FairWork Commission

DECISION

Fair Work Act 2009
s.240—Applications to deal with a bargaining dispute
s 739—Applications to deal with a dispute

Application by Sydney Trains
(B2022/1749)

Application by NSW Trains
(B2022/1750)

Applications by Australian Rail, Tram and Bus Industry Union, The Association of Professional Engineers, Scientists and Managers Australia, Australian Municipal, Administrative, Clerical and Services Union, Australian Manufacturing Workers' Union, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and The Australian Workers' Union
(C2022/8265, C2023/571)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT CROSS
COMMISSIONER RIORDAN

SYDNEY, 10 MARCH 2023

Dispute concerning various claims arising in enterprise bargaining – dispute under Sydney Trains Enterprise Agreement 2018 and NSW Trains Enterprise Agreement 2018 – dispute under Sydney Trains and NSW TrainLink Enterprise Agreement 2022.

Introduction

[1] These matters have arisen out of a long-running bargaining dispute involving Sydney Trains and NSW Trains (collectively, the Rail Entities) and the following unions (collectively the Rail Unions):

- The Australian Rail, Tram and Bus Industry Union (RTBU);
- The Association of Professional Engineers, Scientists and Managers Australia (APESMA);
- The Australian Municipal, Administrative, Clerical and Services Union (ASU);
- The Australian Manufacturing Workers' Union (AMWU);
- The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); and
- The Australian Workers' Union (AWU).

[2] Two separate enterprise agreements (collectively, the 2018 Agreements) previously covered Sydney Trains and NSW Trains respectively, namely the *Sydney Trains Enterprise*

Agreement 2018[1] (2018 Sydney Trains Agreement) and the *NSW Trains Enterprise Agreement 2018*[2] (2018 NSW Trains Agreement). The nominal expiry date of the 2018 Agreements was, in each case, 1 May 2021.

[3] The parties began bargaining for a single replacement agreement in May 2021. The bargaining was protracted and involved numerous instances of protected industrial action taken by the Rail Unions and their members. On 1 September 2022, the Rail Unions made an application to the Commission for bargaining orders pursuant to s 229 of the *Fair Work Act 2009* (Cth) (FW Act). This application led to the Commission providing assistance to the parties in their bargaining by way of a number of conciliation conferences. On 21 November 2022, each of the Rail Entities filed an application for the Commission to deal with a bargaining dispute pursuant to s 240 of the FW Act (matters B2022/1749 and B2022/1750). On 25 November 2022, pursuant to these applications and with the assistance of the Commission, the parties reached an agreement in-principle as to the terms of a new enterprise agreement, the *Sydney Trains and NSW TrainLink Enterprise Agreement 2022* (2022 Agreement). As part of their agreement, the parties also agreed that the Commission should arbitrate two questions concerning matters which were not resolved to finality as part of the 2022 Agreement. These questions, as subsequently formulated by the parties, are:

(1) What increases to remuneration should apply or the Commission award effective between 1 May 2021 and 30 April 2024?

(2) Should the Higher Standards Cleaning allowance (HSC Allowance) (or any component of it) be paid to Customer Service Attendants (CSAs) who perform cleaning duties?

[4] On 14 December 2022, the Rail Unions filed an application for the Commission to deal with a dispute pursuant to the dispute resolution procedures in the 2018 Agreements (matter C2022/8265). This application identified the dispute as concerning the two agreed questions set out above. On 20 December 2022, the Commission directed that this matter be joined with matters B2022/1749 and B2022/1750 and listed the matters for hearing in relation to the two agreed questions before a Full Bench on 8 and 9 February 2023.

[5] The 2022 Agreement was put to a vote of employees of the Rail Entities over the period 24-30 January 2023. By the end of that voting process, an overwhelming majority of employees had voted in favour of approval of the 2022 Agreement. The 2022 Agreement was thus *made* for the purpose of s 182 of the FW Act on 30 January 2023.

[6] On 6 February 2023, the Rail Unions filed an application for the Commission to deal with a dispute pursuant to the dispute resolution procedure in the 2022 Agreement (matter C2023/571). This application also identified the dispute as concerning the two agreed questions set out above. It was joined with the other three matters and was also listed for hearing on 8 and 9 February 2023.

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[1] [2018] FWCA 2318; AE428119

[2] [2018] FWCA 2319; AE428120

[7] On 7 February 2023, the Rail Entities lodged an application for approval of the 2022 Agreement and, on 10 February 2023, the 2022 Agreement was approved.[3] It consequently took effect on 17 February 2023 and has a nominal expiry date of 1 May 2024.

[8] Upon the making of the 2022 Agreement, bargaining between the parties ended. It is therefore doubtful whether the s 240 applications before the Commission, which are predicated on the existence of a bargaining dispute, can continue to provide the requisite jurisdiction to answer the agreed questions and the power to make orders, if necessary, to give effect to those answers. However, we are satisfied that the requisite jurisdiction arises under the s 739 dispute applications. In respect of matter C2022/8265, the dispute resolution procedures in the 2018 Agreements empower the Commission to arbitrate disputes about "*…matters pertaining to the relationship between the Employer and Employees…*" (see clauses 8.2(a) and 8.4 of each agreement). The matters the subject of the agreed questions are undoubtedly "matters pertaining". Notwithstanding that the 2018 Agreements ceased to operate upon the 2022 Agreement taking effect on 17 February 2023, the precondition for arbitration in s 739(4), namely the parties' consent to arbitration, was satisfied prior to this time and jurisdiction vested in the Commission at that point.[4] In relation to matter C2023/571, the dispute resolution procedure in the 2022 Agreement likewise permits disputes about "matters pertaining" to be arbitrated by the Commission (clauses 8.2(a) and 8.4). In addition, clause 8.11 of the 2022 Agreement specifically empowers the Commission to continue to deal with any dispute commenced under clause 8.4 of either of the 2018 Agreements that was not resolved between the parties or determined by the Commission in accordance with the dispute resolution provisions in those agreements, and clause 8.13 deems such provisions to be provisions of the 2022 Agreement.

[9] We deal with each of the two agreed questions in turn below.

Question 1 – Increases in remuneration

Background

[10] The nominal expiry date of both the 2018 Sydney Trains Agreement and the 2018 NSW Trains Agreement was 1 May 2021. The last wage adjustment provided for under these agreements was an increase of 3.0% payable from 1 May 2020. The 2022 Agreement provides for the following wage adjustments/payments:

- a 2.53% increase taking effect from the first pay period commencing on or after 1 May 2022 (clause 11.1(a));
- a one-off flat payment of $4,500 payable as at the date the 2022 Agreement was made (i.e. 30 January 2023) (clause 11.6);
- a 3.03% increase taking effect from the first pay period commencing on or after 1 May 2023 (clause 11.1(b)); and

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[3] [2023] FWCA 423

[4] See *CFMMEU v Falcon Mining Pty Ltd* [2022] FWCFB 93

- such additional pay increases as may be determined as a result of this arbitration (clause 11.1(c)).

[11] Question 1 requires us to determine the amounts, if any, to be payable pursuant to clause 11.1(c) of the 2022 Agreement.

[12] The position of the Rail Entities is that no further wage increase should be awarded pursuant to clause 11.4 of the 2022 Agreement because the wage increases and the one-off payment for which the agreement already provides are consistent with the *NSW Public Sector Wages Policy 2022* (2022 Policy) and are fair and reasonable.

[13] The position of the Rail Unions is that the wage increases currently provided for in clause 11.1 of the 2022 Agreement should be supplemented as follows in order to maintain real wages and add an additional 1% per annum increase to account for productivity improvements:

(a) a 6% increase effective 1 May 2021;

(b) an additional 3.47% increase effective 1 May 2022 (making a total increase of 6% effective from that date); and

(c) an additional 2.97% increase effective 1 May 2023 (making a total increase of 6% effective from that date).

NSW Public Sector Wages Policy

[14] An important feature of the Rail Entities' position, as well as one of the major points of contention in the bargaining process between the parties, is the 2022 Policy. The stated purpose and intent of the Policy is as follows:

"1.1. The primary aim of the NSW Public Sector Wages Policy 2022 … is to ensure better services and value for the public. In this context, the Government remains committed to a policy of fair remuneration and other conditions of employment that improve services and are consistent with maintaining fiscal sustainability.

1.2. The intent of the Wages Policy is to provide for the adjustment to remuneration of public sector employees that reflects the economic and fiscal environment and the contribution of employees and also provides incentive for workplace improvements that support the delivery of Government priorities."

[15] The 2022 Policy applies to the NSW Public Service, Teaching Service, Police Force, Health Service and Transport Service, and any government service or statutory body. The Policy permits annual increases in remuneration, inclusive of superannuation, or other conditions of employment, on the basis that such enhancements do not increase employee-related costs by more than:

- 3.0% in financial year (FY) 2022-23;

- 3.0% in FY 2023-24; and

- 2.5% per annum in FY 2024-25 and following years.

[16] The 2022 Policy also allows an additional 0.5% increase in FY 2023-24 where a substantial employee contribution has been made to productivity-enhancing reforms agreed to by the employer, and further enhancements to remuneration and other conditions of employment may also be provided where the associated cost is offset by achieved employee-related cost savings.

[17] The earlier *NSW Public Sector Wages Policy 2021* (2021 Policy), provided for increases in remuneration and other conditions of employment that did not increase costs by more than 1.5% per annum, and permitted additional wage increases fully offset by employee-related costs savings. The *NSW Public Sector Wages Policy 2011* (2011 Policy) provided for wage increases and other enhancements which did not increase costs by more than 2.5% per annum, and also permitted additional wage increases fully offset by employee-related costs savings.

[18] Apart from employees of incorporated entities (such as Sydney Trains and NSW Trains) which are national system employers within the meaning of s 14 of the FW Act, and some other minor categories, employees to whom the 2022 Policy applies are covered by awards of the Industrial Relations Commission of NSW made under the *Industrial Relations Act 1996* (NSW) (IR Act). Importantly, s 146C(1) of the IR Act constrains the award-making powers of the NSW Commission by requiring it to give effect to any policy on conditions of employment of public sector employees that is declared by the regulations to be a policy that is required to be given effect to by the Commission. The wage increase caps contained in the 2022 Policy are declared for the purpose of s 146C by clauses 6 and 6A of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014* (NSW) (Regulation). The 2011 Policy was similarly declared by the Regulation for the purpose of s 146C(1). The 2021 Policy was not due to the relevant amendment to the Regulation being disallowed, and a revised version of the 2021 Policy was issued in August 2021 restoring the wage increase cap to 2.5%. As a result, public sector consent awards of the NSW Commission made or varied in 2021 contained, in the main, increases of 2.5% inclusive of superannuation increases.

Rail Entities' submissions

[19] The Rail Entities submitted that it was significant that their position, excluding the $4,500 one-off payment, was consistent with the Policy, and that their position taking into account the one-off payment, generally exceeded the pay increases received by other NSW Government employees. The Policy, they submitted, is a vital mechanism for maintaining fiscal sustainability within NSW, and the NSW Government's responsible approach to successfully controlling wage growth has supported the State's various credit ratings and been key in withstanding budgetary pressure from pandemic disruptions and maintaining a large capital spending program. In this way, the Rail Entities submitted, their position serves the public interest and has regard to the state of the NSW economy, while providing a particularly generous outcome for their employees.

[20] The Rail Entities also submitted that their position, assessed in totality, is fair and reasonable. They submitted that while the Reserve Bank of Australia's (RBA's) current position is that economic growth is solid, unemployment is very low and inflation is unacceptably high, growth in the global economy is expected to slow significantly in the year ahead and inflation, which is predicted to have peaked at 8.0% in the December 2022 quarter, will reduce to 3.2% by the December 2024 quarter. The Rail Entities also pointed to the remuneration for their employees as generally exceeding that of employees in NSW and Australia comparator industries, and further submitted that their employees have historically benefitted from consistent and continual increases to their overall remuneration since 2010 which has increased the purchasing power of their remuneration. It was also submitted that, under the Rail Entities' position:

- the one-off payment of $4,500 was estimated to amount to an increase of 3.77%;
- employees would receive enhanced employment conditions amounting to an increase of 2.1%;
- a significant change to the average full-time employee's remuneration would result;
- employees would be placed in a far more beneficial position than under corresponding classifications covered by the *Rail Industry Award 2020* (Rail Industry Award); and
- assessed against historic and forecasted CPI, the real buying power of employees far outpaces inflation.

[21] In support of their submissions, the Rail Entities relied upon:

- a witness statement made by Sam Walker,[5] the Executive Director of the Budget Division of NSW Treasury;
- an expert report,[6] a supplementary report[7] and a further supplementary report[8] prepared by Gregory Houston, a founding partner of HoustonKemp, a consultancy firm of economists with expertise in areas including competition, finance, regulation, policy, analytics and modelling; and
- a witness statement[9] and a statement in reply[10] made by James Quaintance, the Acting Director of Finance Business Partnering for Sydney Trains.

Sam Walker

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5 Witness statement of Sam Walker, 20 Jan 2023 (Exhibit 32)

6 Report of Greg Houston, 20 Jan 2023 (Exhibit 20)

7 Second report of Greg Houston, 3 Feb 2023 (Exhibit 21)

8 Third report of Greg Houston, 7 Feb 2023 (Exhibit 22)

9 Witness statement of James Quaintance, 20 Jan 2023 (Exhibit 15)

10 Reply witness statement of James Quaintance, 3 Feb 2023 (Exhibit 16)

[22] In his witness statement, Mr Walker said that he had been informed by Employee Relations in the NSW Department of Premier and Cabinet that the following cohorts of NSW Government employees had received pay increases broadly consistent with the 2022 Policy:

- approximately 79,301 Public Service employees received an increase to remuneration of 3.0% from 1 July 2022 consisting of a pay increase of 2.53% and an increase of 0.5 percentage points to employer superannuation contributions;

- NSW Health workers, including nurses, doctors, paramedics and allied health professionals, received an increase to remuneration of 3.0% from 1 July 2022;

- police officers received an increase to remuneration of 3.0% from 1 July 2022, and they will receive an increase to remuneration of 3.5% from 1 July 2023 (comprising a 3.03% increase to salaries plus an additional 0.5% increase supported through productivity-enhancing reforms); and

- teachers employed in the NSW Department of Education received an increase to base pay of 2.04% from 1 January 2022 and 0.25% from 1 July 2022 and to remuneration of 3.0% from 1 January 2023. They will also receive a further increase to remuneration of 3.0% from 1 January 2024.

[23] Mr Walker said that he had been informed by the NSW Public Service Commission that, as at 23 June 2022, there were approximately 12,656 full-time equivalent (FTE) employees employed by the Rail Entities, compared to approximately 363,617 employees across the NSW public sector. His evidence was that employee-related expenses are the largest component of NSW Government expenses, and are estimated to be $48 billion (41.8% of total expenses) in 2022-23 and $48.4 billion in 2023-24 (44.2% of total expenses). Of this, the employee expenses of the Rail Entities for 2022-23 are approximately $1.8 billion ($1.5 billion for Sydney Trains and $0.3 billion for NSW Trains), representing 1.6% of total Government expenses. Mr Walker said that any increase to remuneration for the Rail Entities over and above the 2022 Policy "*may deteriorate the budget position relative to the 2022-23 Budget (net of any change to fares)*".[11]

[24] Mr Walker's evidence was that the management of expenses, including employee expenses, was relevant to maintaining fiscal sustainability within NSW, and the 2022 Policy and its predecessors were consequently relevant. Credit rating agencies had generally commented favourably on the NSW Government's control of employee expenses, compared to their more critical comments about the Victorian Government's employee expense management. Mr Walker was not required for cross-examination.

