DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

OSM Australia Pty Ltd
v
Construction, Forestry and Maritime Employees Union
(C2024/91)

and

Tidewater Ship Management (Australia) Pty Ltd
v
Construction, Forestry and Maritime Employees Union
(C2024/93)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT BELL — MELBOURNE, 3 MAY 2024
DEPUTY PRESIDENT HAMPTON

Appeal against decision [2023] FWC 2597 of Deputy President Binet at Perth on 15 December 2023 in matter number B2023/678 and appeal against decision [2023] FWC 2638 of Deputy President Binet at Perth on 18 December 2023 in matter number B2023/686

Background

[1] This decision deals with two appeals for which permission is required. The first is brought by OSM Australia Pty Ltd (OSM) against a decision[1] and order[2] of Deputy President Binet both made on 15 December 2023 by which the Deputy President determined, pursuant to s 472 of the *Fair Work Act 2009* (Cth) (Act) to vary the proportion by which the payments and leave accruals of certain employees of OSM who had participated in partial work bans were reduced by OSM. The variation was from 90% to 65% in the case of payments and to zero in the case of annual leave accrual. The second appeal is brought by Tidewater Ship Management (Australia) Pty Ltd (Tidewater) against a decision[3] and order[4] of the Deputy President both made on 18 December 2023 by which the Deputy President determined, pursuant to s 472 of the Act to vary the proportion by which the payments and leave accruals of certain employees of Tidewater who had participated in partial work bans were reduced by Tidewater. The variation was from 90% to 71% in the case of payments and to zero in the case of annual leave accrual.

[2] OSM and Tidewater (together "the appellants") each seek permission to appeal the decisions (together the "Primary Decisions") and associated orders and, if granted, appeal the Primary Decisions and orders. The Primary Decisions concern applications brought by the

Construction, Forestry and Maritime Employees Union (CFMEU) for orders under s 472 of the Act.

[3] OSM relevantly employed employees to perform work in the offshore oil and gas industry pursuant to the terms of the *OSM Australia Pty Ltd and MUA Offshore Oil and Gas Enterprise Agreement 2021*, some of whom are members of the CFMEU. Tidewater relevantly employed employees to perform work in the offshore oil and gas industry pursuant to the terms of the *Swire Pacific Ship Management (Australia) Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Maritime Offshore Oil and Gas Industry) Enterprise Agreement 2018*, some of whom are also members of the CFMEU. The CFMEU, relevantly a bargaining representative, was bargaining for proposed agreements with OSM and Tidewater.

[4] On 14 March 2023, the CFMEU notified each of OSM and Tidewater of protected industrial action taking the form of rolling stoppages of work, save for the performance of defined exempt duties. The rolling stoppages were to be taken by way of ten consecutive 12-hour stoppages of work by the OSM CFMEU members and the Tidewater CFMEU members from 0600 on Wednesday, 22 March 2023 to 0600 on Sunday 27 March 2023. The duties exempt from the rolling stoppages were: watch keeping at sea; fire rounds; port security watches; safety drills; provision of meals and mess room services; movement of perishable stores; all dealings with emergency equipment in any manner; and any and all safety and emergency related issues.

[5] The appellants issued payment reduction notices in accordance with s 471(1)(c) of the Act to their respective employees and the CFMEU. The notices advised employees that their pay would be reduced by 90% for each day they engaged in the partial work bans as set out in the notices of protected industrial action. Those OSM and Tidewater CFMEU members who engaged in the protected action had their pay reduced by 90% for each day they engaged in industrial action and had their leave accruals for each day of service reduced by 90%, despite there being no mention of leave accruals being reduced in the payment reduction notices.

[6] Subsequently, the CFMEU applied to the Commission pursuant to s 472 of the Act in substantially the same terms for orders to vary the proportion by which the payments and leave accruals of OSM and Tidewater CFMEU members who engaged in the protected action were reduced.

