DECISION

Fair Work Act 2009
s.739— Application to deal with a dispute

Peter Lamb & Mitch Brown
v
NRG Gladstone Operating Services Pty Ltd
(C2018/2743 & C2018/2770)

DEPUTY PRESIDENT ASBURY BRISBANE, 8 AUGUST 2018

Application to deal with a dispute – Construction of agreement – Whether employees who attend Joint Workplace Consultative Committee Meetings are called out – Finding that call out provisions do not apply in such circumstances.

OVERVIEW

[1] This decision relates to applications by Mr Peter Lamb and Mr Mitch Brown (the Applicants) for the Fair Work Commission (the Commission) to deal with a dispute under a dispute settlement procedure in the *NRG Gladstone Operating Services Pty Ltd (NRG GOS) Enterprise Agreement* (the Agreement). The dispute relates to the proper construction of terms of the Agreement dealing with "*recalls*" and the application of those terms to employees attending Joint Workplace Consultative Committee (JWCC) meetings. The Respondent is NRG Gladstone Operating Services Pty Ltd (NRG).

[2] The dispute arose after NRG initiated a disciplinary process against the Applicants in relation to their claim for the minimum payment under clause 6.5.3 and the manner in which the Applicants conducted themselves in respect of that claim. Those matters are not the subject of the present dispute. This decision relates only to the construction dispute and not to the disciplinary process being undertaken or the reasonableness of the belief of the Applicants about their entitlement to claim the four hour minimum payment.

[3] A number of conferences of the parties were conducted and the dispute was not resolved through conciliation. The dispute was then listed for arbitration and the parties agreed that the question for arbitration is:

> "*Is attendance at a Joint Workplace Consultative Committee Meeting by a Shift employee (as contemplated by clause 2.1.5 of the NRG Gladstone Operating Services Pty Ltd (NRG GOS) Enterprise Agreement 2017 (Agreement)) a "recall" for the purposes of clause 6.5.3 of the Agreement giving rise to an entitlement to payment for a minimum of 4 hours' work at the appropriate overtime rate where after leaving the Employer's business premises on Monday, Tuesday, Wednesday, Thursday or Friday (whether notified before or after leaving the premises), the Shift employee attends a meeting outside that employee's normal shift roster?*"

[4] The Applicants submit that the Commission should find in the affirmative on the above question. It is the Respondent's position that attendance at a JWCC meeting does not constitute a recall for the purposes of clause 6.5.3 of the Agreement.

[5] Each of the Applicants filed witness statements. A witness statement made by Ms Stacey Marie Williams was filed in support of NRG's case. None of the witnesses were required for cross-examination and the statements were admitted by agreement subject to some paragraphs not being relied on. were filed by:

STATEMENT OF AGREED FACTS

[6] The agreed facts are as follows:

1. JWCC meetings are held monthly;

2. At the start of each calendar year, the Respondent sends meeting invitations out to the JWCC members for the scheduled JWCC meetings for that calendar year;[1]

3. JWCC meetings are preceded by a pre-JWCC meeting, which generally occurs for one hour between 8.30 am and 9.30 am on the day of the JWCC meeting;

4. JWCC meetings are generally held for one hour, from 10.00 am to 11.00 am. Occasionally, JWCC meetings go for longer than one hour in duration;

5. Employees are free to attend JWCC pre-meetings and meetings where they occur within their normal shift roster without any loss of pay; and

6. Shift employees who attend JWCC meetings that are outside their normal shift roster are paid overtime for their attendances at the pre-JWCC meeting and the JWCC meeting.

AGREEMENT PROVISIONS

[7] The provisions of the Agreement to which the dispute relates are as follows:

2.1 JOINT WORKPLACE CONSULTATIVE COMMITTEE

2.1.1 A Joint Workplace Consultative Committee (JWCC) has been established between the parties to this Agreement, to facilitate communication and consultation between the Employer and Employees to promote initiatives for the improvement of the workplace relations within the workplace.

2.1.2 The JWCC is a consultative group and although highly desirable, does not need to come to an agreed position on any matter that it considers or discusses.
The JWCC will not vote on issues: it is a venue for discussion and consultation. Issues will be discussed in good faith.

2.1.3 Any member of the JWCC may raise issues for inclusion on the JWCC agenda.

2.1.4 Matters that may be discussed include but are not limited to:

- Management proposals and the effects of proposed changes on Employees e.g. changes to policies and procedures that effect Employees;

- Changes to organisational structure;
- Strategic issues;
- Information and reports on particular aspects if the Employer's operation that may affect Employees;
- Proposals which would cause significant changes in the workplace.

2.1.5 The JWCC will meet monthly and each quarter the JWCC will decide whether to hold a Special JWCC meeting to be held where all Regional Union Officials are invited to attend. A yearly scheduled of meeting dates will be drafted up and distributed to members prior to the beginning of each year.

Meetings shall be scheduled within normal working hours. JWCC members who are shift Employees shall be paid overtime for attending JWCC meetings outside their normal shift roster. Any member of the JWCC can call for a Special JWCC meeting where there is an urgent matter to be discussed.

6.5 OVERTIME

6.5.1 General

a) Except as hereinafter provided, all time worked in excess of that provided for in clause 6.1 or before the regular starting time or after the regular ceasing time, shall be deemed overtime and shall be paid for at one and a-half times the All Purpose Rate for the first three (3) hours and double time thereafter.
b) Each day to stand by itself when overtime is being computed, except where an Employee commences overtime on one day and continues to work such overtime into the next day.
c) No Employee shall refuse to work a reasonable amount of overtime to meet the needs of the Employer.
d) When any portion of an hour is worked, Employees shall receive payment in respect of any broken part of an hour at the overtime rate with a minimum payment for one half hour.
e) Overtime worked in any calling or in connection with which more than one (1) shift per day is worked, shall be paid for at the rate of double time. For all Employees engaged in shift work, all time worked in excess of eight (8) hours in any one day shall be considered as overtime. This clause shall not apply where shift Employees have agreed to work on a permanent 12 hour shift roster.
f) Where Employees are required to report to work overtime between midnight and 6:00am, they shall be paid at the rate of double time for all rime so worked up to the ordinary starting time Monday to Friday and up to 7:00am Saturday.

6.5.2 Overtime on Administrative Closure Days, Statutory Holidays Saturdays and Sundays.

a) Saturday – All overtime work done on a Saturday shall be paid at one and a-half times the All Purpose Rate for the first three (3) hours and double time thereafter, with a minimum period of three (3) hours work or payment therefore.

b) Sunday – All overtime work done on a Sunday shall be paid at the rate of double time with a minimum period of four (4) hours or payment therefore.

c) Administrative Closure Day – All overtime work done on an administrative closure day shall be paid at one and a-half times the All Purpose Rate for the first three (3) hours and double time thereafter, with a minimum period of four (4) hours work or payment therefore.

d) Statutory Holidays – All time worked on a public holidays outside the ordinary working hours specified in this Agreement, prescribed by a roster, or usually worked on the day of the week on which the holiday is kept, shall be paid at double the rate prescribed by this Agreement for such time when worked outside such working hours on an ordinary working day.

