TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT GRAYSON
DEPUTY PRESIDENT SLEVIN

C2023/7882

s.604 - Appeal of decisions

Appeal by Australian Maritime Officers' Union, The (001N) (C2023/7882)

Sydney

10.20 AM, THURSDAY, 15 FEBRUARY 2024

PN1

DEPUTY PRESIDENT CLANCY: Good morning. Could I take appearances, please?

PN2

MS T ELLIS: If it pleases the Commission, my name is Ellis, E-l-l-i-s, initial T, and I represent the Australian Maritime Officers' Union as the appellant in this matter, and with me I have Mr Rabeling, R-a-b-e-l-i-n-g, initial G.

PN3

DEPUTY PRESIDENT CLANCY: Thank you, Ms Ellis.

PN4

MS P WILLOUGHBY: May it please the Commission, my name is Willoughby, Willoughby, initial P of counsel, and I seek leave to appear on behalf of Poseidon Sea Pilots Pty Ltd, instructed by HR Law.

PN5

DEPUTY PRESIDENT CLANCY: Thanks, Ms Willoughby. The Full Bench has consulted on the question of permission. Ms Ellis, do you have any submissions you wish to make on the question of permission to appear?

PN6

MS ELLIS: No, we have no objections to them being represented.

PN7

DEPUTY PRESIDENT CLANCY: Thank you. The Full Bench's view is there is sufficient complexity attached to the matters raised by the appeal such that it would be more efficient for Poseidon Sea Pilots to be granted permission to be legally represented and we grant permission. Are there any housekeeping matters before we get underway?

PN8

MS WILLOUGHBY: I should raise for completeness, your Honours, I am joined in this meeting room by Jill Hignett and Olivia Cinnamon of HR Law, as well as Glen Marshall, John Ecclestone and Catherine Hobbs of Poseidon Sea Pilots.

PN9

DEPUTY PRESIDENT CLANCY: Thank you. If there's no other housekeeping matters, we'll hear from the parties any submissions they have in relation to the matters that are in addition to the material that they've filed. Thank you, Ms Ellis.

PN10

MS ELLIS: Thank you, Deputy President. The only other housekeeping matter that I would raise is we've prepared short written closing submissions, and I can email them to everybody once I've finished my closing oral submissions, but I will leave it in the Bench's hand as to whether you'd prefer just oral submissions or whether you're happy to accept our written closing submissions.

PN11

DEPUTY PRESIDENT CLANCY: Can we assume they largely – they'll mirror one another?

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MS ELLIS: Yes.

PN13

MS WILLOUGHBY: Yes.

PN14

DEPUTY PRESIDENT CLANCY: That's fine. Happy to hear your oral submissions and if you'd like to subsequently file the written submissions in confirmation. Ms Willoughby, are you happy with that?

PN15

MS WILLOUGHBY: I am, your Honours. The only matter that I would raise about that is if there's any information which hasn't been anticipated that comes either in the form of questions or from the union, I'd like to have the opportunity to perhaps put in a written submission at that point, but otherwise we're content to proceed with oral submissions.

PN16

DEPUTY PRESIDENT CLANCY: We're going to proceed on the basis that there's nothing in substance that's going to materially change from what is put orally and what is in the written outline. I don't want, and nor would the other members of the Bench want there to be a process that strings out because someone wants the opportunity to reply to something that's in writing that hasn't been otherwise put on notice or put now.

PN17

Ms Ellis, if that's the nature of the document, that it simply reflects what you're going to be saying, we'll proceed with your oral submissions and then you can confirm what is put in writing.

PN18

MS ELLIS: Thank you.

PN19

MS WILLOUGHBY: Thank you. We're content with that.

PN20

DEPUTY PRESIDENT CLANCY: Thank you.

PN21

MS ELLIS: With respect to our opening statement I provide the following submissions. Firstly, we're seeking permission for leave to appeal against the decision to approve the Poseidon Sea Pilots Marine Pilot Enterprise Agreement 2023, and that is *Poseidon Sea Pilots Pty Ltd* [2023] FWCA 3984 in matter AG2023/3450, and if leave is granted we'll also address our grounds of appeal.

PN22

Further, our case will be relying on the following supporting documents, which have been filed and either have been or will be provided to the respondent. That is our form 7, which was filed on 15 December 2023; our written submissions, which are dated 19 January 2024; all (indistinct) material in the appeal book, which was filed on 20 December 2023; our oral submissions today, and then our closing submissions, our written closing submissions.

PN23

Then we note that the Commission needs to determine two things: firstly, whether permission to appeal should be granted to the AMOU in accordance with section 604 of the Fair Work Act, and then secondly, the Commission needs to determine whether there has been an error in the original decision to approve the Poseidon Sea Pilots Marine Pilot Enterprise Agreement 2023.

PN24

Would the Bench like me to follow on and make submissions about why we say the leave should be granted?

PN25

DEPUTY PRESIDENT CLANCY: Yes. Thank you.

PN26

MS ELLIS: We say that section 604(2) of the Fair Work Act deems that the Commission must grant permission to appeal if it can be satisfied that it's in the public interest to do so, and we say that there's sufficient public interest to warrant an appeal in this case, and there are also appealable errors.

PN27

Paragraph 3 of our F7 and paragraphs 12 to 15 of our written submissions in effect say that we've met the public interest test in Glaxo Smith Kline, being that appeals can be allowed where the public interest has been attracted because the decision has manifested in their justice and its result is counterintuitive.

PN28

We also submitted that we have met that test, because O'Neill DP's decision to approve the agreement was based on the incorrect fact that the marine pilots were not shift workers, and that injustice will go on to become a substantial one because it will affect other employees in the maritime industry who are on equal time rosters and work 24-hour shifts.

PN29

We also submitted that failing to correct this decision will erode public confidence in the Commission, and further to those written submissions, we've met the Glaxo Smith Kline test in that the matter raises issues of importance and general application.

PN30

So, firstly, the appeal deals with public holidays and annual leave, and they are both National Employment Standards that affect all employees in Australia, and we say that that is an issue of importance.

PN31

Secondly, it raises a matter of general application, will provide the Full Bench an opportunity to provide further clarification on how the Roy Hill Holdings test of 34 Sundays and six public holidays applies to employees who work long hours on an equal time roster.

PN32

We also say that it's in the public interest to ensure that an agreement made under the Fair Work Act meets the objects of that Act. At section 3(b) it says that the objection of the Act is to ensure a guaranteed safety net of fair, relevant and enforceable minimum wages and conditions through the National Employment Standards.

PN33

We say leave to appeal should be granted as there are significant errors of fact and law in the decision, including that O'Neill DP did not follow the CFMMEU v OS MCAP decision of the Full Court of the Federal Court, which is a requirement under section 608(4) of the Fair Work Act.

PN34

We say that that decision essentially says that you cannot contract out of an employee's National Employment Standards entitlement to be absent on a public holiday, and we say that the Full Bench can be satisfied that there was an error on the part of the primary decision-maker in accordance with the principles in *Coal and Allied Operations v AIRC* [2000] HCA 47.

PN35

We also say that we have met the test in House v The King, being that an appealable error has been made if the Deputy President acts upon a wrong principle, allows extraneous or irrelevant matters to guide or affect the decision, mistakes of facts, or does not take into account some material considerations.

PN36

Our submissions on the grounds of appeal will show that she has based her decision and used her discretion on incorrect facts by comparing the marine pilots' seven-day roster with that of the employees in OS MCAP. This comparison has dismissed the reality that the enterprise agreement allows the pilots to work 24-hour shifts and not 12-hour or 12.5-hour shifts.

PN37

These pilots can work any 14 hours in that 24-hour period, and the decision also fails to acknowledge that under the agreement the pilots can work 98 ordinary hours in seven days or 49 hours per week if it's averaged over their two-week seven day on, seven day off roster cycle, and we say that that's more than the employees in OS MCAP and it's substantially more than the 38 ordinary hours that the National Employment Standards provides for.

PN38

With regards to the error of law in the original decision, including that O'Neill DP erred in not following a decision of the Full Court of the Federal Court in OS MCAP, in creating this decision O'Neill DP has read words into the

Fair Work Act that are not there. The Act does not say that award-free employees can be financially compensated in lieu of the right to be absent on a public holiday.

PN39

This decision has led to an injustice where the pilots did not receive their full NES entitlement to be absent from work on a public holiday, and it has led to an injustice where the employees are deemed not to be shift workers for the purposes of accruing annual leave.

PN40

On the respondent's own evidence, there are at least 36 employees that are covered by this agreement who would be affected by the appeal, and we say that that's a significant number of workers, and we say that the public would be interested in knowing whether they've received a just outcome or not.

PN41

Because of the concerns that we've raised about the decision, it's clear that the decision is attended with sufficient doubt to warrant its reconsideration and a substantial injustice may result if leave is refused. We say that that is in accordance with the principles of Wan v AIRC.

PN42

Ultimately we say that the decision is wrong and it's in the public interest to fix an injustice made by an incorrect decision, and that is to prevent a wrong decision from being applied in future cases as a precedent.

PN43

Finally, granting leave to appeal will also allow the Full Bench to provide further clarification and guidance on the principles in Roy Hill Holdings, and that is whether or not every single employee should have to work the 34 Sundays and six public holidays to be considered a shift worker, or whether the number of hours worked on those days can be enough to push an employee into the shift worker category, because currently that question still lingers in the maritime industry, particularly where, as I said earlier, where the employees on an equal time roster and effectively working long hours every second weekend and public holiday.

PN44

So that concludes my submissions on whether the appeal should be allowed. Would you like me to continue on to my substantive submissions on the issues in dispute or would you like to hear from the other side first?

PN45

DEPUTY PRESIDENT CLANCY: Yes, if you could continue, please, with your submissions, and then we'll hear from Ms Willoughby.

PN46

MS ELLIS: Thank you. We say that there are only two issues in dispute in this matter, and we say that the respondent has inadvertently agreed with one of our views on their issues in their written submissions.

PN47

We say that those two issues are whether the marine pilots are shift workers, and whether the pilots are entitled to days off in lieu of working public holidays.

PN48

At paragraph 58(g) of their written submissions, the respondent agrees that the award is irrelevant to the pilots, because they are award-free and that there's not a prescribed right to payment for public holidays at law, and then it follows that this means that the respondent cannot financially compensate a pilot for working on a public holiday and for not getting their entitlement under section 114 of the Fair Work Act, which is to be absent from work on a public holiday.

PN49

Then ultimately we say that the respondent thinks that there's a gap in the legislation, in case law that these particular award-free employees squeeze into, and we're just asking the Commission not to let them succeed in finding a loophole that allows these employees to get less than the National Employment Standards, because there is no loophole.

PN50

Then if we turn now to ground one where we say that the Deputy President erred in finding that the marine pilots were not shift workers, we continue to rely on paragraphs 2.1 of our F7 and paragraphs 17 to 21 of our written submissions that say that the Deputy President erred in failing to establish that pilots are shift workers, and we say that's for two reasons.

PN51

Firstly, she didn't provide – actually more than two reasons. Firstly, she didn't provide reasons for being satisfied that the pilots were not shift workers. Secondly, failing to follow the principles in House v The King by allowing extraneous or irrelevant matters to guide or affect the decision, she's mistaken the facts, and did not take into account the material considerations.

PN52

We say that the Deputy President incorrectly applied *O'Neill v Roy Hill Holdings* [2015] FWC 2461, and we know this because by comparing the pilots seven-day roster to the seven-day roster in OS MCAP, it is clear that she's failed to take into consideration that the pilots are actually rostered on for 24-hour shifts with up to 14 hours' work in that 24 hours, and therefore it should be acknowledged that simply relying on 34 Sundays and six public holidays is not enough of a test when the pilots are working more hours on those days.

PN53

We also say that the Deputy President should have distinguished the pilots from the employees in Roy Hill Holdings and found them to be shift workers. We say that it was open to the Deputy President to divert from the single Commissioner's decision in Roy Hill Holdings of 34 Sundays and six public holidays where they considered that to be regularly working.

PN54

The Full Bench distinguished the employees in Roy Hill Holdings from other employees who don't necessarily work a roster with an even number of shifts or hours on Sundays and public holidays in the four-yearly review of modern awards. The Full Bench found that the roster should not be the ultimate determination on whether or not somebody is a shift worker, and we agree with that proposition.

PN55

We say that it was open to O'Neill DP to determine that the pilots are in fact shift workers, but she did not because of her mistaken assumption of the facts, and at paragraph 12 of her decision, O'Neill DP found the similarities in the seven-day roster, but she did not find the differences in the roster that show the pilots work more hours on a Sunday and a public holiday.

PN56

Roy Hill Holdings does not mention how many hours an employee needs to work on the 34 Sundays or six public holidays to be entitled to their shift worker status, but by referring to MEAA and Theatrical Employees Award case at paragraph 29 of Roy Hill Holdings, it shows that it excludes overtime shifts in the calculation.

PN57

So it follows that Roy Hill Holdings should be using the 38 ordinary hours under the National Employment Standards as a base to exclude overtime hours, and O'Neill DP should have done the same and realised that the pilots are working more ordinary hours on those days.

PN58

By not acknowledging the difference in the pilots' seven-day roster, the Deputy President did not acknowledge that the marine pilots are on the 24-hour shifts where they can work 14 hours in that 24-hour period, but she also doesn't acknowledge that they can work 98 hours in seven days, or 49 hours averaged per week over their two-week roster, and according to Roy Hill Holdings the pilots would need to work 40 days' worth of Sundays and public holidays to be entitled to shift worker status.

PN59

So that is, if we're taking the basis of the NES, about six 7.6-hour public holiday days, which is 45.6 public holiday hours per year, and then 34 Sundays equals 258.4 Sunday hours per year.

PN60

So that's a total of 304 hours they would need to work on a Sunday or a public holiday to be considered a shift worker, and we say that under the enterprise agreement that's only 18.45 days on a Sunday or 3.25 days on a public holiday for a pilot, because they can work 14 hours under their enterprise agreement.

PN61

The respondent at paragraph 36 of their submissions says that a pilot works 23 Sundays per year, so they're already working more Sundays per year than the Roy Hill Holdings decision, and the pilots are on an equal time roster where they

work week on and week off, so they would work approximately half of the public holidays in a year.

PN62

This year there are 13 public holidays in the Queensland calendar, so they would actually work 6.5 public holidays per year, and it's clear that the pilots work enough Sundays and public holidays to justify them being shift workers.

PN63

Then further to that, the test in Roy Hill Holdings, which is 34 Sundays and six public holidays, needed to be considered regularly working for the purposes of annual leave. It doesn't consider the words 'regularly working' in the ordinary sense and it should. For example, if I went for a swim at the beach once a fortnight or every second Sunday, I would tell people that I regularly went to the beach. So we ask the question, why can't workers get an extra week's leave when they can't go to the beach with their families every second Sunday and every second public holiday because they're working.

PN64

Then, finally for ground one, Roy Hill Holdings is a single Member decision of the Fair Work Commission, so it's within the Full Bench's power to correct this precedent and find that the pilots in this case are shift workers, and we ask the Full Bench to vary the Deputy President's decision to that effect.

PN65

With regards to ground two, we say that the Deputy President erred in failing to find that the marine pilots were not entitled to 5.5 days off in lieu of working public holidays.

PN66

The respondent cannot rely on the loaded rates decision to show that the pilots can have a loaded rate to compensate them for working on a public holiday, because the decision refers to the BOOT, which as the respondent points out at paragraph 45(b) of their written submissions, the BOOT is not relevant because the pilots are award-free.

PN67

In any event, we'll explain in our submissions that employees under an award must also get a day off for a public holiday or the day substituted, even if they are getting paid a loaded rate.

PN68

At paragraphs 24 and 29 of CMMEU v OS MCAP, the Full Court determined that the correct interpretation of section 114 is that employees have an entitlement under the National Employment Standards to be absent from work on public holidays, unless there's been a reasonable request not to work and the request has not been unreasonably refused.

PN69

The Full Court goes on to say that this NES entitlement cannot be displaced, because section 61(1) and section 55(1) of the Fair Work Act specifically says that

the National Employment Standards cannot be excluded by an enterprise agreement.

PN70

The question then becomes whether there's a reasonable request to work. Section 115(2) of the Fair Work Act allows for public holidays to be substituted for another day. So given days off in lieu of the public holiday, we say, is a very compelling argument that the request to work on the actual public holiday is reasonable, because the pilot will get that public holiday off at some point in the future.

PN71

So, in summary, OS MCAP says that the respondent cannot contract out of its obligations to give the pilots a day off on a public holiday, but they can give them a day off in lieu to compensate them and make it more likely that their request to work on a public holiday is reasonable.

PN72

We also say that the Full Bench in Canavan upheld that if employees do not receive the full National Employment Standards benefit under the agreement, the agreement has excluded the NES. So if the pilots are not given either the public holiday off or a substituted day off in lieu, then they're not getting their entitlement under the National Employment Standards.

PN73

As I said earlier, the respondent actually goes on to make our case in their written submissions, and paragraph 58(g) essentially says that the award is irrelevant to the pilots, because they're award-free, and that there's not a prescribed right for payment for public holidays at law.

PN74

So that leaves the question of why is the respondent trying to financially compensate a pilot for working on a public holiday by using a loaded rate when they know that they're not allowed to, and we say that it's now for the Full Bench to find both sides agree that the pilots are entitled to days off for working public holidays or in lieu of, and we ask that the Full Bench varies O'Neill DP's decision to ensure that the pilots get their entitlement to be absent on a day that is substituted for a public holiday by finding that the pilots are entitled to at least 5.5 days off in lieu of working the public holidays.

PN75

Then, just finally, in our earlier written submissions we'd not really turned our mind to whether the employees under an award would also be entitled to public holidays off if they were getting paid a penalty rate for that disability. In fact we'd sort of formed the view that being paid a penalty rate probably did compensate them enough for working on a public holiday, but upon further reflection, we've actually formed the view that OS MCAP confers the right to be absent from work even though they're getting paid extra on a public holiday.

PN76

The Full Bench in Canavan upheld that if the employee does not receive the full National Employment Standards benefit under the agreement, the agreement has excluded the National Employment Standards. So it follows that the employees under an award should also be entitled to be absent from work on a public holiday or get the public holiday substituted for another day off, otherwise they're not getting their full entitlement under the National Employment Standards.

PN77

We're not actually seeking to press that argument here, because it's not relevant to our case, but we just raise it because the Full Bench may want to turn its mind to that issue when making its decision.

PN78

Then, in closing, we submit that the respondent in their written submissions has provided the Commission with no convincing arguments. We've met the public interest requirement, and we've shown that there have been appealable errors in the original decision.

PN79

We have also shown that the respondent agrees that there's no legal basis on which an employee can be paid to take away their right to be absent on a public holiday, and we say that the Full Bench should take it that there's no valid opposition to the propositions that we've advanced.

PN80

We submit that the Commission should vary the decision to say that the marine pilots are shift workers, and that they're entitled to be absent on a day that is substituted for a public holiday by finding that the pilots are entitled to at least 5.5 days off in lieu of working public holidays.

PN81

DEPUTY PRESIDENT CLANCY: Thank you. Thank you, Ms Ellis. We'll hear now from Ms Willoughby, please.

PN82

MS WILLOUGHBY: I apologise, and thank you, your Honours, I neglected to turn myself off mute. The starting point of course is whether permission to appeal ought to be granted, and the appellant says that they've demonstrated a public interest, but the respondent's position is that they have not demonstrated a public interest and therefore that this will be a discretionary decision for the Full Bench.

PN83

Of course we accept that if your Honours are satisfied that there is a public interest that you must grant permission to appeal, we say that you should not be so satisfied, and I will go through why shortly. However, of course, even if you're not satisfied that there's a public interest, you have the discretion to grant permission to appeal, and we say you ought not, because there are no matters of public importance or general importance in application here.

PN84

It is accepted by the respondent that the public interest test is not one that can readily be defined, but for the purposes of this application to appeal I think both parties, appellant and respondent, agree that an appropriate starting point is the test that was set out in Glaxo Smith Kline. Would your Honours like me to take you to that relevant passage? It is set out I believe in both of our written submissions.

PN85

DEPUTY PRESIDENT CLANCY: No. Thank you. We're familiar with it.

PN86

MS WILLOUGHBY: Thank you. So what we say is that that test sets out a number of criteria, the first being that there are issues of importance (indistinct) general application. We say those matters are not present here. Where there is a diversity of decisions at first interest, we say that is also not present and don't understand it to be argued.

PN87

Where the decision at first instance manifests an injustice, we understand that that's argued, but our position is that it has not been made out, or that the result is counterintuitive, and we say that that is also not made out in these circumstances. So we're saying none of the relevant factors are present in this case.

PN88

So we direct our submissions to the limb of issues of importance and general application, because that's how we understand the appellant to frame their argument. The respondent disputes that there are any such issues present in this case.

PN89

If I can turn to the issue of shift workers, the appellant says that the original decision is a matter that affects other employees in the industry that are engaged on equal time rosters, working 24-hour shifts, and that, in its submission, should therefore be regarded as shift workers.

PN90

It's difficult to see how the decision to approve this enterprise agreement, which covers a single enterprise, with 36 affected employees, and in circumstances where most marine pilots nationwide are covered by awards, how that could be a matter that affects other pilots outside of this single enterprise.

PN91

We say there is no matter of general application or importance beyond this enterprise. It's only these 36 workers that are under consideration.

PN92

It's inferred that the issue that the appellant raises is that the Deputy President determines that the workers were not shift workers, and the fear that the appellant appears to hold that this reasoning may be followed in future matters.

PN93

However, we say that it's of limited application because this decision applies only to the respondent's marine pilots, and further that the decision that was made by the Deputy President does not have any precedential value on that point, because as the appellant points out, her Honour did not set out the facts upon which she relied in order to determine that point, and so that decision cannot be relied upon to have some precedential value in similar facts.

PN94

She did so, we say, in part because she was satisfied that the affected workers were not shift workers, but in any event, they were entitled to sufficiently to satisfy the requirement of section 87 regardless of whether they were shift workers. We say that is clear in her decision on this point, which is in paragraph 14 of that decision.

PN95

We also say that decision was open to her to make on the evidence that was before her. It was clearly articulated in the decision that the Deputy President was satisfied that section 55 of the Act was not contravened, and that finding applies equally to section 87 and section 114, so equally to the question of shift workers and public holidays.

PN96

The appellant relies on this alleged effect on other employees as granting a substantial injustice, but we say there's no material that's before the Full Bench that would support that assertion, in circumstances where the application of this enterprise agreement is limited to 36 workers in an industry that is predominantly award-covered.

PN97

Given that the decision affects only 36 workers, who in any event have five weeks of annual leave, there is no basis to say that this decision impedes upon their NES entitlement to that right.

PN98

As to the issue of public holidays, if I could turn to that next. The appellant takes the position that the agreement deprives the affected workers of their right to be absent on public holidays, and relies on that position to suggest that this decision is susceptible to correction.

PN99

However, we say there are three problems that are inherent in that submission. The first is that it assumes the existence of a right for workers to be absent on public holidays, but we say that right is fettered by the operation of the Act.

PN100

This is clear in the drafting of section 114(3) of the Act, which provides that an employee may refuse an employer's request to work in one of two circumstances: where the employer's request is not reasonable, or where the employee's refusal is reasonable.

PN101

That leaves open a wide territory, where an employer makes a reasonable request, and there is no legitimate reasonable reason for refusal where an employee may be required to work on a public holiday.

PN102

That reasoning was applied in the case of the *CFMMEU v OS MCAP Pty Ltd* [2023] FCAFC 51. Would your Honours like me to give you the full citation? I am aware that it's in our list of authorities and our written submissions.

PN103

DEPUTY PRESIDENT CLANCY: No, thank you.

PN104

MS WILLOUGHBY: If I could perhaps take you to that decision, your Honours, specifically at paragraph 43 of that decision?

PN105

In her Honour's original decision, I believe there is a typographical error as to the passage that she relies upon, and I believe it's actually this passage and not paragraph 9 as is referred to in her Honour's original decision that she relied upon in making this finding. This passage specifically says:

PN106

> *An employer can ultimately require employees to work on public holidays who are involved in critical services or where it is desirable (although 'not critical') to remain open on public holidays in circumstances where the employer has satisfied the obligations imposed upon it under ss 114(2) and (3), namely, that it has made a request, that request is reasonable, and in circumstances where an employee's refusal is not reasonable.*

PN107

We therefore say that the first issue with this submission by the appellant is that it assumes an unfettered right to be absent from work on public holidays, and on the clear face of the NES, as supported by this Full Court of the Federal Court decision, that right is not unfettered.

PN108

Secondly, while the agreement does not expressly contemplate this situation, it does expressly provide that it's to be read in conjunction with the NES, and that the NES will override the agreement if it provides a greater benefit, and that's found in two places within the agreement, in clause 6, in a clause of general application, and also in clause 117, which deals specifically with one of the questions that's under consideration today.

PN109

I'm not sure if your Honours have in front of you the appeal book, but it's on page 39 of the appeal book. Obligations in regard to public holidays are as set out in the NES and this agreement. So it's made very clear that the NES is not being overridden by this agreement.

PN110

These employees do have a right to reasonably refuse a request to work on a public holiday. We don't resile from that, but it needs to be a reasonable refusal in order to enliven that entitlement to be absent.

PN111

The third point is that the decision clearly articulates the Deputy President's decision that the agreement does not contravene section 55, and inherent in that decision is the proposition that the NES is not offended by the agreement, and we say that decision was open to her on the evidence that was provided.

PN112

Accordingly, we say that the appellant's submission, which I am going to summarise as the decision must be corrected in order to enable the employees to gain the benefit of their NES rights cannot be accepted.

PN113

In respect of the issue of the public interest matter, the appellant also says that the original decision was made based on errors of law or fact. Although that is a discretionary consideration for your Honours to take into account, my submission is that that's not a matter that goes to the public interest per se.

PN114

The appellant says that the decision is 'sufficiently attended by doubt as to warrant its reconsideration', and that 'failing to correct the decision will erode confidence in the Commission.' However, there is nothing that is pointed to that supports that submission, in our position.

PN115

The matters that I've referred to in my opponent's submissions go only to the first limb, which is that it's a matter of importance and general application, and not to those other limbs, on my reading of those submissions. I'm unable to discern how those submissions go to any doubt about the application of the decision, or any way in which its approval could erode confidence in the Commission.

PN116

The respondent therefore says that those contentions must be rejected and it's not in the public interest for the matter to be heard on the appeal. Nor, in the respondent's submission, is there any merit to the substantive appeal which should ground your discretion to grant permission to appeal outside of the public interest for the reasons that have already been articulated, and are articulated in my written submissions. However, I will just touch on some high points as I go through the remainder of my submissions, if I may.

PN117

The next point that I wished to turn to is the actual way that the grounds of appeal have been framed. The appellant and the respondent agree that the principle in House v The King applies to the decision to approve the agreement. However, we do not agree that the grounds as formulated disclose a proper basis for this appeal.

PN118

We say that the relevant principle is found on page 505 of House v The King, and it is extracted in Coal and Allied Operations v AIRC at paragraph 21, which in our list of authorities is found at page 39. I'm sure your Honours will be well versed, however, I would like to go through those principles very briefly in order to demonstrate why I say the grounds of appeal don't satisfy them.

PN119

The first of course is: if a judge acted upon a wrong principle, allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, does not take into account some material consideration, then his determination should be reviewed.

PN120

We say none of those matters are properly drawn within the grounds for appeal, and it is not for the respondent to try to discern the proper grounds or to try to redraft them, nor is it for this Full Bench to do so.

PN121

As to the first ground, which is broken up into three limbs, as to ground (1)(a), the respondent is unable to identify how this ground falls properly within the passage cited, and we say that it ought to be struck out.

PN122

In effect that ground is that the Deputy President erred because she did not reasons for being satisfied that the pilots were not shift workers. We've tried to grapple with the ground as drafted, and it may be that the appellant intends to rely upon a later passage in the same paragraph in House v The King, which refers to where it may not appear on the face how the primary judge has reached the result embodied in the order, which for your Honours' reference is extracted in *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, which is on page 20 of our list of authorities.

PN123

However, if that is the position that the appellant is taking, in response to that proposition we say it does not stand as authority. The Deputy President was required to elucidate her reasons for reaching the relevant state of satisfaction. It's sufficient that she did so. Nor we say is the decision unreasonable or plainly unjust such that it would enliven the House v The King principles referred to in that passage.

PN124

There is no flow on effect, regardless of the characterisation as shift workers or not. Either way the workers received five weeks of annual leave per annum.

PN125

I'd like to deal with grounds (1)(b) and (2)(b) together, because they're closely connected and I think that is a more efficient use of time. Both of them deal with the decision that was made in the CFMMEU v OS MCAP Pty Ltd, which I've been referring to as OS MCAP. Both of them say that the Deputy President erred when she found similarities between the employees in that case and the marine pilots in this case.

PN126

Ground (1)(b) we say is, it's capable of discerning what it is that the appellant is saying in respect of ground (1)(b). What we understand the appellant to be articulating is that the Deputy President acted upon a wrong principle, being the principle set out in CFMMEU v OS MCAP. If that's the appellant's intention, then it's accepted that that's properly articulated. If they are agitating a different ground of appeal, then we dispute that it's capable of being discerned.

PN127

But the basis for that contention appears to be found in paragraph 19 of their submissions, where they refer to the 'difference in shift arrangements' between the employees in that case and employees of the respondents, and specifically, that one group works 24-hour shifts, being the respondent in this matter, and that the other group works 12-and-a-half-hour shifts and a mix of day and night shifts.

PN128

That factor is undeniably correct, but it does not lead to the conclusion that the Deputy President acted upon a wrong principle. The relevant considerations upon which she relied are set out in paragraphs 10 to 12 of her decision, and they're evident on the face of the decision.

PN129

Both operations are 24-hour-a-day, seven-day-a-week operations, operating 365 days a year, and both sets of employees operate on the basis that the workers may be required to work on public holidays and that remuneration for doing so is incorporated into their base remuneration.

PN130

Those are the matters that she was guided on in respect of that decision. The rostered working hours do not form part of her decision, and nor should they, because it's not an issue that forms part of the (indistinct) for her either decision or the decision of the Full Court.

PN131

The fact that there are similarities between the groups of workers, albeit that their working arrangements are not identical, and further that those similarities lend themselves to the conclusion that the relevant employer may require the employees to work public holidays in certain circumstances, is one that was open to the Deputy President to draw in making her decision.

PN132

This is a matter which is articulated in paragraph 49 of our written submissions. I don't intend to take your Honours there, but I do rely upon that paragraph also.

PN133

I'd just also like to come back to an extract from OS MCAP, which I refer to at paragraph 43. Leading on from that, in paragraph 44, that decision clearly says that an employer is able to have a roster which includes public holidays, and at an earlier time, in paragraph 40, the Full Court said that 'an employee must work if the request is reasonable and there is no reason for refusal which is reasonable.'

PN134

If I could turn to ground (2)(b), it is more difficult to discern what it is that is said to be the way that it satisfies the House v The King principles here, but if the Commission is against us – sorry, if I turn to (2)(b), the ground should be rejected because the similarities that are noted by the Deputy President, which I've already referred to, are in fact relevant for the question of whether the employer is entitled to require the workers to work on public holidays, to which she averts in paragraphs 11 and 12.

PN135

We say she had regard to the correct facts. She found that the NES was not contravened, and her Honour therefore found that the rights that they had within the NES to refuse to work if that refusal is reasonable are not impeded by the decision.

PN136

If I could turn then to ground (1)(c), which is that the Deputy President has erred by failing to distinguish the facts in O'Neill v Roy Hill. The first matter to note is that no reference to that decision appears at all on the face of her Honour's decision, and it's far from apparent that she relied upon it at all.

PN137

However, if it is to be inferred that she did so, again we cannot identify how the fact that she failed to distinguish the facts is a matter which falls within the House v The King proposition, which is cited. We therefore say it ought to be struck out.

PN138

If the Commission is against us on that point, the respondent agrees that that decision is not binding upon the Full Bench. Of course it was a decision of a single Commissioner. We understand that. It was not binding on the Deputy President for the same reason.

PN139

However, if we look at paragraph 14 of the agreement decision, the Deputy President in effect says two things: one, that she's satisfied that the workers are not shift workers, a finding which we say was open to her on the material that was before her; and two, even if they are shift workers, they're receiving the requisite five weeks' annual leave.

PN140

There's no basis on the face of the decision for the appellant to ignore that second proposition, assume that it formed no part of her decision, surmise that she made the decision solely on the basis of an authority that she did not cite, and therefore assume that she fell into error because she failed to distinguish the facts in that case.

PN141

On that last point, the respondent also says that there's no basis to assume that the decision in Roy Hill should be distinguished, particularly in favour of the decision

in the four-yearly review of modern awards for the Registered and Licenced Clubs Award, which the appellant referred to in the written submissions.

PN142

In that regard, again I won't take your Honours through them, they're already in front of you, but I refer specifically to our written submissions at paragraphs 51 and 52.

PN143

To the contrary, Roy Hill concerned award-free employees for whom the definition in section 87(3) of the Act was in issue, whereas the modern award review by definition was concerned with the application of the award to award-covered employees. The modern award review is therefore less relevant to the question of this enterprise agreement than Roy Hill.

PN144

We would also note that the decision in Roy Hill is not an isolated one. In making that decision the Commission articulated a long history from paragraphs 25 to 33 of that decision, which is on page 243 of our list of authorities; a long history was articulated that supports the proposition that Roy Hill stands for, before the Commission in that case concluded that they were entitled to have regard to that historical context, and that consequently, having regard to the earlier decisions, that the determination that an employee regularly works on Sundays and public holidays if they have worked at least 34 Sundays and six public holidays in a year is one that was not only open to the Commission in that case, but in light of its long historical background and context ought to be followed, because it would be a significant departure from the current case law to say that it ought not be followed, and it would certainly be insupportable, in our submission, for that decision to be made on the basis of a decision reviewing a modern award which has no application in this case.

PN145

A final point that I'd like to make in that respect is that in fact the number of Sundays that are being worked is not the number that is submitted by the appellant at all, because based on a 52-hour week, it's accepted that it's a week-on week-off roster, but it fails to take into account that there are five weeks of annual leave taken by the employees, which means that it's a 47-week working week, which brings the number of Sundays worked down to 23.5 Sundays per year, except that on average it would be 5.5 public holidays. But those matters don't come close to meeting the threshold that's required.

PN146

If I could turn then to the grounds of appeal concerning public holidays? I'll deal with grounds (2)(a) and (2)(c) together, because they're closely connected, and ground (c), in my submission, appears to operate on the assumption that ground (a) has been accepted.

PN147

Those grounds are that the Deputy President erred by failing to acknowledge that as award-free employees the NES does not provide the pilots an entitlement to financial compensation for working public holidays, and ground (c) is that the

Deputy President erred by failing to acknowledge that the marine pilots are therefore working at a loss on a public holiday.

PN148

Again, it's difficult to discern how that ground falls within the (indistinct) from House v The King, which has been cited, and again we say it ought to be struck out, but if the Commission is against us on that, we have grappled with the ground, the basis for the ground, having had the benefit of the submissions from the appellant.

PN149

It may be that the intention is to say that the Deputy President failed to take into account a material consideration, and in response to that proposition, the respondent says that it's implicit in the findings of paragraph 12 that the Deputy President expressly considered the source of the workers' entitlement to remuneration for public holidays worked.

PN150

Additionally, we say that it's not necessary in any decision approving an enterprise agreement for the Commission to acknowledge the effect of the NES. The effect of the NES is that there is no compensation provided for in it for working on public holidays. The effect of it is that you may be required to work on a public holiday, and you may not receive compensation for it, unless there is compensation from some other source of entitlement.

PN151

There is no compensation in the NES that's absolutely true, but to say that the Deputy President was required to expressly acknowledge that, it's difficult to see how that proposition could be correct in any case. We therefore say ground (2)(a) is baseless.

PN152

Because ground (2)(c) appears to be wholly predicated on an assumption that there's no entitlement to additional pay, we say ground (2)(c) must also fail.

PN153

In addition to that, we say it's difficult to say how the marine pilots are working at a loss in circumstances where the enterprise agreement expressly provides that they are compensated for working on public holidays in two ways.

PN154

That is in clause 118 of the enterprise agreement, which provides they're compensated for working on public holidays by their remuneration, which is accepted by all parties as above the high income threshold, and in addition, by the addition of one week of annual leave over and above the NES entitlement.

PN155

A further point that I'd like to make in that regard is that the NES is not prescriptive about the way in which an employer and employee can agree to substituted days for public holidays, and in our submission, the provision contained there that I've just referred to in the agreement is sufficient to

demonstrate that that additional five days of public holidays, or one week as it were, is designed to substitute for the public holidays. We say that satisfies the requirements of section 115(3) of the Act.

PN156

If I could turn finally to ground (2)(d), the respondent again struggles to identify how this ground falls within the passage cited in the appellant's submission and says that it ought to be struck out.

PN157

Additionally to that, if the Commission is against us on that point, the respondent refers again to the permissive nature of section 115(3) and (4) of the Act. The starting point is that there is no unaggregated entitlement in the Act either to be absent from work or for the substituted public holiday. There is no basis on which the employees can say we have an unfettered right to be absent from work. That is clear from the drafting of the NES and from the decision in CFMMEU v OS MCAP. Nor is there an unfettered right for a substituted public holiday.

PN158

If we can turn to section 115 of the Act, both of those sub-provisions (3) and (4) provide:

PN159

A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day -

PN160

An employer and an award/agreement free employee may agree on the substitution of a day or part-day for a day or part-day.

PN161

There is no legal basis for the proposition that where an employee is required to work on a public holiday they must be given either pay or an alternative day off. Even if the Full Bench is against us on this point, we say that in any event they are adequately compensated by the additional week, and that provision that I've referred to, section 115(3), is sufficient to be an agreement for substituted days off.

PN162

It's open to conclude that clause 118 of the agreement provides that the additional week of annual leave is provided as a term substituting for those public holidays worked.

PN163

Finally, again I'm not going to read the submissions that we've already put in writing, but I would refer your Honours

PN164

specifically to paragraphs 23 and 29 of the submissions that we've put in writing, and for those reasons, your Honours, we say that permission to appeal should be

refused, and in the alternative, if permission is granted, that the appeal should be dismissed.

PN165

Are there any questions that your Honours have that I could assist you with?

PN166

DEPUTY PRESIDENT CLANCY: No, thank you, but we will hear any submissions in reply from Ms Ellis, if she'd like to address the Bench.

PN167

MS ELLIS: Thank you. I'll just work backwards. I believe that our earlier written submissions and oral submissions would cover everything, however, I just want to make a couple of points just to clarify our position.

PN168

The respondent made submissions that they don't understand how our grounds in our form 7 have any basis, and I'm confident that the earlier submissions that we made will provide the Bench enough clarity to make the correct decision on those.

PN169

The respondent claimed that it's not necessary for the Full Bench to decide, or the Commission to decide issues of the NES when approving an agreement, and we say that it is relevant for the Full Bench to make clear what the legislation's expectation is on National Employment Standards when they know that there are issues in dispute.

PN170

It would prevent further disputes in future if everybody could look at the decision at the front of the enterprise agreement and know exactly what they're entitled to. So in our submissions, we say that it is for the Full Bench to clarify these issues.

PN171

With regards to the similarities, the respondent raised issue with the similarities where we found in OS MCAP that the Deputy President acted upon a wrong principle when comparing employees in our case with employees who work 12-hour shifts, and they said that both operations are 24/7, but we say that that does not go far enough.

PN172

So yes, both operations are 24/7, but the employees in the other cases are not available; they're not on call essentially for that full 24 hours. So once they finish their 12 hours, or their nine-and-a-half hours or the 12-and-a-half hours, they go home, they finish. These pilots are sitting around waiting for shifts. So we say that it's open for the Full Bench to distinguish those cases.

PN173

We also say that, with regards to the respondent's submissions that the application of this appeal is only going to affect 36 workers because essentially everyone else is on an award or an agreement, we say that that's not true and this employer has

pilots in Melbourne who are not on an award and they're not on an enterprise agreement, and we say that this decision will affect them. It will also affect anybody who needs to try and interpret the National Employment Standards when it comes to public holidays and annual leave.

PN174

We continue to rely on all of our submissions that we've met all the tests in Glaxo Smith Kline, Coal and Allied, and House and King in saying that there are sufficient grounds in granting this appeal, and we say that even if the Bench isn't with us on either matter, both the matters of whether they're entitled to days off in lieu of public holidays and whether they are shift workers, both need to be determined.

PN175

We also say that the Full Bench is bound by OS MCAP. That decision says that there is a right to be absent on a public holiday, and we say that the Full Bench cannot divert from that.

PN176

We say that – just to clarify – the respondent made submissions to the effect that the Deputy President made the right decision based on Roy Hill Holdings and based on OS MCAP, and we say no, the Deputy President did not make the right decision, because it was based on incorrect facts. There's nothing further from the AMOU.

PN177

DEPUTY PRESIDENT CLANCY: I have a question for you, Ms Ellis.

PN178

MS ELLIS: Okay.

PN179

DEPUTY PRESIDENT CLANCY: I have a question for you. If we are with you on either of your points, what do you ask us to do about the decision to approve the agreement? Do you want us to quash the decision to approve the agreement, or are you just seeking the Full Bench to rewrite the reasons for the approval of the agreement?

PN180

MS ELLIS: We want the agreement to be in place. We just want it to accurately reflect that the pilots are entitled to days off in lieu of public holidays, and that they're entitled to be called shift workers. So by any means available to you, whether it be vary the decision or send it back to the original Member, or ask the company for undertakings to say that they accept that the employees are shift workers and entitled to their public holidays, anything that you see fit.

PN181

DEPUTY PRESIDENT CLANCY: Thank you.

PN182

MS WILLOUGHBY: Your Honours, may I be heard on that point?

PN183

DEPUTY PRESIDENT CLANCY: You may.

PN184

MS WILLOUGHBY: In our submission, if your Honours are against us and decide to uphold the appeal, it will be open of course to your Honours to quash the agreement, however, we say that it's not possible for it to be varied. It would be a substantial variation to the terms, and could only occur by way of an undertaking, which of course the employer is not obliged to give.

PN185

So we would say the outcome must be that the matter is either quashed and remitted, or quashed and a new agreement is required. It can't be the case that the terms are varied unilaterally without an undertaken given by the employer, which they are not required to do.

PN186

MS ELLIS: May I please be heard on that?

PN187

DEPUTY PRESIDENT CLANCY: Yes.

PN188

MS ELLIS: We say that the whole point of us being here is to ensure that this agreement is fair and ensures that their employees are entitled to what they are under the National Employment Standards. If the Full Bench was to quash the agreement that would be horrendous. The pilots would go backwards literally.

PN189

So we respectfully ask that the Full Bench do everything in its power to ensure that the agreement goes ahead and that the employees are entitled to their fair entitlements.

PN190

DEPUTY PRESIDENT CLANCY: Thank you. The Full Bench will reserve its decision and in due course a written decision will be sent to the parties and published, but in the meantime we thank the parties for the material that they have submitted ahead of today's hearing, their submissions today - Ms Ellis, we note that you will file your written closing submissions from today and serve them on the respondent. There being nothing further - - -

PN191

MS WILLOUGHBY: If - - -

PN192

DEPUTY PRESIDENT CLANCY: Sorry, yes?

PN193

MS WILLOUGHBY: May I ask would you benefit from me producing today's oral submissions into a written form as well? I'm happy to do so if you would find benefit from that.

PN194

DEPUTY PRESIDENT CLANCY: If you're happy to do so, that would be welcomed by the Bench.

PN195

MS WILLOUGHBY: Thank you, your Honours.

PN196

DEPUTY PRESIDENT CLANCY: There being nothing further then, the Commission will adjourn. Thank you.

ADJOURNED INDEFINITELY [11.26 AM]