Deputy President.

PN22

THE DEPUTY PRESIDENT: If you're operating from the court book, it's at page 76.

PN23

MS TUCKER: Thank you.

PN24

MR LAPIDOS: Yes, here it is, Amelia, 'From 1 September 2024'.

PN25

MS TUCKER: Yes, yes, that's - - -

PN26

MR LAPIDOS: That is correct, Deputy President. It should have been 2023.

PN27

THE DEPUTY PRESIDENT: Well there's no objection to the correction? All right. Well with that correction to paragraph 2 I will mark the supplementary witness statement of Josephine Amelia Tucker together with the one annexure, the statement dated 5 March 2024 comprising two paragraphs is exhibit 2.

**EXHIBIT #2 SUPPLEMENTARY WITNESS STATEMENT BY  
JOSEPHINE AMELIA TUCKER DATED 05/03/2024**

PN28

THE DEPUTY PRESIDENT: That's the applicant's evidentiary case?

PN29

MR LAPIDOS: Yes. There's one other matter just in terms of a preliminary procedural matter, Deputy President. Once the evidence has concluded, we would ask that the respondent go first and we follow. I understand that's a little unusual. Just that in the written submissions we went first, the respondent went second and then we provided a reply and in those circumstances we think it would be fairer for us to be able to hear what they say in response to our reply at least as well as other things before we respond to them.

PN30

THE DEPUTY PRESIDENT: Well the normal order of things, Mr Lapidus, is that you would go first, the respondent would make its submission then you have a reply so you will hear what Mr Rawson has to say and you will get an opportunity to reply.

PN31

MR LAPIDOS: In that case, thank you.

PN32

THE DEPUTY PRESIDENT: Just bear with me for a moment, Mr Rawson. Yes, Mr Rawson.

PN33

MR RAWSON: Thank you, Deputy President. I might start by formally tendering the agreed bundle of additional emails which I think is by consent, so bundle of 11 – 12 pages. It contains the heading 'Fair Work Commission Right of Entry Dispute (Matter RE23/599) Emails Between the Parties in relation to Proposed Trial Arrangements' and you will observe that, without going through the entire bundle, the email on the front page is from Mr Lapidus to yourself, Deputy President, and has his signature block at the bottom of the page and that email is dated September 12.

PN34

There's a – and that's the culmination of a chain of emails that extends and go backward to the last email which starts at the top of page 11, starts on 31 July 2023, so I tender that bundle.

PN35

THE DEPUTY PRESIDENT: Is there any objection to the tender?

PN36

MR LAPIDOS: No objection, Deputy President.

PN37

THE DEPUTY PRESIDENT: Well I'll mark the bundle of emails which is headed 'Fair Work Commission Right of Entry Dispute'. The first in time email appears at page 11 of the bundle dated 31 July 2023 and the last email, that is the most recent in the bundle, appears at page 1 and is dated 12 September 2023. If I said 31 July 2021, I meant 2023. I can't – in any event, the tender bundle is 12 pages and will be marked as exhibit 3.

**EXHIBIT #3 BUNDLE OF EMAILS HEADED 'FAIR WORK  
COMMISSION RIGHT OF ENTRY DISPUTE' DATED FROM  
31/07/2023 TO 12/09/2023**

PN38

THE DEPUTY PRESIDENT: It's in the court book, the enterprise agreement.

PN39

MR LAPIDOS: The agreement.

PN40

MR RAWSON: Yes, and I accept it's a Commission document. It bears the Commission's - - -

PN41

THE DEPUTY PRESIDENT: I don't require – I generally don't require authorities and/or enterprise agreements to be tendered but it's before me, yes.

PN42

MR RAWSON: Yes, thank you for that indication.

PN43

THE DEPUTY PRESIDENT: Thank you.

PN44

MR RAWSON: Our written submissions which are dated 12 December 2023 have four documents annexed to them, they are annexures A to D, and I would seek to tender those annexures.

PN45

THE DEPUTY PRESIDENT: The annexures, yes, so I – is there any objection to the tender of the four attachments to the - - -

PN46

MR LAPIDOS: I just wanted to clarify, they go up to G. Did I mis-hear you? Did you ask for everything to G to be - - -

PN47

MR RAWSON: These are the annexures - - -

PN48

MR LAPIDOS: No, I beg you pardon I think I'm looking at the wrong – to D, that's right. Sorry, no objection, Deputy President.

PN49

MR RAWSON: Then - - -

PN50

THE DEPUTY PRESIDENT: Sorry, just bear with me, Mr Rawson. So A to D?

PN51

MR RAWSON: Yes, Deputy President.

PN52

THE DEPUTY PRESIDENT: All right. Well I will mark the annexures to the respondent's outline of submissions which are marked attachment A – sorry, not attachment A, annexure A because there's two, there's attachment A and then there's annexure A which follows it, so in the court book attachment A starts at 278 and annexure A starts at 290.

PN53

MR RAWSON: Yes, and annexure – attachment A is the document that contains  
- - -

PN54

THE DEPUTY PRESIDENT: The directive.

PN55

MR RAWSON: - - - a directive from the former attorney-general and then immediately over the page is a landscape document - - -

PN56

THE DEPUTY PRESIDENT: I see.

PN57

MR RAWSON: - - - 'Protective Security Policy Framework'. That's attachment B.

PN58

THE DEPUTY PRESIDENT: I'm sorry, I've jumped over further and I've passed Mr Keane's statement so, no, I'm with you now. The documents that are marked attachment A, attachment B, attachment C - - -

PN59

MR RAWSON: And attachment D.

PN60

THE DEPUTY PRESIDENT: Okay, which one is attachment D?

PN61

MR RAWSON: Attachments A to C are all single pages and attachment D is the black and white document back in portrait layout headed 'Circular 2022/09'. I'm sorry, my mistake, it is – attachment C is two pages.

PN62

THE DEPUTY PRESIDENT: Yes.

PN63

MR RAWSON: Attachment D follows those two landscape pages so they are attachment C, it's - - -

PN64

THE DEPUTY PRESIDENT: Attachment – this is the 'Visitors to the ATO' document, is that the one, or?

PN65

MR RAWSON: No, it's a circular headed 'Circular 2022/09'.

PN66

THE DEPUTY PRESIDENT: Bear with me.

PN67

MR RAWSON: I'm informed that you may be looking at the witness statement of Mr Keane rather than our submissions.

PN68

THE DEPUTY PRESIDENT: Yes, and I'm looking at your submissions. I don't have an attachment C to your submissions. Sorry, D to your submissions, in the court book.

PN69

MR RAWSON: The document that bears the notation 'C' in the court book is attachment D and there was an attachment C which seems to be missing from the court book. It's a two page landscape table - - -

PN70

THE DEPUTY PRESIDENT: This is my attachment C.

PN71

MR RAWSON: Yes, that's attachment C.

PN72

THE DEPUTY PRESIDENT: What I don't have is D.

PN73

MR RAWSON: But D is in the court book I think.

PN74

THE DEPUTY PRESIDENT: Yes, but it doesn't appear as - - -

PN75

MR RAWSON: But it's marked as C.

PN76

THE DEPUTY PRESIDENT: Is it?

PN77

MR RAWSON: Yes, so go to page - - -

PN78

MR DIENI: Two thirty-six onwards.

PN79

THE DEPUTY PRESIDENT: Two thirty-six. I see. This is the circular to the - -  
-

PN80

MR RAWSON: Yes.

PN81

THE DEPUTY PRESIDENT: Just bear with me. All right. All right. This is attached – at least in the court book, it's attached to the employer response. Yes, so it's attached as attachment C to the employer response which is dated 21 July. What I might do for convenience is this, I will mark the documents annexures A through C which are - sorry, attachments A through C which are attached to the respondent's outline and appear at court book 278 through to 281 as exhibit 4 and I will mark the document which is a 'Circular 2022/09 Union representation in Commonwealth agencies' dated 6 October 2022 which is at the court book 236 through to 239 as exhibit 5.

**EXHIBIT #4 ATTACHMENTS A TO C OF RESPONDENT'S  
OUTLINE**

**EXHIBIT #5 CIRCULAR 2022/09 UNION REPRESENTATION IN  
COMMONWEALTH AGENCIES DATED 06/10/2022**

PN82

MR RAWSON: Thank you, Deputy President, and I now call Scott Keane. Sorry, my mistake, I've been asked to call Mr Nascimento first. I call Chris Nascimento. Thanks.

**<CHRISTOPHER NASCIMENTO, AFFIRMED** [10.23 AM]

**EXAMINATION-IN-CHIEF BY MR RAWSON** [10.23 AM]

PN83

THE DEPUTY PRESIDENT: Thank you, Mr Nascimento. Take a seat. Mr Rawson.

PN84

MR RAWSON: Now, Mr Nascimento, is your full name Christopher Nascimento?---Yes, Christopher Nascimento.

PN85



Are you the manager, physical security operations centre for the Australian Taxation Office?---Yes.

PN86

Have you made a witness statement in this matter?---Yes.

PN87

Do you have it with you in the witness box today?---I do, yes.

PN88

Is it a statement of yours of three pages followed by a number of attachments, A through, I think, to G – no, to E?---I think it is to G.

PN89

Yes, my mistake. Yes, to G. Have you had a chance to read that recently?---Yes.

PN90

Are there any corrections you'd like to make to that statement?---No.

PN91

Deputy President, I tender that statement.

PN92

THE DEPUTY PRESIDENT: Yes, thank you. Any objection to the tender?

PN93

MR LAPIDOS: I've no objection, Deputy President.

\*\*\* CHRISTOPHER NASCINENTO

XN MR RAWSON

PN94

THE DEPUTY PRESIDENT: Thank you. I'll mark the witness statement of Christopher Nascineto dated 17 January 2024 comprising 17 paragraphs together with the annexures marked A through G as exhibit 6.

**EXHIBIT #6 WITNESS STATEMENT BY CHRISTOPHER  
NASCINENTO DATED 17/01/2024**

PN95

MR RAWSON: Mr Nascineto, if you can stay there. Mr Lapidus will have some questions for you.

PN96

THE DEPUTY PRESIDENT: Yes, thank you. Cross-examination?

**CROSS-EXAMINATION BY MR LAPIDOS**

**[10.25 AM]**

PN97

MR LAPIDOS: Thank you. I do have some questions for you, Mr Nascineto, but first can I just ask you a question about whether you're aware that the Fair Work Act makes provision for entry permits to be issued to union officials who are fit and proper people?---Yes, I'm aware.

PN98

Good, thank you. Can I ask you in relation to the visitor guidelines in annexure A of your witness statement, can you tell us specifically what the occupational health and safety requirements it contains that the ATO requires union official permit holders to observe?---No, I'm not a WHS expert. It's not really my expertise. I'm not entirely sure.

PN99

Well I'm only asking you about what's in the visitor's guide in annexure A of your statement but you – you're unsure about what would - - -?---About the work health safety, is that what you're – which bit are you referring to?

PN100

I'm not referring to any bit of it. I'm just asking you if you can tell me which part of it specifies an occupational health safety requirement that a union permit holder would have to comply with from the ATO's perspective?---I don't think it does. It's not the intent of this document. This is - - -

PN101

THE DEPUTY PRESIDENT: Well I'll just – perhaps I might help you out a bit. See the document in front of you, the - sorry, the big book there?---Yes.

PN102

Can you open that up to page 391?---Sure. Yes.

PN103

Get you to look at the second dot point from the top at 391?---ATO security and safety policies, okay.

\*\*\* CHRISTOPHER NASCINENTO

XXN MR LAPIDOS

PN104

So that would be one?---Yes.

PN105

Yes.

PN106

MR LAPIDOS: I guess, so - - -

PN107

THE DEPUTY PRESIDENT: Well I'm asking you. That's a safety related requirement?---It's a – yes, a security - sorry, and I can – I'm – I'm security so - - -

PN108

I understand?---Yes, so I guess the – the security policy and procedures we do require to be – I guess, abide by in part of this policy is mainly the PSPF, the protective security policy framework.

PN109

MR LAPIDOS: I'm not sure exactly which page the Deputy President was referring to in the court book. Can you - - -

PN110

THE DEPUTY PRESIDENT: Three nine one.

PN111

MR LAPIDOS: Three nine one, and you were talking about the third dot point, is that right, Deputy - - -

PN112

THE DEPUTY PRESIDENT: No, the second dot point.

PN113

MR LAPIDOS: Sorry?

PN114

THE DEPUTY PRESIDENT: The second dot point.

PN115

MR LAPIDOS: Second:

PN116

*Abide by all applicable security and safety policies, procedures and protocols.*

PN117

I see. Now can you tell me which specific ATO safety policy this is referring to?---So security policy, the people security - - -

\*\*\* CHRISTOPHER NASCIMENTO

XXN MR LAPIDOS

PN118

Well I wasn't asking you about security policy. I was asking you about safety policies?---Safety. I do not know the safety policy.

PN119

All right. Thank you. These guidelines on the second page refer to union visitors. Can you see that?---Yes.

PN120

Can you – do you know why union visitors are classified as visitors under the policy?---Because they do not have clearance to my knowledge. So anyone that does not have a clearance, so pre-integrity – pre-engagement integrity check or a national security clearance is considered a visitor so that's why they're in here as a visitor.

PN121

I'll take you then to your annexure D and section C5.6, so this deals with authorised personnel. Can you see that C5.6.1?---C5.6.1, yes, authorised personnel access.

PN122

This says, does it not, at paragraph 61 that access to security zones 2 to 5 and ATO premises at Docklands includes zones 2 to 5, correct?---Yes, it does.

PN123

And so then there is a listing of the types of personnel who may be – who are authorised, types of authorised personnel.

PN124

MR RAWSON: Deputy President, I hesitate to do this especially if I've got it wrong, but I just understand that Mr Lapidos has asked the witness to go to annexure C but I think he's actually reading from a corresponding paragraph of D.

PN125

THE DEPUTY PRESIDENT: I thought he - - -

PN126

MR LAPIDOS: I said annexure D.

PN127

THE DEPUTY PRESIDENT: I thought he said D.

PN128

MR RAWSON: That's my mistake, I do apologise.

PN129

MR LAPIDOS: That's all right.

\*\*\* CHRISTOPHER NASCIMENTO

XXN MR LAPIDOS

PN130

THE DEPUTY PRESIDENT: Mr Nascimento, you understood you're looking at annexure D?---Yes, I'm looking – I'm fairly certain I'm looking at the right place, so what was the question?

PN131

MR LAPIDOS: The question is about what types of people are authorised personnel and so it says at paragraph 61 there are three categories listed there?---Yes.

PN132

They are – it says that access to those security zones are restricted to authorised personnel?---Correct.

PN133

Then there are some examples of authorised personnel?---Yes.

PN134

The issue is who is authorised personnel and so if you look at paragraph 62 now, the next paragraph down, it talks about a mandate for the entity's accountable authority which would be - - -?---Yes.

PN135

- - - the Commissioner, I suppose, and his delegates, to authorise people who are not directly engaged by the entity or covered by the terms of the other contract or agreement and in (a) and (b) it talks about the level of security clearance and

appropriate evidence of business need, so I'm asking you whether a union official that holds an entry permit, which means that under the Fair Work Act they've been found to be a fit and proper person to hold that entry permit, and who exercises their power of right of entry to enter ATO premises, do you say that they meet the requirements in paragraph (b)?---In paragraph (b)?

PN136

There's – well I mean, in paragraph - - -?---62.b?

PN137

- - - 62 there is the issue of security clearance and evidence of a business need?---So I guess there wouldn't - to me, it wouldn't satisfy requirement (a) and as for (b), I – I couldn't answer that now. We would need to do a risk assessment.

PN138

But that's referring it to the business need, is it not, for the person to have access to the premises and it takes us back, does it not, to paragraph 61 just above at (c):

PN139

*Personnel who, because of business needs, require ongoing or regular access that's authorised by the accountable authority.*

\*\*\* CHRISTOPHER NASCINENTO

XXN MR LAPIDOS

PN140

?---So, sorry, so at the end of 62.b, requirement 5(vii), that's not – that's not I think what you're referring to there, I don't think. But in brackets, that requirement 5(vii), is that what you're saying it takes it to?

PN141

I was taking you – I was really asking you whether that relates to the paragraph above at (c), so it talks about different types of authorised people, people who can be authorised to have access to the premises, and at (c) it talks about personnel who because of business needs require ongoing or regular access, so I'm really asking you whether union permit holders who – from the ASU and the CPSU in terms of access to ATO premises, do you accept they have a - require ongoing or regular access to ATO premises?---I don't know if I can answer that. It's not – like I don't know enough about that to know whether or not it's ongoing and regular. Yes, I just don't know.

PN142

Well I'll ask you a question about your attachment G which is about photographic building pass types and if you could go to the last page. There is an exemption there, in emergency situations, the second dot point?---Yes.

PN143

Does that also, for example, apply to police executing a warrant, for example?---Yes, so the intent of that – that specific dot point is to allow expedient access for emergency services in the event of an emergency so that they do not need to go through a visitor's signing process. That being said, when police or when emergency services do attend as a routine, so ie if we've invited them to a

meeting which happens quite often with the crime prevention officers, then they do sign in as visitors, they are given an escorted visitor pass.

PN144

The same document on the second page has an example of a day pass?---Yes.

PN145

It says the day pass doesn't require the holder of it to be escorted, correct?---Correct.

PN146

The ATO can issue those and the holder must be identified, in order to issue it the guard post has to verify the person's authority to access the site?---Correct.

PN147

Is there a reason why a union permit holder who has exercised all the requirements to be able to enter ATO premises without an invitation – is there any reason why they can't be issued with a day pass?---According to this policy, the reason is because they do not have a current PEIC, a pre-engagement integrity check, an exemption granted by the security vetting or a signed declaration of secrecy which only applies to co-located government agencies. So that's - - -

\*\*\* CHRISTOPHER NASCINENTO

XXN MR LAPIDOS

PN148

Are you aware that Ms Tucker has a PEIC?---I am not.

PN149

If you accept that she was asked by the ATO to apply for one, would that mean she – what is the process once she applies?---I'm not an expert on that but generally speaking it's like a – a police check, it's one of the checks by our security vetting team.

