



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT MILLHOUSE

AG2023/3969

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

**Application by West Cranes & Access Hire Pty Ltd
(AG2023/3969)**

Melbourne

10.00 AM, THURSDAY, 14 DECEMBER 2023

PN1

THE DEPUTY PRESIDENT: Thank you. Good morning, everyone. Mr Melhem, you appear for the applicant company this morning.

PN2

MR C MELHEM: That's correct, Deputy President. Along with me is Mr West.

PN3

THE DEPUTY PRESIDENT: Thank you. You seek permission to appear as paid agent today, Mr Melhem?

PN4

MR MELHEM: I do, Deputy President.

PN5

THE DEPUTY PRESIDENT: Thank you. Mr Miller, you appear for the AWU.

PN6

MR S MILLER: That's correct.

PN7

THE DEPUTY PRESIDENT: Thank you. And Ms Barnes-Whelan, you appear for the intervenor, the CFMEU, today?

PN8

MS E BARNES-WHELAN: I do. Thank you.

PN9

THE DEPUTY PRESIDENT: Thank you, everyone. Thank you for your attendance in person this morning. Ms Barnes-Whelan, do you have any objection to the Commission granting permission to Mr Melhem to represent his client today? I do consider that there is a sufficient basis to grant permission having regard to his involvement in the application to date.

PN10

MS BARNES-WHELAN: No objection from the CFMEU.

PN11

THE DEPUTY PRESIDENT: Thank you. Mr Miller, I assume that you don't wish to raise any objection to the grant of permission?

PN12

MR MILLER: No, I don't.

PN13

THE DEPUTY PRESIDENT: All right. Permission is granted. Thank you, Mr Melhem.

PN14

MR MELHEM: Thank you, Deputy President. The application before you for the certification of the agreements by the company Grampian Grain Hire trading

as West Crane, and from my opening we understand there's an issue with that, which I will come to address later on. In fact I am going to be brief. I don't intend to go for long.

PN15

THE DEPUTY PRESIDENT: All right.

PN16

MR MELHEM: I will just say that the company will rely on the submission which was filed on 27 November as our full submission in relation to this matter and the matters raised by you and also by the CFMEU. We believe we have filed a comprehensive response to these questions. Unless, Deputy President, you wish me to address a particular point I'm happy to do so, and as foreshadowed by the CFMEU of their intention to cross-examine Mr West about his input in our witness statement as part of our submissions, which we have no objection to that.

PN17

So I'm really guided by you how we proceed, whether we proceed with Mr West's statement and cross-examination by the CFMEU and hear the submissions from the various parties, and obviously with your indulgence have the right of reply towards the end if I need to address any specific points raised by the CFMEU in particular which have not been covered in our submissions. So I might leave my comments at that at this point in time.

PN18

THE DEPUTY PRESIDENT: All right. Very helpful, thank you, Mr Melhem. Mr Miller, is there anything that you would like to raise at the outset in terms of the process for proceeding today?

PN19

MR MILLER: No, not in particular, Deputy President. We envisage making submissions in relation to the application in general. We are comfortable having the evidence of Mr West tendered and the process of examination and cross-examination, and then submissions at the end, if that pleases.

PN20

THE DEPUTY PRESIDENT: Thank you. Ms Barnes-Whelan?

PN21

MS BARNES-WHELAN: Thank you. Just a couple of matters I would like to raise from the outset. The first (indistinct), and I don't think all that much turns on this, but I thought I'd bring your attention to it. The CFMEU filed two lots of submissions in this matter. They're filed in different names. Deputy President, you might be aware that the union has had a change of name as of 1 December this year. So we're now obviously the Construction Forestry and Maritime Employees Union as of 1 December.

PN22

I have had an exchange of correspondence with the other side regarding the two witness statements I have put on in this matter.

PN23

THE DEPUTY PRESIDENT: Yes.

PN24

MS BARNES-WHELAN: It's my understanding that there is no intention to cross-examine me on those statements. So, Deputy President, I am not sure that now is the appropriate juncture if you would like me to tender those statements.

PN25

THE DEPUTY PRESIDENT: Mr Melhem, are you able to confirm that position. It's correct you don't seek to cross-examine Ms Barnes-Whelan about the statements that she has tendered or seeks to tender?

PN26

MR MELHEM: That is correct, Deputy President, we have no intention of examining - - -

PN27

THE DEPUTY PRESIDENT: Thank you. That also reflects your position, Mr Miller?

PN28

MR MILLER: Yes, it does, Deputy President.

PN29

THE DEPUTY PRESIDENT: All right. Thank you. I have two witness statements before me from you, Ms Barnes-Whelan. The first you might remind me of the date.

PN30

MS BARNES-WHELAN: The first statement is dated 16 November 2023.

PN31

THE DEPUTY PRESIDENT: I will mark that as exhibit 1.

EXHIBIT #1 WITNESS STATEMENT OF EMMA BARNES-WHELAN DATED 16/11/2023

EXHIBIT #2 FURTHER WITNESS STATEMENT OF EMMA BARNES-WHELAN DATED 08/12/2023

PN32

Any other matters, Ms Barnes-Whelan?

PN33

MS BARNES-WHELAN: No. Thank you, Deputy President.

PN34

THE DEPUTY PRESIDENT: I think that the most appropriate course may be then for us to call Mr West to give his evidence. Mr West, can I ask you to please take a seat in the witness box. That's right. Can you indicate whether you would like to take an affirmation or an oath on the Bible today?

PN35

MR WEST: The hand up, not the Bible.

PN36

THE DEPUTY PRESIDENT: Oath on the Bible? Thank you.

PN37

THE ASSOCIATE: Was that an affirmation?

PN38

MR WEST: Yes, please.

PN39

THE ASSOCIATE: Can you please state your full name and your address.

PN40

MR WEST: Gary Ross West, (address supplied)

<GARY ROSS WEST, AFFIRMED

[10.09 AM]

EXAMINATION-IN-CHIEF BY MR MELHEM

[10.09 AM]

PN41

MR MELHEM: Thank you, Deputy President. Mr West, can you again for the record state your name and occupation with the company?---Yes, I'm the general manager of West Cranes & Access Hire or Grampian's Crane Hire, whatever you want to put it down as.

PN42

I beg your pardon. Deputy President, should I have that tendered, or we take it as read, tender the statement. I forgot to do - - -

PN43

THE DEPUTY PRESIDENT: No, that's perfectly fine, Mr Melhem.

PN44

MR MELHEM: It's been a while since I appeared before this Commission.

PN45

THE DEPUTY PRESIDENT: You seek to tender the witness statement?

PN46

MR MELHEM: Yes. I tender the statement by Mr West, which was sent to the Commission and the other parties, dated the 24th of the 11th 2023.

PN47

THE DEPUTY PRESIDENT: Any objection, Ms Barnes-Whelan?

PN48

MS BARNES-WHELAN: No objection, thank you.

*** GARY ROSS WEST

XN MR MELHEM

PN49

THE DEPUTY PRESIDENT: I assume no objection, Mr Miller?

PN50

MR MILLER: No objection.

**EXHIBIT #3 WITNESS STATEMENT OF GARY WEST DATED
24/11/2023**

PN51

MR MELHEM: Thank you, Deputy President. It's all coming back to me. It's been a while. Mr West, I am going to be brief, I am going to ask you a number of quick questions. If I take you to - that is your statement?---Yes, it is.

PN52

And it's true and factual?---True and correct, yes.

PN53

And signed by you?---And signed by me, yes.

PN54

In relation to point 1 in your statement where you state:

PN55

The employees who voted on the proposed agreements were employed by the company as of the time the NERR - which is the notice of employee representational rights - was provided in July 2023.

PN56

Can you confirm the employees were the same employees employed back in July 2023 still employed by the company today?---Yes, they are, at that project, yes.

PN57

And are the same employees who voted on the proposed agreement?---Yes, they are.

PN58

And there's no other employees of the company - - -?---No.

PN59

- - - working on wind farm project?---No.

PN60

Or likely to be covered by the agreement?---(Indistinct), that's right.

PN61

In relation to point 2 of your statement, which you state that you weren't present and management was not present when the vote on the agreement took place; is that correct?---That's correct, I wasn't there, no.

*** GARY ROSS WEST

XN MR MELHEM

PN62

The third point which I want just briefly as well in relation to the work currently performed by the employees on that project - Deputy President, referring to the Golden Plains Wind Farm Project, which is the company currently engaged to deliver work as a wind farm project. Hence the proposed agreement is to cover workers on that site. So when I refer to that particular project that's the only project the company is engaged on wind farm. So the nature of the work you say in your statement that employees perform rigging work, crane work, formwork, steel fixing, general labouring, and when they were employed they were classified as CW5, which is under the Building and Construction On-site General Award. Why were they classified under the CW5 classification under the Building and Construction Award?---Why? Well, it's a higher award. That's mainly what - most of the time they're driving the cranes, and so it's under that award and the Crane Crew Award. Because it's a higher award we pay that fee, pay that wage.

PN63

But did they perform other work other than crane?---They do perform other work, but it's like helping the steel fixes, sort steel and things like that. But, you know, the higher award is when they're driving their cranes. That's why we pay them a higher award.

PN64

You're referring to the higher rates of pay - - -?---Yes.

PN65

- - - of \$65 an hour plus other allowance?---Yes, every hour they're there.

PN66

But you've classified them as construction worker 5 when engaged on that project, which is basically the Building On-site Construction Award - - -?---Yes.

PN67

- - - because of the general nature of the work you're performing?---Performing.

PN68

Can you describe, are they experienced construction workers, are they multi skilled, what do you expect - what is the expectation of a small company like yourself? Do you expect someone to do one particular task or multiple tasks?---Well, being a fairly small company we try and have people to be multi skilled a bit, because it's just, you know, small company and few employees. So we're multi skilled, and when they are it was only the higher award or that multi skilled - you know, yes.

PN69

So basically you could have - yes, so that's why you made the decision because you wanted to be multi skilled to do a variety of tasks, including crane driving?---Including crane driving.

*** GARY ROSS WEST

XN MR MELHEM

PN70

But then when you refer to the actual rate of pay it's not the mobile crane rates of pay, it is the industry common rate through enterprise agreements for a similar classification of a crane crew, which is the highest rate in comparison for example with another classification within the agreement. So you've decided to pay the highest rate?---Yes.

PN71

But expecting people to work and be flexible and do other jobs which contain with the construction worker definition?---Yes, when we're quiet.

PN72

MS BARNES-WHELAN: Apologies, sorry. I suggest making comments - he's getting very close to leading the witness. So we would just like to note that.

PN73

THE DEPUTY PRESIDENT: Yes, thank you. Mr Melhem, I have given you a little bit of leeway, but when you're putting your questions to the witness it's really important that you're not at the same time inviting the answer that you're seeking. So perhaps you could just put them in a little bit more broad terms so that we can get the evidence from Mr West.

PN74

MR MELHEM: Thank you, Deputy President, I will do that.

PN75

THE DEPUTY PRESIDENT: Thank you.

PN76

MR MELHEM: Mr West, can you sort of describe why you're paying the employees - you decided to pay the market rate of \$65 an hour. Why are you paying that rate and what's your expectation in return?---Well, that's the rate for when they're driving the crane, which is most of the time. That's the crane crew rate, so we pay that higher award.

PN77

But is there expectation for them to perform other work as well within the construction worker division?---I don't understand what you mean by that. What do you mean other work? Well, they just do the other work under that same rate, under the crane crew rate.

PN78

Okay. So they're still fixing - the labouring - - -?---Yes, we still pay them the crane crew rate right through.

PN79

Now, you mention in your point 4 that the company is currently looking to tender for further work, and on that particular project with stage 2 my understanding?---Yes.

*** GARY ROSS WEST

XN MR MELHEM

PN80

So is that something - what are you looking at there, a lot of work or what sort of -
- -?---Probably very - probably very similar to what we're doing, and whatever
else comes up of course that we can tender for, but mainly what we're doing now,
and there's avenues for, you know, water trucks and things like that, and I
understand we'll get the opportunity to tender for that later.

