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TRANSCRIPT OF PROCEEDINGS

O/N 1017

TASMANIAN INDUSTRIAL COMMISSION

COMMISSIONER T.J. ABEY

T No 11513 of 2004

T No 11540 of 2004

HENTY GOLD MINE ENTERPRISE AWARD

**Application pursuant to the provisions of
section 23(2)(b) of the Industrial Relations Act 1984
by the Construction, Forestry, Mining and Energy
Union, Tasmanian Branch to make the above award**

HENTY GOLD LIMITED ENTERPRISE AGREEMENT 2004

**Application pursuant to the provisions of
section 55(3) of the Industrial Relations Act 1984
by the Australian Workers Union, Tasmania Branch
and Henty Gold Limited for approval of the
above agreement**

HOBART

10.00 AM, FRIDAY, 6 AUGUST 2004

Continued from 5.8.04

HEARING COMMENCED

[10.05am]

PN4146

THE COMMISSIONER: Yes, good morning. Mr Flanagan?

PN4147

MR FLANAGAN: Yes, Commissioner?

PN4148

THE COMMISSIONER: I am in your hands.

PN4149

MR FLANAGAN: Thank you. If I can call Mr Bill Lowe?

PN4150

THE COMMISSIONER: Yes.

<WILLIAM LOWE, SWORN

[10.06am]

<EXAMINATION-IN-CHIEF BY MR FLANAGAN

PN4151

THE COMMISSIONER: Yes, Mr Flanagan?

PN4152

MR FLANAGAN: Thank you.

PN4153

Mr Lowe, are you familiar with an organisation known as the Australian Workers' Union?---I am.

PN4154

Right. Can you tell me if you have been a member of that organisation?---I've been a member of the Australian Workers' Union for 35 years.

PN4155

Have you ever been an official of the Australian Workers' Union?---I was an official of the Australian Workers' Union from 1983 until 1995.

PN4156

So what was that position as an official? Was it an elected organiser? Any officer bearer's positions?---Yes, I was on the branch committee, full-time organiser, and then branch president for some six years.

PN4157

So when were you branch president?---'91 until '96. Start of '96.

PN4158

And when were you an organiser?---From '87 until '96.

PN4159

Right. So can you tell me what your responsibilities were for the AWU as an organiser?---Mainly construction within the Hydro when they were building the dams on the West Coast and the mining industry. Also I had a fairly large area in relation to the agricultural department, butter, cheese, dairy.

PN4160

So geographically what was your base?---Well, I was based in Burnie but the area that I covered was from Mount Arrowsmith right across to Legerwood, Scottsdale, on the North West Coast - on the North Coast - West Coast.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4161

So the north - well, the West Coast - straight North West would that be a - - -?---No, it would be the west and the north.

PN4162

Okay?---Yes.

PN4163

All right. So you have indicated that part of the industries which you represented were mines. Can you tell us what mines were in place at the time that you were an organiser? Metalliferous mines?---Metalliferous was - if I can start on the East Coast - it was the anchor gold.

PN4164

Which one?---The anchor - the anchor mine. Then we went across to the Mersey tin mine up in behind Gowrie Park.

PN4165

Right?---There was the Kara mine at the back of Burnie.

PN4166

Was is the name of that mine?---Kara.

PN4167

Kara?---Kara tin - tungsten. It changes its name on a fairly regular basis. Port Latta, Rosebery, Renison, Mount Lyell.

PN4168

And when you refer to Mount Lyell that is the copper mine at Queenstown?---Yes, I'm not too sure of the name of it now.

PN4169

No, that is all right, we want to know about what its name was when you were the organiser?---Yes.

PN4170

We can start with the anchor gold mine. Can you tell me what sort of membership the AWU had at that site?---We had full membership there. It was only a small mine. It was just some tailings type support and an underground four-wheeled operation.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4171

Right?---We used driller machines and boggers.

PN4172

I was going to say you had bogger operators, drilling machines underground. What did you have on the surface?---Some guys that operated the flotation. It was only minor flotation because again it's a small - was a small operation. It was probably 12 people. Crushers, tables, separators, and that's about it.

PN4173

Okay. Were there any FEDFA members at that site?---No.

PN4174

So if we can go to the Mersey tin mine. Can you tell me what the presence of the AWU was at the Mersey tin mine?---We were full membership there. Everything was a member of the AWU there.

PN4175

Was there any FEDFA?---No.

PN4176

If we can go to the Kara tin mine?---That was approximately - it floated from 16 to 28 people and that was AWU people only.

PN4177

Only AWU?---Yes.

PN4178

No FEDFA?---No.

PN4179

If we can go to Port Latta. Can you tell us what Port Latta was?---Port Latta was a smelting section that was the bottom end of Savage River mines. And we had something like 45 to 50 members there. It was a little bit over that but a fairly nasty situation developed when half a dozen guys on the ship loading facility joined up with the FEDFA.

PN4180

Why was it nasty?---Well, it was where there was an agreed set of rules and systems that were carried out where people could swap and change between jobs when - if someone was off crook or there was a heavy workload and things like that, they could change over.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4181

And at that time, the ship loaders - if I can call them that - - -?---Were AWU.

PN4182

Were AWU?---Yes.

PN4183

But then they joined the FEDFA?---Yes.

PN4184

So in joining the FEDFA did that impact on the capacity of the employees to swap?---No, they stopped, they didn't do anything and all they did was ship loaders.

PN4185

So the effect of that was that because they were FEDFA ship loaders, AWU people couldn't participate in that function. Is that what you are saying?---Well, they weren't supposed to, but it was a fairly - yes, it became fairly ordinary because some of the guys were accepted and some of them weren't. Yes, it got a little bit out of control.

PN4186

Okay. You were also the organiser for Rosebery?---Yes.

PN4187

Can you tell me what union presence was at Rosebery?---Well, in the initial stages, it was about 500 AWU members. Probably, 40 FEDFA. But as the mine got lower, the jobs decreased fairly effectively. Initially, it was something like - it dropped to 370 of the AWU, and maybe 20 in the FEDFA.

PN4188

Were the AMWU or the ETU at Rosebery?---Yes, they had a fairly large group of people. But in a lot of cases, because the age of the trades assistants that worked within the amalgamated metalworkers' section, they got rid of the - that's probably not fair comment - they decided that they could do the work without trades assistants.

PN4189

Who is they?---The metal workers.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4190

Right?---So the AWU took on board over a period of time, the trades assistants into the mining and into the metalliferous side of the mine. It was mainly because it was a - young lads and that from around the town. It was a social thing.

PN4191

And what was the situation at Renison? What was the presence of the AWU there?---It was total membership at Renison for a long period of time.

PN4192

So there was no FEDFA?---No, there was a situation that developed itself in the early '90s where the FEDFA were trying to get some representation in the mining industry and - - -

PN4193

But prior to that situation, it was all AWU?---Always AWU.

PN4194

Okay. And what was the situation at Mount Lyell?---There was - I think from memory - there was only one or two FEDFA guys and they operated the winch.

PN4195

Okay. So the AWU had the underground mining work force?---Underground and metalliferous mining - metallurgical mining.

PN4196

Did they have the surface?---Surface - everything on the surface.

PN4197

The mill?---The mill, yes.

PN4198

And you had FEDFA winder drivers, did you?---Yes.

PN4199

But that was the only occupation?---Yes.

PN4200

Okay. So you have said that there were FEDFA people at Rosebery. What were the occupations that the FEDFA performed at Rosebery?---They operated the winch - the big coby winch - that carted the guys up and down the hole. And then there was the locomotive drivers.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4201

And that was it?---Yes, maybe towards the end of the FEDFA positions there because of the job changes, there was probably only 10 - maybe 10.

PN4202

Okay. Now, you have referred to Port Latta as being the back end of the Savage River mines. Can you tell me about the presence of the AWU at Savage River mines?---Well, the AWU had no presence at the Port Latta mine - at the Savage River mine - in the mill. There was some deal done in the '60s between some politicians and some union officials to allow the FEDFA to have some credibility within that part of the State. Do you want names and addresses?

PN4203

No?---No, okay.

PN4204

That is okay. Mr Reece is not around to defend himself any more, Mr Lowe?---I don't have to tell Mr FitzGerald, he will probably know them.

PN4205

So there was an arrangement entered into?---Yes.

PN4206

And it was recognised that the FEDFA would have a role at Savage River mines?---Yes.

PN4207

Yes. Was the FEDFA the only union at Savage River mines?---No, they weren't. The ETU, metalworkers, and the Transport Workers' Union.

PN4208

Right. Okay. So how would you describe the relationship between the FEDFA and the AWU in the mining industry at the time that you were an organiser?---Fairly hostile. Could I use an example?

**** WILLIAM LOWE

XN MR FLANAGAN

PN4209

Yes?---We were having a meeting with Savage River mines and when we organised the meeting we believed it was going to be in the Civic Centre in Burnie. That meeting was cancelled for a number of reasons that I wasn't aware of. I found out later, it was to keep the AWU away from the meeting and the meeting was held at Savage River. We objected to the meeting at Savage River and the company told us there wasn't a worry about it because if we went on site - town site - at Savage River, the FEDFA would have an automatic 24 hour stop work.

PN4210

Why was that?---Because they believed that the AWU was only ever out to pinch the membership at Savage River mines.

PN4211

So the way to avert that development was employees embarking on a stoppage if the AWU went on site?---Yes, we came to an agreement that we'd have the meeting in the church because everyone stays honest in church.

PN4212

Okay. Now, during your time as an organiser, did the competition as it is or was between the AWU and the FEDFA ever lead to any altercations between AWU officials and FEDFA officials?---It did. On many occasions between officials, between members, there was dust ups, wrestling matches, insults, a whole range of things used to happen, with a fair amount of animosity not only between the officials but the members as well. They - I don't - I never encouraged violence between members and the officials but it used to happen.

PN4213

Now, earlier in your evidence, you spoke about a situation at Renison where the FEDFA attempted to encroach upon the AWU. Can you tell us about that?---Yes. That was at about the time that the FEDFA were probably in their death throws of that organisation on the West Coast, because the mining industry was really winding back and because of the FEDFA's stand to have one man and one job, they wouldn't go through the system. They operated their locos or their winches, they wouldn't do anything else.

PN4214

So they wouldn't multi-skill?---Wouldn't multi-skill at all, so it became harder on them to stay in the industry and they were almost decimated in the late 80s and early 90s.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4215

Can we talk about that decimation and we will come back to Renison? You said that they were at Rosebery?---Yes.

PN4216

Were they decimated at Rosebery during the late 80s, early 90s?---They were cut back substantially but there was still a whole host of guys that stayed there, somewhere in the vicinity of 10 to 15 maybe. And we had a council of war with the - Jim Challis - the current - the State Secretary then, and Brenton Best, the organiser. That we wanted to maintain those guys on site and we had a meeting at Rosebery and they accepted to let them guys join the AWU for that period of time. It was from three months to two years and there'd have been no FEDFA guys left on site.

PN4217

So there was a transitional arrangement?---Yes.

PN4218

For the FEDFA to vacate the - - -?---Yes, yes, we said we'll sign them up now and then when their jobs are finished after the two year period, there will no need to get rid of them, they'll be poked in and around in the mill, underground, and any other spot that we could find them.

PN4219

So the agreement was for the FEDFA to vacate the field at Rosebery?---Yes.

PN4220

Did you have any sort of arrangements like that with Mount Lyell?---No, it just happened. It just happened. Those two guys stayed there, they'd done that job, and as far as I know, they're still there. Those two guys that snatch the winch up and down the hole.

PN4221

Okay. So going back to Renison. You have said that the FEDFA effectively vanished from the industry, except by the sounds of it, the ship loaders at Port Latta and people at Savage River mines?---Yes.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4222

You said that they had commenced encroaching on AWU membership. Can you tell us what happened there?---Yes, they - one of the guys that was working there - and he was a fairly vocal, fairly good - well, not fairly good - a very good job delegate with the AWU - had actually left the job. He'd retired for whatever reason, he got out of the industry, stayed on site. And the FEDFA offered him a position as an organiser if he could turn the - whatever he could - out of the AWU into the FEDFA on site.

PN4223

Now, the person you are talking about, was that person an AWU delegate when they were employed at the site?---Yes.

PN4224

But that person had - - -?---Well, he took that - yes, he'd ceased his employment there at that stage.

PN4225

Ceased his employment?---He was still a financial member of the AWU but he wasn't a - - -

PN4226

On site?---He wasn't on site, yes.

PN4227

And he is no longer the rep?---But he's no longer a rep.

PN4228

Was he the senior rep?---He was the senior rep, yes, for a long time.

PN4229

Okay. For a long time?---Yes.

PN4230

He would have had the confidence of the men, wouldn't he?---Yes.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4231

Okay. So can you just clarify what the approach was of the FEDFA to that person?---The approach was that the Federal secretary - the name escapes me, I'm sorry, at the moment - from the FEDFA came to town. He had a meeting with them. They called me up and said would I be able to be in Zeehan and have a meeting. And said yes, fine, so I went down. And I had a packed crowd when I got to the meeting centre and normally you've got to wait for the sheep to turn up, but they were all there and we had the meeting, and I was asked some questions and I answered the questions and then away I went. And they stayed there. So when I was leaving, I went up town and got some fuel and a couple of the guys pulled me up and said, "Well, look, you know, you're being set up." And I said, "Why?" And he said well, we have had two meetings this morning - three meetings this morning - one with a guy from Sydney, one with you, and then another guy from Sydney - the same guy from Sydney met after you left. And from what I could gather from those comments and after was that there was a - the FEDFA was trying to take over all the AWU membership at Renison Bell.

PN4232

And they had enlisted the former - - -?---The former - - -

PN4233

AWU delegate?---AWU delegate to try and get to that. And the position was that if he could get them to swing over, he was given an employment - job. I believe that went over really well with the FEDFA organisers in the State at the time.

PN4234

So how did the AWU respond to that development?---We didn't do anything much at all really, other than get back and talk to the people. Explain situations to

them, that they were obviously were given the wrong story on one or two occasions and it became a non-event.

PN4235

Did the AWU initiate any proceedings for a demarcation order, for example?---There was at the time a fairly large Federal matter that took part in the room next door. I was sort of part of that but it was an on-running thing and I think at the end of the day, some illness overtook me just after that and I left the organisation. And I believe that we were - it was proven that we weren't kosher - we've never been kosher because we're union officials. But what we said was the truth, the whole truth and nothing but the truth, and everything was proven in our favour.

**** WILLIAM LOWE

XN MR FLANAGAN

PN4236

Okay. So when the FEDFA sought to enrol AWU members at Renison, you didn't seek to enrol FEDFA members elsewhere in retaliation?---Yes, I went down to Savage River mines and signed up all the guys in the mill down there.

PN4237

So this is the work force that was going to go on strike if you went on the site?---Yes.

PN4238

How is that you were now able to sign them up in retaliation?---Because they'd never been offered the assistance that I was supposed to have not to give to the guys at Renison.

PN4239

Can you tell me prior to being an official of the AWU, what was your job?---I was a miner.

PN4240

Where at?---Rosebery.

PN4241

How long were you at Rosebery for?---Thirteen years.

PN4242

No further questions, Commissioner.

PN4243

THE COMMISSIONER: Mr Bukarica?

<EXAMINATION BY MR BUKARICA

[10.31am]

PN4244

MR BUKARICA: Just one or two questions, Mr Lowe. Just in relation to the last issue about employees in the mill that you signed up at Savage River?---Yes.

PN4245

Do I understand that you are saying that the members there were dissatisfied with their service they would have seen from the FEDFA?---Yes.

**** WILLIAM LOWE

XN MR BUKARICA

PN4246

And accordingly they were attracted to the option of being provided with better service. Is that - - -?---From the AWU.

PN4247

Yes?---Yes.

PN4248

So from your perspective as a unionist, you understand the position where workers who feel like they are not being serviced or looked after would want to seek that out. Do you accept that?---I do.

PN4249

And you would accept the position, wouldn't you, that if you had a non-union site and a group of workers approached you looking for assistance as a unionist, you would go and try to help them?---Non-unions or non-unionists?

PN4250

Non-unionists?---Non-unionists?

PN4251

Yes, yes?---No, not particularly. Not particularly. I'd certainly want to find out - because of the situation that developed at Savage River mines there was an agreement between the FEDFA and the AWU within the mining industry that was - where I approached our union after a meeting with Bill Kelty where we agreed - Mike Gray and myself - agreed to sit in at a meeting chaired by Bill Kelty to overcome the problems that we were having within the mining industry. Now, I turned up to that meeting. I put our position forward. Kelty asked what would it take to fix it and I told him that in future we would always talk to one another. It was no stabbing one another in the back and sneaking round the back door and that was agreed by the FEDFA and by the AWU. And I always dealt with that situation after. And if someone had got through the system, which is possible, especially in places that are isolated and that haven't got township tie-ups with it, especially places like Henty now, Savage River now, you really don't know who's where and who's doing what and mining companies do tend to play both ends against the middle. They don't help until it hurts them and then they'll quickly jump in and try and help someone. But at the end of the day, we always try to negotiate between two officials prior to any sort of backfire.

