TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER RYAN

C2023/1755

s.739 - Application to deal with a dispute

Captain Anthony Lucas
and
Qantas Airways Limited
(C2023/1371)

Qantas Airways Limited
and
Captain Anthony Lucas
(C2023/1755)

Qantas Airways Limited Pilots (Long Haul) Enterprise Agreement 2020

Sydney

9.00 AM, THURSDAY, 4 MAY 2023

Continued from 01/05/2023

PN84

THE COMMISSIONER: Good morning, I'll take the appearances for the applicant.

PN85

MR NEIL: If the Commission pleases, I appear to ask for permission to represent Captain Lucas in both matters. My name is Neil.

PN86

THE COMMISSIONER: Thank you, Mr Neil, and we'll come to the question of permission in a moment. And appearing for Qantas?

PN87

MR M FOLLETT: Yes, Mr Follett – I also seek permission to appear on behalf of Qantas Airways Ltd and should note, Commissioner, your camera doesn't seem to be working.

PN88

THE COMMISSIONER: I've just checked a couple of settings on my laptop, Mr Follett, but can the other parties see me? Mr Neil, can you see me?

PN89

MR NEIL: The problem is now cured – whatever, Commissioner, you did, it was successful.

PN90

MR FOLLETT: Well, I can now see you, Commissioner, but I can't see Mr Neil.

PN91

MR NEIL: And I can't see Mr Follett.

PN92

THE COMMISSIONER: I don't know if I can fix those matters.

PN93

MR NEIL: No, no. I don't know what that message is.

PN94

THE COMMISSIONER: But the parties can see me?

PN95

MR NEIL: I can see you, Commissioner, and hear you very clearly and I can hear Mr Follett.

PN96

THE COMMISSIONER: And, Mr Follett, your camera has just turned off.

PN97

MR FOLLETT: Yes, now I can see Mr Neil but cannot see you. It just keeps switching between. Maybe it's whoever's speaking last. I'm not sure.

PN98

THE COMMISSIONER: That may be the case. But can the parties see me?

PN99

MR NEIL: Yes, now, yes.

PN100

MR FOLLETT: I cannot.

PN101

THE COMMISSIONER: Well, if the Commission – sorry, if I speak, Mr Follett, does it bring my camera back up at your end?

PN102

MR FOLLETT: No, it does not.

PN103

THE COMMISSIONER: I'm just wondering if - - -

PN104

MR FOLLETT: Now I can see both of you.

PN105

MR NEIL: I too can see everyone (indistinct) Mr Follett and hear everyone.

PN106

MR FOLLETT: No one touch anything.

PN107

THE COMMISSIONER: Let's deal with the issue of permission then. Mr Follett, you've previously been granted permission to appear in some of the interlocutory aspects of these proceedings but I might just ask both parties to address me on the issue of permission this morning, firstly going to you, Mr Neil.

PN108

MR NEIL: First of all, of course, we have no objection to the continuation of Mr Follett having permission to represent Qantas in both matters. So far as our application is concerned, (indistinct). Now, that position, of course, is driven by an appreciation that the present application at least, as well, involves matters of some complexity, involving the evaluative assessment of a number of factors against various legal standards – the kind of matter which we accept is one in which the Commission would be assisted by Qantas being legally represented and we have the same position so far as Captain Lucas is concerned.

PN109

THE COMMISSIONER: So I take it, Mr Neil, that submission is based on the satisfaction of the pre-condition in section 596(2)(a) of the Act?

PN110

MR NEIL: Correct.

PN111

THE COMMISSIONER: Thank you. Mr Follett.

PN112

MR FOLLETT: Yes, I echo what Mr Neil said. I'm not sure we necessarily share the same view about the degree of complexity but we certainly take the view that irrespective of that the proceedings will be conducted more efficiently with legal representation and of course insofar as Captain Lucas is represented, raise issues of comparative fairness under subsection (c) also.

PN113

THE COMMISSIONER: Very well. Having regard to the materials that are before the Commission – and that is the submissions and witness statements that have been filed for the purpose of this application and knowing the background to the matters in dispute between the parties and having considered the submissions of the parties this morning I'm satisfied that the preconditions set out in section 596(2)(a) and 596(2)(c) of the Fair Work Act have been met and that it is appropriate to exercise my discretion to grant permission to the parties to be represented by lawyers in this matter. Permission is granted to both parties.

PN114

MR FOLLETT: As the Commission pleases.

PN115

THE COMMISSIONER: Very well, now, in terms of the directions that were issued by the Commission earlier in the week, I understand both parties have filed an outline of submissions as well as a witness statement. How do the parties envisage proceeding this morning, Mr Neil?

PN116

MR NEIL: What we would propose, if it is convenient, Commissioner, is that we tender the witness statement made by John Pablo on 2 May 2023. I also have a number of documents I wish to tender which I hope we have communicated to your chambers this morning.

PN117

THE COMMISSIONER: And just in terms of the witness statements, Mr Follett, in terms of proceeding this morning, how do you wish to proceed and do you require Mr Pablo for cross-examination?

PN118

MR FOLLETT: Given it's an interlocutory application, Commissioner, we took the view that the party wouldn't ordinarily require leave to cross-examine. Irrespective of that, we don't have any intention of cross-examining Mr Pablo and his statement can be received – as can those other documents my learned friend mentioned.

PN119

THE COMMISSIONER: Thank you. Mr Neil, is that the same – APA have the same or Captain Lucas have the same position in relation to the statement of Mr Alley?

PN120

MR NEIL: No.

PN121

THE COMMISSIONER: Thank you. Now, just in terms of – we might just deal with the statement of John Pablo first. So I might just indicate the submissions and the two statements – that is the statement of Mr Pablo and Mr Alley – were consolidated into a PDF document referred to as a hearing book and circulated to the parties. Have the parties received that from my chambers?

PN122

MR NEIL: We have, thank you, Commissioner – yes.

PN123

MR FOLLETT: We have.

PN124

THE COMMISSIONER: It might just be convenient throughout the course of today that if there is reference to documents in that hearing book, we use the large, red page numbers at the bottom of each page, just so that we're all singing from the same sheet, so to speak. The statement of Mr Pablo commences at page 13 and is dated 2 May. So the statement of John Pablo set out at pages 13 through to 21 and dated 2 May will be exhibit 1.

EXHIBIT #1 WITNESS STATEMENT OF JOHN PABLO DATED 02/05/2023

PN125

MR NEIL: If the Commission pleases.

PN126

THE COMMISSIONER: Mr Neil, just while we're with you we might deal with those documents you referred to. You had those sent to my chambers earlier this morning?

PN127

MR NEIL: I hope so. The first document that I wish to tender perhaps is the originating application taken out by Qantas in the Federal Court. I wonder if it should travel with the second document, the statement of claim. Perhaps I should tender them both together.

PN128

THE COMMISSIONER: As a bundle.

PN129

MR NEIL: As a bundle.

PN130

THE COMMISSIONER: Sorry, just before we go back – Mr Follett, were there any objections to any aspect of Mr Pablo's statement?

PN131

MR FOLLETT: No, Commissioner.

PN132

THE COMMISSIONER: Thank you. In relation to the application, the statement of claim in the Federal Court, Mr Follett, I think you indicated there's no objection to the tender of those documents earlier?

PN133

MR FOLLETT: No, no objection.

PN134

MR NEIL: The version I'm tendering, I hope, Commissioner, I hope carries with it the filing details.

PN135

THE COMMISSIONER: The court's stamp, in effect, on the first page, towards the bottom on the left above, 'Important information'.

PN136

MR NEIL: Yes. The critical point is that both documents were filed on 26 April 2023.

PN137

THE COMMISSIONER: Well, I have the documents that have been sent to my chambers by AIPA this morning, and those attachments. So we'll deal with the – perhaps we deal with those documents this way: the originating application and statement of claim, filed in the Federal Court matter number NSD346/2023, will be exhibit 2.

EXHIBIT #2 ORIGINATING APPLICATION AND STATEMENT OF CLAIM IN FEDERAL COURT MATTER NSD346/2023

PN138

MR NEIL: If the Commission pleases. Then there's a letter from Herbert Smith Freehills to Captain Lucas dated 1 May 2023.

PN139

MR FOLLETT: That's already in the evidence, Commissioner – annexure DA7 to Mr Alley's statement.

PN140

MR NEIL: I won't trouble. And then there is a reply to that. So I withdraw that tender. Everyone knows where the document is. Then I tender a letter from the Association to Herbert Smith Freehills, dated 3 May 2023.

PN141

THE COMMISSIONER: Is that the 3rd or the 1st? Sorry - - -

PN142

MR NEIL: Third of May – this is the response to the letter of 1 May. That should also - - -

PN143

THE COMMISSIONER: I have that now – so it's a letter from the Australian International Pilots' Association dated 3 May.

PN144

MR NEIL: Yes.

PN145

THE COMMISSIONER: Mr Follett, any objection?

PN146

MR FOLLETT: No, Commissioner.

PN147

THE COMMISSIONER: The correspondence dated 3 May from AIPA to Herbert Smith Freehills will be exhibit 3.

EXHIBIT #3 CORRESPONDENCE FROM AIPA TO HERBERT SMITH FREEHILLS DATED 03/05/2023

PN148

MR NEIL: That is my evidence.

PN149

THE COMMISSIONER: Thank you, Mr Neil. Mr Follett.

