



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT GRAYSON
DEPUTY PRESIDENT SLEVIN**

C2023/7793

s.604 - Appeal of decisions

**Appeal by Liang-Godber
(C2023/7793)**

Sydney

2.00 PM, THURSDAY, 15 FEBRUARY 2024

PN1

DEPUTY PRESIDENT CLANCY: Good afternoon. If we could take appearances, please.

PN2

MR A FRONIS: Thank you. My name is Fronis, F-r-o-n-i-s, initial A. I'm counsel instructed by GLR Law.

PN3

DEPUTY PRESIDENT CLANCY: Thank you.

PN4

MR B RAUF: If it pleases the Commission. I seek permission to appear for the respondent. My name is Rauf, R-a-u-f, initial B. I'm here with my instructing solicitor from Ashurst, Ms D'Andrea, initial E.

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DEPUTY PRESIDENT CLANCY: Thank you, Mr Rauf. Well, can the Bench assume that neither party objects to the other being represented?

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MR RAUF: We certainly don't.

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MR FRONIS: I don't either. Thank you.

PN8

DEPUTY PRESIDENT CLANCY: Thank you. The Full Bench has conferred on the question of permission and considers, pursuant to section 596(2)(a), that permission should be granted to both parties to be legally represented. Now, are there any housekeeping matters before we get underway with the substance of the appeal?

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MR FRONIS: Not from my side. Thank you.

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DEPUTY PRESIDENT CLANCY: All right. Thank you.

PN11

Mr Rauf.

PN12

MR RAUF: Deputy President, I might just check one thing. My instructing solicitor has provided a bundle of authorities. Can I just check that, Deputy Presidents, each of you have that pursuant to the direction?

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DEPUTY PRESIDENT CLANCY: Yes.

PN14

MR RAUF: We were asked to provide it online with the links and we have sought to do that.

PN15

DEPUTY PRESIDENT CLANCY: So is it the 546 pages?

PN16

MR RAUF: That sounds about right. Yes.

PN17

DEPUTY PRESIDENT CLANCY: That's right. Yes. Thank you. I have a copy.

PN18

DEPUTY PRESIDENT GRAYSON: Yes.

PN19

DEPUTY PRESIDENT SLEVIN: Yes.

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MR RAUF: If it pleases. Thank you. That's all for the respondent. Thank you.

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DEPUTY PRESIDENT CLANCY: Thank you.

PN22

All right, Mr Fronis.

PN23

MR FRONIS: Thank you. At the outset I would just quickly address the leave to appeal issue. It's addressed in my written submissions, but I do briefly want to reiterate that the matter involves the conduct of Commonwealth employees and in those circumstances where two acts of bullying were already found at first instance, it raises, in my respectful submission, a public interest consideration. There's certainly a public interest in regulating the conduct of Commonwealth employees and Commonwealth officers.

PN24

I also respectfully submit that there's a public interest in the fair and efficient administration of justice and if the Full Bench can be persuaded that there were errors below, then I would submit that leave should be granted in this case.

PN25

I also note that the respondents have filed a notice of contention that's dated 8 February 2024. Its purported to be an appeal under section 604 of the Fair Work Act. That's what it states on the face of it. To the extent that it's an actual appeal, it's brought out of time, but in any event, I will address the crux of that contention, and the reason I'm doing that first, which may appear to be somewhat out of order, is because it challenges two findings that were made at first instance, and those two findings are what I rely on principally for ground 1 of my appeal and, therefore, I address the criticism of those two findings that were made given that the respondent contends that those findings were incorrect.

PN26

It's, firstly, the respondent contends that Mr Hay, in sending the email on 16 November 2022, which appears at page 198 of the appeal book, was not unreasonable and there was not a proper basis for finding that sending this email created a risk to the appellant's health and safety. It's also then further alleged that the same is the case in relation to the 32-minute phone call with Ms Nattey. Now, those are the two act which, at first instance, were found to constitute bullying.

PN27

Now, I note that Hunt C was prepared to make those findings of bullying, having heard the witnesses and considered the evidence, and in my respectful submission, the Full Bench should be slow to interfere with findings of fact that rely on actually findings of credibility and then, in fact, hearing the witnesses. The Full Bench is not in the same position as Hunt C at first instance.

PN28

The phone call with Ms Nattey was, in my respectful submission, unreasonable conduct. Not only was it found to be the case at first instance, there was certainly a proper evidentiary basis for finding that.

PN29

Now, it was found at paragraph 187 of the decision of Hunt C that Ms Nattey had leant on Ms Liang-Godber to stand down. The respondents are attempting to downplay this and frame it as it not being unreasonable because Ms Nattey's evidence was that she told Ms Liang-Godber multiple times that she did not have authority to require her to stand down.

PN30

Now, it's interesting because it reminds me of a play by Shakespeare, and it's a Marc Antony speech at the funeral of Julius Caesar where he repeats that Brutus is an honourable man, and it would, in fact, not be needed to be repeated if Brutus was, in fact, honourable. He is, in fact, saying the exact opposite, and Ms Nattey, in repeating - and that was her evidence that she repeated in the phone call multiple times that she did not have the authority to stand Ms Liang down - that wouldn't be needed if she wasn't leaning on Ms Liang to stand down, which was the finding made.

PN31

Ms Nattey gave evidence, and it appears at page 780 of the court book, and at page 780 Ms Nattey gave evidence that she told Ms Liang-Godber to just simply consider the advice of an email from Dr Micadakis of 31 January and to consider her obligations under the Best Practice Guide.

PN32

Now, it was found at first instance that the Better Practice Guide did not apply, and in my respectful submission, the evidence of Ms Nattey gave a sufficient basis for Hunt C to draw the conclusion that Ms Nattey was leaning on Ms Liang-Godber to stand aside as chair.

PN33

I will further submit, consistent with the findings below, that Mr Hay's email of 16 November 2022 was unreasonable as well. It was derived from an inaccurate view about Ms Liang-Godber being required to stand down. Mr Hay assumed that the RDAB committee had authority to require her to stand down as chair and did not conduct any investigations into whether this was the case or turn his mind to it.

PN34

In relation to that, that's shown at page 202 of the court book, in the email of 23 November 2022, where Mr Hay said that he just took the advice of the committee on face value, so without conducting any further investigations himself.

PN35

The respondents then challenged the findings about this being a risk to the appellant's health and safety. Ms Liang-Godber gave evidence about the risk to her health and safety. That evidence is at page 195 of the appeal book. It's her statement, and this evidence, as far as I can tell, having looked at it, was unchallenged in cross-examination. Hunt C was clearly prepared to accept unchallenged evidence from Ms Liang-Godber about the risk to her health and safety, including stress and anxiety that she had endured because of the conduct, and in my respectful submission, the assertion that there wasn't a proper evidentiary basis to find that was just without merit.

PN36

Now, if I can turn then to ground 1. It's in relation to two separate instances that were found at first instance that I am now saying that should have been constituted to be a group of people; those two people that was Mr Hay and Ms Nattey.

PN37

Now, it's contended they form a group. It's put against us by the respondents that this is a new contention, and effectively, that we're raising it for the first time; however, the respondents forming a group of people was squarely raised on the material below. There's a witness statement of the appellant appearing at page 195 of the court book, at paragraphs 49 to 51, where she specifically refers to the respondents being a group of people.

PN38

The closing submissions of the appellant below, which appears in the court book at - my apologies. I will get the reference for that, but it's page 12 of the closing submissions below at paragraph 64(a) where it's specifically submitted that the conduct was occurred by a group of individuals, and I will have to circle back to get the appeal book reference for those closing submissions. At paragraph 64(b) it was submitted there was repeated conduct.

PN39

The respondents then addressed, in their submissions at first instance, at page 13, the issue of whether the appellant was bullied by an individual or a group, so they can't then turn around and say this is a new contention.

PN40

There was some cross-examination that went also to issues of structural organisation which would inform matters relating to a common purpose; for example, page 931 of the court book, which is the transcript at PN543, where Ms Nattey gave evidence about Mr Hay being a director of program management, and Ms Westaway was the liaison officer.

PN41

Again, at PN535, there was evidence that the first point of contact is Ms Westaway and after that Mr Hay above her, and matters can be escalated to him or it can be escalated to Ms Nattey, and at page 965 of the court book, at PN896, it says Mr Hay is a supervisor - referring to Ms Westaway - Mr Hay sits next to her and she works closely with him.

