IN THE FAIR WORK COMMISSION

FWC Matter No: AG2014/6009

Aurizon Operations Limited and Ors

Applicants

and

Australian Rail, Tram and Bus Industry Union and Ors

Respondents

FINAL SUBMISSIONS OF THE SECOND, THIRD, FIFTH, SIXTH AND SEVENTH RESPONDENTS

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Introduction

1. These submissions are made on behalf of the Australian Federated Union of Locomotive Employees; the Queensland Services, Industrial Union of Employees; the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union and Together Queensland, Industrial Union of Employees (the Unions).

2. Those unions are covered by and have members employed under each of the agreements that are the subject of this application.

3. The applications to terminate the agreements should be rejected on the following grounds:

   (a) It would be contrary to the public interest to terminate the agreements at this time.

(b) It would not be appropriate to terminate the agreements given:

(i) employees and the relevant organisations overwhelmingly oppose termination of the agreements; and

(ii) the adverse impact on the employees, and the relevant unions far outweighs any benefits which might accrue to the applicant.

The Legal Framework

Construction of legislative provisions

4. If an application for the termination of enterprise agreements is made under s.255 of the Act then, in accordance with s.226 of the Act, the Commission must terminate the agreements if the Commission is satisfied that it is not contrary to the public interest to do so and the Commission considered that it is appropriate to terminate the agreements taking into account the matters set out in s. 226(b) of the Act.

5. Section 226 of the Act provides as follows:

> ***226 When the FWC must terminate an enterprise agreement***
>
> *If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:*
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> *(a) the FWC is satisfied that it is not contrary to the public interest to do so; and (b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:*
>
> *(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and*
>
> *(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.*

Tahmoor Coal Decision

6. The requirements of s. 226 of the Act were given careful consideration in the matter of *Tahmoor Coal Pty Ltd the Tahmoor Colliery Enterprise Agreement 2006; Tahmoor Washery Workplace Agreement 2006* [2010] FWA 6468 ("Tahmoor").

Termination Not Be Contrary to the Public Interest

7. In paragraphs [27] – [31] of the decision, Vice President Lawler set out the authorities relating to what is meant by the phrase "the public interest". In this regard, Vice President Lawler followed the decision *In Re Kellogg Brown and Root Bass Strait (Esso) Onshore/Offshore Facility Certified Agreement* (2000) 139 IR 34 and the High Court's decision in *Queensland Electricity Commission; ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1; (1987) 61 ALJR 393 (1 July 1987); [1987] HCA 27.

8. Consistently with those decisions, in considering public interest the Commission may be called upon to balance competing public interests. It should take into account all of the h

> ***[23]*** *The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards.*

9. It is axiomatic that Parliament was intending to further the public interest by the passage of the Act and that objects of the Act set out the matters which the Parliament considers to further the public interest.

Termination Be Appropriate

10. In Paragraphs [32] – [55] Vice President Lawler discusses what is meant by the use of the word 'appropriate' in s. 226(b).

11. In paragraph [39] his Honour held that s. 226(b) confers a broad discretion that must be exercised judicially. Applying *Paddy v Commonwealth Bank* [2002] FCA 111, Vice President Lawler held that the general discretion was circumscribed only by the subject matter, scope and purpose of the legislation. The scope and purpose of the FW Act in relation to bargaining were found to be matters that must obviously bear upon a proper exercise of the discretion.

12. After considering the objects of the Act, and the objects of the relevant part, Vice President Lawler held:

> ***[49]*** *The objects in s.3(f) and s.171(a) are particularly relevant. They indicate that collective bargaining in good faith for an enterprise agreement is the central way in which, in the framework that has been established by the FW Act, productivity benefits are to be achieved.*
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> ***[50]*** *The object in s.171(b) is also clearly relevant. It emphasises that a key role of FWA is to facilitate good faith bargaining and the making of enterprise agreements. This suggests that that one of the effects of termination which should be considered is whether termination will enhance or reduce the prospects of the parties concluding a new agreement through bargaining.*

> ***[51]*** *The object in s.3(a) is advanced by a termination of an agreement where this would promote productivity. However, the object in s.3(a) is expressed in general terms whereas the objects in s.3(f) and s.171(a) are more specific. Given that principle of construction that the specific overrides the general, this suggests that the emphasis on promoting productivity (part of the object in s.3(a)) is primarily to be achieved through collective bargaining in good faith (the objects in s.3(f) and s.171) rather than by other means, such as termination of an expired agreement.*

13. In this regard, Vice President Lawler approved of what was said by Vice President Watson *in Energy Resource of Australia Limited v Liquor, Hospitality and Miscellaneous Union* [2010] FWA2434. At paragraphs [53] to [55], his Honour made the following observations:

> ***[53]*** *While his Honour emphasised only the object in s.3(a), for the reasons I have given, I consider that the objects in s.3(f) and s.171 are also of particular importance and should be seen as qualifying the general object in s.3(a). I respectfully agree with the outcome in ERA. However, it needs to be borne in mind that the circumstances in that case were very unusual indeed. The agreement in question was some 10 years past its nominal expiry date and had a continuing application to only three employees - less than one per cent of the employer's workforce. The remainder of the relevant workforce was employed on statutory individual contracts and the terms and conditions of their employment would not be directly affected by termination of the agreement in that case. Clearly enough, ERA was not a case where bargaining for a replacement agreement had been ongoing since the passing of the nominal expiry date of the agreement in question.*
>
> ***[54]*** *I respectfully agree with his Honour that it is not intended by the legislation that agreements should remain in place indefinitely and that it is unreasonable to lock an expired agreement in place indefinitely. On the other hand, this does not mean that a party to an agreement has a prima facie right to have the agreement terminated merely because the agreement has passed its nominal expiry date.*
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> ***[55]*** *It seems to me that under the scheme of the FW Act, generally speaking, it will not be appropriate to terminate an agreement that has passed its nominal expiry date if bargaining for a replacement agreement is ongoing such that there remains a reasonable prospect that bargaining (in conjunction with protected industrial action and or employer response action) will result in a new agreement. This will be so even where the bargaining has become protracted because a party is advancing claims for changes that are particularly unpalatable to the other party. While every case will turn on its own circumstances, the precedence assigned to achieving productivity benefits through bargaining, evident in the objects of the FW Act, suggests that it will generally be inappropriate for FWA to interfere in the bargaining process so as to substantially alter the status quo in relation to the balance of bargaining between the parties so as to deliver to one of the bargaining parties effectively all that it seeks from the bargaining.*

14. At paragraph [70] the Vice President concluded that the Act entitles bargaining representatives to hold out and decline to make concessions on matters that are important to them. Both parties in that case had engaged in such conduct, and accordingly the Vice President did not consider that it was appropriate to terminate the agreement.

