TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER WILSON

AG2023/969

s.185 - Application for approval of a single-enterprise agreement

Application by Peabody Energy Australia Coal Pty Limited (AG2023/969)

Melbourne

10.00 AM, FRIDAY, 23 JUNE 2023

PN1

THE COMMISSIONER: Good morning, parties. Thank you very much for attending. I will just start by taking the appearances. First of all for the applicant.

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MR JACKA: If the Commission pleases my name is - pardon me.

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THE COMMISSIONER: You can be the applicant if you wish.

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MR D WILLIAMS: I would be very happy if Mr Jacka would take on the role of shepherding this agreement through the Commission's processes. I am for the applicant, Commissioner. Dan Williams is my name from Minter Ellison. I am not aware as to whether approval has been dealt with. Perhaps it has to be. I am very confident there will be no objection to it.

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THE COMMISSIONER: All right, I will turn to that in a moment. And for the MEU?

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MR A JACKA: For the MEU Jacka, initial A, and on another video line is Mr Timms who is an official at the MEU.

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THE COMMISSIONER: All right, thank you. Mr Jacka, Mr Williams has alluded to permission for appearance. Do you have any objection to that this morning?

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MR JACKA: No, we don't.

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THE COMMISSIONER: All right. In that case I grant you that permission, Mr Williams.

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MR WILLIAMS: Thank you.

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THE COMMISSIONER: And my decision in due course will refer to the reasons. Now, parties, obviously this morning's hearing relates to the potential approval of the enterprise agreement which is before me relating to Peabody Energy at the Metropolitan Mine. What I note from the file obviously is that there's been objections raised by the MEU about certain aspects of the agreement, and indeed aspects of the undertakings which have been provided in response to the Commission's concerns. What I propose to do if it's convenient to you both is to first of all hear the Mining and Energy Union in relation to its objections and then turn to Peabody to respond. Is that a convenient way to progress?

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MR WILLIAMS: That would have been our suggestion.

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THE COMMISSIONER: All right, thank you. In that case I will turn to you, Mr Jacka. Before I do that let me just check the file. I have all the details in front of me. So I will turn to you, Mr Jacka.

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MR JACKA: I just want to start by saying, Commissioner, that I apologise in advance if you can hear a notification coming through for emails. I have tried to turn that off and I can't, so you may hear that from time to time.

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THE COMMISSIONER: Let me know when you've done it and I will follow your lead with my machine as well.

PN16

MR JACKA: Yes, okay. Obviously that will only be on when I'm not on mute. The other thing I'd like to say too is this morning we sent an email to the Commission proposing an amended undertaking that was copied to the applicant and Mr Williams, and what that does is proposes an amendment to our previous undertaking. I'm not sure if you've got that, Commissioner.

PN17

THE COMMISSIONER: Yes, I have, and I understand what it is intended to mean and what you mean by that. Before we move too far into the material you might be able to help me on this, or it might be Mr Williams, that the early stages of the file refer to issues associated with clauses 18 and 21 which are dealt with within your email this morning, Mr Jacka, but then there's also correspondence it seems about the clause 23 compassionate leave, and then the file to some extent goes cold in respect of that particular issue. So maybe as you progress if you can just be clear to me the clauses about which you are concerned and the undertakings you seek in respect of each of those clauses.

PN18

MR JACKA: Yes. Look, I can answer that now. We don't have any issue or take any issue with the clause 23 undertaking. The two issues for the MEU is the clause 18.1 undertaking. The terms of the enterprise agreement in clause 21.1 which I think meant to be dealt with by undertaking 1 of the applicant in terms of the NES savings clause. So they're the only two issues that we have an objection to or issue with.

PN19

THE COMMISSIONER: All right. Thank you for that clarification. Please proceed.

PN20

MR JACKA: I don't propose to go over our outline of submissions that were filed on 1 June, but we do rely on those submissions. As I probably already indicated now our objection in this matter is in relation to the clause 18.1 undertaking being

inconsistent with section 114 of the Fair Work Act, and also relevantly what the Full Court has recently said about the operation of 114, the clause at clause 21.1 of the agreement again being inconsistent with section 114.

