



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER LEE**

**B2023/47**

**s.236 - Application for a majority support determination**

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

**Melbourne**

**10.00 AM, MONDAY, 1 MAY 2023**

**Continued from 23/02/2023**

PN1

THE COMMISSIONER: Good morning, all. Mr Amoresano, you're still representing the AMWU?

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MR L AMORESANO: Good morning, Commissioner. Yes, that's correct.

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THE COMMISSIONER: Yes, and Mr Macinnis, likewise for the respondent?

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MR A MACINNIS: Yes, Commissioner, that's so.

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THE COMMISSIONER: Thanks. Thanks for your attendance. This matter has been the subject of a hearing already and the provision of evidence, and directions were set for a further opportunity for the parties to assist me, particularly in respect of the bargaining representative issue, to file further materials.

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You've complied with those directions and I have read all those materials, and I'm grateful for those additional submissions. They're very helpful. And today is an opportunity for the parties to say anything further that they want to say about the matter, in any respect. So, over to you, Mr Amoresano.

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MR AMORESANO: Yes, Commissioner. So, I'm going to take your point in regard to the AMWU, that in our opinion, as standing as bargaining representative. So, to determining that we need to look at the AMWU eligibility rules, we believe that the rule that gives us standing, in particular, rule 1C (VIII), regarding technical officers and technical assistants, Commissioner, we believe that based on ResMed principle, we submit that the phrase, pretty much, 'technical officer,' and 'technical assistant,' should be construed liberally and

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non-technically.

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It should not be answer to the five – the capitalised letter, that does not mean that the role needs to be technical assistants and technical officers. We have also added to our submissions a definition of 'science technician' and 'chemistry technician,' and 'technical officer' from the Australian Bureau of Statistics, and we believe that can help the Commission determine how to interpret the words, 'technical assistant' and 'technical officer,' because those words are not defined in the AMWU rules.

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Those definition in the Australian Bureau of Statistics tells us that science technicians perform tests, and experiment; provide technical support to further assist with research and design, and production in different laboratory places; help

with control of the quality and quantity laboratory supplies, and we believe that those roles are the ones performed at Selborne by some of the employees.

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In fact, Selborne does control analysis and testing on site. They have a laboratory with testing capability. They use machinery such as centrifuge and spectrometers. They calibre and maintain equipment onsite and therefore, we argue, the respondents employ people as technical assistants and technical officer, as assigned under the AMWU rules.

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We also want to point out that the fact that the respondent believes they are in the pharmaceutical industry does not exclude the application or rules. First of all, the fact that the respondent argued is within the pharmaceutical industry. This does not exclude that they can also be in the science or/and chemistry industry.

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Also, we believe that the word, 'science,' should be construed broadly, and the meaning of, 'science,' is indeed quite broad and comprises a range of different disciplines. Commissioner, we are not asking the Commission to extend the definition of, 'science' to something like cooking a cup of tea, as suggested by the respondent.

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We are asking the Commission to extend the word, 'science,' to people that actually work in a laboratory environment, perform test analysis, they have laboratory equipment, and we believe that in this regard the word, 'science,' can definitely encompass those people in that environment.

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As I said before, the fact that the words, 'technical officer,' and 'technical assistant,' are capitalised, in our opinion it does not mean that the roles should be the same as the employee at Selborne. It's actually what they do that matters in this case, if they perform the work of technical officers or technical assistants.

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Finally, in regard to this firm, Commissioner, we would like also to draw the attention of the Commission to the Drafting, Production Planners & Technical Workers Award of 1998. We rely on that award because of ResMed principle, and not because there are words, the already meaning of the words in the AMWU rules.

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But that was another award when it was still standing provision, and in that award the AMWU was the sole party to that award, and that award was covering, particularly in Scale C and D, apply at – was covering several pharmaceutical companies and laboratories, such as – there's a list there but we mentioned four laboratory, Australian Laboratory Services Pty Ltd; and so on.

