[2016] FWCFB 6332

The attached document replaces the document previously issued with the above code on 21 September 2016

Endnote 24 to be deleted from paragraph 36.

Endnote 17 to read [2015] FWCFB 210

Christine Gambrill
Associate to Senior Deputy President Drake

Dated 22 September 2016

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Construction, Forestry, Mining and Energy Union-Mining and Energy Division

v

AGL Loy Yang Pty Ltd T/A AGL Loy Yang
(C2016/4415)

SENIOR DEPUTY PRESIDENT DRAKE
DEPUTY PRESIDENT ASBURY
COMMISSIONER CAMBRIDGE

SYDNEY, 21 SEPTEMBER 2016

Appeal against decision [2016] FWC 4364 of Deputy President Clancy at Melbourne on 1 July 2016 in matter number B2016/581.

[1] This decision concerns an appeal against the Decision[1](**the Decision**) and Order[2] of Deputy President Clancy dated 1 July 2016. The Decision arose from an application for a protected action ballot order (**PABO**) made pursuant to s.437 of the *Fair Work Act 2009* **(Act**) lodged by the Construction, Forestry, Mining and Energy Union – Mining and Energy Division (**CFMEU)** on 26 May 2016 and heard on 10 June 2016.

[2] In the Decision Deputy President Clancy found that he was not satisfied that the CFMEU had been and was genuinely trying to reach agreement with AGL Loy Yang (**AGL**) and dismissed the application.

[3] The appeal was listed before this Full Bench on Wednesday 24 August 2016 in Sydney. Permission was granted for the parties to be legally represented prior to the appeal being heard. Mr Crawshaw SC, with Mr Bakn of Counsel, appeared for the CFMEU. Mr O'Grady QC with Mr Avvalone of Counsel, instructed by Mr West of Minter Ellison solicitors, appeared for AGL. Both parties provided a written Outline of Submissions and addressed those submissions at the hearing.

Principles governing an appeal pursuant to s.604 the Act

[4] This is an appeal for which permission is required pursuant to s.604 of the Act. The Fair Work Commission (**the Commission**) is required to grant permission to appeal if it is satisfied that it is in the public interest to do so, but the circumstances in which it may grant permission are not limited to situations in which the public interest requires it.[3] It has a residual discretion as to the grant of permission to appeal.

[5] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[4] Some of the considerations relevant to determining whether the public interest is attracted were identified by a Full Bench of the Commission in *GlaxoSmithKline Australia Pty Ltd v Makin.* It identified some of the considerations that may attract the public interest as follows:

> "... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."[5]

[6] It will rarely be appropriate to exercise the discretion in favour of the grant of permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[6] However, the mere identification of some error in the decision under appeal may not by itself constitute a sufficient basis for the grant of permission to appeal.[7]

[7] An appealable error in a decision involving the exercise of a discretion is an error of the kind identified in *House v The King*.

> "*It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred*."[8]

[8] In *Minister for Aboriginal Affairs v Peko-Wallsend and Others (Peko-Wallsend)*[9] the High Court considered the implications on appeal of a failure by a decision maker to take into account a relevant consideration. Mason J (with whom Gibbs CJ and Dawson J agreed) identified the following principles:

- the ground of failure to take into account a relevant consideration can only be made out if the decision maker fails to take into account a consideration which he or she was bound to take into account;
- the factors a decision make is bound to consider is determined by construction of the statute conferring the discretion, and it will often be necessary to decide whether enumerated factors are exhaustive or merely inclusive;
- where a statute confers a discretion that is unconfined, the factors that may be taken into account (or not taken into account) are similarly unconfined except where there is a limitation implied by the scope and purpose of the statute;

- Not every consideration that a decision maker is bound to take into account, but fails to take into account, will justify the court setting aside the impugned decision. A factor may be so insignificant that the failure to take it into account could not have materially affected the decision[10];

[9] In relation to the proposition that it is generally a matter for the decision maker, and not the court, to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising statutory power, Mason J went on in that case to observe that:

> "*I say 'generally' because both principal and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance. The preferred ground on which this is done, however, is not the failure take into account relevant considerations or the taking into account of any irrelevant considerations, but that the decision is "manifestly unreasonable*."[11]

Grounds of Appeal

[10] The grounds of appeal are that the Deputy President erred in concluding that the jurisdictional prerequisite in s.443(1)(b) of the Act had not been met in circumstances where he found that the ultimate object of the CFMEU was reaching an agreement. He had regard to the tactics or approach adopted by the CFMEU rather than its motivation, object or purpose.