PN21

It is also our submission that our undertaking proposed by the MEU will resolve the concerns raised by the Commission in relation to weekend roster and an entitlement to six weeks annual leave, and I will get into the reasons briefly why we say that addresses the Commission's concerns, and also deals with the inconsistency.

PN22

And then one other issue or point that we think is important is ensuring that the proposed undertakings are clearly understood by employees, and what we mean by that is whether or not it's a request or a requirement to work a public holiday, the interaction with section 114 and the authority on that. As I have already submitted, Commissioner, this is an NES provision and a modern award or enterprise agreement shouldn't exclude that.

PN23

The other point that we would like to make is that apart from dealing with the inconsistencies between the enterprise agreement and the National Employment Standards, our clause doesn't prevent Peabody from being able to have a weekend roster that includes public holidays, and the ability to roster employees on the weekend.

PN24

The important issue here is what that means in terms of employees being given an option to refuse to work a public holiday and the criteria of reasonableness that's set out in 114 of the Act. But importantly what our undertaking also does is it doesn't disturb the requirement for employees to work on Sunday 272 hours per year. So they get their roster. We address the concerns of the Commission by not disturbing the 272 hours, and really our undertaking and proposed undertaking still puts employees on notice that they may be required to work a weekend roster, but it also makes it clear to employees that they have an entitlement to refuse to work on a public holiday.

PN25

I don't wish to really go on and say much more than that. The real issue for us is in terms of the inconsistency with the NES and whether or not they're the choice that's provided for by the term. And I think the best way to deal with it is probably to reply to Peabody's submissions and their proposed undertaking.

PN26

First of all it's our submission that the effect of the NES undertaking and the clause 18.1 undertaking creates an internal inconsistency or is confusing, and the substance as we understand it of the applicant's submissions, apart from the submission about whether laws might change and there may be court rulings down the track that might be different to the Federal Court ruling, which refers to what the High Court might say - because just to be open and transparent probably

everyone knows that the Full Court decision has been appealed to the High Court and the respondent in that is seeking special leave.

PN27

The substance of their submissions is that the undertaking doesn't displace an NES entitlement that deprives the employees of a choice not to work on a public holiday where they are rostered to work, and that the undertakings if accepted by the Commission are taken to be a term of the enterprise agreement, but read in conjunction, or I think the actual correct wording is subject to section 114 of the Fair Work Act. And then what they say is Peabody has no intention of unilaterally requiring employees to work on public holidays without first making a request. To do so would be a breach of the NES.

PN28

The construct of the undertaking that's being proposed by the applicant as we have said is inconsistent with 114 and internally inconsistent. The reason we say that is that section 114 as upheld by the Full Federal Court plainly gives an employee a choice not to work on a public holiday, and that's what we have stated in our outline of submissions. What section 114 does is it gives also an employee an opportunity to decline to work on a public holiday by reference to reasonableness, and also an obligation of employees to demonstrate that the request, or in this case the word 'requirement', using that word is reasonable, and there's a criteria in section 114.

PN29

If the proposed undertaking and clause 18.1 undertaking is subject to the NES, then it's our submission that you plainly can't have a term saying on the one hand while it's subject to the NES and that means section 114 and therefore it's a request and then there's a test of reasonableness, and then the second part of that clause saying employees are required. The language is just inconsistent with each other.

PN30

What the intent is and what it's supposed to say is that if it's subject to section 114 then there needs to be an option for employees to be able to not work it and there needs to be an option for employees to say it's not reasonable, your request for me to work on a public holiday, or my refusal is reasonable. The point I'm making in this submission is that the words in the current undertaking proposed by Peabody just don't do that. In our submission the words are just plainly not a request.

