



# Fair Work Australia



## TRANSCRIPT OF PROCEEDINGS

*Fair Work Act 2009*

20949-1 20950-1

**SENIOR DEPUTY PRESIDENT DRAKE**

**B2009/10457 B2009/10458**

**s.437 - Application for a protected action ballot order**

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and  
Allied Services Union of Australia**

**and**

**Australian Postal Corporation**

**(B2009/10457)**

**(B2009/10458)**

**Sydney**

**2.17PM, MONDAY, 17 AUGUST 2009**

**Continued from 13/08/2009**

**Reserved for Decision**

PN104

MR R REITANO: I appear for the applicant.

PN105

MR F PARRY SC: I seek permission to appear for Australia Post if your Honour pleases.

PN106

THE SENIOR DEPUTY PRESIDENT: Mr Parry have you seen the submissions that were tendered by Mr Reitano the other day when the matter was in I think on Thursday the 13th?

PN107

MR PARRY: I have your Honour.

PN108

THE SENIOR DEPUTY PRESIDENT: Mr Reitano's submissions are that the employer has no right of appearance and the Commission ought not to provide permission for any person from the employer to make submissions in this matter that they're here as busybodies.

PN109

MR PARRY: Yes I've - sorry your Honour.

PN110

THE SENIOR DEPUTY PRESIDENT: You've had an opportunity read those?

PN111

MR PARRY: Yes I have had an opportunity to read those your Honour and we will submit that those submissions are in error and they would lead your Honour in to error if you were to follow them. Now I've prepared a set of submissions your Honour which I can hand up to your Honour. Now our position is that we either have - - -

PN112

THE SENIOR DEPUTY PRESIDENT: Why don't I read them first Mr Parry then I'll hear from you. I think its more convenient to do that.

PN113

MR PARRY: Yes your Honour, would your Honour be assisted by the authorities that we've referred to therein?

PN114

THE SENIOR DEPUTY PRESIDENT: I don't know yet but I can't see any reason why I wouldn't be. Why don't you hand them up?

PN115

MR PARRY: Yes your Honour there's reference to a decision His Honour Vice President Lawler in paragraph 1.7 dealing with the CEPU v, Australian Post. If I could hand up a copy of that. There is also your Honour, in section 2.4 and onwards, reference to a couple of High Court authorities dealing with statutes and natural justice and procedural fairness, probably well known to your Honour, but I'll hand those up in any event. That is Annetts v. McCann and Kheo v. Minister

for Immigration. your Honour in 3.4 there is reference to person aggrieved and there's a decision of a Full Bench referred to in NTERU v. Monash. If I could hand that up to your Honour.

PN116

There is in part 4.4 a reference to a decision of Senior Deputy President O'Callaghan CEPU v. Tiko which I hand up to your Honour. Now your Honour, further, we have filed and served an affidavit of Katherine Walsh of Australia Post. We would want the contents of that affidavit also considered by your Honour when reading this submission.

PN117

THE SENIOR DEPUTY PRESIDENT: Thank you.

PN118

MR PARRY: If your Honour pleases.

PN119

THE SENIOR DEPUTY PRESIDENT: Mr Reitano what I intend to do is read the submission and quickly examine the material otherwise provided and then I'll hear from you. Have you read the submission?

PN120

MR REITANO: Up to page 3 I've read the evidence provided to me this morning, other than the folder. That's of no moment.

PN121

THE SENIOR DEPUTY PRESIDENT: The attachments or the - - -

PN122

MR REITANO: I haven't read the attachments. I've read the body of the affidavit. I don't need to read the attachments.

PN123

THE SENIOR DEPUTY PRESIDENT: All right, well that's what I intend to do so you can all come and go as you please. I'll be just a little while.

**<SHORT ADJOURNMENT** **[2.22PM]**

**<RESUMED** **[2.30PM]**

MR PARRY: If your Honour pleases, just to make clear that we submit that there is a right to be heard and present evidence but alternatively we say that that we should be heard and be able to present evidence in the event that your Honour forms the view you have a discretion in the matter and we would say in the circumstances your Honour forms that view, we say that you should be minded, because of the matters we've raised in these submissions, to hear such submissions and hear such evidence. your Honour I referred earlier to the affidavit of Katherine Walsh but there is also another affidavit in respect of the second matter before your Honour concerned post logistics of Toni Scott-Brown that was filed and served on Friday. Does your Honour have that?

PN124

THE SENIOR DEPUTY PRESIDENT: Yes I do. I just don't remember which file it was in. Was that in the matter of 10458?

PN125

MR PARRY: As I would understand it, yes your Honour.

PN126

THE SENIOR DEPUTY PRESIDENT: Yes I've got that.

PN127

MR PARRY: She deposes to the background of - or the absence of negotiations that we would have it and your Honour will have noted our reference to section 460 and your Honour will see from section 460 there is an immunity created and indeed the section contemplates that a protected action valid order may be quashed or varied on appeal. It would be an anomalous and curious outcome if that party that could appeal and exercise its rights to quash or vary an appeal would not have rights to appear at the initial hearing and present material and argument with regard to matters that any such a hearing would canvass. Those are the .... if your Honour pleases.