Gregory Houston

[25] Mr Houston was initially requested by the Rail Entities to prepare a report addressing the following matters:

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[11] Witness statement of Sam Walker, 20 Jan 2023 (Exhibit 32) at [12]

(1) the state of the economy since the nominal expiry of the 2018 Agreements on 30 April 2021 and until the nominal expiry of the 2022 Agreement on 1 May 2024, including projected inflation and the spectrum of wages in the public sector;

(2) his assessment of the value of past increases to remuneration to employees covered by the proposed enterprise agreement;

(3) his assessment of the value of the proposed increases to remuneration and conditions offered by the Rail Entities (including the one-off payment of $4,500);

(4) the value of the current remuneration of employees covered by the 2022 Agreement;

(5) any other matters within his expertise relevant to the determination of remuneration to apply to employees covered by the 2022 Agreement in respect of the period 1 May 2021 to 30 April 2024;

(6) his assessment of base rates of pay under the 2022 Agreement against those under the Rail Industry Award for employees under similar or equivalent classifications.

[26] In his report, in relation to the first of the above matters, Mr Houston drew on data and commentary from the Australian Bureau of Statistics (ABS) and the RBA. As to the state of the economy since 30 April 2021, Mr Houston set out historical indicators for consumer price inflation, wage growth, and employment and unemployment, as follows:

(a) <u>Consumer price inflation</u>: Using the CPI measure of inflation, inflation for Australia has decreased from 3.85% for the June 2021 quarter to 3.01% for the September 2021 quarter, but has then increased over all subsequent quarters to reach 7.27% for the September 2022 quarter. Similarly, CPI inflation for Sydney has decreased from 4.1% for the June 2021 quarter to 2.91% for the September 2021 quarter, but then has increased to 6.99% for the September 2022 quarter.

(b) <u>Wage growth</u>: Using the "*total hourly rates of pay excluding bonuses*" Wage Price Index published by the ABS, year-on-year public sector wage growth in Australia has increased from 1.31% as at the June 2021 quarter to 2.35% as at the September 2022 quarter. In the private sector, year-on-year wage growth in Australia has increased from 1.88% as at the June 2021 quarter to 3.44% as at the September 2022 quarter. Mr Houston observed that year-on-year private sector wage growth declined between the December 2021 and March 2022 quarters, but remained above the corresponding year-on-year wage growth for the public sector over the whole period from the June 2021 quarter to the September 2022 quarter. For NSW only, year-on-year wage growth for the public sector has increased from 1.09% as at the June 2021 quarter to 2.25% as at the December 2021 quarter, before declining to 1.79% as at the September 2022 quarter. Conversely, year-on-year wage growth for the private sector in NSW has increased from 1.96% as at the June 2021 quarter to 3.37% as at the September 2022 quarter. The historical year-on-year wage growth for the private sector in NSW declined between the December 2021 and March 2022 quarters, but has remained above the corresponding year-on-year wage growth for the public sector in NSW over the whole period from the June 2021 quarter to the September 2022 quarter. For the FYs ending June 2021 and June 2022, Mr Houston noted that actual public sector wage growth in NSW was less than 2.5%, and observed that this may imply that the maximum annual wage growth set out in NSW public sector wages policy overestimates actual NSW public sector wage growth.

(c) Employment and unemployment: The RBA's November 2022 Statement on Monetary Policy (November 2022 Statement) reported that the labour market was very tight, with the employment-to-population ratio and the participation rate both at near-historic highs and with unemployment at a near-50-year low of 3.5%.

[27] As to the anticipated state of the economy through to May 2024, Mr Houston's report set out the RBA forecasts concerning consumer price inflation, wage growth, employment and unemployment in the November 2022 Statement as follows:

(a) Consumer price inflation: The percentage increase in the CPI will peak at 8.0% in the December 2022 quarter, but then reduce subsequently between the December 2022 quarter and the December 2024 quarter to 3.2%.

(b) Wage growth: The percentage increase in the WPI will gradually rise through to the December 2023 quarter and remain at 3.9% between the December 2023 quarter and the December 2024 quarter. Mr Houston said that when the effect of inflation is taken into account, the change in the purchasing power of wages remains negative until June 2024 before turning positive in December 2024.

(c) Employment and unemployment: The percentage increase in employment will peak at 3.8% in the December 2022 quarter and then decline subsequently between the December 2022 quarter and the December 2024 quarter, at which point it will be 0.9%. The unemployment rate will decline to 3.4% in the December 2022 quarter, and then increase subsequently to reach 4.3% during the December 2024 quarter.

[28] In relation to the second matter he was requested to address, Mr Houston said that he calculated employee remuneration as being the sum of annual base pay, overtime, penalties and allowances for full-time staff before tax and excluding superannuation, one-off payments agreed as part of an enterprise agreement and the estimated superannuation allowance. Mr Houston's report included calculations of the changes in base rates of pay and average full-time remuneration, and a comparison with consumer price inflation, over the period 1 April 2010 - 30 April 2022, as follows:

Table 1

Period	Change in base rate of pay	Change in average full-time remuneration	Consumer price inflation over the period
1 April 2010 – 31 March 2011	4.00%	4.00%	3.26%
1 April 2011 – 31 March 2012	3.50%	3.50%	1.63%
1 April 2012 – 31 March 2013	3.50%	3.50%	2.50%
1 April 2013 – 30 September 2014	3.50%	3.74%	3.91%
1 October 2014 – 30 September 2015	3.00%	3.24%	1.50%
1 October 2015 – 30 September 2016	3.10%	3.10%	1.30%
1 October 2016 – 30 April 2018	3.20%	3.20%	3.29%
1 May 2018 – 30 April 2019	3.00%	3.91%	1.59%
1 May 2019 – 30 April 2020	3.00%	2.09%	-0.35%
1 May 2020 – 30 April 2022	3.00%	3.20%	10.23%

[29] Mr Houston concluded from this that in seven years of the approximately 12-year period analysed, full-time employees covered by the 2022 Agreement and its predecessors received an average remuneration increase greater than the CPI rate over the subsequent period in which the remuneration increase applied and thereby experienced an increase in the purchasing power of their remuneration. Further, Mr Houston calculated that over the whole period, the cumulative increase in the average remuneration of full-time employees (38.98%) exceeded the cumulative CPI rate (32.46%) and thus full-time employees had experienced an increase in the purchasing power of their remuneration of approximately 6.52% on average.

[30] In relation to the third matter concerning the value of the changes to remuneration in the 2022 Agreement, Mr Houston noted that he had taken into account, in addition to the wage increases provided for in the 2022 Agreement:

- the one-off payment of $4,500, which he valued at approximately 3.21% of average gross earnings, including superannuation, and assumed it would be paid during the period from 1 May 2023 to 30 April 2024;
- changes in the compulsory rate of superannuation; and
- the value of enhanced employment conditions, which he was instructed equated to approximately a 2.1% increase to average gross earnings including superannuation.

[31] On this basis, Mr Houston calculated that the 2022 Agreement would produce the following changes to base rates and average full-time employee remuneration, compared to consumer price inflation (actual and RBA-projected):

Table 2

Period	Change in base rate of pay	Change in average full-time remuneration	Consumer price inflation over the period
1 May 2022 – 30 April 2023	2.53%	3.19%	6.30%
1 May 2023 – 30 April 2024	3.03%	9.34%	4.20%

[32] Mr Houston concluded that the cumulative change in average employee remuneration over the term of the 2022 Agreement (12.83%) will be greater than the RBA's cumulative inflation forecast (10.76%), and thus employees will on average experience an increase of 2.07% in the purchasing power of their remuneration. He also concluded that over the entire period from 1 April 2010 to 30 April 2024, the cumulative change in average employee remuneration (56.82%) will be greater than cumulative inflation, actual and forecast (46.72%), and thus employees will on average have experienced an increase of 10.10% in the purchasing power of their remuneration.

[33] Mr Houston undertook an alternative calculation which excluded the $4,500 one-off payment and its associated superannuation payment. This results in a revised change in average full-time remuneration for 1 May 2023 – 30 April 2024 of 5.67%.

[34] In relation to the fourth matter, Mr Houston assessed the value of the current average full-time remuneration of employees on five classifications for the period 1 May 2022 – 30 April 2023 as follows:

Cleaning (formerly Presentation Services) Attendant:	$79,616
Guard Thereafter:	$107,643
Driver Thereafter:	$124,388
Customer Service Attendant Year 1:	$90,689
Regional (former CountryLink) Driver:	$131,118

[35] Using the same methodology, Mr Houston also calculated the average full-time remuneration for a range of junior-level, mid-level and senior-level classifications. He also compared the average remuneration amounts for these five classifications above to comparator Australian and NSW classifications, and concluded that they were either broadly in line with or higher than average cash earnings for the comparator classifications.

[36] As to the fifth matter, Mr Houston said that there were no other matters within his expertise that were relevant. As to the sixth matter, Mr Houston compared the weekly base pay rates for selected classifications in the 2022 Agreement for the period 1 May 2022 - 30 April 2023 to the minimum weekly pay rates for comparable classifications in the Rail Industry Award, and concluded that the rates in the 2022 Agreement were higher than those in the award.

[37] In his supplementary report, Mr Houston addressed a number of matters in the report prepared by Dr Jim Stanford for the Rail Unions (see below). First, in relation to the data used by Dr Stanford, Mr Houston said that:

- he had used the Australia All groups CPI to assess the cumulative effect of inflation rather than the Sydney All groups CPI used by Dr Stanford because there was no up-to-date, authoritative forecast for the latter, although ultimately this made little difference to the outcome of his analysis of the cumulative changes in inflation and wages (Table 1 above); and

- he considered Dr Stanford's analysis of the extent of remuneration changes by reference to base rates of pay only omitted important components of the remuneration received by employees covered by the 2022 Agreement and consequently underestimated the extent of change in the value of employee remuneration.

[38] In relation to Dr Stanford's consideration of productivity growth, Mr Houston observed that Dr Stanford had not disclosed the basis for or data that supported his conclusions concerning economy-wide labour productivity growth and its relationship with wages growth. However, he referred to data which supported Dr Stanford's estimate that average annual labour productivity growth across the Australian economy was over one per cent over the last 25 years, while noting that growth had slipped in recent years. Mr Houston also referred to data which indicated that economy-wide average nominal cash earnings over the period from 2010 to 2020 tracked closely with combined CPI and labour productivity growth over the same period. Finally, Mr Houston said that while the economic principle relied upon by Dr Stanford that the real purchasing power of workers' wages should grow over time in proportion with ongoing improvements in labour productivity was widely accepted, the relationship was a long-term one and that short-term deviations can be expected. He also said that the principle is an economy-wide one which could not be reasonably be applied to inform employee remuneration decisions in relation to a specific enterprise or industry sector.

[39] During cross-examination, Mr Houston accepted that his analysis of the changes in real wages during the period 1 May 2022 – 30 April 2024 (Table 2) would need to be adjusted to take into account that the $4,500 payment and the enhancements to conditions would occur in the first year rather than the second year.[12] He also accepted that if he was wrong in applying superannuation to overtime, this would require a further adjustment,[13] and likewise that if his instructions that enhanced conditions were worth 2.1% and were applicable to annual gross earnings were incorrect, this would require a further adjustment.[14] Mr Houston was taken to an alternative calculation for the period 1 May 2020 to 30 April 2024[15] which made adjustments for these matters, and accepted that it changed his end-point calculation to show a reduction in real wages, although he emphasised it was also necessary to take into account mid-point changes.[16] Mr Houston was also taken to alternative calculations for the period from 1 April

[12] Transcript, 9 February 2023, PNs 1170-1172

[13] Transcript, 9 February 2023, PNs 1186-1192

[14] Transcript, 9 February 2023, PNs 1194-1201

[15] Exhibit 25

[16] Transcript, 9 February 2023, PNs 1214-1304

2010 to 30 April 2024,[17] which he accepted were mathematically correct (except in relation to the fourth alternative calculation, which altered the starting point).[18] Mr Houston also conceded that there were errors in his calculation of the current average full-time remuneration of employees in the five classifications which he identified for the purpose of comparison with comparator classifications, and in the remuneration figures used for the comparison (see paragraphs [34]-[35] above).[19]

James Quaintance

[40] Mr Quaintance is a qualified Chartered Accountant and undertakes financial analysis and advice for Sydney Trains. In his first statement, he set out the information and the source thereof concerning the average earnings of the Rail Entities' employees which had been provided for the purpose of the preparation of Mr Houston's report. He also explained how the one-off payment of $4,500 was estimated to have the value of 3.77% of average gross earnings for each employee, and clarified that this was for Sydney Trains employees only (with the value being 4.06% for NSW Trains employees). Mr Quaintance said that this figure was calculated by multiplying $4,500 by the number of employees (by headcount), adding the cost of superannuation and payroll tax, and then dividing this by total employee-related expenses for the final year of the 2018 Agreements.

[41] Mr Quaintance also explained the basis for the estimated value of enhanced employee conditions of 2.1% which was used by Mr Houston in his report. He said that this value was for Sydney Trains only, with the value for NSW Trains being 2.27%. The enhancements which were valued were the following:

Table 3

Condition	Cost per annum $M	% equivalent
Electrical Safety Allowance	$7.75M	0.54%
Off-Duty Payment – calculated using six months' average pay	$7.84M	0.55%
Living Away from Home (LAHA) allowance changes	$3.09M	0.22%
Higher Standards Cleaning allowance	$2.13M	0.15%
Increase in the overtime cap for Operational RC graded employees	$1.45M	0.10%
Relief Signallers to work a standard 24 x 7 rotating roster	$1.59M	0.11%
Other Conditions – cost impacts all below 0.10% each	$6.09M	0.43%

[42] Mr Quaintance said that the valuation of 2.1% was more likely to be an underestimate rather than an overestimate because not all enhancements to conditions were costed. Items not included, but which are likely to result in a cost to the Rail Entities, include new rostering arrangements and changes to parental leave arrangements. In terms of the benefit to employees,

[17] Exhibit 24

[18] Transcript, 9 February 2023, PNs 1318-1326, 1383

[19] Transcript, 9 February 2023, PNs 1479-1566

Mr Quaintance said that the changes to the conditions would not apply to every employee and, even for employees within the same employee cohort, the value to individual employees would vary based on work patterns and individual circumstances.

[43] In his reply statement, Mr Quaintance provided a calculation of the additional costs to the Rail Entities of the Rail Unions' wages position were it to be adopted. He calculated the total additional cost over the three-year period from 1 May 2021 to 1 May 2024 to be $566.7 million (including $70.4 million assigned to cost of revaluing accrued leave entitlements).

