



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

1055085

**VICE PRESIDENT HATCHER  
DEPUTY PRESIDENT DEAN  
COMMISSIONER WILSON**

**C2017/2237**

**s.604 - Appeal of decisions**

**Stephen Fitzgerald  
and  
Woolworths Limited  
(C2017/2237)**

**Sydney**

**10.07 AM, MONDAY, 28 AUGUST 2017**

PN1

VICE PRESIDENT HATCHER: I will take appearances. Mr Fitzgerald, you appear on your own behalf? Mr Fitzgerald, can you hear me?

PN2

MR S FITZGERALD: Sorry. Since the last time I was in here I've gone profoundly deaf. I have two hearing aids and I'm still learning to try to pick up what's going on there. What I'm getting is sort of the distant sound of penguin squawking and the clicks and whistles of a Kalahari bushman. I'm setting up some voice recognition software here which will help me because what you say will then come up on screen. With voice recognition software it only recognises one person's voice at a time.

PN3

There is a way around this. You can proceed with what you're saying and I will just embrace that as being said. What I would like you to do is afford me the opportunity when it's my turn to speak of letting me run through everything I have to say without interruption, that would be great, because I'm having difficulty with the communication issue. Mr Shariff, I've already spoken to him about that and he's quite okay with me getting through what I have to say and then he will have his turn without me interrupting. At this point in time if you could just bear with me for 30 seconds and I'll set up the voice recognition software so that I can recognise your voice and the type will come up on screen so I can read what you're saying. Is that acceptable?

PN4

VICE PRESIDENT HATCHER: Mr Fitzgerald, why don't we adjourn, you tell us when you're ready, and we'll come back. So we'll adjourn and we'll - - -

PN5

MR FITZGERALD: I don't understand anything you're saying.

PN6

VICE PRESIDENT HATCHER: Yes. All right.

PN7

MR FITZGERALD: Sorry. So, look, just say what you need to say. I can read that in the transcript. I'm quite happy to go along with anything you say, okay.

PN8

VICE PRESIDENT HATCHER: The associate will explain to you just what's happened.

PN9

MR FITZGERALD: Yes.

PN10

VICE PRESIDENT HATCHER: We'll adjourn until you're ready to proceed.

**SHORT ADJOURNMENT**

**[10.09 AM]**

**RESUMED**

**[10.19 AM]**

PN11

VICE PRESIDENT HATCHER: Mr Shariff, your appearance is noted. Mr Fitzgerald, go.

PN12

MR FITZGERALD: With the voice recognition it needs to work on one voice at a time, so when you speak I will click it on to recognise your voice, and then I'll change profile to Mr Shariff. If there's any issues, if I'm getting lost on this, but as I pointed out, the evidence is already in. We're going through what is already before the Fair Work Commission, and no doubt you've already been through the transcripts so nothing new is coming up here, so I'm not going to be left in the dark even though I can't hear and I'm quite happy to proceed on that basis.

PN13

So I'll continue then. One of the key reasons we are here, and I'm getting this terrible echoing in my head, so I'm going to take these hearing aids out. They're not helping me. That's better. Now I hear nothing. So these get the audio keys but I still need to learn a bit more about the audio keys that pick up on vocabulary. The voice recognition software when it's tuned in to me is great. I can dictate perfectly, punctuation everything, so it needs to tune in to people's voices, and I've set it up through your audio system, and it may or may not work, but we'll see how we go. I'm quite happy for you to keep an eye on what's going on.

PN14

One of the key reasons we're here is because of Woolworths' jurisdictional objection in relation to section 386 for unfair dismissal remedy. From where I stand the jurisdictional objection is a bit of an assault on the Fair Work Commission and Federal law, and it shows some degree of contempt by Woolworths for the system. I'll come back to that though.

PN15

So that's a little disconcerting for me. There's also evidence, and I've said this all along of Woolworths bullying and harassing people out of their job and then not terminating their employment, which is an assault on section 394 of the Fair Work Act. I have the evidence of that here and I'll present that to you when I get to it.

PN16

Speaking of contempt. Sorry, I forgot to introduce myself. I'll do that now. My name is Stephen Fitzgerald, a previous employee of Woolworths Supermarket, Avalon, New South Wales, seeking unfair dismissal remedy before the Full Bench of the Fair Work Commission. I've already explained the situation with my hearing.

PN17

Just a point that I would like clarified before we continue; the directions of Hatcher VP for the submission on appeal were less than 10 foolscap pages double-spaced. I had one week to do my submission; Woolworths were granted an extension of time and given four weeks to do their submission, and that's 17

pages, not double-spaced. I'm just wondering if they were given permission for that. It doesn't really matter what the eloquent excuse is for this, that's still a form of contempt for the Fair Work Commission process by Woolworths. Now, whether or not this is acceptable is up to you, and if you feel inclined to allow it, then I'd like to know that now. Woolworths outline of submission on appeal I was told less than 10 foolscap pages double-spaced. This is 17 foolscap pages not double-spaced, so it breaches the directions given to me and no doubt the directions given to Woolworths. So, to me, again it's another show of contempt. But that's up to you, if you want to accept it or not.

PN18

What I would like to do is just leave that at this point in time so that we can get on with it. If Woolworths refers to this at any time during proceedings, we can have the debate then. Another point: proceedings in the Fair Work Commission as advised on the website are somewhat informal, so in view of that you may or may not accept but it's up to the Fair Work Commission. It's up to the Full Bench.

PN19

There's the directions. Why we are here in the Fair Work Commission; unlawful workplace practice. It's all in this transcript, so I'll run through the evidence briefly. When I get to it as the foundations stand for what's to follow. First of all, it's important to understand the reason and the motivation for unlawful bullying and harassment, unlawful unfair dismissal summed up as unlawful workplace practice. You know, I'd like to paint the big picture so everyone knows what's going on, so please bear with me for just a couple of minutes on this. I won't take very long.

PN20

I'm just going back to the sort of person I am. In primary school I was voted in as school captain for protecting the innocent kids from the bullies. That came with privileges so I was rewarded for that behaviour and that still continues today. The difference now is that the bullies are bigger. Also I have an unquenchable thirst for knowledge and what I have learnt along the way is that there's two types of people. There's human beings with warmth, compassion, love, understanding, some degree of intellect, logic and reason, and there's those human animals, who are animals pretending to be human. They have none of those qualities. I won't elaborate on that further, but I have seen it in my eight years at Avalon that the background of Woolworths is riddled with that cancer; type 2 human beings.

PN21

Anyway, I'll get past that. What brought up the bullying and harassment of staff in Woolworths Avalon is not just the attitude of management. There's also this thing called the internal performance score card. Now, this is a result of a lot of really poor decisions by upper management that impact the profitability of Woolworths. The internal performance score card with an attack on Woolworths Avalon frontline management staff, and to divert attention away from upper management decisions that impacted the profitability of the store. So they're trying to point their finger at someone else. Anyway, the motive for unlawful workplace practice, and there's evidence of that. From the witness statement of Luckshini Sivaskanda dated 27 February 2017, paragraphs 45, 46 and 47, I'll read it out. You don't have to go looking for it:

PN22

*Woolworths utilises a performance score card comprising five measures to assess the performance of its stores nationally.*

PN23

This is from Luckshini:

PN24

*I am aware that the store has been given a mandate to implement initiatives to improve store performance as a result of the score card performance in the 2015/2016 financial year. The store is under pressure to improve store standards in line with Woolworths' internal performance score card.*

PN25

Paragraph 47:

PN26

*As a result there is and has been a need for store management to emphasise expectations around performance and conduct. This was a directive across the store and not directed towards any particular person.*

PN27

Guess what, Woolworths went after every manager in the store other than the store manager and the 2IC. Every other manager was attacked and I was caught up in the carnage.

PN28

The carnage started as soon as the new manager, Andrew Tiller, and the new 2IC manager, William Lose came to the store, so it was a premeditated attack. They didn't wait to have a look around to see what people did or get to know people or to find out how efficient people were; they just got straight into it. They disembowelled the frontline management staff and, from what I've seen, replaced staff with people who are no better, and in a lot of cases not as competent, so the whole exercise was futile. I shop there every day. I see what goes on. I was there for eight years. Those people became close friends and colleagues of mine. They were beaten to death by Woolworths management.

PN29

Let's look at the staff, other than myself, that were abused to the point of nervous breakdown and out of their jobs at the will of manager 2IC William Lose. Meat department manager, Cheryl Wilesmith, made redundant and bullied and harassed to the point of requiring extended stress leave. Cheryl has still not recovered. She's still a nervous wreck a year down the track. She was the hardest worker I have ever known in my entire career; dedicated. She'd get there early and stay there late. She'd go in on her days off and this is the way they treated her; beat her down and destroyed her. This is the pain inflicted by Woolworths management of their own dedicated staff. Witness statement of Cheryl Wilesmith, exhibit 2, right up there at the top of the exhibit list:

PN30

*Around September 2016 I was bullied and harassed by Woolworths Avalon manager 2IC, William Lose, to the point where I required two weeks stress leave with the bullying and harassment as the reason. At the time I was told I had been made redundant after 30 years dedicated service. I never received a redundancy payment.*

PN31

She's still in a state of shock. She is such a nice person. It's despicable.

PN32

Office manager. And when I said they went after the management of the store, meat department manager, Cheryl Wilesmith, office manager, Ren Law, duty manager, Ray Plater, produce manager, Tony Hearne, grocery manager, Sanjay Saar. All beaten up by Woolworths, bullied and harassed. Sanjay and Tony left. They walked out. They couldn't cope with it. Ray needed extended stress leave. I couldn't cope with it. Despicable acts of human indecency.

PN33

Office manager, Ren Law. Her duties have been reduced as a result of outsourcing. Okay. That's in the transcript. Read the transcripts. So 2IC William Lose threw out her nice comfy office chair and left her with a plastic one. I mean, that symbolises getting rid of her. She was no longer wanted. Her job had been outsourced. So instead of saying, "Let's work out a new deal for you", they beat her up, threw out her equipment. It's in the transcripts. So William Lose symbolises throwing that person out with the rubbish, the same thing he did with the chair, the same thing he did with me and my office furniture.

PN34

I've got the transcripts here. PN1076:

PN35

*That's correct. Yes. Okay. Now, after five years in the office you would have known what was happening in the office. Our pays were – used to be managed by you and then went to - across to all yours?---Something like that. Success factors.*

PN36

Okay. PN1078:

PN37

*Okay. So that reduced your role in the store to some extent?---Yes, it did.*

PN38

Ren, "Yes it did". 1079:

PN39

*Yes I did.*

PN40

*Okay. Now, following on from that I remember having a talk to you and I asked you again in passing, you know, whether you were having issues with William Lose and you said, 'Oh, he threw out my chair'.*

PN41

On the transcripts from Ren. Okay. She was brought to the hearing by Woolworths. I hadn't approached her about this, but they didn't know that I was going to get this out of her under cross-examination, so it wasn't hidden.

PN42

Produce manager Tony Hearn bullied and harassed out of his job by 2IC William Lose, who went across to Coles. His mobile phone number is on the record and I requested that Commissioner Cambridge, in view of the informal proceedings, give him a call and ask him. They beat him up and drove him out of his job, and again a really good worker. A dear person. These people are frontline staff, they're professional, they work really hard. There's nothing stupid about the good ones.

PN43

Grocery manager, Sanjay Saar. Bullied and harassed out of his job by 2IC, William Lose, who went across to Coles. Another dedicated hard worker. Duty manager, Ray Plater, bullied and harassed by 2IC, William Lose, to the point of requiring extended stress leave. Let's have a look at his witness statement, exhibit 1, right at the top of the list. Okay:

PN44

*After the time Stephen Fitzgerald left Woolworths Avalon the Woolworths Avalon manager 2IC, William Lose, approached me and said he got rid of Stephen Fitzgerald because he wasn't performing.*

PN45

Well, I was performing. Okay. That's one of the excuses they use in their regime of getting rid of people. Number 1, get an Indian immigrant student worker to cast false accusations, dispersions on your character. That happened to me, it happened to Ray, it happened to people at other stores that I've spoken to. Then the employer then goes after the job. Okay. It's despicable.

PN46

Second, they give you a reduced performance score card which goes on your permanent record, so they degrade you and drag you down. Third, they bully and harass you to the point of nervous breakdown; (4) they drive you out of your job but they don't terminate your employment to avoid section 394 in relation to unfair dismissal. Okay. They're corrupting the Act. It's an assault again on the Fair Work Commission by Woolworths.

PN47

Then he said, "It was my fault for not keeping Stephen Fitzgerald working". So William Lose is doing this carnage and told to do it by upper management and I know the people involved. I won't point them out to you, but I know them. Ones that blow in from England. This is Ray Plater saying about me:

PN48

*I said that Stephen Fitzgerald started at 5.30 pm did a mop up and prep the store to receive the loads.*

PN49

And it was a big job after a day's mess just to do that.

PN50

*He then unloaded all the delivery trucks.*

PN51

Milk truck, first produce truck, grocery truck, second grocery truck, 50 tonnes of produce unloaded by hand, brought in to the store, put away, all left ship shape and clean and then I did all the paper work for the day, and I did that in five hours. No one at the store who has replaced me has been able to match that.

PN52

I was dedicated to the job. I was a minute away from home, so I could get home and check on my disabled wife.

