DECISION

Fair Work Act 2009
s.604—Appeal of decision

Christopher Budd

v

Australian Federal Police
(C2018/2950)

DEPUTY PRESIDENT ASBURY
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER HAMPTON BRISBANE, 5 OCTOBER 2018

Appeal against decision [[2018] FWCA 2776] of Deputy President Kovacic at Canberra on 17 May 2018 in matter number AG2017/6432; whether an agreement contains unlawful terms; whether a clause in agreement providing for additional maternity leave is an objectionable term; whether the term is a discriminatory term; whether there has been a denial of procedural fairness; arguable case of appealable error not established; public interest not evidenced; permission to appeal refused.

Introduction

[1] The Australian Federal Police (AFP) made a single enterprise agreement titled the *Australian Federal Police Enterprise Agreement 2017–2020* (Agreement) with relevant employees when a majority of those employees voted to approve the Agreement on 14 December 2017. On 19 December 2017, the AFP made an application under s.185 of the *Fair Work Act 2009* (Act) for the approval of the Agreement. By decision issued on 17 May 2018,[1] Deputy President Kovacic approved the Agreement.

[2] Mr Christopher Budd was a bargaining representative for the proposed agreement and is the Appellant in this proceeding. Mr Budd has applied for permission to appeal and has appealed against the decision by notice of appeal lodged on 31 May 2018.

[3] Central to the controversy below, and again agitated in the appeal, is the question whether clause 46 of the Agreement is an unlawful term within the meaning of s.194 of the Act because it is a discriminatory term as described in s.195 of the Act and/or an objectionable term within the meaning of s.12 of the Act. Clause 46 makes provision for maternity leave, including paid maternity leave in certain circumstances, and its full terms are set out later in this decision. Other grounds of appeal are also raised, including procedural fairness grounds, but the key issue that is raised in the appeal is whether the Deputy President erred in being satisfied that the Agreement does not include any unlawful terms as required by s.186(4) of the Act.

[1] [2018] FWCA 2776.

Grounds of appeal

[4] The Appellant raises procedural fairness as grounds of appeal. These are set out at [15] – [24] and [66] of the attachment accompanying the notice of appeal.[2] There are two elements to the procedural grounds. In short compass the Appellant contends first, that he was denied the opportunity to participate in an oral hearing of the application. Secondly, the Appellant contends that in the circumstances of the conduct of a telephone conference by the Deputy President on 18 April 2018 and the views expressed by the Deputy President during the conference there arose a reasonable apprehension of bias.

[5] Each of the other grounds of appeal set out in the attachment to the notice of appeal relate to the central controversy identified above. Although at [40] of the attachment accompanying the notice of appeal[3] the Appellant sets out the grounds of appeal as follows:

- the first instance decision was based on wrong principle;
- the first instance decision was guided by irrelevant factors;
- the first instance decision failed to take into account a material consideration;
- the first instance decision is unreasonable;
- the first instance decision is plainly unjust; and
- the decision involved an error of law.

[6] More particularised grounds are also contained throughout the attachment which give some amplification to the generalised *House v the King*[4] grounds cited above. Briefly by these grounds the Appellant contends the Deputy President erred:

- in concluding that the *Maternity Leave (Commonwealth Employees) Act 1973* (Cth) (MLCEA) and clause 46(2) of the Agreement were "legally connected";[5]
- because the foregoing conclusion was "contrary to existing authority";[6]
- in his characterisation of clause 46(2) of the Agreement and his failure to appreciate that the provision was not statutory or legislative but rather consensual in the exercise of the "industrial powers" of the AFP;[7]
- in failing to interpret properly the "relevant statutes";[8]
- in taking into account the report of the Productivity Commission on Paid Parental Leave, which was an irrelevant consideration;[9]
- in failing to take into account the nature of additional maternity leave as a matter of fact (primary carers leave), which was a material consideration;[10] and
- in failing to identify the correct purpose of clause 46(2).[11]

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[2] Appeal Book 10-11, 15.

[3] Appeal Book 13.

[4] (1936) 55 CLR 499 at 505.

[5] Appeal Book 11, 13-14.

[6] Appeal Book 12.

[7] Ibid.

[8] Appeal Book 12.

[9] Appeal Book 14.

[10] Ibid.

[11] Appeal Book 12.

[7] Further grounds are advanced in the Appellant's written submissions. There the Appellant contends the Deputy President erred:

- for the purpose of assessing whether the impugned term, was a discriminatory term, by using the wrong comparator;[12] and
- in making a number of factual errors.[13]

Consideration

Procedural fairness grounds

(a) Absence of an oral hearing

[8] It is convenient that we begin with the procedural fairness grounds of appeal. As earlier noted, the procedural fairness grounds contain two elements. The first concerns a contention that there was a denial of procedural fairness because the Appellant was denied the opportunity to participate in an oral hearing. For the purposes of responding to this part of the grounds of appeal the AFP sought leave to adduce evidence in the form of a statement of Mr Peter Murray McNulty, a solicitor in the employ of Ashurst, the solicitors acting for the AFP, in relation to the application for the approval of the Agreement. The Appellant did not oppose the admission of the statement into evidence and in the absence of an audio recording or a transcript of the telephone conference conducted by the Deputy President on 18 April 2018, we considered the matters canvassed in the witness statement to be relevant to the procedural fairness grounds of appeal. We granted leave accordingly, admitted the statement[14] and the Appellant cross-examined Mr McNulty.[15]

[9] The Appellant contends that the "standard procedure" for any court or tribunal is well known, which broadly speaking involves a directions hearing, the filing of written submissions and the conduct of an oral hearing.[16] He says that the Deputy President conducted a telephone conference (which approximates a directions hearing) but that during the conference the Deputy President had said that he hoped the matter could be resolved in full at the conference.[17] The Appellant contends that a hearing was not permitted and that he had to "push for" written submissions to be accepted.[18] He also contends that the procedure adopted by the Deputy President made no provision for reply submissions.[19]

[10] In combination, so the Appellant contends, the procedure adopted by the Deputy President denied him procedural fairness.[20] He says as a consequence the issues raised by him were not given a full hearing and anything that may have been unclear from his written

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[12] Appeal Book 19 at [14].

[13] Appeal Book 14-15 at [58]-[65].

[14] Exhibit R1.

[15] Transcript of Proceedings PN39 – PN111.

[16] Appeal Book 10 at [17].

[17] Appeal Book 11 at [18].

[18] Ibid.

[19] Appeal Book 11 at [18 a].

[20] Appeal Book 11 at [19].

submission or misunderstood when considered on the papers, was not able to be clarified or fully argued in an oral hearing.[21]

[11] In response to the application by the AFP for the approval of the Agreement, the Appellant filed a declaration in which he raised the issue that clause 46(2) of the Agreement was an unlawful term.[22] By email correspondence dated 8 March 2018, the bargaining representatives, including the Appellant, were invited to indicate whether they wished to be heard in relation to issues raised in their respective statutory declarations or whether they were content to rely upon the declarations alone.[23] At the request of some of the individual bargaining representatives, a notice of listing scheduling a conference before the Deputy President on 18 April 2018 to discuss the various issues raised by them was issued on 4 April 2018.[24]

[12] By email correspondence dated 12 April 2018 to the Deputy President's Chambers, the Appellant briefly outlined his concern about the Agreement and in so doing said, "I think my issue will require a hearing to be properly decided".[25]

[13] The conference proceeded on 18 April 2018. There is no audio recording or transcription of the conference proceeding. Mr McNulty gave evidence about his recollection of the conference which was as follows:

> "12. On 18 April 2018, I participated in a telephone conference before Kovacic DP. Mr Budd also participated in the conference. As far as I am aware, no transcript of the conference was prepared. I estimate that the conference went for approximately one and a half hours.
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> 13. During the conference before Kovacic DP, Mr Budd objected to my representation of the AFP. Kovacic DP heard some short oral submissions from Mr Budd on the objection.
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> 14. During the conference before Kovacic DP, each bargaining representative was invited to discuss the issues raised in their respective Form F18 and F18As. Mr Budd outlined the nature of his issue. Mr Budd referred to his allegation that the provision of additional maternity leave under the Enterprise Agreement was discriminatory. At one point during the conference Mr Budd stated that he had prepared a full written outline of submission that he wished to file.
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> 15. At one point during the conference, I recall Kovacic DP stated that men were not entitled to maternity leave. I do not recall Kovacic DP stating that "there was no discrimination issue".
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> 16. During the conference, I outlined a response to the issue of Mr Budd. At one point in the conference I referred to section 14 and section 31 of the *Sex Discrimination*

[21] Ibid.

[22] Exhibit R 1, Annexure A.

[23] Exhibit R1, Annexure B.

[24] Exhibit R 1, Annexure C.

[25] Exhibit R 1, Annexure E.

Act 1984 (Cth) (SD Act). At another point in the conference I referred to the additional maternity leave as being reasonable.

