



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER TRAN**

**AG2023/3340**

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

**Application by AJS Electrical Contracting Pty Ltd T/A AJS Electrical Contracting  
(AG2023/3340)**

**Melbourne**

**2.00 PM, FRIDAY, 10 NOVEMBER 2023**

PN1

THE COMMISSIONER: Thank you and good afternoon, everyone. Now, we have plenty on the call today so I'll just work out who we have and where. For the applicant, we have Ms Carey. Good afternoon, Ms Carey.

PN2

MS L CAREY: Good afternoon.

PN3

THE COMMISSIONER: We also have Mr Jervis. Good afternoon, Mr Jervis.

PN4

MR G JERVIS: Good afternoon, Commissioner.

PN5

THE COMMISSIONER: Mr Stockman and Ms Bunyan on the same line and Ms Boesen – I hope I've said everyone's name correctly. But please do tell me if I've said it incorrectly. Then for the union we have Mr Kentish, good afternoon, Mr Kentish.

PN6

MR A KENTISH: Thank you, Commissioner.

PN7

THE COMMISSIONER: So this is a hearing into an application made by AJS Electrical Contracting Pty Ltd T/A AJS Electrical Contracting for the approval of an enterprise agreement named the AJS Electrical Contracting Pty Ltd Single Enterprise Agreement 2023. The CEPU - and forgive me for not saying your full union name, Mr Kentish – has requested the provision of materials which they were provided and have made some submissions. The applicant, AJS Electrical Contracting, oppose the intervention of the union. I propose to exercise my discretion under section 590 of the Act to hear from the union in relation to the approval application but only with respect to a number of issues.

PN8

The key issues that I will be limiting the union's submissions to – what I will hear from them in relation to – are the coverage issue relating to the enterprise agreement, and connected to that any matters relating to the better off overall test. I will hear submissions about the law in relation to genuine agreement but given there are no witnesses put forward by the union, and no expectation that you'll be calling evidence in relation to that, Mr Kentish, you won't be examining or otherwise interrogating the facts as put on by the applicant about the genuine agreement question but I will hear your submissions in relation to how the law may be applied there.

PN9

I will provide detailed reasons as part of a decision to approve or not approve the enterprise agreement in relation to exercising the discretion to hear from the union. Now, in terms of the approval of the agreement, there were a number of matters raised by me in an email on around 4 October 2023, which I'm aware AJS,

the applicant, definitely got an I believe was also forwarded to you, Mr Kentish. Some matters were raised in that and then further matters were raised in submissions following the directions and to the intervention of the union there.

PN10

These are the things I'm interested in that I need to be satisfied of in order to approve the enterprise agreement and these are the things that I'd like to bear in mind in addressing as we go on. There will be a matter that will be new so if the parties require it, this will really only apply to the applicant, then we may put on a further timetable should you need to put in more submissions about that. The first issue relates to the notice of employee representational rights. I did get a reply from the applicant or its representative about the questions. The questions I asked were twofold. The first was about using the pre 6 June 2023 notice of employee representational rights.

PN11

But the second question asked – and the question was answered there in a reply that I received on 6 October 2023. There was a second part to that question, which was that the employer's notice stated the coverage of the enterprise agreement was 2023/2028, or something like that. I'll pull that up in one moment. Yes, so the heading or the top paragraph in the notice of employee representational rights provided to employees in an email on 28 July 2023 – it says (indistinct) about the applicant giving notice that it's bargaining in relation to an enterprise agreement, which is proposed to cover employees that 2023 to 2028 – my concerns emailed of around 4 October identified that as an issue and invited submissions.

PN12

The response on 6 October didn't address the question about that coverage. That relates to the bigger question about the coverage of the enterprise agreement itself and how that's addressed in the enterprise agreement. So there's that. There's the further aspect – and this is new and I did not identify it in my concerns email of 4 October and I apologise for that oversight. There is the further issue that the cover email of 28 July itself indicates that if anyone who receives the notice of employee representational rights wishes to nominate a bargaining representative, they have 14 days from this notice to do so. I would be interested to hear about whether or not that cover email forms part of the notice and in regard to what the Commission has said in the case of Peabody and I accept that this has been sprung upon you, so if you wish to ask for further time to put in submissions in relation to that, you will be given that further time. Just so that you know that, and I can set it out again. So that's one aspect. The next is the coverage of the enterprise agreement itself and that has relevance in terms of what is the underpinning award that the Commission needs to consider in assessing whether or not the enterprise agreement passes the better off overall test.

PN13

Mr Jervis, I don't know if it's intentional but we are all looking at your keyboard. Something may have just tipped over for you. Thank you. Then we have concerns raised in relation to genuine agreement and the three witness statements that had been provided: two by Mr Stockman, one by Ms Bunyan, so the applicant may wish to formally put into evidence those statements. I may

have some questions of the witnesses themselves to assist me there. And then the last question will be the better off overall test. Now, this is an application for the approval so we do have the applicant present. I may need to first confirm, Ms Carey, whether your organisation is a lawyer or paid agent that may need permission to represent under section 596 of the Act, so if you wouldn't mind addressing that and then we'll proceed to deal with the matters, thank you.

PN14

MS CAREY: Okay, yes, I am a lawyer for NECA so we would request leave to appear in this matter. In saying that, Gordon Jervis will be doing the – he's taking the lead on this matter as I've just started with the organisation.

PN15

THE COMMISSIONER: Were you the employer's bargaining representative or was NECA the employer's bargaining representative?

PN16

MR JERVIS: No, Commissioner – the employer didn't have a bargaining representative. The employer bargained on its own behalf.

PN17

THE COMMISSIONER: All right, so you're otherwise lawyers or paid agents on behalf of the employer in relation to the approval of the enterprise agreement?

PN18

MR JERVIS: Yes, Commissioner. I'm an employee of NECA, which is an employer organisation of which AJS is a member. I don't really need to seek leave to appear.

PN19

THE COMMISSIONER: All right, and that's because NECA is a - - -

PN20

MR JERVIS: Registered employer organisation.

PN21

THE COMMISSIONER: Right, thank you for that. I have some old legislation before me which I'm just moving away. That's what I'm messing around with here and thank you. I apologise, Ms Carey, for addressing questions to you. You appear top in my list of people which is why I assumed you were the speaker for (indistinct). I will address things now to Mr Jervis and not direct things to you. All right, so, Mr Jervis.

PN22

MR JERVIS: Yes, thank you, Commissioner. Look, I might just deal with the issue of coverage to begin with. The intended coverage of the agreement is quite plain and unequivocal. The definition of employee insofar as the agreement covers employees means any persons employed by the company performing work within New South Wales and who performs work in accordance with the classifications covered by this agreement – schedule A of the agreement is the classifications definition. Each classification is type of an electrical

worker. There can be no doubt that the relevant award for the purposes of the better off overall test, among other things, is the electrical, electronic and communications contracting award. It can't be any other award. Commissioner, if I may, I might just continue on with the submission unless the Commission has any questions at this stage?

PN23

THE COMMISSIONER: Is that all you wish to say on the coverage issue, Mr Jervis?

PN24

MR JERVIS: Well, I don't know if there's any need to say anymore because the Commission is still concerned. We'd certainly like the opportunity to answer those concerns in a reasonable time.

