



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2022/35

s.158 - Application to vary or revoke a modern award

**Application by Woolworths Group Limited
(AM2022/35)**

General Retail Industry Award 2020

Sydney

11.30 AM, MONDAY, 27 FEBRUARY 2023

Continued from 21/02/2023

PN94

PRESIDENT HATCHER: Good morning, everybody. Look, this is going to be on record unless we reach some point where there's a consensus that it might be useful to go off record. And so, for that purpose, particularly with the SDA crowd at the end of the table, can you keep your voices up so that we can record it. All right, so, I'll take the appearances. So, Mr Gotting, you appear with Mr Morris, Ms Kornman, Ms Kerr and Ms Mooy for Woolworths.

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MR A GOTTING: And Ms Young as well. She's via video link.

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PRESIDENT HATCHER: Ms Young. All right, okay. Then for the Transport Workers' Union we have Ms Biviano and Mr Webb.

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MS L BIVIANO: Yes, (indistinct).

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PRESIDENT HATCHER: Ms Bhatt, you appear for the Ai Group.

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MS R BHATT: Yes.

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PRESIDENT HATCHER: Mr Izzo, Ms Mamblona, you appear for ABI and New South Wales Business Chamber.

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MR L IZZO: Yes.

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PRESIDENT HATCHER: Ms Cunningham, you appear for Coles. Mr Guy, and Mr Smith and Mr Worsley appear for the SDA.

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SPEAKER: Yes.

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PRESIDENT HATCHER: And we've dealt with Ms Young. And then on Teams we have Ms Dooley for the United Workers' Union.

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MS L DOOLEY: Yes, that's correct. My colleague, Elliott Womersley is here also. And my colleague, Emily Warman.

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PRESIDENT HATCHER: All right, thank you. And Ms Carroll for the National Retail Association.

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MS CARROLL: Good morning.

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PRESIDENT HATCHER: So is that everybody? All right. Well, the purpose of the conference today is hopefully to elucidate what are the issues in respect of the application and then to see whether any of those issues can be resolved, or at least narrowed.

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I think the starting point for the consideration is what the parties say about the current (audio malfunction), that is, having regard to the type of establishment you just saw at the inspection. I'd just like to establish the position of the parties. That is, whether they contend that the work is already covered by the Retail Award, or whether they contend that it is covered by some other award. And if it's the latter, can I ask the parties to briefly identify why they say it would be covered by some other award. So I'll start with you, Mr Gotting. What's your position.

PN110

MR GOTTING: Your Honour, the position is that the relevant employees that work in the Customer Fulfilment Centres or in the eStores are covered by the GRIA - General Retail Industry Award 2020. Most of the employees could be covered in the Retail Employee Level 1 classification.

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PRESIDENT HATCHER: So that's because - - -

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MR GOTTING: Of the (indistinct words).

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PRESIDENT HATCHER: Woolworths falls in Clause 4.18 – Woolworths falls in the General Retail Industry as defined?

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MR GOTTING: That is so.

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PRESIDENT HATCHER: And you're saying in relation to the definition of 4.2(b) that the function being engaged in is the retail sale or hire of goods.

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MR GOTTING: That is so. And Your Honour will see that subparagraph (b) deals with food. Your Honour will also see that subparagraph (d) deals with personal and recreational goods. And additionally, Your Honour will see after paragraph (h), there is, excluding the following, that are covered by other awards, and we say that none of the exclusions apply to the work that's covered by the Customer Fulfilment Centre, or the eStores (indistinct).

PN117

PRESIDENT HATCHER: No doubt someone will make reference to (indistinct) Warehousing and Distribution. So is there a distinction there that (audio malfunction) - - -

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MR GOTTING: The distinction is that the purpose of the facilities, that is, the Customer Fulfilment Centre, as well as the eStore, is not to store on an interim basis, items for eventual transport to a wholesaler or retailer. But rather the purpose is to fill orders that have been placed online. And because the purpose is different does not constitute a warehouse, and it's not involved in warehousing and distribution.

PN119

PRESIDENT HATCHER: Am I right in thinking that the traditionally established tradition is that the storage areas in physical supermarkets have always been regarded as coming under general retail.

PN120

MR GOTTING: Yes. If Your Honour's asking about the dock area that's out the back - - -

PN121

PRESIDENT HATCHER: In a supermarket.

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MR GOTTING: In a supermarket, which receives the goods from a truck, typically from the distribution centre; as well as if there is some orders that are going out from the supermarket by way of a delivery vehicle, it's obviously a matter of more recent application. Your Honour may be aware of the Coles litigation, *TWU v Coles*, determined by the Full Court of the Federal Court in 2014. But that was a recent indication of the Retail Award covering the work that was done in that dock area out the back, and then the actual delivery of the retail items, from the back of a supermarket.

PN123

PRESIDENT HATCHER: Okay. I might ask Woolworths to go next. Do you have any different position.

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MS CUNNINGHAM: Coles (Indistinct words).

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PRESIDENT HATCHER: Sorry.

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MS CUNNINGHAM: No, we have the same position as Woolworths, Your Honour.

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PRESIDENT HATCHER: All right. Well, what about the SDA? Mr Guy?

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MR GUY: Yes, Your Honour. The position of the SDA is (indistinct) to that of Woolworths as far as (indistinct) is concerned.

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PRESIDENT HATCHER: And on the point of the SDA, how does one distinguish between Woolworths or Coles type situation, and the retailer – I mean, you might say you're covered by this award – somebody who sells wholly online, directly to customers. And what covers them?

PN130

SPEAKER (SDA): Property. What was the purpose of what the (audio malfunction). You take Amazon, it's probably the classic example, which actually stores (indistinct words) another retailer is quite substantial. About 30 percent of its business is actually distribution for other retailers (indistinct words) storage services (indistinct words) that it's structured. But where the purpose of the (audio malfunction) is to go direct to customer (indistinct words).

PN131

PRESIDENT HATCHER: So that would apply to a wholly online retailer?

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SPEAKER (SDA): I believe so. Unless they were doing a market based operation for giving other retailers on their behalf, and if they were just doing it themselves. On behalf of themselves, so, yes, that certainly is general retail could be covered by both the award and covered by (indistinct words) in New South Wales by the Retail Trading Act, for example. (Indistinct) operate that off (indistinct words).

PN133

PRESIDENT HATCHER: All right. Ms Bhatt, do you want to go next?

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MS BHATT: Happy to Your Honour. There's not much that I can add to what Mr Gotting already said in support of Woolworths' position.

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PRESIDENT HATCHER: Thank you. Do you identify any distinction between the type of facility which Woolworths and Coles operate, and a wholly online retailer?

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MS BHATT: There might be some distinction that (indistinct) drawn depending on the other operations that are conducted by that business. So whether they have any shopfronts, if they do, where they're located. Are they adjacent to or adjoined (indistinct) the facility from which online orders are distributed. Or is it truly an online only - - -

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PRESIDENT HATCHER: If it truly is – this is hypothetical, but if it's truly online only, do you have a position about what award covers it?

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MS BHATT: No. I don't think (audio malfunction).

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PRESIDENT HATCHER: Mr Izzo, Ms Mamblona, what's your position?

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MR IZZO: So, our position would be to agree with both Mr Gotting and the SDA. So we agree with all the positions put by Mr Gotting. But in terms of the wholly online retail question, we would agree with the SDA that if they are conducting retail sales, and you look at the structure and purpose of the business, and it is to be a genuine online retailer, not to sell to other retailers or wholesalers, then they're capable of being covered by the Retail Award.

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PRESIDENT HATCHER: Right. And Ms Carroll, do you take any different position?

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MS CARROLL: Thank you, Your Honour. No, I agree with the position as put by Mr Gotting and the SDA. And Mr Izzo just summed it up really nicely, that for wholly online businesses or retail businesses selling direct to consumer, we agree that the Retail Award can apply to those businesses.

PN143

PRESIDENT HATCHER: All right. Okay, so let's go to the TWU next. So what award do you say covers the specific facility we just saw this morning, to start off with.

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MS BIVIANO: Yes, so the specific – we would still say consistent with our position paper that there's still a question of coverage, and whether or not there are other awards that might cover in our case that would be the Road Transport and Distribution Award, having regard to the relevant provisions of 4.2 of the Award. That (indistinct) et cetera, for the focus of – in the context of their (indistinct) distribution facility, to have a right to the customer.

PN145

The question of whether the fact that the goods are ordered online, I don't – I must admit, I don't have instructions as to whether or not that creates some sort of separate arrangement. Although, the thing is, from the TWU's perspective, and previous discussions (indistinct). That is that those goods are still stored in (indistinct) those facilities, are picked and then distributed from those facilities consistent with any other distribution site.

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PRESIDENT HATCHER: So wouldn't the logic of that position suggest that the same would apply to an instore, home delivery operation?

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MS BIVIANO: An instore?

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PRESIDENT HATCHER: That is, one where Woolworths is delivering to customers from a physical store, not - - -

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MS BIVIANO: There is challenges in respect of that which we're still working through.

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PRESIDENT HATCHER: What are they?

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MS BIVIANO: Well, we say that because the store, in and of itself, is purely established for the purpose of distribution, it's as distinct to operations that are attached to an existing supermarket where it's accepted, and I think the Coles online matter was discussed, where there's been previous discussions about the distribution from the supermarket, of goods.

PN152

PRESIDENT HATCHER: I can't remember, did the Full Court decision discuss delivery from a wholly online centre?

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MR GOTTING: No.

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MR GOTTING: I'm sorry. No, that wasn't directed to me, I apologise.

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PRESIDENT HATCHER: Well, anybody, (indistinct words).

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MR GOTTING: The answer is, no. It was that the factual circumstances were that the online orders were fuelled by a supermarket. Then the other issue – sorry – I should emphasise that the particular classification that (indistinct) worker that was an issue in that case was a delivery person. That is, the person that took the filled order, once it had been consolidated, and delivered it to the customer. And that's a different circumstance to the application by Woolworths. In that, there's no aspect of the Woolworths application that relates to that delivery aspect. I'm sorry to cut Your Honour - - -

PN157

PRESIDENT HATCHER: No, (indistinct words). So, I'm just looking at the Award. So, you say 4.2(b) applies to (indistinct) Woolworths and the road transport and distribution industry when it conducts the operation, is that right?

PN158

SPEAKER: (Indistinct).

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PRESIDENT HATCHER: Is there a definition of 'Distribution facility'?

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SPEAKER: Yes.

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MS BIVIANO: Yes, there is. In clause 2.

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PRESIDENT HATCHER: Okay. And finally, Ms Dooley, what's the UWU's position?

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MS DOOLEY: Thank you, Your Honour. The UWU's position is that the workers that are doing the work of the like that was inspected this morning would be covered by the Storage Services and Wholesale Award. And we've detailed that in our position paper from paragraph 8. So we've said that employers for whom these workers work, are engaged in the storage, services and wholesale industry which is defined in Clause 4.2 of the Storage Services and Wholesale Award. So that's receiving, handling, storing, freezing, refrigerating, bottling, packing, preparation for sale, sorting, loading, dispatch, delivery or sale by wholesale of produce, goods or merchandise, as well as activities and processes connected and incidental or ancillary.

PN164

PRESIDENT HATCHER: Does the phrase, 'Sale by wholesale' operates a narrow (indistinct) of a definition?

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MS DOOLEY: I beg your pardon?

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PRESIDENT HATCHER: Yes, Clause 4.2 of the Storage Services Award, in the definition you've just taken us to, refers to sale by wholesale. Does that operate to place the definition and a context different to that from the Woolworths facility, and its retail sale, not wholesale?