PN81

And that sort of could provide you with some security - -?---Yes.

PN82

- - - and security for the employees to remain employed?---Yes.

PN83

One last question. So the employees employed on the current project were they
specifically employed on the wind farms and they don't work anywhere
else?---That's right, they've simply been employed for wind farms, and that's all
they - that's all they've been working on.

PN84

And you have no intention, or have you any intention to engage the other four
employees currently employed by the company on the wind farm
project?---No. No.

PN85

Deputy President, I might leave my questions at that and may be come back later
on for cross-examination. Thank you.

PN86

THE DEPUTY PRESIDENT: All right. Mr Miller, do you have any questions
for the witness?

PN87

MR MILLER: No questions, thank you.

PN88

THE DEPUTY PRESIDENT: Thank you. Ms Barnes-Whelan, please proceed.

PN89

MS BARNES-WHELAN: Thank you. Before I proceed with my questions I was
hoping to hand up four documents to Mr West. These documents should already
be before the Commission. I will run through what those documents are.

PN90

THE DEPUTY PRESIDENT: Thank you.

PN91

MS BARNES-WHELAN: Firstly I have the notice of employee representation
rights. According to the file that I accessed from the Commission the date of this
notice of employee representational rights is 31 July 2023.

*** GARY ROSS WEST

XN MR MELHEM

PN92

THE DEPUTY PRESIDENT: Yes.

PN93

MS BARNES-WHELAN: So I will be handing up that to Mr West. I will also be handing up to Mr West my further witness statement. That's mainly because of an earlier F17B filed in support of another enterprise agreement, which the company filed about a month before this one. I will also be handing Mr West the F17B for this agreement. And the one final document I was hoping that I will be able to turn him to is a document that purports to explain the terms of the agreement. The title of that document, I believe the Commission has that, and there is an error in the title, but 'Updated notice to all West Cranes & Access Hire employees covered by the proposed EBA.' I do have all those documents, Deputy President, before I was to hand them to Mr West.

PN94

THE DEPUTY PRESIDENT: I am just clarifying that I have before me the fourth document to which you refer. While I'm doing that, Mr Melhem, do you have a copy of those materials before you today? They form part of all of the material that's been filed in this application.

PN95

MR MELHEM: Yes, I do, Deputy President.

PN96

THE DEPUTY PRESIDENT: Mr Miller, you have all those documents?

PN97

MR MILLER: I believe so. Probably not all together, so I might - in fact I think the information in the explanatory document which Ms Barnes-Whelan referred as the final document, I may not have that one.

PN98

THE DEPUTY PRESIDENT: And that document, the title of that page, Ms Barnes-Whelan, 'Updated notice to all West Crane & Access Hire employees covered by the proposed EBA'?

PN99

MS BARNES-WHELAN: That's it.

PN100

THE DEPUTY PRESIDENT: All right.

PN101

MS BARNES-WHELAN: You have that one. I also have another hard copy with me if you require that.

*** GARY ROSS WEST

XN MR MELHEM

PN102

THE DEPUTY PRESIDENT: It might be useful if you can use that hard copy just to demonstrate to Mr Miller if necessary which document it is in his bundle to which you're referring.

PN103

MS BARNES-WHELAN: If I may hand those documents up to Mr West?

PN104

THE DEPUTY PRESIDENT: Yes, thank you very much.

CROSS-EXAMINATION BY MS BARNES-WHELAN [10.21 AM]

PN105

MS BARNES-WHELAN: Mr West, I will just begin by confirming that you have a copy of your witness statement on your today?---Sorry, what do you mean?

PN106

I'm just confirming that you have that copy of the witness statement that Mr Melhem took you through?---Yes.

PN107

So I will begin by asking you this question, Mr West. Has your workforce been covered by a certified enterprise agreement previously?---Not with a union. Is that what you mean?

PN108

Full stop?---Full stop. Yes, well not on a wind farm. I don't fully understand what you mean by that.

PN109

Okay. Have your employees traditionally been covered by a modern award rather than an enterprise agreement?---The ones back home have, not the ones on the site, because we are doing (indistinct).

PN110

I will ask you to firstly turn to that explanatory document, the beginning of it is the 'Updated notice to all West Cranes & Access Hire employees.' Do you have that before you?---Which one?

PN111

It's titled 'Updated notice to all West Cranes & Access Hire employees'?---Yes. That one there, yes.

PN112

So I will just get you - you've got the first page open there. So on that first page where it refers to a revised EBA and the previous agreement, you're referring to the agreement that was filed on 20 September this year by the name of the West Cranes & Access Hire Pty Ltd and the AWU Agreement, aren't you, Mr West?---So what do you mean by that, on 23 September?

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN113

In that document, the updated notice - - -?---Yes.

PN114

- - - you will see a reference to:

PN115

West Cranes & Access Hire has now completed the negotiation with your AWU representative for a revised EBA.

PN116

?---Yes.

PN117

And then it talks about the main changes to the previous agreement. Now, that previous agreement was the West Cranes & Access Hire Pty Ltd and the AWU Agreement of 2023, wasn't it?---Yes.

PN118

So just to confirm that we're on the same page that's the agreement that was filed I think on or around 20 September this year?---Yes, I think it was September, yes.

PN119

Just to refresh your memory it was the agreement that was discontinued prior to its approval by the Fair Work Commission. So I will refer you now to what's known as the F17B for this part application. I think I provided you with two F17Bs. I will let you take your time to identify which one I'm referring to?---F17B, yes.

PN120

There's two there covering different agreements. So do you just want to make sure you're on the right one.

PN121

THE DEPUTY PRESIDENT: Is this the one dated 24 October 2023?

PN122

MS BARNES-WHELAN: This one is the one - bear with me, Deputy President, there are a few documents at play here. This will be the one dated - sorry, 20 September 2023.

PN123

MR MELHEM: Deputy President, I'm not sure the relevance of referring to an F17 which is not subject to this proceeding, which I understand the unions are referring to an agreement was previously lodged and withdrawn.

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN124

THE DEPUTY PRESIDENT: Yes. At the moment, Mr Melhem, I don't know what the question will be in relation to that issue. So let's give Ms Barnes-Whelan

an opportunity to advance the proposition and then we can determine its relevance at that juncture.

PN125

MR MELHEM: Thank you.

PN126

THE DEPUTY PRESIDENT: Thank you.

PN127

MS BARNES-WHELAN: Thank you. So now that you have that document before you, Mr West - - -?---It's that one there I suppose, yes.

PN128

Yes. So that agreement was voted on - would you agree with me that that agreement was voted on by the same group of employees that voted on this agreement?---Yes.

PN129

Now, again turning to that F17B for that prior agreement you acknowledged in that F17B that the relevant underpinning award for these workers was the Mobile Crane Hiring Award, did you not?---I'm sorry - - -

PN130

To assist you here, Mr West, this is actually an annexure to my further witness statement. So if you pick up the witness statement marked 'Further witness statement of Emma Barnes-Whelan', I think it's in front of you there, there is an attachment to that witness statement, and that is the F17B for that previous agreement?---Yes.

PN131

Now, I ask you to turn to page 4 of that F17B?---Yes.

PN132

So again I will put the question to you. In that F17B you acknowledge that the relevant underpinning award for this workforce was the Mobile Crane Hiring Award. Do you agree?---Well, I don't fully understand what you mean there, but I - - -

PN133

In that document do you acknowledge that the underpinning award for this workforce - - -?---I don't know what you mean by that.

PN134

Okay. If I can ask you to look again at page 4 of the F17B, question 8 specifically?---Section 8?

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN135

Question 8, sorry, specifically. Now, there should be a question there about what award would cover these workers if they weren't covered by the proposed

agreement. I believe you identify that award as the Mobile Crane Hiring Award?---Mobile Crane Award 2020, is that what you're talking about?

PN136

Yes?---Well, we do, but on that particular site - - -

PN137

I'm just asking for a yes or no answer, whether that's what you said in that declaration?---I still don't understand what you mean. Well, yes - well, we started that award. I don't fully understand what you mean.

PN138

All I'm asking is in response to question 8 of that document - - -?---Yes.

PN139

- - - did you write Mobile Crane Hiring Award 2020?---Yes. Yes, I suppose it is, it's (indistinct).

PN140

So that agreement for which that declaration was filed in support of, that agreement was voted on, on 14 September this year. Do you agree with that, or on around that date?---Yes, around that date, with the higher - with the higher approval - award. Not the old award, but the new award.

PN141

All I'm asking is whether that agreement was voted on, on or around 14 September?---Yes, for the new award.

PN142

And so on or around that time you acknowledge that your workers were performing work that would otherwise be covered by the Mobile Crane Hiring Award. Do you agree with that?---I don't understand what you mean by that. We were paying that higher award for the start of that job.

PN143

Yes. So in that document, and again this is a document filed in support of that application for approval, you've said in that that the work that those workers performed were covered by the Mobile Crane Hiring Award. Is that incorrect?---No.

PN144

So then to repeat my question; so around that time that that agreement was voted on your workers were performing work that would have been covered by the Mobile Crane Hiring Award. That's what you've said in your document, Mr West?---I still don't understand what you mean. We weren't paying that Mobile Crane Award, which is only the low award, we weren't paying that from the start of the job.

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN145

All I'm asking is whether that document which was filed in support of the old agreement identifies the underpinning award as the Mobile Crane Hiring Award?---I still don't know what you mean. Well, I still don't understand what you mean by that, because we weren't paying that award. We weren't paying that award right from the word go.

PN146

I'm just asking what's in your document, Mr West.

PN147

MR MELHEM: Deputy President, that was a separate agreement. That agreement has been withdrawn and a new agreement has been negotiated. I don't see the difference that at the time the company have negotiated an agreement, and I see where Ms Barnes is going, and the Mobile Crane Award was applied, but since then by consent the parties withdrew the agreement and a new agreement has been negotiated, and I think that's what we should (indistinct).

PN148

THE DEPUTY PRESIDENT: All right. Ms Barnes-Whelan, I think you put the question in a couple of different ways to the witness. On the documentary material it's apparent that the Mobile Crane Hiring Award was nominated as the answer to the applicable modern award. I accept that's different to the F17 that's presently before the Commission in relation to this application. You might make some submissions about the import of that difference, because I'm not sure that you're going to get any further responses to that question from the witness in relation to why.

PN149

MS BARNES-WHELAN: I think that's right, Deputy President, and for the benefit of Mr Melhem the relevance of this line of questioning I think will become apparent and how it's relevant to the points in dispute in this application.

PN150

THE DEPUTY PRESIDENT: Yes.

PN151

MS BARNES-WHELAN: So I might just move on now to further questions on this point. Mr West, the duties of your workforce haven't changed since the time that agreement was filed, have they? You've got a crane crew, crane operator, rigger, doggers, would you agree with that?---Sorry, I didn't totally hear what you said there. Since the - - -

PN152

Have your four workers - - -?---Yes.

PN153

- - - that are covered by this agreement - now, you've acknowledged that they voted on the last agreement as well - are they performing crane operating duties, rigger and dogman duties?---Yes.

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN154

The nature of the work they perform hasn't dramatically changed since that last agreement was filed in the last month?---No, it hasn't changed.

PN155

You have addressed this - Mr Melhem touched on this point with you in his examination-in-chief, but you've said in your statement that you're looking to tender for further work around steel fixing, formwork, and other civil work generally. You agree with that?---(No audible reply)

PN156

But you haven't been successful in those endeavours at this stage, have you, Mr West?---Well, they haven't come out yet.

PN157

Okay. But the answer is this is an aspiration at this stage, isn't it?---Yes. We've been - we've indicated that we will be in line to do that, but we haven't - there's been nothing confirmed yet.

PN158

But you hope down the track - - -?---Yes.