6.5.3 Recalls

a) Employees recalled to work overtime, after leaving the Employer's business premises on Monday, Tuesday, Wednesday, Thursday or Friday (whether notified before or after leaving the premises) shall be paid for a minimum four (4) hours' work at the appropriate overtime rate for each recall. Provided that, except in the case of unforeseen circumstances arising, an Employee shall not be required to work the full four (4) hours if the job the Employee was recalled to do is completed within a shorter period.

b) Provided also that overtime worked in cases where it is customary for an Employee to return to the Employer's premises to perform a specific job outside of working hours, or where the overtime is continuous (subject to a reasonable meal break) with the completion or commencement of ordinary working time, shall not be regarded as overtime for the purposes of this subclause.

c) Employees called out on availability duty shall be entitled to payment for such work from the time of leaving home to commence work until they return home from such work, but they must return home within a reasonable time and payment shall be calculated accordingly.

THE APPROACH TO CONSTRUCTION OF AGREEMENTS

[8] The approach to construing enterprise agreements was most recently set out in a Decision of a Full Bench of the Commission in "*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Ltd*[2] as follows:

> "1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:
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> (i) the text of the agreement viewed as a whole;
> (ii) the disputed provision's place and arrangement in the agreement;
> (iii) the legislative context under which the agreement was made and in which it operates.
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> 2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.
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> 3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.
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> 4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.
> 5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the

employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.

6. Enterprise agreements are not instruments to which the *Acts Interpretation Act 1901 (Cth)* applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

(i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
(ii) notorious facts of which knowledge is to be presumed; and
(iii) evidence of matters in common contemplation and constituting a common assumption.

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.

14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.

15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding."[3]

[9] In *CFMEU v Endeavour Coal Pty Ltd T/A Appin Mine*[4] a Full Bench of the Commission held that the context of an agreement provision is significant. In this regard, the Full Bench set out the explanation of this point by the NSW Court of Appeal in *Mainteck Services Pty Ltd v Stein Heurtey SA,*[5] emphasising the following matters:

- Until a word or phrase is understood in the light of the surrounding circumstances, it is rarely possible to know what it means[6] and there is always some context to any statement;[7]

- Language considered in its context will often have a clear meaning and context will often not displace that meaning – "but not always";[8]

- To state that a legal text is clear reflects the outcome of an interpretation process and means that there is nothing in the context that detracts from the ordinary literal meaning and cannot mean that context can be put to one side;[9]

- The phrase used by Mason J in *Codelfa* "*if the language is ambiguous or susceptible of more than one meaning*" does not mean that the susceptibility of the language to more than one meaning must be assessed without reference to the surrounding circumstances and in order to determine whether more than one meaning is available it may be necessary to turn to context;[10] and

- Context has also been described as surrounding circumstances and the meaning of terms normally requires consideration not only of the text, but of the surrounding circumstances known to the parties and the purpose and object of the transaction.[11]

[10] The case law in relation to the approach to the construction of enterprise agreements makes it clear that context and purpose are relevant to the construction of provisions in an enterprise agreement and must be considered even where the words of the provision being construed appear, on their face, to have a clear and unambiguous meaning. There is always context to any term of an enterprise agreement and the presence or absence of ambiguity may be in the eye of the beholder.

APPLICANTS' EVIDENCE AND SUBMISSIONS

[11] Mr Brown is a member of the CEPU and has been a delegate at the Gladstone Power Station since 1993. Mr Brown is a member of C Shift and works 12 hour shifts over a 10 day shift cycle in a 50 week roster. Mr Brown works a mix of day and night shifts. Mr Brown said in his statement that the purpose of JWCC meetings is to discuss issues in the workplace with delegates and management. JWCC meetings are held monthly and Mr Brown has attended three in the last twelve months. NRG distributes a calendar at the beginning of the year.

[12] JWCC meetings fall on some days that Mr Brown is rostered off. Shift employees work the same number of hours as day employees – 1885 per year. Unlike day employees, those hours are worked in 12 hour blocks including on Saturdays, Sundays, public holidays and nights. Day employees are not asked to come to work and attend meeting on Sundays, nights, or public holidays. Days off are important to Mr Brown.

[13] Mr Brown contends that the Agreement does not specify the amount of payment for attendance at JWCC meetings but simply states that shift employees will be paid overtime to attend the meetings. JWCC meetings on Mr Brown's days off are inconvenient to attend, but there are important issues to be dealt with and he has been elected to represent employees of NRG. For this reason, Mr Brown tries to attend meetings when he is able to do so.

[14] Mr Lamb is a member of the AMWU and has been a representative of Operators Control at NRG for 8 years and a delegate of the Union for three years. Mr Lamb states that employees with issues on site come to him for guidance and that he is a key point for management to communicate with the workforce. Mr Lamb states that he works on a 4 on 6 off roster which means that he works 2 day shifts followed by two night shifts and then has 6 days off. This is repeated over a 10 day cycle. Mr Lamb works 12 hours shifts and on average works 36.25 hours per week. The days that Mr Lamb works vary across the roster and the pattern of the roster repeats every 50 weeks. Although the Agreement provides that day shift is 7.00 am to 7.00 pm, the practice is that shifts are typically worked between 6.15 am and 6.15 pm and 6.15 pm to 6.15 am.

[15] Mr Lamb is a member of the JWCC. According to Mr Lamb, its role is to provide a forum for workplace discussions and to promote communication between the workforce and management. The purpose of the JWCC is to effectively avoid industrial disputation, talk about potential workplace changes and give workers budget and safety updates. There are approximately 12 employee representatives on the JWCC including 5 employee representatives who are shift workers.

[16] As a shift worker it can be difficult for Mr Lamb to attend JWCC meetings which are often scheduled outside of his ordinary working hours. The meetings are usually scheduled for the second Tuesday of every month but are occasionally changed due to public holidays. The email notification for meetings allocates time from 10.00 am to 11.30 am but typically the JWCC meetings run for only 1 hour although the meetings occasionally extend to 2 hours. Mr Lamb arrives on site for a pre-meeting which takes place between employee representatives, from 8.30 am to 9.30 am. These are part of the process of attending a JWCC meeting. There is a half hour break between the pre-meeting and the JWCC meeting which is generally a crib break taken by all employees and not just members of the JWCC.

[17] Mr Lamb states that on some days when JWCC meetings are held during time that he is not rostered on, he is either asleep after night shift or preparing for his first night shift. For example, if a pre-meeting is scheduled for 8.30 am and Mr Lamb's night shift concludes at 6.15 am he has slightly over two hours to return home before coming back to work to attend the meeting. If the JWCC meeting concludes at 11.00 am then Mr Lamb has to return home to sleep and has to attend work again at 6.15 pm for his night shift which results in Mr Lamb having less than the rest period of 10 hours he is entitled to have between shifts.

