



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BEAUMONT
DEPUTY PRESIDENT ROBERTS**

C2023/7933

s.604 - Appeal of decisions

**Appeal by Mining and Energy Union (301V)
(C2023/7933)**

Sydney

10.00 AM, MONDAY, 11 MARCH 2024

PN1

THE ASSOCIATE: The Full Bench of the Fair Work Commission is now in session in matter C2023/7933 Mining and Energy Union v Specialised Mine Services Pty Ltd.

PN2

VICE PRESIDENT ASBURY: Good morning. Could we start by taking the appearances, please?

PN3

MS E SARLOS: Vice President, it's Sarlos, initial E, for the Mining and Energy Union. With me is Delpiano, initial E.

PN4

VICE PRESIDENT ASBURY: Thanks, Ms Sarlos.

PN5

MR J YVANOFF: Your Honour, appearing for the respondent is Mr Jesse Yvanoff, stakeholder relations manager for SMS, and appearing with me is Mr Sam Perkins, general manager of SMS.

PN6

VICE PRESIDENT ASBURY: Thank you. Ms Sarlos.

PN7

MS SARLOS: Thank you. This was an application for approval of the enterprise agreement, voted on by four employees. The application was made by an employer, the respondent, that was a related entity of a well-known operator in the Black Coal Mining Industry, Nortech, who has an existing enterprise agreement in operation, which covers the performance of work at the sites the relevant employee cohort were working.

PN8

What we've found out since the agreement was approved, from the material that's no longer been redacted, as a result of us requesting that material from the library, rather than from Chambers, at first instance, is that all four employees were casual employees and that all four of them had an existing relationship, of some kind, with Nortech.

PN9

Now, on finding that information out, the MEU applied for and the Commission issued orders to produce. From that material we have found out that all four of those employees had been recently employed by the respondent. All four employees were paid above the rates in the agreement. All but one of them had been employed by Nortech, under similar contracts of employment, and it is our submission that they were therefore transferring employees, within the meaning of section 311 of the Fair Work Act. None of this information was known to the MEU at first instances, although the relationship with Nortech and the casual status of the employees was known to the Commission.

PN10

Now, from this one of two situation arises. Contrary to the Black Coal Mining Industry Award - sorry, the employees, as casual employees, were engaged contrary to the exclusion in the Black Coal Mining Industry Award, which we say, for reasons we can expand on or will expand on, means the agreement couldn't have been genuinely agreed, or they were properly employed as casuals, under the Nortech agreement, which is at page 123 of the court book. But the explanation they received did not touch on their actual terms and conditions of employment so was manifestly inadequate and, again, meaning that the agreement couldn't have been genuinely agreed, for the purposes of both the standard principles in section 180(5).

PN11

Now, further, the material that has come back from the order to produce makes clear that these employees were neither sufficiently representative nor did they have a sufficient interest in the terms of the agreement. This is obviously a new piece of legislation that we think that it's important to fully explore the consequences of that and we hope to do that today.

PN12

Now, despite all this, the Deputy President was satisfied, for the purposes of section 186 and 188, for reasons that we would say are not quite clear.

PN13

Now, the relevant facts that I've taken you to are contained mostly in the material that the respondent, and its related entity, Nortech, have returned, in response to the order to produce. We seek to adduce that evidence as a bundle and it is in the court book which the Commission very kindly pulled together.

PN14

Now, we note it's unusual to adduce evidence on appeal, but we note the principles governing the admission of evidence on appeal, most recently set out in the decision of the Full Bench in *AWU v Altrad*, which is at tab 4 of our authorities. Those principles being that:

PN15

To admit further evidence the Commission must be satisfied the evidence is not able to be obtained or adduced with reasonable diligence, at first instance. The evidence must be of such probative value that there is a probability that there would have been a different result at first instance, and the evidence must be credible.

PN16

Now, we say the evidence in response to the order to produce meets all three. In terms of whether that was material or evidence that could have been obtained or adduced with reasonable diligence at first instance, the MEU was prevented from going down this path by not having access to all the material filed in the F17B. You'll see that there are grounds of appeal as well, and we can expand on them, if required. But had we known, we would have sought this material at first instance. The casual status of the employees, the relationship with Nortech are both critical to the decision that the Deputy President made.

PN17

That goes to the second point. We say the evidence is of probative value, to the extent that there is not just a probability but a likelihood that there would have been a different result at first instance, if it had been adduced at first instance.

PN18

Now, those key facts are evidence such as the rate of pay of the employees, the purported casual nature of their employment and their previous employment with Nortech. All of these have significant probative value to the questions that the Commission was required to consider at first instance - sorry, satisfy itself of at first instance.

PN19

Finally, the evidence which has been provided by the respondent is in response to an order of the Commission. We've no reason to believe it is not credible, particularly given those circumstances. I also understand that it's not opposed, the respondent doesn't oppose that evidence being admitted.

PN20

VICE PRESIDENT ASBURY: So you'd be seeking to tender, as a bundle, the material from 187 of the Commission?

PN21

MS SARLOS: Yes, Deputy President.

PN22

VICE PRESIDENT ASBURY: Does that include the material that was the legislative check list, which starts at 236? So the check list that the Commission staff - - -

PN23

MS SARLOS: No, Vice President, we don't rely on that. So the - being section E of the court book, that material, rather than the amended appeal book.

PN24

VICE PRESIDENT ASBURY: So - - -

PN25

MS SARLOS: So I have it starting at page 59 of the court book. Sorry, that's the orders, rather, at page 66.

PN26

VICE PRESIDENT ASBURY: Page 66 of the court book.

PN27

MS SARLOS: To page 194, which is the end.

PN28

VICE PRESIDENT ASBURY: Okay.

PN29

MS SARLOS: Now, we also did apply for orders to attend, from Mr Perkins and Mr Yvanoff, who are both here today. That's because of what we know now, particularly about the relationship with Nortech, we are able to make that request a priority, now, in a way that we weren't able to at first instance. We don't know the evidence that will be given by Mr Yvanoff and Mr Perkins, but we think they're both likely to provide evidence, which will be of significant probative value and which it is probable that it would have resulted in a different decision, at first instance.

PN30

For example, we expect them to give evidence that will confirm that the employees were transferring employees, covered by a transferrable instrument. We expect them to give evidence of the content of the oral explanations provided to employees and the substance of the matters raised as a concern, in relation to section 180(5) and section 188(1). I don't need to tell the Bench that these are key considerations in the appeal and in the statutory task the Commission was required to perform at first instance.

PN31

We expect they'll give evidence as to the strategy underpinning the decision to move the employees into this new entity. Sorry, not new entity but this different entity, as well as giving evidence about the purpose of making the agreement, which will go to the genuineness of the agreement.

PN32

It remains to be seen whether the evidence will be credible, we hope that it will be. But if it's not, I think that that, in itself, is - will be telling for the resolution of the appeal. So we would respectfully request the opportunity to cross-examine both Mr Perkins and Mr Yvanoff, and we note that that is - that they consent to that approach.

PN33

VICE PRESIDENT ASBURY: Okay. We'll receive the material that has been identified at pages 66 to 194 of the court book. And which of the witnesses do you wish to call first, Ms Sarlos?

PN34

MS SARLOS: Ideally, we would have one - not both of them in the room at the same time. So I think with Mr Yvanoff doing the advocacy it might be more appropriate to call Mr Yvanoff first, if that's okay.

PN35

VICE PRESIDENT ASBURY: Okay. If you wouldn't mind waiting outside while Mr Yvanoff gives his evidence. Thank you.

<JESSE YVANOFF, SWORN

[10.24 AM]

CROSS-EXAMINATION BY MS SARLOS

[10.24 AM]

*** JESSE YVANOFF

XXN MS SARLOS

PN36

MS SARLOS: Mr Yvanoff, I'll start by asking, did you fill out the form F17B?---I did.

PN37

You did, on behalf of Mr Perkins?---Correct.

PN38

In terms of the explanation that is referred to in that document, did you conduct that explanation?---I did.

PN39

At both Mudgee and Wollongong?---Correct.

PN40

Are you able to tell me who was present at the Mudgee explanation?---The Mudgee explanation was attended by Luke Sissans(?)

PN41

Just Luke?---Will Davidson, those two.

PN42

And the Wollongong explanation?---Was attended by Paul Wilson.

PN43

Okay. So one employee didn't - Rob?---Wasn't available.

PN44

Okay?---They weren't on shift.

PN45

Okay?---From memory.

PN46

And did he get some other explanation, or it was just the written summary that was provided to him?---I do recall some phone calls being exchanged.

PN47

Okay. Do you remember what was discussed in those phone calls?---It would have been very similar to what we discussed at the premises, which they were quite short.

PN48

They were short. So about how long was that discussion?---Maybe 45 minutes.

PN49

Okay. I have a copy - - -?---That would have been Robert Poole(?), by the way.

PN50

Yes, Robert Poole. I might just hand up the - I've got my bundles confused, I think it's the appeal book with the F17.

*** JESSE YVANOFF

XXN MS SARLOS

PN51

VICE PRESIDENT ASBURY: The court book or the appeal book?

PN52

MS SARLOS: The appeal book, the amended appeal book, if you have it. So there's - the unredacted version of the F17B is, regrettably not correctly labelled in the court book, but it's at page 215, sorry at the appeal book. Sorry, I'll get on top of that. So I'm just - we're going to go to page 229 of the amended appeal book. I'll get you a copy. So you'll see both responses, in terms of the summary of the Mudgee explanation and the Wollongong explanation are the same. If you look at the third column, that talks to the substance of the explanation. Now, you say a detailed discussion was undertaken around the casual status and how the agreement differed from the award, do you recall what it was you communicated?---I do, in general.

PN53

Would you mind telling the Bench?---Sure. So it was giving the explanation that no matter what we were going to do that the casual status and the casual application of the award would be at least met under the agreement. So there were some questions during a couple of meetings, for example, or people calling me up about the casual status and it was really about ensuring that we would meet our obligations, no matter what the statute was.

PN54

Okay?---That any payment would be in excess of.

PN55

So it was a concern with the casual rate of pay?---Payment in general, I would suggest, not with the casual status.

PN56

Okay. You ended up giving an undertaking, at first instance, around the casual pay, do you recall why that was?---No.

PN57

I'll just remind you, I think the casual amount was below the award amount and so the undertaking was to the effect that you would - that all employees would get the casual rate, does that ring a bell?---Well, that makes sense.

PN58

Yes, okay. But it wasn't your intention for the casual rate in the agreement to be below the award?---It wasn't.

PN59

And that wasn't communicated to the employees?---No. It was communicated, quite clearly, that our - we were making sure that whatever payments were made were going to be in excess of the award.

*** JESSE YVANOFF

XXN MS SARLOS

PN60

Okay. And were you aware that those employees couldn't have been employed under the award, as casuals, at the time that you were having those discussions?---No.

PN61

Even though you'd explained to them that casuals can be engaged under the award?---It didn't occur to me.

PN62

Okay. Did you explain to them that casuals could be engaged under the award?---No, I didn't.

PN63

So that wasn't part of the detailed discussion around the casual status?---No. From recollection it was more about how much we were going to get paid, not the status itself.

PN64

Okay. Now, there were four employees that voted on the agreement. Do you know them individually?---I know them as employees.

PN65

Okay. How many employees does SMS have now?---Two.

PN66

Two. So at least two have gone, two of those original four?---Correct.

PN67

Yes, okay. Where do those two employees currently work?---At Ulan underground, the same place. Mudgee if you like.

PN68

Is Ulan geographically - so Mudgee is west New South Wales?---Yes.

PN69

So it would fall, thinking about the mining districts, it would fall in the southwestern mining district of New South Wales?---I expect so. I don't know, but it is Mudgee.

PN70

Okay. And I'm assuming those two employees were also - well, we know three of the four employees were employees of Nortech, you'd agree?---Two, from recollection. I think Robert Poole and Luke Sissans were former employees of Nortech.

PN71

I think Paul Wilson as well?---Paul Wilson, I don't recall whether he was, he may have been. Luke - certainly Will Davidson wasn't.

*** JESSE YVANOFF

XXN MS SARLOS

PN72

Where did Will come from?---He was a new to industry.

PN73

In the F17 it talks about the experience that all of the employees had with bargaining, prior to this agreement, what was Will's experience?---He'd been around the mining industry for a while, just working at - - -

PN74

What does 'around the mining industry' mean?---Well, family, friends, he'd been exposed to it, in some form, with other site contractors.

PN75

But had he been involved in bargaining?---Yes, he told me he was.

PN76

But you didn't inquire further, to get a sense of his experience?---I did not. I did not.

PN77

What about the other three employees?---Well, as far as I understood, they had been through bargaining at least once in their lifetime, if not more.

PN78

How did you form that understanding?---Just through general discussion.

PN79

Okay?---They had said, 'Yes, this is something we're familiar with'.

PN80

Okay. Now, how - I'm interested in how those three employees, so Paul, Luke and Robert, came to be employed with SMS? They were all employees of Nortech. Let's start with Robert, was there a conversation? How was he recruited for the respondent?---From recollection, I think there was some form of separation with Nortech, before we got the contract, or at least the ability to supply employees at Ulan, and these were prime candidates for us to put on.

PN81

So the respondent has a contract with Ulan?---No. Nortech had the contract and the capability to put people on.

PN82

Okay. So these employees were employed by Nortech to perform work at Ulan?---No, they weren't.

PN83

Are you sure?---Sorry, yes they were.

PN84

Okay?---Yes. Yes, they were.

*** JESSE YVANOFF

XXN MS SARLOS

PN85

And then when you talk about some kind of separation, are you able to elaborate on that?---We were talking about changing the contract to - from Nortech to SMS, that didn't quite occur. So we were thinking, well how are we going to, you know, keep these employees here without them leaving us.

PN86

What was the motivation, otherwise, for them leaving?---We were trying to establish a set of employees that would stay, because we'd had a number that left and because of the conditions, the payment conditions, and we were talking about getting a contract under another entity, eventually. It didn't eventuate but that was the strategy, so that we could then renegotiate the rates.

PN87

The rates for the contract or the rates for the employees to be paid?---Both. So the rates for the contract that we had with Nortech weren't going to be what we considered enough to retain those employees.

PN88

None of them were paid the rates in the Nortech agreement though?---They weren't?

PN89

No. So Will - well, Will's a bit of an outlier. But Will is paid \$54 an hour, Robert's paid \$81, Luke \$64 an hour, these are the contract rates, and Paul \$82. So I'm just confused as to the motivation for moving these employees over to the respondent, in order to pay them above the Nortech agreement when they're already paid above the Nortech agreement. I'm not sure I am across what the incentive was for them?---It was based on the contract itself. So we were losing people because we were paying those rates. We'd lost a number of people already. So it was creating another entity where we could renegotiate the rates, because we couldn't negotiate the rates under Nortech, they were fixed. The contract rates, not the employee pay rates. If we were to get higher rates for the contract we could then pass that on to the employees.

PN90

So you're talking about the commercial contract that - - -?---Commercial contract, I am.

