



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CLANCY

C2024/312

s.418 - Application for an order that industrial action by employees or employers stop etc.

**"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union"
known as the Australian Manufacturing Workers' Union (AMWU)
and
Orora Packaging Australia Pty Ltd T/A Orora Beverage Cans Australasia
(C2024/312)**

Melbourne

11.45 AM, FRIDAY, 19 JANUARY 2024

Continued from 18/01/2024

PN1

THE DEPUTY PRESIDENT: Thank you. Could I confirm appearances for transcript, please?

PN2

MR S FODROCY: Yes, Deputy President: Fodrocy, initial S, for the applicant.

PN3

THE DEPUTY PRESIDENT: Thank you, Mr Fodrocy.

PN4

MR C BANASIK: Yes, Mr Banasik, initial C: I seek leave to appear for the respondent.

PN5

THE DEPUTY PRESIDENT: Thank you. Mr Fodrocy, do you have anything you want to say in relation to section 596?

PN6

MR FODROCY: No objection.

PN7

THE DEPUTY PRESIDENT: Thank you. Well, having regard to the matters that are outlined in section 596 and in particular subsection (2)(a), I grant permission to Orora to be represented by Mr Banasik, noting that matters raised by the application are such that I'm persuaded that it would enable the matter to be dealt with more efficiently, taking into account the complexity. All right, now, are there any housekeeping matters that the parties want to raise before we get into the substance of the application?

PN8

MR FODROCY: I've handed up to your clerk – and I think that's been put in front of you – two cases which are referred to in my written submissions.

PN9

THE DEPUTY PRESIDENT: Yes.

PN10

MR FODROCY: The case of Esso and the case of (indistinct) – probably mispronounced that. That's just for the Commission's convenience.

PN11

THE DEPUTY PRESIDENT: Thank you, I've got copies on the bench here, thanks. All right, now, the parties have had some discussion. Anything from – sorry.

PN12

MR BANASIK: I also have a hard copy of the authorities, Deputy President.

PN13

THE DEPUTY PRESIDENT: Okay.

PN14

MR BANASIK: But I understand you just indicated you have them before you? If not I can hand one up.

PN15

THE DEPUTY PRESIDENT: Yes. Thank you. Thank you very much, all right. There's been some discussion about the witness evidence. so as I understand it, no requirement from Orora to cross-examine Mr Stockdale, is that correct? And the position regarding Mr Mullins?

PN16

MR BANASIK: The same.

PN17

THE DEPUTY PRESIDENT: Same, thank you, all right – then for your part, Mr Fodrocy, you do require the opportunity to cross-examine. Is that correct?

PN18

MR FODROCY: Correct, and, Deputy President, I may also seek to examine Mr Mullins just on one point of his witness statement.

PN19

THE DEPUTY PRESIDENT: All right.

PN20

MR FODROCY: And obviously, no objection to the respondents crossing if necessary.

PN21

THE DEPUTY PRESIDENT: All right. So you require – Mr Buntman's here in the court room but Mr Cartledge we have online if needs be. Yes, all right. Okay, well, in the usual course, it being your application, Mr Fodrocy, we'd start with your evidentiary case so given what you've indicated in relation to Mr Mullins, do you propose starting with his - - -

PN22

MR FODROCY: Yes, Deputy President.

PN23

THE DEPUTY PRESIDENT: Thank you.

PN24

MR L MULLINS: Lachlan Mullins, employee of the AMWU: our address is 251 Queensberry Street, Carlton.

<LACHLAN MULLINS, AFFIRMED

[11.50 AM]

EXAMINATION-IN-CHIEF BY MR FODROCY

[11.50 AM]

*** LACHLAN MULLINS

XN MR FODROCY

PN25

THE DEPUTY PRESIDENT: Thank you. Yes, Mr Fodrocy.

PN26

MR FODROCY: I'll provide Mr Mullins with a copy of the digital court book.

PN27

THE DEPUTY PRESIDENT: Yes – any objection, Mr Banasik?

PN28

MR FODROCY: Unfortunately, Deputy President, that was my only printed copy so I don't necessarily have the page number references for your benefit.

PN29

MR BANASIK: I've just had some instructions – we don't have a copy of the court book so my learned friend will need to identify the documents rather than page numbers.

PN30

THE DEPUTY PRESIDENT: Okay. So it was emailed this morning by chambers so I just might check that.

PN31

MR BANASIK: It's located. That was our error.

PN32

THE DEPUTY PRESIDENT: All right. So, Mr Mullins, just as you get underway, that microphone there doesn't necessarily project your voice to the court room but it still is important because it's links us to the transcription service?---Sure, would you prefer me to stand?

PN33

No, no, stay seated but just speak clearly and directly towards that?---Yes, Deputy President.

PN34

Thank you. Thanks, Mr Fodrocy.

PN35

MR FODROCY: Mr Mullins, can I confirm for the record your full name, address and occupation?---Yes, my full name is Lachlan Alexander Mullins. My occupation is organiser with the AMWU, the Australian Manufacturing Workers Union. Our address is 251 Queensberry Street, Carlton.

PN36

Thank you. And before you have the digital court book. I believe you have an indexed page in front of you?---Yes.

PN37

Can you turn to the – your witness statement or what is described as your witness statement?---Yes, identified at page 13. I have that in front of me.

*** LACHLAN MULLINS

XN MR FODROCY

PN38

Can you take a moment and once you have been able to review it can you confirm whether that is your statement?---Yes. Yes, I can confirm that's my statement consisting of three pages from 13, 14 and 15.

PN39

And directly over the page of your statement there should be a series of documents marked consecutively LM1 to LM14?---LM1, LM1A, LM2, LM3 and LM4.

PN40

On my (indistinct)?---Yes.

PN41

On my bundle the attachments are all page numbered in red at the bottom middle of those attachments and that page number goes up to 54?---Yes, that's correct, taking us up to the end of LM14.

PN42

LM14 being a notice of employee response action?---Correct.

PN43

Thank you. Can you confirm, are there any changes that you wish to make to the statement I took you to earlier before?---No, there aren't.

PN44

And can you confirm for the record that your statement with attachments is true and correct?---Yes, it is true and correct.

PN45

Deputy President, I seek to tender the statement with attachments.

PN46

THE DEPUTY PRESIDENT: Thank you. Mr Banasik, subject to any cross-examination you wish to do, any objections to the tendering of this statement?

PN47

MR BANASIK: No.

PN48

THE DEPUTY PRESIDENT: Thank you. I will mark the witness statement of Lachlan Mullins which is dated 17 January 2024, comprising 37 paragraphs and 14 attachments as exhibit A1, thank you.

**EXHIBIT #A1 WITNESS STATEMENT WITH ATTACHMENTS OF
LACHLAN MULLINS DATED 17/01/2024**

PN49

MR FODROCY: Thank you. Mr Mullins, taking you back to the first page of your statement - - -?---Yes.

*** LACHLAN MULLINS

XN MR FODROCY

PN50

- - - paragraph 5, do you have that before you?---Yes, I do.

PN51

Can you read out the paragraph?---Yes, I can:

PN52

Between 16 June and 28 August 2023 I attended around four bargaining meetings with Orora and several other employee bargaining representatives who I understand to be appointed themselves as bargaining representatives (the individual employee representatives).

PN53

Thank you. May I ask, were there, other than those individuals and yourself, any other persons attending those bargaining meetings?---Yes, there was: from Orora's side, there was Richard Cartledge, Daniel Chi, but I can't confirm at what point he was attending those meetings, and Lee Buntman. On occasion past those dates Claire Roche also attended.

PN54

Thank you. Just to confirm, in paragraph 5 you refer to several other employees bargaining representatives?---Yes.

PN55

I'm not sure off the top of your head, would you be able to name those other employee bargaining representatives?---Yes, I know them by first names so if that's permitted I'll provide those. That would be Jake, last name I believe Clarke; Joel Stockdale, Andrew (indistinct) - - -

PN56

Rather than – if you refer back to the index on the first page of the court book - - - ?---Yes.

PN57

- - - and find the witness statement of Lee Buntman dated 18 January?---On page 111?

PN58

Thank you. Let me know when you have that in front of you?---Yes, I have that in front of me.

PN59

If you could turn to the second page, paragraph 16?---Yes. I can confirm that the names in that list are the – what I took to be the individual employee bargaining representatives. William Goudappel, Joel Stockdale, Andrew Trentfield, Jake Clarke, Cameron Gatons, Anne Vagessi and Adam Davado.

PN60

Earlier in answer to my question you advised that Mr Cartledge and Mr Buntman were also in attendance (Indistinct)?---Yes, that's correct.

*** LACHLAN MULLINS

XN MR FODROCY

PN61

May I ask you: during that meeting – these were bargaining meetings, is that correct?---That's correct.

PN62

That's who you would characterise them and in those meetings, on behalf of the employees that you represented you pursued the claims (indistinct)?---That's correct, yes.

PN63

Apologies for the phrasing of the question. Who spoke on behalf of the employer during those bargaining meetings?---That would be Lee Buntman, from AIG – Australian Industries Group.

PN64

And did Mr Buntman always talk on behalf of the employer?---I wouldn't say that you could clarify it as always but if I was to determine how often, I would suggest that it was 95 per cent of the time by Lee Buntman spoke on behalf of Orora. The process during bargaining meetings would be that Mr Richard Cartledge would bring in a laptop, he would sit immediately behind the laptop, open Teams for Mr Lee Buntman to appear via video link and the vast majority of negotiations were conducted directly with Mr Lee Buntman on behalf of Orora Beveraging.

PN65

So you say the vast majority and I think you said earlier 95 per cent?---Correct.

PN66

If not Mr Buntman, who spoke on behalf of the company in bargaining meetings?---Nobody else did speak on behalf of Orora other than Lee Buntman. However I am suggesting that I have put questions to Mr Richard Cartledge and he has referred them back to Mr Lee Buntman and on the occasions that he has answered, he hasn't provided an answer to progress the negotiations other than to say that he will have to get advice or words to that effect.

PN67

Would it be correct to say, based on your evidence that you've just given, would it be correct to suggest that Mr Buntman – apologies, I'll start again. Would it be correct, based on your evidence that you just gave, that Mr Cartledge did not, during these bargaining meetings that you attended make representations, substantive representations on the bargaining whether in response to - - -

PN68

THE DEPUTY PRESIDENT: Fairly leading question.

*** LACHLAN MULLINS

XN MR FODROCY

PN69

MR FODROCY: I'll rephrase, Deputy President. Apologies. I'll move on. Turning to a slightly different line of questioning, Mr Mullins, what is your understanding of Mr Cartledge's position?---I think I could characterise that as facilitating the opening of a laptop to provide Lee Buntman access to attend bargaining meetings on behalf of Orora.

PN70

Thank you. Are you aware of his formal employment position?---In regards to Richard Cartledge?

PN71

Yes, Mr Cartledge's title, for example?---Off the top of my head I believe that would be operations manager.

PN72

Do you know from your experience whether dealing with the company or otherwise, what that entails as an operations manager?---No, I do not.

PN73

Thank you, and one final line of questioning, Mr Mullins: in your role as an organiser for the AMWU, is it common practice or otherwise for you to send emails to other individuals?---Yes.

PN74

And when you do so, have you ever had cause to use delivery receipt or read receipt function?

PN75

THE DEPUTY PRESIDENT: Sorry, I didn't hear the last part of your question. Is it common to use emails - - -

PN76

MR FODROCY: Send it to individuals.

PN77

THE DEPUTY PRESIDENT: To individuals, thank you.

PN78

MR FODROCY: Unnecessary verbiage, Deputy President. I'll restate the question, Mr Mullins: when you send those emails have you ever used what is commonly known as a delivery or read receipt function?---Yes, I have.

PN79

To the extent that they might be different, have you used both or one of the two, delivery or read receipt?---Depending on the correspondence, I would use one or the other or both, yes.

PN80

Yes, all right. I'll take you to Mr Buntman's witness statement again, Mr Mullins?---I have that in front of me.

PN81

Thank you. Attached to that statement, starting at annexure LB5 - - -?---One moment – yes, I have that in front of me.

*** LACHLAN MULLINS

XN MR FODROCY

PN82

Starting with that page, page 12 of the statement – I'm not sure in terms of the court book – and ending - - -?---I beg your pardon, sorry, I don't – that's LB15. I can't see because the page numbers are printed over the top. One moment.

PN83

MR BANASIK: Page 122 of the court book?---Thank you, Deputy President – yes, I have that in front of me.

PN84

MR FODROCY: And confirming that that is a document headed, 'Lee Buntman', with an email stated to be from postmaster@outlook.com?---Yes, that's correct.

PN85

And then there's a bundle of these attachments, which are essentially a similar category?---Yes.

PN86

The last one being LB10, which is 11 pages – so 133 of the court book?---Yes, I have that.

PN87

Is that an email that's headed, 'Lee Buntman', and it appears from William Goudappel?---Yes, that's correct.

PN88

Thank you. From your recollection, do these – earlier your evidence was you had used a delivery or read receipt?---Yes, that's correct.

PN89

When you did so, did you receive emails either like this or otherwise?---Yes, on occasion.

PN90

MR BANASIK: I question the relevance of this line of inquiry. It seems to be either just based on the witness's own experience with completely different emails in completely different circumstances from what might be a completely different email system and therefore of really minimal relevance and compared to the time taken or alternatively if this is heading towards questions around these particular documents which are exhibited to the affidavit, would seem to be heading in the direction of an interpretation which the witness is really not qualified to comment on.

PN91

THE DEPUTY PRESIDENT: Well, I'm not sure where the line of questioning is going but I query it, given that the respondent in its submissions accepts that the first notice of the (indistinct) conference wasn't received by Mr Stockdale, Mr Clarke and Mr Gatons. I'm wondering where we're going with this, I suppose.

*** LACHLAN MULLINS

XN MR FODROCY

PN92

MR FODROCY: Deputy President, in answer to your question and the potential relevance, in brief one of the issues that is before you as under our application is whether the rules have been complied with.

PN93

THE DEPUTY PRESIDENT: Yes.

PN94

MR FODROCY: And part of the rules go to whether the respondent, the employee who sent the email is capable of producing to the company what is described as the delivery statement or a read receipt.

PN95

THE DEPUTY PRESIDENT: Isn't this ultimately going to get to the point where Mr Mullins might have a view on what a delivery statement is and he might be – I don't know what the rules contemplate as being a delivery statement. But - - -

PN96

MR FODROCY: Deputy President, I don't seek to suggest that Mr Mullins has any expertise on the point but whether he has direct experience of such and to put these documents to Mr Buntman, and potentially Mr Cartledge. I'm in your hands, Deputy President.

PN97

THE DEPUTY PRESIDENT: Let's continue this traversing of - - -

PN98

MR FODROCY: Hopefully a very quick final question for Mr Mullins. In your experience with delivery or read receipts - - -?---Yes.

PN99

- - - and if you can't remember or can't answer the question, tell me, or the Commission: are you aware of any reason there might be a difference between LB5 and LB6?