Subsequent decisions

15. The decision in Tahmoor was approved by Deputy President Sams in the matter of *SDV (Australia) Pty Ltd re SDV Australia Pty Ltd – Warehouse Collective Agreement* 2008 – N0SW [2010] FWC 5385. In that matter DP Sams held:

> ***[40]*** *Obviously, the practical effect of terminating an agreement is to substantially alter the 'status quo' in relation to the bargaining process. I agree with Lawler VP's comments in Tahmoor Coal that it would generally be inappropriate for the Commission to interfere in the bargaining process by terminating an existing agreement.*
>
> ***[41]*** *In this case, there is no doubt the nominal term of the TWU Agreement has expired, that the Union and its members wish to engage in negotiations with the applicant for a new agreement and have commenced, albeit in a preliminary way, discussions for such an agreement. All these ingredients, reinforce in my mind, the inappropriateness of altering the 'status quo' so as to plainly advantage one party's negotiating starting point over the other. This is a powerful reason why it would be inappropriate to terminate the TWU Agreement at this point in the bargaining cycle. I would wish to emphasise, that to do so would be contrary to the objects of the Act and the principles underpinning the primacy given to enterprise bargaining under the Act.*
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> (Emphasis added)

16. Similarly In Royal Automotive Club of Victoria [2010] FWA3483, Commissioner Rowe, after noting the difference s between the FW Act provisions and the old WR Act provisions, held:

> ***[21]*** *Secondly, Section 226 concerning the termination of agreements is found in Part 2-4 of the FW Act which deals with Enterprise Agreements. The legislative scheme and objects of the Act and the objects of Part 2-4 in particular in this respect are quite different from the WR Act. Part 8 of the WR Act which dealt with Workplace Agreements did not have separate objects. The FW Act places a strong emphasis on the objective of facilitating and enabling collective bargaining, bargaining in good faith and the making of enterprise agreements. The termination of an agreement without the agreement of all parties covered by the agreement must now be considered in this context. It is clearly a public interest consideration under s 226(a) if the termination of an agreement would be contrary to the objectives and scheme of the legislation in respect to facilitating and encouraging bargaining and agreements. It is also a context within which the interests of and effects on the parties should be considered as required by Section 226(b).*
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> ***[22]*** *The legislative context created by the FW Act is consistent with the approach taken by Justice Boulton in the Mount Thorley Operations Enterprise Agreement matter 4. Justice Boulton found that:*
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> > *"It is preferable that the parties negotiate a new agreement to replace the 1996 Agreement rather than having that Agreement terminated by the Commission under Section 170MH. In most cases certified agreements remain in place and the terms and conditions of employment provided thereunder continue to apply until a new certified agreement is negotiated by the parties to replace the agreement (see s 170LX(2))." 5*

> ***[23]*** *It has certainly been the case since the introduction of a legislative scheme for collective bargaining in Australia that the platform for bargaining replacement agreements has been with very few exceptions the old agreement. That is, the terms and conditions provided by the old agreement remain in place until a new agreement is negotiated by the parties. There has never been a drop dead date for agreements. The FW Act reinforces this by making the unilateral termination of agreements more difficult including by the introduction of s 226(b) and by the removal of any equivalent to Section 393 of the WR Act. The FW Act also reinforces this by removing the option of statutory individual contracts and by encouraging and facilitating bargaining in good faith.*
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> ***[24]*** *The termination of an agreement in many cases will result in a significant shift in the balance of forces in bargaining. The legislature has deemed it fair to restrict the unilateral termination of agreements and to preserve a situation where in most cases collective agreements remain in place until a new agreement is negotiated to replace it. There is nothing in the legislation that suggests that there should be bias towards terminating an agreement because there is a long period since its nominal expiry date or because it is only relevant to a small number of employees.*

17. The decision in Tahmoor Coal was also approved in the following matters:

    (a) *Shop, Distributive and Allied Employees Association* [2014] FWC 5344;

    (b) *Victorian Canine Association T/A Dogs Victoria re Victorian Caine Association/ASU Inc Enterprise Agreement 2005-2010* [2013] FWC 4260;

    (c) *Lucas Drilling Pty Ltd* [2014] FWCA4213; and

    (d) *Badman v Altice Traffic Pty Ltd re Altice Traffic (SA) Employee Collective Agreement 2009* [2013] FWC4409.

18. More recently s. 226 was considered in the matter of *MFB v UFU* [2014] FWC 7776. In that matter Commissioner Wilson refused to terminate the enterprise agreement applying to the Metropolitan Fire and Emergency Services Board in Victoria. Commissioner Wilson followed the decision in Tahmoor and the authorities referred to above.

19. At paragraph [132] Commissioner Wilson accepted that the objects of the Act were relevant to determining whether the termination of the agreement was contrary to the public interest:

> ***[132]*** *Consideration of these decisions leads to the view that findings about the public interest will invariably be situational, requiring consideration of the particular circumstances of the agreement; the circumstances of bargaining; together with considerations about the productivity or efficiency of the enterprise; and other factors, including the extent to which continuation or termination of the agreement gives effect to the Objects of the FW Act, which are set out in s.3;*

20. Whilst Commissioner Wilson accepted that the objects of the Act were relevant to determining whether the termination was contrary to the public interest, at paragraph [138] the Commissioner held that the termination was not contrary to the public interest. Commissioner Wilson explained that the strongest public interest factor against the termination of the agreement was the effect that the termination would have or the parties' bargaining positions and undue interference in the bargaining process. The Commissioner held that this was a matter related to the private interests of the parties and not the public interests. Respectfully, such a conclusion is wrong and should not be followed.

21. The application of the objects of the Act can only ever occur in circumstances relating to individuals. However, the public interest is served by those objects being applied in every circumstance. If one is to say that the application of objects to particular circumstances only affects private interests of the parties, then the objects can have no work to do in assessing the public interest. Such a conclusion is inconsistent with the Full Bench in *Kellogg Brown.*

Applicants' submissions in respect of Tahmoor Coal

22. The applicants contend in their Outline of Submissions that Tahmoor is incorrectly decided. They do so on the basis that they assert that Lawler VP wrongly gave primacy to the objects of the Act which promote bargaining.

23. That submission cannot be sustained. The approach taken by Lawler VP, and adopted by a number of members of the Commission, rightly recognises that the objects require the promotion of collective bargaining.

24. There are no decisions of the Commission that criticise or refuse to follow the decision in Tahmoor.

Onus

25. If the Commission is not satisfied of both elements of s. 226, then the application must fail.[1] Put another way, if the applicants cannot persuade the Commission that it is both not contrary to the public interest and appropriate in all the circumstances, then the application should be dismissed. Seen in that light it is clear that the onus lies on the applicants to satisfy the Commission of both elements.

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[1] See *MFB v UFU* [2014] FWC 7776 at [104].

