



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT HAMPTON**

**B2023/1339**

**s.248 - Application for a single interest employer authorisation**

**Association of Professional Engineers, Scientists and Managers, Australia,  
The  
and  
Wollongong Resources Pty Ltd,  
Great Southern Energy Pty Ltd T/A Dela Coal,  
Whitehaven Coal Mining Ltd,  
Peabody Energy Australia Coal Pty Ltd,  
Ulan Coal Mines Ltd  
(B2023/1339)**

**Adelaide**

**11.35 AM, THURSDAY, 21 DECEMBER 2023**

PN1

THE COMMISSIONER: Good morning or good afternoon all, depending on where you are. So, look I'll just confirm the appearances. So, firstly, for the applicant, APESMA.

PN2

MR I TAYLOR: Yes, if it pleases, good morning, Deputy President. My name is Ingmar Taylor. I'm appearing with Ms Lisa Doust for the applicant.

PN3

THE COMMISSIONER: Good, thank you.

PN4

MR TAYLOR: With your permission of course.

PN5

THE COMMISSIONER: Yes, of course, I understand that. Thank you, Mr Taylor. Perhaps Peabody Energy next?

PN6

MR DALTON: Thank you, Deputy President. I appear with my learned friend Mr McLean for Peabody and seek permission of course.

PN7

THE COMMISSIONER: Yes. Thank you, Mr Dalton. For Delta Coal?

PN8

MR GODING: May it please the Commission, my name is Goding and I appear for Great Southern Energy, trading as Delta Coal. And like everyone else on the call to date I seek permission to appear as entered.

PN9

THE COMMISSIONER: Good, thank you, Mr Goding. Wollongong Coal?

PN10

MR J FOX: If it pleases the Commission, Fox, initial J, with my friend Mr Coorey. I seek leave to appear for Wollongong Resources Pty Ltd.

PN11

THE COMMISSIONER: Thank you, Mr Fox. Ulan Coal?

PN12

MR J FLEMING: May it please the Commission, Fleming, initial J. I seek permission to appear on behalf of Ulan Coal Mines Limited with Mr Bell and Ms Fenton.

PN13

THE COMMISSIONER: Thank you, Mr Fleming. And last and certainly not least, Whitehaven Coal?

PN14

MS F EDWARDS: Yes, thank you, Deputy President. It's Edwards, initial F, seeking permission to appear.

PN15

THE COMMISSIONER: Very well. Thank you, Ms Edwards. All right. So, firstly, dealing with the issue of permission. As all parties are proposed to be represented I take it that neither party is seeking – none of the parties are seeking to be heard in opposition to permission. I will take silence as concurrence. But in any event having regard to the complexity of the matter, the nature of the proceedings and the significance of the case, and the fact that all parties are seeking to be represented, in my view, the matter will be more efficiently dealt with by having all parties represented by a lawyer, and in that context permission is granted and that will be confirmed in any subsequent directions the Commission issues in the matter.

PN16

Secondly, I just want to make a couple of observations – firstly, slightly tongue in cheek, I take it given the quality and range of representation here that the Commission should proceed on the basis the application is by consent? No? Perhaps not. All right.

PN17

So, look, in that context and making the assumption that was likely to be the case, I must say, I've listed the matter for a status conference deliberately. The parties will appreciate and, indeed, this is comprehended in some of the draft directions that have been provided is that this is the sort of matter that may well end up being dealt with by a Full Bench.

PN18

Now, it's ultimately a matter for the President to decide but in order to allow the President to make an informed decision about that I thought it was appropriate to effectively check the status of the matter and, in particular, whether the application was opposed. And, if so, what was likely to be agreed or not agreed as the case might be so the scope and nature of proceedings, including the evidence might be understood.

PN19

So that is what I propose to do today. That will assist the Commission and, indeed, in particular, the President to form a view as to firstly whether the matter should go to a Full Bench and, if so, at what point. Bearing in mind that it's been relatively common in recent days, even where the matter is referred to a Full Bench to have a single member and not necessarily the presiding member deal with the pre-hearing processes, including directions and the like.

PN20

So that's the reason why I have convened the hearing in this way at this point obviously at the end of the year, rather than leading into the New Year.

PN21

So, look, I have read the application which is comprehensive and also I have obviously looked at the statement which was provided by your client, Mr Taylor, I

think this morning or yesterday and in that light I don't know whether you wanted to provide any further introduction or whether it might be useful for me to hear from the employers so I can begin to ascertain what is or is not agreed in the matter.

PN22

MR TAYLOR: Yes, thank you, Deputy President. I think, ultimately, you and for that matter the President will be guided, primarily, by what the employers to say, to the extent to which we have received a position from the respondent's employers it is that they do not consent to the application and we are yet to understand the basis of their objections. But we do anticipate that they are likely to go to issues which haven't yet been determined by a Full Bench. In particular, questions concerning whether employers have clearly identifiable common interests. The question of whether they could establish the application is contrary to the public interest, and also whether they can establish or whether the Commission can be satisfied that each of the employers are reasonably comparable.

