



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

COMMISSIONER PLATT

AG2022/5025

s.185 - Application for approval of an agreement

**Application by Charles Darwin University
(AG2022/5025)**

Adelaide

1.00 PM, WEDNESDAY, 18 JANUARY 2023

Continued from 20/12/2022

PN232

THE COMMISSIONER: Hello. This is Commissioner Platt speaking in speaking in matter AG 2022/5025, application for the approval of an agreement by Charles Darwin University. Ms Crews, you're representing the applicant today?

PN233

MS CREWS: Correct.

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THE COMMISSIONER: Thank you. With Ms Rance. Mr Barlow, you're representing the CPSU?

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MR BARLOW: Thank you, Commissioner.

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THE COMMISSIONER: Mr McAlpine, you're representing the NTEIU?

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MR McALPINE: Thank you, yes.

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THE COMMISSIONER: And, Mr Pumper, you're representing the AMWU. Okay. Ms Crews, so there's a few matters that I need to deal with today. One of them is: how many casual employees were provided work during the access period?

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MS CREWS: Four hundred and five.

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THE COMMISSIONER: How many casual employees were given access to the ballot?

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MS CREWS: Six hundred and 69 casual employees were employed during the access period. I - - -

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THE COMMISSIONER: Is that 669?

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MS CREWS: Yes, during the access period.

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THE COMMISSIONER: Yes, good. Sorry. I said - - -

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MS CREWS: And 405 of those were - - -

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THE COMMISSIONER: Sorry. Okay. So, yes, but what I want to know is how many casual employees were given access to the vote?

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MS CREWS: I can pull that information out for you. I'll just need a moment.

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THE COMMISSIONER: Sure.

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MS CREWS: If that's okay?

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THE COMMISSIONER: Yes.

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MS CREWS: I'm happy to continue on while I find this information, if you like.

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THE COMMISSIONER: I'm happy to adjourn for a few minutes, if you need to, to find this information out.

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MS CREWS: Yes, it will only take me two minutes to pull it out. Sorry, Commissioner.

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THE COMMISSIONER: I'll wait. I'll wait. That's fine.

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MS CREWS: So during the voting period there were 556 casuals that were provided access to the vote.

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THE COMMISSIONER: So there 669 casuals employed. How many were provided access to the vote? Five hundred and?

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MS CREWS: Five hundred and 56. I should point out there that quite a number of our staff will have casual and fixed term or ongoing contracts. So the ones - they would have - - -

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THE COMMISSIONER: All right. How many - how many - - -

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MS CREWS: - - - (indistinct) the first time (indistinct).

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THE COMMISSIONER: How many casuals who did not have a fixed term or full-time contract with the university were given access to the vote?

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MS CREWS: Five hundred and 56.

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THE COMMISSIONER: Presumably you are aware that if the casual employee does not work during the access period they're not entitled to vote. You're aware of that?

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MS CREWS: No, I was not aware of that.

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THE COMMISSIONER: That's a decision in Kmart. I'm happy to give you the reference. So what that means in this case is that there were 151 employees who voted but - sorry, 151 casual employees were given an opportunity to vote who weren't entitled to vote. You understand what I'm saying?

PN265

MS CREWS: Yes.

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THE COMMISSIONER: So your agreement was there were 1065 people voted. Is that correct?

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MS CREWS: Yes. I will pull up the exact numbers.

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THE COMMISSIONER: I got this from the F17, so hopefully they're the same as the ones - - -

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MS CREWS: They're the correct number, yes.

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THE COMMISSIONER: Just make sure because I note that the number of casuals you said on the F17 was 556 but then you told me it was 644 in an email. Anyway - - -

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MS CREWS: So the - - -

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THE COMMISSIONER: So 1065 people was the total - - -

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MS CREWS: So 1065.

PN274

THE COMMISSIONER: - - - number of vote. And the 644 out of those persons approved the ballot?

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MS CREWS: Correct.

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THE COMMISSIONER: Fifty per cent plus one is 533 votes?

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MS CREWS: Correct.

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THE COMMISSIONER: So there's 131 votes in excess of what was required to achieve a majority.

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MS CREWS: Okay.

PN280

THE COMMISSIONER: I'm asking you. If you don't agree, tell me. So 644 people have voted; 533 is 50 per cent plus one. So when you subtract the two I got 131 but there's - you had 131 ballots in excess. But the problem is that there are 151 employees who weren't entitled to vote, who voted, and if they all voted yes then your agreement doesn't have a valid majority. Do you understand what I mean?

PN281

MS CREWS: I understand what you mean, Commissioner. The university would like to seek a 24-hour adjournment so that we can confirm our numbers and respond to you with those numbers to double-check it all.

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THE COMMISSIONER: Are you saying that the numbers that you've given me are wrong?

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MS CREWS: So I'm not saying that they're wrong but we would like to confirm them because this is a significant issue for us to consider.

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THE COMMISSIONER: You can do that. You'll also have a look at the decision in Kmart. I'll get my associate to send you a link so that you understand what the issue is. But it appears on the face of it that - sorry, did you - how was the vote conducted?

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MS CREWS: Online.