Evidence

Background

26. Ownership and operation of railways in Queensland has historically been considered an activity of Government. As observed by Justice Logan in *CEPU and oths v QR Ltd and oths*[2]:

> *A study of Queensland legislation since the time of Queensland's being constituted in 1859 as a body politic separate from the then colony of New South Wales discloses that the ownership and operation of railways has historically been regarded by its Parliament as an activity of government.*
>
> *…*
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> *That Queensland and other States were, at the time of Federation, owners and operators of railways is an assumption which underlies two provisions of The Constitution, s 51(xxxiii)(the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State) and s 51(xxxiv) (railway construction and extension in any State with the consent of that State). In describing the background to these provisions at the time of the Federation debates, Quick & Garran noted, inter alia, that, "[i]t was also perceived that the railways were valuable assets, associated with and forming the main tangible security for the public debts of the colonies" (Quick & Garran, The Annotated Constitution of the Australian Commonwealth, (1901 ed, Legal Books reprint, 1976), pp 643-644, §220).*

27. The first two applicants are the corporate successors to QR Ltd and QR Network Pty Ltd. QR Ltd was a Government Owned Corporation and QR Network Pty Ltd was a wholly owned subsidiary of QR Ltd.

28. QR Ltd was from its inception responsible for establishing, maintaining and managing rail operations in Queensland. These operations included passenger, network, regional freight and coal haulage.

29. Pacific National entered the intermodal freight market and commence competing with QR Ltd quite some time ago.[3]

30. In 2007 a corporate restructure took place and QR passenger Pty Ltd and QR Network Pty Ltd, both wholly owned subsidiaries, were established.

31. In 2009 Pacific National commenced competing with QR Ltd in respect of bulk commodities, including coal.

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[2] [2010] FCA 591
[3] PN1141

32. On 8 December 2009 the Premier of Queensland announced a decision to partially privatise rail operations in Queensland. As part of this plan, the regional freight and coal haulage business was to be privatised and the passenger network was to remain in public ownership. It was determined that QR Ltd and QR Network Pty Ltd were to be privatised and that QR Passenger Pty Ltd was to remain in government hands.

33. Throughout early 2010 QR Ltd went through a difficult process of determining which of the employees of QR Ltd were not required for the soon to be privatised business. These employees were then offered in employment in QR Passenger Pty Ltd. This process was not handled well and was subject of significant litigation and substantial penalties being imposed on QR Ltd and other corporate entities.[4]

34. As a consequence of this process some 3460employees left employment with QR Ltd.[5]

35. Further, at that time a number of guarantees about employment conditions were given by then government. These guarantees reflected the maintenance of existing conditions that had been enjoyed by the employees for many years. After some negotiation it was agreed between the Unions and QR Ltd and QR Network Pty Ltd that these guarantees would be given effect by way of enterprise agreements made under the Act.

36. Each of the Agreements was made in 2010 at or around the time that shares in QR Limited were offered to the public through an IPO.

37. Each agreement contains a number of terms which reflect the entitlements of relevant employees which have existed over many years. Those entitlements were bargained for over many years and reflect part of a package of terms and conditions which often involved lower remuneration than might otherwise have been paid. This included the period from when Pacific National entered the market. A number of the union witnesses give evidence that in 2010 they were prepared to approve the enterprise agreements because they safeguarded existing conditions. That is the Unions and the employees did not seek to bargain for higher wages, rather they sought to forgo higher wages in return for locking in important conditions.

38. To the extent that the applicants now complain that they held "serious concerns" about the conditions being included in the agreements, no evidence of those concerns can be found in the prospectus documents or any of the public statements made at the time of the initial public

[4] See *CEPU and oths v QR Ltd and oths* [2010] FCA 591
[5] Ibid at [114].]

offering[6]. Further, the Australia Eastern Railroad North Queensland Rail Operations Enterprise Agreement 2011 was entered into after privatisation and contains the very same terms now complained of.

Conduct and progression of bargaining

39. Bargaining commenced in in April 2013.[7] Bargaining commenced at Aurizon's initiative and earlier than many of the Unions had expected.[8]

40. Aurizon commenced bargaining with an ambitious log of claims. This log included reducing the number of agreemnest from 14 to 2 and the removal of the following conditions:

    (a) No forced redundancies;

    (b) Restrictions on lift up and lay back;

    (c) removal of RDOs;

    (d) removal of block leisure periods;

    (e) Removal on the restrictions on whether drivers can be required to perform shunting work;

    (f) removal of the restrictions on driving of motor vehicles for train crew;

    (g) broad banding; weaking of the dispute resolution procedure;

    (h) weakening of the consultation requirements;

    (i) removal of the rail passes; and

    (j) reduction in certain allowance.

41. Further, Aurizon sought to translate 14 agreements with 900 pay points and 1100 pages into just two agreements. The task before the parties was mammoth. So much was conceded by Aurizon.[9]

42. Indeed, due to the size of the task before the parties Aurizon unilaterally decided that bargaining

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[6] See PN 694 and 695.
[7] See Brewer [13](a), Young [194].
[8] See PN 334.
[9] See Pn330-335.

should commence early.[10] However, the early start to bargaining had unintended consequences. The Union parties were not ready to start bargaining at that time and had not yet finalised their logs of claims nor had them endorsed by their members. This meant that when bargaining commenced the Unions were not in a position to put forward their own claims, nor where they in a position to properly respond to Aurizon's claims.[11] Further, for the first two months of bargaining the Unions were subject to a confidentiality agreement which prevented them for discussing Aurizon's claims with their members more broadly.[12]

43. However, by far the two biggest impediments to bargaining were Aurizon's insistence that questions of scope should not be dealt with first and that it would not quantify its offer in respect of specific conditions that were being removed other than to refer to the 4% wages offer. [13]

44. On a number of occasions the union representatives made it clear that no progress could be made on Aurizon's desire to remove conditions until questions of scope had been resolved. They Unions' position was simple, until they knew what sort of deal they got on scope, they could not work out what concessions they could make on other matters.[14] Despite the Unions' position Aurizon insisted that the parties negotiate on the core conditions. This caused significant delays.

45. The issues caused by the failure to resolve scope issues were further compounded by Aurizon's failure to properly quantify its offer in respect of each of the conditions is sought to remove from employees. The usual course when party seeks to buy something from another is to say how much they are prepared to pay for it. Despite the repeated requests from the Union representatives,[15] Aurizon refused to do this, other than to say "it was a 4% package."[16] Importantly, at no time did Aurizon seek to establish the costs to each employee of the reduction in terms and conditions.[17]

46. Further, in September 2014, when Aurizon at last agreed to negotiate condition by condition, progress started to be made.[18] However, in the midst of those negotiations, Aurizon peremptorily broke off negotiations and sought the approval of the agreements.

