DECISION

Fair Work Act 2009
s.604—Appeal of decision

QGC Pty Ltd
v
Australian Workers' Union, The
(C2016/6512)

DEPUTY PRESIDENT ASBURY
DEPUTY PRESIDENT DEAN
COMMISSIONER SAUNDERS

BRISBANE, 3 MARCH 2017

Permission to appeal against decision [2016] FWC 6671 of Commissioner Simpson at Brisbane on 24 October 2016 in matter number B2016/915.

Introduction

[1] QGC Pty Ltd (Appellant/QGC) has applied under s. 604 of the *Fair Work Act 2009* (the Act) for permission to appeal and appeals a decision of Commissioner Simpson issued on 24 October 2016 (Decision).[1] The Decision concerned an application for a majority support determination made by the Australian Workers' Union (the Respondent/AWU) under s. 236 of the Act. In the Decision the Commissioner determined to grant the AWU's application and he subsequently issued the majority support determination sought by the AWU (Determination) on 24 October 2016.[2]

[2] QGC's notice of appeal stated six grounds of appeal contending that the Commissioner erred in addressing the fairly chosen issue in s. 237(2)(c) of the Act by:

1. Failing to consider the way that QGC had organised is enterprise;
2. Treating the performance of a different role, task, skill or function or work as operational distinctiveness;
3. Failing to consider the nature of the work performed by employees excluded from coverage, including the operational and organisational interrelationships between those excluded employees and the employees covered;
4. Treating the willingness or wish of employees to bargain as influencing the fairness of the group of employees to be covered, when in reality the former and latter matters are separate;
5. Considering that the group was geographically distinct, in circumstances where each of the employees in the group to be covered worked not at a single location or within a

geographic subset of the area of the business but instead each worked at a separate location; and

6. Concluding that the group was not arbitrarily chosen in circumstances where membership of the group to be covered depended on membership of the AWU and such membership was an irrelevant consideration to the fairly chosen issue.

[3] The appeal was heard on 13 December 2016. In written submissions dated 24 November 2016, the Appellant sought permission to be represented by Mr Dixon SC and Mr Gotting of Counsel. The Respondent in written submissions dated 14 November 2016 also sought permission to be represented by Counsel. By email also dated 14 November 2016, the Respondent sought an adjournment of the hearing on the basis that its Counsel was not available on the date on which the appeal had been listed for hearing. The request for an adjournment was refused. On 8 December 2016, the Respondent filed further submissions opposing the Appellant being represented by Counsel on the basis that the Respondent would now be represented by its industrial advocate and that fairness would be achieved if the Appellant was represented by the Solicitor who represented the Appellant in the hearing at first instance.

[4] Permission was granted for the Appellant to be legally represented by Counsel of its choice (Mr Dixon SC and Mr Gotting of Counsel) on the basis that the Full Bench was satisfied that it would enable the matter to be dealt with more efficiently taking into account its complexity. As a Full Bench of the Commission observed in an appeal by the New South Wales Bar Association[3] in relation to a similar argument to that advanced by the AWU, the duty of the Commission under s. 596 of the Act is to either grant or refuse permission for a party to be represented by a lawyer or paid agent, based on the matters it is required to consider in so deciding. It is not within the power conferred on the Commission to choose who that lawyer will be either by reference to the identity of the lawyer or whether the lawyer is a barrister or solicitor (or in the case before us Senior Counsel).

Factual Background

[5] The Appellant operates and maintains gas extraction and processing infrastructure in the Surat Basin in Queensland. That infrastructure includes Coal Seam Gas (CSG) wells, Field Compression Stations (FCSs), Central Processing Plants (CPPs) and gas plants, pipelines and trunklines. The Appellant describes the operation and maintenance of this infrastructure as its "Upstream Operations". Those operations are significant and consist of: 2,672 CSG wells; 24 FCSs; 6 CPPs; 2 major water treatment facilities; the Condamine Power Station; a 390 km network of trunklines used for CSG and water; a 540 km export pipeline operated on behalf of an owner; Telecommunications and HV network; 18 above ground facilities; 32 water storage ponds; and 28 pump stations housing 42 pumps. Upstream operations are also divided into three regions: North, Central and South, [4] which stretch across 3,700 square kilometres.[5]

[6] The Appellant divides its Upstream Operations into two units – the Business Delivery and Business Enabling Units. Employees in the Business Delivery Unit are divided into two groups: Operations and Processing employees comprising nine classifications and Maintenance Trade Employees comprising 18 classifications.

