



Fair Work Australia



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

21380-1

SENIOR DEPUTY PRESIDENT RICHARDS

B2009/10670

s.238 - Application for a scope order

**Australasian Meat Industry Employees Union, The
and
Woolworths Limited
(B2009/10670)**

Brisbane

10.04AM, FRIDAY, 23 OCTOBER 2009

Continued from 22/10/2009

Reserved for Decision

PN770

THE SENIOR DEPUTY PRESIDENT: Good morning everyone, please take a seat. Are there any housekeeping matters we need to deal with? It looks like there might be.

PN771

MR HATCHER: Just the one, your Honour. Your Honour will recall that yesterday I put a tentative objection to AMIEU1, the schedule that Mr Crawford had regard to in forming his views on negotiations, can we simply reinforce the restriction on the basis of the tender of that document, your Honour. We did - - -

PN772

THE SENIOR DEPUTY PRESIDENT: I think I made comment at the time about it and I think that Mr Crawford gave evidence about how he came to be in possession of that document and questions were put to him about that, his knowledge of that document.

PN773

MR HATCHER: Yes, he wasn't able to vouch for its accuracy, we have done the analysis overnight and come to the view that it's wildly inaccurate, I think that was the expression used by those who looked at it. We have afforded our friends the opportunity to revise it and we have even indicated a preparedness to provide them with the figures that we obtained by review of the prime material. They have not taken up that opportunity so we simply reinforce the restricted nature of the tender.

PN774

THE SENIOR DEPUTY PRESIDENT: Are you intending to put that document to Mr Carr at this stage or are you not?

PN775

MR HATCHER: No, we're content with the evidence as it stands, that is that's the document that he had regard to and its accuracy has not been proved.

PN776

THE SENIOR DEPUTY PRESIDENT: Anything else to the evidentiary case? I think the SDA witness - was it the SDA witness who was going to be next?

PN777

MR RYAN: I'm not certain where we finished yesterday with whose witness was going to first.

PN778

THE SENIOR DEPUTY PRESIDENT: That's where we were going to go in the context of yesterday but it doesn't necessarily need to be the case. It's a question for yourselves as to what we draw.

PN779

MR RYAN: We're quite happy to have our witness go next.

PN780

THE SENIOR DEPUTY PRESIDENT: I don't know whether my associate told you whilst we were in the interlude, I have a short telephone conference at 11.30.

PN781

MR HATCHER: Yes, your Associate doesn't miss a trick, Your Honour.

PN782

THE SENIOR DEPUTY PRESIDENT: Good, thank you. I'm hoping no more than 10 minutes. I was trying to squeeze a few things in early this morning but it didn't quite work.

<SUE-ANNE BURNLEY, SWORN

[10.08AM]

<EXAMINATION-IN-CHIEF BY MR RYAN

PN783

MR RYAN: Sue-Anne, have you prepared a statement for the purpose of these proceedings?---Yes, I have.

PN784

Is there any corrections or changes you wish to make to your statement?---Yes, there are two. The first one is to deal with paragraph 3 that negotiations I say they started in early 2009, they actually started in December, there was a first meeting of the company in December of 2008, and the second change would be to delete paragraph number 10.

PN785

In all other respects the statement is true and accurate?---Yes.

PN786

We would seek to tender the statement as filed.

EXHIBIT #SDA1 STATEMENT OF SUE-ANNE BURNLEY

PN787

No further questions, Your Honour.

PN788

THE SENIOR DEPUTY PRESIDENT: Good, thank you. Mr Norris.

PN789

MR NORRIS: Yes, thank you, Your Honour.

<CROSS-EXAMINATION BY MR NORRIS

[10.10AM]

PN790

MR NORRIS: Ms Burnley, you have made a correction to paragraph 3 of your statement. When did you become aware of that particular inaccuracy?---Late yesterday afternoon when I was reading my statement again.

PN791

So at the time of the preparation you didn't make any check of records?---When I prepared the statement I was actually at home sick, so I had no access to my records at that time.

PN792

Did you have any discussions with somebody about this particular change?---No.

PN793

Nobody suggested to you it might be a very useful thing to effect that change?
---No.

PN794

You say there in paragraph 3 that negotiations commenced now in December 2008 with a view to concluding an agreement prior to 30 June 2009. Now, how many meetings to the best of your recollection were conducted during that period?---I'm not sure, we were meeting at least regularly once a week and the meetings would sometimes go over one or two days, or three days. There was only one meeting in December and that was on either the 16th, 17th or 18th of December. There was no meetings in January and then we met regularly after that time.

PN795

Did anyone from the Australian Workers Union of Employees Queensland attend those meetings?---No.

PN796

Was there a reason for that that you're aware of?---It's custom and practice that they speak to the SDA Queensland branch regarding national negotiations.

PN797

Yes, it's customary. But this is the first time that you have ever undertaken a proposed national agreement with Woolworths, isn't it?---It is with Woolworths.

PN798

So when you're talking about custom, you're talking about custom in relation to other negotiations, aren't you?---Yes. But also with regard - I don't think the AWU - I think the SDA Queensland branch also conducts when it was a State agreement the same approach is taken.

PN799

During the course of these meetings did somebody other than Mr Carr professing to bargain on behalf of Woolworths South Australia Pty Ltd turn up?---To bargain for who are you asking for?

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN800

Woolworths South Australia Pty Ltd?---I don't know who the people on the other side of the table were precisely bargaining for, they were representatives of Woolworths supermarkets.

PN801

Did somebody identify themselves as being there and bargaining on behalf of Woolworths South Australia Pty Ltd?---No.

PN802

You are aware Mr Carr has given evidence in these proceedings, are you aware of that?---I know he - - -

PN803

MR RYAN: He hasn't strictly?---No, he's filed - - -

PN804

MR NORRIS: My friend's point is well taken. You are well aware that Mr Carr proposes to give evidence in these proceedings?---Yes.

PN805

Have you read through that evidence?---No, I have to a couple of points but not fully.

PN806

He proposes to give evidence that in respect of proceedings post-1 July 2009 he considered it practical and efficient to produce a complete draft proposed agreement for negotiations. Have you read that part of his evidence?---Yes.

PN807

Are you aware of that?---Yes.

PN808

In a like vein were any complete, fully drafted proposed national agreements given to the SDA during the course of these negotiations that occurred between December 2008 and June 30 2009?---There were draft agreements exchanged.

PN809

Did somebody professing to bargain on behalf of Woolworths Limited present you with a complete fully drafted proposed enterprise agreement?---I guess the company would have claimed that their first draft that they gave us was the final draft which was given some time in March or April.

PN810

Can you tell us precisely whom initiated the negotiations specifically for a national agreement?---No, I can't.

PN811

You are unaware of that?---Not precisely who, I know it's - - -

PN812

You just coincidentally turned up at a location and coincidentally representatives of Woolworths were there as well and there was a thought bubble that appeared and said, well let's negotiate a national agreement.

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN813

MR HATCHER: If it please Your Honour I have an objection here. My friend properly objected to his witness being interrupted in the middle of an answer and if it was as proper objection for him to take it is a practice he should observe himself.

PN814

MR NORRIS: Yes, very well, your Honour. So you maintain that you are totally unaware - are you looking towards your legal - - - ?---No, no.

PN815

You maintain that you are - - - ?---I'm trying to answer a question you posed to me which was at point two I said that I had been given the responsibility by the national secretary of the SDA to conduct the national negotiations.

PN816

So I take it that it would be your evidence that Mr De Bruin, he's the national secretary, yes?---Yes, he is.

PN817

That Mr De Bruin wouldn't have indicated to you in any way, shape or form who initiated the proposal?---No, he didn't.

PN818

The SDA have never sought to do a national agreement covering supermarket operations with Woolworths at any time, have they?---That's incorrect, we have.

PN819

When did that occur?---There was some talks I think around '99 or 2000 regarding moving to a national agreement because there was State agreements everywhere and the SDA found it would be useful to have one national agreement similar to what we have with other national employers that we have one agreement and at that time it didn't lead - we did do some work but I wasn't involved at that time, some other industrial officer had the duty at that time.

PN820

Very well, but are you aware with whom these discussions were had with on the Woolworths side of things?---No.

PN821

I take it of course you would be aware of the national agreements that apply to Coles Supermarkets Australia Pty Ltd on a national basis since 2002?---Since 2002? Yes.

PN822

So apart from the discussions that occurred approximately nine years ago, up until the present time you have never sought to do a national agreement covering the entire supermarket operations of Woolworths have you?---Me personally or the SDA?

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN823

The SDA?---It's always been an aim to have a national agreement.

PN824

Yes, but you have never manifested that intention at any time other than you say around about 1999 and 2000?---I think it was probably a point that was discussed at higher levels between the SDA and Woolworths representatives at various times.

PN825

You say it was probably?---Yes, there were talks which occurred between the national secretary and senior IR representatives of Woolworths Corporation.

PN826

So you're making an assumption?---To the degree that I can't swear and tell you which day and time, but there have been some discussion at some points that this would be the direction we would be wanting to move in.

PN827

How are you aware of that?---Because the national secretary has made general reports at staff office meetings to that extent.

PN828

You are a national industrial officer with the SDA, yes?---Yes.

PN829

You would agree with me that an essential part of that role would be fully aware of the legislation that relates to workplace relations at any given time?---It's part of my duties, yes, to be aware of the legislation.

PN830

Do you suppose or do you agree with that or do you suppose that's the case? ---Can you rephrase the question that you asked?

PN831

You would agree with me that it's an essential part of your role as a national industrial officer to be aware of and have a good working knowledge of the legislation that applies to workplace relations at any given time?---In the national office of the SDA that is not necessarily a requirement.

PN832

So you were given responsibility by the national secretary to negotiate a national agreement with Woolworths, correct?---Yes.

PN833

But you profess to having no knowledge whatsoever of the legislation that applies to workplace relations?---No, I didn't say that.

PN834

MR HATCHER: I object, it's most unfair to a witness to put a question like that and it doesn't follow from his previous questions. It's just unfair and shouldn't be done.

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN835

THE SENIOR DEPUTY PRESIDENT: Well, it may be. I suspect Ms Burnley is dealing with the question. Keep going.

PN836

MR NORRIS: Well, you say it's not necessarily the case for an industrial officer working for the SDA to have a knowledge of the legislation that relates to workplace relations at any time. Do you have a knowledge of the legislation that relates to workplace relations at any given time?---Yes, I do have knowledge.

PN837

I take it you would be aware that the Fair Work Bill was introduced into the parliament on 25 November 2008?---I was aware it was introduced into parliament, but I don't know the date.

PN838

Would you have us believe that you weren't aware that that particular bill - - -

PN839

MR HATCHER: Can I invite my friend to identify what possible relevance to these proceedings this witness's knowledge of the placing before the House of a piece of draft legislation could have.

PN840

THE SENIOR DEPUTY PRESIDENT: I suspect that Mr Norris is seeking some definition or motivation.

PN841

MR NORRIS: Correct, we're more than entitled.

PN842

THE SENIOR DEPUTY PRESIDENT: I am happy to hear the questions.

PN843

MR NORRIS: Can you tell us when you became aware that it was being proposed that new legislation would replace the former Workplace Relations Act?---That would be the election that elected the Rudd government.

PN844

Correct. Could you tell us when you became aware that a bill for that Act had been introduced into the parliament?---Some time in late 2008.

PN845

Like all of us I would suggest, as a person who is involved intimately in workplace relations you would have no doubt familiarised yourself with the terms of that proposed bill?---I was familiar with the general terms at that time but I was waiting for it to come into actual proper - - -

PN846

Indeed, a very sensible course to adopt. You would have been aware that there were proposed bargaining provisions?---Yes, because that was part of the proposals in the election.

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN847

I take it you would have become aware at a subsequent time that those provisions were coming into effect on 1 July 2009?---Yes, because that's when the whole Act was coming into effect.

PN848

You have given evidence you were seeking to reach agreement by 30 June 2009, correct?---Yes.

PN849

You were aware the bargaining provisions of the Fair Work Act were coming into effect on 1 July 2009, correct?---Yes.

PN850

Would you have us believe that that was a mere coincidence?---Coincidence with what?

PN851

In respect of the dates?---Well, that's where the date change for the legislation, so you comply with the legislation up to 23 June and then the new legislation starts on 1 July.

PN852

Let's start again. You have given evidence that you were aiming to have an agreement reached by 30 June 2009, correct?---Yes.

PN853

You have given evidence that you were fully aware that the bargaining provisions of the Fair Work Act were coming into effect on 1 July 2009, correct?---Yes.

PN854

Would you have us believe that your aim to conclude an agreement by 30 June 2009 was a mere coincidence?---No, I would say it could be done under the WorkChoices legislation.

PN855

Well, of course it would be able to be done under the WorkChoices legislation but I'm asking you was the timing of your aim to conclude an agreement coincidental with the coming into effect of the provisions of the Fair Work Act?---I don't understand what you mean by coincidental.

PN856

Well, Ms Burnley, were you trying to conclude an agreement by 30 June 2009? ---Yes.

PN857

You were aware that the provisions of the Fair Work Act 2009 relating to bargaining for an enterprise agreement were coming into effect on 1 July 2009? ---Yes.

PN858

Would you have us believe that your aim to conclude an agreement by 30 June 2009 was a pure coincidence?---I don't understand.

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN859

I suggest that you are deliberately playing - you are deliberately pretending to be confused - - -

PN860

THE SENIOR DEPUTY PRESIDENT: Let's just put a question, let's put a question. This is more a statement than a question so let's just craft this into a question to the witness.

PN861

MR NORRIS: Well, let's ask it another way. I would suggest to you that it was no coincidence in terms of the timing of the date that you sought to reach an agreement?---I don't know how to answer that question.

PN862

I would suggest to you that your aim to reach an agreement by 30 June 2009 was for the express purpose of avoiding the obligations that would have come into

effect the very next day relating to bargaining for an agreement, what do you say to that?---It was so that we could process the agreement under WorkChoices legislation.

PN863

Well, that's not the question that I actually asked you?---So you're asking whether we wanted to avoid the Fair Work - the new legislation from 1 July?

PN864

Yes, precisely?---Well, our preference was for it to be done under the first - under the existing legislation of 30 June.

PN865

Why did you have that preference?---It was a legislation we were familiar with at the time.

PN866

Ms Burnley, you have just given evidence that you were familiar with the Fair Work Act that was coming into effect on 1 July 2009?---Yes.

PN867

I suggest that is not a satisfactory response at all?---Yes, well I guess our aim had been that we should have had it rolled out and voted on by 30 June and we didn't reach that objective.

PN868

You're saying you guess that that was your objective?---Well, our objective was that. That's what we set out to do in December was to have the agreement finalised, rolled out, voted on, lodged with Workplace Authority prior to 30 June and that was reached.

PN869

That was your objective?---Yes.

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN870

I will put the question to you once again, give you every opportunity. And that objective was formulated as far back as December 2008 for the express purpose of avoiding the substantive obligations in relation to bargaining that were coming into effect on 1 July 2009, do you have anything that you wish to say in response?---It wasn't the express reason for the negotiations and the objective.

PN871

In paragraph 4 of your statement - - -

PN872

THE SENIOR DEPUTY PRESIDENT: Sorry, can I just take you back a minute, it just begs the question, if you know Ms Burnley it wasn't the express reason, what was the express reason?---I deal with express as being multiple reasons and the prime objective was to have a national agreement with Woolworths supermarkets. So it was one reason. We wanted to simplify the way we dealt with Woolworths supermarkets as one division.

PN873

So it's more the time frame was the question, what was the express reason for attempting to have the agreement signed, sealed and delivered as it were by 30 June 2009?---So that it could be processed under the WorkChoices legislation.

PN874

MR NORRIS: In paragraph 4 you say, "The timing of the negotiations was primarily in response to the fact that existing agreements applying to Woolworths supermarkets in all states and territories except New South Wales, ACT and Queensland were to reach their nominal expiry date prior to 30 June 2009." That is your evidence. But as I understand your evidence now another purpose or objective was to have the agreement completely negotiated and finalised under the provisions of the Workplace Relations Act, is that correct?---Another purpose, yes.

PN875

So you say another purpose was because a range of agreements were expiring on 30 June 2009 and I presume, because it's not explicitly stated, that you wanted an agreement in place in order to confer wage increases for the benefit of those employees under those expiring agreements?---Yes.

PN876

Ms Burnley, the SDA has been party to a number of agreements that granted back dated wage increases, hasn't it?---There will have been some, yes, and there are arrangements in place for others which are back dated, even though the agreements aren't back dated themselves.

PN877

And of course employees have received the appropriate back pay, correct?---As far as I'm aware, yes.

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN878

Indeed in fact in respect of the current proposed national agreement, those employees whose agreements were expiring on 30 June 2009 will receive their first wage increase back dated to 1 August 2009, is that correct?---Yes, that would be correct at the moment.

PN879

So I take it from that that you're fully aware of means by which you can redress the timing of wage increases, particularly if you are concerned that they should commence from a particular date?---Do you mean legally or with agreement with the company.

PN880

With an agreement with the company?---Yes.

PN881

Now, you say in paragraph 5, "Within Woolworths the SDA has negotiated a number of agreements covering all persons employed within a Woolworths supermarket with such agreements being negotiated on a State by State basis. Progressively agreements have been made which apply to all employees within a supermarket, rather than having separate agreements for meat departments." Now, these agreements that you are referring to in that particular paragraph, they

were negotiated exclusively between the SDA and Woolworths, weren't they?
---To the best of my knowledge I would agree with that.

PN882

And the AMIEU were deliberately excluded from those negotiations, weren't they?---I have no knowledge to that.

PN883

Ms Burnley, were you involved in the negotiations?---No, the State agreements.

PN884

You can't tell us anything. You say at paragraph 6, "There have been real inefficiencies in conducting bargaining with Woolworths on a State by State basis for supermarket agreements." I take it, Ms Burnley, that you would agree with me that the SDA is a competent union?---Yes.

PN885

All officials at the SDA ranging from the national secretary to an ordinary field organiser would be looking to put in a most efficient day's work every time they commence?---Yes.

PN886

Is it really your evidence that for a period of 15 years officials of the SDA have been wasting considerable periods of time negotiating in an inefficient manner with Woolworths?

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN887

MR HATCHER: I object, relevance? The evidence from my friend's organisation is that they would wish to have a national agreement. If it's national agreement versus national agreement, where is the relevance of testing this witness about the efficiencies of State agreements versus national agreements, unless it goes to credit of course.

PN888

MR NORRIS: I would ask that the witness be excused before I respond.

PN889

THE SENIOR DEPUTY PRESIDENT: Very well, if you don't mind waiting outside, Ms Burnley for a minute or two.

<THE WITNESS WITHDREW

[10.34AM]

PN890

MR NORRIS: It certainly goes to motive for seeking a national agreement, Your Honour, and it also goes to credit. One of the global considerations - - -

PN891

MR HATCHER: My friend doesn't have to - I said unless it goes to credit. He says it goes to credit, he had better make good the proposition.

PN892

THE SENIOR DEPUTY PRESIDENT: All right, we will invite Ms Burnley back in then if you don't mind.

PN893

MR NORRIS: Do you recall the question I asked you, Ms Burnley?---Not really, it was about the State inefficiencies or something.

PN894

Yes, I will put it to you again. Is it really your evidence that for a period of 15 years officials of the SDA have been wasting considerable periods of time in negotiating in an inefficient manner with Woolworths?---It was inefficient in that some decisions could be made at a State level and some decisions had to be made through the corporate level which then involved somebody such as the national secretary to become involved in each and every one of the various State agreements.

PN895

Is it really your evidence that the SDA has allowed this process to continue for a period of 15 years?---I guess that's why we were trying to get a national agreement earlier, except two have to be willing to do that.

PN896

I would suggest there is another explanation for it. I would suggest to you that you were more than satisfied with the pattern of bargaining that was occurring throughout that period, do you have anything you wish to say to that?

PN897

MR HATCHER: Well, my friend just can't put propositions out of thin air. He's going to have to adduce evidence of this, this is an attack on credit. He's going to have to support it with some evidence and there is nothing in his evidence to date.

PN898

THE SENIOR DEPUTY PRESIDENT: We're not being taken to anything for the purposes of asking the response from the witness. In my view Ms Burnley is capable of dealing with the matter from her evidence so far. Ms Burnley, you are entitled to respond if you have some direct knowledge about these matters or if you - you respond as required?---Yes, can I get you to repeat your question again?

PN899

MR NORRIS: Well, I would suggest there was another explanation for why you didn't take any concrete steps to change the pattern of bargaining in 15 years. I would suggest to you that you were more than satisfied with that pattern of bargaining?---No, we weren't satisfied with that pattern of bargaining hence our attempts previously to try and get a national agreement. However, the employer that we are bargaining with has to agree to that approach.

PN900

So Woolworths, whenever you have approached them about the concept of doing a national agreement, have always disagreed with the proposition?---They haven't disagreed, it's been something that they have been considering, however at various stages other matters have been more pressing and they haven't been able to resource the - what's required to reach a national agreement, and it also went to the way that Woolworths Corporation at that time or the supermarket was run, they were all run on State basis initially whereas now they're much more moving to a centralised national office structure.

PN901

That's part of the explanation?---Yes.

PN902

You're aware that under the legislation that it's applied since at least 1996 related corporations are treated as one employer for the purposes of agreement making, you're aware of that?---Yes.

**** SUE-ANNE BURNLEY

XXN MR NORRIS

PN903

So the fact that subsidiaries of Woolworths Limited were operating these businesses was no impediment whatsoever to doing a national agreement?---It wasn't - we don't go into the details as to who owns and who operates, we treat them as Woolworths supermarkets. They had State HR people who controlled the businesses in the States and the Territories. There wasn't a national person that you went and spoke to to deal with a problem in WA, you went to the WA Department, HR people, whatever they were called to deal with. If you had a problem in Tassie you went down there to see the HR people.

PN904

In paragraph 8 of your statement you refer to the award modernisation process. Would you agree with me that one of the considerations that the Commission had to have regard to in performing its functions is the desirability of reducing the number of awards operating in the workplace relations system?---Yes.

PN905

Can you point us to any provision of the Fair Work Act that requires the Tribunal to reduce the number of enterprise agreements operating in the workplace relations system?---I'm not aware that there is one.

PN906

You have deleted paragraph 10 of your statement?---Yes.

PN907

Can you tell us the reasons why you deleted it?---I couldn't understand fully what I'd written there, so I deleted it.

PN908

You couldn't understand what you had written?---No.