PN128

THE SENIOR DEPUTY PRESIDENT: Mr Parry is it in relation to 1.2(b) and (c) in your submissions that you say that the facts are in dispute as to whether there has been or is a genuine attempt to reach agreement? You don't say that there's been no application made for instance under 437, it's only those - are the facts in dispute confined to those matters?

PN129

MR PARRY: Well we do say that there has not been an application that complies with section 437 insofar as it refers to protected industrial action and related matters, but they're linked obviously with the grounds we raise in 1.2(b) and (c) concerning genuinely trying to reach an agreement.

PN130

THE SENIOR DEPUTY PRESIDENT: All right, thank you. Mr Reitano, if you're ready.

PN131

MR REITANO: Could I deal with the submissions that have been made in two parts and the two parts are these. Firstly I want to say something about Vice President Lawler's decision that's referred to. It impacts on the second part of the submission but I think I need to deal with it slightly separately, and the second matter I want to deal with is to invite your Honour to ask this question. What is the right that Australia Post say that your Honour is going to infringe or affect if your Honour makes an order? I want to deal with those two things separately because in respect of the second part, the submission will be that there is no right that your Honour is infringing by making an order and I'll come back to that shortly.

PN132

Can I say firstly, we addressed it in our written submissions the other day and we repeat it again here, the decision of Vice President Lawler is only relevant -

putting aside that we say in any event it was wrong - putting that completely to one side with respect to the Vice President - is in any event of only relevance here because it highlights the importance of the legislative change that was brought about by the Fair Work Act and that change is that in "re-enacting" the protected action ballot procedures the legislature took a deliberate act in removing from the scheme of the act the right of an employer to come along in these proceedings and make submissions. The prior form of the Act that Vice President Lawler was considering had a specific legislative provision that said, a party (which included an employer) could come to the then Commission and make submissions and Vice President Lawler took that one step further and said, well that must include the right to bring evidence and that's what His Honour was considering in that case.

PN133

That's the passage I think that's referred to in my learned friend's written submissions, or a reference to it in any event. So it was against that background that Vice President Lawler held that an employer could be heard. Compare both the object of the provision that I put to your Honour the other day about - this being about there being fair and democratic processes, not something that one found in the WorkChoices Legislation - and compare the total absence of any provision, the complete and utter absence of any provision about mere busybodies (employers) coming along and interfering in the democratic process of the union. So the first point we make is to emphasise again to your Honour the fact that your Honour will not find anywhere in this part of the Fair Work Act anything that gives a right to an employer to interfering with the conduct of an organisation in respect of seeking to ballot its members to ascertain their views about whether they wish to engage in protected industrial action.

PN134

The second matter that I want to deal with is - as I said, to invite your Honour to ask when my learned friend talks of rights of natural justice or perhaps in modern parlance, rights of procedural fairness, he must identify a right that an order is going to infringe and in my submission there is not substantive right that will be found anywhere that could be said to be infringed by any order your Honour makes and if I could refer briefly to the halcyon days before we had protected absent ballots under this Act and under the previous Act, there was no right in an employer to participate in the decision making process of a registered organisation that would involve even taking industrial action .

PN135

There was nothing at all that was impacted upon in that decision making process and likewise that is re-enacted here when we talk of - and I take your Honour back to it again - the objects of the Act to be concerned with democracy and the right of members to vote. It may be, somewhere down the track, that a consequence of the vote of the members leads to damaging and hurtful industrial action being taken against Australia Post. That may be the consequence, but it is not the consequence of anything your Honour is doing here. What your Honour is doing here is entitling people to exercise their democratic right within the organisation. To say yes or no I am not going to, or I am going to, participate in industrial action and that is a far cry from your Honour's order impacting on anything to do with Australia Post.

PN136

The most that my friend can plead to are three things. That is that Australia Post must be given notice of the application, something with which the legislature specifically deals with, unlike making submissions and leading evidence and running arguments, or trying to delay the happening of the ballot, the legislatures specifically provide that the employer must be given notice of what is to happen or the application being made within 24 hours. One might ask why and the answer to that is reasonably simple. Because the legislature wanted the employer to know that the process had been instigated such that would require it to comply with a direction given by the AEC to provide the names and addresses of employees. Something that is a mere procedural requirement on an employer and not affecting any substantive right so they could know that what was going to happen was that the AEC might then be empowered to say hand over the relevant names and addresses of employees so that we could put them on the role.