PN23

For that reason we think it is a matter that would be appropriately heard by a Full Bench. We think it would be appropriate for the Commission as presently constituted to make some directions and to that end we have ordered some to you, as you've identified, Deputy President, and to the other parties.

PN24

Just to give some understanding of what directions we're seeking one of the threshold questions, of course, is the question of whether a majority of employees at each employer wish to bargain, collectively, for a multi-employer enterprise agreement. And Mr Callucio's statement which was provided provides evidence to that effect. It may be that employers agree that there is such a majority. But, in anticipation that there is an issue raised as to that we have proposed some directions at paragraphs one through to four that will allow the evidence that Mr Callucio has put on to be compared to total numbers of relevant employees so that the issue can be determined for the benefit of the parties and the Commission at the earliest possible opportunity.

PN25

The directions we seek are in a form that is commonly made by the Commission and will establish, in effect, the total number of workers who would be caught by the proposed enterprise agreements which can then be compared to the number who have voted to establish the majority support.

PN26

The balance of the directions are directed to the matter proceeding as efficiently as possible. Each of the employers received a letter in the last few days asking them whether they will agree to certain agreed facts which we do not anticipate would be an issue. Each employer, of course, has to separately address these. We did ask for a response by today but no employer has been able to do so to date.

PN27

Given that this matter does not proceed by way of formal pleadings it would, we think, be useful for the employers to at least address those potential agreed facts at an early stage so that if, as we anticipate, some or all of these will not be put in issue the parties are put to the cost and time of putting on evidence as to those matters.

PN28

The balance of the directions 6, 7, and 8 are really directions just so that the matter can be prepared for hearing as efficiently as possible and would commence with the applicant filing and serving its materials, the respondents to then file and serve theirs and then a period for reply.

PN29

My client is keen for the matter to be ready for hearing as early as possible in the New Year, and to that end has proposed the timetable that you see there, Commissioner.

PN30

THE COMMISSIONER: So, Mr Taylor, when you talk about the nature of directions the Commission commonly issues. I take it you're referring to in the context of something like a majority support determination?

PN31

MR TAYLOR: Yes, it is, sir. I should have made that clear. But that's correct, Deputy President in that it is, in effect, a majority support determination question, albeit occurring at five mines simultaneously, rather than each – that the Act requires the Commission to be satisfied that there's a majority of employees of each employer who would be caught by the proposed agreement and APESMA arranged, as you have read from Mr Callucio's statement, an online voting which Mr Callucio, using the best information he has establishes that there is a substantial majority of employees who wish to bargain at each of the mines.

PN32

But given that he necessarily is working on information and belief as to the total number of employees who would be covered by any such proposed agreement, we think it's appropriate that there be some directions which would allow the Commission to receive evidence which would put that issue to bed entirely, along the lines of the directions that we seek at one through to four.

PN33

THE COMMISSIONER: All right. Well, that might be like premature and unnecessary depending on what I am about to hear.

PN34

MR TAYLOR: Yes.

PN35

THE COMMISSIONER: So I think with that – the other comment I wanted to make is that given the nature of the matter, I think whatever directions are issued by the Commission would be prudent to allow for interveners and I have based that on having been on a number of Full Benches dealing with, effectively, test

cases of the 6 June reforms, which is one of those. There has been similar – there has been a case largely uncontested but this one is going to sort of test the boundaries of the provision which appears likely then the directions should at least contemplate the potential involvement of interveners.

PN36

MR TAYLOR: Yes, if it pleases.

PN37

THE COMMISSIONER: Yes, thank you, Mr Taylor. All right. So perhaps then I will hear from the respondents, generally, both in relation to the application because if there is capacity to indicate the extent and nature of any disagreements that are evident at this point. Look, I would also be particularly keen given the matter that we have just – the exchange I have just had with Mr Taylor – to ascertain whether the – and I am just trying to find the table. Excuse me for a moment.

PN38

Yes, I would be interested in the – so this is I am talking about the table which is in Mr Callucio's statement at page five, paragraph 28. And, in particular, it seems to me the critical question is going to be whether the first line, that is the total number of employees at each employer that falls within the scope of the declarations sought by the applicant whether those numbers are in dispute or otherwise, or not known at this point. So subject to that, Mr Dalton?

PN39

MR DALTON: Thank you, Deputy President. Now, Deputy President you have received this morning some proposed directions of Peabody.

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THE COMMISSIONER: Yes.

PN41

MR DALTON: That's the product of a process of conferral amongst the respondents. So, obviously, the other respondent employers will have an opportunity to say what they want after I have finished to the extent they wish to emphasise anything or put something different. But Peabody opposes the application and we understand that that's also the decision of the other respondents.

PN42

The grounds upon which Peabody intends to resist the authorisations sought by the union are, essentially, the four primary grounds. The majority support issue, a matter on which the union bears an onus. And the other three critical issues in respect of which the presumption will operate in relation to my client on my instructions and we anticipate probably also in respect of the other employers, although I don't speak for them on that. And that's the common interest issue, the reasonable comparable operations and business activities issue and the not contrary to the public interest issue.

