



A U S T R A L I A N  
I N D U S T R I A L  
R E L A T I O N S  
C O M M I S S I O N

**TRANSCRIPT OF PROCEEDINGS**

*Workplace Relations Act 1996*

19422-1

**COMMISSIONER LAWSON**

**BP2008/4317**

**s.430(9)(a) - Application for order to suspend or terminate a bargaining period (other circs)**

**VersaCold Logistics Limited**

**and**

**National Union of Workers Australasian Meat Industry Employees Union,**

**The**

**(BP2008/4317)**

**Sydney**

**10.49AM, FRIDAY, 21 NOVEMBER 2008**

PN486

THE COMMISSIONER: I note that there are no changes to the appearances. This matter is being dealt with today and on the 22nd, the 23rd and the 31st of October 2008. On 22 October I commented on the matter at the time with the following remarks, that an application had been made for an order to suspend or terminate a bargaining period initiated by the NUW in BP2008/140; that the applicant companies allege that the NUW had failed to genuinely try to reach an agreement with the employers; and that an amended application had been filed, spelling out an additional ground which relied upon that there existed a demarcation dispute between the NUW and the AMIEU over union coverage at the Eastern Creek facility.

PN487

On 22 October the Commission next dealt with an urgent section 496 application filed by the same applicants as the section 430 matter, in relation to then pending industrial action. The proceedings in both matters were adjourned to the following day, 23 October, following an undertaking given in relation to the NUW not proceeding with its immediately intended industrial action. When the two applications were heard again on 23 October, proceedings commenced with the Commission's statement. Next, reference was made by the advocate for the NUW of concurrent Federal Court of Australia proceedings in relation to an NUW challenge to the validity of the VersaCold AMIEU agreement as it applied at the Eastern Creek site. The Federal Court proceedings continued on Friday 24 October.

PN488

The Commission noted that the company had commenced to implement the new agreement for its employees at all four sites. The company applicant to the section 496 proceedings then withdrew its application for orders to prevent or stop the industrial action. The section 430 proceedings were then adjourned to 31 October for a report-back. At that 31 October report-back hearing Mr Joseph gave a further undertaking that industrial action would not be initiated until the section 430 proceedings were next listed for today, 24 November.

PN489

Mr D'Arcy, it's your matter. I invite you to now commence the section 430 proceedings, or if there is anything relevant on development since 31 October, I guess now is the time to tell me about those.

PN490

MR D D'ARCY: Commissioner, we are ready to proceed in relation to the 430 matter.

PN491

THE COMMISSIONER: All right.

PN492

MR D'ARCY: Commissioner, as you outlined, our application in relation to this matter is to seek a suspension or termination of the bargaining period, of the NUW's bargaining period and that is BP2008/3726. Our amended application adds two grounds. Those grounds effectively are the 430 two, that the - - -

PN493

THE COMMISSIONER: 430 subsection 2.

PN494

MR D'ARCY: 430(2), sorry. Particularly subclause B, and that is that the NUW tried generally to reach agreement with my client on the basis that a binding agreement that's legally enforceable can't be made because an agreement has already been made with the AMIEU New South Wales branch. Commissioner, the added ground was under section 438 and that is that it's a circumstance that industrial organisation(sic) is being organised or taken by an organisation that is a negotiating party; and I should say that that's qualified by subsection 1 of the Act - subsection 1 of 430. 430(1) is in both tenses so it deals with the circumstances that existed or exist. So when it deals with 430(8) it deals with not just industrial action that is being organised but industrial action that has been organised.

PN495

Commissioner, in support of this application we filed a statutory declaration, or two statutory declarations in fact by Mr David Hammond. I would seek to call Mr Hammond to the stand, if it pleases.

**<DAVID KENNETH HAMMMOND, SWORN**

**[10.55AM]**

**<EXAMINATION-IN-CHIEF BY MR D'ARCY**

PN496

MR D'ARCY: Mr Hammond, did you prepare two statutory declarations for today's hearing?---I did.

PN497

Are they before you there?---They are.

PN498

Are they the statutory declarations that you prepared?---They are.

PN499

Sorry?---They are, yes. Sorry.

PN500

Commissioner, I would seek to tender both of those statutory declarations as filed with the registry.

PN501

THE COMMISSIONER: They're separated only by a date, aren't they? Is the first one dated 20 October 2008?

PN502

MR D'ARCY: That's correct.

PN503

THE COMMISSIONER: The second one is 21 October 2008?

PN504

MR D'ARCY: Yes, Commissioner.

**EXHIBIT #D1 STATUTORY DECLARATION TOGETHER  
WITH ATTACHMENTS OF DAVID KENNETH HAMMOND  
DATED 20/10/2008**

**EXHIBIT #D2 STATUTORY DECLARATION TOGETHER  
WITH ATTACHMENTS OF DAVID KENNETH HAMMOND  
DATED 21/10/2008**

PN505

THE COMMISSIONER: Yes, go ahead.

PN506

MR D'ARCY: Mr Hammond, you say in your statement D1 in paragraph 4 that VersaCold commenced operations at the Eastern Creek CDC on 4 February 2008?---That's correct.

PN507

Firstly, what occurs at that particular site; what business is it?---It's a Coles chilled distribution centre. A temperature controlled distribution centre where we receive, handle and distribute Coles's entire range of chilled product to 211 stores.

PN508

Had VersaCold previously performed this work?---Yes. Prior to that it was - and this was the start of the migration period, it was all being handled at - the same product at Arndell Park Northside by VersaCold.

\*\*\*\* DAVID KENNETH HAMMOND

XN MR D'ARCY

PN509

THE COMMISSIONER: When you say a translation period; from one site to another site?---Correct. That was - the first case into the new distribution centre was the 4th of February 2008. Prior to that all the product was being handled at Arndell Park North, and then we began the migration period then and it finished on the 7th of April 2008.

PN510

Thank you.

PN511

MR D'ARCY: Mr Hammond, at paragraph 5 of D1 you talk about a P & O Cold Logistics Limited New South Wales Enterprise Award 2003, a New South Wales consent award?---Yes.

PN512

That's attached at DH2?---Mm mm.

PN513

Can you tell me what that document covered?---It covered all of - - -

PN514

MR JOSEPH: Commissioner, excuse me. I don't mean to interrupt the witness but I want to object, and I know objections on the ground of relevance don't often find favour but I do wonder, with respect, what this history has to do with the application?

PN515 THE COMMISSIONER: A valid question.

PN516 Mr D'Arcy?

PN517 MR D'ARCY: Commissioner, what we're trying to establish is that - - -

PN518 MR JOSEPH: Perhaps it should be done in the absence of the witness. I should have ..... if there's any - - -

\*\*\*\* DAVID KENNETH HAMMOND XN MR D'ARCY

PN519 THE COMMISSIONER: All right, Mr Hammond, would you mind waiting outside please.

PN520 MR JOSEPH: I'm sorry Commissioner.

<THE WITNESS WITHDREW [11.00AM]

PN521 THE COMMISSIONER: You didn't object to the tender, Mr Joseph.

PN522 MR JOSEPH: Well no, I take the point but it's of no relevance. I take your point, Commissioner, but I wasn't aware that additional questions were going to be asked beyond what is contained in that affidavit.

PN523 THE COMMISSIONER: The affidavit speaks for itself.

PN524 MR JOSEPH: It does. It does, and I really do wonder - I'm assuming that this matter is going to be dealt with in a time-efficient manner. I really do wonder, with respect, what possible relevance all of this background would have. I must say, as a matter of course I don't generally object to the tender of material on the grounds of relevance, because it's ultimately a matter for weight. But when we start to take up the Commission's time, that's why I rise to object, Commissioner.

PN525 THE COMMISSIONER: Mr D'Arcy, is there any need to cover the history, given that this is an application to suspend or terminate an existing bargaining period?

PN526 MR D'ARCY: Commissioner, all we're trying to establish is that the history itself with the AMIEU New South Wales branch - - -

PN527 THE COMMISSIONER: Well once again, the document which has not been objected to at this point speaks for itself in that regard.

PN528

MR D'ARCY: Certainly. I can withdraw the question. I have no particular issue, if it's accepted in relation to the AMIEU having traditional coverage of VersaCold sites.

PN529

MR JOSEPH: It's not that - - -

PN530

THE COMMISSIONER: That's not the case.

PN531

MR JOSEPH: It doesn't need to be established so it's not a matter that I need to comment on, or agree to.

PN532

THE COMMISSIONER: There is an award in existence and they are respondents to the award. They speak for themselves.

PN533

MR D'ARCY: Certainly.

PN534

THE COMMISSIONER: Can you ask Mr Hammond to come back, please.

**<DAVID KENNETH HAMMOND, RECALLED ON FORMER OATH**

**[11.03AM]**

**<EXAMINATION-IN-CHIEF BY MR D'ARCY, CONTINUING**

PN535

THE COMMISSIONER: Thank you, Mr Hammond.

PN536

Mr D'Arcy.

PN537

MR D'ARCY: Thank you Commissioner.

PN538

Mr Hammond, the relationship with the AMIEU New South Wales branch; do you know over what period the relationship with - - -

PN539

MR JOSEPH: Objection on the same basis as what I've put previously.

PN540

THE COMMISSIONER: No, I'll overrule that question.

PN541

MR JOSEPH: Yes.

PN542

THE COMMISSIONER: Go ahead Mr D'Arcy.

PN543

MR D'ARCY: Sorry, Commissioner. Overrule the question or the objection?

PN544

THE COMMISSIONER: Sorry, the objection.

PN545

MR D'ARCY: Mr Hammond, can you tell us how long the relationship is between the AMIEU New South Wales branch and VersaCold?---It's - - -

PN546

THE COMMISSIONER: Mr Hammond, in responding to that question, I only want you to give responses from your own firsthand knowledge?---It's over 30 years.

PN547

MR D'ARCY: Is there a representative body for VersaCold employees in New South Wales?---Yes there is.

PN548

What is that body?---It's a joint consultative committee. We have union delegates from every site that attend a meeting every six weeks or so, and table issues et cetera from both sides, and try and resolve any matters.

PN549

Do they have any other responsibilities?---At the appropriate time the - we - any bargaining that has to be done in regard to the agreement renewal, it takes place - - -

\*\*\*\* DAVID KENNETH HAMMOND

XN MR D'ARCY

PN550

THE COMMISSIONER: So do I understand correctly that this joint consultative council, apart from it being a joint consultative council, it is also a bargaining agent?---Yes.

PN551

I see.