**** WILLIAM LOWE

XN MR BUKARICA

PN4252

Yes. So a principled approach?---Yes.

PN4253

And in terms of the principle approach, you say back door deals and stabbing each other in the back, that is not on, is it?---Well, supposedly, it's not.

PN4254

And a moment ago you said - and correct me if I am wrong - that in the mining industry employers often play one union off the other. Is that what you - is that your - - -?---I'm talking about when I was in the mining - I haven't been there for nine years.

PN4255

Yes?---But in them stages - those days - that's what used to happen. The - when it got to push and shove, they got particularly nervous, but in the initial stages, they didn't want to know. It was too hard, they'd bolt. And quite often - I don't know about the FEDFA - but I was left dragging them in and saying well, look, this has got to be sorted out, and sort it out like that.

PN4256

Now, getting back to the - what I was putting to you earlier is really - it is the hypothetical position?---Are you trying to suggest that there is some sort of sweetheart deal between someone, are you?

PN4257

No, no, no, I didn't ask you that, did I?---It's the way you play with words.

PN4258

What I was trying to put to you is this, that - the question was earlier was if you are - as a unionist - you get approached by a bunch of non-unionists, they want to join the union, get organised, and do something collectively, your natural response would be as a unionist would be to help those guys?---No.

PN4259

No. All right?---The first thing I'd do, would ring up the appropriate union.

PN4260

Yes?---The same as the - that I would - can see was the appropriate union.

**** WILLIAM LOWE

XN MR BUKARICA

PN4261

That you see as the appropriate union?---Like, if it was a group of electricians. Say, well, look, fellas in that industry, I could probably cover you but there is an appropriate group of people that look after you on a consistent basis, talk to them. If you're not happy with them, come and see me.

PN4262

Okay. What about if the appropriate union by way of constitutional coverage was the FEDFA?---Still would have difficulty with their past background and that's a personal comment against personal people.

PN4263

Yes, you are a loyal AWU man?---I'm a life member of the AWU.

PN4264

But you mentioned earlier that the AWU - you recruited a bunch of guys in the mill at Savage River?---It was tit for tat.

PN4265

Yes, tit for tat. So presumably the FEDFA had constitutional coverage that covered those guys?---At that stage, I'm not sure, because as I said it was a meeting - it was an agreement between Eric Reece and the secretary of the FEDFA and the secretary of the AWU and that was an early '60s problem and I don't step away from that because everyone knows about it and that's what happened, so - - -

PN4266

All right. But in terms of Savage River at least the CFMEU had the mill operators before you recruited them? That is right?---Yes.

PN4267

And other classifications on site, say, dozer operators?---No, no, FEDFA.

PN4268

Yes. What classifications did the FEDFA cover as far as you can recollect?---The crane, the loaders, the dozers, and the mill. Basically, that type - that side of the - and the Transport Workers' Union cab.

**** WILLIAM LOWE

XN MR BUKARICA

PN4269

The trucks?---The trucks.

PN4270

Yes. And metalworkers - the tradesmen?---Yes, yes, ETU.

PN4271

Right. And so I don't see you saying there was a deal done about coverage at the mine in the '60s. But that coverage must have been based on some union rules?---No, it was - as I said - my knowledge of the '60s - the early '60s - was to get someone in as Prime Minister - Premier of the State - deals were done.

PN4272

Okay. So the FEDFA was responsible for getting Mr Reece up, was it - were they? They wouldn't claim that?---You don't really understand the political side of the Labor Party then, do you?

PN4273

No, I don't, no, I don't. Not in Tasmania, I don't?---No, okay, then, I will let you off on that one.

PN4274

I have got to plead ignorance there. Okay, that is all. If the Commission pleases.

PN4275

THE COMMISSIONER: Thank you, Mr Bukarica. Mr FitzGerald?

<CROSS-EXAMINATION BY MR FITZGERALD

[10.40am]

PN4276

MR FITZGERALD: Thanks, Mr Lowe, it is, yes, it is interesting to have a bit of an historical perspective from you. I think, you know, those round the bar table, including the good Commissioner, would certainly have some memories of that, maybe not always good memories.

PN4277

Mr Lowe, you said you had dealings with Mr Best of the CFMEU, now the MHA?---Yes.

**** WILLIAM LOWE

XXN MR FITZGERALD

PN4278

He said in his evidence of you that he regarded you well. Would you share the same feelings?---Eventually, I did, yes.

PN4279

Right. What were the - you know, you are alluding to something different. What about initially?---We came to the arrangement at Rosebery and then he wandered off and tried to sign up some members at another mine site.

PN4280

Right. So was there any personal altercation you had with Mr Best at any stage?---Several occasions we come together, yes.

PN4281

Right. Now, can you provide some more details?

PN4282

MR BUKARICA: Objection. Objection, Mr Commissioner. I think the basic position in cross-examination is that we had Mr Best giving evidence a couple of weeks ago. He accepted there was an altercation, but he was not pressed beyond that. And he wasn't - it wasn't - there were no propositions put to him about what occurred or the reasons or whys or wherefores. It would have been appropriate if this sort of line of questioning is going to be pursued that Mr Best was first given the opportunity of addressing those issues. I mean, it is a basic issue of fairness.

PN4283

MR FLANAGAN: Commissioner, Mr Lowe is on oath, so he is required to tell the truth. Secondly, one of the key tests which is required to be met in the application for an award is in section 63(10)(c)(III), which is the orderly conduct of industrial relations in Tasmania. This question goes to the effect of competition on the orderly conduct of industrial relations in Tasmania.

PN4284

THE COMMISSIONER: Yes, well, I don't think there is any argument about that point. Mr Bukarica's point is that Mr Best conceded that there was an altercation with Mr Lowe, but he wasn't pressed to go into the details of it and now Mr FitzGerald is pressing for the details. It is a very fine point, Mr Bukarica. I am inclined to - given that there was evidence of an altercation - I am inclined to allow Mr FitzGerald to continue. If I consider he is going beyond the bounds of fairness, which might compromise the evidence of Mr Best, then we will stop. But I will allow the question and see how far we get.

**** WILLIAM LOWE

XXN MR FITZGERALD

PN4285

MR FITZGERALD: Thanks, Commissioner.

PN4286

Mr Lowe, can you provide some details about that altercation - or altercations?---We was on the Hellyer mine site.

PN4287

Yes?---And I believed rightly or wrongly Mr Best was on a mine site that had never covered FEDFA and he was in my opinion at the time trying to become involved with that mine site.

PN4288

Okay?---Soliciting membership.

PN4289

Right. Can I just stop you there? When did the Hellyer mine site get under way, approximately, can you recall?---I actually overlooked the - because there was a change in the period of time of three mine sites, it was the Cleveland mine turned into the Kew River mine turned into the Hellyer mine.

PN4290

Right?---And that - I lost them in my train of thought. But that became an issue in the - there was no FEDFA at the Cleveland tin mine. That closed down. Everyone went to the Kew River mine. That closed down. And that was just an AWU site, and then the big mine was starting up at the Hellyer mine just up the road, and that was again rightly or wrongly at the time, the AWU thought that we were just bringing members through from one mine to another mine to another - it was all the same people, all the same type of work. And Brenton I believed was doing the wrong thing and we got into a situation where we came together.

PN4291

What do you mean by that?---I whacked him.

PN4292

What was his response?---Threw - part one back - and we realised that we weren't doing the right thing and we stopped.

**** WILLIAM LOWE

XXN MR FITZGERALD

PN4293

Okay. So did he continue to press the issue of membership at the Henty mine?---Not after that, no.

PN4294

It had some impact then?---We actually spoke with Jim Challis after that.

PN4295

Right?---And said look, you know - - -

PN4296

So Jim Challis was the secretary of the FEDFA?---FEDFA at the time, I'm sorry, yes.

PN4297

And what was Mr Challis' response?---He - well, he didn't give a response other than send a letter to the State Secretary of the AWU and said it wasn't a - something for organisers to do.

PN4298

Right?---And that was the end. It just died a natural death.

PN4299

So the CFMEU effectively withdrew any further moves on membership in the Henty mine?---Yes.

PN4300

Okay. At that time, the Henty mine - and if you can't recall the date, I can understand that?---No, mate, no, not off - - -

PN4301

I can certainly recall when it closed. But you - would you have regarded that as a green field site - a new site?---Yes.

PN4302

Right?---Yes.

**** WILLIAM LOWE

XXN MR FITZGERALD

PN4303

And who would you have regarded as the appropriate unions to have coverage of that site?---Rightly or wrongly, I assumed it would be the AWU because the same people were coming from the Cleveland tin mine, 15 kilometres away. They had been there for 20 years. They went to the Kew River mine and there was never any doubt that it was an AWU site.

PN4304

Yes?---And then they went five kilometres down the hill and started to develop a new mine down there. And it was the same company, it was - we knew it was going to be the same people. There was going to be extra people there, of course, because it was a larger operation.

PN4305

Yes?---But there was never any doubt by anyone at any time that it was going to be anything other than an AWU site.

PN4306

Did Mr Best - given that scenario you just painted - did Mr Best give any justification why he was trying to seek members at that site?---Just membership.

PN4307

Right. And that would be the membership in what sort of categories or classifications?---Well, he didn't - he was just saying he had a right there. He wanted loader drivers, he wanted truck drivers, and operators in the mill.

PN4308

Right. So those positions - - -?---Both.

PN4309

Which would be covered by AWU normally?---Yes.

PN4310

Okay?---Yes.

PN4311

You mentioned the Rosebery mine and can you recall when the FED and FA amalgamated to form the CFMEU?---Yes, after '90.

**** WILLIAM LOWE

XXN MR FITZGERALD

PN4312

Okay. Early '90s?---Yes.

PN4313

Okay?---Yes.

PN4314

Can you recall the CFMEU withdrawing their interests from the Rosebery award?---No.

PN4315

Right?---I wasn't part of it.

PN4316

No, but you can recall - I think you mentioned some proceedings in the Federal Court next door to here?---Yes.

PN4317

Were they demarcation proceedings you were talking about?---Yes.

PN4318

Right?---Yes.

PN4319

And can you recall the result of those demarcation proceedings? Was it the - the CFMEU were effectively demarked out of the mining industry in Tasmania?---Mm hm.

PN4320

That is your okay?---Yes.

PN4321

Would you agree with me that it naturally follows that the reason why they withdrew an interest out of the Rosebery award was because of that demarcation decision?---Yes, because it was prior to that the arrangements that we'd entered into on a handshake was prior to that. It was sort of - and they knew what was happening, that there was nothing left.

PN4322

Okay. So when you say there is nothing left, do you mean your membership had declined?---Yes, most of them had got in. Those that had left, had left. Those that had stayed, had over a period of a couple of years had eased into pipe fitting jobs.

PN4323

Okay?---Driving the vehicles underground and things like that, that were - where they joined the AWU to - well, in turn to stop the arguments that would've happened from the AWU guys if they'd have, say, turned up and someone was driving a truck or a jumbo with an FEDFA ticket.

PN4324

Okay. So from the early '90s, did the CFMEU continue to hold membership at the Rosebery site?---To my memory, no.

PN4325

Okay. So what about those loco drivers and winder drivers, would they continue to cover those, or did they - - -?---No, they come over.

PN4326

They came over to the AWU?---Yes, yes.

PN4327

Okay. So you would agree that effectively the CFMEU had abandoned the industry - if you like - at that point?---Mm.

PN4328

All right. We won't go into the deal relating to Savage River. But at the time as an organiser with the AWU and as you have said, you know, a passionate member - a passionate organiser - did you have a knowledge of the rest of the industry in Australia, the metalliferous sector in Australia?---Yes.

PN4329

Right. Which unions covered the rest of the metalliferous sector in Australia?---AWU. The metalliferous?

PN4330

Yes?---Yes.

PN4331

Okay. Were you aware at that time, the CFMEU having any coverage in any metalliferous site?---I had been to Western Australia on a couple of occasions and there were some attempts but they weren't - - -

PN4332

Weren't successful?---Weren't successful.

PN4333

Okay. Would you agree with me that because of this political deal - if I can describe it as that - that the - sorry, the Savage River site was an anomaly within

the context of the AWU coverage throughout the rest of Australia?---Yes, a huge anomaly because it was one of the very, very few that - there wasn't any in Tassie.

PN4334

Right?---And we all knew what it was for.

PN4335

Okay. Were you aware of the circumstances of Australian Bulk Minerals re-opening the mine in about 1997?---No.

PN4336

Right?---No, had very little input with that.

PN4337

You don't know what the arrangements are as a result of that - the union arrangements at Savage River and Port Latta?---No, I'm not au fait of the arrangements at all.

PN4338

Okay. If I put to you that the AWU were now the sole union with the ABM organisation, would you agree with me that that is effectively correcting the anomaly which was created as a result of this political deal?---It would've saved a whole lot of heartache and angst over a long period of time.

PN4339

Was the Cornwall coal mine operating when you were an organiser of the AWU?---It was.

**** WILLIAM LOWE

XXN MR FITZGERALD

PN4340

Right. And what was the coverage - the union coverage - of that site then?---FEDFA.

PN4341

Okay. Did you have any approaches by employees to be a member of the AWU at that site?---I did.

PN4342

Right. And what was your response to that?---I told them no, I wasn't prepared to do that.

PN4343

Right. Why is that?---For the same - well, it wasn't long after the Bill Kelty arrangement where we'd come to - that we wouldn't go around sniping one another.

PN4344

Yes?---And we didn't take it any further.

PN4345

Okay. So did you refer those potential members back to the CFMEU? Is that what you are saying?---I didn't mention the names but I mentioned to the bloke

that was - looked after the - may very well still, I don't know. Len Miles. I've known Len all my life.

PN4346

Right?---I mentioned it to him that - and it wasn't anything to do with the AWU and the FEDFA, it was just that - it was a friendship thing that I said well, look, you know, perhaps a phone call to overcome these problems might be to your benefit. And I believe to this day, he did that and fixed it.

PN4347

Okay. All right. Were there any other instances where employees approached you but you felt that another union were - was a more appropriate union to join?---Yes.

PN4348

Right?---Yes.

**** WILLIAM LOWE

XXN MR FITZGERALD

PN4349

Okay. Can give me any examples of those, Mr Lowe?---Yes, there was the UMT factory at Wynyard.

PN4350

What happened there? What were the - who were the unions involved?---Metalworkers.

PN4351

Right?---They wanted to join the AWU. I told them that wasn't appropriate.

PN4352

Okay. Any other examples?---The - yes, there was - there was several but some were - that took a little bit of time.

PN4353

Right?---Like a meeting and two or three phone calls. Some were just a phone call where people would - the PKIU.

PN4354

Right?---At APPM. During the dispute at the APPM in the early '90s, the PKIU were considering coming over to the AWU and it wasn't a real good timing, but we weren't interested in that any way and the - some of the FEDFA guys were then considering coming over to the AWU at that time as well.

PN4355

Right. Okay. And just - and so effectively you dissuaded them from doing that and stuck with the PKIU, did you?---Dissuade, it's probably a real strong word in some of the cases, yes. But I certainly suggested that they probably ring a particular person - or a particular number.

PN4356

Okay. You referred to the Federal demarcation decision. Would you agree with me that in your time as - and when you completed your turn in - what year was it - '95 - that the CFMEU effectively complied with that demarcation order?---Mm.

PN4357

Right. So there were no attempts to poach members or join other sites in the mining industry in Tasmania?---If I can be a little blase, McLean and Wakefield were certainly a breath of fresh air after Gray, Lowe, and Best.

**** WILLIAM LOWE

XXN MR FITZGERALD

PN4358

Can you elaborate on that a little, please?---Yes, well, we - they were - seemed to me - McLean - I became fairly involved with him over a period of time and I liked the way he operated.

PN4359

Right?---And I worked with him fairly well and I believe Wakefield and him get on fairly well now too. I don't know. But at the time, while I was there, there was certainly no love lost between Gray and Lowe. There was none lost between Best and Lowe but I vote for him now, but - so Savage River mines has come back to bite me.

PN4360

So is it a question of available options, Mr Lowe? I will leave it at that. Thank you, Mr Lowe.

PN4361

THE COMMISSIONER: Mr Flanagan, can you top that? Thank you, Mr Lowe.

<THE WITNESS WITHDREW

[10.59am]

PN4362

THE COMMISSIONER: Mr Bukarica, did you - - -

PN4363

MR BUKARICA: No, if the Commission pleases, I think that is the evidence in the matter.

PN4364

THE COMMISSIONER: Yes, it is.

PN4365

MR BUKARICA: And I think that in terms of batting order, it might be appropriate if I commence.

PN4366

THE COMMISSIONER: Yes.

PN4367

MR BUKARICA: There is a house-keeping issue or a preliminary issue that I would like to deal with first. If the Commission pleases.

PN4368

THE COMMISSIONER: Yes.

PN4369

MR BUKARICA: There has been evidence over the last few days concerning the precise level of CFMEU membership at the Henty gold operations and contentions. In order to put that issue to bed, what the CFMEU proposes to do with the leave of the Commission is to hand up copies of the application forms which were signed by our members on a private and confidential basis for the Commission's eyes only. If there is no objection, I propose to do that.