[18] As a result, it is difficult for shift workers to attend JWC meetings. Mr Lamb has attended 6 of the last 10 meetings including the meeting of 13 March 2018. Three of those meetings were scheduled during periods when Mr Lamb was rostered off and he did not attend the remaining 4 meetings of which 3 were rostered outside his working hours and 1 was scheduled while Mr Lamb was on annual leave. Of the 3 meetings that Mr Lamb did not attend when he was rostered off, he was sleeping following night shift on two occasions and attending to a personal commitment while rostered off on the third occasion.

[19] Mr Lamb believes that there is a requirement for him to represent his members at JWCC meetings. Mr Lamb receives email notifications of the meetings at the start of the year requesting that he attend and states that if NRG want to facilitate the process as required in the Agreement then he is required to attend the meetings. Mr Lamb further states that if the Company requests his attendance he considers that this is a notification that he is meant to be there for the meeting.

[20] With reference to the principles relevant to construction of enterprise agreements, the Applicants submit that the meaning of clause 2.1.5 is clear and unambiguous, and that it provides an entitlement to payment of overtime to members of the JWCC who are shift employees where they attend a JWCC meeting outside their normal shift roster. Regarding the *amount* of overtime payable, this clause is silent. The Applicants submit that clause 6.5.3 provides for the amount of overtime payable for attendance at a JWCC meeting outside a normal shift roster.

[21] The Applicants also submit that because the clauses are clear and unambiguous and there is no uncertainty which would permit the Commission giving consideration to the evidence of surrounding circumstances.[12]

[22] The terms "*recall*" and "*recalled*" are not defined in the Agreement. The Applicants submit that "*recall*" has the ordinary meaning "*to call back; summon to return*".[13] They concede the further conditions attached to the term "*recall*" in clause 6.5.3, those being that the employee must be recalled "*to work overtime, after leaving the Employer's business premises on a Monday, Tuesday, Wednesday, Thursday or Friday*".[14]

[23] The Applicants submit that current authorities on the interpretation of "*recall*" deal with clauses in different terms to clause 6.5.3, and as set out in *AMWU v Berri*,[15] the task of interpreting an enterprise agreement is one of interpreting the agreement produced by the parties.[16] However, the Applicants did refer to the definitions of '*recall*' in *Polan v Goulburn Valley Health*[17], *Construction, Forestry, Mining and Energy Union v Leighton Contractors Pty Ltd*[18], and *Director of Public Employment v New South Wales Fire Brigades Employees' Union.*[19]

[24] In *Polan v Goulburn Valley Health*, a "*recall*" was stated to "[suggest] *a conscious decision by or on behalf of an employer to require an employee to perform specific duties of employment outside the employee's ordinary hours of duty*".[20] In line with the definition of "*recall*" above, the Applicants submit that a shift employee is called back or summoned to return to the Respondent's business premises for a JWCC meeting by a conscious decision of the Respondent where:

- The role of the JWCC, which consists of employer and employee representatives, is enshrined in the Agreement at Clause 2.1. It plays an important role in facilitating communication and consultation between the Respondent and its employees in respect of matters that the Respondent is otherwise obliged to consult with its employees about pursuant to the Agreement such as, for example, changes to organisational structure and proposals which could cause significant changes in the workplace. Accordingly, employee attendance at these meetings is critical to fulfill the JWCC's role under the Agreement;

- The Agreement mandates at Clause 2.1.5 that the JWCC will meet monthly;

- The schedule of meeting dates is compiled by the Respondent;

- Emails notifying meeting dates are issued by the Respondent;

- Though the email notifications of meeting, typically schedule a JWCC meeting for 10:00am to 11:30am,15 in practice, JWCC meetings can vary in length, often exceeding one hour and on rare occasions running to two hours and are preceded by a pre-JWCC meeting typically scheduled for one hour at 8:30am to 9:30am;

- Meetings are typically scheduled on the second Tuesday each month but due to the nature of the 50 week, 10 days, 12 hour rostering arrangement applying to the Applicants in this proceedings, and to a number of shift employees of the respondent, these meetings will sometimes fall when shift employees are not rostered to perform work;

- The 50 week, 12 hour roster is prepared by the Respondent in consultation with its employees, but is ultimately worked at the direction of the Respondent;

- In order to attend a JWCC meeting which falls at a time when they are not rostered to perform work a shift employee is necessarily required to return to the Respondent's premises, sometimes only shortly after completing a 50 week, 12 hour night shift;

- In no other context can a shift employee, nor the Applicants, attend the workplace outside their rostered hours and receive payment of less than a minimum of 8 hours pursuant to the Operators Schedule of the Agreement.[21]

[25] In oral submissions the Applicants contended that the submissions of the Respondent were to the effect that a "*temporal connection*" should be implied so that in order to be recalled, a shift worker must be summoned or requested to work additional hours of their roster at some period at short notice. This requirement is not within the express language of the clause and does not arise under that language. The Applicant's interpretation of the clause as applying where meeting dates are notified by the employer in advance is entirely consistent with the express words of the clause and is not technical or pedantic as asserted by NRG.

[26] Further, the Applicants highlight that in accordance with clause 2.1.5, shift employees are to be paid overtime for attending JWCC meetings outside their normal shift roster, and state that it is unambiguous that a shift employee is "*recalled to work 'overtime' in these circumstances*".[22]

[27] In relation to the term "*after leaving*" the Employer's business premises, the Applicants submit that these shift employees are recalled to work overtime, "*after leaving*" the Respondent's business premises on these occasions, and that on each occasion in the circumstances particularised at paragraph 25, the employee is notified prior to leaving the premises. It is submitted that this notification is given when the employees are issued with the notifications of meetings by the Respondent, that to attend the JWCC meeting they will need to attend work after leaving the Respondent's business premises on a weekday, for example, after completing a shift on the Monday to attend a JWCC meeting scheduled for Tuesday at a time when they are not rostered to perform work.[23]

[28] The Applicants submit that clause 6.5.3(b) does not preclude the Applicants from the entitlement to the minimum of four hours overtime but rather it makes specific and exclusive provision for "*circumstances in which an employee recalled to work overtime, after leaving the Employer's business premises on Monday, Tuesday, Wednesday, Thursday or Friday (whether notified before or after leaving the premises) will not be a recall for the purposes of Clause 6.5.3(a)*".[24]

[29] The Applicants reiterate that construction requires the terms of an agreement to be read in the context of the agreement as a whole. In this regard they submit that clause 6.5.3(b) "*exhaustively identifies*" the circumstances in which an employee can be "*recalled*" where it is not deemed a "*recall*" for the purposes of the entitlement at clause 6.5.3(a). They state that there are two exceptions:

1. Firstly, where it is customary for an Employee to return to the Employer's premises to perform a specific job outside of working hours; or
2. Secondly, where the overtime is continuous (subject to a reasonable meal break) with the completion or commencement of ordinary working time.