PN42

So there are factors, in my submission, that do go to the common purpose and organisational structure, and then what I will seek to do, especially when addressing grounds 2 and 3, is to say, well, there was a common purpose here, and that common purpose also does not rely just on those two findings made at first instance because I also say in grounds 2 and 3 that there ought to have been other findings of bullying that were made at first instance that were not made.

PN43

I have approached grounds 2 and 3 together in my written outline because there's some overlap between them. The emails that were sent that bypass Ms Liang-Godber were emails relating to setting up a new bank account for the RDAB, and effectively, what the department did and what Mr Hay put into motion was a plan to open up a new bank account and then the Commonwealth would redirect funding through that new bank account.

PN44

This is the account that the appellant, as the chair of the organisation, would not have access to because none of the emails copied her in to tell her that they're going to open a new bank account, and although I will make reference to those emails soon, but she was not even told about it.

PN45

Now, if one could imagine if we take a commercial company, for example, if someone had opened up a new account without telling the CEO and then, effectively, redirecting funds into it and paying funds out of it, all without telling the head of the company, that would be clearly unreasonable, and the same circumstances here in this situation. Ms Liang-Godber, as the chair of the organisation, has responsibilities and duties to that organisation. To go around her to open up a new bank account, in my submission, was unreasonable.

PN46

Now, Mr Hay and Ms Westaway were directed, as of 28 November 2022, not to have any contact with Ms Liang-Godber because of the complaints made, but the emails that I refer to are before 28 November 2022, save for an email by Ms Nattey, who effectively took over liaising with Ms Liang-Godber after 28 November 2022.

PN47

I have listed all of these emails at paragraph 25 of my written submissions and I have pinpointed the references to them. Now, unless it would be of assistance, I don't intend to take the Full Bench, at this point, to each individual email given that they're pinpoint referenced in the submissions, but all of the emails, for the most part, are in relation to varying funding arrangements and opening up a new bank account and so they're relevant to both grounds 2 and 3 from that perspective, but the email of 13 December 2022, that's referred to in paragraph 25(i) of my written submissions, which was an invitation to Ms Roberts to attend the RDAB state expo which did not copy in Ms Liang-Godber - and that was an email from Ms Nattey - now, that one isn't to do with that and that's relevant to ground 3, as opposed to ground 2.

PN48

Now, I would like to, if I may draw the Full Bench's attention to Ms Westaway's evidence. It starts at page - well, not starts, but I refer to page 970 of the appeal book. At page 970, at PN947, Ms Westaway was cross-examined in relation to the appellants not being included in the emails. She mentions that:

PN49

Ms Liang-Godber, an officer, was not included in the correspondence with myself and other department members regarding difficulties that they were having with processing payments and opening a new bank account.

PN50

Now, just below, at PN948, when she was asked about this again, she said that:

PN51

I think that given that I was not in contact with Ms Liang-Godber from 28 November might be a clear indication as to why I wouldn't be doing that.

PN52

That's quite an evasive comment because the emails being referred to were from before 28 November. In any event, she continued on, and then at page 971 at PN953, she gave evidence that she did not think it was appropriate to include Ms Liang-Godber in the emails. That implies that Ms Westaway was using her own judgment to exclude Ms Liang-Godber in the email. She says, 'I didn't think it was appropriate', and she goes on, at PN955, to suggest that she did not correspond with the chair normally.

PN53

Now, in my respectful submission, none of these are particularly good reasons to exclude the chair of the organisation from emails that pertain to setting up a new bank account for that organisation and to redirect funds from the Commonwealth to that bank account.

PN54

In relation to the common purpose, I don't understand it to be contentious to say that Ms Westaway works very closely with Mr Hay. I drew attention before to the fact that she gave evidence indicating that she sat close to him and worked closely with him and that he was her direct supervisor.

PN55

Now, Mr Hay started off this process, in effect, of excluding Ms Liang-Godber from these emails. He did that in his email of 22 November 2022. Now, that email is one of the emails that I refer to at paragraph 25 of my submissions and I pinpoint that reference as appeal book at page 805.

PN56

I also refer to the fact that Ms Nattey continued to exclude her in an email of 13 December 2022, and it's clear from the evidence that was provided at first instance that Ms Nattey had considered that Ms Liang-Godber was required to stand down. She gave that evidence and I have referred to that in my submissions, and Mr Hay, effectively in his email that I referred to before of 23 November, clearly stated in there that he took the advice of the board on face value that she was required to stand down.

PN57

So all of this was really derived from that belief, a belief that was found to be incorrect at first instance, and I don't understand it to be challenged on appeal that she was not, in fact, required to stand down.

PN58

Now, one of the interesting points that derives from the first instance decision was that there actually doesn't appear to be a significant amount of evidence, or really, I would say, no evidence that can support a conclusion that Ms Liang was not authorising payments to the bank from the account in the first place.

PN59

There is some evidence of that, and I will take the Full Bench to it. It's at page 197 of the court book. There's an email of 16 November 2022 where Ms Liang asked Mr Hay for clarification on her position because her understanding from Mr Hay's email was that she was being asked to stand aside. So she basically said to Mr Hay in that email, 'Well, if I'm required to stand aside I won't be able to authorise payments', and so she questioned her role as the chairperson at that time.

PN60

Now, that seems to be the only basis for a finding that Ms Liang-Godber wasn't authorising payments. That finding was at 112 of the decision at first instance where it was stated that Mr Hay was made aware, in November 2022, that Ms Liang was unwilling to authorise payments, but the question is where is the evidence for that, and it seems to be just that email of 16 November 2022 that does not support that finding. Further to that, it does not appear that Ms Liang-Godber was ever cross-examined about her willingness to authorise payments.

PN61

Now, Ms Liang-Godber, in fact, did produce evidence to the department that she did authorise ATO payments that were required to be paid by 25 November. In fact, she paid them on 21 November 2022, despite her email of 16 November 2022. That's found in an email that she sent on 8 December 2022 to Ms Westaway and Ms Nattey - and I apologise to the Full Bench because I will have

to circle back to get that reference to that email in the court book, and I will do that when my learned friend is making submissions so that I can refer specifically to where that letter is in the evidence – but, effectively, my point is that she did authorise payments on 21 November.

PN62

No one seemed to have conducted any sort of investigations or inquiries in relation to this. Certainly there's no evidence in that regard. There's no cross-examination on the point. It's all just assumed that Ms Liang-Godber wasn't authorising payments, seemingly from this email of 16 November, and this set in motion all of this, effectively, and I don't want to use the word, or I might use the word 'secretly', opening up a new bank account without Ms Liang-Godber knowing. So all of this is going around the chair of the organisation.

PN63

Now, there were multiple emails in relation to this that I refer to at paragraph 25 of my written submissions, so, in my respectful submission, it was repeated conduct and it's, effectively, a continuous repeating conduct as well of treating Ms Liang-Godber as if she was required to stand down when it was clearly found that she was not.

PN64

The respondent appears to try to argue that a lot of this is a new contention, but it is not. The appellant's submissions at first instance, at page 170 of the court book, and in a statement of evidence at page 187 of the court book, or the appeal book - I'm sorry - allege that the appellant was frozen out of these emails and it's cast quite wide. So, effectively, it was all clearly raised at first instance, in my respectful submission.

PN65

I will just quickly address the issue of future risk. That never arose in the first instance decision, effectively because of the findings that were made and it was not repeated, but Mr Hay was questioned about the risk at PN856 of the transcript, and basically he said it was up to the department how management of RDA Brisbane would occur in the future, and he did not exclude the possibility that he would be working with RDA Brisbane in the future while Ms Liang-Godber was the chair.

PN66

He even turned his mind to working with Ms Liang-Godber in the future - that's at page 961 to 962 of the court - and he even says that he would call her as well. I'm sorry, he says that he would take her call if she did call, and at first instance, page 14 of the closing submissions noted that Ms Liang-Godber was the chair.

PN67

She still is the chair at that point in time and she still is now. Ms Nattey may be the primary contact moving forward, given that she's maintained communication with Ms Liang-Godber after the complaint was made, and also that the department could restructure itself how it wishes. So the direction to Mr Hay and Ms Westaway not to have contact with Ms Liang-Godber was because of these

complaints in these proceedings. It doesn't mean that that won't occur again in the future if the department reorganises itself.