[7] Save for the percentage of the varied proportion and some minor differences in content of the Deputy President's reasons for decision, the Primary Decisions and the orders are, for the purposes of the appeals, relevantly identical.

Appeal grounds

[8] The appeal grounds advanced by the appellants are the same in each appeal. The appellants, by their amended appeal notices, advance four appeal grounds by which they contended the Deputy President erred.

[9] Ground 1 contends the Deputy President acted on a wrong principle and ignored mandatory considerations for the purposes of s 472(3)(a) of the Act, being a qualitative

assessment of the "nature" and "extent" of the partial work bans (as opposed to a mere temporal assessment of the bans).

[10] Ground 2 contends that the failure to conduct a qualitative assessment of the bans (and, in particular, their impact on the commercial operations of each appellant) led the Deputy President to ignore relevant considerations in her assessment of fairness under s 472(3)(b) of the Act.

[11] Ground 3 contends that the Deputy President acted beyond power in purporting to make the annual leave accrual adjustment orders. By ground 4, the appellants contended in the alternative that the Deputy President's conclusion underpinning the annual leave accrual adjustment orders relied on legal and evidentiary propositions which did not support it and ignored relevant considerations.

[12] It is uncontroversial that an appeal under s 604 of the Act is by way of re-hearing and that the powers under s 607(3) are accordingly exercisable only once error is shown on the part of the primary decision-maker.[5] Grounds 1, 2, and 4 challenge conclusions involving the exercise of evaluative judgment, and so require the demonstration of error in the decision-making process as discussed in the *House v the King*.[6] Ground 3 is concern with the power to make the annual leave accrual adjustment orders. The Deputy President either had power or she did not. There is only one legally correct answer.

The Primary Decisions

[13] The CFMEU applications before the Deputy President were heard together on 12 October 2023. Evidence for the appellants was given by Mr Warren Harrower, who was then employed by OSM as an employee relations manager, and in that role he had accountability in relation to both OSM and Tidewater.[7] As noted earlier, the Primary Decisions are relevantly identical. For that reason, it is sufficient for the purposes of the appeals to here only refer to the decision concerning Tidewater (TD).

[14] The Deputy President dealt with some introductory matters and preliminary matters not presently relevant at TD [1]-[8]. The background is set out at TD [16] – [31]. At TD [32] – [36], the Deputy President sets out the statutory (ss 471 and 472 of the Act) and regulatory (reg 3.23(2) of the *Fair Work Regulations 2009* (Cth) (FW Regulations)) provisions relevant to the application. The Deputy President notes at TD [35] that Tidewater relied on the payment reduction notice as evidence that it has complied with its obligations under the Act. At TD [38], the Deputy President sets out the text of the notice and she notes at TD [37] and [39] the CFMEU contended that the notice did not comply with reg 3.23(2) of the FW Regulations because it did not specify an estimate of the usual time Tidewater considered that an employee would be spending during the day performing the work that is the subject of the work ban.

[15] The Deputy President's substantive reasoning is set out at TD [41] – [59] as follows:

> "[41] In considering whether to make an order to vary the proportion by which an employees payments are to be reduced, the FWC must consider whether the proportion specified in the notice given under paragraph 471(1)(c) was reasonable having regard to the nature and extent of the partial work ban to which the notice relates.

[42] Deputy President Easton explained in *Transport Workers' Union of Australia v Transit (NSW) Services Pty Limited T/A Transit Systems* that:

> *"Section 472(3)(a) requires the Commission to consider whether the calculation under Regulation 3.21 is reasonable. This firstly requires the Commission to assess whether the employer's methodology and calculation of the time spent on banned work is sound. The Commission might consider whether the employer's estimations of the time taken to perform certain work are reasonable, whether the employer has included or excluded particular tasks, and so on."*

[43] Regulation 3.21 of the Fair Work Regulations 2009 (Cth) (**Regulations**) provides the following mechanism to determine the proportion to be paid to employees engaged in partial work bans:

> "***Reg. 3.21 Payments relating to partial work bans—working out proportion of reduction of employee's payments***
>
> *For subsection 471(3) of the Act, the proportion mentioned in paragraph 471(2)(a) of the Act is worked out for an employee or a class of employees by carrying out the following steps.*
>
> *Step 1*
>
> *Identify the work that an employee or a class of employees is failing or refusing to perform, or is proposing to fail or refuse to perform.*
>
> *Step 2*
>
> *Estimate the usual time that the employee or the class of employees would spend performing the work during a day.*
>
> *Step 3*
>
> *Work out the time estimated in Step 2 as a percentage of an employee's usual hours of work for a day.*
>
> *The solution is the proportion by which the employee's payment will be reduced for a day."*

[44] Tidewater estimated that the usual time that the Employees would spend performing the Exempt Duties was 10%. The Employees are engaged to perform 12-hour shifts. Ten percent of a twelve hour shift is 72 minutes.

[45] The CFMEU submit that the proportion calculated by Tidewater and specified in the Payment Reduction Notice was not reasonable having regard to the nature and extent of the partial work ban to which the notice relates.

[46] The information contained in the Daily Industrial Action Report indicates that as a matter of fact that the Employees performed on average more than 72 minutes of work.

[47] This was conceded under cross-examination, by Mr Harrower:

> *"MR EDMONDS: You have seen the industrial action reports. You would accept, wouldn't you, that a number of those employees, the vast majority of those employees, performed more than 72 minutes of work on days where protected action occurred?*
> *MR HARROWER: I agree with that."*

[48] The parties agree that the percentage of work completed by the Affected Employees during the period of the partial work bans was 29.2%. There was therefore as a matter of fact a significant difference between Tidewater's estimate of the time Affected Employees would spending performing the Exempt Duties and the actual time Affected Employees spent performing the Exempt Duties.

[51] The evidence that Mr Harrower did give reveals that no contemporaneous estimate of the time Affected Employees would spend performing the Exempt Duties was undertaken. Rather, Mr Paul simply adopted an estimate used for earlier industrial action. There is no evidence that Mr Paul turned his mind to the making of an appropriate estimate in the circumstances of the pending industrial action. Furthermore, it would appear that Mr Paul was not involved in undertaking this earlier estimate and therefore his knowledge of its accuracy is unclear. In addition, the estimate was itself based on historical patterns of work. There is no evidence to suggest that these patterns of work have remained undisturbed over time or that Mr Paul turned his mind to this possibility.

[52] Furthermore, there is no evidence before me that the historical estimate matched the actual hours worked by the Employees during the previous industrial action such that it might be used as a reliable measure.

[53] Tidewater submit that it had no way of knowing what work would or not be performed by the Affected Employees and that this excused its reliance on a historical estimate. However, the Exempt Duties were clearly identified and a number of the Exempt Duties, including those which required the longest time to perform, were duties which could reasonably be presumed would be performed. For example, the evidence is that the Affected Employees have a separate statutory requirement to perform watch duty. The provision of meals and mess room services are typically excluded from industrial action for obvious reasons.

[54] Tidewater also submit that the work performed by the Affected Employees could not be valued at more than 10% and the 'inconvenience' suffered by Tidewater outweighs the commercial value of duties which were performed. The statutory regime requires employers to have reference to the time the relevant duties take to perform not some monetary value that the employer might attach to the duties. In any event it is clear from the evidence that the Exempt Duties included statutory duties which if not performed would have required the vessel to return from sea. The performance of those

duties allowed the Vessel's to stay 'alongside' reducing the impact of the industrial action on Tidewater clients. Inconvenience to employers is the point of protected industrial action which is made lawful by the FW Act to balance the bargaining power between employees and employers.

[55] Clause 26.2 of the Agreement provides that Employees accrue time off at the rate of 1.153 days' leave to compensate Employees public holidays, intervals of leave, annual leave, personal/carer's leave, compassionate leave and time spent travelling in off duty time. The evidence is that leave accrues each day an Employee is on a vessel regardless of the number of hours actually worked on that day. If there is no nexus between hours of work and leave accrual it is difficult to establish how leave accrual can be withheld for partial performance.

[56] Tidewater withheld 90% of Employees leave accruals during the period of Industrial Action. Tidewater's intention to do so was not made clear in the Payment Reduction Notice.

[57] Furthermore, Tidewater did not point to any authority in which leave accruals have been withheld pursuant to section 471.

[58] Taking into account these matters I am not satisfied that the amount withheld was reasonable have regard to the nature and extent of the work ban.

[59] In determining whether to make an Order the FWC must also consider the fairness between the parties taking into consideration all the circumstances of the case. Given the all the circumstances of this case, and in particular:

a. The discrepancy between the Exempt Duties and the duties listed in the Notice of Reduction it was unclear to Employees what duties they would be paid for and what duties they would not be paid for.
b. The employees were not clearly notified that Tidewater intended to withhold leave accruals.
c. No contemporaneous estimate was undertaken by Tidewater and the validly of the assessment which it relied upon is not supported by evidence.
d. The actual hours employees worked on average significantly exceeded the estimate made by Tidewater which suggests that the estimate was itself not reasonable." [Footnotes omitted]

Analysis

Permission to appeal

[16] For the reasons which will shortly become clear, we consider the appellants have advanced an arguable case of appealable error. Additionally, as the appeal raises for consideration the proper approach to the application of s 472 of the Act, we consider that it is in the public interest to grant permission to appeal, and we do so.

Ground 3

[17] It is convenient to first deal with appeal ground 3 which challenges the Deputy President's conclusion (at Primary Decisions [59](b) and [60](b) respectively) that it was appropriate as a matter of fairness to vary the proportion by which the OSM and Tidewater CFMEU members' leave accruals were reduced to 0%, and the orders giving effect to the conclusion.

[18] The CFMEU contends that the accrual and subsequent payment (or non-payment) of leave entitlements constitutes a "payment" within the meaning of s 472 of the Act and so the Deputy President had power pursuant to s 472 to vary the proportion by which OSM and Tidewater CFMEU members' leave accruals were reduced. We do not accept the first part of the contention dealing with leave accruals. The question of subsequent payments does not arise on appeal.

[19] We agree with the appellants that the Deputy President acted beyond power in deciding and subsequently making orders varying leave accruals *simpliciter*. Section 472(1) of the Act empowers the Commission to make orders varying the proportion by which an employee's payments are reduced. It does not grant power to vary the proportion by which an employee's leave accruals might be reduced. The accrual of leave is not a payment. Leave such as annual and personal leave accrues progressively during a year of service according to an employee's ordinary hours of work and accumulates from year to year.[8] Payment in respect of leave accrued is made when leave is taken, permissibly cashed out or, where applicable, on termination of employment.

[20] Moreover, the operative parts of the payment reduction notice relevantly provided:

> "**PARTIAL WORK BANS**
>
> If you are directed to undertake the above Exemption duties, you will be engaging in a "partial work ban" (as that is defined in the Fair Work Act s470(3)).
>
> Tidewater has considered these exemptions. It is extremely difficult to know what duties fall within the Exemptions and what duties do not. Tidewater has considered this and estimates that the usual time an employee would spend during any given day performing these duties will be 10%.
>
> Accordingly, we confirm that if you do engage in partial work (that is, you engage in stoppages but perform some or all of the above duties as directed) your payments will be reduced by 90% for each day you engage in the partial work ban."[9]

[21] There is no mention of any reduction to leave accruals in the notice.

[22] The appellants below advanced a case that they were entitled to reduce payments made for periods of leave accrued during the industrial action period and correctly, in our view, submitted that varying leave accrual rather than a payment associated with that accrual would be beyond power.[10]

[23] Also below, it appears the Deputy President accepted, or at least considered, that an order directed to leave accruals was beyond power as is evident in the following exchange recorded in the transcript:

> "THE DEPUTY PRESIDENT: So, isn't there a third argument – or is that just me – that deduction of accruals is not authorised by the provision of the Act because it only allows for the deduction of payments not accruals?
>
> MR EDMONDS: Yes, and that potentially raises an estoppel issue as well. It potentially means we don't have a remedy here.
>
> THE DEPUTY PRESIDENT: Yes, the remedy's somewhere else."[11]

[24] In our view, leave accruals are beyond the reach of an order under s 472 of the Act. In making such an order, the Deputy President exceeded the power conferred by s 472 and so was in error. This appeal ground succeeds.

Ground 4

[25] As we earlier noted, ground 4 is raised as an alternative to ground 3. Given our conclusion above, this ground need not further be considered.

Ground 1

[26] The appellants challenge the Deputy President's conclusion (Primary Decisions at [57] and [58]) that, for the purposes of s 472(3)(a) of the Act, the amount each appellant withheld was not reasonable having regard to the nature and extent of the work ban.

[27] Section 472 of the Act provides:

> "**472 Orders by the FWC relating to certain partial work bans**
>
> (1) The FWC may make an order varying the proportion by which an employee's payments are reduced.
>
> (2) The FWC may make the order only if a person has applied for it under subsection (4).
>
> (3) In considering making such an order, the FWC must take into account:
>
> (a) whether the proportion specified in the notice given under paragraph 471(1)(c) was reasonable having regard to the nature and extent of the partial work ban to which the notice relates; and
>
> (b) fairness between the parties taking into consideration all the circumstances of the case.
>
> (4) An employee, or the employee's bargaining representative, may apply to the FWC for an order under subsection (2) if a notice has been given under paragraph 471(1)(c) stating that the employee's payments will be reduced."

[28] The appellants contend the matters listed at s 472(3)(a) and (b) of the Act are mandatory considerations and each must be evaluated and given due weight, having regard to all other relevant factors. So much is not controversial.

[29] The appellants say the task to be performed under s 472(3) of the Act stands in contrast to that which the employer performs under s 471 - the employer's anterior task is a purely temporal exercise governed by the formula set out in reg 3.21 of the FW Regulations. By contrast, the Deputy President was under s 472(3) required to consider reasonableness, having regard to both the "nature" and "extent" of the work ban. So much may also be accepted.

[30] The appellants contend that the Deputy President's inquiry ought properly to have extended beyond a mere temporal assessment to encompass consideration of qualitative aspects of the partial work ban. They contend the Deputy President variously overlooked or disregarded submissions and evidence that went to the qualitative question. That evidence included:

- that the exempt duties were able to be performed by other employees not engaging in the partial work bans;[12]
- that there was a commercial impact to the appellants' operations because of the partial work bans, with the appellants suffering the total loss of the ability to productively use the vessels to perform their contracted function;[13] and
- the evidence of Mr Luke Byrne, a CFMEU member employed by OSM, given under cross-examination about watch-keeping and fire round duties.[14]

[31] Before the Deputy President, the appellants contended that the "exempt duties performed by the employees, for which payment is now claimed, is almost entirely made up of 'watch keeping' duties".[15] The appellants then advanced contentions about the qualitative value to the employers of watchkeeping duties, and the commercial impact of the partial work bans as follows:

> "There is no great value, beyond allowing the Respondent's vessels to remain at sea by complying with the relevant regulations, obtained from the work of the employees in performing the exempt duties. There was no emergency work performed by employees, and the fact that they remained available to perform it, does not alter the benefit provided to the Respondent.
>
> The Commission ought find the inconvenience suffered by the Respondents, and the Respondents' clients, outweighs any 'benefit' obtained from the work performed by the IRs, and that the deduction of 90% was, in all the circumstances, given the nature and extent of the industrial action, reasonable."[16]

[32] In substance, the appellants contended below that the matters render the work performed by the employees to be of minimal benefit.