[30] The Applicants submit that neither exception applies to shift employees in the context of attendance at JWCC meetings as clause 6.5.3(b) provides that where the above exceptions apply, overtime worked "*shall not be regarded as overtime for the purposes of this subclause*". Clause 2.1.5 provides that attendance at JWCC meetings *shall* constitute overtime. Therefore, the Applicants submit that attendance at a JWCC meeting should be viewed as a "*recall*" which gives rise to the entitlement to pay a minimum of four hours' overtime.

[31] In relation to extrinsic material, while the Applicants' primary contention is that the words of the clauses are clear and unambiguous, in light of arguments advanced by NRG in with respect to extrinsic material, the Applicants submit that the JWCC Charter provides that a quorum must be at least 50 percent of the employee representatives, and further under a heading of "Rights and Duties of Members" states that:

> "All members of the JWCC are to carry out their duties in a responsible and sincere manner, including attending meetings and be present before the time set down, forwarding apologies to the chairman if unable to attend."[25]

[32] As the Charter refers to "*duties*", the Applicants argue that this connotes a notion of at least a request from the employer to attend.[26] Further, they submit that the Charter includes provision that site union representatives are "*accountable*" for representing their members' viewpoint to the employer. The Applicants submit that the provisions of clause 2.1.5 in relation to payment of overtime to employees attending JWCC meetings supports the proposition that they are "*compelled*" and required to return to work for attendance at JWCC meetings.[27] The Applicants also point to the concession made by NRG to the effect that there is no consistency in the overtime paid to other employees for attendance at JWCC meetings. The Applicants submit that NRG confirms workers are not only being paid for the time they actually attend JWCC meetings and that this demonstrates that NRG's interpretation of the clauses is not clear. [28]

NRG EVIDENCE AND SUBMISSIONS

[33] Ms Williams has been employed by NRG since 2015. Ms Williams' evidence is that that the JWCC was established in 1994. Each Union nominates delegates and notify NRG of elected delegates and any changes. Each elected Union delegate automatically becomes a member of the JWCC. Employees are not directed or selected by NRG to be members of the JWCC.

[34] The JWCC has a Charter dated 15 March 2006, which was tendered by Ms Williams.[29] Ms Williams also tendered documents evidencing that the Charter was reviewed at a JWCC meeting of 14 March 2006 and approved by a subsequent meeting prior to the meeting on 26 May 2006.[30] The JWCC Charter relevantly provides that:

- The JWCC will meet monthly;
- A yearly schedule of meeting dates will be drafted and distributed prior to the beginning of each year;
- Meetings shall be scheduled within normal working hours;
- JWCC members who are shift employees will be paid overtime for attending JWCC meetings outside their normal shift roster;
- JWCC members will be given adequate time for preparation for meetings – typically in the order of one hour prior to the meeting; and
- The "Specialist Employee Relations" is responsible for drafting and distributing a yearly schedule of monthly JWCC meeting dates prior to the commencement of each year.

[35] Ms Williams also tendered the NRG Workplace Relations Policy.[31] Minutes of JWCC meetings on 16 July 2009 and 19 August 2009 also tendered by Ms Williams indicate that the Policy was developed in consultation with the members of the JWCC,[32] and was later updated in March 2014 with the effect of relevant provisions unchanged.[33] The Policy provides that:

> "(a) Paid or recorded time due to "enterprise business", which is defined to include preparation for and attendance at JWCC meetings, "shall be based on start and finish times recorded in business documentation (e.g. meeting minutes etc.)";[34] and
>
> (b) The table (which remained unchanged between the 2009 and 2014 versions) provides that the "Time/Frequency" for JWCC members to "prepare the morning of the scheduled JWCC Meeting" is "8.30am to 9.30am monthly" and that the "Time/Frequency" for JWCC meetings is "10am to 11am Monthly".[35]

[36] Further, Ms Williams tendered correspondence between the parties in relation to the negotiation for the Agreement and contended that the Unions had not sought a minimum overtime payment for attendance at JWCC meetings or that such attendance be treated as a recall. There was also no discussion in relation to clause 6.5.3(a) of the Agreement applying to shift worker employees attending JWCC meetings. According to Ms Williams, attendances at JWCC meetings by shift worker employees outside their normal shift roster, have always been paid as general overtime based on one hour of preparation time and one hour for attendance, as minimum. Such attendances have never been paid as a recall during Ms Williams' time with NRG.

[37] NRG submits that on proper construction of the relevant clauses, the only entitlement created under clause 2.1.5 is for a payment made to an employee for overtime in

accordance with the general overtime entitlements as provided in clause 6.5.1.[36] NRG submits that clause 2.1.2 provides that the JWCC is a consultative group made up of representatives of the parties to the Agreement. The parties to the Agreement, as provided in clause 1.2.1, are NRG, its employees and the five unions covered by the Agreement. The union representatives on the JWCC are not directed or appointed by NRG,[37] and there is no requirement under the Agreement for them to attend the meetings, nor does it relate to their duties as employees.[38]

[38] In relation to the proper construction of clause 2.5.1 of the Agreement, NRG submits:

(a) The first sentence of clause 2.1.5 provides that the JWCC "will meet monthly". This prescribes the frequency of JWCC meetings. It does not mandate that attendance at JWCC meetings is compulsory or otherwise at the direction, instruction or request of the Respondent.

(b) This construction is reinforced by the second sentence of clause 2.1.5, which provides that a "*yearly schedule of meeting dates will be drafted up and distributed to members prior to the beginning of each year*". The members of the JWCC have agreed that the Respondent is to be responsible for sending the yearly schedule of meeting dates to JWCC members at the beginning of each year.[39] This further supports that the first sentence of clause 2.1.5 is relevant only to the frequency and scheduling of meetings, rather than requiring compulsory attendance at meetings.

(c) When clause 2.1 is read as a whole, it is plain that employees are not individually requested, required, summonsed, instructed or otherwise directed to attend each JWCC meeting by the Respondent. Further, when the first and second sentences of clause 2.1.5 are read together, it is clear that employees are merely to be notified of the scheduled dates for and the frequency of JWCC meetings prior to the beginning of each year.

(d) The third and fourth sentences of clause 2.1.5 deal with payment for attendances at JWCC meetings.

(e) The third sentence provides that meetings "shall be scheduled within normal working hours". "Normal working hours" is not defined either in clause 2.1 or in the definitions in clause 1.3 of the Agreement.

(f) However, the fourth sentence of clause 2.1.5 is informative as to the meaning of "normal working hours" in the third sentence. The fourth sentence of clause 2.1.5 provides that "JWCC members who are shift Employees shall be paid overtime for attending JWCC meetings outside their normal shift roster". In the context of the fourth sentence, "normal working hours" in the third sentence of clause 2.1.5 should be construed as being the "normal working hours" for employees who are not "shift Employees" and who do not work a "shift roster".