PN53

*Mop up at the store, unloaded all the delivery trucks, did all the empty pallets and roll cage return, and all the paper work for the day. He finished at 10.30.*

PN54

So I did five hours straight through every day. Five hours straight. Only took a 10 minute break if the opportunity presented itself. Why would you get rid of that person? It's insanity. But this is what you get from Woolworths management; pointing the finger, blaming someone else for their stupid decisions. Ray also said that:

PN55

*If there was opportunity he would –*

PN56

Me, Stephen Fitzgerald –

PN57

*take a break and go home and check on his disabled wife, take her to the bathroom.*

PN58

This is in his witness statement:

PN59

*I said to Stephen Fitzgerald that the actions of management have impacted staff morale with multiple resignations and good staff going across to Coles Supermarket.*

PN60

Exhibit 1 and exhibit 2 we've just been through it. I've been through the store being given a mandate to boot people out. I've looked at the staff other than

myself who were turfed out. Then there is me, the back dock coordinator and safety officer for eight years bullied and harassed out of my job by Woolworths manager 2IC, William Lose. This included persistent denying me access to my office furniture. He took away the analogue RF gun essential to me doing my job efficiently. He took it off me, wouldn't let me use it, so that I could do all the paperwork. How are you supposed to work under those conditions? This went on for two weeks, persistent non-stop bullying, harassment and intimidation. The job I did was extremely dangerous, manual pallet check, elevated off the tail gate of the truck. You had to stay really focused on getting the job done safely. I was the safety officer. For the previous two years, not an injury. As soon as they got rid of me, two injuries, one hospitalisation, three lower back injuries. That's how dumb they are.

PN61

Persistent denying me the access to office furniture, took away the RF gun I needed for the efficiency of my job. He broke into my locker, removed personal items, he removed and disposed of my safety officer photo from the safety officer display and as the last straw he threw the office equipment out with the rubbish. It's all in the transcripts. As outlined in my applicant's closing submission dated 15 March 2017 as follows.

PN62

As outlined above William Lose says one thing and then he contradicts himself and says another. Another thing, and then he fabricates the fantasy story. After seeing the photo on appendix 3 which is a photo of where my desk was downstairs what William Lose is now suggesting is absolute insanity. You try to work under the stairs with the lift motors running. He reckoned if he pushed my desk under the chairs that's where I could do my office work. I'm a big man. You'd have to be a contortionist to get under there. It's impossible, it's pathetic and it's hair-brained and it's fabricated and again if he liked the desk under the stairs so much why did he throw it out with the rubbish? And I'll get to the evidence of that. I know why. That's what he does. That symbolised throwing that person out with the rubbish, the same thing he did to Ren, the office manager.

PN63

PN1470, Mr Fitzgerald:

PN64

*You got rid of the desk.*

PN65

When he was sitting in the witness chair:

PN66

*You got rid of the desk. Okay. And you threw it out with the rubbish.*

PN67

Will Lose:

PN68

*I was hoping it would go to a good home initially which is why I left it outside.*

PN69

Admission that he threw it out. PN1473:

PN70

*So you didn't want it in the store.*

PN71

Will lose:

PN72

*It didn't fit in that spot under the stairs.*

PN73

Clearly, there was no room there. That's where he expected me to do my office work.

PN74

PN1474:

PN75

*It didn't fit in that spot so you put something bigger there.*

PN76

He pushed the chair under there and put a roll cage - and pushed my office chair and desk under there. When he got rid of that, he put a roll cage there which was bigger to block access. You couldn't get to the lift motors after that. It didn't fit in that spot, so he put something bigger there:

PN77

*Don't like the boxes where you've got it indicated.*

PN78

*No, no, no, we're talking about the desk. My desk.*

PN79

Will Lose:

PN80

*Okay. The desk did fit under the stairs.*

PN81

So he's contradicting himself. It didn't fit under the stairs but now it does. There's only so much interference and distraction you can take while doing an extremely dangerous job, and it was dangerous. It took me years just to build my lower back muscles up using a manual power jack to do that job without back strain. My lower back muscles are like iron cables because of it and, you know, I appreciate that, but anyone new coming along to do the job, back pain, back injury, back injury, back injury. See, they didn't understand what was required. I did. I looked into things. No one liked to see the big picture. As outlined in the witness statement of Ray Plater it was Woolworths' intention to get rid of me and that's exactly what they did. You can't argue with that witness statement. William Lose said to Ray Plater that he got rid of me.

PN82

All of these actions were reported to the store manager, Andrew Tiller, and he did nothing to curtail the activity of 2IC, William Lose. In fact, the bullying and harassment escalated from that point. So I took the appropriate action and one would think that the store manager would have done something about it unless he was complacent and removing internal management. And Andrew admits to my representations to him, and admits to doing nothing about the unlawful activity of William lose. He admits to that, also in the transcripts. As you can see, I was caught up in the carnage at Woolworths Avalon and no doubt Woolworths will refer to exhibit 5, 6 and 7. Mr Shariff here will pull those up and throw them in your face as a smoke screen and diversion away from the unlawful acts of bullying and harassment and unlawful, unfair dismissal summed up as unlawful workplace practice.

PN83

Back to their outline of submission on appeal again it is all smoke screen and diversion and attempt to mislead the Full Bench by omission. That's all that is. I've been through it with a fine tooth comb. Exhibit 5, 6 and 7. Exhibit 5, code of conduct conflict declaration; exhibit 6, training focus, bullying and harassment. Maybe they should have given that to William Lose. Exhibit 7, training history record. This is what they threw up at the hearing for their excuse why I was bullied and harassed out of my job. It doesn't make any sense. No logic and reason. Again, type 2 human beings, no brains. How can any of this possibly justify the unlawful workplace practice perpetrated against the staff at Woolworths Avalon? To even think it justifies those unlawful acts you would need to be somewhat mentally challenged.

PN84

The people that do these sort of things are hallmarked with brutish animal behaviour. Nothing justifies what Woolworths did to me and other innocent hardworking dedicated career personnel at Woolworths Avalon and that is why I'm before you, the Full Bench, seeking unfair dismissal remedy. It was my intention to do the same thing I did when I worked as a field officer for the Department of Lands under district surveyor, Bill Kelly, and that was to work for 10 years and then retire from the job. Ten year chapters I like my life in. Retired from the job at the Lands Department with long service leave. My intention with Woolworths was 10 years dedicated hard work, and retire with long service leave. They cut that short for no reason. I got eight years, so I was denied two years' wages and long service leave meaning I seek what they took from me plus damages for fabricated defamation of my character, perpetrated by Woolworths representative, Nicole Barclay and Ian Bennett of Sparke Helmore. It's all in the record and I'll come to that. Thank you, Mr Bennett. I'll continue now.

PN85

One of the other issues that brought me before the Full Bench was legal representation. That's a bit of a moot point now because I'm here without it and Woolworths has two lawyers here on their behalf, so no point even going into it. No, I will go into it. We need to know these things because it actually stems from the pre-hearing conference, so you do need to know what goes on. I understand why I was not afforded the opportunity to have an adjournment so that I could

seek public funding to afford a barrister. I had a look at your list downstairs and you're very busy. I appreciate that. You know, and an adjournment ruptures your timetable to some large extent. All you need to do is tell people that. "Mr Fitzgerald, you're asking for an adjournment but we are under pressure here. It would better, in view of the fact that things are somewhat informal, that we proceed and we will make allowances for you not having legal representation". Then I know what's going on. Now, I know. It's quite clear. So it's not pandering to Woolworths; it's that you are under pressure to perform. You've got a lot to do and an adjournment, as I said, you lose a whole day. So, you know, I'm on your side there. I understand it. I wasn't real happy at the time, but after looking at what's going on in here, I now understand. So my apologies for what I thought about you.

PN86

I was misled by the Fair Work Commission website and I was misled by what Cambridge C asked Nicole Barclay representing Woolworths off the record. This off the record thing has to stop. If deceit is going to be done that's where it happens. No more off the record. In a pre-hearing conference Cambridge C asked Nicole Barclay if she would be represented by a solicitor or barrister. Nicole Barclay distinctly said no. Now, after reading the website it says legal representation is not required to afford a person in my position the opportunity to present their case to the Fair Work Commission, and then Cambridge C asks Nicole Barclay if she's going to be represented by a solicitor or barrister and she says no. That confirms I don't need legal representation.

PN87

She said she would not have legal representation at the hearing and she did have legal representation at the hearing. There's a bit of a point here. Mr Bennett was at the hearing. As pointed out by Cambridge C Woolworths can have anybody assisting them at the hearing including the Prime Minister. I was a bit gob-smacked by that. Including the Prime Minister. I mean, that's enough to shut anyone up, so it shut me up and we proceeded. Ian Bennett constantly gave Nicole Barclay representing Woolworths legal advice. His name appears three times in the transcripts. If he's not representing Woolworths why is his name in the transcripts three times? This legal representation was not approved by the Fair Work Commission. It was a ploy to disadvantage me on two levels; once in your website, and once in a pre-hearing conference.

PN88

I was misled off the record and of course it cannot be proven. It's premeditated deceit. I was misled, lied to and disadvantaged, so there's two points here; (1) being misled by the Fair Work Commission website about not requiring legal representation; and (2) being lied to by Nicole Barclay. When I brought this up in the hearing in the transcripts she lied about it there as well. If you want to weave your way through it she also contradicted herself. To me, this point is moot now. I'm here by myself without legal representation.

PN89

We might as well keep going with this. Woolworths; now when I came into this I was under the impression you didn't need legal representation. The most I can get out of this case if it goes in my favour is half a year's wages, \$16,500. I was

working abbreviated hours, I was close to home so I could look after my wife. She is more important to me than doing the long hard slog of making a fortune to pay for a lawyer. So now you afforded me the opportunity and I really, really appreciate that as any worker would, but what has unfolded since then is a little bit disturbing. On 17 August, 11 days ago, Woolworths were given permission for legal representation. Here we have it. At that point I made representations to the Full Bench for adjournment so that I could seek public funding which would expose this case to public scrutiny and be able to afford a barrister to match Woolworths. That didn't happen and I explained why. You know, you're on a tight schedule, fair enough. I'm still disadvantaged by that. Woolworths had legal representation in the hearing; Woolworths had legal representation here in the appeal and I don't. I am a worker representing Australian workers, all of them, the whole lot. I represent the whole lot of them. What are they going to think? Well, I won't be telling them because that's not what I want here. I'm about protecting the Fair Work Commission and I'm about protecting the Federal Government and our beautiful two party preferred political system which is the best in the world. It's not perfect, but it works really, really well.

PN90

Woolworths are about undermining and destroying it, corruption of our law, assault on the Fair Work Commission. That can be misconstrued. I know what the situation is here. I know what the facts are, but the voting public don't. It's about perception, what they perceive at election time, that's what happens. So you can't afford to give people the perception that something untoward is happening here. You need to dot the "i's" and cross the "t's" and clean this up.

PN91

From your website, legal representation is not required, as I said, to afford a person in my position the opportunity to present their case. That's added on by Cambridge C, and he said that quite a few times. To be honest, you should also say, to be honest that Woolworths will have legal representation, but the worker will not be allowed to have legal representation. You know, to be fair in the Fair Work Commission, at least let the worker know what they are facing when they come here seeking justice. I have been battered and bruised and this has taken up nine months of my life to the day, to the day. My representations here, 27 November, here it is 28 August, nine months later. Let's hope something good is borne from this. So I don't have much money, I couldn't afford legal representation, blah, blah, blah, blah, been through it. That correspondence with the Full Bench is all here in this group of emails about whether or not I get an adjournment and legal representation.

PN92

Four; perjury and contempt by Woolworths manager 2IC, William Lose. This is a Federal jurisdiction. It is subject to Federal law. There are Federal authorities that take matters on. Perjury and contempt in this arena is a Federal crime. We are in a Federal jurisdiction and false testimony is a Federal offence; obstruction of justice, article 25 of the Criminal Code. William Lose lied to the Fair Work Commission about his conversation with me and he lied about having conversations with his own boss, Woolworths store manager, Andrew Tiller, and it's all on the record.

PN93

William Lose has committed perjury and holds the Fair Work Commission in contempt and I'll get to that. William Lose has been 2IC for a long time. He has aspirations to become store manager. So he doesn't wish to be seen as someone who has difficulties with the communication. When I approached Andrew Tiller about William Lose and the incessant harassment and bullying expecting that Andrew would shut it down and get William Lose off my back, which didn't happen, it escalated. When I approached store manager, Andrew Tiller, I said, "Why doesn't Will talk to me about what's going on here?" You know, "It's driving me insane", and all I got from Andrew Tiller was, "He doesn't say much". That was it, and I was marched out the door. That's it. Andrew could have shut it down and diffused the situation there and then but he didn't. He did nothing. Pathetic. Look at all the time we're wasting here. Look at what this has cost. I mean, it must be costing you \$10,000 an hour to run this. Woolworths has cost us that, tax payers.

PN94

William Lose said he had multiple conversations with me during his bullying and harassment campaign to get rid of me. Those conversations are all lies. They are a total fabrication, and if you read through them you will, like me, be somewhat disturbed by it. He also said he had multiple conversations with Andrew Tiller about this case here in the Fair Work Commission and Andrew denies those conversations happened. Andrew has no reason to lie. I said to Andrew before I started cross-examination on him that it wasn't that long ago that a prominent public figure was in prison for two years for misleading the court. So that was to make sure I got the truth out of Andrew, and he gave me the truth.