PN552

MR D'ARCY: Mr Hammond, if I can refer you to D2 and paragraph 12. You refer to a number of draft clauses that were prepared by the NUW to be inserted in the draft agreement. Can I hand up a - - -

PN553

THE COMMISSIONER: I'm now handed a document.

PN554

MR JOSEPH: Sorry Commissioner, I didn't know you had been handed a copy. I object to the Commission seeing this document. I'm sorry, I didn't know the Commission had been handed a copy.

PN555

THE COMMISSIONER: Well I think Mr Hammond was just given a copy and asked to - well, I presume he is asked to identify it. I haven't read it and I haven't seen it.

PN556

MR JOSEPH: That's all right. I do apologise to the Commission, I didn't see that.

PN557

MR D'ARCY: Mr Hammond, is that the document that you refer to in that paragraph?---Yes. Yes.

PN558

Commissioner, I seek to tender that document.

PN559

THE COMMISSIONER: Can I ask why it wasn't attached to the statement, exhibit D2?

PN560

MR D'ARCY: It was, Commissioner, an oversight. It was meant to be attached. I should also indicate that we did indicate to Slater & Gordon, who represent the respondent in the matter, that we were going to tender this document, together with another. It is a document produced by the NUW. If it pleases.

PN561

MR JOSEPH: Well I've got an extra ground of objection. This document wasn't produced by this witness, although he may be able to say that it's a document that he was given by somebody from the NUW. But can I say two further things, Commissioner. One - and I can say to the Commission without the Commission looking at it - it is marked for the purposes of negotiation only.

\*\*\*\* DAVID KENNETH HAMMOND

XN MR D'ARCY

PN562

THE COMMISSIONER: Is it a without prejudice document?

PN563

MR JOSEPH: It is not marked without prejudice but I would submit that a document being marked in negotiations for the purpose of negotiation only would certainly give an indication. Again, it's a matter for the Commission ultimately, but it would give an indication that - - -

PN564

THE COMMISSIONER: Is it really relevant? Because it's something that occurred on 29 September or thereabouts, and discussions - I'm aware from having read some of the material that has been filed to date that things advanced considerably beyond 29 September. So it's really only a step along the way, isn't it? Is it any more than that?

PN565

MR JOSEPH: I wouldn't have thought so but it's not a document I seek to tender.

PN566

THE COMMISSIONER: No. Do you still object to Mr Hammond acknowledging that that's the document that he received?

PN567

MR JOSEPH: No, I don't object to him doing that.

PN568

THE COMMISSIONER: Right.

PN569

MR JOSEPH: It's only the tender of the document that I object to, but Mr Hammond giving evidence that he got draft clauses from the NUW, I don't object to him giving that evidence.

PN570

THE COMMISSIONER: Thank you Mr Joseph.

PN571

Mr D'Arcy, oversight or not, is it actually relevant?

PN572

MR D'ARCY: Yes Commissioner, we say it is.

PN573

THE COMMISSIONER: All right, well have Mr Hammond identify it, if that's what he can do.

PN574

MR D'ARCY: Mr Hammond, have you seen this document before?---I have.

PN575

Is this the document you refer to, that you received on the 29th?---It is.

\*\*\*\* DAVID KENNETH HAMMOND

XN MR D'ARCY

PN576

Of September?---It is.

PN577

Commissioner, we seek to tender that document.

PN578

THE COMMISSIONER: The document now tendered, which is titled VersaCold Cold CDC Roberts Road Eastern Creek EA 2008 draft clauses "For the purpose of negotiation only" I will mark as exhibit D3.

**EXHIBIT #D3 DOCUMENT TITLED VERSACOLD COLD CDC  
ROBERTS ROAD EASTERN CREEK EA 2008 DRAFT  
CLAUSES MARKED "FOR THE PURPOSE OF NEGOTIATION  
ONLY"**

PN579

MR D'ARCY: Mr Hammond, if I could take you to clause 3 Incidents and Parties Bound, of that D3; what is your understanding of discussions that you attended and the meetings you had with the NUW in relation to that clause, and the intent of that clause?

PN580

MR JOSEPH: Objection. What sort of question is that? "What is your understanding of what happened?"

PN581

THE COMMISSIONER: Doesn't the document speak for itself? I haven't read it, but you have asked Mr Hammond to acknowledge receipt of it. He has received it, and it stands on what it says.

PN582

MR D'ARCY: Certainly.

PN583

THE COMMISSIONER: I don't know what it says.

PN584

MR D'ARCY: Mr Hammond, did you have discussions in relation to this document?---Yes.

PN585

Can you tell the Commission what the discussions were in relation to particularly to paragraph 3 or clause 3 of this document?---The discussions were that the NUW wished to be the sole union representing that site and that they didn't want to represent any other site in VersaCold New South Wales.

PN586

MR JOSEPH: I'm sorry, Commissioner, I don't wish to be difficult but I'm going to object to that answer remaining on the record. It's put that he had that discussion and has given some evidence.

\*\*\*\* DAVID KENNETH HAMMOND

XN MR D'ARCY

PN587

THE COMMISSIONER: Yes, you will be entitled to cross-examine him if you have some doubts about it.

PN588

MR JOSEPH: I thought he was - - -

PN589

THE COMMISSIONER: I'm sorry, what is the objection?

PN590

MR JOSEPH: The objection is that I thought he was being asked whether he had a conversation with somebody. This appears to be an impression that Mr Hammond is giving evidence about.

PN591

THE COMMISSIONER: From his firsthand knowledge of a discussion.

PN592

MR JOSEPH: I take that point, yes.

PN593

THE COMMISSIONER: I will allow the question.

PN594

MR JOSEPH: Yes, I take the point Commissioner.

PN595

MR D'ARCY: Mr Hammond, in paragraph 20 of D2 you mention a meeting you had with the NUW officials and delegates and attached minutes arising from that meeting, DHA14. Could you please tell us what your recollection is of that meeting in relation to Mr O'Donnell's comments that were listed in the minutes, and Mr Cripps?

PN596

MR JOSEPH: Commissioner, perhaps this witness could be asked whether he prepared the minutes? I'm assuming the minutes have been attached to his statement as being a recollection of what was said. No notice was provided to us that more evidence was going to be called about minutes that have already been put on in these and other proceedings, as evidence of what was said.

PN597

THE COMMISSIONER: I'll uphold your objection, Mr Joseph.

PN598

There is no need to have this witness repeat evidence that he has given in his exhibits.

PN599

MR D'ARCY: Certainly Commissioner.

PN600

THE COMMISSIONER: Or in his statement and the attachments. You can draw whatever attention you like to them later on but you're wasting everybody's time to have Mr Hammond repeat what he has already said.

\*\*\*\* DAVID KENNETH HAMMOND

XN MR D'ARCY

PN601

MR D'ARCY: Certainly.

PN602

Mr Hammond, if I can hand up to you a group of flyers and a web log page. Mr Hammond, have you seen these before?---Yes I have.

PN603

THE COMMISSIONER: I'm sorry, what are - - -

PN604

MR D'ARCY: If I could hand up - - -

PN605

THE COMMISSIONER: I'm not aware of them but just describe them to me.

PN606

MR D'ARCY: They are flyers of the NUW.

PN607

MR JOSEPH: Hang on. We haven't established that.

PN608

THE COMMISSIONER: They're flyers.

PN609  
MR D'ARCY: They're flyers.

PN610  
THE COMMISSIONER: That were placed in the workplace.

PN611  
MR D'ARCY: They are.

PN612  
THE COMMISSIONER: All right.

PN613  
MR D'ARCY: There are also some flyers which were placed in the workplace that are on an internet page.

PN614  
Mr Hammond, have you seen these before?---I have.

PN615  
Where did you have occasion to see these documents?---On the - on the site in Eastern Creek and also in the blog page that we reviewed on the system.

PN616  
THE COMMISSIONER: I'm sorry, what was that, Mr Hammond? On the what?---Reviewed on the internet.

PN617  
MR D'ARCY: If I could seek to tender these?

PN618  
MR JOSEPH: I'm going to object. I'm not sure what either of these is being tendered as. Commissioner, perhaps I should do this in the absence of the witness. I'm sorry to be taking up your time, Commissioner.

\*\*\*\* DAVID KENNETH HAMMMOND XN MR D'ARCY

PN619  
THE COMMISSIONER: Thank you Mr Hammond, if you wouldn't mind just waiting outside.

<THE WITNESS WITHDREW [11.17AM]

PN620  
MR JOSEPH: Gentlemen, this is going to be a very long and painful process if this line of questioning continues and if the line of objections continue. We will be here for weeks. We have one day set aside for the evidence and quite frankly, if fresh evidence was to be introduced today it should have been provided to the respondent to the application before this morning.

PN621  
MR JOSEPH: Yes.

PN622  
THE COMMISSIONER: This is ambush, Mr D'Arcy.

PN623

MR D'ARCY: Commissioner, I let the respondent's solicitors know that this was what was going to be tendered. They had - - -

PN624

MR JOSEPH: When?

PN625

THE COMMISSIONER: Did you provide them with copies of it? Or did you just put them on notice that you would be bringing new material? Because quite frankly we won't get through this material if you're going to bring further new material. The other side are perfectly entitled to seek an adjournment to get to respond to it; to take instructions to respond to it.

PN626

MR D'ARCY: Commissioner, this is the last. There is no more new material that we're seeking to tender, and they are documents that are well known to the respondent.

PN627

THE COMMISSIONER: With very great respect you can't say that.

PN628

MR D'ARCY: They appear on their website.

PN629

MR JOSEPH: But you can't say that. You can't say that. It hasn't been proven.

PN630

MR D'ARCY: Mr Hammond has already given some evidence that he has seen this on their website.

PN631

THE COMMISSIONER: So it's in the public domain.

PN632

MR D'ARCY: Certainly.

PN633

THE COMMISSIONER: All you can do is ask Mr Hammond questions about what he has observed in the public domain.

PN634

MR D'ARCY: Yes.

PN635

THE COMMISSIONER: And if the source of the material is not clear, then what does it mean? I don't know.

PN636

MR D'ARCY: Well Mr Hammond has also said he has seen these on the website.

PN637

THE COMMISSIONER: Yes, he has seen them on the website. I get back to the point, Mr D'Arcy, that you had some weeks to prepare for this. I simply do not accept the proposition that you advised the respondent's solicitors most recently -

I don't know when - of your intention to bring fresh evidence, without providing them with copies of that evidence.

PN638

MR D'ARCY: Certainly, Commissioner. I spoke to them when we were last here before you - when I was last here before you. Yes, you're quite right. I did not provide it.

PN639

THE COMMISSIONER: Well that's not good enough, Mr D'Arcy, and if Mr Joseph seeks an adjournment to take instructions on this new material he will be granted the adjournment.