PN43

So those are the four primary grounds upon which my client intends to resist the application. In terms of the directions, I think there's potentially some scope to assimilate the competing proposals and then there's some differences in terms of the sequence and timing that I want to address you on.

PN44

So starting with - - -

PN45

MR TAYLOR: Mr Dalton, I do apologise for interrupting. Mr Neilson, our solicitor, has been travelling internationally in the last 12 hours and it may well be that your instructing solicitors forwarded those directions to him for the purposes of today. But they haven't been able to come to my attention or to those who are instructing me or my junior.

PN46

So I was wondering whether there is someone who can, while you are speaking, forward a copy to me and to Ms Doust so that we can have that in front of us while you're speaking please? And, again, I apologise for interrupting.

PN47

MR DALTON: Of course. We'll see to that. I might just wait a minute, Deputy President, to allow Mr Taylor to see those directions so he can follow what I am saying.

PN48

THE COMMISSIONER: That's appropriate. Thank you, Mr Dalton.

PN49

MR TAYLOR: I have just been instructed that Mr Neilson did ask some solicitors, possibly not all – but hopefully all – that because he was travelling any correspondence should be sent to Mr Callucio and so maybe that Mr Dalton's solicitor can – already has Mr Callucio's contact details and can ensure that it goes to him as well.

PN50

MR DALTON: Yes.

PN51

MR TAYLOR: Thank you, Mr Dalton. Mr Madsen was good enough to forward me an email with those directions. So I now have them in front of me.

PN52

MR DALTON: Good. All right. So, Deputy President, let's start with the initial steps to progress the presentation of the applicant's case on the majority support issue and the other pre-requisites that don't involve the presumption.

PN53

So looking at the applicant's proposed directions 1 to 4, my client's position is that it doesn't resist directions being made along those lines, subject to four things. First, my client seeks to reserve its position, generally, on the majority

support issue. So it shouldn't be taken to be conceding that the survey and the manner in which it's being conducted would prove a majority of employees want to bargain for this particular kind of agreement with the implications that that carries.

PN54

The second point is that we would ask the applicant to clarify the purpose and the timing of the proposed directions in 1(a) and 2. So I am clear about that 1(a) is the list to be the list of those who were the survey respondents? Or is it a list referable to something else, such as the union's current view as to the relevant list of employees in a particular point in time. So we'd ask for that clarification.

PN55

And also order two, now there is a timestamp used there. You will see at the end of 2(a) it says, 'As at the 22 December 2023'. Deputy President, you will be aware that the timing of this assessment is really for the Commission to decide so that's something that should be clarified before directions are made.

PN56

The third issue is as to the timing. So the applicant proposes that the employers provide their list by tomorrow. Now we say that that's unreasonably tight. This needs to be done properly and needs to be checked by reference to the descriptions of the roles that are variously described depending on the mining operation concerned and that a period of a few days, a few business days is a more reasonable timeframe. And given the time of the year we would suggest that the 9 January is an appropriate and reasonable period of time to expect the employers to be able to compile that list accurately and to furnish that to the Commission on a confidential basis.

PN57

Deputy President that would have a consequential impact on the timing of the applicant's proposed directions 3 and 4, assuming the Commission is comfortable that it can do the things set out in those directions within a week, then that would push that timing through to the 16 January.

PN58

And the fourth matter, and I think this is just out of an abundance of caution but the proposed direction 3 that is what the Commission will publish to the parties is numerical only. It doesn't disclose names and identities of individuals.

PN59

So, Deputy President, subject to those reservations, Peabody doesn't resist directions along those lines. We say that that would then dovetail into our proposed direction 1. You will see there, Deputy President, that we propose that the parties confer with a view to arriving at agreed facts by the 25 January.

PN60

We would have in mind that those agreed facts, I think consistent with what the applicant has in mind and contemplates by its proposed direction 6(c), that the agreed facts could clear the decks, as it were, in relation to a number of the factual matters going to the pre-requisites that are unlikely to be contentious.



PN61

Matters upon which the applicant bears the onus, but matters that probably won't be contentious. And so that should be done at an early stage. That was a process that, I think, Deputy President, you provided for in the recent IEU case.

PN62

We would think that that's an adequate substitute for the applicant's proposed direction 5. That takes us to our proposed direction 2 and we would observe that that overlaps in substance with the applicant's proposed direction 6 on our proposal in terms of timing. It's only six days after what the applicant's proposing.

PN63

And then, Deputy President, you will observe that the scope of what the applicant should provide and also the sequence of the exchange of evidentiary materials is informed by the reality that most of the evidence to be adduced by the employer respondents will be engaging with matters to which the presumption applies.

PN64

And so what we had in mind was that the union would start with their evidentiary case. So they would close out their evidentiary case on majority support and any non-agreed pre-requisites in sections 248 and 249 to which the presumption doesn't apply.

PN65

You will see also that we proposed that the applicants provide an outline of submissions in relation to their case, generally. Now, we see from the grounds of the application there's an outline but we would ask them to articulate further, in effect, their case concept. So articulate in outline form what their position is constructionally in relation to these critical expressions, and how they say on the proper construction that they advance that those matters are satisfied in the circumstances of this case.

