DECISION

Fair Work Act 2009
s.306E—Application for a regulated labour hire arrangement order

Application by the Mining and Energy Union
(C2024/1506)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT SAUNDERS

SYDNEY, 1 JULY 2024

Application for a regulated labour hire arrangement order in respect of WorkPac Pty Ltd and WorkPac Mining Pty Ltd in relation to work performed for Batchfire Callide Management Pty Ltd.

Introduction and factual background

[1] The Mining and Energy Union (MEU) has applied under s 306Eof the *Fair Work Act 2009* (Cth) (FW Act) for a regulated labour hire arrangement order applying to Batchfire Callide Management Pty Ltd (Batchfire) as the regulated host and WorkPac Pty Ltd and WorkPac Mining Pty Ltd (collectively, WorkPac) as employers in respect of employees who perform work at the Callide Mine, a black coal mine operated by Batchfire, near the town of Biloela in Queensland (Mine). Neither Batchfire nor WorkPac oppose the making of the order sought by the MEU.

[2] The factual background may be ascertained from the facts pleaded in the MEU's application and the witness statements of Cornelis Westra, an employee of WorkPac who performs mining work at the Mine, and David Wieden, an employee of Batchfire who works at the Mine and is the Secretary of the Callide Valley Lodge of the MEU, filed by the MEU. The facts are not disputed by Batchfire or WorkPac and may be summarised as follows.

[3] The Mine is an open-cut coal mine which produces thermal coal for energy generation. Batchfire operates the Mine and employs about 237 production employees and 110 maintenance employees, as well as supervisory, technical and administrative staff, for that purpose. Batchfire and its employees are covered by the *Callide Mine Union Enterprise Agreement 2021*[1] (Agreement), an enterprise agreement in operation under the FW Act. Clause 3 of the Agreement provides that it covers Batchfire and '…each Employee of [Batchfire] who is eligible to be a member of the CFMMEU or AMWU or CEPU, and employed in a classification set out in clause 9…'. The reference to the CFMMEU in clause 3 is to be read as a reference to the MEU.[2] Clause 9 contains classifications for all grades of production employees as well as engineering employees.

[4] WorkPac is, among other things, a labour hire business operating in the mining industry. WorkPac supplies about 324 production workers which it employs to Batchfire to work at the Mine.

[5] Production employees at the Mine, whether employed by Batchfire or WorkPac, are eligible to be members of the MEU, and a significant number of such employees are in fact members of the MEU (including those employed by WorkPac). Rule 2(A) of the MEU's rules provides that all employees engaged in or in connection with the coal and shale industries are eligible for membership of the MEU and, in addition, rule 2(B) relevantly provides that all classes of engine drivers and other specified operators of plant and equipment engaged… in or in connection with the coal and shale industry and the mining industry also eligible for membership.[3]

[6] Batchfire and WorkPac production employees working at the Mine:

- attend the same pre-start meeting each day and are allocated work and equipment for their shift by Batchfire in the same way;
- perform the same production work and operate the same Batchfire-owned or leased machines and equipment, which include draglines, excavators, dozers, loaders, haul trucks, graders and water carts;
- wear the same Batchfire uniforms;
- are equally required to comply with Batchfire's instructions, usually communicated by Batchfire's supervisors;
- must undertake the same site induction, conducted by Batchfire, before commencing work at the Mine;
- operate pursuant to the Safety and Health Management System established by Batchfire for the safe operation of the Mine pursuant to its obligations under the *Coal Mining Safety and Health Act 1999* (Qld);
- operate under the same Batchfire standard operating procedures and other policies and procedures;
- are rostered on the same rosters and allocated into the same production crews by Batchfire;
- take annual leave only when determined by Batchfire, and must notify Batchfire of any personal or carer's leave that is taken;
- take breaks at times determined by Batchfire and share the same crib facilities;
- undertake the same training provided by Batchfire; and
- use personal protective equipment and consumables provided by Batchfire.