47. The evidence demonstrates that Aurizon's conduct in negotiations to date has been, to say the

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[10] See PN334.
[11] See PN371
[12] Brewer [21]
[13] See PN372 to PN375.
[14] See Brewer [24], [41], [48] and young [201] and [203].
[15] See PN2387 and PN2388.
[16] See PN372 to PN375
[17] See PN385.
[18] See Brewer [91], [93] and [95.2], .

least, intransigent. However, despite Aurizon's conduct progress is being made. An agreement has been reached on the largest stumbling block - scope. Accordingto Aurizon one of the three agreements has been approved by employees. Further, the Unions have approached Aurizon and agreement has been reached for the Unions to provide Aurizon with an offer in respect of its "big ticket" claims. This offer is to be provided by 25 November 2014. [19]

48. Finally, the RTBU has sought a protected action ballot. This will be the first industrial action taken by any of the unions. The effect of that industrial action has not yet been felt and its effect on bargaining is not yet known. However, it is unlikely to make it the resolution of the outstanding claims more difficult. Moreover there can be no criticism of the unions in taking a conservative position in respect of industrial action. This especially so when Aurizon admit that they have factored into their considered locking out the employees if they take protected action.[20]

Aurzion's position and the competitive pressures it faces

49. Aurizon is an ASX listed blue chip company. Aurizon is Australia's largest rail freight operator and is the world's largest rail transporter of coal from mine to port for export markets. [21]

50. Aurizon presently has approximately 7,500 employees. However, fewer than 5,000 are covered by the Agreements.[22] It annual revenue for the 2013/14 financial year was $3.832 billion. This was a 2% increase on the previous year. The underlying EBIT profit figure for 2013/14 was $851. This represented a 13% increase on the previous year.[23]

51. Mr McKeiver frankly concedes that Aurizon is going well and has designs on increasing its profitability. Further, Mr Mckeiver acknowledges that Aurizon is in a growth pattern and that over the next five years coal volumes will increase by 3.4%, compounding, per annum. All of this is consistent with Aurizon's public statements. Its 2013 investor briefing says that it is aiming for a 25% EBIT margin by FY15[24] In its Annual Report for FY14, it states that it is on target for that improvement.[25]

52. In addition to its financial performance Aurizon dominates the coal haulage market in Queensland. It presently has a market share of 70%. Many of its contracts are long term and

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[19] See PN2270 and PN2274.
[20] See PN489.
[21] McKiever [9]-[10].
[22] See PN343.
[23] Aurizon Annual Report 2013-14. See attachment BISS – 5 to statement of Robinson p.1, PN 819 to PN826 and PN1150.
[24] Ibid. BISS 3.
[25] Ibid. BISS 5 at p. 1.

locked in[26]. Indeed in 2013 Aurizon entered into 3 x 4 year coal haulage contract with BMA which was the largest contract in Queensland rail history.[27]

53. Aurizon's only real competitor is Pacific National. Whilst it is true to say that BMA recently entered the market, its presence is so small so as to be insignificant.

54. Whilst Aurizon and Pacific National compete for work, that competition is properly described at the lower end of the competitive spectrum.[28] Further, the intermodal market has been relatively stable for the last two or three years.[29] There are limited opportunities for new providers to enter the market. Indeed BMA's entry to the market was five years after Pacific National's entry to the market which was seven years after the market was open to competition. This suggests that the rate for new entrants is one every six and half years.[30] This is a further indicator of limited competition.[31]

55. To the extent that Mr Morton asserts that Aurizon is the subject of vigorous competition, his opinion represents an overstatement and should not be accepted. The use of the word vigorous is not accepted by Dr Hale as proper description of the pressures faced by Aurizon, nor is it consistent with a common sense approach to the situation that Aurizon finds itself in.[32] Aurizon is one of two providers in a relative closed market. BMA has recently entered the market, but only provides haulage in respect of its own operations. Aurizon presently holds 70% of the market share and owns the below rail assets which any competitor needs to make use of. Whilst it is conceded that the QCA's regulation of the below rail assets removes the worst aspects of monopoly, regulation is a treatment for the symptoms of anti-competitive behaviour. It is not a replacement for true and open competition.[33]

56. Moreover, the entry of BMA into the market suggests that the market is not truly competitive. If the market were truly competitive BMA would not have felt the need to move away from its core business to pursue rail haulage. Indeed, BMA's public statements make it clear that the move from BMA has been undertaken not because BMA has some desire to be in the haulage business, but to increase the competition within the market. Such action is an implicit

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[26] See PN807.
[27] See Allen annexure PA4.
[28] See Hale annexure CH3 page 5.
[29] See PN1141.
[30] See PN 3430 where Mr Morton gave evidence that the network was open to competition from 2001.
[31] See PN 2713, PN2716, PN2727, and PN2273.
[32] TO the extent that there was an attempt to impugn Dr Hale's expertise in cross examination, it clearly failed. See PN2644 to PN2677.

[33] See PN2713 and PN2715.

recognition of the absence of competition in the marketplace. Indeed Marcus Randolph from BHP Billiton explained the rationale for establishing their own rail transport as being the need to make Aurizon more competitive.[34]

57. In this regard Mr Morton's advocacy for the applicants'' case can be seen by his inability to make obvious concessions. For example his refusal to concede that competition was less "vigorous" before BMA entered the market or to recognise that one of BMA's objectives in entering the market was to increase competition, notwithstanding that was what BMA had said.[35]

58. Further, Mr Morton's assertion that Aurizon faces a risky business outlook is plainly overstated. For the reasons set out above, Aurizon is preforming extremely well. It is increasing its revenue and profitability and it is signing record new contracts with its largest client. Further, there have been no public statements to the ASX about risk of this kind. Seen in that light Mr Morton's statement is unable to be sustained and should not be accepted.

59. Contrary to Aurizon's claims in the case, the evidence demonstrates that Aurizon is performing extremely well and that the current agreements are not causing it to lose ground. The evidence demonstrates that Aurizon has successfully made the transition from government owned monopoly provider to the market leading private interest. Whilst Aurizon is the subject of some competitive pressures, these pressures are no more significant than those faced by any other business in the modern economic environment.

The lure of the footplate – Mr Browne and his flawed analysis

60. Aurizon complains about many employee terms and conditions which it has previously agreed to. In support of its attempt top remove those conditions Aurizon relies heavily upon Mr Adrian Browne's analysis of those conditions and his comparisons between the Aurizon conditions and Pacific National's conditions.

61. Mr Browne's analysis contains a number of significant flaws. Those flaws are so significant that his analysis cannot be relied upon.

62. The first and most significant matter is that Mr Browne's analysis proceeded on a number of assumptions. Those assumptions are often not stated or revealed in his report. The reliance upon assumptions as opposed to actual data and the failure to state the assumptions makes it

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[34] McKeiver [54].
[35] See PN3535 to PN 3540.

difficult to asses whether those assumptions were reasonable or likely to be accurate.[36]

63. This concern is further heighten when it is remembers that Messrs McKeiver, Gregg and MacDonald only gave anecdotal or hypothetical examples of inefficiencies arising from the conditions. That is, none of the Aurizon witnesses sought to provide actual evidence of how these conditions work in practice and the effect that those conditions are having on a day to day basis. In fact Mr MacDonald frankly admitted that the restrictions he complained of did not in practice cause any problems at all because of the attitude of employees to accommodate the employer.[37]

