



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER LEE

B2023/47

s.236 - Application for a majority support determination

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union"
known as the Australian Manufacturing Workers' Union (AMWU)
and
Selborne Biological Services (Australia) Pty Ltd
(B2023/47)

Melbourne

2.00 PM, THURSDAY, 23 FEBRUARY 2023

PN1

THE ASSOCIATE: This Commission is now in session in the matter of B2022/47, section 236 application by Australian Manufacturing Workers' Union, AMWU, for hearing.

PN2

THE COMMISSIONER: Good afternoon, everyone. So, Ms Presdee, you're representing the Union?

PN3

MS PRESDEE: Yes. Mr Amoresano is taking the lead, Commissioner, but, yes, we are both representing the Union.

PN4

THE COMMISSIONER: Thank you. And Mr Macinnis, you're seeking permission to appear?

PN5

MR MACINNIS: I am, Commissioner, yes.

PN6

THE COMMISSIONER: Yes. Your submissions on that, please.

PN7

MR MACINNIS: Commissioner, in my submission, there are three reasons why leave should be granted. The first is that this is a - the question of the interpretation of the Union's rules, which is the primary point that arises before you today, is a complicated question of both fact and law on which the Commission would be assisted by having a legally trained person responding.

PN8

The second point is that my client does not have any dedicated HR staff who could deal with this matter. And the third reason, Commissioner, is that you have hopefully and I say, the benefit - I hope that's not a misdescription - of my written submissions. The written submissions being the (indistinct) in front of you, and it remains unclear (indistinct) - - -

PN9

THE COMMISSIONER: Sorry, Mr Pope, can you mute your - thanks. Sorry, go on, Mr Macinnis. You went into feedback, there.

PN10

MR MACINNIS: Sorry. Sorry, Commissioner. The written submissions being the advocate that you send ahead of you and the one who remains after you have gone, hopefully - - -

PN11

THE COMMISSIONER: Yes.

PN12

MR MACINNIS: - - - that I have sent ahead of me, persuades the Commission that the Commission will be assisted by leave being granted for me to represent the respondent in today's proceedings.

PN13

THE COMMISSIONER: Thanks very much for that. Mr Amoresano, have you got any views about whether or not I should grant permission to appear?

PN14

MR AMORESANO: No, Commissioner, we have no - we're not going to oppose.

PN15

THE COMMISSIONER: Look, Mr Macinnis, I've had regard to those submissions, I'm satisfied there is a level of complexity such that it would be appropriate to grant permission to appear to enable the matter to proceed more efficiently. So permission is granted on that basis. Now, you've got Leonard Lozina with you and we've got two witnesses. Mr Wickham for the Union, and Mr Pope for the respondent.

PN16

Look, just before we proceed, I think Mr Macinnis, you know, correctly framed that - well, there's the issue of whether or not there's a majority of the group chosen and whether they wish to bargain. That's one point. And there's the other point to do with whether or not there's an eligibility for the Union to represent. Now, I set the directions for this matter in my stock-standard manner, which is that the Union would put in its materials, the respondent would reply.

PN17

Almost always the debate is about really whether or not there's enough employees that have signed the petition of whatever it might be. This is a little unusual in that the rule issue has emerged as a significant issue, and the Union hasn't been given an opportunity by me to respond to the extensive submissions that have been made by the employer on that point, and indeed of course there's been evidence brought by the employer buttressing the submissions made by Mr Macinnis.

PN18

So I just flag that I think there will probably be a need for a further process because I want to give full consideration to that fairly serious question about whether or not there's an eligibility for the Union to represent these employees. Now, I just want to canvass with the parties the best way to proceed. It may well be that in respect of both witnesses that - and I was happy for them both to join the call because really their evidence goes to different points.

PN19

On the one hand Mr Wickham's, you know, really goes to the means by which he collected the signatures. And most of what Mr Pope is talking about is the characterisation of the industry in which the respondent operates, and so on and so forth. Just so I'm not sure how much of that evidence is contested and how much cross-examination is required. And so it might be that the best way to proceed is

to deal with that evidence today. Get that evidence in and then provide a further process to deal with the rule issue.

PN20

Or, alternatively, allow that rule issue to be - I'll allow the Union to put further submissions in on that rule issue, and then we just deal with the matter - the whole kit and caboodle, as it were, further down the track. I appreciate that we've got the witnesses here. There'd be some desirability on the former course, I think, but I don't want to make matters unnecessarily complicated. So starting with you, Mr Amoresano, in respect of the evidence of Mr - is Mr Pope - is he required for cross-examination and what are your views about, you know, what I'm canvassing as to the potential ways forward with the matter?

PN21

MS PRESDEE: Commissioner, I'll deal with that. Firstly, yes, Mr Pope will be required for cross-examination. I think it would be our preference to - because we understand that Mr Pope spends his time both in Australia and the United Kingdom. So we're mindful that the availability of him as a witness might not be as great going forward.

PN22

THE COMMISSIONER: Yes.

PN23

MS PRESDEE: So we do think that through cross-examination we may be able to place some facts on the record which would support any submissions that we are making in relation to the eligibility of the Union to cover the employees at Selborne, and so we believe - - -

PN24

THE COMMISSIONER: All right. So - right.

PN25

MS PRESDEE: - - - that will assist us.

PN26

THE COMMISSIONER: Yes.

PN27

MS PRESDEE: And then if we need to put on further written submissions addressing that, then we can do so.

PN28

THE COMMISSIONER: All right. Mr Macinnis, your perspectives?

PN29

MR MACINNIS: Well, Commissioner, the first submission from our perspective is that the Union ought not be permitted to have any further opportunity to put on submissions on the eligibility rule. The issue of the eligibility rule has been live since at least 25 January of this year, where a letter which the Commission will find annexed to Mr Pope's statement was sent to the Union. But, more

importantly, it's clear from the material which the Union has filed in the Commission, particularly in relation to Mr Wickham's statement, that Mr Wickham was aware of the evidence and has sought to give evidence. And the Commission finds this in paragraphs 4 to 9 of Mr Wickham's statement.

PN30

So the stating point, from our perspective, is the Union was clearly on notice of this point prior to the date on which their material was due on in these proceedings. If what they have put on they now consider to be inadequate to deal with the position, firstly, it's difficult to see that that material can be buttressed in any sensible given the submissions that I propose to develop that question.