PN909

Perhaps somebody else drafted it for you and you couldn't understand what they'd drafted?---Somebody had put - because I was off sick somebody had put some words together, however it was emailed to me, I changed it and sent it back after I had signed it.

PN910

Upon reflection you couldn't understand paragraph 10?---No.

PN911

Yet you have signed this particular statement on 8 October 2009?---Yes.

PN912

I have nothing further, Your Honour.

PN913

MR HATCHER: Nothing from me, Your Honour.

PN914

THE SENIOR DEPUTY PRESIDENT: Good. Ms Burnley, you are excused.

<THE WITNESS WITHDREW

[10.41AM]

PN915

THE SENIOR DEPUTY PRESIDENT: Are we calling Mr Carr?

PN916

MR HATCHER: Yes, if it please Your Honour. I call Gerald Michael Carr.

<GERALD MICHAEL CARR, SWORN

[10.42AM]

<EXAMINATION-IN-CHIEF BY MR HATCHER

PN917

MR HATCHER: Sir, your name is Gerald Michael Carr. Your business address is 1 Woolworths Way, Bellavista New South Wales and you are the national workplace relations manager supermarkets for Woolworths Limited?---Yes, I am.

PN918

On 9 October 2009 you swore an affidavit for the purposes of these proceedings?---I did.

PN919

That is the evidence you would wish to give in these proceedings?---Yes.

PN920

I tender that affidavit, if it please Your Honour.

EXHIBIT #WOOLWORTHS2 AFFIDAVIT OF GERALD CARR

PN921

Sir, since preparing that affidavit have you prepared an updated chronology of negotiations with the AMIEU?---Yes, I have.

PN922

Might the witness be shown this document. Do you identify that as the updated chronology, Mr Carr?---Yes.

PN923

I tender that document.

EXHIBIT #WOOLWORTHS3 UPDATED CHOROLOGY OF NEGOTIATIONS WITH AMIEU

PN924

Mr Carr, on the second page of that document you refer to correspondence received from the AMIEU on 15 October which was dated 13 October, might the witness be shown this document. Do you identify that document as the correspondence referred to?---Yes.

PN925

I tender that document.

**EXHIBIT #WOOLWORTHS4 CORRESPONDENCE RECEIVED
FROM AMIEU**

PN926

Sir, you deal with correspondence in reply of 16 October immediately there under. Might the witness be shown this document. Do you identify that document, sir, as the correspondence there referred to?---Yes, I do.

PN927

I tender that document.

EXHIBIT #WOOLWORTHS 5 CORRESPONDENCE IN REPLY

PN928

Mr Carr, the chronology in the right hand column beside the dates 15 October 2009, 16 October 2009 and 19 October 2009 refers to attached material, that material is in fact not attached to the document is it?---No.

**** GERALD MICHAEL CARR

XN MR HATCHER

PN929

Mr Carr, can I ask you to turn to Annexure GC10 to your affidavit. This is the current state of the negotiated supermarket agreement, is that a fair characterisation?---Yes, it's a draft copy which we sent to the AMIEU for the purposes of discussion with them, yes.

PN930

There was some evidence given yesterday about the way in which savings clauses might work in the Victorian Meat situation?---Yes.

PN931

Can you direct the Tribunal's attention to the clauses in this draft agreement that would deal with this position?---Yes, I can. The first place to start is on p.58 or clause 3.1.2 which reflects a schedule described as schedule A, and this schedule reflects the situation whereby there has been a buy out of penalty rates and loadings contained in the Victorian Meat Agreement and over the page at page 59 at 3.1.2B there is a further schedule which is schedule B which reflects the rate with an increase in it which would be the arrangements that people who choose not to enter into that buy out arrangement would be under. Now, in respect to the choice of choosing either schedule A or schedule B, that would apply to all employees employed in Victorian meat rooms prior to 26 September 2011. So those people would have a choice between either schedule A or schedule B.

PN932

Could you tell the Tribunal the significance of that date in September 2011?
---Yes, the significance of that date is that's the date when the current Meat Agreement - nominal expiry date of the current Victorian Meat Agreement.

PN933

Thank you?---So that those people will have the choice or can make an election between schedule A and schedule B and that choice, should they choose to for example go with schedule B, which is to maintain their current penalties, that choice remains ongoing until those people leave the business. That arrangement does not cut off at the expiry of the proposed agreement but it goes on until that

person leaves the business. In respect to people who are new and come on board after 26 November 2011, they would just automatically go onto schedule A which are the rates which reflect the buy out arrangements. If you then go to clause 13 on p.128 and in particular clause 13(1) that details the particular loadings and penalties which are being preserved with that option where employees employed before 26 November 2011 choose to take that election which is schedule B election.

PN934

Now, sir, if we look at clause 13 we see it's perhaps one of the lengthier clauses in this proposed agreement and it has a number of other provisions dealing with situations in various States?---Yes.

**** GERALD MICHAEL CARR

XN MR HATCHER

PN935

Can you explain to the Tribunal the genesis of those provisions in this draft agreement?---Yes, in short the genesis of those provisions has largely come from the existing separate superannuation agreements that are in place and as part of the negotiations and discussions we included those save provisions within this and in the instance that I have just referred to there were some additions by way of special arrangements as we've made in the case of meat.

PN936

So the purpose is to continue for so long as they are needed savings provisions?---Correct.

PN937

Such as the Victorian Meat situation proposed?---Correct.

PN938

Mr Carr, last evening is it the case that you asked the solicitors acting for Woolworths to review the schedule AMIEU that was tendered in the proceedings?---Yes.

PN939

Were you given some information in relation to morning penalty rates in that document?---I was.

PN940

What was that information?---The discussion that was had was the schedule that was tendered yesterday reflected a penalty being applied from five a.m. to six am. Monday to Friday in the mornings when in fact when we reviewed the agreement the ordinary hours Monday to Friday are five a.m. to six p.m. - sorry to nine p.m. but there is a penalty from six p.m. to nine p.m. but there is no penalty between five a.m. and six a.m.

PN941

Did that have a significant impact on the costings or the calculations in that document?---Yes, it did throw out other calculations that were associated with that schedule.

PN942

Were you told of other inaccuracies in the document?---Other inaccuracies in respect to mathematical calculations I recalled, yes I can't remember any other detail.

PN943

But you made no independent review of that?---No.

PN944

Thank you, Mr Carr. That's the evidence-in-chief, Your Honour.

<CROSS-EXAMINATION BY MR NORRIS

[10.53AM]

PN945

MR NORRIS: Let's start with the evidence you have given, Mr Carr. You have given evidence about the provisions of the proposed draft national enterprise agreement specifically schedules A and B, do you recall that of course?---Yes.

PN946

These relate to savings provisions in respect of Victorian Meat Units?---Yes.

PN947

And also Tasmanian Meat Units?---Yes, there are similar provisions in Tasmania, yes.

PN948

I believe the words that you used precisely were that these particular provisions of the agreement came out of the negotiations and discussions. Do you recall using those words?---Yes.

PN949

I take it those negotiations and discussions that you're referring to were with the SDA?---Yes.

PN950

Apart from the issue raised in your evidence this morning about penalty rates applying between five a.m. and six a.m. can you throw any further light on inaccuracies on the document that is Exhibit AMIEU1?---Only to the extent that I have talked about this morning and that is that it is my understanding that because of that issue that then throws out some of the mathematical end points I suppose that are reflected in the document.

PN951

Yes, and we are talking about a loading that applies for one hour between Monday and Friday, is that correct?---Yes.

PN952

You haven't gone away yourself and conducted these calculations, have you?---No.

PN953

Mr Carr, you have given evidence of 24 years experience in workplace relations including some academic experience and some very senior employment experience; do you recall that evidence?---In my affidavit, yes.

PN954

You are an essentially workplace relations specialist, aren't you?---That's the field that I've worked in for the last 24 years, yes.

PN955

Would you agree with the term workplace relations specialist? Don't be modest, Mr Carr?---I suppose - well, a specialist in the sense that that is the exclusive area I have worked in, yes. Well, not exclusive, I have worked in general HR as well, but yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN956

You would agree with me that an essential part of your experience over that time is a good working knowledge of the legislation that applies to workplace relations at any given time?---Correct.

PN957

Of course that good working knowledge of the legislation that applies at any given time has been an essential part of you role at Woolworths since 1999, hasn't it?---Yes.

PN958

Of course if you've ever been in doubt about a particular legal matter you're only a phone call away from Henry Davis York Solicitors, aren't you?---Yes, and other advisers.

PN959

Well, goodness knows there's enough of them here today, Mr Carr, I would agree with that. You have given evidence, Mr Carr, that Meat Unit employees represent five per cent of the non-salaried staff employed in your retail operations, is that correct?---Yes.

PN960

You would agree with me that even if all of these employees voted as a block in a unified manner, they would have very limited capacity to affect any vote on this proposed national enterprise agreement that you're putting forward, wouldn't they?---Yes.

PN961

Mr Carr, what percentage of the employees covered by Woolworths proposed national enterprise agreement are casual employees?---As a generalisation - I don't have specific figures of Meat vis a vis non-Meat but as a generalisation casuals represent about 30 to 33 per cent.

PN962

How many employees covered by the proposed agreement are aged between 15 and 24?---I don't have that precise number.

PN963

I might be able to assist you in a moment but you don't know presently?---No.

PN964

What is the annual turn over rate of employees proposed to be covered by Woolworths Limited's proposed enterprise agreement?---It varies from

supermarket to supermarket but in general somewhere between 25 and 28 per cent.

PN965

Can I just show you a document, Mr Carr, do you recognise this document at all, Mr Carr?---It's not one I'm overly familiar with but I get to see various reports that are within the office but I can't say that I'm intimately acquainted with this, no.

PN966

Did you have any input into it?---No, I don't believe so.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN967

Of course you would agree with me that it's not - Woolworths Limited are not in the habit of making public statements or promulgating material that is incorrect in any way, are they?---I would assume no.

PN968

Do you assume or do you know?---Well, they wouldn't intentionally I believe, no.

PN969

Can I just take you to page 34 of that document, Mr Carr. I beg your pardon, page 35. Can you just read into the record for me the very first sentence on the left hand column?---In the body of it or up the top under the heading of, "Employee turnover"?

PN970

In the body of it?---"The nature of retail sector means a high proportion of our people are casual employees, many of whom are teenagers entering the workplace for the first time."

PN971

Do you agree with that statement?---In large part, yes, the issue of high proportion is something that I would need to think about but yes, the rest of it's accurate.

PN972

Well, while you are thinking about it if you can't give an answer immediately, if something comes to mind during the course of my cross-examination feel free to interrupt me. Can you just turn to page 32. You will see three pie graphs there, do you see those?---Yes.

PN973

The middle pie graph is under a heading, "Woolworths employees by age ratio 2007/2008, Australia excludes ALH and PEL."?---Yes.

PN974

I take it that the acronyms ALH stand for Australian Leisure and Hospitality"?
---Correct.

PN975

And PEL is an acronym that represents Woolworths New Zealand operations, isn't it?---Yes.

PN976

In fairness to you, Mr Carr, I must draw your attention to the fact that these figures, if you turn to page 33, on the right hand side you'll see a heading, "Total employees Woolworths Limited Group," do you see that?---Right at the - in the far right hand corner of the top table, yes.

PN977

It lists variously supermarkets Big W, Consumer Electronics, other divisions, executives?---Yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN978

So can you just turn back to page 32. That pie graph represents the collation of all those numbers, excluding ALH and PEL, do you agree with that?---Yes, PEL is listed in the table on page 33, but yes.

PN979

Given that you can't tell us precisely how many people aged between 15 and 24 will be covered by this proposed enterprise agreement, you would agree with me that this is the best evidence we've got?---It's a source of evidence, yes.

PN980

It's the best evidence, isn't it?---The most accurate evidence would be a payroll report but, yes, I accept that this is published, yes.

PN981

Yes, because, for example, these figures include executives, correct?---Yes.

PN982

I take it there's not too many executives at Woolworths Limited that are aged between 15 and 24?---That would be fair to say, yes.

PN983

You'll see there that the percentage of total employees aged between 15 and 24 is 47 per cent?---That's right.

PN984

Would you agree that that's a rough guide to the proportion of persons aged between 15 to 24 who will be covered by this proposed enterprise agreement? ---Using this document that's what the figure says, yes.

PN985

You're not in a position presently to contradict it, are you?---No, not at the moment, no.

PN986

So given that the turnover rate of employees is somewhere between 25 per cent and 30 per cent and given that a large proportion of employees to be covered by this proposed agreement will be aged between 15 and 24, you'd agree with me that a lot of those employees won't see out the duration of the agreement? Would you agree with that proposition?---There certainly would be a turnover, yes, yes.

PN987

Would you agree with the proposition that I've put to you or do you wish to disagree with it?---Can you repeat the proposition?

PN988

You've given evidence that the turnover rate, the annual turnover rate in supermarket operations is between 25 and 30 per cent?---Yes.

PN989

So one in every three employees every year - well, perhaps that's not precise, but roughly one in every three employees engaged in the supermarket operation actually leaves the employment of Woolworths?---Yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN990

You've agreed with me that around 47 per cent is the proportion of employees aged between 15 and 24 employed in Woolworths supermarket operations? ---Yes, according to this document, yes.

PN991

So I'd suggest to you once again a very large proportion - I withdraw that. Would you agree with this proposition? A large group of teenage casual employees entering the workforce for the first time and who are unlikely to see out the duration of this proposed agreement will have a substantial influence in the vote? ---They will have an influence in the vote. I don't know about substantial.

PN992

Will their influence be far greater than say for instance meat unit employees?

PN993

MR HATCHER: I object, your Honour. It's just not a fair question. One needs to form an assessment as to the likelihood of these people voting before one can form an assessment of the influence they're going to have on the vote. One needs to form an assessment of how these turnover figures and so forth apply within meat departments before one can form an assessment and where does it all take us? Is it suggested that employees subject to the agreement ought not be entitled to vote?

PN994

THE SENIOR DEPUTY PRESIDENT: If Mr Carr is of the view that the questions are asking him for information that can't be readily provided and that is not within his knowledge or it cannot be adduced or subject to any reasonable inference, he should say so.

PN995

MR NORRIS: I beg your pardon, your Honour, I didn't quite - - -

PN996

THE SENIOR DEPUTY PRESIDENT: If Mr Carr is of the view that the questions do not provide him a basis to make a response that's within his knowledge or does not provide information from which he can make a reasonable inference, he should simply say so.

PN997

MR NORRIS: Yes, exactly. Now, Mr Carr, you've heard Mr Hatcher's answer to the question from the bar table. Do you have anything further you wish to add to it?---No.

PN998

Would you agree with this proposition? A large group of young teenage casual employees entering the workforce for the first time who are unlikely to see out the duration of this proposed agreement will have a substantial influence in determining the wages and conditions of tradesperson butchers?---No, because it would depend on the asserted high number of people in that age group. As I said earlier, that those figures would vary from department to department, so it could well be that the people in that age bracket are in fact in other departments.

PN999

Would you agree with this proposition? A large group of teenagers across Australia who do a few hours casual checkout work after school will be voting on complex grandfathering provisions about penalty rates and ordinary hours that only relate to meat units in Victoria and Tasmania?---No, they would be voting on the entire package and there are grandfathering arrangements in other areas outside of meat as well.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1000

Yes, you say that they'll be voting on the global package, but part of that global package is schedule A and schedule B that you've been taken to this morning? ---That's part of it.

PN1001

Yes, so they will be voting at the very least on those provisions as well?---If they're voting on the total package, yes, that's part of it.

PN1002

Yes. I tender the corporate responsibility report into evidence, your Honour.

EXHIBIT #AMIEU5 CORPORATE RESPONSIBILITY REPORT

PN1003

MR NORRIS: Now, would you mind just turning to paragraphs 46 and 47 of your affidavit, please? You've read through those particular paragraphs, Mr Carr? ---I've had a look, yes.

PN1004

Would it be fair to say that you describe the role that Woolworths Limited played whenever state based negotiations for certified agreements in Woolworths supermarket operations occurred?---Yes.

PN1005

I take it you were personally involved in the corporate "big picture" guidance and ultimate "sign-off" on the negotiation strategy?---I have had input into that process, yes.

PN1006

I take it you'd be aware that from that involvement that at different times prior to 2002 some state based certified agreements in supermarkets covered more than one company in the Woolworths group, didn't they?---When you say one company, you're referring to subsidiary companies?

PN1007

Correct?---Yes.

PN1008

So I take it that you've been aware for a very long time that related corporations are treated as one employer under the legislation that's applied from time to time? ---I believe so.

PN1009

So you'd agree with this proposition that I'm going to put to you? Since 1999 when you commenced employment with Woolworths Limited, despite the fact that supermarkets were then operated by state based subsidiaries of Woolworths Limited, there were no legal impediments preventing the Woolworths group from seeking a national agreement covering all of its supermarket operations?---I don't believe there was any legal impediment. It's not a question I asked.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1010

Of course, you'd agree with me that there were definitely no impediments from 30 June 2002 when all employees in supermarket operations except for those in South Australia had their employment transferred to Woolworths Limited?---In 2002 there was the transfer from state subsidiaries to Woolworths Limited, yes.

PN1011

Yes, but there were definitely no impediments to doing a global national agreement definitely after 30 June 2002 that you're aware of?---Not that I'm aware of.

PN1012

I take it that it's part of the brief in all the roles that you've had over the years with Woolworths to keep a close eye to the industrial arrangements that your major competitor, Coles Supermarkets Australia Pty Limited, have negotiated over the years?---Yes, I keep an eye on it.

PN1013

Of course, you'd be aware that since 2002 Coles Supermarkets Australia Pty Limited have been doing national agreements with the SDA that cover virtually all employees in their supermarket operations in Australia?---Yes, I'm aware that they have a national agreement, yes.

PN1014

Since 2002 have you been aware of that?---Around that, yes. I don't know the precise date.

PN1015

You'd have to agree with me that the concept or idea of a national agreement isn't a new or novel concept to you, is it?---No. The company has national agreements in other parts of the business as well.

PN1016

Like for instance Big W?---Correct, yes.

PN1017

Indeed, that Big W agreement was negotiated on a national basis firstly in 2003, is that correct?---I think that might be round the date. I'd have to check that precisely.

PN1018

In the negotiations for the Victorian meat unit agreement, I'll read the full title out to you, Mr Carr, the Woolworths Limited Trading as Woolworths Safeway Supermarkets and AMIEU Agreement 2008, you're aware of that agreement?---I am.

PN1019

If I describe it as the Victorian meat unit agreement, you know what I'm referring to, don't you?---Yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1020

In negotiations or the negotiations for the meat unit agreement in Victoria were concluded in September 2008, weren't they?---Yes.

PN1021

You'd agree with me that at no time during those negotiations were the Victorian branch of the AMIEU made aware that Woolworths Limited had taken a decision to negotiate a national agreement covering its entire supermarket operations across Australia?---I don't believe that that subject was discussed during the negotiations, no.

PN1022

You see, as I understand your evidence that would be because no decision had been taken at that stage to propose a national agreement covering supermarket operations, had it?---There'd been no definitive decision at that point.

PN1023

You've given evidence that the making of a national agreement covering supermarket operations will lead to considerable benefits to the business, do you agree with that?---Yes, I've said that.

PN1024

You're also of the view that negotiating for a national agreement covering supermarket operations is a more efficient form of bargaining, is that correct? ---Yes, I've said that as well.

PN1025

Can I just recap where we're at? It'll only take a minute, Mr Carr. You've agreed that there were no legal impediments to making a national agreement covering the Woolworths supermarket operations since you've been at Woolworths Limited? ---I think my answer said that that's my understanding. However, I haven't checked it in terms of back in the early parts of 2000.

PN1026

You're more than aware of the concept or an idea of a national agreement? ---Yes.

PN1027

You've been aware of that for a very long period of time?---Yes, I've been aware of the concept of a national agreement, yes.

PN1028

You've agreed that your view is that negotiating for a national agreement covering supermarket operations is a far more efficient manner of negotiating?---That's one of the benefits.

PN1029

Yes, and you've agreed that a national agreement will deliver efficiency benefits that state based agreements could never achieve?---There are benefits to be gained from a national agreement that's state based, yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1030

Yes. Mr Carr, is it really your evidence that for a decade under your stewardship you've allowed an inefficient pattern of bargaining to occur?---No.

PN1031

Well, that's precisely what has occurred, I put to you?---Well, I think you're making the assumption that I - - -

PN1032

I'm not making any assumptions, Mr Carr.

PN1033

MR HATCHER: Allow the witness to answer?---I think what was inferred in the question is that I single-handedly get to make that decision and that's not the case.

PN1034

MR NORRIS: Yes, but no doubt you have input into whether such a decision should be made?---Yes.

PN1035

Is it really your evidence that for a decade under your stewardship you've allowed agreements to be reached that didn't deliver maximum efficiency benefits to the business?---No. The agreements that we've reached we believe have provided benefits in the context that they were negotiated.

PN1036

Yes, but if you'd have negotiated on a national basis you would have gotten more efficiency results for the business, wouldn't you? You've agreed to that, haven't you?---I personally, yes.

PN1037

I think there's a more plausible explanation for this, Mr Carr, but we'll get to it presently. As I understand your evidence, the decision to propose a national agreement covering supermarket operations was made by Woolworths Limited in the early part of 2009, that's correct, isn't it?---Definitive decisions were taken towards the end of 2008, yes.

PN1038

Towards the end of 2008? Can you be a little bit more precise for us?---Sorry?

PN1039

Can you be a bit more precise for us as regards the timing?---Yes. I recall it was around December, I think.

PN1040

I take it your aware that the Fair Work Bill was introduced into the House of Representatives on 25 November 2008?---Yes, thereabouts.

PN1041

I take it that you like every other practitioner in this particular field we operate in made yourself familiar with the legislative changes that were proposed at that stage to occur?---Yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1042

It seems to me also from your evidence that you were well aware that the provisions relating to bargaining for enterprise agreements were coming into force on 1 July 2009. Would you agree with that?---Yes. I was aware that the transitional legislation provided for that.

PN1043

So you'd agree with me that in a whole decade, the only time that Woolworths Limited had manifested an intention to negotiate a national agreement covering its supermarket operations is after the introduction of the Fair Work Bill into the parliament?---No.

PN1044

Well, Mr Carr, I put it to you that that is the only overt manifestation of that intention that is apparent on the evidence?---The company has considered a national agreement for supermarkets over periods of time. I've got to say that the most serious consideration occurred in the latter part of 2008, but it's not something that wasn't ever explored previously.