PN25

THE COMMISSIONER: Yes, well, let me flag to you my concerns now and you can have a consideration as to whether you can answer them here if I'll need to just put in a timetable for some further submissions.

PN26

MR JERVIS: Right.

PN27

THE COMMISSIONER: The first is in relation to – it is with respect to the classification and just noting that there isn't a usual kind of coverage clause in the enterprise agreement so there's that interaction. And this is where I would be happy to give you a further time because I did not ask for it prior to this hearing but there is an interaction between what the notice of employee representational rights says is the coverage, which is unclear, because it just says a timeframe of a year - - -

PN28

MR JERVIS: Yes.

PN29

THE COMMISSIONER: - - - or a period of years – 2023 to 2028, or something.

PN30

MR JERVIS: Yes.

PN31

THE COMMISSIONER: And then how that interacts with the enterprise agreement itself in that there's no clear coverage clause in an enterprise agreement – in the enterprise agreement.

PN32

MR JERVIS: Yes.

PN33

THE COMMISSIONER: Then in terms of the enterprise agreement and the kind of ascertaining of coverage by looking at the definition of employees, and then

looking at the classification that I do note of course that the classification in the enterprise agreement clearly says electrical worker, grades 1 through to 5 and then site supervisor, project supervisor and apprentices.

PN34

MR JERVIS: Correct.

PN35

THE COMMISSIONER: But from my reading of it, you know, electrical worker grade 1, that's a title. I don't know what you come across in your industries but in any number of industries there are any number of job titles that don't necessarily reflect what the job actually is. It becomes just a title and then there's a list of the duties so that's the classifications in the classification structure. Electrical workers grade 1 through to 3 do not necessarily limit the work to what might be covered by the electrical contracting, et cetera, award. Electrical worker grade 4 talks about an employee who's worked for not less than one year in the industry.

PN36

Now, the enterprise agreement doesn't incorporate the award so in going back and looking for a definition of industry I don't see one. I may be overlooking it but there's not one there in the definitions. Then site supervisor and project supervisor similarly are broad so there might be some argument in terms of what tradesperson might mean, referring back to other classifications there.

PN37

MS CAREY: Commissioner, if you don't mind me jumping in here – Gordon, sorry – if you have a look at section 3.3 of the enterprise agreement, hopefully I've got the most up-to-date one here, in section 3.3.4, it says:

PN38

*Without in any way limiting the foregoing and to remove any doubt this agreement expressly excludes and completely displaces the Electrical, Electronic and Communications Contracting Award 2020.*

PN39

Is that sufficient to indicate that it is that award that we're – that's in coverage?

PN40

THE COMMISSIONER: No, so it's clearly saying – it's clear words are saying that it's not part of the enterprise agreement. My reference to that was that then means I can't use it to guide me in what definitions are used in the agreement itself or what words in the agreement itself might mean something and I might have to look elsewhere. That might well be what's intended but what I'm concerned about is how do I clearly identify coverage of the enterprise agreement - - -

PN41

MR JERVIS: Yes - - -

PN42

THE COMMISSIONER: - - - how are the employees who received the notice of employee representational rights to know that it indicated them, were there other

employees of the organisation who are not covered by this enterprise agreement or who, looking at this enterprise agreement, goes back and forth to the classification section to try to ascertain whether or not they are covered when they might be other types of employees, like Ms Bunyan, who does a different role to that defined or intended and that might be what is intended but it is not what the document necessarily expresses what an outsider looking at it and trying to work it out might not come to the conclusion of the intention because that's not what the words express. That's what concerns me, Mr Jervis.

PN43

MR JERVIS: Yes, Commissioner, the definition of employee can't be read in isolation, in our submission. It must be read in conjunction with schedule A because that's what the definition invites you to do and I say again that the schedule A classification structure is consistent with electrical workers, it is consistent with employees who would otherwise be covered by the electrical award and therefore the correct comparator and really the only – or the main purpose of having a comparator award is for the purposes of the better off overall test and for – that the employees covered by the agreement are fairly chosen.

PN44

But as I was saying, there can't be any doubt that the appropriate comparator is the electrical award, when the definition of employee is not read in isolation, it's read in conjunction with the classification structure and including – a labourer is a labourer but in this context a labourer working in this industry that would otherwise be covered by the award is a grade 1 electrical worker. A grade 2 electrical worker does unskilled tasks but by, for example, it does – a grade 2 electrical worker performs tasks that are typical of tasks performed in the electrical industry, including cut to specified lengths, using conduit and other cable support systems, painting cable trays and the rest of it. All of those words and items mentioned are typical of the electrical contracting industry.

PN45

An electrical worker grade 3 inspects and tests fire alarm and security alarm systems. Again, that's something taken from the award. Indeed, the whole definition is taken from the award, as is every other definition in schedule A. So I think it's really straining common sense to arrive at some other coverage, other than the agreement covering electrical workers. Thank you, Commissioner.

PN46

THE COMMISSIONER: Thank you. I guess if that's all, Mr Jervis, time for you to move on to your next point.

PN47

MR JERVIS: Yes, I think so. I'm not aware of the issue concerning the NERR but going to worthy employees, was the group of employees to be covered by the agreement fairly selected, I think – and perhaps we can be advised on this – but the NERR would have been issued to only employees falling within the classification structure set out in the agreement and that's a distinct operational unit of the business. Commissioner, you've already flagged that you will allow the intervention of the union under section 590. While we still maintain our objection to it there is not much we can do about it.

PN48

Commissioner, we say that the agreement should be approved because the three essential elements of the approval process or approval requirements have been satisfied. The pre-approval steps – there was no objection taken to those other than the issue around the NERR. The applicant has completed the requirements of the Act, taking the pre-approval steps including issuing the NERR, not beginning the access period till at least 14 days after the NERR was issued. That is the date taken as when the employer agreed to bargain. They held meetings during the access period. They gave a comprehensive explanation of what the enterprise agreement was intended to do, what its effect was and what were the relevant provisions of the agreement that should be noted. The ballot was held at least seven days after the access period commenced and we rely on the contents of the form F16 application and form F17B filed with the application and the various attachments. Now, according to question 20 of the F17, the NERR was issued on 28 July 2023. Question 21.2, 'The how and when for approval', attaching the proposed agreement and details of the discussion and approval meetings was issued on 4 September. Question 22: 'Discussion meetings were held on 6 and 8 September'. Question 26.2: 'The vote occurred on 12 September'.

PN49

The next element, Commissioner, is genuine agreement and we say that the agreement satisfied the requirements of section 180(5) of the Act. We rely on the response given at question 22 of the F17. The minutes of the discussion meeting is attached to the witness statement of Ms Bunyan and the witness statements of Mr Stockman. We also rely on our submissions and submissions in response to the CEPU filed today. The third element, Commissioner, is the better off overall test. There can't be any doubt that this agreement satisfies the better off overall test. The all-purpose rates of pay in the agreement range between 15 per cent and 24 per cent – sorry, 29 per cent – above the comparable award rates for a grade 1 to grade 5 licenced electrical worker.

PN50

The site supervisor rate is 38 per cent above the licenced electrician plus leading hand allowance and the project supervisor is 44 per cent above the licenced electrician all-purpose rate plus the leading hand allowance. We accept that the industry allowance and tool allowance have not been counted twice as we previously put. For some reason those allowances, which are usually included in the all-purpose rate, were extracted and then put back in again. However, the scenarios painted by the CEPU are not about the account for the travel time payment made under section 5.3.2 of the agreement to employees commencing work on site within a 20 kilometre radius.