PN640

MR D'ARCY: Certainly.

PN641

THE COMMISSIONER: And these proceedings will be delayed even further. So you have to make up your mind whether the significance of the documents which you wish to tender are of such importance that you wish to press on with your tender, which in effect will invite an adjournment to the proceedings.

PN642

MR D'ARCY: Commissioner, we won't push on.

PN643

THE COMMISSIONER: All right. Thank you Mr D'Arcy.

PN644

Can you get Mr Hammond back please, Rose?

**<DAVID KENNETH HAMMOND, RECALLED ON FORMER OATH**

**[11.21AM]**

**<EXAMINATION-IN-CHIEF BY MR D'ARCY, CONTINUING**

PN645

THE COMMISSIONER: Mr D'Arcy.

PN646

MR D'ARCY: Thank you Commissioner.

PN647

Mr Hammond, have there been any further negotiations with the NUW after 19 October of this year?---19th of October, no.

PN648

Are there any further meetings scheduled presently?---No.

PN649

Thank you Commissioner and thank you Mr Hammond. That's all I have.

PN650

THE COMMISSIONER: Cross-examination, Mr Joseph.

PN651

MR JOSEPH: Yes. Commissioner, I would seek - - -

PN652

THE COMMISSIONER: Mr Joseph, can I just comment that it appears that you are on your own today. Ms Maiden is not here.

PN653

MR JOSEPH: Yes.

PN654

THE COMMISSIONER: Presumably she's still you're instructing solicitor.

PN655

MR JOSEPH: Yes.

PN656

THE COMMISSIONER: I think one of the NUW officials who has been present in earlier proceedings and is the person who has been directly involved in many of the meetings on site - at least I'm aware of that - was here at the commencement of the proceedings and has now left.

PN657

MR JOSEPH: Well he hasn't left - I'm sorry, I don't mean to butt in, Commissioner. I asked him to wait outside because I didn't know what was going to fall from Mr Hammond, and I thought I may have to call him.

PN658

THE COMMISSIONER: All right.

PN659

MR JOSEPH: All I was going to ask was perhaps a two-minute adjournment. I'm fine. I'm ready to proceed but ask for a two-minute adjournment just to clarify one or two matters with Mr O'Donnell before I cross-examine Mr Hammond.

\*\*\*\* DAVID KENNETH HAMMOND

XN MR D'ARCY

PN660

THE COMMISSIONER: Yes.

PN661

MR JOSEPH: Which will only be very short, I might add.

PN662

THE COMMISSIONER: Is it likely that you would be calling Mr O'Donnell?

PN663

MR JOSEPH: I think it's highly unlikely, actually.

PN664

THE COMMISSIONER: All right. Well in those circumstances I'll grant the adjournment for five minutes. If you would ask Mr O'Donnell to remain outside after you have conferred with him.

PN665

MR JOSEPH: Yes ,all right.

PN666

THE COMMISSIONER: We will resume then with the cross-examination of Mr Hammond.

PN667

MR JOSEPH: Thank you Commissioner.

PN668

THE COMMISSIONER: We will adjourn now for five minutes.

**<SHORT ADJOURNMENT**

**[11.23AM]**

**<RESUMED**

**[11.32AM]**

PN669

THE COMMISSIONER: Mr Joseph.

PN670

MR JOSEPH: Thank you Commissioner, and thank you for that short adjournment. Perhaps I should have said at the outset, Commissioner, thank you for accommodating my client and myself by starting a bit late this morning.

PN671

THE COMMISSIONER: All right.

**<CROSS-EXAMINATION BY MR JOSEPH**

**[11.32AM]**

PN672

MR JOSEPH: Mr Hammond, the minutes that are attached to D2 - and I don't need to take you to any particular minutes - they all seem to take the same form; who prepared those minutes?---Ms Sullivan.

PN673

All right, so they weren't prepared by yourself?---No.

PN674

So they're not actually your own recollection of what was said?---They are my recollection because once they're prepared I vet them and - before they're issued.

PN675

Issued to whom?---To all the people that are within our company.

PN676

Yes, you're not suggesting they were issued to the NUW officials who were present at the meeting?---I believe that we - can I just check my notes? Because I believe that we would have sent them to them with our letters.

PN677

THE COMMISSIONER: Mr Hammond, answer the question from your firsthand knowledge. If you don't know, say so?---I don't know, sir.

PN678

MR JOSEPH: All right. So your evidence is that you say they're an accurate reflection of what was said?---Yes.

PN679

But they're your recollection of what was said?---Yes.

PN680

Not necessarily everybody's recollection of what was said?---No.

PN681

Right, and clearly there were a lot of meetings?---Yes.

PN682

There were a lot of things said in those meetings about various matters in relation to negotiations?---Yes.

PN683

You would agree that at various times people got a little bit hot under the collar? ---I'm not going to answer that.

PN684

THE COMMISSIONER: Well I direct you to answer the question?---Well, a little bit hot under the collar - - -

PN685

Again, you were asked to answer a question. You can't refuse to answer the question. You can answer it from your firsthand knowledge to the best of your ability?---What do you mean by hot under the collar?

PN686

MR JOSEPH: Appear to become frustrated?---Yes.

PN687

Appear to make comments that may not have been given a lot of thought, as in shot straight from the hip, as it were?---No, I - - -

PN688

If you don't know, sir, you don't know?---I don't know the - - -

PN689

All right. Sir, can I put to you that the last industrial action that was taken by members of the NUW at Eastern Creek concluded on 17 October of this year? ---I - I'm - I don't know - I can't recall the date immediately to - to my mind, but it sounds approximately right.

\*\*\*\* DAVID KENNETH HAMMOND

XXN MR JOSEPH

PN690

You would agree with me that it was prior to the application made on your company's behalf to the Commission to suspend the bargaining period with the NUW?---The industrial action concluded prior to the application?

PN691

Yes?---Is that the question?

PN692

That's the question?---Yes, that's right.

PN693

All right Sir, can I show you a letter, if I may; do you recall seeing that letter, sir?---I do.

PN694

Yes all right, and you recall receiving that letter from Mr Bellan?---I - I'd - I'd need to check. This looks like a letter - I do recall seeing a letter of this nature, I just question the date. I'm not quite sure of the date and I would need to check my notes.

PN695

Well if you want to check your notes, sir, I don't mind? Perhaps I can assist in this way, Mr Hammond. In D1, paragraph 13, you say you sent a letter to Mr Bellan saying that the 2008 agreement had been approved by a valid majority of employees, and that was on 20 October; and asking that the NUW provide a favourable response or cancel the industrial action that was at that time planned? ---Yes, I recall that.

PN696

I'm giving you that date or pointing you in that direction to give you a reference point in terms of time for receiving the letter from Mr Bellan. I don't know if it's in your evidence, sir, if that's what you're looking for?---Now I - I think it's correct then.

PN697

I tender that letter. I don't need to ask any further questions, but I don't have another copy. But I don't need to ask him any further questions about it.

PN698

THE COMMISSIONER: All right. What is tendered now is a document from Mr Bellan, state secretary of the NUW, addressed to VersaCold Logistics, delivered on 20 October 2008.

**EXHIBIT #J1 DOCUMENT FROM MR BELLAN, STATE  
SECRETARY OF THE NUW, TO VERSACOLD LOGISTICS  
DATED 20/10/ 2008**

PN699

MR JOSEPH: Thank you, Commissioner.

\*\*\*\* DAVID KENNETH HAMMOND

XXN MR JOSEPH

PN700

Mr Hammond, you have not responded to that letter?---No.

PN701

You understood from that letter, sir, that the NUW wished to continue to discuss a collective agreement with you for the Eastern Creek site? Perhaps I should show the witness a copy of it. I'll have to give the witness my own copy.

PN702

THE COMMISSIONER: Yes, please do come forward, Mr Joseph.

PN703

MR JOSEPH: Yes.

PN704

THE WITNESS: In essence, that's what the letter says. Yes.

PN705

MR JOSEPH: Yes, but VersaCold has chosen for whatever reason not to accede to that request to continue to negotiate?---Correct.

PN706

Thank you.

PN707

No further questions, Commissioner.

PN708

THE COMMISSIONER: Re-examination Mr D'Arcy?

**<RE-EXAMINATION BY MR D'ARCY**

**[11.41AM]**

PN709

MR D'ARCY: Just a question, Commissioner.

PN710

Mr Hammond, are you aware of why VersaCold has not met again with the NUW in relation to that request in the letter of J1?---Because we formed an agreement with the AMIEU, voted on it accordingly, and registered it accordingly.

PN711

Thank you. Nothing further, Commissioner.

PN712

THE COMMISSIONER: Thank you for your evidence, Mr Hammond. You may step down. Mr Donzow, do you have any questions in cross-examination for Mr Hammond?

**<CROSS-EXAMINATION BY MR DONZOW**

**[11.42AM]**

PN713

MR DONZOW: Mr Hammond, in your evidence you were asked what was carried out at Eastern Creek sites and you indicated chilled park and I put it to you that you also issued frozen at that site similar to what was carried out at the Arndell Park site?---That's correct, yes.

PN714

That's all, Commissioner.

PN715

MR D'ARCY: No re-examination, Commissioner.

PN716

MR JOSEPH: No re-examination, Commissioner.

**<THE WITNESS WITHDREW**

**[11.43AM]**

PN717

THE COMMISSIONER: Any further evidence, Mr D'Arcy?

PN718

MR D'ARCY: No, thank you, Commissioner.

PN719

THE COMMISSIONER: Is that the end of the evidence?

PN720

MR D'ARCY: That is the end of our evidence.

PN721

MR JOSEPH: No evidence, Commissioner. I think the Commission would be aware there's now exhibit J1 and there was some - I'm sorry. I don't know that it's really - I was a little unclear, Commissioner, I must say reading the transcript from the 22nd. My learned friend, Mr Schluyter was appearing for my client. It appeared as though both matters were listed.

PN722

THE COMMISSIONER: 496 was subsequently withdrawn.

PN723

MR JOSEPH: Yes. There was the bargaining period that my client served on Mr D'Arcy's client was an exhibit S1 of 22 October. I'm not sure whether it's therefore an exhibit in these proceedings. I don't know that it's an issue to be perfectly honest that a bargaining period - - -

PN724

THE COMMISSIONER: Well, it is if it's relevant and you're not sure, then tender it in these proceedings, unless Mr D'Arcy can confirm whether it's an exhibit in this matter as well because I think on the 22nd the matters have been dealt with concurrently.

PN725

MR JOSEPH: That's the impression I got.