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THE COMMISSIONER: Electronic - - -

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MS CREWS: Through electronically.

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THE COMMISSIONER: Electronically?

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MS CREWS: Yes.

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THE COMMISSIONER: Is your ballot agent able to identify how individuals voted?

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MS CREWS: I can confirm with them and put that in our response as well. If we are able to confirm and then let you know which casualties - like, the numbers of casualties, would that affect the position?

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THE COMMISSIONER: I would need to know the names of the casualties who were not entitled to vote and then you'd need to send me the entire ballot in a spreadsheet with those persons identified, so that I can work out, if they were removed what the impact on that would be.

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MS CREWS: Okay.

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THE COMMISSIONER: All right.

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MS CREWS: We can see if we can retrieve that from the election company.

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THE COMMISSIONER: Sure. Obviously if you can't retrieve it then I suspect - well, you'll have two choices. You can either withdraw the application and do the ballot again, or alternatively you can ask me to write a decision on it.

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MS CREWS: Okay.

PN298

THE COMMISSIONER: The next issue is - so assuming you're able to climb over that hurdle, Mr McAlpine, the submissions of the NTEIU as to genuine agreement are at a pretty high level, to put it politely. And I haven't been able to actually understand why it is that you say the NTEIU says that there's no genuine agreement.

PN299

MR McALPINE: I assume that's addressed to me.

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THE COMMISSIONER: Yes. Yes.

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MR McALPINE: Yes. Look, I think that we rely on what we've said. I have to say our - - -

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THE COMMISSIONER: You haven't said much. Do you want me to tell you what you've said? Basically what you've said is we say that the agreement hasn't been genuinely agreed - - -

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MR McALPINE: Yes.

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THE COMMISSIONER: - - - and we oppose its ratification for that basis, but you don't actually tell me why.

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MR McALPINE: Well, the basis on which we say that is that we think that the number and type and scope of undertaking that are required for it to pass the BOOT test means that the agreement will be significantly changed. So we're really relying - - -

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THE COMMISSIONER: Is that the only basis that you say that it hasn't been genuinely agreed?

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MR McALPINE: I suppose as sort of a direct adjunct to that, that those matters, in terms of the final agreement, were not properly explained to the employees. I mean, our primary consideration - - -

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THE COMMISSIONER: Which matters haven't been explained? The matters contained in the undertakings?

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MR McALPINE: Yes, that's right.

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THE COMMISSIONER: How could they be explained to the employees when the company didn't know that it had to give it?

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MR McALPINE: No, you're right, Commissioner. It really boils down to the question of whether the changes to the agreement are more than ephemeral or insignificant, and that - - -

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THE COMMISSIONER: How does that form part of the test as to whether or not the agreement was genuinely agreed? As in, if the agreement is genuinely agreed, when does that occur?

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MR McALPINE: I suppose we may not have framed our submissions as well as we should, I accept that.

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THE COMMISSIONER: Yes, but isn't - - -

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MR McALPINE: But what we really say - - -

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THE COMMISSIONER: But isn't the agreement genuinely agreed at the time it's made?

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MR McALPINE: It is if people weren't misled, yes.

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THE COMMISSIONER: That's right, yes. But how can someone be misled about an undertaking which is not yet into existence?

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MR McALPINE: Well, they're being misled about the effect of the agreement.

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THE COMMISSIONER: Where were they and in what areas were they misled about the effect of the agreement?

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MR McALPINE: Well, they were misled in about the effect of the agreement - sorry. I suppose you're - I was going to say I suppose you're correct in that the issue is not so much genuine agreement. The question is whether the changes to the agreement are sufficiently significant that you should not accept the undertakings that are necessary. That is a fairer characterisation of our position, rather than genuine agreement. And - - -

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THE COMMISSIONER: Does that mean, then, in terms of the NTEIU's opposition with respect to genuine agreement, I can ignore that and what you want to draw my attention to is whether or not I'm unable to accept the undertakings because they represent a substantial change to the agreement?

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MR McALPINE: Yes, that's right. That is right. That is fair.

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THE COMMISSIONER: Is it fair to characterise all of the undertakings have been made such as to improve effectively rates of pay to ensure that the agreement meets the BOOT?

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MR McALPINE: Well, and we've suggested other undertakings that should be - -

-

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THE COMMISSIONER: Yes, I'm not worried about the ones that you want at this point. Right. But of the undertakings that have presently been given, is it a fair characterisation that all of those matters involve the improvement of penalties and/or loadings or rates of pay?

PN327

MR McALPINE: Yes, yes, that's right.

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THE COMMISSIONER: In terms of - as in I accept your point as to the facilities management undertaking. Just bear with me. Ms Crews, has the university provided me with a final undertaking yet or not? Ms Crews, are you there?

PN329

MS CREWS: Sorry, Commissioner.

PN330

THE COMMISSIONER: Hello.

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MS CREWS: We are in the - can you hear me, Commissioner?

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THE COMMISSIONER: Yes.

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MS CREWS: Yes. We're in the process of finalising an updated undertaking. I just wanted to clarify that they weren't facilities management workers, Territory FM is a radio station.