PN137

The third aspect is my friend points to the appeal or review requirements and all that need to be said about that is that a person with a sufficient interest (a member of the CEPU perhaps) might want to come along and appeal an order that your Honour makes and that person clearly has a right in respect of the fact that they are voting in the ballot and they might want to come to the Commission and say your order on appeal is bad for this, that or the other reason, or alternatively, your Honour would not make it the order that the CEPU is seeking because that infringes upon my democratic right for a whole range of reasons. One might be that they're proposing to ballot people who aren't employed by this employer and your Honour should be made aware of that before your Honour process to make an order or alternatively, any number of other things that might directly impact upon the employee's right to vote which your Honour is enshrining in any order that will be made.

PN138

It cannot be said that the making of an order that the order your Honour makes that gives people the right to vote is going to infringe any right that Australia Post presently has. All it is going to do is allow for the - what the AEC provides - the fair and democratic ascertainment of the will of the members. That's what the provision's about. It's not about forestalling industrial action. It's not about stopping industrial action. It's not about running interference on industrial action. It is about ascertaining the views of the members and that is why I say unashamedly, it is not for busybodies to come along and interfere in that process of ascertaining the views of the members. Once the question is asked, what is the right that Australia Post are trying to protect? The answer is clearly, at present and even after your Honour makes an order, there is no relevant right. If perhaps they had a vote - and they don't - there might be some, but other than that their submissions entirely fail to come to grips with when they say we're entitled to natural justice - the identification of any private or public right that they have that your Honour might infringe if they make - if your Honour were minded to make an order. Those are the submissions that we wish to make.

PN139

THE SENIOR DEPUTY PRESIDENT: Do you have any response Mr Parry?

PN140

MR PARRY: Can we say my learned friend commences with a submission about rights. Our written submission commences with a position that doesn't require the existence of a right, but concerns the position of Fair Work ;Australia being satisfied as to whether the jurisdictional prerequisites are present and in that context the legislature has included section 443(1)(b) about genuine bargaining for a clear purpose. That is, the legislature requires the parties and Fair Work Australia to be satisfied that the employer and the bargaining representatives have genuinely tried to resolve the matter before they commence on the processes which will allow industrial action to take place. Now the employer is part of that negotiation process, we say that when we turn to a consideration of whether there are rights in existence, you don't construe that narrowly, it doesn't have to be a legal right or a proprietary right or a financial right. It can be a future right.

PN141

It can be - and is in this case - where a decision may be made that will affect us in the future and manifestly we say it will affect us in the future if a decision is made by this Commission without jurisdiction - by Fair Work Australia, I apologise. So our submission is we have a right to be here. We have a right to be heard but in any event in the matter of an appropriate exercise with discretion, Fair Work Australia should hear what we have to say. If your Honour pleases.

PN142

THE SENIOR DEPUTY PRESIDENT: I've already had an opportunity to consider this question in a very recent matter in another application. In that case it was in any event unnecessary for me to issue a determination. I don't think in this case it is a question of rights. There is no open-ended right to be heard on these applications pursuant to s.437. It's not a question of rights. It's a question of an exercise of discretion by Fair Work Australia in each application. There are occasions when it is improper to hear evidence and that discretion ought to be exercised in those cases where it's proper to hear evidence. Those cases are the cases where there are facts relied on in the application and which are in dispute. In this case, in this application, there's been a proper application lodged, it appears to me in the proper form.

PN143

There is material in the application which states that the applicant is genuinely, or has been and is genuinely seeking to reach an agreement. In the absence of any dispute over that evidence, that is evidence that can be relied on and the orders issued, but where matters of fact are put forward, where there's a question on the material that is provided by those persons, I think it's proper for the Commission to hear the material on that matter in dispute, but that is an exercise of discretion. In this case, the only matters on which I think it's appropriate to hear anybody is the question of genuineness of the bargaining and for that limited purpose in this application I think it's proper to hear the evidence of whoever it is that whose affidavits have been filed - I've forgotten the name of the second witness - and limited to that issue, I'll hear the evidence. If you want greater reasons for decision on that issue I'll give it to you later but we've got Ms Walsh's evidence here. I'm told you don't want to cross-examine Mr Husic or Mr Bryant.

PN144

Mr Reitano may want to call them. I don't know if you do - to add anything now. What about Ms Walsh and - - -

PN145

MR REITANO: Could your Honour just pardon me a moment.

PN146

THE SENIOR DEPUTY PRESIDENT: Miss Scott-Brown.

PN147

MR REITANO: I don't require either of them for cross-examination. I've just had a quick discussion with Mr Parry. About that. Neither of us intent to take any Browne v. Dunn points against the other on aspects of the affidavit material.

**EXHIBIT #AUSTRALIA POST 1 STATUTORY DECLARATION  
OF MS WALSH IN 10457**

**EXHIBIT #AUSTRALIA POST 1 STATUTORY DECLARATION  
OF MISS SCOTT-BROWN IN APPLICATION 10458**

PN148

THE SENIOR DEPUTY PRESIDENT: Since this is a matter of submissions, does either party want to have a short time, my having reached my decision about that material - before you address me? I no longer have a four o'clock matter. There's no pressure as to time.

PN149

MR REITANO: I had apprehended I'd said all I wanted to say in chief the other day your Honour so I'm really with Mr Parry.