PN159

- - - that your workforce can perform in the future steel fixing and formwork - - - ?---Yes, and that's the wind farms, on the wind farm.

PN160

Okay. I will ask you to now, and I apologise for the jumping between documents, but I ask you to now turn to the F17B. This is the one that was filed in support of this present application?---Which one, that one?

PN161

No, not that one, the other one?---Yes.

PN162

So I will ask you to turn to your response to question 21 of that document. I will give you a little bit of time. I believe in this section there's a discussion - there's a response on these questions indicating that a full explanation of the agreement's content was given to the workforce. Do you agree?---Yes.

PN163

And that a representative of the AWU and a representative of the company was present for that explanation?---Yes.

PN164

Were you the representative that was present at the meeting?---Yes, one of them, yes.

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN165

Would you agree with the fact that in terms of the explanation that was given about the terms of the agreement and their effect, the explanation was only given by reference to the Building and Construction General On-site Award?---No.

PN166

I'm just asking what your recollection was of what was - - -?---Just - it's a long time ago. The actual wording and what you said I can't remember that. Whatever was on the award.

PN167

Okay. Even without going into a granular level of detail as to what was said, would you agree that that explanation centred around the Building and Construction Award rather than the Mobile Crane Award?---Both. Yes, it was both. It was sort of - it was under that award, but that's - yes, it was both, what we can do on that site, the jobs we do on that site.

PN168

I think you may have already answered the question, Mr West, but you don't have any evidence in the way of notes, any minutes of what was explained about how the agreement differs from the Mobile Crane Hiring Award?---Well, no, not - we're only a small company, there was only four people there we were playing it to, so - and I was with another person, and Cesar.

PN169

Okay. But you don't have any notes - - -?---No.

PN170

- - - what was discussed?---I don't.

PN171

And again I think I already know the answer to this question, so forgive me for being repetitive, but based on what you've told me you couldn't explain for instance what was said in relation to the different types of employment under the Building Award as opposed to the Mobile Crane Award?---Not really, no.

PN172

You couldn't tell me how the inclement weather provision of the Mobile Crane Award differs from the Building and Construction Award?---The difference?

PN173

Yes?---No, not really.

PN174

You can't say anything - was there a discussion about notice of termination, the notice of termination entitlement under the Mobile Crane Hiring Award?---Yes.

PN175

There was?---Yes.

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN176

Okay. Can you tell me what that explanation was?---Just a notice of a termination? What do you mean?

PN177

How it differs - - -?---Well, whatever was in the award. I can't remember the exact figure. That's in October, I can't remember the exact times and frames and how long each day was and all that sort of stuff. I've got to refer - I've got to refer to the - I've got to get the award out all the time to remember it. There's that many rules on it.

PN178

It's quite lengthy?---Yes.

PN179

I understand. I won't labour this point too much, but I assume you couldn't tell me anything about public holidays, paid following termination and how that differs between the Building and Construction Award and the Mobile Crane Award?---The difference between them - they'd be similar I would think.

PN180

I put it to you they're not?---Aren't they?

PN181

You can't recall obviously?---No.

PN182

Okay. So I guess to wrap up that line of questioning you would agree with what I put to you now is that you can't remember what was said in that meeting?---Not the exact words, no. Just we went through the - went through the award. We had it in front of us and we just flicked through it and each driver, or each person that was there had an award in front of them to take home with them and study it.

PN183

So to the extent you can give assurance about how the agreement was explained to the Commission, the extent of that would be the agreement was explained by reference to the Mobile Crane Hiring Award. Is that as far as you can take it?

PN184

MR MELHEM: If I may be persistent, Deputy President, and I'm not sure whether it's going to help or not, but the explanations at the meeting were given by myself and the AWU representative, not by Mr West. I'm not sure whether that can help in clarifying that point, and the lack of knowledge of Mr West in relation to this matter. So I'm just making that point.

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN185

THE DEPUTY PRESIDENT: It might be a matter for you, Mr Melhem, as to whether you consider it necessary to give evidence on your own behalf in relation to what was discussed, but for these purposes I'm quite interested in the answer that Mr West was proposing to provide to the question that was just put. So if you wouldn't mind re-putting that question, Ms Barnes-Whelan.

PN186

MS BARNES-WHELAN: I will do my best. Thank you. Again, Mr West, based on what your recollections are of the explanations given in that meeting all you can tell the Commission is that there was an explanation of how the terms of the agreement differ from the Mobile Crane Award?---How it differs?

PN187

I can assist with reframing that. Would you agree that you can't go to the details of how the agreement differs from the Mobile Crane Award, but all you can say is that the Mobile Crane Award was explained?---Yes, it was explained.

PN188

THE DEPUTY PRESIDENT: Can I clarify, Mobile Crane Award is the award that your - - -

PN189

MS BARNES-WHELAN: Sorry, I'm using a shorthand version. The Mobile Crane Hiring Award.

PN190

THE DEPUTY PRESIDENT: No, sorry, that wasn't the purpose of my clarification. Your question as I understood it was that in short compass the agreement was explained by reference to the Mobile Crane Award. Is that an accurate framing of the question for the witness?

PN191

MS BARNES-WHELAN: The question essentially for the witness, and as you may have picked up on, Deputy President, is that we can't get a sense of how the agreement was explained by reference to what we say is the correct underpinning award, which is the Mobile Crane Hiring Award. My question for Mr West is essentially is the best assurance he can give the Commission is that there was an explanation.

PN192

THE DEPUTY PRESIDENT: About the Mobile Crane Award?

PN193

MS BARNES-WHELAN: About the Mobile Crane Award.

PN194

THE DEPUTY PRESIDENT: I see.

PN195

MS BARNES-WHELAN: But no more than that.

PN196

THE DEPUTY PRESIDENT: Thank you.

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN197

MS BARNES-WHELAN: I think Mr West has answered that question. I might move on from there for a moment, Mr West. Again I will get you to turn to the F17B for this present application. This isn't the one that - - -

PN198

THE DEPUTY PRESIDENT: I'm sorry to interject, Ms Barnes-Whelan, just before you leave that topic, Mr West gave some evidence a moment ago in response to a proposition by you that he can't remember what was said, and Mr West's answer was that, 'We just ran through the award.' When you say the award are you able to clarify what award it is that you mean?---Well, the one that was in front of us, the one that we were - the one that we were given by the union.

PN199

All right. And you've been speaking a little today about the higher award, higher as in greater; is that correct?---Well, the Crane Hire Award is - the Crane Crew Award is the higher award. Is that what you mean?

PN200

And when you're referring to the Crane Crew Award which award are you referring to?---I don't know. What was in our document, the CW5 Crane Crew Award.

PN201

All right. So you're referring to the award that has the CW5 classification in it, are you?---Yes.

PN202

All right. Ms Barnes-Whelan, any questions arising from those that I just put?

PN203

MS BARNES-WHELAN: No further questions on that.

PN204

THE DEPUTY PRESIDENT: Thank you.

PN205

MS BARNES-WHELAN: Again, Mr West, I will ask you to turn your attention to the F17B that was filed in support of this application. I think that's the one. I will ask you to turn to, I believe it's page 12 of that declaration?---Page 12?

PN206

Page 12, apologies, I'm just catching up myself. It's stated in this F17B that the last notice of employee representational rights was provided on 9 October 2023. Is that correct?---Yes, it would have been.

PN207

At paragraph 1 - I will get you to now turn to your statement. At paragraph 1 of that statement you said:

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN208

A notice of employee representational rights was also provided to this workforce in July 2023.

PN209

Is that correct?---I don't know what you mean by that.

PN210

I will just get you to turn to, sorry, paragraph 1 of your witness statement, Mr West?---(Indistinct), yes.

PN211

Yes. So in that would you agree you state that a previous - - -?---On July 31 or whatever it was, yes.

PN212

I will ask you now, in that bundle of documents I gave you there was a copy of the notice of employee representational rights, which was apparently handed out - - -?---Yes.

PN213

- - - or issued to the workforce on that time. Now, would you agree that that notice refers to the proposed agreement as the West Cranes Access Hire and the AWU Agreement 2023; you'd agree with that?---Yes.

PN214

That's not the title of the agreement before us today, is it?---I don't know what you mean by that.

PN215

The title of the agreement, Mr West, that's in front of the Commission today is - just bear with me - would you agree that the title is the West Cranes & Access Hire Pty Ltd and the Australian Workers' Union Wind Farm Agreement? That's the agreement we're talking about today, is it not?---(Indistinct reply)

PN216

But that's not the title of the agreement that's in that - - -?---What do you mean? Well, it's the same, isn't it?

PN217

Does it have 'wind farm' written in that?---In the first one? I don't know.

PN218

It should be plain in the face of - - -?---I can't remember - I can't remember those exact words.

PN219

You should be able to read the document, Mr West, and see if the agreement - - - ?---This document here?

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN220

- - - is described as being a wind farm agreement?---What's appendix A?

PN221

I'm sorry, what was that, Mr West?---(Indistinct) set out appendix A. What's appendix A?

PN222

That's not my question, with respect, I'm asking about the title of the agreement. Could you please read it out?---It says West Cranes & Access Hire and the Australian Workers' Union Agreement 23.

PN223

Excellent. Now, that agreement, the title of that agreement you just read out, was actually voted on by the workforce on 14 September this year, wasn't?---It was, yes. I don't remember the exact date.

PN224

I will refer to it as the prior agreement. But that prior agreement was voted up by your workforce before it was discontinued?---Before where, sorry?

PN225

Your workforce voted to approve that previous agreement?---Yes.

PN226

But before it was certified by the Commission it was withdrawn essentially?---Yes.

PN227

And then no other notice of employee representational rights was sent to the workforce until October, was it?---I don't know. I can't remember the dates, gosh. Early October.

PN228

You agree it wasn't - - -?---Within your award, with – you mean the upgraded award.

PN229

Would you agree it was on or around the 9 October?---Yes, probably. Probably was. Yes.

PN230

Okay. I think I might leave my questions there at this stage.

PN231

THE DEPUTY PRESIDENT: All right.

PN232

MS BARNES-WHELAN: Thank you, Mr West.

*** GARY ROSS WEST

XXN MS BARNES-WHELAN

PN233

THE DEPUTY PRESIDENT: Thank you. Mr Melhem, any re-examination for the witness?

PN234

MR MELHEM: Just a couple of points.

RE-EXAMINATION BY MR MELHEM

[10.48 AM]

PN235

MR MELHEM: Mr West, you were asked a question about the agreement which was lodged in the Commission and then withdrawn. And Ms Barnes referred to the changes from Mobile Crane to the Building Construction Award. Was it also the – but going back to the actual duties of the employees at the time, and you did say asked you about whether the task have changed, the employees at that time were still performing the same work in which you described earlier when I asked you the question, which is predominantly crane work - - -

PN236

MS BARNES-WHELAN: Sorry, if I may again, the witness is being with respect fed the answer. So I just want to note that.

PN237

MR MELHEM: Deputy President, I am just trying to find because the answer he gave earlier in relation to – there's a bit of confusions in some of the answers and I am trying to correct those, because Mr West is not an expert - - -

PN238

THE DEPUTY PRESIDENT: I understand that.

PN239

MR MELHEM: - - - in industrial relations. So that's what I am trying to clarify for you.

PN240

THE DEPUTY PRESIDENT: Yes. I think the way in which I am understanding the question at this stage, Ms Barnes-Whelan is providing Mr West some familiarisation of the answer that was given by him in response to your question in order to frame the question that's going to be put. So in those circumstances and given the nature of the way that the cross-examination has proceeded, I do think that there is some utility in refreshing the witness's memory to some extent about what he has said previously. So to the extent that the question is put in that way, I will allow it, but I acknowledge the concern that you have raised about feeding the answer to the witness and will be sure to keep an eye on that issue as we proceed.

PN241

MS BARNES-WHELAN: Okay.

PN242

THE DEPUTY PRESIDENT: Thank you.

