



# DECISION

*Fair Work Act 2009*

s.229 - Application for a bargaining order

## Construction, Forestry, Maritime, Mining and Energy Union

v

## DP World (Fremantle) Limited T/A DP World

(B2019/478)

DEPUTY PRESIDENT BINET

PERTH, 8 JULY 2019

*Application for Bargaining Orders - Interim Decision.*

### Introduction

[1] On 16 June 2019 the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) applied (**Application**) to the Fair Work Commission (FWC) pursuant to section 229 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a bargaining order in relation to its negotiations with DP World (Fremantle) Limited t/a DP World (**DP World**) for a replacement agreement.

[2] The Application arose from the refusal by DP World to participate in scheduled bargaining sessions if those sessions were attended by Mr Shane Bickley (**Mr Bickley**). Mr Bickley is an employee of DP World who is currently certified unfit to perform his normal duties.

[3] The Application was listed for a conciliation conference on 18 June 2019. The Application could not be resolved by conciliation and the Application was listed for a hearing on 30 July 2019 (**Substantive Hearing**).

[4] On 16 June 2019 the CFMMEU sought interim orders in relation to the Application prior to the determination of the substantive merits of the Application (**Interim Orders**).

[5] A hearing to determine the application for interim orders was held on 3 July 2019 (**Interim Hearing**).

### Permission to be represented

[6] DP World sought permission to be represented at the Interim Hearing by Mr Stephen Crilly (**Mr Crilly**) of Seyfarth Shaw Australia. The CFMMEU opposed this request.

[7] Section 596 of the FW Act provides as follows:

*“s. 596 Representation by lawyers and paid agents*

- (1) *Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before FWA (including by making an application or submission to FWA on behalf of the person) by a lawyer or paid agent only with the permission of FWA.*
- (2) *FWA may grant permission for a person to be represented by a lawyer or paid agent in a matter before FWA only if:*
  - (a) *it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or*
  - (b) *it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or*
  - (c) *it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.”*

[8] DP World submitted that the Interim Hearing would be attended by complexity because it involved questions as to the extent, if at all, the good faith bargaining obligations require an employer to accommodate the attendance of an employee at bargaining meetings who is not themselves a bargaining representative; the scope and extent of the FWC’s powers under sections 230 and 231 of the FW Act and the appropriate approach to an application for interim orders.

[9] DP World submitted that in light of the complexity of the matter the application for interim orders could be determined more efficiently if it was represented by an experienced advocate with professional obligations to the FWC, who would be able to assist the FWC.

[10] DP World submitted that it was unable to effectively represent itself because it was concurrently engaged in other proceedings in the FWC, including urgent proceedings under section 418 of the FW Act in matter C2019/3975, and a range of other arbitral proceedings.

[11] DP World indicated that it would not oppose the granting of permission to be represented to the CFMMEU if it were sought. DP World noted that if permission to be represented was not sought by the CFMMEU that the CFMMEU would be represented by Mr Luke Edmonds (**Mr Edmonds**), a solicitor employed by the CFMMEU.

[12] The CFMMEU opposed the granting of permission to be represented to DP World on the grounds that the only matter to be determined by the FWC at the Interim Hearing is the appropriate approach to the making of interim orders. The CFMMEU submitted that tests to be applied are not complex and should be well known to any senior human resource professional or junior legal practitioner.

[13] The CFMMEU submitted that in the absence of any identified clashes of listing dates, in light of the availability of Seyforth Shaw Australia to assist in the preparation of submissions and given the qualifications and experience of its in house personnel that DP World had not demonstrated that it is in fact unable to effectively represent itself.

[14] In *Warrell v Walton*<sup>1</sup> the Federal Court held that:

*A decision to grant or refuse “permission” for a party to be represented by “a lawyer” pursuant to s 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted. It is apparent from the very terms of s 596 that a party “in a matter before FWA” must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by s 596(2) have been taken into account and considered. The constraints imposed by s 596(2) upon the discretionary power to grant permission reinforce the legislative intent that the granting of permission is far from a mere “formal” act to be acceded to upon the mere making of a request. Even if a request for representation is made, permission may be granted “only if” one or other of the requirements in s 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequent exercise of the discretion conferred by s 596(2): i.e., “FWA may grant permission...”. The satisfaction of any of the requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting “permission”.*

[15] While the Interim Hearing does not require a final determination of the merits of the Application it does require a finding to be made as to whether there is a serious question to be tried.<sup>2</sup> This requires at least a cursory consideration of the obligations imposed on the parties by, and the scope and extent of the FWC’s powers under, sections 230 and 231 of the FW Act. Taking into account the complexity of the issues to be considered I was satisfied that granting leave to DP World to be represented would enable the matter to be dealt with more efficiently.

