



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT BINET**

**B2023/1357**

**s.425 - Application to suspend protected industrial action**

**Application by DP World  
(B2023/1357)**

**Perth**

**5.30 PM, TUESDAY, 12 DECEMBER 2023**

PN1

THE DEPUTY PRESIDENT: Mr Williams, you're appearing on behalf of the applicant?

PN2

MR D WILLIAMS: That's correct, Deputy President, thank you.

PN3

THE DEPUTY PRESIDENT: And Mr Farouque, you're appearing on behalf of the respondent?

PN4

MR K FAROUQUE: That is correct, Deputy President.

PN5

THE DEPUTY PRESIDENT: Is there any housekeeping before we start?

PN6

MR FAROUQUE: Just one matter from our end: perhaps my learned friend I think wants to say something. I'll let him go first.

PN7

MR WILLIAMS: All I wanted to say, Deputy President, is that the application itself did not find its way into the digital court book and I apologise for that but I'm sure everyone has a copy.

PN8

THE DEPUTY PRESIDENT: Thank you. Mr Farouque.

PN9

MR FAROUQUE: Deputy President, we just noted that we filed just a short time ago, the amended – some corrections to the witness statement of Mr Evans and I just wanted to confirm that that had reached you.

PN10

THE DEPUTY PRESIDENT: Are the changes extensive?

PN11

MR FAROUQUE: They're not extensive, Deputy President.

PN12

THE DEPUTY PRESIDENT: I'm just wondering if I could – if they're on particular pages, is it possible just to swap them into the digital court book so I've got one court book, or - - -

PN13

MR FAROUQUE: I think that would probably be – wouldn't be problematic. I can just quickly identify the changes. They are to – they're marked up, I think, in the documents. Paragraph 46 and 59 (indistinct).

PN14

THE DEPUTY PRESIDENT: Sorry, what was the first one?

PN15

MR FAROUQUE: Paragraph 46.

PN16

THE DEPUTY PRESIDENT: Yes.

PN17

MR FAROUQUE: You can see that just the last part of that, paragraph 46 there's a marked up addition. Then 59N - - -

PN18

THE DEPUTY PRESIDENT: Just want to check it doesn't affect the page numbering.

PN19

MR FAROUQUE: I don't think it should affect the page numbering, Deputy President.

PN20

THE DEPUTY PRESIDENT: Yes, so that one's fine. I'm just going to swap page 278 of the digital court book with the revised page 11 of the new witness statement. And the second page was?

PN21

MR FAROUQUE: Page 14 of the witness statement, which – just bear with me – is - - -

PN22

THE DEPUTY PRESIDENT: Page 281 of the digital court book.

PN23

MR FAROUQUE: I think that's right, 281 of the digital court book, yes.

PN24

THE DEPUTY PRESIDENT: Okay.

PN25

MR FAROUQUE: And then the only other matter that I just wanted to raise, Deputy President: Mr Evans is the witness being called on behalf of the respondent. He is also providing instructions in connection with the matter. I'm not certain whether any issue is taken by my learned friend as to his presence in the court during the - - -

PN26

THE DEPUTY PRESIDENT: If you need to get instructions from him I'll adjourn.

PN27

MR FAROUQUE: Okay, thank you, Deputy President.

PN28

THE DEPUTY PRESIDENT: Okay, I propose to admit the digital court book as the only exhibit in the proceedings. Does either counsel have any objections to that?

PN29

MR WILLIAMS: We don't, Deputy President. I think that's a practical course.

PN30

THE DEPUTY PRESIDENT: Mr Farouque.

PN31

MR FAROUQUE: WE don't either, Deputy President.

PN32

THE DEPUTY PRESIDENT: Excellent, okay. Anything else before we start?

PN33

MR FAROUQUE: No, Deputy President.

PN34

MR WILLIAMS: Ready to proceed.

PN35

THE DEPUTY PRESIDENT: Okay, Mr Williams, did you want to expand further on the written submissions that have been filed or do you want to move straight to the witnesses?

PN36

MR WILLIAMS: Deputy President, the matter has come on efficiently, for which we're grateful. I think I don't require an opening from Mr Farouque and I think it would be convenient if we just move into the evidence. We had sought to make our submissions (Indistinct) to be comprehensive.

PN37

THE DEPUTY PRESIDENT: Great, excellent. Do you want to get Mr Hulme online? Yes. Is there anything additional you're proposing to ask Mr Hulme evidence in chief or are we moving straight to cross-examination?

PN38

MR WILLIAMS: Once his statement has been admitted – well, it has been admitted I suppose but he'll have to swear it. At that point I have no further questions for him.

PN39

THE DEPUTY PRESIDENT: We'll just get Ben to get give him his affirmation and then we'll make him available for cross-examination. Mr Hulme, you've just joined the proceedings. Ben is just going to get you to give an affirmation first of all and then Mr Farouque is going to cross-examine you.

PN40

MR M HULME: I understand, Deputy President, thank you.

PN41

THE ASSOCIATE: Please state your full name and address.

PN42

MR HULME: Mark Shawcross Hulme, (address supplied).

**<MARK SHAWCROSS HULME, AFFIRMED [5.43 PM]**

**EXAMINATION-IN-CHIEF BY MR WILLIAMS [5.43 PM]**

PN43

THE DEPUTY PRESIDENT: Mr Farouque.

PN44

MR FAROUQUE: Deputy President, are you calling on me to cross-examine now or is - - -

PN45

THE DEPUTY PRESIDENT: Yes.

PN46

MR FAROUQUE: - - - the statement to be formally tendered or - - -

PN47

THE DEPUTY PRESIDENT: The witness statement is admitted already and Mr Williams indicated he doesn't require Mr Hulme for any questions.

PN48

MR FAROUQUE: Thank you.

PN49

THE DEPUTY PRESIDENT: So Mr Hulme is all yours.

**CROSS-EXAMINATION BY MR FAROUQUE [5.43 AM]**

PN50

MR FAROUQUE: Okay, thank you very much, Deputy President. Mr Hulme, in your witness statement I think you indicated that the protected industrial action commenced on 1 October 2023. Is that – that's not correct, is it? Do you agree with that proposition?---I'd need to go and check the actual notes but it was not prior to that date. I'd have to check where the first one was (indistinct).

PN51

Okay. I want to just take you to the notices of protected industrial action which are set out in your witness statement, I think at MSH2. Do you see those notices?---Yes, there's a number of them so if you can take me to a date - - -

PN52

\*\*\* MARK SHAWCROSS HULME

XN MR WILLIAMS

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

If you just go to page 34 of the – if you've got the court book before you?---Yes, I do.

PN53

SO that's the first notice – one of the notices you received on 28 September 2023?---Yes, taking effect from Monday the 9th.

PN54

And that was a notice in relation to Brisbane, that's correct, isn't it?---Yes, that is correct.

PN55

You can see that from paragraph A. Then if you scroll through or just look at the dates of the industrial action notified, the earliest date in that notice is 7 October. Do you agree with that? There are a number of dates of industrial action commencing on 7 October?---Yes, that's correct.

PN56

Okay, thank you. Then if I could just take you to the next notice, which is at page 37 of the court book?---Yes.

PN57

That is a notice in relation to Fremantle?---Yes, it is.

PN58

And then the earliest – there's a number of bans or forms of industrial action which are notified to commence. The earliest dates are on 6 October, do you agree with that?---Yes, I do.

PN59

Then in relation to the notice on page 41, that's in connection with – that's a notice in respect of Melbourne, isn't that right?---That's correct.

PN60

The earliest form of industrial action notified there is for a date on 8 October. Do you agree with that?---Yes, that's correct.

PN61

And then if you move to the notice on page 45, that's in relation to the port of – the Sydney port?---Yes, it is.

PN62

And that has various dates of industrial action but if you scroll through that document, I think the earliest date of the industrial action notified is 7 October?---Right – yes, that's correct.

PN63

That's correct. So if you go to your witness statement at paragraph 31 – do you have that before you?---Yes, I do.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN64

Where you say that from 1 October, the (indistinct) and its members have engaged in protected industrial action, that's simply not correct, is it?---No, that is not correct.

PN65

Yes, okay – thank you for that. There was a bargaining meeting – isn't it correct – on 28 September 2023. There was a meeting which happened on that day, isn't that right?---I'd need to refresh but my recollection is yes, there was.

PN66

That meeting went till about around 3 o'clock, 3 to 4 o'clock on that day. Do you recall that?---Not specifically, Mr Farouque.

PN67

Okay, but it went into the afternoon, is that right?---My recollection is yes.

PN68

Okay. You spoke with Mr Evans at that meeting, didn't you, on that day? He was at the bargaining meeting?---My recollection is Mr Evans has been at every one of the part 8 bargaining meetings.

PN69

And what I want to suggest to you is at about 3 pm on that day, towards the end of that meeting, Mr Evans spoke to you about scheduling the next meetings to occur in October 2023?---Yes, discussions were held in most of the meetings on the final day or final days about scheduling following meetings, yes.

PN70

But you would agree that he spoke to you on that particular day about scheduling meetings for October?---He may have. I couldn't tell you specifically but as I said, in most meetings on either the second-last day or the final day, yes, there were discussions with regard to future meetings, both at a part A or the local schedule meetings.

PN71

And at that point, it's correct to say that in response to Mr Evans's query about meetings in October, you said something to the effect of, 'We're not going to negotiate with a gun to our head'. Do you recall saying that to Mr Evans?---I couldn't tell you whether I said it at that meeting but I have definitely used those words to Mr Evans previously, yes.

PN72

Do you agree it's likely you said it to Mr Evans?---I have definitely said to Mr Evans, Mr Farouque. Whether it was said in that meeting or not, I don't recall.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN73

DO you recall saying to Mr Evans at that meeting on 28 September that DP World would not meet on days when protected industrial action was occurring because you did not want to bargain in those circumstances? Do you recall saying that to

him on the meeting of 28 September at about 3 pm?---Not specifically those words but the intent behind – very similar words, I would have said, yes.

PN74

Okay, I just want to take you to a document which is – do you have the court book with you, Mr Hulme, at all?---Sorry, do I have a - - -

PN75

Do have the court book with you?---Yes.

PN76

You do, okay, thank you. Just bear with me, Mr Hulme. I want to take you to page 300 of that court book?---Just (indistinct). Yes.

PN77

You have that before you?---I do.

PN78

So that's a – you see the AE2 there?---I do.

PN79

That's an email, chain of emails that you've had, other people have been recipients at various points, with Mr Evans. Do you recognise that?---Yes, I do.

PN80

I want to take you to an email which is at – bear with me, Mr Hulme, if you may – it's at page 310 of the court book?---Yes.

PN81

And at the very bottom is an email from – of that page, 310 – is an email from Mr Evans to you and he is asking for confirmation about the next round of part A meetings for 17 and 19 October, 'So that we can book travel, we can offer the MUA Victorian branches a meeting venue'. Do you see that?---Yes, I do.

PN82

Then your response to him on 4 October, was it not, is that – if I take you to the second line – 'As advised last week, we will not meet on days when PIE is occurring'. Do you see that?---Yes, I do.

PN83

Having seen that do you agree that it's likely that that was a reference to the meeting, bargaining meeting, when you referred to last week, the bargaining meeting on 28 September?---As I said, whether it occurred in the meeting, whether it occurred in a discussion or an email, I have definitely indicated that to Mr Evans previously. It may have been related to that meeting, I couldn't tell you specifically.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN84



Okay, but you accept that you told him in the week previous at some point that you will not meet on days when PIE is occurring?---On the basis of my email, yes, I'm (indistinct) - - -

PN85

Okay, you accept that could have happened at the meeting on 28 September?---Yes, it could have.

PN86

Thank you. Now, I want to put it to you that in fact you did say that to Mr Evans on 28 September and you said that – to him at that meeting – you would not be meeting when protected action was occurring. I put it to you that you did say it to him?---I'll repeat my previous statement: I have definitely said it to Mr Evans in meetings. Whether I said it on that day or not I cannot recall but I have definitely used those words to Mr Evans.

PN87

Yes, okay. And the fact of the matter is, Mr Evans, do you accept the proposition that you took that position and conveyed that to Mr Evans before the MUA had in fact notified DP World of any protective industrial action?---That is possible.