*** GARY ROSS WEST

RXN MR MELHEM

PN243

MR MELHEM: Thank you, Deputy President. So the task you have described earlier in the earlier answer have not changed?---Not changed, no.

PN244

In the multi-tasks the employees haven't changed right through the whole project. In relation to the question in relation to the explanations of the award, and which award applied in the explanation notes which were given to the employees – and I am going to be careful here, Deputy President, I am guided by you, I am going to ask this question – the explanation was predominantly given, and I was referring earlier by myself on behalf of the company in the AWU, hence why Mr West's lack of attention to what actually went on, I was – these explanations were given by myself and the AWU were presenting to employees about the proposed agreements and the various documentations and the comparison between the various awards and the enterprise agreement. So can you confirm that this explanation was given by myself and the AWU?---Yes.

PN245

And when you referred earlier, and that's – it's just an earlier clarification, Deputy President in relation when you talk about the higher award rate, you didn't mean the actually Mobile Crane Award rate itself, because the award for a similar classification, that award is somewhere around \$27 an hour, but it's just the actual rate you are paying is \$65 an hour plus site allowance. You meant the industry market rate, not the award rate?---That's right.

PN246

I just want to clarify is that your understanding?---Yes, yes.

PN247

And in relation to the name of the agreements and the titled, do you accept that the reason that the agreements, they only – the content of – maybe I will paraphrase it. The concept of the agreements, remain the same as the previous agreement, except the application of state wide agreement versus windfarm. But the content otherwise as far as wages and conditions remain the same for the employees covered by the agreement. Would that be correct?---Yes.

PN248

Look, I have got nothing further, Deputy President.

PN249

THE DEPUTY PRESIDENT: Thank you, Mr Melhem. Mr Melhem, does that conclude the company's evidentiary case? That is, is Mr West the only witness that you're seeking to have give evidence today in the proceedings?

PN250

MR MELHEM: That's correct.

*** GARY ROSS WEST

RXN MR MELHEM

PN251

THE DEPUTY PRESIDENT: All right. Thank you very much. Mr West, thank you for your evidence. You're excused from the witness box and you can resume your seat at the Bar table. Thank you.

<THE WITNESS WITHDREW

[10.54 AM]

PN252

THE DEPUTY PRESIDENT: Mr Miller? Would you like to make your submissions and/or indicate to me whether notwithstanding the position that you earlier raised about not intending to give evidence whether there's been any change in your views about that?

PN253

MR MILLER: No, Deputy President, there isn't a change in that respect.

PN254

THE DEPUTY PRESIDENT: All right.

PN255

MR MILLER: I am more than happy to put my submissions down.

PN256

THE DEPUTY PRESIDENT: Thank you.

PN257

MR MILLER: Deputy President, consistent with statements on page 2 of the Form F18 declaration dated 30 October 2023, the AWU does support the agreement. The AWU considers that the agreement provides for terms and conditions of employment that are well in excess of the statutory minimums passing the better off and overall test and giving both the employer and future employee certainly concerning those terms and conditions. Secondly, the AWU's view is it ensures productivity by removing the prospect of protective industrial action prior to the nominal expiry date of the agreement.

PN258

In connection with the submissions and submissions in response, there are two specific issues that I will address, first of all, Deputy President, in relation to the issue of whether there has been genuine agreement to the enterprise agreement for the purposes of section 186 to sub-section (a) and section 188(1), from the commencement of negotiations, the AWU always intended to be a party to the agreement in that its members be covered by the agreement. The members shared that intention and their actions of both, the meetings that are referred to in Form 17(b) on the 13 October and also on 23 October were consistent with that intention.

*** GARY ROSS WEST

RXN MR MELHEM

PN259

In particular, the vote on the agreement that's referred to in paragraph 2 of Mr West's witness statement, to the extent that it was conducted by the AWU site delegate on 23 October 2023, and approved by those employees present, that reflected that intention. On the issue of the applicable award and the explanation

of its terms, the AWU notes that in clause 5.3 of the agreement, the terms of the Building and Construction Award are incorporated into the agreement.

PN260

I would also say considering Mr West's evidence today and I guess, the challenges in terms of characterising from his point of view, correctly, which award apply, but ultimately intention that the standard in terms of wages conditions were well in excess of any award minimum. We don't consider that consistent with section 188(2)(b) of the Act, that the members in attendance at the meeting on the 23 October, were disadvantaged by any failure by the applicant or any potential unintentional mischaracterisation of an award not to explain the terms and the effect of award minimums.

PN261

That said, we also note the offer by the applicant as expressed in clause 29 of its submissions that it provide undertakings in that regard such that those undertakings not prevent approval of the agreement.

PN262

My second point, Deputy President is in relation to better off over all tests for the purpose of section 193. And beyond the arguments concerning the applicable award for the purposes of coverage, we note that on the Commissions own better off overall test analysis, and also the intention of Mr West as expressed that the rates of paid for employees engaged under the Building Award are between 84.93 per cent and 98.73 per cent above the award and that the rates of pay for employees engaged under the Mobile Cranes Award are between 117.33 per cent and 127.97 per cent above that award.

PN263

Thank you, Deputy President.

PN264

THE DEPUTY PRESIDENT: Thank you, Mr Miller. Ms Barnes-Whelan. Thank you.

PN265

MS BARNES-WHELAN: Thank you, Deputy President. I primarily intend to rely on the written submissions that we filed in relation to this application, but I would like to take this opportunity to emphasize aspects of those submissions, particularly in light of the evidence that we have heard today from Mr West. Now, as we have just heard from Mr Miller of the AWU, he spoke about there being a big focus on you know, the work that was being performed in order to essentially ascertain the underpinning award.

PN266

That line of questioning wasn't just directed at that point. That line of questioning was directed at the question as to whether this agreement was sufficiently representative and whether the workforce had a sufficient interest in the agreement. But once we consider the breadth of the agreement and the classifications that it covers.

PN267

Now, this is a matter, we would say in our respectful submission is not a matter that could be remedied through the provision of undertakings or by trying to characterise it in some way as some minor technical or procedural error. Deputy President, as you will be aware, the one key decision is the leading authority on the issue of the requirement for aboding cohort to be sufficiently representative of the agreement's coverage. Now, we have extracted key parts of that decision in our submissions, but it's worthwhile I think emphasizing aspects of that decision. Particularly paragraph 155 of that decision where it states,

PN268

Where employees working in few occupational classifications consent to an agreement that covers numerous other occupations, or other occupations in an industry beyond their own, an explanation of the terms of the agreement and their effect may fall short of providing an adequate basis for the formation of genuine consent.

PN269

Now, this principle is also discussed in the decision and I believe indeed, it's cited in one key, in the decision in KCL Industries Pty Ltd, the citation being 2016 FWCFB 3048, where a Full Bench comprising of Vice President Hatcher as he was then, Deputy President Gostencnik and Commissioner Simpson found that employees in the context of the application in that matter could not have given informed consent in relation to occupations and industries in which they did not work and presumably had no experience.

PN270

Now, turning to the present application, here we have four employees, employees that are employed by Mobile Crane Hiring company, that is performing in our submission work covered by the Mobile Crane Hiring Award. Mr West has even acknowledged in his evidence and even in his evidence in chief that they are predominantly engaged as a Crane crew.

PN271

Now, the applicant has had the opportunity to present evidence that could foreseeably reflect a change in their duties. To show that they're doing work beyond that. But no such evidence has been forthcoming in the form of say, a position description, contract of employment or indeed a variation to their contract of employment.

PN272

THE DEPUTY PRESIDENT: But isn't the evidence at least that the work is going to be performed on site as opposed to a state-wide agreement covering the work traditionally performed by the company?

PN273

MS BARNES-WHELAN: And to that we would say there is an aspiration at this stage, that the company, the applicant will be successful in tendering for this further work. But we wouldn't put it, and we would respectfully submit it doesn't go higher than that at this stage. It's simply an aspiration. The workers haven't

received any concrete documentation, any change to their contracts reflecting that they will indeed be performing this other work.

PN274

THE DEPUTY PRESIDENT: But does the evidence go so far as to demonstrate in your view that the four employees are performing work on site, on a project?

PN275

MS BARNES-WHELAN: Well, a couple of points to note there, now there's been a lot of discussion regarding the project, the enterprise agreement, I think the way it's drafted goes to Wind Farm Projects more generally.

PN276

THE DEPUTY PRESIDENT: Yes.

PN277

MS BARNES-WHELAN: My understanding of the evidence that we have heard today is that the employees that are performing work there are predominantly employed or are employed to be a crane crew. Now, they may assist from time to time with, I think the words were 'picking up steel', that sort of thing, but these people are members of a crane crew employed and we can't forget this is a Mobile Crane Hiring company. That's plain even on the name of the company but also once you look at the company's website and you see what services they provide.

PN278

THE DEPUTY PRESIDENT: But doesn't the agreement itself demonstrate that their services are expanding?

PN279

MS BARNES-WHELAN: They can frame – what we would say is that they can frame the agreement to include any manner of things. But that doesn't mean that the workforce is performing that work. Currently and that the workforce that wrote it on the agreement has an interest. Because in the absence of concrete evidence to show that they will be performing that work, how can we say they do have an interest? I will get to some of these points further. How can we say that they do have an interest, for instance, in the (indistinct) of a carpenter? Which is – or a tradesperson.

PN280

These are all classifications which are incorporated and I will get to this a little further along in my submissions, but these are all classifications incorporated into that agreement. So even if you were to accept, and I suggest that we shouldn't but even if we were to accept that the company imminently will be moving into this deal fixing form work space, even if that evidence were to be accepted, the breadth of the classifications and the occupations contained in the Building and Construction Award alone, is so broad, that it still wouldn't be sufficiently representative.

PN281

So like we said, we have got a somewhat – and I say this respectfully, and I hope this comes to fruition, but we have got somewhat of an aspirational statement

regarding future work, but what we do know is that these workers are currently doing crane crew work so they're doggers, rigman, crane operators.

PN282

Now, I just briefly touched upon the broad range of classifications. This agreement is expressed to cover. So – and this is a point which I probably should refine from my written submissions because the agreement itself, looking at the building Construction Award classifications, the agreement itself I believe refers to CW1 through to CW6. What I didn't mention and what was omitted from my submissions is that in the agreement, it goes on to say if a classification is not listed in this table, you essentially incorporate the building Construction Award classifications.

PN283

So we're not just looking at what's in that table, we're also looking at schedule A more broadly of the Building and Construction Award.

PN284

So to illustrate again, the breadth of what that award covers, the CW3 classification which is generally referred to as sort of the Trades Classification, just CW3 covers over 60 job titles. The carpenters, bridge and walk carpenters, painters, brick layers, pipe layers, various plan operators. Operators of graders, excavators. It is – and that's just looking at one of the classifications in the Building and Construction Award.

PN285

THE DEPUTY PRESIDENT: So can we just work through that? There's a couple of questions that I have in relation to it. First, the proposition that you raised about the classifications in the agreement addressing CW1 to 6 and then incorporating the balance. Take me to where you say that that's made good.

PN286

MS BARNES-WHELAN: Yes. Just bear with me sorry, Deputy President. I would have had the page number, but I only picked up on this point - - -

PN287

THE DEPUTY PRESIDENT: 154. And it's a reference you say to where the employee's classification is silent in this clause, the classification structure in the Building Award classification will apply.

PN288

MS BARNES-WHELAN: Yes.

PN289

THE DEPUTY PRESIDENT: So you say that despite the agreement referencing only CW1 to CW6, that provision indicates that it's not confined to simply those classifications alone from the Building Award.

PN290

MS BARNES-WHELAN: Precisely.

PN291

THE DEPUTY PRESIDENT: All right. And so in your view then, does that cover all of the streams in schedule A of the Building Award, that is civil construction, engineering?

PN292

MS BARNES-WHELAN: Sorry, I am not quite sure I understand your question.

