



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

DEPUTY PRESIDENT BINET

C2020/8999

s.739 - Application to deal with a dispute

Mr Scott Nigel Tracey

and

BP Refinery (Kwinana) Pty Ltd

(C2020/8999)

Perth

1.00 PM, FRIDAY, 3 FEBRUARY 2023

PN1

THE DEPUTY PRESIDENT: Mr Tracey, you're appearing on your own behalf this morning?

PN2

MR S TRACEY: I am.

PN3

THE DEPUTY PRESIDENT: Is there any housekeeping before we start?

PN4

MR TRACEY: Me and Mr Boothman had a chat about how we thought the morning might run, with oral opening and then cross-examination. If there's nothing out of the ordinary, oral closing and there wouldn't be any written closing, but that's all I can suggest.

PN5

THE DEPUTY PRESIDENT: It sounds perfect to me.

PN6

MR TRACEY: I'll try and keep it brief, but you know how hard it is for me.

PN7

THE DEPUTY PRESIDENT: I know how these things go. Mr Boothman?

PN8

MR R BOOTHMAN: Deputy President, the only matter I bring to your attention - Ms Millar, who ordinarily would appear on behalf of BP, is hospitalised; has been for a number of weeks; is likely to be out mid to late February, but yes, sends her apologies and I'm stepping in today. But the ordinary course would be that she would continue.

PN9

THE DEPUTY PRESIDENT: Thank you. Mr Tracey, did you want to speak to the submissions that you've filed?

PN10

MR TRACEY: I wasn't sure if Mr Boothman would be going first, seeing that he was applying for - - -

PN11

THE DEPUTY PRESIDENT: We can do it that way if you like. Mr Boothman, would you like to go first?

PN12

MR BOOTHMAN: I'm happy to, Deputy President.

PN13

THE DEPUTY PRESIDENT: Is there anything you want to add to the submissions that you've already filed?

PN14

MR BOOTHMAN: If it please the Commission, we might be heard on just four very short points.

PN15

THE DEPUTY PRESIDENT: Sure.

PN16

MR BOOTHMAN: We would say - just given the correspondence that's occurred since the submissions were filed, we would say first that Corrs's involvement, despite Mr Tracey's many assertions, has aided in the efficiency of these matters, and our view is that Corrs should be granted permission to continue to appear so as to continue to aid both the Commission and Mr Tracey in the resolution of this dispute.

PN17

The second point, as the Deputy President well knows, a recusal application is one of inherent complexity. The question of whether the Deputy President should recuse herself from a hearing, hearing a matter is not merely procedural but one involving a question of law.

PN18

We have cited the authority of Deeney, Hughes, Park, Seiffert v Patrick Projects, which is in our written submissions, so whether a member is capable of hearing or indeed whether they should in fact hear a matter on account of a suggestion of bias, which was made, becomes a jurisdictional issue.

PN19

It's well-established in the Commission that the starting point is that jurisdictional objections are often complex, and there is a UGL decision, which I don't have in front of me but we can provide to the Commission if necessary. I understand and appreciate that there are subsequent decisions at a Full Bench level that says not every jurisdictional objection will be complex, and each matter must be determined on its own facts, but we say, and in my experience, respectfully, a recusal application is one of inherent complexity so as to warrant the granting of permission for BP to be represented.

PN20

The third point, and with no disrespect intended to Mr Tracey at all, but every time pen is put to paper and he appears before the Commission, he does raise numerous arguments which in my experience are novel and complex, many have been before the (audio malfunction) created authorities that workplace relations practitioners like myself refer to and rely on. They are inherently novel and complex.

PN21

Fourth, the matter in and of itself is complex. Mr Tracey has been disputing various matters before this Commission since 2008. The various matters are often intertwined, and it would take any new person, and I point to Mr Lynch specifically - would take him a significant amount of time to unravel all of those. Mr Lynch's statement speaks for itself. He has no advocacy experience in

contested hearings, and we say that there is no basis to suggest that his inquiries at BP of other personnel were not true and correct.

PN22

But on the contrary, Corrs, and specifically me and Ms Millar of counsel, have been intimately involved in all of the matters since (audio malfunction). We have assisted the Commission and Mr Tracey throughout that entire period, and we will continue to do so.

PN23

So it's our respectful submission, adding to our written submissions, that the pre-conditions for the granting of permission for BP to be represented have been (audio malfunction) I wish to be heard on.

PN24

THE DEPUTY PRESIDENT: Thank you.

PN25

MR BOOTHMAN: Unless there's anything else I can help?

PN26

THE DEPUTY PRESIDENT: That's all. Thank you, Mr Boothman. We'll call Mr Lynch then. Do you require to ask Mr Lynch any questions in evidence-in-chief, or are we happy to go straight to cross?

PN27

MR BOOTHMAN: No. Unless there's a formality that I can run through for tendering his statement, beyond that there's no questions.

PN28

THE DEPUTY PRESIDENT: Yes. So if you could just get him to confirm the accuracy of his statement. The way it goes, whoever goes first does their opening, produces their evidence, sits down. The other side does their opening, produces their evidence, sit down, and then you do closing. And when you're speaking, if you just jump up if you need to speak and then wait till I ask you to speak, only because if you speak from down there or if you speak over the top of Mr Boothman, it's very hard for the transcription service to work out what's being said.

PN29

MR BOOTHMAN: No problem.

PN30

THE DEPUTY PRESIDENT: Thank you.

PN31

THE ASSOCIATE: Can you please state your full name and address?

PN32

MR LYNCH: Christopher James Lynch, and address is 717 Bourke Street, Docklands.

<CHRISTOPHER JAMES LYNCH, AFFIRMED [1.13 PM]

EXAMINATION-IN-CHIEF BY MR BOOTHMAN [1.14 PM]

PN33

MR BOOTHMAN: Mr Lynch, can you hear me okay?---Yes, I can.

PN34

You've made a statement in relation to these proceedings, correct?---That's correct.

PN35

Do you have a copy of that statement in front of you?---Yes, I do.

PN36

Can I confirm it runs some three pages?---Yes, it does.

PN37

Two pages there will be paragraphs 1 through 11, and on the third page is a date, 19 January 2023. Is that your signature above that?---Yes, it is.

PN38

Are there any changes you'd like to make to the statement?---No.

PN39

Do you say that this is a true and accurate reflection on account of the facts that you understand them in these proceedings?---Yes, I do.

PN40

I don't have any questions, Mr Lynch. We'd like to tender that statement, if it please the Commission.

PN41

THE DEPUTY PRESIDENT: I'll mark that exhibit R1.

EXHIBIT #R1 WITNESS STATEMENT OF CHRISTOPHER JAMES LYNCH DATED 19/01/2023

PN42

Mr Tracey, do you have any questions for Mr Lynch?

CROSS-EXAMINATION BY MR TRACEY [1.15 PM]

PN43

MR TRACEY: Yes, I do. Can you hear me okay?---Yes, I can.

*** CHRISTOPHER JAMES LYNCH

XN MR BOOTHMAN

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN44

From beginning to the end, how much time would you have spent in preparing this witness statement?---I would say probably less than an hour. An hour or so.

PN45

So about an hour then?---Yes.

PN46

Did you prepare it by yourself, or were you assisted by Corrs, like in the drafting or the context or what was required to go into it?---I was assisted.

PN47

What kind of assistance were you provided?---Corrs assisted with the wording of the paragraphs, or some - - -

PN48

And you had – sorry. Did you have any trouble following the information they provided you, or the formatting of the paragraphs that they provided you to use?---Sorry, can you repeat that?

PN49

In respect to your last answer where you said something like they assisted with the words to use in the paragraphs or the types of paragraphs, did you have any problems following their information or the paragraphs they instructed you to use?---No.

PN50

Did you spend any time since writing this witness statement preparing for appearing today?---Yes.

PN51

How much would you say you spent?---I'd say maybe an hour.

PN52

As the person who has general day-to-day carriage of the event, have you spent much time in general reviewing this matter or the other matters between myself and BP?---Some time.

PN53

Would you be able to provide an estimation of how much time? It doesn't need to be exact, just to the closest hour?---Of all matters, is - - -?

PN54

Yes, of all matters since you've become the person who has day-to-day carriage?

PN55

MR BOOTHMAN: Sorry, just Mr Lynch is only dealing with this proceeding, correct?

PN56

MR TRACEY: This is more in regard to my understanding as Mr Lynch now has day-to-day carriage of all information, all workplace disputes, based off his witness statement, including mine. So I'm just asking as part of his job how much time he spent in general.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN57

MR BOOTHMAN: I think, Deputy President – sorry, it might conflate the issues of this proceeding if we account for all of Mr Tracey's matters, which as I said in my submissions, that they are voluminous. If Mr Lynch was to say 50 hours for all matters, whereas in actual fact he may have only appeared in a short space of time, that might - - -

PN58

THE DEPUTY PRESIDENT: I think that's probably something you could press in re-examination potentially.

PN59

MR BOOTHMAN: Certainly.

PN60

THE DEPUTY PRESIDENT: To be able to rely on the evidence, it's helpful to make it clear on transcript what question the witness is answering. So sometimes on TV, counsel will look like they're being quite smart in asking questions in a certain way, framing them a certain way, but you need to be careful that when that written word is put on a piece of paper it's clear that the evidence that you're going to rely on from that witness is the answer to the question that you want to rely on. Do you understand what I'm saying?

PN61

MR TRACEY: Yes. I'll try to refer to a specific paragraph just to get to the point I was trying to make.

PN62

THE DEPUTY PRESIDENT: Yes. Maybe if you put the question again and just clarify whether you're asking him about this particular application or any application involving yourself and BP. That might help.

PN63

MR TRACEY: Yes. This question's just more of a general nature, because in your witness statement at paragraph 9 you discuss how demanding your job is, and how you have limited time and you don't think you'd be able to represent BP effectively. I'm just curious to how much time in general that you spend dealing with these matters – my matters, sorry?---In the last – since coming into this role, it's difficult to estimate over a number of months. I'd say several hours.

PN64

Less than five?---Possibly more than that I would say, in reading through some of the materials, yes.

PN65

So maybe between five and 10?---Yes.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN66

Can I just quickly get you to refer to, or just read in your own head paragraph 1 of your witness statement, please?---Yes.

PN67

In that paragraph, you refer that your witness statement is made from your own knowledge, 'except where otherwise indicated, in which case I have identified the source.' In your witness statement you haven't identified any other sources. So it's fair to say your entire witness statement is just based from your knowledge?---Yes, I think so, without re-reading through, yes.

PN68

Would you like a moment to review your witness statement and answer again, or are you happy with that answer?---Well - - -

PN69

(Indistinct) - - -

PN70

THE DEPUTY PRESIDENT: Sorry, just a minute, Mr Lynch.

PN71

MR TRACEY: The witness statement says what it says. He speaks from his own knowledge, unless otherwise identified. It's not otherwise identified. It's from his own knowledge. That's what he says.

PN72

THE DEPUTY PRESIDENT: Okay.

PN73

MR TRACEY: In that regard Ms Hill said the exact same thing of the last matter, and then under examination it turned out that the statement wasn't actually from her own knowledge. That's why I'm trying (audio malfunction) now.

