TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT HAMPTON

B2023/988

s.234 - Application for an intractable bargaining declaration

Ventia Australia Pty Ltd T/A Ventia Australia Pty Ltd
and
United Firefighters' Union of Australia
(B2023/988)

Broadspectrum and United Firefighters' Union of Australia (QLD Branch) Enterprise Agreement 2018

Adelaide

10.30 AM, TUESDAY, 21 NOVEMBER 2023

PN1

THE DEPUTY PRESIDENT: Good morning, all. I'll just confirm the appearances. Mr Smith, you're seeking permission to appear for the applicant?

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MR SMITH: That's correct, Deputy President.

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THE DEPUTY PRESIDENT: Yes, good morning. And, Mr Bromberg, you're seeking permission to appear for the respondent union.

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MR BROMBERG: That's correct, Deputy President.

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THE DEPUTY PRESIDENT: I can't recall whether I dealt with this in the directions or not, but unless any party wished to be heard on the question, I propose to grant permission to both parties to be represented, noting the relative novelty of an application of this kind, a contested matter, at least, being dealt with by a single member. So in that context, that permission is granted.

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MR BROMBERG: Thank you.

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MR SMITH: Thank you, Deputy President. We're content to proceed that way.

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THE DEPUTY PRESIDENT: Very well. I've received from the applicant written outlines plus two witness statements, and from the respondent a written outline and a witness statement, and also a statement of agreed facts. Has there been any discussion between the representatives as to how we might proceed today?

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MR SMITH: Yes, Deputy President. It's been agreed between Mr Bromberg and I, subject to your approval, of course, that the parties would seek to rely on the witness statements as filed, with no further examination or cross-examination of the witnesses.

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THE DEPUTY PRESIDENT: I think the only potential factual dispute – I mean, there are some what might be described as opinion evidence in there which I'm sure I'll deal with in the normal way, but in terms of direct factual disputes, I suspect the only direct factual dispute is about the status of a couple of meetings, as to whether or not they were associated with the contingency arrangements for the section 240 conference or whether they were bargaining meetings. I think they are the only points at issue. How do the representatives consider I should deal with that?

PN11

MR SMITH: Deputy President, we're happy to have those particular events portrayed in the way that they are in the statement of agreed facts. There's a label that has been put on those events and the parties will no doubt refer to them as they wish to in the course of their submissions.

PN12

There is one point that I raise in our submissions about a point in Mr Murphy's witness statement. In the table in the witness statement there's a description of the company's position on wages which is just not correct, as would be clear from the witness statement of Mr Costi, but it's really just an assertion about what the company's wages position is, but I'll clarify that in the course of our submissions and refer to our evidence on that point. I'm not sure that it's an issue that would really require any cross-examination on.

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THE DEPUTY PRESIDENT: So what paragraph is that?

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MR SMITH: So in Mr Murphy's witness statement there's - - -

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MR BROMBERG: It's paragraph 15, Deputy President.

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MR SMITH: 15. And at row 1 the Ventia position as described there is completely wrong, but I'll explain what Ventia's position is on wages. I'm not sure where that position came from.

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THE DEPUTY PRESIDENT: Mr Bromberg, are you content for that matter to be dealt with through submissions?

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MR BROMBERG: I am, Deputy President. It's not for us to put words in the mouth of Ventia. Their position will be their position. I intend to go to the table and take you through it as well, and it will be clear from my submissions that things have moved somewhat from these sort of official positions and that needs to be taken into account, but I'm happy to proceed that way.

PN19

On the first issue – and I'm not sure Mr Smith has necessarily answered your question, Deputy President – we don't dispute that the events in the table in paragraph 5 of the agreed facts occurred, it's really the character of those events. I did think there was a slight factual controversy in relation to that. It's the difference between 17 bargaining meetings and 14 bargaining meetings.

PN20

We really say that the difference is explained by the fact that at least two of them are effectively mention hearings in the Commission, one in preparation for the 240 process and one effectively disposing of the 240 process. Mr Murphy could

give evidence about what occurred in those meetings, but at the end of the day we don't think a whole lot turns on it. We say that really they speak for themselves.

PN21

They weren't bargaining meetings, they were, and we accept, a meeting between the parties, but one facilitated by the Commission in the ordinary way and not one where the nitty-gritty of bargaining occurred. I'm not sure if Mr Smith is willing to accept that or not. If it's the difference between 17 and 14, I'm not sure that we can necessarily resolve that for you unless we call evidence.

PN22

THE DEPUTY PRESIDENT: I think that was supporting my original question. Yes, all right. I'm not necessarily requiring that to be done, but I just need a way of resolving the dispute on that matter if the witnesses are not going to be called. Mr Smith, Mr Bromberg has effectively sort of characterised how his client would see those, I think, the three meetings that are in dispute.

PN23

MR SMITH: Deputy President, we'd be happy to accept the labelling that's in the statement of agreed facts. When that document was put together there was some discussion about how those particular events are to be characterised. We don't accept that they shouldn't be taken into account as meetings that were part of the bargaining process, because clearly they were meetings that occurred, the outstanding issues were discussed, et cetera, but they are what they are described as. In terms of whether that's a bargaining meeting or not, it's an issue of interpretation, no doubt.

PN24

Even if there was evidence about those matters, I don't think there would be any difference of view about what those events were, it's really just what they should be described as.

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THE DEPUTY PRESIDENT: Very well. For my part, I'm comfortable to leave it on that basis.

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MR SMITH: Thank you.

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THE DEPUTY PRESIDENT: Perhaps then we'll just deal with the evidence, given that none of the witnesses are required for cross-examination. So perhaps the statement of agreed facts, the parties confirm I should take that as read. No amendments to that?

PN28

MR BROMBERG: Yes, thank you, sir.

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THE DEPUTY PRESIDENT: Very well. The statement of agreed facts will be admitted and marked as exhibit 1.

EXHIBIT #1 STATEMENT OF AGREED FACTS

PN30

The witness statement of Mr Nicholas will be admitted and marked as exhibit 2.

EXHIBIT #2 WITNESS STATEMENT OF MR NICHOLAS

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The witness statement of Mr Costi admitted and marked exhibit 3.

EXHIBIT #3 WITNESS STATEMENT OF MR COSTI

PN32

And, lastly, the witness statement of Mr Murphy will be admitted and marked as exhibit 4.

EXHIBIT #4 WITNESS STATEMENT OF MR MURPHY

PN33

Unless I've overlooked any of the evidence, I think that deals with that. Mr Smith, will I take it then you will lead off with submissions, Mr Bromberg will then make his submissions, you'll have a right of reply?

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MR SMITH: Yes, thank you, Deputy President.

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THE DEPUTY PRESIDENT: I should advise both parties that I've read the very constructive written submissions that have already been made.

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MR SMITH: Thank you.

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MR BROMBERG: Thank you for that indication, Deputy President.

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MR SMITH: Deputy President, as you would have seen from the materials that you've read, the facts associated with this matter are quite clear and there's little contention about nearly all of the factual matrix for the application.

PN39

Bargaining commenced in early August last year, more than 15 months ago. The agreed statement of facts identifies the list of meetings, conferences and teleconferences. There is a minor point. At paragraph 8 of the statement of agreed facts there is another report back mentioned there to Commissioner Platt on 5 May which is not in the table. So that really adds up to 18 events, if you like, bargaining meetings, conferences, teleconferences.

PN40

As stated in Mr Nicholas's witness statement at paragraph 25, industrial action has been taking place since April of last year and is still ongoing. The parties have

agreed on many, shall we say, secondary items as set out in the statement of agreed facts, but remain a long way apart on a series of core items.

PN41

After more than 12 months of negotiations the company decided to put a proposed enterprise agreement to a vote of employees in August, and as identified in Mr Costi's witness statement at paragraph 21, 33 employees were eligible to vote and 26 voted against the proposed agreement. That's despite the fact that the company made a very reasonable offer, we'd say, to the employees.

PN42

The company offered to back-pay the first wage increase all the way back to 1 October last year, conditional on the offer being accepted, and the company offered a $1,000 sign-on bonus, conditional on the offer being accepted. It's quite clear from the materials that with regard to the back-pay offer and the sign-on bonus, the company made it clear that if the employees rejected the offer they would no longer be on the table, and that is the case. They are no longer on the table.

PN43

Despite all of this, the employees rejected the company's offer, and it's clear, we say, that the parties are a very long way apart. Just briefly sort of stepping through what the key items are, firstly on wages, the company is offering wage increases totalling 10 and a half per cent over a three-year period, with three three and a half per cent wage increases payable from the date the agreement comes into effect, being 12 months later and 24 months later, and I've already dealt with that issue at paragraph 15 of Mr Murphy's witness statement.

PN44

The UFU's position on wages is set out in Mr Murphy's witness statement. The union's seeking 13.7 per cent in total for wage increases, four times 3.425 per cent wage increases, with the first one backdated to 1 October 2022, and when you look at the proposed expiry date of the agreement and the phrasing of the wage increases, as well as the quantum, it highlights how far apart the parties are.

PN45

As I've said, the company's offering 10 and a half per cent over three years. The union wants 13.7 per cent for an agreement that would expire on 1 April next year So that's only a couple of months away. The agreement would hardly be approved before it expired. So there's a vast difference between the parties on wages.

PN46

Despite that large number of bargaining meetings, the parties are no closer together today than they were certainly in April, or even in June. Paragraph 17 of Mr Costi's witness statement, he refers to a document that he prepared in June for Ventia, and that document's got some coloured highlighting on it and it is attachment ZC5, and as you can see, Deputy President, in that document it sets out what the UFU had indicated that its position on wages was back in June.

PN47

That position, as set out in that document, was the UFU have indicated that four per cent from 1 October 2022, four per cent from 1 October 2023 and four per cent from 1 October 2024 would be acceptance, and then you can see there that the nominal expiry date that the UFU had indicated was 30 September 2025. So what's quite clear is that the UFU have gone backwards since June on their position, quite markedly so.

PN48

So just in summary, on that point the parties are poles apart on wages, and despite the substantial efforts of Ventia, as I've said, the UFU has moved even further away from the company's position.

PN49

The expiry dates also are poles apart, three years from the date of approval in the company position, 30 June next year for the UFU's position. Personal leave, the UFU wants a 50 per cent increase in personal leave entitlements. At the moment the NES entitlements apply of 10 days per year. The UFU wants 15 days per year.

PN50

On long service leave the UFU wants again a 50 per cent increase in long service leave entitlements. Instead of the 13 weeks for 15 years of service the union wants 13 weeks for 10 years of service, and as you'd be well aware, Deputy President, the Queensland entitlements are as per what the employees are currently receiving, 13 weeks per 15 years of service.

PN51

Redundancy pay, the UFU want to more than double the amount of redundancy pay for employees with 10 or more years of service. At the moment it's 12 weeks maximum, as per the NES. The union wants 22 weeks after nine years of service.

PN52

The other bit ticket item, if you like, Deputy President, is the aviation and first aid allowances. At first glance that might look like just a claim for two allowances that some employees might receive, but in this case we're talking about firefighters in the defence aviation industry, and as Mr Nicholas has stated in his witness statement, every employee would be entitled to both of those allowances every week, so it really is just a claim for increased remuneration dressed up as a claim for an aviation and first aid allowance.

PN53

So it's clear that the parties are a long way apart. Despite that, no party during the negotiations has at any stage asserted that the other party has not been negotiating in good faith. Ventia accepts, of course, that the Fair Work Act does not require parties to make any concessions during bargaining and that the UFU is entitled to hard bargain, if you like – that's a term that's been used in a number of the authorities - but it's quite clear in section 228 of the Fair Work Act, section 228(2), that the good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for an agreement or to reach agreement on terms that are to be included in the agreement.