PN293

THE DEPUTY PRESIDENT: Let me put it in a slightly different way. The argument that's put against you in the company's written submissions is that the Full Bench in the decision of CPU v Axioma Construction Australia Pty Ltd, at paragraph 45, deals with the question of whether four employees may – who made an agreement had the authenticity or moral authority to do so. In the face of an intervention application by the CPU. And the Full Bench there said that the agreement here does not cover classifications across multiple awards. The classification range is confined to a part of the building and construction sector being civil construction, rather than to the entire sector and in those circumstances, in relation to that case, that Full Bench said that it was not concerned that those four employees did not have the authenticity or moral authority to make that agreement. And so I am wondering if you can address me on how that provision or how that observation made in the Axioma case by the Full Bench might apply here.

PN294

MS BARNES-WHELAN: Okay. I think I comprehend the question and looking at the classifications, so the earlier point, I think the agreement does incorporate the full scope of classifications in the Building and Construction Award, but I think by necessity that is limited to the scope of the agreement.

PN295

THE DEPUTY PRESIDENT: Yes.

PN296

MS BARNES-WHELAN: So there's the connection between those two parts of the agreement. Now, obviously the agreement says the company, the agreement shall apply to work the employees who are engaged in the classifications in the State of Victoria and Windfarm projects.

PN297

THE DEPUTY PRESIDENT: Yes.

PN298

MS BARNES-WHELAN: So that does to an extent. To an extent.

PN299

THE DEPUTY PRESIDENT: Yes.

PN300

MS BARNES-WHELAN: We'd still suggest that it's not sufficiently represented unconditionally, but to an extent narrow the breadth of the building construction classifications which could work – could be performed under.

PN301

THE DEPUTY PRESIDENT: Yes.

PN302

MS BARNES-WHELAN: Once you consider the scope of the agreement but also – and look, we don't have evidence from the company save to say that they're planning on doing some steel fixing or form work or whatnot. But they're – when you're looking at a windfarm project, you know, that could still cover a range of classifications which are contemplated by the Building and Construction with civil type classifications.

PN303

THE DEPUTY PRESIDENT: Yes.

PN304

MS BARNES-WHELAN: In the civil space, you still have carpenters for instance. There are operators of various plans for instance. We could foreseeably run through all of those classifications which are – which could be bound both in the – well, the plant operator classifications and more intensive waders, excavators, that sort of thing, not defining civil space.

PN305

THE DEPUTY PRESIDENT: Yes.

PN306

MS BARNES-WHELAN: But there are classifications which traverse both general construction and civil construction too.

PN307

THE DEPUTY PRESIDENT: Yes.

PN308

MS BARNES-WHELAN: So then returning to my point here is that all we have, real clear evidence of is crane crew. Got a crane crew boding on this agreement which does encompass necessarily limited by the scope, a range of classifications.

PN309

Now, what then? The question then and turning to these decisions concerning sufficient interest and why it's important, this begs the question is that this agreement incorporates a Building and Construction Award. And there are various terms that in that award, that mobile crane operators, doggers, and riggers, would have no conceivable interest or stake in.

PN310

So for instance, like this agreement could foreseeably cover or expand to carpenters for instance, carpenters work in civil. Now, keeping that in mind, a crane crew isn't required to carry their own tools for instance, they would have no

need for a tool allowance. Now, these are issues that do affect tradespeople. Also, there is no apprenticeship. They get their ticket, their regard dogging ticket, they become a crane operator. So they also have no interest in the provisions concerning apprentices. And they just use this fun way of a couple of examples here.

PN311

So on that basis, we say that this agreement can't be approved because there isn't a sufficient interest or stake in its terms, once regard is had to what the work these sort of people are doing. Even if you're dealing it to the civil space. So that's – and just to go back to that point, this is something which is fundamental to the question of genuine agreement. This is not something that can be easily remedied, we would submit by the other side.

PN312

THE DEPUTY PRESIDENT: What do you say in relation to the proposition that's advanced which seems to straddle both sufficient interest and explanation but to provide undertakings in relation to each of those aspects of the Mobile Crane Award with which you have raised some concerns?

PN313

MS BARNES-WHELAN: On the point of sufficient interest, my understanding is, and I am happy to provide a note on this to chambers after this hearing, but my understanding is, is that there is some authority to say and I think this came from the Full Bench near MMS decision.

PN314

THE DEPUTY PRESIDENT: Yes.

PN315

MS BARNES-WHELAN: I don't have the citation on hand.

PN316

THE DEPUTY PRESIDENT: That's all right.

PN317

MS BARNES-WHELAN: That you know that some of these issues to do with sufficient interest, and I believe it's in that case, they talk about the sufficient concerns with that insufficient interest won't necessarily be capable of being remedied through an undertaking, but like I said, I am happy to send through a note following the completion of this matter, the hearing today.

PN318

THE DEPUTY PRESIDENT: Yes.

PN319

MS BARNES-WHELAN: So that's from the point of sufficient interest. Now, turning to the next part which is the issue of genuine agreement and whether the terms in the effect of the agreement work were properly explained. And there's a few things I would like to go to Deputy President, before I come back to that point you raised regarding undertakings.

PN320

Is that – well, firstly, we're primarily relying on written submissions to suggest that the Mobile Crane Hiring Award is the appropriate award. We won't waiver that point too much. But at - - -

PN321

THE DEPUTY PRESIDENT: Just noting that what you have just said about not labouring that point, I don't know that it's dealt with in your reply submissions, and please correct me if I am wrong. But the argument raised by the company is in effect, that the provisions of clause 4 of each award are instructive here and that the Building Award is the most appropriate award having regard to the work that the employees perform and the environment within where it's performed. And in those circumstances, clause 4 of the Mobile Crane Award specifically at 4.3(b) makes it clear that the Mobile Crane Hiring Award doesn't cover an employer bound by the Building Award. Now, is there anything that you wanted to say specifically in response to the company's reliance upon clause 4 of each of the awards for the purposes of coverage?

PN322

MS BARNES-WHELAN: I think this goes back to the question of the evidence that we - and the evidence before the Commission – is that there may be an aspiration to move into work which is contemplated by the Building and Construction Award, but presently there is evidence before the Commission to say that these workers form essentially a crane crew. They have got evidence which is annexed to my affidavit that this company advertises itself, it operates in a Mobile Crane Hiring industry. It employs workers that fall whether they can appropriately classify it as workers or not, but appropriately fall within the classifications of the Mobile Crane Award.

PN323

It's aspirations to the form work, to move into that Building Construction Award space, is no more than an aspiration so we say once you look at the voting cohort now and the work that they have performed, then that, the Mobile Crane Hiring Award is the appropriate award.

PN324

THE DEPUTY PRESIDENT: Thank you.

PN325

MS BARNES-WHELAN: Now, I believe it was at paragraph 11 of the – I think it was the applicant's reply submissions. It's asserted that the agreement was explained by reference to the Mobile Crane Award. I directed as you would have observed, Deputy President, I directed a lot of questions to Mr West on that front. We don't have evidence about the nature of that explanation. I understand that Mr West was present in the room, the explanation was being delivered by the AWU and by Mr Melhem. We do not have evidence from either the AWU or Mr Melhem about the content of that explanation by reference to the Mobile Crane Award. They were given the opportunity to and they did not take up that opportunity to provide that evidence.

PN326

So what that means is that all we really, in reality have, is and I use this a little bit reluctantly, because I think it's a little bit harsh, but it's essentially, a self-serving statement of the kind which is discussed, I believe it was in one key - I think it's extracted in my submission - a self-serving statement saying well we did this. We explained it by reference to the Mobile Crane Award. And that's what we have got at this stage. Because the people that were in the room or Mr West, and I understand because memories do get hazy, but he cannot give evidence of that discussion and the AWU and Mr Melhem cannot give evidence of that discussion. So we can't – the Commission cannot be satisfied that the agreement was explained by reference to the Mobile Crane Award.

PN327

Now, this brings us I think to the point you raised earlier is reliance. The applicant has flagged the potential to proper undertakings to essentially address the deficiencies in the explanation, falling from the MMS decision. Now, I believe in that regard, it said, well, look, we can see paragraph 30 of the CFMU's submissions and we will provide undertakings on those matters.

PN328

What I will note is that, and this is particularly in the time constraints of dealing with agreement applications as I appreciate. The Commissioner deals with a lot of them and we need to get through them quickly. That list is illustrative. It wasn't exhaustive.

PN329

There are other entitlements in the Mobile Crane Award which are more beneficial, that weren't listed there. That was illustrative. They're entitlements regarding the arrangements to do with taking annual leave. There are entitlements regarding make up time, flexibility concerning make up time. So that's one difficulty in the applicant's approach. That was a non-exhaustive list. And this is the difficulty where we have got a case where no explanation was given, that now, the applicant is trying to clean up the fact that no explanation in reality was given by reference to the Mobile Crane Award.

PN330

And what we would suggest is that undertakings of this kind when we accept that there is the authority of MMS and I believe that went up for judicial review and it failed in its prosecuted in its argument there, but undertakings of this kind would usually be given in circumstances where there are limited deficiencies in the explanation given. But here, we have no explanation, no evidence of any explanation being given by reference to the Mobile Crane Award.

PN331

And in MMS, it's important to note that I believe it was in MMS, they said, they noted that there was a small number of more beneficial terms in the pre-existing instruments in that case, that had been excluded by the agreement that essentially weren't explained, it was a small number. Here we haven't got any explanation by reference to what we say is the appropriate award. So that's a difficulty here and it's also, if they are, if the applicant is to proffer such undertakings, they will be exhaustive, they will be – have to cover a very, very broad number of matters. So that's what we would say on the issue of undertakings to address genuine

agreement. A final point I will raise is in relation to the notice of employee representational rights.

PN332

In our submissions, we did raise a concern regarding the failure of the employer in this instance, to comply with section 181(2), by requesting that the employees wrote on the agreement only two weeks after the issuing of the last rep rights notice. Now, to address this concern, the applicant states the following, that the employee's received a rep rights notice in July, 31 July and that, in any event, providing the second notice of rep rights two weeks prior to the vote, constitutes a minor procedural error.

PN333

Now, what – and look, this wasn't a matter, and I appreciate this wasn't a matter raised in my written submissions, so it may be the case that the applicant might want to address this by way of a further written note. But what – there is a real risk in this case and based on the evidence that we have heard from Mr West, is that the July rep rights notice actually related to the previous agreement for which bargaining concluded when the agreement was made, on 14 September. So if that is accepted and noting that that rep rights notice refers to the title of that previous agreement, was issued at a time where there was bargaining was about to kick off for that agreement, if we are correct, we would submit that that notice of rep rights notice effectively became spent at the time the agreement was made. That first agreement was made. And should therefore not be relied upon in the context of this application.

PN334

So again, this is, I acknowledge the fact that this wasn't raised in my written submissions and the applicant may want to say something about that, but we would say that this does give rise to the possibility that the requirement to provide the notice of rep rights within 14 days of the notification time for this agreement wasn't complied with, so that's in addition to our concerns regarding the October rep rights notice being provided only two weeks prior to the vote and so there are those competing issues and that is not to detract from the fact that there are also issues that appears with form, identifies the incorrect employer and the incorrect agreement. So what we would suggest is that in the circumstances, where we have got issues with timing, we have got issues with the content of the notice of rep rights and I – the requirements in relation to the notice of rep rights, it appears that no aspect of it has been actually complied with here. There was issues with timing, contents, so the question needs to be asked, what work does sub-sections or do sub-sections 173, 174, section 181(2) have to do if an employer can disregard all the requirements in relation to the timing of the notice, in relation to the content of the notice.

PN335

So we would suggest on this issue, and just turning to the issue of the late issuing of the note, that this isn't a minor procedural error, in circumstances, in the circumstances of this case. The delay in issuing that notice of rep rights and employees were denied important information for a third of the minimum period. Seven days that's required by the Act.