PN91

And the idea behind it was, we'll create - we'll try and contract with this new entity, which is essentially Nortech under a different name, in order to get a better set of terms and conditions for employees?---It was, but it was to create a separate business all together, because there was a discussion amongst the partners that other - one partner, that Sam wanted to go out and run the company, rather than having under the constraints of Nortech.

*** JESSE YVANOFF

XXN MS SARLOS

PN92

And what were the perceived constraints under Nortech?---There were partnership discussions where Sam actually wanted to run the company, he wanted to be the managing director and he wanted to ensure that this new company would run under what he feels how a company should run.

PN93

Okay. Going back to those employees, and you talked about that separation, I'm just keen to understand what that meant, when you say there was a separation with Nortech. Is that some kind of separation agreement and then there was a period of time and then they started with - - -?---No, there was no physical separation.

PN94

Okay. So one day there was Nortech, they signed the respondent agreement and the next day they're doing the same work - - -?---Correct.

PN95

- - - for the respondent?---Correct.

PN96

Okay. How is Nortech perceived, generally, in the industry?---It's predominantly came from Queensland, established itself down at Tahmoor and Appin Mine. It certainly came in and was perceived as being a higher payer than most other contractors.

PN97

If Nortech has this reputation of being a higher payer than other operators, I just don't follow the logic as to why you needed to then move employees over to this other entity to pay them more, when there's already that reputation that they're paid more?---Because we were losing people. We couldn't keep them, even under the Nortech agreement.

PN98

And what about the specialised agreement did you think would help with retention?---I would give us flexibility because, as we came to understand, the corporate body viewed enterprise agreements as a primary contractual matter, but the operational people didn't. So the Nortech agreement was seen to be, let's say, expensive and therefore the length of the contract would be limited. In fact, it was mainly a purchase order arrangement rather than a formal contract. So our strategy was to have something that looked like it was meeting, let's call, the market that area, which was lower than the Nortech area. At least get the contract in place and then the operational people could, with us, negotiate better rates within that contract.

PN99

Okay. So just in shorthand, Nortech is seen as too expensive to get the contracts - - -?---Correct.

*** JESSE YVANOFF

XXN MS SARLOS

PN100

- - - the kind of commercial contracts you wanted so you'd create this agreement which was lower rate agreement, get the contract and then work out some more beneficial arrangement for employees that was Nortech or higher?---Correct.

PN101

It seems like quite a convoluted process to go through to pay your employees more?---It was, and that's what - that's why Ulan was a difficult prospect for us, and that's why we only have two employees left.

PN102

Okay. Is the intention to recruit more employees?---Yes, it is.

PN103

In terms of what you communicated to the employees, you just said, very clearly, 'Nortech was too expensive, we need this new entity', was something like that told to the employees?---We shared that information with them.

PN104

When you say, 'we shared that information' did you tell them?---Yes.

PN105

Do you remember when that was?---I would imagine I would have had that conversation with a number of them, on different occasions, but particularly when we were doing the presentation.

PN106

The explanation presentation?---Mm-hm.

PN107

So I want to ask you about, there's an email that you sent - it's not that email. It is in the court book, which we'll provide you a copy of, on 20 July, so it's just - it's page 166 of the court book. This is from some of the material returned. I'll give you a copy, but it's a short email so I'll just let you know. It says:

PN108

Dear All,

PN109

Please find attached our draft VI for discussion in the coming weeks.

PN110

Then attached is a copy of a draft enterprise agreement for the respondent. We can't see who it was sent to, I imagine they're in blind cover copy, the bcc?---Mm-hm.

PN111

Do you recall who it was sent to?---It would have been sent to whoever the employees were at the time.

*** JESSE YVANOFF

XXN MS SARLOS

PN112

Okay?---I could provide that for you.

PN113

It's fine. It's fine?---My apologies.

PN114

No, no, it's not a problem. I'm just going back to where we were previously. I'm keen to understand, surely if you were talking to these employees about the need for them to move to this new entity, that conversation would have happened before they signed those contracts?---Yes.

PN115

Yes. Okay. So it would have happened, we've got the engagements with the respondent start happening around 22 June, so the conversation would have had happened in the lead up to that time?---That sounds right.

PN116

Okay. And around that time, just to - just to make very clear in my mind, you said something to the effect of, 'The rates in the Nortech agreement are seen as too expensive, we need a new agreement so that we can build a success of what we're doing here', or something?---Yes.

PN117

Yes. Okay?---In summary, yes.

PN118

Okay. I wanted to ask, in the - did you prepare the material in response to the orders to produce?---I assisted, yes.

PN119

There are no rosters in there. Do your employees not work to a roster?---They do.

PN120

They do, but you don't have copies of those rosters?---They certainly weren't given to you, by the sounds of things.

PN121

No. Okay. All right. Okay. And going back to the rates of pay for your employees, we've got the contract rates, they were in the material that was returned. Why is there such a difference between what the employees are paid? We've got Will on \$54, Robert on \$81, Luke on \$65 and Paul on \$82. Is it just the rosters?---They would be related to the rosters, indeed, because they were all in one rates, is the terminology I would use.

PN122

Okay?---So, from recollection, I think Robert may have been on a weekend roster, Will would have been on a weekday roster.

*** JESSE YVANOFF

XXN MS SARLOS

PN123

Yes, okay. Were they always paid those same hourly rates?---Again, it would depend on the roster they worked.

PN124

So even though the contracted rate was whatever it was, if their roster changed they might have a higher ordinary rate or a lower ordinary rate?---So they were all in one rates. It was never worked out based on what you know in the award as an ordinary rate. We just make sure we met, at least, that total number if they worked those rosters under the award.

PN125

Okay. So the contract rate was kind of irrelevant. If you changed rosters you'd get a different rate?---So contracted rates were based on rosters.

PN126

Yes. Okay. But just to be clear, if the roster changed the rate would change?---Correct.

PN127

Okay. I just ask that because there is some jumping around in the payslips that you've provided. Sometimes people are paid more, sometimes people are paid less. Around the time of the agreement, Will is paid less per hour. I was just wondering why that might be?---I can only imagine it was because he was on a week day roster.

PN128

Okay. And he would have changed rosters for some - do you know why he would have changed rosters?---It would have been the needs of the client.

PN129

Okay?---So there was quite a few roster changes. Again, because of our arrangement, we would just supply where they were needed.

PN130

Okay. And your arrangement, was it with Nortech or with Ulan?---So I'm talking about the commercial arrangements, so we would say to Ulan, if they needed to be on weekdays then that's where they'd go. If they needed to be on weekends that's where they would go.

PN131

You could do that because they were casual?---Yes.

PN132

And when you say 'we', is it the Nortech 'we' or the Specialised Mining Services 'we'?---It's the SMS.

PN133

Okay. So you had a direct relationship with Ulan, even though you didn't hold the contract?---That's right.

*** JESSE YVANOFF

XXN MS SARLOS

PN134

You being SMS, rather than Nortech?---Yes.

PN135

Okay. Luke's pay also dropped around the time of the access period, the agreement. I'm guessing it would be the same explanation?---Yes. Yes, definitely. Some of them were on weekends and then they were brought back to week days and then some of them moved back to weekends. Sorry, there was a seven day roster arrangement in there.

PN136

Okay. So a lot of different arrangements for four employees?---Yes, it was an interesting - well, still is an interesting place to work.

PN137

Okay. What's your involvement with Nortech these days?---I am still the stakeholder relations manager.

PN138

Okay. Do you do other work outside of Nortech and SMS?---I do.

PN139

With other similar contractors in the coal industry?---Not in the coal industry, no.

PN140

Okay. Sorry, I'm just checking. I just have a couple more questions. Where else does SMS, or did, in September last year, did SMS have contracts, do you know?---So when we talk about contracts, I just want to be clear that it's purchase orders.

PN141

Okay?---Yes. They are a contract of such, but we don't have a written contract. We have attempted to put SMS employees in a number of different mines, and just haven't gotten there lately.

PN142

Okay, so apart from - - -?---There was one, I do believe, at Dendrobium, which is a South 32 mine, I think that was Paul Wilson, from memory.

PN143

Yes, so he worked there for a week, at Dendrobium?---He worked there for a little while.

PN144

Okay. But also he was at Metropolitan?---He went to Metropolitan.

PN145

I think so the Metropolitan period appears to have sandwiched the week at Dendrobium?---Yes, may have.

*** JESSE YVANOFF

XXN MS SARLOS

PN146

So that's just, you know, as he's needed?---Yes.

PN147

Yes, one more question. So Paul - Paul is the one employee that's outside of Ulan, he's down in the south?---Yes.

PN148

And he was employed by SMS on 3 July?---Yes.

PN149

Now, when - in the F17 you've got here that bargaining commenced on 1 August and the notice of employee representational rights was sent on 12 August?---Mm-hm.

PN150

Now, I've got a couple of questions from that series of events. First is, that email that I took you to earlier, that's in the latter pages of the court book, provides the draft agreement, and that's dated 20 July?---Mm-hm.

PN151

Would you still agree that bargaining - that you indicated an interest in bargaining on 1 August?---Yes.

PN152

Even though you'd already started a dialogue with employees prior to that time?---Yes.

PN153

And you told them about the intention to make an agreement while they were still with Nortech?---Yes.

PN154

Okay. Why is that?---There was a lot of issues around people leaving, so we had to placate some of that anxiety.

PN155

Can you talk me through how you placated the anxiety?---Well, we talked about how we could make a longer arrangement with Glen Corp, who own Ulan.

PN156

So then you sent this draft agreement for discussion, on 20 July?---Well, that was the intention to just say, 'Well, this is something that we're thinking about'.

PN157

'But we're not starting bargaining yet'?---But we weren't starting bargaining.

*** JESSE YVANOFF

XXN MS SARLOS

PN158

Okay. Were employees across that detail?---Correct. They, in fact, were the ones that said, 'Look put something together and we can have a look at what something might look like, an EA'.

PN159

But we're not bargaining?---No, we're not bargaining.

PN160

And we don't have the intention to bargain?---No.

PN161

Okay. But then less than two weeks later we start bargaining?---Yes.

PN162

Okay. And the notice of employee representational rights, it was sent to most employees, but not all. Do you know why it wasn't sent to Paul Wilson?---I don't know.

PN163

Would you agree - sorry, in fairness - - -?---I expect that he would receive it.

PN164

I should take you, and my apologies, this isn't in the amended appeal book, I have copies and I should have given it to you before I asked you that question. Sorry, associate, can I hand up some copies. So this is just an unredacted copy of a redacted copy that's in the appeal book?---Mm-hm.

PN165

You'll see a list of employees, I'm guessing some of them are the employees that moved on?---Mm-hm.

PN166

But despite being 12 August, after Paul Wilson is employed, he is not on the bcc list?---He's not.

PN167

Was he given it another time, or - - -?---I don't recall.

PN168

Okay. Don't recall means don't think so, don't remember doing that?---I don't remember.

PN169

Okay. Could you say you didn't give it to him?---That's a possibility.

PN170

Okay. Could you say you did give it to him?---That's also a possibility.

*** JESSE YVANOFF

XXN MS SARLOS

PN171

Okay. But we have no evidence of him having received a notice of employee representational rights?---Nothing here, no.

PN172

Okay. All right. Thank you very much Jesse?---You're welcome.

PN173

No further questions, thank you.

PN174

VICE PRESIDENT ASBURY: Mr Yvanoff, when the draft agreement was sent to employees, on 20 July, who was it sent to?---So it's not written there, but it was sent to the current employees at the time.

PN175

So the four - - -?---I would suggest it - - -

PN176

The four who made the agreement? Which current employees?---The list that was placed on the Saturday, 12 August, I would suggest they were the employees that it was sent to. That email where the bcc is unredacted.

PN177

Okay?---I can confirm that.

PN178

Well, can you produce a copy of the email with who it was sent to?---I would be able to.

PN179

Okay. And you say those were all employees of Specialised Mine Services, at the time that it was sent to - - -?---Yes. Yes.

PN180

So between the draft, on 20 July, and then the letter of 5 September, with the proposed agreement and the ballot document, were there any other versions of the agreement sent around?---Not that I recall.

PN181

Okay. And can you also tell me, in this - in the Specialised Mine Services agreement, as approved, there's a provision there that talks about casual employees. Just bear with me while I turn it up. 10.4(a) which says:

PN182

A casual employee's engagement comes to an end at the completion of each shift.

PN183

?---Yes.

*** JESSE YVANOFF

XXN MS SARLOS

PN184

Okay. Well, you can agree or disagree with me that it doesn't appear that there's a provision of that kind in the Black Coal Mining Industry Award?---I'm not familiar with one, no.

PN185

Did you explain the effect of that provision to the employees?---Yes, I did.

PN186

What did you tell them?---That that's how it would occur.

PN187

So at the end of every shift their employment ends and they're employed again on the next shift?---Except that we had a roster that they were employed under.

PN188

Right?---Whilst that might occur, there certainly was a roster and there was an intention for them to continue their employment under that roster.

PN189

And, again, you can agree or disagree with me, but it seems that the - at least the four employees who made this - who made the MS agreement were paid significantly above the agreements rates when they worked under the Nortech agreement?---Yes.

PN190

And they were paid roughly the same rates when they came to work for SMS that they'd been paid by Nortech?---Yes.

PN191

So what did you tell them about their rates, compared to the rates in the agreement?---We just explained that, from recollection, that this was still part of that whole commercial strategy, if you like, to get the - to get a commercial contract and that the rates would continue on as - they wouldn't lose any money from what they were earning under Nortech.

PN192

So, effectively, you told the, 'Don't worry', and you can again agree or disagree with this, because if you're an employee and you're getting \$80 something dollars an hour, and you're showed an agreement that's got significantly lower rates, less than half of that amount in it, you might be concerned about what you're agreeing to, mightn't you?---They were.

PN193

Yes?---But in fact they told us the commercial reality was something they understood, because we were trying to get a commercial contract. This is the way that we felt was the best way to get a commercial contract. So we did explain that whole strategy.

*** JESSE YVANOFF

XXN MS SARLOS

PN194

Since the agreement was approved, have you employed other employees under it?---No.

PN195

Why not?---Because we still haven't got that commercial contract at Ulan.

PN196

Right?---We are looking and still intending to employ at other mine sites.

PN197

Okay. And when these employees were offered employment with Specialised Mine Services, what did they do, with respect to their employment at Nortech? Did they resign? Did they - what did they do?---They were offered employment with SMS and they accepted that employment. So they did, in effect, resign from Nortech.

PN198

Okay. And what's the relationship, as you understand it, between Nortech and SMS?---Nortech holds the purchase order at Ulan and SMS subcontracts to Nortech.

PN199

Yes. But are there any, for example, directors in common, between Nortech and SMS?---There are no directors but there's certainly shareholders. At least one shareholder, I should say.

PN200

Okay. Do you have any involvement yourself, with Nortech?---Other than as a stakeholder relations manager? I do not.

PN201

Okay. Well, perhaps could you explain to me why some of the letters of offer that the Nortech employees were given, and perhaps if I can show you the documents. Are you familiar with the documents that were produced by Nortech?---Yes, I am.

PN202

Okay. So if I go to, for example, the letter of offer that was given to Mr Sissans, 31 March 2023, with Nortech?---Yes.