PN74

THE DEPUTY PRESIDENT: I think Mr Lynch answered the question and said that it was from his own knowledge. Is that correct, Mr Lynch?---Yes, I believe so.

PN75

MR TRACEY: Can I just get you to refer to paragraph 2 of your witness statement, and in that paragraph 2 it says:

PN76

Where I refer to being aware of a fact or a matter, I have become aware of this through the performance of my role and my experience.

PN77

So given that statement and your previous one, how is it you've come to the knowledge that no BP employees in the HR department would be able to represent BP effectively?---That was based on my knowledge and understanding of the experience of the people and culture team.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN78

I guess I'm asking where (audio malfunction)?---Sorry, that just cut out.

PN79

I guess I'm asking where does that knowledge and (audio malfunction)?---It comes from my – you know, my position and working closely with all of the people in the team, or most of the people in the team; probably – and I'm not aware of anyone having that experience based on all of the discussions and matters that I've been involved in, including, you know, recruitment activities and talent conversations, discussions of that nature.

PN80

Sorry, just to clarify, now you're referring to discussions. Previously you've said it was all from your own knowledge; you would identify the sources otherwise. So can you please just clarify what discussions you're referring to and with what people?---So, I mean, over the years there are meetings that occur that discuss people's – where people talk about their experience when you're going through recruitment activities and things of that nature. But I mean, I'm not aware of any experience of the matter, of this nature, in the team. It hasn't come up in any – it hasn't been raised.

PN81

Do you understand there's a difference between no one having any experience and you not being aware of the experience?---Yes.

PN82

So in paragraph 8 of your witness statement where you say:

PN83

It is true that BP has a dedicated human resources department who are experienced in dealing with complex employer relations. However, no one in that team has experienced it acting as an industrial advocate in contested hearings before the Commission.

PN84

Is it more accurate to say that it's not that no one has any experience, it's just you are unaware if anyone has any experience?---Yes, to my knowledge no one has that experience.

PN85

While we're discussing BP's human resources department, which is what you refer to in paragraph 8, what do you characterise as the human resources department that you're referring to? Sorry, to be clear, in regards to people, positions, locations?---Well I guess the - what we call the either human resource or people and culture team, supporting businesses across BP Australia.

PN86

What job classifications I guess make up – fill in in that department?---There's quite a lot of different jobs - - -

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN87

Sorry, I'll try and be more clear. Do positions like BP's in-house counsel come under that HR department you refer to?---No.

PN88

Are you aware – referring to the statement you've made in paragraph 8 about to your knowledge no one in the HR department has the relevant experience, what about outside the HR department - are you aware of anyone who would have the relevant experience to represent BP in this matter effectively?---No BP employee, no.

PN89

Are you aware that BP has in-house counsels and a number of lawyers employed by them?---Yes.

PN90

And you don't believe they would have the requisite skills to represent BP effectively in this matter?---No.

PN91

Why not?---The in-house counsel employed in BP Australia, to my knowledge there is no employment – there's no employment background for any of them.

PN92

And you consider that's an important factor to represent BP effectively in this matter?---Yes.

PN93

Are you aware that BP has employees that previously worked for the Fair Work Commission as associates to Commission Members, or a Commission Member?---Sorry, can you just repeat that? A BP employee, did you say?

PN94

Yes. Are you aware that BP has an employee that previously worked in the Fair Work Commission as an associate to one of the Fair Work Commission Members?---No.

PN95

MR BOOTHMAN: Sorry, Deputy President, it might assist Mr Lynch if Mr Tracey tells him who that person is.

PN96

MR TRACEY: I don't have the full name of that person. I can refer to that. That was in my oral submissions.

PN97

THE DEPUTY PRESIDENT: I suppose at the moment all my evidence is that he's not aware of anyone, so there is no one. So unless you've got evidence that there is someone and you put that to him, the evidence is that there is no one.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN98

MR TRACEY: Yes.

PN99

THE DEPUTY PRESIDENT: Remember, Mr Tracey, you're not calling anyone to give evidence, so that's the difficulty. Going to (audio malfunction) you need to have – you can't just put stuff from the Bar table that things are facts. Facts you need to give as evidence.

PN100

MR TRACEY: Okay.

PN101

THE DEPUTY PRESIDENT: If you want to put a question, a name to him perhaps.

PN102

MR TRACEY: Yes. I'll have to come back to that name, but while I'm there, are you aware of one of BP's in-house counsel with the name, Annessa – I apologise if I am going to mispronounce her name – Annessa Nikolaou or something? She's based in Melbourne, and she's counsel for BP and responsible for the BP Kwinana refinery?---Sorry, what's the question? Am I – what's the question?

PN103

Are you aware of a BP employee named Annessa – A-n-n-e-s-s-a – and the surname is Nikolaou – I apologise – N-i-k-o-l-a-o-u? According to her LinkedIn profile she's based in Melbourne. She's BP counsel responsible for the BP Kwinana refinery?---I know the name.

PN104

Are you aware – is she responsible for the BP Kwinana refinery in legal matters?---I don't know. I have not – yes, I don't know that.

PN105

Are you aware of a BP employee, first name Michael, I only have a surname beginning with M - he's based in Perth; he's strategy and corporate development, previously a lawyer, and admitted to the Supreme Court of Western Australia?---Sorry, an employee named Michael in - - -

PN106

He (indistinct) - - -?--- - - - in Western Australia?

PN107

Yes. His first name is Michael. I only have a surname beginning with M. I don't know the surname. He's based out of Perth and his job title is 'strategy and corporate development'?---I can't think of anyone that matches that description.

PN108

Are you aware of many of BP's in-house counsel?---I know a few of them, yes.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN109

And you don't think any of them would be able to represent BP effectively in this matter, based with their legal skills and education?---Correct.

PN110

And that was because - it was your earlier answer that they don't have an employment background, is that correct?---Yes.

PN111

Would you still consider that they would not be able to represent BP effectively if someone with an employment background, like Mr Boothman or another Corrs lawyer, prepared all the relevant submissions and arguments to be read during the hearing?---Sorry, what's that question?

PN112

Considering you didn't think they were suitable because they didn't have an employment background, in circumstances where all the material is prepared ahead of time by someone with an employment background and they're simply required to read it out during the recusal hearing, would you consider they could now represent BP effectively?---No, not as efficiently as external counsel.

PN113

Sorry, I'm not asking that. I'm asking about effectively?---Yes.

PN114

They're different terms?---Yes. Effectively, no.

PN115

And now why wouldn't they be able to do it effectively?---Because my understanding is that, you know, that participating in such matters, you know, requires more than just reading the prepared statement, and it would be required - yes, doing other things during the hearing and responding to certain matters.

PN116

MR BOOTHMAN: sorry, Deputy President, I have to object to the line of questioning. Mr Lynch can't possibly know the extent of each lawyer's extensive advocacy experience in any jurisdiction. The point being made is whether they can act in this Commission. Mr Lynch's evidence clearly has been he doesn't believe anyone could. Mr Lynch might know lawyers that work within BP, but can't simply be expected to know all of their advocacy experience. It's not part of his role. He hasn't described that in his statement. It's sort of veering off course, in my view.

PN117

THE DEPUTY PRESIDENT: Mr Tracey, I suppose there's two issues here. First of all, Mr Tracey just making assertions from the Bar table that these people exist, and Mr Lynch has told me that he's unaware that they exist, so I've got no evidence before me. This is the problem if you don't lead the witness evidence. If someone says the only witnesses, it doesn't exist, then that's what I'm left with.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN118

And the other thing, Mr Tracey, to be fair to you, that I think that you may like to address in closing submissions, but certainly in matters where I've declined leave on the basis that the materials were filed in advance, they were exclusively matters where the issues between the parties were quite simple.

PN119

They were all unfair dismissal applications, which have very limited criteria which need to be considered. Those criteria are very thoroughly dealt with in the bench books, and having had conferences with the parties, having had the opportunity to draw to their attention the particular legal principles they need to address, I was confident that the matter was simple enough so that the hearing wouldn't require the discharge of any particular legal skills, because really they were participants in the proceedings. It was really factual disputes of which they had personal knowledge. So that's something I think you might like to address in closing submissions.

PN120

But the argument that Mr Boothman calls, or some other law firm could just provide written submissions to read out may not be – the case law where that exists may not apply directly to these proceedings, because as, for example, today, it's not a question of the parties just dealing with the facts. There's arguments about legal principles, there's arguments about the lines of questioning, there's greater complexity to the proceedings - would be where I've got a butcher who's been dismissed by his employer, and the employer's there and the butcher's there, and so they're really just arguing about the facts. Does that make sense?

PN121

MR TRACEY: Yes.

PN122

THE DEPUTY PRESIDENT: If we're just going to let the questions go – it's a long answer to it though.

PN123

MR BOOTHMAN: That's fine, Deputy President.

PN124

MR TRACEY: Could you just bear with me then? I'll have a – quickly fly through and just try and ignore questions that may not be relevant to answering at all.

PN125

THE DEPUTY PRESIDENT: Well, I want to put that there so you have (audio malfunction). That to me is a distinction between the cases where I've refused leave and the clients' cases were granted leave, and for a lay person that might be a little confusing that at some circumstances where a Member has granted leave and in other circumstances where they haven't.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN126

So I'm trying to sort of assist, at least in my mind, why that's occurred in the decisions that I've made, and some of which you relied in your submissions.

PN127

MR TRACEY: Okay. Thank you. In respect to your witness statement that nobody from BP's HR department could represent themselves effectively, it would be accurate to say that you actually haven't gone around and asked every department, have you?

PN128

MR BOOTHMAN: Sorry, is there a particular paragraph that you're taking Mr Lynch to?

PN129

MR TRACEY: We've referred to paragraph 8 that (audio malfunction)?---Would you mind repeating the question? I'm reading the paragraph now, but if you can repeat the question, please.

PN130

Sure. I just wanted to confirm that in regard to your statement that no one in the HR department team has experience as an industrial advocate in contested hearings before the Commission, you haven't specifically gone around and questioned everybody to find out if that's correct, is it? That didn't come out very well. Sorry. Did that question make sense or do I need to start it again?---No, I haven't done that.

PN131

With the exception of no employment background experience, does anybody in the HR department have experience that is comparable to representing BP or dealing with matters in an adversarial role?---I'm not sure what comparable would look like.

PN132

I guess doing the same role but not related to employment matters. That could be criminal matters, it could be civil matters. I guess I'm asking does anyone else have experience acting for BP or another party in an adversarial Commission or Court that you're aware of, but the only issue is they don't have employment matters?---Not that I'm aware of.

PN133

What are your ordinary working hours per week as outlined in whatever document governs your employment?---Ordinary hours are 38.

PN134

Does that document require you to work additional hours or overtime as required by the company to meet business needs?---Yes.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN135

Have you ever been required to work additional hours or overtime to meet business needs?---Yes.

PN136

How often would you work that overtime?---Often.

PN137

What kind of additional or overtime hours would you say you work average per week or month, whichever way is easiest for you to work out based on how much?

PN138

MR BOOTHMAN: I'm sorry, I'd object to the line of questioning, and in fact if Mr Tracey continues, the outcome might be that Mr Lynch says if you ask me to take on this matter more significantly the matter becomes harder for Mr Lynch to run in fact. I would object. There's no relevance to him working overtime.