PN726

THE COMMISSIONER: It commenced with the 430 proceedings. I adjourned. My recollection is I reconvened and called the 496 matters on. We then dealt with them. It was at that point that exhibit S1 was tendered, then it's as relevant in these proceedings as it was in the 496 proceedings. Do you disagree with that, Mr D'Arcy?

PN727

MR D'ARCY: Yes, your recollection is quite correct. It was actually out of D1 and it's attachment 3 to that.

PN728

THE COMMISSIONER: So exhibit S1 was equal - - -

PN729

MR D'ARCY: Yes, it's in D1.

PN730

MR JOSEPH: It's actually in D3, so I don't need to re-tender it. I think it's - - -

PN731

MR D'ARCY: It's at attachment 3 of D1.

PN732

THE COMMISSIONER: Yes, thank you. Submissions then. Any evidence from you, Mr Donzow? You're a party to these proceedings.

PN733

MR DONZOW: Commissioner, just for the record, in relation to section 430(8) - - -

PN734

THE COMMISSIONER: No. I don't want to have submission. I want to know whether at this point in time you wish to bring any witness evidence forward.

PN735

MR DONZOW: No, Commissioner.

PN736

THE COMMISSIONER: All right. Mr D'Arcy, your submissions.

PN737

MR D'ARCY: Certainly, Commissioner. Commissioner, I just intend to run you through the facts very quickly and then deal with the demarcation argument and then deal with the genuinely try to reach agreement argument, if it pleases.

PN738

THE COMMISSIONER: I'm not telling you how to run your submission.

PN739

MR D'ARCY: Certainly. I'm just outlining. Commissioner, on 19 September VersaCold filed the Eastern Creek Distribution Centre Greenfield Agreement 2007, which is agreement number 073403166 with the Workplace Authority. The Coles CDC Eastern Creek site commenced its first operation box moved on 4 February 2008. That was effectively a business - - -

PN740

THE COMMISSIONER: Either speak up or just be a little more precise. I'm having difficulty sort of following what you're saying.

PN741

MR D'ARCY: Certainly, sir. The first box was moved on 4 February 2008 at the Coles Eastern Creek CDC, the site in question, at 3 Roberts Road, Eastern Creek. Prior to that time the evidence of Mr Hammond is that that work had been performed at Arndell Park North Distribution Centre and approximately for the last 10 years. There is a consent award which covered or covers those sites including Arndell Park North - - -

PN742

THE COMMISSIONER: Which sites?

PN743

MR D'ARCY: Arndell Park North.

PN744

THE COMMISSIONER: That's the only one you've mentioned.

PN745

MR D'ARCY: Arndell Park North and South, Girraween North and South and the Minto facility. They are listed in exhibit D1 in attachment DH2 in clause 6 of that consent award. On 18 June 2008 the NUW served a bargaining period notice on VersaCold Logistics Limited and that is, as we just discussed, attachment 3 to D1. On 22 August 2008 the AMIEU served a bargaining period on VersaCold Logistics Limited, and that's attached at D1, attached there at 4, annexure 4.

PN746

On 19 September, Commissioner, you approved the application by the NUW for protected action ballot and on 29 September the ballot was declared proved by the Australian Electoral Commission. Between 24 September 2008 and 8 October 2008 there was a series of meetings between the NUW and VersaCold group of companies to discuss a proposed agreement, its content and the NUWs involvement. As part of those meetings on September 29, 2008 the NUW presented a number of draft clauses. One of those draft clauses was a period of operation clause that included the NUW and VersaCold as the sole parties to the agreement, that the NUW proposed for the Eastern Creek VersaCold site.

PN747

Commissioner, that's exhibit D3 and the clause quite clearly sets out:

PN748

*The agreement shall be binding upon VersaCold Logistics Limited, Coles CDC Eastern Creek Pty Ltd -*

PN749

with their address and the National Union of Workers with their address and covers classifications specified in the agreement at Coles Chilled Eastern Creek Distribution Centre at 3 Roberts Road, Eastern Creek, New South Wales. On 7 October 2008 VersaCold compiled and confirmed with the NUW there was a final log of claims. That log of claims is at D2 and attachment 11 and, Commissioner, you find an extensive array of claims there. Also at that attachment those claims were costed and a letter which is at that attachment, 7 October there is a confirmation to Mr Bellan from Mr Hammond in the letter which confirms receipt of the final log of claims and lists those claims. Includes 19 separate claims and VersaCold costed those at 19 and a half per cent as referred to in that letter.

PN750

THE COMMISSIONER: 19 and a half per cent of what?

PN751

MR D'ARCY: On top of the existing wages bill or 3,343,121 and that's at paragraph 8 of that letter.

PN752

MR JOSEPH: I'm sorry, Commissioner, I don't want to interrupt, but it seems like the application has changed in final addresses. As I understood the grounds that were being put it wasn't suggested that the NUW were being unreasonable, but rather the grounds, as I've understood them for this point in the amended application on the 430(2) point is solely that the NUW can't be trying to reach an agreement because the company has already reached an agreement with the AMIEU.

PN753

THE COMMISSIONER: That's the amended application. The first ground wasn't - that wasn't in lieu of the first one, the first ground. The amended application incorporated both from my understanding of the amended application.

PN754

MR JOSEPH: Again, it wasn't raised in the original application either.

PN755

MR D'ARCY: We're not seeking to prosecute that point.

PN756

MR JOSEPH: All right. Thank you, Commissioner. That's all - I just wanted it clarified in case I had to deal with it.

PN757

MR D'ARCY: Because in essence we're not seeking to prosecute that point, Commissioner, because Mr Bellan then walked away from all those log of claims later on with the exception of adding one new claim and the NUW being party to the agreement. On 8 October, and this is D2, paragraph 20 of Mr Hammond's statement and the attachment is DHA14. There are minutes of a meeting that account with Mr Hammond's evidence and his recollections of that particular meeting where it's noted in the minutes that Mr O'Donnell says, "If this continues there will be Industrial Relations demarcation proceedings."

PN758

Mr Cripps also says, "The company also wants to feed you an agreement which is a shit sandwich. The company are trying to threaten the NUW and do a deal with a scab union." On 2 October 2008 the AMIEU New South Wales Branch gained conditional registration pursuant to clause 2 of schedule 10 of the Act. On 8 October 2008 the NUW and the AMIEU - sorry - I'll start again, Commissioner, sorry. On 8 October VersaCold group of companies and the AMIEU New South Wales Branch resolved the terms and agreement to be put to all members at all New South Wales sites and that included Arndell Park North, South, Girraween North and South, Minto and the Eastern Creek site.

PN759

On 10 October Mr Bellan, Branch Secretary of the NUW, spoke with Mr Hammond and that is paragraph 24 of Mr Hammond's statement in attachment DHA17 and the essence of that conversation in the minutes or that conversation itself was that the NUW were prepared to do the deal with a \$500 sign on bonus with them in the agreement for Eastern Creek and then accept all other terms and abandon all other terms of the log of claims, effectively abandoning those 19 items.

PN760

On 17 October 2008 the NUW notified VersaCold of an eight hour stoppage at work, for night shift commencing 22 October at midnight and an eight hour stoppage of work for the day shift commencing 23 October, 5 am. On 17 and 19 October a ballot for the approval of VersaCold Logistics Limited New South Wales Union Collective Agreement was held for all warehouse employees of VersaCold New South Wales including the Eastern Creek CDC, the ballot approved by a valid majority of employees covered by the 2008 UCA and was lodged with the Workplace Authority on 20 October 2008.

PN761

As the Commission was informed there were in fact stoppages on the site in accordance with notices served under protected action by the NUW. Commissioner, in relation to demarcation argument, demarcation is defined under section 4 of the Act, the definition of demarcation and the definition itself, particularly subsection (c) of that definition says that:

PN762

*There's a dispute about the representation under this Act of the industrial interests of employees by an organization of employees.*

PN763

We say first off that the section 4 is a non-exhaustive definition. The section 4 is a non-exhaustive definition and it does leave the Commission discretion to interpret from the common sense perspective of the evidence and its experience in relation to what a demarcation dispute is. If I could hand up to the Commission decision of McHugh J in relation to Hancock ex parte Australian Federation of Airline Pilots, High Court decision.

PN764

THE COMMISSIONER: Just give me the citation. The copy of this document that you've handed up has been conveniently trimmed up at the top so I can't see the citation.

PN765

MR D'ARCY: It does start again on the second page. Citation, it looks like it's up the top of 34 IR at 406. I can supply that later exactly - - -

PN766

THE COMMISSIONER: No, I'm satisfied with that, seeing it at the top of the next page of the document tendered.

PN767

MR D'ARCY: Commissioner, if I could take you to page 410 of that decision and it's the second paragraph, about three-quarters of the way down and I should say there's very limited authority in relation to - - -

PN768

THE COMMISSIONER: Just a moment, Mr D'Arcy. Page 410, yes?

PN769

MR D'ARCY: Second paragraph, three-quarters of the way down the sentence starts, "The question of representation". "The question of representation however is of the essence of a demarcation dispute." "There's very little written in relation to defining of a demarcation dispute outside the statutory definition."

PN770

THE COMMISSIONER: Are you quoting or are you now - - -

PN771

MR D'ARCY: Yes, that's a quote. Yes, the sentence says, the quote is, "The question of representation however is the essence of a demarcation dispute and to relies on existing facts virtually may pre-empt the resolution of the dispute." The central question of this is that the demarcation dispute central to it is the question of representation. We say that the Commission can inform itself in relation to

demarcation dispute because the definition under subsection (4) really, it says, it includes. So it's a non-exhaustive list. In any event we say that this dispute is about representation of the interests, industrial interests of employees by an organization of employees.

PN772

We say that it is about the representational rights that flow from having an agreement under the Act and those representational rights and then acquiring membership at this particular site. They include sections like 760 of the Act which gives right of access to employee organizations where they are party to an agreement with right of access to the site, hold discussions with employees. Also agreed in documentation and one of the agreed factors between VersaCold, the NUW and the AMIEU, and I say the NUW because Mr Bellan accepted, as I said, all points with the exception of a \$500 sign on bonus that had been agreed with the AMIEU, New South Wales Branch and that was rights in relation to having compulsory arbitration under the Act because the agreement allowed it.

PN773

MR JOSEPH: Sorry, Commissioner, I don't understand that submission at all and just so I can respond to it, I'd ask my friend to just say it again, if he doesn't mind.

PN774

THE COMMISSIONER: He was losing me as well, Mr Joseph. Mr D'Arcy, what's the relevance of it, the existence of the agreement and Mr Bellan's position?

