TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER JOHNS

B2023/1161

s.229 - Application for a bargaining order

CSL Limited (CSL)

and

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
(B2023/1161)

and

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

Melbourne

10.00 AM, MONDAY, 11 DECEMBER 2023

Continued from 16/11/2023

PN1

THE COMMISSIONER: Thank you, I will take the appearances, please.

PN2

MR M FOLLETT: If the Commission pleases, I appear with my learned friend Mr Garozzo, seeking leave to appear for the applicant.

PN3

THE COMMISSIONER: Thank you, Mr Follett.

PN4

MR E WHITE: If the Commission pleases, I appear for the two respondents, the two unions, each of whose names I won't say in full, but commonly known as the AMWU and the CEPU.

PN5

THE COMMISSIONER: Thank you, Mr White. I think I have previously given permission.

PN6

MR FOLLETT: I think that's right, Commissioner. I will proceed on that basis.

PN7

THE COMMISSIONER: Thank you. Mr Follett, I think this is the first time that you have appeared before me since your recent elevation. Congratulations.

PN8

MR FOLLETT: Thank you, Commissioner. I have had a very brief discussion with my learned friend Mr White this morning and I understand the position to be that provided certain documents are provided to you, Commissioner, by my learned friend, there won't be a necessity to cross-examine Mr Fridell.

PN9

THE COMMISSIONER: No. That will save us four hours.

PN10

MR FOLLETT: Can I do two things - three things, rather. With respect to Mr Fridell's statements, the Commission has very helpfully prepared a court book. There are two corrections of a relatively minor nature that I would seek to make to the first of those from the Bar table. The first statement dated 16 November commences on page 72.

PN11

THE COMMISSIONER: Yes, I have that.

PN12

MR FOLLETT: At paragraph 27, the Commission will see the last date, there's obviously a typographical error with the year.

PN13

MR WHITE: Sorry, what was that Matthew? 27?

PN14

MR FOLLETT: 27.

PN15

THE COMMISSIONER: Page 77.

PN16

MR FOLLETT: And also - - -

PN17

THE COMMISSIONER: So I am looking at paragraph 27. What change am I making?

PN18

MR FOLLETT: The year, the last year, 24 November - - -

PN19

THE COMMISSIONER: Yes, all right.

PN20

MR FOLLETT: I don't think the notice was given for 11 years later.

PN21

THE COMMISSIONER: We hope bargaining is resolved by then.

PN22

MR FOLLETT: And on page 85, paragraph 59(d), we wish to strike through the words at the end of the first line - after 'Ford ute', we wish to strike through the words 'with the number plate 1XM 3XV'.

PN23

THE COMMISSIONER: So there will be a full stop after 'Ford ute'?

PN24

MR FOLLETT: Correct.

PN25

THE COMMISSIONER: Thank you. Other than those changes, we tender that statement.

PN26

MR WHITE: Well, before it's tendered, I thought I had made copies, but I don't have copies, but we had a number of objections to Mr Fridell's statement, and they are significant objections.

PN27

THE COMMISSIONER: Are they in a written format, Mr White?

PN28

MR WHITE: I can email them to your Honour and I can email them to my learned friend. I'm sorry I don't have copies.

PN29

THE COMMISSIONER: No, no, that's all right. Why don't we just take a short adjournment so that administrative matter can be taken care of. It will just make it easier for us.

PN30

MR WHITE: Thank you. Possibly before you go, while I'm on my feet, the two documents which my learned friend referred to, which I wish to provide to the Commission, those are a document titled 'It's Time to Vote Yes', in which:

PN31

The applicant is pleased to announce that we are putting the CSL MET Agreement 2023 to a vote of employees.

PN32

As we speak, that's one document, and the next document - - -

PN33

THE COMMISSIONER: The agreement's going to a vote?

PN34

MR WHITE: Yes, the company has put out an agreement and the voting closes in a couple of days - - -

PN35

THE COMMISSIONER: Oh.

PN36

MR WHITE: - - - which is a matter which, at the least, would significantly go to the discretion of the Commission on whether it's - - -

PN37

THE COMMISSIONER: I mean if the vote gets up, this is all done with?

PN38

MR WHITE: Yes, precisely.

PN39

THE COMMISSIONER: When's the vote?

PN40

MR WHITE: I think it closes in two or three days.

PN41

THE COMMISSIONER: That's useful.

PN42

MR WHITE: The second document relating to that is an email from the company to its employees titled 'Preparing to Vote for the CSL MET Agreement 2023'. Can I hand those two documents to the Commission, please.

PN43

THE COMMISSIONER: Yes. Mr Follett, you have no issue with me receiving these documents?

PN44

MR FOLLETT: I do not, Commissioner, no.

PN45

THE COMMISSIONER: All right, the 'It's Time to Vote Yes' document will be marked as exhibit 5 in the proceeding.

EXHIBIT #5 DOCUMENT TITLED 'IT'S TIME TO VOTE YES'

PN46

MR WHITE: Exhibit 5?

PN47

THE COMMISSIONER: Yes. And the internal email headed 'Preparing to Vote for the CSL MET Agreement 2023' will be exhibit 6 in the proceeding.

EXHIBIT #6 INTERNAL EMAIL HEADED 'PREPARING TO VOTE FOR THE CSL MET AGREEMENT 2023'

PN48

MR WHITE: Thank you, Commissioner.

PN49

THE COMMISSIONER: All right, we will take a short adjournment so that we can get some instructions.

SHORT ADJOURNMENT **[10.14 AM]**

RESUMED **[10.23 AM]**

PN50

THE COMMISSIONER: Yes, thank you. Mr White.

PN51

MR WHITE: Thank you, Commissioner. I'm not sure of the best way to do this. I think probably tediously is probably the best way to move through the objections, but before we start doing that, if the Commission please, I will just make a very short submission. I understand, of course, that the Commission is not bound by the rules of evidence - section 591 of the Act so provides - but, that being said, your Honour, doesn't give a licence to the Commission to ignore them and, in fact, the Commission should be guided by them. The matter was touched on briefly in a Full Bench matter. It's an appeal by Mackie. I will give you the reference and then read out what the Commission said, if that's convenient, Commissioner.

PN52

THE COMMISSIONER: Yes.

PN53

MR WHITE: That's an appeal by Mackie [2013] FWCFB 8210.

PN54

THE COMMISSIONER: Sorry, just slow down. [2013] FWCBC - - -

PN55

MR WHITE: FWCFB 8210.

PN56

THE COMMISSIONER: Thank you.

PN57

MR WHITE: At paragraph 28, the Full Bench say this:

PN58

> *The evaluation of the identification evidence, which we agree is better referred to as recognition evidence, should be viewed in light of s.591 of the Act, which provides that 'The FWC is not bound by the rules of evidence and procedure in relation to a matter before it (whether or not the FWC holds a hearing in relation to the matter).' Although the rules of evidence do not apply in the strictest sense, as a Full Bench noted in the decision in Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union...*

PN59

Then there is a citation for that and then it quotes that case:

PN60

> *While the Commission is not bound by the rules of evidence that does not mean that those rules are irrelevant. As the then President of the Industrial Relations Commission of Western Australia said in respect of a similar provision in the then Industrial Relations Act 1979 (WA)...*

PN61

This is the WA case:

PN62

> *However, this is not a licence to ignore the rules. The rules of evidence provide a method of enquiry formulated to elicit truth and to prevent error. They cannot be set aside in favour of a course of inquiry which necessarily advantages one party and necessarily disadvantages the opposing party...*

PN63

And there is a citation for that:

PN64

> *The common law requirement that the Commission must not in its reception of evidence deny natural justice to any of the parties acts as a powerful control over a tribunal which is not bound by the rules of evidence.*

PN65

Then it says:

PN66

A similar observation was made by the Industrial Commission of New South Wales in PDS Rural Products Ltd v Corthorn...

PN67

where the NSW Commission said:

PN68

First, it is correct to say, as the commissioner did, that he was not bound to observe the rules of law governing the admissibility of evidence. It should be borne in mind that those rules are founded in experience, logic, and above all, common sense. Not to be bound by the rules of evidence does not mean that the acceptance of evidence is thereby unrestrained. What s 83 does do in appropriate cases is to relieve the Commission of the need to observe the technicalities of the law of evidence. Common sense, as well as the rules of evidence, dictates that only evidence relevant to an issue which requires determination in order to decide the case should be received. This means that issues must be correctly identified and defined.

PN69

Then it concluded:

PN70

We agree with the above observations. In our view the rules of evidence provide general guidance as to the manner in which the Commission chooses to inform itself.

PN71

It is often, as the Commission would be aware, that an approach is taken by parties in matters which is fairly relaxed - and I don't say that pejoratively; I say 'relaxed' in terms of parties being content that the Commission admit evidence but then give weight to the evidence as the Commission sees fit, having heard parties' objections - but, in our submission, that is not an approach we think is appropriate in the current circumstance.

PN72

You will have seen, if the Commission please, that, largely, the objections are founded on two bases: one, a hearsay objection. Section 59 of the Evidence Act - that's Commonwealth - provides:

PN73

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

PN74

I am sure you are well familiar with that concept.

PN75

So, subject to there being any exceptions to that, which we assert there is not any relevant exception to the hearsay rule, can I now go to the specific matters to which we object.

PN76

The first matter is paragraph 45 of the statement of Mr Fridell.

PN77

THE COMMISSIONER: Sorry, Mr White, I just wonder - Mr Follett, I mean the applicant doesn't assert that Mr Fridell's statement isn't rife with hearsay and opinion; it's just a question of weight, isn't it?

PN78

MR FOLLETT: Of course. A very large number of the objections are not maintainable, in any event, because they are all contained in business records, which is an exception to the hearsay rule. Secondly, they are all matters of weight. Thirdly, almost all of them relate to the events of 13 October, which, we understand from the submissions of the other side, those events are not directly contested. There's a concession that they establish a prima facie case of obstruction. It goes a little bit further than a prima facie case; it establishes actual obstruction.

PN79

The CCTV footage speaks for itself. It didn't occur to us, Commissioner, that there would be much dispute about what happened on 13 October; we would be more talking about whether or not relief should go in relation to that. If my learned friend wants to develop a submission that you should find that there was no obstruction by any persons on picket on 13 October, he is entitled to make that submission to you, subject to anything you might say about the weight you would give the evidence, but we have CCTV footage and we have contemporaneous notes, which are all business records, and the letters from Gordon McKay are all business records.

PN80

THE COMMISSIONER: Thank you. I think my chambers certainly had observed, because I had, on 6 December that, you know, there are some paragraphs, say, for example 47(e), which I can see Mr White has also identified, is a reference to a file note by another person about a conversation that was reported to him by someone else about a conversation that that person had with an unidentified person. It's all pretty loose.

PN81

MR FOLLETT: Well, (a), it doesn't make it inadmissible because the content of a representation in a business record can either be from the person who witnessed it or on the basis of information provided to that person. Whatever weight you put on that is a matter for your judgment.

PN82

THE COMMISSIONER: Yes.

PN83

MR FOLLETT: Hearsay is objectionable, in the strict sense, for the very reason that it's usually incapable of being tested and lacks veracity and weight when the person who said they heard or saw something isn't available for cross-examination. That's why the rule is there. My friend can make whatever submissions he wishes to directly to you about what weight, if any, you should place on the various evidence. That particular example you give, obviously, would probably have less weight than some others.

PN84

THE COMMISSIONER: Yes.

PN85

MR FOLLETT: But it doesn't mean you wouldn't accept it, but it's not challenged, it's just objected to. I can't stop my friend going through these passages - you, of course, can - but we can sit here for a good couple of hours going through these and my answer to almost all of them will be the answer that I have already given, that it's either, (a), admissible or, (b), if it's not, you should receive it and give it such weight as you think is appropriate in the context of a case where what happened on 13 October is not really in issue.

PN86

THE COMMISSIONER: Is that a way forward, Mr White?

PN87

MR WHITE: No.

PN88

THE COMMISSIONER: All right.

PN89

MR WHITE: I'm sorry, Commissioner, but - - -

PN90

THE COMMISSIONER: No, no.

PN91

MR WHITE: Normally, you know, 99 per cent of times in the Commission, a similar approach that my learned friend urges on you is adopted, but - - -

PN92

THE COMMISSIONER: I didn't read it in the submissions, and maybe I've missed it, but are the unions urging me to find that there was no obstruction on the 13th?

PN93

MR WHITE: The objections go to the particulars of obstruction and the particulars of those who might have been involved in it. The applicant is seeking the Commission, as it must, to take all the evidence and circumstances into account in determining, (a), whether there's a breach of the good faith bargaining obligations and, (b), whether it's reasonable, in all the circumstances, to make an order. As part of, as we understand, the applicant's case going to the latter of

those things, it says that the obstructive picket was, in turn, violent or aggressive, and that plays into the picture and should be taken into account in terms of the Commission's exercise of its discretion as to whether it's reasonable in all the circumstances.

PN94

So, yes, you will have seen in our outline that we say, yes, there was a prima facie case that there was some obstruction, but, other than that, if the applicant continues to rely on what it asserts to be the particulars of that obstruction, then we, unfortunately, have to ask the Commission to go through these things carefully.

PN95

As to my learned friend's submission that these matters are subject to the business records exception, presumably he relies in the Commonwealth Act on section 69, and it provides the exception, in subsection (2) of that section. The exception is in these terms:

PN96

The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made...

PN97

And there are two things which both need to exist:

PN98

...(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact...

PN99

So that sort of cuts out, in the vernacular, second-hand hearsay:

PN100

...or

PN101

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge...

PN102

So if it follows those steps, the second-hand hearsay might get in, but that section does not apply:

PN103

...if the representation:

PN104

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding.

PN105

That is subsection (3). When you look at the material which is filed, from a very early time, the applicant clearly has had in contemplation a proceeding.

PN106

Now the Commission is, relevantly, a body that can take evidence, so it's - for example, if one looks at - we will start at WF17, and that is commencing at page 139 of the court book, if the Commission please. This is a letter from CSL to Citywide Utilities, or Gordon McKay - it's sometimes described as Gordon McKay - and it's dated 4 October, so well before 13 October - and, on page 141 of the court book, the second page of that letter, after having explained its view about the labour hire provider agreement, it says:

PN107

We also consider Citywide is in breach of clause 1.6 as it failed to give -

PN108

Sorry, just at the bottom of page 140:

PN109

We consider that Citywide is in breach of the terms and conditions of the agreement as set out above.

PN110

Then, further, in relation to clause 1.6, continuing on the following page:

PN111

We also consider Citywide is in breach of clause 1.6 as it failed to give CSL the required notice period and, further, it failed to provide a suitable replacement. It is entirely possible that the breaches referred to in this letter may lead to loss and damage being incurred by CSL and we remind you that clause 14 sets out the indemnity towards CSL in this regard.

PN112

So right from, we say, 4 October, there's evidence that CSL is looking to its legal options in relation to Gordon McKay.