PN31

The other important thing, and I think it is a very important point in terms of how enterprise agreements are drafted, and drafters are often criticised, and unfairly or fairly the criticism is focused on the drafters not making the words that are clear, and it's important that on basic principles that an employee understands the words of the enterprise agreement. And what they should in relation to this matter understand is that there's limitations on when they may be required to work a public holiday and there are circumstances where being rostered to work on a public holiday may be refused.

PN32

Our submission is that the undertaking proposed, or the undertakings proposed by Peabody are apt to confusing employees. I will start with the clause 18.1 clause. Using the words 'subject to the NES' and then saying an employee is required, as we say and said before internally inconsistent, but in our submission an employee reading that would be confused by that and they may be apt to thinking from those words that there is a requirement to work and that they don't understand that they have a choice not to work, because frankly an employee doesn't go around with a copy of the Fair Work Act and NES entitlements.

PN33

Some employees are across the NES entitlements and the Fair Work than others, but if you accept that an employee is going to see an enterprise agreement and say, well these are my terms and conditions the wording currently proposed would be apt to confusing employees and almost mislead them about their terms.

PN34

I provided and we have referenced the Full Federal Court decision in our submissions, and I have also provided a copy, Commissioner, and I just want to emphasise this point. With respect to the background facts that were in that decision at paragraph 9 onwards what you will see there is the background facts are, and if I start at paragraph 9 of that:

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The relevant employees are engaged pursuant to a standard form contract which foreshadowed that the employees may be required to work on public holidays and receive no additional remuneration.

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And then you will see the term there. In paragraph 10 the Federal Court observes that:

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Employees contracts stipulated that they may be required to work on public holidays.

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And that's what our initial undertaking that was provided to the Commission said, and you will see the reasons why we have now sent this undertaking with the amendment. The problem that comes up if you continue to read through the facts is that the company makes a decision to say that they're going to ballot employees and each employee pulls their name out of a hat and that will decide whether or not they're required to work Christmas and the new year's eve public holidays. But they also then send communications to the employees saying, 'But you will not be able to work for the next two years on the Christmas holiday', and that's set out in paragraph 10 just down towards the bottom of the quote there where it says, 'People will not be able to have Christmas off again for two years.'

PN39

So what you have got is a conflict between the terms of their contracts saying they may be required, then something expressed in writing plainly saying, 'You will not be able to have Christmas off again.' And then you've also got the underlying

issue which the court deals with in terms of section 114 and what actually were the employees' entitlements.

PN40

Then if you go to paragraph 16 you then are provided with an example by way of affidavit from a Mr Toomey where he says, and you will see there at paragraph 16 that the reference is to paragraph 58 of his affidavit, where it says:

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Mr Toomey deposes that they are also told that six people will be able to take time off and who they were and would be worked out later, and he states that this is the first time he became aware of the requirement to work on Christmas and Boxing Day.

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And it goes on to say that because he had been given or he had seen that in writing he understood then that he was required to work on Christmas or Boxing Day, and that was his understanding in the directions from the employer, despite the fact that he was an employee with a contract that said he may be required, and he was no doubt at that time not aware of section 114.

PN43

And while the facts are slightly different in relation to this matter you can see what the Federal Court was actually dealing with in that, and how express words used by an employer created a misunderstanding or a confusion as to what employees thought they were entitled to. We say that it's a problem and a problem that needs to be dealt with by accepting the undertakings of the MEU in that the way that the undertakings have been drafted, particularly the clause 18.1 undertaking, but not just that clause and I will come to the other issue about clause 21 in a second, is that an employee could easily misread or misunderstand or be confused by the words 'Subject to the NES employees are required to work on a public holiday.'

PN44

And then the same problem exists in relation to clause 21, and that's even more emphasised by the fact that there is no undertaking proposed by Peabody that even says we're going to insert the words 'subject to' prior to the words stating that an employee is required to work on a public holiday. It doesn't even say that in the proposed undertaking.

PN45

So if an employee reads clause 21.1 they would read it, in our submission, as being required to work on a public holiday. And if they happen to read the undertaking, the clause 18.1 and 21.1, based on the words that they're reading, they would easily, in our submission, or may easily be led into the belief that they're required to work and they don't have the option.

PN46

The final point I would like to raise is also in response to Peabody's submissions, and what they say is they had no intention of unilaterally requiring employees to work on a public holiday without first making a request. To do so would be a

breach of the NES. That's also the union's intention, and as we understand it it's also the intention of our members and employees that that's how the clause should work. So if that's the case then why not have those words in the enterprise agreement.

PN47

First of all if it's the applicant's intention then the words in the enterprise agreement or at least in the undertaking should say that. And equally if it's the objective intention of the parties then that's what the words should say, and on basic principles those words should be plainly set out in the enterprise agreement, or at least in this case in the undertaking. They're our submissions, Commissioner. If you have any questions I'm happy to obviously answer them.

PN48

THE COMMISSIONER: Thank you. The question I have is in relation to clause 18, and what I am about to ask I don't think remedies the concern you raise in respect of clause 21, but I should raise it in respect of clause 18. Where we started, the Commission started, was with the concerns correspondence which we issued to you, or to the parties on 18 April, and that raised a concern in respect of the definition of shift worker in clause 18. We asked that in all innocence, which was we weren't satisfied that the clause appeared to define a shift worker for the purpose of the NES.

PN49

Then the response chain that we got into was to put forward a series of proposals in respect of whether the weekend roster required employees to work ordinary shifts or whether they may be required, et cetera, and it just seems to me in respect of clause 18 that the parties may well have drifted considerably further from where we the Commission started. So the question to you, Mr Jacka, is whether in respect of that narrow concern raised in April it could be dealt with for an entirely different way, not raising any questions about whether people are required to work on public holidays.

PN50

MR JACKA: In my mind, and Mr Williams might have a different view, but the enterprise agreement can provide for terms above the award and above the NES, and really that provision of the enterprise agreement, that's what it did. I appreciate what the Commission was raising in terms of the concern, and that's why we have made the submission in saying that our proposed undertaking still allows or addresses that concern in that - if you look at what the award says, and they use the word 'requirement', we're not hiding from that, and I will get to that in a second - it still allows for a weekend roster and there's still going to be employees who may be required to work, because the refusal is still contingent on whether the refusal is reasonable or the request is unreasonable.

PN51

And dealing with that part frankly we don't anticipate that there's going to be a lot of refusals. A lot of the feedback honestly from the employees after the Full Federal Court decision is, in colloquial terms, the sky was going to fall in, but it didn't. That roster will still operate, but in any event, in our submission, the enterprise agreement can provide for above award provisions if the parties agree

on it. I think probably maybe in hindsight is that a definition of what a shift worker was or a definition probably would have been helpful. And the other thing too is that probably neither undertaking, but particularly our undertaking doesn't displace the requirement to work 272 hours per year on a Sunday.

PN52

But the second point about the modern award is that I am told that those terms in the modern award were drafted well before the Fair Work Act and their provisions that were carried through during the award modernisation, and I can't peel off the section of the Act, but again a modern award can't be inconsistent with the NES, and our submission would be that arguably that term of the modern award is inconsistent and probably needs a variation to be compliant with section 114 as interpreted by the Full Federal Court.

PN53

THE COMMISSIONER: All right, thank you, that was the only question I had. So if I turn to you, Mr Williams. You're muted there, Mr Williams.

PN54

MR WILLIAMS: Thanks, Commissioner. Thanks, Mr Jacka. Just to deal briefly with that first issue. As I understand the concern that was expressed from chambers it was an issue as to whether section 196 was engaged. We did respond to that, I think perhaps reflecting some of Mr Jacka's comments, to the effect that the Black Coal Mining Industry Award doesn't appear to do that and therefore the issue doesn't issue. Now, I hadn't understood there was a continuing concern either on your part, Commissioner, or Mr Jacka's part, it appears not on Mr Jacka's part, but if there is a remaining concern then perhaps we can address that.

PN55

THE COMMISSIONER: No, it wasn't so much a remaining concern, it was more just - I don't wish to be rude here, but are we overengineering the associate.

PN56

MR WILLIAMS: We probably are, but we wanted to be responsive. In response to Mr Jacka's concerns, which I take to be substantially, in fact completely based around the section 114 and how it applies to public holidays, which arises in clause 18 and also clause 21, I can be pretty short, because the approval task under section 186 is not discretionary, it's a mandatory task, if the requirements are satisfied in a couple of different parts of the division.

PN57

In relation to the NES the only requirement is under section 186(2)(c) that the NES not be excluded, no provision of the NES be excluded. The undertaking that we proposed on 9 May embraces the NEC. It doesn't exclude it, it embraces it. It makes it explicit if it wasn't already explicit that the agreement applies subject to the NES, and we think that's sufficient to satisfy the only requirement relevant to your determination, which is the one in 186(2)(c).

PN58

We have provided an alternative undertaking in our submissions at paragraph 10. We think the 9 May undertaking covers the point, but you might prefer the

undertakings in our submissions, they're more specific to the particular sections, particular clauses in the enterprise agreement. But beyond that it seems that the agreement should be approved because there would be no basis for a finding that the enterprise agreement excludes a provision of the NES, which we think is the only relevant point.

PN59

Now, I might say Mr Jacka made some comments about whether or not the Black Coal Mining Industry Award needs another update. Well, maybe it does, but I just make the point that in clause 29 it adopts the same methodology. That is in clause 29.1 it says public holidays are provided for in the NES, which is perhaps not explicit that the award doesn't exclude the NES, but it says that public holidays are provided for.

PN60

Then in clause 29.4 it proceeds to presume that any reference to section 114 or the factors to be taken into account that employees can be required to work on a recognised public holiday. So it seems to adopt a similar methodology. That is if it can be said that the award doesn't exclude the NES it's because in clause 21.1 it refers to the NES. We have gone further, we're prepared to say that our agreement should be subject to the NES, perhaps that's better language.

PN61

But otherwise what the request for an additional undertaking seeks to do is to extend matters significantly beyond what section 186 requires and rewrite the enterprise agreement to incorporate provisions of the NES into the agreement itself. There is of course no requirement that any benefit or any part of the NES has to be incorporated into an enterprise agreement. They are separate standards, and many enterprise agreements in fact refer completely to the NES on a range of entitlements which are dealt with in the NES. They might say in relation to annual leave annual leave is dealt with in the NES.

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So there can't be a requirement that some sort of unbolting of provisions and concepts in the NES are to be put into the enterprise agreement. They just - - -

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THE COMMISSIONER: I might be persuaded to that, but on earth does subject to the NES for the purpose of the six weeks of annual leave mean. What does that mean? It's being more than a little bit pregnant. You're not saying public holidays or annual leave is dealt with in the NES, you're saying subject to the NES we are going to do something. What does it mean?

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MR WILLIAMS: In relation to clause 18.1?

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THE COMMISSIONER: Yes. What I see you to be saying in your submissions is that you put forward that there's the potential for a change in the Full Court interpretation through the High Court, so it appears that you're saying subject to whatever the prevailing opinion is in respect of the NES we're going to do

something. That raises I guess a question of contingency, and for that matter uncertainty as to how these workers will be treated come the next public holiday.

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MR WILLIAMS: I think we would accept that the alternative undertaking that we have provided in clause 10 would be unnecessary, and potentially not just unnecessary, but potentially confusing. We prefer the model in our original undertaking.

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THE COMMISSIONER: So then you get to the point of difference, which is you use the word 'requires' and the union uses the words 'may be required'. Now, surely requires is inconsistent with the Full Court decision.

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MR WILLIAMS: Well, it's inconsistent with the Full Court decision, Commissioner. We accept that. Sorry, it's not inconsistent with the Full Court decision, it just has to be applied in a manner consistent with the Full Court's interpretation of section 114.

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THE COMMISSIONER: Tell that to a worker. What does that mean?

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MR WILLIAMS: Well, I will come to the issue of clarity and how it might impact on your discretion. I may say now that if clarity and understanding of employees was a value which had to be applied in every enterprise agreement approval it would be a pretty difficult task. We say that it is sufficient for there to be a sign post to the requirements of the NES, and then as in many other situations employees have to take advice if they're in any doubt what the obligations are. As I said that clarity itself is a desirable but not a value which can be applied in an approval situation.

PN71

The issue of what section 114 means is not itself free of doubt or free of difficulty, even for people who are directed towards it. And so for example in the first instance decision in OS an experienced Federal Court judge found that the requirement for a request was essentially satisfied by a requirement in the contract. And there are many, many agreements which follow a similar course to ours, and the award itself is not dissimilar, and that was the decision of the judge at the time, that the Full Court took a different view which appears on the face of it to be sensible, and that is that a request is a request and a requirement is a requirement. But who knows what the High Court will say. So we can't predict every change in approach, judicial approach, or for that matter change in legislation.

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THE COMMISSIONER: I accept that, but what do we say to the workers bound by this agreement until the High Court provides its pronouncement?

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MR WILLIAMS: Well, it has not been suggested that the workers have not genuinely agreed to this agreement. That's not suggested, it's not a point taken.

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THE COMMISSIONER: No.

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MR WILLIAMS: And, that's the time, respectfully, that's the occasion when issues of clarity or understanding are to be raised, and then and then only, and if no point is taken that the workers did not genuinely agree, which obviously can take into account concerns about whether or not workers understood the terms of it that's the end of it. That's where that issue must be determined, and no concern has been raised about that.

PN76

Workers are in the same position in relation to public holidays as they are in relation to the accrual of personal leave, which is another matter where different judicial interpretations all the way to the High Court have taken quite different views about how personal leave accrues and how it is deducted. These are not easy concepts. Judges disagree about them, lawyers disagree about them.

PN77

And we accept that in this and in relation to other circumstances workers may need good advice from those who support them, and fortunately for the workers under this agreement they have got the benefit of good advice. With respect, it would be unavailable to refuse to approve the agreement because of the concern about the level of understanding that an individual worker might have in a particular situation, hypothetical situation in the future.

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THE COMMISSIONER: You say to me that the issue ultimately that I need to determine is whether or not section 186(2)(c) is engaged which requires that the term of the enterprise agreement not exclude the National Employment Standards.

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MR WILLIAMS: That's correct.

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THE COMMISSIONER: However in looking at section 186(2)(c) it then refers one to section 55 - - -

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MR WILLIAMS: It does.

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THE COMMISSIONER: - - - which says that:

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A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

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MR WILLIAMS: That's correct.

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THE COMMISSIONER: Isn't the issue with which I need to engage the last phrase, 'any provision of the National Employment Standards'?

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MR WILLIAMS: Precisely.

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THE COMMISSIONER: Yes, and the question though that the judicial interpretation, such as it is today, is that the National Employment Standards mean something other than require.

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MR WILLIAMS: And, with respect, our preparedness to qualify, to give an undertaking which explicitly qualifies the operation of that clause by reference to the National Employment Standards is a complete answer to that question as a matter of law. We accept the comments in relation to the potential for confusion. We accept that, but that applies in many circumstances, many different circumstances. And the fact here is that my client, which is a responsible employer, well advised, and as has said in its submission understands what the law is, and the first step is for it, the first step is for my client to make a request which is compliant with the current wording and current judicial interpretation of section 114.

PN89

So if my client doesn't do that, and of course it wouldn't be the slightest basis to think that it would not, then there might be a concern, but if my client does do that then the issue of how workers are informed and what they understand to be their rights is resolved because they will be given a request, and the request as the Full Court has told us has to carry with it the possibility that on a reasonable basis the workers can refuse.

PN90

That, in my submission, goes further than is required. That explanation goes further than is required to the exercise of your function. But perhaps it's some comfort that even taking into account the awkwardness and maybe the brevity of the way that the clause is expressed and the legal effect of the reference to the NES, these workers will not in fact be misled. They will be advised of their rights, and if the employer ever fails to do so they have got Mr Jacka's organisation to fill the breach. But as I said what may happen in the future in a particular circumstance can't be a factor in your consideration.

PN91

I might also say that even if it was it's a wicked problem to solve, because if you take Mr Jacka's suggested undertaking which we have received this morning, and by the way we're not disadvantaged by that, we've had a good chance to consider it, but Mr Jacka seeks an undertaking which includes the underlined paragraph, the sentence:

PN92

Employees may refuse to work the public holiday if the refusal is reasonable, or if the requirement to work the public holiday is unreasonable.

PN93

Now, if we agreed to that or if you required that of us and it was given that bakes into the agreement a concept which is drawn from the NES, but is drawn from a provision in the NES which might change. It might not of course, but it could change. In my experience there is concern in the business community that the Full Court's interpretation of the NES is in some cases awkward and unworkable. Now, it is what it is. The High Court may say differently, or alternatively perhaps not in this government but in a different parliament, there might be some variation to it.

PN94

And so for example, and it is completely hypothetical of course, but it is not fanciful to think that in future section 114 may exclude from the current regime a situation where an enterprise agreement which passes the BOOT against an (indistinct) award which requires work on public holidays that that's all there is to it.

PN95

What I mean by that is that the NES might be amended in the future so that the concept of reasonableness of request and reasonableness of refusal is taken out completely in particular industries where employees are and have always been required to work on a continuous basis including public holidays. I'm not saying it's going to happen, but it might, and if it did happen then we would be subject to a clause in an undertaking which takes effect as a term of the agreement, which gives employees a right which at that point the NES would not give them and which my client had not agreed to give them. That's one difficulty.

PN96

The other difficulty is that the clause uses the word 'reasonable' and 'unreasonable', uses those terms, but it doesn't import the factors in section 114(2), which the Commission or a court for that matter would be obliged to take into account in administering the NES entitlement. But under the clause which Mr Jacka proposes it might not. It might just simply have to apply objective, or even subjective interpretations of what's reasonable in a particular situation.

PN97

So the vice in trying to overengineer this will find a solution which is in drafting which goes beyond simply embracing the NES, which is what we seek to do, it's a dangerous one, because in six months time the High Court may say something different. In two years time the parliament may say something different. And in the meantime my client would have been required to commit to a term in an enterprise agreement, which are not easy to amend and even harder to terminate, which binds it to a standard which no longer applies anywhere else.

PN98

So, Commissioner, in our submission the correct thing to do is to limit your, as of course you must, limit your discretion to the matters in section 186. Give full

weight to the explicit reference to section 55, which of course you would apply in any event. But there is no basis for a finding that my client's agreement excludes any part of the NES if we are prepared to explicitly say that it does not in terms in an unqualified way.

PN99

Irrespective of concerns about clarity or possibility for confusion, Commissioner, that's where we see it rests. I have made some points which perhaps might give you some comfort that the concern, although certainly a reasonable concern, is not likely to result in workers being misled, but that's not a problem that we can solve in these proceedings. In our submission, Commissioner, you would accept that if we're prepared to provide an undertaking which explicitly says that all terms, and if you wish explicit terms, subject to the NES, then that really must resolve it.

PN100

THE COMMISSIONER: You've provided three undertakings, three sets of undertakings. There was a set on 26 April; there was the set on 9 May, and then there's proposals within the 16 June outline of submissions that you filed. Which are the ones that I should consider for the purposes of my decision?

PN101

MR WILLIAMS: The written undertakings which are given in (indistinct) on 9 May 2023. If they are unacceptable to you for any reason we propose alternative undertakings in clause 10 of our submission, and we are prepared to provide those.

PN102

THE COMMISSIONER: All right.

PN103

MR WILLIAMS: We think that that simplicity is the best approach and therefore we prefer the undertakings as given on 9 May.

PN104

THE COMMISSIONER: All right. Then in the submissions you filed on 16 June at paragraph 9 you say you have no intention of unilaterally requiring employees to work on public holidays without first making a request. Is that something you would be prepared to put in an undertaking?

PN105

MR WILLIAMS: Well, the problem with that is the same problem that the law may change over time, Commissioner.

PN106

THE COMMISSIONER: So that's a 'No'?

PN107

MR WILLIAMS: That's a 'No'. That's a 'No'. But what you can be assured of is that my client will meet its obligations under the enterprise agreement and the NES.

PN108

THE COMMISSIONER: All right, I think that's - sorry, you go.

PN109

MR WILLIAMS: Commissioner, can I say that specifically in this context that the point of contention between the OS first decision and second decision was what was contemplated by a request. The judge at first instance found that request should be interpreted as a concept similar to requirement. The Full Court took a different view. That I understand is a point of contention being taken to the High Court. So the problem with my client giving an undertaking in accordance with that submission is what is actually intended or required by the term 'request' may change over time.

PN110

THE COMMISSIONER: So what's the status of the submission then?

PN111

MR WILLIAMS: It's a submission that you should accept as a statement that my client will comply with the law as it stands from time to time, and it's made in the context that we fully accept that the Full Court has interpreted section 114 in a way which is binding on all businesses, including my client.

PN112

THE COMMISSIONER: All right, thank you. I don't have any further questions. So if I turn to you, Mr Jacka, for any reply you wish to make.

PN113

MR JACKA: I will probably start in reverse order in dealing with this concept in submission about what may happen in the future and what may not and therefore that should affect the terms of an enterprise agreement. Frankly if all parties did that and sort of thought about hypotheticals about what the legislation may change or High Court decisions, et cetera, you probably wouldn't have many terms that actually mean what they're supposed to say at the time.

PN114

The second point is dealing with the 186 submission that was the topic of discussion, we obviously have said that section 55 says that you can't displace terms of the NES from an enterprise agreement, or they can't be inconsistent to use my words, and that's dealt with and you've already discussed the 186 point with Mr Williams where the section 186 does deal with that, and perhaps we didn't spell that out as well as we should have in our submissions, but we're making that submission now.

PN115

But going back to our initial point and the key point is that the words of this undertaking are plainly inconsistent with the NES, and it's about request v requirement, and if it doesn't specifically say request then there needs to be words that at least provide for the ability of an employee to make a choice, and that's done on the criteria of reasonableness.

PN116

Now, to deal with Mr Williams' point our proposed undertaking that we sent to the Commission today doesn't set out a criteria of what a reasonable refusal might be or unreasonable request. We're happy to provide an undertaking specifically setting out the exact words in section 114. That will set out what the criteria for that would mean. We don't think we need to, because it already says subject to section 114, and so that's what it would mean.

PN117

But our submission is that the words that are proposed in this undertaking are plainly inconsistent, because on one hand you've got section 114 that says it's a request, whereas the words that follow read in conjunction with each other and in context say to employees, and they say the words are is that employee will be required, and it's a problem in terms of the internal inconsistency. I think really that's all we need to say about it.

PN118

THE COMMISSIONER: Thank you. And that's all you wish to say, Mr Jacka?

PN119

MR JACKA: It's all we wish to say.

PN120

THE COMMISSIONER: All right. Thank you very much, parties. What I will do now is to reserve my decision and undertake to provide it to you as soon as I can.

PN121

MR WILLIAMS: Thank you, Commissioner, appreciate it.

PN122

THE COMMISSIONER: All the best.

PN123

MR WILLIAMS: Thanks, Adam.

PN124

MR JACKA: No problem. Thank you.

ADJOURNED INDEFINITELY **[10.53 AM]**