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They were all bound by the award, and AMWU was the sole union party. In that award it can also be seen there was work as technical officer, technical assistant, technicians. They were all broadly covered by that award, and so we believe that we have a standing as the AMWU in this case. And that's it, in regards to technical assistants and laboratory technician.

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THE COMMISSIONER: All right.

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MR AMORESANO: Thank you.

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THE COMMISSIONER: Anything else you want to say about any other matter, including whether there's a majority?

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MR AMORESANO: Yes, Commissioner. In terms of the majority, we believe we have satisfied the requirement, Commissioner. We have submitted to the Commission a list of people that signed the petition, and that was unproductive. We believe that the fact that Selborne's argue that we were not willing to give an unredacted version of the list to the employer does not disqualify us, and it actually is a pretty common rule of the court to not disclose who signed the petition to the employer.

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Also, the Commission requested to actually give an unredacted version to the Commissioner only, and that's what we did. So, we pretty much, urge the Commission to reject any inference or suggestion made by the respondent that we made up the number of the people that signed the list, and the majority supported termination, and we believe that the Commission should just compare the list that was submitted, with the list of the employee and the employer that was also submitted, and determine if there's a majority, and we believe there is.

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In terms of how the signatures were collected, Commissioner, Mr Wickham gave detailed evidence of how that was done. He collected most of the signatures, and when he was not able to, other employees reached out to Mr Wickham via email or messages, supporting the majority supported termination. We believe that this does not affect our collection of signatures.

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In fact, we rely on APESMA decision that I have cited in our submission on the fact that the Commission can use any method on how to determine if there is a majority of employees, and the employees can also express their opinion subsequently via email or messages and that does not infringe on our collection of signatures, Commissioner. That's all I have to say in regard to that.

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THE COMMISSIONER: All right, thank you.

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MR AMORESANO: Thank you.

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THE COMMISSIONER: Thanks, Mr Amoresano. Mr Macinnis?

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MR MACINNIS: Commissioner, I don't propose to repeat the matters that are set out in my written submissions, in detail. But what I do want to point out is that the oral submissions my friend has developed, completely fail to engage with what we say are the problems with their submissions, and the problems in respect of, not just the two limbs of the rules on which they rely, and I note there was a third limb pressed in written submissions which I will deal with, briefly but that's in fact pressed in oral submissions, but also don't engage with what we say are the problems in relation to the evidence that has been put before you, in relation to whether or not there is majority support for bargaining.

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So, I might, Commissioner, deal with the matters in that order.

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THE COMMISSIONER: Sure.

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MR MACINNIS: First, to deal with the two limbs which have been pressed up until the written submissions which were filed in reply, and then this third limb, the 1C(e) point. In fact, Mr Amoresano's oral submissions this morning have really indicated the vice in the approach to construction which is pressed upon you by the AMWU, which is, in effect, to say, well, if you can find a way to make these particular employees fit within the scope of the rules, then that's what you should do regardless of whether or not that works a violence in respect of the operation of the rules, more generally.

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It is often said that merely because something should be given a beneficial construction does not mean that it should be an idiosyncratic construction. We very respectfully say that what you are being asked to do by the union here is to give these rules an idiosyncratic construction, which works in this context, but without considering the wider context of that.

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I think what has been made clear by my friend's oral submissions this morning, is really what we said in our written submissions, that there is an attempt made by the union to say, well, you can equate 'TECHNICAL OFFICER,' capitalised, and 'TECHNICAL ASSISTANT,' capitalised with 'technician.'

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And what we said in our written submissions, starting with the bit of the unscientific approach of using a full text search to see how many awards refer to, 'technician,' but then setting out for you, Commissioner, some of the different ways in which, 'technician' is used, and I think what's particularly relevant, as we

said in paragraph 4(b) of our written submissions, is that the Black Coal Industry Award, as one example of the examples we put forward, includes a classification for a laboratory technician.

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My friend, I think, this morning, basically said if anybody's working in a laboratory, that means a technician and that means they're within coverage of the AMWU. The fact that the AMWU has coverage in the Black Coal Industry may be quite a surprising result for any number of people, not least the CFMMEU. But that, I think, is the problem.