PN68

So those are the submission that I wanted to make at this point in time, and I will get those references in relation to those emails that I refer to as well while my learned friend is speaking, but unless there's any questions, I don't intend to expand upon my written submissions any further.

PN69

DEPUTY PRESIDENT CLANCY: Thank you.

PN70

MR FRONIS: Thank you.

PN71

DEPUTY PRESIDENT CLANCY: We will hear from Mr Rauf.

PN72

MR RAUF: Thank you, Deputy Presidents. Just before I do begin, my learned friend indicated he would provide references while I'm talking, and so that, in fairness, I can understand the documents that he seeks to refer to and properly address them - because one of the issues here is, in my submission, a level of abstraction or characterisation which does not necessarily reflect what the detail of the evidence is - I would be grateful if I can have some of those or all of those references prior so that I can see what my learned friend refers to. I must confess, I had some difficulty following some of the reference that he cited.

PN73

DEPUTY PRESIDENT CLANCY: Well, I think if, in reply, he has identified those, we will give you an opportunity then to comment.

PN74

MR RAUF: I'm grateful. Thank you, Deputy President. In that case, Deputy Presidents, what I propose to do is deal with four topics. Firstly, the issue of the permission to appeal. Secondly, I will explicate the salient points in relation to ground 1 of the appeal. Thirdly, I will address the key points without repeating, necessarily, the submissions relating to grounds 2 and 3 together, and then fourthly, I will have something to say about the notice of contention, and the way in which it is to be understood and the manner in which it is framed.

PN75

Can I start then on the issue of permission. We have addressed that in paragraphs 4 to 8 of our outline. In summary, we say that having regard to the grounds for appeal and the reasons in support of those grounds, the appeal does not meet the public interest test, and we say that for three reasons.

PN76

Firstly, contrary to my learned friend's submission that, because we are concerned with Commonwealth employees, this in some way enhances or creates a level of

public interest. In my respectful submission, it does not. It is not a matter of general importance or application.

PN77

Under these provisions the Commission is tasked to determine, in respect of any bullying application, (1) whether certain conduct occurred. Then whether it was unreasonable. Then, in the circumstances, whether it created a risk, and then also, again, confined to those circumstances, if there's a risk. If there is a risk of that continuing, the bullying behaviour that is, and that is all very fact specific.

PN78

It is, as the Commission has again and again emphasised in decisions in this area, it is about the circumstances applying in respect of each bullying application at the time that the allegations are made, and I just, again by way of correction, can I note this. My friend said that there were two instances of bullying found at first instance. There were not. What was found were two instances of unreasonable conduct, but of course, the Commissioner wasn't satisfied as to some of the other requirements, the integers for it, to constitute bullying.

PN79

So I just want to correct that as well, but nothing in this case, in my respectful submission, provides guidance in other matters, Commonwealth or otherwise. It is fact specific.

PN80

Secondly, and somewhat relatedly, the Full Bench is invited to make inferences and findings, and in doing so, arrive at a different outcome to those found by the Commissioner, for instance, with respect to the bank account, and in doing so, it is properly understood a case which is sought to be re-run, and in my respectful submission, that very rarely provides the basis for an appealable error.

PN81

Thirdly, this – and, importantly, I will develop this, but the contention raised about a group of individuals acting 'with a common purpose' and also I think 'continuation' of conduct. This was not a proposition put at first instance. It is not a pure question of law, but rather, a contention that the Commission should have found that, as a matter of fact, the conduct was undertaken with a common purpose and/or the second instance was a continuation of the first.

PN82

That's the way it's put in the submissions of my learned friend, but these were not contentions put as a matter of fact or law at first instance, and I will develop that because that forms one of the reasons which we oppose, ground 1, and in fact, I will come to that now.

PN83

At the core of ground 1 is a contention that the findings of the two separate instances of unreasonable conduct, not bullying, are connected. They are connected, it is said, by a common purpose to sideline and the conduct of Ms Nattey, in February 2023, is characterised as being a continuation of the email sent by Mr Hay back in November 2022.

PN84

As I have said already, these were contentions which were not raised in terms of the connection between those two instances of conduct, that the case below was ran with reference to certain categories of alleged conduct, as is apparent, we say, from paragraph 34 of the decision, and indeed, described in different terms in the submissions - and we have provided references to that in terms of the two instances of conduct again - and it was never put to any witness that there was some common purpose, that there was some continuation, that there was some commonly held belief or understanding which motivated them all, and the Full Bench is now asked to infer that.

PN85

We say that, for good reason, the jurisprudence of this Commission prevents an appellant from raising on appeal contentions that were not raised at first instance for the obvious reason that it gives rise to prejudice in terms of the way the case was run and the evidence.

PN86

So that's our first opposition to ground 1, but even stepping back from that, we say that the contention is misconceived and at such a level of abstraction that it disregards the detail of the facts and circumstances that were before the Commissioner at first instance, and we say that when one has regard to those facts and circumstances, not only was it open for the Commissioner to find, as she did, that is that there wasn't a repetition of the behaviour of concern, but that she was correct to find as she did.

PN87

Before going into some of those facts, can I just say something about the provisions, noting of course, that, as we understand, the appellant doesn't challenge the principles that were applied by the Commissioner, but rather, that the application of those principles to the facts to say that the wrong conclusions were drawn.

PN88

Just coming to the provisions, and some of the extrinsic material that was referred to by the Full Bench in the *Bowker v DP World* decision to discern the mischief to which the provisions are directed. That's at tab 4. I don't want to take the Full Bench to that, but can I just briefly take the Full Bench to the explanatory memoranda. Now, that's at tab 12, appreciating that I think, Deputy Presidents, you might have numbered.

PN89

DEPUTY PRESIDENT SLEVIN: Page numbers may assist, Mr Rauf.

PN90

MR RAUF: Yes. Unfortunately, my printout doesn't have that.

PN91

DEPUTY PRESIDENT CLANCY: Is it a revised explanatory memorandum?

PN92

MR RAUF: It is. Yes, your Honour, at tab 12, but they are hyperlinked, I think, from the index. 283 I'm told. I might ask my - - -

PN93

DEPUTY PRESIDENT SLEVIN: I have got that. Thank you.

PN94

MR RAUF: Thank you. If the deputy presidents can just note certain things as to really the rational and the understanding informing conduct by a group of individuals, and then I will come back to tie that, and then, in that context, speak to the circumstances in this matter, but just going to the first page at paragraph 86 of the explanatory memorandum.

PN95

Deputy Presidents, you will see that reference is made to the workplace bullying report and that the amendments, being the response to that report, and that, at paragraph 38, one of the issues highlighted was the difficulty that many workers had in trying to find a quick way to stop bullying so that they did not suffer further harm or injury, and then over the page, at paragraph 108, at the end and importantly:

PN96

The behaviour has to be repeated, unreasonable and cause a risk to health and safety.

PN97

So they, of course, find their way in terms of the legislative prescription, and if I can ask the Full Bench to note at 109:

PN98

The Committee went on to note that 'repeated behaviour' refers to the persistent nature of the behaviour and can refer to a range of behaviours over time and that 'unreasonable behaviour' is behaviour that a reasonable person -

PN99

I don't read all of that, but if I can just ask the Bench to note that. Then can I also go to the Workplace Bullying Report, which is the next tab, 13, commencing at page 291, and then in that there's only two sections that I want to ask the Bench to note.

PN100

Firstly, at paragraph 1.14. That's at page 318, and there the report speaks of the different ways, importantly, which bullying can manifest; for example, initiation ceremonies are more likely to occur in certain sectors or amongst workers of a certain age. Reference is made to a recent example back then of five workers wrapping a 16-year-old in cling wrap, and then at 116, the committee heard of psychologically abusive group behaviour known as mobbing. Mobbing is usually to try to drive a worker from the workplace et cetera.

PN101

They were the references in the report which I wanted the deputy presidents here to note, and really highlighting that the repeated nature of the behaviour is a core element, and also in the examples given, initiation ceremonies, mobbing et cetera, the psychologically abusive group behaviour, something more than disconnected, separate and random acts.

PN102

That is also consistent when one looks to the many decisions of this Commission as to the understanding of group behaviour, and again, we have noted a series of these decisions in the outline at footnote 22. Again, very briefly, I will seek the indulgence of the Bench to just go through the five of them and highlight just some key paragraphs where the behaviour of concern was referred to.

PN103

Firstly, at tab 5, *Re Watts*, and I will just get the page reference. Sixty-one. If your Honour goes to that decision, at 103 of that decision is a list of the examples of the behaviour by a group of individuals. So co-workers laughing at a joke. In 3, supervisors making comments to co-workers and asking another employee in a derogatory manner what it was like to work with Ms Watts on the night shift and so forth, and then at 104, with respect to certain bits, not all, but some of those were found to have been unreasonable conduct, and then in 105:

PN104

In the circumstances I am satisfied that in each of the instances 1 to 5 inclusive Ms Watts' co-workers behaved unreasonably.

PN105

And some of those were individuals, but some of those by involving groups, so more than one person acting in concert or in some joint manner.

PN106

Then in tab 6, the *Hammon v Metricon Homes*' decision at 95, and that's a decision in which the applicant alleged that various managers had been complicit in and/or participated in a certain behaviour. If one goes to paragraph 79, having considered the circumstances, the Commissioner finds that one of the supervisors:

PN107

Mr Brand is only responsible for one of the incidents which I have found to be substantiated –

PN108

As there is no repetition, there is no basis for a bullying finding against Mr Brand. Mr Grant is only responsible for one of the incidents. By itself it is not particularly serious and it was not repeated –

PN109

I am not satisfied that Mr Fennessey, Mr Brand, Mr Grant and Mr Cooper were acting in concert to harm Mr Hammon. Considering the four substantiated matters as a whole I am not, on balance, satisfied that the test of 'repeated unreasonable behaviour while at work' is met.

PN110

So here one sees a reference to acting in concert. Can I then go to Hatcher VP's decision in *Mac v Bank of Queensland* at tab 7, at page 113, and I only want to take the Bench to paragraphs 97 and to 100. This is a matter involving alleged bullying behaviour by a number of managers. At 97, for instance, Hatcher VP noted that:

PN111

It is then necessary to turn to whether Ms Mac has been bullied at work by Ms Van Den Heuvel, Mr Thompson, Ms Hester, Ms Newman and Ms Locke as she alleges.

PN112

Then at 99 it was noted that the case involved the proposition that a number of managers had bullied her at work:

PN113

That is, either individually or as a group had repeatedly behaved unreasonably towards her - in placing her on a PIP –

PN114

a performance improvement program –

PN115

and in commencing to implement the PIP.

PN116

Then, finally, at 100:

PN117

It is not unknown for performance management techniques to be used as a means to achieve and justify -

PN118

and I underline this –

PN119

a predetermined outcome of termination of employment. Conceivably, if this occurred, it might be able to be characterised as a series of repeated instances of unreasonable behaviour such as to fall within the first limb of the definition of bullying at work. However, Ms Mac did not submit that Ms Hester, Ms Van Den Heuvel, Mr Thompson, Ms Locke or Ms Newman, had either jointly or singly engaged in the PIP process with the predetermined objective of dismissing her from her employment -

PN120

so again, some predetermined objective, not separately. It had a certain outcome, but there was some level of predetermination and concert or acting jointly.

PN121

There's two more matters that I will briefly take the Bench to. There's the *Bowker v DP World* decision at tab 9 at page 161 of the bundle. Now, here one sees, from

paragraph 14, there was reference to conduct by a group of individuals engaging in bullying behaviour, and at paragraph 97 - I'm sorry, before I go to 97 - in terms of the group, importantly, at paragraph 14 was where it was also seen as important to define the group as, and here:

PN122

constituting those persons who subscribe to, or support, the existence of a system of authority and control at the Terminal which stands apart from DP World -

PN123

and then going to 97, the Deputy President there was satisfied that members of that group adhered to a code and system earlier described, and that was then used as a basis to silence or target individuals who did not abide by the expectations of the group and that there was a risk of this continuing by members of the group as identified. Then at 107:

PN124

As victims of the Bullying Behaviour that has been enabled by the Code and system and as individuals who have railed against it -

PN125

I won't read that. That's, again, here the Deputy President talks about the risk of the bullying occurring by the group of people with reference to this code. So, again, people acting in concert or together towards a predetermined outcome, to use the words of Hatcher VP in the earlier decision.

PN126

Just finally, can I just come to the often quoted decision of Hampton C in *Re SB*, and that's at tab 11 at page 265. So this was, of course, allegations against co-workers. Relevantly, for present purposes, in terms of group or conduct by a group of individuals, one of the issues raised here - and one finds this at paragraph 82 - was that to the extent that two co-workers had made complaints against the applicant here, there was an allegation that it was conduct by a group of individuals. At 82 the Commissioner said this:

PN127

I have heard direct evidence from the applicant and CC about those allegations. There is apparently some commonality of allegations with those made earlier by NP -

PN128

the other co-worker -

PN129

although this is not of itself insightful -

PN130

However, I am satisfied that the making of the allegations by CC was not of itself unreasonable -

PN131

And the notion that these were made as part of any form of coordinated campaign against the applicant was, on the evidence, rejected.

PN132

So really drawing from all of that is that the jurisprudence of this Commission reveals that one looks to understand the conduct by a group of individuals in the context of the persistent behaviour to which these provisions are directed, persistent and repeated.

PN133

The cases reveal that there has been activity in concert, jointly, towards some predetermined outcome or objective, such as driving an employee out of work, mobbing, lynching, initiation ceremonies and so forth.

PN134

Now, here, coming then to this matter, here the Commissioner found that the sending of the email on 16 November 2022 was unreasonable conduct, and the telephone call or discussion involving Ms Nattey with the appellant on 2 February 2023 was unreasonable conduct, but on the evidence, in my submission, it's very clear that the two incidents involved communications by different people and were entirely different and disconnected, and there's no evidence, in my submission, below to suggest or support that Mr Hay and Ms Nattey were acting together in concert or as part of any campaign.

PN135

These contentions were never raised and they were never put to the witnesses, and as I said earlier, the level of abstraction which the appellant relies on disregards the facts and circumstances that were before the Commissioner, and in doing so it is submitted that the conduct of these two individuals and those two instances were linked by an intent to sideline based on a belief or understanding as to the application of the rules and that the appellant was required to step aside.

PN136

That is not so, in my submission, when one delves into the detail of this evidence, and I will just take the bench to some of that, initially in appeal book 174. If I can direct the Bench to that. I'm sorry, I think I said 174. I meant page 198. I'm becoming confused by the various numbers appearing on pages.

PN137

At page 198 the Bench will see the email which is the subject of this conduct, and it is an email whereby Mr Hay indicates that he's been advised of a situation by the committee and that the appellant was requested not to carry out duties while a complaint is being considered. So this is a complaint involving her at the time, and then on the basis of that, there's a request that, 'You withdraw your resignation to attend a briefing session.' So it's specifically to withdraw the registration, but as things unfold, that is left as a matter for the judgment and discretion of the appellant.

PN138

In the submissions my learned friend says there's a doubling down on 23 November. When one goes to the email of 23 November - Deputy Presidents, if you will give me one moment. That's at appeal book page 203. I'm sorry, 202 rather.

PN139

It is a reply to a query, thanking the appellant for her email. It is leaving it to her judgment as to what she does and what she considers to be appropriate. It's not a doubling down. It is responsive and it is, again, making it clear that, 'It's a matter for you.' That's the email interaction. Now, by 30 November, of course, Mr Hay had been directed not to engage with the appellant and he has nothing more to do with her from that date.

PN140

So that's what occurs in relation to the email. In my submission, there's nothing there to support that Mr Hay was acting in seeking to enforce or apply some guidelines or understanding. He had gotten an email from the committee. He was then following up on that, making a request, but in any event, leaving it for the appellant, and that was the extent of it.

PN141

Ms Nattey doesn't feature in any of that. She's not in the emails. There's no evidence of discussions with Ms Nattey. Instead, of course, the Full Bench is asked to again infer, make findings, in circumstances where those findings were not sought in respect of that conduct at first instance.

PN142

DEPUTY PRESIDENT SLEVIN: Is it still the case, Mr Rauf, that Mr Hay doesn't engage with your client?

PN143

MR RAUF: On my instructions, yes. So that hasn't changed. So if I can just, moving on from that, Mr Hay has been given the instruction not to engage from 30 November. Then there is the second interaction on 2 February of the following year, and that also, if I can ask or trouble the Bench to just briefly go to that email as well because it, in my submission, is also telling of the context and the circumstances. I need to make sure I have got the right one.

PN144

Now, there's two emails that underpin or precede the discussion. The first of those is at appeal book page 780. At this stage Ms Nattey is on leave. In her position is a colleague, Dr Emi Micadakis, and at page 780 is an email which she sends to the committee generally. So it's not directed to anyone. It's to the committee generally, noting that the various complaints and concerns have been raised in relation to members of the committee and then the fact of the earlier bullying application which had been made by the appellant which was separately determined by Hunt C in respect of other members of the committee.

PN145

Dr Micadakis then refers to the expectation under the Practice Guide and asks that the members consider that expectation and stand aside until these matters are resolved. So that's the request made.

PN146

Now, on the evidence, Ms Nattey returns on 1 February, and if the Bench goes to appeal book page 782 there is an email received, provided for Ms Nattey among others, noting that the issue that the committee members had, in response to that email, have resigned in effect. They have tendered their resignation.

PN147

Now, the only one who hasn't given any response is the appellant, and that is the motivation. That is the driving factor which underpins the call on 2 February. Not any belief or understanding that my learned friend now asks the Full Bench to find, but these emails, and then the call is then made to discuss, in effect, the request made in the email from Dr Micadakis. Again, in these emails, Mr Hay doesn't feature. He's out of the picture by this stage and has been for some, at least two months.

PN148

In my submission on the evidence, there is no evidence of any connection, campaign, acting in concert, predetermined outcome. They are two entirely separate interactions disconnected from each other, in very different circumstances. The first one, to seek a withdrawal from or a registration to attend at a briefing. The second one, bullying applications having been made, Ms Nattey following up to see if members of the committee, or in particular, one member who hadn't responded, had considered the request.

PN149

Again, it wasn't directed other than the appellant was the only person who had not responded to the email. All of the other committee members had. In their discretion they had chosen to resign. They weren't asked to do that, but they had, but that is the context. They are the circumstances.

PN150

To the extent that there was any common purpose or commonality alleged below, it was that both of Ms Nattey and Mr Hay were racist and had a deeply rooted animosity - to quote - towards people of Chinese ethnicity. That was properly, in my submission, rejected. The evidence did not support that.

PN151

It was no more than a scurrilous allegation that was made, but it was rejected, but the abstraction at which things are put now by the appellant, in effect, asks this Bench to disregard all of the evidence in circumstances that were before the Commissioner, including some of what I have taken the Bench to, and instead, infer some broader motive or common purpose of sidelining based on a very specific understanding.

PN152

In my submission, having regard to the mischief to which these provisions are directed, and the focus on persistent or repeated behaviour by a group of

individuals of the type that has been discussed in the intrinsic materials and earlier decisions of this Commission, the construction now urged also subverts that purpose and instead posits that any two acts, no matter that they are entirely disconnected, can still be construed as persistent, repeated behaviour of concern.

PN153

To give a crude example, if I had a certain interaction with an individual at a workplace, and then quite apart from that, months later another person, despite there's no connection or conferral between the two, that would, on the construction urged, amount to conduct by a group of individuals and it, in my submission, with the benefit of the jurisprudence and the intrinsic materials, that just cannot be right, and so we say that there is no appellable error manifested and ground 1 should be rejected.

PN154

Can I then deal with grounds 2 and 3. They, again, invite the Bench to make 'inferences and findings' based on the evidence which is different to that found by the Commissioner, and again, there's this contention that the appellant was excluded and that the exclusion was connected to:

PN155

The position at the department and notable that of Mr Hay and Ms Nattey that the appellant should stand down from her position.

PN156

So, again, there's this broad motive sought to be put on all of this which, in my submission, is just not open on the evidence. To take, for example, the bank account. That's dealt with at paragraph 177 of the decision, and I will come to the submission that, well, there was no evidence to support a finding that there was some refusal or absence of cooperation by the appellant in facilitating payments. There was, in my submission, and I will take the Bench to it, and we reject that submission entirely.

PN157

Having considered the evidence and the circumstances - and there was some detail to it - the Commissioner, ultimately, was not satisfied that Mr Hay had engaged in bullying in respect of his involvement in assisting the committee to open a new bank account, and again, we have dealt with that in the submissions and I don't want to repeat what we have said, but can I just highlight these points.

PN158

In some of the circumstances we have referenced, as we have outlined or adverted to in paragraphs 27(a) through to (c) of our outline, but in short, the appellant had expressed that she was unable to authorise payments from the committee's bank account, and given the submission made, perhaps I do need to take the Bench to some of this evidence. If the Bench will just excuse me one moment.

PN159

If I can ask the Bench, firstly, to look to the email at appeal book page 633. This is, at the top, an email from Mr Steven Shotton, who was one of the members on the committee. He's providing, by way of update, an email to Mr Hay and Ms

Westaway, and one sees below the chain or exchange involving Mr Shotton and the appellant, and then other people from the committee are copied in, seeking authorisation or appointment of an additional signatory to make necessary payments to staff and creditors et cetera, and the email from the appellant on appeal book 634, towards the middle of the email:

PN160

As a result of this, I will not be able to exercise my role as chair to carry out this below financial task. I did email you and all of the members last week to advise and remind you that you requested for me not to act as chair and I wouldn't be able to exercise my financial authority and wouldn't be liable for any responsibilities arising from your request.

PN161

Staff payment to be done on the 10th of each month as per board minutes. This shows the decision made at RDAB secretive meeting of 27 October to hold off chair's duties hasn't acted as the best interest of RDAB.

PN162

Preceding that, of course, was the email for Mr Shotton:

PN163

Could I please ask for you to log into the RBAD Comm Bank account and approve the pending maintenance request for Robyn so that we can process staff pay?

PN164

If that email exchange isn't clear evidence of a resistance and a refusal I'm not sure what is. Now, can I also then ask the Bench to look at appeal book page 584, and here - - -

PN165

DEPUTY PRESIDENT GRAYSON: I'm sorry, Mr Rauf, where are you taking us to?

PN166

MR RAUF: Appeal book page 584, Deputy President, and at paragraphs 54 and 55 reference is made, again, to that email correspondence which I took the Bench to, and then in the second line of paragraph 54:

PN167

RDA Brisbane raised concerns that they could not meet their legal and financial obligations, including to make payments to staff.

PN168

and then at 55 -

PN169

The department and RDA Brisbane explored the option of RDA Brisbane opening a new bank account –

PN170

So there was certainly evidence there, and having regard to all of those circumstances inasmuch as Mr Hay was concerned, the Commissioner, in my submission, quite properly found that he was faced with a novel situation and he was concerned with wanting to help with what was a matter of urgency, and he was trying to address or facilitate this immediate and pressing issue of payments.

PN171

Now, the appellant invites the Full Bench to come to a different landing and characterise that differently, but in my submission, the finding was very much open to the Commissioner on the evidence, and again, there is no appellable error demonstrated.

PN172

I also make this submission, that again, as in the case with the contention connected with the first ground of appeal, it was the first time that there is this attempt to isolate emails and to rely on those emails in isolation as, in themselves, some bullying or unreasonable conduct.

PN173

At the hearing below they were relied on as a part of what was said to be a conspiracy in which Mr Hay was involved to open this bank account, and the Commissioner dealt with those contentions and made her findings. What is now put is a different case in a different light, and again, the appellant should not be permitted to do that.

PN174

The emails are also erroneously, in my submission, characterised as being part of the position of the department. There was no such position. The emails were sent in the context and circumstances which, in my submission, were evident from the email. Of course, there was more evidence before the Commissioner on transcript and statement and so forth, but it was dealing with a particular issue which had arisen, and that's what Mr Hay was doing inasmuch as his conduct was concerned, and inasmuch as Ms Westaway was concerned, she was, as the Commissioner found, undertaking her administration responsibility and simply doing her job.

PN175

Again, there's nothing there of acting on some belief or seeking to enforce some guideline, or acting in concert or in campaign, and so, in my submission, grounds 2 and 3 should also be dismissed.

PN176

Can I then, finally, come to the notice of contention. The notice of contention is exactly what it purports to be and that is it's a document on which the respondent relies to submit that the outcome of the decision, if permission is granted in the appeal and there is found to be an appellable error, then the notice of contention provides the basis to arrive at the same outcome; namely, that the bullying application is dismissed. It is framed in that way because we appreciate that in going back to the two instances of unreasonable conduct we are necessarily making a submission that, having regard to the evidence, there wasn't a proper evidentiary basis.

PN177

So we are, in effect, inviting the Bench to consider matters of weight, and there is a high onus in terms of permission, and on its own, I don't submit that the test or the gateway of permission or public interest is necessarily satisfied, on its own, but of course, if the Bench was to get there by the path of the appellant's appeal, then this squarely becomes an issue and can be considered as an alternate pathway and that's how we rely on it.

PN178

Of course, if the Bench, on the appeal, does not grant permission, then that's the end of it and the notice of contention falls away. It's a matter for the Bench, of course, if it wishes to make any note in respect of the issues raised, but the Bench would not be required to deal with the notice of contention if permission, otherwise, is not granted generally.

PN179

Again I will try and keep this very succinct given that we have dealt with it - and it's at paragraphs 35 to 42 - but, in essence, inasmuch that there were the two instances of unreasonable conduct found, both on 16 November 2022 and the telephone discussion on 2 February 2023, we raise two challenges to those instances.

PN180

One - and it's the same challenges in respect of both - to submit that applying the test, that is the reasonable person test and the objective consideration, that they would not be found to be unreasonable conduct by each of the individuals. So that's the first challenge, and the second is that there was not a proper or adequate evidentiary basis to find that the relevant behaviours created a risk to the appellant's health and safety.

PN181

Can I just very briefly deal with both of those in turn. I have taken, deputy presidents, I have taken you to the email of 16 November by Mr Hay. It speaks for itself, in my submission. It's no more than a request. It is a request in the circumstances described, and that context, in those circumstances, were accepted as a matter of evidence. It was responsive and not insisting on any outcome. It was no more than a request, which on 23 email was reiterated.

PN182

Now, the Commissioner then goes down the path of considering the issue of conflict as between the guidelines and the committee rules and that, in my respectful submission, then colours her assessment of reasonableness or otherwise of the conduct as found, but in delving into that issue, well, it was, in my submission, an irrelevant consideration inasmuch as the Commissioner there went into the merits of a proper substantive issue of interaction between instruments in a manner cautioned against by, for instance, Hatcher P, in *Mac v Bank of Queensland*, and I say that because there it was the issue of a PIP and whether it was properly implemented, understood and applied, and the president, our president said:

PN183

I don't need to go into the merits of that. The question before me is whether, in the circumstances, there was an evident and intelligible basis for the way or the decision that was made?

PN184

And it need not be the best or the preferred course, but whether there was some basis for it, and of course, in that case there was. Here, given the circumstances and the language in the email, and that there is not any insistence or requirement or demand, in my submission, any issue about how the rules interact with the guidelines and belief about that cannot inform the assessment of the circumstances on 16 November, as they played out, not as they existed in someone's mind, unless that was reflected and manifested. Then it's different. Had Mr Hay said, 'I'm relying on the guideline. You need to step down', then that's a very different matter, but that's not what occurred.

PN185

Similarly, if we come to the telephone discussion, again I have taken you, Deputy Presidents to the context and circumstances of those in the preceding emails which were the driving factor as to the call being made.

PN186

The first thing to note is the evidence of Ms Nattey was preferred by the Commissioner to the evidence of the appellant as to the discussion. On that evidence the discussion took some time because the appellant had raised wide-ranging issues, including Senate Estimates, including earlier interactions, and repeating her understanding of guidelines and so forth, to which responsively Ms Nattey kept saying, 'Well, look, I can't enforce that. I'm not doing that.'

PN187

I can't quote Shakespeare, but what I can refer to are the circumstances here, and those circumstances are Ms Nattey's responses were precisely that, responsive to the issue constantly being raised and wanting to be debated by the appellant, and Ms Nattey saying, 'Well, no. That's not what I'm saying. I'm just asking you to consider it.' They were the circumstances.

PN188

Now, again here, in my respectful submission, the Commissioner then digresses and goes back to this issue of rules and guidelines and then asks the question on the transcript of Ms Nattey:

PN189

Was this your understanding of the guidelines?---Yes, that was my understanding -

PN190

but the Commissioner also accepted that the issue of conflict between those instruments was not something that had been brought to the attention of Ms Nattey. It was not in her mind. It had no role to play, but in any event, as in the case of the email from Mr Hay, there was no insistent, demand, requirement on some compliance with guidelines.

PN191

So, again, what Ms Nattey thought, what she believed, in my respectful submission, was irrelevant to whether or not her making the call and having the discussion was unreasonable. In the circumstances, in my submission, that I have taken the Bench to, it was not, and to that extent we say that - and, again, on this alternate pathway under the notice of contention - the bullying application ought to have been dismissed.

PN192

The second challenge, very briefly, is that, to the extent that it was found that there was created a safety risk by that conduct, there is nothing more than the assertion of the appellant. The Bench has been taken to that, but just for completeness, the only reference to that is at appeal book page 195.

PN193

There's a paragraph where the appellant speaks about being more anxious and distressed and having trouble sleeping. She states an opinion, and then at 51, damage to business and public reputation. In respect of 51, of course, that was outrightly rejected in the decision where the Commissioner said that there was no evidence of this, and more than likely, to the extent that there was any such damage, it was by the appellant publicising or making comments on social media.

PN194

There was no other evidence, and one might compare that, for instance, to matters where this Commission has found there to be a risk, real not conceptual as it's described, but, for instance, again *Re SB*, at paragraph 45, there was evidence of injury and absences from work, and a need to facilitate a return to work. In *Bowker v DP World*, at paragraph 9, there was a reference to evidence of sick leave and medical evidence. So they were cases where there was some evidence.

PN195

Now, in saying that, I don't, for a moment, submit that there needs to be actual injury, actual risk and so forth, but it needs to be something more than a mere assertion or conceptual.

PN196

So that's the other criticism we raise in respect of the Commissioner being satisfied that the two instances found by her were unreasonable conduct, and not bullying, as my friend earlier submitted. Unreasonable conduct, but as I said earlier, when I started on the notice of contention, if the Bench does not grant permission on the appeal and does not otherwise find a compellable error, then the notice of contention falls away? They were the submissions, unless there was an question by you, Deputy Presidents.

PN197

DEPUTY PRESIDENT SLEVIN: Does the notice of contention really reflect the submissions your client made at first instance on those topics or have you refined them somewhat?

PN198

MR RAUF: It does. No, so at first instance it was those contentions arise.

PN199

DEPUTY PRESIDENT SLEVIN: You have said that Mr Hay no longer has any contact, as it were, with the appellant, as I understand it.

PN200

MR RAUF: That's so.

PN201

DEPUTY PRESIDENT SLEVIN: Is that an ongoing thing?

PN202

MR RAUF: It certainly is as it stands, yes. There's no instruction or change to the instruction issued back on 30 November that Mr Hay not to have any interaction with the appellant and so that's been ongoing.

PN203

DEPUTY PRESIDENT SLEVIN: And what's the situation with Ms Nattey?

PN204

MR RAUF: Deputy President, will you give me a moment. I will just confirm. I'm instructed that there's a similar position, such that Ms Nattey is also not engaging with the appellant, but I have just asked. All right. I will give you the appeal book reference for this, but at paragraph 61 or 62. I can find that.

PN205

Deputy President, if you will give me one moment. I will just turn up the reference so I'm not speaking out of turn. Here we go. So at appeal book 646, paragraph 60, Ms Nattey says:

PN206

I have not had any involvement in the matters relating to RDA Brisbane since 16 February 2023.

PN207

So she's also now in a situation where she's not having any engagement with the appellant, and on my instructions, that continues to be the situation.

PN208

DEPUTY PRESIDENT SLEVIN: And that arrangement is not contingent upon the outcome of these proceedings, is it?

PN209

MR RAUF: Not on my instructions, no, but perhaps if I can just, again, confirm. So as the direction was expressed from 16 February it's not contingent. It's ongoing. It's one of those things that might be reviewed down the track, but there isn't any contingency attached to it relating to this matter.

PN210

DEPUTY PRESIDENT SLEVIN: Thank you.

PN211

MR RAUF: If it pleases.

PN212

DEPUTY PRESIDENT CLANCY: Thank you.

PN213

Yes, in reply.

PN214

MR FRONIS: Yes. Thank you. Firstly, the email of 8 December 2022 that I referred to.

PN215

DEPUTY PRESIDENT CLANCY: I'm sorry, which date in December?

PN216

MR FRONIS: 8 December 2022.

PN217

DEPUTY PRESIDENT CLANCY: Thank you.

PN218

MR FRONIS: It appears at page 259 of the appeal book, and that's the email that indicates that payments were authorised despite the email on 16 November, and it refers to payments to be made on 21 November.

PN219

Now, it is, of course, accepted that the appellant in the email of 16 November questioned her ability to make those payments, but my submission is that more inquiries should have been put to hand when such an extraordinary step was being considered.

PN220

I also refer to the submissions at first instance, paragraph 64(a) and 64(b). They appear at page 12 of the court book, or the appeal book rather, and I refer to the respondent's submissions, and that is at page 18 of the appeal book, paragraph 12, and page 20 of the appeal book, at paragraph 20.

PN221

MR RAUF: What pages were they; I'm sorry?

PN222

MR FRONIS: Page 18, paragraph 12, and page 20, paragraph 20.

PN223

MR RAUF: Thank you.

PN224

MR FRONIS: I just want to quickly address my learned friend's submissions about an email that appears on page 780 of the appeal book.

PN225

DEPUTY PRESIDENT SLEVIN: Before you do, Mr Fronis.

PN226

MR FRONIS: Yes. I'm sorry.

PN227

DEPUTY PRESIDENT SLEVIN: Can you just take me to where, in terms at first instance, it was put that the conduct was group conduct? I see the reference you have taken us to in the submissions, but I don't think, in terms, it actually rises that high.

PN228

MR FRONIS: So that's page 12 of the court book.

PN229

DEPUTY PRESIDENT SLEVIN: Yes. That's right. It seems to be a statement of what the legislation says. It doesn't appear to me, at any point, to take it any further than that to ask for a finding of group conduct from the Commission.

PN230

MR FRONIS: Well, at paragraph 64(a), after it refers to what the Act considers to be bullying, it says, 'As was the case between the respondents collectively here', so I rely on that submission being made there.

PN231

DEPUTY PRESIDENT SLEVIN: And that's the extent of it?

PN232

MR FRONIS: And also I previously referred to Ms Liang-Godber's statement where she indicated her - and I can refer to it again - but she indicated in her evidence before the Commission that it was group conduct.

PN233

DEPUTY PRESIDENT GRAYSON: And was that proposition put to Mr Hay or Ms Nattey in cross-examination at all?

PN234

MR FRONIS: Not directly that it was group conduct, but what I say is the facts that were put to them in cross-examination would give rise to the - an inference could be drawn that it was group conduct. It wasn't specifically put, 'Are you a group?' but that's really a question of law, in many respects, and some subjective tests as to whether they're a group.

PN235

So it's a question of were they cross-examined sufficiently on the background factors that could give rise to that finding as a matter of law, and I say that they were. Specifically, it would be difficult to pinpoint exactly where. I did pinpoint the cross-examination with respect to the organisational structure, but really the factors that go through to determine whether there's any kind of common purpose is really all throughout the cross-examination, and it would be me referring to specifically most of the pages because really what we are saying is that it's basically a collective determination to freeze Ms Liang-Godber out.

PN236

I can refer to three instances of that by each of the three people involved. Mr Hay's email at 23 November 2023, page 202 of the court book. His belief that Ms Liang-Godber was obligated to stand aside. Ms Nattey, it was clear. It was found and she gave evidence that she was under the belief that Ms Liang-Godber was required to step aside, but also Ms Westaway was as well. At page 970 of the court book, at the top of that page, from the middle of the paragraph it starts with the words:

PN237

Given the board has asked Ms Liang-Godber to stand aside from her active duties as chair.

PN238

So there was a common purpose to freeze out Ms Liang-Godber under that belief that she was obliged to stand aside, and they all had that view, all three of them, and each of those points was cross-examined on, even though it wasn't then cross-examined, 'Well, you did that in cahoots or in conjunction with the other person', but in any event, in my submission, the cross-examination would have been sufficient to give rise to those inferences and they were able to be properly drawn, so it's not really a new contention as is being alleged now.

PN239

If I can refer to page 780 of the appeal book. That was an email that my learned friend indicated was addressed to the committee as a group, rather than specific individuals, but I do note at the bottom paragraph, at the bottom there's a one-liner, but then above it there's a whole paragraph so, effectively perhaps, you could say the second last paragraph of that. It specifically mentions the chairperson and the deputy chairperson.

PN240

So it does indicate the chair by name, so in my respectful submission, it's not quite correct to say that it didn't refer to specific individuals. It may not have referred to Ms Liang-Godber by name, but certainly referred to her position.

PN241

DEPUTY PRESIDENT CLANCY: It's just restating what's in the guidelines, isn't it, in the previous paragraph?

PN242

MR FRONIS: Yes. That's right. That's the email. That's not an email from Ms Nattey, but in any event, I just wanted to clarify what my learned friend indicated when he said that it was an email addressed to the committee as a whole. It certainly did at least name the chair, but that's not an email relied upon for the purposes of bullying because that's not an email sent by either respondents. What it is, though, is an email that was referred to by Ms Nattey in the 32-minute telephone call that occurred and that's the relevance of that.

PN243

Now, in relation to just the risk in the future, the Commonwealth clearly appears to have a policy of when a complaint is made to restrict contact between the

individuals involved. They certainly have done that in this case. They did that originally with Mr Hay and Ms Westaway from 28 November, and now they have done it also with Ms Nattey, but putting that aside that they temporarily, or it's put that it's not contingent on this case, it's a measure that's put in place every time a complaint is made by the Commonwealth.

PN244

If that was sufficient, then no one could ever get a stop bullying order against the Commonwealth or anybody else, any other employer who just simply says, 'I'm just going to restrict contact now that a complaint is made', but this is at odds with the evidence of Mr Hay that I have already pointed to before where he indicated that there could be a restructure. He indicated that - and I can refer to it again - but he indicated that he would take Ms Liang-Godber's call and, effectively, that there could be some involvement in the future.

PN245

DEPUTY PRESIDENT CLANCY: Where is that in the evidence?

PN246

MR FRONIS: So at page 961 to 962 of the court book. Now, it really starts from the top of that page, and there's cross-examination over those two pages in respect to this issue. Specifically though, at PN860 on page 962, that's where he refers to taking her call in the future, and it's at PN856 where he refers to:

PN247

It's a matter for the department to determine how the management of RDA Brisbane will occur going forward.

PN248

So the issue is, really it's a case where the department may restructure its affairs so that there is involvement with these three individuals with Ms Liang-Godber as chair and certainly the evidence of Mr Hay that he will take her call as well and that does create a risk of future contact.

PN249

DEPUTY PRESIDENT CLANCY: Where is the restructure evidence?

PN250

MR FRONIS: I will just go back to 961. Now, that is at page 961. It really starts from PN855 and then 856 where he talks about:

PN251

It's a matter for the department to determine how the management of RDA Brisbane will work going forward -

PN252

and I also just note at over the page, at PN860, he indicates absolutely at a question:

PN253

You would try and assist with matters on which she was calling in?

PN254

DEPUTY PRESIDENT CLANCY: So what's the proposition you want to put?

PN255

MR FRONIS: I'm sorry?

PN256

DEPUTY PRESIDENT CLANCY: What's the proposition you want to put because he's being asked by the Commissioner:

PN257

How would you conduct yourself with Ms Liang-Godber going further?

PN258

That is 857 -

PN259

?---In the same manner I have always conducted myself, in a respectful, polite or cordial manner with reference to the facts that are put in front of me and with reference to the relevant material I have had to deal with all RDA program management matters.

PN260

Does her cultural heritage cause you any issues?---Absolutely not.

PN261

So if she was to ring you in the future you would take her call?---Providing I was in a position to do so through the department; absolutely.

PN262

And you would try and assist?---Absolutely.

PN263

So what do you want us to draw from that exchange?

PN264

MR FRONIS: Well, from all of that and from PN856 we would draw two things. Firstly, that Mr Hay would be willing, in the future, to interact with Ms Liang-Godber. It's not a situation where he's saying, 'Under no circumstances will I talk to her. If the department said that I had to engage with her I just would have to refuse.' He's not giving any of that evidence. He said, 'Absolutely. Yes, I would', and so that, combined with the evidence that it's up to the department in relation to future conduct and how it's structured, means that there is a risk in the future and that's what we rely on there.

PN265

DEPUTY PRESIDENT CLANCY: The question that was put there by the Commission was:

PN266

I haven't been taken to any orders that Ms Liang-Godber would seek in respect of you.

PN267

So what were the orders put to the Commissioner that would be sought in respect to Mr Hay?

PN268

MR FRONIS: I will have to look at that. I'm sorry. I will have to go back to the submissions at first instance to look at the orders that were being sought there, specifically in relation to Mr Hay.

PN269

DEPUTY PRESIDENT CLANCY: Well, it's just that you're making submissions now about what he should do or what he could do. He's saying, 'Well, this is how I would interact', and you're saying, 'Well, that creates risk.' You need to take us to it if you're going to sustain that sort of a submission.

PN270

MR FRONIS: Well, the submission is just simply about future risk. So that's where it goes to.

PN271

DEPUTY PRESIDENT SLEVIN: I think what we're after, Mr Fronis, is if we get to where you want us to be, are you asking us to make orders, and if we are required to make orders, then the matters in section 789FF need to be satisfied?

PN272

MR FRONIS: Yes.

PN273

DEPUTY PRESIDENT SLEVIN: One of them is that:

PN274

There is a risk that a worker will continue to be bullied at work by the individual or group.

PN275

and these questions, certainly from my point of view, are aimed at that, and that's why I asked Mr Rauf the questions I did. It appears that there is very little risk of contact, let alone any contact occurring constituting bullying at work.

PN276

MR FRONIS: Well, the contact and the risk, as I have pointed out, the highest I can put it from that evidence there is that there's a risk of future movements in how the department is managed, that they would be contacting Ms Liang-Godber in the future, and that really is the future risk that could eventuate, that these three people are employees of the Commonwealth and involved in this area. Ms Liang-Godber remains the chair and there's a risk in the future they will be required to have contact with her.

PN277

DEPUTY PRESIDENT SLEVIN: It goes to the utility of the appeal. It just seems to me that your client has, in one sense, achieved what she may have been

seeking to achieve by not having had contact with these people she believed bullied her. So regardless of the question of whether she was bullied or not, she has achieved that end by the actions that the Commonwealth have taken in response to the application and they seem to be measures put in place that are ongoing.

PN278

MR FRONIS: I accept that those are the measures, but the difficulty with those measures that have been put into place is the evidence in relation to them is, effectively, 'Yes, we have stopped contact with her now', but the evidence, as I pointed out, also indicates that that could change in the future. Otherwise, it's just statements from the bar table that, 'These are my instructions.' That's what my learned friend is saying, 'These are my instructions that it won't occur in the future', but is there actually any evidence in relation to that at first instance that goes that far, that there would never be any contact in the future?

PN279

If that evidence was led, then certainly he could point to it, but I can't see him to indicate that that was the case, especially given the questioning I referred to in the evidence of Mr Hay.

PN280

DEPUTY PRESIDENT SLEVIN: What do you seek in disposition of your appeal?

PN281

MR FRONIS: Well, effectively, that the stop bullying order is made. Ms Liang-Godber is not saying that, 'I want to have absolutely no contact with these people.' In fact, for the smooth running of the organisation, it would possibly be beneficial for her to be able to have contact with someone in such a senior position as Ms Nattey, for example, but it's a question of she just wants the bullying and the conduct to stop, going forward, and that's what she's seeking. Unless there's any further questions, I don't intend to make any further submissions.

PN282

DEPUTY PRESIDENT CLANCY: Thank you.

PN283

Mr Rauf, reference is made to those parts of the evidence and the like so - - -

PN284

MR RAUF: Yes. Very briefly. Just five points, Deputy President. Reference is made to the email of 8 November, but I think it's conceded that that was overcome and it was out-of-date based on the subsequent emails where there was a refusal indicated, so I would say no more about that. Reference is made - - -

PN285

MR FRONIS: The date, I'm sorry, of the email?

PN286

MR RAUF: The 8 November 2022 email at appeal book 259 that you went to.

PN287

Then the submission, reference is made to the submission at paragraph 12 as the statement about, or a contention about group conduct, but in my submission, when one looks at that, it is no such contention as is put on appeal and I will, otherwise, repeat my earlier submissions.

PN288

The question was asked, with reference to the transcript, 'Were there any questions put about group conduct?' et cetera, and reliance is placed on the whole of the transcript, not in particular.

PN289

What I would say on this is this, that I invite the Bench to read it for itself, and when it does it will observe two things. (1) Mr Hay was never asked about the incident involving Ms Nattey and vice versa. (2) neither of them were ever questioned about any group conduct or in concert or campaign or collective approach or common purpose.

PN290

Just fourthly, your Honours were taken to appeal book at page 961 in the transcript, and I think this really highlights part of the problem with this appeal. It takes things out of context and seeks to then put it in a particular light to make a submission.

PN291

The submission was made about a risk of bullying into the future, but Clancy DP, as you quite properly observed, the evidence of the exchange is in the context of a discussion with the Commissioner where she was seeking to clarify that the relief being sought, or the orders being sought, and if there was a need for Mr Hay to interact, how would he do so? One can't divorce the interaction from that context as is sought to be done. It is erroneous, in my submission.

PN292

Just finally, it was said that there was no submission about there not being some guarantee or certainty about things changing, not changing in the future. With respect, the evidence that was before the Commission - and I have taken the deputy presidents to one of those references in respect of Ms Nattey - was that a direction was given to have no further interactions. That is the position. There is no change on that.

PN293

There is nothing to suggest that there will be a change on that, and the absence of certainty doesn't certainly mean that there's evidence to say, well, things might change. The evidence is the evidence and, in my submission, that does bring into real question the very utility of this appeal and the relief sought. They were the things that I wished to say just in closing. Thank you.

PN294

MR RAUF: Perhaps I just, just for fairness to my learned friend because he made the submission that that email at page 259 of the court book was 8 November and predated the email of 16 November. I have got it open. It clearly says 8 December so I just thought I might draw his attention to that.

PN295

MR FRONIS: I rely on the emails I have taken the Bench to. They speak for themselves and very clearly, in my submission, convey a refusal or a lack of cooperation about facilitating payment.

PN296

DEPUTY PRESIDENT SLEVIN: Just one more thing, Mr Fronis. The orders sought at first instance appear to be at page 63 of the appeal book.

PN297

MR FRONIS: Yes.

PN298

DEPUTY PRESIDENT SLEVIN: When you say that you're seeking the Full Bench to make orders that the bullying stop, are those the orders that you are seeking?

PN299

MR FRONIS: Yes. It's orders to stop bullying, but it doesn't say in there - and this is obviously drafted by Ms Liang-Godber herself - but it says:

PN300

The exclusion of me from the department and RDA business discussions and meetings is bullying and must be stopped.

PN301

Effectively, that's what she's seeking. So she is not seeking that there be no contact at all with Mr Hay and Ms Westaway and Ms Nattey. She's just seeking that the bullying stops and she stops being excluded.

PN302

So, in some sense, it's actually not what she wants, to be completely separated from them, because they do hold very high positions in the RDA and in the Commonwealth government department, and not being able to have that liaison with someone as high up as Ms Nattey does make it more difficult for Ms Liang-Godber to do her job and run the organisation, but effectively, that's why. So it's not quite what she wanted.

PN303

DEPUTY PRESIDENT GRAYSON: Well, different orders were sought, I think, in your submissions before the Commissioner, ultimately; is that right?

PN304

MR FRONIS: I'm sorry, what was that?

PN305

DEPUTY PRESIDENT GRAYSON: That is, I think the application had different orders sought and you ultimately sought at the hearing before the Commissioner.

PN306

DEPUTY PRESIDENT SLEVIN: Page 180 of the appeal book.

PN307

DEPUTY PRESIDENT GRAYSON: Yes, 179 to 180.

PN308

MR FRONIS: Yes. That's seeking the formal qualification to stop. The formal apology to stop the types of behaviour alleged. Yes. That's right, and those orders there, they support my contention that she wasn't seeking to have absolutely no contact with these individuals. She's simply saying that she wants this type of conduct to stop, and obviously there's further orders sought there. I don't understand her position has changed. It remains the same at this point in time.

PN309

DEPUTY PRESIDENT CLANCY: Thank you very much.

PN310

MR FRONIS: Thank you.

PN311

DEPUTY PRESIDENT CLANCY: The Full Bench will reserve its decision. We will consider the material that's been put to the Commission prior to today, and we thank the parties for that and we thank them for their submissions this afternoon. The decision we make will be sent to the parties, but there being nothing further, I will now adjourn the commission.

PN312

MR FRONIS: Thank you.

ADJOURNED INDEFINITELY

[3.54 PM]