17. During the conference, Kovacic DP stated that Mr Budd would be provided with seven days to file a written submission in support of his issue. Kovacic DP stated that the AFP had a further seven days to file a written submission in response. I agreed with this statement. Mr Budd did not object to providing written submissions.

18. During the conference, Mr Budd did not object to Kovacic DP only conducting a telephone conference and not conducting a hearing.

19. During the conference, Mr Budd did not ask for a further conference. Mr Budd did not ask for a hearing or a further hearing.

20. Towards the end of the conference, Kovacic DP repeated the statement concerning written submissions. Once again, Mr Budd did not object to providing written submissions.

21. At that point in the conference, I asked Kovacic DP to advise when he expected to determine the application. I noted that the AFP had filed the application in December 2017. Kovacic DP stated that he would look to deal with the application as expeditiously as possible.

22. At the end of the conference I did not anticipate that there would be a further conference or a hearing. I understood that Kovacic DP would consider each of the written submissions and then publish a decision."[26]

[14] The Appellant did not give evidence about his recollection of the conference and he relied upon his contention of that which had occurred in the conference contained in the attachment to his notice of appeal.[27] The Appellant contended in effect that his version of events should be preferred to the sworn evidence given by Mr McNulty because his version of events, based on his recollection, was prepared much earlier in time, namely 21 May 2018 than that of Mr McNulty, whose witness statement was finalised on 20 July 2018.[28] Mr McNulty was cross-examined about his recollection of the conference and maintained his recollection as set out above. We prefer the sworn evidence given by Mr McNulty to the Appellant's contentions which were not the subject of sworn evidence nor exposed to cross-examination. Mr McNulty is a legal practitioner who would well understand the duty of a practitioner of candour and the serious consequences for a legal practitioner in giving evidence which is not candid or which is misleading. We therefore accept that during the conference before the Deputy President, the Appellant did not request a further hearing or conference.

[15] It is uncontroversial that during the conference the Deputy President made arrangements for the filing of submissions. These arrangements were confirmed in an email to

[26] Exhibit R1 at [12]-[22].

[27] Transcript of Proceedings PN 98, Appeal Book 11 at [18].

[28] Transcript of Proceedings PN106 – PN107.

the Appellant and Mr McNulty from the Deputy President on 18 April 2018.[29] Relevantly the arrangements were that:

> "Mr Budd is to provide any further written submissions to the Commission regarding the application for approval of the Australian Federal Police Enterprise Agreement 2017-2020 by no later than close of business on Tuesday, 24 April 2018, with the Australian Federal Police (AFP) to provide any submissions in reply by no later than close of business on Tuesday, 1 May 2018."[30]

[16] The Appellant filed a 17 page submission on 23 April 2018.[31] The AFP filed submissions in reply on 1 May 2018.[32]

[17] Although we accept, on the evidence of Mr McNulty, that the Appellant did not request an oral hearing during the conference on 18 April 2018, it is not apparent to us on the evidence that the Appellant's request that there be a hearing to deal with the issues, set out in his email correspondence of 12 April 2018, was dealt with during the conference other than by implication. That is, it may be inferred that the Deputy President decided not to accede to the earlier request and to proceed upon the basis of written submissions.

[18] In dealing with an application or a matter before the Commission under the Act, one of the early issues that a decision maker will usually need to address is whether to allow affected or interested persons to participate in the proceedings by way of written submissions, oral hearing or a combination of the two. It is well-settled that there is no right to an oral hearing in administrative proceedings.[33] Nor is it necessary in every circumstance that there be an oral hearing.[34] Whether an oral hearing is required in order to afford procedural fairness to an interested or affected person will depend upon a range of considerations including the statutory context under which the administrative proceeding is being conducted, the nature of the power that is being exercised, the issues that require determination, whether evidence is to be adduced, whether cross-examination of witnesses is required, whether there are conflicting accounts of the facts and whether there are credibility issues that may need to be determined.

[19] In exercising its powers and functions under the Act it is important to emphasise that the Commission may inform itself in relation to any matter in such manner as it considers appropriate.[35] It may, but is generally not obliged to, hold a hearing.[36] It may, but is not required to, invite oral or written submissions.[37] It may make decisions as to how, when and where a matter is to be dealt with.[38] In performing its functions and exercising its powers, the

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[29] Exhibit R1, Annexure H; Appeal Book 16.

[30] Ibid.

[31] Exhibit R1, Annexure I; Appeal Book 17-33.

[32] Exhibit R1, Annexure J; Appeal Book 35- 39.

[33] See for example *NAHF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 359 at 365 [33]; *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 40 5F CR 384; *Chen and Others v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591.

[34] See *WZARH v Minister for Immigration and Border Protection* [2014] FCAFC 137; (2014) 230 FCR 130 at [9] (appeal dismissed: *Minister for Immigration and Border Protection v WZARH* (2015)256 CLR 326)).

[35] Section 590(1).

[36] Section 590(2)(i); s.593(1). There is an exception in s.397 of the Act relating to unfair dismissal matters, which is not relevant to this matter.

[37] Section 590(2)(b).

[38] Section 589(1).

Commission must do so in a manner that is relevantly fair and just, quick, informal and avoids unnecessary technicalities, and is open and transparent.[39]

[20] In dealing with the AFP's application to approve the Agreement, the Deputy President was exercising relevant powers and functions in Part 2–4 of the Act. An object of that Part is relevantly one of ensuring that applications made to the Commission for approval of enterprise agreements are dealt with without delay.[40] There is nothing in that Part that compels or requires the Commission in dealing with an application for approval of an agreement to conduct an oral hearing.

[21] The circumstances in which the application was determined on the basis of the written material rather than by way of a combination of written material and an oral hearing relevantly are as follows:

- The Appellant raised the issue that clause 46(2) of the Agreement was an unlawful term in a statutory declaration filed in the Commission;[41]
- The Appellant was invited to indicate whether he wished to be heard in relation to issues raised in his statutory declaration or whether he was content to rely upon the declarations alone;[42]
- The Appellant briefly outlined his concern about the Agreement in email correspondence dated 12 April 2018 and in so doing said, "I think my issue will require a hearing to be properly decided";[43]
- A conference proceeded on 18 April 2018 in order to discuss the various issues raised by individual bargaining representatives, including the Appellant.[44] The Appellant participated in the conference;
- The Appellant was provided with an opportunity to expand on and explain the nature of his objection to the approval of the Agreement at the conference and he availed himself of the opportunity;[45]
- The Appellant referred at the conference to his preparation of a full written submission and his desire to file that submission;[46]
- The Appellant did not request either during the conference or subsequently, that the Commission conduct an oral hearing;[47]
- The material does not disclose that a serious factual dispute required determination or that any witness evidence raised credit or that credit was in issue;
- To the extent that the Appellant asserted that additional maternity leave was as a matter of "fact" primary caregiver leave, he did not propose or seek to lead any evidence to make good that assertion;
- The Appellant did not propose or seek to call any person to give evidence. Nor is it evident that any request to cross examine the maker of any statutory declaration that had been filed in the proceeding had been made;

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[39] Section 577.

[40] Section 171(b)(iii).

[41] Exhibit R1, Annexure A.

[42] Exhibit R1, Annexure B.

[43] Exhibit R1, Annexure E.

[44] Exhibit R1, Annexure C.

[45] Exhibit R1 at [14].

[46] Ibid.

[47] Exhibit R1 at [19],[28], [30] and [33].

- The Appellant was given the opportunity to file written submissions in support of his objection[48] and he filed a 17 page submission;[49] and
- It is not apparent that the Appellant made any request, either during the conference or subsequently, for an opportunity to file a written submission in reply to the reply submission of the AFP.

[22] In these circumstances we do not consider that the absence of an oral hearing resulted in any denial of procedural fairness to the Appellant.

[23] Although we consider that it would have been desirable for the Deputy President to have expressly determined the Appellant's request for an oral hearing (contained in the email correspondence of 12 April 2018), we do not consider overall having regard to the circumstances set out above that the Appellant was denied procedural fairness by reason of the absence of an oral hearing. The Appellant made comprehensive written submissions and the bases for his objection to the approval of the Agreement were set out therein. Contrary to the Appellant's contention, there was no obligation either by reason of "usual practice" of the Commission or otherwise to afford the Appellant opportunity to file reply submissions. It must be remembered that the AFP's case for the approval of the Agreement is contained in the material that it filed at the time of making the application, together with such additional material provided in response to concerns raised on behalf of the Deputy President by the agreement assessment team. That was the AFP's case in chief. As part of that case it did not identify any term of the Agreement as an unlawful term in response to question 2.14 of the employer statutory declaration accompanying the application for the approval of the Agreement. The Appellant objected to the approval of the Agreement and was given an opportunity to set out his opposition in written submissions. The AFP was given an opportunity to reply. That is consistent with the so-called "usual practice" of the Commission in dealing with matters, namely that an applicant first sets out its case, then an opposing party would then set out its case, and the applicant would reply. There is nothing controversial or unusual in the course adopted by the Deputy President. We are not persuaded that merely because the Appellant did not have an opportunity to amplify his lengthy written submissions that there has been a denial of procedural fairness. Moreover the Appellant has not identified any issue or issues that he would have raised,[50]or which were not already raised had he sought and been given the opportunity to file submissions in reply or had there been an oral hearing. It follows that so much of the grounds of appeal concerning the Deputy President's failure to hold an oral hearing are rejected.

