TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT O'NEILL
COMMISSIONER LEE

C2023/413

s.604 - Appeal of decisions

Appeal by Ambulance Victoria
(C2023/413)

Melbourne

10.07 AM, MONDAY, 17 APRIL 2023

PN1

DEPUTY PRESIDENT CLANCY: Thank you. Good morning. We'll confirm appearances please?

PN2

MR N HARRINGTON: Good morning members of the Full Bench. My name is Harrington, initial N, and I seek permission to appear to the extent required. We have put in something in writing and I don't oppose my learned friend seeking permission to appear- - -

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DEPUTY PRESIDENT CLANCY: Thank you, Mr Harrington.

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MR M HARDING: Yes. My name is Harding, initial M and I seek permission to appear for the respondent in the appeal.

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DEPUTY PRESIDENT CLANCY: Thank you. The Full Bench is conferred on the issue of permission and permission is granted to both parties to be represented. Thank you.

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MR HARRINGTON: Shall I kick off?

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DEPUTY PRESIDENT CLANCY: Yes. Have you had any discussions about how – I presume you're going to proceed in the normal fashion, yes.

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MR HARRINGTON: Yes. We haven't discussed anything. I just assumed I'd go first.

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DEPUTY PRESIDENT CLANCY: Yes.

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MR HARRINGTON: I wasn't going to address permission on appeal directly but I can if you require me to do it. I was really going to get into the niche of the grounds as it were.

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DEPUTY PRESIDENT CLANCY: Well, the agreement as we understand it requires permission to be granted. Is that right?

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MR HARRINGTON: That's my understanding. But I can check that.

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DEPUTY PRESIDENT CLANCY: Yes.

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MR HARRINGTON: We have addressed that in submissions.

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DEPUTY PRESIDENT CLANCY: Yes.

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MR HARRINGTON: Some agreements don't.

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DEPUTY PRESIDENT CLANCY: Yes.

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MR HARRINGTON: And I have read those decisions.

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DEPUTY PRESIDENT CLANCY: Yes.

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MR HARRINGTON: But I read out – my learned friend might have a different view. He might give me a free kick on that but I thought we had to seek permission.

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DEPUTY PRESIDENT CLANCY: Yes. All right.

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MR HARRINGTON: I can go to the agreement and address you on that.

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DEPUTY PRESIDENT CLANCY: Yes.

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MR HARRINGTON: Did you have, Clancy DP – did you form a different opinion about that matter, did you?

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DEPUTY PRESIDENT CLANCY: No. It appears as though the parties are proceeding on the basis that permission is required.

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MR HARRINGTON: Yes. Well, I am but - - -

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DEPUTY PRESIDENT CLANCY: Yes.

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MR HARDING: I am proceeding on that basis.

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DEPUTY PRESIDENT CLANCY: I beg your pardon?

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MR HARDING: I am proceeding on that basis too.

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DEPUTY PRESIDENT CLANCY: Yes. Yes. So you can address permission as you'd like to.

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MR HARRINGTON: Yes.

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DEPUTY PRESIDENT CLANCY: But we'll hear you now - - -

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MR HARRINGTON: On the substantive.

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DEPUTY PRESIDENT CLANCY: Yes.

PN36

MR HARRINGTON: I'll start with a little bit of housekeeping because I reviewed my own written submissions this morning and there were just a couple of little typographical errors, some of which matter, so I will take you to those if I can. Footnote one on page one of the outline of submissions of the appellant. Sorry – it's footnote two. So it's page two. It's *Rail Commissioner v Rogers* [2021] FWCFB 371, it says it's 62. It should be 61 and I can take you to that at the relevant time – probably quite soon this morning. So that's just a small amendment to a number there.

PN37

Paragraph 21 of these submissions has a typographical error – the first line – which is on page three – 'AV provided with the following reasons in invoking clause 23.4' – that should read.

PN38

Can I then take you to footnote 30, on page eight? And this is a reference to *Steed v The State Government Insurance Commission* [1986] Volume 161, CLR, 141. And it should be at 145. Again, a small numerical error there.

PN39

Subject to any direction from the Bench here today the way I intend to tackle the appeal, of course relying upon my written submission, is first address this question. Is the appeal concerned with the correctness standard? And that's an important question because we're apart on that. My learned friend, as I read his submissions, says the correctness standard, which has been recognised by this Commission applying High Court authority, the correctness standard is not a *House v The King* lens or it's not a *House v The King* question.

PN40

The correctness standard is put thus. Did the member exercising jurisdiction answer the unique question in a correct manner? It's not a question of was it open

as an exercise of discretion when answering that very particular question posed to resolve the dispute. So the difference between us and I will get into this in a moment is that I say the correctness standard applies. My learned friend says, 'No. It doesn't.' Mr Harrington, on behalf of Ambulance Victoria, must demonstrate *House v The King* error.

PN41

First ramification, why this is important? Because if the correctness standard does apply in the adjudication of this appeal and you so find, the doorway opens for you as the Full Bench to then reach the correct conclusion on the material before you.

PN42

You must undertake that task. That's how I read the authorities and, again, I will come to those. So that's important because I am going to have to address you today both on these technical questions of the correctness standard but I will along the way touch on what I consider to be some errors in the decision.

PN43

But, again, the Full Bench of this Commission has said if it is an appeal involving the correctness standard identification of error alone is not enough. I must persuade you of the correct answer to the substantive question below.

PN44

So I must persuade you when you come to the task. I must persuade you – if I can just go to the question? This is, of course, it's reproduced in the decision itself. 'Does the respondent have reasonable business grounds for refusing the FWO pressed pursuant to clause 23.4 of the agreement?' I must persuade you, the Full Bench, that the answer is 'yes' to that question.

PN45

So we're apart on that. And I think I should address that really at the threshold.

PN46

The next matter that I will address you on is if you're with me and the correctness standard applies I will address you on the fact that the Commissioner erred and reached the wrong decision. The wrong conclusion. Because he misconstrued clause 23.4 when he came to his construction task, when he had to give consideration to were there reasonable business grounds to refuse? My submission is the Commissioner fell into error on that. And the billboard error – if I can call it that is this. The Commissioner, on my submissions, determined that there was an obligation to genuinely try to reach agreement before the decision was reached.

PN47

My submission is that the Commissioner, in his reasoning pathway, and the critical paragraphs – paragraph 76 to 80 of the decision – I will take you to those – the Commissioner says at the threshold that looking at clause 23.4, reasonable business grounds, Ambulance Victoria had an obligation to try to genuinely try to reach agreement before it made its decision. It failed. It did not comply with that obligation and, therefore –

PN48

(a) the Commissioner found Ambulance Victoria acted unreasonably. So it could not have reasonable business grounds on any view; and

PN49

(b) coming to paragraph 80 of the decision, the Commissioner found that conduct in failing to genuinely try to reach agreement vitiated – and that's his word – the Commissioner's word 'vitiated' the decision making by Ambulance Victoria.

PN50

That's the profound construction error which led to the incorrect decision being made at first instance where the Commissioner was exercising his private arbitral function.

PN51

And just to take you there very quickly, the reason that the Commissioner erred, in my submission, is because when you look to 23.4 – 23, generally – but 23.4 there is no written expressed, and in my submission, implied obligation to 'genuinely try to reach agreement before the employer, Ambulance Victoria makes it determination on the flexible work application'.

PN52

Something then arises there. If you are against me on that and you say, 'But Mr Harrington we do find that it's expressed or implied', two matters emerge. The first is well, we contend on the evidence before the Commissioner there was such evidence. There are a range of emails between 28 February and 9 March and some other conversations where there was an attempt to talk about the issue, to work out with Ms Fyfe, because she required eight changes – if I can put it like that – to work flexibly. Eight changes. Seven were agreed.

PN53

The problematic one, as I am sure you are aware because you've read the material – the problematic one was the reduced hours night shift, whenever it came up. That was the problematic aspect that Ambulance Victoria said, 'We can't give you that. We can't do that operationally and on grounds of efficiency and there's a cost associated with that.'

PN54

So we say there was plenty of evidence – if the obligation existed – there was evidence there. The Commission says – made a finding you didn't generally try to reach. That's a warm-up proposition to this proposition and it's a very important proposition now – ground three. It's what I call the natural justice ground.

PN55

The VAU, with the greatest respect, who fought this application hard did not come to this Commission and argue in writing or in closing oral submissions that such an obligation existed on Ambulance Victoria and it had failed to comply with that obligation under clause 23. Therefore, it was unreasonable, it could never succeed on reasonable business grounds. The VAU, the respondents state, did not ever advance that argument.

PN56

Now, if Ambulance Victoria is coming to this tribunal to defendant itself to avail itself of a right under the agreement to contend that it had reasonable business grounds, if the attack on its decision is that you fail at the threshold because clause 23 contains an obligation that you must generally try to reach agreement before you make your decision. If that's the first, last or only attack, we're entitled to know that well before we step foot in the Commission. But we're entitled to know it during the hearing.

PN57

I will take you to a part of the transcript with the Commissioner, very late in my closing oral submissions, where the question of reasonableness arises. But not as a construction question. But when you come to read the decision itself what you read at 76 to 80 are those critical paragraphs, in my submission, what you will read is that obligation existed. It's not a general law obligation. It's not a common law obligation. It's not a statutory obligation under the Fair Work Act because we weren't proceeding under the Fair Work Act.

PN58

That is going to happen in this Commission in the future because the Commissioner helpfully explained where the law is going in this regard and where the Commission's jurisdiction is going to expand. We know that because the amending legislation was passed last year. That is going to happen. It was not the general law of the statutory jurisdiction at the time that this matter was heard.

PN59

The jurisdiction in the Commission was a consideration of what did these parties refer for dispute resolution under their agreement to the Commission? And clause 23, of course, squarely falls within that because we never objected to jurisdiction saying, 'This is not a proper dispute.' I said, 'Yes, we're in dispute. Absolutely.' And here's the question. And the question is about do we have reasonable business grounds? As my learned friend who's instructing today said in his closing oral submissions, 'It's quite a narrow dispute.' There's quite a few facts but it was quite a narrow legal question as it were. It's about reasonable business grounds and did we have them for refusing?

PN60

That question is answered by reference to the agreement and the agreement alone, not the existing legislation last year, not the future legislation, amendments that are coming to the fore.

PN61

So your task, in my respectful submission, members of the Full Bench will be to look at clause 23 itself and say, was there such an obligation imposed on Ambulance Victoria? And then critically was that part of the case that was actually advanced? That obligation? Because it takes absolute prominence in the reasoning pathway of the Commissioner.

PN62

So that natural justice ground that I have just addressed you on again it's fundamental because that's the jurisdictional error as you would well accept. Now

my learned friend on that and we'll come to this he contends – I should go back – we wrote to them, the union, last week and said, 'Well, do you concede that there was a breach of the rules of natural justice on this ground that it was not how the case was advanced?' Well, with respect the response is rather opaque saying, 'You have to make that out to the Commission.'

PN63

Now, the reason we ask that question and I will be clear about this is because the High Court authorities my learned friend wishes to take you to on materiality, because not every breach of natural justice results in a failure to invoke or exercise jurisdiction. And I accept that proposition. Steed, the High Court case that I will take you to says not, and applying English authorities says not every breach of natural justice because if the breach has no material effect upon the ultimate outcome jurisdiction, effectively, was properly exercised and remains in tact.

PN64

So the contested ground today between us on natural justice, on this jurisdictional question, is apparently going to be that my learned friend doesn't concede that there was a breach of natural justice but he, as I read his submissions, will say even if those – that submission, that construction was not advanced before the single member in his private arbitral jurisdictional setting that denial of natural justice to you would not affect the ultimate outcome in this case.

PN65

And there are High Court authorities in the recent couple of years in the immigration jurisdiction that addressed this question of so-called materiality. Was the breach itself material?

PN66

They are the matters that I am going to address head-on today but what I must also do in my submission is the final part of the submission I will make is to address you on assuming that the correctness standard applies why you should reach a conclusion to the question that my client, Ambulance Victoria, did have reasonable business grounds for refusing which takes you into the landscape of the evidence that was adduced. Of course all of that is effectively before you in the appeal book.

PN67

Unless there's any question or issue with the way I am going to proceed I will get stuck into that first question about the correctness standard or principle if I might? Thank you.

PN68

Can I first take you to what the Commission has adjudicated on this matter? And I might start with the decision of *Rail Commissioner v Rogers* which is at footnote two and I made a slight amendment to that you might recall just before.

PN69

It's in the authorities that we provided to the Commission and it's at tab four starting at page 72 of the authorities that were provided by the appellant

today. The paragraph that I wish to take you to is, as I corrected myself earlier today, is paragraph 61 of that decision and it bears – because it's important – I think it's worth reading out to you.

PN70

That was like this matter it was a dispute – an appeal from a dispute finding and an adjudication in the private arbitral setting of that dispute. The Full Bench said this at 61 –

PN71

We reject the submission of Mr Rogers that this appeal was one which challenges the discretionary decision such as to make applicable the appellate principles stated in House v The King. It is the 'correctness standard', rather than the 'discretionary standard', which applies to this appeal because it is concerned with the proper construction of the provisions of an enterprise agreement. The discretionary standard only arises where the decision under appeal involves evaluative conclusions in respect of which the applicable legal criteria [permit] some latitude or choice or margin of appreciation such as to admit of a range of legally permissible outcomes. That a 'unique outcome' is required in arbitrable decision made under section 739 of the Fair Work Act concerning the construction of the terms of an enterprise agreement which applies to the parties is amply confirmed by section 739(5) which has the relevant effect prohibiting the Commission from making a decision that is inconsistent with the agreement. Accordingly, our duty in determining this appeal is to substitute our own conclusions concerning the proper construction of the relevant provisions of the 2016 agreement if we disagree with those of the Commissioner.

PN72

So based on the opening that I made to you before what's in issue today is what is the meaning of and effect of the expression 'to have reasonable business grounds', when can Ambulance Victoria invoke that upon what facts and is there anything in clause 23 that says Ambulance Victoria must first generally try to reach agreement before it does so.

PN73

These are construction questions on any view. It is not a *House v The King* review that's advanced before you today. The explanation, very ably demonstrated, by the High Court is – and this is the provenance if I can call it that of a few decisions in this Commission. And I will take you to tab five in the appellate's list of authorities. *Minister for Immigration and Border Protection v SZVFW and Others*, Volume 264 CLR, 541. That decision, just bear with me – if I can take you to Gageler J at 49, paragraph 49 of the decision I have just referred you to at tab five. And as always Gageler J it's clearly and succinctly put.

PN74

The line is not drawn by reference to whether the primary Judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary Judge to reach the conclusion demands a unique outcome, in which

case the correctness standard applies or tolerates a range of outcomes in which case The House v The King standard applies. The resultant line is not bright but it is tolerably clear and workable.

PN75

So what – and you can read the preceding paragraphs to give you a sense of how he reached that conclusion. What his Honour there was explaining was that there are in certain instances upon review, as it were, it's a profound difference between *The House v The King* evaluation of a discretionary error versus or in contrast to the so-called correctness standard where there's only one answer. And, here, if I can put it bluntly from the outset, the one answer is two questions that must be answered on construction.

PN76

Is there anything in clause 23 of this agreement that says that Ambulance Victoria must generally try to reach agreement before it makes its decision. My answer to that is no, there's not. There's only one answer to that. It's got nothing to do with discretion.

PN77

The second question before the Commissioner is was there reasonable business grounds on the evidence before him. That's not discretionary. It's an objective assessment. They're either on the evidence that we adduced Ambulance Victoria. There's either reasonable business grounds or there's not. It's a unique answer. And that's to put into play in this context before you today what Gageler J at paragraph 49 was addressing directly there.

PN78

I have taken you to Rogers which applied that decision. Can I take you to more recent decisions and I will start with *AWU v Orica* – tab two of the appellant's authority booklet – [2022] FWCFB, 90. And in that decision – I am going to paragraph 12. And again, this is pretty neatly put by a Full Bench of this Commission.

PN79

The decision against which the appeal has been brought concerns the proper construction of the agreement. The decision did not involve the exercise of the discretion. The answer given by the Deputy President is either correct or it was not. The appeal is to be determined by reference to that which has previously been described as the correctness standard. Therefore, if the answer given by the Deputy President was correct then any error made in the reasoning process will not result in the appeal being upheld.

PN80

And I want to focus on that last sentence just for a moment there. That's why the High Court and Full Benches of this Commission have said, if you're coming along to argue the correctness standard you don't need to necessarily labour about all the so-called errors in the reasoning pathway. You must, first of all, persuade the Full Bench it's not a discretionary decision that you're appealing from.

PN81

Secondly, you can talk about error as much as you want, and it might assist your case to demonstrate the correct answer, but you must address the Full Bench on what the correct answer is because the Full Bench's task, once it's applying the correctness standard, is to say, 'Here is the proper construction of clause 23.' And, in my submission, and I urge you to find this.

PN82

Applying the correctness standard, the Commissioner in this instance, misconstrued clause 23 by determining that there was an obligation to generally try to reach agreement before making a decision.

PN83

Two, the Commissioner erred in his construction of reasonable business grounds, because on the evidence adduced to him there were such reasonable business grounds and that's the unique and the correct answer.

PN84

The next decision that I will take you to – again, a recent decision is *AMA v Monash Health* [2022] FWCFB 82, and this is at tab three of the appellant's list of authorities. And I am taking you here to paragraph 25 –

PN85

> *'Second, the AMA's submissions do not disclose any proper basis to substitute the alternate answer no for the answer given by the Commissioner. The determination whether a party has complied with or contravened a provision of an enterprise agreement does not involve the exercise of a discretion. In this case, although the question of compliance with clause 21.5(a) requires an evaluative judgment to be made by reason of the clause being concerned with the reasonableness of the assignment of work it nonetheless demands a unique outcome.'*

PN86

Going back to Gageler J there.

PN87

> *'The correctness standard therefore applies to this appeal. It is not sufficient in an appeal to which the correctness standard applies for the appellant merely to point to alleged errors in the reasoning process or findings of subsidiary fact in the decision under appeal, as the AMA has done here. Rather, the appellant must advance a positive case as to why a different answer to the question posed for the determination is the legally correct answer. The AMA has simply failed to do this.'*

PN88

Those are the statements of principle from the High Court and the Full Bench of this Commission that I rely upon. My learned friend, in his written submissions for the respondent, Ms Fyfe, at paragraph 10 contends as follows. The correctness standard does not apply to the performance of these functions. And that's where we're fundamentally at odds and in disagreement. And, in my submission, my learned friend is wrong in that submission, given the authorities to which I have taken you and the way in which the High Court and this Full Bench – the Full

Benches of this Commission have explained how the correctness standard operates, particularly in appeals concerning private arbitral dispute outcomes where there's a construction question involved.

PN89

Now, I will concede this. My learned friend has a gateway out perhaps if he can say, 'But this was not about – what the Commissioner did was not about a construction question.'

PN90

Well, when I concede that I'm probably being a bit naughty, because ultimately he can't contend that. It is a construction question. The section 739 of the Act directs you to that in terms of the Commission must make sense of and determine the dispute by reference to what's in the agreement. What does clause 23 require when a flexible work application has been made? And the appellant today – Ambulance Victoria – has come along and said, 'We know what it requires and we say we had reasonable business grounds. The Commissioner said – or found, I should say – you did not have reasonable business grounds because you did not generally try to reach agreement before you made your decision. And that was unreasonable and that conduct vitiated everything else you did. Again to use his expression in this term.

PN91

My learned friend, in his written submissions, before this Full Bench contends at paragraph 11 the phrase, 'Reasonable grounds is undefined in the agreement'. Well, that's true. Reasonable business grounds is not defined. I accept that. I think we both agree on this that reasonable business grounds must be objectively assessed by the decision maker.

PN92

Now where, in my respectful submission, my learned friend runs into real trouble in his submission on this point is at paragraph 12 of his written submissions where he says, 'A determination that there are or are not reasonable business grounds for refusing a particular proposal for change allows for the making of value judgments by the FWC that are essentially practical are weighing', as the Commissioner described it in 49 of the decision of any adverse impact – et cetera.

PN93

And then down that paragraph, the last two sentences –

PN94

'By its nature resolution of that question tolerates different, albeit legitimate opinions rather than requiring one unique outcome.' That's where we're apart. That's wrong. With the greatest respect that is not right. There is one unique outcome required on the construction task and the - can I take you back to AMA and Monash Health where the Full Bench said and I read this out to you. 'Although the question of compliance with clause 21.58 requires an evaluative judgment to be made by reason of the clause being concerned with the reasonableness of the assignment of work, it nonetheless demands a unique outcome.'

PN95

So that's been tackled by the Full Bench saying, 'There might be an evaluative process involved looking at the words of the clause and looking at the evidence it's adduced.' But the question will always be two-fold in my respectful submission. Does the analysis require a unique outcome? Does it lead you to a unique outcome? And, two, to test that was it a discretionary decision? Was it discretionary that the first instance member was doing? Was he exercising a discretion?

PN96

And, in my respectful submission that is the bridge too far for my learned friend. There's just in no sense was Johns C being asked or required to exercise a discretion because reasonable business grounds either existed or they didn't.

PN97

An obligation to generally try to reach agreement, an obligation either existed in clause 23 or it didn't. That's the uniqueness of these outcomes that must be reached.

PN98

So my learned friend hitching his wagon to – well, it requires an evaluative assessment of value judgments. And the question tolerates different albeit legitimate opinions, rather than – one unique outcome – that cannot withstand analysis in my respectful submission.

PN99

So my learned friend at paragraph 13 of his written submission goes on to say *The House v The King* standard of review applies and he says that I must come here today and demonstrate a vitiating error according to those principles.

PN100

Okay. If you're against me on the correctness standard I have got a notice of appeal with 13 apparent or alleged errors in the reasoning pathway. So I have gone about it that way too, just to be careful about this, but I have always maintained, particularly at ground one that the correctness standard applies.

PN101

So my job before you is different and your job in adjudicating this appeal is different to a *House v The King*.

PN102

Part (b) of the appellant's written submissions outline summarises the submissions I have just made to you. Now can I move to the next – unless there's a question that you have for me can I move to the next matter I wish to address you on that flows on necessarily?

PN103

If the appeal is concerned with the correctness standard Ambulance Victoria contends that the decision was wrong because clause 23 was misconstrued in that it imposed so said Johns C an obligation on Ambulance Victoria to generally try and reach agreement.

PN104

Can I take you to the decision itself? And if I might briefly? And this is at tab two of the Appeal Book and it starts at page five of the Appeal Book and I would jump right into it and take you to the critical paragraphs from my perspective. And so I am taking you to page 43 of the Appeal Book starting at paragraph 76. And the Commissioner says this at 76 of the decision –

PN105

'Although clause 23 does not contain the express reference to genuine attempt to reach an agreement with the applicant about her FWA request.' Sorry, I withdraw that. I'll start at 75 –

PN106

'What is evident from the chronology of events is that there was no genuine attempt to reach an agreement with the applicant about her FWA request.'

PN107

I'll just pause there and affirm what I submitted earlier that well we say there was such evidence but I will come back to that.

PN108

'It will be noted that discussions with an employee, and generally trying to reach agreement will be expressly provided for when the new provisions become operational.' That's the amending legislation that comes into force soon.

PN109

'76. Although clause 23 does not contain the express reference to discussions and generally try to reach agreement (as is proposed in the new legislation or in clauses that were before Wilson C in Emery and Bell DP in Azmi it is difficult to see how I can make a finding that AV had reasonable) affected by reason and sound judgment business grounds if it did not have a discussion with Ms Fyfe and seek to reach an agreement with her. AV acted unreasonably, and that unreasonableness infected its decision.'

PN110

I can start here. That last sentence is critical because that's a finding, which is my learned friend's word, dispositive. It's a dispositive finding by the Commission, on the evidence before him, that Ambulance Victoria acted unreasonably because it did not generally try to reach agreement in accordance with the findings of fact he made. But then he goes on. He says that unreasonableness infected its decision.

PN111

So I used the word earlier 'threshold'. Right from the threshold Johns C here makes a finding at 76, that because you did not do that thing you were unreasonable and that unreasonableness permeated, infused, infected, your decision thereafter – the decision you reached. Because you did not generally try to reach agreement.

PN112

Now quite correctly, Johns C, in 76 refers to Emery and Azmi. They were decisions of this Commission and I'm sure we're not apart on this, where the parties had negotiated and placed into their agreement an obligation to generally try to reach agreement. And quite properly the Commission in those cases, Wilson C particularly, in Emery had regard to that consideration. Did you generally try to reach agreement because your clause requires that of you. That's what – the clause I am concerned with requires. Did you do it?

PN113

Here, and I don't read it being put by my learned friend that there's any express obligation in clause 23 of this agreement to generally try to reach agreement. Neither was there ever advanced and I'm not sure how it's advanced today. But neither was it ever advanced there's an implied obligation in clause 23 to do that.

PN114

What Johns C has done, whilst noting that other cases have looked at and considered and analysed clauses with such an obligation he has said, 'Well, that obligation applies in this case and you didn't comply with it. So you acted unreasonably and it's infected your decision.'

PN115

Now, that is a significant and fundamental error of construction and that's where the correctness principle comes into play because if there's an error of construction of that magnitude that there's a finding by the Commissioner below in his construction task that there was such an obligation and we didn't comply and he says that you're unreasonable and you can't therefore argue reasonable business grounds. That's it. It's a paradigmatic. It's the lens through which the rest of this decision then gets reason because I will take you through 77.

PN116

There's reference to Bell DP in Azmi which the Deputy President considered section 65 of the Act as it presently stands before it's amended – section 65 of the Act does not contain an express obligation to discuss the request and to generally try to reach agreement, although it might be presumed in the ordinary course that there would be some discussions to that effect.

PN117

Again, if I can pause there and segway. There was some discussion to that effect in this case. There was evidence of it, but the Commissioner appeared to ignore that in reaching his conclusion that AV did not generally try to reach agreement.

PN118

At 78, in the first instance decision, there is reference to the explanatory memorandum of the Fair Work bill 2008. Again, the powers being exercised by the Commission below – Johns C – was a private arbitral dispute resolution power reposed in him in this Commission by virtue of the agreement of the parties. The statute had very little work to do in that setting.

PN119

Paragraph 80 is the next critical paragraph.

PN120

'I concur with both the Deputy President and the Commissioner in this regard. AV should have tried to generally reach agreement with the applicant absent that attempt any purported reasonable business grounds were vitiated by the failure to do so.'

PN121

So, again, to examine the reasoning pathway and – paragraph 80 and what I have just read to you about vitiating if they do so, must be read in the context of what precedes it in paragraph 76. 76 – says AV acted unreasonably and the unreasonableness infected its decision. 80 says you should have tried to generally reach agreement. And I will interpose this – because your agreement requires you to do that.

PN122

Now that's the controversial part perhaps in my submission, 'Because your agreement requires it.' But the agreement must require it. It must require it because that's the dispute that's being resolved is over the operation of clause 23. If the agreement doesn't require it, express or implied, if it does not the conduct can't be relevant as unreasonable or not consistent with an obligation contained in the clause itself.

PN123

But what the Commissioner does in quite strident terms is to go on to say absent that attempt any purported reasonable business grounds. So any grounds that you came to this Commission with, the factual substratum of your attempt to argue reasonable business grounds, anything you wanted to say - anything about reasonable business grounds – that's vitiated by your failure to do it. Failure to do so to generally try and reach agreement. That's the reasoning pathway. That's what the Commissioner has done.

PN124

Now there's a unique answer to this. He's either done the right thing or the wrong thing. It's not about discretion. In his construction task he's either construed the clause 23 correctly or he has not.

PN125

Later in the reasons at 102 that concept of reasonableness gets another run in a slightly different context. And that's at page 50 of the Appeal Book. Addressing this concept of flexible spare and whether other shifts could be worked the Commissioner determined at –

PN126

'102. Obviously as Ms Capp explained the above process would not guarantee Ms Fyfe a nightshift but where AV has exhausted all other options to fully fill the shift such an arrangement would address at least 64 per cent of AV's operational needs and partially meet community expectations and result in the ability for Ms Fyfe to balance her work and family needs. Not to have done so goes against common sense. It is obvious that there could have more done to reach a mutually satisfactory outcome but was not. Consequently that renders AV's decision unreasonable.'

PN127

Now what's problematic about – I have taken you to that because that word 'unreasonable' has got another rung. But what's problematic about that is well unreasonable in what particular setting? Because at all times as a private arbitration decision maker the Commissioner must be tying back his findings of fact and his observations to whether or not the narrow question, as the VAU described it, whether or not AV has persuaded the Commission on an objective basis, on the evidence adduced, it had reasonable business grounds. Not whether it acted reasonably at large or not but whether it had reasonable business grounds.

PN128

This is where some of the confusion, I think, has crept it into the decision making process and infected the reasoning pathway of the Commissioner. The Commissioner appears to have taken the view at 76, 80 and 102. It's up to me to determine whether AV acted reasonably. That's the wrong question and it's probably a jurisdictional error when you put it like that.

PN129

No. The task before you as the arbiter in this private arbitration was to look at clause 23 – expressly the provision upon which AV relied – and determined as a question of fact did it have reasonable business grounds. Not whether it acted reasonably or unreasonably through a process because that's to mistake your task.

PN130

DEPUTY PRESIDENT O'NEILL: Would you agree? Or what would your response be to a proposition that at least in some circumstances discussions would be required to be had without an express provision?

PN131

So I will give you a scenario that's relevant to this case. There was a lot of material and discussion before Johns C about whether Ms Fyfe had in her FWA request expressly identified that she was prepared to be a flexible spare – or obviously a spare or whatever - - -

PN132

MR HARRINGTON: Yes.

PN133

DEPUTY PRESIDENT O'NEILL: Thus the language ended up being. And there was quite a lot of discussion about that that wasn't clear initially and wasn't made clear until after the original request had been refused.

PN134

MR HARRINGTON: I think it was the second stage of the grievance process in May that Ms Capp said and that's when I became aware she was saying, 'I'll work as a flexible spare.'

PN135

DEPUTY PRESIDENT O'NEILL: But in the way you ran the case, before Johns C, you accepted the principles of I think Wilson C and the Brimbank case.

PN136

MR HARRINGTON: Yes.

PN137

DEPUTY PRESIDENT O'NEILL: And they include the need for managers to weigh the personal circumstances of the applicant and against the cost and impact for the organisation.

PN138

Now, in assessing the cost and impact of the organisation and doing that exercise, if that depends on the extent of flexibility or the seeking clarification about precisely what the parameters of the request are, if that changes the impact on the business then does that not suggest that some discussion, in those circumstances, would be required and Ambulance Victoria would be obliged to have those discussions in order to properly assess the cost and impact?

PN139

MR HARRINGTON: Two responses. First of all the explanatory memorandum had that conceptual sense about it which is it's a good idea and it's in the decision as well.

PN140

DEPUTY PRESIDENT O'NEILL: Yes.

PN141

MR HARRINGTON: It's a good idea to do that and I think President – Bell DP said you would normally expect that to occur. I have always contended that that happened in this case but I will leave that alone as a fact because you're asking me a bit more about a hypothetical. The next way to address that is the clause itself talks about a response in writing which can be yes or no. But it can be more than that.

PN142

Of course it would be prudent to have those discussions to clarify in the general sense. But what the Commissioner has done in this case is to say, 'In your clause you had that 'obligation'.'

PN143

Now, my learned friend might say, 'No. He was saying you had the obligation at large.' Now, that's again problematic. The obligation must emerge from the clause itself. You're talking about prudent business practise I agree with you on prudent business practise.

PN144

DEPUTY PRESIDENT O'NEILL: Well, no. No, that's not really what I am saying and it's a distinction. I mean Johns C was talking about whether there was an obligation to genuinely try to reach agreement. The question I am raising is slightly different which is, in assessing the cost and impact, is there a need to have discussions to clarify and have an understanding in order to properly be able to assess the cost and impact. And if those discussions aren't had then arguably the person wouldn't have met the obligation to assess the cost and impact.

PN145

So, in this case, if Ambulance Victoria had gone to Ms Fyfe and said, 'We can't agree that there's – because there's no shifts available that align with the shorter night shift - - -

PN146

MR HARRINGTON: Which it effectively did in its emails ultimately, yes.

PN147

DEPUTY PRESIDENT O'NEILL: Which was essentially what was put.

PN148

MR HARRINGTON: Yes.

PN149

DEPUTY PRESIDENT O'NEILL: But if you're a flexible spare we could. Are you prepared to do that? Well, then that's a very different proposition and that's not the way it panned out. But if the cost and impact to Ambulance Victoria is fundamentally different depending on the nature of the parameters of Ms Fyfe's flexibility, then it seems to me that it's arguable, at least, that there's an obligation to flesh that out in order to assess what the actual cost and impact would be.

PN150

MR HARRINGTON: Well, that's where we might differ because you say there's an obligation. If there's an obligation it must find its genesis, its provenance in the clause itself. And I read the decision and it may be read differently. I read the decision to say it's a little bit opaque about this. It talks about the obligation but it does not – the decision and the reasons do not seem to link it into clause 23 x or y. It just says, 'This is the obligation.' And it's like, 'Well, we know the obligation is coming at general law because the Commission has told us that and we all know that as lawyers practising in the area. But your job, Commissioner, was to look at the words of this clause and determine what was required.'

PN151

And Johns C clearly struggled with it and I say that in a positive way because he was saying I've got these decisions where there is such a positive obligation in the clause and they're decided as they're decided as me and Wilson C. And no one criticises that. But unfortunately for him, Johns C, he's got a clause that doesn't have the obligation in it.

PN152

And so how does he find – how does he reach the conclusion that the obligation exists? And this is what I was addressing before. He seems to take the approach, 76, 80, 102, you've got to act reasonably at large. And it's like well we should act reasonably. Don't get me wrong. But the clause talks about reasonable business grounds it doesn't talk about an obligation to act reasonably per se.

PN153

And in a way that ties into the – and I think it's orthodox to return to the clause of the Act – sorry, the provision of the Act which disputes dealt with by the FWC, section 739(5) heading FWC must not make a decision inconsistent with act or

instrument. Despite subsection (4) the FWC must not make a decision that is inconsistent with its act or a Fair Work instrument applies to the parties.

PN154

Now what the parliament there is saying is the FWC can't come in and say, 'We're going to make sure there's a fair outcome or a reasonable outcome when you've got a dispute.' Maybe that's socially beneficial and should be in the legislation. But the parliament has said and I've taken you to some decisions that have tied the decision – sorry, the dispute resolution jurisdiction of the Commission back to section 739 and 739(5) gets a serious guernsey in that analysis because the parliament has said, 'You as the Commission can't do something that's inconsistent with the Act.' Which, of course, makes sense. But more importantly it can't do something that's inconsistent with a Fair Work instrument. You must apply its terms.

PN155

Deputy President, can I touch upon something else that you said about flexible spares and spares – and I want to put this on the record now in case I forget about it later – particularly if you're with me on the correctness principle in this case.

PN156

The Commissioner struggled with and there was a lot of hoo-ha about this. Was Ms Fyfe making an FWA application where she was to be considered a 'spare' and then the next question which created a lot more trauma in the running of the hearing or a flexible spare.

PN157

The position of Ambulance Victoria consistent with its evidence is this. You're a spare or you're a flexible spare if you fit within the established shift structure, that you go and do work that's within the shifts that are structured, that are rostered at this time. That's how you become a spare or a flexible spare.

PN158

But if you come to AV and you say, 'I want to work five hours less on the night shift. You're not a spare or a flexible spare as defined at that point. You're asking for something that's quite bespoken outside the funded shift structures that are in place. So you're not strictly a spare as AV would define you or a flexible spare.

PN159

And it's something that's really quite critical in this decision because if you, as I did yesterday, if you've read through the transcript itself you'll see my objections, some well-placed, some not – perhaps saying, 'Well, we know from Wilson C that the assessment of reasonable business grounds must be made at the time of the decision and what you know and what you have been asked for.' The flexible spare – the literal words were never used in the Fair Work – flexible work application – the written application. There was no discussion at the time before 9 March, the decision about being a flexible spare.

PN160

The evidence, unchallenged from Ms Capp, was second stage grievance in May – so a lot later on – and I closed the case addressing this too. That's when the flexible spare concept arose.

PN161

It got a bit of traction with Johns C because he said, 'If that's right Mr Harrington maybe the VAU should think about not prosecuting this dispute notification before me and go back and put to you I want to be a flexible spare in this particular way.' And he put it out there. The whole thing could collapse today and it could be redone and he spoke on the transcript, 'I'll give you an expedited hearing. We'll come back and we'll deal with it because we're all ready to go.'

PN162

And no criticism of VAU. They didn't do that. They said, 'No. We're not running our case like that.' And it's like, well you're running your case that you're a spare or a flexible spare. AV said, 'No, you're not. You're not a spare because you're not agreeing to work a full rostered funded shift. You're asking for a reduced hours shift. That doesn't make you a spare or a flexible spare.'

PN163

Secondly, the flexible spare concept arose in the grievance procedure process as a let's try and work a solution to this. It was then and there.

PN164

DEPUTY PRESIDENT O'NEILL: But it was well – two things – wasn't the evidence that anyone on an FWA is a spare and that that is both a spare spare and a flexible spare? And, secondly, in relation to and you were very clear not to criticise Ms Fyfe for not specifying the flexible spare element in the FWA but as I read the FWA application form it doesn't invite or ask an applicant to set out what they are prepared to agree to or what particular form they are seeking. What the form asked them to do quite kind of sensibly is what working arrangements are you seeking?

PN165

MR HARRINGTON: What do you want?

PN166

DEPUTY PRESIDENT O'NEILL: And why? And that's what was done. So I'm not sure that – what the relevance is that there was or wasn't an express reference and that Ms Capp only became aware of it at a later date.

PN167

MR HARRINGTON: I think it dovetails in the merits of this case is disputed. I could put it like that. Not strictly. Perhaps it is very much alive on this appeal if you have to reach the right decision on the correctness principle. Spares and flexible spares work funded shifts.

PN168

Again, there was a lot of discombobulation about what do you mean funded shifts, because Johns C exclaimed at one point – a little bit antagonised – that it's all just government money. It's just one bucket here and one bucket there. But there was

clear evidence before him from Ms Capp that Ambulance Victoria is funded by government for coverage purposes to cover all of the State, all the regions and to fund its shift structure to have people there.

PN169

It has to use its allocation of funding in that particular way. If it has to move spares and flexible spares around to different shifts and it has to cover because of COVID bringing new people in and the like it's got to find other funding for that. So it has a structure in place to fund the shifts that are called funded shifts. To fund that shift structure it has. If a person says, 'I want to work flexibly and I want to work outside that structure', it's not that you're going to get your FWA refused per se. It doesn't work like that of course. It's that it's much more challenging and problematic and requires the people in rostering. And I think there was very clear and helpful evidence given by – I forget his name – Mr Weiner – about this. About how rostering actually works.

PN170

And the Commissioner accepted his evidence and I think considered him quite a good witness in the sense of saying, 'From a rostering perspective we want to fill that 14-hour shift fully because our life is simpler and because of the funded shifts everything is simpler. If we can't do that we've got some limited options.'

PN171

And he explained how that rostering system works based on the funding, and funded shifts. And the other thing to keep in mind in a case like this is seven out of eight of the requests were doable and were done and were agreed. It was this one – I'm not saying it's insignificant – but it's the nightshift in a particular way which is five hours reduced.

PN172

Mr Weiner gave evidence and again this is getting into the weeds of characterisation, if you do less – if a shift – if a worker performs a shift for less than four hours less than required hours that's a dropped shift. There was a lot of evidence about dropped shifts and the like. And, again - - -

PN173

DEPUTY PRESIDENT O'NEILL: Dropped shift but not drop a vehicle is where it landed.

PN174

MR HARRINGTON: Dropped shifts versus dropped vehicle. Correct.

PN175

DEPUTY PRESIDENT O'NEILL: And all of that.

PN176

MR HARRINGTON: And there's a distinction and he was pressed on that and he had to sort of explain how that works. Complicated. Well, it serves to indicate – five – 5,000 or 6,000 - - -

PN177

DEPUTY PRESIDENT O'NEILL: He painted a very clear picture of the complexity.

PN178

MR HARRINGTON: I've got 6,000 employees.

PN179

DEPUTY PRESIDENT O'NEILL: And the challenge of rostering to align with – you know – the parameters of the organisation - - -

PN180

MR HARRINGTON: I think he said 6,000 employees and 500,000 shift rotations in a year. There's particular evidence about just the complexity of this and how they're trying to balance a range of interests. What Ms Fyfe was told early on is right from the get-go – from evidence from Mr Liu. He wasn't called to give evidence because his evidence was accepted unchallenged.

PN181

Right from the get-go Mr Liu communicated there are problems with the nightshift. This is a problem. And he gave some evidence that he would put it upstairs for further consideration because it was outside the structure. And Ms Fyfe, if you recall in this evidence she responded to it, I know that there's going to be an issue with resourcing for nightshift but I'd like it considered anyway.

PN182

So she had a grasp herself that this is about of the box. It doesn't mean it can't happen per se but it's going to be difficult to make it work. And the strange element of this jurisdiction - and I think Wilson C's decision in a way illustrates this - is that employers, particularly Ambulance Victoria who facilitate many flexible working arrangements, employees make their decisions.

PN183

And then you get into a contested scenario. And in some cases the lawyers get involved and you're trying to peel back the decision making and reasoning leading up to that date of the decision.

PN184

Wilson C was pretty clear saying the evidence that's relevant is the evidence to the date of the decision. If you come along and start loading up later with ex post facto justifications the Commission likely won't have any regard to that because that wasn't your reasonable business grounds at the time as expressed to the employee.

PN185

Now the reasonable business grounds expressed to Mr Fyfe, in this case, were quite broadly put. It was about - - -

PN186

DEPUTY PRESIDENT O'NEILL: I think it was operational - - -

PN187

MR HARRINGTON: Operational.

PN188

DEPUTY PRESIDENT O'NEILL: And their shift times don't align.

PN189

MR HARRINGTON: Yes. The shift times don't align. Operational. I don't think the expression unfunded shift got a run then. But Johns C did not exclude evidence about unfunded shifts on that basis. You don't have to use the exact descriptor of what's in your head at the time of making a decision. But it is relevant to call that evidence later to explain operationally why it's problematic and could be on grounds of costing. It could be on the grounds of unfunded shifts. It could be on the grounds of the inefficiencies associated with working as a flexible spare.

PN190

Because remember a flexible spare for Ms Fyfe had this reality. Wherever she might be required to go within a very – quite a broad geographical radius – up to a hundred kilometres I think – as far as Shepparton if I recall – 105 kilometres – she didn't have to arrive there on the nightshift until 9.00 pm and she finished at 6.00 am – early. So start late, finish early. She had to be given work in that setting, as a paramedic principally, and so she'd either be a single responder – possibly. Or if she was on a vehicle as a part of a crew she starts late and finishes early.

PN191

And these are real practical issues that AV was struggling with at the time and why it was operationally very challenging in the context of the paramedic who was highly skilled, to be fair, she's a clinical instructor and the like. And that was another issue raised which is well we can't really have you working as a clinical instructor if you're not with the graduate the whole time.

PN192

So that forecloses that. That closes down that possibility that we can use you as a clinical instructor. So there were a myriad of real challenges arising and that's why the evidence was called about these so-called reasonable business grounds.

PN193

DEPUTY PRESIDENT O'NEILL: Just while you go through the detail, and I'm sorry I'm not trying to kind of distract you too much.

PN194

MR HARRINGTON: No, that's fine. Absolutely.

PN195

DEPUTY PRESIDENT O'NEILL: But just while you go through the basis of AV's consideration of the request, I don't recall seeing anything written that goes to AV's weighing up against the impact on the business. Ms Fyfe's personal circumstances.

PN196

MR HARRINGTON: There's, as I recall the evidence and I will have it checked before we finish today but there was nothing in writing disclosing any reasoning pathway around that.

PN197

DEPUTY PRESIDENT O'NEILL: Or even the fact that that exercise was undertaken.

PN198

MR HARRINGTON: Well, this is where it gets challenging, because there was a grievance almost concomitantly or concurrently there was a grievance process enacted and/or engaged by Ms Fyfe when she got the knockback on 9 March. And what was never resolved before the Commissioner, and it's not a criticism of him, was he never excluded some evidence about that grievance procedure process. Because Ms Capp gave evidence about it in the letters that emerged from it.

PN199

But what I will say in response to you, Deputy President, is that after 9 March, through to the middle part of May, there was a discussion of a lot of options and balancing and weighing up because of that – because of the grievance procedure.

PN200

Now, no one's come here today and said that was erroneous by Johns C to allow that evidence in. It was in. Both parties assumed it should go in because it's part of the story, if I can put it very broadly – it's part of the story of application for FWA, refusal, form of refusal.

PN201

DEPUTY PRESIDENT O'NEILL: All of that material – we're going to postdate the decision – the refusal of the original request?

PN202

MR HARRINGTON: I'm absolutely admitting that. Yes, after 9 March.

PN203

DEPUTY PRESIDENT O'NEILL: And going back to the same principle that you're sort of – the assessment needs to be as to whether there were reasonable business grounds as at the 9 March.

PN204

MR HARRINGTON: Yes.

PN205

DEPUTY PRESIDENT O'NEILL: And if in satisfying the Commission that there are reasonable business grounds that involved a process of weighing up the cost and impact against the employee's personal circumstances. Wouldn't there need to be some evidence that the employee's personal circumstances were weighed up prior to the refusal of the 9 March?

PN206

MR HARRINGTON: There could be such evidence, yes. But even if there were not it doesn't mean there weren't reasonable business grounds, because there's a list of factors to take into account and it doesn't - - -

PN207

DEPUTY PRESIDENT O'NEILL: But if there's principles in assessing whether there were reasonable business grounds invokes that balancing exercise – that's the piece that I'm struggling with.

PN208

MR HARRINGTON: Both parties came to the Commission and said well reasonable business grounds, as an expression, is not defined in our agreement. We all know, of course, practising in the area and the Commission well knows that the Act itself contains at Division 4 of Chapter 2 requests for flexible working arrangements. I made the submission to the Commissioner that the term, 'reasonable business ground backgrounds,' is a term of industrial – I didn't use this word but I'll use it now, notorious industrial usage.

PN209

It has a providence and one can't ignore the Act, because the Act actually contains a provision that uses that same expression. So, one can assume that parties, when negotiating their agreement, are cognisant that the Act has this concept in it. And 5A of section 55, for the purposes of the statute, and the statutory definition of the phrase, contains this.

PN210

'Without limiting what are reasonable business grounds for the purpose of subsection 5, reasonable business grounds include,' so it's open. For the purpose of the statute you can have a look at these matters. 'But the new working arrangements requested by the employee would be too costly for the employer, that there is no capacity to change the working arrangements of other employees to accommodate new working arrangements; (c) that it would be impractical to change the working arrangements of other employees or recruit; (d) that the new working arrangements for present employees would likely result in the significant loss and efficiency of productivity; that the new working arrangements request by the employee would be likely to have a significant negative impact on customer service.'

PN211

Statutory considerations – it seems that this Commission and the Commissioner, particularly, said that, 'Well, given that the phrase you've used in clause 23, your agreement, it has some providence. These are the sort of matters we'll have a look at.' So, the contention that I continue to advance before the Full Bench today on that matter is that the list of matters that Wilson C said you should have regard to, and all accept that a list, it's only a list. It's not legislative.

PN212

DEPUTY PRESIDENT O'NEILL: No, I understand.

PN213

MR HARRINGTON: Yes, and it's not in the agreement, itself. But it's a guide only, as such as to matters that you might wish to take into account. Because you might fail to have regard to one of them, but have a powerful business grounds case on a number of the other matters that you place before the Commission, or the reasons why you refuse the request.

PN214

The third proposition I wish to come to is, because of the erroneous construction and the finding of noncompliance with the, genuinely try to reach agreement obligation that the Commissioner found, the reasoning pathway thereafter, and I mean after paragraph 80, was infected by that error and the wrong conclusion was reached.

PN215

My learned friend, in his written submission says about that, 76 to 80, they're not findings, that's not dispositive. They're just general observations along the way, and the real meat of the reasoning process starts at about 83 onwards of the decision. Can I just be very clear to the Full Bench. That's not right, we don't agree with that.

PN216

Paragraph 76 and paragraph 80, to which I've taken you to, are very clear, in unadorned, clipped, crisp English. You're unreasonable in how you went about it because you didn't genuinely try to reach, and therefore it infected your decision. Then at 80, if you come back to it, any purported reasonable business grounds were vitiated by the failure.

PN217

So, that's where you start with the analysis. That's the paradigm, the lens, that the Commissioner has adopted before he then launches into an exploration, or an examination of the Ambulance Victoria grounds. You'll see from 83, or thereabouts, onwards there's a whole lot of analysis about the case that Ambulance Victoria ran, in point of fact, to argue its reasonable business grounds.

PN218

But as the Commissioner said, and he was doing his job to go through all this, but he said right from the get-go, it's unreasonable. You've been unreasonable and it's affected everything. And then he's given us his reasons. Well, it's affected all those reasons. You cannot reason this decision to excise out those critical sentences in 76 and 80.

PN219

It's been put against me in writing, of course, always politely, well, you're being selective in how you focus upon the Commission's reasons. No, no, no, I'm just reading the Commission's reasons in plain English terms.

PN220

There are very profound statements made, and they are findings, at 76 and 80 and the set the lens, the paradigm, and that everything that comes after that is viewed through that lens. That's the only reasonable way to read this decision when you're assessing the reasoning pathway.

PN221

DEPUTY PRESIDENT CLANCY: What do you say about the Commissioner's finding at 88 of the decision?

PN222

MR HARRINGTON: What he says there is that adverse impact, costs, et cetera, what I say there is – and at 89 he says, 'What was left unanswered on 9 March was – and why not, is not a position to offer.' So, 88 seems to say, well, you haven't addressed costs or adverse impact over and above the inevitable small, adverse impacts associated.

PN223

We hadn't addressed it on 9 March in the email. I concede that, okay? But we did educe evidence because the Commission called for evidence of any cost impact. And you might recall, it went into evidence and was considered relevant, and if I got to the appeal book under 'Transcript and Exhibits,' at tab 3 down on page 734 of the appeal book, 'Wednesday, 17 August 2022.'

PN224

So, this is well after February 2022, I concede that, that the Commissioner called for any cost impact analysis that was done, and if I can take you down to, what I call, the last paragraph by James Davis Lee, Workplace Relations, quote, 'Over the proposed twelve week trial, AV anticipate it will occur an additional expense of $11,812.80, related to backfilling Kilmore 14 hour nightshift for the branch roster, due to Ms Fyfe's proposed FWA.'

PN225

'This cost has been reduced by the savings realised by the reduction in Ms Fyfe's weekly hours of work and the funded hours,' and it goes on.' That analysis was done by Ambulance Victoria, and remember, Ms Fyfe asked for twelve months of this arrangement, so you have to say, four times $11,812 gets you to, let's call it, forty-six, forty-seven thousand.

PN226

DEPUTY PRESIDENT CLANCY: That's not the number.

PN227

MR HARRINGTON: Sorry?

PN228

DEPUTY PRESIDENT CLANCY: It was reduced by the amount of hours that she would be working.

PN229

MR HARRINGTON: I read him to say, 'This cost has been reduced.'

PN230

DEPUTY PRESIDENT CLANCY: I see.

PN231

MR HARRINGTON: I read that to say, here's the number but it's already been reduced.

PN232

DEPUTY PRESIDENT CLANCY: It's already been deducted, okay.

PN233

MR HARRINGTON: And it's my submission on a fair reading of those words, that there might be other interpretations. So, it wasn't $11,812 over twelve months, is the point I'm trying to make here. That's a quarter, one quarter of a calendar year, or one quarter of a year. It's four times that. That's not what Wilson C may have described as an insignificant cost to the organisation. That's a real cost.

PN234

DEPUTY PRESIDENT CLANCY: But your position is, all right, it's not in the 9 March email, but is your position that the labour hire – the answer given on 9 March, or was it done subsequently to 9 March?

PN235

MR HARRINGTON: There's, and I should just pause there because I reviewed in the transcript yesterday, and I did make submissions on costing, so I don't want to make an inconsistent submission today. Because the way the hearing develops, the submission was, there was a cost and you have that evidence because you've called for it. There was a cost.

PN236

But it's not insignificant and I took it no further than that. I didn't say there was no cost, and we communicated the cost is significant and we can't afford it. I didn't contend that either on mine much, because it's not there, it's not in the email communications about this matter.

PN237

DEPUTY PRESIDENT O'NEILL: I think maybe in the transcript there was a reference that Ambulance Victoria were not animated by the cost impact in the decision to refuse.

PN238

MR HARRINGTON: I think that's a fair way, Deputy President, of putting it, and you've picked up on something really important here. Nine March, in a broad sense, captures what animated them, which is operationally really quite difficult, and for the reasons that we educed evidence about. No reference to cost on 9 March.

PN239

The Commissioner got interested in the cost question and he called for the documents, so 'Have you done any costings?' And we said, in real time on that first day, I said, 'I'll see what I can get today,' and we did produce that email. We had no costing but again, that email's dated August. It's not dated February or March, it's down the track. So, it's when the dispute is probably almost before the Commission, almost, by that point.

PN240

So, there were costs in point of fact, but was it articulated to Ms Fyfe? No. Was it the prime motivator/animator of Ambulance Victoria around 9 March, at that point? No. It became something of some focus because the Commissioner got interested in that question.

PN241

DEPUTY PRESIDENT O'NEILL: The other point that Johns C is referring to in paragraph 88 appears to be, is that there was no information given to Ms Fyfe in the initial rejection about either the cost or the adverse impact. So, the only explanation given was, we're not currently able to provide the shift times outside the roster, and we're not in a position to offer this level of variation. So there wasn't an explanation of any kind, is I think, the point that can be read from it.

PN242

MR HARRINGTON: There's some, perhaps, mixed evidence on that because Mr Lu, he wasn't called for the challenge in his evidence. Mr Lu gave some impact about the inclusion of the nightshift at 32 to 35 of his statement. So, he had given some, what I'll call oral. He had sort of had a discussion about it, and Mr Clancy also gave evidence at 33 that he had had some conversations with Ms Fyfe.

PN243

The fact is there were conversations with Ms Fyfe, and this dovetails back to the point about, 'you didn't genuinely try to reach.' So, with the greatest of respect to Johns C, he fixed on that issue. There was evidence about conversations, and there were the emails, of course. There was evidence about a conversation about these matters.

PN244

You had, particularly Lu and Clancy, neither of which had to turn up to give their evidence, but their statements were accepted into evidence unchallenged, saying those things. So, one should be careful about the picture that's getting drawn. Because Johns C took a very strong view at 76 through to 80 about what apparently AV didn't do and was obliged to do, that implicates everything that comes thereafter if that's the submission I was making.

PN245

But it skips over some of this really important evidence about genuinely trying to reach. That's a nice segue way or launching point, of what I call the natural justice ground if I can come to that. Because as I opened earlier this morning with, having read the transcript yesterday quite carefully, and looking at the VAU's written submissions from Ms Fyfe and the like, the case was never run on the footing of, you can't have reasonable business grounds if you don't genuinely try to reach agreements.

PN246

That proposition, hopefully quite elegantly articulated, was never put, not even implicitly put. It is not a criticism of the respondent here today below. They made choices about how they're going to run their case. We do that every day, as advocates. That's okay. But if you're going to run your case on a primary, you might call it a Trojan horse ground like that, which is to articulate it, Ambulance

Victoria, you should not be contesting this application before Johns C because you're going to fail at the first hurdle.

PN247

You didn't meet an obligation that you had to genuinely try to reach agreement. You didn't do it, so all that evidence doesn't mean anything because you've been unreasonable from the get-go. That was never advanced orally or in writing. You know, members of the Full Bench, how Johns C approached this matter because he, as articulated at 76 through to 80 as a minimum, he says, well, you did have that obligation and you failed to meet it, therefore you fail at the threshold. It vitiates, it vitiates your reasoning process to reject, and it vitiates the case you are running here today before Johns C.

PN248

It wasn't run like that. And I put this out there to my learned friend. If you say the case was run like that, when you address the Full Bench today, take me to the transcript, take me to the written documents. Where was it run like that? It wasn't run like that. So, for Ambulance Victoria then to receive a decision and read through 76 to 80 and go, well, that's note case we came to meet. We came to meet a complex, interesting case and there's a lot of facts flying around, but that's not the case we came to meet.

PN249

And that is, to use a colloquial, that's the bunker buster. That's the big bomb that's been dropped on our defence of this claim and we're gone, we're done, and we weren't even told we were fighting about that. It wasn't put you'd better persuade the Commission that you did genuinely try to reach agreement before 9 March. It was never put like that.

PN250

So, the union, if I can put it like that, has not run its case like that, and you might say to me, well, could you have otherwise somehow been on notice, and as an advice before the Commission I accept that I've got obligations of candour. Can I take you to an exchange in the closing submissions in the transcript, day 2, and I want to take you to page 726 of the appeal book, and to PN116, we'll start at.

PN251

The Commissioner:

PN252

Mr Harrington, there seems to be, correct me if I'm wrong, part of the submission by Ambulance Victoria is, look, we've got this piece of paper. It said that, we rejected it, and Commissioner, you're stuck with the piece of paper and our rejection of it back in March.

PN253

The Commissioner then goes on:

PN254

Surely a reasonable employer takes the piece of paper and says, 'Well, how do we work with this, and was it unreasonable for Ambulance Victoria not to have

a conversation about a flexible spare at 11 branches, filling the 14 hours, and the 14 hour spare first, and then overtime and then coming to the application.'

PN255

'Commissioner, can I address that? Commissioner: Wouldn't an employee,' when I say, 'Can I address that' – 'You have been around the industrial world for a long time and seen a lot of cases dealing with industrial dispute. The question in an industrial dispute settlement might be, was that unreasonably tied to some obligation in the agreement? I get that. Your job today is not to assess on a merit basis whether something was unreasonable per se, it's to assess whether there were reasonable business grounds as at that today. The reasonableness is' – Commissioner, 'I understand your submission, thank you.'

PN256

I bring that to the attention of the Full Bench because I'm running very hard on this denial of natural justice point. That's not enough, when you look at 76 to 80. That's not giving my client an opportunity to be heard on a very specific construction question of, there's an obligation in clause 23 for you to genuinely try to reach agreement before you reach your decision.

PN257

I was dealing there with an observation about, coming back to the submission I made earlier, reasonableness at large, and I said to the Commissioner, 'Well, we're not here dealing with reasonableness at large, we're dealing with reasonable business grounds as that phrase exists in clause 23. And he said at the end, 'I understand your submission, thank you.'

PN258

You get no closer to this natural justice point, this jurisdictional error point, than that because the VAU never advanced it. That's not my opportunity to expand upon genuinely trying to reach agreement, on the facts that we educed, and how that obligation doesn't even exist in clause 23. Because it's a very general exchange about reasonableness.

PN259

On this question of natural justice I've taken you to, already the submission I've made that the VAU in oral closing, on day 2 at page 705, PN953, said that the dispute is a narrow dispute, and that was the opportunity to say, oh, by the way, they haven't genuinely tried to reach agreement and so they're in big trouble at a paragrammatic level, before they even get off the ground with their evidence. That was never put.

PN260

DEPUTY PRESIDENT CLANCY: Sorry, what was that transcript reference?

PN261

MR HARRINGTON: The transcript reference was 705, page seven - - -

PN262

DEPUTY PRESIDENT CLANCY: 705.

PN263

MR HARRINGTON: By PN953. Thank you, Commissioner. Ultimately this is a fairly narrow dispute that concerns the operation of clause 23 of the agreement. It is really confined to one element of that clause, the issue of whether there were reasonable business grounds to reject the applicant's request for an SWA. That's not problematic, that's correct.

PN264

There's a fair few facts out there and we were there arguing about a lot of different matters, but it's a construction question on what does clause 23 require, and has AV, my client, satisfied the Commission that it had reasonable business grounds. If you read on, and I'm not going to take you through it all now, but you'll nothing in what follows in those oral closing submissions where the expression, 'genuinely try to reach agreement,' falls from the lips of the advocate for the VAU.

PN265

My learned friend's submissions on this point, members of the Full Bench is – and I'll try to be fair to him in articulating it is, well, even if you were denied natural justice on this, so called grounds, it is immaterial because you lost the application on different grounds. There is a principle of materiality and I accept that proposition.

PN266

The High Court had deal with this, and my submission on that is, to go back to basics, to go back to Steed's(?) case, and if I can take you to Steed's case which is in our list of authorities at tab 9, and that is the decision of the High Court Australia [1986] V161 CLR at page 141, and the headnote gives you a hint about what the High Court thinks. It says this:

PN267

Not every department from lawful natural justice at a trial will entitle the aggrieved party to a new trial. But where there has been a denial of natural justice affecting the entitlement of a party to make submissions on an issue of fact, especially when the issues of whether the evidence of a particular witness should be accepted, it is more difficult for a Court of Appeal to conclude that compliance with natural justice could have made no difference to the outcome.

PN268

And it goes on. But what I really want to take you to is the providence of that headnote at page 145 of the decision, the reasons of the High Court, but it's page 260 of the authorities book – this is the authorities from the appellant. Quote from page 145:

PN269

The general principle applicable in the present circumstance was well expressed by the English Court of Appeal, Denning, Romer & Parker, Lord Justices, v Jones & National Coal Board, in these terms. 'There is one thing to which everyone in this country is entitled, and that is a fair trial in which he can put his case properly before the judge.

PN270

No cause is lost until the judge has found it so, and he cannot find it without a fair trial, nor can we affirm it.

PN271

Quote:

PN272

That general principle is, however, subject to an important qualification which Boswell J plainly had in mind in (indistinct) with the practical question as being, 'Would further information possibly have made any difference?' That qualification is that an appellant court will not order an new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.'

PN273

And I take no issue with those observations and that reasoning. It goes on, quote:

PN274

For this reason, not every departure from the rules of natural justice at a trial will entitle the agreed party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law when, in the opinion of the appellant court the question of law must clearly be answered unfavourably to the agreed party, it would be futile to order a new trial.

PN275

And it goes on, quote:

PN276

Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue of whether the evidence of a particular witness should be accepted, is more difficult for a Court of Appeal to conclude that compliance with the client's natural justice could have made no difference.

PN277

And then it goes on. That's the test. That's well accepted in Steed's case. There's been a couple of recent decisions in the Immigration setting that have developed and applied but they have not undermined that principle from Steed. My learned friend seems to principally rely upon one of them and if I could take you to it, that decision which is MZAPC, which his in my learned friend's book of authorities, *MZAPC v Minister for Immigration and Border Protection*.

PN278

That was a matter involving an application for a protection visa after unsuccessfully seeking a student visa. The Tribunal in that case was given material that the applicant for the visa had been convicted of three counts of drink driving, 15 miscellaneous motoring offences, and one count of state false name.

PN279

But the appellant before the Tribunal was not told the Tribunal had that material before it, and it didn't use it to reason through its decision. So, ultimately, and you can see this from the first page, 'The Tribunal affirmed the decision to refuse the protection visa on other grounds.' The Tribunal was not persuaded that there was an imminent serious risk to the applicant upon return to India, so it refused it on those grounds.

PN280

The appellant went to the Full Federal Court. Quote: 'There was no dispute the Tribunal's failure to disclose to the appellant the existence of the notification had breached an implied condition of procedural fairness, identified in the SZMTA case in the High Court. It was common ground that the state false name offence could contribute to a decision-maker forming an adverse view of the appellant's honesty.' And it goes on.

PN281

But what the High Court ultimately found is, in his appeal to the High Court of Australia, the appellant disputed that he needed to prove that the High Court of Australia took into account the information covered by the notification, arguing that the onus of disproving the materiality of the information should be borne by the Minister. A lot of this decision is focused on who had the onus, so I want to be clear about that.

PN282

But what emerges from this decision from the court is that Steed is upheld, and that ultimately, if you can excise out the so-called jurisdictional error but the result would be the same in any event, then the so-called jurisdictional error, denial of natural justice, has no material effect. And that's what Steed was saying, which is if the Tribunal determined, or the body making the determination would have come to the same decision in any event, the breach of natural justice, the so-called jurisdictional error, effectively can be quarantined out and the decision will still stand that there is no jurisdictional error, as such.

PN283

So, that's this principle of materiality.

PN284

It is hard to understand how my learned friend can rely upon that in this case, because at the very threshold the paradigm and the lens through which the Commissioner reasoned after paragraph 80, was his finding of noncompliance with, quote, 'an obligation,' which must be an obligation in the clause; 'noncompliance of an obligation; unreasonableness; vitiating conduct.'

PN285

My client had no opportunity to be heard on those profound findings on the public record, no opportunity to be heard on those findings and to advance any case on them. Because, for example, if it had have been told that's the issue, I would have taken the Commissioner to the conversations from the witnesses whose evidence is not challenged, Clancy and Lu who were not called, that there were some conversations; that there were some emails.

PN286

I would have contended, if there is such a obligation, brackets, (and I say there's not), but if there is, we've satisfied the genuinely try to reach. No opportunity. No opportunity, whatsoever.

PN287

DEPUTY PRESIDENT CLANCY: The materiality point, how does it play out here? You say you can answer it, in any event, by the references to the conversations with Lu and Clancy. But where does it lead you back to the reasonable business grounds, as at 9 March?

PN288

MR HARRINGTON: It's a good question, Deputy President, because if you're with me on the correctness principle, what you will do is, you will ask yourself the question, 'Are we persuaded on the substantive application that reasonable business grounds existed.' That's how you will deal with it.

PN289

But if you find that the correctness principle is in play, there was no ever, per se, because there is such an obligation in the clause and we failed to meet the obligation in the clause, then the jurisdictional point that I'm running here, the denial of natural justice, has significant traction. Because I need that change. I need that opportunity.

PN290

DEPUTY PRESIDENT CLANCY: Yes, but that's really at the heart of my question. What if we say, all right, we accept that 76 to 80 of the decision took the Commissioner down the wrong path. Strip all that away.

PN291

MR HARRINGTON: Yes.

PN292

DEPUTY PRESIDENT CLANCY: And you say it's the correctness standard, was there reasonable business grounds to reject the application, and do we take that as it being reasonable business grounds at the time of the decision on 9 March, and I understand your position to be, yes. And that leaves us with the email at that time, where you say the animator was, it was operationally difficult. And that is it.

PN293

MR HARRINGTON: There are operational reasons, the operational difficulty.

PN294

DEPUTY PRESIDENT CLANCY: Yes.

PN295

MR HARRINGTON: And then there was evidence called to explain that.

PN296

DEPUTY PRESIDENT CLANCY: That's right.

PN297

MR HARRINGTON: Which was – as best as I can recall, it was all received. I mean, we're not here arguing about error because irrelevant material was taken into account. We're here arguing about - - -

PN298

DEPUTY PRESIDENT CLANCY: If your proposition is, we perform the task now - - -

PN299

MR HARRINGTON: Yes.

PN300

DEPUTY PRESIDENT CLANCY: Of answering the question that was agreed between the parties - - -

PN301

MR HARRINGTON: Yes.

PN302

DEPUTY PRESIDENT CLANCY: We're left with, it was operationally difficult, and the evidence that was before the Commissioner on that.

PN303

MR HARRINGTON: Yes. Is where you're going to, you don't have to decide natural justice or jurisdictional error? Is that what you're asking me, at that point?

PN304

DEPUTY PRESIDENT CLANCY: If we're in your favour on those two points, and our task then becomes that of determining that of whether - - -

PN305

MR HARRINGTON: The correct answer, so to speak.

PN306

DEPUTY PRESIDENT CLANCY: The correct answer was given, are we engaging with, it was operationally difficult and the evidence that was before the Commissioner on that point?

PN307

MR HARRINGTON: You are, yes. But the thornier question, and dare I say it, I don't know the answer to this is, given the jurisprudence of the High Court in this Commission that you must then decide the case, the correct answer on what is before you, what you don't have before you other than my submissions, written and today, is what do we say about genuinely try to reach, and that obligation, and was there enough evidence, because we didn't develop that before the Commissioner. So, it's not before the Commission below, such that I can say they are our arguments on that.

PN308

Perhaps the answer is, well now is your opportunity to be heard, because if the correctness standard applies and we have to be persuaded, part of that question

will be, was there any such obligation of genuinely try to reach. But I suspect the answer to that is, if you're embarking on the course as a Full Bench to redetermine, you've already determined that there was some error of principle, and perhaps that's the obligation in genuinely try to reach agreement.

PN309

DEPUTY PRESIDENT CLANCY: Yes, I don't see why we would be engaging in, were there discussions or the like, we'd just want to know what the reasonable business grounds were. But that's actually back into the space, the dialogue you were having with O'Neill DP.

PN310

MR HARRINGTON: Yes, I think that's right, Deputy President. The issue I was trying to address you on is that if you are embarking on that course, if you were at that part of your reasoning process, you must have determined that the obligation to genuinely try to reach does not exist in the clause.

PN311

DEPUTY PRESIDENT CLANCY: Yes, well, let's assume that's under determination.

PN312

MR HARRINGTON: Yes, so I don't need to address you on that.

PN313

DEPUTY PRESIDENT CLANCY: No. I want to know, if that's the view of the Bench, what do we then proceed to do?

PN314

MR HARRINGTON: You then have to look at the evidence, yourself.

PN315

DEPUTY PRESIDENT CLANCY: Yes.

PN316

MR HARRINGTON: And determine what the correct answer, the unique answer to the question is.

PN317

DEPUTY PRESIDENT CLANCY: Correct.

PN318

MR HARRINGTON: Yes.

PN319

DEPUTY PRESIDENT CLANCY: And I want to know, what you would say we'd be looking at.

PN320

MR HARRINGTON: In accordance with what Wilson C has determined, and I think the Full Bench has subsequently upheld, is that you move to the date of 9 March and you look at the refusal.

PN321

DEPUTY PRESIDENT CLANCY: Yes.

PN322

MR HARRINGTON: But as Johns C proceeded with it, you can receive evidence of what was sitting underneath the refusal, those operational matters. You can receive all that evidence of what was going on. Because there seems to be attention in the case that, you didn't write a long email setting out all your reasons to Ms Fyfe. It seems to have been suggested below, therefore you can't come along now and put different arguments, if I can put it like that, because in one of the police cases, Wilson C was critical of the police for running it that way.

PN323

What we say about that is, we wrote the email on 9 March, after some backwards and forwards, and we explained that it was operational reasons that created the difficulty, which means that we had reasonable business grounds to refuse, and then we called all that evidence to explain why those operational difficulties existed. So, you can have regard to all of that. And you'll see in the outline that is filed by the appellant, that I've tried to assist the Full Bench there at part (f). The evidence before the Commission of AV's reasonable business grounds at paragraph 23 onwards. It refers to the evidence of Narelle Capp and it summarises that.

PN324

It also refers to Mr Wynert's evidence. This is page 5, 23(c) and (d), and also 24, paragraph 24. I've made a bit of an assumption that if you're with me, that's the task that you must undertake. Because those Full Bench decisions I have taken you to, that's what they suggest, is that if you find that the correctness standard applies, you grant permission because you find that there was an error in the construction task, you then say, we must resolve this dispute and find the unique answer on the evidence that was called.

PN325

And the unique answer is, we would contend, Ambulance Victoria, that there were reasonable business grounds, as at 9 March, because of the myriad of operational difficulties, and there was evidence before the Commission about all those matters.

PN326

DEPUTY PRESIDENT O'NEILL: And those difficulties are identical, whether we're talking about a flexible spare, or a spare spare, is that how you put it?

PN327

MR HARRINGTON: Yes. All of it stems from the reduced hours nightshift. Five hours - - -

PN328

DEPUTY PRESIDENT O'NEILL: If the impact is no different for a spare and a flexible spare, then why was there such an issue about the fact that that hadn't been made clear during the - - -

PN329

MR HARRINGTON: Because what became apparent is what a flexible spare could do, was quite different to - - -

PN330

DEPUTY PRESIDENT O'NEILL: Was travel to eleven - - -

PN331

MR HARRINGTON: Yes, quite different to a spare. It - - -

PN332

DEPUTY PRESIDENT O'NEILL: But that's my point. If there's a different - - -

PN333

MR HARRINGTON: It's just a quite different analysis, that's all.

PN334

DEPUTY PRESIDENT O'NEILL: But you maintain that the impact is the same, and as outlined in your outline?

PN335

MR HARRINGTON: I start from the proposition and I've advanced this already, that spare and flexible spare was accepted before the Tribunal below, but AV has always contended you're a spare or a flexible spare if you work a full shift. That's the proper definition.

PN336

DEPUTY PRESIDENT O'NEILL: I understand that.

PN337

MR HARRINGTON: Because you're in the funded shift structure. If you move to an unfunded shift structure by your reduced hours, then you're something akin to a spare or a flexible spare but it's different. It's different because there's another overlay of complexity when you're not working the full shift.

PN338

Because AV's position with Ms Fyfe was, we'll give you any of the shifts that you can work, if you fit within the established shift structure. So, there was – of course, I would say this, but there was a lot of flexibility on that basis. It's the movement outside on the nightshifts that created the real operational problems. And yes, there was - - -

PN339

DEPUTY PRESIDENT O'NEILL: But there was all the flexibility in the world, provided it was within the existing roster structure?

PN340

MR HARRINGTON: That sounds a tiny bit pejorative, the way you've put that. But no, I put it slightly differently to you, but that's the idea. The idea is, there was flexibility of a kind, but once you moved outside these established funded shifts - - -

PN341

DEPUTY PRESIDENT O'NEILL: Which may be for very good reason. Please don't - - -

PN342

MR HARRINGTON: Yes. And there was, just in terms of the transcript, there was something interesting said by my learned friend below about this. He did contend that at page 707 of appeal book at PN966 to 966, 'All rural paramedics who are on an FWA work as a spare,' and that was, he said, contended by both witnesses, and that was the language that was being used.

PN343

But in the written reply submissions by the VAU in this case, and this is at Appeal book 265, Ms Fyfe contended she would be utilised to fill any unexpected vacancies, in a similar manner to a spare officer. Now, that's a written submission, but the VAU is highly skilled and knowledgeable about how AV operates, and its rosters. It's a very interesting use of words there. 'Any unexpected vacancies in a similar manner to a spare officer.'

PN344

That's one of our points. It was not strictly as a spare officer, it was in a manner similar to. But because of the reduced hours and unfunded shift concept, it was much more problematic. It's five to 12.00 and I'm conscious of the time. I have addressed you on what I consider to be the primary grounds. What I haven't done, and I can rely upon my written submissions, if, if I can put it this way, a *House v The King* analysis.

PN345

I have not taken you to all the submissions that we've made about individual errors by the Commissioner in the reasoning process. I stand by all those submissions that are in writing to you, but you probably have now grasped the idea that if this is not a *House v The King* discretionary review application to this Full Bench, I don't need to go through and identify lots of errors, because the Full Bench has already said in its decision, identification of error alone won't guarantee you success.

PN346

My client obtains success before this Full Bench on the correctness standard if it persuades you that the answer, 'No, AV did not have reasonable business grounds,' was incorrect, and if I can persuade you that the unique answer is, 'Yes, it did have reasonable business grounds,' which is what I've been trying to address you on in the last 15 or 20 minutes.

PN347

Unless there is, what I'll call, one of the *House v The King* style grounds errors that you would like me to address you on, I will rely upon my written outline in respect of those matters. Because you'll recall, the notice of appeal has 13 effective grounds in it, and it reads a bit like a standard Full Bench appeal, *House v The King*.

PN348

It looks like that, but we've made it very clear in our submissions that it's our position, Ambulance Victoria's position, is this is not a *House v The King* error in discretionary decision making. The correctness standard as articulated by Gageler J applies, and has applied by a number of decisions of the Full Bench of this Commission.

PN349

Is there any other matter that you would like me to address you on at this point?

PN350

DEPUTY PRESIDENT CLANCY: All right, thank you, Mr Harrington.

PN351

MR HARRINGTON: Those are the submissions, thank you.

PN352

DEPUTY PRESIDENT CLANCY: We'll take a short adjournment and resume at five past 12.00.

SHORT ADJOURNMENT **[11.56 AM]**

RESUMED **[12.12 PM]**

PN353

DEPUTY PRESIDENT CLANCY: Thank you. Mr Harding, and Mr Harrington, you can take this on notice, as well. What's exercising the mind of the Bench is that if the Bench is with the appellant in terms of paragraph 76 to 80 of the decision, and that that approach of the Commissioner there infected his analysis of the question that was before him, that is, we accept the force of the proposition that there's a natural justice point, and that there was error in the reasoning process of the Commissioner, we then move to, well, what is the task before the Commission in dealing with this dispute, and this question about the correctness standard.

PN354

It seems to us that the question before the Commission on its terms requires some sort of an objective analysis of whether there were or were not reasonable business grounds, and in that, involves an exercise of discretion having regard to the material before the Commission. It's not a correctness standard in the sense of, did clause 21.4 of the agreement compel the payment of overtime in this particular scenario. That's either correct or not, it imports.

PN355

So, if that could be addressed, please, and in that, if the Commission is required to undertake that task, who is to undertake it, and to what material must the Commission have regard. And it was perhaps enlivened in some of the questions that I asked Mr Harrington before the break about, well, is it the material relied upon as at 9 March, or is it now the material that is educed as the matter unfolded before the Commissioner, and the evidence that came to light.

PN356

So, they're some of the things exercising the minds of the Bench at this point, if that's helpful, and if they could be addressed, please.

PN357

MR HARDING: Members of the Bench, I won't deal with any of that now, save to ask one question. Does that also incorporate addressing you on, in a broad sense, if you were with me, whether it gets remitted, or do we have to address you on whether the Full Bench actually has to undertake the task?

PN358

DEPUTY PRESIDENT CLANCY: The two alternatives, yes.

PN359

MR HARDING: Yes.

PN360

DEPUTY PRESIDENT CLANCY: Is the material before the Full Bench and is the task of the Full Bench now, to proceed to determine the question, or if it's an error in the sense of the exercise of discretion, how is it to be deal with?

PN361

MR HARDING: Thank you.

PN362

DEPUTY PRESIDENT CLANCY: Thanks, Mr Harding.

PN363

MR HARDING: Yes. Thank you, Deputy President, and of course, we rely on our written submissions of 13 March and I want to address your question directly, Deputy President. The answer is that we agree with you, with the reasons we've developed about (indistinct) and that's at the heart of our case on the issue.

PN364

Secondly, in respect of what the Full Bench does about this, even if the Full Bench is with Mr Harrington, well, what Mr Harrington's case is, is that (a), if the Commissioner imposed an obligation that to presumably reach agreement and/or that AV was denied justice in respect of that issue. If you uphold those (indistinct) it is only that question that the Full Bench would need to address.

PN365

That actually begs the question about whether there has in fact been a (indistinct) justice clause involving an absence of materiality and also an absence of there being (indistinct) on the critical to the question, (indistinct). But they're the issues that are agitated in this appeal, and if, as Mr Harrington seems to suggest, AV is denied an opportunity to be heard in relation to those issues, the remedy (indistinct) to be heard.

PN366

What Mr Harrington says effectively, is to say, I actually want an opportunity to run this case again, as if Johns C so worded it in such a way that his conclusions about whether (indistinct) agreements AV has started on the other

(indistinct). And that can't be right, that can't be right. That doesn't give proper effect to the conclusions there that the Commissioner reached, reading from paragraph (a) (indistinct). You can't read it as subject of any proper attack (indistinct), raises some factual questions about that.

PN367

But those factual questions can only be (indistinct) really in the context in which it's set (indistinct), that goes back to zero and the case is heard again. But that's not the proper function of the Full Bench. The proper function of the Full Bench is to determine whether there's been error, and to deal with that error. It's a much more narrow exercise than what my learned friend suggests.

PN368

There is a profound parting of the ways between my client and AV on what the Commission (indistinct). We'd reject the proposition that the Commissioner imposed some obligation of construction. AV's submissions, in fact, depend on a misconstruction of the Commissioner's decision, and so we say, hoist themselves up on a footing of this constructional question, which doesn't arise. It's a constructional confection.

PN369

And when that is understood, the problems that my learned friend point to fall away. It is important first to have a look at what the agreement says, and my learned friend has taken you to the provisions in the agreement in clause 23, and I don't think there's really any dispute between the parties either on appeal or below, or before Johns C, that clause 23, which is the flexible work arrangements is connected to Section 65.

PN370

I mean, as a matter of context one would construe, on proper authority one could construe Section 23, having regard to the statutory provisions in Section 65. And when one has a look at clause 23, what it says the employer may refuse the request on reasonable business grounds. It's a purely objective test. It's not whether or not the employer had reasonable business grounds, and it's not the reasonable belief of the employer, it is on reasonable business grounds.

PN371

In that sense, having regard to the application of that clause, it was a matter for the Commissioner to be satisfied that either AV had the reasonable business grounds or it didn't. Obviously, AV would be expected to run a case saying it had reasonable business grounds, for the reason that it refused that it gave on 9 March. But the Commissioner wasn't there assessing – his job wasn't to assess whether or not AV had those grounds. He had to assess for himself whether or not reasonable business grounds existed.

PN372

We're not looking into the minds. There's no subjectivity. We are not looking into the minds of the AV decision makers and saying, hang on, okay, having looked at those minds, I take the view one might have (indistinct) on business grounds. Obviously AV had an opportunity to say, these are the grounds we rely

on and the Commissioner can decide for himself whether or not there were reasonably based business grounds.

PN373

And that's the factors upon which the refusal operates. So, if the Commissioner agreed that there were reasonable business grounds, that engages clause 23.4, and therefore the request is legitimately refused. If not, then 23.4 doesn't operate at all, in which case their flexibility (indistinct). It's conciliatory to observe that – it does seem that there's a degree of one-way street in relation to the flexibility contended for by AV, because when you have a look at clause 43.1 of the enterprise agreement, and I think you have the enterprise agreement, apparently the employer requires flexible arrangements.

PN374

'To meet service and operational requirements, employees may be required to work other shift patterns or shift rosters. Those shifts include shifts of varying lengths, up to a maximum of 14 hours.' So, there's no stipulation as to a condition of employment that employees have a 14 hour (indistinct) by operation of the agreement. There is a right to require those employees, but that right has to be read with clause 23.4.

PN375

Then having regards to this concept of the correctness standard, the hinge of my learned friend's argument is this is a construction case. Well, it's not. The case was, and this is recorded in an agreed question and the agreed question that was set out in the decision, and this is at paragraph 10, 'Does the respondent have reasonable business grounds for refusing the FWA request pursuant to clause 23.4?' It invokes that question that I've just put to you.

PN376

All the Commission was asked to do was, did the employer have reasonable business grounds on the objective basis set out in that clause. That's it. So, when you look at the question, the issue, the legal criteria, the legal criteria plainly is one that tolerates a variety of different opinions. My learned friend took you to Gageler J reasons in SZVWFW, horribly named, that's in our materials. It's tab 1 of those materials.

PN377

If I can take you to page 22 of the list of authorities that have been filed by my client, you see there that at paragraph 44, his Honour Gageler J analyses the course of authority that is dealt with for function of appeal by way of rehearing, of course, which this is. And it refers to their Honours reasons in *Norbis v Norbis* identifying that the fundamental conception of an appeal is a process for the correction of error.

PN378

And if the questions involved lend themselves to differences of opinion which, given a range of legitimate and reasonable answers to the questions, it would move on to allow a Court of Appeal to set aside the judgment and decide for itself what it is that ought to have been done. And I start there.

PN379

And his Honour then goes through and Warren Coombes, and at paragraph 46 of his Honour's reasons he says, 'The correctness standard of appellant review that a conclusion of the primary judge has been (indistinct) simply characterises a value. It attracts the (indistinct) standard.

PN380

But going back to 49 which my learned friend took you to, 'that where the legal criterion' – do you see this, it's about the third line down, 'that line is drawn by reference to whether the legal criteria applied or purportedly applied by the primary judge to reach the conclusion, demands a unique outcome, in which case the correctness standard applies or tolerates a range of outcomes in which the *House v King* standard applies.'

PN381

There's the critical issue. What's the legal criteria? And when you have satisfied yourselves of that, then the question is does that legal criteria tolerate a range of outcomes? That's not purely a question about whether or not there's an exercise of discretion. Obviously it may, but it's wrong to view this as simply a dichotomy between a question like a constructional question, there's only one kind, there's only one correct construction of one, and a discretionary judgment on the other.

PN382

What His Honour is there referring to is the difference between a decision where there's only one (indistinct) or one that tolerates a range of outcomes, which could include but is not limited to discretion, and this is an issue that falls into the second category. O'Neill DP, I think you put to my learned friend parts of the reasons of Wilson C where the Commissioner identified the exercises that the weighing, with the personal effect, on the one hand, as against the impact on AV on the other. That weighing implies that there could be a variety of different outcomes.

PN383

That is anticipated by Section 65, itself. The Commissioner's reasons in the Emirates case, and they were in, I think, the AV materials, and the Commissioner at paragraph (audio malfunction) and I've copied it - let me just find where the – I think it's at tab 7 of the materials rather – no, that's not right – I'll just direct your attentions to paragraph 43 where the Commissioner analyses the explanatory memorandum to Section 65, and in paragraph 45 goes on to identify the range of considerations that would apply to an assessment of whether or not there are reasonable business grounds.

PN384

At the top of the page that I've got, it cites this from the explanatory memorandum and I'm going to hand you a copy of the explanatory memorandum in a short while – 'A list of reasonable business grounds is non exhaustive and such grounds will be determined in regard to the particular circumstances of each workplace and the nature of the requests that are made.'

PN385

Now that's an assessment of fact that involves a range of different things. I'm going to hand up the explanatory memorandum, but it's only – if you just give me the front page or the relevant parts (indistinct). Then have a look at the bottom of the page 267. The bill does not identify what may or may not comprise reasonable business grounds but rather, 'the reasonableness of the grounds is to be assessed in the circumstances that apply.

PN386

That's why in the submissions, we submit that reasonable business grounds is really pertaining to the state of affairs, rather than a standard in the same way as a breach of reasonable business (indistinct). Reasonable business grounds, I like to identify (indistinct) simply a text book, essentially circumstantial and it then requires an opinion to be formed about whether or not that set of circumstances in that context, a refusal (indistinct).

PN387

In section 65A, sorry, section 65.5A, it makes that (indistinct). Whilst I'm with 5A, (indistinct) the discussion with my learned friend today indicated today what it was that were the business grounds that were provided to me by my client is set out on page 8 of the Commissioner's reasons. And then, just simply, we can't provide you the shift configuration you asked for.

PN388

It was operational, as my learned friend has conceded. That was principally what it was about. You will note that 5A of Section 55B identifies a ground that there is no capacity to change the working arrangements. But the Commissioner found that there was. AV came along and said, we can't do it, we can't change these arrangements. The Commissioner said, no, no, you can. And here he is, here's how you do it. And on that basis he found that there were not reasonable business grounds.

PN389

So, my learned friend makes a case about the correctness standard depends on whether you accept that there is a constructional dispute, which in turn requires you to accept that the Commissioner imposed some obligation contrary to clause 23.4. He did none of those things. If you go to the Commissioner's reasons, much has been made in terms of what the Commissioner said in paragraph 76, or page 43 page 43 of the appeal book.

PN390

He is plainly dealing with the reasons that have been proffered by AV. He doesn't talk about an obligation. Those words are not used. He talks about, 'Clause 23 does not contain the express reference to discussions in genuinely trying to reach agreement.' It is difficult to see how I could make a finding that AV had reasonable business grounds,' not reasonableness at large, 'had reasonable business grounds:

PN391

If it did not have a discussion with Ms Fyfe and seek to reach an agreement with her.

PN392

There he's dealing with the reasons that the AV had proffered for saying no. Not his conclusion about whether or not there were reasonable business grounds, and I'll explain why I say that in a minute. But just focusing on paragraph 76, all he's there speaking about is what was proffered by AV.

PN393

Undoubtedly, in considering 'reasonable business grounds', it's plain that discussions are a relevant consideration. Not the exclusive one, and the Commissioner didn't decide the case on that basis, but a relevant one, and the X, ma'am, makes that crystal clear.

PN394

Paragraph 258, under the heading, 'Request for flexible working arrangements', the second sentence:

PN395

The intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements.

PN396

That's what it says. Then the illustrative example of Michael, which is on the following page, provides an example of how that would be given effect. It's plainly in the context of discussions.

PN397

Obviously the statute does not make that the gravamen of reasonableness, but it's within a frame that is intended to create a process or reaching agreement. So it was plainly relevant for the Commissioner to have regard to the discussions and that's what he did.

PN398

When he then - my learned friend took you to paragraph 80. It's important to have regard to what the Commissioner actually said in that paragraph. He's speaking here about AV and what it should have done. Again, he's speaking about what AV should have done before refusing. Not deciding whether or not there's reasonable business grounds, he's deciding what should have been done by AV, that's the language he uses, 'AV should have tried'.

PN399

Then he goes on to say:

PN400

Absent that attempt any purported reasonable business grounds were vitiated by failure to do so.

PN401

The word 'purported' is important because he's referring to what AV proffered. They come along and they say to the Commissioner, 'These are our reasonable business grounds, we can't do it. We can't accommodate this shift pattern so, therefore, we say no'. The Commissioner, appropriately, analyses that

and say, 'But you didn't talk to her', that's his finding, 'and in that sense I can't accept your reasons'. Then he goes on to determine whether or not there are reasonable business grounds. That's apparent from 83:

PN402

I must apply the principles drawn from memory, in doing to I'm satisfied -

PN403

Then he goes on to identify a list of matters.

PN404

Then, in 84, 'What I need to determine', and, of course, the language 'determine' is significant here because that expressly evokes the functions that the Commission has, under the disputes resolution clause, which is to determine the dispute. That's the language:

PN405

What I need to determine is whether, on an objective basis, t he respondent had reasonable business grounds for refusing the applicant's request.

PN406

And then he goes on to do it.

PN407

Now, my learned friend - - -

PN408

DEPUTY PRESIDENT CLANCY: The question could be asked is why then outline 76 to 83? So 84 describes the task that he was required to undertake, he could just have proceeded to do that.

PN409

MR HARDING: He could have, but he didn't. That doesn't mean his decision vitiated for error. It's this issue you posed, Clancy DP, which is, all right, let's assume that he got it wrong, in relation to the genuine discussions question, well, where does that leave us? Because - - -

PN410

DEPUTY PRESIDENT CLANCY: That's really what I'm interested in.

PN411

MR HARDING: Yes, where does that leave us? Where it leaves you is 84 and after.

PN412

DEPUTY PRESIDENT CLANCY: Yes. But dealing with 84 and after, and I've asked Mr Harrington this, does it come down to - what the Commissioner had before him was, essentially, what is outlined in the appellant submissions, at 23 and 24. He's had regard to that and he's had regard to what was put, on behalf of the respondent, and he's formed the view that - - -

PN413

MR HARDING: He's formed a view, exactly.

PN414

DEPUTY PRESIDENT CLANCY: So if the analysis then become, in terms of the 'what next', that's where the Commission was tasked whether it's done by this Full Bench or some other means. That's what's before the Commission.

PN415

If it's accepted that the Commissioner's decision making process, there is error in the decision making process because of the analysis.

PN416

MR HARDING: Well, I think it's important - therein lies the - my submission is that there isn't error, material error.

PN417

DEPUTY PRESIDENT CLANCY: I understand that. You've got the materiality point.

PN418

MR HARDING: No, that's in relation to procedural fairness. So the first thing we say is that the Commission didn't misconstrue clause 23.4. He did not impose the constructional obligation.

PN419

DEPUTY PRESIDENT CLANCY: Okay. We're not with you on that.

PN420

MR HARDING: If you're not with me on that, then you would conclude, would you not, that he did impose that obligation. But I still would say that it's an obligation that doesn't vitiate the decision. It doesn't produce a 'Yes' answer to the question that he asked - - -

PN421

DEPUTY PRESIDENT CLANCY: Yes.

PN422

MR HARDING: It still leads to a 'No', because what the Commissioner did is to look at the reasonable business grounds issue, from 84 on and resolve it against the AV. So I suppose you could say this - - -

PN423

DEPUTY PRESIDENT CLANCY: And he's made no error, you say, having regard to what is put at 23 and 24, in terms of the evidence that the respondent relied upon?

PN424

MR HARDING: He certainly is not. He is focused on - what's put against us in 23 and 24 is a course of how the evidence was run, but the Commissioner appropriately focused on the reason that was given on 9 March, as AV's reasons. I think there doesn't seem to be any contest about that, but Mr Weiner(?) comes in later. But in terms of what it is that AV - the refusal was on 9 March,

for the reason contained in that email. The Commission correctly focused on that and said:

PN425

All right, (a) I don't accept that that gives rise to 'reasonable business ground', that deals with the AV's subjective reasons for why it did what it did.

PN426

Then he went on to say:

PN427

All right, here's my view of whether or not there were reasonable business grounds.

PN428

That's, essentially, the structure of the case, in my submission.

PN429

But if you're against us and you conclude that somehow or other there was some imposition of an obligation that misconstrued clause 23.4, so as to impose something that the agreement couldn't bear, then you would find, would you not, that, on the case that I'm putting, it didn't matter.

PN430

DEPUTY PRESIDENT CLANCY: The case, as it developed, sees other material come before the Commissioner. It's put by the appellant that that was at the Commissioner's behest, in some instances. So what does - - -

PN431

MR HARDING: As I understand, I didn't appear at first instance, but I'm instructed that what occurred is that that material that Mr Harrington took you to today was at the behest of the Commission. It wasn't material that AV itself relied upon.

PN432

DEPUTY PRESIDENT CLANCY: Yes, so it's before the Commissioner so - - -

PN433

MR HARDING: It came in after the hearing and wasn't tested.

PN434

DEPUTY PRESIDENT CLANCY: All right.

PN435

MR HARDING: It came in during the hearing, I'm sorry.

PN436

DEPUTY PRESIDENT CLANCY: All right. So it's come during the hearing and it's dealt with before the Commissioner, so what do you say about that?

PN437

MR HARDING: Well, what I say - - -

PN438

DEPUTY PRESIDENT CLANCY: Both parties here seem to be drawing arbitrary lines around what can be reasonable business grounds, it's a point in time.

PN439

MR HARDING: It's a point in time. It's a point in time.

PN440

I mean otherwise the clause doesn't work. The clause says, 'You have a right to make a request', and then the employer has a right to say, 'No', and gives their reasons in writing.

PN441

DEPUTY PRESIDENT CLANCY: What about the example of costs? Now, costs might not have been put up, in headlights, in the 9 March email, but it's a factor existing at 9 March. Do you accept that as a proposition?

PN442

MR HARDING: If it exists - yes, I think I have to accept that, in the sense that it would be open, wouldn't it, for AV to come along and say, 'Well, there was a cost issue at the time, even though we didn't expressly refer to it in our correspondence, but it did exist at the time'. But, again, in terms of the way the case was run, the case was run on the footing that it was operational circumstances that were the motivator. I think that was Mr Harrington's submission, and that was the way in which the case was framed, so some weight needs to be given to the way in which it was framed.

PN443

Now, insofar as costs became part of the proceeding, it doesn't appear that that was something that the Commissioner was taken to directly, other than in passing. That has to be some weight.

PN444

Having that I say that, I'm thinking about the transcript, on page 718, which is day 2, as I understand it, from PN 1052, there's an exchange between the Commissioner and Mr Harrington. The Commissioner says:

PN445

I just can't get my head around Ambulance Victoria saying 'We're going to reject an offer from an employee to fill gaps that we have regularly, that would result in a benefit to the community, a benefit for her, and a benefit for the employer', I can't get my head around it.

PN446

Mr Harrington says:

PN447

All right, well, thank you, and I mean this sincerely for being candid because that's the nub of this application.

PN448

It goes on, and then at PN 1069:

PN449

No, Commissioner, it's not a question of 'honestly' -

PN450

And this is something the Commissioner had put:

PN451

it's a question of how the emergency services operation are funded. Not just the funding, but how that funding must be used, in order to structure the operations with the real human resourcing it has for people to be out there on the road.

PN452

This is the critical point. It's at the centre of gravity of the application, and how it's defended by Ambulance Victoria.

PN453

So Ambulance Victoria did not make that front and centre of its case, it made it the centre of gravity of its case, that it couldn't do this.

PN454

Now, I suppose, Clancy DP, your question evokes the possibility that that might be revisited if the Full Bench were to find that there was error. What I'm suggesting is, the appropriate approach is to say that the error that AV comes along to this Full Bench and says exists, is one that pertains to genuine agreement, that's it. That in those circumstances it would be wrong for the Full Bench to venture forth into a reconsideration of other matters which have been determined and for which there is no erroneous conclusion, other than the one that AV disagrees with. That's the highest it can be put. But that's not a basis for appellant intervention, per se, in the absence of error.

PN455

I think I left my submissions just at the point at which I think I was about to conclude, on the question of the standard of correctness. If you accept that there was no misconstruction, this is not a constructional exercise, that in large part this is largely a constructional case that has been built by AV, rather than as a result of the reasoning process adopted by the Commissioner, then you ought to reject their arguments about error, on the footing that the agreement was misconstrued.

PN456

I would also add, and I think this is in one of the cases that the AV have relied on, it was in the Monash University case, at paragraph 25, a Full Bench decision, even if the standard of correctness applies, AV still has to satisfy you that the appropriate answer to the question posed for determination is, 'Yes'.

PN457

So it's not just the question of some abstract conversation about whether or not it ought to be standard of correctness, in the sense of unique outcome, because if

this was a constructional issue, which it's not, or a *House v King* error. Even if they're right about the standard of correctness, they still have to satisfy you that the appropriate answer is yes, and their difficulty is that they can't because they haven't addressed, properly, paragraphs 84 and on. In terms of the findings that the Commissioner actually made about reasonable business grounds, as opposed to what it said today, was this infection that somehow spread across the whole of Johns C's reasoning so to deny it of any real force because he posed, in effect, the wrong question for himself. But when you have a look at paragraph 84 and on, he's posed the correct question and dealt with it.

PN458

In paragraph, I think under the heading 'AV's approach', in our written submission, we deal with the particular matters that are identified by AV in their written submissions, at paragraph 50 and thereafter, and address them. I don't know whether I need to repeat them, and I won't, other than to say that really the frame of reference, as I think I've probably mentioned here, is that AV said it couldn't do it. The Commissioner said, 'You could', and the 'could' question is answered, really, from paragraph 95 of the Commissioner's reasons.

PN459

Now, it's important to bear in mind here that I think it's been put by my learned friend that this concept of spare and a flexible spare had to be somehow predetermined as being someone who could fill the entire 14 hours. Well, why? It's important to bear this in mind, in relation to how it is that AV refused, they said, 'We couldn't do it', paragraph 95 and on addresses that and shows that it can and could be done in the way that it's outlined. That doesn't, moreover, involve an obligation, on the part of AV, to necessarily place my client in the 14 hour shift - in a shift that would otherwise be filled by someone else.

PN460

The predicate of the Commissioner's approach was to say this, 'If you have a shift, a drop vehicle', I think is the words that are used, 'so that that vehicle would not go out of the branch, but for the fact that you can fill it with someone else, who is a spare, and you have someone who can do the 14 hours, fill it with that person. But if you can't, then Ms Fyfe is available to fill it for nine. That way the vehicle goes out'.

PN461

So we're here talking about a situation, this is the frame, as I understand it, of the Commissioner's reasons. It's not about saying, 'All right, we have to deploy Ms Fyfe in a particular way to take the place of someone who would otherwise be doing 14 hours'. He's talking about a situation in which the shift wouldn't run, but for the fact that Ms Fyfe was available to fill it for nine. That's the concept of the dropped shift, or the dropped vehicle, and I think there's evidence about how frequently that occurred. We've referred to it, in paragraph 25 of our written submissions and 24 of our written submissions.

PN462

There was a considerable amount of evidence about just how extensively this occurred. About 147 dropped vehicles, I think, is the way in which it was put, had occurred over a three month period, from March to August, 147. The evidence -

that material is in tables that are in the appeal book, under the heading 'Transcript and Exhibits', at item number 4, 'AV unfilled vehicle statistics, March 2022 to August 2022'.

PN463

So there was evidence before the Commissioner about the extent of this, as a phenomena and he addresses that in paragraph 100(b) of his reasons:

PN464

There are many dropped shifts, therefore, as the last resort option, the applicant refilling a position that would otherwise be vacant by using her as a last resort, AV would at least have an officer filling nine hours of a 14 hour shift.

PN465

That's how he understood this phrase, 'Better than nothing'. Perhaps one that could be better phrased but, nonetheless, that's the way he was able to assess the question or - or a frame through which the Commissioner assessed 'reasonable business grounds'. A shift that would not otherwise run could be filled by Ms Fyfe, which would allow AV to fill it with someone who could do the 14 hours, whether as a matter of ordinary hours or on overtime, or they could use Ms Fyfe and that community need would be met.

PN466

Now, that's not an unfunded shift, that's a funded shift. That's a shift that exists and that would run, but for the fact that someone is sick and can't do it, or for some other reason is unable to do it. It's a funded shift, it's planned, it's programmed, it's scheduled. They're not asking - my client didn't ask AV to make up a roster that didn't otherwise exist, solely for her. She said, 'I will fill the hole created by someone's absence'.

PN467

That addresses, in particular, 65(5)AB, as a consideration and also addresses the weighing exercise that the Commissioner expressly contemplated doing and it evokes the reasons of Wilson C. A weighing exercise in which he was able to say:

PN468

All right. Well, having regard to the considerations of AV and it's needs, and its need to run shifts that are funded by the government, so as to ensure that there's a planned and scheduled coverage of the areas that AV covers, here's a way in which it could be done.

PN469

There's a salutary, I'll hand you up a decision, the context is slightly different, well, somewhat different actually. This is the decision of the High Court, in *Waters v Public Transport Corporation*. It's a very famous case pertaining to the concept of direct discrimination and it pertained to a situation in which tram drivers – adjustments were being made, by the Victorian government, to the tram service and disabled people said that they weren't able to use the tram services with those changes.

PN470

The case was run on the basis that the PTC was applying a requirement or condition that was not reasonable, and the High Court dealt with that, in a variety of different ways. On the question of reasonableness, and this is where it's relevant because whilst the statutory context is different we are still talking about a situation in which AV says, 'All right, here's why we can't do it. Here's the requirement that we have', and that's qualified by reasonableness.

PN471

Their Honours Mason and Gaudron JJs deal with that concept, on page 362 of the decision. I just draw your attention to it, for the purpose of context, because his Honour Brennan J, from the foot of page 378, agrees with their Honours about reasonableness and then says this, at the top of page 379:

PN472

But even where the imposition of the particular requirement or conditions appropriate and adapted to the performance of the relevant activity, or the completion of the relevant transaction, it is necessary to consider whether performance or completion might reasonably have been achieved without imposing so discriminatory a requirement or condition.

PN473

That's the concept of flexibility that we're here talking about. Can it be done in a different way? AV said, 'No' the Commissioner was able to say, 'It could be, and here's the way to do it'. Now that is inherent in the concept of reasonableness.

PN474

In this connection, in this statutory context, in this agreement context, it's reasonable business grounds, so reasonableness is linked to the ground that the employer advances as legitimate and appropriate for the performance of its function.

PN475

Then, as his Honour Brennan J has emphasised, it is important to have a broader view and to think about whether it could be done differently, so as not to impose the burden of the work requirement that the employee is seeking some flexibility in relation to because, otherwise, it defeats the whole point of the flexibility.

PN476

I think I'll turn to the question of procedural fairness at this point and what my learned friend says about that, as I understood it. At no time were we ever on notice that the Commissioner would decide the case on the footing that AV did not make attempts to genuinely reach agreement with Ms Fyfe. Well, it follows, from the submissions we've made, he didn't decide the case on that basis. That's of significance to the procedural fairness argument that my learned friend has raised and it's at two levels.

PN477

Firstly, they come along and they say, 'We've been denied procedural fairness and that amounts to jurisdictional error'. Well, the first threshold question is, was there a denial of procedural fairness? The second question is, does that denial rise

to a standard that you could conclude that the Commissioner erred jurisdictionally? My learned friend addressed you on the materiality issue that pertains to the second of those questions, is this jurisdictional error?

PN478

But in relation to the question of procedural fairness itself, there is still a requirement for there to be, for the error to have arisen in relation to a critical question, that's the phrase. In the materials we've provided you tab 5 is decision of the Full Bench. If I can direct you to paragraph 24 of the Full Bench's reasoning there, which is on page 165 of our list of authorities:

PN479

It is plainly the case that if a decision maker intends to dispose of an application in a manner that is adverse to the interests of a party to the proceeding, by reference to some consideration which was not agitated then we need an opportunity to respond to that.

PN480

Then the next sentence:

PN481

This is just another way of illustrating the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn.

PN482

It didn't turn on whether or not AV had genuinely reached agreement with Ms Fyfe, it turned on whether or not there were reasonable business grounds, and on that AV failed.

PN483

Now, this gives effect to the reasoning of the High Court, in the case that my learned friend took you to, it's in our materials, it's the unhelpfully phrased case, MZAPC, which is item 3, tab 3 of our materials.

PN484

On page 120 of our materials, or our list of authorities, at paragraph 46, the majority in that case, which consisted of Kiefel CJ, Gageler, Keen and Gleeson JJ, examined the intersection between material error, rising to jurisdictional error and procedural fairness itself. You'll see, at the bottom of that paragraph:

PN485

To say that at demonstrated the appellant had been deprived of the opportunity of a successful outcome is an aspect of the proof of procedural fairness. It is necessary to accept that procedural fairness is a matter of practical injustice to the demonstration of a bare or merely technical denial of procedural fairness is not enough.

PN486

Then, for completeness, Beidleman J deals with the same issue, at paragraph 161, page 141 of our list of authorities. Again:

PN487

Breach of the rules of procedural fairness requires a finding that the applicant has been denied a fair hearing, in a practical way.

PN488

Not an abstract, hypothetical way, but a practical way.

PN489

Then the materiality issue arise if, on a critical issue, there has been a denial and then another obligation falls on the person asserting jurisdictional error to show that it's material.

PN490

It all comes to the same thing which is, in this case, where is it that the offending part of Johns C's reasons, paragraph 80, has so infected his approach that one can say that his findings about reasonable business grounds were vitiated? You can't.

PN491

DEPUTY PRESIDENT CLANCY: What about paragraph 102? I think the last sentence was raised by Mr Harrington.

PN492

MR HARDING: The last paragraph is a summary, it has to be read with 101 and 100. He then says:

PN493

It's obvious that more could have been done to reach a mutually satisfactory outcome but was not. Consequently that -

PN494

He's not referring to that sentence, he's referring to everything that's in 102 and 101. If it was otherwise there would be just no need for him to have done that. He could have disposed of the case by simply saying, 'I find that AV did not reach genuine agreement with the applicant, therefore there was no business grounds, the answer is no', but he doesn't. That's not the way he deals with it at all.

PN495

It would be to elevate a single sentence, a single sentence, in a single paragraph that analyses business grounds, in the way that the Commissioner does, to a status that the Commissioner himself did not give it.

PN496

That can be tested in this way. If AV was denied the opportunity to persuade the Commissioner that it had given a genuine opportunity to Ms Fyfe, would that have changed the answer to the question that was posed for arbitration? The answer's got to be no, because it doesn't address the other considerations, the fact that, as he said in 101, the reasonable business grounds here must take into account the fact that this was a way in which work could be performed that would enable Ms Fyfe to have the benefit of the flexibility she asked for, to do the work

in the way that she needed, to accommodate her parenthood responsibilities and get a service for AV that it wouldn't otherwise be able to run.

PN497

So if it's put in that way, if they were denied the opportunity to persuade, so therefore answer the question, there was a realistic chance, the answer has still got to be, a chance of what? This is the Steed question as well. Would this denial have led to a new trial, which is what AV are angling for, a new trial, on everything.

PN498

But on the issue that they ventilate before the Full Bench, that's not the appropriate result, it's much more limited than that, even on their case. Even on their case.

PN499

Unless there's any questions, they're the submissions for Ms Fyfe.

PN500

DEPUTY PRESIDENT CLANCY: Thank you, Mr Harding? Anything in reply?

PN501

MR HARRINGTON: A few matters, thank you, Deputy President.

PN502

Perhaps, as is often the case, if I can work in reverse, I'll start with what I've just heard, what my learned friend has just addressed to your Honour.

PN503

Would this denial lead to a new trial? That, in part, is something that you raised when you came back on the Bench. The answer is, whether it's a new trial or not, it's a reconsideration because these are - there's a primary construction error, which is very much part of our first limb of our case. There's a construction error, in terms of imposing an obligation to generally try to reach, that's 76 to 80. Then, as I made the submissions earlier, and Clancy DP took my learned friend to 102, it really does emerge, when you study this decision, this set of reasons, there's a just as fundamental analytical error, in the reason pathway, which is that the Commissioner is confused and has asked himself the wrong question.

PN504

The question he asks himself, in 76 to 80 is, 'Was AV's conduct reasonable?'. How do I know that? Because we know that, in 76, he hands down a finding, as it were, that 'AV acted unreasonably and that unreasonableness infected his decision'. But he does not stop there. My learned friend is trying to, on the one hand, ignore 76 to 80. He says, 'Just ignore that, nothing to see here, it's revisited at 102'. The wrong question, asking yourself the wrong question, a jurisdictional error is revisited at 102, because, as the Deputy President presiding observed, 'What do you say about 102?', this is right near the end because it runs to 106, this decision. Consequently that renders AV's decision unreasonable.

PN505

That's not the question, it's not the test. The question that needed to be answered was, did AV have reasonable business grounds for refusing? That's the question that was asked. It was legitimately asked, it arose, under 23.4. But what we've got, with the greatest respect, is at 76 the matter goes off reservation, it goes off into the wilderness with determinations about reasonable behaviour, reasonable conduct and infection, and it's our (indistinct) at 80, absent that attempt, any purported reasonable business grounds were vitiated by the failure to do so.

PN506

As I said, it's effectively revisited at 102. It infects the entirety of it. It's a construction error, it's a jurisdictional error of asking oneself the wrong question and, on top of all that, you get to a situation where, and my learned friend didn't really grapple with this, we weren't given the opportunity to deal with what I might call the wrong question, but we weren't given the opportunity to even confront that. We were not able to grapple with it.

PN507

Now, my learned friend says, the AV is effectively angling for a retrial. No, we're just angling for the correct analytical approach, the correct reasoning pathway and the correct decision. That's what needs to occur here.

PN508

Maybe I should segue to this, if you're with me, how does that happen? I think there are two options. The Full Bench could do that task itself, could undertake that task itself and if you did, you would be somewhat aided in undertaking that task, of course, by our submissions I'd hope, but also the - at paragraph 21, under the heading, 'Uncontested facts', there's considerable findings that are set down there by the Commissioner, including, at (e), 21(e), page 5 of the decision:

PN509

AV's funding can only be used to pay for paramedic wages and resources for shifts that align with the operational response hours and staffing considerations, as prescribed by AV's research model. These are funded shifts.

PN510

These are findings that you could, if this Full Bench feels it should, determine the question were there reasonable business grounds itself.

PN511

Now, the other alternative you have, undoubtedly, under section 607(3)(c) of the Act, is a power of remittal to a member of the Commission. This matter should not be remitted back to Johns C, and I want to make that submissions quite clearly, because there are a number of unfounded and censorious comments about AV in this decision and that starts at 76 to 80, which I've contended is the wrong approach to start with, the findings as to unreasonableness.

PN512

That finding as to unreasonableness at 76, and then jumping down to 102, it's akin to a credit finding, 'You, AV, acted unreasonably'.

PN513

Now, if this Bench said, 'We're not going to deal with this, but it does need to be redetermined, we'll send it back to Johns C', with the greatest respect to Johns C, he's a skilled Commissioner, he has put in print some pretty pointed findings about what AV did or didn't do or should have done. So it ought not be remitted back to him, it could be remitted to a member of the Full Bench itself or, of course, another member of the Commission to be determined correctly.

PN514

The decisions I've taken you to suggest that you, as the Full Bench, must, if you find that the decision is incorrect, because it's not a discretionary decision as such, if you find it's incorrect, so that there's some sort of error in how Johns C reached his decision, the decisions of the Full Bench tend to suggest the Full Bench undertakes that task. But the statute itself give you the power to say, 'We will remit it to a member, or one of our own members sitting on the Full Bench'. So that's available to you. I think we were asked to address you briefly on that point.

PN515

My learned friend, in his most poetic and dramatic, referred to it a constructional confection, I congratulate him on that, I'm impressed by that, but there's no confection here, by AV, in running this appeal. We vigorously advance the proposition that why the decision is not correct is because in the construction task the Commissioner erred, and I've made my submissions about that.

PN516

But to assist you, if I can take you back to the AMA decision before a Full Bench, in fairly recent times, *AMA v Monash Health*, at paragraph 25 of that, and I read this out to you before but:

PN517

> *The determination of whether a party has complied with or contravened a provision of an enterprise agreement does not involve the exercise of a discretion.*

PN518

When we said, 'No', on the basis of reasonable business grounds, did AV have the right to refuse on that basis? That's not a discretionary - it's not proposing to this Commission a discretionary decision, it's an analytical task where the Commission must assess, on the facts, leading to a unique answer, did AV have reasonable business grounds, in all the circumstances?

PN519

The Full Bench is correct, at 25, in *AMA v Monash Health*, and that's why, to quote it, the correctness standard therefore applies to this appeal, to this appeal by AV today, because 76 to 80 either demonstrates that the Commissioner determined there was an obligation to genuinely try to reach and because he says AV didn't apply, it was acting unreasonably or, 76 to 80 and 102, evidence that the Commissioner asked himself the wrong question, which is, was AV generally acting reasonably. That's the wrong question.

PN520

Therefore, this Bench, or a member of this Commission, if you would agree with those submissions, must go back and determine, on the evidence, whether AV has satisfied clause 22.4, that it had reasonable business grounds at the time. It's a task that simply can't be performed by Johns C, as the remitted person.

PN521

The AMA decision, just for what it's worth, it concerned an assignment of work provision or clause, this is at page 61 of the authority booklet:

PN522

The health service will ensure that the type and volume of work assigned to the doctor is reasonable, with regard to the doctor's skills, abilities, capacity, and ability to perform.

PN523

Monash Health went on to make that assessment, in relation to the relevant doctor, who ran the appeal, who appealed the decision, and I've read to you from paragraph 25, the member below, in the first instance, Commissioner was asked, and this is paragraph 5, to consider this question:

PN524

Has Monash Health complied with clause 21.5(a) of the AMA et cetera, insofar as having regard to Dr Hum(?) skills and abilities in directing Dr Hum, on 11 August 2021, to work three sessions per week in the community care centre.

PN525

Et cetera. That, the Full Bench, as you know, because I read to you 25, says:

PN526

That's an application of the correctness standard. The assessment of reasonableness is not discretionary.

PN527

There may be an element of evaluation where the Full Bench of the single member sits there and says, 'On the evidence before me, and on evaluating what was reasonable', but there's one unique answer to that question, in the *AMA v Monash Health* case.

PN528

On all fours with that is what's before you today. There is one unique answer to the question that Johns C agreed that he had to answer, 'Does the respondent have reasonable business grounds for refusing the first FWA request, pursuant to clause 22.4 of the agreement'. There is one unique answer to that, yes or no, on the evidence.

PN529

My learned friend frolics into dangerous terrain when he starts referring to an explanatory memorandum from 2008, underlying the current Act and emanation of section 65, before (5)(a) was inserted to section 65 of the Act. He says you can use that to construe clause 23.4.

PN530

I would urge the Full Bench to move forward with considerable caution because that's an explanatory memorandum underlying an Act which does use the phrase, 'reasonable business grounds', but we have parties to an agreement who did import all of section 65 or 65(5)(a) into their agreement. They used the phrase, 'reasonable business grounds', and they did no more than that and they didn't define it. So, again, looking at an EM to the Act from 2008 can only take you so far, in my submission.

PN531

My learned friend referred to paragraph 80 of the decision and the reasons of Johns C, and he said, 'There's nothing about obligation there'. The submission he made is that this just says what AV should have done, and it should have tried, to paraphrase the language of paragraph 80. It begs the question, why should AV have tried to generally reach agreement with the applicant and that absent any attempt is going to vitiate it. There has to be a juridical basis for that. There has to be something in the clause that says it should have, it should have. The clause is silent on this. It's not that decisions referred to by Johns C, where the clause of the agreement does impose the obligation.

PN532

This is where the analysis is frayed and dangerously erroneous because what the Commissioner is doing is asking himself the wrong question about acting reasonably, not focusing on 'reasonable' in the context of 'reasonable business grounds'.

PN533

Hypothetically an employer could be harsh, rude and behave badly in its communication of a refusal to an FWA, and let's call that acting unreasonably, but its business grounds, underlying that bad behaviour, could be reasonable business grounds. The bad behaviour, in the manner of communication, does not disqualify the reasonableness of the business grounds themselves.

PN534

Clancy DP asked my learned friend about 76 to 83 and the significance of what happened from 84 onwards. The question that is prompted by that exchange between the Deputy President and my learned friend is this, what's 76 to 80 doing? What's 102 doing? You can't ignore them, they're part of a reasoning process.

PN535

My learned friend, in his written submissions, says, '76 to 80 is not dispositive, they're comments along the way'. They're not. At 80 is a statement of conclusion, 'Were vitiated by the failure to do so'. At 76 there is a finding, 'acted unreasonably', and that unreasonableness infected its decision. They are findings. They cannot be ignored. They cannot be glossed over.

PN536

On the question of how costs came into play, this was something that my learned friend was questioned about and he, innocently, made a mistake, thinking that the costs evidence and material came later. It came in the middle of the hearing, in a

way slightly out of the blue, and can I take you to transcript - sorry, appeal book at 638, but transcript at PN 369?

PN537

If I recall it correctly, Ms Capp(?) had just started to give her evidence, examination-in-chief starts at P 358, and Ms Capp, at 368 says:

PN538

Ms Capp, you're aware that there was some work done to cost this proposal on some basis?---Yes, I'm aware there was discussion about the funding models.

PN539

No, was work done to the cost model, on a temporary basis or permanent basis?---I believe there was a review of the temporary basis, yes.

PN540

Who did that?---I'd have to look and come back to you, I can't tell you.

PN541

Was that presented to you, the costing?---Yes, it was.

PN542

How did you receive it?---By email.

PN543

All right, well I call for that.

PN544

So the Commissioner called for that email, first day, early - post Ms Fyfe's evidence, but in my first witness, Ms Capp's evidence. The Commissioner says, 'Can inquiries be made and the like'.

PN545

Then, if you - there is further, at 734 of the appeal book, I think it's probably the closing - 734, sorry, is the email itself, and I've already taken you to that and it's got the numbers and the analysis in it.

PN546

Now, as I said, when I made my original submissions earlier today, those numbers and assessment is done in August, it's not done in February. Ms Capp was in a position to speak to this because in her statement that she made to the Commission and, of course, she was cross-examined on this, her statement is at 423 of the appeal book, at 31 to 32, under the heading, 'Budgeting for funded shifts':

PN547

AV's funding can only be used to pay for paramedic wages and resources of the shifts.

PN548

And it goes on, at 32:

PN549

There is no excess of funds and AV exceeds its funding on operational matters most years.

PN550

33:

PN551

The costs have been reviewed.

PN552

And it goes on.

PN553

So Ms Capp was in a position to speak about funding generally and how it's used, but it was in the context of very early in her evidence-in-chief that the Commissioner called for the document. I think the document, if I recall, arrived later that day and pretty much went straight into evidence.

PN554

So the costs issue, it cannot be said that AV got to the hearing and went, 'We want to run a costs - excessive costs argument now'. Costs were always an issue and that's there. The primary focus is operational but the Commissioner said, 'I want to understand what you know and what you've done analysing the cost effect of this request for an FWA', and we adduced that evidence, so it was more evidence.

PN555

But it does bring into sharp focus, members of the Full Bench, this question of where does one draw that line? Does everything stop at 9 March, because that's when the decision was made? Well, Johns C didn't do that, he wanted evidence of the grievance, he allowed it in. He wanted cost assessments or cost analysis, which were done in August. He's referred to that in his decision. I don't see that to be problematic but, on one view, Wilson C, in his decision, may not have permitted that. That's the way he went about it. As a single Commissioner he said, 'You can't come to the Commission later on and expos facto start adducing evidence of what may have been in your mind or what might have justified you, it's what you determined at the time'.

PN556

The question to be determined before Johns C was framed with a certain breadth, does the respondent have reasonable business grounds for refusing? It's not 'did the respondent', it's 'does it have it for refusing it'. That question, in the way it's framed, allowed for an analysis, beyond 9 March, to incorporate in other material. Both parties agreed on that question. Johns C, the funny thing was, he agreed, of course. He accepted that was the question but overnight, if I recall, between day 1 and day 2, he had an idea that maybe we should ask a different question. Now, that was probably a bit too adventurous for my learned opponent and myself at the time, we chose to stick with the original question.

PN557

But that was the question, so 'does it', does it have reasonable grounds for refusing it back then. That opened a gateway, as it were, to permit this evidence that Johns C received about costings and an explanation as to the difficulty posed by the operational aspects of the request.

PN558

Very briefly, to conclude, my learned friend was at his fearsome best when he said, 'They have not addressed paragraph 84 of Johns C's decisions, the reasons, and beyond that'. Well, we have addressed it, we addressed it in writing and we addressed it through our so-called grounds of appeal, there was 13 of them. We said there were multiple errors, if we're required to demonstrate in the *House v King* sense, we don't think we are. We think the correctness standard applies and we just have to demonstrate constructional error, wrong question asked, therefore it needs to be redetermined and the correct, unique answer needs to be arrived at by this Commission, one way or the other.

PN559

My learned friend also said, 'My client did not ask them to make a shift for her'. Well, she came to us and said, on the final line of the eighth variation, 'I want to work a shift with these two times; start later by three hours, finish earlier by two hours', 9 pm to 6 am, I think it was, a nine hour shift. That was, on one view, on one view, asking for a bespoke, specific shift arrangement for her alone.

PN560

I don't understand the relevance of *Waters v Public Transport* because that's a well known High Court decision that deals with indirect discrimination. It's old guise, it's old emanation. My learned friend can't really gain any traction with anything said by the High Court in that very specific statutory context of imposition of conditions or requirement and whether they were reasonable in nature, in the discrimination law setting.

PN561

Finally, on that natural justice point, my learned friend again advanced, in a very robust manner, this proposition; that the decision itself, by Johns C, didn't turn on whether AV had generally tried to reach agreement. Yes, it did. Yes, it did because - okay, if it didn't then 76 to 80 must be written and visible and it's not there. 76 to 80 is there, everything turned. It was paradigmatic, it created a lens throughout which everything else was viewed when the real analysis started and 102 finishes it all off by nailing that coffin, saying 'unreasonable conduct', wrong test.

PN562

That 102 reference simply reaffirms that the lens was always focused in a particular way, for Johns C, and the lens was established from 76 through to 80 and the reasoning that you read there.

PN563

In terms of my learned friend's heroic submission from the MZAPC case that apparently there's no practical injustice to AV in this case, because it was never told that it should have, it should have generally tried to reach agreement and because it did not, which we dispute, it was acting unreasonably, that infected

everything it did, it vitiated everything it did. We were never - it was never run by the VAU, it was never put to us. The closest Johns C came to say, 'What about reasonableness generally?', the wrong question, the wrong test, in my submission here today. I address that at the end and then we get the decision with 76 to 80 and then through to 102.

PN564

We didn't get a fair go, on any view, using the language of Steed, applying the English authorities. We did not get a fair go and I've referred to a number of decisions that I don't need to take you to, in the private commercial arbitral context that I often refer to as misconduct in arbitration, but those decisions out of England are very clear that a private arbitrator must give parties the opportunity to be heard on central questions and cannot go off and make a decision on something that is wrong, immaterial or simply not been put, so that one of the parties hasn't had the benefit to be heard.

PN565

So those are the submissions in reply and, as I said, how you go about it from here, the option is for this Full Bench, looking at the decision, looking at those findings of fact that, in many instances aren't challenged here before you today, you three, the three at the Bench, goes off and makes the decision. But it's more complicated than the *AMA v Monash* decision, to be fair, this case. It's a fair bit more complicated than that. Otherwise there is no doubt that you have the power to remit the question for redetermination to a member of this Commission and, in my submission, it ought not, on any view, be remitted to Johns C.

PN566

Those are the submissions, thank you.

PN567

DEPUTY PRESIDENT CLANCY: Thank you.

PN568

MR HARDING: Can I be heard, in relation to one matter, finally, Clancy DP

PN569

DEPUTY PRESIDENT CLANCY: Yes.

PN570

MR HARDING: Which is, by way of objection, my learned friend, in reply, raises a *House v King* ground of error. On the grounds he should be held to the grounds. In reply he raised that and insofar as he relies on paragraph 102, I refer you to 105 of Johns C's decision. He ought to be held to his grounds, those grounds don't raise it and we ought not be disadvantaged by it.

PN571

DEPUTY PRESIDENT CLANCY: Thank you. We thank counsel for their assistance today. The decision is reserved and will be issued in due course.

ADJOURNED INDEFINITELY **[1.42 PM]**