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So, in taking you to some of the different awards in which the word, 'technician,' is used, as distinct from, as we indicated in our first round of written submissions, the awards in which capitalised, 'TECHNICAL OFFICER,' and capitalised 'TECHNICAL ASSISTANT,' are used, there really is no textual limitation in the AMWU's rules which would allow you to sensibly find, well, the technician's employed by Selborne are within the scope of the rules, but Broadcast technicians are not, Gaming technicians are not, Nail technicians are not.

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And for the union to say, look, we've found a classification in relation to the employment of science technician, and that's we would like the rules to mean, doesn't in my respectful submission, make it so. And I think the failure to engage with that and the need to show that capitalised, 'TECHNICAL OFFICER,' or capitalised, 'TECHNICAL ASSISTANT,' mean lower case, 'technician,' then where would the limitation of, 'technician' be within the AMWU's rules. In our submission that question can only be answered by saying, well, there must be some textual limitation, and there just isn't, in the relevant part of the AMWU rules, that textual limitation.

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So, our primary point on that, which we made in our written submissions and which I think is that the merit, in my respectful submission without wishing to pump up my own tyres too much, but that's then demonstrated by the AMWU, this morning, just not engaging with that point but also using as one of their examples, one that very much plays into what we put forward in relation to, 'laboratory technician.'

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So, our position there is that there is just no sensible and principled basis upon which the Commission could interpret capitalised, 'TECHNICAL OFFICER,' or 'TECHNICAL ASSISTANT,' in such a way that extended to what the AMWU is asking you to do here, without, as I say – and one always try to avoid floodgates arguments because they're usually bad, but here the extension of, 'technician,' into all kinds of technicians would, in my respectful submission, involve the AMWU getting a whole lot of coverage that would surprise many other industrial unions.

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We said in our written submissions, the passage that said, look, you shouldn't construe these things mechanistically, but nor can the Commission ignore the fact

that over many years, many people have sought to fashion union rules in such a way as to avoid demarcation. So, to put at nought all of that work that had been done, and by saying, 'technical officer,' can mean all kinds of technicians, is a construction, in my submission which the Commission should seek to avoid.

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And it can be avoided by simply saying, 'TECHNICAL OFFICER,' capitalised, and 'TECHNICAL ASSISTANT,' capitalised, have meanings in the State Government Agencies Award and the Higher Education Industry General Staff Award, and the Education Services Co-Secondary Education Award, and that's a sensible construction to use those words, which is consistent with the awards and doesn't involve doing violence to the scheme of ensuring that union rules do not, to any significant extent, overlap, for the very sensible industrial purpose of ensuring that demarcation disputes are avoided as far as possible. So, that's what I wanted to say in relation to the first limb, Commissioner.

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In relation to the foreman and supervisors of manufacturing processes limb, and these arguments really cover the administrative employees' limb, as well, because the union has conspicuously failed to identify the person on whose behalf it is acting, that is the principal reason why, in my submission, the Commission should not accept the arguments on these limbs.

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Because even if it is found on the downstream point that my client is in the industry of chemistry or the industry of science, the union, in order to be a bargaining agent, has to represent an employee, and so in circumstances where, although we may have many technicians, the number of people we have who would be foremen or supervisors in the manufacturing process, if any, must be a very small number.

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For the union to say, we are entitled to bargain based on these limited rules, would necessarily, in my submission, require the union to identify the particular person so that the Commission could satisfy itself that that person was a foreman or supervisor in manufacturing processes. And the same thing is true in relation to the administration limb, Commissioner.

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Again, in the absence of the identification by the union, not only of the person who it seeks to bargain on behalf of, but indeed any of the people who have apparently provided this majority support, the Commission could not, in my respectful submission, find that the union had established its burden.

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So, if that is the case, in the absence of identification of a person who is a foreman or supervisor, or a person who is an administrative employee who the union was bargaining on behalf of, that would be the end of the inquiry. And that is not a surprising position.