PN775

MR D'ARCY: Yes. Our argument is in relation to the existence of a demarcation dispute is that being a party to an agreement gives you certain rights under the Act. One of those is representation. In terms of where the agreement provides for, as this agreement does, as was agreed with all the parties, for a compulsory arbitration, then compulsory arbitration be accessed under the Act. If the agreement doesn't provide for compulsory arbitration then there is no compulsory arbitration underneath the Act given those sections.

PN776

THE COMMISSIONER: You've lost me completely. What's compulsory arbitration got to do with representation rights? Your argument is that residency to an agreement confers representation rights. Now, how do we get to arbitration?

PN777

MR D'ARCY: Commissioner, all we're saying is that if you're a party to an agreement you then have certain rights which flow from being a party to that agreement under the Act.

PN778

THE COMMISSIONER: You don't have to repeat that, yes, right. Well, then what was your subsequent comment about arbitration?

PN779

MR D'ARCY: Well, under this particular agreement, if VersaCold had have accepted Mr Bellan's proposal on 10 October then the NUW would have had those rights under the Act flowing from the agreement which would then allow

them the access to the site, the access to compulsory arbitration, those rights which are conferred by the Act. Commissioner, there are on the record competing bargaining period notices from the NUW and the AMIEU, both seeking to make an agreement with VersaCold for the Eastern Creek CDC. The NUW sought in the draft clauses that were provided on 29 September 2008 a coverage clause that would exclude the AMIEU New South Wales Branch from the Eastern Creek CDC and Mr Hammond gave evidence in relation to his understanding of that request that was sole representation.

PN780

As of 10 November - sorry, 10 October, Commissioner, there were only two issues left on the table and that was the \$500 sign on bonus and that the company make an agreement with the NUW as the sole representatives. The NUW at that stage abandoned all other claims, all 19 log of claims items for those two items. The AMIEU New South Wales Branch clearly seek to represent the members at Coles CDC by the making of the VersaCold Logistics Limited New South Wales Union Collective Agreement 2008 as filed with the Workplace Authority.

PN781

Mr Hammond gave evidence in relation to the operation of a single bargaining unit at all of VersaCold New South Wales' sites which not only dealt with day issues, but also deals with the negotiation of agreements. Commissioner, if I can hand up a decision.

PN782

THE COMMISSIONER: I'm now handed a copy of the decision of a Full Bench of the Commission titled National Union of Workers v Australia Meat Holdings Pty Ltd, it's print Q4988.

PN783

MR D'ARCY: Commissioner, this was a decision of a Full Bench on appeal from a decision of Commissioner Smith to suspend a bargaining period in relation to Australia Meat Holdings Pty Ltd. The submissions, and it's on page 8, the submissions put on behalf of the NUW on that occasion was:

PN784

*There was no evidence before Commissioner Smith to allow him to be satisfied that industrial action related to a significant extent demarcation dispute or an entitlement to exercise a discretion that's been the bargaining period.*

PN785

THE COMMISSIONER: Where are you reading from? Page 8, which paragraph?

PN786

MR D'ARCY: Top of page 8.

PN787

THE COMMISSIONER: Top of page 8, yes.

PN788

MR D'ARCY: Under the heading, Submissions.

PN789

THE COMMISSIONER: Not on the copy that I've got.

PN790

MR D'ARCY: Commissioner, it is - - -

PN791

THE COMMISSIONER: Page 7 of 19 there is a section headed, The Submissions.

PN792

MR D'ARCY: It's paragraph 26 headed, Submissions, Commissioner.

PN793

THE COMMISSIONER: The copy of the decision that you've provided me is not numbered by paragraph. I have found page 7 there is a subsection or a heading called, The Submissions.

PN794

MR D'ARCY: Commissioner, the paragraph there starts, "Mr Freeburn's main argument".

PN795

THE COMMISSIONER: Yes.

PN796

MR D'ARCY: And that argument was there was no evidence before Commissioner Smith.

PN797

THE COMMISSIONER: I'm sorry?

PN798

MR D'ARCY: That argument was there was no evidence before Commissioner Smith to enable him to be satisfied that industrial action related to a significant extent to a demarcation dispute. The examination that the Full Bench has in relation to the word "relate" and that can be found under the Conclusion of that decision. It's a heading number 2 relates.

PN799

THE COMMISSIONER: Let me just find the Conclusions first. What page do you have in your print, Mr Joseph?

PN800

MR JOSEPH: I just asked what page it started on so I don't know, Commissioner. I'm still looking for it.

PN801

MR D'ARCY: It's page 10.

PN802

THE COMMISSIONER: Page 10? It's a Conclusions paragraph, is it? Does it start, "The elements of section 170MW(5) in the middle of page 10 of the print copy that you've handed to me?"

PN803

MR D'ARCY: Yes. That's the Conclusions section that I'm referring to.

PN804

THE COMMISSIONER: Right.

PN805

MR D'ARCY: In relation to the word "relates" which is numbered number 2 and underlined in inverted commas and at the end of that paragraph the Full Bench say in the second last sentence:

PN806

*We do not think it necessary to go beyond the dictionary definitions in considering the meaning of "relates" which is a common English word in determining whether the industrial action relates to the demarcation dispute we consider whether there is an association, connection or relation between the two.*

PN807

So we say it's open for the Commission to draw an inference in relation to the evidence placed before the Commission. Our submission is that they're - - -

PN808

THE COMMISSIONER: What am I to infer, Mr D'Arcy?

PN809

MR D'ARCY: That the industrial action that was taken and then organised to be taken - and that was set aside because we were here and there were undertakings given to this Commission, to you, Commissioner. But the industrial action that was taken, the industrial action that was organised we say you take a broad look at what "relates" means in relation to the demarcation dispute. We say that there's two issues left on the table after 10 October, after Mr Hammond's conversation with Mr Bellan and they were the NUWs representation on one hand and a \$500 sign on bonus.

PN810

In this decision and, it's page 11, and what the Full Bench say is that the evidence, they thought in that case that there were two interrelated disputes. One for wages and conditions.

PN811

THE COMMISSIONER: I'm sorry. Are you now still quoting from this authority?

PN812

MR D'ARCY: Sorry, Commissioner, I'm not quoting. I can quote if you like. I will come back and quote - - -

PN813

THE COMMISSIONER: Take me to the relevant spot in the decision if you want me to follow your argument and how this authority applies to your argument.

PN814

MR D'ARCY: Sir, it's page 11, the end of page 11.

PN815

THE COMMISSIONER: Well, we're not quite sure about page 11 because obviously you're reading from something different to the copy that you've handed to me because every page reference I've got so far is different to the page references you're quoting from. So your page 11 is more likely to be my page 10.

PN816

MR D'ARCY: Commissioner, I just checked it with Mr Joseph's copy and it's the end of page 11, the last sentence on page 11.

PN817

THE COMMISSIONER: Which says, "The evidence we think"?

PN818

MR D'ARCY: Yes.

PN819

THE COMMISSIONER: Very well, all right.

PN820

MR D'ARCY: And it says:

PN821

*The evidence we think showed that there were two interrelated disputes. One, a dispute over the claim by the employees who joined the NUW and by the NUW for increased wages and improved conditions of employment and (2), a dispute over the claim by these employees and by the NUW that FJW should negotiate with the NUW as a representative of the employees with respect to claim for increased wages and improved conditions of employment.*

PN822

We say that a similar situation exists here, that there are in fact two claims left, and that is (1) for wages and conditions, that the 19 log of claims items have gone by the wayside and we're left with one, and that's the \$500 sign on bonus, and the other is that the agreement be made with the NUW.

PN823

The Full Bench go on to say straight after that:

PN824

*Dispute (1) was demonstrated by the failure of FJW to accede to the log of claims served by the NUW on FJW and on 18 May 1998 the notice date, 25 May 1998 of initiated bargaining period dispute (2) was demonstrated by the refusal of FJW to recognise the NUW as the representative of the employees who joined it (see particularly the last paragraph of FJW's letter 29 May 1998 to the NUW). In our view dispute (2) is a demarcation dispute within the definition of section 4 in particular paragraph (c) of it.*

PN825

They go on to say in the following paragraph:

PN826

*Did then the industrial action relate to a significant extent to this demarcation dispute? There was no direct evidence that it did. The NUW did not, for instance, concede that it did. Indeed, it denied it. Despite this denial it could be inferred that it did. Our view, it could be by reference to undisputed facts set out earlier, in particular the exchange of correspondence between the TWU and FCSU incorporated in the NUW in 1990, item 4, List of Facts.*

PN827

We say that quite clearly the Full Bench said that the Commission can infer from the evidence before it that a reasonable inference that there was a demarcation

dispute regardless of if it's admitted. Now, we say the demarcation dispute arises quite clearly because the AMIEU and the NUW both have competing bargaining periods. There was a resolution with the AMIEU New South Wales Branch in relation to an agreement, had competing interests on this particular site. The NUW relinquished all claims except two. It makes it very clear. That is, do an agreement with the NUW and not the AMIEU.

PN828

MR JOSEPH: I'm sorry - - -

PN829

MR D'ARCY: That, I believe was the evidence of Mr Hammond.

PN830

MR JOSEPH: No, it wasn't, Commissioner, and the submission has changed three times. I've made notes, but he's claiming that Mr Bellan was saying, "Make us a party to the same agreement as the AMIEU," and now it's changed back and forward. I'm not sure what my friend is trying to actually say.

PN831

THE COMMISSIONER: You'll be able to highlight any inconsistencies in the submission when you get to make your submission, Mr Joseph.

PN832

MR D'ARCY: Commissioner, we say the evidence of Mr Hammond was quite clear and that it was the exclusion of the NUW to the exclusion of the AMIEU. Commissioner, there was no evidence to contradict Mr Hammond's evidence. The meeting of 8 October with Mr O'Donnell, quite clearly the minutes record and Mr Hammond says it was an accurate reflection of the minutes themselves, that if it continues it will be industrial action with demarcation proceedings. Mr Gary Cripps, an official of the union also, indicates that they are - he calls the AMIEU a scab union.

PN833

In relation to section 430(8), we need to establish that the industrial action is being organised, taken by an organisation who is a negotiating party. The bargaining period notice clearly sets out that the NUW is a negotiating party and as I said earlier in my opening submissions, it says the circumstances provided for in subsection (1). Subsection (1) when read there with subsection (8). Subsection (1) says:

PN834

*Subject to subsection (9) the Commission must by order suspend or terminate a bargaining period if after giving the negotiating parties an opportunity to be heard, it is satisfied that any of the circumstances set out in subsections (2), (3), (7) or (8) exists or existed.*

PN835

We say quite clearly that there was industrial action being organised, industrial action that was taken. In relation to it relating to a significant extent a demarcation dispute, we say that there are just two issues left on the table, \$500 sign-on bonus and the NUW being party to an agreement over the AMIEU.