PN54

The same intent is reflected in section 255(1)(a) of the Act, where the Commission is expressly precluded from making an order requiring particular content to be included or not included in a proposed agreement. So the parties, after extensive bargaining, have reached their positions, and they're entitled to do that. As much as the company would have liked the UFU to have accepted what it genuinely believes is a very fair and reasonable position, it recognises that the union has the right under the Act to maintain the position that it's been maintaining and refusing to move from for many months.

PN55

So if I can turn to the statutory requirements and why Ventia's application meets all of those requirements. At section D of our outline of submissions at paragraphs 36 to 70 we set out in some detail why we say the application meets all of the requirements of the Act. In the respondent's outline of submission it is conceded that the application meets the statutory requirements in section 235(1)(a) and 235(1)(c), so I don't need to deal with those. The facts are quite clear.

PN56

The respondent also concedes that the application meets the statutory requirements in 235(2)(a), that being that the dispute has been dealt with under section 240. As you know, Deputy President, there's some submissions that have been made about the extent of that process, which I'll deal with shortly, but there's no argument from the respondent that the statutory requirement is not met.

PN57

So there appears to be only two issues of contention, firstly, whether there is no reasonable prospect of agreement being reached if the Commission doesn't make the declaration, and secondly, whether it is reasonable in all the circumstances to make the declaration.

PN58

Just dealing firstly with the no reasonable prospect issue, in our submission the facts associated with this matter very strongly support our contention that there's no reasonable prospect of agreement being reached. The UFU's position has not shifted closer to Ventia's since June, and as I've said, it's gone backwards since June.

PN59

In his witness statement, Mr Nicholas states at paragraphs 12 and 13 that:

PN60

> *In my view, the position that Ventia has offered is fair and reasonable. The cost increases that would result from the claims that the UFU is pursuing on behalf of the employees are not sustainable or acceptable to Ventia. Ventia is not prepared to accept the UFU's claims.*

PN61

Mr Costi expresses a similar view in his witness statement at paragraph 24. He states:

PN62

In my view, there is no reasonable prospect of agreement being reached because the differences between the parties on the non-agreed matters are too great. After more than 12 months of negotiations, approximately 17 bargaining meetings, conferences and teleconferences, including a relatively extensive section 240 process, there is no sign that an agreement will be able to be reached and the parties are unlikely to move from their current positions.

PN63

Paragraph 23 of our outline of submissions we cite the relevant test which was enunciated by the Full Bench, as you know, Deputy President, in *UFU v FRV*, at paragraph 29, and that paragraph is really the test associated with when there are no reasonable prospects of agreement being reached. Just to quote the Full Bench:

PN64

No reasonable prospect is obviously not the same as no prospect, in that it does not require a certain and concluded determination that an agreement cannot be reached if a declaration is not made, but rather, on the ordinary meaning of the words used, requires an evaluative judgment that it is rationally improbable that an agreement will be reached.

PN65

In our written submission we highlight a number of decisions under the former section 170MW(7) of the Workplace Relations Act, and as we state in our written submissions, those authorities need to be treated with caution given that it was a very different Act, and of course there wasn't intractable bargaining provisions in the Act, but they do show the importance of the Commission taking into account the history of the bargaining, and they also make the point that no reasonable prospect does not mean no prospect. So broadly considered, they are not that different from what the Full Bench determined in the recent matter in which you were involved, Deputy President.

PN66

In the respondent's submission at paragraph 21.C, the UFU refers to the Commission's decision in *United Voice v MSS Security* as authority for the proposition that the bar for a finding that there's no reasonable prospect of reaching agreement should be high. The words used in that authority were 'should be relatively high', but that decision related to section 423 of the Fair Work Act, of course, an entirely different section of the Act, and at a time when there weren't intractable bargaining provisions in the Act.

PN67

As I've said, the relevant test is the one set out at paragraph 29 of *UFU v FRV*, but in any event, even if the Commission as currently constituted were to decide that a relatively high bar should apply, the facts surrounding this matter would clearly meet that test. After 15 months of exhaustive bargaining, agreement is nowhere near being reached and there are no reasonable prospects of agreement being reached.

PN68

The UFU also argue that the making of an intractable bargaining declaration should be an option of last resort. Again, that's not the relevant test, but in support of that proposition the UFU cites a decision of a Full Bench of the Commission in ISS Health Services which related to an application by the company to extend the default period for a transitional instrument.

PN69

The comments about being a last resort need to be considered in the context in which they were made. In the relevant paragraph the Full Bench was really setting out for parties at the start of the bargaining process what options they had, and they made a comment that, 'As a last resort, if you don't reach agreement, the intractable bargaining declaration might be made.' So when fairly considered, in context, the Full Bench was really just encouraging the parties to try to reach agreement and not see the IBD provisions as an end in themselves at the start of the bargaining process.

PN70

The Full Bench was clearly not intending to articulate a test for the intractable bargaining provisions, a test of last resort, whatever that might mean. But even if the Commission were to decide that this should be a last resort, again we would say any such test would clearly be met by the facts associated by this matter.

PN71

At paragraphs 25 to 33 of the respondent's submission the UFU makes some points about the history of bargaining and it argues that just because there are some more generous terms in enterprise agreements applicable to Ventia workers in other states, somehow or other this makes it more probable that Ventia will agree to reflecting those similar terms in the agreement applicable to the Queensland employees, and we say that is a very long bow. Ventia has more than 100 enterprise agreements across the country and the notion that it should agree to apply the most generous terms to the employees in every state is, of course, completely inappropriate and fanciful.

PN72

Ventia is not prepared to extend the terms in the New South Wales and Victoria firefighting enterprise agreement to the employees in Queensland, as it has made abundantly clear to the UFU right from the start of bargaining, and it still should be abundantly clear. That position has been consistently rejected all the way through the last 15 months and no amount of additional bargaining is going to change that position.

PN73

It isn't even a particularly logical position from the UFU in many ways, because that agreement that they want to reflect in the Queensland agreement terms expires next year, and it would be very surprising if the UFU aren't going to want any further wage increases or additional terms in that negotiation next year.

PN74

So there is no inherent logic in the union's position, but despite that, Ventia is not prepared to accept that claim. In the words of the Full Bench again, it is rationally improbable for the UFU to continue believing that Ventia is going to accept that

claim. It is not going to accept it. There is vast evidence in support of that, and as I have mentioned, section 228(2) does not require parties to make concessions.

PN75

In the respondent's outline of submissions they also deal with the length of time over which bargaining has taken place, at paragraphs 34 to 44 of the outline of submissions, and it's argued that active bargaining between the parties has been relatively short. They even go so far as to state that since April 2023 Ventia has, in effect, refused to bargain with the UFU. That assertion, as polite as I could put it, is completely inconsistent with the facts, including those in the statement of agreed facts. It's completely untrue that Ventia has, since April 2023, refused to bargain with the UFU.

PN76

As set out in the agreed statement of facts, tracking from April there were the two full days of conciliation before Commissioner Platt on the 18th and 19th, there was a report-back on 5 May, there was a bargaining meeting on 11 May, there was a further report-back on 13 June, there was a further meeting between the parties on 22 June, and then the company, of course, put an agreement to a vote and urged the employees strongly to accept it on 24 and 25 August. So how it could be put that the company has refused to bargain with the UFU since April – as I've said, the politest I could say about that is that it is inconsistent with the facts.

PN77

In addition to the meetings and other events that have occurred, the company has continued to discuss the issues with its employees, it's continued to discuss the issues with the UFUA, it's tried exhaustively to reach agreement before it made this application. The UFUA's main argument seems to be that the company's refusal to agree to the UFU's claims is unreasonable and they think they should change their position, but as I've said, in Mr Nicholas's witness statement he sets out there why the company believes its position is fair and reasonable and the fact that they're not going to accept the UFU's claims.

PN78

If the UFU really believed that the company was refusing to bargain with it since April, surely it would have filed an application for a bargaining order or made some assertion that the company wasn't bargaining in good faith. Apart from the submission that has been made in response to the applicant's outline of submissions, there's been no suggestion from either party that the other party hasn't been bargaining in good faith, and as Mr Murphy points out in his witness statement, the parties still have a constructive relationship. It's recognised by Ventia, as I've said, that the UFUA is entitled to bargain hard for what it wants, but that doesn't mean that this matter can continue on indefinitely, and that's why this application has been made, after 15 months of unsuccessful bargaining.

PN79

At paragraphs 45 to 47 of the UFU's outline of submissions the assertion is made that the parties are not that far apart and that there is a relatively narrow gap between the parties. Those assertions are clearly not supported by the facts. I won't go through what I said earlier about the differences between the parties, but even on wages and expiry date the parties are poles apart. They're not in a

position of having a relatively narrow gap between their positions, or not that far apart.

PN80

At paragraphs 48 to 53 of the respondent's outline of submissions it's argued that the Commission has been under-utilised in assisting the parties to reach an agreement. Again, that assertion is not supported by the facts. I've gone through the fairly exhaustive efforts that Commissioner Platt and Ventia went through to try to reach agreement in that quite extensive section 240 process – in fact, very extensive 240 process, starting in April. Yes, it's true, agreement was reached on quite a number of items - secondary items, really, not the big ticket core items, but it was a very useful process. The Commissioner put a lot of effort in, as is very clear from the record of events.

PN81

Further, section 240 proceedings are not going to lead to agreement being reached. Ventia has made it quite clear it's not prepared to accept the UFU's position, and as I said earlier, the UFU's position has been heading off in the wrong direction, or in an opposite direction, to getting closer to Ventia's position, at least since June this year.

PN82

The UFU also in its outline of submissions deals with the extent of industrial action that's been taken. At paragraphs 54 to 61 of the outline of submissions the union argues that the industrial action taken to date has been measured and it hasn't had a substantial impact. Even if that is correct - and we don't concede that, but even if that is correct, at any time the industrial action can be expanded.

PN83

As Mr Nicholas states in his witness statement, paragraphs 21 to 24, the employees covered by the agreement are firefighters. Even though they're not required to fight fires, they need to be on duty to ensure the safety of defence aviation activities. I won't - - -

PN84

THE DEPUTY PRESIDENT: I suspect, Mr Smith, you mean they're not expected to fight fires all the time.

PN85

MR SMITH: No, that's right, but they need to be there.

PN86

THE DEPUTY PRESIDENT: Yes.

PN87

MR SMITH: It's a critical safety issue. So if they're taking - - -

PN88

THE DEPUTY PRESIDENT: Yes. I mean, they are expected to fight fires if they occur.

PN89

MR SMITH: Yes. As Mr Nicholas states, if a defence aircraft were to crash or have an emergency landing, Ventia has a contractual obligation and all of the equipment, the personnel, to go and put out that fire and also rescue the people who are involved in that. It's a critical capability and industrial action, of course, could have a dramatic impact on that.

PN90

The industrial action that's being taken at the moment is sort of set out there at paragraph 25 of Mr Nicholas's witness statement, and it could ramp up at any time. In fact, this is alluded to by Mr Murphy, and at paragraph 61 of the UFU's outline of submissions the argument is fairly strangely put, in our submission. Not wanting to be disrespectful, but the argument's put that the fact that more damaging industrial action may occur should be taken into account by the Commission when deciding whether there's a reasonable prospect of agreement being reached.

PN91

The fact that tomorrow there might be more damaging industrial action, in the union's argument that should lead to weight being given to the fact that there are reasonable prospects of agreement being reached. We say that it would be completely inappropriate to take that into account in the circumstances of this matter, but the fact that more damaging industrial action could be taken should be taken into account in looking at whether it is reasonable in all the circumstances for the intractable bargaining declaration to be made, and it should weigh strongly in favour of the declaration being made, the fact that there is this threat, which the union is being quite open about, of ramping up the industrial action.

PN92

THE DEPUTY PRESIDENT: Mr Smith, just going back to your first point, why wouldn't the Commission have regard to the extent of protected industrial action in making the first judgment, that is, whether or not the bargaining is intractable, to use the shorthand term? It's part of the scheme of the Act, and so why, in that context, wouldn't the Commission have regard to the extent of industrial action and look at whether the industrial action has brought about a movement in the employer's position or not as part of reaching an overall conclusion?

PN93

MR SMITH: Deputy President, we certainly believe that you should take into account the industrial action that has been taken and the fact that that industrial action has not led to the company changing its position. Our point is that it would not be appropriate, in our submission, that the prospect of more damaging industrial action being taken should lead you to conclude or weigh in favour of a finding that there are no reasonable prospects of agreement being reached.

PN94

After 15 months of bargaining and industrial action that has been taking place for 12 months or so, the parties remain poles apart. The industrial action that has been approved by the ballot is consistent with the forms of industrial action that are set out there at paragraph 25 of Mr Nicholas's witness statement, and in Mr Costi's witness statement the ballot order is linked to his statement so that you

can see the forms of industrial action that have been authorised. It doesn't include an indefinite strike, for example. That's not something that is open on the current ballot order, but there is the prospect of more damaging industrial action.

PN95

At paragraphs 62 to 71 of the respondent's outline of submissions the UFU argues that there has been a significant change in circumstances that will make it more likely that agreement will be reached. The union's argument here is that because the Department of Defence has only sought a bid at this time from Ventia for a new contract, this somehow means that Ventia will, it seems the argument is being put, more or less definitely be awarded the contract, and that is just simply not correct. As Mr Nicholas states at paragraph 7 of his witness statement:

PN96

> *The defence base services contract is currently being tendered and Ventia has submitted a bid. The Department of Defence has made it clear that the successful bidder will be selected on the basis of a number of criteria, including value for money.*

PN97

Even though it is correct - and the company's been quite open about this; it's written to employees about it – at the current time there is only one bid that has been sought by the Department of Defence, but at any stage the department can decide to insource the work or can decide to call for other contractors to bid for the work.

PN98

It of course is not credible to argue that the Australian Defence Force could not have the capacity to carry out its own firefighting activities on its army bases. At any time the Department of Defence could insource that work and of course it wouldn't need to call for bids from Ventia or anyone else, or it could decide to - - -

PN99

MR BROMBERG: I'm sorry, Deputy President. I'm sorry to interrupt, Mr Smith. There's simply no evidence to support any of these submissions about the defence capabilities. This is just speculation from the Bench and we object to it.

PN100

THE DEPUTY PRESIDENT: From the Bar table, I think you meant.

PN101

MR BROMBERG: Sorry. My apologies, Deputy President. Certainly not from the Bench, from the Bar table.

PN102

MR SMITH: Deputy President, I think it's just an absolute fact. It's a notorious fact that public and private sector businesses often insource work that they have previously outsourced. Section 311 of the Fair Work Act has a specific provision there about the insourcing of work. So I'm not saying anything that isn't obvious. The Department of Defence has many options. A 10-year contract is

coming to an end next year. It has asked Ventia to bid. It has put in a bid. It has not received a response yet to that bid. It has not been awarded a new contract. Those are the facts, quite clearly.

PN103

Even if Ventia is awarded a new contract, Ventia has made it clear to the employees and to the UFU that it is not prepared to accept the UFU's claims for alignment with the terms and conditions in the New South Wales and Victorian agreement. It has made a very fair and generous offer, it believes, and that is the extent of the offer that it is able to make.

PN104

The Department of Defence, and hence taxpayers, expect value for money from the contractual relationship that they have with Ventia and other service providers. Mr Nicholas has made it clear that that's one of the criteria in the contract's negotiations, value for money. We strongly reject the UFU's assertion that somehow or other Mr Nicholas's evidence and our submissions have been somehow or other incomplete.

PN105

There's nothing incomplete about those submissions. They are completely factual and there's nothing incomplete about Mr Nicholas's evidence. The facts are there. The contract is coming to an end in the middle of next year. Ventia has put in a bid and at this stage that is the extent of it. The contract hasn't been awarded. The company's advised employees that at this stage only Ventia, as it understands it, has put in a bid. That's good news, but it's certainly not the awarding of a contract or an indication that a contract even is likely to be awarded.

PN106

If I can turn to the other leg briefly, the reasonable in all the circumstances leg, section 235(2)(c). In our written outline of submissions at paragraphs 62 to 70 we outline why it would be reasonable in all the circumstances to make a declaration. I won't go through all those reasons, but in our submissions there we deal with the relationship between the parties, the history of bargaining, the conduct of the parties, the prevailing economic circumstances, the bargaining environment, and also we deal with these contractual issues which we believe strongly weigh in favour of the reasonableness of making the declaration.

PN107

In its outline of submissions the UFU argues at paragraph 75 that the fact that the parties have a good relationship, this should weigh in favour of a finding that it would not be reasonable to make an IBD, but that is a very strange submission. It can't possibly be correct that a good relationship between the parties should weigh in favour of a party not utilising a provision in the Fair Work Act.

PN108

It's an object of the Act in section 3 for the system to be cooperative and productive, the system of workplace relations. It's set out there in section 3. If the Commission were to decide the parties should not have access to an important part of the Act just because they're acting cooperatively and they've got a good

relationship, that would obviously be inconsistent with the objects of the Act and also defy common sense.

PN109

Paragraph 76 of its outline of submissions, the UFU argues that bargaining has not been protracted. I've dealt with that in detail. 15 months of extensive bargaining, on any interpretation, is extremely protracted.

PN110

At paragraphs 77 to 81 of its submission the UFU submits that Ventia's conduct during bargaining weighs against the making of an intractable bargaining declaration. Its sole argument, Deputy President, in support of this proposition is that Ventia told its employees before they voted on the proposed agreement that it intended to seek arbitration from the Commission if the employees rejected the agreement.

PN111

It's a very strange argument that a company that's being open, honest and up front with its employees is somehow or other misusing the IBD provisions for strategic advantage by its honesty. That is very strange. Mr Anderson's correspondence is there attached to the witness statement of Mr Murphy, and you can see by that correspondence, Deputy President, that Mr Anderson was urging the employees to accept the offer. He talked about arbitration because the company wanted to be up front and honest, but he stated, and I quote:

PN112

There is a risk, of course, in this process for both parties.

PN113

He was actively urging – the company was actively urging people to accept the offer so that we wouldn't be here today but wanted to be up front about the fact that if they don't accept the offer, it's going to be a time-consuming process before the matter is resolved, because the company intended to make an application and it made the preliminary decision, just before that vote, that it would make this application, and then made a distinction, of course, after the vote, as it said it was likely to do.

PN114

There's been no misuse of the IBD process. The application made by Ventia is entirely consistent with the very reason why the IBD provisions have been inserted into the Act by the Australian parliament. Bargaining has become intractable. There's no reasonable prospects of agreement being reached, and it's reasonable, in all the circumstances, for the Commission to make the declaration.

PN115

Just a couple of other points. At paragraph 82 of the UFU's outline of submissions the point is made there that there's no evidence that Ventia's offer is consistent with prevailing economic circumstances. The company's offer is clear. It's there for everyone to see, including yourself, Deputy President.

PN116

Mr Nicholas has given evidence that the company regards the offer as fair and reasonable. Obviously what is fair and reasonable is closely related to what is consistent with the economic circumstances. In contrast, the UFU has given no evidence whatsoever about why it thinks it is fair and reasonable to just insist that the Queensland employees of Ventia should receive the same terms and conditions as another group of employees in two southern states.

PN117

The circumstances are very different, the history, of course, with different groups of workers is different, and as we've said, the UFU can keep pushing this issue month in, month out, year in, year out, but the company has made it clear that it is not going to accept that position.

PN118

At paragraph 86 the UFU argues that the making of the intractable bargaining declaration is premature, and its main argument here is an assertion that Ventia might change its position if it's awarded a new contract by the Department of Defence. There's no evidence whatsoever that that is the case.

PN119

In fact, Mr Nicholas and Mr Costi's evidence shows that that is not the case. This issue about the contract is not of relevance to the likely future circumstances of Ventia's position. It has made a fair and reasonable offer and that position is sitting there and is not reasonably likely to change, as the terminology in the intractable bargaining provisions set out.

PN120

THE DEPUTY PRESIDENT: Just on that, Mr Smith, what does the evidence reveal, if anything, about the time frames of the contract decision-making process?

PN121

MR SMITH: The contract ends on 30 June next year. Ventia has submitted a bid. There's been no announcement from – or no communication, as I understand it, from the department about the acceptance of that bid or otherwise. Even though the last contract was 10 years, it can't necessarily be assumed that the next contract is necessarily going to be 10 years. Of course, a client has all sorts of options with contractual arrangements. So the facts at the moment are that we know that there's a contract that expires next year. We know that Ventia has submitted a bid, and that's as far as the evidence takes it, Deputy President.

PN122

THE DEPUTY PRESIDENT: Thank you.

PN123

MR SMITH: On the issue of the views of the parties, at paragraphs 88 and 89 of its submission the UFU submits that the views of the parties are in mutual consideration. We agree with that proposition. The fact that the UFU opposes the application should not outweigh Ventia's support for the application. So it appears that the parties all agree that the views of the parties should be regarded as

a mutual consideration when the Commission is weighing up the evidence and submissions.

PN124

Deputy President, I've just received a message. I just need to correct one thing that I said. The past contract was six years, with two two-year options. So that's how you get to the 10 years. Yes, they had the contract for 10 years, but it was a six-year contract, and in terms of the next contract, I'm unaware of how long that contract is going to go for, and there is no certainty on that because there is no contract.

PN125

So just then one final point, the post declaration negotiating period. If you are minded to grant the declaration, Deputy President, we've submitted that if the declaration is granted there should be a post declaration period that expires in mid-February. That takes into account the fact that the Christmas, New Year period is looming, Deputy President, by the time a decision is handed down and the period is declared, and we note that the UFU agrees with that proposition, that if there's a declaration, the post declaration negotiating period should be declared and it should expire in around mid-February.

PN126

So unless there's any questions, Deputy President, in conclusion we say that the application that Ventia has made meets all of the statutory requirements and the relevant tests as set out in the Fair Work Act and as articulated by the Commission in the recent Full Bench decision in *UFU v FRV*, and accordingly we urge the Commission to grant the declaration that's been sought. If the Commission pleases.

PN127

THE DEPUTY PRESIDENT: Mr Smith, the only thing I want to draw you a little further on is the impact, if any, of the announcement on 11 September about the tender process. So I understand – and I'm taking this, and I assume that this is not – it's not in the evidence but it's in the respondent's submissions at paragraph 66. So this is at least part of the announcement that was made to the employees.

PN128

MR SMITH: Paragraph 66. Yes.

PN129

THE DEPUTY PRESIDENT: Yes. So it's an extract from the announcement, but based on what's written here, would it be fair to say that what was announced was that Ventia was the preferred tenderer?

PN130

MR SMITH: I could check whether that terminology is appropriate, but that extract in the submission is from the letter that is attached to Mr Murphy's witness statement. So if I can just perhaps deal with that question in reply and then Mr Bromberg no doubt could say anything that he wishes. I'll just check what the terminology is.

PN131

THE DEPUTY PRESIDENT: Yes. I should have referred you to the source, that's true. Yes, so it is in the evidence, which is JM3, but whether that's the right description or not, it would certainly suggest there's been progress in the contract process and that Ventia are now, I suspect, more likely to be a contender, be successful, than would otherwise have been the case.