PN1045

No, and you say, your words are that the company had considered it, is that correct?---Yes.

PN1046

But you'd agree with me that the only time that a definite decision to negotiate such a national agreement was taken after the introduction of the Fair Work Bill into the parliament?

PN1047

MR HATCHER: Your Honour, I'm assuming these questions are directed and confined to supermarkets.

PN1048

MR NORRIS: I believe I made that clear in the question.

PN1049

THE SENIOR DEPUTY PRESIDENT: I presume the witness has been replying in relation to supermarkets?---Yes, I have, yes. I wouldn't accept the proposition that the reason to embark upon a national agreement was because of the - - -

PN1050

MR NORRIS: That's not the question that I asked you, Mr Carr. I suggest you direct your answer to the question that I've asked you. I'll give you an opportunity on the answer you wish to give later, so you'd agree with me that the only time that Woolworths Limited have ever taken a definite decision to negotiate a national agreement covering their supermarket operations is after the introduction of the Fair Work Bill into the parliament?---Certainly publicly we said that we wanted to go down the path of a national agreement in that time frame, yes, but as I say, there'd been consideration of that previously.

PN1051

Yes, there'd been consideration of that issue previously, but there'd been no concrete decision to embark upon that course, had there?---Not 100 per cent definitive, no.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1052

You see, I'd suggest to you the real reason you didn't propose a national agreement for a decade is because you were more than satisfied with the pattern of bargaining and agreement coverage you had in place over that time. Do you have anything you wish to say in response to that?---I wouldn't accept that. As I said earlier, there was consideration of embarking upon a national agreement on previous occasions, most notably in the early 2000s and for various reasons it was decided not to progress with that and the particular reason at that time was we had made an acquisition of a large supermarket chain and the business felt that it would have been too much to take on board to take on the acquisition plus embark upon a national agreement so a national agreement has been something that has been in the minds of people for a fair while.

PN1053

Yes. Now, that acquisition of other supermarkets, it may have detained you for six months, I take it?---Sorry?

PN1054

It may have detained your time for approximately six months or so?---It was a longer period than that. It was quite a significant transitional process. It was a large acquisition.

PN1055

Perhaps a year?---Yes, a year, 18 months, thereabouts.

PN1056

Yes, over the course of a decade, you say that for 18 months you were detained on other things?---What I'm saying is that there was serious consideration given to a national agreement back then and the reason - one of the reasons it didn't go forward was for the explanation I've just given.

PN1057

You say you were detained for 18 months, correct?---With that acquisition, yes.

PN1058

Yes, so I imagine that you promptly revisited that consideration of proposing a national agreement immediately after you'd finished that project?---No. There

was no consideration of it straight afterwards, no. There were other things came along and - - -

PN1059

Yes. You see, I'd suggest to you that your only motivation for seeking a national agreement in the early part of 2009 or I'd rephrase that. I'd suggest to you that your only motivation for seeking a national agreement in December 2009 was for the express purpose of avoiding the obligations that the Fair Work Act would have imposed upon you in July 2009 to recognise and bargaining in good faith with the AMIEU?---I reject that.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1060

I beg your pardon?---I don't agree with that.

PN1061

Very well. Your Honour, I believe that the tribunal indicated - - -

PN1062

THE SENIOR DEPUTY PRESIDENT: Yes, I do. Are you about to embark on a new line of questioning, are you? Is this a transition point?

PN1063

MR NORRIS: I'm quite comfortable with adjourning presently, your Honour.

PN1064

THE SENIOR DEPUTY PRESIDENT: We still have another four minutes to go.

PN1065

MR NORRIS: Well, I am about to embark upon a new line of cross-examination, your Honour, so it might be a convenient time if that's acceptable.

PN1066

THE SENIOR DEPUTY PRESIDENT: We'll adjourn on the terms we've discussed. Thanks very much.

<SHORT ADJOURNMENT

[11.27AM]

<RESUMED

[11.51AM]

PN1067

THE SENIOR DEPUTY PRESIDENT: Thanks, everyone. Perhaps if we resume.

PN1068

MR NORRIS: Mr Carr, I just want to turn back momentarily to some earlier evidence. You gave some evidence about the turnover rate in respect of your supermarket operations. Do you recall that?---Yes.

PN1069

You estimated it was between 25 and 30 per cent?---Thereabouts.

PN1070

Can you tell us for the last annual reporting period how many people Woolworths recruited to work in its supermarket operations?---No. I don't have that information.

PN1071

Can I just take you to AMIEU5? It's the corporate responsibility report, in particular page 33 and in particular the right-hand corner. There's a box there, the very top right-hand corner. Now, you'd agree with me that it reads:

PN1072

We recruited more than 70,000 new employees creating jobs and career opportunities in local communities across Australia and New Zealand.

PN1073

?---Yes, I agree with that wording.

PN1074

You'd also agree with me that that 70,000 relates to the figure in the table that appears below, total WOW employees 188,674?---That 188,674 I'm assuming represents the total number of employees employed by Woolworths.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1075

Yes, indeed?---In Australia and outside of Australia.

PN1076

I have nothing further. I just thought I'd bring it to your attention. Now, you say in your affidavit that you considered it desirable to reach an agreement prior to 30 June 2009 because a number of employees would be due for a pay increase. Is that a fair summary of your evidence?---That's correct. I said that.

PN1077

Indeed, you were very concerned that employees in this position would become disgruntled if they didn't receive such an increase promptly. Is that right?---I was very conscious that there were some major supermarket agreements expiring during the June/July period and that it would be good to have an agreement in place so that those people could derive the benefits of the agreement.

PN1078

Yes, but you were concerned that employees in this position would become disgruntled?---That could be one outcome, yes.

PN1079

You'd agree with me, of course, that Woolworths Limited can grant their employees a wage increase at any time independently of any negotiations for a proposed enterprise agreement, can't they?---Theoretically, yes.

PN1080

Yes, it's theoretically possible?---It's not practice, though.

PN1081

You'd agree with me that that's rather unremarkable, your last response, Mr Carr, I must say. You'd agree with me, Mr Carr, that Woolworths Limited have been a party to agreements that granted back-dated wage increases, hasn't it?---Yes.

PN1082

Yes, and the employees presumably received the appropriate back pay?---If there's been a back-dated agreement within the agreement, yes.

PN1083

In fact, in respect of those employees that you have grave financial concerns for, in the proposed national enterprise agreement those employees will receive their first wage increase back-dated to 1 August 2009, correct?

PN1084

MR HATCHER: Can we clarify who these employees are that the witness has grave financial concerns for? I don't recall any evidence to that effect.

PN1085

MR NORRIS: Well, Mr Carr has given evidence about a group of employees in his affidavit that were on agreements and he just said it in the witness box who were on agreements that were expiring between June and July and he had concerns that they would become disgruntled.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1086

MR HATCHER: That's so.

PN1087

MR NORRIS: Yes, so the question was rather precise, with respect.

PN1088

THE SENIOR DEPUTY PRESIDENT: You can ask the question, but I think it was the rather ornate presentation of the evidence as it was. Is that what the concern was?

PN1089

MR HATCHER: Yes. Grave financial concerns was the expression.

PN1090

THE SENIOR DEPUTY PRESIDENT: Yes, I don't think it's been recast in the form in which it was originally presented, so we'll ask it in that form.

PN1091

MR NORRIS: Very well, your Honour. In respect of those employees that you had concerns would become disgruntled, in the proposed national enterprise agreement those employees will receive their first wage increase back-dated to 1 August 2009, correct?---Yes, some of them will, Victoria, South Australia and Western Australia, yes, those three states.

PN1092

Yes, and they were the only states that had agreements that were expiring between June and July?---That's correct.

PN1093

Yes, so I'd put it to you due to your knowledge and experience you knew well that there were several means to deal with a concern over the timing of proposed wage increases. Do you agree with that?---No, because the company pays wage increases through the agreements when those agreements have been duly

negotiated and certified or authorised by the relevant tribunal. It's at that point that any payment is made. We don't make payments ad hoc.

PN1094

No, but you've given evidence that you've been a party to many agreements where pay increases were back-dated?---Yes, after those agreements had been certified, ratified, approved, whatever, yes.

PN1095

Presumably that was for the purpose of allaying any disgruntlement over the timing of the wage increases?---It has been as a result of the negotiation process.

PN1096

Yes, but you'd agree with me that in respect of your concerns about disgruntlement, it's an appropriate means to address that, isn't it?---It's a mechanism to attempt to address that, yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1097

Mr Carr, Ms Burnley has given evidence in these proceedings that - and she can only give evidence on behalf of the SDA that on the part of the SDA amongst other things they considered it desirable to reach an agreement under the Workplace Relations Act. Now, was it any part of Woolworths' desires throughout this process to reach an agreement under the provisions of the Workplace Relations Act?---Our desire was to try and reach an agreement by 30 June for the purposes that I've just explained of trying to have that coincide with the expiration of those agreements that I referred to.

PN1098

Yes, so I take it it's your evidence that the fact that the Workplace Relations Act was expiring in many respects on 30 June 2009 was a mere coincidence?---No.

PN1099

It wasn't a coincidence?---I acknowledge that the Workplace Relations Act, elements of it were expiring on 30 June, but that wasn't the sole motivation for embarking upon that time frame, no.

PN1100

No, no, it wouldn't have been the sole motivation, of course, but it was part of the motivations, wasn't it?---We were wanting to get an agreement done by 30 June.

PN1101

Mr Carr, was it part of the motivations or wasn't it?---No, it wasn't a significant part of the motivations, no.

PN1102

Very well. Now, you give evidence that you had a desire to reach agreement by 30 June 2009?---Yes.

PN1103

I take it you undertook all expeditious means available to you to reach that objective?---It was the aim and objective to get there and we endeavoured to, yes.

PN1104

How many meetings were conducted with officials of the SDA?---I don't have the approximate number, but I would assume probably in the order of 10 or 12, thereabouts.

PN1105

Of those 10 or 12 meetings, did they last for a day?---Some were lengthy meetings that might have gone for most of the day. Others were half days. It was a combination of time periods.

PN1106

So I take it that the first time you set aside two whole days for the purposes of these negotiations was 29 and 30 June 2009?---I would have to check my records, but I'd be surprised that they were the only two full days that had been set down.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1107

You'd be surprised?---Mm.

PN1108

But you can't tell us anything else other than that?---Not without checking my records, no.

PN1109

No?---There were blocks of days that we had put together during that period.

PN1110

Yes, I just recall that your response previously was that there were some full days, there were some part days. You didn't mention any blocks of two days in that response, did you?---No, but what I meant in my response was that if there had been a two-day block, there might have been a full day on day one and three-quarters of a day on day two.

PN1111

Very well. Now, I'd suggest to you that in stark contrast the progress on progressing the agreement after 1 July 2009 became very pedestrian. What do you say to that?---It's gone longer than we had all anticipated.

PN1112

Yes. It was nearly two months between 1 July 2009 and of course the end of August before you even came up with a draft?---No, there were drafts that had - there was a document that we had that we were working on and towards the end of August I sent to the AMIEU for the purposes of our discussion the draft document as it was at that point.

PN1113

Yes, so during the negotiations that commenced in the early part of 2009 no doubt there were fully drafted proposed agreements, weren't there?---There was continuous work on a draft. I mean, at the outset of the negotiations we put a draft on the table as to what we wanted to achieve in the negotiation and that document was the basis of the discussion through that period.

PN1114

This draft that you've just referred to, I take it it was a complete fully drafted proposed agreement that dealt with in specific all the terms and conditions of

employment that you were seeking?---That draft was reflective of the things that we wanted to achieve. The draft that we sent you at the end of August that was as a result of the negotiations reflected differing outcomes because of the negotiation process.

PN1115

Indeed, but I think you'd agree with this. You had a full draft early in the part of 2009, did you not?---We had a draft that we wanted to achieve, yes.

PN1116

Yes?---It wasn't an agreed draft.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1117

No, of course, and as you say over time things were negotiated, things were amended, corrected, new things would have been inserted, no doubt, is that correct?---That process occurred, yes.

PN1118

Mr Carr, you're aware that Mr Graham Bird has given evidence in these proceedings?---I am.

PN1119

Have you read the evidence that he gave by way of affidavit?---I have.

PN1120

Yes, and as I understand your evidence, you're not disagreeing with anything that he's deposed to on oath?---I would want to - to answer that question here, I would need to revisit his affidavit. It's a while since I've read his affidavit. I was in court yesterday when he gave evidence. If there's a specific issue that you want me to comment on, I can do that.

PN1121

I'll leave it to your counsel in that regard, Mr Carr. You're aware that Mr Graham Smith has also given evidence in these proceedings?---Yes, I am.

PN1122

As I understand your evidence, you're not disagreeing with anything he's deposed to on oath either?---Again I read his affidavit earlier and I heard his evidence yesterday. If there's a specific point that you want to clarify with me, I'm happy to answer it.

PN1123

I don't have a point. I'm asking you if you disagree with any aspect of the evidence.

PN1124

MR HATCHER: Well, then the witness should be shown the evidence, with respect. I have no objection to my friend putting the affidavit in front of him. If he wants the witness to comment on it he must fairly have it in front of him.

PN1125

MR NORRIS: Very well. Look, I'll withdraw that question. You're aware that Mr Crawford has given evidence in these proceedings?---Yes.

PN1126

Mr Crawford has described in summary form the state based negotiations that have occurred in Queensland, Western Australia and New South Wales. You're aware of that evidence?---Yes, I recall hearing that, yes.

PN1127

As I understand it, on the basis of hearsay you believe that in respect of the 1998 negotiations in Queensland the AMIEU only attended one meeting. Is that your evidence?---That's what I've been informed. I wasn't with the company in 98 but I did speak to somebody who was involved in that process and that was the information that I was provided.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1128

That's as high as you can put it?---Sorry?

PN1129

That's as high as you can put it?---That I spoke to somebody who was involved in the negotiations in 98, yes.

PN1130

I take it you didn't ask your Queensland colleagues whether they still had minutes of the meetings on file?---No, I didn't.

PN1131

I take it that you agree with Mr Crawford's evidence that in respect of the negotiations in Queensland in 2001, 2004 and 2007 for four walls agreements in Queensland the AMIEU were deliberately excluded from the negotiations?---The AMIEU, yes, weren't involved in those negotiations. Certainly in 2007 it was the case. 2004 I recall there was discussion between the company and the union, but, no, I believe that they weren't involved in those negotiations, yes.

PN1132

When you say "weren't involved," that was by a decision of Woolworths, wasn't it?---Yes. We embarked upon an agreement with the SDA.

PN1133

I take it you'd agree with Mr Smith's evidence that in respect of the 2000, 2003 and 2006 negotiations that occurred in South Australia again the AMIEU were deliberately excluded from the negotiations?---The negotiation was between Woolworths and the SDA.

PN1134

Yes. Now, would you agree that the AMIEU were deliberately excluded from the negotiations?---They weren't included, yes, I agree.

PN1135

THE SENIOR DEPUTY PRESIDENT: Well, it wasn't an accident, was it? I mean, you didn't forget to - - -?---No, it wasn't an accident.

PN1136

MR NORRIS: I take it you'd agree with me that since the commencement of negotiations for the proposed national enterprise agreement since early 2009 up until 30 June 2009 the AMIEU have been once again deliberately excluded from the negotiations?---Yes, they weren't included.

PN1137

I take it you'd agree with me that since 1 July 2009 until 27 August 2009 the AMIEU have not been included in any discussions between Woolworths Limited and the SDA relating to the proposed national enterprise agreement?---During the period in 2009 from late August, 4 September onwards, the discussions about the proposed national agreement have been between Woolworths and the AMIEU in a separate bargaining meeting.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1138

With respect, Mr Carr, that's not the question that I asked you. I asked you about the period between 1 July 2009 and 27 August 2009?---Sorry.

PN1139

Are you clear on that?---Yes.

PN1140

And I'm putting to you that the AMIEU have not been included in any discussions between Woolworths and the SDA relating to the proposed national enterprise agreement. That's correct, isn't it?---Not in that period, no.

PN1141

So there were discussions between the SDA and Woolworths during - - -?---No, there were discussions between Woolworths and the AMIEU from late August onwards.

PN1142

You've just agreed with me that the AMIEU were not included in any discussions between Woolworths Limited and the SDA relating to the proposed national enterprise agreement between 1 July 2009 and 27 August 2009?---Yes, I agreed with that.

PN1143

You didn't respond by saying there haven't been any discussions, did you, to the original question?---I agreed that there hasn't been any involvement with Woolworths, the AMIEU and the SDA in that period July to 27 August. I then went on to say that since late August Woolworths have been negotiating or bargaining with the AMIEU as well as having discussions with the SDA, drafting.

PN1144

Can I just take you to AMIEU5 again, Mr Carr, particularly page 48, if you could turn that over for me, please? Now, you'd agree with me, wouldn't you, that in the left-hand column under the banner freedom of association and union engagement there's some words, isn't there?---Yes.

PN1145

And you'd agree with me that the very second sentence starts, and I'll read it into the record:

PN1146

We aim to develop and maintain active partnerships with unions to forge positive and constructive relationships and are proud of what we have been able to achieve.

PN1147

I'd emphasise the next bit:

PN1148

We hold regular meetings with all the unions who represent our employees and we fully respect the role they play in maintaining a constructive and productive working environment.

PN1149

Do you agree with me they're the words there?---Yes, I do.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1150

You previously agreed with me that Woolworths wouldn't knowingly publicly promulgate any information that was misleading or false in any way, haven't you?---Yes.

PN1151

Now, you have to agree with me that this is a statement of corporate responsibility and philosophy, isn't it?---Yes, that's the report heading.

PN1152

I take it you'd agree with me that you have not held regular meetings at all with the AMIEU, have you?---The company has had meetings about various issues outside of enterprise bargaining with the AMIEU in various states at various times and in relation to agreements that we have with the AMIEU in Victoria and Tasmania, that is including the bargaining process.

PN1153

Yes, but in relation to an issue that is so fundamental to an employee as their working terms and conditions of employment, you have not only failed to meet with the AMIEU, you have deliberately excluded them on a number of occasions over a long period of time, that's correct, isn't it?---We have chosen to enter into agreements with the SDA, which is what's been provided by the legislation from time to time.

PN1154

I'm not talking about who you chose to enter into agreements with. What I just put to you was that in respect of something so fundamental as an employee's terms and conditions of employment, whenever a meeting has been held to discuss such matters that actively cover employees that the AMIEU is entitled to represent, not only have you not met with the AMIEU, you have deliberately excluded them from the negotiations, that's correct, isn't it?---I can only say what I said previously and that is that the - - -

PN1155

You repeat the same evasive answer?---No, we've entered into those agreements with the SDA which we've been able to under the legislation.

PN1156

You see, it says there:

PN1157

All the unions who represent our employees.

PN1158

You would agree with me, wouldn't you, that the AMIEU is a union that is entitled to represent certain employees that work for Woolworths Limited, yes?
---Yes.

PN1159

I mean, I would suggest to you, Mr Carr that you've breached your own corporate philosophy over a long period of time and in particular in relation to the negotiations that were conducted from January 2009 to 30 June 2009. Do you have anything you wish to say in response?---No, I'd reject that.

PN1160

I beg your pardon?---I'd reject that.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1161

You'd reject it. Now, Mr Carr, look, I'd like to apologise in advance, I'm about to read somebody's name and I may mispronounce it, Mr Carr. Any assistance you could give me would be greatly appreciated, but do you know a Mr Naum Onikul?---Naum Onikul, yes.

PN1162

Naum Onikul, is that the - - -?---Yes, it is.

PN1163

Naum Onikul, how do you know him?---He used to work at Woolworths.

PN1164

How long?---How long did he work at Woolworths?

PN1165

Yes?---I think he was a long serving employee. I don't know precisely but I'd suggest probably in excess of 20 years.

PN1166

Yes, you'd agree with the figure of 21 years, wouldn't you? Yes, now - - -?---If that's what's being quoted.

PN1167

Yes. Can you tell us what positions Mr Naum Onikul held during that time?---He held a variety. I think his position he held when he left the organisation was general manager, supermarkets. He was also general manager, liquor, liquor and petrol at one point in time.

PN1168

When you say general manager, isn't it correct that he was actually the director of food and liquor for Woolworths Limited until the end of 2008?---Food and liquor. He hasn't been - no, I - well, the title - - -

PN1169

Yes?---I don't know what the title was at the time but it was effectively general manager of the supermarkets, yes.

PN1170

Now, in terms of the corporate structure, did you report to Mr Onikul or was he a subordinate of yours?---No, I didn't report to Mr Onikul and he wasn't a subordinate of mine.

PN1171

Did you have much involvement with him?---Not much.

PN1172

You had some involvement?---I knew him. I didn't have a lot of involvement with him in a work sense.

PN1173

Would you say that he had an intimate knowledge of the overall business and of course the standard day-to-day operations of Woolworth stores?---Yes, he would have a good understanding of how the supermarket operation works, yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1174

Yes, indeed. Now, you can only give me an answer based on your dealings with Mr Onikul, but based on your dealings with Mr Onikul, would you regard him as a person of honesty and integrity?---From my limited exposure, yes.

PN1175

He's not the sort of person to tell lies just to cut corners, is he?---As I said, from my limited exposure the answer would be yes.

PN1176

You see, in paragraph 37 of your affidavit, if you'd like to turn it over, you've expressed a belief that:

PN1177

Meat departments aren't a geographically operationally or organisationally distinct part of the supermarket business that Woolworths operate.

PN1178

Is that a fair summary?---Yes.

PN1179

I'll just show you a document. Now, you would agree with me this is a statutory declaration made for the purposes of securing the certification of an agreement under the Workplace Relations Act, correct?---Yes.

PN1180

You would agree with me that Mr Naum Onikul is the person who is making the declaration?---Yes.

PN1181

Now, you would agree with me that on page 2 there's a question that says:

PN1182

Does this agreement apply only to a part of the single business?

PN1183

And there's a response:

PN1184

Yes.

PN1185

?---Yes.

PN1186

You would agree with me that below that it says:

PN1187

If yes, is the part of the single business a geographically distinct part or a distinct operational or organisational unit within the single business?

PN1188

?---Yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1189

And you would agree with me that Mr Onikul has responded:

PN1190

Yes.

PN1191

?---By signing the affidavit, yes.

PN1192

Yes, I tender that into evidence, your Honour.

EXHIBIT #AMIEU6 STATUTORY DECLARATION OF NAUM ONIKUL

PN1193

WITNESS: This document would have been pre 1999, I suspect.

PN1194

MR NORRIS: Well, it appears on the face. I'll be proceeding in chronological order, Mr Carr, just to allay your concerns. Yes, it's made in 1997?---Mm.

PN1195

Do you know a Stephen James Chapman?---Yes.

PN1196

How do you know him?---He's the HR manager for region 2, which is South Australia and the Northern Territory.

PN1197

Have you had much involvement with him?---From time to time I've had dealings with him, yes.

PN1198

Based on those dealings would you consider him a person of honesty and integrity?---Yes.

PN1199

I'll show the witness yet another document. Before I do, he's not the sort of person that would tell lies just to cut corners, is he?---No.

PN1200

MR HATCHER: If it saves my friend time and saves us all from the theatre, we don't object to my friend tendering any statutory declarations that have come from the files of the Commission dealing with certified agreements. We understand the point to be made and we'll deal with it.

PN1201

MR NORRIS: Yes, and we're entitled to run the case as we see fit, not as my learned friend suggests, with respect, your Honour. Statutory declarations have been made by seven individuals.

PN1202

THE SENIOR DEPUTY PRESIDENT: All right, let's proceed.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1203

MR NORRIS: Yes.

PN1204

Now, you would agree with me that Mr Chapman is the person making this declaration. Look, I may expedite the process?---Yes, I'm just struggling with the - - -

PN1205

I simply wish to question Mr Carr on the individuals as he knows them from hereon in. I just simply tender that document, it speaks for itself.

**EXHIBIT #AMIEU7 STATUTORY DECLARATION OF
STEPHEN CHAPMAN**

PN1206

MR NORRIS: Do you know a Brian Morrissey?---No.

PN1207

Don't know him at all?---I know the name. I've heard of the name. I've not had any dealings with him, I think he may have been before my time.

PN1208

Yes, but you can at least confirm that at one time he worked at Woolworths, can't you?---I've heard that name, yes. I'm not familiar with exactly what role he - - -

PN1209

I'll just simply tender this one, your Honour, the witness can't assist us with Mr Morrissey's general credit.

**EXHIBIT #AMIEU8 STATUTORY DECLARATION OF BRIAN
MORRISEY**

PN1210

MR NORRIS: Do you know a Stephen James Chapman? I'll withdraw that, Mr Carr.

PN1211

Your Honour, I've already questioned Mr Carr about Stephen James Chapman. I'd simply seek to tender into evidence another statutory declaration that's been made by that particular individual.

PN1212

Do you know an Anthony Ross Colin Blackshaw?---No.

PN1213

Again the witness can't assist us, so I would simply tender it into evidence, your Honour.

PN1214

THE SENIOR DEPUTY PRESIDENT: You're just getting ahead of me.

**EXHIBIT #AMIEU9 FURTHER STATUTORY DECLARATION
OF STEPHEN CHAPMAN**

**EXHIBIT #AMIEU10 STATUTORY DECLARATION OF
ANTHONY BLACKSHAW**

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1215

MR NORRIS: Do you know a Kiernan Hibberd?---Yes.

PN1216

How do you know him?---He formerly worked for the company and has subsequently left but I knew him when he was a regional manager in Victoria, regional HR manager in Victoria.

PN1217

Yes, based on your dealings with him, would you consider him a person of honesty and integrity?---Yes.

PN1218

Wouldn't be the sort of person that would tell lies just to cut corners?---No.

PN1219

I'll just show you the statutory declaration made by Mr Hibberd. I beg your pardon, there should be a copy for the Bench as well.

PN1220

THE SENIOR DEPUTY PRESIDENT: This is being handed up as what?

PN1221

MR NORRIS: An exhibit.

**EXHIBIT #AMIEU11 STATUTORY DECLARATION OF
KIERNAN HIBBERD**

PN1222

MR NORRIS: Do you know a Robyn Julie Atkinson?---Yes.

PN1223

Can you tell us how you know her?---She formerly worked for the company and I knew her in her capacity as a regional HR manager in South Australia.

PN1224

Based on your dealings with her, would you consider her a person of honesty and integrity?---Yes.

PN1225

She wouldn't tell lies just to cut corners, would she?---No.

PN1226

I seek to tender two statutory declarations made by Ms Atkinson at different times. I beg your pardon, no, just the one.

PN1227

Do you know a Rachel Steele?

PN1228

THE SENIOR DEPUTY PRESIDENT: I suggest we'll mark - - -

PN1229

MR NORRIS: How do you know her?

THE SENIOR DEPUTY PRESIDENT: We'll mark Ms Atkinson's - - -

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1230

MR NORRIS: I beg your pardon, your Honour.

**EXHIBIT #AMIEU12 STATUTORY DECLARATION OF
ROBYN ATKINSON**

PN1231

MR NORRIS: Do you know a Rachel Steele?---Yes.

PN1232

How do you know her?---I - she was a regional HR manager in Victoria and so I knew her mostly in that context.

PN1233

So you had involvement with Ms Steele, of course?---Yes, I knew her, yes.

PN1234

Based on that involvement, would you consider her a person generally of honesty and integrity?---Yes.

PN1235

She's not the sort of person who would tell lies just to cut corners, would she?
---No.

PN1236

I seek to tender another exhibit, your Honour, it's a statutory declaration made by Ms Steele.

PN1237

Do you know a Janine Duggan?

PN1238

THE SENIOR DEPUTY PRESIDENT: I'll just mark it once I've sighted it.

PN1239

MR NORRIS: I beg your pardon once again.

PN1240

THE SENIOR DEPUTY PRESIDENT: Yes.

**EXHIBIT #AMIEU13 STATUTORY DECLARATION OF
RACHEL STEELE**

PN1241

MR NORRIS: Do you know a Janine Duggan?---Yes.

PN1242

How do you know her?---She's one of the regional HR managers in Victoria.

PN1243

She's presently employed?---Yes.

PN1244

Is she a person of honesty and integrity based on your dealings with her?---Yes.

PN1245

She wouldn't tell lies just to cut corners, would she?---No.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1246

I tender another exhibit, your Honour, being statutory declaration made by Ms Steele on 22 December 2005. I beg your pardon, your Honour, I should have referred to Janine Duggan. It's a statutory declaration declared by Ms Duggan on 22 December 2005.

PN1247

THE SENIOR DEPUTY PRESIDENT: Just let me look at it.

**EXHIBIT #AMIEU14 STATUTORY DECLARATION OF
JANINE DUGGAN**

PN1248

MR NORRIS: You may not have seen all of those exhibits, but assume that each and every one of those exhibits in the relevant part, the individual making the declaration has declared that meat units are a geographically, operationally and distinct - or distinct part of the single business. Assume that to be correct just for the purposes of my question, Mr Carr. You would agree with me that there's eight people, ranging from corporate directors of Woolworths Supermarkets to senior HR personnel in Woolworths who obviously contradict your view that meat units are not operationally, organisationally or geographically distinct?

PN1249

MR HATCHER: I object. The question isn't fairly put. These are documents that deal with different places at different times. If my friend can make it relevant he needs to deal with each document, each time and see what this witness's views are, if he has any at that time in relation to that operation to the extent that it is relevant.

PN1250

MR NORRIS: I ask that the witness be excused before I respond, your Honour.

<THE WITNESS WITHDREW

[12.29PM]

PN1251

MR NORRIS: Not one scrap of evidence before the Tribunal presently that establishes that the operations of meat units have been altered in any substantial way over the last decade, therefore, my learned friend's objection is not well taken.

PN1252

MR HATCHER: It's not up to us, we're not the applicant, but to the extent that reliance is to be placed on a document that deals with a state at a point in time, it's not a fair question to say to this witness, you've expressed the view in 2009 in relation to the national operations of the supermarkets which is at odds with all these statutory declarations, it is not. They don't deal with the situation, national supermarkets in 2009. Now, it maybe that my friend can make the link that he appears to want to make but he can't do it in that omnibus fashion. That is just not fair.

PN1253

THE SENIOR DEPUTY PRESIDENT: If you're going to require the witness to respond to these documents, Mr Norris, if you put it to him in a global manner you'll be likely to obtain a highly generalised and qualified response. I'm afraid it might be more useful for you for your particular purpose to either pick out particularly relevant ones or to lead him through each of those after his response to each of the - - -

PN1254

MR NORRIS: I don't propose to do that, your Honour, I believe the documents speak for themselves.

PN1255

THE SENIOR DEPUTY PRESIDENT: Can we invite the witness back in.

<GERALD MICHAEL CARR, RECALLED

[12.31PM]

<CROSS-EXAMINATION BY MR NORRIS, CONTINUING

PN1256

MR NORRIS: Now, Mr Carr, over the period between 1997 to 2005 there's presently before the Tribunal seven exhibits which at various times between 1997 and 2005 declare on the part of eight people who then were employed by Woolworths meat units are a geographically, operationally or organisationally distinct part of the single business. I take it you disagree with the opinions that have been expressed in those declarations?

PN1257

MR HATCHER: Well, I object. That's the very basis upon which the Commission has already ruled.

PN1258

MR NORRIS: Well, there was no ruling.

PN1259

MR HATCHER: Because you withdrew the question.

PN1260

MR NORRIS: I didn't withdraw the question.

PN1261

Do you agree or disagree with each and every document as it was made at that time.

PN1262

MR HATCHER: I press the objection.

PN1263

THE SENIOR DEPUTY PRESIDENT: Mr Carr, you will have to step outside again.

PN1264

MR NORRIS: No, look, I won't press the matter any further, your Honour, the documents speak for themselves.

PN1265

Just turn to paragraph 27 of your affidavit. Your Honour, I'm about to embark on a new strand of cross-examination and I note that it's just after half past 12. If your Honour is - - -

PN1266

THE SENIOR DEPUTY PRESIDENT: We might press on till one o'clock.

PN1267

MR NORRIS: Very well, your Honour.

PN1268

You've read paragraph 27, Mr Carr?---Yes.

PN1269

You would agree with me that a fair summary of that evidence is that it's not common for general retail employees to perform work in meat units but it's not uncommon for meat unit employees, other than butchers and slicers, to assist from time to time in, say, for instance, restacking shelves?---Yes, I think it talks there about some specialised skills required in various areas but the fact that there is movement within the supermarket proper as well.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1270

Yes, very well, and that's because of, as you just indicated, the specialised knowledge on safety issues required to work in a meat unit?---That's a consideration, yes.

PN1271

Yes, that's the reason why you simply don't take a 15 year old check out operator and suddenly put them into the meat room.?---In a temporary capacity, do you refer to?

PN1272

Yes?---I mean, it's not uncommon for people to be transferred in there and be trained and skilled up to - to work in the area.

PN1273

On a permanent basis I take it you're referring to?---Yes.

PN1274

You'd also agree with me that knowledge of food safety and hygiene requirements in relation to meat is just as much a paramount consideration?---That's a - that's a paramount consideration throughout the store.

PN1275

Yes, indeed, your mantra is "The fresh food people". You'd be severely compromised if something untoward happened, wouldn't you?---What do you mean by that?

PN1276

Well, if something untoward in relation to meat products in terms of food safety and hygiene occurred?---Yes, we seek to attain those standards at all times.

PN1277

Now, meat departments, as you describe them, do they have accounts and budgets that are distinct from the overall store accounts and budgets?---Not to my knowledge. My understanding is that the meat department is the same as any other department in the store and reports through to the store manager and they're all part of the store budget, et cetera.

PN1278

So, no separate accounts, say, for instance, of the profit and loss made by the meat unit are kept?---Yes, that - yes, the profit and loss of departments, I believe - I believe, I'm not an expert in this accounting area, but I believe that there would be a knowledge of how departments perform.

PN1279

Yes?---But that's all part of the global budgeting process and all part of the global profit and loss for the store.

PN1280

Well, if I were to put it to you that meat managers are required to manage a budget, would you agree or disagree with that proposition?---Yes, my understanding is that they are required, like any other department, a manager would be required to manage a budget.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1281

Yes, and that budget includes, for instance, staffing costs?---Yes.

PN1282

Now, can I just take you to exhibit GC5 to your affidavit, Mr Carr. You would agree with me that this is the request that Mr Janine Keith sent out to all Woolworth supermarket store managers in Victoria and Tasmania?---Yes.

PN1283

Beneath the heading there is a line that says "Date of request". Is that the same on your document?---Yes.

PN1284

Can you just read out that date for me?---1/10/2009.

PN1285

Yes, and you would agree with me that at the very bottom left hand corner there's another annotation - I beg your pardon, there's more printing that says 01/10/09? ---Mm.

PN1286

And the time appears to be 2.48 pm?---Yes.

PN1287

It appears that this document was generated on 1 October this year, doesn't it? ---No, that was when the document was called for to demonstrate the process that occurred when making notification in July.

PN1288

Yes, you maintain there's an innocent explanation for all this?---Yes, I said that's when the document was called for. The document in fact was distributed in July.

PN1289

Now, can you just have a look at that particular document, particularly towards the bottom where there's some writing in bold that says:

PN1290

Document 1, enterprise agreement notification for employees.

PN1291

?---Yes.

PN1292

And the third bullet point reads:

PN1293

Do not place it near the finger scanner.

PN1294

?---Yes.

PN1295

What's a finger scanner, Mr Carr?---My understanding is that it's a mechanism for people to scan on and off duty.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1296

It's exactly the same, say, for instance, in the old days the time clock that used to punch in and punch out?---Yes, that's the - - -

PN1297

Yes, you agree with the analogy?---Yes.

PN1298

Now, it would certainly be the case that each and every employee would have to use the finger scanner, wouldn't they?---My understanding is that, yes, most use the finger scanner, yes.

PN1299

Well, do most or do all of them use it?---My understanding is that they - that they would all use it but I'm again not an expert in those day to day operations of the store.

PN1300

Is there a reason why there was an instruction given not to place it near the finger scanner?---I don't know that explanation. I - - -

PN1301

Don't know?---No, I don't know what that explanation would be.

PN1302

Now, the first bullet point says, to summarise, that the notice was to stay on the staff notice board until advice had been given to remove it?---Yes.

PN1303

When was that advice given to remove it?---I'm not aware.

PN1304

You can't assist us?---No.

PN1305

Could it have been the very next day after the 14th?---No, no, it wasn't. I mean, what I'm saying - - -

PN1306

Well, you just said that you weren't aware?---No, but the notices could still be there. I wasn't responsible for any advice to remove it, that's what I was trying to say.

PN1307

So, you can't assist us in any way as to when the instruction to remove the notices was given?---If there was a - if there was an instruction to remove it.

PN1308

It says on the document:

PN1309

Leave the document on the noticeboard until you are instructed to remove it.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1310

?---Mm.

PN1311

Well, to deal with the interjection from the bar table, the fourth bullet point reads verbatim:

PN1312

This document is to stay on the staff noticeboard until you receive advice to remove it.

PN1313

Now, you will see there that there's a document 2 referred to in the exhibit you're presently looking at?---Yes.

PN1314

And apparently document 2 is a fax sheet for store managers?---Yes.

PN1315

Have you seen that document?---Yes, I've - - -

PN1316

And you'd agree with me that over the page it said, and I quote verbatim:

PN1317

It is important that it is not displayed on the staff noticeboard or used to conduct team talks.

PN1318

?---Yes.

PN1319

What was so sensitive about this document that you wouldn't want it displayed? ---There was nothing particularly sensitive, there was just an explanation for managers as to what the process entailed was and that was the protocol that was followed.

PN1320

Why is it that it's said that it's important that it is not displayed on the staff noticeboard if that's all it was?---Well, because we don't generally display documents that are sent to managers on noticeboards.

PN1321

Can I just take you to GC4. It appears the copy that I've been provided with maybe a little bit out of order in some respects, but GC4 and the copy of the affidavit of Gerry Carr that I've been provided with is the notification of employee representation rights. Is that what you're looking at, Mr Carr?---Yes.

PN1322

Can you just go to the very bottom of that and you would agree with me it reads:

PN1323

The meeting date, time and venue of the meeting referred to -

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1324

well, actually there's no reference but it reads -

PN1325

The meeting date, time and venue will be posted on the store's staff noticeboard in the near future. All costs incurred attending the meeting, including time of f and any travel will be at your personal expense.

PN1326

You would agree with me that that is no part of the sample form that appears in the regulations, the Fair Work Regulations 2009?---Those last two lines would have been added, yes.

PN1327

Yes, of course. Now, would you agree with me that it appears from that that Woolworths weren't going to entertain any requests to meet with a bargaining representative in a location other than that stipulated by Woolworths, correct? ---The intention was to hold a meeting in Sydney, yes.

PN1328

Yes, and I take it you'd agree with me that given there's an indication that you're going to have to, in effect, personally attend and the cost would be at your expense, you weren't going to entertain, for instance, a bargaining representative making claims by any former part or electronic correspondence, were you? ---Sorry, making claims by?

PN1329

Of importance in relation to the proposed national enterprise agreement?---No, I suppose the contemplation was a meeting but if somebody had forwarded in that fashion I'm sure we would have - - -

PN1330

You'd agree with me that they'd have to come to the meeting to seriously participate, wouldn't they?---Well, that would be the most desirable outcome, yes.

PN1331

MR HATCHER: Your Honour, I know I'm testing the Tribunal's patience with my objections - - -

PN1332

MR NORRIS: Not just the Tribunal.

PN1333

MR HATCHER: But, as I understand the application, it's directed to a claim that the scope of the proposed agreement should be restricted to exclude employees in meat units, non-salaried employees in meat units nationally, that's what's in the agreement. How can the question of whether non-meat union bargaining representatives are to be reimbursed their costs of attending at Sydney to attend a bargaining meeting bear on that?

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1334

THE SENIOR DEPUTY PRESIDENT: I can only presume that Mr Norris is attempting to draw a line between that matter ultimately or create a nexus with the general notion of fairness, and he's attempting to portray Woolworths as an organisation that paid scant regard to all bargaining representatives, bar one. Is that what you're trying to - Mr Norris, is that your - - -

PN1335

MR NORRIS: We'd adopt that summary, your Honour, yes.

PN1336

THE SENIOR DEPUTY PRESIDENT: I think that's the point.

PN1337

MR NORRIS: Very eloquently put.

PN1338

THE SENIOR DEPUTY PRESIDENT: I think that's the point of it. I understand your concern that these matters seem to be somewhat obliquely related to the main thrust of the application but I'll allow Mr Norris to press on and to form the connections he's ultimately seeking to form.

PN1339

MR HATCHER: May it please.

PN1340

MR NORRIS: Now, you're obviously aware that you had 14 days from 1 July 2009 in which to produce and distribute this notice. You were aware of that, weren't you?---Yes.

PN1341

Can you tell us why you left it to the last two days of those 14 to action?
---Because to get this sort of notification organised to get to 800 stores is something that takes a bit of planning and coordination and the timeframe was met.

PN1342

What sort of planning and coordination are you talking about, Mr Carr?---Well, all of the communication arrangements that are involved which is reflected in the previous exhibit that you were referring to.

PN1343

So, it's a matter of going onto the store columns system, as I understand it, and simply sending by electronic form the exact exhibit that I've taken you to previously, that being GC5 and GC6 - I beg your pardon, GC5?---That's the ultimate end result. It's not as simple - it's not as simple as you've portrayed, I believe.

PN1344

You've given previous evidence about a concern some employees who won't receive pay increases promptly on 30 June 2009 might become disgruntled?
---Yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1345

Well, your actions in leaving the actioning of this particular item to the last two of 14 days are directly inconsistent with that concern, isn't it?---The notice was distributed as quickly as we could humanly do it.

PN1346

Very well. Now, in response to this particular notice, you acknowledge receipt of Mr Crawford's correspondence dated 21 July 2009 advising you of the AMIEU's intention to act as a default bargaining representative, you acknowledge that, don't you?---Yes.

PN1347

At or about 21 July 2009?---Yes.

PN1348

Are your words, yes, you'd agree with me. You'd agree with me that at any time you could have at least simply acknowledged receipt of the correspondence?---We did make contact with - I did make contact with Mr Crawford in - in August to inform him that we'd received the letter and that we were wishing to set up a meeting with him.

PN1349

When you say you made contact, you made contact on or about 26 August 2009 on your evidence, didn't you?---Yes.

PN1350

You received this particular piece of correspondence on 21 July 2009?---Yes.

PN1351

Correct?---Yes.

PN1352

You would agree with me that at any time from 21 July 2009 onwards you could have just simply acknowledged receipt of the correspondence, couldn't you? ---Yes, I suppose I could have.

PN1353

And that could have been by way of return correspondence or indeed just picking up the phone, couldn't it?---Which is what I did ultimately in August, yes.

PN1354

Yes, approximately five weeks, six weeks later, and you say prior to that time you thought it best to finalise into draft form the in principle agreement you'd reached with the SDA before commencing any negotiations with the AMIEU, is that correct?---Yes.

PN1355

Now, Mr Carr, can you point me to any provision of the Fair Work Act that says some bargaining representatives are more important than others?---No.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1356

No. Would you agree with me - well, let's start again. So, on 1 July 2009, you would agree with me that you had predetermined a course of action in relation to drafting the proposed national enterprise agreement?---On the 1st - from 1 July there was work done on drafting a proposed national agreement.

PN1357

But you essentially had decided at that point in time that the best way to proceed was to finalise that draft before engaging any other bargaining representative, is that correct?---We took a view that the - to facilitate the bargaining discussions with the representative, the only representative that had notified us, was to have a draft which reflected where things were up to, given the fact that a lot of the discussion and the in principle component of it had been reached before 1 July.

PN1358

Yes, and you took that decision at or about 1 July 2009, didn't you?---No, that decision was - was something that evolved during that period because there was drafting still going on.

PN1359

Very well. Would you agree with this that information about the process that you were undertaking was relevant information concerning the negotiations with the AMIEU?---Well, as I said earlier, that was reflected in the draft that we gave to the AMIEU for the purposes of discussion and also the invitation that we provided to the AMIEU to raise any other issues that they so wished.

PN1360

What I'm talking about is the course of action that you were undertaken. You determined a course of action to produce a draft which reflected the in principle agreement with the SDA?---Yes.

PN1361

Is that correct?---Yes, it is.

PN1362

Now, would you agree with me that was relevant information concerning the negotiations with the AMIEU?---That - that draft was presented to the AMIEU.