[44] Under cross-examination, Mr Quaintance gave the following evidence concerning his costing of the enhancements to employee conditions in the 2022 Agreement:

- His costings of the changes in conditions were concerned with changes to employee-related costs consistent with the 2022 Policy.[20]

- He accepted that some changes in conditions may increase employee-related costs without increasing employees' remuneration.[21]

- He accepted that many employees of the Rail Entities do not work overtime.[22]

- In respect of the $4,500 one-off payment, the cost calculation had included superannuation and payroll tax on the amount.[23]

- He did not know whether an overtime cap previously existed or not.[24]

- He could neither explain nor verify the costing for the NSW Trains' drivers' overtime bonus.[25]

- He was not aware of, and did not take into account, any cost offset for the removal of the entitlement to depot ratios, nor did he cost changes to the posting of the fleet roster which might generate savings.[26]

- He had no understanding of the percentage of employees who would be able to access the electrical safety allowance, but confirmed the costing thereof included superannuation and payroll tax.[27]

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[20] Transcript, 8 February 2023, PNs 583-585, 635-637

[21] Transcript, 8 February 2023, PNs 586-593

[22] Transcript, 8 February 2023, PN 594

[23] Transcript, 8 February 2023, PNs 615-616

[24] Transcript, 8 February 2023, PN 662

[25] Transcript, 8 February 2023, PNs 665-669

[26] Transcript, 8 February 2023, PNs 674-675

[27] Transcript, 8 February 2023, PNs 678-679

- In costing the off-duty payment, there was a high-level assumption that what is true for train crew is true for all other employees, including those who do not work on master rosters.[28]

- The change to the LAHA is only that the payment for accommodation is made directly in full to the provider rather than as a flat amount to employees, so employees do not receive any additional money, and the costing of this as an 0.22% increase to annual gross earnings should be taken out.[29]

- In respect of the changes to the roster for relief signallers, the cost is a result of the fact that the Rail Entities require work to be done on weekends for which weekend penalties are payable, but not a cost arising from the fact that employees necessarily want to work on weekends.[30]

- It had been assumed that the full cost of paying the professional engineers' loading would be payable immediately.[31]

- It was considered that the increase from two to five days of compassionate leave would result in an increase to employee-related costs.[32]

- It had been assumed that the equalised meal allowance arrangement which had been costed was a change compared to the conditions under the 2018 Sydney Trains Agreement, but Mr Quaintance had no independent knowledge whether this was the case.[33]

Rail Unions' submissions

[45] The Rail Unions submitted that, historically, the concept of "fair and reasonable" wages has, in the context of enterprise and industry-level wage fixation, always had as a fundamental concern the question of the ongoing maintenance of a standard of living, so that a wage which is fair at the time it is set will cease to be so if it, through decline in real value, drops in its relative purchasing power. They submitted that the Commission has continually reiterated that a critical, albeit not determinative, consideration is the effect of CPI changes on real wages, while accepting that the task is not simply confined to a rote mathematical exercise of simply applying a sufficient wage increase to compensate for inflationary changes over time, whether retrospectively or otherwise. They also submitted that maintenance is not the only goal, and that a proper approach to wage fixation includes wage growth over a period of time, at least at a modest level, whether or not supported by increases in work value or other considerations, in order to support the proper functioning of the economy and national prosperity generally.

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[28] Transcript, 8 February 2023, PNs 680-692

[29] Transcript, 8 February 2023, PNs 694-702

[30] Transcript, 8 February 2023, PNs 703-711

[31] Transcript, 8 February 2023, PNs 719-731

[32] Transcript, 8 February 2023, PNs 734-736

[33] Transcript, 8 February 2023, PNs 741-751

[46] In respect of the wage increases provided for in the 2022 Agreement, the Rail Unions submitted that there was no particular rationale for the amounts, since they simply apply the increases contemplated by the 2022 Policy which were "*fixed behind closed doors for (as yet) unexplained reasons*". They submitted that the 2022 Policy is just a policy and presents no obstacle to the Commission determining the matter, and the Commission would exercise great caution before placing any weight on the figures in the policy as evidencing fair and reasonable wage increases, absent some separate compelling justification, since to do otherwise would be to risk outsourcing the evaluative judgement it is required to perform to the NSW State Government.

[47] The Rail Unions submitted that calculating real wage value requires a starting point to be selected, and that the correct point is the wage rates established at the time of the last wage increase on 1 May 2020. From that date until 1 May 2024, even taking into account the two minimum increases for which the 2022 Agreement provides, the real wages of workers will likely decline by 13%. Absent a suitable increase as an outcome of this consent arbitration, this would represent a real failure to ensure that the real value of these workers' remuneration at a minimum keeps pace with the cost of living. Further, it was submitted, in circumstances where employees' productivity levels have only increased, it strongly indicates that it would not be fair or reasonable in the circumstances to leave the minimum increases undisturbed. In addition, there should be sustainable real wages growth at 1% per annum. The Rail Unions submitted that total increases of 6% effective from 1 May 2021, 1 May 2022 and 1 May 2023 are the amounts necessary to maintain real wages and achieve a 1% increase per year in recognition of the significant productivity improvements permitted by the 2022 Agreement. This included, it was submitted, the introduction by NSW Trains of the Mariyung intercity fleet and the agreed removal of a longstanding restrictions on the Rail Entities' ability to implement changes in work practices without union consent. Retrospectivity in the operation of the wage increases was required because workers have suffered actual losses in the real value of their wages as a result of lengthy delays in bargaining caused largely, if not entirely, by the "*rigidity and what could be described as chaos in the manner in which [the Rail Entities] conducted [themselves]*".

[48] In support of their submissions, the Rail Unions relied on:

- an expert report,[34] and a supplementary expert report,[35] prepared by Dr Jim Stanford, Economist and Director of the Centre for Future Work at the Australia Institute; and

- two witness statements made by Toby Warnes, the Director of Organising for the NSW Branch of the RTBU.[36]

[49] The Rail Unions also tendered statements from the following witnesses in reply, none of whom was required for cross-examination:

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[34] Statement and report of Dr Jim Stanford, 20 Jan 2023 (Exhibit 18)

[35] Further statement and report of Dr Jim Stanford, 3 Feb 2023 (Exhibit 19)

[36] Witness statement of Toby Warnes, 20 Jan 2023 (Exhibit 1); Reply witness statement of Toby Warnes, 3 Feb 2023 (Exhibit 2)

- Alec Beville;[37]
- Natalie Falvey;[38]
- Keith Lang;[39]
- Tim Neill;[40] and
- Allen Neinrinckx.[41]

Jim Stanford

[50] The Rail Unions requested that Dr Stanford address the following questions in his first report:

(1) What is the difference between real and nominal wage rates or value?

(2) What is the most appropriate Consumer Price Index measure to assess past real wage value and change, and why?

(3) What is the most appropriate source of forecast future changes in that same Consumer Price Index measure?

(4) What effect does real wage growth over time have on the economy?

(5) Is there a level of real wage growth that is, at a minimum, necessary to achieve positive economic outcomes?

(6) What effect does stagnation in real wage growth over time have on the economy, as a general proposition?

(7) What effect does a decrease in real wage value over time have on the economy, as a general proposition?

(8) Using the most appropriate Consumer Price Index measure to assess real wage value change, what has been the change from 1 May 2020 to 30 December 2022?

(9) Using the most appropriate forecast of future changes in that same Consumer Price Index, what is the change that is expected from 1 May 2020 to 30 April 2024?

(10) Taking into account the three increases set out in assumption 5 above, what will be the change, or projected change, in the real wage value of affected workers from:

(a) 1 May 2020 to 30 April 2022;
(b) 1 May 2020 to 30 April 2023; and

[37] Reply witness statement of Alec Beville, 3 Feb 2023 (Exhibit 4)
[38] Reply witness statement of Natalie Falvey, 3 Feb 2023 (Exhibit 9)
[39] Reply witness statement of Keith Lang, 3 Feb 2023 (Exhibit 8)
[40] Reply witness statement of Tim Neill, 3 Feb 2023 (Exhibit 11)
[41] Reply witness statement of Allen Neinrinckx, 3 Feb 2023 (Exhibit 5)

(c) 1 May 2020 to 30 April 2024?

(11) After taking into account the three increases set out in assumption 5 above, what further increases, if any, would be needed to maintain real wage value for the affected workers:

(a) Effective 1 May 2021 for the period: 1 May 2020 to 30 April 2022;
(b) Effective 1 May 2022 for the period: 1 May 2022 to 30 April 2023; and
(c) Effective 1 May 2023 for the period: 1 May 2023 to 30 April 2024?

(12) Alternatively, after taking into account the three increases set out in assumption 5 above, what single increase would be needed effective 1 May 2023 to maintain real wage value for the affected workers for the period 1 May 2020 to 30 April 2024?

(13) What average yearly increase would be needed to achieve the level of wage growth you indicate as necessary in response to question 4 for the periods:

(a) 1 May 2020 to 30 April 2022;
(b) 1 May 2020 to 30 April 2023; and
(c) 1 May 2020 to 30 April 2024?

[51] In his first report, Dr Stanford initially discussed inflation trends in NSW, and said that the year-over-year growth rates in the CPI published by the ABS are the most commonly used measure for reporting changes in the CPI, with the caveat that year-over-year figures reflect changes in prices which may have occurred several months before the month in question. He also said that the all-items CPI (rather than the "trimmed mean" or "weighted median" figures) was the best measure for assessing the purchasing power of wages, since consumers purchase all items in the CPI basket, not just the less volatile items, and the all-items CPI for NSW is the most appropriate measure for employees of the Rail Entities. Since such employees historically received pay increase on 1 May each year, Dr Stanford considered that it was appropriate to use the June CPI data as an approximate benchmark for the consumer prices prevailing on 1 May each year.

[52] Dr Stanford said that since the re-opening of the NSW economy after lockdowns and other restrictions associated with the COVID-19 pandemic, inflation had accelerated in NSW (as in other parts of Australia), and as at September 2022 the NSW CPI had increased by an average of 7.0% compared to year-earlier levels. By contrast, for several years preceding the pandemic, inflation in NSW averaged about 2% per year, below the RBA's target of 2.5%, and in the initial months of the pandemic inflation had dipped further so that in the June quarter of 2020 the NSW CPI declined by 1% year-over-year. Dr Stanford said that the acceleration of inflation after the pandemic reflected a number of casual factors including the unleashing of pent-up consumer demand once restrictions were lifted, extra consumer spending power as a result of income supplements during the pandemic, shifts in consumer buying patterns away from services and towards goods, disruptions in supply chains for many strategic commodities, disruptions to agricultural markets in Australia related to flooding and other disasters, and higher energy prices. The upsurge in CPI inflation was slightly less dramatic in NSW but over the long term there is no reason to expect a significant difference in inflation rates between

NSW and the rest of Australia. Recent experimental monthly data published by the ABS indicates that inflation stabilised at just over 7% nationally in late 2022.

[53] In relation to inflation forecast for 2022-23, Dr Stanford said that while some of the factors behind the current surge in inflation are temporary or transitory, those initial concentrated inflationary pressures have spread into other sectors of the economy, causing a broader upsurge in prices that will be harder to reverse. The RBA's strategy of sharply increasing interest rates to reduce inflation back toward its 2.5% target will not directly affect many of the initial sources of inflation noted above (such as energy price shocks or global supply chain disruptions) and will cause some prices such as rental accommodation to rise. Dr Stanford said that it seemed likely that inflation will remain above historical norms for considerable time to come. He set out the RBA and Treasury forecasts for the all-items CPI for Australia as follows:

Table 4

Source	June 2022 (actual)	Dec. 2022	June 2023	Dec. 2023	June 2024	Dec. 2024	June 2025
RBA	6.1%	8.0%	6.25%	4.75%	4.25%	3.25%	
Treasury	6.1%		5.75%		3.5%		2.5%

[54] Dr Stanford noted that both the RBA and the Treasury expect that inflation will have peaked at the end of 2022 and then return to the RBA target range of over the following two years, reflecting a reversal of some of the unique shocks which led to the current upsurge in inflation and the contractionary impact of recent interest rate increases by the RBA and other central banks around the world. He also referred to the NSW Government's forecast of inflation in its June 2022 budget of 5.5% for FY 2022-23 and 3% for 2023-24, but said that the acceleration in inflation that had occurred since then had rendered this forecast irrelevant for planning purposes. Dr Stanford referred to data published in inflation expectations by the RBA, which showed that consumers and union officials expected year-over-year inflation for the 12 months to December 2023 to be higher than the RBA forecast, while market economists expected it to be somewhat lower.

[55] Dr Stanford next addressed in his report the specific questions posed for his consideration. It is not necessary to set out his answers to questions 1-4. In relation to questions 5, 6 and 7, Dr Stanford said that:

- over time, real wages should grow at least as quickly as productivity to ensure that factor shares of national income remain stable, real unit labour costs remain constant and labour is rewarded for growing productivity;

- over the last 25 years, average labour productivity in the Australian economy has grown at an annual average of over 1% per year, which allows for real wages to grow at a similar pace without lifting real unit labour costs or affecting employers' profit margins;

- in practice, real wages have lagged substantially behind productivity, and real unit labour costs have declined markedly;

- if real wages do not increase in line with productivity improvements, the negative consequence will be that labour's share of national income will decline over time, real unit labour costs will decline, employers will experience a disincentive for technological change and capital accumulation since until about costs become relatively cheaper, income distribution becomes more unequal, and workers lose the incentive to participate in economic innovation, technological change and efficiency;

- many of these negative consequences have in fact been experienced in Australia over the past decade; and

- if nominal wages do not keep pace even with inflation, then the above negative consequences are exacerbated in that the labour share of GDP and real unit labour costs fall even further, households see their absolute purchasing power decline, household financial stress increases, and more households increase consumer debt in an attempt to sustain consumption purchases.

[56] In relation to question 8, Dr Stanford concluded that, based on actual CPI data through to the September 2022 quarter and RBA forecasts after that, the real wages of the Rail Entities' employees would fall by about 12.7% over the period 1 May 2020 to 30 December 2022. In his supplementary report, Dr Stanford updated this to an actual figure of 12.4% based on CPI data to the end of December 2022. As to question 9, Dr Stanford said that there would, utilising RBA forecasts, be a cumulative increase in prices of approximately 21.4% from 1 May 2020 through to 30 April 2024 which, without changes in nominal wages during that period would correspond to a real wage reduction of 17.6% for the employees. As to questions 10 and 11, Dr Stanford produced the following analysis:

Table 5

Year	NSW All-Items CPI (June quarter)	Assumed Nominal Wage Increase (effective 1 May, "at least")	Real Wage Index (1 May 2020=100, to 30 April)	Additional Wage Increase Required to Maintain Real Wage at 1 May 2020 Level
2020	114.7	----	100.0	----
2021	119.4	0%	96.1	9.59%
2022	125.7	2.53%	91.2	3.63%
2023	133.6	3.03%	88.1	1.18%
2024	139.2	----	87.0	----

[57] In the alternative, and in answer to question 12, Dr Stanford said that a single additional nominal wage increase of 14.91% on 1 May 2023 would maintain the value of real wages as at

30 April 2024 at their May 2020 level, although it would not compensate employees for the loss of purchasing power during this period. As to question 13, Dr Stanford said that the average yearly increases needed to achieve a level of real wage growth in proportion to average productivity growth in the broader economy of 1% per year would be as follows:

Table 6

Contract Period	Cumulative Inflation	Cumulative Productivity Growth	Required Cumulative Nominal Wage Growth	Annual Compound Wage Increase
2020-2022	9.6%	2.0%	11.8%	5.7%
2020-2023	16.4%	3.0%	20.0%	6.2%
2020-2024	21.4%	4.1%	26.3%	6.0%

[58] In his supplementary report, Dr Stanford responded to various matters discussed in Mr Houston's primary report. He first dealt with the issue of the proposed one-off $4,500 payment. In general terms, Dr Stanford said that payments of this nature are often proposed as a way of providing an inducement to worker, often tied to approval of an enterprise agreement, in a way that does not build into additional long-term compensation costs. He said that the value of such payments must be carefully considered in terms of the time frame across which those payments apply, since unless repeated in the future they will disappear from a worker's compensation bundle. Dr Stanford noted that Mr Houston's analysis had incorporated the $4,500 into the final year of the 2022 Agreement (1 May 2023 to 30 April 2024), and said that this led to very misleading conclusions regarding trends in nominal and real compensation in the time period leading up to that final year and that, since the payment would probably not be replicated in future years, set the stage for a substantial reduction in apparent compensation after 1 May 2023. This also did not take into account the losses in real compensation experienced in intervening years (when no such bonuses were paid, and hence real compensation was immediately undermined by inflation). Dr Stanford's view was that an appropriate methodology in evaluating the impact of one-time payments was to ascribe their value evenly across the full period of the agreement, which approach recognised that the one-time payments have value but avoided the distortion resulting from ascribing it to any particular year.

