



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER JOHNS

AG2023/4538

s.217 - Application to vary an agreement to remove an ambiguity or uncertainty

**MSS Security Pty Limited T/A MSS Security
and
United Workers' Union
(AG2023/4538)**

MSS Security Victorian Enterprise Agreement 2021

Melbourne

9.00 AM, TUESDAY, 13 FEBRUARY 2024

PN1

THE COMMISSIONER: Thank you, good morning parties. I will take the appearances.

PN2

MS CAMPBELL: Thank you, Commissioner. Natalie Campbell, and I appear on behalf of the applicant, MSS.

PN3

THE COMMISSIONER: Thank you.

PN4

MR WHITESIDE: And good morning, Commissioner. Whiteside, initial T, and I appear on behalf of the respondent.

PN5

THE COMMISSIONER: Thank you, Mr Whiteside. Just for completeness, Ms Campbell, I think I have already given permission to be represented but just for the purposes of transcript I confirm that permission has been granted pursuant to section 596 of the Fair Work Act.

PN6

MS CAMPBELL: Thank you, Commissioner. Could I just also raise a matter of housekeeping? It's very warm here today in Melbourne and it's still warm in the hearing room in Melbourne. Could we just - - -

PN7

THE COMMISSIONER: I'm sorry. Associate, I need the volume turned up. I can hardly hear Ms Campbell. Ms Campbell, it might be good if you were right next to the microphone.

PN8

MS CAMPBELL: Is that better, Commissioner?

PN9

THE COMMISSIONER: Much better.

PN10

MS CAMPBELL: Thank you. Apologies. Could I seek the Commission's indulgence to appear not wearing jackets in the Commission today, just due to the heat in Melbourne.

PN11

THE COMMISSIONER: Yes, of course. Have we failed to pay the electricity bill and there's no air-con in Melbourne?

PN12

MS CAMPBELL: It might be the early start time. We're not certain here. But such - - -

PN13

THE COMMISSIONER: It's a bit stuffy here in Sydney as well I'm afraid.

PN14

MS CAMPBELL: Turning just to some other matters of housekeeping, we just wanted to confirm that the Commission has the digital tribunal book, which has been prepared by the Commission which we're very grateful for.

PN15

THE COMMISSIONER: Yes. We have that.

PN16

MS CAMPBELL: That's the document that I will be referring to today. In terms of the applicant's documents that the Commission needs to be aware of there's our outline of submissions which is at page 14 of the tribunal book. We have some witness statements from Ms Bhoomika Bharti, Mr Jamie Adams and Nelson Meechan. Each of the witnesses are here today in court and will be given the opportunity – I'll tender those statements through those witnesses.

PN17

We also have an agreed statement of facts.

PN18

THE COMMISSIONER: Yes.

PN19

MS CAMPBELL: Sorry, Commissioner, is that better in terms of the microphone?

PN20

THE COMMISSIONER: Yes. Thank you.

PN21

MS CAMPBELL: There was a little bit of a reverberation here. And we also have an agreed statement of facts that's been agreed by both the parties.

PN22

THE COMMISSIONER: Yes.

PN23

MS CAMPBELL: It's probably appropriate that as the applicant I tender the agreed statement of facts, or alternatively, we could just tender the digital tribunal book.

PN24

THE COMMISSIONER: So long as there's nothing missing from the digital tribunal book which has, on my count, 657 pages. What I propose to do is mark as an Exhibit in the proceedings each of the document as they correspond with the tab in the digital tribunal book. So, for example, the Form F1 will be Exhibit 1. The witness statement of Bhoomika Bharti will be Exhibit 2.1 and so forth and so on.

PN25

MS CAMPBELL: Thank you, Commissioner. I am content to proceed on that basis and I can't see there are any objections from the other side of the Commission table.

PN26

THE COMMISSIONER: Very good.

PN27

MS CAMPBELL: So turning now to the application that MSS has brought before the Commission today I understand from the last directions that the Commission has read the materials and also your decisions demonstrate that you are familiar with this area of the law. So I won't spend a lot of time in a detailed opening, but I just wanted to outline a few things just so that the cross-examination and the evidence that will proceed before the Commission makes sense in context.

PN28

So we are seeking a variation of clause 21 of the agreement. The agreement is not in the digital tribunal book but both parties have set out clause 21 in their submissions. That's at CB9 and 10 of the book in the applicant's submissions.

PN29

The phrase that is in issue is the Fair Work Commission minimum wage increase. It's MSS's position that this phrase is ambiguous and uncertain because it is not clear whether this refers to the Fair Work Commission award increases, or the Fair Work Commission National Minimum Wage increase. So that's the dispute that is before the Commission today.

PN30

We are seeking a retrospective variation of the enterprise agreement so that it is clear that it refers to the subjective intention of the people who voted up and agreed to this agreement, that is, that it refers to the Modern Award Minimum Wage increase.

PN31

I am just going to briefly address the Commission on the steps that the Commission is bound by under 217 of the Fair Work Act and I understand that the Commission is very familiar with this so I won't take long.

PN32

The first issue that is a matter of a statutory pre-condition is whether or not the phrase is ambiguous and uncertain. There are a number of principles. They do not seem to be in dispute between the applicant and the respondent in this proceeding. So I won't address you on those in detail. But we submit to the Commission that it's necessary in determining whether or not there is an ambiguity or uncertainty not to interpret the clause, but simply to look at the clause on the face of the document that is the enterprise agreement.

PN33

Now the reasons that we say the Commission ought to find that there's an ambiguity or uncertainty in this clause is that read on its face it is not apparent which of the Fair Work Commission increases the phrase refers to. Read on its

face the clause itself does not indicate whether it is referring to a minimum wage increase or a percentage and there are multiple ways of reading the clause.

PN34

In our submissions we referred to the fact that the term used is an amalgam of both the National Minimum Wage and the Modern Award Minimum Wage. It was set against us that the selection of the words Fair Work Commission Minimum Wage were not an amalgam, and perhaps it's the case that amalgam is given a different meaning by the respondents to us. But what that submission intended was that there is no equivalent phrase within the Act or within the industrial landscape that makes it clear what it is that those words meant. And in that sense the words are uncertain and/or ambiguous.

PN35

The Commission will be familiar that as part of its annual wage review in 2022 to 2023 the Fair Work Commission increased the National Minimum Wage and the Awards Minimum Wages. This is the first time since an order of those nature had been made that the increases were different. That's a matter in the agreed statement of facts.

PN36

The respondents have also drawn the Commission's attention to the schedule. We agree that these are relevant. Schedule A which is set out in the agreement refers to being updated and distributed within 14 days of FWC Minimum Wage decisions. So we have a slightly different view or a different reference to the terms there. And Schedule B makes a similar reference, as does Schedule C.

PN37

Now, we submit that the use of the different words in this part of the agreement indicates and underscores our submission that this is a term that is ambiguous, or uncertain, within the context of clause 21.

PN38

Now, ambiguity can also be drawn from the surrounding circumstances. That is why we refer to the 2022/2023 decision. The negotiation of the agreement really happened in two parts. There are agreed facts pertaining to this but the agreement was put up to a vote and then was ultimately withdrawn by the applicant.

PN39

It was not until after that occurred and only with three bargaining meetings remaining that the Fair Work Modern Award and Modern Minimum Wage increase decisions were for the first time in history different. And I'll make some submissions on the evidence around that.

PN40

Now, I want to just underscore for the Commission that the question of ambiguity is separate from its proper construction. Much of the respondent's outline of submissions are really about how it says this phrase should be construed.

PN41

But to take that approach would lead the Commission into error. Just because a term is capable of construction it does not mean that it is not ambiguous or uncertain. Ambiguous terms are frequently construed by industrial bodies, including the Commission and the courts in Australia. And as you would well be aware ambiguity at times is a precondition to certain aspects of a constructional exercise.

PN42

What the Commission needs to give attention to here is that ambiguity means capable of more than one meaning, and that is an objective question.

PN43

THE COMMISSIONER: In your submissions you refer to – well, you say that the Commission ought to be satisfied that the agreement is ambiguous, or in the alternative uncertain.

PN44

MS CAMPBELL: Yes.

PN45

THE COMMISSIONER: Is the better case that it's uncertain?

PN46

MS CAMPBELL: My reading of the Full Federal Court authority which is Bianco Walling is that ambiguity and uncertainty are not really to be read as extremely different. But I can see that uncertainty in this particular case is something that looms large. And that is particularly because there seems to be a lack of certainty between many people who were involved in making this agreement as to what those words mean.

PN47

So I would take the Commission's lead on that to say that perhaps uncertainty is the better description of this particular term. We would have to be led by Bianco Walling on what the real difference between ambiguity and uncertainty in the legislation is.

PN48

In my submission, it would be possible for a Commission to find that an agreement was uncertain but not ambiguous. And that would still meet the statutory precondition to - - -

PN49

THE COMMISSIONER: Or I could find that it's uncertain and not make any decision about ambiguity.

PN50

MS CAMPBELL: Correct. And that would still, in my submission, be correct at law in that it would meet the statutory precondition that would then allow the Commission to consider the other steps in 217.

PN51

THE COMMISSIONER: Thank you.

PN52

MS CAMPBELL: It might now be appropriate for me to move on to those other steps. So there's a recent decision of Deputy President Bell that has been relied on by the respondents in their submissions. That clearly points out that a second precondition is that a party to the agreement has brought the applications. That's not in dispute here. I think we all agree that that has been met by MSS bringing the application.

PN53

Then we turn to the next area that is in dispute which is whether or not the agreement should be varied. Now, here, the Commission has a discretion and that is enlivened by the ambiguity or uncertainty to vary the agreement. One of the things that looms large in this case of an area of potentially legal difference is whose opinion, or whose subjective intention is it that the Commission should be paying attention to in determining what the mutual intentions of the parties are.

PN54

Now this was given some attention by Deputy President Sams in another MSS case, where it's clearly stated there that the Commission should be looking at the mutual intention of the people who were voting and making the agreement. Now that means the relevant intention are those of MSS, which are attributed through its employees and also those of the employees.

PN55

The opinion of the union about the meaning of the agreement as a bargaining representative would overstate the role of the union within the Fair Work regimes and that's what Deputy President Sams said. So when you're hearing the evidence today, although it's appropriate for the union to provide evidence about the bargaining process and what it communicated to its members, the subjective intention of the union is not what is at issue here at law. So that's just an important point to make. And a little bit – you know – we'll see, I suppose, where that goes today in the evidence.

PN56

Otherwise these issues on variation are set out in our submissions and unless there's anything further that I can address you on that that's really the opening that I wanted to make on behalf of MSS.

PN57

THE COMMISSIONER: But if you say it's the mutual intention of the employee covered by the agreement and MSS that it should be read the way that you would have me vary it, why not just put that to the employees and vary the agreement yourself? You could do that.

PN58

MS CAMPBELL: That would be, however, at the next bargaining round and my

- - -

PN59

THE COMMISSIONER: No, no. You could vary the agreement, couldn't you?

PN60

MS CAMPBELL: By a voting process?

PN61

THE COMMISSIONER: Yes. If you say that that is the mutual intention of the employee and MSS just go and vary the agreement. Fix it yourself. Why do you need me to do it?

PN62

MS CAMPBELL: I suppose the purpose of an application under 217 is to avoid the onerous and communication process required by a vote and to come to the Commission and to allow you to defer to the subjective intention of the parties and that that may be a more efficient way to deal with this issue than returning to a vote.

PN63

THE COMMISSIONER: But in the overall exercise of my discretion surely it's relevant that there is a mechanism by which MSS and its employees can remedy this if they want to.

PN64

MS CAMPBELL: Commissioner, I wouldn't say that that's relevant given this particular statutory process.

PN65

THE COMMISSIONER: Why not? It's, you know, as you said, first I have to determine whether there is ambiguity or uncertainty. And then I need to determine whether, overall, in the exercise – it's an overall exercise in discretion, isn't it?

PN66

MS CAMPBELL: Yes.

PN67

THE COMMISSIONER: But why is it not relevant to the overall exercise of my discretion, that there is a power within the Fair Work Act for you and your employees to fix this?

PN68

MS CAMPBELL: The reason is, Commissioner, that 217 directs your attention to the intention of the parties at the time that the agreement was made. So whether or not they have that understanding now is not relevant. The issue is what they subjectively intended the clause to meet at the time. So there's not really a retrospective though to sort of say, 'Well, what are our options now? Could we do this? Could we do that?' The question is how 217 works and that's from – it's clear that what you have to look at is the subjective intentions of the parties and what they meant by the term that's there.

PN69

THE COMMISSIONER: Yes, but even if I - - -

PN70

MS CAMPBELL: And you are really varying to correct the agreement – I'm sorry to speak over you - - -

PN71

THE COMMISSIONER: No. That's all right.

PN72

MS CAMPBELL: Correct the agreement in order to reflect those subjective intentions. Another thing that indicates that is that a 217 application can be brought a long time after the vote has occurred and there may be a completely different group of employees who have different intentions or want to get a different outcome out of such an application now. And that's why the point in time aspects of your assessment of what the subjective intentions of the parties who made the agreement were at the time that they made it is critical and that's really where we have focused our evidence.

PN73

THE COMMISSIONER: Yes.

PN74

MS CAMPBELL: Unless there's anything else I can assist you with we have witnesses in the court. Would you like an order for the witnesses to leave the Commission hearing room in Melbourne, Commissioner.

PN75

THE COMMISSIONER: Yes. I so make that order.

PN76

MS CAMPBELL: While that is happening, the first witness on behalf of MSS is Bhoomika Bharti and she will just come to the witness box now, Commissioner.

PN77

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

PN78

MS BHARTI: Bhoomika Bharti, (address supplied).

<BHOOMIKA BHARTI, AFFIRMED [9.35 AM]

EXAMINATION-IN-CHIEF BY MS CAMPBELL [9.35 AM]

PN79

THE COMMISSIONER: Ms Bharti, can you hear and see me?---Yes, Commissioner.

*** BHOOMIKA BHARTI

XN MS CAMPBELL

PN80

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

PN81

MS CAMPBELL: We're just having that handed up. Thank you, Commissioner.

PN82

THE WITNESS: I do have it, Commissioner.

PN83

THE COMMISSIONER: Just bear with me.

PN84

MS CAMPBELL: The witness statement is at 2.1 if that assists the Commission.

PN85

THE COMMISSIONER: I have that. I just need the witness to speak so that the camera will deflect to her. Ms Bharti, just say 'test 1, 2, 3'?---Test 1, 2, 3.

PN86

Can we have - - -?---Yes.

PN87

Thank you. All right. Great, I can see you now. Do you have a copy of your witness statement in front of you?---Yes, Commissioner, I do.

PN88

Thank you. Are there any amendments you'd like to make to the witness statement?---Sorry?

PN89

Are there any amendments you would like to make - - -?---No.

PN90

- - - to the witness statement?---No. No, Commissioner.

PN91

Are its contents true and correct?---They're true. Yes.

PN92

Would you have me receive it as your evidence in these proceedings?---Yes.

PN93

Thank you. If you just wait there Mr Whiteside might have some questions for you.

CROSS-EXAMINATION BY MR WHITESIDE

[9.37 AM]

PN94

MR WHITESIDE: Good morning, Ms Bharti. Commissioner is the microphone level - - -

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN95

THE COMMISSIONER: That's very good. That's very good. I can hear you very well, thank you.