[11] It was further contended that the Deputy President erred in reaching this conclusion in that he:

- failed to take into account all of the circumstances in the period prior to the determination of the application, being the period between the application being filed and the final submissions, and the period between the hearing and the Decision;

- concluded that a cooling off period was necessary between the cessation of behaviour that offends, or may be deemed to offend, the notion of genuinely trying to reach agreement and the making of an application;

- failed to take into account the fact that AGL and the CFMEU had been unable to agree on arrangements to meet, and had thus been unable to bargain other than in the context of a s.240 process in which CFMEU was participating before another member of the Commission;

- concluded that the CFMEU had made non-permitted claims and withdrawn them in circumstances where the Deputy President did not making a finding about whether the claims were in fact about non-permitted matters;

- failed to consider that the CFMEU had denied that the claims were about non-permitted matters;

- did not put the CFMEU on notice that he was going to take into account the timing of the withdrawal of the claims;

- concluded that the application for a PABO had been made prematurely;

- concluded that the CFMEU was not genuinely trying to reach agreement because language used by the CFMEU was not conciliatory;

- considered irrelevant matters including that the CFMEU was the only bargaining representative that made an application for a PABO; that the CFMEU had been involved in 6 employees nominating to be bargaining representatives for 337 employees; correspondence from the CFMEU that was said to have been "unhelpfully combative" and the CFMEU's conduct prior to the CFMEU agreeing to commence bargaining and/or participating in bargaining.

- failed to afford procedural fairness to the CFMEU by not putting the CFMEU on notice that he was going to take into account the requirement for a "cooling off period" when determining whether the jurisdictional objection in s. 343(1)(b) had been established, including that he did not provide the parties with an opportunity to address him on whether the period between 10 June 2016 and 1 July 2016 met such a requirement.

Submissions of the CFMEU

[12] In the hearing of the appeal Mr Crawshaw focused on Deputy President Clancy's finding that the CFMEU had not been and was not genuinely trying to reach agreement. He submitted that the history of negotiations was not given appropriate weight in the exercise of Deputy President Clancy's discretion.

[13] There was no challenge to the factual findings of Deputy President Clancy to the extent encompassed in the Decision. Rather, Mr Crawshaw submitted that the Deputy President had not dealt with the full factual matrix in that he did not deal with the extensive bargaining that had actually taken place and which "… *the CFMEU relied upon to assert the authenticity and genuineness of its intention*".[12]

> "*This included CFMEU officials and delegates meeting with AGL Loy Yang on 28 October, that was the initial meeting, and outlining the CFMEU claims, the provision of written copies of its claims to AGL Loy Yang during these negotiations, participating in approximately 17 negotiations meetings, and exchanging correspondence in furtherance of the negotiations, the exchange of draft agreements, draft proposal and draft clauses and the making of amended proposals and counter proposals*."[13]

[14] Deputy President Clancy commenced to deal with whether the CFMEU had been and was genuinely trying to reach an agreement at paragraph 87 of the Decision. Mr Crawshaw identified paragraph 92 of the Decision as the only paragraph where the extensive negotiations between the parties, and other activities related to bargaining, were dealt with in any detail, although he conceded that the Deputy President mentioned in paragraph 115 that numerous meetings between the parties had taken place, as follows:

> "[115]------*Formal bargaining between the CFMEU and AGL Loy Yang commenced with a meeting on 16 October 2015, the CFMEU having initiated bargaining by letter dated 28 September 2015. During the ensuing eight months the parties have*

frequently exchanged correspondence containing assertions and counter-assertions, in addition to meeting and the other proceedings that I have detailed above."[14]

[15] At paragraph 116 of the Decision (set out below) the Deputy President listed five negative issues which he took into account when reaching his conclusion as to whether the CFMEU had been genuinely trying to reach an agreement. The Deputy President considered and weighed these factors separately against issuing a PABO.

