DECISION

Fair Work Act 2009
s.185 - Application for approval of a single-enterprise agreement

OS MCAP Pty Ltd
(AG2023/2623)

Mining Industry

DEPUTY PRESIDENT SLEVIN SYDNEY, 21 MAY 2024

Application for approval of the Operations Services Production Agreement

[1] OS MCAP Pty Ltd (**OS**) has applied for approval of a single interest enterprise agreement known as the *OS Production Enterprise Agreement* (**the Agreement**). The application is made pursuant to s 185 of the *Fair Work Act 2009* (**the Act**).

[2] The Commission is required to grant an application for the approval an enterprise agreement if satisfied that the requirements in s 186 and s 187 of the Act are met.

[3] The Mining and Energy Union (**MEU**) and the Australian Workers Union (**AWU**) were bargaining representatives for the Agreement. The unions oppose the application.

[4] At the hearing of the application OS and the MEU sought to be legally represented. Permission to be represented was granted as s 596(2)(a) of the Act was met, the matter is sufficiently complex and legal representation would assist in the efficient conduct of the matter.

[5] In the proceedings OS relied upon the information provided in its Form F16 Application, Form F17A declaration of Allison Chauncy, Principal Employees Relations for the BHP Group, and a statement of Ms Chauncy. The MEU relied upon witness statements from Eliza Sarlos, Senior National Legal Officer, Steven Pierce, Queensland Vice President, Richard Staker, Lead Organiser in Queensland, and Shane Wiseman who is employed by OS at Blackwater in Queensland. There was no cross examination. The AWU relied upon the content of its Form F18 declaration and adopts the submissions of the MEU.

[6] The basis of the unions' opposition is that the Commission cannot be satisfied the Agreement was genuinely agreed to for the purposes of meeting the requirement in s 186(2)(a).

The Evidence

[7] Ms Chauncy described OS's operations in broad terms and set out the steps taken in the bargaining for the Agreement, including the steps taken when the request was made for the employees to approve the Agreement by voting for it.

[8] Ms Chauncy explained that OS is a contractor providing a range of production services to businesses across Australia that are either within the BHP Group or are owned by joint ventures to which entities in the BHP Group are party. In providing those services OS employs production technicians in mine operations across Australia, in both coal operations (in Queensland) and non-coal operations (in Western Australia and South Australia). The employees, who perform work on mine sites in Western Australia and South Australia are covered by the *Mining Industry Award 2020* (**MIA**). Employees who perform production work in Queensland are covered by the Black *Coal Mining Industry Award 2020* (**BCMIA**). OS also employs supervisory, technical, and management employees, who are not covered by the Agreement.

[9] Ms Chauncy described OS initiating bargaining for an agreement to cover its production employees in August 2018. An earlier agreement was lodged with the Commission for approval in October 2018, however, following an initial approval, which was appealed to a Full Bench of the Commission[1], that application was dismissed in November 2020. Bargaining recommenced in December 2020. Meetings occurred from December 2020 to September 2022. OS posted the minutes of those meetings online allowing access by all employees using OS's internal information portal. Following each meeting information bulletins were also circulated to employees by email. The bulletins were also available online on the internal information portal.

[10] Ms Chauncy recounted that in September 2022, the MEU made an application under s 240 of the Act for the Commission to deal with a bargaining dispute.[2] The Commission conducted three conferences to resolve that dispute. The employees were provided with updates of those conferences. In March 2023 there was a vote seeking the employees' agreement to a proposed enterprise agreement. Most employees voted against approving that proposal.

[11] Bargaining continued after the unsuccessful vote. OS made some changes to the proposal that was voted down. In July 2023 the employees were again asked to vote on a proposed agreement. On 7 July 2023 OS sent employees an email with a copy of a ballot notification, voting instructions which set out the method and time of the vote, and links to a ballot website and OS's online information portal. The email also attached explanatory documents about the Agreement including comparison tables comparing the Agreement against the terms of the two awards. The vote was conducted by CorpVote, an external ballot agent.

[12] Ms Chauncy described in-person crew briefings held between 10 July 2023 and 16 July 2023. At these briefings a short video explaining the Agreement was played. Links to the video were also made available on OS's online information portal. Managers at the various mine sites were responsible for ensuring employees had access to the information about the ballot. This responsibility included making printed copies of the material available where requested. Ms Chauncy gave evidence about the steps taken at one the mine sites in this regard. The MEU was active in opposing the approval. It conducted a campaign to encourage employees to vote against approving the Agreement, including by circulating documents to employees.

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[1] *CFMMEU v OS ACMP* [2020] FWCFB 2434

[2] The MEU was at that time still a division of the Construction, Forestry, Maritime, Mining and Energy Union. I have used MEU to refer to the union throughout these reasons.

[13] The vote was held between 17 July 2023 and 21 July 2023. At the time of the vote 1,467 employees were covered by the Agreement. Of those, 1,338 voted and 830 of those voted in favour of the Agreement. Which is to say the ballot had a participation rate of approximately 91% and a majority of approximately 62% voted to approve the Agreement.

[14] The first witness for the MEU, Mr Wiseman, is an OS employee located in Blackwater. He gave evidence that he received the email from OS on 7 July 2023. He attended a crew meeting before the vote occurred. At the meeting the crew watched a video about the Agreement and was given a document in the form of a question and answer document. The crew was also shown a document which included tables to assist in explaining the way salaries were calculated under the Agreement. He said many questions were asked during the meeting about the rates of pay in the Agreement and how base salary was calculated. He said he had no idea how to calculate the minimum salary or hourly rates payable under the Agreement, even with the assistance of the tables. He could not recall the information about other terms and conditions.