PN139

MR TRACEY: The relevance is that Mr Lynch has stated in his witness statement that he has a busy job and he doesn't – he can make time for this, and the difference is what Mr Boothman has just argued is not a matter of effectiveness or efficiency, it's a matter of preference and convenience. I have authorities that state that despite how busy Mr Lynch is, whether BP wants him to represent them in this matter or not is up to BP and a matter of preference. So the issue becomes does he have – that's why I'm asking – he says he doesn't have time; I'm trying to establish how many hours of work does he do overtime; could he make the time to represent them if he was required to.

PN140

THE DEPUTY PRESIDENT: I think what you're trying to say is that if he's not working copious hours of overtime that he should be able to take on these proceedings. But the difficulty with that is given the focus in society now, work/life balance, the fact that he's – whether it's reasonable to have an expectation an individual will work excessive additional overtime because their employer needs them to do a task, and I think what his evidence is, I can't do that task within my hours of work. The fact that he could potentially stay awake and work every night, I'm not sure that adds to the argument that it's a matter of convenience, because it's not a matter of convenience if people are having to work excessive hours to perform the task.

PN141

Do you understand? And I think that's the point Mr Boothman's trying to get to, is that even if he says, you know, I just work 38 hours and I go home the very second that clock hits 5.30, the question is well, is it reasonable to expect an employee to work additional hours to perform additional tasks. BP are saying well Mr Lynch's evidence is that he currently doesn't have that time.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN142

So if you perhaps would ask him do you have a lot of time off during the day, you know, do you do a lot of client functions, go to the cricket, and well you could do it in those times might be something that's a bit more compelling than yes, he

should stay back till midnight every night to do this matter, and I think that's where Mr Boothman's trying to go - his objection is.

PN143

MR BOOTHMAN: Correct, Deputy President.

PN144

MR TRACEY: I guess my point was I wasn't going as far as saying excessive overtime. Mr Lynch has already acknowledged that whatever document his employment contract, or whatever it is, requires him to work additional hours, he has worked additional hours. My point was going more to the fact that if BP asked him or BP instructed him, because Mr Lynch has stated at paragraph 7(b) of his witness statement that his role includes 'delivering people relations, advisory support to leaders, facilitating a resolution of workplace employee relations concerned, and coaching to drive engagement, pre-empting and resolving ER cases.'

PN145

So I guess this is – he's already established he has day-to-day carriage of this role, it's part of his job. My question was going more to, if BP asked him - if he is so busy that his 38 hours is done, if BP asked him to do extra overtime each week, not excessive but just additional hours as required by his employment contract, that he would be able to do that. That was where I was going. So I was trying to explore that.

PN146

THE DEPUTY PRESIDENT: Okay. I think his evidence is that he's already doing overtime.

PN147

MR TRACEY: Yes.

PN148

THE DEPUTY PRESIDENT: You can ask him how much he's doing, but to be transparent, I'm not sure that takes the argument any further, because you shouldn't be expected to work – I mean your case – if they say he has to work an extra four hours every night on your case, well why - is that then okay for them to say yes, but also there's something in Melbourne we want you to work on, and that's another four hours, you know.

PN149

So I don't know that it helps that argument, unless you can say well, look, he's sitting around twiddling his thumbs during normal working hours, he could take it on. Does that make sense?

PN150

MR TRACEY: It does. Yes, I won't delve into that then. I've got - - -

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN151

THE DEPUTY PRESIDENT: (Indistinct) question, but as Mr (audio malfunction) say, the question doesn't really take us far, because unless he's not doing anything during the middle of the day - - -

PN152

MR TRACEY: Yes.

PN153

THE DEPUTY PRESIDENT: And it's not – the recusal application – or because of the grounds of the recusal are based on the history of the matter, it's not just a question of him getting around the facts for an unfair dismissal where there are blind facts: somebody punched another employee (indistinct) X. The argument is that the grounds of recusal which need to be addressed require a knowledge of a history which goes back many years and lots of proceedings, and so even if he had an extra hour free, instead of going to his kid's soccer or whatever, it is that Mr Lynch does, when he's not doing his extra overtime at BP, there's not enough hours in the day for somebody to get their head around a very long history, because the grounds of recusal go to the history, as opposed to other recusal applications which I'm involved in, which might go to a specific act.

PN154

MR TRACEY: Yes.

PN155

THE DEPUTY PRESIDENT: Does that make sense?

PN156

MR TRACEY: It does. I was going to address that point specifically in oral points, but - - -

PN157

THE DEPUTY PRESIDENT: Do you want to ask him any more questions about it, or are you happy to - - -?

PN158

MR TRACEY: No, I'll just go back to that one, because he didn't actually answer it.

PN159

THE DEPUTY PRESIDENT: Okay.

PN160

MR TRACEY: How many hours a week or month, depending on how often you actually work overtime, would you say you work?---It would vary quite a bit from week-to-week, month-to-month I would say.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN161

Can you provide me some figures so it's not so vague? It can be as much as I did this much in December, this much in November, just so we actually know what

we're talking about?---An example, I would say an average for last month might be around 10 hours additional - - -

PN162

That was for January, was it?--- - - - per week. Per week, sorry.

PN163

Ten hours per week. Was that for January, or are you talking December, because we've just gone in - you said for the last month? So are we talking January?---Over the last month it'd be.

PN164

Right?---Yes, somewhere around – say, for over the course of January, perhaps five to 10 hours per week, and there would be periods – yes, periods of more or less, yes.

PN165

Do you ever take sick leave or personal leave or annual leave?---Yes.

PN166

Since starting your new role have you taken annual leave?

PN167

THE DEPUTY PRESIDENT: Mr Tracey, there's a thing called the National Employment Standards, which (audio malfunction) deal with sick leave and annual leave.

PN168

MR TRACEY: Yes. No, I - - -

PN169

THE DEPUTY PRESIDENT: The fact that he has some basic human rights - - -

PN170

MR TRACEY: I'm going to a specific point.

PN171

THE DEPUTY PRESIDENT: Okay.

PN172

MR TRACEY: Sorry, just to get back to that question, since starting your new role have you taken annual leave?---Yes.

PN173

Are you able to say how long that annual leave lasted for, please?---I think days of annual leave would have been around eight to 10 days.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN174

What happens with your workload while you're on annual leave? Does that get redistributed to somebody else to complete, or does it just – nothing happens to it

or it just sits there waiting for you to come back?---It depends on the current matters and projects that I'm working on.

PN175

If you were taking annual leave now for a couple of weeks, would your work be reallocated, or would it be sitting (audio malfunction)?---Some work would be reallocated - - -

PN176

MR BOOTHMAN: Objection. Sorry, Chris. We're getting into full hypotheticals now. Mr Lynch has not put in evidence anything about annual leave or the redistribution of his work. I can address it in re-examination, but I feel it's not in evidence about his annual leave and he's being cross-examined on something that he's - - -

PN177

MR TRACEY: No - -

PN178

MR BOOTHMAN: Sorry, I'll wait for you to finish.

PN179

MR TRACEY: Sorry. His evidence was at paragraph 9:

PN180

My current role is demanding on my time. I am responsible for multiple geographical (audio malfunction). I do not consider that I have and nor could I make the time necessary to dedicate to appearing as an advocate at this hearing before the Commission.

PN181

So he said he doesn't have the time, he couldn't make the time.

PN182

THE DEPUTY PRESIDENT: Yes.

PN183

MR TRACEY: The question I asked him previously to the last question was of whether his work gets reallocated. He says it depends on what he's doing. So I asked him specifically the work he's doing now if he was taking annual leave or – maybe I should have rephrased it, like, if you were representing BP in this matter – I was more trying to establish the fact would his work be reallocated, and he answered yes, his work would be reallocated.

PN184

THE DEPUTY PRESIDENT: I suppose then – I think the evidence that Mr Lynch is trying to give is that there's not a capacity within BP to do that work internally, and he is the person most capable of doing this, because it's within his remit, and that if it was as easy as just getting someone else to do another task, that would have been the basis of – it could have been allocated, that work.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN185

I suppose maybe if we go to the direct question rather than sort of skirting around the issue, and say could your work have been allocated to somebody else to enable you to do this, or why hasn't it been allocated to someone else. Because did you take leave, when were you sick - it's a long way to get to – it's a roundabout way to get to a question which is really why can't your work be allocated to someone else. So maybe let's just ask the direct question.

PN186

MR TRACEY: Okay. Thank you, yes. Forgetting the issue of effectiveness and focusing purely on the issue of time, could your current duties at work be redirected to somebody else to enable you to represent BP in this matter?---No.

PN187

Why is that 'no' when you answered a previous question that if you were on annual leave right now your work could be reallocated, but it couldn't be reallocated solely for you to work on this case?---So, if I was to fall sick, I mean things would be reallocated to the best of everyone's ability of course, but - you know, but part of the reason I'm employed in this role is because I have, you know, a skillset and experience in certain areas so that those tasks and duties that I'm hired to do, you know, would not be done as effectively.

PN188

But your previous answer was if you were to take annual leave right now, your current jobs could be reallocated to somebody else while you're not at work. So why couldn't that exact same process happen now, for you to work on this matter as opposed to being on annual leave?---As I said, my earlier answer I don't think – I think I was cut off when you were asking about annual leave earlier, but yes, some matters, as I said, if I'm away for any reason, then things are allocated as best they can be. It doesn't mean that they will be, you know, done to the same degree or to the same effectiveness.

PN189

Of course, but that wasn't the question. The question was can your work be reallocated if you were doing this, in circumstances where you've already admitted that it can be reallocated under other circumstances? I guess I'm having trouble reconciling your two answers in respect to your time management as opposed to a matter of convenience and preference?---What's the question?

PN190

I guess I'm still trying to understand why your work can't be reallocated for you to work on this matter when you said, while it not be done to the level that you like it to be done, it can be reallocated if you would take annual leave?---Some matters – if I was to take annual leave, and I don't think I had a chance earlier to respond to that question fully – so when I take annual leave, some matters would be reallocated as much as possible and other matters may have to wait.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN191

Who assigns you what work you do, what specific duties you do at work?---My priorities come from a variety of places and people.

PN192

Can you provide some specifics, like managers further above you, people sideways on the hierarchy?---Yes. Some matters are – some priorities are assigned by my line manager, and some are self-identified.

PN193

So technically there would be nothing from your line manager – - -?---Or - - -

PN194

Sorry, I thought you were finished, or did you still want to go on further with that?---No.

PN195

So technically there would be nothing stopping your line manager to represent BP in this matter, in respect to time-wise and job allocation?---I'm not sure I understand the – can you – what's the question again?

PN196

Ignoring that you don't think you have the ability to effectively represent BP, (indistinct) with time and your availability, technically can your line manager assign you to do this job? If he's assigning you other jobs he could assign you to do this job as one of your jobs?---I don't currently have the capacity to do that with the other priorities that I have.

PN197

I'm asking whether he has the ability to (audio malfunction)?---You might have cut out there. Whether he has the ability to - - -?

PN198

To assign you to do this job?---We would have a discussion around capacity at that time.