PN51

Most importantly the second witness statement of Mr Stockman confirms that scenarios A and B set out in the CEPU's submissions are never likely to occur. They're certainly not reasonably foreseeable and in fact they're not foreseeable at all. On the other hand, employees working a normal eight-hour shift or more than two hours of overtime are significantly better off under the agreement than under the award. Other than that, Commissioner, we rely on the material that we've already filed in relation to this matter.



PN52

THE COMMISSIONER: Thank you, Mr Jervis. Do you propose to call either Mr Stockman or Ms Bunyan to put their statements into evidence?

PN53

MR JERVIS: Well, I would propose to tender those witness statements. Whether you need to have Mr Stockman and Ms Bunyan swear to those statements, is a matter for the Commission. But nevertheless, we do seek to tender them, yes.

PN54

THE COMMISSIONER: Thank you. I understand that you would have received a digital court book shortly prior to this afternoon's hearing.

PN55

MR JERVIS: Yes.

PN56

THE COMMISSIONER: I apologise for the delay in getting that to you. But in terms of the witness statements that have been tendered they'll be marked with exhibit numbers in accordance with their numbering in the digital hearing book. So the first witness statement of Mr Stockman of 20 October 2023 is exhibit no.5.

**EXHIBIT #5 FIRST WITNESS STATEMENT OF ANTHONY STOCKMAN DATED 20/10/2023**

PN57

The second witness statement of Mr Stockman of 3 November 2023 is exhibit no.8.

**EXHIBIT #8 SECOND WITNESS STATEMENT OF ANTHONY STOCKMAN DATED 03/11/2023**

PN58

And the witness statement of Ms Bunyan of 20 October 2023 is exhibit no.6.

**EXHIBIT #6 WITNESS STATEMENT OF JASMINE BUNYAN DATED 20/10/2023**

PN59

I do have some questions of both - - -

PN60

MR JERVIS: Yes.

PN61

THE COMMISSIONER: - - - to assist me so if I may, I'll ask you, Mr Jervis, to call Mr Stockman and then Ms Bunyan. I will ask in terms of that for Ms Bunyan to not be in the room while Mr Stockman gives his evidence and vice versa, please.

PN62

MR JERVIS: Thank you, Commissioner. Anthony, I need to call you formally as a witness. Can you state your full name and occupation for the benefit of the transcript?

PN63

THE COMMISSIONER: Apologies, Mr Jarvis. Thank you for the calling. We'll get my Associate to administer the affirmation to Mr Stockman.

PN64

MR JARVIS: All right.

PN65

THE COMMISSIONER: And then you can ask your questions.

PN66

MR JARVIS: Thank you.

PN67

THE ASSOCIATE: All right, Mr Stockman, can you hear me all right?

PN68

MR STOCKMAN: I can.

PN69

THE ASSOCIATE: Brilliant. All right. So this is an affirmation. So would you be able to state your full name and address for me?

PN70

MR STOCKMAN: Yes. My name is Anthony John Stockman. My residential address is (address supplied).

PN71

THE ASSOCIATE: Fantastic. Thank you.

**<ANTHONY JOHN STOCKMAN, AFFIRMED** [2.30 PM]

**EXAMINATION-IN-CHIEF BY MR JARVIS** [2.30 PM]

PN72

THE COMMISSIONER: Thank you. Mr Jarvis?

PN73

MR JARVIS: Yes, thank you, Mr Stockman. You've filed - - -

PN74

THE COMMISSIONER: I apologise, Mr Jarvis. Your camera has tipped forward on to your keyboard again.

\*\*\* ANTHONY JOHN STOCKMAN

XN MR JARVIS

PN75

MR JARVIS: Thank you. You filed two witness statements in support of this application?---I did.

PN76

And the second one, indeed, was by way of a response. Is that correct?---Correct.

PN77

Now the first witness statement is of three pages in length. Do you have that witness statement in front of you?---I do.

PN78

Yes. And do you swear that the contents of it are true and correct to the best of your knowledge, understanding and belief?---Yes, I do.

PN79

Now, a second witness statement was filed on the 3 November. That's your witness statement is it?---Yes.

PN80

And it's some two pages in length?---Correct.

PN81

And do you swear that the contents of that witness statement are true and correct to the best of your knowledge, understanding and belief?---I do.

PN82

Thank you. I've nothing further, Commissioner.

PN83

THE COMMISSIONER: Thank you, Mr Jarvis. Mr Stockman, I just want to take you to a couple of bits of your witness statements. In your first one in paragraph five, you talk about the company's primary work. Could you explain that a bit further for me, especially in relation to what maintenance contracts may be involved?---Did you say – sorry – clause number five of my first statement?

PN84

Yes?---Yes.

PN85

Where you say the company's primary work is electrical contracting?---Yes.

PN86

Et cetera?---Yes.

PN87

Thank you. I would just like to hear further from you about what the company's work is?---Yes.

\*\*\* ANTHONY JOHN STOCKMAN

XN MR JARVIS

PN88

And I'd like to get an appreciation of what maintenance contracts might mean?---Yes. So we undertake electrical installations in commercial and industrial facilities. The maintenance contracts includes testing of electrical equipment and replacement of faulty electrical equipment in industrial and commercial facilities.

PN89

Thank you. And as an operations manager what work do you undertake? Well, you personally – not the company?---I'm not sure I understand the question. I am the manager of the operations of the company that I have just described.

PN90

All right. Do you hold an electrical license or anything like that?---Yes, I do.

PN91

Would you otherwise be covered by the enterprise agreement?---Would I otherwise be covered by the enterprise agreement? I don't understand that question, sorry. I don't believe so. I don't come under the classifications that are included in Schedule A or Schedule C of the agreement if that answers the question.

PN92

Thank you. Now, you attended all of the meetings in which the enterprise agreement was explained. Is that right?---Yes, I did.

PN93

Did you take notes of what you discussed at those enterprise agreement with the employees?---My recollection is that I did take notes. We generally do at those meetings, yes.

PN94

Have those notes been provided as part of the material that is provided to the Commission?---Sorry. Could you repeat the question?

PN95

Have those notes that you took been provided as part of the materials to the Commission?---My recollection of those meetings have certainly been provided. The actual notes that I took have not been provided. If you're talking about the handwritten notes they have not been provided.

PN96

Thank you. In progressing through this application for approval of the enterprise agreement did you ask any of the employees who were as part of the discussions to provide their views at all?---Or of the employees who were invited to provide their views, yes.

\*\*\* ANTHONY JOHN STOCKMAN

XN MR JARVIS

PN97

Their views to the Commission? Or their views to the employer? I mean about their views to the Commission about the approval application?---Sorry, there's been some discussions about the approval process and that I have kept them up to

date. They have voiced their opinion but I haven't invited it but they have voiced their opinion.

PN98

No worries. Thank you. That's all I have to ask. Mr Jarvis, is there anything you'd like to ask in clarification or in correction before I release Mr Stockman?

PN99

MR JARVIS: Not at this time, Commissioner, no.