PN336

Now, this is not a case when we look at the cases concerning section 118 and minor procedural errors, this is not a case of the employer providing the notice of rep rights 20 days prior to the vote rather than requisite 21. This is a third of the period. The minimum period, those employees didn't have that information. Now, if I understand the submission correctly, it's suggested well, what harm does this do, or has been done by this in circumstances where the employees are represented by the AWU.

PN337

Now, this somewhat ignores the fact or doesn't acknowledge the fact that the notice of rep rights also contains other important information, including the fact that works have the right to revoke the status of an organisation such as the AWU to act as a representative. And their ability to appoint someone else.

PN338

So they were also denied this, notwithstanding the fact that there is – actually I think that evidence may have been withdrawn, but the suggestion is that these workers were members of the AWU. And I may leave my submissions there, unless there are any questions?

PN339

THE DEPUTY PRESIDENT: No, thank you, Ms Barnes-Whelan. Thank you. Well, actually, one question before you sit down, you indicated that you might like the opportunity to provide a note in relation to the capacity for undertakings to resolve any issues. Do you still seek to do that beyond today?

PN340

MS BARNES-WHELAN: If I could, Deputy President.

PN341

THE DEPUTY PRESIDENT: All right. Thank you. We will deal with the facility for doing so after we hear from the company again. Thank you. Mr Melhem?

PN342

MR MELHEM: Thank you, Deputy President. First of all, I will address the number of points raised by the CFMU, perhaps if I – the first one if I can address in addition to the submission, which I referred to earlier, in relation to the award, we will say that the Building Construction and On Site Award, is the appropriate award. And not because the company's aspiration to refer to work.

PN343

We say because of the current work the company is performing on that project on a Wind Farm Project and I refer to Ms Barnes-Whelan's mentioned something about the definition in the agreements which is the scope of the classification case of the broader one by incorporating the award. And just in relation to that example, CW5 classification in the award covers crane classification, 20 to 100 tonnes which is exactly what the company is performing on that Wind Farm Project today.

PN344

So we say the Building Construction Award has great coverage. So it's not likely the Building Award doesn't have it; it does have it. And then it goes on to a high level of crane work, 100 tonnes to 200 tonnes to 1200 tonnes and so forth. And NERR correctly pointed out in our submission that the reason the company moved from the Mobile Crane award coverage to the Building Coverage because of that scope because the Mobile Crane does restrict the ability of the employer to perform what they're currently performing today and because the Building Construction Award has the same coverage in relation to cranes, so therefore, that's why this award was relied on or incorporated into the agreement.

PN345

And because doing otherwise, it's going to restrict the company's operations. Current operation and future operation and we say any comparison in the agreements in relation to any award, it has to be the Building Construction Award. It cannot be the Mobile Crane Award because of its restriction.

PN346

THE DEPUTY PRESIDENT: So just on that, Mr Melhem. Within the agreement at Appendix A, there is a reference there to a crane crew, Vic only, and the agreement provides as follows,

PN347

Crane crew classification shall be defined as in schedule A of the mobile crane's hiring award 2020. What was meant by that inclusion?

PN348

MS BARNES-WHELAN: The reason for that inclusion is to arrive at from – there's a crane crew enterprise agreement, let's call it pattern agreements, in a major project in Victoria.

PN349

THE DEPUTY PRESIDENT: Yes.

PN350

MS BARNES-WHELAN: Which contain a specific definition and specific rates of pay. So the company, in order for the company for the company to be competitive and provide its employees the higher rates, so that's why that classification was specifically attached to the appendix, so employees will receive the higher rate in comparison with other cranes operators for example in the state where they can be covered by a pattern agreement or major project agreement, so to sort of illuminate any confusion.

PN351

Now, probably hindsight, we would have probably have that wait and see if we – (indistinct) with you. Seven in the classification, we thought in order to have clarity and for a crane crew for example, if you're performing a crane crew operation, then it's an apparent (indistinct) instead of sort of having – that this – that's the only reference we are in the agreement in relation to the Mobile Crane Award is the actual definitions. They are all be in addition to the definition of the Construction Award.

PN352

THE DEPUTY PRESIDENT: So do you have a copy of the Mobile Crane Award before you, Mr Melhem?

PN353

MR MELHEM: I do that I can open, Your Honour. Bear with me. I will just fire the computer. I don't have hard copies, so I am going to – okay. I will just bring it up. Okay. I do now.

PN354

THE DEPUTY PRESIDENT: Thank you. Thank you. So I am at page 40 of that award, Schedule A classification structure and you will see there's a reference to Mobile Crane Employees, Level 1, through to 7 so when you say in the agreement,

PN355

Crane crew classification shall be defined as in schedule A of the Mobile Cranes Award,

PN356

What I am seeking to understand is there's obviously no reference within Schedule A to the term crane crew. And so when you say that the crane crew classification shall be defined as in schedule A, is it the case that you're saying that each of the classifications Mobile Crane Employee Level 1 to Level 7, are to be applied as classification descriptions for the employees under the agreement?

PN357

MS BARNES-WHELAN: No, not quite. Because – because we have sort of selected the highest rate, so if we were to strictly apply the classification of – just bear with me, it's probably vehicle or be other crane level 5, which will have cranes of two – I don't know, things that warrant classifications.

PN358

Mobile Crane in 344, but theirs are the questions we could in relation if we only employing a crane crew with the current rate and then below that you'd see there's an allowance for incremental increase in that schedule for – from memory I think for every 50 tonnes and above, there's an allowance paid on top of that. So you could apply specifically if you say for a crane crew, that's that classification and then with the adjustment for any crane that's operated on more than a hundred tonnes, there's an allowance for every 50 tonnes thereafter.

PN359

THE DEPUTY PRESIDENT: Yes.

PN360

MR MELHEM: It's a singular description exists in the building awards which clause 19.5 of the Building Construction Award as well. So it's sort of, if you compare the two, definitions pretty much the same definition. But the reasons behind it, in discussions with the AWU is that if people in the industry want to compare like for like, then if West Crane employees would like to compare what a crane crew would be paid on major project, on Wind Farm Project, will be exactly

the same as the rate for the West Gate Project as a crane crew. So that's why the definition was condensed and the reference was made, was simply just for that purpose. Not for the purpose of linking the award. It's more the further assist the employees in understanding my rate of pay is no different to a crane crew operating on the West Gate Tunnel, for example, and the West Gate Project. So that was the only purpose of describing it the way it's being described and that's how the AWU would like to describe it and that's – we agreed to actually include that description in the actual appendix.

PN361

THE DEPUTY PRESIDENT: So two questions that arise from that. The first is what is it – you referenced a moment ago perhaps Mobile Crane Employee Level 4 or Level 5. What is it about the skills and duties within each of those classifications that you say these employees are not currently performing or which do not capture the work you say the employees are currently performing?

PN362

MR MELHEM: If we look at the descriptions in that award, the employees does capture the work that they're currently performing, but also in addition to that, they're performing the other duties which we talked about like the seal fixing, forming work, et cetera. So that's – so if we go and sort of classify an employee just a mobile crane, then that definition is the right definition. But then if a new employee comes in, it might be employed as a labourer for example, which is possible under that agreement, well, could be purely classified as CW where it's one, two, three, dependent on the skill set. So that's where the agreement provide that flexibility.

PN363

And we're not (indistinct) if we're trying to short change or hide things. We're saying if you're crane crew that is your classifications. And we made reference to the award so people can compare apple with apple.

PN364

So the company is not trying to deceive anyone to say you have got a CW5 and we're not going to pay you other rates of pay you may be entitled to, even though the Building Construction Award has the same application in relation to what is the base rate for crane driver for example, this year there would be five times a tonne. Plus an allowance for every – I think from memory, 50 tonnes there is a \$2.50 for 50 tonnes thereafter. So there's a very similar application to do what is really – it doesn't matter which award we apply, employees are not disadvantaged and I think that's the point we would like to make that employees are not disadvantaged by applying either award.

PN365

THE DEPUTY PRESIDENT: So isn't the concern that's raised by the CFMEU though, is that when you're talking about the four employees that have made this agreement, that their work is covered both by the Mobile Cranes Award. You just want to ensure that this agreement has scope to employ employees in the future that might perform work under the Building Award?

PN366

MR MELHEM: We go one step further. We say the employees are currently performing a bit of both. I believed for predominantly doing crane work and they're doing, you know, the work I talked about.

PN367

THE DEPUTY PRESIDENT: Yes.

PN368

MR MELHEM: And yes, there's the likelihood other employees may be employed on that project. I was going to go and address that point, Deputy President, in relation to what classification, the how many classification or occupation need to select to have an agreement certify. If we accept the CFMEU argument that because the employees covered or currently employees have crane tickets or rigging tickets, but they don't have any other qualifications they don't perform other works, so they put he really should not be certified. I mean, a similar argument would apply to many agreements before this Commission, construction industry that could be rejected because they don't cover every single occupation. For example, a steel fixing company might be certifying an agreement with – which contain a CW1 to CW7 which is not uncommon. But they only have two occupations within that award classification.

PN369

THE DEPUTY PRESIDENT: Sir, I understand your point in terms of the sufficiently representative issue there. But it may be that that issue falls second in line to the explanation issue and if one is focussing upon the submissions that you're making today when we're talking about at least the four employees that have made this agreement the evidence before the Commission doesn't demonstrate that there was any explanation about the Mobile Cranes Award. And the question that I have for you is – is it possible in those circumstances for the company to overcome that concern when I don't have before me evidence as to the explanation insofar as it concerns the Mobile Crane Award.

PN370

MR MELHEM: Then I suppose I – we – I mean, we do say the explanation was given and I said that in my submission earlier that I was involved in giving the explanation there for employees and so the AWU - - -

PN371

THE DEPUTY PRESIDENT: You will accept though that there's no evidence of that before the Commission and it is a fact that's in contest?

PN372

MR MELHEM: Well, we're happy to, if we need to, to the Commission please, we are prepared to provide further evidence but otherwise we can leave it at that.

PN373

THE DEPUTY PRESIDENT: Well, I did indicate to you earlier, Mr Melhem, that you might choose to give some evidence about that and then when I asked you if you wanted to close your evidentiary case, you indicated that you did and that there were no further witnesses that you would seek to call.

PN374

MR MELHEM: Yes.

PN375

THE DEPUTY PRESIDENT: Now, Ms Barnes-Whelan might have something to say in relation to that. But even if we just focus for present purposes on the explanation point, you would accept that at this time there's no evidence before the Commission of any explanation about the Mobile Cranes Award, wouldn't you?

PN376

MR MELHEM: Accept what we said about them in submissions.

PN377

THE DEPUTY PRESIDENT: Yes, and the extent of those submissions of course, is to say simply that an explanation of the agreement with reference to the Mobile Cranes Award was provided to the employees during the access period which doesn't give me any indication about what was explained, how it was explained and the terms and the manner in which that occurred.

PN378

MR MELHEM: Well, apart from that, that is correct. But we do press the point again, explanations were given. And comparisons were made between the various awards and the whole concept of the agreement. The other thing I want to make Deputy President, is the four employees in questions are experienced construction workers. They have been working under the terms of this agreement since that has commenced in May 2023 and they have been paid under the termed figure and so their familiarity with the agreement is very well known, because they are working under the current agreement or the proposed agreement as an overall payment. So their level of understanding about the content of contained in the agreements, we will say that is – is sufficient for – they have very sufficient understanding about the content of the agreement. So they're not like a new employees have no idea about the content of the agreement. They have been working and paid under the same term and conditions currently contained in this agreement. So we will say that's in itself – in fact, we were looking at providing for the evidence but in order to sort of have an expedited hearing, we withdrew the four employees were prepared to come and give evidence. But we wouldn't want to delay the process going forward. And I accept your point.

PN379

THE DEPUTY PRESIDENT: Yes, well, can I put it this way. The hearing today provides the company with the opportunity to satisfy me that the agreement is capable of approval. I express the preliminary view that on the evidence before the Commission, at least insofar as the explanation is concerned, I have some reservations about the Commission's capacity to approve.