PN150

MR FOLLETT: Yes, we seek to tender the witness statement of Douglas Peter Alley, dated 3 May. It runs from court book 29 to court book 45 – hearing book, rather.

PN151

MR NEIL: No objection and no requirement to cross-examine.

PN152

THE COMMISSIONER: So the witness statement of Mr Douglas Alley dated 3 May – thank you, Mr Follett – and set out the accompanying annexures at hearing book pages 29 to 45 will be exhibit 4.

EXHIBIT #4 WITNESS STATEMENT OF DOUGLAS ALI DATED 03/05/2023

PN153

THE COMMISSIONER: Does that complete the evidence?

PN154

MR FOLLETT: Completes my evidence.

PN155

THE COMMISSIONER: Thank you. Mr Neil.

PN156

MR NEIL: If it please, Commissioner. This is Captain Lucas's application. The Commission declined to exercise its discretion to arbitrate both of these disputes at this time and instead adjourned the hearing of those disputes pending the hearing and determination of Qantas's application to the Federal Court in matter no.NSD346 of 2023. That is an order modelled on the order made by Commissioner Lee in the Metro Trains case, a copy of which I hope has been forwarded to your chambers this morning.

PN157

THE COMMISSIONER: Yes, a copy of that decision was annexed or attached to the email with the other documents.

PN158

MR NEIL: For reasons that we will shortly develop, it will be our contention that the present circumstances are closely analogous to those considered by Commissioner Lee in Metro Trains, and the exercise of the discretion presently reposed in you would fall in the same way as in Metro Trains. Metro Trains, in turn, applied the factors identified by Bromberg J in *Teys Australia Beenleigh Proprietary Limited v AMIEU*, a copy of which you will find, Commissioner, in a bundle of authorities that we think has been provided by Qantas.

PN159

THE COMMISSIONER: Yes, I have the respondent's bundle of authorities that were provided to my chambers yesterday evening.

PN160

MR NEIL: Very well. So that is the application, if it please. The order that we seek necessarily entails - and this is accepted - necessarily entails that the hearing presently fixed of both disputes, be vacated. When we say necessarily entails, we accept that that would be a consequence of the making of the order that we seek.

PN161

May we begin with some matters that are not in dispute. It is accepted that the Commission has power to make an order in the terms and of the kind that Captain Lucas seeks. In that regard, I endorse what has been said on behalf of Qantas in paragraph 7 of its written submissions on page 23 of the hearing book.

PN162

THE COMMISSIONER: Paragraph 7?

PN163

MR NEIL: Yes.

PN164

THE COMMISSIONER: Thank you.

PN165

MR NEIL: It is also accepted that the decision that you are called upon by Captain Lucas' present application to make, is a discretionary decision, and in that regard I endorse what is said on behalf of Qantas in paragraph 8 of its written submissions, beginning on page 23 and following onto page 24.

PN166

THE COMMISSIONER: Thank you.

PN167

MR NEIL: Next, it is accepted that the onus falls on me to justify the exercise of discretion in the way for which Captain Lucas contends. In that regard, I would draw attention to what has been said on behalf of Qantas generally in paragraph 9, but most particularly in subparagraph (d) of paragraph 9, in its written submissions on page 24.

PN168

Now, the justification of the exercise of discretion in the way for which Captain Lucas contends on (indistinct), is the pendency of proceedings in the Federal Court, commenced by Qantas, in which proceedings arise the same or substantial - or at least substantially the same issues as are involved in the disputes which are before the Commission.

PN169

It perhaps goes without saying, but I did want to draw attention shortly to the circumstance that - well, two circumstances which are in some respects different than those that were considered by Bromberg J in Teys, and those which were considered by Lee C in Metro Trains. Two features of this case that I had in mind were: one, the proceedings in the Federal Court were commenced by Qantas; and, two, they were commenced by Qantas as recently as 26 April 2023 at a time when the proceedings in these disputes had advanced to the point of hearing dates being fixed. It's all happened very suddenly and not at our initiative.

PN170

THE COMMISSIONER: I understand the submission, Mr Neil, but I think just as at the 26 April hearing dates in - - -

PN171

MR NEIL: Well, were in contemplation. Perhaps I should put it that way.

PN172

THE COMMISSIONER: Well, hearing dates in 1371 were at that stage fixed, but 1755 weren't fixed at that stage.

PN173

MR NEIL: Yes. I think the point that you make Commissioner is well taken, but the substance of the submission remains the same. And the point of the particular factual circumstance that I'd wish to point to. With that in mind, may I go to Teys and remind you, Commissioner, of some of the salient features of the reasoning in that decision.

PN174

THE COMMISSIONER: And will you be taking me to the version of Teys in the respondent's authority bundle?

PN175

MR NEIL: I hope so, yes.

PN176

MR FOLLETT: Tab 12, page 256, Commissioner.

PN177

THE COMMISSIONER: Thank you, Mr Follett. And I think your bundle uses red numbering at the top of each page.

PN178

MR NEIL: I don't actually - for some reason the red numbering isn't reproduced in that bundle as I have it, but I wanted to go first to paragraph 20. But before I did so, could I remind you, Commissioner, that this was, in effect, an application to the Federal Court for something in the nature of an anti-suit injunction restraining the further conduct of proceedings in the Commission. The proceedings in the Commission, like these proceedings, were for a private arbitration under a dispute resolution or settlement provision in an enterprise agreement.

PN179

Now, I wonder if I could invite you, Commissioner, first to look at paragraph 20 which frames the nature or identifies the nature of the dispute.

PN180

THE COMMISSIONER: Mr Neil, I might just indicate, just if you're using the respondent's PDF file of the bundle of documents, the PDF numbering at the top matches - that is, in the menu by the top, matches the page numbering in red, so there's no disparity between those, if that assists you.

PN181

MR NEIL: Thank you. I appreciate it. Then you will see, Commissioner, in paragraph 21 the - Bromberg J records the fact now - uncontroversial there, and now accepted, that the Federal Court had jurisdiction to deal with the dispute of the kind that Teys was bringing to it. The same applies, of course, in the present case. Then paragraph 22, the first sentence:

PN182

I accept, and it was not disputed, that the substantive question necessarily arises for determination in both this proceeding and the proceeding in the Fair Work Commission.

PN183

Stopping there for a moment, the same is, on our case, true here. The issues that arise in the determination in the Federal Court are identified in the originating application, the first document in exhibit 2. And then we'll see, as Qantas accepts in its written submissions, that there is a very - at least a very substantial overlap between the issues that Qantas has raised in the Federal Court, and those that arise on the present disputes in the Commission. To the extent that there is something leftover in the Commission, that will be covered by the cross-claim that the Association intends to file in the Federal Court, now that the jurisdiction of that court has regularly been invoked by Qantas.

PN184

So for every practical purpose the situation described by Bromberg J in the first sentence of paragraph 22 is the same situation with which the Commission is now confronted. There are two sets of proceedings, both pending and both concerning essentially for every practical purpose the same issues. One in the Federal Court and another set in the Commission.

PN185

That was something that Teys pointed to in support of the injunction that it sought. You will see that, Commissioner, in paragraph 24 of Teys. Then in paragraph 26, Bromberg J identified the test which, in our submission, is the appropriate test to apply in this case, in the disposition of Captain Lucas' present application. The application, said Bromberg J:

PN186

The application for an interlocutory injunction raises difficult issues in which there are competing considerations. On balance, I am persuaded that the interests of justice are best served by the substantive question being first determined in this court.

PN187

Now, that's the test, in our submission, the interests of justice. And the conclusion to which Bromberg J came, is the same conclusion for which we contend for substantially the same reasons in this case. The interests of justice test is discussed in paragraphs 27 and through to 29, where his Honour locates as the source of that test the judgment of North J at first instance in *Transport Workers' Union v Lee*, which as his Honour notes in paragraph 29, was accepted seemingly without criticism by the Full Court in the Lee litigation.

PN188

Now, then at paragraph 30 Bromberg J turned to consider what the interests of justice required in the circumstances of that case. His Honour, as you will there see, Commissioner, identified six matters relevant to the exercise of discretion. In our submission, the same six matters are appropriate for consideration in this case. They were, as the Commission will have seen, they were the same six matters - the same six factors that Lee C came to consider in Metro Trains, drawing substantially on Teys.

PN189

THE COMMISSIONER: Yes.

PN190

MR NEIL: The first and second of those six factors are addressed in paragraph 31 of Teys:

PN191

First, this court's specialist function is the determination of controversies concerning existing rights and liabilities, including under the Fair Work Act. Conversely, that is not the traditional function of the Fair Work Commission.

PN192

MR NEIL: Stopping there for a moment, our learned friend in his written submissions seeks to diminish the significance of that factor, but the proposition advanced by - or the correctness of the proposition advanced by Bromberg J here in the first two sentences of paragraph 31, has never been doubted. Then as you will see, Commissioner, and recall, Bromberg J goes on to note, as is undoubtedly the case, that the Commission has, in its functions as a private arbitrator or capacity as a private arbitrator, been given some ability to address rights and liabilities but that is as His Honour identified not the Commission's specialist function.

PN193

The second factor identified by His Honour is that the Fair Work Commission is an inferior tribunal and the – whereas the Federal Court is a superior court of record.

PN194

The third factor is the subject of paragraph 32. 'His dispute,' as His Honour observed, 'Is not without difficulty. It raises complex legal issues.' His Honour then went on in the anti-penultimate sentence to say:

PN195

Those issues of law deserve the attention of a superior court. It is noteworthy that under section 608 of the Fair Work Act, the Commission may refer a question of law to this court. That suggests that where complicated legal issues arise, consideration ought to be given to their resolution by this court other than by the Commission.

