TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER RYAN

C2022/3093

s.739 - Application to deal with a dispute

Flight Attendants' Association of Australia
and
Qantas Airways Limited T/A Qantas Airways Limited, QF Cabin Crew Australia Pty Limited
(C2022/3093)

Flight Attendants' Association of Australia, Qantas Airways Limited and QF Cabin Crew Australia Pty Limited Enterprise Agreement 2022 (EBA11)

Sydney

10.00 AM, WEDNESDAY, 8 MARCH 2023

Continued from 07/11/2022

PN1

THE COMMISSIONER: Good morning. I'll take the appearances.

PN2

MR P BONCARDO: If the Commission pleases, my name is Boncardo and I appear for the FAAA in both proceedings, Commissioner. I have a right of appearance under clause 9.1.9 in the dispute proceedings and to the extent necessary to seek permission to appear in respect to the Qantas entity's section 217 application, I think permission may have been granted on a previous occasion. If it hasn't, I formally seek - - -

PN3

THE COMMISSIONER: Yes, I think permission was granted to the applicant in the 217 matter.

PN4

MR BONCARDO: Thank you.

PN5

THE COMMISSIONER: But we'll deal with permission in a moment, Mr Boncardo. For the respondent in the 739 and the applicant in the 217 matter?

PN6

MR M FOLLETT: Yes, Mr Follett, and I, too, have a right of appearance under clause 9.10 of the enterprise agreement. To the extent necessary, I seek permission otherwise.

PN7

THE COMMISSIONER: Thank you. In the 217 matter permission was granted to the applicant on a prior occasion. In terms of permission in relation to the FAAA, Mr Boncardo, any brief submissions you wish to make?

PN8

MR BONCARDO: The matter does have some complexity to it, Commissioner. There is a heated debate as to whether or not there is an ambiguity or uncertainty and there is also a debate about the relevant factors that will guide your exercise of the discretion in the event of a jurisdictional (audio malfunction) to have been established. It would, in my submission, be of assistance to the Commissioner and enable the matter to be dealt with more efficiently if my client were granted permission to be represented by a lawyer. I rely obviously on section 596(2)(a).

PN9

THE COMMISSIONER: (2)(a), okay. Mr Follett, any submissions in reply?

PN10

MR FOLLETT: We don't oppose it, Commissioner.

PN11

THE COMMISSIONER: Thank you. Permission is granted on the basis that I'm satisfied that the preconditions set out in section 596(2)(a) of the Fair Work Act

has been met. In terms of the 739 matter, I note the parties' reference to clause 9.10 of EBA11. To the extent that was in contest, I would have otherwise granted permission under section 596(2)(a) for the parties to be represented in that matter. I just say that for completeness.

PN12

These matters have been set down for the purpose of hearing. I understand my chambers has prepared a hearing book and circulated that to the parties. That should have all the materials other than the applicant's further submissions in the 739 matter that were filed on 6 March. I haven't got an updated hearing book. I wasn't proposing to circulate an updated hearing book to include those, given they were under two pages and they were submissions rather than evidence.

PN13

MR BONCARDO: That's so, Commissioner, although I think that the submissions did in fact reach the hearing book.

PN14

THE COMMISSIONER: Did they?

PN15

MR BONCARDO: Pages 632 to 633 on my note.

PN16

THE COMMISSIONER: They haven't reached mine or maybe I've got an earlier version, but that's fine. We've got the submissions, anyway, and they're referable by the date. In terms of the way we proceed today, I might just put this to the parties. In terms of the evidence, is it convenient that the evidence in one comprises the evidence in other to the extent the evidence may speak for itself where it's obviously related to one matter as opposed to the other matter?

PN17

MR BONCARDO: Yes.

PN18

MR FOLLETT: Yes.

PN19

THE COMMISSIONER: Are the parties content to proceed on that basis? In relation to the determination of the proceedings - I might just refer to it as the employer – the employer in its submissions has indicated that the 217 matter should be determined first and then, depending on the outcome or determination of that matter, the relevant part of the dispute application then be determined if necessary.

PN20

MR BONCARDO: There is logic to that approach. I perhaps was over-thinking things, Commissioner, when I saw your proposed questions for determination in respect to my client's dispute. The only comment I would make in respect to question 3 is that in the event that the Commission does find, contrary to my

instruction, that non-flying duties do not include standby, then the 217 application is otiose.

PN21

Logically the 217 application should proceed to be determined first. I am in your hands, Commissioner. I was proposing to address you on all issues and focus firstly on the 217 before coming to the instruction questions that are relevant to my client's dispute, but I'm in your hands.

PN22

THE COMMISSIONER: Yes, and I might just say I have had some questions circulated to the parties and those questions seem to pick up the issues.

PN23

MR BONCARDO: Yes.

PN24

THE COMMISSIONER: Do the parties wish to speak to those questions before opening or as part of opening?

PN25

MR BONCARDO: The only matter I would mention is that it is unnecessary for the Commission to answer question 1. That aspect obviously has been resolved by the parties. So far as my client's application is concerned, only questions 2 and 3 need to be determined.

PN26

THE COMMISSIONER: And then question 3 is contended upon the outcome of the 217 matter?

PN27

MR BONCARDO: That's so.

PN28

THE COMMISSIONER: Very well. Are questions 2 and 3 otherwise appropriate - - -

PN29

MR BONCARDO: Yes, they are.

PN30

THE COMMISSIONER: - - - to the dispute insofar as the union is concerned?

PN31

MR BONCARDO: Yes.

PN32

THE COMMISSIONER: Mr Follett, is there anything you wish to say about those questions?

PN33

MR FOLLETT: Well, we don't have a difficulty with question 3. Question 2, at least as presented having regard to the factual substratum, that's too broad, ultimately it's a matter for the Commission as to whether it sees value in seeking to reach agreement on the proposed questions. I mean, ultimately it seems that the issue that separates us is fairly clear. There are probably multiple different ways question 2 could be expressed.

PN34

The comment about it being too broad is – and perhaps this is not so much a constructional issue as one of the facts – there's no removal of duties contended for by my client before 8 am on the preceding day. It's at 8 am if an employee is not cleared for duty that the consequence follows. Whether that requires some variation to the question or at least the Commission just keeping that in mind - as I say, it's probably not strictly a constructional issue because if we are right that we had a right to remove the duties in any case, then whether it's 8 am or 3 pm or some other day or some other time probably doesn't much matter.

PN35

THE COMMISSIONER: So if the proposed question was modified to say 'where the employer has only been notified of the employee's return to duties - - -'

PN36

MR FOLLETT: After 8 am.

PN37

THE COMMISSIONER: - - - 'after 8 am on the preceding day.'

PN38

MR FOLLETT: Yes, or an alternative way is to flip the question and say, 'Is the employer entitled to remove an employee's duties if the employer has not been notified of the employee's return to duties on or before 8 am the preceding day?' It's the same question.

PN39

THE COMMISSIONER: Just in reverse, yes, yes. Mr Boncardo, is there - - -

PN40

MR BONCARDO: I don't have any difficulty with that approach, Commissioner, or either iteration of the question Mr Follett has outlined. For the sake of being pedantic, there I think should be a reference to 'return to duties from sick leave', because the dispute pertains only to a 'return from sick leave'.

PN41

THE COMMISSIONER: Sick leave.

PN42

MR BONCARDO: I think we're all clear on that, but to ensure that the question is directed specifically at (audio malfunction)

PN43

THE COMMISSIONER: Well, Mr Follett, the reverse version, I am - if the parties are content to proceed on the reversed version subject to those modifications and incorporating 'return from sick leave', would that be an appropriate approach?

PN44

MR FOLLETT: I think it would certainly resolve the dispute.

PN45

THE COMMISSIONER: So I might just ask you to go back over that, Mr Follett.

PN46

MR FOLLETT: Yes.

PN47

THE COMMISSIONER: The reverse version.

PN48

MR FOLLETT: 'Is the employer entitled to remove an employee's duties if the employer has not been notified of the employee's return to duties after sick leave on or before 8 am on the preceding day?'

PN49

THE COMMISSIONER: Should it be 'from sick leave' or 'after sick leave'?

PN50

MR FOLLETT: Probably 'from sick leave', yes; 'return to duties from sick leave', yes.

PN51

THE COMMISSIONER: So, 'Is the employer entitled to remove an employee's duties if the employer has not been notified of the employee's return to duties from sick leave on or before 8 am on - - -'

PN52

MR FOLLETT: 'On or before 8 am.'

PN53

THE COMMISSIONER: Sorry – 'on or before 8 am on the preceding day.'

PN54

MR FOLLETT: Yes.

PN55

THE COMMISSIONER: Mr Boncardo?

PN56

MR BONCARDO: No difficulty with that.

PN57

THE COMMISSIONER: Thank you. We will proceed on that basis. I'm just wondering if they should be renumbered questions 1 and 2 given the resolution of

– those questions be 1 and 2. I will at a convenient time throughout the day have this document amended and circulated to the parties just for completeness.

PN58

MR BONCARDO: Certainly.

PN59

THE COMMISSIONER: That brings us then to how we proceed. Now, I have reviewed the submissions and the materials, but do the parties wish to make – I think you indicated you wished to make some opening submissions or remarks, Mr Boncardo.

PN60

MR BONCARDO: Commissioner, I'm in your hands. None of the witnesses are required for cross-examination. If it is convenient I would propose that the entirety of the court book, to the extent it contains evidence, be tendered, and then proceed if it is convenient to the Commission to address you on the submissions.

PN61

THE COMMISSIONER: So none of the - - -

PN62

MR BONCARDO: None of the witnesses on either side of the bar table are required for cross-examination.

PN63

THE COMMISSIONER: I take it we should be finished today then.

PN64

MR BONCARDO: Well within today.

PN65

THE COMMISSIONER: All right then I might just deal with the evidence and given that we're dealing with the 217 matter first, I'll work through those witness statements and then I'll work through the 739 statements even though the evidence might be evidence in the other. I'll deal firstly with the employer's witness statements.

PN66

The statement of Helen Gray, dated 4 November 2022, and set out at pages 643 to 746 – and when I say 'the witness statement', I mean the witness statement and any annexures referred to therein – will be exhibit 1. I should actually have said, Mr Boncardo, are there any objections?

PN67

MR BONCARDO: Commissioner, I don't make any formal objections. The witness statements on both sides contain matters which would be objectionable (audio malfunction) applied. To the extent that the witness statement of Ms Gray and the witness statement of Ms Byrne express opinions and views, those are matters to which you can accord the (audio malfunction) weight.

PN68

THE COMMISSIONER: Yes.

PN69

MR BONCARDO: So I don't make any formal objection.

PN70

THE COMMISSIONER: If there are any submissions as to weight, you can make them along the way.