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The union has conspicuously decided to conceal the information in this matter, and I'll come to deal with what happened in relation to Mr Wickham's cross-examination on the last occasion, Commissioner, but will make the point that you specifically pointed out to Mr Wickham when he refused to answer the question about on whose behalf he was acting, or on whose bargaining interests he had, that you thought that I might be setting that up for a submission about whether or not the weight should be given to the evidence.

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Mr Wickham had that clearly indicated to him by the Commission, that by concealing the matter he was putting at risk the weight of the matter, and he made the decision not to provide that information. So, what we would say about that, Commissioner, is that the failure to provide that information in circumstances where the information was plainly necessary to determine the question about whether or not there was foreman or supervisor manufacturing processes that the union had, and on whose behalf it was bargaining, that failure to provide that information should, if no other matter is fatal to the application, if they look at the application.

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But even if we're wrong on that, Commissioner, even if you could somehow surmise or guess that there was a person who was a foreman or supervisor of the manufacturing processes, what we say is that the industry of chemistry and the industry of science involves a question of looking at what the nature is of the work that is being performed.

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And as we have set out in our submissions, Mr Pope gave evidence on which he was questioned but not shaken.

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Mr Pope's position is that Selborne is involved in the pharmaceutical industry and that, again, there is a sensible and tenable construction which can be given to the industry of science and the industry of chemistry, without saying everything that involves a scientific reaction or a chemical reaction is science; without saying everything that involves basic biochemistry is science, because the nature of basic biochemistry is that it's basic; and that sensible construction is to say, are you producing scientific chemical products, or are you carrying out science for the purpose of, for example, the chemical manufacturing industry; or are you doing chemistry or science, or some other aim. And as we have said in our written submissions, food manufacturing and brewing are good examples of industries in which basic biochemistry, and probably more than basic biochemistry is carried out on a regular basis.

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No one would suggest that the industry of brewing is the industry of chemistry or the industry of science. When you look at it from the perspective of how you interpret industry in the context of the union rules. So, in relation to the point that was raised in the written submissions about the administrative employee stream, the first thing we would say about that, Commissioner, is that if we're right on the



foreman and supervisors point, then the administrative employees' argument fails for the same reasons.

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Namely, 1), it's not an industry of chemistry and science; and 2), there's been a failure by the union to identify the administrative employee who they say is covered. But I think, perhaps more importantly, Commissioner, if you go to that rule, 1C(e) which was relied upon for the first time in closing submissions, you will see that it specifically carves out persons who are eligible to be members of the CPSU, as of their eligibility rules in 2002, and also persons to be eligible as members of the Managers & Professionals Association under its rules in 2002.

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So, in order for you to find that the union had covering based on that rule, it would be necessary to identify the person involved, so that it could be then considered whether they are eligible under the rules. So, for all of those reasons, in my respectful submission, Commissioner, we have set out in our written submissions and the union has had the opportunity to respond to what we say are the errors that the Commission is being urged to adopt in relation to the construction of union rules that would be necessary, in our respectful submission, for the Commission to come to the conclusion that the AMWU had coverage here.

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And in particular, in relation to the foreman limb and the clerical limb, if there was a valid basis for coverage, that could have been made clear by the union by indicating the employee whose bargaining interests they are seeking to represent, and it's been made clear on our side that that is what needed to be done and it hasn't, and hasn't been done.

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The slogan of the Washington Post Newspaper, as you may be aware, Commissioner is, 'Democracy Dies in Darkness.' A majority support determination is a kind of democracy. The union has chosen to shroud it in darkness and it should, if not die, at least be dismissed on that basis. So those are our submissions in relation to the threshold question of coverage.

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THE COMMISSIONER: Yes.

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MR MACINNIS: If the Commission does find that the union does have the entitlement to represent the industrial interests of an employee despite the fact that the employee has never been named, then in our submission, Commissioner, you should not find in relation to the test under Section 237 that the majority support has been determined.

