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 SYDNEY, 12 NOVEMBER 2020
DEPUTY PRESIDENT COLMAN

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

[1] In a decision issued on 8 May 2020[1] (first decision), this Full Bench upheld appeals made by the CFMMEU, the AWU, the CEPU and the AMWU against a decision of Deputy President Boyce issued on 19 December 2019 to approve the *Operations Services Production Agreement 2018* (Production Agreement) and the *Operations Services Maintenance Agreement 2018* (Maintenance Agreement) (collectively "Agreements"), quashed the Deputy President's decision, and decided to re-determine the applications for approval of the Agreements made by OS MCAP Pty Ltd (OS MCAP) and OS ACPM Pty Ltd (OS ACPM) respectively. In respect of the re-determination of the applications, a plurality (Hatcher VP and Booth DP) expressed the following concerns as to whether the approval requirements in s 186 of the *Fair Work Act 2009* (FW Act) had been met:

> "(1) *Section 186(2)(a)* – We have a concern that the element of genuine agreement in s 188(1)(a)(i) is not satisfied because of non-compliance with s 180(5), on the basis of our reasons in paragraphs [75]-[80] above.

[1] [2020] FWCFB 2434

(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."[2]

[2] The Full Bench made directions in the first decision for OS MCAP and OS ACPM to file written responses to the above concerns, including any proposed undertakings, and for the appellant unions to file submissions in reply. The Full Bench also made directions that the appellant unions file any submissions that they wished to make concerning whether any impediment to approval of the Agreements arose under s 188(1)(c), and for OS MCAP and OS ACPM to file submissions in reply.

[3] In a further decision issued on 13 July 2020[3] (second decision), the Full Bench dealt with the responses and further submissions received pursuant to these directions. In a majority decision (with Colman DP dissenting), we concluded that OS MCAP and OS ACPM had offered undertakings which either wholly or substantially met the second and third categories of concern set about above relating to ss 55 of the FW Act and the BOOT. However, we concluded that the first category of concerns in relation to s 186(2)(a), arising from non-compliance with s 180(5), had not been met by the undertakings proposed by OS MCAP and OS ACPM. We said:

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

[4] OS MCAP and OS ACPM provided advice on 17 July 2020 that they wanted a further opportunity to address the remaining concerns at a hearing. Accordingly a further hearing was conducted on 31 July 2020. After it was identified that the submissions of OS MCAP and OS ACPM had not addressed all of the outstanding issues, the parties were permitted to file further written submissions and a further hearing was conducted on 11 September 2020.

The issues to be addressed

[5] There are four issues which we address in this decision. They relate to undertakings proposed by OS MCAP and OS ACPM in response to findings we made in the first decision that OS MCAP and OS ACPM failed to comply with the "*genuinely agreed*" approval requirement in s 186(2)(a) of the FW Act, in that they did not take all reasonable steps to

[2] Ibid at [91]

[3] [2020] FWCFB 3669

explain the effect of certain provisions of the Agreement as required by s 180(5). The specific matters that were the subject of these findings were as follows:

(1) The salary rates under any alternative rosters introduced pursuant to clause 2.1 of Schedule 1 of each of the Agreements (see paragraphs [75](3) and [76] of the first decision) (**alternative rosters concern**).

(2) The hourly rates of pay for part-time employees under clause 5.2 of each of the Agreements (see paragraph [75](1) of the first decision) (**part-time rates concern**).

(3) The hours of employment of part-time employees under clause 9.4 (see paragraph [75](1) of the first decision) (**part time hours concern**).

(4) The hourly rates for casual employees under clause 5.3 of each of the Agreements (see paragraphs [75](2) and [76] of the first decision) (**casual rates concern**).

[6] There is a fifth issue arising from the contention advanced by the appellant unions that the Agreements also did not satisfy s 186(2)(a) because, for the purpose of the s 188(1)(c) element of the "*genuinely agreed*" requirement, there are reasonable grounds for believing that the Agreements have not been genuinely agreed to by the employees who voted for them (**genuinely agreed issue**). For reasons explained later, it is unnecessary for us to deal with this issue.

[7] We will deal with each of these issues in turn.

Alternative rosters concern

[8] In the first decision, we said that the explanation given in relation to the salary rates applicable when alternative rosters are worked pursuant to clause 2.1 of Schedule 1 of each of the Agreements merely repeated the text of the provision and left unknowable what a person's remuneration will be, or how it will be calculated, under any new roster that might be introduced. In the second decision, we determined that undertakings proposed by OS MCAP and OS ACPM to that point, which were primarily directed at dealing with concerns about compliance with the better off overall test (BOOT) approval requirement, did not address our concern relating to non-compliance with s 180(5). We went on to say:

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

[9] In response to the alternative hours concern, OS MCAP and OS ACPM have in respect of both Agreements now offered amended undertakings as follows:

In relation to the Production Agreement:
"The Company undertakes that it will not exercise its discretion under clause 9.5 of this Agreement to require Employees to work rosters other than those specified in clause 1.2. of Schedule 1 of this Agreement."