The statutory scheme

[7] Part 2-7A—Regulated Labour Hire Arrangement Orders, was added to the FW Act by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and commenced operation on 15 December 2023. The outline in the Revised Explanatory Memorandum (REM) for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* explains the purpose of Part 2-7A as: '[p]rotecting bargained wages in enterprise agreements from being undercut by the use of labour hire workers who are paid less than those minimum rates'. The detailed explanation of Part 2-7A in the REM relevantly includes the following:

> 602. Part 6 would insert new Part 2-7A into the FW Act. New Part 2-7A would relate to various labour hire arrangements and provide for orders to be made regulating these arrangements.
>
> 603. When an employer supplies one or more employees to perform work for a host business, employees and unions would be able to apply to the FWC for a regulated labour hire arrangement order. The FWC would be prohibited from making an order unless it is satisfied that the performance of the work for the host is not or will not be for the provision of a service, rather than the supply of labour. The FWC would also be prohibited from making an order if satisfied that it was not fair and reasonable in all the circumstances to do so, having regard to submissions from affected businesses and employees. In determining whether making an order would not be fair and reasonable, the FWC would be required to consider a range of factors including existing pay arrangements, whether the performance of the work is for the provision of services rather than the supply of labour, and the history of industrial arrangements applying to the host and the employer.
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> 604. If the FWC made the order, employers that supply labour to a host and are covered by the order would generally be required to ensure that employees working as part of the arrangement are paid no less than the rate at which they would be paid under the host employer's enterprise agreement if they were directly employed (the protected rate of pay). In this way, the orders would protect bargained rates in enterprise agreements that host businesses have negotiated with their employees from being undercut by the use of labour hire.

[8] The key provision in Part 2-7A is s 306E, which provides:

> **306E FWC may make a regulated labour hire arrangement order**
>
> *Regulated labour hire arrangement order*
>
> (1) The FWC must, on application by a person mentioned in subsection (7), make an order (a ***regulated labour hire arrangement order***) if the FWC is satisfied that:
>
> (a) an employer supplies or will supply, either directly or indirectly, one or more employees of the employer to perform work for a regulated host; and
>
> (b) a covered employment instrument that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind; and
>
> (c) the regulated host is not a small business employer.

Note: The FWC may make other decisions under this Part which relate to regulated labour hire arrangement orders: see Subdivisions C (short-term arrangements) and D (alternative protected rate of pay orders) of this Division, and Division 3 (dealing with disputes).

(1A) Despite subsection (1), the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A).

(2) Despite subsection (1), the FWC must not make the order if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to any matters in subsection (8) in relation to which submissions have been made.

(3) For the purposes of paragraph (1)(a), it does not matter:
- (a) whether the supply is the result of an agreement, or one or more agreements; or
- (b) if there are one or more agreements relating to the supply—whether an agreement is between:
  - (i) the regulated host and the employer; or
  - (ii) the regulated host and a person other than the employer; or
  - (iii) the employer and a person other than the regulated host; or
  - (iv) any 2 persons who are neither the regulated host nor the employer; or
- (c) whether the regulated host and employer are related bodies corporate.

Note: If related bodies corporate with different corporate branding do not provide labour to each other, a regulated labour hire arrangement order cannot be made because labour is not supplied in the way mentioned in paragraph (1)(a).

(4) For the purposes of paragraph (1)(b), in determining whether a covered employment instrument would apply to the employees, it does not matter on what basis the employees are or would be employed.

Regulated employee and host employment instrument

(5) An employee referred to in paragraph (1)(a) is a ***regulated employee*.**

(6) The covered employment instrument referred to in paragraph (1)(b) is a ***host employment instrument***.

Who may apply for an order

(7) The following persons may apply for the order:
- (a) a regulated employee;
- (b) an employee of the regulated host;
- (c) an employee organisation that is entitled to represent the industrial interests of an employee mentioned in paragraph (a) or (b);
- (d) the regulated host.

Matters that must be considered in relation to whether work is for the provision of a service

(7A) For the purposes of subsection (1A), the matters are as follows:
- (a) the involvement of the employer in matters relating to the performance of the work;
- (b) the extent to which, in practice, the employer or a person acting on behalf of the employer directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work;

(c) the extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work;
(d) the extent to which either the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees;
(e)the extent to which the work is of a specialist or expert nature.

Matters to be considered if submissions are made

(8) For the purposes of subsection (2), the matters are as follows:
(a) the pay arrangements that apply to employees of the regulated host (or related bodies corporate of the regulated host) and the regulated employees, including in relation to:
(i) whether the host employment instrument applies only to a particular class or group of employees; and
(ii) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employees; and
(iii) the rate of pay that would be payable to the regulated employees if the order were made;
(c) the history of industrial arrangements applying to the regulated host and the employer;
(d) the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise;
(da) if the performance of the work is or will be wholly or principally for the benefit of a joint venture or common enterprise engaged in by the regulated host and one or more other persons:
(i) the nature of the regulated host's interests in the joint venture or common enterprise; and
(ii) the pay arrangements that apply to employees of any of the other persons engaged in the joint venture or common enterprise (or related bodies corporate of those other persons);
(e) the terms and nature of the arrangement under which the work will be performed, including:
(i) the period for which the arrangement operates or will operate; and
(ii) the location of the work being performed or to be performed under the arrangement; and
(iii) the industry in which the regulated host and the employer operate; and
(iv) the number of employees of the employer performing work, or who are to perform work, for the regulated host under the arrangement;
(f) any other matter the FWC considers relevant.

What an order must specify

(9) A regulated labour hire arrangement order must specify:
(a) the regulated host covered by the order; and
(b) the employer covered by the order under this section; and
(c) the regulated employees covered by the order under this section; and
(d) the host employment instrument covered by the order; and
(e) the day the order comes into force, which must be:
(i) if the order is made before 1 November 2024—that day or a later day; or
(ii) otherwise—the day the order is made or a later day.

> Note: For paragraphs (b) and (c), additional employers and regulated employees of those employers may be covered by the order under section 306EA.
>
> *What an order may specify*
>
> (10) A regulated labour hire arrangement order may specify when the order ceases to be in force.
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> Note: For variation and revocation of a regulated labour hire arrangement order, see section 603.

[9] We make the following observations about s 306E relevant to the determination of this matter. *First*, in order for an application to validly enliven the Commission's jurisdiction under the section, it must be made by a person described in s 306E(7). Where the application is made by an employee organisation (s 306E(7)(c)), the Commission must be satisfied that the organisation is 'entitled to represent the industrial interests' of *either* a 'regulated employee' (s 306E(7)(a)) or an employee of the 'regulated host' (s 306E(7)(b)). Under the FW Act, an organisation is entitled to represent the industrial interests of a person if the person falls within the coverage of the organisation's eligibility rule.[4] A 'regulated employee' is an employee referred to in s 306E(1)(a), namely, an employee of an employer who is or will be supplied by the employer, directly or indirectly, to perform work for a regulated host (s 306E(5)). A 'regulated host' must be a person with the requisite constitutional character (s 306C) and, contextually, refers to an employer to whom the labour of regulated employees is supplied.

[10] *Second*, where a valid application is made, s 306E(1) *requires* the Commission to make a regulated labour hire arrangement order (notwithstanding the section heading) if it is 'satisfied' that the criteria specified in paragraphs (a), (b) and (c) of the subsection are met and neither of the prohibitions ('must not') upon the making of such an order in ss 306E(1A) and 306E(2) apply. The anchoring of the requirement to make an order upon the Commission reaching a relevant opinion or state of mind as to the criteria in paragraphs (a), (b) and (c) of s 306E(1) imports a degree of latitude and subjectivity in the evaluation of the three prescribed matters.[5] However, the state of mind reached must be one which could be formed by a reasonable person who correctly understands the meaning of the law under which they are acting,[6] and findings or inferences of fact which found the state of mind must be supported by some probative material or logical grounds.[7]

[11] *Third*, the consideration required as to the s 306E(1)(a) criterion is guided by s 306E(3), which makes it clear that the concept of the supply of labour by the employer to the regulated host for the performance of work with which s 306E(1)(a) is concerned is not intended to be restricted by reference to the formal legal arrangements by which this occurs. In particular, paragraph (b) of s 306E(3) illuminates the reference in s 306E(1)(a) to labour being supplied 'either directly or indirectly' by explaining that a direct agreement between the employer and the regulated host for the supply of labour is not required in order for the s 306E(1)(a) criterion to be satisfied. The statutory intention in this respect is confirmed by s 306D(3) and by paragraph [626] of the REM. Further, the relevant effect of s 306D(2) is that the requirement for the performance of work for the regulated host is satisfied if the work is performed wholly or principally for the benefit of the regulated host, an enterprise carried on by the regulated host, or a joint venture or common enterprise engaged in by the regulated host and one or more other persons.

[12] *Fourth*, satisfaction as to the criterion in s 306E(1)(b) is premised on there being a 'covered employment instrument' which 'applies' to the regulated host. 'Covered employment instrument' is defined in s 12 to encompass five categories of instrument including, relevantly, an enterprise agreement. The requirement that the covered employment instrument must 'apply' to the regulated host, in the case of an enterprise agreement, calls up s 52(1), which provides that an enterprise agreement 'applies' to an employer if it is in operation, 'covers' the employer, and no other provision of the FW Act excludes the application of the agreement. Section 53(1) provides that an enterprise agreement 'covers' an employer if the agreement is expressed to cover, however described, that employer.

[13] If it is determined that an enterprise agreement applies to the regulated host, the s 306E(1)(b) criterion next requires satisfaction that, on the hypothesis that the employees supplied to the regulated host to perform work for the regulated host were in fact directly employed by the regulated host to perform 'work of that kind', the agreement would 'apply' to such employees. 'Work of that kind' includes work of substantially that kind: s 306D(1). Sections 52(1) and 53(1) equally apply to, respectively, the application to and coverage of an employee by an enterprise agreement. The evaluation required by s 306E(1)(b) will involve making factual findings as to the nature of the work performed (including any qualifications which may be required, the tasks undertaken and the skills exercised) for the regulated host by the employees supplied by the employer, and then determining by reference to the coverage and classification provisions of the relevant enterprise agreement whether that work is of a kind such as to make the agreement applicable to the relevant employees if they were directly employed by the regulated host. Section 306E(4) clarifies that, for the purpose of this evaluation, it does not matter on what 'basis' the employees are or would be employed. This would appear to exclude from consideration whether the employees are or would be employed on a full-time or part-time, or permanent or casual, basis or for a specified period of time or task.

[14] *Fifth*, the criterion in s 306E(1)(c) is to be determined by reference to the definition of 'small business employer' contained in s 23 of the FW Act. If the regulated host is not a small business employer, the criterion will be satisfied even if the employer supplying labour to the regulated host is a small business employer (as paragraph [633] of the REM confirms).

[15] *Sixth*, notwithstanding satisfaction as to the criteria in s 306E(1), s 306E(1A) prohibits the making of a regulated labour hire arrangement order *unless* the Commission is able to reach a positive state of satisfaction that the performance of work by the employees supplied to the regulated host is not, or will not be, for the provision of a 'service' rather than for the supply of labour. Although s 306E(1A) is expressed as a prohibition, its substantive effect is that reaching the described state of satisfaction is an additional precondition to the making of an order. It is clear that 'service' in s 306E(1A) is used in a different sense than 'service' as defined in s 22. The contradistinction between the provision of a service and the supply of labour in s 306E(1A) implies that the former must involve something more than simply the performance of work by the employees supplied to the regulated host. The matters prescribed in s 306E(7A) provide guidance as to the matters which might constitute this 'something more', so that a finding of fact that one or more of these matters apply would weigh in favour of a conclusion that a service, and not just labour, is being provided.[8] The requirement to have regard to these matters means that they must be treated as matters of significance in the decision-making process.[9] They are intended, as paragraph [638] of the REM explains, to:

> … allow the [Commission] to assess the reality of the arrangement to determine whether it is, or is not, for the provision of a service and then decide, as a jurisdictional question, whether it is prevented from making an order.

[16] *Seventh*, the prohibition on the making of a regulated labour hire arrangement order in s 306E(2) only operates if the Commission is positively satisfied that it is not fair and reasonable in all the circumstances to do so. The provision thus operates in an inverse way to s 306E(1A). The requirement to have regard to the matters in s 306E(8) is conditioned upon submissions having been made about them. That is, in the absence of any such submissions, regard need not be had to those matters. The statutory intention in this respect is confirmed in paragraph [646] of the REM: 'The FWC is only required to consider matters listed in new subsection (8) where the parties have made submissions on these matters'.

[17] *Eighth*, s 306E(9) specifies the mandatory terms of a regulated labour hire arrangement order and, in addition, s 306E(10) confers a discretionary power to specify when an order ceases to have effect. Paragraph (d) of s 306E(9) requires the order to specify the host employment instrument covered by the order. However, absent the exercise of the power in s 306E(10), it will not always follow that the order ceases to have effect when the specified instrument ceases to have effect because s 306EB provides that the order is taken to operate by reference to any successor instrument that would apply to the regulated employees if they were employed by the regulated host to perform work of the kind to which the order relates. Paragraph (e) of s 306E(9), which concerns the operative date of such an order, makes it apparent that an order cannot be given retrospective operation.

[18] Sections 306F and 306H deal with the effect of a regulated labour hire arrangement order once made. The key obligation is that established by s 306F(2): the employer must pay any regulated employee no less than the 'protected rate of pay' for the employee in connection with the work performed by the employee for the regulated host. Section 306F(4) defines 'protected rate of pay' as 'the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee'. 'Full rate of pay' is defined in s 18(1) to be the rate of pay that is payable to the employee inclusive of incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts. Subsections (5), (6) and (7)–(8) of s 306F adjust these obligations in relation to casual employees, national system employers under ss 30D or 30N and pieceworkers respectively in ways which are not presently relevant. Section 306H imposes obligations on the regulated host to provide information concerning the protected rate of pay for one or more employees on request of the employer.

Consideration

[19] We are satisfied, for the purpose of s 306E(7)(c), that the MEU is an employee organisation that is entitled to represent the industrial interests of the employees of WorkPac who are supplied to perform work for Batchfire at the Mine, and of the employees of Batchfire who work at the Mine. The MEU therefore has standing to make the application before us.

[20] We are further satisfied that we are required by s 306E(1) to make the regulated labour hire arrangement order sought by the MEU. We find that:

(1) WorkPac supplies employees of WorkPac to perform production work for Batchfire at the Mine.

(2) The Agreement would apply to these employees if Batchfire were to employ the employees directly to perform production work at the Mine.

(3) Batchfire is not a small business employer.

[21] We are also satisfied for the purpose of s 306E(1A) that the performance of work by the production employees supplied by WorkPac to Batchfire is not and will not be for the provision of a service rather than for the supply of labour. In relation to the matters to which we are required to have regard in s 306E(7A), on the basis of the non-contested factual background we have earlier set out, we find (using the subsection's paragraph designations) as follows:

(a) There is no evidence that WorkPac has any involvement in matters relating to the performance of work beyond the mere supply of production workers.

(b) Neither WorkPac nor any person acting on behalf of WorkPac directs, supervises or controls (or will direct, supervise or control) the production employees which it supplies to the Mine. These functions, including the functions of managing rosters, assigning tasks and reviewing the quality of work, are undertaken by Batchfire and its employees.

(c) The production employees supplied by WorkPac do not use the systems, plant or structures of WorkPac to perform their work. Rather, they use the systems, plant and structures of Batchfire.

(d) There is no evidence that WorkPac is or will be subject to industry or professional standards or responsibilities in relation to the production employees it supplies to Batchfire, apart from its usual statutory work health and safety obligations as an employer. Batchfire has obligations under the *Coal Mining Safety and Health Act 1999* (Qld) as to the safe operation of the Mine and, for that purpose, maintains a Safety and Health Management System which applies to the production employees supplied by WorkPac.

(e) The production work performed at the Mine, which involves the use of plant and equipment, is not of a specialist or expert nature.

[22] All of these findings weigh in favour of our conclusion that the performance of work by the production employees supplied by WorkPac to Batchfire is not and will not be for the provision of a service and rather demonstrate that it is only for the supply of labour.

[23] In relation to s 306E(2), we are not satisfied that is not fair and reasonable in all the circumstances to make the order sought by the MEU. There is no material before us which would permit such a state of satisfaction to be reached. No submissions were made about any of the matters specified in s 306E(8) and, accordingly, we are not required to have regard to those matters.

[24] We conclude therefore that we are required by s 306E to make a regulated labour hire arrangement order as sought by the MEU. The draft order provided by the MEU contains a schedule of pay rates derived from the Agreement which would be payable as at 1 November 2024 (being the earliest operative date for an order permitted by s 306E(9)(e)(i)). It is clear that s 309E(9) does not require the inclusion of a rates schedule in a regulated labour hire arrangement order, nor do we consider that the subsection contemplates this occurring. As earlier explained, any order made under s 306E is given operative effect by s 306F, which (subject to the specified exceptions) obliges an employer the subject of such an order to pay no less than the 'protected rate of pay', which is derived from the employment instrument specified in the order, to employees for work performed by them for the regulated host. It does not appear that it is intended that the order would itself specify any payment obligation. The procedure provided for in s 306H whereby the regulated host is required to provide the employer with information concerning the protected rate of pay of employees covered by an order tends to confirm this.

[25] We will publish a draft order together with this decision which sets out only the matters specified in s 306E(9). The operative date in the draft order will be 1 November 2024, consistent with s 306E(9)(e)(i). No party submitted that the order should specify when it ceases to be in force pursuant to s 306E(10), so the draft order does not contain any such specification. Because this will be the first order to be made under s 306E, we will allow interested parties a period of two weeks to comment on the terms of the order before it is made.

PRESIDENT

Appearances:

P Boncardo, counsel, and *A Walkaden* for the Mining and Energy Union.
D Williams, solicitor (of MinterEllison), for Workpac Pty Ltd and Workpac Mining Pty Ltd.
J Hall, solicitor (of Ashurst), for Batchfire Callide Management Pty Ltd.
T Clarke for the Australian Council of Trade Unions.
B Ferguson and *C Beasley* for The Australian Industry Group.

Hearing details:

2024.

Sydney by video link using Microsoft Teams:
5 April (mention and directions), 26 April (report-back).

Matter determined on the papers.

Written submissions:

Mining and Energy Union: 19 April 2024.

Printed by authority of the Commonwealth Government Printer

<PR776569>

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[1] AE511965.

[2] *Fair Work (Registered Organisations) Act 2009* (Cth) s 113.

[3] Mining and Energy Union Rules.

[4] *Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2016] FCAFC 147, 244 FCR 344, 264 IR 192 [60] (Jessup J, North and White JJ agreeing).

[5] *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47, 203 CLR 194 [19]–[21] (Gleeson CJ, Gaudron and Hayne JJ).

[6] *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42, 69 CLR 407, 430 (Latham CJ).

[7] *Minister for Immigration v Eshetu* [1999] HCA 21, 197 CLR 611 [147] (Gummow J).

[8] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [635].

[9] *Edwards v Giudice* [1999] FCA 1836; 94 FCR 561 [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 [81]–[84]; *National Retail Association v Fair Work Commission* [2014] FCAFC 118; 225 FCR 154; 244 IR 461 [56].