PN66

We think that that would be an efficient step to take because it would then give greater focus to the respondents in meeting their obligation to rebut the presumption. That would be focused by reference to the case concept that is outlined by the applicants. So that's why we seek that particular step.

PN67

Then that leads to our proposed direction 3, Deputy President, which picks up on your observation that it's appropriate to include a direction giving an opportunity for interested persons to be heard, consistent with what you did in the IEU case. We think that it would belong there in the sequence of steps to be taken.

PN68

Then that takes us to our proposed directions 4, 5 and 6. This is the timetable for the exchange of evidence and submissions on the contested issues in respect of which the presumption would operate.

PN69

Now we seek significantly more time than that allowed by the applicant in their proposed direction 7. The applicant proposes three weeks. We propose eight weeks as well as a process whereby each respondent has an opportunity to respond to what the other respondents have put. So I want to address you on why we say that that additional time and that process is warranted in the context of this case.

PN70

First, Deputy President, the subject matter of these three issues, common interest, reasonable comparability of operations and business activities and public interest is broad and has a level of complexity to it. In particular, these related concepts of common interest and reasonable comparability they both call for a comparison. So the word, 'common' calls for a comparison of the interests. And comparability, of course, explicitly requires a comparison between the operations and the business activities of the various respondents.

PN71

There are five respondents. So the case to rebut the presumption requires identification of interest operations business activities on the one hand and then a comparison of those things in the hands of one respondent, as between the other respondents.

PN72

Now each respondent will be in a position to identify their own interested, their own operations, their own business activities. Just to give you an outline of the flavour of the evidence that Peabody has in mind that will be relevant to these matters, just looking at it from its perspective in terms of – you know – what interests it has, what operations it runs and activities et cetera, compared with the knowledge it has available to itself of the other operations, which is necessarily incomplete.

PN73

There will be evidence, probably a combination of lay and potentially expert evidence. So there's going to need to be industry overview and context. And then there's evidence that will go to the sort of fundamental differences that we say emerge from looking at these different respondents.

PN74

So there's a fundamental difference between a thermal coal mining operation and a metallurgical or coking coal mining operation. Sales and marketing and pricing are completely different. The cost structure of the businesses are completely different. The production processes are very different.

PN75

There's a fundamental difference between an operation supplying thermal coal to a local power station, such as Chain Valley and operations supplying thermal coal to the overseas customers, such as the other respondents – well most of the other respondents. Completely different markets. Completely different economic model.

PN76

There's a fundamental difference in operations and business activities of different underground mining methods. There's the long wall method and then there's the board and pillar method. The former is much more capital intensive and automated. Again, the economic model for mines, depending on what method is considered feasible and is ultimately adopted, is fundamentally different. The operational processes are completely different. The roles that attach to those processes are different.

PN77

The quality of the coal that's mined – different market, different price point. Again, completely different economic model underpinning that coal mining operation. Different stages of the mine life. Again, completely different economic propositions applying at the point in time, depending on the stage of the life at the mine.

PN78

So that's just to give you a flavour of the sort of differences that are likely to be exposed on the evidence that my client intends to bring on these overlapping related issues about common interests and comparability of operations and business activities.

PN79

We anticipate, at this stage, probably to three lay witnesses, being managerial witnesses, covering the sales, marketing and commercial issues, operational and industrial issues.

PN80

Deputy President, some of this evidence is likely to be commercially sensitive. So there's likely to be a regime in place and some orders that would support a protection of that commercially sensitive information. Expert evidence from someone expert in the industry, the markets and the mine economics that applied. The fundamentally different mine economics that apply to the different operations in the sense that I have described.

PN81

Deputy President, additionally, to pick up on the comparison exercise that it's inherent in these expressions, there will need to be evidence of the interests and operations of the business activities of the other respondents. And as I said we will have some knowledge of that but it would be incomplete. There will need to be sharing of information or whether that's voluntary or by compulsion through orders of the Commission on application.

PN82

There are complexities around this, having regard to competition laws that apply. Not only in respect of agreements, arrangements and understandings that are likely to have the effect of substantially reducing competition but also any concerted practice which potentially would extend to collaboration and voluntary information sharing, as between the respondents who are competing. Because as you will have seen from the flavour of the issues and the differences et cetera, not just talking about terms and conditions of employment. We're talking about

economic models for the mining operation, which will include cost inputs, life of mine et cetera, plainly is capable of including commercial in confidence material.

PN83

So we're going to need additional time. Not saying that these things are unmanageable but it takes more time to manage them properly. So, in a nutshell, Deputy President we ask for more time, given the scope of the subject matter being brought. The fact that expert evidence is in Prospect and it takes time to engage experts to provide them with instructions and factual assumptions. And there's the complexity around the information exchange as between the respondents, given the comparison exercise that's inherent to these critical tests.