PN31

But, secondly, there's no procedural fairness requirement, in my submission, which would give the opportunity for the Union another bite of the cherry because the cherry was known and on the table prior to the point at which material has been dealt with, and there has already been a very clear first bite taken in respect of Mr Wickham's statement. So that would be my first submission.

PN32

THE COMMISSIONER: Well, I'll just deal with that first. It's not a procedural fairness issue, from my perspective. This is a perspective, Mr Macinnis, of me wanting to be best informed as to what the position is in respect of the rules. And I'm not in that position at this time, and it's for that reason that I'm canvassing the process. It's as simple as that.

PN33

MR MACINNIS: I appreciate that, Commissioner, but from the perspective of the Union they'd be afforded further opportunity to deal with the matter and, in my submission, that's not something which ought to be put on. Sorry, Commissioner, I've just been given a note about Mr Pope's availability. I might just put my submission in relation to the question of cross-examination.

PN34

THE COMMISSIONER: Yes.

PN35

MR MACINNIS: And then I might turn - if I could have a moment, Commissioner, just to ascertain what that says. Commissioner, in relation to the cross-examination this is my submission. In my submission, this is a matter in which the Commission won't be assisted by cross-examination on either side. It's not been clear what cross-examination of Mr Pope is required or how that could assist in the determination of either the rules issue or the question about majority support determination.

PN36

I would very happily forgo cross-examination of Mr Wickham in the event that cross-examination of Mr Pope is not required. And, in my submission, for the Commission to deal with this matter in a just, quick and cheap manner, and in particular to get to the real issues, rather than sort of having a snuffle around in cross-examination to see whether a case that doesn't previously exist can be

established, it's my submission that this is a matter in which, Commissioner, you ought to take both witness statements on the basis of what is there and not to have any further - not to require either of the witnesses for cross-examination, but simply to proceed on the basis of what's there.

PN37

THE COMMISSIONER: Well, if one party wants to cross-examine another witness, Mr Macinnis, then they've got an entitlement to do so.

PN38

MR MACINNIS: Well, subject to the Commission's ability always to control its own processes, and to see whether if cross-examination is unlikely to be a helpful process, whether cross-examination - - -

PN39

THE COMMISSIONER: Well, I have never - well, I don't recall ever in my 10 years indicating to a party that I was going to deny them the right to cross-examine. And, indeed, I'd be - I'd have concerns about the procedural fairness in doing so, whether it was to you, Mr Macinnis, or the Union in this case.

PN40

MR MACINNIS: Very well. Very well, Commissioner. Well, in that circumstance of cross-examination, I will require Mr Wickham for some short cross-examination.

PN41

THE COMMISSIONER: Sure.

PN42

MR MACINNIS: My primary submission should be, in terms of what you have indicated, Commissioner, as to whether the matter should be bifurcated today, is that the Union has had the opportunity to put before you everything that it could put before you in relation to the construction of the rules. I am ready today to deal with the question of why neither of the rules the Union relies upon provides any coverage in respect of any employees, putting to one side, of course, the issue that nobody has been identified.

PN43

But subject to taking short instructions in a moment, Commissioner, in relation to Mr Pope's availability, my submission is that the matter ought to be dealt with. All of it should be dealt with today, and if the Union's not ready to proceed and can't give you the assistance that you want to have in relation to the rules, well, that sounds against the Union and not against my client.

PN44

THE COMMISSIONER: Sure. Yes. All right. Well, look, just so it's clear I thought I indicated my position earlier but I understand that. I think what we'll do is - and I'm disposed towards providing an opportunity for the Union to put on reply materials in respect of the rules issues. And it might be that we have to have another short hearing after that because obviously, Mr Macinnis, you'd be afforded an opportunity to respond to anything that arose from that.

PN45

So but it might be that the Union doesn't require that process, but at the moment, as I say, there's not a great deal to be able to work with within that space, beyond what you've supplied, Mr Macinnis, I should say. So the way we'll proceed then is to deal with the evidence of Mr Wickham first, I presume, and then the evidence of Mr Pope. Yes?

PN46

MR AMORESANO: Yes, Commissioner.

PN47

THE COMMISSIONER: Yes. Are you controlling this now, Mr Amoresano?

PN48

MR AMORESANO: Yes.

PN49

THE COMMISSIONER: All right. Well, you'll call your evidence. From the Union's point of view, do you need Mr Pope disconnected for this or are you happy for him to stay? It's up to you.

PN50

MR AMORESANO: He can stay.

PN51

THE COMMISSIONER: All right. So you're calling Mr Wickham to give evidence?

PN52

MR AMORESANO: Yes, I'm calling Mr Wickham to give his statement.

PN53

THE COMMISSIONER: All right. We'll swear him in.

PN54

MR AMORESANO: Yes.

PN55

THE ASSOCIATE: Hi, Mr Wickham. Could you please repeat after - state your full name and address?

PN56

MR WICKHAM: Michael Edward Wickham. Office is located at 80 Oldaker Street, Devonport, Tasmania.

PN57

THE ASSOCIATE: Thank you.

<MICHAEL EDWARD WICKHAM, AFFIRMED

[2.14 PM]

PN58

THE COMMISSIONER: All right. Thank you, Mr Wickham. So, Mr Amoresano.

PN59

MR AMORESANO: Yes, Commissioner.

PN60

So, Mr Wickham, can you state again your full name and address, please?---Michael Edward Wickham. 80 Oldaker Street, Devonport, Tasmania, being the office.

PN61

Did you give a statement dated 6 February 2023?---I did.

PN62

Do you have a copy of the statement with you?---I do.

PN63

Do you have - there is any error or correction you wish to make to your statement?---Overall, no. I think probably given that I've been informed of some previous correspondence about six or seven years ago, which I was a bi-party to in some respect, and clearly never recalled it, given everything else I've got, that the issue about coverage was raised with another organiser back then. Other than that, I have no changes to the statement.

PN64

Thank you. Thank you, Mr Wickham. Then I tender the statement and I have no further witness questions.

PN65

THE COMMISSIONER: Can I just ask, Mr Wickham - can I just get clear, it's got 26 paragraphs, the statement that you put in?---Mine's got 23, Commissioner.