PN96

MR WHITESIDE: Okay. Is it too close? I've got it rather close.

PN97

THE COMMISSIONER: No, no. It's fine but it's a reminder that we need to get better microphones with some extensions on them so that it doesn't sit on the lectern like that.

PN98

MR WHITESIDE: Good morning, Ms Bharti. My name's Mr Whiteside. I've just got a few questions for you this morning. So, Ms Bharti, you commenced employment with MSS in 2021?---That's correct.

PN99

And you began participating in the bargaining for the 2021 agreement in July of 2021?---Yes.

PN100

So you'd be very familiar with the terms of the 2021 agreement?---Yes.

PN101

You'd also be very familiar with the terms of the predecessor agreement which is the MSS Victorian Enterprise Agreement 2017?---Yes. I've gone through it but not probably as much in detail as I would have for the agreement that was in negotiations.

PN102

Yes, okay. Now, you accept the clauses 21.1(3) and 21.2.2 of the 2021 agreement derive from the 2017 agreement?---Yes.

PN103

And would you agree that apart from some minor formatting differences - - -

PN104

THE COMMISSIONER: Sorry, Mr Whiteside, just because of the technology you just need to slow down so that I can properly hear the witness answer the questions. Because what happens is when the witness speaks the camera flicks and so we just need to slow down and wait for her to answer before you ask the next question. Thank you, sorry.

PN105

MR WHITESIDE: Yes, sorry Commissioner.

PN106

THE COMMISSIONER: No. Not at all.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN107

MR WHITESIDE: I'll start the question again.

PN108

THE COMMISSIONER: Thank you.

PN109

MR WHITESIDE: So apart from some minor formatting differences and the years being updated would you agree that clauses 21.1.3 and 21.2.2 of the 2017 agreement are otherwise identical to clauses 21.1.3 and 21.2.2 of the 2021 agreement?---Yes. I think so.

PN110

And you say as much in that paragraph 39 of your statement?---Yes.

PN111

Where you state, 'Clause 21 of the EA was essentially carried forward from the previous version.'?---That is correct.

PN112

And you weren't involved in the negotiation or drafting of the 2017 agreement, were you?---No. I was not.

PN113

So you can't really tell us anything about the original intended meaning of the words Fair Work Commission in relation to this can you?---No.

PN114

Now, you have 15 years of professional experience in Human Resources Management?---Yes.

PN115

And between 2021 and October 2022 you were the People Culture and IR Manager?---Yes. That's correct. For MSS Security.

PN116

Yes. And then since October 2022 you have been the State Manager of Operational Performance?---Yes.

PN117

So is it correct to say that with both your past and present roles at MSS, your role is involved ensuring that MSS complies with its legal requirements with respect to its industrial instruments?---Yes. That's the role of every senior manager.

PN118

Yes. Ensuring employees are paid correctly?---Yes. Yes.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN119

Dealing with the union, and then being involved in the bargaining negotiations between July of 2021 shortly after the negotiations began and then they brought

'23 when the agreement was finally approved. Now as part of your role you keep abreast of the Annual Wage Review decisions?---Yes.

PN120

I take you now to paragraph 35 of your statement?---Yes.

PN121

Now, paragraph 35 you state, 'On or around the end of May 2022 there was an announcement by the FWC the minimum wage was increasing. At first it was unclear to me whether this referred to award amounts or the National Minimum Wage decision and whether there was any difference.' Then I take you to the next paragraph which is 36. You go on to state that around the middle of June 2022 the FWC clarified there was a difference in the increase of the National Minimum Wage and the Modern Award Minimum Wage increase, with the form of increase by 2 per cent and the latter being increased by 4.6 per cent.

PN122

So you'd agree by your own account that by at least June of 2022 you were aware of the difference in the rate of increase that had been ordered with respect to the National Minimum Wage and the Modern Award system?---No. You've left the important thing in the 36 which is the minimum threshold. So what I understood what it said was for the awards the National Minimum Wage was 5.2 per cent. For the Modern Awards it was 4.6 per cent but there was a certain threshold. If any of the employees were under that minimum threshold they were to be increased by 5.2. And when I looked at that point, as compared to the SSIA which is relevant to our industry only Level 1 employees were falling under that. And anyone from Level 2 to Level 4 or Level 5 was all above the threshold, hence my observation was that they will be awarded 4.6 per cent, not 5.2.

PN123

THE COMMISSIONER: Did you have anyone at Level 1?---No. Not for the one
- - -

PN124

But if they had been at Level 1 you would have given them 5.2?---Yes. That's correct.

PN125

MR WHITESIDE: Okay. I accept there is the threshold aspect that was in the Annual Wage Review decision of 2022?---Yes.

PN126

The question is - - -

PN127

THE COMMISSIONER: Sorry, just I want to be very clear here. Ms Bharti, your whole case is that you should have paid 4.6 is that right?---Yes.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN128

And you have just conceded to me that had you had employees at Level 1 you would have paid them 5.2, isn't that correct?---That was my understanding. If they fell below the threshold.

PN129

Yes. So it's not the case that you would have paid everyone 4.6, is it?---For the employees in question, it was 4.6.

PN130

Yes, but had you had employees at Level 1 you would have paid them 5.2?---At that time. Yes, that was my understanding.

PN131

Thank you. And Ms Campbell you're going to need to get some instructions about that very important section.

PN132

MS CAMPBELL: Thank you, Commissioner.

PN133

THE COMMISSIONER: Keep going, Mr Whiteside.

PN134

MR WHITESIDE: Thank you, Commissioner. Just to put the question in a slightly different way. Beyond the issue of employees on Level 1 who were the uplifted to ensure they reached the 5.2 per cent increase. You were aware though that there was a different rate of increase that had been awarded to the Modern Award system and compared to the National Minimum Wage?---That's not how I interpreted it back then. What I interpreted it was that there was a minimum threshold that because of the CPI and inflation that was introduced. And it was said that anyone below that minimum threshold would be 5.2. Anyone above the threshold will be 4.6 because that was the award increase. So that was my understanding.

PN135

So for employees above Level 1, though, you were aware that a different rate of increase had been ordered to the award system as opposed to the National Minimum Wage?---So, right we were talking about the enterprise agreement and because we were always talking about the increases to be in comparison with the award, like we were talking about award plus 2.5 per cent. So what that base would be was 4.6 plus 2.5 per cent.

PN136

The question isn't about how you understood that to operate with respect to the agreement you were negotiating?---M'mm.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN137

The question is just asked as a general proposition you were aware that the Commission had taken a different approach to what it historically had and had

ordered different rates and increase to the award versus the Modern - - -?---Yes. I was aware there are two rates that have been introduced.

PN138

That's all I am asking. Very good. There were then bargaining meetings held on the 30 June 2022?---M'mm.

PN139

And another bargaining meeting on the 14 July. Now there was no discussion in the June or July meetings about the meaning of the words 'Fair Work Commission, minimum wage increase'. As existed in clauses 21.1.3 and 21.2.2 of the 2017 agreement which was underpinning the negotiations?---So what's the question?

PN140

That there was no discussion about the term – the phrase – 'Fair Work Commission minimum wage increase' at the June or July bargaining meetings?---That that I can remember, no.

PN141

Nobody turned their minds to the meaning of those existing words?---No, because everyone was discussing the wage increases. It wasn't yet- - -

PN142

So not MSS, not the UWU, not the independent bargaining reps? Nobody turned their minds to those – the meaning of those words?---No. No.

PN143

And there was no proposal from MSS to change or alter those existing words was there?---No. Not that – not in my memory of recollection.

PN144

I'll take you now to your statement at paragraph 39?---M'mm.

PN145

You state, and I'm not – well, I can go to this part if you like. But if you go to the second sentence you state, 'The bargaining of clause 21 was completed by the time of the May 2022 decisions of the FWC and we did not return to this issue during the bargaining.' Can I take you now to annexure JR which is at pages 608 to 609 of the tribunal book.

PN146

THE COMMISSIONER: Sorry, Mr Whiteside, what page?

PN147

MR WHITESIDE: 608 and 609.

PN148

THE COMMISSIONER: Thank you?---Yes.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN149

MR WHITESIDE: Apologies, Commissioner. I returned to the wrong part of the book.

PN150

THE COMMISSIONER: That's all right.

PN151

MR WHITESIDE: Do you have that there, Ms Bharti?---Yes, I do.

PN152

Would you agree that that's a copy of an email sent by you to Mr Richardson from the UWU from the 3 August 2023?---2022. Yes.

PN153

Yes. Apologies, 2022. And that's an email where you reject the UWU's wages proposal?---What I remember reading the email that was about the public holiday PEN payments to be taken away, not the wage proposal overall.

PN154

Well, you say there, 'We would like to maintain the agreement in its current form with FW increases for all the years.'

PN155

THE COMMISSIONER: Well, Mr Whiteside, be fair. Finish the sentence.

PN156

MR WHITESIDE: 'Which still maintains the above award advantage proposed and to existing employees.' Was that not in response to the union's previous or its latest wages proposal?---What I recollect now, reading the email that was in response to union suggesting of taking the PEN payments out for the existing employee. So the bands could be combined or to that regard.

PN157

Sure?---That way. It was because if you read the first one that is regarding the public holiday not worked payment. So that's my recollection of that email.

PN158

When you refer to the – it goes to the union's proposal. It's a response to the union's earlier proposal to overhaul the distinction between new and existing employees in the agreement?---Yes.

PN159

Yes?---Yes.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN160

Which was, itself, part of the union's general wage claim which was seeking to end the grandfathered rates with respect to existing employees and move to a single tiered wage system with respect to ending the distinction between new and

existing employees?---Yes. So there were two different claims and the distinction and the wage claim were two different claims.

PN161

Yes. So the email is a response to that aspect of the union's wages proposal which necessarily involved changing the words, of course, 21?---No. Not changing the clause 21. I'm not sure what you're referring to.

PN162

Well the clause 21 provides a wage increase regime for new employees and also for existing employees. So if the union was seeking to end the existing distinction between new employees that would necessitate change in the union's proposal, necessitate changing the words in clause 21 would it not?---I think that will necessitate the change in a lot of clauses in the agreement. I'm not sure how is that relevant to the minimum wage that we're talking about today. I'm sorry. I'm not understanding your question because what you're saying is if we were to change existing and new and like remove those terms from the agreement we would probably have to rewrite the whole agreement anyway.

PN163

Yes. But that would include rewriting clause 21?---Yes.

PN164

Okay. I will take you now to annexure BB22 which is at page 26 of the tribunal book and again bear with me while I also turn to that page.

PN165

THE COMMISSIONER: So, Mr Whiteside, what page?

PN166

MR WHITESIDE: 226?---226 is it?

PN167

That's right. So just in general terms would you agree this is an email from Mr Richardson of the union seeking or putting a revised wages proposal to MSS for consideration in the bargaining?---I'm sorry but I haven't got into that statement – can you just - - -

PN168

That's okay. Take your time?---- - -help me with that? Is it 226? Is it these pages or – there's no 226 in here. Yes, sorry. Sorry, Commissioner.

PN169

THE COMMISSIONER: No. That's fine.

PN170

THE WITNESS: Yes. I have it in front of me.

PN171

MR WHITESIDE: You have it there?---Yes.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN172

So without the need to go through it sentence by sentence you'd agree that the introductory paragraph there has been a headline that says 'wages' and then below that there's (indistinct) to clause. So just in very general terms this is the union putting a revised wages proposal to MSS on the 25 October 2022?---Yes.

PN173

Yes. I'll now take you to Mr Richardson's statement at paragraphs 37 to 38 and I have not written the number down here which is a mistake. I will get that number for you. Page 573 of the court book.

PN174

THE COMMISSIONER: Thank you I have that.

PN175

THE WITNESS: Yes.

PN176

MR WHITESIDE: Are you there?---Yes.

PN177

So here Mr Richardson states that at the bargaining held on the 2 December 2020 – that should say '2022' I think – 'Ms Bharti advised the UWU team at MSS did not agree with the UWU's revised wages offer of 25 October 2022 and would be putting its own agreement out to a vote as soon as possible.

PN178

Again, in general terms, would you agree that at that meeting – sorry, would you agree that at the December meeting MSS did indeed reject the UWU's wages proposal of 25 October 2022?---I don't quite remember the date that you've just stated but, in general, yes.

PN179

Okay. Thank you. So taking you back to your own statement at paragraph 39 of your statement?---Yes. What page was it? I have it now. Page 30.

PN180

Page 30. Yes?---Yes.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN181

That's right. This is where you state that – this is where you state in the second sentence, 'The bargaining of clause 21 was completed by the time of the May 2022 decision of the FWC and we did not return to this issue during the bargaining.' Now, given there was a wages proposal put by the UWU in October, which was being rejected in December, the statement that bargaining in relation to the clause 21 had been completed by May it's not really true is it?---It is, because there are two log of claims. So when we're saying clause 21 and the wordings around it that's different. When we're saying 'wages proposal' that was different. So what I meant to say in that statement there is the wordings around the clause or – yes – so it wasn't about the wages. As I said in the second

bargaining round the wages proposal put by UWU was more to a safeguard and was more towards getting rid of new and existing. Whereas the first bargaining round the wages proposal was about how much I was going to get the increases to both existing and new.

PN182

But you've accepted that discussions with respect to clause 21 which deals with wages those discussions continued after May 2022, didn't they?---The wording and the wages. So what I'm – what we did – is it the point 35 you're saying?

PN183

Paragraph 39?---Thirty-nine. Sorry. I was reading the wrong paragraph. Yes. So we did it in the second round of bargaining. We didn't quite go in details of what was discussed in the first round of bargaining. It was not exactly the wages that we were discussing. It was more about the classification, to safeguard rates, and that was one of the things. So we were discussing those – not exactly – how the wages are going to be increased and what percentage.

PN184

But those discussions go to – the discussions which occurred with respect to the union's revised wage proposal that was put to you in October of 2022 and which was projected in December of '22, that necessarily dealt with the drafting or redrafting of clause 21?---That's not how I've made that statement. That's not how I've made that point or the way that I have made that point is to say that we had almost discussed all the wages or wage increases that we were going to propose. And then in the second round of bargaining the union had only come with a couple of – three or four log of claims that we were dealing with separately. That is what I meant of that statement.

PN185

So you wouldn't still stand by your statement? The bargaining on clause 21 was completed by the time of May 2022? That's not sustainable is it?---The way you're interpreting it now because you're saying all - anything that – any claim that had or any clause that had anything to do with wages or wages written in it is the same thing, then probably not.

PN186

THE COMMISSIONER: I mean after May 2022 you were still discussing what wages would look like. Isn't that right?---Yes.

PN187

And I mean you ultimately accede to the claims being made by the union, but you could have and that would have resulted in a change, wouldn't it?---The change of the wording in that clause, probably not.

PN188

Well, it would have had to have wouldn't it? It you had acceded to the safeguarding, for example, clause?---If you – yes, sorry - - -

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN189

You would have had to change clause 21, wouldn't you?---Yes. Sorry. To rephrase that. If you were to away from any increases that were relying on the base rate awards then, yes.

PN190

But you don't – in the enterprise bargaining you don't have a deal where you have a deal do you?---That's right.

PN191

And so everything's up in the air until you've got a deal at the end?---That's correct.

PN192

And at no point did someone sign – at no point did the union sign-off and say, 'We agree with clause 21', did they? Until the end?---No. We didn't discuss clause 21 in particular, no.