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We appreciate that the cases make it clear that there are numerous different ways in which the Commission can be satisfied of that. There is plainly no one exacting test, and some of the authorities say it's not for the Commission to determine whether employees are acting sensibly or not sensibly, or whether they

have all of the information. It's not a counsel of perfection and we do not seek to say that it is so. But here we are so far away from a counsel of perfection that we say that the union has not discharged its burden.

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And, again, without rehashing the matters in the written submissions, it is, we think, extremely instructive that Mr Wickham has given very careful evidence about what it is that he said to the employees, and wanted to give speeches under cross-examination about how he'd done all that. So, he knows very clearly that the nature of what he's said to employees is important, because he gives that detailed evidence.

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And yet, there is no evidence at all that is put before the Commission in relation to the signatures, again, of unknown number, which were obtained. Some of them, it is said in the written submissions - there's no problem with the fact that they're obtained over the Christmas break because they can be obtained by email or they could be obtained by text message.

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I'm not sure if you've ever tried to sign a cheque with a text message, Commissioner, but in my submission, once you start to get to the stage of saying, well, we got a signature by text message, that just opens up the question of, from whom did these emails and text messages come. And, as again, we've said in our written submissions, the Commission does have the advantage of seeing, which we have not seen, the unredacted list.

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The Commissioner has the advantage that we have provided of the list of employees, and indeed, not only on the confidential basis but as you'll be aware, Commissioner, in Mr Pope's witness statement he expressly put out the list and gave you the further assistance, and gave the union further assistance, to say these are the people and this is what they do.

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THE COMMISSIONER: Yes.

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MR MACINNIS: So, we have not sought on our side of the record to obscure anything, because we think here that having a clear understanding of the position is advantageous to our case. The union could have, similarly, shone a light on its process. It has deliberately, and Mr Wickham's evidence makes it clear in the clearest possible way, decided that it would rather do this in darkness, in the hope that that will persuade you that there is majority support somewhere in the murk and the gloom.

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And what we would say is that particularly in circumstances where Mr Wickham was very unimpressive in his evidence, very prone to giving speeches, very prone to not answering questions, and very prone to concealing from the Commission and from my client, information which appears to be critical to the decision-

making task that you have, Commissioner, in relation to whether there is majority support.

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So, for all of those reasons we say that the union has not demonstrated that it has the entitlement to represent the interests of these members, but that even if you are against us on that, Commissioner, that there is nonetheless – and accepting that the threshold is not a demanding one – there is not sufficient evidence before you to enable the Commission to be affirmatively satisfied that the majority of employees of Selborne wish to bargain with the employer, and those are the basis on which we say that the application should be dismissed. Those are my submissions.

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THE COMMISSIONER: Thank you. Anything in reply?

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MR AMORESANO: Yes, Commissioner, thank you. I just want to add that the employees have made it very clear to us that they – for fear of retaliation, they do not want to disclose their names.

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THE COMMISSIONER: Yes.

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MR AMORESANO: I think this is not about having the other party in the darkness, having the respondent in the darkness, this is just a request by the employee, which is not an uncommon one. We all have been workers and they do not wish to disclose their names, because they fear of retaliation, as I said, and this is not uncommon.

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It is not about leaving the respondent in the darkness.

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We have provided an unredacted version of the signatures to the Commission, as requested, and we as the AMWU, we do not think that that's enough to not make a majority support determination. In regards to the member that we have signed, Commissioner, again, we have been asked not to disclose those names, for the same reason, to the respondent.

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I have been told that we could share those, at least, the member, with the Commission if requested, if that's something that the Commission wants, and we could also disclose that to the respondent if an undertaking is made that it will not be disclosed to any of the employer, and that's all I have to say in regard to this point.

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THE COMMISSIONER: So, on that last point, to counsel only, in other words?

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MR AMORESANO: Yes. Yes.

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THE COMMISSIONER: All right.

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MR AMORESANO: Yes. Yes.

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THE COMMISSIONER: So, there are you talking about your membership list, as it pertains to this employer?

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MR AMORESANO: Yes, that's correct.