PN1363

No, no, the process you decided to embark upon of completing into draft form, that's what I'm talking about. Do you understand now?---With what I - what we - we came to the view that to facilitate meaningful bargaining with the AMIEU something that would assist in that process would be to provide a draft which reflected where we were up to at the time, given the fact that a lot of the discussion and the in principle components of it had been agreed to before 30 June. So we then did that and during that period in July, into August, there was still some fine tuning to have that document in a state that was useful for the purposes of the discussion.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1364

Yes, so you would agree with me that the process that you undertook in preparing and producing that draft agreement in order to make more practical and efficient, as you put it, negotiations with the AMIEU was relevant information concerning the negotiations with the AMIEU, wasn't it?---Well, it was, yes.

PN1365

Yes, indeed. You'd agree with me that the first time you made contact with Mr Crawford was on 27 August 2009, correct?---Yes.

PN1366

THE SENIOR DEPUTY PRESIDENT: It's the 26th, isn't it? Don't you call him on the 26th?---I think I - yes, I just need to check my notes.

PN1367

MR NORRIS: I believe there was a return phone call involved. Perhaps I should recast what - - -?---Yes, 26th I called Mr Crawford.

PN1368

You would agree with me that the first time that you spoke personally with Mr Crawford was on 26 August 2009, according to your evidence?---Correct.

PN1369

Now, are you aware of the good faith bargaining obligation in the Fair Work Act requiring a bargaining representative to disclose in a timely way relevant information to the negotiations?---Yes.

PN1370

And you'd agree with me that up until 9 October 2009 when you swore this particular affidavit, you've never disclosed to the AMIEU at any time this particular process that you embarked upon on 1 July 2009 until 26 August 2009, did you?---No, I don't accept that because I recall at our meeting on 4 September that I explained the background to the draft and that agreement in principle had been reached before 30 June on key issues and that during the period from that until we met on 4 September or until I had sent the draft on I think 27 August, that that reflected the discussions that we'd been having the SDA and the draft reflected where we were up to at that time. So I think it is full disclosure by way of the draft and that explanation.

PN1371

THE SENIOR DEPUTY PRESIDENT: Did you have any - from the date you received the notice that the AMIEU was a bargaining representative, I think it was on 21 July, yes, and between the date you contacted Mr Crawford - - -?---Yes.

PN1372

- - - on 26 August, did you have any meetings with the SDA for the purpose of progressing the draft negotiations as they had been?---Yes. Yes, there was further - we were working on the draft and that's when we got it to a point where it was going to be useful for discussion, that's when I forwarded it.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1373

So you weren't just looking through your notes and your various documents from the previous meetings to collate an up to date version of the draft, you also had further discussions at meetings with the SDA about the development of the agreement?---We were having discussions with the - yes, further discussions with - regarding the draft which led to some discussions of the content of it, yes.

PN1374

And that was after 21 July?---Yes.

PN1375

And before 26 August?---Yes.

PN1376

So, at the - - -

PN1377

MR NORRIS: Can you go - sorry, your Honour.

PN1378

THE SENIOR DEPUTY PRESIDENT: Yes, I've finished.

PN1379

MR NORRIS: Can you go to GC11 for me, Mr Carr. These are the minutes that were taken, I presume, by Ms Janine Keith?---About?

PN1380

The meeting of 4 September 2009?---No, I think they may have been taken by Ms Van Campen.

PN1381

MR NORRIS: I'm happy to be corrected, they were taken by Ms Van Campen, you say?---Sorry.

PN1382

They were taken by Ms Van Campen, you say?---That's my understanding, yes.

PN1383

Now, can I take you to the second page and in particular to the bottom where there's a box that says "Gerry" and reads:

PN1384

Agreement in principle has been reached with SDA on 30 June. Draft agreement is a product of that agreement in principle.

PN1385

Now, apart from that in those minutes, can you take me to any place where you disclose in any detail the complete process that you embarked upon from 1 July 2009 till apparently in or about mid August 2009 in drafting that agreement?
---I mean, what the minute says is simply that the draft agreement reflected the in principle agreement. It doesn't go on to talk about what I've just said I said at the meeting but I did say it at the meeting.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1386

So, the highest you can put it is on 4 September 2009 you allegedly made full disclosure to the AMIEU of the process that you embarked upon, 1 July 2009, until, on your evidence, in our about mid August 2009, is that as high as you can put it?---No, what I - what I said earlier is that when I contacted Mr Crawford on 26 August and when I - when we set up the meeting for 4 September and I informed him that I was sending him a draft, enclosing a draft, which I did either that day or the next day, I'd need to check the chronology, that that draft reflected the discussions and drafting that had occurred as a result of the process, and I re-emphasised that point in our meeting on the 4th.

PN1387

That doesn't appear anywhere in your affidavit, does it? That's a recent invention, isn't it?---No.

PN1388

Now, you say in paragraph 86 of your affidavit you consider that:

PN1389

It's practical and efficient to complete the draft agreement with the SDA before engaging any other bargaining representative.

PN1390

?---Yes.

PN1391

Your Honour - - -

PN1392

THE SENIOR DEPUTY PRESIDENT: Yes, I 'm wondering whether - - -

PN1393

MR NORRIS: We adjourn and I'll put the question after the recession.

PN1394

THE SENIOR DEPUTY PRESIDENT: Yes, okay. We will adjourn until 1.45. Thank you.

<LUNCHEON ADJOURNMENT

[1.00PM]

<RESUMED

[1.48PM]

PN1395

THE SENIOR DEPUTY PRESIDENT: Good, thanks everyone.

PN1396

MR NORRIS: Mr Carr, I believe we're up to paragraph 86 in your affidavit. You've given evidence, sir, that you considered it practical and efficient to complete the draft agreement reflecting the in principle agreement with the SDA and Woolworths before engaging any other bargaining representative. That's your evidence?---Yes.

PN1397

But if you'd made concessions to the AMIEU during negotiations, you would have to enter into a redrafting process, wouldn't you?---Yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1398

You'd also have to get the SDA to agree to the changes, wouldn't you?---Yes.

PN1399

Well, I'd suggest to you it wasn't the most practical and efficient way of proceeding then, was it?---We were always open to suggestions, issues that the AMIEU had to incorporate into the draft and so that was the position and so it would have been practical to have done that.

PN1400

You see, I'd put it to you that at all times from early 2009 until the present, the whole bargaining process that you've undertaken with the SDA was for the express purpose of putting yourself in a position of strength where you could reject all claims made by the AMIEU. Do you have anything you wish to say to that?---I'd reject that.

PN1401

Have you in fact made any concessions to any proposals that the AMIEU have advanced in the negotiations you've undertaken thus far?---Well, the AMIEU have raised a couple of issues, one around consecutive days off over the weekend and during the discussions that I have had with the AMIEU have pointed out that the agreement caters, encompasses for that.

PN1402

I'm just asking if you've made any concessions whatsoever?---I would say that the draft agreement has accommodated requests made by the AMIEU, yes.

PN1403

Have you acceded in whole or part to any claims that the AMIEU has advanced on you during these negotiations?---In part I would say, yes.

PN1404

That's your opinion?---Yes.

PN1405

Very well. Now, as I understand your evidence, part of this exercise in preparing the draft agreement was to gather up all of the draft clauses that had been agreed to, is that correct?---Yes, that's what the draft reflects, yes.

PN1406

And you've given evidence that you in fact had a complete draft from the commencement of negotiations in early 2009, that's correct, isn't it?---A Woolworths draft that was placed on the table expressing our log of claims. That draft, however, was not an agreed draft.

PN1407

Yes?---And I made that point earlier.

PN1408

Now, this process of collating the draft agreement, I'd suggest to you that SDA officials wouldn't have been needed in any way, shape or form to complete the task, would they?---In fact they are and were.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1409

I presume that Ms Van Campen was present at all negotiations?---Yes.

PN1410

She would be able to complete the task by herself, wouldn't she?---Well, it was a situation where there were discussions about various clauses and those clauses went backwards and forwards and at various times we would summarise them and forward them and on other occasions the SDA would summarise them and forward them, which was how the process occurred. So no one person controlled the draft, as such.

PN1411

Are you talking about clauses that went backwards and forwards prior to 30 June 2009?---No, I'm talking about clauses that were part of the drafting process as a result of the agreement in principle prior to 1 July 2009.

PN1412

You say in paragraph 97 of your affidavit that progress on drafting the in principle agreement was slow over the balance of July and early August for various reasons?---Yes.

PN1413

Now, when you say it was difficult to arrange any discussion times with SDA officials, which officials are you referring to?---I'm referring to the group of people that we were dealing with. I think I've mentioned Ms Burnley in the paragraph. We ended up meeting, I think, for the first time in July, late in July, to progress the draft.

PN1414

Yes, but which SDA officials, I'm asking you. You say there that it was difficult to arrange any discussion times with SDA officials, plural?---Mm.

PN1415

Which SDA officials are you talking about?---I'm talking about the people that we were involved with in the drafting process.

PN1416

Who were they?---Ms Burnley, Mr Tonkli, there were numerous others.

PN1417

So we had about four or five people involved in drafting an agreement?---There were four or five people that attended the meetings, yes.

PN1418

Yes, and there were potentially three or four officials from the SDA?---Yes.

PN1419

Now, tell me, Mr Carr, why is it Ms Van Campen couldn't continue the process of drafting this agreement in the absence of the SDA officials?---Because the way that we did the draft was to meet together to discuss the words to be included in the draft and when those words were agreed, we then moved on and plugged that bit into the draft.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1420

Yes, you were still negotiating the precise terms of the agreement, weren't you? ---We were - we were talking about some of the detail, yes, but the agreement in principle had been arrived at before 30 June.

PN1421

Now, you say another reason for the delay in progress was some time was spent in preparing and distributing the notice of representational rights?---Yes.

PN1422

I suggest to you that on the surface it looks like a few hours work to me. Do you agree or disagree with that?---I disagree with that.

PN1423

It's the case, isn't it, that the notice of representational rights has two lines added to it from the standard form in the regulations, correct?---Yes.

PN1424

How long did it take to prepare those two lines?---The preparation and distribution of that notice also entailed obtaining some advice about how we needed to do it and within which timeframe, so that period of time - - -

PN1425

Can I just halt you there, Mr Carr, I have no interest whatsoever in the detail of any of the advice that you may have received?---No, well - - -

PN1426

If you're going to - - -?---No, the reason that I'm going to that is that it wasn't just a simplistic matter of getting a piece of paper together, putting two lines on it and

pressing a button and sending it out, I mean, it - we needed to get some advice about how to do it properly, getting the mechanics of it organised. It was going out to nearly 100,000 people, it was going to 800 stores and these things don't happen in simple, you know, quick - - -

PN1427

Now, you say at paragraph 100 of your affidavit that it became apparent to you in mid August that you didn't actually have an in principle agreement with the SDA. Now, I take it this became apparent to you at a meeting with SDA officials, is that correct?---I you would just give me a minute to read that paragraph.

PN1428

I apologise, Mr Carr?---What I - what I say at paragraph 100 is I don't mention that we did not have an in principle agreement because we did. What I said was it became apparent that there was not a final agreement on all matters and one of the examples that I used there were the subject of allowances.

PN1429

Now, did this become apparent to you at a meeting with SDA officials?---Yes.

PN1430

Whom attended on behalf of the SDA?---I would need to check the minutes for the precise meeting that that was discussed at.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1431

I see, so there are minutes of these meetings?---Well, my - my hand note or something, you know, as to who was at the meeting.

PN1432

Yes?---The - it would have been most likely Ms Burnley, Mr Tonkli, Ms Towan.

PN1433

Did you meet with Mr Joe De Bruin at any time between 1 July 2009 and 26 August 2009?---Yes, I - there was one meeting where he attended during that period, yes.

PN1434

I see. Based on your experience in your dealings with Mr De Bruin, is he normally engaged in the process of drafting agreements?---Sorry?

PN1435

Based on your experience in dealing with Mr De Bruin, I presume over a long period of time, have you ever seen him engaged in the process of drafting an agreement?---I personally haven't. The circumstance that gave rise to Mr De Bruin's attendance on that particular occasion was that he happened to be in Sydney in the building where we were having the meeting. He called in to see how everything was going and did not stay for the conclusion of the meeting.

PN1436

Did you keep minutes of that meeting as well?---I might have had a handwritten note as to who was there or something, I - - -

PN1437

Well, just tell me generally, is there any correspondence, emails, minutes that would corroborate this account you give of events between 1 July 2009 and 26 August 2009?---Well, during that period there were, you know, drafts - draft agreements being exchanged between the parties.

PN1438

So there might have been some documents that will essentially support what you're saying in your affidavit, that's correct? That's your evidence, is it?---What I'm saying is that there were - there were drafts that were exchanged between the parties during that period of time.

PN1439

You see, I would suggest to you, Mr Carr, that you were disregarding, failing to recognise the AMIEU as a bargaining representative while you were busy trying to finalise negotiations with the SDA during that period. Do you have anything you wish to say that that?---Yes. Post 1 July when we had an obligation to meet with bargaining representatives we embarked upon that course.

PN1440

That's your complete answer? Very well. Can I just take you to GC1. Now, as I understand your evidence, this particular document was generated by somebody other than yourself?---Correct.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1441

Yes, and that was Mr - I beg your pardon, Ms Rhonda Van Campen?---No.

PN1442

Well, you can correct me if you wish, Mr Carr?---Yes, this was annexed - this information was extracted from our payroll department who - I asked them for a report in respect to union deductions for the SDA and the AMIEU.

PN1443

That was the complete instruction that you gave?---Yes. Well, obviously also to encompass in those figures the numbers of employees in the group, yes.

PN1444

In respect of the SDA membership levels, you can't tell us then whether some SDA member that might have been engaged for 10 hours in the last month and worked in meat units hasn't been included in the list, can you?---The list reflects any employee who has authorised a union deduction to either the SDA or the AMIEU.

PN1445

Yes, but you can't tell us - you can't give an answer to my last question, can you?---No, the report does not break down how many hours a person works.

PN1446

Very well?---It just reflects the membership levels.

PN1447

Now, do you recall a claim being made during the negotiations with the AMIEU that an official of the AMIEU should be enabled to be present at inductions for new employees?---Yes.

PN1448

And, indeed, to screen a video promoting the AMIEU?---Yes.

PN1449

To disseminate information. Do you recall that claim?---I do.

PN1450

And of course you rejected that claim?---Yes.

PN1451

Now, do you have any arrangements, whether by way of formal agreement or by an exchange of correspondence with the SDA about this particular issue?---Of induction?

PN1452

Yes?---Yes, we have an arrangement with the SDA where they attend our retail inductions and that's across the retail board, not just in supermarkets, but Big W and Dick Smith and the like, and they're the union that cover that whole field and they do attend inductions, yes.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1453

Yes, but you won't permit the AMIEU to attend, will you?---No, we rejected that claim.

PN1454

Now, can I just take you to GC2, particularly the last page?---Yes.

PN1455

And you would agree with me this relates exclusively to the State of New South Wales?---Yes.

PN1456

Relates to an issue in the year 2000, we can agree on that?---Yes.

PN1457

And you can see or you would agree with me that you were certainly responding to concerns expressed by the then employment advocate about practices at inductions?---The issue, as I understand it, came to our attention as a result of wording in our agreement and that was the issue to do with how the matter originated. In respect to inductions, again I think the whole thing was around the wording that was in the agreement about exclusivity from memory.

PN1458

Yes, it's just in the paragraph on the last page under the heading "Induction documents"?---Yes.

PN1459

The second sentence reads:

PN1460

I understand that the OEA's concern relates to any statement that should you be offered employment you will be encouraged to become members of the SDA, which is the appropriate union for all employees.

PN1461

?---Yes.

PN1462

Were those type of statements being made at inductions?---No, they weren't. What - we have never sought to influence employees as to which union they should join, nor whether they should be in the union or not in the union. This whole issue came up as a result of some historic wording that was in the New South Wales Supermarket Agreement and subsequently those words were removed from the New South Wales Supermarket Agreement and in a practical sense there was no influence ever placed on employees to only join one union.

PN1463

Now, you say that it's Woolworths practice to respect an employee's right to choose whether they join a union or don't join a union, is that the position?---Yes.

PN1464

Would you agree with me that it would be desirable that they made a fully informed choice?---I'm sure employees do make a fully informed choice to decide to join a union or not join a union.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1465

I'd suggest to you that they don't because some of your new employees are deliberately being prevented from information that there is a union other than the SDA that is entitled to potentially represent them. Do you disagree with that? ---Yes, I would.

PN1466

Now, you've agreed with me that you have a letter of understanding with the SDA?---Yes.

PN1467

And it certainly deals with matters relating in your training there, doesn't it? ---In certain specifications, yes.

PN1468

Can you tell us what other matters it deals with?---It deals with, from memory, union deductions.

PN1469

Anything else?---Training, union, I think they're the main things, yes.

PN1470

Yes, but there's other things?---I'd need - I'd need to refresh my memory by looking at the letter.

PN1471

Does it deal with the issue of inductions?---The issue of inductions has been something that's been in place with the SDA for a few years now, yes.

PN1472

You've given evidence about four walls agreements that have been reached on a state by state basis, you'd be aware of those, wouldn't you?---Yes.

PN1473

In any of the votes of employees on those proposed agreement, was there any distinct count taken of employees working in meat units?---Employees working in meat units would have been part of the population that voted to approve the agreement.

PN1474

Yes, so you would agree with me there was no distinct ballot of meat unit employees as to whether or not they, for instance, wanted to vote yes, or, for instance, wanted to vote no to the proposed four walls agreement?---No, all of the approvals would have been in line with putting the vote out to the relevant people covered by the agreement to vote to either accept it or reject it.

PN1475

You've given evidence - - -?---And we do that across the store, we don't do that in segments.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1476

There's nothing illegitimate about it, I'm not suggesting that in any way. Now, you have given evidence that you have a degree of confidence that if this current proposed national enterprise agreement were put to the vote it's likely to be approved?---I would hope so.

PN1477

Can I put this proposition to you, you must have equal confidence that if an identical proposed national agreement that related only to your meat departments were put up it too would be approved?---I don't know. It's a proposition that we haven't countenanced because of the intention to want to have one national agreement as has been expressed.

PN1478

Well, you've expressed a view on the overall vote?---I said I hoped it would be accepted.

PN1479

You have given evidence that you think it's likely that it's going to be approved, that's correct, isn't it?---Yes, I'd hope it would be.

PN1480

I'm asking you, well, if the vote were only conducted at meat unit employees on the same terms, albeit constricted to only apply to meat unit employees, you must think it likely that they will approve it as well?---Well, I don't know. I mean, I heard evidence yesterday that the AMIEU are not comfortable with grandfathering clauses and the like. They're contained in those agreements, so I don't know whether the employees would accept it or not.

PN1481

Yes, of course. So of course it would be more advantageous to include them in an overall vote across the store, wouldn't it?---No, I'm not saying that, I'm saying that - - -

PN1482

Well, do you agree with the proposition or do you disagree with it?---I'm saying that our - that our - that what we've made very clear is that we want to progress a national agreement, which is a four walls agreement, which covers all employees in the supermarket who are non-salaried.

PN1483

Mr Carr, in respect of the negotiations that proceeded with the SDA from January 2009, did any specific officer or employee of Woolworths (South Australia) Pty Ltd participate in the negotiations?---No.

PN1484

Can I just ask you, let it be surprised that some maverick - - -?---Can I just qualify that, that salaried employees are Woolworths Limited employees, so there wouldn't have been the capacity for a Woolworths (SA) Pty Ltd employee to be involved unless they were from the enterprise agreement non-salaried group. So any salaried person who's negotiating on behalf of Woolworths is employed by Woolworths Limited.

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1485

Let it be supposed that one of the those persons employed by Woolworths Limited were to advance a claim on the SDA on behalf of - purporting to be on behalf of Woolworths South Australia Pty Ltd without your knowledge and certainly without your approval, what would you do?---I'm a bit confused by the question. So you're proposing that a Woolworths Limited salaried employee who's negotiating would advance a claim on the SDA on behalf of Woolworths (SA) Pty Ltd.

PN1486

Correct, yes?---Well, any claims were claims that had generally been put together, so, I mean, there were claims that had particular origins in particular places and there were general claims, so - - -

PN1487

Yes, it was done on a completely unified basis, wasn't it?---The ultimate list of things that we list to pursue were - reflected a list that was all encompassing, albeit that there elements that were specific to particular places, which some were South Australia Pty Ltd.

PN1488

Now, you have given evidence that you believe the SDA have the entitlement to admit to membership all employees of Woolworths Supermarket operations across Australia and excluding the salaried staff. Is that your evidence?---Within supermarkets?

PN1489

Yes?---Yes, they have the right to cover those employees within supermarkets.

PN1490

Including, for instance, a supermarket butcher?---Yes.

PN1491

Cabinet attendant?---Yes.

PN1492

All the employees in the meat unit?---Yes.

PN1493

How did you form this view, Mr Carr?---It's my understanding that their constitution provides them with the capacity to do that.

PN1494

When you say it's your understanding, I take it you've never read it?---I have looked at it many, many years ago but during the course of my time at Woolworths when I've taken advice on these sorts of things, that's been the view put to me.

PN1495

Whose advice have you taken?

**** GERALD MICHAEL CARR

XXN MR NORRIS

PN1496

MR HATCHER: I object.

PN1497

THE SENIOR DEPUTY PRESIDENT: Well, is it - - -

PN1498

MR NORRIS: Well, I need to hear what the nature of this objection is.

PN1499

THE SENIOR DEPUTY PRESIDENT: Is it legal professional privilege, is that the advice in the context that you're about to answer?---Yes.

PN1500

MR NORRIS: Very well. I have nothing further, your Honour, thank you.

PN1501

THE SENIOR DEPUTY PRESIDENT: Mr Ryan.

<CROSS-EXAMINATION BY MR RYAN

[2.14PM]

PN1502

MR RYAN: Mr Carr, if I may ask you some questions. You've referred to the document known as the Woolworths Limited (trading as Woolworths Safeway Markets) and Australasian Meats Industries Employees Union Agreement 2008? ---I have.

PN1503

If I could show the witness that document.

PN1504

MR NORRIS: Your Honour, I must apologise to Mr Ryan, I do have one further question. It would be more convenient to deal with it now rather than - - -

PN1505

THE SENIOR DEPUTY PRESIDENT: There's no objection?

PN1506

MR NORRIS: I apologise for the interruption to all my learned colleagues and indeed - - -

PN1507

THE SENIOR DEPUTY PRESIDENT: We'll let you - if there's something else that you - - -

PN1508

MR NORRIS: Yes.