PN95

William Lose said he had multiple conversations with me. It's in his witness statement. They're all fabricated. His witness statement is a total fabrication and lies. He also said he had conversations with Andrew Tiller about this court case which didn't happen. Again, fabrications and a lie in his witness statement; Federal offence. Let's go to the evidence. PN1231:

PN96

*Now, as the manager you would expect that you would know what the staff are doing and know who's involved, Will Lose, included. Okay. One would expect that you would have a conversation with him about it, about coming to the Fair Work Commission today.*

PN97

Andrew:

PN98

*No, we were not to discuss witness statements, anything like that.*

PN99

PN1232:

PN100

*So you didn't say anything to William Lose?---Other than the fact that we were coming here today at 10.30 nothing.*

PN101

PN1239, Mr Fitzgerald:

PN102

*Will has no idea what's going on?---Yes.*

PN103

PN1240:

PN104

*He does. How does he know that? Did you talk to him?---No. That was not from me.*

PN105

PN1244:

PN106

*Like over review did you talk to him?---No.*

PN107

No conversations between William Lose and Andrew Tiller about the case in the Fair Work Commission. PN1245:

PN108

*Not at any time?---Other than the fact that we had to be here today.*

PN109

That's Andrew under oath. Let's jump to William Lose under oath. PN1512, Mr Fitzgerald:

PN110

*Before we came to court here once you were aware of the situation regarding the Fair Work Commission claim by me for bullying, harassment and unfair dismissal did you discuss the matter with Andrew?*

PN111

Pretty simple question; same one I put to Andrew:

PN112

*I mean, he's your boss?---Yes, I did.*

PN113

PN1513:

PN114

*Pardon?*

PN115

William Lose, PN1514:

PN116

*Yes.*

PN117

*Well, I would too. You know, you'd find out what was going on. And what did Andrew say to you?---I can't recall.*

PN118

Because they didn't happen. PN1515:

PN119

*You wouldn't have a clue?---Can't recall specifically what he said.*

PN120

PN1519, Mr Fitzgerald:

PN121

*Sorry, all I am getting at here is that Andrew has said he didn't have a conversation and Will did; correct?*

PN122

PN1526, me:

PN123

*Well, the nature of the question now after being interrupted by Nicole Barclay, the nature of the question now then is, and I said to Andrew, I'll ask exactly the same question, in relation to coming to the Fair Work Commission, did you have a conversation with Andrew about it?---Yes, I did.*

PN124

PN1527:

PN125

*I'll accept that.*

PN126

PN1543, Mr Fitzgerald:

PN127

*Will, with your discussion with Andrew about coming here today, and as I said about this case at the Fair Work Commission, what did you discuss with him?---On what occasion?*

PN128

So he's fabricating multiple conversations with Andrew that didn't happen. He lied on his witness statement; he lied under oath; he fabricated multiple conversations with me that didn't happen. What I'm getting at here is that he went behind people's backs at bullying and harassment to get rid of them. He didn't discuss anything with them. William Lose lied about his conversation with store manager, Andrew Tiller, the same way he lied about his conversations with me. They are a total fabrication, perjury and contempt for the Fair Work Commission.

PN129

Back the jurisdictional objection I mentioned earlier. Jurisdictional objection; Woolworths' jurisdictional objection and no doubt one of the driving forces that brings this appeal before the Full Bench. This is a direct assault on the Fair Work Commission by Woolworths. Our law is under attack. Woolworths is attempting to run a brushcutter through the Fair Work Act 2009 in terms of unlawful unfair dismissal so they can continue with unlawful workplace practice unabated. This impacted my case and section 386, so this is corruption of the Fair Work Act by Woolworths. The little trick that Woolworths has pulled is that the jurisdictional objection cannot be heard at the beginning of the case. This is important. You need to do something about this. A jurisdictional objection should be heard at the beginning of the case, not left right out and only be triggered at the end of the case. I wasn't aware of what was going on. I'm not a lawyer.

PN130

The jurisdictional doesn't exist until the case is dismissed based on the applicant leaving of his own accord rather than being bullied and harassed out of his job as a result of the actions of his employer; the decision of Cambridge C. That then triggers the jurisdictional objection which then exposed me to a \$30,000 costs order by Woolworths which they did. After me for \$30,000 when I have no money. I come in here without legal representation and then I have to pay Woolworths \$30,000 for defeating me. I mean, come on. You know, if I knew that was going to happen I could have hunted up the \$30,000 with public funding and used that \$30,000 to defeat Woolworths. I mean, is this some sort of joke or what? Anyway, the little trick that Woolworths has pulled is that the jurisdictional objection can't be heard at the beginning of the case as is protocol because it doesn't exist until the case is lost at the end of the hearing, from my submission on appeal as follows. Must be really proud of yourselves.

PN131

In the pre-hearing conference I requested that I be fully informed of what was happening; page 129, paragraph 26, and I was not fully informed of what was happening with no mention that the jurisdictional objection triggers if the case is lost on the basis that the applicant left of his own accord rather than Fair Work Act 2009 section 386(1)(b), being forced to leave by the employer, and the applicant then faces the costs order, page 128-129, paragraphs 17 to 26. In relation to my constructive dismissal claim both Cambridge C and Nicole Barclay were aware of the ramifications of the jurisdictional objection. Why wasn't I told of the possibility at the pre-hearing conference? I am not a lawyer. The website says I don't need a lawyer. I'm standing here without a lawyer. So who knows what they're going to throw at me this time. I had no idea what a jurisdictional objection was.

PN132

In relation to the ramifications I was misled by omission. Would I have continued with the case seeking six months' pay being \$16,500 for unfair dismissal remedy if I faced Woolworths' legal bill of \$30,000 for that day in court. That's what they're after me for. Would I have continued with the case if I had known the Fair Work Act 2009 had been corrupted to favour as follows. Woolworths has a predetermined method for unlawfully disposing of staff without terminating their

employment, page 30, paragraphs 10 and 11. This is done to avoid Fair Work Act section 394. The only course of action in terms of unfair dismissal remedy is Fair Work Act 2009, section 386(1)(b) which then leads to the jurisdictional objection trap that I was forced into by the decision of Cambridge C. The Act is corrupted and corporations have the green light in terms of unlawful workplace practice whether they use it or not. You have to do something about this. If somebody comes up with a jurisdictional objection again they lose the case, full stop, no more jurisdictional objections, hit it on the head.

PN133

The abuse of section 394, Woolworths don't terminate your employment until it's after the time has expired for you to make an appeal for unfair dismissal remedy; 21 days; the premeditated corruption of the Act by Woolworths on two counts. All relating to unfair dismissal remedy. Why? So they can continue with it unabated without fear of prosecution. From where I stand it's pretty easy to shut this down, as I just said. Every time Woolworths comes up with a jurisdictional objection they lose the case and a problem, and you can start with this matter right here. They will never use the jurisdictional objection again if you belt it on the head right now. You can also resolve Woolworths' corruption of section 394 by changing the 21 day time limit to lodge an unfair dismissal remedy application to in terms of the statute of limitations. That knocks that one on the head. It's really simple. I'll repeat this over and over again, the battle here is between Woolworths and the Fair Work Commission. I'm just the ham in the sandwich being eaten alive.

PN134

Woolworths' corruption of the Fair Work Act. Let's have a bit of evidence now. You've got the jurisdictional objection, now let's have a look at the rest of it. I have said this all along, so there is nothing new here. When Woolworths wants to get rid of someone, this is the tried and tested process they use. This is what they did to others and this is what they did to me at Woolworths Avalon. I spoke to them all. We all copped the same treatment. This is what they did to others and this is what they did to me at Woolworths Avalon. It's woven into the transcripts, witness statements, and submissions of this case: (1) they get an Indian immigrant worker to make false accusations against the targeted employee. These are Indian student immigrant workers only entitled to do 20 hours a week. The Indian who made false accusations against me was doing 40 hours not 20. They lie and they cheat. I'm not saying they all day. Every ethnic group has the same problem. There's good people in there and there's bad people.

PN135

So for the record thank you, Kamal Akanal and Luckshini Sivaskanda, for making false accusations against me and I'll come to that. I'm speechless. And Ray Plater would also like to thank the Indian worker who cast aspersions on his character. Ray is a beautiful person. He would never hurt a fly. He worked so hard. This can't be tested but remember as a star witness I do have some credibility. They cast aspersions on the targeted employee's performance and management then gives that employee a radically reduced performance rating score which goes on the employee's permanent record. Ask Luckshini, she is sitting on those records and I'll come to that. Link those records to every employee who has been

unceremoniously dispatched by Woolworths. Then they start the bullying and harassment and intimidation program of that person to drive the person into a nervous breakdown and force stress leave.

PN136

I've already read out Cheryl's witness statement as outlined there, forced leave with bullying and harassment as her stated reason. When that person leaves their job Woolworths don't terminate your employment to avoid section 94 of the Fair Work Act so you can't say they sacked you even though you're no longer working at Woolworths, and why would you work for them after what they did to you? You wouldn't. You're working for animals. Most workers walk out, beaten and damaged and fade quietly into the night like Sanjay Saar and Tony Hearn did. Both walked out without a job and both pestered Coles until they got one. They're good workers. Phone them up off the record, if you don't believe me. Their mobile numbers are on the record. Get one of your assistants to do it. But then again as a star witness I should have some credibility. I've proven my credibility and reliability throughout this entire case. Okay. There's one word I live by, one word; honesty. That's what motivates me and drives me. Let's hope a bit rubs off over the – sorry, guys, I can't help myself. I get wound up.

PN137

When you take legal action for unfair dismissal remedy Woolworths will try to block it with a jurisdictional objection and cut you down in relation to the Fair Work Act 386. That's what they did to me. It's on the record and in the transcripts. Note Woolworths' jurisdictional objection in relation to Fair Work Act 2009, section 386 in relation to unfair dismissal remedy is a direct assault on the Fair Work Commission and our law. So why? So they can continue with unlawful workplace practice unabated. Sorry for repeating that.

PN138

Point (d) from above. To avoid Fair Work Act 2009, section 394(2)(a) and I quote in relation to unfair remedy:

PN139

*The application must be made within 21 days after the dismissal took effect.*

PN140

Woolworths don't terminate your employment until after that 21 days has expired. Attention everyone:

PN141

*Woolworths Limited has advised us that as at the 18th of the 12th 2016 you are no longer employed with the company and we updated the status of your shares in line with the plan rules.*

PN142

My letter of resignation, appendix D, and on file as follows reads – so, I'll read it out when I come to it. Andrew Tiller, my letter of resignation:

PN143

*In view of ongoing and persistent bullying, harassment and intimidation by Will Lose, the 2IC of Woolworths Avalon and the associated danger of working in a disruptive environment and also since my leave entitlements have now expired I am left no choice but to resign.*

PN144

VICE PRESIDENT HATCHER: What page is that?

PN145

MR FITZGERALD: "In view of the above my employer and employee" - - -

PN146

VICE PRESIDENT HATCHER: Mr Shariff, can you tell me what page that is?

PN147

MR FITZGERALD: - - - "relationship with Woolworths is extinguished as of 27 November 2016."

PN148

MR SHARIFF: Page 151.

PN149

MR FITZGERALD: "Sincerely Stephen Fitzgerald, 27 November 2016".

PN150

If it wasn't for the other evidence put into Woolworths' corruption of the Fair Work Act 2009 you may be fooled into thinking this is a coincidence. The letter I'm referring to, okay, and I'll be straight down the line with this. This came to me after the hearing with Cambridge C. This is a letter proving that Woolworths don't terminate your employment until 21 days after you leave to avoid Fair Work Act, section 394. There's going to be an argument here as to whether or not it's admissible, and I've already discussed this with Mr Shariff. I said something would be coming up that he will object to. Okay, I expect that objection. I would be objecting, but this is really critically important. Okay. They cut a hole in the Fair Work Act, section 386. This is them destroying the Fair Work Act, section 394. Link Management Service:

PN151

*Management of your share plan shares now that you have left Woolworths the Woolworths Limited Link Market Services administers the Woolworths Limited employee share plan.*

PN152

See, I was a good employee. I bought the maximum amount of shares of Woolworths every year and you're not allowed to sell them for three years. I was supporting that company and look what they did to me:

PN153

*Woolworths Limited has advised us that as at the 18th of the 12th 2016 you are no longer employed with the company by letter of resignation, 27 November.*

PN154

My termination from Woolworths, 18 December, exactly 21 days. You could argue it was a coincidence but not in light of what's going on here. This again is a direct assault on the Fair Work Commission Fair Work Act 2009 and our law and Australian society.

PN155

I understand it's probably not admissible because it's dated the 18th of the 5th 2017. The hearing with Cambridge C was 3 March, I believe. Okay, two months prior to this. In view of the gravity of the situation, this needs to be acknowledged. The original letter right here. You don't have to take it, but I would. It's attacking you, you and you.

PN156

In view of the gravity of the situation and evidence of the concerted attack by Woolworths on the Fair Work Commission I feel that you could make an exception and have a look at the original letter from Link Marketing and my letter of resignation already on file, all there. Your choice. It appears to me that the battle is between – once again, the battle here is between Woolworths and the Fair Work Commission, and, again, I'm just the ham in the sandwich. I have my copy, there's one for you if you want it. You don't have to take it. That's fine.

PN157

Here's another big one. It's raising to a crescendo here. Evidence of interfering with witnesses, witness tampering, evidence of it; a Federal offence. The penalties are harsh. This is a Federal jurisdiction. Breaches to the Criminal Code, article 25, 27 and some other article. Unbelievable, astonishing that they would take these risks and risk losing their lawyer's licence.

PN158

In relation to exhibit 8 prepared by Roland Hassall, partner at Sparke Helmore lawyers dated 24 February 2017 and I quote:

PN159

*In the event you seek to rely on the witness statement from Ms Wilesmith and Mr Plater as your evidence-in-chief at the hearing we advise that each of the witnesses will be required to attend the Fair Work Commission for cross-examination by Woolworths.*

PN160

That was a letter they sent to me. I'll just pull it out so I can show you. You've got exhibit 8 there. Anyway that's what it looks like. It's been sent to me. We both know I've read through Ray's witness statement and I've read through Cheryl's witness statement. We all know that Ray and Cheryl would have verified their witness statements because they're good people; they're not into perjury and to the detriment of Woolworths.

PN161

This letter is suggesting that Woolworths wanted Ray and Cheryl at the hearing. Would that be correct, Mr Shariff? Did you want Ray and Cheryl at the hearing? Be very careful about what you say because Woolworths are going to question you on that one. Just a yes or no will do. Did you want them at the hearing? He

shook his head. That's a no. There's one way to resolve this. He didn't want them at the hearing, so we don't have to go into the next step to resolve this which would be invite them in to verify their witness statement with the Federal police, so they can cross-examine them about witness tampering and interfering with witnesses. If you don't do it, I will. That's if it goes beyond this here today.

PN162

See, again, I'm not about hurting anyone. It's not in me to do that. I'm about behaviour modification. Woolworths needs to modify their behaviour. None of this needs to go beyond these walls and this whole case can be shut down. Now provided you do something about what's happening, and provided Woolworths does modify their behaviour in terms of the way they treat their workers. This is just the evidence that I can use if I need to to get this from a 3.5 on the Richter scale to an 8.5 where the earth will rumble right across the board and I have the capacity to do that as you can see.