PN113

You will see, similarly, in WF22, which commences at page 153 of the court book, once again this is a letter from CSL to Gordon McKay setting out the background. This letter is dated 19 October. Sorry, it's Gordon McKay to CSL. Yes, it's from CSL. You will see, at the bottom of page 155 of the court book, the statement that CSL was taking it seriously. It asserts that ETU and others have acted illegally and that it is taking steps to address such matters through appropriate legal mechanisms. So that's - - -

PN114

THE COMMISSIONER: Although it says, 'CSL does not have any current intention of initiating proceedings against Gordon McKay.

PN115

MR WHITE: Yes. It continues, that sentence continues:

PN116

The ETU may be exposing Gordon McKay to a direct or accessorial liability to the above causes of action as a consequence of its conduct in supporting or complying with any directions or instructions issued to it by the ETU and refusing to comply with the terms of the agreement.

PN117

So whilst it may say there that it had no current intention, it was saying, in terms, that Gordon McKay was engaging, potentially, in either direct or accessorial conduct which might render it liable.

PN118

WF27, similarly, at court book 172, at the bottom of page 173, CSL reminds GMK that the continued refusal or failure to provide its services to CSL is a breach of the agreement:

PN119

CSL reserves its right regarding the ongoing breaches by GMK in respect of any further breaches in the future.

PN120

That is consistent with the legal position it was putting in WF17, to which I took the Commission first.

PN121

I don't know if I referred the Commission to annexure WF22, which commences at page 153 of the court book. Yes, I think that's the one we were discussing before, and then WF24 is the one I didn't take you to. That commences at page 160 of the court book, where, once again, it asserts to GMK that failure to provide its services would be a breach of the agreement, in respect of which CSL reserves its rights in this regard.

PN122

That's in terms of Gordon McKay, and it was clearly, we say, in contemplation of the possibility of legal proceedings within the meaning of section 69 of the Evidence Act.

PN123

Of course, in relation to the unions, the respondents, WF29, which commences at page 178 of the court book, is a letter dated 13 October 2023 to each of the respondents in which CSL asserts that the respondents have acted in breach of their good faith bargaining obligations and, in the last paragraph on page 185 of the court book, clearly warns of, or has in contemplation, an application to the Commission, which is relevantly a proceeding within the meaning of section 96 of the Evidence Act.

PN124

In our submission, it is not correct to say that the business document exception is of assistance to the applicant in this case, and the evidence to which we have taken objection, we say, remains hearsay, which would not be admitted, or which should not be admitted. We understand the Commission has a general discretion

as to whether it admits evidence, having regard to it not being bound, but, having regard to the approach we say the Commission ought to take in respect of the rules of evidence, we say these matters - and we can go through them individually - are objectionable.

PN125

As to the CCTV footage speaking for itself, the Commission may not have noticed, but we didn't object to the CCTV footage. Others' perceptions, descriptions or opinions about what it says is a different issue.

PN126

For those reasons, we think the matters which we object to are sufficiently serious, in that the applicant continues to rely on them for purposes, not least of which, is whether the Commission would find it reasonable to issue an order, subject to any earlier findings.

PN127

THE COMMISSIONER: In terms of - say if I look at WF4.

PN128

MR WHITE: WF4?

PN129

THE COMMISSIONER: Which is on page 109 of the digital tribunal book.

PN130

MR WHITE: Yes.

PN131

THE COMMISSIONER: Absent any additional evidence, I think I would have some trouble accepting that the lady was likely to damage the vehicle - I don't know who she is, I don't know what her aptitude is to damage vehicles, or anything like that - but even if I accept the rest of what's there, in the overall exercise of my discretion, if I found that there was (indistinct) obstruction, for want of a better phrase, and the more I (indistinct) I might get criticised, but it's pretty light level - - -

PN132

MR WHITE: Well, it is, and - - -

PN133

THE COMMISSIONER: - - - having regard to what has happened in other industrial environments.

PN134

MR WHITE: Yes. Well, that is so, but it's still relied on and, to the extent that the applicant seeks to rely on it, then the Commission, in my respectful submission, needs to be in a positive position to be able to really assess, and, if it's not admissible, should adopt the approach that I read out as described by the various Full Benches.

PN135

THE COMMISSIONER: Yes, but, as I say, even if I find that there was some obstructural picketing, possibly the highest I get is it was pretty low level and it was two months ago.

PN136

MR WHITE: If that was what the Commission was to find, then we might take a different approach, but, at the moment, that's not what the applicant is urging on the Commission, and that's the bind that we're in, if the Commission please.

PN137

THE COMMISSIONER: Yes, thank you. Go on.

PN138

MR WHITE: I'm not quite sure how the Commission now wishes to proceed.

PN139

THE COMMISSIONER: Well, I think you have made general submissions in relation to hearsay which likely cover all of the paragraphs, unless you want to take me to any specific ones. Do you want to make a general submission about opinion evidence?

PN140

MR WHITE: The opinion evidence rule is in the Commonwealth Act at section 76, and it provides that:

PN141

Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

PN142

Now there is an exception within that section itself. Subsection (2) provides:

PN143

Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations...

PN144

which is not relevant here. So that's the broad, general rule about opinion evidence.

PN145

There is, as with the hearsay rule, an exception and that is contained in section 78 of the Evidence Act. It provides:

PN146

The opinion rule does not apply to evidence of an opinion expressed by a person if:

PN147

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and ...

PN148

and I stress 'and' - it is conjunctive:

PN149

...(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

PN150

It is difficult to see in the evidence or the material that's put in in this case why, or how, it could possibly be said that the opinion of Mr Fridell is necessary to obtain an adequate account of his perception of a matter. In large part, his opinion, based on specific matters, some of which he saw, but he can give evidence about what he saw, the Commission is not assisted by his opinion about that he saw.

PN151

So that's the general submission about opinion evidence, if the Commission please.

PN152

THE COMMISSIONER: Yes.

PN153

MR WHITE: I'm still not sure how the Commission wishes to approach the matter.

PN154

THE COMMISSIONER: Well, I think, having regard to the broad submissions that you have made, I don't think I'm assisted by going through each paragraph, unless you particularly wanted to take me to some by way of example.

PN155

MR WHITE: Well, there are various - - -

PN156

THE COMMISSIONER: Degrees.

PN157

MR WHITE: - - - degrees of egregiousness, but I understand, from what the Commission said, that you don't propose to strike these matters from evidence.

PN158

THE COMMISSIONER: I do not.

PN159

MR WHITE: You do not. Having regard to that, for our part, I think we would be content to rely on the Commission's experience to allocate various degrees of egregiousness to the material that's filed, and I don't think you would be assisted by submissions from me in that regard.

PN160

THE COMMISSIONER: Thank you. Mr Follett?

PN161

MR FOLLETT: If I can just broadly, you've said something about the hearsay and the exception to the Evidence Act. I just want to say something broadly about the opinion evidence (indistinct).

PN162

THE COMMISSIONER: All right.

PN163

MR FOLLETT: The Commission doesn't assume the Commission doesn't need to hear me on the in contemplation of legal proceedings point.

PN164

THE COMMISSIONER: I'm happy to hear you on it.

PN165

MR FOLLETT: Well, I don't need to address you on it. I can. But the short point is - - -

PN166

THE COMMISSIONER: For completion it would be appropriate.

PN167

MR FOLLETT: The only evidence of any contemplation of any legal proceedings, and we don't accept contemplation but the only evidence of any contemplation of any legal proceedings prior to 13 October is alluding to Gordon McKay about their conduct, nothing to do with conduct of the picket, so the point just dies.

PN168

As to the opinion, large parts of it are where Mr Fridell effectively synthesises what one can see from the footage and the file notes.

PN169

THE COMMISSIONER: But how am I assisted by that? Surely - - -

PN170

MR FOLLETT: Well, you probably don't need it.

PN171

THE COMMISSIONER: But hang on. We've got the file notes, we've got the text messages and we've got the video. Surely I read the file note, I read the text message, I watch the video and I form a view about it and I'm not assisted by what Mr Fridell says happened.

PN172

MR FOLLETT: I can't say anything against that, Commissioner.

PN173

THE COMMISSIONER: Thank you.

PN174

MR WHITE: There's just one small matter in reply to whether or not legal proceedings were in contemplation. And my learned friend says, well, that's only Gordon McKay, the conduct. But of course the Commission will note that the applicant relies very heavily on correspondence with Gordon McKay in which Gordon McKay makes a number of observations unspecified and unexplained. So, the fact that it was Gordon McKay and the fact that breaches of contract were alleged might impact or influence what Gordon McKay might say in its correspondence.

PN175

And that in part informs why it is that there is the exception to the business record or – I mean, to put it bluntly, Gordon McKay might be saying – okay, I should adopt one – Gordon McKay might easily say, well, it wasn't us, it's them, as a way of getting out of any potential litigation or heading off any potential litigation. That's putting it bluntly.

PN176

MR FOLLETT: I think we were up to receiving the statement, Commissioner.

PN177

THE COMMISSIONER: Yes. The statement of Warren William Fridell dated 16 November 2023 as amended is exhibit 2.1 in the proceeding.

EXHIBIT #2.1 STATEMENT OF WARREN WILLIAM FRIDELL DATED 16/11/2023

PN178

And then we have the second statement?

PN179

MR FOLLETT: Yes, the second statement is the supplementary witness statement dated 7 December, commencing at court book 254.

PN180

THE COMMISSIONER: Yes, that is exhibit 4.1 in the proceeding.

EXHIBIT #4.1 SUPPLEMENTARY WITNESS STATEMENT OF WARREN WILLIAM FRIDELL DATED 07/12/2023

PN181

I've noted that there are objections already to the witness (indistinct) with the statement.

PN182

MR WHITE: I'm sorry, I didn't hear, Commissioner.

PN183

THE COMMISSIONER: I've noted that in relation to the supplementary statement, in your list of objections that's already dealt with.

PN184

MR WHITE: Yes.

PN185

THE COMMISSIONER: So, I note the objection.

PN186

MR WHITE: Yes. Thank you, Commissioner.

PN187

MR FOLLETT: Now Commissioner, just to complete the picture, and I understand this is not objected to, if I can take you to court book 77.

PN188

THE COMMISSIONER: Yes, I have that.

PN189

MR FOLLETT: And you'll see a reference at paragraph 27 to further stoppages on the dates identified. It's also the case that further stoppages have been notified and taken in the weeks subsequent to that period. There was two in the first week, three in the second.

PN190

THE COMMISSIONER: Do we have the dates?

PN191

MR FOLLETT: Yes, 28 and 30 November; 4, 6 and 8 December; and there are notified stoppages for this week, today, the 13th and the 15th. It's also not in contest that all the stoppages are pursuant to notices of protected action, that on each of those days there's been a picket at the site broadly in the terms that you've seen on other days, so not as - - -

PN192

THE COMMISSIONER: Has (indistinct) been there all day (indistinct)?

PN193

MR FOLLETT: No, not all the time. So, not obstructive and no immediate evidence of any trespass. That's our case.

PN194

THE COMMISSIONER: Yes. Mr Follett, while we are dealing with recent events, at paragraph 19 on page 75 Mr Fridell says, 'As of the date of this statement', which is 16 November, 'there have been approximately 22 bargaining meetings.' When was the last bargaining meeting?

PN195

MR FOLLETT: Referred to in the 22, or generally?

PN196

THE COMMISSIONER: When was the last in the 22, that was my first question.

PN197

MR FOLLETT: I'll get instructions.

PN198

THE COMMISSIONER: Yes. The second question was, since 16 November were there bargaining meetings, and how many and what dates were they on? Mr White, can you assist me?

PN199

MR WHITE: I've got a document I can give to the Commission that records these bargaining – I can show it to my friend.

PN200

It seems I do have a document. I can tell you what my instructions are if that's more accurate. And I'll show this to Mr Follett. So, these are my instructions if the Commission please.

PN201

We've got a range of documents which we could provide to the Commission and my learned friend to make good a number of these instructions if that would assist the Commission.

PN202

THE COMMISSIONER: So, you say that – they said up until 16 November there were 22. You say there were 24. And nothing since the 16th.

PN203

MR WHITE: Since the 16th? Well, no, there's been a number of things happening since 16 November. And perhaps I can tell the Commission what my instructions are in relation to that.

PN204

THE COMMISSIONER: So, just in relation to that - - -

PN205

MR WHITE: I'm sorry, at the bottom of that page you'll see there some events post the 16th.

PN206

THE COMMISSIONER: Yes. Yes. And when did the union – 20 November the union's right to withdraw from accepting his offer to make representations (indistinct) wrote to the Commissioner objecting.

PN207

MR WHITE: Yes.

PN208

THE COMMISSIONER: And then post them, CSL have gone out to a vote. When did they notify that?

PN209

MR WHITE: The 29th. But before the 29th I can tell you some further instructions.

PN210

THE COMMISSIONER: Yes.

PN211

MR WHITE: I'll give that to my learned friend and – now, what the document that I've just provide to the Commission shows is that there were further discussions as between the parties, further negotiations relating to the matters set out on the front page of that document I've just provided. And the negotiation team, CSL, and the unions as the bargaining representatives are exchanging correspondence and negotiating in relation to each of those four matters and each of them providing different clauses, and each of them responding to the different clauses.

PN212

Now, I don't need to go to the detail of all of those clauses but what you will see if the Commission pleases, is email traffic constituting negotiation continuing.

PN213

THE COMMISSIONER: Can I assume from that you would say to the extent that the complained of conduct occurred, it can't have been undermining enterprise bargaining because they're continuing with to enterprise bargain?

PN214

MR WHITE: Of course. And you will have seen - - -

PN215

THE COMMISSIONER: It can't have been too much of a distraction because they're still doing it. Yes.

PN216

MR WHITE: And you will have seen from the minutes 5 and 6, that you won't have seen but I'll direct your attention to, so for exhibit 5 on the second page, the CSL MET Agreement 2023 – do you see that second paragraph? 'We are putting to voters a very competitive offer and the product of months of consultation with employees, employee representatives and leadership.'

PN217

And you'll see in exhibit 6 in the first paragraph, 'Dear Colleagues, we are pleased to announced that we are putting CSL MET Agreement Number 3 to a vote of employees. We recognise and thank all bargaining representatives for their hard work during the negotiation.'

PN218

So, of course bargaining has continued responsively and whilst the impression may be given, I should say Commissioner, that – whilst the impression might be given from those parts of exhibits 5 and 6 that I read out that with the consent or agreement the unions and the bargaining representatives that it wasn't, and it was put out without agreement. But possibly slightly misleading but it's there and it's out there as we speak. So, that's my - - -

PN219

THE COMMISSIONER: Are the unions actively running a no campaign or?

PN220

MR WHITE: I believe so. But in terms of instructions about negotiations if the Commission pleases, they're my instructions. If there's no serious issue about those we would ask that those documents be marked.

PN221

THE COMMISSIONER: Yes. So, just as an administrative matter can I say that the list of objections to Mr Fridell's evidence, I'll mark as exhibit 7 in the proceeding.

