[2023] FWC 2427[Note: An appeal pursuant to s.604 (C2023/6948) was lodged against this decision - refer to Full Bench decision dated 3 May 2024 [[2024] FWCFB 234] for result of appeal.]

DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Australian Federation of Air Pilots
v
Surveillance Australia Pty Ltd T/A Leidos - Airborne Solutions
(C2023/4181)

COMMISSIONER CONNOLLY MELBOURNE, 24 OCTOBER 2023

Alleged dispute about any matters arising under the enterprise agreement and the NES; [s186(6)] – the application of individual flexibility arrangements (IFA) under the agreement – whether or not employees' annual leave entitlement can be varied by an IFA.

Introduction

[1] On 18 July 2023, an application was lodged by the Australian Federation of Air Pilots (**AFAP** or the **Applicant**) under s.739 of the *Fair Work Act 2009* (the Act) for the Fair Work Commission (the Commission) to deal with a dispute under the Dispute Resolution Procedure contained in clause 1.12 of the *Surveillance Australia Pilot and Observer Enterprise Agreement 2016* (**the Agreement**). The Respondent in this matter is Surveillance Australia Pty Ltd T/A Leidos – Airbourne Solutions, the employer covered by the Agreement.

[2] The Agreement was approved by the Commission on the 12 September 2017. It commenced operation on the 19 September 2017 and reached its nominal expiry date on 30 June 2020. The AFAP is covered by the Agreement and acts for employees covered by the Agreement. Both the AFAP and Airbourne Solutions indicate they are in the process of negotiating a replacement agreement.

[3] In its application, the AFAP indicated:

> *"This dispute is about the application of clause 1.14 of the Agreement (Individual Flexibility Arrangements) ("IFA") as it relates to employee's annual leave entitlement.*
>
> *The applicant asserts that annual leave cannot be varied by IFA.*
>
> *The respondent asserts that any entitlement in the agreement can be varied by IFA, including annual leave.*

The respondent is seeking to impose clause 1.6 of the Agreement – Annual Leave – whereby annual leave is discharged as part of the employee's period of rostered days off.

The applicant asserts that the respondent's view is misconceived, having regard to:

- *the terms of the Agreement at clause 1.14;*
- *the scope of matters permitted to be subject to an IFA are those contained in clause 1.14.1.1(a)-(3) of the Agreement;*
- *sections 202-204 of the Act."*[1]

[4] Further in its application, the AFAP indicated that the relief it sought was:

"a binding determination that annual leave;
(i) is beyond the scope of clause 1.14.1.1(a)-(e) of the Agreement; and
(ii) therefore cannot be varied by an IFA."[2]

[5] On 20 July 2023, my Chambers issued directions to the parties seeking an initial written response to the dispute from the Respondent and the matter was listed for a Conference on Thursday, 28 July 2023.

[6] The response from Surveillance Australia indicated that the parties were currently negotiating for a replacement agreement and that in the interim they were facing a service shortage of Pilots, which they were seeking to address by implementing "fly-in-fly-out" (FIFO) arrangements with a number of Pilots. Noting that the Agreement did not prohibit or contemplate FIFO work, Surveillance Australia indicated they had proposed individual flexibility arrangements (IFA) pursuant to clause 1.14 to facilitate the work.

[7] In early 2023, Surveillance Australia proposed a memorandum of understanding (MOU) to the AFAP to facilitate a variation to the terms of the Agreement which would form the basis of the proposed IFA's and operate as a position for dealing with FIFO work in the proposed new agreement.

[8] This initial MOU failed to include reference to proposed variations of hourly flying allowances and daily meal and incidental allowances. Upon discovery of this error, estimated to equate to some $30,000.00 per annum per pilot, an amended MOU was proposed.

[9] In the revised position put to the AFAP, Surveillance Australia apologised for its error and indicated its views that the revised IFA proposal met the better off overall test required under clause 1.14.3.4(c) of the Agreement. Unfortunately, discussions between the AFAP and the Respondent were unable to reach a resolution and the AFAP initiated the internal dispute resolution procedure under the Agreement. Subsequently, after following the dispute resolution procedure without a resolution, the parties agreed that the Agreement's procedure had been followed and the Commission held jurisdiction to deal with this dispute.

[10] Surveillance Australia further noted that while the AFAP has continued to agitate this dispute, the company has been able to largely resolve concerns raised by the FIFO Pilots with whom it has proposed IFA's and an IFA has subsequently been signed by 4 of 7 of the affected Pilots.

[11] As to the merits of the AFAP's application, the initial submissions of the Respondent were that the dispute is misconceived. Specifically, that:

> *"Clause 6.1.3 of the Agreement provides that "annual leave will be taken at times agreed between the Employee and Employer". It is accordingly open to Airbourne Solutions to reach agreement with the pilots about when they will take their annual leave.*
>
> *For convenience, it has included the proposed agreement about the taking of annual leave during (paid) off swings in the context of matters set out in the IFA. To say that a document which sets out an IFA cannot also deal with ancillary matters that are able to be generally agreed between the parties, takes an unreasonably narrow view of the requirement for the making of an IFA."*[3]

[12] In its response, the Respondent also referred to the decisions of Judge Lucev in the matter of *Fong v Halliburton Australia Pty Ltd [2019] FCA 2885 (**Fong**),* which relevantly held in respect of a requirement of an employee to discharge their annual leave during their paid off swing.

[13] Noting that the pilots in this matter are not award/agreement free, s.93(3) of the Act contemplates scope for a modern award or enterprise agreement covered employee to be required to take their annual leave, the Respondent submitted that:

> *"Airbourne Solutions relies on the decision of Judge Lucev in* <u>*Halliburton*</u> *to say that if a requirement to take annual leave during an off swing is reasonable, an agreement to take annual leave during an off swing is reasonable, and does not inherently offend the National Employment Standards as the AFAP contends."*[4]

The Conference

[14] At 10:00 am on 28 July 2023, I convened an initial conference by video to discuss this dispute with the parties.

[15] At the conference, AFAP was represented by Mr Jarad Marks and Mr David Stephens. Surveillance Australia was represented by Ms Alexandra McFadyen, Head of Employee and Industrial Relations and Mr Tom Smallwood, Head of Flight Operations, along with Ms Katie Sweatman (Of Counsel). In accordance with s.596 of the Act, Ms Sweatman sought leave to appear and was granted permission, noting no objections were made.

