



DECISION

Fair Work Act 2009

s.739 - Application to deal with a dispute

**Australian Rail, Tram and Bus Industry Union
&
Automotive, Food, Metals, Engineering, Printing and Kindred Industries
Union
v
Sydney Trains
(C2023/6548 & C2023/7155)**

DEPUTY PRESIDENT CROSS

SYDNEY, 17 MAY 2024

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)]

[1] Applications were made by the Australian Rail Tram and Bus Industry Union (the RTBU), and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) (together referred to as the Applicants), pursuant to Clause 8, Dispute Settlement Procedure (DSP), of the *Sydney Trains and NSW TrainLink Enterprise Agreement 2022* (the Agreement). The disputes relate to Clause 32.1 – Uniforms and Personal Protective Equipment of the Agreement. The Applicants dispute the manner of the application of Clause 32.1 of the Agreement by Sydney Trains (the Respondent/Sydney Trains).

Description of the Dispute

[2] The Applicants noted that in bargaining for the Agreement, a significant issue between the parties was the wearing of shorts and other uniform items suitable for hot weather conditions.

[3] As a result, the parties amended Clause.32.1 of the Agreement, which now provides as follows:

“The Employer will provide Employees in operational roles, e.g. train crew, on-board services station operations, maintenance and infrastructure Employees, with uniforms and where required, Personal Protective Equipment (PPE). These will be suitable and appropriate to the type of work activity being undertaken and the risks involved in those types of work activity. Without limiting the generality of this clause, as part of the Employer’s uniform offering, the Employer will provide Employees the option of wearing shorts and other uniform items suitable for hot weather conditions other than in circumstances where there is an unacceptable risk to safety.”

[4] The AMWU noted that employees engaged in the Engineering & Maintenance Branch (EMB) of the Respondent perform tasks from time to time that may constitute an unacceptable risk and, in those circumstances, would not permit the wearing of shorts. However, irrespective of the type of work activity being performed on any given day, if any part of employee's role requires them to perform a task that constitutes an unacceptable risk, Sydney Trains requires that employee to wear long pants for all work required. The AMWU characterised this as a "blanket approach" being applied by Sydney Trains such that the relevant employee can never wear shorts, even if they do not perform tasks that constitute an unacceptable risk on a particular day.

[5] Some of the subject employees are sometimes referred to as "infrastructure workers", being trade and non-trade frontline employees engaged in maintenance and construction duties in respect of the rail infrastructure managed and operated by Sydney Trains.

[6] The RTBU stated that Sydney Trains is applying a ban on the wearing of shorts and other summer uniform items in a "blanket manner", rather than in specific "circumstances" as envisaged by clause 32.1.

[7] The AMWU submitted that Sydney Trains' approach to determining whether employees are entitled to wear shorts does not align with the requirements in cl.32.1, as:

- (a) employees' uniform must be suitable and appropriate to the type of work activity being undertaken; and
- (b) employees must be afforded the option to wear shorts where that work activity does not constitute an unacceptable risk to safety.

The Question for Determination

[8] The question for arbitration was determined by the Commission. The question is:

"Having regard to the operation of clause 32.1 of the Sydney Trains and NSW TrainLink Enterprise Agreement 2022 and the obligations of Sydney Trains under section 19(1) of the Work Health and Safety Act 2011 (NSW) and section 52(1) of the Rail Safety National Law (NSW), can Sydney Trains lawfully and reasonably direct relevant employees that they perform their work wearing long pants, where Sydney Trains has assessed that for those particular employees that the risk of them wearing shorts would pose an unacceptable risk to safety?"

[9] The hearing of the Applications occurred on 28 February 2024 (the Hearing).

Background Facts

[10] Pursuant to directions issued by the Commission, the parties filed statements and submissions. Consisting of the evidence before the Commission:

- (a) The AMWU relied upon statements from:
 - (i) Mr David White – An XPT Storeman and Health and Safety Representative (HSR);

(ii) Mr Keith Lang, employed by Sydney Trains as a Heavy Plant Technician, since 24 February 2003. Mr Lang is also the State President of the AMWU New South Wales Branch and an elected HSR for Heavy Plant and Resurfacing for the Heavy Plant and Resurfacing Work Group in Auburn, New South Wales; and

(iii) Mr Luke Warwick-Smith – An Engineer and Operator in the Strathfield Rail Equipment Centre (Strathfield REC), and elected HSR for the Strathfield REC work group.

(b) The RTBU relied upon statements from:

(i) Ms Bronwyn Kelly – An RTBU Organiser who was, and continues to be (due to leave taken) a cleaner based at Lidcombe station;

(ii) Mr Kerry Williams – An Infrastructure Worker with Sydney Trains;

(iii) Mr Michael Sullivan – An Infrastructure Worker with Sydney Trains, and an elected official with the RTBU in the positions of NSW Infrastructure President, RTBU NSW Branch Councillor, RTBU National Infrastructure Committee member and RTBU NSW Executive Committee member;

(iv) Mr Ricky Keehn – An Organiser with the RTBU; and

(v) Mr Steve Hatcliffe – A Cleaning Attendant employed by Sydney Trains.

(c) Sydney Trains relied upon statements from:

(i) Mr Mitchell Gaskin, Director Safety Environment Quality and Risk (SEQR), Service Delivery Engineering and Maintenance, Sydney Trains; and

(ii) Mr Nev Nichols, Executive Director, Engineering and Maintenance of Sydney Trains.

[11] Only Mr Lang, Mr Gaskin and Mr Nichols were cross-examined, and it was apparent that there were no contested facts of any significance requiring determination. I note that, curiously, Mr Nichols stated he did not read any of the statements in chief of the Applicants.¹

[12] As noted above, Clause 32.1 of the Agreement was amended from its previous form. The Agreement operated from 17 February 2023.

[13] Some employees such as train crew and customer service attendants could already wear shorts prior to the amended clause being inserted into the Agreement. While Sydney Trains and its predecessors had shorts as part of their work uniform, approximately 15 years ago when RailCorp rebranded into Sydney Trains, shorts were removed from the uniform ordering catalogue.