EXHIBIT #7 LIST OF OBJECTIONS TO MR FRIDELL'S EVIDENCE

PN222

Having asked the question about when bargaining occurred and whether it's occurred since 16 November, Mr White has provided a document headed, 'Dates of EBA negotiated meetings.' Mr Follett, are you content for me to receive that document?

PN223

MR FOLLETT: I can't speak to its complete accuracy.

PN224

THE COMMISSIONER: I can stand the matter down and you can get some instructions if you like.

PN225

MR FOLLETT: Insofar as its accuracy is a matter that might influence your decision then I would have to take that up. It's not quite clear to me what the immediate relevance of it is. The last meeting was on 16 November with Commissioner Wilson. There's been no bargaining meeting since then. But there has been an exchange of correspondence.

PN226

THE COMMISSIONER: Yes. So, based on what you've just said there doesn't seem to be much contention about what's in this document headed, 'Dates of EBA Negotiations.'

PN227

MR FOLLETT: No. All I can't say is whether the numbers 1, 4 and 24 specifically accord with my instructions. They're very close, obviously, where - - -

PN228

THE COMMISSIONER: They're pretty close. But do you – Mr Fridell says as at 16 November there were 22 bargaining meetings and it would appear there were 24. And none since, other than the PABO conference before Commissioner Wilson.

PN229

MR FOLLETT: It is even conceivable that number 1 and 2 on this list may not have been counted as bargaining meetings by Mr Fridell, so – I don't want to

unduly waste the Commission's time. I don't think anything turns on it, so I'm probably happy for you to receive it, Commissioner.

PN230

THE COMMISSIONER: All right. Then I'll mark the document headed, 'Dates of EBA Negotiation Meetings', as exhibit 8 in the proceedings.

EXHIBIT #8 DOCUMENT HEADED, 'DATES OF EBA NEGOTIATION MEETINGS'

PN231

Then the document which is an exchange of emails, five pages between 17 November and 22 November – is there any problems with me receiving that?

PN232

MR FOLLETT: It speaks for itself, Commissioner, so no.

PN233

THE COMMISSIONER: Yes. Then I'll mark that as exhibit 9 in the proceedings.

EXHIBIT #9 FIVE PAGES OF EMAIL EXCHANGES BETWEEN 17/11/2023 AND 22/11/2023

PN234

Does that bring us to final submissions?

PN235

MR FOLLETT: I believe it does.

PN236

THE COMMISSIONER: Yes. Mr Follett.

PN237

MR FOLLETT: Thank you, Commissioner. We contend for three contraventions of the good faith bargaining regime. One, the organisation of an obstructive picket on 13 October; two, interference with the performance of contracts by Gordon McKay and Dynapumps; and three, a failure to disclose relevant information.

PN238

Each of those three segments or three cases are dealt with in Mr Fridell's primary statement in different sections.

PN239

So, one, paragraphs 36 to 76; two, paragraphs 77 and 97; and three, paragraph 101 and following. Can I deal with the first incident first. We say it's clear from the contemporaneous business records and CCTV footage that there was prevention of access to a number of vehicles on 13 October.

PN240

It doesn't appear to be disputed that the union organised the picket. We make that point in paragraph 22 of our written submission and also 66. And by reference to

the union's correspondence to us where they effectively assert that they're entitled to organise a community protest, as they call it. Then - - -

PN241

THE COMMISSIONER: I think they said, 'peaceful picket'.

PN242

MR FOLLETT: Peaceful picket. Then - - -

PN243

THE COMMISSIONER: And for the most part you'd accept it was a peaceful picket.

PN244

MR FOLLETT: For the most part, yes.

PN245

THE COMMISSIONER: Yes. And you'd accept that there was no attendance of violence or anything like that?

PN246

MR FOLLETT: Other than maybe some raising of voices on the 13 October, yelling, nothing else.

PN247

THE COMMISSIONER: I mean it's all pretty low level, isn't it?

PN248

MR FOLLETT: Well, it depends what you mean by low level, Commissioner. Low level by the standards of some of the notorious industrial figures in this country, yes. You could be as peaceful and quiet and lovely as you like. But if you prevent vehicles entering the site then the impact can be substantially the same.

PN249

We have no difficulty with a peaceful protest or peaceful picket and we don't make any allegations about what happened on any day other than 13 October insofar as the picket was concerned. There was some trespassing in the very early days but once that was clarified there's no suggestion of any ongoing trespass. There's no suggestion of any ongoing blockade.

PN250

This all really comes back to, if you accept the conduct and you accept that that of itself on that day was a contravention of regime which I'll take you to shortly, what then?

PN251

THE COMMISSIONER: Yes.

PN252

MR FOLLETT: And there's no doubt, Commissioner, there is some force in the proposition that, well, it's almost two months ago. There's been a continuation of

a peaceful picket but no continuation or repetition of blockading. Is it appropriate or reasonable, to use the statutory terminology, to make an order with respect to that?

PN253

THE COMMISSIONER: Yes. I mean, your client sought some undertakings. Those undertakings weren't given. But it might have been enough that you've made a shot across the bow and it's caused some restraint.

PN254

MR FOLLETT: Well, that's one way to view the sequence of events. Another way to view it is that the union are holding fire waiting till these proceedings dissipate, and ultimately the submission that - - -

PN255

THE COMMISSIONER: It can take 12 weeks to write a decision for that.

PN256

MR FOLLETT: The submission goes no higher really than saying, well, if something else happens in the future they can come back here quickly. That's really what this boils down to. Because for example, if they say they're not doing anything and they're not going to do anything, then making an order doesn't matter.

PN257

If they say, well, we're not doing anything and there's no evidence we're continuing to do anything so don't make an order, and if something happens they can always come back quickly, well that's what that boils down to. And reasonable minds might differ on that, sort of where the scale lies on that.

PN258

I want to take you through some of the evidence which we would contend supports the proposition that an order should be made. Can I deal – there are some legal arguments advanced, Commissioner, which we've dealt with in part in our reply which appear to suggest that even if you accepted that there was a blockade and a physical obstruction to an extent on 13 October, that that of itself would not contravene section 228(1)(e) of the act.

PN259

THE COMMISSIONER: Because it goes to the substance of bargaining and not the process of bargaining.

PN260

MR FOLLETT: That's one of the submissions. It appears to be a fundamental misreading of what that case was talking about. The juxtaposition between procedural and standing is the juxtaposition between 228(1) and 228(2), all of 228(1) under the procedural aspects of bargaining, and 228(2) under the substantive aspects. That is, no concessions, no agreement. That's what that case is talking about.

PN261

It's Anglo Coal, I believe. Has the Commission been provided with a copy of the authority? No.

PN262

THE COMMISSIONER: Thank you. The (indistinct).

PN263

MR FOLLETT: Anglo Coal is tab 4. 98, paragraph 98, 228(1) is giving us the procedural or process based – there's a reference there to good faith bargaining applies to procedural or processed based – that's all of them. And there's a reference to 228(1) there.

PN264

THE COMMISSIONER: So what paragraph was it again?

PN265

MR FOLLETT: Ninety-eight.

PN266

THE COMMISSIONER: Ninety-eight, thank you.

PN267

MR FOLLETT: And you see also this is made plain by the preceding paragraph 97 – 228, 'This is reinforced by 228(2) which excludes substantive matters.' So, the distinction to what's being drawn is the process based requirements, all of which are found in 248(1), and the substantive based arguments which are in (2). Beyond that if it's suggested that whatever was said in Anglo Coal goes beyond that then it just plainly cannot be right.

PN268

The whole point of all the good faith bargaining requirements is to see that agreement is reached. It's not entirely clear to us what sort of distinction can be drawn between strictly processed base conduct and substantive conduct.

PN269

And in fact, it was reduced to good faith bargaining requirements to effectively a dead letter, that you can come to the Commission and get orders for exchanging of documents and attending meetings but you can't get any orders going to the actual substance of bargaining.

PN270

You can't undermine anyone's position. I mean, what other work can 228(1)(b) have to capricious or unfair conduct if it's not otherwise caught by process-based things such as attending meetings? 228(1)(e) is basically directed to the process bargaining and impacts on that process, and this involves the process of bargaining.

PN271

Then it's said, well, there's not sufficient evidence of the impact on bargaining. Well, there's the obvious and plain inference that we've spoken of in the Lyon case at paragraph 48 that's referred to in paragraph 13 of our required

submissions. I don't need to take the Commission to that paragraph just at the moment.

PN272

But the mere fact that we have all these emails being written and we have all these letters being written and we have this process occurring. Since the filing of the application there hasn't been a face to face bargaining meeting when there's been lots immediately beforehand, proves a point that there has been diversion, distraction, impact and effect.

PN273

THE COMMISSIONER: Sorry, Mr Pollock. How does it necessarily follow that that's the reason why there wasn't bargaining meetings?

PN274

MR FOLLETT: It doesn't necessarily follow, no, but - - -

PN275

THE COMMISSIONER: There could be a whole range or other reasons why there weren't bargaining meetings that's unconnected with all this.

PN276

MR FOLLETT: There could be.

PN277

THE COMMISSIONER: Why there were no bargaining (indistinct)?

PN278

MR FOLLETT: There's a submission that you can't undermine collective bargaining unless it undermines the collective.

PN279

THE COMMISSIONER: You don't have to take me to that.

PN280

MR FOLLETT: Yes. We just note parenthetically that that argument was run and rejected in the Castlemaine Perkins case, 210 - - -

PN281

THE COMMISSIONER: Sorry, say that again?

PN282

MR FOLLETT: That argument was run and rejected in the Castlemaine Perkins case, paragraph 210 to 213. Then it's said at paragraph 19 that it doesn't undermine freedom of association because it doesn't relate to the association between the employer and its employees. We'll make the obvious point that part 3(1) which deal with freedom of association is nowhere near (indistinct).

PN283

We'd extend obviously the conduct as against contractors by unions, item (7) of 342, the extent to conduct between principals and the contractors, items 3, 4 and

6, and obviously the interference with contractors' performed work is an archetypical case of coercion associated with bargaining under 34(3) and 34(8).

PN284

In any case we've got both Castlemaine Perkins and Lyon as authority for the proposition that obstructive pickets involve a contravention of 228(1)(e) which undermines collective bargaining. There's a submission in paragraph 20 which we don't quite understand, dealing with Castlemaine Perkins. It seems to suggest, based on one extract of what Commissioner Hunt said, that she somehow erred because she only considered unfairness, not the two-stage test of unfairness that that undermines collective bargaining or freedom of association. That's plainly not the case. At tab 13 is Castlemaine Perkins. At paragraph 206, the Commissioner sets out the principles either from Anglo Coal or Oaky Coal – Oaky Creek Coal.

PN285

You'll see on page 62 of the decision, second dot point on that page, there are two limbs. Then you see there's references to the two-stage test in a consolidated fashion in para 215: '(indistinct) conduct that undermines collective bargaining'; 226, same again, about line 4; 227, same again and then the two-stage test referred to in 229 and 230. In 229 the conduct was unfair; 230, unfairness undermines. I'll return to reasonableness at the end. The second way we put our case relates to the interference with contractors insofar as the same legal points arise. Obviously we make the same submissions.

PN286

One can either prevent a contract being performed by physical acts on a picket or words.

PN287

THE COMMISSIONER: To the extent that it's said that the unfair conduct rises so high as to be tortious conduct, do I have jurisdiction to make findings about that? Shouldn't it be somewhere else if you're fighting about tortious conduct?

PN288

MR FOLLETT: Well, firstly, you don't need to make a finding of tortious conduct. Secondly, of course you have jurisdiction to make that finding because it's a finding of fact and/or law that you need to form an opinion on in order to guide your conduct. It's well established law in this place, as well as coming from the High Court about that. So for example, you can't legally determine whether someone's an employee or a contractor but you regularly make that sort of decision in deciding an unfair dismissal claim.

PN289

You can't make a decision – a legally binding decision – about a whole range of things but you need to make the finding as a step along the way to working out what orders you ought make. We don't need to prove it's tortious conduct but it obviously is.

PN290

THE COMMISSIONER: But the submissions don't go to dissecting the elements of that tortious conduct.

PN291

MR FOLLETT: No, they don't, but - - -

PN292

THE COMMISSIONER: I'm just meant to make that up?

PN293

MR FOLLETT: Well, the interference with the performance of a contract is a tort. That inference can come from preventing. It can come from making it more difficult. What is not unlawful is mere dissuasion and that's – when I come to it, that's what this point turns on. There's two ways to look at the sequence of events. One is the benign way the union has put it to us. That is: 'We're entitled to have a peaceful protest or peaceful picket. We're entitled to speak to contractors about what's happening at the site and we're entitled to tell those contractors that we'd prefer them not to provide services to CSL because that will undermine our bargaining campaign'.

PN294

All that is perfectly legal. What you can't do is go further by way of threats or intimidation or actions in the case of the blockade to tell people not to attend. Putting aside the questions of tort, Commissioner, it's plainly unlawful under 343 and 348. The Esso case involved protected action which happened to be not protected and ipso facto, once that action loses protected status it's tortious, it's a contravention of adverse action, it's a contravention of 343, 348, because it's taken for the purpose or is the intent of persuading someone to make an enterprise agreement.

PN295

The union doesn't shy away from that purpose and intent here. In fact, they embrace it. They say in their correspondence, which I'll return to, that's the very reason why they're doing it. But the issue turns upon an assessment of the evidence and a finding as to whether or not what the union has done has gone – what the unions have done is gone no further than telling contractors they'd prefer them not to cross the line and the contractors then embrace that proposition or it goes further. And if you find it's gone further, it's – with respect – very difficult to see how one could say that doesn't undermine collective bargaining and freedom of association because it would be entirely unlawful and unfair because it's outside the legal mechanisms available under the scheme of the Act, spoken about in Castlemaine Perkins and Lion. I don't need to take you to it. You've got protected action there. That's your lever. You can engage in other lawful levers. What you can't do is engage in conduct which prevents contractors by words or deed servicing the company. This case turns on inference. The union says it's a weak inferential case. We say it's rather quite strong, for the reasons I'm just about to tell you about. The mere fact it's inferential is almost entirely irrelevant. We want to make three points: (1) the evidence raises quite a strong inference, certainly sufficient to be established on the balance of probabilities, (2) the union's silence not only in the Commission, enables the Commission to infer a

number of things, one of which the evidence wouldn't have assisted and two of which is that any evidence given was likely to be unfavourable to the unions.

PN296

THE COMMISSIONER: But who should they have called?

PN297

MR FOLLETT: Mr Crumble.

PN298

THE COMMISSIONER: Who else?

PN299

MR FOLLETT: The other – Chris Spindler.

PN300

THE COMMISSIONER: They couldn't have called the unidentified woman who may or may not have made some (indistinct) in front of a car. Who knows who she is?

PN301

MR FOLLETT: No, but this part of the case is not about the blockade. This part of the case is about the coercion or interference with contractors and it relates only to Gordon McKay and Dynapumps.