PN100

THE COMMISSIONER: Thank you, Mr Jarvis. You're released from your affirmation and if you could please ask Ms Bunyan to return and we'll administer the affirmation to Ms Bunyan?---Yes.

PN101

Thank you?---Thank you.

**<THE WITNESS WITHDREW**

**[2.37 PM]**

PN102

THE ASSOCIATE: Right. Ms Bunyan, would you be able to please state your full name and address?

PN103

MS BUNYAN: No worries. Full name is Jasmine Bunyan and my address is (address supplied).

PN104

THE ASSOCIATE: Brilliant, thank you.

**<JASMINE BUNYAN, AFFIRMED**

**[2.38 PM]**

**EXAMINATION-IN-CHIEF BY MR JARVIS**

**[2.38 PM]**

PN105

THE ASSOCIATE: Thank you, Ms Bunyan.

PN106

THE COMMISSIONER: Thank you. Mr Jarvis?

PN107

MR JARVIS: Yes, thank you, Ms Bunyan. Now, a witness statement signed by yourself dated 18 October 2023 was filed with the Commission. Are you aware of that?---Yes, I am.

PN108

And that witness statement is some three pages long. Is that correct?---Yes, it is.

\*\*\* JASMINE BUNYAN

XN MR JARVIS

PN109

And there are – I think it's some 10 pages of attachments. Is that correct?---I would suggest it would be about that. Yes.

PN110

Thank you. And do you swear that the contents of your statement are true and correct to the best of your knowledge, understanding and belief?---Yes.

PN111

Thank you. Thank you, Ms Bunyan. I have nothing further.

PN112

THE COMMISSIONER: Thank you. Ms Bunyan, I have just a couple of questions for you. Some of them will go to your statement and some of it to the attachments. So I will do my best to take you to those bits if you do have them before you?---Mm-hm.

PN113

Or we'll mark with them if you don't it. Now, in paragraph five of your statement you described the company's primary work. Could you explain the business of the company to me?---So it is an electrical contracting business in the industrial and commercial area. So we supply maintenance contracts for large and commercial businesses, such as shopping centres and mines and that type of thing. And then we also – a majority of the work is project work in construction of large buildings, I guess, and dealing with builders or building contractors to build and for supply of the electrical component of those buildings.

PN114

Thank you. Now, you also say in paragraph three and one, that you're an administration manager?---Correct.

PN115

Are you covered by the enterprise agreement?---No.

PN116

And you say the enterprise agreement is intended to cover 11 of these?---Yes.

PN117

Are they for the employees of the company?---Are they what, sorry?

PN118

All of the employees?---No. They are all the electrical employees.

PN119

And what are the other employees of the company who would not be covered by the enterprise agreement?---Okay. So there's myself and Julieanne who are both admin staff and we are under the Clerk's Award and we have Aaron who is an estimator and admin and he is also under the Clerks Award. And then we have Anthony and Andrew who are on a salary.

\*\*\* JASMINE BUNYAN

XN MR JARVIS

PN120

And they're managing - - ?---They're the managers. Yes.

PN121

Yes. Thank you. Now, in the – in your witness statement and then also in some of the attachments you say that there were minutes provided both to the Form F17B and then there was some provided in your witness statement as well. You also say you didn't physically attend. You were not physically present at the meetings?---No.

PN122

Were you at the meetings at all? Did you attend electronically?---No. I did not attend electronically. I just did all the administrative part of it and Anthony conducted both all of the meetings and – yes, so I just then did the paperwork part of it.

PN123

Sure. Now you say that you typed up the meeting minutes?---Yes.

PN124

On what information did you type up the meeting minutes if you were not at the meeting?---Well, so the meeting minutes, I guess, is it a meeting minutes as such or maybe the (indistinct). Are we talking about the one for the 6 September? Those minutes?

PN125

So what is appended to your witness statement, minutes of a meeting on the 8 September?---Yes. I've got them now.

PN126

And then what was provided to the Commission were those saying, 'I don't appear to have typed up minutes for the meeting of the 6 September.'?---Okay. It would be – it's going to be the same but that was just for the three staff members that are in Manildra because they are in Bathurst.

PN127

Yes. So you typed up those minutes?---Yes. I just would say they're not so much a minute of a meeting. They're saying what is going to be discussed in those meetings. And the one from the 8th we have the boys signed to say that they have received a copy of their agreements and that they had been to that meeting who had those reference things – the action things explained to them.

PN128

All right. So did you get any report about what happened in the meetings in order to type up the minutes?---I just popped the returned ones in there where the boys had signed that they had received their - - -

PN129

And in terms of typing up what is called the Minutes of the meeting?---Yes.

\*\*\* JASMINE BUNYAN

XN MR JARVIS

PN130

When did that occur?---That occurred before the meeting so that they had a reference as to what to sign.

PN131

So they're not actually a record of what was discussed at the meeting itself?---No. They're more an action as to what was going to be discussed at the meeting.

PN132

Right. Did you speak with anyone at all about what occurred at the meetings?---Well, I spoke to, obviously, Anthony and Andrew who go to those meetings, just to check that everything had gone okay and they hadn't received any negative feedback about it. No.

PN133

Thank you. That's all I need to ask of you, Ms Bunyan. Mr Jarvis may have some questions though. Mr Jarvis?

PN134

MR JARVIS: Yes. Thank you, Commissioner.

PN135

Ms Bunyan, attached to your witness statement is a record of a tool box talk dated 8 September 2023. Have you got a copy of your statement in front of you?---I have. Yes.

PN136

Yes. And can you see that record of the tool box talk?---I have got a copy of that tool box talk, yes.

PN137

Yes. Was that – when was that provided to you?---That was provided to me on that day they had the tool box meetings each Friday morning.

PN138

Right?---And then given these when there's – when I come in about at nine o'clock. So - - -

PN139

Yes. Okay. So that was provided to you?---Yes.

PN140

Some time after 6.30 am?---Yes. Well, around 9.00 am if you - - -

PN141

All right. And, in fact, that's one of the number of records of tool box talks. Was that they same pattern in so far as the meeting would finish at around 6.30 am? And then you would be provided with the tool box talk records?---Yes. That would be correct.

\*\*\* JASMINE BUNYAN

XN MR JARVIS



PN142

Right. And there's one of those on the 18 August, 28 July and so on?---Yes.

PN143

They're all related to the workshop at Bradwardine Road and were there ever similar minutes or tool box talks relating – held at Manildra?---No. But some other staff who are at Manildra have attended these meetings.

PN144

I see. So the staff at Manildra would have attended the Bradwardine Road tool box meetings?---That's because with two of the staff members – or one staff member was here at the time when these meetings were discussed and she has now gone out to Manildra.

PN145

Right?---So she attended that meeting.

PN146

Yes?---On the 28th – on the 20th. And then another of our employees he lives in Bathurst but works in Manildra.

PN147

Right?---So they would attend the meeting and then they would head to site.

PN148

Okay. Look, thank you, Ms Bunyan. I've got nothing further, Commissioner.

PN149

THE COMMISSIONER: Thank you, Mr Jarvis. And if there is nothing further from the applicant I will ask now to hear from the union. Are you finished with your opening Mr Jarvis?

PN150

MR JARVIS: I am. Thank you, Commissioner.