PN100

MR BANASIK: Your Honour, this seems to be calling for - - -

PN101

THE DEPUTY PRESIDENT: I don't know really where that's going to get us, Mr Fodrocy.

PN102

MR FODROCY: (Indistinct).

PN103

THE DEPUTY PRESIDENT: How would he know?

PN104

MR FODROCY: It's a simple question.

*** LACHLAN MULLINS

XN MR FODROCY

PN105

THE DEPUTY PRESIDENT: Well, he's looking at an email that someone else has sent that's generated something. What do you want him to say?

PN106

MR FODROCY: In his experience using these functions, perhaps he's aware whether there's reason?---Would you like me to answer the question?

PN107

THE DEPUTY PRESIDENT: Go ahead?---So in my experience there is a difference, in that in the first instance, the LB5, when I have had similar returned emails from Postmaster, I would confirm nothing other than an email left in my outbox and in relation to LB6, I would be concerned that that had the potential of being less likely to have arrived at the other end. That's as far as I can provide - -
-

PN108

Thank you.

PN109

MR BANASIK: I object to that answer.

PN110

THE DEPUTY PRESIDENT: Well, I know, (indistinct) the answer. I mean, I don't find it very useful.

PN111

MR FODROCY: I (indistinct) further, Deputy President. I have no other questions.

PN112

THE DEPUTY PRESIDENT: Any questions arising for cross-examination?

CROSS-EXAMINATION BY MR BANASIK

[12.13 PM]

PN113

MR BANASIK: Mr Mullins, you've never cited an instrument of (indistinct) in relation to (indistinct) bargaining representative, have you?---No, I haven't.

PN114

You've never asked to see whether such an instrument exists?---No, I haven't.

PN115

Mr Cartledge was in attendance at all of the bargaining meetings as well, was he?---Yes, as far as I can recall.

PN116

And you're not privy to what conversations Mr Cartledge had with Mr Buntman outside of those meetings, are you?---No, I would not be.

*** LACHLAN MULLINS

XXN MR BANASIK

PN117

That's the cross-examination.

PN118

THE DEPUTY PRESIDENT: Thank you. Thank you, Mr Mullins, for your evidence?---Thank you.

PN119

You may step down. You might take the court book back, thank you.

<THE WITNESS WITHDREW

[12.13 PM]

PN120

Now, if we can deal with Mr Stockdale's statutory declaration – Mr Fodrocy, what would you like to do with that?

PN121

MR FODROCY: Deputy President, subject to any objection from the respondent and whether you're comfortable to take it as an exhibit, it's a statutory declaration, it's been signed on its face. I don't understand there to be much controversy in the contents.

PN122

THE DEPUTY PRESIDENT: All right. Mr Banasik?

PN123

MR BANASIK: I've got no objection.

PN124

THE DEPUTY PRESIDENT: All right, well, I'll mark the statutory declaration of Joel Stockdale, which is at page 73 of the court book, and it was declared on 17 January 2024, comprises 12 paragraphs – I'll mark that exhibit A2.

EXHIBIT #A2 STATUTORY DECLARATION OF JOEL STOCKDALE DATED 17/01/2024

PN125

All right, and is that the extent of your evidentiary case, Mr Fodrocy?

PN126

MR FODROCY: Yes, Deputy President.

PN127

THE DEPUTY PRESIDENT: All right. Mr Banasik, there's no – well, I'll just refer to the statutory declaration of Mr Fodrocy of yesterday's date. Does that arise for further consideration in the matter?

PN128

MR BANASIK: There's no issue going to (indistinct).

*** LACHLAN MULLINS

XXN MR BANASIK

PN129

THE DEPUTY PRESIDENT: Okay, thank you. Well, we'll move to the evidentiary case then of Orora and, Mr Banasik, how do you want to proceed there?

PN130

MR BANASIK: The respondent calls Lee Buntman.

PN131

THE DEPUTY PRESIDENT: Thank you, Mr Buntman.

PN132

THE ASSOCIATE: (Audio malfunction).

PN133

MR BUNTMAN: Lee Sam Buntman, lawyer, Level 5, 441 St Kilda Road, Melbourne, Victoria 3004.

<LEE SAM BUNTMAN, AFFIRMED [12.16 PM]

EXAMINATION-IN-CHIEF BY MR BANASIK [12.16 PM]

PN134

THE DEPUTY PRESIDENT: Thanks, Mr Buntman. If you just get yourself comfortable with the microphone as well too, please. Yes, Mr Banasik.

PN135

MR BANASIK: Mr Buntman, do you have before you a copy of your statement of yesterday's date, together with the exhibits?---I do.

PN136

And have you reviewed that statement recently?---I have.

PN137

Is there anything in that statement you wish to change?---I don't.

PN138

Is the contents of the statement true and correct?---They are.

PN139

I tender the statement.

PN140

THE DEPUTY PRESIDENT: Thank you. Mr Fodrocy, subject to cross-examination any objections to the tendering?

PN141

MR FODROCY: No objections.

*** LEE SAM BUNTMAN

XN MR BANASIK

PN142

THE DEPUTY PRESIDENT: Thank you.

**EXHIBIT #R1 WITNESS STATEMENT OF LEE BUNTMAN,
WHICH APPEARS AT PAGE 111 OF THE COURT BOOK, DATED
18/01/24, HAS 35 PARAGRAPHS AND 20 ANNEXURES**

PN143

Are there any additional matters?

PN144

MR BANASIK: The evidence-in-chief.

PN145

THE DEPUTY PRESIDENT: Thank you. Any cross-examination, Mr Fodrocy?

PN146

MR FODROCY: Yes, Deputy President.

PN147

THE DEPUTY PRESIDENT: Thank you.

CROSS-EXAMINATION BY MR FODROCY

[12.18 PM]

PN148

MR FODROCY: Good morning, Mr Buntman, again?---Good morning.

PN149

If there are any questions that you require me to restate please let me know. First I will take you to your statement R1 at page 111 of the court book. Do you have that in front of you?---I don't have the court book. Is there a particular paragraph you want me to go to in my statement?

PN150

Thank you. I take you to paragraph 1 of your statement. If you could read that out for me, please, Mr Buntman?---'I have been employed by Ai Group Workplace Lawyers, Australian Industry Group, since June 2021.'

PN151

Thank you. Immediately prior to that employment what was your role, what was your employment immediately prior to commencing with Ai Group Workplace Lawyers?---I'm not sure of the relevance, but I've been admitted as a lawyer for 20 years and engaged as an industrial advocate for a few years prior to that. Prior to my employment with the Australian Industry Group I was employed in the public health sector working for the Royal Children's Hospital Melbourne and Monash Health.

PN152

Thank you. In your evidence just then you referred to being an industrial advocate I believe for a few years?---That's correct.

*** LEE SAM BUNTMAN

XXN MR FODROCY

PN153

Can you be more specific?---I was not admitted as a lawyer, but engaging in the activities involved in representing clients in the Fair Work Commission.

PN154

And for how many years?---Approximately two years.

PN155

Would it be correct to say you've been - would it be accurate to say that you have been working in the industrial relations space for around five years?---Can you ask the question again. I may have missed - - -

PN156

Put it this way; how long would you say that you have been acting professionally in the industrial relations?---Approximately 22 years.

PN157

Thank you. In that career, I'll put it, you have had cause to serve documents on parties, other individuals; is that correct?---That's correct.

PN158

Thank you. And you are aware of the Fair Work Commission rules?---Yes.

PN159

And you are aware of the Fair Work Commission rules as to (audio malfunction)?---Yes, that's correct.

PN160

I take you to paragraph 2 of your statement, Mr Buntman. I will read it out. It says:

PN161

I am currently employed in the role of senior associate/principal advisor workplace relations.

PN162

?---That's correct.

PN163

Can you tell the Commission what is involved in that role as a senior associate/principal advisor workplace relations?---Advising and representing members of the Australian Industry Group.

PN164

And for how long have you been employed in that role?---Approximately two and a half years.

PN165

Essentially from when you commenced?---Correct.

*** LEE SAM BUNTMAN

XXN MR FODROCY

PN166

Thank you. Do you in that role have responsibility for other lawyers or other staff members at Ai Group?---Not formally. We work in a team environment, so natural things that come with a team environment, you know, collegian environment, guiding and mentoring, but there's no formal responsibility.

PN167

In that guiding and mentoring that you mentioned do you have occasion to guide and mentor junior employees?---That's correct.

PN168

Junior lawyers?---Yes.

PN169

Would that guidance and mentoring, albeit informal, involve answering questions about Commission procedures, things like that?---It could hypothetically.

PN170

Has it ever in your recollection?---I get - often get questions about enterprise agreement approval processes.

PN171

Thank you. Turning now to a separate matter, Mr Buntman. At paragraph 14 to paragraph 21 of your statement you outline your evidence on the emails being sent to individuals listed in that statement. At paragraphs 15, 16, 17, 19 and 20 refer to delivery receipt; is that correct?---That's what it says, yes.

PN172

And in paragraph 21 you refer to a read receipt?---That's correct.

PN173

Thank you. In your capacity as a senior associate/principal advisor prior to this occasion have you had cause to request delivery or read receipts of emails that you had sent or from - - -?---There have been occasions.

PN174

Do you know how many occasions that might be?---I couldn't tell you.

PN175

More than five?---Possibly.

PN176

Would you say you have familiarity with the delivery or read receipt function of Outlook?---I know how to check the boxes to turn on those features. I don't know the technical aspects of IT systems in Fair Work.

*** LEE SAM BUNTMAN

XXN MR FODROCY

PN177

But presumably you don't have any expertise to interpret - do you have expertise or otherwise experience to interpret the results of that function?---I can draw the distinction between a delivery and a failed delivery, and in read a notification

when it says has been read. For example Mr Goudappel bounced back emails that said it had been read. So I took that as being read. The other emails I took as being delivered, except for Mr Gatons which had not been delivered, which was - can be distinguished from the other notifications.

PN178

(Audio malfunction) email of Mr Gatons - - -?---That's correct, his Gmail I think.

PN179

If I could take you to pages 122 and 123. Apologies, annexure LB5 and LB6?---Thank you.

PN180

Which is pages 12 and 13 of your attachments?---Thank you. Yes.

PN181

The first was annexure LB5. Beneath what I'm going to refer to as the send and receiver details can you see the words, 'Your message has been delivered to the following receipt'?---Yes.

PN182

And then over the page at annexure LB6, again after the details on the sender and receiver, there's the words, 'Delivery to these recipients or group is complete, but no delivery notification was sent by the destination server.' Are you aware of why there might be a difference between those two statement?---No, I'm not.

PN183

Or noticing at the time that you received these emails that there was a difference?---The words are different, but I read that as it said that delivery was complete.

PN184

At the time did it cause you any cause to consider why there might be a difference?---No, I drew a distinction between the kind of return message I got from Mr Gatons which said delivery had failed, and the others. I can't recall my thinking at the time to be able to answer what I thought at the time, other than there was a distinction between Mr Gatons' email to his personal address and all the other delivery receipts.

PN185

Bear with me one moment, Mr Buntman. Earlier the Commission heard from Mr Mullins' evidence. On his evidence I think the words were 95 per cent of the time or a substantial majority of the time in bargaining meetings Mr Mullins had attended you spoke on behalf of the company?---Yes, I recall his evidence.

PN186

And separately Mr Mullins gave evidence that when Mr Cartledge for the employer spoke it was in response to questions of Mr Mullins. Do you recall that evidence?---I recall Mr Mullins' evidence.

*** LEE SAM BUNTMAN

XXN MR FODROCY

PN187

Do you recall Mr Mullins' evidence in its entirety?---Yes.

PN188

That saves me questions. Thank you. This question is going to have a couple of sub-clauses to it, so bear with me, Mr Buntman, but I expect that you are perfectly capable of responding to it?---You might just ask one at a time then.

PN189

Thank you. Mr Mullins' evidence was that 95 per cent of the time or a substantial majority of the time you spoke on behalf of the company in those meetings. His evidence was also that if Mr Cartledge spoke it was in response to a question of Mr Mullins, and the responses that he got invariably, on Mr Mullins's evidence, was from Mr Cartledge that you spoke on behalf of the company, and I believe the words may have been Mr Cartledge deferred to yourself. I put it to you based on that evidence that Mr Cartledge during those meetings did not on behalf of the employer bargain with the employee representative, including Mr Mullins on behalf of the union?---I wouldn't agree - - -

PN190

MR BANASIK: I object to that form of question. It's really calling for a legal conclusion which is a matter of submission rather than evidence that this witness can give, and an opinion of a (indistinct) nature.

PN191

MR FODROCY: Mr Buntman has, I think the words were around 20 years in the industrial relations space experience. He is a (indistinct) lawyer. He's given his occupation as a lawyer. Regardless of whether he has expertise or capacity to give an opinion he's certainly capable of responding to the question of whether it was bargaining in the common sense of the word.

PN192

THE DEPUTY PRESIDENT: I will allow the question. I don't know where it's going yet, but you can both make submissions, (indistinct) to make your submissions.

PN193

THE WITNESS: I would phrase it this way. In the bargaining room there were seven employee bargaining representatives and Mr Mullins on behalf of the AMWU. Other than occasional input by Mr Stockdale Mr Mullins spoke on behalf of all those employee bargaining reps. When he went out to break and get instructions six employee bargaining reps would go with him, their separate bargaining reps. In answer to your question I wouldn't agree with your conclusion. Do you want to go through - I mean you can break it down into different bits, but as a general proposition I don't agree with it.

*** LEE SAM BUNTMAN

XXN MR FODROCY

PN194

MR FODROCY: Mr Buntman, I put it to you that 95 per cent or the time, or a substantial majority of the time you spoke on behalf of Mr Cartledge, is that

correct, during the bargaining meeting. Is that correct?---I would say the majority of the time I did speak. Mr Cartledge makes contributions in every bargaining meeting. Often the questions he's faced are loaded questions, or designed to antagonise or point score. So he's correct not to answer those questions. When he's being asked legitimate questions in bargaining he has addressed those questions.

PN195

Thank you, Mr Buntman, I think you've answered my question. You said that in your view as majority of time. Mr Mullins has given the figure of 95 per cent. What do you mean by majority?---More than 50 per cent.

PN196

Thank you, Deputy President, no further questions for Mr Buntman.

PN197

THE DEPUTY PRESIDENT: Thank you. Any matters arising? No. Thank you. Mr Buntman, thank you for your evidence, you may step down.

<THE WITNESS WITHDREW

[12.35 PM]

PN198

MR BANASIK: The respondent calls Mr Cartledge who appears remotely.

PN199

THE DEPUTY PRESIDENT: Thank you. Good afternoon, Mr Cartledge, it's Deputy President Clancy. Can you hear and see me?

PN200

MR CARTLEDGE: Yes, I can, Deputy President.

PN201

THE DEPUTY PRESIDENT: Thank you. We're going to take your evidence now. My associate will take an oath or affirmation, and then Mr Banasik will take you through your evidence.

PN202

MR CARTLEDGE: Okay, thank you.