[7] CSG wells are managed, monitored and controlled by Wellsite Lead Operators and Wellsite Operators who are treated as Operations and Processing employees. Gas Plant Lead

Operators and Gas Plant Operators employed by the Appellant manage, monitor and control FCSs and CPPs and are treated as Operations and Processing employees. Control Room Operators operate CSG wells, FCSs and CPPs and are treated as Operations and Processing employees. The pipeline and trunkline network is managed, monitored and controlled by Transmission Operators who are treated as Operations and Processing Employees. Maintenance Trades employees maintain the CSG wells, FCSs and CPPs and are treated as Maintenance Trades Employees.

[8] The Respondent applied for a majority support determination under s. 237 of the Act, by application made on 24 August 2016. The proposed single enterprise agreement for the purposes of s. 236(1) and s. 237(1) of the Act was to cover the Gas Plant Lead Operators and Gas Plant Operators. The proposed single enterprise agreement did not cover Wellsite Lead Operators and Wellsite Operators and other operators in the Business Delivery Unit including Control Room Operators, Transmission Operators and Power Plant technicians.

Legislation

[9] Sections 236 and 237 of the Act provide as follows:

> "**236 Majority support determinations**
>
> (1) A bargaining representative of an employee who will be covered by a proposed single enterprise agreement may apply to the FWC for a determination (a majority support determination) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.
>
> (2) The application must specify:
>
> (a) the employer, or employers, that will be covered by the agreement; and
>
> (b) the employees who will be covered by the agreement."
>
> "**237 When the FWC must make a majority support determination**
>
> *Majority support determination*
>
> (1) The FWC must make a majority support determination in relation to a proposed single enterprise agreement if:
>
> (a) an application for the determination has been made; and
>
> (b) the FWC is satisfied of the matters set out in subsection (2) in relation to the agreement.
>
> *Matters of which the FWC must be satisfied before making a majority support determination*
>
> (2) The FWC must be satisfied that:
>
> (a) a majority of the employees:
>
> (i) who are employed by the employer or employers at a time determined by the FWC; and
>
> (ii) who will be covered by the agreement;

want to bargain; and

(b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and

(c) that the group of employees who will be covered by the agreement was fairly chosen; and

(d) it is reasonable in all the circumstances to make the determination.

(3) For the purposes of paragraph (2)(a), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Operation of determination

(4) The determination comes into operation on the day on which it is made."

The Decision

[10] It was not in dispute before the Commissioner that the requirements in s. 236 of the Act were satisfied. The Commissioner was also satisfied, on the basis of a petition tendered by the AWU, that the requirements in s. 237(2)(a) were met. Further QGC abandoned its contention that the requirements of s. 237(2)(b) had not been met and accepted that for the purpose of that provision, it had not yet agreed to bargain. No issue is taken with these matters in the appeal.

[11] Before the Commissioner and in the appeal, QGC asserted that the group of employees the subject of the application – Gas Plant Lead Operators and Gas Plant Operators – is not organisationally, operationally or geographically distinct and that all Operators are part of the Business Delivery unit and the Operations and Processing Employees group. The AWU maintained that the Gas Plant Lead Operators and Gas Plant Operators are operationally and organisationally distinct and in particular that they are distinct from Wellsite Lead Operators and Wellsite Operators. The Commissioner concluded that the Gas Plant Lead Operators and the Gas Plant Operators (on the one hand) and the Wellsite Lead Operators and the Wellsite Operators (on the other hand) are geographically, operationally and organisationally distinct. Key findings made by the Commissioner in relation to Lead Gas Plant Operators and Gas Plant Operators were that:

- They perform their work in different settings [104];
- Most of the time Gas Plant Operators are the only person in the gas plant [105];
- They are operationally distinct on the basis that their functions are distinct and roles discrete from other operators and they do not work alongside each other [106]; and
- There are similarities in the nature of their work with the work of Well Site Operators [107].

[12] The Commissioner went on to conclude that:

> "[108] However they are also distinct from one another in some respects. The two categories of Gas Plant Operator employee are geographically distinct from Well Site Operators in that the CPP's FCS's and other gas plant are at different locations to the CSG well site facilities where Well Site Operators perform their work. Mr Cashman gave evidence as a Gas Plant Operator that he never moves between a gas plant and a well site.
>
> [109] There is also a degree of operational distinctness because the FCS's and CCP's where the Gas Plant Operators work, perform a different function in the Upstream Operations process to that of the CSG wells where the Wellsite Operators work, despite those distinct functions also being a step within an integrated process.
>
> [110] There is also a degree of organisational distinctness from one another as can be seen from the Organisational Structure as they sit within distinct groups with separate supervision. As was said by the AWU, it is not until the third level in the chain of command at Area Administrator or Field Manager that management responsibility for Gas Plant Operators and Well Site Operators is shared.
>
> [111] The Career Progression document also reveals that they are paid and classified differently. Mr Maxwell said the difference in pay was based on operational and production risk. Mr Cashman said there was a lot more involved with a gas plant then a well site. Whilst there was some evidence of Wellsite Operators acting in or transferring to Gas Plant Operator roles they cannot just step straight into the role. Whilst there are common core competencies Gas Plant Operators require TAFE qualifications for some of their work. Mr Maxwell gave evidence that some Wellsite Operators have those competencies as well, and of that group they would also require other specific modules which may take up to a month or so to obtain." [Footnotes omitted].

[13] QGC also contended before the Commissioner that the group of employees to be covered was arbitrarily chosen. In this regard, the Commissioner records that QGC argued that the fact that the AWU had filed an earlier application for a majority support determination proposing a broader group to be covered was indicative of arbitrary selection of the group by the AWU for the expediency of achieving a majority. In relation to this submission the Commissioner concluded:

> "[112] The evidence demonstrates that the selection of the group as proposed in this application is not arbitrary as has been suggested by QGC. It is not based upon employee characteristics such as date of employment, age or gender. It is based on being part of a distinct group of 66 employees belonging to two classifications of employee performing a role exclusive to that group with some unique competencies."

[14] The Commissioner noted that the AWU had the ability under its rules to represent all employees employed by QGC including the Wellsite Lead Operators and the Wellsite Operators. The Commissioner also considered that a witness for QGC had indicated that the Company was not prepared to bargain with Gas Plant Operators and Lead Gas Plant Operators and it was these employees who had approached the AWU to bargain on their behalf and not the Wellsite Lead Operators and Wellsite Operators. In relation to the interests of QGC, the Commissioner found:

> "[121] I have come to the conclusion that while it is clearly not the preference of QGC to have its Lead Gas Plant Operators and Gas Plant Operators working under an Enterprise Agreement, while at the same time also having its other Operations and Processing Employees and Maintenance Trades Employees continue under the existing Award and common law contract arrangements, such circumstances do not give rise to such a level of concern that it

> would cause me to regard the group as not being fairly chosen for that reason, when weighed against the extent of their distinctness, and the expressed desire to bargain as a group. I have also had regard to the evidence of Mr Maxwell that employees sometimes transfer between roles, and can also achieve career progression from one classification of employment into another. I have heard QGC's argument that it is not in its interests to have significant differences in the industrial conditions that apply to its broader workforce for these reasons. QGC's submissions concerning the integrated nature of its business indicate a view that the only group that could satisfy the tests in s.236 would be if a majority of all of its Operations, Processing and Maintenance Trades workforce wanted to bargain."

[15] The Commissioner also found that it had not been shown that the group to be covered was unfair and concluded that the group was fairly chosen. In concluding that the group was fairly chosen the Commissioner noted that there was no evidence of any other group that wanted to bargain and that this weighed in favour of granting the application.[6]

Submissions on Appeal

Appellant

[16] Relying on its six grounds of appeal, QGC sought that permission to appeal be granted and the Commissioner's order making the majority support determination be quashed pursuant to s. 607(3)(a) of the Act. QGC also sought that the Full Bench make a further decision that the time for determining the fairness of the group to be covered is the date of the determination of the appeal and that it should be re-determined, based on a range of matters relating to whether the group is organisationally, operationally or geographically distinct and whether it was fairly chosen.

[17] In relation to its appeal grounds, QGC submitted that in addressing the fairly chosen issue including whether the group is organisationally, operationally or geographically distinct (the distinctiveness issue) the Commissioner erred by failing to consider the way in which the Appellant had chosen to organise its enterprise including its structuring of operators into a cohesive and integrated group referred to as the Operations and Processing Employees group, and thereby misdirected himself in law and failed to take into account a matter that he was required to consider. It is also submitted that while the Commissioner referred to the Explanatory Memorandum for the Bill that became the Act and the evidence about the structure of the Appellant, he failed to consider that matter and the evidence when addressing the distinctiveness issue. In oral submissions the Appellant emphasised that while QGC's proposition that the group was not distinct was noted, the Commissioner did not identify the integration of the group into the workforce and the integrated nature of the workforce and did not attach any weight to the extensive evidence in this regard.

[18] In relation to the second error the Appellant submits that properly considered, operational distinctiveness is concerned with the organisation of the employer's operations (including the structure of the operations) and not the nature of the role, skill, task or function performed by an individual or a group of employees. It is submitted that in addressing the fairly chosen issue (including the distinctiveness issue) the Commissioner erred by treating the performance of a different role, skill, task, function or work as operational distinctiveness. In oral submissions, the Appellant contended that the distinctiveness test is not met by reference to whether an employee is performing a different role in an integrated process and that concentrating only on an employee's role does not answer the distinctiveness test. This is said to be a fundamental error on the basis that operational distinctiveness is concerned with a

course of productive or industrial activity and that is different to function or work performed by a group of employees.

[19] The Appellant submits in relation to the third error that in addressing the fairly chosen issue (including the distinctiveness issue) the Commissioner erred by failing to consider the nature of the work performed by employees excluded from coverage, including the organisational and operational interrelationships between those employees excluded and those employees covered and thereby failed to consider a matter that he was required to consider. The relevant interrelationships included the interactions between the Gas Plant Lead Operators and the Gas Plant Operators on the one hand and Control Room Operators and the Transmission Operators on the other hand. In oral submissions the Appellant emphasised that this error involved a failure to consider the nature of the work performed by those who were excluded from coverage and the interaction between excluded and included employees. It is submitted that the excluded employees are also operators and that they are performing similar roles to those who are included and are part of an integrated and cohesive team.

[20] With respect to the fourth error, the Appellant submits that in addressing the fairly chosen issue the Commissioner erred by treating the willingness or wish of employees to bargain as influencing the fairness of the group chosen. In oral submissions the Appellant pointed to the Commissioner's observation that there was an absence of evidence from the excluded group of any reasons why it would be unfair for them to be excluded and contended an absence of evidence cannot answer or address the question of distinctiveness. The Appellant also submits if the relevant group is not operationally, organisationally or geographically distinct, then it is necessary to identify what factors outweigh the absence of these attributes. Absence of evidence about the wishes of an excluded group could not outweigh the absence of distinctiveness.

[21] In relation to the fifth error it is submitted that the AWU did not contend before the Commissioner that the Gas Plant Lead Operators and Gas Plant Operators are geographically distinct. It is contended that that the Commissioner erred in finding that Gas Plant Lead Operators and Gas Plant Operators are geographically distinct in circumstances where such operators did not work at a single location or in a geographic subset of the total business, but rather, worked at one or more of 30 disparate locations (24 FSCs and 6 CPPs). In oral submissions, Counsel for the Appellant asserted that the Gas Plant Lead Operators and Gas Plant Operators are not geographically distinct based on the location of all of the employees in these roles and not geographically distinct as a sub-set, on the basis that all employees work in the Surat Basin.

[22] Further, the Gas Plant Lead Operators and Gas Plant Operators are not geographically distinct from maintenance staff in the same locations. The Gas Plant Lead Operators and Gas Plant Operators are also not geographically distinct on the basis of 30 disparate locations throughout the Surat Basin, as such operators do not work exclusively at one location but can be required to visit more than one to undertake their work. Rather the group of Gas Plant Lead Operators and Gas Plant Operators is scattered through the Surat Basin attending to facilities, and sometimes more than one facility in a day, and they move from location to location, sometimes five times or more.

[23] The sixth error is said to involve arbitrariness in that a basis upon which the employees were found by the Commissioner to be fairly chosen, is that they were members of the AWU. This is said to follow from the evidence before the Commission that the AWU

Official involved in the matter was not aware that the Union had membership among any other group of employees and the fact when all of the evidence is considered, the one factor that distinguishes the Gas Plant Lead Operators and Gas Plant Operators from other employees in an organisation where they are integrated, is their membership of the AWU.