PN66

Is that right? What does the last paragraph say?---'At the time of making this statement the respondent is yet to initiate bargaining.'

PN67

All right. Well, the version I've got says that that's paragraph 26?---Yes. Just one moment. I must have a later version.

PN68

I've only got one version. It's the version that the Union filed with the application?---Yes. And I - - -

*** MICHAEL EDWARD WICKHAM

XN MR AMORESANO

PN69

So, Mr Amoresano, can we - if necessary, we'll stand the matter down briefly, and can you get a copy of the actual statement that Mr Wickham is making in front of him in order that he can proof that?---My apologies, Commissioner, I printed the wrong one off earlier. I have the original one that - the latest one that I'm now just printing.

PN70

We're going to adjourn for five minutes. Mr Amoresano is going to make absolutely clear which one it is that you're looking at. We're adjourned. We'll resume in five minutes.

<THE WITNESS WITHDREW [2.18 PM]

SHORT ADJOURNMENT [2.18 PM]

RESUMED [2.21 PM]

<MICHAEL EDWARD WICKHAM, RECALLED [2.21 PM]

EXAMINATION-IN-CHIEF BY MR AMORESANO, CONTINUING [2.21 PM]

PN71

THE COMMISSIONER: Mr Wickham?---Yes.

PN72

Hello?---I'm here.

PN73

We've got you back on camera, I think?---No, I'm still waiting to be let in.

PN74

No, you're back on the call. I think you've got your - you've covered up your camera or you've put the slider across or something?---Okay. What I've got in front of me it says, 'We've let people in the meeting know you're waiting', so I'm not quite sure what's going on, because it dropped out.

PN75

Well, look, we can hear you. I think we're probably okay to proceed. Perhaps again, Mr Amoresano, if you can just get him to identify the statement that he's attesting to and we'll take it from there.

PN76

MR AMORESANO: Yes, Commissioner.

PN77

So, Mr Wickham, did you give a statement dated 6 February 2023?---I did. That's correct.

PN78

Do you have a copy of the statement in front of you?---I do, indeed.

PN79

Are there any - is the statement 26 paragraphs?---It is 26 paragraphs, correct.

PN80

Is there any error or correction you wish to make to the statement?

PN81

THE COMMISSIONER: That doesn't sound good.

PN82

THE ASSOCIATE: He's left the meeting again.

PN83

THE COMMISSIONER: All right.

PN84

MR MACINNIS: My cross-examination is not going to be that terrifying.

PN85

MS PRESDEE: See if we can get hold of him.

PN86

THE COMMISSIONER: I think it's more a flock of seagulls flew past the antenna tower at Devonport, caused a disruption.

PN87

THE ASSOCIATE: Mr Wickham, can you hear us again?---My apologies, Commissioner. I'm three-quarters of the way moving office. I'm in a very temporary site at the moment.

PN88

THE COMMISSIONER: That's all right?---So (indistinct).

PN89

Let's just keep going, Mr Wickham. So keep going, Mr Amoresano.

PN90

MR AMORESANO: So, Mr Wickham, can you confirm again that the witness statement you have is 26 paragraphs?---Correct.

PN91

Are there any error or correction that you wish to make to the statement?---No, no, I don't have any.

PN92

Then I tender the statement, Commissioner.

PN93

THE COMMISSIONER: Can I ask you, Mr Wickham, do you say that everything in that statement is true and correct?---Yes, I do.

PN94

Can I just ask you, on the statement I've got it says 6 February 2022. Is that what it says on yours?---It does say that, Commissioner. Correct.

PN95

I presume it's meant to be 2023.

PN96

MR AMORESANO: Yes, that is correct, Commissioner.

PN97

THE WITNESS: Yes.

PN98

THE COMMISSIONER: I'm not asking you. I'm asking the witness.

PN99

MR AMORESANO: Sorry.

PN100

THE COMMISSIONER: Yes, Mr Wickham?---Yes, 2023. It should be 2023, Commissioner.

PN101

Thank you. All right. Thanks for that. Well, you seek to tender that, Mr Amoresano?

PN102

MR AMORESANO: Yes, Commissioner. Thank you.

PN103

THE COMMISSIONER: All right. So no objection to it, Mr Macinnis?

PN104

MR MACINNIS: Thank you, Commissioner. Mr Wickham, before I begin, can I just check - - -

PN105

THE COMMISSIONER: Sorry, just - sorry. No objection to the tender?

PN106

MR MACINNIS: No, I'm sorry. No, no objection, Commissioner.

PN107

THE COMMISSIONER: No. Yes. So I'll mark that AMWU1.

EXHIBIT #AMWU1 WITNESS STATEMENT OF MICHAEL EDWARD WICKHAM

PN108

Thanks. Yes, Mr Macinnis, cross-examination.

CROSS-EXAMINATION BY MR MACINNIS

[2.25 PM]

PN109

MR MACINNIS: Thank you, Commissioner.

PN110

Mr Wickham, just before I begin, can I just check that the version you have in front of you of your statement is a version which runs to 17 pages and which includes a number of annexures?---Yes, it does, but I have - they're on the printer, I think, Mr Macinnis. So I haven't got them in front of me, but they all printed out.

PN111

Commissioner, I anticipate that I will need to take Mr Wickham to some of those annexures.

PN112

THE COMMISSIONER: Yes. So are you able to access those, Mr Wickham?---

PN113

MR MACINNIS: Mr Wickham?---Yes, I have all the annexures with me.

PN114

THE COMMISSIONER: Yes. Great. Thanks, Mr Macinnis.

PN115

MR MACINNIS: Thank you, Commissioner.

PN116

Mr Wickham, can I take you to paragraph 12 of your statement, please?---Yes.

PN117

Now, you see that paragraph begins, 'On or around 20 December 2022'?---I can.

PN118

And the paragraph goes on to discuss a meeting that you had at my client's premises?---Correct.

PN119

When you say, 'On or around', Mr Wickham, which of those was it?---It was on or around 20 December, to the best of my recollection of my calendar.

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN120

Well, Mr Wickham, can I suggest to you that your calendar should presumably allow you to identify the precise date on which the meeting took place? Is that a reasonable proposition from the way a calendar would normally work?---You can take that as a proposition but my calendar is not always filled out entirely, so I

was relying on other meetings around that week to what day I had been at that site.