64. Secondly, Mr Browne's analysis did not take into account aspects of the current agreements that were Aurizon's benefit. For example Aurizon employees work a 40 week, whereas Pacific national work a 38 hour week. Mr Browne adjusted the Pacific National wages up to reflect 40 hours. However, at no time did Mr Browne attempt to calculate or quantify the advantage accruing to Aurizon by virtue of the 40 hour week. Further, Mr Browne's unwillingness to concede the obvious, namely that a 40 hour week offers some benefits to an employer over a 38 hour week, demonstrates the partisan way in which his analysis has been conducted.[38]

65. Thirdly, Mr Browne's analysis proceeded on the basis that Aurizon employees would always insist on their strict legal rights and never voluntarily agree to do something which Aurizon could not compel them to perform. The evidence in this case demonstrates that Aurizon employees regularly volunteer to undertake work in circumstances where Aurizon could not compel them to do so. Further, such an assumption is inconsistent with Mr Browne's own experience of the willingness of staff to help out.[39]

66. Fourthly, Mr Browne concedes that he had "no visibility" into the way in which the conditions contained in the Pacific National agreement operated in practice or how Pacifica National organised its workforce or the allocation of work. This is a significant shortcoming. Further, Mr Browne had not been provided with the modelling of Pacific National's labour costs undertaken by Aurizon. It should also be noted that Aurizon have not led any evidence about that modelling. The absence of this evidence suggests that it does not favour Aurizon.

67. Fifthly, Mr Browne's analysis was undertaken against the 2009 Pacific National agreement. It

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[36] See PN1882 to PN1884.
[37] PN1418-23
[38] See PN1667
[39] See PN1942.

ought to have been updated against the 2014 agreement and the wages rates contained therein. Interestingly, Mr Browne concedes this is in his reply statement, but did not seek to undertake any further analysis or to give evidence of any such further analysis. Further, Mr McKeiver concedes that any competitive disadvantage may have changed.[40]

68. Finally, Mr Browne despite being aware of Pacific National's 6% yearly retention bonus, failed to include that in his analysis. The 6% bonus represents a significant increase in Pacific National's wages. When one includes the annual wage increase over the course, plus the 6% bonus it is apparent that Mr Browne's figures significantly understates the advantage that Aurizon enjoys in respect of wages.

69. Despite being aware of this significant remuneration Mr Browne failed to include it in any analysis he undertook. Further, Mr Browne offered no explanation for why he excluded this additional remuneration. Once again such conduct suggests that Mr Browne undertook his analysis with the goal of making the Aurizon agreements look as uncompetitive as possible.

70. Having regard to the foregoing matter it is apparent that Mr Browne's analysis cannot be relied upon.

The importance of the conditions to employees and their views about termination

71. There is a great deal of evidence before the Commission to establish that termination of the agreements will have a drastic effect on the employees covered by them.

72. Those agreements were reached on the basis of a package. The evidence of employees shows that rates of pay have been lower for many years because of the existence of the terms which employees value not just in terms of maintaining a work/life balance but in respect of health and safety issues.[41]

73. The survey undertaken by Dr Muurlink reveals that:

    (a) 85% of employees oppose the termination of the agreement. After completion of the interviews 89% opposeds

    (b) there is a high degree of comprehension about the terms and conditions enjoyed by

[40] See PN837.
[41] See Young [61] and [64] on which he was not cross examined.

employees;

(c) on a scale of 0-10, the importance rating for no forced redundancy was 8.45;

(d) on a scale of 0-10, the importance rating of the lift up and lay back entitlements was 8.04;

(e) on a scale of 0-10, the importance rating for the consultation obligations was 8.82; and

(f) on a scale of 0-10, the importance rating for the shunting requirements was 6.95%.

74. The report of Dr Muurlink is amplified by the evidence given by the Aurizon employees. This evidence is as follows.

Mr Bernard Misztal

75. Mr Misztal is a fitter employed by Aurizon at the Rockhampton workshop. He is the AMWU delegate. He is 58 and a half years old.

76. Mr Misztal's age and length of service make moving or finding other work difficult.

77. Mr Misztal gives evidence about the privatisation process and why he voted to approve the agreements.

78. Mr Misztal gives evidence of the importance of the following conditions:

(a) no forced redundancy and relocation;
(b) rail passes;
(c) dispute procedure;
(d) drug and alcohol testing;
(e) internal vacancies;
(f) LDOs on public holidays; and
(g) RDO arrangements.

Mr David Wotton

79. Mr Wotton is employed as a wagon maintainer by Aurizon at Toowoomba. He is the AMWU delegate.

80. According to Mr Wotton his age and experience would make finding other work outside of Aurizon very difficult.

81. Mr Wotton gives evidence of the importance of:

(a) no forced redundancy and relocation;
(b) rail passes;
(c) dispute procedure;
(d) drug and alcohol testing;
(e) internal vacancies;
(f) LDOs on public holidays; and
(g) RDO arrangements.

Mr Mark O'Dempsey

82. Mr O'Dempsey is a production support officer at Redbank. He is the QSU delegate.

83. Mr O'Dempsey gives evidence about the privatisation process and the enterprise agreements that were agreed to in 2010. Mr O'Dempsey gives evidence about the importance of maintaining the existing conditions in the agreement of 2010 being a key factor for his support.

84. Mr O'Dempsey gives evidence about the importance of:

(a) no forced redundancy and relocation;
(b) rail passes;
(c) dispute procedure;
(d) drug and alcohol testing;
(e) internal vacancies;
(f) LDOs on public holidays; and
(g) RDO arrangements.

Ms Sandra Bratt

85. Ms Sandra Bratt is employed by Aurizon as an electrical fitter mechanic. She is a CEPU delegate.

86. Ms Bratt is an EIT.

87. Ms Bratt speaks about the difficulties she has had in finding alternative employment.

88. Ms Bratt also give evidence about the importance of:

(a) no forced redundancy and relocation;

(b) rail passes;

(c) dispute procedure;

(d) drug and alcohol testing;

(e) internal vacancies;

(f) LDOs on public holidays; and

(g) RDO arrangements.

Mr Anthony Brotherton

89. Mr Brotherton is employed by Aurizon as a locomotive driver at Toowoomba.

90. He is an AFULE member.

91. Mr Brother gives evidence about the importance of:

(a) no forced redundancy and relocation;

(b) rail passes;

(c) dispute procedure;

(d) drug and alcohol testing;

(e) internal vacancies;

(f) LDOs on public holidays; and

(g) RDO arrangements.

(h) signing on at a station as apposed to on the train;

(i) lift up and laid back;

(j) hours of work;

(k) the problems with drivers performing shunting; and

(l) car driving restrictions.

Mr Bruce Hodby

92. Mr Hodby is employed by Aurizon as a train driver at Blackwater.

93. He is an AFULE member and the sub branch secretary.

94. Mr Hodby gives evidence about the importance of:

(a) no forced redundancy and relocation;

(b) rail passes;

(c) dispute procedure;

(d) drug and alcohol testing;

(e) internal vacancies;

(f) LDOs on public holidays; and

(g) RDO arrangements.

(h) signing on at a station as apposed to on the train;

(i) lift up and laid back;

(j) hours of work;

(k) the problems with drivers performing shunting; and

(l) car driving.