PN150

There are checks undertaken and then the ATO is informed of the outcome of the checks, well someone, a delegate, and then they say to the applicant for the PEIC, 'You've met the requirements'?---Correct.

PN151

If Ms Tucker has met the requirements of the PEIC, then is she eligible for a day pass?---Correct.

PN152

Thank you. That's all, Deputy President.

PN153

THE DEPUTY PRESIDENT: Any re-examination?

**RE-EXAMINATION BY MR RAWSON**

**[10.40 AM]**

PN154

MR RAWSON: Yes. Mr Nascimento, have you still got attachment D of your statement there and if you have could I ask you to keep it open at paragraph 62?---Yes.

PN155

You were asked some questions about paragraph 62. You'll observe paragraph 62 says – talks about the requirements for an entity's accountable authority to authorise ongoing or regular access for persons who are not directly engaged by the entity or covered by the terms of a contract or agreement and then before authorising any access the accountable authority or CEO ensures, and it sets out that as at (a) and (b) and then at (b), I think, which I think you were specifically asked about it speaks of an appropriate evidence of a business case and risk – a documented business case and risk assessment. To your knowledge, has Mr Lapidos ever presented a business case for such a clearance?---Not that I've ever seen.

PN156

Now the paragraph (b) also talks about a business case that is – I'm sorry – maybe it was in your evidence that you talked about regular access. The evidence before the Commission is that Mr Lapidos has served one entry notice on the ATO during the course of 2023. Would you consider one entry notice in a 12 month period regular access?---No.

\*\*\* CHRISTOPHER NASCIMENTO

RXN MR RAWSON

PN157

The evidence before the Commission is that Ms Tucker has served one entry notice during 2023 for 6 July. Would you consider Ms Tucker's one annual – one entry notice for 2023 to be regular access?---No.

PN158

No further questions.

PN159

THE DEPUTY PRESIDENT: Yes, thank you. Mr Nascimento, thank you for your evidence. You're excused.

<THE WITNESS WITHDREW

[10.42 AM]

PN160

THE DEPUTY PRESIDENT: Yes, Mr Rawson.

PN161

MR RAWSON: Deputy President, I call Scott Keane who is not in the room but I think he's in the precinct.

<SCOTT JEFFREY KEANE, AFFIRMED

[10.43 PM]

EXAMINATION-IN-CHIEF BY MR RAWSON

[10.44 PM]

PN162

THE DEPUTY PRESIDENT: Yes, thank you. Thank you, Mr Keane. Take a seat. Sorry, Mr Rawson, before you. Mr Keane, I notice that you attended the witness box, you've got some – a copy of your statement and then a black folder?---Yes, I do.

PN163

What's in the black folder?---The copy – this statement was just handed to me then. I believe it's a – it's the previous one.

PN164

No, I understand that. What's in the black - - -?---The black folder is a copy of my statement and the attachments to it.

PN165

Okay, and have you made any markings on it?---Yes, I have.

PN166

Well I'm just cautioning you that if you take a document in the witness box and Mr Lapidus wants to see it and he asks for it he'll be entitled to it so you might want to reconsider whether that's - - -?---No, that's fine, Deputy President. The only two markings I've made on it is corrections to my statement.

PN167

All right. Okay. Yes, Mr Rawson.

\*\*\* SCOTT JEFFREY KEANE

XN MR RAWSON

PN168

MR RAWSON: That's a useful prompt. Mr Keane, is your full Scott Keane?---Yes, it is.

PN169

Now in your witness statement you describe yourself as the acting assistant commissioner, workplace relations for the Australian Taxation Office. Is that still an accurate statement of your current position?---No, it's not. I was permanently appointed into that position in February of this year so I'm no longer acting, I'm permanently in that role.

PN170

THE DEPUTY PRESIDENT: Congratulations?---Thank you.

PN171

MR RAWSON: Thank you. Now I think we've discovered you've got more than one copy of your statement with you there in the witness box so would you agree that you have a – made a witness statement in this matter dated 17 January 2024?---Yes, I do.

PN172

Which is eight pages?---Yes.

PN173



Then it contains a number of annexures that are numbered A through to U?---Yes, I believe that's the annexure numbers.

PN174

You have at least one complete set of that there in front of you?---Yes, I do.

PN175

I think you've indicated to the Deputy President that you have made some notes of some corrections that are required to that statement?---Yes, yes.

PN176

We might start, if it's convenient, from the start of the document and can you take us through one by one any corrections you wish to make to the statement apart from your title which we've already covered?---No problems at all, thank you. In section 27, in I think it's the third or fourth last paragraph – sorry, sentence, it says:

PN177

*Ms Greenwood asked Ms Tucker to consider the matter.*

PN178

That should be:

PN179

*Ms Beasley asked Ms Tucker to consider the matter.*

\*\*\* SCOTT JEFFREY KEANE

XN MR RAWSON

PN180

Yes, thank you for that?---And in section 30(c) it says:

PN181

*Mr Lapidos and Ms Beasley entered the ATO premises.*

PN182

That should be:

PN183

*Mr Lapidos and Ms Tucker entered the ATO premises.*

PN184

All right. Thank you. Are there any further corrections you wish to notify?---No. Actually there're only one further correction. I haven't noticed – noted it in here, however, the number of staff that I have has increased. I believe it was early in the document where it says – in dot point 1 it says:

PN185

*I have three direct reports and 14 indirect reports.*

PN186

I have five direct reports and approximately 30 indirect reports now.

PN187

THE DEPUTY PRESIDENT: Empire building?---I would prefer it wasn't.

PN188

MR RAWSON: Thank you, Mr Keane. With those corrections that you've informed the Commission of, are you able to say that your witness statement is true and correct in every particular?---Yes, I am.

PN189

If you can just stay there, Mr Keane. Mr Lapidos will have some questions for you.

PN190

THE DEPUTY PRESIDENT: Any objection to the tender, Mr - - -

PN191

MR RAWSON: I'm sorry. Thank you, Deputy President.

PN192

MR LAPIDOS: No objection, Deputy President.

\*\*\* SCOTT JEFFREY KEANE

XN MR RAWSON

PN193

THE DEPUTY PRESIDENT: Yes, thank you. I'll mark the witness statement of Assistant Commissioner Keane dated 17 January 2024 comprising 46 paragraphs noting the amendments which are recorded in the transcript to paragraphs 1, 27 and 30(c) and the annexures marked A through U, that document will be exhibit 7.

**EXHIBIT #7 WITNESS STATEMENT BY SCOTT JEFFREY KEANE  
DATED 17/01/2024**

PN194

THE DEPUTY PRESIDENT: Cross-examination?

**CROSS-EXAMINATION BY MR LAPIDOS**

**[10.49 AM]**

PN195

MR LAPIDOS: Thank you, Deputy President. Can I first take you to annexure I of your statement please, Mr Keane. That's an email from Mr Jeremy Moore dated Friday, 8 April 2022?---Apologies, Jeff, I'm just scrolling through to find it. Yes.

PN196

Are you aware whether Ms Tucker and myself were regularly exercised right of entry into various ATO offices prior to that email being issued?---Only aware from what's in that email, Jeff. I have no – sorry, do I – Jeff or Mr Lapidos?

PN197

Mr Lapidos is probably the correct way, but - - -?---Okay, sorry, Mr Lapidos.

PN198

But are you aware that Ms Tucker and I regularly accessed ATO premises using our entry permits prior to that date?---My staff have informed me of that, yes.

PN199

Yes, thank you. Are you also aware that the ATO asked Ms Tucker and I to make a PEIC application in the past?---Yes, I am.

PN200

And that Ms Tucker actually made such an application?---Yes, I am.

PN201

Do you know what happened with that application?---I do know. I believe it was successful.

PN202

That's what I wanted to find out?---Yes. I understand it was successful, yes.

PN203

Thank you. In terms of Ms Tucker and I exercising our entry permits which are issued under section 512 of the Fair Work Act, on what basis – well do you say that when we exercised those entry powers that we entered the ATO as a visitor?---Yes.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN204

Why would you regard us as visitors in those circumstances?---Under the ATO – I believe it's the security CEI but it may be the visitor's policy, it does list a number of examples of visitors. There is a particular section that is determined union visitors.

PN205

Yes, it – I think there's a copy in your statement, is there not, of that visitor's policy?---Both the visitor's policy and the security CEI.

PN206

Annexure A. Sorry?---Both the – there is a copy of both our business policy and security CEI.

PN207

If we could just quickly look at the visitor's guidelines and in annexure A to your statement just refers to union visitors?---Yes.

PN208

It just says that the Fair Work Act and the Work Health and Safety Act set out legal procedures and it cautions employees not to sign in a union official as a visitor without confirming with your area, that's your area employee relations?---Yes.

PN209

That all legal obligations have been complied with?---Yes.

PN210

Doesn't really clearly say that people – union officials exercising their right of entry under section 484, for example, that they are visitors?---No, but I base my answer on the previous part of that guide, Mr Lapidos, where it says visitors to the ATO, this is the first page of annexure A, it says:

PN211

*Visitors to the ATO must wear a visitor's pass and be escorted at all times. Visitors can include.*

PN212

I note it doesn't list union representatives there but the fact that it then specifically calls out any union visitors, your question was why I believe that you are visitors to the ATO, so.

PN213

I wanted to ask you about union permit holders, entry permit holders that exercise their right of entry to the ATO. The ATO's position is they must be escorted at all times. Is that right?---Yes.

PN214

Can you explain what at all times means in the context of a permit holder exercising their right of entry?---So at all times means that an ATO employee must be escorting them at all times they're on the premises of the building.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN215

If a permit holder is in an approved meeting room for the purpose of meeting with union members, for example, what happens in terms of the escorting requirement?---It would depend on who the escort is, Mr Lapidos. Quite often it would be expected that the escort is the ATO employee that the union representatives are meeting with given that they are ATO employees because they could meet the escort requirements. I – I am aware that a previous entering arrangement was made for yourself and Ms Tucker to be able to go from the booked room where an ATO employee was to have line of sight that allow you to access the toilet and lunch room facilities unescorted.

PN216

Is that still the ATO's position?---In relation to?

PN217

Ms Tucker or I if we use our right of entry powers to enter ATO premises and meet all the requirements and we're in a meeting room, is the ATO's position still that we can access the nearest bathroom and kitchen without being escorted?---I understand that was considered during previous discussions on this matter but was not reached agreement on.

PN218

I understand but what is the ATO's position currently?---ATO's position is as per our visitor's guide that all visitor's must be escorted at all times.

PN219

What happens if I should issue an entry permit for next week sometime and it meets all the statutory requirements, how am I going to access the premises, for example at the Wollongong office?---I've not attended the Wollongong office, Jeff, so I can't speak specifically to that.

PN220

Well maybe I'll ask you about the Docklands office?---Okay, so would you like me to discuss through the process that's required to go through?

PN221

Yes, please?---So you are required to email either the employee industrial relations team mailbox or the union access mailbox and advise of your notification to enter the office along with the relevant documentation. My team who manage those mailboxes will generally come back and ask you to confirm the location in which you'll be meeting, whether you require a meeting room and who your escort for that will be. Part of that - - -

PN222

If I can just stop you there. If I can clarify if in those circumstances I don't nominate an escort?---It's expected that you do provide an escort to access the premises, Mr Lapidos. We do provide union delegates with paid time for these activities.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN223

What happens if I won't specify a union delegate?---If you're unable to provide an escort, it doesn't need to be a union delegate, it could be an escort, that could be any ATO staff member. If you're unable to provide an escort you won't be provided access to the premises.

PN224

Why does the ATO say that it is reasonable for me, when exercising these right of entry powers, and for the purpose of this discussion we assume I've met all the statutory requirements, why does the ATO expect me to nominate an ASU member to escort me?---Doesn't need to be an ASU member, Mr Lapidos. It could be any member of ATO, an ATO employee. However, whatever the reason for your particular site visit would be, it's expected that given you are meeting with an ATO employee they may act as your escort for that period.

PN225

What are the responsibilities of that ATO staff member as an escort?---To ensure compliance with the visitor's guide and security CEIs.

PN226

There is – the ATO's got a workplace relations guide?---Yes, it does.

PN227

I think you've referred to it in your evidence in annexure F. It's on pages 47 and 48, that's how they've been numbered on your statement.

PN228

THE DEPUTY PRESIDENT: Thirty-seven and 38 you mean.

PN229

MR LAPIDOS: On mine it says 47 and 48. Can you find it?---Yes, it's annexure F, page 37 in mine, the workplace relations guide.

PN230

Anyway, there is a heading 'Union Access and Right of Entry'. Does it say anything there - - -?---Sorry, Mr Lapidus, I'm just trying to find it.

PN231

THE DEPUTY PRESIDENT: That's at 47?---Yes, yes, union access and right of entry, bottom of 47, yes.

PN232

MR LAPIDOS: Before I ask you about that section, if I can take you to the first page of that annexure, of annexure F, workplace relations guide and there's a heading 'What you need to know'?---Yes.

PN233

The purpose of this guide is to help people deal with - know how to deal with these types of circumstances that the guide raises, correct?---Yes.

\*\*\*

SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN234

But when it comes to union access and right of entry, these procedures you're saying the ATO expects people to follow, I didn't notice them in there?---No, but I would say it's not an exhaustive list, Mr Lapidus. ATO employees are expected to be aware of relevant CEIs and guidelines and that's covered in the visitor's guidelines and security CEI.

PN235

Who – if I exercise the right of entry in the way I've described, how do I – and I've made a number of appointments to speak to people through the day, how do I get into the meeting room?---Your escort could escort you from the security desk through to the booked meeting room.

PN236

Sorry, who does?---Your escort.

PN237

Which escort?---Your arranged escort.

PN238

Well I – if I haven't arranged an escort?---As I said before, if you haven't arranged an escort you won't be provided access to the building.

PN239

How do I arrange an escort?---You can do that through your union delegate, through the employee that you're planning on meeting with.

PN240

What am I meant to tell the employee I'm meeting with?---I don't understand your question, Mr Lapidos.

PN241

Well you say I need to have an escort?---Yes.

PN242

I need to arrange the escort?---Yes.

PN243

The escort has to be an ATO employee?---Yes.

PN244

You're suggesting that the person I'm speaking – I wish to speak to be the escort?---Yes.

PN245

Well what am I meant to tell that person? What is my responsibility?---To arrange the escort. The ATO employee's responsibility is to have awareness of the visitor guides and security CEI and their obligations under that.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN246

I'm expected to tell the employee if they want to meet with me they've got to escort me?---Yes. Or you could arrange another escort. It doesn't necessarily have to be the person that you're meeting with. You could use a delegate for those activities.

PN247

I've got to tell them their responsibilities, is that right?---No. As ATO employees they are aware of their responsibilities to the security CEI and visitor guidelines.

PN248

But I've got to tell them that they have those responsibilities in order to bring me in?---No, but I - I - I'm sorry, Mr Lapidos, I plainly don't understand your question because ATO employees are required to be aware of their obligations under the security CEI and guidelines.

PN249

That means - - -?---If you were to approach somebody and request that they be your escort then they would be aware of those requirements.

PN250

You understand I don't accept that I'm a visitor to the ATO when I'm exercising these right of entry powers?---I note that's your position, yes.

PN251

Yes, so what responsibility do you say I have in informing an ATO employee about my need to be escorted in?---In arranging the – the meeting you would

inform the ATO employee that you wish to come in. They will be there to sign you in as their visitor and so the obligation is on them.

PN252

If we can assume I have – if we can assume that I've got into the premises and I'm in the meeting room - - -?---Escorted, yes.

PN253

- - - and I've seen the first – my first appointment and let's just say it goes for half an hour and that my second appointment is not for another 20 minutes after the first person has left, what is meant to happen?---There's a range of options that could – that are there, Mr Lapidos. You're not moving around the building or – or leaving the room in that particular circumstance so you wouldn't be required to be escorted whilst in the room but if you did leave the room then you would need to arrange an escort.

PN254

I could remain in the room without an escort?---Yes.

PN255

If I wanted while I'm waiting in the room for the next meeting - - -

\*\*\*

SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN256

THE DEPUTY PRESIDENT: Well can I – sorry, can I just raise it, that seems to be inconsistent with the first dot point of the obligations that are set out in annexure A of your statement which says:

PN257

*Is escorted at all times while on the premises.*

PN258

What you just said seems inconsistent with that?---In that the – they aren't leaving the room, Deputy President.

PN259

But they're still on the premises, aren't they?---They are still on the premises.

PN260

That's what that says, isn't it, at all times whilst on the premises?---What I explained has been our current practice.

PN261

Yes, All right.

PN262

MR LAPIDOS: So if there is a gap between me seeing the first - my first interview and my second interview, and I decide - and I'm unescorted at that time, which you just said is the ATOs common practice and I need to go to the bathroom, am I able to go to the bathroom unescorted?---Under the current arrangements, you would need to contact an escort for that.



PN263

Is what happens with the CPSU?---That's my understanding, yes. I'm certainly not aware of anything other than that happening.

PN264

So I've got half an hour between my first interview and the second. My first person has left and I've decided to - I need to go to the bathroom, what do I - what does the ATO expect me to do?---To contact your escort.

PN265

Well, the escort's left to do their work?---To call them.

PN266

I've got to call them back and say, 'I need to go to the bathroom'?---Yes. Yes.

PN267

And hope they come - and they need to then apply to get released from duty, is that right?---Formally, yes. Generally, they would have discussed this with their manager already. If not, your other available options are, as I know you've exercised in the past, to call members of my team and they can resolve an escort for you in those requirements. It is a very defined use case that you're presenting to me, however.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN268

So I just want to clarify with you, the ATO Enterprise Agreement has got a specific - it recognises a role for union delegates or union representatives, is that not right?---Yes.

PN269

And there's provision for them to be released from duty to perform union duties?---Yes.

PN270

And they should apply to their manager if they wish to be released from their ordinary work in order to perform those duties?---Yes.

PN271

And would you expect that escorting a union official would form part of those duties?---Yes.

PN272

Is there any similar provision for an ATO employee who is not a union delegate?---No, but common practice would be that staff members can be released after discussions with their manager, to discuss with - to meet with unions. They don't have to be a union delegate.

PN273

So I want to ask you about the trial that there were discussions between the ATO and the ASU about how right of entry might be exercised during the trial?---The trial - during the conciliation for this matter?