[14] Weekly enterprise agreement implementation meetings involving the Combined Rail Unions (the CRU) and Sydney Trains took place shortly after 17 February 2023. During one

of those meetings in February or March 2023, the issue of wearing shorts was raised and it was agreed between the CRU and Sydney Trains that there would be a separate review to meet about its implementation going forward in relation to the Engineering and Maintenance Branch (EMB). There were eventually five review meetings held in relation to wearing shorts (Hot weather uniform review meetings).

[15] On 10 March 2023, Mr Toby Warnes, Director of Organising for the RTBU, sent Mr Nichols a letter in the following terms:

Wearing of summer uniforms by workers in Engineering and Maintenance

We refer to the recently approved Sydney Trains and NSW Trains Enterprise Agreement 2022 (the Agreement). An important claim put by our Infrastructure Division during the negotiations leading up to the Agreement was the wearing of summer uniforms whilst at work.

The resultant clause 32.1 is set out below:

*The Employer will provide Employees in operational roles, e.g. train crew, on-board services station operations, maintenance and infrastructure Employees, with uniforms and where required, Personal Protective Equipment (PPE). These will be suitable and appropriate to the type of work activity being undertaken and the risks involved in those types of work activity. Without limiting the generality of this clause, as part of the Employer's uniform offering, **the Employer will provide Employees the option of wearing shorts and other uniform items suitable for hot weather conditions other than in circumstances where there is an unacceptable risk to safety.***

(Our emphasis)

Importantly, the clause extends to all employees of Sydney Trains and is not discretionary, i.e. Sydney Trains must provide "the option of wearing shorts and other uniform items suitable for hot weather conditions". This includes, but is not limited to shorts, breathable shirts, hard hat alternatives, and breezeway hats.

To this time, our members are yet to receive any paperwork or communication on how to utilise their new right under clause 32.1. We seek your urgent attention on the provision of these uniform items availability through the channels ordinarily used for uniform and PPE ordering.

We expect that this issue will be resolved prior to 31 March 2023 with either a final or interim solution on the question of providing the uniform items. We also take this opportunity to remind you that clause 32.1 came into legal effect on 14 February 2023 and that this should have been acted on immediately at that time.

[16] The first review meeting took place on 30 March 2023, which was coordinated by Mr Nichols. Numerous representatives from Sydney Trains and the CRU attended. The focus of the first meeting was when employees could wear shorts only, as opposed to could not wear shorts. Mr Nichols indicated that Sydney Trains were not interested in an 'on-off model' (wearing shorts for some work activities during a shift, but not others). The CRU indicated that the focus should be on when employees cannot wear shorts, as opposed to when they can.

[17] During the first review meeting, Mr Lang raised the issue that any Safety Management System (SMS), Safe Work Method Statement (SWMS), Safe Work Instruction (SWI) and Safe Operating Instruction (SOI) in operation at that time could not be used as the basis to determine whether shorts could be used, as those documents proceeded on the assumption that long pants were the default option, which had been in place for more than a decade. In response, Mr Nichols said that the review would not be constrained by the current SMS, but it would frame the process. Mr Nichols indicated the parties would work through the easier areas first (the “*no brainers*”), and then progress to the more complex and contentious areas.

[18] On 21 April 2023, Mr Warnes, provided the list of jobs that the RTBU considered were suitable for wearing summer uniform items, being:

- (a) OHW;
- (b) patrols (HV,1500V, signage);
- (c) pole base inspection;
- (d) revcoms;
- (e) bond inspections;
- (f) 4Y weights inspections;
- (g) tracks and structures;
- (h) track and structure inspections;
- (i) ultra sonic inspection;
- (j) front of train / engine inspection;
- (k) track patrol / examine length;
- (l) signals;
- (m) points testing / construction;
- (n) track testing;
- (o) failure response;
- (p) maintenance in relay rooms and locations;
- (q) protection officers;
- (r) lookouts; and
- (s) flag men.

[19] On 26 April 2023, Adrian Catt, Senior Organiser, Professionals Australia, added the following additional areas to Mr Warnes' list:

- (a) Rail Equipment Centre (REC) at Strathfield;
- (b) Clyde Warehouse at 152 Manchester Road; and
- (c) Control Systems.

[20] Also on 26 April 2023, Mr Lang advised by email that the AMWU also considered the following areas should be able to wear shorts when not engaged in hot work activities or within hot work exclusion areas:

- (a) Plant Mechanics; and
- (b) Fleet Maintenance.

[21] The areas identified as “*no brainers*” or “*priority areas*” in terms of being able to wear shorts, included:

- a. Rail Equipment Centre (REC);
- b. Store Personnel Network Maintenance Division Senior Stores and Facilities Officers;
- c. Front of Train Inspections Network Maintenance Division;
- d. Store Personnel Commercial and Supply Chain;
- e. Clyde Warehouse & Chullora;
- f. Control Systems (Test Development Centre area) – Engineering System Integrity; and
- g. Fleet Maintenance.

[22] As part of the preliminary assessment, Sydney Trains considered the residual risks associated with the removal of the existing control measure of long pants, having regard to the tasks / areas / roles that were proposed by the Unions. These risks included:

- (a) UV exposure;
- (b) visibility of traffic (eg when accessing the rail corridor);
- (c) cuts and abrasions (eg walking through rail corridor);
- (d) slips and trips (eg walking on ballast);
- (e) electrical hazards;
- (f) chemical hazards; and

(g) flora and fauna hazards (eg skin irritations or abrasions).

[23] The second review meeting was held on 4 May 2023. Mr Gaskin recommended that experts from SafeWork NSW, the Cancer Council, amongst others, should present at the next meeting to go through the potential risks of wearing shorts.

[24] The third review meeting was held on 5 June 2023. The meeting was an educational meeting during which various subject matter experts presented on the risks of UV exposure and other potential hazards. Documents were presented during the meeting and subsequently circulated, including:

- a. PowerPoint slides;
- b. SafeWork NSW, Ultra-Violet (UV) Radiation;
- c. Cancer Council NSW workplaces and sun protection;
- d. Rail Industry Safety and Standard Board Australian Standard (AS 7471:2019) regarding Australian rail personal protective equipment – minimum requirements;
- e. SafeWork NSW, Code of Practice: Managing the work environment and facilities;
- f. SafeWork NSW, working in extreme heat: the facts;
- g. SafeWork Australia, working in heat infographic;
- h. SafeWork NSW, hot weather prompts;
- i. SafeWork NSW, Heat – Working in extreme heat;
- j. SafeWork Australia, Managing the risks of working in heat;
- k. SafeWork Australia, Managing the risks of working in heat: guidance material.