PN84

That also explains why we seek that additional step of an opportunity for each respondent to respond to whatever the other respondents have put. We propose a modest period of I think three to four weeks to allow that response to be concluded, following which the union would have an opportunity to file and serve its evidence responsive to the matters raised by the respondents.

PN85

And then we propose a further step which is a reply because we anticipate that the union's responsive material could be substantial. So, Deputy President, that I hope explains why we have proposed the directions we have, the sequence of those steps and why we say a significantly longer timeframe is reasonable in the circumstances.

PN86

Before I finish I should say something about the issue of the Full Bench. Based on what you've heard I think it's clear that the hearing of this case is likely to involve a considerable amount of evidence. And so five days is probably optimistic. It could be several days. That's a matter we would say will be important in the President's deliberations as to whether this is – whether it's in the public interest or the Full Bench to be stepping into the first instance hearing of this case. I will say no more about that.

PN87

We are otherwise agnostic about that matter and would leave that up to the President's discretion. I think that's all we could say at this point. I will just check my instructions. Yes. That's all we have to say at this point in relation to the directions, if the Commission pleases.

PN88

THE COMMISSIONER: Mr Dalton, look you may not have instructions about this and I appreciate the table was only relatively recently received but - - -

PN89

MR DALTON: Yes.

PN90

THE COMMISSIONER: - -do you have instructions as to whether I think your clients is the 109? Whether the 37 that's suggestion has been that sort of the total of the relevant employees is likely to be right? Or is there contest about that?

PN91

MR DALTON: I don't have any instructions either way, other than to confirm we don't oppose the directions 1 to 4 to tease those numerical issues out.

PN92

THE COMMISSIONER: All right. Very well. Thank you very much, Mr Dalton. Mr Goding?

PN93

MR GODING: Thank you, Deputy President. I just confirm that my client opposes the application and it puts in issue the four matters that were identified by Mr Dalton in the course of his submissions. The first being the majority employee's point, the second being the reasonably comparable point, the third being the common interest point and the fourth being the public interest point.

PN94

I am conscious that Mr Dalton has made some extensive submissions in support of the directions that were sent by Peabody. My client supports the directions being made by Peabody and my client endorses the submissions that have been put by Mr Dalton this morning in support of those directions. My client also does not oppose directions 1 to 4 in the APESMA proposed directions, subject to the reservations that Mr Dalton identified orally this morning.

PN95

Could I just supplement one aspect of the comments made by Mr Dalton concerning proposed direction 4 in the APESMA directions? And if I understood it correctly Mr Dalton indicated that it should be a list of persons rather than the names of the persons. I support that submission. But could I indicate that it may be beneficial if the list breaks down the persons into their classifications because the Commission may appreciate that there are four relevant classifications and it may be of greater assistance to the parties if there's a breakdown of that kind.

PN96

Deputy President, can I indicate that it's likely that some of the preliminary facts that are identified in the proposed direction 5 of the APESMA directions will not be contentious. But we would just seek a bit of time to confirm that position.

PN97

Can I also indicate that in terms of paragraph 28 of Mr Callucio's statement and the table there's one figure that relates to my client which is the Chain Valley Colliery reference in that table. And that's the figure of SIEA employees being 41.

PN98

I can indicate to the Commission and to Mr Taylor that there's no dispute about the accuracy of that figure in respect of my client but we do seek the other

directions 1 through 4 in the APESMA, or we do not oppose those directions so that we can test the balance of the figures that are included in that table.

PN99

Could I just briefly emphasise four other matters in support of the directions? The first is that the Commission will appreciate readily that the applicant has the benefit of two rebuttable presumptions. And so its evidentiary burden at one level is relatively limited.

PN100

The evidentiary burden really falls on the respondent employers and as Mr Dalton's indicated that burden will be significant in a practical sense, not just for each individual employer but also as against the group of employers.

PN101

Secondly, there should be, in my submission, a reasonable opportunity provided to the employer parties to lead the appropriate evidence directed to the relevant evidentiary matters on which they bear the evidentiary burden. And whilst we recognise that there's a wish on the part of the applicant to proceed quickly in the New Year that wish should not preclude the respondents having an appropriate time to prepare and file, serve and understand each other's evidence.

PN102

I can indicate that my client intends to rely on both lay and expert evidence. We have made endeavours already to identify an expert. As the Commission will readily recognise that at this time of the year many of the experts have already risen for Christmas and New Year. And on our present understandings are unlikely to be available until the end of January to accept an engagement, let alone to prepare the evidence which we would seek then to prepare, which we would rely upon in due course.

PN103

So there are some practical limits on the respondent parties, including my client in preparing evidence in a tight timeframe as proposed under the APESMA directions. The third matter that I wanted to emphasise is that simply because the parties are operating in the same industry does not mean that they are reasonably comparable and there are a range of differences between my client and the other respondent employers.

PN104

Mr Dalton emphasised some of them in the course of his submissions. But it is material, in my submission, that my client provides its coal for the use at a power station and is not involved in the export of the coal overseas. And that will be a significant factor which is relied upon by my client in the course of the proceedings.