PN121

So is your evidence to the Commission today that although you give extensive evidence of what occurred in the meeting, you can't even specify with precision the date on which that meeting occurred?---I can, because I very clearly know what the meeting was about. It's not an issue with my recollection at all. The day in that particular week may be but certainly not the meeting because that was the reason as to my - what continued on at the start of this year. So I have no issue with that at all.

PN122

Mr Wickham, this will proceed more smoothly if you listen to my question. Can I suggest to you that if you say on or around 20 December 2022, then you can't specify with precision the date on which the meeting occurred?---No, on or around is the best I can do. That's as I said.

PN123

Thank you, Mr Wickham. Now, can I suggest to you that if it did occur on 20 December 2022 that's the Tuesday before Christmas?---Without looking at a calendar in front of me at the moment, I'll take that as you've indicated.

PN124

Very well. And you - - -?---That'd be right because (indistinct) Christmas.

PN125

And if I suggest to you that Christmas Day was a Sunday this year, so that the Tuesday - there were only three days remaining until Christmas. Would you accept that as a correct proposition?

PN126

THE COMMISSIONER: Last year.

PN127

MR MACINNIS: You're indeed correct, Commissioner. I do apologise, I withdraw the question. Mr Wickham, would you accept that Christmas last year fell on a Sunday, so that if the Tuesday before Christmas, there were only then three working days until Christmas?---That sounds about right, from memory.

PN128

Now, Mr Wickham, if I can take you down to paragraph 19 of your statement, you say, 'A few days later'. Does that mean a few days later than the meeting which was on or around 20 December 2022?---Yes, so a few days later (indistinct). That's correct.

PN129

Now - - -?---But it was a couple of days after that.

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN130

Now, you haven't attached that email to your statement, have you?---I have the emails that were sent to me, and they were tendered along with - through our IOs. I have them in front of me, those emails.

PN131

Well, you might like to then take me and show me where in your statement, Mr Wickham, the email that's referred to in paragraph 19 is attached to your statement, if you say it's been filed?---The attachments I have are all blanked out. They are the petition to the Fair Work Commission. There are no - there is -
- -

PN132

Mr Wickham - - -?---I - - -

PN133

Mr Wickham, this will work better if you listen to my questions and answer my questions. In paragraph 19 you say, 'A few days later Member emailed me the forms', and my question is that email is not attached to your statement in these proceedings; is it?---No, not to my statement, it's not. Correct.

PN134

But can you tell the Commission what day it was that that email was received?---It was some time around - a couple of days after the initial meeting. Some time around in that week, and that's the best I can recall for you.

PN135

So, Mr Wickham, are you saying you no longer have a copy of that email?---I would have a copy on my emails, for sure, in my email file.

PN136

Well, from that email file you can tell the Commission, can't you, what day it was that email was received?---I could.

PN137

Is there a reason why you don't wish to do so?---Sorry?

PN138

Is there a reason why you don't wish to do so, Mr Wickham?---I didn't say I didn't wish to do so. I said I could find it if I needed to. They were sent to our legal team. All this around the NSD - I haven't kept a record other than email - train of emails. And I don't have it printed out with me, but I have no reason at all - if the Commissioner requests it and he hasn't got it, I can send it.

PN139

You know you're on your oath, Mr Wickham, and your oath is to tell the whole truth, so I am asking you what is the day on which you say the emails referred to in paragraph 19 was received by you?---And I will repeat that it's on or around the 20th, that week. I do not have a clear recollection of the date, and unless I go back into my email trail and find it, I cannot give you a specific date.

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN140

Commissioner, I'm not sure whether the witness understands the import of that answer but that's, in my respectful submission, a clear failure to answer. Could the Commission give the witness a direction about the need to answer questions that are asked?

PN141

THE COMMISSIONER: So if you could do that, Mr Wickham, I am asking you to answer the questions that you are being asked. And you're being asked about the particular email which included the forms that you refer to in paragraph 19. So just ask the question again. Mr Wickham, listen to it carefully, Mr Wickham, and answer it honestly, please?---I am trying to answer it.

PN142

MR MACINNIS: Mr Wickham - - -?---I would have to go back to my own emails to find it, to give you the exact date, I'm afraid. I don't have that in front of me.

PN143

Well, is there any reason why you can't do that now, Mr Wickham, by reference, for example, to your mobile telephone? Are the emails on your mobile telephone?---That's a good question. That's quite possible.

PN144

THE COMMISSIONER: Did we lose him again?

PN145

THE ASSOCIATE: Yes, Commissioner.

<THE WITNESS WITHDREW

[2.34 PM]

PN146

THE COMMISSIONER: All right. Look, we might adjourn briefly and see if we can get him reconnected and we'll see what's - see where he's up to.

PN147

MR MACINNIS: Commissioner, without wanting to foreshadow the cross-examination, could I just also foreshadow that I'm about to ask the witness paragraph 20 of the statement says - it says, 'Attached is a copy of the text messages to be included in the petition.' Those don't - at least on the copy that I have - appear to be attached. So I want to ask the witness about those. So if the witness is being asked - and I'm not suggesting obviously that my friend would do anything improper while the witness is under cross-examination.

PN148

THE COMMISSIONER: Yes.

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN149

MR MACINNIS: But if the witness was to ask about were there any other documents that you should have to hand, that he must have, with respect, access

to but that he would need access to in the witness box, then I can just foreshadow that that is also a matter that I will be turning to very shortly.

PN150

THE COMMISSIONER: Yes. Look, all right, that's fine. Look, Mr Amoresano, can we - is there some way you can - well, what's the easiest way to do this? I think maybe if we can just get Mr Wickham reconnected for a start. Are you happy, Mr Macinnis, that I just indicate that he's also referred to some documents in paragraph 20, and that he should prepare those as well while he's looking for the others?

PN151

MR MACINNIS: Yes.

PN152

THE COMMISSIONER: And then we'll just stand it down. Yes.

PN153

MR MACINNIS: That's a very suitable course, Commissioner, yes.

PN154

THE COMMISSIONER: Okay. That's the best way to deal with it. All right. Let's just see if we can get Mr Wickham back again.

