TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

B2023/925, B2023/968, B2023/969

s.234 - Application for an intractable bargaining declaration

Applications by Chevron Australia Pty Ltd

Sydney

3.00 PM, TUESDAY, 12 SEPTEMBER 2023

PN1

JUSTICE HATCHER: Mr Duncalfe, you appear for the Australian Workers' Union?

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MR DUNCALFE: That's correct, your Honour.

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JUSTICE HATCHER: And Mr Fox, you appear for the CEPU?

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MR FOX: I do.

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JUSTICE HATCHER: All right.

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Are all parties content for all three applications to be dealt with together?

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MR DUNCALFE: I'll go first, your Honour.

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JUSTICE HATCHER: Thanks.

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MR DUNCALFE: The Australian Workers' Union doesn't particularly have a view on that, as long as the directions for filing of submissions and reply make some type of acknowledgment that it is three matters and not just one.

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JUSTICE HATCHER: All right.

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Well, perhaps we start with you, Mr Dalton, you're the applicant. What do you say?

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MR DALTON: Yes, so that's one of the directions that we would be seeking today, your Honour, that the three applications be heard concurrently. The reason why we say that's the appropriate way of hearing these applications is the bargaining claims and issues across the three streams of bargaining are, essentially, common. That is, the union's claims and the difficulties that the parties have encountered in negotiating on those claims are, essentially, common across the three streams.

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And the bargaining history also very largely overlaps. So you have the Platform stream of bargaining that is, essentially, the leader, bargaining having started there I think about three years ago. The other two bargaining streams, Gorgon and Wheatstone Downstream, have almost identical bargaining histories and they, in

turn, have effectively followed the progress, or lack of progress, of the negotiations in Platform.

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So the issues will be the same in terms of the elements of section 235 we say, very substantially the same. And the time taken to run one would, effectively, be the time taken to run three. We estimate that that would take two days, your Honour.

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JUSTICE HATCHER: All right. Well, I'll come back for the estimates in a second.

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Mr Fox, you take any different view from Mr Duncalfe?

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MR FOX: No. It seems to me that it would be more efficient to have the matters ravelled together, notwithstanding that there's complexity to each and we're dealing with members across each of those sites under each of those agreements that have a interest and, well, need to have an opportunity to have their position represented.

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JUSTICE HATCHER: All right. Thank you.

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Now, I want to indicate, just to cut to the chase, that I've formed a provisional view about the way in which this matter should be programmed. And I can indicate quite clearly that I formed this provisional view before seeing the proposed directions by the applicant in each matter. So what I propose to do is state my provisional view and then give the parties the opportunity to comment.

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My provisional view is that the three applications should be listed for hearing together, before a Full Bench, on Friday, 22 September in Sydney, with video-links on request.

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And that there would be a program by which the applicant could file its evidence and submissions by close of business on Friday, 15 September.

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And the unions and any other interested party opposing the applications would file their evidence and submissions by close of business on Wednesday, 20 September.

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All right. So that's a provisional view only and I'm open to be persuaded to any alternative course.

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So I'll start with you, Mr Dalton.

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MR DALTON: Well, your Honour, you will have seen from our proposed directions they're not a lot different from what you've proposed there. We're agnostic on the question of a direction from you to assemble a Full Bench to hear the case, it was really just an issue about how quickly the matter could be listed. And we would be satisfied with a listing on Friday, 22 September. And we're content for the mode of locations at hearing, as you've proposed, along with the directions for the exchange of materials.

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JUSTICE HATCHER: All right.

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Mr Duncalfe?

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MR DUNCALFE: Thank you, your Honour. As you will have seen, the AWU, in consultation with the ETU, propose some fairly different directions, giving us a little bit more time to be able to get our evidence together and respond to the application. Obviously, at the point right now, we don't know what evidence the applicant relies on in order to make good its case. If we received that on the 15th and then only have five days, calendar days, to respond we think that is far too short a time.

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This is three separate enterprise agreements. Despite what Mr Dalton has said, there are some significant differences between the genesis of bargaining, how bargaining's progressed, the length of bargaining, the claims. The AWU, in particular, has two separate officials across the three negotiations, one is with the Platform and one is with the two onshore agreements. There's questions to be asked around the genuine nature of the application and whether or not Chevron's just seeking to defeat a current protected industrial action.

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The AWU doesn't think that - it would be highly prejudicial, obviously, if the IBD is made against the employees who are taking protected industrial action. The AWU doesn't think that we'll be able to present an effective case with only five calendar days to prepare, your Honour, especially when we've got three separate applications covering 500 workers, 470 of them being members of the AWU. We've got 20 plus employee representatives who we think should be enabled to make submissions or give evidence as they see fit.

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We think that the negotiations are far from intractable, and we have come prepared to the directions hearing to offer a proposal for further negotiations before Riordan C in Perth, for a period, and request that this directions hearing be adjourned until that can happen, because we think, contrary to what is in the application from the applicant, there has been significant movement on five key issues and that happened in front of Riordan only last week. And we don't think it'll take much to formalise any principle agreement around those five issues and then move on to others.

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So our proposal has materially changed from what we had discussed with the applicant earlier today, in that we think there would be utility in more mediated discussions before Riordan C, just because Riordan C has dealt with it previously. And then that would allow time for the parties to narrow the issues in dispute and then we could program around it. This isn't a straightforward matter, your Honour, there's three agreements, there's been multiple NERRs distributed by the applicant, and some of those NERRs were distributed nine months of today, or the application, and so there's questions around that.

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Negotiations commenced on a conditional basis for the Wheatstone and Gorgon agreements. For the Wheatstone Platform, that was an NSD, and then a ballot for the other two, the onshore agreements, that was via just correspondence and negotiations via written correspondence between the AWU and Chevron. There's a lot to get through, your Honour, and respectfully, five days will not enable us to put forward our best case.

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JUSTICE HATCHER: All right.

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Mr Fox?

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MR FOX: Well, I agree with the AWU's assessment of that. I think that there's a great deal of complexity and our ability to present a case that will assist the Commission in the best way that we're able to, well, may not be able to be done in that time period. So we do prefer more time.

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JUSTICE HATCHER: All right.

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Do you want to say anything in reply, Mr Dalton?

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MR DALTON: Just briefly. It's not about providing the respondents with the time required for them to prepare their best case, it's about a reasonable opportunity to be heard. And the subject matter of these applications is, effectively, we're at a crossroads after protracted bargaining with enormous resources spent by the parties and the Commission, in trying to reach agreement, and they're fundamentally apart on several key issues.

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Protected industrial action's happening. It's clear that that is to escalate. The union's seeking to carve out any impact on gas production but there's still the question of significant risk to LNG production, and that's a (indistinct). The eyes of market are watching what's happening. The price has already spiked by over 10 per cent, and there are other countries producing more and more LNG.

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There is a real issue here for Australia and the Commission, with this circuit-breaker provision, to intervene in a timely way to make a declaration so that appropriate settings are in place for the parties to be able to negotiate in a way that might offer prospects of them achieving and agreement when the default position is the Commission will be arbitrating if we can't reach agreement.

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But until we're in those settings, we say there's no reasonable prospect of reaching agreement, and the trajectory of the dispute is just going to be escalating industrial action with impacts on LNG, if not more. So there is - - -

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JUSTICE HATCHER: Well, can I say, that last submission seemed to contradict the thrust of your application, but - - -

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MR FOX: No, your Honour, because it's not necessarily accessing the other circuit-breaker provision in section 424. So we say that there's a real role for the Commission to be involved in a timely way. And so the subject matter of this application includes the need for it to be heard early. If it's not heard quickly, there is subject matter here that is eroded. So we do seek an early hearing.

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JUSTICE HATCHER: All right.

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And what do you say in response to Mr Duncalfe's proposal about further, well, mediation to be conducted by Riordan C?

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MR DALTON: At the moment, your Honour, we just can't see any reasonable prospect of that being fruitful under the existing settings. So Chevron wants to reach an agreement, but as we've experienced last week, five days of intensive conciliation in Perth by Riordan C, a very experienced member of the Commission, every effort was made there to reach an agreement with the looming prospect of protecting industrial action, and the parties are still miles apart.

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So we say that a post-declaration negotiation period would be the appropriate environment in which our client would normally participate in further conciliation but - - -

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JUSTICE HATCHER: Well, I make it clear, Mr Dalton, you shouldn't take for granted that that opportunity will exist. That is, if you succeed, you can expect to be launched, very expeditiously, into an arbitration.

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MR DALTON: Of course. And we would not be wanting any post-declaration negotiating period to be anything more than a very confined period, to give the

parties that opportunity before arbitration. Because as your Honour would well know, that is a different setting and it does focus the mind on the reasonableness of your position, given the prospect of arbitration.

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Now, we're not in that mode at the moment and that's a problem, because the parties are entrenched. And we really see no utility with further conciliation, at this period of time.

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JUSTICE HATCHER: It seems to me that further mediation or conciliation, prior to any hearing of the applications, would, as it were, be a further test of whether bargaining was truly intractable or not.

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MR DALTON: It would be further testing; but as I've sought to explain, we don't think that's likely to be useful. But if you're minded to encourage or require the parties to participate in that sort of process, because I did say something from a process perspective.

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(Indistinct) section 240 conciliation applications were made by Chevron, they'd either been formally terminated, as the case in Platform, or for all intents and purposes, they were concluded last week because there, Riordan C conducted that conciliation process on the basis that the unions would hold of on protective industrial action, the parties would give it five days to see if they could reach agreement. They weren't able to reach agreement. On Friday afternoon the unions commenced their protective industrial action.

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We would say the appropriate procedural course would be that the Commission calls a compulsory conference under section 592, and that would be conducted in private, without prejudice, of course, for the parties then to - so that creates an environment in which the parties aren't worried about compromising their position in relation to the substantive application, which is a matter of particular concern to my client at this stage.

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JUSTICE HATCHER: All right. Look, I think I've already made this clear, Mr Dalton, but I'll just say it again for more abundant caution.

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Section 235A gives the Commission the discretion to order a post-declaration negotiating period. Again, I repeat, that your client's shouldn't assume that the Commission will grant that period and the alternatively is that a arbitration may occur very quickly, and perhaps as quickly as these applications are heard.

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MR DALTON: Understand.

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JUSTICE HATCHER: All right.

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Look, I've heard the parties. I appreciate what the unions have said about the tightness of the timetable. Notwithstanding that, I have decided to confirm the provisional view over the stated. It seems to me that, in circumstances where there is a possibility of even a likelihood of protected industrial action occurring which has implications for the public interest, the sooner these applications are determined, the better.

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If the applications have merit, then it is obviously in the public interest that they be determined as soon as possible because the industrial action occurring would be pointless. If they don't have merit, well then the applications are best disposed of as soon as possible and the parties can continue on their process of bargaining.

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So I will make the directions which I proposed earlier and list the matter for hearing, on the basis I proposed earlier, but that will be subject to the condition, and that is that Chevron participates in a meaningful way in further mediation and conciliation to be conducted by Riordan C in the period between now and the date of hearing.

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And arrangements will be made for the Commission to contact the parties to ensure that that occurs.

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I've indicated that the directions I've indicated and the listing will be sent to the parties later today in writing.

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Mr Dalton, are there any other matters which I need to deal with today?

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MR DALTON: No, your Honour.

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JUSTICE HATCHER: All right.

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Mr Duncalfe and Mr Fox, any other matters?

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MR DUNCALFE: Nothing from me, your Honour.

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MR FOX: No, your Honour.

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JUSTICE HATCHER: All right.

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Well, I thank the parties for their attendance. As I've said, the directions and listing will be sent to the parties in writing later today.

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And we'll now adjourn.

ADJOURNED TO A DATE TO BE FIXED [3.18 PM]