PN203

And, again, you can agree or disagree with this, but at that time the Nortech agreement was in effect. Nortech had an enterprise agreement that was approved by the Fair Work Commission and was operating?---Yes.

PN204

So can you explain to me, and Mr Sissans was doing work that would be covered by the Nortech agreement?---Yes.

*** JESSE YVANOFF

XXN MS SARLOS

PN205

Well then can you explain to me why he would have been told, in his letter of offer, that 'All your terms and conditions of employment are governed by the Black Coal Mining Industry Award'?---I cannot.

PN206

And it seems that the same was said to Mr Poole, who was employed 5 May 2023?---The only explanation I can give, your Honour, is that they were employed under the SMS entity, which did not have an agreement.

PN207

But this document is offering them employment with Nortech?---I see. I don't have it in front of me so - - -

PN208

'We are pleased to offer you conditional employment with Nortech'?---Well, that must have been a mistake.

PN209

Okay. And yet Mr Davidson, who was employed in 2022, 26 May 2022, was told that his terms and conditions are governed by the Nortech Development (NSW) South-western Enterprise Agreement, 2019?---Sorry, I can't provide an explanation of why they're different, other than that would have been an error.

PN210

So as far as you're concerned, those employees, so Mr Poole and Mr Sissans, were covered by the Nortech agreement at the time they were employed by Nortech?---I would agree. But that enterprise agreement covered that area, indeed.

PN211

That's the 2019 agreement?---Correct.

PN212

Not the 2022 agreement?---It was definitely an agreement applied at the time.

PN213

And they kept on working where they were working and simply changed employer?---Correct.

PN214

Without any break at all?---Correct.

PN215

Okay. Anything arising from my questions, Ms Sarlos?

PN216

MS SARLOS: No, thank you, Vice President.

*** JESSE YVANOFF

XXN MS SARLOS

PN217

DEPUTY PRESIDENT BEAUMONT: Just to clarify, so at all material times Nortech has held not a commercial agreement or contract, but a purchase order with Ulan?---Correct.

PN218

Okay?---We were and still are in negotiations for a commercial contract, it just hasn't been executed.

PN219

Okay.

PN220

VICE PRESIDENT ASBURY: Thank you for giving your evidence, you're excused?---Thank you.

<THE WITNESS WITHDREW

[11.00 AM]

PN221

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

PN222

MR PERKINS: Yes.

PN223

THE ASSOCIATE: On a Bible.

PN224

MR PERKINS: I don't know, this is all new to me, mate.

PN225

VICE PRESIDENT ASBURY: Okay. You're about to give evidence in the Fair Work Commission, and you're going to be asked to either take an oath or an affirmation, which you're going to say you are going to tell the truth, the whole truth and nothing but the truth.

PN226

MR PERKINS: Yes.

PN227

VICE PRESIDENT ASBURY: So do you want to swear an oath on a Bible.

PN228

THE ASSOCIATE: You can swear an oath or a Bible or you can just simply raise your hand and do an affirmation.

PN229

MR PERKINS: Okay, I'll just raise my hand.

PN230

VICE PRESIDENT ASBURY: Okay.

*** JESSE YVANOFF

XXN MS SARLOS

PN231

THE ASSOCIATE: Please state your full name and address?

PN232

MR PERKINS: Sam Craig Perkins, (address supplied).

<SAM CRAIG PERKINS, AFFIRMED

[11.02 AM]

CROSS-EXAMINATION BY MS SARLOS

[11.02 AM]

PN233

VICE PRESIDENT ASBURY: Mr Sarlos, your witness.

PN234

MS SARLOS: Thank you, Vice President.

PN235

Mr Perkins, you've completed an F17B form in this matter, that was filed with the application?---Mm-hm.

PN236

It is, similarly, like the oath you've just given, or the affirmation you've just given, you swear that it's true, it's correct and there's nothing you change from it?---Mm-hm.

PN237

Okay. Did you complete that F17 yourself?---No.

PN238

Who completed it for you?---That was completed with a business colleague.

PN239

Okay. Who? Who was the business colleague? There's nothing - it's not a problem. I notice you just looked at Mr Yvanoff, was it him?---Yes, just - - -

PN240

Okay. And even though you didn't complete it, you're confident that it's all accurate?---Correct.

PN241

How are you confident of that?---I'm very confident in the business colleagues that I work with.

PN242

But you didn't do any individual checks to work out if what you were saying in this important document that is, you know, you're telling the Commission is your evidence, you didn't do any individual checks, it was your confidence in Mr Yvanoff?---Yes, I always - I always cross check everything that we do with business people and documentation and I'm very confident with everyone that works alongside me.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN243

Okay. So one of the things that is in your from F17B is some information about some explanations that you - that were given to employees in Mudgee and in Wollongong. Did you provide those explanations?---Pardon?

PN244

Were you part of the explanation process with the employees?---Correct.

PN245

You were in the room?---Yes.

PN246

At Mudgee?---Yes.

PN247

And who else was in the room with you?---The employees, myself and Jesse.

PN248

Okay. Who were the employees?---There was a number of employees in that room out there, that was part of that contract out there with Ulan.

PN249

Yes. Do you recall the number?---There'd probably be, I'd say, six to seven guys, I think, were in the room, or thereabouts.

PN250

Not including you and Jesse?---Yes, that's just the employees, I believe.

PN251

Okay. And you don't remember their names?---Yes, there was - Geez, you're testing my memory now.

PN252

I know, it was a while ago, sorry?---It was. There was Will, there was Mark. Yes, sorry. No, you're testing my memory there.

PN253

Is that Mark Hatch?---Pardon?

PN254

Mark Hatch?---Yes.

PN255

Was he an employee?---Mark Hatch, no, he's not an employee.

PN256

Okay, I understand?---Scott, I believe, was one of them. Will, Scott, two - the two Wesley, father and son, were there, I believe. Tayne Leeman(?). Yes, sorry, that's - - -

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN257

That's okay. I wouldn't remember if you asked me the same question, I don't think. How about in Wollongong?---Pardon?

PN258

How about the Wollongong explanation, were you present for that?---The Wollongong explanation?

PN259

So there were two meetings, one was in Mudgee and one was in Wollongong. Were you present at the Wollongong meeting?---No, I wasn't.

PN260

It was at the Steelers Club, if that helps jog your memory?---No, I wasn't. No.

PN261

Okay. But you've given evidence to the Commission about what was said at that meeting?---Correct.

PN262

Based on what Jesse has written was said at that meeting. But you can't give any direct evidence of what was said at that meeting, you weren't there?---At the one in Wollongong?

PN263

Yes?---Correct.

PN264

We'll stay with the one in Mudgee. You should have, before you, two folders, I hope?---Yes.

PN265

If you could open the one which is called the amended appeal book?---This one doesn't have a title on it, this one is the court book.

PN266

I think - no, okay, it's the one without the title, sorry?---Without the title, yes.

PN267

It was a last minute recruit for the morning. If you can turn to page 229 of that book?---Yes.

PN268

Are you there?---Yes, it's on this page.

PN269

Of course. So you'll see this is what you've put in your statutory declaration. You'll see there's three columns, the final column on that table being your evidence as to what was discussed in those meetings?---Mm-hm.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN270

Now, you say, the third paragraph down in that column, and the same is repeated for the Steelers Club, but the oral presentation included what was in the award and not in the agreement and how the NES applied to the agreement terms. Are you able to talk me through what that means? Just picking one part of it? Sorry, that's an unfair question. When you talk about an oral presentation about what was in the award and not in the agreement can you recall what that was?---Yes. I suppose, basically, with enterprise agreements you reference back to the award. So we talked about our employees around what the award states and then we talk about, obviously within the mining industry and stuff like that, what acceptable rates and stuff like that are. That's the discussion point that we talk about.

PN271

And you'll see the next paragraph down talks about detailed discussion around the casual status. Are you able to talk me through that detailed discussion?---Well, with - with most businesses there's actually terms around how long a casual employment is - actually is with the determined employer and then normally there's a probation period around casual employment and then normally you transition to full-time employment.

PN272

So what did you tell the guys in the room, at Mudgee, about those issues?---What issues?

PN273

The terms of the casual employment. You know, what you've just said that there's - - -?---Yes. Well, that topic itself doesn't really need to be explained about because everyone within the mining industry normally knows that you do have a probationary period with any sort of business before you do actually gain full-time employment. None of those guys are like new to industry, if that's what we can call it. So most of those guys are experienced within the mining industry and they understand that.

PN274

Is that true for all of them?---What's that?

PN275

That they're not new to industry?---Yes. Most of them are all experienced coal mine workers.

PN276

You said 'most of them' then, but before you said 'all of them'. Were all of them experienced coal mine workers?---Every single person that was at that Mudgee house was an experienced coal mine worker.

PN277

Was Will Davidson?---Yes, William Davidson would be classed in the experienced mining. He'd done his new to industry program at a different mine site and then went out to Mudgee.

PN278

Even though his contract of employment lists him as an 'operator inexperienced'?---Well, I suppose like I class a new to industry someone that's worked in the mines for like three months.

PN279

Okay?---You know, like once someone's worked in the pits for three months then they can gain a drift ticket and can gain loader tickets and that sort of thing.

PN280

Okay. And how long had Will worked in the pits for? Was Nortech his first job in coal mining?---Yes, correct.

PN281

Yes, okay. I might be able to help you out there because his contract of employment is here. So he - okay. No, I see. I see. So that was May 2022 he started with Nortech. Still paid at an inexperienced rate when he comes over to Specialised but not inexperienced in the sense that we're talking about now. Sorry, that was a bit confusing?---Yes.

PN282

I understand what you're saying is that you would consider him experienced because he'd been in coal mining for at least a year?---Yes. But it all depends on the site, to be honest. Like certain sites say after six months they can be classed as experienced, but it is all site dependent.

PN283

So going back to the discussion and what you've described as a detailed discussion was undertaken around the casual status?---Mm-hm.

PN284

You've also just said, 'We didn't really need to go into the terms of employment because everyone kind of knows'. So can you tell me, when you talk about the detailed discussion around the casual status, what were the details?---That was discussed with the employees, you're asking?

PN285

Yes?---Yes, I suppose we talk to the guys around what our expectation is for guys to actually become full-time, what the system that we follow, as the business principles and what we outline to those guys. Normally we like to have guys in the business for at least between six to 12 months to determine if they do fit the business to become a full-time employee, through that probationary period.

PN286

So it's really about casual conversion rather than anything to do with the status of employment as a casual?---When you talk - yes. Well, it depends what the - what you're trying to sort of get at.

PN287

I just want to know what the detailed discussion was. So you've talked then about, you know, the way in which you might become a full-time employee. That, to me, is casual conversion, how you convert from being a casual to a full-time employee?---Yes.

PN288

Was there anything else you talked about?---Yes, there was a number - like, yes, it was more so - the topic was more so around, yes, the guys - basically the business vision and those sort of things. That was the main topic around that, because, obviously, for myself, like a lot of the guys that I do work with, you know, we're worked with some time on different projects and those sort of things, so I basically wanted to outline the business vision to those guys and for myself, as the managing director, what path I was going to be taking with that business.

PN289

Okay. We'll come back to the business vision, because I think that's interesting. Just there was nothing else that you recall talking about when talking about casual employment. I might help you out. So under the Black Coal Mining Industry Award, which you've also said in this statutory declaration, was what applied to those employees. You can't have casual production employees? Production engineering employees? Yes, I understand they were all engaged as casuals, so I'm just giving you an opportunity to let us know what was discussed about that awkward reality?---Yes. Sorry, I'm just trying to - - -

PN290

I can ask again, in a different way, if you want, or - - -?---Yes.

PN291

So one of the issues we've raised in this matter is that under the Coal Award, are you familiar with the Coal Award?---Yes I wouldn't say I'm an expert, but I'm somewhat like - - -

PN292

Sure. One of the key aspects to it is that you can't have casual employment for production engineering roles, is that something you're aware of?---When you say, 'production engineering roles', what - - -

PN293

So thinking about, it's called a schedule A employee, under the award. So it's anyone that is not in the office, basically. No, that's not accurate. So deputies - I don't have a copy of the award but it's basically all your employees are production engineering employees. They're all production employees. They're operators?---From the couple of years that I've been down in New South Wales there's a vast amount of businesses that have casual employees within their enterprise agreement, like what you've stated as production workers.

PN294

Yes, in their enterprise agreement. But your employees, you say, were award covered?---As like comparing to the award, is that - - -

PN295

So you can have different industrial instruments that apply to different employees?---Yes.

PN296

If there is no enterprise agreement for an operation for an enterprise, the award will apply?---I get what you're saying. Yes, so they're covered under the award until the enterprise agreement.

PN297

Yes, perfect?---Yes, okay. I'm with you.

PN298

Good way to explain it. So one of the motivations I would think, for a new entity in the coal industry and one that we try and resist, but unsuccessfully, as you probably know from the many operators in the industry that have casual employment, through enterprise agreements?---Yes.

PN299

But one element, one motivator, for a lot of operators, is to get an agreement so they can have casual employees?---Okay. Yes.

PN300

So I was just wondering, was that - with that knowledge now, was anything about the award limit on casual employment discussed at those meetings?---I'm just trying to digest it. So, basically, like as a business owner, like my aim is to have full-time employment. Like most coal mine workers want to be full-time.

PN301

Sure?---So, yes, that discussion is always had with guys. Like if they go through their probationary period, both the site and us, as a business, are happy. Like that's something that we try and go down the avenue of, if that's what you - - -

PN302

I think that's a great objective - - -?---Sorry.

PN303

- - - and I hope that that's where your operations land because I think we share the same value of full-time employment. But it doesn't really change the question at all. You've got this room full of casual employees - - -?---Yes.

PN304

- - - who are award covered, is that correct?---Yes. That's correct, yes.

PN305

So they're engaged as casual employees, even though, under the award, they cannot be engaged as casual employees, is that correct?---Yes. I can't answer you on that one.

PN306

So if the award says you can have casual employment in the coal industry only for schedule B employees and schedule B other staff roles, you'd accept that anyone working in production, like an operator, can't be a casual, under the award?---Yes. Well - because, see, our guys weren't actually in production there. Like when you talk production normally that means like on the actual long wall phase or down in development, whereas our guys were doing secondary support type works and, (indistinct) delivery works, so that - - -

PN307

It's still the same. Basically, if you end up with - well, I don't have a copy of the award with me, which I should have. I'll talk you through - so it's anyone that falls in the mine worker category, which is your entry level - so you've got your induction level 1, induction level 2 and then mine worker. So that's an employee who is assessed by the employer as competent to perform the required tasks in a variety of operating circumstances and under limited supervision. So the tasks being - I wish I had an official hear to talk you through the specificities - - -?---I'm just sort of referring to as what - like what's occurred in the past and what, you know, like what you class as production and this, that and the other. And I suppose reference then to the mine sites where we've been at. Like, you know, when we done conveyer installations at sites, that's not classed as production. But, you know, like you could be literally from here to the wall away from a development face, but that's not production.

PN308

Okay. Maybe you can talk me through the kind of work you do, your guys do?---As in the guys that you were talking about that were in the room?

PN309

Yes?---Yes. So those guys are doing like secondary support type work, ventilation work out by, so - - -

PN310

Necessary for the production of coal?---Pardon?

PN311

Necessary for the production of coal?---Well, everything in a coal mine is necessary for - - -

PN312

That's true. Good point?---Yes.

PN313

Look, I think I am not well placed to talk you through what is production, but I think we will leave it there and say - - -

PN314

VICE PRESIDENT ASBURY: Are they underground?---Yes.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN315

They're underground working on ventilation, they're doing conveyer work?---Yes.

PN316

They're working on conveyers, those sorts of things?---Yes. Yes, that - they're basically doing supporting work. They call it like, yes, outlier support is sort of a bit of a title that they use, but like when you say 'production', production is like on a long wall face, or a development, where you're actually cutting the coal, so to speak. That's normally what - - -

PN317

Well, in terms of the award coverage, it's employees who are working underground doing maintenance, doing conveyers, working on overhauling the equipment that's doing the production. So that's the kind of work your employees are doing?---Yes, that's correct.

PN318

All right. Thanks.

PN319

MS SARLOS: Thank you, Vice President, it was - I would have gotten there eventually, but thank you very much.

PN320

VICE PRESIDENT ASBURY: I can actually say I have physically been underground at the Ulan mine for a whole shift, many years ago?---Yes, all right.

PN321

MS SARLOS: That's impressive. Okay. So you're comfortable now to say, yes, your casually employed operators were properly classified as production workers, in the meaning of the award, which might be different to the words you used on site?---Yes. Okay.

PN322

Yes, you're comfortable with that. And the award does not permit casual employment for production operators? I know you don't know that, but if that were the case, you'd accept that your employees are engaged in a way that wasn't contemplated or wasn't permitted by the award?---Yes, I guess if what you're stating is correct, then - - -

PN323

Yes. Okay. And was anything about that discussed with those employees?---No, I don't believe so. Like as in around them being production workers, is that what you're saying?

PN324

Not about the production workers but about the casual employment. We can leave the production workers, once - the status of casual, under the award?

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN325

VICE PRESIDENT ASBURY: Mr Perkins, did anybody say to them, in the explanation, 'If you were covered by the award we couldn't employ you as a casual employee, but under this agreement we can', or words to that effect?---Yes, to be honest - like with - the honest truth is, is that with my role in the business, like I obviously take charge of the operational stuff. With all the enterprise agreement based stuff, I do actually let Jesse take the lead on all that sort of stuff. So there's a lot of - I'm just being straight up and honest, there's a lot of stuff within the enterprise agreements and all the legal stuff that does go with it. Like I'm not an expert on that, I'm there to actually lead the charge in the operation of the business. There could have - like Jesse does speak in terms with enterprise agreements and all this stuff with awards and EAs and Black Coal and all that sort of stuff that - like, you know, it's being spoken about but, like I said, I can't even remember the exact names of the guys that were in that room. That was going back - I've got 85-odd employees, with multiple different sites and I'm not trying to make any excuses, but that - there possibly could have been that discussion, but like I'm - there's been a lot of things happen in the last 12 months for me to try and remember that.

PN326

MS SARLOS: It's not your focus, right. Yes, okay. But it's news to you that you can't have casual employees in those roles, under the award?---Yes. Well, like I said, I'm not even - it's hard for me to try and gauge that those guys were production type workers because like, for me, if they're production type workers, I don't believe there's anyone that knows that sort of stuff better than my business colleague, in Jesse, and I don't believe he would put us in that position for that.

PN327

Okay. You mentioned before the business vision, I was wondering if you could tell me what the business vision is?---Yes. So for myself, I am obviously the director of Specialised Mine Services, I've put a lot of time and effort into actually creating this entity and the business vision is, is that between myself and other business principals within Nortech is that Specialised Mine Services is actually going to be Sam Perkins moving forward, hence the reason why we've actually created this entity.

PN328

Okay. You referred to Nortech and the principals of Nortech, so there's been some kind of split in that organisation where you've got this new entity, can you explain it to me?---Yes, I prefer not to go into too much detail but, basically, Specialised Mine Services will be my entity.

PN329

Okay. Who's the director of Nortech?---The director is my wife, Sherry(?).

PN330

She's the sole director of Nortech?---Correct.

PN331

And who are the partners you refer to?---There's another business principal in there, that's been a part of Nortech for a lot of years.

PN332

So when you break away and do your Specialised Mine Services, who's left running Nortech?---There's another person that's in that business that will be taking that over.

PN333

What's your current role with Nortech?---Operations/general manager. There's a lot of different titles that I hold, unfortunately.

PN334

I know how it works with that. Is there a succession plan? Obviously a general manager is a pretty significant role in any company. If your plans are quite clear that you're leaving Nortech to one side, what's the internal plan?---The plan is, is that I've got a few other people that I've worked alongside, over the last couple of years, that I want to bring in as minor shareholders to basically be a part of the success that I believe Specialised Mine Services will take. Then there's some other things as well that I want to do, within the industry as well, to utilise that entity.

PN335

Okay. Are there things that you felt you couldn't do with Nortech that you're hoping to do with Specialised Mine Services?---Correct.

PN336

What are they?---I don't want to get into the personal things but everybody knows when there's other individuals involved in business and stuff like that. We've come to a mutual agreement and that's where I'll leave it. Hence why that's - - -

PN337

You and your wife have come to a mutual agreement?---No, not my wife.

PN338

Okay. So the other partner, not your wife, the sole director of the company?---Correct.

PN339

But the motivations for focusing your energy on Specialised Mine Services are an issue in this appeal. So I'm really sorry, I don't want to push you into any personal terrain, but if you could explain why you felt you couldn't do it with Nortech but you can do it with Specialised Mine Services. I think it would be really helpful?---Well, Nortech wasn't originally created by myself. Nortech was created by one of the other business principals in there, he started that some time ago and, yes, for me this is something personally that I've wanted to do, that I've - yes, it's been a long - like the last couple of years I've put a lot of time into this, with certain things, and having discussions with certain individuals and hence the reason why it has been created. Yes, it's more of a thing that, you know, like when you're brought into an entity they hold a certain bit of gratitude, I guess, if that's the word that you can use, and other things around it. But I was the one that

did actually crate Specialised Mine Services and that's the path that I'm going down.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN340

So you wanted something of your own, not something that you've inherited or, you know - - -?---I guess you could say that, yes.

PN341

Even though your wife is the sole director of Nortech?---Well, my wife's the director, for reasons in the past for that needing to be happening. But - - -

PN342

What do you mean by that?---Pardon?

PN343

What do you mean, reasons in the past for that to be happening?---Well, there's been things that have occurred in the past that have happened and we made the business decision that Sherry-Anne(?) was going to be the director of that, but she hasn't always been the director for that business.

PN344

You used to be the director, correct?---I did.

PN345

Yes. What were those things in the past that led to that decision?---There was some mining operational things that occurred that - - -

PN346

What do you mean?---Some mines that, yes, that made operational decisions that impeded on the directors at that time. We've had another business principal that was part of the business that made that - created a situation where we couldn't be directors.

PN347

Would you be able to tell us, with some clarity? I can see you're trying to avoid going to it, but it would be - if you could be clear about what happened, that would be helpful?---One of the - one of the business principals left the business, basically, without any knowledge of us knowing and left us in a predicament after we're owed a very large sum of money from a mining entity.

PN348

Understood. Okay. So you wanted your own thing, Specialised Mine Services is that. There's no other reason that you would point to for why you needed to shift your focus away from Nortech and into this operation?---No.

PN349

Would you agree that Nortech is seen, particularly in the south, as being quite an expensive operation?---I don't believe so.

PN350

No? You're not - -?---Most companies down there are within a very small figure within each other. When you say 'an expensive' what do you mean?

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN351

That the rates paid are too high?---I don't believe so.

PN352

You don't see any issue with the rates paid for Nortech?---At the end of the day, guys are paid what they're worth. It depends what you're calling high. What are we talking high?---I'm just talking about a general view in the industry that the rates in the Nortech agreement are too high?---No, I don't believe so.

PN353

You've never had any issues with Nortech getting a contract because of those rates?---It depends on what sites you go to, depending on that sort of thing. But, like all business, it's a decision that's made between a company and the business that's actually going for that tender. Sometimes, depending on what site you go, there's obviously always different - there's different decision makings that come on for a tender. It just depends on what enterprise agreement people have in place, and those sort of things, that dictate what actual charges are.

PN354

So I'll just go back to the question, you've never had issues with the rates in the Nortech agreement, in terms of securing a contract?---In securing a contract?

PN355

Or generally the cost of labour is too high, so people will go with someone else?---Yes, we have. Yes.

PN356

Has that been something, you know, a one-off or something you faced with Nortech?---Well, I wouldn't say 'a bit', no, because - - -

PN357

More than once?---I don't believe so. Most of the work that we do is specialised work so, you know, like dependent on what the skillsets they require like it's like any person that specialises in a job, normally, you know, like a company's happy to come to terms with whatever sort of rates that you do have, dependent on the agreement that you have between each other.

PN358

So turning now to the employees that voted on the agreement, the four of them. I'll just remind you, because it's been a little while: Will Davidson, Robert Poole, Luke Sissans and Paul Wilson?---That's right, Robert Poole, yes.

PN359

You're remembering who else was in the room?---Yes. Like I'm not making excuses, but it's hard when you've got 80-something guys and some people - we've got four different Robs in the business and, you know, like - - -

PN360

In Specialised Mining Services?---Pardon?

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN361

The 80 guys, are you talking about SMS or Nortech?---Eventually they'll be.

PN362

So the intention is to get the Nortech guys?---No. I was just saying like eventually, hopefully, I do have four Robs in Specialised Mine Services, that would be good.

PN363

Okay. When you're talking about the 80 guys, it's not the guys with SMS?---No.

PN364

How many guys are currently employed by SMS?---I think there's - there'd be three or four, I believe.

PN365

Okay. All of them the same as those four employees that voted on the agreement?---No. What's his name, there's one employee that's no longer in that.

PN366

As in one employee's left?---No, one employee that's in that group is no longer employed.

PN367

Okay. Has he been replaced, have you had new recruits?---He hasn't been replaced, no.

PN368

So maybe three then?---Correct.

PN369

If you've had no new recruits then obviously - yes, okay?---Yes.

PN370

They - three of the four employees were all employed by Nortech immediately before starting with SMS, you'd agree with that?---Mm-hm.

PN371

Did you recruit them for SMS?---Like as in myself personally?

PN372

Yes?---Yes, I guess you could say that.

PN373

Okay. So let's start with Will, what did you tell Will when you wanted him to come over to SMS?---I asked him if he would like to be an employee for Specialised Mine Services.

PN374

Did he have any questions about what that meant?---Did he have any?

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN375

Yes?---I suppose - yes, me and Will, like I brought him on as a new to industry. We had some chats, basically about what I explained to you before, about the business vision and he knows certain personnel within the business structure and stuff like that and, yes. I spoke to him about like Specialised Mine Services and obviously what it meant and with his skillset that he has. Yes, he actually like the way that discussion went about, I suppose.

PN376

Okay. You know you've given an affirmation to tell the truth today?---Correct.

PN377

Yes, okay. I just want to make sure, was there anything else you spoke to Will about?---Like in relation to coming across to Specialised Mine Services, you mean?

PN378

Mm-hm?---No, not particularly. I suppose it was just, yes, around becoming an employee for Specialised Mine Services. Like - - -

PN379

To achieve your business vision?---Pardon?

PN380

To help achieve your business vision?---Yes. Well, every single one of them had the same discussion. Like I've spoken to all these guys about this.

PN381

That it was about achieving the business vision? The move from Nortech to this entity they've never heard of was about achieving the business vision?---I've - like I've said, I've discussed with all of these guys around the actual vision for Specialised Mine Services, so like that's what I'm saying, like I've had that discussion with all of these guys.

PN382

And nowhere in those discussions did you mention the difficulty of obtaining work, under the Nortech agreement and the need to have a new agreement? Remembering you're under oath?---When - you mean as in we've had discussion - like have I had a discussion with Will around trying to get work in Nortech, is that what you're - what you're asking?

PN383

I'm wanting to understand what was told to those three employees that were Nortech employees, about the need for them to cease their employment with Nortech and, instead, be employed under near identical conditions with Specialised Mine Services. So I'm particularly keen to understand why it was

there were four employees, what was told to them about this process, the agreement making process?---Yes.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN384

Why there was a view that the Nortech agreement couldn't help you achieve the business vision? So I'll take you back to the question before, are you sure that in those conversations with those three employees, the three transferring employees, that there was no discussion at all about the difficulties of securing contracts under the Nortech agreement?---Yes. Like we've had discussions with all, like all the guys out there because - around like - like the contract negotiation type situations, I guess, if that's what you can call it. Most of those employees that were in that room have been a part of like certain company negotiations things down in the south-western district and stuff like that. Like most of those guys are aware of what did occur with the Nortech enterprise agreement down there.

PN385

What did occur, when you say that?---Like around the actual Nortech EA approval process down that way. Like there was obviously, you know, when you're a part it you're privy to like all the voting process and, you know, like going back and forth around the negotiations, sorry, you call it, and all that sort of thing. With regards to like actually discussing with them around like gaining contracts with that, I'm just trying to - like with - are you saying with Will personally, or the actual group?

PN386

The three. The three transferring employees. So with Will - - -

PN387

VICE PRESIDENT ASBURY: Ms Sarlos, in fairness, I think you're putting to the witness that they're transferring employees. It's a bit of a line of questioning you might want to unpack it.

PN388

MS SARLOS: Thank you, Vice President. With the three employees that went from Nortech to SMS - - -?---Yes?

PN389

- - - did you have any conversations with them about the challenges of securing contracts under the Nortech agreement because of the rates?---Look, I don't - I don't talk with any of our employees about like direct things like that. A lot of guys that I've known for some time, like I have discussion around the process that you go through with that, but I don't believe - yes, I don't say, 'Sorry, we can't get contracts because of this'. Like they're my employees, like we don't have that sort of discussion with them. If that's what you're - - -

PN390

Sorry, just to be clear, I'll give you one more chance, one more opportunity, rather, sorry. There was no discussion with them, along the lines of, 'We want

you to come over to Specialise. We're going to make a new agreement because we can't get contracts under the Nortech agreement'?---No, that was never - - -

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN391

Okay, that's fair?---Like if we couldn't get contracts with the Nortech agreement we wouldn't have been down at Appin and what not. I wouldn't have been going around to other sites like trying to actually get work. If that was the case, then we wouldn't have anything.

PN392

Okay. Look, I'll just put it to you that I don't think that that's correct. I think that what actually occurred was the Nortech rates were prohibitive to securing new contracts in the south and SMS offered you an opportunity to get a new agreement, to get a cheaper agreement to secure more contracts, under that lower cost of labour, what would you say to that?---No, that's - well, because like we're at Appin, we're at Metrop, like they continually still ask us to supply labour. So, no, that's not correct that Nortech can't get the work because we do.

PN393

Okay. Now, you mentioned some difficulties around the Nortech agreement, can you tell the Commission what you're talking about?---I wouldn't say it was difficulties, it was more a learning thing for myself. When I first come down to New South Wales I was a little bit industrially nave. I didn't realise that enterprise agreements - I didn't realise that was a thing, to be honest with you. We come from Queensland where enterprise agreements weren't a bit thing, so we come to sites, try to get work and they say, 'You need an enterprise agreement'. We're like, 'Okay, right'. So when I refer back to that question that you asked, that was actually the first time where we'd actually had to renew an agreement, so it was a big learning curve for me, that, you know, like you go through, you put something forward, the guys obviously come back, they're always going to try and want something better or more, or whatever else is involved, like certain terms and conditions and those sort of things. So it was a big learning curve for myself personally and luckily I got to work with Jesse to actually learn a lot from him through that. Then in the end we were obviously successful with getting that enterprise agreement approved, without too many hurdles, so, yes, that's what I was referring to.

PN394

Okay. When you talk about, you know, you're describing the process of bargaining, right, that it was more complicated than you thought because employees will want certain things in the agreement that you might not want to give?---It was just, for me, like I've never been through it, so I was like - I was like, 'Okay, what normally happens here?' Like if you offer \$40 bucks and you go, 'I want \$44', you know like it's like, 'Okay, I'd love to be able to give you that', but obviously, you know, part of that process is we had to compare that sort of stuff to other companies as well down there, so that was all a thing for me to obviously learn, like, 'Here you go', and then obviously you have to give some sort of response back to them to try and reach an agreement.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN395

You mentioned you've got operations up in Queensland, you haven't gone through that process there, would you say that's easier?---Well, through my whole time of doing an apprenticeship up there and then working, I never actually hard of any contracting company's actually having to have an enterprise agreement. It was more so like the tier 1 BHPs and Rio Tintos and all those sort of big companies that had enterprise agreements.

PN396

You know most of them do, in Queensland?---I worked for several companies up there - - -

PN397

Okay, it's - - -?--- - - - and I never had to vote on any EA or anything like that, I'd just get an employment agreement and that's all it was.

PN398

So it was all pretty new to you?---Yes. Like I said, when I come down here and we got knocked back from South 32 because we didn't have an enterprise agreement, I was like, 'Wow'.

PN399

Yes. And just to go back to that earlier question, would you say it's easier without an enterprise agreement, or without the bargaining, rather?---I wouldn't say it's easier, but it's just a completely different process that you have to have in place to actually do business with mining companies.

PN400

And it's not more straightforward, from the company's perspective, to just employ a bunch of guys, pay them rates, and that's it, without that give and take of bargaining?---Well, certain sites require it and certain sites don't.

PN401

Sure, but would it be better for your operation if sites didn't require it and you could just go along and engage people as you wanted?---Not better, because - - -

PN402

More straightforward?---Well, it depends. Like there's several things that it can be dependent on because, obviously, if you go to a site and they say they don't require an enterprise agreement it can make the process to mobilise guys to site easier. Whereas, if they do say you need an enterprise agreement, which was the situation we were in, we obviously didn't have any opportunity to mobilise, we actually had to have something in place.

PN403

So you wouldn't say that the first example you gave is better, from the company's perspective, where you can just get up to site, mobilise, you don't need to worry about the agreement?---Yes, well, you know, if that's what the site requirement is, then it obviously allows you to be able to grab the labour from certain places to be able to mobilise for a project, if that's what they want done.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN404

So you'd say that's easier than the alternative?---Yes, if 'easy' is the right work. I'd probably say it's a bit more efficient.

PN405

Okay, 'easy' or 'efficient', I'll take either, that's fine. Now, how long have you been involved with Nortech?---2014 or '15 or thereabouts, so about seven years, or so.

PN406

Always in the GM role?---No. No, definitely not.

PN407

And this - that Nortech agreement in 2022 was your first experience with bargaining?---Yes. Yes.

PN408

Are you aware that Nortech have had a lot of goes at getting agreements approved?---When you say 'a lot of goes'?

PN409

I don't have the number, top of mind, but I think it would be around four or five knocked back agreements, for various reasons, particularly around genuine agreement, and then the 2019 was, to my recollection, the first - my colleague might check that?---Yes, we had an enterprise agreement that was for when we were over at Tahoor Mine, but we've only ever had one renewal process.

PN410

Sure, one renewal process. But similar to with SMS, the process that starts having an enterprise agreement. So this is the first SMS enterprise agreement. Are you aware that Nortech had many attempts to try and get their first enterprise agreement? By 'many attempts', I'm sorry, I don't have the number on me, but it is four or five?---Are you talking about like the renewal that was done?

PN411

No. No, no. So not the '22 renewal. The '22 renewal was renewing an existing enterprise agreement, correct?---Mm-hm.

PN412

So that existing enterprise agreement was approved in 2019?---Mm-hm.

PN413

But that was after, I think, several attempts in the years before. I know because I was in some of those cases?---Yes. Actually when we - when we - I think when we were still in Queensland, yes, another business colleague, we tried to do an - like I think it was called a Greenfields, or something like that, or whatever the terminology was, and then, yes, then we actually got a phone call from a union person and myself and the business colleague went down and we met with them down in Wollongong and we were honest with them. We said, 'Listen, we've just tried to file for an EA', and obviously when that happens, the CFMEU at that stage they were called, they got a hold of it, so we went down and met with them

to basically talk to them about the work opportunity we had down at Tahmoor, so I think if that's what you're referring to then, yes, I do agree with you.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN414

Yes. So there were earlier attempts at bargaining?---Yes.

PN415

And how - do you recall any of them being knocked back by the Commission saying, 'No, go and have another try, this doesn't - - -?---I think the first one - like I didn't actually - I wasn't a big part of that, but I do believe that, yes, there was a knockback initially, which I think that was why we actually went and sought professional help because we didn't actually have anyone of a professional nature actually assist us with that, I don't believe.

PN416

And that's when Jesse became involved?---Correct.

PN417

Okay. I understand. Okay. Sorry, I will get the number of attempts at the Nortech agreement but there were several in 2019. Does that ring - - -?---Yes, that date roughly does. Yes, I think that was when we went down to Tahmoor.

PN418

Okay. Then you had the first agreement in 2019, after those failed attempts. Was that with - do you remember, was it a small number of employees that made that agreement?---Geez. Yes, it wouldn't - like, in total, the - I think we only had about 20-something guys at Tahmoor, so I can't remember - like that was staged over a period of time, so it could have ranged from anyone, between one and 20, dependant on when that was. Like I said, I can't - I can't put my finger on exactly how many people we might have had in the business when the EA was done. It would have been over five, but.

PN419

Over five?---Yes, definitely, it would have been over five.

PN420

Whose idea was it to make this SMS agreement?---Mine.

PN421

Yours?---Yes.

PN422

And whose idea was it to bring those employees across from Nortech?---It was a bit of a collective decision, but mainly mine.

PN423

Yes. What was the reason for making the enterprise agreement?---Like I said to you - well, you need an enterprise agreement in New South Wales, to operate on certain sites.

PN424

At Ulan?---No, I don't believe Ulan are a site where you - - -

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN425

What kind of sites are you talking about?---Actually, I think Glencore you do actually have to have that EA. Well, basically, we - the reason for the SMS EA is we wanted to have an enterprise agreement that did cover the whole of New South Wales for that reason. So that obviously - because before I had to move back up to Queensland myself and my wife actually had plans to move up to the Newcastle region, so that that way we wanted to try and have an EA that covered the whole of New South Wales so that if there were sites in Newcastle that needed it, we had one. Wollongong, we had one. And even out west, you know. I'm not 100 per cent sure which sites do or don't need them out Mudgee way, but I know between the Newcastle region and the Wollongong region an enterprise agreement is definitely something you have to have in place.

PN426

And you mentioned Appin before as one of those sites, when you were trying to get into Appin. Can you remember any others?---That you need an EA?

PN427

Yes, sorry, that you need an EA?---Yes. So Appin, Dendro and Metrop.

PN428

Okay. So it didn't matter that Paul Wilson was at Dendro and Metropolitan, without an EA? Have I got his name right, Paul? Yes. So Paul Wilson was working at Metropolitan and did some work at Dendrobium?---Correct.

PN429

For SMS?---Yes.

PN430

It wasn't an issue that he - - -?---No. Well, like I said before, like with the business, the four businesses down there, there's - I think there might be two or three down there that I've got like a handful of people. But soon as you go to a certain number of employees you actually have to have an enterprise agreement.

PN431

Got it. So you can have a couple, like a handful?---Yes, correct.

PN432

Got it. Sorry, I've just lost my train of thought. All right. So you wanted to make the EA so you could get those contracts. You specifically mentioned Metropolitan, Dendrobium and Appin, just then, when I asked which sites require you to have an enterprise agreement?---Mm-hm.

PN433

You'd agree that in the south you need an enterprise agreement?---Yes.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN434

Yes. Okay. But that's not been your experience at other places. You're not sure about Ulan but definitely in the south you need an enterprise agreement?---I know down in the south, and I know up in Newcastle as well, that you have to have an enterprise agreement up in those areas as well.

PN435

Okay. Do SMS have a contract out at Ulan, to perform work? Contract to perform work?---No, SMS doesn't have a contract.

PN436

So how are those employees performing work there?---Those employees are actually contracted through the Nortech engagement out there.

PN437

Okay. So the employees that were employees of Nortech ceased their employment with Nortech, were then hired by SMS to perform work, under the Nortech contract, is that correct?---Yes, that is.

PN438

Was there a period of time between working with Nortech and working with SMS?---No.

PN439

Like a break in employment?---Yes. There was a - well, yes, because the guys, they were transitioning between - when they went up to Ulan, between Ulan and Mudgee, I think it was around about that sort of time.

PN440

Sorry, so there was a break or there was not a break, between the Nortech employment and the SMS employment?---As in like they left the business?

PN441

Yes. So they cease employment with Nortech. I'm just wondering, how soon after do they start? Next week or - - -?---No. Yes, I'm sorry, I - like I said, that was over a year a bit ago, I can't actually remember how - what timeframe it might have been. It could have been a week, two weeks, or a four.

PN442

You and I have the same experience of time. It's less than a year actually, it was September - sorry, it was June last year?---Yes.

PN443

Okay. So you're not sure if there was a break in employment?---No. Like I said, it was - I remember, roughly, the guys were working out at Ulan and that was when I - yes, I started actually putting a fair bit of time into it. But, yes, it was around that - between them going to Ulan and out to Mudgee. But as for a specific timeframe, I'm sorry, I can't actually - yes.

PN444

No, no, that's fine. That's fine. Would you agree it wouldn't have been more than a month, if there was a break?---No, it wouldn't have been more than a month, no.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN445

Okay. You still needed to perform work under the contract and those guys were going to perform that work? Okay. I think we are near the end. Can you recall any questions from the guys during those bargaining sessions? Sorry?---I've got three young kids that ask me questions every day. Honestly, I'm not lying and I'm sorry to laugh, but I - I - seriously, I cannot remember - I can't even remember what car I drove out there that day.

PN446

All right. All right. I've got three kids as well, so I have some sympathy for you. Okay. Look, I think that's all?---Like most of the guys were encouragement because they've either worked with me, and stuff like that, and I don't mince my words when I talk to guys about this. Everybody that has either worked with me or for me or whatever it is, they understand my passion for mining and my passion is to be surrounded by like good coal mine workers that work for me and stuff like that. Sometimes I have to make hard decisions around certain employees and stuff like that, but this - this agreement, like I am a young businessman and I understand that there's a lot of businesses out there that try and do certain things to get away with this, that and the other, but this business is not that. I will be the face of Specialised Mine Services and I'll take this business to where I need it. Like I work very hard to get to where I have now and I'll prove to everyone here that I'm not here to try and undercut people or do this or do that to directly not benefit somebody. Like you ask any one of the people that have worked for me over the period of time, and I always try and be the highest payer on the site. If I can't be, it'll definitely be close, but I never try and come in and take money away from people that are trying to provide for their families, like I try and do.

PN447

Yes. I get that. Sorry, you've just reminded me of a couple more questions. So you do pay above the agreement, or at Nortech the rates were well above the Nortech agreement?---I always want to try and pay our employees the highest amount of money, like any person.

PN448

Yes. And the same as SMS, none of those employees were paid the rates in the agreement?---The guys were paid what ever their employment contract was.

PN449

Okay. And would you agree that that was above the rates that are set out in the agreement?---Yes. Like I said, I try and - we want to try and pay our employees the most amount of money we can.

PN450

So what purpose does it serve then to have that agreement with lower rates in it?---Well, an enterprise agreement is based off a base rate that has to be agreed between the tier 1 company and the contracting company.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN451

Okay. So - - -?---That's what an EA is. Like whatever that rate is on that agreed EA is what is had between. But if you can pay your guys more than above the EA, that's not a legal thing to do, you can do that.

PN452

Of course, and we'd encourage it. But can I just go back to something you just said then, an enterprise agreement, the rates set out in the enterprise agreement are what are agreed between the company, so the contractor, the rates that they tell you to pay, and you, rather than the employees and you?---Well, the rates agreed upon between the employee and the company and then that EA is between the company and the contractor and the contracting company, Specialised Mine. That's what the EA is, is that's between us, Specialised Mine Services, and BHP.

PN453

The enterprise agreement is between - the enterprise agreement is between you and your employees, no?---Yes. Yes.

PN454

So how - I'm just curious to understand how the mine operator comes into that arrangement?---Well, like we said before, you can't - like certain mine sites, you can't work on them without the EA.

PN455

Sure. But I think what you said before is that the rates in the agreement are the rates that you're communicated from the host company is what you've got to pay. Is that what you said, or did I miss something?---No, no, no.

PN456

Okay?---The rates are between the company and the employee, that's obviously - -
-

PN457

Got it. Sorry, I missed it?---Then the EA is then communicated to the tier 1 company that you do work with, that's your enterprise agreement.

PN458

Got it. So what was the dialogue around the rates, given all these guys were paid well above the - in bargaining, was there much discussion about the rates paid?---Rates. Yes, probably. I think we discussed that with the guys. Yes, we would have had to have. They wouldn't have just agreed on coming across and working for nothing. I'm sure at some stage the rates were discussed about, whether - you know what I mean, like no one's going to agree to something and go, 'Yes, no worries, Sam, I'll just come and work for you because you're Sam Perkins'.

PN459

It would be nice to have that reputation, wouldn't it?---Well, I'd like that.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN460

So they weren't too bothered that the rates that you were guaranteeing in the agreement were far below what they were being paid?---There was never any concern, I don't believe, otherwise they wouldn't have come across.

PN461

Is that weird to you? Does that seem weird?---I'm not going to - I'm not here to judge people. If - I'm sure they would have told me if they weren't going to come across and that would have been the situation that I would have - - -

PN462

You would agree that the pay someone gets for performing work is one of the core benefits of performing work, right?---Mm-hm.

PN463

And it didn't strike you as odd that these employees, who were paid well above the agreement, were unconcerned that they're agreeing to terms in the agreement that were well below what they were earning?---I'm not here to judge people.

PN464

No, no, I'm not asking you to judge them. But did it, you know, did you explain to them why the rates were far lower? You just gave a very passionate, you know - - -?---Yes.

PN465

You were quite passionate about wanting to pay people, you know, as much as you can?---The rates within the enterprise agreement are, like everyone talks about, a - what do you call it, like an industry - I'm trying to think of the terminology. An industry market value, or whatever you think, if that's what you can call it.

PN466

Sure?---Like that's a terminology that everyone sort of references to.

PN467

Would that have been the discussion, you know, "These are industry standard rates, you guys are paid \$81, \$82, but this is industry standard"?---Yes. I'm just trying to think like in regards to the actual meaning itself. Yes, I'm sure those discussion were had, like I said. But if the guys had an issue or a drama with it, I'm sure they would have raised it and then that would have been something that we would have had to have had the discussion around.

PN468

Well, I put it to you that they didn't have an issue with it because they were guaranteed the contract rates that they were being paid, would you agree with that?---Say that again?

PN469

They didn't have an issue with the rates in the agreement because they knew that the rates in the contract, that were much better, were the rates that they'd be entitled to. They didn't have to care about the agreement rates because they were already getting more and would continue to get more?---Well, they would have - they would have been - they would have reviewed the actual EA rates. No one just breezes through something without reviewing it.

PN470

Sure. But I'm putting to you that they didn't care about the EA rates because they had their higher rate of pay confirmed?---Well, if they didn't or didn't care about it, like that's not for me to tell - - -

PN471

VICE PRESIDENT ASBURY: Mr Perkins, let's - - -?---I don't.

PN472

Let's focus on this. Have you got page - have you got the document that is the appeal book? So you've got a court book and then you've got one that's got nothing on the front of it?---Yes. Correct. Yes.

PN473

Okay. Can you go to page 164 of that and you should have, on that page, the schedule of rates in the Nortech agreement?

PN474

DEPUTY PRESIDENT BEAUMONT: Is it the Nortech agreement 2019 or 2022?

PN475

MS SARLOS: It's 2022.

PN476

VICE PRESIDENT ASBURY: 2022. So you've got - yes, it's 2022, so are you looking at that schedule?---Yes, I am. Yes.

PN477

Okay. So at the time, let's take the 1 July 2023 rates, which is what would have been paid under the Nortech agreement, at or around the time that the SMS agreement was made, okay?---Mm-hm.

PN478

If you look at the rates under the SMS agreement, which you will find on page 212 of the same book?---Yes. Yes, I've got that.

PN479

Well, you can see that they're lower, under the SMS agreement?---Yes. Correct, yes.

PN480

Now, if you look at, for example, Mr Sissans, when he worked for Nortech he was paid \$64 an hour and when he came to work for SMS he was paid \$64 an hour?---Mm-hm.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN481

So what you're being asked is, what discussion was there about the difference between the rates, because Mr Sissans was covered by the Nortech agreement, right?---Yes.

PN482

So he's being shown an agreement that has got lower rates in it that the agreement he was covered by?---Mm-hm.

PN483

What, if any, discussion was there about that?---Yes. Like I said before, with our rates that we had with an enterprise agreement, if we - if we can actually get higher rates for a particular skillset on a mine site, then that's obviously something that we can, dependent - - -

PN484

I'm sorry, Mr Perkins. I don't argue that you want to pay people as much as you can pay them?---Yes.

PN485

What I'm asking you is, when these six guys were in a room at Mudgee, looking at a new agreement that they were being asked to approve, did they ask why the rates were lower than in the Nortech agreement, or did anybody tell them that?---Yes. We actually - we went through the rates to the guys. Like when we actually - you go through - like we had the whole enterprise agreement there and we went through it step by step. So we - - -

PN486

Okay. So you went through the rates and you said, 'The rates in the agreement start at \$31.05 for an inexperienced operator and, Mr Sissans, you're an operator experienced, so the rate for an operator experienced is, let's say, \$33.19 an hour'?---Nineteen, yes.

PN487

Right?---Yes.

PN488

And Mr Sissans says, 'I'm getting \$64 an hour now', was there any discussion about what would happen to Mr Sissans' rate, if he agreed to this agreement?---Well, because the guys are based on a casual basis, with the rates that they were at there, they weren't full-time employees so that's why Mr Sissans is on that \$63, or thereabouts.

PN489

But if I put 25 per cent on the rate, and again you can agree with me or disagree with me, if I put 25 per cent on the rate, under the Nortech agreement, I still don't get to - - -?---Yes, the rate is - the rate is lower.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN490

Yes?---Like with SMS than Nortech.

PN491

And if I put 25 per cent on the SMS agreement rate, I don't get to \$64 an hour. So did - what were employees told about their existing rates, if those rates were higher than this agreement, than the SMS agreement?---They were going to be on the same rate.

PN492

Okay. So they were told that?---Yes.

PN493

Right. Thanks.

PN494

DEPUTY PRESIDENT BEAUMONT: Can I just get, by way of clarification, because I'm from Western Australia, Ulan, is that in the south-western district or area?

PN495

MS SARLOS: Yes. I would say - - -

PN496

DEPUTY PRESIDENT BEAUMONT: I don't mind who confirms, it's just by way of clarification that Ulan is known to be in the south-western?

PN497

MS SARLOS: Yes. And if the Bench wanted to satisfy itself of that point, the Ulan Coal Mines Limited Underground Certified Agreement makes it clear that it's in the south-western sector.

PN498

VICE PRESIDENT ASBURY: But in any event, the Nortech agreement applied throughout New South Wales, as I understand it.

PN499

MS SARLOS: No, it was limited to the south-west.

PN500

VICE PRESIDENT ASBURY: No, the 2022 didn't but the 2019 did. The 2019 wasn't limited in scope.

PN501

MS SARLOS: I see the point you're making. So the 2019 would look like - correct.

PN502

VICE PRESIDENT ASBURY: Yes. And the 2022 Nortech agreement - - -

PN503

DEPUTY PRESIDENT BEAUMONT: Is limited to the south-western.

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN504

MS SARLOS: Well, that's - - -

PN505

VICE PRESIDENT ASBURY: No, it says, 'The employees employed by the employer, in the south-western mining district of New South Wales', at 3.1(b), is that the 2019 or the 2022?

PN506

MS SARLOS: That is the 2022.

PN507

VICE PRESIDENT ASBURY: And the 2019 is not so limited. That provides, 'The employees employed by the employer'. Which begs the question, if the reason or the vision was you and your wife moving to Newcastle and that was the impetus of a new agreement that had brought a coverage, you already had that in the 2019 Nortech agreement so how did that then provide a rational or justification for the vision of the new company that you created, in Specialised. Because you did say, 'We were looking at getting one with broader scope'. So you established this entity, you set up an agreement that's not so limited in scope?---Mm-hm.

PN508

But you already had that with the 2019 agreement?---I didn't think that that 2019 one would be valid because - - -

PN509

Was it terminated?---Pardon?

PN510

Was it terminated?---I'm not 100 per cent - like it was - like I thought it would be terminated if the - - -

PN511

So you thought, by the 2022 one, it would therefore mean that the 2019 was no longer in operation?---Yes, correct.

PN512

Okay?---Is that not the case.

PN513

I'm not here to answer you on that?---Okay. Sorry

*** SAM CRAIG PERKINS

XXN MS SARLOS

PN514

MS SARLOS: Thank you. Now, I know you've talked through that you're not across the different industrial instruments that apply but, just out of fairness, I want to ask you; when you walked through - you said you went through the clauses of the agreement and explained them, in comparison to what the existing terms and conditions were. What was the instrument, the document? Was it an award? Was it the Nortech 2022 agreement? The 2019 agreement?---Jesse was the one that actually went through that - went through the document with the guys.

PN515

Okay. And your evidence, in the F17B, is that it was the award, you'd agree with that now as well? So there was no explanation given between the Nortech 2022 or the 2019 agreement and the terms in the SMS Agreement? No. All right, thank you. No further questions, thank you.

PN516

VICE PRESIDENT ASBURY: Mr Yvanoff, do you have anything you want to ask Mr Perkins?

PN517

MR YVANOFF: I do have a couple of questions.

RE-EXAMINATION BY MR YVANOFF

[12.14 PM]

PN518

MR YVANOFF: Mr Perkins, I just want to see if you can share your view on what happened with Nortech, when they went to Malabon and, potentially, why they didn't get any people working at Malabon?---With Nortech?

PN519

Yes?---When we went out to Malabon we met with some management out that way. We went through a tender process, I guess you could call it, a contract process, and we were unsuccessful with that, due to one of our skillset being a higher rate than one of the other competitors.

PN520

So was it a significant number, in terms of the charge rate that Nortech put forward, under that tender?---Yes, that one particular skillset was considerably.

PN521

Did something happen similar when an application or tender was made for the Appin umbrella agreement? Were there similar commercial circumstances that suggested that Nortech wasn't successful for that particular job?---There was - there was things within our enterprise agreement that were brought up that weren't in our favour commercially for that, if that's the question you're - - -

PN522

Was Nortech seen to be more expensive than other competing contractors, on that particular tender?---Well, as like with our - with our base line or base what do you call it, industry standard, if that's the word, and I'll refer back to. We are - we are

higher than - than our other competitors. It's not by a huge amount but, yes, we are higher which, I suppose, yes, like with that contract that we did go for because it was a volume based contract with a large amount of numbers, yes, we would have been more expensive. That's just a no brainer.

*** SAM CRAIG PERKINS

RXN MR YVANOFF

PN523

Would you also agree that as your style as a general manger, you do share with your employees more than what would be an employee/employer relationship, i.e. your business vision, you're very open about it?---Yes, with my business vision, yes, I do. Like I said before, I have those discussions with - with guys around the business vision and where I see it. I don't - I don't go into certain details that I don't believe that they - they need to - like don't need to know. But, yes, I'm open around that. All of our - all the employees and all the people that work around me know that I'm open and passionate about that.

PN524

Yes. And one of those motivations for you to create a separate entity outside of Nortech, would you agree, was about to remain what we call market competitive?---Correct. Yes, I've stated that before.

PN525

Indeed. However, would you also agree, or would you at least explain that sometimes when Nortech were having their tender discussions there were two different points of view. One was a corporate point of view and one was an operational point of view and quite often, in those discussions, which we both took part of - - -

PN526

VICE PRESIDENT ASBURY: You're giving evidence from the Bar table.

PN527

MR YVANOFF: Sorry.

PN528

VICE PRESIDENT ASBURY: Because you're not sworn in, are you, at the moment?

PN529

MR YVANOFF: No, I'm not. Can you explain the differences between commercial - the commercial outlook on an EA versus an operational outlook on the EA, in relation to gaining a contract?---Yes. Well, commercially - commercially gaining a contract obviously, yes, it comes down to rates that are agreed upon between the company and the contractor. Operationally - - -

PN530

Let me put it another way. Would you agree that the commercial side of an entity, such as a Glencore or a South 32, compare enterprise agreements?---Yes, they do.

PN531

However, the operational people have discretion to allow contracts or allowed people to be paid, or contractors to be paid more?---Yes, that - yes, that does occur.

*** SAM CRAIG PERKINS

RXN MR YVANOFF

PN532

Does Nortech, indeed, have more than one commercial contract in New South Wales?---No, not a commercial contract.

PN533

And at this point in time, and to date, is it that Nortech is operating on mainly purchase orders and not full blown commercial contracts?---Yes, that is correct. Yes.

PN534

Thank you.

PN535

VICE PRESIDENT ASBURY: Mr Perkins, again, you can agree or disagree with this. If you go to a client and tender for contracts to one of the tier 1 companies and you say, 'Here I am with my rates, \$31.05, \$33.19' et cetera?---Yes.

PN536

Then the cline is entitled to say, 'You've got an agreement, they're the rates, we're going to compensate you with the contractual work, according to - assuming that you're going to pay employees those rates?---Yes, correct.

PN537

Right. Okay. Thanks. Anything arising from my question, Mr Yvanoff?

PN538

MR YVANOFF: No, your Honour.

PN539

VICE PRESIDENT ASBURY: Ms Sarlos?

PN540

MS SARLOS: No, thank you.

PN541

VICE PRESIDENT ASBURY: Do you have any other questions? Thanks. You're excused. Thank you for giving your evidence, you can join Mr Yvanoff at the Bar table?---Thank you. Do I just leave these here?

PN542

Ms Sarlos, do you want your documents back?

PN543

MS SARLOS: Not particularly.

PN544

VICE PRESIDENT ASBURY: Pardon?

PN545

MS SARLOS: Sure. Sure, thank you.

<THE WITNESS WITHDREW

[12.20 PM]

*** SAM CRAIG PERKINS

RXN MR YVANOFF

PN546

VICE PRESIDENT ASBURY: Are you ready to make submissions?

PN547

MS SARLOS: I'd appreciate a small comfort break if that would be - - -

PN548

VICE PRESIDENT ASBURY: Sure. What if we stand the matter down till half past, so for 10 minutes?

PN549

MS SARLOS: That would be great, thank you.

SHORT ADJOURNMENT

[12.20 PM]

RESUMED

[12.30 PM]

PN550

MS SARLOS: So my plan, with submissions, was to go through each of the grounds but to focus, I think, where the meat of the matter is, in the genuine agreement grounds. Those grounds are obviously concerned with reaching a requisite state of satisfaction. It's a discretionary decision where the decision maker is given considerable latitude as to the decision to be made.

PN551

While there is considerable latitude, that latitude is not boundless and our submission that goes across each of those satisfaction based grounds is that the Deputy President went beyond the bounds of that latitude.

PN552

We'll take you to what we say was acting on wrong principle, being guided by extraneous or irrelevant facts and, significantly, failing to take into account material considerations.

PN553

The first ground I wanted to deal with was that in relation to the statement of principles, which section 188(1) requires the Commission to take into account when determining whether it is satisfied that the agreement was genuinely agreed. I will take our written submissions as read and the statutory context in which that new provision appears.

PN554

But despite that obligation, our submission is that the statement was not or was not adequately taken into account and that the Deputy President was guided by relevant facts in reaching any state of satisfaction in respect of section 188(1).

PN555

The decision does not contemplate the statement of principles at all. Instead, it identifies a blanket satisfaction of, relevantly, sections 186 and 188. You can see the extent of the consideration at paragraph 8 of the decision, which is at page 12 of the court book.

PN556

In our submission, this lacuna of evidence is a process devoid of the active intellectual consideration which the legislation required of the statement and principles.

PN557

Our written submissions took you to some authorities that related to section 387 and its predecessor, which we accept is a different statutory context that sees the Commission serving a different function. However, we think the structure of section 387 means it's a helpful comparator when determining the task required of the new section 188(1).

PN558

As the Bench would know, section 387 decisions step out the decision making process, making a finding in respect of each of the circumstances specified in the relevant statutory provision.

PN559

This is, in our submission, to satisfy what the Full Court and the Full Bench found, in relation to the provisions predecessor, as set out in the authorities referred to in our written submissions.

PN560

Our written submissions included the submission that the Commission is obliged to make a finding in respect of each of the statement of principles. You'll be pleased to know we're stepping back from that submission. We accept that it's not a requirement for the Commission to reveal its findings and the consideration that went into those findings, in respect of each of the principles. But the way the Commission treats section 387 is an important jump off point to explore what is required by the Commission when recording its satisfaction, for the purposes of section 188(1).

PN561

The Full Bench found, in *Quinpath(?)*, and my apologies, it's not in the authorities, but I can hand up a copy. So at paragraph 13 of that decision the Full Bench made the following observations:

PN562

The Commissioner's decision contained five paragraphs. It noted the Commissioner's satisfaction that the requirement of sections 186, 187, 188 and 190, dealing with the old legislation, had been met and attached

undertakings. The Commission deals with many thousands of applications for approval of enterprise agreements each year. Brief decisions are both common and appropriate in respect of applications that are uncontested or do not otherwise raise concerns as to whether the various approval requirements in the Act have been met. However, when a bargaining representative for an agreement -

PN563

And we would say a third party intervenor as well:

PN564

opposes its approval and articulates substantive and reasonably arguable grounds for its opposition, a decision containing more detailed reasoning may be required.

PN565

We think that foundation can and should be expended, particularly in light of the new obligation placed on the Commission, before it can reach the requisite standard of satisfaction when determining if an enterprise agreement has been genuinely agreed.

PN566

Where a decision maker is required to take into account, or have regard to, a prescribed set of circumstances, then that requirement is a jurisdictional pre-requisite to the exercise of power. That taking into account has been described as an active intellectual process, in *Tickner v Chapman*, which I won't take you to but it's [1995] 57 Federal Court 451. And I'll return to that phrase, as I think it's in parallel to the rigorous scrutiny of the Commission, that Bromberg observed in *Tayes(?)* that is required for this process.

PN567

We have a couple of observations of how to determine if that active intellectual process has been undertaken, as observed by the Full Court, in *Kagee(?)*, which I will hand up and, again, my apologies, it's not in the bundle. What a weekend does to your plans.

PN568

Now, this was a case that considered whether the Migration Review Tribunal fell into jurisdictional error by failing to have regard to each of the mandatory considerations prescribed in the relevant regulations, and if that failure was demonstrated on the face of the reasons.

PN569

From 57 the court examines the relevant principles, which I'll run briefly through, I won't take you to the specific words. The first is to reiterate that point from *Tickner*, that the active intellectual process is a jurisdictional pre-requisite. Then, at 58:

PN570

While the decision maker can determine appropriate weight to be given to each circumstance, the failure to give any weight to a factor to which a decision

maker is bound to have regard in circumstances where the factor is of great importance in a particular case may support an inference that the decision maker did not have regard to that factor at all.

PN571

At 59 the Full Court make observations that:

PN572

A decision maker does not take account a consideration if they dismiss it as irrelevant. If it is apparent that the particular matter has been given cursory considerations only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not, in fact, been taken into account.

PN573

Now, the Full Court conclude that paragraph by identifying that:

PN574

Whether the inference should be drawn will, of course, depend on the circumstances of the particular case.

PN575

At 60 and 61 they make observations that:

PN576

There can be matters that are fundamental and non fundamental and not all matters will be fundamental to the decision making process.

PN577

Then, at 62, the Full Court say:

PN578

Although the Minister may have regard to each and every one of the prescribed circumstances, not all of them will be central or fundamental to each case.

PN579

We accept that. You'll see, from this, why we elected to step away from the Bolder written submission and while it's encouraged us to step down from that submission, there's an important corollary to be drawn. There will be prescribed circumstances that will be fundamental or central to a matter and, as the Full Court says, at paragraph 60 of the Kagee decision:

PN580

In some cases it may be apparent that amongst the factors which the decision maker is bound to have regard there is one factor, or perhaps more than one, which is critical or fundamental to the making of the decision in question.

PN581

Our submission is that where there is a fundamental matter for consideration it must be addressed in the decision.

PN582

We say this based on something the Full Court observed, at 59, and how to deal with what appears to be a cursory consideration. I will read more of that paragraph than I have of the others that I've glided through. So:

PN583

A decision maker is entitled to be brief in his or her consideration of a matter which has little or no practical relevance to the circumstances of a particular case. A court would not necessarily infer, from the failure of a decision maker to expressly refer to such a matter in its reasons for decision that the matter has been overlooked. But if it is apparent that the particular matter has been given cursory consideration only, so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not, in fact, been taken into account.

PN584

Now, as I've already said, whether that inference should be drawn will depend on the circumstances of the particular case.

PN585

So while the Commission must take into account each of the principles, we accept not all of them will be central to each case. But, as the Full Court held in the decision WAEE, which is cited in Kagee, at 65:

PN586

The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But this is an inference, not too rarely drawn, where the reasons are otherwise comprehensive and the issue has, at least, been identified at some point. Where, however, there is an issue raised by the evidence, advanced on behalf of an applicant, and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's review of the delegate's decision. A failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

PN587

Obviously, we're in a different context, but we think those comments are in line with those of the Full Bench, in Clean Paths(?), where a bargaining representative or, as in this matter, a third party, articulates substantive and reasonably arguable grounds for its opposition, a decision containing more detailed reasoning may be required. The same, we would say, for issues that have fundamental considerations in the disposition of the matter.

PN588

We're obviously in the early days of the provision, but I think it is a position that is tacitly accepted by some Commission members already. Take, for example, Masson DP, in Glenn Howard(?) which is at tab 9 of the bundle of authorities. I'll just read to you, it's a very short paragraph, at 6:

PN589

Correspondence was sent to the employer, by my Chambers, on 25 August, raising a number of concerns, including the notice to vote issued to employees and lodged with the Commission does not provide the place or method of the vote. The employer responded on 31 August 2023 and provided that employees were not advised of the specific voting method, as a standard method of voting, but a show of hands at a meeting was used and was familiar to employees. The employer further advised that in conducting the vote to considered approval of the agreement, the owner of the business, after opening the meeting, withdrew to allow the show of hands vote to be conducted. I note the vote in support of the agreement was unanimously in favour. Having regard to the statement of principles, on genuine agreement and, in particular, clauses 15 and 16, I am satisfied, in the circumstances, that employees were provided with a reasonable opportunity to vote on the agreement in a free and informed manner.

PN590

That, we say, is what the statement of principles requires. A similar approach has been taken by Yilmaz C and Tran C. These aren't in the bundle but I can - so there's a CEPU decision, which is [2023] FWCA 2583 and Fredericks Family Trust, which is [2023] FWCA 2505.

PN591

When the Act calls for the Commission to take into account the statement of principles for those that are fundamental, the decision must evidence the active intellectual process undertaken in the process of forming any state of satisfaction. Without it, for a matter that is live and potentially dispositive of the application, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked. And, in our submission, that's exactly what's happened here.

PN592

What is fundamental will, of course, be different in different factual circumstances which is, again, why we stepped away from that earlier submission, but we set up the principles in our written subs, at 19 to 25, that we think were important in this case and were not adequately dealt with or not - were not properly considered.

PN593

We no longer press that principle 15 was fundamental but we would add principle 2 to that list, in light of the failure of the respondent to have provided all employees with the notice of employee representational rights, which Mr Yvanoff spoke to today, something we have realised only since receiving the material that was provided in response to the order.

PN594

Having said all that, what was the active intellectual process undertaken by the Commission at first instance, particularly about those fundamental elements? In this case the Deputy President did not consider the statement of principles at all, either as a whole or individual principles that were critical to the making of the decision in question.

PN595

She refers to some of the MEU's submissions but does not appear to consider them. This is what I think the Full Court described as a cursory consideration, in Kagee, the decision I took the Bench to.

PN596

Rather than consideration of those submission or, more relevantly, the principles themselves, the Deputy President then makes some specific findings, at paragraph 9 of the decision. It's worth looking at those closely, as they show the arguments that the Deputy President gave weight to and how misguided, we submit, the consideration was. Whether that was in respect of the statement of principles or the other considerations around genuine agreement, in section 188. If you'd like to view it, it's at paragraph 9 of the decision.

PN597

Now, here, first, she determined that the size of the cohort met the statutory minimum and she accepted the submission of the employer that a small business is not irreconcilable with the coal industry. Yet the concern, in relation to the small cohort, is not resolved by the statutory minimum or an assessment that the coal industry can home a small business. Instead, the matter of importance, in relation to the cohort, is set out at principles 17 and 18.

PN598

Looking at principle 17, it states:

PN599

In considering whether employees have a sufficient interest in the terms of an enterprise agreement, as required by section 188(2)(a) of the Fair Work Act, and whether the employees are sufficiently represented, as required by subsection (2)(b), the Fair Work Commission may take into account of whether the employee's entitled to vote on the enterprise agreement are to be paid the rates of pay provided for in the agreement, and the extent to which the employee is entitled to vote on the enterprise agreement are employed across the full range of classifications, types of employment, geographic locations, industries and occupations.

PN600

Now, we have spent a bit of time talking about the types of employment today, as well as the rates of pay. That was information that was not before the Deputy President, yet she was satisfied, in relation to the - yet the Deputy President reached that satisfaction, in relation to the small cohort, but we would say that satisfaction was misdirected. It was a conclusion irrelevant to the task required by principle 17 and that concern was misdirected.

PN601

What can be inferred from this consideration is what the Deputy President did not consider. There was no consideration of whether the employees were to be paid the rates of pay provided in the agreement. We know this because that information was not before the Deputy President.

PN602

The same can be said for the classifications in the agreement, on the types of employment. The inference must be drawn that any consideration of that status was cursory, but it had - had it been more meaningful, the Deputy President would have realised that those employees were engaged in a manner which was inconsistent with the award, a matter critical to the making of the decision that she can't have turned her mind to.

PN603

Similarly, we submit that she would have turned her mind to the fact that all of the employees were casual employees that had no interest in provisions that are central to the agreement, such as redundancy, notice of termination, the leave provisions.

PN604

Going then to principle 18, the principle states that:

PN605

An enterprise agreement will generally not have been genuinely agreed to by the employees covered by the agreement, unless the agreement was the product of an authentic exercise in agreement making between the employers and employees in one or more enterprises and the employees who voted for the agreement had an informed and genuine understanding of what was being approved.

PN606

If the Deputy President considered and resolved this by her observation at 9(a), in relation to small cohorts, again that's misguided.

PN607

It's possible, though, that the Deputy President's satisfaction, at 9(c), goes to that point. Here she declares she is satisfied that:

PN608

The employees covered by the agreement are sufficiently experienced in bargaining and, as a result, no concerns arise in respect of whether that genuine bargaining occurred.

PN609

There are two problems with this. First, the concern is not whether genuine bargaining has occurred but whether the agreement was the product of an authentic exercise in agreement making. They're different things, as I think the Bench would be aware, and I note that in a draft statement of principles initially floated by the Commission, there was a concern around bargaining, and that was changed in the final version to refer to, 'an authentic exercise in agreement making'.

PN610

With the information we now have, we would question the authenticity of the exercise in agreement making. Had the Deputy President given the agreement the rigorous scrutiny that the agreement making process requires, we suspect she would have too, to the point where she could not have been satisfied that genuine

bargaining, even if it had taken place, was a complete answer to whether the agreement was a product of an authentic exercise in agreement making.

PN611

Now, I don't have the benefit of transcript, but we've all heard today the evidence of Mr Yvanoff, in particular. Sorry, I'm just looking for the note so I can accurately communicate it. But Mr Yvanoff did agree that one of the motivations of making the agreement, or the primary motivation of making the agreement, I don't think I'm placing that too high, was to get around the rates in the Nortech agreement.

PN612

Now, Mr Perkins' evidence differed on that although, in re-examination, there was some movement closer to that position or that could be inferred from the position of Mr Perkins. But I think, on any view, that situation needs - strongly infers that the authenticity of this process was not there.

PN613

VICE PRESIDENT ASBURY: Ms Sarlos, is there anything inherently wrong with an employer that is paying above the minimum award rate but wants to pay lesser amount than its competitors to win work. Is there anything inherently wrong with that, or anything - I'm probably asking the wrong person that question. Is there anything contrary to the legislation in that approach?

PN614

MS SARLOS: I appreciate the rephrase. No, there's not, but if you look at the Full Court's observations, in One Key, the legislation is clearly concerned with the authenticity of the agreement making process. And in circumstances where there are small cohorts of employees that are perhaps guided towards making this agreement, that goes against the objective of collective bargaining in the agreement. We would say the bargaining that occurred in this context is similar to that.

PN615

We heard from Mr Perkins about the challenges he had in negotiating the replacement to the Nortech 2019 agreement. This was a process that they sought to avoid, through selecting, some of them people that Mr Perkins knew quite well, had brought into the industry, selecting them to make this agreement.

PN616

While there's nothing in the legislation that says that's not right, the statement of principles introduces new ideas in which to apply what I would say is the existing authorities, particularly around KCL and One Key, how to determine the authenticity of the process. If you're looking at KCL, if you're looking at One Key, we would say this is of a similar ilk, it doesn't match up. But, no, I would agree, there's nothing in the legislation that says you can't do that.

PN617

I would say - no, I withdraw - - -

PN618

VICE PRESIDENT ASBURY: You say that it's in combination, though, with the other matters, including that apparently they were all casual employees, they were all paid substantially more than the rates in the agreement?

PN619

MS SARLOS: Yes, absolutely. I think where you have a small cohort of employees who are paid well above the rates in the agreement, both the existing terms and conditions of employment and those that would come to apply under the agreement, and that's exactly what the new provisions, 188(2), but also principles 17 and 18 go to. This is exactly that situation.

PN620

Our submission is the Deputy President can't have turned her mind to that. Instead, the matters that she was concerned with, set out in paragraph 9, evidence an entirely different thought process.

PN621

Now, we'd also say, on that observation at 9(c), the experience that an employee has, in bargaining, says nothing about the genuineness of the bargaining, even if that was the relevant question. Notwithstanding that we question whether the hearsay evidence on that point was credible enough to rely on, particularly today hearing from Mr Yvanoff that he didn't really interrogate the experience in bargaining, it was just, 'Yes, we've got experience in bargaining', noting that one of the employees had only been in the coal industry since mid-2022.

PN622

To the extent that the conclusion at 9(c) was directed at principle 18, it demonstrates a failure to grapple with the task required and a failure to consider the requirements of principle 18.

PN623

For the principles concerning the explanation of the agreement, particularly in these circumstances, principles 8, 10, 12 and, to a degree, 18, the consideration of the Deputy President is set out at 9(e). A simple statement:

PN624

The explanation and terms and the effect of the terms was sufficient to meet the requirements of the Act.

PN625

Now, the requirements of the Act are that the Deputy President is satisfied. It's not that there is a hard and fast rule to how you reach that state of satisfaction and we would submit that any satisfaction reached on that point was not the product of the actual intellectual process required.

PN626

The Deputy President had no knowledge of key aspects relevant to the assessment, principally the oral explanation which even Mr Perkins could not recall what was there, so we have no evidence of that. This means that her assessment of the content is an assessment made solely on the summary of key terms, which appears at page 181 of the amended appeal book.

PN627

Now, that cannot be enough. Principle 8 makes it clear that the explanation required for section 180(5) should include, at a minimum, explaining to employees how the proposed agreement will alter their existing minimum entitlements and other terms and conditions of employment. This is consistent with the authorities and it is quite clear that the summary, at page 181 of the amended appeal book, does not do this.

PN628

Given this inadequacy to make any assessment that the explanation was adequate, the Deputy President needed evidence of the oral explanation. Yet, all she had was what appears in the F17B, in response to part 3.4. The unredacted version, which is in the amended appeal book, at page 229. I'll read from it, we've gone to it today as well:

PN629

The oral presentation included what was in the award and not in the agreement.

PN630

And how the NES applied to the agreement terms:

PN631

Detailed discussion was undertaken around the casual status and how the agreement term differed from the award.

PN632

We've heard today that that description of the casual status was perhaps more focused on the casual conversion and not the fundamental changes that would occur under the agreement, when compared to the award. We've not heard much else on that very important, particularly in this industry, causal issue.

PN633

Now, again, we would say this is not enough. As the Full Court held, in *One Key*, at 113:

PN634

The content of the explanation and the terms in which it was conveyed were relevant considerations to which the Commission was bound to have regard. The absence of that information meant the Commission was not in a position to form the requisite state of satisfaction.

PN635

Put differently, without knowing the content of the explanation it was not open to the Commission to be satisfied that all reasonable steps had been taken to ensure that the terms had been explained or that the employees genuinely agreed to the agreement.

PN636

Of course there was that one summary document, but we say that's nowhere near enough and I think the oral explanation was a necessary component of all

reasonable steps. Without that content you can't be satisfied. It wouldn't be even enough without the fundamental explanation deficiencies and misleading information, which we will come to, which are also central to principle 10.

PN637

Now, the Deputy President expressed satisfaction on two further points, at paragraph 9. (b) is directed to the BOOT concerns, which we will come to, and (d) is directed to the MEU's concern, expressed around principle 15. The Deputy President's satisfaction demonstrated, again, the absence of actively engaging with the statement.

PN638

The concern was whether holding the vote 300 kilometres away from the location of some of the workers provided for a fair and reasonable opportunity to cast a vote, even if there was a mechanism for proxy voting. These are new provisions. The conclusion that a proxy vote provides a fair and reasonable opportunity to cast a vote evidences a cursory consideration, devoid of the rigor the legislation requires in this process. Now, it may be that upon interrogation that proxy voting was fair and reasonable in the circumstances is not information the Deputy President had before her.

PN639

I will leave the statement of principles there and move on to whether all reasonable steps were taken, under section 180(5), and I just want to focus this. It's not the complete submissions, we've got more in the written submissions, but the two key issues on this point, which I won't recite the provisions or the statutory context of section 180(5), only to say that the new subsection 188(4)(a) provides much the same as what existed under the previous legislative context.

PN640

Now, the two points on the 180(5) point and on the explanation issues in the statement of principles, are the casual employees and the transferring employees. We say one of them has to be true and either of them is enough to get to the point where it can be, without a doubt, that the agreement shouldn't have been approved.

PN641

We spent a bit of time, in cross-examination today, talking about the conditions in the Black Coal Mining Industry Award, particularly the limitation on the engagement of casual employees. And, Vice President, it's a matter that you considered in the decision of Go To People, which is in the bundle, but I have not made a note of which tab it's at.

PN642

VICE PRESIDENT ASBURY: Before or after Sells, Ms Sarlos?

PN643

MS SARLOS: Tab 10, thank you. I will recite the passage, because it's directly on point. The issue that we're trying to get to is, if these employees didn't know that they were engaged in a way that was contrary to the award, how could any explanation, which fundamentally starts from the point of, 'These are your current

terms and conditions, here's what's going to change'. How can any explanation be adequate, as the Vice President put much better:

PN644

In the present case, either the relevant employees were not covered by the Black Coal Award when they voted to approve the agreement or, if they were covered by that award, they were employed by the employer in breach of the limitation in the award. This is not a case where a group of casual employees, employed on work covered by another modern award or an enterprise agreement that did provide for casual employment, voted to approve an agreement which would have been utilised to deploy these employees and future employees to perform work by a Black Coal Award, in production and engineering classifications, on a casual basis. The relevant employees were already deployed and there is no relevant modern award or enterprise agreement that provides for casual employment which covers those employees.

PN645

Now that was what that agreement was ultimately - what that application was ultimately dismissed on, that point, among some others, if my recollection is correct, but that was a central consideration. We say the same applies here. These employees did not know what their terms and conditions of employment were and the explanation did nothing to furnish them with that knowledge so they could make an informed decision.

PN646

Now, that submission is one I'd be happy to sit on, except we all know, of course, that these employees weren't covered by the Black Coal Mining Industry Award, despite what they were told. We submit that consistent with section 311 of the Fair Work Act they were transferring employees. They were covered by the Nortech agreement, we would say the 2022 Nortech agreement, but we make the point that the Bench has made today, that the 2019 agreement would have applied in any event.

PN647

In those circumstances, the relevant industrial instrument that the employees were required - that the explanation was required to reference was the relevant agreement, the Nortech 2022 agreement.

PN648

This is a similar issue as was explored in one of the several Ausdrill decisions. This one was the decision of Masson DP, which my colleague will - I think it's tab 3 of the bundle. So at 82 the Deputy President says:

PN649

In simple terms, for employees to properly consider whether the agreement represented a good deal, worthy of their support, they needed to understand how it compared to the terms and conditions they were entitled to, under the instrument that currently applied to them. Absent that clarity, it is unclear to me how it could be said that employees were able to make an informed decision, based on a clear understanding of the differences between what they

were currently entitled to and what the agreement would provide, by comparison. Ausdrill says that employees were familiar with the instrument -

PN650

Your Honour, I don't need to go there because that's not a situation here. It doesn't matter, it's not been suggested that these employees were familiar enough with this instrument to know that it's what applied to them. They were told - - -

PN651

VICE PRESIDENT ASBURY: Some of them have employment contracts that said it didn't apply to them.

PN652

MS SARLOS: I was just - yes, exactly right, Vice President. Some of them, in fact I think all but one were told that the Black Coal Mining Industry Award applied to them. One was told the 2019 agreement applied to them.

PN653

Now, we would say that that's consistent with the outcome in Go To People, but also the Full Bench in Ditchfield and what is now embodied in principle 8 of the statement of principles.

PN654

Now, we have amended ground 4, which is in relation to errors in assessing whether the relevant employees had a sufficient interest and were sufficiently representative. It's for similar reasons for what we've gone through, around principle 17 and 18 of the statement of principles, but we just make the point, since filing our submissions, we've learnt these employees were paid above the agreement rates, and I think that along should cast serious doubt over whether they had a sufficient interest in the terms of the agreement.

PN655

Subsection 188(2) is intended as a safeguard against small cohort agreements. We know this from the passage in our submissions taken from the explanatory memorandum, 702 of the explanatory memorandum. But we'd also like to take the Bench now to 704.

PN656

So new paragraph 188(2)(b) is intended to ensure that:

PN657

Employees requested to vote on an agreement are sufficiently representative, having regard to the coverage terms or intended coverage of the agreement. For example, employees engaged in one industry, occupation or classification should not be capable of being found to have genuinely agreed to an enterprise agreement intended to cover employees across a substantially wider range of industries, occupations or classifications.

PN658

We know these employees were all purportedly engaged as casual employees yet they still agreed to terms of an agreement that would come to apply to their future co-workers that were part-time and full-time employees.

PN659

And at 705 of the EM the legislature makes a point:

PN660

A small cohort of employees would also not be sufficiently representative where the agreement is intended to ultimately cover a much wider workforce, following transfers of employment, possibly within a corporate group.

PN661

We've heard today, from Mr Perkins, of the intention of the hopes that everyone from Nortech would come to work for SMS. I think that needs to raise serious questions about whether this was an agreement that was genuinely agreed.

PN662

VICE PRESIDENT ASBURY: Can I just interrupt, just very quickly as you pause. With section 311 you're saying or arguing that there was a transfer of business?

PN663

MS SARLOS: Yes.

PN664

VICE PRESIDENT ASBURY: All right. So if the Full Bench is to accept that submission, the evidence it would rely upon to suggest that's the case, do we have evidence with regard to an associated entity, or what is it that the - what is it that you're relying upon?

PN665

MS SARLOS: The contracts of employment. Are you talking about creating the association - - -

PN666

VICE PRESIDENT ASBURY: So the transfer of business. Yes, the connection.

PN667

MS SARLOS: Sorry, I'm just going to bring up the legislation.

PN668

VICE PRESIDENT ASBURY: I'm just wanting to understand where it appears that there's an argument that there's the requisite connection.

PN669

DEPUTY PRESIDENT BEAUMONT: You filed some material, some ASIC searches.

PN670

VICE PRESIDENT ASBURY: Yes.

PN671

MS SARLOS: Yes.

PN672

VICE PRESIDENT ASBURY: So I was looking at 'associated entity' and I was just wondering if the Bench has got the evidence.

PN673

MS SARLOS: Of the associated entity. I'm just going to go to the Courts Act, so I can respond to that in an informed way.

PN674

VICE PRESIDENT ASBURY: Because I note the form F17, the amended form F17, or form F17 doesn't identify that there's a predecessor agreement. So when it was before the Deputy President she wasn't informed of there being a predecessor, arguably because they thought the new entity didn't have a predecessor agreement.

PN675

MS SARLOS: Yes, and I appreciate that context. However, we'd say the flags in the signed agreement that said, 'Care of Nortech', were enough of a red flag to say, 'Hey, there's something to see here, let's make some more inquiries'.

PN676

VICE PRESIDENT ASBURY: Yes.

PN677

MS SARLOS: Look, could I provide a short note on the meaning of associated entity and how it links in with the corporate structure, based on what's already in the material, rather than do it on the run, if that's okay.

PN678

VICE PRESIDENT ASBURY: Well, if you provide that note then the respondent will have an opportunity to reply to it, because it's been argued that Nortech and SMS were associated entities and therefore there was a transfer of business from one to the other when these employees transferred, as I understand it.

PN679

MS SARLOS: Yes. If the Bench would allow that indulgence, I'd be grateful.

PN680

VICE PRESIDENT ASBURY: How long would you need?

PN681

MS SARLOS: Look, two days.

PN682

VICE PRESIDENT ASBURY: Okay. And you can respond to that when you get it, Mr Yvanoff.

PN683

MR YVANOFF: Yes.

PN684

VICE PRESIDENT ASBURY: Would you like longer? So two days would be Wednesday, would you be in a position to respond by, say, Monday of the following week?

PN685

MR YVANOFF: Yes, Monday the following week.

PN686

VICE PRESIDENT ASBURY: Great. Thanks.

PN687

MS SARLOS: Thank you.

PN688

Now, we've looked at the explanatory memorandum to see what function 188(2) is meant to serve, but despite this the Deputy President did not turn her mind to the respondent's intention for the agreements to cover a much wider work force, the rates of pay or the casual status of the employees. These were matters she needed to consider.

PN689

We've made several submissions, in writing, on this point but want to add to that that point that I just raised in relation to the principles that four casual employees determined the rate of - the fate of prospective employees, in relation to terms of the agreement that would not cover them. Redundancy, in particular, within the coal industry, is a very important provision that would not apply to those employees that made this agreement. Similarly, leave entitlements and notice of time determination. These aren't small issues. We would submit that, in addition, what has been raised in writing, these employees did not have the moral authority to agree to those terms.

PN690

Despite this, and what has been set out in writing, the Deputy President determined she was satisfied and we say that when she did so she was in error by failing to take into account these relevant matters. Concluding that section 188(2) was satisfied when such a satisfaction was unavailable, having regard to the absence of information that was necessary to consider.

PN691

I hadn't planned to say anything on the undertaking and BOOT grounds, and just rely on the written submissions, unless the Bench wanted me to address them?

PN692

VICE PRESIDENT ASBURY: No. I understand your principal point is the casual loading and the way it's treated on weekends and - - -

PN693

MS SARLOS: Yes, for the BOOT submission, correct.

PN694

VICE PRESIDENT ASBURY: Yes.

PN695

MS SARLOS: And then the undertaking that they're not directed to the concern.

PN696

VICE PRESIDENT ASBURY: Do you press the argument that the agreement was incorporated and the substantial change - so the award was incorporated, based on the wording of the clause?

PN697

MS SARLOS: I would need to remind myself of that.

PN698

VICE PRESIDENT ASBURY: Well, as I understand - - -

PN699

DEPUTY PRESIDENT BEAUMONT: Isn't there an undertaking that it did become incorporated.

PN700

MS SARLOS: Yes.

PN701

VICE PRESIDENT ASBURY: As I understand it, you say that's a substantial change and does it really incorporate the award or does it just provide that where the award provides for a higher term and condition? I guess my question, does that undertaking actually incorporate the award?

PN702

MS SARLOS: The undertaking says it's to be read and interpreted in conjunction with the award, which we would say is award incorporation. And where there's an inconsistency between the agreement and the award and the award provides a greater benefit, the award provision will apply to the extent of any inconsistency.

PN703

Now, I think the point we made in our submissions was the complication that that bring about. Again, going to the Go To - - -

PN704

VICE PRESIDENT ASBURY: Which was, although arguably a different circumstance, because it specifically incorporated the award.

PN705

MS SARLOS: We would argue that undertaking 1, it's titled 'Award incorporation', and we would say it does incorporate the award.

PN706

VICE PRESIDENT ASBURY: I understand your submission. Thank you.

PN707

MS SARLOS: Finally, there are grounds 1 and 2 which are about the redactions. We hadn't intended to go to them in any detail. I think the authorities on those points are fairly clear.

PN708

Unless the Full Bench had any questions, those are my submissions.

PN709

VICE PRESIDENT ASBURY: Nothing from me, thanks. Did you have anything you wanted to say, in response, Mr Yvanoff?

PN710

MS SARLOS: My apologies, I just wanted to correct something that I had taken Mr Perkins to, if that's okay? It's been - it was one failed attempt I was confused. Unfortunately, I've done too many of these and I was confusing Nortech with another, so I just wanted to correct that. My apologies for misleading.

PN711

VICE PRESIDENT ASBURY: As I understand it, also, at first instance the MEU raised the connection with Nortech and SMS, in its submissions at first instance?

PN712

MS SARLOS: Yes, correct.

PN713

VICE PRESIDENT ASBURY: Yes. Okay. Thanks. Mr Yvanoff, are you in a position to reply at this point?

PN714

MR YVANOFF: I am, your Honour.

PN715

VICE PRESIDENT ASBURY: Okay. Thanks.

PN716

MR YVANOFF: It's going to be short and sweet because we would rely on our response already submitted, your Honour, subject to any questions you may have of us.

PN717

DEPUTY PRESIDENT BEAUMONT: No questions from me.

PN718

VICE PRESIDENT ASBURY: No questions from me.

PN719

MR YVANOFF: Thank you.

PN720

VICE PRESIDENT ASBURY: Thank you. All right. I take it there's nothing in reply, Ms Sarlos?

PN721

MS SARLOS: Nothing in reply, thank you.

PN722

VICE PRESIDENT ASBURY: We'll indicate that we will reserve our decision and issue it in due course. On that basis we'll adjourn. Thank you.

ADJOURNED INDEFINITELY

[1.12 PM]

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