(g) It is plain from the language of the third and fourth sentences of clause 2.1.5 that if an employee attends a JWCC meeting at a time that is within their "normal shift roster", they will continue to be paid their usual pay for their attendance at that meeting. It is also apparent from the language of these sentences that employees have liberty to choose to attend a JWCC meeting during their "normal shift roster", as

opposed to completing their usual work, and that they will continue to be paid for that attendance.

[39] NRG also submits that while there is no definition of "*shift Employee*" for the purposes of clause 2.1.5, the term "*Shift worker*" is defined in clause 1.3.15 of the Agreement as "*an Employee who works on a shift roster*". NRG further points to clause 6.3 of the Agreement which deals with "*shift work*" and provides the ordinary hours of work for such workers.[40] In light of the fourth sentence of clause 2.1.5, NRG submits that if a shift employee attends a JWCC meeting at a time when they are not rostered to work, then that employee is entitled "*to be paid overtime for attending JWCC meetings*".[41]

[40] Further, NRG submits that there is no definition of "*overtime*" for the purposes of clause 2.1.5 and that nothing in the clause expressly prescribes a minimum or maximum entitlement of hours of overtime.[42] However, it submits that the words "*for attending JWCC meetings*" are informative and that they should be read:

> "(a) *First*, as a precondition to the entitlement of a "shift Employee" to "overtime" for attending a JWCC meeting "outside their normal shift roster". An employee is only entitled to "overtime" if they "attend" such a meeting; and
>
> (b) Second, as informing the amount of "overtime" that an employee is entitled to receive for attending a JWCC meeting in those circumstances. Namely, the "shift Employee" is entitled to "overtime" for the duration of their attendance."[43]

[41] NRG submits that clause 6.5.1(a) which is in the following terms, provides an employee's entitlement to General Overtime:

> "Except as hereinafter provided, all time worked in excess of that provided for in clause 6.1 or before the regular starting time or after the regular ceasing time, shall be deemed overtime and shall be paid for at one and a-half times the All Purpose Rate for the first three (3) hours and double time thereafter."

[42] NRG submits that the word "*deemed*" is informative as it confirms that NRG's authorisation for overtime pursuant to this sub-clause may be express or implied. Clause 6.5.1(d) further provides that when any portion of an hour is worked, employees receive a minimum payment of one half hour at the overtime rate. Clause 2.6.2 of the Operator Schedule headed "*Overtime hours*" provides that for Operators (Control), overtime is paid at double the all purpose rate for all hours worked outside of rostered hours (including penalty rates). Clause 3.3.5 of Part 3 of the Operator Schedule is drafted in identical terms in respect of the overtime entitlements of Fuel Handlers.

[43] Accordingly, when sub-clauses 6.5.1(a) and (d) are read together with clauses 2.6.2 and 3.3.5 of the Operators Schedule, the only minimum payment for "*general*" overtime for "*shift Employees*" is one half hour at "*double the all purpose rate*" and otherwise, those employees are entitled to be paid at "*double the all purpose rate*" for "all time worked outside of rostered hours.

[44] When clause 2.1.5 is read harmoniously with these clauses, "*shift Employees*" who attend JWCC meetings "*outside their normal shift roster*" are entitled to be paid for their actual time in attending the JWCC meeting, with a minimum entitlement to a payment of one half hour of overtime."[44]

[45] NRG also points to the lack of definition of the term "*recall*" in the Agreement and submits that the relevant elements of clause 6.5.3(a) of the Agreement are:

> "(a) The first sentence defines the scope and application of the clause, including an employee's entitlement to receive and the Respondent's obligation to pay a minimum of four hours' overtime for a "*recall*".
>
> (b) In order for clause 6.5.3(a) to be triggered, entitling an employee to a minimum of four hours' overtime, an employee must have satisfied the following threshold matters:
>
> (i) *First*, the employee must have been "recalled to work overtime". The tense of the word "recalled" is relevant, as it suggests an active decision or instruction from the Respondent to an employee on a particular occasion and for a particular purpose.[45] The words "an Employee shall not be required to work the full four (4) hours if the *job* the Employee was recalled to do is completed within a shorter period" in the second sentence of clause 6.5.4(a) are also supportive of the need for there to be an active decision or instruction from the Respondent for the employee to perform the work (emphasis ours). Those words suggest that the "job" the employee has been "recalled" to perform is under the control and direction of the Respondent and provides a fetter on the Respondent's ordinary prerogative to require employees to work those hours for which they will be paid;
>
> (ii) *Second*, the employee must have been recalled after "leaving the Employer's business premises" on a weekday; and
>
> (iii) *Third*, the employee must have been "notified" of the recall "before or after leaving the premises".
>
> (c) The second and third threshold matters in subparagraph [45] above are temporal considerations. When the sentence is read as a whole, it is plain that there must be a temporal connection between the time of the notification and the performance of the "job" in order for an employee to be "recalled" for the purposes of clause 6.5.3(a). The words "before or after leaving the Employer's business premises" provide further proof of the temporal connection required in order for a "recall" to work to occur."

[46] NRG rejects the Applicants' interpretation of the term "*recall*", noting that the act of being "*recalled*" has a well settled industrial meaning. NRG makes reference to the decision of *Director of Public Employment v New South Wales Fire Brigades Employees' Union*[46] where it was held:

> "The ordinary meaning of "recall" is to "call back" or to "summon to return"… Importantly, where there is a need to recall an off duty employee or summon them to return to work to perform overtime work, it embodies the notion of an unstructured, unforeseen or unplanned event that is required to be dealt with at short notice. Employers are usually required to pay a premium on such recalls for the sudden interruption caused to the employee's rest or leisure time and the premium also acts as a deterrent against employers requiring employees to work unnecessary or excessive overtime."[47]

[47] NRG also referred to the Decision of Commissioner Johns in *CFMEU v Leighton Contractors* where it was observed that:

> "The phrase recall to work overtime is not a term of art. It has a common and usual industrial meaning. A recall happens when a person is officially ordered to return to a place."[48]

[48] In line with these authorities, NRG submits that a recall is for the performance of unscheduled tasks or duties after the conclusion of an employee's rostered hours. In this regard NRG also refers to the Decision of the Federal Court in *Polan v Goulburn Valley Health*[49] where it was noted that a recall: "*suggests a conscious decision by or on behalf of an employer to require an employee to perform specific duties of employment outside the employee's ordinary hours of duty*", otherwise, "*an employee could unilaterally decide to return to work for a short period of time (say, half an hour) and trigger her or his entitlement to paid for a…minimum period*".[50] NRG therefore contends that the Agreement cannot be properly construed to the effect that a "*shift Employee*" attending JWCC meeting outside their normal shift roster is "*recalled*", and further that the concept of a recall applying to such attendance is incongruous with the nature of work performed by Production Operators.[51]

[49] NRG also referred to Mr Brown's statement that while at times it is inconvenient, he attends the JWCC meetings as there are important issues he is elected to deal with. NRG submits that this is hardly the language of an employee who is being compelled, required or otherwise directed by his employer to attend.[52]

[50] NRG submits that if, in the alternative, the Commission is satisfied that JWCC members are "*recalled*" to work to attend JWCC meetings outside their normal shift rosters, then clause 6.5.3(b) applies to negate the entitlement to a minimum four hours overtime provided in 6.5.3(a).[53] In this regard, NRG submits that on the Applicants' evidence, it is customary for them to try to attend JWCC meetings on their rostered days off,[54] and that as a "*recall*" requires "*a temporal connection between the direction to work and the work*", their attendance must fall within the exception provided in clause 6.5.3(b).[55] NRG submits that attendance at JWCC meetings cannot be considered a recall for the following reasons:

- While the JWCC plays an "important role in facilitating communication and consultation",[56] a shift employee's attendance at JWCC meetings is voluntary such that they have not been "recalled" for the purposes of clause 6.5.3(a) of the Agreement.