PN150

THE SENIOR DEPUTY PRESIDENT: I thought you might have thought of something else to respond to the material in the affidavits.

PN151

MR REITANO: I was going to say it after - I was going to deal with it - - -

PN152

THE SENIOR DEPUTY PRESIDENT: What about you Mr Parry?

PN153

MR REITANO: - - - if Mr Parry's happy with that.

PN154

MR PARRY: If your Honour pleases, well I understood from reading transcript the other day that Mr Reitano had put what he wanted to put and he's confirmed that so on the basis of that, I'll make submissions in reply as it were. your Honour we have prepared an outline of submissions of Australia Post. If I could hand those up to your Honour.

PN155

THE SENIOR DEPUTY PRESIDENT: I think I'll read this.

PN156

MR PARRY: Again your Honour, there's a number of authorities referred to therein. Hopefully the propositions that are referred to in those authorities appear in the outline but there's quite a number of them as your Honour will note. I'm content to put a bundle of those together and hand them up to your Honour but that might just take a minute to put together.

PN157

THE SENIOR DEPUTY PRESIDENT: Well why don't I read your outlines of submissions while that's being done?

PN158

MR PARRY: If your Honour pleases.

PN159

THE SENIOR DEPUTY PRESIDENT: Mr Reitano isn't that an FMD, not N?

PN160

MR REITANO: I'm sorry your Honour?

PN161

THE SENIOR DEPUTY PRESIDENT: It's Facility Management Doctor isn't it?

PN162

MR REITANO: No, Nominated.

THE SENIOR DEPUTY PRESIDENT: Nominated. Yes. I'm going to take a short break. Be back at 3.15.

**<SHORT ADJOURNMENT**

**[3.03PM]**

**<RESUMED**

**[3.27PM]**

THE SENIOR DEPUTY PRESIDENT: Yes. You've had a change to read those Mr Reitano?

PN163

MR REITANO: I have your Honour.

PN164

THE SENIOR DEPUTY PRESIDENT: I took a bit longer, I'm sorry. Do you want to respond to those submissions?

PN165

MR REITANO: I don't know if Mr Parry wants to say anything?

PN166

THE SENIOR DEPUTY PRESIDENT: Did you Mr Parry, want to add anything?

PN167

MR PARRY: your Honour, in paragraph 2.9 your Honour the last sentence refers to the CEPU has never retracted its claim for such a Common Law agreement.

PN168

THE SENIOR DEPUTY PRESIDENT: I'm sorry, I couldn't hear. Which clause number?

PN169

MR PARRY: Paragraph 2.9.

PN170

THE SENIOR DEPUTY PRESIDENT: Yes.

PN171

MR PARRY: I just wanted to delete after the words, "Common Law agreement", the rest of that sentence. your Honour the - - -

PN172

THE SENIOR DEPUTY PRESIDENT: So full stop after Common Law agreement. Everything else out?

PN173

MR PARRY: Yes.

PN174

THE SENIOR DEPUTY PRESIDENT: Yes, anything else?

PN175

MR PARRY: your Honour the references in 2.9 really relate follow then to 2.1.4 which say:

PN176

*There is no evidence that the original claim made has been dropped*

PN177

and your Honour the original claim as referred to therein is referred to in paragraph 49 of Ms Walsh's statement which refers to the Common Law agreement at Tab 20. I won't take your Honour to that at the moment but - unless your Honour so seeks - but it refers to an agreement being provided which prohibits contractors being engaged and 2.1.5 refers to what occurred on 18 December 2008 and that appears in paragraph 59(c) of the affidavit of Ms Walsh where the union made a claim in respect of contractors which we would say went to obligations to consult and opportunities for employees in a very similar way to that considered by His Honour Justice French in Westfarmers. your Honour in paragraph 6.5 the form of the question CEPU proposes to put to the relevant employees, your Honour will have seen from the application that there are a wide variety of different types of industrial action that are sought to be voted on and there is one yes or one no and we say that that form of question is inconsistent with a scheme which refers to approval of particular industrial actions.

PN178

your Honour will have seen - we've made fairly brief submissions in paragraph 10 on page 14 about post logistics. your Honour will have read the affidavit of Ms Scott-Brown which makes clear there has simply been no meetings, discussions, claims et cetera for some 18 months and your Honour we've included a submission with regard to extension of time. your Honour I'm not sure - nothing

seems to have been said about that of which we're aware but there was an application as we understood it, not only that there be a protected action ballot held but that also there be some extension of time with regard to that. Now, I've included submissions with regard to that. I don't recall anything being said about that matter at all, but if it is said, then we would make those submissions. If your Honour pleases.

THE SENIOR DEPUTY PRESIDENT: Thank you.

PN179

MR REITANO: Could I deal with the submissions, firstly by referring to what I might say is the technical submission about whether we're trying to arrive at an agreement or have been trying to arrive at an agreement under the Fair Work Act and I don't want to spend a great deal of time on that technical submission. I then want to secondly deal with the aspect about what I might call the contractor's submission which one can only say has an air of unreality about it both in fact and in a common sense analysis. Thirdly I want to deal with some of the other things that are said about specific questions and the like, but can I make the overall submission that if your Honour was under any doubt after reading Mr Husic's affidavit about what the union has been about over the last couple of years in terms of trying to get an agreement, your Honour would be persuaded by Ms Walsh's evidence in that regard that the union has actively been attempting to secure an agreement to cover a wide range of matters including those matters that were in principle agreed, subject to membership ratification about two years ago or so.

PN180

Of course that membership ratification - and there's no evidence to suggest otherwise - never happened, and so the condition for the in principle agreement, or the condition precedent to the in principle agreement to become certified never arose. Moreover, it needs to be remembered that the membership ratification under the former WorkChoices Legislation needed to happen within a reasonable time so it couldn't be sought for example now. There was no ballot if you like of reasons that are explained in Ms Walsh's affidavit about that. Can I deal firstly with the technical submission that I've identified and that appears to arise from where it is said in I think paragraph 3.4 is where it reaches its high water mark because the words marked appears in bold, it seems to suggest and invite your Honour in paragraph 3.4 to come to the conclusion that because there were, or have been, no negotiations and I use the word negotiations very deliberately, there have been no negotiations since 1 July this year when Fair Work - when the Fair Work Act came into force, that your Honour would curiously conclude that therefore, the organisation has not been genuinely trying to reach an agreement with the employer because agreement means what it means in the Fair Work Act and not otherwise.

PN181

So anything before 1 July as I understand how the submission runs, anything before 1 July would be something that your Honour would have presumably no regard to. We haven't met with Australia Post since 1 July. We haven't written to them. We haven't pressed any claims on them. We have left them to their own devices sine before then. Now I invite your Honour to reject that submission

completely, for one very simple and self evident reason, and that relates to item 18 of schedule 13 of the Fair Work Act and that item, four squares pertains to precisely this type of situation. The item applies, so it says, if before the repeal of the Work Place Relations Act a bargaining representative for a proposed enterprise agreement - sorry a bargaining representative for a proposed enterprise agreement engaged in conduct in relation to the proposed agreement.

PN182

So can I just pause at each requirement. Everything that the organisation did before 1 July 1999 under the Work Place Relations Act to seek an agreement, could be regarded as relevant conduct. (b) immediately before that day there had been no agreement. That's obvious here. We wouldn't be here otherwise if there was. (c) that there were people who'd be covered by the proposed enterprise agreement had it been made and, (d) that the employer would have been covered by the agreement. So if all of the requirements of item 18 (1) are met, the affect of that is that sub paragraph 2 applies and that invites your Honour to take this approach. Amongst other things, Fair Work Australia may take into account hat conduct in deciding under part 3.3 of the Fair Work Act which deals with industrial action whether a bargaining representative is genuinely trying to reach an agreement in relation to the. proposed enterprise agreement and that's precisely what's happening here.

PN183

your Honour is entitled to take into account everything happened before 1 July in relation to this application in respect of the proposed agreement that is sought under Fair Work Australia. It is a common sense drafting technique that attempts to deal with in a common sense way rather than a legal technical way, the fact that agreement under the old Act and agreements under the new Act and things done under the old Act in respect of securing agreements and things done under the new Act should be seamless in terms of the transition from one scheme to the other. Item 18 is a complete answer to the suggestion that because we haven't done anything since 1 July this year, your Honour would conclude that we're not genuinely or that the organisation is not genuinely trying to reach an agreement.

PN184

Could I ask your Honour to note that the section of the Act does not say has been genuinely negotiating with a view to trying to reach an agreement. your Honour is not invited to look at what step or steps the organisation may or may not have taken in respect of securing agreement. The satisfaction your Honour must have is that the applicant, here the organisation, has been and is genuinely trying to reach an agreement and that could happen in a whole host of ways, one of which is negotiation. But there are a range of other ways in which one might genuinely be trying to reach an agreement. One might be - and some might suggest we should be ashamed of this - but one might be a threat to engage in industrial action. "I want an agreement and I want it now and I'm going to go on strike if you don't give it to me", might be evidence of a genuine desire to reach an agreement, as much as participation in negotiations, or participation in proceedings, or writing correspondence.

PN185

One needs to look at everything that is done in order to come to a view as to whether the organisation is genuinely or has been genuinely trying to reach an agreement. Now the second item that we understand that is run against us and we say that your Honour would reject the submission - the second item that is run against us is that somewhere back in ancient history the unions sought a deed that dealt with the issue or issues pertaining to contractors and that it is said - presumably it is seriously put - that that claim has not been withdrawn and therefore it must still be on the table. There's a range of things that militate against such a finding. Firstly, your Honour would know as well as anyone else does, that negotiation doesn't occur in a vacuum and is not static, particularly over such a long period of time as Ms Walsh identifies in her affidavit.