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MS DOOLEY: No.

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PRESIDENT HATCHER: Why is that?

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MS DOOLEY: Sale by wholesale is part of that definition. So it's one element which stands separate to, for example, receiving or handling or storing. It's one of many different elements that go to make up that definition.

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PRESIDENT HATCHER: All right. So next question. I'll start with you again, Mr Gotting. Does that mean that, in dealing with this application, first question to be decided is what award currently covers (indistinct)?

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MR GOTTING: Yes. Could I just respond to one other aspect.

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PRESIDENT HATCHER: Yes.

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MR GOTTING: And that is in each of the awards there's a most appropriate classification clause. And the position of the applicant is that the most appropriate classification is, as an alternate argument, is the Retail Award, rather than the Warehouse Award or the Transport Award.

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PRESIDENT HATCHER: So does that involve – perhaps it doesn't – does that involve a concession that, leaving aside the most appropriate clauses, (indistinct words) in one award?

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MR GOTTING: The primary position is that it does not. But as a fall back, as an alternate to the extent that is necessary, then we rely on that Clause 4.7, the most appropriate classification. I think there's no doubt there's a dispute between this.

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PRESIDENT HATCHER: Yes.

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MR GOTTING: As to the coverage.

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PRESIDENT HATCHER: Well, does anyone disagree that that would be the first question to be determined in this matter? That is a preliminary question. Does the UWU agree with that, Ms Dooley?

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MS DOOLEY: Yes, Your Honour. Yes, I had thought, and it may be a later question, but a question about what the nature of the facility is that was visited this morning. Which may be connected with the question about award coverage.

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PRESIDENT HATCHER: Well, of course, I mean, Woolworths is raising the context of that specific type of facility. I don't understand Woolworths to be raising any broader proposition concerning online retailing. That is as I understand, it's seeking to confine its application to the circumstance of the facility of that specific type.

PN181

MR GOTTING: That is so. There's two stores. So we saw one store this morning. The Customer Fulfilment Centre. There's another store which is called an 'eStore', which is effectively a supermarket on one half of the store, and electronic fulfilment on the second half. And our application applies to both. But to be clear, we're not seeking to suggest that our definitions cover all the types of online fulfilment facilities. There may be a range of other online fulfilment

facilities that are not covered by our definition. And we're not seeking to be exclusive. So, in that sense, I endorse what Your Honour's put.

PN182

PRESIDENT HATCHER: So, Ms Dooley, it would seem that the application's only dealing with an online fulfilment facility operating in connection with a brick and mortar retailing entity. Does that change anything?

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MS DOOLEY: Your Honour, my concern was for a third type of facility which may service online orders that also may act as a distribution centre delivering goods to a retail outlet for then further sale.

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PRESIDENT HATCHER: Well, if your concerned about that, is there any room for you to have a discussion with Woolworths to separate what they're concerned about and what you're concerned about?

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MS DOOLEY: There may well be. I guess the concern is that any change to definitions or creations of new definitions may apply more widely than to what Woolworths two particular examples are, or that in the future, what is now a CFC may transform half of its operations into a distribution centre and then does the award coverage change in that instance, or remain the same? Or is it split?

PN186

PRESIDENT HATCHER: Well, I understand – I mean, Ms Dooley, it seems to me, the same applies to the TWU. There's two ways we can do this. We can simply launch into an arbitration where the preliminary question is, what award covers this work, and you'll get an answer. And you can presume that we would then make variations to confirm the answer that we've given, and everyone's stuck with the result.

PN187

But alternatively, if the UWU and/or the TWU think that there's some possibility of engaging in a dialogue to come up with a form of words which deals with the Woolworths situation, and the analogous Coles situation, but doesn't extend it to anything else that the parties are concerned about – if there's room for that to occur, well then, I'll (audio malfunction) it. I think that's the fork in the road now that is, whether you want to take a chance with an arbitration, which may, on one view, involve us – and I anticipate this will go to a Full Bench involving a Full Bench determining what is the most appropriate award, if there's overlap in coverage. Or whether there's a way in which the parties can come up with a form of words which deal with the specific situation the applicant's concerned with and leaves untouched anything else which the parties might be concerned about.