[16] The parties presented a brief outline of their positions and indicated a willingness to undertake further discussions as to the possible terms of an IFA and FIFO working arrangements that had the potential to resolve the dispute. That being the case, the parties were encouraged to engage in further discussions.

[17] A second conference was convened on 4 August 2023 with the same representatives. At this conference, the parties provided an update to the Commission that discussions were unable to resolve the dispute and requested the matter be programmed for determination.

[18] I sought confirmation from both parties as to the question to be determined by the Commission. Both parties confirmed that the question to be determined by the exercise of the arbitral powers of the Commission is:

'Whether the Individual Flexibility Arrangements ("IFA") provided in Clause 1.14 of the Surveillance Australia Pilot and Observer Enterprise Agreement 2016 ("Agreement") can be applied to employees' annual leave entitlements.'

[19] Subsequently, my Chambers issued Directions on 11 August 2023 for the filing of submissions and evidence and the matter was listed for a Hearing to arbitrate the dispute on Wednesday, 20 September 2023.

[20] Considering all the evidence and submissions along with all of the circumstances in this matter, I have determined that the answer to this question is in the negative. The reasons and consideration for the making of this decision are set out in the paragraphs below.

Legislation

[21] This dispute is seeking the exercise of the Commission's arbitral powers under s.739 of the Fair Work Act 2009. Section 739(4) relevantly provides;

"(4) "If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so."

[22] The relevant Dispute Resolution Procedure is contained in clause 1.12 of the Agreement. At 1.12.7, this clause relevantly provides:

"1.12.7.1 FWC will first attempt to resolve this dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion, making a recommendation; or using interim orders; and

1.12.7.2 if FWC is unable to resolve the dispute at the first stage, FWC may then:

(a) arbitrate the dispute; and

(b) make a determination that is binding on the parties.

Note: If FWC arbitrates the dispute, it may also use the powers that are available to it under the Act."

[23] **Clause 1.14 – Flexibility Provisions** of the Agreement is set out below:

"1.14.1 The Employer and an Employee covered by this agreement may agree to make an individual flexibility arrangement (IFA) to vary the effect of terms of the Agreement if:

1.14.1.1 the Agreement deals with 1 or more of the following matters:

(a) arrangements about when work is performed;

(b) overtime rates;

(c) penalty rates;

(d) allowances

(e) leave loading; and

1.14.1.2 the arrangements meets the genuine needs of the Employer and Employee in relation to one or more of the matters mentioned in paragraph 1.14.1.1; and

1.14.1.3 the arrangement is genuinely agreed to by the Employer and Employee.

1.14.2 The Employer must ensure that the terms of the individual flexibility arrangement;

1.14.2.1 are about permitted matters under section 172 of the Act; and

1.14.2.2 are not unlawful terms under section 194 of the Act; and

1.14.3 result in the Employee being better off overall than the Employee would be if no arrangement was made.

1.14.3 The Employer must ensure that the IFA:

1.14.3.1 is in writing; and

1.14.3.2 includes the name of the Employer and Employee; and

1.14.3.3 is signed by the Employer and Employee and if the Employee is under 18 years of age, signed by a parent or guardian of the Employee; and

1.14.3.4 includes details of:

(a) the terms of the Agreement that will be varied by the arrangement; and

(b) how the arrangement will vary the effect of the terms; and

(c) how the Employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

1.14.3.5 states the day on which the arrangement commences.

1.14.4 The Employer must give the Employee a copy of the IFA within 14 days after it is agreed to.

1.14.5 The Employer or Employee may terminate the IFA:

1.14.5.1 by giving no more than 28 days written notice to the other party to the arrangement;

1.14.5.2 if the Employer and Employee agree in writing – at any time.

1.14.6 Where requested to do so by an Employee subject to an IFA, the Employer must provide copies of the IFA made under this clause to the Employee's Union or other representative."

[24] Relevantly, **Clause 6.1 Annual Leave** provides for the annual leave entitlements and conditions of employees under the Agreement. The provisions of this clause are set out below:

"6.1 ANNUAL LEAVE

6.1.1 A permanent employee is entitled to six weeks (42 calendar days) of paid annual leave (inclusive of Saturday, Sundays and Public Holidays) for each completed year of service. Annual leave will accrue and be credit on a pro-rata basis in accordance with legislative requirements. Normally annual leave must be taken in the year in which it accrues.

6.1.2 For rostering purposes, a weeks annual leave will be 7 calendar days paid at 40 hours.

6.1.3 Annual leave will be taken at times agreed between the Employee and the Employer.

6.1.4 In recognition that the company has a right to manage leave balances, the following approach will be followed:

6.1.4.1 The company may remind employees of leave balances at 42 days (6 weeks) accrual and advise that a leave request should be submitted by the accrual of 63 (9 weeks) to reduce the balance to or below 42 days.

6.1.4.2 At 63 days (9 weeks) balance, and in the absence of receipt of a Leave Application, the company will follow up the employee and seek a leave application to reduce the employees balance to 42 days as a minimum, however, where no application is subsequently received the company may roster the employee leave (to suit operational requirements) back to a balance of 42 days.

6.1.5 An Employee employed on the Furgo LADS contract will take annual leave during the Christmas stand down period and as promulgated by the Client.

6.1.6 Any annual leave accrued but not taken will be paid out on termination.

6.1.7 If an Employee is recalled to duty whilst on annual leave, the Employee will be credited two days annual leave for each day recalled duty.

6.1.8 Where requested by an employee, the Employer will endeavour to roster Employees two RDO's either immediately before or after, or one day immediately before and immediately after, a period of annual leave greater than 14 consecutive days. However, where an Employee applies for and is approved leave that is equal to or greater than a full year entitlement, the Employee shall have a right to take two rostered

days free of duty immediately before or after, or one day immediately before and one day immediately after the leave period if the Employee so requests.

6.1.9 The Employer will respond by approving or rejecting an Employees application for annual leave within 14 calendar days or receiving such an application from the Employee. If the application is neither approved nor rejected, the Employee will be contacted with 14 days and the application held pending clarification within 28 days.