PN186

You will not see after negotiations resumed, or to use I think my learned friend's words in his submission, you will not see since negotiations recommenced any reference to a desire to obtain the clause that was in the deed that existed previously, so you just won't find that at all. You won't see Mr Husic saying in any meeting, or God forbid Mr Metcher saying in any meeting, "We want the term that was in the deed". Ms Walsh doesn't refer to that and doesn't even come close to it. You don't find it in any correspondence. You do however find interestingly enough a specific reference in paragraph 56 of Ms Walsh's affidavit - sorry statutory declaration - to a letter dated 10 November 2008 when negotiations are about to be resumed, I think Mr Husic writing advising Australia Post that there were various reasons why they wanted to re-resume negotiations and one of the things that is specifically referred to - and I quote, is:

PN187

*Additionally we identify the following issues that need to be addressed in any future enterprise bargaining agreement and .4 is contracting out to the extent permitted*

PN188

And you do find a whole range - a whole host of matters that are put on the table in terms of what the CEPU is seeking in those negotiations and the paragraphs that follow - in particular paragraph 59. You do find a long list of things that Mr Music is said to put on the table, 24 matters that were raised. It is not suggested anywhere in those 24 matters that any of them were prohibited content, the language of the former Act or any of them were not matters that could not be pursued in enterprise negotiations. There is an expression of Ms Walsh's disappointment in paragraph 60. That's by the by from my submission - - -

PN189

THE SENIOR DEPUTY PRESIDENT: Is this the letter from Mr Husic dated 10 November 2008?

PN190

MR REITANO: Yes your Honour.

PN191

THE SENIOR DEPUTY PRESIDENT: How many matters did you say were in it?

PN192

MR REITANO: Sorry, I only referred to item 6 in the letter. I've gone to paragraph 60 - sorry paragraph 59 of the affidavit.

PN193

THE SENIOR DEPUTY PRESIDENT: Yes thank you.

PN194

MR REITANO: Where there are a series of matters that were listed that were raised in a meeting but none of which would appear to include contracting. Nor do you find, after that date, that is after 1<sup>st</sup> November - so you don't find - you find a reference to contracting out as permitted. You don't find any reference to contractors generally in terms of what had been proposed in ancient history to be in a deed. You do find a whole raft load of other matters that are raised - that the union wants to go into an agreement and you don't find finally, Australia Post asking at any relevant time, "Do you still want what you were proposing back then in terms of what should go in a deed?" Now all of that points to a retraction of what was previously sought.

PN195

It is disingenuous to suggest that the union in June 2009 was pressing a claim for something that had been sought some years ago because it hadn't been retracted. With respect it is just a nonsense position to take. It is an attempt to interfere with the ballot we wish to conduct with our members. Finally on the question of contracting, I refer to section 172 of the Act and I invite your Honour if your Honour needs to have any regard to it, to paragraphs 672 and 673 of the explanatory memoranda to the Act, which specifically identify that section 172 was designed to include a whole host of aspects about the use of contractors in agreements - was intended to permit provisions about contractors, unlike the previous Act which had a far more stringent regime of prohibited contracting in respect of contractors - section 172 is designed to, and intended, to specifically allow to the full constitutional limit, one would divine from paragraphs 672 and 673 of the explanatory memoranda the regulation of employment relationships insofar as various aspect of contracting affect them.

PN196

So it can't be said with the utter and complete confidence with which it's been said, either that we're pressing clauses that might arguably have been prohibited that were contained in the deed nor can it be said, or is it said that we are pressing clauses in respect of contractors that could not possibly be in an enterprise agreement. It is clear that the legislation contemplates that such clauses might be included and nor can it be said that there is a proscription generally about such provisions. The fact that Mr Husic said in November 2008 to the extent possible or to the extent permissible, is a complete answer to the suggestion that we want something in an enterprise agreement that replicates what had gone before. Could I ask - or could I invite your Honour while I'm dealing with the issue of - sorry, could I deal with a miscellanea of issues?

PN197

The first one is this, that when your Honour has regard to Ms Walsh's affidavit your Honour should be very careful, both in terms of the affidavit and in terms of my learned friend's submission, to come to a conclusion that there was an

agreement arrived at, at any time in October 2007. To the extent that there was an agreement in 2007. It was an in principle agreement. It was subject to, and it is clear from Ms Walsh's affidavit - at various points it is absolutely clear that it was subject to membership vote and endorsement, and it never happened. There was not an agreement ever that could be certified by this Commission. In October 2007 or indeed today. If there had been as I said, we would not be here.

PN198

Could I then next deal with the issues that are raised in respect of the matters that are dealt with in paragraph 8 generally of the affidavit. This is an attack on the industrial action that we seek to have a ballot about because it's said that various bans, limitations, restrictions on various kinds of work could result in various things. Perhaps I'll - - -

PN199

THE SENIOR DEPUTY PRESIDENT: I don't think that that's a matter about which I gave leave to appear.