PN380

Now, I indicated that I would hear from Ms Barnes-Whelan if it is the case that you do press to adduce further evidence in relation to that point. But I am ultimately in your hands, Mr Melhem. You elected not to press those earlier witness statements and they were withdrawn. And to date, the only witness that

has given any evidence is Mr West who wasn't able to give any indication to the Commission about the subject of any discussion despite the fact that he is the representative of the company that has signed the statutory declaration that's presently before me.

PN381

MR MELHEM: No, no. I accept that.

PN382

THE DEPUTY PRESIDENT: So how would you like to proceed?

PN383

MR MELHEM: Well, obviously, we'd still like to provide any further evidence in reference to that particular point and what I understand you are saying, Deputy President, that in the absence of any direct evidence, that could be an issue where you might not have the ability to approve the agreement in relation to that point. Do I understand?

PN384

THE DEPUTY PRESIDENT: That's a preliminary view that I hold.

PN385

MR MELHEM: Yes.

PN386

THE DEPUTY PRESIDENT: I haven't formed any concluded views on the evidence but it is the case that I think it's important for me to indicate to you that there is no evidence aside from a one line in your written submissions that there was an explanation in relation to the Mobile Cranes Agreement.

PN387

MR MELHEM: Well, the two ways we could proceed, we can just leave it at that. I said I am prepared to now to provide that attendance even though I have indicated earlier it was no requirement. I wasn't offering to provide that, but I am happy to do so if the Commission will see a benefit in that and there's no objection. Otherwise, I am just guided by you and if the agreement is not going to be approved because of that, then we will just accept that decision and then look at going back to drawing board and start again.

PN388

THE DEPUTY PRESIDENT: Well, it - - -

PN389

MR MELHEM: That's basically where we're at.

PN390

THE DEPUTY PRESIDENT: It's not for me to put words in your mouth in terms of what you'd like to do, Mr Melhem. If you'd like to take a moment to consider your position, you're welcome to do so. If you'd like to give evidence you can indicate to me now and I will see Ms Barnes-Whelan's responsive views in

relation to it, but it's a matter for you to tell me how you'd like to proceed with your case.

PN391

MR MELHEM: Well, if we can seek adjournment for about five minutes?

PN392

THE DEPUTY PRESIDENT: Yes, of course. Any objections to that course to give Mr Melhem an opportunity to consider his position?

PN393

MS BARNES-WHELAN: No objections to the adjournment, but flagging an objection to him giving further evidence.

PN394

THE DEPUTY PRESIDENT: I understand. All right. We will adjourn for five minutes. Thank you.

SHORT ADJOURNMENT

[11.49 AM]

RESUMED

[11.59 AM]

PN395

THE DEPUTY PRESIDENT: Thanks, Mr Melhem.

PN396

MR MELHEM: Thank you, Deputy President. If my assistant commissioned, I am prepared to provide evidence in relation to a matter you have raised in relation to explanations and to understand the CFMEU review on that issue and objecting but if that can be assisted, then yes, Commissioner, I am prepared to do so. But if the Commission has formed the view that the train already left the station we accept that as well. And we will just have to deal with that.

PN397

THE DEPUTY PRESIDENT: All right. Ms Barnes-Whelan?

PN398

MS BARNES-WHELAN: Thank you. We do object to Mr Melhem putting on further evidence at this stage. The applicant has had ample opportunity leading to today's hearing to put on the evidence that they now seek to. And not only have they not taken up the opportunity in the lead up to the hearing, they were invited to earlier in the hearing and confirmed that their evidentiary case was closed. And the affect of that is that we moved closing submissions and they have had the benefit I think, proper process should dictate that evidence comes first. Then we can do our closing submissions based on what comes from that evidence. We have already proceeded to that stage. They have had the benefit of hearing our closing submissions, our discussion of the evidence presented by Mr West, I think will be put at a significant disadvantage for Mr Melhem to now put on evidence at this stage of the hearing. So we object on that basis.

PN399

THE DEPUTY PRESIDENT: Thank you. Mr Miller, would you like to say anything?

PN400

MR MILLER: No.

PN401

THE DEPUTY PRESIDENT: All right. Any reply, Mr Melhem.

PN402

MR MELHEM: No, Deputy President.

PN403

THE DEPUTY PRESIDENT: All right. Consistent with the approach that I have taken in relation to this approval application to date, my view is that the Commission is always assisted in taking the opportunity to hear from the parties in relation to the circumstances that inform the matters upon which I need to make a decision about.

PN404

I acknowledge and indeed have raised myself, the issues that the CFMEU has identified about it having already presented its closing submissions. But in circumstances where I consider the Commission will be assisted with understanding the exact nature of the explanation that was provided to the employees, then my view is that there is a basis for the Commission to hear from you today, Mr Melhem. Now, the procedural fairness issues that you have raised, Ms Barnes-Whelan, can be remedied in my view by giving you of course, the opportunity to cross-examine, Mr Melhem on his evidence and then giving the CFMEU the opportunity to make any further supplementary closing submissions in relation to its case.

PN405

That can be done in the circumstances and I will be guided by the parties but can be done with the benefit of transcript in a short period of time to file written submissions. If you consider that there is a need for you to further reflect on any evidence that's given by Mr Melhem today. I will be in your hands in relation to that matter and you can provide me with an indication at the appropriate moment about how you might like to approach those closing submissions.

PN406

MS BARNES-WHELAN: Thank you, Deputy President.

PN407

THE DEPUTY PRESIDENT: In those circumstances, Mr Melhem, I will invite you to take the witness box, please. Will you be taking an oath or an affirmation today?

PN408

MR MELHEM: Affirmation, please.

PN409

THE DEPUTY PRESIDENT: An affirmation. Thank you.

PN410

THE ASSOCIATE: Please state your full name and your address?

PN411

MR MELHEM: Cesar Melhem. May I not disclose the residential address?

PN412

THE DEPUTY PRESIDENT: Business address is fine.

PN413

MR MELHEM: I don't have one. PO Box address 3251, Caroline Springs, Victoria.

<CESAR MELHEM, AFFIRMED

[12.04 PM]

EXAMINATION-IN-CHIEF BY THE DEPUTY PRESIDENT

[12.04 PM]

CESAR MELHEM

XN THE DEPUTY PRESIDENT

PN414

THE DEPUTY PRESIDENT: Mr Melhem, what is it that you would like to say?---Thank you, Deputy President. I have attended a meeting with the employees on 13 October 2023. And the purpose of that meeting was to explain the terms of the proposed agreement. Prior to that meeting, I had sent correspondence to the employees in relation to the proposed agreements with the summary which summarised the proposed agreements, which the Commissioner has a copy of that. That prior to that, the company through Mr West and the AW delegates were in ongoing discussions with the employees in discussing the terms of the proposed agreements, but maybe if I just focus on – if that's what you want me to do, Deputy President – on the meeting on 13th, which I was present. Which I took the liberty in explaining on behalf of the company the proposed terms of this agreement and explanations went to – talking about we're now doing a Wind Farm Project specific, or Wind Farms, taking the employees through the proposed wage rate, the – how the RDO system will work, how the overtime payment will be working, the shift rate, and sort of went through the proposed agreement. Now, I will say it did not go through it clause by clause but I have covered the relevant clause. For example, and I want to talk about – I will talk about clauses about how the RDO will work, public holidays, redundancies, income protection, accident make up pay and so forth. So we went through that and then as a matter of reference, we talked about how that referred back to the two awards and the reason for that as the Building Construction Award was the award incorporated into the agreement, which I have stated to the employees, the content of the agreement pretty much mirrored the award in relation to wages and conditions, because it is a comprehensive agreement and in the reference to the Mobile Crane Award, the particular schedule Appendix A, I think from memory, the actual rates of pay and descriptions was done just for reference. If your employees wanted to compare apple with apple or they wanted to be able to compare how a crane crew is paid, that's on a similar size project in the state of Victoria and that's how we arrived at the two rates of pay for example, the \$60 -

\$62, I think for a non-crane crew, dogman's – I am sorry, I should have brought my glasses with me. A rigger dogman, for example, hourly rate and the second classification for a crane crew of \$65.13 an hour. So that was fully explained to employees in relation to how that will apply to them. But in relation to the award, the main focus was on the Building Construction Award and – but definitely we had some discussions about the Mobile Crane Award at a particular reference in the proposed agreement for the actual rate and comparison but the comparison was as I said earlier, it was in relation to what is the market rate of a similar project. And obviously there were some questions being answered, but really wasn't many questions, because the employees have full knowledge of the content of the agreements and have been working on it, as I said earlier in my submission that they had been paid under the terms of the agreements, how familiar would the agreements been in working in – in a similar construction industry for a long time, particularly on major project, which attract that type of agreement.

PN415

Thanks, Mr Melhem, anything else?---Nothing. Unless - - -

PN416

All right. Thank you. Ms Barnes-Whelan.

CROSS-EXAMINATION BY MS BARNES-WHELAN

[12.08 PM]

PN417

MS BARNES-WHELAN: Okay. Thank you. So Mr Melhem, you just spoke to a list of matters that we have discussed in the context of this meeting on the 13 October, and correct me or fill in the gaps, if I missed anything, but those matters include essentially the scope of the agreement, that covers Wind Farm Projects?---Mm-hm.

PN418

Wage rates, RDO system, accrue systems, overtime rates, and shift rates. Did that cover off everything that - - -?---I am just giving a sample. We went through the whole document. I mean, expiry date for example we discussed that being February 2025. I just gave sample about this – the items we covered.

PN419

Okay. Would you agree that at least with the matters that you listed, these are all entitlements that exist under the Building and Construction Award? When you indicate RDO accrue systems, you're looking at overtime shift rates? These are common place things in both awards, aren't they?---The focus was about what the agreement contents were. But if we look at the RDO for example that you mentioned, now the RDO system under the agreement is a 36 hour week, nine days fortnight. The difference between how the RDO operate between the Building Construction Award and the Mobile Crane award is no difference.

*** CESAR MELHEM

XXN MS BARNES-WHELAN

PN420

But in terms of that you have got an RDO system which is contemplated by the Building and Construction Award, there's also an RDO system contemplated by

the Mobile Crane Award?---No, no. It's – the RDO system is contemplated by the enterprise agreement not by the award.

PN421

Yes, I am not asking – I am talking about the underpinning awards also contemplated an RDO system - - -?---Yes, yes, of course.

PN422

Yes. Okay. Including the Building and Construction Award. Now, what we need to get to in my view, the bottom of, is you said, and correct me if I am wrong, you said, 'There was some discussion about the Mobile Crane Award, some discussion and it was about wage rates'?---Yes.

PN423

Correct? And - - -?---Definition more than the wage rates.

PN424

Excuse me?---Definition not – because the schedule talked about definition, and referring to the Mobile Crane Award, the definition of the classification, not the wage rate as such because there's a huge gap between the two rates.

PN425

Yes, but that wouldn't actually form the part of that discussion. I believe I noted it down in the direct evidence before that there was a discussion about Mobile Crane Award wage rates, but my question is what did you discuss about the entitlements contained at the Mobile Crane Award beyond that?---There's no need to get into that point because we – the Mobile Crane Award did not apply and also because the terms and conditions of their Building Construction Award and Mobile Crane Award are very similar. In fact they are the same, so we didn't go through it clause by clause but a copy of – a copy of the award was actually given to the employees. It was a copy of the Mobile Crane Award was attached to the documentation sent to the employees.

PN426

Respectfully, yes, you are required to provide copies of incorporated documents, including the Building and Construction Award and presumably, the Mobile Crane Award was provided to employees as provides by consent earlier, that comparison of rates, as you might be able to compare but the fact of the matter is Mr Melhem, there are a number of conditions, a number of departures in terms of the conditions in between the Building and Mobile Crane Award. Could you speak to any of those differences?---Well, there could be, but if you compared the agreements to any of the award, the agreements in comparison is 117 per cent higher than a mobile crane award and 98 per cent higher than the award, the other award.