6.1.10 An Employee may cash out annual leave with Employer approval. However, annual leave must not be cashed out if it results in the Employees remaining accrued entitlement to paid annual leave being less than 4 weeks (28 days). The Employee's request to cash out annual leave must be in writing.

6.1.11 Where an Employee becomes seriously ill or injured during annual leave for a period of not less than 7 consecutive days the duration of such illness/injury will be counted as personal/carers leave. Providing that firstly the Employee will advise the Employer as soon as practicable after the commencement of the illness and secondly produces proof of illness to the Employer within 7 days of return to duty.

Every consideration will be given to granting equivalent substitute recreation leave in the manner requested by the Employee."

[25] Annual Leave is also provided for as a protected entitlement of all employees under the Act in the **National Employment Standards (NES)** in s.87 – Entitlement to Annual Leave. The specific NES provisions for how annual leave can be taken are provided for in s.88 and are set out below:

"88 Taking paid annual leave

(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave."

[26] **Flexibility Terms** are mandatory requirements of agreements registered under the *Act*. Sections 202(1) – 204 specifies how these requirements are to be met. Relevantly, s.202 provides the following:

"202 Enterprise agreements to include a flexibility term etc.

Flexibility term must be included in an enterprise agreement

(1) An enterprise agreement must include a term (a **flexibility term**) that:

(a) enables an employee and his or her employer to agree to an arrangement (an **individual flexibility arrangement**) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and

(b) complies with section 203.

Effect of an individual flexibility arrangement

(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:

(a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and

(b) the arrangement is taken to be a term of the agreement.

(3) To avoid doubt, the individual flexibility arrangement:

(a) does not change the effect the agreement has in relation to the employer and any other employee; and

(b) does not have any effect other than as a term of the agreement.

Model flexibility term

(4) If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.

(5) The regulations must prescribe the **model flexibility term** for enterprise agreements.

Submissions

[27] In addition to the F10 Application, the AFAP filed written submissions, submissions in reply and made supplementary oral submissions in the Hearing. Appearing for the Applicant was Mr Jared Marks, AFAP Chief Legal Officer and Mr David Stephens. Surveillance Australia was represented by Ms Katie Sweatman (of Counsel) who was granted leave to appear in the circumstances. The Respondent provided an initial outline of its position, along with supporting documentation, for the Conference conducted on 28 July 2023 and further written submissions. Ms Sweatman provided further oral submissions, and submissions in reply at the Hearing. A summary of these submissions is set out below.

[28] The AFAP acknowledged the important background to this dispute and confirmed that the dispute is about the Respondent's proposed FIFO arrangements and the AFAP's concern with the intention to vary annual leave entitlements by the IFA clause. The AFAP objects to the use of IFA's to vary annual leave entitlements.

[29] Initially, the AFAP submitted that the Respondent produced two documents for consideration. Part A was an IFA dealing with permitted matters in accordance with clause 1.14. Part B was described as a document dealing with matters "incidental" to Part A. Part B proposed to vary annual leave terms in the Agreement in the same or similar terms as originally proposed in the IFA. The AFAP maintained its objection to Part B on the basis that renaming

part of the original document from IFA to Part B is not a material change as it retains the same substance and effect.

[30] In a further response to these concerns, the AFAP submits that the Respondent re-characterised the proposed Part B as a common law contract. The AFAP maintains it objections to the inclusion of terms in a common law contract that purport to vary annual leave entitlements by not enhancing them and on the grounds that the substance of the contract retains the character of the first proposed IFA. It is the AFAP's submission that the common law contract purports to vary, inter alia, terms of the Agreement relating to annual leave in the same manner as an IFA (if such arrangements were permissible in an IFA).

[31] In this regard, at paragraph [14] of the Applicant's outline of submissions, they state:

> *"It does so by restricting the way annual leave can be taken by dictating when and for how long it will be taken; and allocates annual leave to a fixed pattern occurring on the off-swing, not-withstanding FIFO Captains are not required to work on those days in any event."*[5]

[32] Reinforcing their submissions with reference to Annual Leave entitlements as a NES provision, the AFAP draws the Commission's attention to the limitations on common law contracts and refers to the explanatory memorandum to the Fair Work Bill 2008 which at [207] provides:

> *"No specific rule is provided about the relationship between the NES and contracts of employment. That relationship is governed by well established principles (eg: a term in the contract of employment that is less favourable than a statutory entitlement is not effective) and does not require additional legislative elaboration."*[6]

[33] A principal submission of the AFAP is that naming a document "common law contract" or Part A, or Part B does not overcome the threshold test that the only way in which terms of the Agreement made can be varied by individual agreement is through a valid IFA. The terms of the IFA in the Agreement are confined to very specific matters as set out in clause 1.14.1.

[34] The AFAP submits that Annual leave is not a permitted matter in clause 1.14.1 of the Agreement and any document proposing to vary the annual leave entitlements is not permissible.

[35] In their submissions in reply to the Respondent, the AFAP made a series of additional submissions. Firstly, the AFAP made submissions regarding Surveillance Australia's claims that they have been largely able to resolve the concerns raised by the FIFO Pilots with whom the IFA's have been proposed and that they are of the view that the dispute is now resolved. The AFAP submits that this claim is unfounded. The AFAP submits that at least 3 of its members are amongst the FIFO Pilots with whom IFA's have been proposed and they have asked the AFAP to press the dispute. They consider the dispute far from resolved.

[36] Secondly, the AFAP made submissions regarding the Respondent's submissions that its decision to remove any term that seeks to deal with annual leave from all of the IFA's proposed leaves it open to the Commission to form the view that there is no live dispute capable of determination. The AFAP submits that the dispute between the parties remains live and

concerns the Respondent's proposed FIFO model, with particular regard to the full benefits of annual leave entitlements under the Agreement and the NES under the FIFO proposals.

[37] In doing so, the AFAP refers the Commission to the following decision of Commissioner Crawford in *Adann Sadiki and Others v Vee H Aviation Pty Ltd T/A Corporate Air* (***Corporate Air***) which provides the following:

> *"(20) … The scope of the dispute settlement procedure should not be narrowly construed as "to do so would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement.*
>
> *(21) In the assessment of the Commissions power, there is a need to characterise the dispute and determine whether the characterisation has a nexus or sufficient nexus to the provisions of the agreement. In doing so, the Commission is not confined to the terms of the dispute application. The entire factual background is relevant and may be ascertained from the submissions advanced by the parties on the question of jurisdiction. Further, an industrial dispute is not necessarily fixed and definite, and it may evolve during proceedings in the Commission."*[7]

[38] Further, the AFAP asserts that:

> *"Whatever document Surveillance Australia use to alter or confine annual leave entitlements, purports to do the work of an IFA, i.e.: it attempts to vary the terms of the Agreement in relation to annual leave in a manner that undermines inviolable terms of the NES.*
>
> *Nothing else but an IFA can vary a term of an Agreement, and nothing may degrade the NES. A common law contract cannot reduce a term of an Agreement. In reality it is an IFA pretending to be a common law contract. I[t] follows that whatever Surveillance Australia call the document it attempts to operate with the effect of an IFA."*[8]

[39] Both the AFAP and the Respondent contend that (with one exception where a 21 day on swing pattern applies) the roster in question operates across 13 x 28-day roster periods where work is performed "on swing" and not performed "off swing" days as follows:

- Days On Swing – 16 days upon which employees need to be available to work (including 2 travel days).
- Days Off Swing – 12 days off (which includes a portion of their annual leave in each period so they may have an off swing of 12 days rather than the 8 days they are entitled to under the Agreement.

[40] The position of the parties differs significantly from this point onwards. The Respondent's position in this regard is best summarised at [5.3] of their Outline of Submissions, stating:

> *"Under the arrangement [**the common law agreement**], a FIFO Pilot agrees to only be required to be available for 16 (including two travel days) out of a 28 day period, with*

> *the extra days they would otherwise have been required to be available to work being a period where by agreement annual leave is taken by the employee."*

[41] The AFAP submits that annual leave can only be taken on days that are otherwise worked and that "off swing days" are employees' rostered days off (RDO's), which are equivalent to a weekend for a Monday to Friday employee, not in number of days but in substance.

[42] Regarding the Respondent's submissions as to what is an IFA and what it can contain, both parties agree that an IFA is a mandatory term required by the provisions of s.202(1) of the Act that enables an employee and their employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of certified agreement in relation to the employer and their employee. Clause 1.14 of the Agreement provides the IFA provisions in this context and both parties agree that an IFA made pursuant to this clause cannot vary annual leave as it is not one of the permitted matters.[9]

[43] Again, the position of the parties differs significantly from this point. It is the Respondent's primary submission that the original IFA provided to the affected employees did not seek or otherwise have the effect of varying annual leave entitlements. In the absence of a definition of the term "vary" or "varying" in either the Agreement or the Act, the Respondent refers to the Macquarie Dictionary definition which defines **"vary"** to mean *"to change or alter, as in form, appearance, character substance, degree etc."*

[44] Further, the Respondent referred to the decision of the Full Bench as to the operation of IFAs in *Request from the Minister for Employment and Workplace Relations of 28 March 2006,* which stated:

> *"The purpose of a model flexibility provision is to permit a reduction in one or more minimum award entitlements as part of an agreement which meets the genuine individual needs of the employer and the employee without disadvantaging the individual employee."*[10]

[45] It is Surveillance Australia's submission that to the extent the original IFA document dealt with annual leave, it did not vary the effect of the annual leave provision of the Agreement, or the entitlement owed to employees in accordance with it terms. Rather, it included matters regarding annual leave as incidental matters and the contents thereof proposed an agreement about how annual leave would be taken while an employee was working on a FIFO basis. Almost identical proposals were included in both, the Part B document and Common Law Contract. Importantly, the Respondent submits, the proposal did not vary the entitlement to annual leave under with the Agreement or the NES.

[46] In contrast, the AFAP submits that it is unclear what is meant by an "incidental term" and that in any event, the provisions for an IFA are provided for in the relevant terms of the Agreement *(clause 1.14 Flexibility Provisions in this instance),* including what entitlements it may be used to vary and there is no place or lawful mechanism to incorporate other terms as this would lead to confusion and disputation, as has occurred in this matter.

[47] Further, the AFAP reiterates its position, that the Respondent is not able to vary annual leave entitlements in the Agreement (or the NES) unless the variation is either beneficial or not to the detriment of the entitlement. They submit that the proposals from Surveillance Australia

– in whatever form; IFA or Common Law Contract, do vary the full annual leave entitlement by denying employees the full benefit of the provisions of clause 6.1 of the Agreement, including reducing flexibility, amongst other things.

[48] Finally, with regard to how annual leave can be agreed to be taken, the AFAP submits simply that this must be done in accordance with the terms of the Agreement and the NES. While both parties agree it is uncontroversial for an employee and their employer to record in writing an agreement pertaining to when annual leave will be taken, the extent of agreement between them goes no further.

[49] On this question, the AFAP submits that the employee is entitled to the full benefit of annual leave entitlements as provided for by the Agreement and the NES, as set out above in this decision. While recognising that an employee and employer can record in writing an agreement to take **a** period of annual leave, critically, the AFAP submits this agreement must be limited to each period of leave (as an entitlement) and that it cannot be that an employee signs away the right to agree each period of leave in perpetuity.

[50] With reference to the provisions of s.88(1) of the Act (as set out above), the AFAP states its position as follows:

> *"Agreement in perpetuity together with the resultant loss of flexibility to choose the time, duration, or banking, of annual leave is a variation that reduces the full benefits of the NES.*[11]

[51] In contrast, the Respondent submits that there is nothing in the Agreement or the Act which precludes an employer from proposing when an employee may take their annual leave, and the employee agreeing with that proposal, as has occurred in the present case. Further, submitting that the proposed arrangements have been made taking into account the complexity of rostering FIFO work and the practical challenges of covering periods of leave given the remote locations of work to be fair and equitable.

[52] On the question of the reasonableness of their proposed requirement to agree to take annual leave during the off swing, the Respondent refers to the decisions of Judge Lucev in *Fong v Halliburton Australia Pty Ltd [2019] FCA 2885,* which held in respect of a requirement of an employee to discharge their annual leave during their paid off swing, stating:

> *"...s.94(5) of the FW Act provides that an employer may require an award/agreement free employee to take a period of annual leave, but only if that requirement is reasonable."*[12]

[53] Noting that the pilots in this matter are not award/agreement free, s.93(3) of the Act contemplates scope for a modern award or enterprise agreement covered employee to be required to take their annual leave, the Respondent submitted that:

> *"...Surveillance Australia relies upon the decision of Judge Lucev in Halliburton to say that if a requirement to take annual leave during an off swing is reasonable, an agreement to take annual leave during an off swing is reasonable, and does not inherently offend the SAPL Agreement or the NES as the Applicant contends."*[13]

[54] Reinforcing its position, the Respondent refers to the decision of the Full Bench of the Commission in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd [2015] FWCFB 3124* (**HNZ Australia**) where the Full Bench found error on the basis of a enterprise agreement term precluding any proposal or agreement by the employees or the employer for annual leave to be taken at any other basis than in accordance with prescribed terms (the off swing) in the enterprise agreement as a contravention of s. 88 of the Act.

[55] In the present circumstances, the Respondent submits the opposite has occurred and that there has been extensive consultation and agreement between the effected employees and the employer about when annual leave will be taken and that there remains scope for the agreements to be revisited and a new agreement reached.

[56] The Respondent acknowledges the limitations of the HNZ Australia decision to the present circumstances of agreement covered employees identified by the AFAP, who also indicate that s.93(3) is explicitly brought to life in the terms of the Agreement's annual leave clause at 6.1, which provides for the employer to require an employee to take paid annual leave in circumstances of an excessive accumulation of leave.

[57] Despite this, the Respondent maintains that HNZ Australia is relevant on the question of reasonableness, both in the circumstances of genuine agreement and the practical reality of FIFO work in remote locations where covering periods of leave necessitates flying in replacement pilots from other parts of the country.

[58] The Respondent then referred the Commission to a number of other approved enterprise agreements negotiated with employers, employees and the AFAP that include similar terms requiring the taking of annual leave in period of off swing for FIFO Pilots.

[59] Finally, the Respondent submitted that, in the circumstance of the present case the pilots in question have and retain a genuine choice as to the proposed agreements about the taking of annual leave during their off swing and these are genuine agreements reached between the employer and its employees entirely consistent with the provisions of the Agreement and the NES. To support this, the Respondent referred to the decision of Deputy President Hampton (Commissioner at the time) in *Australian Federation of Air Pilots v Surveillance Australia Pty Ltd T/A Cobham Aviation Services Australia - Special Mission [2021] FWC 5162* (***Cobham)***.

[60] The AFAP addresses each of these submissions in their reply material that I will address in turn below.

[61] With regard to the Respondent's submissions at paragraph 7.10 of their outline of submissions that "*any period of time where an employee is being paid can be taken as annual leave"*, the AFAP contends this to be firstly; contrary to the express words of s.89 of the Act which deal with when an employee is not taken to be on annual leave; and secondly, because it suggests any period of paid time (i.e. personal leave or public holidays for example) can be considered and discharged by an employer as annual leave.

[62] The AFAP submits this is plainly incorrect.

[63] In reference to the decision of the Full Bench in HNZ Australia, the AFAP first pointed out the acknowledged error in the Respondent's submissions that the dispute did not deal with an agreement approval, but rather was solely brought about by a dispute. A dispute involving a

21 day on/ 21 day off roster that purported to discharge annual leave in the day off roster period. HNZ Australia maintained that an agreement as to a term that was reasonable in accordance with s.93(3) of the Act had been reached and that it was legitimate to apply.

[64] The relevant clause was at 14.2.1(b) of the HNZ Agreement and provided for:

"an equal time roster in which annual leave is taken during the year as part of the touring days offs".[14]

[65] The AFAP further submits that the Full Bench in HNZ Australia, relevantly went on to state:

In relation to s.88 that:

"*Self evidently clause 14.2.1(b) of the Agreement has the effect of denying a touring pilot the opportunity of reaching agreement with HNZ about when annual leave may be taken and the duration of the leave. At the very least, the clause limits the days on which annual leave may be taken by agreement."*

In relation to the interaction with s.93(3) that:

"…. the requirement compels a touring pilot to take annual leave only on days on which the touring pilot would not otherwise be working. Indeed the notion that a touring pilot should only take a period of annual leave on days on which a pilot is already not required to work seems to us plainly unreasonable. That the touring pilots are entitled to rostered days off, and hence receive a break from duty, does not render the requirement that annual leave be taken only during days off reasonable."

In relation to the interaction with s.55(1) that:

"Section 55(1) of the Act prohibits an enterprise agreement excluding the NES or any provisions of the NES. A provision of an enterprise agreement need not expressly exclude the NES in order to fall foul of s.55(1). A provision of an enterprise agreement which in its operation results in an employee not receiving the full benefit of the NES also contravenes the prohibition. Clause 14.2.1(b) has the effect of depriving a touring pilot working an equal roster of the full benefit of s.88 of the Act."

Finally concluding, with regard to s.56 of the Act that:

"As clause 14.2.1(b) of the Agreement is not a term permitted by either s.55(4) or s.93(3) of the Act, it follows that it has no effect."[15]

[66] The AFAP further submitted that in the present case where the proposed terms of the Surveillance Australia IFA have the same requirement to the taking of annual leave during the "days off" or "off swing" of a roster pattern, this denies the employees the "full" benefit of the NES and that the Commission should conclude the proposed annual leave arrangements are non-permissible.

[67] With regard to the other approved agreements that include similar terms requiring the taking of annual leave in period of off swing and genuine agreement of the Pilots referred to by

the Respondent, the AFAP identified these as cases wherein the agreements provided the employees alternative options to choose for both the performance of FIFO work and the taking of annual leave.

[68] The AFAP then submitted that these options are not available to employees in the present case as the proposed FIFO arrangements do not include any alternative options for the taking of leave or the undertaking of FIFO work, thus, negating any basis of a genuine agreement being able to be reached.

[69] The Respondent provided further background to the industrial context for this dispute and decision of the employer to seek to implement FIFO working arrangements for FIFO pilots and its version of the background to the failed negotiations with the AFAP. This included various versions of the documents from the original IFA to Part A, Part B and the Common Law contract.