PN203

THE ASSOCIATE: Thank you, Mr Cartledge. Can you please state your full name and your address.

PN204

MR CARTLEDGE: Richard John Cartledge, (address supplied).

PN205

THE ASSOCIATE: Would you like to take an oath or an affirmation?

*** LEE SAM BUNTMAN

XXN MR FODROCY

PN206

MR CARTLEDGE: Oath.

PN207

THE DEPUTY PRESIDENT: Have you got a Bible there? Has he got a Bible? It might have to be an affirmation.

PN208

THE ASSOCIATE: Did you have a Bible?

PN209

MR CARTLEDGE: No, I don't. Affirmation will be fine.

<RICHARD JOHN CARTLEDGE, AFFIRMED [12.36 PM]

EXAMINATION-IN-CHIEF BY MR BANASIK [12.36 PM]

PN210

THE DEPUTY PRESIDENT: Thank you, Mr Banasik.

PN211

MR BANASIK: Mr Cartledge, are you employed by Orora Packaging Australia Pty Ltd?---Yes, I am.

PN212

What's your role?---My role is the operations manager of the Ballarat site.

PN213

Have you prepared - or do you have before you your statement dated yesterday, including the four annexures?---Yes, I do.

PN214

Have you read that statement recently?---Yes, I have.

PN215

And is there anything in it that you wish to change?---No, there's not.

PN216

Is your statement true and correct?---Yes, it is.

PN217

I tender the statement and annexures.

PN218

THE DEPUTY PRESIDENT: Thank you. Mr Fodrocy, subject to cross-examination any objections?

PN219

MR FODROCY: No objection.

*** RICHARD JOHN CARTLEDGE

XN MR BANASIK

PN220

THE DEPUTY PRESIDENT: Thank you.

**EXHIBIT #R2 WITNESS STATEMENT OF RICHARD JOHN
CARTLEDGE WHICH APPEARS IN THE COURT BOOK AT PAGE
180, COMPRISES 33 PARAGRAPHS, FOUR ANNEXURES, DATED
18/01/2024**

PN221

Any further matters?

PN222

MR BANASIK: The evidence-in-chief.

PN223

THE DEPUTY PRESIDENT: Thank you. Mr Cartledge, Mr Fodrocy who's the advocate for the AMWU will have some questions for you now in cross-examination.

PN224

THE WITNESS: Thank you, Deputy President.

CROSS-EXAMINATION BY MR FODROCY

[12.38 PM]

PN225

MR FODROCY: Mr Cartledge, can you hear me?---Yes, I can.

PN226

You might not be able to see me. Thank you. I am going to ask you a few questions on behalf of the applicant. If you don't understand any of the questions or if you need me to repeat them please just let me know. If you don't recall then please tell me that you don't recall?---Okay. Thanks.

PN227

All right. I am going to ask you a few questions that might seem odd or obvious in their answer. It's my prerogative. I seek the responses on your evidence as you see fit. I understand you have your statement dated yesterday in front of you. Can you confirm whether at the top of your statement there are page numbers in large red font 180?---No. It's all in black and white.

PN228

It's in black and white, but does the top of the page have the number 180, yes or no?---I can't see 180.

PN229

Thank you. At the bottom in the middle does it say page 1?---No, it doesn't have that, because I've just printed it off.

PN230

Thank you. I will do my best to direct you to the appropriate spots, Mr Cartledge. Please let me know when you're there and have it in front of you. All right?---Okay.

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN231

Thank you. In paragraph 1 of your statement you say that you're an operations manager for Orora Packaging Australia. How long have you been an operations manager for that company?---I've been operations manager since 2006.

PN232

Thank you. Can you explain for the Commission, although the Commission might already be aware, it's really for my benefit, what is involved in being an operations manager?---It entails numerous things, but essentially I'm responsible for the site on Orora's behalf. It's, you know, from production, quality, safety, all of those aspects; cost, and I manage the site on Orora's behalf.

PN233

When you say the site which site are you referring to?---Just Ballarat. So Orora has six sites.

PN234

Thank you. Ballarat being 1 Bowral Place, Mitchell Park, Victoria 3352?---Correct.

PN235

Thank you. At that site is it correct to say that you are the most senior employee of the company?---That would be correct.

PN236

In your role as operations manager since 2006 have you been involved in previous rounds of bargaining for enterprise agreements?---We've had employee collective agreements previously which I've been involved in.

PN237

Were you involved in the bargaining - I refer you to paragraph 3 of your statement where you refer to the replacement to the Orora Beverage Cans Ballarat Enterprise Agreement 2020. Were you involved in the bargaining for that agreement, the one that I just read out to you, Orora Beverage Cans Ballarat Enterprise Agreement 2020?---I was involved, yes.

PN238

I won't take it to you at the moment, but the evidence that's been given in your statement and Mr Buntman's statement is that for the current bargaining round the company has engaged the services of Ai Group; is that correct?---That's correct.

PN239

And for the previous agreement, the 2020 agreement, did the company engage Ai Group?---I can't recall, but we would have sought assistance when I was doing that agreement.

PN240

During that previous round of bargaining were you in bargaining meetings with employee representatives, whether it be the union or otherwise?---In 2020?

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN241

Correct?---Yes.

PN242

In those bargaining meetings who spoke on behalf of the employer?---At that time it was me.

PN243

Okay. Bear with me one moment, Mr Cartledge?---It's okay.

PN244

Evidence has been given in this hearing, you may have heard it earlier from Mr Buntman and Mr Mullins. Do you recall that evidence from Mr Mullins and Mr Buntman?---Yes.

PN245

The evidence of Mr Mullins was that in the bargaining meetings for the current agreement bargaining rounds a substantial majority of the time, or 95 per cent of the time Mr Buntman spoke on behalf of the employer. Is that correct?---There would be a significant amount of time that Mr Buntman spoke as part of the negotiation, yes.

PN246

Mr Mullins gave evidence that if he were to ask you a question about matters during bargaining the frequent response was that you would defer to Mr Buntman. Is that correct?---Not entirely. I believe I answered the questions when they were relevant to the bargaining, and expanded on examples at the time. If it wasn't relevant to the bargaining then I probably didn't respond.

PN247

Are you aware of whether there has been correspondence by email in relation to bargaining between Mr Mullins and Mr Buntman regarding the negotiation for the current bargaining agreement?---Are you asking me if there's emails between Lee and Lachlan?

PN248

In essence. Are you aware of whether they have any emails between Lachlan and Lee, correct?---Yes.

PN249

What is your understanding of the content and purpose of those emails?---They would be part of the communication process in terms of our agreement, or to update, provide updates.

PN250

Would it be accurate in your view to characterise those emails as involving negotiations about the terms of the replacement agreement?---I would say they were emails, without looking at any one specifically, they would be emails just as follow ups to previous bargaining meetings, and responses to those meetings.

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN251

When you say responses to those meetings those responses for example might be Mr Mullins putting a response on behalf of the union to Mr Buntman; is that correct?---There would be - there would be instances where from meetings that we were required to respond to, and so those emails are responded to, and then there's responses back from Lachlan.

PN252

Have you ever sent an email under your own name to Mr Mullins on behalf of the union setting out those responses or the employer's position on issues in bargaining, in the current round of bargaining?---I don't believe so.

PN253

Is it your practice to instruct Mr Buntman to do so?---In this - in this case Mr Buntman has provided responses on Orora's behalf.

PN254

Thank you. If I take you to paragraph 28 of your statement, Mr Cartledge?---Yes.

PN255

Apologies, paragraph 29, the one following?---Yes.

PN256

Can you recall the AMWU raising on behalf of its members an issue - I will start again. Do you recall at that conference mentioned in that paragraph I just took you to that the AMWU had raised alleged issues to do with receiving emails?---Yes, I remember that.

PN257

In paragraph 30 you say that:

PN258

In that conference Orora also committed that to resolve any alleged issues raised by AMWU about service a new order and directions and notice of listing will be hand delivered to employee bargaining representatives.

PN259

?---Yes.

PN260

Do you recall at the time forming a view about the AMWU's allegation regarding (audio malfunction)?---I'm not sure I understand that one, sorry.

PN261

In that conference you say that the company confirmed that to resolve any alleged issues raised by the AMWU about service that you would hand deliver them. In short why did you determine to hand deliver the subsequent orders, notice of listing?---To ensure that we were to comply with the directions that were given at the time. That was a request to make sure that they were hand delivered.

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN262

Did you undertake to make any enquiries about the allegations that the AMWU had made at that time or shortly thereafter?---In terms of?

PN263

The allegations that were put was that some of the employee representatives had not received the emails on the basis that the emails were sent from an external address. Do you recall undertaking any enquiries at that time in response to the allegations to confirm whether that was the case or not?---So we provided feedback corporately that they hadn't been received. But did I do any further investigation post that? No, from an IT perspective.

PN264

When did you provide the corporate feedback?---After the Commission.

PN265

On that day?---Yes, when it was raised that they weren't delivered.

PN266

And who did you raise the corporate feedback to?---That would have just been through the process back into our corporate team.

PN267

Do you recall any response from the corporate team?---No, not at that time.

PN268

Are you aware of any changes that might have been made as a consequence of the feedback you provided?---At that time, no, I had no update.

PN269

Or between that time and today?---It would appear as I note in 26, paragraph 26, that there's been some investigation that subsequently indicated that those emails weren't received. Is that what you're asking?

PN270

Not quite, but I will seek clarification, Mr Cartledge. So paragraph 26 of your email(sic), I take it you refer to the line:

PN271

I have today been informed that Kylie Newman, GM People and Culture Beverages, has today undertaken some investigation to determine whether the production employees did receive the external email from Mr Buntman.

PN272

Is that what you're referring to?---Yes, that's - yes.

PN273

So today being 18 January?---Yes.

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN274

To confirm your evidence you're not aware of any other action by the company between 26 October, being the date of the mention, and 18 January in regard to - -
-?---No.

PN275

Thank you. I take you back to paragraphs 20 to 22 of your statement?---Yes.

PN276

Would it be correct to characterise that as your description of how and why the work email addresses were set up for the relevant employees?---Are you coupling those three questions together or - I'm not sure I understand that one either, sorry.

PN277

I will rephrase it, Mr Cartledge. In paragraph 21 you say that the Orora email addresses were set up on or about 5 October 2023. Is it correct that prior to 5 October 2023 - apologies, Deputy President, I might have jumped the gun here. Mr Cartledge, first I want to take you to paragraph 13 of your statement. At that paragraph you list six employees who were bargaining representatives - seven, apologies?---There's seven, yes.

PN278

And I understand that Mr Goudappel - setting him aside for the time being - the six employees, is it correct to say that prior to 5 October 2023 those six employees did not have work email addresses?---I would say that would be correct.

PN279

And Mr Goudappel at paragraph 15 you say - in your statement at paragraph 27 - apologies. Bear with me. Paragraph 26 I will take you to, Mr Cartledge?---Okay.

PN280

Beginning at the fourth line from the bottom you say:

PN281

Except for Mr Goudappel. His email is set up to receive external emails as part of his role.

PN282

Have you got that statement in front of you?---At 26?

PN283

Twenty-six, and it is the fourth line from the bottom in brackets?---I see. I understand, yes.

PN284

'Except for Mr Goudappel. His email is set up to receive external emails as part of his role'?---Correct.

PN285

Are you aware when Mr Goudappel's email was set up?---Not exactly, but it will be years if that helps.

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN286

Years prior to - - -?---His role requires him to have access to external because he deals with customers and deliveries. So he gets emails in terms of deliveries. So as part - as part of his role he has to have access.

PN287

Understood. Thank you. In paragraph 21 you say that, "The email addresses are set up to take it as an organisation wide initiative"?---Yes.

PN288

Are you aware of what that initiative was?---There is - there's a program for single sign on for employees to access an app, and to do that they needed an Orora email. So my understanding is that the business, or Orora, was setting up emails for everyone so they could access the app, and by doing that with an Orora email are able to see their payslips, and that program had been on for 12 months.

PN289

For 12 months the program - apologies, what do you mean by the program?---To set those up, to have - to set the system up to allow that to happen. So it hasn't occurred in five minutes.

PN290

And to use common language it went live on 5 October for these six employees, and presumably others, but these six - - -?---No, it went live for everybody, at Ballarat. So Ballarat was chosen for whatever reason corporately to be the first site, and I'm not sure who was second or third, but we were first. The decision was made for Ballarat to go there.

PN291

And the app you referred to earlier does it have a name?---I'm not sure. I actually don't use it.

PN292

All right. Are you aware what the app is used for by the employees?---It's so they can access their payslip.

PN293

Are there any other features of the app that are used by the employees that you're aware of?---Not that I'm aware of, no. It's to allow single sign on.

PN294

Earlier you said that the emails were - the Orora emails were generated so that there would be access to the app; is that correct?---As part of that, yes, I believe so.

PN295

As part of that. Are you aware of any other reasons for setting up the work email addresses?---No.

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN296

Thank you, Mr Cartledge. I take you to paragraph 24, which is on the same page of your statement?---Yes.

PN297

So you ask Mr Buntman to email the order and directions to the employee bargaining representatives?---Yes, he's done that, or we would have asked him to do that, yes.

PN298

Thank you. For the avoidance of doubt you did not send an email to the bargaining representatives yourself?---No.

PN299

And earlier in your statement at paragraph 4, which is on the first page, 'Orora has its own bargaining representative. Mr Buntman is not the bargaining representative for Orora.' Is that correct?---He's not the bargaining representative, no.

PN300

And the Ai Group is not the bargaining representative for Orora?---No.

PN301

In your role as operations manager does the company assign yourself as the representative for bargaining on behalf of the company?---As per point number 3?

PN302

A yes or no answer, Mr Cartledge?---Sorry. Yes, they would have appointed me the person responsible for getting the agreement, yes.

PN303

Thank you. I believe earlier you said that you have been an operations manager for this company since 2006?---Yes.

PN304

In that role you presumably - I will take it, unless you tell me otherwise, that you frequently send emails to individuals - I think that's in your statement - that you are able to receive them. Have you ever had cause to use the delivery or read receipt function of Outlook?---I don't use either.

PN305

On 10 January, paragraph 9 of your statement, on or about 10 January you say you were in receipt of an email from myself?---Yes.

PN306

Did you at any time after that email either myself, Mr Mullins or any other representative of the union regarding who was the appropriate person to receive a protected action notice?---Did I - sorry, can I have that again, please.

PN307

Since receiving that protected action notice - - -?---Yes.

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN308

- - - have you sent an email to either myself, Mr Mullins or any other representative of the AMWU?---No.

PN309

Have you phoned, spoken to in person Mr Mullins, myself or any other representative of the AMWU about the protected action notice?---No.

PN310

Bear with me. Do you have Mr Buntman's witness statement in front of you?---No.

PN311

Do you have any other witness statement in front of you other than your own?---No, just mine.

PN312

All right. I am going to take you to a passage of Mr Mullins's statement, and I will read it out to you. Bear with me. Unless there's any issue, Deputy President, I will read out the passage that I wish to take - - -

PN313

THE DEPUTY PRESIDENT: Thank you.