*** CESAR MELHEM

XXN MS BARNES-WHELAN

PN427

Mr Melhem, the difficulty is and the question, the issue here is that in a CFMEU submission, the appropriate underpinning award is the Mobile Crane Award. Now, under the Act, there's required to be an explanation of the terms

that affect the enterprise agreement by reference to the industrial instrument in this case, what we say is the Mobile Crane Award. Now, there are some key differences here in the Mobile Crane Award. We can see that you have given some explanation to the Building and Construction Award but – and I have mentioned this earlier, so you have heard a little bit about this, but could you give – or can you tell me about what you said in that meeting – about how the agreement differs from the Mobile Crane Award in respect to the inclement weather entitlements?---The agreement has its own inclement weather which is – which is - - -

PN428

But did you give an explanation as to how that differs from the Mobile Crane Award?---I am getting there. The agreement has its own inclement weather provision which is higher than the award. Both awards.

PN429

Okay, so then did you give an explanation about public holidays after notice of termination for retrenched employees?---Well, we explained the terms of the agreements in relation to these two clauses, yes.

PN430

So what's the difference, Mr Melhem between the entitlement and the Mobile Crane Award and the entitlement in your agreement with respect to the payment of public holidays, post-termination?---Well, the – in relation to termination, redundancy, there's an industry redundancy fund in a - - -

PN431

I am asking about public holidays?---Public holidays - - -

PN432

Paid for after termination?---I think - - -

PN433

You didn't say the award?---I think the terms are the same. If you are terminated, which you will notice for example on a public holiday, that public holiday is covered. Is that what you're referring to?

PN434

Not quite, Mr Melhem, there is a difference?---Well, let me know.

PN435

And I am just doing these things by way of example?---Right.

PN436

Now, bear with me because I need to turn to – excuse me. So I will leave it – I will assist you even a little bit more here, Mr Melhem. What I want to know about is what the Mobile Crane Award says about public holidays that are payable in circumstances where someone's been retrenched?---Can you repeat that again?

*** CESAR MELHEM

XXN MS BARNES-WHELAN

PN437

My question is what does the Mobile Crane Award say about the entitlement to public holidays in circumstances where someone's been retrenched?---Well, I don't have the copy of the order in front of me to answer that question.

PN438

But did you discuss that?---Well, I don't recall that specific discussions.

PN439

Okay, so you have got no evidence of that being discussed. Now, I am just doing these through – by way of example here?---Well, perhaps if I say this. I mean, you don't go read every single letter of an award 100 pages and an agreement. You go to the main aspect of what are the main conditions for employment and employees have received copies of the various awards and the proposed agreements and, yes, allow questioning – questions and answers. So if you're asking me have I gone through the award from A to Z, the Mobile Crane or the Building Award of the EBA, the answer is no, it's ridiculous. You don't – but that's – you don't – you don't expect anyone to go through that. You go through the main items and you assume people have read these awards and you allow for questions. You cover the key elements. Because if I say to you I have gone through these awards A to Z, I will be misleading you and I won't do that. But have I gone through, explaining the main elements of the proposed agreements and how they compare with awards, we went through that, but did we say were the – did clause 41 of the agreement talk about accident make up pay and the building construction award is this and the other one? The only thing I would have said in that – it is better that I am just giving an example, that the accident make up pay in the agreement for example, provide 104 weeks of accident make up pay on full rates for two years but the award provides less than that. So that - - -

PN440

So can you, if I can just stop you there, because actually the requirement is, is that there is an obligation on the employer, particularly in circumstances where the terms of the agreement – there are terms of the agreement that are less beneficial than would otherwise, that these workers would otherwise be entitled to. Now, would you agree that the Mobile Crane – well, I will put it to you. The Mobile Crane Award states – provides that retrenched employees shall be paid for all public holidays falling within a 20 day window from their last date of employment. Now, this agreement says that that will only get within a 10 day window. Would you say that that is a disadvantage?---Yes. Go back. We always said the applicable award was the Building Construction - - -

PN441

It's a very simple question?---No, no, I am answering your question. You're trying to sort of say to me that we disagree on which award is applicable. Let's agree to disagree. I don't agree that the Mobile Crane Award is the applicable award. The applicable award is the Building Construction Award. That's what the agreement stated. And that's what the agreement incorporated. So therefore and now you're trying to bring in your argument in relation to the Mobile Crane and I don't accept your – the premise of your question.

*** CESAR MELHEM

XXN MS BARNES-WHELAN

PN442

Okay, so I assume your view was the same at that time, too, that the Mobile Crane Award wasn't the applicable underpinning award and for that reason you didn't actually explain adequately the terms of the agreement by reference to the Mobile Crane Award, because you just said it was irrelevant?---Well, that's when the other reason why we changed that to a different award and the agreement was withdrawn.

PN443

No, my question – so at the time you explained to this agreement, you thought the Mobile Crane Award had no worth at all?---Well - - -

PN444

Did you? It wasn't the appropriate underpinning award in your view, was it?---Probably not.

PN445

Okay?---That's why the agreement was withdrawn.

PN446

And that is also why you didn't feel the need to explain the terms of the agreement in any real detail, including just one, that's just one clause. You didn't feel the need to explain by reference to Mobile Crane Award because in your view, this – the work that's being performed by these workers in your view is not being performed in the Mobile Crane Hiring Industry. It's covered by the Building and Construction Award?---That's correct. That's - - -

PN447

Okay. I don't have any further questions.

PN448

THE DEPUTY PRESIDENT: Thank you, Ms Barnes-Whelan. Mr Miller, for completeness is there anything you would like to put to Mr Melhem?

CROSS-EXAMINATION BY MR MILLER

[12.19 PM]

PN449

Mr MILLER: Just, Mr Melhem, just in relation to the question that were asked of you by anyone who is present, can you recall what the nature of those questions were?---My employees?

PN450

Yes?---The questions along the lines about when the agreements, how likely the process will take for the agreement to be certified in the Commission. The expiry date of the agreement, and it was questions about the site allowance for example so all these was for the past, confirming the rate of pay. That higher rates will continue to apply versus the other rates. So their the type of questions were asked and were answered by myself and the AWU facilities.

*** CESAR MELHEM

XXN MR MILLER

PN451

So from your recollection then, those questions that were asked related to the terms of the agreement?---Yes.

PN452

Thank you.

PN453

THE DEPUTY PRESIDENT: Anything arising from those questions, Ms Barnes-Whelan?

PN454

MS BARNES-WHELAN: Nothing further, Deputy President.

PN455

THE DEPUTY PRESIDENT: All right. Thank you for your evidence, Mr Melhem, you can resume your place at the Bar table?---Thank you.

<THE WITNESS WITHDREW

[12.21 PM]

PN456

THE DEPUTY PRESIDENT: Mr Melhem, I propose to invite you to continue providing your closing submissions orally at which time I will then hear from you, Ms Barnes-Whelan about how you might like to provide any supplementary closing submissions taking into account the position that's been advanced in final form by the company. Mr Melhem, thanks.

PN457

MR MELHEM: Thank you, Deputy President. The only areas I am going to address in my closing submission that notwithstanding there may be some errors which we concede the number of errors that have occurred. I don't think these errors are substantial to stop the certification of the agreement.

PN458

We say in relation to the company note for example, the company that was simply an error because that's – the name has been used and we're happy to give undertaking in relation to that point. We also have interviewed any undertaking the Commission might see fit to actual that we address any concerns and including the award which we don't believe that required because we still say that the award applicable is the Building Construction Award and that should remain the case. That we are quite open to basically provide the Commission with any undertaking might be required and I just want to finish off by saying. The main thing we need to be mindful of that yes, there may be the company there are some errors, technical errors. They're not substantial enough to give a disadvantage to the employees because none of the employees will be disadvantaged by some of the errors we're going to find.

*** CESAR MELHEM

XXN MR MILLER

PN459

The employees will be enjoying a high level of rates of pay and enjoying better condition of the employments of either awards. And that's clearly demonstrated by the analysis by this Commission and that's our position as well, so therefore,

the agreement should be certified and the agreement also has the support of the Australian Workers' Union as a party to the agreement, representing the employees of the company and that should be given considerable weight.

PN460

Now, with these comments, we hope that the Commission approve the agreements and as I said, we're happy to give whatever necessary undertaking to the Commission to satisfy the Commission with its requirements. So with that, I will leave my submission at that and thank you Commissioner for - - -

PN461

THE DEPUTY PRESIDENT: Thank you, Mr Melhem. Before I turn to the CFMEU, Mr Miller, is there anything else that you wanted to say, taking into account the supplementary evidence that was given by Mr Melhem?

PN462

MR MILLER: No, Deputy President.

PN463

THE DEPUTY PRESIDENT: Thank you. Ms Barnes-Whelan, how would you like to proceed?

PN464

MS BARNES-WHELAN: I am happy to just orally give a further submission from what just came out of Mr Melhem's evidence rather than put in a final written submission. I will note though that I would still like to provide the Commission that note about potential authorities and the question of whether an undertaking can address concerns to do with submission interest.

PN465

THE DEPUTY PRESIDENT: Thank you.

PN466

MS BARNES-WHELAN: What I will say about the evidence we have just heard from Mr Melhem is that I just picked one, one condition from the Mobile Crane Award - I could have gone through many, which confers a benefit when compared to this agreement and this is a difference of - this is not an insignificant - this is a financial benefit for workers that's in the Mobile Crane Award that they do not get under this agreement. Just one example. And it's clear that he did not explain that difference. I could have gone through many more but to save everyone time, I didn't. But then I think what came out of the evidence is Mr Melhem saying essentially, it was to the effect of look, we're trying to - the CFMEU was trying to make this about the Mobile Crane Award. This is never about Mobile Crane Award. This is about the Building and Construction Award.

PN467

Now, I think it's clear from the evidence that was also in his mind at the time that he gave that explanation. That he was not required to give any explanation by reference to the Mobile Crane Award because he didn't think it was required. This is also reflected in the written document that was provided to the work force. Save for mentioning I think the Mobile Crane rates or the definitions,

however you want to call it, there is no reference to that award. They provided the award, they have made that much clearer and I think that's clear on precis evidence. They provided the Mobile Crane Award to the work force but the work force shouldn't be required – that obligation is on the employer – they shouldn't be required to do a line by line assessment and go through Mobile Crane Award to see, 'Oh, what am I missing out on'. The employer's required to explain these particularly less beneficial terms. How their employment will change. And there's – I think it's reasonably apparent that that wasn't done by reference to the Mobile Crane Award.

PN468

I think that's it from me, Deputy President unless there are any questions.

PN469

THE DEPUTY PRESIDENT: Thank you. How long do you anticipate that you might need to provide my chambers with a note on that issue, Ms Barnes-Whelan?

PN470

MS BARNES-WHELAN: I do have another meeting to run off to this afternoon, so I am a little bit limited in that regard but I imagine I can do so even by 10 am tomorrow morning.

PN471

THE DEPUTY PRESIDENT: All right. That's fine.

PN472

MS BARNES-WHELAN: Okay.

PN473

THE DEPUTY PRESIDENT: If you can do that by 10 am tomorrow morning then I will, as a matter of fairness, upon receipt of that note, I am comfortable to give the company and the AWU a short additional period of time to respond, in the same order of time frame that the CFMEU is taking. So up to a max of 24 hours to provide a supplementary response. What I might do is upon receipt of that note from the CFMEU just enquire of you as to whether you'd like to provide anything in reply and if so, then you will understand that it will be due by 10 am the following day. All right. Anything else?

PN474

MS BARNES-WHELAN: No, Deputy.

PN475

THE DEPUTY PRESIDENT: Can I thank you all for coming down today and for the evidence and submissions that you have all given? It's been helpful to me and I appreciate it. Thank you. We will adjourn on that basis.

ADJOURNED INDEFINITELY

[12.28 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

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