



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER ALLISON

C2022/8256

s.739 - Application to deal with a dispute

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union"
known as the Australian Manufacturing Workers' Union (AMWU)
and
Opal Packaging Australia Pty Ltd T/A Opal Fibre Packaging
(C2022/8256)

Orora Fibre Packaging National Enterprise Agreement 2019

Melbourne

10.00 AM, MONDAY, 20 NOVEMBER 2023

Continued from 25/08/2023

PN1

THE COMMISSIONER: Thank you. Good morning, parties, I will take the appearances, please.

PN2

MR A BONELLO: Good morning, Commissioner, an appearance for the applicant, Bonello, initial A.

PN3

THE COMMISSIONER: Thank you, Mr Bonello.

PN4

MS C YUEN: Good morning, Commissioner. For the respondent Yuen, initial C.

PN5

THE COMMISSIONER: Thanks, Ms Yuen. Thanks, parties. I'm proposing to run this morning as follows. We will hear the evidence of Mr Hutchinson first, and then give him the opportunity if you'd like to leave you can, or to stick around. I would then like the parties to address me on whether we are now finished with the evidence, noting that there does appear to be a contention regarding the discussion of Ms Cassan and Mr Hines. And thirdly, subject to that discussion we will then move to closing submissions. So that's how I propose to run this morning. Are both the parties comfortable with that?

PN6

MS YUEN: Commissioner, I believe there's one step missed which is further cross-examination of Mr Horan in relation to the 5 December meeting.

PN7

THE COMMISSIONER: Okay. Thank you. Have we got Mr Horan here today?

PN8

MR BONELLO: Yes, Commissioner.

PN9

THE COMMISSIONER: Okay. Excellent, thank you. Thanks, Ms Yuen, I think we will go to Mr Hutchinson first.

PN10

MS YUEN: Thank you, Commissioner. I call Steve Hutchinson to the stand, please.

PN11

THE ASSOCIATE: Please state your full name and address for the record.

PN12

MR HUTCHINSON: Steven Darren Hutchinson, (address supplied)

<STEVEN DARREN HUTCHINSON, AFFIRMED

[10.05 AM]

EXAMINATION-IN-CHIEF BY MS YUEN

[10.05 AM]

PN13

THE COMMISSIONER: Thank you. Ms Yuen.

PN14

MS YUEN: Thank you, Commissioner. Mr Hutchinson, please state your full name and your business address?---Steven Darren Hutchinson, and business address is 572 Swan Street, Burnley.

PN15

Thank you. And have you prepared a statement for the purposes of these proceedings?---Yes.

PN16

Associate, is there a statement available for Mr Hutchinson, please. Thank you. The statement that the associate has just handed you is that the statement that you have prepared?---Correct.

PN17

And are the contents of that statement true and correct?---Yes.

PN18

No further questions, Commissioner. I seek to tender that statement.

PN19

THE COMMISSIONER: Thank you.

**EXHIBIT #OPAL 4 STATEMENT OF STEVEN HUTCHINSON
DATED 27/10/2023 CONSISTING OF NINE PARAGRAPHS AND
ONE ATTACHMENT**

PN20

MS YUEN: Thank you, Commissioner.

PN21

THE COMMISSIONER: Thank you. Thanks, Mr Bonello.

CROSS-EXAMINATION BY MR BONELLO

[10.07 AM]

PN22

MR BONELLO: Thank you, Commissioner. Good morning, Mr Hutchinson?---Good morning.

PN23

I will just be asking you some questions today in relation to this matter. First I'd just like you to turn to paragraph 5 of your witness statement, please, Mr Hutchinson?---Is that on page 1?

*** STEVEN DARREN HUTCHINSON

XXN MR BONELLO

PN24

Yes, it is. You say that you approached Mr Horan and asked him to go to the boardroom to attend a meeting with Mr Edwards and Ms Chew to discuss the interaction he had with Jenny McLean; is that correct?---Correct.

PN25

When you approached Mr Horan for the first time he opposed going to that meeting, didn't he?---Correct.

PN26

THE COMMISSIONER: Sorry, Mr Bonello, just before you go on, Ms Yuen, did you have any view on Mr Horan being in the room regarding - - -

PN27

MS YUEN: Yes, good point, Commissioner. It would be preferable if Mr Horan could step out, thank you.

PN28

THE COMMISSIONER: Thank you, Mr Horan. Thank you. Sorry, Mr Bonello.

PN29

MR BONELLO: Thank you, Commissioner. I will just ask you that question again, Mr Hutchinson. When you approached Mr Horan for the first time he opposed going to the meeting with Mr Edwards, didn't he?---Yes, as per paragraph 6.

PN30

What was the reason why he opposed going to that meeting?---As paragraph 6 he said that he would request someone from the AMW attend the meeting.

PN31

So is it correct then to say that he raised the issue of union representation with you?---It is what I've said. Yes, I believe that's correct.

PN32

Thank you. Mr Hutchinson, you say in paragraph 6 of your witness statement that you went back to the boardroom to relay back to Mr Edwards and Ms Chew - to relay Mr Horan's request; is that correct?---Correct.

PN33

Can you tell us what you relayed back to Mr Edwards and Ms Chew?---Essentially at paragraph 6 I went back to the boardroom to meet Mr Edwards and Ms Chew and literally articulated straight back that Grant had requested AMWU representation, to which as I then went back to Mr Horan to inform him that he was required to attend.

PN34

What was the response from Mr Edwards and Ms Chew?---That he was, that Grant was still required to attend. It was not necessary.

*** STEVEN DARREN HUTCHINSON

XXN MR BONELLO

PN35

Thank you. Would you then agree that there were two clear - would you then agree that there were clearly two different views on how that meeting should have been carried out?---As I was not party, like privilege to the meeting itself I was simply requested to get Grant to the meeting, and that was essentially the end of my role I guess.

PN36

Well, you agree, Mr Hutchinson, that Mr Horan raised the issue of union representation; is that correct?---Correct.

PN37

And that you agree that Mr Edwards told you to relay back to Mr Horan that if he doesn't attend he will be stood down?---Correct.

PN38

So again, Mr Hutchinson, would you not agree that there were clearly two different views on that day regarding the issue of union representation; one from Mr Edwards and one from Mr Horan?---I guess you could, yes.

PN39

Thank you. When Mr Horan raised the issue of union representation with you did you attempt to engage in discussions to resolve that matter with him on that morning?---No. I simply went back to the boardroom to relay the conversation.

PN40

So from your evidence then, Mr Hutchinson, it's clear that Mr Horan raised a dispute with you that morning, isn't it?---I wouldn't say it was a dispute. Grant simply requested that he have the AMWU present for the meeting.

PN41

But you would agree that he raised the issue with you of union representation?---He raised the issue of union representation, yes.

PN42

Thank you. At paragraph 9 of your witness statement, Mr Hutchinson, you state that the attachments SH1 are examples of Mr Horan raising disputes with you; is that correct?---Yes.

PN43

From the examples you have provided do you agree that Mr Horan doesn't have a practice of formally placing the matter in dispute?---I would argue that the type of emails I received are typically what I would receive, such as hash tags and what not applied to certain emails.

PN44

Would you agree that he often does not include words such as 'We are in dispute as per the agreement'?---I would agree with that, yes, based on my history with Grant.

*** STEVEN DARREN HUTCHINSON

XXN MR BONELLO

PN45

Thank you. So I will refer - please if you can turn to the first email, SH1. You do then agree that he's raising, or Mr Horan's raising an issue for a dispute with you by this email; is that correct?---Correct.

PN46

Thank you. And you agree that Mr Horan does not include words such as 'We are in dispute', or words such as 'We are in dispute as per the agreement', in this email; is that correct?---Not in this agreement, I agree. In this email, sorry.

PN47

Thank you, Mr Hutchinson. No further questions, Commissioner.