PN88

In fact that position that you've taken and you acknowledge that you've conveyed to Mr Evans, is one that you in your own witness statement at paragraph 34 describe as DP World's consistent position that it will not meet with the MUA on days where protected industrial action is occurring?---As the lead negotiator for DP World, I have – and I'll repeat – conveyed those words to Mr Evans in meetings. I have done it consistently in discussions or phone calls that I've held with Mr Evans, in the lead to the PABO being handled or being voted on. A number of MUA officials, including Mr Heath, was very clear that when protected action was able to be taken the MUA intended to absolutely whack us. It is conveyed in correspondence between the maritime union and their members. It is conveyed between the maritime union on public forums that they have. It was very clear that the maritime union intended to use protected industrial action at the earliest opportunity that they could, which is what we've seen is consistent after the expiry of the agreement. So - - -

PN89

Okay?--- - - - have I said those words to Mr Evans? Yes, I have.

PN90

And you accept that it's possible that you said those words even before the PABO was voted on, is that right?---I said the MUA's words were – have been conveyed throughout negotiations, including during the PABO.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN91

No, I'm not asking about the MUA's words. I'm asking you about your words. So if you could listen to the question, did you – a moment ago you indicated that you conveyed to the MUA that DP World would not meet with the MUA when

protected industrial action is taken and you indicated that you conveyed that to the MUA even before the PABO had been voted on?---No.

PN92

That's correct, isn't it?---No, that's not what I said.

PN93

Okay. I want to put to you that you said these words to – you just gave evidence to this effect: 'I've conveyed those words' – being a reference to, 'we won't meet on the days when protected industrial action is occurring', okay – so what you said in reference to that – I'll start again, Mr Hulme. When I say, 'those words', in my question, I mean, 'DP World will not meet when protected industrial action is occurring', and I want to say that you just gave evidence a moment ago that, 'I have conveyed those words to Mr Evans in meetings consistently in discussions and phone calls in the lead up to the PABO being voted on'?---No, well, then I will withdraw that comment that I made. That is inaccurate so I withdraw it.

PN94

So, Mr Hulme, in circumstances where you have at least acknowledged that you conveyed the position that I've described, not meeting with the MUA if protected industrial action is being taken, and that you acknowledged in your evidence that you conveyed this to Mr Evans before the protected industrial action had been notified. I'm going to put to you that the position that DP World is taking is simply an industrial tactic in the bargaining and that's the true purpose that DP World has taken the position that it has?---I don't agree with that assertion.

PN95

Do you agree with the proposition that DP World wants the enterprise agreement to be made with a minimum of disruption and financial loss to its operations from protected industrial actions?---Yes.

PN96

That's correct, isn't it?---Yes.

PN97

And do you also agree with the proposition that in any period when the MUA members are unable to take protected industrial action the employees have less bargaining power? Do you agree with that proposition?---No, I do not.

PN98

I put this to you, Mr Hulme, that DP World's refusal to meet with the MUA while protected industrial action is occurring is simply an industrial tactic that the company has taken to minimise disruption and financial loss to its operations?---No, I don't agree with that statement.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN99

Now, there have been a number of meetings – well, during the course of the bargaining there have been a number of meetings which have occurred to – in respect of the negotiations after the MUA notified protected industrial action, isn't that right?---Yes.

PN100

And an example was the facilitated negotiations with the Commission with the exception of 4 December but the other days when that facilitated negotiation occurred, on those days no protected industrial action occurred, isn't that right?---That's correct. It was notified and subsequently withdrawn.

PN101

Saturday 9 December was the last of those meetings which occurred pursuant to the section 240 notification, isn't that right?---That's correct.

PN102

And at the end of the meeting, in the Fair Work Commission, it's correct to say, isn't it that Mr Evans indicated to you that the union would suspend protected industrial action on the days that the company and the MUA met for both part A and part B meetings. That's correct, isn't it?---You're saying prospectively in future?

PN103

That's right?---Yes, that's correct.

PN104

Yes. And that would – it's correct to say the position as set out to you by the union has been subsequently conveyed in respect of respective part B meetings by various officials of the MUA to DP World. That's correct, isn't it?---I have seen some, not all, but that is my understanding, yes.

PN105

Yes. And if you look at Exhibit A3 and I will just get that page reference up for you, Mr Hulme, if you bear with me. It's at page 312 of the court book?---Yes, I have page 312.

PN106

Yes, and that's a reference to the next part B meeting, isn't it? In respect of the Fremantle Terminal? If you see the email from Mr Heath to Ms Sazfranski?---Yes, that's – this is the first time I have seen the email, but yes, I can see it.

PN107

Yes, and she's a DP World employee?---Yes, she is.

PN108

Yes. Human Resources manager in Fremantle?---That's correct.

PN109

And you agree that the email that Mr Heath sent her is an indication or conveys that the MUA National DP World Bargaining Committee have agreed to cancel PA for 24 hours for our next part B meeting', and then he refers to a suspension of that particular day. Isn't that right?---That's correct.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN110

Okay. And that's consistent with your understanding in respect of the other terminals as well, isn't it?---Yes, it is consistent.

PN111

And in respect of the position that you took then, in the email that I showed you earlier to Mr Evans, of the 4 October, that DP World would not meet with the MUA on days that protected industrial action is occurring. The current circumstance, it's correct to say, Mr Hulme, is that the days when meetings are scheduled, the union has indicated to you that protected industrial action will not occur?---That is what the union has communicated. That's correct.

PN112

Yes. And it's correct to say isn't it, then, Mr Hulme. That what you claim to be impediments or difficulties in meeting witness the MUA do not arise on those particular days when meetings are scheduled because the union has indicated to you that industrial action will not occur on those days?---The industrial action not occurring on those days doesn't detract from the company's requirement to manage our business which occurs on the date prior and the date post of meetings and that requirement to manage involves very senior members within the DP World management team. It involves the general managers who are responsible for their terminal operations. It involves labour superintendents. So on the day of the meeting as an example in Sydney, the labour superintendent would be attending a meeting whilst no (indistinct) industrial action is occurring, we're required to roster employees on the day of the meeting for the subsequent days. And in some instances, we provide two days' worth – two days' forward allocations. So a day of no protected action provides a benefit to our customers, to our employees to the general public of no industrial action occurring on those days. But there is still a significant inconvenience, to our terminal management teams and broader group that manager the scheduling of our vessels. So, no, it's definitely an inconvenience of a day despite industrial action not occurring, particularly when it's occurred on the days prior and will occur on the days post.

PN113

Mr Hulme, you have said in your witness statement at paragraph 34 that DP World's position has consistently been that it is unable to participate in bargaining while protected industrial action is occurring. Do you see that part of your witness statement at paragraph 34?---Yes.

PN114

Yes. You acknowledge that you said to Mr Evans in your email 4 October, I think you have accepted that you said it prior to that that the position of DP World is that it would not meet on days when protected industrial action was occurring?---Our position has been that we're unable to participate on those days.

PN115

Yes?---While we need to focus on managing the business.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN116

Yes. The union has told you that on scheduled days of meetings, that it will suspend the protected industrial action?---That's correct.

PN117

Yes. And that is presently the position of the union?---That's correct.

PN118

Yes. So in those circumstances you haven't previously met with the union on days when protected industrial action was not occurring, there's no reason why DP World cannot meet and negotiate effectively with the union having regard to the position that it's presently taking and has communicated to you. Do you agree with that proposition?---DP World's position has been consistently, but we're unable to participate in bargaining on days when there's PA. If there's no PA occurring, we have made ourselves available for those meetings.

PN119

Okay. And you will continue to do so?---I can't – we have made undertakings this week to meet with the Maritime Union in part B meetings. I have not taken the position going forward as to where we go with regard to negotiations, right, and what action is in front of us, what the business circumstances are. We have given an undertaking that – sorry – the Maritime Union have withdrawn industrial action for part B meetings this week and flagged one at least for next week, right, and we are participating in those meetings.

PN120

Okay, and so you would then agree with the proposition that in those circumstances that you have just described it is where the union is not taking protective industrial action on the days that the meetings occurred, that the days that the meeting is occurring, it is practicable then for you to meet and negotiate with the union, for DP World to meet and negotiate with the union?---Mr Farouque, I will repeat my statement from a moment ago or my answer to your question. There is no industrial action occurring as an example in Sydney tomorrow and we are meeting with the Maritime Union representatives tomorrow as part of bargaining.

PN121

And it's practicable for you to do so?---Tomorrow it is, yes.

PN122

Okay. Thank you. Now, protecting industrial action is notified, I think the union under the PABO is required to give five – under various PABOS – is required to give five days' notice of protected industrial action. That's correct, isn't it?---Five clear days. That's correct.

PN123

Yes. And in fact, I think it is correct to say that in practice, the union has in fact given more than five days. It's given something like six or seven days in most instances, if not all?---I'd have to check, but yes, it has frequently provided greater notice than five clear days.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN124

Okay. And you understand what the purpose of notice is, don't you under the regime of industrial action?---Yes, I do.

PN125

You'd agree it's really there to enable the employer to take whatever other defensive action and arrange other contingencies to ameliorate or mitigate the effects of the protected action?---Yes, I am familiar.

PN126

Excellent. You're an experienced industrial operator in that regard, aren't you?---That's probably for others to determine but yes, I have spent many years dealing with industrial relations.

PN127

Yes, and it's fair to say that DP World and you, as in your position as the Senior Director of Operations use that time diligently to prepare and plan for the mitigation that DP World needs to put in place?---Yes, we attempt to take steps to mitigate what the impact of advice industrial action.

PN128

Yes. And when some of those mitigations for example, is to arrange subcontracting, is that right?---Where it is provided for without limitation by the PABO, yes.

PN129

Yes. And what I'd suggest to you is that in circumstances where you have that advanced notice of the industrial action, DP World is well capable of putting into place operationally appropriate mitigations for that action?---In some instances, we are able to mitigate the industrial action that has been advised and in other instances, we are unable to. It depends on the circumstance, the type of action that's been advised and many number of issues or occurrences that are occurring that are within our control but many of which are outside of our control.

PN130

Yes. And part of the steps that you have – or part of the practical operational steps that you can plan ahead is for example, identifying who is available to attend relevant meetings with the MUA if the days when industrial action is occurring include a day when negotiations are scheduled to occur?---That's not quite right. We have rosters for our fix salaried employees, so yes, I would be aware of which employees who are fixed salary are rostered to days or shifts where meetings have been scheduled and we will adjust the employees or the time the employee would be available to participate in meetings based upon the advised industrial action. For our employees who are variable salaried employees, they don't have a fixed roster. They're allocated normally the day prior. In some instances two days prior, so I may or may not be aware of their availability for the six days or seven days prior.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN131

But these are – I am talking about people who are going to attend the meetings. The negotiation meetings?---Well, the individuals who are nominated to attend the meetings will be advised by the relevant branch official but we know who's in the bargaining team, that will depend on who's available to work – who's rostered to work. If there are – if they're on leave, there are circumstances - - -

PN132

I think we might be at cross-purposes, Mr Hulme. I will just rephrase the question. I am talking about the members of the DP World bargaining teams?---Oh, management representatives?

PN133

That's right. Management representatives?---As the general rule, yes, I would be aware in the days prior to a meeting, which management team representatives are available. Yes.

PN134

Yes. Okay. I want to put it to you, Mr Hulme, that in circumstances of that advanced notice when industrial action is occurring, your management team are well-prepared to be able to balance their response in the operational needs and meet and negotiate with the MUA and focus on the resolution of the bargaining (indistinct), do you agree with that?---No, I don't.

PN135

There are seven negotiators who meet for the – as part of a management team nationally for DP World. That's correct, isn't it?---(Indistinct) there are six.

PN136

Just - - -?---Myself, Katherine Winter, and the four general managers.

PN137

There's yourself, Tori Kakovski, that's right?---No, she's no longer employed by DP World.

PN138

All right. Okay. So - - -?---But yes, there was seven. There is now six in the bargaining. DP World bargaining.

PN139

But there were seven previously and now there are six, is that right?---That's correct.