PN302

THE COMMISSIONER: So is it only in relation to that issue that you press the Jones v Dunkel matter?

PN303

MR FOLLETT: Yes.

PN304

THE COMMISSIONER: Thank you.

PN305

MR FOLLETT: Thirdly, the union has had multiple opportunities to give undertakings and have refused to do so and the Commission will make of that what it will. It was referred to and relied upon by Commissioner Hunt in the Castlemaine Perkins case as a matter of relevance. Dealing with the first of those issues first, the evidence - - -

PN306

THE COMMISSIONER: There's a lot more evidence in the Castlemaine case.

PN307

MR FOLLETT: There's a lot more evidence of obstruction, because the obstruction was repetitive. I think there was only – I think it was three days of obstruction in that case. I don't know what the difference is in terms of failing to give an undertaking. One can do something once and be asked not to do it again and refuse to give that indication or one can do it 100 times and be asked not to go it again and refuse to give that indication. We accept that the number of occasions

upon which something happens affects the strength of the inference about its repetition in future but that's a slightly different point to the failure to give an undertaking.

PN308

It can be put fairly against us - I don't want to argue my learned friend's case – that one instance on one day doesn't give you a sufficient basis to have a well-founded fear that it might happen again, sufficient to warrant an order. The end point of that analysis is what I said earlier: ultimately you either make an order to restrain something that they say they're not doing and they won't do, or you don't make an order and tell us to come back the moment it repeats itself and of course if it doesn't, we won't be back here. If it does, we will, and we'll be saying - - -

PN309

THE COMMISSIONER: Maybe back for an interim order first.

PN310

MR FOLLETT: Maybe, and we'll be saying, 'We told you so'. The evidence is that – from Mr Fridell at both 24 of his first statement and 11 of his second statement, that there's – varies the number of contractors ordinarily per day but up to 15 and in relation to both Gordon McKay and Dynapumps since 13 October – so that's the day of the obstruction – Gordon McKay has never returned to site on a day that involved a work stoppage. That's paragraph 89 of Mr Fridell and then paragraph 12 of the reply. Dynapumps has never returned to work at the site on a day where there's been a work stoppage. That's the evidence of Mr Fridell at 100 and paragraph 14 of the reply.

PN311

THE COMMISSIONER: And for all their letter writing says they haven't taken any action against either of those contractors.

PN312

MR FOLLETT: Well, when you say, 'We haven't taken any action against them', if you mean legal action, no, we haven't. It doesn't greatly assist us to terminate the contract of a contractor who we need the services of. We've written letters to them to try to cease and desist their breach of contract. They have not done so. We have available legal remedies. Whether or not we pursue them against them doesn't really change the conduct we complain of and in fact, it's entirely irrelevant to the conduct we complain of.

PN313

THE COMMISSIONER: Is it not relevant in the exercise of my discretion that you've got – your client has remedies and the like available to it which it's choosing not to pursue.

PN314

MR FOLLETT: Well, the only potential available remedy of any use, fullness or utility would be a mandatory injunction. It's very, very difficult to get a mandatory injunction to enforce a contract of service because damages is almost always an adequate remedy. But suing for damages is not going to assist us because they still don't turn up and work and terminating the contract for

repudiation doesn't assist us either because then we don't have their services available to us. I don't go so far as to say it's not capable of being relevant to the exercise of your discretion but it's a fairly low level – to use the Commission's terminology – low-level issue that might be capable of being put against us.

PN315

So since 13 October Gordon McKay and Dynapumps are out. Now, plainly enough, something's happened.

PN316

THE COMMISSIONER: They just might want to be protecting their workplace health and safety of their own employees.

PN317

MR FOLLETT: Well, that's right. There's two explanations - - -

PN318

THE COMMISSIONER: That has nothing to do – it has nothing to do with getting to you, and the unions in this matter.

PN319

MR FOLLETT: Well, that's one of the available inferences you could draw.

PN320

THE COMMISSIONER: But how do I put that out of my mind?

PN321

MR FOLLETT: You don't have to put it out of your mind. All you have to do is find that the inference we contend for is more probable and then you make - - -

PN322

THE COMMISSIONER: Why should I do that?

PN323

MR FOLLETT: Well, I'm about to tell you why you should do that. So the first is they've been told by the union not to cross the picket or they'll be blacked or second, they've been told by the union that, 'We'd prefer you not to do that. You're free to do it, there's no repercussions if you do but this is our preference', and the contractors decide potentially for that reason, potentially because they don't want to expose their employees to harm – a point I'll return to, mind you – not to cross on their own. That's essentially the case that the union put to us when you look at page 204 where that's effectively what they've said they're doing. But the unions have objections to people performing workers' jobs, workers only take industrial action to pressure the employer and that pressure is ameliorated by others performing the work, obviously. But unions don't like this. Unions are entitled to have a peaceful picket and to communicate their views to those who are considering crossing the picket.

PN324

If people continue to attend the picket with a view to crossing the picket, the unions will continue to request that they reconsider their decision, having regard

to protected industrial action – again, bringing it all the way back to, 'This is us doing this to assist us in bargaining, as an adjunct of the protected industrial action'. As to the consequences of the (indistinct), that's not a matter within the union's power. I'm not quite sure what that means. That's the exact thing that's within the union's power. In any case, now I'll tell you the reasons why the more preferable inference is the one we contend for.

PN325

I used the terminology before, 'Blacked', and I'll keep using it. It's well-known terminology: blacklisting. That is there will be issue for you on other sites, on other projects, in other locations if you go against the union – if. There is evidence, some evidence, that that was said expressly on the picket on 13 October to Vagala. That's at Mr Fridell's statement at 53 and 55 and it's included in the note WF8 at page 119. So there's a reference already to blacklisting. The physical obstruction and prevention has already occurred. That's not gentle persuasion. The initial interactions with Gordon McKay are telling and they really lead to only one realistic conclusion being available.

PN326

Initially, before any of this happened, where it was on the horizon, Gordon McKay said to us that they should be okay to do the work because the principle aspects of the work they were doing was not supplementary labour, as it were – that is taking the jobs of the employees engaged in work stoppages – but separate and distinct maintenance work. You see this at 137, WF16. So it's Pat Golding is the main contact from GMK. Seems to believe they can support all of the facility F shut: rationale, they're not doing the work currently expected to be done by CSL employees. Hence he feels the ETU should not have a problem: 'However, Pat is going to confirm this with the ETU and find out ASAP and let me know'. Now, they have contractual obligations to attend and perform work as required. What is it exactly that Mr Golding needs to find out from the ETU? What problem exactly is he speaking about? Why is it relevant to Mr Golding whether the CEPU has a problem or not? That has no bearing whatsoever on the contractual obligation. It's already giving a window into where Gordon McKay is at, which we'll see comes to fruition. The next thing we hear is that on 3 October two contractors due from Gordon McKay the next day have taken annual leave. It's not sick leave, that's annual leave. The only way to take annual leave is for the employer to agree with the timing so Gordon McKay has obviously agreed on 4 October, which coincided with the very first day of the picket that two employees due to attend that day were going to be on annual leave.

PN327

Even if one was as a labour-hire provider or a contractor to allow the two employees that you had assigned to a job to take annual leave on a particular day, your job is to find another person because that's what you do. It's not at all clear to us why Gordon McKay would have authorised annual leave at such late notice, which itself was inconsistent with their contractual obligations. It's suspicious and entirely uncommercial conduct.

PN328

THE COMMISSIONER: How did they respond to that letter that complained about that?

PN329

MR FOLLETT: How did they respond to that complaint?

PN330

THE COMMISSIONER: Yes, your client wrote to them and said, 'This is a breach of the service agreement by allowing this to occur'. How did they reply?

PN331

MR FOLLETT: By asserting that it wasn't. I'll take you to that. Obviously what's happened is Mr Golding has spoken to Shannon Grundle because he refers to – in numerous places – talking regularly with the ETU. So for example, at 143, he refers to open communications with the ETU. Obviously he's been told not to cross the line or they'd be blacked. So CSL writes to Gordon McKay about this as the Commissioner has identified. That's at WF17, commencing at page 140. Gordon McKay's response was not truthful, with respect. That's contained in WF18. There's an oral reference there and then there's a subsequent reference at 149. So their response is to say, 'Well, it was agreed with you that they would attend'.

PN332

Gordon McKay did in fact attend the site on the 2nd and have a meeting with CSL where it was agreed by both parties that Gordon McKay would not attend the site. There's a reference there to the open communications with the ETU. Now, on the evidence before you, that's not what occurred. On the evidence before you at WF19, page 146, in response to that letter there's an internal email referring to 2 October. He advised that his team would not work on 4 October. Fairly odd thing to do, for a company to write to complain about the non-attendance of a contractor in circumstances where they've agreed and threatened legal proceedings in circumstances where they've agreed. On any view of the available evidence, that was not truthful by Gordon McKay.

PN333

They doubled down on that representation at page 149. Why would Gordon McKay be telling us mistruths - - -

PN334

THE COMMISSIONER: Isn't it just a matter of perception? I mean, Gordon McKay say you agreed to all this. At 146 Dion Courtman says, 'We didn't push back'.

PN335

MR FOLLETT: No, that was about whether people turn up for a couple of hours. That's not that they turn up at all. Now, importantly – and this is a point I'll return to – this is well before there being any issues at site with obstruction, yelling, alleged yelling, alleged abuse, screaming and shouting on 13 October. All of the later so-called reasons – and I'll return to this – given by Gordon McKay are completely falsified, in our respectful submission, because all that had happened to this point in time was a peaceful picket on the 4th and a peaceful picket on the 11th.

PN336

Plainly enough, we say, he's been told not to cross the line or he'd be blacklisted and then in exchanges Mr Golding, in our respectful submission, effectively admits as much. So firstly you have WF20 at 148. There's a further reference - this is on 10 October – to speaking to the union again. So: 'I spoke to Sadir to confirm the rumour and confirm the proposed action is being taken by the CSL employees in conjunction with the union'. Then he says: 'As a business, Gordon McKay cannot cross the line of the industrial action being taken by CSL personnel due to the implications to the rest of our business should we go against the ruling'.

PN337

Now, there's no implications for his business – none – on any other site or elsewhere if the union in these discussions had simply said to him, 'We'd prefer you not to cross but it's your choice and it's a matter for you and there'll be no repercussions'. He couldn't have any concern whatsoever about the implications to his business on other sites unless he'd been told in terms of those implications and he uses the terminology, 'Go against the ruling'. It means what it says. He's been told of the ETE's decision. The ruling. And he can't go against it. And then two days later on 12 October, there's a discussion at the site. This is referred to at page 152 where he says, 'I am not able to force my personnel to cross the line and go against union directives'. Now, it's – what's more probable than not that he was asked by way of mere request. We all know about requests and requirements after the public holidays case and the distinction between the two. A request by union not to cross the line, what's more probable that someone has called that a ruling or a directive that they can't go against or what actually was said was you won't do this or there will be implication for your business elsewhere.

PN338

THE COMMISSIONER: But Mr Follett, how do proposed orders assist as a practical measure?

PN339

MR FOLLETT: They make it unlawful, separately unlawful in contravention of an order of this commission that they not engage.

PN340

THE COMMISSIONER: No, no. (Indistinct) the union does all the things that I order them to do?

PN341

MR FOLLETT: Sorry? Does all the things you order them to do?

PN342

THE COMMISSIONER: Yes.

PN343

MR FOLLETT: Well, so there's a positive obligation about notifications etcetera and then there's negative obligations by way of restraints.

PN344

THE COMMISSIONER: Yes. So the union says, the union complains with all of these orders, it says to the contractor, the Fair Work Commission has told us to do all these things and we have done them.

PN345

MR FOLLETT: Well - - -

PN346

THE COMMISSIONER: (Indistinct) that it means.

PN347

MR FOLLETT: Then depending upon what the evidence says, poor means, we may or may not have relief available to us. When the Commissioner says the union says this to the union, well, that's – might be what they say, what they would say, but how do you prove any inferential case. You put the pieces together and you say - - -

PN348

THE COMMISSIONER: I just said yesterday it's my discretion. I think it's relevant and you can correct me if I am wrong. Without the utility of the orders.

PN349

MR FOLLETT: Well, that – there's a whole range of assumptions in that, Commissioner. (1) That the union would positively say something to Gordon McKay. There's the order that will assist in that endeavour. But (2) it will assume that Gordon McKay then, what will continue not to provide services, you don't know that. And (3) it would involve an assumption that Gordon McKay would continue to not provide the services strictly and wholly as a result of their own decision rather than any pressure or influence or threats coming from the union. You're not in a position to make any of those assumptions and then saying well, because I have assumed all of these things, the orders going to have no utility. The order has utility because it gives extra enforcement weight to what they shouldn't be doing already and what we say they are and they have done.

PN350

If the order is futile because it has the effects that you're assuming it may have, then it will have done its job. But we don't know any of those things. And you can't speculate about what may or may not happen and then use that speculation as a basis to say well, there's going to be no utility.

PN351

It may well have beyond the legals, separate real world impacts as well. For example, it may give Gordon comfort – Gordon McKay some comfort to know that the Commission, not only us, have said well, you should keep providing services to us. And the union shouldn't be telling you not to. The Commission thinks that as well.

PN352

Part of this assessment of what I am taking you through will serve to demonstrate that those very benign explanations as one of the available explanations just don't hold any water whatsoever, which raises more questions about well, why are they

effectively not telling us the truth and acting in such an uncommercial way. So I was taking you through 152 and again, asking the question out of that sequence of events to date, what's the more probable that the union have gone no further than requesting Gordon McKay not cross the line and Gordon McKay have decided to breach their contract and go with that. Well, they have been told just like Vagala was told.

PN353

Then at 154 and 156 at WF22 we ask a series of questions. We point out at 155 that there appears to be some ruling or directive. And that will place Gordon McKay's business in jeopardy and then we ask a series of questions on page 156. And questions (b), (c) and (d) relate specifically to those alleged directives or rulings for discussions with the union. The response from Gordon McKay at 158, WF23, we say again, contains some admissions.

PN354

Firstly, at Point 1, 'When CSL was first notified of the industrial action, I received a call from Shannon Grundle of the ETU regarding the impact it would have on Gordon McKay technicians'. So this is industrial action being taken by CSL employees and the ETU speaking to Gordon McKay about what impact that would have on Gordon McKay. There's no obvious or immediate impact unless the ETU was going to do something.

PN355

'I was informed that the ban was on all maintenance activities. That is, anyone who does maintenance on the side is not – is banned'. And then at Point 5 again, Mr Golding also refers to the repeats the existence of the ruling, due to the implications on the rest of our business, should we go against the ruling. And the we get some responses at page 159 and those responses involve a non-answer to any of the three specific questions relating to this particular component of our case.

PN356

THE COMMISSIONER: So why don't I just get Mr Golding in here and ask him?

PN357

MR FOLLETT: What, issue an order for attendance?

PN358

THE COMMISSIONER: Yes.