PN196

Then in paragraph 33 the fourth factor is identified that the issues are of general importance. We will come back to talk about – to say something about that in a moment if we may, by reference to the way in which that factor was dealt with in Metro Trains.

PN197

Then paragraph 36 is where His Honour came to the fifth and most important factor:

PN198

If the substantive question continues to determination in private arbitration and in this court, there is the potential for the answers to be inconsistent.

PN199

His Honour then goes on to deal with the circumstance that – with the fact that that might not be an especially weighty consideration if there was a standard appeal mechanism from the Commission to the Federal Court for arbitration outcomes, but as His Honour observed and as the Commission – as you, Commissioner will be familiar - there is no such standard appeal mechanism. A little – at about Point 7 or 8 on the page, you will see that His Honour addressed that, making the observation as is undoubtedly the case that:

PN200

There is no appeal to the Full Bench of the Commission otherwise in the Commission, and there is no statutory appeal to this court or any other.

PN201

His Honour then went on to point out that the – that for reasons advanced in the balance of paragraph 36, he then went on to observe in paragraph 37 that the scope for review of an arbitration decision is limited. That is the case at present. On the present state of the law.

PN202

Follows with the conclusion to which - that His Honour came to on this factor, in the second sentence at paragraph 37, and (4) is a conclusion that applies in this case:

PN203

It will be consistent with the interests of justice that the potential for inconsistency, the risk of the Commission exceeding its authority be diminished by the early determination of an issue by the court. If the court - - -

PN204

- - - passing over the next sentence - - -

PN205

- - - if the court first determines the issue, a potential for inconsistent results is minimised. Mainly for the reasons given above, concerning the complexity of the substantive question, significance is an issue of general importance. I consider that this is such an important case.

PN206

And then His Honour identified a sixth consideration and began dealing with that as you will see, Commissioner, in paragraph 38. The sixth consideration is the potential for delay in the Fair Work proceeding. This matter was heard on 16 September. The Commission was list as you will see in the second sentence, Commissioner. This – the Commission was going – listed to hear the matter before it, only a few days later on 18 September. His Honour then observed:

PN207

Any order that I made restraining that hearing would result in delay.

PN208

And as you have heard, Commissioner, we accept that that is the position here, too. But then His Honour said this in our submission importantly:

PN209

But if this court can move quickly in determination of the substantive question, the delay would not be great. I expect that this court will be able to move quickly. This is a question of construction, the factual issues that arise are limited.

PN210

That is the circumstance which in our submission is apt to describe the proceedings in the Federal Court. Both as they are presently constituted and as they will be constituted further constituted upon the filing of a cross-claim by the association. The resolution of the matter before Bromberg J, Commissioner, you will see at paragraph 45. His Honour declined to make – to grant the injunction of the sort but stood the matter over to give the Commission the opportunity to make – to further consider a further application for an adjournment in light of the reasons. So my researchers have not disclosed what then happened in the Commission.

PN211

Could I then invite you to turn to Metro Trains, Commissioner, just again, by way of reminding you of how those factors were identified by Bromberg J, were dealt with by Commissioner Lee.

PN212

THE COMMISSIONER: That is a decision?

PN213

MR NEIL: Thank you, yes. If you have that Commissioner, you will see the issue with which Commissioner Lee was concerned identified in the first paragraph particularly – we – we particularly wish to remind you of the second and the third sentences. The sentences that begin essentially and accordingly.

PN214

THE COMMISSIONER: What paragraph was that, Mr Neil?

PN215

MR NEIL: Paragraph 1.

PN216

THE COMMISSIONER: Thank you.

PN217

MR NEIL: Now, just in terms of the background, you will see, Commissioner that in the first sentence of paragraph 2, that the matter before Commissioner Lee was of the same character as the proceedings that are before you. The timing was a little different and the circumstances of the mitigation in the Federal Court were a little different because by the time Commissioner Lee had come to address this application, proceedings in the Federal Court have advanced to the point where there was a hearing date already fixed. You will see that in paragraph 4. A hearing date in the Federal Court.

PN218

If I might ask you Commissioner to turn to paragraph 8, if you would be good enough to look at the first sentence in paragraph 8. That sentence describes a circumstance that obtains here. We accept that the Commission has such a discretion. The source is as you will be aware, Commissioner is in Clause 47.2.5(f) of the Enterprise Agreement. In the question that the Commissioner was being asked to determine is framed in the last sentence of paragraph 8. The Commissioner identified some particular circumstances in paragraph 9 and we

wish to draw attention to those, essentially because it might be said they might be set against the present – our present application.

PN219

First sentence:

PN220

There is an inherent desirability in giving effect to the requirements of dispute settlement clauses. If the parties themselves have agreed to and seen fit to include in their enterprise agreement, we can't resile from that.

PN221

Passing over the next two sentences, the next sentence, this sentence:

PN222

However, in this case, the respondent has determined that its preference is to litigate the matter in the Federal Court of Australia.

PN223

I will come back to that factor in a moment, if I may. Or circumstance in the moment, if I may. Then this:

PN224

I agree with the applicant that the Commission is the agreed forum to resolve disputes. We can't resile from that proposition. Further, at least part of the remedies sought by the respondent being a permanent injunction on the applicant from training drivers and the manner disputed can be effectively achieved in the Commission by way of the question being framed, answered in the manner sought by the respondent. That determination would be binding on the parties. We accept that an analogous circumstance obtains here.

PN225

Then in the last sentence:

PN226

However, I note that the imposition of pecuniary penalties on the applicant sought by the respondent is not a remedy available in this jurisdiction.

PN227

And you will be aware, Commissioner, stopping there for a moment, looking at the originating application, that in Exhibit 2, that the imposition of pecuniary penalties is relief that is being sought by Qantas against the association in the Federal Court. And that will – and I can tell you that will be a feature of these associations cross-claim as well.

PN228

Then in paragraph 10, pass over the first sentence. The second sentence, it is clear that the Commission has been acting as private arbitrator under the Enterprise Agreement has (audio malfunction) the question of law such as the construction of Fair Work instruments in a way that bound the parties in the resolution of the dispute. We accept that, too, can't resile from that.

PN229

Now, however, despite all of those circumstances, despite the Commissioner's – Commissioner Lee's recognition of each of those circumstances the Commissioner nevertheless made an order that gave primacy to the pending proceedings in the Federal Court.

PN230

We accept the application to the present case of what is said in paragraphs 9 and 10. But contend that notwithstanding those circumstances, the interest of justice require that these proceedings be substantively adjourned pending the hearing and determination of the proceedings in the Federal Court. Essentially, the – precisely for the same effectively the same reasons that Commissioner Lee came to that conclusion in Metro Trains.

PN231

Commissioner, you will see in paragraph 12 and maybe perhaps just draw attention to the first sentence, that at paragraph 12, that Commissioner Lee found particularly apposite to the question before him, being the question identified in the last sentence at paragraph 8. The same question with which you are concerned. Commissioner Lee found particularly apposite the reasoning of Bromberg J in Teys. We urge the same conclusion upon you, Commissioner, with respect.

PN232

Now, then in paragraph 13, Commissioner Lee set out the approach taken by Bromberg J in Teys and identified in summary the six factors that Bromberg J had taken into account.

PN233

And then paragraph 14 is important in our submission.

PN234

These matters - - -

PN235

- - - these factors in other words, said the Commissioner - - -

PN236

- - - are helpful in providing some guidance as to whether or not I should exercise the discretion to arbitrate the dispute. Having regard to these matters, it is evident that the matters in 1, 2 and 5 exist here.

PN237

And just stop there for a moment. (1) Reports specialist function as the final determination of the legal rights of the parties under the Act. (2) The Commission is an inferior Tribunal and will be assisted by the reasons of the court. (5) If the substantive question continues to determination in private arbitration and at the same time in the court, there is the potential for the answers to be inconsistent.

PN238

If the court first determines the issue, the potential for inconsistent results are minimal. His Honour referred to this,

PN239

- - - said the Commissioner,

PN240

- - - as the most important matter.

PN241

And now going back to paragraph 14, then you will see in the third sentence at paragraph 14 that the Commissioner agreed with Bromberg J that the matter considered at 5 was an important matter. We would urge you, Commissioner, with respect to place a great deal of weight on that factor.

PN242

There is simply no answer to it. In anything said on behalf of Qantas in opposition to the present application. It is inevitable as matters stand, inevitable, that there is a potential for inconsistent answers to substantially the same question. Or questions. The same or substantially the same questions. Inconsistent results. Not since time immemorial have regarded that the existence of such a potential as anathema. So far as I am aware, in all my years of practice in the Commission, the Commission has taken the same view.

PN243

Then going back to paragraph 14 if I may, the fourth sentence, the Commissioner turn – we had the Commissioner turn to look at Matter no.3, factor No.3 and that you will recall, Commissioner, looking at paragraph 13 is the complexity of the legal issues in the matter. The Commissioner said this:

PN244

There is some complexity in the matter as there is in most matters requiring construction of terms in an enterprise agreement. Whilst the complexity is not on the level of the matter before His Honour in Teys, there is clearly considerable complexity that arises from the competing approaches to the proper construction of the agreement.

PN245

And stop reading there for a moment and make this – and make a submission that the same reasoning would apply in this case. We accept that the legal issues in this dispute and in the Federal Court are not of the same degree of complexity that Bromberg J dealt with in Teys. But is this – whatever one thinks of this dispute, however one analyses it, whatever one thinks of the proceedings in the Commission – however one analyses those, it is clear that there are serious differences between the parties as to the proper construction of clause 19.1.2 of the Enterprise Agreement. There are seriously contestable constructional choices to be made about that provision.

PN246

And the resolution of those constructional choices is a legal question of a kind which engages Factor 3 in the same way that it did – that they did in Metro Trains.

PN247

Then, if I may go back to paragraph 14, then the Commissioner turned to deal with Factor 4, the general importance of the issues. Now, in Teys, you will – you will recall Commissioner – what made the matter of general importance was the circumstance that the same or similar provisions appeared in other – in many other enterprise agreements. As in the – as were in issue in the Teys litigation.

PN248

We can't say the same here, but the same – just as the same could not be said in Metro Trains, the Commissioner – Commissioner Lee recognised that. It is clear in the sentence that begins:

PN249

The matters in dispute are not of general importance in the manner that they were in Teys where many other Enterprise Agreements in the industry had similar provisions.

PN250

But then the Commissioner said this and we would respectfully adopt and apply it to this case:

PN251

It is clear that this matter is important in its own right. With the applicant making clear that its resolution could impact on its ability to provide services if there is an inability to train convergent train drivers within the time frame that they seek.

PN252

The same sorts of or analogous questions of importance are raised by Qantas in this case was on his side. For his part, Captain Lucas points to serious consequences for members of the association. Particularly second officers, depending upon the way in which the present – the dispute that is before the Commission and before the Federal Court is resolved. So it is plainly important in its own right. It affects as AIPA pointed out in the submissions that Mr Dalgleish filed earlier this week and that are now in the hearing book, it affects a very large number of or proportion of the relevant cohort.

PN253

Then a little further on in paragraph 14, the Commissioner turned to a sixth matter, the potential for delay:

PN254

It may be an observation that it is likely that the Commission could deal with this matter within a slightly shorter time frame than is currently set down before the court. However, this has to be balanced against the other matters in particular, the important matter of (5) the potential for inconsistent results.

PN255

Then and – then the Commissioner observed to a point of difference that we identified between this case and the present case and Metro Trains which is that in Metro Trains, there was an actual date for hearing in that Federal Court, that has

not yet (audio malfunction). Then in paragraph 15, the Commissioner made the order on which the orders I now seek (audio malfunction).

PN256

Now, in this case, in our submission, the interests of justice are best served by the substantive issues being determined in the Federal Court, the jurisdiction of that court, now having regularly been invoked by Qantas. Of the six factors identified in Teys, and applied in Metro Trains, undoubtedly, Factors 1, 2, and 5 exist here. Factor 5 is a primary importance in our submission. Its application and its existence and its operation in this case is overwhelmingly in support of our present application, is unavoidable.

PN257

The only way to avoid it is to make the order that we seek. Unavoidable is the matter saying the only way to avoid it is to make the orders that we seek. Factors 3 and 4 are present and operate in favour of the exercise of discretion in the way in which we seek by analogy applying the reasoning of Commissioner Lee in Metro Trains.

PN258

Clearly, there can't be in our submission, can't be any serious debate about Factors 1 to 5. But the real focus of opposition, it seems to us, that the real question that you, Commissioner are called upon to decide is – or pertains to Factor 6: delay. That is really the nub of it. Now, as you will have – I hope we have made clear – what we accept, that if the – if discretion is exercised in the way in which we seek, if the orders we seek are made, there will be some delay. We accept that. But we point to three circumstances that diminish the significance of that delay as a factor weighing against the support we derive from Factors 1 to 5, particularly Factor 5.

PN259

These are the three circumstances that we point to in relation to delay as a consideration. First, as it is such a substantial ground of Qantas's opposition to the orders we now seek, one would expect Qantas to have mounted a substantial case that delay would cause prejudice that could not be addressed in some other way.

PN260

But Qantas's case in that regard never rises above unparticularised assertions. One would expect to see, for example, one would expect to see detailed evidence (indistinct), assuming for present purposes that Qantas is right in its construction of Clause 12.1.2. But it – in respect of the point of allocation, if it is right in contending that the moment of allocation has not – the moment for allocation has not arrived, that an allocation has not already been affected, assuming in Qantas's favour for the moment that that construction is correct. Then one would expect to see detailed evidence about when any second officers in training on the A380 will finish their training, when on Qantas's construction of 19.1.2 they would be available for allocation to the A380, how many of them there were in that regard and when a moment ago, allocation would be expected to arrive and occur, and more importantly, and decisively what prejudice would flow to Qantas or any third party if the moment of allocation or

the act of allocation of any one of those particularised second officers in training was delayed, and if so, by how long.

PN261

There is none of that. It is all unparticularised, generalised, assertions. Nothing more. A slim read upon which to rest this ground of objections. The second circumstance to which we point, under the heading of delay, is that even if one accepts at face value Qantas's generalised unparticularised assertions of prejudice. Even if one accepts it face value, then Qantas is or would be the sole author of its misfortunes.

PN262

It was Qantas who commenced proceedings in the Federal Court. Not Captain Lucas and not the Association. But the problem with which the Commission is presently confronted is a problem created entirely by Qantas and its actions.

PN263

It has exacerbated that problem so far as the evidence reveals and so far as the Association is aware. It has exacerbated that problem by taking no steps to secure or to seek to secure from the Federal Court an expedited or accelerated hearing. Expedition is something that the Federal Court has in its Armoury to deal with problems of this kind. As Bromberg J observed in Teys in paragraph 38, in the passage that we reminded you of, Commissioner, a little earlier. In Bromberg J's words:

PN264

I expect that this court will be able to move quickly. This is an issue of construction, the factual issues that arise are limited.

PN265

Cease reading there. Just like that case, this case in the Federal Court and in the Commission is substantially a question of construction. There are very few factual controversies. This is the very kind of matter that could readily be expedited in the Federal Court, if only Qantas had asked for it. But it comes along here opposing the application that we now make, pointing to delay, making generalised, unparticularised assertions of prejudice in support of that, without having taken the first step to ameliorate the consequences of its - the first and most obvious step to ameliorate the consequences of the circumstance that it had itself created by commencing proceedings in the Federal Court.

PN266

Now, I can tell you that Captain Lucas, and through him, by me, the Association is prepared to undertake to the Commission as a condition of the order that it seeks, that if Qantas were to seek expedition of the proceedings it has commenced in the Federal Court, the Association would consent to that application. If Qantas does not do so, then upon the filing of the Association's cross-claim, it will do so. It will make such an application, and will pursue that application in the Federal Court regardless of the position Qantas takes.

PN267

Moreover, in support of application for expedition - an order for expedition and otherwise, the Association will do all things reasonably possible to facilitate the earliest convenient hearing of the proceedings in the Federal Court. Those are three undertakings which I offer now as a condition of the order that we seek - of the making of the order we seek. As a condition of the exercise of discretion in our favour, if I can put it that way.

PN268

What that means of course is if there is such delay as there may be, as a consequence of the issues being litigated in the Federal Court as opposed to the Commission, those undertakings and the effect that will be given to them, substantially ameliorate that delay. Qantas does not want to hold - the Association does not want to hold this up. It will do everything in its power to push the Federal Court proceedings on.

PN269

By way of giving some substance to that, I can tell you, Commissioner, that although the Association's defence in the Federal Court is not required now for quite some weeks, as Qantas' written submissions point out, we will be - the Association will nevertheless be filing its defence and cross-claim next week.

PN270

Then the third consideration that we point to under the heading of 'Delays,' the delay - and, again, this takes at face value Qantas' generalised assertions of prejudice. All of that, in our submission, must be - ought properly to be balanced against a proper appreciation of what is actually happening here.

PN271

What is happening, what Qantas is doing, is forum shopping of the most blatant and cynical kind. It wants to have - not to make a choice between the Commission and the Federal Court; it wants to have both. It wants to have, as Mr Dalgleish put it in his written submissions, two bites of the cherry. Or as I would put it, to have its cake and eat it too. Its position is that having commenced proceedings in the Federal Court, having poised above the Association's head the sort of pecuniary penalties, it wants to litigate the same issues in the Commission while keeping the pcs in the Federal Court on ice, to be taken up whenever it chooses.

PN272

That is not a course, we would respectfully submit, that would commend itself to the Commission as an appropriate way to deal with the issues. Qantas made its choice. It made its choice when it took out the proceedings in the Federal Court, and it is now stuck with it or ought to be stuck with it. It can't have it both ways. Captain Lucas and the Association behind him, and the members that it represents, ought not to be vexed in that way.

PN273

The interests of justice tell strongly against that, and those are three considerations which, in our respect, substantially diminish the significance of delay as a factor against the exercise of discretion in the way that we seek. Now, unless I can be of anymore assistance, those are the submissions we wish to make.

PN274

THE COMMISSIONER: Thank you. Mr Follett. Now, Mr Follett, it appears I have lost your video, so I'm not sure if that's been turned off by you or whether there's a malfunctioning or gremlin in the system.

PN275

MR FOLLETT: I haven't turned it off.

PN276

THE COMMISSIONER: I can see you now.

PN277

MR FOLLETT: Thank you.

PN278

THE COMMISSIONER: Thank you. Mr Follett.