[59] In relation to Dr Houston's inclusion of superannuation contribution increases in his analysis, Dr Stanford accepted that it is reasonable to consider superannuation as a form of "compensation" or "remuneration". He said, however, that they are distinct from wages and cannot be considered "wage increases" because:

- except under extraordinary circumstances, workers cannot access their superannuation accounts to finance current consumption;
- they reflect the obligation of employers to contribute to the lifelong economic security of their employees; and

- recent changes in superannuation contribution rates reflect the long-planned phase-in of the superannuation system and reflect the implications of demographic ageing, and they do not constitute an unexpected or incremental gain for employees.

[60] Dr Stanford nonetheless undertook an adjusted version of his analysis set out in Table 5 above which took into account increases in superannuation contributions:

Table 7

Year	NSW All-Items CPI (June quarter)	Nominal Compensation Increase, Including Higher SG Rate (effective 1 May, "at least")	Real Wage Index (1 May 2020=100, to 30 April)	Additional Wage Increase Required to Maintain Real Wage at 1 May 2020 Level
2020	114.7	----	100.0	----
2021	119.4	0.46%	96.1	9.09%
2022	125.7	3.0%	91.7	3.16%
2023	133.6	3.5%	88.9	0.72%
2024	139.2	----	88.2	----

[61] In respect of Mr Houston's analysis of wage increases and inflation going back to 2010, Dr Stanford said Mr Houston's conclusion that real wages at the end of the term of the 2022 Agreement would be higher than in 2010 was neither surprising nor relevant, since it was a normal, expected, and healthy outcome of a well-functioning labour market that real wages should increase gradually over time, preferably in close relationship to the average growth of labour productivity in the broader economy. He said that in collective bargaining discussions, the focus would normally be placed on immediate economic trends and conditions affecting workers during the term of the agreement being considered and that, in this case, real wages had declined by 12.1% since May 2020 with longer-term developments being of especially little relevance to workers who had started their careers with the Rail Entities more recently. As to the relationship between wage increases for such workers and the credit ratings for the NSW Government, Dr Stanford observed that the workforce of the Rail Entities constituted less than 2.4% of the total State public workforce, and that the additional wage increases claimed by the rail unions would constitute an insignificant fraction (a small fraction of 1%) of the State's total ongoing expenses. Accordingly, it was not conceivable that wage increases for the workers covered by the 2022 Agreement could affect the overall judgment of credit rating agencies regarding the NSW state government's ability to service its debt, whether positively or negatively.

[62] Dr Stanford rejected Mr Houston's comparison between estimates of average total remuneration for full-time employees in various categories covered by the 2022 Agreement with average cash earnings received by all employees in Australia in purported "comparator" industries as both lacking in relevance and flawed.

[63] In cross-examination, Dr Stanford accepted that, in his analysis of real wage growth, he had not had regard to the period prior to May 2020 because he was not asked to,[42] nor had he considered whether there had been productivity gains within the Rail Entities' enterprises.[43] He did not consider that productivity conditions within the enterprise should be ignored, but that the level of productivity growth across the economy sets a relevant benchmark against which real wage progress in all parts of the economy should be attached.[44] In his analysis of real wage growth from 1 May 2022, Dr Stanford accepted that he had not taken into account the 3% increase operative from that date because that was included in his starting point, and that the $4,500 one-off payment would constitute an extra level of compensation towards purchasing power, but did not accept that improved conditions necessarily translated into purchasing power.[45] Dr Stanford agreed, by reference to Mr Houston's first report, that there had been an increase in the standard of living for the Rail Entities' employees since 2010, but there had been a decline relative to a different starting period such as 2018 or even 2020.[46]

Toby Warnes

[64] Mr Warnes set out a number of matters relevant to the Rail Unions' case concerning the quantum of wage increases in his witness statement. He first described the bargaining process with the Rail Entities, which commenced in May 2021. He described this bargaining process in the following terms:

> "The bargaining process was protracted and frustrating. It involved no clear decision makers, various changes in positions on previously agreed claims, multiple legal challenges to protected industrial action, high level political interference by multiple Government Ministers, and opaque reasoning behind the positions adopted by the Employer on issues in bargaining."[47]

[65] Mr Warnes annexed to his statement two separate witness statements he had previously prepared in support of an application for bargaining orders which the Rail Unions had filed on 1 September 2022. These annexed witness statements described in detail the difficulties which, from the unions' perspective, had caused the protracted and to that point fruitless bargaining process, including:

- disputes and litigation concerning the introduction and safe operation of NSW Trains' new intercity fleet, including a number of major changes in position on the part of NSW Trains and the NSW Government about this issue;

- the Rail Entities/NSW Government reneging on agreements that had been made about a range of matters;

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[42] Transcript, 9 February 2023, PNs 902-905

[43] Transcript, 9 February 2023, PNs, 907-914

[44] Transcript, 9 February 2023, PN 915

[45] Transcript, 9 February 2023, PNs 941-953

[46] Transcript, 9 February 2023, PNs 970-975

[47] Witness statement of Toby Warnes, 20 Jan 2023 (Exhibit 1) at [9].

- a lack of explanation about the reasons for changes of position about various matters;
- false and misleading public statements about industrial action undertaken by the RTBU and its general position;
- threats to cease bargaining and seek termination of the current enterprise agreements;
- a refusal to bargain on wages other than in accordance with the 2022 Policy;
- a failure to identify the decision-makers in respect of various issues; and
- the difficulty in getting members to make concessions in the face of changing positions and public vilification.

[66] Mr Warnes expressed the view that, if the agreement in-principle reached by the parties on 25 November 2022 (which included the conduct of this arbitration) had been put forward by the Rail Entities in 2020 or 2021, it would likely have been accepted. In relation to the 2022 Policy and its predecessors, Mr Warnes noted that, from May 2021 until 15 December 2021, the Rail Entities' position was that there should be a 0.3% increase to wages in the first year of the new agreement and thereafter the position would revert to the wages policy (as it then was). He said that on 15 December 2021, the Rail Entities' position reverted to the terms of the wages policy at the time, meaning a 2.04% increase for each year of the agreement. Mr Warnes observed that, despite the wage policy in place since 2011, wage increases in previous enterprise agreements had consistently provided for higher increases that the maximum permitted by the policy.

[67] In relation to improvements in conditions provided for in the 2022 Agreement, Mr Warnes said that many classifications either did not achieve any claims, or will not receive any financial benefit from conditions won through the negotiations, or received financial benefits that were contingent upon the worker suffering a disability at work or inconveniencing their private lives.

[68] In reply, Mr Warnes said that while the government restrictions imposed because of the COVID-19 pandemic had temporarily increased the amount of overtime offered or required to be worked by employees, in general the amount of overtime worked varies widely between employees and many employees do not work any overtime at all. He added that the length of time train drivers and train guards can work is limited by the *Rail Safety National Law 2012* (NSW).

[69] In response to Mr Quaintance's analysis of the "enhanced conditions" said to be provided by the 2022 Agreement, Mr Warnes observed that:

- The new off-duty payment will only apply to employees of the Rail Entities who are directed to stay home, which would be a "*tiny*"[48] proportion.

[48] Ibid at [21]

- The LAHA does not remunerate employees for particular work but rather compensates them for the extra costs they incur when living away from home.

- The HSC Allowance similarly does not supplement an employee's wage but rather compensates for discomfort and disability experienced when cleaning particular waste and wearing a respirator.

- The Rail Unions do not agree that there is an "overtime cap" for RC Graded employees; if they are correct, then there is no enhancement in this regard in the 2022 Agreement.

- The changes to rostering arrangements for Relief Signallers simply mean that they will receive the same variety of work as permanent signallers.

- The Rail Entities only accepted the Cab and Security Allowances for train drivers and train guards (as applicable) into the 2022 Agreement on the basis that they were cost-neutral.

- He does not understand how Mr Quaintance could attribute a dollar figure to compassionate / bereavement leave when the employee would by definition have to have experienced a tragic event to access the leave, and does not receive additional remuneration.

- The equalised meal allowance arrangements also do not provide additional remuneration for time worked, but are compensatory in nature.

- The Rail Unions' "*significant concession*"[49] in no longer being able to refuse a facilitation agreement being put to an employee vote under clause 12 of the 2022 Agreement is a correspondingly significant productivity improvement for the Rail Entities.

- It does not appear that Mr Quaintance has taken into account the train drivers' agreement to give up their former overtime bonus.

[70] However, in cross-examination, Mr Warnes accepted that the 2022 Agreement contained a number of enhancements to conditions, some of which involve the addition of loadings to base rates of pay.[50]

Alec Beville

[71] Mr Beville is employed by Sydney Trains as a Technical Officer, installing telecommunications equipment on Sydney Trains' network. He was involved in the negotiations for the 2022 Agreement on behalf of the CEPU. In relation to "enhanced conditions" referred to by Mr Quaintance, Mr Beville said:

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[49] Ibid at [22]

[50] Transcript, 8 February 2023, PNs 276-280

- The Electrical Safety Allowance prescribed in clause 47A of the 2022 Agreement is being paid to retain experienced electrical employees and encourage them to maintain their qualification.

- The LAHA was updated in the 2022 Agreement such that the employer now pays for employees' accommodation and parking directly when they are required to live away from home, and employees receive an allowance for each meal for the period living away from home based on time requirements. This was done because accommodation has become expensive since the 2018 Agreement was made and the allowance therein was insufficient, and the changes have allowed "*better bulk buying of accommodation*".[51]

- He does not understand why receiving a 10-hour break after working overtime under the 2022 Agreement (as opposed to an eight-hour break under the 2018 Agreement) would increase his pay.

- He and all other employees classified under section 2 of the 2022 Agreement will not receive the equalised meal allowance as it applies only to infrastructure workers classified under section 5 of the 2022 Agreement.

- Very few employees will in fact benefit from the increases to the upper limits for HV cables competency classifications and HV cable joining work group leaders. This increase was meant to take effect in the 2018 Agreement but did not due to clerical errors.

- It was a "*significant concession*"[52] on the Rail Unions' part to relinquish their right to refuse a facilitation agreement (with the current scheme being set out in clause 12 of the 2022 Agreement), notwithstanding that they negotiated other safeguards like a longer access period and better consultation obligations.

Natalie Falvey

[72] Ms Falvey is the Principal Industrial Officer of the APESMA and has been involved in bargaining with Sydney Trains and NSW Trains since July 2021 on behalf of the APESMA. In relation to the "enhanced conditions" dealt with by Mr Quaintance, she said:

- Not every Sydney Trains engineer is eligible for the engineering loading. In order to be eligible, they must be recognised as a Professional Engineer under the 2022 Agreement and supervise employees carrying out Professional Engineering work or undertake that work without supervision. Ms Falvey said that in Australian jurisdictions where engineering registration is mandated, the uptake is about 25%.

[51] Ibid at [24]

[52] Ibid at [41]

- A number of payments, including the off-duty payment, cleaning allowance, increase in overtime cap and the cab/security allowance only apply to operational employees or a subset of employees which does not include engineers.

- While the LAHA could potentially apply to engineering employees, it would only arise in limited circumstances and the majority of APESMA members who are engineers would rarely receive the LAHA.

- The Electrical Safety Allowance is only available to engineers who hold electrical qualifications and meet other eligibility criteria, which is not all engineers.

Keith Lang

[73] Mr Lang is employed by Sydney Trains as a Heavy Plant Technician and was the lead AMWU negotiator in the bargaining for the 2022 Agreement. His response to Mr Quaintance's evidence concerning the "enhanced conditions" was:

- The LAHA under the 2022 Agreement is only an "enhancement" in the sense that employees will now not be out of pocket for accommodation as they sometimes were under the 2018 Agreement, as Sydney Trains will organise it directly with the provider.

- The increased compassionate/bereavement leave entitlement does not add to wages and not every employee would have cause to use it.

- The increased overtime cap for Operational RC graded employees will only apply to a limited number of employees.

- His recollection from the roadshows in the lead-up to the vote that ultimately made the 2022 Agreement is that there would only be three new work group leader positions for Plant Mechanics.

- The penalty rate now applicable when employees are required to return to work without having had a 10-hour break after overtime will be of very limited application because it would only be in an emergency or unforeseen circumstances that such a break would not be afforded.

- The equal meal allowances for wages infrastructure workers and salaried infrastructure workers, which Mr Quaintance has identified as an alleged "enhancement", have already been paid since 2018 and are merely being formalised in the 2022 Agreement.

Tim Neill

[74] Mr Neill is employed by Sydney Trains in the role of Quality Assurance Manager and at the time of making his statement was acting in the role of Manager, Customer Relations. Mr Neill has worked for Sydney Trains since 2014 in various roles including as a CSA, and participated in bargaining for the 2022 Agreement as an ASU delegate on behalf of salaried employees. Mr Neill gave evidence about overtime, and said he is not expected to work overtime, and has worked minimal overtime in the last three financial years. Nor is his team expected to work overtime. He estimated that for the whole 10-person Customer Relations team, overtime worked would average only around 10 hours per month. In response to Mr Quaintance's evidence about improved conditions and trade-offs, Mr Neill said none of the enhanced conditions were relevant to him or other ASU members.

Allen Neinrinckx

[75] Mr Neinrinckx is currently employed by Sydney Trains as a Senior Signalling Mechanical Engineer, and is a member of the APESMA. Mr Neinrinckx described performing overtime when it was offered, but said this was irregular, and did not recall having done overtime since around 2000. He said he did not believe there is a guarantee of regular overtime for any of the signalling mechanical engineers he works with. As to the entitlement for engineering loading to be available to employees recognised as either a Registered Professional Engineer or a Chartered Professional Engineer, Mr Neinrinckx said he does not have these qualifications so cannot access the entitlement. He believed that some of his younger colleagues (but not all of them) will access the entitlement. Mr Neinrinckx said that the LAHA is a "*no-go zone without prior approval*" from a manager.[53] He had not accessed this allowance himself since 2005, and said obtaining the required approval would involve a number of levels of management and be a difficult and tedious barrier to overcome.

Consideration

[76] We earlier identified the jurisdictional basis upon which we proceed in this arbitration as being the exercise of the dispute resolution function in s 739 of the FW Act. The determination of an appropriate outcome of a dispute under s 739 is necessarily highly context-specific and will almost always fall within the ambit established by the parties' respective positions in the dispute. The determination of the first question concerning the level of wage increases under the 2022 Agreement does not involve any abstract exercise in fixing fair and reasonable wages for NSW rail workers, nor is it analogous to the exercise of the Commission's powers under the FW Act to set minimum rates of pay in modern awards having regard to the modern awards objective and the minimum wages objective in ss 134(1) and 284(1) respectively of the FW Act. We are conducting a private arbitration agreed to by the parties to the dispute, and the outcome is to be determined by reference to the specific considerations raised by the parties in support of their respective positions and the history of the dispute.