Mr Michael Coxon

95. Mr Coxon is employed by Aurizon as a locomotive maintainer.

96. He is an electrician by trade.

97. Mr Coxon give evidence about the importance of:

(a) no forced redundancy and relocation;

(b) rail passes;

(c) dispute procedure;

(d) drug and alcohol testing;

(e) internal vacancies;

(f) LDOs on public holidays; and

(g) RDO arrangements.

Mr Stephen Peacock

98. Mr Peacock is employed by Aurizon as a network controller. He is a QSU delegate.

99. Mr Peacock give evidence about:

(a) no forced redundancy and relocation;

(b) rail passes;

(c) dispute procedure;

(d) drug and alcohol testing;

(e) internal vacancies;

(f) LDOs on public holidays; and

(g) RDO arrangements.

Mr Stewart Rach

100. Mr Rach is employed by Aurizon as a train driver at Gladstone.

101. He is the AFULE delegate.

102. Mr Rach gives a detailed response to the following issues:

(a) shunting/ shunters have better training/ the demarcation reduces the workload for train drivers;
(b) roster-the advanced notice is important to work life balance given the unusual hours worked by Aurizon employees;
(c) overtime- this response is weak;
(d) lift up and lay back;
(e) shift link;
(f) driver only operations – Mr Rach deals with this is two different place in his affidavit. He explains that some trains do not have a TP and therefore driver only operations are more dangerous;
(g) leisure periods – Mr Rach give evidence that given the variations in shifts and roster are important for employees to have periods of leisure;
(h) car driving restrictions – Mr Rach gives evidence about the reasons for the car driving restrictions. This evidence predominantly relates to fatigue; and
(i) depo duties- Mr Rach stridently opposes the suggestion that drivers do not do any work whilst in the depo after driving trains. However, his evidence appears to suggest that if the drivers are not actively directed to do something they will not do any tasks.

103. Mr Rach also give evidence about the importance of:

(a) no forced redundancy and relocation;
(b) rail passes;
(c) dispute procedure;
(d) drug and alcohol testing;
(e) internal vacancies;
(f) LDOs on public holidays; and
(g) RDO arrangements.

No forced redundancies

104. The provisions about no forced redundancy are of obvious importance to all employees. There is substantial evidence about the age and length of service of many of the employees. Many of them have legitimate concerns about their ability to obtain work outside of Aurizon. These concerns are real and not fanciful.

105. Moreover, the provisions have not prevented Aurizon from reducing the total number of employees by a substantial amount in a short period.[42].

106. Further, there are 69 employees whose employment will be brought to end almost immediately upon the removal of the no forced redundancies provision.[43]

107. Job security is an immensely important aspect of any employee's conditions of employment. In this case, the no forced redundancy entitlement is a longstanding entitlement for the Aurizon employees. It is entirely reasonable that the employees wish to retain this clause or to obtain significant compensation for its removal. Aurizon may well have a desire to remove the condition. However, it operates in world where that was a condition it agreed to. The change of ownership is irrelevant. In these circumstances, it is incumbent upon Aurizon to make realistic proposals to remove this condition (and others).

Lift up and lay back

108. The lift up and lay back provisions give train crew certainty about their hours of work. There is considerable evidence about why this certainty is important to workers who have varying shifts and uncertain patterns of work.

109. The fact that employees want some degree of predictability in respect of their hours of work is not surprising or unreasonable. This is especially so in circumstances where those employees already have uncertain and changing patterns of work.

110. Further, Aurizon are not able to demonstrate what effect removing the lift up and lay back provisions would actually have on productivity.[44]

111. It is apparent from the evidence that Aurizon wish to be able to vary the start and finish times

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[42] See PN 1039, PN1044 and PN1414.
[43] See PN590.
[44] See PN1174.

of train crew's shifts with very limited notice to the affected employees. For example Mr Gregg concedes that Aurizon wants the ability to contact an employee at 5.30am and advise them that their new start time is 6am instead of 9am.[45]

112. Seen in context the changes to lift up and lay back are of substantial importance for Aurizon employees. It is reasonable that they seek to retain those conditions or that they require compensation from Aurizon for the removal of that condition.

Rail passes

113. Rail passes are a long standing entitlement. They permit Aurizon employees to travel on the suburban train network at no cost. Such an entitlement plainly forms part of an employee's remuneration. There is some evidence that in the case of some of the employees in South East Queensland that this entitlement is of substantial value.

114. If Aurizon seeks to remove this entitlement they should offer to compensate the employees for it. The quantification of the value of the entitlement should be a simple and straight forward mater.

Shunting restrictions

115. There is considerable evidence before the Commission that shunting is a dangerous task that varies from depot to depot. It is conceded by Aurizon that drivers should not be required to undertake shunting unless they are trained in the shunting requirements at the depot in question. Given the number of different depots that each driver visits and the risk of death or serious injury if mistakes are made , it is not unreasonable that train crew support the retention of the restrictions on the performance of the shunting work.

116. In this matter the Commission is not required to determine whether it is desirable that the restrictions on shunting be maintained or to what extent they should altered. The real question facing the Commission is, in light of the evidence, are the employees' concerns unreasonable and is their position untenable? The answer to that question is obviously no. The restrictions placed on shunting and any conditions imposed upon the performance of that work are serious matters and are matters that are properly left to the employees and the employer to negotiate.

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[45] See PN 1184.

Car driving restrictions

117. As with shunting, there is considerable evidence before the Commission about the safety issues associated with train crew driving motor vehicles after the performance of train driving. Again while reasonable people may differ about what restrictions are appropriate, it cannot sensibly be suggested that there should be no restrictions or that employees do not have a proper interest is being involved in the setting of those restrictions. Once that is accepted it becomes apparent that the employees' position is respect of this issue is reasonable and understandable. Moreover, the setting of those restrictions are properly a matter for the employees and the employer to agree on.

The Public Interest

118. As noted above the determination of whether the termination of the agreements is not contrary to the public interests involves a consideration of all relevant factors bearing upon the interests of the public.

119. It is important for the purposes of applying s.226 of the FW Act to consider the relevant factors referred to in that section separately, paying due regard to overlapping considerations.

Objects of the Act and the Part

120. Important to a consideration of the public interest is the promotion of the objects of the *Fair Work Act*. For the reasons set out above, the Parliament has decided that the public interest is further by the advancing the object of the Act.

121. The respondents contend that there are two object which need to be considered in this respect. They are:

(a) S. 3 (f) - achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(b) S. 3(d) - assisting employees to balance their work and family responsibilities by providing for flexible working arrangements.

Bargaining for productivity

122. The analysis of the objects, the legislative scheme of the Act and their application to matters

such as that before the Commission now adopted by Lawler VP in the *Tahmoor* case (and accepted in numerous decisions thereafter) is appropriate.

123. It is apparent from the objects of the Act and the Act emphasis on collective bargaining that the Parliament intended that the collective bargaining would be the primary way in which terms and conditions should be set. Once that is accepted it follows that action which would have the effect of restricting or otherwise interfering in collective bargaining are not in the public interest.