PN314

MR FODROCY: Thank you. Paragraph 35 of Mr Mullins's statement says:

PN315

On 16 January 2024 at 8.01 pm I received an email from Mr Buntman with a document titled 'Notice of employer response action.'

PN316

Were you copied into that email?---I believe so. I'd have to just check, but I believe I would have been.

PN317

And you instructed Mr Buntman to send that notice; is that correct?---The notice was sent on Orora's instruction.

PN318

Who communicated the instruction on behalf of Orora to Mr Buntman?---I'm not sure.

PN319

It wasn't yourself?---I don't believe so.

PN320

Were notices of the kind given to employees, the relevant employees of the company, by means other than email?---With regard to what, sorry?

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN321

The notice of employer response action - - -?---Yes.

PN322

- - - which had been emailed, are you aware of whether that was hand delivered to employees?---Our response action notice?

PN323

Correct?---Yes, it was hand delivered to all but three employees, and the other three were delivered via email, and then through a follow up text message to ensure that they received it, and all three acknowledged that they received it via text.

PN324

Who sent the text?---Our manufacturing manager.

PN325

Thank you, Mr Cartledge. Deputy President, that was the only questions I have.

PN326

THE DEPUTY PRESIDENT: Thank you. Any re-examination?

PN327

MR BANASIK: (No audible reply)

PN328

THE DEPUTY PRESIDENT: Mr Cartledge, thank you for your evidence. You're excused from further attendance and you can disconnect the link if you want, but if you want to remain online as an observer you're welcome to do so?---Thank you, Deputy President.

PN329

Thank you.

<THE WITNESS WITHDREW

[1.14 PM]

PN330

THE DEPUTY PRESIDENT: Mr Banasik, is that the completion of the evidentiary case?

PN331

MR BANASIK: Yes.

PN332

THE DEPUTY PRESIDENT: All right, thank you. Well, if we're going to be moving to submissions I will adjourn the Commission for a period, and we will come back at 2 o'clock for that purpose. Thank you.

LUNCHEON ADJOURNMENT

[1.15 PM]

RICHARD JOHN CARTLEDGE

XXN MR FODROCY

RESUMED

[2.09 PM]

PN333

THE DEPUTY PRESIDENT: Thank you, Mr Fodrocy.

PN334

MR FODROCY: Thank you, Deputy President. Before I start, I might just clarify a point. Last night, I understand Mr Buntman filed an application, a Form 1 for revocation.

PN335

THE DEPUTY PRESIDENT: Yes.

PN336

MR FODROCY: Do you wish the parties to address you on the application?

PN337

THE DEPUTY PRESIDENT: Well - - -

PN338

MR FODROCY: I'm not aware if it's been allocated - constituted.

PN339

THE DEPUTY PRESIDENT: I think I should engage with it. What I ultimately do with that application, I haven't determined anything yet. As I understand it, the respondent presses the application before me and so, to that extent, you ought to address it.

PN340

MR FODROCY: Thank you. Dealing first with the union's application for orders, I rely on the particulars in the form and the outline of submissions and statements attached thereto. I won't address you in detail on them, other than if you require any clarification, Deputy President.

PN341

I will start - in brief, the applicant seeks orders against the company. To the extent that Mr Buntman and the Ai Group are not bargaining representatives, the applicant does not seek orders against them as a bargaining representative, nor, as I understand, could the applicant under the Act. Dealing with that matter, the applicant seeks the orders against the company on the basis that it has contravened an order of the Commission, an order of the Commission, we accept, not made under 448(a), but that it is, in all likelihood, made under 589.

PN342

THE DEPUTY PRESIDENT: Your position is that it's made - - -

PN343

MR FODROCY: We accept that.

*** RICHARD JOHN CARTLEDGE

XXN MR FODROCY

PN344

THE DEPUTY PRESIDENT: All right.

PN345

MR FODROCY: Paragraph 2 of the orders of Allison C dated 17 October order, correctly speaking, under section 448(a), but rather we think the correct view would be that it's an order under general procedure, power to make decisions as to how a matter is dealt with before the Commission.

PN346

THE DEPUTY PRESIDENT: Right. That being the case, does that have implications for how this is a case involving industrial action that is not protected in this respect? Section 411 clearly calls out section 448, so you're saying we don't - - -

PN347

MR FODROCY: We rely on 413.

PN348

THE DEPUTY PRESIDENT: All right. So I put 411 to one side?

PN349

MR FODROCY: Yes.

PN350

THE DEPUTY PRESIDENT: And then we're looking at 413 and the common requirements. Okay. All right.

PN351

MR FODROCY: You will note from Allison C's orders that it is expressed that it's an order in line with the direction at paragraph 2 of the orders, which goes to section 598 of the Act and the power to make decisions.

PN352

As you just mentioned, the applicant alleges, and the evidence we says shows, that there has been contravention of an order of the Commission and that occurred on or immediately after the date and time by which the employer was required to comply with the orders, and that contravention having occurred, section 413(5) is engaged and deprives the notice that was given by the company of its characterised protected industrial action, failing to meet a common requirement in the Act.

PN353

The evidence which was filed by the respondent supports a finding that there has been a contravention of the order and the oral evidence that you received from Mr Buntman and Mr Cartledge today further supports that. Specifically Mr Cartledge's evidence I want to draw to your attention on the purpose, as he understood it, for the work email addresses, that being, in his evidence, to enable the employees to sign into an app which, as he understood it, provided them with electronic access to payslips, and those email addresses were - it was my word but he agreed with it - live from 5 October 2023 to all the relevant individual bargaining reps other than Mr Goudappel. We submit that it's irrelevant that

Mr Goudappel receives the emails. It's sufficient on the terms of the order of Allison C that one of the bargaining reps was not served the orders and the notice. For the sake of evidence, Mr Stockdale is one of those employees, but we rely on the other five individual employees also having not received it in accordance with the order.

PN354

THE DEPUTY PRESIDENT: It's at least three, isn't it, because two might have gone to their personal email?

PN355

MR FODROCY: In my submission, if those employees had received it by personal, that is not sufficient for the purposes of the Fair Work rules.

PN356

THE DEPUTY PRESIDENT: I know you're going to take me to the rules shortly, but in terms of - - -

PN357

MR FODROCY: If I am wrong on the point, then it will be three.

PN358

THE DEPUTY PRESIDENT: Yes, three.

PN359

MR FODROCY: But - - -

PN360

THE DEPUTY PRESIDENT: But one's enough?

PN361

MR FODROCY: One is enough.

PN362

THE DEPUTY PRESIDENT: That's your submission?

PN363

MR FODROCY: Correct.

PN364

THE DEPUTY PRESIDENT: Sorry, just before you go too much further, your submission on section 598, is it 598(3) you're saying?

PN365

MR FODROCY: What do you mean, Commissioner?

PN366

THE DEPUTY PRESIDENT: Do I understand your submission to be this, that what's expressed to be order 2 under the order and directions of Allison C of 17 October, which says:

PN367

The employer, subject to the above order, will serve a copy of the award and the notice of listing -

PN368

et cetera. Are you saying that pursuant to section 593, or relying on 593 - sorry, 598(3) - that that is a decision of Allison C described as an order and must be made by an order? Is that your submission.

PN369

MR FODROCY: No, Deputy President. The submission is that under section - well, as a logical consequence, yes, so under section 589(1) of the Act, the Commission may make decisions as to how, when and where.

PN370

THE DEPUTY PRESIDENT: Yes.

PN371

MR FODROCY: So the order of Allison C, order 2, is a decision as to how the matter is to be dealt with.

PN372

THE DEPUTY PRESIDENT: Yes.

PN373

MR FODROCY: Subsection (4) of 598:

PN374

A decision of the Commission that is not described as an order may be made by order.

PN375

When I say - - -

PN376

THE DEPUTY PRESIDENT: I see.

PN377

MR FODROCY: - - - (indistinct) by, the jurisdictional power under 589 does not describe the decision as having been made by an order, but subsection (4) of 598 empowers the Commission to make it by order regardless, and that is what Allison C did, in my submission.

PN378

THE DEPUTY PRESIDENT: All right. Thank you.

PN379

MR FODROCY: Which, as a signpost, the applicant does not dispute the Commission has power to revoke such an order if you oppose the revocation, which I will come to.

PN380

THE DEPUTY PRESIDENT: All right. Just on that, the submission that this was an order made under section 589 of the Act and not under 448(a), what flows from that is that you say there's no bar to the Commission considering an application to revoke under section 603 because it's not a decision referred to in subsection (3) of section 603?

PN381

MR FODROCY: Yes, Deputy President, this particular order, in our submission, is not expressly barred by that subsection.

PN382

THE DEPUTY PRESIDENT: Subsection, yes. All right. You take the view that the decision is made by an order, but, nonetheless, where section 603(1) says the Commission may vary or revoke a decision, the fact that the decision made by order doesn't take it outside the power of section 603? The High Court in Esso talks of 603, the power to revoke an order.

PN383

MR FODROCY: Yes, I don't dispute that the order is capable of being varied or revoked by 603.

PN384

THE DEPUTY PRESIDENT: All right. Thank you.

PN385

MR FODROCY: But the submission is that the Commission should not exercise its discretion.

PN386

THE DEPUTY PRESIDENT: Yes, I understand, yes.

PN387

MR FODROCY: Turning to briefly the evidence which we say supports why the order has been contravened, I just wanted to draw the Deputy President's attention to the evidence given today by Mr Cartledge, which is, as he understands, the email addresses were set up to enable sign-on for an app and that app was for payslips and that the relevant employees, other than Mr Goudappel, had access to that from 5 October, which is two weeks before Mr Buntman attempted to send the orders via those email addresses, and that's relevant, Deputy President, for rule 42. I've got an old copy of the Act here in front of me.

PN388

THE DEPUTY PRESIDENT: 42(2)(f)?

PN389

MR FODROCY: I believe so, (f)(ii).

PN390

THE DEPUTY PRESIDENT: Yes. Your proposition is that it wasn't a common form of communication on the basis that it wasn't live for much more than two weeks and that, in any event, it was set up for the specific purpose of - - -

PN391

MR FODROCY: Logging into an app.

PN392

THE DEPUTY PRESIDENT: App for a payslip or pay information.

PN393

MR FODROCY: Not communication.

PN394

THE DEPUTY PRESIDENT: Yes.

PN395

MR FODROCY: That, in our submission, is sufficient to say that it was not served. Equally, there's no evidence in regards to the personal email addresses that that was a common form of communication, but, in our view, it's unnecessary to decide because Mr Stockdale did not receive via a personal email address the orders.

PN396

THE DEPUTY PRESIDENT: Well, there's a second element here, too, anyway, isn't there, because order 2 has a dual component? They also had to alert such bargaining representative.

PN397

MR FODROCY: I don't have instructions on whether Mr Stockdale, for instance, was alerted by the employer.

PN398

THE DEPUTY PRESIDENT: Yes, but there doesn't appear to me to be evidence before the Commission that suggests that the individual employee bargaining representatives were alerted. The evidentiary case seems to be - the evidentiary position seems to be that Mr Buntman sent emails to the seven and that was about the extent of it; there weren't any follow-up enquiries made.

PN399

MR FODROCY: Not to my knowledge.

PN400

THE DEPUTY PRESIDENT: Pardon?

PN401

MR FODROCY: Not to my knowledge.

PN402

THE DEPUTY PRESIDENT: Well, not to my knowledge either because I don't think there's anything before me to positively suggest that there was. But the order required that they would serve and alert.

PN403

MR FODROCY: My understanding of that email, if you were against us, Deputy President, on the point on whether service occurred - - -

PN404

THE DEPUTY PRESIDENT: Yes.

PN405

MR FODROCY: - - - which is not accepted, but the words of Mr Buntman's email, to be fair to the employer and not to lead you into any error, appears to say:

PN406

In accordance with the order and directions, Orora advises you of your obligation to attend -

PN407

et cetera.

PN408

THE DEPUTY PRESIDENT: Sorry, I didn't catch you.

PN409

MR FODROCY: It says:

PN410

In accordance with the order and directions, Orora advises you of...

PN411

the first dot point:

PN412

...your obligation to attend the conference scheduled for 2 pm on 26 October in the Fair Work Commission.

PN413

That is at page 121 of the court book, which I understand to be the email that was purportedly sent. It might be that they were alerted.

PN414

THE DEPUTY PRESIDENT: Isn't that predicated on them getting the email?

PN415

MR FODROCY: Correct, and, as I said, in the event that you were against the applicant and saying that service was given or that they received it or that they - - -

PN416

THE DEPUTY PRESIDENT: If I'm against you in your argument on the rule, that is, if I was to find, for example, that it was a common form of communication, you're saying that it's in here, that the text of that email serves to alert?

PN417

MR FODROCY: The text of the email refers to - well, it refers to alerting them to that.

PN418

THE DEPUTY PRESIDENT: But it requires - - -

PN419

MR FODROCY: Them to have received it and Mr Stockdale's evidence is he did not receive it.

PN420

In the authorities bundle that I provided, there is a definition of 'common'.

PN421

THE DEPUTY PRESIDENT: Yes.

PN422

MR FODROCY: I won't take you through too much of it.

PN423

THE DEPUTY PRESIDENT: Which part of the definition? Is it lengthy?

PN424

MR FODROCY: Yes, yes. Here it is. In particular, definitions 5, 6 and 7.

PN425

THE DEPUTY PRESIDENT: All right. Just a sec. Sorry, are we in the Macquarie Dictionary one?

PN426

MR FODROCY: Correct. It's page 393 of the dictionary copy.

PN427

THE DEPUTY PRESIDENT: Yes, all right.

PN428

MR FODROCY: Common is the last definition on that page.

PN429

THE DEPUTY PRESIDENT: Yes. So it's number 5? Which one - - -

PN430

MR FODROCY: 5, which is 'generally or publicly known.'

PN431

THE DEPUTY PRESIDENT: Yes.

PN432

MR FODROCY: 6, 'widespread, general, ordinary.'

PN433

THE DEPUTY PRESIDENT: Yes.

PN434

MR FODROCY: 7, 'frequent occurrence, familiar or usual.'

PN435

THE DEPUTY PRESIDENT: I see.

PN436

MR FODROCY: We say any of those three definitions appear to us to be the appropriate ones that are used in the rules, and the communication to those work email addresses would not satisfy that meaning of common.

PN437

THE DEPUTY PRESIDENT: Yes.

PN438

MR FODROCY: And we say that's sufficient for a finding that there's been a contravention of an order. In brief, however, we note that, on the evidence, Mr Buntman is the person who served, or attempted to serve, the employees and Mr Buntman is not the employer. Neither is AiG. I take that no further because (audio malfunction).

PN439

THE DEPUTY PRESIDENT: So that's for the purposes of the rule again?

PN440

MR FODROCY: That's the rule. So that's 42(2)(f)(i), which states that the person to be served is an employee.

PN441

THE DEPUTY PRESIDENT: I see.

PN442

MR FODROCY: And Mr Buntman, on the evidence, is the person who sent the email and is not the employer. He may well have been acting on behalf of the employer, but - we also contend (iii) is not met.