PN155

THE ASSOCIATE: Sure, Commissioner.

<MICHAEL EDWARD WICKHAM, RECALLED [2.36 PM]

CROSS-EXAMINATION BY MR MACINNIS, CONTINUING [2.36 PM]

PN156

THE ASSOCIATE: Hi, Mr Wickham, can you hear me?---I can now.

PN157

THE COMMISSIONER: All right. Mr Wickham, it's Commissioner Lee. So just listen carefully. So we were dealing with paragraph 19?---Correct.

PN158

And Mr Macinnis was asking you about locating the particular email that you refer to in paragraph 19. So I want you to take a few minutes and see if you can find that. And in paragraph 20 you also refer in the second sentence there to a copy of the text messages to be included in the petition?---Correct.

PN159

Can you find a copy of that as well?---So the - I have my email trail on the 20th where I received an email with two names on it for the MSD. That's on the 20th of the 12th. I have - now, I don't have the - the petitions I've got, Commissioner, are all blanked out but I do have three or four of those with various numbers and I
- - -

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN160

No, listen - Mr Wickham - - -?--- - - - have a text message - - -

PN161

Mr Wickham. Mr Wickham?--- - - - (indistinct).

PN162

Mr Wickham, listen carefully. Look at paragraph 20, the second sentence?---Yes. Correct.

PN163

So:

PN164

Attached is a copy of the text messages to be included in the petition.

PN165

?---Yes.

PN166

All right. Can you locate that?---I'd have to go back to my text messages, Commissioner, to find that because I don't have that as a hard copy in front of me.

PN167

All right?---I'd have to try and get - find that again in my old text messages, if it's there. I wasn't expecting that to - to have them in front of me.

PN168

Yes. Well, with respect, Mr Wickham, it says 'attached' which I read to mean - - - ?---Yes.

PN169

- - - attached to your statement is that document. But I can't see it?---No, and - - -

PN170

Unless Mr Amoresano - - -?--- - - - my copy - - -

PN171

- - - can point to it, but I don't think it's there.

PN172

MR AMORESANO: Commissioner, it's actually some of the text messages are attached to the witness statement. I think it's page 11, but it's - - -

PN173

MR MACINNIS: Highly redacted.

PN174

MR AMORESANO: It's redacted. Yes, it's redacted, yes.

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN175

MS PRESDEE: It is.

PN176

THE COMMISSIONER: Okay.

PN177

MR MACINNIS: Commissioner, in that case I don't think I can take the point about paragraph 20 any further if the position appears to be that where it says, 'Attached is a copy' when actually not attached is a copy.

PN178

THE COMMISSIONER: Yes. Yes.

PN179

MR MACINNIS: But, Mr Wickham, can I take you back though. I want you to listen carefully to my question. When you say, 'A few days later Member emailed me the forms', is your evidence now that in fact the only further email which you received with the forms was on 20 December, the same day as the meeting?---Yes, I do have a copy on the 20th and that's the only email I've got that I can find in my email trail at the moment. There were a number sent to me by text, as was indicated, but on the 20th was the one that I've been able to find at the moment.

PN180

Very well, Mr Wickham. So when you say in paragraph 19:

PN181

He told me that he followed up with the employees who were on shift or on holidays, and collected other signatures -

PN182

would you accept that it is unlikely that there were other employees of my client who were on holidays on 20 December who could be followed up later on 20 December after your meeting?---No, because I received another one - I received that email on the 20th. The text messages from the particular employees who were on holidays were attached with the - with our submission from the legal team, and they would have been from the 20th onwards, from memory. So they were text messages to those employees. Not sent by me - they were sent to me.

PN183

I see and - - ?---I can't get the text messages out of my phone.

PN184

Very well, Mr Wickham. Now, you say, though, or you give the impression from paragraphs 18 and 19, that there was a particular member of the Union, a particular employee of Selborne, who was responsible for collecting those additional forms and signatures. Is that your evidence?---Correct.

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN185

I see?---That's correct.

PN186

And who is that member, Mr Wickham?---I'm not prepared to say that.

PN187

Mr Wickham - - -

PN188

MR AMORESANO: Yes, we object to that.

PN189

MS PRESDEE: We object to that.

PN190

MR AMORESANO: That question.

PN191

THE COMMISSIONER: On what basis?

PN192

MS PRESDEE: Relevance.

PN193

THE COMMISSIONER: Okay. Mr Macinnis.

PN194

MR MACINNIS: Well, I press the question, Commissioner. Without foreshadowing material that I want to put before the witness, there is a great deal of evidence given here by Mr Wickham - presumably because he knows it's important to give this evidence. In paragraph 16 there's the domain point of it, very carefully indicating what it was that was said and very carefully eschewing any suggestion of inducement or of threat.

PN195

But evidence he has now given that it appears that a number of these signatures - and we don't know how many - were collected by this employee. We don't know whom. And so to test the question about this evidence, that apparently came after the meeting, that's already in a very confused state given Mr Wickham's statement, plainly I need to know who the employee is from whom this material was put forward. And there's no basis for a witness on his oath to refuse to give that answer, in my respectful submission.

PN196

THE COMMISSIONER: Yes, and why do you need to know the name of the employee?

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN197

MR MACINNIS: Well, so we can assess, firstly, whether the employee was there. Secondly, whether the employee is a person who was someone in respect

of whom the Union had coverage. But the issue here, Commissioner, is that there is a chain of custody problem in respect of the other things which arise. The chain of custody problem is even larger before the - now than before the cross-examination started, because the dates are horribly confused and it appears that - and I should say, Commissioner, although this is not in Mr Pope's statement, you'll hear evidence later on that there was a Christmas close-down at Selborne between 22 January - sorry, 22 December and 9 January. So that puts considerable doubt on anything new arriving during that period. In order to understand how that material all came through, we need to know who this person was who was left as Mr Wickham's emissary at the workplace.