124. In this case the employer seeks significant productivity improvements. Specifically it seeks to remove longstanding and valuable entitlements from employees. The scheme of the Act is that such arrangements should be reached collectively between the employees on the one hand and the employer on the other. The Commission should, consistent wit that scheme and the objects of the Act eschew intervention which would have the effect of resolving the bargaining dispute in favour of one party.

125. For that reason alone, it would be contrary to the public interest to terminate the agreements at this stage.

Undermining of QCA Regulation and adverse effect on competitors

126. The evidence discloses that Aurizon is subject to an undertaking under the *Queensland Competition Authority Act 1997*. That Act provides, in Division 7 that undertakings must be given by organisations such as Aurizon who have a monopoly over certain assets (in Aurizon's case the below rail assets over a large part of its network). Under s.133 of the Act the authority can require an operator or owner, such as Aurizon, to give a draft access undertaking which is designed to limit the cost which the operator can charge for access to the assets. Aurizon has given such an undertaking which is due to expire on 30 June 2015. In 2013 it had proposed new draft access undertaking to replace the existing one. That was rejected after investigation by the QCA. As Mr Morton notes in his evidence, the QCA considered that over the four years of the proposed undertaking Aurizon's claim for costs was $457 million too high.

127. On 11 August of this year Aurizon offered a new draft access undertaking which is being considered by the authority at present. Submissions in respect of it were due on 3 October. A draft decision on policy will be made by the Authority in mid-December with submissions on

that in February 2015. The final decision will be made in May 2015.[46]

128. In calculating the cost to Aurizon, its labour costs in respect of the maintenance of its below rail network form part of the consideration.[47]

129. Mr Morton conceded that if the labour costs used to calculate the basis of the MAR figure were the actual costs, and Aurizon were able to reduce those costs it would receive an additional payment over and above that which QCA had determined was appropriate for the competitive operation of the network. At page 43 of the MAR decision, the QCA deals with operating costs. At page 58 it noted that Aurizon submitted that labour costs should be treated as a separate factor for the purposes of cost escalation over the life of the undertaking and that this should be AWOTE.

130. The QCA accepted that there should be a separate labour cost adjustment factor, but that this should not be AWOTE (around 5% per annum over the course of the undertaking) but should instead be ABS wage price index.

131. In terms of train controls, safe works and operations costs the QCA said:

> *Aurizon Network has proposed we consider its actual costs during UT3 rather than the UT3 costs allowances when establishing efficient costs. Given the cost reductions achieved by Aurizon Network across the train control, safe workings and operations function over the course of UT3, we consider that 2012/13 actual costs are either at or are transitioning to an efficient baseline cost for these costs components.*

132. At page 62 they said:

> *Based on the above analysis our draft decision is to use 2012/13 actual costs as the base costs for estimating efficient costs for train control, safe working and operations costs for 2014 DAU period.*

133. The effect of this is that the QCA proceeded on the basis that the benchmark labour costs, for the purposes of determining the maximum allowable revenue, were Aurizon's actual costs. This means that should the Commission terminate the agreements Aurizon will enjoy a substantial windfall. Such a windfall will undermine the QCA undertaking process.[48]

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[46] See exhibit F14

[47] See Maximum Allowable Revenue decision – exhibit F19.

[48] This is consistent with the hypothetical proposition accepted by Mr Morton (see PN3515) and contrary to the supposition which was opined by Mr Morton (see PN3517).

134. Accordingly, it is important to bear in mind a number of significant public interest considerations:

(a) Aurizon operates in a market which is regulated because it is not properly competitive.

(b) That regulation involves Aurizon being required to make available access to its network at a fee which the QCA determines to be fair (not a fee determined by competition in an open market).

(c) Aurizon's first application in respect of that fee was found by the QCA to involve grossly inflated assessments of its costs.

(d) The position in regard to ongoing fees after the expiry of the existing undertaking has been under consideration for many months in a lengthy process which has almost reached its conclusion.

(e) It is unlikely that if these agreements are terminated it will be possible to factor into the undertakings which Aurizon would be required to give the true cost of its maintenance and operation of the below rail network.

(f) Accordingly, it is likely that Aurizon will achieve a substantial advantage in the market by being able to charge more than the true cost for access to its network.

(g) An undertaking once made and approved can only be withdrawn by the undertakor (that is Aurizon) in certain circumstances. There is no ready procedure under the Act for amendment of it by the QCA if circumstances change.

135. Therefore in the circumstances of this market and Aurizon's current position, there is a strong factor to be brought to bear in support of the proposition that termination of the agreements would be contrary to the public interest.

Appropriateness

Aurizon's conduct and the significant nature of the changes sought

136. In this matter Aurizon seeks substantial changes to the status quo. Aurizon frankly concedes as much.

137. However, notwithstanding the concession as to the extent of the changes sought, Aurizon have

approached the bargaining in intransigent and belligerent manner. From the outset Aurizon have refused to negotiate on scope. This is notwithstanding the Unions' views that scope was one of the most significant changes sought by Aurizon and a threshold matter that needed to be resolved prior to the other claims.

138. Further, Aurizon have not made a genuine attempt to value the totally of conditions they wish to remove from employees. Given the failure to undertake such work it is difficult to see how they could consider that their offer of 4%, which is somewhere between 1-2% over CPI, was fair and reasonable. This was also compounded by Aurizon's unwillingness to identify what compensation was being provided for the removal of which conditions.

139. Despite the attitude being adopted by Aurizon some progress is being made. Firstly, agreement has been reached on scope. This has involved a substantial concession from the unions from 14 agreements to 3. It is also important to note that there have been no concessions of such a magnitude from Aurizon. Further, on Aurizon's case one of the three agreements has been approved by employees.

140. Given that it is Aurizon which seeks such substantial change and that it is Aurizon which has caused so much of the delay in bargaining, and that the unions have made significant concessions, it is not appropriate in the circumstances for the Commission to intervene, by terminating the agreements, and grant Aurizon everything that they have sought from the beginning but have not been willing to bargain for.

Importance of conditions

141. The conditions which Aurizon seek to remove are real and substantial for the employees concerned. The Conditions affect job security, hours of work, rostering, safety and pay through allowance and broad banding. These are not esoteric matters. They have real and concrete effects for the employees concerned.

142. If Aurizon wishes to achieve the productivity gains it has identified, it should like any other employer, pay for those advances. It is a large well resourced and extremely profitable company. It currently pays considerable less than its biggest competitor. There are no special circumstances which warrant it being given what it is not prepared to pay for.

Enforceability of undertaking

143. In their written outline of opening the Respondents took issue with the passage in *Tahmoor Coal*

at [13] in which Lawler VP stated that an undertaking given in the same circumstances as the one offered by the Applicants in this case would be enforceable in a Court of Equity.

144. The Respondents indicated that they submitted that that statement was incorrect, and relied upon the High Court decision of *Australian Broadcasting Commission v Lenah Game Meats* (2001) 188 CLR 199.

145. In their opening the Applicants did not seek to assert that Lawler VP's decision in this respect was correct. Instead they relied upon two decisions which were said to give support to the proposition that the offering of the undertaking to relevant employees could found a variation to their contracts of employment which would be enforceable at common law. Those decisions were *Commonwealth v Crothall Hospital Services (Australia) Ltd* (1981) 54 FLR 439, 36 ALR 567 and *Brambles Holdings Limited v Bathurst City Council* (2001) 53 NSWLR 153.

146. Neither of those cases makes good the proposition which the Applicants assert. *Crothall* was a case in which that company had entered into a contract with the Commonwealth to undertake cleaning services. The contract contained provisions in respect to variations. During the course of the contract Crothall submitted invoices or claims for payment which were not consistent with the contract. Nor were they supported by formal variations in the manner contemplated by the contract itself. Notwithstanding this, officers of the Commonwealth issued certificates authorising payments of the relevant invoices. Ultimately the Commonwealth sought to claim that the payments above the initial contract rate were made under a mistake. It also sought to rely upon the *Auckland Harbour Board v The King* [1924] AC 318 to claim that the payments were made without authority of Parliament and were therefore recoverable.

147. As to the first proposition the Court found that by its conduct the Commonwealth in accepting the invoices and making the payments after having them certified under the *Audit Act* as payable had agreed to a variation of the contract.

148. That is clearly quite different to the present case in which the employees are not asked to do anything other than what they have already contracted to do, that is work, in return for their wages and the contracted conditions.

149. The second case, *Brambles*, is likewise of no assistance to the Applicants. In that case Brambles claims that notwithstanding that it had acted upon the basis of a variation to an agreement and had taken the benefit of that variation it was not bound by it and was not bound to accord to the Bathurst City Council the rights which accrued to it under the variation. In other words, like

Crothall it was a case in which the party who had acted in accordance with the purported variation was found to be bound by it.

150. The distinction with the present case is that the question will not be whether or not the employees are bound by the variation to the contract if there be one, but whether the employers will be bound.

151. It is of course a principle of long standing that any contract, including a variation to a contract must be supported by consideration.

152. A factual situation more consistent with the current one (although still relevantly different) was dealt with by the Supreme Court of Victoria in *Ajax Cooke Pty Ltd v Nugent* (1993) 5 VIR 551. In that case the employer placed a notice on a noticeboard stating that employees would be entitled to certain redundancy benefits. An employee was dismissed on the grounds of redundancy and sued successfully to recover the benefits in the Magistrates' Court. The employer appealed, in an appeal which was confined to the questions of error of law, to the Supreme Court.

153. JD Phillips J considered the question of whether the Magistrate had fallen into error. Relevantly to the present circumstances, he considered whether the longstanding principle in *Stylk's* case would prevent recovery. In order to overcome that difficulty it was necessary for the employee to show that consideration had moved from him to the employer to support the variation to the contract. His Honour thought that there were three possible types of consideration and ultimately found that it was open to the Magistrate to conclude that an employee would have given consideration to the employer by remaining in employment until he or she was made redundant.

154. The very same notice on the very same noticeboard was considered in another case by the Court of appeal in *Ajax Cooke Pty Ltd v Chee Wong* (unreported, 2 September 1996) Tadgell, Ormiston and Callaway JJA. Slightly different considerations arose in that case. But the Court noted that JD Phillips J's judgment was confined to the question of whether it was open to the Magistrate to make the decision that had been made. Callaway JA, with whom the other members of the Court agreed, stated that had it been up to him he would have decided that the posting of the notice was at most a representation and was not an offer to enter into a contract.

155. Applying the analysis of Phillips JA to the circumstances here, one has to ask what is the consideration which could be said to move from the employees to the employer in support of a

variation of the contract allowing the employees to enforce the undertaking against the employer.

156. It is very difficult to characterise it in the same way as Phillips JA did in *Nugent*. It seems difficult to say that an employee remaining in employment for the few months of the undertaking thereby gives consideration for a variation to the contract of employment.

157. All of this of course proceeds from an assumption that the contracts of employment provide that employees will be paid their award entitlements and be afforded award conditions.

158. This point, although difficult, is neither esoteric nor unimportant in the context of this case. The Applicants offer the undertaking for a good reason. They seek to rely on it as mitigating the effects of termination of the agreement on the employees. It is common ground that it does not mitigate all of the effects, many will occur immediately. However, if the undertakings are unenforceable or their enforceability is doubtful, difficult and potentially expensive, the weight to be accorded to them is less. Furthermore, even on the Applicants' best case, that is that the undertakings vary the contracts, what can be varied one way can be varied another. No doubt employees can have their employment terminated on notice and can thereby have their terms and conditions of employment varied on the same notice. If they wish to accept reduced terms and conditions then they can continue working (this is the point of *Crothall* and *Brambles*). If they do not wish to accept reduced terms and conditions then under the principle in *Addis v Gramophone Records* their entitlements are limited to the notice period under their contracts which, in circumstances where the agreements had been terminated would be the NES.

159. The other aspect of the undertaking of importance is that, again, even taking at its highest from the point of view of the Applicants, its limited duration places another weapon in the Applicants' armoury in the bargaining to proceed after termination. That is, it is crafted in such a way to allow the Applicants to pressure the employees in make agreement quickly or face reductions in wages and conditions on the expiry of the undertaking. It would have been open to the Applicants to offer to undertake wages on an ongoing basis. After all they are not seeking to reduce the rate of pay as opposed to conditions in bargaining. The undertaking represents a position for them which is superior than what they would obtain if they were able to achieve agreement on the enterprise agreements which they seek. Accordingly, it should be inferred that the only reason for having a sunset provision in the undertaking is to further enhance the employer's position in bargaining.

160. In the circumstances, the problematical nature of the undertaking and the poison pill wrapped

in it – that is the sunset provision – means that far from improving the Applicants' position it detracts from it both on public interest grounds and in respect of the appropriateness of termination because of the effect on employees.

Granting the application will cause an inevitable race to the bottom

161. Termination would undermine bargaining and deliver a tremendous advantage to the Aurizon companies against their competitors. Moreover, it will deliver an advantage that they were not able to secure through good.

162. If the agreements are terminated, then Aurizon will pay less than their competitors and have all of the productivity gains they seek. This is especially so if after six months no agreement has been reached and the employees revert to the Modern Award. This will enable them to undercut Pacific National. Pacific National will then be forced to adopt a similar course when their agreement expires. Given the Aurizon employees' experience, the Pacific National employees will be either forced to accept Pacific National's offer or risk the ultimate termination of their agreement.

163. In other words if Aurizon is successful in this application it will lead to a race to the bottom, not the maintenance of appropriate standards in terms of conditions of employment in the industry.

Conclusion

164. For the foregoing reasons it is respectfully submitted that the application should be dismissed.

Dated: 12 November 2014

W L Friend QC
Counsel for the Respondents