PN4370

THE COMMISSIONER: Is there any objection to that course? It is a course - I should say it is a course that the Commission has adopted in the past.

PN4371

MR FITZGERALD: Yes.

PN4372

THE COMMISSIONER: In dealing award interest matters.

PN4373

MR FITZGERALD: The only issue I have, Commissioner, is that I understand that application form but it doesn't go - there is no proof in terms of - current financial status. We have already heard from Mr Hinds where he was asserting he had members at the Beaconsfield gold mine that when I pressed him on that, in fact, they weren't members at all. They were simply paper members - if I can call them that - because they weren't financial, so I have some concerns in that regard.

PN4374

THE COMMISSIONER: Mr Flanagan?

PN4375

MR FLANAGAN: I understand that the intention is to demonstrate bona fides of the position I don't think there is actually any dispute that there are members of the CFMEU on site. I concede that there are at least nine that are in the mill and at least one that was underground. So on that basis then, I don't have a problem with the list being provided to the Commission. But in the absence of the company and I mean, I would like them absent, I would like to test the list with one name to see if it appears on that membership list still. Only in the sense that there was a member of the CFMEU who was underground, who we have enrolled in the AWU.

PN4376

THE COMMISSIONER: You can't sort this out between yourselves?

PN4377

MR FLANAGAN: Yes, well, we might be able to. We can have a talk.

PN4378

MR BUKARICA: Perhaps we can do that over the break. If the Commission pleases.

PN4379

THE COMMISSIONER: Yes, I would have thought so.

PN4380

MR BUKARICA: All I am saying is really that we stand by the evidence that Mr Hinds has given and we are prepared to put the material before the Commission. Because there has been issues about when people joined.

PN4381

THE COMMISSIONER: Yes.

PN4382

MR BUKARICA: The precise number, etcetera. The application forms really put that to bed at least. The issue of the one member that may have gone back, we can sort that out between the AWU and ourselves, I think.

PN4383

THE COMMISSIONER: Yes. Well, I propose to have a 10 minute break now. If you can have a chat about that aspect? And we will then go to submissions, with you opening the batting, Mr Bukarica.

PN4384

MR BUKARICA: That is what I propose.

PN4385

MR FLANAGAN: Okay.

PN4386

THE COMMISSIONER: Very well, we will adjourn for 10 minutes.

SHORT ADJOURNMENT

[11.02am]

RESUMED

[11.22am]

PN4387

THE COMMISSIONER: Yes, Mr Bukarica?

PN4388

MR BUKARICA: Commissioner, I think Mr FitzGerald had something he wanted to put to you first.

PN4389

MR FITZGERALD: It was just a simple matter. Thanks, Mr Bukarica, for that. In respect to this issue, I just want to draw the attention of the Commission to the evidence of Mr Flanagan yesterday where there are in fact 20 employees engaged at the mill, that being four shifts of four, two swingers - if I can call them that - a process in the gold room and a process co-ordinator, so that makes 20, just to clarify that aspect.

PN4390

MR FLANAGAN: And moving on from that, Commissioner. The discussion between the unions is that we would like to have two minutes as it were off

record with yourself in the absence of the company to work through the CFMEU membership issue.

PN4391

THE COMMISSIONER: Yes. We will adjourn for a couple of minutes.

SHORT ADJOURNMENT

[11.23am]

RESUMED

[11.24am]

PN4392

THE COMMISSIONER: Back on record. During the brief adjournment, I have met with the two unions and I have been provided with - or I understand to be - copies of membership applications to the CFMEU. That will be on the basis for the eyes of the Commission only. There is one other point that I would just like to clarify. Mr FitzGerald, you just raised this evidence of Mr Flanagan yesterday about the number of people employed in the mill.

PN4393

MR FITZGERALD: Yes.

PN4394

THE COMMISSIONER: I would like to think that this is not contentious. Is it agreed that it is 20?

PN4395

MR FLANAGAN: Yes, there is no issue about that.

PN4396

MR BUKARICA: Yes, I have got no basis to challenge it.

PN4397

THE COMMISSIONER: No, fine, okay. Thank you. Yes, Mr Bukarica?

PN4398

MR BUKARICA: If the Commission pleases. Mr Commissioner, the most important thing I think in this matter is to define precisely what the Commission's function is and purpose is, and also to determine what it is not. And I think that is significant in view of the nature of much of the evidence that has been put before the Commission over the last couple of days but also prior to that in Ulverstone. And it appears to me that much of the evidence that has been led, particularly by the employer and the AWU, is evidence that would more properly be submitted or dealt with in a union demarcation case - a section 118A case in effect. Essentially, we say, much of the evidence goes to fundamentally irrelevant consideration, which is which union is better placed to represent workers in the metalliferous mining industry.

PN4399

That is not the nature of the test the Commission is required to make in terms of making the proposed award or indeed considering the section 55 agreement that

the AWU has put forward. We say that if the employer or the AWU wish to achieve a demarcation order - an exclusive representation order - then there is a means and a mechanism to achieve that end, a direct way to do it. And really what has occurred in these proceedings is the employer and the AWU, in our submission, have co-operated in trying to achieve by indirect means what they should really do by direct means.

PN4400

Now, there is a reason for that and as we go and talk about the nature of the Workplace Relations Act, the organisation's issue and its inter-relationship with the Tasmanian Industrial Relations Act, it can be seen that really the direct route has got problems in it for both the AWU and the employer, so that explains perhaps why the approach has been taken that it has in this matter. But in any case, we say the task or the issue that we have to address today - and this is set out in the first hearing of the matter before there was an AWU intervention - is firstly should the Commission refrain from further hearing.

PN4401

There was at least a putative application of that sort foreshadowed by Henty Gold. I think I need to address that because it is rolled up in the general discretionary question. And that refrain hearing matter - issue - relates to the entire section 118A union demarcation question. The second and more relevant, I should say, test is that concerning whether the CFMEU has an interest per se under the State Act. And our submission will be that clearly on the evidence we do have an interest and to some - the extent of that interest is maybe contentious, but we say ultimately we have shown and the rules of the organisation show that there is sufficient interest for the CFMEU to be party to or to seek an award in the nature that we seek.

PN4402

But the real question or the real rub is whether an award should be made. And here we have the issues raised squarely by the AWU and the employer in relation to section 63C - roman - 10C - I beg your pardon - relating to the orderly conduct of industrial relations in Tasmania. And in relation to that issue, we will be making submissions about what that means and what the Commission has previously - the attitude the Commission has previously adopted. But in our respectful submission much of the evidence which - or we say assertions - which go to that point by way of objecting to the CFMEU application are extremely overblown, have no basis in the current context of industrial relations in Tasmania and ultimately can't be supported. So we say they are the three tests that we have to meet. Not whether the CFMEU is the more appropriate union to represent workers in the metalliferous mining industry in Tasmania. Not whether we have a better product. The issue is do we firstly have an interest and secondly will including us in the award or seeking or making an award in the terms we seek compromise the orderly conduct of industrial relations in this State.

PN4403

So, Commissioner, I think by way of clarification we say that is an important distinction. On the one hand under a section 118A order application much of the evidence that has been bandied around or been presented concerning the respective wares of the organisation is relevant. But here we have got an

application relating to one particular mine site. The question is as a matter of equity and fairness and good conscience whether we should be granted the application we seek and secondly whether - or in addition I should say - whether in so doing there will be the outcomes that are contended by the AWU and Henty Gold.

PN4404

Now, it is important I think to address firstly the existing section 118A order, which the Commission has been taken to on numerous occasions. I am not going to dwell long on this issue because I think in the course of examination - evidence and cross-examination the contours of the order - the essential features have been fleshed out. But we say the order is significant or relevant in two respects. One - and this is an obvious issue - the order doesn't apply to Henty Gold. When the order was formulated, we submit that it was deliberately targeted at particular mine sites or operators in the metalliferous mining industry in Tasmania.

PN4405

It would have been quite simple for the Commission - or those hearing the matter - to have simply said the AWU shall have the right to the exclusion of the CFMEU to represent employees in the metalliferous mining industry in Tasmania. And indeed similar words have appeared in other section 118A demarcation orders involving both the AWU and other unions. For example, the CFMEU in the early 1990s obtained a section 118A demarcation order, which granted the CFMEU exclusive coverage of carpenters and joiners in most States of Australia to the exclusion of the AWU. And bearing in mind, that is occupational coverage rather than industry coverage, but it was an across the board order.

PN4406

So we say that had the intention been to completely cover the industry then that would have been reflected in the terms of the order. But what is also clear is that the order reflects an agreement and I refer the Commission to the 1994 decision, which is print L2471, wherein his Honour, Vice President Moore addresses the - I am sorry, Mr Commissioner, I should have before I started this said that I will be referring to my folder of authorities I handed up in Ulverstone as we go. And also I will be broadly following the outlines of CFMEU1, which is the contentions, but not exactly.

PN4407

Now, the decision of his Honour, Vice President Moore, as will be evident reading the decision, is based on an agreement negotiated under the auspices of the ACTU in which the FEDFA accepted that it was going to vacate certain mining operations and that is reflected in the order. However, the order - and I refer the Commission to in particular the last two paragraphs of the decision where there is discussion of the precise forms of the order and how broad really the order should be. And I will just quote the last two paragraphs and give the Commission my version of what it means. And the decision says:

PN4408

While there are some aspects of the written agreement -

PN4409

and referring there to the ACTU brokered agreement:

PN4410

It is suggested the orders were intended to relate only to particular mine sites and aspects ...(reads)... in the manner set out in the schedule to the decision.

PN4411

And then we look down a decision and the words that we use is the following employers in metalliferous mining in Tasmania and South Australia, and then the employers are named. Now, that should be understood in the context where the AWU was saying - as I understand the reasoning - that the exclusion should be general in respect of those companies, that is, for example, Pasminco Mining, that there should be a general exclusion of the CFMEU of any employees in those mines. That wasn't what the decision was. The decision was exclusion relating to the metalliferous mining operations of those particular companies. Now, that means of course that in our submission that any downstream processing, for example, is not covered by the terms of a section 118A order.

PN4412

THE COMMISSIONER: And that presumably would apply to all the named mine sites?

PN4413

MR BUKARICA: Yes, yes, it is metalliferous mining. Now, there certainly will be an argument about - well, from the AWU's perspective and employer no doubt - where there is processing on site and it is an integral part of the mining operations. Well, that is - I probably concede would fall within the order. But where there is another location or a distinct and quite discrete processing operation, then we say that is not covered. So in terms of the order, it doesn't remove the FEDFA coverage from the entire industry and it doesn't extend to non-direct metalliferous mining operations, in our submission.

PN4414

Now, the other significant part of our submissions concerning this matter is the context in which the section 118A orders were issued is all important. And here I am referring to the legislative context. The legislative context in the early 1990s placed a high premium on the rationalisation of union coverage and the avoidance of demarcation disputes, and no doubt for good reason, because all of us in this room are practitioners of some long standing and certainly demarcation disputes, particularly in the 1970s and '80s was a major feature of industrial relations in Australia. It appears to be less so now, or much less so. And indeed the game has moved on in a general sense. The issue nowadays is much more concerned with choice - issues of choice - in agreement making, but also issues of fundamental representative rights - if I can use that shorthand. In other words, whether unions, for example, have a right to simply exist at all.

PN4415

Now, it will be said of course that - and rightly - that the Commission is concerned with the operation of the Industrial Relations Act - the Tasmanian Act - and the Tasmanian Act has not been subject to the same sort of fundamental

change as what has occurred in relation to the Workplace Relations Act or the Commonwealth legislation. And that is true and that is why part of our application deals with an attempt - well, at least initially - of the employer to impose an industrial arrangement, which we say is not contemplated by the Industrial Relations Act.

PN4416

But it is not the end of the story to say the Commonwealth scheme has no importance or relevance, it does. Because both the AWU and the CFMEU in terms of the legal entities which exist under this Act - the Tasmanian Act - are branches of the Federal union and by virtue of the operation of - if I can find the section. There is a particular section I will take the Commissioner to shortly. In fact, I think I have marked it. Yes, section 62 - I beg your pardon - section 63(5) of the Tasmanian Act deals with the simple registration of Federal organisations in the State and the recognition prima facie of the constitutional eligibility of those Federal organisations within the State.

PN4417

So in other words there is enabling legislation in Tasmania which says effectively we shall allow the organisational issue to be determined in relation to organisation of - registration of organisations to be determined Federally and we will accept that. Now, we say what flows from that as well is that issues such as the change in the Workplace Relations Act relating to the competition issue amongst unions, the de-emphasis upon achieving sole union coverage and the like impacts upon what the Commission is being asked to do here because the issues which the AWU ventilate and, in particular, can ultimately only be resolved in the Commonwealth jurisdiction and the question - that is the question of who, if there is to be an exclusive representation order, it is clear it can't be done in this Tribunal, it can only be done in the Commonwealth Tribunal. And it is quite clear that since, in particular 1996, there has been radical changes; freedom of association is a prime object of the Act.

PN4418

There is a variety of different - this is the Commonwealth Act, there is - and I note there is a similar provision but perhaps less emphasis placed under the Tasmanian Act. There are various forms of agreement-making now available. Under the Commonwealth Act there is, for example, Mr Knott conceded in cross-examination, there is the ability to do AWAs in which an employee can pick whoever they like to be their bargaining agent. There is section 170LK, or non-union equivalent of the State Section 61 Agreements; again, Constitutional eligibility is not the issue there. An employee can nominate a union to represent him or her in that context.

PN4419

So there has been, in terms of the Commonwealth legislation, a breaking-down of the rigid position of conveniently belong and a view that competition amongst unions is in itself a sin, or a matter to be discouraged. It is quite the opposite in terms of the operation of Commonwealth legislation. Now, I might at this juncture, take the Commission to the legislation which now has replaced section 118A. I apologise, I can only - I only have an Internet download copy - I seek to tender, or hand up the copy.

PN4420

THE COMMISSIONER: Yes.

PN4421

MR BUKARICA: Perhaps it doesn't need to be tendered but I am in the Commission's hands.

PN4422

THE COMMISSIONER: It is something - it is an extract from the Act. I don't think it is necessary to be tendered.

PN4423

MR BUKARICA: If the Commission pleases. The new schedule, and it is actually a schedule of a much larger, or broader set of amendments dealing with the conduct and practice of organisations. It is the legislation - the particular section that I have referred the Commission to was referred to as the Registered Organisations Act, ROA, I think, and deals with, as I said, issues of conduct of unions and the like. And this now, section 133 through to 135, have replaced the old section 118A and I will be taking the Commission to a couple of decisions shortly which talk about the nature of the change, or the impact, but all I want to say at this stage is that what was once a relatively straightforward process, that is of making an application, proving wares, if you like, and being granted exclusive coverage is no longer the case.

PN4424

The new requirement is, basically, that there is a demarcation dispute in place but that there is a real - real impact upon the productive functioning of an enterprise, if I could use that short term. In other words, it is no longer possible to say just because the AWU and the CFMEU disagree and there might be some antagonism, or ambitions one versus the other, that that is sufficient to found jurisdiction. It is no longer the case. It has to be a real - real, on the ground, disruptive demarcation dispute.

PN4425

Now, we say there is no such evidence here and in terms of the conduct of the CFMEU, it has been entirely proper and lawful. The other thing that the Act does, and I will be taking the Commission shortly to a decision of his Honour, Munro J, in Forstaff, is elevate to high prominence the views of employees in relation to any application. One of the features of section 118A applications that, at least the CFMEU used to find some difficulty with was that the views of employees was relegated fairly low in terms of the hierarchy of considerations, discretionary considerations the Commission was asked to rule upon when an application was made, and that is no longer the case.

PN4426

So, again, that focuses the mind on the point that the nature of the organisational coverage issue is at present under the Commonwealth legislation, that competition in itself is not a bad thing, indeed, ought to be encouraged as part of the, if you like, array of choices that are available in relation to agreement-making and representation and the like and, really, the Commission should only intervene

and impose an exclusive representation order when it has particular consequences.

PN4427

Now, Commissioner, I might just refer to my outline, CFMEU1, and starting at page 6 and 7, I cover - I cover the matters I have just been talking about generally, that is the effect of the section 118A order and the general change in emphasis under the Workplace Relations Act. I beg your pardon, up to page - between pages 6 and 9. But I would like to do is take the Commission in some detail to a decision of a Full Bench of the Industrial Relations Commission, Australian Industrial Relations Commission in the CPSU - Community and Public Sector Union and the National Tertiary Education Union. It is a decision of 11 August 2000, print S9084. Does the Commission have a copy of that?

PN4428

THE COMMISSIONER: Yes, I have got it.

PN4429

MR BUKARICA: Now, at paragraphs 17 and 18, at least in the copy that I have and hopefully what the Commission has in front of it, the Full Bench has got cause to consider the development of organisational coverage rules since, if you like, the late '80s through to the time the decision was made, which I must note and I will get to in a moment, is before the ROA legislation. It was section 118A had been amended and it was still in operation and wasn't completely replaced until, I believe, 2003 is the current ROA legislation, but from point of - in our submission there is no relevant difference. But what the Full Bench says, commencing at page 17, paragraph 17, is:

PN4430

The legislative scheme prior to the commencement of the Industrial Relations Act 1988 Commonwealth encouraged the registration ...(reads)... was broadened but confined to demarcation disputes.