- The Applicants' construction ignores the ordinary and well settled industrial meaning of the term "recall" and fails to acknowledge the "temporal considerations" enshrined in the express words of the first sentence of clause 6.5.3(a) of the Agreement which require that in order to be a "recall", there must be a summons, request, direction or other instruction to work additional hours outside of the employee's shift roster on short notice.

- The Applicants' contention in relation to clause 6.5.3(b)[57] is not correct as that clause does not "clarify" clause 6.5.3(a) but rather describes circumstances in which an employee will <u>not</u> have been "recalled" for the purposes of clause 6.5.3.

[51] As clause 2.1.5 provides that overtime is to be paid for attendance at JWCC meetings outside of normal shift rosters, NRG submits that the general overtime provisions in clause

6.5.1 apply to regulate the amounts that the Applicants will receive for their attendance at the JWCC meeting.[58]

[52] In relation to extrinsic material, NRG submits that while its primary contention is that clauses 2.1.5 and 6.5.3(a) of the Agreement have plain and unambiguous meaning, the Commission should have regard to certain extrinsic material as an aide to interpreting the Agreement for the purposes of establishing whether an ambiguity exists. In this regard reference was made to the JWCC Charter which was developed in consultation with, and approved by, members of the JWCC. Regard should also be had to the Workplace Relations Policy. NRG submits that these documents are admissible as contextual evidence of the surrounding circumstances of the Agreement. They are part of the framework of objective background facts and as such can be used as an aide to the interpretation of the Agreement. NRG submits that the extracts above support the submission that shift employees who attend a JWCC meeting outside of their normal roster are to be paid overtime limited to the actual hours worked in attending those meetings and, "*as a minimum, an hour preparation and an hour for attending the JWCC meeting*".[59] The JWCC Charter and NRG Workplace Relations Policy do not make reference to attendance as a "*recall*".

[53] NRG submits that while clauses 6.5.3(a) and (b) of the Agreement have had identical counterparts in each of the predecessor agreements, clause 2.1 was introduced for the first time in the current Agreement at the request of union bargaining representatives. While the "*overtime*" to which employees are entitled was not clarified in the clause, NRG submits that clause 2.1 is largely identical to the relevant provisions of the JWCC Charter. NRG argues that the insertion of clause 2.1, and in particular clause 2.1.5, reflects the existing practice and intention of the parties, informed by the JWCC Charter and Workplace Relations Policy, for employees to be paid general overtime for the actual time of their voluntary attendances at JWCC meetings outside of their normal roster.

[54] NRG also points to the fact that sub-clauses 6.5.3(a) and (b) had identical counterparts in predecessor agreements and were "rolled over" to the current Agreement. There were minimal discussions regarding clause 6.5 during the bargaining process, and NRG submits that no discussions concerned an interaction between clause 2.1.5 and clause 6.5.3 of the Agreement.[60]

[55] While clause 2.1 was newly introduced in the Agreement, NRG submits that as no discussions occurred in relation to any interaction between the two relevant clauses, clause 6.5.3 should continue to have its commonly understood meaning in the Agreement. It submits that clause 2.1 should not be construed "*for the first time in its history*" to allow shift employees "*who voluntarily return to work outside of their ordinary roster*" to be considered "*recalled*" and hence entitled to a minimum of four hours' overtime.[61]

[56] Lastly, NRG noted that the practical operation of clause 2.1.5 serves as reassurance that the Respondent's construction of the Agreement operates fairly towards both parties. NRG submits that of the five Production Operator employees who are members of the JWCC, analysis of overtime payments made shows:

- Shift employees have been paid overtime equivalent to at least the length of the JWCC meetings;
- Shift employees regularly received less than four hours overtime in respect of their attendances at JWCC meetings outside their ordinary roster; and

- In the majority of cases, shift employees were paid an amount of overtime in excess of the actual length of the JWCC meeting plus an hour of preparation.

[57] NRG submits that this evidence establishes that these employees, on the whole, received a substantial benefit when compared to the actual time of their attendance at JWCC meeting events.

CONSIDERATION

[58] The construction of an agreement begins with consideration of the ordinary meaning of the relevant words. Relevantly clause 6.5.1 provides that all time "*worked*" in excess of that provided for in clause 6.1 or before the regular starting time or after the regular ceasing time, is deemed to be overtime. The relevant overtime rate in the present case is prescribed in clause 6.5.1(f) which provides that overtime is paid at the rate of double time for employees engaged as shift workers. Clause 6.5.1(d) provides that employees shall not refuse to work a reasonable amount of overtime to meet the needs of the employer.

[59] Clause 6.5.3 provides that employees "*recalled*" to work overtime after leaving the employer's premises on Monday, Tuesday, Wednesday, Thursday or Friday, whether notified before or after leaving the premises, are entitled to be paid for a minimum of four hours work at the appropriate overtime rate. It is clear from the introductory words of the clause that it is dealing with a recall for the purposes of an employee working overtime. The term "*recalled*" has an ordinary meaning – a person who is recalled is summoned to return to a place in a manner where there is a requirement for the person to return. The clause limits the operation of the recall provisions to circumstances where the employee has left the employer's business premises on a week day – Monday to Friday.

[60] It is axiomatic that to be recalled to work overtime "*after leaving the Employer's business premises*" on one of the nominated days, the employee must have first been at the employer's business premises on one of those days. It is not necessary for the purposes of the present dispute to deal with the question of whether the clause operates so that an employee can be recalled on a day that the employee has not been at work – for example an employee who is at work on Tuesday, absent on sick leave during the ordinary hours on Wednesday and is required to attend work on Wednesday evening.

[61] It is sufficient for the purposes of the present dispute to note that the recall provision operates when a sequence of events occurs. The employee must be at work on one of the nominated days and must leave the workplace. After the employee leaves the workplace, the employee must be recalled by being summoned or required to return to work. Notification of the requirement to return to work may be given either before or after the employee leaves the workplace. The purpose of the recall must relate to the employee performing a particular job. The employer cannot simply recall the employee and allocate four hours of work. The employee is entitled to be paid for four hours work in connection with the performance of the particular job regardless of whether it is completed in a shorter period. The employer cannot find additional work or allocate another job to an employee who completes the job that he or she is recalled to do in less than four hours and thereby require the employee to work the full four hours for which the employee has been paid, other than in other than in unforeseen circumstances.

