TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

C2023/1931

s.604 - Appeal of decisions

Captain Anthony Lucas
and
Qantas Airways Limited
(C2023/1931)

Sydney

3.24 PM, MONDAY, 17 APRIL 2023

PN1

JUSTICE HATCHER: I will take the appearances. Mr Dalgleish, you appear for the appellant?

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MR E DALGLEISH: Yes, thank you, your Honour.

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JUSTICE HATCHER: Mr Follett, you seek permission to appear for the respondent?

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MR M FOLLETT: That's so, your Honour, thank you.

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JUSTICE HATCHER: Do you oppose permission for legal representation being granted to Qantas, Mr Dalgleish?

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MR DALGLEISH: No, we do not.

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JUSTICE HATCHER: All right, that permission is granted, Mr Follett.

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MR FOLLETT: If your Honour pleases.

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JUSTICE HATCHER: Go ahead, Mr Dalgleish.

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MR DALGLEISH: Thank you very much, your Honour. This hearing today is in relation to permission to appeal in regards to the decision or order in proceeding number C2023/1371.

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As outlined in the F7, AIPA submits that a directions hearing is a short-thought tribunal appearance where decisions or orders are made about what should happen next in a dispute, recognising that the tribunal has an incidental power to control its own procedures.

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AIPA submits that a decision of the Commission includes any decision of the Commission, however described. That's the Fair Work Act 2009 - Commonwealth - section 598(1).

PN13

AIPA submits that on 22 March 2023, Ryan C listed the proceedings for conference on 29 March 2023. At the 29 March 2023 conference, at PN 296 onwards of the transcript, evidenced is the Commissioner setting directions for timetabling and the questions for determination.

PN14

AIPA submits that the parties received the Commissioner's decision and order on 31 March 2023 outlining the dates for hearing, timetabling for the filings of materials and questions for determination after the parties provided proposed wording on 29 March 2023.

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JUSTICE HATCHER: To be clear, the subject matter of the appeal is the questions that were determined in directions. I assume there's nothing else in the directions that - - -

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MR DALGLEISH: Well, in the directions, we don't take any task with the dates for hearing or timetabling; it's just the questions for determination, your Honour.

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JUSTICE HATCHER: All right. Both parties had proposed, ultimately, two questions for determination; is that right?

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MR DALGLEISH: That's where it was, that's where it finally got to, that's correct, your Honour.

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JUSTICE HATCHER: And the second question was proposed by your client, or Captain Lucas, and agreed to by Qantas; is that correct?

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MR DALGLEISH: The second question, as it stands, our view was that it had to be answered irrespective of the answer to the first question.

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JUSTICE HATCHER: I see.

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MR DALGLEISH: Whether the first question was a 'No' or a 'Yes', we still had to make a determination as to whether 16.5 would apply, so, whether the association was deemed to be reasonably or unreasonably withholding agreement, irrespective of the answer to that first question, the second question would need to be answered.

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JUSTICE HATCHER: On the Commissioner's proposed questions, if the answer to question 1 was 'No', then that would be the end of the matter and, in effect, Captain Lucas would win, wouldn't he? That is, how does that not favour Captain Lucas' position?

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MR DALGLEISH: Well, it's not quite as simple as that, your Honour. That's one reading of it. The question of 16.5, the clause 16.5 is the only clause in the agreement which goes to operational reasons other than clause 19.1.2. In clause

19.1.2, your Honour, you will see that there is no remedy, so the only way that, in our view, you can by-pass pilots is by clause 16.5, and that, of course, results in by-pass pay being paid. So, we are talking about 20 second officers, at this stage in this training year. However, we are just about to move into the next training year where there is a potential 60 second officers in dispute.

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Our view about the quantum for the by-pass pay is in dispute with Qantas, but, nevertheless, it would be in the magnitude of, say, 100,000 a year, approximately. The by-pass would be for two years, but there is a four-year freeze in place, so it may result in a four-year freeze for those second officers. So, it's quite a substantial amount of money we are talking about.

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Clause 19.1.2 is divided into three parts, and it's probably best understood as there's a temporal element, so on the completion of training, and then it results in an aircraft type that you are assigned to or allocated to, but there's three parts to the clause, and the problem with Ryan C's question is that it looks back at the reasonableness or unreasonableness of withholding, but the clause is written in the present tense, not the past tense, and there has been at least six requests and, well, six responses, for want of a better way of putting it.

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So, it's whether a question like that can even be asked and whether it's beyond jurisdiction. We did try to put forward 14 questions and then that was reduced down to four, with subsets of eight questions in total. That's because the clause itself has three parts to it.

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The first part is 'suitably qualified pilots putting in sufficient bids'. In relation to this matter, there is no factual contest. There were 63 bids put in for the 20 SOTs, or 20 positions, or 20 vacancies, so that's not in dispute. But, as you will notice in the clause, your Honour, there is a (indistinct) in the word 'or', then there's the words, of course, 'otherwise agreed for operational reasons'.

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So, on one view, it could be (a) or (b), on another view, it might be read (a) and (b). Whether it's read compartmentally or together, or whether the second part of the clause prevails over the first part of the clause, nevertheless, the issue arises when you see the words 'otherwise agreed for operational reasons'. The only other place you find operational reasons in the Long Haul Enterprise Agreement is in 16.5.

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So, there is a solution, and back on 14 September 2022, there was a solution proposed by AIPA, which was to redirect Qantas' attention to clause 16.5 because it dealt with seniority, meaning captain, first officer, second officer, second officer in training, it dealt with the allocation of aircraft and it also dealt with by-pass pay.

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The reason we are here is because, essentially, under 595(2) of the Fair Work Act, at conference on 31 March, the Commissioner made a decision or order and he wasn't engaged in the outcome of a process carried out by mediation or conciliation or the making of a recommendation or expressing an opinion. Therefore, in our view, the Full Bench has jurisdiction to hear the appeal as a decision or order was made by Ryan C on 31 March 2023.

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In relation to the competence of the appeal, whether the person - - -

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JUSTICE HATCHER: Mr Dalgleish, I'm still trying to understand what this is about.

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MR DALGLEISH: Yes.

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JUSTICE HATCHER: What is wrong with the first question?

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MR DALGLEISH: Well, if we have a look at the clause itself - let me just turn to the clause itself.

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JUSTICE HATCHER: Yes, I have the clause.

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MR DALGLEISH: If we turn to the clause itself and I pull up the question itself - - -

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JUSTICE HATCHER: If you look at the clause, Mr Dalgleish, it has two scenarios to avoid the requirement in the first part of the sentence. The first is that there's insufficient bids. You say it is agreed that that doesn't apply, that is, there are sufficient bids; correct?

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MR DALGLEISH: Well, we say it does apply. That's the end of the matter. There were sufficient bids by suitably qualified pilots, therefore, the 20 second officers who applied should be allocated according to seniority. We say you don't get to the second part of the clause. That's the whole point of why the clause needs to be deconstructed and construed properly, because you don't get to whether there's an operational reason otherwise agreed and, even if you did get to 'otherwise agreed for operational reasons', all the Qantas Group can do is ask our permission. That's all they can do. That's all that means, 'otherwise agreed'. 'Otherwise agreed' means you must find mutual agreement. Now, if we don't have any mutual agreement, that second part of the clause falls away.

PN41

Then you get to the third part of the clause that has the association unreasonably withheld agreement. The way Qantas would like that to read is how I was just about to put it: has the association unreasonably withheld agreement for operational reasons? It doesn't say that at all. It says, in the active voice, the association.

PN42

Now, of course, the association has its own rules, it has its own objects and it acts in the best interests of its members. So, this type of clause or this type of wording for this type of clause commonly appears, as we all know, in commercial law in tenancy agreements and mining leases. It doesn't commonly appear in industrial law at all, but once you start using those words, you get into, well, the active voice is the association will not - that's in the present tense - unreasonably withhold agreement. So, the questions set by the Commissioner looks into the past. It doesn't say 'has not' - - -

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JUSTICE HATCHER: But, Mr Dalgleish - - -

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MR DALGLEISH: - - - if I can put it that way.

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JUSTICE HATCHER: - - - I'm looking at the proposed questions at annexure E to the notice of appeal, page 79. They are your questions, aren't they?

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MR DALGLEISH: That's our questions after we were shut out, essentially, from putting our questions forward before that, yes, but there's a transcript that's not included here where we went through a large number of suggestions and none of them were taken on. So, 78 were out preferred questions, page 78. Page 79 was the second set of questions we put forward. 'Yes' is the answer to that question, but, of course - - -

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JUSTICE HATCHER: What is the difference between the Commissioner's question 1 and your question 1 on page 79?

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MR DALGLEISH: Well, unfortunately, after being shut out and not given - none of our questions being given an opportunity to actually be looked at, we were reconciled with page 79.

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JUSTICE HATCHER: What's the difference?

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MR DALGLEISH: So, if you have a look at 78 - - -

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JUSTICE HATCHER: Can you answer my question?

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MR DALGLEISH: - - - it goes through the (indistinct).

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JUSTICE HATCHER: Mr Dalgleish, can you just answer my question? What is the difference between the question 1 alternatives on page 79 and the Commissioner's question 1?

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MR DALGLEISH: What's the difference between our question on 79?

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JUSTICE HATCHER: Yes, and the Commissioner's question 1, that is, what has the Commissioner's question 1 done which shuts you out of anything you want to argue by reference to page 79?

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MR DALGLEISH: When there are sufficient bids from suitably qualified pilots.

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JUSTICE HATCHER: Yes?

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MR DALGLEISH: That's a significant issue because we're talking about - - -

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JUSTICE HATCHER: But you just said it's agreed that there were sufficient bids. You have told me that's not in dispute; correct?

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MR DALGLEISH: That's right. What is in dispute is whether those 20 SOTs are awarded the bid according to seniority. Now, according to that clause, when there are sufficient bids from suitably qualified pilots, that's the end of the matter. That's how that clause reads. It's (a) or (b). Well, we prefer option (a) and, unfortunately, the Qantas Group gave us the power to derail managerial prerogative in that clause by assigning the association as its decision-maker. That's what they did. 'The association will not unreasonably withhold agreement.' Well, we haven't. We've said, 'Allocate the 20 pilots who put in sufficient bids, and if you don't want to do that, you don't have to. Go to clause 16.5 and pay by-pass pay, which is about 200,000 a pilot, $4 million.' So it's quite a significant difference.

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The other thing you will note, the difference between the question, your Honour, is that we have got point (f) in 'or'. It goes to 28 March 2023 in option (b), and that's because there was a further decision made by the association on 28 March. That's important because, of course, this matter has been reconsidered six times. Now the case law says you can reconsider and consider and reconsider this matter over and over again, and it has been by AIPA.

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JUSTICE HATCHER: Are the circumstances for the 28 March period any different to the earlier circumstances, that is, is there any possibility that the facts of that period give rise on any view to a different answer to the other periods?

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MR DALGLEISH: Well, there was quite a comprehensive negotiation between 28 February and 28 March. It was done on a without prejudice basis. It all would depend whether that gets read in or not. We would say it should be looked at and that's why we didn't end up with a resolution on 28 March, unfortunately. So, the association considered its views still prevailed over the Qantas Group, and that's because clause 19.1.2 doesn't have any recitals in it, it doesn't do what a clause would ordinarily do in that respect, it doesn't say, 'Well, unreasonably withholding is understood to be (a), (b), (c), (d), (e)' like you would see in a mining lease, for example. You would see the same clause in Rio Tinto or BHP, except they'd have two pages of exceptions explaining to you what the operational reasons are.

PN64

The problem we have here is Qantas has just said, 'Well, otherwise agreed for operational reasons.' One operational reason might be that you by-pass 20 pilots and they might like to be paid properly under the enterprise agreement. So, on page 78, which were a whole lot of questions which were just ignored, essentially, by the Commission - that's why we've got a section there that deals with all of the relevant clauses, (a), (b), (c), (d) and (e), 16.4.4(a), 16.4.14(b), 16.5, 16.6.2 and 17.5.2, because they are all the relevant clauses in relation to understanding how clause 19.1.2 works.

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This is unlike any other agreement before the Commission. The enterprise agreement is 280 pages long, it has 50 seniority clauses in it and 19.1.2 is just one of the 50 seniority clauses, and they all work together and all are to be read as a whole. So, consequently, that's why we have an issue.

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Those questions were not only just ignored. If we go back to appendix C on page 74, these were the questions that the applicant actually put forward and those questions were very relevant because I was trying to determine whether the clause itself was promissory, whether there was a promise in it, whether the issue itself went to just an obligation or a proviso, how we were to understand the regarding of giving of consent, because the whole point of question 12 on page 74 is the essence of the dispute. If the association didn't act dishonestly, unreasonably, arbitrarily or propitiously, according to the High Court authority of Secured Income, there's no chance of Qantas winning. They have the onus, the burden to prove that we acted dishonestly, unreasonably, arbitrarily or propitiously.

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JUSTICE HATCHER: Mr Dalgleish, you say that this question 12 on page 74 is the core of the dispute; correct?

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MR DALGLEISH: It is the core, yes.

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JUSTICE HATCHER: Okay. But that's just another way of expressing the question that the Commissioner put in question 1: 'Did the association act unreasonably in refusing consent, or did it unreasonably refuse agreement?' It's the same question, isn't it? You can make whatever submissions you like about what constitutes an unreasonable refusal of agreement in response to question 1, but it seems to me it's just the same question.

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MR DALGLEISH: Well, it's the same question - - -

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JUSTICE HATCHER: I am struggling to understand what the distinction is you are trying to make. I mean you can put whatever arguments you like in support of the proposition that the association did not unreasonably refuse agreement, but that's not indicating anything wrong with the questions.

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MR DALGLEISH: Well, the question is in the past tense and the clause is written in the present. There's a jurisdictional issue right there.

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JUSTICE HATCHER: Mr Dalgleish, you seem to have a habit of evading every question I ask you. Question 1 goes to whether the association unreasonably withheld agreement by reference to a series of past periods; correct?

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MR DALGLEISH: Well, that's what the Commissioner set down, yes, that's correct, your Honour.

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JUSTICE HATCHER: But that's what you say the dispute is about, that is, whether there was or was not an unreasonable refusal of agreement with respect to a series of defined periods.

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MR DALGLEISH: No, we say that the suitably qualified pilots who put in sufficient bids should have been allocated to the A380 and weren't done so, and that wasn't done so, and if you don't want to do that, you can't by-pass them without paying by-pass pay. It's a very different question. I mean I - - -

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JUSTICE HATCHER: Mr Dalgleish, you are the one who just told me that question 12 on page 74 was the core of the dispute. Is that correct or not correct?

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MR DALGLEISH: Well, it's one core of the dispute. There's three parts to the clause, your Honour. I mean, if you have sufficient bids from suitably qualified pilots in that clause, it's arguable you don't get to (b). That's what the word 'or' means.

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JUSTICE HATCHER: Is that what you - - -

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MR DALGLEISH: It means an alternative.

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JUSTICE HATCHER: Is that what you are arguing?

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MR DALGLEISH: Well, that's one of the arguments. You don't get to (b), you don't get to 'otherwise agreed for operational reasons' and if you got to operational reasons, then there is no balancing exercise in that clause, so we can prefer our decision-making to Qantas' decision-making. So, Qantas might have 180 operational reasons why they should prevail and we have one operational reason, which is we act in the best interests of our members, which is an object of our association, and it is not in the best interests of our members for Qantas to circumvent seniority because seniority is sacrosanct to the whole nature of the Long Haul Agreement.

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JUSTICE HATCHER: Mr Dalgleish, that seems to be an argument in support of the proposition that the association did not unreasonably refuse agreement; correct?

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MR DALGLEISH: Well, it may get to the third exception, that's correct, your Honour. It may not. It might stop at exception 1. That's why in the first arbitration, the first question was: 'Were there sufficient bids from suitably qualified pilots?' If that answer to that question was 'Yes', you don't get to (b) and (c) or question 2 and 3.

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JUSTICE HATCHER: Where did you pose that as a question of construction?

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MR DALGLEISH: That was in the original first arbitration, your Honour, so let me take you there.

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JUSTICE HATCHER: No, in the questions in this matter, where did you propose a question which embodied that proposition?

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MR DALGLEISH: If you have a look at page 78, there it is:

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If there are currently sufficient bids to the A380 from suitably qualified pilots currently employed by Qantas, then is it that SOTs cannot be allocated by Qantas to the A380?

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If the answer to that is 'Yes', you don't get to question 2 or 3.

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JUSTICE HATCHER: All right. I understand that.

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MR DALGLEISH: So that's the point I'm making. So, each time we were shut out during the conferences, our point is that we never actually - we got down to two questions in the end because it's the only thing the Commissioner would listen to, unfortunately. Our view was that there were the question rephrased on page 78. Now, those two questions - - -

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JUSTICE HATCHER: Mr Dalgleish, I'm going to just stop at that point and turn to Mr Follett. As I understand it, Mr Follett, the appellant is arguing that it wished to advance the contention, right or wrong, that if there were sufficient bids from suitably qualified pilots, that is the end of the story, that is, you don't go any further with 19.1.2. Firstly, do you accept that that proposition has been advanced by the appellant below and, secondly, do you accept that it's not a proposition which is encompassed in the Commissioner's questions?

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MR FOLLETT: Well, it was certainly put as part of attachment C to the notice of appeal. I don't recall that particular issue taking much time at the actual conference on 29 March, but, be that as it may, it was certainly the case that AIPA or Mr Lucas went to the conference on 29 March with that as one of its questions.

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Two, in answer to your second question, well, it's obviously not comprehended by the questions proposed by the Commissioner.

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JUSTICE HATCHER: Regardless of its merits, if that's a question of construction which Captain Lucas wants to contend, why shouldn't there be a question which allows for that question of construction to be determined?

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MR FOLLETT: Well - - -

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JUSTICE HATCHER: I mean we can't really follow what happened before the Commissioner on the appeal before us.

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MR FOLLETT: No, other than, I guess, the central point, which is how it is this process of establishing questions limits in any way what the arbitral dispute resolution process of the Commission is. I mean you may have noted that in the first arbitration, the Commissioner was contemplating varying the questions before the thing was discontinued. He issued a decision a couple of days ago on the recusal application where he said the formulation of specific questions might be something that can be dealt with and revisited at the hearing.

PN100

We are putting an awful burden on these questions as if somehow they establish the complete metes and bounds. Speaking for myself, your Honour, and, I guess, putting aside the formalities of permission and hours on appeal, et cetera, I am sure it doesn't really concern us greatly one way or another whether that question is asked because we are pretty confident we know what the answer will be, but I think the exclusion of it was more explicable on the basis that it didn't take on any particular significance at the 29 March conference.

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JUSTICE HATCHER: It gives rise to the possibility that if the questions remain as they are, the hearing might go ahead, the Commission might give the answer 'Yes' to the first question, but then Captain Lucas says it doesn't matter because the question of unreasonably withholding agreement doesn't arise if there's suitably qualified bids, and that aspect of it hasn't been resolved, if you follow that.

PN102

MR FOLLETT: That's true. Of course, that's right. AIPA will have its remedies or Captain Lucas will have his remedies, one of which might be the filing of another dispute, which, of course, is not in anyone's interests. I could take some instructions, your Honour, but it might well be that, putting aside the appellate process, we could simply agree to write to the Commissioner and say that we think that particular question should be answered as part of the hearing on 16 through to 18 May.

PN103

JUSTICE HATCHER: It might be useful, Mr Follett, in that if, for example, Qantas indicated a willingness to do that, that might bear upon whether we grant permission to appeal or not.

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MR FOLLETT: Yes.

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JUSTICE HATCHER: All right, that has been useful, Mr Follett. I will now turn to Mr Dalgleish. Does that seem to be a useful way forward, Mr Dalgleish, that if we add a question which goes to your point of construction that if there's sufficient qualified bids, that's the end of the matter under 19.1.2?

PN106

MR DALGLEISH: I think I would have to say, your Honour, question 3 at page 78 is fairly important. The reason question 3 is of such significance is because those clauses, read with 19.1, result in an understanding of whether by-pass pay is paid or not, because essentially this matter comes down to, on 14 September 2022, Captain Lucas - - -

PN107

JUSTICE HATCHER: I think, once again, Mr Dalgleish, you have evaded my question by going to a different subject matter. Just stick with - - -

PN108

MR DALGLEISH: I would say, 'No', the answer to your question is 'No'. What would solve the problem is question 1 on page 78 and question 3 on page 78 being incorporated into the current questions as they stand and that, irrespective of whether there was reasonable or unreasonable withholding in the first question settled by Ryan C, that the second question is answered because otherwise - I mean, just to put this in context for the Commission, there are 200 second officers over the next five years to be allocated. We will be back in the Commission every single training year having a dispute about what 'unreasonably withholding' means. So, unless someone at the Commission or the court, whichever jurisdiction it is taken to, can solve the interaction or operation or interpretation of clause 19.1.2 with the requisite clauses in question 3 on page 78, we will be back before the Commission every training year, and that's not something that Qantas wants to do, it's not something that AIPA wants to do.

PN109

For whatever reason I have not been able to get that across effectively to the Commission, which is why we are here today, this is not just about 20 second officers. There are 200 second officers over the next five years to be allocated to the A380, so, unless we can settle it once and for all whether the association will not unreasonably withhold agreement or has reasonably withheld agreement in relation to the requisite clauses of the Long Haul EA10, we will keep coming back here because, unfortunately, Qantas says by-pass pay doesn't apply and we say by-pass pay does apply, and we say that you have asked under the wrong clause, 19.1.2.

PN110

This is why I keep trying to stress to the Commission that Qantas was entitled to ask for what they wanted under clause 19.1.2 and AIPA was entitled to redirect them to the correct clause, which is 16.5, dealing with by-pass pay for operational reasons. So, irrespective of what happens with clause 19.1.2, we still have the requisite clauses in 3(a), (b), (c), (d) and (e) to contend with, and just so your Honour understands what that means, those clauses go to seniority, by-pass pay and what a vacancy is, and under the Long Haul EA10, there's 10 or 11 different types of vacancies. A vacancy is not just a vacancy as understood in the ordinary meaning.

PN111

Qantas will argue that SOTs were not allocated according to a vacancy and we will argue that they will; hence why the other requisite clauses were included in the proposed questions for determination.

PN112

So, the answer to your question is, no, question 1 won't just resolve it, but questions 1 and 3, if they were added, 3(a) through to (e) would solve it in relation to the two questions already posed by the Commission with the addition of those questions.

PN113

JUSTICE HATCHER: Mr Dalgleish, I am not sure that the Commission can solve future disputes by reference to facts which haven't occurred yet, but it seems

to me that as long as the questions deal with the proper construction of clause 19.1.2, you can bring to bear any other provisions of the agreement upon that question that you consider appropriate. If you say that these other clauses bear upon the proper construction of 19.1.2, then I don't think that you need a specific question to be able to do that.

PN114

MR DALGLEISH: Well, we put it in our application, your Honour and so we expected that, as the applicant, we would have those questions answered. That's the whole reason we refiled the F10 in a more comprehensive fashion.

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JUSTICE HATCHER: All right. Anything further, Mr Dalgleish?

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MR DALGLEISH: Is there anything you need to hear in relation to the public interest?

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JUSTICE HATCHER: No, unless you want to add something that's not in your notice of appeal.

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MR DALGLEISH: Yes, quite possibly, your Honour.

PN119

JUSTICE HATCHER: Go ahead. What do you want to say, Mr Dalgleish?

PN120

MR DALGLEISH: Sorry, your Honour, I'm just trying to pull that up, if I can. If you can just give me a moment. I would say this. In terms of the public interest, of course we know it goes to matters of importance in general application and it goes to matters at first instance that manifest an injustice or a counterintuitive.

PN121

We would say the decision or order under appeal raises important issues concerning the points raised by the applicant: one, who decides the questions relating to an arbitration; two, who decides procedural issues relating to an arbitration; three, whether a fair hearing can result on the settled questions subject to the arbitration; and, four, whether the questions settled by the Commission are beyond jurisdiction.

PN122

Second, the decision or order under appeal manifests an injustice as the decision adversely affects present and future rights of 200 second officers over the next five years in the aviation sector.

PN123

Third, I would say appeals concerned with the interpretation of an important section of the Fair Work Act, which has not been considered by the Full Bench - in this respect, we are dealing with a legislative instrument, the current Long Haul

EA10, and we are dealing with more than just 19.1.2, as was clear in our F10, we are dealing with seniority, aircraft type, allocation, rates of pay and first day lottery provisions of the enterprise agreement, those, your Honour, being clause 16, 17.3, 17.4, 19.1.2 and 32.7.

PN124

In terms of - the decision or order under appeal obviously raises general issues in relation to the legal principles and we would say that the clause should have been looked at in terms of the construction cases of Berri and Golden Cockerel.

PN125

In terms of what I said before in relation to past tense, the clause doesn't read, 'The association has not unreasonably withheld agreement', it reads in the present tense, 'The association will not unreasonably withhold agreement.'

PN126

Nor does it read in the future tense, 'The association may be deemed to have unreasonably withheld agreement if this conduct occurs' - that's in the list of recitals, as I pointed out before in, say, for example, a mining lease - identifying the association 'who will' with a determinative or necessary consequence, 'reasonably or unreasonably withhold agreement.' In summary, 'will' means in the context of meaning - and there's 'will' mentioned twice within that clause - in the Oxford English Dictionary, expressing a determinative or necessary consequence without the notion of future. The expression 'will not unreasonably withhold agreement' in this context does not indicate future likelihood, rather it expresses a determinative or necessary consequence. Katzmann looked at that at *CFMEU v FWA* (2011) 195 FCR 74 at 79.

PN127

AIPA submits that it has not unreasonably withheld agreement, and I will take you to this case, your Honour - - -

PN128

JUSTICE HATCHER: Mr Dalgleish, you seem to be addressing now the merits of the dispute.

PN129

MR DALGLEISH: I'm talking to the public interest aspects of it, yes.

PN130

JUSTICE HATCHER: Of an appeal against directions? An appeal doesn't lead to us interpreting this agreement. You do understand that?

PN131

MR DALGLEISH: Well, the Commissioner needs to have an understanding of the clause in order to finalise the questions, I would have thought, so, in a sense, what we are dealing with here is not an exercise of discretion at all. On one view, it may be an exercise of discretion, but the proper way of looking at the nature of the decision under appeal, it would be an error to characterise the decision under appeal as a broadly discretionary decision.

PN132

I am not going to take everyone through Coal & Allied and what 'discretion' means, but LH EA10 is a legislative instrument. Clause 19.1.2 of the agreement stipulates the tribunal 'will' determine the question if it is satisfied that all of the conditions set out in clause 19.1.2 exist. The use of the alternative 'or' and/or the cumulative 'and' after each subclause, the provision of 19.1.2 indicates satisfaction must be reached in respect of each and every matter in dispute within the clause. It must be properly construed to determine the question.

PN133

If the tribunal reaches the requisite degree of satisfaction as to the matters in clause 19.1.2 in terms of its construction, and it is difficult to envisage a situation where it would not exercise its discretion to make an order one way or the other, but this is particularly the case when the terms of clause 19.1.2 are considered. The provision requires the tribunal to be satisfied that the association will not unreasonably withhold agreement in all of the circumstances to make a decision or an order.

PN134

What I am pointing to is the relevant legitimate consideration exists militating against the making of an order, or an opinion, or setting questions which would inevitably be bound having regard to it under this head clause. A close examination of the matters a tribunal is required to be satisfied of clause 19.1.2 and whether that involves an exercise of discretion, let alone a wide discretion, now, what I'm talking about here is clause 19.1.2 requires an understanding to be properly found or construed and the application of that finding by the Commissioner to the legislative obligations contained in the legislative instrument, which is LH EA10, which are the seniority obligations and by-pass provisions.

PN135

So there's no explicit or implicit subjectivity involved in that task. It's not a discretionary question. We can look at *Hope v Bathurst City Council*, for example, where Mason said:

PN136

> *The question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law.*

PN137

And, of course, clause 19.1.2 requires the formulation of questions and an opinion specified in a legislative and statutory enactment properly construed. So, the process entails making findings of fact, obviously at trial, and taking into account relevant considerations on the question that resolve the matter to finality in the formulation of the question. The formulation of the requisite questions and opinion is discretionary, your Honour - there's no doubt about that - but the process that must be adhered to in properly reaching any settlement of questions and opinion are not.

PN138

Clause 19.1.2 requires it to be properly construed based on the agreement and the F10 and then the application of that construction to determine whether the association is reasonably or unreasonably withholding agreement by setting questions that finally determine that matter to its end point. The tribunal does not determine this by exercising discretion, it is a decision of the kind described in *Hope v Bathurst City Council*.

PN139

Further, the tribunal is under a mandatory obligation pursuant to 19.1.2 to take into account whether the group is, as the clause says - I'm not going to read the entire clause out, but there's three parts to it: obviously, the completion of training; the aircraft type; whether there's sufficient bids from suitably qualified pilots and, of course, that's prior to the commencement of clause 32.7. Clause 32.7, if you are employed prior to the commencement of that, you are on a higher pay rate to if you were employed after that. That's just the first part of the clause.

PN140

The second part of the clause, as we discussed earlier, is 'otherwise agreed with the association for operational reasons'. Now, 'otherwise agreed' is not just approval. We don't just grant approval. You can ask us for our agreement. Then, of course, we get to the key clause which ties it altogether: 'The association will not unreasonably withhold agreement.' So this again involves determining the questions for the makings or findings of fact and determining whether they fall within the properly construed phrase under the agreement, under the Act results in one way or the other for the Qantas Group or AIPA. No discretion is involved.

PN141

The only discretion is what weight such findings attach to reaching a state of satisfaction that the pilot group, one, on the completion of training, a SOT will be allocated by the company to the B787, A330 or A330, A350, SSF aircraft rather than the B747 or 380 aircraft and, two, was unless there are insufficient bids from suitably qualified pilots employed prior to the commencement of the clause, and that's clause 32.7, and, three, otherwise agreed with the association for operational reasons the subject matter of the clause.

PN142

So, clause 19.1.2, in closing, in 16.5 requires the tribunal to be satisfied that it is the association reasonably or unreasonably withholding consent in all of the circumstances to set the questions, determine the arbitration and make the order. The formulation of the requisite questions and the opinion may well be discretionary, your Honour, but, once again, the process that must be adhered to in properly setting the questions and reaching the opinions are not. They are a matter of law.

PN143

Thank you.

PN144

JUSTICE HATCHER: Thank you. Mr Follett?

PN145

MR FOLLETT: Yes, thank you, your Honour. I can inform you that we will undertake to correspond to the Commissioner to the effect that question 1 on page 78 of the bundle should be an additional agreed question for the purposes of the arbitration.

PN146

Beyond that, we agree with your Honour's observation about question 3, that if these clauses are capable of bearing upon the proper construction of clause 19.1.2 then Mr Dalgleish will be free to make whatever submissions he wishes about that. It's just a simple matter of context. The only other point I would make about question 3 is that it's strictly a hypothetical or an advisory opinion, given that it's not anchored to any particular facts.

PN147

Beyond that, your Honour, obviously this is otherwise an application for permission to appeal against a procedural interlocutory decision where permission would rarely, if ever, be granted and it's difficult to identify what substantial injustice, if any, AIPA or Mr Lucas might suffer, particularly in circumstances where the questions are capable of being formulated during the course of the hearing.

PN148

Beyond that, your Honour, I don't have much further to say.

PN149

JUSTICE HATCHER: Thank you, Mr Follett. Can you just give us a second, please.

PN150

All right, Mr Dalgleish, is there anything briefly you want to say in response to what Mr Follett has just said?

PN151

MR DALGLEISH: I will only say two things, your Honour. The overriding policy of law is to provide a real remedy or relief to the person aggrieved who has suffered a real loss, which is the second officers in training, arising from the breach of the agreement, and the principles of law which we are talking about today is bringing the arbitration or the litigation to finality, and case management would urge strongly for this course based on the questions that resolve the matter to its entirety, and so I will leave that with you, your Honour, thank you.

PN152

JUSTICE HATCHER: Thank you. I thank the parties for their submissions.

PN153

We are in a position to give our decision. On the basis that we accept the undertaking proposed by Qantas, we have decided to refuse permission to appeal. We will issue our reasons as soon as we can, but not now.

PN154

I thank the parties for their submissions and we will now adjourn.

ADJOURNED INDEFINITELY **[4.12 PM]**