PN151

THE COMMISSIONER: Thank you. Mr Kentish? And just a reminder that I am exercising my discretion to hear from you in relation to the coverage issue in relation to the BOOT and in relation to the law with respect to genuine agreement. Thank you.

PN152

MR KENTISH: Thank you, Commissioner. Apologies for needing to ask but is that the end of the evidentiary case of the applicant?

PN153

THE WITNESS: Does that mean - - -

PN154

THE COMMISSIONER: Yes. I believe it is, sorry, Ms Bunyan?---Yes.

\*\*\* JASMINE BUNYAN

XN MR JARVIS

PN155

You're excused as well. But you're welcome to come in and listen to the rest of this as is Mr Stockman?---Okay, thank you.

<THE WITNESS WITHDREW

[2.50 PM]

PN156

MR KENTISH: Thank you, Commissioner. And just to confirm the matters that the union has been given permission to address the Commission on is the BOOT – the better off overall test, this issue of coverage and the issue of genuine agreement. But only in so far as our submissions are confined to the law. So no submissions with respect to the evidence that's been received. Is that right?

PN157

THE COMMISSIONER: Yes.

PN158

MR KENTISH: Thank you, Commissioner. Commissioner, perhaps I could start with – well, in some ways the easiest one for myself because I have least to say about it and that's the coverage point. The Commissioner will be aware that we have made submissions with respect to the coverage point in the – I think their termed initial submissions which have been filed with the Commission. And the point is dealt with at page seven of those submissions at paragraphs 13 and 14.

PN159

Commissioner, I don't have a lot else to say about that matter, other than we'd rely on those submissions, except for I did want to respond to a matter raised by Ms Carey for the applicant, and that was in relation to the presence of at paragraph 3.3.4 in the – under the heading 3.3 Relationship to Awards. And what I wanted to draw the Commission's attention to it was the terms of 3.3.3 directly above it which appear to go beyond what's in 3.3.4 to the effect that it says that this agreement, and I will pick it up halfway through the first sentence, 'Expressly excludes and displaces the operation of any and all other matters and conditions of employment, including those however described or identified as are preserved in time or preserved notional to any' – et cetera – and then it finishes – 'in any award'. And the words 'any award' obviously suggest that potentially, at least, there may be more than one award involved.

PN160

The union would have to – properly would have to concede the point that Mr Jarvis raises about the – some of the commonality between the words used in the classification structure of the agreement and the classification structure of the Electrical Contracting Award. There are clearly similarities to those. Whether that's enough to – for the Commission to satisfy itself that the intention was to confine the scope of the agreement to effectively those classifications within the electrical contracting award will necessitate a finding that it was intended that the scope of that award is also picked up by the agreement.

PN161

It may be that the Commission does make that finding. In our submission we think it's a stretch with respect. The agreement is poorly drafted. There should

have been some concern given to a definition of industry or picking up the definition of industry out of the award. On its face it is ambiguous. We would depart from Mr Jarvis there.

PN162

Deputy President it's our submission that there's, at the very least, an ambiguity if – look, that's probably all that we have to say on it. I don't think I can take it further than what we put in our written submissions as the Commission has observed. We weren't involved with the making of the agreement and aren't well placed to speak to the subjective intentions of anyone who was involved with it. On its face it's at least ambiguous if it pleases.

PN163

Commissioner, with respect to the better off overall test it's our submission that the agreement doesn't pass the better off overall test. We have provided two examples in our further submissions. They're number 10 of the digital hearing book, at least the further submissions are behind the virtual tab. And, Commissioner, the examples themselves are at paragraph 19 which appear on page 13 and 14 of the submissions.

PN164

The first example provided is an example of a casual electrical worker Grade 5 who is directed to work from the site within 20 kilometres of the company depot and who works three hours. Now, there's some evidence which has been accepted by the Commission or which has been tendered and it is before the Commission that perhaps the company is – well, certainly, Mr Stockman says that the company is unlikely to employ a casual for three hours. As our submissions state at the end of that example in the box which contains example A, even if the hours of work are increased to eight hours, on our calculation a casual employee is still behind.

PN165

I think it was conceded that there was no double counting with respect to the electrical license allowance in that example. In any respect, we say that there was no double counting and that the rate that's quote is exclusive of the electrical license allowance. So it was a proper application of the award to re-include that.

PN166

Commissioner, I do note of course that in the second witness statement of Anthony Stockman behind virtual tab 8, Mr Stockman does go on to I think say at paragraph 13, for example, the company never engages a casual employee for three hours. Well, with respect, we say that the issue goes beyond three. And at present the company does not employ any casual employees. And this is unlikely to change.

PN167

Commissioner, of course, we were not given permission to cross-examine the witnesses in this matter so we take the evidence as it appears. But, Commissioner, in the statutory declarations of Ms Bunyan, which is the Form F17B on page 3 of 25, and, Commissioner, the Form F17B is behind virtual tab number 3 - I will go to that so I'm using the correct numbering. So that begins at page 46 of the court book.

PN168

Commissioner, the part of that I wanted to take the Commission to is on page 52 of the court book. It's the answer to question 6, which is a question concerning the demographics of the workforce, and the Commission will see in the first column which is headed 'Demographic group', two-thirds of the way down 'Casual', and then in the corresponding column next to it '1'. So there does appear to have been, at least on that evidence, some use of casual employment via the company.

PN169

I would also take the Commission to the minutes or purported minutes which are attached to the witness statement of Ms Bunyan. The Commission asked some questions in relation to those of Ms Bunyan today. If the Commission goes to the document entitled 'Minutes of meeting', and I will endeavour to find it in the court book for the Commission. So it's beginning on page 87, the witness statement of Jasmine Bunyan, and it's the attachment that is provided on pages 94 and 95 of the court book, minutes of meeting, location AJS workshop in Robin Hill.

PN170

If one goes down to - what following Ms Bunyan's evidence we noted the intention expressed by these minutes. One will see that under 'Action' it says:

PN171

*Staff handed a copy of the following documents for their reference.*

PN172

And then at dot 3:

PN173

*Casual employment information statement (James Milne and Seth Archer).*

PN174

Both James and Seth appear to have been present at that meeting, and that could be confirmed by the record of toolbox talk that Mr Jervis took Ms Bunyan to. On page 91 there's a signature next to Seth Archer and also a signature next to James Milne.

PN175

On that basis, with respect, it looks a lot like there were casual employees employed at the time, and in any event we say that that provides a basis upon which the Commission could satisfy itself that it's reasonably foreseeable that casuals might be employed by the company, and that casuals, which after all are provided for in the agreement, are a type of employee who is relevant for the purposes of the better off overall test, accepting, as the union does, that that test has been somewhat confined by the recent amendments to the Fair Work Act which now talk about what's reasonably foreseeable.

PN176

Commissioner, still on example A, the example of the casual employee, it's put against the union in the written submissions that the union has failed to account for the travel time, or the travel time allowance entitlement under the enterprise

agreement. But if one goes to the travel allowances in the enterprise agreement, and they can be found on page 7 of the agreement itself, which is page 8 of the court book - Commissioner, on our reading if the employee commences on a site or project that is within 20 kilometres that in effect the entitlement in 5.3.1 is excluded, and we say that because it's the wording of that clause which says:

PN177

*Where an employee commences work on a site or project that is not based within 20 kilometres of the company depot, as opposed to the company depot, and is not provided with transport to the site or project by the company the employee shall be paid at the employee's base rate of pay for the time taken to travel to and from the project or site.*

PN178

We took, the union took that as intended to mean that there was no benefit within the 20 kilometres of the company depot, and it's that circumstance which forms one of the three dot points which appear in the example A in paragraph 19 of the further submissions of the union, where we frame it as:

PN179

*An employee who's a casual electrical worker grade 5 licence - - -*

PN180

So that's your standard licenced electrician.