[15] Mr Wiseman said he uses his mobile phone to access work communications. He does so while on the company bus between Blackwater and the mine site. He said that he received and read the email of 7 July 2023 on his mobile phone. He did not read the attachments because there were many of them. Mr Wiseman works 12.5 hour shifts on a seven day on/ seven day off roster. He works seven days in a row and then returns to his family in Yeppoon on the Queensland coast for his days off. He does not access work information whilst on days off. He was not provided time during working hours to read the material about the Agreement and so he did not read it.

[16] Mr Wiseman briefly described his working arrangements and his understanding of how the *Black Coal Mining Industry Award* applied. He was unaware that the Award required the agreement of employees to work more than 10 ordinary hours at a time, or that agreement was required on the starting and finishing times of shifts longer than 10 ordinary hours or that agreement was also required to determine the starting and finishing places of a shift. Nor was he aware that the Award required that there be two public holidays on which work will not be carried out. Mr Wiseman was part of the first group of OS employees at Blackwater mine in 2020. He was not involved in any process where employees agreed to work 12.5 hour shifts nor was he aware of an agreement about start and finishing times and places for those shifts. He also said that there had been no public holidays at Blackwater that have been non-working days. Mr Wiseman also gave evidence that he was aware that BHP was in the process of selling the Blackwater mine site.

[17] Mr Staker described OS's operations in Queensland. There are 6 mines where OS operates. He estimates the number of OS employees at each mine as:

- Saraji Mine, 270 employees.
- Peak Downs Mine, 260 employees.
- Blackwater Mine, 280 employees.
- Caval Ridge Mine, 54 employees.
- Goonyella Riverside Mine, 210 employees; and
- Daunia Mine, 110 employees.

[18] Mr Staker said that in each of the operations employees work 12.5 hour shifts in accordance with a standard letter of offer provided to employees prior to commencement. A

copy of the standard letter was provided. The standard letter states that employees are responsible for their own transportation to their location of hire and OS arranges transport between that location and the work site. It states that OS will inform employees of their daily start times. Mr Staker said he understands that the starting and finishing places for each shift is also determined by the company. Mr Staker said due to the size of the mines the starting place can be 20 minutes from the entry of the mine and that where starting places are on the machines the employees are required to operate, travel to the starting place occurs on the employee's time and can result in employees being at attendance on the mine site for more than 13 hours per day. Mr Staker described most workers in OS as commuting to their location of hire on fly-in/fly out, drive in/drive out, or bus in /bus out arrangements.

[19] Mr Pierce provided a history of the BCMIA focussing on the terms dealing with length of shifts, starting and finishing times, starting and finishing places and public holidays. Mr Pierce described the process by which the union had developed roster arrangements with shifts longer than 10 hours that it was willing to agree to. He described the importance of employees agreeing to starting and finishing places as the size of many mines can lead to an hour of unpaid travel, on top of a lengthy workday, if shifts do not commence at the mine entrance. He also described an industry practice of Christmas day and Boxing Day being days off and how the BCMIA accommodated that arrangement.

[20] Ms Sarlos' statement dealt with the conditions of employment of OS's employees. Her statement included copies of job advertisements and a standard letter of offer. Ms Sarlos also provided documents that were made available to employees from around May 2023 on OS's online information portal. The documents are entitled "Enterprise Agreement Handbook OS Production". Three versions of the handbook were provided. The first was described as the Queensland version from May 2023. The second was described as the Queensland version as modified on or around 7 July 2023. The third was the South Australian version from July 2023.

[21] Ms Sarlos also provided documents downloaded from OS's information portal which included documents described as BHP Redundancy Termination Australia Policy, Explanation of the Above Award Guarantee, and Sign on Bonus information. Ms Sarlos also provided a transcript of the video that was presented to employees in the crew meetings described by Ms Chauncy.

[22] Ms Sarlos provided a copy of an announcement by BHP that it was selling the Blackwater mine and associated media release and reports about the sale. A further media release from BHP was provided indicating that BHP has reviewed its Australian operations and found that it has been incorrectly deducting leave on public holidays and that it was working to rectify the issue.

[23] Ms Sarlos also provided calculations of the remuneration due to employees under the BCMIA during a 12 month period. The calculations projected the earnings that would apply to the rosters worked by OS employees, as described in the information provided to employees in the links in the OS email of 7 July 2023. The period used for Ms Sarlos's calculations was the twelve month period from August 2023 to August 2024. Added to these rates were the allowances payable under the BCMIA for those rosters. The figures reached are described as the BCMIA loaded rate. The calculations gave different results to the OS information.

[24] Ms Sarlos's calculations were for four roster arrangements. The first set of calculations were for the roster that was described in the OS tables as Roster 1, where the employee commenced the first week of the roster on a day shift. The roster involves 12.5 hour rotating shifts with combinations of day shifts and night shifts. The second set of calculations applied to Roster 1 where the first week of the roster cycle commenced with a week when no work is required. The third set of calculations applied to what was described as roster 2 where the employee was rostered on to work in the first week. The fourth set of calculations applied to roster 2 where the employee is rostered off on the first week of the cycle.

[25] The point of the calculations was to demonstrate that depending on what roster an employee works, and how the roster cycle commenced, different entitlements apply affecting annual pay. This gave rise to differences between the information provided by OS Ms Sarlos's calculation based on Award entitlements. In relation to roster 1, for example, the difference was as much as $5,553.26 per annum and for roster 2 the difference was in one instance $2,904.78 per annum.