PN279

MR FOLLETT: Thank you, Commissioner. We rely on our submissions dated 3 May found at pages 22 to 28 of the court book, and should I note one minor change to those submissions at paragraph 10(g), found on hearing book page 27. There's a reference to at least 35 years, and I think that should more properly read, 'At least 30 years.' I think the relevant power was introduced in 1992.

PN280

THE COMMISSIONER: Thank you.

PN281

MR FOLLETT: Commissioner, the principle and most compelling of what we say are a long list of reasons not to stay or adjourn these proceedings, is found in paragraph 10(e) of our written submissions, court book page 26. The ordinary premise of applications of this type brought by Mr Lucas are either one of two things. One, vexation by having to run two proceedings at the same time. Or, two, where a matter is in an inferior tribunal which it cannot conclusively determine. Say, for instance, an issue as to its jurisdiction.

PN282

The first of those ordinary premises for this sort of application is vexation and, of course, one should not be vexed by having to deal with the same matter in two separate jurisdictions at the same time. The second issue deals with an issue of utility or futility. That is, why would the inferior tribunal who cannot conclusively determine an issue going to its jurisdiction, go first only for that matter to be capable of reassessment in the court on a correctness standard.

PN283

Neither of those considerations apply here at all. As such, there is no good reason for why the Commission proceedings, as advanced as they are, as ready for hearing as they are, should go off indefinitely so that the court can decide some of the issues in no one knows what time frame. My learned friend placed some reliance at the end on expedition in the court. That's all very interesting but anyone who knows how expedition applications work in a court is it's often got

nothing to do with what the position of the parties is, and everything to do with the availability of the docket judge or some other judge who might be capable of hearing the case.

PN284

It's a matter for the court, and to rely or place any significant weight at all on something that is completely unknown and outside of everyone's control, including the parties, is not something that you should countenance or place any weight upon. We ask rhetorically, as we have in footnote 27 of our written submissions, on court book 27, if it is truly the case that Mr Lucas wants the issue determined and places emphasis on expedition in the court and undertakings and these sorts of things, if that's really his position, why does he want to stay these proceedings?

PN285

When properly construed and considered, there is no reason, other than - and with great respect to my learned friend he opened the door on this - talk about blatant forum shopping; that's all this application from Mr Lucas is. Why is this application just not simply dropped when we said, 'Well, look, we're not going to press things in the Federal Court. We'll allow the Commission to go through its processes and then we'll see what happens.'

PN286

The suggestion that there's forum shopping here is a complete nonsense. Mr Neil obviously hasn't read footnote 26 of our submissions. What exactly is left to be done in the Federal Court and whether or not those proceedings continue, and if they continue in what form and to what extent, are matters that no one can know until we get the outcome of these proceedings.

PN287

Why does he not accept a delay in the filing of a defence in the Federal Court to avoid any suggestion of duplication? Well, we all know the reason why, the real reason why, he doesn't want you to hear this case. He's already made an application to have you recuse, which the Full Bench described on appeal as completely devoid of merit. There is no reason, if he really wants this dispute resolved, other than obvious forum shopping where he wants to basically stop this thing which is on the precipice of a hearing, which incidentally he has already discontinued once. This is about delay and forum. Delay and forum.

PN288

His case rises no higher than Teys. And as we've noted in our written submissions at paragraphs 8 and 9, that is not a very useful way of making an application of this type, and it doesn't stand for a whole lot because every case turns on its own. And we note, incidentally, that Sterling has a longer list of factors that are most commonly applied in this Commission, including at Full Bench level. That's at paragraph 43 of the Jayasundera Full Bench. Both of them, of course, are non-exhaustive and we don't say the matters in Teys are not capable of being relevant, but we do have something to say about some of them in due course.

PN289

The court has no monopoly on construction questions. On any view, the Commission determines construction questions of enterprise agreements tens of times, possibly even hundreds of times, more regularly than the court would. To say that the Federal Court is specialist, implying, of course, that the Commission is not, when it's been doing this on more occasions for 30 years, to the extent that proposition had any merit, it may have had merit back in 2015, but it hardly has any merit in 2023.

PN290

My learned friend rests his case on Teys. He says the first five factors apply here. Properly construed, factors 1, 2 and 5, which I will come to what they stand for in a moment, but 1, 2 and 5 apply here. This matter is not complex, certainly not as complex as the issue in Teys. Teys was a case about the incorporation of an external document into an enterprise agreement. That is not an easy question. The reason it's not an easy question is because it relates to issues such as whether employees were aware of it, whether it was distributed to them at the time of voting, whether it affects an internal variation to the enterprise agreement. They are not easy questions.

PN291

This case, and contrary to the very high level assertions that my learned friend makes, appreciating he is at a significant disadvantage because he doesn't know much about this case, with respect, that certainly you and I do and Mr Dalgleish does, this is not a construction issue. There is very little that separates the parties from a constructional perspective.

PN292

This is a case - put aside questions 1 and 3. The only issue that arises in the Federal Court at this stage is question 2. Question 2 is unreasonably withholding. We all refer to the same cases and, as Mr Dalgleish keeps reminding us, secured income in the higher court. There's not going to be a big difference between us as to what the relevant principles are. Ultimately it's a factual question. This idea that there won't be much evidence and it's going to be determined on a construction issue is a nonsense, as you well know. You are going to have to go through what Mr Dalgleish keeps reminding us is 3000 pages of material and work out the factual question: was the Association's withholding unreasonable? That is a factual question of nuance. It's not a legal question.

PN293

THE COMMISSIONER: Does it not require determining the construction of the clause along the way?

PN294

MR FOLLETT: Of course, of course, but in terms of what's the central issue, as I said, the construction of the clause along the way is probably not going to be the hugest issue in terms of what unreasonable means. Mr Dalgleish is going to say secured income. We're going to say secured income is relevant, but the authorities show that the construction of the issue turns upon the particular context in which it's used. There's not going to be a great deal between us.

PN295

There will be a debate about whether or not, if it is not arbitrary or capricious, is that the be all and end all, but that's the only real debate we're likely to have and, unlike Teys and Metro, that decision along the way was the only decision that was required to be made. That's the reason why Bromberg J, in Teys - given, of course, he was hearing the case, it's very easy for him to make assessment of how quickly that court could deal with the matter, which was obviously an important consideration to him - but, as he said, this is not an evidence case, this is simply a construction case: is this document incorporated or not? Of course that matter can get on quickly.

PN296

Point 5 of Teys, no bearing on this case whatsoever. The evidence led in that case showed that the particular clause was used in what was described as many enterprise agreements in the meat processing industry and his Honour accepted that proposition and said, therefore, it is likely to affect many thousands of employees.

PN297

THE COMMISSIONER: Point 4?

PN298

MR FOLLETT: Yes, sorry, point 4. And large numbers of employers.

PN299

Now, at its highest, this case potentially, over five years, might affect 100 pilots or 200 pilots, but, as you will have seen, the factual premise for that submission is certainly not established. As Mr Alley explains, the document that great weight is placed upon that you've heard a whole lot about in mentions is a planning document that does not currently represent the position with respect to allocations for the next five years. You simply don't know how many direct allocations Qantas might have a desire for in the next five years. That's point 1.

PN300

Point 2, what is it exactly that you are going to be deciding in this case that's going to have some determinative impact upon what may or may not be the position with respect to potential direct allocations in subsequent years? We will certainly know what the clause means, we will certainly know how it applies and operates, but, ultimately, when it comes down to the question of unreasonable withholding, that's a facts question.

PN301

The operational reasons might be different. They might be the same, but they might not be as pressing. The union's reasons for refusing might be different. The union may have taken different steps. No doubt the determination of the question will have some bearing upon how the industrial parties deal with these situations insofar as they arise in the future, but nothing you say or, indeed, what the court says is going to determine any of those matters, so points 3 and 4 don't arise, or, insofar as they do arise, they don't arise to anywhere the extent relied upon.

PN302

Emphasis is placed on points 1, 2 and 5. Keep in mind, Commissioner, I am only dealing with Teys because so much emphasis is placed on it. It is one case of many. Emphasis has been placed on points 1, 2 and 5. When you look at those points, they are structural, they apply in every single case. Insofar as they apply, they apply to every single case. Unavoidable. Yes, the Federal Court is a superior court, yes the Commission is an inferior tribunal.

PN303

Point 5 I will return to. Point 5 is actually wrong. My learned friend almost places his entire case upon point 5. It's wrong. But, even if it were right, points 1, 2 and 5 are structural. That being so, why isn't every case in the Commission just stayed? As we point out in our submissions, not that this is all that important, but every case we refer to, six or seven of them, that establish what the principles are, every single one of them a stay was refused, but points 1, 2 and 5 applied in every one of them.

PN304

Now dealing with point 5, my friend said we didn't have an answer to it. My friend used a lot of adjectives to basically emphasise, with the assistance of you, Commissioner, how important it was to his case. It was fundamental, a great deal of weight, simply no answer to it. Point 5 is the potential for inconsistent decisions. That is, if the Commission goes first and determines the point in a private arbitration, the court can reach an inconsistent decision. As a matter of law, that is capital W-R-O-N-G wrong, and the person who told us as a matter of law that it is capital W-R-O-N-G wrong was Bromberg J, which decision has been upheld on appeal on at least three separate occasions.

PN305

Teys was a case decided in 2015, Two years later came along Energy Yallourn Australia, which is referred to in our submissions. Energy Yallourn Australia was decided in October 2017, after Metro Trains as well, incidentally, and what did Energy Yallourn Australia tell us? Energy Yallourn Australia told us that when the Commission determines an issue of law or fact in a private arbitration, the court cannot determine it, it has no jurisdiction to determine it. The reason it has no jurisdiction to determine it is because there is no matter in the constitutional sense, and the reason there is no matter is because there is no justiciable controversy between the parties because it's been resolved by the private arbitrator.

PN306

That is the common law, and the common law for the first time was applied in the Fair Work Act context in Energy Yallourn Australia in 2017, upheld on appeal and upheld subsequently on numerous sub-appeals, including most recently in the Full Court in a case called Air Services Australia.

PN307

If you determine, Commissioner, the answer to question 2, nothing in the court can deal with that. It just simply cannot be dealt with, if the circumstances are the same as they were in Energy Australia, and that raises issues such as the parties and things of that type, but, as a matter of law, as a matter of principle, point 5 is now wrong, it has been overtaken by developments in the law.

PN308

Subject only to an argument that this private arbitration doesn't bind the parties in the court, there's no chance of inconsistent determinations.

PN309

Just returning to the constructional issue as well, we wish to emphasise, insofar as constructional issues arise, two matters. Firstly, one of them I can't provide a great deal of assistance to you because the case is not in the bundle. It is referred to in Metro Trains, so perhaps if I could ask you to take up Metro Trains just so you can see the citation, and then I'll tell you what the case is about. It's actually footnote 8 of Metro Trains. It's a case called *Clermont Coal Pty Ltd v Brown* [2015] FCAFC 136. That was a case where the Commission was dealing with a genuine redundancy dispute in the context of an unfair dismissal.

PN310

Interestingly of course not only did that involve a constructional issue as to what a genuine redundancy was under the Act, but it also related to a jurisdictional issue. The employer sought a declaration in the court as to what the genuine redundancy meant, and that was a matter that the Commission had dealt with. The situation on the facts was that the Commission had heard the matter and reserved its decision. The employer went off to court and sought a declaration, and the court simply said, this was the Full Court, it just said we're not dealing with it, because to use the words of his Honour Jessup J with whom the other members of the court agreed, and I think it's referred to in Metro Trains as well:

PN311

> *The question upon which the declaration is sought is four-square within the matters upon which the Commission must deliberate.*

PN312

I just refer that case to you, and in particular paragraphs 9 to 12, a very, very short judgment. That involved a legal constructional question, and the court said, well, the Commission is dealing with it, we're not interested. This idea that (a) if there is any constructional issue, and (b) it's in the Federal Court everyone should just drop everything in the Commission and go off to court has no substance whatsoever.

PN313

Equally I would like to take you, Commissioner, to one of the decisions in our bundle. It's a One Tree case, tab 9.

PN314

THE COMMISSIONER: Yes, I have that, thank you.

PN315

MR FOLLETT: It commences at 214, and the passage I wish to take you to is at 237. It's paragraph 97. Before I read that paragraph to you I need to tell you a little bit about what the case was. There was a dispute about transmission of redundancy entitlements in a transmission of business scenario, and the dispute was essentially about how many weeks pay for a year of service employees got,

and that turned on a dispute of construction of the enterprise agreement clause. That was being dealt with in the Fair Work Commission.

PN316

The employer commenced proceedings in court seeking two forms of relief. One, effectively a stay or injunction against the Commission proceeding, prohibition as it were, on the basis that the Commission didn't have jurisdiction, because the employer hadn't consented or agreed to the private arbitral clause on the transferred instrument. That argument was rejected. But the other thing the employer said was, well now we have commenced in the court and we also want the constructional issue, which was the centrepiece of the case the Commission dealt with, we want the court to deal with the constructional issue instead of the Commission, and the court gave that argument short thrift as you will see in paragraph 97.

PN317

The appropriate place for determination of the construction argument is in the Commission. The legislative intent in 186(6) which requires that there be a dispute resolution term referable to the Commission or another independent party is to encourage dispute resolution, including by way of arbitration outside of the judicial system. That is a fundamental statutory requirement which would be avoided if the relief sought by One Tree on the basis of the constructional argument were to be entertained. Nothing in Teys per Bromberg J suggests otherwise or requires the court to determine all issues in the matter. His Honour was anxious to avoid the most important factor being a potential for inconsistent decisions if the matter proceeded in both the court and the Commission.

PN318

Which of course I have noted is now not the law.

PN319

That concern will not arise in this instance as I propose to leave the constructional argument for the Commission.

PN320

THE COMMISSIONER: Why do you say Teys is not the law, Mr Follett. Is it because of Energy Australia Yallourn which dealt with the issue of jurisdiction and the issue of inconsistent decisions?

PN321

MR FOLLETT: It depends what you mean by not the law, Commissioner.

PN322

THE COMMISSIONER: What do you - - -

PN323

MR FOLLETT: Let's take it this way. It doesn't determine how you deal with this application. It is merely one case among a plethora, all of which have said here's a big list of factors that may or may not be present. You will see in our submissions we referred on the facts of this case to various of the considerations

from the Sterling list. Teys doesn't materially depart in a particular way from any of those. It doesn't establish a new or separate test. There's no contest between Sterling or Teys. They're just examples of cases dealing with the same issue.

PN324

But the point I'm making about Teys when one focuses on points 1, 2 and 5, which seems to me what all the noise is about, irrespective of whether they're right or wrong they are structural in nature which apply in every single case, and if there was some ipso facto decision rule then every case would be stayed. But separately from that the point I made about point 5 is that that now is wrong.

PN325

That concern is either (a) extinguished, or (b) significantly ameliorated. You can have debates about exactly what is decided by the Commission and whether or not there's anything left for the court to determine. You can have debates about whether what was decided by the Commission binds the disputants in the court, but what is now clear is that insofar as a constructional issue for example or a question is such as unreasonable withholding, if that were determined by the Commission that's the end of it.

PN326

Energy Yallourn was a case about - it was just the construction of an allowance. The Commission said the allowance is payable. The employer didn't like that result, went off to court and sought a declaration that the allowance wasn't payable, and the court said, 'I'm not even going to deal with the merits of it because I don't have jurisdiction to. I cannot determine the question. There is no matter.' Now, that wasn't the law. It certainly wasn't the (indistinct) in 2015 when Bromberg J placed significant emphasis on the potential for inconsistent findings.

PN327

Now, as I have said, Commissioner, our case is not put on the basis of Teys or anything else. Our case is put on the basis of the authorities as they stand. I'm spending time on Teys simply because that's the only case Captain Lucas has got. I will return to Metro in one moment, and I'm pointing out to you why insofar as points 3 and 4 arise in Teys they don't arise here. Point 6 was obviously a negative in Teys, but balanced overall didn't carry today. Point 6 is crucial here. And then points 1, 2 and 5 they're structural firstly, and secondly 5, the big ticket item, is now legally incorrect.

PN328

A number of other matters of note, paragraph 9 of our written submissions cannot be overlooked. Some case of sufficient cogency and justification needs to be advanced as to why on the particular facts and circumstances of this particular case justice is better served by a stay or an adjournment, and all you've really heard, Commissioner, is, well it's in the court. You haven't heard any reasoning other than, well it's in the court. The court should deal with it. No reason as to why the court should deal with it, just that it should deal with it.

PN329

Simply pointing to, well here's a case where the Commission proceedings were effectively stayed, therefore just follow that, is not of much assistance. I mean I

could have done that with all seven of the cases that we rely upon. Gone through each of the factors and said, well that applies here, that applies here. If it's a weight of numbers game we'd have seven, they'd have one or two. It's not the way you should deal with it of course.

PN330

Dealing just briefly with Metro Trains my friend, as any advocate would do, highlights the similarities and downplays or ignores the differences. To say that it's on par or very similar to the facts of this case is a dramatic overstatement. Most importantly, and this is where I commenced on paragraph 10(e), most importantly by reference to a consideration of where the proceedings were at. The matter was listed in court. There were directions made for the exchange of materials and the matter was listed for hearing on 30 November 2017.

PN331

Commissioner Lee had conciliated the case in the Commission. That's all he'd done. Nothing else. No directions had been made. You will see that at paragraph 6. No directions had been made. No submissions or materials had been set down for exchange, let alone exchanged, and he was dealing with the case in late August early September, three months before the listing in court.

PN332

When you look at the analysis, it's really paragraph 14, Commissioner Lee refers to points 1, 2 and 5, which we have already addressed you on. That doesn't really carry a lot of weight, in our respectful submission. He then makes, or I think respectfully to the Commissioner is somewhat of a difficult observation in terms of its cogency, by dealing with point 4 from Teys in saying, 'Well, yes, this doesn't affect a lot of people and is not important to a lot of people, but it's important to the disputants.'

PN333

That's not really what Bromberg J was saying, and every dispute in the Commission is going to be important to the disputants. And then more relevantly the potential for delay, and he said, 'Well, of course it's likely the Commission could deal with the matter in a slightly shorter timeframe.' It's not quite clear the basis for that. I think that's probably not much more than an observation that 'I might be able to list it for hearing before 30 November. But the court have set down a date for hearing and the parties are working in that timeframe. The timetable the court has set may be cutting it fine to have some certainty. However, I am not satisfied the Commission proceeding to arbitrate the matter now would see a dramatic difference in resolution.'

PN334

That couldn't be a million miles further away from this case. That's exactly what going through the court is going to achieve, a dramatic difference in the timetabling and the resolution. We are listed to commence this case in 12 days. All of the materials, the primary materials, are filed. The primary submissions are filed. All parties have complied with your directions. The questions have been set. We don't even have a defence in the court. We have a suggestion of a cross-claim. Mr Neil asserts the cross-claim is going to cover all

the matters in this case. It's not quite clear how that could be so, especially in light of the letter that was sent by Mr Dalgleish which contends or says that it will contend that Qantas's contravened clause 19.1.2. Question 3 in this case doesn't deal with clause 19.1.2. It deals with clause 16.5 and bypass. So unless that letter is wrong, not all of the issues will be dealt with. We're ready to go.

PN335

And the best my learned friend can do in the court is say, 'Well, we'll ask the court for expedition and we'll cooperate to see if we can get it'. But you're not going to get a quick hearing because it's evidential in nature. If it was simply a construction issue we'd exchange 10 pages of submissions and have a hearing. That is not going to be what occurs in the court, as the Commission well knows. On that point of timing and delay, it actually has two complexions and I want to deal with both of them. My learned friend only dealt with one of them. First and foremost, without considering specific factual issues of prejudice there is – are the propositions we derive from paragraph 9(b) of our submissions, there is a statutory mandate on this Commission to act quickly.

PN336

Paragraph 9(c) of our submissions: it is a grave matter or a not insignificant matter to interfere with the ordinary business of the Commission and 10(d) of our submissions; the delay in and of itself, especially of the type of length contemplated here, is against the proper administration of justice. Each of those propositions does not rely in any sense on issues of comparative prejudice. It is the prejudice to the administration of justice brought about by delay, and the interference with the usual business of the Commission and an overturning of the statutory mandate to deal with matters quickly.

PN337

Secondly, the other complexion is of course the factual one, being specific prejudice. My friend made a series of assertions about the evidential case on prejudice put by Qantas and how there's nothing. Well, I think the disadvantage that my learned friend labours under is he doesn't know the nature of the material or he may not know the nature of the material that's already been filed in this case, which Mr Alley on the question of prejudice relies upon. The reason why delay is prejudicial is covered in significant detail, significant detail in the statements of Mr Kuhl(?) and Mr Alley – Mr Alley in particular – in the substantive proceedings which Mr Alley in his statement in this stay draws upon to support the prejudice from delay. There is an extensive factual basis for why that is prejudicial. That is why we've made the request in the first place. The Commission is no doubt familiar with it: the training backlog, the issues about fleet interruptions, that we can't fly the flights we want because we don't have the pilots we need – all of those sorts of matters. I'm not going to rehearse them all now.

PN338

But to say there's not an evidential foundation for the prejudice and it's just high-level assertions is plainly wrong. There appeared to be a submission – at least in the written submissions – not emphasised today orally that there wasn't any prejudice to us because we've already proceeded to allocate. Well, that – the factual premise of that assertion has obviously been exploded as well. The

position as it stands today is that Qantas is not in a position to allocate any stops to the A380 aircraft until the matter is determined under clause 19.1.2, this is. Because obviously, Commissioner, as Mr Alley says, if we were to do that and we were found to be wrong, that would be a contravention of the enterprise agreement.

PN339

Now, we're not quite sure what is sought to be made of the fact that it's Qantas that's filed the proceedings in the Federal Court. When it says it's the author of its own misfortune – well, that's simply not correct. We didn't make this stay application. It's only the stay application which has given rise to the issue before the Commission and that's not of our doing. We've made our position plain, that the mere fact that we filed proceedings in the Federal Court had very little to do with what was supposed to happen in this Commission. So I'm not sure what is sought to be made of that and even if something is sought to be made of that, well, it's Mr Lucas who filed his dispute proceeding in this Commission after he'd already filed another one back in 2022 and then discontinued it.

PN340

He apparently wants this Commission to determine the matter as well and he apparently – as things stand today – only wants the Commission to determine that, other than this suggested cross-claim but now suddenly he's changed his mind. Talking about forum shopping and opportunism, there was no evidence of any intention to file any proceedings of any consequence in the Federal Court from Captain Lucas until we've done so in circumstances where we said we didn't want to press them in a way that prejudiced the continuation of these and he's changed complete direction and said, 'Well, don't worry about everything in the Commission. I want to go off there now because I think I'll get a better chance'. There was reference to the dates being fixed for the hearing of this matter. As we note in our submissions, the dates for the hearing of 1371 have been fixed since 31 March – five weeks ago. My friend referred also to, I think, what Bromberg J had said in Teys about the power for the Commission to refer matters to the Federal Court. Well, as the cases will show, there are very, very, very few referrals of any questions to the Federal Court that succeed.

PN341

His Honour Bromberg J also made note of the appeal with permission versus appeal as of right in a court versus the Commission. I don't understand the particular significance of that, we must say. If there is nothing in the point then permission will be refused. If there is something in the point then ordinarily permission would be granted. That is, arguable case of appellable error, obviously injustice for the decision is likely wrong. The way permission works on these cases is – in the Commission – is if you've got a point, you'll get permission. If you don't have a point, you won't. Practically, that doesn't materially differ from anything that's going to occur in court.

PN342

I'd also note from Teys, a minor point – but at paragraph 37, which is found at page 269 of the PDF, the last sentence:

PN343

Mainly for the reasons given above, concerning the complexity of the substantive question and its significance as an issue of general importance I consider that this is an appropriate case; that is the court should determine the issue first to avoid potential inconsistency.

PN344

Those two factors, for the reasons we've already addressed, don't apply or certainly don't apply with any similar gravity in this case so even that factor simply can't be slavishly applied here as realistically my learned friend seeks you to do. But just on the prejudice point again, I've already dealt with the factual material dealing with the prejudice. My learned friend, there was no evidence about when the training finished – well, when you look at the starting dates, which was in the evidence of Mr Alley and you look at the evidence in Mr Alley's statement about how long the training course takes. You can work out the end dates of that training, pretty close to, and the crux of those two matters compared together is that they're at simulator stage and in several weeks they'll be ready for deployment. My learned friend said you don't know how many: well, you do. It's in Mr Alley's statement. There are eight SOTS who have commenced training. That's how many. And there is a desire, I think, to put another 12 SOTS commencing training shortly. For all of those reasons, when you actually boil it down, you ask yourself the real question of why this application is being made. If Mr Lucas really wants this dispute heard and determined he can have it heard and determined far more quickly here.

PN345

He could have it determined in a way which is as binding as anything he'll get in court with far less work, far less cost, far less delay. Why does he not want that to occur? I mean, it strikes one as odd that if he had never made this application we wouldn't be here. But what is the significance of us having made this application, practically? None – no significance, at least as things presently stand.

PN346

Of course if we were three stumps out of the ground in the proceedings before the Commission, well, that is obviously going to have some implications for the continuation of the Federal Court proceeding. But the reverse is equally the case. I mean, I think practically we could accept even if there is a risk of inconsistent judgments, which for the reasons I've identified are not, but if the court were to go first, there's no law that says the Commissioner couldn't decide the matter differently. You could run the Energy Yallourn argument backwards and say, 'Well, there's no dispute now for the Commission to resolve'.

PN347

But putting that issue aside, there's no law that says, 'Well, you'd have to decide the case the same way the court did'. The risk of inconsistent judgment still arises but ultimately, here we are, ready to go. All the work's been done, twice. All the primary materials are in and Mr Lucas's application would have the effect of putting all that aside, setting up a new case by way of cross-claim that we don't know what it is. We're going to have to defence that. Under the rules we would be entitled to take 28 days. I don't know what the cross-claim is. I don't know whether we'd need 28 days or some shorter period of time, of course. Then we're at the mercy of the court as to when we might get a listing and expedition is

difficult, even when it's consensual and the evidence as to what the Federal Court would ordinarily look like is in the material.

PN348

Captain Lucas himself says it's north of 18 months to get a hearing. That is true, subject of course to an application for expedition. The point really is we just don't know. I think realistically the prospects of a hearing this year are slim but we simply don't know. My learned friend will of course say, 'Well, we think it will get on quicker'. We just don't know. And it's notorious fact that the court reserves for longer than this Commission does – notorious. It's undeniable and unarguable that this case would be heard and determined in this Commission months – we're talking months – before anything out of the court. And in the context of where this dispute started way back in 2022, where a run-through with the Commission understanding the pressing need to have the question of allocations decided at that time by the end of March.

PN349

It's then crumbled to nothing, not by the actions of the Commission or my client but by Mr Lucas to then make essentially the same application the next day. Here we are all of that time later, and we still don't have resolution of the issue that both parties apparently want resolution to and now we're being asked to adjourn it off for another indeterminate period of months before the underlying issue – and importantly, of course, the training year is gone. The actual subject matter of the dispute might be gone. For all of those reasons, we say quite forcefully that this application has no merit and it should be dismissed. If the Commission pleases.

PN350

THE COMMISSIONER: Thank you, Mr Follett. Mr Neil, any submissions in reply?

PN351

MR NEIL: Seven points, if it please: can you hear me, Commissioner? There's just a delay at my end, I think. Is all well now? But I'm afraid I can't hear you.

PN352

THE COMMISSIONER: Can you hear me now, Mr Neil?

PN353

MR NEIL: Yes, I can, thank you.

PN354

THE COMMISSIONER: Just needed a refresh. How long do you think you'll be in reply, Mr Neil?

PN355

MR NEIL: About 10 minutes – 10 to 15 minutes at the most.

PN356

THE COMMISSIONER: Thank you.