PN181

*- - - is directed to work from a site within 20 kilometres of the company depot and works three hours.*

PN182

So we don't accept the criticism made in relation to that example, and we do say that there is a live question about whether the BOOT is capable of being passed. That's a confined example using a confined set of facts. One can speculate about the other circumstances that might apply of course, and in our initial submissions, as they've been termed, the union raises several matters of a more contingent nature; for instance the employer having now the power to direct employees to do training outside of work at ordinary time, to vary the start and finishing time of the workers' shifts unilaterally, and several other matters, including going to excessive leave and so forth.

PN183

We say overall the union has done enough with what we've pulled out of the agreement in example A to show that the agreement doesn't pass the better off overall test, particularly when one accounts for the background of those matters which are harder to quantify. We accept that.

PN184

In relation to example B the union has given the example of a continuous shift worker who's directed to start work from site within 20 kilometres of the company depot again, and the union has provided for a 10 hour shift, eight ordinary hours and two overtime hours. We would have to concede that on the evidentiary case

the Commission could find that it's perhaps not reasonably foreseeable that the company would go to continuous shift work. That's certainly the evidence of Mr Stockman. And so it may be that the example doesn't hold much weight with the Commission, given the changes to the Act. Notwithstanding of course that the agreement provides for continuous shift work.

PN185

On that, Commissioner, obviously there's evidence from Mr Stockman about a potential pattern of hours, which I think is in Mr Stockman's second witness statement at paragraph 10 where Mr Stockman says:

PN186

*As with shift work employing casuals does not fit our business model which is predominantly medium size commercial and industrial construction working from 7 am to 3.30 pm five days per week.*

PN187

That's really the only evidence that I'm aware of that's before the Commission about what the current rosters might look like. The Commission asked both of the witnesses some questions about the difference between construction work or installation work and maintenance work. Obviously this paragraph 10 goes to construction work, not maintenance work. So, with respect, there is something of a black hole as to what the maintenance people might be doing, and presumably the maintenance people would include the people at the Manildra Flour Mill, although I don't know.

PN188

But certainly the description of the company in both of the witness statements, both the witness statement of Ms Bunyan, that's the one dated 18 October, and the identically worded paragraph in the witness statement of Mr Stockman of his witness statement of 20 October, both of those describe work also including maintenance contracts for large commercial businesses such as shopping centres, mining, grain handling plants and local councils. And I think Ms Bunyan in her oral evidence today again mentioned mining when asked about that.

PN189

So we do say there are some difficulties for the Commission with respect to knowing what's reasonably foreseeable. As it is the Commission, with respect, would need to do what it can with the evidence that's before it, but we do press example A. Even on the material in paragraph 10 of Mr Stockman's second witness statement there's an issue about casuals there, if they're being sent to a site within 20 kilometres of the depot, which is surely reasonably foreseeable.

PN190

Commissioner, that was all that - no, there was one further aspect of that that I did want to go to with respect to the pattern of work, or I want to draw the Commission's attention to it, because the amount of evidence on what people work is quite scant, but there would appear to be some in - or the Commission could draw an inference about it in the first - - -

PN191

THE COMMISSIONER: Before we go there, Mr Kentish, can I just ask you a question about your example A.

PN192

MR KENTISH: Yes, Commissioner.

PN193

THE COMMISSIONER: Which is whether the difference would magnify - is there a crossover point in time if the casual employee works longer hours, because the daily travel time allowance, the electrical licence, and the daily start and finish on job allowance are a set per day amount.

PN194

MR KENTISH: That's right.

PN195

THE COMMISSIONER: So is there a point in time when the balance tips effectively in favour of the casual employee if they're under the enterprise agreement as opposed to (indistinct) the modern award?

PN196

MR KENTISH: Commissioner, I don't know what that point is, but there would certainly have to be one. I do know that it's somewhere beyond eight hours. I didn't do the calculations above eight. Eight is a fairly standard sort of period of time that people work. And on the types of patterns that we have in paragraph 10 from Mr Stockman the employee wouldn't be doing any more than eight I think. But certainly, yes, there would be a point, probably not much beyond that, maybe nine or 10. I don't know. I can certainly do the calculations and let the Commission know if it assists subsequently. But the point that the Commission makes regarding some of the benefits in the award effectively being flat benefits will eventually mean that there is a crossover point. The fewer hours the greater disadvantage.

PN197

THE COMMISSIONER: Yes. So the greater disadvantage for a casual employee he can be employed for fewer than those hours that a full-time employee would be?

PN198

MR KENTISH: I'm sorry, Commissioner - - -

PN199

THE COMMISSIONER: A casual employee would be more disadvantaged because they can be rostered to work on less than the tipping point effectively.

PN200

MR KENTISH: Certainly. Yes.

PN201

THE COMMISSIONER: All right. We can return to your pattern of work submission then, Mr Kentish.

PN202

MR KENTISH: Thank you, Commissioner. Yes, it's in the first witness statement of Mr Stockman dated 20 October. At paragraph 15 there's purportedly a question asked by one of the employees at one of the meetings. Although how that sits with the record of the toolbox meeting is a matter for the Commission. There's a question that says, 'Can we still make arrangements that suit us when the job allows such as working four by 10 hour days and having one day off', which perhaps raises the inference that different patterns are available, we just don't know what they are.

PN203

Commissioner, that's all I wanted to say about the BOOT. Unless the Commission have any further questions in relation to that I will move on to genuine agreement and try to be on my best behaviour about not going to the facts. Commissioner, with respect to the genuine agreement point, the point that was pressed by the union, and the only one that I'm able to assist the Commission with respect to law on, is in relation to the requirement that the Commission have evidence before it that enables the Commission to make a finding that the agreement was genuinely agreed.

PN204

And in particular the point that I want to address the Commission on is whether or not the agreement was adequately explained in a way that the Act requires it to be for a finding to be made that the agreement was genuinely agreed. So, Commissioner, there's been some changes in this space as a result of the legislation that amended the Act, and there's been a new subsection (4)(a) put into section 188 of the Act. So section 188(4)(a) now reads:

PN205

*The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with subsection 180(5) in relation to the agreement.*

PN206

Now, Commissioner, that's a new feature of the Fair Work Act, and as best I can see comparing the terms of the unamended Act and the amended Act effectively that has been inserted because the obligation that that be considered has been removed as part of the changes that were made to the Act in section 188(1). So previously the obligation to be satisfied that the employer had complied with subsection 180(5) appears to have been in section 188(1)(a)(i) of the unamended Act.