Given these facts, we would respectfully submit the Commission be satisfied the demarcation dispute exists over coverage of rights they represent - representation, coverage and rights at the Eastern Creek CDC.

PN836

Commissioner, in relation to genuinely trying to reach an agreement, the workplace agreement VersaCold Logistics Limited New South Wales Union Collective Agreement 2008 is made with the AMIEU New South Wales Branch and is made pursuant to section 328 of the Act. Section 348(3) of the Act provides that a collective agreement lodged before the nominal expiry date of an earlier collective agreement has no effect until after the nominal expiry date of the first agreement.

PN837

We say that a party must be able to make an agreement that is binding as a pre-requisite in establishing genuinely trying to reach agreement and legally enforceable. The NUW may want to have a binding agreement with VersaCold and a legally enforceable agreement with VersaCold. They can't, not for at least three years pursuant to section 348 of the Act. The 2008 UCA agreement with the AMIEU cannot be varied or terminated as it's not in operation. It is at this stage only made because it hasn't passed the no disadvantage test with the Workplace Authority.

PN838

Commissioner, we respectfully request that the Commission suspend or terminate the bargaining period, BP2008140 under either section 430(2)(b) or under section 430(8) of the Act on the grounds that we have mentioned. If it pleases.

PN839

THE COMMISSIONER: Mr Joseph.

PN840

MR JOSEPH: Commissioner, I apprehend that Mr Donzow will be more likely than me to be supporting the application. Perhaps so I can deal with both, do you mind if I - - -

PN841

THE COMMISSIONER: No, a reasonable comment again. I didn't wish to ignore Mr Donzow. It's your opportunity now to make a formal submission, Mr Donzow.

PN842

MR DONZOW: Commissioner, I'll be brief. In relation to section 430(8) circumstances of demarcation dispute, it is true that earlier this year our union had discussions with representatives from the NUW with the assistance of Unions New South Wales. Unfortunately, those discussions did not resolve the issues between us - - -

PN843

MR JOSEPH: I'm sorry, Commissioner, I'm going to have to formally object. I don't know anything about any of this.

PN844

THE COMMISSIONER: Certainly there's no evidence before the Commission about this. You're introducing new material now, Mr Donzow. By introducing new material you in effect invite the respondent to these proceedings again to seek an adjournment to get instructions.

PN845

MR DONZOW: Given the objection, I'll withdraw that, simply for the record in relation to our submissions, Commissioner. Based on the evidence before you and the conclusions drawn by the Commission in the statement that was read into the public record on 23 October in respect of this matter, and I might add that we support the Commission's conclusions in that statement, we believe that the Commission must find in favour of the applicant and issue an order terminating the bargaining period in accordance with section 430 of the Workplace Relations Act 1996. If it please the Commission.

PN846

THE COMMISSIONER: Mr Joseph.

PN847

MR JOSEPH: Commissioner, if I can begin, as I understand the amended application proceeds on two bases. They're outlined, as I understand, properly I think at paragraphs 13 and 15 of the amended application, firstly that the NUW might want to make a binding agreement with VersaCold but they can't because VersaCold has already made an agreement with the AMIEU and that's the section 430(2) point and secondly, what I'll describe as the NUW's continued agitation toward that end significantly relates to a demarcation dispute.

PN848

I think it needs to be recognised firstly, Commissioner, that no issue appears to be taken with the NUW's bargaining period, no issue is taken with the NUW'S entitlement, if I can call it that, to reach an agreement. The bargaining period was properly instituted. The Commission is well aware, obviously, because the Commission made an order for a ballot. The Commission is also aware that no protected industrial action or any other action has been taken since 17 October and no complaint was made at or about that time in relation to that action. The only proposed action that was complained of to which this application appears to have related in a chronological sense anyway, was the action that was then not taken on 22 and 23 October.

PN849

Prior to the purported agreement, if I can call it that, being reached between the AMIEU New South Wales and VersaCold, there appears to have been no complaint or no suggestion that there was a demarcation dispute or that the NUW was not trying to bargain in good faith. I only make that observation, Commissioner, particularly in relation to the demarcation point because I think my friend is trying to construct an argument with respect to nothing, but I'll come back to that in a moment.

PN850

If I can take the Commission to the terms of section 430, the Commission will see - and I don't need to remind the Commission that the applicant moves under sections 430(2) and 430(8). If I can hand up to the Commission some excerpts

from a decision of the Full Federal Court in CFMEU and Ors v AIRC which is reported in 89 FCR 200. Just by way of introduction, Commissioner, this was a decision that was ultimately overturned by the High Court and it was in relation to his Honour Bolton J's original decision to suspend a bargaining period in relation to industrial action that was taking place in the Hunter. The Commission might recall the dispute. The decision of his Honour was then overturned by a Full Bench. That decision was overturned by the Full Federal Court and that decision was overturned by the High Court.

PN851

Some observations were made by the Full Federal Court that were not challenged by the High Court in relation to the nature of the discretion that the Commission has in dealing with applications to suspend or terminate bargaining periods. True it is that the particular focus in this decision and in that dispute was section 430(3) because it was said that industrial action in that case was endangering a section of the community. Nevertheless, certainly from my reading of my looseleaf service, this appears to be still the prominent authority on these questions.

PN852

I've written at the bottom of the pages the page numbers, Commissioner, and I hope you can follow.

PN853

THE COMMISSIONER: Yes, I've got that.

PN854

MR JOSEPH: At page 208 firstly, at paragraph (c) the power to terminate under the heading - - -

PN855

THE COMMISSIONER: The subheading being the satisfaction of the Commission.

PN856

MR JOSEPH: Yes:

PN857

*The power to terminate the bargaining period conferred by section 170MW(1) -*

PN858

I'll just stop there for a moment. We're of course dealing there with the pre-Work Choices legislation but I don't believe it's significantly or relevantly different in this respect:

PN859

*- is a discretionary power that can be exercised if a condition precedent is satisfied. The condition precedent is that the Commission is satisfied that one of the circumstances identified in the following subsections exists or existed.*

PN860

Then there are some other comments. I'm going to take the Commission to this issue of exists or existed in a moment but the relevant point is this, in section 430(1) it is said that subject to subsection (9) the Commission must by order suspend or terminate a bargaining period if after giving the parties an

opportunity to be heard it is satisfied. The decision of the Full Federal Court was that even though the word "must" is used, there is still a discretion. There are two discretions, one being the Commission has to objectively find certain facts to exist and secondly, the Commission then must decide whether to exercise its power.

PN861

The next point that I think I need to take you to, Commissioner, and this is a somewhat more vexed question because it's entirely relevant to these proceedings, is the use of the words in subsection (1), the last words "exists or existed". You see, it says there:

PN862

*If the Commission is satisfied that any of the circumstances set out in subsections (2), (3), (7) and (8) exists or existed.*

PN863

On page 211 in the Full Federal Court report that I've handed to the Commission there is a consideration of the use of that phrase and paraphrasing, Commissioner, the Full Federal Court decided that you could look at it two ways, one meaning that if we take the word "exists" then a particular state of affairs would have to exist at the point in time in which the Commission is considering the application or secondly, if it's "existed", if that state of affairs existed at sometime relevantly in the past.

PN864

Some consideration was given to that in relation to the issue of demarcation disputes, but importantly, in essence, the question being considered there was whether the existence of the words "exists or existed" in section 430(1) conditioned the use of present or past tense in the other subsections of the section because, for example, Commissioner, and relevantly for our present purposes, you will see that subsection (8) dealing with demarcation disputes relates solely to industrial action as a precondition to industrial action that is being organised or taken, is being organised or taken and I'll say something about the evidence on that point in a moment but if, as I'm going to urge the Commission to do - can I say this that, on one view the Federal Court said well, it may be that even though the present tense is used in subsection (8) because of the use of the word "existed" in subsection (1) it may be that the Commission can sort of say, well, it might not be organised now but maybe it was organised in the past for that reason and the Commission can suspend or terminate a bargaining period on that basis.

PN865

Importantly, at page 212 the Full Court decided at paragraph (c) that they did not, having regard to the nature of those proceedings, find it necessary to reach a concluded view on the point so the matter is left undecided. I'd have to say, Commissioner, I did my best trawling the Commission's website. I can't say that I'm 100 per cent certain this question hasn't been considered later, but certainly in the looseleaf service in my chambers there's no other authority referred to and I couldn't find any in my brief search.

PN866

The issue then is this, and I think it's a relevant point to be dealt with upfront as it were, whether for the purpose of considering any application under subsection (8) whether the situation would have to exist presently or could exist in the past. In

my submission, if one reads the section as a whole, the Commission will see that you have to be satisfied that any of the circumstances set out in subsections relevantly (2) and (8) exists or existed.

PN867

In subsection (2), which deals with:

PN868

*Industrial action before or during the bargaining period by a negotiating party has organised or taken or is organising or taking industrial action to support or advance claims in respect of a proposed collective agreement -*

PN869

and so forth. In subsection (2) you have both the past and the present tense. In subsection (8) you only have the present tense. In my submission, the use of the words "exists or existed" in subsection (1) is telling because it's asking the Commission to direct its attention to the different circumstances which arise. It is not saying, "We're rewriting subsection (8)" where it says "Is being organised or taken" to mean was organised or taken, it's merely noting in subsection (1) because it's dealing with a variety of circumstances through subsections (2), (3), (7) and (8) where present and/or past tense might be relevant to that particular ground. In relation to demarcation disputes it is only industrial action that is presently being organised or taken that could be relevant as a precondition.

PN870

I'll just make the observation it appears as though the Full Commission - and I might come to this in a little while because I just had a quick look at the F J Walker Foods decision. It appears as though the Full Commission proceeded on that basis in that case but perhaps I might come back to that because there's a few other things I need to say.

PN871

In relation to the 430(2)(b) ground which is that the NUW is not genuinely trying to reach an agreement with the other negotiating parties, the first thing I'd say is this. What is being put - because this is the reason I asked whether it was being alleged that the NUW was not bargaining in good faith, I'm fortified by the fact that my friend says no, that's not a ground, it is simply the case that VersaCold has reached an agreement with the AMIEU. Commissioner, if you look at the wording of section 430(2), the circumstance is that a negotiating party, not being the applicant for the order, is not genuinely trying to reach an agreement.