<CROSS-EXAMINATION BY MR NORRIS, CONTINUING [2.15PM]

PN1509

MR NORRIS: Now, Mr Carr, you've given evidence that it's likely in the near future that you will be in a position to commence all the requirements in order to obtain certification of this particular proposed national agreement?---Yes.

PN1510

Can I just ask you, are you going to await the deliberations of this particular Tribunal before you put the proposed agreement to the vote.

PN1511

MR HATCHER: I object. It can hardly relate to the issues before this Tribunal.

PN1512

MR NORRIS: It relates directly to whether or not an interim decision very similar to what Commissioner Roberts gave in another case is appropriate in the circumstances, your Honour.

PN1513

THE SENIOR DEPUTY PRESIDENT: Is there some intention to move for that course of action, is there?

PN1514

MR NORRIS: I'm asking the witness, your Honour.

PN1515

THE SENIOR DEPUTY PRESIDENT: Yes, well, find out what Mr Carr intends if there's any formed view?---Our position is the one that we provided to the AMIEU recently and we were asked for an undertaking which we gave to the conclusion of the proceedings today of the 23rd. It's our intention that we would like to have the process completed by the end of this year and we will begin the processes of getting that organised. As you can imagine it's not something that can happen overnight, it's a lot of people and a process that requires some work. I'm not in a position to say when any vote will be taking place, except that we're working towards getting the matter completed or the process completed before the end of the year.

PN1516

MR NORRIS: Yes. You understand these processes though that we're going through today, don't you, Mr Carr? His Honour's taking evidence at the moment, do you understand that?---Sorry?

PN1517

His Honour is taking evidence at the moment, do you understand that?---Yes, I understand that?---Yes, I understand that, yes.

PN1518

You understand that at some point in time his Honour will give a decision in relation to the application?---Yes, I understand that.

PN1519

My question is very simple, will you await the release of his Honour's decision before you put this proposed national enterprise agreement to a vote of the employees?---A decision on these matters?

PN1520

A decision on this application, the application that we're all sitting here today in connection with, Mr Carr?---I'm placed in a fairly difficult position with that question.

PN1521

There should be no difficulty whether you respect the jurisdiction of the Commission - the Tribunal - - -

PN1522

MR HATCHER: I object, that doesn't flow at - - -

PN1523

THE SENIOR DEPUTY PRESIDENT: That's a different question?---The - what I was about to say, that I'm in a - I'm in a very difficult position in the sense that I'm not wholly and solely able to give a commitment on any date at this point in time which is, you know, the response I gave to the AMIEU previously I would think is reflective of that.

PN1524

So you're not in a position to give any commitment?---I'm not at this moment.

PN1525

I take it that means you've got to consult with other people?---I would - - -

PN1526

Do you undertake to consult with those people on the question that I have directly asked you?

PN1527

MR HATCHER: I don't know that witnesses can be asked to give undertakings, your Honour, I don't know that that's part of the formal procedures of Fair Work Australia. It's certainly not part of the formal procedures of any other Tribunal I've been before.

PN1528

MR NORRIS: Your Honour, this is directly relevant to whether or not - - -

PN1529

MR HATCHER: But it's not a question, it's a request for an undertaking.

PN1530

MR NORRIS: Leaving that aside, this is directly relevant to whether or not an interim decision or otherwise should be made.

PN1531

THE SENIOR DEPUTY PRESIDENT: We can deal with that outside the context of the taking of evidence.

PN1532

MR NORRIS: Well, look, I've given Mr Carr an opportunity to - - -

PN1533

THE SENIOR DEPUTY PRESIDENT: If you want to have a discussion at some other point, other than during the cross-examination as to what the policy may be, if there is one, it's one that could be had at some subsequent point during submission or whatsoever. It appears plainly, for the purpose of cross-examination, that Mr Carr has no instructions and is not in a position to present any response to your question, other than in the terms to which it has been previously explained to the AMIEU. That's all he can do and that's all he can say. Is that right, Mr Carr?---Yes.

PN1534

So, if you want other undertakings by way of direct discussions between yourself and Woolworths then it's a matter for you to have with the parties and that will ground any subsequent application you wish to make.

PN1535

MR NORRIS: Yes, very well, your Honour. I have nothing further. I apologise to my learned friends.

<CROSS-EXAMINATION BY MR RYAN, CONTINUING [2.20PM]

PN1536

MR RYAN: Mr Carr, is the document you've got there, is that the agreement you're referring to?---That's the Victorian Meat Agreement, yes.

PN1537

I'd like to have that tendered, your Honour.

EXHIBIT #SDA2 VICTORIAN MEAT AGREEMENT

PN1538

MR RYAN: Mr Carr, if I can take you to clause 4.6 of the agreement, on page 22?---Yes.

PN1539

Are you familiar with that clause?---Yes, I've seen it before.

PN1540

Do you know the history behind how that clause came to be in the agreement?
---No, I don't know the history to it. I assume that at some point there was a discussion about the utilisation of hours where there may have been a downturn of hours in the meat unit and so this clause provided the capacity for meat employees to work in other parts of the supermarket, but I don't have the historical basis of when it went in and what surrounded it.

PN1541

Would the same effect be achieved through a single national agreement covering all employees in supermarkets in terms of employment flexibility, working inside

and outside meat departments?---There is the - there would be the capacity to have employees move within departments. In fact, this particular clause is included in the draft.

PN1542

Mr Carr, you answered a question from Mr Norris that you believed that the AMIEU had an entitlement to represent Woolworths employees?---Meat - meat employees - sorry.

PN1543

Meat employees. Do you qualify that by reference to any particular part of Woolworths or is across all of Woolworths?---I'm sorry, no within supermarkets.

PN1544

So, you expressed the view that the AMIEU has an entitlement to represent meat workers in supermarkets?---Yes, and there's also, as was referred to yesterday, the company also has two processing plants, one at Brismeat here in Queensland and one at Bunbury in Western Australia, of which both plants have AMIEU members.

PN1545

How did you come to form that view that AMIEU has an entitlement to represent the workers in Woolworths Supermarkets?---Once again, taking advice from our - their rules and their constitution that they had the capacity to do that.

PN1546

I have no further questions.

<RE-EXAMINATION BY MR HATCHER

[2.24PM]

PN1547

MR HATCHER: Thank you, your Honour.

PN1548

Mr Carr, you were asked some questions about inductions and I think your answer wasn't confined to supermarkets but dealt with Dick Smith stores and so forth?
---Yes.

PN1549

Can you just explain to the Tribunal how the inductions for supermarkets are conducted?---Yes. The - with respect to the union input component or the SDA?

PN1550

Just the general - - -?---The whole - - -

PN1551

The whole - - -?---Okay. Inductions are held for new employees. They're held on a regular basis, weekly, sometimes two weekly - sometimes twice a week. My understanding is that they go for most of the day. They focus on the, in the case of supermarkets, the supermarket business, talk about the objectives and aims that the company wants to pursue in that business and then there are various elements that are part of that program, I'm not closely connected with all of them, but I know that they have sections on safety and the like, and one of the sections is in respect to - the SDA goes to those inductions and I think has a 10 minute period there.

PN1552

And who, by way of new employees, attends?---It would be any new employee who would be working in the non-salaried supermarket area, yes.

PN1553

Are there any unit specific inductions?---No.

PN1554

You've given evidence about having reached an agreement in principle prior to 30 June?---Yes.

PN1555

And you've given some evidence that you then engaged in a procedure that you understood would be about dotting i's and crossing t's, but you subsequently came to a view that there were some more substantial issues that remained outstanding? ---Yes, that's correct.

PN1556

You were asked by his Honour whether you had some meetings with the SDA between 21 July and 26 August and you said that there were some meetings and that in those meetings there was a discussion of some - there was a detailed discussion of some matters?---Yes, that's correct.

PN1557

Can you just explain to the court how those discussions arose and how they fit into the characterisation that you'd included in your written statement that I earlier took you to?---Yes, during that period we were working on the draft and there were areas of the draft that we were able to go ahead and agree words and settle those particular clauses, and then there were some areas which required a more in depth discussion and an example of that was the area of allowances where there were a plethora of state specific allowances and we were trying to see if we could rationalise that group of allowances and have them apply nationally and have less reliance on state specific allowances. So that's an example of the sorts of discussion that was involved in that process.

PN1558

Can I ask you, at any point in your discussions with the Meat Union, have they ever identified any matter dealt with in the proposed agreement that effects a particular disadvantage on a meat employee - on a meat unit employee by reason of their conditions of work in a meat unit, some peculiarity of their conditions of work in a meat unit?---No.

PN1559

Thank you, sir. That's the evidence of this witness, your Honour.

PN1560

THE SENIOR DEPUTY PRESIDENT: The witness is excused.

<THE WITNESS WITHDREW

[2.28PM]

PN1561

THE SENIOR DEPUTY PRESIDENT: Does that conclude the evidentiary case on the part of both - - -

PN1562

MR HATCHER: Subject to this, your Honour. I tender a table of the comparison of conditions in the proposed shop agreement and the relevant retail butchers' awards in the various states and I tender with that, your Honour, the supporting documents. I'm sorry, your Honour, I'm properly corrected, the comparison is between the existing shop agreement and the relevant butchers' awards in the various states.

PN1563

THE SENIOR DEPUTY PRESIDENT: And this together is a single exhibit.

PN1564

MR HATCHER: It's a single bound volume, your Honour, of those butchers' awards with the wage rates included. We wouldn't want to fall into the same difficulties as our friends of not producing the prime material.

PN1565

THE SENIOR DEPUTY PRESIDENT: You want this marked, I presume.

**MFI #WOOLWORTHS 6 VOLUME OF BUTCHERS' AWARDS
INCLUDING WAGE RATES**

PN1566

MR HATCHER: And that, your Honour, is the evidence of the respondent.

PN1567

THE SENIOR DEPUTY PRESIDENT: Are the parties in a position now to turn to a closing submission?

PN1568

MR NORRIS: Well, we're in a position, your Honour, but it would be my submission that this is essentially one of the second or third times that the Commission as - I beg your pardon, the Tribunal has had cause to consider an application of this nature. There are no detailed decisions that have been released as yet, there's only an interim decision of Commissioner Roberts in relation to another matter. Whilst we are prepared to proceed by way of oral submissions, we would submit that it would be of considerable assistance to the Tribunal if detailed written submissions were actually produced and delivered. Now, were the Tribunal of the mind to accede to that submission, we would certainly be in a position to deliver ours no later than seven days from today's date. I hear from my friends at the bar table - - -

PN1569

THE SENIOR DEPUTY PRESIDENT: Yes, I must admit I'm not greatly drawn to the proposition of further delay. It's been quite an extensive period of time for the purposes of the construction of evidence and submission in relation to this matter, indeed a very long time. Anyway, I will hear from the other side.

PN1570

MR HATCHER: If it please, your Honour, we don't oppose the course proposed and if it's of any assistance to the Commission I've sought instructions and I'm instructed to give an undertaking that our client will afford the AMIEU 14 days' notice of any intention to put an agreement to the vote, and there's no magic in the

14 days, your Honour, it's just that it gives them sufficient time to make any application they would wish in the circumstances.

PN1571

THE SENIOR DEPUTY PRESIDENT: Okay. So, you are acceding to this matter of deferral. Mr Norris, what exactly are you saying? Are you saying that there are no closing oral submissions to put and that you wish to put them in writing in a week's time or - - -

PN1572

MR NORRIS: I'm saying we can proceed either way but it would be of considerable assistance to the Tribunal if we were able to give detailed written submissions, given this is essentially the first time that the Tribunal, as presently constituted were to consider a matter such as this, it is a new provision of a new Act. I think there will be certainly - - -

PN1573

THE SENIOR DEPUTY PRESIDENT: There has been a matter in South Australia, hasn't there?

PN1574

MR HATCHER: Your Honour, we've been only able to turn to two decisions, neither of which could be said to represent a high mark of the scope of the scope provisions.

PN1575

THE SENIOR DEPUTY PRESIDENT: What's your disposition? Are you able to make oral submissions today in clothing or are you also seeking an opportunity to put submissions in writing?

PN1576

MR HATCHER: Your Honour, we are in a position to address orally, if that was thought appropriate by the Tribunal, but we don't oppose proceeding in writing. We would have our submissions filed seven days after our friend's submissions.

PN1577

THE SENIOR DEPUTY PRESIDENT: Well, Mr Norris, are you able to give your closing submissions, putting aside what might be in my interests or the Tribunal's interests, are you able to give closing submissions orally today?

PN1578

MR NORRIS: Certainly, your Honour. If we could have a short adjournment perhaps of about 15 minutes.

PN1579

THE SENIOR DEPUTY PRESIDENT: All right, we'll adjourn for 15 minutes and then we'll proceed to closing submissions. Thank you.

<SHORT ADJOURNMENT **[2.34PM]**

<RESUMED **[2.53PM]**

PN1580

THE SENIOR DEPUTY PRESIDENT: Thank you everyone. Mr Norris.

PN1581

MR NORRIS: Yes thank you your Honour. Your Honour suffice to say we rely obviously upon the consolidated submissions of the AMIEU that were filed last week. I'm only seeking to amplify some of the points therein by reference to the evidence that Your Honour has heard over the last two days. Now there's been some jurisdictional points taken in respect of the notice of concerns to be delivered upon relevant arguing representatives. We rely upon the submissions that we've put, both primary and in response to the submissions that have been advanced on behalf of both the respondents. I only seek to make the submission Your Honour that you heard evidence today and indeed there's direct evidence in the affidavit of Mr Carr that the management figures of Woolworths South Australia Pty Ltd in respect to the supermarket operations are in fact employed by Woolworths Limited.

PN1582

Now that only, in my submission strengthens our submissions that are made between paragraphs 28 and 37. You've also heard evidence from Mr Carr that the only people that were present during the negotiations on behalf of Woolworths Limited and indeed Woolworths South Australia Pty Ltd during the period from early 2009 until 30 June were employees of Woolworths Limited. In my submission that evidence only edifies the submissions that we've made, those paragraphs I've referred Your Honour to. Yes very well Your Honour, so that really is as much as I can add on the jurisdictional points that have been raised. We turn then now to section 238 itself and particularly subsection 4, the circumstances in which this Tribunal may make a scope order.

PN1583

Now the first requirement of course is paragraph(a) that the bargaining representative who made the application has met or is meeting the good faith bargaining requirements. Now in my submission nothing in the evidence that your Honour's heard over the last two days would indicate anything to the contrary. Indeed, on all the evidence that was filed beforehand, it's readily apparent to the Tribunal that the AMIEU has been meeting its good faith bargaining obligations insofar as when the opportunity was given to it, to actually commence bargaining, on or around 26 August 2009. Now, the SDA obviously take point that the AMIEU had an obligation to bargaining in good faith. With the SDA again, I wouldn't take Your Honour through the submissions we've already put. We've nothing further to put there. It would only be repetitious.

PN1584

THE SENIOR DEPUTY PRESIDENT: Sorry, can you just take me to your precise paragraphs there?

PN1585

MR NORRIS: Paragraphs 76 through to paragraph 98 and it's our submission on the 45 paragraphs of evidence that Mr Carr has given on the negotiations, including the further evidence that he gave in chief here today and on the evidence of Mr Crawford, it's readily apparent that the AMIEU has met at reasonable times, genuinely considered proposals, responded in a timely manner. I don't believe there were any requests for any specific information made by Woolworths Limited but - so I don't think that that particular requirement is presently relevant and of course the AMIEU hasn't engaged in any capricious conduct that would

have undermined freedom of association. We turn then to Paragraph(b) of subsection 4 of section 238.

PN1586

We're making an order, promote the fair and efficient conduct of bargaining. I'll advance this point your Honour. The Act itself contemplates and sets out in much detail what an efficient form of bargaining is. It's good faith bargaining. So that's what the Act itself contemplates as an efficient form of bargaining. In terms of the requirement to promote fair bargaining. Fairness is of course, as we've already put, not a term that one gives one's own subjective meaning to. Fair is very different to whether something's lawful. Fair - fairness is to be determined primarily by reference to the Act, objects, specific provisions. It's broad intent on any particular issue. As we've already put, any conduct that is inconsistent with any of those would almost inevitably have to be regarded as unfair.

PN1587

Now, Your Honour it's not contested that prior to 30 June 2009 the AMIEU were deliberately excluded from these negotiations and we'd rely upon the passage from Joy Mining that we've already identified to Your Honour and what His Honour Justice Munro says about that. Anticipate that there might be a submission that conduct has been cured by events subsequent from 1 July 2009. That particular submission would not be readily available on the evidence that's been heard today in front of Your Honour. Your Honour you would be wholly satisfied that the explanation Mr Carr has advanced for the lengthy delay in engaging the AMIEU as a bargaining representative was not for any of the reasons that were expressed in his affidavit.

PN1588

You'd be satisfied on that basis by the cross-examination. You'd be satisfied on the direct question that the Tribunal put to Mr Carr. You'd also be satisfied by the question my learned friend put in re-examination. He invited Mr Carr to give some details about what these meetings were about, consistent with the way they've been characterised in Mr Carr's affidavit and the response was:

PN1589

Well we were sitting down and talking about allowances and seeing if we could rationalise them across the states.

PN1590

That's got nothing to do with drafting your Honour, that's all about negotiating. So it is readily apparent that there were negotiations occurring from 1 July 2009, the full extent of which we'll never know, but it's readily apparent that there were some negotiations occurring and the AMIEU weren't notified of them, let alone invited to them. Indeed it was all part of a design. As I put to Mr Carr in cross-examination it was part of a design that has been repeated on a number of occasions in the past. Reach agreement with the STA and say no to everybody else. Now that's what all this activity post 1 July 2009 was directed at. You'd be satisfied on the evidence Your Honour. It was directed at, as fast as they could possibly achieve it, finalising the negotiations and the negotiations were continuing, so that they could reach a concluded process.

PN1591

You would find wholly unconvincing the explanations that have been given. They, with respect, unravelled under cross-examination and for that reason your Honour you would find that the - essentially the same conduct that was occurring prior to 30 June 2009 continued, right up until 26 August 2009. Now I'd submit to your Honour, the act itself contemplates what an efficient form of bargain is. It's bargaining in good faith. Now you would find that that has not occurred here. The making of a scope order and I have a draft order that I will hand up to the Bench. I propose to address it at the conclusion of my submissions, but I'll hand it up. The making of an order in my submission will promote efficient bargaining because it will, in respect of meat units, in respect of employees engaged in meat units, in the respondent's national supermarkets, it will return them to ab initio and they will not have the fruits of their design and there will be genuine good faith bargaining ab initio.

PN1592

Now in terms of promoting fair bargaining your Honour there is a considerable amount of evidence that was both put to Mr Carr and Mr Carr's own evidence in cross-examination and some exhibits that establish rather conclusively in my submission, that a very large proportion of employees who will have substantial influence in the vote on this proposed agreement will be young, casual and most likely on the turnover rates - well let me recast that - they will be unlikely on the turnover rates to ever see out the life of the agreement. As was put, teenagers working after school in all parts of Australia, doing some checkout work, whether it be part time or casual, across Australia, will be voting on complex transitional provisions relating to loadings in ordinary hours, that relate exclusively to meat unit employees in the states of Victoria and Tasmania.

PN1593

Now we've identified as one of our grounds of unfairness, just the sheer weight of the numbers involved. In my submission the evidence that you've heard only really heightens that particular point. It would be wholly unfair to allow that to continue. Indeed, it's my submission that not making the order wouldn't promote a fair and efficient conduct of bargaining. Indeed it would reward a party that has acted clearly other than in good faith bargaining. It would reward them. It would give them the fruits of their design and indeed one can postulate that others who might read a decision to that affect might think, well this is the way to go. We'll reach agreement with whoever the principal player is amongst the bargaining representatives, we'll then take that - we won't have any regard to any other bargaining representative until that process is complete, then we'll take it out to the other bargaining representatives and say well, here's the position.

PN1594

We'll listen to anything you've got to say. So in my submission not making the order will not - will reward such conduct and actions. Now, in my submission Your Honour you would find the explanations that have been given for both the timing and the target dates for completing the negotiations for this proposed national agreement as being wholly unconvincing. You've heard the evidence of Mr Carr under cross-examination. He's had ten years to do something about that and there are no impediments and the only time that a concrete decision was made to do something about a national agreement was after the introduction of proposed legislation, a bill for an Act. You would find wholly unconvincing that Mr Carr

was putting his foot on the accelerator as he would have us believe, to conclude that agreement by 30 June 2009 because of concerns over pay increases for certain employees in the states of New South Wales, South Australia and Western Australia.

PN1595

You would find it all too coincidental. Now Ms Burnley was a little bit more candid in her evidence than Mr Carr. She readily conceded that one of the purposes of the timing of the negotiations was to reach an agreement under the Workplace Relations Act. Mr Carr wouldn't concede it, but Ms Burnley quite frankly did concede it. Apart from that Your Honour, we rely upon our written submissions on the point between paragraphs 99 and 105. Now the next consideration is in paragraph (c) of subsection 4 of section 238, that the group of employees who will be covered by the agreement propose to be specified in the scope order was fairly chosen. So that's the primary thing that Your Honour must consider, amongst other things.

PN1596

That the group was fairly chosen and in so determining whether or not something was fairly chosen, your Honour is bound to have regard to the matters specified in subsection 4A being of course that if an agreement to be specified in the scope order doesn't cover all of the employees of the employer whether or not the employees that it will cover or whether the group is geographically, operationally or organisationally distinct. Now insofar as the AMIEU receive orders for a proposed enterprise agreement that will pertain nationally, across Woolworths supermarkets operations to non salaried staff in meat units it was fairly chosen. You would be wholly unconvinced by the evidence of Mr Carr that meat units are not an operationally, organisationally or geographically distinct part of the business.

PN1597

You would be wholly convinced on the exhibits that were tendered being a range of statutory declarations a range of people in the employer Woolworths ranging from 1997 right up until 2005, declaring meat units were in fact operationally, geographically or organisationally distinct part of the single business. Now in my submission no evidence is presently available to the Tribunal to suggest in any way, shape or form that the operation of meat units has been altered in some significant way since 1997 but I'll deal with any submission to that effect when I close. Now, your Honour then arrives at paragraph (d) of subsection 4 of section 238. Is it reasonable in all the circumstances to make the order? Well it could not possibly be in contest that item 18, part 3 of schedule 13 of the Transitional Act has direct application.