PN163

Exhibit 8, letter to have Ray and Cheryl at the hearing. They didn't want them at the hearing. Australian Criminal Code, obstruction of justice, article 25, Intimidating or corrupting witness, false testimony, William Lose; preventing the attendance of a witness in court. Federal Offence. The penalties are harsher than the normal. They beat the crap out of you; prison; loss of licence to practice law.

PN164

*As I have previously stated that Ray Plater was interfered with by Woolworths management on two occasions. He advised me that he had been contacted by Woolworths head office. The second time in a small receding voice.*

PN165

In that there is an inference, you know, Ray is telling me, "I need my job in Avalon". You know, "The Woolworths head office has been on to me. All you've got to do is talk to him. All the Federal corruption authority has to do is talk to him. All the Federal Police has to do is talk to him and find that out. All the Federal ombudsman has to do is talk to him. Do you understand that? It's pathetic. You're really good as process but really bad with logic and reason. Ray needs his job and is prepared to put up with the abuse from Woolworths management. I will testify that and the Federal authorities, all they had to do is ask him.

PN166

As pointed out by Nicole Barclay representing Woolworths and is in the transcripts Nicole Barclay said this, and it's in the transcripts, they wanted me to have Cheryl at the hearing. It's a smoke screen, a diversion, a cover up. This is what Nicole Barclay said and it's in the transcript, "Cheryl will be away until the Monday after the hearing". I spoke to Cheryl after the hearing and she said she was sick on a cruise ship during the hearing with chronic stress. So to get Cheryl to the hearing as required by Woolworths in their illustrious letter from Sparke Helmore, Roland Hassall, Partner from Sparke Helmore, no doubt he come up with this. It's evidence of corruption; premeditated breaking of Federal law. It's insane.

PN167

I spoke to Cheryl after the hearing. She said she was on a cruise ship, so to get Cheryl to the hearing I would have needed to fly her in by helicopter. So Ray is not available, and Cheryl is out in the Pacific, and Woolworths knew that because Nicole Barclay representing Woolworths said she was away until the Monday after the hearing. They didn't need to draft this letter. The end result would've been the same. It's really stupid. They have destroyed themselves as a legal firm.

PN168

Let's have a look at the witness statement of Ray and Cheryl again, accepted into evidence by Cambridge C, exhibit 1 and 2, right up there at the top of the list again. I've read them out. I won't do it again. So Woolworths wanted Ray and Cheryl at the hearing to testify against Woolworths. The letter from Mr Hassall is starting to sound a little bit odd. If Woolworths wanted Ray and Cheryl at the hearing all they had to do was give them leave to appear, the same way they gave Ren Law, William Lose and Andrew Tiller leave to appear; all employees of Woolworths and all work in the same store. Woolworths were aware that Cheryl would be on a cruise ship during the hearing. They approved her leave to be away during the hearing. When Nicole Barclay had leave pending she asked the Fair Work Commission for a one month extension of time to submit her outline of submission on appeal. She was given that one month extension. You know, if one of the key witnesses wasn't going to be here you would have made allowance for that. I'm sure you would have. She was given that one month extension of time.

PN169

If Woolworths wanted Cheryl at the hearing they would have asked for a postponement so that Cheryl could attend the hearing and verify her witness statement, or they could have denied her leave which is standard practice for Woolworths. When people apply for leave management go, "No, it's too busy. Forget it". "But I'm booked to go", "It's doesn't matter, work". That's what they do to people. They could have done that to Cheryl if they wanted to. So they could have denied her leave which is standard practice for Woolworths management. They did it to me on a couple of occasions. "No, you can't, we're too busy". "But it's July, the quiet time of the year". Anyway, it's just the way they are. Is that what Woolworths really wanted; to have Cheryl and Ray at the hearing to verify their witness statements? Clearly not. Smoke screen, cover up, point the finger at me, criminal act, premeditated criminal Federal offence.

PN170

The letter from Roland Hassall at Sparke Helmore can simply be explained for the record with rudimentary criminal psychology. Now, as I said before, I have a thirst for knowledge. I like to know everything. I can't help it. The arsonist helps the firefighter put out the fire that the arsonist started to divert attention away from himself and the criminal act. Same psychology. The person interfering with the witnesses drafts a letter demanding the attendance of those witnesses in court to divert attention away from the criminal act of witness tampering and point the finger at someone else. It's pretty serious stuff, isn't it? I mean, seriously this is serious stuff. This is what you're dealing with here. They're attacking you; they're attacking our law; they're attacking me.

PN171

All the Federal authorities have to do is talk to Ray Plater working at Woolworths Avalon and Cheryl Wilesmith transferred to Woolworths Warringah Mall for confirmation of the witness tampering. Federal Criminal Code, article 25 and 27, the policing authorities are, for the record, in case you want to take this up, the Australian Crime Commission, the Commonwealth Ombudsman and the Australian Federal Police in relation to Australian Crimes Code. These are Federal crimes with harsh penalties for individuals and note this, Woolies, corporations are not exempt, article 26. Google it, guys. This is a devious premeditated act. Roland Hassall, you idiot. You didn't have to draft a letter, exhibit 8. The end result would've been the same without the evidence of witness tampering. Ray and Cheryl would not have been in attendance at the hearing. You have implicated yourself on behalf of a corrupt corporation and risk of reputation and your licence to practice law and this is all on the record forever.

PN172

Roland – well, I'm not talking to Roland, am I? Shariff; all you're going to get when he stands up here is smoke screen, diversion and cover up attempting to mislead the Full Bench by omission. If you have any defence on Woolworths' behalf as to why they conspired to involve themselves in unlawful workplace practice against their own staff, and these were hard working and dedicated personnel, let's hear it. Have you got any evidence as to why Woolworths did all that? Zip. Woolworths is attacking section 394, the 21 day thing, to avoid unfair dismissal remedy claims and section 386, the jurisdictional objection with the evidence woven into the transcripts, and I've just run through it all, so it can't be disputed or argued to slash away at the Fair Work Act 2009. Our law is under attack by Woolworths. Wake up people. History tells us that corporation corruption destroys society from the inside.

PN173

One more point, exhibit 8 suggests that Woolworths wanted Cheryl and Ray at the hearing before Cambridge C to verify their witness statements. Clearly they didn't. That covers that. Do you want to have a break? I can keep going. All I've got left here is Woolworths fabricated defamation of my character and evidence of that, the decision of Cambridge C, I left or Woolworths got rid of me, and then one that you don't want to hear, the way I have been treated throughout the process in the Fair Work Commission as a worker. But I'm going to run through it anyway. I just need a sip of water.

PN174

VICE PRESIDENT HATCHER: We might take a short morning tea adjournment.

**SHORT ADJOURNMENT**

**[11.33 AM]**

**RESUMED**

**[11.49 AM]**

PN175

VICE PRESIDENT HATCHER: Mr Fitzgerald? Sorry, before you start, I'll just read this on to the record. Given what has transpired during the morning the

Commission has decided to make some directions for the completion of the hearing today. The directions are as follows:

PN176

Mr Fitzgerald be given a further 30 minutes for the completion of his oral submissions; (2) Mr Fitzgerald will refrain from making any offensive statements towards Woolworths' legal representatives and will refrain from attempting to engage in dialogue with them in the course of his submissions; (3) it is likely that when Woolworths makes its oral submissions there may be questions from the Bench about those submissions. In this respect a copy of the transcript will be provided to Mr Fitzgerald after the hearing, and he will be permitted a period of seven days to make any submissions in reply in writing; (4) after Mr Fitzgerald has filed any written reply submissions the Full Bench will reserve its decision.

PN177

MR FITZGERALD: My apologies for indiscretions. I am quite an earthy person and again I'm not a lawyer, but I'll remember next time. Hopefully there won't be a next time. I should be able to wrap this up in 30 minutes. Woolworths fabricated defamation of my character. You see, you're under attack, I'm also under attack. In the witness statement of Luckshini Sivaskanda dated 22 February 2017 as follows, 51(b):

PN178

*Mr Fitzgerald appears to have taken documents from Woolworths which he was not permitted to take.*

PN179

In the transcripts, this is from Cambridge C:

PN180

*I wasn't talking about the media as such. I misunderstood what was happening. It was just a broad – but that's the document which ultimately we found to be the one that was troubling the respondent a little in terms of perhaps why the applicant had it at all. Nevertheless what I'm suggesting here is that it's not going to form part of any material that would be publicly accessible unless you were a party to the proceedings or under an FOI to obtain the file. But I do understand a bit of concern about that. If you want me to specifically put that document in the file in an envelope and mark it as confidential I see no reason why I couldn't do that.*

PN181

So it's on the file in an envelope marked "confidential".

PN182

It wasn't until I read this transcript that I spotted this premeditated ploy by Woolworths. They must have been really proud of themselves to sneak that through unnoticed to cast aspersions on my character and undermine my credibility as a reliable witness. This situation has arisen because of my hearing difficulty. Woolworths' representative, Nicole Barclay and Ian Bennett at Sparke Helmore took advantage of that. They took advantage of my disability. They

have taken advantage of a disabled which is the lowest possible form of human indecency and that pretty much – I won't say that. I won't say that either.

PN183

They're talking about the council lease with Woolworths Avalon. There's a reason for me being in possession of a copy of a deed of licence between Pittwater Council, the licensor and the Woolworths Limited, the licensee, in relation to unloading trucks in the council laneway at the rear of Woolworths Avalon New South Wales. I was the employee responsible for unloading the trucks in the back lane at Woolworths Avalon, the area covered by the council lease. I downloaded the lease agreement off the internet so that I would be in compliance with council regulations, so that I would know what council wanted and I could work within their stipulated requirements. On one of the days I was off the person doing the back dock breached those requirements and Woolworths was fined \$3000, I believe. That wasn't going to me doing that. Woolworths has made out that I stole the lease agreement by hunting around in the dark behind locked doors peering into filing cabinets with a torch. That's called defamation of character and it's all on the record. And I expect to be compensated and I will be taking civil action to have the premeditated defamation of my character stricken from the record, so you'll be hearing from a Judge about that one, or a Magistrate. So you don't have to take – or you can't take action yourself. You need to be directed. The Fair Work Commission can expect a court order.

PN184

As I said, you can get a copy of the deed of licence online. You know, the internet, the same place I got it, like any licence agreement with the council, it's public domain. They're making out I went into an office somewhere bona vista and stole it. The apology from Luckshini Sivaskanda, you know, she made out that I stole a document. She didn't know what it was. It was her witness statement, but she couldn't or wouldn't tell me what it was. You know, I was denied that knowledge, and that's how they got it through. So the apology to me from Luckshini Sivaskanda for not knowing what the document was referred to in her witness statement is appropriate although that was her witness statement, why didn't she know what it was? All the drama, intrigue in sealed envelopes. Follow the link below and everyone in Australia gets a copy of Woolworths lease agreement;

[hypertexttransferprotocol\\portalpittwater.nws.gov.au.commonoutputdataworksaccess](http://hypertexttransferprotocol\\portalpittwater.nws.gov.au.commonoutputdataworksaccess). That's where you get it. The lowest form of human decency. I can't say the rest of that. I've already been picked up for it. So there's evidence of defamation all on the record. You can hardly get out of that one, Woolies.

PN185

Eight; the decision of Cambridge C; I left or Woolworths got rid of me. It appears to me that an example of significant error of fact in my case is that Cambridge C put that I left Woolworths which exposed me to the jurisdictional objection which exposed me to the \$30,000 cost order when, in fact, Woolworths' intention was to get rid of staff as evidenced in the witness statement of Ray Plater where Woolworths manager 2IC, William Lose said to Ray Plater, again, exhibit 1, that he got rid of me. Witness statement of Ray Plater dated 29 January 2017 and I quote:

PN186

*After the time Stephen Fitzgerald left Woolworths Avalon the Woolworths Avalon manager 2IC, Will Lose, approached me and said he got rid of Stephen Fitzgerald.*

PN187

Me. In addition, have a look at the proven with evidence actions of William Lose in terms of bullying, harassment, intimidation to get rid of staff as outlined in my closing submissions dated 15 March 2017. It makes compelling reading. You'll love it. Page 52 to 73 of the appeal book. It's not exactly Clive James but it's pretty good. Once again, the witness statement of Cheryl Wilesmith, exhibit 2 where Cheryl was made redundant, beaten out of her job by Will Lose, blah, blah, blah. I've been through that.

PN188

Clearly, I left Woolworths. I mean, I'd still be working there otherwise as pointed out by Cambridge C. The question is how and why? And that's explained in the Fair Work Act 2009, section 386(1)(b):

PN189

*The person has resigned from his or her employment but was forced to do so because of conduct or a course of conduct engaged in by his or her employer.*

PN190

I think I've proven that. The why was part of an internal management removal plan as a result of the internal performance score card as already elaborated on and an attempt by Woolworths upper management to cast aspersions away from themselves for their pathetic decisions over the past eight years that have driven the company to its knees, and I watched it happen.

PN191

You can cut me off at any time. The way I've been treated through the process in the Fair Work Commission: you need to know some of this. In light of what has unfolded I feel that I have been unfairly treated throughout this entire process in the Fair Work Commission, and I'm only going by the facts and the evidence all on the record and in the transcripts. What we're talking about here is public perception. The facts don't matter at election time; public perception is what drives election outcomes. You have to be aware of that. This is a public arena. People watch what's going on here. You impact all of Australian society with every decision you make.

PN192

Legal representation at the hearing: I was misled about legal representation. Woolworths had legal representation and I did not. I've been through that, so that's (1); (2) being misled about parties bearing their own costs. From your website you say that parties bear their own costs. No costs and no legal representation. I wouldn't be here if you didn't say that. How could I possibly do it? Woolworths came after me for \$30,000. That will destroy me and my disabled wife. They want to drive me into bankruptcy and throw me out on to the street for speaking out against them. That's their intention. I was misled by your website. Please fix that up.

PN193

The Fair Work Act 2009, section 386 and section 394, in terms of unfair dismissal remedy being corrupted by Woolworths so that they can continue with unlawful work practice unabated. How long has this been going on? Fair Work Act 2009, eight years. So they've manipulated it somewhere in the last eight years. Clearly, once again the worker is disadvantaged by that. It needs to be fixed.

PN194

Four; being given one week to do my submission when Woolworths were given four weeks because Nicole Barclay said she was going on holidays for a month. Roland Hassall prepared the submission; not Nicole Barclay. I won't say that was a ploy, but it certainly smells like it. The Fair Work Commission website advised that there is a facility for the Commission to provide an interpreter on request. To me, an interpreter is someone who interprets the spoken language from one dialect to the spoken language in another dialect. That could also be a person who interprets the spoken language into the written word. If that person was here beside me now I would miss nothing. You know, you say you provide that facility, but I was denied that. Please. I only ask to avoid confusion, that's all, so that things would run smoothly just in case. I haven't needed that yet and I won't. I mean, we're managing okay and we will, and I appreciate the seven day thing.

PN195

Six; legal representation of this hearing: I was denied a postponement but I've explained – I understand why so I won't go into that and fair enough. Point number 7; in the pre-hearing conference I requested that I be fully informed as to what was happening. I'm not a lawyer. You know, I was not fully informed. I have no previous experience in these matters. I was kept completely in the dark about Woolworths' jurisdictional objection. I didn't even know what it was, and I had no idea that the consequences could destroy me. It kind of leaves me speechless.

PN196

And continuing; the amount I was to receive in compensation if I win this appeal is six months' wages, 16,500. Legal representation would have cost me 30,000. With this appeal hearing that's now 60,000. No doubt they'll charge the same amount again to Woolworths. How can I afford that? To run this case for 16,500. If you tell people you don't need legal representation explain what can happen. Explain to them that Woolworths will have legal representation. They're the one worth 60 billion dollars.

PN197

So, so much for the even playing field referred to by Cambridge C, and what's happened to me suggests that this is what has happened to workers in the past and I'm sure they didn't get to appeal; they were beaten to death before they got here. And unless there are some changes it will happen to people in the future. The workers are the foundation stone of society. Everyone feeds off us. Everyone. What happens if you bite the hand that feeds you? Think about it.

PN198

At the pre-hearing phone conference the conciliator advised me, and again, off the record, that very few cases are ever won and Woolworths will go after damages

and drive the applicant, that's me, into bankruptcy. So it's happened a lot of times. In the hearing, and on the record this time, Cambridge C said that 300 cases similar to mine had come before him. The conciliator said very few cases are won. These innocent people seeking justice. Three hundred cases that came before him were the Woolworths fully represented by legal people. He also said if Woolworths wanted they could be assisted by the Prime Minister. That's on the record. The Prime Minister hears that. He is going to be insulted to think that Woolworths or Cambridge C would like him to represent Woolworths. I mean, I'm gob-smacked. Read the transcripts. And speechless that Woolworths is going to come up with, "Well, you had the opportunity to postpone proceedings and get a lawyer". Clearly I couldn't afford a lawyer, \$30,000 and another \$30,000. So the proceedings continued.

PN199

You know, everything was set and ready to go so let it roll. And, again, lawyer, Ian Bennett's name appeared three times in the transcripts. That's evidence of Woolworths' legal representation without consent in the hearing before Cambridge C, so another show of Woolworths' contempt for the Fair Work Commission trying to sneak one in there to stick it up both of us. The Fair Work Commission was set up by labour leader, Kevin Rudd. He's got a few issues, I know that, but he's a good man. Mainly his problem was he doesn't like working with idiots. It rubs him the wrong way. Labour leader, Kevin Rudd, to do what the name implies, be fair to workers. In light of the above seven points we are not seeing a great deal of that, and in fact I'm seeing quite the opposite. Woolworths has been given everything they asked for, and I have been denied on multiple occasions. Although I'll say this again and this is important I truly do appreciate the opportunity to present my case before the Full Bench on appeal, and I thank you for that, and that's what I'll carry with me. The rest of it is gone now. It's off my chest never to be repeated.

PN200

This is something that you need to keep in mind, again, public perception. There are political appointments here in the Fair Work Commission; two of you. I don't know which two, and I'm just talking about public perception again; not the facts. Please keep in mind that public perception carries the weight at election time. In light of the way I've been treated in the Fair Work Commission and relating to those seven points I'm beginning to wonder about the relationship between the Fair Work Commission and corporates. Shock, horror. Well, perhaps the Fair Work Commission should make a concerted effort to change that perception. You know the perception of Government pandering to corporations at the expense of the Australian worker. Think about it. It would be a prudent move to keep the public on side, don't you think? After all the liberal party has one seat majority, and Pauline Hanson is hovering in the wings.

PN201

As I said to Ben Davis, chief of staff, to the Honourable Michaelia Cash, and we have been in communication, I communicate at all levels on par with anyone you can throw at me, I can match them. As I said to Ben Davis, chief of staff, to the Honourable Michaelia Cash, your minister, there's a dangerous game being played out here in the Fair Work Commission. It's about public perception. It threatens

our two party preferred political system, the best political system in the world. Look how beautiful it works. It's not run by Liberal or Labour and we've got One Nation in the middle getting legislation through that would be denied by Liberal and Labour. It's perfect. It works. Well, it's not perfect. It's got flaws, but it's the best. It's worth protecting, the same as the Fair Work Commission and our law is worth protecting. The same as I am worth protecting. The only thing that threatens all of that is corporate corruption as evidenced in this case and on the record.

PN202

I'll got a little bit here about my right of reply but I won't run through that now. I'm looking forward to the transcripts and I will be responding to that within the seven days and I'll be looking forward to your decision. I will have one thing to say though. I've still got a few minutes. In the case of case referencing by Woolworths they're going to be throwing that at you. Proceedings here are somewhat informal, and I'll give you a little bit of background on case referencing. Again, I research everything including our legal system. Traditionally, and I'm going back to British Common Law, that's where it comes from, case referencing when a JP, Magistrate or Judge doesn't have sufficient evidence to draw a firm conclusion to avoid looking like the case is lacking in some way on appeal. They point to some other Judge for their previous decision in a similar matter and fair enough. It's beautiful. It used to work great. It's kind of a safeguard, a backup plan but has the potential to be abused particularly in the modern era as our reasoning from the past is forgotten in time. There's no previous matter here with this case. This is the first appeal in terms of jurisdictional objection. It's the first one in terms of Woolworths attacking the Fair Work Act.

PN203

It's a precedent. So the outcome here is really important. It will set the new precedent for the future, for future case referencing for as long as we have our existing adversarial legal system. Case law by its nature is merely a guide, and as history tell us, it can be manipulated to a predetermined outcome. We need to be careful here not to be seen to protect the guilty and persecute the innocent as so often happens in case law referencing these days. The situation needs to be turned on its head. The word "law" implies justice and justice needs to be seen to be done and it won't be if Woolworths is allowed to continue with unlawful workplace practice. The Fair Work Commission is the policing authority in these matters. Do the policing; it's your job. Keep in mind that I am not the only one Woolworths has attacked here. They've also attacked the Fair Work Commission and the reason for that so that Woolworths can continue with unlawful workplace practice unabated as evidence shows. You can knock it on the head.

PN204

I rest my case.

PN205

VICE PRESIDENT HATCHER: Mr Shariff?

PN206

MR SHARIFF: Yes, thank you.

PN207

VICE PRESIDENT HATCHER: Just hold on a second. Mr Shariff, we only wish to hear you in relation to the legal representation point and what, if anything, might follow if that point was found to have merit.

PN208

MR SHARIFF: Yes. That was the point I was proposing to deal with first. I'm conscious that Mr Fitzgerald has some hearing difficulties, and I understand that what he's done is he's got a voice recognition program and he's been able to have that program recognise my voice in part and hopefully that will start recording, but if there's any difficulty with that I'm sure Mr Fitzgerald will let us know, but I

- - -

PN209

VICE PRESIDENT HATCHER: The purpose of the transcript is that Mr Fitzgerald won't be required to make his reply today. He can read the transcript and make it in a consecutive fashion in writing.

PN210

MR SHARIFF: May it please. Can I deal with the representation issue by first taking the Bench to a transcript of the pre-hearing conference? That the Full Bench should find in the appeal book and I'm not sure whether the appeal book that the Full Bench has got is in the same format as mine, but the pre-hearing transcript commences at page 172 of the appeal book behind, in my appeal book, tab 18. I've got copies of the appeal book in a consolidated form.

PN211

VICE PRESIDENT HATCHER: Just provide that copy then.

PN212

MR SHARIFF: Yes. Can I take you to tab 18, which is a transcript of the pre-hearing conference that was held on 25 January, and can I take you to PN29 on page 175, your Honours see a question being posed by the Commissioner in the final sentence:

PN213

*Ms Barclay, I take it are you going to be the person that will actually conduct the case on behalf of the respondent?*

PN214

And the response was:

PN215

*At this point in time my answer to that question will be yes, however, we would like to reserve our right to seek leave of the Commission to be represented.*

PN216

Then the Commissioner indicates:

PN217

*If you use a lawyer or paid agent then we will need to determine whether permission should be granted –*

PN218

And the balance I won't read. Your Honours can read that yourself, and then at PN33 the Commission makes reference to the Warrell decision and then at the top of the next page Ms Barclay records that at this stage will report on the basis that, "It'll be myself representing Woolworths in the future", and then the Commissioner indicates that, "If that changes then you'll need to advise".

PN219

So that's what happened at the pre-hearing conference. The indication was that, at that stage, Woolworths intended to represent itself. If that changed they would inform the Commission and so on.

PN220

VICE PRESIDENT HATCHER: But it all begs the question - - -

PN221

MR SHARIFF: What does representation mean?

PN222

VICE PRESIDENT HATCHER: - - -what is representation and did the Commissioner ask the right question?

PN223

MR SHARIFF: I accept that that's a – can I just deal with the facts first and then I'll come to the issue?

PN224

VICE PRESIDENT HATCHER: Yes.

PN225

MR SHARIFF: What then happened at the hearing at tab 19 of the appeal book commencing at page 189, PN10 – sorry, PN8 I should commence. Mr Fitzgerald indicates he's not ready to proceed because there were a couple of issues and would like those sorted upfront. He indicates that, "At the preliminary hearing the Commissioner had specifically asked Ms Barclay if she would have a solicitor or barrister here with her. She said no. That is not on the record. We have a gentleman here from Sparke Helmore", and all the rest.

PN226

Ms Barclay records at PN12, I appreciate this is just bending the question, but I'm just taking your Honours to the facts, because I think some of the things that Mr Fitzgerald has indicated were factual. Ms Barclay indicates and confirms that she would be representing Woolworths, and there was no intention to seek leave to have legal representation, and Mr Bennett was simply there to assist. Then the Commissioner indicates, "Well, then I won't be hearing from him at all". There's then a debate as to whether an adjournment should be given and the like.

PN227

That results then at PN30 on page 191 Ms Barclay putting forward a proposal that, "The way to proceed today and see how the proceedings move forward. If Mr Fitzgerald becomes uncomfortable with Mr Bennett in the room perhaps we can address Mr Bennett's conduct in the room", and so on. But I can assure you he's simply here today to assist me with my paperwork". Then the Commissioner says this, and this might be coming to where - - -

PN228

VICE PRESIDENT HATCHER: So, before you move on, it's not factually in dispute, is it, that Mr – and this is not meant to be a criticism or otherwise but just as a fact, that Mr Bennett was seated at the Bar table?

PN229

MR SHARIFF: Yes. That's an accepted fact.

PN230

VICE PRESIDENT HATCHER: Yes.

PN231

MR SHARIFF: I think it's important for me to draw your Honours' attention to what the Commissioner said about that commencing at PN31 because I think this is relevant to whether there was an error. I'm picking up PN31:

PN232

*When there's an argument about this question that there's actually permission for a party to be represented by a lawyer or a paid agent –*

PN233

Et cetera. And then over the top of the page -

PN234

*I would say in the circumstances, having regard to section 596 of the Act, permission for Woolworths to be represented by lawyers or paid agents is refused but that then doesn't mean that I have the capacity to say to Woolworths they cannot have the assistance of anyone, whoever that might be, a lawyer or paid agent. They could get the Prime Minister here to assist them.*

PN235

That's where, I think, Mr Fitzgerald gets some of the matters he's raised earlier about.

PN236

*I couldn't stop that. All I could do is, under section 596 of the Act, is refuse permission, for the permission that's standing there and speaking on behalf of Woolworths and conducting the case on behalf of Woolworths to not be a lawyer or paid agent. I can't do anything sort of behind the scenes. To say well, you can't have this person or you can't have that person there, how they actually configure their assistance in respect of the matter is something I have absolutely no control over.*

PN237

I think to the extent we're going to have an argument about whether there's any error in the way the Commission has dealt with the matter I'll return to that point to determine whether the Commissioner nevertheless had a residual power to direct how parties were configured or parties and people assisting it were configured in the actual hearing room, but I will return to address that.

PN238

Can I then deal with what's then the Commissioner mentions at PN43:

PN239

*But if you're extremely troubled by that then the only way that could be remedied is for perhaps to, say, level the playing field is to allow you an adjournment to get you represented.*

PN240

Then Mr Fitzgerald indicates that he intended to proceed, and that's all that I wanted to take your Honours to in respect of that matter.

PN241

Mr Fitzgerald indicated that there were some references to Mr Bennett in the transcript. Can I just quickly take your Honours to that? At page 268 you'll see that there's an exchange occurring between Cambridge C and Mr Fitzgerald about some documents, and there's a question as to whether a particular email was received by Mr Fitzgerald and Mr Bennett is recorded as having said he did send the email. "I emailed it to you". You'll find that at PN886 and 888, and that seems to have arisen as part of some exchange that was occurring about whether an email was received or not, and then at the top of page 269 it's picked up. And one doesn't know whether this has been – I don't have evidence of this of course, and there wasn't – we've only got the transcript. One doesn't know whether these were things being said that have been picked up on the transcript as opposed to Mr Bennett actually standing up and saying them. I can't take – I can tell you what my position on that is, but I'm not sure if it assists your Honours.