PN200

MR REITANO: All I can say is your Honour received the submissions. If your Honour - - -

PN201

THE SENIOR DEPUTY PRESIDENT: I'll read them. I think I restricted these matters to - - -

PN202

MR REITANO: Whether we were negotiating genuinely or not - so I withdraw that. Whether we genuinely voted on agreement.

PN203

THE SENIOR DEPUTY PRESIDENT: Yes I did.

PN204

MR REITANO: Well in that case, unless your Honour wants to hear me on the other matters, I don't intend to deal with them.

PN205

THE SENIOR DEPUTY PRESIDENT: No, but there is a matter that concerns me. It's a matter of - well everyone so far has been discussing at great length Ms Walsh's affidavit but Miss Toni Scott-Brown says different things about the agreement and Mr Bryant refers to - does not refer to the long period of discussions that Mr Husic does. Is there some information I don't have here about the negotiations?

PN206

MR REITANO: I think the only information that your Honour might be - well there's two things. Perhaps I should put in some context. As I understand it, the people who would be covered by the logistics agreement, if I could call it that - Mr Bryant's agreement. There are about 50 of them as I recall it. They are all employees of Australia Post. They're not employed by a separate employer. In the final paragraph of Mr Bryant's affidavit and I can't remember the precise words, but it is to the effect of, it is true that not a great deal has happened in

respect of that agreement because it usually follows on from the Australia Post negotiations. I think that's the substance of it and - - -

PN207

THE SENIOR DEPUTY PRESIDENT: You say it's the same employer?

PN208

MR REITANO: It's the same employer. There's not - I don't think there's any issue about that anyway.

PN209

THE SENIOR DEPUTY PRESIDENT: Yes, in relation was to the orders.

PN210

MR REITANO: We're content for them to vote in the other ballot.

PN211

THE SENIOR DEPUTY PRESIDENT: The way the question is put:

PN212

*Any of the protected action, part of the industrial action, all of the industrial action.*

PN213

Do you want to look at the application?

PN214

MR REITANO: Yes your Honour.

PN215

THE SENIOR DEPUTY PRESIDENT: Mr Parry invited that matters about the way in which those questions are put and it's the same question that occurred to me. If all that is there is a yes or a no, how do you indicate your preference for any part or all.

PN216

MR REITANO: Well you can vote for all of it or you can vote against it all.

PN217

THE SENIOR DEPUTY PRESIDENT: But you can't vote for part?

PN218

MR REITANO: No. We're asking them, do you agree with all of this. If yes, say yes. If no, say no. If it is in fact consistent with the decision, I think in relation to Australia Post for Vice President Lawler - it may have been Telstra, but - - -

PN219

THE SENIOR DEPUTY PRESIDENT: It may have been, but it's me who's hearing this one - wait until I get to read it before - - -

PN220

MR REITANO: I understand that. I'm only say that that's where we pick up the pro forma from if you like.

PN221

THE SENIOR DEPUTY PRESIDENT: Just let me re-read.

PN222

MR REITANO: If your Honour's concerned about that, that's a matter which I'm content - I'd be pleased to take instructions if your Honour has any concerns about it.

PN223

THE SENIOR DEPUTY PRESIDENT: I would re-word it to make it clearer, the first paragraph, but - - -

PN224

MR REITANO: Could I deal with one issue that - - -

PN225

THE SENIOR DEPUTY PRESIDENT: Yes, I think I interrupted you I'm sorry.

PN226

MR REITANO: I think what I said was that unless your Honour wishes to hear me on matters upon which leave was not granted to Australia Post, I don't intend to say anything further and I assume that your Honour won't have any regard to the submissions that were made by Australia Post in respect of those matters but there is one matter that I do want to address because Mr Parry raised it and that is against whom the order - sorry in whose favour the order is made in terms of the group of employees to be balloted. We do think that it may need to be amended to read, in order 3.1 in the - what I might call the main matter and we think the amendment is this - that it should read as it does:

PN227

*"The employees to be balloted are those employees including regular casuals employed by the Australian Postal Corporation"*

PN228

and then the word, "And" should be inserted

PN229

*"Who are members of the CEPU"*

PN230

And then all the words to the end of the sentence should be deleted and the following words should be included:

PN231

*"Excluding members of the CEPU employed in post logistics (third and fourth party warehousing/fulfilment operations)"*

PN232

THE SENIOR DEPUTY PRESIDENT: Employed in post logistics, in brackets?

PN233

MR REITANO: Third and fourth party warehousing/fulfilment operations. And then the other order also needs to be amended. The same clause 3.1. After the

words, "Members of the CEPU and who" all the words to the end of the sentence need to come out.

PN234

THE SENIOR DEPUTY PRESIDENT: And who are members of the CEPU?