[25] The fourth review meeting was held on 11 July 2023. That meeting reviewed previous meetings regarding the subject matter experts, provided an update on the “*no brainers*” areas and legal advice that Sydney Trains had sought from Ashurst. During this meeting, it was discussed that a sub-working group focussing on Hot Weather and Heat Management would be established. This working group was separate to the hot weather uniform review regarding wearing shorts and was focused on controls outside of shorts or long pants, as confirmed in an email from Mr Gaskin dated 26 July 2023.

[26] On 31 July 2023, the legal advice from Ashurst was provided to the CRU. The totality of that advice was as follows:

1. We have been asked to provide advice in relation to whether wearing shorts (together with sunscreen) instead of long pants would be an appropriate control measure having regard to Sydney Trains and NSW Trains (together, Trains) obligations under the Work

Health and Safety Act 2011 (NSW) (WHS Act) and the Rail Safety National Law (RSNL).

2. Trains has a primary duty under the WHS Act to ensure, so far as reasonably practicable, the health and safety of its workers, which requires it to eliminate or minimise risks to health and safety, so far as is reasonably practicable. A similar duty arises for Trains as rail transport operators in managing risks to safety under RSNL.

3. The wearing of long pants is a control measure which Trains has implemented to eliminate, or minimise, a number of foreseeable risks to certain workers. This includes UV exposure, visibility (eg when accessing the rail corridor), cuts and abrasions (eg walking through rail corridor), slips and trips (eg walking on ballast), burns or irritations due to spillage of liquids/chemicals, skin irritations or abrasions from flora and fauna, and risks relating to work on or near rail track and ballast risks including ensuring visibility by others (the Foreseeable Risks).

4. Personal protective equipment (PPE) and clothing (including long pants) as a control measure to minimise the Foreseeable Risks, is applied in accordance with Trains' safety management system and Australian Standards, including:

(a) Various SWMSs, for example, for Civil Inspections and Maintenance Work in the Danger Zone of the Railway Track and Accessing the Rail Corridor Outside the Danger Zone, which include long pants as a control measure against hazards and risks, including the Foreseeable Risks (noting these are examples of activities for which long pants are an appropriate control, and that they will also be an appropriate control for other activities).

(b) Sydney Trains PPE – Organisational Guide (SMS-06-GD-3323), including clause 6.3 which deals with PPE for sun protection and clause 6.2.1 which deals with high visibility clothing to be worn in the rail corridor to increase visibility to train crew, track vehicle drivers and plant operators.

(c) The Rail Industry Safety and Standards Board "Australian rail: Personal protective equipment - Minimum requirements" (AS 7471:2019), which provides long pants as a recommended control measure for UV exposure and high visibility outer clothing as minimum PPE for accessing the rail corridor. Long pants for visibility is also dealt with in AS 4602.1:2011.

5. For certain workers (being those workers exposed to the Foreseeable Risks identified above), given the exposure to new risks due to implementing shorts – which is a lower control measure (when a higher more effective control is readily available) or amounts to no control measure at all for some risks – Trains would be exposed to liability for not meeting its primary duty of care to workers under the WHS Act and its obligations under RSNL. In those circumstances, for certain workers that would pose an unacceptable risk to their health and safety.

6. Allowing certain workers to wear shorts will not eliminate or minimise foreseeable risk, so far as reasonably practicable, and instead: (i) is likely to expose workers to new risks (including some of the Foreseeable Risks); (ii) will remove a readily available and effective control measure against known hazards and risks (including the Foreseeable

Risks); and (iii) there will be an increase in the likelihood and/or severity of risk of injuries from those risks (including the Foreseeable Risks).

7. Administrative controls and PPE are considered the least effective at minimising risk, and implementing shorts is a less effective control, or not a control measure at all, for some risks that long pants are a current control measure for. As NSW courts have stated (for example in *SafeWork NSW v Poletti Corporation* [2019] NSWDC at [88]), a PCBU must have regard for human error and workers being careless, inadvertent and inattentive in their compliance with safety systems. The duty on a PCBU is to implement control measures that take into account that such acts will occur and that they must be guarded against to the fullest extent practicable.

8. A failure to adopt appropriate PPE, and to ensure its use, can expose a PCBU to liability under the WHS Act and RSNL. As a recent example, *Boral Resources (Vic) Pty Ltd* was convicted of a breach of WHS laws for failing to provide and maintain a safe system of work requiring workers to wear respiratory protective equipment and to ensure proper supervision to ensure the PPE was worn.

9. Under the WHS Act and RSNL, Trains cannot contract out of its responsibility, nor can its duty be transferred to another person (such as workers). In light of these obligations, the removal of long pants as a control measure for certain workers will pose an unaccepted risk to health and safety and expose Trains to liability.

10. It is possible that for certain other workers, the wearing of long pants is not a relevant control measure (for example, workers who are not exposed to the Foreseeable Risks). Whether that is the case for certain workers needs to be determined through a risk assessment process.

[27] The fifth review meeting was held on 21 August 2023. That meeting largely focused on reporting back that the “no brainer” areas had been finalised and going through the legal advice from Ashurst. Mr Lang considered that Sydney Trains were trying to shut down any further consideration of the shorts review. He stated that the entirety of operations within Fleet Maintenance and Heavy Plant and Resurfacing needed to be considered for shorts, and that risk assessments needed to be conducted.

[28] In the afternoon of 21 August 2023, Mr Lang sent an email to Ms Drebber, with many others copied in, as follows:

Hi All,

As discussed at todays Hot Weather Uniform Workgroup meeting. The AMWU would like to understand the following...

Noting the “foreseeable risks” what consultation occurred when determining that long pants are an “appropriate control”

Additionally,

4(a) identifies various SWMS including long pants as controls, these are mandated by SMS-06-GD-3323 not through risk assessment of the specific task.

What consultation has occurred with the implementation of SMS-06-GD-3323 and subsequent updates?

How did any of the above consultation meet the obligations expected under sections 47,48, and 49 of the WHS Act?

How did any of the above consultation meet the obligations expected under section 99(3) of the RNSL(NSW)?