PN242

VICE PRESIDENT HATCHER: It's reasonably clear at 885 that Mr Fitzgerald began to direct his remarks directly to Mr Bennett.

PN243

MR SHARIFF: To Mr Bennett, yes. But can I then take you to the next reference, which is at page 278, and this just appears to be a typographical error by the transcription service, PN991 records, Ms Bennett asking a question, but I've sought instructions about that and I'm told that that's just a transcription error. I appreciate that's not evidence before your Honours but I'm just assisting your Honours as best as I can on that matter. But those were the facts as they transpired that I wish to take your Honours to.

PN244

That then brings me to the question of the law in section 596. There is, on my review of the authorities, I can find no case directly on this point that's actually given content to the meaning of the word "represent" in the jurisprudence of this

Commission and its predecessors as far as I can tell, but that might just be a limitation of my own research. That's the first point I wanted to make.

PN245

The second point I wanted to make by way of the research I've conducted is that I haven't been able to locate any cases of the Commission or its predecessors that have dealt with the idea of the McKenzie friend, that is, dealt with the idea of a person who is not a representative but who is in the Commission's Courtroom and is assisting the advocate. The only reference I could find was a passing reference in a decision of Spencer C in the context of an enterprise agreement approval involving Downer, but I haven't been able to find any other cases dealing with that point.

PN246

So we are dealing with uncharted territory in terms of what the actual law is on this point. We have said in the submissions at paragraph 3.21 what we say is the ordinary meaning of the word "represent". Of course the word "represent" is the word that is used in the Act at section 596, and we say the ordinary meaning of the word to represent is to stand or act in the place of, and to speak and act for by way of delegated authority. That's just the starting position. So we say it's a matter of text, the word "represent" in section 596 is a reference to the person who is actually standing in place of the relevant party and presenting the case.

PN247

Can I take - - -

PN248

VICE PRESIDENT HATCHER: If you look at 596(3).

PN249

MR SHARIFF: Yes.

PN250

VICE PRESIDENT HATCHER: That's the contextual indicator, is it not, that when the section talks about representation it's talking about more than in court advocacy, that is, if you're right subsection (3) would be entirely otiose.

PN251

MR SHARIFF: Can I just turn that up?

PN252

VICE PRESIDENT HATCHER: The same could be said of rule 12.

PN253

MR SHARIFF: I was going to come to rule 12. Rule 12 is simply a statutory rule that is seeking to further regulate the way that the Commission intends its practice and procedure to work. So in terms of statutory instruments ultimately we have to interpret the Act and the rules, we say, they are made for a specific purpose. They aren't ultimately giving content to what section 596 does. But 596(3) - - -

PN254

VICE PRESIDENT HATCHER: If that's right, then rule 12 might be ultra vires then.

PN255

MR SHARIFF: It might be. That's no disrespect to any of its authors, but those rules are made as in other courts just by rules with consultation with the rules committee and are then made in the usual way of rules. Yes, I think there is certainly an argument about the full contours of rule 12 and whether it extends the notion of representation further or limits it by reference to section 596.

PN256

The way we read subsection (3) is to deal with circumstances where the submissions are in fact made, that is, the written submissions are signed off on by the legal representatives as opposed to then being assisted or prepared. So what 596(3) is seeking to do, in my respectful submission, is to ensure that the reach of 596(1) isn't applying to the making of written submissions.

PN257

VICE PRESIDENT HATCHER: But on your reading it's unnecessary because it doesn't extend so far on its ordinary meaning.

PN258

MR SHARIFF: That's right. So what I'm saying is that 596(3) might just simply be there for the purpose of clarification. It doesn't render it otiose. Can I come at this a different way as well, which is to go to some authorities that deal with what was going on here? So what was going on here was a person was sitting at the Bar table assisting the advocate with handling of documents and the like and that was the asserted purpose, and there isn't any suggestion that what Mr Bennett was doing, other than the couple of exchanges I've taken your Honours to, extended beyond simply sitting at the Bar table and providing assistance in the way that's been described.

PN259

VICE PRESIDENT HATCHER: I mean, what cast doubt about it on all that is the fact that your client has made a costs application.

PN260

MR SHARIFF: Yes.

PN261

VICE PRESIDENT HATCHER: And that includes a charge for professional legal services for the whole day that was spent in court.

PN262

MR SHARIFF: For the seven hours, I think, in that costs application.

PN263

VICE PRESIDENT HATCHER: Yes.

PN264

MR SHARIFF: The costs application, if I can just make my first formal response to this?

PN265

VICE PRESIDENT HATCHER: Yes.

PN266

MR SHARIFF: The costs application isn't an application, we say, that's properly before your Honours in the current appeal. The costs application is an application that's been made to Cambridge C and has not yet been determined with. So it's not part of the record, we say, that's before the Full Bench at the moment.

PN267

Can I move past the formal point and deal with this point; the fact that Mr Bennett sits at the Bar table and whether it's Mr Bennett or Mr Smith or Mrs Smith sitting at the Bar table, and the fact that there might be a retainer as between Woolworths and a third party whereby they are providing assistance and are to charge costs for that is irrelevant to whether there is representation occurring at that point in time. It may well be highly relevant to a question of costs assessment but it is irrelevant to whether representation is in fact occurring.

PN268

VICE PRESIDENT HATCHER: I mean, these costs have been charged to your client, as I understand it.

PN269

MR SHARIFF: Yes.

PN270

VICE PRESIDENT HATCHER: That is what was added to the costs application was a bill of costs that was sent to your client.

PN271

MR SHARIFF: Yes. Yes.

PN272

VICE PRESIDENT HATCHER: Under the legal profession uniform law - - -

PN273

MR SHARIFF: Yes.

PN274

VICE PRESIDENT HATCHER: - - -a solicitor is entitled to charge legal costs for the provision of legal services as defined.

PN275

MR SHARIFF: Yes.

PN276

VICE PRESIDENT HATCHER: So there can't be any doubt that what's being charged is for legal services.

PN277

MR SHARIFF: There can't be any doubt that what Mr Bennett was providing, by reference to the retainer between Woolworths and Sparke Helmore, was the services as agreed between Woolworths and Sparke Helmore.

PN278

VICE PRESIDENT HATCHER: There was a solicitor/client relationship between them.

PN279

MR SHARIFF: There's no doubt about that.

PN280

VICE PRESIDENT HATCHER: So what I'm struggling with is how a solicitor can sit at the Bar table in a solicitor/client relationship with a client appearing in the matter, charge for a professional legal services for the whole day - - -

PN281

MR SHARIFF: Yes.

PN282

VICE PRESIDENT HATCHER: - - -but at the same time not be said to be representing the client.

PN283

MR SHARIFF: Because they're two different things, and it would make no difference whether Mr Bennett was sitting at the Bar table or Mr Bennett was sitting in the Courtroom. If Woolworths and Sparke Helmore have agreed, as between client and solicitors, that is for Woolworths to engage services of that type and Woolworths wants to foot the cost of that that's a matter for Woolworths. It is a matter for Woolworths and Sparke Helmore on costs recovery as between client and solicitor under the uniform law as to whether what was then done, let's say if Mr Bennett was sitting in a Courtroom, was a legal service which Woolworths might want to quibble about. If it wasn't a legal service there might be some appropriate scope there for Woolworths to chisel away at the bill. But that's the retainer whether Mr Bennett sits in a Courtroom or sits at the Bar table; (1) we can't avoid the fact that that is a relationship between client and solicitor and a service was being provided, but it doesn't equate to the provision of representation for the purposes, we say, of section 596 of the Act.

PN284

VICE PRESIDENT HATCHER: If you have, as in the current scenario, a client instructs solicitors who brief counsel in the matter, the instructing solicitor is surely representing the client just as much as the counsel? It's artificial to say that the other persons at the Bar table aren't appearing or representing the client simply because they're not the ones doing the speaking.

PN285

MR SHARIFF: I think, for the purpose of section 596, in *McAuliffe v ATO*, your Honour, the Vice President was a Member of that Full Bench, determined that there isn't a distinction to be drawn between a barrister and a solicitor for the

purpose of representation. That's so. I accept that for the purpose of the argument. But taking your Honour's example, I am the advocate. I am the person who's representing, for the relevant purposes, Woolworths in this appeal. Mr Bennett might be here. He might be providing a legal service, but he's not the person, we say, who's doing the representation of Woolworths for the purpose of this appeal, to use your Honour's example.

PN286

There is nothing – if I just take it a step back, as we understand it, and I'm now speaking in terms of common practice in the Commission, it is not uncommon to find circumstances where clients are representing themselves because either permission hasn't been granted or permission hasn't been sought, to have legal representatives sitting in the Courtroom to provide them with tips or guidance and the like. There's nothing that we say that prohibits that in section 596 of the Act. If one wanted to prohibit that one would have needed express words to the contrary because that would cut across the right of the party to be able to be so represented. And I do wish to take your Honours to some authorities in other tribunals that deal with the question of representation.

PN287

VICE PRESIDENT HATCHER: Can I just test that? Does that mean that again in the instructing solicitor scenario that that solicitor, because they're not representing anybody, no longer has a duty to the court?

PN288

MR SHARIFF: No. That's – no, no, no, no - - -

PN289

VICE PRESIDENT HATCHER: How does a person who's not representing anyone in the proceedings have the duties attaching to a solicitor who's representing a client in the proceedings?

PN290

MR SHARIFF: Mr Bennett would not need to be sitting at the Bar table - - -

PN291

VICE PRESIDENT HATCHER: No, I don't want to personalise this. I'm just - - -

PN292

MR SHARIFF: No, we're just using, unfortunately for Mr Bennett, him. But the solicitor, just like a barrister, has an overriding duty to the court. That's a paramount duty as well as the duty to the client. You don't need to be - - -

PN293

VICE PRESIDENT HATCHER: Even if he or she just walks in court and sits in the gallery?

PN294

MR SHARIFF: I'm sorry, I didn't catch that.

PN295

VICE PRESIDENT HATCHER: Even if he or she just walks in court and sits in the gallery as a member of the public?

PN296

MR SHARIFF: They have a duty to the court in respect of the matters in which they are retained. So I don't see the fact as to whether the solicitor sits at the Bar table or sits in the Courtroom as interfering with the overriding duty of practitioners to the court or to the tribunal, as the case may be. That's right.

PN297

VICE PRESIDENT HATCHER: That creates a sort of intermediate - so the person is retained by the client for the purpose of attending the proceedings, they sit at the Bar table, they have a duty to the court, but they're not representing the client.

PN298

MR SHARIFF: They are not representing – no, see, I think there has to be distinction drawn between representing the client pursuant to a retainer; just pausing there. That is the rendering of legal services to the client pursuant to a contract. No doubt about that. I'm not cavilling with that proposition. I can't. I accept that, and in fact I'll go further and say it doesn't matter whether the person is a lawyer or not. It could be a paid agent. If there's a contractual arrangement between the client and a third party for them to come along to provide assistance it just wouldn't matter. I would have to accept that the person was providing services. It's a different issue as to whether the provision of those services amounts to representation for the purposes of section 596 of the Act.

PN299

VICE PRESIDENT HATCHER: What if you have senior and junior counsel and the senior counsel is hogging all the advocacy and the junior counsel doesn't say anything? Is the junior counsel representing anybody?

PN300

MR SHARIFF: In those cases the usual way I think it's done in the convention of this Commission, as it is in other courts, is that both persons appear, that is, usually it's announced that "I appear with my learned friend so and so", and so both persons are appearing as the advocate. Isn't that - - -

PN301

VICE PRESIDENT HATCHER: So they can be an advocate even though they're not speaking?

PN302

MR SHARIFF: No, they can be representing - - -

PN303

VICE PRESIDENT HATCHER: Even though they're not speaking?

PN304

MR SHARIFF: - - -even though they're not speaking in that case, yes.

PN305

VICE PRESIDENT HATCHER: Under modern legal practice senior counsel can appear together with a junior counsel but can also appear together with a solicitor.

PN306

MR SHARIFF: Yes.

PN307

VICE PRESIDENT HATCHER: So is the solicitor, in that scenario, representing anyone for the purpose of 596?

PN308

MR SHARIFF: No.

PN309

VICE PRESIDENT HATCHER: No?

PN310

MR SHARIFF: Not in that example, no. Mr Bennett is here sitting with me to take the example, but I'm the person who's representing the client. I'm the person who is, for the purpose of the hearing, representing Woolworths for the purposes of section 596(1).

PN311

VICE PRESIDENT HATCHER: So if you had a case with lots of witnesses, and then halfway through the case you decide that Mr Bennett is going to take one of the witnesses, there would have to be a further application for permission or - - -

PN312

MR SHARIFF: This, I think, brings us to a roundabout way back to McAuliffe, which I think means that once – we're talking about where legal representation has been granted. Legal representation can only be granted pursuant to McAuliffe in respect of the fact of legal representation irrespective of whether it's barrister or solicitor. I accept that. But once representation has been granted it's a different question. Here representation wasn't granted, and our point was, on any view of the facts, I accept what Mr Bennett was doing at the hearing was the provision of a legal service to Woolworths. I have to accept that. But we say it did not amount to representation of Woolworths in the proceedings. So it's just a question of fact.

PN313

There might be some nice esoteric points in what your Honour has raised with me, but on the facts as that happened here Mr Bennett's conduct never amounted to representation of Woolworths in the hearing. I accept that it amounted to the provision of legal services. I accept that. But it did not amount to the provision of representation for the purpose of the proceedings.