[62] The provisions of the clause, read in conjunction with the overtime clause, make it clear that the employee is required to attend for a recall subject to the provision in clause 6.5.1 in relation to the reasonableness of overtime. The provisions of clause 6.5.3 in relation to the minimum payment for a recall make it clear that the purpose of a recall is for the employee to perform a job that he or she is instructed or directed to perform by the employer, subject to the limitations on the employer with respect to the right to allocate other jobs during the four hour period for which the employee must be paid. But for this term, an employer required to make a minimum payment has the right to require work for the entire period covered by the payment and the employee is required to perform work for the entire period covered by the payment unless the employer waives the right to require such work.

[63] I agree with the submission of NRG that there is a temporal connection between the time of the notification and the performance of the job in order for an employee to be recalled to work overtime within the meaning of the clause. This temporal connection is strengthened by the fact that the notification of the requirement to return to work can be given before or after the employee has left the employer's premises. The temporal connection between the work and the notification is further reinforced by the exclusion from the recall provision of employees who customarily return to the employer's premises to perform a specific job outside of ordinary working hours or where overtime is continuous with the completion or commencement of ordinary working time, subject to a reasonable meal break.

[64] The temporal connection is also evident from the proviso that, except in the case of unforeseen circumstances arising, an employee who is recalled shall not be required to work the full four hours, if the job the employee was recalled to do is completed at an earlier time. Circumstances will only be unforeseen if they arise after the employee has been notified of the recall and allocated a job to perform during the recall. These provisions operate on each occasion of a recall, rather than in respect of a pre-arranged customary attendance at work outside ordinary hours.

[65] In relation to the JWCC, clause 2.1.1 of the Agreement provides that the Committee is established between the parties to the Agreement to facilitate communication and consultation and to promote initiatives to improve workplace relations. Clause 2.1.2 provides that the JWCC is a consultative group and that although highly desirable, does not need to come to an agreement on any matter that it considers or discusses and that it will not vote on issues. By virtue of clause 2.1.3 any member of the JWCC can raise issues for inclusion in its agenda. Matters that may be discussed are listed in clause 2.1.4. While those matters include management proposals and information on aspects of the employer's operation, the list is not exhaustive and may include matters raised by any member pursuant to clause 2.1.3.

[66] By virtue of clause 2.1.5, the JWC meets monthly and a yearly schedule of meeting dates is to be drafted and distributed to members prior to the beginning of each year. That sub-clause also provides that meetings will be held within normal working hours and that shift employees "*shall be paid overtime for attending JWCC meetings outside their normal shift roster.*" The schedule of meeting dates is a draft and is circulated prior to the start of each year, presumably for comment and feedback from members of the Committee. Clause 2.1.5 prescribes the frequency of meetings and is not a mechanism by which an individual employee can be required to attend meetings. The sub-clause further provides that any member of the JWCC can call for a special meeting where there is an urgent matter to be discussed.

[67] The provisions in clause 2.1 of the Agreement do not on their plain meaning contain any prescriptive requirement as to attendance at JWCC meetings by members of the Committee. I do not accept the Applicants' submissions on this point. The provisions do not prescribe any mechanism for NRG to control which of its employees will be members of the Committee. There is no requirement that shift employees be members of the Committee. Rather, there is an agreed payment for such employees where they attend Committee meetings outside their normal shift roster. Clause 2.1 of the Agreement does not give NRG the right to direct Committee members to attend. NRG does not have the right to prescribe matters for discussion or to prevent discussion of any matter within the remit of the JWCC. NRG does not have the right to impose an outcome on discussion or deliberation by the JWCC. Further, an employee member of the Committee may call a special meeting and thereby bring about the attendance of other members.

[68] These provisions can be contrasted with the provisions of the Agreement dealing with overtime. As previously noted, employees are required to work overtime subject only to reasonableness. The recall provisions in clause 6.5.3 are triggered by a requirement that a particular employee return to work after having left, to perform a particular job as directed. The employee cannot be required to perform another job unless an unforeseen circumstance arises and must be paid for four hours work whether or not the job requires the full four hours to be worked. Clause 2.1.5 does not deem attendance at a JWCC meeting to be "*work*" or "*overtime*" but rather prescribes a payment for that attendance.

[69] The draft schedule of meeting dates distributed prior to the beginning of each year in accordance with clause 2.1.5 of the Agreement is not a notification of the kind provided for in clause 6.5.3 in relation to employees being recalled. The participation of a shift employee in a meeting of the JWCC does not involve the employee being recalled to do a particular job. The draft schedule of meeting dates produced at the beginning of each year does not constitute notification of a requirement to return to work of the kind dealt with in clause 6.5.3 of the Agreement. The draft schedule of dates provided for in clause 2.1.5 relates to dates on which the JWCC will meet and does not require particular members to attend on particular dates. The draft schedule of dates is not a notification of the kind contemplated by clause 6.5.3 of the Agreement with respect to recalling a particular employee to work on a particular occasion to perform a particular job. Employees who attend JWCC meetings are not there solely in their capacity as an employee but also as representatives of other employees. In this regard their duties are not to the employer but to those they represent.

[70] I turn now to consider the context or the surrounding circumstances in which the Agreement was made in order to ascertain whether there is an ambiguity, notwithstanding the apparently plain meaning of the disputed terms of the Agreement. Clause 2.1 of the Agreement is a clause that is intended to provide mutual benefit to both the employer and employees by improving workplace relations. This contextual consideration tells against the proposition that there is a requirement by the employer that employee members of the Committee attend meetings. This is emphasised by the evidence of Mr Brown and Mr Lamb to the effect that they do not attend every meeting of the JWCC and do not consider themselves required to do so. Rather, their view is that they are obligated to attend as representatives of employees and they do so when they are able. There is no evidence of any repercussions from NRG for shift employees who are members of the JWCC and who do not attend meetings. On occasion, Mr Brown and Mr Lamb are unable to attend JWCC meetings for reasons including personal commitments on their days off.

[71] A further contextual matter is the terminology in clause 6.5.3. As has been submitted by both parties, the term "*recall*" has a particular meaning in the lexicon of industrial relations. The cases referred to by the parties establish that meaning of the term "*recall*" is that the employer has summoned an employee to return to the workplace and there is a requirement (albeit subject to the reasonableness of the request) that the employee comply with the summons. The term "*recall*" also connotes that the employee is required to perform specific duties outside of the employee's ordinary hours. It is usual that such clauses prescribe a minimum payment for a callout and contain a prohibition on the employer finding work to fill the period covered by the minimum payment. Further, the concept of a recall usually involves an unstructured, unforeseen or unplanned event. This is reflected in the minimum payment that is generally prescribed for a recall. The employer is required to pay a premium to have such an event addressed by way of a recall and the premium compensates the employee for the inconvenience of having to attend for work twice on the same day, in circumstances which were not known to the employee sufficiently in advance for the employee to plan for the attendance.

[72] Shift employees attending JWCC meetings to participate in a process for the mutual benefit of employees and the employer, are not recalled in the manner contemplated by clause 6.5.3 of the Agreement. Although there is an inconvenience to those employees, that inconvenience is to benefit those they represent, and JWCC members are compensated for the inconvenience by the overtime payment. They are also at liberty not to attend if the inconvenience is too significant on a particular occasion.

[73] The context of the Agreement provisions in dispute also includes the JWCC Charter and the Workplace Relations Policy. These documents were considered and endorsed by the JWCC. The charter also indicates that employees who are JWCC members are paid for the actual time spent attending meetings and for preparation prior to meetings. The fact that preparation time is paid is also a contextual matter that indicates that shift employees are not recalled to work overtime when attending JWCC meetings on days when they are not rostered to work. Employee members of the JWCC who are not shift employees attend the meetings without loss of ordinary pay. Committee members who are shift employees are entitled to be paid at overtime rates for their attendance and for preparation time. There is no indication that such employees are entitled to a minimum payment of four hours by virtue of the recall provision in clause 6.5.3 of the Agreement.

[74] I also note that clause 2.1 is a new provision and that it was intended to enshrine in the Agreement the role and operation of the JWCC. There is no evidence that the new clause was intended to operate with clause 6.5.3 to establish a minimum payment for shift employees attending meetings on their days off, particularly when such arrangements had not previously been in place.

[75] If I am wrong in relation to this conclusion, I would also find that attendance at the meetings by shift employees at times outside their roster is customary and that it is excluded from the recall provisions in clause 6.5.3 in any event. Employees who are shift workers are informed of the meeting dates for JWCC meetings prior to the commencement of the year. The evidence establishes that such employees have the option to attend the meetings and where they do so have been customarily paid for the actual hours of the meeting including an additional amount for preparation.

CONCLUSION

[76] For these reasons I accept the submissions advanced by NRG in this matter and I answer the question for arbitration as follows:

> Question:
>
> *Is attendance at a Joint Workplace Consultative Committee Meeting by a Shift employee (as contemplated by clause 2.1.5 of the NRG Gladstone Operating Services Pty Ltd (NRG GOS) Enterprise Agreement 2017 (Agreement)) a "recall" for the purposes of clause 6.5.3 of the Agreement giving rise to an entitlement to payment for a minimum of 4 hours' work at the appropriate overtime rate where after leaving the Employer's business premises on Monday, Tuesday, Wednesday, Thursday or Friday (whether notified before or after leaving the premises), the Shift employee attends a meeting outside that employee's normal shift roster?*
>
> Answer:
>
> No.

DEPUTY PRESIDENT

Appearances:

Mr G. Sivaraman of Maurice Blackburn on behalf of the Applicants.

Mr J. Hall of Ashurst on behalf of the Respondent.

Hearing details:

Brisbane.
21 June.
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[1] Statement of Stacey Williams dated 14 June 2018 at [30]; Statement of Peter Lamb dated 4 June at [36], [37] and [42]; Statement of Mitch Brown dated 4 June 2018 at [24] and [25].

[2] [2017] FWCFB 3005.

[3] Ibid at [14].

[4] [2017] FWCFB 4487.

[5] [2014] NSWCA 184 at [71] – [85].

[6] *Manufacturers' Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cas 60-853 at 75-343.

[7] *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667 at [64].

[8] *Project Blue Sky v Australian Broadcasting Authority* 194 CLR 355 at [78].

[9] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 391 per Lord Hoffman, approved in *Campbell v R* [2008] NSWCCA 214; 73 NSWLR 272 at [48] (Spiegelman CJ, Weinberg AJA and Simpson J agreeing) and *Dale v The Queen* [2012] VSCA 324 at [73].

[10] *Franklins Pty Ltd v Metcash Trading Ltd* [2009] 76 NSWLR 603 at [17] cited in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR at [71] – [85].

[11] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165 at [40].

[12] Transcript at PN42.

[13] Macquarie Dictionary, fifth edition, Macquarie Dictionary Publishers, 2009 at page 1381; Applicants' Outline of Submissions at [21].

[14] Applicants' Outline of Submissions at [21].

[15] [2017] FWCFB 3005.

[16] Ibid at [114].

[17] [2016] FCA 440.

[18] [2015] FWC 8888.

[19] [2008] 180 IR 170.

[20] [2016] FCA 440 at [74].

[21] Applicants' Outline of Submissions at [25].

[22] Ibid at [26].

[23] Ibid at [27].

[24] Ibid at [29]-[30].

25Transcript at PN90.

[26] Transcript at PN91.

[27] Transcript at PN92.

[28] Transcript at PN92.

[29] Statement of Stacey Williams Annexure "SW-3".

[30] Ibid Annexures "SW-1" and "SW-2".

[31] Statement of Stacey Williams Annexure "SW-6".

[32] Statement of Stacey Williams dated 14 June 2018 at [15]-[19]; Annexures "SW-4", "SW-5".

[33] Ibid "SW-7"

[34] Ibid at paragraph [28]; Annexure "SW-9".

[35] Ibid at [28]; Annexure "SW-9".

[36] Transcript at PN119.

[37] Statement of Stacey Williams dated 14 June 2018 at [6].

[38] Respondents outline of subs dated 14 June 2018 at [24].

[39] Statement of Stacey Williams at [12], [14], [29], [30], [43] and [47]; Annexures "SW-3" and "SW-9" to the Statement of Stacey Williams.

[40] Ibid at [27].

[41] Ibid at [30].

[42] Ibid at [31].

[43] Ibid.

[44] Respondent's Outline of Submissions at [36]-[37].

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[45] *Polan v Goulburn Valley Health* [2016] FCA 440 at [74] and [76].

[46] [2008] NSWIRComm 158.

[47] [2008] NSWIRComm 158 at [51], citing *Re Metalliferous Miners, etc, General (State) No 2 Conciliation Committee* [1940] AR (NSW) 249 at 255; *Local Government Electricity Association of New South Wales v Electrical Trades Union of Australia, New South Wales Branch* [1975] AR (NSW) 697 at 699.

[48] (2015) FWC 8888 at [21].

[49] [2016] FCA 440.

[50] Ibid at [74].

[51] Respondent's Outline of Submissions at [42]-[43].

[52] Transcript at PN146.

[53] Respondent's Outline of Submissions at [44].

[54] See Statement of Peter Lamb dated 4 June 2018 at [49]; Statement of Mitch Brown dated 4 June 2018 at [38].

[55] Respondent's Outline of Submissions at [47]-[48].

[56] Applicants' Outline of Submissions at [25(a)].

[57] Ibid at [19] and [30]-[33].

[58] Ibid at [48].

[59] Ibid at [58].

[60] Respondent's Outline of Submissions at [65]; Statement of Stacey Williams dated 14 June 2018 at [45].

[61] Respondent's Outline of Submissions at [67].