PN140

Okay. So it's Mr Geoffries, Mr Handling, Mr Edie, Mr Croski and Ms Winter?---That's correct.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN141

Okay. That's quite a well-resourced negotiating team, isn't it?---There is a large amount of experience in a negotiating team. The four general managers are responsible for their respective business units, so it is highly appropriate that

they're present. There is often half the number of management representatives as there are employee representatives or union officials. So - - -

PN142

But just the question I asked you, that is a well-resourced management negotiating team. You agree with that, won't you?---Um, I am not sure that I have a bench mark as to what it is with other organisations or within DP World, there have been occasions where we have bargained with less management representatives, then occasions where we bargained with more. But - - -

PN143

Mr Hulme, you're an experienced industrial operator, aren't you? You have been negotiating agreements since 2000, isn't that right?---That's correct. Yes.

PN144

That's right. And DP World is a large multi-national corporation, isn't it? Or it's part of a large multi-national group?---Yes, it is.

PN145

It runs a very significant business operation with a turnover of what is it, in excess of \$800 million a year?---Yes.

PN146

And it's in an important sector of the economy?---It's a very important sector of the economy.

PN147

Yes? And are you giving evidence to the Commission that you kind of – you don't agree with the proposition that a company in those circumstances is not bringing a well-resourced negotiating team to bargain with the NUA?---I am responsible for leading the negotiations. I have input into who was in the bargaining team. I am more than satisfied with the individuals and the experience in our bargaining team.

PN148

Do you agree that it's a well-resourced team, Mr Hulme?---I will repeat the statement. I don't have a bench mark as to what is an unreasonable – resourced team. So I am more than comfortable with the team that we have to bargain for our enterprise agreement with the Maritime Union in this instance.

PN149

In the negotiations that you had on – in the Fair Work Commission from – and I want to take you just to the days between the – I think it's the 5th and the 9th of December, it's fair to say that on those days, you were able to consider claims and respond to claims made by the MUA. Isn't that right?---Yes.

PN150

Okay. And in fact, I think you say in your own witness statement, that there was a nailing of a number of issues on those particular days, isn't that right?---Yes.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE



PN151

And during those days, your – DP World was able to put forward its – some of its own claims and advance those claims in the negotiations? That's right, isn't it?---Yes.

PN152

Now, you accept, don't you, that the whole purpose of protected industrial action is to when taken by – when organising and engaging by employee bargaining reps and their members, the whole purpose is to create loss and disruption to an employer's operations for the purpose of advancing employee claims in the bargaining. Isn't that right?---Yes.

PN153

Do you accept that as a general proposition, don't you?---Yes.

PN154

And that necessarily ancillary to that is that it's – well, it's often the case, is it not that there's no certainty as to the duration when protected industrial action or how long it will be taken for because that uncertainty creates a further incentive for the employer to resolve claims with the employee – employee bargaining representatives?---It may. But yes. There's no – there's no certainty. I agree.

PN155

Yes. And it's correct to say that the fact that protected industrial action is being taken would not prohibit DP World from responding to MUA claims or making its own claims. You agree with that proposition, don't you?---Can you repeat the question for me?

PN156

The fact that protected industrial action is being taken does not prohibit DP World from responding to MUA claims or making its own claims in the bargaining?---That's correct.

PN157

And it's fair to say isn't it, that there have been previous instances that whilst protected industrial action has occurred in bargaining between the MUA and DP World, the parties have even, while that industrial action is being taken, negotiated and resolved industrial disputes, negotiated and resolved claims in enterprise agreements. That's correct, isn't it?---Yes.

PN158

And that is – I will withdraw that. I want to just take you to paragraphs 39 and 40 of your witness statement. Have you got those before you?---Yes, I do.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN159

Just take you to paragraph 39. Just want to, just for the purposes of your response, Mr Hulme, I just want to put to you, that's just simply – what you say there, this is just simply not correct. DP World has the capacity to agree or respond to proposals regardless of whether industrial action, protected industrial

action is being taken or not?---Well, I am comfortable with my commentary at paragraph 39.

PN160

In respect of what you said, paragraph 40, I want to put it to you that what you say there is simply not correct?---I disagree with you.

PN161

Do you accept Mr Hulme that the MUA is in the – is in a better position than DP World to assess the sentiment of its members in respect of the bargaining? Do you accept that proposition?---Can you repeat the question, please?

PN162

Do you agree that the MUA is in a better position than DP World to assess the sentiment of its members in connection with the bargaining?---Quite probably. Yes.

PN163

What you say then at paragraph 41 of your witness statement, do you accept the view that if the MUA considered that a suspension of protected industrial action would make it more difficult to have its members agree to an agreement, do you accept that they're in a better position to make – to accept that – to make that assessment?---Sorry, can you repeat the question?

PN164

Yes, I will repeat it again. Just bear with me? I will just put this to you. It's evidence that Mr Evans will give. Mr Evans says that he believes that a suspension of protected action will create a period when resolving the dispute with DP World will be harder because Members will be less likely to want to settle when they have the least bargaining power?---That's Mr Evans's opinion. I don't agree with him, but that's Mr Evans's opinion.

PN165

Yes. And you – but you did accept the proposition didn't you, that the MUA was in a better position to assess the sentiment of its members, than DP World, didn't you?---Yes, I did.

PN166

And having regard to that general assessment then, do you agree that Mr Evans's opinion that he expresses there, is more likely to be accurate than yours?---Is it likely to be more accurate? It may be more accurate. I don't – I couldn't answer that question. I don't know what extent Mr Evans goes to engaging with his membership on a daily basis, what feedback has been given, where that feedback is given in large meetings, smaller groups, individuals, so I – Mr Evans is a statement, he's entitled to his opinion.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN167

So I think you indicated earlier that well, I think in your witness statement, you'd been involved in – you said that you have been involved in bargaining since I

think, about 2001 of DP World and its predecessor companies?---Yes, that's correct.

PN168

Yes. You were involved in the last round of bargaining for enterprise agreements at DP World, weren't you?---Yes, I was.

PN169

And those agreements expired in about 2019, didn't they?---Yes, they did.

PN170

And that bargaining was quite protracted, wasn't it?---It ended up quite protracted, yes.

PN171

And in fact, I think the last of the agreements which is the Port of Melbourne one, was not finalised until about February 2021, isn't that right?---That is correct. We did have in principle agreement with the national negotiating team at the Maritime Union which was subsequently overruled by the National Office of the Union which resulted in the enterprise agreement taking many months and in some locations, I think closer to nine months to resolve. So in principle agreement had been resolved with the – the negotiating team and – I will use my words – they got rolled by their national office. So it could have concluded far earlier, Mr Farouque, than what it subsequently did on the basis of the union's internal processes.

PN172

MR FAROUQUE: Okay. Well, there were various times during the bargaining for that agreement that the MUA agreed to suspend industrial action for periods of time, isn't that right?---Yes, that's accurate.

PN173

Mr Evans will give evidence, Mr Hulme, that each time the MUA would suspend industrial action, it would have rounds of meetings with DP World during which there was little or no – there was little movement from DP World. That's true, isn't it? Do you agree with that proposition?---Yes, there would have been little movement from DP World, as we found the reverse situation with little movement from the Maritime Union.

PN174

And after those suspensions of protected industrial action which the MUA agreed to in respect of that bargaining, it found and Mr Evans will give evidence that it would have to return to protected industrial action, and that happened a number of times, didn't it?---They didn't have to return to industrial action. They made a choice to return to industrial action.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN175

Okay. Mr Evans will give evidence that the MUA has moved to initiate protective industrial action by way of the notices on the, effectively the first notices, I think it was the 28 September. Due to the previous experience of negotiating with DP

World which was that the company only moves when it's positioned – moves its position or settles when there's protected industrial action occurring?---I – I had dealt with Mr Evans in negotiations for many, many years. That statement has never been made previously to my recollection. It has never been in any statement from Mr Evans before the Commission. It is his opinion. I don't agree with it, we have negotiated many agreements over significant periods of time, where agreements have been reached in circumstances where protective action was not occurring. So I disagree.

PN176

Just in relation to the section 240 application, it's correct to say that during the course of that application – during the course of the meetings in respect of that application, in the course of the meetings which occurred and the bargaining which occurred, Mr Evans on a number of occasions indicated to you that the MUA – that if agreement was – if resolution was not agreed within six days, the union would return to protected industrial action and discontinue the section 240 application. Is that right?---Absolutely untrue.

PN177

Did he say words to the effect of – to this to you during the course of the discussions which were had, 'There were six days to land it'?---Yes, he said that.

PN178

Okay. What, I suggest to you then, that where you say in the witness statement that 240 – in paragraph 61, 'The 240 process was abruptly ended by the MU', is simply not correct. He told you from the commencement of an early point that on the MUA's perspective, they would engage in six days negotiations under the section 240?---No, that is not correct.

PN179

Do – just bear with me for a moment, Mr Hulme. You accept, don't you that the MUA considers that its ability to bargain is not impeded by the taking or the ability to take protective industrial action?---Yes, I accept that.

PN180

In relation to the part B negotiations, it's correct to say that the union has – the MUA has previously sought to have part B negotiations occur at an earlier time. That's correct, isn't it?---Part B negotiations have occurred.

PN181

But it's correct to say that part B – the MUA has sought for that to – part B negotiations to happen from the – from effectively the start of bargaining. It's that right?---Part B negotiations have occurred during the bargaining period since we commenced in April. There have been a number of part B meetings or local discussions.

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN182

And in fact, those part B meetings are going to continue next week, aren't they?---Yes, I have answered that question. Sorry, this week? They will continue?

PN183

This week, sorry?---I think there is one pencilled in for next week, yes.

PN184

Yes. Thank you. Mr Hulme, you have indicated that you're a – you agree with the proposition that you're an experienced industrial practitioner, aren't you?---Again, I have done this for a long period of time. That's – yes, I would think I am experienced. That's for others to determine though, I guess.

PN185

Do you agree with the proposition that any period, and the MUA – where MUA members are unable to take – to engage in protective industrial action, the MUA and the employees have less bargaining power. Do you agree with that proposition?---No, I don't agree with that proposition.

PN186

Do you agree with the proposition that the companies attempt to propose the condition that it will not meet with the MUA while protected industrial action is occurring is simply an industrial tactic by DP World to minimise its own commercial disruption and financial loss and to create circumstances where an enterprise agreement favourable to it can be made? Do you agree with that proposition?---I think I have answered that question previously.

PN187

That Commissioner, no more further questions for the witness.

PN188

THE DEPUTY PRESIDENT: Thank you.

PN189

MR WILLIAMS: Deputy President, I have no re-examination for this witness.

PN190

THE DEPUTY PRESIDENT: Thank you. Mr Hulme, you're excused from your oath and you can remain participating in the proceedings remotely or you can go on to your life elsewhere?---Thank you, Deputy President, I will hang this call up and I will join others in the other room.

PN191

Okay.

<THE WITNESS WITHDREW

[6.55 PM]

PN192

THE DEPUTY PRESIDENT: Thank you. Mr Farouque, did you want to say anything on opening, or you're happy to have Mr Evans join us?

\*\*\* MARK SHAWCROSS HULME

XXN MR FAROUQUE

PN193

MR FAROUQUE: Just the one short matter. Deputy President, we filed our submission and it sets out the substance of our case. Just the other matter that I wanted to raise in particular is – it's a, I think, a now worthy matter, that the union has indicated in the statement of Mr Evans, its position is that it wouldn't take protected industrial action, or suspend protected industrial action on the days when there is a schedule to occur. That's in respect of part A and part B. Mister – you just heard from Mr Hulme agreed with that proposition. Meetings are scheduled to occur in fact, this week and I think Mr Hulme indicated next week, we just want to draw that in addition to the matters that are set out in our submissions in a very material consideration, in the exercise of any discretion under section 425, as to whether there should be some extended 90 day order to suspend protected industrial action. Our proposition is simply unsustainable, in having regard to that evidence. And the suggestion that it's impractical – well, some are – some burdensome impediment on DP World meeting with – with the MUA, in those circumstances just simply seems to be utterly unsustainable and we just want to draw that matter to your attention in our opening, in addition to the matters raised in our written submissions. But other than that, I would – now, I'd just propose to call Mr Evans and have him sworn, Deputy President.

PN194

THE DEPUTY PRESIDENT: Okay. Thank you.

PN195

THE DEPUTY PRESIDENT: Mr Evans, you have just joined the proceedings and then we will ask you to give an affirmation and then Mr Williams will cross-examine you.

PN196

MR EVANS: Thanks, Deputy President.

PN197

THE ASSOCIATE: Please state your full name and address?