PN132

I would accept entirely, just applying first principles, that that doesn't give Ventia a blank cheque. There's still a long process to go, but it would obviously be helpful for Ventia that it's the only one who the department is currently engaging on it. Are your instructions that that has no impact on the bargaining? And I ask that in the context that there's been no bargaining meetings at all, or no negotiations at all, since that announcement, as I understand the facts.

PN133

MR SMITH: Deputy President, I've been advised that it is correct that Ventia is now the only tenderer at this point in time. So that has been a process, and when that became clear, the employees were advised, but as the evidence shows, the contractual requirements in not only the last contract but in the tender process, are that the successful contractor must deliver value for money.

PN134

So the company, through all of this bargaining over the last 15 months, has been well aware, as has the UFU, that this contract is coming to an end in the middle of next year. That, as Ventia's witnesses have identified, does not mean that the company is going to shift its position. It has to deliver value to money for the client, and it has framed its position all along, including the final position that it got to, with a view to the contractual requirements. So we say that it doesn't change anything. If Ventia wins the contract, the position of Ventia is not going to alter on the offer that it makes.

PN135

THE DEPUTY PRESIDENT: Thank you, Mr Smith.

PN136

MR SMITH: Thank you.

PN137

THE DEPUTY PRESIDENT: Mr Bromberg?

PN138

MR BROMBERG: Thank you, Deputy President. I might just quickly pick up – and I will need to come back to that letter and its relevance. We put a significant emphasis on that development and we think it's an important development that the Commission should be very aware of.

PN139

It's relevant in this way. It changes the dynamic of the bargaining. We don't say that's necessarily in our favour. It may be that it's not in our favour, but that will ultimately influence the position of the parties. For example, if Ventia were to

come to us and say, 'We are locked into this contract and this means this is the only wage outcome we can now afford', that, in turn, might have an impact on what position the UFU takes. Equally, if they obtain a 10-year contract, then there are relevant claims currently that the parties are apart on that might be impacted by that.

PN140

The most obvious one, and something we've made an example of in our written submissions, is the redundancy provisions. One might readily understand why Ventia would not agree to an enhanced redundancy scheme in circumstances where they're six months out from the end of their contract, but of course that position, just as a matter of common sense, might soften if they are then locked into a further 10-year contract, because the reality, the practicality of the situation changes. The likelihood of redundancies reduces and therefore the costing of a claim like that reduces.

PN141

So we say it's very significant, and I'm going to come back to it, including in addressing what we say is the conspicuous absence of this evidence in Ventia's case, and I'll make some submissions about that.

PN142

It is correct that the UFU opposes the making of an intractable bargaining declaration, and there are really two issues before you, Deputy President. We accept, and I accept, the submissions this morning of Mr Smith in respect of the factual preconditions that the Act sets out. We accept they're met. It's really the evaluative judgments that you'll need to make, Deputy President, which we contest, and that really turns not necessarily on contested facts but how one interprets the facts and their relevance to the evaluative judgments that you'll need to make.

PN143

Mr Smith, both in writing and orally this morning, has made some submissions about the proper construction of the phrase 'no reasonable prospect of agreement being reached' in section 235(2)(b). We, for the most part, embrace, for example, the guidance that the Commission can take from the way in which, for example, the phrase 'no reasonable prospects' has been construed in relation to the Fair Work Act. That's something that the Full Bench in *UFU v FRV* did, and by reference, I think, to the case in Spencer.

PN144

We don't take issue with that. In fact, we essentially agree that the test is met if the Commission is satisfied that it is rationally improbably that an agreement will be reached if the intractable bargaining declaration is not made. We say that test is informed by the explanatory memorandum. Again, I don't think this is controversial, but we say that you look at whether or not it is so unlikely that it could not be considered a reasonable chance.

PN145

It is unlikely that the Commission would reach such a state of satisfaction unless the parties had been bargaining for an extended period, and of course we take

issue with what 'extended' means, or 'protracted', in the words of Mr Smith, means, and had exhausted all reasonable efforts to reach agreement. So we say they're the factors that inform ultimately the test, which is rational improbability.

PN146

We accept that some guidance can be taken from the section 170MW cases. We also embrace Mr Smith's warning that of course this is a very different scheme, but we do say it can assist the Commission, given that the phrases are so similar, to fill in some of the gaps, in particular some of the considerations that one might take into account in reaching the evaluative judgment that parliament has set for you.

PN147

We also make some further submissions about the construction of the intractable bargaining scheme as a whole, and we think that they're critically important here. We say that it's not controversial, and indeed it's the effect of these provisions, that the making of an intractable bargaining declaration under the Act brings to an end enterprise level bargaining and replaces it with a binding arbitration in the Commission.

PN148

So we say one process sanctioned by the Act. In fact, we'll go further than that. We say it is a process which is put up on a pedestal in the Act, an important process of bargaining, and of course we can make that submission by reference to section 3F which expressly states as an object of the Act that it is to promote enterprise level bargaining underpinned by good faith bargaining obligations and clear rules governing industrial action.

PN149

That is the scheme. That was a scheme that was set up by this Act and emphasised by the Act, and we say that although parliament has inserted the intractable bargaining scheme, it must be understood in the context of the Act as a whole, and where it brings to an end bargaining and replaces it with binding arbitration, it is relevant to look at how those two schemes would then work together.

PN150

Of course, any construction of section 235(2)(b) must be consistent with the objects of the Act, the purposes of the Act, and that's set out in section 15AA of the Acts Interpretation Act, and of course it just picks up the common law position. Project Blue Sky sets that out quite nicely, and, Deputy President, you'll be well aware of that.

PN151

We do make the submission that the intractable bargaining declaration should therefore be treated as an option of last resort. It's not quite the case that we rely on ISS Health Services in the way Mr Smith says. We clearly accept that in that case the Full Bench was not construing section 235(2)(b) in a way which would be binding on you, Deputy President, but what we say is that in a comment which is otherwise unrelated to the scheme, the Full Bench alludes to the fact that the intractable bargaining scheme really only kicks in at the very end of the process.

PN152

Of course, that's supported by the high bar that parliament has set in reaching both the evaluative judgments, but in particular the one that we're concerned with at the moment. Rationally improbable. It's not no prospect. A small prospect is enough for the Commission not to make a declaration, and so we say that's a very high bar and that is consistent with parliament's intention here.

PN153

Parliament's intention is to put in place a circuit-breaker. It's not to replace bargaining, it's not to give the parties another tool in the toolkit to be used in the bargaining process, and we'll touch upon that again shortly. It is to replace the process. It is to bring one to an end and to start another, and we say in the context of the Fair Work Act and particularly so where bargaining is given a great importance and the Commission, in particular, is armed with all sorts of powers in order to assist the parties in bargaining, one needs to be very careful between determining what might be the impasse and what is truly intractable, such that it is appropriate to bring the bargaining process to an end.

PN154

We have made reference, Deputy President, to a decision in United Voice v MSS Security. I think that my instructor provided a copy to your chambers this morning. In any event, the relevant extract is set out in our written submissions. It is related to section 423, but of course the terms of section 423F, it imports the same phrase. Again, we don't say this is binding on you, but we say it is useful guidance. It is a useful warning in this case that conflict is inherent in negotiations and there is no fixed set of rules for resolving that conflict when one reaches an impasse.

PN155

What we do know is that the Commission is well populated with enterprise agreements that have experienced an impasse or stalemate. Deputy President, I have no doubt that you have dealt with a number of situations where there is an impasse, and that requires hard work. It can be difficult. It can involve industrial action. That is the scheme of the Act. That needs to be separated from what parliament has now arrived at as a slightly different situation, one of intractable bargaining, and so for this reason, and this is the point made, the bar that is set for the Commission should be relatively high, and we say it is in this case, as it was under that legislation.

PN156

We also think that some relevance should be given to that last sentence, and from what I've heard of Mr Smith, it seems to be a touch point for Ventia. They say, 'Well, we're just not going to budge. We're not going to move.' Naturally that is a self-serving opinion that is put forward by Ventia, and the Commission should be careful in accepting that sort of evidence and that sort of submission.

PN157

What it must do and, we say, should do in this case, is look at the circumstances objectively, look at the circumstances of bargaining – I'm about to go to these things – and arrive at a conclusion for themselves about whether or not this is just an impasse or whether or not the parties are so far down the path, have exhausted

all reasonable actions that one might expect of the parties in bargaining, and are still in a position where they simply cannot bridge the gap.

PN158

So we say, consistent with the way in which we construe the text, the context and the purpose of the Fair Work Act, the Commission should be slow to make an intractable bargaining declaration and thereby end bargaining between the parties. We say that's particularly so where one party doesn't think that the situation is intractable and the other does, and that can be contrasted, for example, with the FRV application before the Commission, where both parties agree that it's intractable and therefore the circuit-breaker is appropriate, because in effect the parties are coming to the Commission, saying, 'We have this problem. We need your help.'

PN159

Having addressed how the UFU contends that a decision to make an intractable bargaining declaration should be, and that is, as a last resort, it's perhaps unsurprising that we say in this case the circumstances do not support the Commission reaching the satisfaction under section 235(2)(b).

PN160

It's not contested that 235(2)(b) is evaluative judgment, and that effectively means that you're exercising a discretion by reference to discretionary factors. We have set out a number of considerations in our written submissions – seven, to be clear. We don't say that that is every consideration. We don't say that in another application only these considerations are relevant, but we say these are relevant considerations in the context of this bargaining period and this application.

PN161

We look at the history of the bargaining between the parties, the length of time over which bargaining has taken place, the extent of the divide between the respective positions of the parties – and I intend to take Deputy President to each of these – the extent to which the Commission has been involved in the bargaining. That's something that comes out of the 170MW authorities, that you do look at how involved has the Commission been.

PN162

The extent of industrial action taken during the bargaining period, but we also say that inherent in exercising this discretion is a forward (indistinct), because the satisfaction that you need to reach is that it's improbable that agreement will be reached. And so it's not just what's happened in the past. You can use – and I think in the AWU case that Mr Smith relies on, the Commission there expressly says that you use the history in order to extrapolate about the future, and that's relevant on a number of these considerations, which I'll go to.

PN163

Whether one party is using the intractable bargaining declaration scheme for a strategic advantage. We'll touch upon this, but in effect, that consideration is this, and it's related to the way in which I've just explained the scheme as a whole. This is not another tool in the toolkit for bargaining and it should not be used in that way. It shouldn't be a threat. Mr Smith characterises the letter in

August of this year in a certain way. We take a very different view of that, and, Deputy President, I'll take you to that letter.

PN164

Finally, and this goes back to the contractual situation, which I'll deal with in more detail, the extent to which there are changing circumstances, and in particular those circumstances might affect future bargaining and how that changes the probability of an agreement being reached.

PN165

I want to start, really, with that last consideration, because again, we think that that's, in many respects, the most significant one. An issue which has loomed over the parties throughout the entire bargaining period has been whether or not Ventia would be given a new contract to provide firefighting services to the Department of Defence beyond June 2024. Indeed, the tender process to obtain a new contract – now, we don't know whether it's six years plus two, plus two, or 10 years. We don't think it matters. We assume it is of a long enough period to give Ventia some security. But it has been repeatedly identified as a reason why Ventia cannot agree in particular to more favourable financial outcomes for its employees as part of this bargaining process, and there are numerous examples of that in the evidence and I wish to take Deputy President to a few.

PN166

The first is in annexure ZC5 which is attached to the statement of Zeb Costi. Mr Smith took you to this table to demonstrate what he calls the shifting position of the UFU, and I'll come back to that, but my concern here is in relation to the last column, the status column. Deputy President, do you have that in front of you?

PN167

THE DEPUTY PRESIDENT: I do.

PN168

MR BROMBERG: Thank you. You'll see in relation to item 1:

PN169

Ventia is unable to increase the costs of this operation any further, otherwise it will risk the contract during the re-tender phase.

PN170

If you go over the page to item 7:

PN171

Increasing the long service leave component would increase costs, which will pose a risk to the tender process.

PN172

Again, at 10:

PN173

This would increase costs, which poses a risk during the tender process.

PN174

And the rest of the items are resolved. I should add that in relation to items 1, 7 and 10, they are what I think Mr Smith described as big ticket items. They are not all but most of the financial claims made by the UFU, and as you can see, in their own document they allude to the fact that they cannot move from their position because of this ongoing tender process.

PN175

That's also borne out in the letter which is JM2 to the statement of Mr Murphy, and I'll ask, Deputy President, for you to open that briefly as well. There are really two relevant parts to this letter, one which relates to this point and which begins at the third paragraph of that letter.

PN176

This letter, I should add, was provided to us by Ventia, but it is a template letter, in the sense that it was not sent to an individual, but individual names would be inserted after 'Dear'. We understand it to be the letter that was sent out, albeit not one that was sent out, if that makes sense, Deputy President. There doesn't seem to be any complaint from my learned friend about it so we'll assume this is the letter that was sent. The third paragraph says:

PN177

This is by far the best package we can provide. Following 18 meetings we were unable to reach a common ground with the bargaining team. To agree the terms being proposed will damage our competitiveness at Oakey and cause risks that will far outweigh the impact of industrial action.

PN178

As a long-term leader of the firefighter portfolio, I care greatly on you and the team remaining relevant today, tomorrow and well into the future. I understand the pressures of cost living, but I also need to balance this with maintaining our competitiveness. As I have stated previously, we are well underway in tender process for the further decade of service. Success for me is the continuity of business over the next decade and –

PN179

- and this is bolded –

PN180

- continuity of employment as you know today.

PN181

The implicit threat in that is that, 'This contract is about our security and it's about your security.' That's well understood by employees and in fact factors in to some of the other considerations which I'll take you to, but it's stated in bold here:

PN182

Defence is evaluating the choice of suppliers into the next contract on capability, service and value for money. The Queensland team are leading in all categories in this discussion. For this very reason it is not a position that we are going to devalue.

PN183

I want to come back to this letter later, Deputy President, in relation to a different consideration. I might leave it there. We say that Ventia has relied on the competitiveness of the tender process as a way of deflecting financial claims, of making – or, sorry, as a reason, as the central reason, why it cannot budge from its position, and that's why we say that the letter of 11 September which is JM3 is so important. It's plain as day that the position has changed.

PN184

We've attached this letter, which was sent out to employees. We make the point, and I think I need to make it here today as well, that it is conspicuously absent from Mr Nicholas's evidence. He gives evidence about this tender process. He calls it a tender process, and the inference that is drawn from that evidence is plainly that it is a competitive tender process, and yet it is not. It is no longer competitive. We accept it's not a done deal, but Ventia are the preferred tenderer. They are the only company who are now tendering for that work.

PN185

Mr Smith raises issues of bringing it in-house with no evidence to support that the Department of Defence has any capability to do that, never mind the capability to do that within six months, and that is the time frame we're talking about now. If you turn to JM3, Deputy President, the paragraph we rely on is the second paragraph:

PN186

Defence has advised that Ventia has progressed through the tendering process, resulting in Ventia as the only company downselected through to the request for tender phase and therefore being invited to tender for the firefighting services package. This is positive news for us as we move through the tendering process.

PN187

Of course, the letter goes on to say that this isn't a guarantee, and we accept that it's not a guarantee, but that's also relevant. I'm going to bring that up in a little bit in relation to the other limb of this scheme, but we say that's very important. We say that it shows a certain level of carelessness in Mr Nicholas's evidence, and that, in our submission, means that the Commission should also be careful about accepting the sort of evidence that Mr Nicholas puts forward.

PN188

The credence of that evidence is undermined by the abject failure – and there's been no explanation from Mr Smith this morning about why it wasn't included. It plainly pre-dates the filing of the evidence. There's no doubt that Ventia were aware that the letter was sent. There's just no reason why it wasn't included. It's plainly relevant and it's something that should have been put before the Commission and indeed is put before the Commission now as highly relevant to the exercise of your discretion.

PN189

We submit that there are at least two reasons why it is important. The first is that Ventia is no longer in a competitive process and employees are likely therefore to

be less concerned about their own job security and, by contrast, Ventia will also be less concerned about the security of their contract, and we say that plainly affects the dynamic of bargaining.

PN190

Second, if Ventia obtains a contract, whether it is 10 years or six years, it doesn't matter. They will be in a much better position to deal with the claims that the UFU are making, vis a vis the contract. And I gave the example earlier that That could work both ways.

PN191

It may be that there is sufficient money in the pot of the contract that they are able to make more attractive wage offers in order to get a deal across the line. And we understand that they are keen to get the deal across the line across the line and that is part of why they have made this application.

PN192

But it works the other way too. As I said earlier, it may be that in a bargaining meeting after the contract is finalised, Ventia would sit down and say, 'Here you go, this is the pot of money. This is why we're making this offer. We cannot move from it.' And that, of course, is something that the employees would have to take into account and the UFU would have to take into account in responding to that claim.

PN193

So to say that it has no impact on the dynamic bargaining is just, frankly, wrong. Common sense says that it does make an impact. And I gave the example also of the redundancy provisions and again, you know, as a matter of common sense one might understand why Ventia are opposed to increasing redundancy in this slightly unsure.

PN194

That will change. And, in fact, it already has changed, because they are now the preferred tenderer. So they are not yet at a secure position, but they are in a more secure position than they were, and they are in a more secure position, frankly, than they have informed the Commission of.

PN195

Turning now to the other considerations in section 235(2)(b), the history of bargaining is relevant. And there are really two points we wish to make about the history of bargaining. The first is that this is not the first time that the UFU and Ventia have engaged in difficult bargaining and ultimately reached an agreement. It is also not the first time that the UFU has engaged with Ventia's predecessors. Both at this location, but also other locations of workers doing the same work as those who are employed and will be employed under this proposed enterprise agreement.

PN196

Mr Murphy, at paragraph 4 lists the agreements he has personally been involved in and they really cover the field for the last 10 years.

PN197

Now, we don't say too much weight should be put on the fact that the UFU has previously made agreements with, in particular, the predecessors, but it does demonstrate that we are in the business of making agreements and the fact that it has been done in the past makes it more probable that it can be done in the future.

PN198

And of course, the closest comparator, and one which is very recent is the agreement that was reached with Ventia in relation to their other locations in Victoria and NSW. That's an agreement that was reached last year. It's in recent memory. It involves many of the same players and relevantly it involves many of the same claims.

PN199

And even more relevantly, those claims were ultimately accepted by Ventia. And that's our second point. We say it is relevant that Ventia have previously accepted the claim that we make.

PN200

Now, Mr Smith says, 'Well, we've got a hundred EBAs. The fact that one is higher than the other doesn't automatically mean that the low ones should be risen. We accept that there are no rules - there's no principle here, but the UFU, guided by its members, has sought to bridge the gap. It is a longstanding gap, but to bridge the gap between the Victorian and the New South Wales agreement and the Queensland agreement.

PN201

And frankly, there is nothing wrong with that. We are seeking to bring workers who are working in the same role but in a different state up to some level of parity. And we are not being unreasonable about it either. We are wanting to make steps towards parity. And this will really, I think, flow on into my submissions about the extent of the differences between the parties.

PN202

Before I get there, I do want to deal with the length of time over which bargaining has taken place. I think you are right, Deputy President, to identify this as a very slight factual controversy. As I said, there's a few different ways to look at it. We don't disagree that the - and in fact we've agreed to it in the agreed statement of facts, that those conferences, teleconferences, meetings occurred.

PN203

But one has to look a little more closely at what those meetings were. And we say when one does that there are at least three that drop off. We have put in our submissions an analysis of that table. Our analysis is this; we say there were six bargaining meetings between 1 September and 23 November 2022. Then between 23 November and 16 February there was only one more bargaining meeting on 18 January. So there was effectively no bargaining in the month of December. There was one meeting in January and then no further meetings until 16 February.

PN204

Then between 16 February and 28 March, there are a further four bargaining meetings. And they are not disputed. They were bargaining meetings in the sense that the parties were there to discuss the claims that were being made in the context of the enterprise agreement bargaining.

PN205

In April 2020 Ventia sought the assistance of the Commission through the section 240 process and there was a mention hearing to facilitate that. We say that - and Deputy President, you will no doubt have been involved in many of those. They are not an opportunity for bargaining. They are an initial conference in order to timetable things, to set out what the issues are. They are not the parties rolling up their sleeves and getting into the nitty gritty of what is between them. And so we say it is overstating it to say that that is a bargaining meeting, in the context of the length of bargaining.

PN206

We are not going to die in a ditch about this. We don't think it necessarily makes that much of a difference, but as we calculated, we say there are only 14 bargaining meetings that occurred over what was a 12-month period or now a 15-month period. But we say when you look at it properly, there is really only a seven or eight month period in which regular bargaining meetings are occurring between the parties.

PN207

And so we say that goes nowhere near an extended period and nowhere near the Commission being satisfied that all reasonable actions have occurred, such that it's improbable that agreement will be reached in the future.

PN208

And so we say that is a matter that weighs against the finding that there are no reasonable prospects of the parties reaching agreement. Because we say, 'Look, when you look at the entire period, it's just not the case that the parties have exhausted all their efforts. And we just say that that this evidence from the facts. It is evident from the agreed facts when you look at what occurred, when it occurred and you break it down and that is, in effect, our submission.

PN209

Mr Smith takes issue with our assertion that Ventia in effect refused to bargain with the UFU. We don't go so far as to say that the refusal was in a way that would bring about, for example, an application in relation to good faith bargaining. What we say is from April onwards it is patently clear that Ventia have made up their mind. The first thing that they do is to unilaterally put an agreement to the workforce, which was rejected and upon its rejection and, in fact, it was flagged before it was put out and therefore flagged with us also that the next step would be for them to go down this process.

PN210

So, we say that their minds were shut to the prospect of bargaining, effectively after the section 240 process. So, again, to count the last six months as active bargaining when assessing whether or not the lengthy of bargaining can somehow assist the Commission to extrapolate the likelihood of agreement in the future, we

say that that weighs in our favour, because in effect over a 15-month period, there has only been a short period of what we describe as active bargaining but, in effect, bargaining. And so we say the Commission should take into account and in fact it's an important consideration.

PN211

Turning now to the respective position of the parties, Mr Murphy has set out in his witness statement his understanding of the respective positions of the parties. I want to make something clear, and I don't think this is unusual in the context of bargaining.

PN212

As I said earlier, we will accept Ventia's position in relation to wage claims. If we've got it wrong we apologise, Deputy President. But in any event, taking their position and they don't take issue with the other positions we've asserted. These are, for want of a better phrase, the official positions of the parties. These are the claim.

PN213

Now, that doesn't mean that in discussions there haven't been concessions made, compromises made, particularly by the UFU and the annexures there C5, demonstrates that.

PN214

So, it's not the case that our position has shifted since June. What I think Mr Costi is there referring to are without prejudice discussions that occurred between the parties. They were done on the basis that these things would be agreed to if there was agreement across the board. And, again, that's not an unusual way in my experience for parties to bargain.

PN215

So, there are two things to say about that. Firstly, that has meant that some of these positions are a little outdated. And, of course, if this matter goes through the arbitration we will need to be very clear about what our positions are. But, for example, it's unrealistic and I don't think we would contend for an agreement that will expire on 30 June 2024.

PN216

Mr Smith makes the point we may not even have an agreement by that date, and I accept that. I am instructed that we would pursue a three year deal. And so the difference between three years and four years again is different to the position as Ventia understands it.

PN217

I was going to deal with the table in order of least contentious through to most contentious, or at least I've interpreted it. Items 11 and 12, which are the watchroom allowance and the deployment payments, they are effectively agreed. The difference between the parties is that it hinges on the wage increases and therefore the actual amount that those allowances look like. So, we don't' consider that there is really very much between the parties in respect of those claims.

PN218

Item 7 is also effectively agreed. That's the redundancy exception. There is still a little bit of wiggle room in respect of the wording of that. But as we understand it, that's not a position the parties are really apart on. At least on an in-principle basis.

PN219

Item 10 we say is of little financial consequence. It is a claim for full reimbursement for what is described as non-standard boots. Ventia are offering reimbursement up to the value of standard boots and so it is really only the difference between the cost of the standard boots and the non-standard boots of which, I might add, there is no evidence before the Commission, but I think you can take judicial notice of the fact that that amount can't be particularly much.

PN220

And so we say it's of little financial consequence and really not something that the Commission would be concerned could not be breached in the context of bargaining.

PN221

Again, item 9 is the difference between 80 and 85 cents per kilometre. And it's submitted that that is a gap which could not be described as large. That is something that even if we were to meet in the middle, is a very small gap to bridge.

PN222

Item 8 concerns the aviation allowance. Mr Smith touched upon the aviation allowance, including by reference to Mr Nicholas' statement at paragraph 18. There, he effectively says that the aviation allowance is superfluous because all employees would qualify for it and therefore his point is it's really just a wage increase. And we say that is patently incorrect.

PN223

For example, a watchroom operator at Oakey would not be entitled to an aviation allowance. Indeed, a rookie firefighter would not be entitled to an aviation allowance. And if the Commission needs any satisfaction about that, the New South Wales and Victoria agreement, which features an aviation allowance has in express terms excluded those two categories of employees from being entitled to the allowance and that's clause 27 which is page 24 of the agreement: that's JM1 to Mr Murphy's statement. It's 27, point 26:

PN224

A firefighter employed at RAAF base East Sale RBW,

PN225

in any event, the other location,

PN226

who holds relevant aviation qualifications and is required to respond to an incident shall be paid an allowance as outlined in appendix D.

PN227

And then it goes on say:

PN228

To avoid ambiguity this allowance does not apply to a dedicated recruit firefighter, watchroom operator as defined in clause 7.

PN229

And just to complete that process, if you look at the proposed agreement that is attached to Mr Costi's statement, page 34 of the agreement, you will see that there are at least three levels of watchroom operator. So it's not as though under this agreement in Queensland that's not a category of employee covered by the agreement. And so we say that's just patently incorrect. There is a purpose to the aviation allowance. It is to reward those firefighters who have extra training in responding to aviation incidents.

PN230

Indeed, we say the same thing about the first aid allowance. Again, that is to reward in effect higher qualifications. That is not something foreign to the world of industrial relations. The fact that all employees might be required to have that at least at a certain level should not detract from the fact that it is a legitimate claim made by the UFU. And importantly, it is a claim - both of them are claims which were previously or have been accepted by Ventia in relation to other employees doing exactly the same work in a different state.

PN231

And so in going back to how far apart we are, we also say it's relevant that it's $23 a week. It's to going to break the bank. There is no evidence before you that it's going to break the bank. They just say we're a long way apart and we take issue with that.

PN232

Now, items 6, 5, 3 and 1 are - I think that Mr Smith said the big ticket items. They are the significant financial items, and we would accept that is where, perhaps, the parties are furthest apart, particularly in relation to their official position. But if you look at the annexure to Mr Costi's statement, on things like the wage increase and allowances, remember the UFU's position on 7 June 2023, and I might add this was on a without prejudice basis, but you can see that the UFU is being reasonable about its wage claim and has been very transparent about the fact that it wants to move to parity with the Victorian and New South Wales agreement and we refute any challenge of that being inappropriate at all.

PN233

But that doesn't mean we won't accept steps towards it. This is a process. It's a transition. That is where we want to go. We've made that clear. There is nothing wrong with that. But in bargaining, we've also made it clear that we will accept less than that. And that just does not seem to be taken into account in anything that Ventia alludes to.

PN234

So we say that it is the case that the gap between the parties is not insurmountable. There are at best 12 items that we need to work through. Of them, four or five of them are really small issues. There is really only three or four issues and the difference between the parties is the UFU is trying to get to a certain destination and Ventia are reluctant to come for the ride. But that doesn't mean that we can't find common ground somewhere in between.

PN235

We certainly think it's possible. We certainly think it's the sort of gap that can be bridged and in fact is bridged, particularly with the Commission's assistance all the time. And that leads me right into the next consideration. And that is that since April 2023, two days in the Commission, we say that the Commission's expertise has been underutilised.

PN236

I think Mr smith described it as a significant of comprehensive 24o process. We say that is just simply not the case. Two days is, in no measure, a comprehensive process. We have all, I suspect, been involved in assisted bargaining with the Commission, which may o for weeks. It may be that there are report backs every two weeks for months.

PN237

With respect to Platt C and he was no doubt reacting to Ventia's position at that end of the second day, but we think there is further scope for the Commission to roll up their sleeves and assist the parties to bridge the gap that we say is bridgeable.

PN238

And that is particularly so when one looks at the ground that was in fact made up in those two days. It's not as though those two days were of no use. Mr Smith seeks to diminish the value of the claims that were agreed, but they were big claims, at least in the eyes of the UFU. I mean, the UFU agreed with the assistance of the Commission, that there would be an expansion of duties for fire fighters and that the interaction of training could be conducted outside of ordinary hours without penalty payments. They are not insignificant concessions.

PN239

As I understand it, it's set out in Mr Murphy's statement there were other issues that were agreed. It's set out at paragraph 14 of Mr Murphy's statement. There was an introduction of a new operational position called 'senior station officer' that would fall outside the agreement. The UFU had given up coverage, effectively, of a category of employee . That is not insignificant.

PN240

There has also been changes to the rosters and the notice periods for rosters which, Deputy President, I'm sure you will be aware is often hotly contested by employees in all sorts of industries. Moving rosters is often something which is incredibly personal to employees. And so to diminish its value really understates it.

PN241

So we say good progress was made in the first 240 process and relying on the decision in AWU re Termination of bargaining period, at paragraph 24, which is extracted in eh applicant's submissions at paragraph 28. It is entirely valid for you to look at the past and use it as a guide to extrapolate to the future.

PN242

And we say when you do that, when you look at the ground tat was covered in just two days, there is the inescapable conclusion that the Commission has been underutilised in this process. Now, there are reasons for that, and I alluded to them earlier, which is shortly after the last 240 process, Ventia went on its way in a very unilateral sense, without the agreement, flagged that if the agreement wasn't voted up, that it would move to this exact process.

PN243

So one might understand why the UFU did not then go back to the commission seeking its assistance, knowing that Ventia was not on board. But that doesn't mean that the Commission can't be satisfied that the Commission was underutilised in this process. And we say that is of value and it goes directly to an assessment of whether the parties have exhausted all reasonable efforts to reach agreement.

PN244

Going back to the scheme of the Fair Work Act, the Commission is given an important role in bargaining and here the parties have not used it effectively. But if the parties did use it effectively, we say that increases the probability that an agreement could be reached and that is a relevant consideration and one which we say weighs in favour of refusing an intractable bargaining declaration.

PN245

Now, I will turn now to the extent of industrial action take during the bargaining period. There are really two elements to this, and I think I have alluded to some of them. One is the extent of industrial action that has occurred today and is continuing to occur. We say that the industrial action taken by employees is notably measured and none of it has had a substantial impact on Ventia's capacity to deliver services to the department of defence.

PN246

And we say there's a good reason for that and Mr Murphy's evidence, which is unchallenged is that further industrial action has not been proposed, because of the ongoing contract negotiations between Ventia and the Department of Defence, and the understandable concern from employees that if Ventia was unsuccessful in the tender process it would directly effect their own job security.

PN247

That is plainly a factor in the negotiations. It is also a factor that feeds into the types of industrial action that employees are willing to take. Of course, that concern is substantially alleviated in circumstances where is it now apparent that the tender process is not a competitive one and that the only company who is invited to tender for the firefighting service package is Ventia.

PN248

That gives everyone a great deal more security. I accept it's not done deal, but it is a significant step towards done deal and, indeed, it will either go one of two ways fairly shortly. That is, that contract will be confirmed, or it will be taken away from Ventia, and both are relevant, and I will return to that.

PN249

And so we say that Ventia's update two employees on 11 September is a significant turning point affecting the dynamic of bargaining between the parties, including because it may encourage employees to authorise other forms of industrial action as a greater lever in negotiations.

PN250

Now, Ventia jumped to conclusions here. I think Mr Smith described our submission as a submission that we would resort to damaging industrial action. In my respectful submission, there is a long way between what we are currently doing and what might be considered damaging or, indeed, a threat to public safety. In any event, it is somewhat inappropriate, I think, to be extrapolating about whether or not that sort of application if it were ever made would be successful.

PN251

The point is, today employees have been taking a certain kind of industrial action. That industrial action is modest. They have done that for a particular reason. That reason has dissipated somewhat. And that is a shift in the bargaining environment which is relevant to the assessment of l whether or not agreement could be reached in the future, and we would say that is because employees feeling a greater level of security may be willing to revisit the types of industrial action or the frequency of industrial action taken. Mr Smith jumps up and down about that and Ventia might not like it, but industrial action is the central tool given to employees in bargaining.

PN252

It is a central part of the scheme. It is an object of the Act, and it cannot be denied to them. Protected industrial action within the meaning of the Act is a tool to be exercised by employees. And what we say is they haven't exercised it thus far in a way which has had the sort of impact they might want, but the shifting of circumstances means that the Commission cannot rule out a scenario where employees take different kinds of industrial action and that those different kinds of industrial action shift the bargaining party towards agreement.

PN253

And that is why it's relevant and we say it's clearly environment. It has been relevant from day dot. It was relevant in relation to the section 170M assessment and some of the cases that Mr Smith alludes to identify that. So that's all we have to say about industrial action, at least in relation to this limb.

PN254

But indeed, that is all I have to say about this limb, and I had proposed to move on to section 235(2)(c) unless, Deputy President, you've got any questions for me in relation to this limb. Otherwise I can deal with questions again at the end.

PN255

THE COMMISSIONER: No, that's fine, Mr Bromberg.

PN256

MR BROMBERG: Section 235(2)(c) of the Act requires the Commission to be satisfied that it is reasonable in all the circumstances to make an intractable bargaining declaration, taking into account the views of the bargaining representatives.

PN257

We submit that section 235(2)(c) is a broad discretion. We have in our written submissions both responded to the consideration set up by Ventia and we accept they are relevant considerations, so we have responded to them and given you our view on them.

PN258

As well, I have identified some further considerations, which are relevant to the exercise of the discretion in this case. And so again, we don't say this is an exhaustive list, but we say these are the relevant considerations, looking at the facts that the Commission should weigh up in determining whether or not it's reasonable in all the circumstances to make the intractable bargaining declaration.

PN259

In response to Ventia's considerations, we'd say a few things. The first one is in response to the relationship between the parties, I think this was the first time Mr Smith used the words 'strange' in relation to my submissions. I won't be offended by that. There is nothing strange about this submission at all. When one looks at the relationship between the parties, it is really only relevant if the relationship is broken down. And that would tend for the making of an intractable bargaining declaration.

PN260

If the evidence before the Commission was the parties just won't sit in a room together, then clearly that is a factor which would tend towards utilising the circuit breaker that parliament has inserted into the Act. But that is not the facts here. The facts here, again undisputed, are - and in fact, I think Mr Smith referred to this, are that there remains a good working relationship between the principal negotiators throughout the bargaining..

PN261

So we say that the relationship between the parties is either neutral or in favour, effectively, of refusing the intractable bargaining. It doesn't make it more reasonable to order an intractable bargaining declaration and the fact that the relationship is a good one.

PN262

So we do say it detracts from the exercise of the discretion. Although we don't put it too strongly.

PN263

THE COMMISSIONER: Yes. I think that last indication is pragmatic because the relationship between the parties can also work the other way. That is, where a constructive relationship is operating between the bargaining representatives - that's effectively what you are talking about here - is that another way of looking at it is, notwithstanding, good bargaining relationships where everyone knows the gay man plays the game and knows each other and are able to confide.

PN264

But if the parties have still not made progress notwithstanding the back door channels if you like, the more open communication than might otherwise exist, the parties have not been absolutely to reach an agreement, a good relationship could in fact be a positive indicator for the fact that it's an intractable bargaining situation.

PN265

Now, I'm not necessarily drawing any conclusions here. I'm just alerting you to the fact that I think there is another way of looking at this consideration.

PN266

MR BROMBERG: And I think we'd accept that, Deputy President, although I would make this comment or warning. That might be true or might be particularly true in circumstances where there are other reasons why an impasse has been reached.

PN267

So if there was no other kind of looming issues in the bargaining period of which we've alluded to, then yes, you might say, 'Well, they've got a good relationship, they still haven't been able to work out their differences', and so perhaps it is an indicator of a truly intractable scenario, but we say that on the evidence before you and in particular the relevance of the contractual situation with Ventia and really on the evidence put forward by Ventia itself, it is that contractual situation which has been a bar to them taking further steps in the negotiating period and we say that that is dissipating at a rapid rate. And so we won't put it too strongly. We accept that it probably could go both ways, but we certainly don't say that there is anything wrong witness the negotiating relationship, such that you would be concerned that if you didn't make an intractable bargaining declaration, that further discussion would have no utility.

PN268

Turning to the history of bargaining, which is something Ventia also says is relevant to this discretion, I've made significant submissions about the history of bargaining. We would say this, and Mr Murphy sets this out in his evidence, that bargaining for the Victorian and New South Wales agreement, which is by far the closest comparator in the sense that it involves the same parties, the same type of work and has a common history was longer. It involved more bargaining meetings and there was more disputation between the parties. So Mr Murphy alludes to a good faith bargaining application that was made. I think the industrial action was challenged well in that bargaining period.

PN269

We say that is a close comparator. It was harder fought, it lasted longer, and it required more work and yet they still arrived at a bargained outcome. And when you compare that to this bargaining; shorter periods, less work done by the parties, less assistance from the Commission, that all tends against the making of an intractable bargaining declaration. And so we say the history can be construed in that way and we would urge the Commission to sue the history of bargaining in that way.

PN270

The conduct of the parties; Mr Smith alluded to the fact we take issue with the conduct of Ventia. This is where JM2 becomes relevant again and I might ask, Deputy President, for you to open JM2. It's a different set of paragraphs. It sort of starts, I guess, with the question and it's on the second page, 'What does this mean to you?'

PN271

THE COMMISSIONER: I have it.

PN272

MR BROMBERG: I will skip over the next paragraph, but I will read you, starting:

PN273

However, in the unfortunate circumstances of an unsuccessful vote, Ventia will seek the commission's assistance to arbitrate the outcome.

PN274

And we say that is a clear reference to this process. As I've said from the onset, I don't want anyone to lose money, despite (indistinct) of industrial action, not a single team member has lost money. An arbitrated outcome will see the removal of a sign-on bonus and backpay. This is due to the cost of legal fees, management effort and time. There is risk, of course, in the process for both parties.

PN275

Now, Mr Smith says, 'How can we be criticised for being so transparent with our employees?' We say, to read this as anything but veiled threat to its employees is nonsensical and devoid of an understanding of the industrial context. This is nothing more than that dangling of a carrot and the threat of the removal of the carrot if they don't do what Ventia wants them to do.

PN276

Now, the threat of tipping the bargaining period, bringing the bargaining period to an end and putting it into binding arbitration, we say if fundamentally against the purpose of the intractable bargaining scheme, for want of a better phrase.

PN277

And it is not designed and was not intended to be something that the parties could use to their strategic advantage in the context of bargaining. And indeed it is more - it signals that Ventia have formed the view that they no longer want to bargain, rather than that there is a truly intractable situation. It shows that at this point in time on 18 August 2023 when this letter was sent, they were already

thinking about what their next step was, despite the fact that it might not happen for a number of months down the track.

PN278

And so again we don't put it too highly, but we say that the Commission ought to be very careful about opening a door in which parties in bargaining - the primary way in which parliament has said the parties should set terms and conditions for employees at an enterprise level should be very careful about opening a door in which the parties at the first sign of difficulty end the bargaining process and commence a new process in which in particular the employees are not able to exercise the other tools which are given to them by parliament in order to influence the outcome.

PN279

And that's a policy factor to be taken into account but it's also relevant in response to here. We say it was unreasonable to effectively threaten to tip this into the intractable bargaining scheme. It was used as a strategic advantage in order to try and get the bargaining over the line. It didn't work and for Ventia to come along here and say. 'There's nothing to see here. All we did was tell the employees how it was', well, that might be true, but it didn't need to say that, and it said it for particular reason. And it said it plainly comment in our submission to make employees think twice about how they were going to vote. And therefore it is used for a strategic advantage in the bargaining, when in fact parliament intends it to be a process different from the bargaining, one that only comes in as a last resort; only when bargaining has become intractable. And so we do say that that is a discretionary factor that ought to be taken into account.

PN280

Ventia make a somewhat vague assertion that their offer is consistent with the prevailing economic circumstances. I will be very clear about this. There is no evidence before the Commission to support that submission. I don't even know whether what they mean is the prevailing economic circumstances of Ventia or the national prevailing economic circumstances or in fact the economic circumstances in Queensland. It is devoid of meaning and there is no evidence to support it, and by making that submission, Ventia we say are effectively leading the Commission into error.

PN281

Because to take that into account as a consideration - now it may well be a relevant consideration, but there is just nothing before you in order for you to determine it one way or the other. And so to take that into account that it is consistent with the prevailing economic circumstances, we say is highly problematic and we would as strongly as we can discourage the Commission from accepting that submission at all.

PN282

The bargaining environment is plainly relevant. There are a few different elements to it. Ventia put quite a lot of emphasis on the industrial action as being relevant to the broader bargaining environment. We accept that. They made the submission that - and they rely on the reasoning of the Full Bench in UFU v FRV,

but we say that that reasoning can be distinguished somewhat from the circumstances of this case.

PN283

First of all, we say in that case - and Deputy President, I'm telling you stuff that you already know, of course, but that was in the context of three years of bargaining. So three times the length of bargaining and that's relevant.

PN284

It's also the case and this is all extracted - these are all propositions extracted from the Full Bench reasons, but it's also the case that on the making of that application, the issue of what was agreed and what was not agreed came to the fore and in effect, the parties are in a state of flux at the moment, not knowing what is agreed and what is not agreed. And so of course if an intractable bargaining declaration is not made in that context, if the bargaining environment is highly different to the environment that we find ourselves here, where there is a very small number in effect of issues between the parties. One might understand how the Full Bench in the other case was concerned about what might happen in terms of industrial action, given the way in which the parties were interacting at this stage and bargaining three years down the track.

PN285

And we just say that to use that paragraph in those reasons as a sort of principle, deployed as a principle in the way that Mr Smith seeks to is just not correct. And so we accept that you should look at the industrial action I've addressed you, Deputy President, on the industrial action and the future likelihood of industrial action. But we say that that is really all that's relevant.

PN286

Furthermore, there is just no suggestion that industrial action taken by employees at Ventia would disrupt the ability for Ventia to deliver its services to the Department of Defence. Ventia are jumping to conclusions there. As I said, there are a lot of things that employees could do. They could take industrial action more often. Switch off they could switch up the sort of industrial action. Of course, there are circumstances we would accept where employees might authorise certain action which would be damaging, but there is no suggestion that they will and to discount the prospect of future industrial action as not being relevant is again just incorrect.

PN287

Of course, the bargaining environment is broader than just the industrial action and this again raises this question of the impending contractual negotiations. We say that the bargaining environment has shifted since this application was made. And relevantly, the parties have not engaged in bargaining since those contract developments have come to light.

PN288

And that is a circumstance which is relevant in assessing whether it's reasonable to make a declaration, because the bargaining environment in our submission has shifted significantly, for all the reasons I've addressed the Commission on already. But it's relevant in the exercise of this discretion as well. And it feeds

directly into my last point, at least in relation to this limb, which is making an intractable bargaining declaration here and now is premature.

PN289

It's premature in a few different ways. First of all, the bargaining environment has shifted, and I've just addressed the Commission on that. Second of all, we submit - now we accept that the timing of it is not clear and there is no evidence before you, Deputy President about the exact timing and that's because the parties simply just don't know the timing. But you can - you do know this. Ventia's contract ends in six months' time or seven months' time and so resolution of the contractual situation with the Department of Defence, one would expect, would be sooner rather than later. That's twofold. If Ventia are not to be used then clearly the Department of Defence are going to have to take quick steps in order to either replace Ventia or, as Mr Smith alludes to bring it in-house. Frankly, if that's going to occur, that needs to occur soon.

PN290

And so we say you can draw the conclusion from the evidence before you that there is likely to be answer in relation to the contract in the near future. And that is relevant, because when you look at the sort of timetable now, before the parties, even if you were to make an intractable bargaining declaration in a couple of weeks' time and we wouldn't assume, given the sorts of issues that we've raised we wouldn't assume that you would have the time to write that sort of judgment in that sort of time. And so realistically, we are looking at a situation where we will not being the arbitration process if a declaration is made and until - we've asked for at least mid-February, but it could be later than that, depending on when the judgement comes out and how long the post-declaration negotiation occurs.

PN291

Now, we are then in a world where it is somewhat likely that the contractual situation will be resolved before the arbitration is resolved. And so that's relevant in a couple of different ways. One, if it is resolved whilst bargaining is still on foot, either because the declaration hasn't been made or because it's resolved prior to the post-declaration and negotiation period ending, then the parties will know where they stand in the bargaining much more clearly than they currently do.

PN292

Ventia will know what sort of contract they've got and importantly the employees will know that they have job security. And for all the reasons that I have already addressed that affects the dynamic of bargaining. We think that is plainly so.

PN293

But similarly it is premature because in the unlikely event, we would say at this point, that Ventia are not awarded the new contract, then there is no utility in the Commission or the parties expending the resources or time in an arbitration during the intervening period. We could be faced with a situation where we are halfway through an arbitration which will be a lengthy one and Mr Smith will stand up one day and say, 'Deputy President, we've just been told that we haven't been awarded the contract and therefore we don't need a workplace determination.'

PN294

Now, that is not a situation the Commission should be put in. That is, we say, the expense of public resources that should not be expended, in those circumstances, but also the parties shouldn't be put to that sort of expense. So we say again it's premature on the somewhat unlikely basis, we think, that Ventia won't be given the contract.

PN295

It is also relevant to the arbitration itself will stop assuming a declaration is made, the Commission will undoubtedly have to reach a determination about certain financial outcomes and plainly Ventia's financial situation will be the subject of evidence in the arbitration, in order to justify why it is that the Commissioner ought not make orders consistent with the UFU's claims.