PN105

The final matter that I wanted to emphasise is that practically once the Commission has considered its application and if it was minded to make an authorisation, it would be necessary for the parties to proceed down the multi-employer enterprise agreement route. Because, practically, it is very difficult to

have an individual agreement or some other type of agreement once the authorisation is made. And that practical difficulty, in my submission, is a reason why it's appropriate to allow the parties a reasonable opportunity to lead the evidence and resistant to the application if that's what the parties are minded to do.

PN106

I otherwise support the submissions that were put by Peabody.

PN107

THE COMMISSIONER: Thank you, Mr Goding. Mr Fox?

PN108

MR FOX: Thank you, Deputy President. Similarly, Wollongong Resources position is that it opposes the application and those grounds are consistent with those raised by Mr Dalton and Mr Goding.

PN109

Consistent with what Mr Dalton had said there was some conferral about the proposed directions that Peabody have put forward. Consistent with that we concur with those – Mr Dalton's submissions in relation to the proposed timetable, including the qualifications he attached to the directions 1 to 5 from APESMA and their insertion into the Peabody's proposed directions.

PN110

THE COMMISSIONER: One to 4, I think, actually.

PN111

MR FOX: One to 4. Apologies, yes. In terms of instructions about the table at paragraph 28 of Mr Callucio's statement, in the time available we don't have instructions, Deputy President, about that. But no doubt we will be in a position to do so shortly.

PN112

I think that in terms of the timetable and the timing of events, particularly, the evidence that we put on by the five employees, I think both Mr Dalton and Mr Goding have set out some of the complexities and challenges in relation to that. It seems to me they're quite apparent.

PN113

In terms of the length of the hearing I don't think it should be underestimated that there's five respondents to the matter. So I am not optimistic it would get dealt with in five days. So those are our submissions, Deputy President, we concur since with what Mr Dalton and Mr Goding have said.

PN114

THE COMMISSIONER: Thank you, Mr Fox. Mr Fleming?

PN115

MR FLEMING: Thank you, Deputy President. I confirm that Ulan Coal Mines Limited also opposes the application and puts in issue the four matters articulated by my friends. I support the directions proposed by Peabody and fully endorse

the submissions of my friend, Mr Dalton and Mr Goding and the matters raised by Mr Fox, including the very practical challenges associated with the evidentiary case.

PN116

In respect of the table I am instructed the number is likely incorrect in so far as Ulan No. 3 Underground Mine is concerned. I would like to bottom out my instructions and it follows, I think, that I support also the comments made in respect of the proposed directions in totality.

PN117

THE COMMISSIONER: Yes, very well. Thank you. Ms Edwards?

PN118

MS EDWARDS: Yes, thank you, Deputy President. I also confirm that Whitehaven Coal Mining Limited opposes the application on the same basis that has been put by other respondent parties and support the directions being made that have been proposed by Peabody, including interposing the directions put forward by APESMA 1 to 4.

PN119

In relation to the table we also don't have firm instructions on this. However, the preliminary view is that there may be a dispute in relation to the number SIEA employees, the Narrabri Coal Mine, but I too have to firm up instructions on that and it may be a different number. Otherwise nothing further from Whitehaven, Deputy President.

PN120

THE COMMISSIONER: Thank you, Ms Edwards. All right. Mr Taylor?

PN121

MR TAYLOR: Thank you, Deputy President. Let me deal with each of the matters sequentially. But before I do could I just identify that the proposed directions that the employers have jointly put to you are ones that wouldn't see this matter capable of being heard for some seven months after it commenced. And we say that that is inconsistent with the general policy of the Act that would encourage these matters to be dealt with as efficiently as possible.

PN122

Now, turning to each of the matters. Firstly, the proposed directions of APESMA 1 to 4 which each of the employers are content to embrace with, provided some matters are clarified. Can I deal with those matters first?

PN123

As to 1(a) the list that the applicant would provide is a list of those persons who were invited – sorry, those persons who were sent a ballot to vote. So it's not limited to those who did, in fact, vote but it is those persons who to use Mr Callucio's table at paragraph 28, the 179 who would be the second row SIEA employees balloted, albeit, of course, broken down by employer.

PN124



The second clarification that Mr Dalton sought is, I think, what he did is identify an error in the date in paragraph two and Mr Dalton's quite right about that. The date there should not be 22 December. It should be 6 December. So it's the same as paragraph one, which is clearly important, for a number of reasons, including that you know the comparing like with like, both of them being dates that the – both of them being – that is the 6 December is the date the application was commenced.

PN125

The next matter I wanted to deal with, just taking them in order is the proposed employers – sorry, the next thing is the timing. Mr Dalton suggested that instead of this happening on the 22 December, it happened on the 9 January. The exercise here is, frankly, straightforward but ultimately we accept that there's no significant prejudice to it being the 9 January instead of tomorrow. And so I won't say anything further about that.

PN126

The next issue was the agreed facts. We suggest to you, Deputy President, that the proposal that we put in paragraph five is the more efficient way of dealing with this matter. I will come to the date in a moment, but it's the more efficient way dealing with the matter.

PN127

It is necessarily the case that each employer has to reach agreement with the applicant as to facts. It would be inherently difficult for there to be some sort of joint process. We have identified in paragraph five a number of matters.

PN128

It is, frankly, more convenient for there simply to be an indication by each respondent by a certain date, as to whether those matters are in issue or not. Rather than an exercise which engages in a discussion, which may or may not lead to a statement of agreed facts, which I might add if the Commission is minded to prefer the employer's response, employer's order would need to be each employer having a separate one, not a single document as the proposed direction would appear to assume.

PN129

The reason why we don't think it needs such a lengthy period of time is implicit in the answers we've already got. Each of the employers has already identified there are four issues and that none of the matters amount to agreed facts are any of those issues. It seems they already have some clarity. But certainly there doesn't seem to be any need that that needs until the 25 January for them to consider whether they have more than 50 employees and the like. These are all matters which one would have thought they would already have instructions on, given the position that they've taken as to what matters they expect to be put in contest.

PN130

So we do urge an earlier date than the 25 January. Frankly, the 12 January or something close to that seems adequate for that exercise to occur.

PN131

Can I then turn to the balance of the submission as to the competing position as to the filing and serving of evidence.

PN132

THE COMMISSIONER: Sorry to interrupt, Mr Taylor.

PN133

MR TAYLOR: Yes.

PN134

THE COMMISSIONER: Just before you do that. It seems to me the other difference between the approach to the agreed facts or contested facts is that effectively five deals with the, I guess, the jurisdictional fundamentals.

PN135

MR TAYLOR: Yes.

PN136

THE COMMISSIONER: And look for what it's worth, I suspect you're right that that's a relatively simple exercise and largely, I suspect, are not going to be contested but that's an uneducated preliminary view at this stage, based on what I have heard. But even if that's right, though, I think the approach by in direction one contemplates a broader framework of matters that might be agreed.

PN137

So, I guess, it's difficult for me to tell at this juncture but what's going through my mind, at least, is that if – in addition to those, I suspect, uncontroversial facts were able to be agreed. But other facts were able to be agreed it might reduce the evidentiary burden for all parties. But that obviously depends on the capacity for parties to reach that agreement and it's clearly untested at this point. But I just thought that I would raise with you, and for all parties, what's going through my mind on that matter at least.

PN138

MR TAYLOR: Yes. Well, for our part we're looking for something that's the most efficient manner and we think it's more efficient that we simply deal with these various jurisdictional/statutory relevant facts and deal with them and the balance of the matters can be dealt with on the evidence filed, rather than engaging in some process whereby each employer seeks to also have this agreed to various other facts which we then have to deal with five employers. We just don't think it's likely that that is going to be an efficient process in respect of an industry in which there hasn't been, to date, the type of approach between the parties which would suggest that that was particularly like to assist in any significant manner to narrow the issues in dispute.

PN139

So, in the perfect world, I accept that it may well be that there are other facts but we frankly think it's more efficient just to deal with the necessary facts that allow the Commission to proceed on the basis of understanding that there really are only those four matters in issue and then leave it to the parties to file their evidence and submissions.

PN140

Turning then to those proposed directions. Proposed direction 2 of the employers is similar to our direction, albeit that it attempts to direct us as to how and what we are to put in our submissions in evidence. We think that's unnecessary and frankly inappropriate. It would be a matter for us as to what matters we deal with in our submissions in evidence, and there's no necessity for the Commission to direct the way that is to be done.

PN141

As Mr Dalton and Mr Goding identified, assuming as we do, that each of these mines has more than 50 employees, the onus is very much on the employers and they have the presumption and necessarily then it will be a certain amount of material that we can identify. But, ultimately, our case will be one that is to some extent responsive so that we understand what it is that is being said to overcome the presumption.

PN142

We will need some time, after the response to the agreed facts is put on, but we don't think that we – and it may well be that what that means is that the date of the 25 January is the relevant date for the applicant to file its material, given any changes to the timetable earlier than that. As Mr Dalton said there's not a lot in the competing dates at that point.

PN143

Where the competing dates then blow out is that the process that then follows, there was no difficulty with interveners seeking to be heard but in the normal course any interveners would be required to file and serve their material at the same time as the parties upon which their position is generally consistent.

PN144

So to the extent to which there is any personal intervener seeking to support the position of APESMA that person would ordinarily and we think appropriately be filing at or, at the very latest, only shortly after APESMA's material. And, similarly, when it comes to any interveners or persons in respect of the employer supporting the employer parties they would be filing at the same time as the employer parties.

PN145

Now, the material that the employers seek to put on won't apparently be able to be put on till the 28 March. But, nevertheless, they don't see the matter being heard until the 5 July. And there's a very extensive time period then. It's clear that the employers have already have a high degree of knowledge about each other's operations. So much has been clear from what Mr Dalton and others have said such that they intend to put on material which does, indeed, compare them to other employers. And it is clear there's a level of communication between the employers occurring right now, such as we do not think it is necessary for there to be a further four-week period in which the employers put on yet more evidence.