PN193

Right?---Yes. Wages overall, yes.

PN194

So there's no agreement on what clause 21 means. Sorry, no agreement on what clause 21 – the wording of clause 21 until right at the end is there?---No.

PN195

So it's not settled by the time of May '22 is it?---No.

PN196

Thank you. Mr Whiteside?

PN197

MR WHITESIDE: Yes, thank you, Commissioner. So just taking a step back, it's your position now that the words 'Fair Work Commission Minimum Wage Increase', those words are ambiguous or uncertain?---Yes.

PN198

And that those words could be understood as a reference to either the National Minimum Wage or a reference to the increase to the Modern Award?---Award Minimum Wage, yes.

PN199

But in June 2022 when a clear distinction had been drawn between the rate of increase of the two, it's true to say that you didn't take any steps to amend clauses 21.1.3 and 21.3.2 to make clear that you intended those words to refer to the Modern Award increase, did you?---No. As I understood that to be in my interpretation it was the Award minimum wage because the National Minimum Wage didn't apply to the employees.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN200

Ms Bharti, I put it to you that you were offering an incorrect understanding of the words in clause 21.1.3 and 21.2.2, referring to an increase to the Modern Award when no such words were there?---You probably could say that. But as I said my understanding all the wage discussions, up until that point, even after, were based on the Award rates plus how much that you're going to provide to the employees. So, in my mind, it was all these Award minimum wage and also the fact that, you know, the threshold was above or below. So National Minimum Wage didn't apply. So it was Award Minimum Wage. That's what we've kept referring to.

PN201

So that understanding was, as you say, in your mind?---That's the understanding of the articles that I'd read and the decisions that I read.

PN202

But the words 'Modern Award' aren't in the subclauses?---Yes. Neither 'National' nor the 'Modern Award', no.

PN203

Okay. I'm taking you now to your statement at paragraph 46. Just to read from your statement you say, and I'm jumping ahead of – like it's sorry, I'll put that again. Just a quote from your statement, 'The union was told that was not something that had ever been raised or discussed during the bargaining meeting and that it had always been linked to the minimum Award increase which, at the time, was 4.6 per cent. But would you accept that prior to the 2017 agreement wage increases under the predecessor agreements had been based on a set percentage figure, hadn't they?---I'm not sure.

PN204

Ms Bharti, I put it to you that previously under the predecessor agreements wage increases had been increased by 3 per cent in June 2014 and June 2015 and June 2016. You're not aware of that?---No. As I said, previous to 2017 I wouldn't be able to remember.

PN205

So you can't say with any certainty then, can you, that wage increases under this agreement and its predecessors had always been linked to the minimum Award rate increase?---Under this agreement - - -

PN206

Can you?---- - -that I was part of the negotiation it was always linked to the Award, but the predecessors I can't say.

PN207

So do you still stand by your statement when you say you have always been linked to the minimum Award rate increase?---What I'm referring to there is this agreement that's in question.

PN208

Okay. Ms Bharti you've said you - - -

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN209

THE COMMISSIONER: Sorry, I just need to – sorry, Mr Whiteside. So when you say, Ms Bharti, it had always been linked to the minimum Award rate increase. What's the foundation for that?---It's the – all during the bargaining process and the negotiations and the communications that have been sent out to the employees, the information sessions that we have done. Every time we have spoken about wages has always been based on the Award increases and the additional percentages that we would put on as a result of this enterprise agreement. So any communications that's gone out to employees, or ever any communications between the union and MSS, and during the bargaining meeting in, you know, with all the bargaining representatives in there all this had Award as the base, and then the additional percentage.

PN210

Thank you.

PN211

MR WHITESIDE: Ms Bharti, returning to the 2017 agreement which you'd accepted you have some familiarity with?---Sorry? Say again.

PN212

I said, returning to the 2017 agreement, which is the predecessor agreement, which earlier you've confirmed you have some understanding of?---I'm sorry. I said before the 2017 agreement I have – yes, okay, I have some understanding but not part of the negotiations.

PN213

Yes, that's right?---Yes. Yes. Okay.

PN214

But the 2017 agreement formed the basis?---Yes. Yes.

PN215

It was the agreement that was up for bargaining?---Yes. Sorry. Sorry.

PN216

In the 2021 bargaining. Yes?---Yes. Understood.

PN217

So under that agreement – the 2017 agreement – wages were increased by 3.3 per cent in July 2017, 3.5 per cent in July 2018. You're agreed. Three per cent in July 2019, 1.7 per cent in July 2020. You've agreed?---I don't have the agreement in front of me so I don't remember the percentages. But if you're reading it from that I'd assume it's correct.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN218

Okay. And 2.5 per cent in July 2021. All these figures they were the rate of increase ordered to both the National Minimum Wage and the Modern Award in those years. So would you agree that going back to July of 2017 the wage

increases provided for in the agreement but equally have been said to have been linked to the National Minimum Wage increases from that?---I'm not sure.

PN219

THE COMMISSIONER: Sorry, I didn't hear the answer?---I'm not sure, Commissioner.

PN220

MR WHITESIDE: I want to put it to you that where you've said in your statement that the wage increases have 'Always been linked to the' – I'm going to put it to you that where you say in your statement that the increases had always been linked to the minimum Award rate increase which at the time was 4.6 per cent, but that's not actually correct is it?

PN221

MS CAMPBELL: Can I just rise? I take issue with this question, Commissioner. The witness has already clarified that that statement referred to her discussions for the negotiation of this agreement. The she identified that she has a passing knowledge of the 2017 agreement. But it's unfair to characterise that statement as being one that's existed since – you know – previous agreements and previous negotiations. And also, unless this is going to a matter of credit, which I don't think it is, I don't really see how the witness's opinion on what the previous agreement said, in this light, can assist the Commission.

PN222

THE COMMISSIONER: As I have heard the evidence it seems to me that what the witness is saying is that in paragraph 46, in the second line, between the words, 'that' and 'it', I should insert 'in bargaining'. So the union was told that was not something that had ever been raised or discussed during the bargaining process – and that in bargaining it had always been linked to the minimum Award wage increase.

PN223

MS CAMPBELL: That's correct.

PN224

THE COMMISSIONER: That's what I think – yes, the witness is saying. Am I right about that Ms Bharti?---Yes, that's correct, Commissioner.

PN225

And should I insert those words with an amendment to clause – paragraph 46 of your witness statement? Ms Bharti, should I insert the words 'in bargaining'?---Yes, please. Sorry. Yes, please – sorry.

PN226

All right.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN227

MR WHITESIDE: Okay. In light of that amendment I'll move on, Commissioner.

PN228

THE COMMISSIONER: Yes, thank you.

PN229

MR WHITESIDE: I take you now to the statement at paragraph 42. Here you're saying that – here you had verbal discussion with Mr Richardson about the union's intention to lodge a dispute with respect to the pay increase for July 2022, not being in line with the National Minimum Wage?---Yes.

PN230

So is it correct to say that you were aware that the union or the different understanding of clauses 21.1.3 and 21.2.2 in at least May 2023?---Yes. When - -
-

PN231

THE COMMISSIONER: Sorry, can I just ask why is any of paragraph 42 to 47 relevant to the decision I have to make?

PN232

MR WHITESIDE: It simply goes to the delay and the timing. We would say the motivation of the application which is a relevant factor to have regard to when the discretion is exercised.

PN233

THE COMMISSIONER: Right.

PN234

MS CAMPBELL: And Commissioner, perhaps that's actually a question that I should be answering, given that it is in our statement. The relevance of it is this. A post – although the assessment of the Commission is the subjective intentions of the parties at the time the agreement was made, there are facts that could post-date that time that would indicate as subjective intention that was previously held. So that's where the relevance comes from.

PN235

THE COMMISSIONER: All right. Thank you.

PN236

MR WHITESIDE: I only have a few more questions. Going now to your statement at paragraph 47 which is just the statement, the sentence referring to the union following its materials in relation to the 739 dispute on the 20 October. Now, it shouldn't be controversial that you didn't file this 217 application until the 23 November this year.

PN237

THE COMMISSIONER: Last year.

PN238

MR WHITESIDE: Sorry. Apologies. Last year, 2023.

BHOOMIKA BHARTI

XXN MR WHITESIDE

PN239

THE COMMISSIONER: Yes. Just a month after the union's application.

PN240

MR WHITESIDE: Just a month after the union's application, and almost six months after you became aware of the differing understandings of clauses 21.1.3 and 21.2.2 held between MSS and the union. Is it correct to say, Ms Bharti, that this 217 application was entirely prompted by the union's 739 application filed on the 20 October 2023?---No comment. I'm not the only person in the organisation who makes decisions. So I can't comment on that. There's a management and there are further discussions that happened.

PN241

Well, I am going to suggest to you that this allocation was entirely prompted by the union's 739 application?---I can't confirm that.

PN242

Nothing further, Commissioner.

PN243

THE COMMISSIONER: Well, I didn't hear the answer?---I cannot confirm that.

PN244

Who made the decision to file the present application before me?---So there was management above me and there are further discussions that happened with our National team so probably - - -

PN245

Do you know who made the decision?---No. I'm not a hundred per cent.

PN246

Was it a committee or one person?---Committee.

PN247

Who's on the committee?---That would be our legal counsel and our managing director, our executive general manager, our National IR advisor, National P&C Manager, and I wasn't the P&C Manager at that time. So the Victorian P&C Manager.

PN248

Were you involved in any of those discussions?---Not in order to do a plan of action because I wasn't in that role. So I was made aware that the union has filed a dispute but then what happened after that, no I wasn't.

PN249

Mr Whiteside?

PN250

MR WHITESIDE: I have no further questions, Commissioner.

*** BHOOMIKA BHARTI

XXN MR WHITESIDE

PN251

THE COMMISSIONER: Thank you. Any re-examination, Ms Campbell?

PN252

MS CAMPBELL: Yes, Commissioner.

RE-EXAMINATION BY MS CAMPBELL

[10.20 AM]

PN253

MS CAMPBELL: Ms Bharti, could you please go to page 30 of the number Volume 1 that's in front of you?---Yes.

PN254

And have a look at paragraph - - -

PN255

THE COMMISSIONER: Sorry, Ms Campbell, you're going to have to just move the microphone a bit close or something.

PN256

MS CAMPBELL: Apologies, Commissioner. Is that better?

PN257

THE COMMISSIONER: That's much better. Yes, that's fine.

PN258

MS CAMPBELL: Okay, thank you. I will endeavour to remember to do that. It's just a matter of me facing the screen, versus then facing the witness.

PN259

THE COMMISSIONER: I'd rather you face the witness.

PN260

MS CAMPBELL: Okay, thank you. Ms Bharti, could you please read paragraph 39? That's the paragraph that you were taken to about clause 21 earlier?---Yes.

PN261

What did you mean to explain to the Commission by that clause – by that paragraph, I'm sorry?---So because the wording of the clause was carried forward from the previous EA. So what I read and meant in that paragraph was that any discussions on the wording was already discussed and was agreed or agreed to disagree before May 2022, not what the repercussions and anything like that. But just the wordings. Purely the wordings of that.

PN262

Thank you. And - - -

*** BHOOMIKA BHARTI

RXN MS CAMPBELL

PN263

THE COMMISSIONER: Sorry. No, but that wasn't the evidence earlier. The evidence earlier was that there was no discussion about clause 21, isn't that right? About the wording in clause 21?

PN264

MS CAMPBELL: The evidence that she just gave was that it was discussed earlier and that after this point the wording of clause 21 was not returned to. Not that it was never discussed.

PN265

THE COMMISSIONER: But it also – but it's not. Her evidence before was that it was not settled. I took a note and it will be reflected in the transcript, that clause 21 was not – I accept that there was no discussion about the wording but the witness made the concession that clause 21 was not settled because there were ongoing discussions about wages - - -

PN266

MS CAMPBELL: That's not disputed, Commissioner - - -

PN267

THE COMMISSIONER: And had there been changes? Yes, well I don't understand the point that's being made.

PN268

MS CAMPBELL: I'm trying to just clarify the distinction between the wording of the clause being resolved versus the substance of the clause which is dealt with in other places of the agreement relating to the wages.

PN269

THE COMMISSIONER: What the witness conceded is until you have an agreement on the substance there is no agreement on the wording.

PN270

MS CAMPBELL: Correct. And I think you and I are in agreement. I'm just clarifying with the witness that what – the point of this evidence is that the wording of clause 21 was not returned to, rather than the substance.

PN271

THE COMMISSIONER: I accept that. But I don't know that it carries you very far.

PN272

MS CAMPBELL: Well, I'll move on from that, Commissioner, but that was just the clarification that I wanted to make. I think we've resolved that. Ms Bharti, are there any Level 1 employees covered by the agreement?---No.

PN273

And is that correct at the time that the agreement was being made?---Yes.

*** BHOOMIKA BHARTI

RXN MS CAMPBELL

PN274

To your knowledge has the agreement previously – the 2017 agreement applied to Level 1 employees?---I can't say to you. It was before my time there were any Level 1 employees for whatever time period or not. So - - -

PN275

So you don't know about prior to the agreement being made were any Level 1 employees likely to be covered by the agreement?

PN276

THE COMMISSIONER: Well, Ms Campbell, you have to be careful. They're covered by the agreement by virtue of what's in the agreement.

PN277

MS CAMPBELL: I'll withdraw that. Yes, I'll withdraw that question.

PN278

THE COMMISSIONER: Whether or not MSS actually - - -

PN279

MS CAMPBELL: Yes.

PN280

THE COMMISSIONER: - - -employs Level 1 - - -

PN281

MS CAMPBELL: Yes, that is the correct question.

PN282

THE COMMISSIONER: It seems to me to be completely irrelevant. The agreement covers Level 1 and the witness conceded that had they employed Level 1 people they would have got – sorry, 5.2 – but the fact that they didn't what difference does that make?

PN283

MS CAMPBELL: It's relevant to the witness's subjective understanding of how the agreement would operate in relation to what her understanding of the threshold wages was.

PN284

THE COMMISSIONER: And her evidence is if we had Level 1 we would have given them 5.2. That was her evidence.

PN285

MS CAMPBELL: Well, that was the question that I was going to ask the witness about. What did you mean by that?---As I said my understanding of the wage increase was that due to inflation and CPI Fair Work has a certain threshold. They've introduced a certain threshold. Any employees, regardless, if they're being paid under that threshold they need a higher increase, whereas if anyone above that threshold they will get only 4.6.

*** BHOOMIKA BHARTI

RXN MS CAMPBELL

PN286

And how did you understand the 5.2 to apply?---That's how I understood it, that 5.2 will apply to any employees who fall under that threshold.

PN287

The threshold being the minimum wage?---Not the minimum wage – I think – yes. There was a certain threshold that I said. I can't quite remember now what was that hourly or weekly rate. So any worker who's earning less than that weekly wage will be uplifted by 5.2. Anyone above that weekly rate or hourly rate will be 4.6.

PN288

THE COMMISSIONER: That's completely consistent with the evidence that was given earlier which is that had MSS employed Level 1 people they would have applied a differential rate. Isn't that right, Ms Bharti?

PN289

MS CAMPBELL: And was your understanding based - - -

PN290

THE COMMISSIONER: Sorry, I didn't hear the witness's answer?

PN291

MS CAMPBELL: I'm sorry. You needed to answer the Commissioner's question. I didn't - - -?---Well, sorry, Commissioner. I wasn't paying attention. Well, what was your question?