PN274

Yes, it's been - the ATO then agreed that Ms Tucker or I could be - would be able to go from a meeting room to the bathroom or kitchen unescorted?---Yes.

PN275

Why was the office - the ATO prepared to do that?---We're trying to find agreement on this matter, Jeff, and we would (indistinct) during conciliation.

PN276

Is it a breach of anything for the ATO to allow that to occur?---I understand that the proposal was for you and Ms Tucker to enter the bathroom and the lunch facilities using the primary corridors and not approaching work stations.

PN277

Yes, that's right. So from the ATOs perspective, it would - it was specifying the route we would have to follow to go from the meeting room to the bathroom or the kitchen, correct?---Yes.

PN278

And the route we were to follow was the corridors between the meeting room and the bathroom or the kitchen?---That's my understanding. I wasn't individually involved in those discussions.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN279

Yes. And there was - it was also made clear that we, when doing that, we were not to walk into the area where the people are working at their desks?---That's my understanding, yes.

PN280

Yes. And we were not required to be escorted at any of those times?---That's my understanding, yes.

PN281

And again, just for purposes of clarification, does the ATO say it was breaching any rules in allowing that?---I believe it was just a discussion, Jeff, so the incident didn't occur.

PN282

No, I understand the trial wasn't implemented, but a trial was proposed. The ATO proposed conditions for the trial and one part of the conditions was once we were in the building, in the meeting room, that we could move from the meeting room to the kitchen or bathroom on that floor using the corridor. Was the ATO breaching any government rules by proposing to allow that?---I'm not sure I'm qualified to answer on any government rules.

PN283

Are you aware of any government rules that offer would breach?---No.

PN284

And can I ask you in terms of a person - so we can talk about my entry into Docklands, if we can assume for the purpose of this question that I've issued an appropriate entry notice and I wish to gain access, do you - so what you're saying is that I have to speak to the first person I wish to interview, or have a discussion with and persuade them to speak to their manager and ask them for permission to bring - to escort me into the meeting room?---I'm not saying that's what you have to do. That is an option available to you. You also have the option of using your delegates - ASU delegates for those activities.

PN285

Do you accept that we don't have delegates in all ATO offices?---I'm not aware of where you have delegates, Mr Lapidos.

PN286

It's not - I'm not asking you where they might be, are you aware we don't have delegates in all ATO offices?---I'm not aware of that, no.

PN287

All right. ATO employees have got a right to representation, is that correct?---Yes.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN288

So I'll come back to that. Would you accept that not all ATO employees would want their manager to know that they're meeting with a union official?---I can't speak on behalf of all ATO employees, Jeff, that's a matter for the employee.

PN289

No. Would you accept that there are some that would not want to?---I can't answer that question. I can't speak for those individuals, Mr Lapidos.

PN290

So do you accept that if I have exercised my right of entry permit, I'm in the meeting room, I've let our members at that office know that they can come to speak to me if they wish and ring me up and make an appointment, the employee that wishes to have discussions with me could use flex leave to come and see me, is that right?---Yes. So they could use any of their normal break requirements and if they were on a break there would be no requirement for them to seek approval from their manager to escort you.

PN291

So what you're saying is that - so first of all, an employee can take flex leave subject to approval by their manager - - -

PN292

THE DEPUTY PRESIDENT: Mr Lapidos, let me just raise this issue with you, that there are two propositions inherent in your questioning. The first is that you've got a right to be there; your right for the purpose of holding discussions is to hold discussions only at certain times, i.e., an employee's meal or other break. So flex leave is not a meal or other break.

PN293

MR LAPIDOS: With respect, that's one of my submissions that - - -

PN294

THE DEPUTY PRESIDENT: No, I understand that, but you're going to have to persuade me that that's right, but frankly, a person who takes flex leave is on leave; not on a break, but on leave and different considerations apply there because if that's right, you're not exercising a right of entry to hold discussions with that employee. Different issues arise in respect of investigations, but here we are just general discussions. Leave or other breaks, in my view, does not include a period where a person's on leave, even if they're attending work.

PN295

So there's that element of it, but - and if you want to continue this questioning, you can, but I'm just foreshadowing with you that I have some difficulty accepting that a period of flex leave is a break as such. I mean, that's a bit like saying that the capacity to talk to employees after they've finished work is a break and there's authority against that proposition. It just seems to me to fall into the same category. They're off duty as opposed to a break between duty whilst on duty. That is a meal or other break.

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SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN296

MR LAPIDOS: Well, I will seek to persuade you otherwise.

PN297

THE DEPUTY PRESIDENT: Yes, sure. But, anyway, continue.

PN298

MR LAPIDOS: So when a person has a meal break, they stop work, correct?---Yes.

PN299

And they're unpaid during that period of time of their meal break?---Correct.

PN300

And there's a lot of flexibility about when they may take their meal break, is that not correct under the ATO Enterprise Agreement?---I wouldn't categorise it as a lot of flexibility, it depends on the role, those employees that are in a scheduled environment have less flexibility than others.

PN301

But if you're not in a scheduled environment and if you can, subject to agreement with your team leader, you can take your meal break almost any time between your start time and from the ATOs position, within five hours of you starting work, is that not right?---Yes. All staff have a regular hours' arrangement or use our standard hours as per our Enterprise Agreement, but regular practice is there is flexibility as to when those meal breaks are taken for non-scheduled staff.

PN302

And when they take their meal break, they make a record on the ATOs time recording system and they specify the time they stopped work and the time they resume work, is that correct?---Yes. All staff are required to record their start and finish times in our time recording system.

PN303

And similarly, if someone wishes to take flex leave during the day, for example, for 45 minutes, they're required to get prior approval wherever possible from their team leader prior to taking that flex leave?---That's correct. Flex leave is subject to operational requirements.

PN304

So in the absence of specific operational requirements, a team leader would approve a request of that nature providing the person has sufficient flex leave available to them?---In general, yes.

PN305

And what are they meant to record on the ATOs time management system in that circumstance?---There is a provision to record that leave as flex time, but not a requirement. The requirement is to list their start and finish times.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN306

So clarify for me how the ATO keeps track of flex time - someone's use of flex leave if they take the flex leave during the day, after they have started work and before they've finished work for the day?---Yes. So the time recording system uses that allocation, so if I was to enter 9 am through till 10 am, it's my start and finish times. I record that hour. If I then come back in and commence another start time from 11 am through to the remainder of the day, the recording system would record the total hours that I've used.

PN307

And is that the way people would normally record their use of flex leave during the day if they use part of their - if they take flex leave for part of the day after they have started and before they have finished?---yes. Generally, for our APS1 to APS6 employees. Our executive level employees operate under a different requirement.

PN308

Yes. So I'll take you now to the situation for the executive level people. So there's special provisions for them in clause 46 of the Enterprise Agreement?---The new Enterprise Agreement that commenced last week?

PN309

Yes?---Yes.

PN310

And in the old one as well?---Yes.

PN311

There's provision for them to have flexible working arrangements, is that not right?---Yes.

PN312

And the ATO expects them to reach an agreement with their manager about how they would have flexible work arrangements?---Yes.

PN313

And it would be available to them to have an agreement that allows them to take a break during the day?---In agreement with their manager, yes.

PN314

And it could be a general agreement that says you can take a short break here or a short break there?---Yes.

PN315

And you wouldn't see, in principle, any problem with an employee having an agreement of that nature?---No.

PN316

The main issue is they do sufficient work and work sufficient hours, is that right?---Well, they do their hours worked as per their arrangement with their manager.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN317

Yes. And how are they expected to record a break of that nature on the - so go back one step. Under clause 46 of the current ATO Enterprise Agreement, is it the case that an EL1 is expected to enter into a flexible work arrangement with their manager if they want to have a flexible work arrangement?---Yes. Yes, so as per the clause 46 in the new EA which I mentioned came into effect last Thursday, there is a new requirement for executive level employees to record their start and finish time in our time management system as per our general employees. Prior to that, however, there wasn't that requirement. They could record it in another manner, but not explicitly in our time recording system.

PN318

So if we can talk about the way it is from now on, if someone - if their flexible working hours agreement with their manager allows them to take short periods of time during the day as time off in lieu, how are they expected to record that?---Yes. All employees are expected to record their start and finish time as per the example I gave you before.

PN319

So let's assume the person starts work at 8.30, finishes at 5 o'clock, so that's their start and finish time and they have - they're expected to take a minimum 30 minute lunch time and that would be recorded on the TMS system?---Yes. Yes, so - yes.

PN320

Yes, and if, in addition, there was provision for them to take an hour off if they wished to, from time to time, how is that meant to be recorded?---That would be in arrangement with their manager, but in general, they would record that in the TMS system, so if I could explain that; if I started at 8.30, I worked through till 12, I would put 8.30 as a commencement time. 12 as my finish time. I would have a half hour lunch break. I would enter 12.30 as my start time. I would enter 2 pm as my finish time, then there's a facility - and then let's say I come back at 3, I've had an hour TOIL as you explained it. There is a facility for me to put in TOIL in, as a comment, but the system adds up all of the hours, so there's no explicit requirement to make that notation in the system.

PN321

And if an executive level employee takes time off in lieu, is there any requirement that they leave the building?---No.

PN322

So someone in that circumstance could go to a meeting room, if there was one available, and use that time off in lieu to make some personal telephone calls, for example?---Yes.

PN323

Wouldn't be a problem?---No.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN324

And the same for an APS1 to APS6 employee that got permission to take flex leave and they got permission to take one hour, for example, during the day, again, they could go to an available meeting room, could they not?---Yes.

PN325

And they could make personal telephone calls?---Yes.

PN326

And you wouldn't see any difficulty with that?---No.

PN327

While they're - if we talk again about that APS1 to APS6 employee and they've got approval to take one hour of flex leave and they've said to the manager, 'I'm just going to be in that meeting room, I've got some personal stuff to do,' if they have an accident while they're in that room, are they covered by the ATOs workers' compensation scheme?---I'm not an expert on work health and safety - - -

PN328

MR RAWSON: I do rise there, Deputy President.

PN329

THE DEPUTY PRESIDENT: It's a legal question. The witness isn't qualified to answer it and you can make submissions about it if you wish.

PN330

MR LAPIDOS: So if someone is in that meeting room in those circumstances while on flex leave and they trip over while they're in the meeting room, for example, if they trip over a chair, would the ATO expect them to lodge an incident report?---Yes.

PN331

If there were two ATO employees in that meeting room, both on flex leave and an argument took place between them and there was an exchange between them that didn't meet the courtesy and respect rule, and there was an agreement on the facts, does the- would you believe that that's of a concern to the ATO?---Again, not my area of expertise. I would seek advice from the relevant areas, but did you say it was a physical altercation, Mr Lapidos?

PN332

Well, no, I didn't say it was physical. I said that there was behaviour that was not - that was inconsistent with the courtesy and respect rule. What I'm asking is whether that would be of concern to the ATO?---I would need to understand more details and the context of the situation and as I said, I would seek advice from subject matter experts on that, Mr Lapidos.

PN333

So - well, I'll just try and press it a little bit. If both - - -

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN334

THE DEPUTY PRESIDENT: Mr Lapidos, to the extent that you're trying to make, what I think is a fairly obvious point, that some occasions when people are not working, their conduct might nevertheless have a connection with work, that much is accepted, isn't it, Mr Rawson?

PN335

MR RAWSON: I mean, it might be that I can assist with a concession here, Deputy President. I will not be submitting that if two ATO employees have a punch on in a conference room, that the fact that one of them was clocked off when it happened is a regular - - -

PN336

THE DEPUTY PRESIDENT: Or both of them.

PN337

MR RAWSON: Or even that both of them are clocked off when it happened, I will not be submitting that that would be a reason why the ATO would take no action in respect of it.

PN338

THE DEPUTY PRESIDENT: Yes. Yes.

PN339

MR LAPIDOS: So I want to ask you about the ATOs expectation that union officials exercising their right of entry have to comply with the visitors' requirements. So the visitors' requirements are twofold in the ATOs case, as I



understand it. One is that persons are escorted at all times and they comply with the visitor guidelines. Who determined that should be that case - should be the case?---Are you asking me who wrote the policy?

PN340

No. Who decided that union officials exercising their right of entry should comply with the visitor requirements?---I couldn't provide you with a name, Mr Lapidos, I'm not aware.

PN341

When did it occur, do you know?---I'm not aware of that either.

PN342

Well, can I ask you why it occurred?---I'm not (indistinct) of when or why, I can only surmise that it's part of our security CEIs and our chief executive instructions.

PN343

So I wanted to ask you about section 491 of the Fair Work Act which is about occupational health and safety requirements and it says:

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN344

*The permit holder must comply with any reasonable requests by the occupier of the premises for the permit holder to comply with an occupational health and safety requirement that applies to the premises.*

PN345

Are you aware of that provision?---Yes, I am.

PN346

So can I ask you in terms of the guidelines, the visitor guidelines, which is the occupational health and safety requirement that the ATO is requesting the permit holder to comply with?---I'm not sure I understand the question, Mr Lapidos. Where's the guidelines you're referring to?

PN347

Well, I - - ?---The visitor guidelines?

PN348

Visitors to the ATO guidelines which are in annexure A to your statement?---Yes. Yes. Sorry. Sorry, Mr Lapidos, I was awaiting to clarify it. Can you please repeat the question?

PN349

Sure. So just to remind you, I'm asking a question in relation to section 491 of the Fair Work Act which says:

PN350

*The permit holder must comply with any reasonable requests by the occupier for the permit holder to comply with an occupational health and safety requirement that applies to the premises.*

PN351

?---Yes. Yes.

PN352

Now, my understanding of the ATO position is that there are two requirements it is imposing on ASU officials who exercise their right of entry. One is to be escorted and the other is to comply with the visitors to the ATO guideline, is that right?---Yes. And a security CEI. Well, all - - -

PN353

Well, where does it - - -?---Sorry, that's for employees, not for visitors. Yes.

PN354

Well, employees have to comply with a range of ATO policies, is that not right?---Yes. That is correct, yes.

PN355

So I'm only asking about Ms Tucker and I, if we exercise our right of entry, the ATO has got power under section 491 to ask us to comply with an occupational - - -?---Yes.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN356

THE DEPUTY PRESIDENT: And more properly, the permit holder has an obligation to comply with it.

PN357

MR LAPIDOS: Yes.

PN358

*Must comply with any reasonable request by the ATO to comply with an occupational health and safety requirement that applies to the premises.*

PN359

?---Yes.

PN360

So in the guidelines, visitors to the ATO which is the requirement?---So the visitor guidelines support the security CEI and the security CEI sets out the responsibilities for implementing and maintaining security practices to ensure the safety of ATO people, business operations, information and IT systems and property so that that's the obligation on the ATO employee to be aware of that, the visitors guide is in support of the security CEI.

PN361

So if I can take you to paragraph 4 of your statement; so you say:

PN362

*All visitors to ATO premises are required to wear a visitor's pass and be escorted at all times.*

PN363

?---Yes.

PN364

*These requirements are set out in the Guidelines: Visitors to the ATO.*

PN365

?---Yes.

PN366

And they're the requirements you say that are - that Ms Tucker and I have to meet?---All visitors, yes.

PN367

But I'm only asking about Ms Tucker and I when we're exercising our right of entry powers and I'm asking which specific health and safety requirement do the visitors' requirements require us to comply with?---I don't believe the visitor guide specifically calls that out, I'm sorry, that's - - -

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN368

So are you saying - no, I won't ask that question. So let me come back to the rights of an ATO employee, under the new ATO Enterprise Agreement in clause 9, I can give you one. Have we got a spare one?

PN369

THE DEPUTY PRESIDENT: No, there's one in the - - -?---In this one, Deputy President?

PN370

There's one big folder and you'll find it; it starts at about page 82 onwards?---Yes.

PN371

MR LAPIDOS: So if you could have a look at - - -?---Bear with me, Mr Lapidus. I'm not getting any younger. My eyesight is failing me as the days progress.

PN372

If you could have a look at clause 9, please. Clause 9.1 in particular?---'Integrity in the APS.'

PN373

That's the name of the clause or the heading of the clause?---Yes:

PN374

*The ATO understands that procedural fairness is essential in building and maintaining trust with APS employees and that it requires fair and impartial processes for employees affected by APS-wide or ATO decisions.*

PN375

So do you - does the ATO accept, for example, that if an employee has a health issue and they have a health case manager assigned to them and there is to be a meeting between the health case manager and the employee and other managers, that the employee gets procedural fairness in terms of that process?---Yes.

PN376

And is that not confirmed by a principle in clause 7.1 of the Enterprise Agreement at (h) - '7.1(h) Treating the employees fairly and impartially'?---Yes.

PN377

And that's reinforced, is it not, by, '(d) Fostering strong cooperative relationships between the ATO and its employees'?---Yes.

PN378

So there may be a number of matters that potentially an employee could have where they could expect the ATO to recognise they should get procedural fairness?---I would say the ATO expects that procedural fairness is applied in all matters.

PN379

Yes?---Yes.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN380

So I'll give you some examples. The ATO has got a performance system?---Yes.

PN381

And the ATO is required under the performance system, to have regular discussions with the employee?---Yes.

PN382

Is that the type of thing where the ATO would expect an employee would have procedural fairness?---Yes.

PN383

Does the ATO accept that they're entitled to representation in a discussion of that type?---Yes.

PN384

And they could be represented by a union official?---Yes.

PN385

And if Ms Tucker - if the employee asked for Ms Tucker or I to attend at the premises, we could?---Yes.

PN386

And we could exercise our right of entry powers for that purpose?---Yes.

PN387

So how are we to get into the building?---In that particular example, Jeff - sorry, Mr Lapidus, as I said before, there would be a number of options available to you. I would suggest that the first and most practical would be for the employee that you're representing, to attend the guard desk and sign you in as their visitor.

PN388

And the ATO would normally allow them reasonable time to prepare for the meeting?---Yes.

PN389

And they could speak with Ms Tucker or I during that period of time?---Yes.

PN390

And similarly, at the conclusion of it they could have time to go over what had happened?---Yes.