In relation to the Maintenance Agreement
"The Company undertakes that it will not exercise its discretion under clause 9.5 of this Agreement to require Employees to work rosters other than those specified in clause 1.1. of Schedule 1 of this Agreement."

[10] OS MCAP and OS ACPM submit that the above undertakings will meet any concern about non-compliance with s 180(5), as they will render moot any failure to explain the remuneration outcomes for alternative rosters. They also submit that it can be accepted that the proposed undertakings meet the requirement of s 190(3) because they are not likely to cause financial detriment to any employee covered by the Agreements and do not result in substantial changes to the Agreements. In respect of the latter proposition, OS MCAP and OS ACPM submit:

- the word "*substantial*" is concerned with change that is transformative of the agreement and raises concerns that the changes may have affected the way in which employees chose to vote in approving the Agreements;

- clause 9.5 of the Agreements provide OS MCAP and OS ACPM with the discretion to, amongst other things, introduce new rosters;

- there is nothing in the Agreements that requires OS MCAP and OS ACPM to exercise that discretion and nothing that constitutes an explicit or implicit promise that they will do so;

- the undertakings leave the discretion in clause 9.5 in place, and thus effect no, or alternatively, no substantial, change to the Agreements;

- there are numerous examples of the Commission accepting undertakings which provide that a particular clause of an enterprise agreement will have no effect or that the employer will not seek to exercise particular rights or powers under the enterprise agreement, and which were found not to be precluded by s 190(3);

- there is a possibility that an alternative roster may be the subject of individual flexibility arrangements (IFAs) pursuant to clause 19 of the Agreements, or the subject of a variation of the Agreements under Div 7 of Pt 2-4 of the FW Act; and

- both possibilities always apply to every enterprise agreement, and any such IFA or variation would necessarily have to be made subject to all the protections provided for in the FW Act.

[11] We will assume for present purposes that the undertakings proposed in response to the alternative rosters concern are capable of acceptance under s 190(3). As to s 190(3)(b), we accept that the undertakings would effect no textual change to the Agreements. We do not necessarily accept however that s 190(3)(b) is concerned with changes to Agreements that are

purely textual in nature. For example, if an undertaking is proposed under which an employer says it will not exercise a discretionary power conferred by an agreement which, if exercised, would benefit particular employees (such as discretion to promote relevant employees to a higher classification with a higher rate of pay), then arguably such an undertaking would significantly alter the nature of the bargain upon which employees voted and offend s 190(3)(b). Nevertheless we will proceed on the basis that the undertakings proposed are not of this nature.

[12] Under s 190(2) of the FW Act, in relation to an enterprise agreement about which the Commission has a concern that it does not meet the requirements set out in sections 186 and 187, the agreement may be approved on the basis of an undertaking accepted under s 190(3) only if the undertaking meets the concern. For the following reasons, we do not consider that the undertakings proposed meet the alternative hours concern.

[13] Under both of the Agreements, the function of Schedule 1 is to specify the rates of salary payable to employees under the Agreements. Clause 1 of Schedule 1 in each Agreement prescribes the salaries payable when employees work one specified type of roster. Clause 2 of Schedule 1 in each Agreement then deals with the salary rates payable if a "*new*" roster is introduced - that is, a roster with a different number and/or pattern of working hours. In this respect, clause 2 of Schedule 1 of the Agreements provide: "*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*." As discussed in the first and second decisions, the Agreements do not prescribe any base hourly rate of pay from which remuneration can be calculated or derived. The "*same principles*" referred to in clause 2 of Schedule 1 are not specified or described in the Agreements, were not provided or explained to the employees who voted upon the Agreements, and have not been provided or explained to us. The explanation of clause 2 of Schedule 1 provided to employees pursuant to s 180(5) merely repeated the words of the provision. For these reasons, we concluded that there was a failure to explain the effect of clause 2 of Schedule 1 of the Agreements constituting non-compliance with s 180(5).

[14] The undertaking we contemplated in paragraph [30] of the second decision, set out above, was one whereby there would be no capacity for OS MCAP or OS ACPM to have employees working on rosters other than those prescribed in clause 1 of Schedule 1 of their respective Agreements. If that was the case, then the failure to explain the effect of clause 2 of Schedule 1 of each of the Agreements would truly be rendered moot because there would be no possibility of employees working rosters pursuant to that provision.

[15] The undertakings proposed by OS MCAP and OS ACPM do not achieve that outcome. They operate with respect to clause 9.5 of each of the Agreements, which provides:

> 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] Clause 9.5 relevantly confers on the employer the authority to unilaterally determine each employee's working hours and roster cycles. The effect of the proposed undertakings

would be that employees could not be required to work alternative rosters pursuant to clause 2 of Schedule 1 by use of the power conferred by clause 9.5.

[17] If clause 9.5 constituted the only pathway to employees working alternative rosters pursuant to clause 2 of Schedule 1, then the undertakings would meet our concern. But it does not. The submissions of OS MCAP and OS ACPM appear to acknowledge that, at least through the use of IFAs pursuant to clause 19 of each of the Agreements (which incorporates the model flexibility term set out in Schedule 2.2 of the *Fair Work Commission Regulations 2009*), rosters other than those prescribed by clause 1 of Schedule 1 could be introduced. The model flexibility term requires that the terms of an IFA must result in the employee being better off overall than if no IFA was made. In the absence of an IFA, an employee would, if the undertakings were accepted, default to the roster and the salary prescribed by clause 1 of Schedule 1 of the relevant agreement. Whether an employee is better off overall under an alternative roster under an IFA than under the default roster and salary provided for in clause 1 of Schedule 1 would be impossible to determine without knowledge of the "*principles used to calculate the Annual Salary set out in this Agreement*" referred to in clause 2. This is because, in the absence of any prescription of hourly rates of pay, the only way by which one could extrapolate from the default salary in clause 1 to establish a baseline salary for an alternative roster against which the better off overall assessment can be made is by application of the clause 2 principles. As earlier discussed, the clause principles were never provided or explained to the employee who voted on the Agreements. Thus they could not have been able to know when voting what level of salary was permissible for any alternative roster under an IFA.

[18] IFAs are not the only way by which alternative rosters could be introduced. The most straightforward way they could be introduced would be for new employees through their contract of employment. This is not just a theoretical possibility: the information before us is that OS MCAP and OS ACPM together now employ around 2000 persons (up from 74 at the time the Agreements were made), and "*[s]ome of them*" are employed on rosters other than those specified in the Agreements.[4] Where an employee is engaged pursuant to a contract of employment under which they are to work according to an alternative roster, no use of the power in clause 9.5 of the Agreements would be necessary to require them to do so. The lack of an explanation as to the effect of clause 2 of Schedule 1 of the Agreements means that the employees who voted upon the Agreements had no capacity to know what employees in that position would be paid.

[19] Accordingly the Agreements cannot be approved on the basis of the undertakings proposed because they do not meet our alternative hours concern.

Part time rates concern

[20] In the first decision, we expressed a concern that, in relation to clause 5.2 of the Agreements, OS MCAP or OS ACPM did not explain its effect in that 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 the second decision,

[4] Transcript 31 July 2020, PNs 19-22. It may also be observed that the website for BHP Operations Services (the trading name for OS MACP and OC ACPM) states, under the heading "*What does the work roster look like?*": "*Primarily the roster offered will be a 7on/7off roster. For some Maintenance roles the roster will flex with Shutdown schedules but provide a stable salary as part of the package. Some of the options available could include, but are not limited to: night-shift only, day-shift only, part time, job share, staggered shifts, casual, 2on/1off or 1on/2off shifts.*"

we concluded that undertakings proposed by OS MCAP and OS ACPM to address BOOT concerns would not meet our concerns about compliance with s 180(5) in respect of part-time employees.

[21] OS MCAP and OS ACPM submit that the undertaking it proposed to meet the alternative rosters concern would also render moot its failure to explain remuneration outcomes for alternative rosters under clause 2 of Schedule 1 of the Agreements. In relation to part-time remuneration for the rosters specified in clause 1 of Schedule 1 of the Agreements, OS MCAP and OS ACPM submitted that the correct construction of clause 5.2 is that part-time employees receive the same entitlements (including salary) as full-time employees, paid on a pro-rata basis, based on the hours worked. It is submitted that no further explanation was required.

[22] Alternatively, and to the extent that the Full Bench still had concerns regarding compliance with s 180(5), OS MCAP and OS ACPM proposed the following modified undertakings:

> *In relation to the Maintenance Agreement*
> "The Company undertakes that, in relation to each part time Employee covered by this Agreement:
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> 1. the Employee's hours of work, including the Employee's starting and finishing times and days of work, will be as agreed in writing between the Company and the Employee;
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> 2. each Employee will be provided with a written statement of the Employee's pro rata equivalent of the Annual Salary, based on the Employee's agreed hours of work. For the roster in Schedule 1 of this Agreement, the minimum pro rata equivalent of the Annual Salary will be calculated by multiplying the hourly rate of $43.07 (Non-trades) or $50.05 (Trades) by the Employee's rostered hours per year; and
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> 3. the Employee's agreed hours of work will only be varied by agreement in writing with the part time Employee."
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> *In relation to the Production Agreement*
> "The Company undertakes that, in relation to each part time Employee covered by this Agreement:
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> 1. the Employee's hours of work, including the Employee's starting and finishing times and days of work, will be as agreed in writing between the Company and the Employee;
>
> 2. each Employee will be provided with a written statement of the Employee's pro rata equivalent of the Annual Salary, based on the Employee's agreed hours of work. For the roster in Schedule 1 of this Agreement, the minimum pro rata equivalent of the Annual Salary will be calculated by multiplying the hourly rate of $41.21 (Non-Coal) and $46.15 (Coal) by the Employee's rostered hours per year; and

3. the Employee's agreed hours of work will only be varied by agreement in writing with the part time Employee."

[23] OS MCAP and OS ACPM submit that the above undertakings would meet any concerns about non-compliance with s 180(5), in that paragraph 2 of the undertakings confirm what OS MCAP and OS ACPM contend is the intended effect of clause 5.2 of the Agreements with respect to remuneration, such that any alleged detriment which required explanation no longer exists. The undertakings would not cause any financial detriment, it is submitted, because they confirm the intention of clause 5.2 and maintain how part-time salaries are calculated in practice. Nor do they change the Agreements substantially or at all, since they simply provide greater clarity regarding the operation of the provisions as intended by the parties.

[24] We do not consider that the submissions and proposed undertakings advanced by OS MCAP and OS ACPM meet the part time rates concern. For the same reasons earlier set out, the undertaking proposed in relation to the alternative rosters concern does not meet the concern about the failure to explain part-time remuneration under alternative rosters worked pursuant to clause 2 of Schedule 1 of the Agreements. We also reject the proposition that clause 5.2 has a clear and obvious meaning with respect to remuneration for part-time employees working the rosters specified in clause 1 of Schedule 1 of the Agreements. Clause 5.2 provides:

5.2 Part time Employees will receive pro rata leave and other entitlements on the basis of a 35 ordinary hour week.

[25] While it might be possible to arrive at a proper construction of clause 5.2 applying the standard techniques and principles for the interpretation of legal documents, we cannot accept that the meaning of clause 5.2 is so obvious with respect to remuneration that compliance with s 180(5) requires no step at all to be taken to explain it beyond merely repeating its text. As s 180(5)(b) makes clear, the requirement imposed by the subsection includes an obligation to take all reasonable steps to ensure that "*the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees*". The relevant circumstances of the voting cohort of employees for the Agreements here include, it may reasonably be assumed, that they are not lawyers or industrial relations experts or person accustomed to reading and interpreting legal documents. Bearing this in mind, we observe the following:

(1) It would not be obvious to the layperson that clause 5.2 deals with remuneration at all. It does not specify any remuneration as a dollar amount. The only entitlements to which it applies which are specifically identified are leave entitlements. The application of the clause to remuneration is dependent upon an understanding that the reference to "*other entitlements*" includes remuneration.

(2) The operative expression in the clause is the Latin term "*pro rata*". There is no basis for the conclusion that the meaning of this is obvious or known to laypersons.

(3) The clause does not say that, for the purposes of remuneration entitlements, part-time employees are to be paid a pro rata salary by reference to the salaries prescribed in clause 1 of Schedule 1 of the Agreements.

(4) Clause 5.2 says the entitlements of part-time employees are pro-rated "*on the basis of a 35 ordinary hour week*". This suggests that the entitlements are to be calculated by reference to the weekly hours worked by part-time employees as a proportion of 35 hours per week, so that in respect of remuneration, a part-time employee working (say) 20 hours per week would receive 20/35 of the weekly rate for a full-time employee. However there is no weekly rate (or salary or hourly rate) prescribed for a full-time employee by which such a pro-rata calculation can be made.

(5) It is not readily apparent that a part-time employee would receive remuneration pro-rated on the salary of an employee working an average of 58.33 or 43.75 hours per week, as provided for in clause 1.2 of the Production Agreement, or an average of 46.88 hours in the case of clause 1.1 of the Maintenance Agreement. The principles by which the salaries are determined for the rosters provided for in clause 1 of Schedule 1 of the Agreements have not been disclosed, so that we do not know how the salaries were calculated. However, it is possible, even perhaps likely, that they are based on a starting-point of the ordinary-time hourly rate and then build in overtime and other penalty rates which would be incurred working the specified roster in order to ensure that the remuneration outcome produced is better than under the relevant award. If so, it would be odd if part-time employees were paid an amount pro-rated on salaries which include an allowance for overtime penalty rates, since part-time employees working less than 35 hours per week would not incur overtime.

[26] It is possible that the construction of clause 5.2 advanced by OS MCAP and OS ACPM is the correct one, although for the reasons explained it is far from being the obvious one. That is not a matter which we need ultimately to determine. It is sufficient to say that compliance with s 180(5) required a comprehensible explanation of the remuneration outcome effected by clause 5.2 to be provided. It is not too much to ask that employees being asked to vote upon a proposed enterprise agreement have explained to them what the rates of pay under the agreement (whether on an hourly, weekly or annual basis) will be. As stated in the first decision, no explanation of this nature was provided by OS MCAP or OS ACPM. The fact that OS MCAP and OS ACPM can now identify hourly rates of pay for part-time employees in their proposed undertakings demonstrates that it would have been a reasonable step for them to have done so prior to employees voting on the agreements.

[27] The undertaking now proposed by OS MCAP and OS ACPM does not address the part time rates concern (whether or not it correctly reflects the proper construction of clause 5.2). It is no answer to a failure to explain the effect of clause 5.2 to the employees who voted upon it to now tell part-time employees, who do not have the opportunity to vote upon the Agreements, what their rate of pay will be under the Agreements according to the employer's interpretation. The purpose of the obligation under s 180(5) is "to enable the relevant employees to cast an informed vote: to know what it is they are being asked to agree to and to enable them to understand how wages and working conditions might be affected by voting in

favour of the agreement".[5] The proposed undertaking has no logical connection to the failure by OS MCAP and OS ACPM to achieve that purpose by complying with s 180(5). The Agreements therefore cannot be approved on the basis of the undertaking concerning part-time employment, even assuming they are capable of acceptance under s 190(3).

Part time hours concern

[28] We identified the part time hours concern in the first decision as being, in respect of clause 9.4 of the Agreements, that there was no explanation of the effect of clause 9.4, including in relation to how the hours of employment of part-time employees are to be determined or how clause 9.4 differs from the part-time provisions in the Mining Award and the Black Coal Award. In the second decision, we concluded that undertakings proposed by OS MCAP and OS ACPM to address BOOT concerns would also not meet our concerns about compliance with s 180(5) in respect of part-time employees. To address the part time hours concern, OS MCAP and OS ACPM propose the same undertakings set out in paragraph [22] above, with paragraphs 1 and 3 of each of those undertakings being relevant. It is submitted that the undertakings proffered remedy any failure to explain that certain provisions in the *Mining Industry Award 2010* (Mining Award) and the *Black Coal Mining Industry Award 2010* (Black Coal Award) regarding part-time employees would be displaced by the Agreements by incorporating those protections in those awards into the Agreements. They also serve the protective purpose of ensuring that part-time employees are not disadvantaged by any failure to explain that certain part-time provisions in the awards would be displaced by the Agreements, and have the result that any detriments which required explanation no longer exist, thereby remedying non-compliance with s 180(5). They also contend that the undertaking is acceptable under s 190(3).

[29] We accept that paragraphs 1 and 3 of the proposed undertakings would in part address the part-time hours concern, in that the failure of OS MCAP and OS ACPM to explain that clause 9.4 of the Agreements did not contain the protective provisions in the Mining Award and the Black Coal Award concerning the establishment of part-time working hours would be rendered moot by undertakings which required it to apply those provisions (or indeed better them in the case of the Mining Award). However, it remains the case that no explanation of the effect of clause 9.4 was given at all (beyond repetition of its text), so that the employees who voted upon the provision were not given the opportunity to understand how it was to operate. This was significant because the provision, for the reasons explained in the first decision, is ambiguous and leaves unclear how the hours and working pattern for part-time employees are to be determined. Because our concern has not wholly been addressed by the undertaking, the Agreement cannot be approved on the basis of that undertaking, assuming it is capable of acceptance under s 190(3).

Casual rates concern

[30] We said in the first decision that OS MCAP and OS ACPM did not explain clause 5.3 of the Agreements, beyond repeating or rephrasing their text, and that the explanation given did not identify what the casual hourly rates actually were, either under the current rosters identified in Schedule 1 of each of the Agreements or under any alternative rosters, nor did it

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[5] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77, 262 FCR 567, 277 IR 23 at [115]

give any readily comprehensible explanation as to how those rates are to be calculated. In the second decision, we determined that undertakings directed at BOOT issues did not address the casual rates concern.

[31] OS MCAP and OS ACPM submit that the undertakings proposed with respect to the alternative rosters concern would also address the casual rates concern as it relates to alternative rosters, in that it would render moot any failure to explain the remuneration outcomes for alternative rosters. In respect of the casual rates of pay for the rosters specified in clause 1 of Schedule 1 of the Agreements, OS MCAP and OS ACPM submit that, on the proper construction of clause 5.3, the casual rate is to be calculated by dividing the prescribed full-time salary by 52, and then further dividing this by the average hours worked per week for that particular roster, and then adding the loading of 25%. This was the first of two alternative interpretations of clause 5.3 identified in paragraph [68] of the first decision and, it is submitted, is the construction which will permit the most favourable result for employees in every circumstance because it is derived from an "all-inclusive" salary rate. OS MCAP and OS ACPM submit that the following undertakings (referred to as "proposed undertaking 5" in the second decision) was consistent with this construction and would render moot the failure to explain the casual rate of pay by affording employees the more favourable result and thus removing any detriment resulting from the failure to explain clause 5.3:

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

[32] OS MCAP and OS ACPM submit that the above undertakings would not cause financial detriment to employees covered by the Agreements nor result in any substantial change to the Agreements, and thus may be accepted under s 190(3).

[33] For the reasons we earlier set out, the undertaking proposed in relation to the alternative rosters concern does not meet the concern about the failure to explain casual remuneration under alternative rosters worked pursuant to clause 2 of Schedule 1 of the Agreements. In relation to the rosters specified in clause 1 of Schedule 1 of the Agreements, we have already concluded in the second decision that "proposed undertaking 5" does not meet the casual rates concern, and the further submissions advanced by OS MCAP and OS ACPM add nothing new. It is not a case of now affording employees covered by the Agreements the most beneficial construction of clause 5.3. Rather, the issue arising from the non-compliance with s 180(5) in respect of clause 5.3 is that employees who were called upon to vote to accept or reject the Agreements did not do so on an informed basis because the

casual rates of pay under the Agreements were never explained to them. That is not remedied by the undertaking, which accordingly does not meet the casual rates concern.

The genuinely agreed issue

[34] In paragraph [16] of the second decision, we set out in summary form submissions advanced by the CFMMEU in support of the proposition that the element of genuine agreement in s 188(1)(c) was not satisfied because there were "*other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees*". We summarised the response of OS MCAP and OS ACPM to those submissions in paragraph [21] of the second decision. However we did not state any conclusions about those submissions because, on the basis of the conclusions we reached about our concerns regarding non-compliance with s 180(5), it was unnecessary for us to do so. Having regard to our conclusions above, it remains the case that that is unnecessary for us to deal with this issue because the Agreements are, in any event, incapable of approval.

Conclusion

[35] We are not satisfied, for the purpose of s 186(2)(a) of the FW Act, that the Production Agreement or the Maintenance Agreement were genuinely agreed to by the employees covered by the Agreements. We consider that there was a failure by the employer in each case to comply with s 180(5), with the result that the element of genuine agreement in s 188(1)(a)(i) has not been satisfied. The undertakings proposed by OS MCAP and OS ACPM have not met the concerns we hold about their failure to satisfy the s 186(2)(a) approval requirement. Accordingly, the Agreements cannot be approved. We dismiss the applications for approval of the Production Agreement and the Maintenance Agreement.

DECISION OF DEPUTY PRESIDENT COLMAN

[36] In my dissenting decision of 13 July 2020, I stated that, subject to undertakings, I would approve the *Operations Services Production Agreement 2018* (Production Agreement) and the *Operations Services Maintenance Agreement 2018* (Maintenance Agreement). The concerns that I identified, in respect of which undertakings would be required, were the following.

New rosters BOOT concern

[37] First, I held a concern that, in light of the narrow reliable margin by which the annual salary for employees working new rosters under Schedule 1 of the Agreements would exceed the award remuneration, and the presence of various detriments accruing to employees under the Agreements vis-à-vis the awards, employees working alternative rosters might not be better off overall if the Agreements applied to them than if the relevant modern award applied, and that the Agreements might not therefore pass the 'better off overall test' (BOOT) in respect of such employees (new rosters BOOT concern).

[38] I considered that the companies' proposed undertaking 4 (I adopt the numbering for the undertakings used in the decision of 13 July 2020) met the new rosters BOOT concern. That undertaking provided that the minimum annual salary paid to employees for working '*any roster, including any new roster'*, will be the amount that would be paid to an employee working that roster if any modern award otherwise applied to them, '*plus at least an*

additional 5% of the total amount that the employee would otherwise have been entitled to under the award'. I stated that I would accept this undertaking, because a 5% margin would in my assessment comfortably compensate for the matters contended by the unions to be detriments accruing to employees under the Agreements. On the basis of proposed undertaking 4, I was satisfied that each award covered employee and prospective award covered employee would be better off overall if the Agreements applied to them than if the relevant modern award applied. I concluded that the undertaking did not cause financial detriment to any employee covered by the Agreements or result in substantial change to the Agreements (see s 190(3)).

[39] The companies have since amended this undertaking, in response to concerns raised by the majority, to extend the meaning of 'annual salary' to include part-time or casual hourly rates fixed by reference to the annual salary. The amended undertaking continues to address my new rosters BOOT concern and I would accept it.

Part-time employees BOOT concern

[40] Secondly, in my decision of 13 July 2020, I expressed a concern about whether the Agreements would pass the BOOT in respect of part-time employees, in circumstances where such employees were working outside the roster system and undertook a significant number of hours beyond their contracted hours (part-time employees BOOT concern). I considered that such employees could be worse off under the Agreements than under the relevant award. The companies proposed undertaking 7, under which they would at the time of offering part-time employment stipulate the ordinary hours of work and the prorated equivalent of the annual salary and would only vary the ordinary hours of work by agreement. I indicated at [42] of my earlier decision that proposed undertaking 7 met my part-time employees BOOT concern, and that it did not cause financial detriment to employees or result in substantial changes to the Agreements. I would accept proposed undertaking 7.

[41] I note that I do not share the concerns of the majority about the adequacy of the explanation of the Agreements and the effect of their terms in respect of part-time employment. Clause 5.2 of each of the Agreements states that part-time employees *'will receive pro rata leave and other entitlements on the basis of a 35 ordinary hour week'*. Unlike the majority, I have no difficulty in accepting that it would be clear to a layperson that clause 5.2 of the Agreements deals with the subject of remuneration, because remuneration is an 'entitlement', and I consider that the reference point for the pro rata calculation is clearly the salary in Schedule 1. Further, I do not agree with the majority's view that the expression 'pro rata' may be unknown to laypersons. 'Pro rata' is a Latin term, but also an English one of common vernacular and industrial usage. The term appears in part-time employment provisions of awards of the Commission, including the *Black Coal Mining Industry Award 2010* (BCMI Award) and the *Mining Industry Award 2020* (MI Award). I note that the part-time pro rata provisions in these awards are similar to clause 5.2 of the Agreements. They both state that a part-time employee *'receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work'* (10.3(a)(iii), BCMI Award, clause 10.1(b) MI Award). In my view, 'pro rata' has a well-understood meaning.

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

[42] In my earlier decision, I stated that I would accept a 'NES precedence' undertaking of the kind offered by the companies, on the basis that the unions' contentions gave rise to a

concern (principally in relation to s 114) as to whether the Agreements excluded provisions of the NES, contrary to s 186(2)(c) (NES concern). Where s 186(2)(c) has become contentious, the prudent course is to accept a 'NES precedence' undertaking. As I stated at [64] of my earlier decision, the companies' proposed undertaking 1, which was in the same terms as a clause in an enterprise agreement recently considered by a Full Bench in *RFFWU v Hungry Jack's Australia Pty Ltd*,[6] met my NES concern, however I considered that the wording of the undertaking could be tightened. The companies have offered a revised undertaking. It meets my NES concern. I would accept it.

Concern in relation to ss 180(5) and 186(2)(a) – explanation of the salary for new rosters

[43] Finally, in my earlier decision I stated that, as the companies' explanation to employees of the terms of the Agreements did not address the 'principles' that would be used to calculate annual salaries for new rosters, I had a concern that the companies had not taken all reasonable steps to ensure that the terms of the Agreements and the effect of those terms were explained to employees as required by s 180(5), and that therefore the Agreements had not been genuinely agreed to by employees as contemplated by ss 186(2)(a) and 188(1)(a)(i) (explanation concern).

[44] I considered that the terms of the Agreements relating to the salary for new rosters, and the explanation of those terms, could reasonably have been understood by employees in two ways. First, employees may have understood that the 'principles' by which the companies could determine salaries for new rosters were simply discretionary, provided that the resulting salary exceeded the award remuneration that would have applied to those rosters. This understanding would have been correct. Secondly however, employees might have understood that a salary for a new roster would not reduce the margin by which the salary for working their current roster exceeded the award (see [51] of the earlier decision). If they thought this, they were wrong. I considered that the explanation concern could be met by a further undertaking that ensured that the salaries for new rosters would not drop below this margin. I also considered that the concern could be met by an undertaking that simply removed the companies' capacity to place employees on rosters other than that specified in Schedule 1 (a 'no new rosters' undertaking). There could be no concern about an inadequate explanation of salaries for rosters that cannot be implemented. I considered that such undertakings would not amount to substantial change (see [59]-[61] of the earlier decision).

[45] The companies have now offered an undertaking, referred to in their final submissions as undertaking 10, that each of the companies '*will not exercise its discretion under clause 9.5 of this Agreement to require Employees to work rosters other than those specified in … Schedule 1 of this Agreement'*.

[46] In their final written submissions, the unions contended that it is not clear whether proposed undertaking 10 is a 'no new rosters' undertaking, intended to preclude the companies using such rosters, or whether it means only that employees will not be *compelled* to work new rosters but can nevertheless work new rosters by agreement. The unions submitted that, if the latter is the case, then the explanation concern must remain.

[47] In my view, undertaking 10 does not prevent the introduction of new rosters. Rather, it precludes employees being required to work new rosters. The companies' written submissions

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acknowledged that the undertaking leaves in place the discretion to introduce new rosters but has *'the effect only that the Respondents will not exercise that discretion by introducing new rosters that they will require employees to work.'* Instead of a 'no new rosters' undertaking of the kind contemplated in the decision of 13 July 2020, the companies have offered a 'no compulsory new rosters' undertaking. The question is then whether this has a logical connection with the explanation concern. In my view, it does.

[48] My explanation concern was that employees might reasonably but mistakenly have thought that a salary for a new roster would not reduce the margin by which their pay for the current roster exceeded the award. The essence of the concern was that a detriment may accrue to employees, because they would be subject to a condition of employment that they may not have genuinely agreed to, namely a condition that they could be deployed on new rosters on a salary that did not maintain the current margin above the award. The effect of undertaking 10 is that employees cannot be required to work a new roster without their agreement. In light of the undertaking, I cannot identify any detriment to employees, or any other concern that is referrable to the genuineness of employees' approval of the terms of the Agreements.

[49] Compliance with s 180(5) is not an end in itself, but part of a means to a statutory end. It serves the requirement in ss 186(2)(a) and 188 that an enterprise agreement be genuinely agreed to by the employees covered by the agreement. The scheme of Part 2-4 of the Act recognises that there may be errors and omissions in the highly regulated process of making an enterprise agreement. Section 190 applies if the Commission *'has a concern that an agreement does not meet the requirements set out in sections 186 and 187'* (which includes s 186(2)(a)). Section 190(2) states that the Commission may approve an agreement if it is satisfied that an undertaking '*meets the concern'*. The effect of proposed undertaking 10 is that employees covered by the Agreements cannot work new rosters unless they agree to do so. And it can reasonably be assumed that they will only agree to do so if they are satisfied with the salary that is offered to them. Employees who may have understood that the salary for a new roster would continue to reflect their existing over-award margin can make the payment of such a salary a condition of their agreement to work the new roster. Indeed they can set whatever condition they like. In these circumstances, proposed undertaking 10 meets my concern about the explanation of the salary for new rosters. It does not cause financial detriment to employees or result in substantial changes to the Agreements. I would accept it.

[50] Of course, employees could not agree to work new rosters on terms that would have them cease to be better off overall under the Agreements than under the awards. But this cannot occur because whatever salary the companies and employees agree to for new rosters must be compatible with proposed undertaking 4, which meets the new rosters BOOT concern.

Genuine agreement – s 188(1)(c)

[51] In my decision of 13 July 2020, I considered and rejected the contentions of the unions that there are other reasonable grounds for believing that the Agreements were not genuinely agreed to by employees for the purpose of s 188(1)(c) (see [65] – [76]).

Conclusion

[52] Subject to proposed undertakings 1, 4, 7 and 10, and to the second and fifth undertakings offered by the companies in the proceedings at first instance, I would approve the Agreements.

VICE PRESIDENT

Appearances:

Mr S Crawshaw SC of counsel with *Ms 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 of counsel with *Ms N Jones* for OS ACPM Pty Ltd and OS MCAP Pty Ltd.

Hearing details:

2020.
Sydney (via video-link):
31 July, 11 September.

Printed by authority of the Commonwealth Government Printer

<PR724514>