PN292

THE COMMISSIONER: I said your understanding was that the agreement covered Level 1 right through to Level 5 isn't that right?---That's correct.

PN293

And had you employed Level 1 people they would have got 5.2 per cent?---If they fell below – if they fell below the threshold. Yes.

PN294

Yes. And so you would have if you had Level 1 employees applied the differential rate?---Yes.

PN295

Good, thank you.

PN296

MS CAMPBELL: And was the source of that understanding from the Award?---That was from the wage decision that was released during the time.

PN297

And which wage decision?---The Fair Work Commission.

*** BHOOMIKA BHARTI

RXN MS CAMPBELL

PN298

So the source of your understanding was from – and was it the wage decision as it applied to awards or the wage decision as it applied to the minimum rate?---Right. So I didn't make the distinction only until later when those two terminologies were – you know – I was introduced to those two terminologies being different, National Minimum Wage and Award Minimum Wage. So at that point that I'm talking about I only read it that, okay, there is this thing about threshold, above and below. But the terminologies or National Minimum Wage being separate Award Minimum Wage, I wasn't across that. So, no, I didn't read it like that or I didn't read it in the Fair Work Commission decision either.

PN299

Thank you. No further questions.

PN300

THE COMMISSIONER: Thank you, Ms Bharti. Can I thank you for your attendance here today and for your evidence? I have been greatly assisted by it and you are now excused as a witness?---Thank you, Commissioner.

<THE WITNESS WITHDREW

[10.28 AM]

PN301

MS CAMPBELL: Commissioner, our next witness is Jamie Adams.

PN302

THE COMMISSIONER: Adams, yes.

PN303

MS CAMPBELL: We'll just get him in. Just in terms of how we're tracking for time, it was a one o'clock finish for today.

PN304

THE COMMISSIONER: Yes.

PN305

MS CAMPBELL: Is the Commission still available for the rest of – or available tomorrow?

PN306

THE COMMISSIONER: Yes, I am - - -

PN307

MS CAMPBELL: Should we just go over. Okay, thank you.

PN308

THE COMMISSIONER: Yes. Yes.

PN309

MS CAMPBELL: That would inform the length of my cross-examination.

*** BHOOMIKA BHARTI

RXN MS CAMPBELL

PN310

THE COMMISSIONER: Well, I should have said no then.

PN311

MS CAMPBELL: I think the witness is ready to be sworn in.

PN312

THE COMMISSIONER: Thank you, Associate.

PN313

THE ASSOCIATE: Yes, can I get you to state your full name and address?

PN314

MR ADAMS: Jamie Grant Lachlan Adams – my residential address is (address supplied).

PN315

THE ASSOCIATE: Do you wish to give an oath or the affirmation?

PN316

MR ADAMS: Affirmation, please.

<JAMIE GRANT LACHLAN ADAMS, AFFIRMED [10.30 AM]

EXAMINATION-IN-CHIEF BY MS CAMPBELL [10.30 AM]

PN317

THE COMMISSIONER: Thank you, Mr Adams. Can you hear and see me?---Yes, I can. Thank you, Commissioner.

PN318

Very good. Do you have a copy of your witness statement there?---I do.

PN319

I'll ask you to have a look at that. Do you have it now?---I do have it before me, yes.

PN320

Yes. Are there any amendments you'd like to make to the statement?---Not at this time, no.

PN321

Are its contents true and correct?---Yes, I believe them to be correct.

PN322

Yes. Would you have me receive it as your evidence in these proceedings?---I would. Thank you.

PN323

Thank you. The statement of Jamie Adams is Exhibit 2.5.

*** JAMIE GRANT LACHLAN ADAMS

XN MS CAMPBELL

EXHIBIT #2.5 WITNESS STATEMENT OF JAMIE ADAMS

PN324

If you wait there, Mr Whiteside might have some questions for you.

CROSS-EXAMINATION BY MR WHITESIDE

[10.31 AM]

PN325

MR WHITESIDE: Good morning, Mr Adams?---Good morning.

PN326

I just have a few questions for you?---Sure.

PN327

So, Mr Adams you commenced your employment with MSS back in 2004?---That's correct.

PN328

And you commenced in your current role as Executive General Manager, Victoria and Tasmania in October 2022?---That's also correct.

PN329

And before that you were the General Manager for Victoria and Tasmania from July 2017?---That's also correct.

PN330

And then you led the negotiations for the agreement since in the bargaining with the 2021 agreement?---That's correct.

PN331

So is it correct to say you'd be very familiar with the terms of the 2021 agreement?---It's fair to say that I am reasonably familiar with the agreement, although I would not profess to understand or – sorry, I would not profess to be able to recite all of it word for word.

PN332

And you'd be similarly familiar with the 2021 predecessor agreement which is the MSS Security Victoria Enterprise Agreement 2017?---My familiarity in the previous agreement is similar to the 2021 agreement predominantly focuses around the rates and matters pertaining to how employees are rostered and the conditions under which they're employed.

PN333

Did you accept that clause 21.1.3, 21.2.2 of the 2021 agreement derived from the 2017 agreement?---I don't have copies of those fully to hand at the moment so it's not possible for me to answer that at the moment.

PN334

THE COMMISSIONER: Well, look at paragraph 17 of your witness statement?---Okay. Yes, I certainly see that that is similar language from the prior agreement.

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN335

MR WHITESIDE: Would you agree that apart from some minor formatting differences and the years being updated the clauses don't just use similar language, clauses 21.1.3 and 21.2.2 of the 2017 agreement are otherwise identical to clauses 21.1.3 and 21.2.2 of the 2021 agreement, aren't they?---Yes, I believe that to be the case.

PN336

So you weren't involved in the negotiation and drafting of the 2017 agreement, were you?---No. I was not.

PN337

So you're not really in a position to tell us anything about the original intended meaning of the words, 'Fair Work Commission Minimum Wage Increase' are you?---As they pertain to the 2017 agreement, no I am not.

PN338

I take you to paragraph 7 of your statement. You refer there to your involvement in the bargaining for five other agreements?---Yes, that's correct.

PN339

If it assists I've got the document here with the wage clauses of those five agreements. I would ordinarily hand that up to you, Commissioner. I have a difficulty in that I don't have a digital copy of this. I have digital copies of the agreements themselves - - -

PN340

THE COMMISSIONER: If you hand up the copies to my Associate? If you hand one bundle to the learned friend. One bundle to the witness and one bundle to my Associate who is incredibly clever, smart and efficient and I am sure he will email me links to the documents.

PN341

What we might do is take just a five-minute adjournment so that I can then have them in front of me.

PN342

MR WHITESIDE: Yes, thank you, Commissioner.

<THE WITNESS WITHDREW [10.36 AM]

SHORT ADJOURNMENT [10.36 AM]

RESUMED [10.46 AM]

<JAMIE GRANT LACHLAN ADAMS, RECALLED [10.46 AM]

CROSS-EXAMINATION BY MR WHITESIDE, CONTINUING [10.46 AM]

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN343

THE COMMISSIONER: Thank you. Mr Whiteside, if you would continue your cross-examination. I don't have the document in front of me. Do you want me to mark it as an exhibit?

PN344

MR WHITESIDE: Yes, that's probably sensible.

PN345

THE COMMISSIONER: How will I describe it?

PN346

MR WHITESIDE: I'm in your hands, Commissioner, as to what you think the appropriate marking should be.

EXHIBIT #6 EXTRACTS FROM VARIOUS ENTERPRISE AGREEMENTS

PN347

THE COMMISSIONER: Ms Campbell, are you content with that?

PN348

MS CAMPBELL: Yes.

PN349

MR WHITESIDE: Mr Adams, I will just - - -

PN350

THE COMMISSIONER: Sorry, I didn't hear Ms Campbell's response.

PN351

MS CAMPBELL: Yes.

PN352

THE COMMISSIONER: Thank you.

PN353

MR WHITESIDE: Mr Adams, sticking with paragraph 7 of your statement you've referred there to five other agreements you've been directly involved in the bargaining of?---That's correct.

PN354

Then turning to this extracts document which has been marked exhibit 6, the first page there, this is an extract from the MSS Security Reserve Bank of Australia Enterprise Agreement 2020. That's the agreement that you're referring to in your statement at paragraph 7?---That's correct.

PN355

Then at clause 19 of this agreement the agreement provides the wage increases for July 2021, 2022 and 2023 of 2.25 per cent, 3 per cent and 3 per cent; that's correct?---That is correct.

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN356

And turning the page this is an extract from the MSS Security Loy Yang Enterprise Agreement 2020. This is an extract from the agreement that you're referring to at paragraph 7?---Yes, that's correct.

PN357

And then at clause 7, rates of pay, we have for July 2021, July 2022 and July 2023 wage increases of 2.75 per cent, 3 per cent and another 3 per cent; that's right?---That's correct.

PN358

And then turning the page again this is an extract from the MSS Security Esso Gippsland Site Security Officers Enterprise Agreement 2020; you would agree?---Yes, I would agree with that.

PN359

That's the agreement that you're referring to at paragraph 7 of your statement?---Yes, that's also correct.

PN360

And then this one, without going into great amount of detail, at clause 16, increases, excepting for permanent rotating shifts on the main gate and Longford heliport, rate of increase 2021 will be 2.75 per cent, and then there are various dollar amounts for those other work sites that are covered by the agreement?---That's correct.

PN361

And then similarly for 2022 there's an increase of 3 per cent for wages in July of 2022; you'd agree?---I would agree.

PN362

And then various dollar amounts for those other particular work sites?---Yes, that's correct.

PN363

Then turning the page over again this is an extract from the MSS Security Crown Casino Security Employees Enterprise Agreement 2021?---That's correct.

PN364

This is the agreement, an extract from the agreement that you've referred to at paragraph 7 of your statement?---That is also correct.

PN365

And then again at clause 2022(sic), classifications of wage rates, we have rates of pay and pay increases at sub-clause 22.3, and then in terms of the wage increases at 22.3.1.2 we have for December 2021 wage increases at 2.25 per cent, and in December 2022 2.5 per cent, and then December 2023 2.5 per cent?---All correct.

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN366

And then the final page here is the MSS Security Victorian Aviation Security Employees Enterprise Agreement 2021, an extract from that agreement rather?---Yes.

PN367

And this is an extract from the agreement which you refer to in your statement at paragraph 7?---Yes, that's correct.

PN368

And then again - this is a bit different - but 11.2 we have 5.75 on approval, and then in year 2 4.6 per cent from the first full pay period on or after 1 July, and then in year 3 the Fair Work Commission minimum wage increase percentage from the first full pay period after 1 July 2023?---That's correct.

PN369

So of those five agreements that you've referred to which you were involved in the bargaining for you would agree that only one of those agreements tethers in your wage increases to the annual wage review?---Not entirely.

PN370

THE COMMISSIONER: Which other one does?---So, Commissioner, for context the Victorian Aviation Agreement negotiation was a protracted exercise.

PN371

Is that the last one?---That's correct. And at that time an upfront increase by the time I inherited it that had been part negotiated by the time I took over the remaining negotiation of that agreement. The 5.75 per cent had been all but agreed in the previous agreement process. I ratified that as part of my responsibilities of leading the remainder of that negotiation closing the agreement out. The 4.6 per cent increase was agreed to post the July 2022 minimum wage decision as it relates to the awards. And so hence it was able to be articulated as a clear number which happened to align with the award increase that year as well, because it didn't go to vote until after that period of time.

PN372

But I think what's being put to you is out of all of the agreements you've negotiated it's only the Aviation Agreement that refers to a linkage to the Fair Work Commission minimum wage increase. I think that's what was put?---If that statement is correct, and there are reasons for that, and that's predominantly driven by the employees' desire to have known and fixed increases at the time of negotiating the agreement, but that's correct.

PN373

Thank you, Mr Whiteside.

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN374

MR WHITESIDE: Thank you, Commissioner. So building on what you've just said only one of those five tethers wages to the annual wage review, and then the other four, for the reasons you've just stated about (indistinct) and the like, the

other four will provide annual wage increases at particular stated percentages; that's correct?---That is correct.

PN375

So you'd have to agree that of all the agreements you've been involved in negotiating the common practice for MSS has not been to structure its agreements in a manner which tethers annual wage increases to the annual wage increase?---Well, with the exception of Victorian Enterprise Agreement 2021 and the Aviation Enterprise Agreement, yes, that's correct. But I should - I'm sorry, I just need to clarify, that's not the company's position. It was a decision that was taken by the employees and negotiating teams on behalf of the employees during that negotiation period to seek those mixed increases, rather than the company's position.

PN376

THE COMMISSIONER: Mr Adams, can I ask you to move a bit closer to that microphone, or, Associate, can you push it forward a bit.

PN377

THE WITNESS: Sorry, Commissioner, is that better?

PN378

THE COMMISSIONER: That's much better, thank you.

PN379

THE WITNESS: So just to repeat what I said before, it's not the company's position to not align to wage increases that are aligned in the award and those agreements that you've stipulated there. That was a decision that was taken by the employees in their desire and their bargaining teams, bargaining representatives on their behalf to have certainty around fixed increases. It was driven by the employees, not by the company.

PN380

MR WHITESIDE: Four of the six that you directly led the bargaining for, for MSS, four of those six you've arrived at a wage clause that provides the specific stated increases?---That's correct.

PN381

I will take you to your statement at paragraph 13?---Yes, I have it in front of me.

PN382

You say:

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN383

Throughout the bargaining process I was conscious of the need for the EA to pass the better off overall test. An aspect of this included that the EA had rates that are better off than the award for the life of the EA. It was my preference that the wage increases referred to it by Fair Work Commission decision to increase award rates of pay. My understanding was the discussions around wage increases were had by reference to the award increases.

PN384

?---That's correct.

PN385

You would of course agree that clauses 21.1.3 and 21.2.2 under both the 2017 agreement and the 2021 agreement don't include the words 'modern award'?---I would agree that they don't include those words, yes.

PN386

That's why we're here today. So you've stated at 14:

PN387

Throughout the bargaining process I'd only thought about the increases - - -

PN388

Sorry. I take you now to your statement at paragraph 14. You're there?---Yes.

PN389

You stated:

PN390

Throughout the bargaining process I'd only thought about the increases under the EA to be aligned with award increases. At this point in time I have not contemplated the minimum wage increase decision as something that was applicable to the employees in question.

PN391

So you're saying you've not contemplated the minimum wage increase decision applicable to the employees in question despite clauses 21.1.3 and 21.2.2 using the words 'Fair Work Commission minimum wage increase'?---Yes, that's correct.

PN392

THE COMMISSIONER: Why isn't the clause objectionable on the basis of being opinion?

PN393

MR WHITESIDE: Is that - - -

PN394

THE COMMISSIONER: Sorry, Mr Whiteside?

PN395

MR WHITESIDE: So can you ask the question again.

PN396

THE COMMISSIONER: Why isn't the clause objectionable on the basis of it being an opinion?

PN397

MR WHITESIDE: Is it clause or the question?

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN398

THE COMMISSIONER: The clause. I don't know whether you're taking the point or not.

PN399

MR WHITESIDE: Sorry, I don't - I'm not taking the point, no.

PN400

THE COMMISSIONER: The witness is expressing an opinion. Isn't that an objection to the clause being in the witness statement?

PN401

MR WHITESIDE: You're saying that the expression - the words in the statement are opinion, are objection on that basis?