PN872

In the current circumstances we have a letter from Mr Bellan, exhibit J1, on 20 October asking VersaCold to meet. Mr Hammond gave evidence that he got that correspondence and the reason that VersaCold has not met with the NUW is that they've reached an agreement with the Meat Workers Union. In a general sense, that might not be considered a ridiculous or outrageous proposition, but the point here, Commissioner, is that the guns have been trained at my client for having done something wrong. My client hasn't done anything wrong. My client has written to VersaCold and said, "We still want to reach agreement with you. We want to meet with you and reach agreement." That is not a basis for terminating a bargaining period.

PN873

I think it's appropriate that I should deal with the issue of the status of the agreement because something has been said. It is said, Commissioner, that an agreement has been made and true it is that a purported agreement has been made between the AMIEU of New South Wales, which is now a transitionally registered association I understand, and VersaCold and related companies. That agreement has been made pursuant to section 328. It is said that it has been approved by the employees at the relevant sites and it's been lodged for approval.

PN874

If I can take the Commission to section 347 of the Act, just reading from the top there, subsection (1):

PN875

*A workplace agreement comes into operation at whichever of the following times is applicable.*

PN876

And relevantly, 347(1)(b):

PN877

*For a union collective agreement the seventh date after the date of issue specified in the notice under subsection 346M(1), 346Q(2) in relation to the agreement.*

PN878

Without having to take the Commission to that, what that means is that the Workplace Authority director needs to consider the agreement for the purpose of the no disadvantage test and then needs to issue - I presume, a notification is issued to the lodging party saying the agreement either meets those requirements or doesn't.

PN879

THE COMMISSIONER: Your point being what, that there is no agreement?

PN880

MR JOSEPH: That no agreement has come into operation yet. You see, it may well be at this point in time - and the Commission would be aware this is a vexed legal issue as to the status of what are called collective agreements when they're not registered, as to what legal status they have but if it be accepted that there is a document that's been signed as agreed between the AMIEU and the company, that is not recognised by the Act until the agreement is in fact approved. Keep in mind that we're talking about the NUW not genuinely trying to reach agreement here. There is no reason why in those circumstances VersaCold could not reach agreement with the NUW.

PN881

I should just hesitate here to remind the Commission this much and I do so by reference to section 347A of the Act. I acknowledge it's a somewhat unusual situation. I do appreciate that. My client appreciates the unusual nature of this situation but again, it's my client that's being sought to be penalised but section 347A says that despite section 347, that is even if - -

PN882

THE COMMISSIONER: Sorry, which section are you quoting?

PN883

MR JOSEPH: 347A, sorry, Commissioner.

PN884

THE COMMISSIONER: Capital A?

PN885

MR JOSEPH: Capital A, excuse me, my apologies. This is a new section in the Act and in effect, what it says is that despite section 347 - in other words, even if the Workplace Authority director gives the agreement a tick and the agreement then does come into force for the purpose of the Act, the agreement does not come into operation unless the requirements in division 2 and section 340 have been met in relation to the agreement.

PN886

Division 2 deals with whether in fact it was a union collective agreement in the first place, it deals with certain requirements for multi business agreements and section 340 deals with the process of employee approval and information being provided. I only take you to those provisions for this reason, Commissioner. My client has commenced proceedings in the Federal Court. Those proceedings are to be heard hopefully to finality on 15 and 16 December. I, of course, could not speculate or suggest when his Honour Buchanan J would determine those proceedings or on what date he would determine those proceedings but that is the process that is under way.

PN887

In those circumstances one of the outcomes that's being sought by my client is in fact declarations of the court that the proposed agreement that's been made between the other parties at the bar table falls foul of precisely those provisions. The effect of that is that the proposed agreement would be declared - even if it was the given the tick by the Workplace Authority director, would be declared void ab initio. That would be the outcome.

PN888

THE COMMISSIONER: I think that's already on the public record.

PN889

MR JOSEPH: I didn't think I needed to lead evidence of the fact that my client's led proceedings in the Federal Court.

PN890

THE COMMISSIONER: It's already been part of the proceedings before me.

PN891

MR AGNEW: Commissioner, what I was referring to was evidence about challenging the making of the agreement in compliance with section 340. There's been no evidence led today about whether or not the agreement has complied with 340 or not.

PN892

MR JOSEPH: That's very helpful. Thank you, Commissioner. I think, in essence, my client wants to preserve its position in that respect and I think it's entitled to. Commissioner, can I say this, if the proposed agreement between the other parties at the bar table were to be approved and were to come into force, and this is prior to any decision by the Federal Court, then I think my client would

have some difficulty because of other provisions of the Act in taking protected action in those circumstances, but we're not there yet. We're not in that position yet because the agreement is not in force. It doesn't come into force until the Workplace Authority director says so, or seven days after that time.

PN893

I think my learned friend Mr Slevin pointed out the provisions of section 348 about the relationship between overlapping agreements so I think in theory protected action is a separate matter because I don't think employees could take protected action if there's a workplace agreement actually in its nominal term. I'm fairly sure that's correct. But you can still bargain, in theory, Commissioner, although it might be considered an odd result but you can have overlapping agreements. I don't know that that's really the issue here because the issue here, as I understand it, is in relation to allegations about industrial action. That seemed to be at the centre of the point so I don't know that I need to say anything further in relation to that.

PN894

In any case, as I said, there's been no industrial action since 17 October and can I say this, could I put on record there is no evidence of any proposed, contemplated, organised action or anything of that sort other than the action which did not go ahead on 22 and 23 October. What I can say is that my client is not presently organising, contemplating any action prior to the Federal Court proceedings.

PN895

If I can just deal with a few other - - -

PN896

MR D'ARCY: Sorry to interrupt. That last statement, Commissioner, I'm just unsure whether or not that was an undertaking in relation to - - -

PN897

THE COMMISSIONER: It doesn't need to be any clearer to me. You've pressed the point before and things have been placed on the public record before. The public record speaks for itself. Mr Joseph said that his client is not proposing any industrial action before the Federal Court proceedings.

PN898

MR D'ARCY: Commissioner, in relation to undertakings, I think we've said before to you that all my client is seeking in relation to this application and the previous 496 application was that that be the outcome and we put that on the record before in relation to these proceedings. In fact we had discussions of that nature before we commenced here today and Mr Joseph indicated to me that they weren't prepared to give an undertaking to that effect.

PN899

THE COMMISSIONER: Since then it would appear his instructions have changed.

PN900

MR JOSEPH: Sorry, Commissioner, perhaps I should - - -

PN901

THE COMMISSIONER: You do need to clarify that, Mr Joseph, because I'm relying on your words.

PN902

MR JOSEPH: Of course. Commissioner, I'm sorry, I always, from experience, try to choose words, when I'm talking about things like this, very carefully. Obviously we don't have instantaneous transcript but what I thought I said was that my client is not contemplating or organising any industrial action and there is no industrial action in contemplation prior to the Federal Court proceedings. It is true, my friend did ask for an undertaking. My client, in the circumstances, doesn't want to give one.

PN903

THE COMMISSIONER: What's the difference between you providing an undertaking and what you have just said, that industrial action is not being contemplated or organised?

PN904

MR JOSEPH: Circumstances change, Commissioner, without being too clever about it. An undertaking - - -

PN905

THE COMMISSIONER: I note the difference, yes.

PN906

MR JOSEPH: Can I say this, that my client doesn't wish to give an undertaking - well, there's a number of reasons which I won't bother you with, Commissioner, but perhaps the most important is, whilst my client is sensible and fully understands the circumstances with the Federal Court proceedings and so on, it feels somewhat aggrieved in that it would be expected to, and doesn't believe it should be expected to give a guarantee or to give away a right that exists under the Act.

PN907

Commissioner, this brings me to the point, protected industrial action is a right that has been preserved in the Act well now for, I suppose about 15 years through various governments and various generations of the legislation. My client recognises that if the agreement were to be approved by the Workplace Authority director, even if it was only for a short period of time, for example, then circumstances will change. It's understood. There's no action in contemplation. My client knows what that means. My client is not here to pull the wool over anybody's eyes.

PN908

THE COMMISSIONER: However, it may well authorise and give proper notice and seek to pursue further protected industrial action.

PN909

MR JOSEPH: That's a possibility,.

PN910

THE COMMISSIONER: That's its right.

PN911

MR JOSEPH: That's the way it's put, Commissioner, but my client recognises that right only exists in certain circumstances. We say we're still in that circumstance. It doesn't mean that there's going to be industrial action tomorrow - well, we know there's not because none has been notified and I've already said that none is contemplated before the Federal Court proceedings.

PN912

Commissioner, if I can deal with a few things. In relation to the section 430(2)(b) argument, I don't need to say much about what was put by my friend. It would appear from the way he has interpreted Mr Bellan's comments as they appear in the minutes, that Mr Bellan, as the secretary of the NUW New South Wales, dropped off all the other items that he was seeking and merely sought a sign-on bonus for employees and for the NUW to be a party to the agreement. We know that the NUW has since written to the company and sought to continue discussions.

PN913

In those circumstances, in my submission, and in a situation where no industrial action has been taken since 17 October, it simply cannot be said that the NUW is not genuinely trying to reach an agreement with the other negotiating parties. That is what the Commission has to decide, not whether VersaCold is trying to genuinely reach agreement, not whether the AMIEU is trying to genuinely reach agreement, the NUW is. It's my client that is under the gun in this application. It's my client's conduct that is relevant, not anybody else's. It cannot be suggested at any stage that my client has not negotiated, nor is it alleged that my client has not negotiated in good faith to try and seek an agreement.

PN914

In relation to the demarcation issue, there's a short answer and a longer answer. The short answer to that part of the application, Commissioner, is that if the Commission accepts my interpretation of subsection (8) and that is that the circumstance as talked about in subsection (1) is only a circumstance in which, as the section itself says, subsection (8):

PN915

*A circumstance for the purposes of subsection (1) is that industrial action that is being organised or taken by an organisation, that is the negotiating party.*

PN916

Then it goes on from there and I'll come to the rest of the subsection in a minute. The first precondition is that there is industrial action that is being organised or taken. There's no evidence of that and in fact the Commission can find, not only from my comments but I think from the evidence, that it's just not happening. The simple answer, and I believe the correct answer, Commissioner, is that that argument just falls over straightaway. Keep in mind, of course, Commissioner, that these circumstances change and applicants can bring new applications. I think that is something that's also recognised because circumstances change in bargaining periods and I think that's contemplated. Be that as it may, I think the application falls over on that basis.