PN198

MR EVANS: Adrian Evans, (address supplied).

**<ADRIAN EVANS, AFFIRMED** [6.58 PM]

**CROSS-EXAMINATION BY MR WILLIAMS** [6.58 PM]

PN199

MR WILLIAMS: Mr Evans, do you have a copy of your statement with you?---I do, yes.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN200

Why did the MUA file a section 240 application?---Trying to get the company to meet with us. They'd refused to attend meetings for about a six week period, I think, at that stage. And so we applied for the section 240 to get them to the bargaining table.

PN201

Are you sure that's correct, that the company had refused to meet with you for a six week period?---Yes, the last meeting we had was the end of September and I think we applied for the 240 around 14 November. Around six weeks.

PN202

So the company's position, to be clear, was that – it wouldn't meet Mondays when there was protected industrial action, but it was perfectly happy to meet on days where there was not protected industrial action. Agreed?---Yes, that was their position, yes.

PN203

Yes. So it wasn't the case that the company was refusing to meet with you?---Well, it was. They refused to meet with us. They cancelled meetings. There was three days of cancelled – of meetings that they cancelled because we had protected action on.

PN204

On those days?---Correct.

PN205

Yes. So if we go to paragraph 33, that's pretty much what you say. You say, 'In light of DP World's ongoing refusal to meet with the union, while protective action was occurring, an application was made', so that seems to be right. But it is the case that the company was not blanket refusing to meet just because you'd started protective industrial action, they were just not meeting up on the days when it took place?---It had an ideological opposition to meeting while we were taking legally protected industrial action, yes.

PN206

Well, why do you call it ideological?---Because it's – it's not a matter for law, or it's a legal right for the employees to take. Other employers were able to meet with protective action. DP World simply choose not to.

PN207

Right. So if we go to paragraph 30, certainly, of your statement, when you're dealing with what happened in the facilitated meetings under the section 240 application, there was an agreement that protected action would remain for the first day and then you say this, you say however, following that day, the union suspended protected action at the end of each day as a concession towards DP World and to facilitate resolution. Do you see that?---Yes, I do, yes.

PN208

So you agree that the unions forbearance in relation to protective industrial action was likely to facilitate resolution?---No, I think we see it more of a, I guess, an acknowledgment of movement and we – we had said to the company in the first instance, when they refused to meet with us that if the first round of meetings went well with protected action on, we would reconsider our position around suspending our protected action going forward for the days of the meetings.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN209

Well, their your words, 'to facilitate resolution'. That was the purpose of your suspension of protective action during that process?---To enable the meetings to occur the following day and to see if we're able to get further movement on the next day.

PN210

In that paragraph, you refer to a recommendation. You say, no recommendation would be required to be made by Deputy President Binet. The recommendation that you're referring to was the possibility that the Deputy President might make a recommendation that the union suspend protective industrial action for the process of going forward. Would that be right?---That was the agreed process. If we were – if the parties didn't agree to meet the next day, the – it was open to the Deputy President to make a recommendation. It may have been DP World refused to meet the next day. It might have been a recommendation around that. It might have been we refused to meet, there might have been a recommendation. The fact is that it wasn't required because the parties agreed to meet again the next day and we agreed to suspend in good faith.

PN211

If the Deputy President had made a recommendation that the union suspend protective industrial action on the following day, that would not – that would have been – that would not have been an inappropriate recommendation for the Deputy President to make, would it?---I think it's a moot point. We were able to reach agreement at the end of each day.

PN212

But if the Deputy President had, you'd accept that that would be an appropriate recommendation for the Deputy President to make in the context of a section 240 application under her control, under her supervision?---I wouldn't accept that, because there was no circumstance which enlivened a potential for a recommendation.

PN213

Well, let's just go back to my question. If the Deputy President had made such a recommendation, you wouldn't suggest that that would be an inappropriate recommendation, would you?---I am not – I am not following your question.

PN214

Well, let's assume that you had said on one of those days that, 'We're not going to suspend protective industrial action' and the Deputy President had to consider whether or not she would make such a recommendation. She might have. She might not have. But if she had, you wouldn't have seen anything inappropriate in her action in making such a recommendation, would you?---I suspect that if a recommendation like that were made, the Deputy President, would have assumed there would have been movement that would justify that. And that one party was being unreasonable. Those circumstances didn't arise during those six days, so there was no need for recommendation.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS



PN215

In other words, the Deputy President might make such a recommendation if she'd thought that there was progress being made? Is that the point you're trying to make?---There was no need – again, there was no need. I think – I'd suspect that -  
- -

PN216

No, no, Mr Evans, I am aware that recommendation was made?---That's right.

PN217

You have given evidence about a protocol whereby there would be some consideration of agreed recommendation. You say it wasn't required. And that's because the union, to facilitate resolution, had agreed to suspend its protective industrial action, but you wouldn't see anything inappropriate with the Fair Work Commission recommending that protective industrial action be suspended for another day or week for that matter, if the Deputy President thought that that would facilitate a resolution?---I think I answered the question. I can't speculate what the Deputy President may or may not decide at the end of each day. I am not sure where you're taking me.

PN218

You haven't answered my question, Mr Evans?---Well, I can't.

PN219

The question was whether you would regard – if it had happened and you must have contemplated it, because it was a possibility, my question is that the union would not – or you would not have regarded that as inappropriate in the context of the section 240? Do you agree with that, or don't you and it's yes or no?---Well, again, I – I don't know what circumstances, whether I would consider it appropriate or not. It depends on the circumstances and there was no circumstances that enlivened that opportunity.

PN220

So in what circumstances would it be appropriate?---I can't speculate.

PN221

Would you agree that it would be appropriate if in the Deputy President's judgment there was some progress being made?---If in her opinion - - -

PN222

In her judgment?---Yes - - -

PN223

She made the recommendation on the basis that she was satisfied that progress was being made, would that be appropriate?---It depends if there was progress being made. It – it's a speculative - - -

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN224

No, Mr Evans – Mr Evans. I am asking you to presume that that was the basis of her recommendation?---That there was progress made? And there was a recommendation at the end?

PN225

That's right. The situation which you must have contemplated it's a possibility, because everybody else did including the Deputy President is that on a daily basis, if the Deputy President was satisfied that progress was being made, she might recommend a continuing moratorium on protective industrial action?---Of course there's - - -

PN226

If she had done that - - -?---I suspect - - -

PN227

Do you agree it would be appropriate?---Yes, I understand your question now. I suspect the Deputy President would have made the same decision that we did because we elected on our own volition to suspend the protective industrial action. Does that answer your - - -

PN228

And that's because you were making progress, weren't you?---On each day, yes.

PN229

Yes. Paragraph 38 you say you made it clear, over the course of that period, that:

PN230

*If we had not reached an resolution at the end of the six days the union would return to protected action and discontinue the section 240 application.*

PN231

So I just want to put to you, as a proposition, that if that was the union's position, you did not, say, make that clear to Mr Hulme, do you agree with that?---Perhaps earlier made it clear to him. Made it clear to him before that. I rang the COO, Brad Lynch, and made it clear to him and I said, 'There's an opportunity to -', in fact I even said it publicly, on the record, that there's six days to reach agreement and the company should come and reach agreement. They've had nine months to assess our claims, do their homework on it, mostly without protected action, and there was plenty of time to reach agreement in those six days.

PN232

You assert that you did - you made that clear to Mr Hulme?---Absolutely, yes.

PN233

When did you do that?---On Monday, on Tuesday, on Wednesday, on Thursday, and perhaps absolutely again on Friday. I said to - - -

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN234

Did you do so in open session, in front of the Deputy President?---I believe so. And, certainly, on the Friday I recall, in front of the Deputy President, when it

was just Mark and myself reviewing and I said we didn't want to waste the Saturday, the Deputy President's time on a Saturday, if we couldn't reach agreement, by coming back on Saturday, so I asked him to be up front about that and that if we couldn't reach agreement by the end of the day on Saturday that we should allow the Deputy President to have her weekend. Mr Hulme said he thought we could get some movement.

PN235

Are you certain that you advised Mr Hulme, or anyone else, that your intention was to discontinue the section 240 application?---Absolutely. That was the end of the process.

PN236

Why did you see it as necessary to do that?---That's the normal course of proceedings in the Commission. At the end of a process you file a notice of discontinuance.

PN237

You didn't consider the possibility that you might just leave it on foot and to ask the Deputy President to suspend the process for a week or two, or whatever you thought was required?---No, we didn't. That was - there was a - the agreement was for six days. The Deputy President offered her time for six days, up to and including the weekend and that was the period that was agreed and, from our perspective, that was the end of the process and we filed the notice of discontinuance at the end of it.

PN238

You'd agree that going into the section 240 process, across all of the terminals, there were many, many claims from both sides that needed discussion, would you agree with that, had not been resolved?---At the start of the process?

PN239

Yes?---Yes, I think we had, I think, around 52 claims, something like that.

PN240

So according to what criteria did you think that it was possible, likely to be possible for you to discuss and resolve all of the outstanding claims, Part A and Part B, in a six day period?---Well, Part A is what we're seeking to get a resolution on, not Part B.

PN241

Well, I'm sorry, that can't be right, can it? To get a deal at these terminals you're going to have to agree with Part B as well, aren't you?---Well, we said to Mr Hulme, to be clear, 'We can get an agreement on Part A and then if we get an agreement on Part A we can move quickly into Part B and have the whole thing wrapped up by Christmas'. And on that basis, if we had have got an agreement on the Saturday, for Part A, I told him we would have ongoing suspension of PIA, I made that clear to him.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN242

Are you suggesting that you had no ambition to resolve Part B issues, as well as Part A issues, in a six day period?---Yes, it was impossible because the full committees need to be involved back on site.

PN243

So therefore there was no possibility of reaching a resolution of all issues in a six day period was there, and you didn't intend to?---I'm not sure if you heard what I said before, but the resolution of Part A, I said to Mark Hulme that if we get an agreement, in principle, on Part A, by the end of Saturday, we would agree to suspend protected action, on an ongoing basis, to meet with Part B and have those resolved before Christmas.

PN244

You accept that there was some movement, indeed some resolution, on Part A issues during that period, don't you?---Yes. All the - quite a few of the low level drafting type issues were mostly agreement on what the status quo is and we're re-wording the agreement to reflect that.

PN245

So that was an intense period of negotiation for six days, with assistance from the Deputy President, in which there was no protected industrial action, and you agree that you have made some ground on Part A issues, which hadn't previously been able to be made?---We made the most ground on Monday, when the protected action was on, actually. Then it started, once we took the action off.

PN246

Well, can I suggest, Mr Evans, that that's just ostensible and the progress was made over the course of the six-day negotiation period?---Well, in terms of from our perspective, the bigger issues were resolved on the first day, when we had protected action on. That's what I'm - - -

PN247

So is the message that you're trying to get to the Deputy President that DP World's preparedness to agree to resolution of issues, within that six-day period depended on whether or not you were taking protected industrial action on a particular day, is that what you're saying?---I'm saying that the protected action focuses the company on getting resolution, that's their history.

PN248

Why did you take the hammer off then?---Why - because that's what we agreed to in the section 240 application, that was the process we agreed to.

PN249

No, you didn't, Mr Evans, you did not agree to that. What you agreed to do was reconsider the issue at the end of each negotiation day, that's what you agreed to do?---Yes, sure.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN250

At the end of each negotiating day you agreed to continue the suspension of protected industrial action to facilitate resolution, and that's your

evidence. (Audio malfunction) doesn't it?---Facilitate the opportunity to meet and we've carried that commitment actually, and we've changed our position. DP World maintains its position that they won't meet with protection action on and we've said that we're prepared to suspend, given that we've had some progress, we're prepared to suspend the action for days in which they are prepared to meet. We're prepared to meet today, tomorrow, the next day, DP World make themselves unavailable.