[16] Given Mr Edmond’s extensive experience and skill as an industrial advocate I was not of the view that this created unfairness as between the parties.

[17] At the Interim Hearing Mr Edmonds appeared on behalf of the CFMMEU and called Mr Adrian Evans (**Mr Evans**) as a witness. Mr Evans is the Divisional Branch Secretary of the WA Branch of the Maritime Union of Australia Division of the CFMMEU. As part of this role he has responsibility for representing members of the CFMMEU to be covered by the Replacement Fremantle Agreement.

[18] DP World was represented at the Interim Hearing by Mr Crilly of Seyforth Shaw Australia who called Mr Glenn Donald Wayne (**Mr Wayne**) as a witness. Mr Wayne is the General Manager – Operations at DP World’s Brisbane Terminal. He was the acting General Manager – Operations of the DP World’s Fremantle Terminal for a period of roughly 6 months in 2014. As a consequence of management changes at the Fremantle Terminal Mr Wayne is participating in the negotiations for the replacement Fremantle Agreement.

## **Background**

[19] DP World is part of the DP World Australia group of companies which employs employees to perform stevedoring duties at its container terminal operations in the Ports of Brisbane, Melbourne, Sydney and Fremantle pursuant to the terms of the following agreements (**Existing Agreements**):

- a. *DP World Brisbane Enterprise Agreement 2016*;
- b. *DP World Melbourne Enterprise Agreement 2016*;
- c. *DP World Sydney Enterprise Agreement 2015*; and
- d. *DP World Fremantle Enterprise Agreement 2015* (**Fremantle Agreement**).

[20] The Existing Agreements are each composed of a “Part A” which is identical in each of the Existing Agreements and a “Part B” which consists of terms and conditions that apply locally at each separate Terminal location.

[21] The CFMMEU is covered by the terms of each of the Existing Agreements.

[22] Bargaining to replace the Existing Agreements commenced by way of a Notice of Employee Representational Rights (**NEER**) issued by DP World on or around 16 August 2018.<sup>3</sup>

[23] The CFMMEU and DP World have been involved in negotiations in relation to Part A of the proposed replacement agreements (**Replacement Agreements**) since the NEER was issued.<sup>4</sup>

[24] The CFMMEU’s bargaining team for the purposes of the Part B discussions to replace the Fremantle Agreement is composed of officials of the CFMMEU and representatives from DP World’s workforce who are elected to the Employee Representative Committee (**ERC**). It is Mr Evan’s evidence that it is a longstanding custom and practise at this worksite that the bargaining team for the workforce is constituted this way.<sup>5</sup>

[25] Mr Bickley is a member of the ERC. He is currently certified unfit to perform his normal duties due to a back injury he has sustained. He has lodged a worker’s compensation claim in relation to the injury but this claim has not yet been accepted by the insurers.<sup>6</sup> Mr Wayne asserts that the CFMMEU has never previously requested that that an employee certified unfit for work participate in bargaining meetings.<sup>7</sup>

[26] The parties first met in relation to the Part B negotiations for the proposed Fremantle Agreement on 1-2 May 2019 (**Replacement Fremantle Agreement**).<sup>8</sup> According to Mr Evans at this meeting the parties simply outlined their respective claims in relation to Part B and there was limited substantive negotiations.<sup>9</sup>

[27] The next scheduled Part B negotiations occurred on 30-31 May 2019.<sup>10</sup> According to Mr Evans on 29 May 2019 Mr Bickley contacted Mr George Coffey (**Mr Coffey**), DP World’s Labour Manager, and informed Mr Coffey that he would be attending the negotiations the following day. Mr Evan’s says that Mr Bickley provided Mr Coffey with a medical certificate certifying Mr Bickley fit to attend the negotiations (**Medical Certificate**).<sup>11</sup>

[28] According to Mr Evans later the same day Ms Heather Stevenson, DP World’s National Compensation Manager, contacted Mr Bickley and informed him that he would not

be permitted to attend the scheduled negotiations the following day without a return to work program being put in place.<sup>12</sup>

[29] The Part B negotiations for the Replacement Fremantle Agreement proceeded on 30 and 31 May 2019 in Mr Bickley's absence while he obtained a return to work program. Mr Bickley obtained a return to work program from Freshstart Injury Management (**Return to Work Program**) and, according to Mr Evan's, duly provided the Return to Work Program to DP World.<sup>13</sup>

[30] The next bargaining for the Replacement Fremantle Agreement was scheduled to occur on 13 and 14 June 2019 at the CFMMEU offices in Fremantle. Mr Bickley attended the CFMMEU offices in Fremantle to participate in those negotiations.<sup>14</sup>

[31] Before negotiations commenced on 13 June 2019 an exchange occurred between the CFMMEU bargaining representatives and the DP World bargaining representatives. Mr Evans and Mr Wayne have different recollections about precisely what was said but in essence agree that DP World representatives expressed concern about Mr Bickley's attendance at the meeting and indicated that DP World had not received a copy of Mr Bickley's Medical Certificate or his Return to Work Program.<sup>15</sup>

[32] The negotiations did not proceed, and the DP World negotiation team withdrew from the CFMMEU premises.

[33] The same day the CFMMEU provided a copy of the Medical Certificate and the Return to Work Program to DP World. According to Mr Wayne, a review of the medical documentation identified some issues of concern for DP World which required further investigation. DP World informed the CFMMEU in writing that DP World would only participate in the scheduled Part "B" negotiations for the Replacement Fremantle Agreement if Mr Bickley did not attend.<sup>16</sup>

[34] In a letter to the CFMMEU sent the same day DP World set out the grounds for refusing to negotiate in the presence of Mr Bickley. In summary those grounds were:

- a. DP World could find no evidence that Mr Bickley had provided the medical certificate to Mr Coffey as asserted by Mr Bickley.
- b. Alleged errors in the Return to Work program
- c. The Return To Work program had not been provided in a timely manner to DP World and had not been prepared in genuine consultation with DP World.
- d. Mr Bickley had not attended any earlier negotiations for the Part B Proposed Fremantle Agreement.

[35] The CFMMEU refused to remove Mr Bickley from its negotiating team and, as a consequence, DP World cancelled the Part "B" negotiations scheduled for that day and the following day.<sup>17</sup>

[36] The CFMMEU have since proposed times and dates for further bargaining meetings however DP World have to date declined to attend and participate in bargaining at those times and dates.

[37] The CFMMEU assert that Mr Bickley is an integral part of their bargaining team given his election as a representative of the workforce to the ERC and his long history in the workplace.

[38] The CFMMEU maintains that the conduct of DP World is in breach of its good faith bargaining obligations set out in section 228 of the FW Act to:

- a. Attend and participate in meetings at reasonable times;
- b. Refrain from capricious and unfair conduct that undermines collective bargaining; and
- c. Recognise and bargain with other bargaining representatives for the agreement.

[39] The CFMMEU sent a notice of concerns to DP World at 10:46am on 14 June 2019 seeking a response by close of business that day (**Notice of Concerns**). No response was received. As a consequence, the CFMMEU applied for bargaining orders on 16 June 2019. The Application is set down for hearing on 30 July 2019.<sup>18</sup>

[40] The CFMMEU seeks interim orders pursuant to section 589(2) of the FW Act requiring DP World to meet and bargain with the CFMMEU, including Mr Bickley if the CFMMEU so determines, until the Application is finally heard and determined.

### **Key Statutory Provisions**

[41] Section 589 of the Act provides that:

***“s.589 Procedural and interim decisions***

- (1) *The FWC may make decisions as to how, when and where a matter is to be dealt with.*
- (2) *The FWC may make an interim decision in relation to a matter before it.*
- (3) *The FWC may make a decision under this section:*
  - (a) *on its own initiative; or*
  - (b) *on application.*
- (4) *This section does not limit the FWC's power to make decisions.”*

[42] Section 229 of the FW Act provides that:

***“s.229 Applications for bargaining orders***

*Persons who may apply for a bargaining order*

- (1) *A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a **bargaining order**) under section 230 in relation to the agreement.*

*Note:* See also section 255A (limitations relating to greenfields agreements).