PN391

And if Ms Tucker had exercised her right of entry powers and was seeing other employees on that day as well, how does she get into the building if the first person she sees doesn't want to tell their manager that they're seeing Ms Tucker?---Well, if the employee was on paid time, there would be - whilst they don't have to provide their manager with who they're seeing, they would need to provide advice to their manager as to why they weren't available for operational work.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN392

And if they were taking flex leave?---I'm not sure I understand, Mr Lapidus.

PN393

So if they were - if the employee decides they don't want the manager to know about meeting with Ms Tucker and they've decided they take flex leave in order to have a break from work so that they can go and see Ms Tucker on the premises without having to tell their manager what they're doing, they can do that, correct?---Correct.

PN394

And in those circumstances, is the employee able to escort Ms Tucker to the meeting room?---Yes.

PN395

Do they have to tell anyone that they're doing that?---No. They're obliged to abide by the security CEI.

PN396

They would have to go to the security guard at reception and arrange to sign her in?---Yes.

PN397

And the security guard would take a note of their name or pass number?---I believe that's the process, yes.

PN398

So they - the office would be aware of it if they wished to find out?---A record exists, yes.

PN399

And the ATO has access to those records?--- Yes.

PN400

What happens if the employee says to Ms Tucker, 'Look, I'd like to meet with you, but I don't want to escort you in'?---Ms Tucker could arrange for another person to escort her. There could be another employee or an ASU delegate.

PN401

And if there is no one else available?---As you mentioned, Mr Lapidos, the employee's on flex time, so they're entitled to leave the building and meet with whoever they would like, wherever they like.

PN402

So Ms Tucker wishes to enter the building, someone wants to meet with her inside the building, doesn't wish to escort her in, so Ms Tucker's not allowed to go into the building?---If an escort can't be provided, yes.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN403

And why doesn't the ATO provide an escort?---The ATO has operational work to undertake on behalf of the Australian community, that work is getting ever increasing and there's an expectation that our employees are undertaking it.

PN404

But you said, did you not, that an ATO employee will effectively be excused from their work in order to escort Ms Tucker?---With the arrangement with their manager due to operational requirements and subject to that.

PN405

Yes, and subject to operational requirements, but those operational requirements you're speaking about are about an immediate operational requirement, are they not?---Yes.

PN406

So if there's not an immediate operational requirement, for example, something has to be done in the next half hour or hour that can't be done by someone else?---There's a thousand scenarios there, Mr Lapidos, depending on the particular work type, whether it's incoming client contact facing work, whether it's project work. What I would add though is that under our workplace relations guide, we do allow for paid time for union delegates to undertake such activities.

PN407

But not for ordinary ATO employees who are not union delegates?---No, generally not, no. But a request could be made. There's a facility within that guide to request that so - - -

PN408

To request what?---An employee could request through to the director of workplace relations who's a member of my team for time to escort Ms Tucker.

PN409

So Ms Tucker wants to be escorted and so she's got to get in touch with a member because - would you accept that Ms Tucker would know the names of our members?---I would assume so, yes.

PN410

And may not know the names of people who are not our members?---I think that's a reasonable assumption.

PN411

And someone who's not an ASU member, you wouldn't expect them to respond to a telephone call from Ms Tucker who they don't know and respond affirmatively to a request to escort her in?---I couldn't speak for those individuals, Mr Lapidos.

PN412

But it wouldn't surprise you, it's not the sort of circumstance you would expect Ms Tucker to go through?---I would agree with that, yes.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN413

So in order for an ordinary ATO employee who wishes to speak to Ms Tucker who has a meeting coming up with the management and wants to prepare for the meeting with Ms Tucker, and Ms Tucker has said to the employee, 'Can you sign me in, please,' and the employee says to Ms Tucker, 'Sure. What do I have to do in order to escort you in?' The answer, is it not, that she should - the employee should apply to the director of employee relations to be released from duty in order to provide the escort for Ms Tucker?---No, not in those circumstances, Mr Lapidos. As you mentioned before, we allow for reasonable time before and after meetings with union delegates to prepare. It's fair to assume that that would include attending the security desk and signing them in.

PN414

THE DEPUTY PRESIDENT: Mr Keane, can I ask you this; a representative of the media - does a representative of the media who's a visitor or wants to be a visitor, have to arrange their own escort?---I'm not - that would generally be handled through the media unit, Deputy President. I'm not familiar with the processes personally.

PN415

Does an employee of another government agency as a visitor, have to provide their own escort?---Yes, they would.

PN416

They do?---Yes. They would generally be coming on site to meet with a member of staff.

PN417

Where in this visitor - so where in this visitors' guide does it tell me that that's a requirement?---I don't believe it says it explicitly in the visitors' guide, Deputy President.

PN418

It doesn't, does it?---Not that I recall, no. It would be the general practice, Deputy President, that if they were coming on site, it would be to meet with somebody and the person that they were meeting with would be responsible for providing their escort components.

PN419

And noncontracted service providers?---Again, I guess it would be assumed that they're meeting with an ATO employee and that was their requirement for visiting.

PN420

MR RAWSON: Deputy President, I'm sorry.

PN421

THE DEPUTY PRESIDENT: Have you finished?

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN422

MR LAPIDOS: Not completely.

PN423

MR RAWSON: I just wanted to - I've hesitated to do this, because I don't - particularly in the presence of the witness, but there have been a lot of questions on this topic, and the witness' evidence will be the witness' evidence, but I just - if it helps Mr Lapidus, I can confirm that the position which is recorded in our submissions at 51 to 53 remain my instructions.

PN424

THE DEPUTY PRESIDENT: Yes, I see.

PN425

MR LAPIDOS: I thank you for that. Just so you understand the ATO position is that in the event that Ms Tucker or I are not able to arrange a delegate to escort them the ATO will nominate an authorised person to do so, providing we meet with the usual requirements?---I do understand that was part of the previous discussions during this matter, yes.

PN426

So I wanted to take you to attachment I of your statement, which is the Jeremy Moore email of 8 April 22, and you will see towards the bottom of the first page 'Rationale for the decision'?---Yes.



PN427

What is the specific occupational health and safety requirement that are being imposed on Ms Tucker and I?---I'm sorry, Mr Lapidos, where does it reference the occupational health and safety under 'Rationale'?

PN428

It doesn't that I could see. I just wondered if you were aware of something or not?---No, I'm not aware of anything other than this email.

PN429

So if I can take you to paragraph 18 of your statement?---Yes.

PN430

You say in the last sentence:

PN431

*CPSU officials complied with the visitor requirements when attending and arranged a CPSU member to escort them during their attendance.*

PN432

How do you know they complied?---I've got no evidence that they didn't. My understanding is that at all times they had a member to escort them.

PN433

And what led you to that understanding?---It was the numbers that (indistinct) research undertaken by my staff.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN434

What was the research?---To check how many times that the CPSU had attended - how many rights of entry there had been over the 2023 calendar year. Not just - not just the CPSU, but - - -

PN435

THE DEPUTY PRESIDENT: Is there a record - there's some record of who the escort is, is there?---I would believe so, that's in the visitors guide, but I wasn't - I didn't undertake this particular activity, Deputy President.

PN436

MR LAPIDOS: It's just that you said that they've complied with the visitors requirement. So it sounds like a statement made with some certainty?---Yes. Certainly I'm not aware that they didn't comply.

PN437

But there's a difference between not being aware of a failure to comply. You could have written it as, 'I'm not aware of any CPSU official failing to comply', which seems to be what you're now saying?---I acknowledge that, yes.

PN438

Whereas you said in fact as a positive statement that the CPSU officials did comply?---Yes.

PN439

Are you changing your statement now?---I would say that I'm not aware that they didn't comply. I can only - I'd need to get clarification from my staff, but I can only imagine that when they looked at these records that there was no evidence that they weren't granted, and as such they were escorted at all times. But, yes, I'm happy to concede, Mr Lapidos, that I should have said I'm not aware that they didn't comply.

PN440

And how would the ATO find out if they didn't comply?---There'd be a range of matters. Certainly there would be awareness at the security desk. It would be reasonable to assume that I would be informed if a right of entry by a union official was denied for not having an escort. Certainly under the security CEI there's also an obligation for staff to report instances where they see anyone on site not wearing a visitor's guide. I would generally be informed of those breaches as well.

PN441

So if we could speak about CPSU officials with entry permits exercising their right of entry powers, and they've gone into the ATO and they've been escorted, and the official wishes to go to the bathroom, do you know that they are escorted to the bathroom?---I couldn't categorically state that, but the obligation of the staff member who's escorting them is to make sure that they're following the visitor guidelines.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN442

Yes. And what is the practice; does the CPSU have a delegate that signs them in, in the morning, is that the normal practice; when they come in is that the normal practice?---I'm not aware if they're delegates or if they're just employees, Mr Lapidos.

PN443

And is the practice that the CPSU member - you've conceded it would normally be a CPSU member?---I would assume so, but it may be somebody requesting membership. I wouldn't - - -

PN444

It could be someone eligible to apply?---Yes, I would assume that on the vast majority however it would be a CPSU member.

PN445

And so what is meant to happen; they get signed in by a CPSU member and get taken to the meeting room?---Yes.

PN446

And what happens if they wish to speak to a number of people while they're in the meeting room, the CPSU and official? What happens in terms of the escort arrangements?---I would assume that in the vast majority of circumstances that

they've arranged and informed the people they're speaking to where they are, and those employees would attend that office.

PN447

So this arrangement the ATO has with the CPSU is that documented anywhere?---The ATO doesn't have an arrangement outside of the visitor guidelines and security CEIs with the CPSU.

PN448

So how does the CPSU know what they're meant to do?---The CPSU - - -

PN449

Officials?---Yes.

PN450

How do they know about how to take their access?---In the same manner that applies to the ASU and the CPSU right through to the union access mailbox, and my team generally confirm who their escort is and provide that information to the security guards.

PN451

But the ATO has given the ASU permit holders specific instructions, has it not, and that is in annexure I from Mr Moore, and that has been repeated subsequently by other management representatives to say that the only way Ms Tucker and I can exercise our entry permit powers is by being escorted?---Yes.

PN452

So there's documentary evidence of instructions to us?---Yes.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN453

What's the situation with the CPSU?---It's the same (indistinct) as you, Mr Lapidus.

PN454

Yes, but how do the CPSU know that?---As I was just trying to say, so when they ask, when they put forward their request for site access generally a member of my team that monitors that mailbox will write back and ensure that they have an escort.

PN455

Does the member of your team tell them that they have to be escorted when moving from the meeting room to the bathroom?---He tells them that they need to follow the visitors guides.

PN456

It says that?---Yes. I don't believe it explicitly states needs to be escorted between the bathrooms and the toilets. I believe he refers to the visitors guides, and if not he refers to escorted at all times.

PN457

And what is the ATO's expectation with the CPSU official in moving from their approved meeting room to the bathroom?---That they're escorted.

PN458

And what does that mean in practice, they've got to arrange for someone to escort them to the bathroom?---Yes.

PN459

And is the CPSU official allowed to stay in the room, in the agreed meeting room without an escort?---Yes.

PN460

So how does that stack up against the expectation that they're escorted at all times?---I acknowledge that as the Deputy President said before that it is an inconsistency.

PN461

So in paragraph 21 of your statement, if you could have a quick look at that, it talks about an incident in March 2009 involving me.

PN462

THE DEPUTY PRESIDENT: Nineteen.

PN463

MR LAPIDOS: Paragraph 21.

PN464

THE DEPUTY PRESIDENT: Yes, 2019.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN465

MR LAPIDOS: Sorry, I beg your pardon, 2019. Yes, March 2019?---Yes.

PN466

Are you aware what happened as a result of that incident?---No, my only awareness of this matter, Mr Lapidus, is via the email that's attached in the statement.

PN467

But that was really letting the office know what had happened?---That's correct.

PN468

But you have no awareness that anything happened as a result?---I have no awareness, no.

PN469

All right. So if I can take you to annexure K of your statement. So do you accept that when exercising entry powers that Ms Tucker or I can be in the relevant ATO premises during ATO working hours?---Yes.

PN470

And working hours generally are 7 am to 7 pm?---Yes.

PN471

And it's possible for us to have people we could see, a variety of people during the day, and they could see us with different arrangements?---Yes.

PN472

One person could see us on flex leave. Another person could see us during their morning tea or afternoon tea break. They could see us during their meal break.

PN473

MR RAWSON: Deputy President, the witness is nodding and giving affirmative gestures, but the transcript won't be picking any of them up.

PN474

THE WITNESS: Sorry, apologies.

PN475

THE DEPUTY PRESIDENT: Perhaps just go through each of those individually and wait for a response.

PN476

MR LAPIDOS: Yes, thank you. Sorry. So if we are on the premises for example between 8.30 and 5, which is within the working hours of the ATO, we could see a number of employees during that period of time, correct?---Yes.

PN477

And employees could make a variety of different arrangements to be able to see us?---Yes.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN478

So it is possible for an employee to arrange to see us while on flex leave?---Yes.

PN479

It is possible for an employee to see us during their morning tea break?---Yes.

PN480

Or their afternoon tea break?---Yes.

PN481

Or during their meal break?---Yes.

PN482

Or because they've applied to their manager to speak to us because there's an employment issue they wish to get some advice about?---Yes.

PN483

And in terms of the latter point the amount of time a manager would release someone would depend on the circumstances; is that right?---I would assume so. I'm not aware of anyone not being released for an appropriate period.

PN484

Yes. No, I'm not suggesting they wouldn't be, I'm just asking to confirm they would be?---Yes.

PN485

They would be released normally subject to any immediate operational requirements. The manager would normally be expected to release a person for a reasonable period of time depending on the circumstances?---Yes.

PN486

And that might be for example as short as 20 minutes, or it could be as long as an hour for example, depending on the nature of the matter?---Yes.

PN487

And they could see us before a meeting with the management, as well as after a meeting with the management?---Yes.

PN488

And again the period of time they're allowed after the meeting would depend on the nature of the meeting, its complexity and its length?---Yes.

PN489

How do you say we're to be escorted between each of those meetings?---It would depend on how those meetings had been arranged. If you were in a singular location there wouldn't be a requirement for you to be escorted except to and from that room, and the varying employees could attend in the room where you had positioned yourself.

\*\*\* SCOTT JEFFREY KEANE

XXN MR LAPIDOS

PN490

So if we can assume for the purpose of this question we've arranged to see five different employees during the day. So you're saying we see one after the other. There could be breaks between seeing each person, and we're not required to have an escort between the breaks?---As long as you don't leave the room that you're in, yes.

PN491

But if we wish to go to the bathroom we have to arrange an escort?---Currently, yes, but I acknowledge that you read to me before that the position that we're putting forward is that you being able to attend the bathrooms and the toilets is agreeable.

PN492

So just to clarify, is it your evidence that the ATO has the power to make an exception if it wishes, if it decides it's appropriate, for Ms Tucker or myself when on the premises exercising our right of entry, where we have a number of meetings during the day, that the ATO has a discretion to allow us to move between the meeting room and the bathroom, following a specified route, if it wishes to do so?---Yes.

PN493

I think that concludes my cross-examination, Deputy President.

PN494

THE DEPUTY PRESIDENT: Yes, thank you. Any re-examination?

PN495

MR RAWSON: Just a couple of very short matters, Deputy President.

**RE-EXAMINATION BY MR RAWSON**

**[12.08 PM]**

PN496

Mr Keane, are ATO employees allowed to go to the bathroom outside of their lunch break?---Yes.

PN497

Do they need to get released from duty in order to do so?---No.

PN498

Would you expect they would need to get released from duty in order to escort a visitor to the bathroom?---I think the occurrence would be rare, but, no.

PN499

Have you ever heard of that happening?---No.

PN500

Now, you were asked some questions about annexure A to your witness statement. So I might ask you perhaps to get that document?---I'm sorry, did you say annexure A?

\*\*\* SCOTT JEFFREY KEANE

RXN MR RAWSON

PN501

Annexure A, A for apple?---Yes. The visitors to the ATO?

PN502

Yes. It's page 9 of your statement. Have you got that?---Yes.

PN503

So the first page of the document is headed 'Visitors to the ATO'?---Yes.

PN504

Can I ask you to read the first dot point under the heading 'What you need to know'?---'All visitors including school age children must wear a visitor pass and be escorted at all times.'

PN505

Does that requirement to your knowledge serve any OHS related objective or purpose?---No.

PN506

No further questions.

PN507

THE DEPUTY PRESIDENT: Yes, all right. Mr Keane, thank you for your evidence, you're excused?---Thank you, Deputy President. Sorry, Deputy President, would you like me to leave there here or - - -

PN508

No, you can take your things with you. Just leave the big book?---Thank you.

**<THE WITNESS WITHDREW**

**[12.10 PM]**

PN509

Mr Lapidos - sorry.

PN510

MR RAWSON: That's the case for the respondent.

PN511

THE DEPUTY PRESIDENT: Yes, sorry, I should have asked. I assumed as much. Mr Lapidos, do you want a short adjournment to collect your thoughts?

PN512

MR LAPIDOS: Yes, please. Deputy President, would it be possible to combine that with the lunch break so I have a little longer?

PN513

THE DEPUTY PRESIDENT: With the lunch break. Only if you're escorted out of here, Mr Lapidos. Yes, that will be fine. We would normally run until 1 o'clock and resume at 2. So shall we say let's resume at 1.30. Would that be convenient?

\*\*\* SCOTT JEFFREY KEANE

RXN MR RAWSON

PN514

MR LAPIDOS: That would be fine. Thank you very much.

PN515

THE DEPUTY PRESIDENT: Convenient to you, Mr Rawson?

PN516

MR RAWSON: That's fine, Deputy President.

PN517

THE DEPUTY PRESIDENT: Yes, all right. We will adjourn now for lunch and we will resume at 1.30. Thank you.

**LUNCHEON ADJOURNMENT**

**[12.11 PM]**

**RESUMED**

**[1.34 PM]**

PN518

THE DEPUTY PRESIDENT: Yes, Mr Lapidos.



PN519

MR LAPIDOS: Thank you, Deputy President. So I would just like to make a point first that we continue to rely upon our written submissions in this matter.

PN520

THE DEPUTY PRESIDENT: Yes.

PN521

MR LAPIDOS: I want to deal first with whether there is a reasonable request to comply with an OH&S requirement, and we've dealt with that in our written submissions. In terms of the evidence Mr Keane we say could not identify the specific OH&S requirement that the ATO requires of us as permit holders exercising our right of entry powers, and Mr Nascimento said he didn't have the expertise to answer that question about OH&S requirements.

PN522

The ATO in its written submission said that its visitor requirements are OH&S requirements, and that those requirements include that we wear a visitor's pass and be escorted by an ATO employee. But Mr Keane in his evidence said that while remaining in an agreed meeting room while waiting for our next discussion that we weren't required to be escorted.

PN523

And in the trial, which is referred to in exhibit 3, if it had been implemented it would have allowed us to move between our meeting room and the bathroom or kitchen on that floor without an escort, provided we use the specified route and did not move amongst the area with desks. And Mr Keane also said that the ATO has a discretion to allow us to move unescorted in this way if it considers it appropriate.

PN524

Now, in terms of OH&S requirements I did look at *Darlaston v Parker* which the ATO referred to in its written submissions, and there is at paragraph 99 of that decision Flick J found that in that case the requirements were concerned 'to ensure the safety of persons entering and remaining on site.' So we say that was a different situation to this. So I just wanted to distinguish our circumstances from the circumstances there, and we say that the ATO hasn't specified an OH&S requirement that applies to the site to ensure the safety of persons.

PN525

THE DEPUTY PRESIDENT: Let's just take the requirements piece by piece. The first requirement is that effectively you report to reception and you get issued a visitor's pass, and that you wear that visitor's pass during your visit.

PN526

MR LAPIDOS: That's their expectation, yes.

PN527

THE DEPUTY PRESIDENT: Yes, but that's the requirement, and the question is whether or not that is an occupational health and safety requirement that applies to the whole site, and whether the request that you comply is reasonable.

PN528

MR LAPIDOS: Yes.

PN529

THE DEPUTY PRESIDENT: Do you say that the requirement to report to them and wear a visitor's pass has no occupational health and safety element?

PN530

MR LAPIDOS: We do say that, but we say actually - - -

PN531

THE DEPUTY PRESIDENT: So any person could come into the ATO without reporting and there would be no danger to any person in the workplace?

PN532

MR LAPIDOS: No, we don't say that. We are only talking about Ms Tucker and I when exercising - - -

PN533

THE DEPUTY PRESIDENT: Yes, but the first point is whether the requirement is a requirement that applies generally to the workplace as an occupational health and safety requirement. Do you contest that the requirement in its application generally - putting you to one side it has - at least an element of occupational health and safety purpose, that is to protect the safety of staff who work in the ATO office?

PN534

MR LAPIDOS: When you put it that way, Deputy President, we would concede that.

PN535

THE DEPUTY PRESIDENT: Yes. So the next question then is whether the requirement and the request that you comply with it is reasonable, and that's what this case is concerned about.

PN536

MR LAPIDOS: Yes.

PN537

THE DEPUTY PRESIDENT: I don't think it's concerned about whether or not, despite Mr Keane's answer - I don't think that this case is concerned with whether or not the application of the requirement generally doesn't have an occupational health and safety element, because I think it clearly does. So the issue then is whether for the purposes of 491 the request to the permit holder that he or she comply with the requirement is reasonable.

PN538

MR LAPIDOS: So on that basis, Deputy President, we would say it is unreasonable, and the reasons we say it's unreasonable are that the Fair Work Commission has found us to be fit and proper persons to have an entry permit issued to us.

PN539

THE DEPUTY PRESIDENT: Well, that applies to everybody, and that would make any requirement to comply with an occupational health and safety requirement necessarily unreasonable, and then 491 would have no work to do.

PN540

MR LAPIDOS: We're talking about the circumstances of the ATO where - - -

PN541

THE DEPUTY PRESIDENT: I do understand that, but you're pointing out one factor that I should take into account in assessing reasonableness that you've been assessed as a fit and proper person. That's the position of every permit holder.

PN542

MR LAPIDOS: Yes.

PN543

THE DEPUTY PRESIDENT: So the fact that you have been so assessed isn't a matter that goes to whether or not the requirement is reasonable, because if that were so then the starting position is that every requirement is unreasonable, because the person to whom the request is made would in all circumstances be a person who has been assessed as a fit and proper person.

PN544

MR LAPIDOS: Well, we could say based on the evidence of Mr Keane that the ATO has a discretion not to require us to be escorted, and that in the trial that is described in exhibit 3 the ATO agreed that we could move from the meeting room, from the agreed meeting room to the bathroom or kitchen nearby, provided we followed the specified route.

PN545

THE DEPUTY PRESIDENT: Yes.

PN546

MR LAPIDOS: And in those circumstances we would say that a requirement that we be escorted during that time was unreasonable.

PN547

THE DEPUTY PRESIDENT: Yes, that may well be right. So do I take it from that that if the requirement were only that you wear a visitor's pass you'd have no objection?

PN548

MR LAPIDOS: No, we do have an objection, Deputy President. We would accept wearing a day pass. So in Mr Nascimento's evidence in the last - - -

PN549

THE DEPUTY PRESIDENT: This is a pass that's given to certain contractors and so on?

PN550

MR LAPIDOS: Yes.

PN551

THE DEPUTY PRESIDENT: Yes, I understand.

PN552

MR LAPIDOS: In annexure G there are a variety of building pass types.

PN553

THE DEPUTY PRESIDENT: Yes.

PN554

MR LAPIDOS: And we say that the non-photographic building pass described here as a day pass, which is unescorted day passes, the yellow one on what's noted as page 58, we would be content to wear that. And we say there is provision for the ATO to issue a building pass of that type, and we ask you to recommend that the ATO consider issuing us with a day pass of that type. Annexure G says that, 'A day pass can be issued where there was a current exemption granted by security vetting.' So that is in the sentence immediately below the picture of the yellow day pass.

PN555

THE DEPUTY PRESIDENT: I'm sorry, I'm just trying to find it. On what annexure is it?

PN556

MR LAPIDOS: G. 444 of the court book, Deputy President.

PN557

THE DEPUTY PRESIDENT: I was just about there. Yes.

PN558

MR LAPIDOS: So if you look at the sentence underneath the picture of the day pass it talks about when it may be issued, and it speaks about a current exemption by security vetting. There is another circumstance where the current PEIC has been issued who have a current PEIC, and you might recall there's some evidence of Ms Tucker having applied for a PEIC, and Mr Keane saying that had been approved.

PN559

The difficulty we have with you making a recommendation on that basis is that it appears to be restricted to ATO staff, contractors or co-located tenants, and we don't fit into any of those categories, but there is an exemption. It seems to be more general, and I will take you to some provisions in attachment D to Mr Nascimento's statement about whether we should be considered visitors or not.

PN560

So just to conclude, so we're asking that you recommend as part of your decision that the ATO's security vetting people consider authorising us to be issued with a day pass when we are exercising our right of entry powers, and that way we would have a building pass to wear when on ATO premises exercising these powers.

PN561

THE DEPUTY PRESIDENT: One possible outcome might be that I conclude that the requirement that you wear a visitor's pass important, and register your attendance and wear a visitor's pass is reasonable, but that you be escorted is not, in which case I don't have to do anything. It's the ATO's problem, it will have to change its policies. I don't have to recommend that you be given a day pass. They will have to accommodate their procedures to accommodate my decision, subject to appeal rights. So it doesn't necessarily follow that I have to find a solution within the parameters that the ATO has set out. But I have got the position under the Act and we are here concerned with the reasonableness of the requirements.

PN562

The requirement has many elements, some of which might be reasonable, some which may not. All of it might be reasonable, all of it might not be, but that's the scope, and the resolution to the dispute might simply be that I determine that the request in its totality is unreasonable, but these elements of the request are reasonable. You've got your rights under the Act to enter, and it's for the ATO to accommodate that in the context of a request that it makes to you in the future, and that request might be that you simply wear this newly established visitor's pass.

PN563

MR LAPIDOS: Well, that would be great if we could get a special visitor's pass of that nature. If I could just explain our concern about being required - - -

PN564

THE DEPUTY PRESIDENT: Is the escort and you pulled up. I understand that.

PN565

MR LAPIDOS: Yes, because if we're escorted - we're wearing an escorted visitor's pass and we - - -

PN566

THE DEPUTY PRESIDENT: And not escorted someone might pull you up, as they're trained to do.

PN567

MR LAPIDOS: That's right.

PN568

THE DEPUTY PRESIDENT: Yes, I understand.

PN569

MR LAPIDOS: So that's our concern about that. Just to reinforce the position we wanted to refer to attachment D. I mean we talked about this during the evidence, and I wanted to refer you to part of attachment D. This is to Mr Nascimento's statement. And if you look at - so our first point, which I might be reiterating something you can see already, so we're saying that we're not visitors to the ATO in the way that someone else might be. For example there's provision in the guidelines for an employee to invite family or friends into the premises, providing

they've got agreement by their manager, and that person has to be escorted, and we're saying we're not visitors in the conventional sense because we're exercising a statutory requirement and that we're being misclassified.

PN570

And if you look at C.5.6.1, which is page 14 of attachment D, but page 44 of the statement - well, maybe if I could correct that. If I can go first to paragraph 72, which is on the next page, C.5.6.5 under the heading 'Visit control.' At paragraph 72 it says:

PN571

*A visitor is anyone who is not authorised to have ongoing access to all or part of an entity's facilities.*

PN572

So we're saying we don't come into that category. And then - - -

PN573

THE DEPUTY PRESIDENT: Well, possibly. I am not sure that the right of entry provisions gives you ongoing access. You've got to give notice and your access is for that day.

PN574

MR LAPIDOS: Yes, but we can exercise it regularly.

PN575

THE DEPUTY PRESIDENT: Sure.

PN576

MR LAPIDOS: And it talks about - if you go to paragraph 61 under the heading C.5.6.1 'Authorised personnel access', paragraph C:

PN577

*Personnel - - -*

PN578

And then:

PN579

*- - - because of business need - - -*

PN580

And we would say this is referring to the ATO's business need to give us access.

PN581

*- - - where the requirement ongoing and regular access that is authorised by the ATO who are the accountable authority, who require regular unescorted access to attend meetings or participate in projects - - -*

PN582

Et cetera. So we just note that we think that - so this is our interpretation of some complicated government guidance. We think it accommodates or provides for right of entry holders.

PN583

So the other thing we would mention is exhibit 5, which is the Public Service Commission Circular 2022/09 at paragraph 5. So that's part of the ATO's submissions, and was called attachment D, but it's been marked as 5. It says at paragraph 5:

PN584

*The government expects agencies to implement arrangements that ensure unions can exercise their industrial rights under the Act.*

PN585

And also in paragraph 6:

PN586

*Employees are entitled to have access to their unions who represent them in the workplace on employment and workplace matters.*

PN587

And at paragraph 20:

PN588

*Agencies may agree to arrangements that provide more flexible access and provided for into the right of entry provisions.*

PN589

So there are limits on your powers. So I won't tell you what those are, because I know you're aware of them, and we're certainly not asking you to order something that goes beyond the Act.

PN590

We did have a discussion earlier today about breaks, and I wanted to address that fairly briefly and say we don't think you need to make a decision about whether an employee's use of flex leave is a break for the purposes of this dispute. So there's nothing in the dispute itself about employees' access to breaks and whether it can be used or not.

PN591

But we just wanted to make a point that from the ATO's evidence it accepts we can be on the premises during working hours between 7 am and 7 pm Monday to Friday. It accepts that we can meet with ATO employees during their morning or afternoon tea break, their lunch break, from their perspective during a period of flex leave for an APS1 to an APS6, or an executive level employee who takes accrued time off in lieu under clause 46 of the enterprise agreement.

PN592

Mr Keane agreed that the ATO has an obligation to provide procedural fairness to staff, at least in accordance with clause 9.1 and clause 7.1(h) and (d) of the

enterprise agreement for a variety of matters, including in relation to issues about their performance. We also refer you to clause 13.5 of the enterprise agreement that says:

PN593

*An employee may have a union representative assist or represent them in any individual employee workplace matter arising under the agreement.*

PN594

And clause 12.3 extends that right to representation to a variety of matters not covered by the EA, such as reviews of action or fitness for duty. So we say that you should accept that we can remain on the premises if our purpose is to have discussions with ATO employees who are our members or eligible to become our members for whatever reason the employee wishes to speak with us, providing they come within any of those categories I've just mentioned. And that the fact that there may be periods of time between those meetings does not mean the ATO can eject us from its premises. But as I said earlier - - -

PN595

THE DEPUTY PRESIDENT: That's a different question, but the issue about whether or not you are exercising particular rights when you're speaking to an employee who has taken a period of flex leave is relevant to assessing whether or not the ATO is able to impose the requirements it does. For example if on a particular day you were going to see five employees and all of them were on flex leave there's a real issue about whether or not you're exercising those rights, because unless the flex leave is part of a break then you don't get the protection of the provisions, and then the ATO is having you on its premises effectively as an invitee and you're required to comply with whatever conditions it imposes.

PN596

MR LAPIDOS: So we were hoping you could avoid making a finding. I understand you indicated you would need to be persuaded.

PN597

THE DEPUTY PRESIDENT: I am happy not to make a finding provided that my conclusions are confined to interviewing employees during their meal or other breaks between continuous periods of work, as opposed to the finishing of work, going on leave and then restarting or starting work after the leave has finished. If that's part of the equation and you want to push back on the ATO by reference to any decision I might make then I'm going to have to decide that issue. But if you're content for me to simply - if you accept that for the purposes of this dispute we are talking only about meal or other breaks, that is other breaks of the kind that a meal break is, consistent with the observations of the Full Federal Court in *CFMMEU v BHP Billiton Nickel West*, particularly the observations of O'Callaghan J, with which Reeves J agreed, about the meaning of that phrase, that although a break in a general sense is capable of including a holiday, that's a break from work, or some other leave, one can't ignore the phrase that precedes it, meal or other break.

PN598



And if the parliament had intended for break to have a generalised meaning it would have simply said break. There would be no need to put 'meal' before other breaks. So that the second word, that is 'breaks', takes some meaning from the first, meal breaks. So it's breaks of a kind that meal break is; that is a break between a period of continuous work.

PN599

MR LAPIDOS: I'm not in a position to argue this point out today, Deputy President, and I'm not seeking leave to come back to you on another time to address you.

PN600

THE DEPUTY PRESIDENT: I'm happy to give it to you if you want me to resolve the whole issue, but - - -

PN601

MR LAPIDOS: I'd rather you didn't, because the dispute didn't turn on that, and I'd prefer that you avoid the issue. I would just say that - - -

PN602

THE DEPUTY PRESIDENT: Well, except that you raised the issue with the witness. You were suggesting that one of the reasons people may not want to notify that they're escorting or that they're even meeting with the union is that understandably some people mightn't want their employer to know they're meeting with the union, and the way they get around that is they take this period of leave. So if that's what you do in respect of that period of time there is a real issue about whether or not that's within the scope of the right of entry.

PN603

Now, the employer can allow you to do that, and understandably it does so, because it fosters good industrial relations, but that's allowing you to do it as opposed to you doing it as a right, and different considerations therefore arise about the application of its visitors policy. If you're simply there exercising a function that you're permitted by the employer to exercise and don't have a statutory right then I find it difficult to conclude that the employer isn't entitled to impose its visitor policy on you.

PN604

If you're there exercising your right and having a discussion during meal or other breaks in the narrow sense, then the question whether or not the imposition of the requirement that you be escorted and so forth, and the reasonableness of that requirement, is a very live issue. But where you're there just simply as effectively an invitee or by consent, as opposed to right, then the employer can caveat that consent with whatever conditions it wishes.

PN605

MR LAPIDOS: So my preference in terms of your decision is to confine the decision to meal or other breaks. And if it turns out in practice on another occasion the ATO wants to make an issue of it we prefer to deal with that if and when it arises.

PN606

THE DEPUTY PRESIDENT: Well, for my part at least I'm content to confine it to that, but I will make it very clear that my decision is confined to meal or other breaks as discussed by the Full Court in the BHP Billiton case.

PN607

MR LAPIDOS: That concludes our submissions, thank you.

PN608

THE DEPUTY PRESIDENT: Yes, all right. Thank you. Yes, Mr Rawson.

PN609

MR RAWSON: Deputy President, I rely on the content of our written submissions dated 19 January 2024. There are a couple of references in those submissions to relevant provisions of what was then the operative enterprise agreement, and of course as we mentioned this morning the new ATO enterprise agreement is effective as of last week. So it might just be convenient to note at the outset for the Commission's benefit at paragraph 44 of our written submissions we refer I think to clauses 44.3 and 103.2 of what I will call the old agreement.

PN610

THE DEPUTY PRESIDENT: This is at footnote 42?

PN611

MR RAWSON: I made a note of the paragraph number, but not the footnote number, Deputy President. I have got no reason to doubt that.

PN612

THE DEPUTY PRESIDENT: Yes. You don't have to specify the clauses in the paragraph. They appear in the footnote. So 44.11, 103.4 and 104.4.

PN613

MR RAWSON: Yes, you're right, it is in the footnotes. I just note that the corresponding provision in the new EA is 44.5, and also footnote 42 references to clauses 44.11, 103.4 and 104.4, the corresponding references of our 44.4 for hours of work; clause 37.4 for shift workers; clause 112.5 for non ongoing employees; and clause 113.7 for casual employees.

PN614

THE DEPUTY PRESIDENT: In footnote 41 the reference to 44.3 is now 44.5; is that right, the first one?

PN615

MR RAWSON: In footnote 41 a reference - sorry, Deputy President, the reference to 44.3?

PN616

THE DEPUTY PRESIDENT: 44.3 is in the current agreement 44.5; is that right?

PN617

MR RAWSON: Yes, we think that's so, Deputy President.

PN618

THE DEPUTY PRESIDENT: Okay. And 44.11 is now 44.4?

PN619

MR RAWSON: Yes.

PN620

THE DEPUTY PRESIDENT: And 103.4 and 104.4 are now 37.4, 112.5 and 113.7?

PN621

MR RAWSON: That's correct, yes.

PN622

THE DEPUTY PRESIDENT: Okay. And 103.2, which is the second reference in footnote 41, is - - -

PN623

MR RAWSON: Now, I haven't made a handwritten correction for that one, I apologise.

PN624

THE DEPUTY PRESIDENT: That's all right.

PN625

MR RAWSON: No, that's 44.5.

PN626

THE DEPUTY PRESIDENT: As well?

PN627

MR RAWSON: Yes.

PN628

THE DEPUTY PRESIDENT: All right. Thank you. Any others?

PN629

MR RAWSON: No. So the dispute before the Commission as you've observed, Deputy President, concerns the operation of part 34 as it applies to the applicants' rights of entry, and specifically the rights that it be granted under section 481 of the Act to investigate suspected contraventions of the Act, that there's been no specific evidence about any entry under 481, and section 484, which is the provision that confers power or a right on the applicants to enter for the purpose of holding discussions.

PN630

And in particular the dispute coalesces around two requirements imposed by the ATO, which we've described in our submissions as visitor requirements, and they are of course the requirement to wear a visitor's pass while on site, on premises, and to be escorted by an ATO employee or other authorised person.

PN631

In addition to relying on our written submissions we just want to make a number of specific points, including by reference to the evidence this morning and the submissions we just heard. The first and most important point which is necessary to address matters that are set out in the written reply submissions of the applicants is that while section 484, and indeed section 481 confer a right of entry on the applicants, that right is subject to an express limitation found in section 491 of the Act, and that is that the permit holder must comply with any reasonable request from an occupier of premises to comply with an occupational health and safety requirement.

PN632

And section 486 of the Fair Work Act provides that the entry rights granted by both section 481 and section 484 do not authorise a permit holder to enter or to remain on premises if they fail to comply with an occupational health and safety requirement that is reasonable and which applies to the premises which section 491 require them to comply with.

PN633

To put that another way there is no statutory right to enter premises where the permit holder fails to comply with a reasonable request to comply with an occupational health and safety requirement that applies to the premises. So what that means is that if the visitor's requirements are both, firstly, an OHS requirement that applies to the ATO's premises and, secondly, reasonable, then the applicants do not have any statutory right to enter the premises under section 481 or under section 484 without complying with those requirements.

PN634

So for all the evidence we've heard in the matter this morning those are the two issues. Are each of these requirements OHS requirements which apply to the ATO premises, and if so are they both reasonable.

PN635

The starting point for the first of those issues, whether the visitor requirements are OHS requirements which apply to all ATO premises, is the Commonwealth's protective security policy framework, and we address that generally in our written submissions at paragraphs 23 to 27. And I won't repeat all of that, but I do want to say that it's incorrect, as the applicants' reply submissions suggest, to characterise the protective security policy framework as policies, guidelines or preferred outcomes, or indeed as no more than an expression of subjective preferences, which is paragraph 19 of the reply submissions.

PN636

Indeed the former Attorney-General in October 2018 directed that the protective security policy framework was an Australian Government policy, and that directive was recertified in October of last year by the current Minister for Home Affairs and the Minister for Cyber Security. That directive is attached A to our submissions which was received in evidence this morning and I think forms the first part of exhibit 4.

PN637

THE DEPUTY PRESIDENT: Yes.

PN638

MR RAWSON: An important point to make about that is that having established the PSPF as a Commonwealth policy which agencies are directed to comply with, sections 15(1) paragraph (a) and 21 of the PGPA Act, that's the Public Governance Performance and Accountability Act 2013, requires the Commissioner of Taxation as the ATO's accountable authority to govern the ATO in a way that is not inconsistent with Australian Government policies which includes the PSPF, and that's perhaps a reminder to me that I ought to have handed up a volume of the authorities that I'm going to take the Commission to before I started these submissions. I can do that now.

PN639

THE DEPUTY PRESIDENT: Yes, thank you.

PN640

MR RAWSON: Sections 15 and 21 of the PGPA Act are at tab 1.

PN641

THE DEPUTY PRESIDENT: Yes.

PN642

MR RAWSON: So far from being an expression of subjective preferences the Commissioner for Taxation is legally required to administer the ATO in a manner which complies with the PSPF, and indeed would be acting unlawfully if he chose to allow the PSPF to be ignored.

PN643

So that's more a foundational proposition. I want to move now to address why we say the visitor requirements are occupational health and safety requirements, because the applicants state that they're not in their reply submissions. The PSPF has four outcomes. One of them, indeed the first one is the physical outcome which is described as:

PN644

*Each entity provides a safe and secure physical environment for their people, information and assets.*

PN645

And indeed the Commission can find that statement in the summary of the PSPF framework which is attachment B to our submissions and which forms part of exhibit 4. So it's not just one of four objectives of the PSPF.

PN646

THE DEPUTY PRESIDENT: Mr Rawson, if it assists you don't have to persuade me that either directive is directed to - that it's an occupational health and safety requirement. It obviously has more than one purpose, but a purpose and it's enough. That's not really the issue for me - - -

PN647

MR RAWSON: That was my point. I acknowledge that the visitor pass requirement has been conceded to be an OHS requirement.

PN648

THE DEPUTY PRESIDENT: I understand, but for my part I can understand well why the requirement to escort is also directed, at least in part, to occupational health and safety.

PN649

MR RAWSON: Yes.

PN650

THE DEPUTY PRESIDENT: It also has another purpose, but that doesn't eliminate it from being an occupational health and safety requirement.

PN651

MR RAWSON: And that's where this submission was taking the Commission to. So if that's accepted, and if I don't need to say anything more about that I will move on. I mean I've separated the first element into two. Firstly, the requirements are OHS requirements. Secondly, that they apply to the ATO's premises. It might be thought it automatically follows the first, but it's not strictly the case that it must be, and indeed I am not sure that it's conceded, at least in respect of both instances, it must be, because Mr Lavidos has understandably referred to evidence that's been given about the extent to which the requirements which we say the ATO relies on may not have been required in the past, or may be capable of variation or moderation. And we accept that these requirements are not merely required to be OHS requirements, but they are required in the OHS requirements which do apply to the ATO's premises.

PN652

The first thing to say about that is it's clear as day on the face of the visitor to ATO guidelines that they are requirements which apply to the premises, and that's at attachment A to Mr Nascimento's statement. Moreover the security CEI instructions require all ATO employees to wear their own building pass visibly at all times on ATO premises, and additionally requires all ATO staff to question anyone on ATO premises who is not displaying an authorised building pass, and that's annexure B to Mr Nascimento's statement.

PN653

And that direction indeed is expressed in terms to be a direction to all ATO employees pursuant to section 13(5) of the Public Service Act. So that's a reference to the obligation in the Public Service Act to all APS employees to behave at all times in a way which complies with a lawful and reasonable direction given by someone in the agency who has authority to give the direction. So there's no doubt that the policy contains those requirements. Further

- - -

PN654

THE DEPUTY PRESIDENT: It's an interesting question whether the direction is a reasonable direction when an employee might be confronted with a machine gun wielding non-badge wearing person and say, 'Hey, you haven't got - you're not displaying your visitor's pass'.

PN655

MR RAWSON: Indeed, and in a different forum where an ATO employee was being subject to a disciplinary process for failure to comply with such a direction, in that circumstance one might expect the employee would raise the reasonableness of the direction as a defence. One perhaps wouldn't expect that they would raise the lawfulness of the direction as a defence and that's our point.

PN656

THE DEPUTY PRESIDENT: Yes, it's not something I need to decide in this case.

PN657

MR RAWSON: We say that the policies make it clear that the directions do apply to the premises and that leads us to the next question which is whether those requirements are reasonable and this perhaps is where most particularly the submissions of the applicants depart from ours because although I think some aspects of the evidence were characterised as evidence that the policies didn't exist, I think the burden of Mr Lapidos' submissions was not that they don't exist but that they're not reasonable.

PN658

We say the reasonableness of the visitor requirements is clear and we address this at paragraphs 30 and 31 of our written submissions including by saying that the requirements are consistent with the ATO's obligation under the WHS Act and, of course, section 19 of the Work Health and Safety Act embodies the ATO as a PCBU's primary obligation to take all reasonably practicable steps to prevent or minimise risks to health and safety at work and we say that each of these requirements are reasonably practicable steps which minimise or serve to minimise the risks to health and safety of persons at – ATO employees and other persons at ATO workplaces.

PN659

That's one aspect of reasonableness, that they serve an identifiable WHS purpose. There are other aspects of reasonableness which I'll develop shortly relating to other purposes of the policy because it's true that reasonableness is, at some level, a balancing question and as many reasons as I might proffer the Commission as to why the requirements are reasonable, the applicants can be expected to proffer reasons why they might be.

PN660

The reasonableness from our side of the Bar table can be justified not just by the OHS purposes which make it an OHS requirement but by any other factors which make the requirement reasonable just as the unreasonableness might be demonstrated by factors that go beyond OHS factors and so we do rely on the balance of the protective security framework including the obvious connection of the protective security framework to both the quite prescriptive secrecy provisions that govern the work that the ATO does as well as ordinary aspects of privacy and confidentiality that underpin the protective security framework.

PN661

So we rely on all of that as going to why the visitors requirements are reasonable. But that's only half of the inquiry that the Commission has to

determine this afternoon, in our submission because it's the applicants who say that the requirements are unreasonable and the Commission has to engage with the reasons why the requirements are said to be unreasonable and in their written reply submissions the applicants attempt to rely on Mr Keane's statement in this regard as demonstrating that the visitor requirements have, in fact, impeded their ability to exercise their right of entry.

PN662

In our submission, that proposition mischaracterises the evidence. Mr Keane's statement, which is exhibit 7, and the various correspondence which he exhibits at annexures I to U show that the ATO had repeatedly notified the applicants of the visitor requirements and show that the applicants have failed to comply with those requirements even where an escort was available. For example, if one goes to paragraph 41(d) of Mr Keane's statement, at 12.48 pm – perhaps back to paragraph 41, the previous page, this is describing events on 23 February 2023.

PN663

At 12.48 pm Mr Lapidos, after attending the ATO's Dockland premises, handed back the visitor pass and walked away from the security desk. Mr Greenwood and another ASU delegate, John Miller, were a few metres away from the desk. Mr Lapidos approached them and they exited the ATO building together. There's been no attempt in this proceeding to explain how the requirement on 23 February 2023 for Mr Lapidos to be escorted whilst on premises was unreasonable in circumstances where he literally walked away from the security desk with two ASU delegates.

PN664

Second example, 6 June last year. If Deputy President goes to annexure G to Ms Tucker's first witness statement, which is exhibit 1. Ms Tucker describes her attempts to enter the ATO Dockland premises on the 6th of – my notes say June but it's clearly July, 6 July last year and then at paragraph – I think it's the last paragraph of her statement – no, it's the second last paragraph of her statement, paragraph 26, she describes arriving at the security desk, a brief exchange with an ATO representative:

PN665

*I was refused entry. Shortly afterwards I wrote an email to Jeff Lapidos explaining what had occurred, attachment G.*

PN666

If one goes to attachment G, it's an email from Ms Tucker to Mr Lapidos and if one goes to the fourth paragraph you'll see it says:

PN667

*I asked Lou to confirm the office were refusing my entry. Lou said, 'Yes' and offered me the use of the phone at the security counter for the purpose of me attempting to find an ASU delegate to escort me. I told Lou that I had my own phone which was in my hand. I left. This all took only a few minutes.*

PN668



Again, no basis in the evidence at all to suggest that the requirement to have a security escort operating in an unreasonable fashion in circumstances where Ms Tucker arrived fully aware that the requirement would be requested, fully intending to not comply with the requirement, offered the opportunity to use ATO resources to try and fulfil the requirement and said, 'No' so there simply is no evidence whatsoever before this Commission from which it could be satisfied that the requirements which the ATO seeks to impose on entry under section 484 have operated in any way unreasonably towards the applicants.

PN669

And all of that is in a context where, as the evidence shows, at the time of both of those proposed entries the ATO's position was that it was the ASU's own obligation to find an escort. We would say that a fairer characterisation of the evidence is that the ASU has had to contort itself in order to be able to fail to comply with the escort requirement. In any event, the ATO's proposal for a trial having been rejected, the ATO accepts that if the ASU is unable to arrange its own escort on a particular occasion the ATO must do so in order for its OH&S requirement to be reasonable and I took the Commission to the paragraphs of our submissions this morning where we set out our position about that.

PN670

So it's not part of our case today that the ATO can refuse - sorry, I'll withdraw that. It's not part of our case today that the ATO can impose a requirement to have an escort as a condition of entry, refuse to provide an escort and then say that the condition having been failed to be met entry will be refused. The ATO accepts although we ask for a recommendation from the Commission that it's reasonable for the ASU to make attempts to solicit its own escort.

PN671

We are also equally content for the Commission to make a recommendation where the ASU advises that those attempts have been unsuccessful, the ATO must provide the escort and there's no basis in the evidence, we submit, to suggest, that that requirement is unreasonable and, of course, there's no evidence that the requirement to wear a visitor's pass causes any issue at all. It's not addressed in the applicants' evidence. They submit without any evidence whatsoever that the requirement advertises the union official as an outsider and serves to differentiate and delegitimise the union.

PN672

But, of course, the opposite is true. All persons on ATO premises are required to wear an appropriate pass on ATO premises. It's true that the pass for ATO staff, contractors and authorised personnel is a different pass to the requirement for visitors but all must wear a pass and the Commission would have observed during the inspection yesterday that that requirement was met. That requirement would extend to the Commissioner of Taxation himself.

PN673

As we saw yesterday, it extends to other APS employees such as myself who are public servants but not ATO employees and the presidential members of the Fair Work Commission. So it's apparent from – we say it's apparent from Mr Lapidos' email to the Commission dated 12 September 2023, which forms part of the first

page of the bundle of emails which was admitted this morning as exhibit 3, that the true reason that the applicants don't – perhaps I'll take the Commission to that. The Commission will see on the first page under the heading 'Visitors Passes' a paragraph that commences:

PN674

*The ATO is requiring ASU permits to wear an escorted visitor passes when we're on ATO premises exercising a right of entry and the ASU permit holders will not wear these passes because we consider the imposition is unreasonable. We cannot allow ATO employees to have the perception that ASU permit holders are not following ATO rules as this damages our reputation with ATO employees. In addition, we do not want to put ATO employees in the difficult position in the context of their obligation to approach or report unescorted visitors that are wearing escorted visitors passes.*

PN675

We say it's apparent from that statement that the true reason the applicants don't want to wear a visitor's pass is because they understand this would mean that any ATO employee who observes them unescorted in the workplace would be required to approach or report them and in that, the position is that the applicants are seeking preferential treatment which elevates them above every other class of persons who may attend ATO premises.

PN676

THE DEPUTY PRESIDENT: Well that would be in a position, would it not, if they were not wearing a visitor's pass at all?

PN677

MR RAWSON: Yes, indeed. Indeed. Now the applicants have also relied on historical arrangements and so in that regard they seek to rely on other emails that are in the same bundle of emails that I've just taken the Commission to including a statement in – sorry, they rely on that for the proposition – sorry, withdraw that. So they take the Commission to emails that Ms Tucker attaches to her statement, which I think are embedded within the tendered document that I've just taken the Commission, to where it's apparent from those emails, and indeed from the other emails in the same tender bundle, that when this matter first came before the Commission the ATO responded to certainly what it understood was a suggestion in conference from you, Deputy President, that a trial be formulated as a possible means of resolving the matter without the need for an arbitration.

PN678

And it's true that in the course of email communications about that trial the ATO proposed a protocol in good faith which would have included some concessions from the position which we say today reflects the requirements of the ATO's own policies and, in particular, there was concessions about unescorted travel from meeting rooms to bathrooms and tea points and the Commission will have observed during the inspection yesterday that the conference rooms, or at least most of the conference rooms, open from what is in effect common areas, common work areas, but which at least have a partition separation that is a porous physical barrier between the corridor and the conference rooms and the work areas.

PN679

And it's true that the ATO contemplated and went into correspondence proposing an arrangement which would have provided a limited form of unescorted access under an agreed regime that contemplated that the permit holder might walk unescorted from a meeting room down a – for want of a better description, a corridor, that's not a completely accurate description, into the core of the building and into a tea room or a toilet.

PN680

That's not what we say is required by the ATO's protective security framework or by the policy documents which are exhibited to Mr Nascimento's statement and it's true that the ATO floated that proposal that included some concessions in that regard just as it's true that the applicants rejected that proposal and there was no agreement and I guess our first point in response to that is having engaged in that process in good faith there's an element of unfairness now in the way in which the applicants have sought to put that correspondence before the Commission in what we understand is an attempt to suggest that the very requirements itself must be unreasonable because the ATO is prepared to countenance some form of limited departure from it.

PN681

We say there's an element of unfairness about that but moreover, the more important point, is that the requirement that the – I'm going to use 'requirement' twice in the same sentence, I'll see if I can avoid that. The proposition that the reasonable OHS requirement needs to apply to the site does not command or compel the party relying on that requirement to be able to adduce evidence of perpetual and universal adherence to the requirement and there are a number of authorities that establish that position.

PN682

If I can, I'll start by taking the Commission to a recent decision of *CFMMEU v Fair Work Ombudsman*, otherwise known as the Cross River Rail appeal, [2024] FCAFC 1 which is tab 2 of our authorities folder, and this was a case which concerned an entry under section 494 of the Act not section 484 of the Act but as the Commission will appreciate, an entry under section 494 of the Act is conditioned by a requirement in section 499 which is relevant in the same terms as section 491.

PN683

THE DEPUTY PRESIDENT: Yes.

PN684

MR RAWSON: And if I can take the Commission to paragraphs 31 and 32, somehow – Deputy President, I've noticed in my folder, despite the index saying that this is behind tab 2, it is, in fact, behind tab 1. It may or may not be the case – it may be that I have just put it in the wrong spot in my folder or it may be that the folders - - -

PN685

THE DEPUTY PRESIDENT: Mine's in tab 2, Cross River Rail appeal?

PN686

MR RAWSON: Yes, that's it, yes.

PN687

THE DEPUTY PRESIDENT: This is the 29 January this year judgement.

PN688

MR RAWSON: Yes, yes.

PN689

THE DEPUTY PRESIDENT: It's my tab 2 in my folder.

PN690

MR RAWSON: The Commission will observe it's a judgement of justices - - -

PN691

THE DEPUTY PRESIDENT: Thank you. Your associate might be playing games with your – putting your folder out of order to just see if you're on top of your game.