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THE COMMISSIONER: Yes.

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MR AMORESANO: Yes.

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THE COMMISSIONER: All right.

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MR AMORESANO: On the assumption that, of course, it will not be disclosed to the employer, yes.

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THE COMMISSIONER: All right. I think there'd be some utility in that, given it is an essential feature.

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Mr Macinnis, could we deal with it on that basis, that it's your eyes only?

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MR MACINNIS: I could, Commissioner, but subject to asking for leave to come back to the Commission if it's necessary to get instructions on that. I mean, obviously, I don't have instructions to give the undertaking, but I'm happy to give the undertaking in a personal capacity, rather than sort of on behalf of the client.

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THE COMMISSIONER: Yes. Yes.

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MR MACINNIS: But I would want the opportunity, if once I had considered that and compared that with the list that is already there on Mr Pope's statement - - -

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THE COMMISSIONER: Yes.

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MR MACINNIS: And I'd need to get some instructions, that I could come back and ask to be released from that undertaking. And the matter could then be argued, and then if I'm not released from the undertaking, then I'm not released.

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THE COMMISSIONER: Yes, okay, provided it remains for me to decide whether or not to release you from the undertaking or not.

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MR MACINNIS: No, no. Of course, Commissioner. No, no.

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THE COMMISSIONER: Yes.

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MR MACINNIS: No, it's not a unilateral - - -

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THE COMMISSIONER: No.

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MR MACINNIS: But having given the undertaking, I'm bound until you release me, Commissioner, yes.

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THE COMMISSIONER: Yes. Yes.

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MR MACINNIS: Or until there's considered the AMWU.

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THE COMMISSIONER: Yes. All right, I think that would be appropriate, Mr Amoresano, because at the moment I'm in the position where I know the names of the people who have signed the petition, and I've got a full list and so have you, as Mr Macinnis point out, of all the names of the employees who would be in scope.

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MR AMORESANO: Yes.

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THE COMMISSIONER: And their positions. What I don't know, and I'm pretty sure there's no evidence directly on this point as to whether everyone who signed the petition is a member of the AMWU – I don't think Mr Wickham gave any evidence to that effect, and it may be that they are and it may be that they're not, and it might be that some of them are non-members and they signed the petition anyway, which is fine, of course, but on this point about whether there is any members who are relevant for the purpose of the argument that I'm not going to repeat, because you've both covered it extensively, this morning - - -

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MR AMORESANO: Yes.

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THE COMMISSIONER: I think that would be useful to have that provided. So, my direction is that it be provided on the basis of the undertaking that has been given by

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Mr Macinnis that it will not be shared with his client.

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MR AMORESANO: Yes.

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THE COMMISSIONER: Let's start with, what's the timeframe for providing that information, Mr Amoresano?

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MR AMORESANO: Commissioner, I think next – tomorrow, the next day?

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THE COMMISSIONER: Yes, by close of business tomorrow?

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MR AMORESANO: Yes.

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THE COMMISSIONER: Mr Macinnis, if you can give an indication to my chambers, say, 48 hours after that if you're content for the undertaking to remain on that basis, or if you want to argue to be released from it.

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MR MACINNIS: Certainly, Commissioner, yes. That's an appropriate course.

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THE COMMISSIONER: Yes, all right. We will proceed on that basis. If there's nothing more, we'll adjourn and we'll take that next step, and we'll see where that takes us, and at some point once the process is finished, one way or another, I'll indicate that in writing to the parties, and the point at which I'm reserved on the decision. But I am obviously not there yet. We need to take this extra step.

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All right, nothing more?

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MR MACINNIS: Nothing further, Commissioner.

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MR AMORESANO: Nothing.

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THE COMMISSIONER: We're all clear? Very good. Thanks for your attendance today, and I look forward to receiving that additional material. Have a good day.

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MR AMORESANO: Thank you, Commissioner.

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MR MACINNIS: Thank you.

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THE COMMISSIONER: We're adjourned.

**ADJOURNED INDEFINITELY**

**[10.33 AM]**