PN198

THE COMMISSIONER: Sure. Mr Wickham, look, you can withhold that information. I understand the basis upon which you'd seek to do so. It will likely have consequences for the case and, you know, may have an effect on the decision I make because the inferences may well be asked to be drawn from your failure to answer. So but it's a matter for you, understanding that?---Yes, look, Commissioner, I'm not prepared to give the name. The MSD - the person I refer to is on the MSD which you have a list of. I'm not prepared to give those names out because none of the employees are prepared to give their names as to who's a member and not a member to the employer. And I don't want to risk that by giving it out. Suffice to say that that particular employee is on the MSD. He is under our coverage and he did consult with those particular employees who were on holidays. He sent me the text messages and their responses, which were in our submissions, as I understand. Mr Amoresano or Ms Presdee will be able to confirm that.

PN199

All right.

PN200

MR MACINNIS: Very well, Commissioner.

PN201

I might just to complete that - Mr Wickham, you have no way of knowing what it was that employee said to any of the employees who subsequently sent to you text messages to procure them to send those text messages; do you?---No. Only what I received in the text message; that's correct. And there are - were copies of them forwarded.

PN202

Thank you. Just for completeness, Mr Wickham, coming back to paragraph 20 where it says, 'Attached is a copy of the text messages to be included in the petition', do you accept that the statement you have filed with the Commission doesn't provide any of those text messages in unredacted form, so that they could be understood either by my client or by the Commission?---My understanding is that they were included, and that's all I can say. Mr Amoresano or Ms Presdee would have to confirm that they were included. I don't have that in front of me.

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN203

Mr Wickham - - -?---They were sent to be forwarded in our submissions.

PN204

Mr Wickham, to be fair to you, it's your statement, and you've told the Commission that you have in front of you a complete copy with all of the annexures. Do you want now to try and find where any unredacted text messages are attached to your statement? Or do you accept that there aren't any?---They're not attached to my statement in front of me. That's all I can say. They were attached, though, with the submissions.

PN205

Thank you, Mr Wickham. I don't need to take that any further. If I can just end with one final question, Mr Wickham. Can I take you forward to page 13 of your statement? You'll see that there are numbers on the bottom right-hand corner of each page, and page 13 forms part of attachment B. Can I take you to page 13?---Yes. Yes, you can but my - the printer that I've got and what I was sent, they are blanked out. I only have a - they're blanked out. I don't have the full unredacted copy in front of me.

PN206

Mr Wickham, rather than making speeches, can I take you to page 13, please, because that's - - -?---You can.

PN207

- - - a page which is not completely blanked out. There is an un-blanked-out section which says a word which is cut off, and then 'be cautious particularly with'. What's that a reference to, Mr Wickham?---Yes, I can see that.

PN208

What's that a reference to?---I can read that, yes.

PN209

And is that - what is that a reference to, Mr Wickham?---Without seeing the rest of it, I can't give you an answer, I'm sorry.

PN210

Mr Wickham, this is - you understand that this is your statement to the Commission and this document is attached to your statement?---I understand that clearly.

PN211

And presumably you made the decision about what to redact from your statement?---In the redacted form, correct. That was done with our legal team.

PN212

Well, Mr Wickham, I would be careful about saying what was done with your legal team in case it discloses privileged conversations your legal team might rather not have disclosed?---Yes. No. No.

*** MICHAEL EDWARD WICKHAM

XXN MR MACINNIS

PN213

But if you made the decision to redact, you must know what is on the original unredacted version of that page; don't you?---I would if I had it in front of me, correct.

PN214

I see, and you say that sitting here with a redacted version, you have no ability to tell the Commission what the original unredacted version of that message was, and who was being told to be cautious, and about what. Is that your evidence, that you have no recollection of what was in that original document?---Without it in front of me, that's corrects.

PN215

I see, so page 13 is of no assistance to you at all in determining any of the issues that are before the Commission today. Is that your evidence?---Yes. With the redacted version I've got, that's correct, because I can only see what you've read out, 'be cautious particularly with'. I don't have the unredacted version in front of me, I apologise.

PN216

And you say, sitting here in the witness box now, that you have no recollection of what that original unredacted version was that you saw before you decided to redact it?---Not off the top of my head. That's correct, I can't.

PN217

Thank you, Mr Wickham. Nothing further, Commissioner.

PN218

THE COMMISSIONER: Thank you. Anything arising from that, Mr Amoresano?

PN219

MS PRESDEE: Commissioner, I'll take that. Yes, there are. Yes, there is. Thank you, Commissioner.

RE-EXAMINATION BY MS PRESDEE

[2.49 PM]

PN220

MS PRESDEE: Mr Wickham, when Mr Macinnis asked you about the date, your - is it correct that your answer, it was, 'On or about 20 December', not, '20 December', that the meeting occurred?---That's correct.

PN221

Thank you?---That's correct.

PN222

Now, if you could please turn to attachment A, which is page 4 of your statement?---Yes, page 4.

*** MICHAEL EDWARD WICKHAM

RXN MS PRESDEE

PN223

Yes?--- Yes.

PN224

Are they a set of emails?---That's a letter from Mr Pope.

PN225

Okay. Can I take you down the page where there appears to be an email from yourself to Mr Pope?---Correct.

PN226

Is there - can you please say for the record what is in the yellow text box?---'This email was sent through an outside organisation. Be cautious, particularly with links and attachments.'

PN227

Mr Wickham, is that an email warning that is part of your email system?---It is, correct. It comes up on all of them. It says, 'Caution, external email', and then follows the words that was written.

PN228

So if you go to page 13 that Mr Macinnis - - -?---Yes.

PN229

And the unredacted part of that email, what does that say?---It says, 'Be cautious particularly with', in yellow, the same as page 4.

PN230

So that is a standard email warning?---It is, correct.

PN231

No further questions.

PN232

THE COMMISSIONER: All right. Thanks. Thanks very much, Mr Wickham. Your evidence has concluded. All right.

<THE WITNESS WITHDREW

[2.52 PM]

PN233

THE COMMISSIONER: We will turn to getting the evidence in from Mr Pope. Mr Macinnis.

PN234

MR MACINNIS: The Commission should have a single statement - if the Commissioner will bear with me one second.

PN235

THE COMMISSIONER: Yes.

*** MICHAEL EDWARD WICKHAM

RXN MS PRESDEE

PN236

MR MACINNIS: Of Neville George Pope, made on 13 February 2023. That consists of a body of two pages, and the statement in total is 20 pages. The pages are in each case numbered on the top right side.

PN237

THE COMMISSIONER: Yes. Yes, thank you.

PN238

MR MACINNIS: I tender that, Commissioner.

PN239

THE COMMISSIONER: Was there any cross-examination required of Mr Pope?

PN240

MR AMORESANO: Yes, Commissioner.

PN241

THE COMMISSIONER: Yes. We'll get Mr Pope back and we'll swear him in and deal with that way, Mr Macinnis.

PN242

MR MACINNIS: Thank you. Sorry, Commissioner, there is one question I wish to put in, in examination-in-chief, I should flag, that I raised in cross-examination in relation to the Christmas close-down.

PN243

THE COMMISSIONER: Yes. Sure.

PN244

MR MACINNIS: But that's the only question I wanted to put in-chief.

PN245

THE COMMISSIONER: All right. Can we just get Mr Pope back?

PN246

THE ASSOCIATE: Mr Pope, can you hear me?

PN247

MR POPE: Yes, I can.

PN248

THE COMMISSIONER: All right. Mr Pope, you're giving sworn evidence in this matter and my associate will just swear you in.

PN249

MR POPE: Thank you.

PN250

THE ASSOCIATE: Mr Pope, please state your full name and address.

PN251

MR POPE: My name is Neville George Pope, and my address in Australia, to be clear, is (address supplied).

PN252

THE ASSOCIATE: Thank you.

<NEVILLE GEORGE POPE, AFFIRMED [2.53 PM]

EXAMINATION-IN-CHIEF BY MR MACINNIS [2.53 PM]

PN253

THE COMMISSIONER: Thank you. Mr Macinnis.

PN254

MR MACINNIS: Mr Pope, have you made a witness statement in these proceedings which was signed by you on 13 February 2023?---Yes, I have.

PN255

And do you have a copy of that with you?---I do.

PN256

Is that statement true and correct to the best of your knowledge and belief?---Yes, it is.

PN257

Thank you, Mr Pope. Mr Pope, just one question. You would have knowledge of the Christmas closedown of - at the respondent's premises?---Yes.

PN258

Can you tell the Commission over the Christmas 2022 to 2023 period, what date the operations of Selborne closed down and what date they restarted again, please?---Just to be clear, I wasn't here when they closed down. I was actually in the UK. But they closed down on 22 December and reopened on 9 January, with the exception of a couple of guys who came in doing some maintenance work.

PN259

Thank you, Mr Pope. Nothing further, Commissioner.

PN260

THE COMMISSIONER: Thanks. All right. So Mr Amoresano, cross-examination.

CROSS-EXAMINATION BY MR AMORESANO [2.55 PM]

PN261

MR AMORESANO: Yes, Commissioner.

PN262

*** NEVILLE GEORGE POPE

XN MR MACINNIS

*** NEVILLE GEORGE POPE

XXN MR AMORESANO

Mr Pope, you mentioned that the industry in which Selborne operates is the pharmaceutical industry. Is that correct?---That's correct.

PN263

But you also mention on paragraph 2 of your witness statement that Selborne also manufacturing product not only for pharmaceutical but also for veterinary (indistinct) and diagnostic industry. Is that correct?---It is. They're all related pharmaceutical industries.

PN264

Can you please describe the kind of environment that is at Selborne? So where those manufacturing of product occur and how they get tested, for the Commission to hear?---Okay. Our raw materials actually can start in the abattoirs or on farms, so that's an open harvesting collection.

PN265

Yes?---We then have various upgraded rooms to the point when we get to what they term as a class 10,000 clean room, where it's fully geared up to go in and the staff are operating under class 100 laminar flows. So it's a diverse environment in terms of control, greater controls closer to the end of the product. In terms of testing, we test to predominantly either European Medicines Agency requirements or the USDA requirements, depending on the customer's needs.

PN266

Thank you. Thank you, Mr Pope?---Some of that testing is done in-house. Some is done in other laboratories, either in Australia or in US.

PN267

Thank you, Mr Pope. And it's - would you reckon it's most of the testing done on site, or sent out?---It depends on the complexity of it. The more complex tests are certainly done externally. Virus testing, for instance, is done in the US. Micro-plasma is done in the US. So we do basic biochemistry tests in Tasmania.

PN268

Thank you, Mr Pope. You mentioned that there's a clean room. Can you tell us what's the clean room, how it looks like and what is done there?---Clean rooms are rooms which have a controlled environment to an international standard. They're widely used in all sorts of industries. They're not specific to our industry but, in our case, it's actually to protect the product from the environment and from the people. So they're predominantly used when we're putting into the final packaging.

PN269

Okay. Thank you, Mr Pope. And what kind of machines are in the clean room?---There's - in some cases no machinery, other than the laminar flow cabinet. But no machinery that staff operate.

*** NEVILLE GEORGE POPE

XXN MR AMORESANO

PN270

Thank you. Thank you. You mentioned that there's some testing done in-house. Can you run us how this testing is done? Is there any machine or

equipment that's been used for the testing? And how - - -?---The most widely - sorry, continue.

PN271

No, sorry. Sorry, please go. It's okay?---The most widely used machines that we would use are incubators for incubating plates. And spectrophotometers which tend to do a total protein in regard to (indistinct).

PN272

So would you reckon it's - do you also use - I don't know - centrifuge and centrifugation process?---Not in the testing process. That's part of the manufacturing process.

PN273

Okay?---We may have a small lab-scale one in there but not widely used. The main centrifugation processes you refer to are part of the manufacturing.

PN274

Thank you, Mr Pope. Mr Pope, we would like to mention that in the manufacturing award we cover technical workers. Do you reckon in the environment of Selborne there are people that can be classified as technical workers?

PN275

MR MACINNIS: Well, I object to that, if the Commission pleases.

PN276

THE COMMISSIONER: Yes.

PN277

MR MACINNIS: If the witness is being asked questions about the form of an award, then he should be given a copy of that, so that he can see what language is being referred to.

PN278

THE COMMISSIONER: Yes, I agree with that.

PN279

MR AMORESANO: Sorry. Sorry, Commissioner. Commissioner, may I read the definition of technical workers in the manufacturing award?

PN280

MR MACINNIS: Commissioner, my objection again is on the basis of relevance. Mr Pope's statement has included a statement specifying the award coverage of each of the employees of Selborne. None of those employees is covered by the manufacturing award, so on that basis asking Mr Pope questions about an award which doesn't apply in his enterprise is not a matter which is of relevance, in my respectful submission.