PN48

THE COMMISSIONER: Thank you. Ms Yuen, I might - I will ask a few questions before giving you the opportunity.

PN49

MS YUEN: Thank you, Commissioner.

PN50

THE COMMISSIONER: Have the parties had the benefit - do you have the transcript at this stage?

PN51

MS YUEN: Yes, it was available online.

PN52

THE COMMISSIONER: Okay. Thank you. Mr Hutchinson, in his evidence Mr Horan says on your return, after you come back and you said, 'No, you're not required to have representation', he says, 'I'm not going upstairs without representation. This is not how it's done in the EA. I'm entitled to representation.' What, and I know it's now over a year ago, but what's your recollection of when you went back and said, you know, 'You need to go in regardless of whether you have representation'?---Yes. All I essentially recall is the initial, 'There's going to be a meeting in the boardroom. Can you please get Grant.' I headed downstairs, found Grant, requested he attend the meeting. He immediately said, 'I want AMWU representation.' So I went back upstairs, relayed that, and was told, 'Not necessary. He needs to attend or he will be stood down' - as per the transcript. And then he didn't - I don't recall him saying anything. He just nodded at me and walked away. And I didn't partake any further, and I believe he attended the meeting.

PN53

Thank you. Thanks, Ms Yuen.

RE-EXAMINATION BY MS YUEN

[10.15 AM]

*** STEVEN DARREN HUTCHINSON

RXN MS YUEN

PN54

MS YUEN: Thank you, Commissioner. Mr Hutchinson, my friend asked you about some of these emails that Mr Horan had previously sent to you. When you

received these emails, they're attached to your witness statement, what did you think that Mr Horan was trying to do?---Raise - raise issues in the factory.

PN55

And what did you feel you needed to do when he raised such issues?

PN56

MR BONELLO: Objection, Commissioner, leading.

PN57

MS YUEN: I can rephrase the question if you like, Commissioner.

PN58

THE COMMISSIONER: Yes, can you rephrase it. Yes.

PN59

MS YUEN: Did you feel that you needed to do anything when you received these emails?

PN60

THE COMMISSIONER: Perhaps if you - after receiving the emails what would be your next step?---I would assess the email and deem whether it was necessary to take further action.

PN61

MS YUEN: Thank you. And, Mr Hutchinson, just thinking back to that second interaction on 5 December when you relayed the information back to Mr Horan, what did you see as the next step for you after that interaction?---Return to business as usual in terms of running the site.

PN62

Thank you, Commissioner, I have no further questions.

PN63

THE COMMISSIONER: Okay. Thank you. Thank you, Mr Hutchinson, I think that you're done?---Thank you.

<THE WITNESS WITHDREW

[10.16 AM]

PN64

Mr Bonello, we might need to retrieve Mr Horan. Thanks, Mr Bonello, if you would like to call Mr Horan.

PN65

MR BONELLO: Thank you, Commissioner, I'd like to call Mr Horan to give his evidence now, thank you. Commissioner, I do note that Mr Horan has already been sworn in. Did you require his evidence today be tendered?

*** STEVEN DARREN HUTCHINSON

RXN MS YUEN

PN66

THE COMMISSIONER: I think we will swear you in, Mr Horan, but obviously we don't have a witness statement, so that's fine.

PN67

THE ASSOCIATE: Could you please state your full name and address for the record.

PN68

MR HORAN: Grant Edward Horan, (address supplied)

<GRANT EDWARD HORAN, AFFIRMED [10.18 AM]

CROSS-EXAMINATION BY MS YUEN [10.18 AM]

PN69

THE COMMISSIONER: Thank you, Mr Horan. Mr Bonello, are there any questions you have?

PN70

MR BONELLO: No questions. Thank you.

PN71

THE COMMISSIONER: Thank you. Ms Yuen.

PN72

MS YUEN: Thank you, Commissioner. Good morning, Mr Horan?---Good morning.

PN73

Mr Horan, could I ask you to please look at paragraphs 4 to 5 of your witness statement. Associate, does Mr Horan have the court book in front of him? Thank you, Mr Bonello. Your witness statement appears commencing on page 24 of the court book, Mr Horan - at 23, my apologies. And the paragraphs I would like you to look at, please, are on page 24, paragraphs 4 and 5. Mr Horan, is the content of those paragraphs 4 and 5 accurate?---Yes.

PN74

Thank you. And could I please ask you to have a look at Mr Hutchinson's witness statement. Have you had the opportunity to review that document as yet?---Yes.

PN75

Hopefully there should be a copy there while Mr Hutchinson was giving his evidence. And could I please ask you to look at paragraphs 4 to 7 of Mr Hutchinson's witness statement?---Sorry, did you say 4 - - -

*** GRANT EDWARD HORAN

XXN MS YUEN

PN76

Four to 7. So under the heading '5 December 2022 interaction with Mr Horan', those four paragraphs, 4, 5, 6 and 7. Now, you'd agree that those paragraphs are accurate, wouldn't you, Mr Horan?---Not completely, no. Sorry, is the - sorry, my

statement back there it's not sort of - there's some bits missing. Does that make any different with like its context?

PN77

I am going to ask you some questions about the evidence when you first gave evidence?---Yes.

PN78

Now, those two statements we've just looked at, neither of those say anything about you mentioning the EBA in those discussions, do they?---No.

PN79

And that's right, because you didn't say anything about the EBA to Mr Hutchinson in those discussions, did you?---No, it's not correct. That's what I was going to say. In the other statement here there's bits that are missing from my original statement.

PN80

Now, neither of those statements indicate that Mr Hutchinson used the words 'disciplinary meeting', and that's right, because he didn't use the words 'disciplinary meeting', did he?---Mr Hutchinson didn't I don't think. I don't recall.

PN81

So what you're saying is in relation to a reference to the EBA you failed to mention that in your witness statement, that Mr Hutchinson - that, sorry, you referred to the EBA in your discussion with Mr Hutchinson. You've left that out in your witness statement. Is that what you're saying, Mr Horan?---The last hearing you mean?

PN82

Yes?---In my witness statement that I submitted before it was included, but then -
- -

PN83

The one that you were reading then?---Yes. Yes, that's correct.

PN84

And so you're saying your witness statement is not accurate, because it's missing a reference that you talk about the EBA?---That's correct.

PN85

No further questions, Commissioner.

PN86

THE COMMISSIONER: Thank you, Mr Horan. I'm going to ask Mr Horan a question, and, Ms Yuen, you're welcome to afterwards ask any other questions. What is your recollection of the discussion. I have read obviously what you've said in your previous - - ?---Yes.

*** GRANT EDWARD HORAN

XXN MS YUEN

PN87

I am just interested having now seen what Mr Hutchinson says what do you say?---Yes. Well, when we had the online hearing I had trouble getting online. The company hadn't - because I did it at work - they hadn't given me a password to get online. So I was a bit flustered, then my computer froze, and it was just a bit - I don't know what the right word is - I was a bit flustered, and giving a complete statement - do I just go back over what he said when he came to me?

PN88

Yes?---Sorry. So he came up to me and said I had to go to a meeting upstairs. I took that as to be that it was some sort of disciplinary meeting concerning somebody. And I said, 'Why? Who is in trouble?' And he said, 'You.' So I said, 'I'm not going to go anywhere without union representation.' He has then left, gone back upstairs I presume. He's come back downstairs and said to me, 'You must attend the meeting.' And I said, 'I'm not going to go without union representation.' And he said to me - I don't recall now the exact position of whether I said then that, 'You're not following the EA', or whether it was after when he said, 'If you don't go you'll be stood down', and I may have said then that, 'This is not how it goes in the EA', or something, words to that effect. I don't remember the exact - I can look at my other statement if that makes a difference to
- - -

PN89

No. Thanks, Mr Horan?---It doesn't have to be verbatim or - is what I meant.