PN251

So why set the arbitrary timetable of six days, Mr Evans, and then discontinue? Not defer but discontinue your application after six days, why did you do that?---That was a process to get them back to the table. We're back to the table, we're meeting, we're discussing things. I've known Mark Hulme for nearly 20 years, I know how he operates. We're quite capable of continued negotiations without facilitation of the Fair Work Commission, although - it was helpful, under the 240, to get us back to the table. The issue - the main issue is that DP World again, on the Saturday, said they were unavailable to meet until 29 January. It's clear that - - -

PN252

I'm just struggling to understand your tactics. You seem to be agreed that there was a negotiation up to the point of the 240, which you and your members (indistinct) unsatisfactory, including because the company won't meet you in periods of protected industrial action. You file a 240, there's a little bit of argy-bargy about whether or not you'll continue that protected industrial action. The company turns up, you make process. On the basis of that progress you agree to continue to suspend industrial action. But at the end of the six-day period you just terminate the process and go back to protected industrial action. How could I understand, and how could the Deputy President understand that your objective was to resolve - to seek resolution of issues when, at the very point it seems like you might be making some progress, you pulled out?---Again, I'll say - - -

PN253

THE DEPUTY PRESIDENT: Sorry, Mr Williams, I probably shouldn't be giving evidence from the Bench, but my understanding was that the parties had committed to make themselves available for a specified period, to have facilitated bargaining and that they made a consensual arrangement that I could issue orders, or recommendations for them to continue with bargaining and withdraw industrial action for that period of time. It wasn't my understanding that - my understanding, in my discussion with the parties, was that the 240 had a specified period that it was going - that arrangement was only for those specified dates.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN254

MR WILLIAMS: Two comments about that. One is that both parties have accepted, of course, that this matter is before you without objection. So we would accept that you have the right to draw on your experience in the section 240 process, otherwise one party or the other would have objected, and neither has. But to the second point, I'm not suggesting to Mr Evans that he's breached an agreement, I'm just wondering what the strategy was, considering that he appeared

to be making some progress?---The strategy is to get the company to the table. The company attended for six days in a row, that's the longest length of bargaining that we've had and we've again said to them, 'We're available, I think we can still wrap this up before Christmas', but the company won't make themselves available and our members aren't prepared to just sit back while their pay increase waits and waits and waits for Mark Hulme to have his holiday.

PN255

Mr Evans, that's an inappropriate speech to be making as a witness, but let's move past that. My question to you is that you appear to be making progress, probably the best chance that anyone would have been able to identify so far, to get it done by Christmas, as it were, and you've pulled back and you've gone back to a tactic which, by the sound of it, hadn't been working. Why did you do that?---Because the company said they were unavailable to meet for seven weeks and we hadn't reached agreement. So our members determined to get an agreement as quickly as possible and the only tool that our members have is to take legally protected industrial action. I hope that gets the company back to the table.

PN256

Alternatively you can continue a productive negotiation, with the assistance of the Fair Work Commission, Mr Evans. You're not suggesting, are you, that the Deputy President wouldn't have, in accordance with the limitations of her schedule, continue to make herself available or if that wasn't possible another member could have been allocated. You're not suggesting that and surely you're not suggesting that the DP World negotiators had said that they weren't prepared to keep going?---Well, I'm really not sure where you're taking me with this one. I don't know how to answer your question.

PN257

How did you think that it was more likely you'd get agreement by Christmas, when you made a decision to pull out of a process which appeared to be working and go back to one which had not been working? I don't understand?---In my - in my experience, with DP World, having negotiated agreements with them for the last 24 years, in various capacities, when it was P&O we didn't need to take any protected action, they had a different management strategy, it was more collaborative. Under DP World the only time they move is when we take protected action. In the past we've suspended for periods and all that's done is drag on negotiations. They only respond when we take protected industrial action.

PN258

I've seen your evidence about that, Mr Evans, and we don't need to go back into past battles. But that has not been your experience this time. This time a section 240 application had been productive, where you and your members (indistinct)?---This time we've been negotiating for six months and got no movement at all, with no protected action. The only reason, I believe, that we got movement this week is because we had protected action leading into it and we had protected action following it. That's the only reason I believe they moved this week.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN259

Mr Evans, we might be looking at different - it's almost as if we're looking at different worlds. You haven't had movement to your satisfaction, before the 240. You did get some movement to your satisfaction once the 240 began. Apart from the first day there had been no industrial action during that process. How could you draw that conclusion?---I think you link it as a causal link to the 240, I link it as a causal link to us actually meeting. The company agreed to meet, we got movement, because of the protected industrial action. That's, I think, the difference between your thinking and mine.

PN260

Even if you might regard the company's position as ideological, your objective still must remain to resolve issues, mustn't it?---Yes, and the only way we can do that is to meet and the company needs to make itself available to do that. I'm in Sydney this week and also Melbourne, I've offered Mark Hulme to meet. My guys have empowered me to finalise negotiations, they don't need to be formal meetings. Mark could just arrange to meet with me and we could finalise it this week, if he was inclined.

PN261

You understand that the position of the company is likely to remain, that it won't meet while protected industrial action is taking place on those days, you understand that, don't you?---Yes, and we've offered to them, or we've put in writing to them. We're meeting tomorrow for Part B, with protection action suspended, in a couple of terminals, if not all four.

PN262

And you also understand that the company's position in this application is that, particularly having regard to what it also regards to be a positive experience in the Commission, it would like to extend that and, on both sides, provide a cooling off period because the company believes it's likely to facilitate resolution. Why would you not accept that position?---Because I don't believe - - -

PN263

(Audio malfunction)?---Because I don't believe a cooling off period would enhance negotiations, I think it would detract from them.

PN264

Even though you've just had a 240 process which turned out to be the most productive sequence in your negotiations so far? I mean if that's your evidence, Mr Evans, I can't change your mind I'm sure, but is that really your evidence?---Absolutely it's my evidence, yes.

PN265

Mr Evans, paragraph 51 you make this statement, 'Members of ownership of it -', and I think that's a reference to the negotiations, tell me if I'm wrong, 'When they have protected action', sorry, I assume that's a reference to protected action, members have ownership of it. Then you go on to say:

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN266

*The instinct would be that we wouldn't be able to trade off outcomes, it would just stall.*

PN267

But, of course, your members don't have to accept a proposal from the company that they're not happy with, do they?---So, again, my experience with my membership and my experience with employers is where there has been suspensions enacted that all that does is drag out the process and the members feel like any concessions we make in that period might not have occurred, had they had the ability to take protected industrial action.

PN268

That remains your judgment as to the best way through this, despite the apparent success of the six days of bargaining, under the 240, is that right?---I think the six days of success was the fact that the parties met for six straight days while there was protected action on either side of it. That's what I think the success was about.

PN269

That's your judgment?---Yes.

PN270

Fine. Why do you challenge the employer's judgment that a different methodology might work better? That is, a period where both parties can focus on negotiation, like in the 240, without industrial action threatened or occurring?---Because in my experience with this management team, they're the same management team I've negotiated with before, we voluntarily suspended protected action for a period of six or eight weeks at a time in order to meet, without any, you know, voluntary cooling off period, and nothing happens. There's no movement. It's only when there's protected action on and in a more condensed way, that the company finally moves. That's their history, that's the way they operate. A cooling off period will not assist bargaining with this management and their tactics.

PN271

Are you sure you're not drawing from past battles, Mr Evans, lessons from past battles which might not be equally applicable in this environment? Are you sure?---Absolutely. It's the same management team. Again, we met for six months with this company, with this management team. We said to them, 'I would really like to have an agreement done before the expiry', and they didn't move on anything, other than prescription glasses and one other matter.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN272

I'm just interested, in that conclusion, Mr Evans, and that doesn't seem to be what happened this time. This time what seemed to have happened is that you took protected industrial action from almost as soon as you could. It's been taken for several months, or two months at least. It didn't seem to resolve in good outcomes, but you didn't put the weapons down for a period, even though it was



only six days, and you got some facilitated assistance. You started to make progress. So wouldn't that be the best indicator of what might be possible?---No. Again, I believe that the protected action and then the ability to meet is what's caused the outcome. The reason that we took protected action so quickly is, in the past we've let it run for six months before we put ballots on, to give it some time to resolve. Then the agreements have taken 18 months or two years past the expiry to settle. In that time our members don't get a pay rise. The last pay rise they got was two and a half per cent last year and in the cost of living crisis we need a resolution as quickly as possible.

PN273

You don't give any credence to the possibility that the best way to achieve that might be to accept a period of, say, 90 days, to really focus, in a non threatening environment, on negotiation? You just don't believe that?---Absolutely not. I think that will absolutely hinder the process.

PN274

All right. Mr Evans, as they say, you're more than entitled to your view. Mr Evans, just one formal matter which I do need to put to you. Subparagraph (48)(e), you say, in relation to the notification of change, you say, 'They have said that they will withdraw that claim, but haven't withdrawn the notification of change'. In fact, what you've been told is that the company negotiators are prepared to let that matter be discussed within the Part B negotiation. That's actually what they told you, wasn't it?---No. The company said that they will not push for the five and three roster in Part B and they'll just discuss a particular issue with the current roster, in each of those Part B meetings. That in effect they'll be withdrawn, the five and three. They did say they reserve the right to put it back on but, again, I think that's their tactics in keeping the NOC as a some sort of point of leverage. We've tried to keep it very separate but. It shouldn't be a matter for bargaining but the fact is that that NOC is absolutely the exact same thing as their EBA claim. They're trying to force their claim through a notification to change process.

PN275

Mr Evans, I don't suggest that it's particularly relevant to these proceedings, but it's an important matter, so just in case it becomes relevant in other contexts, I suggest to you that DP World did not say they would withdraw the claim but, instead, said that they would be prepared to discuss the issue in the Part B negotiation?---No, they said they were going to withdraw the five and three.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN276

And I suggest that what they have said to you is that if the negotiators, on behalf of the union, were able to come up with a roster arrangement which was equally beneficial to the company, or better, they would be prepared to consider it but they had not agreed to withdraw the notification?---I hadn't actually discussed, at all, the notification of change, I've been very clear about keeping that separate. It's a separate - it'll be a matter of separate legal process, I suspect, as well, if the company get to implement it or attempt to implement it. But in terms of their claim, they absolutely said that they withdraw the five and three roster,

but they want some changes in each of the four terminals. There's also a maintenance roster, they've already withdrawn that in Brisbane and Fremantle and sought to amend it in Sydney and Melbourne. Our guys will talk through those things tomorrow. I hope that these proceedings don't change their position, but I guess we'll find out tomorrow in Part B.

PN277

Mr Evans, if, against your belief, again, I'm going to again ask you to accept a hypothetical, which I understand you don't accept but if, hypothetically, there was a period of suspension where your members were undertaking full duties, with no loss of pay and during that period all issues or perhaps even a number of issues were resolved to the satisfaction of both sides, that would be a good thing, wouldn't it?---Incredibly unlikely. The company maintains its position that they won't do a sign on bonus and that the agreement would only come into force - sorry the anniversary date would be delayed by its commencement of the new agreement. So, in effect, it'd just extend the pay freeze.

PN278

Yes, I understand you don't think it's likely, but I suppose it would depend on goodwill on both sides, but if it did and, hypothetically, by Christmas, Christmas is very close, you did have a situation where there was a wage outcome, a resolution of issues, and a period where your employees stopped losing remuneration through protected industrial action, maybe that's a pipe dream, Mr Evans, but if it happened it would be a good thing, wouldn't it?---Well, if only - we've agreed to suspend action on days we meet. I guess if we met every day up until Christmas your hypothetical could become reality and we could reach agreement. We're available to meet if the company is. But in my experience, your hypothetical just doesn't happen, especially with this management team.

PN279

And that's why you reserve the right, which certainly currently your members have, to take protected industrial action either side of a bargaining meeting, is that right?---Absolutely, yes.

PN280

What if that's genuinely inhibiting the employer's capacity to - - -?---It's not. This is a global behemoth. This company has many layers of management. They have operations managers that take care of operations on a day-to-day basis. The general manager is rarely seen, they're out doing other parts of the business. They're not required to keep the day-to-day running happening.

PN281

I understand, I'm not even challenging your views, Mr Evans, that would be silly, you have your views. But what if you were wrong? What if your judgment about that happened to be wrong?---Well, again, I'll put to you that I'm in Sydney now, I've offered Mark Hulme the opportunity to meet and resolve this. I'm available and my team's available each and every day, up to Christmas time, to resolve it. If the company were prepared to meet every day, we would suspend every day.

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN282

But you want to reserve (indistinct) and do it on your terms, which includes the ability to take industrial action on any other day, don't you?---Well, again, I think the employees' only tool that they have in bargaining in protected action. So, yes, we want to maintain that right to keep the company, this company that has as deep pockets as this, that has huge resources around industrial relations, that actually the only opportunity the members have is to take protected action and they need that to get the company focused to get an agreement.

PN283

I suggest to you, Mr Evans, that that has not been the experience and in this negotiations - - -?---That is the - - -

PN284

I'm not talking about past negotiations, I'm talking about this one, and if I suggest to you, it's just not been your experience. Your experience has been that the only time that things really started to move was when you engaged the assistance of the Commission and suspended industrial action for a number of days?---I'll say it again - - -

PN285

If you don't agree with me I can't persuade you, Mr Evans, but I'd suggest to you that that's what's happened?---Again, I'll say to you, my understanding of it, for six months we bargained with no protected action, with no threat of protected action and the company didn't move on any of its claims or any of the members' claims and it's only after we took protected action that we got movement. That's the reality. I know you see it a different way, I can't change your mind either.

PN286

No, no, you can't change mine, I won't change yours, but you accept the possibility that on this occasion your judgment might not be correct?---No, I don't.

PN287

You don't. Thanks, Mr Evans, I don't have any further questions for you.

PN288

THE DEPUTY PRESIDENT: Mr Farouque?

PN289

MR FAROUQUE: I have no re-examination, Deputy President.

PN290

THE DEPUTY PRESIDENT: Thank you.

<THE WITNESS WITHDREW

[7.34 PM]

PN291

THE DEPUTY PRESIDENT: Is there anything, gentlemen, that you'd like to say in closing?

\*\*\* ADRIAN EVANS

XXN MR WILLIAMS

PN292

MR WILLIAMS: I have a few submissions, Deputy President. I appreciate the hour.

PN293

THE DEPUTY PRESIDENT: It's later your hour than my hour.

PN294

MR WILLIAMS: I was going to make that point, that's correct.

PN295

THE DEPUTY PRESIDENT: I feel like counsel has more likely seen the home paddock than me, given the later hour over there.

PN296

MR WILLIAMS: I don't want to unnecessarily hold anyone up, Deputy President, but I do have a few closing submissions, if I may.

PN297

THE DEPUTY PRESIDENT: Sure.

PN298

MR WILLIAMS: Thank you, and I'll try and be as efficient as possible.

PN299

Deputy President, section 425 is one of a number of powers the Fair Work Commission has, in relation to bargaining and also in relation to a lot of other matters, where it's really given an almost discrete discretion to do what's appropriate. That's the wording, 'To do what's appropriate', as long as the Commission takes into account any mandatory preconditions and also takes into account, as section 425 demands, any other matters that can be considered relevant.

PN300

It's a discretion which is completely at large, as long as you consider the appropriate matters. That test is simply whether something is appropriate. It's not qualified, it's not fettered. It would, of course, require you to consider the way that the discretion has been exercised in other places but what is appropriate or the matters which lead to a conclusion that an order is appropriate or not appropriate. In a different matter in a different context it might be of very little assistance to you. You simply have to absorb the context of the particular matter and work out what's appropriate.

PN301

You do have to give consideration to the three particular matters and I've made written submission to those and, of course, it would be an error if an order was made without consideration of those matters or, for that matter, an order not made without consideration of them. But beyond that, you are permitted and, in fact, required to take into account any other matter which you think is relevant.

PN302

Now, we accept, as the applicant, that for us to persuade you that it's appropriate in the scheme of the legislation requires us to establish a persuasive rationale, which is the words that Coleman C used in Aurora(?), at paragraph 34. We need a persuasive rationale, we don't just come here and get an order of this kind, which does impact on rights, just from the asking. But we do have a persuasive rationale and I'll summarise it this way.

PN303

The first one is that my client is one of a very small number of terminal operators which maintain the gateway for the import and export of freight into and out of Australia. It makes it a little bit different, in that regard, to many negotiations where the parties most affected or only affected, in some cases, are the parties themselves. My client and, of course, its workforce is entrusted with critical infrastructure and the failure of that infrastructure to perform, for whatever reason, impacts on many, many people: direct customers, shipping lines, and, of course, it effects the nation.

PN304

The impacts of protected industrial action since October is significant and increasing. I am not suggesting that the damage would rise to the kind of threshold required for section 424 or section 426 application, that might be a matter for another day but not today. The evidence certainly wouldn't allow you to make a finding about that. But we're not asking for the order for protected industrial action to be terminated, we're asking for it to be suspended, not on the basis of harm but to provide, not just the parties but the community, with a cooling off period.

PN305

I don't want to make an emotional appeal to the spirit of Christmas, but the timing here is relevant. It's relevant to what's appropriate to do in these circumstances because the stakes are perhaps particularly high as far as the community is concerned. There is nowhere in section 425 does it say that you should set your face against matters which might make it appropriate to order a cooling off period by reference to the interests of those other than the parties directly affected. Of course the interest of the parties directly affected might be more immediate and might have to be given more weight, but that's the situation we're in.

PN306

The second is, this is the matter I put up with Mr Evans with the most emphasis. The actions of the MUA, as we put it, abruptly discontinuing the section 240 application at a time when resolution had not been achieved but some progress had been made and my client certainly saw value in the progress continuing. I accept that it was a step-by-step process. I accept that Mr Evans had made no commitment, on behalf of the union, beyond the six-day period. But having been involved in a number of these matters, as have you, sometimes section 240 applications need particular time to succeed.

PN307

We're not suggesting the MUA as not legally entitled to discontinue its application but it most certainly had other alternatives, one of which being to leave it on foot but to ask for a deferral while other negotiation took place. It was certainly

unusual conduct to discontinue and it must have been designed, we say, contrary to what Mr Evans says, not to move back to a format which was more likely to facilitate resolution but really to do the opposite, move back to a scenario where, at least in the short term, resolution was less likely.

PN308

Now, it may be that Mr Evans, or it's certainly the case that Mr Evans is entitled to his strategic decisions, he set the strategy as he sees fit, but if Mr Evans is wrong, has misjudged the situation and returned to a non facilitated method of negotiation where industrial action is free to be taken on any day, as we understand, when industrial action is not taking place. Well, that's exactly where we've been, we've just had two months of that.

PN309

If Mr Evans' strategy is wrong, then he would not be the first industrial strategist to have misjudged the situation. Now, I don't know - I guess only time could tell, on different scenarios, whether that's right or not, but industrial strategies which are entered into optimistically and genuinely, in retrospect sometimes have to be regarded as maybe not the best course of action. We think this is such a case and we think if one looks subjectively at the course of events and, particularly, the good that was done, with good will on both sides, while the section 240 application was in place and the parties had put their weapons down and we think it's very curious that Mr Evans would think it would be in the interest of resolution, which is what section 425 is about, to take it back into the wilderness again.

PN310

The third aspect of what we say about our persuasive rationale is that there is good reason to be optimistic that suspension for an appropriate period would be beneficial in assisting the parties to resolve matters at issue, which is obviously not the first and, perhaps, most significant criteria that you need to consider.

PN311

Obviously the MUA disagrees but, as we say in our written submissions, its subjective view is not determinative of that matter. It's a question of judgment by you, as an expert tribunal member and one, which in the peak of the circumstances, or someone in the particularly circumstances, is uniquely placed to form that judgment.

PN312

You would take into account Mr Evans' view. You'd take into account his judgment. But the judgement as to whether or not a suspension is likely to facilitate resolution of issues, which is the factor, that's up to you, that's for you to decide. You have one party that says it will. You've got one party who says it won't. But what we say is that there is evidence of a proposal which is akin to a cooling off period, not quite but akin to a cooling off period, which has established the value of that process.

PN313

As much as Mr Evans points to bargaining power and the loss of, as he puts it, industrial leverage, bargaining power is an interesting concept. There are many

completely satisfactory deals reached without any industrial action at all. One would not be suggesting, in those circumstances, that the parties did not have bargaining power, of course they did. They had the normal bargaining power that any negotiator has to be reasonable, to be persuasive, to get assistance from the Commission and to look for balanced and sensible ways through difficult issues. Industrial - the ability to take industrial action may be a form of bargaining power but it most certainly is not the only one, although the focus in the MUA's strategy appears to be singularly on that.

PN314

The other factors, and this is just simply a reality in terms of why we say it's the right time and the right course, is that because of the nature of the infrastructure and the criticality to the Australian economy, (indistinct) gives detail about this, I know it's before you, I know you're familiar with it, I won't go through it in detail, I don't need to. But we must be nearing a scenario where an external third party will feel compelled to take their own action. If they do, that may serve to take the matter of negotiation out of the hands of the parties entirely. That is inimical to the objects of the legislation, which focus on the reaching of negotiated outcomes between the parties.

PN315

It's not - when I say inimical, I suppose, in certain circumstances, that's not the case, but it certainly isn't consistent with the resolution of the issues in the hands of the parties. As the stakeholders involved in this difficult process, Deputy President, in our submission we should look to opportunities to avoid that and this is the best way to do it.

PN316

Then, finally, in terms of our rationale, there's a lot of force in the name of the slogan if you like, at the top of section 425, it's a cooling off period. We should take that word at face value as the right purpose and the purpose of this section. It's not intended to be an adjunct to an adversarial process where (audio malfunction) to give one party an advantage over the other, or to take away rights, in an unreasonable way, that parties have. It's a cooling off period. It's purpose is exactly that.

PN317

In this case the MUA's action in, as we say, abruptly discontinuing its section 240 process where it plainly had other options, we say better options, is a very powerful indicator that a cooling off period might be just what we need to have some space for reflection. Without being patronising to Mr Evans, I certainly don't meant to do that, but perhaps it's time for reflection on just how valuable those six days were. That may be in circumstances where not just the company is suffering, it's the employees, it's the community, it's the shipping lines, it's the economy. Maybe that's when a cooling off period really has real value to offer.

PN318

We say that's the persuasive rationale of the kind that Coleman DP referred to. They're the elements of it. We do have to take specific matters into account and I'll shortcut my submissions, because I've made reasonably significant written submissions on these points.

PN319

I do want to say something about the key objection, which is the idea that there'll be a relevant disadvantage to the MUA. That's an issue, that issue of relevant disadvantage, is not mentioned, specifically, in section 425. That is not to say that it's not a relevant matter for you to take into account and Aurora and also the Shell decision, Deputy President, which is your decision and drawing from the Full Bench decision makes it clear that it can be a relevant matter to take into account, but it is not a mandatory matter to be taken into account.

PN320

What, in our submission, would be more powerful would be to just reflect on whether or not, even if it does have that effect for a temporary period, for a defined period, that if that turns out to be likely or probable or even possibly, to meet the other objective, the primary objective, which is to assist the parties to reach resolution then that - the meaning of that objective should overwhelm a temporary removal of one party's protected industrial action rights.

PN321

Of course it's inevitable. Any application, under section 425, would do that. If there was no protected industrial action taking place, you wouldn't need section 425. So section 425 specifically contemplates that there will be appropriate circumstances where it is, in fact, appropriate to take away the right to take protected industrial action from whichever party is taking it. It could, of course, be the employer. It could be both. You could have a circumstance where there's a protected industrial action being taken with the response of a lockout and one party or the other could come to the Commission and, appropriately, ask for a cooling off period.

PN322

In this case, my client has not exercised its response action right to date. Mr Hulme has said, in his statement, and he doesn't say it as a form of threat, he says it as a form of operational necessity, that the time will come, rapidly, when the company will have to look at its own options, assuming, of course, third parties don't look at theirs.

PN323

So the scheme of section 425K is with the implication that it can be beneficial to parties if, through whatever means, they can be encouraged and facilitated to allow them to resolve the matters in issue between them and if there's some evidence, which we say there is, of the cessation, on a temporary basis, of industrial action to facilitate that, then that goes as a long way to, we would say, establishing that an order is appropriate.

PN324

There have been circumstances where the Commission has found it inappropriate, in circumstances where there's plainly been a conclusion that the filing of a section 425 application was opportunistic, maybe made for the purposes simply to defend oneself and not squarely for the purpose of facilitating resolution. But, Deputy President, that's not the case here. Despite Mr Evans' suspicion about some aspects of it, my client does want to reach agreement. It does want to reach agreement.



PN325

It was strongly encouraged by the efficacy of the process, under your leadership, in the section 240 application. It has a position which we say is entirely reasonable, that it should not be required to negotiate significant issues, with huge economic consequences for it, in circumstances where the union essentially has a gun at its head, in relation to protected industrial action, so that the union will decide, on a day-by-day basis whether or not sufficient progress has been made for further industrial action to be taken. It's not realistic to expect that on every - that continuously, every day from now until resolution is received, that my client, or the union for that matter, will participate in negotiation. That's just not realistic. But that's the only circumstance under which, by what Mr Evans is saying, that my client does not negotiate with industrial action taking place, continuing the damage. And as we say, (indistinct) the decisions on both sides.

PN326

As an expert tribunal member you would know that there are occasions when industrial action does solve a problem, a bargaining problem, an employer is jolted into action or even overwhelmed and then, one way or another, the matter gets solved. But there are other occasions, and this appears to be one of them, where the continuance of protected industrial action entrenches positions, does not resolve positions, makes it harder to get deals because employers have to take into account, this employer has to take into account the cumulative damage. Employees have to take into account, themselves, the loss of remuneration and eventually everyone starts chasing their own tail.

PN327

If you've accepted my submission that that's really the true character of what we're looking at here, then a cooling off period is likely to be the one thing which might actually achieve a resolution which we trust both parties are looking to achieve.

PN328

I've made submissions in relation to duration. I expect a submission to be made that the duration is not sufficient for you to be persuaded that that's a factor in favour. As Coleman DP said, in Aurora, at paragraph 32:

PN329

*The evaluation of that issue would have been on the nature.*

PN330

And we would say, the context of the action, including who is being hurt by it and how much they're being hurt.

PN331

In this situation, in the context of critical infrastructure, one might reasonably take the view that two months of duration and the backlogs and the difficulties and the damage that Mr Hulme talks about in his statement, means that the duration is sufficient for you to be satisfied that the duration weighs in favour of a conclusion that it is appropriate to suspend. But, alternatively, you might say that it's really just a neutral consideration.

PN332

But this protected industrial action for two months, across four terminals, large workforce, and an enormous impact and continuing impact on the economy and on many third parties. That's a duration which we say should be regarded as significant. No requirement in section 425 that it be taken for any particular period of time, it's for you to evaluate, consider the duration and then evaluate what that means, for your conclusion.

PN333

There has been a change of focus in the Fair Work Act, there now appears to be acceptance that the committee doesn't - shouldn't, in all circumstances, have to put up with a situation where parties who are bargaining and effecting others can just go about it for as long as they want, without any recourse, which was the regime we had prior to the latest amendments.

PN334

Now, there's the nine month period, after nine months of negotiation, if the situation is intractable the Fair Work Commission can take it out of the hands of the parties and resolve it. That probably reflects and acceptance that the community is just not prepared to accept, or doesn't want to accept, protracted, unresolvable negotiating processes which involve protected industrial action which spills out and hurts them as well, in circumstances where they don't control it and they have no real ability to protect themselves against it.

PN335

So if nine months is regarded as the soft timeframe, if you - the soft deadline, if you like, when another option becomes available, if bargaining is intractable. Two months is a significant proportion of that.

PN336

Mr Evans' submission, and I expect - all of his evidence, rather, and I expect it will be Mr Farouque's submission, based on his cross-examination, will be that we've really got all we deserve because the MUA has said that it will suspend industrial action on any day that my client agrees to bargain.

PN337

So what they seek to do, when one actually looks at that, is to place pressure associated directly with protected industrial action, on my client. Firstly, to meet, although my client, apart from his approach to usual industrial action, has no - he's certainly prepared to meet. But also that my client has no guarantee whatsoever on either side, before or after, and that at least by implication, if not by specific notification, if Mr Evans' union is not satisfied with the course of negotiation on a day when negotiation is scheduled, there'll be more industrial action.

PN338

For the reason Mr Hulme explains in his statement and in our grounds, that's just not satisfactory to my client. Not satisfactory in the sense that it cannot rationally and objectively negotiate in circumstances where if the MUA, at its discretion, is not happy with the way the negotiation has gone, they can continue to take industrial action. That's their right, of course, in the absence of an order, or, as it may come to, a different sort of order, that's clearly their right. But my client is not acting irrationally in the protection of its business in making the submission,

in accordance of that view, that that's just not productive and does not permit it to negotiate in the best possible way. That's not an irrational position either.

PN339

So you have a clash of different approaches, Deputy President. They won't be reconciled, in the sense that Mr Hulme is not going to accept Mr Evans' view of the world and vice versa, we don't expect that. But section 425 is a power given to the Commission, in a situation where bargaining is unsatisfactory and particularly, we say, where external damage is being done, and to provide the parties will a cooling off period and it is exactly what it says, a cooling off period on both sides, so both sides can reflect on what's actually the best way through this. We say that is squarely, in this particular circumstance, consistent with the public interest, certainly not inconsistent with it. And we have proposed a methodology by which the parties will change focus, which I think was going to be an outcome, as my client at least wished, of the 240, to change focus and spend some time away from Part A claims, which have been very difficult to resolve, and see of some good work and some good progress on the Part B matters might lead to a different light being cast on the negotiation generally. Who knows. What we say is it's time to try something new because what's been tried so far is not working.

PN340

So that's why we've asked, Deputy President, you to suspend the protected industrial action for 90 days. There are a lot of Part B matters and they are different at each terminal. It's going to take some time. And for the parties to do their best. If, at the end of it, Mr Evans' predictions prove to be true, well, I guess the parties are back where they were. But at least, Deputy President, the Commission would have done what it can to help the parties find a way through this. Except for that brief window, when it was in your hands, it has been a pretty unsatisfactory process on all sides. That's why we ask you to make the order.

PN341

They'd be my submissions.

PN342

THE DEPUTY PRESIDENT: Thank you, Mr Williams.

PN343

Mr Farouque?

PN344

MR FAROUQUE: Thank you, Deputy President.

PN345

Firstly, I just want to start with the opposition, as the purpose of section 425. I think my learned friend wants to say a discretion of the Commission is essentially at large as to whether or not to suspend protected industrial action, pursuant to section 425. That's simply incorrect and to take that approach would be one which is not consistent with the established principles, concerning section 425.

PN346

In that regard we just draw your attention to the paragraph of the Aurora decision of Coleman DP, which we've set out at section 17 - at paragraph 17 of our submissions, which is that the objects of part 2.4 which concerns the enterprise agreement, including providing simple, flexible and fair framework that enables collective bargaining in good faith and enabling the Commission to facilitate the making of enterprise agreements. Section 71:

PN347

*Having regard to these objects, I consider the Commission should not lightly reach a state of satisfaction that it was appropriate to suspend protected industrial action under section 425 and that a persuasive rationale must be established as to why it is appropriate to suspend the right to take protected industrial action.*

PN348

In the context of this particular provision, it puts the primacy of the focus of how any order of suspension would assist the bargaining representatives reach - whether the suspension is beneficial to the bargaining representatives to the agreement because it would assist in resolving the matters at issue.

PN349

Now, in my respectful submission, that factor simply is - the Commission cannot be satisfied that suspension would be beneficial to the bargaining representatives of the agreement because it would assist in resolving the matters at issue.

PN350

The case initially put by the respondent focused very much on - this is the presentation in the written materials that were filed and in the application put primacy of focus on the detrimental impact protected industrial action was having on the capacity of the company to meet and respond to resolutions and participate in the bargaining process. That proposition, we say, is fundamentally unsound. You heard the evidence of Mr Evans, an experienced union official who reflected on his experience of bargaining, that there are companies in the industry who bargain, engage in bargaining while protected industrial action is taking place.

PN351

I know the Commission can draw from your own experience of matters but, as a general proposition, the notion that a company is unable to meet and respond to proposals in bargaining whilst protected industrial action is taking place is simply fanciful and incorrect and is not borne out by the experiences conveyed by Mr Evans and, indeed, by the common conduct of matters in respect of bargaining.

PN352

But what makes the matter more astounding, in respect of this matter, is the articulated position of the union which it set out on the last day of the facilitated bargaining, 9 December, which Mr Hulme agrees was the position of the union, that on the days that meetings were scheduled to occur the union would suspend the protected industrial action. Consequent on that, there are already meetings

which are scheduled for this week and, indeed, I think Mr Hulme indicated that I think there's one meeting scheduled for next week.

PN353

So this general proposition being put by the company that there's somehow some inability to bargain in the present circumstances simply falls flat on its face because there's meetings scheduled and bargaining is going to occur.

PN354

Furthermore, Mr Hulme agreed that on the occasions when the facilitated bargaining occurred before the Commission, in a circumstance where, on a day-to-day basis, apart from the first day, the union did not agree to suspend protected industrial action, but bargaining occurred and the company was able to respond. So it seems remarkable that this application is being pursued, given the factual configuration which is occurring, in respect of prospective meetings and its coincidence with protected industrial action. The union's position has been unequivocal.

PN355

Mr Hulme agreed that that position had been conveyed. He understood that (indistinct) conveyed in a number of points, and accepted that Mr Heath had sent that very message, in respect of the Fremantle ports. So the proposition simply is just unsustainable that there's an impediment that bargaining can't occur.

PN356

It is even more remarkable when we consider the scale and nature of the applicant's operations. We're not talking about a corner shop or a small enterprise overwhelmed by a large and powerful union, we are talking about a multinational corporation with significant resources at its disposal, despite Mr Hulme's apparent reluctance to agree to the very trite proposition that his bargaining team is well resourced. That type of entity brings with it seven and then six people now to the bargaining table for the national bargaining were somehow unable to properly engage in bargaining in circumstances where protected industrial action was taking place. It's just a remarkable proposition, an extraordinary one, given the scale and nature of the applicant's operations and the resources that it has at its disposal.

PN357

Furthermore, the proposition that industrial action, the protected industrial action, was somehow causing this overwhelming detriment to the bargaining and hence causing inability on the part of DP World to focus on the bargaining and causing detriment is simply unsustainable, having regard to the sequence of events. I took Mr Hulme to that sequence very carefully in the cross-examination. If you recall, the first notification of protected industrial action was on 28 September. Mr Hulme, mistakenly, in his witness statement, had supposed that the industrial action had commenced on 1 October. Well, he conceded that that was wrong because the earliest that the industrial action had occurred, pursuant to those notices, was, I think, 7 October, and in some ports it was even later than that particular date.

PN358

Now, having regard to that sequence, I think it's very, very noteworthy, the evidence of Mr Evans, which is uncontradicted, which is that Mr Hulme said, on 28 September, before even the union had notified protected industrial action, because that notification occurred, as set out in Mr Evans' witness statement, that occurred at about 7.50 pm, Mr Hulme said to Mr Evans, in response to Mr Evans' inquiry as to scheduling of meetings in October, the uncontradicted evidence from Mr Evans is that Mr Hulme said, and I just want to get that witness statement in front of me, Deputy President, because I think it's telling. Bear with me, I think I've - sorry, yes, I've got it now.

PN359

The witness statement of Mr Evans very clearly set out, at paragraph 30:

PN360

*Mr Hulme indicated to me, on 28 September 2023, prior to notifying of protected industrial action, that DP World would not meet in October while protected action was occurring.*

PN361

Then there's another reference, I'm just trying to identify it, that's at paragraph - it's on page 6 of the witness statement, at paragraph 21 and it's (e):

PN362

*Towards the end of the day, on 28 September 2023, at about 3 pm AEST, a discussion that the next meeting was in October, with Mr Hulme. Mr Hulme said words to the effect that, 'We're not going to negotiate with a gun to our head and that DP World would not meet on days protected action was occurring because it didn't want to bargain in those circumstances'.*

PN363

Now, this is before the industrial action was actually notified, because the industrial action was notified at about 7.50 that day.

PN364

So this notion that there's some impediment in the bargaining simply cannot be sustained in circumstances where, before the industrial action is actually notified, Mr Hulme and DP World are taking the position, 'We're not going to negotiate with a gun to our head and DP World would not meet on days that protected action was occurring', before even the impact - before the industrial action had been notified, before the industrial action had actually occurred, they were of that position. All it represents, in my respectful submission, is a mere industrial tactic on the part of DP World to be in a circumstance where there is - to minimise the disruption to its operations from protected industrial action and, in essence, to advance its position in the bargaining by diminishing the bargaining power of the union. It has nothing to do, in reality when one looks at that sequence of events, why the detrimental impact of bargaining - detrimental impact of protected industrial action on the ability of DP World to bargain. It's their position. As Mr Evans described it, their ideological position that they won't bargain while protected industrial action is occurring. The sequence of events well draws that out, in terms of what has occurred here.