PN71

MR BONCARDO: Certainly, yes. Thank you.

PN72

THE COMMISSIONER: On those matters.

PN73

MR BONCARDO: And I'm content to proceed on that basis in respect to all of the respondent's evidence.

PN74

THE COMMISSIONER: Thank you.

PN75

MR FOLLETT: I think that's an agreed position between the both of us.

PN76

THE COMMISSIONER: Very well.

PN77

MR FOLLETT: The statements will go in and then if there are appropriate submissions to be made about weight – I don't know what the solution to this issue is, Commissioner, but insofar as you're working on a slightly different court book and page numbers - - -

PN78

THE COMMISSIONER: I have just recognised I have made an error in the page reference to the statement. It should start at page 642.

PN79

MR FOLLETT: Yes, yes.

PN80

THE COMMISSIONER: I was about to correct that.

PN81

MR FOLLETT: What do you have at page 632?

PN82

THE COMMISSIONER: I have the 217 and form F1 application.

PN83

MR FOLLETT: Yes, that's where – 632 on the version that both Mr Boncardo and I are working on, which was distributed by the Commission, is the FAAA's reply submissions of 6 March and the form F1 application commences at 634. It's odd that your version of Ms Gray's statement commences at 642, because we have the form F1 application at 634 through to 638, my client's outline of submissions at 639 to 643 – yes, then at 644 for Ms Gray, so the index is incorrect on mine.

PN84

THE COMMISSIONER: It may be because the 6 March reply or applicant's further submissions in the 739 matter were slotted in.

PN85

MR FOLLETT: Yes.

PN86

THE COMMISSIONER: That might have had the consequential impact from the 278 documents going forward. I'm just seeing if I can - - -

PN87

MR FOLLETT: Yes, Ms Gray should be 644; Ms Byrne, 749, is correct; 823 is correct; 828 is correct. It appears that at 632 the submissions have been slotted in. Somehow that changes the number for Ms Gray's statement to 644, but all the rest of the numbering remains correct on the version that I believe both Mr Boncardo and I are working off.

PN88

THE COMMISSIONER: Very well. My associate is just arranging the alternate version to be located and sent to you.

PN89

MR FOLLETT: It seems that it won't cause too many difficulties.

PN90

MR BONCARDO: My instructor has the printed off version that Mr Follett and I are (audio malfunction) he can work on it off his computer if you would like this version.

PN91

THE COMMISSIONER: That might be a convenient approach, Mr Boncardo. The other way to deal with it is just to refer to the dates of the statements.

PN92

MR BONCARDO: Yes.

PN93

THE COMMISSIONER: Without the page references. Usually I like to refer to the page references on the record just so everyone knows precisely the document.

PN94

MR FOLLETT: Hopefully this works; the next statement should be found at 749.

PN95

THE COMMISSIONER: Just one moment, Mr Follett. Just confirming, exhibit 1 will be the witness statement of Helen Gray, dated 4 November and set out at pages 644 to 748 of the hearing book.

EXHIBIT #1 WITNESS STATEMENT OF HELEN GRAY DATED 04/11/2022 – PAGES 644 TO 748 OF HEARING BOOK

PN96

THE COMMISSIONER: The witness statement of Patricia Byrne, dated 4 November and set out at pages 749 to 822, will be exhibit 2.

EXHIBIT #2 WITNESS STATEMENT OF PATRICIA BYRNE DATED 04/11/2022 - PAGES 749 TO 822 OF HEARING BOOK

PN97

THE COMMISSIONER: I might now deal with the statement of Mr Steven Reed in the 217 matter.

PN98

MR BONCARDO: That commences at page 828, Commissioner, and is dated 22 December last year.

PN99

THE COMMISSIONER: That runs to, with the annexures, 971.

PN100

MR BONCARDO: That's so.

PN101

THE COMMISSIONER: The witness statement of Mr Steven Reed, dated 22 December 2022 and set out at pages 828 to 971, will be exhibit 3.

EXHIBIT #3 WITNESS STATEMENT OF STEVEN REED DATED 22/12/2022 - PAGES 828 TO 971 OF HEARING BOOK

PN102

THE COMMISSIONER: Moving to the witness statements filed in relation to the 739 matter, the witness statement of Steven Reed, dated 4 November – now, my original references here should be correct, so it's at page 44.

PN103

MR BONCARDO: Yes.

PN104

THE COMMISSIONER: Through to - - -

PN105

MR BONCARDO: To 595.

PN106

THE COMMISSIONER: - - - 595. That will be exhibit 4.

EXHIBIT #4 WITNESS STATEMENT OF STEVEN REED DATED 04/11/2022 - PAGES 44 TO 595 OF HEARING BOOK

PN107

THE COMMISSIONER: I will just deal with all the reply statements, as well, Mr Boncardo, while you're on your feet.

PN108

MR BONCARDO: Certainly. The first of those is the witness statement of Lauren Fry of 27 January this year, which commences at page 616 of the court book.

PN109

THE COMMISSIONER: And with the annexures goes to 619?

PN110

MR BONCARDO: That's right.

PN111

THE COMMISSIONER: That will be exhibit 5; so the witness statement of Lauren Fry, dated 27 January 2023 and set out at pages 616 to 619 of the court book, will be exhibit 5.

EXHIBIT #5 WITNESS STATEMENT OF LAUREN FRY DATED 27/01/2023 - PAGES 616 TO 619 OF COURT BOOK

PN112

MR BONCARDO: There is next a statement of David Horsfall, which commences at court book 622 and is dated 22 February this year. That goes over to court book 623.

PN113

THE COMMISSIONER: The witness statement of David Horsfall, dated 22 February 2023 and set out at pages 622 to 623, will be exhibit 6.

EXHIBIT #6 WITNESS STATEMENT OF DAVID HORSFALL DATED 22/02/2023 - PAGES 622 TO 623 OF COURT BOOK

PN114

MR BONCARDO: The next witness statement is a witness statement of Julie Moody, which commences at court book 628 and runs to 629, dated 3 March this year.

PN115

THE COMMISSIONER: The witness statement of Julie Moody, dated 3 March 2023 and set out in the court book at pages 628 to 629, will be exhibit 7.

EXHIBIT #7 WITNESS STATEMENT OF JULIE MOODY DATED 03/03/2023 - PAGES 628 TO 629 OF COURT BOOK

PN116

MR BONCARDO: Finally, the witness statement of Teri O'Toole of 3 March 2023, contained at court book 630 to 631.

PN117

THE COMMISSIONER: The witness statement of Teri O'Toole, dated 3 March 2023 and set out at pages 630 to 631, will be exhibit 8.

EXHIBIT #8 WITNESS STATEMENT OF TERI O'TOOLE DATED 03/03/2023 - PAGES 630 TO 631 OF COURT BOOK

PN118

MR BONCARDO: That is the totality of the applicant's evidence.

PN119

THE COMMISSIONER: Thank you, Mr Boncardo. That brings me back then to - - -

PN120

MR FOLLETT: The witness statement of Helen Gray, dated 23 December 2022, commencing at court book 601 and concluding at court book 609.

PN121

THE COMMISSIONER: The witness statement of Helen Gray, dated 23 December 2022 and set out at pages 601 to 609 of the court book, will be exhibit 9.

EXHIBIT #9 WITNESS STATEMENT OF HELEN GRAY DATED 23/12/2022 - PAGES 601 TO 609 OF COURT BOOK

PN122

THE COMMISSIONER: Does that conclude the evidence?

PN123

MR FOLLETT: Yes, Commissioner.

PN124

THE COMMISSIONER: How do the parties wish to proceed in terms of batting order if we're dealing with the 217 matter first?

PN125

MR BONCARDO: I'm in your hands, Commissioner. As I said, I was quite content to address both matters in one go and proposing to deal with the 217 application in respect to clause 4.2, and say something further about the construction of clause 4.2. My submissions on the 217 application obviously influence my submissions on the construction question in respect to clause 12.2, but I'm entirely in your hands as to whether or not you want to bifurcate the matter - - -

PN126

THE COMMISSIONER: I don't necessarily want to bifurcate in terms of chief respondent's reply, chief respondent's reply, but I just wonder, Mr Follett, do you

have any view as to whether given that – it's just a question of whether the applicant in the 217 matter leads their submissions first.

PN127

MR FOLLETT: That would be logic. I did speak with my learned friend and suggested that he might go first, but now that I think about it, it all makes sense that I go first. I will say this: any party, if there is some legitimate reply that needs to be made, then we're not going to stand on ceremony with respect to the order.

PN128

THE COMMISSIONER: Yes.

PN129

MR FOLLETT: I mean, I'm content to proceed now - - -

PN130

MR BONCARDO: Commissioner, I'm entirely - whatever will assist you.

PN131

THE COMMISSIONER: Yes, I think it might be better if the employer proceeds first given that that's the order in terms of the way the matters are being determined.

PN132

MR FOLLETT: Indeed. With respect to the 217 application, Commissioner, there are really only three issues that you need to determine. The first is whether or not to (audio malfunction) pass through the ambiguity or uncertainty gateway. That is, is there ambiguity or uncertainty in clause 12.2 of part B of EBA11. I'll come to its terms shortly.

PN133

The second question is in the exercise of your discretion, assuming (audio malfunction) should note, of course, if the answer to question 1 is no, then the application fails. If the answer to question 1 is yes, in the exercise of your discretion should you vary the enterprise agreement; you're not required to. Then if the answer to question 2 is also yes, question 3, how? For reasons which will be seen, the second and third questions essentially blend into one.

PN134

Just very briefly if I could take you to the clause, Commissioner, which you no doubt are familiar with. It's found most easily in terms of ordering at page 93 of the court book. EA11 is in the court book a couple of times, but I just return to this version for chronological ease. You will see the clause is headed 'Rest periods' to which I will turn. There is a concept in 12.1 called 'Upline rest', which is rest away from a home base, and then 12.1 is 'Home base rest'. You will see references to 'Duty type', then minimum rest periods for 'Planned' or 'Unplanned' duty types.

PN135

The row in issue is 'Non-flying' and the question is, relevant to this application insofar as non-flying may or may not include standby, is the clause ambiguous or uncertain with respect to that issue? As we observe in our reply submissions in paragraphs 3 to 5, found at court book 972 to 973, whilst the FAAA have denied the existence of ambiguity or uncertainty, the effect of their submissions we say in real terms is to admit it.

PN136

Paragraph 5 of our submissions, at 973, we note that the term 'non-flying' both in clause 12.2 and in the agreement as a whole is not defined. Because it is not defined, both parties seek the use of proxies to aid as internal context the proper construction of the clause and you'll see that explored in the submissions of the dispute. There are proxies in the agreement which go both ways. There is one proxy which the union refers to which suggests that standby duties are a form of non-flying duty and there are other proxies, several of them, which suggest that standby duty is not a non-flying duty.