PN443

Much may be said by the respondent about attribution of state of mind for the company. Even accepting that Mr Cartledge objectively was not aware of whether it had been received, or capable of being received, the test is not what was subjectively known to the employer, the words of the rule are, 'It is reasonable for the employer to expect' and that inclusion of the word 'reasonable' introduces an objective assessment of whether, presumably, a person in those shoes ought to have expected, or would have expected, be capable of being received, and Mr Cartledge's evidence about the purpose of the email, and I think his words were 'an initiative by the company on a whole to set up these email addresses for that purpose', suggests that he ought to have known, or a reasonable person ought to have known, it was not capable of being received by external addresses.

PN444

In our submission, none of the roman numerals for 42(2)(f) are satisfied. However, they are expressed as (indistinct) conditions and, on the

highest put, as (ii) is not satisfied, it's irrelevant whether the other roman numerals were satisfied, but, in short, we submit they weren't either.

PN445

Turning to subsection (2)(c), because para (f) of subsection (2) is said to be subject to rule (2)(c), again that is not expressed as a sufficient condition by which service is deemed to have occurred. It is a necessary condition in that it says:

PN446

Service of a document on a person may be effected by emailing the document to an email address only if the person serving the document either -

PN447

Then the conditions.

PN448

I took the witnesses to the returned emails that Mr Buntman received. I will address it further on why when it comes to the revocation application, save that, in our view, as Mr Buntman, on his own evidence, is a very experienced practitioner in this area of law, who, on several occasions, had occasion to use delivery statements, is the word given in the rule, or read receipts, and the apparent inconsistency in what the returned email he received actually said ought to have alerted to him that perhaps some of the employees had not received his email, and the fact that he, on his evidence, appears not to have done anything in response is not inadvertent, it is a carelessness which, respectfully, should not be cured or excused by way of a revocation. The authorities which I will take you to later are in support of our submission.

PN449

Other than that, Deputy President, it is only if you are against us on whether service has been effected under subrule (2)(f) and you find that they are all satisfied, (2)(c) would not prevent, in our submission, you making a finding that service has not been made under the rules because (2)(c)(i) and (ii) are alternatives and I understand Mr Buntman does retain an email (indistinct) and he has produced such. As I say, that is in the event that you are against us on service under 42(2)(f).

PN450

THE DEPUTY PRESIDENT: Yes.

PN451

MR FODROCY: But, as I submitted earlier, it does not detract from the carelessness that we say tainted the respondent's service and which, in our submission, supports as a reason why the Commission should not exercise its discretion to revoke an order, the order in this case.

PN452

THE DEPUTY PRESIDENT: You say it's carelessness, not inadvertence?

PN453

MR FODROCY: Correct. There are other matters in the F1 and the respondent's outline of submissions which we disagree with, but dealing for the moment with the applicant's application for an order to stop, in the respondent's outline of submissions, the respondent, at paragraph 2, states that:

PN454

By the applicant's reasoning, the industrial action itself is organising is unprotected.

PN455

That is not accepted. The purported reason is because of the lateness of my filing or serving of the outline of submissions yesterday evening/yesterday afternoon. It is true in a technical sense I contravened the direction, but what's key is that it was a direction of the Commission, not an order. It was not expressed to be made as an order and the sections that I took you to earlier in relation to Allison C's order are not enlivened, that being section 598(3) and (4).

PN456

Relevantly, for the sake of this matter, if your direction were considered a decision as to how the matter is to be dealt with under section 589(1) such that it comes under the ambit of section 598, subsection (3) is not enlivened because, as I said earlier, 598(a), which is the (indistinct) section, does not state the decision must be made by order. Subsection (4) is not enlivened because in the direction that you gave, you did not describe it as an order, or you did not make it by an order, you made a direction.

PN457

Setting that aside, if you were to consider that the direction was an order, the applicant is prepared to make an application for leave to apply to extend the period to comply with your direction by 36 minutes, and if that leave were granted, we would apply for that extension, but, for the reasons given, the applicant does not consider that to be necessary.

PN458

To the extent that it might need to be dealt with, we submit that there's no prejudice on the respondent if the extension were granted by 36 minutes. The respondent had copies of its detailed application, originating application, with the witness statements. The delay is minor - 36 minutes - and it would appear the respondent's reply was directed to occur the following morning, in which they had ample time to respond to the submissions which were slightly delayed. In any event, it was not a material breach.

PN459

Before I turn to the revocation application, I should say, as a point of clarity, that in terms of the jurisdiction to make the order under 418, we contend that the basis of there being a contravention that industrial action by the employer that is not protected action, or would not be protected action, is threatened by way of the notice that was given to employees, which stated that, in brief, if the employees were to take part in the employee claim action, the respondent would take employer response action, that being the threat.

PN460

We also say that the taking of the unprotected action is impending or probable. On my instructions, there are employees who intend to take part in the industrial action previously notified by the employees' bargaining rep tonight from 7 pm, in which case, on the words of the notice by the employer, their industrial action would commence from that time, ending on the 24th. In that sense, it is probable, but, importantly, threatened, impending or probable are set out as alternatives and only one need be satisfied.

PN461

I will turn to the revocation application. As outlined earlier, the AMWU opposes the application on the basis that the Commission, whilst on its face, the power to revoke is not limited by the statute, the provision (audio malfunction), but the authorities establish that the discretion is otherwise covered by the Act, its purposes, and we say that the authorities support the proposition that this indicates (audio malfunction) revocation not occur because it would, in one sense, upend parliament's intention when it comes to section 413(5)

PN462

THE DEPUTY PRESIDENT: Sorry, 41?

PN463

MR FODROCY: 3(5).

PN464

THE DEPUTY PRESIDENT: Yes.

PN465

MR FODROCY: That being that common requirement for industrial action to be protected. (Indistinct) in part 3.2. The authority of *Castlemaine Perkins v United Voice* [2018] FWC 4470, index 2 of our list of authorities, at paragraph 77 and paragraph 108, relevantly, paragraph 77 provides:

PN466

The provisions of the Act in relation to protected industrial action are part of a statutory scheme that prescribes the rules of engagement in relation to bargaining. Those provisions include s. 413(5). In Esso the majority of the High Court said in relation to s. 413(5) that the Fair Work Act 2009 is predicated on participants abiding by the rules.

PN467

Later in that same paragraph, the Commission states, citing Esso:

PN468

Section 413(5) denies the immunity of protected industrial action to persons who have not previously complied with a pertinent order or orders 'and who had thereby demonstrated that they were not prepared, or prepared to take sufficient care, to play by the rules.'

PN469

We say that that's directly on point, Deputy President. I took Mr Buntman to his experience as a practitioner in this space. Assuming that his acting on behalf of the employer is otherwise appropriate in circumstances where he was not appointed as a bargaining representative and the obligation fell on the employer, Mr Cartledge's evidence was that he did nothing to communicate to the employees, but, setting that aside, Mr Buntman, if not actually, ought to have been aware of the rules regarding service under rule 42.

PN470

I believe, on his evidence, he had around 20 years' experience in industrial relations law, around three years working for Ai Group as a senior associate/principal advisor, which he said he mentors and guides all junior staff, and prior to that as an industrial advocate before the Commission.

PN471

It is our submission that Mr Buntman, and by extension the employer, did not abide by the rules and did not take sufficient care to do so. Regardless of whether Mr Buntman was entitled to rely on the delivery receipts, which we say should have alerted him to there being a potential issue, as would the statements made by Mr Mullins in his email prior to the mention and by the applicant during the mention, which alerted them to the issue, he took no, as I understand on the evidence, no action to rectify that.

PN472

Mr Cartledge reported it to the employer and until yesterday, on Mr Cartledge's evidence, the employer took no action to rectify it or to even investigate what had occurred, if our allegations were true or otherwise.

PN473

The delivery receipt is irrelevant for the reasons I took you to earlier in regards to rule 42 because 42(2)(f) provides the three conditions which must be satisfied, all of the conditions which must be satisfied. On the evidence, at least one has not been satisfied, that being it was not a common form of communication between the employer and the employees. Whether Mr Buntman was actually aware of that, he ought to have been. He ought to have been aware of the rule, and someone in his position, who is providing the services to the company for fee, presumably, it was incumbent upon him to take care in ensuring that the order was complied with in accordance with the rules. He did not do so. For that reason, we say it was not inadvertent.

PN474

We also want to draw your attention to paragraph 108 of *Castlemaine Perkins v United Voice* that I took you to earlier. Paragraph 108 relevantly says, in finding against the union in that matter who had applied for a revocation, 'It is not a case' - this is starting at the fourth line from the top:

PN475

It is not a case where genuine inability to comply with the interim bargaining order was followed by prompt action to seek an amendment to those requirements. It is not a case where there was a prompt concession as to non-compliance and a genuine and reasonable endeavour to correct the situation.

PN476

Again, that is squarely on point for this matter. Mr Cartledge advised the employer and the employer (indistinct) the relevant corporate officers, who he could not recall who that was, but the employer did nothing until yesterday.

PN477

During the mention, when it was raised, there was no concession from the company.

PN478

THE DEPUTY PRESIDENT: During the mention before the Commissioner?

PN479

MR FODROCY: Yes, on 26 October. There were no concessions, there was no acceptance, there was no genuine and reasonable endeavour to correct the situation. No amendment was sought - - -

PN480

THE DEPUTY PRESIDENT: What do you make of the subsequent order that was made by the Commissioner, which is in the court book at page 82?

PN481

MR FODROCY: The Commissioner - - -

PN482

THE DEPUTY PRESIDENT: Which follows the mention, and order 2 says:

PN483

The order will ensure all bargaining representatives other than the AMWU receive a copy and they are alerted.

PN484

So it has moved from this notion of service to an obligation to ensure they received a copy, and all the bargaining representatives attended that subsequent conference or that conference on 14 November.

PN485

MR FODROCY: In our submission, the subsequent orders and directions do not cure the earlier contravention. They do not purport to vary or revoke the earlier orders, and no orders of the Commissioner have done so. The contravention occurred on, or immediately after, 4 pm on 20 October and, in a sense, the bell cannot be unrung.

PN486

THE DEPUTY PRESIDENT: Your proposition is, having been put on notice of these issues by correspondence that was sent variously by, I think, yourself and Mr Mullins, the respondent Orora should have sought to cure the - - -

PN487

MR FODROCY: Correct. And Mr Cartledge's evidence was that he provided feedback to relevant officers of the company, but the company did nothing. So, at least at that time, it was aware - he was aware or had a reasonable basis for

believing that there was an issue, and if his state of mind were to be imputed to the company, then so be it, but it was incumbent on either Mr Cartledge or Mr Buntman to consider what the consequences of that contravention were and whether it ought to have brought an amendment, variation or revocation at an earlier time, and it did not do so.

PN488

It is not the responsibility of the applicant to tell Ai Group or companies whether it has contravened orders and whether it might have consequences to the company to taking industrial action. Mr Buntman has around 20 years of experience. I expect the employer was ably represented by someone who was aware of the requirements of the Act and the rules.

PN489

In the mention, I recall raising the matter and seeking to alert the Commission that there may have been a misrepresentation, unintentional misrepresentation, as to what had occurred and whether the employee bargaining representatives had actually received the notice. On my recollection - I don't intend to give evidence from the table, Deputy President, but suffice to say that despite me raising it, as the evidence suggests, the company did not rectify the issue. I haven't applied for a copy of the transcript or an audio of the mention, but I'm not aware of whether it was recorded.

PN490

I wish also to take you to Esso, which I understand that the respondent intends to do so as well. We agree that Esso is relevant to the exercise of your discretion. The relevant paragraphs in my view are 49 to 52 of that decision. I seek to draw your attention to paragraph 50:

PN491

If a document cannot be filed within the time specified in an order made by the Fair Work Commission, an application might be made for the time to be enlarged, or alternatively for the order to be revoked and a new order made allowing greater time, and, if there were good reason for the failure to file the document timeously, no doubt time would be enlarged, especially when it is appreciated that to refuse to enlarge time would preclude the possibility of protected industrial action.

PN492

We say that is good law, Deputy President, but, in this case, the company has failed to give you a good excuse, a good reason for why. At least on 26 October, Mr Cartledge was concerned enough about whether service had been effected. For the company to, several months later, say that it was inadvertent or mistaken and now seek to revoke it, it has essentially sat on its hands, reckless and careless as to the consequences of having failed to serve the documents.

PN493

Similarly, the same paragraph of Esso refers to a satisfactory excuse and, again for the same reasons, it is not satisfactory. Mr Buntman has years of experience, the Ai Group have years of experience providing services to companies and Orora, in

this case Orora Packaging, is owned by a major multinational company. It ought to have played by the rules, in the words of both Esso and Castlemaine Perkins.

PN494

Later in paragraph 50 of Esso, starting around seven lines from the bottom:

PN495

If, however, it appeared that the failure to file the document on time or to file what was required by the previous order was the result of contumaciousness or unacceptably careless disregard for the terms of the order, or if it were thought that to alter the order retrospectively would amount to an inappropriate or unfair interference with the rights of the parties, it might be expected that the Fair Work Commission would decline to exercise the power conferred by s 603...

PN496

I don't submit that the matter involved contumaciousness. I do submit that it is an unacceptably careless disregard for the terms of the order and the rules and, further - and this is where I think 448(a) is relevant, Commissioner - in our submission, to revoke the order such that the contravention had not occurred would be an inappropriate and unfair interference with the rights of parties.

PN497

Now that's not the applicant. At the relevant time of the contravention, the relevant parties were the applicant and seven bargaining representatives, six of whom, on our evidence, did not receive the orders. At that time, the relevant Act required those individual bargaining representatives to attend a conference ordered under 448(a). They were not given notice of it and if, but for the adjournment which was granted - although I want to come back to that point - if, but for the adjournment, the conference went ahead and they did not attend, they, too, may very well have lost their rights to take protected action separately from if they are members of the applicant and the applicant is the bargaining representative.

PN498

I will take you through that, Deputy President. At the time, those employees were bargaining representatives for themselves, as I understand it. They have now revoked their status, other than Mr Goudappel perhaps, but he's neither here nor there.

PN499

THE DEPUTY PRESIDENT: He's not here.

PN500

MR FODROCY: The consequence if this order were revoked on application of the respondent - the respondent's application seeks to revoke order 2 of Allison C's order, not the first, and there is perhaps an argument, not necessary in this case, that section 603 prevents order 1 from being revoked or varied.

PN501

If that were the case - none of those bargaining representatives attended a conference of the Commission at that time. Myself and Mr Mullins attended what was termed a mention and Mr Buntman attended the mention, but none of those six employee bargaining representatives did, and that is directly because they were not given a copy of the order and they were not alerted to the requirement to attend.

PN502

Revoking the order will not cure that contravention. As a substantive consequence of Mr Buntman's failure to serve according to the rules, those bargaining representatives, if they are to continue being bargaining representatives for themselves, would have lost the right to take employee claim action by virtue of section 413(5).

