



TRANSCRIPT OF PROCEEDINGS

Workplace Relations Act 1996

18738-1

COMMISSIONER THATCHER

BP2008/3401

**s.451(1) - Application for order for protected action ballot to be held
Australian Municipal, Administrative, Clerical and Services Union
and
IBM Australia Limited
(BP2008/3401)**

SYDNEY

9.07AM, TUESDAY, 01 JULY 2008

Continued from 27/6/2008

Reserved for Decision

PN273

MR C HARRIS: I appear for the ASU and with me is MS N ARROWSMITH.

PN274

MR S MEEHAN: I continue my appearance with MS N RICHARDSON.

PN275

THE COMMISSIONER: Is Ms Foster appearing?

PN276

MR MEEHAN: She is a solicitor instructing.

PN277

THE COMMISSIONER: I see thank you. Well leave will continue to be granted, yes Mr Harris?

PN278

MR HARRIS: I suppose it's worthwhile speaking to the submissions just briefly before we start. Our argument is a very simple one we argue that the ASU is eligible to cover workers at the IMB Flight Deck and as a result of that the application period that was issued on 1 May is valid. To that argument based on an ordinary construction of the rules of the union and the evidence that we're going to provide on the work that's actually at the flight deck by these workers.

PN279

THE COMMISSIONER: In your submission are these people these employees covered by any award at the moment?

PN280

MR HARRIS: We make no submission on award coverage.

PN281

THE COMMISSIONER: You make no submission?

PN282

MR HARRIS: No, apart from the fact that IBM is a party to the business equipment technical services award.

PN283

THE COMMISSIONER: Thank you very much. Well I've received your outline of submissions and so you're calling a witness?

PN284

MR HARRIS: Yes, we would like to call Sally McManus, the supervisor secretary of the Australian Services Union.

PN285

THE COMMISSIONER: I presume we have no problems with witnesses sitting in the room, have you discussed it, no problems?

PN286

MR HARRIS: Yes, we did.

<SALLY MCMANUS, AFFIRMED

[9.10AM]

<EXAMINATION-IN-CHIEF BY MR HARRIS

PN287

THE COMMISSIONER: Before you start Mr Harris and I can say the same to you Mr Meehan, unfortunately I didn't get back from Melbourne until late and I haven't had a really good chance to read the witness statements, so if you can bear that in mind please as we proceed, thank you.

PN288

MR HARRIS: Is your name Sally McManus?---It is.

PN289

Do you have a copy of your statement?---I do.

PN290

Is this a true and correct statement I trust?---It is.

PN291

I've no further questions.

PN292

THE COMMISSIONER: Yes.

PN293

MR MEEHAN: Commissioner I have some objections to that, if they might be dealt with before you mark them.

PN294

THE COMMISSIONER: Certainly.

PN295

MR MEEHAN: The first is paragraph 19. I'm quite conscious that the rules of evidence don't have strict application in this tribunal, but paragraph 19 comprises hearsay and an opinion and a conclusion on what seems to be as between the parties the ultimate issue for determination, that is whether the nature of the work performed fits within the eligibility rules. This witness is not capable of giving an opinion in that regard, particularly where it is based as is clear on hearsay.

PN296

THE COMMISSIONER: Well we might as well take this one at a time.

PN297

MR MEEHAN: Yes.

PN298

THE COMMISSIONER: In respect of the hearsay or I'll note the objection and I'll take that into account when giving weight to the evidence. In respect of the other one which is based upon that it's opinion not evidence as I understand what you're saying.

**** SALLY MCMANUS

XN MR HARRIS

PN299

MR HARRIS: Yes, the witness is saying I have no doubt that is a conclusion that the work fits within the industry as defining the rule. That's a question this Commission has to decide and a witness' opinion based on what someone else might have told her about the work is a conclusion that goes to that question of

someone who's not an expert and based only on the foundation of hearsay. Firstly, it would not bind the Commission but secondly it could not help.

PN300

THE COMMISSIONER: It certainly won't bind the Commission.

PN301

MR MEEHAN: It could not help at all. It ought to be struck out, it's not evidence that ought to be received in these proceedings Commissioner.

PN302

THE COMMISSIONER: I would be interested to hear from – I think it may be the wording of the sentence and it may be that the matter can be canvassed because the witness would have great knowledge I would imagine of the union's members and what they do.

PN303

MR MEEHAN: Well that's hearsay. If this witness comes here in circumstances where the union chooses not to call any of the employees to give evidence about the work they do, then it's hearsay it's based on what someone else has said who I cannot – whose evidence I cannot test in cross-examination. The very reason we respectfully ask the Commission for the adjournment that we did in order that we could lead evidence about the work, if my client had taken the approach that the union now wishes to, I would simply have put someone in the witness box and said this is – the work is not work within the industry rule.

PN304

It would not have helped the Commission one iota in the task that confronts, just as this evidence cannot. They are the reasons of my respectful submission it should not be received, it can't be remedied because there is no one here from the workforce that is relied upon by the union to give evidence about the work.

PN305

THE COMMISSIONER: Do you want to say anything Mr Harris?

PN306

MR HARRIS: The construction of the rules of the ASU is something that has to be discussed in this case. We think that as the secretary of the union Ms McManus is well placed to offer an opinion on that. Yes, the evidence that's being led is hearsay, but in most cases, the source is identified so it's secondary hearsay and the Commission is not bound by the rules of evidence. I'd argue that to strictly observe the rules of evidence would hamstring in the Commission in making a decision in this instance.

**** SALLY MCMANUS

XN MR HARRIS

PN307

THE COMMISSIONER: I'm going to allow the sentence and I'll give the weight that it should require in the circumstances on the basis that the union can give an opinion as to what work applies to its rules. Yes, Mr Meehan.

PN308

MR MEEHAN: Paragraph 20 that is a conclusion with no foundation.

PN309

THE COMMISSIONER: You're saying that the federal secretary of the union isn't entitled to say who is a member of the union.

PN310

MR MEEHAN: That is not what – what this witness says is not proof of membership. There's been no step taken to bring any documentary evidence of membership.

PN311

THE COMMISSIONER: Well if there's an objection to the evidence I may take that into account, but I'll need - - -

PN312

MR MEEHAN: There is an objection to paragraph 20.

PN313

THE COMMISSIONER: There's an objection to paragraph 20 on the basis of that you assert that Mr Shane Micudaj is not a member of the ASU?

PN314

MR MEEHAN: No Commissioner because we can't make such an assertion, we don't know.

PN315

THE COMMISSIONER: Assertions can be made from the bar table, they're made all the time and they'll be given weight. But if there's an objection from the bar table, then it's a matter of evidence. So if she gives no evidence and Mr Harris makes the assertion and you don't make an objection to the fact, I'm entitled to accept it.

PN316

MR MEEHAN: That's true I'm making an objection to the fact, it's not a fact, it's an opinion. It's someone coming and asserting as a conclusion that that person is a member of the union. That is not proof of the fact.

PN317

THE COMMISSIONER: I just said a minute ago it's a person – you're entitled to make assertions from the bar table, as is Mr Harris and if there's no objection as to the fact I'm entitled to accept a fact. If it's a question that you object to the witness making an assertion that Mr Harris can make the assertion, that's okay I'll hear from Mr Harris.

**** SALLY MCMANUS

XN MR HARRIS

PN318

MR MEEHAN: I must – because I don't understand what the Commission means by that.

PN319

THE COMMISSIONER: I'm saying that as assertions as to facts are made from the bar table all day every day in the Australian Industrial Relations Commission.

PN320

MR MEEHAN: Yes.

PN321

THE COMMISSIONER: And there's significant authorities to the effect that if there's no objection from the other side, from the bar table, the Commission is entitled to accept the assertion. If there is an objection from the bar table as to the validity of the other assertion, then it becomes a question of evidence, a question of let's hear evidence.

PN322

MR MEEHAN: Yes.

PN323

THE COMMISSIONER: At this particular case I was saying is your objection on the basis that you assert that the individual is not a member of the union and if it is so, well then it may become a matter of evidence if it's not well nothing is here no there on paragraph 20 because Mr Harris only has to assert it from the bar table.

PN324

MR MEEHAN: Except Commissioner they are adducing, they are purporting to adduce this as evidence. That is the purpose of paragraph 20 the witness is being asked as a matter of fact is that statement true. I'm saying as the basis of objection that it is simply a conclusion it is not an observation of fact. My client is not in a position to assert one way or the other whether any person is a member, that is a matter entirely – proof of that matter is entirely within the realm of the union.

PN325

THE COMMISSIONER: I were to think so, I would have thought that the branch secretary of the union would know who's their member.

PN326

MR MEEHAN: Well they may, but they to prove that they would show for example documentary evidence of membership.

PN327

THE COMMISSIONER: No, well - - -

PN328

MR MEEHAN: Anyhow that's my objection thank you Commissioner.

**** SALLY MCMANUS

XN MR HARRIS

PN329

THE COMMISSIONER: I'm going to allow the paragraph.

PN330

MR MEEHAN: If it please the Commission. Paragraph 22 in its entirety. It is hearsay and the third sentence patently demonstrates that it is a conclusion as to if I may use the words, the ultimate issue before the Commission because those words pick up directly from the rules of the ASU. So it is purported to be an opinion that his position fits squarely within the rules, and for that reason it should not be received.

PN331

THE COMMISSIONER: I note that the evidence is hearsay, I'll allow the paragraph and give it the weight it deserves.

PN332

MR MEEHAN: Paragraph 23 the second sentence is an opinion, no foundation.

PN333

THE COMMISSIONER: What's your opinion on that one Mr Harris?

PN334

MR HARRIS: Ms McManus has been involved in the IT industry for many years, she was an organiser with the ASU in the IT industry before she had the position of branch secretary and because of her involvement over a long period of time, I think she is in a position to express an opinion on development within the industry.

PN335

THE COMMISSIONER: I would have thought Mr Meehan that this is sort of such general knowledge that even the rules of evidence might apply to the fact that certain things have evolved because of technological advancement. I would have to say that I'm of the opinion like everybody else in the room I think, there's been technological advancement in the industry. Your objection is because it's an opinion is it?

PN336

MR MEEHAN: Without foundation.

PN337

THE COMMISSIONER: Without foundation, okay I'll that objection, I'll delete the sentence.

PN338

MR MEEHAN: If it please the Commission. Paragraph 25 in the first sentence the words, "as no other union had coverage of this industry" that is a conclusion of law it ought not to be received for that reason.

PN339

THE COMMISSIONER: I'll allow the sentence in a tentative way at this stage, but I may ask a question of the witness myself about the basis of that whether that's drawn from reading decisions, or the – or what. So I'll allow that tentatively for the moment.

**** SALLY MCMANUS

XN MR HARRIS

PN340

MR MEEHAN: May it please the Commission. Paragraph 27 that contains a conclusion of law going to eligibility, or the eligibility rules of APESMA for that reason it ought not be received.

PN341

THE COMMISSIONER: So if the sentence stopped after "qualifications" that would overcome your objection?

PN342

MR MEEHAN: It would Commissioner.

PN343

THE COMMISSIONER: Okay I'll allow that objection.

PN344

MR MEEHAN: Paragraph 28 it's an opinion as to a question of law going to the eligibility of other unions to enrol the IBM workers. There is no foundation for it, but in any event it's a conclusion of law. It ought not to be - - -

PN345

THE COMMISSIONER: It's an expression of a belief isn't it?

PN346

MR MEEHAN: Yes, a belief about the capacity of another union to enrol the workers and that capacity is a question of law. That is whether another union within its eligibility rules could enrol these workers.

PN347

THE COMMISSIONER: But this is another case isn't it Mr Meehan where Mr Harris just has to assert that from the bar table, that's what you're saying?

PN348

MR MEEHAN: With respect no, it couldn't, such an assertion would carry no weight.

PN349

THE COMMISSIONER: No, but the ASU has dealings with other unions all the time. They have a view of where their demarcation is with other unions. I'd have to confess that I'm aware but I'm not aware in detail, that there are union agreements between one union between another union as to – not that it should affect this case, but - - -

PN350

MR MEEHAN: May I make this submission Commissioner, if the union here today asserted no other union could enrol these workers that is clearly an opinion. That opinion maybe as a matter of law right or wrong and for that reason would carry absolutely no weight.

PN351

THE COMMISSIONER: I agree with that, I was wondering whether another union might bob up here today. But there hasn't been one. But it's her belief it's not a fact. It's not a statement to say no other union can enrol these workers. It's just saying that's the belief, from the state secretary of the ASU.

**** SALLY MCMANUS

XN MR HARRIS

PN352

MR MEEHAN: But if that's her belief then it would also not be admitted because it has no relevance. If it's been – if it's sought to be adduced for that purpose only, namely Ms McManus personal belief it has no relevance to the proceedings but I suspect it is not being sought to be adduced for that purpose at all, but because the union wants it to be received by this Commission as a conclusive position. That is the ASU are the only union that can enrol these workers. That is, when one has regard to that purpose this evidence in its form is inadmissible.

PN353

THE COMMISSIONER: Well it's an opinion and I'll allow the objection.

PN354 MR MEEHAN: If it please the Commission they are the objections.

PN355 THE COMMISSIONER: Very well the witness statement with the omission of those three changes I'll mark.

**EXHIBIT #H5 WITNESS STATEMENT OF SALLY MCMANUS
DATED 30/06/2008**

PN356 THE COMMISSIONER: Yes, Mr Harris, no questions?

PN357 MR HARRIS: Sorry?

PN358 THE COMMISSIONER: Do you have any questions?

PN359 MR HARRIS: No, no further questions.

PN360 THE COMMISSIONER: Yes, Mr Meehan.

<CROSS-EXAMINATION BY MR MEEHAN [9.27AM]

PN361 MR MEEHAN: Ms McManus did you take any steps yourself to make arrangements for any of the IBM workers that you say are members to come before the Commission today and give evidence about their role?---No, I didn't.

PN362 Are you aware whether anyone else within the union took any such steps?---Yes, I am aware, and no one did.

PN363 Thank you nothing further, Commissioner.

PN364 THE COMMISSIONER: Any re-examination arising?

**** SALLY MCMANUS XXN MR MEEHAN

PN365 MR HARRIS: No, no further questions.

PN366 THE COMMISSIONER: Any further evidence Mr Harris? You'll have the opportunity to make final submissions at the end. So that completes your evidence Mr Harris?

PN367 MR HARRIS: Yes.

PN368 THE COMMISSIONER: Sorry, you're excused then, no sorry I was going to ask – excuse me a question.

PN369

How familiar are you with the work at Baulkham Hills, have you ever been there?---I haven't been there because it's a high security site. But I've been to three meetings of the workers there. I've had extensive discussions with them about their jobs. I've come across and we've got other members who do almost the same work for other companies. It's not unusual for me to be talking to those types of workers and understand the work they do.

PN370

In paragraph 16 you said the vote was 46 people, would those 46 people be within the category of people who in the bargaining period or are they other people? ---All of those people work at the flight deck, not all of them are infrastructure operators. Some of them are batch operators, I think that's in both of our statements that there's two lots of workers. They are all members of the union.