PN692

MR RAWSON: I don't have an associate and yesterday I had a legal - - -

PN693

THE DEPUTY PRESIDENT: The colleague.

PN694

MR RAWSON: - - - assistant who was working remotely and I think something's gone astray but I accept that as the person who gave the instruction that's my fault.

PN695

THE DEPUTY PRESIDENT: Yes.

PN696

MR RAWSON: If I can – so that I observe the decision of Halley, Goodman and McElwaine JJ and the judgement is a judgement of the court and at paragraph 31 the court came to deal with a proposition which my submission is relevantly on all fours with the way we understand the applicants' position in this case is:

PN697

*Crisply summarised, the appellants' argument is that because the sign-in and induction practice was not insisted upon with respect to all contractors and visitors to the site, it did not amount to an OHS requirement that applies to the premises within the meaning of section 499 of the Fair Work Act. We are unable to accept that submission. It conflates what were the OHS requirements for the worksite with their enforcement.*

PN698

Then they go on to talk about the contractual clauses and then the last sentence of paragraph 31 they say:

PN699

*These were requirements relating to OHS applicable to the worksite. They did not cease to have that character because on the evidence their enforcement was not uniform as between workers, visitors and union permit holders.*

PN700

Then at paragraph 34 they underline that proposition by reference to the findings of Snaden J in *ABCC v CFMMEU (Monash Freeway Widening Case)* which is cited. If I can just draw your attention to the bottom of the passage cited which appears across the page on page 11:

PN701

*Nonetheless, conduct upon which an occupier insists in order to promote safety or good health at particular premises is likely to be conduct that reflects an 'occupational health and safety requirement that applies to the premises', no matter how narrow its scope or how recent its creation.*

PN702

The next matter relied on by the applicants as going to unreasonableness is set out at paragraphs 24 and 25 of their reply submissions and it's to the effect that the effect of the escort requirement is such that where a union delegate can't be sourced, staff will be required to meet with the union in the presence of a delegate of management and that's not the position either recorded in the documentary evidence or, indeed, in the evidence given this morning.

PN703

It seems to us, on the state of the evidence, it's common ground that, in fact, any escort would escort the applicants to the location of their meeting with members and would only be required to remain until the member arrives from which time the member who inevitably would be an ATO employee would fulfil the function of an escort. There's never been a suggestion from the ATO that management delegates would remain present during a meeting between the applicant and their members.

PN704

And can I take the Commission in particular to Mr Keane's statement, annexure Q, which appears at page 91 of his statement. I apologise I haven't cross-referenced that to the relevant court book page. For some reason this document has appeared in excruciatingly small print. But I'll take the Commission to the bottom of page 91, a paragraph immediately before the signature block:

PN705

*Based on the advice above, the union to source an escort (workplace delegate) for your entry on Wednesday to escort you to the booked meeting room and to remain with you until your member meetings commence.*

PN706

There's never been any statement by the ATO that it asserts as an OHS requirement or, indeed, as any requirement that an escort, a management escort for want of a better description, must remain with either of the applicants in a meeting room while holding a discussion with an employee. And can I also take – perhaps while we're still in Mr Keane's statement, can I take the Commission also

to annexure T which is page 100. This one happily is in larger print and about a third of the way down the page - I'll just give you an opportunity to find that, Deputy President.

PN707

THE DEPUTY PRESIDENT: Yes, I have it.

PN708

MR RAWSON: The statement – so I won't say a third, it might be more helpful if I say about 11 lines down the page, sentence starting:

PN709

*Your escort needs to adhere to the ATO visitor policy and ensure that any members escorting you also remain with you until your escort returns or another member meets with you. As previously discussed, we agree to offer the ASU some flexibility as follows. Once you're in a meeting room, your escort can leave on the premise ...*

PN710

which wasn't the clearest word to use in that context but:

PN711

*Your escort can leave on the premise that you are meeting with members and they will be your escort on meeting with them.*

PN712

Those are the reasons why we say the OHS requirement is reasonable, both of the OHS requirements are reasonable. Our submissions, of course, have developed the further argument which is around an implied constraint in the right of entry provisions themselves and we rely on this insofar as the applicants contend that a whole range of broader reasons why the visitor requirements exist are not relevant to the Commission because they don't go to OHS issues and, of course, I'm talking about the broader – protective security framework in its broader sense recognising, as I have, that one of the four pillars of that policy is intrinsically OHS.

PN713

I equally recognise it serves other purposes that are not OHS. But we say it's important in that context to understand the implied constraint that we do say conditions the exercise of powers under sections 481 and 484 and that is the implied constraint that the right – well firstly, the implied constraint that the right of entry must be exercised so as to promote the objects of part 3-4 of the Act set out in section 480.

PN714

There are a number of authorities for that proposition which we cite at footnote 7 of our written submissions including *Australasian Meat Industry Employees' Union v Fair Work Australia* [2012] FCAFC 85, which I won't take the Commission to now but it's at tab 3 of our authorities folders, and in that judgement was cited with approval in *MUA v Fair Work Commission* [2015] FCAFC 56 which is tab 4 of our authorities folder.

PN715

And then perhaps I will take the Commission back to Australasian Meats – Australasian Meat Industry Employees' at paragraphs 63 and 65, so that's tab 2 of our – no, tab 3 of our authorities folder, and this is a passage - judgement of Flick J and although I'm relying on it in terms of implied constraints of the Act it's deeply relevant to questions of reasonableness and we would say applicable to the present dichotomy of views between the parties in this case. At 63:

PN716

*Such hypothetical instances serve to emphasise that there may be a divergence between what the occupier regards as a 'reasonable request' as opposed to the perception of those seeking to enforce a right of entry. There is much to be said for the view that the statutory right of entry conferred on a permit holder by section 484 should not be construed as conferring any greater right than is necessary to achieve the statutory objective. The common law rights of an occupier, on this approach, are only to be diminished to the extent absolutely necessary to give effect to the right conferred. Subject only to the requirement that an occupier make a 'reasonable request', the balance that the legislature has sought to achieve between granting a statutory right of access and the consequent diminution of the common law rights of an occupier is thereby struck. An occupier, on this approach, need not be further involved itself in promoting or accommodating the interests of those seeking entry.*

PN717

And then at 65:

PN718

*The same phrase employed in section 492, namely 'any reasonable request by the occupier', it should be noted, appears elsewhere in part 3-4 (sections 491 ...*

PN719

which is, of course, the relevant provision here:

PN720

*... and 499). Subject to the specific statutory requirements applicable to each of these provisions, that phrase should be construed in the same manner in each of these sections.*

PN721

And we say in that passage his Honour, Flick J, is saying that the question of reasonableness arises in the contrary – sorry, contrary, in the context of a statutory regime which imposes or grants a specific identified right of entry to persons holding entry permits and conditions that requirement by a number of requirements that are phrased by reference to reasonableness and Flick J is saying, in our submission, that in considering reasonableness one can give regard to the panoply of common law rights which his Honour was concerned with in that case of an occupier but we say a fortiori that must also extend to statutory rights and statutory obligations such as those we say are manifested through the PGPA Act into their obligations under the protective security framework.

PN722

So we do say that that framework is relevant to the Commission's determination of the reasonableness of our OHS requirement. Those endorsements have received – so those observations have received endorsement by a succession of Full Courts and, indeed, a summary of those decisions is at paragraph 11 of *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* which is tab 5 of our submissions. I don't make any other point about that other than that's a useful paragraph to identify the extent to which Flick J's observations have been endorsed by a Full Court of the Federal Court, albeit, I think, as is said in *Teys* with perhaps a question mark over the qualifier absolutely before absolutely necessary. I don't think anything turns on that. I think something is either necessary or it's not necessary I think.

PN723

So we rely on all of the ATO's legislative obligations that we have set out in paragraphs 35 to 37. Or, indeed, in fact all of those that we set out between paragraphs 30 and 38 of our written submissions.

PN724

If I can move now to the facility of recommendations that we have outlined in our written submissions? We've – excuse me – our written submissions seek that the Commission makes recommendations about two matters. Firstly, at paragraph 48 of our written submissions, about the times of day of any entry under section 484.

PN725

And, secondly, at paragraph 53 of our written submissions, a recommendation about the ASU first making attempts to source its own escort before the ATO provides one. And we have addressed the basis of those recommendations or the basis on which we seek them from paragraphs 43 to 53 of our written submissions.

PN726

The first point I need to address is the statement in the applicant's written reply submissions at paragraph 16 that that request for facility of recommendations fails because it does not relate to any of the matters listed in section 505(1), paragraphs (a) to (e). That submission appears to misunderstand the language of section 501- so 505(1) – because the chapeaux - - -

PN727

THE DEPUTY PRESIDENT: It's not exhaustive.

PN728

MR RAWSON: I beg your pardon?

PN729

THE DEPUTY PRESIDENT: It's not exhaustive.

PN730

MR RAWSON: It's not exhaustive. It's inclusive. That's the point, yes. Now, the second perhaps dimension to the critique of these recommendations, at least, as we understand it is that under section 490(1), the applicant's rights of entry,



including the right conferred by section 484 maybe exercised during working hours and it's clear that the ATO Enterprise Agreement provides that the bandwidth for working hours is 7.00 am to 7.00 pm. And that's certainly the case. We don't cavil at all with that suggestion. But it's only with respect half of the equation, because whilst it's undeniable that the right of entry conferred by section 484 may be exercised at any time during working hours, it's equally undeniable in our submission that it also can only be exercised for the purpose of holding discussions with eligible employees during meal breaks or other breaks.

PN731

So there does need to be an actual intention on the part of the permit holder seeking to exercise the power to enter in order to hold a discussion or discussions with one or more eligible employees which will take place during a meal time or other break.

PN732

And if the permit holder does not intend to hold a discussion with an eligible employee during a meal time or another break, the condition for the exercise of power never becomes enlivened.

PN733

And it's in that context that the recommendations which we seek proceed. And it's perhaps necessary to take the Commission to some aspects of clause 44 of the new enterprise agreement at this point.

PN734

And the Commission will see, firstly, at subclause 44.3 that standard hours of work for full time employees are 8.30 am to 12.30 pm, and 1.30 pm to 4.51 pm, Monday to Friday.

PN735

Secondly, at clause 44.5, the bandwidth for ordinary hours is 7.00 am to 7.00 pm. Thirdly, that a meal break of at least 30 minutes must be included, after not more than five hours – I'm sorry that's subclause 44.4. And then fourthly, and this is clause 44.13, regular hours should be worked continuously, except for meal breaks.

PN736

So, it's against the backdrop of those provisions that we say the power of entry conferred by section 484 will only support an entry for the permit holder to hold discussions with a person who wishes to participate in the discussion which must be held during meal times or other breaks.

PN737

Now, against the backdrop of those provisions, I think, two generalisations can be floated. One is most people – most ATO employees – inevitably will take a 30-minute unpaid meal break, or longer, somewhere between 12.00 midday, and 2.00 pm. As a generalisation, we think that's uncontroversial. And it's qualified by the second generalisation which is the four provisions that I have taken the Commission to, provide enough flexibility that I can't make that as a universal proposition. And it is true that a range of ATO employees may take unpaid meal

breaks before 12.00 pm, and a range of ATO employees may take unpaid meal breaks after 2.00 pm. And there was evidence from Mr Keane this morning that ATO employees may exercise their rights to flexible work in such a way as to obtain their supervisor's approval to take some other form of unpaid rate outside those times.

PN738

And we don't cavil with any of that. And we don't seek an order from the Commission confining entry to 12.00 to 2.00 pm. But what we do seek as a recognition of an appropriate balance of those two generalisations that I have made is a recommendation from the Commission. And the recommendation is set out at paragraph 48 of our submissions, which is, that unless otherwise agreed any future entries under section 484 be aligned with the parameters in the enterprise agreement – submissions are written before this agreement commence. So we don't need to say or any successor agreement, or maybe we do, because presumably this agreement will be replaced one day.

PN739

And then we say, 'Currently this would resolve in entries usually occurring between 12.00 midday and 2.00 pm, other than for contact centre staff. Such a practice will ensure compliance with section 492 and reduce the risk of an escort not being available and allowing escorts to be provided without undue burdens on any particular individual or work area.'

PN740

And then at 49, we say, 'By allowing for the applicants and the ATO to agree on alternative entry times the recommendations sought by the respondent would provide for more flexible arrangements to be made on a case by case basis consistent with the guidance from the Australian Public Service Commission and the circular.'

PN741

Now, Mr Lavidos took the Commission to the circular this morning but we rely on that circular because that circular is a Public Service Commission policy directed to the ATO which encourages, or indeed requires them to adopt that flexible and engaged stance with unions, such as the applicant's union around matters such as union right of entry.

PN742

And we say the Commission can have every confidence that the ATO will engage constructively with requests from the ASU for entries of times outside of 12.00 to 2.00. And, indeed, in so far as that we merely seek a recommendation of this subject matter we're not suggesting at all that the Commission should make any orders which confines the applicant's rights of entry to 12 midday to 2.00 pm. But we do say a recommendation in the terms we proposed would be an appropriate balance to the framework of such entries.

PN743

And perhaps just to buttress that submission can I take you, Deputy President, to your own decision of *CFMEU v Austral Bricks (Vic) Pty Ltd* [2014] FWC, 5407

which is at tab 6 of our folder where at paragraph 29, Deputy President, you said the first three sentences –

PN744

*'The right of entry given to a permit holder under section 484 of the Act is not a right that is unfettered. The mere status of a union official as a permit holder does not give the union official an untrammelled right to enter the premises of an employer or occupier. The right is subject to express and to implied constraints.'*

PN745

And then if we come down about eight lines, immediately after footnote 70,

PN746

*'One implied constraint is that the right must be exercised so as to promote the objects of Part 3 – 4, which are set out at section 480.'*

PN747

Now, that's a point I've already made. But then, Deputy President, you go on to say –

PN748

*'Another implied constraint might be that entry under section 48 is only authorised at times that are approximate to meal times or other breaks since discussions with employees are only permitted during those times or breaks. This would be consistent with a view that the right of entry conferred on the permit holder by section 484 should not be construed as giving any great right than which is necessary to achieve the statutory purpose. Namely, to permit a permit holder to hold discussions with particular employees during their meal times or other breaks.'*

PN749

Now, your Honour is expressing, I think, with respect a provisional view or qualified view about that and we put it perhaps slightly differently. We don't suggest that the applicant's right of entry in this matter are conditioned by an implied requirement that they can only enter at a time that is adjacent to a meal break.

PN750

But what we do say is the fact that the purpose which permits them to enter is limited to holding discussions during meal breaks or other breaks, is a matter that informs a consideration of what the objects of the Act would require. And we say, in the circumstances of this case that's sufficient to justify the recommendation which we seek.

PN751

And we can prove that point by saying there's certainly no evidence adduced by the applicant in this proceeding which would suggest that that recommendation would impair their right under section 484 in any respect. And that's unsurprising, in our submission, within the terms of section 44 of the enterprise agreement.

PN752

The last point I want to make, and I'll do this briefly, is to address the suggestion by the applicants that any relief granted by the Commission in this proceeding should be confined to the Docklands premises.

PN753

At paragraph 50 of the applicant's reply submissions they say that would be appropriate because that's the site at which the dispute has arisen and the facts and circumstances that call for arbitral resolution, that the employer applies its own visitor policy more broadly, but does not alter the nature of the task before the Commission.

PN754

The first point to make about that is that's not at all how the dispute was framed in the application. And if I could take the Commission to the application by which this proceeding was commenced. And, in particular, to questions 2.1 and 3.1 of the application.

PN755

So in response to question 2.1, which appears on page four of the application, the dispute concerns the imposition by the Australian Taxation Office of a new right of entry requirement. Down to the third paragraph. 'The ATO asserts that a permit holder's right of entry to its premises' – plural – 'is subject to what it stipulates as its safety and security policies.'

PN756

And I just pause to observe there it was acknowledged that the application states that those policies extended to safety. And then at paragraph 3.1 the relief sought, 'An order that the ATO cease and desist from imposing its escort entry requirements.' No suggestion in that paragraph that the order be confined to Docklands.

PN757

And then equally at the applicant's submissions – the written submissions in the first instance – at paragraph 4 – by this stage the applicants say, 'We ask the Commission to restrict its determination to our right of entry at the ATO's Docklands office, at 747 Collins Street, Melbourne. This is the site at which the dispute occurred in practice.' But look at the next sentence, 'The applicants intend exercising our right of entry at both the Docklands office and other ATO sites in the future.'

PN758

So there's no doubt about the fact that the applicants contest the imposition of this requirement at Docklands and at other ATO sites and that we are on notice that they propose to do so.

PN759

THE DEPUTY PRESIDENT: The description of the dispute also seems to be confined to the – at least at that stage – to the requirement that the official be escorted.

PN760

MR RAWSON: Yes.

PN761

THE DEPUTY PRESIDENT: There's no suggestion in there – of no complaint, at least in the application, about the visitor pass requirement.

PN762

MR RAWSON: That might be so but I'm not making any jurisdiction point about that - - -

PN763

THE DEPUTY PRESIDENT: No, I understand that.

PN764

MR RAWSON: - - -around it. I would want to think – well, we accept - - -

PN765

THE DEPUTY PRESIDENT: Disputes can evolve.

PN766

MR RAWSON: Yes. We accept we're here to deal with that aspect. And, indeed, I mean – there's at least a factual foundation for that element of the dispute in the paperwork. There's no factual foundation in the paperwork for any suggestion that this is a Docklands' requirement or that its problems are confined to Docklands.

PN767

So, in so far as the applicants say the evidence concerns the Docklands site only, that's merely a product of the limited nature of evidence which the applicants have advanced in support of their application. It's not for our client to go and manufacture or that's – I withdraw the word 'manufacture' – it's not for our client to go and lead evidence of other sites when the applicants have elected not to do so themselves.

PN768

Secondly, we say the fact that the ATO applies and is legally required to apply to visitor requirements to all sites does alter the task before the Commission. There's no concession from the applicants that they're willing to comply with these requirements at any other ATO site and it follows from their own documents the controversy that they've notified that the Commission arises in relation to all ATO premises.

PN769

And then, thirdly, we say – in fact, thirdly, we say even in his cross-examination of Mr Keane this morning, Mr Lapidos sought to ask Mr Keane a question about access to the Wollongong office and one can infer from that, that the Wollongong office, at least, is in the applicant's thoughts in this proceeding.