PN146

If there is to be any period at all it ought to be significantly shorter than four weeks. The applicant will need to file material in reply, and a period of four weeks to do that we accept is appropriate.

PN147

And then apparently there is to be a reply to reply evidence and the reply submissions and we think that is unnecessary. And so order seven, we think, would not be made. There is no need for the employers to effectively put on three sets of evidence and submissions prior to the hearing when they are the respondents. They should be putting on one. At best one plus a capacity to respond to each others but not yet more submissions as well.

PN148

So we ask for, in short, a timetable that would see the matter heard, if not from the early March then as soon thereafter as practicable. And we think a hearing, in the month of April, or April onwards is capable of being done if the Commission so orders by the parties coming up with a timetable which would allow that to be done.

PN149

I have just received a couple of notes, sir. If you could just give me a moment?

PN150

THE COMMISSIONER: Certainly.

PN151

MR TAYLOR: We were planning to meet together but in what is somewhat of a throwback, sort of retro, I came down with COVID this morning.

PN152

THE COMMISSIONER: Oh - - -

PN153

MR TAYLOR: So I am now at home.

PN154

THE COMMISSIONER: Sorry to hear that.

PN155

MR TAYLOR: Yes. And so unsurprisingly, those instructing me decided they didn't need to be in a room with me after all. So I have just got some notes. So if you just give me a moment?

PN156

THE COMMISSIONER: Certainly.

PN157

MR TAYLOR: The notes I have received is just as to the change to paragraph 1(a). I am told that the list that the applicant proposes to provide pursuant to 1(a) can be properly described as follows. SIEA employees afforded an opportunity to vote in the ballot. It's SIEA employees afforded an opportunity to vote in the ballot. Generally with these notes is that they are short. It may be – yes, so they

are, I'm told, the way in which we would describe it. Otherwise they are my submissions in response. Thank you.

PN158

THE COMMISSIONER: Very well. Thank you. Any additional submissions?

PN159

MR DALTON: Look, just one, Deputy President. Just on that last point. I think it would be preferable from a definitional perspective that we don't use a description that might call for interpretation, such as opportunity – afforded an opportunity to vote in the ballot. It really should be – you know – sent an email. What was it? Sent a ballot. Sent a ballot to vote sounds more factual and, in my submission, would be preferable.

PN160

THE COMMISSIONER: Thank you. Just in relation to the proposed reference point for what is proposed direction number 2 – the 6 December – my view is, particularly having dealt with multiple majority support determinations over the years, that it is highly desirable to have the dates coincide to avoid arguments about the changes in the electorate so to speak.

PN161

So, look in that context, unless I hear to the contrary I'll take it that given the relatively small number of employees involved that that 6 December won't create any issues.

PN162

MR DALTON: Well, just to be clear, our position is that – yes, the dates should coincide to avoid confusion and difficulties in relation to the handling of the processes envisaged by the applicant's proposed directions 3 and 4, for example. We don't want this to be explained by other factors, such as the mismatch in the dates.

PN163

In terms of whether the 6 December is adequate proof of the majority support, we would just seek out of caution to reserve our position on that question.

PN164

THE COMMISSIONER: Yes. No, I understand. But I take it there are no logistical issues with that, given the relatively small cohort of employees involved.

PN165

MR DALTON: No.

PN166

THE COMMISSIONER: Very well. All right. So anyone else seeking to be heard? No?

PN167

MR GODING: Deputy President? Could I just deal with the - - -

PN168

THE COMMISSIONER: Yes, Mr Goding?

PN169

MR GODING: - - -issue of Mr Taylor's description as a reply on a reply on a reply. You might appreciate, of course, that there's a rebuttable presumption. And so it would be ordinarily expected that the party, such as the respondent employers in this case have an opportunity to respond to the evidence led by APESMA on the issue.

PN170

And that's what, as I understand it, the proposed direction 7 is intended to do. It's not sought to elongate the process unnecessarily and to have ping pong on ping pong. It simply reflects that the party that bears the evidentiary burden and having the right to lead the last piece of evidence.

PN171

THE COMMISSIONER: Thank you. Anyone else? Mr Fleming, did you wish to say something earlier?

PN172

MR FLEMING: No. Thank you for that invitation, Deputy President. I have resolved the issue as to the timing of when the majority of employees be assessed as consistently with the submissions that have been made to you.

PN173

THE COMMISSIONER: Very well. Thank you. All right. Well, look, I should advise that in addition to the consideration that you advise there's obviously some logistical issues for the Commission as well, including issues of leave. As I have mentioned at the outset that the decision the President has to make about if and when a Full Bench is convened and what processes he would like to follow in that respect. So, look, I just alert the parties to that, subject only to any developments that might occur as a result of that. I will obviously consider what's been said. I appreciate the very constructive way in which you have advanced your respective positions, I found it very helpful. The Commission will advise of how the matter is going to be dealt with and any directions to be issued as soon as we're able to do that.

PN174

Thank you all. Good afternoon and Seasons Greetings. The Commission will be adjourned.

**ADJOURNED INDEFINITELY**

**[12.45 PM]**