> **"[116]** I have had regard to the following when assessing whether the CFMEU has been and is genuinely trying to reach agreement with AGL Loy Yang:
>
> (a) the CFMEU's refusal to bargain and the purported nomination as bargaining representatives of Mr Hardy and Mr Walsh while they were away on holiday during the period July to October 2015 for contextual purposes;
>
> (b) the CFMEU's pursuit of an agreement to cover AGL Energy and related bodies corporate during the period November 2015 to April 2016;
>
> (c) the CFMEU's pursuit of matters contested by AGL Loy Yang as being non-permitted during the period January to 24 May 2016;
>
> (d) The response and attitude of the CFMEU during February and March 2016 to the AGL Loy Yang proposal for an intensive bargaining summit in March 2016; and
>
> (e) The allegations regarding the CFMEU's involvement in the nomination by 337 employees of the six individuals as bargaining representatives and their subsequent, ongoing participation in the bargaining process."[15]

[16] Mr Crawshaw rejected AGL's submission that the Deputy President dealt with the many facts and circumstances surrounding the parties bargaining as part of a holistic assessment, including the extensive bargaining the CFMEU relied upon. In response to this submission Mr Crawshaw drew the Full Bench's attention to the fact that the extensive facts and circumstances relied upon by the CFMEU in paragraphs 91 and 92 of the Decision were not mentioned in the Deputy President's conclusion.

[17] In response to AGL's submission that the weight given to a particular consideration is a matter for the decision maker at first instance, not to be inferred by an appeal bench, Mr Crawshaw took the Full Bench to the judgement of Justice Katzman in *Lambley v DP World* (*Lambley*).[16] In *Lambley* DP World submitted that the Deputy President from whose decision it had appealed had not appropriately balanced all the circumstances of the matter, nor given due weight to the factors in s.387, and that this involved an error of the kind identified in *House v The King*.

[18] Mr Crawshaw submitted that Deputy President Clancy gave insufficient weight to the extensive bargaining that had taken place between the parties and gave disproportionate attention to the negative disqualifying factors identified by him, leading to a wrongful exercise of his discretion, and that the outcome of the exercise of discretion by Deputy President Clancy was unreasonable and plainly unjust.

[19] In support of this submission, Mr Crawshaw pointed to paragraph 123 of the Decision where Deputy President Clancy found that throughout the period in which it persisted with claims against AGL Energy and its related bodies corporate, the CFMEU was not genuinely trying to reach an agreement. Mr Crawshaw submitted that this conclusion should be considered in conjunction with paragraph [165] of the Decision where it is stated that:

> "Notwithstanding the evidence of bargaining activity that has occurred, I am not persuaded the CFMEU satisfies the requirement that it has been and is genuinely trying to reach agreement with AGL Loy Yang. Virtually all of its bargaining has been characterised by periods during which it has pursued an agreement:
>
> - covering employers that had never agreed to or initiated bargaining;
> - with material that has only recently been withdrawn, it having been vehemently opposed on the basis it comprised non-permitted matters; and
> - while being involved in the appointment of the six bargaining representatives, a highly unusual development that has, of itself, disrupted the bargaining, altered its process and is ongoing."

[20] Mr Crawshaw submitted that the Deputy President fell into error because he only considered these particular aspects of the bargaining being undertaken for particular periods, and did not take into account the other relevant facts and circumstances for those periods of bargaining. He confined his consideration to these particular aspects of the CFMEU claim and did not consider the other matters to which he ought to have applied his mind and given weight. Applying the reasoning of the Full Bench in *Esso Australia Pty Ltd v AMWU (Esso)*[17] the Deputy President was obliged to take into account all the facts and circumstances surrounding this application, and did not do so in respect of this period January 2016 until 24 May 2016. The Deputy President's conclusions about that period were determinative.[18] Mr Crawshaw further submitted that the Deputy President segmented the overall assessment into a consideration of each of the component facts and considerations scrutinised separately, as if they were determinative of the issue.