PN917

Can I just take the Commission just to deal with the other parts of this demarcation argument. I might ask the Commission to return to those two decisions. I'll only say this about re Hancock, the decision of McHugh J which appears to have been an application for order nisi, just the actual issuing of an order, not a full hearing. The only thing I'd say about that is, I don't believe it's particularly illuminating for the question before the Commission, but it is, of course, dealing with the Act as it was in 1990 which would have been, I think, the 1988 Act at the time and I must say I'm not entirely sure.

PN918

THE COMMISSIONER: The headnote confirms that, Mr Joseph, Industrial Relations Act 1988 Commonwealth.

PN919

MR JOSEPH: Yes. You'll see there from the headnote and you'll see on the first page, it was in the context about 118 application. In that case, that was a demarcation dispute because it was one union trying to knock another union out. F J Walker which was a dispute, I recall, between the NUW and the TWU in essence. That was a demarcation dispute, from recollection, or certainly from viewing the - the record seems to have had an element of demarcation to it.

PN920

If you go to page 4 of this decision, you'll see there - - -

PN921

THE COMMISSIONER: Page 4?

PN922

MR JOSEPH: We're going to have difficulties here. I'm talking about the paragraph that begins:

PN923

*On 29 May 1998 FJW wrote to the NUW -*

PN924

which is at the top of my page 4. It has next to it a paragraph - I don't know if it's a paragraph number but the number 11 in parentheses.

PN925

THE COMMISSIONER: I think we've got the citation correct at the start.

PN926

MR JOSEPH: Do you have the NUW v Australian Meat Holdings decision there, Commissioner?

PN927

THE COMMISSIONER: I thought you were talking about Hancock.

PN928

MR JOSEPH: I'm sorry, Commissioner, I just referred to F J Walker. Obviously I didn't do it very clearly.

PN929

THE COMMISSIONER: Page 4 of that decision?

PN930

MR JOSEPH: Page 4 of that decision.

PN931

THE COMMISSIONER: So we're singing off the same song sheet, does it say down the bottom left-hand corner page 4 of 19?

PN932

MR JOSEPH: Yes, it does. In this case there was a previous demarcation agreement between the TWU and what was the Federated Cold Storage Union Victoria, which subsequently amalgamated with my client, over the coverage at the relevant sites. It appears as though the NUW was seeking to or had signed up some people that had been members of the TWU in this particular situation, employees of F J Walker Foods and there FJW, as they're called, wrote to the NUW on 29 May 1998 saying:

PN933

*We do not recognise the right of the NUW to represent the industrial interests of employees at the Mulgrave site.*

PN934

I'm looking at the fifth or the sixth - the last paragraph - and they raised the issue of demarcations at work. That then came before Polites SDP further down that page where his Honour made the observation about utilising the provisions of section 118A, if that in fact was the issue.

If you go over to page 6, that's 6 of 19, you'll see at paragraph 22 that FJW subsequently filed a 118A application, and this was the situation - just stop there for a moment - in all of this where the NUW had initiated a bargaining period, was seeking to take protected action to get an agreement for the employees that had signed up. Here we've got an appeal from the 170MW order and in that case Commissioner Smith did suspend the bargaining period. You'll see there on page 6 that the section as it then was is set out and it doesn't appear to be relevantly different. If you look at subsection (1), Commissioner, you'll see exists or existed there in the reproduction of section 170MW as it was and then subsection (5) appears to be relevantly similar to section 430(8).

PN935

I then go over to page 10 of 19 under the heading Conclusion:

PN936

*The elements of section 170MW(5) that require consideration in this appeal are, industrial action that is being organised or taken by an organisation that is a negotiating party, no issues arise with respect to this element.*

PN937

In this case it would appear, Commissioner, that the Commission accepts as a proposition that it doesn't seem to have been argued that it was dealing with present tense industrial action. In fact, if you go back to page 6 you'll see on paragraph 24:

PN938

*At midnight on 24 June 1998 industrial action by the NUW at the Mulgrave distribution centre commenced.*

PN939

The company files their application the next day for a 170MW and the following day Commissioner Smith made the decision suspending the bargaining period. He also made a 127 order, I think, Commissioner, as well. In that situation the industrial action was on foot. It may be because there was no issue about it being on foot at the time the application was heard, the matter didn't need to be considered but it seems to me well, they've just accepted the wording of what was 170MW(5) is now 430(8) at its face value, being industrial action presently being organised or undertaken.

PN940

I've only got another couple of remarks to make and it relates to the proper categorisation of the evidence in relation to whether it could be said - and this only becomes relevant, Commissioner, if you don't accept my argument. If the Commission takes the view that the industrial action doesn't have to be industrial action that is being organised or being taken, but could be industrial action that was organised and taken and it only happened twice, being 16 and 17 October, if the Commission doesn't accept my interpretation on the present tense argument but accepts that there could be something that happened beforehand, then the Commission has to consider whether that industrial action, that industrial action on the 16th and 17th related to a significant extent to a demarcation dispute.

PN941

If we accept that "relates" means has a connection with - I accept it's an ordinary word, although it's given a lot of consideration in various decisions in various courts, but if we accept that it means something along the lines of as a connection with, you can't then read it down to a significant extent. You see, we have evidence of certainly one side's recollection of 30 or so meetings, I mean, numerous meetings over negotiations. The NUW have been having discussions for a few months with VersaCold and there's records there of numerous meetings between the parties, at the same time, both prior and after the Federal Court undertakings that were given on 19 September, numerous meetings with the AMIEU. Over that entire period of time both the AMIEU and the NUW, it would seem, had members at Eastern Creek.

PN942

What the applicant points to is one comment in one meeting on 8 October that an official of the NUW is said to have made. That's it. There is, in fact, no evidence of a demarcation dispute at all. A disparaging remark, if it was made, about one union official about another union does not amount to a demarcation dispute, Commissioner. If it did there would be demarcation disputes every day, I suspect.

PN943

Can I say this, my friend's argument seems to be trying to hang his hat on the part of the definition of demarcation in section 4 that makes reference to a dispute about the representation under this Act of the industrial interests of employees by an organisation of employees. Who is the dispute with? There's no evidence of any dispute between the AMIEU and the NUW. They were both trying to get an agreement with the company, with VersaCold, but that's not a dispute between the two unions. There's no evidence of that and the mere fact that the NUW was trying to reach an agreement for its members with VersaCold cannot amount to a demarcation dispute.

PN944

In one sense you wouldn't need to have another union on the scene. If Mr D'Arcy's argument is correct and representation rights are said to arise from being a party to an agreement, every dispute over every agreement could conceivably be a demarcation dispute in that sense. If it is said that the tripwire for having these representational disputes was the NUW's wish to be a party to the agreement - and that just illustrates it might be seen as - it's absurd because it seems to be the logical conclusion of his argument and I don't it can be right. I think for there to be a demarcation dispute, one needs a dispute between two unions over the coverage of employees. Here we don't have any evidence of that.

I don't think the evidence, to the extent that I understood the way in which Mr D'Arcy was trying to interpret it, Mr Bellan saying, "We want to be a party to the agreement and our members want a sign-on allowance and some additional money," either a further wage increase or whatever it might be, I don't see how it is said that that gives rise to a demarcation dispute.

PN945

If that's the best the applicant can do out of all of those meetings, it's a bit hard to suggest that the industrial action that took place on 16 and 17 October, and that's the industrial action we're talking about, is said to relate to a significant extent to a demarcation dispute. At that time there was no agreement. There was no agreement at that time, not even a purported agreement between the AMIEU so true it is VersaCold had told the NUW, "Sorry, we're not doing a deal with you, we've decided we're going to put this other agreement to a vote," but it's precisely in those circumstances where they said no to the NUW, the NUW is entitled to do what it did.

PN946

I'm sorry I've pushed this beyond the 1 o'clock mark, Commissioner. Again, I suppose, just in concluding, I note my friend said the application was to suspend or terminate. It reminded me I should have asked him beforehand which in fact he was seeking to do and it appears as though both options are open to the Commission. My client would say that neither are appropriate in the circumstances and that the way the evidence stands as it is, the application ought be dismissed and if circumstances change, the applicant would be entitled to make a fresh application if it had good grounds to do so. If the Commission pleases.

PN947

THE COMMISSIONER: Mr D'Arcy, you have an opportunity to respond and Mr Donzow has an opportunity to respond. Can you give me an idea how long you're likely to be?

PN948

MR D'ARCY: I just have a couple of quick comments, Commissioner.

PN949

THE COMMISSIONER: You, Mr Donzow?

PN950

MR DONZOW: Commissioner, I don't think I could add any more to my submissions at this stage.

PN951

THE COMMISSIONER: We might press on with Mr D'Arcy.

PN952

MR D'ARCY: Commissioner, I just want to correct - whilst it is true what Mr Joseph says is that the last organised and taken industrial action was on 16 and 17 October, there was threatened industrial action by notices which were on prior to this application being made which were then called off after undertakings given to yourself, and that was for 23 October and 24 October. In dealing with section 430(8) where it deals with industrial action that is being organised or taken, we say that at the time the application was made, just to be very clear, there was industrial action being organised by the NUW but it wasn't taken. With that, Commissioner, we have nothing further, if it pleases.

PN953

THE COMMISSIONER: Mr Donzow?

PN954

MR DONZOW: No further submissions, Commissioner.

PN955

THE COMMISSIONER: Thank you for those submissions, thank you for the evidence. These proceedings will adjourn. I'll reserve my decision. The parties will be notified when that decision is available. The Commission is now adjourned.

**<ADJOURNED INDEFINITELY**

**[1.23PM]**

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|---|
| <b>LIST OF WITNESSES, EXHIBITS AND MFIs</b> |
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|   |              |
|---|--------------|
| <b>DAVID KENNETH HAMMOND, SWORN .....</b>   | <b>PN495</b> |
| <b>EXAMINATION-IN-CHIEF BY MR D'ARCY.....</b>   | <b>PN495</b> |
| <b>EXHIBIT #D1 STATUTORY DECLARATION TOGETHER WITH<br/>ATTACHMENTS OF DAVID KENNETH HAMMOND DATED<br/>20/10/2008 .....</b>  | <b>PN504</b> |
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| <b>EXHIBIT #D3 DOCUMENT TITLED VERSACOLD COLD CDC<br/>ROBERTS ROAD EASTERN CREEK EA 2008 DRAFT CLAUSES<br/>MARKED "FOR THE PURPOSE OF NEGOTIATION ONLY" .....</b> | <b>PN578</b> |
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| <b>EXHIBIT #J1 DOCUMENT FROM MR BELLAN, STATE<br/>SECRETARY OF THE NUW, TO VERSACOLD LOGISTICS<br/>DATED 20/10/ 2008.....</b>                                     | <b>PN698</b> |
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