PN90

No, that's fine?---Yes.

PN91

Thank you. Ms Yuen, was there anything out of that you wanted to follow up?

PN92

MS YUEN: No, thank you, Commissioner.

PN93

THE COMMISSIONER: Thank you. Mr Bonello?

PN94

MR BONELLO: No, Commissioner.

PN95

THE COMMISSIONER: Okay. Thank you, Mr Horan?---Thanks. Is that it, sorry?

PN96

Yes, that's all for today?---Okay. Sorry. Thanks.

<THE WITNESS WITHDREW

[10.26 AM]

*** GRANT EDWARD HORAN

XXN MS YUEN

PN97

Thank you. Mr Horan, you're free to go if you like or you're welcome to stay as well. Thanks, parties. I do want to have a talk now about whether we are at the end of evidence. I might go off record, please.

OFF THE RECORD

[10.27 AM]

ON THE RECORD

[10.42 AM]

PN98

THE COMMISSIONER: Thank you. I have just had a discussion with the parties regarding if there's any further evidence, and noting there appears to be contest between whether there were any discussions between Ms Cassan and Mr Hines. I have asked the parties to provide supplementary witness evidence. The applicant will be providing a statement from Ms Cassan by close of business this Wednesday, the respondent having an opportunity to respond and provide any witness evidence in response by close of business Friday, and that evidence if it is to be heard will go ahead next Tuesday afternoon. Thank you, parties, as indicated I will hear closing submissions, noting that that's subject to anything that may arise out of the further supplementary evidence. Thank you, Mr Bonello.

PN99

MR BONELLO: Thank you, Commissioner. So, Commissioner, I will take you to page 18 of the court book. We noted here three sequences where the Commission can find jurisdiction. In light of the oversight which is the 14 December discussion that occurred roughly about an hour after lodgement obviously that is no longer relied upon. But that we say, Commissioner, shouldn't be an impediment in you finding jurisdiction, and I will explain why now.

PN100

Before I do I will explain sequence 1. So as we have referred to it, Commissioner, this commenced with the discussion between Mr Horan and Mr Edwards on 5 December. It was then progressed by Ms Debasia's discussion with Mr Beales on 6 December, and finally that concluded with the 7 December discussion between Ms Cassan and Mr Hines. That in itself, Commissioner, we say should satisfy you to have jurisdiction in this matter and meeting the requirements of clause 15 of the agreement.

PN101

However, adding to this and the reason why of course we are here is due to the further discussion which occurred on 5 December prior to the meeting between Mr Horan and Mr Edwards. This is the discussion where Mr Horan obviously had the discussion with Mr Hutchinson prior to the discussion with Mr Edwards. So to limit any confusion I will refer to discussion 1 on 5 December, and then discussion 2 on 5 December. Obviously discussion 1 is with Mr Hutchinson and discussion 2 is with Mr Edwards.

PN102

From the evidence given today and previously, and previously we can find this at PN47 of the transcript, it's evident that Mr Horan first raised the dispute with Mr Hutchinson by refusing to attend due to the respondent not following the correct

procedures set out in the enterprise agreement prior to any disciplinary meetings taking place.

PN103

As we can see although Mr Horan raised the issue he was then later forced to attend the meeting, given that the respondent made it clear that he would be stood down if he didn't. We say Mr Horan attended the meeting with Mr Edwards immediately after his instruction with Mr Hutchinson, and the meeting with Mr Edwards was a meeting which further discussed the dispute, which is obviously, let's not forget, the dispute is the respondent not following the correct procedures prior to any disciplinary meetings taking place.

PN104

So effectively, Commissioner, on 5 December those two discussions we are relying upon satisfies the first requirement, the first meeting requirement in clause 15, and then satisfies the second meeting requirement in clause 15 of the agreement.

PN105

THE COMMISSIONER: Sorry, so you're saying the two discussions on the 5th satisfy the first and second steps of the disputes procedure?

PN106

MR BONELLO: Yes, Commissioner, that's correct.

PN107

THE COMMISSIONER: How do you say that the second steps - - -

PN108

MR BONELLO: So, Commissioner, I will just get the agreement. So, Commissioner, in clause 15.2(b) Mr Horan attempted to resolve the matter at the workplace by a discussion with Mr Hutchinson. He raised the issue with Mr Hutchinson, and from Mr Hutchinson's evidence he did not attempt to resolve the issue with Mr Horan there and then prior to the meeting with Mr Edwards. That is clear from the evidence given today. So we say that discussion Mr Horan had with Mr Hutchinson satisfies the first requirement, 15.2(b).

PN109

Upon Mr Horan entering the boardroom and further discussing the matter with Mr Edwards, and from evidence given by Mr Horan it's clear that he again raised the issue of the company not following the correct procedures in the EA, and by virtue of that he raised the issue of the union representation with Mr Edwards, and Mr Edwards did not attempt, or the matter was not resolved there in that meeting. In effect that meeting then with Mr Edwards satisfies 15.2(c). And, Commissioner, if I can emphasise that the requirements here are that the meetings take place with more senior levels of management. There is no requirement for the AMWU to step in, or anything of that sense, but there is a requirements for the meetings to take place with more senior levels of management, and we can confirm that Mr Hutchinson - sorry, I should say Mr Edwards is more senior than Mr Hutchinson.

PN110

THE COMMISSIONER: I understand, but you're saying 15.2(c) doesn't require with the regional or branch secretary. You're saying that's not a requirement, that's optional?

PN111

MR BONELLO: Well, Commissioner, we say that the employee is entitled to be self-represented throughout that process as well.

PN112

THE COMMISSIONER: Right.

PN113

MR BONELLO: Commissioner, flowing on from that we then say there's two other discussions that we rely upon. That is the discussion between Ms Debasia and Mr Rod Beales. I will touch on that discussion. So in line with the two discussions that Mr Horan engaged in we say there is only one more requirement now for a discussion which must be with more senior levels of management than Mr Edwards. And we say there were two discussions; one between Ms Debasia and Mr Rod Beales that occurred. We can see via the evidence of Ms Debasia that there was email correspondence noting the concerns, noting the dispute, and there was no response to that email. Nevertheless, the discussion was raised as we can see in the Qantas decision. Although there is no response the obligations of the party raising the dispute has still been met, allowing us to proceed to the next stage. I can find that paragraph for you, Commissioner, but it is in the submissions.

PN114

THE COMMISSIONER: Yes, thank you.

PN115

MR BONELLO: So we say, Commissioner, that obviously the third requirement was satisfied by Ms Debasia's email to Mr Beales, and although there was no response that is not required and shouldn't be an impediment in the jurisdiction process. Nevertheless, there was even a further discussion between Ms Cassan and Mr Hines on 7 December by way of email correspondence, but now as well, a discussion on that day as well.

PN116

So we say, Commissioner, that there's a number of discussions in this matter that give rise to your jurisdiction, Commissioner. That is obviously by sequence 1 as referred to on page 18, or can be by the other methods as I've just alluded to, the two discussions on 5 December, and the third one being between Ms Debasia and Mr Rod Beales, or it can be the two discussions on 5 December and the third one being Ms Cassan and Mr Hines' discussion.

PN117

THE COMMISSIONER: I see you've indicated a number of different sequences. With sequence 2 and sequence 3 what do you say in relation to them, noting the discussions on the 15th occurred after the dispute was lodged?

PN118

MR BONELLO: Yes, Commissioner. Sequences 2 and 3 as referred to on page 18 are no longer relied upon by the applicant.

PN119

THE COMMISSIONER: What's your view, Mr Bonello, in relation to (indistinct) the parties to address me on the correspondence from the 13th?

PN120

MR BONELLO: Yes, Commissioner. I believe it's annexure RB5 of the Beale statement. We don't rely upon that discussion either. I think the respondent merely notes it for possibly some sort of background to the dispute, but that is not a discussion that we rely upon. The only email correspondence from Ms Debasia that we rely upon is on 6 December.