PN199

Would that same line manager have the ability to reassign your current duties to somebody else?---No.

PN200

So once you've got a duty it could never be taken off you?---No, because I don't think anyone else has capacity or the necessary skillsets to do all of the priorities that I currently have.

PN201

So you're the only person in BP that can do every job you do? No one else has the ability to do any of the jobs you do?---No, that's not correct.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN202

So some of your work could be reassigned to people who have the ability to do some of the jobs you do?---Yes, some aspects of work could be reassigned. I mean, yes - - -

PN203

So some of your - - -?---No one has – I'm not aware of anyone with spare capacity, so this would all require – yes, would require priorities to be redetermined for the function.

PN204

Would it be fair to say that priorities (audio malfunction) every time someone takes annual leave, because everyone has to pick up the slack from the person who's not here?

PN205

MR BOOTHMAN: Objection. Mr Lynch has answered the question. When he goes on leave he reallocates for a temporary period of time. He comes back, picks up his role again. He's answered the question.

PN206

MR TRACEY: Yes, and then he just stated on the last question that no one has the capability to do any of his jobs that could be reassigned, because no one else has the time to do it. Again, as you've just (indistinct), and that wasn't his evidence.

PN207

THE DEPUTY PRESIDENT: But, Mr Tracey, the thing that strikes me is that Mr Lynch said since he's been appointed he's taken 10 days annual leave. I don't know if he took that in a single block or individual days, but I have no evidence before me of how long it's anticipated it would take someone to get on top of these materials, do the work, but from my own experience there is certainly hours and hours of work to read all the materials.

PN208

I think that recusal file was filed yesterday. I think that's in excess of 2000 pages. It is clear from the materials filed alone, that would take some considerable period of time for somebody, whoever does this work, to get around it. So the fact that he can take a day's annual leave and work can be allocated for a single day is not compelling to say that he has time to take on something which might take weeks to prepare for.

PN209

So, I'm trying to allow you to ask questions as much as you can, but to sort of explain the boundaries, proving that Mr Lynch is capable of taking annual leave, and mustn't stay chained to his desk every day for his entire employment, is not necessarily compelling in relation to the argument that's being put.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN210

There's a chunk that's missing, and the chunk is the fact that he can take leave and have some duties reallocated and some sit there doesn't immediately take the step that he then has the capability to prepare for something which is quite complex.

PN211

MR BOOTHMAN: Thank you.

PN212

THE DEPUTY PRESIDENT: So you can ask him the questions but as Mr - the reason why Mr Boothman's jumping up and down is because his clients pay for however, he longs he sits in this room and - - -

PN213

MR TRACEY: Yes. We jumped up and down and get through it quicker.

PN214

THE DEPUTY PRESIDENT: He's trying to keep it as short as possible.

PN215

MR TRACEY: So just to clarify then and touch on what the Deputy President said, when you took your annual leave, what was the makeup of that in regard to one day, 10 days in a row, two - five days, et cetera?---Since starting this role, I believe that was all in one block.

PN216

All right. Thank you?---There may have been one day that was not part of that block.

PN217

No problem. Thank you very much. As the person who now has day-to-day carriage of the matter, how familiar are you - in order to do that job, how familiar are you required to become with this matter?---I'm, yes, familiar at a high level with the matters that are under discussion.

PN218

Sorry, just to be clear you said you were familiar at a high level?---Yes.

PN219

After this - I have a feeling everyone's going to jump and down when I ask this question, but it is getting to - - -

PN220

THE DEPUTY PRESIDENT: Maybe think about whether you should ask it then.

PN221

MR TRACEY: It's getting to a specific point which will become apparent but - - -

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN222

THE DEPUTY PRESIDENT: All right. So maybe make the point apparent so that I don't grant the Boothman's objection and you don't get to answer it - ask it. Straight to the point.

PN223

MR TRACEY: And really I'm just trying to think how to answer it in that way - ask it in that way.

PN224

THE DEPUTY PRESIDENT: You're in cross, so you don't need - you don't have to worry about leading the witness. Ask the question.

PN225

MR TRACEY: After the appeal decision was handed by the Full Bench, in respect to the jurisdictional issues for this matter which then required it to have this matter handed back to be redetermined, were you - was it your role to instruct BP how to act when I tried to settle the matter?

PN226

MR BOOTHMAN: So objection. Mr Lynch has stated that he's only been (indistinct) for a particular point in time, that point in time occurred after the termination.

PN227

MR TRACEY: All right.

PN228

MR BOOTHMAN: I think the answer - Mr Lynch can answer the question, but his statement already addresses this point.

PN229

MR TRACEY: Didn't have a date in front of it.

PN230

MR BOOTHMAN: That's all right.

PN231

MR TRACEY: She was asking anyway so (indistinct) - - -?---I'm getting a good glute out that I (indistinct).

PN232

Maybe I don't need to. No, I'll just leave that one there then. I think that'll do it then for the time being and for - well, that'll do it for the cross-examination.

PN233

THE DEPUTY PRESIDENT: Excellent. Thank you, Mr Tracey.

PN234

MR TRACEY: Thank you, Mr Lynch.

*** CHRISTOPHER JAMES LYNCH

XXN MR TRACEY

PN235

THE DEPUTY PRESIDENT: Mr Boothman, anything in re-examination?

RE-EXAMINATION BY MR BOOTHMAN

[2.10 PM]

PN236

MR BOOTHMAN: Perhaps some very quick things.

PN237

Mr Lynch, Mr Tracey talked briefly about whether or not you had walked around to each and every person in the People and Culture Team and I just wanted to ask you some quick questions. You say in your statement that you've worked 14 years at BP, correct?---Yes.

PN238

You've worked alongside now, taking apart there were people who have left in that 14-year period from the People and Culture Team and it may have changed names, but you've worked alongside other members in the People and Culture Team on a day-to-day basis?---Yes, that's right.

PN239

As the manager of that team you would know if someone from your team was running a contested matter in this Commission, correct?---Yes.

PN240

Is anyone from your team running a contested matter at this point in time from your team?---No.

PN241

And in all your years of BP, how many times have you or anyone else in the People and Culture Team, run a contested (indistinct)?---None.

PN242

Are you aware of any member of the BP inhouse legal team running a matter before this Commission?---No.

PN243

Mr Lynch referred to particular lawyers and I recall that he could not remember the name, but the person allegedly had responsibility for the Kwinana Refinery, can you please let the Commission know the current status and whether there is still in fact a Kwinana Refinery?---No, there is not.

PN244

Thank you. And I'll just quickly go to the question - the line of questioning Mr Tracey about the redistribution of work. Now, you are the manager and you say that you're the person most capable, correct?---Yes.

PN245

And when you go on leave, you pass tasks to someone below you on the hierarchy, correct?---Yes.

*** CHRISTOPHER JAMES LYNCH

RXN MR BOOTHMAN

PN246

And your evidence is that no one in BP has (indistinct) experience advocating before this Commission (indistinct) hearing even if you pass this matter down the hierarchy to a person below you on the chain, your evidence remains that that person will not have the experience?---That's correct. Yes.

PN247

And reallocation of (indistinct) periods of leave, it's temporary, correct, you return?---Yes.

PN248

Hopefully. If you were to reallocate those matters to another person, they would then, would you agree, they would then need to reallocate their duties for what they are paid by BP. Do you agree that eventually you would run out of bodies at BP for whom to reallocate all of the duties to?---Yes.

PN249

And I think you referred to it as needing - your evidence was that you referred to it as needing a full reallocation of priorities, is that what you meant by that?---Yes, that's right.

PN250

That's it, Deputy President. Thank you, Deputy President.

PN251

THE DEPUTY PRESIDENT: Thank you.

PN252

Mr Lynch, thank you for giving your evidence. You're released from your oath and (indistinct) disconnect from the proceedings?---Thank you, Deputy President.

<THE WITNESS WITHDREW

[2.14 PM]

PN253

THE DEPUTY PRESIDENT: All right. Mr Tracey, did you want to add to the submissions that you filed?

PN254

MR TRACEY: Sorry, can you repeat that, please?

PN255

THE DEPUTY PRESIDENT: Well, that's the end, as far as I'm aware, of Mr Boothman's (indistinct) so we're now up to you. Is there anything you'd like to add to the submissions that you've already filed?

PN256

MR TRACEY: I would like to expand on some of the points if I could, please. I will try and keep it brief and I have a feeling that I've covered information that you've probably already read, so if I get too stuck in - - -

*** CHRISTOPHER JAMES LYNCH

RXN MR BOOTHMAN

PN257

THE DEPUTY PRESIDENT: All of it, Mr Tracey. I've read all of it already.

PN258

MR TRACEY: Yes. I know but sometimes I feel like I have to cover a bit to go in - but what I'm trying to say is if I start covering too much (indistinct) not required to be expanded on, please just let me know.

PN259

THE DEPUTY PRESIDENT: Would it help you if I explain the things which I think might incline me to a view that it's appropriate to grant leave so that you can address those issues.

PN260

MR TRACEY: Sure.

PN261

THE DEPUTY PRESIDENT: All right. So what strikes me is that the grounds for the recusal are based on a history of prior determinations which you say demonstrate bias and so to determine or argue about whether those prior determinations demonstrate bias requires an understanding of all of those prior proceedings in circumstances which those determinations were made and that - because of the history of the matter and the various interlocutory applications and appeals is quite voluminous.

PN262

So it's a lot of information for someone to get their head around who hasn't been involved in the proceedings since the start of those proceedings. The second thing that strikes me is that the manner in which the proceedings have been conducted is that you have been very thorough in trying to articulate the basis of your claims to a point where the volume of materials which are filed and the novelty of some of the arguments, legal arguments put and the (indistinct) of submissions which were necessary to put those and respond to those is likely to make proceedings in which you're involved in, complex.

PN263

So in your submissions, you took me to an application where the member indicated that a recusal wasn't a complex matter. That particular matter has a history of its own and in those particular circumstances, the member - I don't know how I put this, I think there was an issue perhaps of whether the recusal application was an attempt to delay the proceeding. So the argument was, 'Well, that shouldn't delay the proceedings. It's not that complex.'

PN264

In my experience, the recusal applications that I've been involved in have been quite complex. They involve the - and as you are aware because you relied on the authorities, the consideration of both Commission and common law authorities at quite a high level, quite complex decisions and so with the exception of that particular case, generally recusal applications, at least in my experience, have been quite complex.

PN265

And having the benefit of reviewing the submissions which you filed and which BP has filed, it does occur to me that this one will be complex not just because of that factual complexity which I've explained is very lengthy and very complex but also because of the complexity of the arguments which the parties are raising.

PN266

And so where there is the opportunity to have a representative who is intimately across the factual background and who has expertise in dealing with recusal applications in this jurisdiction, it does strike me that it is likely to assist the efficiency of the proceedings. So did you want to address those things?

PN267

MR TRACEY: Yes. Yes, please.

PN268

THE DEPUTY PRESIDENT: (Indistinct) something else you'd like to do but I'm trying to narrow your focus.

PN269

MR TRACEY: Sure. Do you want me to address those ones first? That's all, I'll have to pick through my things just to find where I've addressed those points.

PN270

THE DEPUTY PRESIDENT: Yes.