PN4431

And then, I will leave that section there, and then in answering the question:

PN4432

Does the WR Act reflect a fundamental change towards encouraging competition between organisations -

PN4433

which appears at paragraph 77 and following the Full Bench says - I beg your pardon, at paragraph - commencing at paragraph 80:

PN4434

In our view the provisions of the WR Act departs substantially from the provisions of the antecedent schemes ...(reads)... to be consistent with encouraging competition between organisations.

PN4435

And then if I go down to paragraph 81.4 in - and the Commission here lists some of the issues of why it now takes that view. The Commission says:

PN4436

The effective elimination of the use of orders under section 118A ... (reads)... was reflected in antecedent legislation.

PN4437

And then, again, the Full Bench makes the following comment which I think is quite significant as well:

PN4438

The WR Act generally, and in particular divisions VIB and sections 170LJ, LK and LL ... (reads)... relevant organisations' Constitutional capacity to enrol the relevant employees.

PN4439

So I will leave the decision there. But I think it confirms quite - in straightforward terms what I have been putting to the Commission as to the operation of the Commonwealth scheme. Now, further relevant to that issue and the whole question of how does the Commission, as presently constituted, regard, for example, section 118A orders that were made in the context of the early '90s. It is the decision of his Honour, Munro J, in Comalco Weipa Site Organisation Coverage Order 1991, it is print PR900546 and it is also a decision which I would refer to - cite but not take the Commission to any detail which is related to that decision which is a decision of his Honour, Vice-President McIntyre in section 204 Application for Consent to Alteration of Eligibility Rules, print PR904973.

PN4440

Both decisions concern the position of the CFMEU at the Weipa Bauxite Mine, and there is a - no doubt the Commission has some general understanding of the major industrial dispute which occurred at the Weipa Mine site in, or about the mid - early to mid 1990s over the introduction of staff contracts and the like. Well, immediately preceding that there was a section 118A order obtained by the AWU which eliminated the coverage of the FEDFA from that mine site.

PN4441

Over time the position occurred, and this is referred to in the decision - the position occurred where the AWUs coverage of members on site became virtually non-existent, so that by the year 2000 when the proceedings were - evidence in the proceedings was led, the evidence was the AWU had gone from having something like 220 members on site, to having one member and the CFMEU, despite having no eligibility, having had its rules altered, had managed to retain, if you like, the loyalty, or membership of around about 80 employees.

PN4442

Consequent to that situation his Honour, Munro J, who issued the original section 118A decision back in 1991, upon the application of the CFMEU effectively reversed the operation of the section 118A order granting, in fact, the CFMEU coverage of production employees at the Weipa Mine site. And the significance I think of the decision is that industrial relations, by its very nature, and we have had evidence of this over the course of these proceedings, is changeable. Arrangements which were - seemed to be permanent and unbroachable maybe 10 years ago, can disappear. Mine sites can open and close. Employees can go from having strongly unionised sites to non-union sites.

PN4443

There are a variety of circumstances which can lead to the Commission legitimately reconsidering the continued validity, at least in this particular matter, the continued validity of an order granting exclusive coverage. Now, I don't want to quote any parts of the decision in detail. I invite the Commission to refer to it, but it is clearly a case of where, if you like, we have heard a lot about vacating the field, or vacating the industry, a case of where a union was granted exclusive coverage and effectively didn't use it and, as a consequence have then subsequently lost that - lost that privilege.

PN4444

THE COMMISSIONER: I haven't read this decision.

PN4445

MR BUKARICA: Yes.

PN4446

THE COMMISSIONER: And I will.

PN4447

MR BUKARICA: Yes.

PN4448

THE COMMISSIONER: But just for my own information, you said that the 118A order was effectively reversed - - -

PN4449

MR BUKARICA: Yes.

PN4450

THE COMMISSIONER: - - - in favour of the FEDFA to the exclusion of the AWU?

PN4451

MR BUKARICA: No.

PN4452

THE COMMISSIONER: Right.

PN4453

MR BUKARICA: No. No, the AWU still have the rights that they have had.

PN4454

THE COMMISSIONER: Yes.

PN4455

MR BUKARICA: And I don't think it was a part of the application by the CFMEU in any case. Now, the decision of Vice-President McIntyre, which I don't go to but I invite the Commission to refer to, is the accompanying rule change granting CFMEU coverage at the Weipa Mine site as a result of the other decision.

PN4456

Now, perhaps to interpose in relation to the submissions I am making, there was, the Commission would recall, some reference, or some contention about the issue of the position of union membership in the metalliferous mining industry in the Pilbara in Western Australia and I say ultimately that particular issue is largely irrelevant to what the Commission's function is in this matter but - so that what the bona fides of our submissions are not challenged on what the position is in the Pilbara, I would seek to tender two documents.

PN4457

One is a copy of a demarcation agreement reached under the auspice of the ACTU in relation to coverage of mine workers at the Pilbara - BHP Pilbara operations. The agreement - unfortunately the copy that I have got is unsigned but I am told by our West Australian officials that it has been executed. Ultimately, I don't think a lot turns on the agreement but I would seek to have it tendered in any case.

PN4458

THE COMMISSIONER: Yes, I will mark that CFMEU5, I think? Is that right?

EXHIBIT #CFMEU5 DEMARCATION AGREEMENT RE COVERAGE OF MINE WORKERS AT BHP PILBARA

PN4459

MR FITZGERALD: Is that both copies?

PN4460

MR BUKARICA: No, the other item, Mr Commissioner, again, just as a matter of interest is an article recently appearing the Australian Financial Review dealing with the Pilbara Miners' Union Multi-Union One-Stop Shop Model, if you like, so - - -

PN4461

THE COMMISSIONER: I will mark that CFMEU6.

EXHIBIT #6 AUSTRALIAN FINANCIAL REVIEW NEWSPAPER ARTICLE

PN4462

MR BUKARICA: The Commission pleases.

PN4463

I don't go to the article. The article is not evidence, but it is a matter of interest. The agreement, though, is significant in relation to the extent to which CFMEU rights are recognised in the metalliferous mining sector. Now, the Commission would have heard various accounts of what the coverage of, or historic coverage of the CFMEU has been in the west and I think my recollection of the evidence was that it was basically confined to a few winder drivers around the place.

PN4464

I invite the Commission to look at the nature of the demarcation proposal there. It is clearly far greater than simply a few winder drivers and, in particular, the Mount Newman pit which I think is the largest single pit, the position seems to be that the CFMEU and AWU will have overlapping coverage over sort of mainstream production positions, but I don't go any further to that issue, other than, of course, as to put by way of comment that if - it is always possible that similar arrangements can be made in this State as elsewhere.

PN4465

Now, just briefly, and I will conclude shortly on the issue of the Commonwealth - the operation of the Commonwealth provisions, but there is one other decision which I ask the Commission to refer to which is another Munro J decision. I note his Honour just recently retired but the decision is print PR943157. It is an application under the legislation which I have handed the Commission. The RA, or ROA schedule, I get a bit confused, but simply I refer to this as confirming my account of the operation of the new section, in particular the increased prominence the schedule now gives to views of employees.

PN4466

In this matter we have a situation where a particular union obtained an exclusive representation order, that is the licensed aircraft engineers in respect to the Avalon maintenance facility, the AMWU challenged that, the other main maintenance union and the decision of his Honour, Munro J, was to say: "Well, look, I am not going to vary or rescind the order for the rest of its terms." It has got another, I think it might have even by now - no, I think it has another 12 to 18 months to continue - "I won't rescind it now but I note that after having conducted a ballot of employees that there is a strong, or at least a majority of employees who prefer to have the AMWU also party to the relevant industrial instrument, therefore, at the end of the nominal term of the existing order I'm going to allow the AMWU in."

PN4467

Again, in my submission, a clear statement by the Commonwealth Tribunal about the nature of exclusive rescindation orders and the greater preparedness to allow competing union coverage provided that competing coverage does not result in deleterious economic impact. Now, I may turn, if the Commission pleases, to probably the central question which is: is it appropriate to make an award at the Henty Gold operation? In doing so I might, I seek to - I will tender a document which I prepared and I apologise for the quality of the document. I have had to have it faxed from Sydney so it is not a brilliant copy, but I think it is legible.

PN4468

THE COMMISSIONER: Yes, it is document, summary of evidence relied on by CFMEU Tasmanian branch, I will mark that CFMEU7.

**EXHIBIT #7 SUMMARY OF EVIDENCE RELIED ON BY CFMEU
TASMANIAN BRANCH**

PN4469

MR BUKARICA: Thank you, Commissioner. The document before you is a summary of evidence that we want to draw the Commission's attention to and which we rely upon in relation to the issue of whether an award should be made. I qualify the question of its accuracy by saying that, obviously I haven't had access to transcript for the evidence that was led yesterday and this morning and so I have my notes and I make, at certain points, reference to what my recollection of the evidence of, for example, Mr Wakefield, by simply saying, you know, referring to a date. Obviously, the Commissioner will be, in making his decision, have the opportunity of having all the transcript and accordingly, those gaps can be addressed.

PN4470

The reasons why we say an award should be made are largely contained in the central facts that we say are founded on the evidence. Firstly, in relation to membership of the CFMEU at Henty Gold, and this goes to interest, we say the CFMEU has got 12 members. There is a, following the discussion we have had there now appears to be an issue about one member who appears to have joined, subsequently joined the AWU, therefore, to the extent necessary the Commission can amend, if you like, the finding in respect to that issue, but we say the CFMEU has at least now 11 members and possibly on one version of the facts, 12, with one person being a dual member.

PN4471

According to both Mr Wakefield, on the part of the AWU, and Mr Daily, in the course of cross-examination, a figure of 10 or more members is, quote, "a reasonably high", or "a reasonably significant" number for a site that has traditionally been predominantly non-union. I think Mr Wakefield cavilled with the term "non-union", however, I think - I do recall, clearly, Mr Daily referring to the site as historically non-union but in any case the transcript will show that up.

PN4472

We also say the evidence shows that - and now the Commission has got the copies of the applications and this can be determined authoritatively, that we have had members at the site for approximately two years. We also say the evidence shows that it was the employees at Henty Gold that approached the CFMEU rather than the CFMEU embarking on some aggressive recruitment campaign. We say, notwithstanding the position, the increased number or the number now being revised of 20 persons in the mill, the CFMEU still has a majority of employees in the mill.

PN4473

And we also say the evidence discloses that there have been numerous meetings between the CFMEU, our members at Henty Gold over industrial issues. We also say the industrial - the evidence reveals that the industrial strategy agreed upon by the CFMEU and its members at Henty Gold was to build a power base at the mine site before approaching the employer on industrial issues. And obviously that position, both from the AWUs perspective and the CFMEUs perspective, was perhaps forestalled by the individual common law contracts question and that was probably - and I put this as a submission because I don't think there is evidence going to it but, clearly, that has forced the hand of at least

the CFMEU sooner than perhaps the union would have liked in terms of its membership position at the mine.

PN4474

Now, in relation to the eligibility of the union, and this goes obviously to interest, we say the CFMEU has got substantial eligibility, and that eligibility derives primarily from the FED and FA rule. The FEDFA rule covers a diverse range of classifications relevant to the mining industry, and there I have extracted largely in the course of cross-examination, and I note that in exhibit - attachment SM1 to exhibit CFMEU3, which is Mr McLean's statement, the relevant eligibility rule is included and I invite the Commission to, and the Commission has already been taken to it several times but to examine the rule and it will be seen that what is evident firstly is that it is a craft union rule, occupational-based rule.

PN4475

It covers, historically has covered a variety of operator-style classifications not only in the mining industry but construction, manufacturing and other industries and, indeed, the eligibility rule of the CFMEU, the old FEDFA rule, can't be read down in respect to any industry or occupation save for the operation of any relevant section 118A limitation. And I can - I will take the Commission just briefly to a decision, a High Court decision of his Honour - I beg your pardon, a Full Court of the High Court in the matter of an application for writs of prohibition certiorari are against the honourable Mr Justice Abernethy Coleburn and Others ex part the Australian Workers' Union which is a decision of 1984. It is in the bundle of material HCA62. Simply, the application not - - -

PN4476

MR FITZGERALD: Sorry, I am just having trouble locating that one.

PN4477

THE COMMISSIONER: It is under - - -

PN4478

MR FLANAGAN: It is behind the two statements.

PN4479

THE COMMISSIONER: Yes, behind the - - -

PN4480

MR FITZGERALD: It is behind the two statements, is it? Beg your pardon.

PN4481

THE COMMISSIONER: Yes.

PN4482

MR BUKARICA: It is - I am not quite sure of the circumstances or the background to the matter ending up in the High Court but it appears that there was a challenge by the AWU to, a sort of interpretive challenge by the AWU to the nature of the eligibility rule of the FED and FA, and on the second page the AWU essentially sought that the High Court find that, and this appears under paragraph 3 and inverted commas on the second page, that:

PN4483

...the scope of FEDFA activity was limited to specified callings in the industry of employers who are engaged in generation ...(reads)... the power be electrical, gas, or otherwise.

PN4484

And what it was, it was simply an attempt to sort of say that the craft rule should be read down to particular industries. The High Court found against it and said, essentially, the rule says what it says. And we simply put to the Commission that the FEDFA eligibility rule says what it says. It covers persons in particular operator grades and any person assisting on, or about any engine, etcetera, etcetera. Now, I think there is, well, I will let the transcript speak for itself. I won't put words in any witness' mouths.

PN4485

Relevantly, of course, there is no restriction, we say, upon CFMEU equipment at Henty Gold and in cross-examination of Mr Knott and Mr Daily I was asked - I asked those gentlemen to see if they could identify any such restriction and both could not. We say also the CFMEU has had an historically significant role in metalliferous mining both in Tasmania and nationally. We don't quibble with the evidence about what occurred from about the mid, well, early to mid-1990s in relation to FEDFA presence. Clearly, up until 1996 the principal mine site of the FEDFA was Savage River. That closed down and a new industrial arrangement was put in place.

PN4486

The CFMEU, not through 118A order, but through a Greenfield Site Agreement lost, in a practical sense, the ability to represent those workers. But the CFMEU was never 118A'd out of Savage River Mine. And whilst the union has not been the dominant union in metalliferous mining in this State, it has been a significant player - at some stages moreso, at other stages less so. And the position in cross-examination of, for example, Mr Knott, it is conceded that, as the Commission already is aware, the CFMEU has got coverage in Weipa Bauxite Mine. It has got coverage in Broken Hill in New South Wales, another very significant metalliferous mining area, and it has through the Pilbara Miners' Union, a presence in Western Australia.

PN4487

So it is simply not true, in our submission, to say the CFMEU doesn't have a role in metalliferous mining either in an historical sense or in an actual ongoing sense. Indeed, the CFMEU has got significant union status granted by the ACTU and that matter is, indeed, covered by exhibit AWU2. As I said in the opening, Mr Commissioner, this is not a proceeding where the Commission is required to assess the respective wares of two unions. It is not a section 118A application. The application is one to make an award, firstly, on our part, and in relation to, and I will get back to this in conclusion, what the Commission ought to do about the section 55 agreement.

PN4488

Much of this evidence of what has occurred around the country and historically really is interesting but not central to what the Commission is required to do. In terms of the way the CFMEU has conducted itself, I think this is a very important

aspect of the Commission's exercise of discretion. It is not a situation like Renison in 1992, where there is a poaching war and there has been back-stabbing and oblique deal-making on the part of the CFMEU.

PN4489

The CFMEU has conducted itself in a manner which is proper and lawful. There has been no threats made. There has been genuine attempts to try to reach an accommodation with the other main union in the area. Really, in terms of the AWU evidence, the evidence of Mr Lowe, not only was it amusing but it was refreshing in the type of attitude that he was expressing, old style, from my point of view, old style principled unionism. In other words, let us not go behind each other's backs. Let us try to sort this out. Let us be amicable about it, notwithstanding early altercations.

PN4490

And, indeed, Mr Lowe expresses a view about Mr Wakefield and Mr McLean which is quite hopeful, I must say, and I think, in our respectful submission, much closer to the truth than the alarmist position that has been advanced in the course of cross-examination and the like over the last couple of days. The position isn't any more, if it might have been the case in the early '90s, or late '80s, where through a demarcation dispute the AWU, or the CFMEU can bring the industry to a halt.

PN4491

Multi-skilling is a feature of practically every workplace in which we have membership. Those old battles were lost long ago. The industrial reality these days is not one of 100 per cent coverage in contending unions staking out - poaching from each other and staking out their turf. The industrial reality these days is unions desperately trying to get a foot into the door in an industry where, at best, one could say there has been challenges in relation to unionisation and the like over the last decade. The position really is one where unions, and this is not a matter for the Commission ultimately to have a view on in particular, but the position is now one where if unions are to survive they must - they must avoid taking each other on and poaching, and the like.

PN4492

And there is certainly based on ABS figures, and I might actually, for the sake of completeness, no, I apologise, I have only got the one - I beg your pardon, I have got two copies of them. Perhaps I will - between Mr Flanagan and Mr FitzGerald, hand my copy over, but I would tender a document produced by ACCIRRT for the ACTU, which is an organisation I think Ms Heilor worked for, which simply stands for the proposition that in relation to metalliferous mining, for example, there has been a dramatic deterioration in union position over the 1990s and, of course, there is evidence here about perhaps Tasmania being different, or you are in a better position from a union perspective, but it is unchallengeable that there have been significant impediments, or challenges for unions in simply the basics, let alone being in a position to fight turf wars and the like. So if the Commission pleases, I tender that.

PN4493

THE COMMISSIONER: Yes, thank you.

PN4494

MR BUKARICA: Of course, I think in cross-examination of Mr Wakefield I quoted two figures.

PN4495

THE COMMISSIONER: This is a document titled Where are the Non-Members? I will mark it CFMEU8.

EXHIBIT #CFMEU8 DOCUMENT

PN4496

MR BUKARICA: If the Commission pleases. I don't - - -

PN4497

MR FITZGERALD: Could I just ask the origin of that document, just it would be nice to know. I notice that it is actually done by ACCIRRT, was it actually commissioned by the CFMEU?

PN4498

MR BUKARICA: No, it is on the front of the page, it is the ACTU and the Labor Council of New South Wales.

PN4499

MR FITZGERALD: Okay.

PN4500

MR BUKARICA: The document itself, Mr Commissioner, is based on the 2000 ABS statistics that tries to map where unionisation occurs where it is low, medium and high and it simply shows that there was a dramatic fall in unionisation in the metalliferous mining industry throughout the 1990s. There was some fall in coal-mining but less precipitous and simply that it stands for the proposition that, which I have just advanced, that it is a difficult environment for trade unions and, therefore, in my respectful submission, the sort of 1980s demarcation scenario is simply not a realistic proposition in the context of this particular matter.

PN4501

Now, in support of that can I also refer the Commission to the other points that I have on page 3 which is that at the time the CFMEU recruited membership at the mine we were unaware of the presence of any other union. The policy expressed by Mr McLean that the CFMEU in this State has a policy of not poaching other members, that is recruiting non-unionists. The evidence, the clear evidence that the CFMEU approached the AWU about this application and seeking a joint approach. The evidence that the AWU summarily rejected that approach. The evidence that the CFMEU consulted with members prior to the lodging of the application and took into account employees' concerns.

PN4502

The evidence that the CFMEU has no objection to the AWU being a party to the proposed enterprise award, and this is a matter I will turn to in conclusion when I

deal with the section 55 agreement which we say is the most appropriate course for that document. Now, in relation to the employer, we say the evidence discloses a number of facts, principally one being that the employees historically preferred non-union industrial arrangements at its site. Secondly, and I - - -

PN4503

MR FITZGERALD: Sorry, what point are we up to?

PN4504

MR BUKARICA: We are up to - - -

PN4505

MR FITZGERALD: I think four.

PN4506

MR BUKARICA: Four?

PN4507

THE COMMISSIONER: 4.1.

PN4508

MR BUKARICA: Secondly, that - and we put a particular flavour upon this next point which no doubt won't be accepted by either Henty Gold or the AWU but we don't resile from it, which is that the employees' acceptance of our union collective agreements has been sudden and corresponds very closely with the application of the CFMEU for an enterprise award.

PN4509

Now, there has been denials in cross-examination and, clearly, the Commission is entitled to take, and will take the evidence that was presented before it and accord the weight and so on, the Commission feels, but what we say is, undeniable is, that the weight of circumstantial evidence in this matter relating to the timing, the affect of the proposed section 55 agreement, the active co-operation between the employer - between on union party and the employer, all point to the fact that the principal purpose of the proposed section 55 agreement is really to be used as a demarcation tool rather than a bona fide attempt to resolve the issues there of representation and the like.

PN4510

I am not saying that that, particularly the amended agreement, doesn't now address employees concerns but I say the manner in which it has arisen, the timing, the whole context, notwithstanding specific denials, just can't be avoided. I say it is not plausible that the main purpose of this application is simply to lock out the CFMEU. Now, locking out the CFMEU may ultimately be, in the Commission's view, a good idea, however, as I said at the outset, what is occurring here is by an indirect route, to put it in a most mild fashion; some sort of process has occurred.

PN4511

There has been a rapid conversion of the employer in which AMMA has played a significant role, which has led to a particular course being undertaken which now sees the CFMEU being in a position of effectively locked-off the site. The Commission will draw its own view of the evidence on that. Now, if I go to

point, 4.6, what is relevant as well is, we say that the particular employer has no specific knowledge of dealing with the CFMEU, and that is the evidence of Mr Daly. Mr Daly also accepted that if the Commission found in favour of the CFMEU, the company would accept the decision.

PN4512

We also say that the employer's attitude towards the CFMEU is heavily influenced by its employer organisation and that is clear in terms of the cross-examination of Mr Daly. And in relation to the evidence of Mr Knott, it also became clear that AMMA has a clear policy of preferring the AWU to the CFMEU in metalliferous mining. So really, in a sense, if you take those steps to the logical conclusion, what is occurring here is that a particular employer organisation, namely AMMA, is determining the appropriate union, or attempting to determine the appropriate union for employees in the metalliferous mining industry to be members of.

PN4513

I say, with respect to AMMA, they are certainly strong advocates of their employer interest and that is their function. But with the greatest of respect it is not their role to determine which organisation an employee shall, or shall not join. And that, in our respectful submission, is the effect of this application, or the AWU employer application. The position of AMMA in relation to the question of flexibility in choice, and this came out in the cross-examination of Mr Knott, is interesting. On the one hand very, very strong advocates of freedom of choice in terms of agreement-making, AWAs, individual contracts, anything goes. But when it comes to choice of union they have got a very firm "no", and a very firm "we support a union monopoly position for the AWU".

PN4514

Other interesting matters, the extent of co-operation between the employer and the AWU since the CFMEU application has been made, and these are the circumstantial matters that I advert to. I don't repeat, I simply note those points there, such as the - when pay-roll deductions came on stream, access to paid meetings, etcetera, etcetera. Now, in relation, finally, Mr Commissioner, to the section 55 agreement, we say the evidence supports that its principal purpose is that of a demarcation tool and whilst it now has a collateral purpose or effect of addressing certain employee concerns, the actual process which has led to the matter being before the Commission evidences that that is simply a collateral purpose.

PN4515

In other words the Commission - the document that is lodged before the Commission, and I understand the Commission's position of, that there is -it is not uncommon to have agreements varied alike, once they have been lodged, but one has to ask what was the desperate hurry in putting in to the Commission a document which was nothing more than a replication of the existing section 61 agreement with the AWUs name on it? An agreement which doesn't expire till 18 September. And now, much later, three or four weeks later, there is a concluded document.

PN4516

Now, I say the inescapable inference is that there was a desperate rush to have something before the Commission prior to this enterprise award application being concluded. And, again I say, ultimately the Commission might find in the consideration of all the public interest reasons that the section 55 agreement is to be preferred and the CFMEU doesn't have a legitimate role. But to say, as some have said, that there is no connection between this application, the course taken by the CFMEU, and the section 55 agreement, is simply implausible, to put it in a neutral way.

PN4517

And I know, and I rely upon the Commission's great experience in these matters, but clearly there has been a, what probably Mr Lowe would call a "back-door" sort of arrangement entered into. I put that as a submission, I don't resile from it, and I think that is a very important public interest consideration in terms of the contending claims here. Now, in relation to the section 55 agreement we note this, firstly: the Commission, unlike in the Federal jurisdiction, has got a broad discretion to accept, or not accept the section 55 agreement.

PN4518

There is no requirement of the Commission, as presently constituted or otherwise, adopt and endorse, or ratify the agreement. The Commission can, or will, if the public interest determines. We say that having regard to all the circumstances in the present matter, that the appropriate course is for the Commission to make an enterprise award; to make an enterprise award in which the CFMEU, the AWU and Henty Gold are the parties. And, indeed, if any other union can establish an interest legitimately, then make that union, or those unions parties as well.

PN4519

And in relation to the options that are before the Commission, if there is a concern about undue interference in the operations of the business and so on, these are the options aren't they: the Commission can either grant the CFMEU application or grant some or, secondly, grant some variation of the CFMEU application or, at its most minimal, the Commission can make an enterprise award in the same form as a section 55 agreement that is currently - that has now been made by the AWU and Henty Gold with the CFMEU as a party as well.

PN4520

So in terms of rounding what now appears to be a fairly messy situation, or on one view, I say the Commission has got considerable flexibility about what it can do and, ultimately, there is going to be much said about the question of the orderly conduct of industrial relations in the State and, in our respectful submission, that is the only possible objection to the - to an enterprise award by the CFMEU. But we say it is the only possible one without conceding that it is a real position. The real position is: is Chris Hinds, or his colleagues, in a position to hold up the industry on demarcation grounds, to challenge the existing status quo, to excite the type of 1980s demarcation disputes, or is the reality that employees should be represented by the people that they want to be represented by, unless there are extremely compelling reasons why that shouldn't be the case?

PN4521

In other words, it will find its level. If the wares, the product - out of view product is as good as contended by Mr Wakefield and Flanagan, the AWU has got nothing to fear. If Mr Hinds is a part-time, wet-behind-the-ears official who knows nothing about the mining industry, the AWU have got nothing to fear. The only proposition that can be advanced about that is that there is some fear that maybe the product isn't as good as contended because if they are confident in their wares then, ultimately, the membership will decide.

PN4522

And, again, it is not an environment any more, if it once was, where unions can dictate terms in terms of demarcation and the like. Nor has there been any evidence put before this Commission as to how the CFMEU has conducted itself, which could lead you to a conclusion that the type of scenario that is being blown up, our submission exaggerated, is likely to occur. We have got the sworn evidence of Mr McLean, who gave evidence in Ulverstone about the union's approach.

PN4523

We have the history of how the CFMEU has conducted itself; the attempts to involve the AWU; there is no suggestion of any of the sort of rough-house tactics that may have existed in the early 1990s and, ultimately, for the objections to succeed there must be more than speculation, with respect. There must be more than, because the AWU and the CFMEU have overlapping coverage, that necessarily will lead to a situation of the type contended. It is not the case. It hasn't been demonstrated here and the standard of proof for such a serious sanction, in our view, of the Commission finding a union with the requisite eligibility, hasn't got an interest for those section 63(10)(c) reasons, you must have the facts before you.

PN4524

Now, just in conclusion, I note there was a decision of Mr Commissioner Gozzi, which I think Mr Cooper appeared in for the AWU, Mr Bodkin for the CFMEU. It is print T4190 of 1992. There was an application by - sorry, Mr Commissioner, do you have a copy?

PN4525

THE COMMISSIONER: I am just trying to find it. This one was by - - -

PN4526

MR BUKARICA: It should be in the bundle.

PN4527

THE COMMISSIONER: Yes, this is by Gozzi?

PN4528

MR BUKARICA: Commissioner Gozzi, 11 April 1995.

PN4529

MR FITZGERALD: The last document in the bundle?

PN4530

MR BUKARICA: Roadmakers' Award?

PN4531

MR FITZGERALD: Yes. Yes.

PN4532

THE COMMISSIONER: Yes, okay, I have it.

PN4533

MR BUKARICA: Okay, and we say that this decision is supportive of the proposition we advance today in the correct, in our respectful submission, the correct approach. This deals with an area of civil construction, another area where there is overlapping coverage between the AWU and CFMEU, particularly FED and FA. Somehow, in the making of the new award, the AWU - the CFMEU was dropped off the list of the award interest parties. The CFMEU made an application to the Commission and the decision which issued found that the CFMEU, notwithstanding the opposition of the AWU, had an interest and should be granted recognition of that interest in terms of that award. And in relation to the finding, I will just take the Commission to the final paragraph, Commissioner Gozzi says:

PN4534

As previously indicated there is no doubt in my mind that the CFMEU satisfied the requirements ...(reads)... all of the circumstances the CFMEU is granted an interest in the award -

PN4535

etcetera. So, with respect, Commissioner, we say that is the correct approach.

PN4536

MR FITZGERALD: Commissioner, could I raise a point of order? I notice the decision was appealed. Does Mr Bukarica intend to produce the appeal decision as well?

PN4537

MR BUKARICA: I will do that over luncheon break, if the Commission pleases. I think I might have left that back in Sydney but my recollection is that the original decision was upheld. But I will do that over the luncheon break.

PN4538

THE COMMISSIONER: Yes.

PN4539

MR BUKARICA: I may have to get it off the Internet or the Commission library if it is available.

PN4540

THE COMMISSIONER: Would this be a convenient opportunity to - - -

PN4541

MR BUKARICA: I am just about to finish, Mr Commissioner.

PN4542

THE COMMISSIONER: I am sorry.

PN4543

MR BUKARICA: And I will - I know I have gone on for a bit but I think the position we were at is advocating one where the CFMEU is granted an interest, indeed, is granted the award that it seeks. One final matter I put to the Commission, and I base this on the Commission's own knowledge and involvement of a number of industries where the CFMEU exists and operates, is that we think the Commission should bear in mind the conduct of the CFMEU as a whole in the State, and use that knowledge to inform itself in the decision in relation to the orderly conduct of industrial relations. If the Commission pleases.

PN4544

THE COMMISSIONER: Yes, thank you, Mr Bukarica. There is one aspect of the evidence which in my mind there is a gap, and that is the explanation and relevance, if there is today, of this notion of ACT designation that is of a significant union. To my mind there wasn't a satisfactory answer given during the evidence and it may be that it is no longer relevant, but I will invite the parties to make any submissions they wish to in relation to that and perhaps after your luncheon adjournment if you wish to comment on that, Mr Bukarica, that would be the opportunity.

PN4545

MR BUKARICA: I thank the Commission for the opportunity.

PN4546

MR FITZGERALD: Commissioner, could I ask that we actually adjourn till 2.15?

PN4547

THE COMMISSIONER: 2.15?

PN4548

MR FITZGERALD: As the normal practice?

PN4549

THE COMMISSIONER: We will just go off the record.

OFF THE RECORD [12.48pm]

RESUMED [12.50pm]

PN4550

THE COMMISSIONER: We will resume at 2 o'clock.

LUNCHEON ADJOURNMENT [12.50pm]

RESUMED [2.06pm]

PN4551

THE COMMISSIONER: Mr Bukarica?

PN4552

MR BUKARICA: If the Commission pleases, just before Mr FitzGerald gets to his feet, before the luncheon break he asked an appeal decision in the Roadmakers' Award case that I cited. I have managed to get a copy from the Registry and I hand a copy up to the Commissioner, and I have handed copies to Mr Flanagan and Mr FitzGerald. And simply to record that the decision by the Full Bench upheld the original decision of Commissioner Gozzi and the reasoning is fairly straightforward.

PN4553

THE COMMISSIONER: Thank you.

PN4554

MR BUKARICA: In relation to the other matter, the question you raise about significant union status and what that means, I have asked the people in our national office to try to locate a definition and endeavour to have that faxed to you care of your chambers, by the end of today, but it may be that we can't locate that before the end of the day. If the Commission pleases.

PN4555

THE COMMISSIONER: Thank you. Mr FitzGerald?

PN4556

MR FITZGERALD: Firstly, Commissioner, I apologise for being a couple of minutes late, we were just waiting on a position description and we had a hold-up with my fax which is not the world's most sophisticated fax but we have got a copy of it. Part of the agreement reached between the company and the AWU in respect to the section 55 process was that because there were some concerns raised by some crews, not all crews within the mine, there was an undertaking given by the company to read into the transcript part of the position descriptions which apply and that is, as I said, is part of the overall agreement with the AWU. So even though it may be somewhat out of kilter, if I can put it that way, as I understand it we are putting all submissions in respect to both matters.

PN4557

THE COMMISSIONER: Yes.

PN4558

MR FITZGERALD: So I thought it might be convenient just to get that out of the way so I don't forget it later on, and if I could just read these into transcript. The first is a letter to the ESOs, the Emergency Services Officers, which - three of them, is a letter to Mr Jeremy Weller, who is an ESO, 9 Comstock Street, Zeehan, Tasmania, 7469; it is 19 July 2004:

PN4559

Dear Jeremy, as you're aware the company's in the process of finalising an agreement between the Henty Gold Mine and the AWU of Tasmania. During discussions with the AWU I have been advised that the ESOs at Henty are concerned about their current and future remuneration relating

to the maximum salaries listed in the agreement. I wish to advise all ESOs at Henty Gold Mine that ESO group - 1: the ESO bands will affect the remuneration structure implemented across the whole of the PDAP region; 2: the company guarantees not to reduce the current salaries of ESOs where salaries are in excess of maximum salaries listed in the agreement; 3: ESO staff whose current salaries are in excess of the maximum salary existing in the group will not be inhibited in their ability to access future increases where appropriate. Please do not hesitate to contact me should you have any further queries related to the agreement. Yours sincerely, Matt Daly, Mine General Manager.

PN4560

And I just stop there just to see whether the AWU have any issues about that and whether that satisfies their concerns about that position?

PN4561

MR FLANAGAN: Well, we thank him for reading that on to the record that was the arrangement. We just seek confirmation that, and if I can just explain it, Commissioner, within the agreement, there are bands of remuneration with a minimum and maximum. Those bands have been implemented by Placerdome on top of arrangements which were in place prior to that. As a consequence there are some employees who are above the band, the ESOs in particular, but there are other employees that are above the band. I just seek the company's confirmation that the principle enunciated in the ESO letter also applies to other employees?

PN4562

MR FITZGERALD: Similarly, Commissioner, if I could do that same in respect to the positions descriptions, as I understand it, when - during the process of consultation there were some concerns from the mining crews to ensure that the position descriptions were already on the record. I wasn't going to read the whole position description because it is quite lengthy, but maybe pick out the key duties, etcetera. It is quite a structured one and the first one is a general miner and if I can - the major account of the area is for a general miner. And this is some major actions and supporting actions:

PN4563

Ground support headings (mission bolt) set up and perform manual scaling. Set up and prepare ground control. Conduct general ground maintenance. Carry out grouting and plating. Check and stabilise mine ceiling.

PN4564

And the expected end result with those accountabilities, with those actions, is:

PN4565

...to make work safe and tidy and ways to measure accomplishments, unable to advance unless ground support completed.

PN4566

The next major action is bogging of muck pile, and the expected result there is:

PN4567

...to advance job, the waste and measure is muck pile moved and transferred to stock pile for processing.

PN4568

The next major action is loading, without any other qualifications there. The next major action is truck operation with the:

PN4569

...expected end result of transport ore for processing. Ways to accomplish - way to measure accomplishments is volume to transporter.

PN4570

The next major action is mark and charge in faces. The expected result, end result there is:

PN4571

...for preparation for blasting, safe and accurate (does the general miner do find?)

PN4572

And the final one is stoke, bogging and conventional mote and tele-remote, the expected end result there is:

PN4573

All bogged from stoke safely, ways to measure accomplishments is ore tons per shift.

PN4574

And I think that completes that for the general miner. I apologise for this because, as I said, I - we were just waiting for these and we had overlooked it. I apologise that when - but Mr Flanagan did remind me of it and that is why I have to get them faxed to my office and that is why were somewhat delayed. The next one is the position of a skilled miner and similarly, there is only one more item in this, the major accountability there is:

PN4575

The major actions and supporting actions, drill and blast headings. Percentage of total position is 50 per cent. Expected end result to extract ore from one body. Ways to measure accomplishments, production targets reached at the end of the period.

PN4576

The next one is ground support headings, (mission bolt):

PN4577

...40 per cent of total position. Expected end result to make work safe. Ways to measure accomplishments. Unable to advance unless ground support completed.

PN4578

And the final one is bogging of muck pile, which is 10 per cent of the total position:

PN4579

Expected end result is to advance job. Ways to accomplish - ways to measure accomplishments, muck pile moved, transfer to stockpile for processing.

PN4580

And the final position is - and I will be very brief here, is the position of shot-fire cable bolter. Similarly, the major accountability areas are:

PN4581

Major actions and supporting actions, charge and fire explosives at mine and development heads. Maintain magazine. Prepare explosions for firing. Conduct development firing. Conduct secondary firing. Handle and transport explosives. Percentage of total position 50 per cent. Expected end result, explosives are packed promptly and correctly to enable firing to occur.

PN4582

The next major action is cable bolting; the list of activities:

PN4583

Bore long holes. Install cabling. Grout and fill holes. Anchor to ground to prevent collapse.

PN4584

Again:

PN4585

50 per cent of total position. Expected end result, cables are installed, holes are grouted and filled, ground is anchored to enable miners to work safely.

PN4586

Now, that completed the three major areas within the mine and that was part of the undertaking which we gave the - which the company gave the AWU, not AMMA, I make that very clear, that it is not AMMA who determines these matters, it is the companies who instruct us and I will address that later in terms of AMMA's position. But, again, I will just seek Mr Flanagan's advice whether that reflects the agreement which is reached whether that is satisfactory.

PN4587

MR FLANAGAN: Yes, thank you, Mr FitzGerald. Thank you, Commissioner. That was for the benefit of the employees.

PN4588

THE COMMISSIONER: Thank you. Yes, Mr FitzGerald?

PN4589

MR FITZGERALD: Thank you. I appreciate that and, obviously, during the course of my submissions I will be addressing the section 55 agreement and why it should be proved before the Commissioner. Commissioner, one thing I haven't done and I think Mr Bukarica has done, the statement which I forwarded to the Commission since the first hearing of this matter, if I could have that incorporated as part of the record?

PN4590

THE COMMISSIONER: Yes.

PN4591

MR FITZGERALD: It might take a bit of finding?

PN4592

THE COMMISSIONER: No.

PN4593

MR FITZGERALD: I have only got one copy here.

PN4594

THE COMMISSIONER: No, that is - yes, I have marked that, R1.

PN4595

MR FITZGERALD: Well, I am sorry, I didn't actually realise that. I didn't actually seek that I don't think, but maybe it was Mr Bukarica who did all of his statement - - -

PN4596

THE COMMISSIONER: Well, I may have marked it at the same time - - -

PN4597

MR FITZGERALD: I am sorry, okay.

PN4598

THE COMMISSIONER: - - - but it is marked in my file as R1.

PN4599

MR FITZGERALD: Okay, thank you. And the other thing which I am not sure I produced on the last occasion was the 1992 decision of the Commission.

PN4600

MR BUKARICA: It is also in my bundle.

PN4601

MR FITZGERALD: Is the 1992 decision there? I thought it was only the 1994 decision?

PN4602

THE COMMISSIONER: No, they both were in Mr Bukarica's bundle.

PN4603

MR FITZGERALD: Well, if that is the case I could have saved myself some copying there. For some reason I thought it was just the - it was just the 1994 decision. The only other one which I have is a - and it has been spoken about, I think, in the - and shown to one of the witnesses, was the Commission's, and again, it is a matter of Commission record, but I think it should at least be produced to the Commission, maybe not marked, but the Commission's record relating to the CFMEUs withdrawal from the Metalliferous Mining and Processing Award, for a matter of interest there. I don't know whether there have been copies been provided there? We are probably going to be a bit short on copies here. Have you got a copy of that?

PN4604

THE COMMISSIONER: Yes, it is a decision of the Commission so it is not necessary to mark it.

PN4605

MR FITZGERALD: No, okay. Well, you have referred to it before.

PN4606

THE COMMISSIONER: Yes.

PN4607

MR FITZGERALD: Commissioner, it will be our submission that the case in favour of the approval of the agreement before you, and the case against the granting of the award by the CFMEU is, in fact, overwhelming. In our view, and I will be making further submissions and, again, I clearly indicate that they - the submissions will be interrelated, but within the provisions of the Act, similar to other agreements which this Commission has approved, there is no good reason why the AWU Henty Agreement should not be approved and, therefore, that would have legal application and override any CFMEU Award which, if you find in favour of making.

PN4608

If you, in fact, found in favour of making the CFMEU Award it would create a very difficult - practical difficulty for you, I would suggest, for the Commission and the parties. So, because during the term of the AWU Henty Agreement that would, in fact, override the award. And if the agreement, if the section 55 agreement simply ran on, which it is possible to do, the effect of the CFMEU Award for a limited and discrete section of the Henty enterprise, and for a very limited number of employees which we have seen, somewhere between 11 and 12, there would obviously be a dichotomy between the two which, in practical terms, I think, would make it very difficult for all the parties concerned.

PN4609

One of the issues which I wanted to raise was that, and I think it is a matter of record of the Commission, is that all the enterprise awards of this Commission I think without exception, as recently as, and again, it is an award which was recently issued by the Commission, and I will just present that. It doesn't need to be presented the same way. This is the Impact Fertilisers Award.

PN4610

THE COMMISSIONER: Thank you.

PN4611

MR FITZGERALD: And I am sure the Commission would be aware of that, but that is - I think completes - there is only a small number of enterprise awards, that has been the Temco Award, the Pasminco Hobart Smelter Award, the Pasminco Rosebery Mining Award, and the Goliath, or the Australian Cement Award, and now the Impact Fertilisers Enterprise Award, they all cover the totality of the operational workforce. So we have, you know, I would suggest, in terms of the public interest grounds, we have an application by a union to cover one section within the enterprise which, in itself, doesn't sit well, I would submit, Commissioner.

PN4612

And we have heard evidence that there has been consultation, and agreement from a small number of people within that discrete section, that being 11, or 12 - it seems like 11 CFMEU members in the mill out of 20. Conceivably, it is a majority, but only just. So that presents, I would suggest, and it is going to present a very difficult practical outcome for the Commission and for the parties. The issue of who is going to be covered by what will come into play and that, I believe, is very much against the public interest.

PN4613

It will be our submissions, and I do intend to take the Commission to transcript because we are of the view that the three witnesses of the CFMEU, the evidence of those should be totally discounted. There is a concern, a very clear concern which I issued - which I indicated to Mr Hinds during cross-examination, that it is our contention that there was collaboration by the witness, Mr Hinds, whilst he was under oath. There is clear admission by Mr Hinds, and I will take you to it later, that the issue of the CFMEU withdrawing their interest from the Mining Award, Mining Metalliferous Processing Award was one which was raised on the first day of the Ulverstone hearing.

PN4614

The only way, and I contend the only way Mr Hinds could come to have that knowledge is if he spoke to former witnesses. Mr Hinds did attempt to, in my view, quite unsuccessfully extricate himself from that mess but, clearly, he had already put his foot in it. He had indicated to the Commission on oath that that matter was raised yesterday. So that, in my view, puts in doubt the totality of the CFMEUs evidence, particularly that of Mr McLean's. The evidence of Mr Hinds, and I will take you to that in full later in the afternoon, was both contradictory and that varied from day-to-day, and I will take you to that where on the first day he made a particular point and changed his story the next day.

PN4615

My concern is, Commissioner, and a very great concern, is that that occurred with some coaching overnight, or some discussion with other witnesses. It is our position that, and it is on the observation of those from the company who had been here during these proceedings, that there was clear coaching going on during the cross-examination. There was clear reference by Mr Hinds from Mr Bukarica, particularly on the issue of the Broken Hill and the statement from the Broken Hill matter, and the membership there and the statement from the CFMEU, there was - I am not sure whether the Commission noticed it but certainly the representatives of Henty noticed it, there was constant seeking by Mr Hinds of reassurance about whether that was the correct answer. Now, given that, and given that - - -

PN4616

MR BUKARICA: Hang on, I - you know, Mr FitzGerald, I understand, is a legal practitioner; I am as well, Mr Commissioner. I am bound by the ethical code of the Law Society of New South Wales and Legal Practitioners Admission Board. These are pretty serious allegations. If Mr FitzGerald believes there is a case he ought to take the appropriate steps, make the complaint, etcetera. I don't see how - I was in the Court room, as the Commissioner was, whilst Mr Hinds

was giving his evidence, I don't recall sending secret messages, or any such thing. I deny it, absolutely. I just don't know what the purpose of this - of this personal attack is?

PN4617

THE COMMISSIONER: They are serious allegations, Mr FitzGerald. If you are going to the matter of witness credit that is one thing. If you are attacking the professional propriety of Mr Bukarica - - -

PN4618

MR FITZGERALD: That is not my intention.

PN4619

THE COMMISSIONER: Well - - -

PN4620

MR FITZGERALD: I think I indicated that it was Mr Hinds who was seeking that reassurance. It was constant in - during cross-examination it was clear to us that there was, maybe not secret hand signals but certainly seeking some reassurance that that was the correct answer. It is simple that I have no issue with Mr Bukarica. I can indicate that I am not a legal practitioner, I am employed by an employer association. I am not enrolled as Mr Bukarica is, I understand. The issue goes more to witness credit, as I indicated, and we will be taking and showing you where there has been some fundamental changes in the evidence from day-to-day and we ask the question: how; why?

PN4621

THE COMMISSIONER: Well, if - - -

PN4622

MR FITZGERALD: Why did Mr Hinds make the statement that that issue was raised yesterday, without reference to the former witnesses. And that is an issue of concern.

PN4623

But I have no issue against Mr Bukarica personally or his ethics. That is not my complaint.

PN4624

MR BUKARICA: Well, I think also in that context, if that is the case, the reference to coaching, Mr Fitzgerald needs to be clear if he is alleged any coaching on my part.

PN4625

MR FITZGERALD: I withdraw the aspect in respect of coaching. But the Commission will judge I am sure as to why there is quite a significant change in position on day one of Mr Hinds' evidence compared to day two, and also I am sure the Commission will consider the issue of how Mr Hinds came to know of the issue of the withdrawal from the Mining Award on the day before, unless there had been some collaboration - I won't call it coaching - between the witnesses and Mr Bukarica, or just the witnesses.

PN4626

THE COMMISSIONER: Well, I think we need to move on. I am already starting to get apprehensive about the timing of this matter.

PN4627

MR FITZGERALD: Yes.

PN4628

THE COMMISSIONER: So - - -

PN4629

MR FITZGERALD: Yes, I am certainly not attempting to delay it, but it is just simply setting out the submissions which we are making.

PN4630

THE COMMISSIONER: So the reference to coaching has been withdrawn?

PN4631

MR FITZGERALD: I will withdraw that, Commissioner.

PN4632

THE COMMISSIONER: Are you satisfied with that, Mr Bukarica?

PN4633

MR BUKARICA: Yes, I am.

PN4634

THE COMMISSIONER: Thank you.

PN4635

MR FITZGERALD: But as I said the evidence of Mr Hinds is contradictory. It wasn't unequivocal, it didn't show any knowledge of the industry, or events, or developments. There are a number of references to major decisions affecting the CFMEU on a national basis, and given he continued to make the excuse that he was too busy, but if he is the secretary of the Mining Division of the CFMEU those matters of national importance affecting all branches we say should have been within the knowledge of Mr Hinds. Clearly they weren't. Maybe that indicates the lack of experience he has had, and I am not having a go at Mr Hinds in other areas, but the lack of experience he has had in the industry.

PN4636

Similarly, Mr Best, and he really didn't add much, and I will speak more about Mr McLean's evidence later. Contrasting that, we have the evidence of Mr Knott, and we say that Mr Knott is a witness with a high degree of credibility. He is able to present, and he was able to present a very knowledgeable view of the industry, both within Tasmania, because of his time spent here, and nationally. His evidence - and there has been some reference to - and the only way Mr Bukarica has attempted to break down Mr Knott's evidence is to make some suggestion that AMMA as an organisation has a sort of a leading role in what Henty does, and I have already indicated to the Commission that clearly we are an organisation which takes instructions from our members.

PN4637

We have very clearly enunciated the position of preference for direct employment arrangements. That facts are, as I am sure Mr Bukarica would be aware, is that there are a multitude of arrangements amongst our membership, ranging from direct employment arrangements via contracts of employment, to AWAs, to the union agreements, both federal and state, the various states, and non-union agreements, both in federal and state. So I can absolutely assure the Commission that AMMA, in terms of its position here, is taking instructions from Henty, and will continue to do so, as it does from all its members.

PN4638

But the evidence of Mr Knott I think is compelling. There is absolutely no way he was broken down in cross-examination. He was very precise. He indicated, as I put to the Commission yesterday, correcting his position in respect to Weipa, that he wasn't sure about that. He was careful enough to research the position, how carefully we advised the Commission there is no contention about that. He had a very good knowledge of the industry, and that is the way it came across, absolutely no breaking down in cross-examination. The evidence of Mr Daly again was straight forward. His memory of events indicates the standing he has as a manager in the industry for some years, and the knowledge he has in the industry.

PN4639

There is, despite Mr Bukarica's attempts to break down Mr Daly in terms of cross-examination, he remained absolutely solid in his evidence, and that I think stands in stark contrast to the three witnesses of the CFMEU. The evidence will be that clearly the CFMEU in Tasmania have had a very limited role in the industry, particularly in recent times. The evidence certainly is there is that the membership of the CFMEU goes to a handful of members, of inactive members at the Savage River site, with no issues at all being raised. Again, this is - the examination of Mr Hinds via those members, there is no active role or representation role. There can't be. There is no award which the CFMEU is bound to there.

PN4640

We heard the evidence of Mr Lowe as to why the CFMEU had a presence there in the first place. Mr Knott described that as an anomaly. It was in contrast to the industrial coverage of similar sites throughout the rest of Australia at the time, and we have now heard from Mr Lowe that effectively it was a political deal which enabled the CFMEU to have that presence. And we have heard since that when the Savage River Mine reopened that the AWU opened it with a Greenfield agreement, and they saw that that was effectively correcting that anomaly which had existed with its previous owners.

PN4641

The contention by the union, the CFMEU, is that effectively everyone utilising power in the broader sense can be covered by the CFMEU. Without being sexist about that, that could be a housewife using an iron. It is as broad as that. What is more important I think the Commission to take into account is to look at the traditional coverage, and the pattern of coverage, not only in Tasmania, but also throughout the rest of the country. We have heard evidence that the only other members within the industry, and again I would suggest they be a completely

inactive membership, at the Beaconsfield Gold Site, where, in our view, and it will be our evidence, and we will simply go through this as well.