PN188

MS BIVIANO: Well, Your Honour, from the TWU's perspective, certainly we've reached out and intend to hold discussions with Woolworths in the first instance to try to see if there's any way that we can narrow issues, and hold those discussions. So in the first instance, certainly allowing those to occur for a period

– those discussions to occur for a period would be useful. Whether, ultimately, we report back and the question is ultimately required to be (indistinct words) position of the TW, which arbitration is another matter. But certainly, in the first instance, first just allowing those discussions to (indistinct words) would be useful.

PN189

PRESIDENT HATCHER: All right. And for the UWU, Ms Dooley? Do you want to try and engage in that process first or should we just decide the, what I think, is the anterior question?

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MS DOOLEY: It may be useful to have a discussion. I'm not sure it will alter the UWU's position ultimately. But it may be useful to progress the matter.

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PRESIDENT HATCHER: Well, it's a matter for you, Ms Dooley. I mean, I don't want to waste people's time. The applicant's got a right to have its application heard. If it would be a useful step, obviously it should occur. But if the message you're sending is that it won't – it's not likely to result in an outcome, then the alternative would be simply to proceed to arbitration.

PN192

MS DOOLEY: I think it may be useful as my colleague from the TWU has suggested. It may be useful to narrow issues that are in dispute. I'm not sure that it will resolve the issues that are in dispute. But it may be useful to narrow those issues. And so we would be prepared to participate on that basis.

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PRESIDENT HATCHER: So just to be clear; narrow them in what way?

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MS DOOLEY: I don't know that I can answer that question yet, Your Honour.

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PRESIDENT HATCHER: Well, what do you say, Mr Gotting?

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MR GOTTING: Woolworths is willing to engage in some discussions so long as we can have an appropriate timeframe so when those discussions – so there's not too much slippage. It's obviously a real issue that needs to be resolved. With respect, it should be dealt with in an appropriate timeframe. But we're willing to have some discussions today, and with the UWU, if they're willing to engage in those today, it may be that we should just set an outside date by which the discussions need to be finalised. And then to have a timetable for the determination of the preliminary question.

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PRESIDENT HATCHER: Right. And how long do you think that should be?

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MR GOTTING: Fourteen days. As an outside. We're willing to participate today. I understand that we're also willing to have (audio malfunction) other discussions with the TWU and the UWU. We're obviously concerned just to ensure that the issue gets resolved in a timely way.

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PRESIDENT HATCHER: Ms Biviano, are you content with that timescale?

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MS BIVIANO: Yes, (indistinct).

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PRESIDENT HATCHER: Ms Dooley, are you content with that timescale?

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MS DOOLEY: Yes, thank you, Your Honour.

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PRESIDENT HATCHER: All right. So do the parties wish to make use of today or?

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MR GOTTING: From the applicant's part, yes.

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PRESIDENT HATCHER: Ms Biviano? Ms Dooley?

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MS DOOLEY: Yes, thank you, Your Honour.

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PRESIDENT HATCHER: All right. Well, what I think I'll do, is I'll allow the parties – we'll keep the facilities going, we'll obviously turn off the recordings. We'll allow the parties to have whatever discussion they need to have today. And I'll leave it to you as to who wants to participate in those discussions or who doesn't. Can the parties revert to my associate as to whether they finished or whether they think I - will be any purpose in me having any further involvement.

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SPEAKER: Thank you.

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PRESIDENT HATCHER: All right. Well, I'll leave you to it on that basis, and I'll be available to provide assistance if that will help.

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SPEAKER: Thank you.

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PRESIDENT HATCHER: Thank you.

ADJOURNED INDEFINITELY

[11.55 AM]