[70] There appears to be significant points of difference between the Respondent's version as to the relevant background to this dispute and the AFAP where the extent to which, or otherwise, the effected pilots had agreed to enter into the IFAs and the significance of the decision of Surveillance Australia to remove the proposed provisions referring to annual leave from the proposed IFA document. Additionally, dispute also arose on whether a live dispute remained before the Commission to determine.

[71] Surveillance Australia submits that the answer to the question to be determined by the Commission, which is outlined in paragraph [18] above, is:

> *"(a) There has been no proposal by Surveillance Australia either in an Individual Flexibility Arrangement (IFA) or common law contract, that varies an employee's entitlement to annual leave under the SAPL Agreement;*
>
> *(b) To the extent that Surveillance Australia and an individual employee have documented their agreement as to when the employee will take annual leave this does not vary the annual leave provisions of the SAPL Agreement."*[16]

[72] In summarising this position, the Respondent submits that:

> *"8.1 …The Commission ought to find that an employee agreeing to take their annual leave on their off swings to have a longer off swing than what would usually be provided for does not vary the effect of the terms of the SAPL Agreement, nor does it reduce the entitlement.*
>
> *8.2 Rather, the Commission should find that it is open to the parties to enter into an agreement about when annual leave will be taken. Surveillance Australia submits that this does not vary the entitlement that an employee has to annual leave nor the entitlement that an employee has to agree with their employer when annual leave will be taken. This is essentially an administrative matter about when annual leave will be acquitted."*[17]

Considerations

[73] The Respondent posed a series of supplementary questions to be determined in the course of deciding the above as follows:

1. *Whether there is a live dispute to be determined by the Commission?*

2. *What is the Agreement that Surveillance Australia and its FIFO Pilots have reached?*

3. *What is an IFA and what can it contain?*

4. *How can annual leave be taken?*

[74] For convenience, I will deal with each of these questions in turn below, along with my relevant considerations.

Question 1: Whether there is a live dispute to be determined by the Commission?

[75] The Respondent contends that in the time since the lodgement of this dispute with the Commission the dispute has been wholly resolved. Specifically, that during the course of events since lodgement the employer is no longer proposing IFA terms which seek to deal with annual leave to any degree. Accordingly, the Respondent submits there is no dispute for the Commission to determine. Further, the Respondent affirms that it has been advised by each of the employees potentially affected by the terms of the IFA and that they are content with the revised documents that do not include annual leave as an IFA term.

[76] Moreover, the Respondent submits that the present circumstances are not simply that the question for determination has evolved over time, as was the case in the *Corporate Air* decision of Commissioner Crawford. Rather, in reference to the recent decision of (then) Deputy President Asbury in *Australasian Meat Industry Employees Union v Primo Foods Pty Ltd [2023] FWC 570* (**Primo Foods**) where the Vice President found that there continued to be a live dispute because the employer maintained its position with respect to payment and would continue to do so.

[77] In the circumstances of this case, unlike in ***Primo,*** Surveillance Australia has agreed from the outset of the dispute that an IFA cannot vary an employee's entitlement to annual leave and that to make its intention clear the document dealing with an IFA did not seek to vary annual leave. The annual leave matters were removed from it and dealt with in a separate document that does not operate as an IFA in intention or effect.

[78] With regard to the views of the affected pilots to whom the IFAs or otherwise are proposed, the AFAP contend that rather than being content with the revised documents, at least 3 of the pilots have asked the AFAP the press this dispute. Neither the AFAP nor the Respondent presented any evidence as to the views of the pilots in question. Accordingly, I consider this factor as neutral.

[79] In reference to the Respondent's submission that by virtue of its decision to remove any reference to annual leave in the IFA document and placing them in a separate document negates the dispute, for the reasons set out below, I do not find these convincing.

[80] Firstly, and significantly, the AFAP contends that the dispute application should not be narrowly confined and that its original F10 Application, while referencing the contention

surrounding the operation of clause 1.14, also included important contextual background as to the dispute emanating from the implementation of FIFO working arrangements that are the very reason why the operation of the IFA clause is being called into question. The Respondent similarly provides submissions as to this contextual background in relation to FIFO working arrangements and this context is not disputed.

[81] In reference to the decision of Commissioner Crawford in *Corporate Air,* the AFAP submits the Commission should be satisfied that the present dispute should not be narrowly confined and that the issues within the original application remain live and to be determined.

[82] In reply, the Respondent refers to the decision in *Primo Foods* and submits that this is not the case here as the employer's position has changed from proposing to include the annual leave terms in the IFA to not including them at all.

[83] While on face value this is correct, the Respondent's own submissions are that rather than being placed within the proposed IFA, the annual leave proposals are now being proposed in a document incidental to the IFA, in a Part B or Common Law contract. Copies of these documents provided to the Commission in evidence indicated this to be the case in identical terms.

[84] Accordingly, the AFAP's submits that whatever the document is called that contains the terms originally proposed within the IFA for dealing with annual leave arrangements for FIFO work, they cannot be included if they vary the entitlement to annual leave by virtue of the provisions of clause 1.14 of the Agreement and the NES.

[85] On this basis, and the evidence and submissions presented before me, I am satisfied that there remains a live dispute between the parties to be determined by the Commission.

[86] Specifically, with regard to both the decision in *Corporate Air* and *Primo Foods*, I am satisfied that the parties clearly remain in dispute as to the proposed FIFO working arrangements. That the Respondent's proposed arrangements for the rostering of annual leave for FIFO workers during their off swing has not changed, and is not likely to change in the future, be it expressed in an IFA or some other document. The question of whether annual entitlements can be varied by the operation of clause 1.14 or some other means remains to be determined.

Question 2: What is the Agreement that Surveillance Australia and its FIFO Pilots have reached?

[87] Surveillance Australia submit that the employer and relevant FIFO pilots have reached an agreement that rather than needing to reside near one of its remote operational bases, the pilots will be able to live in a capital city and work on a FIFO roster. To this end the employer has prepared two documents for the pilot's consideration. The first, a proposed IFA varying working hour arrangements and allowances to sensibly reflect the compressed nature of working hours on a FIFO arrangement. The second, a common law agreement that deals with incidental matters, including annual leave, about which a common understanding between the parties is required to give practical effect to the FIFO arrangement.

[88] At [5.3] of the Respondent's outline of submissions, they state:

> *"Under the arrangement, a FIFO pilot agrees to only be required to be available for 16 (including two travel days) out of a 28 day period, with the extra days they would otherwise have been required to be available to work being a period where by agreement annual leave is taken by the employee."*

[89] Except for a slip swing, where a 21 day-on pattern applies, the FIFO rosters proposed operates across 13x28 day roster periods where work is performed "on swing" and not performed "off swing" days as follows:

- 16 days on Swing – including 2 days Duty Travel
- 12 days Off Swing

[90] The Respondent submits FIFO pilots under the proposed arrangement receive 175 off duty days (less 26 travel days), resulting in a total of 149 days off with no work-related activity per year. This is in contrast to a pilot not working a FIFO arrangement who is entitled to 8 days off in each 28-day roster period (as nominated by the employer), a total of 92 rostered days off (across 46 weeks) and 42 days annual leave per annum for a total of 134 calendar days off.

[91] This is achieved by the employee agreeing that their annual leave entitlement will be acquitted during their off swing over each 13 rosters cycles over a 12-month period, allowing the employee a longer off swing than that which they would generally be entitled to. Importantly, the Respondent submits that this is a genuine agreement between the employees and their employer and not a case where the employer has unilaterally advised when annual leave will be taken. Further, that employees continue to remain able to apply for annual leave outside their off swing and that it may be possible for additional on swing leave, subject to the ability to backfill and travel arrangements.

[92] There is no contention between the parties as to the terms of the agreement regarding annual leave that the affected Pilots and Surveillance Australia are purported to have reached and why this is so in the circumstances. That is, that the substantive 13x28 day roster pattern of 16 days on swing (including 2 duty travel days) and 12 days off swing give practical effect to the FIFO working arrangements.

[93] What is contested is (1) the nature of the additional off swing days; (2) whether they can include a period of annual leave; (3) whether the agreement to take annual leave on the off swing amounts to a variation of annual leave entitlements; (4) and whether a variation to annual leave entitlements can be made by agreement by means other than an IFA and whether such an agreement has been made in these circumstances. I will address the first of these two questions in the consideration below and return to the additional two questions in subsequent considerations.

[94] Firstly, to the nature of the additional off swing days. Unlike in other industries where an RDO is made up of accrued hours that an employee has already worked, the Surveillance Australia Agreement sets out that a Pilot is entitled to 8 days off work in each 28-day roster period as nominated by the employer. Importantly, it is not disputed that these rostered days off are to be days free of work.

[95] To achieve the 13x28 roster pattern proposed for FIFO work, the employer proposes employees agree to take 4 annual leave days in addition this 8-day entitlement as the additional days off to achieve the 12 off swing days required to facilitate the 16/12 roster pattern required.

[96] Critically however, rostered days off under the Agreement are an entitlement to be days free of work. Clause 1.2.47 of the Agreement defines Roster to mean *"a scheduled arrangement of work days, non-work days and start times for a specified period."* It follows that the nature of the 4 additional off swing days proposed to achieve the 13x28 roster pattern should also be days free of work.

[97] Secondly, to the question of 'can these days free of work be considered to be annual leave.' Both the Agreement and the NES provide for annual leave is an entitlement to be taken on days that are otherwise worked as have been previously set out in above at [24] and [25].

[98] As set out above, rostered days off under the Agreement are to be days free of work. As provided for by the Agreement and NES, annual leave is to be taken on days that would otherwise have been worked. On this basis, I am not convinced that the 12 off swing days proposed by the employer as rostered days off in these circumstances can include a period of annual leave, whether that is by agreement or not. Rather, I am more compelled by the reasoning of the Full Bench in HNZ Australia as set out below:

> *"…the requirement compels a touring pilot to take annual leave only on days on which the touring pilot would not otherwise be working. Indeed the notion that a touring pilot should only take a period of annual leave on days on which the pilot is already not required to work seems to us to be plainly unreasonable. That the touring pilots are entitled to rostered days off, and hence receive a break from duty, does not render the requirement that annual leave be taken only during days off reasonable."*[18]

Question 3: What is an IFA and what can it contain?

[99] The Respondent submits and it is not contentious that an IFA is a mandatory term required by the provisions of s.202(1) of the Act that enable an employee and their employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of certified agreement in relation to the employer and their employee. Clause 1.14 of the Agreement provides the IFA provisions in this context and both parties agree that an IFA made pursuant to this clause cannot vary annual leave as it is not one of the permitted matters.[19]

[100] Importantly, there is no prohibition on an IFA document including incidental matters and details about an employee's entitlement that is not being varied. Nor, however, is there any mechanism for matters that are not permitted to be varied by means of an IFA to be varied by other means such as a Common Law Contract or Part B document. At the Hearing, the Respondent identified a number of items included in the documents in question falling into this category which was not disputed by the AFAP.

[101] Primarily, the Respondent's position is that to the extent the original IFA document dealt with annual leave, it did not vary the effect of the annual leave provision of the Agreement, or the entitlement owed to employees in accordance with it terms. Rather, it included matters regarding annual leave as incidental matters and the contents thereof proposed an agreement about how annual leave would be taken while an employee was working on a FIFO basis. Almost identical proposals were included in both the Part B document and Common Law Contract. Importantly, the Respondent asserts, the proposal did not vary the entitlement to annual leave under with the Agreement or the NES.

[102] The complete requirements for the making of a valid IFA under the Surveillance Australia Agreement are set out in clause 1.14 and replicated at paragraph [23] and include relevant requirements that the arrangement is genuinely agreed to by the employer and employee.

[103] Therefore, the critical question that remains is whether the terms proposed by Surveillance Australia relevant to annual leave entitlements, in the original IFA or some other document, sought to vary those entitlement or not. I will turn to this question in the final consideration below.

[104] With regard to the existence of a genuine agreement between the Employer and Employee, there is no question this is a requirement for the making of a valid IFA. The Respondent, as will become clearer below, maintains that there is no question that the employer and their employees in this matter have genuinely agreed to when annual leave will be taken and that this does not vary the employee's entitlement to annual leave under the agreement or the NES. The Respondent refers to the decision in *Cobham* as relevant to whether employees have genuinely agreed or otherwise being coerced into agreement to arrangements to take annual leave.

[105] The AFAP however, asserts that in the present circumstances, it appears employees are not being provided with a genuine choice and cannot therefore genuinely agree. Here, the choice available to employees appears to be either agreeing to the proposed arrangements for the taking of annual leave on the off swing as part of the FIFO arrangements or not working FIFO, there being no other choice available to employees unlike in other instances of FIFO working arrangements negotiated by the AFAP and included in previously approved agreements.

[106] Neither party have presented any evidence from employees on the question of a genuine agreement being made or otherwise. In any event, given the question of whether the proposal varies employees' annual leave entitlements or otherwise is necessarily a pre-condition to whether or not an IFA can be made, it is necessary for me to determine this question first.

Question 4: How can annual leave be taken?

[107] Surveillance Australia submits, and it is not disputed, that there is nothing controversial about a written agreement between an employer and employee pertaining to when annual leave will be taken being made. Further, that an employee and an employer agreeing to when a period of annual leave will be taken by the employee in a common law contract does not vary an employee's entitlement to annual leave under the Agreement.

[108] The Respondent asserts that pursuant to both terms of the Agreement and the Act, it is the case that annual leave is taken at a time and for a period that is agreed between an employee and their employer that commonly occurs by way of a request made by an employee, that is agreed or refused by their employer. Additionally, that there is nothing in either the Agreement of the Act that prohibits an employer from proposing when an employee may take their annual leave, and the employee agreeing to that proposal. Moreover, that this has occurred in the present case where arrangements have been made to account for the complexity of rostering FIFO work and the practical challenges of covering periods of leave given the remote locations of work to be fair and equitable.

[109] It is not controversial, or disputed in this case that annual leave must accrue and be taken in accordance with the Agreement and the NES. Nor is it contended that it is not permissible for an employee and an employer to record an agreement to annual leave in writing.

[110] However, as the AFAP have identified, there are a number of points of contention that arise with the submissions made by the Respondent. Principally, that the precise wording of the NES at s.88(1) supports a position that *"Paid annual leave may be taken for* ***a*** *period agreed between an employee and his or her employer"* not for an agreement in perpetuity or for the period of an IFA or common law contract as proposed by Surveillance Australia.

[111] The Full Bench in HNZ Australia have also affirmed that the NES entitlement to annual leave is *to leave on days that are otherwise required to be worked*, not rostered days off as proposed by Surveillance Australia. Further, this decision supports the Commission to find that Surveillance Australia's proposed annual leave arrangements are similarly not permissible.

[112] Additionally, in regard to s.93(3) of the Act, the Agreement already provides for a provision at Clause 6.1.4.2 providing the employer with a reasonable entitlement to the require an employee to take leave.

[113] For these reasons set out above, I am convinced by the AFAP's submissions.

[114] Therefore, the final consideration that remains to be determined is the question of whether or not the employer's proposals for the taking of annual leave to facilitate FIFO working arrangements in fact vary the employee's entitlement to annual leave. This is a question of fact that can be determined by reference to the proposal and the entitlement.

[115] Relevantly, in explicit terms, the employer's proposal for the taking of annual leave set out in either the original IFA, Part B document of Common Law Contract all specify that:

> *"Your annual entitlement to annual leave will be acquitted during the off duty periods.*
>
> *You may request an extension to an off rotation for the purposes of having an extended holiday once per calendar year, such (that) you are (off work) for a total of six consecutive weeks (42 calendar days)*
>
> *The request must be made six months in advance and is subject to company approval.*
>
> *Requests will not be unreasonable withheld.*
>
> *In order to be eligible to make such a request, you must accrue 14 additional 'on' days in advance through duty extension where you wish that extended period of absence to be paid or enter into an agreement to take 14 days unpaid leave (or a combination or both paid and unpaid days)."*

[116] This proposal is not consistent with the provisions of the NES and clause 6.1 of the Agreement as detailed in this decision previously.

[117] Significantly, and self-evidently, neither the NES nor the terms of the Agreement provide for a requirement that leave be taken on off duty days. Nor do they provide a specific limitation on when an extended period of leave may be taken, but for an employee having

accrued entitlements and the employers entitlement to consider, agree to and not unreasonably refuse leave requests.

Conclusion

[118] In short, I am satisfied that the issues of dispute between the parties remain at issue and that the Commission has the jurisdiction to determine this dispute. In light of the above conclusions, it has not been necessary to determine whether the annual leave terms proposed have been genuinely or not genuinely agreed between the employer and the affected pilots.

[119] Accordingly, based on the considerations made throughout this decision, I am satisfied that the annual leave proposal by Surveillance Australia do vary or seek to vary an employee's annual leave entitlements as provided for by the Agreement and the NES.

[120] I am satisfied that this is not permissible by either an IFA or any other instrument purporting to have the same effect of an IFA. Accordingly, I find that to the extent they seek to vary and limit an employee's entitlements to annual leave, Surveillance Australia's proposed FIFO arrangements, which are the subject of this dispute, are also not permissible. Therefore, I am satisfied that the IFA provided in clause 1.14 of the Agreement cannot be applied to employees' annual leave entitlements.

<u>COMMISSIONER</u>

Appearances:

Mr D Stephens and Mr J Marks *on behalf of the Applicant.*
Ms K. Sweatman *on behalf of the Respondent.*

Hearing details:

2023.
Melbourne.
20 September.

Printed by authority of the Commonwealth Government Printer

<AE425429 PR766420>

---

[1] F10 at page 7.

[2] Ibid at page 9.

[3] Respondent's position at [3.2] and [3.3].

[4] Ibid at [3.6].

[5] Applicant's outline of submissions at [14].

[6] Ibid at [22].

[7] *[2023] FWC 2105*.

[8] Applicant's submissions in reply at [28] and [29].

[9] Respondent's outline of submissions at [6.3].

[10] *[2008] AIRCFB 550* at [163].

[11] Applicant's submissions in reply at [44].

[12] Respondent's Outline of Submissions at [7.7].

[13] Ibid at [7.9].

[14] *[2015] FWCFB 3124* at [8].

[15] Applicant's submissions in reply at [57].

[16] Respondent's outline of submissions at [8.3].

[17] Ibid at [8].

[18] *[2015] FWCFB 3124* at [27].

[19] Respondent's outline of submissions at [6.3].