[21] In addition Mr Crawshaw noted that the Deputy President had not found that the matters relied upon were impermissible matters. He submitted that "… *The Deputy President found that the appellant was not genuinely trying to reach agreement because the respondent had merely alleged that such claims were non-permitted, in circumstances where the Deputy President did not find that the respondent's allegation had been made out*." The consequence of this period of bargaining being found not to be a period of genuine bargaining for an agreement is that it led to a consideration of what might be regarded as an acceptable *cooling off period* from the cessation of the behaviour.

[22] Mr Crawshaw submitted that the attitude of the CFMEU in bargaining, characterised by the Deputy President as either combative or unhelpful, cannot be a factor to be taken into account when considering the genuineness or otherwise of a party's efforts to reach an agreement. Such conduct is conduct in bargaining and it may be hard bargaining or an industrial tactic.

[23] Mr Crawshaw also identified as an error, the Deputy President's summary of the task before him. He described his task as "…*I should take into account all the circumstances*

including not just the CFMEU's ultimate objective of an agreement but also the genuineness of its conduct."[19] This is said to indicate that the Deputy President misdirected himself as to the relevant test by introducing the notion of genuineness of conduct as a separate consideration, distinct from a genuine intention to try and reach an agreement.

[24] Further, the Deputy President took into account as a negative factor, the involvement of the CFMEU in the appointment of additional bargaining agents. Mr Crawshaw characterised this conduct by the CFMEU as a tactic consistent with genuinely trying to reach agreement. The Deputy President considered this to be non-genuine conduct which could be taken into account in determining whether the CFMEU had been genuinely trying to reach an agreement. He submitted that there was no rational negative inference to be drawn from the appointment of extra bargaining representatives impugning the genuineness of the CFMEU in trying to reach an agreement. He submitted that only conduct that demonstrates a lack of genuineness in trying to reach an agreement should have been considered.

[25] Mr Crawshaw also submitted that Deputy President Clancy did not take into account the meetings that took place following the hearing before him and prior to his Decision. There was evidence of those meetings before the Deputy President. He was required to consider all matters up to the time of his determination of the application, and did not do so.

Submissions of AGL Loy Yang

[26] Mr O'Grady for AGL submitted that Deputy President Clancy had a broad discretion conferred by the Act, unfettered by the matters raised on appeal by the CFMEU. The issues that the Deputy President took into account were available for his consideration, and he properly applied the formula in *Total Marine Services Pty Ltd v MUA (**Total Marine***) where a Full Bench of the Commission held:[20]

> "*[32] …it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement."*

[27] Mr O'Grady characterised the test in Total Marine as "…*an invitation to have regard to anything that the Commission considers is relevant in order to assess whether it is appropriate in the circumstances to empower an applicant with the capacity to take protected industrial action. And because of the broad rubric of matters that might need to be considered in that context there are no additional fetters and one simply applies the language as it appears*."

[28] Mr O'Grady further submitted that the CFMEU had undertaken a piecemeal dissection of the Deputy President's reasons, searching for error, without considering context or having regard to the totality of the considerations to which the Deputy President had regard. Without any statutorily imposed limitation it is generally a matter for the decision maker to determine the appropriate weight to be given to any particular matter which is required to be taken into account when exercising their discretion.[21]

[29] Mr O'Grady also submitted that the CFMEU submission essentially relied on the second limb in *House v The King* by asserting that the reasons for the Deputy President's

conclusion that the CFMEU was not genuinely trying to reach agreement do not disclose how the result was reached. The test for an error of that kind is very high, and relies on the Order being, on the facts, plainly unjust or unreasonable. In this regard, Mr O'Grady referred to the Judgement of Katzman J in *Lambley v DP World Sydney Limited and Fair Work Australia*[22] where her Honour observed that:

> "*The principle is that an appellate tribunal cannot substitute its own view for the decision of the primary decision-maker where it considers that insufficient weight has been given to a relevant consideration unless it comes to the clear conclusion that 'for that reason' that discretion has been wrongly exercised*".[23]

[30] Mr O'Grady submitted that that this description could not be applied on the basis of the facts before Deputy President Clancy.