PN402

THE COMMISSIONER: Well, it's a matter for you.

PN403

MR WHITESIDE: It is opinion, but I think it does go to the subjective intention of the parties during the bargaining.

PN404

THE COMMISSIONER: All right.

PN405

MR WHITESIDE: I don't think we take issue with that. So just to return to where I was; you've accepted that despite the clauses using the words 'Fair Work minimum wage increase' you hadn't contemplated the minimum wage increase to the national wage as being applicable to the employees?---That's correct.

PN406

Staying at paragraph 14 of your statement you state:

PN407

At the time of the bargaining I was also not aware of any difference in those rates historically.

PN408

But you would have been aware of the divergence in the increases to the minimum wage and the award announced in June 2022?---I was aware, but that was in a well advanced stage of the bargaining process. So prior to that I hadn't been aware of any deviance between the award rates movement and the minimum wage movement.

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN409

But after the announcement in May, and the clarification if you like in June that there was a difference in the rate of increase to the modern award system compared to the national minimum wage, you never turned your mind to how that decision, that decision to order different rates of increase, you never turned your

mind to how that decision would interact with existing clauses 21.1.3 and 21.2.2?---That's correct, I did not.

PN410

And that's because there was no discussion during the bargaining after the annual wage review decision as to what the words 'Fair Work Commission minimum wage increase' meant?---No, that's correct. To the best of my recollection I don't believe that there was any discussion around what that meant from either party in terms of the rates impact to wage rates.

PN411

I will take you now to paragraph 41 of your statement. Perhaps it's better to start at paragraph 40, apologies. You refer at paragraph 40 to becoming aware that United Voice, which is the predecessor name of the union now, considered that the increase in pay rates ought to have been in line with the national minimum wage increase of 5.2 per cent. And then at paragraph 41 you state:

PN412

This was the first time that I was aware that a union held this view. I was of the understanding about the bargaining that the increase referred to in the EA would be of the modern award wage increase. It is my recollection that at no time during the bargaining period access period where documentation was issued to the employees which specifically referred to the increase from July 2023 - - -

PN413

I think you mean 2022.

PN414

- - - of 4.6 per cent, or voting period, that the UWU expressed anything to suggest they held a different understanding of the wage decision interpretation.

PN415

Now, with respect to the discussions which did occur in relation to clause 21 and wages generally would you agree that most of the discussion about wages after June 2022 was in relation to the UWU's wage claims?---Yes, that could be possible. I don't specifically recall who initiated those conversations, but that is - that is possible, yes.

PN416

The UWU's first claim which was put forward - when I say first claim I mean first claim in the second round of bargaining - the UWU's first claim in the second round of bargaining put forward in April of 2022, that was to end the two tiered wage scheme which differentiates between new and existing employees, and the proposal to increase wages to 6 per cent above award rates, which is what the union refers to as safeguard rates. Do you recall that proposal?---Yes, that certainly sounds familiar, yes.

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN417

And then in the latter period of the second round of bargaining the discussions centred on the UWU's revised wage claim, which was put forward in October 2022, and that was a more moderate - it was a moderated claim which was to bring wages for so-called new employees up to 2 per cent above award and in stages over the life of the agreement?---Yes, I recall that.

PN418

And then in contrast MSS just wanted to preserve the status quo and maintain the existing clause which had originated in the 2017 agreement?---My understanding is I think that originated in an earlier version of that agreement, but, yes, I do recall that.

PN419

So the discussions that happened - so you've accepted that the parties did not turn their minds to the words, the meaning of the words 'Fair Work Commission minimum wage increase' during the bargaining after the June annual wage review decision, and that subsequent discussions was about the UWU seeking to radically or dramatically change the words in clause 21, and you were seeking to preserve the status quo. And ultimately the status quo was preserved?---Correct.

PN420

I will take you now to annexure JR3, which is at page 610 and 611 of the tribunal book?---Sorry, Mr Whiteside, can you confirm which book that's in?

PN421

That's the second - I think we all have the same problem with the binders not being large enough - so it's the second book?---And which page was it again, please?

PN422

610. So if you start with - sorry, were you seeking to say something, Commissioner?

PN423

THE WITNESS: Yes, I do have it in front of me.

PN424

THE COMMISSIONER: No, no.

PN425

MR WHITESIDE: Apologies. Are you with me?---I am. I have that, thank you.

PN426

So this is a United Workers' Union bulletin. It's title is 'MSS EBA update'. This is a document which was circulated by the UWU to its members in January?---Okay.

PN427

And then there's four sub-headings down it says 'Wage increases' and the commentary from the union is:

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN428

MSS is maintaining the split system wage system. So-called new employees employed after 2012 will be paid minimum wage increases for 2022, 2023 and 2024, and then from 2021 rates that are .5 per cent above the award so-called employees will be paid minimum wage increases for 2022, 2023 and 2024, but from base rates at least 3.5 per cent higher than the award.

PN429

You would accept that this document was circulated by the UWU during the access period?

PN430

MS CAMPBELL: Commissioner, can I just rise to address you on this line of questioning. My understanding is that this is a UWU document. I think the witness should be given an opportunity to ask whether he's seen it before, whether he knows what the provenance is, if this is a document that he's ever seen during the time that it was issued. It's just a little bit unclear how his opinion on the document without that information could assist you.

PN431

THE COMMISSIONER: Thank you, Ms Campbell, I think that's correct. Mr Whiteside?

PN432

MR WHITESIDE: Mr Adams, have you seen this document before?---I believe I have.

PN433

THE COMMISSIONER: Sorry, do you have a recollection of when you might have seen it?---Not specifically, Commissioner. It could have been during the access period, but I couldn't categorically state that that was fact.

PN434

Thank you, Mr Whiteside.

PN435

MR WHITESIDE: I will just put it to you this way, Mr Adams. Do you accept that the commentary that the union provided in this document does not refer to the wage increases on offer being in line with the modern award, and rather that the words 'minimum wage increase' is used?---I would agree that's what the wording is, yes.

PN436

THE COMMISSIONER: But it refers to the award at the end of the sentence, I think in fairness. As I understand it - - -

PN437

MR WHITESIDE: It's a differential - - -

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN438

THE COMMISSIONER: Sorry, as I understand it, and Ms Campbell can correct me, the evidence from the applicant's witnesses is that whenever there's a reference to minimum wage it's always followed somewhere in the sentence or somewhere else in the document by the reference to the award. That's what they say. And therefore everyone understood that it was a reference to the modern award minimum wage increase, and that sentence says:

PN439

So-called existing employees will be paid minimum wage increases for 2022, 2023 and 2024, but from base rates at least 3.5 per cent higher than the award.

PN440

And I am sure what Ms Campbell is going to invite me to do is read that as the union understanding that the minimum wage increase was always centred around the award. I am sure Ms Campbell is going to say this document helps her more than it helps you.

PN441

MR WHITESIDE: Commissioner, our witnesses are yet to give their evidence, but - - -

PN442

THE COMMISSIONER: Anyway keep asking the question.

PN443

MR WHITESIDE: If I can clarify. The question is simply that - I think it is accepted that both the parties look at the wages and compare them to the award differentials, and that is why in the UWU's various, particularly at second - both its wage claims, it's trying to achieve wages that are above the award, and the way the awards are being measured is by reference to the comparison to the award. But that's looking at the ultimate dollar figures and how they look compared to the award, but it doesn't flow from that that the words in the clause tether that actual increase to the award. It's a different question. One goes to section 207 and the better overall test. The other is whether those words should be taken to have one meaning or another, and we say the words obviously aren't ambiguous, but - - -

PN444

THE COMMISSIONER: I don't think you mean 207.

PN445

MR WHITESIDE: No, 206, apologies. I will move on. If you go now to page 612 and 613 of the tribunal book?---Yes, I have those.

PN446

This is a document that dates from 21 April 2023, which was circulated just after the agreement was approved by the Commission. Have you seen this document? I understand you've seen this document before, Mr Adams?---I don't believe I'd seen this document prior to the hearing in the body of evidence and the statements that were issued to us in preparatory to this case.

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN447

I will just put it to you this way, Mr Adams. Do you accept this document is consistent with the UWU having a different understanding of clauses 21.1.3 and 21.2.2?

PN448

MS CAMPBELL: Commissioner, I just rise. I am not sure this witness can be asked about a different organisation's understanding. I am happy for submissions to be made on this document along the lines of what Mr Whiteside has just put to the witness. I don't think it's a *Browne v Dunn* issue. I just think that that question can't assist the Commission to understand the issues in dispute.

PN449

THE COMMISSIONER: Mr Whiteside, I think that might be right.

PN450

MR WHITESIDE: The question just goes to Mr Adams' statement where he has stated that to his recollection at no time during the bargaining access period or voting period that the UWU had expressed anything to suggest they held a different understanding of the wage decision interpretation. That's why I sought to take Mr Adams to the union material circulated, the first one in January during the access period, which doesn't refer to the rate of increase being tethered to the modern award, and then to the April document, which explicitly refers to the 5.2 per cent.

PN451

THE COMMISSIONER: Yes, but I think that's a matter for you to make a submission. I don't know that this witness's view about what this document says, that he says he can't recall seeing, assists me.

PN452

MR WHITESIDE: I will move on, Commissioner. Mr Adams, I only had a few more questions for you. I will just take you to your statement at paragraphs 39 to 40. So here at 39 you understand that the union first raised a dispute about the pay rates via email on 15 June. That's when you then became aware that the union considered that the wage rates ought to have been in line with the national minimum wage increase. Now, you would accept that MSS didn't file this application until some time later on 23 November of last year; you'd accept that?--I believe that to be the case, yes.

PN453

Is it fair to say that this 217 application was entirely prompted by UWU's section 729 application, which was ultimately filed on 20 October 2023?--I think it's fair to say that our position following that was that we wanted to remove any ambiguity and correct what was obviously a misunderstanding in the interpretation of what that clause should actually mean.

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN454

So you would accept this application was prompted by the UWU raising a dispute?---Yes.

PN455

No further questions.

PN456

THE COMMISSIONER: Thank you. Ms Campbell, any re-examination?

PN457

MS CAMPBELL: No, there's not, Commissioner. I think the witness, unless the Commission has any further questions, can be excused.

PN458

THE COMMISSIONER: Thank you. Sorry, just for completeness - - -

PN459

MS CAMPBELL: Sorry.

PN460

THE COMMISSIONER: That's all right. Mr Adams, can I thank you for your attendance here today. You are now excused as a witness?---Thank you, Commissioner.

<THE WITNESS WITHDREW

[11.17 AM]

PN461

I understand, Ms Campbell, that completes the evidence on behalf of the applicant?

PN462

MS CAMPBELL: No, Commissioner, there's just one more witness, Nelson Meechan. His statement is at the back of the materials. It was provided in reply. I will just turn up the page number for you, and if I might just get Mr Meechan brought into the hearing room. It's tab 4.

PN463

THE COMMISSIONER: Tab 4, yes, sorry.

PN464

MS CAMPBELL: 623 to 625.

PN465

THE COMMISSIONER: Thank you.

PN466

MS CAMPBELL: Commissioner, I note the time, it's 12.18. If you needed to take a short break now we could. I suspect the time may - - -

*** JAMIE GRANT LACHLAN ADAMS

XXN MR WHITESIDE

PN467

THE COMMISSIONER: I think it's 11.18.

PN468

MS CAMPBELL: Sorry, you're right it is 11.18. The clock in front of me seems to be on, what would we call it, non daylight saving time. Sorry about that. If you wanted to take a short break we could do that now if you need time to refresh yourself. I think I should be able to finish the cross-examination of the two union witnesses by 1 pm, and that's what our intention is.

PN469

THE COMMISSIONER: Let's bat on.

PN470

MS CAMPBELL: Okay. Thank you.

PN471

THE ASSOCIATE: Please state your full name and address.

PN472

MR MEECHAN: Nelson (indistinct) Meechan, (address supplied)

<NELSON MEECHAN, SWORN [11.20 AM]

EXAMINATION-IN-CHIEF BY THE COMMISSIONER [11.20 AM]

PN473

THE COMMISSIONER: Mr Meechan, it's Commissioner Johns, can you hear and see me?---Yes.

PN474

Very good. Do you have a copy of your witness statement there?---Yes.

PN475

Are there any amendments you would like to make to the witness statement?---No, everything's (indistinct) there. Everything's just the way I spoke to lawyers - - -

PN476

No, no, listen to me, a simple question. Are there any amendments you would like to make to the witness statement?---No.

PN477

Are its contents true and correct?---Yes.

PN478

Would you have me receive it as your evidence in these proceedings?---Yes.

PN479

Thank you. If you wait there Mr Whiteside might have some questions for you. It is exhibit 4 in the proceeding.

*** NELSON MEECHAN

XN THE COMMISSIONER

PN480

MR WHITESIDE: Good morning, Mr Meechan. I have only a few questions for you this morning. If I can begin by taking you to your statement at paragraph 7?---Yes.

PN481

This is where you state:

PN482

I volunteered to be involved in MSS Security Victorian Enterprise Agreement 2021 negotiations as an employee bargaining representative. In my capacity as an employee bargaining representative I attended the bargaining meetings as an employee of MSS.

PN483

Now, to become an independent employee bargaining representative there's a formal process; you'd agree?---Yes.

PN484

To become an employee bargaining representative you would have filled out a form appointing yourself in writing as an employee bargaining representative; is that right?---Yes.

PN485

I take you now to your statement at paragraph 13. This is where you state:

PN486

Throughout the bargaining process I was talking to employees about what was happening at the bargaining table. Minimum wages came up. I mentioned the 4.6 increase that (indistinct) in respect of the financial year 2022/2023 pay period.

PN487

Is it correct to say you were not formally appointed by any other employees as their bargaining representative during the bargaining?---No.

PN488

THE COMMISSIONER: Sorry, I didn't hear the witness's answer.

PN489

THE WITNESS: No.

*** NELSON MEECHAN

XN THE COMMISSIONER

*** NELSON MEECHAN

XXN MR WHITESIDE

PN490

MR WHITESIDE: So you're saying that at least one or other employees filled out a form appointing you as their bargaining representative?---No. I was asked by

other guards to become one of the bargaining people at the EBA. They wanted someone who would speak up for them.

PN491

But in a formal sense it was only you who appointed yourself?---Yes.

PN492

So in a formal sense you were a bargaining representative for yourself only?---No.

PN493

MS CAMPBELL: Commissioner, I am not sure where this line of questioning is going. I don't necessarily know whether the formality aspect is something that this witness was even aware of or whether it's important. I just don't really see whether or not the witness was formally representing others doesn't go to their subjective intentions. He has simply given evidence about his communications with other employees. He doesn't have to formally represent them for that evidence to be relevant.

PN494

THE COMMISSIONER: How is 'I was talking to employees about what was happening at the bargaining table' useful to me at all?

PN495

MS CAMPBELL: Because it's another example of where communications were being made about what this agreement meant and what its effect was. He is another person who's communicating that on the basis of the award increase at 4.6 per cent. So it simply supports the rest of the communication that it was clear to employees that 4.6 per cent, the award increase, was the increase that they agreed to, which goes to the subjective intention of the parties aspect of the test.

PN496

THE COMMISSIONER: But he clearly wasn't a representative of any other employee other than himself.

PN497

MS CAMPBELL: No, but what I am saying is that that doesn't actually matter one way or another whether he was or he wasn't.

PN498

THE COMMISSIONER: That can be a matter for submissions.