[24] In this regard, Counsel for the Appellant pointed to evidence that the tasks performed by the group chosen are the same as those performed by operators not within the group; the similarity of the qualifications and training for all operators; the similarity of the assignment of areas of responsibility; and the standards that apply to the performance of work for all operators; and the way in which they liaise with maintenance employees is also similar. These factors, combined with the lack of operational, organisational or geographical distinctiveness are said to result in a logical conclusion that the one factor that has really driven their selection is Union membership.

Respondent

[25] In relation to the grounds of appeal, the Respondent submits that the finding that the group of employees chosen is operationally distinct, was based on evidence that the skills and functions of Gas Plant Operators and Gas Plant Lead Operators were separate from other employees within the Maintenance Trade employees group of the Appellant and that those groups of workers did not work together. The Commissioner also considered, on the basis of the evidence, that the Gas Plant Operators and Gas Plant Lead Operators were a distinct group from other employees in the Operations and Processing Employees Group in that the work of other members of that Group was performed in different settings. In this regard the Commissioner found that the Gas Plant Operators and Gas Plant Lead Operators worked around CPPs and FCSs and other gas plants while other members of that Group worked on pipelines and trunklines, in a control room or around the Condamine Power Station.

[26] The Commissioner also found that the strongest argument advanced by QGC was that Gas Plant Operators and Gas Plant Lead Operators were not distinct from Well Site Operators and that there were many similarities between the roles. However, after weighing that evidence the Commissioner found that distinctions also existed on the basis that the two categories of Gas Plant Operator were geographically distinct from the two classifications of Well Site Operators in that the CPPs and FCSs and other gas plant were at different locations to the CSG Well Site Facilities where the well site operators performed their work. The Commissioner also found that the groups were distinct on operational grounds because the FCS's and CPPs where the Gas Plant Operators worked performed a different function in the upstream process to that of the CSG wells where the Well Site Operators worked, despite these distinct functions being a step within an integrated process and were covered by different classifications under the existing industrial arrangements, depending on their levels of experience. The AWU also points to the Commissioner's reference to the Appellant's organisational structure in concluding that there was a clear distinction between Gas Plant Operators and Well Site Operators and that it was not until the third level of the chain of command at the Area Administrator or Field Manager level that management responsibility for the two groups of operators is shared.

[27] The AWU submits that the Commissioner ultimately determined that the selection of the group as proposed by the Union was:

- not arbitrary;

- not based upon employee characteristics such as date of employment, age or gender; and
- based on being part of a distinct group of 66 employees belonging to two classifications of employees performing a role exclusive to that group with some unique competencies.

[28] The AWU further submits that the Commissioner took into account that it was only the Gas Plant Operators and Gas Plant Lead Operators who had approached the Union about wanting to bargain rather than any other group that would fall within the ambit of the Union's rules and that there was no evidence of any other excluded group wanting to bargain. The AWU contends that the Commissioner was not mistaken as to the jurisdiction he had to perform or the nature of the opinion or value judgement required of him.

[29] Having regard to s. 237(2)(c) and s. 237(3A) of the Act, the principles in relation to the fairly chosen issue and the findings of fact and conclusions reached, the Commissioner took into account all relevant considerations. In relation to Ground 1 of the appeal the AWU submits that the Commissioner did take into account the way that the Appellant had chosen to integrate its Operations and Processing Employees Group and evaluated that consideration.

Principles governing an appeal pursuant to s.604 the Act

[30] 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.[7] It has a residual discretion as to the grant of permission to appeal.

[31] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[8] 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* 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*."[9]

[32] 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.[10] 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.[11]

[33] An appealable error in a decision involving the exercise of 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*."[12]

[34] In *Minister for Aboriginal Affairs v Peko-Wallsend and Others (Peko-Wallsend)*[13] 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 maker is bound to consider are 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; and
- 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.[14]

[35] 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'*."[15]

[36] The Commission must be "satisfied" of the statutory criteria set out in s. 237(2) of the Act before it can make a majority support determination. QGC contends that a decision as to whether the Commission is so "satisfied" is not a discretionary decision; rather it is a question as to whether the decision maker has reached a "state of mind which must be formed reasonably and on a correct understanding of the law."[16] QGC submits that such a decision

may be challenged on the grounds set out by in *Buck v Bavone*[17] on the basis that the decision maker "misdirected itself in law", "failed to consider matters it was required to consider", "took irrelevant matters into account" or "if the decision reached appears so unreasonable that no reasonable authority could possibly have arrived at it."[18]