PN271

MR TRACEY: While I'm doing that, off the top of my head but - I could probably address something that was raised before just in regards to the voluminous nature of the court book and I would say the majority of that was just because of the amount of authorities that were required to be included and there was transcripts and that in there and it was just - my time was limited.

PN272

It was simply to attach the entire transcript as opposed to refer to - so I would roughly on that point, I would say the voluminous of those documents shouldn't be taken at face value, I guess.

PN273

THE DEPUTY PRESIDENT: So the difficulty is, Mr Tracey, if they're filed, they have to be read by me and the other side. So you might say now that there's irrelevant content in there but having filed them, we have to read them.

PN274

MR TRACEY: All right. I'm not saying they have to - I'm not saying they don't have to be read but for an example, an excuse or hyperbole, I might say, 'Refer to paragraph 10 of the transcript', and later on I might say, 'Refer to paragraph 50 of the transcript', but for simplicity's sake and time management, I've included the entire transcript where instead of just - so I guess that was the point I was - - -

PN275

THE DEPUTY PRESIDENT: I suppose you can refer to particular paragraphs but then again, you also have to read the transcript to see the context in (indistinct) paragraphs occurred.

PN276

MR TRACEY: Yes. Yes.

PN277

THE DEPUTY PRESIDENT: So it isn't quite as narrow as you're saying, 'I only referred to paragraph X in the transcript.'

PN278

MR TRACEY: All right. Sorry, yes, these points are just spread out through my - what I've got written down.

PN279

THE DEPUTY PRESIDENT: That's fine. Do you want to just talk to them rather than try and find them in the submissions?

PN280

MR TRACEY: Yes. I'm not very good off the cuff, that was all.

PN281

THE DEPUTY PRESIDENT: (Indistinct) easier for you.

PN282

MR TRACEY: Can I just briefly but in regard to the complexity of the arguments, I did - sorry, I'll just skip through this one. Just to save time, can I just start from the beginning, I'll try and be brief and then I'll highlight those bits when they come up in my submissions?

PN283

THE DEPUTY PRESIDENT: Sure.

PN284

MR TRACEY: That might be quicker that way, that's all.

PN285

THE DEPUTY PRESIDENT: I have read all of them.

PN286

MR TRACEY: Yes.

PN287

THE DEPUTY PRESIDENT: So you don't need to read them out to me.

PN288

MR TRACEY: No, no. There were just certain points I wanted to highlight but I'll just try and go through it so I can just highlight the bits without having to re-read it.

PN289

THE DEPUTY PRESIDENT: Sure, do you want to do that?

PN290

MR BOOTHMAN: Might it assist is Mr Tracey is given five minutes to do this?

PN291

THE DEPUTY PRESIDENT: Do you want to have an adjournment and just highlight (indistinct) speak to.

PN292

MR TRACEY: Sure. Yes, that'd be great. Thanks very much (indistinct). That'd be great, your Honour.

PN293

THE DEPUTY PRESIDENT: All right. 10 minutes, 15 minutes, what would you like?

PN294

MR TRACEY: 15 should be heaps. Thank you.

PN295

THE DEPUTY PRESIDENT: All right.

SHORT ADJOURNMENT

[2.23 PM]

RESUMED

[2.42 PM]

PN296

THE DEPUTY PRESIDENT: So - - -

PN297

MR TRACEY: Yes, I've got most of the way through it. I've written some notes to address the points you raised and I'll still read them out. So I just briefly address the points you've raised and then I might cover them a bit more as I get through the part, in my submissions but the first in respect to history of the prior determinations and requiring a full understanding of voluminous documents.

PN298

I guess in respect of that, I would argue that some points - some parts that where I refer to like matters from my unfair dismissal, maybe not all of them but some of it, doesn't require an understanding of the voluminous documents. I simply point to factual matters that say, for example, 'This was said, that was said in response. This was the determination and the evidence doesn't show it.'

PN299

That referring to factual matters such as that doesn't require an understanding of the complete matter, that just requires an understanding of the comment that one side (indistinct) was written down - they submitted as evidence when it actually wasn't submitted. That's not what the evidence shows. So that doesn't require a full understanding of the previous matter, it just requires the ability to look at the two documents and see they don't actually line up.

PN300

Now, obviously that won't be for everything but many of the matters in the - many of the points I make in my recusal application can be resolved by such circumstances. In regards to there being a lot of information to get their head around, while Mr Lynch did state in his witness statement at paragraph 9 - or hold on a sec. Sorry, at paragraph 10:

PN301

There is a significant amount of material relating to this matter which I am not presently familiar with.

PN302

That's what he wrote in his witness statement but then when I re-put the question to him when he was being cross-examined, I asked him what his level - specific to address this matter, what his level of knowledge was, he answered - he said he has a high familiarity with this matter.

PN303

THE DEPUTY PRESIDENT: He said he had a familiarity with it at a high level.

PN304

MR TRACEY: All right. I guess I don't see the difference in a high level or a high familiarity.

PN305

THE DEPUTY PRESIDENT: All right. So a high familiarity means that you're very familiar with something.

PN306

MR TRACEY: Yes.

PN307

THE DEPUTY PRESIDENT: Having a familiarity with something at a high level means you just know the big picture, you don't know the details.

PN308

MR TRACEY: All right. Fair enough. But I didn't understand the difference. Right. And the other point and I'll expand on this in a minute, was where you said the matter could be handled more efficiently when you've got representatives with a history and an understanding of the background or the relative legal issues. I guess I would argue as per the authorities I referred to, and I'll expand on them that representation doesn't always equal efficiency.

PN309

THE DEPUTY PRESIDENT: This is true.

PN310

MR TRACEY: So that was just touching on those points you made and I'll address them a little bit fuller when I go through it. I do want to slightly address a couple of points from 596, so I'm not trying to reargue my submissions, it's just more so you understand where I'm going when I make a point. So sometimes I'll

refer to an authority, other times I won't. If you want me to refer to an authority that (indistinct).

PN311

THE DEPUTY PRESIDENT: I've read each of the authorities you referred to in your submissions in preparation for today.

PN312

MR TRACEY: Yes. No, I just mean if I refer to something now and I don't say which authority said this but - so the Full Bench previously noted that the relevant sections of the Act be considered when making a decision on representation is section 3 which is object of the Act, section 577 which is performance and function of the Fair Work Commission and 578, what they must take into account and then obviously 596.

PN313

598 obviously deals expressly with matters of representation by lawyers but section 3, 577 and 578 can effectively be considered issues of fairness when the exercise of discretion is made. Is that - I don't want to rehash it. It's axiomatic that the grant of representation is a two-step process. The second step, as noted in Wellpacks and Well v Warden says:

PN314

The second step involves the consideration as to whether in all of the circumstances discretion should be exercised.

PN315

And I just want to highlight the fact that it says:

PN316

Whether in all of the circumstances -

PN317

- not just in some of the circumstances and I say this is relevant to any issues of unfairness created by the grant of permission irrespective of whether the criteria of 596(2) were satisfied or not. Specifically in respect to 596(2)(a) efficiency, the key issue - this bit is kind of obvious but it gets to where I'm going but the key issue is efficiency taking into regard the complexity of the matter.

PN318

A lack of complexity may mean that permission is declined. Complexity of the issue is the (indistinct) but I would also argue that it requires a correct characterisation of efficiency (indistinct) in 596(2)(a) and the Commission in the past has provided two authorities that provide good characterisation on this issue. The first one is actually a matter between myself and BP and it said:

PN319

The criteria on whether to grant permission for legal representation enable the matter to be dealt with more efficiently, not whether it would enable a party seeking to be legally represented to be represented efficiently.

PN320

So obviously the key point from that is that the matter is dealt with efficiently, not that the party is represented efficiently and that decision's been cited in multiple - in two other Full Bench decisions being Wellpacks and Paul Dirkis v Staffing and Office.

PN321

But the second point is that the assessment required under 596 is not whether the matter could be efficiently dealt with by inhouse personnel but if permission is granted, whether it would be more efficient and for information I'll get into in a second, I would argue that in this matter, based on the characterisation of this matter which I'd discuss in a second, there would be no increase in efficiency irrespective of whether it's external representation or internal employees.

PN322

And as I mentioned, as I foreshadowed at the start, there's no Commission authorities at all that state universally that permission to be represented - if permission is granted to be represented that automatically translates into greater efficiency in which the matter is dealt with. In my submissions obviously I referred to Ralf Rodl v Qantas and in that at paragraph 31 of that one he stated:

PN323

I'm not satisfied that the use of legal representation by the respondent necessarily translates into official conduct of the hearing.

PN324

The same sentiment was echoed in the authority referred to by BP in Applicant v Respondent. At paragraph 20 Deputy Sams wrote:

PN325

In my experience the prospect of a case being run more efficiently and focussed on the relevant issues to be determined is more likely where competent representation is involved.

PN326

The key point being more likely. So Deputy Sams acknowledges that it is not always likely. And this same point again was echoed by Commissioner Cloghan in Stephen Woodward v Greyhound and who wrote:

PN327

Lawyers who appear before me generally they do not burden the Commission with unnecessary formality; by and large, lawyers bring focus and efficiency to proceedings. Of course, there are exemptions.

PN328

And I did - I probably haven't got that far yet but I do have authorities that state that - and I guess it almost probably doesn't need to be said but these decisions are made specific to the facts of the matter before you which is why none of those are universal.

PN329

It's well-established that rule 12.1 of the Fair Work Commission Rules, when read with section 596(1) can ameliorate any decision refusing permission for BP to be represented because Mr Boothman or anyone else from Corrs can still prepare all of the work - all of the submissions and everything to be carried out during the hearing prior to the hearing, especially in circumstances where the recusal hearing has now witnesses to be cross-examined.

PN330

It's purely just been submissions put in by the parties in the tender bundle. I imagine it would be limited to oral submissions and that is it because there's no cross-examination, there's no need to go away and write anything. So in those circumstances, when all the information is already before the parties, everything can be prepared ahead of time and whether it's Mr Lynch or whether it's one of BPs many inhouse legal counsel who are also lawyers, they would be - I submit they would be more than capable of presenting an efficient and effective argument based on submissions pre-prepared for them by lawyers experienced in this area.

PN331

Yes, I guess that's what I've already said. My thoughts are the recusing hearing will be simple and straightforward. I know you've foreshadowed that there will be some complexity, but I would argue that - and I know you already raised this but the principles for recusal are relatively straightforward, even in the common law ones, whether the facts fit those principles is a different matter but the principles themselves seem very straightforward. Again, yes, that's what I've already read out to you. That was it for efficiency.

PN332

In respect of effectiveness, I would just say that 596(2)(b) is concerned with fairness, taking into account a party's inability to represent themselves or their employer effectively and, I guess, before considering the issue of effective representation, it's worth noting how BP's submissions were drafted.

PN333

There are - hold on a sec. Yes, that's all I'm getting at. In BP's submissions for the representation, at paragraph 3, which is at the top of the second page, BP write, 'There is no relevant' - first they state they haven't been party to an application for recusal, and I'm not getting into that part, but the next part of the sentence is:

PN334

There is no relevant experience within BP that would enable effective internal representation in these proceedings.

PN335

So, their view is a lot broader than the way it's been stated by Mr Boothman (audio malfunction) that there's no relevant experience within BP at large. They haven't limited it to the HR department; they also haven't limited it to experience as an advocacy in the Commission. In those circumstances, BP actually - the authorities say that BP has the onus of proof to demonstrate that there is no experience within them to be effective representation in this matter.

PN336

In that regard, Mr Lynch's witness statement is purely limited to the BP HR department, of which he has only been the head for three months. He does not address the ability or the effectiveness of BP's in-house counsel, he was unable to - I'm trying to get the right word - actively or effectively provide - - -

PN337

MR BOOTHMAN: Sorry, Deputy President, I don't think that is the evidence. I think Mr Lynch did go into detail, after cross-examination by Mr Tracey, as to his knowledge of members of the legal counsel in-house at BP and whether they had been in contested matters before this Commission. His evidence was that he was not aware that anyone had and, in re-examination, that was also drawn out that he was aware that no one in his 14 years had ever been before this Commission in any contested matter. That was the evidence.

PN338

MR TRACEY: In regard to that second point, I thought that was purely in respect to the HR department, not BP's lawyers.

PN339

MR BOOTHMAN: But he said, to his knowledge, no one, to his knowledge, had appeared before this Commission in a contested matter - in his 14 years.

PN340

MR TRACEY: Yes, but his experience - my understanding was that question was framed as BP's HR department, not BP employees.

PN341

THE DEPUTY PRESIDENT: You might both need to check the transcript.

PN342

MR TRACEY: Yes. I was going to get to his cross-examination. When I was talking about his evidence at first, I was referring to his statement. His written witness statement addresses purely the HR department and, as I say, BP bore the onus of proof to provide evidence that BP's legal team would be unable to do this. They provided no written statements.

PN343

My understanding is, when I put the matter to Mr Lynch - and Mr Boothman will be able to correct me if I'm wrong - he was unfamiliar with the specific in-house counsel that I referred to. He said he was aware of other in-house counsel, which went unnamed, but my understanding was he had no idea. He didn't know. I'm not saying they didn't - he didn't know their experience and their ability to do it. He was unsure of it. So, I would argue that saying he isn't aware of something is completely different to saying something doesn't exist. All he stated was he's not aware of their ability. BP has produced no evidence to say that BP's in-house counsel do not have the ability. They are completely different matters.

PN344

The key issue under 596(2)(b) - and I don't even know if it's worth going over this because I know every matter we've ever - every representational issue has always

been decided on (2)(a); it's never got to (2)(b) - but, in respect to 596(2)(b), *King v Patrick Projects* stated that the relevant test was not the experience and the ability of PP's in-house personnel but whether - it's not:

PN345

an assessment of the skills and education of the individual employer representative, but rather it involves an examination of the resources available to the respondent as a whole -

PN346

including internal legal, human resources and other specialist personnel, and you, yourself, made the determination in an unfair dismissal in respect to different circumstances that BP is a large company with an extensive human resources department and access to large - I'm poorly paraphrasing - but large resources, including outside specialist personnel.

PN347

So, I guess I would argue Mr Lynch's witness statement was framed solely in respect of 596(2)(b), effectiveness did not cover, (a), efficiency or, (c), fairness, and so I guess as much as his testimony argued that BP could not do it effectively or BP personnel could not do it effectively because of their lack of skills and ability, I would argue, as far as effectiveness goes, they are not a relevant consideration, and that is supported by the Commission authorities.

PN348

That's it for 596 specifically.

PN349

I did want to quickly touch on fairness, which I've already half done before, in respect to granting permission to be represented can create an imbalance and create unfairness. Irrespective of whether granting representation creates efficiency, creates effective representation, if it still creates a prejudice or an imbalance, that weighs very strongly against granting permission. I guess the balancing act between an increase in efficiency or the unfairness it creates towards another party is something that needs to be heavily considered when determining whether to exercise discretion.

PN350

Unless you want me to specifically go into it, which I don't think you do, this was specifically pointed out in *Warrell v Walton* in paragraph 23, where it said there is (indistinct) to consider the potential prejudice a party may experience if permission were to be granted to the opposing party.

PN351

That sentiment was then restated in *Angela Doyle v Specialty Group*. Cambridge C made the observations that the issue of fairness between the parties is a matter of recognised significance; if permission for legal representation for the employer was granted in his specific circumstances, an imbalance would emerge whereby one of the parties was unrepresented and the other was represented by a lawyer. In some circumstances, such an imbalance may have little practical effect, but the resulting imbalance would at least provide the appearance of disproportionate

representation on one side and a significant potential for the absence of fair and just proceedings, as was identified in *Warrell v Walton*, and it should be anticipated that the Commission would inevitably act to avoid even the appearance of an unfair process.

PN352

Those principles have been echoed in many, many decisions, and I listed 12 of them in my submission, but I'm not going to re-repeat them, but I listed 12 of them (audio malfunction) and half of them were all from the same Commission member, but some of them were from other Commission members as well.

PN353

In respect to the complexity of the recusal matter, as I touched on before, I would argue it's not that complex. BP's submissions are limited to six pages. They limited - any consideration or principle for actual bias was limited to one sentence. They gave three paragraphs to apprehended bias, but, yes, they were very simple, and, as for their arguments as to why there was no apprehended or actual bias, they basically just - their submissions are limited to - yes, sorry, so BP made no conscious decision to specifically address the individual claims in my submissions; instead, they simply claim that they can be dealt with summarily having regard to the authorities listed in their submissions, which refer to the characterisation of a commission or a tribunal in carrying out their duties.

PN354

BP address four specific points. Their submissions can be distilled down to four specific points. I fail to articulate any logical connection between the decisions and your actions. That's not particularly complex. The issue has been dealt with and rejected by the Full Bench in my appeal and, as such, is an abuse of process.

PN355

Specifically in that regard, I would argue it is completely specious. The matter was never even considered. BP - two points on that - and I'm not giving evidence from the Bench - but two points on that was in BP's submissions, they refer to my appeal application, yet they didn't - as per directions, they were required to file any documents they relied on for their submissions, yet they didn't file that document with it, which wasn't before yourself, it was before other people, so they have referred to this document to say I've done something in this document, but didn't supply that document and I was unable to adduce any new evidence of a transcript from that case.

PN356

So, I would argue, at least on that point, it is a classic example of this matter being dealt with inefficiently by representation, over-zealously trying to represent their client, because they made statements that were factually incorrect and, I guess, even legally incorrect, because at no stage did I make bias arguments in the appeal. I made a pre-judgment argument and, on transcript, which I was unable to adduce, I actually expressly stated I'm not raising bias arguments, so that's a classic example of representation leading to inefficiency.

PN357

Again, the next point, their final point in their submissions was, even if the Deputy President is biased against me, it is an irrelevant consideration - I'm paraphrasing poorly - but it is an irrelevant consideration because the substantive matter requiring determination by the Deputy President is not discretionary, she is required to determine a factual controversy. Again I would argue specious and misses the point. Yes, it is a legal question of factual controversy, but there are still considerations that must be made in order to - or antecedent decisions that must be made in order to determine a legal question that isn't discretionary.

PN358

MR BOOTHMAN: Sorry, Deputy President, if I might be heard on that point. The decision Mr Tracey refers to not being attached is the Full Bench decision appealing the TOIL matter and the classification matter before a Full Bench. If the Bench requires us to provide a copy of that decision, we can.

PN359

THE DEPUTY PRESIDENT: Is that the one you're talking about?

PN360

MR TRACEY: Sorry, unless I misspoke, I wasn't referring to the decision, I was referring to the application.

PN361

MR BOOTHMAN: Sorry, you referred to a decision that was not attached which we refer to in our submissions. The decision is the Full Bench decision in this matter.

PN362

THE DEPUTY PRESIDENT: Didn't we have a conversation in chambers where you said you wanted to file extra materials, including that decision? You don't need to do that; I can read it.

PN363

MR TRACEY: Yes, unless I misspoke, I wasn't referring to the decision because the decision I think is attached. It was the application. They wrote - I'm paraphrasing poorly - they wrote, 'Mr Tracey made such and such a claim in his application for appeal', but they didn't attach the application to back up the claim they said I made, and my point being was I didn't make a bias claim in my application and - - -

PN364

MR BOOTHMAN: Sorry, if I can correct for the record, the application that we refer to in our submissions is Mr Tracey's application for recusal, which is already before the Commission, hence why it was not attached. The decision which we refer to, which Gostencnik DP refers to a prejudgement argument in the appeal notes, was not provided to the Commission for the reasons that you just stated. We did not think that it was necessary to send a copy of the decision that would have, we thought, already be before you. Those documents we did not provide because they were already before the Commission. So, I just wanted to clear that up. It's not because we were attempting to mislead the Commission in any way. They were before your Honour already.

PN365

MR TRACEY: I was making no claim that they hadn't given the decision. Unless I've misread their submission, I read that as they were talking about the appeal application, not the bias recusal application. That's how I read their submissions to state, unless I've misread it.

PN366

THE DEPUTY PRESIDENT: It might be an error on your part rather than misconduct on theirs.

PN367

MR TRACEY: I wasn't saying it was misconduct; it was more the fact that I think the point they're making is wrong. I was just saying they hadn't supplied the evidence to back up their comment.

PN368

THE DEPUTY PRESIDENT: I suppose the argument I think you're trying to make is that I shouldn't grant leave because they are not making things more efficient and what Mr Boothman is trying to explain is that they are not making things less efficient, there's no need to burden me with more paper because I already had those bits of paper in front of me.

PN369

MR TRACEY: I guess my point being they're making it less efficient because they're making submissions, and not for the first time, of claims that are factually incorrect and clearly incorrect when you look at the documented evidence, and they have repeatedly done this in respect to other authorities, which I was going to get to and refer to, and I'll get to that in a minute, but it was in my submissions where they say things like, 'The Full Bench in this authority said such and such' when they clearly didn't, and it's not even a discretionary question, the paragraph doesn't say that, and they do this repeatedly.

PN370

MR BOOTHMAN: Sorry, just again - this is the third time - all of these proceedings, we stand up and defend not only our firm, but obviously our reputations as officers of the court. There has been numerous allegations that Corrs, myself and Ms Millar, who is not here to (audio malfunction) have done things improperly. They have been raised before numerous members of this Bench and not once have they been substantiated and, on a number of occasions, which, if we need to go and find them, there have been remarks to Mr Tracey that there's no basis for any of them. Corrs have put paragraphs into the submissions from decisions. Those documents are plainly before your Honour. They speak for themselves. If they don't say what we say they say, your Honour will make that finding. Where we've referred to documents, they are made and done so in the footnotes.

PN371

At no point have we attempted to mislead and there's been no foundation on any of those accusations, and this is - again I'm only standing up for the record, but this is again Mr Tracey's assertion that we are acting improperly, and again I'm

standing up to say there's just no basis for that and it's inappropriate to make those accusations.

PN372

THE DEPUTY PRESIDENT: Mr Tracey, perhaps you're not aware, but legal practitioners have very onerous obligations to the court; in fact those override their obligations to their client.

PN373

MR TRACEY: Yes.

PN374

THE DEPUTY PRESIDENT: If a legal practitioner were to behave in breach of those conduct rules, they could lose their licence to work. So, it's very serious allegations that you're making today and allegations that are (audio malfunction) and you need to be very careful about framing those allegations because they are matters which are of some significance and potentially quite controversial because the allegations you are making, if they were upheld, could result in multiple practitioners losing their practice certificates. So, you can't just wildly make allegations, and you've done it on numerous occasions before me, and you can't continue to do it with impunity because they are very serious. It's like someone saying that you're a thief and a robber, that you're committing criminal acts because they don't like things that you've done. So, you need to just be very careful about the allegations you make.

PN375

MR TRACEY: Yes.

PN376

THE DEPUTY PRESIDENT: Similarly, there is a number of authorities which you refer to which you say say things which I don't agree that they say, but I look at those materials and I look at them in context and I take your submission about what you say you think they say and sometimes I agree with you and sometimes I don't agree with you. That doesn't mean that you're a liar or you're trying to mislead me. That's what you understand, and when I consider submissions that you make, I do it in light of the fact that you are an unrepresented applicant.

PN377

MR TRACEY: Yes.

PN378

THE DEPUTY PRESIDENT: Okay? And I hold the representatives of the respondent at a much higher standard of care to references they make.

PN379

MR TRACEY: Yes.

PN380

THE DEPUTY PRESIDENT: And I don't give them that same leeway and, having done that, I think a lot of these allegations that you are making, you should be careful in making.

PN381

MR TRACEY: Yes. If I can just address two points there. One, in regards to Mr Boothman saying it's been raised many times, he is correct, I have raised it many times, but I would argue on that point that every time I've raised it, it's never been addressed. When I say 'addressed', I mean no decision or statement has been made. I raised the thing and it hasn't been addressed in the decision or - - -

PN382

THE DEPUTY PRESIDENT: Can we disagree with that. I can remember a specific occasion when Ms Millar leapt to her feet and in the strongest terms refuted it.

PN383

MR TRACEY: Yes.

PN384

THE DEPUTY PRESIDENT: I said to you, Mr Tracey, at that time, it's improper to make those allegations.

PN385

MR TRACEY: Yes.

PN386

THE DEPUTY PRESIDENT: So it's not correct to say it hasn't been dealt with.

PN387

MR TRACEY: If I can just - - -

PN388

THE DEPUTY PRESIDENT: Mr Tracey, I've been very careful in my decisions and my colleagues are very careful to deal with applicants and accommodate their lack of knowledge of practice, their lack of knowledge of the law. You shouldn't misunderstand that courtesy as saying that what you are saying or doing is right.

PN389

MR TRACEY: Yes.

PN390

THE DEPUTY PRESIDENT: People are trying not to do you unnecessary reputational harm or to make harsh criticisms in a public forum.

PN391

MR TRACEY: Yes.

PN392

THE DEPUTY PRESIDENT: So if your position is that you need to have on the record that some of your conduct is inappropriate, that may well be what I will do in my decisions.

PN393

MR TRACEY: Yes.

PN394

THE DEPUTY PRESIDENT: But, in the past, I haven't done that because I've taken into account your particular circumstances, not only that you are unrepresented but some of the challenges that you face in terms of presenting your case, but that is quite a rash thing to say that because you haven't had on the record that this is improper that it's okay to do what you say because you have been counselled off transcript and on transcript, and if it's necessary for me to put in written decision that some of your behaviour is inappropriate, I will do that, but I haven't done that to date.

PN395

MR TRACEY: Yes.

PN396

MR BOOTHMAN: I'm sorry, your Honour, just having regard to that statement you have just made, there is decisions on the record where Mr Tracey has been counselled for this, including at the Full Bench level in his costs application by the Vice President. There was no finding that Corrs had done any of the things that Mr Tracey had asserted. It is already on a decision. The reason why we are taking such issue is because Mr Tracey continues to do it despite having been told by a Full Bench that there was no basis for any assertions he had made to that point, and they continue, and there has been another decision from Gostencnik DP about his treatment of Ms Hill as a witness in these proceedings when she was not before the Bench to defend herself. So, Mr Tracey has had multiple opportunities to curb his behaviour and we say it's becoming inappropriate.

PN397

MR TRACEY: If I can just try and clarify because sometimes I don't explain myself very well. In regard to the point you said before where I made a point and Ms Millar jumped up to respond, I wasn't trying to say that a response hadn't been made in that regard, I was using that as an example. I was saying that the point I made, Ms Millar then jumped up and said something, then you said something along the lines of, 'It's inappropriate to make this without testing it.' My point was that it was never tested.

PN398

That was the point I was trying - when I said no decision had been made, what I meant was no decision had been made to whether the assertion I made was correct or not, and I would argue that you actually - in this matter, you actually tested that assertion to a degree in regards to the email chain that Ms Hill had sent to BP and Ms Hill stated that she hadn't. You asked her a number of questions to try and tease information out of her and the final question basically ended up with, 'No, I send the full transcripts. It wasn't me. It wouldn't have been me that sent - that modified the transcript before I sent it.'

PN399

This is in regard to a different point, but as far as that one went, there was no - that wasn't addressed in the decision. But, I guess from that point, you teased the information out that the change in evidence had come from their side, if Ms Hill was to be believed.

PN400

MR BOOTHMAN: Again, this - - -

PN401

THE DEPUTY PRESIDENT: I don't think that was a particular (audio malfunction), but - - -

PN402

MR BOOTHMAN: This particular issue - sorry.

PN403

THE DEPUTY PRESIDENT: Sorry, Mr Boothman. Mr Tracey, I want you to be under no misapprehension. If it is necessary for me to put on transcript each time your conduct is not appropriate and put in my written (audio malfunction), I will do that. I haven't done that out of respect for you and the efforts that you make in trying to prepare for these proceedings because I have a lot of respect for the amount of time and effort you really put in to try and articulate your case. But if it is such that you have to see it in a written decision so that you don't behave in a manner which is inappropriate, then I will do that.

PN404

So, I am warning you again you need to be careful about the allegations that you make which suggest that people are behaving improperly, unlawfully or in breach of the conduct rules without a basis for doing so because that could be the difference between Mr Boothman being able to feed his family or not.

PN405

MR TRACEY: Yes.

PN406

THE DEPUTY PRESIDENT: They are very serious allegations to make. If a lawyer loses their practice certificate, that is their ability to work, like for a pilot losing his pilot's licence. So, they are not think that Mr Boothman can take lightly when you're putting them on the record, a public document, and Mr Boothman and Ms Millar have been quite circumspect in standing to deal with the things that you're making, but you can't continue to do that because it's on the public record on the transcript and it's often made, regularly made without any basis.

PN407

If you think there are things which they do which are inappropriate, there are processes for that to be dealt with and that's through the Legal Practice Board and you should pursue it in that forum, not make comments on transcript which are without an opportunity for them to deal with and provide evidence to deal with. Okay?

PN408

MR TRACEY: Yes. I guess because I'm not as articulate, I don't know how to phrase it without coming off that direct, and that's my issue, I guess. I find it very hard to phrase it in a certain way to then make my point come across without then sounding that way. Yes, I guess, especially in circumstances where I can't - I can't

adduce more evidence later on in certain aspects, and I'm not going to get into any other specific bits, but - - -

PN409

THE DEPUTY PRESIDENT: I think, for example, saying, for example, that, you know, Corrs have misrepresented what authorities say, I think that is a very - I don't see the basis on which you can make such a statement. The same could apply to statements that you make about authorities. People have different views about what authorities say or mean. Unless they are actually (audio malfunction) the wording in a quote from an authority, that is a person's view about what an authority says. Now there's things that you say authorities say which both Corrs and I disagree with.

PN410

MR TRACEY: Yes.

PN411

THE DEPUTY PRESIDENT: But that's your submission, and you may be right, a Full Bench might find that your interpretation (audio malfunction). A Full Bench might find a different view from the Federal Court or the Full Court of the Federal Court. That's the way it all works, you know, it's a perspective. That doesn't mean that they are lying or misleading, so using that type of language is wrong.

PN412

MR TRACEY: Yes.

PN413

THE DEPUTY PRESIDENT: What you might say is, 'The interpretation which they've applied I disagree with, I think it should be interpreted this way.' It's different to say, 'They are lying, they are misleading the court' because those are things which are in breach of the practice rules.

PN414

MR TRACEY: I guess - - -

PN415

THE DEPUTY PRESIDENT: Using your choice of language is really important. You might disagree about how they interpret, but you can't say that they are fraudulent or misleading where they have a different view to you when it's simply just a different view.

PN416

MR TRACEY: I guess in that regard, I was going to your further point. I wasn't trying to argue a difference of opinion in principle, I was trying to argue the other bit you said where words have been changed to give it a different meaning. I'm not saying it was deliberately done to give it a different meaning, but that was the effect of it.

PN417

THE DEPUTY PRESIDENT: When you say words are changed, do you mean that they have paraphrased an extract from a decision or they have changed in quotations the - - -

PN418

MR TRACEY: More that they've paraphrased it to say it says something they completely didn't say.

PN419

THE DEPUTY PRESIDENT: But that's a question of perspective, Mr Tracey. They draw from a particular authority it has a particular meaning and you draw from a particular authority a particular meaning. Now sometimes I agree with them, sometimes I agree with you about what the judge meant in that particular proceeding. It doesn't mean that they are trying to mislead me. That's what they have drawn from that authority in the same way you have drawn certain conclusions.

PN420

MR TRACEY: Yes, I'm striving to articulate this, but I guess it wasn't a matter of I'm arguing this principle and they are arguing a different principle. I don't want to repeat the example because then it might come across that I'm phrasing it the wrong way and being disrespectful, but I guess it was - a hyperbole example was it's like saying, 'I'm colour blind, I think this thing is red' and you say, 'I don't need to determine whether it's red because it doesn't matter, you only need a highlighter' and someone else coming along and saying, 'The Deputy President said it was a green highlighter', that kind of thing, to a point where - it's hard for me to explain without referring to the specific example and I fear if I refer to the specific example, it will come across in the wrong way which you're counselling me not to do.

PN421

THE DEPUTY PRESIDENT: You can say you disagree with their interpretation of what that decision meant.

PN422

MR TRACEY: Yes.

PN423

THE DEPUTY PRESIDENT: You can't say that they're misleading the Commission because they have a different view to you about what the decision says.

PN424

MR TRACEY: I suppose the clearest example was the specific authority they referred to - generally when I get my authorities, because I'm not a lawyer, I either get them from the Commission web page, I get them from AustLii or Jade.

PN425

THE DEPUTY PRESIDENT: Yes.

PN426

MR TRACEY: I believe legal practitioners have access to industry sources where they get them, and there was a specific paragraph in the decision, which is the same in every decision because it's the decision itself, which said, 'The Full Bench determined that we didn't need to consider this matter.' BP's submissions essentially said, 'The Full Bench said' - how do I phrase it - 'The Full Bench said their consideration of this matter would affect such and such.' Yet the industry copy of the decision, which has summaries and (indistinct) at the top, contradicted - well, it was accurate to the decision and contradicted the submissions they were making, so it wasn't really a matter of law, it was - yes, I don't know how to explain it without - I'll just leave it. I don't know how to explain it without fear of treading backwards into the - - -

PN427

THE DEPUTY PRESIDENT: I think it's the language that you use.

PN428

MR TRACEY: Yes.

PN429

THE DEPUTY PRESIDENT: If you say, 'I disagree with how they've interpreted that decision, I think this is what the court meant', that's different to saying that they're lying about the decision or misleading. The language that you use has legal implications.

PN430

MR TRACEY: Yes.

PN431

THE DEPUTY PRESIDENT: A change of the use of language - you can disagree with them about their interpretation and you say, 'Well, I don't think that's what the Full Bench meant by that, this is the language of precisely what was said.' That's different than saying somebody is acting unlawfully. Does that make sense?

PN432

MR TRACEY: Yes, okay. Yes, that's cool. I'm just trying to figure out how I refer to this next - we've spent so long on that. I'll just wrap this up. Only in respect to those kind of issues, but phrasing them differently so they don't come across as harsh without actually saying them, I guess my point would be that - it goes back to the issue that granting permission to be represented does not necessarily go to efficiency. I'm not going to delve into them further, but I guess from my recusal submissions, I gave a number of examples where - and I'm talking about disagreeing with principle, not anything untoward - where I guess their interpretation of decisions I would consider were so far out there, those interpretations are what has caused so much inefficiency. My requirement to respond to those interpretations is what leads to so much voluminous documents because I then have to supply all this evidence to prove the points they're making are not correct. I guess - - -

PN433

THE DEPUTY PRESIDENT: I suppose the difficulty, Mr Tracey, with that argument is that the applicant usually files first (audio malfunction) materials, with respect, generally start - - -

PN434

MR BOOTHMAN: Sorry, Deputy President - - -

PN435

THE DEPUTY PRESIDENT: Corrs' stuff has always been shorter than (audio malfunction).

PN436

MR BOOTHMAN: Sorry, if I could just interject. In our view, respectfully, it doesn't really matter what BP's view is on this recusal application to a degree. We have given authorities with a view to assisting the Deputy President in coming to her view as to whether she has acted in a biased manner. We will very likely say very little at the recusal application hearing because we don't think there is any basis to it and it will be for Mr Tracey to convince you, Deputy President, that you have displayed bias. Beyond our submissions, I would expect that I will say very little. So, it doesn't need Mr Tracey to address all of our cases. That was us assisting the Commission and Mr Tracey can deal with those cases in any way he sees fit and convince you, Deputy President, that you should recuse yourself. As I said, we will say likely very little.

PN437

MR TRACEY: Yes, just to clarify my point, I was not referring to their recusal application, I was referring to the jurisdictional (audio malfunction), but more so the fact that BP's submissions, and they have a right to their interpretation of whatever decision they are referring to, but I would argue that - and I know I'm not right all the time, but the majority of theirs have been incorrect, and it's those matters which have been causing (audio malfunction). I'm just going to leave it there. Thank you.

PN438

THE DEPUTY PRESIDENT: Okay. Mr Boothman, is there anything you wanted to say in closing?

PN439

MR BOOTHMAN: I guess if I close very briefly, your Honour. I think, as you would know, preparation is the key to any good advocacy. We have alluded to today on many occasions that there are just now so many documents. A number of the personnel at BP - I'm probably the last - - -

PN440

THE DEPUTY PRESIDENT: The last one standing.

PN441

MR BOOTHMAN: - - - left standing who's been here from day one.

PN442

THE DEPUTY PRESIDENT: Including me and Mr Tracey.

PN443

MR BOOTHMAN: That's right. Mr Tracey - - -

PN444

THE DEPUTY PRESIDENT: I think we all have to go for a drink at the end.

PN445

MR BOOTHMAN: Mr Boothman might get his pupillage and become a lawyer.

PN446

THE DEPUTY PRESIDENT: I keep on encouraging him to.

PN447

MR BOOTHMAN: I think Mr Tracey made a submission that it would not be more efficient for us to continue, us being Corrs - we say that submission cannot be accepted - as opposed to Mr Lynch. Mr Lynch, his evidence was that he is familiar with this matter at a very high level. To expect him now - and I suggest Mr Tracey submitted as well that he was likely to refer to historical matters in his application dating back to 2018 when he was first dismissed from BP, and so, since then, there have been tens of thousands of documents, and that is not an exaggeration, tens of thousands of documents that Mr Lynch will have to find time, which he says he does not have, to read in the event Mr Tracey says, 'In my unfair dismissal application, X happened.' Mr Lynch - going back to my proposition at the start that preparation is key - Mr Lynch, as a professional, will need to be prepared and read those decisions. You cannot turn up at this Commission unprepared. It is unprofessional.

PN448

The second point we would close with is that, as we have said, and I had it written down before I jumped up wildly, but lawyers, they do have duties to this Commission and to Mr Tracey as a self-represented applicant. My first opening submissions, I made a fourth point that said Corrs, specifically me and Ms Millar of counsel, we have been intimately involved in all of these matters dating back to 2018 and we have assisted the Commission and Mr Tracey throughout that entire period, and we will continue to do so, and I would point to Mr Tracey relying on Corrs from time to time to prepare court books, to field phone calls, to confer with him on (audio malfunction) to work with him to try and make the matter more efficient, and we have prepared what we say are submissions that have been concise, clear and we've given authorities which we say support the propositions that we have sought to advance on behalf of the respondent.

PN449

We think, going back, in our respectful submission in closing, the evidence is that Mr Lynch is not the person to run this matter and anyone he would delegate to would be of lesser experience, and the preconditions for the granting of permission for BP to be represented have been met.

PN450

I don't have anything further, Deputy President, unless I can be of assistance?

PN451

THE DEPUTY PRESIDENT: Thanks, Mr Boothman.

PN452

MR BOOTHMAN: May it please the Commission.

PN453

THE DEPUTY PRESIDENT: Mr Tracey, one of the things that you raised was that you were unaware of whether Corrs had any experience in (audio malfunction) applications. It's a matter of public record that they have recently because they've been involved in a recusal application (audio malfunction). That's something which is not in evidence, but I want to put it to you because it's a matter which addresses one of the issues that you raised and you may not be aware of the proceedings.

PN454

MR TRACEY: I'm aware of it. I'm not sure if I phrased it that way, but if I did - yes, I am aware of that and (audio malfunction) brought that to my attention at the start of - before the start of the proceedings.

PN455

THE DEPUTY PRESIDENT: Is there anything you wanted to say in closing, Mr Tracey?

PN456

MR TRACEY: No, I don't want to get bogged down. I'd only - just in respect to Mr Boothman's last point that if Corrs weren't representing BP in this matter, it wouldn't be strictly limited to either Mr Lynch or someone below him he delegates to, as mentioned previously, BP employ a number of in-house counsel, lawyers practising, so it's not simply a matter of either Mr Boothman and Ms Millar versus Mr Lynch or one of his underlings, the third option is any number of BP's in-house counsel, who are, I submit, highly experienced. That's all I've got. Thank you.

PN457

THE DEPUTY PRESIDENT: Mr Tracey, just for the record, I don't have any evidence that BP have any other counsel or that they are highly experienced. All I have as witness evidence in these proceedings is Mr Lynch's written evidence about the HR department and his oral evidence that he wasn't aware of the individuals that (audio malfunction).

PN458

MR TRACEY: I guess to address that point - it's multi answers - he didn't know the people I referred to, but he did say that there are other BP in-house counsel that he is aware of. He was unaware of their education, so that's not that they wouldn't be able to do it, he just had no knowledge.

PN459

THE DEPUTY PRESIDENT: Similarly, I have no knowledge of it either.

PN460

MR TRACEY: Yes, but I guess in that regard, BP bore the onus of proof two show that those in-house counsel would not be able to do it and they haven't, they haven't addressed it in their - - -

PN461

THE DEPUTY PRESIDENT: I think in his oral evidence, he didn't believe they were able to when you put that question to him.

PN462

MR TRACEY: Yes.

PN463

THE DEPUTY PRESIDENT: It might have been one question too many.

PN464

MR TRACEY: It may have, but I know he also said when I asked him, he said that he didn't know their experience and that.

PN465

The second point was I guess I didn't realise - and it's my fault for not being a lawyer - I didn't realise in regard to those bits I need to submit evidence because I guess I assumed it was either the same as when referring to a decision or in other matters where I've seen counsel - actually, a good example is 596(2)(b), effective representation. In one of the decisions, they refer to the dictionary of what 'effective' means and they say, according to Webster or according to Meridian, it gives this definition, this definition and this definition.

PN466

My understanding is when those kind of submissions are made, they are not answered in evidence in a witness statement, they are made in submissions with reference to, in the footnote, 'I did a Google search on Webster's online dictionary on this date and this was the result it gave', which is what I did in my submissions in respect to I did an online search on LinkedIn of BP's employees, I named them, I put the link in the footnotes. My understanding was that was the same. If it's not, I live and die by that - - -

PN467

THE DEPUTY PRESIDENT: Citing authority is not relying on evidence.

PN468

MR TRACEY: Yes.

PN469

THE DEPUTY PRESIDENT: Evidence of a disputed fact, and as you put it in your submissions, there's a disputed fact about appropriately skilled people.

PN470

MR TRACEY: Yes.

PN471

THE DEPUTY PRESIDENT: I think that was in your second lot of submissions.

PN472

MR TRACEY: Yes, yes, I guess it's my fault for not entering the evidence. I just didn't - I thought it was the same for like, yes, with the definitions, you put in submissions, you put the link to that, because it's not evidence. I suppose the only way I could have said it was, 'I did a LinkedIn search on such and such a date' and that is my fault if the way I've done it is inadmissible and I guess I have to live with that.

PN473

I thought there was one more point in there. Now I've gone off at a tangent.

PN474

THE DEPUTY PRESIDENT: Sorry if I distracted you.

PN475

MR TRACEY: No, that's all right, it happens more than you'd know. Yes, it was only about the lawyers, I think.

PN476

THE DEPUTY PRESIDENT: You spoke about the duties of solicitors to the court and you said that - - -

PN477

MR TRACEY: No, I wasn't going to readdress those matters. I'm leaving that one line.

PN478

THE DEPUTY PRESIDENT: That one line, okay, yes.

PN479

MR TRACEY: I think it was purely about - yes, I think it was - I've probably addressed it - it was purely about representation, not just the option of Mr Lynch and one of his underlings, but I'll - I can't remember what it is. I'm not going to remember it if I keep standing here and rattling on, so I'll just leave it there.

PN480

THE DEPUTY PRESIDENT: Okay, thank you. Thank you, gentlemen, for your submissions today. I will (audio malfunction) and issue with reasons in due course. Thank you.

ADJOURNED INDEFINITELY

[3.37 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

CHRISTOPHER JAMES LYNCH, AFFIRMEDPN32

EXAMINATION-IN-CHIEF BY MR BOOTHMANPN32

**EXHIBIT #R1 WITNESS STATEMENT OF CHRISTOPHER JAMES
LYNCH DATED 19/01/2023PN41**

CROSS-EXAMINATION BY MR TRACEYPN42

RE-EXAMINATION BY MR BOOTHMAN.....PN235

THE WITNESS WITHDREWPN252