PN1598

That enables Your Honour in considering whether - in deciding whether it was reasonable in all the circumstances to make a bargaining order or a scope order. It enables Your Honour to take into account the conduct that was engaged upon immediately before the commencement date. There's no dispute that they were bargaining for an agreement under the Workplace Relations Act, a collective agreement. There's no dispute that they hadn't completed those negotiations. There's no dispute that the employees that they were seeking to cover with the proposed agreement, are the same employees that are seeking to cover in respect

of this proposed enterprise agreement under the new legislation, so it has direct application and in our submission the evidence that you've heard over the last two days only serves to fortify the case on behalf of the AMIEU.

PN1599

It's readily apparent. I won't repeat the submission, but it's readily apparent that in respect of that conduct it was a repetition of a historical pattern of conduct to deliberately exclude the AMIEU from negotiations, deliberately not recognise the AMIEU as a legitimate representative of employees' rights, et cetera, et cetera. Now if there's no other countervailing considerations in my submission Your Honour. Insofar as Mr Carr gives extensive evidence about the efficiencies that one might achieve through reaching an agreement on a national basis, it has no direct relevance to bargaining for that agreement, which is what this particular section is all about. That's the result of bargaining. This particular section deals with the bargaining process per se. As we've already indicated in our submissions, that evidence with respect, is highly irrelevant. Your Honour unless there's some questions from the Bench - I do intend to address your Honour on the draft order that we've proposed. Can I just refer your Honour to subsection 6, of section 238? Now it reads:

PN1600

The scope order (a) must be in accordance with this section and, may relate to more than one proposed single enterprise agreement.

PN1601

Can I just hand up for your Honour's attention, an extract from the explanatory memorandum to the original bill, if this particular paragraph isn't clear enough on its own face, there's a rather illustrative example contained in this particular explanatory memorandum. It appears on page 156 which is the very last page of the document that I've just handed up to your Honour. Indeed it's entitled, "Illustrative example". It speaks about David's debt services who refused to bargain collectively with its employees who are in two divisions, the loans division and the debt recovery division. Now there's a majority support determination sought as a majority of the employees want to bargain with the employer for a proposed enterprise agreement. Now look I won't go through the remainder of the particular example that's been set out but at the very last sentence it's said, I beg your pardon, the second last, the penultimate sentence it's said:

PN1602

FWA makes the scope order specifying DDS and the debt recovery division employees in one proposed enterprise agreement and DDS and the loans division employees in another proposed enterprise agreement.

PN1603

It's just a manifestation of the fact that your Honour's not confined to making orders about one proposed agreement. Now in our draft order of course we seek that the scope firstly of the single enterprise agreement proposed by the applicant, being the AMIEU, shall be as follows and it's pretty self explanatory after that. We then propose at paragraph 2 the scope of the single enterprise agreement proposed by the respondent shall be as follows. Now that's to make very, very clear that there can be no overlap should Your Honour be disposed to make the orders, no overlap between these two particular sets of negotiations. Now unless

your Honour has any questions about our submissions, that's as far as I can assist the Tribunal at this stage.

PN1604

THE SENIOR DEPUTY PRESIDENT: Thank you Mr Norris, and of course you'll have an opportunity in reply to this.

PN1605

MR NORRIS: Yes.

PN1606

MR RYAN: If the Tribunal pleases the submissions of the STA will be relatively brief but one of the issues I'd raise first is that during these proceedings an issue has come to my mind which I should alert the Tribunal to. One of the problems of the current structure of the Fair Work Act is that in relation to bargaining representatives there are two clear groups of bargaining representatives. Those who are specifically appointed as a bargaining representative by an employee and those who are determined to be default bargaining representatives and section 176 deals with the issue of the bargaining representatives and identifies the concept of the default bargaining representative. Where the structure of the Act falls down is that when an employer initiates a proposal to have an agreement, puts out the notice for - the notice of bargaining representation rights, the notice which is in schedule 2.1, workers are advised that if they are a member of a union, their union is the default bargaining representative, the structure of the Act doesn't require that the employer ever has to tell the unions who are likely to be the default bargaining representatives that that bargaining process is being initiated, nor does it give any advice to the workers that the union may not know that the bargaining is taking place, so that a worker who receives a schedule 2.1 notice isn't necessarily under any obligation or even encouraged to go and tell their union that their union can be the default bargaining representative. So they're in - in some respects there's a disconnect between the structure of the Act in the way it treats the two respective concepts of a bargaining representative.

PN1607

THE SENIOR DEPUTY PRESIDENT: Or else it just assumes there's a delegate there somewhere.

PN1608

MR RYAN: Yes but that's an assumption - - -

PN1609

THE DEPUTY PRESIDENT: It's an assumption.

PN1610

MR RYAN: Yes and because if that is the assumption it simply leaves open the prospect that on occasions a default bargaining representative may not actually be aware of the bargaining process going on. Even where default bargaining representatives exist there is no obligation on any one party to inform all other default bargaining representatives that they also exist as default bargaining representatives so in the case of Woolworths there's no obligation on the STA to tell the AMIEU the AWUEQ or the ALHMW that we are a default bargaining representative. Equally were they a default bargaining representative there is no obligation on them to inform everyone else. The relevance of that in this

particular matter is that where a bargaining representative has an obligation to deal with other bargaining representative - other relevant bargaining representatives the structure of the Act places an obligation on them without the structure of the Act providing them with a guaranteed mechanism so that everyone knows who is who at the bargaining table or in the bargaining process.

PN1611

Now we rely upon our written submissions but in preparing the written submissions this not a point I specifically address. It's something that has come to light as I have been looking more carefully at this during the way in which this matter is developed over the last two days and it is an area where if I had to make a concession, it would be that whilst we hold to the submissions that we have put in writing that each bargaining representative has an obligation to engage in good faith bargaining with every other bargaining representative, where the bargaining representatives are default bargaining representatives there is a question of do you really know that there is another default bargaining representative present in the process when the structure of the Act doesn't provide a clear mechanism for that to occur.

PN1612

The other issue that does rise in relation to the concept of the default bargaining representative is that it's the concept of the default bargaining representative is - and it's in 176(1)(b):

PN1613

An employee is a bargaining representative of an employer who will be covered by the agreement if the employee is a member of the organisation.

PN1614

Then in that sense therefore membership of the organisation is the trigger for being a default bargaining representative. There is nothing within the structure of the Act or the regulations which requires a default bargaining representative to establish the bona fides of their membership base. In other words, there is nothing that requires them to prove that those persons whom they do have as members are legitimately entitled to be members of the organisation and quite clearly section 176(1)(b)(1) would have to be read on the basis that where it refers to a member of the organisation it would be a member or a person who is entitled to be a member and who as a result of the entitlement to be a member, is a member of the organisation because you can't actually be a member unless you're entitled to be a member. The difficult with that is that the - - -

PN1615

THE SENIOR DEPUTY PRESIDENT: The same issues arise in predicted action ballots though. The same situation emerges there and there may be challenges in that context to the proper - the legitimacy of the claim of membership.

PN1616

MR RYAN: Yes and that's relevant because in the consolidated submissions of the AMIEU at paragraph 3 the AMIEU says:

PN1617

The evidence of Mr Crawford establishes conclusively that the AMIEU is a legitimate bargaining representative for the proposed agreement.

PN1618

Mr Crawford's evidence doesn't establish that. There in fact is no evidence before the Commission that conclusively establishes that there's any employee in Woolworths who is a member of the AMIEU and who is entitled to be a member of the AMIEU. Now I - having said that I'll also say - - -

PN1619

THE SENIOR DEPUTY PRESIDENT: I'm just thinking of Mr Carr, of the - - -

PN1620

MR RYAN: Same with.....

PN1621

THE SENIOR DEPUTY PRESIDENT: - - - GC1, they might be having a flow of funds which is unwarranted as you're saying.

PN1622

MR RYAN: It could very well be and Mr Carr noted that he's taken advice on it so that his belief is that the STA has eligibility and the AMIEU have eligibility. That's his belief that he's taken advice on but its not necessarily proof before this Tribunal that the AMIEU has an entitlement, but equally I can say there's no evidence before the Tribunal that the STA has any - or that any employee employed by Woolworths is eligible to be a member of the STA because we simply haven't gone to that level of proof. Neither the AMIEU nor ourselves have put up any identified member and established that that member is both eligible under the rules and is an employee of Woolworths and on that basis it does - it does at least - it's at least an important issue for the tribunal to bear in mind.

PN1623

We don't press it in the sense that we're happy to concede that there will be some persons within Woolworths who is most likely to fall within - or possibly will fall within the rules of the AMIEU and on the basis that we're not going to press the argument, we just noted that there are these difficulties which - this may not be the proper case to resolve them but we'd simply note that these are difficulties that are inherent in the structure of the Act for matters to be proven before a Tribunal in order to obtain scope orders.

PN1624

THE SENIOR DEPUTY PRESIDENT: You appear to be approaching a submission by way of your cross examination of Mr Crawford and perhaps Mr Bird that the definition of meat industry might be malleable or subject to some transitional period in the future. is that what you - is that something you're also going to but not at this point?

PN1625

MR RYAN: It is arguable that the AMIEU has no eligibility in relation to any person employed in a supermarket. It's an arguable case, but it hasn't been argued and I don't intend to argue it. I think in some respects it would become a distraction in some respects. We don't press - we're not going to press that argument - - -

PN1626

THE SENIOR DEPUTY PRESIDENT: You were toying with it - you were toying with it I presume in cross-examination?

PN1627

MR RYAN: Yes definitely. Very definitely and if nothing else, simply because this is one of the first major matters coming before the Tribunal on that k- - -

PN1628

THE SENIOR DEPUTY PRESIDENT: I'm on the organisations panel and I can see us being here for another month on that one alone.

PN1629

MR RYAN: Yes and that is one of the real issues that may - that Fair Work Australia may force to address in other matters. I am simply not going to press it today but I do raise it because the bald assertion that is in the consolidated submissions of the AMIEU at paragraph 3 is not something we would concede, has been established on any stretch of the imagination by the material that has been put before you. Your Honour Mr Norris also has a complete misunderstanding of the legislation. He does confuse the concepts of fair and efficient conduct of bargaining with good faith bargaining. They're not mutually inclusive terms. They're highly separate terms. So much is very clear from the language of section 230 and in particular subsection 3 which makes it very clear that those concepts of fair and efficient conduct of bargaining and good faith bargaining are very, very separate and the - the issue of good faith bargaining can be met by all parties and it can still be inefficient or unfair bargaining.

PN1630

What this leads to very clearly is that whereas the AMIEU have constantly complained both in - constantly complained since they first raised matters with the - with Woolworths that the negotiations were going on between Woolworths and the STA. That's not a valid complaint. The concept of good faith bargaining permits and properly permits the employer to meet its good faith bargaining requirements with a single bargaining representative to the exclusion of others as long as the employer also meets its good faith bargaining obligations with the other bargaining representative even to the exclusion of the first. So in the case of a three way party involving Woolworths, the STA and the AMIEU. Woolworths and the STA can engage in good faith bargaining to the exclusion of the AMIEU and that meets the good faith bargaining requirements.

PN1631

Woolworths and the AMIEU can engage in good faith bargaining to the exclusion of the STA and that meets the good faith bargaining requirements. That is then separate from an issue as to whether that process is the most efficient conduct of bargaining and if there are inefficiencies arising out of every one participating in good faith bargaining, then the appropriate order is a bargaining order, not a scope order and that is exactly what section 230 contemplates, that you can make the orders where there is good faith bargaining in fact going on but where there may necessarily be inefficiencies even where everyone participates in good faith bargaining. So the concept of fair and efficient bargaining is not the same as good faith bargaining and the two should not be confused.

PN1632

THE SENIOR DEPUTY PRESIDENT: Sorry can you just take me back to your triangular relationship gain and which parties can exclude which parties but still be bargaining in good faith?

PN1633

MR RYAN: In the case of the present matter, Woolworths and the STA can bargain in good faith to the exclusion of the AMIEU. Woolworths and the AMIEU can bargain in good faith to the exclusion of the STA and given that there are actually other parties who are potential here and the clearest one is the AWUEQ, Woolworths and the AWUEQ could bargain in good faith to the exclusion of both the STA and the AMIEU. So each time that bargaining takes place, it is done in good faith, but good faith bargaining does not require that all of the bargaining participants be together. It requires that bargaining which does occur is done in good faith. That's the good faith bargaining part. It may be inefficient and unfair and any bargaining representative can allege both inefficiency and unfairness, if that does occur but it's not an allegation that bargaining is not done in good faith.

PN1634

It may only be an assertion that there is a more efficient and fair way to construct the bargaining and that's where the orders under section 230 allow a limitation on the number of bargaining representatives and the way in which bargaining representatives may need to conduct themselves but there is a very clear distinction between good faith bargaining obligations and the concept of fair and efficient bargaining and certainly what has happened on the current matter is that the STA and Woolworths can bargain as much as we like in good faith and w4 will meet the good faith bargaining obligations and we can do so and actually must have the right to do so, in the absence of other bargaining representatives.

PN1635

In our written submissions we say every bargaining representative has a good faith bargaining obligation with everyone else. We rely upon that and that just means that when you have a three way dinner party or tea party on this, each party has an obligation to each other. If we extend it to the fourth party, the AWUEQ, then each of the four parties has an obligation to each other but that doesn't require under good faith composite bargaining by all parties simultaneously at the one time. It can be met by the process I've just described. Your Honour, Mr Norris has tendered a number of exhibits relating to statutory declarations by officers of - - -

PN1636

THE SENIOR DEPUTY PRESIDENT: Can we just go back to this notion of composite bargaining again. What is it about section 238 which leads you to a conclusion that composite bargaining isn't considered or is incompatible with the provisions? I mean, because itself could be used for the purposes of sorting out composite bargaining where parties are bargaining together in a composite manner and attempting to do so in good faith and it ceases to be efficient, then 238 then comes into play.

PN1637

MR RYAN: Yes, it could but it's not a necessary precondition that there either has to be composite bargaining or independent bargaining. Section 230 is much more directed at problems that would arise from composite bargaining and it goes to the issue of the fair and efficient conduct of bargaining. Section 238 is much more particularly concerned with designating a particular group as the group

about which bargaining will take place. The elements are not necessarily the same in section 230 and section 238.

PN1638

What it means in respect of section 238 is that whether or not there's composite bargaining or individual bargaining between the employer and each of the separate bargaining representatives may be a factor but it's not necessarily a critical factor because it's not necessarily the trigger for the application for the scope order. The trigger for the application of the scope order is that someone has a particular concern about particular aspects of the bargaining process. One of the submissions I'm trying to make very clearly is a submission about fair and efficient conducted bargaining has to be identified as being that and it's not to be confused with making an assertion that good faith bargaining is not occurring simply because Woolworths and the SDA have met on their own. That is not a tenable submission because the Act permits, it specifically permits the SDA and Woolworths to meet on their own as long as they meet the good faith bargaining requirements between themselves.

PN1639

The issue probably more fairly and squarely here is whether or not that constitutes an element of fair bargaining or efficient conducted bargaining. Your Honour, I go to the issue of the statutory declarations that Mr Norris has put. The only response I'd put to that is that in the material before you, both in the affidavit material of Mr Carr and of Mr Crawford, they also identify a number of the four walls agreements that have been made by Woolworths Supermarkets. For each of those four walls agreements a similar statutory declaration would have been filed by a similar titled or statused company representative and in each case they would also have said that there was an operationally distinct part of the single business of Woolworths with that operationally distinct part being an entire supermarket, a four walls supermarket.

PN1640

There's simply no weight that can be attached either way that some statutory declarations identified an operationally distinct area within the single business of Woolworths being a meat department, and other statutory declarations also on the records of Fair Work Australia identifying that there's an operationally distinct part of the single business where that distinct part is a full supermarket is simply a matter of what happened at a particular point of time. It is not in our submission relevant to the proceedings now, mainly because the real effect of it is that all of those statutory declarations were true at the time they were made, even though they appear to be in conflict, they were all true. They were true at the point of time for the circumstances that gave rise to the making of that statutory declaration and the making of the respective agreement.

PN1641

The final matter I'd raise, your Honour, is that any reference to the issue of young workers and their potential possible voting habits is irrelevant. To give any weight to the fact that a group of workers are young has all the hallmarks of making decisions on a highly discriminatory ageist basis and should be restricted. One of the things that the tribunal can be at least confident of is that the process under the Act itself requires that before anyone participates in a voting process on any agreement under the Fair Work Act that the terms and the effect of those

terms of the proposed agreement must be explained to the persons who are to vote and must be explained to them in language which is appropriate and suitable in which case it's irrelevant as to whether a person is a 15 year old casual or a 55 year old casual, both working the same hours on the same day. The information will be given to them in a manner which is appropriate to meet the requirements of the Act and they will be able to exercise a proper vote and it will be an informed one.

PN1642

To treat young people in a way that implies that they either are not going to do the right thing by not considering it or they are going to act improperly or irrationally is simply not a sound proposition and one that should be totally rejected by the tribunal. It has all the hallmarks of an elitist approach where, if you are young, you simply can't participate in these processes effectively. The Act certainly treats young workers as having the capacity to make the decisions that are required to be made and that should be respected by the tribunal. Your Honour, we rely on our written submissions in all other respects. If the Commission pleases.

PN1643

THE SENIOR DEPUTY PRESIDENT: Good, thank you.

PN1644

MR HATCHER: May it please the Commission, I'm indebted to Mr Jauncey for the extensive and thorough written submissions that have been filed. We of course rely upon them. Might I supplement them, your Honour, by commencing with a review of the legislative framework against which section 238 falls to be interpreted and your Honour will be familiar with the judgment of the High Court in Project Blue Sky that tells us that the appropriate way of interpreting legislation is to look at it in statutory context to determine the purpose that the legislature had in mind.

PN1645

The first section that we travel to in that regard is section 3:

PN1646

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians (a) and we draw particular attention to paragraph (f), achieving productivity and fairness through an emphasis on enterprise level collective bargaining, underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

PN1647

The emphasis that we place is on the words "enterprise level collective bargaining". Can I then, your Honour, travel through to section 12 which has within it the definitions and there is a definition firstly of enterprise and an enterprise is a business activity project or undertaking. An enterprise agreement is also defined as a single enterprise agreement or a multi enterprise agreement. So it's an agreement in relation to a business relevantly for present purposes. Can I next, your Honour, travel to section 168A. I acknowledge immediately that this section has not yet commenced. It deals with modern enterprise awards, but it

nonetheless affords once more the definition of a single enterprise and a single enterprise is a business project or undertaking that is carried on by an employer.

PN1648

The focus is on the business that is carried on by the employer and it ought not be in doubt but that Woolworths supermarkets is a business carried on by the employers relevantly related corporations, Woolworths Limited and Woolworths South Australia Limited. Your Honour, can I next travel to section 171 in the Act which sets out the objects of the bargaining part of the Fair Work Act. The objects of this part are:

PN1649

To provide a simple, flexible and fair framework that enables collective bargaining in good faith.

PN1650

Again I emphasise particularly "at the enterprise level". For enterprise agreements, might I emphasise the next words, "that deliver productivity benefits" and then the next provision, in the objects deals with enabling FWA to assist in that process. Section 172 deals with making an enterprise agreement and again we draw particular attention to subsection 2:

PN1651

An employer or two or more employers that are single interest employers may make an enterprise agreement -

PN1652

and might we stress these words -

PN1653

with the employees who are employed at the time the agreement is made and who will be covered by the agreement.

PN1654

The alternative then is with one or more relevant employee organizations but that does not apply to our client's circumstances. It's a Greenfield's Agreement. The type of agreement we're talking about is an agreement with the employees who are employed at the time. It is not an agreement with organizations. That, in our respectful submission, is an important distinction in Fair Work Act.

PN1655

Can we next, your Honour, travel to section 228, the good faith bargaining requirements. We've heard quite a deal during the course of these proceedings about good faith bargaining requirements, but one needs to have regard to exactly what they are, paragraph of subsection (1), paragraph (c):

PN1656

The representative must respond to proposals made by other bargaining representatives for the agreement in a timely manner. Must (d) give genuine consideration to the proposals of other bargaining representatives for the agreement and give reasons for the bargaining representatives' responses to those proposals. (e) Refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining. (f) Recognise and bargain with the other bargaining representatives for the agreement.

PN1657

But of course the good faith bargaining requirements pursuant to subsection (2) do not require the making of concessions during bargaining or the reaching of agreement.

PN1658

Can I then, your Honour, travel to section 231, what a bargaining order must specify and subsection (2) tells us the kinds of bargaining orders that FWA may make in relation to a proposed enterprise agreement and they include the following, (a):

PN1659

An order excluding a bargaining representative for the agreement from bargaining. (b) An order requiring some or all of the bargaining representatives of the employer who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining.

PN1660

Now, can I pause there, your Honour, to invite your Honour to reflect on what application orders of that nature may have and surely it could only be to a circumstance such as this, where there are different interest groups within the enterprise in respect of which bargaining is taking place and there is an impasse arrived at because one or several of those bargaining representatives are adopting a position which is at odds with the other bargaining representatives for the employees or perhaps for employers in a multi employment situation.

PN1661

It is contemplated that notwithstanding those different views one or more of those bargaining representatives can be excluded from the negotiation. So the fact that there are different views as to the impact of provisions on employees is contemplated by the legislature, that there is an acceptance that in reaching an enterprise level agreement it's necessary to have an enterprise level approach. What is good for - what provides the most good for the most employees. Now, our friends clearly find that notion offensive but it must be said that since 1993 industrial relations legislation in this country has worked upon that premise, that enterprise arrangements should be arrived at and whilst they've been in different forms, some involving unions, some not, the focus has been upon enterprise level agreements that are designed to remove inflexibilities, differences in conditions, disadvantages between respective groups within the enterprise to make enterprises more effective and more efficient and accordingly the construction that our friends seek to impose on section 238 cannot, cannot be seen to be consistent in our respectful submission with the legislative framework in which it appears.

PN1662

Section 238 provides:

PN1663

A bargaining representative for a proposed single enterprise agreement may apply to FWA for a scope order if the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly.

PN1664

And we adopt what was said by Mr Ryan about the distinction between efficient and fair bargaining and good faith bargaining. One needs to have regard to the bargain on behalf of the employees in the enterprise and see if there is some inefficiency or unfairness in the bargaining for an agreement for the enterprise on behalf of the employees. Can we also draw attention to subsection (4):

PN1665

FWA may make the scope order if FWA is satisfied, and we draw particular attention to paragraph (c), that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen.

PN1666

And (d):

PN1667

It is reasonable in all the circumstances to make the order.