PN4642

It will be our submissions that the only way that those employees became interested in joining the CFMEU was the influence Mr Hinds had when he was engaged in a different capacity at the site, as the security officer. Now, that has been denied in evidence, but it is simply not a plausible response. In any event the membership, if we can call it that, because they are not - and it was misleading, I would suggest, for Mr Hinds to say they are members. It was only when pressed as to their memberships status that he admitted that they weren't financial members, therefore they had no status.

PN4643

But notwithstanding their status it is clear that there has been no active involvement by the union, no issues raised by the union on behalf of the employees at Beaconsfield Gold. And therefore again it is similar to the Australian Bulk Minerals situation, the CFMEU are not party to an award, they had no rights of entry. Again there is absolutely nothing the CFMEU can offer them. Similarly, with the Henty Gold Mine, again there has been evidence that the members have been members for two years. I think the true position is that there has been a few members there for a number of years, but again they have been inactive. They could be what I say residual members coming from other sites or other functions, where they were members of the CFMEU and continued to be so.

PN4644

It has taken effectively two years for the CFMEU to raise any issues on behalf of the unions. And this notion of setting up a power base, and have strategy meetings, in my view, again is not plausible. So what we will be saying, Commissioner, is that the issues of rules and whether there is an ability to cover or not is, I think, a very peripheral issue, is the custom and practice which has existed in this industry. And we will move more on to the potential for the disruption later. And that is something which I think the Commission should hold more highly than the issue of whether there is in fact a key to recovery - to cover.

PN4645

There is a whole range, and again I will take you through it, but I am just foreshadowing it. Mr Hinds in evidence indicated that - and there is some doubt about - he says there is some doubt about whether the section 118A now applies to the legal entities which are named in that section 118A order. Well, I can say, Commissioner, none of those legal entities exist in this current day. Talking about Beaconsfield, the Pasminco site which is now in effect - the Queenstown site which is now Copper Mines of Tasmania, the Renison site. Again, as you are probably aware, that is about to reopen, and did operate under different owners from Renison Limited in previous times.

PN4646

There is clear evidence that the CFMEU, certain for a substantial period, complied with the section 118A order, and that was at a time when those entities had changed. So they had accepted that. Now, Mr Hinds says, rather

opportunistically, that there is some doubt whether those orders will continue to apply to those sites, based on the legal entity argument. Yet it was his own legal adviser's advice, as he described it, to leave the Beaconsfield Gold site alone. What we say about that section 118A decision, and I can't speculate, and nor can Mr Bukarica I think speculate about the reasons why there is no specific sites.

PN4647

But clearly it is consistent with the AWU evidence as well, the three witnesses by them. Clearly the intention was to demark the industry in favour of the AWU. The evidence is clear. That has been complied with. It was consistent with others, with the rest of the industry throughout Australia. The CFMEU really don't have a role in the industry here, and the futile attempts, I would suggest, to somehow - and I think it has been answered by the evidence of particularly Mr Knott - to say that the members held at Cornwall Coal, the members held at Temco, and the members held by contractors such as Lloyds North at Cornwall Coal are within the metalliferous sector is quite clearly wrong.

PN4648

It has been freely conceded by Mr Knott with his knowledge of the industry that the CFMEU have had a presence in the coal sector. That sector has been clearly distinguished and differentiated between the metalliferous sector. It is clearly a long bow to suggest that the members held by the CFMEU at Temco are in the metalliferous mining sector. As Mr Knott said, one is a smelter and one is a mine. It is a stand alone facility, as opposed to Henty, which is an integrated site. So again the membership numbers in the metalliferous sector, in the terms of significant, which Mr Bukarica is suggesting, is pretty paltry I would suggest.

PN4649

The other site where they hold members again is similar to Temco, but run by a totally different division of the CFMEU, the construction and general division, I understand, is the Zinifex Hobart site. And again it is misleading for the CFMEU to suggest that those numbers should be taken into account for the purposes of establishing some allegedly significant involvement in the industry. When you examine it and reduce it to its basic essentials we are talking about 11 members, 11 inactive members or so, at the Henty Gold Mine, and we are talking about, I think it was six or seven from memory, again inactive members, at the Savage River site.

PN4650

That is the extent of the involvement. You could hardly say that was significant. It will be our submission, Commissioner, and we will take you to the evidence here as well, that this allegation by the CFMEU witnesses, and particularly Mr McLean and Mr Hinds, that there will be a peaceful coexistence, is an absolute joke. Why are we here? If that was the case the deal would have been worked out previously, and there would some demarking between the unions. Clearly the AWU are taking a strong position on this, and do not want to be part of any CFMEU award structure.

PN4651

Justifiably the AWU hold that position in my view, given that they are the appropriate union in the industry. We have heard a great deal of evidence, and uncontested evidence, by the union, and reluctantly I would have to concede that

our members and our association have been on the receiving end of that in some instances, where the AWU have run comprehensive, and I would suggest very professional and persistent campaigns on such matters as hours of work. It hasn't affected the Henty Gold Mine, because there was, if you like, a compliance in any event.

PN4652

But at some sites our members were forced to change their shift arrangements as a result of the AWUs persistent lobbying, which effectively caused the implementation of the hours of work inquiry, which in turn caused directions by Workplace Standards on the Mt Lyell site, and the contractor Barminco at that site. Again, and it is a position of AMMA that we have obviously opposed the number of issues such as portable long service leave, but it keeps us busy, and we respect that it is the AWUs right to raise these issues, as I think they respect us to raise opposition to those issues as well.

PN4653

But there is comprehensive evidence by the AWU witnesses, not only of recent times via Mr Wakefield and Mr Jones, but even as early as the early 90s and 80s, where we had a, you know, very comprehensive picture of the industrial warfare which went on in those days. Now, Mr Bukarica and his witnesses are suggesting that that is all forgotten, we are in a different era, we are all mature parties, and we can work it out. Well, the fact is, Commissioner, we are in this Commission, both strongly putting our positions, all parties strongly putting their positions, in opposition to the CFMEU application.

PN4654

That doesn't show any evidence of any sort of peaceful coexistence to me. I would suggest that that is a fanciful claim by Mr Bukarica. Mr Knott's evidence also talked about extensive litigation between the CFMEU in the civil and mechanical area, which, and I wasn't party to it, but as an officer of our organisation it was one which I was fully briefed on, and in contradiction to Mr Hinds, which I would have thought he would be briefed on as well, because he is an officer of his organisation, and I think probably had more idea that he actually indicated in evidence, but that was a major case, where the CFMEU were seeking to intrude in areas where the AWU traditionally had coverage.

PN4655

That case went on for about seven years, as Mr Knott said. It went ultimately to the High Court, which ultimately confirmed earlier decisions of earlier Tribunals, and rejected the CFMEU application. It was defended strenuously by the AWU. I am aware of that, and very strenuously by our association with our members associated in that area. As Mr Knott said in terms of legal costs it cost our association in excess of a million dollars to defend that. But that again is not at a national level. It is an indication that the AWU and the CFMEU cannot peacefully coexist.

PN4656

You know, Mr McLean was fairly confident in his evidence, and he suggested that maybe the ACTU can assist in that. I mean, as you would be aware I am sure, Commissioner, the ACTU in these sorts of matters have been singly unsuccessful. If I could put it this way, they pander to the political factions, if I

can put it that way. And that is not an easy answer to potentially a very difficult problem. And I don't think you can just simply wipe out years of history. You know, the history, apart from some years of compliance, has continued to be demonstrated.

PN4657

Now, we have seen Mr Hinds receiving advice from his lawyers to leave the Beaconsfield site alone, yet he has not actively, but may be - and we will talk about that later when we get to Mr Hinds' evidence - but he has willingly taken on members, although they haven't signed on, to be members of that organisation. So that doesn't indicate to me now a preparedness to comply with the section 118A order. The extent of, and it is our submission, and we will certainly show this in the evidence, the extent of deceit in terms of the evidence of Mr Hinds doesn't indicate to me an organisation that is transparent and is willing to work things out in a peaceful way with the other union, being the AWU.

PN4658

There was evidence, and this is recent evidence, of a heated discussion between Mr Hinds and Mr Wakefield on the new deck, as it was described, of the AMWU offices. That wasn't back in 1990, that was this year. Now, that doesn't indicate to me that the unions can peacefully work it out. What we have, Commissioner, is if you grant the CFMEU application very fertile ground to enable the demarcation disputes of the 80s and 90s to be reignited. It is as simple as that. I won't speak further about the AMWU witnesses, but to my mind - - -

PN4659

MR BUKARICA: CFMEU.

PN4660

MR FITZGERALD: Sorry, the AWU witnesses. To my mind, just briefly alluded to them, both Mr Wakefield and Mr Jones under some difficulty, and Mr Lowe had clearly established a long pattern of involvement by the AWU. They have clearly indicated, and I don't think it is an issue of which is the best product. What they have demonstrated is that they have provided, you know, ongoing services to members of a range of issues, not just industrial issues, but associated issues. And clearly they have established that it has been their turf for a number of years, and the involvement of the CFMEU has been minuscule in the extreme.

PN4661

We have seen by the evidence, and I think again in terms of the CFMEUs involvement I understand the Pilbara thing is still developing, and is very recent, so I don't know whether that is of any great worth. The Weipa membership of the CFMEU is small in the overall scheme of things. In terms of the industry nationally, you know, 80-odd members at Weipa is hardly significant. In terms of the CFMEUs involvement at Broken Hill there was no evidence about numbers or activity or anything like that, but what there was evidence from Mr Knott on was that there was very much a historical thing, the union were registered under the State Act.

PN4662

I know our organisation has been involved with the re-establishment of the Broken Hill Mine and my instructions are that the CFMEU have a fairly limited

involvement there. They are very much a historical involvement. So in the overall scheme of things the CFMEU have been very much a small part. Now, what I think I might do, Commissioner, is just continue to proceed with the submissions made by Mr Bukarica, and respond to those. And then I will take you to the evidence which I indicated I would do, because it is of great concern, and I can clearly show you the inconsistency of evidence of Mr Hinds, and also the inconsistency between Mr Hinds and Mr McLean and Mr Best.

PN4663

Mr Bukarica placed a great deal of emphasis on the issue of the 118A, and the repeal of that section, and what is required, and he is contending that we would have difficulty. I mean, that is a matter for speculation. As you would be aware, that is not the test which the Commission has to apply to the making of whether this award should be made or not. It is a broad public interest, and I will go through that as to why I believe it is against the public interest to make an award for a discrete section within one particular plant for seemingly 11 at the maximum employees, when all our other members within the industry either have arrangements in place with the AWU, or have arrangements in place with the AWU and the two trades unions.

PN4664

So that would be the effect if the CFMEU application were granted. We would have every site within Tasmania covered by those several industrial arrangements with the AWU and the two trade unions, or with the AWU solely, and then we would have one site, which would stick out, with the CFMEU having some role. It is our submission that we are not required to arraign a section 118-type argument or its equivalent under the current Act. That is not we are required to do under this application.

PN4665

As to whether that would be - and we have certainly sought instructions as to what - and we have decided not to proceed that way, but to concentrate on this application. In any event, it is not what is required, and it is not part of this application. Mr Bukarica says that he deliberately, or his union deliberately targeted non-union mine sites. And the record will show it. I made a note to the effect that he agrees with me that the transmission provision of the Federal Act would in fact enable that 118A to apply to the current operators at those sites.

PN4666

MR BUKARICA: I can't recall that, Commissioner.

PN4667

MR FITZGERALD: The record will show that.

PN4668

MR BUKARICA: I am sorry, Mr Commissioner, I didn't. I have never made such an admission. The issue of the effect of the transmission of business provisions I have not addressed at all in these proceedings, so I ask that Mr FitzGerald shall be accurate about what is being said.

PN4669

MR FITZGERALD: That is note I have made, but it may not have been quite as specific as that, but that is note I made from this morning's proceedings.

PN4670

THE COMMISSIONER: From this morning's proceedings?

PN4671

MR FITZGERALD: Yes. In the submissions by Mr Bukarica.

PN4672

THE COMMISSIONER: Well, the record will show that, but I must say at this stage I am inclined to agree with what Mr Bukarica has just said.

PN4673

MR FITZGERALD: Okay. I apologise if I have misquoted you, Mr Bukarica, but that was my recall, and that is the note I made at the time. It is important, I think, Commissioner, to clearly show to the union that the Henty site is an integrated site. It doesn't provide a stand alone processing facility. There is at times an interchange of staff between the mine and the mill and vice versa from time to time. It is on the one physical site, and that is one thing we haven't done is have inspections, but I think I can do that by a submission, unless Mr Bukarica has any contest to that, but I don't think it would be contested that we are all talking the one site.

PN4674

Whereas, I suppose, Savage River could arguably be given a geographical separation of the sites, and be argued that it is a mining site at Savage River and a processing site at Port Latta, but the Henty site is very much a mining site, an integrated mining site. As I said, Mr Bukarica placed a great deal of emphasis on drawing - and I think somewhat of a long bow - drawing an analogy out of the Federal Act which has no application in this environment. The test the Commission should apply is whether an award should be made, or whether we should refrain from hearing it in accordance with 21(1)(C), and that is, you know, whether it is in the public interest or any other reason why the Commission should refrain from making the order.

PN4675

We can't deny that there has been radical changes to the Industrial Relations Act since 1996, and that there is a greater emphasis on freedom of association and various forms of agreement. But we have within the body of the CFMEU rules an ineligibility to enrol members at certain sites. Conceivably, not the Henty site. That makes logical sense. Henty had not even commenced operations when that order was made. I am not even sure whether exploratory work was done. I assume exploratory work was done at that time, but the intend, we say, of that order was to demark, as simple as that, the CFMEU out of the metalliferous mining sector in Tasmania.

PN4676

And quite clearly there is emphasis placed on the metalliferous sector as opposed to the coal sector. We have no question about that. So all the submissions Mr Bukarica made in respect to the analogies of the Federal Act, and drawing issues or argument to current section 118A or equivalent, in my view can be quite

simply dismissed on the basis of that is not the test which has been applied. Mr Bukarica says, using these analogies, that a statement made by Munro J that the views of employees had been elevated in the terming of the 118A or equivalent matters. I think that is probably the easiest way to refer to it. The ROR I think it is.

PN4677

But if that is the case then employees have voted with their feet surely. Now, we have heard evidence of substantial membership by the AWU in the mine and the mill. We have heard - and again that is important, the context of the cross over and interchanging of staff between the two departments. Surely that is something which can't be ignored. We have heard evidence of a small number of employees of the CFMEU in the mill only, and an inactive membership up until this point only. I think the evidence of Mr Daly was that he was unaware of the degree of consultation which occurred between the CFMEU and their members and others at the site. But if it is freedom of association then others at the site where the award application was made, was made without reference to those.

PN4678

And clearly those employees, members of the AWU it seems at the mill, are going to be affected by the CFMEU application if it were to be successful. Yet they weren't consulted. As Mr Hinds said, he consulted only with his members. So what the Commission must do is really weigh up not the aspects of the Federal Act, but weigh up the evidence and the public interest. And what we say is there is already competition at the site, the Henty site. If the CFMEU application is granted that will provide fertile ground for the CFMEU then to simply enrol whoever they wish at the site, including those and, you know, members of the mine.

PN4679

It must stand out to you, Commissioner, that the application simply covers the mill only, and there is no coverage of the mine. That says something, in my submission. What it is going to end up is that everyone is going to be a loser if the application were granted, the company particularly. And the company, as you would be well aware, Commissioner, will be the meat in the sandwich. I don't think we are so naive to think that if the CFMEU were successful in their application, and were granted an award, which, as I said, stands in contradiction to all other enterprise awards in this Commission, that that would be the end of it. Clearly they would use that as a basis to enrol members, and clearly they would use that as a basis to enrol members in the mine.

PN4680

Mr Hinds, in his evidence, said, "Everyone is fair game." He didn't care about the 118A, he didn't care about his rule coverage. He said, "If the employees turn up and say, 'I want to be a member of the union'", he will take them on. Now, clearly that is fertile ground. It is a recipe for disaster. We are going back to the old days of when, like, what Mr Lowe said, where there could be physical altercations as a result of those sorts of things. Now, clearly, that altercation occurred, if you recall, and it is quite vivid in my cross-examination of Mr Lowe, as a result of Mr Best, the CFMEU organiser at the time, attempting to enrol

employees at the Hellyer site, who were clearly eligible and traditionally covered by the AWU.

PN4681

Now, what is the purpose of the application otherwise? That begs the question. Is it just going to be that they have their name on the award? No, clearly not. It is going to be for the purposes of launching a membership campaign, and they have already talked about strategising, but that strategising went on for two years without any real result, and a form of power base. Well, the power base hasn't really changed, but, you know, we will go through some of those issues later on. So that is really what the Commission has to do, is to weigh up all those and the public interest. Now, what is the potential?

PN4682

And the history hasn't been good, Commissioner. And the reason why it has been better in recent years is that the CFMEU have in fact complied with the section 118A and stayed out of the industry. But there is no doubt, in my submission, that despite these fanciful claims that the unions can peaceably co-exist, that the CFMEU will continue to encroach in the industry. They will continue to encroach at the Henty site, and then use that as a basis of establishing their presence in other sites on west coast mines. We have heard evidence that Mr Hinds and his colleagues ran advertisements in the West Coast Herald and conducted meetings with very few attendees, I should add.