PN503

THE DEPUTY PRESIDENT: What if order 1 was revoked as well?

PN504

MR FODROCY: It's not necessary to do so or to decide on that, but I would suggest that it's quite possible that section 603 - - -

PN505

THE DEPUTY PRESIDENT: Prevents.

PN506

MR FODROCY: - - - prevents or bars the Commission from doing so as it's - - -

PN507

THE DEPUTY PRESIDENT: It's under the decision - - -

PN508

MR FODROCY: - - - a decision (indistinct).

PN509

THE DEPUTY PRESIDENT: Yes.

PN510

MR FODROCY: And that's why I say that Mr Mullins and myself, on behalf of the union, Mr Buntman and perhaps Mr Cartledge did attend on that day, if it were to be found that the order be not revoked.

PN511

THE DEPUTY PRESIDENT: What's the status of order 1 as things currently stand?

PN512

MR FODROCY: In my submission, it's not necessary and we do not invite the Deputy President to make a decision on it. In brief, if section - - -

PN513

THE DEPUTY PRESIDENT: You see, at the moment, no bargaining representative has attended a conference at 2 o'clock on 26 October 2023.

PN514

MR FODROCY: If, under 603(3), the Commissioner was barred from varying the order, the reported amendment to the listing to convert it to a mention did not occur, it remained a conference, the applicant union and the respondent lawyer were at that conference.

PN515

THE DEPUTY PRESIDENT: Yes.

PN516

MR FODROCY: So in terms of consequences for the parties before you, we submit that there are none. And I raise this purely because - in response to the employer's application which says that the contravention order is minor and procedural. It is neither. It was important with severe consequences for those employee bargaining representatives. And as the Act stood at that time. In brief, the - - -

PN517

THE DEPUTY PRESIDENT: Well, I am just wondering now - sorry.

PN518

MR FODROCY: There's an alternative submission, Deputy President, which has just occurred to me.

PN519

THE DEPUTY PRESIDENT: And what happens if, whatever reason a conference is - that is ordered under section 448A, and everyone's notified but for a particular reason it, you know, that the time has to be changed?

PN520

MR FODROCY: Then - - -

PN521

THE DEPUTY PRESIDENT: Is that - is it prevent - does section 603 prevent there being an alternative time made? I mean, if everyone would breach? Is that too simplistic? I don't know.

PN522

MR FODROCY: I am not prepared at this time to make special note on that, Deputy President.

PN523

THE DEPUTY PRESIDENT: I might have to. I don't know.

PN524

MR FODROCY: In our submission, it's not necessary because we say the revocation should be not granted on the basis of there being no real excuse.

PN525

THE DEPUTY PRESIDENT: But, no, but working back from it then that time - that order to attend a conference could not have been varied by the Commissioner. And - - -

PN526

MR FODROCY: As I say, in this case, if that is true, the union and the employer attended it. It is - - -

PN527

THE DEPUTY PRESIDENT: The union and employer attended. The six bargaining representatives cannot take protective industrial action. And - - -

PN528

MR FODROCY: That would be the evidence, yes.

PN529

THE DEPUTY PRESIDENT: And nor could – nor could Orora take its response action.

PN530

MR FODROCY: Because of the contravention.

PN531

THE DEPUTY PRESIDENT: Because of the contravention.

PN532

MR FODROCY: Correct.

PN533

THE DEPUTY PRESIDENT: So, we're left in the situation where conceivably six and possibly – I don't know whether Mr Goudappel did – but six and possibly seven additional people (audio malfunction) prevented from taking protective industrial action.

PN534

MR FODROCY: No, Commissioner, because those six other than Mr Goudappel, O'Dwyer and (indistinct) did attend the mention. Which was either a mention or a conference. But then six who did not have revoked their bargaining representative components.

PN535

THE DEPUTY PRESIDENT: Yes.

PN536

MR FODROCY: On the evidence. They're no longer bargaining representatives and under the relevant - - -

PN537

THE DEPUTY PRESIDENT: I see. 4135 is (indistinct).

PN538

MR FODROCY: They are – not four, one - well, yes, 4135 goes to who must not have contravened irrelevantly - - -

PN539

THE DEPUTY PRESIDENT: Because they're no longer bargaining representatives?

PN540

MR FODROCY: They're no longer bargaining reps and so I think it's expressed there's been the bargaining reps and the employee. Three, five - so, yes, 415A - -

-

PN541

THE DEPUTY PRESIDENT: B? No?

PN542

MR FODROCY: And then B is the case that we find ourselves in.

PN543

THE DEPUTY PRESIDENT: Yes.

PN544

MR FODROCY: It would – it would have to be both the employee and the bargaining representative of the (audio malfunction). But the union being the bargaining representative, the employee did not contravene the order.

PN545

THE DEPUTY PRESIDENT: Sorry, the whom?

PN546

MR FODROCY: The union - - -

PN547

THE DEPUTY PRESIDENT: The union - - -

PN548

MR FODROCY: - - - which is now the bargaining representative of those employees.

PN549

THE DEPUTY PRESIDENT: Yes, but what about the employees?

PN550

MR FODROCY: But it's expressed with the employee and the bargaining representatives, both. Not or. And/or. And those were the necessary conditions. That simple matter of legislative drafting, if Parliament had intended it for just to be (audio malfunction) used to it (audio malfunction).

PN551

THE DEPUTY PRESIDENT: Not sure I follow your point.

PN552

MR FODROCY: So 4135.

PN553

THE DEPUTY PRESIDENT:

PN554

The following persons must not have contravened any orders. But if the person organising or engaging in the industrial action is an employee' - - -

PN555

MR FODROCY: But, so on that basis, the (audio malfunction) if the employee, say Mr Stockdale?

PN556

THE DEPUTY PRESIDENT: Yes.

PN557

MR FODROCY: All right, for the sake of argument, because he did not attend.

PN558

THE DEPUTY PRESIDENT: Yes. Yes.

PN559

MR FODROCY: And he proposes to engage in industrial action.

PN560

THE DEPUTY PRESIDENT: Which?

PN561

MR FODROCY: But I am not aware if he does or not for the sake of argument.

PN562

THE DEPUTY PRESIDENT: Yes, but – just for the sake of it's - - -

PN563

MR FODROCY: Then importance of (audio malfunction) the employee, Mr Stockdale and bargaining representative, the employee, the union, must not have contravened. So because in our submission the union has not contravened, but (audio malfunction) to talk about (audio malfunction). And it's our submission that B is not (audio malfunction).

PN564

THE DEPUTY PRESIDENT: That seems an odd outcome.

PN565

MR FODROCY: (Audio malfunction) Deputy President.

PN566

THE DEPUTY PRESIDENT: No, thank you.

PN567

MR FODROCY: Other than materiality irrelevant for the revocations of the companies of the – the order was superseded by events, we rely on the carelessness aspect to say that there are (audio malfunction) a bit material on (audio malfunction) submission.

PN568

We're trying to also say (indistinct) not for the Commission to determine the (indistinct) consequences of that set out by Parliament in terms of the Act. There's consequences which flow from the Act, that rely on whether there's context and purpose, whether the Commission considers or the employer considers that the consequences (indistinct) is irrelevant. Deputy President, unless there's any questions, I have nothing further.

PN569

THE DEPUTY PRESIDENT: All right. Thank you.

PN570

MR BANASIK: Yes, Deputy President. In my submission, it's rather not all application, where the applicant is in (indistinct) form of application is not relying on a breach of a substantive order in relation to bargaining or industrial action. But is relying on what we say is a minor and inconsequential breach, but a breach of a procedural – what might be called colloquially, a direction but has been described as, by virtue of the way that it's been promulgated as an order, and I will come back to that as being why that's relevant to the Commission's discretion.

PN571

But the initial point that I wish to make is that the applicant has been highly critical of the respondent in its submissions and harping on about – well, I shouldn't use that – that's a – I retract that. The applicant has been submitting that the respondent has not been (indistinct) and that's – that justifies really, this harsh consequence of the respondent being barred from any industrial – industrial action which firstly, in my submission is not the case at all. And secondly, the other objectives of the Act need to be recognised, in particular in section 171 of the Act which gives the objects of the R2.4 regarding enterprise agreements, and that includes:

PN572

To provide a simple, flexible and fair framework that enables collective bargaining in good faith. Particularly, at the enterprise level for enterprise agreements that deliver productivity benefits and to enable the Fair Work Commission to facilitate good faith bargaining and the making of enterprise agreements including through making bargaining orders dealing with disputes where bargaining representatives request assistance and ensuring that applications to the Fair Work Commission for approval of enterprise agreements had dealt without delay.

PN573

It's really (indistinct) to those objectives for the applicant to be seeking to leverage a breach of a procedural order in order to obtain this massive coup in terms of being able to prevent the respondent from engaging in industrial action whether under this PABO award, any future industrial action in relation to this agreement which is currently being subject to bargaining.

PN574

And it's entirely reasonable in my submission for the respondent to take the position it has in relation to the 20 – let me get the date of the initial

(indistinct). The 17 October orders of – that were effectively different – the approach that it's taken has been in my submission a constructive approach where after it became – it became notified or it became aware that there was an issue with the way that it sought to have then service in that first instance when the matter was adjourned, then it used a different method of service to ensure that the problem would not reappear.

PN575

So it says that the applicant – the respondent did nothing to investigate the issue, did nothing to cure the issue. That is, in my submission, a – not an accurate reflection of what occurred. What occurred is when the issue was ventilated and it was ventilated in quite a short period of time, though it was a couple of days before the conference, the first email was sent raising an issue and then again it was ventilated at the mention a couple of days later and from that point on the respondent has constructively engaged in terms of serving the next order a different way and then in terms of the order which leads us outward or the notice which is the subject of the current application that is the notice that was issued earlier this week by the respondent, the evidence in relation to that, was that mixed bonus service was used and various steps were taken to make sure that everybody who needed to get the notice had the notice.

PN576

Now, given the objectives of the enterprise agreement and the part of the Act dealing with enterprise agreements, it's reasonable for the respondent to assume that the applicant will undertake its – will conduct itself in a constructive manner rather than as is occurring here, attempting to use a past breach which is no longer of any consequence and which has been substantively addressed through the company's prior – through the company's remedial action to be engaged in what is really, to use Mr Buntman's words when he was giving evidence, point-scoring.

PN577

Now, the real issue for determination is the respondent's application for the revocation of the order and then I assume that's – that you have considered the Esso case but there's just some particular points that I want to take you through, as I take you through my submissions on that – on that point.

PN578

Now, starting at paragraph 29 of the case, the High Court at that paragraph noted that the – noted that section 4135 is poorly drafted. And that follows a part where the court – or I should say the majority sets out the union's contentions in that case. And in particular at paragraph 26, it sets out what seems to have been the union's primary contention which is that an interpretation which would have been pressed by Esso would lead to capricious and unjust results and raised an example and yes, this is about slightly more than half way down that paragraph, you will see counsel for the AWU offered by way of an example:

PN579

A breach of an order to file a document within a specific time, committed by filing a document a day or two late or a breach of an order to file a document compliant with particular requirements committed by – - -

PN580

I won't read out the rest of it. It's – it's there on the page. The High Court engaged with that submission at paragraph 49 and the High Court effectively rejects the submission principally because any such outcomes can be ameliorated through the exercise of the discretion under section 603.

PN581

But the respondent says that it has reasonable excuse for all non-compliance and I have – and I am going to address this in my written submission (indistinct), we tread that ground but I want to engage with the applicant's submission on that point. Now, the applicant places great emphasis on the delivery receipts and what it says is two different forms of delivery receipts have been – that should have put this department on notice that something was wrong.

PN582

Now, the union has not lead any expert evidence at all regarding what those notations mean and in my submission, the Commission can't assume that the form of message that was sent in relation to the Orora emails as any significance as to whether the emails were delivered or not, regardless of whether it's reasonable for Mr Buntman to have known of that significance.

PN583

And if I can take you to that particular – that particular exhibit which is at page – it's at page 22 - at page 122 of the Commission book. Sorry, at page 123 of the Commission book. And this is the message which the applicant seeks to impugn. And the reason I say that the Commission can't read anything into this is for this simple fact which is that amongst the email addresses, which are listed there, is the email address of Mr Goudappel (indistinct). And it's conceded by the applicant that Mr Goudappel received that particular email.

PN584

So if that's the case, then there – it can't be the case that that message means that there is some warning about whether or not the email has been received. So really, if the applicant wanted to make that point they really should have been bringing some evidence today about what that notation means because based on that simple fact, it's unlikely that it has the meaning that the applicant seeks to attribute to it.

PN585

We're given that it's – there is no reason for the Commission to find (audio malfunction) in relation to those emails. In any case, the decision in the Castlemaine case that is provided by the applicant needs to be distinguished on its facts. And the full case is not before the Commission but in brief summary, there was a bargaining order made by the Commission which in effect pivoted the union from engaging in (audio malfunction) activity and required the union to provide notices in a number of different mediums to inform its members that there was a prohibition on engaging on - in that activity, that included posting it on the home page of their website, sending a text message with a specific – specific form that the – that the Commission had prescribed amongst other things.

PN586

The union did not comply with that requirement and it sent a text message using a much briefer form of words and it didn't post the notice to the home page of its website but another area of its website which was less prominent and – and the submission on the part of the applicant that (indistinct) that it really was buried under a bunch of other items.

PN587

So that's really distinguishable from this case, where that was something that was very pertinent to the issue of the industrial action and it was a matter of substance and it was – and most importantly is that the Deputy President in that case did not accept the union's explanations for why it didn't comply, because the union sought to say that we couldn't post it on the main page of our website for a particular reason which the Commissioner – sorry, I beg your pardon – the Deputy President did not accept on the basis of some other evidence that was before the – before the Commission. And similarly it didn't accept the reason advanced by the union for the text message and found that effectively the conduct of the union was – was, if not tumultuous, that it was reckless.

PN588

And here that's not the case at all. Here we have got what is in my submission fairly described as a procedural or there in the sense that it's an order that's not made of the 448A or any of the other provisions formally within that part of the Act, but is made under, I think it was section 589 but I could be getting confused between 589 and 598 (indistinct) today. So it's an order that's properly described as a procedural order, and in my submission it's not a substantial matter relating to the bargaining of industrial action.

PN589

THE DEPUTY PRESIDENT: Except if it's not complied with it has implications for those who require it to be served.

PN590

MR BANASIK: Yes. I say it's inconsequential because of the adjournment, and I know you asked my learned friend a question about the consequence of that. In my submission, what the Commissioner did was not to seek to revoke the earlier order or to vary that order or anything to that effect. In my submission, what the Commissioner did is utilise the power under 589 to adjourn the conference to another date. That's the most simple solution to the problem that the Commission posed earlier, and the most logical solution.

PN591

THE DEPUTY PRESIDENT: Arguably, she couldn't use 603.

PN592

MR BANASIK: I beg your pardon?

PN593

THE DEPUTY PRESIDENT: Arguably, she couldn't use 603.

PN594

MR BANASIK: Yes. In relation to paragraph 1, yes.