*Multi-enterprise agreements*

(2) *An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.*

*Timing of applications*

(3) *The application may only be made at whichever of the following times applies:*

- (a) *if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:*
  - (i) *not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or*
  - (ii) *after an employer that will be covered by the proposed enterprise agreement has requested under [subsection 181\(1\)](#) that employees approve the agreement, but before the agreement is so approved;*
- (b) *otherwise--at any time.*

*Note:* *An employer cannot request employees to approve the agreement under [subsection 181\(1\)](#) until 21 days after the last notice of employee representational rights is given.*

*Prerequisites for making an application*

(4) *The bargaining representative may only apply for the bargaining order if the bargaining representative:*

- (a) *has concerns that:*
  - (i) *one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or*
  - (ii) *the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and*
- (b) *has given a written notice setting out those concerns to the relevant bargaining representatives; and*
- (c) *has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and*
- (d) *considers that the relevant bargaining representatives have not responded appropriately to those concerns.*

*Non-compliance with notice requirements may be permitted*

- (5) *The FWC may consider the application even if it does not comply with [paragraph \(4\)\(b\) or \(c\)](#) if the FWC is satisfied that it is appropriate in all the circumstances to do so.*

[43] Section 228 of the FW Act provides that:

“s.228 *Bargaining representatives must meet the good faith bargaining requirements*

- (1) *The following are the **good faith bargaining requirements** that a bargaining representative for a proposed enterprise agreement must meet:*
- (a) *attending, and participating in, meetings at reasonable times;*
  - (b) *disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;*
  - (c) *responding to proposals made by other bargaining representatives for the agreement in a timely manner;*
  - (d) *giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals;*
  - (e) *refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;*
  - (f) *recognising and bargaining with the other bargaining representatives for the agreement.*

*Note:* See also section 255A (limitations relating to greenfields agreements).

- (2) *The good faith bargaining requirements do not require:*
- (a) *a bargaining representative to make concessions during bargaining for the agreement; or*
  - (b) *a bargaining representative to reach agreement on the terms that are to be included in the agreement.”*

## Consideration

[44] The power granted under section 589(2) of the FW Act to make an interim decision in relation to a matter also incorporates a power to make an interim order.<sup>19</sup>

[45] The power to make an interim order is discretionary. In determining whether to exercise that discretion the FWC applies principles substantially similar to those applied by the Courts in determining whether interlocutory relief ought to be granted.<sup>20</sup>

[46] Those principles require the FWC in determining whether or not to make an interim order to determine whether<sup>21</sup>:

- a. there is a serious question to be tried; and
- b. the balance of convenience favours the granting of the interim order sought.<sup>22</sup>

*Is there a Serious Question to be Tried?*

[47] The prerequisites for making an application for a bargaining order are set out in section 229 of the FW Act.

[48] As a bargaining representative for the Proposed Fremantle Agreement the CFMMEU has standing to make an application for a bargaining order.

[49] The Fremantle Agreement expired on 28 February 2019 therefore the Application was brought not more than 90 days before its nominal expiry date.

[50] The CFMMEU are concerned that DP World has not met, and is not meeting, the good faith requirements set out in the FW Act by refusing to attend and participate in meetings attended by Mr Bickley.

[51] The good faith bargaining obligations set out in section 228 of the FW Act oblige the CFMMEU and DP World inter alia to:

- a. attend and participate in meetings at reasonable times;
- b. refrain from capricious and unfair conduct that undermines collective bargaining; and
- c. recognise and bargain with other bargaining representatives for the agreement.

[52] DP World submit that Mr Bickley is not a bargaining representative for the purposes of the Act and that it is not capricious or unfair to refuse to meet with an employee who has not been part of the bargaining process to date, whose importance to the bargaining process has not been clearly articulated and who DP World are not satisfied is medically fit to participate.<sup>23</sup>

[53] DP World refused to attend and participate in scheduled meetings on 13 and 14 June 2019 if Mr Bickley attended those meetings. The CFMMEU also assert that DP World refused to permit Mr Bickley to attend the bargaining meetings held on 30 and 31 May 2019. The CFMMEU have since proposed times and dates for further bargaining meetings for Part B of the Fremantle Replacement Agreement however DP World have to date declined to attend and participate in bargaining at those times and dates and have not indicated when they will be available to attend and participate in further bargaining meetings

[54] The evidence currently before me is that the long standing custom and practice is that the CFMMEU bargaining team for Part B negotiations at the Fremantle Terminal is composed of officials of the CFMMEU and members of the ERC.<sup>24</sup>

[55] Mr Bickley is a member of the ERC. Mr Bickley has provided a medical certificate and a Return to Work program certifying him fit to participate in negotiations. There is currently no medical evidence before me to suggest that he is not fit to participate in negotiations.

[56] Mr Bickley did not attend the first Part B negotiations for the Replacement Fremantle Agreement. However the evidence currently before me is that he endeavoured to attend all other bargaining meetings but his attendance has been opposed by DP World. In any event Mr Wayne conceded in cross examination that the make up of DP World's bargaining team has changed in the course of the negotiations.

[57] DP World have not identified any authority for the proposition that an employer is entitled to determine the make up of the bargaining team of a bargaining representative where that bargaining representative is a 'corporate entity' as opposed to an individual. Nor that each member of each bargaining team must attend every bargaining meeting in order to be

eligible to attend future bargaining meetings. Nor that a bargaining representative must satisfy other bargaining representatives of the value of the contribution which might be made by each member of its bargaining team.

[58] The CFMEU provided written notice to DP World setting out the nature of its concerns at 10:46am on 14 June 2019, seeking a response by close of business that day. No response was received.

[59] The CFMMEU considered that DP World did not respond appropriately to those concerns and therefore the CFMMEU applied for bargaining orders on 16 June 2019.

[60] DP World assert that the CFMMEU did not provide it with a reasonable time within which to respond to its concerns before filing this Application.<sup>25</sup>

[61] Without finally deciding the issue, I note that the question of Mr Bickley's attendance at Part B negotiations for the Replacement Fremantle Agreement appears to have been raised and considered by DP World from as early as 29 May 2019. Even if it were not, it was the subject of discussion between the parties, and of a detailed letter by Mr Craig Pedler, General Manager Operations at the Fremantle Terminal, setting out DP World's position, on 13 June 2019. The CFMMEU's concerns therefore were not concerns which DP World were unaware or which DP World had not had an opportunity to give some consideration. Arguably a matter of which a party is already aware might reasonably be expected to take less time to consider than a matter not previously brought to their attention. There is no evidence currently before me that DP World indicated to the CFMMEU that it required any additional time to consider and respond to the concerns than the deadline set out in the Notice of Concerns.

[62] I also note that section 229(5) of the FW Act provides that the FWC may consider an application for bargaining orders even if the applicant for the bargaining orders has not given notice of its concerns and/or not given the relevant bargaining representative a reasonable time in which to respond to those concerns, if the FWC is satisfied that it is appropriate in all the circumstances to do so.

[63] In the circumstances I am satisfied that there exists a serious question to be tried.

*Does the balance of convenience favour the granting of the interim order sought?*

[64] The CFMMEU submit that it requires the assistance of Mr Bickley to bargain with DP World and that a delay in completing negotiations due to a refusal by DP World to participate in bargaining in which he is involved will cause detriment to its members.<sup>26</sup>

[65] The CFMMEU submit that, provided that Mr Bickley is certified fit to attend the meetings, DP World suffer no detriment if he attends those meetings until the Application is finally determined.<sup>27</sup>

[66] DP World submit that the granting of an interim order is futile because no further bargaining meetings are scheduled before the date of the Substantive Hearing. DP World also submit there is no evidence of a prejudice to the CFMMEU if Mr Bickley does not participate in the bargaining and that no prejudice arises because the parties have negotiated in the

absence of Mr Bickley effectively to date. DP World further submit that the CFMMEU members face no detriment because the Part A negotiations are proceeding nationally.

[67] DP World declined to participate in the Part “B” bargaining scheduled for 13 and 14 June 2019 if Mr Bickley participated in those negotiations. The CFMMEU have since proposed times and dates for further bargaining meetings however DP World have to date declined to attend and participate in bargaining at those times and dates.

[68] A delay in the conclusion of negotiations means a longer period of uncertainty for the workforce as to the terms and conditions of their employment in the future and a delay in receiving the benefit of any improvements in entitlements or conditions secured in the course of bargaining.

[69] The Substantive Hearing is not scheduled to occur until 30 July 2019. Presuming that the parties file closing written submissions, after they have acquired transcript of the proceedings, and that the decision were to issue within the timeframes the FWC aims to achieve, the Application is unlikely to be finally determined before late September. The good faith bargaining obligations set out in section 228 of the FW Act oblige the DP World inter alia to attend and participate in meetings at reasonable times. Given the parties last met to discuss Part B of the Replacement Fremantle Agreement in mid May 2019 it would seem probable that a bargaining meeting will occur before the Application is finally determined.

[70] Therefore any interim order would not be futile or without prospect of relevance.

[71] The evidence currently before me is that the long-standing custom and practice is that the CFMMEU bargaining team for Part B negotiations at the Fremantle Terminal is composed of officials of the CFMMEU and members of the ERC.<sup>28</sup> Mr Bickley is a member of the ERC.

[72] Mr Bickley did not attend the first Part B negotiations for the Replacement Fremantle Agreement. However, the evidence currently before me is that he endeavoured to attend all other bargaining meetings and that his attendance was opposed by DP World. In any event Mr Wayne conceded in cross examination that the make up of DP World’s bargaining team has changed in the course of the negotiations.

[73] On the evidence currently before me the status quo is that members of the ERC form part of the CFMMEU bargaining team and that the make up of the CFMMEU and DP World bargaining teams may vary during the course of the negotiations.

[74] The inclusion of employees and operational managers in bargaining teams can improve bargaining and bargaining outcomes in a multitude of ways. Such individuals generally have the most informed understanding of the day to day operation of the business and the opportunities to create more productive workplaces. They can ensure that the agreement is operationally effective and expressed in language understood by those who apply the agreement on a daily basis and those to whom the agreement applies on a daily basis. This reduces the likelihood of disputes about the interpretation of the agreement during the life span of the Agreement. Importantly their endorsement of an agreement can assist in securing majority approval for the proposed agreement when the workforce is balloted.

[75] The prejudice suffered by the CFMMEU if Mr Bickley is excluded from the negotiations is not compensable.

[76] There is no submission that the number of members in the CFMMEU bargaining team is compromising the bargaining process or that Mr Bickley is not in a position to make any contribution to the bargaining process.

[77] Provided that Mr Bickley is fit to participate in negotiations there does not appear to be any prejudice suffered by DP World if Mr Bickley participates in bargaining pending the outcome of the Substantive Hearing.

[78] I am satisfied that the balance of convenience favours the granting of an interim order.

[79] I will therefore order that DP World must attend and participate in meetings at reasonable times notwithstanding the attendance of Mr Bickley at those meetings provided that Mr Bickley is medically fit to participate in the meeting.



DEPUTY PRESIDENT

*Appearances:*

*Mr L Edmonds* on behalf of the Applicant.

*Mr S Crilly* on behalf of the Respondent.

*Hearing details:*

2019.

Wednesday

July 3

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<PR709938>

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<sup>1</sup> [2013] FCA 291 at [24].

<sup>2</sup> *John Holland Queensland Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWC 3583.

<sup>3</sup> Exhibit A1 at [10].

<sup>4</sup> Exhibit A1 at [11] and Exhibit R1 at [5].

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<sup>5</sup> Exhibit A1 at [12].

<sup>6</sup> Exhibit A1 at [13]-[14].

<sup>7</sup> Exhibit R1 at [11].

<sup>8</sup> Exhibit R1 at [7].

<sup>9</sup> Exhibit A1 at [16].

<sup>10</sup> Exhibit R1 at [7].

<sup>11</sup> Exhibit A1 at [17] and Attachment AE1.

<sup>12</sup> Exhibit A1 at [18].

<sup>13</sup> Exhibit A1 at [19] – [21] and Attachment AE2.

<sup>14</sup> Exhibit A1 at [22].

<sup>15</sup> Exhibit A1 at [22]-[23] and Exhibit R1 at [12]-[16].

<sup>16</sup> Exhibit R1 at [16] and Exhibit A1 at Attachment AE3.

<sup>17</sup> Exhibit A1 at [23]-[24].

<sup>18</sup> Exhibit A1 at [25] and Attachment AE3.

<sup>19</sup> *John Holland Queensland Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWC 3583.

<sup>20</sup> *Telstra Corporation Ltd v CEPU* (2003) 125 IR 88 at [88].

<sup>21</sup> *Health Services Union v Victorian Hospitals' Industrial Association* [2012] FWAFB 2901 at [5].

<sup>22</sup> Where relevant an applicant may be required to give an enforceable undertaking as to damages: *Telstra Corporation Ltd v CEPU* (2003) 125 IR 88 at [89].

<sup>23</sup> Respondents Outline of Submissions filed on 1 July 2019 at [4]-[5].

<sup>24</sup> Exhibit A1 at [12].

<sup>25</sup> Respondent's Outline of Submissions filed on 1 July 2019 at [4]-[5].

<sup>26</sup> Applicant's Outline of Submissions filed on 28 June 2019 at [20]-[21].

<sup>27</sup> Applicant's Outline of Submissions filed on 28 June 2019 at [22].

<sup>28</sup> Exhibit A1 at [12].