PN4683

Was that for fun? Clearly not. It was for the purpose of enrolling members in the industry, and there is no shirking the issue, Commissioner. That is what will happen. And what we will see in response, without a doubt, as Mr Wakefield said yesterday, is that the AWU will retaliate, just as Mr Lowe did back in the 90s. And that will then retaliate into other areas. The AWU, as Mr Wakefield said yesterday, would see Cornwall Coal employees as fair game. It has the potential for a very fertile - it provides fertile ground for a major demarcation war.

PN4684

Despite these fanciful claims by Mr Bukarica that, "Everything is hunky dory. We will work it out. Leave it to us." Well, there has been absolutely no evidence of that so far. If I can refer to the Weipa decision, and I must admit I am fairly familiar, having been up to Weipa in the last month myself, as to the presence of the CFMEU and other unions on site. I was trying not to take too much notice of it, given I was on holidays, but it was fairly obvious. The Weipa decision in the, if you like the over ruling, the overturning of the 118A original order, was based on a radical change in numbers. Clearly that is not the case here. We have heard evidence that the AWU have had a presence on site at the Henty Gold Mine for a number of years.

PN4685

I personally was involved in Legislative Council proceedings where the AWU used Henty Gold as a case study, if I can put it that way, on the issue of right of entry. There has been evidence that the numbers over the years have changed between, I think, seven and 12. The Henty Gold, under its former owners, changed their position of right of entry, and recognised that, despite the fact that the non-union section 61 agreement was continued to run on, but recognised that

the AWU were the appropriate union. They have responded to a number of claims by the AWU, both formally within this Commission and you, Commissioner, I am sure would be well and truly aware of the Butler case being on the Full Bench, which overturned the reinstatement order.

PN4686

But that case went on for, my recollection is seven or eight days at first instance, and a couple of days on appeal, or at least one day on appeal. There was the Wayne Brown case which came before the Commission, which was run at the same time. It was clear that the company, and this is not the current company but the former company which ran the Henty site, continued to recognise the AWU as the principle union, as the appropriate union in the industry. We heard evidence that relations between the company and the AWU officials were civil. We heard evidence that the AWU were frustrated that they couldn't go to representative role, but were excluded by the fact that the wages and conditions packages they were receiving were favourable, particularly compared with the rest of the industry.

PN4687

They were frustrated by the fact that the employees really didn't have any issues to raise with them, and employees themselves didn't want to raise issues. We did see a change in attitude, certainly, and that came in with the roll over of the common law contracts, which I will talk about in a minute. But we saw a change in ownership of the company. We heard evidence from Mr Daly that Placerdome at its other sites has arrangements with the AWU. They clearly recognise that that is the appropriate union to deal with the industry at other sites in the same industry throughout Australia.

PN4688

The attitude of the company in terms of maintaining the current arrangements, the current direct upon arrangements was that they wanted to continue with that under a common law contract, and we have heard evidence about that. We heard evidence that the AWU became involved at that point, but not in response to the CFMEU application. And there has been a number of attempts by Mr Bukarica to draw some connection there, all unsuccessful. And all it is is he is saying it is not plausible. The evidence of Mr Daly, which was on oath, clearly indicates no connection.

PN4689

That should be the end of it, but Mr Bukarica still attempts to draw out, and it was also supported by the evidence of Mr Wakefield yesterday, and I think Mr Flanagan, who I may recall there may not be so good. But there was no connection. It was in response to the employees concerns about their rights under a common law contract of employment. We heard evidence from both Mr Wakefield and Mr Jones and Mr Flanagan that his union had effectively - themselves had also targeted, if you like, non-union sites. They had over the last 12 to 18 months made some changes in respect to the industrial arrangements at the Beaconsfield Gold site.

PN4690

They had in conversation with me urged me to influence our members, and that is what Mr Bukarica is suggesting, to change their view on the non-union

arrangements which were in place at Beaconsfield and the Henty site. My response to them consistently was, "I am not in a position to do that, nor would I." And as any other employer group's position is that they will clearly act on the instructions of their members and they will advise them on what options are available, but we can't instruct them. So it has been a constant theme that Mr Flanagan said to me that, "You know, we have knocked off," I think in those terms, "Beaconsfield Gold, now Henty."

PN4691

Now, what it was was the appropriate opportunity was provided to the AWU in terms of this issue of the employees' genuine concerns about a common law contract of employment. In retrospect maybe those concerns may not have manifested themselves so strongly if the company had sought to renew the current agreement, but the company, for its own reasons at a corporate level, determined that they wanted to proceed with common law contracts. And that obviously caused a great deal of concern amongst employees, to the extent that they contacted their union and the union then contacted Henty, and then the discussions for the agreement took place from that point.

PN4692

And the concern was about providing an appropriate underpinning agreement, and that is what the company has done, simply that. But no matter how hard Mr Bukarica tries to draw some sort of link, that hasn't been described in the evidence. In respect of the Pilbara agreement, which Mr Bukarica raises, I suppose all we can do is take it on his word that it has been signed and implemented, but it was an unsigned document, so it really has no status. What he says, and I will just draw the contrast with the situation in Tasmania, is that he says that the Pilbara agreement covers more than a few drivers and the like and there is overlapping coverage.

PN4693

Well, in Tasmania the practice is that there is not overlapping coverage. It is clearly understood by the employees, by the principle union concerned, the AWU, and by employers in the industry who the appropriate union is, and there is no overlapping coverage. So the relevance of the Pilbara decision is indeed highly questionable. There was some discussion about, in terms of Mr Bukarica's submission, about the respective numbers between the AWU and the CFMEU and roughly in the mill they seem to be pretty much equivalent. And, you know, Mr Bukarica managed to successfully get from Mr Wakefield in cross-examination that in terms of the non-union site that that is reasonably significant.

PN4694

I think even Mr Daly would agree with that. But needs to be considered in the context of the other members of the AWU who have been - 40 plus of those, who are members of the AWU. That is where the significant number comes in to play. As indicated, we have heard evidence that there have been members of the CFMEU for two years. It seems that that has built up only in recent years, but so what? They have been inactive members. There has been nothing raised by the employees with the company through the representation of the CFMEU. We heard no evidence about that. The issue of the lodge structure is an internal mechanism of the CFMEU which that is their business, but there is no recognition

sought by the company - well, there was no indication of that to the company, so the company didn't recognise it.

PN4695

As Mr Daly said the first time the company became aware of the lodge structure, we had never even heard of what a lodge structure was. I was aware of the term, but Mr Daly wasn't, until the first hearing in Launceston. The evidence of Mr Hinds - you know, I will take you to it in full later - is that he recognised the - and this is where I - certainly the reference I had made to transmission, but the evidence is that he received advice from his legal advisers to leave the Beaconsfield Gold site alone, yet he did continue to enrol members there.

PN4696

I think that draws the natural conclusion that it certainly is arguable that within the transmission provisions of the Federal Act that that 118A will continue to have ongoing applications to whatever operator. And we have seen that being complied with for at least a decade or more by the CFMEU, because, as I said, all those sites have changed in their legal entities in that time. If Mr Hinds says that it is not the same legal entity, it is all state development, not Beaconsfield Gold, which has operated in the Beaconsfield Gold Mine, why then didn't his union seek to enrol members at the Zinifex site?

PN4697

That company has changed from my recall probably at least three times in terms of its legal entity. Why then did Mr Hinds seek to enrol members at the Renison site? And that, since I have been involved in the industry, has changed its legal entity at least on two occasions. And why then didn't he seek to enrol members at the Mt Lyell site? And again in my involvement that has changed at least once.

PN4698

THE COMMISSIONER: Mr FitzGerald, I would just ask you to pause for a moment. I get the impression your submission is going on for some time?

PN4699

MR FITZGERALD: It will, Commissioner, yes. And I am afraid to say that, thinking about Mr Bukarica's plane, I do need, because they are serious matters which I have raised in terms of the issue, I do need to take you to those, and there will be, you know, fairly detailed examination of the transcript. So for that reason I think I am not going to be able to complete today.

PN4700

MR BUKARICA: Mr Commissioner, if I could offer a suggestion. I just had a brief word with Mr Flanagan. It appears that we are going to run out of time today regrettably. The position probably could be served if the remaining submissions were put in writing to the Commission, including - I mean, I have managed to extract from the transcript what I think are the relevant reference. Mr FitzGerald could do the same. Bearing in mind, however, I think there should be a very short time frame for those, if that is an agreeable course, maybe in the order of a week or so, so that any awards, etcetera are not - - -

PN4701

MR FLANAGAN: Yes. Look, in terms of process, we have had Mr Bukarica's submissions. Mr FitzGerald will get part way through his, perhaps complete, I don't know. It doesn't sound like it though. Perhaps if the outstanding submissions, if any, on the part of Mr FitzGerald certainly from the AWU, can be provided to the Commission by next Friday, and an appropriate period of brief for Mr Bukarica to reply, obviously the AWU, and I am sure everyone is concerned that the date is fast approaching when the section 61 expires, and we don't want them left high and dry.

PN4702

THE COMMISSIONER: Yes. That is one alternative. The other alternative was that I could reconvene in the middle of next week and excuse Mr Bukarica from attendance, that he has made his submissions, and give him an opportunity
- - -

PN4703

MR BUKARICA: And be able to look at the transcript, yet?

PN4704

THE COMMISSIONER: Yes.

PN4705

MR FITZGERALD: Commissioner, I have commitments Monday, Tuesday and Wednesday - - -

PN4706

THE COMMISSIONER: Off the record, please.

OFF THE RECORD

RESUMED

[3.30pm]

PN4707

THE COMMISSIONER: We will go back on the record. Mr FitzGerald, if you can proceed and we will adjourn at about quarter to four.

PN4708

MR FITZGERALD: What I intend to do, Commissioner, is just complete the response to Mr Bukarica's submissions, and just heeding your advice, one of the matters when it comes on again on Friday next I will attempt to succinctly summarise the - so I apologise if I seem delaying. It is not my intend to do that, I can say that. So I will just complete the response to Mr Bukarica's submissions. Commissioner, I was certainly talking about the aspect of competition of union members. I am sure Mr Flanagan will address this as well, and indicating that if the application from the CFMEU were granted it would present fertile ground.

PN4709

Effectively what we have is two unions at the one site competing for the same workforce, certainly in the mill, potentially in the mine. We saw an example of

that, and history can't be ignored, where Mr Wakefield indicated that a number of employees at the Pasminco Hobart site had in fact come across to the CFMEU. I think we saw that at Temco too, where, as a result of the incoming AWU leadership, there was a mass exodus to the CFMEU. Now, clearly there are issues there which cause proper competition, and real competition. There is no doubt, as I said, that the CFMEU will attempt to use this as a means to promote that competition.

PN4710

We heard evidence from Mr Wakefield yesterday that, as he described it, one up man ship, and someone else described it in other terms. I think it was Mr Flanagan described it in other terms. But clearly it is an inefficient way to negotiate either an agreement or an enterprise award if you have a number of parties, and it becomes even more inefficient if you have got a number of parties representing the same workforce, the same section of the workforce, if I can call it that, as opposed to those dealing with the AWU and the CFMEU with their respective membership.

PN4711

So, you know, there really is - it can't be dismissed. Again, I just respond to Mr Bukarica's submission. He says there is circumstantial evidence that this - and it is only circumstantial evidence, and that has got to be considered against the direct evidence - that there is some linkage between the indecent haste which Mr Bukarica is suggesting of the agreement, and we will address that later, because it is certainly not indecent haste. But that is all he can say, "It is not plausible, there is circumstantial evidence, it has been used as a demarcation tool." It is not the case. The current agreement which is in place, the section 61 agreement, is an underpinning document over-ridden by a common law contract.

PN4712

The proposed agreement is in exactly the same terms. It provides that underpinning protection. So for Mr Bukarica to call it a demarcation tool is again, like many of his submissions, fanciful. And this notion, and in my is a rather pathetic attempt to draw some sort of connection between our organisation and Henty. Now, Mr Knott's evidence in that regard was very clear. He unashamedly indicated that our association has a particular position on direct employment arrangements, and that is the position. It is well known. It has been adopted by the Australian Chamber of Commerce as their position also. And that is something which happens in the industrial relations debate, whether national or state level.

PN4713

But the facts are that, as we have already seen in the evidence, that amongst membership there are a multitude of arrangements, ranging from direct employment contracts, AWAs to union agreements and non-union agreements. And you try to draw some sort of, again, I think, quite unsuccessfully linkage between AMMAs position on freedom of choice, and the freedom of choice of the union of whatever union to join. Now, clearly that has got to be AMMAs position is very much subject to the appropriate union, and our members have - across the nation have arrangements with the appropriate union. In terms of the agreement, the section 55 agreement, I will be making further submissions there, which is before the Commission.

PN4714

What we would urge the Commission to do is apply the same test as it does in approving every other section 55 agreement which has come before it, and that is, and we say that the discretion is not there which Mr Bukarica is suggesting. If we can satisfy, and it is our submission that we will be able to satisfy, the requirements of the Act in terms of section 55, and the requirements of the terms of section 36, the public interest provisions, the Commission's discretion, and also, sorry, the reference to the wage fixing principles, and the no disadvantage aspect associated with that, the Commission, in my respectful submission, has no discretion. The discretion really is only in respect of public interest.

PN4715

THE COMMISSIONER: Just on that point of the 55 agreement, there has been reference to an amended document which is not before the Commission.

PN4716

MR FITZGERALD: No.

PN4717

THE COMMISSIONER: When is it intended that be lodged?

PN4718

MR FLANAGAN: I can give it to you now.

PN4719

THE COMMISSIONER: Well, I think it may be useful, because Mr Bukarica is an intervener.

PN4720

MR FLANAGAN: Yes. I accept that, Commissioner.

PN4721

MR FITZGERALD: I think it would be wise, Commissioner. We would certainly urge that it be presented now. It probably should have been presented earlier.

PN4722

THE COMMISSIONER: Thank you. So the intent is that this document replace the existing document?

PN4723

MR FITZGERALD: That is my intention. I think Mr Flanagan will make submissions on that as well, Commissioner.

PN4724

MR FLANAGAN: I will speak to it when I get a run at it.

PN4725

MR FITZGERALD: Does that need to be formally introduced in the proceedings, Commissioner?

PN4726

THE COMMISSIONER: Well, it is an amended application.

PN4727

MR FITZGERALD: Yes. Okay.

PN4728

MR FLANAGAN: Can I seek leave to amend the application by the union and Henty to replace the agreement attached to the application with the agreement which I have provided you with?

PN4729

THE COMMISSIONER: Yes.

PN4730

MR FITZGERALD: There is no opposition to that leave being sought.

PN4731

THE COMMISSIONER: Mr Bukarica, you are an intervener. I am not quite sure what standing it gives you.

PN4732

MR BUKARICA: I wouldn't object in any case.

PN4733

THE COMMISSIONER: Thank you.

PN4734

MR FITZGERALD: Thank you. Yes, I am sorry. As I said, I think it should have been - - -

PN4735

THE COMMISSIONER: Leave is granted to amend the application.

PN4736

MR FITZGERALD: Thank you. Mr Bukarica asserts, and I don't think it has been substantiated by the evidence that, you know, times have changed. That is the end of the conflict. Now, what we have seen effectively, Commissioner, that might be the case, because the CFMEU haven't up until now been involved in the industry. But what we have seen is a transfer of that conflict into the industrial tribunals in other Courts. And we have seen active and vigorous proceedings before even up to the High Court.

PN4737

So things might have changed somewhat in the industry here, but it has been transferred to another Tribunal or another forum, sorry. I notice there are a couple of exhibits within the CFMEU bundle of documents, including the interpretation of the decision, which haven't been referred to in any specific way. I am not sure what the status of those is, but my submission is that, given Mr Bukarica hasn't asked for those, they should be just dismissed.

PN4738

THE COMMISSIONER: I was going to ask that question, Mr Bukarica. There is a number of decisions in your bundle that you haven't referred to.

PN4739

MR BUKARICA: Mr Commissioner, they relate to references in exhibit CFMEU1, where I have just listed awards where we have had interests, etcetera. I don't think they are critical, but I have referred to them, and cited them.

PN4740

THE COMMISSIONER: Yes. Thank you.

PN4741

MR FITZGERALD: And finally I think it might be appropriate, because I have got - I was going to address CFMEU7 in detail, but I think it might be appropriate that I finish at this point, because that would take me longer than five minutes. Commissioner, just the final point is in respect to the road makers matter, you know that is a matter which is appropriate to that industry, and in those circumstances it would need to be viewed in context of this application and the application for an agreement, which is in vastly different circumstances, where the majority of employees not only at Henty, but at every other metalliferous mining site in the state is covered by the AWU. So for that reason we reject the road makers reference on the basis of relevance. If it pleases.

PN4742

THE COMMISSIONER: Yes. If there is nothing further today, we will adjourn until 9 am today week. Mr Bukarica will be excused from attending that hearing. The transcript will be sent to Mr Bukarica with a few days to respond, to bring us to finalisation. The Commission stands adjourned.

ADJOURNED UNTIL FRIDAY, 13 AUGUST 2004

[3.40pm]

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