PN770

And then, finally, we say in any event, the applicants have led no evidence before the Commission that could, in fact, raise any realistic questions about whether any materially different considerations might arise at any other ATO site.

PN771

Deputy President, those are the submissions for the respondent.

PN772

THE DEPUTY PRESIDENT: Thank you, Mr Rawson. Mr Lapidos, anything in reply?

PN773

MR LAPIDOS: Yes, Deputy President.

PN774

THE DEPUTY PRESIDENT: Yes. Go ahead.

PN775

MR LAPIDOS: In relation to the last point we thought it was most convenient to confine the evidence to the Docklands site. And we said, in our submission, somewhere – written submissions – that if you made a decision in relation to Docklands there would be principles in your decision and that you could leave it to the applicants and the respondent to apply them elsewhere. So, we felt it was convenient for everyone to confine the facts to the Docklands site.

PN776

There were a few other points I wanted to raise. So the ATO is relying for the question of whether the requirements are reasonable or not to the protective security framework. And we would just say that the ATO's ability to specify the route we followed, to specify the meeting room we use, means that in practise, that there's no possibility of a breach of security - - -

PN777

THE DEPUTY PRESIDENT: The meeting room you use is an agreed room?

PN778

MR LAPIDOS: Yes. Well - - -

PN779

THE DEPUTY PRESIDENT: It's not an ability of the ATO to specify. There has to be agreement, otherwise you can go into the lunch room?

PN780

MR LAPIDOS: Yes. That's right. So, in fact, it hasn't been a problem in practise for quite some years. But, yes, I accept what you're saying. But my point was the ATO's interest in security issues, you can see from your inspection that providing we comply with their direction to follow a specified route. In practical terms there's no risk of any security breach or privacy breach or confidentiality breach. So that's the point we would make in relation to that.

PN781

The ATO talks about health and safety requirements not being applied consistently, and just because a requirement may not be applied consistently, that in itself doesn't mean it's not a health and safety requirement. That's not the issue that we're raising. We're talking about whether a requirement is reasonable or not. And we were making the point that the ATO is prepared to allow us to go unescorted between the meeting room and the kitchen and bathroom.

PN782

We're not saying because of that there is no health and safety requirement.

PN783

THE DEPUTY PRESIDENT: Well, what do you say? Do you say that there's a consequence in that, that that is a factor that makes strict compliance with the escort requirements unreasonable. Is that the point?

PN784

MR LAPIDOS: Yes. Then the ATO speaks about if they provide the escort that their escort would have to remain in the room with us until the first employee arrives. And we say that means they will be able to identify the first person that we meet and that may hinder our ability to meet with people, and therefore it's unreasonable.

PN785

THE DEPUTY PRESIDENT: Well, I think the point that's made against you about that is that there's no evidence to support that proposition, that there's not even any evidence from which I might draw an inference. That is, no employees has given evidence that this is a factor that might affect their capacity to be your escort. That's Mr Rawson's point.

PN786

MR LAPIDOS: Well, if that's a defect in our case and it becomes a problem in the future we can always have another dispute, Deputy President, and we will lead that evidence. But I would have thought that as a matter of general knowledge of the Commission, that employees may be reluctant to identify themselves.

PN787

THE DEPUTY PRESIDENT: Well, let's accept for a moment, that there might well be some employees who might be reluctant to be identified either as union members, who are sympathetic towards the union, or as participating in a union activity, such as meeting with the union officials. Let's accept that might be the case.

PN788

The fact that that might be the case does it mean that the requirement is unreasonable unless I have some evidence about how many employees are members or eligible members of the union at a particular workplace. And the delegates you might have – whether the sort of reluctant crew constitute three per cent or 80 per cent of the workforce. Those are matters that are relevant in assessing whether the concern is a material concern affecting reasonableness. Without that I'm doing no more than guessing that.

PN789

MR LAPIDOS: Well, as you point out we haven't led any evidence about that - -  
-

PN790

THE DEPUTY PRESIDENT: I didn't point that out. Mr Rawson did. But that's the difficulty. And look, I'm not unsympathetic to the view that there are – you know – I've been a union official myself, I understand that there are employees who are reluctant to be seen with you, talk to you, walk with you down the corridor. I understand all that and hopefully things have changed for the better, since I was an official in the 80's. But I accept that that might be a concern at particular workplaces.

PN791

But, unless I understand or have some evidence about how many might fall into that category – I mean, for example, one way that you might have been able to lead that evidence without necessarily disclosing the identities you could have conducted a survey in the workplace and ask these questions, and set out the methodology behind it and how many responses and so on. And that might have been a matter which I could take into account in assessing whether or not you're likely to be hindered by the escort requirement of having to nominate a particular employee or particular employees, and therefore assessing whether or not the requirement is unreasonable.

PN792

But I don't have that. And so as I say well what I am left with is an impression that in some workplaces this is an issue and no evidence about how many. And, therefore, I'd only be guessing if I then concluded from that that the requirement has an impact – a negative impact on your capacity to exercise your right of entry discussion powers.

PN793

MR LAPIDOS: So I understand what you're saying. We are a small union I would just say - - -

PN794

THE DEPUTY PRESIDENT: Sure.

PN795

MR LAPIDOS: - - -and it is a bit difficult for us to arrange a survey of that nature. But if I may add? If you're minded to allow the ATO to escort us to the meeting room we don't see a need for them to remain with us in the meeting room until the first person turns up, given the ATO has said today that once we're in the meeting room, we've seen the first person, that person leaves. We remain in the room. We can remain in the room until the next person turns up, for example, 20 minutes later.

PN796

So, if they're saying – like the management representative has to stay there until the first person turns up, we say in those circumstances, well that doesn't follow.



PN797

THE DEPUTY PRESIDENT: But Mr Lapidus, if you're comfortable with that there's no reason why you couldn't agree to that sort of proposal for the ATO now.

PN798

MR LAPIDOS: Well we've still got an issue about the escorted visitor pass.

PN799

THE DEPUTY PRESIDENT: But if you're wearing an escorted visitor pass, so most of the time when you're walking around, you will be escorted to and from the relevant meeting room or meeting rooms. Once you're there the escort leaves, and the only time you'll be leaving the room is to attend the bathroom.

PN800

MR LAPIDOS: Yes. Or the kitchen.

PN801

THE DEPUTY PRESIDENT: Yes, or the kitchen.

PN802

MR LAPIDOS: Or we want to leave for a break of our own.

PN803

THE DEPUTY PRESIDENT: In which case – well, leave the building you mean?

PN804

MR LAPIDOS: Mm.

PN805

THE DEPUTY PRESIDENT: Well, isn't the requirement that you be escorted out? It's a two-way requirement. It's there and back. But whilst you're there you can use the toilet and the facilities. And so you call someone to escort you out of the premises.

PN806

MR LAPIDOS: But we still have the difficulty of going to the kitchen or the bathroom wearing our escorted visitor pass - - -

PN807

THE DEPUTY PRESIDENT: Well if - - -

PN808

MR LAPIDOS: We would have preferred not to have this hearing.

PN809

THE DEPUTY PRESIDENT: It seems to me that that issue can be overcome by the ATO simply publicising to its workforce in a memo that this the arrangement it's entered into with the ASU permit holders. That is, they will attend. They will get a visitor's pass. They will be escorted to and from the meeting room but otherwise they will stay in the meeting room, unless they want to use the facility, go to the bathroom or the kitchen facilities.

PN810

And in those occasions they will be able to do so unescorted and so that your answer to – if you were pulled up by any employee – your answer is 'Well, I'm going to the bathroom pursuant to the arrangement.' I don't think that's a hugely insurmountable problem.

PN811

MR LAPIDOS: You're now kind of suggesting we change to a conference to try and - - -

PN812

THE DEPUTY PRESIDENT: I'm not suggesting anything. I'm saying that if that was something that was acceptable to you, you can organise – have a discussion with Mr Rawson or those instructing him – to facilitate that sort of a right. But even if you finish your submissions and do that afterwards, I'm not suggesting I'll facilitate the discussions.

PN813

But what I am saying is that you're suggesting that one aspect of unreasonableness is the fact that they will let you be unescorted to the bathroom and to the kitchen. And my response was simply well if you're comfortable with the other aspects of it and you're comfortable for the arrangement to operate in this way that's an agreement you can reach with this employer now.

PN814

MR LAPIDOS: So I don't think we've ever had an issue about being required to be escorted to the meeting room, and if the ATO says we have to be escorted back out again, when we want to leave, on the basis that it's a management representative doing it. So the management representative takes us to the meeting room and then leaves. We call them again when we want - - -

PN815

THE DEPUTY PRESIDENT: Well, I think the proposition, in fairness, I don't want to unnecessarily verbal the ATO is that the first port of call would be you trying to organise one of your members to do so. But if you're unable to they will provide somebody and they will make sure that they will do so so that you're not delayed. So that would mean that somebody would have to be on call. You know? Because you might, for example, have arranged for Mary Smith to meet you and be escorted. And on the morning Mary Smith is sick and your escort is gone.

PN816

So, you know, at short notice they're saying they'll have somebody from there if you can't arrange somebody to escort you up. And, similarly, you might have had Mary Smith or Fred, or somebody else, lined up to escort you out, and then you're not able to do so for whatever reason. The person is jammed with work or whatever – can't make it – or you can't contact them. Then there'll be a person – there has to be a person from management's perspective available to facilitate your exit – if that's what they want to do.

PN817

If there is any undue delay in relation to those matters well that's only a matter that goes to the reasonableness of the requirement. And so much is conceded by Mr Rawson which is why he put the proposition in his submissions.

PN818

So all I'm saying is that if that's the to and fro' escort is not an issue and you're happy with the unencumbered movement from the bathroom and the kitchen, whilst you're in the – well, it will be your visitor's pass – sorry, Mr Rawson?

PN819

MR RAWSON: I don't want to interrupt my learned friend's reply but I just feel – I'm concerned that there has been a slight mischaracterisation of our current position. Because whilst it's true that as part of the trial discussions we were prepared to countenance - - -

PN820

THE DEPUTY PRESIDENT: Yes.

PN821

MR RAWSON: - - -an agreed position that might have included the elements, such as escorted access to the toilets and the kitchen facilities, our attempts to negotiate an agreed outcome failed. Our position is that the requirements required escort at all times - - -

PN822

THE DEPUTY PRESIDENT: I do understand that.

PN823

MR RAWSON: Yes.

PN824

THE DEPUTY PRESIDENT: But Mr Keane, during his exchange with the union, whilst he was giving evidence, suggested that he would not be uncomfortable with allowing unencumbered movement. That was the position.

PN825

And so what I am saying is if that was something that Mr Lapidis would be comfortable with, there's nothing to stop him having a discussion with you and Mr Keane to try and resolve that issue in that way.

PN826

MR RAWSON: Forgive me. I was perhaps falsely apprehending that your Honour was under the impression that that was the relief in fact which we were seeking.

PN827

THE DEPUTY PRESIDENT: No. No, no, no. I understand. Your position is that the visitor's policy is the visitor's policy and so that means escorted at all times. I understand that. But you do say that when they're in – for example – when they're in a meeting room with a member or a potential member, that's an escort.

PN828

MR RAWSON: Yes.

PN829

THE DEPUTY PRESIDENT: For the purposes of the policy and there doesn't have to be someone standing outside the room.

PN830

MR RAWSON: That's right.

PN831

THE DEPUTY PRESIDENT: So, in most cases, they will even on your analysis be escorted – at most times – if not all times, even if we were to do a different sort of – you know – a compromise as between the parties.

PN832

But all that I was saying, Mr Lapidos, is that those factors that go – that he's relying upon, as being unreasonable, because there had been an indication that this might be an acceptable outcome or something that you're looking – if that was something that the union were happy with, then they could have a discussion with you about it, and you could resolve it, let my Chambers know before I have to arrive at a decision, if that's what you want to do.

PN833

But I'm not going to be rewriting the policy. So that from my perspective it seems to me that the requirements do go to an occupational health and safety requirement and that it does apply to the premises generally, and so the issue is whether or not each and every aspect of it, or the direction is reasonable.

PN834

The issue of the visitors passes is one aspect of reasonableness and then the escorting is another, and that can be broken down into escorting to and from, and escorting at all times.

PN835

So it might be that escorting to and from is reasonable and escorting at all times is not. There are a range of possibilities within that, that might be arrived at. But I am not going to then rewrite the policy for the ATO, as I indicated earlier. The decision will be the decision and it will have to either appeal or if it's to comply, an outcome assuming some aspect of it is adverse to its interest and it's going to have to modify its policy to abide by the decision.

PN836

But, as I say, if there are – where you were going about a hybrid arrangement – that's something that you can negotiate with the ATO.

PN837

MR LAPIDOS: I just want to address the ATO's request or proposal that you recommend our accesses be confined to 12.00 to 2.00.

PN838

THE DEPUTY PRESIDENT: Yes.

PN839

MR LAPIDOS: It kind of brings us back to the conversation about what's a break and how the flexible hours work in the ATO. Mr Rawson suggests that most people take a break between 12.00 and 2.00. I don't think there was any evidence to that effect. But the way the enterprise agreement works, they can take their lunch break any time up to five hours after their finish time.

PN840

THE DEPUTY PRESIDENT: Yes.

PN841

MR LAPIDOS: The other thing is we didn't really explore morning tea and afternoon tea breaks. We didn't explore whether a break from work includes the employer saying to the employee, 'You can take a break from work to meet with the union to prepare for your discussion about your performance issue.'

PN842

So I not sufficiently familiar with the decisions about exactly what 'other breaks' mean to be able to really persuade you one way or the other.

PN843

THE DEPUTY PRESIDENT: Well, for what it's worth I think – if an employee says to an employer, 'I want to have a break to consult the union about whatever issue', and the employer says, 'Yes, you can have that break but I think that's a break.' As opposed to what we discussed earlier, which was taking of leave, effectively, is not a break in my view.

PN844

MR LAPIDOS: And just coming back, and I was hoping to avoid all this territory. So I am only raising it in the context of the ATO's request for this recommendation.

PN845

THE DEPUTY PRESIDENT: I understand. Yes.

PN846

MR LAPIDOS: But I would just like to observe about we're not talking about flex leave where someone takes the whole day off.

PN847

THE DEPUTY PRESIDENT: I understand that.

PN848

MR LAPIDOS: It's only where they've taken a short period of time.

PN849

THE DEPUTY PRESIDENT: Yes. Sure. No, I do understand that. But it is leave nonetheless and my Associate is under the same sorts of arrangements where they have the capacity to take, under the enterprise agreement, periods of flex leave. And that might be to go off and – you know – have attend to a medical

appointment or whatever. Or finish early. Or, you know, have some part of the morning - - -

PN850

MR LAPIDOS: Could be for anything.

PN851

THE DEPUTY PRESIDENT: Yes. For any purpose. But it might be in the middle of the day. It might be at the end of the day.

PN852

MR LAPIDOS: Yes.

PN853

THE DEPUTY PRESIDENT: And so on. Yes, I understand.

PN854

MR LAPIDOS: There was one other thing we wanted to raise with you, Deputy President.

PN855

THE DEPUTY PRESIDENT: Yes.

PN856

MR LAPIDOS: Ms Tucker gave evidence of applying for one of these PEIC - - -

PN857

THE DEPUTY PRESIDENT: Yes.

PN858

MR LAPIDOS: - - -assessments, and Mr Keane acknowledged that it had been made and that Ms Tucker had been found to be suitable – for want of a better word – but, in practise, given the ATO position there was never any purpose for that. And Ms Tucker asks for a recommendation from you that the ATO arrange to remove her application and any record made as a result of that from the Commonwealth's records.

PN859

THE DEPUTY PRESIDENT: Yes. Well, I understand that. But I'm not sure – well, it's a recommendation that you ask for. I'm not sure that a recommendation from me is going to have any higher sway than the request from the person  
- - -

PN860

MR RAWSON: I mean I haven't come here on notice of that request, or frankly, in a position to respond to it. But it's the type of request, perhaps, that might be raised, firstly, outside of these walls and that it would be addressed in accordance with any relevant legislative requirements, some of which including – you know – the Privacy Act – might facilitate the making of a request like that. Some other requirements, such as the Archives Act might stand in its way. I am not capable of resolving those competing issues.

PN861

THE DEPUTY PRESIDENT: And that wouldn't change if I were to make a recommendation.

PN862

MR RAWSON: No.

PN863

THE DEPUTY PRESIDENT: That is, the ATO would be bound to comply with the law.

PN864

MR RAWSON: Yes.

PN865

THE DEPUTY PRESIDENT: In relation to a particular record if it was a record that required to be, as required to be retained, or couldn't be - - -

PN866

MR RAWSON: Yes.

PN867

THE DEPUTY PRESIDENT: But there might be other issues about what security is put around the information and so on.

PN868

MR RAWSON: Yes.

PN869

THE DEPUTY PRESIDENT: But, yes, so I think the request, in the first instance, ought to be made to the ATO. As I said, even I were minded to make such a recommendation, Mr Lapidus, I'm not sure that it's going to assist in resolving the matter if the ATO identifies a particular statutory impediment to that.

PN870

MR LAPIDOS: Well, I can tell you if you made such a recommendation Ms Tucker would appreciate it.

PN871

THE DEPUTY PRESIDENT: Yes. Well, I well understand that. But can I just say this much? That I would be reluctant to make a recommendation in circumstances where there hadn't been a request made to the respondent in the first instance. So that if between – you know – now and releasing my decision a request is made and a response is received, I will give consideration to it, otherwise I'd be reluctant to do so.

PN872

MR LAPIDOS: Thank you.

PN873

THE DEPUTY PRESIDENT: All right. Is that it, Mr Lapidus?

PN874

MR LAPIDOS: Yes, Deputy President.

PN875

THE DEPUTY PRESIDENT: Yes. Well, can I thank the parties for their helpful written and oral submissions. I will reserve my decision and publish a decision in due course. Otherwise we are adjourned and good day. Adjourn the Commission.

PN876

MR RAWSON: Thank you.

PN877

MR LAPIDOS: Thank you.

**ADJOURNED INDEFINITELY**

**[3.35 PM]**



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