PN1668

Then subsection (4)(a):

PN1669

If the agreement proposed to be specified in the scope order will not cover all of the employees of the employer or employers covered by the agreement FWA must in deciding for the purposes of paragraph 4(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically operationally or organisationally distinct.

PN1670

Now if it is not there would seem to be no basis to separate it out. Now, you can have within a group of employees, employees employed who have very specific conditions which may be overborne by a majority. They may not be organisationally or operationally or geographically distinct. The Act contemplates that their will may be overborne. Can I also draw attention to the Fair Work Registered Organisations Act 2009. It is related legislation. It incorporates provisions that for many, many years formed part of the Workplace Relations legislation in this country, most particularly section 133 provides for orders about representation rights of organizations of employees. There's a very traditional demarcation power, but might I draw your attention to section 137A which deals with representation orders for workplace groups:

PN1671

Subject to this part, part 4 and subsection 151(6), FWA may, on the application of an organization, an employer or the Minister make the following orders in relation to a dispute about the entitlement of an organization to represent under this Act or the Fair Work Act, the industrial interests of employees. An order that an organization of employees is to have the right to the exclusion of another organization or other organizations, for an order that an organization of employees is not to have the right to represent the industrial interests of the employees in a particular workplace group.

PN1672

Now, if it please the tribunal, much of what we've heard today has all the hallmarks of a traditional demarcation dispute. The Meat Union are attempting to

say, "This is our turf. The SDA ought not be here." If that's their case, they should bring it under the appropriate legislative provisions. To the extent that they seek to bring it under 238 they need to point to some unfairness exacted on the employees who are subject to the agreement. It matters not whether there has been any unfairness to the AMIEU. Such unfairness is denied. But so what? The question that 238 attends upon is the fairness to the employees subject to the agreement. Is the group that has been chosen, does that group result in some unfairness? The default position is, once you identify the enterprise, that is the level at which an agreement is made. There's provision for some other lesser position, it is true, but the default position is the enterprise agreement. Someone who wants something other than the enterprise must make out the case for some different treatment.

PN1673

In our respectful submission scope clauses are not about union representation or concerns. They focus on the enterprise. If it was intended that scope clauses were to have the effect that is contended for given the history of industrial regulation in this country focusing upon agreements at the enterprise level since 1993 one would have expected significantly clearer language than that which is to be found in section 238. Now, when one attends upon the fairness to the employees, the subject of these proceedings, one looks to the authorities that are relied on by our friends and your Honour will excuse me if I don't give the references, but your Honour will have seen in the authorities adopting them in a shorthand manner, the judgment of his Honour, Munro J in *Joy* and the judgment of his Honour, Senior Deputy President O'Callaghan in *Coca-Cola*.

PN1674

Those authorities seem to stand for the proposition that unfairness can result from an inappropriate or artificial choice of scope which will likely prevent agreement. In our respectful submission that is as much as can be derived from those cases. It cannot be suggested that choosing the enterprise as the level at which agreement is to be made is artificial, inappropriate or likely to prevent agreement. Choosing the enterprise after all is the choice directed by the legislature. It should be pointed out that to the extent that matters are relied upon as being likely to prevent agreement in this circumstance, that those matters relate to what are said to be complex transitional provisions in relation to employees in meat units in Victoria and Tasmania.

PN1675

In the remainder of the Commonwealth of Australia the employees in meat units have their conditions of employment regulated under an agreement-like fashion as that proposed. It is only the employees in Victoria and Tasmania who presently have separate provision. So the scope orders that are proposed create as many problems as they might be said to solve. Now, in our respectful submission reliance upon the evidence of Mr Carr at paragraphs 67 and 68 of his affidavit makes good the proposition that there is no unfairness of the type envisaged in either *Joy* or *Coca-Cola* in the present proceedings. Might we also concede that unfairness may result from a minority's interests being illegitimately overborne by the majority and clearly that was a thread which the AMA sought to give some substance to in the course of these proceedings.

PN1676

But that would require there being particular concerns of the isolated group which may be traded away by an unaffected majority. Now, your Honour, when I say particular concerns, I mean concerns which particularly affect that group and one might consider the situation on some of the evidence before the tribunal today at Woolworths supermarkets where the employees are employed by Woolworths Limited, entering into a bargaining process in conjunction with, I think it's AHL, the hotels' operation conducted by the Woolworths group, and were it to be the case that an agreement was put up which, for instance, make no separate provision for penalty rates between the hours of midnight and 3 am when it might hypothetically be proposed that many hotels were trading and very few supermarkets were trading, one might say that there could be unfairness and that the scope of the proposed agreement excited the sorts of interests identified in section 238. But this is not that case.

PN1677

There is no evidence of any such concern here. To the extent that there is any evidence of an impact on relevant employees' conditions, the conditions are conditions which apply generally through the supermarket. They have no particularity to the meat workers. They're not tool allowances, they're not protective clothing allowances. They're simply penalties for certain ordinary rates, for certain ordinary hours of work and public holidays. These are matters of general concern to the entire workforce. These are the sorts of matters that enterprise bargaining was meant to eliminate since 1993.

PN1678

One sees the rationale for that approach in the legislature in Mr Bird's evidence. Mr Bird's evidence was, meat unit employees in Victoria perceive themselves as having better conditions and they're therefore disinclined to do work outside the meat unit. That is the very sort of inhibition on productivity dealt with in the objects of the Act that has been the subject of decision after decision after decision in this tribunal and its predecessors concerning enterprise bargaining. It is the sort of irrelevant distinction that is meant to be eradicated. So much is reinforced in Mr Carr's evidence at paragraphs 64, 75 and 76.

PN1679

The tribunal will also recall Mr Crawford's evidence, that disparate conditions among employees working side by side will inevitably create disaffection. Hardly rocket science. Woolworths clearly and understandably wishes to eliminate disparate conditions among employees working side by side. Inevitably in any process of dealing with disparate conditions and harmonising those conditions, transitional issues will arise. They have been dealt with. Mr Carr explained in the witness box the way in which the transitional issues are proposed to be dealt with in what is still a proposed agreement. It's not an agreement at the stage where the Commission is asked to consider - sorry - whether the Tribunal is asked to consider whether it's appropriate. It is simply, at this stage, a negotiating document.

PN1680

But in that negotiating document transitional provisions are put in place that do not simply last the life of the agreement, they last the life of the employment. And they reflect prior agreement and prior agreement and prior agreement where

the harmonisation process has been continuing, as is contemplated by the legislation. Most particularly, if we might so submit, there is no evidence upon which the Commission could be satisfied that bargaining would proceed any more fairly or efficiently were the scope of the agreement altered. If I can remind your Honour of the evidence of Mr Carr at paragraphs 68, 148 and 149 where he says that the whole purpose of harmonisation is to provide benefits for employees as well as the employer. And the benefits for the employer are quite tangible.

PN1681

There is nothing to suggest that the desires of our client to harmonise conditions would be different were the orders sought for made. There is every reason to suspect that our client would continue to wish to access the productivity gains available by harmonising conditions throughout the enterprise. That being accepted, one must wonder what benefit there would be to employees in meat units in placing them in a situation where the majority of employees go off and reach their agreement and that agreement inevitably forms the basis of any agreement for the tale.

PN1682

It must be thought highly unlikely that Woolworths could be so foolish as to negotiate an AMIEU agreement prior to finding out what arrangements it could arrive at in respect of the vast majority of employees working in the supermarket. And having reached agreement in the bargaining unit that applies to the vast majority of employees in the supermarket, it must be thought highly unlikely that Woolworths would negotiate a different agreement with the tale which might then well and truly have the dog hopping. But the difficulties don't stop there because on the evidence, even in this semi protected workshop that the AMIEU would seek to establish in the meat units, they don't have the numbers.

PN1683

There will still be two bargaining parties representing employees, at the least. And they will still presumably have disparate interests. There will still be those dreadful young casuals who may not choose to spend their life in Woolworths. Now, unless the next application by the AMIEU is to have them disenfranchised, they will still be voting on the agreement. The one matter that the AMIEU has passingly spoken of as being a particular disadvantage for their members is the loss of their protected action rights. But one must say on the evidence, how and when could those protected action rights arise? You would have a situation where the Victorian and Tasmanian meat workers can't engage in protected action for some years, but you would have disparate groups across the country in meat units with scattered representational rights, presumably being urged by the union to engage in industrial action.

PN1684

Well, would they or would they not? Would they be able to achieve some different answer? Or is it the meat union's position that they should just wait for another two years without any improvement in conditions? Would that be fair to the employees? Is that an efficient way of conducting negotiations? So one might put aside immediately that consideration. So then we come back to where the unfairness is said to be. And it is clearly only in the loss of some penalties of a potential loss to future employees of some penalties. Not to any existing employee and a loss of penalties that has been bought out on a tentative basis and

in respect of which the meat union, were it minded so to do, can still contribute in the negotiation process and in respect of which the AMIEU will be entitled to participate in genuine, good faith bargaining and in respect of which the AMIEU will be entitled to address its members on the benefits and detriments of proposed agreements.

PN1685

And just while I return for the moment to the good faith bargaining, can I remind the Commission that an application for a bargaining order under the provisions of section 229 may only be made - this is pursuant to subsection (3) - that:

PN1686

Whichever of the following times applies, (a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement -

PN1687

And that is clearly the situation here:

PN1688

(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements.

PN1689

Or the latest nominal expiry date of those enterprise agreements, or:

PN1690

(ii) after an employer that will be covered by the proposed enterprise agreement has requested that employees approve the agreement.

PN1691

We haven't arrived at either of those times. If good faith bargaining is that which the union claims to desire, they have no claim available under the Act, as yet. That's not to say our client doesn't wish to engage with them in good faith bargaining. Our client patently recognises the role of the AMIEU as a bargaining representative. Our client clearly wishes to engage with them in the process of arriving at an agreement. But our client does not recognise a distinctive need for the prescription of matters of common interest to all supermarket employees, such as penalty rates and public holidays. May it please the Commission, in our respectful submission the orders should be rejected.

PN1692

THE SENIOR DEPUTY PRESIDENT: Good, thank you.

PN1693

MR NORRIS: Thank you, your Honour. Might I make the initial global submissions by way of response, that much was canvassed about the merits or otherwise of particular provisions of the proposed agreement. Well, with respect, that has absolutely nothing to do with the bargaining process which is what section 238 is directed at. The bargaining process. And I start specifically by referring to the submissions of the SDA and I believe the point was taken that an order for good faith bargaining was a better remedy, or a remedy that should have been pursued and that we're confusing fair bargaining with good faith bargaining.

Well, with respect, on the facts of this particular matter the AMIEU were effectively in the dark until 4 September 2009.

PN1694

Now, my learned friend at the bar table from the SDA ought apparently have us approach this particular Tribunal some time prior to that saying we suspect there's something untoward going on here. We suspect there may be bargaining other than in good faith going on. We suspect all of these things and we seek a bargaining order. It really is an untenable submission with respect, your Honour. It was also put by my learned friend that bargaining representatives are quite entitled to meet on their own. Well, prima facie that might be so. But one thing is for sure; bargaining representatives are required to recognise other bargaining representatives. That did not occur from early January 2009 until 30 June 2009. It did not occur from 1 July 2009 until at the very earliest 4 September - I withdraw that - 26 August 2009. Whilst negotiations in isolation were continuing.

PN1695

In the context of all of bargaining representatives being made aware that there was another bargaining representative out there that wished to negotiate. One other good faith requirement is of course the bargaining parties disclose relevant information in a timely fashion to other bargaining representatives. No disclosure whatsoever, let alone in part, was made at any time either by the SDA - if a good faith obligation does exist between the SDA and the AMIEU, and your Honour would be aware we take issue with that particular proposition - but certainly in respect of Woolworths, no disclosure was made at any time. It was squarely put on notice on 21 July 2009 that the AMIEU was a bargaining representative that sought to undertake the bargaining in the negotiations.

PN1696

Indeed, you could take from the evidence that they were well aware of that even prior to that particular point in time. No disclosure was made until it finished its affairs and its negotiations with the SDA. Now, my learned friend, Mr Hatcher, took you to the provisions relating to good faith bargaining orders which say that bargaining representatives may be excluded from the negotiations. Indeed, some may be ordered to consolidate, et cetera, et cetera. And he also referred, of course - and to illustrate the point - referred to a situation. This might be enlivened when two bargaining representatives are at odds with each other, in conflict. Well, I'd simply refer your Honour to the illustrative example that I've handed up earlier about David's Debt Services.

PN1697

There the employer became aware that the two bargaining representatives were at odds with each other and he applied for - well, I withdraw that - they applied for a scope order. On that ground alone. That's the parliament's contemplation of exactly what this particular section contemplates. Now, it was said by my learned friend from the SDA that statutory declarations have been signed in respect of four walls agreements that have been reached. Now, with respect, if one couldn't describe supermarket operations within the state of Queensland, or within the state of New South Wales, or any other state and territory, as being a geographically distinct part of the single business, well then one wonders when you would ever be able to describe that particular aspect of the business in that way.

PN1698

So it is absolutely no comparison whatsoever. And doesn't serve to diminish from the evidence by way of the exhibits that the AMIEU has already tendered. Now, my learned friend, Mr Hatcher, referred the Commission - beg your pardon, I'll have it by heart - referred the Tribunal to various objects of the Act relating to enterprise bargaining and the focus on the enterprise. Now these, of course, are expressions of purpose, statements of broad philosophy, et cetera, et cetera. One thing is for certain, your Honour; they can not be used to cut down or diminish a specific provision of the Act. Now, section 238 by its very nature contemplates that a single enterprise might be the subject of scope orders. Without being repetitive, I refer to the David Betts' situation and the explanatory memoranda.

PN1699

It would be a serious error of law and/or principle to use objects to cut down a specific provision of the Act which, of its very nature, contemplates separating by way of agreement coverage different aspects of an enterprise. Now, it was also raised by my learned friend, Mr Hatcher, that this is really just a demarcation dispute in disguise, apparently. But you'd note from the concession of Mr Bird, whilst he was giving evidence, that the SDA are entitled to become bargaining representatives should the scope orders be granted. Now, that really deals with that particular point as it was taken. The orders aren't being sought to exclude the SDA in any way, shape or form. Indeed, Mr Bird acknowledged that they'd be included in any negotiation should the scope orders that we seek be made.

PN1700

It was also submitted by Mr Hatcher that this is all about unfairness visited upon a union, as opposed to the unfairness visited upon employees. Well, it's readily apparent from the terms of the legislation that the union is a default bargaining representative on behalf of employees. If their particular representative has been subjected to some unfair bargaining, those consequences are visited primarily on the representative, but more so upon the employees to whom they represent. Now, there were various submissions about inhibitions on productivity due to a dispute over a particular clause. Once again I'd simply reemphasise, that's simply a matter in issue in the bargaining process. It has nothing to do with the bargaining process per se, or what agreement might be reached ultimately out of a fair and efficient bargaining process.

PN1701

Some reference was made to the aims and objectives of Woolworths and how they're seeking to harmonise conditions and so forth and that was a very fair thing to do. That's just simply, again, a bargaining position. And parties are able to take any bargaining position that they see fit under the Act and they're entitled to bargain hard for it. They're not required to make concessions. But that has nothing whatsoever to do with the bargaining process which is what section 238 is directed squarely at. It was also put that making the order wouldn't promote fairness and efficiency of negotiations because it would be two years until certain employees could exercise their legitimate statutory right to advance claims by way of protected industrial action.

PN1702

Well, that's really the high tide mark. It's readily apparent that they're a group of employees and have a legitimate statutory right, if there is a deadlock. If there is a

deadlock. Because the Act itself contemplates a bargaining process where parties bargain in good faith and if there is a deadlock they can give up seeking to reach an agreement, or they can press their claims by way of legitimate and lawful protected industrial action. That is a statutory right conferred on employees who are members of an organisation.

PN1703

Now, there are at least three states where that right exists. Progressively that right will become available as well. One thing is for certain not making this particular scope order will instantaneously take away those rights should the agreement that is being proposed be accepted. And we've heard Mr Carr's evidence, he is quite confident that it's likely to be approved. Now, another point was take about the AMIU will still have to deal with those "dreadful" casuals. Well, we don't regard them as dreadful in any sense but one this for certain a casual employee working within the confines of a meat unit would have commonality of interest and community of interest with those other employees working in the meat unit. One thing is for certain, your Honour, a casual youthful employee working a few hours after school on the checkout does not and we certainly wouldn't have to deal with up to 30 per cent of the overall number of employees proposed to be covered by this agreement being in that particular category. Unless the Tribunal has some questions that is as far as I can take the matter at this stage, your Honour.

PN1704

THE SENIOR DEPUTY PRESIDENT: Good. Thank you, Mr Norris. There is some novelties of these matters they haven't been, as has been stated earlier, subject to a great deal of scrutiny or subject to any great jurisprudence as it were and on that basis I am happy to take some limited further comments that anyone, submission, anyone wishes to make if there is anything that has been missed and has been overlooked in your argument that you would like to press.

PN1705

MR RYAN: We're comfortable, your Honour, with our submission.

PN1706

MR HATCHER: Your Honour, the only supplementation we would seek to make is the very real difficulties that orders in these terms create for employees who move between units. They will be within a bargaining group and outside a bargaining group from time to time. I mean, it is inevitable if you establish multiple bargaining groups within a single enterprise where the employees do move about and the evidence is that they do.

PN1707

THE SENIOR DEPUTY PRESIDENT: So what happens in relation to Tasmania and Victoria currently then, is there no mobility?

PN1708

MR HATCHER: There is some mobility but the evidence, your Honour, was that it is significantly restricted.

PN1709

THE SENIOR DEPUTY PRESIDENT: Yes. But then again if I recall Mr Carr's evidence the actual mobility is constrained in any event given the particular environments. Well, Mr Carr gave evidence there was some measure of mobility.

PN1710

MR HATCHER: Yes.

PN1711

THE SENIOR DEPUTY PRESIDENT: He didn't go so far as to attempt to exaggerate the extent of that mobility.

PN1712

MR HATCHER: No, no, quite, and it wasn't a restriction of mobility limited to meat units. He made the point that - - -

PN1713

THE SENIOR DEPUTY PRESIDENT: Yes, it was across the - - -

PN1714

MR HATCHER: I am sorry, your Honour?

PN1715

THE SENIOR DEPUTY PRESIDENT: Yes, it was across multiple working zones and work environments.

PN1716

MR HATCHER: Yes. There were for instance particular concerns in relation to seafood, I think, and the bakery because of the hot ovens and so forth.

PN1717

THE SENIOR DEPUTY PRESIDENT: Mr Norris, do you want to respond to that all? It is just a courtesy I extend to you.

PN1718

MR NORRIS: Well, only to say that that's a problem - well, it is not a problem, it is a scenario that is specifically envisaged by section 238 by its very nature again. To use that as some sort of weighty consideration against making the orders would just simply defeat the entire operation of the section itself.

PN1719

THE SENIOR DEPUTY PRESIDENT: What I would like to hear you both on actually before we close is the nature of the apparent discretion that is vested in the Tribunal. I haven't heard from you on that and it occurs to me that I think it reasonable that I should. There is reference to it in the written submissions from Woolworths as prepared and relied upon and I've read that and it refers to Coal v Allied and I don't whether there is any requirement to take it any further than that but if anyone does wish to put anything to me I am happy to hear it.

PN1720

MR HATCHER: Well, your Honour, a provision that is expressed in terms of reasonable in all the circumstances of course requires very much a valued judgment, House v the King judgment. The circumstances though in our respectful submission are to be directed. That is one needs to have regard to what is relevant about the circumstances. We say that the relevance is, as we've already put, that the default position under the legislation is the enterprise level and if I could perhaps put it in this context. My friend invites the Commission to prefer reliance on an example provided in an explanatory memorandum over reliance on the objects of the Act and we say that's just misplaced as a matter of law but if one does look at that example, one clearly has two disparate work group.

PN1721

You know, I think, that was the point I was making with the reference to the hotels being dealt with in the one bargain with the supermarkets and it's that discretion that deals the concerns that derived from joy in Coca Cola where there is an artificiality or a perceived artificiality in the negotiating groups. In our respectful submission when the negotiating group chosen by the employer and principle bargaining representative and I don't say that in any pejorative sense only that in recognition that the SDA patently has the largest numerical interest of any bargaining representative in relation to these matters. When their election of the bargaining group coincides with the default position under the legislation and when the aggrieved bargaining party can point to no particular oppression of those on whose behalf it acts that is particular to their circumstances as opposed to their common - their circumstances common with other employees. Then, in our respectful submission, the circumstances that the Commission is to have regard to would not be such as to make it reasonable to make the order.

PN1722

THE SENIOR DEPUTY PRESIDENT: Thank you.

PN1723

MR NORRIS: Yes, look, I'd just respond or attempt to assist the Tribunal by saying that the power to make a scope order is clearly discretionary. FWA may make the scope order if FWA is satisfied. You don't need - the Tribunal certainly doesn't need any lecture or elucidation from myself as to the degree or requisite standard of satisfaction but it's abundantly clear that each and every one of the paragraphs appearing there under are required accumulatively to be addressed and the Tribunal must be satisfied of all of them. Now, if the Tribunal is positively satisfied that each and every paragraph appearing on this sub section 4 will be achieved it would normally follow that the Tribunal would make the order.

PN1724

So whilst it is a discretionary decision it is a discretionary decision that is tempered by specific considerations and one would concede readily a global consideration in paragraph (d), a broadly global consideration. I am nothing further, your Honour.

PN1725

THE SENIOR DEPUTY PRESIDENT: Thank you very much everyone. Thank you for your assistance and your submissions.

PN1726

MR NORRIS: Before we rise, I might just ask through the Tribunal if the undertaking - as I understand it, there was an undertaking to give the AMIU 14 days notice for any process of a vote would occur if we were entering into written submissions. I might enquire through the Tribunal to my learned friend whether that stands now that we have completed submissions?

PN1727

MR HATCHER: Yes, there is no difficulty with that, your Honour.

PN1728

MR NORRIS: Very well.

PN1729

THE SENIOR DEPUTY PRESIDENT: So you still have that opportunity, Mr Norris, should it come to pass.

PN1730

MR NORRIS: Thank you.

PN1731

THE SENIOR DEPUTY PRESIDENT: Can I thank the representatives for their assistance in their submissions and in helping to adduce the evidence in relation to this matter. The decision is reserved of course and I will attempt to move to it promptly and we are adjourned. Thank you.

<ADJOURNED INDEFINITELY

[4.33PM]

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