PN314

Can I just take your Honours to some authorities from other tribunals that deal with this point and come back to deal with how Cambridge C dealt with the matter. We had a bundle of authorities prepared and perhaps it might just be easier to provide the bundles, and we had a copy for Mr Fitzgerald. Can I first, in

those authorities, take your Honours to the decision in McGuirk? That's at tab 12, and that's *Vice-Chancellor of the University of New South Wales v Curtin and McGuirk*. It's the media neutral citation is 2006 NSWADT 271, and it's a decision of the then President of that tribunal, O'Connor J. Can I take your Honours to paragraph - - -

PN315

VICE PRESIDENT HATCHER: Who was Mr McGuirk again? He rings a bell.

PN316

MR SHARIFF: I'm sorry?

PN317

VICE PRESIDENT HATCHER: Who was Mr McGuirk again? He rings a bell.

PN318

MR SHARIFF: No, it's not - - -

PN319

VICE PRESIDENT HATCHER: I think he might have been a client of mine at some stage.

PN320

MR SHARIFF: No, it's not the infamous Mr McGuirk who was associated with Semitage but it might have been more of the nature of a person who'd been a client of your Honours in a past life. But can I take your Honours to paragraph 40 and following? This was the McKenzie friend application. Just to place this in context, there was an application for Mr McGuirk to assist Mr Curtin, I think it was, in the proceedings. At paragraph 41 his Honour refers to the decision in *Watson v Watson* of Lindenmayer describing what a McKenzie friend is and I pick up from paragraph 2 of that.

PN321

*a litigant who appears before a Court in person is ordinarily entitled, if he or she so wishes, to have the assistance, in the Court, of a friend or assistant who may sit beside the litigant at the bar table for the purpose of taking notes, handling or cataloguing documents or exhibits, making quiet suggestions to the litigant as to how best to conduct the case, and generally being of assistance to the litigant in presenting his or her case to the Court, provided that that person does not disrupt the proper conduct of the proceedings. However, an important limitation upon the role and functions of a 'McKenzie friend' is that he or she may not (except, perhaps, in the most exceptional cases, and with the express leave of the Court) act as an advocate for the litigant in the proceedings.*

PN322

So just pausing there, the common law in this area recognises a distinction between a person who is sitting as an assistant, a McKenzie friend, and a person who then becomes an advocate.

PN323

VICE PRESIDENT HATCHER: But is there any authority that a lawyer providing legal services to the client can be a McKenzie friend?

PN324

MR SHARIFF: Can I just read on?

PN325

VICE PRESIDENT HATCHER: Yes.

PN326

MR SHARIFF: It's the very next paragraph:

PN327

*The Act allows a party to be represented by an agent: section 71(1)(b) -*

PN328

That was the ATD Act -

PN329

*Who may constitute an agent is left undefined. The term, as I see it, is a broad one, and is not limited to admitted legal practitioners. The existence of such a right to be represented by an agent does not, in my view, affect action by the Tribunal necessary to the orderly management and conduct of its business. Section 73 of the Act gives the Tribunal power, subject to the Act and the Rules, to determine its own procedures. This may, in my view, extend to not permitting a particular person to appear as an agent, or to limit the way in which a person appears as an agent. There is an express power in section 71(2) allowing the Tribunal to 'order that the parties to the proceedings before it may not be represented by an agent -*

PN330

And so on. 43:

PN331

*The presence of section 71(2) in the Act shows a particular legislative concern with the possibility that the Tribunal may be affected in being able to do its work if it cannot discipline the presentation of oral submissions by agents.*

PN332

Then I read down to 45:

PN333

*The Act makes no reference to the form of assistance given by a McKenzie friend. In my view, the Tribunal can permit participation of this kind in its proceedings. This is an aspect of the management of its procedures.*

PN334

*Allowing assistance of this kind is consistent with the access objectives that often underlie the creation of tribunals -*

PN335

And then they refer to specific requirements there. 47:

PN336

*It would be open to the Tribunal to permit as a 'measure' advancing these objectives allowing a party to be given assistance by a McKenzie friend. But it is not a right, and the introduction of such a person into the framework of the proceedings is to be approached with care.*

PN337

Then reference is made to two recent English cases dealing with McKenzie friends. In 49 his Honour deals with:

PN338

*Leicester City Justices case the Court of Appeal considered that there was no bar of any kind to an unrepresented party involved in civil proceedings being assisted by 'quiet and unobtrusive advice from another member of the public accompanying him as an assistant or adviser'. The Court of Appeal did not think that a court's inherent power to regulate its own proceedings extended so far as to exclude such a member of the public playing the role of assistant.*

PN339

Then goes on:

PN340

*there was evidence that Mr Curtin or the assistant might have had the intention of disrupting or abusing the process of the court.*

PN341

Then his Honour deals with the circumstances in which the tribunal could:

PN342

*inquire what, if any, the role contemplated by Mr McGuirk would be. It would be open at that point to the other party or the Tribunal to raise any concerns.*

PN343

In 51 his Honour then deals with a Bow County Court case, a public proceedings allowing the assistance of a McKenzie friend unless a Judge was satisfied the fairness and interests of justice did not require the litigant to have such assistance and the like. Then over the page 53:

PN344

*The right of audience in the ordinary courts is confined to legal practitioners. Care is exercised in allowing persons other than legal practitioners to represent parties. The courts have two basic concerns.*

PN345

Those concerns we'll come back to in some of the later decisions. 54:

PN346

*Similar concerns can affect the decision whether to prevent a litigant in person being assisted by a McKenzie friend.*

PN347

There is a reference to *R v Smith* and:

PN348

*to the way in which a McKenzie friend might subvert the trial.*

PN349

And 55:

PN350

*In my view there is a danger in any class of litigation – not just criminal trials – that the proposed McKenzie friend may be an agitator or promoter.*

PN351

And in 56 dealing with the discretionary matters:

PN352

*In my view, therefore, the proper practice is for a litigant in person to advise the Tribunal at the outset of the proceedings if he or she wishes to be assisted. The other party should be invited to indicate its attitude –*

PN353

And so on. I'll come back to the significance of that in terms of what Cambridge C did.

PN354

Can I then take your Honours to tab 4 of the bundle? It's a decision of Cristovao, C-r-i-s-t-o-v-a-o v Registrar Caporalá, C-a-p-o-r-a-l-a [2012] FCA 1329. It's a decision of Murphy J in the Federal Court, and can I take your Honours to paragraph 28:

PN355

*The principles regarding the Court's discretion to allow the participation of a McKenzie friend have been well traversed ... While any person may attend as a friend of a party to take notes –*

PN356

I stress the "while any person", it can be legal practitioner or not –

PN357

*may attend as a friend of a party to take notes make suggestions, and give advice, courts must be very careful in allowing an unqualified person to participate in a proceeding as an advocate.*

PN358

Then the factors are set out as to what considerations the court will have regard to in allowing the McKenzie friend to appear as an advocate as opposed to simply providing assistance.

PN359

VICE PRESIDENT HATCHER: Is that right, that is, I would have thought that once you seek to appear as an advocate you cease to be a McKenzie friend? You're becoming an agent of the litigant.

PN360

MR SHARIFF: That's right. So once you're appearing as an advocate you cease to be a McKenzie friend but the factors (a) to (e) are the factors that the court will take into account to allow an unqualified person, that is, someone who is not a lawyer to be allowed to represent you, that is, to be your advocate so the complexity of the case, the genuine difficulties.

PN361

You will see in this case at paragraph 30 a Mr Chin, not the Mr Chin of the Bar, sought to appear in the proceedings as an advocate. He was allowed to sit with the relevant client, Mr Cristovao to provide advice and make suggestions so long as he didn't disrupt the proceedings and so on.

PN362

That then takes me to the decision in Mayger, that's at tab 5, M-a-y-g-e-r v Community Accommodation and Respite Incorporated No 2 [2017] FCCA 470, a decision of the Federal Circuit Court of Heffernan J. Can I take your Honours there to paragraph 3 commencing at the top of the, I think it's the, second page of the judgment.

PN363

*it is within the jurisdiction –*

PN364

This is the Federal Circuit Court –

PN365

*to permit a person to appear as a McKenzie Friend. The usual role of a McKenzie Friend is limited to providing support to an unrepresented party, perhaps sitting with them at the bar table assisting them to make notes, providing suggestions to that person, and in essence providing a sounding board with respect to forensic or tactical decisions. Traditionally the concept has not extended to acting as an advocate or representative.*

PN366

So there's the distinction that – and this is why I'm stressing I think your Honour has raised with me quite proper points about where the line might become very blurred, but on the facts that happened here all that Mr Bennett did was to sit at the Bar table and provide assistance at that time. It never escalated or transformed into acting as an advocate or a representative.

PN367

At paragraph 5:

PN368

*Whilst the general principle restricting the role of a McKenzie Friend is well established, there is authority to suggest that in appropriate circumstances a court may make an order permitting a person to make oral submissions in that role.*

PN369

So that's the limited circumstances in which a McKenzie friend might be permitted to become an advocate. Then:

PN370

*Edelman J, as he then was in Nepal v The Minister for Immigration & Border Protection made the observation that he doubted whether there was such an absolute prohibition on assistance by a McKenzie Friend ... He emphasised some of the considerations which have been identified by courts relating to the question of whether or not a McKenzie Friend should be permitted at all, namely the fact that the lay person is not regulated, they have not been trained in the ethical duties of lawyers, and there is an inherent risk that a non-lawyer representative may do more harm to a party than good.*

PN371

So in this case there was in fact an application by, I think, the application's husband to act as not just the McKenzie friend but as the lay advocate, and you'll see at paragraph 20 and following the Judge deals with – Heffernan J, that is, deals with that application, and I can indicate that His Honour comes to the conclusion at 32 that he wasn't satisfied to allow the husband a right of audience in the capacity of an advocate, but that didn't prevent the husband from acting in the role of a McKenzie friend.

PN372

But just coming back to paragraph 22, picking up what his Honour says from the Federal Court authority about, I'm picking up the quotes:

PN373

*A barrister or solicitor has a statutory right of audience in the Court -*

PN374

Of course we don't have that here. We have to seek permission –

PN375

*While it is apparent that the ordinary and preferred course is that a party appear in person or by a solicitor or barrister, neither the Act nor the Rules nor the Judiciary Act proscribe or preclude an appearance by a person on behalf of another person, with the leave of the Court. A court has an inherent right in regulating its own proceedings to allow a person, not being a party or a party's lawyer, to conduct a case on behalf of a party where it is desirable to do so in the interests of the administration of justice.*

PN376

Then his Honour goes on to deal with the issues that might arise where that McKenzie friend wants to act as the actual advocate in the proceedings and then one has regard to the factors which I've taken your Honours to before.

PN377

Can I then come to Cambridge C's articulation of the reasons why he permitted this to occur? Just going back to the transcript, tab 19 at page 192, and just before I come to precisely what Cambridge C said again, our position is this; that on the

facts Mr Bennett, by sitting at the Bar table, was not representing Woolworths in the hearing. That's our first point.

PN378

VICE PRESIDENT HATCHER: That's based upon the definition you ascribe to representation.

PN379

MR SHARIFF: Yes, the oral - - -

PN380

VICE PRESIDENT HATCHER: If it was interpreted to mean in respect of lawyers – the provision of professional legal services in connection with a matter before the Commission - - -

PN381

MR SHARIFF: Yes.

PN382

VICE PRESIDENT HATCHER: - - -then it would follow, would it not, that Mr Bennett was representing Woolworths in the matter?

PN383

MR SHARIFF: I think if one comes to the conclusion about the word "represent" as being as broad as that, I'm not sure it necessarily follows that Mr Bennett was representing Woolworths at the time, and this is the point I'm making. Factually what was he in fact doing? He was sitting at the Bar table and providing assistance to the advocate, and - - -

PN384

VICE PRESIDENT HATCHER: The problem is, is that the bill of costs, as it were, lifted the lid on what Mr Bennett was actually doing and it's pretty clear it's in that bill of costs that Mr Bennett prepared the whole case for hearing. He prepared the questions, the cross-examination, he prepared the oral submissions.

PN385

MR SHARIFF: Yes.

PN386

VICE PRESIDENT HATCHER: In effect he prepared the script for Ms Barclay to follow. Is that a reasonable comment?

PN387

MR SHARIFF: I think that's a fair inference to draw from the bill of costs, but that's permitted. Just going back to the rules for a moment, that's permitted under the rules.

PN388

VICE PRESIDENT HATCHER: I'm not sure about that. Rule 12 accepts certain specific types of out of court representation.

PN389

MR SHARIFF: Yes.

PN390

VICE PRESIDENT HATCHER: It doesn't exclude everything.

PN391

MR SHARIFF: Yes, but where's one drawing the line on that? That's why I say I'm not sure rule 12 can rise higher than the source as a stream. Rule 12 has its foundational basis in section 596. It becomes a very arbitrary line to draw to say, well, legal representatives can prepare submissions and can prepare documentation and engage in correspondence with litigants, but somehow it stops at assisting in providing guidance and tips in relation to the actual advocacy that occurs in the Courtroom. It's rather arbitrary to say it's limited to the preparation of submissions because ultimately submissions, whether they're in writing or not, usually in writing, but are going to form the basis of what the advocate then presents in court. But we're dealing here with Mr Bennett, not in that capacity, but Mr Bennett's positioning at the Bar table and providing assistance by way of passing notes or passing documents to assist the advocate, Ms Barclay.

PN392

VICE PRESIDENT HATCHER: That's what junior counsel do, isn't it?

PN393

MR SHARIFF: I think junior counsel do a lot more than that.

PN394

VICE PRESIDENT HATCHER: They help prepare the case; they help handle the documents for the primary advocate.

PN395

MR SHARIFF: Usually they're the brains trust I think we'd like to say but frankly  
- - -

PN396

VICE PRESIDENT HATCHER: Mr Bennett was clearly the brains trust of this case, wasn't he? With the greatest of respect to Ms Barclay.

PN397

MR SHARIFF: No, no, but we're dealing with – see, if Mr Bennett hadn't been in the court, on the interpretation your Honour is putting to me, Woolworths was still being represented contrary to not having sought permission. That just sets up, as I say, a very arbitrary line. What would it make - - -

PN398

VICE PRESIDENT HATCHER: In terms - - -

PN399

MR SHARIFF: I'm sorry.