PN357

MR NEIL: Very well. Point 1: why has this application been brought? The answer is simple: it has been brought because circumstances have changed. Qantas changed those circumstances. It changed those circumstances by – of its own volition – instituting proceedings in the Federal Court and waiting until 26 April 2023 to do so. That is a material change to the circumstances surrounding this dispute. That change is the explanation for the present application. The application is made because as a result of Qantas's initiative in commencing proceedings in the Federal Court, then if the hearing of this dispute continues in the Commission, my client and the association behind him will be litigating questions the same as those raised in the Federal Court with – or substantially the same, a substantial overlap.

PN358

No shade to my learned friend, he said rhetorically, 'It's all in the written submissions'. There's a substantial overlap at the very least and as to that overlap, we say it's greater. It doesn't matter. As to that overlap at least, then there is a sword hanging over my client's head. Unless the institution of the proceedings in the Federal Court is an abuse – and we don't make that suggestion – it must be taken that Qantas intends to pursue those proceedings, seriously, to obtain the relief that it seeks. And that is a presently-existing fact, regardless of whether we delay and take an extension in putting on a defence and regardless of any arrangements that are made inter parte. The claim for the declarations that Qantas seeks, the claim for the imposition of pecuniary penalties, that would remain. It is not in the interests of justice that that be so.

PN359

That's the answer to the rhetorical question, 'Why is this application being made'? It's being made because of a change of circumstances effected solely by the actions of Qantas. One could listen to the submissions made on behalf of Qantas and come away with the impression that Qantas was an innocent bystander in all of this, caught up in circumstances not of its own making. But of course that would be an erroneous impression. We would not be making this application if Qantas did not institute a proceeding in the Federal Court. That's the whole gravamen upon which it is made. That's point 1. Point 2: could I deal with the Energy Australia point? Energy Australia is invoked by Qantas to undermine the potentiality for inconsistent answers to questions – an inconsistent answer to the question of, for example, whether the association had unreasonably withheld its agreement to the allocation of second officers in training to the A380.

PN360

It's not at all as simple as Qantas would have it and there are at least three reasons why that is so. The decision in Energy Australia and all of the authorities that have subsequently taken up that line of reasoning, depends on the construction of the language of the dispute-settlement provision in that case. It was the binding effect of the decision of the Commission which was the starting point of the proposition that there was then no matter. The language of the present case, the language of the enterprise agreement in the present case is materially different. The relevant – the analogue provision is clause 47.2.4. That does not use the language like that, the same as – we would submit – not like that of the language considered in Energy Australia. Step 1.

PN361

Step 2: even if it did, even if clause 47.2.4 were construed so as to make binding upon the parties to this dispute, the answers given by the Commission, then one must ask, 'Who are those parties'? Captain Lucas is a party to the disputes that the Commission is considering. The association is a party to the proceedings in the Federal Court. It's a very long jump. Perhaps it could be made but there's at least a serious question as to whether it can; a very long jump to transpose the binding effect of any decision that the Commission might make, assuming that clause 47.2.4 is interpreted in that way to the Association. The parties are not the same. Then there's a third problem, which is that – as you know – there is an issue about whether the dispute initiated by Qantas has a sufficient jurisdictional basis to support an arbitration. The question is whether Qantas had complied with clause 47.2.1 or 47.2.2. So there's a live jurisdictional issue.

PN362

And even if the first two points that I've made go nowhere then that live jurisdiction issue is justiciable in the Federal Court and if determined against jurisdiction that would open up the potentiality for the Federal Court to look at that substance of the matter. Now, put all those three things together – there is at least, at the very least, a serious question about whether the – any decision that the Federal – that this Commission might make would preclude the Federal Court from looking at the substance of the dispute, and that being so there is at least a serious question about whether there would be the potential for different answers to the substantive dispute. It's not necessary for you, Commissioner, to resolve that now, of course – those serious questions now.

PN363

The mere existence of those questions adds to the complexity of the overall matter. But it certainly means that there is at least the potential for different answers and that's the potential that factor 5, identified by Bromberg J, points to. Now, if it were not so, why did Qantas commence proceedings in the Federal Court asking for declaration, substantially canvassing the subject matter, at least of question 2 before the Commission? Why did they do that? In doing that Qantas must be taken to have accepted the possibility that the Federal Court might in fact rule on its claim for those declarations. Otherwise it would be perfectly wrong for Qantas to have asked – file proceedings asking the Federal Court to do so.

PN364

So factor 5 remains and factor 5 operates, strongly in favour of the claim that we make. Next point: as to delay. I'm sorry, as to complexity: some submissions were made to the effect that – at least as I understood them – there was no constructional question involved in any of the matters before the Commission. That of course can't be right.

PN365

The content, the meaning of the enterprise agreement's requirement that the association not unreasonably withhold agreement, that's a question of law, that's a constructional question. The question of what reasons the association may have had for withholding the agreement, what those reasons were, that's a question of fact. The question of whether the facts so found or how those facts so found apply

to the legal test identified by the first question, that's another question of law, and it ultimately is a question of construction. That's the way the High Court approached it in Secured Income. It looked at the meaning or the content of the contractual obligations and then applied that to the facts.

PN366

The fact that judicial minds might differ on the meaning of such a phrase and its application to a particular set of facts is demonstrated by the fact that in the Secured Income litigation, the primary judge had found in one way and the Queensland Court of Appeal and the High Court in another way.

PN367

Next point. As to delay, much was made, much was made of the circumstance that, as we sit here now, it is not possible to know how long any delay occasioned by the making of the order that we seek might be, but the fact that we don't know that is entirely a circumstances of Qantas' making. It created that circumstance in two ways: one, by waiting until 26 April to institute proceedings in the Federal Court, noting, as we do, that there is not one word of explanation as to why Qantas waited until then to do so. If it was available for Qantas to act in that way on 26 April, it was available to act in that way long before and, if it had done so, if it had acted in what it concedes to be its rights in a timely way, then there would be an answer to all of the questions that our learned friend has raised on behalf of Qantas.

PN368

The second way in which Qantas is the author of this problem is that, having instituted the proceedings, it didn't even ask for expedition; not one word about that in the originating application.

PN369

It cannot be the case that in opposition to an application which is made to address a circumstance that Qantas has created that Qantas can rely upon difficulties and uncertainties of which it is the author, the sole author, to the exclusion of anyone that I represent.

PN370

Next point. Something was said about Qantas' offer to give us, to an extent, the association, an extension in time in the defence of the Federal Court proceedings. The difficulty with that proposition is that no matter what extension might be granted from now until the crack of doom, it would not change the substantive position, which is that, Qantas having commenced those proceedings, those proceedings hang over our head for so long as they continue.

PN371

Last point. Back to the prejudice point. It was suggested that there was more than enough evidence for the Commission to make a solid finding, solidly-based finding, about the prejudice that Qantas might suffer if there was a delay. The difficulty with that is that when one looks at Mr Alley's witness statement - true it is he refers back to other matters - but the kind of delay he is talking or the prejudice he is talking about would be occasioned if, to use his words, 'the dispute was not resolved as soon as possible' (paragraph 17).

PN372

Paragraph 18, he refers to prejudice which he describes as

PN373

further and ongoing operational uncertainty and prejudice.

PN374

Circumstances that will remain highly uncertain with a tendency to stultify what may be legitimate and necessary business decisions.

PN375

I'm sorry, in our submission, language like that is redolent of unparticularised and generalised assertions. One simply doesn't know, you simply don't know, Commissioner, because Qantas hasn't troubled to tell you that if there is a delay of one week, two weeks, one month, three months, this will be the consequence and this will be the prejudice that flows from that consequence. You are just left with these airy expressions, 'as soon as possible' and so on.

PN376

If it please, those are the submissions we make by way of reply, unless we can be of any further assistance.

PN377

THE COMMISSIONER: Thank you, Mr Neil.

PN378

MR FOLLETT: Commissioner, I don't want to make a reply to a reply, I just want to point out that one of the submissions my learned friend made I think was legally wrong, and all I would ask you to do is read the cases. The submission that Energy Yallourn and like cases turned upon the drafting of the clause is not how the court decisions decided. You can be your own judge of that by a bit of reading. That's how we read them. You may take a different view, but that's how we read them. It turned upon the effect of a private arbitral decision relying on the common law.

PN379

THE COMMISSIONER: Mr Follett, I think I will give Mr Neil an opportunity to say anything to that.

PN380

MR FOLLETT: Yes - - -

PN381

MR NEIL: We can go round and round in circles, but the difficulty with that proposition is it is at much too high a level of generality. It's a private arbitral decision which takes its character from the agreement that constituted the private arbitration, and that agreement included a provision that the arbitral award would be binding on the parties.

PN382

Now, the point we are making is that was explicitly an element of Energy Australia and Yallourn. It's a different element than appears here and it's one of the reasons why there is at least a serious question about what the Federal Court could do. It's a serious question and, at the risk of repeating myself, if Qantas didn't accept that there was a serious question that the Federal Court could deal with these matters, why has it asked the Federal Court to do so?

PN383

I think I have strayed into repeating myself, so I won't go on.

PN384

THE COMMISSIONER: I understand the position of the parties, so, look, I thank the parties for their submissions. I will give consideration to the material and submissions the parties have made and issue my decision and reasons in due course.

PN385

The Commission is adjourned, thank you.

ADJOURNED INDEFINITELY **[11.22 AM]**

LIST OF WITNESSES, EXHIBITS AND MFIs