(b) Apprehended bias

[24] The apprehended bias ground of appeal is founded on a comment said to have been made by the Deputy President during the telephone conference on 18 April 2018. The Appellant contends that it was clear during that conference that the Deputy President was predisposed against the Appellant's discrimination argument. The Appellant contended that the Deputy President explicitly suggested, without the benefit of argument, that maternity leave is by definition for women, and therefore there was no discrimination issue. The Appellant contends that in his decision the Deputy President came effectively to the same conclusion, and ignored the substance of the Appellant's written submissions. The Appellant

[48] Appeal Book 16.

[49] Appeal Book 17-33.

[50] Transcript of Proceedings PN219 – PN235.

contended that the circumstances give the distinct impression the Deputy President determined the issue in advance, with the reasons for decision merely a justification of the Deputy President's existing view, regardless of the arguments advanced by the Appellant.

[25] Mr McNulty gave evidence about the telephone conference before the Deputy President. Mr McNulty's evidence was relevantly, that at "one point during the conference, I recall Kovacic DP stated that men were not entitled to maternity leave. I do not recall Kovacic DP stating that "there was no discrimination issue"".[51]

[26] An allegation of apprehended bias will, in the usual course, be determined by the judicial officer or tribunal member against whom the allegation is levelled. Resolving the allegation will require an assessment of whether a fair-minded lay observer might reasonably apprehend that judicial officer or tribunal member might not bring an impartial and unprejudiced mind to the resolution of the relevant question to be decided and involves a two-step process.[52]

[27] The principles relating to disqualification for apprehended bias, particularly as they relate to a situation where a judicial officer or tribunal member has previously made a finding or stated an opinion about a particular issue, were usefully summarised by Middleton J in *Kirby v Centro Properties Limited (No 2)*[53] as follows:

> "The principles respecting disqualification for apprehended bias represent a balance between two competing policy considerations, namely the maintenance of public confidence in the judicial system, by ensuring that the public perceive that cases are decided only by reference to the evidence before the court, and the need for judges to discharge their duties unless good reason is shown.
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> The apprehension of bias principle is stated in *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [6] where Gleeson CJ, McHugh, Gummow and Hayne JJ said (subject to qualifications relating to waiver and necessity):
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> > "... a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."
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> The question is one of possibility (real and not remote), not probability. If there is an appropriate apprehension of bias, then the judge must disqualify himself or herself, no matter what case management considerations arise in the efficient and effective determination of a proceeding.
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> In *Ebner*, the majority in the High Court affirmed that the application of this test involves two steps. First, there must be identification of what it is that might lead a judge to decide the particular questions before him or her other than on the merits. Second, having identified the factors or circumstances that might influence a departure

[51] Exhibit R1.

[52] For example, see *George v Foster* [2012] FCAFC 148 at [72]; *CFMEU v LCR Group Pty Limited* [2016] FWCFB 916 at [29]; *United Voice v Broadspectrum (Australia) Pty Limited; Parker v Garry Crick's (Nambour) Pty Limited* [2018] FWCFB 279 at [11]-[12].

[53] (2011) 202 FCR 439.

from meritorious decision-making, it is "no less important" to articulate the "logical connection" between those factors and the fear that the judge might not apply proper judicial method (that is, merits based decision-making) in resolving the controversy on the facts and the law (at [8]).

The mere fact that a judge has made a particular finding on a previous occasion does not necessarily give rise to an apprehension of bias. Nevertheless, in some situations previous findings may lead to disqualification and "what kind of findings will lead to relevant apprehension of bias must depend upon their significance and nature": *Gascor v Ellicott* [1997] 1 VR 332 at 348 (Ormiston JA); see also at 342 (Tadgell JA with whom Brooking JA agreed); and see *Cabcharge* at [34].

However, as the majority observed in *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; (2011) 242 CLR 283, the lay observer is the "yardstick", and in this regard:

> "... the lay observer might *reasonably* apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature" (at [139]). (Emphasis in original.)

The application of these principles does not change merely because a judge expressly acknowledges at the hearing of the first proceeding that different evidence may be led in the later proceeding, casting new light on the facts he or her had found in the previous proceeding. This is assumed to occur in any event. Such an acknowledgment does not necessarily remove the impression created by reading the earlier judgment that the views there stated *might* influence the determination of the same issue in a later judgment: see *Laurie* at [145] per Heydon, Kiefel and Bell JJ. [Emphasis in reported judgement]

These principles must be carefully applied. It has been said that: "... disqualification flows from a reasonable apprehension that the judge might not decide the case impartially, rather than that he will decide the case adversely to a party": *Cabcharge* at [32]; *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 352 (Mason J). Needless to say, disqualification of a judge by reason of prejudgment must be "firmly established": *Cabcharge* at [25]; *Re JRL* at 352. Judges should not accede too readily to recusal by reason of apprehended bias.

To apply these principles in any given case is a matter of judgment and evaluation depending on the exact circumstances. Undoubtedly, the question of an apprehension of bias requires one to focus on the issues that the judge is called upon to decide - see eg *British American Tobacco Australia Ltd v Gordon* (2007) NSWSC 109 at [97] per Brereton J. No strict approach should be taken in identifying the legal and factual issues. The issues before a judge sought to be disqualified may well be different in some respects to those issues determined in the earlier proceeding. At the core of the inquiry is an examination of the legal and factual issues on foot and the extent to which previous findings may, in the eyes of the fair-minded lay observer, impact on the judge's ability to decide the matter other than on its merits.

> Because the test of apprehended bias involves "a fair-minded lay observer" who is observing a judge, the assumed characteristics of each need to be considered.
> A judge is trained and is required "to discard the irrelevant, the immaterial and the prejudicial": see *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527 (McHugh JA), adopted in *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568 at 584-585 (Toohey J); *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); and *Laurie* at [80] (Gummow J); and at [140] (Heydon, Kiefel and Bell JJ).
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> As to the "reasonable observer", in *Laurie* at [145], Heydon, Kiefel and Bell JJ affirmed that a reasonable observer would note the possibility of the evidentiary position changing between the previous proceeding and the subsequent proceeding.
> In *R v Burrell* (2007) 175 A Crim R 21; [2007] NSWCCA 79 at [11], McClellan CJ at CL (with whom the other members of the New South Wales Court of Criminal Appeal agreed) stated that:
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> > "The ordinary fair minded person understands that in the exercise of the judicial function it will be necessary, from time to time, for a judge to reconsider matters which have previously been considered or which may have been pronounced upon by that particular judge."
>
> In *Sengupta v Holmes* [2002] TLR 351, at [35]-[37], Laws LJ (Jonathan Parker LJ agreeing) stated that the fair-minded observer would recognise that a professional judge would be capable of departing from an earlier expressed opinion.
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> However, as I have indicated, applying these principles will be a matter of judgment and evaluation in the circumstances. The application of these principles to particular facts in earlier authorities, concerning as they do, the particular circumstances that may or may not have lead a judge to be disqualified, are not to be elevated to the "principles" to be applied. Nor is the application of the principles in any given case to be used as a gloss upon those principles. As the authorities demonstrate, including *Laurie*, the principles are relatively well established, but in the application of these principles reasonable minds may differ as to the result."[54]

[28] An aspect of the principles summarised above requires some elaboration in light of the contention advanced by the Appellant. It is not sufficient simply that the judicial officer or tribunal member may be called on to determine an issue about which an opinion has already been expressed. There must be a further element, namely that in considering the issue about which an opinion has earlier been expressed, there is a real possibility that in doing so the judicial officer or tribunal member will merely adhere to the earlier expression of opinion without giving fair consideration to the evidence and arguments advanced that might support a different conclusion. This was explained in by Hayne J in *Minister for Immigration v Jia Legeng*[55] as follows:

> "Saying that a decision-maker has prejudged or will prejudge an issue, or even saying that there is a real likelihood that a reasonable observer might reach that conclusion, is to make a statement which has several distinct elements at its roots. First, there is the

[54] Ibid at 441 – 443, [8]-[23].

[55] (2001) 205 CLR 507.

> contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. Secondly, there is the contention that the decision-maker will apply that opinion to that matter in issue. Thirdly, there is the contention that the decision-maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. Most importantly, there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.
>
> Often enough, allegations of actual bias through prejudgment have been held to fail at the third of the steps I have identified. In 1894, it was said that:
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> > "preconceived opinions - though it is unfortunate that a judge should have any - do not constitute such a bias, nor even the expression of such opinions, for *it does not follow that the evidence will be disregarded*." (Emphasis added)
>
> Allegations of apprehended bias through prejudgment are often dealt with similarly."[56] [Footnotes omitted]

[29] The contention advanced by the Appellant in substance involves the proposition that only the first two of the three elements identified by Hayne J are necessary to be made out in order to establish a reasonable apprehension of bias. The substance of that contention cannot be accepted. As was stated by Gaudron and McHugh JJ in *Laws v Australian Broadcasting Tribunal* [57]:

> "A reasonable bystander does not entertain a reasonable fear that a decision-maker will bring an unfair or prejudiced mind to an inquiry merely because he has formed a conclusion about an issue involved in the inquiry ... When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her."[58]

[30] Proceeding on the basis that the Deputy President made a statement or statements as asserted by the Appellant, it seems to us that all that the Deputy President was doing was formulating a proposition so that its correctness can be tested and expressing no more than a preliminary view or an inclination or disinclination towards an argument or conclusion. That this is so seems to us plain from the circumstances surrounding the making of the statement or statements. First, the statement of the Deputy President that "maternity leave is for women" though technically correct, was in circumstances where further submissions were to be made, little more than a preliminary indication of a disinclination towards accepting the objection of the Appellant. Secondly, the Deputy President's statement plainly invites the Appellant to provide further explanation of the grounds of objection. It is far better that the Appellant knows that the Deputy President has a preliminary view on a particular subject than not. Knowledge of the preliminary view gave the Appellant the opportunity to address it. Thirdly, given the Deputy President set down a timetable for the filing of submissions, his statement could not reasonably be regarded as an indication that the Deputy President might not bring

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[56] Ibid at 564, [185]-[186].

[57] (1990) 170 CLR 70.

[58] Ibid at 100.

an impartial or unprejudiced mind to the resolution of the objection. The opportunity given to the Appellant to file written submissions seems to us to be plainly an indication of a willingness on the part of the Deputy President to consider fully, without prejudgement, all grounds that the Appellant wished to raise. Fourthly, the email to the parties from the Deputy President on 18 April 2018 sent after the conference setting out the timetable for submissions and indicating an intention; to *"assist the parties in preparing their respective submissions"*[59] further emphasises the Deputy President's willingness to properly consider the unlawful terms grounds of objection the Appellant was raising.

[31] For these reasons the apprehended bias ground of appeal advanced by the Appellant must fail. In the circumstances it is unnecessary for us to deal with the additional point raised by the Respondent in opposition to this ground of appeal, namely that an allegation of apprehended bias must be raised with the Member of the Commission at first instance, and if it is not then waiver occurs.

Clause 46 of the Agreement – whether the Deputy President erred in being satisfied that the Agreement does not include any unlawful terms as required by s 186(4)

[32] The Appellant contended before the Deputy President, and again before us, that clause 46(2) is an unlawful term. Clause 46 of the Agreement provides:

> "**46 Maternity Leave**
>
> (1) An Employee is entitled to maternity leave as provided in the Maternity Leave Act (Commonwealth Employees) Act 1973.
>
> (2) An Employee with 12 months continuous service in the AFP, or a qualifying agency under the provisions of the Maternity Leave Act (Commonwealth Employees) Act 1973, and is eligible to access leave under this Act, is entitled to be paid for an additional four weeks maternity leave in excess of that provided by the Maternity Leave Act (Commonwealth Employees) Act 1973.
>
> (3) The payment of any paid maternity leave may be spread over a maximum period of 32 weeks at the rate of half the normal salary. Any paid maternity leave beyond the first 16 weeks does not break continuity of employment however, does not count as service for any purpose, unless required by legislation.
>
> (4) A period of maternity leave is not broken by or extended by Designated Public Holidays.
>
> (5) At the completion of a period of maternity leave under the Maternity Leave Act (Commonwealth Employees) Act 1973, an Employee is entitled to request, at least four weeks before the end date of the original leave period, an extension of unpaid leave of up to 12 months in accordance with the Fair Work Act."

[59] Appeal Book 16.

[33] After setting out the terms of the impugned provision, the relevant legislative provisions and summarising the competing contentions, the Deputy President turned to consider the issue as follows:

> "[27] Initially I would indicate that I do not accept Mr Budd's characterisation of the additional four weeks maternity leave provided for in cl.46(2) of the Agreement as "primary caregiver leave". This is because eligibility for additional leave is determined with regard to an employee's length of service with the AFP, or a qualifying agency under the provisions of the ML Act, and eligibility to access leave under the ML Act. In that regard I note that s.6 of the ML Act deals with absence from duty in relation to childbirth, with s.6(1) providing "A female employee who has become pregnant …" with an entitlement to be absent from duty for a period not exceeding 52 weeks. An employee who has been confined is not entitled to 12 weeks' paid maternity leave under the ML Act unless covered by the Act for a continuous period exceeding 12 months [s.6(3)]. This favours the Applicant's contention that the purpose of additional maternity leave is to provide additional leave to birth mothers to recover from giving birth. Significantly, the ML Act does not provide leave, either unpaid or paid, to males to whom the Act applies.
>
> [28] The practical effect of the operation of cl.46(2) of the Agreement is that an employee who is not eligible to access leave under the ML Act, irrespective of their sex, is not entitled to the additional four weeks maternity leave provided for in cl.46(2). More specifically, a female employee who does not have 12 months continuous service in the AFP, or a qualifying agency under the provisions of the ML Act, and is not eligible to access leave under the ML Act would not be entitled to the additional four weeks maternity leave provided for in cl.46(2) of the Agreement. In other words, it is these criteria rather than the sex of the employee which determine an employee's eligibility for additional maternity leave. This does not support a finding that the term is discriminatory on the basis of sex. For the same reason, I do not consider that cl.46(2) of the Agreement discriminates on the basis of sexual orientation, particularly in circumstances where I do not accept Mr Budd's characterisation of additional maternity leave as "primary caregiver leave", or family responsibilities.
>
> [29] Beyond this, I note that Mr Budd provided no evidence to support his assertion that cl.46(2) of the Agreement rested entirely on the sexist premise that men cannot or should not be primary carers.
>
> [30] With regard to the issue of indirect discrimination, as noted by Commissioner Bissett in *Melbourne University* there is some debate as to whether or not indirect discrimination is encapsulated by s.195 of the FW Act. This point was reiterated by the Applicant in its submissions which also highlighted that the matter was currently being considered by the Commission. Without expressing a view on that issue, I consider that cl.46(2) of the Agreement does not entail indirect discrimination for the following reasons. As noted by Vice President Lawler in *Australian Catholic University Limited T/A Australian Catholic University* reasonableness is a factor in determining whether a clause is indirectly discriminatory. As can be seen from above s.5 of the SD Act has effect to s.7B of that Act which provides a reasonable test in respect of indirect discrimination. The Applicant contended that as the intention of cl.46(2) was to provide birth mothers with an additional four weeks of maternity leave

to recover from giving birth, it was reasonable in all the circumstances to require the person accessing the leave to have given birth. I consider that contention compelling in circumstances where:

- eligibility for additional maternity leave is limited to those AFP employees who have 12 months continuous service in the AFP, or a qualifying agency under the provisions of the ML Act, and are eligible to access leave under the ML Act (which as previously noted is by virtue of s.6 of the ML Act limited to a female employee who becomes pregnant); and
- for the reasons previously outlined, I do not accept Mr Budd's characterisation of additional maternity leave as "primary caregiver leave".

[31] The reasonableness of the provision of additional maternity leave as per cl.46(2) of the Agreement is reinforced in my view by the Productivity Commission's findings in its report *Paid Parental Leave: Support for Parents with Newborn Children* which on the issue of child and maternal welfare included the following:

> "• There is compelling evidence of child and maternal health and welfare benefits from a period of absence from work for the primary caregiver of around six months and a reasonable prospect that longer periods (nine to twelve months) are beneficial.
>
> …
>
> • Maternal recovery can be prolonged and an early return to work may increase the risk of depression and anxiety. On maternal recovery grounds, the length of absence from work should be no less than 12 weeks and potentially up to six months with wellbeing after that time dependent more on women's preferences than recovery."

[32] I turn now to deal with Mr Budd's contention that cl.46(2) is an objectionable term as defined in s.12 of the FW Act. While s.351(1) of the FW Act provides that an employer must not take adverse action against an employee on the basis of the employee's sex or family or carer's responsibilities (among other grounds), s.351(2) of the FW Act provides that subsection (1) does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken. Section 351(3)(ad) of the FW Act specifies that the SD Act is such an anti-discrimination law. Beyond this, Item 1(d) of s.341(1) of the FW Act provides that an employer takes adverse action against an employee if the employer "discriminates between the employee and other employees of the employer". I note also that s.342(3)(a) of the FW Act provides that adverse action "does not include action that is authorised by or under this Act or any other law of the Commonwealth".

[33] As can be seen from the provisions of the SD Act set out above, s.5 of the SD Act in essence defines sex discrimination while s.14(2)(a) of the SD Act makes it "unlawful for an employer to discriminate against an employee on the basis of the employee's sex … in the terms and conditions of employment that the employer affords the employee". Section 14 of the SD Act appears in Division 1 of Part II of the SD Act. Finally, s.31 of the SD Act provides that "Nothing in Division 1 or 2 renders it unlawful for a person to discriminate against a man on the ground of his sex by

> reason only of the fact that the first-mentioned person grants to a woman rights or privileges in connection with pregnancy, childbirth or breastfeeding." In circumstances where I accept the Applicant's submission that the purpose of additional maternity leave is provide additional leave to birth mothers to recover from giving birth and do not consider that cl.46(2) discriminates on the basis of sex, I consider it unlikely that cl.46(2) of the Agreement would be found to constitute unlawful discrimination on the basis of sex as a result of s.31 of the SD Act.
>
> [34] Against that background, to the extent that cl.46(2) entails adverse action against male AFP employees on the basis that it discriminates between those employees and other employees, it is not adverse action within the terms of s.351(1) of the FW Act because the adverse action would by virtue of s.351(2)(a) of the FW Act not be unlawful under any anti-discrimination law in force in the place where the action is taken, i.e. the SD Act which is specified at s.351(2)(ad) of the FW Act.
>
> [35] As to Mr Budd's contention that by refusing to grant fathers who are primary caregivers additional maternity leave or some other type of equivalent leave the AFP is also taking adverse action against those employees on the basis of their family or carer's responsibilities, that contention is not sustained when regard is had to s.7A of the SD Act which defines discrimination on the ground of family responsibilities. More specifically and with particular regard to s.7A(a) of the SD Act, fathers who are primary caregivers are treated no different from other employees, whether male or female, without family responsibilities as neither is entitled to additional maternity leave under cl.46(2) of the Agreement.
>
> [36] The above analysis does not support a finding that cl.46(2) of the Agreement requires or permits, or has the effect of requiring or permitting, or purports to require or permit or has the effect of requiring or permitting a contravention of Part 3-1 of the Act which deals with general protections. This in turn does not support a finding that cl.46(2) of the Agreement is an objectionable term as per s.12 of the FW Act."[60] [Endnotes omitted]

[34] There are two aspects to the Appellant's attack on the Deputy President's decision concerning whether the Agreement contains unlawful terms. The first concerns whether clause 46(2) is a discriminatory term, the second, whether it is an objectionable term.

(a) Objectionable term

[35] It is convenient that we begin with the second aspect. The Appellant contends that the Deputy President did not property construe s.351 of the Act in determining the meaning of "discrimination" and whether the impugned term of the Agreement is an objectionable term.[61] The Appellant contends the Deputy President decided without giving reasons, and contrary to the Appellant's submissions, that ss.14 and 31 of the *Sex Discrimination Act 1984* (Cth) (SDA) are part of the definition of "discrimination" to be read into the Act.[62] The Appellant contends that the Deputy President should have (and we should) undertake a "full statutory

[60] [2018] FWCA 2776 at [27] – [36].

[61] Appeal Book 10 at [10]-[14].

[62] Ibid.

construction exercise" to determine the meaning of "discrimination" in the Act,[63]presumably for the purposes of determining whether the impugned term is an objectionable term.

[36] The Appellant also contended that the Deputy President failed to consider whether discrimination for the purposes of determining whether a term is an objectionable term included indirect discrimination.[64] He also says that the Deputy President failed to apply the decision in *Sayed v CFMEU*[65], and contends that if there is differential treatment because of an identified characteristic, that treatment is proscribed by s.351 of the Act.[66]

[37] In the context of that which the Deputy President decided, these submissions are misdirected and we reject them.

[38] Briefly stated, a term of an enterprise agreement will be an objectionable term, relevantly, if it requires or permits, or has the effect of requiring or permitting, or purports to require or permit conduct in contravention of Part 3–1 of the Act and will be so whether the conduct is directly permitted or required, or by necessary implication.[67]

[39] The relevant starting point, apart from the impugned term of the Agreement, is s.351 of the Act which provides:

> "**351 Discrimination**
>
> (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
>
> Note: This subsection is a civil remedy provision (see Part 4−1).
>
> (2) However, subsection (1) does not apply to action that is:
>
> (a) not unlawful under any anti−discrimination law in force in the place where the action is taken; or
>
> (b) taken because of the inherent requirements of the particular position concerned; or
>
> (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:
>
> (i) in good faith; and

[63] Ibid.

[64] Appeal Book 19 at [14].

[65] [2015] FCA 27.

[66] Appeal Book 19 at [16].

[67] Section 12; *Australian Industry Group v Fair Work Australia* (2012) FCR 399 at [17] – [19] and [66].

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an anti−discrimination law:

(aa) the Age Discrimination Act 2004;

(ab) the Disability Discrimination Act 1992;

(ac) the Racial Discrimination Act 1975;

(ad) the Sex Discrimination Act 1984;

(a) the Anti−Discrimination Act 1977 of New South Wales;

(b) the Equal Opportunity Act 1995 of Victoria;

(c) the Anti−Discrimination Act 1991 of Queensland;

(d) the Equal Opportunity Act 1984 of Western Australia;

(e) the Equal Opportunity Act 1984 of South Australia;

(f) the Anti−Discrimination Act 1998 of Tasmania;

(g) the Discrimination Act 1991 of the Australian Capital Territory;

(h) the Anti−Discrimination Act of the Northern Territory."

[40] As is evident from the above, the relevant conduct that is proscribed is the taking of "adverse action" by an employer against an employee or prospective employee because of particular attributes of that person.

[41] "Adverse action" takes its meaning from s.342 and relevantly item 1(d), which describes that adverse action is taken by an employer against an employee if the employer "discriminates between the employee and other employees of the employer". A corresponding description of adverse action taken by an prospective employer against a prospective employee appears in item 2(b).

[42] The meaning of "discriminates" in item 1(d) of s.342 of the Act was considered by Justice Gordon in *Klein v Metropolitan Fire and Emergency Services Board*[68] in which Her Honour determined that given its natural and ordinary meaning, the word "discriminates" in Part 3–1 is apt to include both direct and indirect discrimination, the latter of which is facially neutral, but may nevertheless amount to or result in less favourable treatment.[69]

[68] [2012] FCA 1402.

[69] Ibid at [92], [95].

[43] However action taken by an employer against an employee or prospective employee is not proscribed by s.351(1) if relevantly, the action is not unlawful under any anti-discrimination law in force in the place where the action is taken.[70] By s.351(3), the SDA is one of the enumerated laws which meet the description of an anti–discrimination law. It is true that for the purposes of determining whether the Agreement contained an objectionable term the Deputy President did not decide whether "discriminates" includes indirect discrimination. But in the circumstances of this case, this is not a fatal omission. It is uncontroversial that the SDA prohibits both direct and indirect discrimination,[71] relevantly in or in connection with employment and work on the ground of sex, sexual orientation, gender identity, intersex status, marital relationship status, pregnancy or potential pregnancy, breastfeeding and family responsibilities.[72]

[44] The Deputy President correctly in our view, concluded that s.351(3) had the effect of rendering that which was not unlawful under the SDA as not being prohibited by s.351(1) of the Act. To the extent that the impugned provision of the Agreement required or permitted, had the effect of requiring or permitting, or purported to require or permit "adverse action" by the AFP against an employee covered by the Agreement or against a prospective employee, because of that person's sex, family responsibilities or sexual orientation, that action was not unlawful under the SDA, and so the impugned term could not be an objectionable term.[73] Specifically, the Deputy President referred to s.31 of the SDA which provides that nothing in Division 1 or 2 renders "it unlawful for a person to discriminate against a man on the ground of his sex by reason only of the fact that the first mentioned person grants to a woman rights or privileges in connection with pregnancy, childbirth or breastfeeding".[74]

[45] The words "in connection with" when used in a statute are of a notoriously wide import. They are capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote.[75] The word "connection" is both wide and imprecise.[76] Ultimately the judgement of connection with the identified subject matter depends upon the statutory context in which the words are used.[77] A conclusion as to connection involves a value judgement[78] and for this reason references to other cases concerning the identification of a connection are seldom of value.[79] However it seems clear that the expression "in connection with" does not require a causal connection between the matters said to be connected.[80]

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[70] Section 351(2).

[71] Sex Discrimination Act 1984 (Cth) ss.5-7B.

[72] Sex Discrimination Act 1984 (Cth) Parts I and II, Division 1.

[73] [2018] FWCA 2776 at [34].

[74] Ibid at [33].

[75] *Collector of Customs v Pozzolanic Enterprise Pty Ltd* (1993) 43 FCR 280 at 288.

[76] *Collector of Customs v Cliffs Robe River Iron Associates* (1985) 7 FCR 271 at 275.

[77] *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469 at [29]; *Samsonidis v Commissioner of Australian Federal Police (No 2)* (2007) 163 FCR 111 at [14].

[78] *Samsonidis v Commissioner of Australian Federal Police (No 2)* (2007) 163 FCR 111.

[79] *Burswood Management Ltd v Attorney-General (Cth)* (1990) 23 FCR 144 at 146.

[80] *Perrett v Commissioner for superannuation* (1991) 29 FCR 581 at 592; *Commonwealth Superannuation Scheme Board of Trustees v Kitching* (2004) 139 FCR 272; *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469.

[46] The Deputy President concluded, we think correctly, that the impugned term provided a benefit in the form of additional leave to birth mothers[81] with the consequence that the term was protected by s.31 of the SDA, taking the term outside the area of proscribed discrimination in the SDA. Although the Deputy President did not expressly say so, it seems to us almost self-evident that a term in an agreement which provides for additional leave to birth mothers is a provision granting a woman a right "in connection with" childbirth within the meaning of s.31 of the SDA. The section applies whether the impugned term would otherwise directly or indirectly discriminate since the relevant proscription of discrimination in Division 1 of the SDA is concerned with both direct and indirect discrimination. It follows that as the impugned term permits conduct that would not be unlawful under the SDA, it does not require or permit, or have the effect of requiring or permitting, or purport to require or permit a contravention of, relevantly, s.351 of the Act. That being so, the Deputy President was correct to conclude that the impugned term is not an objectionable term within the meaning of s.12 of the Act.

[47] The Appellant's appeal grounds in so far as they concern whether clause 46(2) of the Agreement is an objectionable term fails.

(b) Discriminatory term

[48] We turn now to the discriminatory term aspects of the appeal. The Appellant advances a number of contentions in support of this aspect of the appeal. The Appellant contends that the Commission erred by rejecting the Appellant's submission that additional maternity leave is, as a matter of fact, primary caregiver leave.[82] In this connection the Appellant also says that the Deputy President erred in his reasoning that the MLCEA and clause 46(2) of the Agreement were legally connected.[83]

[49] The Appellant contends that the Deputy President failed to correctly characterise the nature of clause 46(2), and specifically that he failed to appreciate that the clause was not statutory or legislative but rather consensual in the exercise of the "industrial powers" of the Respondent.[84]

[50] The Appellant also contends that the Deputy President erred by using the wrong comparator. He contends that the appropriate comparison is as between a woman who meets all of the relevant service requirements and has finished her ordinary maternity leave and is about to begin additional maternity leave (week seven of the baby's life) and a man who meets all the relevant service requirements and is about to be or continue being, the primary caregiver at the equivalent time (week seven of a baby's life).[85]

[51] The Appellant also contends that s.195 of the Act has application to terms that indirectly discriminate and that the Deputy President erred in concluding that the impugned term of the Agreement did not indirectly discriminate and was not a discriminatory term.[86] Additionally the Appellant contends that the Deputy President was "wrong at law" to consider

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[81] [2018] FWCA 2776 at [33].

[82] Appeal Book 27 at [37].

[83] Ibid.

[84] Ibid.

[85] Appeal Book 27 at [37 c i].

[86] Appeal Book 10 at [14].

a report of the Productivity Commission titled "Paid Parental Leave: Support for parents with Newborn Children". The report was not tendered by the Appellant nor by the AFP in proceedings before the Deputy President. The Appellant contends that the Commission's proceedings are adversarial not inquisitorial and the Commission cannot tender its own evidence.[87]

[52] In approving an enterprise agreement the Commission must be satisfied *inter alia* that the Agreement does not include any unlawful terms.[88] An "unlawful term" includes a term of an enterprise agreement that is "a discriminatory term".[89] Section 195 sets out that which is a "discriminatory term" as follows:

> "**195 Meaning of discriminatory term**
>
> *Discriminatory term*
>
> (1) A term of an enterprise agreement is a discriminatory term to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
>
> *Certain terms are not discriminatory terms*
>
> (2) A term of an enterprise agreement does not discriminate against an employee:
>
> (a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or
>
> (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
>
> (i) in good faith; and
>
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
>
> (3) A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:
>
> (a) all junior employees, or a class of junior employees; or
>
> (b) all employees with a disability, or a class of employees with a disability; or

[87] Appeal Book 11 at [26].

[88] Section 186(4).

[89] Section 194.

(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply".

[53] Before the Deputy President and before us the Appellant asserted on a number of occasions that the additional leave for which provision is made in clause 46(2) of the Agreement is not maternity leave and is as a matter of fact primary caregivers leave. The apparent basis for this assertion is that the recovery need for a birth mother to take leave after birth, wanes at about seven weeks after the infant's birth. Thereafter, relevantly the birth mother or the father can continue to care for the infant as primary caregiver. Putting to one side the correctness of the underpinning assumption for the assertion and his expertise to make it, making and continuing to make a submission that something is so, does not make that a reality.

[54] The entitlement for which provision is made by clause 46 (2) of the Agreement is plainly for additional maternity leave. The Appellant did not lead evidence as to the nature of additional maternity leave as a matter of fact. The Deputy President can hardly be criticised for not taking into account a "fact" which the Appellant failed to establish by evidence, presumably thinking that an appropriate substitute was dogmatic repetition of an unsustainable mantra.

[55] The additional leave for which provision is made by clause 46(2) can only be accessed by a birth mother. This is made clear by the eligibility preconditions to the clause namely an entitlement under the MLCEA. A father will never be so eligible. Nor is a primary caregiver who is not the birth mother, for example birth mother's partner in a same-sex relationship, or the adoptive parents of an infant, able to access the additional leave. It is in this context that the Deputy President referred to the impugned provision of the Agreement and the MLCEA as being legally connected. That is the entitlement under clause 46(2) of the Agreement is conditioned by an entitlement under the MLCEA. The Appellant's submissions to the contrary are without merit and are rejected.

[56] No error is disclosed in the Deputy President's dismissal of the Appellant's argument as to the nature of the leave given by clause 46(2) of the Agreement, nor is there any error as to the Deputy President's description of the relationship between clause 46(2) and the MLCEA. Furthermore the Deputy President's discussion of the MLCEA and its interaction with clause 46(2) at [27] of the Decision does not disclose as the Appellant asserts, any mischaracterisation by the Deputy President of the nature of clause 46(2), or that he failed to appreciate that the clause was not statutory or legislative but rather consensual in the exercise of the "industrial powers" of the Respondent. The Deputy President was doing no more than making the plain and obvious point that the terms of clause 46(2) of the Agreement make eligibility for the additional leave conditional upon meeting particular eligibility requirements in the MLCEA. The reference to the particular terms of the MLCEA is made necessary to show how that statute operates in order to determine which employees become eligible to the additional leave for which clause 46(2) provides.

[57] Similarly, the contention that the Deputy President failed to identify the correct purpose of clause 46(2) in considering whether the term was a discriminatory term is also without merit.[90] As is evident from his Decision, the Deputy President accepted the AFP's submission below that the purpose of clause 46(2) is to provide additional maternity leave to

[90] Appeal Book 12 at [29 a].

birth mothers to recover from giving birth.[91] The Deputy President formed the view that the impugned clause only conferred benefits on an employee who could access maternity leave under the MLCEA, which relevantly, is confined to a birth mother. It necessarily follows from that conclusion that the clause did not confer a benefit on non-birth mothers or fathers. The Appellant's criticism is that the question of "purpose" should have been determined by the Deputy President without regard to the MLCEA. How this could possibly be so escapes us since the MLCEA is by reason of clause 46(2) of the Agreement, the door through which an employee must first have walked before the additional leave entitlement can be accessed.

[58] The Deputy President considered whether s.195 of the Act extended to indirect discrimination and noted that there was some debate over whether the provision so extended.[92] The Deputy President did not resolve the identified debate but instead proceeded on the assumption that s.195 extended to indirect discrimination. He then considered whether the condition in clause 46(2) that was said to give rise to indirect discrimination was reasonable.[93] There can be no criticism of the Deputy President in adopting this approach. In choosing to proceed in that way, the Deputy President did not interpret s.195, rather he assumed, favourably to the Appellant, that the provision had broader operation than being confined to terms of an agreement that directly discriminate.

[59] The Deputy President considered the operation of the SDA and concluded that s.7B contained a reasonableness test in respect of indirect discrimination.[94] The Deputy President interpreted s.7B in accordance with the ordinary meaning of the words used in the provision. He determined that reasonableness is a factor in determining whether a term is indirectly discriminatory. For this conclusion the Deputy President referred to Vice President Lawler's decision in *Australian Catholic University Limited*[95].

[60] We consider that the Vice President's conclusion is one that may be legitimately debated since on one view "discriminates" used in s.195 if that section applies to indirect discrimination, carries a meaning which, absent a statutory definition amounts to no more than a facially neutral term which imposes a facially neutral condition the result of which is unfavourable treatment of a person with a particular attribute. This may be so given that the notion of "reasonableness" as a defence to a claim of indirect discrimination is a statutory construct, rather than one that is to be found in the ordinary meaning of the word "discriminates". This view is made more compelling given the limited range of exceptions for which provision is made in s.195 and in particular noting that the Parliament chose expressly to exclude from the regime of discriminatory terms, if the reason a term of an enterprise agreement discriminates is the inherent requirements of a particular position concerned. Similar forms of exception can be found in a range of anti-discrimination legislation. These are apt to appropriately be called to aid in respect of both direct and indirect discrimination particularly in the area of disability discrimination.