*** NEVILLE GEORGE POPE

XXN MR AMORESANO

PN281

THE COMMISSIONER: All right. What do you say about that?

PN282

MS PRESDEE: Commissioner, the coverage question is not determined by what award the workers fall under but as to whether or not they meet the definition of technical officer and/or technical assistants. So a manufacturer - a supervisor performing a manufacturing scientific process. There is no definition of technical officer or technical assistant. This is an - it's an indicative way of determining whether or not a worker who may be in the pharmaceutical industry is a technical worker or not. Whether or not they're covered.

PN283

THE COMMISSIONER: Sure. But what's the utility in putting these things to the witness, or is this something you can make submissions about?

PN284

MS PRESDEE: Well, the utility is realistically that Mr Pope's statement is - and the submissions of my friend are largely that, well, anything can be science. We're pharmaceutical, that doesn't count, it's not - it's manufacturing but not your type of manufacturing. We want it put without - I mean, if needs be, we can rely on submissions but we thought it would probably - - -

PN285

THE COMMISSIONER: Well, I mean, it - - -

PN286

MS PRESDEE: - - - save the Commission's time if - - -

PN287

THE COMMISSIONER: Well, you're dealing with this - - -

PN288

MS PRESDEE: If there was an agreed position.

*** NEVILLE GEORGE POPE

XXN MR AMORESANO

PN289

THE COMMISSIONER: Yes. You're dealing with this witness who's made these 13 paragraphs of - that's his 13 paragraphs of evidence there. So Mr Macinnis' point is about relevance, and, you know, Mr Pope's not here giving evidence about the awards that apply that I can see and so on and so forth. His evidence is about how he seeks to characterise the industry that he's in - his business is in. Everything that's said about manufacturing award and so on, is by way of submission. So that's the relevance point, I think. I mean, it might be I'm missing something, that there's something you want to put to him despite the fact that he hasn't given any evidence about, I guess, industrial matters, per se. His evidence is about - you know, it seems to be born from his - well, obviously his expertise as a managing director of this business as to what the business does, basically. Then, of course, Mr Macinnis will make his submissions about what I should make of that in the context of your rules, as will you. So and I'll make a decision about all that somewhere down the track. But the question is - yes, I'm just not sure where you're going with asking him about particular awards and so on. We can do it but,

you know, he needs to be looking at copies of the award and so on and so forth, and I think the question then would still come back to what's the relevance of that. How is that going to help me decide it, no matter what he says.

PN290

MS PRESDEE: As the Commission pleases. We withdraw the question.

PN291

THE COMMISSIONER: All right. Next question.

PN292

MR AMORESANO: No further questions.

PN293

THE COMMISSIONER: Okay.

PN294

MR AMORESANO: Thank you.

PN295

THE COMMISSIONER: Nothing arising?

PN296

MR MACINNIS: Nothing in re-examination, Commissioner, no.

PN297

THE COMMISSIONER: No. All right. Thanks for your evidence, Mr Pope?---Thank you.

<THE WITNESS WITHDREW

[3.05 PM]

PN298

THE COMMISSIONER: All right. Well, that deals with the evidence. Now my thinking would be that there be an opportunity to provide further written submissions - the Union going first - on all matters, which would include obviously everything that's been put in contest in respect of this application.

PN299

Rules and the issues that have been raised about whether or not - even if there is coverage, whether or not there is a satisfactory basis for me to be satisfied as to the matters that I'm required to be satisfied of under the Act. And I propose a further written reply from you, Mr Macinnis, as a matter of fairness. And then what I'll do is - and I'm proposing, say - well, is a week each enough? Or two weeks each? Mr Amoresano?

PN300

MR AMORESANO: Two weeks. Two weeks.

*** NEVILLE GEORGE POPE

XXN MR AMORESANO

PN301

THE COMMISSIONER: Two weeks. Yes. Two weeks for you, Mr Macinnis?

PN302

MR MACINNIS: Yes, thank you.

PN303

THE COMMISSIONER: Thank you, and what I'll do is I'll list the matter for a short hearing say a week after I get Mr Macinnis' material and if the parties indicate before that that you don't need to be heard, well, we might not have it. Or we might have it because I just want to ask you a few questions, but we'll proceed. We'll proceed that way. Does that sound satisfactory, Mr Amoresano?

PN304

MR AMORESANO: Yes, Commissioner.

PN305

THE COMMISSIONER: Yes. Mr Macinnis.

PN306

MR MACINNIS: Sorry, Commissioner, in inviting those submissions do you also want submissions if it's found that we're unsuccessful on the coverage point and we proceed to the question about whether or not the requirements of section 237 are met, do you want submissions on that question as well?

PN307

THE COMMISSIONER: Yes, I'm dealing with the whole thing together.

PN308

MR MACINNIS: Yes.

PN309

THE COMMISSIONER: So I'm expecting the Union to make submissions on both points. No doubt they'll anticipate, you know, what you've alluded to today about, you know, chain of custody and so on and so forth. You tell me what you want to say about those various points, and obviously anything else you want to say to me about your rules. And obviously anything that fell from the evidence that was given today, both in chief and by cross-examination from both of you. But, yes, we're dealing with the whole thing together. It might be that the decision that comes down, you know, for example, might just say at the end, 'Well, there's no eligibility and that's the end of the matter and I don't have to deal with the rest.' Or it might - I might say there is eligibility but I'm not satisfied on the other point. Or obviously I'm satisfied on both, in which case the MSD is made. So that would appear to be the three possible combinations that will fall out at the end. All right.

PN310

MR AMORESANO: Great. Yes.

PN311

THE COMMISSIONER: Satisfactory?

PN312

MR MACINNIS: Yes.

PN313

MR AMORESANO: Yes.

PN314

THE COMMISSIONER: Nothing further? All right. We'll set some directions upon those lines and we'll adjourn. Thanks for your time today.

PN315

MR AMORESANO: Thank you, Commissioner.

PN316

MS PRESDEE: Thank you, Commissioner.

PN317

MR MACINNIS: Thanks, Commissioner.

ADJOURNED TO A DATE TO BE FIXED

[3.08 PM]

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