[31] In relation to the extensive bargaining that the CFMEU suggested had not been taken into account in the Deputy President's conclusion, or given sufficient weight, Mr O'Grady submitted that that extensive bargaining had been referred to at length in the early part of the Decision at paragraph 7 through to paragraph 49, and at paragraph 115. Mr O'Grady described the Deputy President as firstly having dealt with the history of bargaining and then considered the negative matters that might lead to a conclusion against a PABO. He referred to paragraph 165 of the Decision where the Deputy President said "… ***Notwithstanding the evidence of bargaining activity that has occurred****, I am not persuaded the CFMEU satisfies the requirement that it has been and is genuinely trying to reach agreement with AGL Loy Yang*."

(Our emphasis)

[32] In relation to the Deputy President's finding that the CFMEU was not attempting to genuinely reach an agreement during the period when it was pursuing non-permitted matters, Mr O'Grady submitted his finding regarding that period is a matter he took into account overall, but that it was not determinative of the ultimate question before him.

Conclusion

[33] The background to this application has been extensively summarised by Deputy President Clancy. We do not intend to repeat that summary in this decision.

[34] Mr O'Grady characterised the test in Total Marine as "…*an invitation to have regard to anything that the Commission considers is relevant in order to assess whether it is appropriate in the circumstances to empower an applicant with the capacity to take protected industrial action. And because of the broad rubric of matters that might need to be considered in that context there are no additional fetters and one simply applies the language as it appears*."

[35] We accept that characterisation with some obvious reservations. A member cannot have regard to irrelevant matters and the weight given to matters must be proportionate.

[36] On a fair reading of the Deputy President's Decision, the matters set out in paragraph [165] of the Decision provided the foundation of his conclusion that the CFMEU had not been

and was not genuinely trying to reach agreement. Other matters not specifically set out at paragraph 165 of the Decision were contextual. Mr O'Grady agreed with that proposition.

[37] In the present case, we are satisfied that Deputy President Clancy did not take into account the tone of the correspondence between the parties as a negative factor in his final determination. This consideration was part of the overall context and not determinative of the application. Had we found that this matter was determinative of the Deputy President's finding in relation to whether the CFMEU had been or was genuinely trying to reach agreement, we would have concluded that the Deputy President had allowed an extraneous or irrelevant matter to guide him. Lack of gentility is not necessarily indicative of a lack of genuineness in trying to reach an agreement. However, we are not persuaded that this matter was determinative or significant in the present case.

[38] We are unable to form a conclusion about the purpose of the CFMEU's involvement in the appointment of additional bargaining representatives. As a strategy its purpose is difficult to appreciate but we are not persuaded that it is necessary for us or AGL to do so. However we are satisfied that the late appointment of additional bargaining representatives did interrupt bargaining, and that this was a matter that the Deputy President was entitled to consider in his overall assessment of the question he was required to determine.

[39] We are satisfied that Deputy President Clancy considered the extensive bargaining which had taken place between the parties. Extensive bargaining would be, in most circumstances, a positive factor in favour of a PABO. Firstly he set out the history of bargaining in the body of his Decision. Having done that, he then set out in paragraph 116 of his Decision five issues which he considered might weigh against a PABO. He dealt with those issues separately and drew conclusions regarding each of those factors. We are satisfied that what he then did in paragraph 165 of the Decision, having reached a conclusion regarding each of the five negative factors set out in paragraph 116, was list the three matters which had on balance persuaded him that a PABO should not issue. We are not satisfied that insufficient weight has been given to any of the relevant considerations, such that we can conclude that the Deputy President wrongly exercised his discretion.

[40] We are not persuaded that the Deputy President's failure to make particular findings about each matter that was alleged to be non-permissible is an error. The existence of claims for non-permitted matters does not support a finding that an organisation was not genuinely trying to reach an agreement. If the Deputy President had found that the pursuit of non-permitted matters meant that the CFMEU was not genuinely trying to reach an agreement he would have been in error. The Deputy President's findings must on this issue be considered in the context of his overall findings and must be read in conjunction with those findings. Further, it is apparent that regardless of whether the claims were or were not in relation to permitted matters, the Deputy President considered the fact that they were pressed for a period and then withdrawn was relevant to the overall context he had to consider in order to reach his conclusion concerning the genuineness of the CFMEU's attempts to reach an agreement.

[41] Following a careful consideration of the Decision we are satisfied that it was the management of the claim for non-permitted matters and its late removal from the bargaining table just prior to the hearing which was the focus of the Deputy President's consideration, rather than the pursuit of the non-permitted matters *simpliciter* and that this was a matter that the Deputy President was properly able to take into account in reaching the conclusion about whether the CFMEU had been or was genuinely trying to reach agreement.

[42] The other two matters relied upon by the Deputy President in support of his conclusion that a PABO should not issue are appropriate matters for the Deputy President to have considered in the exercise of his broad discretion. Both issues were capable of going to the issue of genuineness.

[43] Firstly, we are satisfied that the action against unrelated entities was a factor properly available for consideration. It would more probably than not have had an effect on bargaining.

[44] Secondly, the appointment of six new bargaining agents was an unexpected development. It is unusual. Contact had to be made with the new bargaining representatives and meetings held. There may have been separate issues to identify and engage in. There is nothing about the appointment of the new bargaining agents that was contrary the Act, but it was open to Deputy President to find that this action disrupted the bargaining, altered its direction and was ongoing. The Deputy President considered that it weighed against a finding that the CFMEU, which he was satisfied was involved in the appointment of these bargaining agents, was genuinely trying to reach an agreement.

[45] Deputy President Clancy considered both issues in conjunction with the management of the claim for non-permitted matters and in the context of the partys' relationship and extended bargaining. Having reached his conclusion, after consideration of appropriate and available matters, he issued his decision and dismissed the application.

[46] Had the Deputy President concluded that the matters of tone and attitude during bargaining referred to by him in the Decision supported a finding that there was a lack of a genuine intention to reach an agreement or that the CFMEU's refusal to meet with outside assistance as suggested by AGL was a factor which was persuasive against the issue of a PABO, we would have concluded differently. Had we been persuaded that the Deputy President relied upon the existence of claims for non-permitted matters, rather than the management of those claims, we would also have reached a different conclusion.

[47] Having regard to the bargaining that has continued to date, the current lodgement of an application to terminate the Agreement and the passing of the cooling off period referred to by the Deputy President, it is open for the CFMEU to make a fresh application for a PABO and in our view, on the material presently before us, a PABO would more than likely issue.

[48] If a Full Bench considers insufficient weight has been given to a relevant consideration it will still not substitute its decision for that of the decision maker at first instance, unless it can clearly conclude that, because of that insufficient weight, the decision maker's discretion has been exercised wrongly.

[49] We are not persuaded that the Deputy President's discretion was exercised wrongly. We are not persuaded that Deputy President Clancy's Decision was manifestly unjust or unreasonable.

[50] We grant permission to appeal but, for the foregoing reasons, the appeal is dismissed.

SENIOR DEPUTY PRESIDENT

Appearances:

Mr S Crawshaw for the appellant.
Mr C O'Grady for the respondent.

Hearing details:

Sydney
August
24

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[1] [2016] FWC 4364 PR582300

[2] PR582301

[3] *Australian Commercial Catering Pty Ltd v Fair Work Commission* [2015] FCAFC 189 at [61]

[4] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44] – [46]

[5] [2010] FWAFB 5343 at [27], 197 IR 266

[6] *Wan v AIRC* (2001) 116 FCR 481 at [30]

[7] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26] – [27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 288, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28].

[8] (1936) 55 CLR 499, at pp 504-505

[9] (1985-86) 162 CLR 24.

[10] Ibid at 39 – 41.

[11] Ibid at 41.

[12] TPN 13 and 14

[13] TPN 14

[14] [2016] FWC 4364 PR582300 at para 115

[15] Ibid para 116

[16] [2013] FCA 4

[17] [2015] FWCFB 210

[18] TPN 105

[19][2016] FWC 4364 PR582300 at para 164

[20] (2009) 189 IR 407

[21] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

[22] [2013] FCA 4

[23] Ibid at 25, citing *Gronow v Gronow* (1979) 144 CLR 513 at 519 per Stephen J and *Lovell v Lovell* (1950) 81 CLR 513 at 533.