[33] On appeal, the appellants contend that the Deputy President gave no weight to that evidence or those submissions. They contend the Deputy President's error in her approach to s 472(3)(a) of the Act was twofold: by applying a wrong (purely temporal) test, the Deputy President ignored relevant considerations and evidence relevant to those considerations.

[34] We do not accept the Deputy President approached the task under s 472(3)(a) of the Act by dealing only with a temporal assessment and not considering the qualitative aspects of the partial work ban. However, we accept the Deputy President disregarded submissions and some of the evidence that went to the qualitative assessment.

[35] As to the first, the Deputy President was plainly aware of the task under s 472(3)(a) of the Act. At [41] and [42] respectively of the Primary Decisions the Deputy President says:

> "Deputy President Easton explained in *Transport Workers' Union of Australia v Transit (NSW) Services Pty Limited T/A Transit Systems* that:
>
> > "Section 472(3)(a) requires the Commission to consider whether the calculation under Regulation 3.21 is reasonable. This firstly requires the Commission to assess whether the employer's methodology and calculation of the time spent on banned work is sound. The Commission might consider whether the employer's estimations of the time taken to perform certain work are reasonable, whether the employer has included or excluded particular tasks, and so on."" [Endnote omitted]

[36] As to the temporal aspects, the Deputy President observed in TD:

> "[50] The witness who gave evidence on behalf of Tidewater at the Hearing, Mr Harrower, had no direct knowledge of how the estimate was calculated as he was not employed by Tidewater at the [time] industrial action occurred. Tidewater elected not the call Mr Paul who was the relevant Tidewater HR Manager at the time of the industrial action.
>
> [51] The evidence that Mr Harrower did give reveals that no contemporaneous estimate of the time Affected Employees would spend performing the Exempt Duties was undertaken. Rather, Mr Paul simply adopted an estimate used for earlier industrial action. There is no evidence that Mr Paul turned his mind to the making of an appropriate estimate in the circumstances of the pending industrial action. Furthermore, it would appear that Mr Paul was not involved in undertaking this earlier estimate and therefore his knowledge of its accuracy is unclear. In addition, the estimate was itself based on historical patterns of work. There is no evidence to suggest that these patterns of work have remained undisturbed over time or that Mr Paul turned his mind to this possibility.
>
> [52] Furthermore, there is no evidence before me that the historical estimate matched the actual hours worked by the Employees during the previous industrial action such that it might be used as a reliable measure."[17]

[37] As to the qualitative assessment, the Deputy President noted the appellants' contentions that the work performed by the employees could not be valued at more than 10% while the inconvenience suffered by the appellants outweighed the commercial value of duties which were performed.[18] The Deputy President assessed that it was clear from the evidence that the exempt duties included statutory duties which if not performed would have required the vessel to return from sea.[19] And that the performance of those duties allowed the vessel to stay 'alongside' reducing the impact of the industrial action on the appellants' clients.[20] The Deputy

President considered that inconvenience to the appellants was the point of protected industrial action, which is made lawful by the Act to balance the bargaining power between employees and employers.[21]

[38] But for that which follows below, we would for these reasons have dismissed ground 1 of the amended appeal notices.

[39] At [8] and [9] respectively of the Primary Decisions, the Deputy President sets out the evidence filed by the CFMEU and notes that:

> ". . . the CFMEU filed witness statements of the following witnesses setting out their evidence in chief:
>
> a. Ms Sumayyah Sayed (**Ms Sayed**) – Ms Sayed is a lawyer employed by the MUA. Ms Sayed filed three witness statements in these proceedings.
> b. Mr Robert Byrne (**Mr Byrne**) – Mr Byrne was not available for cross examination and the CFMMEU withdrew his statement." [Underlining added and endnotes omitted]

[40] The underlined passage above is incorrect. As the transcript of the proceedings below reveal, Mr Byrne gave evidence commencing at PN290 and he was cross-examined as recorded at PN309-PN326. As we earlier noted, Mr Byrne's evidence given during cross-examination was addressed in the appellants' submissions below and the appellants relied on that evidence in support of their contentions as to the qualitative value that should be assigned to the exempt duties discussed in Mr Byrne's evidence. As the extracted passage from the Primary Decisions underlined above shows, the Deputy President did not consider Mr Byrne's evidence.

[41] The CFMEU did not address this aspect of ground 1 of the appeal notices in their written submissions on appeal. We consider the evidence of Mr Byrne given during cross-examination was material to the Deputy President's consideration. The evidence of Mr Byrne was not otherwise replicated in the evidence that the Deputy President considered and was directly relevant to the statutory task. Further, the Deputy President failure to consider that evidence and necessarily the submissions of the appellants relying on that evidence is a material error, one that could reasonably have affected the ultimate assessment under s 472(3)(a) of the Act.

[42] For this reason, the appellants have made good ground 1 of their amended notices of appeal.

[43] In the circumstances, we do not consider that it is necessary for us to deal with ground 2 of the amended notices of appeal.

[44] For these reasons, the appeal will be upheld, the Primary Decisions and attendant orders will be quashed, and the applications will be remitted to the Deputy President for redetermination in light of our decision.

Orders

[45] We order:

1. Permission to appeal in each case is granted.
2. The appeals in C2024/91 and C2024/93 are upheld.
3. The decisions in *Re Application by Construction, Forestry, Maritime and Energy Union* [2023] FWC 2597 and *Re Application by Construction, Forestry, Maritime and Energy Union* [2023] FWC 2638 are quashed.
4. The orders in PR768831 and PR769570 are quashed.
5. The applications in B2023/678 and B2023/686 are remitted to Deputy President Binet for redetermination.

DEPUTY PRESIDENT

Appearances:
A Pollock of counsel for the appellants
L Edmonds for the respondent

Hearing details:
Melbourne
2024
13 March

Final written submissions:
Appellant, 12 February 2024
Respondent, 9 March 2024

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[1] *Re Application by Construction, Forestry, Maritime and Energy Union* [2023] FWC 2597

[2] PR768831

[3] *Re Application by Construction, Forestry, Maritime and Energy Union* [2023] FWC 2638

[4] PR769570

[5] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, [2000] HCA 47 at [17]

[6] (1936) 55 CLR 499, [1936] HCA 40

[7] Appeal Book (AB) 345 (witness statement of Warren Harrower at [1])

[8] See, for example, *Fair Work Act 2009* (Cth), ss 87(2) and 96(2)

[9] AB39

[10] AB134

[11] AB434 at PN193 – PN195

[12] AB141-AB142

[13] AB142

[14] AB445-AB446 at PN314-PN326

[15] AB529-AB530 OSM-Tidewater Outline of Closing Submissions at [82] and see further [87] – [89] regarding the specific aspects of Mr Byrnes' evidence on which the Appellants relied.

[16] Ibid at [90]-[91]

[17] *Re Application by Construction, Forestry, Maritime and Energy Union* [2023] FWC 2638 at [50]-[53]. The corresponding assessment for OSM is found in *Re Application by Construction, Forestry, Maritime and Energy Union* [2023] FWC 2597 at [49]-[52]

[18] *Re Application by Construction, Forestry, Maritime and Energy Union* [2023] FWC 2597 at [53] and *Re Application by Construction, Forestry, Maritime and Energy Union* [2023] FWC 2638 at [54]

[19] Ibid

[20] Ibid

[21] Ibid