PN121

THE COMMISSIONER: Okay.

PN122

MR BONELLO: So to conclude, Commissioner, so we are contending that there are three clear sequences where you can find jurisdiction, and I have emphasised that just before, so I won't go into that any more. To conclude I will reference paragraph 92 of the Maersk Crewing decision. That decision notes that a dispute may begin with the question or an inquiry. Mr Horan clearly inquired with Mr Hutchinson on the morning of 5 December that he's entitled to a support person, he's entitled to union representation, and he noted that this is not the correct procedure as per the agreement. And it should be noted that Mr Horan has quite a lot of experience in this matter being the union delegate. So he does know the procedures.

PN123

So Mr Horan inquired further information in this regard and there was no attempt to engage in discussions from Mr Hutchinson to resolve it. So as per the Maersk Crewing decision, Commissioner, we say that the dispute here was commenced given Mr Horan raising an inquiry with Mr Hutchinson, as he did. And as we know from paragraph 70 - I have referred to this in the materials - paragraph 70 of the Qantas decision, that there needs to be some sort of an occasion where those participating in the discussion knew that there was an opposing view being expressed, and something that needed to be resolved.

PN124

And lastly from that decision it further notes that it's not necessary for those participating in the discussion to know that they were participating in the discussion which formed part of the DRP in the agreement. So in that regard we note that the first discussion on 5 December, that's the discussion between Mr Horan and Mr Hutchinson, is an occasion that ticks off those requirements, and that the minimum content requirement as referred to in the Qantas decision at paragraph 70 has been met.

PN125

It's clear from the evidence that Mr Hutchinson clearly observed two opposing views on that morning. There was a view from Mr Horan that he was entitled to union representation, and there was a view from the respondent that he wasn't, and the reasonable person ought to know that that's something that needed resolution. And as Mr Hutchinson has referred to he did not attempt to resolve the matter.

PN126

So we rely heavily, Commissioner, on the minimum content requirement in that decision, and we say it's been met in the first discussion of 5 December. It's been met in the second discussion on 5 December; likewise on the 6th and likewise on the 7th.

PN127

THE COMMISSIONER: Mr Bonello, and I understand you're going through your note and your sequences, but obviously the discussion on the 9th, what do you say in relation to the discussion on the 9th; how does that fit in?

PN128

MR BONELLO: Sorry, Commissioner, I should note - so the 9 December discussion is included in sequence 2 on page 18 of the court book. I should have alluded to the fact that sequence 2 and 3 entirely I no longer rely upon. So the discussion on 9 December is no longer relied upon.

PN129

THE COMMISSIONER: Okay.

PN130

MR BONELLO: And, Commissioner, that is due to the fact that given the 14 December discussion as we found out occurred a very, very short time after lodgement, then the 9 December discussion wouldn't - although that did occur prior to lodgement it won't meet the requirement of more senior levels of management. I believe a representative of the union, Mr Mick Bull, had a discussion with a representative of the company. However, the rep of the company was not the proper person to satisfy the seniority requirement in the DRP.

PN131

THE COMMISSIONER: Okay. Thank you.

PN132

MR BONELLO: So I will rephrase, Commissioner, just to set out, the discussions that we do rely upon are the two discussions that occurred on 5 December, and it is the discussion which occurred on 6 December and then on 7 December. If you require me to give further information or - - -

PN133

THE COMMISSIONER: That's fine. Thank you, that's clear.

PN134

MR BONELLO: Thank you, Commissioner, that is our closing submissions. Thank you.

PN135

THE COMMISSIONER: Thank you. Thanks, Ms Yuen.

PN136

MS YUEN: Thank you, Commissioner. Commissioner, as you're aware we've actually got three arguments in this case. The first one is the non-compliance with the DRP and I will talk through the various sequences and give our response to what Mr Bonello has said.

PN137

The second one is that we say the dispute was previously resolved. And the third one is probably more a point than an argument to say that even if the respondent fails on those first two arguments, the scope of the dispute here is limited to the investigation itself, and not to any disciplinary process which was commenced well after the dispute was notified to the Commission.

PN138

So if I start with that first issue, which is the one that we've spent most of our time on. Starting with the context of section 186(6) of the Act, that term is there, or that section is there to provide a term that provides a procedure for settling disputes about matters arising under the agreement and the NES.

PN139

So we say that there needs to be a context for all of this. If we take a step back and look at the Fair Work Act the whole point here is we're trying to have a procedure for settling disputes. Now, the manner of compliance with a dispute resolution procedure should also be read in the broader context of the Fair Work Act's objectives, which includes productive and cooperative workplace relations.

PN140

So we sort of take a step forward from that broad context and look at the wording of clause 15.2. We have referred to this in our reply submissions. There's a number of reasons why the chain of events did not amount to compliance with the dispute resolution procedure.

PN141

Firstly we say that the dispute resolution procedure requires discussions to occur. Flicking off an email or a text message does not meet this requirement. Secondly we say that the discussions required at each step of the procedure must involve an attempt to resolve the matter, and I will talk a little bit more about the Qantas decision in a moment. But consistent again with section 186(6) this is a procedure for settling disputes. A perfunctory statement of a party's concerns is all that is required is inconsistent with that broader context and approach that the Act takes, and to find otherwise could have broad reaching consequences.

PN142

So if we go back to the fundamental purpose of dispute resolution procedures this is also acknowledged in the Maersk decision at paragraph 86 of the first instance decision. The court says:

PN143

Such provisions must be construed having regard to their evident purpose as providing a mechanism by which to encourage discussion and resolution. They should be interpreted practically and with an eye to commonsense, having regard to the context in which they are applied so that they can be implemented in a clear way on a day to day basis at work sites.

PN144

I will come back to the other parts of this decision later, but I think that nicely sets out the context in which we're working.

PN145

Now, the AMWU seeks to rely on the Qantas decision as well as the Maersk decision. However, we say the principle established in the Qantas decision must be read in their full context. We accept that the Qantas first instance and appeal decisions both establish that there's a general starting point that dispute resolution clauses need to be construed with some degree of flexibility. However, we say in this case the AMWU is asking the Commission to take informality and flexibility to a whole other level well beyond what the Qantas case contemplates.

PN146

Importantly at paragraphs 100 and 112 of the appeal decision the Full Federal Court agrees with the first instance judge that the following matters must be proved in order to establish there has been a stage 1 discussion. These are sort of the minimum content requirements that the appeal court approves.

PN147

Firstly, as my friend has emphasised, and we completely agree, there must be opposing views. That's the essence of the dispute about the matter, and we accept that. But the second point that the Full Federal Court very clearly sets out and agrees with the first instance judge is the participants must understand that the dispute is one in need of resolution. This is a fundamental part of the minimum content established in the Qantas decision.

PN148

And the reason for this is clear. As they talk about in the Qantas decision the dispute resolution process places obligations on the party, binding legal obligations in respect of the resolution of the dispute. This is precisely the reason for that second limb. The parties need to understand that the dispute or the issue is one that needs to be resolved.

PN149

Even Mr Horan acknowledged this in his evidence when he talked about, the first time he gave evidence, it's been obvious to parties when there's an issue that needs to be resolved. I accept we don't have to say the word 'dispute'. The respondent accepts that, but even Mr Horan acknowledged, 'Well, we know when there's a problem and we talk about it.' And similarly Mr Hutchinson gave evidence to that

effect as well. We say that is not the case in this current situation. We say that AMWU has sought to re-characterise events as steps in the dispute process after the fact.

PN150

The second limb of the minimum requirements as set out in the Qantas decision is crucial. The parties may understand they have opposing views. They may understand they don't agree with each other. They may understand that simply someone's not happy. That may well satisfy limb 1. But in addition to this limb 2 must be satisfied. Both parties must also understand that there is a dispute in need of resolution. Otherwise how can the law expect them to comply with the dispute resolution procedure which requires them to seek to resolve the dispute.

PN151

The other point we would make, Commissioner, is that the clause requires each step to be exhausted in the process before moving to the next step. Again it's not a tick and flick and move on. You can only move from step 1 to step 2 if the step 1 discussions do not resolve the dispute, and only to step 2 to step 3 if the dispute cannot be resolved at the workplace level.

PN152

So, Commissioner, if we work through the various events in the various sequences that have been put forward and are now relied upon, starting with, I believe my friend called it the discussion 1 on 5 December. In Opal's submission on the evidence the witness statements of Mr Horan and Mr Hutchinson are consistent with each other in terms of this meeting.

PN153

Opal submits that the evidence provided by Mr Horan in the witness box, which added flourishes to these brief conversations, should be rejected as having not occurred. Opal submits that Mr Horan did not refer to the EA in the discussion on the basis of the evidence, and in addition Mr Horan accepted today, I would submit, that Mr Hutchinson did not make any reference to a disciplinary discussion during those brief discussions.

PN154

So while we maintain that Mr Hutchinson's version of the events of 5 December should be accepted over Mr Horan's, we say even if Mr Horan's evidence is accepted the applicant still has failed to establish jurisdiction. And that's again going back to the two limbs established in the Qantas decision. Were there opposing views? Yes. Mr Horan didn't want to go to the meeting without representation. Mr Hutchinson wanted him to go to a meeting. Sure, you can argue there are opposing views. But we say there is no basis for the AMWU to claim that they have satisfied the second limb of the Qantas decision, that the parties must be aware that the dispute is one in need of resolution.

PN155

There is no evidence before the Commission which the Commission can be satisfied that Mr Hutchinson understood it was a dispute in need of resolution as a result of that 5 December interaction. It is very clear that the purpose of those discussions was to get Mr Horan to go to the meeting room, and that was pretty

much it. Mr Hutchinson said, 'Yes, then I just got on with my day.' He got back to business as usual. He had no understanding whatsoever that there was something more he needed to do to resolve anything.

PN156

In the submissions my friend gave just now there was some discussion around 15.2(c) of the enterprise agreement, and this goes to, I guess, the discussion 2, which is when Mr Horan went and met with Mr Edwards and Ms Chew. We say that not only had the first - that had 15.2(b) not been met through the brief interactions with Mr Hutchinson, but if we are wrong there moving to 15.2(c), in our submission, it is not correct to say that the regional or branch secretary or their nominated representative does not need to be involved. Those words are in the agreement.

PN157

Now, I appreciate it could be a moot point that what if someone didn't want that union representing them, but that's not the case. The very point of that whole discussion was, 'I want the union.' 'No, go to the meeting without the union.' So to suggest that Mr Horan didn't want the union in the 15.2(c) discussion is inconsistent with the evidence. It was clear he wanted to be represented by the union. And we say that 15.2(c) requires the regional or branch secretary or their nominated representative to be involved in the second level discussion.

PN158

So going in more detail to the purported discussion 2, the second meeting on 5 December, we submit that Ms Chew's evidence should be preferred to that of Mr Horan. It's supported by a contemporaneous file note. We say Mr Horan's recollection of the meeting was confused. He didn't have notes, it was some time ago. Even the basics of how Mr Edwards's role and work location were introduced were unclear in Mr Horan's mind.

PN159

On this basis we say the Commission should not accept Mr Horan's evidence that he did say something about a dispute in the meeting. We say his evidence is not convincing and that Ms Chew's evidence should be preferred. But once again a similar submission to what I made in relation to the discussion 1 on 5 December.

PN160

In any case even if Mr Horan's evidence is preferred over Ms Chew's we say the applicant has still failed to establish jurisdiction. Firstly, because of that point I just made around 15.2(c) and the requirements of the regional branch secretary or the nominated representative to be involved. But secondly, going again to the two limbs of the Qantas decision. Again opposing views, yes, I can see how an argument could be made there. Mr Hutchinson and Ms Chew similarly, they wanted Mr Horan to come to the meeting. He didn't want to be there without an AMWU representative. Yes, understood. But again we say that there is no basis for the Commission to find that the second limb of the Qantas minimum requirements has been satisfied. Mr Edwards and Ms Chew were aware that there was a dispute in need of resolution.

PN161

Now, my friend made some submissions to the effect I believe that Mr Hutchinson, Mr Edwards and Ms Chew ought to have known, or reasonably to have known that there were opposing views that required resolution. With all due respect we submit that is not the test established by the Qantas decision.

PN162

In our submission at paragraph 112 of the appeal decision the Full Federal Court rejects the idea of an objective or reasonable person-based test, and makes very clear that the minimum requirement, the second limb of the minimum requirements is that both parties will be aware that they have opposing views, and that there is a dispute in need of resolution, and that that is sufficient to satisfy the requirements.

PN163

Now, we contrast this with the evidence that both Mr Horan and Mr Hutchinson have given about other issues and concerns in the workplace and how the other party has been made aware of these. These actually sound really consistent with the principles in Qantas. They have had occasions where something has been wrong. Mr Hutchinson said, 'Well I've realised I needed to look into it, do something about it.' In contrast the 5 December discussions were not of this nature, neither in the discussions with Mr Hutchinson or the subsequent discussions with Mr Edwards and Ms Chew.

PN164

So we say the meetings on 5 December are to be distinguished from the findings or the meetings in the Qantas decision that were found to satisfy the requirements of step 1 of the dispute resolution procedure there. If you have a look at the evidence in the Qantas decision there were two disputes heard together, one relating to Qantas, one relating to Jetstar.

PN165

But if you have a look at the evidence of the relevant manager in the Qantas case, it's extracted at paragraph 86 of the appeal decision, and he describes the discussions with the various employees, and during those discussions in the evidence he repeats several times, 'I was unable to resolve this for them', clearly indicating he understood there was a dispute. It needed to be resolved and he couldn't resolve it.

PN166

And this led the Full Federal Court to conclude at paragraph 89 that those discussions satisfied both limbs of the minimum requirements, despite the fact they were somewhat informal discussions. It wasn't a formal, you know, there is a dispute, what are we going to do, but there was a recognition that despite the informality the relevant manager clearly understood there was something that needed to be resolved and he couldn't do it in that discussion.

PN167

Similarly the relevant manager in the Jetstar case, which was heard at the same time, which is extracted at paragraph 104 of the appeal decision, the discussion was found to have met both limbs. You will see in reading the extract that the manager and the employee discussed the issues, and the manager referred the

employee to senior management as again he did not have the ability to resolve the dispute. Quite clearly the manager understood that there was something that needed to be resolved, and again this is confirmed in paragraph 113 of the appeal decision.

PN168

THE COMMISSIONER: Ms Yuen, what about a situation where one of the parties doesn't believe there's a dispute, so they're continuing with their behaviour and saying there's no dispute here, we're just going to continue on doing what we're doing, while the other party is saying, no, we dispute what you're doing. I mean in that instance you are not going to have both parties agreeing that there's a dispute to be resolved, because one of them is following a particular pathway. What do you say in that instance?

PN169

MS YUEN: Commissioner, I submit that that probably goes to the concept of stonewalling as set out in the Maersk decision, which really developed the Qantas decision a little further, to say if one party is effectively stonewalling and refusing to participate then the courts will see the first step or the relevant step as concluded through the refusal. But what we say is that the Maersk decision follows on from the Qantas decision. It doesn't throw out the Qantas decision. It says you still need to have the two limbs. There still needs to be an understanding that there is an issue to be resolved. It's just that one party is saying, 'Well I just don't want to get involved. I don't want to resolve it. I'm not participating in this process', which becomes that stonewalling concept.

PN170

THE COMMISSIONER: Okay.

PN171

MS YUEN: So, Commissioner, a finding that the 5 December discussions met the two limbs of minimum content as set out in the Qantas decision would, we say, be taking the principles in Qantas to a whole new level. In our submission that would be a level inconsistent with the Fair Work Act, with the clause itself, and the purpose of the dispute resolution procedure being to seek to resolve disputes.

PN172

Commissioner, I propose now to talk about the 6 December email unless you have any other questions on the 5 December meeting.

PN173

THE COMMISSIONER: No, thank you.

PN174

MS YUEN: So in relation to the 6 December email we say clearly this was not a discussion and it was not in any attempt to resolve the dispute. We say there is no basis on which to conclude that there was a mutual understanding by both parties that in the sending of that email there was a dispute in need of resolution, as required by the second limb of minimum content in the Qantas decision.

PN175

Furthermore, we say if this was the third discussion, and I appreciate my friend has suggested a couple of different sequences, one of which this was put forward as a third discussion, we say it does not meet the requirements of clause 15.2(d) of the dispute resolution procedure. That clause requires that the dispute meeting be with the national secretary or their nominated representative. There is no evidence that Ms Cassan had nominated Ms Debasia to be the representative in any discussion on 6 December.

PN176

Furthermore, the 15.2(d) requires that the Opal party must be a more senior representative of the company. Similarly there is no evidence before the Commission that Mr Beales is more senior than Mr Edwards.

PN177

THE COMMISSIONER: I mean the email clearly raises concerns with what has occurred. Why do you say that's not raising opposing views?

PN178

MS YUEN: We accept it's raising opposing views. There are opposing views, and Mr Beales conceded that in his evidence. We are saying the second limb is not satisfied. Similar to my submissions before that the parties weren't aware that there was a dispute that needed to be resolved, that Mr Beales needed to do something. We say the email was really a statement of concern or issues. There was no request for a response. There was no request for a statement of the respondent's position. There was no seeking of an exchange of views. She was simply setting out the AMWU's views on a particular matter. We say the conclusion cannot be reached that Ms Debasia was seeking to resolve a dispute with Mr Beales by sending that email. She was simply setting out her concerns, and it had not been made clear at all to Mr Beales, and he didn't understand that he was somehow duty bound to seek to resolve a dispute just because he got a narky email.

PN179

THE COMMISSIONER: What do you say the purpose - it seems to me odd with the industrial relationship the parties had that a senior manager would receive an email setting out concerns from the union and think they're just having a vent. But that's essentially what - - -

PN180

MS YUEN: Effectively, yes, that is the submission, Commissioner.

PN181

THE COMMISSIONER: Thank you.

PN182

MS YUEN: So, Commissioner, in relation to the 6 December email obviously the Maersk decision is sought to be relied upon by the AMWU. Similar to my submissions in relation to the Qantas decision we say the AMWU are asking the Commission to take the Maersk decision to a whole new and unprecedented level that would be out of step with the Fair Work Act and the clause.

PN183

Let me explain why. So firstly once again as I have said it's clear from the Maersk decision that the two limbs of minimum content from the Qantas decision still need to be applied, and this is set out in paragraph 97 of the first instance decision. Now, Maersk then extends that into this stonewall or blank wall concept. What Maersk looked at is the concept of discussion and whether a stonewall could, I guess, prevent the progression of a DRP process by a refusal to engage, as we were talking about before.

PN184

Importantly we submit that this stonewall does not sit in isolation. It sits together with the minimum requirements of the Qantas decision. As I said before there must be opposing views and the participants must understand that the dispute is one in need of resolution. It may be that one of those participants decides that they don't want to participate or refuse to.

PN185

Now, we say there's no evidence before the Commission that Mr Beales or indeed Ms Debasia had an understanding there was a dispute in need of resolution when the 6 December email was sent. And as I said before it was effectively, you know, a statement of the AMWU's view. I believe you described it as a vent, which I think was a very good description, Commissioner.

PN186

Now, Commissioner, if I contrast the 6 December email to the relevant email of 9 March 2018 in the Maersk case from which this sort of stonewall principle was established. That's extracted at paragraph 18 of the first instance decision. And at the end of the long email sort of setting out the concerns the writer of the email says:

PN187

We hereby start the process of the dispute resolution according to section 45 of the EBA. We hereby await your response.

PN188

The email made abundantly clear that there was a dispute in need of resolution, which we say was in stark contrast to the 6 December email sought to be relied upon.

PN189

Now, Commissioner, if the Commission does not accept Opal's submission about the second Qantas limb not being satisfied we say that in any case this case is clearly distinguishable from the stonewall situation in Maersk that led the court to conclude that the discussion which met the two Qantas limbs in that case, was at an end when Maersk failed to respond to the 9 March 2018 email.

PN190

My friend makes submissions about paragraph 92 of the Maersk decision. We say that paragraph 92 of that first instance decision needs to be read in the full context of the decision which goes through to paragraph 101, and we say it does not stand

for the proposition that a failure to respond to an email will always constitute the conclusion of a discussion for the purposes of a dispute resolution procedure.

PN191

At paragraph 95 of the decision the court references a situation where a party raises a matter for discussion and meets a blank wall. But if you read on at paragraph 101 of the decision the court makes some general observations about what could occur. It's not a statement of principle, this will always be the case. The court is setting out some general observations of things that could occur, but doesn't conclude that every time someone fails to respond to an email that will conclude a dispute resolution process.

PN192

The court acknowledges, yes, there could be a situation where a party sends an email, the other party fails to respond or to engage with the matters set out in the email. But then the court goes on to actually consider the facts of the Maersk case to see how it applies to these sort of general considerations of what could occur, again also in the context of the Qantas minimum requirements.

PN193

So a couple of things that clearly distinguish the Maersk case from the current case. Firstly, as summarised in paragraph 165 of the appeal decision, not only was there the 9 March 2018 email in the Maersk case which I read a little extract from before, but also there were discussions on board the relevant vessel without the issues in dispute. So the appeal court was very careful in paragraph 165 to mention that not only were there discussions, but there was also this 9 March unanswered email, and that led them to uphold the finding that step 1 of the dispute resolution process had been satisfied. Here we don't have any concurrent discussions or even attempts at discussions between Ms Debasia and Mr Beales.

PN194

Secondly, the key distinguishing factor here is the second step in the Maersk case occurred five months later on 27 August 2018. This is referred to in paragraph 167 of the appeal decision. Clearly it was open to the court to conclude at that point that there had been a failure to respond to the 9 March email, or to engage with the issues raised in it. We say that was not the case here. The 6 December email did not request a response, did not seek a discussion.

PN195

The following day on 7 December there was an email exchange between Ms Cassan and Mr Hines to clarify the next steps in the investigation that was underway at the time. Events overtook the 6 December email before any sensible period of time had elapsed for a stonewall or blank wall conclusion to be reached.

PN196

Now, Commissioner, during part 2 of this hearing Commissioner Bissett asked me, 'Well where is the line between five months in Maersk and one day here?' I believe the Commissioner's words were, 'How long is a piece of string.' I'm not sure what the answer is, Commissioner, but in our submission that is a matter for another case on another day. In our submission the line is clearly closer to five

months than to one day. It's a much longer piece of string than the AMWU is proposing in their submissions.

PN197

THE COMMISSIONER: What about in the instance where there is an urgent, possibly urgent consequence like termination being on the table. Then obviously five months or a longer timetable may not be appropriate. What do you say in relation to if there's an urgent matter on the table?

PN198

MS YUEN: I accept that all the facts and circumstances have to be taken into account in every case. You know, we obviously can't guess at what every case might hold and the urgency or otherwise of what's going on. It should certainly factor into this concept of stonewalling or blank walling. I appreciate my friend had previously made submissions to the effect that the stonewalling occurred in the context of a disciplinary process, and therefore the string should be shorter, so to speak. In our submission that should be rejected in this case.

PN199

It is abundantly clear on the evidence that no disciplinary process was on foot during this time. There was a misconduct investigation. There were allegations being investigated, and a meeting was being scheduled for the purpose of Mr Horan giving his account of events. That meeting was originally scheduled for 7 December and then later rescheduled by agreement to 9 December.

PN200

So in our submission there was no disciplinary process underway through any of the sequences that are put forward. In our submission Mr Beales did not respond to the 6 December email because it was not clear to anyone that he was expected or indeed required by the dispute resolution procedure to do so. And in any case any response became irrelevant the following day when Ms Cassan contacted Mr Hines via email. Those are my submissions on the 6 December email, Commissioner, unless you have any further questions on that.

PN201

THE COMMISSIONER: Thank you.

PN202

MS YUEN: Now, I did prepare, Commissioner, submissions on the purported discussion on 7 December between Mr Hines and Ms Cassan. Would you like me to go through those now or save it to see what we get out of the next steps in evidence?

PN203

THE COMMISSIONER: Perhaps if there's no evidence on what the content of any telephone discussion is, well if you limit your comments to the email that's fine.

PN204

MS YUEN: Thank you, Commissioner. So, Commissioner, obviously reserving our rights to make submissions on any purported discussion, looking at the 7

December emails that were exchanged between Ms Cassan and Mr Hines, and of course it's not disputed that they were exchanged, they are a matter of evidence, the first point we make is that the precondition of clause 15.2(d) had not been satisfied. It was not established that the dispute could not be resolved at the workplace level, which is the precondition for the third level of discussions to occur, and I repeat my submissions in relation to the 5 December discussions and the 6 December email in that regard.

PN205

In any case if the Commission does find that the first two steps have been satisfied and by 7 December the parties were at the third step, then we say that the exchange of emails on 7 December was not a discussion. But more importantly it was not in any attempt to resolve the dispute.

PN206

In Opal's submission the two limbs of minimum requirements specified in the Qantas decision are not met by that brief email exchange on 7 December. Ms Cassan seeks a confirmation. Mr Hines sent back a clarification of the purpose of the meeting and the next steps. We say that the AMWU has failed to establish both the first limb of opposing views, and the second limb that both Ms Cassan and Mr Hines understood that there was a dispute in need of resolution through the exchange of those emails.

PN207

Now, Commissioner, as I understand from Mr Bonello's submissions we no longer require consideration of the 9 December meeting or the 13 December email.

PN208

THE COMMISSIONER: Yes, I think that's right.

PN209

MS YUEN: I note, Commissioner, you have requested submissions on the 13 December email, and our submission is simply it's not relevant. And similarly the 14 December text messages as I understand it are no longer relied upon, so I won't make submissions on those.

PN210

So, Commissioner, for all of these reasons the respondent submits that our first argument should be accepted. The dispute resolution procedure has not been complied with. The attempt by the applicant to re-characterise events after the fact by proposing various alternative sequences in the hope that one will eventually stick, with a stretched interpretation of both Qantas and the Maersk decisions, should be rejected.

PN211

We say to accept these stretched interpretations would be inconsistent with the Fair Work Act, with the dispute resolution clause itself, and with the principles established in the Full Federal Court decisions, including the principles referred to in paragraph 86 of the Maersk decision. The proposed interpretation put forward by the applicant is not at all aligned with the purpose of seeking to resolve

disputes. It creates a tick and flick approach. It does not encourage discussion and resolution, and we say it is not a practical nor commonsense approach that works in the real world at the work site.

PN212

If we think about this commonsense and real world approach concept that's referred to in Maersk, in the context of this particular EBA it really highlights how crucial limb 2 of the minimum requirements as set out in the Qantas decision is to the ability of a dispute resolution clause to work in a practical and a commonsense way. And, Commissioner, you alluded to this earlier, and I'm sure you can appreciate for an EBA covering 10 sites, 930-ish employees, there are opposing views. There are differing ideas, there are people who are unhappy on both the employee and the management side, a large range of issues on a regular basis.

PN213

But Qantas is very clear on the fact that this is not enough. The opposing views point is limb 1, but the understanding that there is an issue in need of resolution between the participants to the discussion is in limb 2, and that goes to that point about the 6 December email, and each of the other conversations or purported discussions.

PN214

So in this case we say there's insufficient evidence before the Commission to establish that during any of the discussions and correspondence that took place between 5 December and 7 December, that any of Mr Hutchinson, Mr Edwards, Ms Chew, Mr Beales or Mr Hines, understood that there was a need to seek resolution of opposing views. Thus we say limb 2 was not satisfied during any of those discussions or correspondence. That limb 2 was in play did not become clear to any of Opal representatives until the F10 was filed on 14 December 2022, and as such we submit it was filed without jurisdiction.

PN215

Commissioner, we did have two further arguments which I would like to talk you through. The second argument is we fail in relation to the sequences is that the dispute was already resolved. Now, clause 15.2(f) of the agreement provides for a dispute to proceed to arbitration where the Commission is unable to resolve the dispute by way of mediation and/or conciliation. This is not the case here. The respondent participated in a conference while reserving its rights in relation to the jurisdictional objection, and the dispute in relation to the investigation that was on foot at that time was resolved at that conference. Not arguing it was a resolution in relation to broader matters relating to Mr Horan's employment, it was a limited resolution in relation to the matters at that time concerning the investigation.

PN216

Now, Mr Bonello's email on page 47 of the court book specifically acknowledges this. Mr Bonello says:

PN217

In this matter before the Commissioner common ground was reached between the parties for the purposes of resolving the matter on 15 December 2022.

PN218

That was the date of the conciliation conference. He then goes on to say:

PN219

Unfortunately the common ground reached between the parties later fell apart by a decision from the respondent to administer disciplinary action that was not agreed upon. The parties have since tried to resolve the matter, however haven't been able to reach a solution.

PN220

I repeat the submissions made in paragraph 4.7 of our reply submissions. The applicant has not explained any of the matters set out there, and simply we say it's not credible for the applicant to maintain a position that the dispute was not resolved in that conference.

PN221

And this relates to our third argument, which is the scope of the dispute which we say was resolved in that conference. We say even if Opal fails in relation to the sequences, even if we fail in relation to the argument that the dispute was resolved at conference, we say the scope of the dispute is limited to the investigation and not to any disciplinary process which commenced well after the dispute was notified to the Commission.

PN222

Now, Commissioner, it's clear that in particular from Ms Debasia's email that there is some muddling of the difference between an investigation process and a disciplinary process. The evidence provided by Mr Beales and by Ms Chew is very clear, that the events leading up to the filing of the F10 related to a misconduct investigation. There was no disciplinary process on foot.

PN223

Had the investigation concluded that there was no misconduct that would have been the end of the matter. It was the ultimate conclusion of the investigation later on 2 December where substantiated allegations of misconduct were found, which then triggered the following disciplinary process.

PN224

Now, as set out in Mr Bonello's 23 June email, which is at page 47 of the court book I referred to earlier, the respondent's decision to administer disciplinary action occurred after the Fair Work Commission conference on 15 December. As such we say the subsequent disciplinary process cannot be said to form part of this dispute should the Commissioner find that there is jurisdiction.

PN225

Some of these following submissions may be a matter for submissions should the matter proceed. So I will mention them briefly. We say the Commission cannot be vested with jurisdiction to make a determination as to the lawfulness of the issuance of a final warning. We say that Mr Horan had an opportunity to raise concerns about the issues outside of this dispute, i.e. the issuing of the final warning, and in fact he did so. The applicant filed a Form F10 on 17 April 2023,

which became C2023/2081. And, Commissioner, there was a typo in the submissions, it's 2081, not 2018.

PN226

It has not been explained to the Commission why we're in this situation where we've got this dispute that was commenced and then withdrawn. So on this basis, Commissioner, we say that if we fail on our first argument, we fail on our second argument and the Commission concludes that it does have jurisdiction to arbitrate in relation to this dispute, the dispute is limited to the investigation only and not to the subsequent disciplinary process.

PN227

Now, there may be some submissions around remedy and what the impact of that is, and that's a matter for a future, should there be necessary for a future substantive arbitration.

PN228

So, Commissioner, I just conclude by noting in the event that the Commission does find it has jurisdiction the respondent reserves its rights in full in relation to the substantive issues, and of course we will lead detailed evidence if required setting out the respondent's positions on those matters in due course. And unless there's any further questions that concludes my submissions.

PN229

THE COMMISSIONER: Thanks, Ms Yuen. Mr Bonello?

PN230

MR BONELLO: Thank you, Commissioner. Commissioner, I will just note and make some submissions just in regards to the second limb of the Qantas decision. I just want to emphasise that it is not a requirement that those or the participants involved in the discussion know that there was a dispute that needed resolution. There is only a requirement that it reasonably be inferred that there's a dispute that needs resolution.

PN231

So in line with that we say that in each and all occasions of these discussions that we rely upon that there were issues raised as a matter of concern that needed resolution, not matters that were raised for the purposes of venting to the respondent. These were matters that were raised due to there being significant concerns that the enterprise agreement was not being followed, and by virtue of that it was a matter which needed resolution. These were matters that we sought to engage with the respondent to ensure that the EA was being followed. Unfortunately those engagements have not resolved the matter.

PN232

So we submit that the discussions between Mr Horan and the respondent on 5 December - sorry, I will repeat that. So we submit that the issues as they were put to Mr Hutchinson should have reasonably been referred to in that it was a matter that needed resolution. It was a matter that needed resolution given that the issue was raised to him that the EA was not correctly being followed.

PN233

Likewise from the correspondence with Ms Debasia to Mr Rod Beales her email clearly infers that the issue and concern are being that the EA was not being followed, and this should have been reasonably inferred to Mr Rod Beales that this was an issue that needed resolution. And we obviously say again that the correspondence between Ms Cassan and Mr Hines where Ms Cassan raises a dispute - well, she raises that dispute with Mr Hines, again Mr Hines should have known or it could be reasonably inferred that he should ought to have known that this was a dispute that needed resolution, not something that Ms Cassan was simply venting to him about.

PN234

Commissioner, I just want to touch on the agreement. My friend noted that there's a requirement for discussions to occur with specific persons of the AMWU. We say if we look at clause 15.2(a) it allows Mr Horan at any stage during this disputes process:

PN235

An employee is entitled to appoint a union representative, including a union delegate or any other representative as requested by the employee to act on their behalf.

PN236

Ultimately this therefore indicates that there is no requirement for the regional or branch secretary of the AMWU to represent Mr Horan. Likewise there is no requirement as in 15.2(d) for the national secretary to represent Mr Horan. If anything that would not allow Mr Horan to be entitled to his right under 15.2(a). So we say, Commissioner, that there is that Ms Debasia had - well, we say, Commissioner, that Ms Debasia was a proper person and was appointed by Mr Horan for the purposes of the DRP, as was Ms Cassan. And even the discussion that Mr Horan had with the company he was entitled to represent himself at those times as well. So that is what we say in that respect.

PN237

Lastly, Commissioner - and further, Commissioner, sorry, my apologies, I did miss something. In applying the Qantas decision I just want to note that it needs to be applied with a degree of flexibility. And Commissioner Bissett notes that in her recent decision titled *Mark Hope v Gomed (Vic)* on 10 October - I can provide that. The matter number is C2023/3431. She notes at paragraph 45 that there is a degree of flexibility that needs to be afforded when applying the Qantas decision.

PN238

Likewise we seek that be given due weight, and also note the point that this was a matter of urgency at the time where Mr Horan was - it was a very, I guess, possible outcome that he would be terminated. So we would like to emphasise that, and hence the reason why such a process was done in the timeframe that it was done in.

PN239

Commissioner, just lastly in respect of my friend noting that the matter was already resolved, the matter was simply not resolved. There was an agreed way,

or there was an agreed method to move forward, and that was reached with Commissioner Bissett. However, that fell apart. That did fall apart, but we say that doesn't render the matter resolved. There was an agreed way forward, which was reached in a conference, but unfortunately that path, the parties did not reach the end of that road. Nor was there an F50 filed to her chambers.

PN240

So, Commissioner, in light of that we say there is jurisdiction there and those are my submissions. Thank you.

PN241

THE COMMISSIONER: Mr Bonello, did you have anything in relation to the third argument, the scope of the dispute?

PN242

MR BONELLO: Commissioner, we say that the scope of the dispute contains the procedures that were implemented prior to - sorry, the scope of the dispute is in regards to the processes that were implemented by the respondent prior to the disciplinary action being taken. That is the dispute we say is the subject to this application.

PN243

THE COMMISSIONER: I see.

PN244

MR BONELLO: Yes.

PN245

THE COMMISSIONER: Okay.

PN246

MR BONELLO: Thank you.

PN247

THE COMMISSIONER: Thank you, parties.

PN248

MS YUEN: Commissioner, can I make an additional submission on that ought to have known or reasonably inferred point?

PN249

THE COMMISSIONER: Yes.

PN250

MS YUEN: Thank you, Commissioner, I appreciate the opportunity. I just wanted to reference the relevant paragraphs in the first instance and on appeal decisions in Qantas, and in my submission my friend has misread what the courts have said. So if we have a look firstly at the first instance decision, paragraph 70, which Mr Bonello has referred to.

PN251

The court does talk about the two minimum requirements, that there was opposing views, and those people participating in the meeting or discussion knew that they, you know, needed to resolve something. But the reference to 'inferred', in our submission, is an evidentiary reference. It's not creating a different test. The reference to 'inferred' is simply that the Commission may not have before it simply what was in somebody's mind at the time. It may need to infer that from emails or evidence about their body language or words spoken or whatever it might be.

PN252

So in our submission the inference goes to the question of did those involved in the discussion know that there was something that needed to be resolved. It does not create a separate test that creates an ought to have known or reasonable person test.

PN253

Now, in the appeal decision, this is referred to at paragraph 100, and the court there talks about - it sets out the test again and says, the second limb of the test:

PN254

It was known or could reasonably be inferred that each of the opposing sides knew that there was a dispute in need of resolution.

PN255

So again emphasising this point, each side needed to know it. It's just from an evidentiary basis you've either got the person saying, 'Yes, I knew', or you've got some other evidence leading to an inference that the person knew.

PN256

And then, Commissioner, I would refer you to paragraphs 111 and 112 of the Full Bench decision, where in fact there was a submission made to the Full Court of the Federal Court to put forward a reasonable person test to say, well if there was a reasonable person who would understand that there was a step in the dispute resolution procedure, and at paragraph 12 the court rejected this. They said:

PN257

The primary judge correctly identified the matters that must be proved to establish the stage 1 meeting. Firstly, there must be opposing views. Secondly, the participants must understand that the dispute is one in need of resolution.

PN258

So in our submission the inference point is not a reasonable person test, it's simply an evidentiary question, and in this case there is not sufficient evidence for the Commission to reach that conclusion. Thank you, Commissioner.

PN259

THE COMMISSIONER: Thank you. Mr Bonello, anything out of that?

PN260

MR BONELLO: No, Commissioner. We remain with the same (indistinct).

PN261

THE COMMISSIONER: Okay, thank you. Okay, thank you, parties. I think that concludes the matter for today. We will see how we go with the witness evidence from Ms Cassan and whether we're required to be here next week. But thank you for your time and I will now adjourn the matter.

PN262

MR BONELLO: Thank you.

ADJOURNED TO A DATE TO BE FIXED

[12.00 PM]

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