PN207

The substance of that change we say is that there is no change. It's just that it's moved because of a number of other amendments to the Act, and in that respect it is consequential that it's popped up at section 188(4)(a). In any respect the terms of section 188(4)(a) are quite plain. They of course refer to section 180(5). That section doesn't appear to have changed, and it of course is the section that provides the following:

PN208



*The employer must take all reasonable steps to ensure that (a) the terms of the agreement and the effect of those terms are explained to the employees employed at the time who will be covered by the agreement, and (b) the explanation as provided in an appropriate manner - - -*

PN209

I dropped out momentarily there, I'm sorry. That section 180(5) has been the subject of a number of decisions both of the Federal Court and the Full Bench of the Commission, and we say that those decisions remain apposite to the considerations that the Commission as constituted needs to make in this matter. And in particular we highlight that the explanation needs to be not only of the terms of the agreement, but the effect of those terms, and we extract some of what we say are the relevant cases in our written submissions, both the initial submissions which extract the One Key Full Federal Court case, and then the *CFMEU v Ditchfield* decision which itself relies on the One Key, or applies the One Key Full Federal Court decision.

PN210

The Commission will be aware - well, I was speaking of changes being made. One of the significant changes or noticeable changes in this space is the introduction of the statement of principles, which the Commission is now obligated to take into account by section 188(1) of the Act. And that statement of principles is a statutory instrument, I think. Anyway it's provided on the Commission's website and is available to applicants and intervenors, and of course it's something that the Commission needs to consider.

PN211

We would, without traversing onto the facts of the case, highlight in particular paragraphs 8 and 12, if paragraph is the right word, perhaps item 8 and 12 of that statement. And in particular paragraph 8 says:

PN212

*Section 185A of the Fair Work Act requires the employer to take all reasonable steps to explain the terms of a proposed enterprise agreement and the effect of those terms to employees employed at the time who will be covered by the agreement. This 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. In explaining this subject to paragraph 9 - - -*

PN213

And then there are two options; there's A and B. A is:

PN214

*Where a proposed enterprise agreement will replace an existing enterprise agreement.*

PN215

Which is not the situation before the Commission. But B is:

PN216

*Where a proposed enterprise agreement will not replace an existing enterprise agreement it will generally be necessary to explain the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award.*

PN217

So, with respect, the Commission needs to turn its mind to whether that has occurred on the facts before it. The statement as I say has more to say about that. Down at item 12 it says:

PN218

*Subject to paragraph 13 an employee may be provided with the explanation required by section 180(5), (a) by giving the employee or ensuring the employee has access to a hard copy of the explanation, (b) by electronic means*  
- - -

PN219

I won't read the rest out.

PN220

*- - - and (c) orally, but the FWC may take into account whether there is a written record or summary kept of the oral explanation.*

PN221

So it's open to the Commission to consider that, given that in these circumstances it would appear that the explanation has occurred orally, which is certainly something which is provided for by the statement. And then at 14, which I didn't flag earlier, but the Commission is able pursuant to that item to take into account various matters about the environment in which is performed and the location of employees and the like when considering the test that it is required to consider under section 180(5).

PN222

Commissioner, the only other matter that I really wanted to go to with respect to the law in this area that we say is key to the matters before the Commission in this instance is what type of evidence is required for the Commission to reach that stage of satisfaction. What is clear both on the Full Federal Court and on Ditchfield is that the Commission needs to consider the content of any explanation. The union particularly relies on, in that respect, *CFMEU v Ditchfield* from paragraphs 17 to 85 which are extracted on our further submissions beginning on page 9.

PN223

Commissioner, we say Ditchfield and, with respect, the Full Federal Court - the determination in the case of the Commission and the rulings of the court are still relevant to the exercise that the Commission must undertake, notwithstanding the other changes which have been made to this part of the Act. Unless there are any questions, if it pleases, I have nothing further.

PN224

THE COMMISSIONER: Thank you for that, Mr Kentish. I don't have any questions for you. The statement of principles is a statutory instrument.

PN225

MR KENTISH: I'm obliged, Commissioner.

PN226

THE COMMISSIONER: And it does mostly seem to distil, at least in that respect, that referral requirements imposed by the Full Court's decision about what the Commission needs to be satisfied for genuine agreement. Mr Jervis, is there anything you would like to say in reply?

PN227

MR JERVIS: Yes, there is, Commissioner, or there should be. Perhaps if I could just go to the question of the BOOT to begin with. The Commission talked about a tipping point and Mr Kentish seized the opportunity to say, well, the tipping point may be beyond eight hours. Commissioner, the only factor that would put the award remuneration above the enterprise agreement remuneration payable to a casual employee working for three hours is the fixed travel allowance.

PN228

I don't have the example in front of me, but there are two - and you identified them - daily allowances that don't really change regardless of how many hours the casual works. So it follows that given that the enterprise agreement casual rates are significantly above the award casual rates, including the 25 per cent loading, the more hours the casual works the more that those fixed amounts tip the balance in favour of the award; so the tipping point is probably three hours.

PN229

Mr Kentish never indicated that he wanted to cross-examine Mr Stockman or Ms Bunyan and he never attempted to do - - -

PN230

THE COMMISSIONER: I don't think that's quite correct, Mr Jervis. I think Mr Kentish may have liked to. I didn't permit him to do so based on the discretion I exercised to hear from him.

PN231

MR JERVIS: Yes, well, you didn't permit him to do so because he had never indicated that he wanted to and that's how it panned out. The evidence of Mr Stockman and Ms Bunyan should be accepted, but in particular in regard to the BOOT Mr Stockman says that they never employ a casual employee for three hours and that should be accepted. Mr Kentish did concede that the employees don't perform continuous shift work, so it's not necessary to take that any further. I think that's all I have got to say about the BOOT.

PN232

THE COMMISSIONER: I understand what has been said, Mr Jervis, and what has been put in terms of the company not employing a casual for a shorter period of time. What my concern goes to - - -

PN233

MR JERVIS: Well, what I'm saying - - -

PN234

THE COMMISSIONER: Sorry, Mr Jervis, I haven't finished. What my concern goes to there is that a full-time employee won't be employed at less than what I'm calling the tipping point, a casual employee can be. Now, they may not be, but they can be, and the exercise we undertake at the Commission and which the excellent agreements team have done here is a kind of assessment about what are the numbers, some of which you haven't seen. Some of that material you haven't seen because it's spreadsheets as to calculations on what the award rates are compared with the enterprise agreement rates.

PN235

The Electrical Award is particularly fascinating because of when allowances become all-purpose and when they don't, so sometimes there are things taken into account where they shouldn't be and sometimes there are things not taken into account when they should be in making that assessment, but the concern is that the company can employ a casual employee for fewer than eight hours. The question is at what point in time - or what is the minimum shift length when it is the case that a rate that a casual employee would be paid under the enterprise agreement falls as less than what they would be paid under the modern award.

PN236

MR JERVIS: Yes.

PN237

THE COMMISSIONER: And what is of interest is, yes, the rates under the enterprise agreement are above the rates under the modern award. I don't have this information before me, but it is often the case that a casual employee is employed at the lower classifications under an award and that the permanent employees are employed at the higher classifications under the award or the agreement. The benefits, the greater amounts, go to the higher classifications.

PN238

There is a point because of the difference in the casual loading and there is a point because of the flat - the daily allowances that apply, but they may or may not affect the BOOT ultimately because of what has been said about what employees the company companies.