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THE COMMISSIONER: Sorry. I apologise for that. Yes, I do understand what you meant. Can I make a suggestion that the draft undertaking that you provided my chambers could be improved? Just let me find it. Give me a second. I think what you're trying to say is that by the provisions of clause X - I don't remember which number clause it is - Territory FM employees will be subject to the span of ordinary hours applicable under the Higher Education Industry General Staff Award. And insofar as they work beyond those hours they will be entitled to the appropriate penalties and/or loadings.

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MS CREWS: Thank you.

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THE COMMISSIONER: Would that satisfy you on that topic, Mr McAlpine?

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MR McALPINE: I think it's Mr Barlow's issue but primarily that - - -

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THE COMMISSIONER: Sorry. Okay. Mr Barlow, will that satisfy you?

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MR BARLOW: Yes, that will. Thank you, Commissioner.

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THE COMMISSIONER: Have you got those words, Ms Crews?

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MS CREWS: Yes.

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THE COMMISSIONER: Just that, you know, to ensure that the overall payment will be equal, you know, that's an issue. So it's a bit vague, so I think really what you're saying is that the ordinary span of hours - sorry, the span of hours will be that contained in the Higher Education Industry Award, and consequently if they work outside that span they will be entitled to, you know, penalties and/or loadings as applicable under the agreement. Was there any other issues that you wanted to raise, Mr McAlpine?

PN343

MR McALPINE: There is one which is just going back to the question of the casual numbers. In our opinion it would be useful if it would assist the Commission and give us some comfort if we actually had a declaration about those casual numbers.

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THE COMMISSIONER: I've already got it. I've already got a declaration. It's the F17 and it's wrong.

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MR McALPINE: Yes, that's what I'm saying. I'm suggesting that rather than us just having another conference and hearing - - -

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THE COMMISSIONER: I'm not having - I don't intend having another conference at this stage.

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MR McALPINE: Okay.

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THE COMMISSIONER: Ms Crews has told me what the numbers are.

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MR McALPINE: Yes.

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THE COMMISSIONER: I have no reason to understand that those numbers aren't correct.

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MR McALPINE: Okay.

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THE COMMISSIONER: And based on those numbers I can't see how in the absence of me being able to identify how each and every one of those 151 employees who were not entitled to vote, voted, I can't see how I can approve the agreement.

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MR McALPINE: Sorry, I was just going to say if the university comes up with another set of figures it would seem to me that that needs to be in the form of a declaration, that's all, rather than - - -

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THE COMMISSIONER: I suspect if that happens I'll be holding a hearing and people will be in the witness box.

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MR McALPINE: Okay.

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THE COMMISSIONER: As in I would be amazed if I was told information that was not correct in a conference like this.

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MR McALPINE: Thank you. The only other - - -

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THE COMMISSIONER: We're on transcript, as in despite the fact that we're all on the telephone this is equivalent to having a hearing in the Commission.

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MR McALPINE: Yes, thank you. Thank you. The only other question which I haven't had the opportunity to consider, which I might get some instructions from my elected masters, is the question of whether or not it's appropriate, given employees who were led to believe that it was a secret ballot that their individual votes are actually going to be in some form or other in evidence, even if it's only to the Commission.

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THE COMMISSIONER: We don't know if that information has been retained at this point.

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MR McALPINE: Yes.

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THE COMMISSIONER: But, yes, that's a fair point that you can make.

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MR McALPINE: Yes. Okay.

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THE COMMISSIONER: As in - - -

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MR McALPINE: I - yes.

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THE COMMISSIONER: Your F18, Mr McAlpine, does that support or oppose the approval of the agreement?

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MR McALPINE: We're opposed to the approval of the agreement.

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THE COMMISSIONER: Sure. Okay. No worries. All right. Anything from you, Mr Pumper?

PN369

MR PUMPER: No, no, Commissioner. I'd just be reiterating some of the points that my colleague has made, so I'll leave it at that.

PN370

THE COMMISSIONER: Sure. Okay. What I can say is in relation to the BOOT issues, obviously that's a matter that I can make an assessment on. I've got what people have said about the BOOT issue. At the end of the day it's for me, with the assistance of the agreements team, to determine whether or not the agreement meets the BOOT and I'll do that. Mr Barlow, is there anything else that the CPSU wanted me to consider?

PN371

MR BARLOW: No, that is all. Thank you, Commissioner.

PN372

THE COMMISSIONER: Ms Crews, you're going to come back to me by close of business tomorrow and tell me - well, my associate will send you the decision in Kmart and you're going to come back to me and presumably you're either going to wave the white flag and accept that the agreement can't be approved; or, alternatively, argue why I can bearing in mind the decision in Kmart. Is that right?

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MS CREWS: Yes. Correct.

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THE COMMISSIONER: Thank you. All right. Well, I'll receive your written submission by close of business tomorrow and if there's a need for me to reconvene it ought to be I'll do that I suspect on Friday at about 10 o'clock. Thanks, parties. I'll close the conference.

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MR McALPINE: Thank you.

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MS CREWS: Thank you.

ADJOURNED INDEFINITELY

[1.20 PM]