PN137

How and the extent to which the Commission finds assistance from those proxy indicators to assess from a constructional perspective the meaning of the phrase as it appears in clause 12.2, demonstrates the ambiguity or uncertainty. It's plain that the clause is not clear; it could mean one or it could mean the other. Its resolution, at least from an ambiguity or uncertainty perspective, is not resolved by the sort of linguistic logic that my learned friend has gone through in the reply submissions, paragraph 16, court book 612, which is effectively going through a series of provisions and essentially saying, well, a standby is a form of duty. It's not defined as a flying duty, ipso facto it must be a non-flying duty. That could be correct or it may not be.

PN138

I did indicate whilst there is one proxy indicator that the union refers to supporting its construction, there are three which we point to. I'll return to these obviously in the context of the dispute application, but the first is – and I guess the most compelling – at 92 of the court book, clause 10.4, where you see a table very much like 12.2, within one page of it, with a very similar column setup – in fact an identical column setup – 'Duty type', 'Planned' and 'Unplanned'. 'Non-flying' appears at the first line entry, as it does in 12.2, then immediately below it you have 'Standby'.

PN139

Now, it's impossible to say in relation to that clause that standby is a non-flying duty type because the duty period limitations are different, so it can't be an included form of non-flying. Is it possible it means something different in 12.2? Well, it's possible. Fairly unlikely, but possible. It's that conundrum which shows that we're well and truly past ambiguity. Issues of choice from a constructional perspective if you are just confronted with the 739, are from an ambiguity gateway which is a low threshold where the Commission errs on the side of finding ambiguity. We're well past it.

PN140

The other clause we refer to in our submissions in reply is clause 25.15 of Part B, found on court book 103. This deals with the circumstances of:

PN141

An employee who, through personal illness, is unfit for flying duty but is declared fit for non-flying duty.

PN142

The point we make is that the primary purpose of standby is to enable an employee to be available to be called to come in to do a flying duty within two hours. In that context you can't be declared fit for standby as a non-flying duty - it could necessarily involve flying duties - but at the same time be declared unfit for flying duties. It's entirely incongruous.

PN143

The third point we make is derived from something Ms Gray says about 12.2. You will note the duty types - this is again on court book 93 – are 'Planned' and 'Unplanned' and Ms Gray says at paragraph 32, court book 650, that standby is not unplanned; it's always planned. Crewing makes an assessment of those persons on available days or available stands as to how many it might need to place on standby and in advance does that allocation exercise, and in that sense standby duty is always planned if you have an unplanned form of non-flying duty in the course.

PN144

When one applies the well-established principles referred to in paragraphs 8 and 9 of our submissions, court book 641, and especially noting as I have already have the lack of a high threshold and the erring on the side of finding ambiguity - not to repeat myself, but if comfortably satisfied the ambiguity or uncertainty gateway. That takes us to the discretion to vary compartment of the case. As I said, the two separate issues effectively blend into one and I'll explain why.

PN145

There are only two available outcomes at this stage of the application: (1) you vary the clause as contended for by us or substantively varied for by us or, (2) you dismiss the application. There is no basis to vary the clause to reflect the union's preferred construction and nor is that sought. The FAAA don't say you should vary the clause to confirm its construction. They just say you should simply dismiss the application.

PN146

Why that is so is made clear by our submissions at paragraph 15, at 642 to 643, and then repeated in paragraph 8 of our reply, at 974, by reference to the MSS Full Bench. If I could just hand up a copy. Unfortunately, it's not stapled. It's a decision of a Full Bench and the particular paragraphs I refer the Commission to are at 22 and 23, 23 more specifically:

PN147

It is possible in this case that the parties had different intentions as to the use of the words 'all purpose'. The resolution of the matter requires the application of the following logic. If an ambiguity exists in relation to the

payment of an additional amount, as in this case, and the evidence establishes that there is no mutual intention to pay the additional amount, then it would normally follow that the Commission should not vary the agreement to create an entitlement that is consistent with the intention of only one of the parties.

PN148

Even if there is no clear mutual intention to not pay the additional amount, it would normally be desirable to resolve an ambiguity to make it clear that the amount is not payable when there is an insufficient basis to find that the parties agreed to pay the additional amount. Therefore, if there was no mutual intention to apply penalty calculations to the allowance, then absent any other compelling circumstance, the company's application was likely to succeed.

PN149

Now, not only is that case authority for the proposition that the Commission would not vary an agreement to increase a cost, it goes further and supports a general approach that where it can be concluded that the employer would not have agreed to the additional cost or some other benefit, it's an appropriate course to vary the agreement to ensure that that benefit is not payable. Here it is plain on the evidence that Qantas would not have agreed to a Z day after standby if it had have been specifically raised.

PN150

We refer to Ms Gray's statement in the dispute proceeding, court book 6 – that can't be right. It must be the variation. No? I apologise, I've got the wrong number. I do, it's 601, at paragraph 5. We also refer to Ms Byrne's statement at court book 753, at paragraphs 27 to 29.

PN151

THE COMMISSIONER: Sorry, what was that second - - -

PN152

MR FOLLETT: Yes, 753 at paragraphs 27 to 29 of Ms Byrne's statement. Just to summarise the nature of that evidence, the clause was first introduced in EBA10; I'm thinking June 2017. It was not changed in EBA11 and I think the evidence is it was not even discussed in EBA11. The change in EBA10 changed the rest period from hours to a day and, to reflect that, the Z day terminology was used in the clause. There were specific discussions about why the union wanted that change associated with particular flying patterns and training duties, but there was no specific discussion about whether non-flying either included standby or didn't include standby.

PN153

From the evidence that I've just taken the Commission to and the references, by reference to MSS it's appropriate to vary clause 12.2 to make it clear that a Z day as a period of rest is not required after a period of standby. That is what our variation does - it's found at court book 638. That's the final page of the form F1 application. Now, just parenthetically I note in paragraph 14 of the union's submissions on this application, at court book 826, the union says that that variation as proposed won't resolve the issue because it won't tell you what the rest period after standby is.

PN154

Whilst that's true, that assumes that there has to be a rest period after standby. Why would that necessarily be so? Where is the evidence to support a conclusion that the parties intended to have a rest period after standby? Importantly and in any case, for Part 2 employees – which has now included everyone – there never was. There never has been a minimum rest period for standby. That's referred to in Ms Gray's statement at paragraph 37, at court book 651.

PN155

One thing the unions appears keen to remind us all about in this application, or these applications, is that there is no Part 1 anymore. There has never been a minimum rest period for Part 2 employees after standby, so the variation we seek is not defective in that sense.

PN156

THE COMMISSIONER: Unless they are called up and then they are not on standby, they're actually on duty.

PN157

MR FOLLETT: Yes, yes.

PN158

THE COMMISSIONER: And then the relevant rest period flows from that.

PN159

MR FOLLETT: I don't think it's contested, or would be contested, that as a matter of practice Qantas may forward the rest periods to such employees, as they have done for years, but that is a matter of discretion, not entitlement, and it has always been 12 hours. That essentially disposes of the application. We say we can go further in any case and contend that the variation we seek does in fact accord with the best available evidence as to the parties' mutual intention with respect to EBA11.

PN160

The explanatory materials referred to in Ms Byrne's statement at court book 754 to 755, paragraphs 30 to 37, don't make any mention of rest periods after standby. It does make mention of rest periods after flying duties. In any case, what is clear from the FAAA's preferred construction of clause 12.2 and the extension of Z days to standby is that it commenced on 25 July 2017. That's the commencement of EBA10, court book 388.

PN161

On the evidence, uncontested, since that time Qantas has been uniformly providing Z days after ground duties, training duties, et cetera, as a non-flying duty - that is Ms Gray at paragraph 44, court book 652 – but it has never provided Z days after standby. That's Ms Gray's statement at paragraph 43, court book 652 again, and Ms Byrne's statement at paragraphs 38 to 40, court book 755. That position on any view was well known to the FAAA and the employees who came to vote on EBA11, which is of course the relevant agreement we're looking

at. Ms Gray offers the observation about that. It's only an observation, but that is at paragraph 43, court book 652.

PN162

It stands to reason that no one for five years has received a Z days after standby. It would have come up if anyone had the genuine legitimate view that clause 12.2 and the reference to non-flying actually applied to standby. No one had that view. Everyone had the same view; that is, non-flying in clause 12.2 doesn't include standby. The unions say in paragraph 16 of its submission, at court book 826, that the clause just applies on its terms. Well, if it was so clear and so simple that it just applied on its terms, it would have been mentioned in five years by one employee or the union or both. Because everyone had the same view, it has never come up and.

PN163

Respectfully, there's no way the FAAA would have negotiated this 'new benefit' in mid-2017 and then never sought to enforce it knowing that it wasn't being provided for five years. In our respectful submission, that demonstrates mutual intention as at the time EBA11 is made, including by reference to the voting employees or at the very least we're in the territory identified by MSS which says that an appropriate variation in such a case is to make it clear that the entitlement doesn't arise.

PN164

Evidently, Commissioner, the variation should be made retrospective. We refer to that at paragraph 16 of our submissions, court book 643. There is reference there to the Aged Care Services Full Bench. I might just hand this whole folder up, if I can.

PN165

THE COMMISSIONER: Yes, very well.

PN166

MR FOLLETT: I think there are two copies behind each tab. I'm sure we can work through that. There is only a very small number. Aged Care is at tab 2. Again, this is a variation by a Full Bench. At paragraph 22 the Full Bench notes there is power to vary retrospectively and then observes at 23:

PN167

> *Having determined that it was the objective intention of the parties that the 2014 Agreement would, from its commencement, cover employees of ACSAG as described in Schedule 3 ... and that are employed in Tasmania, it necessarily follows that the Variation Order that we make apply from the commencement of the 2014 Agreement; that is ... should apply retrospectively.*

PN168

That appears to be the more common practice in the Commission, not universal. There is no mandated requirement that you do so, but it stands to reason having regard to the way in which the variation cases are developed and the principles applied that if the Commission finds that the clause should have meant something at the time it was made, you vary it from the time it was made –

or commenced operation, rather. I note the union hasn't said anything against the proposition of retrospectivity either.

PN169

That's everything I wanted to say on the 217 application, Commissioner. Is it appropriate now that I move through the dispute or would you prefer to hear from Mr Boncardo first?

PN170

THE COMMISSIONER: It might be better if Mr Boncardo now deals with 217 in reply.

PN171

MR FOLLETT: Yes.

PN172

THE COMMISSIONER: Just on reflection of what I might have indicated earlier, if Mr Boncardo deals with 217 reply and 739, you can then deal with anything - - -

PN173

MR FOLLETT: If the Commission pleases.