[29] While Ms Drebber responded on 22 August 2023, indicating “*I would like to confirm receipt of your email and advise that we will revert back shortly*”, Mr Lang never received a response. After 21 August 2023, the shorts review meetings were never again reconvened.

[30] On 7 September 2023, Ms Drebber confirmed that further consideration would only be given to the Fleet Maintenance Centres and the Heavy Plant and Resurfacing Depot within the confines of the Maintenance shed structures. That email provided, in part, as follows:

Hi All,

Thank you for attending the last Hot Weather Uniform Review meeting, please find slide pack attached.

At this meeting an action was recorded for ‘Sydney Trains to provide position in writing regarding the wearing of shorts noting reference to IW’s [Infrastructure Workers] within the Rail Corridor’.

Please find the response to this action below:

Sydney Trains has an obligation to meet the requirements set out in clause 32.1 of the 2022 Sydney Trains and NSW TrainLink Enterprise Agreement, see clause below.

...

Through this forum the Unions have identified a number of areas/ tasks/ roles referred to as ‘priority areas’ which have been reviewed through formal assessment to determine whether wearing shorts instead of long pants is appropriate in terms of safety. These reviews were completed with HSR, union delegate, line manager and SEQOR engagement and as reported at the last meeting held 21 August, shorts are now available for order through Equip for certain areas/tasks/roles; with manager and employee communications to this effect currently being drafted or already implemented.

With regard to any areas/ tasks/ roles beyond the ‘priority areas’, referred to as the ‘remaining areas’, we have sought to understand both the potential risk and mitigations, through the workshop held on the 5th of June 2023 with unions and relevant independent experts which provided up to date evidence and information, as well as to understand our obligations as the duty holder by seeking legal advice from Ashurst.

The unions have been provided a copy of this legal advice which ultimately sets out that the removal of long pants as a control measure for certain workers (which includes those within the rail corridor) will pose an unacceptable risk to the health and safety of workers and expose Sydney Trains to liability. The advice also states that the obligations of the business as the primary duty holder cannot be delegated.

For the purposes of this item, the definition of the 'Rail Corridor' Sydney Trains has applied is that from the Safeworking Glossary (Version 8.5, 04/12/22) which outlines the following:

Rail Corridor: *The land on which a railway is built, comprising all property between property fences, or if no fences, everywhere within 15m from the outermost rails.*

Sydney Trains is willing to provide support of further risk assessments to Fleet Maintenance Centres within the confines of the Maintenance shed structures themselves, and similarly with the Heavy Plant and Resurfacing Depot structures.

Regarding other uniform alternatives such as breezeway hats, hard hats etc. this was discussed at the meeting held on the 4th of May where is was advised that such requests are to be sent through to the relevant PPE committees as part of the BAU process. We propose that further discussion of these items be taken as an action to be discussed at the Hot Weather and Heat Exposure working group where it can then be referred to the general Engineering and Maintenance PPE working group and the relevant Health and Safety Committee Structures as appropriate.

It is requested to the unions that they provide details of any further areas/ tasks/ roles outside the rail corridor that they would like reviewed in accordance with the process already applied. The path forward for these reviews will be through the Hot Weather and Heat Exposure working group where they can be allocated to the relevant Health and Safety Committee Structures as appropriate, where they will undergo the same HSR, union delegate, line manager and SEQR assessment as completed for the 'priority areas' already assessed.

Given the above we hold the view that we have met our obligations as set out in clause 32.1 and look forward to continuing to work with the Unions and HSRs to explore opportunities for hot weather and heat management changes beyond 'shorts' through the Hot Weather and Heat Exposure working group.

[31] Mr Warnes responded to the above email as follows:

We refer to our letter of 10 March 2023 and your email below.

We believe the Sydney Trains may be labouring under a misunderstanding of our position here. We weren't asking Sydney Trains for permission. This is our right, and we will be exercising it. In the coming hotter months, our members will be wearing shorts and other uniform items that are suitable for hot weather conditions.

We sought to engage with Sydney Trains on this issue in the hope that it would engage genuinely, and we could avoid disputes over the course of the summer where genuine safety issues arose. Unfortunately, Sydney Trains has decided to apply a blanket approach to the issue of hot weather uniforms and confect or exaggerate safety concerns in an attempt to deprive our members of their hard fought and won rights. Clause 32.1 cannot and should not be applied as a blanket approach.

We will proceed on the basis that members are entitled to wear shorts at all times, and if an event that poses an "unacceptable risk to safety" arises, local management can raise

the issue with the HSR or Union Delegate and it can be dealt with on a case-by-case basis. We ask that you remind your managers that it is against the law to take adverse action against a member that is exercising their workplace rights, in this case, wearing summer uniform items.

It's a genuine shame that despite the change in attitude we've seen across the rail agencies over the past few months, that the Engineering and Maintenance Branch remains stuck in the ideological zealotry of the past decade.

Obviously, we do not accept your position as outlined below.

[32] Fleet Maintenance risk assessment meetings occurred on 29 September and 18 October 2023, however the risk assessment for Fleet Maintenance Centres was confined to the shed structures only. Sydney Trains relied on Ms Drebbler’s email dated 7 September 2023 outlining Sydney Trains’ position on wearing shorts.

[33] Heavy Plant and Resurfacing Depot risk review and assessments were also narrowed to the depot only and within the structures, as outlined in Ms Drebbler’s email of 7 September 2023.

[34] Mr Lang initially raised a dispute regarding this matter on 17 November 2023. Ms Mona Hariri (Manager Employee Relations) sent Mr Lang an email on 21 November 2023 that annexed a document referred to as the “Sydney Trains’ Summer Uniform Feasibility Assessment”. That document provided:

Location/Role/Task	Risks: Assessments/SWI/SW MS/ Documents Completed Y/N	Can shorts be used safely? Y/N	Are shorts available for these workers now? Y/N	Key Function updates/comments/considerations
Rail Equipment Centre	Yes: RA completed	Yes	Yes Through Equip (Blackwood) with managers approval	CCSC still have levels of consultation underway largely within Management.
Store Personnel NMD SSFO	Yes: RA completed	Yes	Yes Through Equip (Blackwood) with managers approval	Prior to roll out NMD are still working on: Testing they can order. MOM (for SSFO) and Team Manager (for civil staff) briefings. This will need to address when shorts can be worn and the need to change out uniform to undertake all other duties.
Front of Train Inspections NMD	Yes: RA completed	Yes		
Store Personnel CSC	Yes: RA completed	Yes	Yes Through Equip (Blackwood) with managers approval	CCSC still have levels of consultation underway largely within Management.
Clyde Warehouse & Chullora	Yes: RA completed	Yes	Yes Through Equip (Blackwood) with	N/A

Control Systems (TDC area) - ESI			managers approval	
	Yes: RA completed	Yes	Yes Through Equip (Blackwood) with managers approval	Low interest in staff wearing shorts onsite as majority wear office attire.

[35] Mr Lang stated the first time he had ever seen the Sydney Trains' Summer Uniform Feasibility Assessment was from reviewing the email of Ms Hariri on 21 November 2023. He had never received or seen that assessment previously and was not aware of any other HSRs being consulted about that assessment.

[36] Mr Lang stated that as far as he was aware, risk assessments had only been conducted for the Rail Equipment Centre and the Commercial and Supply Chain Stores (both of which formed part of the "no brainers" areas), Fleet Maintenance Centres and the Heavy Plant and Resurfacing Depot. Neither of the risk assessments were completed for Fleet Maintenance Centres or the Heavy Plant and Resurfacing Depot as at 19 January 2024. Mr Gaskin stated that an on-site risk assessment had been completed in person at REC Strathfield.

[37] Areas in EMB where risk assessments have never since the approval of the Agreement been conducted include:

- a. Major Works Directorate – Track;
- b. Major Works Directorate – Structures;
- c. Major Works Directorate – Civil Mechanical;
- d. Network Maintenance Directorate – Civil;
- e. Network Maintenance Directorate – Signal Mechanical; and
- f. Fleet – Rail Emergency Train Recovery Unit (RETRU).

[38] In relation to the Heavy Plant and Resurfacing Depot Work Group, at least as at the time of the Hearing, there was a risk assessment performed but it remained in draft form. There are other work groups where, at the time of the Hearing, only a draft risk assessment exists.² Mr Gaskin agreed that a risk assessment should be completed for Fleet Maintenance Centres outside the confines of the Maintenance shed structures themselves, and similarly with the Heavy Plant and Resurfacing Depot structures.³

[39] What occurred was Sydney Trains conducted a preliminary assessment of more contentious work areas and decided that it didn't consider that further risk assessments should occur.⁴

[40] On 18 December 2023, Mr Paul Bugeja, Deputy Executive Director, Network Maintenance, Sydney Trains, issued an update that included the following:

Hot weather clothing

Following the completion of risk assessments with relevant HSR, union and management representatives as part of a review of Hot Weather uniforms, it has been determined that the removal of long pants as a control measure for SSFO/SO duties and Front of Train tasks, does not present an unacceptable risk to safety. As such, the wearing of shorts (where the worker chooses to) for these duties only is now permitted. There is no requirement for people to wear shorts while performing these two specific duties, it is an option in addition to their current PPE.

The shorts need to be Sydney Trains' issued shorts, which are cotton drill and navy in colour, and are available to order through the Blackwoods General Uniform Catalogue.

[41] Notwithstanding the above message, there have been difficulties in obtaining appropriate uniforms and being able to wear shorts other than for front of train tasks.

[42] While cleaners, such as Mr Hatcliffe, were always able to wear shorts at work, on 3 January 2024, Mr Hatcliffe received an email from Mr Mark Rivera, A/Area Manager Illawarra (Cronulla - Port Kembla – Waterfall - Wollongong) Fleet Customer Experience/FMD, Sydney Trains, that stated:

Hi Illawarra Team,

I trust this message finds you well. I would like to inform you that the matter regarding wearing shorts and short-sleeved shirts is currently undergoing an industrial dispute process. As of now, the established position is that all Engineering and Maintenance staff (including Fleet) must adhere to the dress code of long pants and long-sleeved shirts due to the risk profile associated with working in the rail corridor, including Maintenance Centres and Stabling Yard.

I urge your cooperation in adhering to this directive for your own safety. Continuous compliance with safety protocols is crucial in maintaining a secure work environment. CICs, kindly ensure that you brief our staff tonight, collect signed briefing sheets, and forward them to me by the end of the week.

Let's continue to work as a cohesive team, prioritizing safety above all.

[43] One week after the above email, Mr Hatcliffe attended work in shorts, but was prevented from working. Mr Nichols was asked why, in relation to cleaners, a risk assessment hadn't occurred. His answer was:⁵

Yes, Deputy President. In this scenario, since the change to the enterprise agreement and the modification of the clause, it's about the application of resources to follow through and be successful in a number of scenarios that we worked on together, with future ongoing consultation and risk assessments to occur. My concern would be to do too many all at once and not achieve the outcomes in an expeditious way.

[44] Regarding the overall process followed, the evidence of Mr Nichols was that to the time of the Hearing, while there were a range of areas, activities and environments that Sydney Trains could have looked at, the focus had been on the priority/“no brainer” areas that parties agreed.⁶

Applicants' Submissions

[45] The Applicants submitted that to some extent, the question for determination proceeds on a false premise, as Sydney Trains cannot simply direct employees to wear long pants because Sydney Trains alone has assessed that wearing shorts for certain employees would pose an unacceptable risk to safety. Any such assessment requires genuine collaboration in accordance with the consultation obligations imposed by the *Work Health and Safety Act 2011* (the WHS Act) and the Agreement.

[46] The Applicants in summary noted that outside the work areas referred to as “*no brainers*”, to which the CRU agreed, Sydney Trains has failed to engage in any genuine consultative process at all.

[47] The Applicants submitted that the proper construction of Clause 32.1 provided to employees are suitable and appropriate to the type of work activity being performed and the risks associated with those work activities. Presuming there is no unacceptable risk for the given work activity, Sydney Trains will give employees the option to wear shorts.