PN365

It is important then - and in that regard, the email of 4 October, where Mr Hulme kind of reaffirmed that position, that they wouldn't bargain on days that protected industrial action was occurring. He didn't contend any reference to, 'We find it really hard to negotiate in those circumstances because we can't practically do anything' because, of course, at that time no industrial action had actually started. It just shows the lack of bona fides of DP World in making this application, premised on this proposition that somehow industrial action was some impediment, in respect of its capacity to bargain.

PN366

I think that's a really, really powerful consideration here and we think it also important to reflect on that proposition, or that circumstance, having regard to the authorities concerning section 425. I want to just draw your attention to the Full Bench decision in *AMWU v Paper Australia*, where the Full Bench said, and we've summarised it at paragraph 22:

PN367

*It is difficult to envisage how the respondent's refusal to bargain during protected industrial action could conform with the objects of the Fair Work Act. The Fair Work Act allows for employer response action but this does not include the capacity to unilaterally withdraw from the bargaining process.*

PN368

Then the Full Bench continued:

PN369

*We accept the appellant's submission that suspending protected industrial action at the respondent's request, in order to encourage parties to resume bargaining when it was the respondent's own decision to stop bargaining in the first place because the applicant was engaging in protected industrial action would be to reward non compliance with the requirements of the Fair Work Act. It is contrary to the public interest and inconsistent with the objects of the Fair Work Act for the Commission to condone such conduct, even when the application before it is not for a bargaining order nor to deal with a bargaining dispute.*

PN370

This falls squarely within that proposition. It falls even more squarely within that proposition in circumstances where the sequence of events that I took you through indicates that this is really an industrial tactic by DP World which was devised, foreshadowed, before industrial action was even notified.

PN371

Mr Hulme almost kind of conceded that it was conveyed before the PABO voting had been completed. Certainly before the industrial action had been notified they took that position. So it cannot, in any view, be regarded as connected to the impact protected industrial action is having on bargaining. It just does not stack up on the facts.

PN372

The other material matters that we want to draw to your attention is the purported statement by Mr Hulme, at paragraph 34 of his witness statement, the evidence where he said, 'DP World's position has consistently been that it is unable to participate in bargaining while PIA is occurring', and his articulation of that position.

PN373

Now, that proposition simply is not borne out. Well, in one circumstance he accepts that bargaining occurred on 4 December when protected action was occurring. But DP World's position has, in fact, been, otherwise than 4 December 2023, that it will not meet on days when protected industrial action is occurring. That's been its position.

PN374

Now, the union, in these particular circumstances, has taken the position that on days when there are meetings occurred, it will suspend the protected industrial action. So, in fact, what DP World's position has been, no impediment, having regard to the actual facts, arises because the union has said that on days when meetings are scheduled to occur it will not engage in protected industrial action. So I'm baffled, quite frankly, as to why we're before the Commission, at this hour, having to deal with this application for a 90 day suspension, where DP World's position was, 'We won't meet on days when protected action is occurring' and the union said, 'Look, on days when meetings are scheduled, we won't engage in protected industrial action'. What is this proceeding about? It seems completely otiose and irrelevant to the scheme of the Act and, in fact, to the substance of DP World's purported complaint.

PN375

We also say that you need to place and, respectfully, significant weight on the matters that Mr Evans gave evidence of. He's an experienced industrial union official who has had experience of dealing with DP World and its predecessor P&O Products, as a delegate, as an elected union official, now as an assistance national secretary and his evidence is that experience in, for example, the most recent round of bargaining, was that pauses or suspensions of protected industrial action for periods detrimentally effected the bargaining position of the union.

PN376

In fact, detrimentally effected the bargaining because DP World dug in. That's the effect of his evidence and significant weight needs to be accorded to that actual experience that occurred - that he has set up. Also significant weight needs to be accorded to Mr Evans' assessment about the impact of suspension inherently on the bargaining position of the union. He has expressed the proposition that suspension would detrimentally affect the bargaining position of the union.

PN377

That is a trite proposition, quite frankly, which is well accepted in a number of authorities which are before the Commission, that suspension does diminish the bargaining position of a union in its capacity as a bargaining representative. That's a very powerful consideration in respect of - is set out in the authorities. That is borne out by Coleman DP's remarks, in Aurora, which I think is an authority which you relied upon yourself, in the Shell Prelude decision.



PN378

Furthermore, even to the extent that the protected - if you accepted the proposition against the weight of evidence, in my submission, that suspension would benefit DP World then, quite frankly, that does not satisfy or constitute any satisfaction that suspension would be beneficial to the MUA, because it would assist in resolving the matters at issue.

PN379

The MUA is in the best position, in my respectful submission, to assess the benefit or detriment of any bargaining by the operation of any suspension order and Mr Evans' evidence is clear on that account, that suspension would be detrimental to the bargaining position of the union and its members.

PN380

Furthermore, I think significant weight needs to be recorded to Mr Evans' assessment about the impact of a suspension order on the sentiment of MUA members. Mr Hulme accepted, I think, that Mr Evans was in a better position, and the MUA was in a better position, to make that assessment than he and Mr Evans' evidence is clear. The operation of a suspension would make it harder, in fact, to make viable concessions in the bargaining because it would be perceived by the members as concessions made in circumstances of, essentially, industrial weakness. That is, the union did not have even the right, during the period of suspension, to engage in protected industrial action.

PN381

So that evidence and the assessment of Mr Evans, based on his experience, is, in my respectful submission, a very powerful consideration which should bear upon your consideration of this matter.

PN382

Much was made by my learned friend of the section 240 application in his cross-examination of Mr Evans and in his submissions and, quite frankly, much of that material is of little actual or practical relevance. The section 240 notification, as Mr Evans indicated, seems somewhat to be consistent with your observations which you made, as to the nature of that proceeding, was that that was going to be of a limited duration. The union set down some markers, six days, and that at the conclusion of the six days it fulfilled what it had said - that Mr Evans had conveyed to Mr Hulme, and discontinued the application in those circumstances.

PN383

I think what my learned friend seeks to make of that proceeding, in aid of an application to suspend protected industrial action, simply is not at all of any assistance to DP World, it's not at all probative. We would submit that what happened in the section 240 dispute, in the circumstances in which it occurred, is neither here nor there, ultimately, in connection with the capacity of the parties to bargain under future - in circumstances where there be no suspension order in operation. It just is not, in my submission - is not relevant or material, at least.

PN384

The propositions that Mr Evans might be wrong as to any calculation that he made, in connection with the 240 application and its discontinuance,

irrelevant. Neither here nor there, in respect of the exercise of a discretion, by this tribunal, under section 425.

PN385

I want to say something about the duration of the protected industrial action. Now, the protected industrial action has only been occurring, I think the earliest that any of the actions occurred in 7 October. Now, that is not an inordinate period for protected industrial action to be taken. It has been punctuated, of course, by the period between the 5th and the 9th when no protected industrial action was taken. There'll be days, I think, apparent when no protected industrial action will be taken, prospectively, on days when bargaining is scheduled to occur.

PN386

So, in my submission, in those circumstances, and having regard to the date when protected industrial action was first taken, the duration of the protected industrial action is not inordinate or excessive. We made that point in the submission.

PN387

Furthermore, I would draw your attention to the observations of Kaufman SDP, in the *Patricks Stevedores v MUA* case, which is referred to in paragraph 14 of our submission, who made an observation which is referable to this circumstances, which is, Patricks had adopted a position that it would not negotiate while industrial action was occurring, and Kaufman SDP indicated:

PN388

*Insofar as the duration of protected industrial action is concerned, it seems to me, although it has now been occurring since April this year, that factor would have borne greater weight had Patricks been prepared to negotiate during this period.*

PN389

So, you know, we've had, as Mr Evans indicated, I think about six weeks when the company refused to meet while protected industrial action was being taken, so the duration factor, consistent with the decision of Kaufman SDP, is even further diminished in circumstances where the company took the position that it did. In any event, industrial action taken from 7 October until to date, noting the periods when it wasn't taken, is not an inordinate or excessive period of industrial action.

PN390

I just want to quickly return to the consideration in the Act, concerning whether the suspension will be contrary to the public interest or inconsistent with the object of this Act. I think there's, in essence, a misapprehension in the position put by the applicant as to that particular consideration.

PN391

The proposition simply seems to be that the protected industrial action would be contrary to the public interest and hence it should be suspended. That is simply not the relevant test. The test is whether the suspension would be contrary to the public interest, or inconsistent with the objects of the Act. Now, we say that the

suspension would be. We say it would be for the reasons set out in the *AWU v Paper Australia* decision, at paragraphs 22 and 23.

PN392

We say it would be inconsistent with the objects of the Act because it would essentially deprive the union from engaging in protected industrial action or organising protected industrial action in aid of its bargaining position, in circumstances where the Act contemplates that particular scheme. So we say that any suspension order, in these particular circumstances, would, in fact, be contrary to the public interest or inconsistent with the objects of the Act.

PN393

Now, just in relation to any other matters that the Commission considers appropriate. The whole notion of protected industrial action, in (indistinct) lost to the employer, detriment to the employer, it's in a circumstance where that will have consequential impacts on third parties, absolutely. That's a consequential impact of protected industrial action.

PN394

Those factors, in the exercise of a discretion, under section 425, should not be accorded - are not, in my submission, relevant or should not be accorded any significant weight here, in the scheme of the legislation and in the nature of protected industrial action, which the Act essentially permits.

PN395

To the extent that you consider that they are relevant, Mr Hulme's material is replete with the mitigatory measures that the company takes in connection with it, including subcontracting arrangements. Sure, there may be occasions in which that doesn't operate to perfection but they are taking significant mitigatory measures.

PN396

They're given at least seven days notice of any protected industrial action, at least five days notice and somewhere between six to seven days notice of protected industrial action and can make arrangements in connection with those matters to take the mitigatory steps to avert the negative impact on themselves or others. And, in fact, to make arrangements to enable their proper participation in meetings as and when they occur, because they have sufficient forewarning. So we say that they are not matters of any weight which should operate in the exercise of your discretion, under section 425 of the Act.

PN397

Now, my learned friend concluded his submissions by referring to various, quite frankly, speculative matters. Well, if this isn't done now a third party might apply to the Commission to seek some suspension or termination of protected industrial action and the issue will be outside of the parties hands. That's just speculation and there's no proper basis for you to take that into account in the what ifs and what might happens and something might happen if you don't do this. That's just completely irrelevant and would be impermissible speculation.

PN398

The foreshadowing of other things that the applicant might do, it might make an application under section 424, well, that's its right to make any application under section 424 if it wishes to do so. The Act gives it standing to do so and there's a test under the Act and they'll call their evidence and the MUA will meet that application and deal with that application. The fact that they might do that in the future is simply irrelevant. I cannot see the relevance of it, in my submission.

PN399

The fact that it might, is the highest it puts it, it might have to take employer response action, well, again, pure speculation and can't really bear upon the Commission's discretion, in connection with section - the exercise of discretion in section 425. Whether it exercises a right available to it under the Act, irrelevant in my submission.

PN400

In my submission, the application is devoid of merit, it should be dismissed and any - and it should simply be dismissed, it has no merit. Those are our submissions, Deputy President.

PN401

THE DEPUTY PRESIDENT: Thank you very much.

PN402

Thank you counsel and the witnesses and supporting personnel that have made themselves available late at night to allow the proceedings to occur. I will reserve my decision and issue written reasons as quickly as I'm able to. Thank you all.

PN403

MR WILLIAMS: Thanks, Deputy President.

PN404

MR FAROUQUE: Thank you.

**ADJOURNED INDEFINITELY**

**[8.35 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**MARK SHAWCROSS HULME, AFFIRMED..... PN42**

**EXAMINATION-IN-CHIEF BY MR WILLIAMS ..... PN42**

**CROSS-EXAMINATION BY MR FAROUQUE..... PN49**

**THE WITNESS WITHDREW ..... PN191**

**ADRIAN EVANS, AFFIRMED ..... PN198**

**CROSS-EXAMINATION BY MR WILLIAMS ..... PN198**

**THE WITNESS WITHDREW ..... PN290**