PN371

What was the ground – what was the basis – you were too young to be around in the sixties and the seventies, what is the corporate knowledge of the organisation, paragraph 25 I'm talking about?---As an organiser – look the award was made in 1971, I was born in 71 but I've had lots of discussions with Reg Myers who was the national secretary of the TSG at the time. I also discussed it with him yesterday. But as an organiser I had to make decisions all the time about what workers I could enrol that would you know be under our rules and we could cover in the IT industry. Over the time I've been a union official, which is 14 years, the work has changed, not a lot, but it has changed. So I've had to be mindful of the fact all the time, are these people maintaining, repairing, installing business equipment. As branch secretary I had to make a decision with this group of workers. I wouldn't enrol them or seek to represent them if I didn't think we covered them under the rules. These are decisions I've got to make every day in terms of this area. I do understand that the history of the TSG essentially came out of workers at NCR. We still have members at NCR. I've been involved in negotiations for enterprise agreements at NCR. I do understand that there was quite a big fight for the first award and that that's the business equipment technical services award and that IBM was one of the first respondents. I haven't read the cases, because actually when you go on to the website it only goes back to the mid 80's so it's hard to get things before then and the short time we've had. But I spoke to Reg Myers and he said well at the time IBM objected at that time to being a party to the award for you know the same reasons they are now, so he wasn't very surprised about it at all.

**** SALLY MCMANUS

XXN MR MEEHAN

PN372

In paragraph 24 you say the information technology industry division rules, what are you, which part of your rules are you talking about?---It's rule part 5 rule 5, it's referred to in - - -

PN373

So are we talking about the description – the industry and eligibility part?---That's right, that's correct.

PN374

I wasn't sure what you meant when you said the division. Okay, any thank you very much any questions Mr Meehan arising out of my questions?

PN375

MR MEEHAN: No Commissioner.

PN376

THE COMMISSIONER: Any questions Mr Harris arising out of my questions?

PN377

MR HARRIS: No.

PN378

THE COMMISSIONER: Thank you very much you're excused.

<THE WITNESS WITHDREW

[9.32AM]

PN379

THE COMMISSIONER: Mr Meehan, appropriate to hear your evidence now?

PN380

MR MEEHAN: Yes, Commissioner. Now I owe the Commissioner an apology because I foreshadowed one or two witnesses and regrettably there are more, but I can say that some of them are very short statements and I think we can still get through them in the time that I had foreshadowed.

PN381

THE COMMISSIONER: Look I'm not in a rush, I don't have to rush out of here, but I just ask you to keep in mind that I'll be reading and studying them subsequent to these proceedings.

PN382

MR MEEHAN: Thank you.

PN383

THE COMMISSIONER: If there's anything that you want to emphasise.

PN384

MR MEEHAN: Before Mr Grassie G-r-a-s-s-i-e takes the stand I should say in respect of his statement the Commission may want to spend some time reading that before he gives his evidence. I don't anticipate asking him many questions beyond what appears here.

PN385

THE COMMISSIONER: Could you give me a little bit of the outline of the – the summary of the evidence? What is the evidence of Mr Grassie just in an overview what's the evidence of Mr Plasto, what's the evidence of Ms Harris.

PN386

MR MEEHAN: Yes, well I'll start with Mr Grassie. He has a role within the national operations centre. Part of the national operations centre includes what has been colloquially described as the flight deck and helpfully Mr Grassie has provided some coloured photos, certainly in my copy.

PN387

THE COMMISSIONER: Yes. I've got some photos here.

PN388

MR MEEHAN: Are they coloured ones?

PN389

THE COMMISSIONER: No. Maybe our technology is not up to it.

PN390

MR MEEHAN: Well technology is evolving we hear. There's a coloured set and you will see some photos just show computer monitors but there is a photo of a room do you have that photo Commissioner?

PN391

THE COMMISSIONER: Yes, thank you.

PN392

MR MEEHAN: You can see a room with people observing computer screen monitors and Mr Grassie will give some evidence about people who performed work within that room in a functional area of the national operations centre, which he describes as systems operations. He has managerial responsibility for the systems operations area.

PN393

THE COMMISSIONER: When we say national, do you mean like this is Australia wide isn't it?

PN394

MR MEEHAN: Well the room is located at Baulkham Hills but the technology such as it is permits IBM to provide the services that it does from this room to clients remotely and they could be located anywhere.

PN395

THE COMMISSIONER: Anywhere yes.

PN396

MR MEEHAN: Mr Grassie will give some evidence about two sub groups, if I might describe them that way within system operations and they are infrastructure operations and batch operations.

PN397

THE COMMISSIONER: Yes.

PN398

MR MEEHAN: By way of outline that's the sum total of what he gives his evidence about and he - - -

PN399

THE COMMISSIONER: The nature of their work.

PN400

MR MEEHAN: The nature of their work, precisely. He just gives his observations of fact about what they do.

PN401

THE COMMISSIONER: Okay. He's the national command centre manager?

PN402

MR MEEHAN: He is.

PN403

THE COMMISSIONER: So where is he in the chain of command? He's what, I need to sort of understand he's the head honcho out there is he?

PN404

MR MEEHAN: Well his responsibility is for a part of the operation out there, that is the systems operations. It's convenient if I may invite the Commission to turn to paragraph 10. You'll see there it gives a functional composition of the national operations centre. He gives evidence about sub paragraph 10(1) systems operations. Other witnesses give evidence about the other areas of operation at the flight deck. There are different functional areas within this room known as the flight deck and Mr Grassie is giving evidence about systems operations.

PN405

THE COMMISSIONER: Just trying to get the matrix, are these – I know that it's been talked about before, there's infrastructure operations and batch operations.

PN406

MR MEEHAN: Yes.

PN407

THE COMMISSIONER: But there's these other 10 functional so will they, somewhere or other in each of these functional areas, there's two broad categories?

PN408

MR MEEHAN: No, not within each, no. There's two broad categories within systems operations, you have heard about those before because there was some debate about them when we were last before the Commission. What has happened, we have gone away and in an effort to comprehensively compile evidence about what goes on at the flight deck it has really in a functional sense become clear to us that there are different functional operations besides those that were being debated last time before the Commission.

PN409

So we have endeavoured to bring before the Commission a fulsome factual account of what is done at this centre. On this footing Commissioner, we understand the bargaining notice and the proposed collective agreement to be intended to cover all employees at the flight deck. That is what we're endeavouring to bring before the Commission. The factual understanding of what work is done at the flight deck.

PN410

THE COMMISSIONER: So that there basically the evidence you are reporting is going to purportedly show that there is five functions covering all of the flight deck, of which there are broadly two categories of people some of them, not all of which are employed in respect of every function. Is that what you're saying? So there are some of those five functions that don't include maybe batch operators or some of them don't include - - -

PN411

MR MEEHAN: It's a very specialised immediate - - -

PN412

THE COMMISSIONER: Well the evidence will, reading this statement, that will have to be fleshed out somewhat.

PN413

MR MEEHAN: It will, it will probably be – this was certainly the case for me, the light will finally shine when you have regard to all the evidence but what I'm inviting you to do Commissioner, if it's convenient and you see some benefit is to have some reading time of Mr Grassie's statement so that when he takes the stand if you have any questions or indeed to assist the Commission if there is any cross-examination, you have at least had some quiet time to reflect on what he says.

PN414

THE COMMISSIONER: And what will Mr Plasto – what is his evidence going to?

PN415

MR MEEHAN: Mr Plasto is the manager Sydney Global Network management centre and essentially he will be giving evidence about the network operators and security operators and if you focus again on paragraph 10 of Mr Grassie, you'll see 10.2 and 10.3.

PN416

THE COMMISSIONER: Okay.

PN417

MR MEEHAN: He will bring together that aspect of the operations. Mr Greer who is the manager enterprise service management, that is Gregory Greer, G-r-e-e-r will be called to give some evidence about a role namely, enterprise service manager, there's one such position on each shift at the flight deck. He will give evidence about that - - -

PN418

THE COMMISSIONER: Enterprise what, service manager?

PN419

MR MEEHAN: Incident and management is the jargon. Ms Kaylene Harris who is the service management service support and reporting manager for IBM Australia, will give some evidence about service restoration managers. Her evidence is also reasonably brief.

PN420

THE COMMISSIONER: So that's going to 10.4 and Mr Greer is going to 10.5?

PN421

MR MEEHAN: Yes, it covers off those areas.

PN422

THE COMMISSIONER: Are you suggesting I read them all?

PN423

MR MEEHAN: Well if your Honour is minded to do so, I would see some benefit in doing that. Mr Grassie in particular it's within his area that the lion's share of the workers are engaged and his evidence is somewhat more detailed and lengthy than the others.

PN424

THE COMMISSIONER: Well I think it's a good suggestion, do you have any problems with that Mr Harris? I don't want to – I'll probably take 15 minutes.

PN425

MR HARRIS: May it please the Commission.

PN426

THE COMMISSIONER: I'll adjourn until then.

<SHORT ADJOURNMENT

[9.42AM]

<RESUMED

[10.01AM]

PN427

THE COMMISSIONER: Yes, thanks Mr Meehan.

PN428

MR MEEHAN: Thank you Commissioner I call Peter Grassie.

<PETER GRASSIE, SWORN

[10.01AM]

<EXAMINATION-IN-CHIEF BY MR MEEHAN

PN429

MR MEEHAN: Is your full name Peter Grassie?---Yes.

PN430

You're the national command centre manager for IBM Australia Limited?---Yes.

PN431

Have you prepared a statement for the purposes of these proceedings?---Yes, I have.

PN432

Do you have a copy of it with you?---Yes, I do.

PN433

Is it a signed copy?---Yes, it is.

PN434

Do you say that the contents of that statement are true and correct to the best of your knowledge and belief?---Yes, it is.

PN435

I tender the witness statement of Peter Grassie as a signed witness statement dated 30 June 2008 as filed, at least I think it was filed.

PN436

THE COMMISSIONER: Very well, there's no objection.

**EXHIBIT #M1 WITNESS STATEMENT OF PETER GRASSIE
DATED 30/06/2008**

PN437

MR MEEHAN: Now Mr Grassie is there a member within your team by the name of Shane Micudaj?---Yes, there is.

PN438

What position does Mr Micudaj hold?---He holds the infrastructure team leader role within the Baulkham Hills flight deck.

PN439

Now can you in your own words – I withdraw that – have you observed the work he performs?---Yes, I have.

PN440

Is that something that you observe with some degree of regularity?---Yes, yes.

PN441

Can you in your own words describe the work he performs please?---Okay, Shane's role as a team leader he provides forms monitoring services for our customer base at an infrastructure level which is hardware and software monitoring.

PN442

Okay and by what means does he monitor those things?---He monitors that through a console.

**** PETER GRASSIE

XN MR MEEHAN

PN443

Now you've used the word console, in your witness statement and you describe what it is, the Commissioner has had an opportunity to read your statement but that word is industry jargon, if I can suggest, what exactly is a console?---A console is a screen, a computer screen with a keyboard and a mouse attached to it. There is behind that screen, or attached to that screen is a internal screen which presents events - - -

PN444

Just pause there?---Yes.

PN445

When you say presents events, do you mean a display comes up on the screen?
---Yes a display comes up on the screen and messages are then presented on that display.

PN446

Okay so pausing there, am I accurately summarising what you have just said, that Mr Micudaj monitors a screen on which is displayed messages about events?
---Yes.

PN447

Now when you use the word event what do you mean by that?---They are indicators of the state of the computer systems. That relates to whether the systems are in a healthy or normal status, or an abnormal status. So normal obviously indicates that they are within tolerance abnormal is something that is out of tolerance.

PN448

When you are talking about systems, and bear in mind if you would, the Commission may not have a full understanding of the service offering of IBM from the flight deck, what are you talking about when you describe systems?

---Yes, a computer system is the interrelation between computer hardware and software that resides on the hardware, or server.

PN449

So that when Mr Micudaj is monitoring these events via the console, via the displays on the console, are the events describing the state of the system?

---Correct.

PN450

Does he do anything else?---He performs change management and team leadership. So he schedules work across his team of operators.

PN451

Can you tell me whether you agree or disagree with this statement. His position involves maintaining, servicing, repairing and structurally altering this equipment, by which I mean computers?---I disagree.

**** PETER GRASSIE

XN MR MEEHAN

PN452

Do you agree or disagree with this statement, he monitors computer hardware and infrastructure of IBM customers and seeks to resolve problems as they arise?---I agree.

PN453

You agree because that monitoring is what you have just described?---Because it is monitoring.

PN454

Do you agree or disagree with this statement? Should the problem involve a need for an on site technician, Mr Micudaj will work with them to repair, maintaining service or structurally alter the equipment?---I disagree.

PN455

Does in your observation, does Mr Micudaj ever leave – I withdraw that – ever go off site as it were to perform his work?---Could you repeat the question?

PN456

Yes, does he ever – does Mr Micudaj ever have to go off site that is leave the flight deck, for example to go to a client's premises to perform any work?---He does at times.

PN457

What would be the nature of what he performs on those occasions?---I'll give an example, he would provide in recent times, he's provided support or as it were – sorry I'll give the example of a recent incident where we required to provide escort services to our locations in Sydney and he provided those escort services.

PN458

You better explain to the Commission what you mean by escort services?
---Basically he - - -

PN459

THE COMMISSIONER: Doesn't sound good to me?---Sorry, no, some third party engineers or third party, or second tier support groups with inside IBM do not have the necessary clearances to attend particular locations. Shane has those

security clearances and can provide that escort service. So basically he provides a watching brief over someone performing a particular task in the environment.

PN460

MR MEEHAN: It doesn't go does it further than the watching brief?---No.

PN461

I think you also mentioned some team leadership in his role?---So he as a team leader, he has a group of infrastructure operators that report to him directly on the flight deck and he schedules their workload, acts as a technical consultant for them. So if they've got questions regarding a particular event or course of action they will use him as a point of reference for direction.

**** PETER GRASSIE

XN MR MEEHAN

PN462

Are you able to say and I don't want you to guess, but are you able to say from your own observations within a range what proportion Mr Micudaj's time would be spent on the monitoring of the console?---At least 70 to 80 per cent.

PN463

Are you able to say how the balance of his time might be broken up by reference to the other tasks you've described?---Can you give me some clarity on that?

PN464

Yes you said at least 70 per cent, so we assume that there's at least 30 per cent of time not spent - - -?---Okay yes, so that's the leadership to the team preparation of particular schedules and reporting to his direct management team as well.

PN465

Thank you, nothing further Commissioner.

PN466

THE COMMISSIONER: Yes Mr Harris.

<CROSS-EXAMINATION BY MR HARRIS

[10.11AM]

PN467

MR HARRIS: From the point of view of IBM's clients, what is the service that IBM provides?

PN468

MR MEEHAN: I object to that. How can he answer from the point of view of the clients?

PN469

THE COMMISSIONER: Ask him – yes, can you just reword the question?

PN470

MR HARRIS: Sorry I'll rephrase that.

PN471

Are you aware of how IBM markets the services that are performed by the IBM flight deck to its clients?---Yes, I'm aware of that.

PN472

How is that done?---Sorry the marketing?

PN473

Yes, that's right how are the services presented in that marketing?---In regards to our customer as a presentation?

PN474

Yes?---That's how they do it as a presentation as an offering.

PN475

What would the content of that be?---The description of the service.

PN476

How would they describe the service?---A monitoring service.

**** PETER GRASSIE

XXN MR HARRIS

PN477

Right what kind of equipment do workers on the flight deck work with?---Keyboards, mice, screens.

PN478

Yes you said they are monitoring, what kind of equipment are they monitoring? ---Servers.

PN479

What types of servers?---There are several types.

PN480

Could you tell us about?---The classifications generally are mainframe servers, which are high end systems, mid range servers and distributed systems.

PN481

When they are monitoring for events, what are those events, what's actually happening?---The events are as I said before, providing status of the infrastructure, hardware and software on the system in those computer systems.

PN482

What kind of status would be reported in an event?---Whether it is okay.

PN483

Yes?---Whether it's got a - has identified a deviation from steady state or alternatively an action that the operator may need to perform.

PN484

Okay and what parts of the system might those events relate to?---As I said before hardware and software.

PN485

Hardware and software and the actions that they are required to perform as a result of these events, what kind of actions would they be required to perform?---Problem determination and which may indicate following a procedure that they had documented in the environment.

PN486

Right and would that involve - what would that involve doing to the server? ---There's many things that can be done to a server, but generally it's problem determinations and analysis of that problem and then following the procedure to potentially call out support.

PN487

Okay I'd like to take you to a document that was included in your statement as PG2, it is the position descriptor for the national operations centre infrastructure operator. Now Mr Micudaj supervises a team, is that correct?---Yes, leads a team.

PN488

What's the job description of the people he supervises?---Provides monitoring services.

**** PETER GRASSIE

XXN MR HARRIS

PN489

Sorry, what's the position title of that?---Okay, infrastructure the one in PG2 is the infrastructure operator.

PN490

So it's the same job, for people that change supervisors this is the job description for that?

PN491

THE COMMISSIONER: I think he's saying in the team that he leads?---Yes, so that's the team - - -

PN492

What are the designations of the people in the team he leads?---Infrastructure operator.

PN493

MR HARRIS: Would I be able to get you to read out please the sixth dot point, under the basic purpose of the job?---Proactively identify and fix problems and potential problems before they adversely impact on users.

PN494

How do the infrastructure operators fix problems?---Based upon their procedures and experience.

PN495

Could you go into a little more detail please?---I need an example, what would you specifically want to know?

PN496

Could you give me an example?---An example of a proactive fix. They'd be -- well for example, proactively identify most of the operations and their alerting is by exception so a component where they'd be performing proactive identification is issuing commands to the console and getting information on the status of the particular environment they're looking at.

PN497

THE COMMISSIONER: I think the question is going to monitoring includes -- it's clear from the evidence that monitoring includes problem identification and problem analysis, but the question which he is going to I think, and I would certainly be interested is to what then happens when there is a problem and that's analysed as something, what do they do versus calling in other than saying getting an engineer or a technical officer in, I think?---Yes, Commissioner. In the primary if I look at it like that, yes there is a large percentage of alerts and actions that do go out to technical support because the flight deck is a first level

environment which is really around problem analysis, problem determination. Docketing that problem, so putting that problem and describing that problem into a system and handing that off through their analysis to a support group to take, to provide direction and fix. So that's the primary role at first level. An example that I would see around proactive identification is for example on a computer system there is storage or disk - - -

**** PETER GRASSIE

XXN MR HARRIS

PN498

They are running out of disk, they are running out?---Running out of disk, and disk space and there would be an alert that potentially presented, or a threshold that would be breached and in each level of those thresholds of breaches, the operators would perform a level of analysis and one of their actions would be to if we were reaching a critical point would be to move the data that is housed on those systems, off to an offline source, such as a tape. That would be a common function that they would perform.

PN499

Okay would you mind reading for me the seventh dot point?---Maintain system hardware and infrastructure performance at contractually agreed levels.

PN500

So what hardware and infrastructure are we talking about in that line of job description?---The systems that they monitor.

PN501

In relation to the contractually agreed levels in terms of the contracts what kind of services does IBM promise to offer in those contracts?---Based upon my experience there are over 1000 service levels that we manage to and they are not actively known by the operators, so it's a difficult statement to provide as to what contract service levels. Basically if I give it at a high level, that the systems are available for our customers. That is the primary service level we try to attain.

PN502

Okay I'd like to take you to the second page of the position description. So on the second page and going over to the third page, there's a box in the table labelled problem and change, can you see that?---Yes.

PN503

So what kind of problems would come up for an infrastructure operator?---The one I described previously space.

PN504

Meaning disk space?---Yes.

PN505

THE COMMISSIONER: That's an example and it's a common example, but is it – are there a divergence of other issues? I'm not really asking to tell us all, every problem that comes along but?---Yes, there are others, absolutely.

PN506

Ranging from the simple to the more complex, a couple of examples?---Yes, more complex would be from my experience you lose visibility to the system so you cannot monitor, is a complex problem you can't see what's occurring with the

infrastructure. That's quite a complex issue to deal with. Simple, could be simple as a user who is logged on to the system can't perform their tasks and they require their user access to be cancelled, so they can log back in and perform their functions, so it might be locked up for some reason similar to what we have with our normal laptops and desktops sometimes, you can't physically log on. That's probably a simple case.

**** PETER GRASSIE

XXN MR HARRIS

PN507

MR HARRIS: On the third page, still within this box, the second dot point?
---Third page?

PN508

Yes in the table on the left-hand side of the column, the second dot point?---Is that the implementation of changes?

PN509

Yes, to the flight, can you read that out please?---Implementation of changes to the flight desk systems, products and devices.

PN510

What kind of devices are you talking about, is the description talking about in that section?---I'm not sure. I would refer to the point before that or two points before that, systems. That would be the mainframe platforms and the mid range platforms that they monitor.

PN511

I just want to take you to paragraph 6 in your statement which is a description of a national operation centre. Is there a room in the national operation centre called the media room?---Sorry just let me find the statement. Sorry what page was that?

PN512

Page 2 of your statement paragraph 6?---Right yes.

PN513

Is there a room in the national operation centre called the media room?---It may be, not that I'm -- not that I know, not that I'm aware of.

PN514

Is there a room in the national operation centre where there are backup tape decks?---Yes.

PN515

So what exactly is in that room?---Tapes, backup tapes as you mentioned and tape drives.

PN516

How do they fit within the system within the national operation centre?---They are peripheries to the servers.

PN517

Who has access to that room?---The media operators and the management.

PN518

Who are the media operators?---They are a third party organisation that IBM has engaged to provide that service.

PN519

If media operators can't solve a problem, who does solve that problem with the tapes?---The operators have visibility of the tape management in the environment and they may be called upon to provide assistance.

**** PETER GRASSIE

XXN MR HARRIS

PN520

THE COMMISSIONER: When you said operators, you mean infrastructure?
---Sorry the infrastructure operators, yes.

PN521

MR HARRIS: I'd like to show the witness a document if I may? Mr Grassie can you tell me what this document is?---It's a document from our personal development tool which outlines the skills, high level skills required of an operator.

PN522

Are infrastructure operators computer operators?---Yes.

PN523

How is this document used within IBM?---It's used to assess skills.

PN524

To assess the skills of the infrastructure operators?---Of operators.

PN525

THE COMMISSIONER: Mr Harris if this is going to evidence, we best mark it as an MFI it's not evidence, you are not seeking to tender it as evidence?

PN526

MR HARRIS: Yes, I am seeking to tender it as evidence.

PN527

THE COMMISSIONER: Any problems?

PN528

MR MEEHAN: Well before you mark it Commissioner I don't know what it's relevance is yet.

PN529

THE COMMISSIONER: No. Okay I'm going to mark it something because otherwise the evidence won't make much sense if he is going to be asking questions on it.

PN530

MR MEEHAN: He can ask questions but then he might wish to tender it.

**MFI# H1 DOCUMENT HEADED PD PERSONAL
DEVELOPMENT TOOL**

PN531

THE COMMISSIONER: Thanks Mr Harris.

PN532

MR HARRIS: Mr Grassie can I ask you to look at page 4 of that document?
---Yes.

PN533

Can I ask you to please read the contents of the second box on that page, it begins proficiencies for maintain IT services?---Services, maintain operational IT systems by performing all or combinations of the following, install, relocate, hardware software components and upgrades for operational use, diagnose, track, fix problems, faults identified in an operational system, manage problems to resolution perform day to day operational procedures, backup, predictive, prevent and maintenance, logs, tape management, disk-management, use hardware, software support processes, and structures in order to maintain an operational system, operate the IT system by use of console command control, monitor manage the problem for port tracking systems used in an operational IT environment.

**** PETER GRASSIE

XXN MR HARRIS

PN534

I'd like to show the witness another document.

PN535

THE COMMISSIONER: Are we finished with this document?

PN536

MR HARRIS: Yes, we are.

PN537

THE COMMISSIONER: Are you seeking to having it tendered as evidence.

PN538

MR MEEHAN: I object to the tender, relevance.

PN539

THE COMMISSIONER: Yes, Mr Harris.

PN540

MR HARRIS: The witness has told us that the document describes the skills that are assessed for operators, infrastructure operators.

PN541

MR MEEHAN: No, he didn't that's not the evidence at all. He was asked whether the infrastructure operators were computer operators and then he was asked to read out this document that describes the skills and left it at that point.

PN542

THE COMMISSIONER: I'm just having some trouble understanding the objection Mr Meehan. This document is a development tool personal development tool for infrastructure operators I thought it was said. Are you saying it's not.

PN543

MR MEEHAN: He was asked whether the infrastructure operators were computer operators. He was then asked to go to page 4.

PN544

THE COMMISSIONER: Am I not correct in the evidence I can't read it back of course, as we don't have real type transcript, but as I understand the evidence was that the term computer operator in this document was inclusive of an infrastructure operator.

PN545

MR MEEHAN: He agreed that an infrastructure operator was a computer operator. He then was asked to read this paragraph on page 4, he wasn't asked whether or not that described the tasks of any of them, performed by an infrastructure operator. To then tender it as proof of anything is surprising but it's not relevant. It doesn't prescribe, it hasn't been the witness hasn't been asked - - -

PN546

THE COMMISSIONER: Well I'm going to allow it to be admitted as evidence and you'll have the right to cross-examine. So I'll change that to exhibit H.

PETER GRASSIE

XXN MR HARRIS

EXHIBIT #H6 DOCUMENT HEADED PD PERSONAL DEVELOPMENT TOOL

PN547

THE COMMISSIONER: Yes, Mr Harris.

PN548

MR HARRIS: Well to go back to the previous document does that document the whole document describe the skills that are required of infrastructure operators? ---The whole document no.

PN549

Does the box start proficiencies to maintain IT services, describe the skills that are required of infrastructure operators?---No.

PN550

I would like to move on to this document if we can. Mr Grassie can you tell me what this document is?---It states a support element operations guide.

PN551

Have you seen this document before?---No.

PN552

You've never seen this document before?---No.

PN553

I've got no further questions on that. I have no more questions thank you.

PN554

THE COMMISSIONER: I might just a couple of questions. Mr Grassie I'm just trying to understand the relationship between the let's just say, the infrastructure operators and say, the engineers and technical support, they're different categories, aren't they?---Correct.

PN555

Can you just give me an idea of how they relate? Are all three categories employed at the flight deck, what we call the flight deck? Or is that national

command centre has a broader function, is that what I should be listening to?
Paragraph 4 you say:

PN556

National command centre the purpose of that is to store manage and process their business data.

PN557

?---Yes.

PN558

That is broader than the flight deck?---Correct.

PN559

That's what you are?---Correct Commissioner.

**** PETER GRASSIE

XXN MR HARRIS

PN560

So we've got this national command centre it has a flight deck, but there are engineers and technical officers who are also engaged maybe at the national command centre, but their work is different from the infrastructure operators, is that what you're saying?---Yes.

PN561

So how do they relate to each other?---The operations as I said before, the operations team, the infrastructure operations team are the first level support. So the alerts present them with information. The engineers are the resources that IBM or third party organisations have that perform the physical maintenance and report of hardware, right. Then there are also software engineers, but they're not generally engaged in support of the hardware. So the operators receive information about a potential problem, or an actual problem on the hardware or software and when it comes to the repair of hardware that is an engineer's responsibility. Within IBM there is very clear demarcation on responsibilities. The equipment as you could appreciate is very expensive and having the wrong skilled resource providing support to that hardware could be catastrophic for a customer's business. Hence why IBM has a distinction of a hardware engineer that performs that maintenance and repair on that equipment.

PN562

No matter how significant no matter whether it is from mainframe to a small PC or something?---Correct, correct, there really isn't – I mean the only thing that changes is the scale of the equipment itself right because servers have bigger componentry effectively.

PN563

What about the technical officer, what do they do? Are they the system designers are they?---No, they are – no designers sit further back in the organisation. Technical support are the experts in the particular componentry for example at a software level they are the people that understand with authority the capabilities and issues with that software, or for example, operating system like Windows. They are the acknowledged experts in that field. So operations again come back to the monitoring function, analysis, remember they see a lot of the similar alerts over time, and they become reasonably au fait with understanding what actions

they need to take, so they're quite responsive in that space. They are not dealing with unique events all the time. you are dealing with common as it were events. so their experience allows them to do problem determination you know provide that information into a problem docket which is then handed to a second level support person to go and take the necessary action to resolve the problem.

PN564

So they're there doing their monitoring, they're doing the analysis some things which are what you would call probably more relatively straight forward they're following procedures or you know doing the business about the memories and things like that and there is at some point where it becomes of a complexity which just more requires them to refer that to technical people?---Yes, the complexity and criticality they are the two key points. Complexity drives a level of a further analysis, so basically an operator will provide a starting point for a second level support person to determine what course of action they need to take. Criticality is the other where you've got a high impact event so you're having significant impact to a customer's business and that second level support should be engaged immediately to take action to recover the situation. They're the two things that drive that action at second level.

**** PETER GRASSIE

XXN MR HARRIS

PN565

If I'm employed by one of your clients and I'm having a problem getting in or to a system, do I, does my say, I don't might be an airline or something, do we have a help desk?---We do.

PN566

So I can have a help desk, but this is a system?---Yes, this is a system environment. A help desk deals with a user request, and they log that and obviously they have a set of procedures and questions they ask to gather information that may be then distributed out to another support group within the organisation for resolution. That's the help desks responsibility the first level for a user.

PN567

The systems sorry, the infrastructure operator vis a vis the batch operator, is that what again a question of complexity?---In our environment we've segmented the role between infrastructure operator and batch operator given the large amounts of work that we perform in those two areas. For example I think my statement says there are 17,000 servers that we monitor, in our environment for customers. There are about 65million batch jobs that are monitored. So given both scale, the segmentation of those responsibilities has allowed us to specialise those skills within the environment. But other organisations take other paths to provide that support.

PN568

Is this what I call exhibit H6, is that relevant a batch operator?---Yes, components of it would be relevant.

PN569

So this is like a check list that could apply to various jobs, not to all jobs is that the case?---In our computers operator's role, yes. But not all components

Commissioner could be aligned, again it depends on the environment that you're in this is a generic skills profile that IBM as an organisation has developed.

PN570

23, infrastructure relays do not work in isolation they work as part of a team, is this the team leader is part of that – is the leader of that team or is the team leader a part of another team? I'm just trying to work out which team we're talking about?---Basically it's saying that the role they work in the flight deck they are a team leader, they are also the infrastructure operators, they must work in unison given the large amount of workload that comes into the environment they may draw on our resources within their team or outside their team to provide support to the customers. So for example Commissioner they might draw on a batch operator to give them, given that a lot of the team members out there have considerable years of experience, they could provide support in situations of high workload for example, in the infrastructure space, we may move a batch operator there for a period of time to provide that support. So there's not clear lines, or hard lines of demarcation that is something that the team leaders and the management team would make decisions based upon the workload coming in.

**** PETER GRASSIE

XXN MR HARRIS

PN571

Is some of this the relevance is when does go to second level support is that that is the cut off between when work is done in a more routine way, the work is done by the infrastructure operator to when it's done by someone else, or the batch operator in their case and someone else?---Yes.

PN572

So what's this cut off it seems to be key to this evidence as to when that cut off is, when it's done at the first level support and when it's done at the second level of support. You talked about before I think when it was criticality and?
---Complexity.

PN573

Complexity yes, same applies?---The same applies yes. You know the workload that is presented to the operators with the events are defined by second level support. They define what alerts are critical for an operator to receive. So you know the operators perform that function based upon someone else defining what alerts they receive in the environment. The word, defining is that second level support has expertise and knowledge and they identify through their experience what is important for operations to provide further level support to. Key to that is that problem determination and representation of that detail in to a problem docket, that is the key work load driver for our organisation a problem docket. A definition of a problem and the ownership of that problem to a support group.

PN574

So the whether is done by at a first level or at a second level is that what you're saying, it depends upon the experience and the knowledge and competency of the individuals?---Yes, yes, I mean you could get as I said in describing a simple problem before with space, I mean you could define some of that to a low level. In the environment there are hundreds of thousands messages presented at a day to the operations teams. You know, their core responsibility is to as I said it is by

exception so its the systems saying this is a problem or this is an action I need you to take and they've procedures against that.

PN575

Thank you Mr Grassie. Mr Harris is there anything you want to say, any questions you want to ask in response to the questions I've asked?

PN576

MR HARRIS: Yes, I do have some questions.

PN577

Mr Grassie would you agree that when infrastructure operators find a problem that they fix it when they can?---If it's within their job their responsibilities, if the procedures indicate that, yes.

**** PETER GRASSIE

XXN MR HARRIS

PN578

Yes, and if required would infrastructure operators reset a system?---Yes.

PN579

What would the effect of resetting the system be on that system?---It would effectively a restart of that system, so it would have a major impact.

PN580

If required would infrastructure operators change the logical partition controls in a system, would they change those settings?---If requested yes.

PN581

What effect would that have on the system?---Change the performance of the system.

PN582

Right and how would it do that?---Well it depends on what settings they change, but generally they would reset to give more capacity to the server for processing.

PN583

If required would infrastructure operators configure channels of a system on or off?---Yes, logically yes.

PN584

What effect would that have on the system itself?---Again it depends on what they're doing with it. You know I'm not, it could have catastrophic effects, it could have positive effects.

PN585

It might help if you could explain what a channel is I suppose in the system?---It's a connection to some a device. So a disk or a tape or something like that. So it's basically just you know as I said a connection most likely the configuration is a logical change right, they don't physically touch any cabling and they are not required to.

PN586

Would you say that if required infrastructure operators would configure reconfigurable channels?---Sorry, can you repeat that again?

PN587

Yes, if required would an infrastructure operator configure reconfigurable channels, so that if they could be configured to connect to a different system? ---Logically?

PN588

Yes?---If they – yes.

PN589

So what would that do to the device that's attached to that system?---Takes it from one system and puts to another.

**** PETER GRASSIE

XXN MR HARRIS

PN590

Okay?---Logically.

PN591

Okay would you say that's structurally altering that system?---No.

PN592

Would you say that monitoring equipment is part of maintaining it?---No.

PN593

I have no further questions.

PN594

THE COMMISSIONER: Yes, Mr Meehan.

<RE-EXAMINATION BY MR MEEHAN

[10.47AM]

PN595

MR MEEHAN: I think you were asked if required would an operator be required to configure channels on a system on or off, to the uninitiated can you explain what configuring channels on a system on or off means?---On their consoles they have the ability to issue commands, configuring on or off is like turning on or off through a command, a connection.

PN596

I think you answered, yes logically?---Yes.

PN597

When you say logically what do you mean by that?---Well they don't physically take a cable and go and plug it from one system into another, there is a configuration that allows us to logically move, logically meaning you can have a device that switches one connection to another system and that's through a panel, a console.

PN598

If at all when would that be required of an operator?---When requested by a support person. Some of those activities are critical and can have an impact on a system and they would need support and advice to do that.

PN599

You mean support person above them in the - - -?---It could be a support person in second level and it could be an engineer who requires that.

PN600

Are you able to say from your own observation whether that happens as a matter of course, or infrequently or ever?---It happens I'd say infrequently in the environment where you've got that activity, and you're normally part of change management you don't make significant changes without controls and that would be under the authority of the change management system.

PN601

It's something is it done just by entering a command on the computer system they are sitting at?---Yes.

**** PETER GRASSIE

RXN MR MEEHAN

PN602

I think you were asked would operators change logical controls, I may have misunderstood the question and I think it was put, if requested. What are logical controls?---It's the same thing I described previously, it's in my view, they are the two are one and the same.

PN603

Again is that something that is just done by entering a command on a keyboard?---Correct.

PN604

Nothing further Commissioner.

PN605

THE COMMISSIONER: Thanks very much you're excused.

<THE WITNESS WITHDREW

[10.50AM]

PN606

THE COMMISSIONER: I'm just going to adjourn for 10 minutes.

<SHORT ADJOURNMENT

[10.50AM]

<RESUMED

[11.09AM]

PN607

THE COMMISSIONER: Thank you, yes Mr Meehan.

PN608

MR MEEHAN: Thank you Commissioner, I call Kaylene Harris.

<KAYLENE BETH HARRIS, SWORN

[11.10AM]

<EXAMINATION-IN-CHIEF BY MR MEEHAN

PN609

MR MEEHAN: Is your full name Kaylene Beth Harris?---Yes.

PN610

You are currently employed as the service manager and service support and reporting manager for IBM Australia Limited?---Yes.

PN611

Have you prepared a statement for these proceedings?---Yes, I have.

PN612 Have you signed that statement?---Correct.

PN613 Do you have a copy with you?---Yes.

PN614 Do you say that the contents of that statement are true and correct to the best of your knowledge and belief?---Yes.

PN615 I tender the statement of Ms Harris dated 30 June 2008 as filed.

**EXHIBIT #M2 WITNESS STATEMENT OF KAYLENE HARRIS
DATED 30/06/2008**

PN616 MR MEEHAN: Ms Harris in paragraph 15 of your statement in the last sentence, you say the resolver groups may consist of IBM employees contractors or employees of third party vendors – focusing for a moment on the IBM employees where are those resolver group employees located?---They can be at many locations around the area. They can be at client’s sites or IBM sites.

PN617 Are any located at the flight deck?---Not that I’m aware of.

PN618 Thank you, nothing further your Honour.

PN619 THE COMMISSIONER: Yes, Mr Harris.

<CROSS-EXAMINATION BY MR HARRIS [11.12AM]

PN620 MR HARRIS: Do you work as an infrastructure operator at the flight deck?
---No.

PN621 Do you supervise infrastructure operators?---No.

PN622 No further questions.

**** KAYLENE BETH HARRIS XXN MR HARRIS

PN623 THE COMMISSIONER: The service restoration in house, who do they - are they responsible for individuals, in the supervisory sense?---They are in the sense that they are a single point of contact for resolver groups, for account teams, and for the customer, the direct customer of IBM so they will be coordinating.

PN624 Yes, coordination, they don’t actually supervise in a sense?---No.

PN625 Any questions arising out of my question Mr Harris?

PN626

MR HARRIS: No, Commissioner.

PN627

THE COMMISSIONER: Any response? No? Thank you very much you're excused.

<THE WITNESS WITHDREW [11.14AM]

PN628

MR MEEHAN: I call Gregory Greer.

<GREGORY NEVILLE GREER, SWORN [11.14AM]

<EXAMINATION-IN-CHIEF BY MR MEEHAN

PN629

MR MEEHAN: Is your full name Gregory Neville Greer?---That's correct.

PN630

You're currently employed by IBM Australia Limited as the manager enterprise service management?---That's correct.

PN631

Have you prepared a statement for the purpose of these proceedings?---Yes, I did.

PN632

Have you signed your statement?---Yes, I have.

PN633

That is dated 30 June 2008?---That's correct.

PN634

Do you say the contents of the statement are true and correct to the best of your knowledge and belief?---Yes, they are.

PN635

Commissioner I tender a signed statement I think the filed statement is not signed.

PN636

THE COMMISSIONER: Thank you.

PN637

MR MEEHAN: Copies have been provided to my friend.

EXHIBIT #M3 WITNESS STATEMENT OF GREGORY GREER

PN638

MR MEEHAN: May it please the Commission no further questions.

PN639

THE COMMISSIONER: Yes, thank you, yes Mr Harris.

<CROSS-EXAMINATION BY MR HARRIS [11.15AM]

PN640

MR HARRIS: Mr Greer do you work as an infrastructure operator at the IBM flight deck?---No, I don't .

PN641 Do you supervise infrastructure operators?---No, I don't.

PN642 I have no further questions.

PN643 THE COMMISSIONER: So when you look at paragraph 19 of your statement?
---Yes, Commissioner.

PN644 It says:

**** GREGORY NEVILLE GREER XXN MR HARRIS

PN645 *Could involve involvement from batch operators people working remotely that dial into the central systems, contractors, engaged by the data centre management services or IBM engineers.*

PN646 ?---Yes.

PN647 We've heard previously evidence relating to people called infrastructure operators, they would not be amongst that group of people, would they or would they not be amongst that group of people? This is when the situation arises as I recall?---Generally no. Infrastructure structure operator could be just a collective term for a number of roles perhaps, but you know it could be applied rather loosely to cover a whole range of different roles.

PN648 I see so the - - -?---In my own terminology, no, not at all.

PN649 Okay, yes Mr Harris any questions arising out of my question?

PN650 MR HARRIS: No.

PN651 THE COMMISSIONER: No, thank you, you are excused.

<THE WITNESS WITHDREW [11.17AM]

PN652 MR MEEHAN: Commissioner I call Grant Plasto P-l-a-s-t-o.

<GRANT PLASTO, AFFIRMED [11.17AM]

<EXAMINATION-IN-CHIEF BY MR MEEHAN

PN653 MR MEEHAN: Is your full name Grant Plasto?---Yes.

PN654

You are the manager Sydney global network management centre for IBM Australia Limited?---Yes.

PN655

Have you prepared a statement for the purposes of these proceedings?---I have.

PN656

That is statement you signed on 30 June 2008?---Correct.

PN657

Do you have a copy with you there?---I do.

PN658

Do you say the contents of it are true and correct to the best of your knowledge and belief?---Yes.

PN659

I tender the witness statement of Grant Plasto as filed.

**EXHIBIT #M4 WITNESS STATEMENT OF GRANT PLASTO
DATED 30/06/2008**

PN660

MR MEEHAN: May it please the Commission I have no further questions.

PN661

THE COMMISSIONER: Yes, Mr Harris.

<CROSS-EXAMINATION BY MR HARRIS

[11.19AM]

PN662

MR HARRIS: Mr Plasto do you work as an infrastructure operator at the IBM flight deck?---No.

PN663

Do you supervise infrastructure operators?---No.

PN664

No further questions.

PN665

THE COMMISSIONER: Mr Plasto, just so I can understand, in paragraph 7, what does paragraph 7 mean? What does that mean in relation to the work that goes on at the flight deck?---Into my area Commissioner?

PN666

Yes, well just relating to your evidence, you talk about non of these network devices described?---Yes the above devices are known as network devices they are not known as peripheral devices, ie a device that you plug into a computer like the printer is a peripheral device.

**** GRANT PLASTO

XXN MR HARRIS

PN667

How does that affect what goes on at the work at the flight centre that is what I was trying to work out?---Well the devices listed under sections - - -

PN668

Sorry I said flight centre, I meant flight deck?---I understood what you meant. The devices within section 6, they are the network devices that manage and are on a network whereas a peripheral - - -

PN669

Yes and the work of the national operation centre, that has relevance to the work of the operation centre?---Because the work – okay you're – okay the work from the operation centre runs across these network devices.

PN670

Yes okay it does?---Yes.

PN671

Looking at paragraph 20 if a problem is a network problem does the role of the network operator work out why a network device has failed and fix the problem with the device. So is that hardware as well as software?---Mainly could be hardware most of the time it is hardware Commissioner.

PN672

Is it?---It could be related to software on a particular network device that could be incorrect that needs resolving or reconfiguring, or it could be a physical link between two sites, as in a telephone line.

PN673

Just look at this, the security people on the security side, looking at paragraph 45, if someone is trying to hack into software the analyst will attempt to solve the problem what does that mean? Does that mean hardware, software?---What will happen is that an alert will come up on their screen for a particular internet address and they will then try to work out where that internet address is located out in the greater world, or internet. Once they basically identify that they will then report that to – they will follow their procedures through the documentation as to what is involved. It may need to go to their next level of support which are the – they call them the CERT which is a basically they will do the investigation as to where it's coming from and if it's a hacker go and report it to the particular authorities.

PN674

So there might be some things they would solve themselves and some things they'll refer on to either more senior people or other qualified people in the centre?---Yes, Commissioner.

PN675

I see, thank you any questions arising out of my questions Mr Harris, Mr Meehan.

**** GRANT PLASTO

XXN MR HARRIS

PN676

MR HARRIS: No Commissioner.

PN677

MR MEEHAN: No Commissioner.

PN678

THE COMMISSIONER: Thank you, you're excused thank you.

<THE WITNESS WITHDREW

[11.23AM]

PN679

THE COMMISSIONER: Well we'll just hear final submissions.

PN680

MR MEEHAN: That's the evidence for - - -

PN681

THE COMMISSIONER: Sorry I inferred that after you said you only had four witnesses. Well I'll just hear submissions any further submissions and do you want time, or will we go straight for it? Okay nobody is saying anything so let's hear from Mr Harris.

PN682

MR HARRIS: I suppose the outline of our arguments is a quite simple argument. There was an objection to our eligibility to cover workers at the IBM flight deck and I suppose an argument that under section 328 it wasn't possible to make a union certified agreement on the basis that we had no eligibility to cover workers there. We argue that we do have eligibility to cover workers at the IBM flight deck based on the ordinary construction of the words of the rules.

PN683

THE COMMISSIONER: Tell me which rules, words which you rely on?

PN684

MR HARRIS: We rely on - - -

PN685

THE COMMISSIONER: I've got part 5 here.

PN686

MR HARRIS: Yes so the people described as being eligible to join the union are persons employed, or usually employed wholly or partly in the servicing - - -

PN687

THE COMMISSIONER: Sorry hold on which area, which one? Where are you reading from?

PN688

MR HARRIS: I'm reading from section 5 part (b) no sorry rule 5 part (b) – rule 5(b) part 5. Sorry, the rules are attached to Ms McManus' statement.

PN689

THE COMMISSIONER: Okay just second.

PN690

MR HARRIS: Commissioner its marked as MFI 7 in that statement.

PN691

THE COMMISSIONER: Okay so this is rule 5, part (iv) is it?

PN692

MR HARRIS: Sir, the words that we rely on are servicing, repairing maintaining - - -

PN693

THE COMMISSIONER: Just a second, where are these words, before you read them out?

PN694

MR HARRIS: Sir if you look to part 5 which is the last paragraph on the page there.

PN695

THE COMMISSIONER: Yes.

PN696

MR HARRIS: This is the rule that relates to the ASU's information technology division.

PN697

THE COMMISSIONER: And the words you rely on? Just tell me where it starts, the first words, the first line, are we talking about the first line?

PN698

MR HARRIS: That's right, yes.

PN699

THE COMMISSIONER: So read out.

PN700

MR HARRIS:

PN701

The industry in or in connection with which the union is registered is the industry of service, repairing, maintaining, structurally altering and or assembling business equipment excluding typewriters, without limiting the generality of the foregoing the term business equipment shall be deemed to include inter alia cash registers, accounting machines, adding machines, calculators, computers, and peripheral equipment.

PN702

So based on the ordinary meaning of those words, we argue that the work done the infrastructure operators at the IBM flight deck falls within our eligibility. Today the Commission has heard evidence about the work that's done by the flight deck infrastructure operators. There's been evidence about including documentary evidence, things like position descriptions, as well as evidence from Ms McManus about her interviews with flight deck workers. We've heard evidence about the way - - -

PN703

THE COMMISSIONER: I've heard the evidence but what does the evidence say is relevant to this?

PN704

MR HARRIS: We've heard the evidence that flight deck operators reset computer systems, that they reconfigure the channels and the attached peripheral devices for the systems, and that they change the functioning of computer system processes by issuing commands remotely from IBM flight deck using logical processes to effect the computer hardware that exists on a system that may be on a work site somewhere across the country.

PN705

THE COMMISSIONER: So is the word servicing relevant do you say?

PN706

MR HARRIS: Sorry?

PN707

THE COMMISSIONER: How relevant is the word servicing?

PN708

MR HARRIS: We would say that the ongoing monitoring and addressing faults that is performed by the flight deck operators is servicing that equipment the computer systems. Monitoring we would say, we submit also is a form of maintenance of those systems and ongoing solving of problems. The reconfiguration of channels and peripheral devices we say is actually structurally altering the systems.

PN709

THE COMMISSIONER: What is that – I can't see – I see right, and do you rely on the word repairing?

PN710

MR HARRIS: Yes, we rely on the word repair, there are all kinds of fixes that have been described today, including moving data from one place to another, are actually there to repair the system. We've also had some evidence about the - - -

PN711

THE COMMISSIONER: What do you say, what's the business equipment then, do you say that shouldn't be read as hardware, it should be read as hardware and software should it?

PN712

MR HARRIS: Yes, computer, I mean we've heard evidence today - - -

PN713

THE COMMISSIONER: I'm trying to understand what you're putting to me, what is your submission?

PN714

MR HARRIS: We've heard evidence today that these workers deal with computer systems so the system is you know the hardware and the software components of that computer system.

PN715

THE COMMISSIONER: Wasn't there evidence that only engineers repair hardware?

PN716

MR HARRIS: I think that evidence was given, but I think there was also evidence given about the tasks that IBM flight deck workers actually perform which is to do things like reset the devices, reconfigure them and change the way that the processes which are part of the hardware of the system actually function. So what the flight deck workers are doing is they are issuing commands from the IBM flight deck that change the way that the hardware functions. So performing service maintenance and repair remotely by issuing commands from the flight deck.

PN717

THE COMMISSIONER: My question was don't read this rule out to me, tell me how you say the evidence relates to the rule. That's what I was asking, so if you've finished that's fine.

PN718

MR HARRIS: Yes, just to say that there was also some evidence about the ongoing developments within the information technology industry and the kinds of maintenance, repair and servicing that are performed by IBM flight deck workers aren't uncommon across the industry, there's a broad range of maintenance that's done on hardware devices, like printers, a whole range of computer equipment that's now done by going to the work location and plugging in a computer and issuing commands to you know repair service and maintain the hardware. So it's also the development of the terms, repair, maintain and service within the industry and their relevance to the construction of the rules.

PN719

THE COMMISSIONER: What do you mean? are you looking at me and you are saying that's the end of it. Have you got any questions?

PN720

MR HARRIS: No, I don't.

PN721

THE COMMISSIONER: What do you say about membership of the ASU?

PN722

MR HARRIS: The ASU has members in the systems operation section at the IBM flight deck so across - - -

PN723

THE COMMISSIONER: Sorry in the systems?

PN724

MR HARRIS: In the systems operations, so across the batch operators and the infrastructure operators. There are also members in network operations and many of those members have been members since before the bargaining period was initiated.

PN725

THE COMMISSIONER: Something you said to me earlier seemed to be talking about the infrastructure operators, are you saying anything to me about the batch operators?

PN726

MR HARRIS: No, we have no submissions to make about the work done by the batch operators.

PN727

THE COMMISSIONER: Did I hear rightly that you said you have members across the – some of the systems, have they? Are we talking about the evidence of M1 I think it was. The functional breakdown was quite interesting, so your membership, you have membership at the centre.

PN728

MR HARRIS: Yes, so it's - - -

PN729

THE COMMISSIONER: It's a question I'm asking, is that what you're saying?

PN730

MR HARRIS: Yes, so we have members in systems operations and members in network operations, in terms of those functions that apply in the flight deck.

PN731

THE COMMISSIONER: Mr Harris I think it's – I don't know whether it's foreshadowed, but I'll hear from Mr Meehan on this, it's probably likely I'm going to reserve my decision as a result of today. But I just want to ask you about the terms of the order you're seeking. I ask this question in the knowledge that the Commission has a facilitative role in relation to a 451 applications. There are some authorities around about them but the questions – this will be subject to granting of – not refusing the application but I'm just trying to cover the bases.

PN732

MR HARRIS: Yes.

PN733

THE COMMISSIONER: About structuring questions in a way that the persons who vote on them, are clear on what they are voting for and I'd have to say that I think that the questions are fairly clear, but it mind had been – had you considered – I can't find the questions, wont' be a second – had you considered rather than asking one catch all question asking a series of questions so that a person could know what they are voting on an unlimited number of bans on overtime, or secondly, rather than – in other words rather than asking one question, nine questions.

PN734

MR HARRIS: We had considered structuring the question in that way. The question that we've actually put in the application is based on a question that was put in a recent matter in relation to RailCorp.

PN735

THE COMMISSIONER: Was that a Full Bench? I'm not bound to follow - - -

PN736

MR HARRIS: No, it wasn't a Full Bench.

PN737

THE COMMISSIONER: No.

PN738

MR HARRIS: The members of the ASU when they met on 23 June voted on this question so you know that's why we put in the question that's was endorsed by the members at that meeting.

PN739

THE COMMISSIONER: I think I've got the answer to my question that's the question you want to go?

PN740

MR HARRIS: Yes. We have no further submissions.

PN741

THE COMMISSIONER: Okay thanks Mr Harris, yes Mr Meehan.

PN742

MR MEEHAN: I'm interested to hear there's no further submissions because I'm not sure Commissioner what I need to address. We understood - - -

PN743

THE COMMISSIONER: Just address how the evidence relates to your submission, your outline of submissions.

PN744

MR MEEHAN: Well I'll come to my apprehension, that is there's no submissions about batch operators, there's no submissions about anyone else, other than the infrastructure operators. I must say we came here understanding that the – both the purported notice initiating the bargaining period and the proposed collective agreement were to apply to all the employees at the flight deck. No submissions are made about eligibility other than in respect of one group of those people.

PN745

THE COMMISSIONER: I asked you that question a couple of days ago and I thought you said to me that it was your view that the Act said you only had – you can – a union can be a party to a certified agreement provided it has one member.

PN746

MR MEEHAN: Yes we accept that. The point I'm making is when there's no submissions put against us in terms of eligibility for anyone other than infrastructure operators, I don't know whether there's any utility in me addressing the Commission on those other people. We don't even know what - - -

PN747

THE COMMISSIONER: No, no, it's your objection, it's your objection, you have made the objection, you have to make the objection. They don't have to counter the objection you have to make the objection.

PN748

MR MEEHAN: Well with great respect Commissioner having - - -

PN749

THE COMMISSIONER: I said to you, I said if these people – and I haven't heard from you yet, but what my point the other day was if IBM – if these people are covered by an existing award, which I'm not sure about, but if they are why shouldn't I take the position with prima facie position, and hear your – and you have the carriage of the – of demonstrating that they somehow or other, how they are not eligible to be covered by a Workplace agreement.

PN750

MR MEEHAN: There is no prima facie position that any of these employees are covered by the award. It's not being submitted either to that effect by my opponent. That's why I'm raising this, why do I need to address matters other than infrastructure operators, when it's not even been submitted against us that the other employees fall within the eligibility rule. Nothing at all, nothing said. But Commissioner if you are telling me that you expect IBM to bear the onus of

satisfying you that all the categories of people are ineligible I will address that task.

PN751

THE COMMISSIONER: I didn't say that. I said I want to hear submissions about all coverage and I'm saying that if these people are covered by an award, an existing award, why shouldn't I take the prima facie position that therefore if they can be covered by an award they can be covered by a Workplace agreement.

PN752

MR MEEHAN: But how is Commissioner how is the Commission to determine the question of the award. No submissions have been made that it covers any of these people. No submissions made about the eligibility of employees other than infrastructure operators to come within the scope of the award, and the award is framed in such a way that its scope and incidence which you'll see in clause 6 picks up on the union's eligibility rules. That is the person - - -

PN753

THE COMMISSIONER: You should make submissions to me in respect of your case and how the evidence relates to your case.

PN754

MR MEEHAN: I'll do so, well I'll start with the award because it appears to be a matter of interest to the Commission. Clause 6 of the business equipment industry technical service award 1999 is binding on IBM Australia as a respondent in New South Wales. But one must go to the clause dealing with the coverage of the award, that is it's scope to see in respect of which employees it extends. Clause 6.2 relevantly states:

PN755

Subject to the exemption specified in clause 8, persons and organisations exempted from coverage under the whole award or certain sections of the award, this award shall apply to employees engaged in or in connection with in subsection 6.2.1 servicing, repairing, maintaining, structurally altering, and/or assembling business equipment but excluding the repair and structural alteration of typewriters.

PN756

Then 6.2.2 sorting, packing and despatching business equipment parts and supplies thereof - - -

PN757

THE COMMISSIONER: That doesn't seem to be relevant.

PN758

MR MEEHAN: No one has suggested that has any relevance. 6.2.3:

PN759

Every operation process, duty or function carried on or performed incidental to the business equipment industry –

PN760

Well no one has suggested that has operation, it comes back to 6.2.1 which as I say picks up directly on those words in the eligibility rules of the union that are relied on by the ASU.

PN761

THE COMMISSIONER: Well clause 18.2 seems to refer to six levels of technician and junior employees, have we been talking about those in your evidence?

PN762

MR MEEHAN: Sorry clause?

PN763

THE COMMISSIONER: 18.2.

PN764

MR MEEHAN: No, because what I will be addressing upon is whether any of the work performed by employees at the flight deck, meet the description in 6.2.1 of the award which defines exhaustively its coverage. That is unless you meet that description clauses about classifications are irrelevant, the award is only binding in respect of these people and so that leads me directly to the eligibility question. It's relevant to both the scope of the award and its relevant to the jurisdictional question that we agitate in these proceedings. Can I just make this observation? The fact that IBM is bound by an award, does not of itself mean that it is bound in respect of all of its employees. That's perhaps a trite observation, that is why I bring the Commission back to clause 6, that is the employees in respect of whom, the award applies.

PN765

THE COMMISSIONER: Okay, can you help me a bit further on the business equipment industry clerical officers award. Are you going to talk to me about clause 3 of it, is that – I'm curious because I think at the initial day you said this was something to do with the clerical industry rather than the information technology industry.

PN766

MR MEEHAN: It's not something suggested on our side of the table. There is not – I'll address it directly.

PN767

THE COMMISSIONER: I just thought – well what's your view is on respect of clause 3 of the business equipment industry clerical officers award?

PN768

MR MEEHAN: I'll come to that, but can I say while we're locating the award, there is not a skerrick of evidence of clerical tasks performed by anyone at the flight deck. The Commission has had all the evidence about everyone that we've been able to muster covering all the groupings of employees. Not one of their tasks could be fairly described as clerical - - -

PN769

THE COMMISSIONER: Well I can't recall any words uttered to that effect, but we've had a fair bit of duty statements and stuff handed up so.

PN770

MR MEEHAN: Yes.

PN771

THE COMMISSIONER: I'll have to have another look at that, but that's your submissions that amongst all the witness statements and attachments thereto, there's no clerical work.

PN772

MR MEEHAN: No clerical work, none at all. I now have the benefit of clause 3.2:

PN773

This award shall apply to all persons engaged in any clerical capacity and or engaged in the operation of shorthand writers and typists and/or on calculated billing or other machines designed to perform or assist in performing any clerical work whatsoever.

PN774

That bears the hallmarks of many clerical awards throughout New South Wales and federally and I would only be repeating myself to say there is not a skerrick of evidence of any work that would meet that description. Now might I then - - -

PN775

THE COMMISSIONER: Well I would find it helpful if you could address the evidence as it relates to the eligibility – what is it part 5 of clause 5.

PN776

MR MEEHAN: I'm coming directly to that. Yes can I say firstly we rely on the short outline of submissions that have been filed.

PN777

THE COMMISSIONER: Yes, I've had a chance to look at that.

PN778

MR MEEHAN: It is only an outline and I will address in more detail the matter that you've raised. But what seems entirely clear as between the parties Commissioner is that the question about which there is a dispute is whether or not any of the work performed at the flight deck by employees is work that would engage the relevant eligibility rules and that's the issue.

PN779

THE COMMISSIONER: Certainly.

PN780

MR MEEHAN: Now what I've attempted to do in the outline is simply trace through the relevant statutory provisions by reference to which we say this eligibility question is engaged. Might I just deal with that before I come to the evidence? The first proposition you'll see in paragraph 2 is that section 451 of the Act is the provision which prescribes who may make an application for an order for a secret ballot. You'll see in subsection (1) it says:

PN781

A person referred to in subsection (3)-

PN782

And I'll come back to that:

PN783

-may during a bargaining period –

PN784

I pause there to say the reference to a bargaining period must mean a reference to a valid bargaining period and so during a valid bargaining period one of the persons referred to in subsection (3) can make the application. Then if one turns to subsection (3) it says:

PN785

The following people may apply.

PN786

And in subsection (a):

PN787

If the bargaining period-

PN788

Again one reads that as a valid bargaining period:

PN789

- was initiated by an organisation of the employees, that organisation.

PN790

So the question of whether a valid bargaining period exists becomes a real question because it effects the standing of a purported applicant for a secret ballot order. That is, if the union makes this application they can only do so if there's a valid bargaining period initiated by that union, if there's not then the standing effected by section 451 subsection (1) and subsection (3) would not be satisfied they would have no standing to make the application and it would follow that it would not be a competent application to invoke the Commission's power.

PN791

Now section 423 of the Act deals with the bargaining period and subsection (1) states:

PN792

This section applies in relation to a collective agreement that a person referred to in subsection (2) wants to try to make if the agreement if made –

PN793

Then sub paragraph (a):

PN794

- will be made under section 327 or 328 –

PN795

I pause there I will be taking you to section 328 which has some relevance. Then in subsection (2) if:

PN796

(2)(b) an organisation of employees wants to try to make a collective agreement to which this section applies –

PN797

Now that is referring back to subsection (1), the section applies to an agreement which if made would be made under section 327 or 328. So that is the gateway, it is dealing with – the bargaining period is dealing with a particular collective agreement relevantly for this proceeding one that if made would be made under 327 or 328. If I can ask the Commission to go to 327, you'll see that's an employee collective agreement section 327 and so it is not presently relevant. 328 is presently relevant, it deals with union collective agreements and says:

PN798

An employer may make an agreement in writing with one or more organisations of employees if when the agreement is made each organisation has at least one member who's employment into single business or part of a single business of the employer will be subject to the agreement and-

PN799

Importantly:

PN800

- is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement.

PN801

That is where the questions of eligibility raise their head, that is, the only union collective agreement envisaged as being able to be made under section 328 is one between an employer and a union which has at least one member in the relevant Workplace and is entitled to represent that member's industrial interests. So when one goes back to the bargaining period provision in 423 it is contemplating relevantly a bargaining period – I withdraw that – for the purposes of section 423(1) it is contemplating a collective agreement of the type in section 328 which requires the existence of a union member at the Workplace in respect of whom the union is entitled under its eligibility rules to represent their interests.

PN802

Now that involves unfortunately at tracing back through the legislation, it's not drafted in the most ideal way, but in our outline the proposition we come to at the end is to say, unless the Commission is satisfied that one or more employees at the flight deck who are proposed to be covered by the collective agreement in respect of which the bargaining notice has purportedly been initiated, then there is no standing to make application for a ballot order. That is the proposition and that is what then brings me directly to the eligibility question. First I need to address the evidence relied upon by the ASU.

PN803

The Commission admitted some evidence over objection and I think Commissioner you indicated that that evidence would be received but you would consider what weight was appropriate to be given to it. So I come back to paragraph 19 of Ms McManus' evidence and I respectfully submit that you would give absolutely no weight to the evidence whereby she states that she has no doubt that their work fits within this industry as defined in the rule above. That is nothing more than an assertion, or opinion, without any foundation based on an analysis of the word, perform. Commissioner you now have the benefit of I submit, a fairly comprehensive account of the work performed at the flight deck.

PN804

You've heard the evidence there has been very little challenge to it, other than in respect of some of Mr Grassie's which I'll come to. That is the platform of evidence I respectfully submit you need to take into account and give weight to, not bold opinions that the work without doubt fits the industry as defined. That is totally unhelpful evidence. The same goes for paragraph 22 when the evidence in relation to Mr Micudaj states his position involves maintaining service and repairing and structurally altering this equipment. Not only is that evidence contradictory to the evidence given by Mr Grassie, but it is just an opinion based on hearsay.

PN805

No effort to even try to arrange for Mr Micudaj to attend here and give direct evidence about what he does. Nothing of that kind and yet an assertion about what his position involves, and purporting to match it up to the eligibility rule, it is entirely unreliable and should be given no weight. In my respectful submissions in any event you would unreservedly prefer Mr Grassie's evidence as to what Mr Micudaj does because Mr Grassie has observed it.

PN806

THE COMMISSIONER: Are you submitting that I should make a Jones and Dunkel inference?

PN807

MR MEEHAN: No, no I'm not.

PN808

THE COMMISSIONER: Don't break your train of thought, I was just asking.

PN809

MR MEEHAN: No, one ought to bring their best evidence there's been no attempt at all to bring the person who can give his own evidence or even someone who has observed the work. Ms McManus hasn't even observed the work. What possible foundation other than hearsay can she have for her conclusions. Mr Grassie comes here, he tells the Commission I've observed Mr Micudaj's work and here's what I say about it as a matter of fact, here's what he does as fact and the Commission would prefer that evidence.

PN810

Opinions about coverage of other unions within the industry is with respect is unhelpful and really irrelevant to the question now before the Commission. The question before this Commission is whether the employees at flight deck are employees who meet the description in the union's eligibility rules. The question of whether some other union might within its eligibility rules may be able to cover, or not be able to cover those employees is quite irrelevant. Before I embark on an analysis of the evidence there's two things I wish to raise. Firstly, my opponent appears to rely on that part of the eligibility rule which at least numerically appears to be in clause 5 and then it comes under part (a) description of industries and then it is part (v).

PN811

That is the industry coverage that regulates as it were the industry coverage of the union. one has to have a look at those parts of the rules which actually deal with the eligibility of particular workers for membership. That after all is the question

before the Commission and that it seems is to be found or dealt with in still part 5 but part (b) deals with eligibility for membership. Does the Commission have a full set of those?

PN812

THE COMMISSIONER: I do.

PN813

MR MEEHAN: I am looking at page 7 of 201, if that's of any assistance.

PN814

THE COMMISSIONER: Got it.

PN815

MR MEEHAN: Okay that's where eligibility for membership - - -

PN816

THE COMMISSIONER: Just a second.

PN817

MR HARRIS: I don't have a copy of the rules with me.

PN818

MR MEEHAN: Part 5 of that part of the rules which the Commission will find on page 12, at least on the copy that I have page 12 of 201, is the part dealing with eligibility for membership. You see that part (a) – I withdraw that part 5, (v) subparagraphs (a) and (b) I submit with respect that that is the provision that really the question for determination hinges upon and it's not dissimilar in it's terminology to the industry description, but it provides, I won't read it all, but:

PN819

An unlimited number of persons who are employed or usually employed wholly or partly in the servicing, repairing, maintaining, structurally altering or assembling business equipment, excluding typewriters-

PN820

Then it goes on to articulate some exceptions and then the last sentence without limiting the generality of the foregoing the term business equipment shall be deemed to include inter alia, cash registers, accounting machines, adding machines, calculators, computers and peripheral equipment. You'll see there's a very close alignment to that provision and the industry coverage provision. But that in my submission is the set of rules against which the Commission needs to test the evidence.

PN821

The other matter I wanted to raise by way of introduction in my respectful submission the Commission ought to approach the task now before it by analysing the evidence in respect of each of the functional categories within the flight deck and making findings as to whether employees performing work within those functional areas, are fit the eligibility description.

PN822

THE COMMISSIONER: Just a moment please. I just wonder whether we need to go down that route, or whether Mr Harris has made the concession that his members are employed in the systems operations and network operations areas,

and you are not relying on membership in the security operations service restoration and incident management areas. Mr Harris?

PN823

MR HARRIS: That's correct Commissioner.

PN824

MR MEEHAN: Well this comes back to the issue that I raised at the outset.

PN825

THE COMMISSIONER: Well I'm just trying to help here, if your submission is that to be able to initiate a bargaining period you must have one member in the area, who can represent – for which the union can represent their interests, isn't it convenient to only address systems operations and network operations?

PN826

MR MEEHAN: Well I perceive this difficulty Commissioner and at the end of the day my concern might not be well founded or it might be but looking forward to the question of whether an order might be made at the end of the day, there will be lists of members or purported members that will be forwarded to the nominated ballot agent and we have no way of knowing whether they are going to be confined to any particular grouping within here and it seems to me it would be important in determining these proceedings for the Commission to identify in which functional areas employees would be eligible to enrol.

PN827

Otherwise the real potential is there might be members purportedly enrolled in some of these other areas who might – who it might be proposed participate somehow in the ballot, we don't know when on the analysis I'm inviting the Commission to do, they would not be eligible within the rules. So that seems to me to present a real difficulty.

PN828

THE COMMISSIONER: I'm not sure how to solve that one off the top of my head. You would – if an order was made, the employer is required to give a list of the names of all persons in the area, which would be the flight deck to the Electoral Office.

PN829

MR MEEHAN: Yes.

PN830

THE COMMISSIONER: The union is required to give a list of its members to the Australian Electoral Commission and they conduct a ballot of the second, provided they fall within the first. This mustn't be an unusual situation, this must apply everywhere I suppose, every ballot. Someone could slip in and say they were – but anyway this is your submission and I'm letting you present your case, I just don't know how this is not a case – you know – if this was a rules committee type thing, I could understand, but these are proceedings for a 451. Now I think I just have to say, just make your case and I'll have to think about it, because I don't know off the top of my head how you get around that one.

PN831

MR MEEHAN: Yes, well I might - - -

PN832

THE COMMISSIONER: Other than he's conceding that he's not relying on membership in the security operation, service, restoration and incident management for the purposes of these proceedings I think that's what he's saying.

PN833

MR MEEHAN: Well one might ask does that mean there is no intention to have anyone other than systems operators and network operators participate in the ballot? If that's what it means, that's one thing but to illustrate in the process - - -

PN834

THE COMMISSIONER: Well shall I ask the question?

PN835

MR MEEHAN: If it pleases the Commission.

PN836

THE COMMISSIONER: This is, Mr Harris, this is question for you. You're following what Mr Meehan says, if the order is made in your favour they'll be providing a list of members, the employer would be providing – well if the order is made in your favour – the employer would be providing a list to the Australian Electoral Commission of all employees of IBM Australia at the IBM flight deck national operation centre New South Wales. And you'll be providing a list of all members of the same thing I suppose, of all members of the union who are employees of IBM Australia at the IBM network flight deck national operation centre.

PN837

Now that could change in time, but I think the question that is being asked, if – and this is a question of the here and now, not on what might be in six months time, he is asking the question are you prepared to make any concession as to whether or not that list would be limited to persons employed in the systems operations and network operations areas? A simple yes or no with no - - -

PN838

MR HARRIS: It depends on what you're asking Commissioner. Are you asking for a proposed amendment to the draft orders or anything like that?

PN839

THE COMMISSIONER: No, no, absolutely not, I was trying to – we have to go back – submissions were being made, persons who have to be eligible, what membership do you have and Mr Meehan is going to address the evidence as it relates to all the employees employed at the et cetera and I said I thought you were not asserting that you currently had membership beyond those two years.

PN840

MR HARRIS: That's correct.

PN841

THE COMMISSIONER: I think you nodded to me that was so and I said to Mr Meehan well you don't really need – perhaps you don't need to address the evidence in respect of the other areas, the security operators, service restoration, or incident management, he said well how could he do that because it may be that members of your association might, might be in those areas, might be voting.

PN842

MR HARRIS: I can assure the Commission that there are no members in those areas.

PN843

THE COMMISSIONER: I think he was asking any list, this is just a question you don't have to say yes – would you - can you give some undertaking to IBM that no persons, or no membership – there would be no persons who are members of the association in those other three areas who would be voting, whose name would be presented to the Australian Electoral Commission in order that they can vote?

PN844

MR HARRIS: Yes.

PN845

THE COMMISSIONER: In the forthcoming ballot should an order be made in your favour? You don't have to accept it, but there it is it's offered to you.

PN846

MR MEEHAN: In the light of that Commissioner could I ask for a five minute adjournment to take instructions?

PN847

THE COMMISSIONER: Certainly.

<SHORT ADJOURNMENT

[12.10PM]

<RESUMED

[12.21.08PM]

PN848

MR MEEHAN: Thank you for the indulgence Commissioner. Can I come to the evidence and when the Commission is testing the evidence about the work performed as it were against the eligibility rules, I invite you Commissioner to apply the principles that have been I submit well settled as to how one construes eligibility rules. I've endeavoured to summarise the proposition in paragraph 10 of my outline which is that eligibility rules are to be interpreted liberally and according to their ordinary and popular meaning.

PN849

There is reference there to the Isaac case and there are others, but that proposition is well accepted. When courts talk about interpreting eligibility rules liberally it means you don't take an unduly narrow approach to construction. But nonetheless, the focus is on the ordinary and popular meaning. Now can I begin with Mr Grassie's evidence and I'm going to take a fairly methodical approach to this if I may. Do you have a copy of his?

PN850

THE COMMISSIONER: Yes.

PN851

MR MEEHAN: So I can perhaps start this exercise at paragraph 10 and just to remind the Commission about the different functional levels within the NOC, which is the national operations centre and remind - - -

PN852

THE COMMISSIONER: Are they the coloured ones? I'm just replacing my black and white ones.

PN853

MR MEEHAN: Yes, the coloured ones.

PN854

THE COMMISSIONER: Paragraph 10 yes.

PN855

MR MEEHAN: Perhaps it's a good starting point and to remind the Commission that Mr Grassie's evidence is essentially dealing with systems operations in 10.1. that is the starting point and can I go directly to paragraph 12 where he states:

PN856

The overall function performed in the systems operations is the monitoring of all computer systems hardware and software in accordance with client's service level requirements.

PN857

Now you've heard Mr Grassie talk about the very many different service level requirements there are, but if one accepts for the moment that they are just the specific contractual requirements between IBM and its clients, the task is here to monitor the systems hardware and software. He then importantly deals with how that is done in paragraph 13. He refers to a monitoring console which is accessed by the operators on a computer screen. I pause there to indicate in the photos that you have you will see that there are some screens which show the monitor that an operator looks at and perhaps because these aren't numbered, could I perhaps show that one to the Commission.

PN858

They are the monitors through which access is going to what Mr Grassie described as a console. In paragraph 3 he explains that – I withdraw that – in paragraph 13 he explains that a monitoring console is an application that displays on screen data, regarding the status and integrity of the system and so when the Commission sees those screens there is data displayed on it, that is information that is being displayed via the console application. He says in 13.2:

PN859

It indicates to the operator the need for further action in the event of a deviation from normal operating status.

PN860

The console is a window for the operator to look into the system and see whether it is working normally. That is the interface, as it were between the operator and what is happening within the system and the console generates alerts and displays information which will indicate whether the system is operating normally or there is some deviation. So that is what is covered in sub paragraphs 13.1, 13.2 and 13.3. Alerts are generated to the operator to initiate a particular action and lastly he says there:

PN861

It facilitates input by the operators into the console to effect first level problem determination which may involve recovery action.

PN862

So there is a keyboard and some commands can be entered into the console by the operator. He then explains in paragraph 14 that there are 88 computer screens and if the Commission looks at the other photo, you'll see a portion of the flight deck and I will show that.

PN863

THE COMMISSIONER: We don't need to mark these do we?

PN864

MR MEEHAN: I don't think so, Commissioner. you'll see there the operators in various clusters within the room viewing the screens and those that are working in this area that Mr Grassie gives evidence about, are accessing the console. Then he explains in paragraph 16 that there are two categories of operation within systems operations, they are the infrastructure operations and batch operations. He says that there are specialist teams of operators to do each. Now just pausing there, the evidence goes no further than to indicate the primary task is one of accessing a console to monitor a status of the system.

PN865

No suggestion of any interaction in a physical sense with any in terms of altering, repairing, maintaining any equipment, the terminal is there it's a means of access to a console, which displays information to be monitored by the operator. He touches upon the shift system. Suffice to say that there are operators on the flight deck around the clock. He then deals specifically in turn with infrastructure operators and batch operators. In 19 and perhaps this is repeating what I said, he indicates the infrastructure operators log on to the consoles via the computer screen in the flight deck area and monitor and analyse the information of data display.

PN866

Again, and I'll come to address the rules themselves, there is no marrying up there between those tasks and repairing, or maintaining or structurally altering or servicing business equipment. This is just viewing information and analysing it. He says in 20, a major part of their tasks involves actively monitoring event consoles for alerts. So the system itself generates an alert message that may indicate problems with hardware, operating systems, or sub systems. He then – so that's the monitoring side, he then says in 21 there are some scheduled tasks that are required to be performed by infrastructure operators using the consoles.

PN867

These are tasks that are performed periodically and they're provided with a check list by the team leader and that's dealt with in paragraph 22. Those tasks are completed by the operators using commands or issuing commands to the console. You type them in on the keyboard and commands are issued via the console. 24 he makes the point that as operators become more experienced in monitoring data they are better able to analyse it and see patterns in it and deal with it accordingly. Importantly, in my submission paragraph 26 he makes the point that the work is undertaken remotely from consoles.

PN868

I ask the Commission to have at the forefront of your mind that the hardware and the systems and the equipment in respect of which this monitoring might relate is

not equipment stationed in the flight deck itself. It could be hardware at a client's premises, miles away. It could be some equipment housed upstairs in the data room. But it is not equipment that is in any way physically attended to in the flight deck. This is all a remote function the key to which, if I can use that term, is via the console on the screen. He does make the point in paragraph 26 that rarely if the hardware is physically located on site at the Baulkham Hills facilities, operators may access consoles which are attached to the hardware in the same manner in which they perform the work remotely.

PN869

So they can plug into hardware and perform the same monitoring task. Now it doesn't need to be remote, but the set up is such that this the suite of services provided is done remotely. Now that is the sum total in the way Mr Grassie describes it of the infrastructure operator's role. There is no suggestion nor could there be of any such operators leaving the flight deck to attend upon physical pieces of business equipment to alter them, to service them by any physical means. Indeed there could be no suggestion in my submission by monitoring alerts and then taking action to support levels and through outside providers, that the operators themselves are repairing or maintaining or structurally altering or servicing equipment. They are monitoring information generated by a console or displayed by a console, and then certain actions are taken where remedial steps are needed and I'll come to that.

PN870

He deals then with batch operators and the batch operators also are performing a monitoring role, they're operating the operation of batch schedules. Now I must confess I had trouble understanding what a batch schedule was, but Mr Grassie explains what it is in his words in paragraph 27. It's an ordered list of batch jobs that run on a given day. A batch job is a unit of work that runs on a computer that tells the system to stop start or perform some other function. I think what he says:

PN871

There could be hundreds of thousands of batch jobs performed in a schedule and 65 million batch jobs are run at IBM every year.

PN872

So these are jobs that in the ordinary course and absent any problems would just run themselves on the system and the batch operator is there to monitor that that operation is performing without a hitch. He gives a helpful illustration in paragraph 29 that if one takes a financial institution client, it will have batch jobs streams relating to its general ledger application and it will have batch jobs streams relating to its credit statements application. So in the ordinary course those jobs will take place, but the role of the operator is to monitor that there are no breaches and that point is made clear in paragraph 30. Again there is a degree of analysis of the information displayed on the console.

PN873

In 31 if a batch job fails – I withdraw that – a batch job fails if the work in it does not complete successfully as scheduled and he points out there can be many possible reasons. The most common would be that in the case of backup of data where there's not enough disk capacity and Commissioner you engaged with Mr Grassie about that type of problem. Indeed Mr Grassie indicated how that

problem would be dealt with but didn't involve some physical attendance or physical change or alteration or service into any equipment at all. It was able to be attended to as Mr Grassie put it by some commands entered on the keyboard.

PN874

He says in 32 when a batch job fails a alert is generated and displayed and then the steps to be taken and remedied at failure would depend upon the client's procedures. That is the client's procedures relating to the failure and the nature and urgency of the batch job. Mr Grassie talked in terms of criticality and the complexity but the Commission needs to bear in mind, that some of these difficulties might be difficulties that can be rectified by the client itself. The monitoring role does not by necessity entail an operator or somebody at IBM, that is an employee of IBM remedying the problem.

PN875

It might involve calling in contractors, engineers, it might be able to be capable of remedy by the client itself. So he says in the example above, the remedial action would either be to check the disk space and try and create space and re-run the batch job or to escalate the failure to a second level response which may involve calling out technical support. That's an illustration of the point I've just made. He says in 33 the batch operators become specialised, they can become specialised in a specific client sense because they come to learn over time, how the client's particular batch jobs and streams operate and what to look out for when monitoring the operation of those jobs.

PN876

Now importantly in 34 he deals with what is to take place if the monitoring alerts the operator to a batch failure. Firstly, it's identification of the failure and the source of it, analysing the failure to determine whether it requires actioning. So at this stage one is still ascertaining what the problem might be. Next is to raise a problem docket. Mr Grassie gave some oral evidence about that. That I think he described it that is the key source document for the generation of work within IBM, a problem document. That is raised as it were on the IBM system and identifies by way of short description what the problem is.

PN877

Then there is a documented procedure to follow information of the batch failure and indicates the steps taken. Depending on those procedures and according to the operators expertise and capabilities, they either take the first level action and Mr Grassie gave some examples of that to correct the failure at their monitor, or they escalate it to second level support. So that in essence is the problem and overwhelmingly I submit it's one of monitoring an identification of problems and where possible attending to the problems via the monitor or where expertise and capability dictate escalating or criticality, escalating the issue to someone else.

PN878

In my submission none of that warrants any finding that it can be married up with the words, servicing, repairing, maintaining, structurally altering, and or assembling business equipment. It is overwhelmingly a monitoring role. No doubt there are many others within IBM, but not at flight deck who have a role that involves, servicing, repairing and altering equipment. There are engineers who do that, and Mr Grassie made very clear the strict demarcation within IBM

between those who have authority to attend and alter or repair hardware and the like and those who don't have authority.

PN879

At 35 he deals with another task involving the systems with change implementation of applications and that involves stopping a batch job, changes then implements the application the batch operator will restart. Again a simple task but not one falling within the description in the rules. He makes the point in 37, perhaps it goes to the ultimate question the Commission has to deal with. These batch operators do not physically deal with any infrastructure or equipment and they don't enter the data centre which is on the floor above where there is – there are servers or hardware and they don't do that.

PN880

Now when the Commission carefully considers that evidence and understands the true nature of what the system operators on the one hand and the batch operators on the other do, in my submission you wouldn't find the necessary connection with business equipment. That is, being employed wholly or partly in the servicing, repairing, maintaining, structurally altering and or assembling business equipment.

PN881

THE COMMISSIONER: What do you say business equipment is? Are you suggesting that business equipment from a computer point of view is hardware but doesn't include the software that is installed thereon?

PN882

MR MEEHAN: Well business equipment could capture forms of hardware, I'd not cavil with that for a moment, but as to software - - -

PN883

THE COMMISSIONER: I'm thinking like you know a washing machine for example, let me say something silly, well washing machine is you know the lot isn't it? It's what makes it tick, it's the motor, it's an electrical motor, there's push button controls, there's a little bit of all sorts of things in there. Now we say here's a computer undefined, it does certain things because it's been programmed to do certain things. I was asking you the question is that when you're putting to me the servicing, repairing, maintaining structure, the altering, are you talking about the hardware, the hardware and the software?

PN884

MR MEEHAN: Well being uninitiated as I am, if I could put my understanding in a simpler form. The software if you like is imbedded in the overall system, the hardware. Now I'm not suggesting that you would look at software in isolation. I would accept that the equipment can comprise the hardware and software that it should operate but I must say I'm not clear I understand how your question relates to the rules Commissioner.

PN885

THE COMMISSIONER: I'm just reading the words, business equipment.

PN886

MR MEEHAN: Yes, what I do say is firstly the Commission the starting point is to say that none of the things – I withdraw that – perhaps put it in a more

principled way. One could accept for example that the monitor screen that operators are looking at through which they access the console, is a piece of equipment. It's a piece of business equipment, but to be caught by the rules, the work has to be partly, or wholly involved in servicing, repairing, maintaining, et cetera. So one can automatically discount that piece of business equipment that they sit in front of.

PN887

One then has to ask, well business equipment outside the flight deck whether it be hardware at a client's premises, whether it be some form of equipment in the data centre upstairs and accepting for the argument that that's business equipment is that equipment being serviced, repaired, maintained, or structurally altered or assembled? One has to put yourself in this position of these operators and say we're not concerned with the screen in front of you, but are you actually doing any of these things to the equipment that's out there, at the client's premises or in the data centre.

PN888

Now whether or not that equipment has software in it or not, probably doesn't matter too much for the answer to that question. Our submission is when you properly understand what it is that these operators are doing, that is primarily monitoring the integrity or the operation the proper operation of the systems out there, you don't get to the point of saying that they are servicing, repairing, items of equipment. They are monitoring the proper functioning of those systems and they are alerted when there is a problem with the functioning and they then can take some steps in accordance with procedures. Some steps they are able to retain for themselves which I think it is fair to submit from the evidence reasonably in the scheme of things simple steps, ones that are difficult or are treated - - -

PN889

THE COMMISSIONER: Practically, we are using the words complexity and criticality I think it was yes?

PN890

MR MEEHAN: Yes, Mr Grassie is and when I say relatively simple I'm talking in the context of people who are experienced in this area of activity they might be in. So the operators will do some basic tasks that is within their capacity and authority to do but there are procedures for escalating problems and remedial action to others. Some of which includes engineers who may well have to go out to the business equipment and repair it or replace it or service it. But not these people, it's not their job. That is why we say there is not a marrying up of what they do with these tasks.

PN891

No doubt one could say an engineer who goes out to rectify a problem at the client might be a person involved in servicing or maintaining, but that's not this case. In that respect the role of batch operator and infrastructure operator is not materially different. In no case are they out there or in the data centre, repairing or servicing business equipment and it is not on proper consideration of the evidence it's not the case that they are performing those tasks through the console. They are monitoring the system and acting upon alerts and where necessary escalating the remedial work to others.

PN892

Now unless you have any particular questions about those roles, any further questions I'll move on to the other functions. Might I first make the point, and I know I'm repeating myself, apart from the network operators to whom I'm going to come to there's no submission against us that any of them are performing work covered by the rules, none at all. If the Commission would weigh that up carefully, one would think if the union were actively asserting, they could lawfully enrol its members under their rules, other people within the workplace to which they want to negotiate a collective agreement they would come here and make a submission about it. Can I ask you to go to exhibit M4 which is the statement of Mr Plasto? Do you have that?

PN893

THE COMMISSIONER: Yes.

PN894

MR MEEHAN: You may recall he deals with two particular groupings of network operators and the security operations analysts. Can I start with the network operators and again I want to work carefully through this statement. The first thing to note in paragraph 5 is that the GNMC which is the global network management centre, provides network monitoring, support and problem solving to IBM, that is both internally and it's customers. In paragraph 6 they manage in the vicinity of 8000 network devices across the Asia Pacific region for IBM and its clients.

PN895

He gives some examples of the network devices that are managed and describes them. There are routers, network switches, packet shapers, firewalls and hubs and he gave unchallenged evidence that none of those devices depend upon a host computer to be operational and he doesn't regard them as peripheral to computers. They are not computers themselves they are devices that form part of a network. Now in paragraph 8 he says:

PN896

Generally speaking a network device at GNMC is responsible for supporting are components that join a computer network together.

PN897

He gives the example they join the IBM network to one of its customers and also join one of IBM's customers to a third party. Now the team is known as a level 2 support group. It's charged with resolving network problems that are identified through monitoring conducted by the GNMC and problems assigned to them which are believed to be network problems. So that in broad compass is the scope of the role. In paragraph 10 he introduces in more detail the particular roles. There's a team of 12 network operation specialists and then four account focal/senior operators – he says they could also be called network analysts or land specialists.

PN898

Six of those only are permanent, the others are contractors and they perform shift work. They are all located on the flight deck. Then at 15 he comes to what they do. He annexes the position description, but I want to first come to paragraph 17. He says:

PN899

Network operators are responsible for monitoring, diagnosing and fixing problems with networks from the flight deck. IBM's other data centres and the many different customer networks serviced by IBM. They do this using a computer screen at their work station at the flight deck and logging into the operation systems of routers and switches to view the device configuration files to work out where the problem is in the network. That is from the core data centre to the client's site.

PN900

Pausing there, I hope I'm capturing this accurately, what these operators are doing is through the computer screen that you've seen in the flight deck, through their computer screen they are logging on to these network devices and they can view through that logging in process, the configuration files to gain an understanding of what problems are occurring on the network. This is not a physical attendance upon any network device and inspecting it and noticing faults. It's again a remote log in view a device configuration file and find out what the problem is. This work comes to them, you'll see in paragraph 18, via a problem ticket and that can come either from other teams or from the help desk.

PN901

In paragraph 20 if the problem is a network problem it's their role to work out why a network device has failed and to fix the problem with the device. Again in 21, they log into the networks remotely from their desks. They don't make site visits to the place where the problem has occurred, all problems are diagnosed remotely. Now importantly in 22:

PN902

During business hours if a device fails they might report the fault with the device to a level 3 network support person who will investigate and reconfigure the device if required.

PN903

So that's an escalation of the problem, it's come in on a problem ticket, the network operator has logged on to the device, looked at the configuration files and they may then report it or escalate it to a level 3 support person. If it can't be resolved by that level 3 person, they'll return it to the network operator with recommendations on what to do next. Again, this involves logging into the device remotely to fix the fault. Now it can involve reconfiguring a device and I think there was a question asked of Mr Plasto in cross-examination about reconfiguration and that is done through the logging in process.

PN904

In 24 they also set up what is described as sniffers on a network to help diagnose a problem. Again it involves logging into a router or switch in configuring the port to ensure the sniffer works. This can involve physically connecting the sniffers to router switches in the data centre. So there are some router switches upstairs and that can be a physical connection. But we're not in the arena with respect, of servicing, repairing, maintain or structurally altering of assembly business equipment.

PN905

THE COMMISSIONER: Just take that in two parts.

PN906

MR MEEHAN: Yes.

PN907

THE COMMISSIONER: Do you say the evidence says the network device is not a piece of business equipment or are you saying that what they do isn't to that business equipment, isn't the servicing et cetera?

PN908

MR MEEHAN: It's really the latter.

PN909

THE COMMISSIONER: Okay I was a little confused. I wasn't sure on paragraph 7 what that was actually wanting to say, what you were going to draw from paragraph 7. I didn't want to interrupt your flow but you know just because he says that he doesn't think that these devices are peripheral to computers, I thought you might be going so far as to say they weren't business equipment.

PN910

MR MEEHAN: He says they're not computers, he says they are not peripherals, that was unchallenged.

PN911

THE COMMISSIONER: In his opinion.

PN912

MR MEEHAN: As to whether that falls within whether devices can fall within the description of business equipment - - -

PN913

THE COMMISSIONER: Within the terms of the rules, not in the terms of whatever he does.

PN914

MR MEEHAN: Yes, I would not cavil with that proposition he could, but of course the Commission has to go further and say what is the work in relation to those - - -

PN915

THE COMMISSIONER: Yes, so we come back to the first part. So it's the first part, it's the - this work you submit is not servicing, repairing, maintaining, structurally altering or assembling?

PN916

MR MEEHAN: Yes, it's monitoring the operation of that and diagnosing the problems through logging into the device and you will note with respect that some of the work in terms of rectifying problems can be escalated to level 3.

PN917

THE COMMISSIONER: So would they deal with level 2 would they? is that what you say the evidence is, but the level 3, they would go somewhere else?

PN918

MR MEEHAN: Well I think the answer to that lies in paragraphs 25 and 26. You'll see in 25 there's engagement with third parties in relation to incidents. A large part of the role of the operators to talk directly to the customers of IBM

when they experience network problems. In 26 they also place calls with technical people working in other areas to work out the reasons for a network problem. It's apparent from paragraph 26 that some of the problems can – the source of them can be from third party providers. For example, a telecommunication provider and so remedying the problem involves contacting those providers and working with them in solving the network problem.

PN919

In 27 if a network device needs to be physically replaced for example at one of IBM's other data centres, the network operator will ask someone from the ITS team to go out to the location and fix it. So its not – the operator is not involved in the physical replacement or repair and indeed engages with third party providers and internally with level 3 support to have problems rectified. In 28 he says that if there is a network problem at the data centre, that is on the floor above the flight deck at Baulkham Hills, the network operator may physically go to where the device is located in the data centre and replace it if that is required.

PN920

But again, with respect we're not in the arena of servicing, repairing, maintaining if one is replacing a piece of equipment. Might I then move on to the security operation analysts and this you will see introduces quite a different role. There's a team of eight security operation analysts, you'll see in paragraph 36 they work a 24 hour rotating roster. There is a job description to which I'll come, 39 security operation analysts are responsible for monitoring the intrusion prevention systems and intrusion detection systems for IBM and clients of IBM. Those devices are designed to identify security threats and vulnerability.

PN921

This is perhaps an area that is easier to understand than some of the other areas because it is about keeping at bay external threats to systems and monitoring the system to ensure that those threats don't become – don't generate into reality. In 40 the analysts monitor the systems from their computer monitors at the desks at the flight centre and they use multiple computer monitors. They receive alerts on their computers notifying them of any anomalies in a customer security system. That has some resonance with the way in which infrastructure operators receive alerts. There is a system that one views and it displays alerts to indicate that attention needs to be given to a particular incident.

PN922

41, if there is a breach of security the analyst needs to follow security procedures to resolve the issue. They are also required to analyse security incidents they are then required to provide network and security monitoring and fault and determination. I move to paragraph 44:

PN923

Security operation analysts will not fix problems with hardware themselves but will communicate with other areas and external parties to resolve a problem. If required they will do basic hands and feet within the data centre.

PN924

I'm not sure what the turn of phrase hands and feet really means, but there's an example given. They'll liaise with external hardware vendors and internal support teams to assist with the resolution of a problem. They'll attempt to solve a

problem if someone is trying to hack into a system. If necessary they'll refer the problem to another area and they'll report a problem to senior people within IBM who are not on flight deck. Then there's discussion about a team leader. Again, the overwhelming focus of this role is on monitoring via a computer screen alerts in relation to security threats to a clients system. The role does not extend in any way to attending upon servicing hardware or repairing or altering it et cetera within the rules.

PN925

Now if the Commission then goes to the annexure and I don't want to particularly dwell on those but there is nothing in those descriptions which would in any way qualify or contradict I should say the body of the statement. Perhaps on page 3 of annexure GP2 you will see the description of roles and responsibilities front line analysts, provide network monitoring and fault determination, resolution or escalation for SNA, NBN firewall and other network systems. Accurately record any problem management systems network alarms and faults. Liaise with other technical areas, awareness of customer service levels when dealing with problems, call out services to third parties as required, Telco's hardware vendors et cetera.

PN926

So in substance and in detail I submit that role does not enter the arena of the tasks caught by the relevant eligibility rule. Unless the Commission has questions about those two roles, I will move on. Now if the Commission could have a look at exhibit M3 which is the statement of Mr Greer. Do you have that Commissioner?

PN927

THE COMMISSIONER: Yes.

PN928

MR MEEHAN: I can be a little more brief in relation to this. You will see in paragraph 3 that the enterprise service management involves proactive and reactive management processes but dealing with incidents that arise for customers of IBM who have outsourced certain information technology functions. By incidents he's talking about component or process failures in the systems that IBM manager. Now it's only the reactive processes that are provided from the flight deck. The proactive processes are provided by employees or others who do not work at the flight deck.

PN929

Coming to the nub of the role in paragraph 6, Mr Greer says that it is to keep an eye on incidents that affect IBM's ability to deliver services.

PN930

The ESM is ultimately responsible for ensuring incidents are resolved by coordinating work by various people with specialist skills to manage and resolve the incident.

PN931

So it's a coordinating role. He says in paragraph 7 they are not constrained by service line, they will work across the whole organisation to mobilise resources.

PN932

The ESM does not fix or repair anything himself or herself. The remedial work in fixing an application that's not functioning is performed by support teams and contract workers not the ESM.

PN933

The ESM doesn't write code, and then in paragraph 11 Mr Greer indicates that the ESM only gets involved in limited circumstances that is when an incident falls outside a severity limit. In 14, 15 he deals with how incidents are raised. 15 part of the role is to maintain awareness of what is occurring across various systems, this can occur formally and informally, talking to other people and the like. Then situation management this is a further illustration of the coordinating nature of the role. The ESM will determine which streams need to be initiated to resolve to solve the problem. He means by that what teams will be put together and there'll be a conference call and expertise will be mustered and the like.

PN934

The ESM does not go into the system himself to solve the problem. They don't have access to the client systems.

PN935

Now I think I can pause there and say that this role is very far removed from the type of role that could in any way come within the rules. There is no connection here with any business equipment. It's primary focus is coordinating expertise to respond to problems, team management. I notice the time Commissioner I've probably got another half an hour.

PN936

THE COMMISSIONER: Can we keep going?

PN937

MR MEEHAN: If it pleases the Commission. Can I ask the Commission to go to exhibit M2 which is the statement of Kaylene Harris. Ms Harris deals with the service restoration management team which is one of the areas for which she is responsible. She says in paragraph 3 it's made up of a number of customer specific sub teams and she's observed the work performed there. In 4:

PN938

It's a team responsible for ensuring that major incidents affecting customers at IBM are resolved efficiently and effectively when they are reported.

PN939

She says:

PN940

Major incidents are reported by customers, IBM employees, or tickets raised by an automated process.

PN941

She then identifies the scope of what a major incident might involve and that can extend to hardware, software, subsystems, applications, cabling or a combination. She says the team provides support for between 50 and 60 customers, as well as internally to IBM in maintaining its own system. Then moving forward to the role and responsibilities there is a job description annexed which I'll come to. She says all of the SRM's – these are the service restoration managers, do the same

type of work, within their customer specific teams. The role is to ensure that service is restored to a customer of IBM when a major incident occurs and they are responsible for overseeing that major incidents that affect the services that IBM delivers to its customers are resolved efficiently and effectively.

PN942

Now she then deals with how severity is graded but I don't need to trouble the Commission with that. Can I move forward to paragraph 15:

PN943

SRM's are not responsible for fixing any SEV1 and SEV2 incidents themselves. It is the role of the help desk to assign tickets to the appropriate resolver group. Then the SRM's need to ensure that SEV1 and SEV2 tickets are actioned by the resolver groups within the appropriate focus. Resolver groups who are assigned SEV1 or SEV2 tickets include for example, network specialists, service specialists and security specialists.

PN944

They can include IBM employees or contractors or third party vendors. So it's not a role that is involved in fixing problems or incidents themselves. It is a role of overseeing the attention that IBM gives to remedying incidents which involves resolver groups and can include third party expertise. In 16 the evidence deals with what physical tasks are undertaken by the SRM's, they are required to monitor their dashboard. That I think has been earlier refined in paragraph 13 on their computer monitors, they have a dashboard and they're required to monitor that and they sort through the SEV tickets as they appear in order to prioritise their workloads and they work on multiple tickets at once.

PN945

In her words she describes the job as the single point of contact when an incident occurs. So there is an interface there for the client or for IBM internally when there is an incident meeting the severity qualifier and this role is concerned with being that interface and making sure the appropriate resolver group is actually doing what it's charged with doing. Physically there's liaison by telephones with account teams within IBM and with customers themselves until the incident is resolved. The SRMs keep an eye on the progress of those tickets to make sure the problems are resolved quickly and to meet the service level expectations of the customer.

PN946

Then it appears there's a role in 19 in interacting or making the interaction between resolver groups happen appropriately. SRM's also instigate paging to resolver groups to account teams and others. Again it is one – it is a role that is not concerned with fixing the problem with systems, or equipment itself it is one of being an interface ensuring the resolver group is actively working on the incident and managing the relationship between the resolver group and others. If the Commission goes to the annexure page H1, you'll see on the first page the position concept and in the second dot point:

PN947

The SRM leads activities related to restoring service following the occurrence of a major incident and takes a leading role in ensuring that high impact

complex problems affecting IBM's clients are driven to restoration in the most efficient and effective manner.

PN948

The duties and responsibilities are set out on the next page. You will see under the first dot point the activities including ownership of the technical service restoration plan, coordination of the restoration actions, escalation and communication. There's planning, coordinating, controlling the restoration, acting as a centre of communication point, developing strong working relationships, training and mentoring other team members. I pause there we are with respect, far removed from the type of role that is caught by the ASU eligibility rules.

PN949

THE COMMISSIONER: Just on that page, the last page, these technical skills that's some internal dos skill set competency based or something is it?

PN950

MR MEEHAN: I can't answer that without instruction. They are skills not tasks and not functions, that's stating the obvious. That in fairly full compass I think deals with the full suite of activities that are performed by workers at the flight deck and for the reasons that I have submitted none of those can properly in accordance with the ordinary meaning of the words in the eligibility rule, can be caught by that rule. It would be stretching significantly the ordinary meaning of those words, servicing, repairing, maintaining, structurally altering or assembling business equipment to say that the tasks performed by any of these people marries up with those.

PN951

THE COMMISSIONER: We don't have to keep saying business equipment, because business equipment can include computers and peripheral equipment, so the task for the Commission is whether you say, whether any of those persons are employed or are usually employed wholly or partly in the servicing, repairing, maintaining, or structurally altering, and or assembling computers and peripheral equipment, right?

PN952

MR MEEHAN: I missed the last bit I'm sorry.

PN953

THE COMMISSIONER: I just substituted computers and peripheral equipment for business equipment because it says, business equipment shall be deemed to include computers and peripheral equipment.

PN954

MR MEEHAN: Yes, but you wouldn't substitute it because it is not so confined, but it includes as you're right to say it includes computers and peripheral equipment, but the - - -

PN955

THE COMMISSIONER: Well I've heard nothing of cash registers, or accounting machines, or adding machines, or calculators, so I assume that's what you're submitting. You're submitting to me that on the evidence none of the employees are employed, or usually employed, wholly or partly in the servicing,

repairing, maintaining, structurally altering and or assembling computers and peripheral equipment.

PN956

MR MEEHAN: Or any business equipment.

PN957

THE COMMISSIONER: Or any business equipment.

PN958

MR MEEHAN: Yes, that's what I say you're not – this is not limited, business equipment is not limited by - - -

PN959

THE COMMISSIONER: I see, yes, include, yes I'm sorry.

PN960

MR MEEHAN: Yes inclusive. But I do submit that when the Commission comes to construing what business equipment means you would have regard to the inclusive types of equipment so - - -

PN961

THE COMMISSIONER: I guess I'm trying to get you to respond to, or partly, because a number of times sometimes the evidence has been primarily, primary or something and you've used that term yourself in making submissions. This says wholly or partly, it doesn't just end, it doesn't say and will in the prime or in the main, it talks about or partly.

PN962

MR MEEHAN: I respectfully agree Commissioner we – I will make the submission in the clearest form I can – we submit that none of the tasks that are described in the evidence in any way involve whether it be wholly or partly, the types of work in relation to business equipment, including computers and peripheral equipment as defined in the rules.

PN963

THE COMMISSIONER: Yes, I understand your submission.

PN964

MR MEEHAN: Now unless the Commission has any further questions, they are my submissions. If the Commission were against us on eligibility we don't press any other grounds of objection to the application but as I earlier submitted with respect this question goes to jurisdiction. If the Commission is with us on our submissions about eligibility the conclusion in my respectful submission must be that this application for the secret ballot order has not been competently made.

PN965

THE COMMISSIONER: Thank you Mr Meehan. Mr Harris is there anything that's been raised in those submissions limited to that, that you want to say in making any submissions?

PN966

MR HARRIS: Just to reiterate - - -

PN967

THE COMMISSIONER: No, I don't want to hear a repeat, I just want to hear is there anything new that's all in respect of what has been said.

PN968

MR HARRIS: I suppose just to emphasise we've heard a lot about what the role of the infrastructure operator isn't. I think that the evidence that was provided particularly by Mr Grassie in cross-examination, indicates the specific tasks that the infrastructure operators perform. It could be taken to come within the eligibility criteria rules.

PN969

THE COMMISSIONER: I'm sorry if before I just want to acknowledge that you did say to me rule 5 (b) 5, but the thing got confused because what was attached to your witness' submission was A5.

PN970

MR HARRIS: Yes.

PN971

THE COMMISSIONER: Anything further?

PN972

MR HARRIS: No those are the submissions.

PN973

THE COMMISSIONER: Very well I propose to reserve my decision.

<ADJOURNED ACCORDINGLY

[1.25PM]

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