PN359

MR FOLLETT: Well - - -

PN360

THE COMMISSIONER: You say Gordon McKay is lying. Why not just issue a notice to get him in here and provide our questions (indistinct)?

PN361

MR FOLLETT: Well, the union haven't asked for that. We haven't asked for that.

PN362

THE COMMISSIONER: Yes, I can do things on my own notion.

PN363

MR FOLLETT: Of course you can. But - - -

PN364

THE COMMISSIONER: Why can't I do that?

PN365

MR FOLLETT: Well, because we're in a serial sitting – seating - - -

PN366

THE COMMISSIONER: Yes, but you ask me to draw adverse inference that is against someone who's not here.

PN367

MR FOLLETT: Well, I am - - -

PN368

THE COMMISSIONER: I am concerned about the procedural fairness of that.

PN369

MR FOLLETT: Well - - -

PN370

THE COMMISSIONER: When they write expressly, any inference that Gordon McKay is not acting in accordance with its obligations and responsibilities on the agreement is denied. Notwithstanding, Gordon McKay remains committed to act in good faith in assisting CSL to the maximum extent possible. You're asking me to find that Pat Golding is lying to you and Pat Golding isn't here to defend himself. I am concerned about the unfairness of that.

PN371

MR FOLLETT: Well, it's not a finding that would have any material bearing on Pat Golding.

PN372

THE COMMISSIONER: Well, it's pretty - - -

PN373

MR FOLLETT: Because the case doesn't involve - - -

PN374

THE COMMISSIONER: Mr Follett, it's a pretty serious thing for me to sit here and say in respect of someone who's had no opportunity to defend themselves based on the material format, I think you're a liar. That's what you're inviting me to do.

PN375

MR FOLLETT: Well, how can I - - -

PN376

THE COMMISSIONER: That's what you're inviting me to do in respect of someone who has not had an opportunity to defend themselves. And you could have put them on notice. You could have brought them here. You could have put to them that they're lying - - -

PN377

MR FOLLETT: It happens every day of the week in this place, Commissioner. It is not, with respect, a legitimate reason to delay this hearing, stand it down, issue an order to Mr Golding for some return date that they don't know about and give them an opportunity to answer these issues. Other than causing delay. It happens all the time.

PN378

THE COMMISSIONER: I don't think in the 10 years I have sat up here that I have made adverse findings against someone who hasn't had an opportunity to defend themselves. I just don't think I have done it.

PN379

MR FOLLETT: Well, it depends on what you mean by had an opportunity to defend themselves. Union officials, individual organisers, delegates, are never named as parties. There's always findings made against them with respect to their behaviour when the union appears. There's findings made in unfair dismissals every day of the week that there's some allegation of misconduct by reference to a witness and the finding is made that the conduct didn't occur, therefore the implication being the witness is not telling the truth.

PN380

THE COMMISSIONER: I don't know about this (indistinct).

PN381

MR FOLLETT: Well, it may not necessarily follow, but that's one of the available conclusions depending upon what the finding is.

PN382

THE COMMISSIONER: Yes, but those segment (indistinct) you have just referred to. Say, in relation to the union organisers. The unions usually a party to the proceeding and they can call a person or not call the person and you can draw a Jones v Dunkel or adverse inference. This is a third party in respect of which – I am just troubled by it.

PN383

MR FOLLETT: Well, - - -

PN384

THE COMMISSIONER: In circumstances where it could have fixed by your client.

PN385

MR FOLLETT: Well, with great respect, Commissioner, you say that, but let's think about what's really going to happen here, all right? You can go and make

that order, he will come along, he will tell you all the stuff in his letters. I will then apply to – well, I will cross-examine him and I will basically put all these things to you and then three days later, I will be telling you to make exactly the same findings that you have already made.

PN386

THE COMMISSIONER: And I would be alieved of the concern that he's had every opportunity to defend himself. The cross-examination might be so unsurpassable that concessions made that he was lying to you, who knows.

PN387

MR FOLLETT: Well, it may well be. But with the greatest of respect, Commissioner it's an available course to you. It's not one that's appropriate or necessary. There's no findings because these are factual findings in a case where he's not a party and no legal effect. They can't have legal effect, they can't operate as an issue estoppel, they can't operate as any form of estoppel. Could they have commercial implications if they were published and someone read it? Potentially. But that's going to be a finding based upon what's already been said and done. I can't take it any further.

PN388

THE COMMISSIONER: Yes, I understand. Thank you.

PN389

MR FOLLETT: So then, speak of the devil, Mr Golding turns to the safety card. And he says, 'With unspecified, unidentified, unparticularised allegations', and - - -

PN390

THE COMMISSIONER: Sorry, which page am I looking at now?

PN391

MR FOLLETT: This is in 159.

PN392

THE COMMISSIONER: Okay.

PN393

MR FOLLETT: It's about the third paragraph from the top, 'In circumstances where the industrial action has at times been heated, Gordon McKay must ensure that it holds occupational health and safety'.

PN394

THE COMMISSIONER: And did your client do a risk assessment?

PN395

MR FOLLETT: Well, we – that's a good question. So we wrote back to Gordon McKay and said, among other things, this is at page 162, at Point 4, 'GMK letter alleges there is industrial action at the site being heated and GMK must ensure that it upholds', etcetera, 'CSL is not aware of any health and safety risk posed by the GMK employees including by purportedly heated industrial action. And this

is the first time that GMK has raised this as a concern. Your letter offers no particulars about such concerns.'

PN396

Then we ask a series of questions about those concerns and we say over the page at 163, 'CSL will promptly consider these matters and where appropriate shall ensure that any issue is addressed. To this end, I note GMK is an ongoing obligation and the agreement to consult, cooperate, and coordinate activities with CSL, any supplies or contract is to ensure optimal health and safety risk management.'

PN397

So they put it on the table. We respond and say, 'This is the first we have heard about it. Give us some details and we will look into it. And what we get in response at page 170, WF26, is a non-response. And there's references now to psychological health and psychosocial hazards. There is also a reference at the bottom of that page. 'Inappropriate' – so he's basically saying, 'We will turn up except when it's inappropriate to do so. For example, if GMK personnel would be required to cross a picket line or when comments made by the union cause some distress.' And then there's subsequent references in WF40 at page 264 to references to victimisation and retaliation.

PN398

Now, as we noted earlier there's some defects in those responses because the two employees on annual leave who went on annual leave on the 4th was before anything had happened. The 4 October picket and the 11 October picket was peaceful. There was no issues or any incidents alleged. There's references to the reasons about the annual leave, which I have taken you to that don't stack up.

PN399

I have got the further email about the ruling. And then on 12 October, again, before any blockade, Mr Golding is talking about union directives. And then importantly on 13 October, Gordon McKay wasn't there. They had already said they weren't attending. And the evidence is they have never been there on a day when there's been a work stoppage.

PN400

There's not single Gordon McKay employee who has had to deal with the picket. Not one. So they cannot themselves have witnessed anything. They cannot themselves have feared for their safety. They cannot themselves have fear of retaliation or victimisation because they have never ever been there on a day when the picket was there after the 13 October. They make assertions about that and then when we try to test it, we get radio silence. When all the circumstances, that leads to the obvious inevitable conclusion we say on the balance of probabilities that a trusted long term commercial partner with clear contractual duties evades, obscures, non-responsive, in breach of contract, they wouldn't do that unless there's been a threat to the ongoing operation of their business by blacklisting. That is consistent with all of the evidence as a whole. The union correspondence, we say adds to the inferential case, moving on from Gordon McKay. At WF29, page 184, we ask the union five questions. There's a partial response at page 204 to the two – to questions 2 and 3. Sorry, three and

four. Partial response in the sense that we asked about the union's position and they answered by reference to the union's generally. And then the follow up response was page 211, WF35, and there's no answer provided to Questions 1, 2, and 5. There's a – basically a non-answer. It's difficult to respond to specific matters in the absence of full knowledge. Well, not particularly. When there's representatives of the – each organisation on the picket, Ms Grundle and others, and we want to see your evidence first, i.e. how good of a case do you have against us and then about the allegation of exertion of pressures on contractors, their response is to say it's hearsay. Not even a denial. Just to say your evidence is no good.

PN401

Undertakings were sought at page 230 as the Commissioner is aware of. We get a response at 233, basically saying nothing new. Not going to address the matters any further. And undertakings were sought in the Commission and not given. Now, the state of all of that evidence combined, we say strongly supports the positive drawing of the inference that the unions were interfering with the form of the contract with CSL, unlawfully and outside of what is permitted within the Barling Scheme. We note in that respect, Castlemaine Perkins at paragraph 217. As to the union's silence, we don't need go any further than Chyule in the High Court. That's at Tab 10 of the bundle. And the judgment of the plurality, Justices Hayden, Crennan and Bell at paragraph 63. There's a reference to Jones v Dunkel, 'The unexplained failure by a party to call a witness may support an inference that the uncalled evidence would not have assisted'. That's a traditional formulation. It's in particularly so where it is party with which is the uncalled witness. That applies here at least insofar as the directing mind and will of the union is concerned.

PN402

But then the next point goes further. 'The failure to call a witness may also permit the court to draw with greater confidence any inference unfavourable to the party that failed to call the witness if that uncalled witness appears to be in a position to cast light on whether the inference could be drawn. And there's a reference to Fortescue Medals Group. That's essentially the problem issue, Commissioner that if a witness is in (a) your camp, so that's Jones v Dunkel, and (b) peculiarly has matters peculiarly within their knowledge, relevant to the issues and they have failed to attend and turn up and give evidence. Then not only can you infer it might have been unfavourable, you can more readily draw unfavourable – would not have been favourable, you can more readily draw unfavourable inferences.

PN403

Further, by reference to paragraph 8 of our reply, you can also – it's all – one would also be slow to draw an inference favourable to unions, Putting all of that together, if there was evidence available to the union that would have been favourable to them, they haven't come here to give it. You should infer that anything they might have said on the topic would not have been. We just ask for McKay not to cross and said there would be no repercussions.

PN404

And there's only other one factual proposition available. Would have been the easiest thing to do for Mr Cronewall in particular to come and give that

evidence. When you combine all of those pieces together, like any good circumstantial case, we say you can comfortably find the balance of probabilities that the unions have been and are continuing to interfere with the performance of the contracts of GMK and Dynapumps.

PN405

Could I now briefly - just bear with me. Can I now briefly deal with the third aspect of our case. Reasonable information, relevant information rather. It doesn't appear to be disputed that we have requested information and the information hasn't been provided. The issues really turn upon was it relevant information and if it was, is it reasonable, in all the circumstances to make it a more compelling provision or disclosure.

PN406

The unions have contended in paragraphs 23 and 24 of their submissions for an implied limitation on the wording of 2281(b), that is that the information does not fall within that provision unless it's relevant to the position that the unions are themselves advancing in bargaining or the matters that the unions themselves are bargaining for.

PN407

And that is said to derive from some fairly generic statements of Commissioner Wilson in the ASU v Commonwealth case referring to National Union of Workers v Defries Industries. That limitation is, in our respectful submission wrong. It will become apparent that the Commission has constituted, which you'd be well aware of, the difficulties with that contention by reference to the Australian Nursing Federation v VHIA case that I will provide.

PN408

Apparently, it's in the bundle in the slip at the front.

PN409

THE COMMISSIONER: Yes.

PN410

MR FOLLETT: There's no statutory or textual basis for that limitation on 22 – on the plain words of 2281(b). We know from Endeavour Cole, just before I come to Australian Nursing Federation, we know from Endeavour Cole at tab 6 of the bundle that the outer limits of the good faith bargaining provisions depend on the facts and they vary from case to case and we know - that's at paragraph 31 and 43.

PN411

And we also know that it's neither possible nor prudent, or to put it in the reverse, impossible and imprudent, or desirable to attempt any exhaustive statement of what may or may not be required in any particular case and that's again at 31 and 43 and that applies obviously enough, we would say, with respect to the question of reasonableness. I'll return to that just for a moment. Australian Nursing Federation, you yourself, Commissioner, gave some observations about 228(1)(b) which we say, with respect, would not only - - -

PN412

THE COMMISSIONER: I suspect it was Commissioner Jones and not me.

PN413

MR FOLLET: Jones. It is Jones.

PN414

THE COMMISSIONER: Before her Honour's elevation.

PN415

MR FOLLET: That's my mistake. Well, Commissioner Jones.

PN416

THE COMMISSIONER: It's a common mistake, I get called Jones quite often.

PN417

MR FOLLET: Made some observations with which we agree that are perfectly orthodox. One by reference to what was said about the necessity for reading in implied limitations. Could I take the Commission to paragraph 34 which is a passage from the Tahmoor Coal Full Bench:

PN418

It's got to be determined in light of all the relevant circumstances. Then equally it would be undesirable to read into the legislation concepts which do not already appear in it for the purpose of explaining its operation. That approach is likely to lead to error in the construction of application of the provisions.

PN419

That applies here. You assess relevant information on case-by-case basis. You don't start introducing certain limitations and saying, 'Well, in every single case information of this type is not going to be relevant or available.' And then at paragraph 99 and 100 there was a suggested limitation and at paragraph 99:

PN420

I'm not prepared to accept the construction of 228(1)(b) of the Act as posited by the HIA. The subsection is expressed in broad terms subject to the information not being confidential or commercially sensitive and being relevant to the bargaining, the proposed Enterprise Agreement, bargaining representatives are required to disclose the information in bargaining in a timely manner.

PN421

This will generally but not always involve the disclosure of information to allow the other bargaining representatives to give consideration of the bargaining representative position.

PN422

It needs to be relevant to the bargaining. Now, just as bargaining comes in many shapes and sizes, so too can the scope and identification of the information that might be relevant to it including information that might be relevant at one point in time in the same bargaining but not relevant at another.

PN423

We say on any view that the conduct on the 13th of October, the obstruction, how it's happening, for how long it might go and whether it might continue as that request was, is directly relevant to the bargaining. The point of it was to apply pressure to CSL in bargaining in exactly the same way the PIA does and the union effectively admitted as such in their first responsive email saying effectively, 'This is why we're doing it.'

PN424

It wouldn't be necessary, of course, if CSL was not in a position to keep operating without the striking employees but it is necessary merely because we can through external contractors. The only way for the industrial action to have utility and effect in such a circumstance is to prevent or dissuade contractors from filling the gap.

PN425

That behaviour is directly relevant to bargaining and the information requested about it is directly relevant. So for example, the financial stability or financial position of a company may be relevant to bargaining, information about the financial stability or the financial position may therefore itself be relevant to bargaining.

PN426

For all of those reasons, we say the jurisdictional foundation for the application exists. It's reasonable in all the circumstances to make the order in terms. It still can have and will have bite and utility for the reasons I've already advanced. At least, at the very least, in respect to contractors, because that conduct continues and the effect of it continues. I've already addressed you at some length about the challenging ideas between making an order with respect to the obstruction and can I just deal briefly with the existence of the vote.