[37] The AWU submits that the decision as to whether a group of employees is "fairly chosen" involves a degree of subjectivity or value judgment, with the result that it can be characterised in a broad sense as a discretionary decision. In support of that argument, the AWU relies on Full Bench decisions of the Commission in *Cimeco Pty Ltd v CFMEU,*[19] *Alcoa of Australia Limited v CFMEU,*[20] and *CFMEU v John Holland*.[21]

[38] There is an element of overlap between error in relation to a discretionary decision in the *House v King* sense and satisfaction error in the *Buck v Bavone* sense. For the reasons that follow, we are of the view that it matters not to the outcome of this case whether the Commissioner's decision is characterised as discretionary or a state of mind.

Consideration – Permission to Appeal

[39] In determining whether permission to appeal should be granted in the present case we have reviewed and considered all material filed by the parties including submissions, correspondence and relevant authorities. We find that permission to appeal should be granted in this matter.

[40] We are of the view that the appeal raises important questions concerning the application of s. 237(2) and s. 237(3A) of the Act in circumstances where the distinctiveness of a group of employees who are said to want to bargain is in dispute. We consider this to be an important matter regarding the Commission's approach in making such a determination and therefore, the public interest is enlivened. It is on this basis that permission to appeal is granted.

Consideration – The Appeal

[41] Regardless of questions about the nature of satisfaction, the extent to which it is a discretionary decision and if so, the width of the discretion, we accept the submission of the Appellant that satisfaction as to the fulfilment of statutory criteria requires an actual persuasion in the decision maker.

[42] For the Commission to reach a state of satisfaction necessary to make a majority support determination, it must be satisfied that the group was fairly chosen and in considering whether the group was fairly chosen, it must take into account, by virtue of s. 237(3A), whether the group is geographically, operationally or organisationally distinct. Distinctiveness is not absolute and can be a matter of degree. Distinctiveness on one of those bases is a factor telling in favour of a finding that the group is fairly chosen. Conversely if the group of employees is not geographically, operationally or organisationally distinct, then that is a factor telling against a finding that the group is fairly chosen. Whether or not a group is organisationally, operationally or geographically distinct is not decisive but rather is a matter to be given due weight having regard to all of the other circumstances.[22]

[43] We accept the submission for the Appellant that it follows that where the group is not geographically, operationally or organisationally distinct, it is necessary to identify what, if

any, factors outweigh the absence of such characteristics and to give significant weight to the lack of distinctiveness in deciding whether the group was fairly chosen.

[44] In relation to ground two of the appeal, we are of the view that the Commissioner has treated the performance of a different role, task, skill or function as operational distinctiveness and has erroneously concluded that the group of employees is operationally distinct on that basis. The term "operational" refers to an industrial or productive activity – here the operation and maintenance of gas extraction and processing infrastructure in the Surat Basin in Queensland. The term "organisation" refers to the manner in which the employer has organised its enterprise in order to conduct those operations. The fact that Gas Plant Operators and Gas Plant Lead Operators perform a different role, task or function to that performed by other operators is not of itself a sufficient basis upon which a finding of operational or organisational distinctiveness can be made in the circumstances of the present case.

[45] On the evidence before the Commissioner, Gas Plant Operators and Gas Plant Lead Operators are required to integrate into a structure under which they work with other employees – many of whom perform very similar work – to safely and efficiently operate and maintain the employer's infrastructure. The evidence of integration was significant and was not outweighed by the fact that the Gas Plant Operators and Gas Plant Lead Operators perform different tasks or roles than those performed by other employees. As Counsel for the Appellant put the argument, a truck driver and a front end loader operator working together on a mine site would not be found to be organisationally, operationally or geographically distinct on the basis that they perform different tasks in what is an integrated operation.[23] Accordingly we are of the view that it was not open for the Commissioner to conclude in the circumstances of the present case that the group of employees was organisationally or operationally distinct on the basis of the task or function that they perform.

[46] By treating the performance of a different role, skill, task or function as operational distinctiveness the Commissioner acted on a wrong principle (in the *House v King* sense) or, in the alternative, misdirected himself in law (in the *Buck v Bavone* sense).

[47] With respect to appeal ground five, we are of the view that the relevant group of employees is not geographically distinct. At first instance the AWU did not contend that Gas Plant Operators and Gas Plant Lead Operators were geographically distinct. Distinctiveness relates to the group of employees with respect to whom the Determination is sought. The fact that each Gas Plant Operator and Gas Plant Lead Operator works alone at a particular location, is not a basis for a finding that the group is geographically distinct. The Gas Plant Operators and Gas Plant Lead Operators do not work in a single location or in a geographical subset of the total business; instead, the group of Gas Plant Operators and Gas Plant Lead Operators is scattered throughout QGC's gas extraction and processing infrastructure in the Surat Basin, which stretches across about 3,700 square kilometres. They sometimes work at more than one facility in a day, and they move from location to location in the Surat Basin. Further, a number of QGC's other operators and maintenance employees work at the same locations as the Gas Plant Operators and Gas Plant Lead Operators, sometimes at the same time and other times on different days.

[48] As such we are not satisfied that the finding of geographical distinctiveness was open to the Commissioner. In our view, the Commissioner erred (in the *House v King* sense) by not taking into account the material considerations set out in this paragraph or, in the alternative,

(in the *Buck v Bavone* sense) by not considering matters he was required to consider in finding that the relevant group of employees was geographically distinct.

[49] We are of the view that the Appellant has demonstrated error in the Commissioner's decision in accordance with *House v The King* or alternatively *Buck v Bavone.* We are not required to identify an appellable error in every ground of appeal for the Decision to be quashed. Having identified relevant error in two significant respects we are satisfied that the appeal should be upheld and the Decision and Determination quashed.

[50] We intend to make a further Decision re-determining the application for a majority support determination as provided in s. 607(3)(b) of the Act if the AWU seeks to pursue the application. In accordance with the decision of a Full Bench of the Commission in *Kantfield Pty Ltd T/A Martogg & Company v The Australian Workers' Union*[24] if the matter is re-determined, in addition to considering whether the group was fairly chosen, we are required to take into account the most current available information in relation to whether a majority of employees wanting to bargain exists.

[51] The AWU is to advise within seven days of the date of release of this Decision – by email directed to the Chambers of Deputy President Asbury and to the Appellant – whether it intends to pursue the application. Should the AWU wish to pursue the application the matter will be listed for mention to determine an appropriate course for the matter to be re-determined, including whether the parties wish to rely on their written submissions in the appeal and at first instance or desire to be heard further in relation to the application.

Conclusion

[52] Permission to appeal is granted.

[53] The appeal is upheld.

[54] The Decision and Determination are quashed.

[55] The AWU is to advise its position within seven days in accordance with paragraph [50] above.

DEPUTY PRESIDENT

Appearances:

Mr H. J Dixon of Senior Counsel with Mr A. B Gotting of Counsel for the Appellant.

Mr T. McKernan and Ms J. Power for the Respondent.

Hearing details:

2016.

Brisbane.

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[1] [2016] FWC 6671.

[2] PR586856.

[3] *New South Wales Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663.

[4] Statement of Robert James Maxwell paragraph 22 – 23.

[5] Transcript at first instance PN789.

[6] [2016] FWC 6671 at [119].

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

[8] *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].

[9] [2010] FWAFB 5343 at [27], 197 IR 266.

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

[11] *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].

[12] (1936) 55 CLR 499, at pp 504-505.

[13] (1985-86) 162 CLR 24.

[14] Ibid at 39 – 41.

[15] Ibid at 41.

[16] *Wei v Minister for Immigration and Border Protection* (2015) 90 ALR 213 at 33 per Keane and Gageler JJ.

[17] (1976) 135 CLR 110.

[18] Ibid at 118-119.

[19] [2012] FWAFB 2206; (2012) 219 IR 139 at [8], applying the decision of the High Court in *Coal & Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at [19]-[21] in which the High Court considered an appeal from a decision concerning whether a member of the Commission was "satisfied" as to one of the circumstances set out in sub-ss (2) to (7) of s.170MW of the *Workplace Relations Act* 1996 (Cth).

[20] [2015] FWCFB 1832 at [24].

[21] [2012] FWAFB 7866 at [14].

[22] *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union and others* [2012] FWAFB 2206 at [19] – [20].

[23] Transcript on appeal PN163.

[24] [2016] FWCFB 8372.