PN595

THE DEPUTY PRESIDENT: Yes.

PN596

MR BANASIK: But she need not - - -

PN597

THE DEPUTY PRESIDENT: Not arguably. She couldn't.

PN598

MR BANASIK: Yes, but she need not use 603, because she could use, in my submission, 589 in the making of a procedural order to adjourn the conference. That is, it's not varying the order, it's not saying the conference is not going to take place, or, 'We're cancelling this conference and we are having another conference', it's saying that, 'We're adjourning the conference to a different date.'

PN599

THE DEPUTY PRESIDENT: And it's varying the time.

PN600

MR BANASIK: There's two different sources of power. One of them is blocked off, but that doesn't mean, in my submission, it's the power of 589, and it will also be relevant, or be used to achieve the same result, as - in my submission, putting aside the issue of 603(3), there would have been two ways to go about it. That's either the Commission could have used 603 to vary the order or 589 to adjourn the conference, and with 603 being taken out, then it must have been, in my submission, an adjournment using 589.

PN601

THE DEPUTY PRESIDENT: What of the issue, though, of - say we're looking at order 1. You say that's an order under 448A.

PN602

MR BANASIK: Yes.

PN603

THE DEPUTY PRESIDENT: What are the implications if that changes and that is not complied with?

PN604

MR BANASIK: I don't quite follow the - - -

PN605

THE DEPUTY PRESIDENT: All right. In this case, 'Must attend conference 2 pm on 26 October', can't change that. Must attend the conference. Mr Fodrocy says those who did turn up in effect conferenced.

PN606

MR BANASIK: (Indistinct). I suppose the point that I'm seeking to make is it's not that you can't change it, it's that you can't change it under 603(3). 603(3) doesn't say that, no, anything that's done under 448A is completely - - -

PN607

THE DEPUTY PRESIDENT: It's an order. It's an order under 448A. 603 says, 'Must not vary or revoke any of the following decisions', a decision under division 8 of part 3(3) which deals with protective action ballots.

PN608

MR BANASIK: Yes. So using specifically the (indistinct), the power under 603 is blocked off, however, in my submission, there is an additional power which is not blocked off, and in section 589 it says the Fair Work Commission may make decisions as to how, when and where a matter is to be dealt with, and that power is not restricted in the same way that 603 is.

PN609

In my submission, the Commission can say, under 589, 'I determine that the conference is not going to be held on 26 October 23 anymore. It's going to be held on a different day at a different time', and that power is not restricted by 603(3), because 603(3) only blocks off 603(1), it doesn't block 589. 603(3) doesn't say that you can't touch an order made under 448A in any way. It just says you can't use 603 to alter an order under 448A, but it's completely silent about the Commission's powers under alternate sections in the Act. So my submission is that 589 was an available source of power, it was in fact a source of power, that was used by the Commissioner in this instant.

PN610

THE DEPUTY PRESIDENT: All right.

PN611

MR BANASIK: So the conclusion from that is that order 1 of those orders of 17 October 2023 that that conference was adjourned, and hence my submission that the defect in terms of notifying those specific employees ultimately ended up being of no consequence for that reason.

PN612

But in any case, even if it had been of consequence, the respondent would, in my submission, have a reasonable excuse, but the question of consequence really (indistinct) to that second issue, of whether the Commission should exercise its discretion. In my written submissions I've outlined a number of matters which are submitted as being relevant to the exercise of the discretion, and there's an additional matter which I'd like to put which flows from the discussion with my learned friend in regards to section 598 relating to whether something is or isn't an order.

PN613

That section seems to establish that there's two categories of decisions that the Commission can make, something that's described as an order or something that is not described as an order. The Commission can make something that's not described as an order into an order, and that distinction is highly relevant for section 413, where if it's an order, then subsection (5) is engaged, whereas if it's not an order, then subsection (5) is not engaged.

PN614

Here we're in the category of something which is not described as an order but has been (indistinct), and in my submission that's a relevant discretionary consideration of the Commission, because it indicates that the matter which is relied on by the applicant is of a nature that would not - - -

PN615

THE DEPUTY PRESIDENT: Sorry, I just need to follow this. You're saying here something that has not been described as an order has been made by an order.

PN616

MR BANASIK: Yes.

PN617

THE DEPUTY PRESIDENT: It is described as an order under the terms of - - -

PN618

MR BANASIK: Yes, that's right. So there's terminologies of decisions and orders, and it seems from the scheme of the Act that anything that the Commission orders or directs is a decision. I think I have a note somewhere about where that comes from. That might be in my written submissions, but I'll just try and locate that, if you bear with me, because that's probably the starting point in going through this statutory scheme.

PN619

I apologise. I can't find it at this moment. Maybe if my instructor locates it I'll return to it, but there is a section that I'm trying to dig out which essentially says that any matter decided by the Commission, including under section 589, is a decision, which in my submission effectively establishes that the Commission primarily makes decisions. That's a blanket term for describing any exercise of the Commission's power under the Fair Work Act. Then, in section 598, it creates this dichotomy between decisions which are orders and decisions which are not orders.

PN620

No, it is 598(1) which I was looking for. That's why I couldn't find it, because it was under my nose. So 598(1), the reference to a part in the decision includes any decision however described.

PN621

THE DEPUTY PRESIDENT: All right.

PN622

MR BANASIK: Yes, and when it says in the note that it includes decisions as to how, when and where a matter is to be dealt with, that picks up the same terminology as section 589.

PN623

THE DEPUTY PRESIDENT: Yes.

PN624

MR BANASIK: So what it seems to be saying is that any time the Commission exercises any power under the Act, which, of course, as a creature of statute, it can only exercise what powers are given under the Act, that it makes a decision to exercise that power, and therefore every exercise of power is referred to as a decision, but then it delineates things that are orders and things that are not orders, however it seems to suggest at subsection (4) that something can be made an order by it being made an instrument described as an order, effectively.

PN625

THE DEPUTY PRESIDENT: Yes.

PN626

MR BANASIK: It seems to be what has occurred here, because looking at Commissioner Allison's orders of 17 October 2023, it's titled 'Order and direction', and you can contrast that, for example, with the PABO on 10 October 2023 which is only headed Order, not Order and Direction. The 17 October order is headed Order and Direction and it has two paragraphs under Order and two paragraphs under Direction.

PN627

THE DEPUTY PRESIDENT: Yes.

PN628

MR BANASIK: In relation to paragraph 2, in my submission that is a - and I think this is accepted by the applicant, (indistinct). That's accepted by the applicant as the exercise of power under 589, and that section says:

PN629

The Fair Work Commission may make decisions as to how, when and where a matter may be dealt with.

PN630

So that is a decision not described as an order. That's to be contrasted, for example, as to section 448A, which says:

PN631

If the Fair Work Commission has made a protected action ballot order in relation to a proposed enterprise agreement, the Fair Work Commission must make an order directing the bargaining representatives for the agreement to attend a conference.

PN632

That's an example of a decision which is described as an order.

PN633

THE DEPUTY PRESIDENT: Yes. So you say that a decision on how a matter is to be dealt with is a decision under 598(4), are you? Is that what you say?

PN634

MR BANASIK: I think 598(1) - no, I beg your pardon. I was thinking of 589. Yes, 598(4), that it's not described as an order, because in the Act it's just

described as a decision but not an order, whereas under 448, that is a decision that's described in the Act as an order. So turning to Commissioner Allison's order and direction, paragraph 1 is what's described under 598(3), whereas paragraph 2 is what's described under 598(4).

PN635

THE DEPUTY PRESIDENT: Yes.

PN636

MR BANASIK: There's possibly a question about whether a decision, so described, that is, a decision that's not described as an order but it is made by order, engages 413(5). I mean, I must say, it's not a matter that had really occurred to me before this became an issue in today's submissions, so (indistinct) where I haven't had the opportunity to prepare submissions, but in relation to the respondent's application under form F1, I would submit that that's a discretionary consideration in favour of granting the leave sought by the respondent, for two reasons.

PN637

The first is that this dichotomy between decisions that are orders and decisions that are not orders shows that there is really a threshold of seriousness or significance between two different types of orders, and although this is described in the instrument as being an order, it's, in truth, having regard to the scheme of the Act, a decision that's not an order and is procedural in nature. So in my submission, that is a matter that's relevant to the Commission's discretion and tends to support the exercise of its discretion.

PN638

The second reason it's relevant is because it raises a real question around whether 413(5) is engaged, whether the Commission even has jurisdiction to make the order that's sought by the applicant under 418, and given that uncertainty, in my submission the far neater solution, rather than potentially having to come back, or potentially having to have this matter determined (indistinct) is to revoke the procedural order and render it a non-issue.

PN639

THE DEPUTY PRESIDENT: You just said it's a decision that's not an order and then you've described it as a procedural order.

PN640

MR BANASIK: Well, that's just my poor use of language. To bring my submission to conclusion, it's my submission that the respondent had a reasonable excuse for its non-compliance with paragraph 2 of the 17 October order and direction, as the matters raised by the applicant don't upset that and the case of Castlemaine be distinguished, and that having regard to the various (indistinct) considerations of the (indistinct), in my submission, it should exercise its power to revoke paragraph 2 of the order and direction of 17 October.

PN641

I haven't addressed the specific orders that are sought by the applicant. It's probably a bit difficult for me to do so at this time without knowing what the Commission's determination is and it might be.

PN642

THE DEPUTY PRESIDENT: What if I'm required to make an interim order?

PN643

MR BANASIK: I beg your pardon?

PN644

THE DEPUTY PRESIDENT: What if I'm required to make an interim order?

PN645

MR BANASIK: I might need to take some instructions as to the force of (indistinct).

PN646

THE DEPUTY PRESIDENT: I've got a matter before me in which it would appear that none of the bargaining representatives, at least - or at least one out of seven doesn't use email, and yet you want things put on Facebook and LinkedIn. Why would I put things on Facebook and LinkedIn if these people don't use email, and I don't even know whether they use the Internet?

PN647

MR FODROCY: Deputy President, apologies. Unfortunately, I'm not aware of the basis on which you say - - -

PN648

THE DEPUTY PRESIDENT: I'm sceptical about why you want to pepper social media with an order for people that don't even use email.

PN649

MR FODROCY: That's the point I'm not aware of. I don't believe - or I don't recall tendering evidence that one of the bargaining representatives doesn't use email.

PN650

THE DEPUTY PRESIDENT: No, I'm not saying one of them. You're saying that they weren't communicated with by email.

PN651

MR FODROCY: They didn't receive the email.

PN652

THE DEPUTY PRESIDENT: Yes, but you're saying it's not common that they receive email. That's your submission - - -

PN653

MR FODROCY: It's not a common form of communication between the employees and employer.

PN654

THE DEPUTY PRESIDENT: Yes, so why would this be posted all over a LinkedIn page of Orora, for example?

PN655

MR FODROCY: Our submission that it was not common for the employees to receive communication from their employer at that particular email address, as required by the rules, does not detract from whether - - -

PN656

THE DEPUTY PRESIDENT: How are these people turning up to bargaining meetings? Apparently they weren't emailed, so how are they turning up to bargaining meetings?

PN657

MR FODROCY: As it is, the ex-employee bargaining representatives, other than Mr Goudappel, are members of the applicant, and they were aware of the bargaining meeting.

PN658

THE DEPUTY PRESIDENT: Yes, but before they revoked their status as bargaining representatives, how were they informed?

PN659

MR FODROCY: I don't have instructions on that.

PN660

THE DEPUTY PRESIDENT: You might know, Mr Buntman. You set all these bargaining meetings. I'm presented with a case where I've been sitting here all day, and people say there was no email communication, they weren't served and there was no follow-up, there was no communication between these people.

PN661

MR BANASIK: Yes. I'm getting some instructions about that, but in relation to the recent (indistinct) conference it was all by hand delivery, and then the notice earlier this week was mostly by hand as well, so I think at least - I think that that's been the (indistinct) more recently (indistinct) ensuring that information is passed on.

PN662

MR FODROCY: Deputy President, if I may, it's the - - -

PN663

THE DEPUTY PRESIDENT: There are approximately 31 employees on staff, on site; that's what I'm told, and they work across four teams and service two shifts.

PN664

MR FODROCY: My instructions are that Mr Mullins advised by SMS the relevant bargaining representatives - - -

PN665

THE DEPUTY PRESIDENT: All right. Well, that might be adequate. See, you're wanting me to go to Facebook and LinkedIn and news pages on websites. I mean, it seems to me to be a bit of overkill in a case that's being presented to me as one where bargaining is only communicated by very rudimentary means and can't even get email communication going.

PN666

MR FODROCY: The particular forms of the orders, I accept the Commissioner's discretion on it. The purpose of seeking, among other things, the websites, the social media accounts, is to ensure, for the avoidance of doubt, that the employees, especially those who are members of the organisation, of the employee organisation, the applicant, are aware that the verification of action by the employer is protected or subject of your orders, if you make some, and there is evidence that - - -

PN667

THE DEPUTY PRESIDENT: I can't even be confident here about the status of email.

PN668

MR FODROCY: Correct, and in that sense, to - - -

PN669

THE DEPUTY PRESIDENT: But the order requires that.

PN670

MR FODROCY: For those whom it has email addresses, and whether the company has rectified the issue that it's identified with receiving - - -

PN671

THE DEPUTY PRESIDENT: I mean, if they don't have email, do they have Facebook?

PN672

MR FODROCY: If they don't have it, they might not have Facebook.

PN673

THE DEPUTY PRESIDENT: Do they have LinkedIn? We don't know, do we?

PN674

MR FODROCY: But in a sense, that is why there are multiple methods by which the notice should go out, so that if they are on Facebook or they're on LinkedIn, or if they have a mobile phone number that's been provided to the company, they receive it that way, and if none of those are appropriate, then it's posted on a noticeboard at work.

PN675

THE DEPUTY PRESIDENT: Use carrier pigeon as well?

PN676

MR FODROCY: It's not particularly uncommon for employees to have Facebook pages.

PN677

THE DEPUTY PRESIDENT: All right.

PN678

MR FODROCY: I understand - - -

PN679

THE DEPUTY PRESIDENT: That's a submission some people might take, but I don't know. I mean, you've spent a lot of the day telling me that they don't receive emails.

PN680

MR FODROCY: It's not a common form of communication. It's very specific - - -

PN681

THE DEPUTY PRESIDENT: (indistinct) communicate - - -

PN682

MR FODROCY: It's very specific that the rules require - - -

PN683

THE DEPUTY PRESIDENT: I know what the rules require.

PN684

MR FODROCY: Right. It does not mean that they don't use email, but it does not detract from whether they are otherwise computer literate. It says nothing about their literacy when it comes to using technology, it says something about what was required in terms of serving on them, and that was failed.

PN685

THE DEPUTY PRESIDENT: In a case that's been run on strict adherence to serving documents and complying with orders of the Commission, what you've done here is, you've inserted about 12 steps that the person complying with the order has to meet. It doesn't give me great confidence.

PN686

MR FODROCY: If the Commission were minded to make orders, or if the respondent is of the view that it would be difficult for it to comply with those orders, then it's open for it to make the admission and give evidence for such. I should indicate, and I think I did this earlier, I don't seek orders against Australian Industry Group itself.

PN687

THE DEPUTY PRESIDENT: Yes.

PN688

MR FODROCY: In essence, your jurisdiction to make the orders would be confined to that much which is required to ensure compliance and no further. So I'm in your hands on the form of the orders. If I might - - -

PN689

THE DEPUTY PRESIDENT: Yes. Have you got some reply submissions?

PN690

MR FODROCY: Yes, Deputy President.

PN691

THE DEPUTY PRESIDENT: Thank you.

PN692

MR BANASIK: Sorry, it might be a convenient time for me to relay my instructions on that issue about the form of order, while that's a topic.

PN693

THE DEPUTY PRESIDENT: Yes.

PN694

MR BANASIK: I'm instructed that it's feasible for the respondent to use hand delivery of the notice for the employees, that there's a shift handover and they can all be handed the notice at that time, and that's what occurred in relation to the protected action notice. If there's any employees who are not working those shifts for particular - - -

PN695

THE DEPUTY PRESIDENT: Leave or absences, what about that?

PN696

MR BANASIK: Receive a text message.

PN697

THE DEPUTY PRESIDENT: Are noticeboards used?

PN698

MR BANASIK: There's a physical noticeboard, and that can be - - -

PN699

THE DEPUTY PRESIDENT: What is the status of email use in the company? It doesn't sound like the internal company email address is used for anything more than this access to an app.

PN700

MR BANASIK: Yes. I don't have any instructions that suggest it's broader than that, and the other issue of emails, it seems that the personal email addresses, like in the case of these bargaining reps, there was - I think it's three or four of them of them that have a personal email address for - and the balance - and otherwise, in terms of the social media and stuff, in my submission, it's (indistinct) and more (indistinct) by solutions are more likely to be effective when we (indistinct) Commission's order, rather than a place.

PN701

THE DEPUTY PRESIDENT: Thank you. Yes, in reply?

PN702

MR FODROCY: Just a minor point on the orders sought. Order 4, in relation to emails, is expressed as, 'Email all of its employees to whom the order relates and for whom it has a nominated email address.' If the employees were to provide an email address, whether it's personal - that they're comfortable to receive it, as such some have, and the company has possession of them, then the company should be able to comply with that order. That's really all I have to say on the proposed order at this time, Deputy President.

PN703

I just want to address a couple of things very briefly in reply, the first matter being that in substance, largely agreed with my learned friend's construction that he took you in terms of 489 and 498, there appears to be no disagreement between the parties in terms of the order or a decision made under 589 does not fall under subsection (3) of 598 but that it may be described as an order, and that is what occurred in this case in relation to order 2 of Commissioner Allison's 17 October orders and directions.

PN704

THE DEPUTY PRESIDENT: As I understood, the respondent's submission is that order 2 comes within the meaning of 598(4). Do you agree with that?

PN705

MR FODROCY: Yes.

PN706

THE DEPUTY PRESIDENT: Yes.

PN707

MR FODROCY: Yes. As I understood it, the empowering provision to make that order is 589(1), the decision to make that decision, and that by virtue of 598(4), having determined to make the decision, it may do so as an order, and Commissioner Allison did that. Perhaps we come to the same solution in different means, but (indistinct) of construction, to that extent.

PN708

Where I do disagree is the inference or the submission that it seeks to make from the distinction between subsections (3) and (4) of 598. Nothing in the Act, from what I am aware of, impels the distinction be made that is sought by the company that if a decision is made and described as an order or expressed as an order under 598(4), it is somehow of a different character than if it had been done as required by 598(3).

PN709

I certainly don't agree with consequences that flow from the respondent's submission that in 581(5) the reference to 'order' somehow means only an order made under 598(3), pursuant to 598(3), and not an order made under 598(4). It's quite clear, by the insertion of that subsection, parliament has intended to empower the Commission to make decisions in the Act as an order despite the empowering provision in the Act where the decision can be made not requiring such decision to be made by order. It's for the Commission to determine whether it wishes to describe it as an order.

PN710

In this case Commissioner Allison has done so, and for the reasons expressed in our closing submissions earlier, it could be that that is for good public policy reasons or in furtherance of the objectives of the Act. Because of the consequences that could attend to a bargaining representative not attending a section 448A conference, rather than by direction, the Commission makes an order that the employer must serve or ensure that it has received the orders and the notice of listing and alert those bargaining representatives to the requirement to attend because of the potential consequences for protected action.

PN711

As a consequence of how employee bargaining representatives are to appoint themselves or have someone else other than an employee org be appointed, the employee organisation, such as the union, when it is bargaining on behalf of the employees, by virtue of the Act, does not receive any bargaining representative appointments made by employee (indistinct).

PN712

In this case, Mr Mullins did not receive any appointments or notice of the appointment. He was only aware that there were others because he attended the meetings, but he, by virtue of the Act, is not required to get that, and so when it comes to applying for a protected action ballot order, the respondent, the employer, has control of the (indistinct) as to who is actually the bargaining reps, other than the union, and their preferred contact details, how to reach them.

PN713

By my instructions earlier, that's not the situation we find ourselves in here, because Mr Mullins said that he had mobile phone numbers of six of the employee bargaining reps, but if we're talking about whether the order 2 of Commissioner Allison's orders is somehow of a different nature, then the decision which is required by the Act to be made, that should be rejected, because it's of no less importance or significance, the order that has been made by Commissioner Allison here.

PN714

As I say, the consequences which can flow, the circumstances in which employee bargaining representatives appoint themselves or another person other than the union, it is essential for good public policy reasons, and to protect those employees' industrial rights, that the employer, being the most appropriate party to be ordered to do so - that the employer passes on the orders and the notice of listing and alerts those employee bargaining representatives to the requirement. I assume that is why they're expressed by the Commissioner as orders. Perhaps there are other reasons.

PN715

I want to come to what my learned friend said in reply to my submission that the company was careless.

PN716

THE DEPUTY PRESIDENT: Just bear with me for a moment.

PN717

MR FODROCY: Yes.

PN718

THE DEPUTY PRESIDENT: The application made to the Commission is an application under section 418.

PN719

MR FODROCY: Yes.

PN720

THE DEPUTY PRESIDENT: On what I've heard today, dealing with that in isolation, I could determine the application on the basis that I was satisfied that an order was made requiring service and it hasn't been complied with and is not saved by - comes within circumstances of 413(5), then I could determine that 418 application. Do you accept that as a proposition?

PN721

MR BANASIK: Yes, I accept that the other 418 industrial action be (indistinct).

PN722

THE DEPUTY PRESIDENT: All right. What you say is, 'Before you go ahead and determine that you should revoke that order.'

PN723

MR BANASIK: Correct.

PN724

THE DEPUTY PRESIDENT: But on the material that's before the Commission, there's nothing to stop me from determining a 418 application based on what I've heard, dealt with today.

PN725

MR BANASIK: On my submission, the Commission should determine the form F1 first, because what is being sought is retrospective, meaning that if the Commission were to simply determine that and to determine that it should grant retrospective leave, then there would be a situation of having made an order under 418 which - an order being taken on - - -

PN726

THE DEPUTY PRESIDENT: But the Commission could make an interim order.

PN727

MR BANASIK: The Commission could make an interim order while it conferred - if it needs to reserve in order to make its determination, on the basis that it can't make a determination under 418 in the time specified by the statute.

PN728

THE DEPUTY PRESIDENT: Yes. You've got to persuade me that I should exercise a discretion - - -

PN729

MR BANASIK: Yes.

PN730

THE DEPUTY PRESIDENT: - - - in relation to the application to revoke, but me declining to maintain that application doesn't mean you can't make it (indistinct), for instance, to the person who made the order.

PN731

MR BANASIK: It would be my submission that the most appropriate place for it to be determined - here. It would be, in my submission, problematic if there was an outcome where it was later decided that the order should be revoked and then there's the 418 application which is - I would submit we'd need to seek an application, I suppose, to revoke that. It would just lead to a vast multiplicity of proceedings in the Commission which can be dealt with in one proceeding.

PN732

Actually, it would be probably - I'd have to amend that submission, because the Commission's power to revoke a order I think is also permitted by 603(3), the same section - because 448A, I think, is in the same part of the Act as 418.

PN733

THE DEPUTY PRESIDENT: Yes.

PN734

MR BANASIK: So that would prevent the Commission from being able to revoke the 418 order, so it has the potential to lead to a very unjust outcome, where if it's later decided that that order made by Commissioner Allison should be revoked, where the respondent then might not have any recourse in order to have the record corrected in respect of the 418.

PN735

THE DEPUTY PRESIDENT: But an interim order may be made pending the outcome of an application, the F1 application.

PN736

MR BANASIK: The interim order would then be discharged on the making of the determination in respect of the 418, whether that's to make the order or to dismiss the application.

PN737

THE DEPUTY PRESIDENT: Mr Fodroczy?

PN738

MR FODROCZY: I largely agree with my friend's submissions, Deputy President.

PN739

THE DEPUTY PRESIDENT: What do you want to agree with?

PN740

MR FODROCZY: That if a decision on the 418 application was not able to be made today, in my submission an interim order would have to be made under 420, and if the Commission were to determine the respondent's application for a

revocation prior to making its decision on the union's application under 418, and if the Commission were minded to exercise the discretion to revoke, as a consequence the Commission could proceed to determine the 418 on the basis that contravention has not occurred.

PN741

I draw your attention to paragraph 50 of Esso, where I believe the High Court deals with this, not in so many words, but they do state in the middle of the paragraph, after the footnote 52:

PN742

If in exercise of the power conferred by 603 an order were made by the Fair Work Commission varying or revoking a previous order with effect from a time earlier than the alleged contravention, the effect would be that there would not have been a contravention of the order.

PN743

On the face of the Act, it's certainly open to the Commission to that course of action. We would submit that, for the reasons I've already given, that you don't exercise the discretion to revoke the order, but a most pressing issue for the applicant is that this issue be determined as swiftly as possible. From section 418 and 420 of the Act, parliament's intention is for these applications to be dealt with swiftly, and that's presumably because they affect the industrial rights of employers and employees, and in this situation the employees are, in a sense, in limbo as to whether they would be subject to a lock-out if they were to engage in their employee claim action. So we would - - -

PN744

THE DEPUTY PRESIDENT: They're not in limbo if there's an interim order made.

PN745

MR FODROCY: Not if there's an interim order, correct, and so whichever course is taken by the Deputy President, and if you form the view that you're unable to make the decision on the 418 application today, for the reasons I've just given, to come to that conclusion as swiftly as possible would be preferable for the applicant and its members so that an interim order may be made and they have certainty over the weekend.

PN746

THE DEPUTY PRESIDENT: An interim order must be made.

PN747

MR FODROCY: Correct. As I say, if you come to that conclusion.

PN748

THE DEPUTY PRESIDENT: Yes.

PN749

MR FODROCY: The interim order would be in relatively simple terms. On the face of 428, it would essentially just be that the industrial action, which in this

case is the lock-out as notified, not occur - I believe currently that it's occurring - if the interim order is made before 7 o'clock tonight, but if it were made after 7, my instructions are that there would be employees taking part in employee claim action which would enliven the lock-out as notified.

PN750

So it sort of depends on when the interim order is made, but if before 7 o'clock, I would expect the order to be relatively simple, that the industrial action as notified not occur or not be organised - and/or not be organised until such time as the 418 application is determined.

PN751

THE DEPUTY PRESIDENT: Yes. Thank you.

PN752

MR FODROCY: Thanks. Sorry, Deputy President, I just want to draw to your attention that - you would have already realised, I made several typographical errors in my outline of submissions where I refer to section 488A. That's obviously should be 448A. Apologies.

PN753

THE DEPUTY PRESIDENT: Yes. 448A. I took that when reading it. Thank you, though. Anything further before I adjourn?

PN754

MR BANASIK: If there is an interim order to be made, just in respect of the name of the respondent there's been a typographical error that we just want to make sure is not carried through, which is that at page 7 of the form F14 the applicant cites the respondent's company name as Orora Packaging Pty Ltd. It's Orora Packaging - - -

PN755

THE DEPUTY PRESIDENT: Australia.

PN756

MR BANASIK: - - - Australia Pty Ltd, which is correctly recorded elsewhere, but I wanted to alert, because Orora Packaging Pty Ltd is a different entity as part of the group, so to make sure it relates to the right entity.

PN757

THE DEPUTY PRESIDENT: Thank you.

PN758

MR BANASIK: Is the Commission considering - if there is to be an interim order, just so I can seek instructions and make any relevant submissions, my learned friend suggested that the order just simply be the substantive order. It didn't seek any orders related to notice. If the Commission is minded to make an interim order, is the Commission considering making any orders beyond what's been sought by my learned friend in his oral submissions?

PN759

THE DEPUTY PRESIDENT: The application seeks an interim order which prevents the respondent from acting on the notice given on 16 January 2024. That's, as I understand, what's sought by the interim order.

PN760

MR BANASIK: Yes.

PN761

THE DEPUTY PRESIDENT: And that flows, if one is looking at section 420(2), that it not occur or not be organised, yes.

PN762

MR BANASIK: Yes. If that's the extent of it, then I don't need to make any submissions.

PN763

THE DEPUTY PRESIDENT: That's how I understand you put it.

PN764

MR FODROCY: Correct. Correct.

PN765

MR BANASIK: Yes. I don't need to address the Commission about that.

PN766

THE DEPUTY PRESIDENT: Thank you.

PN767

MR FODROCY: I think, for clarity, Deputy President, my understanding is that it would not be necessary to go beyond referring to the respondent company in the correct name of the company, because if the interim order were to (indistinct) stop, not engage - not occur, sorry, and not be organised, that would cover the company and its officers and employees from - same sense, instructing a third party from doing so, because that instruction, in my mind, would be it organising, in breach of the interim order, but I don't suggest that it should go beyond applying to the respondent, because the respondent will be prevented from organising and taking steps in that organisation.

PN768

THE DEPUTY PRESIDENT: So you're suggesting I don't need to say 'Orora Packaging Australia Pty Ltd and any employees, directors, officers, agents of'.

PN769

MR FODROCY: It may be completely unnecessary for the sake of ensuring and covering it. I'd be content for such an order, but I think there's some authorities that say unnecessary verbiage, things like 'aiding and abetting', are not required, because that would be organising action and it's covered.

PN770

MR BANASIK: I think the point that (indistinct) more raising was that it be - the draft of it also refer to (indistinct).

PN771

THE DEPUTY PRESIDENT: That's not a - - -

PN772

MR FODROCY: I've already dealt with that separate matter.

PN773

MR BANASIK: So that was my (indistinct).

PN774

THE DEPUTY PRESIDENT: All right. Thank you. I'll consider the matter, reserve my decision, conscious of the requirements under the Act in terms of determining it one way or another, and the parties will be notified by email sent from my chambers as to the outcome. Thank you. We'll adjourn.

ADJOURNED INDEFINITELY

[4.46 PM]

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