PN296

And so the arbitration doesn't occur in a vacuum. And it is likely that where the contractual situation with Ventia is likely to be resolved in the near future, that that is relevant in determining whether or not to make a declaration now, because otherwise there is a risk that a determination will be made on an incomplete picture. Whether that is an incomplete financial picture or an uncertain future in relation to the contractual situation. Again, that is not in the interests of anybody. And that is a really strong consideration that needs to be taken into account in quite unique circumstances where we are really quite close to knowing what the contract is going to be, whether that's two months, four months or six months, even if we have the parallel arbitration running alongside it, it's likely at some point they are going to collide. Or it's likely that the Commission is going to want to know something about the contractual situation and uncertainty is not helpful in that context. And so we say it's premature. And another reason why an intractable bargaining declaration should not be made.

PN297

Finally, I was going to address the views of the party. It's not contentious and indeed both parties seem to assert that it is a neutral consideration. We accept what the Full Bench has to say. The parties' opinions - and it is really just opinion, Deputy President, you've alluded to it, I think, in your effective opening - the fact that Ventia is of the opinion that it's intractable only goes so far. It should be taken into account, but as should the UFU's view that it's not intractable, for all of the reasons that I've addressed today. And so we don't' think that that consideration really takes the argument either which way and not much reliance should be put on it.

PN298

In the event that the Commission determines to make an intractable bargaining declaration, I must say we agree with the submission that it should not end before mid-February 2024, but I think that depends somewhat. We say that there should be a couple of months of post-declaration negotiations.

PN299

So if a declaration was made tomorrow, then mid-February would make sense. If, however, and we would certainly understand this Deputy President, it took you some weeks to put together a judgment in relation to this application, it may be

that mid-February is no longer appropriate and mid-March is appropriate in that context.

PN300

We think there is value in a post declaration negotiation period. Perhaps because we can resolve the whole thing in light of the changes to circumstances, but at the very least there are four or five issues that I think the parties could most likely in that process, and particularly witness the assistance of the Commission, settle down so that the issues in dispute at the arbitration are narrow.

PN301

And so we think that there is no harm in that being a couple of months. We would certainly put our hand up and say we would want the Commission's assistance through that process, and we think that would be productive.

PN302

So we agree with the submissions made by Ventia with that, I guess, slight alteration. Of course, once the declaration is made, there is a parliamentary intention that the Commission move quickly, and we are cognisant of that. Although we say that the section 235A clearly gives discretion to the Commission to put in place a period of time which is useful. And so we urge that if you make the declaration - of course, we don't urge you to make the declaration, but in the event that you do that the period is a reasonable one so that the parties can, at the very least, narrow the issues in dispute and we think that there is every chance of that.

PN303

Unless you've got any questions for me, Deputy President, they were my submissions. Of course we have filed outlines of submissions, and we rely on those so to the extent that I haven't covered off on things in writing, although I think I have, we rely on them.

PN304

THE COMMISSIONER: Very well. Thank you, Mr Bromberg. Mr Smith, any reply?

PN305

MR SMITH: Just a couple of brief points, if I may, Deputy President. As you know, I went through, in some detail, all of the arguments that were in the respondents outline of submissions and my opening submissions, so I don't need to cover many issues. But there was one point put, which was along the lines of the UFA would be prepared to accept an agreement of three years.

PN306

Now, my instructions are that at no stage has the UFA even remotely put forward a position that it was prepared to accept an agreement of three years from the date of approval. It might be that in making that submission, Mr Bromberg was really talking about a new position from the UFA that it's three years from, you know, some date last year. But the only point I want to make is that at no stage has a position like that been remotely put in the bargaining and as of the current day,

you know, you've got all the facts before you about the position that the bargaining parties.

PN307

So for the UFUA to come along and put a different position today, we don't think much weight should be given to that, because obviously the appropriate time to be putting a position is to the company .

PN308

THE COMMISSIONER: Mr Smith isn't the difficulty with that - even if all that's right (indistinct) this is a completely new and different position, Mr Bromberg on instructions has advised not only your client through yourself, but also the Commission, presumably with authority, and I'm sure that's right, that the UFUA's position was three years.

PN309

Now, it's true that there is no commitment to that. There is no reference point to when it starts. It might be three years from a particular day or date, but it certainly is a change in position, but given that's the case, I mean, can the Commission just ignore the fact that that position has now been advanced?

PN310

MR SMITH: Even put in that at its highest from the UFA, it still is the case, Deputy President, that there is a very significant difference between the parties on wages. So, you know, we hear that position. We don't understand the UFA's position because of all of the issue that we've just identified. There is no clarity about where it starts, where it finishes. As I pointed out, the UFA's position on wages has gone backwards, not forwards.

PN311

So the reason why there hasn't been progress made since June or April, whatever day, is because the UFA hasn't been prepared to shift its position. And the company has had a position as well, based on the cost that it can sustain. So, you know, the facts are that the parties have been in this intractable bargaining situation for some time.

PN312

On the contract negotiations, the point we'd like to make here is that what is being made out of the status of the contact in terms of the UFA's arguments, but Ventia has always been hopeful, of course, that it would e awarded a new contract. It is the existing contractor. It has been hopeful, and it remains hopeful and it's obviously very pleased that at the moment, the department of defence is not going out to other contractors and there has been no announcement that it's going to take the work back inside. So they are all positive things.

PN313

But the terms of Ventia's existing contract are that it delivers value for money and a high standard of service and so on. And these are elements of the new contract. So fact that Ventia may be awarded a new contract should not be any higher than, you know, what the facts sustain. The position that Ventia has reached after all of those bargaining meetings and all of the efforts that it's made

over the last 15 months have been in an environment where it was the existing contractor. It was hopeful that it would be awarded a new contract. And as Mr Bromberg said, there's no certainty about that.

PN314

But, you know, the contract negotiations, yes, are a factor in the bargaining environment and all parties have understood that. But they are not the biggest issue. The biggest issue is that the company has made a fair and reasonable offer, and the union is pushing for a position that is way in excess of that. And you made the point yourself, Deputy President, this issue about the parties' relationship is an interesting one, because the parties have maintained a good relationship all through that 15 months, yet that hasn't led to them being able to conclude an agreement.

PN315

And as we've argued on the facts, we think the arguments are very strong that there are no reasonable prospects of agreement being reached and there is no utility in our submission in any further delay. And there is also quite a focus on the relevance of industrial action. You know, the facts are that the forms of industrial action that have been approved by the ballot, and as I said, Deputy President, the link to the ballot order is there, are - well, they stand there on their facts. They are not strikes and other forms of industrial action that would necessarily cripple the business.

PN316

So that is a fact on the current protected action ballot. But , you know, the industrial action has been ongoing for a lengthy period of time now. The various forms of industrial action that are approved are largely being already taken.

PN317

Now, the letter that Mr Bromberg is seeking to make a lot of mileage out of by Mr Anderson was issued in September, two months ago, that the employees were advised that the company was, at the moment, the only bidder for the new contracts. So there hasn't been any expansion in the industrial action and I'm certainly not encouraging it, but to form the view that there is the prospect and a reasonable likelihood of a big expansion in industrial action, you know, we think you should just look at the facts, of course, and form a judgment on that.

PN318

On this issue of so-called veiled threat, Mr Bromberg took you to the wording in Mr Anderson's letter and, you know, when we are all sitting here months later it's easy to say that should have been worded slightly better, but there is another piece of correspondence that clarifies hat somewhat, because if you were to read Mr Anderson's letter back in - the August letter. 18 August.

PN319

If you were to read that letter, it could be interpreted that the company was saying that you need to vote to approve this agreement or else we will make the intractable bargaining declaration and the Commission will take away your backpay and your sign-on bonus.

PN320

That is not what the company was saying, as is quite clear from the email that forms ZC7 to the witness statement of Mr Costi. Immediately the vote was rejected, immediately after the employees rejected the agreement, Mr Anderson sent an email to Mr Murphy saying, 'Attached is the result of the ballot. We confirm that Ventia are no longer prepared to offer back pay and the thousand dollar sign-up payment.'

PN321

The clear understanding was that the company was making that offer to employees and that if they voted to reject it they would be coming off the table. And they were also, as I pointed out and we still make the point very strongly ,there was no misuse of the intractable bargaining provisions or any veiled threat or dangling of carrots and removing carrots. What there was was honesty and openness. Saying to the employees, 'Here is the offer we are making. Here are the elements of it.' Yes, encouraging them to vote for it and being open and honest about what the company intended to do as really a last resort. It's not the relevant test, but after 15 months the company has made this application. There are no reasonable prospects of an agreement being reached.

PN322

I think I will leave it there, Deputy President, unless there are any questions and so forth.

PN323

MR BROMBERG: Deputy President, sorry, there is one thing and it's not by way of reply to reply, but I do think it's worth bringing to your attention, the first point made by Mr Smith was that they have never heard of this three year concession before. If you turn to ZC5, which is attached to Mr Costi's statement, item 2, nominal expiry, Ventia's position 30 September 2025. 'The UFU's position, the UFU have indicated that it is potentially willing to accept 30 September 2025', which, on my account is pretty close to three years.

PN324

Now we accept that - and only on instruction, although instruction with authority, to convey that we would be contenting for a three-year term from approval. Of course, we would need to further articulate the way in which that affects the wage increases and whatnot. But on nominal expiry date, I was keen to first of all identify that clearly April 2024 is not a workable date anymore, and to update that.

PN325

And to say that it's the first time they've heard is completely contrary to the evidence they have themselves put into issue.

PN326

MR SMITH: Deputy President, just one point on that, unless my maths is incorrect, that document was prepared on 7 June. The proposed UFUA expiry date is 30 September 2025, but that is only two years and three months. Nothing like three years. So I am not sure that takes it any further than I took it before.

PN327

MR BROMBERG: Except that it matches the position of Ventia at that point in the negotiations. So it is the case that it is less than three years, but it is effectively a concession to Ventia's position, albeit one that was without prejudice and now appears in the evidence. So I didn't want to take it any further than to say that at least the changing or shifting sands in respect of the nominal expiry date are not entirely new, albeit we accept we would want to - particularly if an intractable bargaining declaration was made, articulate more clearly whether that's through the post negotiation period or through some other correspondence. We would, certainly on my encouragement, articulate our position so that the parties knew exactly what was agreed and what wasn't and that the terms of the arbitration were clear.

PN328

MR SMITH: We don't disagree with that point, Deputy President. If you do make a declaration we think there is utility in the post-declaration period to not only explore whether agreement can be reached at that point, even though there are no reasonable prospects of that, but at the very least, in similar vein to what the Full Bench identified in UFU v FRV, that there would be utility in the positions of the parties being clearly articulated. We believe we've been very clear from Ventia's perspective, but we're still hearing various positions put by the UFU as late as today. But I'll leave it there. Thank you, Deputy President.

PN329

THE COMMISSIONER: Thank you. So firstly I appreciate the constructive submissions being made to assist the Commission. I secondly I will reserve a decision. I will give it to you in writing at the earliest opportunity. Certainly, I make what was hopefully an obvious point that whilst the period under which the decisions is reserved won't be the last opportunity for parties to take control of your own affairs. Depending on the outcome, the options might narrow, so in that context I would urge the parties to think seriously about their own - controlling their own affairs to the extent to which you are able to do that on an entirely without prejudice basis. Now, I'm not going slow or advance the decision in any unnatural way. I will hand it down when it's ready, but I just make the point that the parties have that window of opportunity if they wish to utilise it, feel free.

PN330

MR BROMBERG: Thank you, Deputy President.

PN331

MR SMITH: Thank you.

PN332

THE COMMISSIONER: Thank you. The Commission will be adjourned and good afternoon.

ADJOURNED INDEFINITELY **[1.11 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs