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, 8 MAY 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] The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), the Australian Workers' Union (AWU), the Australian Manufacturing Workers' Union (AMWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) (collectively "unions") have lodged various appeals,[1] for which permission to appeal is required, against two decisions issued by Deputy President Boyce on 19 December 2019 (decisions).[2] In the decisions, the Deputy President approved the *Operations Services Production Agreement 2018* (Production Agreement) and the *Operations Services Maintenance Agreement 2018* (Maintenance Agreement) (collectively "Agreements") without issuing full reasons at the time of approval. Reasons for both decisions were subsequently published in a single document on 24 January 2020[3] (reasons). The unions contend that the Agreements should not have been approved by the Deputy President on the basis that the Agreements' terms contravened the National Employment Standards (NES) prescribed by the *Fair Work Act 2009* (FW Act), the Agreements did not pass the better off overall test (BOOT) and various pre-approval steps had not been fulfilled by the respondents. They also contend that the Deputy President's reasons either exhibited actual bias or gave rise to a reasonable apprehension of bias. The unions seek

[1] Details of each appeal are attached to this decision
[2] [2019] FWCA 8595 and [2019] FWCA 8601
[3] [2020] FWC 398

that permission to appeal be granted, the appeals be upheld, the decisions be quashed, and the matters redetermined by the Full Bench.

[2] The background to this matter may briefly be summarised as follows. OS MCAP Pty Ltd (OS MCAP) is a company that was registered on 17 May 2018. Its ultimate holding company is BHP Group Limited (BHP). It lodged the application for approval of the Production Agreement on 8 October 2018. The application and the Form F17 declaration which accompanied the application assert that:

- OC MCAP operates in the mining industry;
- OS MCAP issued a notice of employee representational rights (NERR) to employees in the period 21-29 August 2018;
- there were no employee bargaining representatives involved in the bargaining process;
- briefings of employees were conducted in the period 11-13 September 2018, during which they were given a "*voting pack*" containing a copy of the proposed Production Agreement, a copy of material incorporated into the Agreement, an explanatory note which summarised and explained the terms of the Agreement as compared with the awards which would otherwise apply, and advice that a vote on the proposed agreement would be conducted by SMS on 24 and 25 September 2018;
- employees unable to attend the briefing sessions were provided with the voting pack by alternative means and briefed by phone during 13-14 September 2018; and
- 58 employees at that time would be covered by the Production Agreement, of whom 50 cast a valid vote in the SMS ballot process and 37 voted to approve the agreement.

[3] Clause 2.1 of the Production Agreement provides that the agreement covers OS MCAP and its employees in the classifications set out in Schedule 1 who undertake production activities on a mining operation. Clause 2.2 provides that "*any site specific enterprise agreement that covers the Company and any Employees working at the specific site(s) will cover and apply to the Company and those Employees to the exclusion of this Agreement*". Schedule 1 contains only two classifications: Production technician in non-coal operations, and production technician in coal operations, who are entitled to annual salaries of $125,000 and $105,000 respectively. It is not in dispute that non-coal production technicians are covered by the *Mining Industry Award 2010* (Mining Award) and coal productions technicians are covered by the *Black Coal Mining Industry Award 2010* (Black Coal Award). The evidence before the Deputy President disclosed that those who voted upon the Production Agreement were all non-coal production technicians who worked in BHP's iron ore mining operations in the Pilbara in Western Australia, and were therefore covered by the Mining Award.

[4] OS ACPM Pty Ltd (OS ACPM) was registered as a company on 17 January 2018. Its ultimate holding company is likewise BHP. It lodged the application for approval of the Maintenance Agreement on 26 October 2018. The application and the Form F17 declaration which accompanied the application assert that:

- OS ACPM operates in the mining industry;

- it issued the NERR either on 9 September 2018 by email or on 11 September 2018 at a meeting of employees;

- there were no employee bargaining representatives involved in the bargaining process;

- on 1 and 2 October 2018, briefings of employees were conducted in the course of which they were provided with a "*voting pack*" containing a copy of the proposed Maintenance Agreement, a copy of material incorporated into the Agreement, an explanatory note which summarised and explained the terms of the Agreement as compared with the awards which would otherwise apply, and advice that a vote on the proposed agreement would be conducted by SMS on 12 and 13 September 2018;

- employees unable to attend the briefings were sent the voting pack and briefed by phone on 2 October 2018; and

- OS ACPM employed 16 persons at the time who would be covered by the Maintenance Agreement, all of whom cast a valid vote in the SMS process and of whom 9 voted to approve the Agreement.

[5] Clause 2.1 of the Maintenance Agreement provides that it covers OS ACPM and its employees employed in the classifications set out in Schedule 1 who undertake maintenance activities on a mining operation, which is taken to include port operations in Western Australia which service mining operations. It operates subject to clause 2.2, which is in the same terms as clause 2.2 of the Production Agreement. Schedule 1 contains two classifications: Non-trade-qualified technicians undertaking maintenance work, who are entitled to an annual salary of $105,000; and trade-qualified technicians undertaking maintenance work, who are entitled to an annual salary of $122,000. It is not in dispute that technicians (trade or non-trade) who work in black coal mining operations are covered by the Black Coal Award and technicians who are employed in other types of mining operations are covered by the Mining Award. The employees who voted on the Maintenance Agreement were all employed in BHP's iron ore mining operations in the Pilbara and were therefore covered by the Mining Award.

[6] On 23 January 2019, by which time the Commission's staff had completed their initial analysis of the Production Agreement and the Maintenance Agreement, the applications for approval of the agreements were allocated to the Deputy President for determination. The Deputy President thereafter dealt with both applications together. Prior to this time, the CFMMEU and the CEPU had sought to be heard in relation to the applications and had filed written submissions in support of this, and shortly after the allocation of the matters the AWU also sought to be heard. The Deputy President conducted a directions hearing on 11 February 2019 and, on the following day, issued directions in relation to both matters which, in summary, required:

- the AWU to file an outline of submissions in respect of its application to be heard by 15 February 2019;

- OS MCAP and OS ACPM to provide the CFMMEU, the CEPU and the AWU with an unredacted copy of the Form F17 declarations in each matter and the voting pack documents by 15 February 2019;

- OS MCAP and OS ACPM to file any evidence, documents, undertakings and submissions in response to the Commission's issues in relation to the application (which were to be communicated to the parties by 20 February 2019), in relation to any additional issues they sought to raise, and in response to the AWU's submissions, by 6 March 2019;

- the CFMMEU, the CEPU and the AWU were, pursuant to provisional leave, to serve submissions in respect of the Commission's issues, any additional issues raised by OS MCAP and OS ACPM, and any other issues the unions wished to raise, by 13 March 2019; and

- OS MCAP and OS ACPM were to file any material in reply by 20 March 2019.

[7] After the grant of some extensions, these directions were complied with by the parties by 4 April 2019. After this there were requests by some of the unions for the right to file submissions in reply, and the CFMMEU also applied to cross-examine upon the witness statements filed by OS MCAP and OS ACPM. This was opposed by OS MCAP and OS ACPM, and further submissions about these issues were filed. Eventually, on 14 May 2019, the Deputy President's Associate sent an email to the parties which stated (omitting formal and non-relevant parts):

> "I refer to the matters above. I also refer to the email dated 12 April 2019 in relation to the Unions' request for leave to provide further written submissions and cross-examine witnesses.
>
> Having reviewed the respective submissions of the parties, the Deputy President has determined that *leave will not be granted* to the Unions to make further written submissions or cross-examine witnesses.
>
> However, given the nature of the issues raised by the Unions, the Deputy President *grants leave* to the Unions to appear at the Hearing and make oral submissions in respect of any matter they seek to agitate concerning the approval of the proposed enterprise agreements.
>
> The parties are directed to confer as to their time estimate for the hearing of the approval applications, and their joint available date/s for the hearing on or after **Thursday, 30 May 2019** (noting that Chambers cannot hold Hearings on Mondays and Wednesdays).
>
> On or before **4.00pm AEST** on **Monday, 20 May 2019**, the Applicant is directed to email the Associate to Deputy President Boyce as to an agreed time estimate for hearing, and joint available date/s."

[8] The above email made apparent that the Deputy President had determined the extent to which the unions would be permitted to participate in the proceedings. No party subsequently sought reasons for this interlocutory decision. After some issues about the availability of the parties and the Commission as to certain proposed hearing dates, a hearing was eventually listed for 27 June 2019. It may be noted at this point that it is not entirely clear why a hearing was necessary: the parties had filed extensive written submissions, in which they had had an

opportunity to respond in full to the Commission's and each other's issues, and the Deputy President had declined to allow any cross-examination upon the witness statements filed by OS MCAP and OS ACPM.

[9] In any event, the hearing proceeded on 27 June 2019. The parties were then allowed to file further written submissions, with the last of these submissions arriving on 19 August 2019. Nothing then happened for almost four months. On 13 December 2019, the chambers of the Deputy President sent an email to OS MCAP and OS ACPM requesting further undertakings, in draft form, concerning four matters: the manner in which personal leave accrued; confirmation of the definition of a shift worker for the purpose of the additional week's annual leave under the NES; the rate of pay for a casual employee who does not work a full roster; and the provision of a set period of notice of a change of roster. On 17 December 2019, OS MCAP and OS ACPM provided draft undertakings in response to this request. The draft undertakings also incorporated an undertaking concerning the default superannuation fund which it had previously proposed in submissions it had filed on 6 March 2019.

[10] On 19 December 2019, OS MCAP and OS ACPM filed copies of the two Agreements attaching signed versions of the draft undertakings previously provided. On the afternoon of 19 December 2019 (at 2.57pm), the chambers of the Deputy President sent to OS MCAP's lawyers an email enclosing modelling of the salary rates in the Production Agreement prepared by the Commission's staff, which showed that this agreement did not pass the BOOT. The email commenced with the words "*As discussed*…", but the circumstances and context of this prior discussion are not apparent. This email was not copied to any of the unions. At 4.43pm OS MCAP's lawyers sent an email to the Deputy President's chambers in which it contended that the modelling was inaccurate and that the Production Agreement passed the BOOT. At 4.57pm and 5.04pm the same day Deputy President published the decisions in which he respectively approved the Maintenance Agreement and the Production Agreement.

[11] The unions' appeals were lodged on 8 or 9 January 2019. The Deputy President's reasons were published over two weeks later, on 24 January 2020.

Relevant terms of the Agreements

[12] We have already referred to the provisions specifying the coverage, classifications and salaries in the Agreements. There are a number of other provisions of the Agreements relevant to the issues raised by these appeals. First, in relation to part-time and casual employment, clauses 5.2 and 5.3 of the Agreements provide:

> 5.2 Part time Employees will receive pro rata leave and other entitlements on the basis of a 35 ordinary hour week.
>
> 5.3 Casual Employees will be paid an additional loading of 25% of their hourly rate (calculated based on the Annual Salary rate for the applicable roster). This loading is paid instead of annual leave, paid personal/carer's leave, notice of termination of employment, redundancy benefits and the other attributes of full time or part time employment. On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours work.

[13] Clause 7 of the Agreements concerns remuneration, and clauses 7.1 and 7.2 provide:

> 7.1 Employees will be paid an annualised salary ("Annual Salary").
>
> 7.2 An Employee's Annual Salary takes into account the Employee's skills, experience, and training, compensation for working on shift rosters which cover public holidays, afternoon shift, night shift and any other applicable allowances or payments applicable to the Employee's roster.

[14] Clause 7 contains no provision pertaining to the remuneration of part-time or casual employees.

[15] Clause 9 of each Agreement concerns hours of work, and clause 9.1-9.5 provide:

> 9.1 The Company expects that usually an Employee's work will be completed in their rostered hours.
>
> 9.2 The rostered hours of work based on an Employee's roster are averaged across the roster cycle, excluding handovers. These Rostered hours are inclusive of an average of 35 nominal ordinary hours and rostered additional hours each week.
>
> 9.3 By working these hours, Employees are acknowledging that the requirement to work the rostered hours of work is reasonable having regard to, among other things, the operational requirements of the workplace and the roster arrangements. The Annual Salary is set on the basis that Employees will work these hours.
>
> 9.4 A part time Employee shall not exceed 35 ordinary hours per week.
>
> 9.5 The Company shall determine each Employee's start and finish times, shifts and roster cycles. The Company may change the Employee's start and finish times, shifts and roster cycles (including the number of hours worked on each shift) and introduce new roster cycles and/or shifts.

[16] In relation to public holidays, clause 10.1 of each of the Agreements provides:

> 10.1 Employees will be required to work on a public holiday from time to time in accordance with the applicable roster cycle. Employees acknowledge that this is reasonable based on the Company's operational requirements. The Annual Salary includes compensation in recognition of the need for Employees to work on public holidays. No separate payment will be made where a public holiday falls during R&R.

[17] Clause 23 of each of the Agreements, entitled "*Better off overall*", provides:

> 23.1 It is the intention that every Employee covered by this Agreement will be better off overall than if a relevant modern award applied to their employment.

[18] As earlier stated, Schedule 1 of each of the Agreements specifies annual salaries for each classification. However these are only payable with respect to specific roster patterns. Thus, clause 1.1 of Schedule 1 of the Production Agreement provides that "*The Annual Salary*

for each classification is set out below for the rosters specified". For Production Technicians on non-coal operations, the specified roster is "*7 days on, 7 nights on, 7 days off (i.e. an average of 58.33 rostered hours per week)*". For Production Technicians in coal operations, the specified roster is "*7 days on, 7 days off, 7 nights on, 7 days off (i.e. an average of 43.75 rostered hours per week)*". Clause 1.1 of the Maintenance Agreement provides:

> 1.1 The minimum Annual Salary for the eight days on, six days off, seven nights on, seven days off roster (with an average of 46.88 hours per week) is set out below.

[19] Both Agreements contain, in clause 2.1 of Schedule 1, a provision enabling different rosters than those referred to in clause 1 to be introduced. Clause 2.1 of Schedule 1 of the Production Agreement provides:

> **2. Applicable roster for the purpose of Annual Salary calculation**
>
> 2.1 The Annual Salary rates in this Agreement have been calculated based on the rosters specified above. Where a new roster is introduced, the Annual Salary paid in respect of that roster will be calculated using the same principles used to calculate the Annual Salary set out in this Agreement and will be greater than what would be paid to an Employee working that roster if any Award applied to them.

[20] Clause 2.1 of Schedule 1 of the Maintenance Agreement provides:

> **2. Applicable roster for the purpose of Annual Salary calculation**
>
> 2.1 The Annual Salary rates in this Agreement have been calculated based on a roster of eight days on, six days off, seven nights on, seven days off. Where a new roster is introduced, the Annual Salary paid in respect of that roster will be calculated using the same principles used to calculate the Annual Salary set out in this Agreement and will be greater than what would be paid to an Employee working that roster if any Award applied to them.

[21] The "*principles*" referred to in the above provisions are not contained, explained or otherwise referred to in the Agreements.

Relevant statutory provisions

Genuinely agreed requirement

[22] Section s 186(1) of the FW Act establishes the "*basic rule*" that, where an application for approval of an enterprise agreement has been made, the Commission must approve the agreement if the requirements set out in ss 186 and 187 are met. One of those approval requirements, set out in s 186(2)(a) and applicable only to non-greenfields agreements, is that the Commission must be satisfied that the agreement has been "*genuinely agreed to*" by the employees covered by the agreement. Section 188 defines when employees may be considered to have genuinely agreed to an enterprise agreement as follows:

> **188 When employees have genuinely agreed to an enterprise agreement**

(1) An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);

(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

(2) An enterprise agreement has also been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

(a) the agreement would have been ***genuinely agreed*** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and

(b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.

[23] The pre-approval step in s 180(5), which is an element of the "*genuinely agreed*" definition in s 188(1)(a)(i), is expressed as follows:

Terms of the agreement must be explained to employees etc.

(5) The employer must take all reasonable steps to ensure that:

(a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

Agreement must not exclude the NES

[24] Section 186(2)(c) sets out a further approval requirement for agreements, namely that the Commission must be satisfied that the terms of the agreement do not contravene s 55, which deals with the interaction between the NES and enterprise agreements. Section 55(1) of the FW Act provides:

> (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Agreement must pass the better off overall test

[25] It is a requirement for approval of an enterprise agreement under s 186(2)(d) of the FW Act that, subject to the operation of ss 189 and 190, the Commission must be satisfied that the Agreement passes the BOOT. The content of the BOOT in respect of non-greenfields agreement is provided for in s 193(1) as follows:

> *When a non-greenfields agreement passes the better off overall test*
>
> (1) An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

[26] The expression "*test time*" is defined in s 193(6) as follows:

> *Test time*
>
> (6) The ***test time*** is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

The decisions and reasons

[27] The Deputy President approved the Agreements with undertakings in two brief decisions issued on 19 December 2019 without publishing his reasons for the decisions. Both decisions are the same (save for the name of the agreement and applicant). The Maintenance Agreement decision[4] is set out below in its entirety:

> "[1] An application has been made for approval of an enterprise agreement to be known as the *Operations Services Maintenance Agreement 2018* (**Agreement**). The application was made pursuant to s.185 of the *Fair Work Act 2009* (**Act**). It has been made by the employer, OS ACPM Pty Ltd (**Applicant**). The Agreement is a single enterprise agreement.
>
> [2] The Applicant has provided written undertakings dated 19 December 2019. Those undertakings are attached to this decision and marked as **Annexure A**. I am satisfied that the undertakings will not cause financial detriment to any employee covered by the Agreement (as compared to the relevant provisions of the *Black Coal Mining Industry Award 2010* and the *Mining Industry Award 2010*) and that the undertakings

[4] [2019] FWCA 8595

> will not result in substantial changes to the Agreement. I also note that these undertakings become terms of the Agreement.
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> [3] Subject to the undertakings referred to above, I am satisfied that each of the requirements of ss.186, 187, 188 and 190 of the Act, as are relevant to this application for approval, have been met.
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> [4] I am satisfied that the more beneficial entitlements of the NES will prevail where there is an inconsistency between the Agreement and the NES.
>
> [5] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 26 December 2019. The nominal expiry date of the Agreement is 26 December 2023.
>
> [6] My reasons for making this decision will be published in due course."

[28] The undertakings accepted by the Deputy President in relation to both Agreements included the following undertaking relating to casual employment (third undertaking):

> "**3. Casual employees (cl 5.3)**
>
> That if a casual Employee is engaged for less than a full roster, the Company will ensure that the Employees' remuneration tor the period of engagement is greater than what would be paid to the Employee working that period if a modem award applied to them."

[29] Corrections to both decisions were issued on 3 February 2020 correcting the nominal expiry date of both Agreements to be 19 December 2023.

[30] On 24 January 2020 the Deputy President published his reasons.[5] It is necessary only to refer to the reasons insofar as they concern matters which are the subject of the unions' grounds of appeal. The Deputy President commenced by outlining the circumstances in which each of the Agreements was made and summarising their terms. In relation to the Production Agreement, the Deputy President said: "rates of pay are between 54.83 percent and 125.84 percent above the corresponding awards".[6] In relation to the Maintenance Agreement, he said: "Rates of pay are between 70.01 percent and 114.76 percent above the corresponding awards".[7] Then, as a comparison point, he set out a tabular summary of the terms of the Mining Award and the Black Coal Award.

[31] After summarising the evidence and materials going to the steps taken by OS MCAP and OS ACPM to explain the terms of the Agreements and their effects to employees, the Deputy President then gave lengthy reasons concerning the unions' requests to be heard in relation to the applications for approval of the Agreements. This included a table in which the Deputy President set out the matters relevant to the unions' applications and his view as to whether these matters weighed in favour or against the applications or were neutral.

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[5] [2020] FWC 398

[6] Ibid at [13](c)

[7] Ibid at [22]

[32] The Deputy President then commenced his consideration of the issue of compliance with s 180(5) by reviewing some authorities and setting out what in his opinion were the principles to be applied. In doing so, he referred to the Federal Court Full Court decision in *One Key Workforce Pty Ltd v CFMEU*[8] as authority that, in relation to s 180(5), it was necessary to consider "whether employees voting on the enterprise agreement were likely to have understood its terms and effect". The Deputy President went on to say:

> "... In the ordinary course, this is to be considered in the context of the reasonable steps taken. But an employee need not have actually understood every term and its effect. Some employees might choose to obtain a better understanding than others (that is a matter for the employee themselves). An employer only need undertake all reasonable steps to achieve the end of "likely" understanding. Further, neither the starting nor the end point is the assumption that employees have substandard intelligence, need to be completely spoon-fed, will vote "blind", or that employees are simply incapable of understanding or ascertaining "what is in it for me" before voting on a proposed enterprise agreement."[9]

[33] He then set out the facts and circumstances relevant to his consideration of s 180(5), which included findings that "there was no evidence that relevant employees *[at the time of voting]* had performed work in the coal industry" but that "there was no evidence brought by the Unions in these proceedings that the mining work performed by relevant employees is not similar or akin to work performed under the Coal Award, or in the coal industry". The Deputy President also found:

> "... if the proposed enterprise agreements are approved, relevant employees' terms and conditions of employment as contained in their contracts of employment will not change (or substantially change). In other words, the types of rosters and hours that relevant employees currently work, and the remuneration received by employees for such work, will not change or substantially change as a result of the proposed enterprise agreements becoming operative. It is the evidence that this is what the Applicant explained to relevant employees (in no uncertain terms) when explaining the terms and the effect of those terms of the proposed enterprise agreements to relevant employees (i.e. prior to the relevant employees voting to approve the proposed enterprise agreements). In other words, it cannot be said that the Applicant was other than totally upfront and honest with employees about this issue..."[10]

[34] The Deputy President then rejected the unions' complaint that the employers failed to explain the effect of the exclusion from coverage contained in clause 2.2 of the Agreements. His reasons for this rejection included:

> "...d) part of the CFMMEU's contention in relation to the Exclusion Clause appears to be that the explanation provided to employees gave them the wrong or misleading impression or understanding that they will be able to bargain for a more beneficial or superior enterprise agreement at a particular worksite (which would then apply to the employees on that site in lieu of the proposed enterprise agreement/s). I reject this contention. The difficulty I have with this allegation is the assertion that the Applicant

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[8] [2018] FCAFC 77, 262 FCR 527, 277 IR 23

[9] [2020] FWC 398 at [80]

[10] Ibid at [83](l)

told employees they will be able to bargain for and/or obtain an enterprise agreement/s with more beneficial or superior terms (than the proposed enterprise agreements) at different worksites into the future. The evidence is that the Applicant told employees that the "terms of a site specific agreement may differ, and any term or condition under a site specific agreement could be better, the same, or less beneficial for a particular employee". In other words, I do not accept that employees likely understood that by voting to approve the proposed enterprise agreements they could make a better deal later down the track at a specific site..."[11]

[35] The Deputy President then dealt with the adequacy of the explanation of the terms of the Agreements and their effect to the relevant employees, and stated (footnote omitted):

"[95] The Unions take a myopic approach to the assessment of the explanation provided to relevant employees. The approach is obstructive. Tendentious approaches to the manner in which the terms and the effect of terms of enterprise agreements are explained to relevant employees (including by way of comparison to modern awards) must be discouraged. Such an approach does not assist the Commission at all. Indeed, the approach is contrary to one of the key reasons a contender will ordinarily advance a request to be heard (i.e. to assist the Commission in its deliberations, to make such deliberations less complicated, and to take a non-partisan or altruistic approach to the question as to whether an enterprise agreement ought to be approved).

[96] Further, it is unacceptable to have contenders qualify, vary, or overly refine the general tests set out in cases such as *One Key* via the assertion of almost perfect, or overly onerous, obligations as to the manner in which satisfaction ought to be arrived at under s.180(5) of the Act. In *One Key*, it was held that there was not enough evidence before the Commission for it to reach the requisite state of satisfaction. Beyond that, *One Key* merely sets out broad statements of principle. *One Key* does not mandate the precise manner in which such principles are to be applied."

[36] The Deputy President then dealt with the specific issues raised by each of the unions concerning the explanation of particular terms of the Agreement, and rejected all of them. In relation to the unions' submissions concerning the adequacy of the explanation concerning the part-time employment provisions in the Agreements, the Deputy President said:

"...Rejected. Overall, the enterprise agreement(s) provisions on this issue, and their effect, were adequately explained in the context of and by reference to the Applicant's Explanatory Materials, having regard to: the Explanation of Agreement Terms document, the Modern Award comparison documents, and a fair reading of the actual terms in the proposed enterprise agreements. Taken together, by reference to explanations as to Type of Employment, Remuneration, Hours of Work (including Rosters), Individual Flexibility, Management of Change/Consultation, Better Off Overall, and Schedule 1, all reasonable steps were taken to explain the proposed enterprise agreements and the effect of their terms concerning part-time employment. In my view, relevant employees would have likely understood the differences between the enterprise agreement and the modern award provisions as to part-time employment, and that regular patterns of work, specifying the hours worked each day, which days of the week the employee will work, and the actual starting and finishing

[11] Ibid at [91](d)

times each day, are subject to rostering arrangements under the proposed enterprise agreements, as opposed to by agreement, with variations also by agreement and in writing, under the modern awards. The absence of express reference to specific award provisions in the Explanatory Materials does not alter my view."[12]

[37] As to the unions' contentions that there had been no explanation of the rates of pay which would apply on new or alternative rosters under clause 2.1 of Schedule 1 of each of the Agreements, the Deputy President said:

> "...Rejected. I do not accept the AWU's interpretation of the proposed enterprise agreements on this issue. It was explained to employees that the effect of the proposed enterprise agreements is to incorporate into annual salaries payments for hours worked under the modern awards (including as to penalties, allowances, overtime, public holidays). It was also explained to employees that the same methodology would be used for changed rosters. Overall, the enterprise agreement(s) provisions on this issue, and their effect, were adequately explained in the context of and by reference to the Applicant's Explanatory Materials, having regard to: the Explanation of Agreement Terms document, the Modern Award comparison documents, and a fair reading of the actual terms in the proposed enterprise agreements. There is no basis to find that all reasonable steps were not taken to explain the terms and effect of terms of the proposed enterprise agreements on this issue."[13]

[38] There were a number of contentions advanced concerning the explanation given in respect of casual employees, which the Deputy President dealt with in a number of places in the reasons in a similar fashion. His lengthiest response to these contentions was as follows:

> "...Rejected. Overall, the enterprise agreement(s) provisions on this issue, and their effect, were adequately explained in the context of and by reference to the Applicant's Explanatory Materials, having regard to: the Explanation of Agreement Terms document, the Modern Award comparison documents, and a fair reading of the actual terms in the proposed enterprise agreements. All reasonable steps were taken to explain the proposed enterprise agreements and the effect of their terms concerning casual engagements. The absence in the explanation of certain limited circumstances where casual rates of pay may be less than award rates is resolved by reference to BOOT promise, and undertaking provided by Applicant on this issue..."[14]

[39] The Deputy President next dealt with the question of whether the Agreements passed the BOOT and in doing so, he noted the "*BOOT promise*" in clause 23.1 of each Agreement. The Deputy President said (footnote omitted):

> "[119] The proposed enterprise agreements contain many terms which are more beneficial than the Award. They also contain a catch all clause that provides that it is the intention that all employees covered by the prospective enterprise agreements will be better off overall than if a relevant modern award applied to their employment (clause 23.1) (**BOOT promise**). I read the BOOT promise as more than a mere statement of intention, but as the basis upon which terms and conditions under the

[12] Ibid at [99](A)

[13] Ibid at [102](H)

[14] Ibid at [99](B)

proposed enterprise agreements are to be interpreted and applied to any employee covered by the proposed enterprise agreement, including in relation to prospective employees. However, in making my assessment for the purposes of s.193 in this matter, I have not been required to apply the BOOT promise as the specific express terms of the proposed enterprise agreement can be construed and applied to reach my requisite state of satisfaction under s.193 of the Act.

[120] In summary, in view of the analysis set out in this decision, and on the basis of the undertakings provided by the Applicant (accepted by me pursuant to s.190 of the Act), I am satisfied that the terms and conditions contained in the proposed enterprise agreements will result in all relevant employees (and prospective employees) to whom the Mining and Production Agreements cover and apply being better off overall as compared to the Mining and Coal Awards. I make this determination as at test time, being the date that the proposed enterprise agreements were filed with the Commission (in October 2018)..."

[40] The Deputy President then dealt with a number of specific contentions advanced by the unions concerning the BOOT. In relation to rates of pay for casual employees, the Deputy President said (footnote omitted):

"[121] The CFMMEU raised BOOT concerns in relation to the quantum of payment to casual to employees for short or irregular shifts, and the purported absence of a limitation on how casual employees may be engaged.

[122] The first concern is dealt resolved by way of the undertaking provided by the Applicant.

[123] I reject the second concern. Casual employees under the proposed enterprise agreements are to be engaged for a minimum of four hours for each engagement, will be paid at higher rates of pay than the Mining and Coal Awards, and have the ability to elect to convert to full-time or part-time employment where they have been regularly engaged for 6 months (and are not irregular casual employees). The Applicant must not unreasonably refuse such a casual conversion request. Importantly, I am unaware that there is any case law or other principle that prohibits an enterprise agreement meeting the BOOT where casual employees may be engaged under that enterprise agreement, but are otherwise excluded (as a form of engagement) under a modern award. Given the foregoing factors, and especially having regard to the greater rates of pay under the proposed enterprise agreements payable to casual employees, I consider that casual employees will be better off overall under the proposed enterprise agreements than if they were employed strictly pursuant to the terms of the Mining or Coal Awards."

[41] In relation to a contention concerning the lack of the identification of the salaries payable on new or alternative rosters under clause 2.1 of Schedule 1 of each Agreement, the Deputy President said:

"...the AMWU asserts that new rosters have not been properly costed, and cannot be determined, in that the payment for such rosters relies upon "principles" that have not been expressly set out in the proposed enterprise agreements. I reject that new rosters cannot be properly costed on the same principles that have been used to arrive at the

proposed enterprise agreements current rostered rates of pay (which are based directly upon the terms and conditions contained in the Mining and Coal Awards). I also note the application of clause 2.1 of Schedule 1 of the proposed enterprise agreements, and the BOOT promise...”[15]

[42] The Deputy President then dealt with the contentions that certain provisions of the Agreements contravened the NES. In respect of the contention that the hours of work provisions of the Agreements were contrary to s 62 of the FW Act, the Deputy President said:

> “[130] ...I reject this allegation. There is no suggestion on a proper reading of the proposed enterprise agreements as a whole, or on the evidence, that the hours of work provisions in the proposed enterprise agreements will apply or be applied contrary to s.62 of the Act. Further, I do not read the proposed enterprise agreement as enabling or providing for any exclusion of the NES hours of work minimum standards.”

[43] In relation to a contention that the public holiday provisions of the Agreements were contrary to s 114 of the FW Act, the Deputy President said:

> “[133] ... There is no suggestion on a proper reading of the proposed enterprise agreements as a whole, or on the evidence, that the hours of work provisions in the proposed enterprise agreements will apply or be applied contrary to s.114 of the Act. The proposed enterprise agreements provide that employees hours of work will be rostered. Public holidays to be worked will appear on an employee’s roster. Clause 10.1 of the proposed enterprise agreements does not prohibit the operation of ss 114(2)-114(4) of the Act. Any concern in relation to whether a roster requiring work on a public holiday is reasonable, or a refusal to work on a public holiday (on a particular roster) is unreasonable, can be dealt with under the proposed enterprise agreement disputes procedures. Further, there are various factors that will be weighed up at the time any issue as to the working of a public holiday arises (as set out in s.114(4) of the Act).”

[44] In relation as to whether there were other reasonable grounds for believing that there had not been genuine agreement pursuant to s 188(1)(c), the Deputy President rejected the unions’ contention that because the employees who voted on the Agreements were to retain their apparently superior contractual terms and conditions of employment, they had “no stake” in the Agreements which consequently lacked authenticity and moral authority. In doing so the Deputy President said that relevant existing employees had a community of interest with prospective employees who would have received under the Agreements “benefits *[which]* include rates of pay significantly higher than those contained in the Coal Award and the Mining Award, extending to terms and conditions (overall) that leave prospective employees better off overall when compared to these awards”.[16] The Deputy President also rejected contentions that the Agreements were not genuine because the existing relevant employees lacked any knowledge or experience of the black coal mining industry and were being used as a springboard to a much larger workforce to be employed largely in the black coal mining industry, and because there had been no bargaining in relation to the Agreements.

[45] The Deputy President’s reasons included the following conclusions (footnote omitted):

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[15] Ibid at [126](b)

[16] Ibid at [154]

> “[163] On 14 February 2019, my Chambers sent correspondence to the Applicant identifying issues and concerns in relation to the approval of the proposed enterprise agreements **(Commission issues)**.
>
> [164] By way of submissions dated 6 March 2019, the Applicant replied to those Commission issues.
>
> [165] In its submissions dated 13 March 2019, the CFMMEU took issue with nearly all of the Applicant’s responses to the Commission issues. The CFMMEU further submitted that given the Applicant’s responses to the Commission issues, these matters identified further grounds as to why the Applicant had failed to comply with s.180(5) of the Act.
>
> [166] Having reviewed the Applicant’s responses to the Commission issues, and considered the allegations made by the CFMMEU as to such responses, I am satisfied that the Applicant’s responses have fully resolved the Commission’s issues, including by reference to the undertakings provided by the Applicant.”

[46] It may be noted that the decisions and the reasons did not make any reference to the concerns held by the Deputy President which gave rise to the four new undertakings first proposed by OS MCAP and OS ACPM on 17 December 2019. Nor was any reference made to the internal Commission modelling sent to OS MCAP on 19 December 2019 approximately two hours before the decisions were issued which showed that the Production Agreement failed the BOOT, or to OS MCAP’s response rejecting this which was received about 15 minutes before the decisions were issued.

Appeal grounds and submissions

Appeal grounds

[47] All of the appellant unions proceeded on the following grounds of appeal (using the numbering in the CFMMEU’s amended notice of appeal dated 17 February 2020):

(1) The reasons of the Deputy President exhibited bias or at least a reasonable apprehension of bias.

(2) The reasons of the Deputy President took into account irrelevant considerations.

(3) The Deputy President erred in finding that he was satisfied that the requirements of s 186 of the FW Act had been met in that:

  (a) he failed to properly consider and/ or incorrectly determined that the terms of the agreement did not contravene s 55 of the FW Act;

  (b) he failed to properly consider and/ or incorrectly determined whether the Agreement passed the BOOT.

(4) The Deputy President erred in finding that he was satisfied that the requirements of ss 186(2)(a) and 188(1)(a) of the FW Act had been met in finding that the respondent had taken *all reasonable steps* within the meaning of s 180(5) of the FW Act.

(5) The Deputy President erred in finding that he was satisfied that the requirements of ss 186(2)(a) and 188(1)(c) of the FW Act had been met.

(6) The Deputy President erred in so far as he relied on an undertaking remedying a deficiency in the explanation required by s 180(5) of the Act.

CFMMEU submissions

[48] In relation to appeal grounds 1 and 2, the CFMMEU submitted that the reasons of the Deputy President exhibited bias or at least a reasonable apprehension of bias by making "*hypercritical*" findings about the unions' approach to the proceedings and giving reasons concerning the application by the unions to be heard which were entirely unnecessary given that issue had long been resolved and the unions had in fact been heard. Those reasons did not support the decision to hear from the unions, and made reference to matters which had never been raised by OS MCAP or OS ACPM. The critical comments made by the Deputy President, it was submitted, reflected comments made by him in an earlier decision (*Downer EDI Mining Blasting Services*[17]) and are demonstrative of an animus against the unions. Alternatively, the critical comments set out in the reasons were irrelevant considerations that affected the Deputy President's consideration of the issues genuinely in dispute and about which it was necessary that he make findings in order to approve the Agreements.

[49] As to the CFMMEU's appeal ground 3(a), it was contended that the Agreements excluded the NES in two respects. First, it was submitted, the salaries payable under Schedule 1 of each of the Agreements required full-time employees to work in excess of the maximum weekly hours prescribed under the NES without any consideration for an employee's personal circumstances. Section 62 of the FW Act prescribes that an employer must not request or require an employee to work more than 38 hours per week unless the additional hours are reasonable and s 62(3) sets out the range of matters that must be taken into account when determining whether such additional hours are reasonable, which includes an employee's personal circumstances, including family responsibilities. Under Schedule 1 of the Maintenance Agreement the required roster involves an average of 46.88 hours per week, and Schedule 1 of the Production Agreement provides for a roster averaging 58.33 hours per week for non-coal operations, and 43.75 hours per week for coal operations. The CFMMEU referred to the explanatory notes in each Agreement which provide that "*[t]he Annual Salary is set on the basis that Employees will work these hours*". The CFMMEU contended that as an employee's full-time status is predicated on their ability to work those rostered hours, the respondents could not have considered the personal circumstances of employees in accordance with s 62(3) when determining the additional hours that each full-time employee is required to work under the Agreements.

[50] Secondly, the CFMMEU contended that the requirement in clause 10.1 of the Agreements to work a public holiday in accordance with the applicable roster cycle contravened the NES entitlement in s 114(2) of the FW Act that any request for an employee

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[17] [2019] FWC 5615

to work on a public holiday must be reasonable and must take into account an employee's personal circumstances pursuant to s 114(4)(b). The CFMMEU submitted that, in dealing with this issue, the Deputy President asked himself the wrong question in that it is not the factors set out at s 114(4) which are to be weighed up at the time the issue of working a public holiday arises, rather they are factors which *must* be taken into account when an employer requests an employee to work a public holiday pursuant to s 114 of the FW Act. Further, in respect of both this issue and the issue concerning the ordinary hours of work, the Deputy President erroneously relied upon the capacity of an employee to assert their rights though litigation or the dispute settlement procedure to dispose of what was a clear and unambiguous inconsistency with the NES.

[51] The CFMMEU's appeal ground 3(b) concerned whether the Deputy President erred in being satisfied that the Agreements passed the BOOT. The CFMMEU submitted that some employees were worse off under the Agreements than the Black Coal Award in that:

- casual employees working in a coal classification would be worse off in relation to personal leave. Under the Black Coal Award, casual employees would be entitled to personal leave upon commencement, pro-rated if they worked less than 35 hours per week whereas under clause 12 of the Agreements, casual employees accrue personal leave through the 25% casual loading;

- in accordance with the Commission's internal agreement assessment, production technicians working in coal operations under the Production Agreement would receive less remuneration than under the Black Coal Award based on the award rates applicable at the time of the decision; and

- the entitlement to be paid out personal/carer's leave on termination in certain circumstances arose only after four years under the Maintenance Agreement, whereas the entitlement under the Black Coal Award is unrestrained by length of service and is available on commencement of employment.

[52] As to appeal grounds 4 and 5, the CFMMEU submitted that the respondents had not met the "*genuinely agreed*" requirement in s 186(2)(a) in two ways. Firstly, it alleged that the respondents had not taken "*all reasonable steps*" within the meaning of s 180(5) of the Act to explain all material differences between the Agreements and the relevant award. In this respect, it was submitted, the Deputy President read down the requirement to take "*all reasonable steps*"; failed to follow Full Bench and Federal Court Full Court authority in relation to this requirement; posited his own substitute test as to whether employees were likely to have understood the terms of the proposed enterprise agreement and their effect; and did not address the specific issues concerning compliance with s 180(5) that had been raised by the CFMMEU. Specific deficiencies in the explanation of the terms of the Agreements raised by the CFMMEU included:

- the identification of casual employment in coal operations as a benefit and a failure to explain that the Black Coal Award did not allow for casual employment;

- a failure to explain that new site-specific agreements could not apply to them within the nominal 4-year term unless they changed their specific employment;

- a misrepresentation that employees could make more favourable agreements at the site they were working on; and

- a failure to explain the difference between the Agreements and those agreements currently applying to other employees at coal mines at BHP sites, with whom employees covered by the Agreements might work side-by-side.

[53] Secondly, the CFMMEU contended that the Deputy President erred in being satisfied that there were no other reasonable grounds for believing the Agreements had been genuinely agreed pursuant to s 188(1)(c), in that the Deputy President failed to take into account a number of matters including:

- his own finding that the employees who voted for the Agreements would remain under their own contractual conditions;

- that the Black Coal Award had distinct conditions of employment of which the employees who voted for the Agreement had no experience; and

- the fact that there was no bargaining for the Agreements.

[54] The CFMMEU's final appeal ground submitted that the Deputy President erred in accepting an undertaking concerning the rate of pay for a casual employee who does not work a full-time roster under s 190 of the FW Act to address a failure to explain this matter in accordance with s 180(5). This, it was contended, was contrary to the Full Bench decisions in *AWU v Professional Traffic Solutions Pty Ltd*[18] and *Diamond Offshore General Company v Baldwin*.[19]

AWU submissions

[55] The AWU relied upon and adopted the CFMMEU's submissions, and additionally submitted that the Deputy President erred:

- in approving the Agreements because they do not pass the BOOT in that the minimum rates payable to employees under the Agreements can only be determined in relation to one very specific roster pattern;

- in concluding that the respondents took all reasonable steps to explain the Agreements' terms and the effect of the terms to the relevant employees because they did not reveal or explain the principles that will be used to derive the minimum rates payable under the Agreements; and

- in concluding that the BOOT was satisfied by undertaking a global assessment of the terms without knowing what the minimum pay rates are.

AMWU and CEPU

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[18] [2018] FWCFB 6333

[19] [2018] FWCFB 6907, 284 IR 1

[56] The AMWU and CEPU relied on and adopted the CFMMEU and AWU's submissions.

OS MCAP and OS ACPM submissions

[57] OS MCAP and OS ACPM submitted that:

- permission to appeal should be refused because the decision raised no issue of importance or general application and the appeal did not challenge the Deputy President's findings of fact or conclusions of law but was principally directed to the states of satisfaction reached by the Deputy President in his decisions;

- the accusations of actual or apprehended bias on the part of the Deputy President do not meet the requisite requirements to prove actual or apprehended bias, are misconceived and should be rejected;

- the CFMMEU's contention that the Agreements contravene s 55 of the FW Act because employees <u>will</u> or <u>must</u> work in excess of 38 hours per week under the Agreements is misconceived because the Agreements do not expressly require this;

- the Deputy President was correct in finding at paragraph [130] of his reasons that the Agreements do not enable or provide for any exclusion of the NES hours of work minimum standards because the Agreements do not remove the right of employees to refuse to work additional hours if they are unreasonable;

- in relation to the public holiday ground, there is nothing in the Agreements that permits the respondents to make unreasonable requests for employees to work public holidays in contravention of s 114(2) of the FW Act, or denies the employees the right of refusal to work a public holiday if the refusal is reasonable pursuant to s 114(4) of the FW Act;

- it was open to the Deputy President to be satisfied that casual employees will be better off overall under the Agreements than if they were employed strictly pursuant to the terms of the relevant awards, particularly given the higher rates of pay for casual employees and higher minimum engagement period under the Agreements which balanced out the personal leave accrual issue;

- there is no authority to suggest that each and every individual term of an enterprise agreement must be explained to employees before an agreement can be approved, and further, the CFMMEU failed to identify which terms of the Agreements required further explanation;

- there was no failure to explain the terms of the Agreement relating to pay rates of casual employees, and therefore the undertaking accepted by the Deputy President was no contravention of s 180(5) of the FW Act;

- in any event, the Deputy President's acceptance of the undertaking in this respect was consistent with the Full Bench decisions in *CFMMEU v Specialist People Pty Ltd*[20] and *CFMMEU v Karijini*;[21]
- in relation to the AWU's contentions, there is no legal obligation or authority which provides that the respondents must disclose to employees the methodology used to set out the annualised salaries in Schedule 1 of the Agreements; and
- further, the Deputy President did reach a state of satisfaction that the Agreements passed the BOOT in accordance with s 186(d) of the FW Act, as explicitly set out in paragraph [126](b) of the reasons.

Consideration

Permission to appeal

[58] We have decided to grant permission to appeal because, for the reasons which follow, we consider that a number of the CFMMEU and the AWU's appeal grounds have merit and vitiate the approval of the Agreements.

[59] It is convenient to deal first with appeal grounds 3(b), 4 and 6.

Ground 3(b) – s 186(2)(d) – whether Agreements pass the BOOT

[60] We consider that the Deputy President's satisfaction that the Agreements passed the BOOT was attended by two fundamental errors. First, the Deputy President appears from his reasons to have proceeded on the basis of an erroneous mathematical comparison between the rates in the Agreements and the rates of pay in the Mining Award and the Black Coal Award. The Deputy President dealt directly with the BOOT in paragraphs [114]-[126] of the reasons, and commenced by correctly stating that the test was a global one. He then said (in paragraph [120]) that his conclusion was, in summary, that "in view of the analysis set out in this decision" and, in addition, on the basis of the undertakings, he was satisfied that the terms and conditions contained in the Agreements would result in all relevant employees being better off overall than under the Mining Award or the Black Coal Award. The "analysis" to which the Deputy President refers is not contained in this section of the reasons, which does not actually engage in any comparison between the principal entitlements under the Agreements as compared to the two awards. The "analysis" appears to be a reference to the summary of the terms and the conditions of the Production Agreement and the Maintenance Agreement set out at paragraphs [13]-[14] and paragraphs [21]-[22] respectively of the reasons, as compared to the summary of the two awards in paragraph [24]. We have earlier set out extracts from these sections of the reasons. They disclose that the Deputy President proceeded on the basis that the rates of pay in the Production Agreement were between 54.83 percent and 125.84 percent higher than in the corresponding awards, and that the rates in the Maintenance Agreement were between 70.01 percent and 114.76 percent above the corresponding awards.

[61] If that were the correct mathematical premise for the assessment of the BOOT in respect of the Agreements, then a conclusion that the Agreements passed the BOOT could not

[20] [2019] FWCFB 6307

[21] [2020] FWCFB 958

seriously be open to challenge. However, the premise was incorrect. The Deputy President appears to have obtained these percentage figures from an initial internal analysis prepared by the Commission's staff in January 2019, in which it compared the hourly rates under the Agreements (produced by dividing the annual salaries by 52 to produce a weekly rate, and then dividing this by the number of hours in the required roster for each classification) to the *ordinary time* rates under the awards. This did not purport to be a comparison between the salaries under the Agreements for the specified rosters and the total remuneration required to be paid under the two awards for working the same rosters, which necessarily encompassed weekend, overtime and public holiday penalty rates and other allowances and loadings.

[62] There was material before the Commission that, at least with respect to the Production Agreement, showed that there was a real issue as to whether the BOOT was passed. An analysis prepared by OS MCAP (attached to its submissions of 6 March 2019) showed that Production Technicians would earn about 5 percent more under the salary prescribed for coal operations in the Production Agreement compared to the classification of Mineworker Advanced under the Black Coal Award. The unions did not challenge the mathematics of this analysis, but contended that it was incomplete because it did not take into account a number of other direct and indirect benefits under the Black Coal Award, with the result that the Commission could not be satisfied that the BOOT was passed. In addition, there was the curious episode which we have earlier recounted whereby the chambers of the Deputy President sent to OS MCAP a couple of hours before he issued the decisions internal modelling showing that the Production Agreement actually failed the BOOT as against the Black Coal Award – modelling which was never disclosed to the unions prior to these appeal proceedings. None of this was dealt with in the reasons and therefore, it must be presumed, was not considered by the Deputy President.

[63] This is not to say that we have positively formed the conclusion that, in respect of full-time employees working the rosters specified in Schedule 1, either Agreement does not pass the BOOT. In this connection we note that, in the appeal proceedings, the CFMMEU provided us with mathematical modelling which it submitted showed that a production technician in coal operations under the Production Agreement would earn less than an Advanced Mineworker under the Black Coal Award working the roster specified in clause 1.2 of Schedule 1. However, this calculation was based on the current Black Coal Award rates which commenced operation on 1 July 2019, not the lower Black Coal Award rates applicable when the applications for approval of the Agreements were filed in 2018. In this respect, the CFMMEU's analysis was not consistent with s 193, which requires that the comparison be conducted by reference to the "*test time*", defined in s 193(6) as meaning the time when the application for approval of the relevant agreement was made. The CFMMEU submitted that its position was supported by the following passage in the Full Bench decision in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care*:[22]

> "[27] Section 193 provides than an enterprise agreement passes the better off overall test if the Commission is satisfied, as at the test time, that each award covered employee and each prospective award covered employee would be better off overall if the agreement applied to the employee than if the relevant award applied to the employee. Although the test time is the date the application was lodged, the

[22] [2019] FWCFB 1716

> Commission is required to conduct an overall comparison, for each existing and prospective employee, of agreement and award conditions. This necessarily requires a consideration of the rates of pay under the agreement and the award that apply to existing and prospective award covered employees assessed 'as at the test time'. A 'point-in-time test' is necessary because the award benchmark may change over the nominal life of the agreement, although its base rate of pay would always be the relevant minimum because of s 206. To our mind, this is the anchoring work of the 'test-time'. The BOOT analysis occurs at this time, taking account of all that is known at this time, including all of the terms of the agreement that will apply over its nominal life. In our view, the 'test-time' does not confine the BOOT analysis to provisions of an agreement that are applicable only at its inception; employees must be better off overall under the agreement, not just better off at 'test-time'."

[64] The above passage does *not* say that, in assessing the BOOT, the comparison point may take into account known changes to the award that occur after the test time. The passage says the opposite, namely that the "anchoring" point of the BOOT is constituted by the award conditions as they are as at the test time. Were it otherwise, parties attempting to make an enterprise agreement would not know the BOOT benchmark they would have to meet, since future award changes would be unknown to them at the time bargaining for the agreement occurred. The point of the passage is that all of the terms of the relevant agreement, including as they operate over the life of the agreement, must be taken into account in making the required comparison with the award terms as at the test time. Accordingly we do not consider that the mathematical modelling provided by the CFMMEU demonstrates that the Production Agreement failed the BOOT in respect of full-time employees undertaking the rosters specified in Schedule 1.

[65] The second fundamental BOOT error is that the Deputy President failed properly to consider the implications for the BOOT of the fact that neither of the Agreements specify an hourly or weekly rate of remuneration by which the BOOT could be assessed for circumstances other than the rosters for full-time employees specified in Schedule 1 of each Agreement. This deficiency in the Agreements had manifestations relevant to the BOOT in respect of full-time employment on rosters other than those specified in Schedule 1 of each of the Agreements, and casual employment, as contended by the unions. We explain this below.

[66] We have earlier identified that clause 9.5 and clause 2.1 of Schedule 1 of each of the Agreements confer on the employer the right to establish rostering patterns other than those specified in Schedule 1 for full-time employees. The Agreement contains no rate to allow the calculation of what remuneration would be payable on any alternative roster. Instead, clause 2.1 of Schedule 1 states that the remuneration for any alternative roster will be calculated "*…using the same principles used to calculate the Annual Salary set out in this Agreement…*". As earlier stated, those principles are not set out or explained in either of the Agreements. Additionally, in their submissions dated 4 April 2019, OS MCAP and OS ACPM declined to disclose these principles to the *Commission*, saying in respect of both Agreements that "*There is no obligation on the Applicant to disclose the methodology used to set the annualised salaries in Schedule 1*". The most that was disclosed was that to set the annualised salaries for a new roster for either of the Agreement, OS MCAP and OS ACPM would "*…take into account the penalties and loadings contained in the Awards and would apply a greater base rate than specified in the Awards.*"

[67] This statement could not permit any proper conclusion to be reached about whether the outcome would pass the BOOT, since to "*take into account*" the penalties and loadings in the awards is not the same thing as applying them. It is simply not appropriate for an applicant for the approval of an enterprise agreement to expect the Commission to conclude that the agreement passes the BOOT in circumstances where the minimum remuneration payable for working patterns expressly permitted by the agreement is incapable of identification. We do not overlook the fact that clause 2.1 of Schedule 1 of each of the Agreements states that the outcome produced by the application of the unspecified principles "*will be greater than what would be paid to the Employee working that roster if any Award applied to them*", but that is incapable of verification by the Commission. Further, because the extent of the asserted remuneration advantage is not quantified or quantifiable, it cannot be balanced against any detrimental terms in the Agreement pursuant to the global assessment which the BOOT requires. Nothing is added by the "BOOT promise" in clause 23.1 which, as the Deputy President found, is not a substantive enforceable provision of the Agreements. In relation to the issue of remuneration under new rosters, the Deputy President said (at paragraph [126](b) of the reasons) that he rejected that new rosters could not properly be costed on the basis of the principles, but gave no explanation of how that could be done without the principles being disclosed. He took no action to require OS MCAP and OS ACPM to disclose those principles.

[68] Casual hourly rates of pay are also not specified in the Agreements, making it difficult to ascertain whether the Agreements pass the BOOT in respect of casual employees (particularly those who work less than complete roster cycles). Clause 5.3 of each of the Agreements provides that casual employees are to paid "*an additional loading of 25% of their hourly rate (calculated based on the Annual Salary for the applicable roster)*". This provision is ambiguous. Presumably the "*applicable roster*" is a reference to the rosters identified in Schedule 1 of each of the Agreements for which annual salaries are prescribed. However it is not clear whether the "*hourly rate*" to which the 25% loading is to be added is simply the specified salary divided by 52 and then divided again by the average number of weekly hours in the "*applicable roster*", or whether it is derived from the unspecified "*greater base rate*" used in the principles upon which the salaries have been calculated.

[69] When this issue was raised in the appeal hearing, OS MCAP and OS ACPM submitted that it was the former methodology so that, for example, the casual rate for a non-coal production technician under the Production Agreement was a (presumably flat) rate of $51.51 per hour. This is higher than the *ordinary time* rate for a Level 4 casual employee under the Mining Award, which is $30.27. However it is *lower* than the rate under the Mining Award where a casual is working more than 3 hours overtime, or on a Saturday afternoon, a Sunday or a public holiday, where a 200% or higher penalty rate applies. The Deputy President asserted in paragraph [123] of the reasons that the casual rates under the Agreements are higher than under the two awards, but the basis for this conclusion was not disclosed and, as a blanket proposition, appears to be wrong on any view as to how those rates are to be calculated.

[70] The third undertaking appears to have been intended to address a difficulty with the casual rate in the Agreements being lower than those in one or both of the awards on certain shifts, notwithstanding that there is no indication in the decisions or reasons that the Deputy President held a concern that the Agreements did not pass the BOOT in respect of casual employees. There is a further difficulty in that the undertaking merely promises that the casual rate for any shift (where a full roster is not worked) will be higher than under any applicable award without ever quantifying what the rate will be. That makes it impossible to undertake

the global assessment required by the BOOT of all the applicable conditions under the Agreements. If, for example, the casual rate paid on a shift pursuant to the third undertaking is one cent above the applicable award, the Agreements may still fail the BOOT because of other detriments not directly related to the rate of pay may mean that casual employees are not better off overall.

[71] Further, it is unclear whether the asserted casual rates would still apply if, pursuant to clause 2.1 of Schedule 1 of each Agreement, a new roster was established, or whether the undisclosed principles used to construct the annual salaries would produce a different casual rate. This issue was not addressed by the Deputy President. This leaves unknowable whether the casual rates, particularly as applicable to casual employees working full rosters, would pass the BOOT in that circumstance. We note in that connection that clause 2.1 of Schedule 1 of each Agreement only promises that the *annual salary* on any new roster will be more than the remuneration provided for under any applicable award for that roster; it does not appear to apply to the casual hourly rate payable to casual employees, particularly those working less than full roster cycles.

[72] Although it was not specifically raised by the unions in their submissions, their contentions concerning the lack of any specification of an hourly rate for the BOOT assessment may also have implications for part-time employment under the Agreements. In respect of part-time employees, clause 5.2 of each of the Agreements simply provides: "*Part time Employees will receive pro rata leave and other entitlements on the basis of a 35 ordinary hour week*". The basis upon which part-time employees are to be paid, either by reference to the rosters specified in Schedule 1 of each Agreement or on any other rosters, is nowhere clearly specified. We would not read the expression "*other entitlements*" in clause 5.2 as referable to remuneration, but even if it is to be read in this way, the relationship between pro-rata remuneration based on a 35-hour week and the annual salaries specified in Schedule 1 of each Agreement is entirely obscure. Further, beyond the requirement in clause 9.4 that the hours of employment of a part-time employee shall not exceed 35 per week, there is no specification of how the hours of work of a part-time employee are to be established. Presumably part-time employees are subject to clause 9.5, which empowers the employer unilaterally to set and to change start and finish times, shift and roster cycles, and the number of hours worked on each shift. By comparison, the Mining Award (in clause 10) requires that the employer inform the employee of their ordinary hours of work and starting and finishing times, with any hours worked in excess of this being paid at overtime rates, and the Black Coal Award (in clause 10.3) requires that a "*regular pattern of work*" with fixed days, hours and starting and finishing time be established for part-time employees upon engagement, with any variation to this requiring written agreement and any hours worked in excess of the fixed hours being paid at overtime rates. Having regard to these matters, the Deputy President's decisions and reasons disclose no basis upon which he could have reached a state of satisfaction that the Agreements passed the BOOT in relation to part-time employees.

[73] For the above reasons, we consider that ground 3(b) of the appeals should be upheld.

Ground 4 – sections 186(2)(a) and 188(1)(a)(i) – whether s 180(5) complied with

[74] The evidence before the Deputy President demonstrated that the "*voting packs*" provided to employees contained a detailed exposition of each clause of the Agreements and a detailed comparison with each of the awards. Normally, absent a specific misrepresentation or

a significant omission, an explanation of the terms of an agreement of this type would reasonably permit a state of satisfaction to be reached that s 180(5) had been complied with.[23]

[75] In this case we consider that there were a number of significant omissions in that OS MCAP and OS ACPM failed to explain *the effect* of a number of critical terms of the Agreements, as required by s 180(5)(a). These terms are the same as those discussed in the context of the second fundamental error we have identified in respect of the Deputy President's consideration of the BOOT, namely:

(1) *Part-time employment, clauses 5.2 and 9.4* - The "*explanation*" of these provisions concerning part-time employment merely reiterated the words actually used in the provisions without giving any explanation of their effect. Thus, in relation to clause 5.2, there was no explanation as to what the hourly rate of remuneration of part-time employees actually is or how it is to be calculated by reference to any current or future roster. In relation to clause 9.4, there was no explanation as to how the hours of employment of part-time employees are to be determined, or how clause 9.4 differed from the part-time provisions in the Mining Award and the Black Coal Award. For the reasons we have earlier given, these provisions are highly ambiguous and, we consider, cannot be understood without an explanation of their intended effect that goes beyond the mere repetition of the words used in the text.

(2) *Casual employment, clause 5.3* – The "*explanation*" again does no more than repeat or rephrase the words of the provision. It does not identify what the casual hourly rates, either under the current rosters identified in Schedule 1 of each of the Agreements or under any alternative rosters, actually are. Nor does it give any readily comprehensible explanation as to how those rates are to be calculated. We do not consider that a reasonable person would be able to determine, with any clarity, what the rates for casual employees are under the working scenarios expressly permitted by the Agreements.

(3) *Alternative rosters, clause 2.1 of Schedule 1* – The "*explanation*" given repeats the text of the actual provision in 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, but says nothing about what those principles are. 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.

[76] In each of the above cases, we consider that it would clearly have been a reasonable step for OS MCAP and OS ACPM to have given the requisite explanation of the effect of the above terms. For example, with respect to casual employment, there was no apparent difficulty in OS MCAP and OS ACPM providing to us after enquiry the hourly casual rates, at least as they are under the current rosters specified in Schedule 1 of each of the Agreements. In respect of alternative rosters able to be introduced under clause 2.1 of

[23] See *AWU v Rigforce Pty Ltd* [2019] FWCFB 6960 at [37]-[38]

Schedule 1 of each of the Agreements, we cannot imagine what the difficulty there 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.

[77] In relation to the provisions of the Agreements concerning part-time employment, the Deputy President simply asserted at paragraph [99](A) of the reasons (earlier quoted) that all reasonable steps had been taken to explain these provisions without identifying any reasons or basis for that assertion. The Deputy President went on to say in the same paragraph to express the opinion that relevant employees "would have likely understood the differences" between the part-time employment provisions in the Agreements and those in the relevant awards, and effectively used this entirely speculative opinion to excuse OS MCAP and OS ACPM from any obligation to explain the provisions. It is necessary to point out at this juncture that the Deputy President applied here and elsewhere in the reasons the wrong test in relation to compliance with s 180(5), which is concerned with the steps taken by the employer to explain the terms of an agreement, not what employees are likely to have understood about the Agreement. The Deputy President said he derived this test from the Federal Court Full Court decision in *One Key*,[24] but he has in fact misread the decision. When the Full Court referred in paragraph [172] to the necessity to consider "whether [the employees] were likely to have understood its terms and effect", it was referring to the element of the genuine agreement requirement in s 188(1)(c), not to s 180(5), as the discussion in paragraphs [141]-[170] of the decision makes clear. The simple fact remains that OS MCAP and OS ACPM could reasonably have provided an explanation of the effect of the part-time provisions of the Agreements and did not do so.

[78] To the extent that the Deputy President dealt with the explanation given concerning casual employment at all (see paragraph [99](B) of the reasons quoted above), he again simply asserted that all reasonable steps had been taken pursuant to s 180(5) without addressing why the lack of identification of the actual casual rates, or the method by which they could mathematically be calculated, was not a reasonable step to be taken. His reference to the undertaking and the "BOOT promise" was not to the point, since neither of these served to identify what the casual rates were.

[79] In relation to the annual salaries payable on new or alternative rosters, nothing stated by the Deputy President in paragraph [102](H) of the reasons, which we have earlier set out, addresses the proposition that there was no explanation of what salaries would be paid, or how they would be calculated, on new or alternative rosters. Further, the explanation referred to by the Deputy President was not given in relation to clause 2.1 of Schedule 1 of the Agreements, but rather in relation to clause 7.1, and merely confirms that the annual salaries are paid in lieu of a range of award entitlements otherwise payable. Nothing in this explanation sets out the methodology for the calculation of the actual amount of annual salaries or allows the amount of such salaries to be identified. The Deputy President does not identify any reason why it would not have been a reasonable step to explain this to employees.

[80] The simple fact is that OS MCAP and OS ACPM did not explain what the rates of remuneration would be for full-time employees on new or alternative rosters, for casual employees, or for part-time employees. For the reasons given, we consider that it was not

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[24] [2018] FCAFC 77, 262 FCR 527, 277 IR 23

reasonably open for the Deputy President to reach a state of satisfaction that there had been compliance with s 180(5) (without undertakings), and therefore that there had been genuine agreement as required by s 186(2)(a). Appeal ground 4 is upheld to that extent.

[81] It is not necessary in the circumstances for us to deal with all the other submissions advanced by the unions concerning compliance with s 180(5) except to say that we do not accept that there was any misrepresentation about the effect of the exclusion from coverage in clause 2.2 of each of the Agreements. The effect of the provision appears to be that the Agreements will not cover the employees where there is a site-specific agreement which both covers and applies to them. In that circumstance, the representation that such site-specific agreements might be "*better, the same or less beneficial*" is in our view no more than a statement of the range of obvious possibilities.

Ground 6 – acceptance of undertakings to cure non-compliance with s 180(5)

[82] Ground 6 of the appeal is rejected for the reasons set out in the paragraph [36] of the recent Full Bench decision in *CFMMEU v Mechanical Maintenance Solutions Pty Ltd*.[25]

Other appeal grounds

[83] Because we have upheld grounds 3(b) and 4 of the appeals, we consider it is necessary for us to quash the decisions and re-determine the application for approval of the Agreements. In that circumstance, we do not consider that it is necessary for us to give consideration to grounds 1 and 2 of the appeals. However, we make the following observations arising from those grounds:

(1) The Deputy President issued his decisions to approve the Agreements on 19 December 2019 on the basis that he would issue his reasons at a later time. This course was inappropriate for the reasons stated in *Re Hungry Jack's National Enterprise Agreement 2019*.[26] There was no urgency in the matter at the time the decisions were made beyond the fact that almost eleven months had passed since the Deputy President had been allocated the matters for determination.

(2) Having taken this course, the obligation of the Deputy President was to issue reasons *for the decisions*. Those decisions did not concern the interlocutory ruling made by the Deputy President on 14 May 2019 as to the role he would permit the unions to play in the proceedings. No party had sought reasons for this ruling. It was not the subject of any appeal at the time, nor was it challenged in the appeals lodged by the unions on 8 and 9 January 2020 prior to the publication of the reasons. Accordingly there was no necessity to provide reasons for this interlocutory ruling at all. Nonetheless, in the reasons published by the Deputy President, ten pages were devoted to the issue of whether the unions should be heard in the proceedings.

(3) It is difficult to characterise the "reasons" given for the interlocutory ruling as actually being reasons for this decision. The ruling, it must be remembered,

[25] [2020] FWCFB 1918

[26] [2020] FWCFB 1693 at [43]-[44]

was to allow the unions to participate in the proceedings with the exception that the CFMMEU's request for permission to briefly cross-examine witnesses was refused. The unions were otherwise permitted to make numerous written submissions and fully participate in the hearing. However the "reasons" primarily concern why the unions should *not* have been permitted to appear. This is best illustrated by paragraph [59] of the reasons, in which the Deputy President set out in tabular form the factors he had taken into account in exercising his discretion under s 590 of the FW Act concerning the unions' application to be heard (not extending to cross-examination). The table, if we understand it correctly, indicates that of the 16 identified factors, none weighed in favour of the application, 4 were neutral and 12 weighed against the application. As was stated in the *Hungry Jack's* decision, "...in order to be reasons for a decision, they must be the reasons formulated in the mind of the decision-maker as justifying the decision at the time the decision is made". The "reasons" are not of this nature and accordingly give rise to legitimate inquiry as to the motivation for their inclusion.

(4) The reasons, both in relation to the interlocutory ruling and more broadly, are replete with criticism concerning the participation of the unions in the proceedings, despite the fact that the unions participated only because and to the extent of *the Deputy President's own interlocutory ruling*. In particular, we consider that the aspersions of obstructionism and delay on the part of the unions to have been gratuitous, particularly in circumstances where the Deputy President took an entire year to complete his consideration of the applications before him.

[84] In relation to appeal ground 3(a), it is also not necessary in the circumstances for us to state any final conclusion as to whether the Deputy President erred in his consideration under s 186(2)(c). It is sufficient to say that there was a proper basis for a concern that the approval requirement in s 186(2)(c) was not met. We have earlier set out s 55(1) which provides, relevantly, that an enterprise agreement must not exclude the NES or any provision of the NES. Where the provisions of an agreement would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes an exclusion of the NES prohibited by s 55(1).[27] Section 55(1) is subject to a number of exceptions and qualifications set out in the remainder of s 55, but there was no contention that any of these were applicable here. We consider that there is a reasonably arguable basis for concluding that the Agreements contravene s 55(1) in relation to hours of work and public holidays, as submitted by the CFMMEU.

[85] In relation to hours of work, the relevant provision of the NES is s 62. Section 62(1) provides, in respect of full-time employees, that an employer must not require an employee to work more than 38 hours in a week unless the additional hours are reasonable. Section 62(2) provides that an employee may refuse to work additional hours if they are unreasonable. Section 62(3) sets out a range of matters that must be taken into account in determining whether additional hours are reasonable or unreasonable for the purpose of s 62(1) and (2). Section 62 operates subject to s 63, which relevantly provides that an enterprise agreement may include terms allowing for the averaging of ordinary hours over a specified period.

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[27] *Canavan Building Pty Ltd* [2014] FWCFB 3202, 244 IR 1 at [36]

[86] It is clear from clauses 9.1-9.3 and clause 1 of Schedule 1 of the Agreements that, subject to clause 9.5, employees under each of the Agreements are required to work specified rostered hours in excess of an average of 38 per week, and are to be paid a fixed salary on the basis of working that roster. Because the payment structures in the Agreements do not provide for any rate of payment other than the annual salary payable for working the full roster, the Agreements arguably do not contemplate that an employee may in any circumstances reasonably refuse to work hours additional to an average of 38 per week. The deemed "acknowledgement" of employees in the first sentence of clause 9.3 of each Agreement cannot, we consider, be effective to render the working of additional hours reasonable if it would otherwise be unreasonable under s 62 having regard to the factors in s 62(3), and on one view may be read as demonstrating that the Agreements do not allow for any circumstance in which a refusal to work the additional hours required by the specified rosters would be reasonable. An available interpretation of these provisions therefore is that employees must in all circumstances work the hours in the rosters specified in Schedule 1 of each of the Agreements, and are to be paid on the basis of this requirement. If so, that would be directly inconsistent with and thereby exclude s 62, and would consequently constitute a contravention of s 55.

[87] In respect of public holidays, the relevant NES provision is s 114. Section 114(1) provides that an employee is entitled to be absent from their employment on an applicable public holiday (as defined in s 115). Section 114(2) provides however that an employee may request an employee to work on a public holiday if the request is reasonable, and s 114(3) provides that an employee may refuse such a request if the request is not reasonable or the refusal is reasonable. Section 114(4) sets out a number of matters which must be taken into account in determining the reasonableness of a request or refusal. They include, among other things, the nature of the employer's workplace or enterprise (including its operational requirements), the nature of the work performed by the employee, and the employee's personal circumstances including their family responsibilities.

[88] Clause 10.1 of the Agreements constitutes a requirement for employees to work on public holidays which fall on their rostered work days. The deemed "acknowledgment" of employees referred to in the second sentence may arguably be read demonstrating that employees are not entitled to reasonably refuse to work on a public holiday. Further, because the deemed reasonableness of the requirement is founded entirely on the operational requirements of the employer, this makes available the interpretation that no account is to be had of the other matters in s 114(4), including the particular family and other personal circumstances of each individual employee. If so, clause 10.4 would exclude the right in s 114(3) to reasonably refuse to work on a public holiday and would thus contravene s 55(1).

[89] We do not propose to deal with ground 5, given that we have separately concluded in respect of ground 4 that the Deputy President erred in his satisfaction that the approval requirement in s 186(2)(a) had been complied with and because, for the reasons set out below, it is preferable that we not express any view about it.

Conclusion

[90] As a result of the errors in the decisions and reasons we have identified, we consider that permission to appeal should be granted, the appeals upheld, and the decisions quashed.

[91] We will re-determine the applications for approval of the Agreements ourselves. We indicate that we have the following concerns as to whether the approval requirements in ss 186 have 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.

(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.

(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.

[92] We will invite OS MCAP and OS ACPM to respond to these concerns, including by proposing undertakings, and we will permit the unions to make submissions in reply.

[93] We will also reconsider for ourselves whether the element of genuine agreement in s 188(1)(c) has been satisfied, and we will invite further submissions on this issue. This is necessary because some of the conclusions we have stated above may have implications for s 188(1)(c). We will invite further submissions about this.

[94] We make the following orders and directions:

(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.

DECISION OF DEPUTY PRESIDENT COLMAN

[95] I agree with the majority that permission to appeal should be granted and that the appeal should be upheld, but on a narrower basis.

[96] Appeal ground 3(b) contended that the Deputy President failed to properly consider, and incorrectly determined, the question of whether the Agreements passed the better off overall test (BOOT). The majority decision finds two fundamental errors in the Deputy President's treatment of the BOOT. The first concerns the margin by which the rates of pay in the Agreements exceed those in the awards. The Deputy President's analysis of the BOOT appears to be based on the summary of the terms and conditions of the two Agreements that is found at paragraphs [13]-[14] and [20]-[21] of the decision, compared with the summary of the two awards that is set out in the table at [24] of the decision. At [13] the Deputy President states that the rates of pay for the Production Agreement are between 54.83 percent and 125.84 percent above the corresponding award, and at [22] he states that the rates of pay for the Maintenance Agreement are between 70 and 115 percent above the award.

[97] These margins in fact reflect the difference between the hourly rates in the Agreements for the prescribed roster and the *ordinary time* rates in the Awards, not the difference between the total remuneration under the Agreements and the Awards for performing the same work. In order to be meaningful comparators, the Award rates would need to be adjusted to include penalties and loadings. To the extent that the Deputy President considered the margins he cited were the actual differences between remuneration under the Agreements and the Awards and relied on these margins in conducting his BOOT analysis, he was in error. But the question arises as to whether it was an error of consequence.

[98] It would not be an appealable error for a member to conclude that an enterprise agreement passed the BOOT by a greater margin than was in fact mathematically the case, provided that the higher margin was not relied upon to offset other detriments. If the correct mathematical analysis shows that employees are ten dollars a day better off under the agreement than under the award, it does not matter that a member might have concluded that they are fifteen dollars a day better off. An evident calculation error in respect of the margin might call into question the validity of the analysis that was undertaken by the member and elicit a re-examination of the BOOT on appeal, however unless the re-examination establishes that it was not open to the member to be satisfied that the agreement passed the BOOT then the calculation error will be inconsequential and there would be no utility in granting permission to appeal in respect of it. The alternative mathematical analysis presented by the appellants has not established that the Agreements do not pass the BOOT in relation to employees working the prescribed roster. In these circumstances, I do not consider that the Deputy President's misapprehension, or misstatement, of the percentage difference in remuneration for the prescribed roster between the Agreements and the Awards was of itself an appealable error.

[99] The second fundamental error identified by the majority is that the Deputy President erred by failing to consider the implications for the BOOT of the fact that the Agreements do not specify an annual salary, or a weekly or hourly rate of remuneration, by which the BOOT could be assessed against other rosters that might be worked under the Agreements. Clause 2.1 in the schedule to each of the Agreements provides that, where a new roster is introduced, the annual salary paid in respect of that roster will be calculated using "*the same principles used to calculate the Annual Salary set out in this Agreement*". The 'principles' are not defined or explained in the Agreements. Therefore, the application of the principles to any new rosters cannot be verified by the Commission, and it is not possible to identify the actual remuneration that employees will receive for working other rosters. But what is relevant for BOOT purposes is that the remuneration for any new roster exceed what would have been payable under the award for the same work, and the schedules to the Agreements confirm that

this will be the case. Clause 2.1 in the schedule to each of the Agreements states that the annual salary for an employee working on a new roster "*will be greater than what would be paid to the Employee working that roster if any Award applied to them.*"

[100] I do not consider that, because the actual salary payable to employees working new rosters is unknown, it is impossible for the Commission to undertake the global comparison required by the BOOT. Rather, the Commission could only validly assume that the remuneration for a new roster would exceed the award rate by one cent and conduct the global comparison on this basis. Of course, if any greater margin were needed to offset detriments, such as the non-application of particular award conditions, the consequence of the Agreements not specifying the margin, or articulating the formula by which the margin can be identified, may be that the Agreements do not pass the BOOT. However, because of the guarantee in the schedules that the remuneration for new rosters will be greater than what the employee would have been paid for working that roster if the applicable award had applied, I do not see any fundamental error in the Deputy President having assessed the BOOT without the benefit of any ascertainable *actual* rate of pay for those rosters.

[101] The BOOT is concerned with ensuring that employees covered by an enterprise agreement remain above the safety net. There would be nothing wrong with an agreement providing a rate of pay that is to be determined at the employer's discretion, provided that in all cases it will exceed the award rate for the same work. However, the reliable margin by which the agreement rate exceeds the award rate will then be perilously narrow and of limited use in compensating for any other detriments in the agreement vis-à-vis the award.

[102] The union appellants contended before us that there were various benefits accruing to employees under the awards which were not reflected in the Agreements. And the companies' F17 statutory declarations acknowledge that there are a range of provisions in the Agreement that are less favourable than those of the underpinning awards, which were set out in a table in Schedule 3 to each statutory declaration. Schedule 2 to those declarations also shows provisions in the Agreements that are more generous than those in the awards. It is clear enough the Deputy President had regard to the significance of these detriments and benefits, as the decision deals at some length with the content of the respective instruments. However, it does not appear to me that the Deputy President took into consideration that the remuneration for new rosters introduced under the schedules in the Agreements reliably exceeded the awards by the thinnest of margins.

[103] The Deputy President said in his decision that he rejected the contentions raised by the AMWU that the new rosters could not be properly costed on the same 'principles' used to arrive at those for the prescribed roster that appears in Schedule 1, and noted that the principles were based on the terms and conditions contained in the awards (at [126](b)). He also noted that it had been explained to employees that the effect of the proposed enterprise agreements was to "incorporate into annual salaries payments for hours worked under the modern awards (including as to penalties, allowances, overtime, public holidays)" (at [102](H)).

[104] From this it would appear that the Deputy President considered that he could assume a 'costed' or higher actual rate of pay for new rosters created under the Agreements. Although the actual rate of pay for new rosters, applying the principles that are referred to but not set out in the Agreements, might perhaps be supposed to generate remuneration that is similar in scale to that of the roster appearing in the schedule, there is nothing in the terms of the

Agreements that guarantees any particular outcome above the award guarantee in clause 2.1 of the schedule. The BOOT compares the application to employees of the enterprise agreement and the relevant award, and it is their enforceable terms that must be considered. I do not consider that there was a proper basis for the Commission to conduct the BOOT on the basis of there being a higher actual rate of pay for new rosters, absent a provision in the Agreements or undertakings confirming a particular rate or some formula or process by which that rate could definitively be calculated.

[105] It may have been the intention to base the remuneration for new rosters on the hourly rate of pay derived from the annual salary for the prescribed roster in Schedule 1 and take into account any applicable award loading, penalty and allowance that would otherwise have attached to the relevant working arrangements. Such a framework for the setting of actual salaries for new rosters would have been ascertainable and capable of being relied upon for the purposes of the BOOT. But there is nothing in the text of the Agreements or any undertaking to this effect. I note that clause 7.2 of the Agreements states that an employee's annual salary "*takes into account … compensation for working on shift rosters which cover public holidays, afternoon shift, night shift and any other applicable allowances or payments applicable to the Employee's roster*". But these words fall short of delivering the postulated framework, as no mention is made of the application of the *award* loadings and penalties that would otherwise apply, and to "take these matters into account" does not guarantee their application to the calculation. In this regard, clause 7.2 stands in contrast to clause 2.1 in Schedule 1 of the Agreements, which contains a clearly articulated guarantee referable to the awards: the salary earned will be greater than what would be paid to an employee working that roster if any award had applied to them. The purpose of clause 2.1 is to ensure the rate remains above the award, but the point of interpretative significance is that this is a definitive and enforceable "formula" referable to the award, and clause 7.2 is not.

[106] If there were no question of there being any other less favourable provisions under the Agreements than under the awards, it would not matter that the Deputy President did not take into account the very narrow margin by which the remuneration for new rosters reliably exceeded the award rate. There are other benefits provided to employees under the Agreements, and it might perhaps have been open to the Deputy President to conclude that these offset the detriments, irrespective of the narrow remunerative margin. However, it cannot be concluded that the Deputy President would have reached the same conclusion in relation to the BOOT, had he taken the narrow margin into account. On this basis, I consider that the Deputy President did not take into account a relevant consideration, and that this error cannot be regarded as one of no consequence. I would therefore uphold ground 3(b) to that extent.

[107] I briefly address some of the other contentions of the appellants in relation to the BOOT. The unions submitted that a production technician working the existing roster in coal operations under the Production Agreement would receive less remuneration than under the *Black Coal Mining Industry Award*. However, the companies had provided calculations with their written submissions to the Deputy President (Attachments C and D, submissions dated 6 March 2019), which indicated that technicians would receive higher remuneration under the Production Agreement, and although these calculations are not reflected in the Deputy President's decision, they provided a persuasive foundation from which it was open to the Deputy President to reach a state of satisfaction that the Agreement passed the BOOT. It has not been demonstrated that these calculations are incorrect. The alternative calculations submitted to us in the appeal by the CFMMEU, which showed the production technician not

to be better off under the Production Agreement, were based on the award rates of pay in operation on 1 July 2019, rather than those that applied "at the test time" (when the Production Agreement was lodged). For the reasons set out in the majority decision, movements in the award rate after the test time are not relevant to the assessment of the BOOT and for this reason the union's calculations are incorrect.

[108] The unions also contended that casual employees would not be better off overall if the Agreements applied to them than if the relevant awards applied. It was submitted that the Agreements do not contain a stand-alone hourly rate for casuals, and that this created an impediment for the proper assessment of the BOOT in relation to casuals. Although no rate is expressly set out in the Agreements, I do not consider there to be any difficulty in identifying it. The rate is ascertainable by dividing the annual salary by 52 and then again by the hours in the relevant roster and applying the 25 per cent loading. The companies confirmed in the appeal that this is how they determine the rate. Of course, for new rosters the BOOT problem identified above applies equally to casuals. But what of the existing roster?

[109] If one considers then the casual rate of pay for the classification of a non-coal production technician under the Production Agreement, the rate for a casual is $51.51, which exceeds the ordinary time rate for a Level 4 casual employee under the Mining Award. The Agreement rate is less than the award rate when the casual is working more than three hours of overtime, or on a Saturday afternoon or Sunday, where a penalty of 200 percent or more applies. However, when a casual is working the continuous roster prescribed in Schedule 1, the amount of time worked on a weekend will be limited, because five sevenths of the work on the roster is performed on weekdays. If another roster is worked, the casual rate would presumably be deducible from the annual salary for that roster, but as discussed above, that is not ascertainable under the terms of the agreement, and one would need to assume the narrowest margin in excess of the award. However, I do not consider there is any additional BOOT concern for casuals working these rosters, because the salary must, according to the terms of clause 2.1 in Schedule 1, be greater than what the employee would have been paid under the award, which would include any applicable award penalties.

[110] In my view it is clear that the award guarantee in clause 2.1 applies to casuals who are deployed on rosters under Schedule 1. Although it is somewhat inapt to speak of an annual salary for casuals, it is obvious that there is intended to be a casual rate of pay, because clause 5.3 speaks of casuals' "hourly rate" and a loading of 25%, and the only source from which to derive it is the relevant annual salary. If the casual employee's hours are less than a full roster, the third undertaking applies and employees must receive "*greater than what would be paid to the Employee working that period if a modern award applied to them.*" This would include overtime, weekend and public holiday penalties. In addition, Schedule 1 in each Agreement states that any unrostered overtime under the Agreement is paid at double time.

[111] For these reasons, I consider that, subject to the BOOT concern I have already identified in connection with employees working on new rosters, casual employees will be better off under the Agreements than if the awards applied to them.

[112] Then there is the question of whether part-time employees are better off overall under the Agreements than the awards. Here we are concerned with prospective employees, as the F17 statutory declarations reveal that none of the employees covered by the Agreements at the time the declarations were made was employed on a part-time basis. Clause 5.2 of each Agreement states simply that part-time employees will receive pro rata leave and other

entitlements on the basis of a 35 ordinary hour week. There are no parameters around the working arrangements of part-time employees of the kind found in the awards, and in particular no provision that defines when a part-time employee will be paid overtime. Under the Awards, time worked beyond the fixed ordinary hours of work attracts overtime rates. To the extent that a new part-time roster might be promulgated under Schedule 1, that roster would attract the "award guarantee" discussed above. But otherwise, it is difficult to see how it could be concluded that prospective part-time employees would be better off overall under the Agreements than under the awards.

[113] This point does not appear to have been raised before the Deputy President. Nevertheless, if it is apparent to a Full Bench that a member could not have been satisfied of one of the approval requirements, there will be an error of jurisdiction that may be corrected on appeal. However, in this case, it does not appear that the point was raised in the appeal either, and therefore I would seek submissions from the respondents before forming a concluded view on the matter. Given the disposition of the appeal, and the proposed orders, the companies will have an opportunity to make submissions on this matter in the rehearing.

[114] The unions also contended that the Deputy President erred in reaching a state of satisfaction that the employers had taken all reasonable steps to explain the agreement and the effect of its terms to employees.

[115] The meaning of "all reasonable steps" in s 180(5) has been addressed in various authorities and I do not recite them.[28] A requirement that a person take 'all reasonable steps' does not mean that the person must take each and every conceivable step that might be reasonable. To "take all reasonable steps" is a turn of phrase that means to take the steps that are reasonably required. There may be hundreds of potentially reasonable steps, any one or more of which might amount to "all reasonable steps", depending on the circumstances. Reasonable minds might differ as to what this might entail. In an appeal, the fact that a Full Bench might have reached a different conclusion about the employer's compliance with s 180(5), or might consider that an employer could have adopted a different or further step in the explanation process, does not speak to error on the part of the member at first instance. However, a significant omission in the explanation may lead a Full Bench to conclude that it was not open to a member to be satisfied that the employer complied with s 180(5), or that a relevant consideration was not taken into account.

[116] 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

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[28] See for example the summary in *AWU v Rigforce Pty Ltd* [2019] FWCFB 6960 at [35]-[36]

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.

[117] In this regard, I consider that the decision was affected by a second error, constituted by a failure properly to have regard to a relevant consideration, namely the omission of an explanation to employees of the effect of the principles that would be applied to the setting of salaries for new rosters. I would uphold the fourth ground of appeal to this extent.

[118] I am not persuaded that the unions' other contentions concerning the companies' explanation of the Agreements and the effect of their terms have merit. The differences between the Agreements and the Awards were addressed in some detail in the companies' explanation. I do not consider there was any reason to explain to employees' differences between the Agreements and agreements that apply at other group entities. And I do not accept the contention that there was a deficiency in the employers' explanation of clause 2.2 of the Agreement, which contains an exclusion from the Agreements' coverage. The effect of clause 2.2 is that the Agreements will not cover employees where there is a site-specific agreement which covers and applies to them. The companies explained to employees that such site-specific agreements might be "*better, the same or less beneficial*" than the current agreements. I agree with the majority that this was a statement of the obvious. Even if, as the unions contended, this statement also connoted that employees covered by the Agreements could negotiate such site-specific agreements and be covered by them, there is nothing misleading about it. Employees could do precisely this, and if a new site-specific agreement were made covering employees covered by the Agreements, then on the terms of exclusion in clause 2.2, the Agreements would cease to cover and apply to them. The agreement interaction provision in s 58 of the Act would not be engaged.

Other appeal grounds

[119] I agree with the majority that it is not necessary to deal separately with ground 5 and that ground 6 should be rejected for the reasons given at [36] in *CFMMEU v Mechanical Maintenance Solutions Pty Ltd*.[29] I agree that because the appeal has been upheld it is not necessary for us to consider grounds 1 and 2. I concur with the majority's observations about these appeal grounds. In particular, I consider that there was no basis for the Deputy President to criticise the unions that participated in the proceedings.

[120] In relation to appeal ground 3(a), which concerns whether the Deputy President erred in his consideration of s 186(2)(c), I agree that there would be a basis for the Commission to have a "concern" that the Agreements exclude relevant provisions of the National Employment Standards (NES), although I am not convinced that they do in fact exclude the NES. Section 190(1) states that if the Commission has a concern that an agreement does not meet the requirements set out in sections 186 and 187, it may approve the agreement if it is satisfied that an undertaking accepted by the Commission under s 190(3) "meets the concern". The Commission may harbour a concern that an approval requirement might not be met and seek an undertaking to remove doubt. It would not need first to reach a state of satisfaction that the requirement would not otherwise be met. This interpretation is in keeping with the ordinary meaning of a "concern" and is one that is compatible with the objects of the Act and Part 2-4.

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[29] [2020] FWCFB 1918

[121] In this case, there is at least a cogent argument put by the appellants, sufficient for it to be open to the Commission to have a "concern", that the provisions of the Agreements concerning hours of work and working on public holidays exclude s 62 and s 114. On the other hand, there is a respectable counterargument that the Agreements do not say, or signify, that employees cannot refuse to work the additional or public holiday hours in a particular case if they are unreasonable in the circumstances, and, by their various references to reasonableness and to particular statutory considerations that bear on the question of reasonableness (notice of the requirement to work, operational requirements, whether additional remuneration is paid etc.), the provisions in fact acknowledge and anticipate the application of the NES and seek to engage with points of relevance to future disagreements about whether the hours should be worked or not.

[122] The stipulation of an employer's working requirements does not necessarily impliedly exclude a worker's NES right not to work unreasonable additional hours. Specified working arrangements will necessarily be worked in real time, subject to the ebb and flow of daily life. If a worker has personal circumstances, if there is a safety issue that arises, if there is some other matter that would make the requirement to work the additional hours unreasonable, it is to be expected that they will invoke NES rights. Many enterprise agreements contain working arrangements that assume an ordinary pattern of work based on more than 38 hours. For example, in the construction sector, enterprise agreements typically prescribe working arrangements based on a 50 hour week, reflecting the common practice in the industry. There is nothing wrong with such working arrangements being set out in an enterprise agreement, provided the agreement does not oust a provision of the NES. True it is that the Agreements do not expressly state that the working arrangements operate subject to the NES. Such "NES precedence clauses" are certainly a good idea, because they avoid arguments of the kind that arose in the matters before the Deputy President and remain contentious on appeal.

[123] In conclusion, I would grant permission to appeal and uphold the appeals on the bases identified above. The Full Bench should rehear the applications for approval of the Agreements. I concur with the orders and directions proposed at [94].

VICE PRESIDENT

Appearances:

Mr S Crawshaw SC of counsel with *E Sarlos* for the Construction, Forestry, Maritime, Mining and Energy Union.
Mr S Crawford for the Australian Workers' Union.
Ms Y Abousleiman for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.
Mr K Scherf for the Australian Manufacturing Workers' Union.
Mr I Neil SC with *Mr Y Shariff* of counsel for OS ACPM Pty Ltd and OS MCAP Pty Ltd.

Hearing details:

2020.
Sydney (via telephone):
23 March.

Final written submissions:

Respondents' outline of submissions in response, 31 March 2020.
CFMMEU's submissions in reply, 3 April 2020.

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Matter number	**Decision appealed**	**Appellant**	**Respondent**
C2020/140	[2019] FWCA 8595	CFMMEU	OS ACPM Pty Ltd
C2020/141	[2019] FWCA 8601	CFMMEU	OS MCAP Pty Ltd
C2020/144	[2019] FWCA 8595	AWU	OS ACPM Pty Ltd
C2020/145	[2019] FWCA 8601	AWU	OS MCAP Pty Ltd
C2020/146	[2019] FWCA 8595	AMWU	OS ACPM Pty Ltd
C2020/156	[2019] FWCA 8595	CEPU	OS ACPM Pty Ltd
C2020/157	[2019] FWCA 8601	CEPU	OS MCAP Pty Ltd