[48] In determining whether an employee is entitled to exercise the option of wearing shorts, the task is three-fold:

(a) first, focus must be directed towards the ‘work activity’ being performed. Importantly, the task is not to undertake some broader assessment of the overarching role performed by the relevant employee in determining whether shorts can be worn. Rather, it must be assessed on a case-by-case basis, having regard to the particular work activity (i.e. the task) being performed by an employee throughout any given day;

(b) second, the work activity must not pose an unacceptable risk to safety. This can only be determined through a thorough risk assessment. If the work activity does pose an unacceptable risk, the employee does not have the option to wear shorts; and

(c) third, if there is no unacceptable risk to safety, Sydney Trains will give employees the option of wearing shorts for that work activity. It is up to the employee to decide. There is no discretion or managerial prerogative afforded to Sydney Trains at this point not to offer, let alone refuse, employees the option of wearing shorts

[49] The Applicants noted that while five shorts review meetings occurred between March and August 2023, only “*no brainers*” were considered and the consideration of more contentious work areas was postponed except for:

(a) Fleet Maintenance, which was initially considered a “*no brainer*”, but was postponed because it was not deemed to be a priority; and

(b) Heavy Plant and Resurfacing,

because Mr Lang sought for those areas to be reviewed during the final shorts review meeting on 21 August 2023. By the email of 7 September 2023, Ms Drebber advised that Sydney Trains was only willing to provide support for further risk assessments within the shed structures for Fleet Maintenance Centres and the Heavy Plant and Resurfacing Depot, and not the broader

Heavy Plant and Resurfacing areas, however none of the risk assessments for Fleet Maintenance Centres, or the Heavy Plant and Resurfacing, had been completed by the Hearing.

[50] The Applicants further noted that there had been various areas of retreat in areas of “*no brainers*”, for example the area of cleaners as highlighted in the evidence of Mr Hadcliffe.

[51] Regarding consultation obligations, the Applicants referred to the summary of principle set out in *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd (Mt Arthur)*,⁷ and submitted that those principles inform the specific obligations under the *WHS Act* (specifically sections 47, 48, 49 and 70(1)(a)) and the Agreement (specifically clause 7) which apply to Sydney Trains.

[52] The Applicants submitted that evidence demonstrates a complete failure to engage with the actual requirements of real and compliant consultation. The failures go beyond defects in form, and are plainly inconsistent with Sydney Trains’ obligations under the *WHS Act* and the Agreement.

Sydney Trains Submission

[53] The Respondent submitted that Clause 32 has as its primary purpose the entitlement of employees to be provided with uniforms and PPE and the processes for such a provision. The clause is directed to the achievement of Sydney Trains’ obligations to ensure the health and safety of workers (including its employees), so far as reasonably practicable, under the *WHS Act* and the *Rail Safety National Law (NSW)* (the RSNL).

[54] The Respondent submitted Clause 32, when read in its entirety and within the context of the Agreement, provided:

- (a) At Clause 32.1 for uniforms and PPE being “*suitable and appropriate*” for the types of work activity being undertaken and the “*risks involved in those types of work activity*”, with such risks clearly being ones to the health and safety of employees;
- (b) For the Employer to have the responsibility for determining the suitable and appropriate uniforms offered to employees;
- (c) At the last sentence of clause 32.1 placing primacy on there not being an “*unacceptable risk to safety*” of employees, if the options of wearing shorts is to be provided; and
- (d) That Clause 32.4 places corresponding obligations on employees that the uniforms and PPE provided to them be “*correctly worn or utilised while the Employee is on duty*”, clearly for the purposes of ensuring that the uniforms and PPE have their proper effect as a control measure for relevant risks to the health and safety of employees.

[55] The Respondent maintained the history of the clause is relevant and noted that Clause 32.1 had its origins in predecessor clauses in the *Sydney Trains Enterprise Agreement 2014* and the *Sydney Trains Enterprise Agreement 2018*. The relevant predecessor clauses provided:

The Employer will provide Employees in operational roles, e.g. train crew, station operations, maintenance and infrastructure Employees, with uniforms and where required, protective clothing or equipment. These will be suitable and appropriate to the type of work activity being undertaken.

[56] Sydney Trains submitted that it is apparent from the words "*uniforms ..., protective clothing and equipment*" above, that what is now referred to in clause 32.1 of the Agreement as PPE, is inclusive of clothing items which protect against a risk to health or safety. Again, that clearly indicates that Sydney Trains had the responsibility for determining the suitable and appropriate uniforms to provide and that the provision of uniform and PPE is for a safety purpose.

[57] Sydney Trains also submitted that the importance of safety in the workplace is provided for in clause 35 of the Agreement, and recognised in clause 2 of the Agreement, which reflects the statutory obligations on Sydney Trains under the WHS Act and RSNL. Additionally, the industrial purpose of the clause, and more specifically, the meaning of the words "*unacceptable risk*" must be understood in light of the statutory framework of the WHS Act and the RSNL.

[58] Sydney Trains has determined that the wearing of long pants is a control measure to eliminate, or minimise, various risks to workers. Those risks include: UV exposure, visibility (eg. when accessing the rail corridor), cuts and abrasions (eg. walking through rail corridor), slips and trips (eg. walking on ballast), burns or irritations due to spillage of liquids/chemicals, skin irritations or abrasions from flora and fauna, and risks relating to work on or near rail track and ballast.

[59] The adoption of long pants as a control measure is provided for in Sydney Trains' safety management system, including:

(a) Various Safe Work Method Statements, for example, for Civil Inspections and Maintenance Work in the Danger Zone of the Railway Track and Accessing the Rail Corridor Outside the Danger Zone, include long pants as a control measure against hazards and risks.

(b) Sydney Trains PPE –Organisational Guide (SMS-06-GD-3323), including clause 6.3, deals with PPE for sun protection and clause 6.2.1 which deals with high visibility clothing to be worn in the rail corridor to increase visibility to train crew, track vehicle drivers and plant operators.

[60] Sydney Trains has also determined that the adoption of long pants as a control measure is consistent with the Rail Industry Safety and Standards Board "Australian rail: Personal protective equipment - Minimum requirements" (AS 7471:2019), which provides long pants as a recommended control measure for UV exposure and high visibility outer clothing as minimum PPE for accessing the rail corridor, and SafeWork Australia's "Exposure to solar ultraviolet radiation" (Guidance Material) and SafeWork NSW materials on "Ultra-violet radiation".

[61] Sydney Trains submitted that in meeting its obligations under the WHS Act and RSNL, it is ultimately a matter for Sydney Trains to determine how it will fulfil its duties. In making such a determination, Sydney Trains conceded it must meet its obligations under the WHS Act to consult, however it remains its duty to discharge the obligations. It is a matter within the

well-established principle of 'managerial prerogative', that Sydney Trains has a right to conduct and manage its business as it sees fit, including with respect the statutory obligations.

[62] As to consultation, Sydney Trains referred to the nature of consultation required under s.48 of the WHS Act, and submitted the right of employees and their representatives to be "consulted" is not a right to veto or substitute the decision of the employer, and it is not a process of negotiation, bargaining or "co-determination" in relation to the relevant decision which is the subject of the consultation – nor is there any requirement on the employer to reach agreement with the employees being consulted.

Applicants' Submissions in Reply

[63] The Applicants characterised Sydney Trains' submissions as:

- (a) Sydney Trains can continue to implement its control measure of long pants, notwithstanding clause 32.1 of the Agreement which confers employees with an express right to wear shorts, unless there is an unacceptable risk;
- (b) The existence of an unacceptable risk is to be determined subjectively at Sydney Trains' behest;
- (c) Wearing shorts presents an unacceptable risk for the purposes of clause 32.1 because of the potential for UV exposure, visibility of traffic, cuts and abrasions, slips and trips, electrical hazards, chemical hazards and flora and fauna hazards, though there is no analysis of whether wearing shorts changes any of those risk profiles; and
- (d) Managerial prerogative enables it to direct employees to wear long pants, notwithstanding the express provisions of clause 32.1.

[64] The Applicants submitted that determining whether an unacceptable risk exists requires an objective inquiry, and Sydney Trains has not demonstrated that shorts pose an unacceptable risk. What Sydney Trains seeks to do is reverse the obligations imposed by clause 32.1, so that instead of the starting point being that employees are entitled to wear shorts (unless there is an unacceptable risk), wearing long pants is the starting point unless employees can demonstrate that there is not an unacceptable risk.

[65] The Applicants submitted that Sydney Trains' managerial prerogative is fettered by the terms of clause 32.1, and Sydney Trains failed to consult as required by s.49 of the WHS Act.

Consideration

[66] In *AMA (Victoria) Ltd and Australian Salaried Medical Officers Federation v The Royal Women's Hospital*,⁸ the Full Bench of the Commission distilled principles for agreement interpretation from the majority judgment of the Full Court of the Federal Court in *James Cook University v Ridd*,⁹ as follows:

“(1) *The starting point is the ordinary meaning of the words, read as a whole and in context.*

- (2) *A purposive approach is preferred to a narrow or pedantic approach – the framers of such documents were likely to be of a practical bent of mind. The interpretation turns upon the language of the particular agreement, understood in the light of its industrial context and purpose.*
- (3) ***Context is not confined to the words of the instrument surrounding the expression to be construed. It may extend to the entire document of which it is a part, or to other documents with which there is an association.***
- (4) *Context may include ideas that gave rise to an expression in a document from which it has been taken.*
- (5) ***Recourse may be had to the history of a particular clause where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form.***
- (6) *A generous construction is preferred over a strictly literal approach but agreements should make sense according to the basic conventions of the English language.*
- (7) *Words are not to be interpreted in a vacuum divorced from industrial realities but in the light of the customs and working conditions of the particular industry.” (Emphasis added)*
- (8) ***In short, regard may be had to predecessor instruments before a conclusion is made that an agreement is ambiguous.”***

[Emphasis added]

[67] The words of Clause 32.1 of the Agreement are clear and unambiguous, and the consideration of the words that have been added to the previous incarnations of Clause 32.1 is telling. The additional words in the current Clause 32.1 are broadly those boldened below:

*“The Employer will provide Employees in operational roles, e.g. train crew, on-board services station operations, maintenance and infrastructure Employees, with uniforms and where required, Personal Protective Equipment (PPE). These will be suitable and appropriate to the type of work activity being undertaken **and the risks involved in those types of work activity.** Without limiting the generality of this clause, as part of the Employer’s uniform offering, the Employer will provide Employees the option of wearing shorts and other uniform items suitable for hot weather conditions other than in circumstances where there is an unacceptable risk to safety.”*

[68] Even without considering the history of the provisions, it is abundantly clear that the Employer will provide Employees the option of wearing shorts other than in circumstances where there is an unacceptable risk to safety regarding a particular work activity. The comparison to prior versions of Clause 32.1 merely reinforces that interpretation.

[69] I accept the Applicants’ submission that Clause 32.1 establishes an express right to wear shorts other than in circumstances where there is an unacceptable risk to safety,¹⁰ and note the

Applicants' clear and appropriate concession that after appropriate enquiry it may be determined in relation to various work activities that unacceptable risks exist.¹¹ Insofar as Sydney Trains asserts that it somehow retains managerial prerogative to direct the wearing of long pants, the clear words of Clause 32.1 dispel that proposition.

[70] Clear issues have arisen in this matter as to the timing and manner of risk assessments, and the evidence has disclosed:

- (a) A failure to address any risk assessments beyond “no brainers” and shed structures for Fleet Maintenance Centres and the Heavy Plant and Resurfacing Depot;
- (b) Unilateral and subjective determinations of risk by Sydney Trains; and
- (c) Reliance on risk assessments performed prior to the commencement of the Agreement.¹²

[71] While Sydney Trains relied both in dealings with the CRU in implementation of Clause 32.1, and in the Hearing, on the Ashurst advice of 31 July 2023, I note that the last two paragraphs of that advice provided:

9. Under the WHS Act and RSNL, Trains cannot contract out of its responsibility, nor can its duty be transferred to another person (such as workers). In light of these obligations, the removal of long pants as a control measure for certain workers will pose an unaccepted risk to health and safety and expose Trains to liability.

10. It is possible that for certain other workers, the wearing of long pants is not a relevant control measure (for example, workers who are not exposed to the Foreseeable Risks). Whether that is the case for certain workers needs to be determined through a risk assessment process.

[72] While the Ashurst advice went no further than a high level statement of responsibilities and obligations, it identified the undertaking of the risk assessment process as the means of determining the existence of unacceptable risk to safety. In many areas, and particularly work activities, those recommended risk assessments have not occurred. That was particularly concerning because as at the date of the Hearing it had been one year and 11 days since the commencement of the Agreement. It is beyond reasonable explanation for the implementation of Clause 32.1 to have taken so long.¹³ The characterisation of Sydney Trains as being a “blanket approach” is correct.

[73] The WHS Act contains detailed consultation obligations, Sections 47, 48 and 49 provide:

Sect 47 Duty to consult workers

(1) The person conducting a business or undertaking must, so far as is reasonably practicable, consult, in accordance with this Division and the regulations, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety.

Penalty: The tier C monetary penalty.

(2) *If the person conducting the business or undertaking and the workers have agreed to procedures for consultation, the consultation must be in accordance with those procedures.*

(3) *The agreed procedures must not be inconsistent with section 48.*

Sect 48 Nature of consultation

(1) *Consultation under this Division requires:*

(a) *that relevant information about the matter is shared with workers; and*

(b) *that workers be given a reasonable opportunity:*

(i) *to express their views and to raise work health or safety issues in relation to the matter; and*

(ii) *to contribute to the decision - making process relating to the matter; and*

(c) *that the views of workers are taken into account by the person conducting the business or undertaking; and*

(d) *that the workers consulted are advised of the outcome of the consultation in a timely manner.*

(2) *If the workers are represented by a health and safety representative, the consultation must involve that representative.*

Sect 49 When consultation is required

Consultation under this Division is required in relation to the following health and safety matters:

(a) *when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;*

(b) *when making decisions about ways to eliminate or minimise those risks;*

(c) *when making decisions about the adequacy of facilities for the welfare of workers;*

(d) *when proposing changes that may affect the health or safety of workers;*

(e) *when making decisions about the procedures for:*

(i) *consulting with workers; or*

(ii) *resolving work health or safety issues at the workplace; or*

- (iii) monitoring the health of workers; or*
- (iv) monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or*
- (v) providing information and training for workers;*
- (f) when carrying out any other activity prescribed by the regulations for the purposes of this section.*

[74] The above consultation obligations are augmented by the Agreement, and in particular Clause 7, and in particular clause 7.3 that provides:

7.3 Consultative Arrangements

The Employer will consult with Employees when there is a proposed change that will impact upon the working arrangements of the Employees. Consultation shall be conducted in good faith with reasonable time for the Employees, Union(s) and their members to respond to the proposed changes. When a change is proposed that will impact upon the working arrangements of Employees, the Employer will communicate the proposed change to the affected Employees and Employee Representatives.

(a) The Employer will provide relevant information about:

- (i) The proposed change;*
- (ii) Any effects on the Employees (including workload changes); and*
- (iii) The rationale for the proposed changes based on business needs.*

(b) The Employer will meet with the affected Employees and/or their Union Representative(s) and discuss the effects of the changes on the Employee(s) concerned and measures proposed to avoid or otherwise minimise any possible adverse impact on affected Employees.

(c) The Employee(s) will be given an opportunity to provide input and discuss the proposed change with their Union Representative(s) to consider the change and respond.

(d) The Employer will respond to any Employee feedback.

(e) Where local consultative committees meet at a regular forum the meeting notice and any agenda shall be provided to representatives on that committee at least one week prior to the meeting.

(f) Where the Employer proposes the introduction of a new policy/procedure or a change to an existing policy/procedure that will impact on employees, the Employer shall in the first instance provide a copy to the nominated representative of each Union for review.

[75] It is clear that Sydney Trains understands the obligations placed upon it regarding consultation as in submissions, when explaining how it described any decision of Sydney Trains regarding risk was subjective, it outlined:

Our argument – when we use the word 'subjective' – I know it's a word which has been put forward by the unions. We would say two things that ultimately the decision is one that Sydney Trains makes after consultation. And that consultation involves a risk assessment, a draft risk assessment being provided to workers, having review meetings and discussions with those employees to consult on the risk assessment measures and then as Mr Lang acknowledged the Sydney Trains ultimately are making the decision based on those consultation and risk assessments as (indistinct) or not. Particular control measures should be retained or altered.

[76] While it is appropriate to state that the determination of risk is to be determined objectively, but for “no brainers”(some of which have been subsequently varied without consultation), it is clear that the consultation process outlined by Sydney Trains has not occurred.

[77] Further, while the witnesses for Sydney Trains sought to refer to alleged injury statistics as somehow constituting evidence that the wearing of shorts presents an unacceptable risk in any specific circumstances,¹⁴ those claims did not withstand the slightest interrogation.

Conclusion

[78] I accept the Applicants’ criticism that the question for determination proceeds on a false premise, as Sydney Trains cannot simply direct employees to wear long pants because Sydney Trains alone has assessed that wearing shorts for certain employees would pose an unacceptable risk to safety. For the reasons outlined above, that assessment cannot be made unilaterally, and requires genuine and contemporaneous collaboration in accordance with the consultation obligations imposed upon Sydney Trains.

[79] The answer to the question for determination being:

“Having regard to the operation of clause 32.1 of the Sydney Trains and NSW TrainLink Enterprise Agreement 2022 and the obligations of Sydney Trains under section 19(1) of the Work Health and Safety Act 2011 (NSW) and section 52(1) of the Rail Safety National Law (NSW), can Sydney Trains lawfully and reasonably direct relevant employees that they perform their work wearing long pants, where Sydney Trains has assessed that for those particular employees that the risk of them wearing shorts would pose an unacceptable risk to safety?”

Is “No”. Sydney Trains is required to comply with the consultation obligations outlined in the WHS Act and the Agreement.



DEPUTY PRESIDENT

Appearances:

J Martin on behalf of the Applicants.

M Seck of Counsel on behalf of the Respondent.

Hearing details:

28 February 2024.

Sydney

In-person.

Printed by authority of the Commonwealth Government Printer

<[AE519142](#) PR771907>

¹ Transcript PN 534 to 539.

² Transcript PN 214.

³ Transcript PN 308.

⁴ Transcript PN 420.

⁵ Transcript PN 563. See also PN 540 to 553.

⁶ Transcript PN 566 to 571.

⁷ [52] [\[2021\] FWCFB 6059](#), at [108].

⁸ [\[2022\] FWCFB 7](#).

⁹ [2020] FCAFC 123, 298 IR 50, at [65].

¹⁰ Transcript PN 592.

¹¹ Transcript PN 721 and 722.

¹² Transcript PN 840 and 841.

¹³ Explanations by Mr Nichols at Transcript PN 563 and 566 to 571 was not acceptable.

¹⁴ Transcript PN 322 to 356, and 479 to 503