PN499

MS CAMPBELL: Yes. Thank you.

*** NELSON MEECHAN

XXN MR WHITESIDE

PN500

MR WHITESIDE: Yes, I agree we will deal with that in submissions. Just staying on the point of the discussions happening at the bargaining table, do you accept that while an offer was - there was a discussion about the wage increase being 4.6 per cent. Do you accept that there was no discussion with respect to the

meaning of the phrase 'Fair Work Commission minimum wage decision' through the bargaining?---No.

PN501

I put it to you that while there was discussion about the various wage increases being offered by the company and the claim by the union, that nobody at the bargaining table turned their mind to the meaning of the words 'Fair Work Commission minimum wage increase'?---I'm not following you on that one.

PN502

So you've said in your statement at 13 that, 'Throughout the bargaining process I was talking to employees about what was happening at the bargaining table.' That's in your statement?---Yes.

PN503

Now, in terms of what was happening at the bargaining table would you accept that the union had put a wage claim seeking to end the distinction between new and existing employees?---Yes.

PN504

Would you accept that the union had put a wage claim seeking wages to be uplifted to 4.6 per cent above award rates?---Yes.

PN505

And would you accept that a revised offer was put by the union seeking to increase rates for new employees over time to 2 per cent above the award?---Yes.

PN506

So would you accept that the discussions which occurred at the bargaining table were really about responding to the UWU's wage claims?---Yes.

PN507

And would you accept that in those discussions there was no active discussion about what the expression 'Fair Work Commission minimum wage' meant?---Yes.

PN508

No further questions.

PN509

MS CAMPBELL: There's no re-examination.

PN510

THE COMMISSIONER: I have a question. Mr Meechan, what's the difference between the national minimum wage and the modern award minimum wage?---I have no idea, Commissioner. It's not - it's not something I would look to.

PN511

Well, in paragraph 19 you say, 'At the time of voting I knew that the national minimum wage had been increased.' Now you're telling me you don't know the difference between the two?---Yes.

*** NELSON MEECHAN

XXN MR WHITESIDE

PN512

Did you write these words in the witness statement?---I said 'Yes'.

PN513

Did you write these words in this witness statement at paragraph 19?---Yes.

PN514

But you're now telling me you don't know the difference between the national minimum wage and the modern award minimum wage?---The national wage - yes, I'm not too au fait with the minimum wage and the national minimum wage. I'm not au fait with that. I was more interested in doing the best I could for the EBA to get the guards some money.

PN515

Yes, all right. Ms Campbell, when we come to submissions you're going to have convince me that I should put any reliance on paragraphs 18 and 19 having regard to what the witness has said.

PN516

MS CAMPBELL: Thank you, Commissioner.

PN517

THE COMMISSIONER: Ms Campbell, any re-examination?

PN518

MS CAMPBELL: No, there's nothing further, Commissioner.

PN519

THE COMMISSIONER: Mr Meechan, you are excused as a witness, thank you?---Thank you.

<THE WITNESS WITHDREW

[11.30 AM]

PN520

We will adjourn until 11.40. Is that convenient, Ms Campbell?

PN521

MS CAMPBELL: Yes, thank you, Commissioner.

PN522

THE COMMISSIONER: Mr Whiteside?

PN523

MR WHITESIDE: Yes, no issue.

PN524

THE COMMISSIONER: Thank you. We will adjourn until 11.40.

SHORT ADJOURNMENT

[11.30 AM]

*** NELSON MEECHAN

XXN MR WHITESIDE

RESUMED

[11.43 AM]

PN525

THE COMMISSIONER: Thank you. Who are we hearing from first, Mr Watkinson or Mr Richardson?

PN526

MR WHITESIDE: We will be calling Mr Watkinson first, Commissioner.

PN527

THE COMMISSIONER: You don't need to, if you don't want to, but did you want to make a brief opening, Mr Whiteside?

PN528

MR WHITESIDE: Yes, I will, Commissioner.

PN529

THE COMMISSIONER: Thank you.

PN530

MR WHITESIDE: So, Commissioner, this application to vary clause 21 of the MSS Security Victorian Enterprise Agreement pursuant to section 217 of the Act by inserting the words 'modern award' into subclauses 21.1.3 and 21.2.2 is an attempt by the applicant to rewrite the terms of the agreement over a year after the agreement was made and some 10 months after the agreement was approved.

PN531

It's an application which appears to have been driven by the applicant's belated realisation that the words in clause 21, a clause which itself is more than five years old, having originated in the 2017 agreement and which omits the word 'modern award', does not, as the applicant's HR personnel appear to have understood had a plain meaning whereby annual wage increases in the agreement are tethered to increases to the modern award rather than the national minimum wage, and the effect of the variation sought is to deny the respondent's workforce the benefit of a 5.2 per cent wage increase for July 2022 and instead to provide for only a 4.6 per cent increase for that period.

PN532

It's an application made as a reaction to a pre-existing industrial dispute between the applicant and the respondent as to the meaning and operation of clause 21, a dispute which arose explicitly in mid-June of last year, six months prior to the making of this application. It is a dispute which is still before you in the Commission and which, of course, has been stayed until the determination of this application.

*** NELSON MEECHAN

XXN MR WHITESIDE

PN533

It is common ground, Commissioner, that for the application to succeed, the Commission must first make a finding that ambiguity or uncertainty can be found in the agreement, and it's also common ground that if the threshold issue of finding ambiguity or uncertainty is satisfied, the making of the variation

nonetheless requires the Commission to exercise its discretion, and a range of additional factors come into play at that stage.

PN534

THE COMMISSIONER: Mr Whiteside, when Ms Campbell addressed me, I put it to her that in the overall exercise of my discretion, I might find that it wouldn't be appropriate for me to vary the agreement because the employer, the applicant in this matter, and its employees could vary the agreement under section 207, and I heard Ms Campbell tell me that I wasn't allowed to have regard to that in the exercise of my discretion. What do you say about it?

PN535

MR WHITESIDE: We would say that is the exact kind of thing that the Commission should have regard to. Ms Campbell also drew a distinction earlier - suggested that we were apart on the legal principles with respect to who the common intention, the common intention - whose common intention, if you like, and that that goes to the agreement being made between the employer and the employees at the end of the day.

PN536

We are not apart on that issue. We simply say that the union, as the default bargaining representatives' views in representing a great number of those employees does go to the subjective intention of the employees and the union and, by the same token, the principles, which were set out by Bell DP in the recent Monash University decision, list a range of factors, including whether or not the proposed variation would result in a significant change to the terms of the agreement and also alter the existing rights, and also what other avenues are open to the parties to resolve the suggested ambiguity and uncertainty.

PN537

THE COMMISSIONER: Where does Bell DP deal with that in the Monash decision?

PN538

MR WHITESIDE: Bear with me, I'll just pick up the decision.

PN539

THE COMMISSIONER: Let me do so also.

PN540

MR WHITESIDE: I'm at paragraph 155 of the first instance decision, which is Bell - - -

PN541

THE COMMISSIONER: Just let me catch up with you. Yes, what page - sorry, what paragraph?

PN542

MR WHITESIDE: 155. Here there's a range of factors guiding the discretion, which have been set out as a summary of the existing authorities, and Bell DP first makes the point that this is not an exhaustive list. Then we have the issues of the

exercise of the discretion is only for the purposes of removing an ambiguity or uncertainty and a variation extending beyond that required to remove an ambiguity or uncertainty would be beyond the jurisdiction conferred by section 217

PN543

There's a consideration of the views of the employees, and, for the latter, including the views expressed on their behalf by an applicable union; the utility of the amendments; the stages of bargaining between the parties; the timing of the application, and that the power does not give rise to a general discretion to determine a matter based on industrial fairness.

PN544

Later in the decision, consideration was given to whether there was an unreasonable barrier - - -

PN545

THE COMMISSIONER: What paragraph?

PN546

MR WHITESIDE: Sorry, apologies, paragraph 166.

PN547

THE COMMISSIONER: Yes.

PN548

MR WHITESIDE: There's consideration of the issue of whether there are unreasonable barriers or difficulties in obtaining substantial resolution of the disputed terms, and here the two avenues suggested by the Deputy President are a court determination or through a bargaining process. I think that that goes to the utility of the application, of resolving the application pursuant to or using the powers under 217.

PN549

That's not an authority which expressly refers to the process to hold a ballot under the Act to potentially vary an agreement by holding a ballot with the employees, but we would make the submission that that is consistent with the principle of looking at the unreasonable barrier or difficulty in obtaining a substantial resolution of the disputed terms in a different avenue to that provided in 217, and we would say that holding a ballot with the employees to resolve the issue is not an unreasonable barrier, nor does it, nor would it, create any difficulty.

PN550

THE COMMISSIONER: Yes, thank you.

PN551

MR WHITESIDE: I will just return to the remarks I have prepared. So the questions before the Commission to determine today are, firstly: are the words 'Fair Work Commission minimum wage increase', as found in clause 21, ambiguous or uncertain? Secondly: if the clause is ambiguous or uncertain, is it nonetheless appropriate for the variation sought to be made?

PN552

We intend to demonstrate over today, and possibly tomorrow, that no such ambiguity or uncertainty exists, and that regardless of any subjective understanding that the respondent's HR personnel held during the bargaining, the existing words 'Fair Work Commission wage increase' should be taken on their face and are quite clearly a reference to the national minimum wage, as the term is understood in the industrial landscape, where the term 'minimum wage' is frequently used as an expression - as a shorthand to refer to the minimum wage, and in an industrial landscape where the words 'modern award' or 'award' are used typically to refer to increases to the modern award system.

PN553

We would say the authorities are clear that the mere existence of rival contentions will not necessarily render a term uncertain or ambiguous; rather, it must be capable of having more than one meaning, and we would say that the words used in the clause, in the industrial landscape, have only one meaning and that the application should fall at the first hurdle.

PN554

It is also common ground that should the Commission be against us and find ambiguity or uncertainty does exist, the second step requires the Commission to exercise a discretion as to whether the variation sought is appropriate, with evidence of common intention as to the intended meaning being a very significant factor in the exercise of the discretion, and the authorities are also clear that the finding of that common intention should not be taken lightly. So should the Commission be against us on the issue of the existence of ambiguity or uncertainty, we nonetheless are confident we can demonstrate to the Commission that it should not exercise its discretion to make the variations sought.

PN555

Starting with the issue of common intention of the intended meaning, we would say the evidence simply will not be there. The first fundamental issue for the applicant is that the words in the clause 21 which the applicant seeks to vary don't have their origins in the 2021 agreement; they are words which were first adopted in 2017; they were only updated and reformatted during the recent bargaining, and the applicant's current HR personnel were not involved in the 2017 bargaining.

PN556

THE COMMISSIONER: Yes, but the evidence of the union in relation to the 2017 bargaining is pretty skinny.

PN557

MR WHITESIDE: The evidence is what it is. We would say we have made an effort to get documentary material which does pertain to the bargaining which occurred in 2017 and that's what - the documents are what they are.

PN558

THE COMMISSIONER: Yes. All right. Anything further?

PN559

MR WHITESIDE: I will just finish my remarks. I appreciate, though, that I may be going on a bit.

PN560

With respect to what was discussed in the recent bargaining, despite the highly publicised divergence in the increases to the national minimum wage and the modern awards in the 2022 Annual Wage Review decision, we are confident the evidence will be that next to no - that no discussion about the meaning of the words occurred during the bargaining, and we would say that in the absence of this evidence, the Commission should be loath to make a finding of common intention as to the intended meanings of the clause.

PN561

Finally, Commissioner, we will deal with the other factors which the Commission should have regard to. In particular, we would say that the making of a variation does result in substantial change to the meaning and operation of the words. It will have the effect of impacting and changing existing legal rights of the employees to their detriment, and we would say that the resolution could be resolved far more efficiently through either the determination of the 739 dispute, or potential court proceedings, which would resolve the issue with some finality, or with the holding of an employee ballot to vary the agreement.

PN562

I will leave it there, Commissioner.

PN563

THE COMMISSIONER: I don't know whether you want to address me on it now, but certainly in closing. You know the case of the applicant in the matter is, 'Look at all the documents we issued during bargaining. They consistently refer to award minimum wages, and everyone must have understood that that's what we were talking about and not the national minimum wage.' In your evidence, it just doesn't seem to be squarely dealt with.

PN564

MR WHITESIDE: I think I'll deal with that in closing submissions.

PN565

THE COMMISSIONER: Yes, I just wanted to give you a heads up that I'm going to require you to deal with that.

PN566

MR WHITESIDE: Yes, thank you, Commissioner.

PN567

THE COMMISSIONER: The other matter - and both of you should take a note - is that in the *Australian Maritime Officers' Union v TT-Line Company matter* [2022] FWC 244, there was discussion about the exercise of the discretion, and it was held that it would not be appropriate for the Commission to vary the relevant clause because there's no basis to conclude that the employees who voted to approve the agreement could have, or should have, understood that the relevant clause had a different, narrower meaning than was contended for by the

company. It seems to me that that might be said equally in this case relevant to the overall exercise of my discretion.

PN568

Who are we going to hear from first?

PN569

MR WHITESIDE: We'll hear from Mr Watkinson first.

PN570

THE COMMISSIONER: Thank you. The other thing to note is that, having been referred to the Monash University matter and Bell DP, there was, of course, an appeal from that decision by Monash University and that appeal was ultimately dismissed, although permission to appeal was granted, and that's [2023] FWCFB 181.

PN571

All right, is Mr Watkinson available?

PN572

MR WATKINSON: Yes, that's me.

PN573

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

PN574

MR WATKINSON: Peter Robert Watkinson, (address supplied).

<PETER ROBERT WATKINSON, AFFIRMED [12.00 PM]

EXAMINATION-IN-CHIEF BY THE COMMISSIONER [12.00 PM]

PN575

THE COMMISSIONER: Mr Watkinson, can you hear and see me?---Yes, Commissioner.

PN576

Very good. Do you have a copy of your witness statement there with you?---Yes.

PN577

I'll let you get it in front of you?---Yes, I've got it in front of me, Commissioner.

PN578

Are there any amendments you'd like to make to the statement?---Yes, there are a couple of amendments.

PN579

All right. Take me to the paragraph number and we will make the changes?---They're only minor ones.

*** PETER ROBERT WATKINSON

XN THE COMMISSIONER

PN580

That's all right?---Number 12, minimum is spelt wrong, there's an 'm' missing - in the second line, number 12.

PN581

Yes?---And number 23, the year is incorrect. It should be 2022, August 2022.

PN582

So I'm looking at 23?---Number 23, it says - - -

PN583

August 2022, yes, of course?---Yes.

PN584

Any other amendments?---That's all.

PN585

All right. Subject to those amendments, are the contents of your witness statement true and correct?---Yes, they are.

PN586

Would you have me receive it, as amended, as your evidence in these proceedings?---Sorry, Commissioner, I didn't quite - - -

PN587

As amended, would you have me receive the witness statement as your evidence in these proceedings?---Yes, I would, yes, Commissioner.

EXHIBIT #? WITNESS STATEMENT OF PETER ROBERT WATKINSON

PN588

If you wait there, Ms Campbell might have some questions for you.

CROSS-EXAMINATION BY MS CAMPBELL

[12.02 PM]

PN589

Thank you, Mr Watkinson. You are an employee of MSS?---Yes.

PN590

And you've been there for a very long time?---Yes.

PN591

Under the current enterprise agreement, you are what's known as an existing employee; is that correct?---That's correct.

PN592

And you have the grandfathered provisions; is that correct?---Yes.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN593

And that's, just for clarity, as opposed to being a new employee?---That's correct.

PN594

You are a level 4 employee currently; is that correct?---Yes, that's correct.

PN595

How long have you been a level 4 for?---Well, we had a dispute over that, which took four years. It's probably in the last 12 months or so.

PN596

Last 12 months level 4?---Yes.

PN597

Prior to that, had you been a level 3?---Level 3, yes.

PN598

The agreement covers all employees in the Victorian sites; is that correct?---Yes.

PN599

Unless they have another site-specific enterprise agreement, such as aviation?---Yes, that's correct.

PN600

That includes level 1 employees?---Yes, level 1, yes.

PN601

Are there any level 1 employees working in the organisation at the moment?---Well, that would be a question for MSS because - - -

PN602

You don't know?---I don't know what their - - -

PN603

Okay. Thank you. You are currently employed on a 28 hours per fortnight role; is that correct?---Yes.

PN604

That's a part-time role?---Yes.

PN605

You were involved in the 2017 bargaining process?---That's correct.

PN606

In that process, was the union's offer to MSS equivalent to the offer that it made in the most recent 2021 agreement?---Yes, the company wanted to keep it the same, the wording, in particular - I think it's clause 21.

PN607

Did the union make the same offer that it had made back in 2017?---No, we were after the safeguard standard rate for all guards.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN608

What you mean - - -?---We wanted to get rid of the tier system and return the safeguard standard, which was taken away in 2012 - unfairly. The reason we got to where we are now is because of what happened in 2012. We'd lost our safeguard rates through unfair procedures by the company, not fair voting processes. We were made to vote numerous times. It was voted down and we were asked to vote again after it had been voted down - again and again - four times.

PN609

Can I just ask - - -?---The voting was not fair or free, but that still - - -

PN610

THE COMMISSIONER: Sorry, sorry - - -

PN611

MS CAMPBELL: I just - I'm sorry to - - -?---Sorry.

PN612

THE COMMISSIONER: Mr Watkinson, this is not an opportunity - - -?---No, okay.

PN613

- - - for you to give some general commentary about what happened during the process. I want you to listen very carefully to the questions asked by Ms Campbell and restrict yourself to just answering her questions?---Okay, Commissioner.

PN614

MS CAMPBELL: Thank you, Mr Watkinson.

PN615

THE COMMISSIONER: I'm not interested in a political rant.

PN616

MS CAMPBELL: Mr Watkinson, in 2017, were the union advocating the safeguard offer?---What was the question, sorry, I don't - - -

PN617

In 2017, as part of the negotiations for that agreement, did the union advocate for what you describe as the safeguard protections to be reintroduced? Do you recall that?---No, because of what had happened in the past.

PN618

I just want to confirm with you, the offer made by the union in 2017 was different to the offer made in 2021?---Yes.

PN619

It was different?---Yes.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN620

Okay. Now, as part of the 2021 offer, what the union were advocating for was what's described as the 666, the 6 per cent increase?---Yes.

PN621

I've got that right?---That's right, yes.

PN622

That offer was made with reference to a 6 per cent increase on the award; is that correct?---Yes, above the award.

PN623

Above the award. Ultimately, that was not what was voted up by the employees?---No, it was not agreed by the company. The company put out their own agreement.

PN624

Correct. Is it the case that at the bargaining table, what the company were discussing was a 4.6 agreement on the award?---No, there was no discussion on that. We were concentrating on getting rid of the tiers and the safeguard standard, but there was no discussion on that particular rate.

PN625

So your evidence is that the rate offered by the company was not discussed at the bargaining table?---No, the company wanted to keep it the way it was written from the previous agreement, the 17 agreement, and we were - we did not want that.

PN626

Did you receive all of the communications provided by MSS that went to employees?---Yes, as far as I know, I received whatever was out there, yes.

PN627

You also would have received some bulletins provided by the union?---Yes, yes.

PN628

Do you accept that in those communications, the company referred to a figure of 4.6 above the award?---We never agreed to 4 - can you just repeat that question, sorry.

PN629

The company referred - so this is not what you agreed, just what the company referred to in its communications with you and the other employees, not something you've agreed to, but I'm just trying to ascertain from you what you understood MSS to be offering. Did you understand them to be offering 4.6 plus the award?---No, I don't recall that at all, 4.6, no.

PN630

What was your understanding of what MSS' offer was then?---5.2, it should have been, yes.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN631

I want to suggest to you, Mr Watkinson, that nowhere in any of these documents, which is quite a big book - there's two in front of you - is the figure 5.2 referred to until a communication came out from the union after the agreement had been voted on. Do you accept that 5.2 was never written down by anyone?---No, I don't accept that, no.

PN632

So where do you say 5.2 was written down?---Well, it's come from the Fair Work Commission that the minimum wage, the Fair Work minimum wage was 5.2. That's where that's come from.

PN633

I am asking you whether the company or the union, prior to the communication of 21 April 2023, ever discussed 5.2 or ever wrote that down anywhere? Do you have a piece of paper that says that?---No.

PN634

No. Okay. Thank you. You just raised yourself that, I believe it was 2022, there were Fair Work Commission decisions pertaining to the national minimum wage and award increases. Did you keep yourself abreast of those decisions?---Yes, yes, I did.

PN635

You were aware of them?---Yes.

PN636

In light of those decisions, did you ever raise with MSS at the bargaining table what you saw the effect of them as being?---No, we did not discuss any of that with the company. We just wanted the two-tier system removed and the safeguard standard. We were contentious from very early on with what we wanted there, and, yes, there was no - - -

PN637

So my question - - -?---There was no discussion on that at all.

PN638

So there was no mention of 5.2 per cent being the increase?---No, there was no discussion on that.

PN639

And that's by either party?---I can't be totally sure on if someone's made a comment.

PN640

Just to your recollection?---No, to my recollection, no.

PN641

You attended all of the meetings that happened after that determination?---Yes, that's correct.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN642

And you just don't have any recollection of 5.2 being mentioned?---It probably was mentioned, yes, but - - -

PN643

You think it probably was mentioned?---Well - - -

PN644

Or you're just not sure now?

PN645

THE COMMISSIONER: Ms Campbell, can you slow it down, please.

PN646

MS CAMPBELL: Apologies, Commissioner, I will slow it down.

PN647

THE COMMISSIONER: You're a little bit excited - - -

PN648

MS CAMPBELL: I am.

PN649

THE COMMISSIONER: - - - and you're talking over the witness.

PN650

MS CAMPBELL: Would you like me to ask that question again, Mr Watkinson?---No, I'd just like to repeat - - -

PN651

Certainly?--- - - - we were after the safeguard standard, and that was where we were in disagreement with the company, and repeatedly MSS stated that they wanted to keep the clause the way it was written, and it's been like that since 17 - 16/17.

PN652

Now I want to suggest to you that MSS did clarify with the employees and the union that it saw that keeping the clause 21 the same meant that there would be a 4.6 increase. What do you say to that?---No, that's not correct because it says clearly in there the Fair Work minimum wage rise.

PN653

And in its other communications, I want to suggest to you that MSS referred to award increases?---Yes, I'd just like to say that I was at that - - -

PN654

Can you just answer that question first and then we'll get to - - -?---Sorry.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN655

Thank you. I want to suggest to you that in its other communications, MSS continually referred to award increases?---Yes, but I do have some information where they said the award did not apply to this agreement. There isn't - - -

PN656

Well, we don't need to worry about that for today. We're just very narrowly focused on this one issue for today. Now, I believe it was around 3 August 2022 that MSS rejected the wage offer of the union?---That's correct.

PN657

That was after the decisions of the Fair Work Commission had been made?---Yes.

PN658

What was then ultimately put out was a revised wage offer?---Yes.

PN659

If you would like to have a look at this document. This was provided to the employees, and it's at 610 of the second volume that you have there. Just take your time finding that?---Yes, I've found it.

PN660

I'm assuming that you were not involved in making this bulletin?---No.

PN661

Do you remember whether you read it at the time?---I'm just reading it through now. I'm not the quickest of readers.

PN662

I'm sorry?---I'm just trying to take it in.

PN663

Thank you. Take your time?---Yes, what was the question on that?

PN664

Thank you. If you can have a look down the page, the second from the bottom arrow refers to wage increases?---Yes.

PN665

My understanding is that here the union is explaining to the employees what happened, or what the offer from MSS is. Do you agree with that?---I don't understand the question, sorry. I'm - - -

PN666

This document represents what the union told employees that MSS were doing?---Yes. I'm just reading that paragraph, sorry.

PN667

Thank you?---Yes, there was one mistake in that. The point was in the wrong position - - -

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN668

Yes?--- - - - and it was reissued out.

PN669

Yes?---It was meant to be 0.5, not 0.05.

PN670

Yes. Now this document is important because it was issued in January 2023 at the commencement of the access period for the vote?---Is that the date? I take your word on that, yes.

PN671

Yes, sorry, you will have to take my word for it. Mr Reardon(?) has told us that that's when it came out?---Yes.

PN672

Do you remember seeing this document back at that time during the voting period?---I'm not a hundred per cent sure. I do remember it actually because we pointed that out, there was a typo there.

PN673

Yes?---Yes.

PN674

Now this document draws the employees' attention to the minimum wage increases as rates being above the award?---Yes.

PN675

Ultimately, you did not agree - yourself, not the union - but you, Mr Watkinson, you voted no to the agreement; that's right, isn't it?---That's right, yes.

PN676

So you didn't agree with aspects of the agreement, but that included the wage offer?---We were - like I said, the safeguard standard and we wanted the tiers gone. That was our main focus and that was the main discussion.

PN677

And that's why you voted no?---That's correct.

PN678

I believe it was about 60 per cent of employees voted yes?---Yes, I'll take your word for that.

PN679

Yes, thank you. And the agreement ultimately got voted up?---Yes, that's correct.

PN680

Now, it wasn't until after the agreement had been voted up - and I can take you to this document - this is on 21 April 2023.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN681

THE COMMISSIONER: What number is that?

PN682

MS CAMPBELL: Sorry, it's at page 612, just a couple of pages over?---Yes.

PN683

In this document, after the agreement's been voted up, the union is telling its members that the agreement provides for increases equal to the Fair Work minimum wage increase of 2.5 per cent in 2021 and 5.2 per cent in 2022?---Yes.

PN684

I want to suggest to you that this is the first time that the union has put that in writing?---No, I don't agree to that, no.

PN685

Where do you say that was said?---I can't, off the top of my head, say when that was said, but - - -

PN686

You don't have a document in mind?---No.

PN687

MSS reacted to this announcement of 5.26 by saying that they were surprised that that was the construction. Does that support the fact - actually, I might withdraw that question; it's probably something that you can't comment on. Now this interpretation has occurred after the agreement's been voted up?---Well, it's April 23.

PN688

Yes, and the agreement, I think, was voted up in January 23?---Yes, I can't - - -

PN689

MR WHITESIDE: The start of February.

PN690

MS CAMPBELL: I'm sorry, the start of February 23?---Yes - - -

PN691

Now isn't it - - -?--- - - - that's right, yes.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN692

Isn't it a bit opportunistic of the union to now say, 'Well, what that really meant was the 5.2 per cent increase' when that hadn't been what any of the discussions had been up until that point?---Well, we didn't discuss it because we were after the safeguard standard, but that's what the wording is there, it's the Fair Work Commission's minimum wage increase, and I was at the bargaining in 17 and that's what the company agreed to. Because we lost our safeguard standard, we didn't have much bargaining power, so we put it to the company if they could give us the minimum wage increase, because there was that chance that we could get a

slightly higher increase. That was the whole purpose of that being put in there. It was so all employees could get a slight increase. There was a chance.

PN693

Back in 2017, the minimum wage increase applied the same to minimum wage employees and award employees. Did you know that?---Yes. It was only this one in contention here, it's the 5.2. Every year, they've been the same.

PN694

That's correct. I want to suggest to you, Mr Watkinson, in 2017, this issue over what that meant would have really been about the award rather than the national minimum wage?---No. Like I just said, we - as a group together, we thought we'll put it to the company that we'll ask for the minimum wage, the Fair Work minimum wage increase, because there is that slight chance that one of those years, we'll get a higher increase, and that's why that was - and the company agreed to that.

PN695

Mr Watkinson, this is very important evidence about 2017. If I can take you to your statement and what you've said on 2017. It's very sparse. It says at 11 and 12 that you were involved in the interpretation?---Yes.

PN696

THE COMMISSIONER: Involved in the bargaining.

PN697

MS CAMPBELL: I'm sorry, excuse me, Commissioner. Correct.

PN698

You were involved in the bargaining with some other people there, and that it was the first to provide an annual wage increase in line with the Fair Work minimum wage increase?---Yes.

PN699

You are now today telling the Commission that there was a different reason for that, and the reason was that on the off chance one of them may have been higher than the other; is that right?---I don't understand what you're trying to say.

PN700

Well, I'm saying that it seems very unlikely that the evidence that you're giving to the Commission now is accurate in light of the fact that it doesn't appear in your statement?---I'm sorry, I don't understand the question.

PN701

THE COMMISSIONER: Mr Watkinson, take yourself back to 2017?---Yes, Commissioner.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN702

You never turned your mind to whether that meant the national minimum wage or the modern award minimum wage, did you?---No, I knew exactly what that meant. That was the national minimum wage that that was referring to.

PN703

All right.

PN704

MS CAMPBELL: Mr Watkinson, do you accept that it could be the case that the award increase could be higher than the national minimum wage?---No, very doubtful that that would happen.

PN705

Is that something that you turned your mind to back in 2017?---Yes. It's very unlikely, highly unlikely, that that would occur.

PN706

THE COMMISSIONER: Why? Why?---Well, just because the minimum wage is people on the lowest - the lowest wage and they could fall behind the cost of living, so there's a chance they could be given a higher than someone on the award. Well, that was just the thinking behind it. It might be wrong, but that's what we were thinking, and it turned out correct.

PN707

MS CAMPBELL: Did you ever put any of this in writing to MSS?---What did you mean 'put in writing to' - - -

PN708

Any of your thinking around the differences between the minimum wage and the award?---It's very difficult dealing with MSS. I'm sorry, but that's what I have the union for. It's extremely difficult dealing with them.

PN709

And was it anything - - -

PN710

THE COMMISSIONER: Sorry, Mr Watkinson, I'm going to remind you to answer the question. The question was, 'Did you put this in writing'?---Sorry.

PN711

And the answer to that question can be 'Yes' or 'No'?---Sorry, Commissioner. No, no.

PN712

MS CAMPBELL: Was this something that you put in writing to any of your employees, or any of the other employees, I should say?---I've discussed it with quite a few employees, yes.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN713

THE COMMISSIONER: Okay. That wasn't the question. The question was, 'Did you put this in writing to other employees?' The answer to that question is 'Yes' or 'No'?---No.

PN714

Right. Listen to the question and answer it.

PN715

MS CAMPBELL: Mr Watkinson, are you telling the truth about this now?---Yes, I am.

PN716

It seems to me, and I'll make a submission later, that - - -

PN717

THE COMMISSIONER: Sorry, Ms Campbell, you've just asked him two questions where you said, 'Did you put it in writing?' He said, 'No.' You said, 'Did you put it in writing to other employees?' He said, 'No.' And now you're putting it to him that he's lying.

PN718

MS CAMPBELL: I'm sorry, Commissioner, I was putting that to the evidence that he gave about conversations that he had.

PN719

THE COMMISSIONER: Well, you've got to be very clear.

PN720

MS CAMPBELL: Yes, I'll - yes, I'll make - - -

PN721

THE COMMISSIONER: You've got to be very clear about that.

PN722

MS CAMPBELL: - - - it clearer, thank you.

PN723

Mr Watkinson, I want to suggest to you that you never had the conversations that you've described to the Commission today?---That's not true. I have had those conversations. That's - I've spoken about that for years, what happened back then.

PN724

Mr Watkinson, if that was true, that's evidence that should have already been in your statement, isn't it?---Well, it's there, isn't it? I was part of the bargaining. What do you want to know? That's why I'm sitting here now.

PN725

No further questions, Mr Watkinson.

*** PETER ROBERT WATKINSON

XXN MS CAMPBELL

PN726

THE COMMISSIONER: Mr Whiteside, any re-examination?

PN727

MR WHITESIDE: No, Commissioner.

PN728

THE COMMISSIONER: Mr Watkinson, can I thank you for your attendance here today. You are now excused as a witness?---Thank you, Commissioner. Thank you, everybody.

<THE WITNESS WITHDREW

[12.25 PM]

PN729

THE COMMISSIONER: Do we have Mr Richardson available?

PN730

THE ASSOCIATE: I'll step out and get Mr Richardson.

PN731

THE COMMISSIONER: Thank you.

PN732

THE ASSOCIATE: If you can remain standing. Can you please state your full name and address.

PN733

MR RICHARDSON: Nicholas Keith Richardson.

PN734

THE ASSOCIATE: And your address, please?

PN735

MR RICHARDSON: (Address supplied.)

<NICHOLAS KEITH RICHARDSON, AFFIRMED

[12.27 PM]

EXAMINATION-IN-CHIEF BY THE COMMISSIONER

[12.27 PM]

PN736

Mr Richardson, it's Commissioner Johns. Can you hear and see me?---Yes, I can.

PN737

Do you have a copy of your witness statement there?---I believe so. I'll just have to turn to it in the book here.

PN738

Page 567?---567.

PN739

567. Leave it in the folder?---Okay. Yes.

*** NICHOLAS KEITH RICHARDSON

XN THE COMMISSIONER

PN740

All right. Are there any amendments you'd like to make to the statement?---No, there is not.

PN741

Are its contents true and correct?---Yes, they are.

PN742

Would you have me receive it as your evidence in these proceedings?---Yes.

EXHIBIT #? WITNESS STATEMENT OF NICHOLAS KEITH RICHARDSON

PN743

Thank you. If you wait there, Ms Campbell might have some questions for you.

CROSS-EXAMINATION BY MS CAMPBELL

[12.28 PM]

PN744

Mr Richardson, you were not involved in the 2017 enterprise agreement bargaining process?---That's correct, that's right.

PN745

I understand you've done a search of the records from 2017 and you've turned up what is annexure NR1, which is the MSS 16 and 17 approval application?---Yes.

PN746

Did you undertake any other searches as to other relevant documents that the union may have had from that time?---Well, searches across our databases, but the official that was looking after that bargaining had left the union, so was no longer working with us, which I think presented an obstacle.

PN747

Yes?---Yes.

PN748

Did you find anything in your own searches that you thought would be relevant to the Commission today?---No, no, I did not.

PN749

So everything that the union had in its possession from the 2017 period of relevance is basically NR1?---That's correct, yes.

PN750

Thank you. Moving on now to talk about the 2021 agreement, you were involved in the bargaining for that?---That's correct, yes.

PN751

I understand that a major dispute between MSS and the union was what's been described in the materials as the wage offers?---Mm-hm.

*** NICHOLAS KEITH RICHARDSON

XXN MS CAMPBELL

PN752

Now that requires amendment of clause 21 to make changes?---That's correct.

PN753

And it would also require amendments in other parts of the document because it would flow through to increases, for example, in the schedules?---Yes, that's correct.

PN754

I also understand that, in theory, it could have gone through to affect others parts of the enterprise agreement; is that correct?---Yes, that's correct, yes.

PN755

The offer that was being put by the union, and correct me if I'm wrong, is what was described as the 666 offer, the 6 per cent above award?---So I guess we referred to it as the safeguard.

PN756

The safeguards, yes?---Yes, and so it was seeking to peg wages at 6 per cent above the award.

PN757

Yes?---So, not necessarily like - or, potentially 666 sequential in years, but the concept was that wages would be tied to the award at the award plus 6 per cent.

PN758

Thank you. MSS' counteroffer was that wages would be 4.6 per cent and tied to the award?---Look, I don't think that that was the explicit offer that was presented to us. So there was a conversation, I guess, going right back to the beginning of bargaining, and this was outside of the formal bargaining process, and what was expressed to me about what Jamie would like to see in that bargaining was that they retain a current system that they referred to as having a group of people on the light wages and a group of people on the heavy wages, which was, I guess, referring to a distinction in the agreement between what's described as new employees and existing employees. And so throughout the bargaining, we were - we changed our claim, that 6 per cent, to a different one, but the response we were receiving back was that MSS would like to retain its existing structure.

PN759

I want to suggest that the existing structure was based on the minimum - I think the word that's used 'Fair Work Commission minimum increase' or 'minimum wage increase'?---Yes. I took that as being what's in that 2017 agreement, yes.

PN760

Multiple communications came from MSS referring to percentage increases above the awards; do you accept that?---Yes, I accept that there was, I think, at least one that I can recall that had percentage increases and described how it was flowing on.

*** NICHOLAS KEITH RICHARDSON

XXN MS CAMPBELL

PN761

Ms Bharti's - I withdraw that. The discussions around the bargaining table were framed by reference to increases on the award; do you accept that?---Certainly ours were, yes.

PN762

Yes?---Yes.

PN763

MSS also say that their discussions were framed around increases on the award; do you recall that?---Well, certainly in them saying that our claims are unsustainable.

PN764

Yes?---Yes.

PN765

Do you recall having a discussion with MSS within the bargaining process about what its response was, or about what its wage offer was?---Well, no, beyond saying we had problems with it because it did not match the safeguard claims, but also that it retained that distinction between new and existing employees.

PN766

So is it fair to say that your focus was on what your offer was as opposed to what MSS' framework was?---Well, yes, yes, we were fighting for what we were fighting for, yes.

PN767

Thank you. Now in May 2022, there were the Fair Work Commission decisions to increase the national minimum wage threshold and the award. Did you pay attention at the time to those decisions?---I did, yes.

PN768

Did the union have a role in advocating - not necessarily you yourself - but did they have a role in advocating for those increases?---Yes, they did.

PN769

So that was something that you were abreast of?---Yes, that's correct.

PN770

My understanding is that those decisions were not ever expressly discussed at the bargaining table after that happened; is that correct?---So there was a dispute after the first full pay period.

PN771

I might just get you to answer - the question was: from May 22, were those decisions ever discussed at the bargaining table to your recollection?---Beyond - well, there was a question about whether or not the award base rates needed to be applied to employees despite the agreement not having been made. So there was that discussion, but there was no other discussion about that decision.

*** NICHOLAS KEITH RICHARDSON

XXN MS CAMPBELL

PN772

Did the question about the award, that was - so you're saying that the award base rates and how they applied were discussed at the bargaining table?---That's right, so - - -

PN773

Can I just ask you another question?---Yes.

PN774

So yes?---Yes.

PN775

Sorry for interrupting you. Was it the case that that was an issue about the 2017 agreement, or was it an issue about the 2021 agreement?---So the discussion about the award rates was really about, like, the Fair Work Act and whether or not the employees were owed those award base rates despite the 2017 agreement not having - having lower rates in that.

PN776

I want to suggest to you that the 5.2 increase was not something that was the subject of an express discussion at the bargaining table; would you agree with that?---That's correct, yes.

PN777

You didn't raise the distinction that the Fair Work Commission had made for award increases or the national minimum wage increase at the bargaining table either?---That's correct, yes.

PN778

That's not something that you recall discussing with any employees?---Well, when the voting happened and when we were talking with the delegates, we sort of outlined, 'Look, there's that 5.2 per cent' and described sort of how - to the delegates how that 5.2 would likely sort of impact the wages. But it wasn't a big thing because the problem was that even the difference that was, you know, with respect to how far people were above the award was marginal with that 5.2 versus the 4.6.

PN779

So you're saying that those discussions happened during the voting period?---Yes, yes.

PN780

And that wasn't something that you commented to members about?---Sorry, I'm saying - - -

PN781

Or communicated to members about?---I did have discussions with members about, you know, what does the national minimum wage mean and what is the effect on the wage rates.

*** NICHOLAS KEITH RICHARDSON

XXN MS CAMPBELL

PN782

Mr Richardson, is that in the statement that you've filed before the Commission?---No, no, it's not.

PN783

Do you accept that that's critical evidence for the Commission to understand?---Well, look, those conversations with the bargaining reps were outside of the bargaining meeting and were not conversations with MSS, and so I guess I didn't think it was critical.

PN784

Now if you could go to page 608. This is in your statement, it's NR2, 608 of the second volume. Just take your time?---An email?

PN785

Yes?---Yes.

PN786

That's an email that you have put in your statement that you received from Bhoomika Bharti. Now Bhoomika says here:

PN787

We would like to maintain the agreement in its current form with FW increases for all years which still maintains the above award advantage to both new and existing employees.

PN788

?---Mm-hm.

PN789

Did you respond to this email at all?---There were certainly conversations about that. I believe if I did respond, it was about the clause that she's referring to there.

PN790

But you didn't take issue with what she had said in the email in terms of that being your understanding of the MSS offer?---Well, look, I didn't respond to that issue, yes.

PN791

Commissioner, Mr Richardson is standing up. Are you still able to hear or should we adjust the microphones?

PN792

THE WITNESS: Sorry.

PN793

THE COMMISSIONER: I can hear him.

PN794

MS CAMPBELL: Okay, thank you.

*** NICHOLAS KEITH RICHARDSON

XXN MS CAMPBELL

PN795

Now I want to take you to another document. This is the bulletin at 610 of the second volume?---Yes.

PN796

Did you prepare this bulletin?---Yes.

PN797

I understand that it was provided to the employees during the access period?---That's correct, yes.

PN798

You have described it as the 'MSS EBA Update'?---Yes.

PN799

If you can just go down the page, the wage increases, do you accept that what's written there is your understanding of what MSS were proposing?---Yes, that's right.

PN800

I think I should just be clear. There was one amendment later on?---That's right.

PN801

Which was just moving a decimal point?---That's correct, yes.

PN802

This document was shared with members?---Yes.

PN803

Is that correct?---Yes.

PN804

Would I be right in thinking that, although non-member employees may have seen it, it's not something that you circulate to non-members?---Look, we do give that to delegates and we will say to delegates as well, because we don't have the contact details of people, to pass it on to people who are non-members. We do also have the contact details of non-members that, for some reason, may have given their email to us. We have the contact details of resigned members as well. So if we have a significant bulletin to put out, we would share it with those people.

PN805

Okay?---Yes, yes.

PN806

Do you accept that, even at this point, you were still referring to the MSS, or, sorry, you were referring to the MSS offer as being higher than the award?---Yes, yes.

*** NICHOLAS KEITH RICHARDSON

XXN MS CAMPBELL

PN807

Thank you. If you could go over to the next tab, this is a document that was sent on 21 April 2023. I understand this is also one of your bulletins?---That's correct, yes.

PN808

This is the first time that, in writing - sorry, I withdraw that. This document puts in writing the 5.2 per cent for 2022?---That's correct.

PN809

Was there any other time that you'd raised that 5.2 per cent in writing with MSS since the May decision in 2022?

PN810

THE COMMISSIONER: Sorry, Ms Campbell, what page are you on?

PN811

MS CAMPBELL: I'm sorry, it's 612, Commissioner.

PN812

THE COMMISSIONER: Yes. Thank you.

PN813

MS CAMPBELL: Was there any other time that you'd raised the 5.2 percentage in writing?---No, not - to be honest, I don't think we sent this to MSS, but to just members.

PN814

To members?---Yes.

PN815

Yes. Thank you. There's no further questions for you, thank.

PN816

THE COMMISSIONER: Any re-examination, Mr Whiteside?

PN817

MR WHITESIDE: Just one short question, Commissioner.

RE-EXAMINATION BY MR WHITESIDE

[12.43 PM]

PN818

Mr Richardson, if you could turn back to the document on page 610, which is the memo, or, rather the EBA update that was circulated in January during the access period?---Mm-hm.

*** NICHOLAS KEITH RICHARDSON

RXN MR WHITESIDE

PN819

Can you tell us how you came to draft the words under the heading 'Wage Increases' and whether you chose those words for any particular reason?---Yes. When drafting those, I chose to copy and paste the minimum wage wording from the agreement that went out and, look, when I put out that bulletin,

we had a lot of other things going on and a lot of priorities, and so rather than putting a table of the rates and those sorts of things, I did not do the calculations, but, I guess, provided wording that sort of described what we believed would be the effect of that clause on people's rates of pay.

PN820

That's the only question I have.

PN821

THE COMMISSIONER: Thank you.

PN822

In those circumstances, can I thank you for your attendance here today, Mr Richardson. You are now excused as a witness.

<THE WITNESS WITHDREW

[12.45 PM]

PN823

THE COMMISSIONER: As I understand it, Mr Whiteside, that's all the evidence on behalf of the union?

PN824

MR WHITESIDE: That's right, Commissioner.

PN825

THE COMMISSIONER: Very good. Should we take a short adjournment for 10 minutes and come back for closing submissions?

PN826

MS CAMPBELL: Commissioner, how much time do you have this afternoon?

PN827

THE COMMISSIONER: I can sit until 1.30. Do you want to have a quick chat amongst yourselves?

PN828

MS CAMPBELL: Perhaps could we just stand the matter down for about five minutes, just so - some of the things that you've raised with the Bar table, we might need to work out, and then we can give you a clear answer on whether we want to finish today?

PN829

THE COMMISSIONER: Yes, we will adjourn until 12.50.

PN830

MS CAMPBELL: Thank you, Commissioner.

SHORT ADJOURNMENT

[12.45 PM]

RESUMED

[12.53 PM]

*** NICHOLAS KEITH RICHARDSON

RXN MR WHITESIDE

PN831

THE COMMISSIONER: Yes, thank you. Ms Campbell. Ms Campbell.

PN832

MS CAMPBELL: Thank you, Commissioner. Sorry, I just didn't quite hear that.

PN833

I have had some discussions with Mr Whiteside and our preference would be, if it's convenient for the Commission, to close tomorrow morning using an online hearing link. The reason for that is that there's been a couple of developments in the evidence today, but also the Commission has helpfully raised some decisions that we would like to give more consideration to, and we think you will be better assisted by closings that are prepared overnight, rather than doing that now.

PN834

THE COMMISSIONER: All right. Very good. So will we start at 10 tomorrow and finish by noon?

PN835

MS CAMPBELL: Yes, that would be suitable for me, and Mr Whiteside is nodding.

PN836

THE COMMISSIONER: All right. Then we will adjourn until 10 am tomorrow morning.

ADJOURNED UNTIL WEDNESDAY, 14 FEBRUARY 2024 [12.54 PM]

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