

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

65261-1

**VICE PRESIDENT WATSON
JUSTICE BOULTON, SENIOR DEPUTY PRESIDENT
COMMISSIONER ROE**

B2011/3995

s.266 - Industrial action related workplace determination

**Australian Licensed Aircraft Engineers Association, The
and
Qantas Airways Limited
(B2011/3995)**

Sydney

2.28PM, MONDAY, 19 DECEMBER 2011

PN1

VICE PRESIDENT WATSON: Can we have the appearances please?

PN2

MR F. PARRY SC: If the tribunal pleases, I seek permission to appear for Qantas Airways. With me are MR B. DUDLEY and MS S. DUC. If the tribunal pleases.

PN3

VICE PRESIDENT WATSON: Mr Parry.

PN4

MR G. NORRIS: Norris, G. on behalf of the Australian Licensed Aircraft Engineers Association, and with me, your Honour, I have MR W. VASTA and MR M. GANT. Mr Vasta is the assistant federal secretary and Mr Gant is the trustee of the organisation.

PN5

VICE PRESIDENT WATSON: Mr Norris. Can I have television camera off now, thank you. Any objection to Mr Parry's application for permission?

PN6

MR NORRIS: There's no objection, your Honour.

PN7

VICE PRESIDENT WATSON: Yes, permission is granted, Mr Parry. Yes, Mr Parry.

PN8

MR PARRY: If the tribunal pleases, firstly we apologise for the delay, there was some minor technical glitches before Christmas. By agreement with Mr Norris I'll go first.

PN9

Qantas appears today in respect of the full bench exercising its powers to make a workplace determination. There is, of course, no applicant for the making of such a determination or indeed a respondent. Once the order terminating the protected actions of Qantas and the ALAEA was made on 31 October 2011, and all the matters were not settled at the end of the 21 day negotiating period, the requirement for the making of a determination became effectively inevitable. In that environment, the ALAEA and Qantas continued to narrow their differences and they have reached a stage where today both appear to consent to the making of a determination by Fair Work Australia pursuant to section 266 of the Fair Work Act.

PN10

What Qantas would propose to do today, subject to any views of the full bench, is to file in the tribunal a statement of Mr Simon Brown of Qantas which goes to the jurisdictional requirements and the statutory requirements for the making and the content of a workplace determination. We will then hand up a document going to the BOOT requirements and then make submissions as to why a determination in the form agreed can be made.

PN11

Can we make the observations at this stage that this is to our knowledge the first workplace determination made under the Fair Work Act. There is no precedent we can directly refer to. The concept of a workplace determination was introduced by the WorkChoices amendments to the Workplace Relations Act in 2006. Before that for some ten years there had been an instrument generally called the section 170MX award that could be made in similar circumstances that prevailed here.

PN12

Authorities from that history may provide some limited assistance to the full bench in dealing with the requirements of part 2(5) of the Act. The rules and regulations to the Fair Work Act do not prescribe any particular matters or processes that need to be followed. Accordingly, we have prepared material and submissions today based on our understanding of the requirements of the Act. If there are matters on which the full bench either requires submissions or further evidence, Qantas will do what it can to assist.

PN13

The statement that I referred to, being the statement of Simon Brown, was sent to the full bench in soft copy and we have a hard copy version for the full bench. If I could hand that up to the tribunal?

PN14

Now, what I would propose doing is taking the tribunal through the document in a general way, not line by line, and then asking Mr Brown to swear to the truth of that statement and then Mr Norris has indicated that he would want to hand up a statement of Wayne Vasta, which we have seen and we have noted concerns with, and then we would deal with the BOOT test briefly and then make some submissions. Now, if that's satisfactory to the tribunal I'll just have a quick – I'll take the tribunal quickly through the statement of Mr Brown.

PN15

VICE PRESIDENT WATSON: Yes.

PN16

MR PARRY: There's one minor amendment that Mr Brown will swear to, which is in paragraph 45(b) and it's a typographical error, "45(b) refers to clause 22.1(a)", that should be 22.2.1.

PN17

Now the statement deals with some of the background to the negotiations. The fact that there was notices of representational rights issued and bargaining commenced. The tribunal will see, from paragraph 9, that there was one other bargaining representative that was appointed and his appointment instrument appears at SGB3. I'll deal, as Mr Brown does, shortly with Mr Moorehead's attitude to this proceeding today and the making of a determination.

PN18

VICE PRESIDENT WATSON: Might his position be relevant also in terms of the identification of agreed terms with the scheme of the Act?

PN19

MR PARRY: Well, the tribunal will see at paragraph 37 of the statement of

Mr Brown that there was an email from Mr Moorehead in relation to his desire not to participate in the processes associated with the making of a workplace determination of these proceedings, and that takes the tribunal to SGB14. And I should indicate I think to more directly answer your Honour's question, at the end of the – yes, SGB14, he indicates that he does not want to participate in the FW arbitration as he believes, and I'm paraphrasing his words, negotiations have been completed to both parties' satisfaction.

PN20

VICE PRESIDENT WATSON: But doesn't the notion of agreed terms under the Act depend on the position at a particular point in time, at the expiry of the 21 days?

PN21

MR PARRY: Yes, at the expiry of 21 days there needs to be matters that are non-agreed for the tribunal to have jurisdiction.

PN22

VICE PRESIDENT WATSON: And agreed are matters which are agreed at that time between the employer and the bargaining representatives. The question is whether that's all bargaining representatives.

PN23

MR PARRY: Well, we would say it's all bargaining representatives.

PN24

VICE PRESIDENT WATSON: Well, what information do we have as to Mr Moorehead's views at that point in time?

PN25

COMMISSIONER ROE: I suppose more precisely that email is the 20 – is dated 22 November, as I understand it, is that, and what was the date at which the – which was the, what was the relevant date for the purposes of a clause – of the clause being you've outlined the agreed matters?

PN26

MR PARRY: 21 November was the – at the end of the 21st day that was the time.

PN27

COMMISSIONER ROE: So that was 21 November?

PN28

MR PARRY: That's right.

PN29

COMMISSIONER ROE: So what you're saying is, I take it, is that that statement of Mr Moorehead's is that as at 21 November he agrees that they are the agree – that those matters were agreed because he's saying that he believes the negotiations have been completed to the parties' satisfaction.

PN30

VICE PRESIDENT WATSON: Well, the question what he meets the day after the 21st day; is he saying he agrees with what the ALAEA position was at that time or the Qantas position or something else, or is he talking about more the

process rather than the content? You can take these questions on notice, Mr Parry. We may well have some – some questions of this nature that might need to be addressed at some – some point. I don't think we need to necessarily delay if there's not a – not a ready answer.

PN31

MR PARRY: If the tribunal please.

PN32

MR NORRIS: If I may, your Honour, with Mr Parry's indulgence, the ALAEA (indistinct) with Mr Moorehead acted on his own behalf totally, and that the email of the 22nd, it would be our submission that that would be read – he, he can only be speaking for himself.

PN33

VICE PRESIDENT WATSON: Yes.

PN34

MR NORRIS: And so therefore that would mean that he believes our negotiations (indistinct) himself have been completed to both parties' satisfaction. So, it would appear on the surface of it that there are no extending issues between Mr Moorehead and Qantas at that time. Hence, his non-appearance here today. So, as a bargaining representative, and by the nature of the workings of 266, we've no issues therefore between him and Qantas and ourselves for that matter, he wouldn't necessarily be here.

PN35

VICE PRESIDENT WATSON: So if the ALAEA and Qantas had agreed on certain matters, and Mr Moorehead through his separate discussions had agreed with Qantas as well, then the agreed matters are in common between both bargaining representatives.

PN36

MR NORRIS: The – one, one – they may well be. The agreed matters may be but it may be that Mr Moorehead has reached agreement on all matters.

PN37

VICE PRESIDENT WATSON: Certainly, but I'm just raising the issue – we're required to put agreed matters into a determination. So it's a question of what are the agreed matters? A lot depends on the point, not now but at – on the 21st of - -

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PN38

MR NORRIS: Yes, I think Mr Parry's going to get to that - - -

PN39

VICE PRESIDENT WATSON: Yes.

PN40

MR NORRIS: - - - because in Mr Brown's statement he does deal with that in further exhibits.

PN41

VICE PRESIDENT WATSON: Yes.

PN42

MR PARRY: Yes, the – so that was the position on the – with regard to Mr Moorehead. And I take it partly on notice, but I'll continue to deal with it as best I can and probably return to it at some stage, if your Honour pleases. That's his position as of 22/11/2011. Then the tribunal will see there was an email sent to Mr Moorehead on 16 December which was following the endorsement of the proposal by the ALAEA, and he – and attached to that was a document which was the determination that we've placed before the tribunal today, and his attached reply is in SGB16, which the tribunal will note, "Please consider this email to be my acceptance of the proposed determination attached". That's the material with regard to Mr Moorehead.

PN43

Now, the full bench made the order, as the tribunal has noted, on 31 October. There was the post-industrial action negotiating period referred to in paragraph 24 of the statement of Mr Brown. And there were conferences that were – that had taken place. And at paragraph 26, of the conclusion of the post-industrial action negotiating period, no bargaining representative sought to extend that period for a further 21 days under section 266(4) of the Act. Now, that then places the tribunal in the position dealing with section 266 of the Act which deals with the circumstances where the tribunal gains jurisdiction to make an industrial action related workplace determination. That is: 1(a) a determination of industrial action instrument has been made, and that's manifestly the case; (b) the post-industrial action negotiating period had ended. That ended on midnight on 21 November and the bargaining representatives for the agreement have not settled all the matters that were at issue during bargaining for the agreement. Now to take up, your Honour, the presiding members' observations, that would seem to suggest that all the bargaining representatives would have had to have settled all the matters that were at issue for the tribunal not to have jurisdiction. And we would say, even leaving aside the position of Mr Moorehead, that that was clearly not the position. And in those circumstances Fair Work Australia must make a determination as quickly as possible after the end of the period. And the areas to be – the terms of that workplace determination are set out in section 267(1); that is it must include the terms set out in subsections (2) and (3). (2) deals with agreed terms. (3) deals with terms dealing with matters of issue, and there is then core terms and mandatory terms.

PN44

The tribunal will see from the statement of Mr Brown, that paragraph 27 and on deal with the matters that had been agreed by the bargaining representatives. That sets out a number of matters that have been agreed to being included in the proposed EBA9. And the tribunal will also see, in paragraph 28, that it had been agreed that the Lamey EBA8 would form the basis of the proposed EBA9. So those terms would in our submission be included in the agreed terms.

PN45

VICE PRESIDENT WATSON: Would I be right in observing that if there was an outstanding claim in relation to a clause in EBA8, which has since been withdrawn but was extant at the – at the end of the post-termination negotiation period, that that could not be – it would not be an agreed term. It might be – it might be agreed now but it would not fall within the definition of an agreed term in the Act.

PN46

MR PARRY: Yes, that would be right.

PN47

VICE PRESIDENT WATSON: Yes. So it's not simply a matter of looking at what is now agreed and comparing that to EBA8. It would be necessary to identify what outstanding claims existed at that time, unsettled claims, to determine whether the terms of EBA8 were agreed at that time or not.

PN48

MR PARRY: Yes, I think I follow your Honour. I think I'm not going to take issue with that. Well, then – well, the terms of EBA8 would either come as agreed matters or matters that still – that they dealt with were still at issue.

PN49

VICE PRESIDENT WATSON: Yes.

PN50

MR PARRY: Yes.

PN51

VICE PRESIDENT WATSON: Yes.

PN52

MR PARRY: Now you don't terms of EBA8, that there's no contest about somehow falling through artificial cracks.

PN53

VICE PRESIDENT WATSON: No.

PN54

MR PARRY: No.

PN55

VICE PRESIDENT WATSON: Yes.

PN56

MR PARRY: Mr Brown's statement deals with matters still at issue, and at the end of the post-industrial action negotiating period, and he identifies those issues which were still not resolved on the big night on 21 November. And he then deals with matters that were withdrawn during the – withdrawn subject to certain matters. So at the end of the period there were matters that were agreed. There were matters that were still at issue which meant that the tribunal had jurisdiction to proceed to make a determination.

PN57

Paragraph 31 deals with the directions giving - - -

PN58

JUSTICE BOULTON: Mr Parry - - -

PN59

MR PARRY: Sorry.

PN60

JUSTICE BOULTON: - - - before, before you go on, in relation to the issues that or the matters that were still at issue, can you identify for me where the matters,

which at least have been reported to be matters in contention; issues such as the servicing of the A380s in Australia, and issues like security of employment, where they feature in the list that's in either paragraph 29 or might have been paragraph 27, and the extent to which they're issues that might need to be addressed?

PN61

MR PARRY: Your Honour, clause 11 is one clause I think is getting job security. It was clause 11 in the previous EB. It's still clause 11 in the existing EB.

PN62

VICE PRESIDENT WATSON: The existing EB being EB8?

PN63

COMMISSIONER ROE: And that's SGB1 is it, yes?

PN64

MR PARRY: There is – SGB1 is EBA8.

PN65

COMMISSIONER ROE: Yes.

PN66

MR PARRY: SGB13 is the proposed workplace determination.

PN67

COMMISSIONER ROE: Yes.

PN68

JUSTICE BOULTON: Is this the one with the note at the bottom of it, "Qantas version 9.12.11"?

PN69

MR PARRY: I'm sorry, I didn't quite catch that, your Honour.

PN70

JUSTICE BOULTON: At the bottom of the front page, is it the one that has got a note on it, "Qantas version 9.12.11"?

PN71

MR PARRY: No, no, your Honour. That – what the – Qantas has filed a determination in accordance with the directions of the tribunal. Last Friday agreement was reached on the terms of the determination to be made which replaces that part – instrument to be arbitrated. I think the document your Honour's looking at is that file document that was to be with - - -

PN72

JUSTICE BOULTON: The determination.

PN73

MR PARRY: The determination. But as of today, it is the document which is SGB13, which is the instrument that we and the ALAEA and the other bargaining representatives seek to have made as a determination.

PN74

JUSTICE BOULTON: So the other document that I'm referring to is not

necessarily of great relevance right now?

PN75

MR PARRY: No.

PN76

JUSTICE BOULTON: No, good.

PN77

VICE PRESIDENT WATSON: And which document did you refer to as the current agreement?

PN78

MR PARRY: The current agreement is SGB1.

PN79

VICE PRESIDENT WATSON: Yes.

PN80

MR PARRY: That is the current EBA3 – I'm sorry, EBA8.

PN81

VICE PRESIDENT WATSON: And you referred us to clause 11.

PN82

MR PARRY: Yes, and there were – can I start from this in answer to your Honour Justice Boulton's questions, that there were claims that had been made in respect of servicing of A3A and security of employment that went beyond clause 11 and were not pursued at the end of the 21 day period, so they don't form part of the matters at issue at the end of that period. But the provisions with regard to clause 11 and job security were an issue and the parties have agreed now that that was what in clause 11 is the position all bargaining representatives want in the determination going forward.

PN83

VICE PRESIDENT WATSON: So there was a matter at issue concerning that clause at the end of the 21 days?

PN84

MR PARRY: Yes.

PN85

VICE PRESIDENT WATSON: And where is that reflected in clause – paragraph 29 of the affidavit?

PN86

MR PARRY: If your Honour would just hold the – the position here is effectively that dealt with in that part of Mr Brown's affidavit from – with regard to 27 and 28. It was a matter of issue during the period but further claims in addition to that set out in clause 11, but those further claims I've indicated were not pursued at the end of the period. The position now with regard to the agreed terms to go into the determination includes clause 11.

PN87

VICE PRESIDENT WATSON: You'd understand our question as really to understand whether we're required to give effect to clause 11, as an agreed term

within the meaning that it has, or whether it's now a consent position that we still need to be satisfied is appropriate, having regard to the factors in section 275. So it's a question of when it became agreed. And I thought you said before that it was not pursued after the end of the 21 day period, but I don't know whether that's the same thing as saying it was an agreed matter at the end of the 21 day period.

PN88

MR PARRY: Your Honour, perhaps I'll take that on notice. I don't want to say something that might be inconsistent but I might have a break at some stage and have a quick talk to Mr Norris because I say anything further - - -

PN89

VICE PRESIDENT WATSON: Yes.

PN90

MR PARRY: - - - with regard to that.

PN91

MR NORRIS: If it pleases, your Honour, Mr Parry - - -

PN92

VICE PRESIDENT WATSON: I think – I think it's appropriate, Mr Norris, if you talk to Mr Parry when there's a break and we hear from you in due course. We might have a number of questions and it's really to ensure that we are following the requirements of the Act, being the first case, and not make any errors. Some of these points might appear pedantic but the precision needs to be necessary.

PN93

MR PARRY: No, they are legitimate – certainly legitimate matters but I prefer to have a discussion with Mr Norris before I said something that - - -

PN94

VICE PRESIDENT WATSON: Yes.

PN95

MR PARRY: - - - might not have assisted.

PN96

COMMISSIONER ROE: So, is it in clause – so, just to make sure you're clarifying the concern as I see it. It really is clause 11 in – covered by paragraphs 27 and 28?

PN97

MR PARRY: Or 29.

PN98

COMMISSIONER ROE: Yes.

PN99

MR PARRY: Yes, I understand about that.

PN100

COMMISSIONER ROE: About what?

PN101

MR PARRY: To have a joint position on that with Mr Norris.

PN102

VICE PRESIDENT WATSON: Yes.

PN103

MR PARRY: To stay with the statement of Mr Brown, there is – there was the directions hearing that took place on 24 November and Mr Purvinas indicated there would be a series of meeting conducted, and we understand that they have so been conducted. There has then been – and Mr Brown deposes to that, Qantas has been informed by Mr Gant, and we have no reason to doubt that the executive of the ALAEA endorsed a proposal put to Qantas and the proposed determination, which reflects the agreed position, is set out in SGB13.

PN104

As I've taken the tribunal to already the position with regard to Mr Moorehead, the other bargaining representative, is as set out in SGB16, which indicates his acceptance of the proposed determination. Now the terms of the proposed determination in SGB13 include, as the affidavit of Mr Brown deposes, in paragraph 40 there's a coverage provision, which is in 4.1. There are then agreed terms, and they are included in the proposed determination as set out in his paragraph 43. I'll amend what needs amending if, following the brief break I'll ask for shortly, deals with or doesn't or needs to deal with matters.

PN105

The determination also deals with matters at issue and they are matters set out in paragraphs 44 and onwards.

PN106

There are then on page 13 the core terms to be included in the proposed determination, including nominal expiry date, omitted matters.

PN107

There is then the better off overall test required by section 272(4) and we have prepared a document to assist the tribunal make this assessment. I'll hand that up to the full bench, it's a document with a heading "Proposed Determination BOOT Analysis".

PN108

VICE PRESIDENT WATSON: I might mark that Exhibit P1.

EXHIBIT #P1 PROPOSED DETERMINATION BOOT ANALYSIS

PN109

MR PARRY: Now, this document goes through three – perhaps the best starting point is the very last page, at the bottom of the very last page as it says there, "This document compares the draft workplace determination to the following awards". There are then the three awards referred to in Mr Brown's affidavit at paragraph 51, and as it says there it summarises the difference between the award and the proposed determination. And the form of the document is not dissimilar to that required by some members of the tribunal when approving workplace agreements; that is comparison data showing improvements and reductions as against the award. And - - -

PN110

JUSTICE BOULTON: The declared award is actually the awards is it?

PN111

MR PARRY: Awards, yes. They – yes, generally it's the Airline Operations Award, your Honour.

PN112

VICE PRESIDENT WATSON: Being the Qantas Enterprise Award not a - - -

PN113

MR PARRY: And – I'm sorry, yes. Yes, the full title is the Airline Operations Licensed Aircraft Engineers Qantas Airways Limited Award 2005 which is an enterprise award as its name would suggest.

PN114

VICE PRESIDENT WATSON: Yes, there is an Airline Operations Award a modern award, but that doesn't apply to these people because they're covered by an enterprise award.

PN115

MR PARRY: That's so. Yes, that's unfortunate shorthand.

PN116

VICE PRESIDENT WATSON: We understand.

PN117

MR PARRY: Now, this document as it indicates draws comparisons between those awards and highlights when there's better off or not better off. I suppose the most significant matter for the parties is that the wage rates that are set out in the first couple of pages – the first three or four pages of this document, indicate wage rates that are well in excess, indeed almost double, the sort of rates set out in the award. So the proposed determination is far in excess of the rates prescribed in the award.

PN118

The vast majority of other conditions are better off or neutral. And where there is a slightly worse off that has been indicated in the right-hand column, and we would say when one comes to look at what is better off overall, we would say that the determination clearly, or in any balancing exercise, would create better off overall results for the employees.

PN119

JUSTICE BOULTON: Mr Parry, can you just give me a quick summary. The 2005 award was, as it were, the paid rates type award? And it has been then – there have been a number of enterprise agreements, have there, since that time?

PN120

MR PARRY: Yes, as I think the name suggests there's been quite a long series of enterprise agreements between the ALAEA and Qantas.

PN121

JUSTICE BOULTON: Yes, I'm just asking about since 2005.

PN122

MR PARRY: I'll have to make – I'll have to make some quick enquiries about

that, your Honour.

PN123

JUSTICE BOULTON: I'm just wondering about, you know, your figures have doubled. I suspect that the rates they might be double what was in the 2005 award but I just wanted to fill in what was the history of that award and then what's happened since in terms of enterprise agreements for the licensed aircraft engineers.

PN124

MR PARRY: Yes, I can't assist standing here.

PN125

JUSTICE BOULTON: Yes.

PN126

MR PARRY: I'll have to get instructions on those matters, your Honour.

PN127

JUSTICE BOULTON: But the significant difference and benefit you say is that the wage rates are significantly higher in what has been agreed between the parties now.

PN128

MR PARRY: Yes.

PN129

JUSTICE BOULTON: And the wage rates are in that agreed category, with matters which were agreed at the end of the bargaining period or were they non-agreed matters?

PN130

MR PARRY: Well, I don't think so, your Honour. The paragraph 29(g) of the statement of Mr Brown indicates that matters still at issue at the end of the post-industrial action negotiating period included the ALAEA's claim for wage allowance increases, and also HNI which dealt with claims in respect of the classification structure and claims for an annualised salary. So if your Honour can take it that wages were not an agreed matter at the end of the period.

PN131

COMMISSIONER ROE: Is that also dealt with at clause 45(g) of the statement?

PN132

MR PARRY: Yes, Commissioner. Yes, clause 45 works through the matters that were said to be at issue and highlights where those matters at issue appear in the proposed determination.

PN133

COMMISSIONER ROE: Could I ask one further question about this attachment if Boulton J has received the answer he needs?

PN134

JUSTICE BOULTON: Yes.

PN135

COMMISSIONER ROE: If the one thing that I notice that says worse off rather

than slightly worse off or better off or taken in isolation, et cetera, relates to clause 55(12) which is the cap on redundancy of 95 weeks in the agreement, whereas presumably in the award there wasn't a cap. If you had an employee who had a very long period of service, would that employee be better off overall as taking this matter into account?

PN136

MR PARRY: Well, that would involve I think, Commissioner, dealing with a couple of hypotheticals, which again I would need to get instructions on.

PN137

COMMISSIONER ROE: Yes.

PN138

MR PARRY: But I understand the question if that helps. I haven't got an answer but I understand the question.

PN139

Now, there are the agreements – I'm sorry, the determination deals with safety net requirements, as per paragraph 52 of Mr Brown's statement, and it deals – we don't think, we don't consider there's any issue with the NES. These are mandatory terms to be included and they are set out in paragraph 55 onwards, and again we submit that the determination includes those mandatory terms. There are other – then factors to be taken into account by Fair Work Australia set out in section 275 of the Act. And, of course, those factors are required to be taken into account but they're certainly not the only matters that are to be taken into account. And Mr Brown has taken instructions from management staff with responsibility and, as paragraph 59 says, been informed that Qantas supports the making of a proposed determination. And I won't read it but paragraphs (a) through to (e) deal with the matters or the factors that need to be taken into account and expresses Qantas's view with regard to them.

PN140

VICE PRESIDENT WATSON: That would appear to be the only evidentiary basis for all of those factors in relation to all of the outstanding matters.

PN141

MR PARRY: Well, it's not quite the only evidentiary basis. The tribunal will have that material. It will have the content of the EBA9. It will have the content of the proposed determination. It will also be able to take into account and give weight to the position of the other bargaining representatives. Where those bargaining representatives are in agreement on a term, then we would say that's a matter that can and should be given some weight in the balancing exercise. Where the bargaining representative is a union with particular knowledge and involvement with the employer, and with significant membership, then perhaps more weight can be given to that consent. So that's the sort of material that the tribunal will have for it. But that's the material upon which we have advanced in the statement of Mr Brown. Now, it's a difficult balancing exercise as to the amount of detail one can and should go into with regard to considerations such as the public interest, such as the position of employees. We've attempted to address them in a broad sense and indicate that Qantas takes a particular position with regard to those matters. Apart from that I can't take the matter a lot further at this stage.

PN142

Now, that's - - -

PN143

JUSTICE BOULTON: These provisions of the Act don't seem to contemplate a situation where after the bargaining period has completed the parties have done what's happened in this case, and that is essentially reached an agreement but outside that mandatory 21 day period.

PN144

MR PARRY: No, they don't. Previously legislative schemes have contemplated parties coming to other arrangements in that period and reflecting them in different ways. This legislative scheme leaves a position where there has to be a determination made. Now, the issue is how - - -

PN145

JUSTICE BOULTON: That begs the question then to what extent should we rely on the agreement of the parties?

PN146

MR PARRY: To a similar extent the legislative scheme now contemplates that at the end of the period there being agreed matters. And those agreed matters simply go into the instrument. There's no suggestion in a curious way that those matters are to be assessed against those criteria. They are simply matters that have to go in. Now, we're not putting the – we're not saying these matters are strictly agreed matters within the terms of the Act, but in some senses they can be treated in a similar way. They are agreed matters, albeit agreed after the end of the 21 day period.

PN147

JUSTICE BOULTON: It would be a different argument if the 21 day period had been extended and you were here today with the same agreement. There wouldn't or maybe we wouldn't be here today. But the point is the legislation doesn't seem to contemplate the situation which has arisen and I think it is a question as to what weight should be given to the agreement of the parties now in looking at all these considerations which are set out in section 275.

PN148

MR PARRY: Well, it is a good question. We've made the submission that some significant weight can be attached to that, particularly in the circumstances that have developed in this case involving Qantas and the ALAEA. So - - -

PN149

VICE PRESIDENT WATSON: Yes, but you suggest that an agreement reached after the end of 21 days should be treated in much the same way as it must be treated if it was agreed before the end of the 21 days or at the end. Looking at it from a different perspective, isn't it true that the tribunal must apply the same approach to outstanding matters by applying the terms of section 275, whether there is agreement now or not.

PN150

MR PARRY: Yes, I'm not disputing that but it would be – my point is only really – those are factors the tribunal must take into account. But there is another very significant matter, that is the agreement of the parties. Now ironically,

taking up his Honour Justice Boulton's point, paragraph 275 factors do not have to be applied to agreed matters at the end of the 21 days, they simply go in. In the most ironic world they can go in notwithstanding any of those criteria. So clearly the legislature is giving some serious weight to the fact that parties agree on matters. So in the context of this scheme we say that if the parties reach an agreement after that date then the legislative scheme seems to suggest that's a matter of some significance. We're not saying it overrides 275 but we say it's a significant factor.

PN151

VICE PRESIDENT WATSON: When we look at, for example, the merits of the case, do we look at the position now that there is no disagreement or do we look at the matters that were at issue and the alternative positions that existed at the time and assess in some way the merits?

PN152

MR PARRY: Well, your Honour, it would be a very curious world if parties came along to Fair Work Australia and said we have an agreement and Fair Work Australia said we had to present all our arguments in a full blown arbitration justifying why clauses go in. We would say that would be a very curious outcome. And when the tribunal comes to assess the merits of the case, the interests of the employers and employees who will be covered by the determination, I think it can be a fairly strong consideration that employers know generally what's in their interests and employees presumably know what's in their interests. And if they're coming along saying this is an instrument which is in our interests, then that's a fact that can be given some weight by the tribunal. The public interest again, we would say would be met by reflecting the fact that a large employer and a union of significance have agreed on terms going forward. So when each of these factors is looked at I think the agreement of the parties takes on, as we would submit, a great significance.

PN153

COMMISSIONER ROE: That arguments seems to me to be pretty strong in respect of most of the factors but it's perhaps a little more difficult with 275(a).

PN154

MR PARRY: (a)?

PN155

COMMISSIONER ROE: Yes, the merits of the case. The other – the other ones I can see the fairly, the other ones I can see the link pretty strongly in the argument you're putting forth. I'm not saying you're wrong about (a), I'm just saying it's not so immediately obvious how the fact that the parties have reached agreement satisfies or is a major factor in that.

PN156

MR PARRY: Well, Commissioner, it might be the fact that some of these factors have limited material before the tribunal and ultimately there's not – might be not a lot either party can do about that without going into huge justifications for what's in the document. Now, all the tribunal has to do is take these matters into account. We say it's a big balancing exercise and the tribunal will no doubt form views as to what's in the – what meets the statutory requirements, and that doesn't mean that you ignore the factors but they might be just put into the mix and given

a particular weight. And in our submission, where you have a position where the parties turn up, have been through a significant period of bargaining and reached an agreement, albeit to be reflected in a determination, that's a matter we would say of some significance to be put into that mix.

PN157

VICE PRESIDENT WATSON: And no doubt there can - - -

PN158

JUSTICE BOULTON: But there - - -

PN159

VICE PRESIDENT WATSON: Sorry. No doubt there can be submissions as well as evidence about these matters, such as the merits behind the particular matters.

PN160

MR PARRY: Yes, we can make further submissions about those matters if the tribunal would be assisted by that.

PN161

JUSTICE BOULTON: I think, Mr Parry, the questions that we're putting are just so that we might get a better understanding of your submission regarding the statutory requirements. I don't think anybody is of any view other than it's a very significant achievement that the parties have been able to reach an agreed position in relation to the many issues which were, you know, in the negotiations between them. It's our function simply to work in accordance with the legislation and that's why we're raising these particular issues to give you an opportunity of putting submissions on them so that we might better understand, you know, the role which we need to perform in terms of making the determination.

PN162

MR PARRY: Yes, your Honour. Well, we take the position that the – as Mr Brown has or will swear to, that the terms reflect a practical and commercial resolution of the matters that issue, and that's what we say with – and also that they support the ongoing provision by Qantas of service to its customers. Now, they are significant matters for us with regard to the merits of the case. Now, if that is a position that we end up with a resolution that's practical and commercial for Qantas then we say that's a consideration that goes to the merits of the case. We would agree with the Commissioner that we don't deal full with each of them and that's a matter that would have positives and negatives very much so. If we turned up here the ALAEA may well have a different position on the merits than we. We might end up even disagreeing on some of the merits of certain matters. In a position where one attends to put forward a consent position, a debate about each and every item of consent may well be counterproductive. So that's – again, we would simply say it's part of the general mix. Unless directed we wouldn't propose putting in anything further about the merits of the case, not directed or suggested.

PN163

Now, there's been a couple of matters raised that probably would be appropriate for me to speak to Mr Norris about. Mr Norris has his own statement to put in. Perhaps - - -

PN164

VICE PRESIDENT WATSON: I haven't marked his statement. I was waiting till it was attested to. Do you propose to do that after a break, do you?

PN165

MR PARRY: I'm comfortable to do it – happy to do it now if the tribunal prefers that?

PN166

VICE PRESIDENT WATSON: No, that's entirely up to you.

PN167

MR PARRY: Well, I'll wait.

PN168

VICE PRESIDENT WATSON: How long do you need?

PN169

MR PARRY: Ten to 15 minutes.

PN170

VICE PRESIDENT WATSON: Yes, we'll adjourn for 15 minutes.

<SHORT ADJOURNMENT

[3.41PM]

<RESUMED

[4.08PM]

PN171

VICE PRESIDENT WATSON: Mr Parry.

PN172

MR PARRY: If the tribunal pleases. Before I call Mr Brown, if I could go through some of the matters that have been raised? Firstly, Mr Brown will give some more evidence about the position of Mr Moorehead at the – at or about the end of the 21 day period. Now, that will cover some of the matters that were still outstanding as far as he was concerned and other claims that he had withdrawn.

PN173

Now the complication of course with multiple bargaining representatives is that unless they all agree with regard to the agreed matters they're probably not agreed matters within the terms of the Act. Now, as well could have the consequence that the position, notwithstanding agreement between the ALAEA and Qantas Airways at the end of the 21 day period, technically a large – all the matters may well be at issue, that is because of the – perhaps I'll put it as the lack of agreement as the tribunal will hear as to all the matters. That may well mean that all matters are effectively in issue.

PN174

Now, that will also – there will also be evidence from Mr Brown about the basis of the negotiations have proceeded during the 21 day period and indeed before, that is there was all the claims that were the subject of debate proceeded on the basis of EBA8, that is claims being attached or modified and then EBA8, and that was the basis of the negotiations both before the termination of the industrial action and thereafter. Now the position we will contend is that in those circumstances the content of EBA8 became, we say, consistent with the

authorities' matters at issue; that is, what was in the document that was forming the basis of negotiations was in substance that made those matters matters of issue, which in effect made clause 11 a matter of issue, which I (indistinct) we'll also hear there were other claims to amend and expand a clause 11 from the ALAEA which were withdrawn during the 21 day period, which left at the end of the 21 day period clause 11 being a matter in issue.

PN175

VICE PRESIDENT WATSON: So it really should be dealt with in clause 29 if it's not already – sorry, paragraph 29 of Mr Brown's affidavit.

PN176

COMMISSIONER ROE: Are you saying it – yes, I didn't quite understand whether you were saying it was an issue or was not an issue after the end of the period.

PN177

MR PARRY: Well, technically because of the position of mister – of the extra bargaining agent who had not agreed these matters, they were not as at issue. So clause 11 will be a matter at issue.

PN178

COMMISSIONER ROE: Notwithstanding the email of 22 November from Mr Moorehead.

PN179

MR PARRY: Well, he had a particular position with regard to various matters that was not necessarily the same position I think as the ALAEA.

PN180

COMMISSIONER ROE: But doesn't the email of 22 November say that he's in agreement?

PN181

MR PARRY: Well, there's two constructions of that. Mr Moorehead had not been involved in the negotiations so there's two ways of approaching it I suppose, one is that he agrees with the basics of – if we're dealing only in clause 11 and I'm not sure of that at the moment - - -

PN182

COMMISSIONER ROE: Because he says that your email below fairly well sums it up:

PN183

As discussed earlier, obviously FWA intervention and the discussions with the ALAEA changed the dynamic from where we started, but in the interests of getting of this EBA finalised I'm happy to confirm that our negotiations have reached a satisfactory end.

PN184

MR PARRY: Yes, the complication is that the negotiations he's referring to were different negotiations under the ALAEA. There were discussions going on with Mr Moorehead that were separate from the discussions with Qantas and ALAEA.

PN185

COMMISSIONER ROE: Did it reach a satisfactory end for Mr Moorehead - - -

PN186

MR PARRY: Yes, it did.

PN187

COMMISSIONER ROE: - - - doesn't then – and presumably that means that he agrees with where it had got to between him and Qantas and Qantas's position is clearly the agreed the matters as at 21 November.

PN188

MR PARRY: Well, that's – that's a construction that's open on the wording of his email, yes, Commissioner.

PN189

Now, there is also the matter of the EBAs and the history of the EBA's that Boulton J was referring to. I think we will have to provide that in the next couple of days to the full bench.

PN190

And the maximum redundancy provisions, we've had some discussion about that. Mr Norris will make some submissions about that. I think the general view is that no one will ever reach a cap. Now, Mr Norris will make some submissions where Qantas will provide, along with the other document in the next couple of days, a document that goes to hopefully support the position of Mr Norris, that the hypothetical that the commission has raised won't be a matter of concern.

PN191

Now unless there's anything further I'll call Mr Brown, if the tribunal pleases.

PN192

VICE PRESIDENT WATSON: Mr Brown.

PN193

THE ASSOCIATE: Could you please state your full name and address.

PN194

MR BROWN: Simon Jeffery Brown, C/-203 Coward Street, Mascot.

<SIMON JEFFERY BROWN, AFFIRMED [4.17PM]

<EXAMINATION-IN-CHIEF BY MR PARRY [4.17PM]

PN195

MR PARRY: If the tribunal pleases, your full name is Simon Jeffery Brown?---It is.

PN196

Your business address is 203 Coward Street, Mascot, in New South Wales?
---That's correct.

PN197

And you're employed in the position of industrial relations manager with Qantas?
---I am.

PN198

You prepared a statement for these proceedings, Mr Brown?---That's correct.

PN199

Do you have a copy of that before you?---Yes.

PN200

You've heard earlier in the tribunal an amendment being made to clause 45(b), that becomes 22.2.1(a) as I understand it?---That's correct.

PN201

Subject to that amendment are the contents of that statement true and correct? ---Yes, they are.

PN202

I tender that statement.

PN203

VICE PRESIDENT WATSON: Exhibit P2.

EXHIBIT #P2 STATEMENT OF MR SIMON BROWN

PN204

MR PARRY: Now, Mr Brown, you've been in the tribunal and heard matter raised about the position of Mr Moorehead. Mr Moorehead, according to your statement, was a bargaining representative throughout this process?---From a date in – from recollection in August, so not from the commencement but at a point in time, yes.

PN205

In August, and did he have claims as against Qantas before the termination of the industrial action?---Yes, he did.

PN206

What sort of claims?---Um, his primary claim from the commencement was – or were in relation to A licences and MOD which is shorthand for maintenance on demand. Throughout the discussions Qantas's position was that those were not matters which ought to be included in an EBA and by the end of the post-industrial action negotiating period Mr Alistair had withdrawn those claims.

PN207

So during – he maintained those claims into the post-industrial action negotiating period?---Yes, but by the conclusion of that period they were withdrawn.

PN208

And what sort of claims did he have at the end of the post-industrial action negotiating period?---Well, no claims remaining is probably the fairest assessment. Throughout the period, for instance, Mr Moorehead had claims in relation to wages. Mr Moorehead sought a three per cent wage increase with clearance of quotas and retrospectivity. Qantas had indicated that whilst those were matters which might be able to be agreed in principle, the ultimate outcome would necessarily depend upon the outcome reached with the ALAEA.

PN209

In his – now you've heard Roe C ask some questions about this. He sent you an email, SGB14, and he refers in that to – I believe Mr Moorehead had, "Our

negotiations have been completed", do you have any idea what negotiations he was referring to?---The negotiations which I've just described which were conducted by way of teleconferences between Mr Gavin Harris, head of line maintenance, Mr Keith Clark, head of people, and myself, and Mr Moorehead. They were conducted as separate negotiations from those which Qantas was conducting with the ALAEA.

PN210

All right, so as it stood at the end of the negotiating period there were no claims being made by Mr Moorehead?---That is correct.

PN211

Yes, now you were involved in the negotiations with the ALAEA in the post-industrial action negotiating period?---Yes, I was.

PN212

You've heard Boulton J ask a question today about the claims that were made in respect of a servicing of A380s, a security of employment, you were aware that clause 11 of the existing EBA is headed, "Security of Employment" and deals broadly with that topic?---Yes.

PN213

What happened to those claims in respect of servicing A380s and security of employment during the post-industrial action negotiating period?---Those claims as well as other variations which the ALAEA had sought to clause 11 throughout the negotiations were withdrawn by the ALAEA prior to the conclusion of the 21 day period.

PN214

Where did that then leave clause 11 as a matter that was either in issue or not? ---Well, to the extent that all matters within EBA8 are at issue, it's at issue, but I think the carriage of the negotiations as between Qantas and the ALAEA before Kaufman SDP was on the basis that EBA8 would form the basis of EBA9 with such amendments as required to include the parties' respective claims. To the extent that the ALAEA's form – claims, excuse me, in relation to extending clause 11 were withdrawn prior to the conclusion of the 21 day period, it would follow that clause 11 would remain in EBA9 as per the terms in EBA8.

PN215

Yes, I've nothing further of Mr Brown.

PN216

VICE PRESIDENT WATSON: Mr Norris?

PN217

MR NORRIS: No questions, your Honour.

PN218

VICE PRESIDENT WATSON: Thank you for your evidence, Mr Brown. You may step down?---Thank you, your Honour.

<THE WITNESS WITHDREW

[4.23PM]

PN219

MR PARRY: Now, that's the evidence on which we relied, subject to any matters upon which the tribunal might require further assistance, and also subject to those two matters that identified Qantas would be providing further material. I have some submissions to make that I've reduced to writing that I can hand up at the appropriate stage, but Mr Norris has a statement and other matters to bring to the attention of the tribunal. If the tribunal pleases.

PN220

VICE PRESIDENT WATSON: Thank you, Mr Parry. Mr Norris.

PN221

MR NORRIS: If the tribunal pleases, your Honour, I have the statement of Wayne Biago Vasta to hand up and Mr Vasta will take the stand and swear to the

- - -

PN222

VICE PRESIDENT WATSON: Yes, it's convenient to call him now?

PN223

MR NORRIS: It is convenient to call him, your Honour.

PN224

VICE PRESIDENT WATSON: Yes, Mr Vasta.

PN225

THE ASSOCIATE: Could you please state your full name and address?

PN226

MR VASTA: Wayne Biago Vasta, (address supplied).

<WAYNE BIAGO VASTA, SWORN

[4.25PM]

<EXAMINATION-IN-CHIEF BY MR NORRIS

[4.25PM]

PN227

MR NORRIS: Mr Vasta, could you state your full name and address to the tribunal?---Wayne Biago Vasta, (address supplied).

PN228

And you're the assistant federal secretary of the ALAEA?---I am.

PN229

And you're authorised to make a statement by the ALAEA?---I am.

PN230

Mr Vasta, to the best of your knowledge is that statement that you've submitted true and correct?---It is.

PN231

I've no further questions, your Honour.

PN232

VICE PRESIDENT WATSON: Yes, you tender the statement. We'll mark the statement of Wayne Vasta Exhibit N1.

EXHIBIT #N1 STATEMENT OF WAYNE VASTA

PN233

VICE PRESIDENT WATSON: Mr Parry?

PN234

MR PARRY: No questions, your Honour.

PN235

VICE PRESIDENT WATSON: Thank you for your assistance, Mr Vasta, you can step down.

<THE WITNESS WITHDREW

[4.26PM]

PN236

MR NORRIS: Your Honour, just in relation to the statement of Mr Vasta, in essence it's something that – he's read the statement of Simon Brown and agrees with the contents of that on behalf of the ALAEA.

PN237

Your Honour, if I may just briefly deal with the question that you asked in relation to section 266 in regard to a determination, how the tribunal would reach a determination. It seems to me that what the parties have put forward to you is effectively a submission, a proposal from the ALAEA to – for a determination, outlining the issues that are between the parties and the issues that are effectively agreed terms. And to a extent, in regard to the process of bargaining and the merits of each other's claims, that workplace determination proposal and the evidence of Mr Brown addresses those issues which may arise under section 275 as well.

PN238

In our view there are two ways the tribunal may look at such submissions. Rather than it being an agreement in regard to all the issues that are outstanding between the parties, it's more an issue of the status – an agreement on the status quo of the parties and a proposal for the tribunal to use as a fair and equitable workplace determination based on the requirements of the Act. It just so happens that the – Qantas's original submission is quite different from the workplace determination proposal. And in a rough comparison one would see in comparing their document that they submitted, if a rough comparison took place there would be significant issues that we've sort have seen between the parties. So therefore, we say the requirements of 266 are met. Our submissions should not be looked as an agreement. Effectively our submissions are basically that, submissions, that our submission for a proposal for a determination. It just so happens that there is no objection by Qantas to the workplace determination proposal that's effectively been put to them by the ALAEA. It was done, as you will see by Mr Brown's statement and Mr Vasta's statement, it was done within the last few days and in effect it is our submission to the tribunal in regard to the contents of a workplace determination.

PN239

There would be two ways in our view that the tribunal or Fair Work Australia may look at such a determination, a workplace determination in this historic first matter of its kind. One, you could have a situation where everything between the parties is effectively not in agreement and you would have to arbitrate on every point. And in process you would take submissions from the parties in regard to

every point. But doing those submissions one party may say, well, look, I don't necessarily disagree with that submission and we'll take that therefore it becomes consent. There's no difference in that process to what used to happen under the old award regime, the end of dispute, and at the end of the day a determination by the commission as to what an award may be and what it may consist of. It just so happened on the content of that order that may be handed down, the parties would make submissions sometimes 100 per cent consent, sometimes 50 per cent. So we would make that there is a distinction between agreed issues between the parties and handing up a consent submission in regard to followers of being a workplace determination.

PN240

Or you may have the situation where both parties rock up and say, look, we've done a lot of work on this in the last few days. We've identified all the issues between the parties. We're going to make a consent submission to you that this is the best determination you could possibly hand down to the benefit of the parties, both parties, because our side in principle agrees that this would be the best determination possible and this side agrees that this would be the best determination possible. It's not necessarily a bargaining agreement in our view. There is a distinction here between the arbitrated consent submissions to an arbitration in what effectively would be the issues that are outstanding between the parties.

PN241

In regard to clause 11, Mr Brown's summation of the events which we didn't challenge is in our view the correct way to look at that in that there are some issues that the parties effectively default back to in the EBA because one party withdraws its claim on it. Now, on one view it may have been that in Mr Brown's statement that could have been included, all those things may be included as agreed terms. In other words, if we're not going to deal with anything in EBA8, no one's challenging it, effectively it lies there dormant as an agreed term because no one's disagreeing with it effectively, and that may be the way to look at that.

PN242

In regard to the redundancy provision and the issue of the BOOT test and the cap as compared to the award. The award provides for four weeks for the first two years, I think it is, to comply with the NES and then two weeks thereafter. There will be no employee in Qantas during the term of this workplace determination who would reach the end of that cap. The requirements in 55 effectively preserve the amounts of redundancy pay accumulated up till 1996 for long serving employees. And based on a 50 year span, which is the maximum amount of service that we could imagine someone having at Qantas at this point in time, that 95 week cap would – and given that that amount was preserved and it increases and then the four weeks apply thereafter, until the 95 week cap that four weeks is effectively the 95 week cap because the other proportion beforehand is fixed on that date. No one in mathematical terms will reach the 95 week cap. So in our view no one during the terms of this agreement is disadvantaged. That's not to say that if someone started in 1996 instead of 50 years from now, from 1996, which is way beyond the term of the workplace determination, then there may be an issue at rights, but I think we're looking at probably another ten EBAs before that period of time may arise.

PN243

In regard to the history of the award, the award in 1996, the Workplace Relations Act 1996 required all paid rates awards to be made minimum rates awards. That process commenced in 1996. It took a long time for the Qantas Enterprise Award to be made into a minimum rates award, which it subsequently was, and then there was another process involved of simplification of the award which was completed in 2005. The parties in 1997, 1996 rolled up the paid rates award, as a lot of parties did in those times, into an EBA to preserve the old award conditions, and hence that was the contents of our EBA4.

PN244

In regard to the number of agreements. I think someone was asking a question in regard to the number of agreements that may have happened since that award in 2005. We've had a brief discussion and we believe there's two, EBA7 and EBA8, if that pleases your Honour and the tribunal.

PN245

VICE PRESIDENT WATSON: Thank you, Mr Norris. Mr Parry?

PN246

MR PARRY: If the tribunal pleases. As I indicated we prepared an outline of submissions. Perhaps if I could hand that up to the tribunal?

PN247

VICE PRESIDENT WATSON: We'll mark that outline Exhibit P3.

EXHIBIT #P3 OUTLINE OF RESPONDENT'S WRITTEN SUBMISSIONS

PN248

MR PARRY: The document sets out the background which I don't take the tribunal to, apart from 4H. 4H refers to as at midnight on 21 November 2011 a number of matters were agreed between the parties but there were also a number of matters still not settled between the parties. Now the tribunal has heard evidence that at the end of the period there were a number of matters agreed between the ALAEA and Qantas, and they are included in the statement of Mr Brown. There is also evidence that Mr Moorehead, another bargaining representative, did not have claims at the end of the period. That leads to two possible scenarios. Number one, if there's a lack of a claim from a bargaining representative that can be taken as an agreement, and that contains some support from Exhibit SGB14 which would suggest that the matters that were agreed with the ALAEA were also agreed with – because there were no claims they were also agreed with Mr Moorehead. That seems a logical construction. However, if the tribunal were to form the view that the matters – the fact that there were no claims did not evidence agreement, then there would – then in those circumstances be an agreement with the union covering the vast majority of employees and simply no claims being pursued by one bargaining representative, and in those circumstances clearly a number of matters would remain at issue and I can only revert back to the statements and submissions we've made and Mr Norris has made about the importance of agreement and the weight that should be given to that.

PN249

The document deals with the jurisdictional prerequisites and paragraph 9 sets those out and it does not appear in contention at all that this full bench is required to make a workplace determination. The only matter that we're really debating here, I suppose, if there be a debate, is the content of that. We have attempted to deal with paragraphs 10 and onwards with the various terms that we say should be included in that. And one matter that the tribunal has raised is matters – what matters are still at issue and in particular, for example, clause 11 and related clauses. We have a set of authorities here, and I can hand up a copy of that to the tribunal.

PN250

VICE PRESIDENT WATSON: It looks some of the previous cases were lengthy cases, Mr Parry.

PN251

MR PARRY: Well, I – the tribunal will appreciate with regard to many of those cases that it's the first eight or 15 paragraphs that really count and then it's just a whole lot of clauses and whole lot of debate about the intricacies which I – but the issue of what matters are at issue has been dealt with in a few of the cases in previous legislative schemes. The bar has been placed in some senses as by the *HSU v Austin Health* under the last legislative regime, and there is some discussion of that in that case at paragraph 59. Now paragraph 59 deals with the construction of the words "matters at issue", and as it was accepted there the matter is of issue – of it is put in issue being raised by a party as being a matter about which it wishes to negotiate and reach agreement, and a similar approach was taken in the *AEU* case. The relevance of that we think goes to when parties do negotiate based on an existing instrument. And here the evidence of Mr Brown is that both parties wanted EBA8 as a basis. They both, in our submission, put EBA8 in issue, therefore the terms of EBA8 became in issue and can be the subject of a determination. And the observations in the *Re Coal Mining Industry* case, which the tribunal as constituted probably has some knowledge of, but again there was a debate in that case about matters at issue, and that appears at page 7 of that *Re Coal Interim Consent Award* case.

PN252

Now, we have set out the factors in paragraph 14 about which the tribunal has correctly raised, that they need consideration. We do attach here a number of authorities in paragraph 15 and onwards dealing with what has been described in (indistinct) decisions as a balanced assessment. That is, we would say taking into account a wide variety of factors, considering those factors and making a determination consistent with the requirements of the Act. So we would say that here each case is different. Firstly, some will require greater weight than given to productivity considerations, great weight being given to merit considerations. In this particular case we would say a matter of great consideration is the fact that the parties are here consenting to the position and have both advanced the position that the requirements of the Act with regard to paragraph 275 have been met.

PN253

Now, those are the submission of Qantas subject to those two further matters that I mentioned earlier. Unless there's anything further I can assist the tribunal with those are the submissions of Qantas.

PN254

JUSTICE BOULTON: The question of the – what were the operations of the workplace determination? It has to operate under section 276 from the day on which it's made. Can the draft determination that you put forward if you wanted it to be – to operate until the end of 2014.

PN255

MR PARRY: Yes.

PN256

JUSTICE BOULTON: What's the thinking there, apart from the fact that it's an agreed position?

PN257

MR PARRY: If the tribunal would excuse me. It's been agreed. You know, it's been discussed - - -

PN258

JUSTICE BOULTON: I sort of got that far with my understanding of the position but it's been agreed you wanted to operate for three years or you wanted to operate until the end of 2014 or what?

PN259

MR PARRY: I think that's the date.

PN260

JUSTICE BOULTON: It's - - -

PN261

MR PARRY: I understand your Honour's question, I understand. The end of 2014, that's the agreement. If the tribunal pleases.

PN262

VICE PRESIDENT WATSON: Yes, thank you for those submissions. There's a large amount of information provided this afternoon by the parties, including a proposed workplace determination which is agreed to – agreed that it should be made by the tribunal. It will be necessary for us to consider that material, together with the submissions today and the foreshadowed further submissions and information. We will therefore reserve our decision in the matter. It may be necessary to relist the matter at some point if questions arise, that we need further information or assistance from the parties. We will endeavour to avoid that but that may be necessary and it's worthwhile foreshadowing it. We do thank the parties for the efforts that they've made, and we note the agreed workplace determination and we thank the parties for the assistance they have provided in putting together that workplace determination and the materials submitted today. We'll now adjourn the proceedings.

<ADJOURNED INDEFINITELY

[4.47PM]

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