PN427

In our respectful submission, it's basically neither here nor there because again, it involves assumptions about what may or may not happen. Evidently enough, you'll decide this application in due course, Commissioner.

PN428

THE COMMISSIONER: But if the vote gets up, it all goes away, doesn't it?

PN429

MR FOLLET: Not necessarily.

PN430

THE COMMISSIONER: Why is that?

PN431

MR FOLLET: Strictly legally it doesn't. practically it does. Well, because the vote - the agreement might not be approved and if the union is opposing it, maybe they'll oppose the approval application. It's not there. Practically, there is a lack of utility if the vote gets up.

PN432

THE COMMISSIONER: And when will we know the outcome of that?

PN433

MR FOLLET: Wednesday. The vote closes on Wednesday but - - -

PN434

THE COMMISSIONER: Can you undertake to let my Chambers know? Yes. All right.

PN435

MR FOLLET: We certainly can do that.

PN436

THE COMMISSIONER: Thank you.

PN437

MR WHITE: I'm sorry, what was that?

PN438

THE COMMISSIONER: I asked if he could undertake to let my Chambers know the outcome of the vote on Wednesday.

PN439

MR WHITE: Thank you, Commissioner.

PN440

MR FOLLET: I can assume from that, Commissioner, that there won't be a decision delivered before that time and that is as it is.

PN441

THE COMMISSIONER: Yes.

PN442

MR FOLLET: We can certainly do that. Just in terms of the form of the orders we seek, I don't need to hand them up to you but they broadly record including the communications that we sought and the locations and sources of those communications with the orders made in Castlemaine Perkins and also in Lyon. I can give you the order reference numbers. There was an interim order in Castlemaine Perkins PR607988 on the 8th of June 2018.

PN443

MR WHITE: 607?

PN444

MR FOLLET: 988 on the 8th of June. There was a final order made, PR609323 on the 3rd of August 2018 and in Lyon, the order is PR725263 made on the 8th of December 2020. Just bear with me one moment. Those are our submissions.

PN445

THE COMMISSIONER: Yes. Thank you. We'll take an adjournment until 12.40.

PN446

MR WHITE: 12.40?

PN447

THE COMMISSIONER: 10 minutes.

PN448

MR WHITE: Why don't we take an adjournment for an hour and a half and come back, an early lunch.

PN449

THE COMMISSIONER: Because you're saying an hour and a half.

PN450

MR WHITE: So, no, no. It's 12.30 now. Come back at 1.30.

PN451

THE COMMISSIONER: That's a very luxurious lunch.

PN452

MR WHITE: No, no. Come back at 1.30. I mean, it's nearly lunchtime so may as well take an early lunch and come back early.

PN453

THE COMMISSIONER: We'll be back at 1 o'clock.

PN454

MR WHITE: 1 o'clock. Thank you.

LUNCHEON ADJOURNMENT **[12.33 PM]**

RESUMED **[1.04 PM]**

PN455

THE COMMISSIONER: Thank you, Mr White.

PN456

MR FOLLETT: Before my learned friend commences, Commissioner, we have reflected on some of the things you have said before lunch and in particular your concerns about the submissions I have made regarding Mr Golding. I had suggested with respect to the two employees on annual leave that he had been mis-truthful. As I think the Commissioner correctly observed, perhaps the exchange between the parties evidenced by page 146 might be a difference of perception and I think in that context I can withdraw any allegation of a lie or mis-truthfulness with respect to that incident.

PN457

The other allegation I made was about what I described as the safety card. I think that's by reference to three documents. I don't need to take you to them. One is at 158, WF23. There is another alternative reading of what Mr Golding says in that document which doesn't involve a suggestion of what has occurred, but rather

involves a suggestion of what might occur. It's only two documents and the same goes with WF40 at page 264.

PN458

One reading of that document also is that it involves a suggestion of not what necessarily has occurred, but rather a concern about what may occur. I think in that context, as well, we can for the purpose of our case withdraw any suggestion of a lie or mis-truthfulness of Mr Golding in that context. What we can't withdraw and don't withdraw is any suggestion that he has been uncommercial, evasive and unforthcoming with respect to his correspondence, not that he has been mis-truthful. Thank you.

PN459

THE COMMISSIONER: I'm assisted by that, Mr Follett. Thank you. Mr White.

PN460

MR WHITE: We will make some submissions about Mr Golding and why he hasn't been called by the applicant in due course, but we note what my learned friend says in respect to that. Now, if the Commission please, in terms of the overall way in which we have put our case, you will have seen in our outline of argument the reply submissions we got to that compared with the positions - in some cases new positions - now being put this morning don't really answer, in my submission, the number of positions that we put in those outlines. First of all, I should say I don't intend to read the submissions. We rely on them.

PN461

THE COMMISSIONER: No, you should take them as being read.

PN462

MR WHITE: Thank you. Can we start with first the question of an alleged breach of the good faith bargaining obligation in 228(1) being a failure to disclose relevant information. Perhaps generically described or poorly described the difference in the parties' positions in respect of this is the breadth of relevance and to the specific matters to which the documents sought should be relevant.

PN463

We have, for our part, adopted what Wilson C said in the ASU case and you will see in that case where we've extracted a part. We have cited a number of other authorities, including Defries. We say that the position taken by Wilson C is utterly consistent with the purpose of the section. The purpose of the section sitting in that part of the Act as it does in relation to the bargaining for enterprise agreements provides and makes provision for, as a repetition, a process of bargaining. It enables the process of bargaining and each of the matters in section 228 are directed to the process of bargaining.

PN464

The process of bargaining includes the matters which my learned friend derives and recalls just exchanging bits of paper, but they are nonetheless procedural and important. The purpose of 228 is to ensure that the bargaining proceed in a procedurally regulated manner. You should read it ejusdem generis perhaps but,

in any event, when one looks at the each of the individual subsections you can see readily that is to which - they're the matters to which they're directed.

PN465

The attending and participating in meetings is a procedural matter. Disclosing relevant information we say should be read in the same way. Responding to proposals is a procedural matter. Giving genuine consideration. These are the matters the subject of the negotiations and recognising with other bargaining representatives it is clearly so, and (e) we say is also directed to that but we'll make some separate submissions in respect of that.

PN466

It is not, we say, the purpose of the section to roam broader than the process of bargaining, including into areas that the applicant now seeks the Commission to go into. The Commission is being asked to extend its purview into matters normally the proper province of courts. If there is an allegation, for example - as there has been in some of the correspondence - of secondary boycott, clearly that's matter for the court. If there are allegations of tortious conduct - and of course there is on this case - that's a matter for the court.

PN467

What the Commission is obliged to do in respect of applications before and under this part of the Act is to look at the way in which it can provide that the preconditions are met, encourage, facilitate or enable the procedural negotiations to continue. The applicant in its reply submissions, both written and orally today, had already the position that the unions have put that not only did we put this as a procedural proposition with which they disagree, I understand that, but we also pointed to the dearth of evidence, the absolute lack of evidence, about any impact in a procedural sense or substantive sense on the bargaining of any of the conduct complained of.

PN468

Mr Fridell gave a supplementary statement. I'm querying whether that's a statement properly in reply. We don't go there, but he made that statement in circumstances where the respondents had boldly put in their submissions that these were the matters to which the Commission had to direct itself and that, further, there was no substantive interference with bargaining. Mr Fridell, who went and made the further supplementary statement in the knowledge of that submission, chose to ignore it completely and there is no evidence from the company - when there could have been - about the impact of the failure to disclose what it is alleged you are bound to disclose on the bargaining.

PN469

Now, that's a surprising omission, but perhaps explained when one looks at the exhibits that we tendered this morning about bargaining continuing, about meetings in the Commission and about emails and exchange of positions which have led ultimately to the company to put out an agreement, but the breadth - - -

PN470

THE COMMISSIONER: That might be said against the company, but to the extent that bargaining stopped was because they decided to put an agreement in.

PN471

MR WHITE: Yes, that's right. It was the one who decided not to make sure the use of the Commission's resources in the form of Wilson C - it was its decision to do that and its decision which was not informed by any nondisclosure of relevant information. The question of relevance which my learned friend seeks the Commission to adopt is almost unlimited in its context. Even if the Commission is against us in respect of the position we put as to the proper interpretation of that section, the Commission should not be against us as a matter of fact in terms of it effecting bargaining.

PN472

The request for information, so-called, akin perhaps to a set of interrogatories, really seek to move the debate between the parties beyond the process of bargaining into areas more properly regulated by the courts and I think we have made that submissions. Now, this morning, Commissioner, you said that you didn't need to hear Mr Follett further on the question of collective bargaining, but - - -

PN473

THE COMMISSIONER: All right.

PN474

MR WHITE: I think that was in part because of the observations by the Commission in Castlemaine Perkins or the like, but I would be grateful if you could hear me - - -

PN475

THE COMMISSIONER: Yes.

PN476

MR WHITE: - - - in relation to collective bargaining. On the one hand the two positions as stated broadly, once again, are these: the position in Castlemaine Perkins or the like was that collective bargaining encompasses the whole process of bargaining. That is, the employer, the bargaining representatives, including if the bargaining representatives are unions. That's the position which my learned friend would have the Commission believe.

PN477

The alternative position is the one that we have put and that is that meaning must be given to the description of 'collective' in that subsection. If the parliament had intended that any impact on the bargaining could be the subject of an application, there was no need for it to include the phrase 'collective'. My learned friend's submission can operate if the word 'collective' was absent the subsection.

PN478

We haven't done an exhaustive review of Commission cases, but in my learned friend's submissions in reply - which we think mischaracterise the submission we made - he says that we make the submission absent authority. Can I just perhaps go to a number of cases. I had thought in the modern electronic age, Commissioner, that you would have access to electronic cases once referred to and I haven't arranged for copies. For that I apologise, but I will do what I can.

PN479

The first matter which I would like to take you to is an *NTEU v Curtin University* matter. The first instance decision is [2016] FWC 3508. In that case - my computer is - sorry. If you can bear with me. I'm sorry, Commissioner. I think I have just deleted it. Commissioner, can you please bear with me. I apologise.

PN480

THE COMMISSIONER: That's all right.

PN481

MR WHITE: I apologise for this. I did delete it.

PN482

THE COMMISSIONER: This is the Curtin University matter?

PN483

MR WHITE: Yes. Edith Cowen, I think. Sorry, Curtin University, Fair Work Commission - bear with me. I won't be long, Commissioner. I'm just getting it up in another fashion. Yes, Curtin University, a decision of Williams C. I'm taking you to these cases to illustrate to the Commission that it, in my submission, has to direct itself properly to the collective nature of bargaining in determining whether or not a breach of the good faith bargaining obligations have been made out.

PN484

In that case can I ask you to look at paragraph 28 where there are some broad principles set out, but importantly those principles follow the section:

PN485

It has previously been held that: (a) a union bargaining representative has an obligation to accurately and fairly report to its members.

PN486

Now, the issue in this case was what was ultimately found to be a misleading publication by the union in the process of bargaining.

PN487

The obligation ... is a significant obligation, given that members and unions generally have trust and confidence in the integrity of officials and employees of unions who are representing them in bargaining for an enterprise agreement.

PN488

Just interpolating there, that is the Commission there is directing itself to the collective nature of the bargain. Now, it may well be, as the Commission notes has been held on a number of occasions, that misrepresentations of various types can unfairly undermine collective bargaining, but it is against the observation in subpara (b) where emphasis is put on the collective nature of the bargaining itself.

PN489

You will see again in another matter - can I take you to this matter. The next matter I want to take you to is a Transport Workers Union matter; *Veolia*

Transport Queensland Pty Ltd [2011] FWA 5691. Now, in this case there are various complaints made about once again publications and staff bulletins put out by the respondent employer. It was a question whether that interfered with or unduly undermined collective bargaining. At 55, the then Commissioner found that the bulletins and the issuing of them had resulted in failure to comply with the good faith bargaining and then sets out the reasons why she made that finding. Particularly at paragraph 58 she says:

PN490

Notwithstanding this, I accept that in the cut and thrust of bargaining, as evidenced by the exchanges between Veolia (through its Solicitors) and the TWU, assertions may have been made on behalf of Veolia, in stronger terms than were intended to be included -

PN491

That's 58. She keeps on going and reaches the final conclusion in relation to this point at paragraph 68 where she says:

PN492

The right to take protected industrial action during the bargaining process, including periods when a proposed agreement is being considered by employees, is a fundamental one. The conduct of Veolia, in issuing a Staff Bulletin on 9 August 2011 containing an incorrect statement about the rights of members of the TWU to take protected industrial action interfered with that right in a way that was unfair, in that it undermined the ability of union members to participate in collective bargaining to the full extent provided under the Act.

PN493

The issuing of two further Staff Bulletins did not correct the first statement with sufficient clarity to overcome the effect of the first statement, and made the entire situation ambiguous.

PN494

So the emphasis there, once again, was the capacity for the union members to participate in the collective bargaining process. The last case I would like to direct your attention to, Commissioner, is a matter of *APESMA v Mt Arthur Coal* [2021] FWC 356. It's a fairly long decision of Saunders DP. Can I first start at paragraph 105. There are a number of matters considered by the DP in this case and so different considerations were given to different and specific matters, but can I start with 105.

PN495

The facts broadly in terms of this allegation was that Mt Arthur in that period during the course of negotiations introduced a condition or precondition that all bargaining representatives, including individual bargaining representatives, had to agree. At the end of paragraph 105 the Deputy President says:

PN496

Such a condition undermines collective bargaining because the condition is capable of preventing the will of the majority of employees from determining whether they want a particular agreement.

PN497

Once again the attention is directed to the collective nature of the bargaining of the employees. Can I go to paragraph 139. Once again speaking about the particular conduct complained of, the conclusion you'll see in the last sentence explains why it undermined the collective bargaining and the reason it did was because it -

PN498

sought to avoid, or delay, an enterprise agreement being made.

PN499

Paragraph 140, he sets out findings in relation to conduct and in the last sentence once again, a step process followed by the Deputy President in each case, he says:

PN500

It was also conduct that had the effect of undermining collective bargaining because it sought to weaken the position of the main employee bargaining representatives (APESMA and the CFMMEU) as well as the capacity of employees to be represented by the union of their choice in a dispute or grievance.

PN501

Once again focused, in my submission, clearly on the collective nature of the bargaining. Like to like effect is paragraph 144, if the Commission please. Particularly I draw your attention to the last sentence:

PN502

The imposition and maintenance of the condition undermines collective bargaining because it means an individual or a bargaining representative representing a minority of supervisors can obstruct the will of the majority.

PN503

So it's not the bargaining itself to which the Commission, in my submission, has to direct its attention, it is to the collective nature of the bargaining. Perhaps lastly, 174. This is another example there of the Commission - the Deputy President clearly directed his attention to, the collective nature. The last sentence:

PN504

The act of unnecessarily delaying bargaining is plainly unfair conduct which undermines collective bargaining because it draws out the bargaining process without good reason, which has the natural effect of weakening or undermining the will of Supervisors to bargain collectively.

PN505

Now, we put these matters to you as examples where the Commission - and we say properly so - has directed its attention to the collective nature. We say that it's properly so and we say that the subsection means what we have propounded. If it

meant what the applicant propounds, what work does the collective description do? If it was only bargaining to which the section was directed, there was no need to have collective at all in the subsection.

PN506

Possibly the last case to which I'll direct your attention, this is another CFMEU case. This is *CFMEU v Oakey Creek Coal Pty Ltd* [2017] FWC 5380. I direct the Commission's attention to paragraph 255. After having gone through the range of facts, one of the findings in relation to the conduct complained of was described as this:

PN507

> *The unfair conduct of surveillance operations in Tieri can only have caused distress and concern to employees and their families and further undermined their engagement in Union activities associated with collective bargaining and membership of the CFMEU.*

PN508

So these are examples, we say, of the meaning of the subsection and the process through which the Commission has to step through to see if there has been a breach. In our submission, there is properly an emphasis on the nature of collective bargaining and, to the extent necessary, we submit that to the extent that there is a suggestion otherwise and that it applies only to bargaining at large, then that observation is wrong.

PN509

Now, the next matter that I wish to direct my attention to is the question of the inferences concerning coercion and it is put by my learned friend this morning that the Commission can lead only to one conclusion and that is that there is a blacklist.

PN510

Well, first of all, there is no reason why a representative from Gordon McKay has not been called by the applicant. Clearly, on the applicant's case Gordon McKay is not a member or not a party in our camp where, according to the applicant, coercing this company.

PN511

This company, described by my learned friend this morning, is one that has had a long-term commercial relationship with CSL and while CSL is prepared to rely on the hearsay contained in correspondence from Gordon McKay, it chose not to call a Gordon McKay representative to say what in fact, had happened.

PN512

Now, there has been criticism that we haven't called somebody to disprove a negative. Always very difficult. But the company is here, urging the Commission to adopt a positive and the positive is that there is a blacklist, whatever that means. It's a very inchoate proposition but the company's urging the Commission to find that there is only one proper reason why Gordon McKay's employees have not crossed the picket and that is because they're blacklisted or a fear of being blacklisted.

PN513

Now, it's a very, very serious allegation and it would have been well within the applicant's ken to call a representative of Gordon McKay and it would have been easily done and if they wanted to prove a positive in circumstances where they haven't or chosen not to call, then the Commission would be far less inclined to draw any inference in their favour.

PN514

One of the difficulties of the hearsay evidence which the applicant relies on and their failure to call anyone from Gordon McKay is that you're really left in the dark about what it is, what is meant by the assertion that there's a ruling or directive by the union. What is the ruling on which the applicant relies? What is the directive on which the applicant relies?

PN515

And, your Honour, there is nothing in the material to suggest other than some hearsay and you know criticisms of that significantly, what the content of that allegation means. It may mean that some of Gordon McKay's own employees have said, 'I don't want to cross a picket.' That may have been what was referred to as a union ruling.

PN516

It may have been that some of Gordon McKay's employees have said, 'Well, I'm very uncomfortable with crossing a picket and I'm not going to do it so don't send me there.' That may have been the directive but in circumstances where you've been left deliberately in the dark, then in my submission, you shouldn't find, as is urged upon you by my learned friend, that the only or the main or the preferable inference is the existence of a blacklist.

PN517

The applicant relies on a number of matters which it says create a strong inferential case, the first of which is the supposed ruling or directives and, Commissioner, you've heard what I've said about that. You've heard our objections about that. Can I make one more submission about that in relation to the Evidence Act and that is that even under the Evidence Act, the Commission's got a discretion not to admit it in circumstances where it would be unfairly prejudicial.

PN518

Now, you've already made the decision that you've admitted it and I'm not cavilling with that now but in terms of how you approach that evidence about directives or rulings, we would ask you to follow the same principles of discretion as is otherwise in section 135 of the Evidence Act.

PN519

The union's silence said to be that we haven't come to disprove a negative. The union's silence in relation to not saying positively in the reply that we did not coerce and have not blacklisted and that question wasn't one that was directly asked. The fact that the union could or could not have given undertakings, we say, is beside the point.

PN520

Industrial parties probably get verballed enough as it is without getting verballed by correspondence demanding undertakings or requesting undertakings when there is no duty or obligation to give them and in circumstances where there's no direct allegation made in the letter requesting the undertakings we're blacklisting Gordon McKay and Dynapumps.

PN521

I mean, Dynapumps is just completely silent in terms of all of the matters in relation to coercion other than the fact that contractors' employees haven't crossed the picket, to use the phrase, since the 13th when there's been protected industrial action going on. All of the other evidence, so-called, was directed to Gordon McKay but don't sort of forget Dynapumps on the way through.

PN522

My learned friend says, 'Well, by reason of there being no employees that the contract is crossing on days when there's been a protected action then plainly enough, something happened', but plainly enough, one of those things might be that the employees of those contractors may have difficulty for whatever reasons, personal reasons and the fact that they're union members perhaps of crossing a picket. It says nothing about blacklisting.

PN523

I should say I think it is clear from the material that there has been more or there is more than one form of protected industrial action which is notified. So as I understand it, there is a range of action which is continuing nearly on a daily basis, the protected industrial action of which my learned friend talks is where there is a stoppage of work by the employees at CSL.

PN524

My learned friend said all of Gordon McKay's reasons were completely falsified. I'm not quite sure whether that allegation has now been withdrawn or only been withdrawn in part. If it hasn't been fully withdrawn, then the observation about disquiet about making findings is correct.

PN525

I don't have a authority but the Mount Erebus case, you know, Mahon in Air New Zealand when the captain of the ill-fated plane wasn't heard in the - heard properly in the Royal Commission. That case - it's a Privy Council case but, Commissioner, it is, I think, reported in the Commonwealth Law Reports.

PN526

The arguments about blacklisting and the like, if the Commission please, really is an example, perhaps of where there's a proper role for the Commission and a proper role for the courts, if that section 45B conduct is engaged in, then the courts are the proper bodies for investigation of that and for taking steps to restrict, if that conduct is found to have occurred. Now - - -

PN527

THE COMMISSIONER: I think the airbus case is 1983 - - -

PN528

MR WHITE: I beg your pardon, Commissioner?

PN529

THE COMMISSIONER: I think the airbus Royal Commission citation is [1983] New Zealand Law Reports 662.

PN530

MR WHITE: I thought it had jumped the ditch and - - -

PN531

THE COMMISSIONER: Jumped the ditch. It is the Privy Council decision, yes.

PN532

MR WHITE: Yes, but because Privy Council case, I think, thought it had been reported in the CLRs but it's certainly reported in the - sorry, it's certainly applied and adopted in any number of cases since then.

PN533

THE COMMISSIONER: Yes. Thank you.

PN534

MR WHITE: If it is the case that Gordon McKay was under a thread of blacklisting, in order to preserve its position with the CSL, the easiest thing in the world ought to have been for it to go to CSL and say, 'I'm sorry but this is what I'm faced with.'

PN535

THE COMMISSIONER: Well, no one likes the dole.

PN536

MR WHITE: Well, in terms of protecting commercial - well, my grandchild told me otherwise the other day and said that I was perpetuating an unfair system. No one likes the dole but the fact of the matter is if that was the case, they've got a perfect reason to go to CSL which is asserting that they're in breach of their contract and implicitly holding the threat of suing them for damages including liquidator damages.

PN537

They could have said, 'Listen, love to but we can't. This is a real problem for us.' Now, they didn't and we think that's certainly a matter you might take into account in assessing the locally held inference that my learned friend suggests.

PN538

I think my learned friend in terms of his criticisms of Gordon McKay's responses in correspondence, asked the rhetorical question, 'Why lie?' This is after he'd made the allegation of lying which I'm still not sure has been completely withdrawn. There's many reasons, perhaps and one of which is that Gordon McKay, no doubt, is - well, I withdraw that.

PN539

Now, can I next go to the next part of my learned friend's reply submissions which deal very generally with the question of the undermining of bargaining and largely he relies on the very broad statements of Deputy President Anderson in the Lyon case and similar observations by Deputy President Asbury and Commissioner Hunt but - - -

PN540

THE COMMISSIONER: Well, the Lyon case was heard very promptly, in a day with a quick decision issued almost a match for an interim order. There's some observations made.

PN541

MR WHITE: Yes. But we don't put the proposition to you that the conduct that we're alleged to have engaged in cannot in some circumstances undermine collective bargaining or undermine the process of bargaining or freedom of association but it depends as my learned friend pointed out, every case depends on its facts.

PN542

In this case, all you've been given is broad-brush, high level assertions about a potential of an impact on or undermining of bargaining. Quite simply, the broad-brush, high level statements are untethered to any evidence. They could have called that evidence if in fact, it was the case that what they complain of has an impact of undermining bargaining or threatens to undermine bargaining.

PN543

But they chose not to even after the respondents put in their submissions the criticisms about the absence of evidence and the proper construction of the clause, the section, they still chose albeit - sorry, they still chose not to lead any evidence about that and Mr Fridell filed a supplementary statement and the Commission now has also been advised that not only did bargaining not cease, not only did bargaining continue both in the Commission and also by email, not only did bargaining continue but without explanation, the company chose to walk away from it, chose not to accept the assistance of the Commission and chose to put an agreement out where incidentally, it thanks the good officers and the services or the bargaining representatives.

PN544

The theoretical proposition really is no more than that and the Commission can't apply - sorry, the Commission can only apply theoretical propositions to facts and evidence and there's nothing to which the theoretical proposition can apply in this case.

PN545

Now, the question of whether or not the information sought, Commissioner, I think we've dealt with that sufficiently. It's not sought in relation to the specific parts of bargaining. The decision of Commissioner Wilson was derided but we say that it's precise and on point and that has two consequences.

PN546

Not only does the applicant not make good its proposition, but the failure to provide the information - sorry, the applicant relies on the letter requesting that information as the concerns notice under the section. If the Commission was to find, as we urge it, that the information there is not information of the type, the subject of the section, then it must follow also that there is no proper notice of concern and accordingly, no proper application before the Commission. Now, we - - -

PN547

THE COMMISSIONER: I understand, yes.

PN548

MR WHITE: We put that in our written outline. Now, can I come next to freedom of association which like a number of the other of the applicant's contentions, is expressed so broadly as to almost render it meaningless. As we understand it, the applicant is saying that it applies to persons with whom it may have relations or with whom it can associate, e.g., contractors or the like and we say that's not a proper reading of the case.

PN549

Can I ask you now to look at Full Court Federal Court in Barclay, the reference to that, if the Commissioner please, is - well, the title is Barclay v The Board of Bendigo Regional Institution of Technical and Further Education [2011] FCAFC 14. Now, this went to the High Court, clearly, but not on this point.

PN550

The section is set out in paragraph 6 and after paragraph 6, the Full Bench start analysing the meaning of that and I ask the Commission to look at paragraphs 14 and following. The phrase, 'Freedom of association' as used in this Act has a long history including a long international history. No, sorry. The provisions in the Act are designed to protect freedom of association whether in part, done so for the purpose of giving effect to Australia's international obligations.

PN551

Paragraph 15 is where the Full Bench start to give some meat to that phrase. I rely particularly on paragraph 14 and 15. I won't read it out unless you'd be assisted by me - - -

PN552

THE COMMISSIONER: No, I've got it in front of me. Thank you.

PN553

MR WHITE: Thank you. Really we rely on that through to paragraph 23 if the Commission please.

PN554

THE COMMISSIONER: Yes. Thank you.

PN555

MR WHITE: So in my submission, if the Commission please, is that freedom of association has a particular meaning in this Act informed by the reasons it was put

in to give effect to Australia's international obligations and are directly related to the participation in registered organisations.

PN556

THE COMMISSIONER: Do they have to be registered organisations or (indistinct).

PN557

MR WHITE: A union doesn't have to be registered.

PN558

THE COMMISSIONER: No.

PN559

MR WHITE: No, I agree. But - yes, I agree, but that doesn't change.

PN560

THE COMMISSIONER: I understand.

PN561

MR WHITE: That doesn't change the point. Now, the next thing I wish to address if the Commission please, is the question of discretion under section 230 if you are satisfied a proper application has been made and breaches have been made out, you still must be satisfied it's reasonable in all the circumstances to make an order and we say for a number of reasons, it's not reasonable in all the circumstances.

PN562

In relation to the conduct on the 13th, nearly two months has passed since that conduct occurred. My learned friend says absent undertakings, there's some fear that it might occur again but no undertakings were provided a long time ago and it hasn't happened again.

PN563

Secondly, the fact that it hasn't happened for nearly two months is a positive reason and the Commission can find, in my submission, that it is unlikely or there is no evidence to - sorry, withdraw. There is no evidence, in my submission, to found a submission that it's likely to occur again.

PN564

Next, whilst they didn't tell you, the company has put an agreement out to vote and as my learned friend ultimately conceded, the practical effect of that if the vote was successful, is to render this application nugatory. That may be a question of timing as you, the Commissioner, asked to be understood.

PN565

Thirdly, and possibly related to the fact that the company has put the agreement out to a vote, is that there is absolutely no evidence of the impact of a picket on the 13th of October on bargaining and you can be satisfied, given that bargaining has continued after the 13th and you can be satisfied given the absence of evidence from CSL, that it has had no impact on bargaining.

PN566

As to the alleged blacklisting, the Commission, if it is satisfied, can only be - well, sorry, I withdraw that. Fundamentally, the Commission can't be satisfied anything like that has occurred or is occurring and if the applicant wanted to rely on anything, he could have led evidence but we've made submissions about that.

PN567

Can I now come to the orders sought? I think from recollection, my learned friend in his oral submissions said that the orders that the applicant was seeking was similar to the orders which had been made in Lyon and Castlemaine.

PN568

THE COMMISSIONER: Castlemaine.

PN569

MR WHITE: And gave reference to the orders that were made. Now, on my instructions, I haven't had time to look at them myself, but there was no order of the type the applicant seeks in order 6 made in those orders. Now, so this is a whole new ballpark which - that is order 6, a whole new game, whole new ballpark which introduces a whole range of different considerations but we'll come to those in a moment.

PN570

In relation to the specific orders, we don't make submissions, putting aside order 6. In relation to - don't make submissions that they are not capable of being made by the Commission. In my submission, they can be made in the event that the Commission makes findings of fact. As to whether the Commission would make them in some senses, it depends on the facts that it finds and it may well be that the Commission would hear or should hear from the parties again with the benefit of the facts that you have found in order to make submissions about what an appropriate order is.

PN571

In my submission, that's not a matter that would take much time but it would certainly give an opportunity for submissions to be made having regard to specific matters which have been found rather than broad, general type orders now, relied on - sorry, the evidence for which is generic, inchoate and at large.

PN572

There are some technical matters about the orders which I wish to draw your Honour's - the Commission's attention to. First, orders 2 to 5 require significant work to be done if they are made in the terms and on my instructions, we would prefer two to five days but certainly a minimum of three days in order to properly give effect to the orders. Now, if the Commission please, these are important matters. It is not the case that there is great urgency. The applicant hasn't pursued this matter as a matter of great urgency but the potential for slippage or slip up or some technical glitch in complying with any orders, can be catastrophic. It is important, in my submission, that when you consider the time, if you make orders, within which to comply with them that you bear in mind that a technical glitch or problem has the effect that preconditions for protected industrial action are not met.

PN573

We would ask the Commission to bear that in mind – squarely in mind – when you consider our request for five days for the – if you were to make any orders. Order 3(b) – and I raise these issues, Commissioner, because a technical breach, as I say, has potentially far-reaching consequences. Order 3(b) requires the unions to send SMS text messages. The message that it's meant to send or that they would have it send is too long and, I'm told, that it's probably not possible to fit that length of message into a text message.

PN574

THE COMMISSIONER: I think if you typed it in it would just be sent as a number of text messages.

PN575

MR WHITE: Yes. But I'm sure then we wouldn't be accused of being in breach of the order when we didn't send a text message. But in any event these are the type of technical glitches, Commissioner, which we ask you to bear in mind. We normally wouldn't assist the applicants in framing orders against us but because of the caution and concern about the effect of the preconditions – 413(5) – an address in order 4(c) is incorrect. It should be https://instagram.com/AMWUVIC. Order 4(d) once again is a multiple tweet. Order 4(e) the first address once again is incorrect and on my instructions it should be https://amwu.org.au/vic_news. Order 5(c) once again on my instructions, the address is wrong. It should be https://instagram.com/ETUVIC. Order (d) once again the question of multiple tweets looms – raises its head.

PN576

THE COMMISSIONER: What's that point?

PN577

MR WHITE: I beg your pardon?

PN578

THE COMMISSIONER: What's the point about the Twitter thing? What's the multiple tweet thing?

PN579

MR WHITE: We don't want to get caught up in some technical breach. We will send if obliged to – we will send tweets but it may not just get in one tweet, I think. Is that the question you asked?

PN580

THE COMMISSIONER: I'm trying to understand the point you're making about the problem with post on its Twitter account – what's the problem with it?

PN581

MR WHITE: And that's order - sorry?

PN582

THE COMMISSIONER: Do we still call it Twitter or is it X account?

PN583

MR WHITE: X, I think. Yes, I think the problem is that there's a maximum amount of characters for the X tweet.

PN584

THE COMMISSIONER: Well, you could post a link to its website on its X account.

PN585

MR WHITE: You could do that and in another case in the past where that has been done we were – I think a matter in which Mr Follett was involved – we were unable to get a retrospective variation of the order to permit a link being posted. So these are technical matters - - -

PN586

THE COMMISSIONER: They're serious. I mean, the orders are very serious.

PN587

MR WHITE: The orders are very serious and the breach of the orders or potential breach of the orders has very serious consequences. One wonders perhaps in relation to order 6, whether that was a matter that was – the applicant had in its mind when it framed an order it now seeks. One could imagine, having regard to the order sought in order 6, endless argument about the compliance with the order and whether or not the – any reply which was given was adequate. It is some imprecise, that which is required, and so open to interpretation: (1) an order in that form shouldn't be made in any event. This submission is made in the alternative to – sorry, in addition to the submission made that the information sought is not information relating to bargaining.

PN588

THE COMMISSIONER: I understand.

PN589

MR WHITE: But the terms of this order are so broad as to really only guarantee, if you like, endless arguments about whether or not there has been compliance with what is expressed in very broad and general terms. So one could readily imagine where there is such a broad border and disagreement that we'd be back in the Commission the first time protected industrial action was notified with an assertion being made that we were unable to take it because of a breach of the order. So the wording of the order is incapable of precise compliance and orders of course – of courts and this Commission – need to be precise and need to be capable of precise compliance. Now, unless you've got specific questions, Commissioner, those are the submissions.

PN590

THE COMMISSIONER: No, thank you, Mr White. I've been greatly assisted. We'll take a five-minute adjournment. Mr Follett, in light of the submissions of Mr White I think I'm going to need you to take up the issue of the collective issue which I sort of shooed you away from earlier. And then just get some instructions about the proposed orders. In respect of orders 2, 3, 4 and 5 – they're currently drafted on the basis of by 12 pm on the day after. Mr White has

pressed that that should be five days after. I'm wondering if the applicant would be opposed if I were to say three days after.

PN591

Then there will need to be some neatening up for the websites, obviously, but I don't need to do that now, and get some instructions about whether six is pressed. We're adjourned until 20 past.

SHORT ADJOURNMENT **[2.14 PM]**

RESUMED **[2.23 PM]**

PN592

THE COMMISSIONER: Mr Follett?

PN593

MR FOLLETT: My friend commenced by making some submissions about 228(1)(b), which sort of very quickly moved into a discussion about the collective. I wasn't quite sure of what was being submitted. There were multiple references to the process of bargaining and the procedure of bargaining. If it was really a submission that an order about relevant information can only go to sub-paragraphs (a), (c) and (d) of 228(1) and not (b), (e) and (f), then there's no foundation for that submission.

PN594

Ultimately if it's no more than a submission that 228 is about the procedure or process of bargaining, and therefore any information requested has to be relevant to the procedure or process of bargaining, then we're ad idem. We're ad idem on the principle. Then it's just a question of whether or not the information we requested is relevant to the process of (indistinct) procedure of bargaining. I have articulated to you the reasons why, and they're broadly consistent with some of the reasons why behaviour of this type shouldn't be engaged in, in the first place.

PN595

Some reference was made to a lack of evidence. We don't accept that characterisation, but even if there was something in it the simple answer is that the conduct need only have the potential to undermine, it doesn't need to in fact have undermined collective bargaining. You don't have to wait until the impacts are borne, and we refer to paragraph 99 of Anglo Coal on that very proposition, which Oakey Coal deals with as well.

PN596

Now, on this collective point there was a lot of reference to cases about collective bargaining. It's not exactly clear to us what the gravamen of the point is here. If no more is being said than the collective bargaining involves bargaining between an employer and its employees, then that's fine. If rather what is being said by reference to collective bargaining is it's bargaining by the collective only, then what he's really saying is that there is no capacity under this regime to obtain orders against unions or employees, because their own conduct can't undermine their own collective bargaining.

PN597

Plainly enough the reference to collective bargaining in the provision is a reference to bargaining. They are synonyms, they are one and the same, there is no distinction. There is only one form of bargaining under the Act and that is collective bargaining, because you don't have AWAs any more, or individual bargaining with individual employees. That's why there is a reference to collective bargaining. That is made pellucid by the objects, not only of the Act, but of the objects of the part.

PN598

In section 3F there's a reference to enterprise level collective bargaining, and in 171A there's a reference to collective bargaining. There is no such thing as bargaining that is not collective bargaining under the Act. So to say that the action has to undermine collective bargaining adds nothing, it just has to undermine bargaining. Otherwise, as I said, you would be the first member of the Commission to say that orders of this type are not available against unions.

PN599

All that has to happen here is that it undermines our ability to bargain with the collective, undermining our bargaining with the collective. That is undermining collective bargaining. And it undermines our bargaining with the collective for all the reasons dealt with in the cases.

PN600

My friend made a submission that, well we should call Gordon McKay. A couple of deficiencies with that submission. Firstly, they're not in our camp. So there's no availability of an inference of the type that we put against my learned friend. We endorse entirely the proposition that a witness in the camp of a party who is not here raises questions about why they're not here. It's just that Gordon McKay is not in our camp.

PN601

THE COMMISSIONER: They're providing you a service and you're paying them.

PN602

MR FOLLETT: It doesn't make them in our camp.

PN603

THE COMMISSIONER: Probably more in your camp than their camp.

PN604

MR FOLLETT: More in our camp than their camp, but as between us interpose they're in no one's camp. We're threatening to sue them. Secondly - - -

PN605

THE COMMISSIONER: I don't think you are. I think your letter expressly said you weren't going to sue them.

PN606

MR FOLLETT: Not at that point in time. No, there's nothing in the material other than, you know, a contention that you're in breach and we expect you to comply with your legal obligations. Secondly, in any event we have put material in from Gordon McKay. We rely upon it for what it says. Forensically if my friend wants to say, well it doesn't mean what we contend it means, it was equally open for him to call Gordon McKay. There's no reason given why he couldn't have called them and said, yes, I've had discussions with Sharon Crumwell and he hasn't told me anything or the sort, or they could have sought an order for his production. So what's good for the goose is good for the gander in that respect.

PN607

My friend made a number of references to the union officials not being called to disprove a negative. I'm not quite sure what my learned friend meant by that terminology. They're disproving a positive by saying, coming here and saying, 'I didn't have a conversation with Mr Golding where I told him anything of the sort, that there'd be any repercussions for his business at any other site if he crossed the picket. I didn't tell him that he wasn't allowed to. I didn't tell him there wasn't a ruling. I didn't tell him there wasn't a directive.' Merely because action could be pursued in court is not a reason, with great respect, why this Commission just vacates the field.

PN608

There were then references to the extent to which the conduct undermined bargaining, and various pejorative terms such as broad-brush, high level, untethered, inchoate. We don't need to go any further than Castlemaine Perkins or Lyon. This is not conduct within the rules. It's outside the rules designed to do exactly what the rules provide for. That is the reasoning of those cases as to why it is unfair. It is putting pressure on an employer, or indeed a union, to do the very thing that the PIA is intended to do, but not using the mechanism of PIA to achieve it.

PN609

THE COMMISSIONER: But it hasn't worked. CSL haven't yield it.

PN610

MR FOLLETT: Well, how do you know?

PN611

THE COMMISSIONER: Well, (indistinct) make any further concessions after the 13th, because - - -

PN612

MR FOLLETT: I don't think there's any evidence of that, but even if it hasn't worked why does that make a great deal of difference? You'd still pressure - - -

PN613

THE COMMISSIONER: In the overall exercise of my discretion if someone is engaging in a useless activity or slapping someone with a wet lettuce why change orders against them? Surely it's relevant to the exercise of my overall discretion, (indistinct) engaged in useless activity.

PN614

MR FOLLETT: If you're talking about pressure to make concessions or make an agreement, well that's one form of pressure; increased cost, increased distraction, and at the end of the day we've got contractors who are not turning up. That has implications. It's not only pressure about making concessions, and pressure builds. It's the very existence of the action outside of the regime which is unfair and undermines collective bargaining. And that reasoning as to why is explained in Castlemaine Perkins and Lyon, and we endorse it; (a) it's obvious, and (b) there's no reason why it ought not be followed.

PN615

A submission was made about there's no concerns of notice about 228(1)(b). That's just wrong. There was a separate concern of notice about that matter. It's found at 227 to 231 of the court book. As I understand the submission that was being put it was the first letter that asked for the information which was a concerns letter, and therefore there was no subsequent letter. 227 to 231 is it; 228, if you haven't provided relevant information in a timely manner, contravention of 228(1)(b), set out concerns with those responses, et cetera, et cetera.

PN616

Freedom of association, (a) is an alternative formulation; it's or, and (b) it sounds like another loophole that needs to be closed, Commissioner, that these orders have capacity to go against unions that needs to be fixed. So we read down collective bargaining and we read down freedom of association as only applying to the actions of employers. There's no substance to that sort of contention.

PN617

Now, in terms of the order - - -

PN618

THE COMMISSIONER: Isn't freedom of association about the freedom of either an individual or an entity, (indistinct) order. Say for example the employer being a member of MECCI or something is it really about their ability to freely associate with a contractor, which is what you're saying.

PN619

MR FOLLETT: We don't need that limb, Commissioner.

PN620

THE COMMISSIONER: Thank you.

PN621

MR FOLLETT: Now, in terms of the order my friend made some observation that, well order 6 is not found in the other orders. The reason order 6 is not found in the other orders and is found in our order is because that's an order directed to the 228(1)(b) contravention. That's the order that remedies the effect of the 228(1)(b) contravention.

PN622

THE COMMISSIONER: So I can take it the matter is pressed?

PN623

MR FOLLETT: Well, it's pressed save for this; it relates to something that has happened and the risk of repetition of that happening. If the Commission was otherwise persuaded to make the other orders we seek, then order 6 itself ceases to have any ongoing utility. So if the other orders are made we don't need order 6. We don't need debates about whether it's clear or not. But obviously if the other orders are not made we press order 6 in its standalone form.

PN624

THE COMMISSIONER: I understand.

PN625

MR FOLLETT: About the terms of the order itself we don't really see how difficult it is to send an email or a text message, but having said that we don't have anything to say in opposition to three days. And insofar as there is a need to clear up the Instagram address in 4(c) and 5(c) in accordance with what my learned friend said, we have no difficulty with that.

PN626

Insofar as (d) in each case should refer to 'X' instead of 'Twitter' then obviously we'd have no difficulty with that. And on 3(b) and also 4(d) and 5(d), this point about character length, it would be easily solved by saying send a message or messages and post - and you could say for example put in brackets by one or more posts on Twitter the following.

PN627

THE COMMISSIONER: Yes.

PN628

MR FOLLETT: Those are the submissions.

PN629

THE COMMISSIONER: Thank you. Mr White, you wouldn't ordinarily get another bite of the cherry.

PN630

MR WHITE: I wouldn't, but at least in respect of the collective bargaining thing I might otherwise have had an opportunity to respond to any submissions about that.

PN631

THE COMMISSIONER: I don't know. It was squarely raised in your materials. You've had every opportunity to ventilate it. Because it seemed a lot stronger after hearing it from you I provided Mr Follett with an opportunity to reply. I think that's about (indistinct).

PN632

MR WHITE: Yes. Well, he's just made one point in his submissions which would take me very - - -

PN633

THE COMMISSIONER: All right.

PN634

MR WHITE: The proposition that there's only collective bargaining under the Act is not correct. Individual bargaining representatives can appoint themselves and be appointed to act for individuals. So it's not just - - -

PN635

THE COMMISSIONER: But only in respect of a collective agreement.

PN636

MR WHITE: Yes, but it's not collective bargaining. That's the essence of the point, isn't it. I don't get normally a right to say anything. I did omit to say that we would like longer if you were minded to make order 6 if pressed, because that's a much more significant task than any of the other orders, and we would want seven days at least, if you were minded to make order 6. If the Commission please.

PN637

THE COMMISSIONER: Thank you, Mr White. Mr Pollock?

PN638

MR FOLLETT: Well, given that it only arises as a standalone order in the event you're against us on the other things, and given its nature, I don't wish to say anything - - -

PN639

THE COMMISSIONER: Yes, thank you. I thank the parties for their submissions, both the written materials which have been filed and also your oral submissions. I have been greatly assisted. Mr Follett earlier asked about when I might issue a decision. I'm afraid I'm interstate on bereavement leave for the next two days, so it just will not be done before Wednesday. If I could just be let known what happened in the outcome of (indistinct). We're adjourned.

ADJOURNED INDEFINITELY **[2.44 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs