TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CLANCY

C2023/948

s.604 - Appeal of decisions

Appeal by David & Antonopoulos and Others
(C2023/948)

Melbourne

10.21 AM, WEDNESDAY, 24 MAY 2023

PN1

VICE PRESIDENT CATANZARITI: Yes, I will take the appearances.

PN2

MR M HARDING: Vice President, my name is Harding, initial M, I seek permission to appear with Mr Bakri on behalf of the appellants.

PN3

VICE PRESIDENT CATANZARITI: Yes, thank you, Mr Harding.

PN4

MR C O'GRADY: If the Full Bench pleases my name is O'Grady, initial C, and I seek permission to appear with my friend Mr Pollock.

PN5

VICE PRESIDENT CATANZARITI: Yes, thank you, Mr O'Grady. Permission is granted. Thank you. The Bench has had the opportunity to read the comprehensive written submissions. We now invite some short oral submissions. Thank you, Mr Harding.

PN6

MR HARDING: Thank you, Vice President. As you have indicated we have filed some submissions and we rely on those. We also rely on some submissions filed below before Deputy President O'Neill, and in particular those appear on pages 349 to 356 and pages 357 to 377 in the appeal book.

PN7

In advancing the appeal, Vice President, I wish to perhaps deal with some aspects of the respondent's submissions first. Then I intend to take the Bench through the enterprise agreement to illustrate the constructional issues that we ventilate in grounds 1 to 5, and then deal with ground 6 of our notice of appeal, and then conclude with some specific responses to the respondent's submissions.

PN8

It is perhaps of assistance I think, Vice President, if I start by explaining some of the context, or the context for the dispute that came before the Deputy President, and that of course pertains to - - -

PN9

VICE PRESIDENT CATANZARITI: Sorry, the audio has just dropped out apparently. So we will have to take an adjournment.

SHORT ADJOURNMENT **[10.23 AM]**

RESUMED **[10.26 AM]**

PN10

VICE PRESIDENT CATANZARITI: Yes, Mr Harding, we will try again.

PN11

MR HARDING: Do you need me to start again, Vice President?

PN12

VICE PRESIDENT CATANZARITI: No. I think we understand your general outline, so just get onto it I think, and I do remind the parties that this matter is listed for three hours, so please keep to the time.

PN13

MR HARDING: I will do my best, Vice President. I did want to take - - -

PN14

DEPUTY PRESIDENT GOSTENCNIK: Mr Harding, you might also move your microphone a little bit closer because I know from prior experience, particularly when you're seated, that the transcript doesn't always pick you up.

PN15

MR HARDING: There's a certain level of discrimination involved in that, isn't there?

PN16

DEPUTY PRESIDENT GOSTENCNIK: That's the least of our problems here.

PN17

MR HARDING: I take it no further. Hopefully that transcript works. I did want to take the Full Bench to some documents that are in the appeal book, but have been provided electronically, which just illustrate the differences between the two types of shift structure as a way of contextualising the debate as it came before the Deputy President, and can I draw your attention to items 29 and 30 of the appeal book. These documents were provided electronically. I don't know if the Full Bench has got those. We have hard copies.

PN18

VICE PRESIDENT CATANZARITI: We have the appeal book electronically, but what are you referring to?

PN19

MR HARDING: Items 29 and 30 of the appeal book. They were apparently provided separately because they're spreadsheets. Perhaps if the Full Bench doesn't have those documents if I can just - - -

PN20

VICE PRESIDENT CATANZARITI: No, we do have them. You're talking about the proposed graduating roster which is 29, and the Essendon - - -

PN21

MR HARDING: Correct.

PN22

VICE PRESIDENT CATANZARITI: Yes, we do have those.

PN23

MR HARDING: Okay. I was wanting to take you first to item 30 which is the Essendon MTT 222B roster, and on my copy of the spreadsheet, Vice President,

there is some tabs at the bottom of the page. They are labelled FTMD and FT@ and then some other letters that follow.

PN24

VICE PRESIDENT CATANZARITI: I have the spreadsheet open. Yes.

PN25

MR HARDING: Yes. I was wanting to take the Full Bench to the second tab, which is FT@, and what you should see in front of you is a series of - it's a table that's got on the left-hand side a column headed 'Table' with a set of numbers, and then another column which is 'Type' and then you've got days and times. Vice President, have you been able to discover that?

PN26

VICE PRESIDENT CATANZARITI: No, I must say - this is number 30 we're talking about, which is the Essendon roster.

PN27

MR HARDING: That's right. And there's tabs at the bottom FTMD and then another tab FT@, and so I'm looking at FT@, the second of the tabs. I can explain it if you're unable to find that.

PN28

VICE PRESIDENT CATANZARITI: Yes, I might get you to explain it.

PN29

MR HARDING: This is an example of the alternating roster that has applied in this industry for about 30 years I think on the evidence, since the 80s, and the way the roster works is that the key days are Monday, Tuesday, Wednesday and Thursday, and you will see that there is under the heading 'Type' a designation of night, day, night, day. But the times are critical because what those times tell you is that for a whole week an employee would work those times, 6.49 to 1842, and then in the next week they would alternate to a day shift and then work the times that are there set out. That's the planned structure of the shifts that are allocated to employees.

PN30

The debate really is between the merits of the alternating roster on the one hand and the graduated roster on the other. It pertains to the extent to which one of the rosters is better at managing what are called rotations. So when we're talking about a rotation we're talking about a situation in which you might have a week of say earlies, or days rather, and then you rotate either forwards in the sense that the next week of shifts are at a later time, which is a forward rotation, or the next week of shifts go backwards, which means that you're starting earlier, and that's a backward rotation. And the merits of the respective shift structures are hinged on this notion that the graduating style of shift minimised backward rotations as a way of managing fatigue.

PN31

And I would add just by way of completion while you've still got it, item 30, that it is not always the case under the planned roster that if you started say a day shift

and then moved to a night that there will be a backward rotation, you could be going the other way. There are occasions when backward rotations occur, and there are occasions when there's forward rotations, but it's accepted from the point of view of the appellants that there's more of the backward rotation in the alternating shifts than there is in the graduated one.

PN32

In respect of the graduating shift structure, which is item 29, the structure of that shift is quite different, and again I was hoping to take you to the spreadsheet that you ought to have. There is that similar style at the bottom, the tabs. It's the second of them that shows the times, and that's the FT@.

PN33

VICE PRESIDENT CATANZARITI: Yes.

PN34

MR HARDING: And you will see that the structure is quite different, and really the best way of illustrating it is really from position 16, numbered 16. Under the graduating shift structure what you have is a block of four late shifts, and then by 20 you get a PLD, which is a program leisure day I think is the acronym, and then a block of earlies. When you look at the times, the starting times for say the lates, you will see that the starting times on each of the days, for instance when you look at item AS16, the starting times from Tuesday, Wednesday, Thursday and then to Friday differ between say Tuesday and Wednesday and Thursday to Friday.

PN35

The significance of all that when it comes to the issue that caused the dispute to arise is this; the plan is not for many employees, we say by far the majority of employees, what they actually worked. The plan of shifts is a structure, a default, that serves as the basis for a right, or a power perhaps may be more accurate, by which employees can create their own personal roster, which essentially enables them to establish a consistent pattern of work by swapping a shift with another person.

PN36

In the case of the alternating roster, you've got a day and a night, day and a night, if an employee does not wish to work nights and only days, then that employee will say to another employee who's only alternating on the night schedule in the week that they're programmed to work days, 'I'll swap with you.' And so in that circumstance that employee who only wants to work days is able to continue working days throughout the roster cycle at consistent times, the times that are actually set out in the schedule.

PN37

The issue then that comes from that is that that enabled employees to configure their work in a flexible way to accommodate their own needs, and this is expressed as shift swapping, and there's provisions in the agreement that deal with that practice and I will take you to those shortly. The difference under the graduated roster is that because you have shifts, you have blocks of four where the shift times start at different points in time.

PN38

The complaint from employees, from the appellants was that it's harder, more difficult to arrange swaps because you have to do it so as to evade, if I can use that phrase in a neutral way, all of the four that you've been allocated and find someone who can work at the times that have been configured for those four. So going back to the example that I took you to, this is item 16, there are four lates that are programmed, 16, 17, 18 and 19; that is that's a four week program of shifts.

PN39

An employee who did not wish to work lates and wanted to work earlies would have to find another driver who would swap all four of those weeks with them, and be able to do so at the differing times that are contained in the shift. The argument then becomes that for the purposes of the practice, the embedded practice that has been part of the industry for years, the ability to swap shifts, which is an important and critical aspect of the way in which work is arranged on the evidence, was impaired and burdened.

PN40

Just by way of preliminary observation the respondents say in paragraph 1 of their submissions that the alternating rosters gave rise to a range of fatigue management risks and posed problems for Yarra Trams in rostering part-time employees. The second of those issues pertains to some provisions in the agreement that increase the number of part-time employees that Yarra Trams can employ over the life of the agreement, and as of June 2022 fixed at 10 per cent of the workforce. That is 90 per cent of the tram driver workforce is and remains full-time; 10 per cent of full-time equivalent employees is the limit that is prescribed, and I will take you to those provisions shortly.

PN41

The dispute that came before the Deputy President had two aspects. The first aspect was a constructional debate about whether or not Yarra Trams was authorised by the terms of the agreement to change the roster during the life of the agreement. Obviously this deals with a point that's been raised against us. They are entitled to bargain for a change when the agreement expires, which it does in a month, but otherwise for the life of this agreement it is, we say, limited to the alternating roster, and I will develop that point.

PN42

The second argument which is engaged by ground 6 is this; that implementation of the graduated roster created a burden, an impairment to shift swapping, or maybe we could describe it as driver initiated shift changes, the roster being really in the end of the day a schedule of shifts. It is said in paragraph 2 that our complaint was somehow or other that there was a generalised allegation that implementation was unjust or unreasonable.

PN43

Well, that was the point that was put against us by my opponents, but it was not the issue that was ventilated by the appellants. On the merit question the appellants said having regard to the two types of shift structure the alternating roster was preferable in the sense it better suited the ability to shift swap.

PN44

No case was put against us that Yarra Trams for operational reasons pertaining to the operation of the tram service itself was unable to use one over another. Both are available as roster shift structures that could be utilised. The employees were told by Yarra Trams for the purposes of the consultation process that occurred that the reason for the change was that the graduated roster was better able to manage fatigue, and there was some evidence given I think by Mr Breton, who was a witness called by Yarra Trams, pertaining to some problems that had been incurred in rostering part-time employees.

PN45

The Deputy President resolved the constructional questions against us and the merit questions against us, but in relation to the merit question the Deputy President concluded that because shift swapping could occur under the graduated roster that there wasn't sufficient - that indeed in those circumstances it ought not be (indistinct) answer the question posed in question 2 in the negative, and we address that in our submissions.

PN46

If I can take the Full Bench to the enterprise agreement which is a complex document, and if you don't have copies of it we can hand up copies. Can I start at the beginning with part 1, and the way in which the agreement is structured is that you've got in part 1 of the agreement a set of common conditions that apply to all the forms of employees that Yarra Trams employs under the terms of this agreement. And then there's a part 2 which is of significance to this case and it's headed 'Operations', and it regulates the work of relevantly tram drivers. And then there are appendices or annexures - actually it's appendix - that also specifically regulate two types of categories of employee, and relevantly for the purposes of this dispute it's appendix 1 which is on page 79 of the agreement, and I'm looking at the page numbers at the top of each of the pages that we've handed up.

PN47

VICE PRESIDENT CATANZARITI: Yes, we have that.

PN48

MR HARDING: Yes. Clause 2.3 of part 1, which is on page 1, speaks about how the clauses or how the parts interact, how the bits in the agreement interact. I can say that in relation to say the appendix, appendix 1, that appendix is derived from award conditions that had applied to employees under a pre Workplace Relations Act award, and that's apparent from the heading in appendix 1, and I will take the Full Bench to that shortly.

PN49

We can see from paragraph 5.1 that the agreement details terms and conditions of employment for employees covered under clause 2, and of course the employees are identified in 2.5. I'm afraid I'm going to have to skip through, I will skip over the rest of part 1 for the present and I will be returning to it shortly.

PN50

The starting point we say for an analysis of how this dispute on a constructional basis is properly resolved is appendix 1, and appendix 1 appears on page 79 as I have mentioned. It tells you that the appendix is based on clauses from the award that's nominated there and that it sets out the various content of those terms. It's clear from the terms of the appendix that it's dealing with some base conditions of employment. So for instance clause 18 tells you about the contract in employment and how employees are employed.

PN51

There's a probation period. Here we are dealing with the employment relationship that's prescribed in 18.2. And then in clause 19 is specifically the first sub-clause, 19.1. We are told about how ordinary hours of work are configured for employees who are covered by appendix 1, tram drivers relevantly here. And so of course like most enterprise agreements are awards the employment is divided into allotments of 38 hours of work per week.

PN52

Then the clause of significance to the dispute in particular is 19.2, and what that says is, 'An employee shall work such shifts as may be allotted to him or her.' So these are shifts of 38 hours over a week. The words 'as may be allotted' tells you that it is an authority and a discretion on the part of Yarra Trams to allot work to employees. And that is to be read with the second sentence, which is 'As far as practicable that allotment of work shall be morning and afternoon shifts on alternate weeks.' That's the alternating structure. We're here talking about a shift structure reflected by the roster that I took you to originally, which is item 30 of the appeal book. 'And shall equally share the broken shifts.'

PN53

Now, it's said against us that that's somehow or other a clause that just pertains to the sharing of shifts between employees. Well, only the second part of that clause deals with that subject. Otherwise if Yarra Trams allots work to employees in exercise of the authority granted by 19.2, the first sentence thereof, then as far as practicable the employees shall work those shifts in the structure that is set out in the second sentence. That's what those words mean, and that's the condition from which you then identify how rosters intersect with the shifts that Yarra Trams is authorised to allot.

PN54

It's true to say that 19.2, the first sentence, does not say how those shifts are to be allotted, but contextually and also by reference to work practice it's apparent it's allotted by way of a roster that schedules those shifts. Now, one of the things that's said against us by our opponents is that there's a distinction between the work referred to in 19.2 on the one hand and rosters on the other. It's a distinction without a difference. Rosters allocate shifts. They allocate shifts of 38 hours over a week. 19.2 describes the shifts of work the roster allocates.

PN55

Contextually the how question of allotment is apparent from clause 22 of appendix 1, which also refers to rosters of traffic employees. But more particularly, and I take you back to part 1, on page 23, clause 31.2, the reader is told that:

PN56

The hours of work for a shift worker shall be 38 hours per week averaged over the one complete cycle of the roster and divided into not more than five shifts per week. Unless specified otherwise in this agreement a full-time shift shall be of eight hours duration.

PN57

I will deal with that last sentence in a while, but what 31.2 tells you is that it's another term that is regulating ordinary hours for shift workers, which of course these workers are, and they do so over a roster cycle. This is contextual information that informs 19.2. The terms of the agreement are joining the dots in a way that explains the intersection between roster on the one hand and work on the other.

PN58

Sticking with part 1 and on page 24 and 25 there are specific circumstances that the makers of the agreement have set out to deal with particular circumstances that might involve a derogation from a shift structure that strictly accords with the second sentence of 19.2, in particular I suppose clause 35 which deals with the Grand Prix. And then 36 'Timetable design' which tells the reader that in relation to timetable design, which invariably informs the shift structure, the roster committee will be the committee to which Yarra Trams will consult about those changes, if there is to be. This is again contextual information. None of these things specifically arise in the circumstances of this case, but they inform - - -

PN59

VICE PRESIDENT CATANZARITI: Yes. I was actually thinking it myself, Mr Harding. We have read the submissions. We know what the points are for the appeal, and you need to actually focus on the appeal.

PN60

MR HARDING: I am seeking to do so, Vice President.

PN61

VICE PRESIDENT CATANZARITI: We are giving you a bit of latitude really, and you're very experienced counsel, so can we really focus on the construction point which really is the heart of this appeal.

PN62

MR HARDING: Yes. I am seeking to do so, Vice President, and I will take your observations on notice about that. Maybe if I can just focus then on how it is that we say 19.2 intersects with rosters. I think I have explained how it is we say it intersects with other parts of the agreement. The issue we ventilate in the submissions is that when one looks at 19.2 it is plainly speaking about work employees have to perform. This is an enterprise agreement.

PN63

We say there's a mutuality that's implicit in 19.2, and that mutuality is apparent from the fact that when one has regard to how the first sentence of 19.2 works, which is that the employer allots, the employee performs the allotment, the second sentence is plainly something that only operates as the mutual second step once

the employer has allotted shifts that we say must accord with the general shift structure that is described in clause 19.2.

PN64

The observation made by our learned friends is that that speaks about shall, there's an obligation shall work, and how does that align with shift swapping. I think it's said against us that the true characterisation of this dispute is that the complaint is about shift swapping, and what we say about that is that 19.2 is to be properly viewed as both an obligation, but also a benefit, because that benefit intersects with other parts of the agreement which facilitate the thing that we're here complaining about; namely, the impact on shift swapping, and that's apparent from 11.6 of appendix 1 on page 83.

PN65

Subject to the approval of and in the manner directed by the Depot Manager employees may exchange shifts and days off.

PN66

There's a correlative provision in part 2 I will take you to shortly. Now, whether that's to be construed as may exchange the obligation to work shifts that accord with the shift structure specified in 19.2 or whether the obligation gives way by reference to the permission that the Depot Manager gives for the exchange it doesn't matter for our purposes.

PN67

What it does authorise is a derogation from the obligation that enables an individual employee to create a personal roster, and they're not my words, they're the words of Mr McMillan who said that in his statement. 'A personal roster that enables the employees to configure work in the way that it suits their circumstances.' No one is suggesting by the way that Yarra Trams is not seeking to facilitate that shift swapping under the graduated roster. That's not the controversy. We say the graduated roster makes it harder.

PN68

With that in mind, Vice President, it's necessary to look at 8.18, clause 8, on page 65 of the enterprise agreement, and this clause deals with train driver rostering and it does so for full-time tram drivers, for full-time tram drivers. It's important to have regard to how this clause operates in relation to the structuring of shifts. One can see from (a) that shifts may be rostered - again here we're speaking about shifts - for work periods up to eight hours and 15 minutes per day and up to 41 hours and 15 minutes of work for the week.

PN69

You might recall I took you to clause 33 part 1 which says a shift is eight hours unless otherwise specified in the agreement. Well, there is where it is otherwise specified. You can see there's interaction between these clauses, they speak one to another.

PN70

There are a range of particular clauses that deal with particular circumstances. In particular 8.3 explains that roster changes can occur and notice should be

given. And then also implicitly accepts that emergency circumstances might arise which require a roster change, and the last of those may also engage the practicality or practicability exception that is referred to in 19.2. These are all particular circumstances that the parties have turned their minds to.

PN71

I drew your attention to clause 11.6 I think it was of appendix 1 which pertains to an exchange of shifts that have been rostered, and if you look at 8.14 of part 2 that clause intersects with appendix 1 by telling you that the practice by which an employee may alter his rostered duty, or her, is to be in accordance with the local arrangements at each depot, and clause 11.6 tells you how that occurs.

PN72

8.18 is then put against us as the basis upon which Yarra Trams can effect what we described as a global alteration to the roster structure, to the shift structure that employees work. Not referable to a particular set of circumstances that arises in emergency circumstances or a particular agreed matter such as the Grand Prix, but it's said against us it's some kind of power on the part of Yarra Trams to simply change the shift structure that clause 19.2 describes. And the source of power is what's said to be the confirmation of a commitment to flexible rostering and no other rostering restrictions.

PN73

What we say there on the constructional question, Vice President, is that that takes that confirmation of commitment far too far. The confirmation of the commitment to flexible rostering has to be read with the other words, 'And no other rostering restrictions, nor will restrictive work practices apply.' So here in this clause what they're dealing with, the makers of the agreement dealing with, is having dealt with particular restrictions in 8.18, and there are other restrictions that are set out in appendix 1, there is a commitment to flexible rostering and no other restrictions, it must mean no other restrictions other than what's in the agreement. And the quid pro quo is expressed in the last sentence.

PN74

A constructional question arose about the word 'initiatives' outlined in this agreement. With respect to our learned friends there's no real difficulty with the construction of that phrase, or that word. What it's telling you is that for the flexibility that's referred to in the first sentence of 8.18. Employees will be rostered in accordance with initiatives as if it was measures, in accordance with the way in which the agreement itself sets up work.

PN75

What we say about that is that it is artificial to simply say on the one hand, well that's rosters, that's dealing with one subject, 19.2 is dealing with work, and the two really are dealing with different subject matters. One rosters shifts. The reference to rostering in accordance with the initiatives in the agreement is a reference to an obligation to do as the agreement commands and to roster the work in a way that reflects the terms of the agreement.

PN76

Now, our learned friends say, well we're entitled to engage the flexibility reference and create an entirely different roster structure, and on that footing we say because we've done that the practicability exception in 19.2 is engaged and we are entitled therefore, that is Yarra Trams is entitled therefore to overlook the remainder of 19.2. But with respect to my learned friends that does not answer the language that is in that sentence, because the language describes an extent, 'As far as practicable.' That question is posed on each occasion that Yarra Trams rosters work of 38 hours over a roster cycle.

PN77

In the case of the way it must follow from the respondent's contentions that for so long as they choose to maintain what is really an incompatible roster structure 19.2 has no work to do, that second sentence. It ceases to have any real significance for the way in which work is arranged and performed, because ultimately if you roster the shifts in a particular way that's the work, that's the planned work, employees can as I have said create by way of change, by way of a personal roster. 'As far as is practicable' is the words. Not 'if practicable', not 'if incompatible', 'as far as practicable', and that's explicable having regard to the way in which work has been arranged in this workplace for decades. Those work practices, and it's uncontroversial, have been arranged in a way that exactly corresponds with clause 19.2.

PN78

The other aspect of the respondent's constructional argument is this, that the consequence of the constructional argument is we, that is Yarra Trams are entitled to devise an entirely different shift structure and impose it on these employees without qualification for as long as we choose to have it. Don't forget 19.2 is a qualified requirement. The parties have taken the trouble to insert the words 'as far as practicable', but those words don't follow the graduated roster. On the respondent's argument it must follow that if they implemented a graduated roster or some other kind of roster that structures shifts, then that roster structure is imposed for as long as Yarra Trams chooses without qualification.

PN79

The differences between us really follow from the fact that Yarra Trams comes at the constructional question from the wrong point. What it does is to start from 8.18 and refer to flexible rostering as some kind of power or authority. I think it uses the word 'has been granted.' There's nothing granted. It says granted flexible rostering and then it starts from 8.18 and then says, well that's enough to enable us to introduce an entirely different shift structure notwithstanding what 19.2 says. Our constructional approach harmonises everything in a way that continues to give clause 19.2 work to do.

PN80

Whilst I'm dealing with 8.18 it's useful to note that our constructional approach has two other aspects to it which ensures that relevant parts of the agreement are read harmoniously one with the other. On page 61 1.2 talks about the appendices, and the chapeau to the clause makes it clear that further terms and conditions of employment are found in appendix 1.

PN81

The very text of part 2 intends that part 2 be read with appendix 1. Clause 1.1 says that:

PN82

> *For the avoidance of doubt the provisions of part 2 apply to part-time employees on a pro rata basis in accordance with their ordinary hours of work.*

PN83

Clause 8, where you will find clause 8.18, applies to full-time employees. What the respondent asks you to accept is that a confirmation of a commitment to flexible rostering by full-time employees says is a platform to change their roster structure because of some perceived difficulty with part-time employees.

PN84

I think the Deputy President accepted a submission from my learned friend that clause 19.2 may be regarded as an assumption of the way work was arranged, but not an obligation. Well, the assumption is powerful because it underscores the commitment. We say of course if assumption is anything less than obligation then we disagree, but even if it was couched in a way of a softer version of that then it still describes a work practice that employees could assume would continue when they entered into this agreement with Yarra Trams back in 2019, because that was the predicate of that.

PN85

Now, we've spoken about mutuality, or I have, and we have explained how one can get to that point through the terms of construing part 2 harmoniously with appendix 1. But it's our contention that that mutuality is implicit from the text of clause 19.2 in any event, and we gain we say some support for that proposition from some obiter observations of Allsop CJ in the case that we've got at item 4 of our authorities, which is the *Australian Building and Construction Commissioner v CFMEU* (The Nine Brisbane Sites Appeal). In paragraph 7 of his Honour's reasons - or paragraph 5 first is where he starts with the constructional approach, and this is on page 121 of the list of authorities that we've provided you.

PN86

VICE PRESIDENT CATANZARITI: Yes, we have those.

PN87

MR HARDING: His Honour starts by approaching the question of how one construes enterprise agreements that contribute to a sensible and practical industrial result shorn of narrow legalism and pedantry, referring to Amcor. And then goes on to refer to the context, and of course the Federal Court has made this clear in a number of cases about the importance of the statutory regime as providing context of how one construes enterprise agreements.

PN88

And then in paragraph 7 he draws on the good faith process under which enterprise agreements are created as a constructional principle that might inform how one approaches constructing terms in those agreements. And in doing so

refers to as an example what his Honour Mason J said in *Secured Income Real Estate v St Martins Investments*, and I will take you to that case shortly.

PN89

This case of course concerned a term in an enterprise agreement that allowed for employees to meet and discuss, and it was suggested against the employees - suggested against the union I think as well as the employees that they were using that clause for a purpose that was ulterior, namely to engage in stop work meetings, and that was the foundation for the action that was brought by the ABCC.

PN90

His Honour first questioned that by reference to the good faith process that the agreement was created in, and grappled with the idea that the purpose or mental state of another could be relevant to how one examines a right to meet and discuss, and ultimately concludes that it didn't have work to do here and that the better way of reading it was to construe the term in the way that Rangiah J had done. The principle that he articulates in paragraph 7 has utility here. When one has regard to the fact that bargaining is a give and take process involving the parties, namely employers on the one hand, employees on the other, and a level of mutuality can be assumed by reference to the fact that they're bargaining for an outcome.

PN91

How that intersects with Secured Income Real Estate, which is item 5 of our materials, on page 159 of the materials that we provided we set out the pages that Allsop CJ referred to in the case that I have just taken you to, and we rely on what his Honour said in the second paragraph. He's drawing on some observations from Lord Blackburn in *Mackay v Dick*, which supports an implication that if it's necessary for one party to do something the other party will agree to facilitate them doing that.

PN92

And the observation that his Honour makes underneath it is important, because it doesn't necessarily mean that you have to imply an obligation to do the facilitative thing in order to construe the agreement with the mutuality that is implicit in what Lord Blackburn has said in that extract.

PN93

And here we're not saying for instance that the mutual obligation on the part of Yarra Trams to structure shifts by their roster in a way that enables employees to perform work in the manner at clause 19.2 leads to some implication of that as an obligation in the enterprise agreement. What we say by reference to what Mason J says is that informs how one construes an obligation on employees, and in a good faith setting, which is how Allsop CJ understood it, that has utility, because we're talking about the creation of obligations in a mutualised environment of bargaining.

PN94

Now, another aspect of the good faith process which we have drawn attention in our submissions is the obligation to inform employees about the effect of the

terms of the proposed agreement that is set out in section 180(5)(a) of the Fair Work Act, and the obligation is that the employer must take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to the relevant employees.

PN95

Having regard to the fact Allsop CJ was viewing the good faith process as a source of construction, as a source upon which one construes terms, subsection (5) of section 180 has work to do in construing the breadth that our learned friends apply to the phrase 'confirm their commitment to flexible rostering.'

PN96

Item 6 of our authorities has the Full Court's decision in One Key Workforce, which construes what genuine agreement means for the purposes of section 188(c) of the Fair Work Act, and on page 196 of the court's reasons they deal with genuine agreement.

PN97

Thus, any circumstances which could logically bear on the question of whether the agreement of the relevant employees was genuine would be relevant. One obvious example is the provision of misleading information - - -

PN98

Which doesn't apply here.

PN99

- - - or an absence of full disclosure.

PN100

And there's a reference to an example, a decision of the former Australian Industrial Relations Commission in Toys 'R' Us, and we have spent some time trying to find that case, which was not easy, but we have, and this is a decision of Vice President Ross as he then was. We're not suggesting for a moment that the facts of that case have any significance to those that apply here. We just draw on the principle that's articulated by his Honour really from page 18 of the report by reference to section (indistinct)(1)(h) of the former Workplace Relations Act, and that provision required - and this is the second point, the second conclusion referred to by his Honour:

PN101

That provision required an employer to explain the effect of the terms of the agreement and to inform employees about the consequences of the agreement being approved. In my view such a requirement brings with it an obligation to fully disclose the impact of the agreement, vis-à-vis the existing award conditions.

PN102

In that case the obligation was met and his Honour then sets out the reasons why.

PN103

So we're here concerned about the effect of the terms of the agreement. We rely on it not to say that there hasn't been some genuine agreement reached about the agreement itself, we rely on it for the purposes of saying that in construing the effect of a commitment confirming flexible rostering it is relevant to note for the purposes of a good faith constructional approach that Allsop CJ outlines that - - -

PN104

VICE PRESIDENT CATANZARITI: So do you say the clause on flexible rostering first appeared in this agreement, not in any predecessor agreement?

PN105

MR HARDING: No.

PN106

VICE PRESIDENT CATANZARITI: So it's been there for some time, and you want to reopen it by way of this appeal?

PN107

MR HARDING: It's been there since 2012. Exactly, and we put in the material in the appeal book. Each agreement since 2012 there's been a confirmation of a commitment to flexible rostering; 2012, 2016, then 2019. And for the first time halfway through this enterprise agreement suddenly it's construed as a source of power to change the structure of shifts that clause 19.2 articulates.

PN108

And one of the reasons is for part-time employees, and it's only in this agreement that there is reference to that number, reference to the number that it will be increased over the life of the agreement, and that's on page 11 of the enterprise agreement, which appears in part 1 under the heading 'Other conditions.' So we've got an incremental increase in part-time employees culminating for 1 July and 10 per cent full-time equivalent.

PN109

My learned friends rely on this confirmation of a commitment given in 2019 and it was given in 2012, 2016, and I can take you to the parts of the appeal book which say that, and I will in a minute. The employees went into the 2019 agreement with a shift structure that precisely corresponded with 19.2. The information provided to employees was before the Deputy President and it was an annexure in my instructor's statutory declaration and appears on page 612 of the appeal book. That's the letter. The document is headed 'Explanation of the terms.' And then about the fourth paragraph down:

PN110

The purpose of this document is to explain the nature and effect of the proposed agreement and to advise you when the vote will be conducted.

PN111

And then there's a table. On page 616 there is reference to part-time employees. It just tells you that there's going to be an increase in the number of part-time employees as a proportion of the workforce, apparently while taking the concerns of full-time employees, and how that's said is of course not articulated.

PN112

And then when one has regard to page 626, which deals with clause 8 of part 2, there's reference to an amendment to full-time tram drivers only in respect of 8.1, 8.2 and 8.12. Actually all of clause 8 applies to full-time employees as I explained. And then appendix 1 is described on page 628, the second column down.

PN113

We put in the relevant provisions of various agreements. The first time this commitment to flexible rostering appears was in the 2012 agreement, and the relevant part is on page 547 of the appeal book, clause 8.14. It appears again in the 2016 agreement on page 578 of the appeal book, clause 8.18.

PN114

It might be said against us, well on each occasion the employees confirm their commitment to flexible rostering, and they did so in 2019, and that might be so, but they did so based on information provided by the employer about what the agreement provided, and in circumstances when they were obliged to explain the effect, and in circumstances in which the existing work practices were as I have described, and that has some significance for construction. We have included in our list of authorities the Full Court decision in *King v Melbourne Vicentre* in item 2. I am being informed that the clause in fact appears at 2006, and I will get you an appeal book reference; 467 in the appeal book.

PN115

VICE PRESIDENT CATANZARITI: Was that one of the clauses introduced in 2006?

PN116

MR HARDING: It appears so.

PN117

VICE PRESIDENT CATANZARITI: Just how long are you going to be, Mr Harding?

PN118

MR HARDING: At least another half an hour, Vice President.

PN119

VICE PRESIDENT CATANZARITI: All right. Let's stick to that time, please.

PN120

MR HARDING: Page 76 of the authorities that we have provided you identifies by reference to the observations of the primary judge:

PN121

Practices in the relevant industry may provide material context when one approaches construction. Hence the framers of documents such as awards may well have been concerned with expressing their intention in a way likely to be understood in the relevant industry rather than with legal niceties or jargon.

PN122

The practices in the relevant industry here prior to this change that took effect on 16 October last year were as I have described. The practices in the relevant industry at the time the employees gave their commitment to rostering flexibility in 2019 were as I have described.

PN123

VICE PRESIDENT CATANZARITI: But on your analysis then they can never change the practices, so there's a breach of the agreement, they can't change the practices. If that is so why aren't you simply going to the Federal Court to try to get a breach of the agreement done? Sydney Trains had a similar by analogy situation. They lost that argument in the Federal Court ultimately when they sought a declaration. It was in the effect of their equivalent rostering clause. Because this all turns on the construction of the clause, but you say there's a straight out breach. If we're against you it doesn't prevent you then of course reagitating and relitigating your breach point.

PN124

MR HARDING: The issue is ventilated under the disputes clause.

PN125

VICE PRESIDENT CATANZARITI: Yes, I understand that and we see that from time to time and people still preserve their rights to then seek a declaration effectively that there was in fact what the clause otherwise means.

PN126

MR HARDING: Yes. All I can say about that, Vice President, is we're agitating a constructional question for the purposes of resolving the dispute that we have put before the Commission.

PN127

VICE PRESIDENT CATANZARITI: I understand that, but you're seeking to sort of - we have a clause that's been in place since 2006 now we know. One of your arguments was that the explanation of what that clause actually means, well it's not surprising that we're not going to find any material now of that clause which has been in place for 17 years as to how it came about, and then we're not going to go backwards and say, well the circumstance what happened in 2006 what is explanation that meant that clause - it really should be the correctness test and we should focus on what that clause actually means now.

PN128

MR HARDING: Yes, I understand that, Vice President. The correctness test deals with questions of construction, and what I sought to agitate is a constructional approach to how one construes clause 8.18 now, and we put two arguments in relation to clause 8.18. We have spoken about how that clause functions when one has regard to just the agreement itself, and then we have advanced a construction that construes the clause in accordance with the mutuality that we say is implicit and explicit by reference to clause 8.18. So they're two limbs of the constructional approach that we press in respect of the clause as it is now.

PN129

DEPUTY PRESIDENT GOSTENCNIK: Mr Harding, if your construction is correct and that effectively involves reading the flexibility rostering provisions as not permitting flexibility of this kind, because it's inconsistent with the pattern of work for which clause 19 and the appendix provides, what other rostering flexibility is clause 8.18 directed to?

PN130

MR HARDING: It deals with a situation where the circumstances are such that it is necessary to derogate from the practice in certain circumstances. So for instance an emergency situation which means that someone might not be able to perform, an employee may not be able to perform that alternating roster because of the emergency. The Grand Prix is a rostering circumstance as particular. It might be that the government makes a change to the timetable that affects how it is that the alternating roster can be delivered.

PN131

There are a range of particular circumstances that will engage the words 'as far as practicable' without stopping it being applied generally, and that's our complaint. The complaint is not really that the alternating roster must be delivered regardless of an operational circumstance for instance that - - -

PN132

DEPUTY PRESIDENT GOSTENCNIK: So for example I think back to restrictions that were imposed as a response to the COVID-19 pandemic in Victoria where for a period we operated under a curfew for example. There might be a need to alter the roster because it's plainly not necessary to run trains after 8 pm in a curfew situation. And so in that circumstance the alternating roster arrangement mightn't work as anticipated.

PN133

MR HARDING: Yes, because for as long as that circumstance prevails and responsive to that circumstance, and really when you look at 8.18 it's kind of like a culminating provision that says, well here are particular things that we have agreed the roster should deal with, and then it says and no other rostering restrictions shall apply. So that at least deals with the restrictions that are outlined in 8.18.

PN134

It might also be the case that it's probably construed as referring to restrictions elsewhere in the agreement, and there are others, for instance in appendix 1 itself.

PN135

DEPUTY PRESIDENT GOSTENCNIK: So in very simple terms the rostering pattern is dictated primarily by clause 19, that the rostering flexibility provision establishes the commitment of the drivers to be flexible within that paradigm having regard to particular operational circumstances that might arise from time to time, but not on a permanent basis.

PN136

MR HARDING: Not on a permanent basis. My learned friends take exception to the use of the word 'permanent', but we're here talking about a situation where there's a standing departure for as long as Yarra Trams deem it fit to depart.

PN137

DEPUTY PRESIDENT GOSTENCNIK: To give effect to the words 'as far as practicable', going back to the curfew situation, it's plainly not practicable during that period to comply with 19.

PN138

MR HARDING: Yes, and again - - -

PN139

DEPUTY PRESIDENT GOSTENCNIK: But once that period stops then it's practical again.

PN140

MR HARDING: Yes. Again that gives effect to the words 'as far as' that are contained in the qualification.

PN141

DEPUTY PRESIDENT GOSTENCNIK: Yes, I understand. Thank you.

PN142

MR HARDING: To some extent what I have just said deals with some of the particular things that are said against us, and I am conscious of the time, Vice President, I will comply with what I said about half an hour. My learned friends rely on a case that's in their list of authorities, and its *Reeves v MaxiTRANS*, which starts on page 114 of their list of authorities, and draw attention to what is said by his Honour Ryan J from paragraph 19 of that case, which is to the effect that, 'An industrial agreement is the product of negotiation.' And I think we both agree on that. 'Not every provision in such a document is to be intended to impose an enforceable obligation.'

PN143

It's pretty clear that 19.2 is expressed in fairly mandatory terms, and I only wish to say about that that the Full Court of the Federal Court has dealt with a similar kind of subject matter in *National Tertiary Education Union v Latrobe*, which we have got in item 3 of our list of authorities. For some reason my bookmarks aren't working very well, suffice to say I draw your attention to what White J said in that case about context, bearing in mind that the term in 19.2, and he says this at 108 of the reasons:

PN144

> *Having been included in an enterprise agreement one might think the parties have included it in an enterprise agreement in order that it be given effect as a term.*

PN145

And Bromberg J in the same case deals with circumstances where words of similar character, I think 'reasonable endeavours' was the language that his

Honour was construing, how that could be seen as obligatory. As far as practicable imposes a test along the lines that I have just discussed with Gostencnik DP that, yes, it does qualify the rigour of the second sentence, but does so ion a way that is dealt with specifically by the parties. That's how we address the issue of permanence.

PN146

In relation to ground 3 we are criticised on the footing that the alternating roster might maintain the shift structure as if it can't be altered in a way that impedes with the duties that Yarra Trams has under the rail safety law. What we say about that is that that's overstating the question. At the end of the day the evidence shows that the roster is a plan of work. The plan is changed by employees with the permission of depot managers, and, yes, there are employees who may continue to perform the roster.

PN147

We say on the evidence that that's a minority of employees. But if they're working the plan such as to say that they are doing actual work according to the roster, then the evidence is that the employer manages that actual work through a set of procedures called the Fatigue Risk Management Manual, which was exhibit 38 below. We have got copies of that document we can hand up. It didn't seem to make it in the appeal book. I just draw attention to page 13 of the internal page numbering, and about three-quarters of the way down there's the words, 'A key control of the management of fatigue related risk of these subject matters.'

PN148

The evidence was that in relation to actual work this is what the employer applies to manage fatigue, and it did so under the alternating roster, and it continues to do so under the graduated roster. So we are not here talking about a situation in which we're denying or impeding the ability for the employer to manage fatigue in respect of actual work, because the evidence was that this manual is the basis for how they do that, and that evidence was given by Mr McMillan who is their Occ Health & Safety witness called by the respondents, and his evidence on that subject is on page 714 to 715 of the appeal book, and also page 245 at PN1965.

PN149

I do need briefly to address ground 6, and I will do so before I conclude. The gravamen of our ground 6 is this, that the criterion that the Deputy President applied to resolving this aspect of the dispute was whether it was possible to shift swap under the graduated roster, and there's a difference between us about whether the correctness standard applies or not. I accept that if one was confined to a question about how one resolves on a merit basis, the pros and cons of the graduated roster versus the alternating roster, that is an evaluative question to which *House v King* might apply, and we have dealt with it on both grounds, *House v King* and the correctness standard.

PN150

Our essential point on the correctness standard is this; having stated that the question is whether or not employees could shift swap the answer that the Deputy President gave was that they could and therefore there was a low impact. But on her own reasons she accepted the evidence of employees that it was more difficult

to shift swap, and what we say is that the issue that the appellants ventilated was not impossibility, but rather difficulty. And on that ground the Deputy President concluded that it was more difficult.

PN151

So applying the correctness standard the correct question that was ventilated by the appellants was whether it was more difficult, and the Deputy President answered that question in the affirmative. If *House v King* applies then what we say about that is that the Deputy President asked herself the wrong question. The question was is it more difficult to shift shop under the graduated roster, and we say that's a legal error to ask yourself the wrong question. It's not about irrelevant considerations, the issue is whether or not the Deputy President asked herself the wrong question. That's an error of law, and we have included for the purposes of that in our list of authorities the *Minister for Immigration and Multicultural Affairs v Yusef* at item 8, and I refer you to paragraph 81 of that authority.

PN152

As for the question of legal criterion we have included Gageler's J very clear elucidation of the two standards of appeal in item 10 of the authorities, and we draw the Full Bench's attention to paragraph 49 on page 385 of our materials where his Honour says:

PN153

> *The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome.*

PN154

On the question of remedy we in the submissions have dealt with that subject. If you agree with us on the constructional question then the Full Bench should quash the decision and make its own decision. If you agree with us in relation to ground 6, we have dealt with that as a standalone ground for the purposes of the relief, we would accept that in the event that you would conclude that the Deputy President asked herself the wrong question, the appropriate course would be to remit, for the Deputy President to deal with that aspect of the case according to the reasons of the Full Bench.

PN155

On the subject of permission itself we have dealt with that in our outline of submissions, suffice as to say simply that if you accept our constructional argument or either of the grounds permission ought to be granted in order to deal with the areas that we have posited, which we say are serious errors that need correction. I don't need to trouble the Full Bench any further at this stage, subject to reply.

PN156

VICE PRESIDENT CATANZARITI: Yes, thank you, Mr O'Grady.

PN157

MR O'GRADY: Yes, thank you, Vice President. I will be as brief as I can. Can I start off by taking issue with some aspects of my learned friend's explanation as to

the background, and to that end could I ask the Full Bench to bring up again item 30 and then item 29 of the documents that my learned friend took you to.

PN158

VICE PRESIDENT CATANZARITI: Yes, we have that.

PN159

MR O'GRADY: The first observation I would seek to make is that it would be wrong to characterise the alternating roster as simply a swap between day shifts and night shifts, because you will see in that table in describing the various types of shifts in addition to the words 'night and day' there are other annotations. So for example you have night NB. That is on the evidence a broken night shift. So somebody would commence at a period of time. They would have a significant period of time off during the course of the shift, and then they would recommence the shift. You have day E, that's an early day shift. You have a night L, which is a late night shift. And you also have night M/E, which as I recall was night middle evening.

PN160

So this paradigm that's being suggested that there is simply a black and a white doesn't accord with the evidence even under the alternating roster. But what is apparent is that under the alternating roster every second week you have a backward rotation, because every second week if you are working nights you are then expected to work mornings, and that has significant fatigue risks.

PN161

And that of course can be compared with the roster that's outlined in item 29, which is a graduated roster, where the evidence was that over the course of the 20 week period people actually move through that roster in order to move from morning to evening, and then of course as my learned friend explained you have the PLD, you have a day off to in effect recalibrate before one then commences morning shifts again.

PN162

And as the evidence adduced by my client showed there were significant occupational health and safety concerns about the fatigue risk inherent in the alternating roster, and it was that that drove my client after an extensive process of assessment and consultation to move to the graduated roster system, and I will take you briefly to some of that evidence in due course to address one of the points my learned friends made.

PN163

The second part of the description my learned friend gave that I wish to expand upon concerns this notion of swapping under the graduated roster, and the parties are agreed that there was the capacity to swap under both the alternating roster and the graduated roster, and as my learned friend says there is a simplicity associated with a swap in an alternating roster environment that may not necessarily pertain when you are moving to a graduated roster, because there are different start times and the like.

PN164

What my learned friend didn't, with respect, take the Full Bench to however is the mechanism that my client introduced in order to facilitate roster swapping under the graduated roster regime, and this appears at item 36 of the appeal book commencing at page 731, where what my client has done in effect is it has automated the process of shift swapping. So that either by using one's mobile phone or a computer located at the depot or one's other computer, one can log in and in effect auction off shifts that one doesn't want to work, by notifying that, 'There are various shifts that I've got coming up, they're not going to suit me.'

PN165

And of course under the graduated roster people are informed of the shifts that they're going to be doing over the next 20 weeks, and they can swap up to five weeks out, and so they can post these are the shift, 'I don't want to do them, does anybody want to do them.' And conversely they can go onto the system and see whether somebody has shifts that they might want to do and grab them, and that is through the various self-service Hastus systems, and the documents, I don't need to take the Full Bench to in detail, but they actually explain how - for example if we go to page 739 of the appeal book - - -

PN166

DEPUTY PRESIDENT GOSTENCNIK: Mr O'Grady, is that a function of an upgrade in the system or a function of the new roster?

PN167

MR HARDING: It was introduced before the new roster was introduced, but it was introduced with an eye to the new roster being introduced. So the previous system was a paper-based system, and then there was a move to this system, and for a while they were running in parallel.

PN168

DEPUTY PRESIDENT GOSTENCNIK: But presumably such benefits as might be derived from the self-service model would have equal application under an alternating roster.

PN169

MR O'GRADY: I would accept that, Deputy President, and indeed if one goes to the previous item, which is item 35 commencing at appeal book 725, you have there the evidence uploaded from the Hastus system as to the number of shift swaps that were occurring, and it's perhaps most clearly explained if one goes to page 726.

PN170

So there are various week starts, and you will see in respect of the various depots there is a total of the number of shifts that are being swapped, and this graduated roster was introduced on 16 October, and you will see for that week there was a grand total of some 3,014 shifts that were swapped. That was slightly less than, but not we would say significantly out of kilter with what had been occurring prior to the move to the alternating roster.

PN171

You will notice that there is a dip off from 16 October, but that of course reflects the time that this document was prepared at the hearing date, and that once we're moving from 16 October we're moving into the future, and obviously this is something that would occur over time as people looked at the shifts and posted them and they were then accepted.

PN172

VICE PRESIDENT CATANZARITI: So just explain to me - in that table where the shifts are swapped which ones are pre the change?

PN173

MR O'GRADY: So prior to 16 October. So at page 728 you will see you've got a week commencing on 9 October. There was a total of 3,201 shifts that were swapped. On 16 October we have 3,014 shifts that were swapped.

PN174

VICE PRESIDENT CATANZARITI: And are they using for this table the new system, Hastus, or whatever it's called?

PN175

MR O'GRADY: Yes. This table was generated on the evidence using a combination of the paper system and Hastus, because it goes back, if you go back to page 725, Vice President, it goes back to January of 2022 when we didn't have the Hastus system, but paper entries were then entered into the Hastus system and Hastus in effect spat this out. There was a time when both systems were operating parallel. But the point I seek to draw from this document is that when one has regard to the changes made to how shift swaps can occur it could not be said, in my respectful submission, that there is some significant difficulty in obtaining shift swaps, because that's just not borne out by the statistics.

PN176

To the extent that various of the applicants asserted that they had had some difficulty we seek to make two points. Could I direct the Full Bench in due course to paragraphs 73 and 75 of the Deputy President's judgment where she notes that there had been a failure on behalf of a number of the applicants to properly engage with the new system. Some of them said, well I don't have a mobile phone for example, so I'm not going to use that. Some of them said it's all too hard. They hadn't even read, a number of them, the documentation that had been distributed by my client about the new system.

PN177

But the evidence also showed, and this is apparent from page 730 of the appeal book, and you will see here this is a table which deals with the individual applicants, that a number of them had been able to successfully use the new system and obtained shift swaps over the course of the various weeks, the subject of this table.

PN178

The transcript references in respect of drivers either not having engaged with the new system or having successfully swapped shifts, and I don't need to take the Full Bench to them, are Mr David at PN249 to 261 and PN280 to 282; Mr Bunker

at PN438 to 443 and PN480; Mr Antonopoulos PN660 to PN690; Mr Cikes PN747 to 765; Mr Tarakci PN1086 to 1111, and Mr Panapar PN1491 to PN1507 and PN1526 to 1528.

PN179

My learned friend took you to the fatigue management handbook, which is exhibit 38, and in effect suggested as we understand it as part of a submission that, well it's not impossible to in effect use the alternating roster with a view to managing fatigue. The points we seek to make in respect of this document are the following. Firstly, when one has regard to the document one can see that like many occupational health and safety documents it is pitched at a very high level and in effect statements of principle. And that's apparent from the part of the document my learned friend took you to where at page 13 of 38 it speaks of:

PN180

A key control in the management of fatigue risk is a set of principles that form a basis of rostering. These principles comprise risk considerations which are based upon international research and recognise best practice and cover such topics as - - -

PN181

And then you have the various bullet points that my learned friend referred to. It doesn't purport to be an exhaustive list. Rather it is dealing with the sorts of notions that might be had regard to when one is considering roster design.

PN182

Mr McMillan, who as my learned friend said was the occupational health and safety expert engaged by my client, gave some evidence about this document, and that appears at PN1052 to 2020 when he was cross-examined, and then in re-examination at PN2151 to 2160. And if I could ask the Full Bench to briefly go to paragraph 2160 where - - -

PN183

VICE PRESIDENT CATANZARITI: Have you just got the appeal book reference for that?

PN184

MR O'GRADY: Thank you. Yes, it is at page 263. And you will see the re-examination on this issue commences at the bottom of the previous page, and I was asking about what other controls might be there, and at PN2160 I said, 'What about the issue of rotation, whether it's backwards or forwards, would that be a principle?' And Mr McMillan said, 'I would argue strongly that it is. The evidence is clear that forward rotation provides better fatigue outcomes.'

PN185

And if I could simply direct the Full Bench to Mr McMillan's statement, which is at appeal book page 709 it commences, but the concerns of my client that led to it moving to the graduated roster as opposed to the alternating roster are dealt with in particular at paragraphs 22 to 33 of Mr McMillan's statement, and that appears at appeal book page 713 to 721.

PN186

So whilst it may be the case that my client can use the alternating roster there is, in my submission, no doubt that the graduated roster is preferable from a fatigue management perspective, and as the Full Bench will be aware in the world of occupational health and safety the obligation is an ongoing one. It is in effect to provide a system of work that is as safe as is practicable, and for my client to ignore a practicable mechanism for reducing fatigue and managing fatigue would give rise to exposure. Hence it made the decisions that it made.

PN187

DEPUTY PRESIDENT CLANCY: Are you saying that we're to read clause 19.2, the words in the second sentence, 'As far as practicable', that can be - all of what Mr Harding says it can (indistinct) be with regard to a graduated roster?

PN188

MR O'GRADY: Yes. And indeed I think in our written submissions we might have made the point that practicability in clause 19.2, and I want to come to the clauses now, but we would say the practicability in clause 19.2 is not something that is simply assessed from an employee's point of view. Even if one accepts their primary construction you will have seen what we say about what 19.2 actually says. But we would say that to the extent that there is an imperative on somebody like my client to alter the way in which it has traditionally rostered employees that is a matter that can go to the practicability of the alternating morning to night rosters.

PN189

Could I go, Deputy President, to the enterprise agreement and just briefly touch upon a number of clauses, some of which my learned friend took the Full Bench to, but some of which he didn't.

PN190

DEPUTY PRESIDENT CLANCY: In that regard I presume you're going to take us - you seem to make more in your submissions about the inconsistency points.

PN191

MR O'GRADY: Sorry, inconsistency, yes, we do.

PN192

DEPUTY PRESIDENT CLANCY: Yes, all right.

PN193

MR O'GRADY: Yes. And that's where I want to start, which is actually clause 2.3(b). My learned friend mentioned clause 2.3. I don't think he mentioned clause 2.3(b), but there is a clear directive, we would submit, that to the extent of any inconsistency the provisions of a part prevail over the provisions on the appendix, and of course clause 8.18 is in a part and clause 19.2 is an appendix, and 2.5 doesn't impact upon that because it deals with a different subject matter.

PN194

The next clause I would seek the Full Bench to have regard to is clause 5.3, which deals with the purpose of the agreement, and you will see there in language that is

consistent, in our submission, with the way in which we would construe clause 8.18 there is an acknowledgement that:

PN195

This is a facilitative agreement which is intended to operate to meet the evolving needs of Yarra Trams, its employees, customers and the State of Victoria. In this context the parties commit to working cooperatively and without delay to ensure - - -

PN196

Various things will occur. And then clause 8, which deals with consultation, which is also important in respect of the construction points, even though my learned friend makes no complaint about the consultation engaged in, because clause 8.1(b) makes it clear that my client, or the clause applies if my client proposes to introduce a change to the regular roster or ordinary hours of work of employees.

PN197

There would be no need, in our submission, for a clause expressed as broadly as that if my learned friend is right and we are in effect bound to maintain the alternating roster for the life of the agreement.

PN198

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr O'Grady, which clause?

PN199

MR O'GRADY: Sorry, 8.1(b). That's at page 4 of the agreement. So there's an express reference to the prospect of a change to the regular roster or ordinary hours of work.

PN200

DEPUTY PRESIDENT GOSTENCNIK: Isn't that a mandatory term? That is the statute requires every agreement to have a term to that effect?

PN201

MR O'GRADY: Yes. But in my submission it still forms part of the agreement and is part of what must be taken into account in construing the other clauses in the agreement, with respect.

PN202

DEPUTY PRESIDENT GOSTENCNIK: But there would be nothing to prevent an enterprise agreement and simply saying the employer shall not ever change a roster, and the statute still requires a consultation term to contain a term about consultation about changes to a roster. One doesn't then read down the term that the parties actually agreed to.

PN203

MR O'GRADY: Well, in my submission the starting point would be that clause 19.2 can't read down the effect of clause 8, and the clause in its terms, in my submission, contemplates that there is the potential for a change of a roster. I can't take it any further than that, Deputy President.

PN204

Clause 22 is the clause that deals with occupational health and safety. Again this is a part of the agreement that in my submission reflects the fact that the parties have turned their mind to occupational health and safety and directed themselves to the provisions in the relevant occupational health and safety legislation.

PN205

Then we come to part 2, which is at page 61, and as my learned friend said clause 1.2 directs attention to the appendices, and within part 2 of course we have clause 8, and clause 8 has a number of features, in my submission, that could be properly described as rostering initiatives for the purposes of the second sentence of 8.18.

PN206

The first one of course is the first sentence in clause 8.18, which we would submit is a rostering initiative, but we would also direct attention to clause 8.13, 8.8, 8.5, 8.3 and 8.2, which we would submit are all capable of falling within the scope of what might be said to be a rostering initiative. And so to the extent that my learned friends submit that, well if clause 19.2 doesn't have the effect for which he contends, the second sentence in clause 8.18 would be rendered otiose, we would submit that's not the case. Then if I can turn to the appendix - - -

PN207

DEPUTY PRESIDENT GOSTENCNIK: Mr O'Grady, can I just ask this. I don't think this has been addressed in the submissions, but I'm happy to stand corrected. Is it one of the contextual considerations in construing 19.2 of the agreement the provisions of section 29(2)(b) of the Fair Work Act, which in simple terms requires the terms of an enterprise agreement applies subject to, relevantly, occupational health and safety law?

PN208

MR O'GRADY: Yes. In my submission it would be. For my client to be in effect required to maintain what it considers to be a less than optimum - - -

PN209

DEPUTY PRESIDENT GOSTENCNIK: I guess what I had in mind just to be clear, Mr O'Grady, is that if a reasonably practical step to ensure that a working arrangement or a system of work is safe is to change the roster to manage fatigue, and an enterprise agreement prevented that from occurring, the effect of those provisions would at least on one view be that you would read down the agreement so as not to prohibit the implementation of the reasonably practical step.

PN210

MR O'GRADY: Yes. I think we touched on it in paragraph 24 of our outline. But, no, I would agree and embrace that.

PN211

VICE PRESIDENT CATANZARITI: Sorry, Mr O'Grady, we're going to have to adjourn again, the audio has just dropped off.

PN212

DEPUTY PRESIDENT GOSTENCNIK: I was just having my best moment.

SHORT ADJOURNMENT **[12.20 PM]**

RESUMED **[12.29 PM]**

PN213

VICE PRESIDENT CATANZARITI: Yes, thank you, Mr O'Grady.

PN214

MR O'GRADY: Yes, thank you, Vice President. I was going to the agreement. I'm up to appendix 1, which is page 79, and there are a number of clauses before one gets to 19.2 that in our submission are worth having regard to. There is clause 6 which deals with minimum payments. We would submit that that is a clause that is also capable of being characterised as an initiative under this agreement, and again it undercuts any suggestion that unless my learned friend's construction is adopted the second sentence in 8.18 would have no work to do.

PN215

Then we have clause 11 which deals with cancellation of rostered days off for traffic employees. Again that might be said to be an initiative under this agreement. And then if I can go to clause 22 we have a clause dealing with rosters. So a specific clause in the appendix dealing with rosters and putting in place some limitations in respect of rosters, and one would have thought, with respect, that if the parties had intended to impose the type of limitation that my learned friend contends for here, then it would have found its way into clause 22, and of course there is no such limitation.

PN216

If one then goes back to clause 19.2 we have the words that my learned friend relies on, and we would make the following points in respect of that language. Firstly, there is no mention of rostering. The clause has two components. The first component is to impose an obligation on employees to work such shifts as may be allocated to him/her. And the second component is that:

PN217

As far as practicable traffic employees shall work morning and afternoon shifts on alternate weeks and share equally the broken shifts.

PN218

So no mention of rostering. Indeed no mention in the second part of the clause on the allocation of shifts. And whilst it is the case that the clause does speak in terms of imposing obligation, although the word practicability we would say impacts upon the stringency of that obligation, that obligation is imposed solely on employees. There is nothing, with respect, in the clause that would warrant a limitation being imposed on my client or the types of rosters that it might seek to put in place. And again where the parties have sought to impose limitations on the types of rosters that can be put in place they have done so in clause 22, which again employs the practicability test, but imposes an obligation on my client as to the types of shifts that it can put in place, and also the process through which changes to rosters can occur.

PN219

So the primary submission that we put in response to the application is the first of the grounds that we have referred to in our outline in paragraph 6, which is that my learned friend's construction fails to give weight to the ordinary meanings of the words used in clause 19.2 read as a whole and in context. My learned friend has built this edifice design, we would submit, to overcome the fact that the words in the clause simply do not get him where he needs to get.

PN220

My learned friend's submissions about practice and about how things (indistinct) work and the length of time the clauses have been there really, with respect, do not assist him, because as was made very clear in the principles of construing enterprise agreements as summarised more recently in the Arid(?) case one starts with the ordinary natural meaning of the words used, and what is being sought to be imposed here is not consistent with those words, even before one gets to clause 8.18.

PN221

The start and end of it really, with respect, could be the fact that clause 19.2 of appendix 1 just does not say what my learned friend wants it to say. And then of course that is compounded by the other matters that emanate from the clauses in the agreement that I have taken you to, including of course clause 8.18 and of course clause 2.3(b), all of it of course in an agreement which the parties have said in clause 5 is designed to facilitate flexibility.

PN222

And yet my learned friend says, well this rostering practice, which in addition to the various health and safety concerns that it gives rise to, is on anything the antithesis of flexibility. But my learned friend says we are bound to maintain this rostering practice in perpetuity unless we can get agreement that it be removed. And as I submit the problem with that is that it fails to pay due regard to the terms of the clause itself. As the Deputy President found the clause imposes obligations on employees to as far as is practicable alternate between day and night shifts.

PN223

The next point I would seek to make to the Full Bench is that what is the underlying paradox with my learned friend's submissions is that he seeks to impose an obligation on my client to maintain an alternating roster, not because he and his clients intend to work such roster, but because they intend not to work such a roster. If one is to divine the intention behind clause 19.2 it is apparent that as far as is practicable employees are to alternate. That's what the clause says.

PN224

Yet my learned friend's submissions are directed to defeating that very object. He doesn't want to impose or maintain an alternating roster for the sake of the alternating roster itself. Rather what he's seeking is the maintenance of an alternating roster so that it can be defeated, because it's easy to swap out of under an alternating roster and a graduated roster. And of course all of this ignores the fact that as the Deputy President found not everybody swap shifts.

PN225

The evidence varied as to the extent that shift swapping occurred, but of course my client's obligations aren't confined to those employees who want to swap shifts, they extend to those who either don't want to or can't swap shifts, and again there as Mr McMillan explained in his evidence there are significant manifest advantages to a graduated roster as opposed to an alternating roster.

PN226

My learned friend took the Full Bench to the One Key decision and the Toys 'R' Us decisions. With respect, they don't assist the task that the Full Bench is engaged in. Those of course were not cases concerning the proper construction of an enterprise agreement. As my learned friend has conceded he's not contending that this agreement wasn't properly approved, and in my respectful submission One Key and Toys 'R' Us which goes to the validity of the agreement are concerned with a very different issue.

PN227

As you pointed out, Vice President, it is hardly surprising that in a clause that has been in place since at least 2006 the parties did not see the need to mention in their explanatory material the effect of that clause. The clause, in our respectful submission, is clear on its face, and what it does say is that there is to be rostering flexibility and no other rostering restrictions.

PN228

In circumstances where a clause to that effect has been there for many years, in my submission there's no basis for contending that in order to comply with the principles of One Key or Toys 'R' Us we needed to explain the effect of that clause. Nor is there any basis for saying that those principles mean that clause 8.18 should be somehow read down absent there being some expressed explanation as to what those words mean.

PN229

As the Full Bench would be aware an ongoing practice cannot override the terms of the agreement. Here we have very clear terms in clause 8.18 and we have, we would submit, also clear terms in clause 19.2. The problem for my learned friends is that the terms of clause 19.2 don't say what they would like them to say.

PN230

My learned friend also took you to the *Reeves v MaxiTRANS* decision and referred to what his Honour White J said in the NTEU decision. As the Full Bench will appreciate our submission in respect of *Reeves v MaxiTRANS* is not that clause 19.2 is horror. Rather what we seek to draw from his Honour Ryan J's decision in MaxiTRANS is that consistent with the range of purposes that clauses in an enterprise agreement might have, the stringency of the obligation that clause 19.2 imposes on employees can be informed by the use of the term 'practicability'.

PN231

As the Full Bench will have seen in his submissions my learned friend seems to be contending that absent the construction that he contends for employees are in effect going to be doomed to be act in breach of the obligations that clause 19.2 puts in place. The short answer to that is practicability. If my client is not using a

roster for which it is practicable for employees to work alternating morning and night shifts, then in my submission there could be no suggestion that employees were acting in breach of the clause and somehow exposed to pecuniary penalties.

PN232

In this context my learned friend went to the NTEU case, which is a decision behind tab 3 of his authorities, and as I recall it he took you to what his Honour White J said in paragraph 108. Could I direct the Full Bench to what his Honour went on to say in paragraph 109 where he noted that his previous observations did not mean that:

PN233

Parties to an enterprise agreement may not include in their agreement some matters which are in the nature of statements of aspirational commitment and not themselves intended to be enforceable obligations or entitlements.

PN234

And then went on to endorse what his Honour Ryan J said in *Reeves v MaxiTRANS*.

PN235

Could I also direct the Full Bench to what his Honour Jessup J said, and I appreciate that his Honour Jessup J was dissenting in this decision, the majority being their Honours Bromberg and White JJ. But at paragraph 30 his Honour observed in the second sentence down:

PN236

Awards and orders contain the commands, rules and injunctions of a public body authorised to impose upon non-consenting parties a resolution of whatever dispute, issue or proceeding had been before it. There is every reason to approach the reading of such an instrument with a disposition to finding a binding obligation, or the establishment of a substantive entitlement, in each of the operative provisions thereof. Enterprise agreements by contrast are doing things of the parties themselves (here using the term 'parties' in the loose sense of the employer and those of its employees who, through their bargaining representatives, were involved in the relevant negotiations). Although the content of enterprise agreements is heavily regulated by the provisions of Divs 4 and 5 of Part 2-4 of the Fair Work Act, there is nothing, so far as I can see, to prevent the parties from including in their agreement provisions or expressions which involve no obligations at all. Indeed, the admixture in industrial agreements of provisions which give rise to obligations and those which are merely aspirational is a practice of long standing.

PN237

Now, again we don't rely upon those passages to suggest that clause 19.2 is merely aspirational or (indistinct). The proposition is that consistent with those observations it is open for the parties to adjust the stringency associated with any obligation through the use of terms such as practicability, which overcomes, in our submission, the concerns raised by my learned friends as to the potential exposure of employees to pecuniary penalties.

PN238

Whilst I am with the authorities could I take the Full Bench to the Nine Brisbane Sites Appeal decision, and my learned friend I think took you to paragraph 7 of that decision. We would direct the Full Bench's attention to paragraph 8 where his Honour Allsop CJ said:

PN239

On the other hand there is much to be said for the clause being read simply according to its plain terms, so that any employee participating in a meeting can be clear that he or she is not participating in industrial action, without having to be concerned with the purposes or mental states of others.

PN240

And of course that was the outcome that flowed in that case. As my learned friend touched on in his reference to it this morning this was a case where there was a clause in an agreement that had certain preconditions for a union meeting, and the union had complied with those preconditions to conduct the meeting which was directed to organising industrial action. And the argument being run by the ABCC was that that was in effect bad faith. It was a sham meeting and therefore it wasn't authorised by the clause and therefore it was capable of prosecuting industrial action, and that argument was rejected by the court who agreed on the whole with what his Honour Rangiah J said, and Rangiah J's in his decision noted that those preconditions had been met, and that in those circumstances the meetings were authorised and did not constitute industrial action, and the relevant passage really commences at paragraph 103 to 106.

PN241

So what his Honour has done is he's adopted the very approach that we would be contending for in these proceedings; namely, one focuses on the language used in the relevant courts, and that language is not undermined by any broader principle of reciprocity or mutuality as contended for by my learned friends.

PN242

In support of this part of his submission my learned friend also referred to the High Court decision in Secured Income Real Estate, which is behind tab 5 of his materials, and as my learned friend said the leading judgment is that of his Honour Mason J, as he then was, with whom the other members of the court agreed. At page 607 in dealing with this notion of mutuality his Honour said in the last paragraph on that page:

PN243

It is easy to imply a duty to cooperate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract, but are not essential to the performance of that party's obligations and are not fundamental to the contract.

PN244

To the extent to which these principles have application here, in our submission the construction contended to by my learned friend would fall in the latter

category, that whatever benefit clause 19.2 might be seen to confer upon employees is not one that could be properly said to be fundamental to the obligations under the agreement. Rather, as my learned friend puts his case as we apprehend it, it's something that's there to provide a benefit to employees, but for the reasons I have already sought to explain and which we have dealt with in our written submissions could not be said to be fundamental to the agreement as a whole.

PN245

As you noted at the outset this morning, Vice President, you've had the benefit of our written submissions. We of course rely on them. We would emphasise what we have said in paragraphs 6 through to 9, and I have dealt with paragraph 6 already, which is the need to give weight to the ordinary meaning of the word 'use'. The point about the use that we want to make of *Reeves v MaxiTRANS* is dealt with in paragraph 10, and as I say it goes to the stringency of the obligation.

PN246

We would also direct attention to paragraphs 15 through to 18 and 22 and 24, and in respect of the initiatives issue we would direct attention to paragraphs 27 and 28. That was all I intended to say in respect of grounds 1 to 5. My learned junior Mr Pollock was going to deal with ground 6 if that's convenient to the Full Bench.

PN247

VICE PRESIDENT CATANZARITI: Yes, thank you.

PN248

DEPUTY PRESIDENT GOSTENCNIK: Before he does, Mr O'Grady, I should just follow up on the discussion we had earlier just before the break about section 29 of the Fair Work Act. The operation of section 29 and a term of an enterprise agreement was the subject of a decision of the Full Bench of the Commission in *Sydney Trains v CEPU*, medium neutral citation which is [2021] FWCFB 746, and the relevant discussion in the context of that dispute commences at paragraph 43 through to effectively paragraph 56. And the issue in that decision was a dispute about the implementation of a new signalling system which was said to be unsafe and the enterprise agreement contained a term which was unqualified by reasonably practicable; that is the employer was obliged to ensure the health and safety and welfare of employees at work, and the Full Bench in that case which I was a member found that that unqualified obligation was inconsistent with the New South Wales occupational health and safety legislation which was qualified.

PN249

MR O'GRADY: Yes, thank you. And of course in addition to that point we would make the point that the agreement itself by making direct reference to occupational health and safety matters being dealt with under the Victorian occupational health and safety legislation suggests that those provisions are to inform the way in which other terms in the agreement are to be construed.

PN250

MR POLLOCK: Members of the Full Bench, might I start by taking you to ground 6 as it appears in the notice of appeal, and this is at page 9 of the appeal book. Your Honours will there see the ground is framed in this way, that the

Deputy President erred and erroneously denied (indistinct) relief by concluding that the graduated roster would have a low impact on employees who swap shifts in two circumstances. Firstly, where the Deputy President found that shift swapping was more difficult and complex under the graduated roster, and secondly that the dominant mode of shift allocation was by employees engaging in shift swapping which would continue under the graduated roster.

PN251

Can I make three headline points in answer to ground 6 which I will develop. The first is contrary to the submissions advanced by our learned friend ground 6 squarely engages discretionary error principles. For the reasons I will explain there is no room here for a correctness standard to apply. And developing on that first point it was open to the Deputy President to make the intermediate finding which is challenged here that the graduated roster would have a low impact on employees who do shift swap. And secondly that it was open to the Deputy President to weigh the detriment that she found to those employees, i.e. that it would be more difficult and complex, against a range of other considerations which pointed towards the adoption of a graduated roster.

PN252

At the outset it's important to understand the question with which the Deputy President was in fact dealing, because that of course does two things. It informs the nature of the error that's required to be shown, and secondly it demonstrates why my learned friends' alleged error is nothing of the sort. The question which was framed as question 2 in the arbitration question was this: Should the Commission make an order enjoining Yarra Trams implementing the graduated roster? That was dealt with under clause 11(c) of part 1 which is the dispute resolution clause under the rubric of any industrial matter.

PN253

My learned friend framed his submissions below by characterising the question as a matter of industrial merit, and you see that at paragraph 30 of his written submissions below, and that's at appeal book 364 and at paragraph 50 at appeal book 370. But otherwise no fetter on the scope of the matters to which the Deputy President was to have regard in determining industrial merits or otherwise in implementing that graduated roster. That is an assessment of the merits at large; should there be an order enjoining Yarra Trams from doing this or should there not? In the outline we describe that as archetypal evaluative judgment attracting discretionary error principles.

PN254

We touch on in the written submissions the High Court's judgment in *Norbis v Norbis*. My learned friend has taken you to Gageler J's reasons in SZVFW, took you to a certain passage within that. Can I briefly take you firstly to Norbis, and this is in our bundle of authorities at tab 3, the joint judgment of Mason and Deane JJ, really commencing at page 517 of the report. The relevant passages commence really towards the last paragraph of 517, 'It is well settled', and so on. I don't need to read all that verbatim, but can I take you in particular to over on page 518 about two-thirds of the way down the page:

PN255

The principles enunciated in House v The King were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appear and the judge at first instance. In conformity with the dictates of principled decision-making it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance in the absence of error on his part.

PN256

I then also take you over to page 520, about halfway down the page:

PN257

The reference to 'wrong principle' in the passage quoted from House v The King no doubt refers to a binding rule rather than a guideline in the sense already explained. A failure to apply a guideline does not of itself amount to error, for it may appear that the case is one in which it is inappropriate to invoke the guideline or that, notwithstanding the failure to apply it, the decision is the product of a sound discretionary judgment. The failure to apply a legitimate guideline to a situation to which it is applicable may, however, throw a question mark over the trial judge's decision and ease the appellant's burden of showing that it is wrong. However, in the ultimate analysis and in the absence of any identifiable error of fact or positive law, the appellate court must be persuaded that the order stands outside the limits of a sound discretionary judgment before it intervenes.

PN258

Again with respect to my learned friend the nature of the question that the Deputy President was asked to resolve on my learned friend's application of course was one of great breadth. It was one of those questions lending itself to differences of opinion which with any given range are legitimate and reasonable answers to the question. In fact it is difficult to identify a question which could have been broader in this context; should Yarra Trams be restrained from implementing it or not?

PN259

Now, my learned friend took you to Gageler J's reasons in SZVFW. If I can just briefly take you to that judgment. It's tab 10 in the appellant's bundle. Now, you will see commencing at paragraph 41 through to 48 Gageler J seeks to resolve or set out and then reconcile what appear at first glance to be some conflicting authority between the approach of the majority in *Warren v Coombes* giving greater latitude to a court on appellate review on the one hand, of course that judgment being handed down in 1979, and then reconciling that with subsequent judgments of the High Court in *Gronow v Gronow*; you will see that discussed at paragraph 42, and then some detailed discussion of Norbis commencing at paragraph 44.

PN260

My learned friend took you to paragraph 49, and we would of course endorse that summary, but I would also draw your attention to paragraphs 47 and 48 which again restate the approach adopted by the High Court in Norbis. And just taking you very briefly to the point that my learned friend took you to in paragraph 49:

PN261

The line is not drawn by reference to whether the primary judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the House v The King standard applies.

PN262

Again the legal criterion applied here, i.e. the question to be answered, was one which tolerated a range of outcomes.

PN263

VICE PRESIDENT CLANCY: What range of outcomes?

PN264

MR POLLOCK: Well, the question was whether Yarra Trams should be restrained from implementing the graduated roster. The criterion used to assess that - - -

PN265

DEPUTY PRESIDENT CLANCY: Doesn't it require a yes or no answer?

PN266

MR POLLOCK: The ultimate answer to the question of course is yes or no.

PN267

DEPUTY PRESIDENT CLANCY: That's right, and you can use an evaluative process to get to that answer, but there's going to be one answer or the other.

PN268

MR POLLOCK: There's going to be one answer or the other, but not only is there an evaluative process in weighing the various considerations, it's also open to the Deputy President (indistinct) a discretion to assess within the bounds of reasonableness what are the various criteria to take into account in assessing whether or not that should be done as a matter of industrial merit. That is plainly in the space of a discretionary decision - - -

PN269

DEPUTY PRESIDENT CLANCY: That leads to a unique outcome, yes or no?

PN270

MR POLLOCK: It leads to a unique outcome of course, but what is talked about here is, 'The line is drawn by reference to whether the criterion applied or purportedly applied by the primary judge to reach the conclusion demands a

unique outcome' - the criterion. And the criterion here were subject to reasonableness otherwise at large.

PN271

DEPUTY PRESIDENT CLANCY: It's a bit like the Commission's approach in approving enterprise agreements.

PN272

MR POLLOCK: Correct.

PN273

DEPUTY PRESIDENT CLANCY: There's only two alternatives, you either approve or you don't approve or (indistinct), but within that there must be satisfaction of certain things, some of which turn on discretion.

PN274

MR POLLOCK: That would be so, and you could also examine for example a decision on whether or not an employee was fairly dismissed or otherwise in light of a range of considerations, some of which are more closely defined, some of which are 387(h), all other relevant circumstances. The outcome is binary, but that doesn't render that decision anything otherwise than discretionary attracting *House v King* principles.

PN275

To that point again just very briefly if I could take you to one further judgment in our bundle of *Sean Investments v McKellar*, and this is a judgment of Deane J as he then was on the Federal Court. That appears at tab 5 of our bundle. Can I take you to page 5 of the reported version - sorry, page 375 of the reported version, and you will see at about line 22 his Honour says this:

PN276

> *In a case such as the present where relevant considerations are not specified, it is largely for the decision-maker, in light of the matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it shown that the decision-maker failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.*

PN277

Now, we of course say that the decision that the Deputy President was tasked with making here was on all fours, and it was open for the Deputy President to weigh relevant considerations and their comparative importance to determine which of the considerations within the bounds of reasonableness were to be considered and how they weighed against each other.

PN278

Set against that my learned friend says at paragraph 49 of his outline that the correctness standard applied because, quote, 'The dispositive reasons for rejecting question 2 were either correct or not.' It's not clear on the face of the submissions

what those dispositive reasons are said to be and how they lend themselves to a binary yes or no outcome, but for the reasons I have addressed we are plainly in the space of a discretionary error.

PN279

Turning to what that error is, or how that error is expressed, I took you a moment ago to the notice of appeal and how ground 6 is framed. The ground appears to suggest that the findings at sub-paragraph 6(a) and 6(b), and you will recall those were that her Honour found that shift swapping was more difficult and complex under the graduated roster, and second that the dominant mode of shift allocation would (indistinct) employees engaged in shift swapping.

PN280

As to the latter of course her Honour's findings weren't to the effect that it was dominant. I think the findings were somewhere between 8 per cent and 60 per cent of employees who didn't shift swap, but be that as it may the way in which the ground is framed seems to suggest that those findings should necessarily have led to a conclusion that a graduated roster should be restrained.

PN281

You see a similar submission at paragraph 46 of my learned friend's outline on appeal. There's an apparent suggestion that what's described as the real disagreement is which of the two rosters is - or the submission appears to say that the real disagreement is whether which of those two rosters is superior on the metric of the ease of shift swapping, which makes it more difficult, and that the Deputy President's conclusion that shift swapping is more difficult or complex under the graduated roster that that, quote, 'Resolves the disagreement.'

PN282

But of course we have got to return to the question the Deputy President was tasked to answering; should the Commission make an order enjoining Yarra Trams implementing the graduated roster? That was in terms the real disagreement between the parties to be resolved. There's nothing in clause 11(c) of part 1. There's nothing in the way in which the question was put to the Deputy President that would confine her analysis simply to which of these rosters makes shift swapping easier or harder.

PN283

Once that's understood then I think as we say in the outline the foundations of ground 6 really fall away. When you look at the integers of the Deputy President's analysis, what she actually considered, each was plainly relevant, and certainly open to her to consider. If one goes first to paragraphs 69 and 70 of the decision, or perhaps if I can take you first to paragraph 65 where the analysis commences, you will see at 66 there's a distillation of the various arguments that the applicants relied, or in favour of their position.

PN284

At paragraph 67 the Deputy President focuses on Yarra Tram's obligations to take reasonable and practical steps to eliminate or minimise risk to health and safety. I pause here to note that it was common ground and remains common ground

between the parties that the graduated roster is unquestionably superior from a fatigue management safety standpoint. That's not disputed.

PN285

The Deputy President makes some findings and draws some conclusions based on the evidence there and you will see of course in the concluding sentence of paragraph 67 the Deputy President places significant weight on that when assessing the merits of the change, and of course that needs to be considered in the context of the outcome of this decision affecting all of the drivers covered by this agreement, those who shift swap and those who do not.

PN286

Now, of course in that context where there is a common ground position that one of these rosters is far superior from a fatigue management standpoint of course it's going to be relevant to consider and give weight to how that roster might impact on the employees who will necessarily get the benefit of that roster because they're not shift swapping.

PN287

My learned leader Mr O'Grady took you to, or at least gave you references to various parts of the evidence of Mr McMillan, the relevant OHS witness below dealing with effectively the OHS rationale for the nature of that change. The relevant paragraphs for present purposes are paragraphs 27 through to 33. I raise that simply to say there was a proper evidentiary foundation for the Deputy President to focus on that and give weight to them.

PN288

The Deputy President then balances those matters against the detriments. The detriments are the findings that, well shift swapping is going to be more difficult and complex for some of these people under the graduated roster, but of course there's nothing uncontroversial and nothing erroneous in the Deputy President first assessing, well how significant, how grave is that detriment, before then weighing it against those OHS benefits. And you will see in paragraph 69 through to 75, and in particular paragraph 73 to 75 where her Honour delves into the evidence - and again my learned leader took you to some transcript references or gave you a notice of transcript references of the cross-examination where two things emerged.

PN289

One was that several of the applicants had not attempted to engage with the new system of allocating shift swaps, and secondly that many of the applicants had in fact managed to secure shift swaps under the new system. Those pieces of evidence, and also the evidence concerning at a global level the number of shift swaps implemented in the immediate lead up to and immediately following the nature of this change, she's weighed those matters and ultimately comes to a conclusion at paragraph 78, or 79, sorry, that as a matter of industrial merit that Yarra Trams shouldn't be prevented from implementing the graduated roster.

PN290

None of that is at all controversial in the context of the breadth of the discretion that the Deputy President had to (1) identify the range of considerations that she

would weigh in determining an at large industrial merit assessment about this, and (2) the comparative weight, the balancing exercise. It's an entirely orthodox approach to what is a discretionary decision.

PN291

VICE PRESIDENT CATANZARITI: Are you going to be much longer, because I think you've traversed this - - -

PN292

MR POLLOCK: Vice President, that's all I need to say. Thank you.

PN293

VICE PRESIDENT CATANZARITI: Thank you. Anything in reply, briefly in reply?

PN294

MR HARDING: Yes, Vice President, there's a few things. Perhaps I could start with where Mr Pollock left off by saying this, that a large part of the foundation for what he said in relation to ground 6 pertains to question 2 and how it's expressed. Arbitration question 2 pertains to relief. That's how it's expressed. It's relief. It's not the way the dispute was framed. The dispute certainly sought to engage the second, the industrial matters concerned that's contained in the dispute resolution clause.

PN295

It was articulated by the appellants on the basis that is actually recognised by the Deputy President in paragraph 69 of her reasons, which makes the point succinctly that the applicants submit that shift swapping is more complex and difficult under the graduated roster, and indeed the hypothetical benefits of the graduated roster may not be realised. That was the issue that was put in issue by the appellants, and there's only a yes or no answer to that, and the Deputy President answered in the affirmative in paragraph 75.

PN296

The question was also ventilated in closing submissions by the appellants in the way set out in appeal book 369 in para 45 to the same effect. To conflate the legal criterion with the relief is to misstate the issue. But as I have said in-chief we put the issue in both ways by reference to the correctness standard, and if that doesn't apply by reference to *House v King* on the footing that the Deputy President posed the wrong issue.

PN297

Just by way of completeness it's quite clear the way in which the Deputy President dealt with the second issue that the appellants raised was to express it in terms of what she says in paragraph 75. She accepts the evidence that shift swapping is more difficult and complex, but not satisfied that it is much more difficult, that they will be unable to swap shifts. It is expressed in terms of possibility. That is to be read with - I think Mr Pollock characterised it as the intermediate finding - I would suggest it is the conclusive finding under the heading 'Conclusion' in paragraph 78, that the graduated roster will result in a low impact because the employees can continue to do so. That wasn't the issue that was put.

PN298

There is no difference between us really in terms of how one analyses the two standards that Gageler J articulates in his reasons in the SZVFW case. It's how one approaches the question of how that was applied by the Deputy President below.

PN299

Beyond that, Vice President, I am conscious of the time, I did want to deal with a number of issues pertaining to construction arising from what Mr O'Grady said. First perhaps if I can deal with what Gostencnik VP has said about section 29, and we've only had a look at the authority briefly.

PN300

DEPUTY PRESIDENT GOSTENCNIK: Speaking for myself, Mr Harding, I don't want to catch people on the run, subject to what the Vice President might have to say about it, but a short note - - -

PN301

VICE PRESIDENT CATANZARITI: A short written submission - - -

PN302

MR HARDING: Thank you. Well, I might deal with it in that way.

PN303

VICE PRESIDENT CATANZARITI: Perhaps by close of business Friday for yours and then two days after that, next Wednesday.

PN304

DEPUTY PRESIDENT GOSTENCNIK: Which will be Monday.

PN305

VICE PRESIDENT CATANZARITI: Yes, I meant to say Wednesday.

PN306

MR HARDING: My learned friend says, well, look, you can't look at clause 19.2 and it just doesn't do what we say it should do, and he says the ordinary meaning of the language that's used in that clause doesn't take us where we need to go. Well, with respect, that's not inconsistent with the way in which you read enterprise agreements according to principle. You clearly have to look at the ordinary meaning, but then you do so in a way that's contextual and purposive, and he said we read it in a way that suggests that we are seeking in some way to evade it.

PN307

What we say about it is that it sets a foundation for a benefit, and that benefit is represented by the actual work practice, and it's perfectly appropriate to construe terms in enterprise agreements in a way that accords with actual work practice as the Full Court said in Vicentre. That is doing so in a way that represents what I think, if I can - the James Cook summary, which is item 1 of our list of authorities in paragraph 65 where their Honours identify the relevant principles that apply to

enterprise agreements, and the culminating principle is the one drawn from *Wanneroo v Holmes* and *WorkPac v Skene* which is:

PN308

> *Words are not to be interpreted in a vacuum divorced from industrial realities, but in light of the customs in working conditions of the particular industry.*

PN309

And that's what our construction does. Perfectly harmonious with principle. What Mr O'Grady invites you to do is to apply the kind of legalism that the authorities eschew. It is incongruous to think that one would regard shifts as somehow distinct from how they are scheduled.

PN310

My friend drew your attention to Secured Income Real Estate, which is item 5 of our list of authorities, page 159, and drew attention to the second aspect of what his Honour Mason J said in that case, that his Honour speaks about something fundamental to the contract, and that is in those circumstances one might have to look at the intention of the parties to determine whether indeed a term should be implied into the contract that gives effect to a duty to cooperate. Well, with respect, we're not here speaking about a contract. That aspect of Mason J's reasons don't have much application in circumstances where you cannot imply a term into an enterprise agreement. The operative part of - - -

PN311

DEPUTY PRESIDENT GOSTENCNIK: Though there have been many who have appeared here who have tried.

PN312

MR HARDING: Indeed. I'm not seeking to. I am seeking to construe the enterprise agreement according to the rule of construction that Mason J outlines. Of course in dealing with the Nine Brisbane Sites Appeal case, which is item 4 in our list, we have drawn attention to paragraph 7 of Allsop CJ's reasons, and my learned friend draws attention to what his Honour said in paragraph 8.

PN313

That paragraph has to be read in the context of the case where the ABCC was, as my learned friend says, seeking to assert that the reasons for the meeting were a sham, and that purpose informed how the clause was to be construed. Well, none of that applies here. We are seeking to apply the clause according to its terms and its context, and we say that reading it simply as his Honour also endorsed as an approach, one reads it simply in a way that ensures that it speaks specifically about a system of work that employees shall perform as far as practicable, which as I have said earlier makes it clear that there is a consequence for the employer without the employer actually scheduling work shifts in that way, the employee simply can't do this.

PN314

Now, my learned friend says, well that's an in terrorem submission that he says ought not be given any weight. But that all depends on whether he's right about the breadth of clause 8.18. Reading it in a way that we say it ought to be read

produces an outcome that doesn't extend as far as my learned friend suggests, and he gives no weight to the fact that clause 8.18 with the last sentence does not speak about initiatives outlined in the clause. It speaks about initiatives outlined in the agreement.

PN315

He then seeks to say, well you've got to then look at how each of the clauses might be expressed in a way that corresponds with some issue about what initiatives means. Initiatives really just is another word here for the measures that the parties have outlined in their agreement. That's really all it means. It's the quid pro quo for the flexibility, and reading it in the complex way that my learned friend seeks to do does violence to the parties' agreement, because it reads it in a very narrow legalistic way which doesn't accord with what the authorities have said is about the generous and purposive approach one takes when one construes the terms in an enterprise agreement.

PN316

One is not seeking to deny people rights. One is seeking to give effect to the agreement as best one can within the frame of the whole agreement construed according to its status as an enterprise agreement made under law.

PN317

He points to clause 5.1 and 5.3 - sorry, he points to 5.3 which speaks about the agreement being a facilitative agreement intended to operate to meet the evolving needs of Yarra Trams. Yes, that's what it says, but that needs to be read in conjunction with 5.1, which says that it contains terms and conditions. Facilitative doesn't mean that the employer can approach the enterprise agreement as if it doesn't have binding terms, or weaken the construction that one would give to those terms.

PN318

Clause 5.3 speaks about this context informing a commitment to work cooperatively in relation to particular subject matters, and there's no suggestion that that hasn't happened here, we just disagree about the outcome as pertains to one of those measures. That's all 5.3 really does. It doesn't have any other work to do in how one approaches the construction of the clauses that are in issue.

PN319

Our learned friend - just returning to 19.2 - draws upon what Ryan J said in the MaxiTRANS authority and clarifies that their purpose in relying on that authority is to say, well the parties can qualify the stringency of a term and condition that's contained in the agreement. Well, we agree with that. I don't think there can be any doubt that as far as practicable is a qualification that qualifies the stringency that would otherwise apply.

PN320

VICE PRESIDENT CLANCY: How broad is as far as practicable? You sort of urged upon us I thought those clauses in the agreement that talked about the Grand Prix or some things like that.

PN321

MR HARDING: Yes.

PN322

DEPUTY PRESIDENT CLANCY: But you're really arguing for as far as practicable to mean something akin to subject to their preference, the employees. That's what you want. You're wanting this broader capacity to swap shifts than is available under the new platform.

PN323

MR HARDING: No, we don't want that, Commissioner. What we want is to retain the ability to swap shifts in the manner that accords with the practice as existed up until 16 October.

PN324

DEPUTY PRESIDENT CLANCY: Which is a broad practice.

PN325

MR HARDING: I'm sorry, Commissioner?

PN326

DEPUTY PRESIDENT CLANCY: Which is a broad practice of swapping shifts.

PN327

MR HARDING: Yes, that's right.

PN328

DEPUTY PRESIDENT CLANCY: So it's a broad (indistinct) as far as practicable.

PN329

MR HARDING: What we say about that is as far as practicable is a qualification that engages circumstances as they prevail, and the parties have turned their mind to those kinds of circumstances and have recorded their agreement in various ways throughout the agreement, including in part 2 and in part 1. In those circumstances practicality or practicability focuses on whether or not that shift pattern is practical in response to one of the agreed circumstances.

PN330

Where we disagree, we part company with the respondents is that we say that it doesn't authorise the respondent to simply come up with a competing shift structure that so long as it applies would denude the second sentence of clause 19.2 with any effect. That's the difference between us.

PN331

Practicality does not necessarily correspond with, or it is concerned with actual practical outcomes rather than necessarily the fact that the employer has changed course midway through the agreement and decide to come up with a different structure, because that gives no work to the words 'as far as' as it contained in that. So we have an outcome, my clients have an outcome in terms of the preservation that exists (indistinct) of work arrangements. That is true, but we don't say that that informs the qualification. We have given an explanation of

how the qualification intersects with the rest of the agreement in a way that ensures that the words of the second sentence continue to have work to do, (indistinct) utility. Subject to the reservation the Full Bench has given us they're the reply submissions.

PN332

VICE PRESIDENT CATANZARITI: Thank you. The decision is reserved. The Commission is adjourned.

ADJOURNED INDEFINITELY [1.33 PM]