PN239

MR JERVIS: Well, Commissioner, we repeat the point that they don't employ casual employees for three hours. Now, that's a scenario that has been proposed by the union and it's not a scenario about casuals in general. Talking about a tipping point, as I've said, the travel time allowance and start and finish on-the-job allowances under the award are fixed amounts regardless of how many hours an employee works.

PN240

It follows then that the more hours that an employee works under the enterprise agreement, the more that that employee will be ahead of what he or she would

receive under the award even if they did receive the travel time allowance and the start and finish on-the-job allowance, and that's what we've talked about being the tipping point. I'm happy for the agreement assessment team to work out what that tipping point is, but as I recall it might be around three hours; it's certainly not eight or anything like that.

PN241

If I could just go to coverage. The coverage clause in this enterprise agreement - or the definition of 'employee' and then the coverage clause in the agreement and the definitions of the classifications at schedule A are the same as occurring in several enterprise agreements that have been made in this industry. It wouldn't surprise the Commission to know that agreements are drafted according to a template. The template has exactly the same words that are now objected to by the union and are in the agreements that have been agreed to by the union in several cases.

PN242

In other words, the union has never objected to the coverage as it has been expressed in the agreement when it has been a party to the agreement and indeed it has never, to my knowledge, objected to the coverage of other enterprise agreements using the same words according to the template. So if the agreement is poorly drafted, then perhaps the union could have spoken about that at some time in the past.

PN243

There is no definition of 'industry' in the award. I don't know where that came from. There is certainly definitions of streams, instrumentation, lines cable work, refrigeration, airconditioning - and that takes me back to that definition of an electrical worker grade 3 or 4 - and so on. I have dealt with the BOOT and I have dealt with coverage of the agreement. That leaves then the genuine agreement.

PN244

We really just rely on the submissions that we have made thus far and we repeat the observation of the Full Bench in the *NECA v CEPU* group training case where it was said that giving the employees a copy of the agreement might be explanation enough; so it's really not a check list that has to be ticked off. Those decisions, almost without fail, talk about what is appropriate in the circumstances of the case.

PN245

This is a smallish company with 11 employees affected by this agreement. Other employees, as stated by Ms Bunyan, clearly know that they're not covered by the agreement. Ms Bunyan said that she is subject of the Clerks Award, for example. There is evidence of various toolbox meetings where the enterprise agreement was discussed, so given that background and given those circumstances, we say that there is no issue about whether or not the agreement was genuinely agreed. Unless you have any questions, Commissioner, those would be my submissions.

PN246

THE COMMISSIONER: Thank you, Mr Jervis. Just in terms of some of what you have said, the Electrical Award does have a definition of the industry that it covers in its coverage clause. It doesn't define it as industry as such, so it does do a bit of back and forth, but it has it in 4.3 to talk about what electrical services is, because that's the industry that that award expresses itself to cover.

PN247

What I'm concerned about with the coverage issue in the drafting of the enterprise agreement - and I acknowledge that there may well be other enterprise agreements that are drafted in this manner that may have been approved by the Commission. This is the one that's before me and there are any number of reasons why an enterprise agreement may be drafted less well than is ideal. Usually that happens more where there is detailed bargaining in historical agreements. What I'm concerned about is section 53 of the Act talks about:

PN248

*When an enterprise agreement covers an employer, employee or employee organisation.*

PN249

It says there that it covers it if the agreement is expressed to cover it and what I'm concerned about with this agreement is trying to work out how it is expressed to cover. Now, we can get there. I think we can get there, but it's problematic because it never anywhere says, 'This agreement covers the company and the employees', and then you go to the definitions of the employees. That's one of the key coverage issues.

PN250

The other - and this is where I will set some directions for some further information and a further opportunity for the applicant to help me satisfy myself that this agreement is capable of being approved. The other issue - and it might well be more fundamental, and it hasn't been engaged with - is that the notice of employee representational rights says at the very beginning the name of the company -

PN251

*gives notices that it is bargaining in relation to an enterprise agreement -*

PN252

it names the enterprise agreement -

PN253

*which is proposed to cover employees that - 2023/2028.*

PN254

I asked in my initial concerns email about whether that was a typo. I invited submissions about whether that was a defect of the notice such that was it minor, is it a defect that can be cured. I may not have asked it in those terms, but that was asked initially. I invite further submissions in relation to that and we'll discuss the timetable shortly.

PN255

In looking at the materials, I have a further concern which is that the cover email which attached the notice of employee representational rights added some words about the notice. Those words were in the cover email and it's appended to Ms Bunyan's statement. In the digital court book it falls at pages 97 and 99 because she is replying to someone who asked some questions about it. The covering email that initially includes the notice of employee representational rights says:

PN256

*Should you wish to nominate a bargaining representative you have 14 days from this notice to do so.*

PN257

That's a question I did not bring to the attention of the company, but I have seen it now and I have a concern about whether it is additional material that affects the notice of employee representational rights. I will invite further submissions only from the company in relation to that and having regard to the Full Bench in Peabody which talks about what forms the notice of employee representational rights.

PN258

I have heard you on all the matters today, of course; the coverage issue, genuine agreement and BOOT. I'll give you a further opportunity to put in any material you wish to put that might help me further in relation to genuine agreement, but I would like submissions in relation to those two questions in the notice of employee representational rights; being, firstly, how the notice expressed coverage and then, secondly, whether the further words in the cover email that attach the notice of employee representational rights is part of the notice and, therefore, may be contravening section 174. How much time do you think you would need to put in those submissions?

PN259

MR JERVIS: Commissioner, I'm about to leave for India for a month, on Sunday. I don't know if Lisa wants to answer those questions.

PN260

MS CAREY: Yes, I can put submissions on those questions. I would like a little bit of time to be able to sort of wrap my head around it because I'm obviously coming into this a little bit later.

PN261

THE COMMISSIONER: Is a week sufficient or is that too short, Ms Carey, as you're coming into this fairly new.

PN262

MS CAREY: Yes, I would like maybe 10 days, if that's okay.

PN263

THE COMMISSIONER: I think that should be fine. Obviously the hold-up is for the employees who don't get this agreement approved, but 14 days if that's what you need.

PN264

MS CAREY: I will try and get it done sooner.

PN265

THE COMMISSIONER: I will give you until noon on Friday, 24 November, to get some further submissions in. We will issue actual directions - so you don't have to rely on just this - about that material. I won't invite any further submissions from the union in relation to that. I have been well informed by the submissions provided today. Thank you, Mr Kentish. Unless there is anything else, I will conclude the hearing.

PN266

MR JERVIS: Commissioner, if I may, I would just like to make one brief point.

PN267

THE COMMISSIONER: Yes, Mr Jervis.

PN268

MR JERVIS: Mr Kentish has raised the fact that we have three document lists that noted different numbers of employees. The inference could be that our records are incorrect and I just want to state for the record that on the date that each of those documents were prepared, the number of casuals employed on that day is accurate. Both those employees are now changed to permanent employees, but at the time we had initially two, then one casual employee. Both of those are now permanent, so the documents are accurate as of the date that they were prepared.

PN269

THE COMMISSIONER: Thank you for that.

PN270

MR JERVIS: Thank you, Commissioner.

PN271

THE COMMISSIONER: This hearing is now adjourned. Thank you, all. Good afternoon.

PN272

MR KENTISH: Thank you, Commissioner.

**ADJOURNED INDEFINITELY**

**[3.53 PM]**



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