PN400

VICE PRESIDENT HATCHER: Section 596 is, in a policy sense, connected with a limitation on the capacity to apply for costs as it seems to me that part of

the reinforcing the rule that costs aren't usually awarded in the Commission proceedings is that prima facie lawyers don't have a right to appear in proceedings.

PN401

MR SHARIFF: Yes.

PN402

VICE PRESIDENT HATCHER: So how does it come about that you have a case where there's no need for permission because the lawyers aren't representing the client, but then those matters can feature in a claim for costs against another litigant?

PN403

MR SHARIFF: There are a number of answers to that; the first is that lawyers can clearly render legal services to a client in respect of Fair Work proceedings. Lawyers can advise their client. Surely the tentacles of section 596 don't reach so far as to prevent lawyers from advising on elements of the proceedings; what the risks are; what one must do in order to succeed and the like to give the types of guidance and things that Mr Bennett, one can draw the inference, did here from the bill of costs.

PN404

Those were all costs in the ordinary course of events in litigation are recoverable in any other court or tribunal. In just any other court or tribunal on an assessment of costs they are the types of costs one would see featuring in litigation. They might not all be recoverable at the end of the day, and that's a different issue, and so I accept one looks at this, and one looks at the line item for seven hours for Mr Bennett's attendance in the court and one can assume that when the costs matter comes before Cambridge C that that will be a matter that warrants scrutiny and may ultimately not be a line item for which any recovery is given. That's a different issue.

PN405

VICE PRESIDENT HATCHER: It suggests that 596 doesn't operate as any protection for a vulnerable litigant against costs being applied for down the track, because you can, as apparently happened here, you can run up very large legal bills without ever obtaining permission for representation.

PN406

MR SHARIFF: I think the question of large legal bills is relative.

PN407

VICE PRESIDENT HATCHER: Relative to this case.

PN408

MR SHARIFF: Relative to this case, but even that's a relative concept. But I think it is right that if leave is not granted under section 596 the client who's appearing may nevertheless incur costs associated with the litigation, but (1) it incurs its own legal costs perhaps in the costs of internal lawyers and they're recoverable. There's authorities to that effect. Obviously because of rule 12 being

empowering if lawyers are involved, and they don't need to be to the notice of the applicant. So lawyers might have prepared the submission; lawyers might have been assisting by way of providing advice in relation to the litigation. If they are all properly legal costs incurred, then the answer to your Honour's question is, yes, the applicant may well be met with an application for legal costs under the relevant provision. Whether those costs are going to be recoverable is a matter for the Commission to determine on the appropriate application.

PN409

But in this case your Honours have the application for costs. Your Honours will have seen then that there was a fairly extensive letter written, this is in the costs application on 14 February 2017, where the fact that Woolworths is going to incur substantial legal costs was communicated to the applicant. Not just that, in the submissions that Woolworths filed, this is at tab 22 of the appeal book, the very final two paragraphs at 85 and 86, page 378 of the appeal book, Woolworths in fact put Mr Fitzgerald on notice that section 611 of the Fair Work Act stipulates the default position in proceedings before the Commission that parties should bear their own costs. Costs can be awarded - - -

PN410

VICE PRESIDENT HATCHER: So where is this?

PN411

MR SHARIFF: This is at page 378. So these are in the what were the outline of opening submissions filed before the commencement of the proceedings. Woolworths actually put the applicant on notice that they were incurring legal costs and they were likely to make a claim for them. Mr Fitzgerald responded to that because in submissions he filed before the commencement of the proceedings, and this is at tab 5 of the appeal book at page 29, he responds to it. He responds to what his position was going to be on legal costs.

PN412

But just coming back to our argument where I was going to, is that we say, as a question of fact, what Mr Bennett did at the hearing did not amount to representation of Woolworths, because he was simply sitting at the Bar table providing assistance. I accept for the inter parties issue as between Woolworths and its lawyers, Sparke Helmore, that amounted to a rendering of legal services, but we say the facts that that is the substance of what Mr Bennett did on the day didn't amount to representation for the purpose of section 596(1). But we don't say that that means that the Commission doesn't have any power to regulate the proceedings before itself. It would have been open to Cambridge C being able to regulate the proceedings before him, and as I understand it, I must say, in the common practice of Commissioners in unfair dismissal applications and the like and other disputes, that is the way that Commission Members at first instance, at least in my experience, tend to deal with the matter, which is to direct the legal representatives either to sit at the Bar table, not to sit at the Bar table, or to sit in the Courtroom.

PN413

VICE PRESIDENT HATCHER: In your submission, that wouldn't have made the slightest difference to capacity to charge the client for the costs - - -

PN414

MR SHARIFF: Correct, absolutely.

PN415

VICE PRESIDENT HATCHER: - - -or for that to appear in a costs bill at the end of the proceedings?

PN416

MR SHARIFF: Correct, absolutely. That's a different matter. That's an entirely different matter. So the one area where I think I'd have to accept that there might've been an error on the part of Cambridge C, if I can go back to the transcript, this is on my construction, is at page 192.

PN417

VICE PRESIDENT HATCHER: This was 35 where perhaps contrary to authorities you've taken to if you read this as saying that Mr Bennett was a McKenzie friend - - -

PN418

MR SHARIFF: Yes.

PN419

VICE PRESIDENT HATCHER: - - -I'll park that for a minute, but he treated that as something you have as of right rather than by permission.

PN420

MR SHARIFF: Right. I'm sorry, I should qualify that; that it is not a matter – sorry, I'll phrase this differently.

PN421

VICE PRESIDENT HATCHER: Not a matter he had any power over.

PN422

MR SHARIFF: Quite. He did have power over that, and we would accept that the Commission has power over that, and to that extent if there's an error we say it's a trivial error because at the end of the day coming back perhaps to deal with this argument, both under 596 and to the extent that there is an error, it's that limited error, what one is looking at is whether nevertheless a fair trial was afforded. If we go to *Warrell v Walton*, it's the case I hesitated about taking your Honours to earlier, that's at tab 13, the inaptly named *Warrell v Walton*, I do believe it got - - -

PN423

VICE PRESIDENT HATCHER: It was corrected.

PN424

MR SHARIFF: Yes, it was corrected. In number 2 I think it got changed to *Warrell v Watson* and that's [2013] FCA 291, and the way that Flick J dealt with the question of representation is whether, at paragraph 19, whether the question of permission to appear resulted in a fair and just hearing being afforded to the applicant, and - - -

PN425

VICE PRESIDENT HATCHER: I mean, I don't think it's necessarily never expressly said so but it's explicit from the fact that relief was granted that this ever amounted to a jurisdictional error.

PN426

MR SHARIFF: It is a, if I can say this with respect to his Honour, that is a part of the decision that is very unclear in terms of a reasoning, and it's a matter about which I think there has been debate elsewhere, but why precisely the question amounted to jurisdictional error isn't explained in the reasons.

PN427

Can I take your Honours to paragraph 21? There were two broad propositions that were put. The first was:

PN428

*Any hearing which was conducted where the discretion to grant "permission" to appear by a lawyer had miscarried was necessarily a hearing didn't meet the criteria of fair and just.*

PN429

So the injection of the "fair and just" standard arises by reason of section 577(a), and your Honours would know that that provision requires the Commission to discharge its functions in a way that's fair and just.

PN430

The narrower submission is that the hearing in the present case was not fair and just by reason of permission being granted to the lawyer, so what then ultimately turned the decision at paragraph 22 was whether there was an error on the Full Bench's part in concluding that the hearing before the Senior Deputy President was fair and just in that the Full Bench had failed to take into account the specific factors bullet pointed at 22. In other words, this is why there's a - - -

PN431

VICE PRESIDENT HATCHER: They look like errors within jurisdiction to me, but - - -

PN432

MR SHARIFF: I would say there are errors within jurisdiction, and I would say they're quintessentially errors within jurisdiction, but what his Honour is saying, if I can try and interpolate from the decision, is because there was a failure to take into account those matters, the specific matters that affected Mr Warrell, that was a failure to take into account relevant considerations, relevant consideration in the Peko-Wallsend sense, that is, they were either relevant because they were mandatory or relevant because of the subject matter, scope, and object of the provisions. The subject matter, object and scope of the provisions being a fair and just hearing. Those were the matters relevant to take into account in order to ensure that the trial was fair and just.

PN433

So what we say, in the present case, is even if there was any error, whether it's on the broader basis that your Honours have put to me in argument on 596 or on the narrower basis in the way that I've identified it, ultimately we say it's not an error that resulted in there not being a fair and just hearing being afforded to Mr Fitzgerald. The reason why we say that that's the case is because if one looks at the transcript of the proceedings below, and Mr Fitzgerald has taken you to parts of it, but selective parts of it, but if one looks at it, he had the opportunity to seek an adjournment if he wished. He wasn't suffering from the hearing difficulties that appear to have impaired him today at the time, and that's apparent from the transcript. I could only find one reference to hearing difficulties in the transcript of the proceedings below. He was allowed to adduce his own evidence. He gave evidence in his own case. He had witness evidence from two other witnesses who weren't called as witnesses yet their statements were admitted into evidence, and Cambridge C said that they would be dealt with by weight. He had the opportunity to cross-examine each of the respondent's witnesses and did so, can I say, with a degree of aplomb, and he filed extensive opening and closing submissions so that the idea that there was a miscarriage of the trial, that is, that there wasn't a fair and just hearing we say, just on the facts, doesn't manifest itself.

PN434

I can indicate as the appeal book does that there were extensive submissions, both in writing and orally, that were made by Mr Fitzgerald, and your Honours will find those submissions at, if I can take your Honours to them, at tab 4 of the appeal book. Your Honours will see that, this is before the trial, these are submissions filed on 1 February 2017 and you'll find that on page 28. Mr Fitzgerald, contrary to some matters that he's put to your Honours today, well understood that there was a jurisdictional objection taken, because one can see that at the foot of page 26 and over the page Mr Fitzgerald makes references to the leading authorities about constructive dismissal, including the authorities which Cambridge C, in fact, referred to. So he put those submissions before the Commission. At tab 5 your Honours will see further submissions that Mr Fitzgerald put to the Commission including in relation to the issue of costs, which you'll find at paragraph 4 on page 29 of the appeal book. Your Honours will then see at tab 7 he filed a witness statement on 1 February, and then at tab 8 he filed a further witness statement, a fairly extensive one, which was in reply to the evidence called by the respondents. At tab 9 is one of the statements of the witnesses who weren't called for cross-examination that you've been taken to, and then he filed fairly extensive closing submissions after having the benefit of transcript at tab 11.

PN435

So we say there wasn't, in this case, by reference to that and by close examination of the transcript, a denial of a fair and just hearing. So to the extent that there was any error on section 596 on either bases, it just didn't affect the outcome of the case, and in fact casting my mind back to what your Honour said in McAuliffe there was an error there because I think Mr Cross hadn't been given permission to appear as counsel, but Mr Noakes had been given permission to appear. Both parties indicated, both the ATO and Mr McAuliffe, indicated that the question of representation didn't have an impact upon the outcome of the trial and in those circumstances my recollection is that in McAuliffe your Honours granted

permission to appeal but dismissed the appeal because there was no utility in the making of any orders. So if there was any error here under 596, either on the broader or narrower basis, we say nothing comes of it because even here on appeal Mr Fitzgerald doesn't point to any actual impact upon the conduct of the trial. He points to things such as witness tampering and unavailability of witnesses. We deal with that in our written submissions and I'm not going to traverse over those issues.

PN436

But none of those attended to the quality of the trial which has got to be contra-distinguished to the facts that Flick J had before him in Warrell where, just going back to that decision at paragraph 23 – I'm sorry, I should go back to paragraph 22 after setting out the factors that his Honour said were relevant considerations weren't taken into account, he said:

PN437

*The absence of any reasons for granting permission is only reinforced by the comparatively simple and confined factual dispute that arose ... Mr Warrell gave one account ... Mr Carter gave a different account.*

PN438

Then his Honour said the difficulty in this case was with an illiterate person who was suffering from a mental disability when they were cross-examining a witness they didn't have the wherewithal to know what questions to have put so that, his Honour concluded, impaired the conduct of a fair and just hearing. As I say, I've always found this decision when I've read and re-read it several times difficult to ascertain why there was jurisdictional error. The path of reasoning seems to be there was jurisdictional error because the Full Bench failed to have regard to the factors I've taken your Honours to. Another way of reading it is that section 596 gave rise to jurisdictional fact but I just don't see that myself in the reading of the decision.

PN439

Unless there's anything further?

PN440

VICE PRESIDENT HATCHER: Mr Shariff, you told me to wait but I thought you were taking me to an authority which said a McKenzie friend could be a - - -

PN441

MR SHARIFF: Yes. Can I - - -

PN442

VICE PRESIDENT HATCHER: - - -practitioner who's professionally engaged to provide services in the matter?

PN443

MR SHARIFF: - - -just try and locate that? I thought it was in one of the decisions I've taken your Honours to. If I can just have a moment? I think it was in the – can I just have a moment?

PN444

VICE PRESIDENT HATCHER: Yes. If you want to send us a note, Mr Shariff?

PN445

MR SHARIFF: Yes. I have a recollection, your Honours, that it might have been a passing reference in the decision and Lindenmayer J in *Watson v Watson*, but perhaps if I can locate that and send that in a short note this afternoon. I'll undertake to do it.

PN446

VICE PRESIDENT HATCHER: Thank you. As I indicated in the earlier directions we'll order the transcript probably on a three day turnaround and then Mr Fitzgerald will have seven days once the transcript is supplied to provide any submissions in response in writing that he wishes to make, and then we'll reserve our decision.

PN447

MR SHARIFF: May it please.

PN448

VICE PRESIDENT HATCHER: We will now adjourn.

**ADJOURNED INDEFINITELY**

**[1.16 PM]**