[61] It is unnecessary for us to further express a concluded view about the issue discussed above. The appeal was not argued in this way. Indeed before the Deputy President the Appellant argued that if the Commission determined that the term did not directly

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[91] [2018] FWCA 2776 at [21] and [27].

[92] Ibid at [30].

[93] Ibid.

[94] Ibid.

[95] [2011] FWA 3693 at [14].

discriminate, then it indirectly discriminated and that the condition imposed was not reasonable within the meaning of s.7B of the SDA.[96] On appeal the Appellant quarrels with the Deputy President's conclusion that the impugned term did not indirectly discriminate.[97] In any event it is not necessary for us to determine this issue because we consider the result would be the same even if reasonableness is not a feature of "discriminates" in s.195 of the Act. This is because the legal concept of discrimination does not extend to different treatment appropriate to a relevant difference. The impugned provision in our view falls squarely within that description, that is, the term confers a benefit upon a birth mother, which is not conferred on any other person which is appropriate treatment having regard to the difference between a birth mother taking leave and a person who is not a birth mother taking leave, relevantly to care for an infant. This distinction in the concept of discrimination was explained by Justice Gaudron in *Street v Queensland Bar Association*[98]. That case overruled previous High Court authority which confined "discrimination" in s.117 of the Constitution to direct discrimination. *Street* was concerned *inter alia* with the scope of the protection against discrimination conferred by s.117. In dealing with that issue, Gaudron J said:

> "... The limits to the protection afforded by s. 117 are, in my view, to be ascertained by reference to the expression "disability or discrimination" rather than by identification of interests pertaining to national unity or by reference to the federal object attending s. 117.
>
> Although in its primary sense "discrimination" refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is "discrimination between"; the legal sense is "discrimination against".
>
> Where protection is given by anti-discrimination legislation, the legislation usually proceeds by reference to an unexpressed declaration that certain characteristics are irrelevant within the areas in which discrimination is proscribed. Even so, the legislation frequently allows for an exception in cases where the characteristic has a relevant bearing on the matter in issue. Thus, for example, the *Anti-Discrimination Act* 1977 (N.S.W.), whilst proscribing discrimination in employment on the grounds of race and sex, allows in ss. 14 and 31 that discrimination is not unlawful if sex or race is a genuine occupational qualification.
>
> The framework of anti-discrimination legislation has, to a considerable extent, shaped our understanding of what is involved in discrimination. Because most anti-discrimination legislation tends to proceed by reference to an unexpressed declaration that a particular characteristic is irrelevant it is largely unnecessary to note that discrimination is confined to different treatment that is not appropriate to a relevant difference. It is often equally unnecessary to note that, if there is a relevant difference, a failure to accord different treatment appropriate to that difference also constitutes discrimination.

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[96] Appeal Book 30-31 at [42]–[49].

[97] Appeal Book 30 at [42].

[98] (1989) 168 CLR 461.

The importance of a relevant difference was noted by Judge Tanaka in the *South West Africa Cases (Second Phase)*, in these terms:

> "... the principle of equality before the law ... means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal. ... To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists."

Similarly, the European Court of Justice said in *Re Electric Refrigerators:*

> "Material discrimination would consist in treating either similar situations differently or different situations identically."

In *State of West Bengal v. Anwar Ali* S.R. Das J. said in relation to Art. 14 of the Indian Constitution which guarantees equality before the law and the equal protection of the law:

> "All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation."

His Honour then went on to note that two requirements are necessary to avoid the prohibition against discrimination, namely,

> "(1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them."

The reference to "disability" in s. 117 must be construed in the context of the expression "disability or discrimination". Just as the legal concept of discrimination does not extend to different treatment appropriate to a relevant difference, so too, the absence of a right or entitlement does not constitute a disability if the right or entitlement is appropriate to a relevant difference."[99] [Footnotes omitted, underlining added]

[62] Brennan J made a similar observation:

"Although it is misleading to derive principles from discrimination cases decided under statutes which are not analogous to s. 117, I refer to these two turban cases as illustrations of two propositions which are inherent in the concept of discrimination. First, discrimination on a prohibited ground may be effected, albeit indirectly, when the expressed ground is a natural or ordinary concomitant of the prohibited ground. Secondly, where the concomitant ground has a rational connexion with an objective

[99] Ibid at 570 – 572.

> unrelated to the prohibited ground, it may not be discriminatory. That is because a class which is singled out for adverse treatment on a ground which has a rational connexion with an unrelated objective - Sikhs who refuse to wear hard hats when the wearing of hard hats is a bona fide occupational requirement, for example are relevantly unequal to others to whom the ground applies and the difference in treatment reflects the inequality. The absence of discrimination consists as much in the unequal treatment of unequals as in the equal treatment of equals. I need not repeat what I said on that topic in *Gerhardy v. Brown*, but I would add the observation of Vierdag, *The Concept of Discrimination in international Law* (1973), at p. 61:
>
> > "discrimination occurs when in a legal system no inequality is introduced in the enjoyment of a certain right, or in a duty, and as a result thereof no sufficient connexion exists between the unequalness of the subjects treated and the right or the duty."
>
> However, a difference in treatment on a ground which is rationally connected with an unrelated objective will nevertheless be discriminatory if the difference is not proportionate to the relevant inequality: see the reference to proportionality in the *Belgian Linguistic Case* [No.2]."[100] [Footnotes omitted, underlining added]

[63] It may be that Their Honours were making the point that differential treatment which is reasonable in the circumstances will not be direct or indirect discrimination. In our view the provision in the Agreement which confers a benefit of additional paid leave to birth mothers described as additional maternity leave, which is not available to a primary care giver of an infant who is not a birth mother is appropriate differential treatment having regard to the difference between the primary caregiver who is birth mother and a person who is also a primary caregiver but is not a birth mother. In our view the ultimate conclusion reached by the Deputy President that the impugned term did not indirectly discriminate was correct.

[64] The further ground advanced by the Appellant is that is that the Deputy President took into account an irrelevant consideration, that is, the report of the Productivity Commission on Paid Parental Leave titled "Paid Parental Leave: Support for parents with Newborn Children" (PC Report).[101]

[65] The Deputy President considered the PC Report in assessing the reasonableness of the condition in clause 46(2) in considering whether the impugned clause was indirectly discriminatory.[102] We agree with the AFP's contention on appeal that the Deputy President's reference to the PC Report was merely to, as the Deputy President himself described, reinforce his view[103] that the condition was reasonable.[104]

[66] In any event, the PC report was relevant to the Deputy President's assessment of the reasonableness of a condition for the purposes of determining whether the impugned term is indirectly discriminated. To the extent that the Appellant suggests that the Deputy President

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[100] Ibid at 510.

[101] Appeal Book 14 at [48] – [50].

[102] [2018] FWCA 2776 at [31].

[103] Ibid; We note that the reasons for reaching the view that the term or condition was reasonable were earlier set out by the Deputy President at [30].

[104] Outline of submissions of Respondent, 20 July 2018, at [35].

should have given parties an opportunity to make submissions on the PC report, we do not consider in the circumstances of this case that the failure to do so should provide a basis for the appeal to succeed. First, as the Deputy President had already reached a conclusion as to reasonableness independently of the PC Report, it was not material to his conclusion. Secondly, by whatever path the Deputy President reached his ultimate conclusion that the term did not indirectly discriminate, for the reasons we have already stated, we consider that conclusion to be correct.

[67] We turn now to the Deputy President's conclusion that the impugned term did not directly discriminate. In this regard the Deputy President said:

> "[28] The practical effect of the operation of cl.46(2) of the Agreement is that an employee who is not eligible to access leave under the ML Act, irrespective of their sex, is not entitled to the additional four weeks maternity leave provided for in cl.46(2). More specifically, a female employee who does not have 12 months continuous service in the AFP, or a qualifying agency under the provisions of the ML Act, and is not eligible to access leave under the ML Act would not be entitled to the additional four weeks maternity leave provided for in cl.46(2) of the Agreement. In other words, it is these criteria rather than the sex of the employee which determine an employee's eligibility for additional maternity leave. This does not support a finding that the term is discriminatory on the basis of sex. For the same reason, I do not consider that cl.46(2) of the Agreement discriminates on the basis of sexual orientation, particularly in circumstances where I do not accept Mr Budd's characterisation of additional maternity leave as "primary caregiver leave", or family responsibilities.
>
> [29] Beyond this, I note that Mr Budd provided no evidence to support his assertion that cl.46(2) of the Agreement rested entirely on the sexist premise that men cannot or should not be primary carers."[105]

[68] The Appellant contends that the Deputy President erred in his conclusion and in particular that he used the wrong comparator for the purposes of determining whether the term discriminated. The Appellant contends that the Deputy President should have compared the position of:

- A woman who meets all the relevant service requirements and has finished her ordinary maternity leave and is about to begin additional maternity leave (week seven of the baby's life); and
- A man who meets all the relevant service requirements and is about to be (or continues being) primary caregiver at the equivalent time (week seven of the baby's life).[106]

[69] Direct discrimination is concerned with the treatment of a person less favourably in the same or not materially different circumstances because of a particular protected attribute of the person. So far as s.195 of the Act is concerned, a term of an enterprise agreement will discriminate in the sense that the term treats less favourably an employee covered by the enterprise agreement because of, or for reasons including, the employee's protected attribute

[105] [2018] FWCA 2776 at [28] – [29].

[106] Appeal Book 27 at [34].

identified therein. Whether a term is a discriminatory term in that it directly discriminates against an employee, is to be assessed in our view as follows.

[70] One must first determine the position of the employee covered by the enterprise agreement with the protected attribute. Secondly, one must determine the position of an employee covered by the enterprise agreement without the protected attribute or with a different attribute. Thirdly, there must be identified differential or less favourable treatment by or as a necessary consequence of the operation of the term of the enterprise agreement in circumstances that are the same or not materially different. Fourthly, one must consider whether the differential or less favourable treatment is because of, or for reasons that include the first employee's attribute. Finally, one must consider whether one or more of the exemptions identified in s.195 are applicable. Terms of an enterprise agreement apply subject to the various anti-discrimination laws identified in s.27(1A).[107] It may therefore also be necessary to consider the operation of the Agreement subject to relevant anti-discrimination laws.

[71] Relevantly for the purposes of disposing with the ground of appeal, it is necessary to consider the position of an employee covered by the Agreement with the relevant attribute (of sex, sexual orientation or family responsibilities) in one set of circumstances and compare it to the position of an employee covered by the Agreement without the relevant attribute in the same or not materially different circumstances.

[72] On the Appellant's submission, he does not contrast the positions of employees with and without the relevant attribute (sex), that is comparing female employees to male employees. Put another way he does not seek to contrast the position of employees with one attribute (female sex) to the position of employees with a different attribute (male sex). Instead, he seeks to compare the positions of a subclass of employees, some with and some without the relevant attribute, that is, female who is a birth mother after a particular period of time and a person who is primary caregiver after a particular period of time. The Appellant does not contrast on the basis of the relevant attribute. Moreover, he does not contrast the position of comparator employees in the same or not materially different circumstances. Rather the Appellant seeks to contrast the position of employees in different circumstances, relevantly the circumstances of a birth mother to the circumstances of a primary caregiver who is not the birth mother of the infant. These circumstances are plainly materially different.

[73] We deal briefly with the Appellant's contention that the term discriminates on the ground of or for reasons including the three identified attributes, namely sex, sexual orientation and carer's responsibilities, by reference to the correct comparator. The first identified attribute is in essence a claim of that the impugned term discriminates against an employee covered by the Agreement on the ground of sex. When one considers the position of the employee with the protected attribute, a male employee, as is evident under the term cannot obtain additional maternity leave. This is because he is not entitled to relevant leave under the MLCEA. The position of an employee covered by the Agreement without the attribute, a female employee, is that she may or may not under clause 46(2) of the Agreement be entitled to additional maternity leave. A birth mother will be entitled to the additional maternity leave because an eligible birth mother is entitled to leave under the MLCEA. However an employee covered by the Agreement who is a mother but not a birth mother, for example a mother of an adopted, of a surrogate child or the female partner of a birth mother,

[107] Section 29 of the Act.

is not entitled to that additional maternity leave under the Agreement because that employee is not entitled to relevant leave under the MLCEA.

[74] It is clear on the face of the impugned term that some employees who are women and covered by the Agreement are treated in the same way as employees who are covered by the Agreement and who are men. Some women who are mothers are unable to access the additional maternity leave under the Agreement. To the extent that there is some differential treatment as between an employee who is a man and an employee who is a woman and birth mother, the differential treatment is not because of the male employee's sex. There is no single beneficial treatment of employees who are women under the impugned term. As is evident from the above, the treatment of employees who are women differs as between those who are birth mothers and those who though are mothers, are not birth mothers. Put another way the treatment of a primary caregiver who is a male employee compared to a female employee in the same circumstances, that is where neither is a birth mother, is the same irrespective of their sex. Neither is entitled to the additional leave and their treatment under the impugned term does not differ because of sex. The treatment under the impugned term differs because of the circumstances, namely giving birth to a child. It is for this reason that paid maternity leave provisions in state industrial instruments have been held to not discriminate on the ground of sex or parental/carer's responsibilities.[108]

[75] On the same analysis the term does not discriminate because of sexual orientation. The position of an employee with a particular sexual orientation is that the employee may or may not be entitled to additional maternity leave under the impugned term. An employee who is a birth mother with the same sexual orientation as another employee who is not a mother but is a primary caregiver of an infant, is entitled to the additional maternity leave. However the non-birth mother or father primary caregiver employee is not so entitled. Mothers and fathers of an adoptive infant and for that matter a grandparent in the capacity of primary caregiver with the same sexual orientation as an employee who is a birth mother are not entitled to the additional maternity leave under the impugned term. An analysis of the entitlement conferred by the impugned term when comparing one employee with a sexual orientation and the other with a different orientation will yield the same result. Such employees may or may not be entitled to additional maternity leave under the impugned term. It is apparent that there is no differential treatment between the comparators, that is as between people with the attribute of sexual orientation and the people without the attribute or with a different orientation. Rather the differential treatment is the result of the relevant circumstance, that is, one employee has given birth to a child, the other has not.

[76] The result of applying the analysis undertaken above is the same as concerns the attributes of family or carer's responsibilities.

[77] In our view the Deputy President correctly concluded that the impugned term did not directly discriminate against an employee covered by the Agreement because of or for reasons including the employee's sex, sexual orientation, family or carer's responsibilities. The grounds of appeal and contentions directed to this conclusion are rejected.

[78] The Appellant also contends that the Deputy President made some erroneous factual findings.

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[108] See *New South Wales Lotteries Corporation and Public Service Association and Professional Officers Association Amalgamated Union of New South Wales* [2013] NSWIRComm 143 at [37] – [39].

[79] First, the Appellant contends that the Deputy President accepted AFP's contention that a woman needs more than six weeks to recover from birth, which, the Appellant says is wrong as a matter of fact.[109] He asserts that recovery from non-complicated childbirth is complete by six weeks. The correctness of this assertion is a matter that we need not decide. It is clear that the Deputy President made no such factual finding. The reference to the contention that maternal recovery can be prolonged at [31] of the Deputy President's Decision is self-evidently a quote from the PC Report, and not a factual finding made by the Deputy President. As we have already discussed the Deputy President did not ground his conclusion as to reasonableness on the PC Report but simply observed that it "reinforced" his earlier (at [30]) conclusion that the term did not indirectly discriminate because the condition imposed was reasonable.

[80] Secondly, the Appellant points to passages of the PC report reproduced in the Deputy President's decision.[110] He asserts that these passages do not in fact support the Deputy President's conclusion.[111] So far as the Appellant's contention concerns the first dot point at [31] of the Deputy President's Decision, we consider his contention to be correct. The first dot point quoted concerns the position of "primary caregivers", who can be, *inter alia*, fathers, mothers or birth mothers. However, the second dot point quoted is squarely related to maternal recovery. The Appellant did not advance any argument nor did he seek permission to lead any fresh evidence on appeal, to suggest that the second dot point was incorrect. Though the first dot point may not "reinforce" the Deputy President's earlier conclusion, it is plain that the second does. In any event, for the reasons earlier stated the PC report was not material to the Deputy President's conclusion. Therefore for those same reasons, the Appellant's critique of the PC Report[112] does not disclose error on the part of the Deputy President in the ultimate conclusion.

Conclusion

[81] For the reasons stated we are not persuaded that the Appellant has made out a case of arguable error. It will rarely be the case that permission to appeal will be granted absent an arguable case of error. No arguable case of error of the kind identified in *House v King*[113] has been established, nor are we persuaded that the decision at first instance is attended by sufficient doubt to warrant its reconsideration. We do not consider the decision manifests any manifest injustice. The result is not in our view counterintuitive and it is not disharmonious with other decisions of the Commission. Nor do we consider that the public interest is enlivened. But even if we were minded to grant permission to appeal, for the reasons stated we would dismiss the appeal. The Deputy President's ultimate conclusion was in our view correct.

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[109] Appeal Book 24 at [33].

[110] [2018] FWCA 2776 at [31].

[111] Appeal Book 12 at [29].

[112] Appeal Book 11–12.

[113] (1936) 55 CLR 499.

Disposition of the appeal

[82] Permission to appeal is refused and we so order.

DEPUTY PRESIDENT

Appearances:

Mr C. Budd on his own behalf.
Mr A. B. Gotting of counsel, with permission, for the Respondent.

Hearing details:

2018.
Sydney:
July 24.

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<PR700943>