PN174

THE COMMISSIONER: - - - thereafter and then of course, Mr Boncardo, you will get a chance to reply to any submissions - - -

PN175

MR BONCARDO: Certainly. Thank you, Commissioner. I confirm with Mr Follett's framing of the issue on the 217 at least insofar as the gateway jurisdictional issues are concerned; namely, so far as non-flying for the purposes of clause 12.2 of the agreement may or may not include standby, is the clause ambiguous or (audio malfunction) encapsulation of the threshold issue which you are required to determine.

PN176

Can I deal with the three relevant factors that you need to consider in exercising your jurisdiction under section 217 by commencing with submissions as to whether or not the clause is in fact ambiguous or uncertain. Can I make one short point in respect to the finding of an ambiguity or an uncertainty. This case is referred to in Mr Follett's submissions and may well have been handed to you in the bundle of authorities.

PN177

MR FOLLETT: I hasn't been.

PN178

MR BONCARDO: He hasn't, he tells me, so could I provide to you a decision of Gostencnik DP in *Bradnam's Windows and Doors Pty Ltd v Australian Workers Union Enterprise Agreement 2018* [2019] FWC 979. It's a short decision, but it contains a neat summary of a principle at paragraph 11 on the second page of the

decision. Now, that summary needs to be read in light of the Full Court decision in Bianco Walling which both parties have referred to in their submissions.

PN179

The portion or dot point I wanted to take you to is endorsed and applied at paragraph 70 in Bianco Walling, and it is the dot point on the third page of the decision where the Deputy President sets out:

PN180

The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced -

PN181

that's a submission made by our friends. Our friends don't go on, however, to note the balance of the sentence which is that –

PN182

and an arguable case needs to be made out for more than one construction.

PN183

There is, if you like, a previous position to finding an ambiguity or uncertainty if there are rival contentions, but those rival contentions need to be in and of themselves arguable. There needs to be some sound or proper basis for them and our submission is that when one looks at the text of clause 12.2, including what my learned friend referred to as the additional properties that Qantas entities rely upon, there is in our respectful submission no relevant ambiguity or uncertainty.

PN184

Can I commence by taking you back to court book 93, being the clause in question and note, as Mr Follett did, we are concerned with a duty type described continuously non-flying. A relevant matter is that non-flying is described as a duty type. The concept of 'duty' is defined in the definition section in Part B which commences at court book 115. At 116, at the base of the page, the Commission will see that:

PN185

Duty means flight duty, available span, ground duty and standby duty –

PN186

then there is an excision for -

PN187

any obligation by the employee to contact the Company ... contact by the Company of the employee.

PN188

Now, our short point is that a duty can include, as the definition makes clear, any of the matters set out being flight duty, available span, ground duty and standby duty, and a non-flying duty is as a matter of ordinary English anything that is not a flight duty for the purposes of the definition, and there is not ambiguity or uncertainty on that basis.

PN189

Now, to the extent there is any doubt that a flight duty means a flight duty, a flight duty itself – that is a duty that involves flying of some sort – is defined on page 117 of the court book as deadheading or an operating duty, which are also defined terms. Operating duty means the performance of duties associated with the safety and comfort of passengers in carriage by aircraft, whilst deadheading means travelling as directed on an aircraft or service transport other than as an operating flight attendant, et cetera.

PN190

Our simple contention is that duty that is not a species of flight duty is a non-flying duty and clause 12.2 in the first column encapsulates any duty that does not involve a flight duty. Our opponents note that we have made reference to one contextual factor and if I can give you the court reference to that provision. It's clause 16 of the agreement, court book 96. This provision deals, Commissioner, with re-assignable hours and pay protection. It imposes an obligation on the Qantas entities to reassign employees' duties on return from various leave and stipulated circumstances, amongst other things.

PN191

Clause 16.1 details recovery which extends into the next roster period is to be limited to one recovered flying offset per recovery occasion. In the second paragraph the Commission will see a limitation in relation to the application of the clause that provides that 'does not apply to non-flying duties'. The bracketed portion sets out the examples of those duties, being standby or ground duties. If the Commission reflects back to the definition clause, standby or ground duties are species of duties. They are contemplated as being the non-flying duties.

PN192

Our learned friend's reference to Ms Gray's statement at paragraph 32 where she sets out that standby are always planned duties doesn't, with respect, take the matter particularly far given that non-flying duties encompass duties other than, we say, standby and non-flying duties aren't exhaustively standby.

PN193

The reference in clause 25.15, which my learned friend took you to at court book 103, which deals with a circumstance where an employee is declared fit for a non-flying duty by a company doctor and may continue on sick leave, and the submission is made that that makes clear that standby which my learned friend says is a flying duty, is not contemplated as being a non-flying duty or – I think that's probably a mischaracterisation of the submission. The submission is that it is a duty whereby an employee is prepared for or able to be called upon to engage in a flying duty.

PN194

There is, in my submission, nothing in the agreement which would indicate that clause 25.15 and the reference to a non-flying duty would necessarily exclude standby. In respect to clause 10.4, which is on its face a pointer against our contention that there is no ambiguity or uncertainty because there appears to be a differentiation between non-flying and standby, our submission simply is that non-flying in clause 12.2 read in light of the definition which includes standby,

obviously encompasses standby and there is a distinction made for the purposes of clause (audio malfunction) only between standby duties and other non-flying duties in respect to the number of hours that can be allocated.

PN195

That is the purpose of clause 10.4 and what it is, in our submission, directed to. It does not, in our submission, supply a matter which points to non-flying duty in clause 12.2 being ambiguous or uncertain. Those are the matters in addition to those written submissions which I wanted to draw the Commission's attention to in respect to the gateway question.

PN196

THE COMMISSIONER: Yes.

PN197

MR BONCARDO: The submissions I now want to make deal with the discretionary issue and, as the Commission knows, questions and discretion - there are no mandatory considerations under section 217 and the discretion is not otherwise relevantly fettered. The parties have set out the relevant matters the Commission can take into account, including whether or not there is a mutual intention which my learned friend has made much of in submissions today as to the operation and application of a provision.

PN198

Can I take the Commission to EBA10 in the first instance. It's not controversial, as Mr Follett pointed out, that when EBA11 was made Part 1 of EBA10 was expunged. Part 1 of EBA10 covered Qantas Airways Limited employees, dealing specifically with (audio malfunction) and if I can ask the Commission to turn up page 387 of the court book, the Commission will find EBA10 commencing there.

PN199

Now, the arrangement of the provisions in EBA10 is neatly set out in the index which commences at court book 390. The Commission will see Part 1 headed 'Qantas Airways Limited employees'. At 391 at about point 6 on the page, Part 2 captures the QF cabin crew employees. Page 392 of the court book, clause 4 of the agreement, the second paragraph, the Commission will see that Part 1 applied to Qantas employees and had no application to Qantas cabin crew employees who will be covered by Part 2.

PN200

Part 1 itself commences at page 408 of the court book and clause 27 of Part 1, which is contained at page 437 – I should say it starts at page 436 – dealt with what are termed 'reserve and standby duties'. At page 437 the Commission will see clause 27.1 which sets out the allocation of standby duty. These are provisions obviously that are not replicated in the EBA11. Clause 27.2 is material for the present purposes and sets out what limits on standby duty entail. The Commission will see that:

PN201

An employee may be allocated to a standby duty of not more than 12 consecutive hours.

PN202

That is reflected presently in clause 10.4 of the agreement that both Mr Follett and I have taken you to. Then it goes on to provide that:

PN203

The duty free time following a standby duty must not be less than 12 hours provided that not more than one such standby duty can commence within one calendar day.

PN204

So there was a requirement that a duty free period, a rest period, of not less 12 hours be provided to an employee of Qantas Airways Limited under clause 27.2 of EBA10. Ms Gray helpfully tells us – and Mr Reed's is (audio malfunction) as well – that that 12-hour period was provided to Qantas cabin crew employees, as well. That's the circumstance or that's the background set of objective facts which apply when the negotiations for EBA11 for Qantas entities are proposed, as Mr Reed explains in his statement, court book 830 to 831, paragraphs 18 to 24, that there will be no more Part 1 and all of the conditions of employment of employees will be set out in what is going to be now Part – what was previously Part 2.

PN205

Now, for completeness, Commissioner, I should take you to clause 12 in Part 2 which is at page 489 of the court book which deals with rest periods, using materially identical terms to 12.2 of the current agreement. In respect to EBA11, Qantas's position as Mr Reed describes was – this is paragraph 18 of his statement at court book 830 – that Part 1 of EBA10 was to be removed completely and custom and practice is a necessary progression (audio malfunction) in effect no longer apply. There would be an exhaustive set of conditions set out in part and what was to become Part 2 of the agreement.

PN206

Mr Reed also sets out that insofar as negotiations were concerned, at paragraph 23, there is no mention whatsoever of Z days by Qantas or the FAAA and no meeting of the minds in respect to the continued operation of any aspect of Part 1 after its deletion up to what was going to apply according to its terms so far as my client was concerned. We say that an important matter in determining whether relief should be granted and, if relief should be granted, what that relief should be, is that the negotiations proceeded on the basis that everything that was contained in Part 1 would no longer have any application and Part 2 would stand entirely by itself as an exhaustive catalogue of the likely entitlements of employees.

PN207

Employees of Qantas Airways Limited will have, if our friends are successful, their right to a 12-hour rest period (audio malfunction) entirely with no rest period provided following standby. Qantas do not propose – and they make clear in the submissions today – to vary clause 12.2 so that a period of rest or standby is provided at all. The proposed variation which the Commission will find in Qantas's application, court book 636 through to 638 containing the revised

provision, does not make any allowance for a period of rest - be it a day, 12 hours or some other time frame - after standby.

PN208

The Commission in exercising the discretionary power under section 271 is concerned, amongst other things, with the industrial merits one way or another. In circumstances where Qantas are not proposing that any period of rest thereafter – a standby period which the Commission can see from clause 10.4, can extend to up to 12 hours. No mandatory period of rest under the agreement is prescribed, but that is a powerful factor against varying the agreement in the manner that Qantas contend for.

PN209

THE COMMISSIONER: So under EBA10 there wasn't so much as a Z day, but a 12-hour period.

PN210

MR BONCARDO: That's so.

PN211

THE COMMISSIONER: Yes.

PN212

MR BONCARDO: That's so, that's so, and that applied as a matter of obligation - - -

PN213

THE COMMISSIONER: Under clause 27.

PN214

MR BONCARDO: That's right, that's right.

PN215

THE COMMISSIONER: For QAL employees.

PN216

MR BONCARDO: For QAL employees and Ms Gray tells us in her statement at – I'm sorry, it's Ms Byrne who tells us this at paragraph 26 that this was a well-established practice which applied to Qantas cabin crew and she opines – you'll place limited weight on this, but in any event she opines that this was a matter that all the parties were relevantly cognisant of. She then sets out at paragraph 27 that entitling a crew member to a Z day after standby would have been a significant departure from the well-established long-standing practice of rostering a 12-hour duty for a period after a standby duty.

PN217

What is proposed in this application, however, is in effect that Qantas have no fetters on their capacity to roster an employee who is engaged on a standby duty of up to 12 hours. I'm repeating myself, but, as I said, there is no aspect of a revised clause 12 set out in our learned friend's application which provides any

such limitation equivalent to clause 27 and that is, as I've said, a reason in Part 2 not to grant Qantas the relief or not grant it the relief in terms that it seeks.

PN218

Can I say something then very briefly about the concept of mutual objective intention. Now, the evidence of both Ms Gray and Ms Byrne to a larger extent is certainly probative of there being a mutual objective intention insofar as EBA10 was concerned and the introduction of clause 12.2 into that agreement, but insofar as EBA11 is first concerned, this issue was not one which was mentioned or discussed. EBA11 resulted in a wholesale revision, as Mr Reed describes in both of his statements, to the structure and operation of the agreement with the removal of Part 1 which applied just to Qantas Airways and the employees.

PN219

In those circumstances we do not think, and we contend, that there cannot have been a mutual objective intention about the operation of clause 12.2 when EBA11 was made. Commissioner, those are the submissions that I wanted to make in respect to the section 217 application. Mr Follett noted that we don't make any submissions as to retrospectivity. I don't have anything to say in respect to that matter. I think we are wholly with our friends. It is accepted that any variation which is retrospective, there is certainly nothing that we point to that would counter that.

PN220

THE COMMISSIONER: Thank you.

PN221

MR BONCARDO: But obviously you understand what I our position is - - -

PN222

THE COMMISSIONER: Yes.

PN223

MR BONCARDO: - - - if the Commission doesn't get to that point. Is it convenient, Commissioner, to turn to the dispute proper?

PN224

THE COMMISSIONER: I think so and then, Mr Follett, when you respond to the dispute you can deal with anything in reply on the 217.

PN225

MR FOLLETT: Yes.

PN226

MR BONCARDO: Thank you. Commissioner, in respect to the construction of clause 12.2, I rely on what I have taken you to in relation to the provisions of the agreement in respect to the section 217 application and say that those provisions, particularly the definition of 'duty', mean that the plain and ordinary construction of a non-flying duty when read in context includes standby and that there is no warrant as a matter of context or purpose, for reading non-flying duties down to not encapsulate standby.

PN227

To the contrary, the term 'duty' makes clear that standby is a duty and it's not a duty that involves flying. It's not a flying duty. The purpose of clause 12.2 is to ensure that employees are afforded appropriate rest after duty and in the absence of any other provision providing a rest period for standby, it would be consonant with the purpose of clause 12.2 that non-flying duty to be read as including standby. We otherwise rely on our written submissions in respect to the construction of clause 12.2.

PN228

Can I deal next with the dispute about sick leave. One of the matters set out in our learned friend's submissions is that this is not a dispute about a term or terms of the enterprise agreement. Can I deal with that threshold contention at the outset and take the Commission to some passages of the evidence. There is an email, the Commission will see, commencing at court book page 29. This email is in a number of places, but it is chronologically easiest to look at it at page 29, which is where it's located as an attachment to the dispute application.

PN229

It's an email from Mr Miller who was at least the head of cabin crew operations for Qantas, dated 16 May 2022. The Commission will recall that the agreement that we are concerned with here commenced operation on 5 April 2022, so this is some six weeks after the agreement has started operating. The Commission will see there is reference to discussions about my client's position on clause 25.10 that crew can be cleared from sick leave at 11.59 on the day preceding their return to duties without loss of patterns, hours, et cetera.

PN230

Mr Miller, in the second paragraph, says that he is going to set out what Qantas entities' position is ahead of the next implementation meeting in respect to the agreement and that Qantas proposes to communicate and update the sick leave clearance process to all staff as part of the implementation of EBA11. A summary of the position is set out at a series of dot points, the first of which describes that clause 25.10 is silent on the time by which a notification needs to be made.

PN231

There is then a reference or a series of references to the practices which prevailed for EBA11 and in the penultimate dot point the Commission will see that Mr Miller sets out Qantas's primary position is that there is no requirement for long-standing practice change; that it is of notification that employees on personal leave – I'm sorry, that if an employee is on personal leave they need to notify Qantas at 8 am two days prior to the commencement of the relevant time period and, if they do not do that, their duty becomes open after that point. The Commission will see that encapsulated in point 4.

PN232

Now, Qantas then goes on to issue a communication to that effect to employees and it says it again in a number of parts of the court book, but if I can take the Commission to court book 582. That is attachment SR8 to Mr Reed's affidavit and it is a slideshow of cabin crew operations, crew operational callouts distributed in May 2022 (audio malfunction) to employees. At 583, the contents

page is set out and, at 586, the Commission will find a slide entitled 'Other key items' and 'Clearing from sick leave' is the first item listed. There is what we contend to be a direction that crews should continue to clear from sick leave before 0800 hours two days prior to a next duty.

PN233

If you have not confirmed by this time, we will need to remove your trip for inclusion in the open time allocation process.

PN234

Now, in our dispute application we identify that the FAAA takes issue with the notion that there is any obligation under the agreement to give sick leave prior to 11.59 pm effectively the day before a return to duty. It appears from our learned friend's submission that Qantas accept that there is no such obligation under clause 25.10 of the agreement.

PN235

The issue appears to be that Qantas says, 'Well, the fact that there is no obligation doesn't mean that we can't direct employees as we have set out to do in the clause. We're entitled as a matter of managerial prerogative to direct them to notify for duty within' - as our friends told us today – 'a day of the duty by 8 o'clock in the morning on that day prior to the return to duty.' Our contention is that that is not permitted by the agreement and is in fact contra to the agreement.

PN236

If I could take the Commission to clause 25, which deals with sick leave. The Commission will find clause 25 in a number of places, including at court book 102. Clause 25.1 to 25.6 set out a number of definitions and what the relevant entitlement is, in respect of personal leave.

PN237

On page 103 of the court book sick leave is dealt with. Clause 26.7 requires provision of a certificate and clause 25.8 to 25.9 deal with notification by employees of (audio malfunction) perhaps, since by reason of sick leave, prior to the absence commencing.

PN238

Clause 25.10, of which the Commission is no doubt well familiar with, given the written submissions, sets out that:

PN239

An employee resuming duty after a period of sick leave must advise the company when they (audio malfunction) return to duty.

PN240

That is the obligation and I don't think it's a contest that any time, the day before the return to duty, is contemplated by clause 25.10.

PN241

Clause 25.11 is important, in our submission. It sets out that:

PN242

Sick leave commences on the first day of scheduled (audio malfunction) to the company and continues until but not including the first full day on which the company has been notified that the employee is ready and physically qualified for duty.

PN243

Now, that notification is the notification that is required to be given, under clause 25.10 and once that notification has been given by the employee, in our submission, clause 25.11 determines that the following day the employee is no longer on sick leave, their sick leave has concluded and they are therefore back on duty.

PN244

Now, there are provisions of the agreement, which we have made reference to in our further submissions, which permit the Qantas entities to remove someone from duty. Amongst those are clause 3.13, which the Commission will find at page 84 of the court book, which deals with the removal of property and (audio malfunction) protection and sets out a series of consequences in the event that an employee fails to (audio malfunction) recognise responsibility, provide a medical certificate, see your Honour, (audio malfunction). That provision does not permit Qantas to remove an employee from duty in the event that they do not notify by 8 am, two days prior to sick leave concluding, or, as we understand the position today, by 8 o'clock in the morning the day before sick leave is to conclude.

PN245

The next provision is clause 9.3, at court book 95, sorry court book 91. Clause 9.3 sets out:

PN246

The total hours of the employee's planned roster, as allocated prior to the start of the period may not be changed by the company, except as a result of unplanned changes of the employee's allocated patterns after the commencement of the roster period, such as sick leave et cetera.

PN247

So there is a facility for Qantas to alter an employee's hours, in the event there are unplanned changes. Now, we don't cavil with that, but what Qantas have promulgated is a direction that you will be removed if you fail to phone in by 8 o'clock two days before or one day before you return from sick leave. That is not an unplanned change of time that would fall under clause 9.3 and the practice that has been being engaged in is that described by Ms Moody, in her statement, and I can take you to that, Commissioner, at court book 658.

PN248

The Commission will see that Ms Moody, at paragraph 4 on 14 February:

PN249

On 14 February she notified operations she was sick and wouldn't be able to return to rostered duties until the 16th.

PN250

She then describes the computer system that Qantas uses to facilitate viewing of rosters, et cetera. Now, at paragraph 6 she sets out that once she called in sick, the rest of the (audio malfunction) rosters dropped into open time and shows (audio malfunction). And, at paragraph 7, her next pattern was to commence on 26 February. On the 25th, the day before, her name was removed from the crew list for that pattern, so she lost that duty. She then sets out, at paragraph 9, that she contacted someone at Qantas operations, called Chris, who she had a discussion with about her removal from duty and he was aware that her last day of sick leave was that day and Chris set out that:

PN251

You've been cleared, but you've lost that trip tomorrow. You must clear before 8 o'clock the day prior to the trip otherwise we will remove you from the trip.

PN252

She (audio malfunction) and said, at clause 25.10. Chris then said that he couldn't put her back on because the rule effectively was that she had to be removed.

PN253

Representation has been made on her behalf, by Ms O'Toole, the relevant secretary of my client, and she was put back on to that pattern.

PN254

But the Commission will see that Qantas' position and, indeed, this process is that in the event that you do not notify by 8 o'clock the day prior to the trip you are removed from the trip.

PN255

Our submission is that there is no capacity, no entitlement for Qantas to do that under (audio malfunction).

PN256

THE COMMISSIONER: If an employee, for whatever reason, didn't notify until late in the day and there was a flight duty the next day, could the uncertainty of whether that employee was going to notify or not lead to a 9.3 operationally urgent requirement?

PN257

MR BONCARDO: I think the answer to that question must be yes. That would ensure that Qantas would be able to make appropriate arrangements. The advice, we say, the practice that (audio malfunction) and the fact that that is not at all contemplated by the agreement, and there is (audio malfunction) part B (audio malfunction).

PN258

If you could just bear with me a moment, Commissioners.

PN259

I'm reminded of one matter that I should have pointed out, in respect to (audio malfunction) and I apologise for jumping around.

PN260

Mr Follett did make the submission that the question of whether or not exhibit A was applicable to a standby duty not being raised in the five years or so since sick days have been implemented. Just for completeness, can I give you, Commissioner, reference to Mr Reed of my client's email of 20 May, at court book 34, where, in the process of an interchange with Mr Miller and a number of other representatives of Qantas, Mr Reed sets out, in FAAA's understanding, that the enterprise agreement, and the Commission will see this on page 1 on the page, provides, for (audio malfunction) in respect to standby. So the matter certainly has been agitated by my client, since the new agreement came into effect.

PN261

The other reference, in that regard, pardon me Commissioner. Those are the submissions, Commissioner.

PN262

THE COMMISSIONER: Thank you. Those are the submissions on the interposed 217 matter, or everything?

PN263

MR BONCARDO: Everything.

PN264

THE COMMISSIONER: Just noting the time but would the parties just want to bat on or would the parties prefer to have a luncheon adjournment or a short comfort break?

PN265

MR BONCARDO: Well, I think if we bat on, or whether we have a comfort break, I'm in the Commission's hands.

PN266

THE COMMISSIONER: I'm happy to bat on if the parties are.

PN267

MR BONCARDO: Certainly.

PN268

THE COMMISSIONER: Mr Follett?

PN269

MR FOLLETT: Dealing in reply to the 217 application first, just dealing with my friend's last point where he referred to court book 34 where the union raised the issue in EBA11, I think you can take our evidence as a reference to it hadn't been raised until this dispute, because that 20 May email is part of the DRP process which gave rise to this particular dispute which is, of course, after EBA11 has been made and commenced operation. Obviously it's being raised now, because here we are.

PN270

My friend appeared to hinge his ambiguity submissions on the proposition that whilst we advance a rival contention it's not argued. It's not quite clear to me how our contention is not even arguable.

PN271

The sum total of his submissions is, we'd point to two gap fillers, one, the various definitions of duty, light duty, et cetera, from which one can deduce, i.e. gap fill, what a non flying duty means and also clause 16.1, from which you can deduce or gap fill what a non flying duty means. But in relation to the same arguments we make, he just dismisses it. So if you accept our submission as to them, then there's no arguable case. That is, you have to determine the point about whether or not are we arguable but are we right before working out whether it's even arguable that we were right in the first instance.

PN272

My friend says, with respect to 25.15, that there's nothing in the enterprise agreement to identify that not flying, in that clause, necessarily excludes standby, and that is correct, but it's entirely incongruous to read non flying in that clause as including standby.

PN273

If we were here having a dispute about what that clause meant, and whether it includes standby or not, plainly the incongruity of a particular construction would be high on the Commission's agenda as to what that clause meant.

PN274

In order to demonstrate that we don't even have an arguable case, my learned friend proceeds, with respect to that clause, as he's right and we're wrong. The same is done for clause 10.4.

PN275

He says, the logic there is you get 10 hours duty limitation for non flying duties but then you get a separate two hours for standby and that justifies pulling it out separately.

PN276

Now, is that an available construction of that clause? Yes, it is. Is it the correct construction? Who knows. That would be a debate about what 10.4 means. But, again, in order to demonstrate that we don't even have an arguable case about 12.2, he assumes the correctness of his construction is 10.4 and then says, ipso facto, you don't even have an argument (indistinct) about what it means in 12.2.

PN277

We'll come to this when I deal with the dispute, but it shouldn't be forgotten what the context of that clause is. Now, these are, ultimately, matters of construction of 12.2, and we're only here dealing with ambiguity, but the context is rest after duty. I'll return to exactly where we put that, when I'm dealing with the dispute.

PN278

My friend then makes some submissions about variation and, in particular, the lack of minimum notice for standby duty, as a consequence of the variation we propose.

PN279

Now, the first point to note is that it's not correct, strictly, to say, under EBA10, that part 1 applied to QAL employees and part 2 applies to QCCA employees. Part 1 only applied to employees on the A330 and every other employee, on the 787 and the A380, was a part 2 employee, which included some QAL, who were called transfer employees. So the strict divider was part 1 is A330 flying, part 2 is 787 and A380 flying.

PN280

Yes, part 1 was A330 flying for QAL employees. There was A330 flying, under part 2 as well, for transfer employees or QCCA employees. So you're left with I think it's about 20 per cent of people under part 1 and 80 per cent under part 2. You'll see that referred to in the agreement. I don't know that it matters a great deal, Commissioner, but I'll take you to it anyway.

PN281

At EBA10, court book 408, part 1 applies to QAL employee who are performing work patterned under part 1 clause 6 and then it goes on to say:

PN282

Part 1 has no application to QCCA or transfer employees.

PN283

Transfer employees are at 509, court book 509.

PN284

As an employee of Qantas who has applied for and been granted a transfer to operate the Qantas A380 fleet and/or 787 fleet.

PN285

Under part 2. And to complete the circle for part 1 Qantas employees:

PN286

Those performing work patterned under clause 6 -

PN287

Which, if you go back to court book 393, you'll see the pool flying for part 1 is 747 and A330s. 747 was retired during COVID. Then you'll see, in the third paragraph:

PN288

747 and A330 not allocated to part 1 can go to part 2.

PN289

So that picks up the reference to QCCA and transfer employees doing that leftover flying. Then 380 and 787 flying is undertaken under part 2.

PN290

There are 20 per cent of people who are QAL employees on the A330 who are part 1 then everyone else, under part 2.

PN291

That may put some context on the apparent issue that the variation we propose would leave formerly part 1 employees who would have had a 12 hour rest period after standby having now no minimum rest period. We've already made out submissions about that. If the conclusion or the solution to that problem was to vary clause 12.2, not quite in the way we have suggested but more like 10.4, so you have non-flying Z day and then you have standby at 12 hours, then that solves our problem and it solves my learned friend's problem.

PN292

There's more than one way to skin a cat, obviously, to remove an ambiguity.

PN293

Now, if I can deal, briefly, with the dispute, insofar as it involves clause 12.2 and the assumption, of course, that the agreement hasn't been varied and we rely, obviously, on what was said already, to demonstrate ambiguity as supporting the proper construction, that is, the provisions we referred to.

PN294

As we noted, there are more contextual indicators in the EA supporting the conclusion that non flying duties does not include standby.

PN295

But the most important, or one of the important matters, which I mentioned briefly before, not to be overlooked, is the immediate context and purpose of 12.2, and is what the clause there for and what is it doing? Is it rest periods after duty, and 12.2 is home based reses.

PN296

Firstly, and this not only supports ambiguity but it plainly supports us on the dispute, the minimum rest period, clause 12.2 commences before the table with the minimum rest period at home base, after completion of a pattern. We note that a Z day, below the table, means a day wholly for minimum rest.

PN297

If you are resting at home after doing something. What does one do on standby, other than be capable of getting to an airport within two hours, nothing.

PN298

Paragraph 29 of Ms Gray's statement, at court book 6549 and 50, on standby you can spend the entire day in bed, in your PJs, watching Netflix, and then on the union's case, you need 24 hours after doing that to rest from doing it, during which, as a rest period, you might sit in bed all day, in your PJs watching Netflix.

PN299

Talk about purpose, it's a nonsense to suggest that the parties would have intended to confer upon people 24 hours rest after a day of doing nothing, that is, nothing for the company. You can do anything you like, as long as you can get to their

airport in two hours. Play golf, deal with gardening, watch Netflix, you can do anything. If you don't get called up, nothing happens. It can't be overlooked, in a constructional exercise, that the union's case, they don't want to say it of course, is people - the parties, when they negotiated the thing, they intended to give people 24 hours rest after doing that standby.

PN300

Every other duty type you actually have to go to work and do something, which must justify, we'd have a debate about the periods, but that's a matter for the negotiating parties, might justify why you need a rest. But did the industrial parties really intend to give you 24 hours off after a period of standby, which period of standby doesn't have to be a day, it could be a short period, it could be 12 hours.

PN301

Further, as I have mentioned, the chapeau to the table, 'May have a rest period at home, after a completion of a pattern', a pattern is defined, in clause 34, court book 117, as:

PN302

A flight duty period of sequence of flight duty periods with intervening rest periods, commencing and completing at a base.

PN303

That is, you fly somewhere, you have a rest, you fly somewhere else, you have a rest and you fly back home, that's a pattern. There could be two flights in a pattern, three, four, that's your pattern. You start at your home base, you go around the world, you come back, and this is how much rest you get when you get home. Now, when you're on standby you don't do any of those things. Standby is not part of a pattern. Standby is placed into - it's not even rostered. Standby is placed onto a particular employees line, only for an employee who is on available days or AV spans. I think there's one further exception, not relevant. You'll see this in Ms Gray's statement, paragraph 32, court book 650, mentioning this earlier.

PN304

Standby duties are not assigned when the roster is built, instead of standby duties allocated to a crew member on an available day or during an available span or reserve line.

PN305

That was the other one. If the crewing operations team anticipates it may need to allocate flying duty to an employee on standby.

PN306

So how do you give the chapeau any work to do, which says, here's the minimum rest you get at home after flying around the world or completing a pattern when standby has got nothing whatever to do with the pattern.

PN307

THE COMMISSIONER: How does the chapeau interact with what might be other non flying duties, such as ground duties and the like?

PN308

MR FOLLETT: Well, it's possible that they could be rostered within a pattern, noting though that the definition of 'pattern' suggests it's limited to flying duties and rest periods.

PN309

These are good questions, Commissioner, but what is really demonstrated, and this is one of the difficulties of my learned friend's construction, plainly on ambiguity and also insofar as he's trying to persuade you on the dispute to go with his construction. There's no rhyme or reason to how this thing has been put together.

PN310

Everyone wants to talk about context and we look over here and say 'Ah-ha, that means it must mean this over here'. That would be so if the document was constructed at one time, all together, and the parties were looking at cross-references or different references in other clauses, to try and put together a coherent whole. On no view can you say that's been done here.

PN311

There are very significant limitations on looking at other clauses and saying, 'Because it means that over there it must mean this over here'. These are some of the examples of the limitations of that proposition. You've got different clauses in the agreement pointing in different directions as to whether a non flying duty includes standby or not.

PN312

You've got ground duties as a non flying duty, as a minimum rest period after a pattern which, in another clause, suggests that a pattern doesn't include ground duties, or non flying duties at all.

PN313

How you put all these pieces together is anyone's guess. The positive for us is that on our application we only need to point out uncertainty or ambiguity and, as we've already said, we think we've got that in spades. The difficulty for the union, on its dispute, ad the benefit for us, is it's the one seeking you to positively endorse it's construction. If you don't know what it means, and there's cases on this, then the union loses because it has the burden of persuading you that the construction for which it contends is correct.

PN314

Its not commonly done in construction fights where the court or Commission says, 'I don't know what this clause means', but it has been done. It's becoming more common in an evidentiary context, particularly in the context of reverse onus or adverse action cases, for courts to avoid making a decision and they just say, 'I don't know what the reasons were, but because it's the employer's onus you lose', but you may not be able to work out what this clause means.

PN315

Now, you only get to that point if you - that takes you through the ambiguity gateway plainly, but you might not favour the variation, for whatever

reason. That part of the case has gone away then you're back to working out what the clause means and you might say, 'I don't know, but it doesn't mean what the union says'.

PN316

We also note, briefly, the implications of the union's construction of this particular clause, which can be used as an aid to construction, (indistinct)and cases of that type. Ms Gray's statement on the dispute deals with this, at court book 601 to 609. It's completely unworkable, operationally. I shouldn't say 'completely' but very unworkable operationally and, with respect, the union knows that and there's no way, we say, the parties would have intended to give rise to those sorts of operationally difficult and deficient results when putting this thing together. That's all we say on the Z day issue.

PN317

Clause 25.10. The development of this dispute has been unsatisfactory to say the least. Monday, 6 March was the very first occasion that the particular nature of the union's case was provided to us. The particular provision of the enterprise agreement which it said supported its construction were advanced or even raised. This was explicitly after we sought extra submissions from the union, to deal with this very issue, because the principal submission were ships passing in the night.

PN318

Ultimately, the first set of submissions from the union still didn't do what they were supposed to, as we've noted in our submissions, court book 625 and following. Essentially, the case is - well, it's not really clear how the case is advanced but the clauses that the union appears to rely upon have nothing to do with clause 25.10. It does raise a question about the Commission's jurisdiction and whether or not the particular matter that arises under the agreement has gone through the DRP process, which it must. Be that as it may, we say the union's contention lacks merit.

PN319

So far as we can tell, they rely, essentially, on two related propositions deriving from two particular clauses which they say have exhaustive effect. You'll see that - - -

PN320

THE COMMISSIONER: Do you say there's an issue as to whether the union's case as gone through the DRP, the jurisdictional issue?

PN321

MR FOLLETT: A dispute about a matter arising under the agreement, and the point I was making was the dispute now appears to be quite different from the dispute as originally contended. It's got two integers, 'dispute' and 'matter arising'. Part of the factual dispute was the removal of duties, and that remains, but that was said to be a matter arising out of the agreement, by reference to clause 25.10. It's not quite clear whether the union says 25.10 provides the answer for which it contents, or whether it merely says 25.10 doesn't support what

we said to employees. But then the answer to the removal of duties is found elsewhere.

PN322

They do refer to 25.10 in their submissions, so it's just a little unclear how they employ it and you'll see what I mean about that shortly.

PN323

If you go to their reply submissions, at 632,in the most recent court book, you'll see that, in paragraph 6, at 633, there's a reference to, 'An obligation which is detailed (exhaustively) in 25.10', and then the same is said about 3.13 in the following paragraph, '3.13 sets out exhaustively the circumstances of each employee'. I'm not quite sure how the 25.10 exhaustive argument works. I understand the 3.13 argument.

PN324

Before turning to the merits of those contentions though, Commissioner, they are contentions advanced, ultimately, in response to what we submitted in our supplementary submissions at court book 626 and 627, where we identified that it wasn't enough for the union to say there's no clause providing you with the ability to take duties away from people. What the burden for the union was, was to identify a clause which precluded it or prohibited it or prevented it, being an aspect of managerial prerogative.

PN325

The union raises a question, 'What aspect of managerial prerogative?'. Well, firstly, it's in existence and, secondly, a well known aspect of managerial prerogative is rostering shifts, hours of work, all wholly within the prerogative of management.

PN326

It's difficult to take one headspace out of the modern work of industrial relations and the employee/employer relationship, rather than the master/servant relationship, but if there was no legislation, no awards, no agreements, and everything was determined by contract, an employer could say, 'You're working tomorrow or your not working tomorrow. You're working in two days time or you're not working in two days time', as much as it liked.

PN327

Just briefly, in the bundle that I've given you, I don't take you to the cases, tab 5, the Alcoa case, you'll see, at paragraph 34, a reference to the Steamster(?) case.

PN328

THE COMMISSIONER: What paragraph was that, sorry, Mr Follett?

PN329

MR FOLLETT: Thirty-four. Sams DP, in the Steamster case, 'The employer has the right to conduct and manage it's business as it sees fit and without external interference'.

PN330

Then paragraph 11 of the Telstra case, which is at tab 6, Smith C, this was about changing shift rosters, and at paragraph 11 the Commissioner says:

PN331

The arrangements of the hours of work, consistent with industrial instruments, or not as the case may be, is clearly a matter that falls within the prerogative of management.

PN332

What we can give we can take away. There's no right inherent, in any particular shift or any pattern and whether you get to keep it or not, unless, relevantly, the legislation provides for it, which of course it doesn't, or the enterprise agreement provides for it.

PN333

Now, there are no express prohibitions in the document which prevent Qantas doing what it says it's entitled to. The union don't point to any, hence the references that I took you to, to 'exhaustively' twice. Both contentions rely on the existence of what can be called an implied prohibition arising, and again the union doesn't say this, but it's what the substance of the submission is, arising from the application of the expressio unius maxim. That is, the express mention of one thing leads to the exclusion of the others, hence the reference to 'exhaustive'.

PN334

Now, the union is careful not to mention that that's what it's doing, because the maxim, that particular maxim, like many, is so discredited in modern times, not limited to modern times, that it's almost never relied upon.

PN335

The High Court has warned about its usage, at least on three separate occasions. The first is found in - my friend probably doesn't have this case, tab 7, *ASU v ATO*, medium neutral [2018] FWCFB 1170, a decision of the President, the former President, Beaumont DP and Saunders C, and I'll take you to the passage in a second, but at paragraph 23 you will see a reference to the High Court decision in Houssein:

PN336

The maxim must always be applied with care, is not of universal application and applies only when the intention it expresses is discoverable, on the face of the instrument. It is a valuable servant by a dangerous master.

PN337

There are other warnings about the maxim, in some case, I'll give you the citations, *O'Sullivan v Farrer*, [1989] 168 CLR 210 at 215, and also *Ainsworth v Criminal Justice Commission* [1992] 175 CLR 564 at 575.

PN338

Indeed, I mentioned modern times, but the criticism of the maxim go back much further. You'll see, in paragraph 23 of the ATO case, a reference to *Colquhoun v Brooks*, that's a decision of the Queen's Bench Division in England, from 1887.

PN339

Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the expressio complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind.

PN340

At 26 of that case the principle which underlines the maxim is that:

PN341

They apply where it can be said that a provision is clearly intended to provide exhaustively on the topic with which it deals.

PN342

That then poses the question whether 25.10, in some way, or 3.1.3 in some way, clearly, on their fact, intend to exclude all other potential circumstances in which a trip might be removed from an employee such that, as a matter of construction, you can say they are a complete (indistinct).

PN343

Now, clause 3.1.3, which is found, relevantly, at court book 84, is not remotely of that kind because, importantly, it deals with a completely different issue. It's a clause appearing under clause 3 which, on court book page 80, is 'Salary and associated matters' and 3.1.3 deals with the consequences of failure to comply with some responsibility, not turning up for a shift, not giving medical certifications or other non-compliant behaviour and it provides for the loss of duty hours which leads to the loss of pay.

PN344

The clause dealing with - which can lead to negative pay adjustments, because these employees are paid salary and then allocated certain hours of (indistinct) period, and you'll see the reference to negative pay adjustments in the clause itself, towards the bottom, with a cross-reference back to clause 3.1.1.

PN345

Now, what happens here, in the present factual circumstances, is nothing of that kind. If you call in on the preceding day, but it's after 8 am, you might lose your trip but you don't lose any pay. It's never been suggested that you do. You still get the full hours credited to you it's just that you don't have to fly them, which, in some says, begs the question why we're even here because we're giving people a day off and paying them for it, and that's in dispute.

PN346

Now, of course, there may be some circumstances where a particular employee might like a particular pattern and, of course, if you lose the front of a pattern you often lose the end of the pattern, or the rest of it as well, because you can't start from Bangalore if you haven't flown to Bangalore, or Dallas Fort Worth.

PN347

The hours that you lose, of course, might later be reassigned. Of course the company will do usually what it can to do that, so that it gets its value out of the salary.

PN348

Given that this particular clause deals with a topic not even remotely related to the present, it's not even arguable. Talking about what's not arguable, that that's an implied prohibition on any other removal of duty.

PN349

We're not quite sure how 25.10 is said to work, as giving rise to some sort of prohibition. It simply tells an employee what to do. It doesn't remotely deal with the topic of what happens if you don't. To find an express intention on that clause to clearly to exclude every other circumstance, not even related to the subject matter of the clause is difficult.

PN350

The union then seek to rely upon clause 9.3 and say that this operates as some form of prohibition. The first thing to say about the clause is its not limited or it's not express to be, as my learned friend suggested, a reference to changing hours, in reference to changing total hours. So it's only going to apply in a particular subset of scenarios where, to take the present example, a trip of, say, 10 hours is removed but than later 10 hours is reassigned back to the employee, the clause doesn't arise.

PN351

Secondly, the exceptions will apply in this scenario. Far from being a prohibition, this is an authorisation. They have to be - you can change the hours for unplanned changes, that's the operation of the clause. What then follows are not exhaustive statements of the circumstances of what an unplanned change is, but they're examples. Such as, plainly they're just examples. Any unplanned change and not ringing in for sick leave, so we don't know whether you're going to turn up for your pattern or not, as I think you put to my learned friend and he accepted, is going to be an unplanned change.

PN352

In any case, in the facts of this scenario, it's either going to be - it's going to be one of the examples, in any case. That's not uniformly for the operationally urgent requirements but, in some cases, it plainly will, such that even if you got to this point you couldn't answer question 1 with a yes or a no. But sick leave, it's an unplanned change, because of sick leave. Because a day when we're asking employees to phone in at 8 am, and the union wants them to phone in before 11.59, that's sick leave. We need to have an unplanned change to your total hours because of sick leave, employees on sick leave and they're being paid for such.

PN353

Now, it wasn't quite clear to me what my friend was trying to make of clause 25.11, but it's crystal clear, we say, that clause says that sick leave starts from the day that you're - sorry, sick leave ends, it includes the day when you're sick but it stops on the first full day when you're supposed to return to duty so, effectively, 12.01 am.

PN354

Obviously the day when you're sitting at home sick, but you ring them up and say, 'I'm notifying that tomorrow I'm going to be okay', that's still sick leave when you're at home. So if you ring up at 5 o'clock in the afternoon and you say, 'I'll still sick but I'm going to return tomorrow', that's an unplanned change to your duties because of sick leave. So far from being a prohibition, it's an authorisation.

PN355

Of course, there'll be many scenarios, in fact potentially all, where there is an operationally urgent requirement, because of a failure to call in before 8 am, to allocate duties to others.

PN356

If you look, Commissioner, firstly, at clause 15.1, which is at court book 95, here's another provision:

PN357

Patterns and ground duties which are not included in a roster or any pattern or ground duty which becomes available.

PN358

The clause recognises that patterns become available, including for sick or carer's leave reasons, that's the heart and soul of this case, become open time.

PN359

Then you go to 15.3 and you see that:

PN360

Open time will be allocated to Qantas QCCA to an employee on an available span or a reserve line holder or an available day.

PN361

So the open time here, that gets released from the employee who hasn't cleared by 8 am, goes into open time to be allocated to persons on available spans. And if you then go to clause 8.3, court book 90, you'll see there's two contact windows where, 'A crew on available days must be contactable'. There's a late afternoon one of 4 pm to 9 pm, but the morning one is 9 am to 11 am. Then you see that all assignments, so if you're on an available day and you get a duty, there's a minimum eight hours notice period from the end of the contact period. So you'll see that from 9 till 11, the first window in the morning, eight hours from completion, so it's eight hours from 11 am, and from the 4 to 9, it's eight hours from 9 pm.

PN362

So for persons that don't call in for sick leave, we have to give them at least eight hours notice of the duty and only can require them, obligatorily, to pick up that shift in those two windows.

PN363

I think the evidence discloses that there's some 200 people on sick leave at any one time, hence the 8 am as being determined, operationally, as the time by which

we need to know who hasn't called in so that by 9 am we've got two hours to call in people to say, 'There's a duty going at 12.50 am the following day, from Sydney to Dallas Forth Worth, we want you to be on that plane'.

PN364

We can't possibly give that notice between 4 and 9 pm and, as you know, international flights can depart any time of the day, and often they depart in the early hours, not quite sure why, great vexation, but you need the 9 to 11 window to get people on planes, hence why most of the relevant circumstances we're looking at here, there will be operationally urgent requirements which mean we need to know, by 8 am, whether you're going to be on your flight.

PN365

As I've said, clause 15.1 is another clause that authorises or at least recognises the release of duties which become available. Here's another example, being sick leave. Of course we're only talking about clearing from duty from sick leave here.

PN366

So then, finally, there's probably other clauses which exclusively recognises the company's prerogative to remove duties and that's clause 13.3, court book 95. It's quite a simple clause but it says:

PN367

Employees must fly each pattern he or she is allocated unless they are removed from the pattern by Qantas QCCA.

PN368

That clause recognises what we say is a reflection of the prerogative of management to remove employees from any pattern at any time.

PN369

There is no reasonable basis, we say, of construction of any provision of the enterprise agreement, for the contention that Qantas is precluded or prohibited from removing trips from employees who do not clear from sick leave by 8 am the day before their return to duty.

PN370

By reference, finally, to court book 621, which is the union's submissions, I think in reply, where they say how the dispute should be resolved, paragraph 8(b), the first sentence of 8(b) is not in dispute and, of course, it doesn't form part of any relevant question for determination. It's the second sentence which is in dispute and there's no basis for it. There's no basis to answer question 1. There's none.

PN371

Unless there's anything further, they're our submissions on both matters.

PN372

THE COMMISSIONER: Thank you, Mr Follett.

PN373

Mr Boncardo?

PN374

MR BONCARDO: Thank you, Commissioner. Can I deal, firstly, with the construction of clause 12.2? My friend took you to it and a number of provisions that are relevant to the construction but remained very much away from the definition which (audio malfunction) myself makes it, in our submission, abundantly clear that 'duty' includes standby. It includes ground duties, it includes other matters that do not encompass flying duties. That is a matter of the utmost significance, we say, because, ordinarily, when a term is used in an instrument that is defined, one applies the definition to that term. 'Duty', we say, is defined in clause 34 to the agreement and when one looks that that definition and then one looks at the prefatory words, 'non flying', and any duty that is not a non flying duty is encompassed.

PN375

Now, lots of reference was made to the apparent purpose of clause 12.2 to provide a break from work. Clause 12.2's purpose is to provide a break from duty. That is reflected in its terms and also reflected in the inclusion of non flying duties in clause 12.2.

PN376

Now one discerns 'purpose' from the text of an instrument, not from some a priority assumption about what a provision is intended to do and it is clear that the drafters of this instrument had, as one of their purposes, giving employees a Z day after they had completed a non flying duty of whatever kind.

PN377

Now, it was submitted that employees, whilst on standby or at home resting, watching Netflix or Stan or Binge or whatever streaming service they may have, it needs to, however, be borne in mind that these are crew members who, whilst on standby, are required to be ready, willing and able to undertake an international flight at relatively short notice. So whilst they are not performing their duties as cabin crew, whilst on standby, they are not engaged in rest. They are waiting for a potential call up to work and there can be, in our respectful - my respectful submission, no notion that they a period of standby is equivalent to a period of rest and recuperation, because they are, effectively, on duty. They need to be able to take a call and able to attend an airport at short notice.

PN378

Reference was made by my learned friend to the persuasive onus, and whether or not you would be satisfied, one way or another, as to our construction of clause 12.2. In our submission, you could be well satisfied that the construction that we contend for is a construction that was not only available but is correct, as a matter of the ordinary meaning of the words contained in clause 12.2 read in light of the definition and the reference in clause 16, to non flying duties, which I took you to previously.

PN379

Our friend's contentions, in respect to suppose anomalous consequences of our construction needs to be treated with some caution, whilst, on Qantas' evidence, there may be inconvenience and difficulties in providing a Z day rest, after a period of standby. That does not permit, in our submission, the Commission to

determine a construction which is at odds with, fundamentally at odds with, the plain words of clause 12.2.

PN380

References to consequences only take one so far because, ultimately, construction is a text based activity and the Commission needs to determine whether non flying duty types are properly construed, duty types that include standby, by reference, principally, to the terms of the agreement themselves, not what a party to the dispute says the consequences will be if the opposing party's constructions are (indistinct).

PN381

In relation to the dispute about sick leave, the initial criticism about our sole reference to clause 25.10 is somewhat unfair in circumstances where it was Mr Miller, whose email I took you to, of 16 May 2022, at court book 29, made it clear that Qantas' view was that they disagreed with my client's construction of clause 25.2 as only requiring a crew member to notify a return to duty after sick leave any time in the day proceeding the return to duty.

PN382

Now, Mr Miller, for example, sets out what clause 25.10 does and doesn't do. Then makes clear what Qantas' understanding of the provision is. That is why the dispute was originally framed as being by reference to clause 25.10. Qantas's position now is that, 'Well, we're able to do this, as a matter of managerial prerogative' and they've engaged with our submissions about clauses 3.13 and clause 9.3. So, there, in our submission, can't be any sensible jurisdictional point raised as to whether or not the dispute settlement procedure, under clause 9 of the (indistinct) has been complied with.

PN383

There is a dispute about the matter arising under the agreement, as to whether or not clause 25.10, or some other provision, entitles Qantas to remove an employee from duty, in the event that they do not notify within the period Qantas contend for.

PN384

Can I say this, in respect to my friend's case now, my friend's characterisation of our case as an attempt to call upon the expressio unius maxim. Now, that is how we put our case. It is, in our respectful submission, the creation of a straw man. Our point simply is that the agreement, particularly clause 9.3, sets out a procedure and a power, sets out a rule and an exception to the rule as to when an employee can be - can have hours taken off and can be removed from duty, et cetera.

PN385

Now, that's not an assertion that will look at a number of provisions and they don't necessarily exclude a person from doing a particular act, but they're intended to deal with the matter. Our submission is clause 9.3, on its face, sets out when the company can change an employees allocated patterns.

PN386

It is not a situation where Qantas can, as a matter of policy, do what they have sought to do, since the agreement came into effect, which is just to remove people, regardless of whether or not an unplanned change to their allocated pattern, which would constitute, for example, an operationally urgent requirement has come into place, it is on every occasion that that has been occurring. That is not, in our submission, contemplated by clause 9.3 and it is certainly not something which is permitted when an employee does what they're required to do by clause 25.10, which is notify Qantas the day beforehand, at any time, as to when they will be returning to duty.

PN387

Now, that cannot be, in our submission, an unplanned change where the employee simply is complying with what they are required to do, under clause 25.10, so as to fall within clause 9.3.

PN388

There may well be a circumstance where it might be an operationally urgent requirement to remove the employee from duty, but an employee complying with the agreement cannot be a matter, in our submission, which would trigger clause 9.3.

PN389

Our learned friend's reference to clause 13.3, in our submission, does not assist Qantas. Employees obligation to fly each pattern is there set out. It is simply descriptive of that obligation, it is not descriptive of and does not confer any power or authority for Qantas to remove someone from the pattern. It simply says that, 'You're required to fly your pattern and unless you're removed from that pattern or Qantas approves you can't fly that pattern', that is exactly what you must do.

PN390

Clause 8.3, which, as we understood it, was relied upon as a contextual matter pointing against our construction, does not, in our submission, advance the matter. Whether or not an employee can be removed from duty after returning from sick leave is determined by reference to the provisions at clause 25 dealing with sick leave and, fundamentally, clause 9.3.

PN391

Clause 15.1 is also, we say, beside the point. It deals with a circumstance, as my learned friend observed, that when patterns in ground duties not included in a roster or any pattern, I should say, or ground duty become available, (indistinct) specifically, they become open time. It deals with when someone is on sick leave and their pattern becomes available, it becomes open time. It does not deal with a circumstance where an employee reports in after completing sick leave and, for the purpose of clause 25.1.1, ceases to be on sick leave.

PN392

My friend makes some submissions about reassignment. It's not a matter that there's been any evidence of significance before the Commission on, but reassignment does not necessarily entail that (audio malfunction) provided

precisely the same hours. So it's not an answer, in our submission, to advance that (audio malfunction) the resolution of what is now question 1 in the dispute.

PN393

Commissioner, unless you have any questions, those were the submissions in reply on the dispute.

PN394

THE COMMISSIONER: Thank you. I thank the parties for their submissions. I intend to reserve my decision and publish my decision and reasons in due course. Is there anything further the parties which to raise with me today?

PN395

MR BONCARDO: No, Commissioner.

PN396

MR FOLLETT: No, Commissioner.

PN397

THE COMMISSIONER: On that basis the Commission will adjourn. Thank you.

ADJOURNED INDEFINITELY **[1.16 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs