DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

The Construction, Forestry, Maritime, Mining and Energy Union;
The Australian Workers' Union;
The Australian Manufacturing Workers' Union and
The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
v
OS ACPM Pty Ltd and OS MCAP Pty Ltd
(C2020/140, C2020/141, C2020/144, C2020/145, C2020/146, C2020/156, C2020/157)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT COLMAN

SYDNEY, 13 JULY 2020

Appeals against decisions [2019] FWCA 8595 and [2019] FWCA 8601 of Deputy President Boyce at Sydney on 19 December 2019 in matter numbers AG2018/6025 and AG2018/5649.

DECISION OF VICE PRESIDENT HATCHER AND DEPUTY PRESIDENT BOOTH

Introduction and background

[1] In an earlier decision issued on 8 May 2020[1] (first decision) we considered and determined appeals made by a number of unions (the CFMMEU, the AWU, the CEPU and the AMWU) against decisions made by Deputy President Boyce on 19 December 2019 to approve the *Operations Services Production Agreement 2018* (Production Agreement) and the *Operations Services Maintenance Agreement 2018* (Maintenance Agreement) (collectively "Agreements"). We determined that permission to appeal should be granted, the appeals upheld, and the decisions of the Deputy President quashed, and further that we would proceed to re-determine the applications for approval of the Agreements. This decision concerns our re-determination of those applications. In this decision, we will adopt the acronyms, abbreviations and defined expressions used in the first decision.

[2] We were not at one as to the basis upon which the appeals were upheld. The plurality (Vice President Hatcher and Deputy President Booth) determined that the appeals should be upheld because there was error in the following respects:

[1] [2020] FWCFB 2434

- the analysis of the BOOT proceeded upon a wrong mathematical premise as to the difference between the rates of pay in the comparator awards (the Mining Award and the Black Coal Award) and those in the Agreements;

- there was a failure to consider the implications for the BOOT of the fact that the Agreements did not specify an hourly or weekly rate of remuneration, which meant that the BOOT could not be assessed for full-time employees working alternative rosters pursuant to clause 2.1 of Schedule 1 of each Agreement or for casual employees; and

- in respect of compliance with s 180(5) of the FW Act, which by virtue of s 188(1)(a)(i) is an element of the requirement for genuine agreement in s 186(2)(a), there was a failure to take into account that reasonable steps had not been taken to explain to the employees who voted upon the Agreement the effect of provisions of the Agreement relating to rates of pay and hours of work for part-time employees, rates of pay for casual employees or the salary rates or the method of calculating salary rates for full-time employees working alternative rosters pursuant to clause 2.1 of Schedule 1 of the Agreements.

[3] In relation to the re-determination of the application for approval of the Agreements, the plurality indicated (at paragraph [91] of the first decision) that it held the following concerns as to whether the approval requirements in s 186 of the FW Act had been met:

> "(1) *Section 186(2)(a)* – We have a concern that the element of genuine agreement in s 188(1)(a)(i) is not satisfied because of non-compliance with s 180(5), on the basis of our reasons in paragraphs [75]-[80] above.
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> (2) *Section 186(2)(c)* – We have a concern that clauses 9, 10.1 and Schedule 1 of the Agreements might contravene s 55, for the reasons set out in paragraphs [84]-[88] above.
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> (3) *Section 186(2)(d)* – We have a concern that the Agreements might not pass the BOOT, for the reasons set out in paragraphs [60]-[72] above."

[4] Deputy President Colman determined that the appeal should be upheld on a narrower basis, namely:

- there was a failure to take into account, for the purpose of the BOOT, that clause 7.2 of the Agreements did not guarantee that award loadings and penalties would be payable in full in respect of alternative rosters pursuant to clause 2.1 of Schedule 1, and that the narrow margin by which salaries for such alternative rosters might reliably exceed the award rates might be offset by other detriments in the Agreements; and

- there was a further failure to take into account, for the purpose of assessing compliance with s 180(5), that there was no explanation given of the effect of the "principles" referred to in clause 2.1 of Schedule 1 of each Agreement on the calculation of annual salaries for alternative rosters.

[5] We joined in the making of the following orders:

(1) Permission to appeal is granted.

(2) The appeals are upheld.

(3) The decisions ([2019] FWCA 8595 and [2019] FWCA 8601) are quashed.

(4) OS MCAP and OS ACPM are directed to file any written responses they wish to make to the concerns identified in paragraph [91] above, including any proposed undertakings, within 14 days of the date of this decision. The CFMMEU, the AWU, the AMWU and the CEPU are directed to file any submissions in reply within a further 7 days.

(5) The CFMMEU, the AWU, the AMWU and the CEPU are directed to file any further submissions they wish to make concerning s 188(1)(c) within 14 days of the date of this decision. OS MCAP and OS ACPM are directed to file any further submissions concerning s 188(1)(c), including submission in reply to the unions' submissions, within a further 7 days.

[6] We have now received submissions from the parties pursuant to orders (4) and (5) in the first decision.

Submissions of OS MCAP and OS ACPM

[7] In response to the NES concerns identified in the first decision, OS MCAP and OS ACPM submitted that the Agreements were never intended to, and should not be construed as, excluding s 62(2), including the right given to employees under s 62(2) to refuse to work hours additional to those stipulated in s 62(1) if they are unreasonable. As to s 114, OS MCAP and OS ACPM took the same position and submitted that the Agreements were not intended to and should not be construed as excluding the right to refuse a request to work on a public holiday. OS MCAP and OS ACPM in any event proposed the following undertaking to address the concerns:

> This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this Agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency. (**proposed undertaking 1**)

[8] As to the BOOT concerns, the submissions of OS MCAP and OS ACPM repeated the benefits and detriments of the Agreements compared to the Mining Award and the Black Coal Award averred in the Form F17 statutory declarations filed in support of the application for approval of the Agreements, and contended on that basis that the Agreements passed the BOOT. Additionally, in order to meet any concerns about the BOOT, the following undertaking was proposed for each of the Agreements:

> The Company undertakes to apply clause 23.1 so as to ensure that every Employee covered by this Agreement will be better off overall having regard to every circumstance than if a relevant modern award applied to the Employee. (**proposed undertaking 2**)

[9] Specifically in respect of remuneration under alternative rosters pursuant to clause 2.1 of Schedule 1, OS MCAP and OS ACPM submitted that:

- the principles referred to in clause 2.1 of Schedule 1 had produced annualised salaries for the specified rosters that were higher than under the comparator awards, and the Commission could therefore be satisfied that the principles would produce the same result for alternative rosters;

- clauses 2.1 of Schedule 1 provides a guarantee that the annual salary in respect of any alternative roster will be higher than what would be paid to an employee working that roster if any award applied to them;

- to address the concern that, in setting the salaries for any alternative rosters, the award penalties and loadings would be taken into account rather than necessarily applied, the following undertaking was proposed:

> The Company undertakes to apply clause 7.2 so as to ensure that an Employee's Annual Salary includes compensation for any allowances or payments applicable to the Employee's roster under any relevant modern award than would otherwise apply to the Employee if this Agreement did not apply to the Employee. (**proposed undertaking 3**)

- this undertaking, together with the guarantee in clause 23, would ensure that the Commission would be satisfied that the Agreements passed the BOOT;

- if there still remained a concern that the Agreements might not pass the BOOT having regard to clause 2.1 of Schedule 1, then the further following undertaking was proposed:

> The Company undertakes to apply clauses 1.1 and 2.1 in Schedule 1, in the case of any roster, including any new roster, so as to ensure that the minimum Annual Salary paid to an Employee for working any particular roster will be the amount that would be paid to an Employee working that roster if any modern award otherwise applied to them (if this Agreement did not apply to the Employee), plus at least an additional 5% of the total amount that the Employee would otherwise have been entitled to under the award. (**proposed undertaking 4**)

- while this undertaking does not stipulate a precise annual salary amount, because it would be impossible to do so where any alternative or "new" roster was not known or knowable, the undertaking does provide a precise statement of how much better off an employee would be compared to the comparator awards; and

- these undertakings would not cause any employees financial detriment (because they are financially beneficial) and do not substantially change the Agreements.

[10] In relation to the BOOT as it applies to casual employees, OS MCAP and OS ACPM submitted that the correct construction of the Agreements is that clause 5.3 provides that the minimum casual rate is derived from obtaining an hourly rate from the annual salary applicable to the relevant roster and adding a 25% loading. The hourly rate is derived by

dividing the salary by 52 and then dividing that sum by the average hours worked per week for the particular roster (to which the 25% loading is added). They proposed the following undertakings in relation to the rosters specified in Schedule 1 of each of the Agreements, consistent with their view as to the construction of clause 5.3:

> **Production Agreement**
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> The Company undertakes that the minimum hourly rates of pay for casual employees (inclusive of the casual loading) based on the employees working the applicable rosters set out in Schedule 1 of the Agreement are as follows:
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> (1) "Coal"– $57.69.
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> (2) "Non coal" – $51.51.
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> **Maintenance Agreement**
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> The Company undertakes that the minimum hourly rates of pay for casual employees (inclusive of the casual loading) based on the employees working the applicable rosters set out in Schedule 1 of the Agreement are as follows:
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> (1) "Non trades" - $53.84.
>
> (2) "Trades" - $62.56 (**proposed undertaking 5**)

[11] In relation to the four specific circumstances where a casual employee's hourly rate might fall below the rate payable under relevant award, OS MCAP and OS ACPM submitted that this did not take into account the significantly higher rates that casual employees would receive in all other circumstances. Additionally, in relation to alternative rosters under clause 2.1 of Schedule 1 of the Agreements, the guarantee that the annual salary would be higher than the amount payable under any modern award would result in the casual rates derived from that salary being higher than under any modern award. It was further submitted that there was no basis for concern about casual employees working more than 3 hours overtime, as casual employees only receive overtime under the comparator awards if they work more than 10 ordinary hours per shift or more than their rostered hours per week. The significantly higher casual rates earned by casuals under the Agreement before overtime is triggered more than compensates for any rostered overtime work, and for unrostered overtime clause 1.3 of Schedule 1 of the Agreements provides for payment at the rate of double time. To address any residual concern, OS MCAP and OS ACPM proposed the following undertaking:

> The Company undertakes that casual Employees will be paid the following loading in addition to their rate of pay where they are engaged for less than a full roster cycle and work one of the following shifts:
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> (1) Saturday after 3 hours – 20% loading;
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> (2) Sundays – 20% loading;
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> (3) Public holidays – 90% loading. (**proposed undertaking 6**)

[12] In relation to part-time employees, OS MCAP and OS ACPM submitted that clause 5.2 of the Agreements ensured that part-time employees received the same entitlements as full-time employees on a pro-rata basis, and thus the BOOT was passed. Alternatively it proposed the following undertaking:

> The Company undertakes that at the time of offering employment the Company will set out the part time Employee's ordinary hours of work (for agreement with the part time Employee) and the prorated equivalent of the Annual Salary. The Employee's ordinary hours of work will only be varied by agreement with the part time Employee. (**proposed undertaking 7**)

[13] In respect of the Full Bench's concern that the element of genuine agreement in s 188(1)(a)(i) was not satisfied because of non-compliance with s 180(5), OS MCAP and OS ACPM submitted that although the employees were not told what the principles were for the calculation of salaries under alternative rosters, they were told that the same principles that had produced a result for the existing roster that was higher than under the comparator awards would be applied in the case of alternative rosters. It was also submitted that the proposed undertaking 4 would also address the Full Bench's concerns about compliance with s 180(5) since, by ensuring that employees are better off overall under the Agreements by a significant and quantifiable margin compared to the Mining Award and the Black Coal Award, it would render moot any omission identified by the Full Bench in that the omission which required explanation would no longer exist.

[14] As to the additional concerns raised as to compliance with s 180(5) in relation to part-time employees and casual employees, it was submitted that proposed undertakings 5, 6 and 7 would also address the Full Bench's concerns for the same reason.

[15] OS MCAP and OS ACPM closed its submissions with the following:

> "… if in some respect the proposed undertakings leave the Full Bench with any residual concerns, then the Respondents would seek an opportunity to know and understand any residual concerns and how they can best be met, including by the provision of further undertakings that will allow the Agreements to be approved. It is submitted that, in this event, a further short oral hearing would be the quickest and most efficient means of doing this, and the fairest to the Respondents and the Appellants."

CFMMEU's submissions

[16] In its submissions, the CFMMEU sought to rely upon as evidence in the rehearing a statement issued by OS MCAP and OS ACPM to their employees shortly after the first decision which relevantly indicated that over 2,300 were employed under the Agreements, that the first decision had no impact on the employees' "*secure, stable*" employment, and that all employees would continue to receive the terms and conditions of employment set out in their contracts of employment. The CFMMEU submitted firstly that the residual element of genuine agreement in s 188(1)(c) was not satisfied because the employees who voted to approve the Agreements: (1) had no or an insufficient "stake" in the Agreements in the sense that they would not in practice be subject to and experience the terms and conditions provided by the Agreements, thus rendering their assent to the Agreements bereft of authenticity or any moral authority; (2) they had no or insufficient knowledge of the coal industry; (3) they did

not give informed consent; (4) employees were provided with misleading information and there was a misrepresentation or lack of full disclosure; and (5) the Agreements were made early in the life of the enterprises and there was an absence of any bargaining. This was the case, it was submitted, because:

- the salaries of the voting employees had been determined before the vote and were not going to be affected by the vote;

- it was not clear that any conditions in the Agreements were superior to those in the employees' contracts of employment;

- OS MCAP and OS ACPM represented to voting employees unable to attend the briefing sessions that nothing would change to their terms and conditions and pay when the applicable agreement was voted on and approved, and this may have affected their vote;

- none of the voting employees worked in the black coal mining industry under the Black Coal Award, noting in that context that the Production Agreement prescribed an annual salary for coal production workers that is $20,000 less than for non-coal production workers, and had no or insufficient knowledge of conditions of employment in that industry or how the provisions of the Agreements operated vis-a-vis the Black Coal Award;

- the voting employees did not vote with an understanding of the complexity of the comparison between the conditions under the Agreements and those under the Mining Award and the Black Coal Award, but rather (it is to be inferred) voted on the basis that they would not be paid under the proposed Agreements because of their higher rates;

- there was no explanation given to identify or explain how wages would be affected by the rosters worked, including what hourly rate may apply in each circumstance, thus rendering unknowable critical terms of the Agreement;

- the voting employees could not know of the financial consequences of the proposed Agreements for employees who were actually to be paid under them;

- there was conflict between the representation to voting employees that "nothing changes to your terms and conditions and pay when this agreement is voted on and approved", and that "important terms and conditions of employment" are contained in the Agreements;

- the failure to disclose the principles used to calculate the annual salaries in the proposed Agreements amounts to a failure to fully disclose the effects of the proposed Agreements;

- employees were told that approval of the Agreements would "provide opportunities for employees to work for the Company across Minerals Australia operations", when in fact nothing in the Agreements affected this;

- employees were not told that they could not bargain for better or different terms, and were barred from taking protected industrial action, for the four-year term of the Agreements;

- the Agreements were made early in the life of the enterprises of OS MCAP and OS ACPM, early in the employment of the voting employees, and prior to either business operating in the coal industry, and at a time when it was known that the businesses would shortly expand into the coal industry, in circumstances in which OS MCAP and OS ACPM now have over 2,300 employees and operate extensively in the coal industry; and

- the inference can be drawn that the Agreements were designed to have the effect of preventing collective bargaining under the FW Act.

[17] In response to the matters raised in the submissions of OS MCAP and OS ACPM, the CFMMEU submitted that:

- proposed undertaking 1 should not be accepted, because it leaves the terms in the Agreement which offend s 55 of the FW Act undisturbed and leaves unclear what an employee's entitlement to remuneration would be if rostered overtime or a rostered public holiday is not worked, is too generically expressed to adequately resolve the specific nature of the NES concerns, would only have legal effect if an employee can identify an inconsistency with the NES, and effectively outsources the task of the Commission required by s 186(2)(c);

- proposed undertakings 3 and 4 did not address the problem of non-compliance with s 180(5), since it remains the fact that the remuneration which would apply on alternative rosters was not explained, and the undertakings do not render this moot;

- it remained the case, notwithstanding proposed undertakings 5 and 6, that it is difficult if not impossible for a casual employee to decipher what their rate of pay is at any given time, and in these circumstances, the proposed undertakings do not meet the concern as to the inadequacy of explanation as to the casual rates under the Agreements;

- proposed undertaking 7 still left obscure the means by which the rate of a part-time employee is to be calculated, and did not rectify the lack of an adequate explanation of the terms of the part-time provisions in the Agreements;

- in any event, the proposed undertakings would result in substantial change to the Agreements by reason of the range of existing provisions upon which they operate and the complexity which they would introduce, and thus are incapable of acceptance by reason of s 190(3)(b); and

- for the same reasons, the Full Bench would not exercise its discretion in favour of accepting the undertakings.

AWU's submissions

[18] The AWU submitted that we could not be satisfied as to the element of genuine agreement in s 188(1)(c) because the failure by OS MCAP and OS ACPM to explain the "principles" for the calculation of salaries under the Agreements meant that full-time, part-time and casual employees could not have properly understood the minimum rates payable under the Agreements. This absence of full disclosure of critical information concerning the rates of pay, it was submitted, meant that the Commission could not be satisfied that the agreement of the employees was genuine in the circumstances.

[19] In relation to proposed undertaking 4, the AWU submitted that it was not clear whether this represented a belated revelation of the "*principles*" referred to in Schedule 1 of each of the Agreements, or whether it has been developed merely to address the Commission's concerns. In any event, it was submitted, if the former it remained the case that the principles referred to were not disclosed to employees and thus were not taken into account when they voted, and if the latter then the Commission still does not know whether the undertaking is more or less favourable than the principles. Further, it was completely unrealistic to expect employees working in the mining industry to be able to conduct the complicated calculations necessary to determine if they are being paid in accordance with this proposed undertaking. The AWU also submitted that proposed undertaking 4 could not remedy the absence of genuine agreement for the purpose of s 188(1)(c) by reasons of the lack of any informed consent as to the "*principles*" referred to in Schedule 1 of the Agreements.

Other unions

[20] The CEPU and the AMWU adopted the submissions of the CFMMEU and the AWU.

OS MCAP and OS ACPM submissions in reply

[21] In relation to s 188(1)(c), OS MCAP and OS ACPM submitted in reply to the submissions of the CFMMEU and the AWU that:

- the CFMMEU should not be permitted to adduce new evidence by way of the statement issued by OS MCAP and OS ACPM after the first decision, which was not probative of any fact or matter in issue;

- the submission that the voting employees had no or an insufficient "stake" in the Agreements because their terms and conditions of employment were guaranteed in their employment contracts and they were not employed in the coal mining industry was not referable to the conclusion reached in the first decision and repeated earlier submissions made at first instance;

- in this case, there was no question that the voting employees would be covered by the Agreements and work in the industry and classifications contained in the Agreements, and voted on the Agreements knowing this would be so;

- notwithstanding their individual contractual arrangements, employees may have a legitimate interest in ensuring that there is a baseline of conditions different to those in the relevant modern award which will operate across all operations and in respect of all employees;

- because, as the CFMMEU acknowledged, it is not clear whether the terms and conditions of employment in the voting employees' contracts are superior to those in the Agreements, the assertion that the employees would not be subject to or experience the terms and conditions of the Agreements was unsubstantiated and should not be accepted;

- the fact that employees may not previously have worked in black coal mining operations has nothing to say about the authenticity of their concurrence in making an agreement that would apply to all the work they would perform under the agreement, whether in black coal or mining operations (noting that at least two employees covered by the Maintenance Agreement had previously worked in black coal mining);

- the classifications in the Agreements covered similar production and maintenance activities in either industry, and the voting employees were provided with a detailed analysis of the differences between the Agreements and the Mining Award and the Black Coal Award;

- the voting employees knew that the salaries specified in Schedule 1 of the Agreements were higher than under either of the comparator awards, and therefore knew that the principles would also produce annualised salaries for alternative rosters that were higher than the comparator awards;

- there was no evidence that any employee was misled, and the representations made by OS MCAP and OS ACPM that their terms and conditions guaranteed by their contracts would not change was legally accurate;

- there was no obligation to explain the legal effect and operation of the FW Act with respect to bargaining and industrial action during the currency of an enterprise agreement;

- that an agreement ends up covering more employees than voted for it is not itself significant in respect of s 188(1)(c); and

- bargaining for the Agreements occurred in conformity with the provisions of the FW Act.

Consideration

[22] It is only necessary in this decision to give detailed consideration to the issue concerning compliance with s 180(5) as it relates to that element of the genuine agreement requirement in s 188(1)(a)(i). In relation to the concerns expressed in the first decision by the plurality concerning the requirement in s 186(2)(c) that the Agreements may arguably contain terms which contravene s 55, we accept that proposed undertaking 1 would, with some modification, appropriately address those concerns. As to the concerns expressed about satisfaction of the BOOT in the first decision, we likewise accept that proposed undertakings 2-7 substantially address those concerns, and would likely wholly address them with some further modifications.

[23] However we do not accept the submission advanced by OS MCAP and OS ACPM that proposed undertakings 3-7 are capable of resolving the concerns expressed in the first

decision concerning compliance with s 180(5). It has been accepted in a number of Full Bench authorities that the Commission has the power under s 190 to accept undertakings which address a concern as to non-compliance with s 180(5).[2] However that does not mean that *any* non-compliance with s 180(5) is capable of being remedied by way of an undertaking. In *CFMMEU v Karijini Rail Pty Ltd*[3] the Full Bench said:

> "[107] ...a concern about whether an employer has complied with s.180(5) and therefore whether the agreement has been genuinely agreed to by the relevant employees, may as a matter of logic be remedied depending on the nature of the concern. It is accepted that in a number of cases concerns about genuine agreement will not be able to be met by an undertaking. But it is not the case, as a matter of logic, that any such concern could never be met. Why for example, could not a concern that an employer explained the effect of a term of the agreement as to shift work was that an afternoon shiftworker would receive a 15% loading under the agreement, when the agreement only provides for a 10% loading, be met by an undertaking that the employer would pay an afternoon shiftworker a loading of 15%? We consider that such an undertaking would remedy the concern since the agreement operating with the undertaking is consistent with the explanation given."

[24] Similarly, in *CFMMEU v Mechanical Maintenance Solutions Pty Ltd* the Full Bench said (footnote omitted):

> "[36] ...It should be emphasised that *Karijini* is not authority for the proposition that *any* instance of non-compliance with s 180(5) is curable by undertakings. Clearly a wholesale failure to comply of the type dealt with in *CFMEU v One Key Workforce Pty Ltd* is not capable of rectification. But, for example, a concern arising from the making of a representation by the employer that a specific term of a proposed agreement is more beneficial than it actually is might, in some but not all circumstances, be addressed by an undertaking to apply the term in the more beneficial way represented by the employer. In this case, there was a failure by the employer to explain that a small number of more beneficial terms in the pre-existing instruments had been excluded by the Agreement. The undertakings addressed this concern by restoring the more beneficial terms for the purpose of the Agreement. This was entirely consistent with the reasoning in *Karijini*."

[25] There clearly must be a logical relationship between the identified non-compliance with s 180(5) and the undertaking proposed to remedy it. For example, if the failure to take all reasonable steps to explain the terms of the proposed agreement and their effect consists of a misrepresentation concerning the benefits of the proposed agreement, then it is possible that this may be able to be addressed by an undertaking which serves to align the terms of the agreement with the representation. If there has been a failure to take all reasonable steps to identify or explain a term of the agreement which is significantly detrimental compared to the relevant modern award, then an undertaking may possibly address this by removing the detrimental term from agreement. In either case, of course, in order for the undertaking to be accepted the condition in s 190(3) must be satisfied – that is, the Commission must be satisfied that the effect of accepting the proposed undertaking is not likely to cause financial

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[2] *CFMMEU v Specialist People Pty Ltd* [2019] FWCFB 7919 at [19]-[25]; *CFMMEU v Karijini Rail Pty Ltd* [2020] FWCFB 958, 293 IR 254 at [97]-[109]; *CFMMEU v Mechanical Maintenance Solutions Pty Ltd* [2020] FWCFB 1918 at [36]

[3] [2020] FWCFB 958

detriment to any employee covered by the agreement or result in substantial changes to the agreement. Further, even if that condition is satisfied, the Commission must be persuaded to exercise its discretion in favour of acceptance of the undertaking.

[26] In respect of clause 2.1 of Schedule 1 of each of the Agreements, the Full Bench in the first decision said that its concern as to compliance with s 180(5) arose from a failure to take reasonable steps to explain the *effect* of this provision beyond merely repeating the text of the provision. The plurality identified the failure in the following terms:

> "It is asserted that the remuneration outcome produced by the application of those principles will be greater than under the otherwise applicable awards, but this does not serve to identify what that outcome will be. The '*explanation*' leaves unknowable what a person's remuneration will be, or how it will be calculated, under any new roster that might be introduced."
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> ... In respect of alternative rosters able to be introduced under clause 2.1 of Schedule 1 of each of the Agreements, we cannot imagine what the difficulty would have been in the '*principles*' by which the annual salaries are calculated being disclosed. This would have permitted full-time employees to understand what salary they would be paid under any alternative roster scenario."[4]

[27] Deputy President Colman identified the failure as follows:

> "The explanation of the Agreements provided to employees about the alternative rosters repeated the text of the provision, stating that the 'same principles used to calculate the Annual Salary' will be used to calculate the salary that would apply to any new or other roster that might be introduced. The explanation did not say what those principles are. It did not state what the actual salary would be or how it could be reliably calculated. In fact, the explanation of the terms of the agreement was accurate in this regard, because the relevant terms do not address those matters. One effect of these terms, as discussed above, was that the minimum enforceable entitlement to an annual salary of an employee working a new roster was only that it would exceed what the employee would have earned if the award had applied. This effect was plain enough. But the effect of the application of the 'principles' on the calculation of the actual salary was not explained, and was not otherwise clear. This was in my view a significant matter that required explication. Had the provision only stated that the setting of the actual salary was entirely at the employer's discretion, the relevant effect would have been clear, but the reference to the existence of principles begs the question as to what they are and how they will determine the remuneration that will be paid to employees working new rosters."[5]

[28] Thus the identified failure to comply with s 180(5) was a failure to explain either the actual salary outcomes which would apply to full-time employees on alternative rosters under clause 2.1 of Schedule 1 of the Agreements or the principles by which those actual salaries would be calculated. As earlier stated, OS MCAP and OS ACPM relied on proposed undertakings 3 and 4 in response to our concern in this respect, as well as the concern (expressed by the plurality) as to satisfaction of the BOOT. Proposed undertaking 4 at least

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[4] [2020] FWCFB 2434 at [75] – [76]

[5] Ibid at [116]

would appear to address satisfactorily the BOOT concern, but neither undertaking is logically related to the identified non-compliance with s 180(5). As was stated by the Full Bench in *AWU v Rigforce Pty Ltd*:[6] "It is a statement of the obvious that rates of pay are, to employees, likely to be the most fundamentally important aspect of an enterprise agreement." The interest of employees in having properly explained to them what they will actually be paid under the work scenarios expressly permitted by a proposed agreement is not coterminous with the separate question of whether the proposed agreement would pass the BOOT. It is obviously the case, and common in our experience, that employees may vote to reject a proposed agreement because it contains rates of pay which they consider to be unsatisfactory, notwithstanding that there may be no question that the proposed agreement would pass the BOOT. Proposed undertakings 3 and 4 are incapable of addressing the failure to explain the effect of clause 2.1 of Schedule 1 of the Agreements in terms of remuneration outcomes for full-time employees. Additionally we note that, even now, OS MCAP and OS ACPM have not disclosed the "principles" by which such remuneration outcomes would be calculated.

[29] For the same reasons, we do not consider that proposed undertakings 5, 6 and 7 would address the concerns expressed in the first decision by the plurality concerning compliance with s 180(5) in relation to part-time and casual employees.

[30] It is difficult to identify any undertaking which would address our concerns in relation to compliance with s 180(5). In respect of clause 2.1 of Schedule 1 of the Agreements, it is conceivable that an undertaking which would remove entirely the capacity of OS MCAP and OS ACPM to place employees on rosters other than those specified in clause 1.1 of the Maintenance Agreement and clause 1.2 of the Production Agreement would render moot the failure to explain the remuneration outcomes for alternative rosters. However we doubt that such an undertaking would be operationally practicable, and it would arguably involve major surgery to the Agreements in a way which may fall foul of s 190(3)(b).

[31] We note that OS MCAP and OS ACPM have not sought to advance a submission that we might be satisfied there was genuine agreement as required by s 186(2)(a), notwithstanding that we are not satisfied for the purpose of s 188(1)(a)(i) that s 180(5) was complied with, on the basis that s 188(2) is applicable. This is not surprising since we consider that on no view can the identified non-compliance with s 180(5) be characterised as either minor or an error.

[32] The above conclusions would suggest that the appropriate course is to dismiss the applications for approval of the Production Agreement and the Maintenance Agreement on the basis that we are not satisfied that the requirement for genuine agreement in s 186(2)(a) is satisfied in either matter. This course could be taken without requiring us to consider the submissions concerning s 188(1)(c). However, we have earlier noted the request at the end of the written submissions of OS MCAP and OS ACPM that, should we retain any "*residual concerns*" after consideration of the proposed undertakings, they be given a further opportunity to address these at a further oral hearing. Accordingly, if OS MCAP and OS ACPM advise us that they still seek such an opportunity in the light of the foregoing reasons, such a hearing will be arranged. If no such advice is received within seven days of the date of this decision, the applications for approval of the Agreements will be dismissed.

[6] [2019] FWCFB 6960 at [39]

DECISION OF DEPUTY PRESIDENT COLMAN

[33] I have had the benefit of reading the decision of Vice President Hatcher and Deputy President Booth. I agree with their Honours' statement of the background and their summary of the parties' submissions, however I have reached a different conclusion. Subject to undertakings, I would approve the *Operations Services Production Agreement 2018* (Production Agreement) and the *Operations Services Maintenance Agreement 2018* (Maintenance Agreement).

[34] In the first decision, I concluded that the appeals should be upheld on two bases. First, in relation to the better off overall test (BOOT), I considered that the assessment at first instance had not taken into account the narrow margin by which salaries for alternative rosters would reliably exceed award rates and whether this margin might be offset by other detriments in the Agreements. Secondly, in relation to the question of whether the companies had complied with s 180(5), I concluded that the consideration of this matter had not taken into account that the explanation provided to employees failed to address the effect of the 'principles', referred to in clause 2.1 of Schedule 1 of the Agreements, that would be used to calculate salaries for alternative rosters, and that this was a significant matter that required explication. I will address each of these matters for the purpose of the rehearing of the applications for approval of the Agreements, as well as the undertakings that have now been offered by the companies in relation to these matters.

[35] In the earlier decision, I also concluded that there was a basis for the Commission to have a 'concern', referable to the approval requirement in s 186(2)(c), that the Agreements excluded ss 62 and 114, which are provisions of the National Employment Standards (NES). As to whether the Agreements passed the BOOT in relation to part-time employees, I considered that this was not a matter that had been raised below and that I would await submissions from the companies before forming a concluded view on the matter. Undertakings have also been offered in relation to these matters.

BOOT concern in respect of employees working new rosters

[36] I maintain a concern that, in light of the narrow reliable margin by which the annual salary for employees working new rosters under Schedule 1 of the Agreements will exceed the award remuneration, employees working alternative rosters might not be better off overall if the Agreements applied to them than if the relevant modern award applied. The unions' submissions have identified certain detriments that accrue to employees under the Agreements vis-à-vis the awards. Some of these are acknowledged by the companies. What is disputed is the significance of these detriments in the 'overall' analysis required by the BOOT, in the context of alternative rosters that might only provide remuneration that exceeds that of the awards by the thinnest of margins. The unions' contentions are sufficient to raise a concern about the BOOT. That the Commission has a 'concern' for the purposes of s 193 does not necessarily connote a conclusion that an approval requirement has not been met.

[37] The companies have offered three undertakings which are responsive to this concern. Proposed undertaking 2 relates to clause 23.1 of the Agreements, which currently provides that 'it is the intention that every Employee covered by this Agreement will be better off overall than if the relevant modern award applied to their employment'. By proposed undertaking 2, the companies would 'ensure that every Employee covered by this Agreement will be better off overall having regard to every circumstance than if a relevant modern award

applied to the Employee.' I do not believe that the Commission could accept proposed undertaking 2 in its current form, because it effectively entrusts to the parties on an ongoing basis the evaluative global assessment inherent in the BOOT, which s 193 requires the Commission to undertake itself, as at a point in time. Proposed undertaking 2 does not meet my concern.

[38] By proposed undertaking 3, the companies would apply clause 7.2 of the Agreements so as to ensure that an employee's annual salary includes compensation for any allowances or payments applicable to the employee's roster under any relevant modern award that would otherwise apply. However, it is possible that this might produce a salary for new rosters that is the same as the relevant award remuneration or, if it is only marginally greater, that the identified detriments might outweigh the higher salary. An employee would not necessarily be better off overall under the Agreements than under the awards.

[39] However, proposed undertaking 4 meets my concern as to whether the Agreements pass the BOOT for employees working new rosters. The undertaking provides that the minimum annual salary paid to employees for working any roster will be the amount that would be paid to an employee working that roster if any modern award otherwise applied to them, 'plus at least an additional 5% of the total amount that the employee would otherwise have been entitled to under the award'. I would accept this undertaking. It is specific and quantifiable, unlike proposed undertaking 2. A 5% margin would in my assessment comfortably compensate for the matters contended by the unions to be detriments accruing to employees under the Agreements. These matters have been well-documented and I do not repeat them here. On the basis of proposed undertaking 4, I am satisfied that each award covered employee and prospective employee would be better off overall if the Agreements applied to them than if the relevant modern award applied. The undertaking does not cause financial detriment to any employee covered by the Agreements or result in substantial change to the Agreements (see s 190(3)).

BOOT concern in respect of part-time employees

[40] The unions contended that part-time employees would not be better off overall under the Agreements than the awards, because the basis upon which they are to be paid, either under the current roster or new rosters, is not specified. The unions also contended that although clause 9.4 of the Agreements provides that the hours of employment of a part-time employee will not exceed 35 per week, there is no specification of how those hours are to be established, and they are presumably subject to clause 9.5, which allows the companies to set and alter start and finish times, as well as shift and roster cycles. The awards place limitations on these matters. In particular, ordinary or regular hours are to be identified and hours worked beyond them are payable at overtime rates. The companies relied on clause 5.2 of each Agreement, which states that part-time employees will receive pro rata leave and other entitlements on the basis of a 35 ordinary hour week, to contend that the Agreements pass the BOOT in relation to part-time employees.

[41] To the extent that part-time employees work a roster under Schedule 1, they will have the protection of proposed undertaking 4 discussed above. Part-time employees working new rosters would also be covered by the award guarantee in clause 2.1 of Schedule 1. But if part-time employees were working outside the roster system, the question arises as to how one would ascertain the point at which overtime would be payable. Clause 1.3 of Schedule 1 states that unrostered overtime is paid at double time for the hours worked, paid at the hourly rate

derived from the annual salary. As I read it, this would apply to any part-time employee not working a roster under Schedule 1. Clause 9.4 states that a part-time employee's ordinary hours per week will not exceed 35. Therefore, an employee working hours in excess of 35 would receive the 'unrostered overtime' payment. But under the awards, hours in excess of the agreed part-time hours also attract overtime payments. A part-time employee not working a Schedule 1 roster who undertakes a significant number of hours beyond his or her contracted hours short of 35 could therefore be worse off under the Agreements than under the relevant award. Moreover, there remains then the question of the non-monetary detriment associated with the fact that the Agreements do not place parameters around the working arrangements of part-time employees.

[42] By proposed undertaking 7, the companies affirm that, upon offering employment to a part-time employee, they will set out the ordinary hours of work and the prorated equivalent of the annual salary, and that the employee's ordinary hours of work will only be varied by agreement. The undertaking provides a fair framework for part-time hours, including a marker for when overtime becomes payable that is similar to that in the awards. The undertaking meets my concern that part-time employees not working a Schedule 1 roster might not be better off overall under the Agreements than under the relevant awards and I would accept it. It does not cause financial detriment. It does not result in substantial changes to the Agreements.

Concern as to compliance with s 180(5)

[43] The companies' explanation to employees of the terms of the Agreements did not address the 'principles' that would be used to calculate annual salaries for alternative rosters implemented under Schedule 1 of the Agreements. This gave rise to a concern that the companies had not taken all reasonable steps to ensure that the terms of the Agreements and the effect of those terms were explained to employees, and that therefore an element of employees' 'genuine agreement' in s 188(1)(a)(i) was not satisfied in respect of the Agreements.

[44] The companies contended that proposed undertaking 4, discussed earlier in relation to the BOOT concern in respect of new rosters, would also address the concern about non-compliance with s 180(5), because it would ensure that employees are better off under the Agreements by a significant and quantifiable margin compared to the awards and would render moot any omission in the explanation. In this regard, the companies relied on the decision of the Full Bench in *CFMMEU v Specialist People Pty Ltd*[7] (Specialist People), in which an undertaking of a similar kind was accepted to address a deficiency in the explanation of an enterprise agreement.

[45] In *Specialist People*, the company had intended that its agreement would cover work falling within the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award). In fact, the scope of the agreement extended to work covered by the *Building and Construction General On-Site Award 2010*, the *Hydrocarbons Industry (Upstream) Award 2010*, and the *Electrical, Electronic and Communications Contracting Award 2010* (the additional awards). Operating on the misapprehension of the narrower coverage, the company had not explained to employees that under the agreement they could in fact be deployed on work covered by the additional awards. The member at first instance had

[7] [2019] FWCFB 7919 at [23]

approved the agreement on the basis that the Manufacturing Award was the only relevant award. The Full Bench concluded that the member had erred in doing so and quashed the decision. On rehearing before the Full Bench, the company offered an undertaking to pay employees the greater of the following amounts: the rate of pay prescribed in the agreement; or an amount comprising the base rate of pay in the relevant award plus 20%, and any applicable allowances and penalties as provided for in that award. The Full Bench considered that the undertaking in that case met the concern about the omission in the explanation. It stated:

> "[23] The undertaking proposed by Specialist People to address our BOOT concern would also address our concern about compliance with s 180(5). That is because, by ensuring that employees are better off overall under the Agreement by a significant margin when performing work covered by the Building and Construction Award, the Hydrocarbons Award and the Electrical Contracting Award, it effectively renders moot the omission we have identified in that the detriment which required explanation would no longer exist. Acceptance of the undertaking would therefore allow us to be satisfied that s 180(5) was complied with."

[46] The companies' submission in support of proposed undertaking 4 draws on this passage. However, in *Specialist People*, employees had not been told anything at all about the possibility of performing work in areas covered by the additional awards, and the question of the conditions that would apply to such work had not arisen. It was in those circumstances that an undertaking to apply the relevant award with a very substantial mark-up was considered by the Full Bench to be sufficient to allay the concern about the deficient explanation of the agreement.

[47] In the present case, the deficiencies in the companies' explanation of the terms of the Agreements was not one of omission, but of uncertainty. The companies' explanation of the salary that would apply to new rosters told employees: '*For new/other rosters, the Annual Salary will be calculated using the same principles used to calculate the Annual Salary set out in the Proposed Agreement and will be greater than what would be paid to an Employee working that roster if an Award applied to them (e.g. the Black Coal Mining Industry Award or the Mining Industry Award)*'.[8] The explanation did not say what the relevant 'principles' were, nor did it state what the actual salary would be or how it could be calculated. The question is then whether this is remediable by undertaking.

[48] Pursuant to s 190(1)(b), the Commission may accept an undertaking if it 'has a concern that the agreement does not meet the requirements set out in sections 186 and 187'. A 'concern' for the purposes of s 190 might reflect the Commission's apprehension that an approval requirement might not have been met, or a conclusion that it has not been met.[9]

[49] As the majority decision explains, a number of Full Bench decisions have now accepted that the Commission has power under s 190 to accept undertakings that address concerns about an employer's compliance with s 180(5). That such power exists is in my view clear on the face of s 190. I agree with the majority that this certainly does not mean than any non-compliance with s 180(5) is rectifiable. One can think of many examples where the

[8] AB1921 for the Maintenance Agreement, AB2016 for the Production Agreement

[9] Any doubt about the latter position is resolved by the Explanatory Memorandum at paragraph 803, and the illustrative example appearing after paragraph 807.

concern in relation to non-compliance would not be capable of being 'met' by an undertaking. I also agree with the majority that there must be a logical relationship between the proposed undertaking and the identified non-compliance with s 180(5) in order for the undertaking to 'meet the concern' of the Commission. Such a connection would need to remedy the adverse effect or potential effect of the omission or error on the genuineness of employees' agreement. The examples cited by the majority are hypothetical cases in point. Is there such a logical connection in the present case?

[50] In considering the nature of the concern that arises in connection with a deficient explanation of an agreement, it is relevant to consider not only the inaccuracy or insufficiency of the explanation as against the terms of the agreement (here, the question of how the salary for new rosters would be set) but also how employees are likely to have understood the deficient explanation. In the present case, I consider that there are two alternative ways in which employees might reasonably have understood the explanation of clause 2.1 of Schedule 1 of the Agreements.

[51] The first alternative understanding is that the principles are essentially discretionary; the companies would use the 'same' unidentified, internal 'principles' to set the new salary as were used to set the current salary, but in all cases the new salary would exceed what the award remuneration for the roster would have been. I have no concern about the explanation of the Agreements as it pertains to this alternative understanding, because it is clear that clause 2.1 of Schedule 1 of the Agreements does in fact provide for at least this much. The second alternative understanding is that, because the clause says, and employees were told, that the *'same'* principles will be used to *'calculate'* the new salary as were used to *'calculate'* the existing salary, employees would reasonably have understood two things: that a calculation was possible, and therefore not a matter of company discretion; and that something must remain constant as between the current salary and the new salary, and that this constant element was the margin by which the current salary exceeds the award remuneration. The second alternative understanding is not legally correct. The Agreements do not promise to maintain employees' existing above-award margin. However, in assessing compliance with s 180(5), and how employees are likely to have understood the terms of the agreement and its explanation by the employer, it is necessary to look beyond the ultimate legal meaning of the text of the agreement or the explanation. This must be so, given the connection between s 180(5) and s 188, which is a protective provision that is concerned with the genuineness of employees' agreement.

[52] In this regard, I take note of the remuneration analysis in attachments A and B to the companies' appeal submissions in reply dated 31 March 2020. The attachments set out tables of wages and allowances comparing the remuneration for the current roster under the Agreements and the awards, including a 'percentage variance' in remuneration, that is, the amount by which the Agreement salary exceeds the award remuneration. Attachment A shows the position of an employee in each of the two classifications under the Maintenance Agreement (trade-qualified technician and non-trade-qualified technician) as compared with six possible classifications under the *Black Coal Mining Industry Award* (BCMI Award). The percentage variance ranges from 1.63% (for trade-qualified technician under the Agreement compared with the award classification 'mineworker – specialised') to 24.20% (for a trade-qualified technician under the Agreement compared with the award classification of 'mineworker – induction level 2'). A separate table sets out a similar comparative analysis in respect of the *Mining Award*. In Attachment B, there is a comparison of the provisions of the remuneration for classifications under the Production Agreement with those of the Mining

Award and the BCMI Award, also showing the percentage variance for each classification of employee under the Agreement.

[53] Employees were made aware of the terms of the awards, and the differences between the awards and the Agreements. Employees knew that the Agreements provided an annual salary that exceeded the award remuneration for the roster set out in Schedule 1 of the Agreements. There is no evidence that employees knew what their respective 'percentage variance' was. But they were told that their salary for new rosters would not only exceed the award but be calculated using the 'same principles' that had produced their current salary. Moreover, as discussed further below, employees were told that the Agreements would provide a heightened 'baseline' or safety net. In such circumstances, it is doubtful that employees would have understood that their salary for new rosters could reduce the higher baseline margin, potentially to a rate only marginally about the award.

[54] The 'percentage variance' is an expression of the classification matching, and its application to the particular working arrangements of the prescribed roster in Schedule 1. It is unlikely that a new roster would entail a change to an employee's classification. However, it is possible that, when a new roster is introduced, the application of the underlying award to the new hours would produce a higher award remuneration, and in that case, unless the agreement salaries were adjusted upwards, an employee's 'percentage variance' would be reduced.

[55] Proposed undertaking 4 states that in respect of any roster, the companies will ensure that the minimum annual salary will be the amount that would be paid for working that roster if any relevant award had applied, plus at least an additional 5% of the total amount; evidently discretion will be applied above this level. The undertaking is compatible with the first alternative understanding of clause 2.1 of Schedule 1. But it is not compatible with the second alternative understanding, because it does not prevent an employee's 'percentage variance' on a new roster being reduced. For employees with a current variance of 5% or less, there could be no problem. But for those with a current variance of greater than 5%, it is possible that their salary for a new roster might result in a reduction in the variance, contrary to the second alternative understanding.

[56] My concern about the deficiency in the companies' explanation of clause 2.1 of Schedule 1 of the Agreements relates to the second alternative understanding. A further undertaking could address my concern by providing that employees working on new rosters will maintain their existing margin above what the award would have provided for the same work, consistent with the second alternative understanding. Such an undertaking would have a logical connection with the concern that I hold in relation to s 180(5). It would meet that concern.

[57] I recap. There was uncertainty in the companies' explanation to employees about the way in which salaries for new rosters will be set. The terms of the Agreements, and their explanation, could reasonably have been understood in two ways. The second of these presents a concern about the genuineness of employees' agreement, because employees might reasonably have thought that a salary for a new roster would not reduce the margin by which their pay exceeded the award. If they thought this, they were wrong. A further undertaking of the kind I have proposed would render their understanding correct.

[58] I note the unions' submission that proposed undertaking 4 would impose on employees an unrealistic burden of having to calculate the 5% in order to determine whether they are being paid correctly. This submission could also be directed at the further undertaking to which I have referred. However, these are in fact burdens carried by the companies; it would be their legal obligation to undertake the calculations, ensure that they are correct, and make the proper payments to employees.

[59] The further undertaking would not result in financial detriment to employees covered by the Agreements. It would not amount to substantial change. In the latter regard, I note the observations of the Full Bench in the recent decision of *CFMMEU v C&H Acquisition Pty Ltd* as to what might constitute substantial change:[10]

> "It follows, in our view, that the word 'substantial' in s.190(3)(b) signifies a degree or quality of change that is substantial in the sense that it would alter the essence or nature of the agreement. It is concerned with change that is transformative of the agreement so as to raise concern that change may have affected the way in which employees chose to vote in approving the agreement. Accordingly, s.190(3)(b) of the Act permits the Commission to accept an undertaking if it is satisfied that the effect of accepting it is not likely to result in substantial changes to the agreement in the sense discussed."

[60] The further undertaking would not in my view be transformative, nor would it provide for an arrangement that employees are unlikely to have approved. It would increase the minimum salary for new rosters in a manner that gives effect to the second alternative understanding. It would not be a substantial change to the Agreements.

[61] As to the possibility, raised in the majority decision, that the companies may wish to provide an undertaking that would remove their capacity to place employees on rosters other than that specified in Schedule 1, I would not consider this to amount to substantial change. It would not immediately bring about any actual change but rather prevent change in the form of alternative rosters. Of course, there would be change to the Agreements, because alternative rosters could not then be introduced under the terms of the Agreements, whereas presently they can be. But there is nothing in the Agreements to indicate that such rosters will necessarily be changed. It is a possibility. Further, if such an undertaking were given, the possibility of introducing new rosters would still exist, because the Agreements might later be the subject of an application to vary by approval of employees under s 210 of the Act.

[62] I would accept an appropriately worded further undertaking of the kind I have described. I would also accept an undertaking not to vary the roster.

Concern in relation to s 186(2)(c)

[63] The unions contended that the provisions of the Agreements concerning hours of work and working on public holidays exclude the provisions of the NES in s 62 and s 114. The company offers proposed undertaking 1 in response to any concern held by the Commission in relation to this matter. I would accept a 'NES precedence' undertaking of the kind offered by the companies, on the basis that the unions' contentions give rise to a 'concern' (principally in relation to s 114) as to whether the Agreements exclude provisions of the NES

[10] [2020] FWCFB 3134 at [37]

contrary to s 186(2)(c). This does not mean that I have concluded that they do contravene that section, for the reasons I gave in the first decision. It is not necessary to reach a final conclusion. Where s 186(2)(c) has become contentious and plausible submissions are raised as to non-compliance, the prudent course is to accept a 'NES precedence' undertaking. The union submissions challenge the form of the undertaking and contend that it would leave employees in the position of having to work out how the NES precedence provision applies in a particular situation. It is true that the undertaking would require interpretation and application from time to time, but again I do not see any burden on employees in this respect, because ultimately it is the employer that must comply with the undertaking on pain of suit for breach of agreement. Further, there is nothing unusual about a provision in an enterprise agreement requiring interpretation and application to particular circumstances. For example, it is common for awards to be incorporated into agreements, subject to an instrument interaction provision.

[64] Proposed undertaking 1 is in the same terms as a clause in an enterprise agreement recently considered by a Full Bench in *RFFWU v Hungry Jack's Australia Pty Ltd*. The Bench concluded that, because of the clause, it was not possible for any individual provision of the enterprise agreement to be read as contravening s 55.[11] Applying the decision of the Full Bench, I consider that the undertaking meets my concern. However, I would consider it preferable for the undertaking to be tightened so as to stipulate that 'the National Employment Standards (NES) apply to all employees as a minimum standard', and that 'where there is an inconsistency between the NES and a clause of this agreement, the NES will apply and the clause of the agreement will not apply, except to the extent that the clause of the agreement provides for a more beneficial outcome for employees than the NES.'

Genuine agreement – s 188(1)(c)

[65] The final matter for my consideration in the rehearing of the applications for approval of the Agreements relates to the union submissions that there are 'other reasonable grounds' for believing that the Agreements were not genuinely agreed to by employees for the purpose of s 188(1)(c). A summary of these submissions appears in the majority decision at [16] and [18], and I adopt it.

[66] First, it was contended that the voting employees had no 'stake' in the Agreements because they are party to contracts of employment setting conditions that exceed those in the Agreements, and therefore they would not be subject to or experience the terms and conditions provided by the Agreements, such that the employees' approval of the Agreements had no authenticity or moral authority. In my view, the fact that relevant employees might be party to contracts of employment with superior conditions to those of the enterprise agreement which they have approved would not of itself mean that their approval lacks genuineness. Part 2-4 of the Act extensively regulates the agreement-making process. It has nothing to say about whether an enterprise agreement must set the actual terms and conditions of employment. The Act is concerned with how enterprise agreements 'cover' and 'apply' to employees, but not with their general effect. There is nothing inherently wrong with an enterprise agreement that prescribes 'baseline' conditions. The companies were candid about this in their correspondence with employees, referring to the Agreements as setting 'baseline terms and

[11] [2020] FWCFB 1693 at [68]

conditions.'[12] A baseline enterprise agreement is still something of value to employees, in which they may have a stake. It provides a higher safety net than would otherwise apply under the award. The safety net will apply in the event that a contract is terminated but the employment relationship continues. It will also apply if an employee is deployed on work outside the scope of the contract but within the scope of the agreement.

[67] Depending on the circumstances, the fact that employees' actual conditions are set contractually at a higher level than those in the relevant enterprise agreement might point to a conclusion that the approval of an agreement was not genuine. If the voting group were placed on contracts effectuating conditions superior to the agreement, but employees employed after the vote were not afforded those conditions, the genuineness of employees' agreement might be impugned on the basis that the voting process was manipulated so as to 'buy' a yes vote, or was otherwise used for a purpose that was not disclosed to or approved by employees. But there is no evidence of any such thing in this case.

[68] Secondly, it was contended by the unions that the employees who voted on the Agreements had no or insufficient knowledge of the coal industry. It was submitted that none of the voting employees had worked in the black coal mining industry under the BCMI Award, and that they had no or insufficient knowledge of conditions of employment in that industry or how the provisions of the Agreements operated vis-a-vis the award. It was said that employees therefore could not have understood the complexity of the comparison between the conditions under the Agreements and those under the awards, but instead voted on the basis that they would simply be paid higher rates that exceeded those in the Agreements. However, the companies informed employees of the reasons for the coverage of the Agreements and explained why the BCMI Award was relevant to their ongoing employment. The explanatory material provided by the companies to the employees contained information comparing the terms of the Agreements to the awards. Any comparison of industrial instruments will have its complexities however I consider that the steps taken by the companies were sufficient to familiarise employees with the essential differences between the Agreements and the awards. The circumstances of this case are very different from those in *One Key v CFMEU*[13] and *Re KCL Industries Pty Ltd.*[14]

[69] Thirdly, the unions submitted that employees did not give informed consent to the Agreements because of uncertainties in the terms of the Agreements themselves and deficiencies in the explanation of the terms of the Agreements. My concern in relation to these contentions is confined to the matters addressed earlier, which I have considered in connection with ss 180(5) and 188(1)(a)(i). Section 188(1)(c) requires the Commission to consider whether there are any 'other' reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees. I do not consider that the concern about s 180(5) needs to be reconsidered in the context of s 188(1)(c).

[70] Fourthly, the unions submitted that employees were misled in various respects about the terms of the Agreements and the surrounding circumstances and that this vitiated their agreement. There is some overlap between this submission and the contentions related to the uncertainty about the actual rate of pay for new rosters. Again, I have addressed that matter

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[12] See for example the letter to new employees from Mr Steve Coe dated 11 September 2019, AB 562; and the letter from Mr Leon Dodd to employees, dated 6 September 2018, AB1172

[13] [2018] FCAFC 77, 262 FCR 527, 277 IR 23

[14] [2016] FWCFB 3048, 257 IR 266

and do not need to return to it. As to the other contentions on this point, the unions submitted that the companies made contradictory statements to employees that, on the one hand, 'nothing changes' to contractual terms if the Agreements were voted up, but that at the same time 'important conditions' would be introduced by the Agreements. However, contractually, nothing does change when an enterprise agreement is approved; equally, the approval of the Agreements creates important statutory conditions that underpin the contractual conditions. I do not consider these statements to have been misleading.

[71] Beyond this, it was said that employees were misled by statements that the Agreements would provide opportunities for employees to work across 'Minerals Australia Operations', because the Agreements did not in fact provide for this. But such opportunity might arise outside the Agreements, and not because of their existence. It has not been shown that the fact of the Agreements being approved has not provided such opportunities. There is no reason why the opportunities would need to be provided through the Agreements.

[72] It was also submitted that employees were not told that the legal effect of the Agreements was to prevent employees from bargaining for different conditions of employment and from taking protected industrial action during the nominal life of the Agreements. Section 180(5) requires an employer to explain an agreement and the effect of its terms. It does not require the provision of general legal advice. In some situations, an explanation of the effect of the terms of an enterprise agreement might require elucidation of a relevant legal point; for example, if an agreement is made well in advance of the nominal expiry date of a current agreement, a reasonable step in the explanation might be to advise employees that, under the Act, the new agreement will not apply to their employment until the nominal expiry date of the current agreement has passed. But I do not see how it could be said to be necessary, in order for employees' agreement to be genuine in the present case, that the companies provide employees with advice of a generic kind about the unavailability of protected industrial action during the nominal life of the Agreements.

[73] Fifthly, the unions said that the Agreements were made early in the life of the enterprises of OS MCAP and OS ACPM and that there was an absence of any bargaining. They noted that the vote occurred soon after the voting employees were employed, prior to either business actually operating in the coal industry, and at a time when it was known that the businesses would shortly expand into the coal industry. The unions noted in this regard that, some 18 months after the vote, the companies now employ approximately 2,300 employees and operate extensively in the coal industry. The unions contended that in these circumstances the inference can be drawn that the Agreements were designed to prevent collective bargaining. However, in *Aldi Foods Pty Ltd v SDA*[15] the High Court stated clearly that an enterprise agreement can be made with two or more employees, so long as they are the only employees employed at the time of the vote who are to be covered by the agreement, and it "does not matter that the agreement may, in due course, come to apply to many more employees".[16] There is nothing in the Act that limits the number of employees who may subsequently be employed under an enterprise agreement by reference to the size of the voting group.

[74] The unions' contention that there was no bargaining in relation to the two Agreements is in substance a submission that there was little actual negotiation. That may be so, but there

[15] [2017] HCA 53, 262 CLR 593, 270 IR 459

[16] Ibid at [82]

was nonetheless bargaining for the purposes of the Act, including a notification time, the issuance of notices of representational rights, correspondence about the substance of the proposed agreement, the settlement upon a text reflecting a proposed agreement, the undertaking of the relevant pre-approval steps, and the vote. Not every collective agreement involves extensive negotiations. Some enterprise agreements entail little actual negotiation, particularly in certain sectors. But the Act makes no prescription in this regard.

[75] The unions submitted more generally that s 188(1)(c) is a protective provision which is a catch all for matters which may otherwise subvert the legislative objective of achieving fairness through an emphasis on enterprise-level collective bargaining (s 3(f)). I agree. They further contended that this objective would be undermined by a process that allows employees to vote on an agreement where they do not have a basis for appreciating its nature and terms. I also agree with this contention. However, I do not consider that this is what has occurred in the present matters.

[76] There was a relatively small voting cohort for each Agreement. Now there are several thousand employees. But that does not vitiate the Agreements. Nor does it preclude future bargaining. There is nothing to prevent the unions enrolling members among the larger cohort ahead of the next round of bargaining. In my view, the voting group did have a stake in the Agreements. It is understandable that the unions would subject the Agreements to close scrutiny. But I do not draw from the facts an inference that the companies initiated the Agreements with the purpose of avoiding collective bargaining. It was not bargaining of the kind endorsed by the unions. It was not bargaining that led to agreements with conditions that the unions consider acceptable for the industry. But it was nonetheless collective bargaining that resulted in enterprise agreements that, subject to undertakings, meet the various approval requirements in Part 2-4 of the Act.

[77] Subject to the provision of the further undertaking I have described above, and subject also to proposed undertakings 2, 4, and 7, and the second, third and fifth undertakings offered by the companies in the proceedings at first instance, I would approve the Agreements.

VICE PRESIDENT

Final written submissions:

Construction, Forestry, Maritime, Mining and Energy Union – 22 and 29 May 2020.
Australian Workers' Union - 22 and 29 May 2020.
Australian Manufacturing Workers' Union – 22 and 29 May 2020.
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia - 22 and 29 May 2020.
OS MCAP Pty Ltd and OS ACPM Pty Ltd – 22 and 29 May 2020.

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