[77] The range of considerations advanced by the parties in connection with the determination of the first question is confined. On the part of the Rail Entities, no evidence has been adduced, nor is it contended, that *any* wage increase additional to those provided for in the 2022 Agreement would cause any difficulty for the commercial or financial position of the Rail Entities or for the budgetary position of the NSW Government. There is no evidence before us about these matters at all beyond Mr Walker's statement that any increases in addition to those permitted by the 2022 Policy "*may deteriorate the budget position relative to the 2022-23 Budget (net of any change to fares)*". [54] This highly qualified statement appears to impart no

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[53] Ibid at [29]

[54] Witness statement of Sam Walker, 20 Jan 2023 (Exhibit 32) at [12]

more than the proposition that additional wage increases might cost the NSW Government more than projected in its 2022-23 Budget, subject to any changes in fares. This is, with respect, no more than a statement of the obvious, and does not support any inference that any additional wage increase will cause any discernible detriment to the NSW Government's budgetary position. Mr Quaintance, in his reply statement, costed the Rail Unions' claim at an additional $566.7 million in total over the three-year nominal term of the agreement, which serves to identify the outer-limit cost of additional wage increases, but even this amount was not placed in any overall commercial or budgetary context (although it is plainly a significant amount). Given that, as Mr Walker stated, total employee expenses for the Rail Entities only constitute 1.6% of total NSW Government expenses, it is not possible to conclude that any reasonable outcome of this arbitration will detrimentally affect the NSW Government's finances to any significant degree.

[78] Mr Houston's first expert report, upon which the Rail Entities rely, identified and discussed some indicators of macro-economic performance in Australia including inflation, wage growth, employment and unemployment. However, no party suggested that any reasonable outcome of this arbitration would have any discernible effect on the NSW or Australian economy and, accordingly, there is no public interest dimension that we need to take into account in this respect. Nor, apart from inflation (which we discuss further below) did any party suggest that any of these macro-economic indicators would have any effect on the commercial circumstances of the Rail Entities or their capacity to pay any reasonable amount of wage increases or upon the circumstances of the employees.

[79] On the part of the Rail Unions, there is no contention or evidence that the wage increases they claim are supported by any change in the work value of the employees of the Rail Entities. The Rail Unions contend that there have been changes in labour productivity supporting their claims, but their case in this respect is limited to Dr Stanford's analysis of long-term Australia-wide labour productivity growth (which Mr Houston did not generally dispute) and the unions' assertions that the introduction of the Mariyung intercity train fleet and the removal of the unions' right of veto over facilitation agreements for changes in work practices constituted significant productivity improvements. We deal with these matters below, but it is clear that the Rail Unions' case in this respect is confined and largely not supported by evidence.

[80] The major issues raised by the parties' respective cases are, first, the 2022 Policy and, second, the benefits currently provided for by the 2022 Agreement measures weighed against actual and projected changes to the rate of consumer price inflation. We will deal with these issues in turn.

[81] In relation to the first of these matters, we do not consider that significant weight should be attached to the 2022 Policy in determining the outcome of this matter for the following reasons:

(1) The Rail Entities have not advanced any rationale, let alone a persuasive one, for the particular percentage limits placed on increases to the cost of employee remuneration and other employee conditions by the 2022 Policy. The original 2011 Policy, which provided for a cap of 2.5% (subject to the capacity for fully cost-offset wage increases) might be said to have been logically referable to the RBA's medium-term inflation target range of 2-3%. However, the 2022 Policy

departs from that target, in circumstances where it is clear that the target will not be met during the period of operation of the 2022 Agreement or for some time thereafter. Therefore, beyond the general proposition that the 2022 Policy represents the NSW Government's desire to constrain generally growth in employee expenditure, it is not possible to identify any logical basis for the particular constraints which it imposes.

(2) The Rail Entities have not explained how the increases to wages and other benefits they have already agreed to in the 2022 Agreement complies with the 2022 Policy. Mr Houston's analysis in Table 2 above, if it is to be accepted, indicates that the 2022 Agreement will provide for an increase in average full-time remuneration of 3.19% in the first year of operation of the 2022 Agreement and 9.34% in the second year once account is taken of increases to superannuation contributions, the one-off payment of $4,500 and the value of enhanced employment conditions, in circumstances where the 2022 Policy is supposed to limit increases in employee expenditure to 3% per annum. That is to say, on the Rail Entities' own case, their position does not comply with the 2022 Policy. It is difficult in that context to place significance on compliance with the 2022 Policy as a determining factor in this arbitration.

(3) Further, it is apparent from Mr Houston's analysis in Table 1 above that in each year of the period from 1 April 2011, approximately when the 2011 Policy commenced operation, to the expiry of the nominal terms of the 2018 Sydney Trains Agreement and the 2018 NSW Trains Agreement on 1 May 2021, the wage increases paid to the Rail Entities' employees exceeded the 2.5% cap imposed by the 2022 Agreement. In short, the Rail Entities have *never* complied with the NSW Government's wages policy.

(4) There is no basis for the conclusion, nor is it contended, that the outcome of this arbitration will have any implications for the application of the 2022 Policy to the rest of the NSW public sector. As the witness statement of Mr Walker demonstrates, public servants, health workers, police officers and teachers have already received wage increases in accordance with the 2022 Policy for FY 2022-23, and teachers will also receive the same increase for FY 2023-2024. More importantly, for the overwhelming majority of NSW public sector workers to whom the IR Act applies, there is no capacity to avoid the operation of the 2022 Policy: employees do not have collective bargaining rights under the IR Act (in that they do not have any right to take protected industrial action) and, as earlier explained, s 146C of the IR Act and clauses 6 and 6A of the Regulation constrain the NSW Commission from awarding pay increases beyond the limits for which the 2022 Policy provides. Consequently, it cannot be said that the 2022 Policy, and the broader budgetary position which it supports, is in any sense endangered by the outcome here.

[82] In relation to the second matter, it is necessary at the outset to establish a datum point for purpose of the analysis. The Rail Unions, and Dr Stanford's expert report, treat the datum point as the date upon which employees of the Rail Entities received their last pay increase, namely 1 May 2020. We do not accept that this is the correct approach. Both the 2018 Sydney

Trains Agreement and the 2018 NSW Trains Agreement took effect on 1 May 2018 and reached their nominal expiry date on 1 May 2021, and provided for pay increases of 3% operative from 1 May 2018, 1 May 2019 and 1 May 2020. It is apparent that the wage increases for which the agreements provide (and which did not, as earlier stated, conform with the 2011 Policy), were intended to adjust employees' remuneration in a way that was agreed to be appropriate across the three-year nominal term of the agreements. An alternative way of assessing the position is that the agreements provided for a pay increase agreed to be appropriate for each year of the nominal term that was effectively payable in advance, so that the last wage increase payable on 1 May 2020 is to be regarded as being the agreed increase for the year that followed. Further, both agreements contain a no extra claims provision, which at least indicates that it was not intended that there be claims for pay increases referable to any part of the period prior to the nominal expiry date on 1 May 2021.

[83] We consider therefore that the appropriate approach is to analyse the effect of inflation upon the wage increases for which the 2022 Agreement provides by reference to the period from 1 May 2021 (the nominal expiry date of the 2018 Agreements) to 1 May 2024 (the nominal expiry date of the 2022 Agreement). In the course of the proceedings, we provided the parties with a copy of an analysis prepared by the Commission's internal economic research team which conducted this analysis using, for actual inflation, the ABS's Sydney all-groups CPI and, for future inflation, the RBA's inflation projections. The figure for average annual remuneration is derived from a calculation contained in Mr Houston's first report, with the amount being inclusive of overtime and other penalties but exclusive of superannuation. It may be noted that, unlike Mr Houston's analysis set out in Table 2 above, the analysis places the one-off $4,500 payment in the year beginning 1 May 2022, not the year beginning 1 May 2023, consistent with clause 11.4 of the 2022 Agreement. No party disputed the mathematical accuracy of the analysis. Shortly after the completion of the hearing on 9 February 2023, the analysis was adjusted to take into account updated RBA inflation forecasts published on 10 February 2023. These updated forecasts for inflation up to 1 May 2023 are slightly lower than before, but the outcome of the analysis is not significantly different. The adjusted analysis is as follows:

Table 8: Comparison of annual remuneration, adjustments by CPI and in 2022 Agreement

		Year beginning			1 May 2024
		1 May 2021	1 May 2022	1 May 2023	
1	Annual remuneration if increased by CPI (actual/projected) over previous year	$119,535	$125,842.12	$134,273.55	$139,107.39
2	Annual change in remuneration (i.e. annual CPI change)		5.3%	6.7%	3.6%
3	Annual remuneration as per increases stipulated in agreement	$119,535	$122,559.24 + $4500 = $127,059.24	$126,272.78	
4	Annual change in remuneration		2.53% (6.3% if one-off payment included)	3.03% (-0.6% if one-off payment included)	
5	***Total change in real value of annual remuneration***				***-9.2%***

[84] It is clear from the above analysis that the real wages of the workers covered by the 2022 Agreement will be very significantly lower as at the nominal expiry date of that agreement as compared to the start of the period of analysis as a result of the effects of the current and ongoing spike in the inflation rate. The $4,500 payment significantly mitigates the effect of inflation in the second year of the period but, because it is only a one-off payment, this benefit disappears in the third year. This projected significant decline in real wages is a significant factor weighing in favour of the award of wage increases additional to those currently provided for in the 2022 Agreement.

[85] However, there are a number of countervailing factors which would cause us not to simply award further wage increases sufficient to maintain the real wages of the workers covered by the 2022 Agreement over the period from 1 May 2021 to 1 May 2024.

[86] *First*, while we consider that, as a matter of fairness, the real wages of the relevant employees should be maintained and, indeed, increase over time, this should be treated as a medium- to long-term objective rather than something that can necessarily be achieved in every year or within the nominal term of every enterprise agreement. An automatic "wage indexation" approach in the circumstances of the current, hopefully temporary, period of high inflation would require wage increases completely out of touch with the wage increases given to other NSW public sector employees pursuant to the 2022 Policy and thus raise broader issues of equity. It would also, based on Mr Quaintance's costing of the Rail Unions' claim, involve a large amount of public expenditure which, while there is no evidence that it would be unaffordable, would presumably not have been budgeted for.

[87] In respect of the maintenance of real wages, we think it is reasonable to look at the longer-term position. It may be concluded from the analysis in Mr Houston's first report of wage increases for employees of the Rail Entities as against the CPI over the period from 1 April 2010 to 30 April 2022 (see Table 1) that the employees received a real wage increase over that period of 6.52% (see paragraph [29] above). Mr Houston further calculated that for the two-year period from 1 May 2022 to 30 April 2024, employees would receive a further real wage increase of 2.07% once account was taken of the one-off $4,500 payment, increases to the superannuation contribution rate and improvements in conditions under the 2022 Agreement (see paragraphs [30]-[32] above and Table 2). It may be accepted, as the Rail Unions contended by reference to their alternative analysis in Exhibit 24, that there are some significant flaws in Mr Houston's analysis. These include that the $4,500 payment was allocated to the wrong year and thus gave a misleading average remuneration figure for the endpoint of the period, that superannuation had been calculated on overtime as well as ordinary-time earnings, and that the enhanced conditions should not have been included because they were wrongly costed and did not apply consistently to employees (a matter which we deal with in greater detail below). However, this alternative analysis still shows a real wage increase over the whole period 1 April 2010 to 30 April 2024 of approximately 1.5% if increases to superannuation contributions are taken into account. Although this was not calculated, if superannuation is excluded the outcome appears to become a negative one. Nonetheless the principal point to be taken is that the longer-term position concerning real wages is, on any view, nowhere near as dire as the shorter-term position set out in Table 8. While we do not consider that past increases in real wages can be carried forward indefinitely to offset current and future reductions in real wages, we nonetheless consider it reasonable to have some regard to the longer-term position. We also take into account that there will be some capacity to make up for any lost ground in future enterprise agreements which are likely to be made in the context of a lower-inflation environment.

[88] *Second*, it is necessary to take into account, at least to a limited degree, that the level of compulsory employer superannuation contributions increased from 10% to 10.5% on 1 July 2022 and will rise again to 11% on 1 July 2023. Although this will not assist employees of the Rail Entities in meeting the current surge in prices, nonetheless it forms part of their remuneration package, may be characterised as deferred income and, most significantly, represents a cost to the Rail Entities in the same way that a mathematically-equivalent wage increase would.

[89] *Third*, some monetary value must be attached to the range of improvements in conditions which have been effected by the 2022 Agreement. However, we do not accept the estimated value of 2.1% calculated by Mr Quaintance (see Table 3). At the outset, it is clear from the terms of Mr Quaintance's analysis and was confirmed in cross-examination that the estimated value was of the cost to the employer, not necessarily the monetary value or other benefit to employees (even on an average basis). This approach was taken because Mr Quaintance approached the analysis from the perspective of the 2022 Policy which, as earlier explained, is framed in terms of increases to employer costs rather than to employee wages. In addition, Mr Quaintance conceded in cross-examination (as earlier outlined in the summary of his evidence) that, in respect of some items, the estimate was higher than it should have been or account was not taken of potential cost offsets that would be achieved under the 2022 Agreement. In respect of other items, Mr Quaintance could not explain or verify the calculation. In addition to these matters, there is the additional difficulty that, to the extent that the changed conditions provide discernible monetary benefits to employees, this is spread very unevenly amongst employees. As the evidence of Mr Warnes, Ms Falvey, Mr Lang, Mr Neill and Mr Neinrinckx makes clear, significant numbers of employees will receive no monetary benefits from the enhanced conditions under the 2022 Agreement, whilst some of the benefits will disproportionately flow to quite small numbers of employees.

[90] Taking these matters into account, we are prepared to accept that the enhanced conditions which took effect upon the 2022 Agreement coming into operation will enhance remuneration from the date by an average of at least 1%, while acknowledging that an averaging approach cannot achieve precision-level fairness across the whole workforce. We also give weight to the fact that the introduction of the HSC Allowance provides a significant increase in remuneration to Cleaning Attendants, who are the lowest-paid employees under the 2022 Agreement (with some minor exceptions), and we accept the unchallenged evidence of Mr Devitt (referred to in relation to Question 2 below) that this was part of the rationale for the introduction of the HSC Allowance. This substantially enhances the fairness of the remuneration provisions of the 2022 Agreement.

[91] *Fourth*, it is necessary to give appropriate weight to the one-off $4,500 payment, despite the fact that it makes no ongoing contribution to the maintenance of real wages over the nominal term of the 2022 Agreement. From a strictly mathematical perspective, the fairest way to do this might be to spread the value of the payment over the whole of the three-year period from 1 May 2021 to 1 May 2024, as proposed by Dr Stanford. However, we prefer an alternative approach. In discharge of its obligation under s 180(5) of the FW Act, the Rail Entities provided their employees with a document entitled "*FAQs – Sydney Trains and NSW TrainLink Enterprise Agreement 2022*" to explain the terms of the 2022 Agreement and their effect prior to them voting on the agreement. In relation to the payment, this document states:

> "A one-off payment of $4,500 (further super is payable on this amount) would be paid following a valid vote where a majority of employees support the Enterprise Agreement (with eligibility based on being employed under the Enterprise Agreement at that time). <u>The one-off payment is in lieu of our people having not received a pay increase since expiry of the Enterprise Agreement on 1 May 2021</u>."
>
> (underlining added)

[92] There is no evidence confirming that the underlined statement above represents a position agreed with the Rail Unions as to the purpose of the one-off $4,500 payment. However, there is likewise no evidence that the Rail Unions ever sought to contradict the underlined statement or to provide any alternative explanation for the payment to the employees. Most importantly, 93% of employees who voted, and 75% of all employees, voted to approve the 2022 Agreement, and in doing so it may be presumed that, if they read the explanatory document at all, they placed reliance among other things on the above statement. It is therefore reasonable to conclude that the underlined statement above constituted a common intention concerning the purpose of the $4,500 payment amongst those who made the 2022 Agreement (being the Rail Entities and their employees). Although it may not be possible to assign a mathematical justification for this, we will therefore proceed on the basis that the $4,500 was intended to substitute for the lack of any pay increase under the 2022 Agreement for the period 1 May 2021 to 30 April 2022.

[93] It finally remains necessary to deal with the Rail Unions' claim that, in addition to pay increases of an amount necessary to maintain real wages, there should be an additional amount awarded to account for national increases in productivity. Dr Stanford's guiding principle that the wages of workers should maintain their real value and additionally increase in line with improvements in national labour productivity (which he estimated and Mr Houston broadly accepted historically averaged about 1% per year) might be broadly accepted as an appropriate longer-term objective for the fixation of the national minimum wage and minimum award wages. However, we do not accept this principle is readily applicable to the setting of actual wage rates at the enterprise level in the enterprise bargaining context, where the primary consideration in respect of productivity is usually the productivity of the enterprise itself. We do not consider that the Rail Unions have demonstrated that there have been, or will be, improvements in labour productivity with the Rail Entities over the period 1 May 2021 to 1 May 2024. As earlier stated, the Rail Unions' case concerning enterprise productivity rose no higher than assertions that the introduction of the Mariyung intercity train fleet (which has been facilitated by an agreement entered into collaterally with the 2022 Agreement), or the removal in the 2022 Agreement of the Rail Unions' right to veto work practice changes being proposed to the workforce. There is no evidence that either of these things will lead to actual productivity improvements. We note that the 1 May 2023 wage increase of 3.03% agreed to in the 2022 Agreement notionally includes the additional 0.5% for productivity-enhancing reforms permitted by the 2022 Agreement for FY 2023-24, but we consider this more to be a fig leaf for an agreed departure from the 2022 Policy rather than evidence of productivity improvement. For these reasons, we do not consider that an additional wage increase on account of productivity is warranted.

[94] Having regard to all the above matters, in response to question 1, we award the following wage increases in addition to those currently provided for in the 2022 Agreement:

(1) An additional 1% operative from 1 May 2022.

(2) An additional 1% operative from 1 May 2023.

[95] We do not pretend that the above amounts are the result of any precise mathematical calculation. They constitute our evaluative judgment concerning what is a fair and reasonable determination of the dispute which the parties have asked us to resolve.

Question 2 – Application of the Higher Standards Cleaning allowance

Background

[96] The 2018 Sydney Trains Agreement is divided into a number of sections. Section 1 is concerned with "*Core Conditions*", and the remaining sections are concerning with discrete categories of employees. Section 3 is concerned with "*Wages Maintenance Grades*" and (as set out in Schedule 3A) includes classifications for "*Cleaning Attendant*" and "*Cleaner in charge*". Clause 103.3(a) in Section 3 provides for a "*Respirator Allowance*" when employees work in "*an environment which requires the mandatory wearing of full protective equipment which includes hood and air line respirator*". This is payable on an hourly basis (item 17 in Schedule 3B). Where an employee is required to wear a respirator for more than 4 hours in a shift, an additional amount per shift is payable (clause 103.3(b) and item 16 of Schedule 3B). Cleaning attendants and cleaners in charge will typically use respirator equipment for this length of time, and thus be entitled to the additional amount in clause 103.3(b), when engaged in fleet maintenance duties at maintenance depots. The additional amount was $2.53 per shift from 1 May 2020.

[97] Section 4 of the 2018 Sydney Trains Agreement applies to "*Operations*", and includes (as set out in Schedule 4A) a number of classifications for "*Customer Service Attendant*". CSAs are station-based staff. Section 4 does not contain any equivalent to the Respirator Allowance.

[98] The 2018 NSW Trains Agreement is similarly divided into sections. Section 3 includes the same classifications for "*Cleaning Attendant*" and "*Cleaner in charge*" (Schedule 3A), and also provides for the same Respirator Allowance (clause 96.3 and items 16 and 17 of Schedule 3B). Section 4 includes CSA classifications, but similarly makes no provision for the Respirator Allowance.

[99] In addition to the Respirator Allowance, Cleaning Attendants and Cleaners in Charge employed by Sydney Trains currently receive a Graffiti Removal Allowance. This allowance is not provided for in the 2018 Sydney Trains Agreement but rather exists by virtue of an exchange of correspondence between the parties. It is payable for the removal of graffiti from trains by way of cleaning agents which require the use of a respirator and personal protective equipment. The amount of the allowance is currently $0.74 per hour. NSW Trains does not currently directly employ anybody in the classifications of Cleaning Attendant or Cleaner in Charge, since these functions are performed by Cleaning Attendants and Cleaners in Charge employed by Sydney Trains or by contractors.

[100] In the 2022 Agreement it has been agreed that the Respirator Allowance and the Graffiti Allowance will be replaced by a new allowance, the HSC Allowance, for Cleaning Attendants and Cleaners in Charge. Clause 103.9 of the 2022 Agreement provides:

> **103.9 Higher Standards Cleaning Allowance**
>
> (a) Cleaning Attendants and Cleaners in Charge, including In Transit Cleaners, Turn Around Cleaners and Station Cleaners will be paid a Higher Standards Cleaning allowance as set out at item 33 of Schedule 3B for the duration of each shift worked (not for periods of leave) in recognition of the following duties:
>
> (i) Removal of graffiti
>
> (ii) Removal of hazardous waste
>
> (iii) Use of respirators and appropriate PPE

(b) The Respirator Allowance at item 16 of Schedule 3B will not apply to employees identified in sub-clause 103.9(a).

[101] Item 33 in Schedule 3B of the 2022 Agreement provides that the HSC Allowance is $2.25 per hour in the first year of the agreement and $2.32 per hour in the second year.

[102] The Rail Unions' claim is that a component of the HSC Allowance, namely $1.19 per hour, payable for the whole of any shift that requires the employee to clean hazardous waste at any point during that shift, should apply to CSAs. Question 2 requires the determination of this claim.

Rail Unions' submissions

[103] The Rail Unions submitted that over the life of the 2018 Agreements, the amount of hazardous waste including biological waste prevalent in the workplace has increased and that, correspondingly, the cleaning standards expected by the public and which the Rail Entities expect workers to achieve has meant a sharp increase in the amount of hazardous waste cleaning. They submitted that although CSAs are not employed as cleaners, they are required to perform regular cleaning as part of their duties and have similarly been exposed to higher levels of hazardous waste in their working environment and have been held by management to higher cleaning standards than were bargained for when the 2018 Agreements came into operation. This has meant that CSAs increasingly engage in hazardous waste cleaning rather than more basic station rubbish removal. This includes, at the low end, small amounts of urine, saliva and mucus and, at the high end, faecal matter, vomit and blood, often in large amounts and particularly in toilets which CSAs are required to clean often with inadequate personal protective equipment (PPE). The Rail Unions submit that the "high end" is more frequent, and that their claim should be granted because:

- the CSAs have an increased requirement to interact with hazardous waste;
- their current wages have not been set in consideration of this increased requirement;
- other workers (namely cleaners) who have also experienced this increase will receive an additional allowance for performing this work; and
- accordingly, it is fair and reasonable that CSAs should receive the same benefit.

[104] The Rail Unions submit that the industrial merit of their claim is obvious, since hazardous waste cleaning is the epitome of dirty work justifying additional compensation, particularly where it falls outside what might be considered a worker's core or usual duties. Because CSAs will not necessarily have to clean hazardous waste as often as a cleaner, given cleaning is only part of their duties as opposed to the entire point of their job and may not occur on every shift, it is appropriate that the allowance is made payable only for those shifts where such work has to be done. Accordingly, the Rail Unions propose that CSAs should be paid the component of the HSC Allowance applicable to hazardous waste cleaning, being $1.19 per hour, for the duration of any shift during which they are required to clean hazardous waste.

[105] In support of their submissions, the Rail Unions relied on witness statements made by:

- Debra Yee, a Platform Manager employed by NSW Trains;[55]
- Geordie Muir, a CSA employed by Sydney Trains;[56] and
- Nyssa Parsons, a Cleaning Attendant employed by Sydney Trains and the Divisional Secretary of the RTBU's Fleet Manufacture, Overhaul, Maintenance and Service Division of Sydney Trains.[57]

Debra Yee

[106] Ms Yee has been employed by NSW Trains since around September 2010 and is currently a Platform Manager at Sydney's Central Station. In this role she is responsible for a team of about five Customer Service Team Leaders (CSTLs) and between 10 and 14 CSAs per shift. Prior to this role, Ms Yee has held various other roles including CSA at various stations between 2010 and 2019, Duty Manager at Moss Vale Station between 2019 and 2021 and CSTL between 2021 and 2022.

[107] Ms Yee said that when she worked as a CSA, her home station was Picton but she could routinely be directed to work at any station on the Southern Highlands line, many of which were not regularly staffed or staffed only on weekdays. Picton was a single-staffed station, and her duties there as a CSA included customer service, cleaning, dealing with maintenance requests, assisting the duty manager and train crew (at Moss Vale), opening and closing the station, and security checks. She said that cleaning was a significant part of the role and that this included not just picking up litter and tidying but also regularly cleaning hazardous substances such as syringes or human waste. As a CSA at Picton, she was required to clean the toilets about once a shift. She also said that more generally, many NSW Trains stations are only cleaned by CSAs. Ms Yee said that in her experience cleaning hazardous waste is required at most, if not all, stations but accepted that conditions of toilets vary. In her witness statement Ms Yee provided the following scale of the nature of cleaning duties which may be required:

> "A 'good shift' is no graffiti, low volume of rubbish, some bodily fluids including some urine, spit and snot. This is quite usual for a toilet.
>
> A 'medium shift' would be no graffiti, cleaning a bathroom twice in a shift, a higher volume of rubbish, higher amount of urine, spit and snot, some vomit and faeces in the toilet bowl.
>
> A 'bad shift' would be a 'full clean' of the toilet including walls and urinal (if it is a men's toilet). There may be urine on the toilet door (or where there should not be). There would be faeces or blood on the toilet seat. We might need to change about two full 120L bins in a shift.

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[55] Witness statement of Debra Yee, 20 Jan 2023 (Exhibit 6)

[56] Witness statement of Geordie Muir, 20 Jan 2023 (Exhibit 7); reply witness statement of Geordie Muir, 3 Feb 2023 (Exhibit 7A)

[57] Witness statement of Nyssa Parsons, 20 Jan 2023 (Exhibit 10)

> An atrocious or 'shithouse' shift would be a bad day plus cleaning faeces, vomit and blood off a wall. There would also be lots of rubbish in the car park."[58]

[108] Ms Yee said the frequency of each type of shift varied from station to station across the year and, when she worked at Picton, a good shift would occur about five days per week, a medium shift about one or two days per week and a bad or atrocious shift about once a week or fortnight. At Moss Vale, where the cleaning duties are predominantly done by the CSA on duty, a good shift would occur about two to three days per week, a medium shift about three to four days and a bad or atrocious shift about one to two days per week. Ms Yee provided specific examples from a range of stations across NSW and attached images to her witness statement of times where hazardous waste was required to be cleaned. These included cleaning up faeces and urine from floors, walls and doors of bathrooms, disposing of used incontinence pants and sanitary items that had been left in bathrooms, cleaning up blood and vomit and disposing of used syringes and condoms.

[109] Ms Yee described the PPE worn by CSAs to clean hazardous waste in relation to some of the examples in her statement. In relation to graffiti removal, staff are told to wear gloves, a mask, and not to use the cleaning materials in an enclosed space for more than 15 minutes. In worst cases for cleaning toilets, staff will use gloves, a mask and a garbage bag. Ms Yee said full PPE was not always available.

[110] Ms Yee described the impact of the COVID-19 pandemic on cleaning duties in her statement. She said that additional cleaning duties were introduced, such as increased cleaning of toilets, disinfecting high-traffic areas, touchpoint cleaning and additional rubbish cleaning. While not all of these duties are still required, Ms Yee said increased cleaning of toilets, touchpoint cleaning and increased rubbish pickup due to face masks are still relevant, and that since COVID-19 the cleaning duties CSAs are required to perform have increased overall.

Geordie Muir

[111] Mr Muir has worked for Sydney Trains and its predecessor entities since October 2007 as a CSA at various stations around Sydney. Seven Hills has been his home station since 2013. He said that his current duties as a CSA include customer service (such as helping customers with information), directions and daily dwell time operation on platforms in peak periods, reporting incidents and accidents, and ensuring customers are compliant with safety procedures. Day-to-day cleaning duties include:

- sweeping platforms;
- hygienic presentation of the toilet blocks;
- maintaining cleanliness and presentation and appearance of the concourse ramps and stairs, with the assistance of heavy machinery;
- appearance and hygienic presentation of the lifts;
- removal and reconditioning of areas affected by heavy dirt graffiti, drink stains, and bodily fluids such as urine, faeces, spittle, vomit and others from the nose or mouth; and

[58] Witness statement of Debra Yee, 20 Jan 2023 (Exhibit 6) at [33]

- removal of women's personal products and dead birds from surfaces on the platform.

[112] He said that CSAs also help disabled customers to board and alight from trains, assist vision-impaired customers to navigate the station and bus interchange, and gather important information and photos where possible of criminal and suspicious behaviours.

[113] Mr Muir said he had not undertaken any formal training in relation to cleaning hazardous waste and was not aware that Sydney Trains offered such training other than "*generic material data sheets and safe working statements*".[59] He gave evidence that Sydney Trains conducts inspections of cleanliness standards at stations and that, if hazardous waste is identified during such an inspection, a notification is received that the expected standard has not been reached. Mr Muir believes a lot is expected of staff when it comes to dealing with hazardous waste and that the amount of cleaning required of staff has increased significantly over the course of his employment. He believes Sydney Trains staff work hard to maintain a high standard of cleanliness but this goes unrewarded for the most part.

[114] Mr Muir said he routinely cleans hazardous waste and along with his colleagues has "*cleaned just about everything you could imagine*".[60] He provided specific examples of hazardous waste cleaning along with photographs in his witness statement. In relation to his current station, he described the particular difficulties on night shift arising from widespread drug use around the station. He said that the retrieval and safe removal of waste disposal of drug paraphernalia was required to be performed regularly and that it was common to have to clean and dispose of vomit, faeces, urine and needles. Mr Muir said that CSAs are also expected to try to rectify graffiti before outside contractors are engaged, and in doing so they sometimes have to use cleaning products which emit a very strong solvent odour and which sometimes penetrate the gloves they wear.

[115] In his reply statement, Mr Muir said that the evidence of Messrs Devitt, Joleski, McDonald and Dixon on behalf of the Rail Entities does not accurately reflect CSAs' experience working at small to medium train stations, particularly in respect of exposure to hazardous waste. His experience was overwhelmingly that CSAs are required to clean up both common rubbish and hazardous waste daily. He accordingly refuted the evidence given on behalf of the Rail Entities that they only need to perform such duties "*from time to time*".[61] Mr Muir also noted that CSAs are expressly directed to prioritise cleaning up hazardous waste and receive a "fail" notification that is also circulated to their senior managers if independent verifiers find such waste when assessing stations.

[116] Mr Muir was not required for cross-examination.

Nyssa Parsons

[117] Ms Parsons has worked as a Cleaning Attendant since 2008, and has held the elected position of Divisional Secretary of the RTBU's Fleet Manufacture, Overhaul, Maintenance and

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[59] Witness statement of Geordie Muir, 20 Jan 2023 (Exhibit 7) at [10]

[60] Ibid at [18]

[61] Reply witness statement of Geordie Muir, 3 February 2023 (Exhibit 7A) at [2]-[3].

Service Division since 2017. In this role Ms Parsons represents, relevantly, cleaners engaged in cleaning trains in stabling yards or a maintenance depot, station cleaning, "turn-around" cleaning of trains which are in service but have terminated, and "in-transit" cleaning of trains in service. She represented her division in bargaining for the 2022 Agreement.

[118] Ms Parsons cleans the inside and outside of trains, and her duties include but are not limited to the following:

- tanking and decanting of trains;
- removal of litter from carriages;
- cleaning of carriage windows;
- cleaning/disinfecting of all hard surfaces, including all crew compartments;
- mopping and/or vacuuming of carriage floors;
- removal of any hazardous waste;
- removal of all internal graffiti (with chemical and respirator);
- removal of external graffiti (with chemical and respirator);
- cleaning of carriage toilets (set-specific);
- removal of all stickers and sticky residue (with chemical);
- external side wash of carriages;
- external end wash of trains;
- replenishment of consumables in train toilets;
- wiping down of seats; and
- handling and removal of sharps, such as used needles.

[119] Ms Parsons said that her role included cleaning particularly hazardous materials which could cause her to feel physically ill such as blood, faeces, urine, used needles, vomit and animal meat.

[120] Ms Parsons described the process of negotiations for the 2022 Agreement which led to the agreed HSC Allowance. She said that this allowance rolled up the existing Graffiti Allowance and Respirator Allowance and a new Hazardous Waste Allowance which the unions had claimed, and was designed to compensate cleaners for cleaning hazardous waste, wearing respirators for more than four hours, exposure to chemicals used to clean graffiti on trains, and for maintaining higher standards of cleanliness expected by the public during the COVID-19 pandemic. Her evidence was that in her experience, cleaners perform duties that would attract the HSC Allowance on every shift, and that despite her extended employment with Sydney Trains she was still surprised at the filthiness of the trains when they came into yards and maintenance centres.

[121] Ms Parsons said that, on 28 June 2022, the RTBU and Sydney Trains agreed on the following definition of hazardous waste:

> "Hazardous waste is a waste with properties that makes it dangerous or capable of having dangerous effects on human health or the environment including but not limited to:
>
> - biohazards;
> - human blood and blood products;

- human bodily fluids;
- decanting of trains;
- pathological waste;
- microbiological waste; and
- sharps waste

…

<u>Examples</u>

- human blood and blood products;
  - plasma, band aids, bandages, sanitary products,

- human bodily fluids;
  - vomit, urine, excrement, spit, mucus, ear wax, semen

- decanting of trains;
  - removal of waste from train toilet systems

- pathological waste;
  - rotten meat, fingernails, eye lashes, animal parts

- microbiological waste; and
  - RAT kits, tissues, face masks, specimen jars, rubber gloves, chewing gum, nappies, condoms

- sharps waste
  - needles, broken glass, or any sharp objects."[62]

[122] She said that this definition was not particularly relevant anymore given that the negotiations had resulted in the HSC Allowance being paid to cleaners for every hour worked, but might be relevant to the other classifications the subject of the Rail Unions' claim.

Rail Entities' submissions

[123] The Rail Entities contend that the HSC Allowance should not be paid to CSAs, but only to the classifications noted in clause 103.9 of the 2022 Agreement, namely Cleaning Attendants and Cleaners in Charge. They submitted that the purpose of the HSC Allowance is to consolidate existing allowances and thereby to continue to compensate employees who attend to specific types of cleaning duties, and that the wording of clause 103.9 makes it clear that it is not a general allowance that is provided in recognition of any cleaning duties. The tasks of removing graffiti and hazardous waste and using respirators and PPE when performing cleaning duties are a regular and consistent component of the workload for Cleaning Attendants and Cleaners in Charge, and the HSC Allowance reflects this in a manner that accords with the historical approach. By comparison, it was submitted, CSAs have never received the Respirator Allowance or the Graffiti Allowance, and while they may, on occasion, perform general cleaning duties, such duties are sporadic and do not involve the removal of graffiti or hazardous waste to the same extent as those of Cleaning Attendants and Cleaners in Charge, or otherwise

[62] Witness statement of Nyssa Parsons, 20 Jan 2023 (Exhibit 10) at attachment NP2

require such employees to use respirators and appropriate PPE. The logic and purpose of the consolidation of existing allowances do not apply to these employees.

[124] In support of their submissions, the Rail Unions relied on witness statements made by:

- Bradley Dixon, Director, Region North and Central at NSW Trains;[63]
- Gregory McDonald, Senior Manager – Employee Relations at Sydney Trains;[64]
- Robert Joleski, Customer Area Manager at Wynyard Station for Sydney Trains;[65] and
- Ronald Devitt, Deputy Executive Director, Fleet Maintenance at Sydney Trains.[66]

Bradley Dixon

[125] Mr Dixon has held his role as Director, Region North and Central since June 2017. In this role, he has ultimate responsibility for NSW Trains' rail operations in the North and Central region which covers Central Station, the Central Coast, Newcastle, Hunter and the North and Northwest of NSW. This includes responsibility for developing and implementing customer service strategies.

[126] Mr Dixon said NSW Trains is responsible for operating intercity rail services and stations, as well as regional rail and coach services outside of the Sydney Trains network. The intercity services operate in an area bounded by Newcastle, Dungog and Scone in the north and north-west, Bathurst in the West, Goulburn in the south-west and Bomaderry in the South (Intercity Rail Service Area), and on some of the Sydney rail network which is operated by Sydney Trains. NSW Trains' regional services operate throughout regional NSW and into Victoria, Queensland and the Australian Capital Territory (Regional Service Area). Mr Dixon gave evidence that CSAs employed by NSW Trains work at stations in the Intercity Rail Service Area but not in the Regional Service Area. He described the duties of these CSAs, which are set out in duty sheets specific to their work location. These can include various cleaning tasks and vary depending on the station size and location.

[127] Mr Dixon said that CSAs may be required to clean up vomit, urine or other biological waste in stations or on trains, and the amount and nature of this work would vary depending on the employee and the station they work at. For example, CSAs at busier stations such as Gosford Station or Newcastle Station conduct turnaround cleans of trains where two to three CSAs walk through the train during the time it is stopped at the platform and remove any rubbish, spills or hazards. Mr Dixon said if during a turnaround clean a cleaning issue is identified but unable to be addressed in the time available, it will be referred to cleaners at the next terminating station

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[63] Witness statement of Bradley Dixon, 20 Jan 2023 (Exhibit 28); reply witness statement of Bradley Dixon, 3 Feb 2023 (Exhibit 29)

[64] Witness statement of Gregory McDonald, 20 Jan 2023 (Exhibit 12); reply witness statement of Gregory McDonald, 3 Feb 2023 (Exhibit 13)

[65] Witness statement of Robert Joleski, 20 Jan 2023 (Exhibit 30); reply witness statement of Robert Joleski, 3 Feb 2023 (Exhibit 31)

[66] Witness statement of Ronald Devitt, 20 Jan 2023 (Exhibit 14)

or a maintenance request will be lodged. Turnaround cleans are only intended to maintain basic presentation of the train, and a more thorough clean is done at the maintenance depot by Sydney Trains employees or contractors (not NSW Trains staff) each day. At some locations Mr Dixon said that CSAs employed by NSW Trains conduct "*tanking and decanting*"[67] of train toilets which involves attaching hoses to the train to fill with fresh water and removing effluent from the train. Mr Dixon's evidence was that it would be unusual for a CSA to have contact with effluent during this task. Mr Dixon said that small or medium-sized stations do not involve turnaround cleans and CSAs who work there are only responsible for cleaning the station platforms and bathrooms.

[128] Mr Dixon said from time to time CSAs may be required to clean up sharp objects such as needles and are provided with PPE to do so. Mr Dixon said that cleaning up biological waste and sharps is not a predominant part of the CSA role, and estimated that for most CSAs no more than 25% of their work time is spent cleaning, and no more than 2% of their time on cleaning biological waste or sharps. This equates to no more than 10 minutes per eight-hour shift. Mr Dixon said that sometimes biological waste at stations will be too significant to be cleaned by CSAs and that contractors will usually be called to complete these types of cleaning tasks.

[129] As to graffiti removal, Mr Dixon's evidence was that CSAs are only responsible for cleaning small areas of graffiti using graffiti wipes. If the graffiti cannot be removed in this manner, the CSA will lodge a request for removal by Sydney Trains staff or contractors. Mr Dixon said CSAs will usually not be responsible for removing graffiti on trains during turnaround cleans because the stoppage time is too short. Mr Dixon understands from conversations he has had with managers in his region that busier stations require CSAs to remove graffiti from stations between two and four times per week, and at other stations about twice a month. Mr Dixon is not aware of any allowance being paid to NSW Trains employees for graffiti removal.

[130] Mr Dixon said that the directions for the use of PPE during cleaning duties for NSW Trains employees are contained in the relevant Safe Work Instructions (SWIs) for the types of work. Although the applicable SWIs for graffiti removal refer to the use of respirators in some circumstances such as low ventilation, Mr Dixon noted that in these circumstances the SWI also indicated that graffiti wipes were not to be used. His evidence was that although he was aware of CSAs using various types of face mask for some cleaning duties, he was not aware of any NSW Trains employees having access to or using respirators, and no claim for the respirator allowance had been made since 2017.

[131] In reply, Mr Dixon responded to Ms Yee's witness statement and the Rail Unions' submissions. Mr Dixon said that the examples of hazardous waste cleaning Ms Yee referred to in her statement are not an everyday occurrence at stations where CSAs are required to do cleaning work (being stations where dedicated cleaners are not employed or contracted). Mr Dixon accepted that CSAs at NSW Trains do not receive specific induction training in relation to cleaning, but said that when a CSA starts work they will be briefed by a supervisor or manager on the relevant Safe Work Method Statements and Instructions, which describe how to perform cleaning tasks safely, and are shown how to carry out each task before practising it themselves under supervision. Mr Dixon stated that he was not aware of any times where

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[67] Witness statement of Bradley Dixon, 20 Jan 2023 (Exhibit 28) at [26]

appropriate PPE has not been available or supplied to stations, and that should appropriate PPE be unavailable, then consistently with the applicable SWIs, hazardous cleaning tasks should not be performed and should instead be reported to a team leader. As to Ms Yee's evidence about the increase in cleaning standards and duties during the COVID-19 pandemic, Mr Dixon accepted that cleaning requirements and equipment did change and provided some further detail and a copy of the measures that were implemented. Mr Dixon said that NSW Trains deployed teams of contract cleaners at locations where turnaround cleaning is conducted (including Central, Newcastle and Wollongong) as well as other locations to conduct touchpoint cleaning in stations and on trains. Mr Dixon said contract cleaners were not engaged at smaller stations and touchpoint cleaning was conducted by station staff. Mr Dixon did not agree with the contention that the incidence of hazardous waste on NSW Trains networks and stations has increased since 2018. He stated that during the COVID-19 pandemic there was a drop in customers and therefore customer-generated mess, and that patronage at most stations and services is yet to return to pre-pandemic levels. He also said that, other than in relation to touchpoint cleaning, the duties of CSAs had not changed as a result of COVID-19.

[132] Mr Dixon was not required for cross-examination.

Gregory McDonald

[133] In his role as Senior Manager – Employee Relations, Mr McDonald attended all bargaining meetings in relation to the negotiation of the 2022 Agreement. In his witness statement, he described the allowances payable to Cleaning Attendants and Cleaners in Charge under the 2018 Sydney Trains Agreement and also set out the history of the Graffiti Removal Allowance. He also outlined the history of the proposal to introduce the HSC Allowance in the 2022 Agreement. He said that, between 6 July and 25 November 2022, the parties negotiated in relation to the quantum of the allowances sought, whether they should be paid separately or as a combined allowance and the classifications that would be entitled to it. Mr McDonald described the offers Sydney Trains made to the Rail Unions during this time. Ultimately, on 25 November 2022, Sydney Trains and NSW Trains proposed the quantum of the HSC Allowance of $2.25 per hour payable to Cleaning Attendants and Cleaners in Charge for the duration of each shift worked in recognition of graffiti removal, hazardous waste removal and using respirators and other PPE.

[134] As to the classifications of employees the allowance should be paid to, Mr McDonald's evidence was that Sydney Trains remains of the view that this allowance should only be paid to Cleaning Attendants and Cleaners in Charge because only employees in these classifications (or equivalent) were previously entitled to receive the Graffiti Removal Allowance and the Respirator Cartridge Allowance when they were introduced. Mr McDonald clarified in his statement that, insofar as clause 103.9 of the 2022 Agreement states that the HSC Allowance will be payable to In-Transit Cleaners, Turnaround Cleaners and Station Cleaners, this is only if they fall within the classifications of Cleaning Attendants and Cleaners in Charge. Mr McDonald noted that by paying the allowance to all employees in these classifications, some will receive it despite not undertaking a high degree of cleaning work. For example, Mr McDonald said that Cleaning Attendants who work at fleet maintenance depots are required to conduct a higher degree of cleaning than Cleaning Attendants who work at stations. Mr McDonald noted in his statement that some other classifications at Sydney Trains, such as CSAs, sometimes perform cleaning tasks, and that while this can involve cleaning hazardous waste and/or graffiti from time to time, the extent to which this work is required is not the same as for employees in the Cleaning Attendant classifications.

[135] In reply, Mr McDonald responded to the statements of Mr Muir, Ms Parsons, Ms Yee and, in relation to the history of the bargaining process, Mr Warnes. Mr McDonald did not agree with Mr Warnes' characterisation of the HSC Allowance as applying where an employee suffers a "*disability at work*", because the disabilities that the allowance intends to cover are not new, and that the only change is in the proposal to combine former allowances. Mr McDonald did not agree with Ms Parsons' evidence that the HSC Allowance was partly designed to compensate cleaners for the higher standards expected of them since the COVID-19 pandemic and said that this had in fact been the subject of a separate claim made by the Rail Unions, which was resolved on 7 April 2022 when Sydney Trains agreed to establish a working group to review this work being undertaken by Cleaning Attendants instead of by contractors. He did not agree that the amount of hazardous waste had increased during the COVID-19 pandemic or that increased expectations of cleanliness related to the pandemic have led to increased expectations to clean hazardous waste. The frequency of hazardous waste cleaning had not increased, and the types of hazardous waste cleaning intended to be compensated for by the HSC Allowance is different from the type of cleaning which increased during the pandemic. Mr McDonald said that, overall, the incidence of hazardous waste has decreased since the start of 2020 because of an overall decrease in the number of people using public transport. He also denied that there was a component of the HSC Allowance of $1.19 per hour for hazardous waste, and said that Sydney Trains never reached an agreement with the Rail Unions about the quantum of each component of the HSC Allowance. In cross-examination, he accepted that the Rail Entities had initially put positions involving the establishment of a separate hazardous waste cleaning allowance in addition to the existing allowances of $0.74 per hour,[68] but later acceded to the Rail Unions' position that there should be a rolled-up allowance, with the amount of $2.25 per hour subsequently being agreed.[69]

Robert Joleski

[136] Mr Joleski has held the role of Customer Area Manager at Wynyard Station since March 2022, and prior to this performed the same role at Strathfield Station since March 2017. Mr Joleski has worked for Sydney Trains and its predecessor entities for 27 years. In his current role, Mr Joleski manages 99 employees at Wynyard and Circular Quay Stations in the classifications of CSTL, CSA, Cleaners in Charge and Cleaning Attendants.

[137] Although Mr Joleski said he has not been involved in negotiations for the proposed 2022 Agreement, he said he was generally aware of its contents, including the proposal to introduce the HSC Allowance to recognise high-level cleaning work — specifically, work involving removal of graffiti, removal of hazardous waste, and use of PPE including respirators. He said that hazardous waste includes biological waste substances such as vomit, faeces, blood and other body fluids, as well as dangerous objects such as sharps, and that biological waste is mostly found in station toilets but can sometimes be located in other areas of stations or on trains. He referred to the SWIs for cleaning toilets and urinals and for cleaning up vomit, and said that the PPE used for cleaning biological waste includes gloves, faces masks (optional) and

[68] Transcript, 8 February 2023, PNs 369-373

[69] Ibid, PNs 378-381

safety glasses (optional), with there being no requirement to use respirators. He also referred to the SWIs for the removal of graffiti using specially-designed graffiti wipes. The PPE required for this task is face masks and safety glasses but not respirators. If Sydney Trains' staff are unable to remove the graffiti, then a maintenance request will be lodged and the removal undertaken by a contractor.

[138] Mr Joleski referred to the CSA position description and said that, at larger, medium-sized and/or busy stations, CSAs are generally rostered on together with dedicated cleaning staff or cleaning contractors and thus are rarely responsible for cleaning duties. At smaller or less busy stations without dedicated cleaning staff, CSAs may have more cleaning responsibilities, but at such stations the demand for cleaning (particularly cleaning hazardous waste) is much lower. Mr Joleski compared the CSA Staff Duty Sheets for Punchbowl, a small station, and Wynyard, and said that the former includes tasks such as emptying rubbish bins, hosing platforms and cleaning toilets, as well as customer service tasks like greeting customers, providing Opal information, and dealing with lost property, while the latter consists almost entirely of customer service duties except for general requirements to inspect station areas for cleanliness and ensure they are free of litter. At small stations, toilets and other areas are usually inspected hourly or half-hourly, and CSAs may spend up to half of an eight-hour shift ensuring the station is clean and tidy. However, a much smaller proportion of this time may be spent cleaning biological or other hazardous waste — at most one hour on a busy day, and this is unlikely to occur on every shift. In relation to graffiti removal CSAs only perform this role at smaller stations. It may only arise a few times each week and take less than 15 minutes on each occasion.

[139] Mr Joleski said that most Cleaning Attendants who work at stations are either Station Cleaners or Turnaround Cleaners. He said that, across the Sydney Trains network, 24 stations are cleaned by station cleaning staff (Cleaning Attendants and Cleaners in Charge), 20 stations are cleaned by outsourced contract cleaners, 119 smaller and quieter stations are cleaned by CSAs, and 17 stations have cleaning staff (Cleaning Attendants and Cleaners in Charge) employed to perform Turnaround Cleaning. He estimated that Station Cleaners at large stations could take up to four hours of an eight-hour shift inspecting and cleaning toilets, but that removing hazardous waste could take up to an hour at a busy station and removing graffiti could take up to 30 minutes. Turnaround Cleaners are responsible for cleaning terminating trains while stationary on the platform and are only employed at stations where train services regularly terminate, such as Central, Hornsby, Parramatta, Bondi Junction, Leppington and Lidcombe. Mr Joleski said that their cleaning activities include the removal of graffiti, litter, hazards, biological waste and spills. He estimated that they may take up to 30 minutes per shift removing offensive graffiti, and up to an hour per shift removing vomit or other noxious materials found while inspecting a terminating train.

[140] In reply, Mr Joleski responded to the statements of Mr Muir and Ms Parsons. Mr Joleski did not agree that the COVID-19 pandemic led to an increase in the types of cleaning that the HSC Allowance was designed to cover, and said that during the pandemic the volume of hazardous waste decreased because of a decrease in customer volumes at stations. Mr Joleski also gave evidence that there were no significant changes to the cleaning standards or frequency expected of Sydney Trains staff due to COVID-19. Although there was a new emphasis on touchpoint cleaning on trains and at stations, this work was done primarily by contractors. As to the examples of hazardous waste in station toilets in Mr Muir's statement, Mr Joleski said this was always required to be cleaned by the Cleaning Attendant or CSA on duty. He noted that the incident Mr Muir described involving cleaning blood from a station bathroom was very uncommon and in such circumstances cleaning contractors would normally be engaged.

[141] Mr Joleski was not required for cross-examination.

Ronald Devitt

[142] Mr Devitt said that the primary purpose of his role as Deputy Executive Director, Fleet Maintenance is to manage the maintenance and presentation of rolling stock, including scheduling and planning to deliver on availability and rolling stock condition targets. He is responsible for ensuring that planning, scheduling, and stock maintenance programs are aligned with business targets for safety and reliability. He said that he attended a number of bargaining meetings in 2022 for the 2022 Agreement relating to the claim made by the Rail Union for allowances for hazardous waste removal, graffiti removal and working with "*nauseous materials*" requiring the use of a respirator.[70] Mr Devitt referred to the position descriptions for Cleaning Attendants and Cleaners in Charge within the Fleet Maintenance Division, and said that these were distinct from those of Station Cleaners and Turnaround Cleaners. He said that they are required to conduct "*G Cleans*" of trains at Maintenance Depots and Stabling Yards, which involves comprehensively cleaning every car in a set, including by removing rubbish, sweeping, cleaning windows, removing graffiti, spot cleaning seats, wiping handrails, sweeping and mopping floors, and on some sets cleaning and decanting toilets.[71] He estimated that, on average, this takes about 30 minutes per car, with additional time being required in some circumstances such as for carpeted trains). They may also be required to conduct "*mini G Cleans*", which are less intensive, taking about 15 minutes per car, and involves removing rubbish and small pieces of graffiti, wiping handrails, and spot cleaning floors, seats and windows.[72] The majority of such cleaning work occurs at night.

[143] Mr Devitt referred to the SWI for G Cleans, which sets out the required PPE including safety footwear, safety eyewear, bump hats, and protective gloves and respiratory protection "*as/when required*". He said that there are also SWIs for specific tasks during G Cleans including for removing graffiti and hazardous waste.

[144] Mr Devitt said that Sydney Trains' position throughout the negotiations was that the proposed HSC Allowance should only be paid to Cleaning Attendants and Cleaners in Charge and that this was intended, in part, to bring up the rates of pay for Cleaning Attendants who are some of the lowest-paid employees under the 2022 Agreement and to recognise the intensity of some of their tasks. In particular, the allowance was primarily aimed at the work of Cleaning Attendants in the Fleet Maintenance Division who routinely carry out heavy-duty cleaning work and who have historically received the Graffiti Allowance and the Respirator Allowance. Mr Devitt referred to the agreed definition of hazardous waste as being "*properties that make it dangerous or capable of having dangerous effects on human health or the environment*",[73] including but not limited to biohazards, human blood and blood products, human bodily fluids,

[70] Witness statement of Ronald Devitt, 20 Jan 2023 (Exhibit 14) at [12]

[71] Ibid at [19]

[72] Ibid at [20]

[73] Ibid at [28]

decanting of trains, pathological waste, microbiological waste and sharps waste. He said that the rationale for including Turnaround Cleaners and In-Transit Cleaners in the HSC Allowance was because they are being transitioned into the Fleet Maintenance Division, and Station Cleaners were also included because they clean hazardous waste (albeit to a lesser extent) and also for the sake of administrative simplicity. Mr Devitt said that although CSAs at smaller station may be required to remove hazardous waste from time to time, Sydney Trains did not extend the HSC Allowance to them because:

- their primary role is to provide customer service;
- they are not responsible for graffiti removal work of the same kind conducted by Cleaning Attendants in Fleet Maintenance Crews;
- they do not conduct any cleaning work that requires the use of respirators; and
- while they are responsible for removing hazardous waste from time to time (e.g. by cleaning station toilets), this is on a lower level than is what required of Cleaning Attendants in Station Cleaner roles, who work at much busier stations with higher demand for cleaning work.

[145] Mr Devitt agreed in cross-examination that CSAs, like Station Cleaners, are not required to work using respirators and do not remove graffiti to the same extent as Cleaning Attendants in Fleet Maintenance.[74] He disagreed with the proposition that CSAs are required to carry out cleaning of hazardous waste on a "*semi-regular basis*" but said they do this "*from time to time*".[75]

Consideration

[146] For reasons of merit, equity and practicality, we do not consider that the HSC Allowance should be paid, either in whole or part, to CSAs who perform cleaning duties, and we reject the Rail Unions' claim in this respect.

[147] As earlier outlined, the starting point of the Rail Unions' case is that the amount of hazardous waste prevalent in the workplace has increased and, as a consequence of the cleaning standards expected by the public and the Rail Entities, there has been a "*sharp increase*" in the amount of cleaning of hazardous waste which CSAs are required to undertake. The evidence did not make good this proposition and in fact contradicted it. Ms Yee's evidence makes it apparent that she has, from time to time, been required to clean hazardous waste ever since she became a CSA in 2010, and any recent changes to cleaning work have been associated with special measures introduced in response to the COVID-19 pandemic and are not connected with cleaning hazardous waste. Mr Muir gave no evidence concerning any recent significant change in the amount of cleaning work, and we understand his evidence to be to the effect that he has been "*routinely*" cleaning hazardous waste ever since he became a CSA in 2007. The collective effect of the evidence of Mr Dixon, Mr McDonald, Mr Joleski and Mr Devitt is that CSAs at smaller and less busy stations have always been required to undertake some cleaning work as

[74] Transcript, 8 February 2023, PNs 514-515

[75] Transcript, 8 February 2023, PN 516

part of their duties, including sometimes cleaning hazardous waste. In relation to the COVID-19 pandemic, any changes which occurred related to "touchpoint" cleaning and not to hazardous waste, and indeed the workload associated with cleaning hazardous waste decreased during the pandemic because of significantly lower patronage levels, which have not yet recovered to the pre-pandemic position. There is no reason to assume other than that the wage rates for CSAs have always been set having regard to the full scope of their duties, including such cleaning duties as they are required to perform.

[148] Accordingly, to the extent that the claim is based on increased work value arising from a significant change of duties or workload, it must fail. In reality, the claim appears to be no more than one for the flow-on of the additional payment agreed to for Cleaning Attendants and Cleaners in Charge as a result of the replacement of the Respirator Allowance and the Graffiti Removal Allowance with the HSC Allowance.[76] The Rail Unions contend that this additional amount constitutes the component of the HSC Allowance applicable to hazardous waste cleaning, but the evidence does not establish that this was the purpose of the establishment of the new allowance. In this respect, we take into account the uncontradicted evidence of Mr McDonald that there was never any agreement concerning the specific purpose of any component of the HSC Allowance, and that of Mr Joleski to the effect that part of the purpose of the allowance was to increase the rates of pay for Cleaning Attendants, being amongst the lowest-paid under the 2022 Agreement, and to recognise the intensity of some of their duties.

[149] A simple flow-on of the increase in pay to cleaners resulting from the introduction of the HSC Allowance to CSAs would be inequitable for two reasons. First, for every hour or part thereof when CSAs perform hazardous cleaning work, they are already on a significantly higher hourly rate of pay than Cleaning Attendants. Therefore, to the extent that it is said that there should be a flow-on because CSAs are, at times, doing the same hazardous cleaning work for which Cleaning Attendants are paid the HSC Allowance, this rationale fails. It would constitute an inequity for this pay difference to be further increased in respect of the performance of the same work. Second, the HSC Allowance operates on the basis that it is paid for the whole of a shift, and the Rail Unions' claim is that the putative hazardous waste component of the HSC Allowance should also be paid to CSAs for the whole of a shift if, for any part of the shift, any hazardous waste cleaning work is required to be done. This would be inequitable because, while it is clear that Cleaning Attendants and Cleaners in Charge do not clean hazardous waste for the whole of their shifts, it is equally clear they do so far more frequently and intensely, especially if they work in Fleet Maintenance. Consequently, it would not be fair for CSAs to receive the claimed component of the HSC Allowance on a per-shift basis in the same way that cleaners do.

[150] Finally, there is a clear impracticality in the Rail Unions' claim. The evidence established that for those CSAs who are required to do cleaning work at all, any requirement to clean hazardous waste may only be intermittent and does not necessarily occur on every shift. The claim proceeds upon the basis that it would only apply in respect of cleaning hazardous waste according to the definition agreed during the bargaining process, as set out in Ms Parsons' evidence (see paragraph [121] above). As was clarified during the hearing, this definition does not encompass the ordinary cleaning of a toilet.[77] Despite the issue being raised with the Rail

[76] See Transcript, 8 February 2023, PN219

[77] Ibid, PNs 517-522

Unions at the hearing, no practical proposal was advanced as to how it might be demonstrated and recorded that, in the course of a shift, a CSA had been required to clean waste which met that definition such as to found the payment of the claimed allowance. Nor was there any explanation as to how the claimed allowance might work in minor or trivial situations — for example, if a CSA were required to pick up and dispose of a single band aid found on a station platform (or claimed that they did). Because CSAs who work at smaller and less busy stations who might be required to perform cleaning duties usually work alone and are self-supervising, these practical difficulties are obvious and significant.

[151] In reaching the above conclusion, we do not intend to diminish the unpleasantness or importance of the work involved in cleaning hazardous waste which is so clearly described in the evidence of the Rail Unions' witnesses. However, for the reasons stated, we consider that this work is already encompassed in the remuneration paid to CSAs and that it would be inequitable and impractical to pass on any component of the HSC Allowance to CSAs.

Conclusion

[152] In answer to question 1, we award the following wage increases in addition to those currently provided for in the 2022 Agreement:

(1) An additional 1% operative from 1 May 2022.

(2) An additional 1% operative from 1 May 2023.

[153] Our answer to question 2 is "No".

[154] We direct the parties to confer as to whether it is necessary to make any order to give effect to our decision and, if so, the terms of that order. Advice as to the outcome of those discussions shall be provided to the chambers of the presiding member within seven days of the date of this decision. In the event of any disagreement, we will invite further written submissions to be provided within a further seven days, and we will then determine the issue on the papers.

THE SEAL OF THE FAIR WORK COMMISSION

PRESIDENT

Appearances:

Y Shariff SC with *H Pararajasingham* of counsel for Sydney Trains and NSW Trains.
I Taylor SC with *L Saunders* of counsel for the Australian Rail, Tram and Bus Industry Union, The Association of Professional Engineers, Scientists and Managers Australia, Australian

Municipal, Administrative, Clerical and Services Union, Australian Manufacturing Workers' Union, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and The Australian Workers' Union.

Hearing details:

2023.

Sydney, in person, with video link using Microsoft Teams:
8 and 9 February.

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