PN235

MR REITANO: "And who" stays in and then the rest of the words, that is:

PN236

*"Will be covered by the proposed enterprise agreement"*

PN237

come out and the words:

PN238

*"Are employed in post logistics (third and fourth party warehousing/fulfilment operations)."*

PN239

THE SENIOR DEPUTY PRESIDENT: Are they in capitals?

PN240

MR REITANO: Could your Honour just pardon me a moment. The version I have is lower case. No your Honour. I think the terminology is terminology well understood by the participants.

PN241

THE SENIOR DEPUTY PRESIDENT: That's good.

PN242

MR REITANO: I hope so anyway. No further submissions.

PN243

MR PARRY: your Honour, briefly - - -

PN244

MR REITANO: Well with respect I don't think my friend gets another turn.

PN245

THE SENIOR DEPUTY PRESIDENT: THE DEPUTY PRESIDENT: No, but I thought he might have something to say and it might be of assistance to me so I'm going to hear him.

PN246

MR REITANO: If it please your Honour.

PN247

MR PARRY: your Honour with regards to logistics, that matter has to be determined on the material before you in respect of that application - the two affidavits you have. With regard to the contractor's matter your Honour, this is an important matter because my learned friend makes colourful submissions about ancient history and asserts from the Bar table that some how the claims in respect of contractors have been retracted and we can - that assertion we say, isn't

consistent with the evidence. There was claim that was maintained the abolition contracting out up until December 2008 and that's clear from the evidence of Ms Walsh at paragraphs 59 and 62. There was a claim made in respect of contractors in December which we say again was not permitted on High Court and Federal Court tests and paragraph 74(e) of the affidavit of Ms Walsh refers to a conversation between Mr Husic and Mr McDonald on 18 June 2009, some three months ago, where Mr Husic told Mr McDonald that the CEPU would be talking to its members about the following points of difference between the parties and your Honour will see (e) refers to contractors. Now, there can hardly be a difference if there is not a claim.

PN248

THE SENIOR DEPUTY PRESIDENT: Yes, I haven't had a chance as clearly as you have Mr Parry or Mr Reitano to look through all of the material but I think what he put was that in the earlier correspondence in November 2008 that claim as to contractors had been altered to a claim for it to be included as was permissible or some other wording like that in the correspondence.

PN249

MR PARRY: Yes there was a letter - - -

PN250

THE SENIOR DEPUTY PRESIDENT: He said that is the retraction.

PN251

MR PARRY: Right, well can we say with regard to that, there is a letter in August which speaks of contractors to the extent permitted but in December there is still reference by the union to the deed and there is reference by the union to what it wants in respect of contractors which is exactly the Westfarmers point that we raise, so in actual fact what the union were asking for in December was we would say, either the deed or the modified claim they raised in December and on either we say the High Court test would say they're not permitted so he says it all amounts to a retraction of the claim from the Bar table. We simply say the easiest thing Mr Reitano could have done with Mr Husic here is to say on instructions that the claims regarding contractors are retractable.

PN252

He doesn't do that and we say that's rather telling and we say that has to be decided now on the evidence before your Honour, which is as we say, fairly clearly there is a claim in respect of contractors. We have to work out what it is. To find out what it is, we go back to December and so if your Honour pleases, we say there is still a claim. It hasn't been retracted and on analysis that claim involves non permitted matters. Finally your Honour there's reference to item 18 and my learned friend says it's a complete answer in the transitional provisions and we say that item 18 is not a complete answer because it's not a deeming provision. The draftsman could have easily have made the previous conduct, a conduct which was deemed to be that of seeking an agreement under the Fair Work Act. It did not do that. Rather, it said, conduct can be taken into account. Now that conduct could have included meetings. Could have included other conduct, but there still remains the issue of whether the Commission - sorry, Fair Work Australia can be satisfied - two nil - can be satisfied regarding whether there

has been an attempt to reach an agreement under this Act. If your Honour pleases.

PN253

THE SENIOR DEPUTY PRESIDENT: Mr Parry, just to ensure that I have your submission exact before I reserve my decisions this afternoon, you don't say that the cases which you've given me copies of, go so far as to say that the fact that there is an impermissible matter being sought in addition to other matters, is by itself enough to make the bargaining not genuine. In all of the cases so far as I'm aware, they say it's a persuasive matter, even highly persuasive, but not itself determining.

PN254

MR PARRY: No, we would put it substantive - if the union is pursuing as a substantive matter a matter which cannot form part of an agreement then that would on the authorities make the bargaining not genuine.

PN255

THE SENIOR DEPUTY PRESIDENT: Right thank you.

PN256

MR PARRY: If your Honour pleases.

PN257

THE SENIOR DEPUTY PRESIDENT: I reserve my decision.

**<ADJOURNED ACCORDINGLY**

**[4.04PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #AUSTRALIA POST 1 STATUTORY DECLARATION OF  
MS WALSH IN 10457 .....PN147**

**EXHIBIT #AUSTRALIA POST 1 STATUTORY DECLARATION OF  
MISS SCOTT-BROWN IN APPLICATION 10458.....PN147**