Genuine Agreement

The MEU complaints

[26] The MEU points to four matters that would lead to a conclusion that the employees did not genuinely agree to the Agreement. The first two matters go to the adequacy of OS's explanation of the terms of the Agreement and the effect of those terms. The first is that the detrimental aspects of the Agreement were not explained to employees. The second matter is that OS failed to take all reasonable steps to explain the effect of the following specific terms of the Agreement:

- clause 3.3, the NES 'preservation' clause.
- clause 6, Duties, as far as it refers to "hubs.
- clause 7 and 27 going to remuneration.
- clause 9, Hours of Work.
- clause 10.3, Public Holidays; and
- clause 25, redundancy.

[27] The third matter is that OS identified transferring instruments that apply to around 21 employees but failed to provide any explanation to those employees of the effect of the terms of the Agreement on the terms of the transferring instruments.

[28] The fourth matter is there were two other reasonable grounds to find that the Agreement was not reasonably agreed to by employees. The first being the failure to explain the various terms of the Agreement meant that employees were unlikely to fully understand the effect of the Agreement, so there are reasonable grounds to believe the Agreement was not genuinely agreed. The second is that as the Agreement was voted for overwhelmingly by employees covered by the BCMIA, who had no knowledge of conditions outside of the coal mining industry, and no knowledge of terms and conditions applying to employees covered by the MIA, those employees had no stake in the Agreement in so far as it would apply to the MIA employees and so their agreement lacked authenticity or genuineness.

Legislation and Authorities

[29] The requirement in s 186(2)(a) is that the Commission be satisfied that the Agreement has been genuinely agreed to by the employees covered by it. Section 188 provides the matters which the Commission must take into account when considering whether employees have genuinely agreed to an enterprise agreement. Section 188, along with other provisions relating to genuine agreement, was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. The relevant amendments commenced on 6 June 2023 and applied to agreements with a notification time after that date.[3] The notification time for the Agreement was 21 August 2018. Consequently, the relevant provisions of the Act as they were prior to 6 June 2023 apply to the current application. References in this decision to the provision of the Act are therefore references to the provisions as they were before 6 June 2023.

[30] Section 188 was in the following terms:

> **"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:
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> (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
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> (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
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> (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."

[31] So, an enterprise agreement is genuinely agreed if the Commission is satisfied of a number of matters, including, at s 188(1)(a), that OS has complied with s 180(5). Section 188(1)(c) requires satisfaction that there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees. Section 188(2) provides that

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[3] See clause 66 of Div 11 to Part 3 of Sch 1 to the SJBP Act.

where the requisite satisfaction in s 188(1)(a) is not present an agreement may still be genuinely agreed where the lack of satisfaction arises from a minor procedural or technical error. That error must not disadvantage employees.

[32] Relevantly here, the MEU raises three matters relevant to OS's compliance with s.180(5). The subsection required OS to do the following:

> (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 employees employed at the time who will be covered by the agreement; and
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> (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

[33] My attention was drawn to a number of decisions of the Court and Commission where the requirements that an agreement be genuinely agreed were considered, including two decisions of the Full Court of the Federal Court of Australia; O*ne Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 (*One Key*) and *CFMMEU v Mechanical Maintenance Solutions Pty Ltd* [2022] FCAFC 15 (*Mechanical Maintenance*) which considered s. 180(5). In *One Key* the Court said at [112]:

> "[112] … In order to reach the requisite state of satisfaction that s.180(5) had been complied with, the Commission was required to consider the content of the explanation and the terms in which it was conveyed, having regard to all the circumstances and needs of the employees and the nature of the changes made by the Agreement. It is true that the Act does not expressly say that. But the question of whether an administrative decision-maker is required to consider a matter is not determined only by the express words of the Act; it may also be determined by implication from the subject-matter, scope and purpose of the Act*: Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39–44 (Mason J)."

[34] In *Mechanical Maintenance* the Court[4] said at [78]- [79]:

> "[78] To advance the purpose of enabling relevant employees to cast an informed vote, s 180(5) expressly requires that they be given, not only an explanation of the terms of the agreement, but the effect of those terms. A proposed enterprise agreement will almost invariably be intended to affect existing working conditions. The ordinary meaning of the noun "effect" includes "consequence". The obligation to explain the effect or consequences of the terms of a proposed enterprise agreement requires explanation of how those terms will affect existing conditions. Any detrimental changes to existing conditions will be of particular significance to employees. The employer's obligation under s 180(5) requires that all reasonable steps must be taken to ensure that the effect of all the terms in bringing about detrimental changes to existing conditions are explained. That means, effectively, that all detrimental changes must be explained, whether through omission or alteration of a favourable existing condition.

[4] From the reasons of Rangiah J who was in the minority on the question of jurisdictional error. There was no disagreement on his Honour's construction of s. 180(5).

> [79] The obligations cast upon employers under s 180(5) are undoubtedly onerous. However, the clear language and purpose of the provision means that it cannot be read as requiring anything less than that the employer must take all reasonable steps to ensure that all the terms, and the effect of all the terms, are explained. The consequence of non-compliance by the employer is the risk that an enterprise agreement approved by the employees will not be approved by the Commission."

[35] I was also taken to a number of Full Benches of this Commission including *CFMEU v Ditchfield Mining Services Pty Ltd* [2019] FWCFB 4022 (*Ditchfield*), *The Australian Workers' Union v Rigforce Pty Ltd* [2019] FWCFB 6960, (*Rigforce*), *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 (*Huntsman*), *CFMMEU v Karijin Rail Pty Ltd* [2020] FWCFB 958 at [60] (*Karijin*) and *CFMMEU v Trustees for Celotti* [2020] FWCFB 5011(*Celotti*).

[36] The Full Bench in *Rigforce* said at [35]:

> "[35] … The nature of the requirement in s 180(5) was analysed in detail by the Federal Court (Flick J) in *CFMEU v One Key Workforce Pty Ltd*. We adopt the summary of that analysis set out in *CFMMEU v Ditchfield Mining Services Pty Limited*, which reduced it to the following four propositions:
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> > (1) whether an employer has complied with the obligation in s 180(5) depends on the circumstances of the case;
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> > (2) the focus of the enquiry whether an employer has complied with s 180(5) is first on the steps taken to comply, and then to consider whether:
> > - the steps taken were reasonable in the circumstances; and
> > - these were all the reasonable steps that should have been taken in the circumstances;
> >
> > (3) the object of the reasonable steps that are to be taken is to ensure that the terms of the agreement, and their effect, are explained to relevant employees in a manner that considers their particular circumstances and needs. This requires attention to the content of the explanation given; and
> >
> > (4) an employer does not fall short of complying with the obligation in s 180(5) of the FW Act merely because an employee does not understand the explanation provided."

[37] In *Huntsman* the Full Bench provided analysis of the operation of s 188. At [117] of that decision the Full Bench set out a number of propositions relevant to the construction of the section. The Full Bench emphasised that subsections 188(1) and (2) should be considered sequentially: a consideration of s 188(2) is only necessary if there has been a failure to meet the requirements in s.188(1). The term "employees covered by the agreement" includes those employed at the time of the voting request. Both subsections 188(1) and (2) require the Commission to ensure the agreement was genuinely made, but s 188(2) specifically addresses situations where errors occur in the procedural requirements. These errors must be minor and relate to specific requirements, such as the requirement in s 180(5). The assessment of "minor

errors" requires an evaluative judgment in considering whether procedural or technical errors have occurred, the nature of the errors in particular whether they might be considered minor errors, and their impact on employees. The Full Bench emphasised the importance of understanding the procedural context and the specifics of non-compliance to determine genuine agreement under s 188. Regard may be had to the objects of Part 2-4 in assessing the context of the non-compliance.

[38] I was also taken to the Full Bench decision which considered OS's earlier application for approval of an enterprise agreement in *CFMMEU, and ors v OS ACPM Pty Ltd and OS MCAP Pty Ltd* [5] (the 2020 OS Full Bench). The Full Bench there made a number of observations that continue to be relevant to a number of the terms in the Agreement the subject of this application.

Consideration

General Criticisms

[39] The s 180(5) matters raised by the MEU were said to be underpinned by three contextual issues relevant to the explanation of the terms of the Agreement. The first was the workforce was relatively new, OS having commenced operations in 2018. The second that no industrial agreement has applied to the workforce previously, and third that the employees were offered a $5,000 sign on bonus payable to employees who voted in the ballot and still employed at the time the Agreement is approved by the Commission but not to persons later employed. OS stressed that the bonus was not an Agreement term. This last issue was said to amount to an incentive that has the effect of encouraging employees to vote for the Agreement without fully assessing its terms. For its part OS points to the many communications with employees about the bargaining for the Agreement. Ms Chauncy provided numerous documents setting out the positions taken by bargaining representatives during the negotiations. Minutes which were posted on the internal information portal were provided as were bulletins circulated to employees. I note these matters but don't find them determinative. The test under s 180(5) is directed at the nature of the explanation by OS of the proposed agreement that was the subject of the ballot. The context assists but the focus is on the adequacy of that explanation.

[40] The MEU's first substantive complaint is that the explanations of the terms of the Agreement were shrouded in communications from OS which highlighted the benefits of the Agreement without reference to the detriments. Where the detrimental effects were mentioned, this was done in a nominal way. The MEU submissions refer to three communications from OS to employees each of which failed to refer to any detrimental effect on working conditions.

[41] The first communication was the email sent on 7 July 2023 which attached a copy of the ballot notification and voting instructions. The email included a link to the OS information portal and a link to the CorpVote ballot website. Both links led to a copy of the Agreement. Links were also available to material incorporated or referenced in the Agreement. The MEU points to comments in the text of the covering email. The email was from OS's General Manager Production, David Oliver. The email referred to minimum salary increases of not less than 4% each year, salary guarantees, paid flights and local travel allowances. The email also

[5] [2020] FWCFB 2434.

referred to the sign-on bonus of $5,000. That reference was in bold font, and it stands out. The MEU points to the use of the words "lock in these benefits" in the email. The full sentence containing those words was "Remember, every vote counts and a majority 'YES' vote will lock in these benefits". The MEU is critical of the email because it makes no mention of the detriments associated with the Agreement.

[42] The second communication was the video presentation which was available through the links in the 7 July 2023 email and later used in toolbox meetings. The video was a slide presentation with commentary on each slide. The commentary was provided by Mr Oliver. A transcript of the video was provided by the MEU. According to the transcript the purpose of the video was to explain the terms of the Agreement. The video highlighted improvements in conditions provided by the Agreement. The improvements were improvements since the earlier proposed agreement that had been rejected by a majority of employees. There is no mention of any detrimental impacts of the Agreement. Key conditions such as leave, superannuation, shift lengths and remuneration were highlighted.

[43] In the video salary arrangements were explained by reference to clause 7 of the Agreement. Clause 7 provides that salaries at the commencement of the Agreement would not fall during the life of the Agreement and that an Above Award Guarantee (**AAG**), also found in clause 7, meant salaries would not fall below 105% of the Award. One of the slides provided three indicative examples of how the AAG would operate. The examples were indicative salaries, hypothesised Award increases, salary increases that would be applied where salary was below the AAG, and the 4% salary increase per year, which is the minimum salary increase in clause 7.4(c). Of the three examples, only one scenario resulted in an actual salary increase following application of the AAG. All three received an increase arising from the 4% minimum salary increase. The amounts payable under the Agreement varied depending on starting salary, bonuses paid under the employees' contracts, and the application of the AAG. The figures were indicative only. Details of how the AAG was calculated were not provided. The video also made reference to the $5,000 sign on bonus which was said to not be included in the Agreement but payable as a flat rate lump sum payment once the Agreement was voted up and approved by the Commission.

[44] The third communication raised by the MEU is the series of documents entitled "Enterprise Agreement Handbook OS Production" issued during the bargaining and available during the access period online on OS's internal portal. The Handbook took a similar tone to the other two communications and provided further detail of the benefits in the Agreement. It explained how enterprise agreements operate as part of the regulatory framework of terms and conditions of employment. It also detailed the history of negotiations.

[45] In dealing with the content of the Agreement it emphasised as "offer headlines" that the Agreement had a 4 year term, salaries would not go backwards with a minimum salary guarantee of 5% more than the Award. Paid flights, travel allowances and local allowances were also emphasised. Payment of personal leave on termination of employment, access to BHP policies on superannuation, redundancy pay, and parental, public service and family and domestic violence leave were also highlighted. The remainder of the Handbook dealt with each of those benefits in more detail. The detailed explanation of pay and bonuses included that remuneration would continue to be through salaries paid under individual contracts. A detailed explanation was provided of the existing salary and bonus arrangements, which the Handbook

stressed were in the employment contracts not the Agreement. The Handbook explained that those arrangements were not in the Agreement because the Agreement was intended to provide a simple safety net arrangement that increased the safety net so that it was above the Award. It was explained that each July salaries would be compared to the Award and that if they fell below 105 % of the Award rate, they would be increased to match the Award. The Handbook did not include examples of how the AAG operated but a link was provided to a note that did. The AAG note was also available by way of a link from the online information portal.

[46] The note stated that AAG was provided in clause 7.3 of the Agreement. It indicated that where an employee's current contract salary was above the AAG then their current salary continued to apply. It explained that clause 7.10 provided for un-rostered-overtime hourly rate which would also never be less than the 105% of the Award hourly rate. The note referred employees to calculations relevant to current rosters being worked under the MIA, which applied to those working in Western Australia and South Australia, and calculations relevant to the BCMIA, which applied to those working in Queensland. The note stated that the un-rostered overtime rate could be found by taking the AAG hourly rate found in tables which were attached to the note and doubling or tripling it (for public holidays). Where current overtime rates under the contract were higher than that figure then the salary rate was to apply.

[47] Four tables were attached to the note. The first relating to employees covered by the MIA (other than trainees). It provided figures for 3 rosters described as Roster 1, Roster 2 and Roster 4, and set out the AAG salary and AAG hourly rates for each level of employee in the MIA being Entry Level through to Level 7. The second table did the same thing for two rosters for BCMIA employees (other than trainees). The classifications were the award classifications of Mineworker Induction Level 1, Mineworker – Induction Level 2/ Mineworker – Training, Mineworker, Mineworker Advanced, and Mineworker Specialised. The third table applied to Mining Award Trainees (National Training Wage Level A of the Miscellaneous Award). It included the same 3 rosters described in the non-trainees and for each roster an AAG and AAG Hourly rate for 15 classifications ranging from a Trainee who had just left school whose highest completed schooling was completion of year 10 to a Trainee who was three years out of school whose highest completed schooling was year 12. The fourth table applied to BCMIA Trainees. It set out the AAG and AAG hourly rate for two rosters and the classifications which had the same description as the mining Award Trainees. In all, the tables provided 109 AAG salaries and 109 AAG hourly rates.

[48] The sign on bonus was also explained. $5,000 would be paid if a majority of employees voted to accept the Agreement and the Commission approved it. The bonus would only be paid to those eligible to vote, were employed at the time of the vote, and continued to be employed at the time the Commission approves the Agreement.

[49] The one communication to employees which made mention of conditions in the Agreement which were less beneficial than the Awards was a document entitled "Explanation of terms of the Operations Services Agreement". It was provided with the 7 July 2023 email. The preamble to that document explained that what followed was a series of tables summarising and explaining the effect of the Agreement. The first table was to be read in conjunction with the full Agreement. The document went on to say the first table should also be read in conjunction with the other tables provided that compared the Agreement to the MIA and CMIA. The first table had two columns. The first column referred to each clause in the Agreement and

the second paraphrased the term. There were ten further tables. The first five of those tables compared the terms of the Agreement against the terms of the MIA. The other five compared the terms of the Agreement against the terms of the BCMIA. The first five tables had the following headings:

a) Terms of the Proposed Agreement that are more beneficial than the terms in the Mining Industry Award.
b) Terms of the Proposed Agreement that are not in the Mining Industry Award.
c) Terms of the Proposed Agreement which are less beneficial than the terms in the Mining Industry Award.
d) Terms in the Mining Industry Award that are not in the Proposed Agreement.
e) Terms of the Proposed Agreement which are different to the terms in the Mining Industry Award.

[50] The second set of tables had the same headings save that the reference to the Mining Industry Award was replaced by a reference to the Black Coal Mining Industry Award.

[51] The MEU submits that the communications to employees, save for the explanatory tables, failed to refer to let alone explain any detrimental changes arising from the Agreement. As to the explanatory tables, the MEU submits that where the less beneficial terms were referred to, they were merely paraphrased and not explained. MEU also points out that the first suggestion that there may be less beneficial terms in the Agreement than the terms of the BCMIA was at page 24 of the 29-page document. The document was not available until 7 May 2023. The vast majority of employees are in Queensland operations where the BCMIA applies.

[52] The MEU submits that a reasonable step was for OS to identify and adequately explain the detrimental effects of the Agreement and that this should have been done prior to 7 July 2023. The Handbooks, for example, had been available since May 2023. It also submits that the explanation should have been in appropriate form, giving concise summaries of the detrimental terms in a similar way to the many concise statements made in OS's material about the benefits of the Agreement.

[53] OS submits that s 180(5) does not require an employer to provide an analysis of every divergence between the Agreement and the Awards. That the explanations it did provide constituted simple and concise information about the effect of the Agreement, without overloading the employees with detail. Minor errors or omissions in its explanation do not mean the employees did not genuinely agree to the Agreement.

[54] OS points to the circulation of the ballot email including a copy of the Agreement and the document that explained in detail the terms and effect of the Agreement together with the presentations at pre-start meetings, including the video and slide presentation and access on both the information portal and voting information website to links to the Agreement as well as the incorporated material, the explanatory material, and the video presentation.

[55] In response to the MEU criticisms OS submits that the prominence given in its communications to the benefits of the agreement did not suggest the Agreement had no detrimental terms. OS pointed to MEU material which was circulated at the time of the vote which highlighted the detriments in the Agreement. The written material circulated by the MEU

was provided. It set out the various complaints the MEU had with the Agreement including concerns over hours of work, public holidays, remuneration and redundancy terms.

[56] In assessing the various OS communications to employees, I agree with the MEU that they were decidedly upbeat in representing the benefits of the Agreement. The terms that were said to be beneficial to employees were explained in detail a number of times. There were varying levels of detail in the covering email, the video explanation, and the Enterprise Bargaining Handbooks but they all focused on the benefits of the Agreement. In the Handbooks the benefits were referred to both in a summary way and then by way of what the documents describes as a "deep dive", which I understand to mean more detail. In contrast the material was restrained and relatively opaque when referring to the detrimental effects of the Agreement. The comparison tables present as an afterthought. They were in a format that did not explain to employees the actual effect of the terms in an accessible way.

[57] I do not accept OS's submission that the MEU material setting out the union's reasons for opposing the Agreement provided balance to its material. First, I was not provided with any evidence as to the extent of the circulation of the MEU material. I don't know how many of the employees saw it. Second, the requirement in s 180(5) is that OS take reasonable steps to explain the terms of the Agreement and the effect of those terms. OS cannot rely on the MEU material as a step it took to meet that requirement.

[58] Having regard to the content of the explanation and the terms in which it was conveyed, as well as the circumstances and needs of the employees, and the nature of the changes made by the Agreement I am not satisfied that the material provided by OS adequately ensured that the effect of all the terms, and in particular the terms that gave rise to detrimental changes to existing conditions, were explained. It follows that I am not satisfied for the purposes of s 188(1)(a) that OS complied with s 180 (5).

Specific Criticisms

[59] The second matter raised by the MEU is that OS failed to take reasonable steps to ensure a number of specific terms of the Agreement, and the effect of those terms, were explained to the employees. Those terms are clause 3.3 which deals with the application of the National Employment Standards (NES), clause 9 which deals with hours of work, clause 10.3 which deals with public holidays, clause 7.6 and clause 7.10 which deal with the AAG, and clause 6.3 which deals with being redeployed to perform work anywhere within a region described as a "hub".

NES matters

[60] Clause 3.3 provides that where there is an inconsistency between the Agreement and the NES the NES will apply except to the extent that the Agreement term is more beneficial than the NES. The MEU complains that the explanatory material provided a link to the "*Fair Work Act 2009 (Including the National Employment Standards)"* without reference to any section of the Act that may apply. In the explanatory tables the clause is paraphrased but not explained. The MEU asserts that for the employees to understand the effect of the clause they would need to follow the link to the Act, assess what terms of the Agreement might be inconsistent, and

assess the extent to which the inconsistency operated to affect the entitlement in the Agreement. The MEU points to a number of specific terms that are likely to be affected by clause 3.3.

[61] In the 2020 proceedings the Full Bench identified two terms in the earlier agreement which could be said to be inconsistent with the NES;[6] the hours of work and public holidays terms. Those terms are repeated in the Agreement. There was no explanation of how clause 3.3 would operate on them. The MEU submits that it was a reasonable step for OS to give an explanation and the failure to do so was contrary to s 180(5). This is said to be so due to the complexity of the interaction of these terms with the NES.

[62] On the first term the MEU described the consequences of clause 9 of the Agreement, which deals with hours of work, for the standard in s 62 of the FW Act which also deals with hours of work. Two aspects of s 62 are raised.

[63] First, section 62 provides that an employer must not request or require an employee to work more than 38 hours unless the additional hours are reasonable. Clause 9 gives the employer an unfettered right to determine the hours of work, subject only to a 12.5 shift maximum. On this issue OS's explanatory material simply stated:

> *Subject to the Proposed Agreement and the NES, the Company will determine rosters, from time to time, including days and hours of work, and starting and finishing places.*

[64] The MEU submits that it would have been a reasonable step to explain that the NES provided a right to refuse to work hours above 38 hours in a week and that clause 3.3 preserved that right.

[65] Second, clause 9.4 of the Agreement states that by working rostered hours the employees acknowledge that the requirement to work those hours is reasonable having regard to the operational requirements of the workplace and the roster arrangements. The MEU points to the Full Bench's observations on a similar clause that this may be seen as requiring employees to work any hours they are rostered and to deem such hours reasonable.[7] As this provision may be contrary to s 62 some explanation would have been reasonable. There was none. The explanation given in the explanatory material simply paraphrased clause 9.4.

[66] The MEU also points to the public holidays provision in the Agreement which is clause 10. After setting out the days which are to be regarded as public holidays and providing how the interactions between shifts and the commencement of holidays will be determined, the clause provides that, subject to the NES, employees acknowledge that where they are requested to work public holidays as part of the roster, the request is reasonable. The term provides that on Christmas Day and Boxing Day employees may request not to work and their supervisor may grant approval to not attend. Non-rostered employees may be asked to volunteer to work but the company will determine who works. Employees who perform certain functions cannot request not to work. The MEU described this as conveying a right for OS to require employees to work public holidays contrary to the standard in s 114 of the Act. Section 114 provides an entitlement to be absent from employment on a public holiday.

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[6] [2020] FWCFB 2434 at [84] – [88].

[7] Id at [86].

[67] The MEU's complaint is that the clause is likely to operate inconsistently with s 114 and that while the explanation mentioned that it was subject to the NES and to s 114 in the explanatory material, it failed to explain how.

[68] OS contends the MEU complaints are selective and only partially quote from one of the documents provided to employees. It points to the first page of the explanatory document which it says made it clear that where there is an inconsistency between the Agreement and the NES the NES would prevail except so far as the Agreement was more beneficial to employees. The MEU's submissions going to the detail of the benefits are described as misconceived and/or semantic.

[69] I do not consider the MEU submissions to be misconceived nor semantic. The complaint that OS failed to describe the effect of the NES terms as they may operate on the hours of work and public holidays clause has substance. In some cases, it may be sufficient to take the approach taken by OS, especially where the potential for inconsistency is limited and the NES preservation clause is included to ensure that where there is an unanticipated contravention of s 55 the NES prevails. Here the clash between the public holidays and hours of work provisions can be anticipated. Particularly, considering the 2020 Full Bench decision which dealt with both issues. Brief explanations of how the NES may operate in the context of each of the terms were reasonable steps to take.

[70] In the circumstances, I consider s 180(5) required OS to take steps to explain the effect of clause 3.3 by reference to at least these two Award terms. It did not, and so has failed to take all reasonable steps to ensure that Clause 3.3 of the Agreement and the effect of that term was explained to the employees.

Hours of Work

[71] The MEU also complains that the explanation of the operations of the hour clause in the Agreement was unreasonable as it did not give the employees sufficient information to understand the effect of the clause on the concomitant Award entitlement. There are three benefits in the hours clause of the BCMIA the MEU says were not explained. The requirement that shifts over 10 hours be by agreement. The requirement that start and finish times for shifts longer than 10 hours be by agreement. And the requirement that designated start and finishing places of a shift be agreed. The effect the Agreement would have on these Award entitlements were not explained. Instead, the entitlements in the Award were merely paraphrased.

[72] The MEU contends that the entitlements are significant as the Agreement gave OS an unfettered right to determine shift lengths, starting and finishing times and places. It submitted that the employees were entitled to know that there was an Award entitlement for there to be agreement on those matters and that was being taken away.

[73] Mr Pierce described the interaction of these three award entitlements. He emphasised the importance of employees agreeing to starting and finishing places, given the size of many mines which may have a mine entrance many kilometres from the place of work. Where the start and finish place for a shift is at the site of the work, for example when the employee arrives at the piece of machinery that they are to operate, it may add significantly to the time is present

at the mine site. This may lead to a 12.5 hour shift requiring a 13.5 hour or longer presence at the mine. The consequences being over an hour of unpaid travel time within a mine on top of an already lengthy workday.

[74] Similar submissions were made in relation to clause 12 of the MIA which provides for agreement on shifts lengths, starting and finishing times and starting and finishing places.

[75] OS submitted that it was sufficient to paraphrase clause 9 of the Agreement as the effect of the clause was clear both on the summary and terms of the clause itself. It contends that the MEU's reliance on s 62 is misconceived as nothing in clause 9 deprives an employee from refusing to work in excess of 38 hours per week where those hours are unreasonable. OS also relies on clause 3.3 in that regard as preserving the entitlement to refuse hours which are unreasonable. The submission misses the point. The MEU complaint is that an award right was being taken away without explanation.

[76] Submissions were also made about the correct interpretation of the Award clauses. OS took issue with the MEU's statement of its obligations under cl 15.1 of the BCMIA. The MEU contending that the clause required agreement when the working hours in a shift are longer than 10 hours. The MEU also pointed to OS's current rosters which it alleged were contrary to the clause as they provided shift lengths greater than 10 in circumstances where there was no agreement of employees in place. On OS's construction the clause only requires agreement when the ordinary hours component of a shift is longer than 10 hours. It said a shift may comprise 10 ordinary hours and 2.5 'rostered overtime' hours without requiring the agreement of employees. OS also countered the MEU suggestion that its current arrangements were contrary to the Award as employees had agreed to work the longer shifts by accepting letters of offer that referred to 12.5 hour shift lengths.

[77] It is not necessary to express a concluded view on the correct construction of the Award clause in this matter. Nor am I required to form a view as to whether OS's current practices are compliant with the BCMIA. My task is to consider whether the terms of the Agreement, and the effect of those terms, were explained to the employees for the purpose of s 180(5).

[78] OS relies on the following, which appeared in the explanatory tables attached to the document included in the 7 July 2023 email to employees. In a table headed "Table C: Terms of the Proposed Agreement which are less beneficial that the term in the Black Coal Mining Industry Award" the following appeared:

Term in Proposed Agreement	Term in Modern Award
Clause 9.5 provides that an Employee shall not be rostered to work more than 12.5 hours in any one shift. This includes ordinary hours per day and any additional rostered overtime.	Clause 15.1 provides that an employer may determine the shift length to be worked where the ordinary hours of the shift do not exceed 10 hours. A shift may be longer than 10 ordinary hours where the employer and the majority of affected employees agree or resolved in accordance with the Dispute Resolution clause of the Award.

[79] The table merely paraphrases the terms. The observation of the Full Bench in *Celotti*[8] that comparative tables containing extracts of clauses of the respective instruments as going no way towards explaining the effect of Agreement terms is apt here.

[80] The extremely flexible rostering arrangements that clause 9.5 of the Agreement afforded OS is clearly an important feature of the Agreement. The effect that term had on the Award prescription on length of shift, starting and finishing times, and starting and finishing places should have been explained. The explanation needed to go beyond merely paraphrasing those terms. Whether the explanation accorded with OS's construction of those clauses, or the MEU view is immaterial. No explanation was provided at all. Given the failure to do so, I am not satisfied that OS took all reasonable steps to ensure that Clause 9.5 of the Agreement, and the effect of that term, was explained to the employees.

Public Holidays

[81] The MEU submitted the explanation of the effect of clause 10.3 dealing with public holidays was inadequate. It failed to inform employees of the requirement under clause 29 of the BCMIA that no work be carried out on at least two public holidays per year. That requirement is not contained in the Agreement and no explanation was given. OS submits that its rosters currently operate such that employees will always have the benefit of at least two public holidays on which they will not be rostered, so no explanation was necessary.

[82] Detailed submissions were also made about the proper construction of the BCMIA public holiday clause. I take the same view to those submissions as I have above in relation to hours of work. My task is to assess whether OS complied with s 180(5) which required OS to take reasonable steps to ensure the terms of the Agreement, and the effect of those terms, were explained to the employees and the explanation was provided in an appropriate manner.

[83] The explanatory tables included table C which dealt with terms in the Agreement that are less beneficial than the BCMIA. The table paraphrased clause 10.3 of the Agreement and clause 29.5 of the BCMIA. The entitlement in clause 29.5 of the BCMIA is also paraphrased in table D, the table setting out the terms in the BCMIA that are not in the Agreement. The tables should have also included an explanation of the effect of the terms on public holidays. If the situation is as OS states, it would have been a reasonable and simple step to tell employees that the rostering practices were such that employees would always receive at least 2 days public holidays off each year. OS's failure to do so was contrary to the requirement in s 180(5). The failure to do so was not as significant as the other failures but in this instance demonstrates that there was a simple means of explaining the effect of a term that was not taken as OS chose simply to paraphrase the competing terms.

Above Award Guarantee

[84] The AAG, which is dealt with in clause 7.7 of the Agreement, was explained to employees. The MEU complains that the explanation given was unreasonable because it failed to provide the formula by which the AAG was calculated. That failure is said to be significant for five reasons.

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[8] [2020] FWCFB 5011 at [47].

[85] First, the absence of such a formula meant employees were unable to understand what their actual rates of pay payable under the Agreement would be. This is said to be important as the employees needed to know how they would be paid under different as the Agreement gives OS the ability to require employees to work any roster thus requiring recalculation of salaries based on changes in rosters. The requirement is consistent with observations made by the Full Bench in 2020 proceedings:[9]

> "[76] … In respect of alternative rosters able to be introduced under clause 2.1 of Schedule 1 of each of the Agreements, we cannot imagine what the difficulty 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."

[86] The second and third reasons relate to the calculations that were provided by OS in the AAG explanation document which was available by following the links in the explanatory material. The failure to provide the formulae used in arriving at those figures requires the employees to trust that OS will make correct calculations. The MEU provided evidence from Ms Sarlos that the figures provided in the AAG explanation were not reliable for the rosters currently being worked. The calculations were said by Ms Sarlos to be based on a series of assumptions which were made without reference to actual hours worked, including when public holidays may fall. On the rosters assessed by Ms Sarlos the amounts payable under the rosters in OS's modelling were in several respects wrong. In some cases, overstating the Award entitlements in others understating those entitlements.

[87] Fourthly, it is said that the prefatory words to the OS tables setting out calculations are misleading. They refer to calculations for rostered hours plus 5%. This is said to be different to the Agreement entitlement of 105% of the amount payable under the Award. The tables do not include any other amounts payable under the Award.

[88] Fifthly, it is said the failure to provide the formulae for the calculations means the employees are unable to assess how the annual reconciliation of Agreement entitlements against Award entitlements provided for in clause 27 will be conducted. The MEU contends that the employees had no way of knowing how their salary under the Agreement would be determined even after the reconciliation process in clause 27 was undertaken.

[89] The remuneration structure in the Agreement is unusual. Rates of pay are not included. Employees are required to carry out several calculations to determine the entitlement to remuneration under the Agreement. It appears that most employees will be remunerated other than in accordance with the Agreement. Some will. Some may be paid in accordance with the contract when the Agreement commences but may become entitled to payment calculated under the Agreement at a later time should their contract fall below the AAG. The task for employees in making the relevant calculations requires them to consider the terms of their contract, the terms of the AAG, the entitlement under the BCMIA including wage rates, and the various penalties and allowances that apply to their pattern of work. The MEU points to the uncertainty

[9] id at [76].

associated the proper application of entitlements to benefits such as public holidays as a further factor in this complexity.

[90] I have already described the tables provided by OS containing rates of pay under the AAG provided to employees by way of a link from the online information portal to a document headed "Explanation of the Above Award Guarantee in the Operations Services Production Agreement". Four tables were attached to the note. The tables provide 109 AAG salaries and 109 AAG hourly rates. These are the rates OS calculated as applying to the current roster. The question of the accuracy of those rates notwithstanding, the tables demonstrate the complexity associated with the current roster arrangements. I have also described Ms Sarlos's calculations and the manner in which the way rosters are worked may impact on the outcome of those calculations. The task will be more complex should those rosters change, or new rosters are introduced.

[91] OS submits the language of clause 7.7 is unambiguous and the effect of the clause obvious on its face. It contends that the explanation was sufficient and appropriate. It describes the MEU criticism of the illustrative examples as disingenuous. OS contends that the 105% guarantee will always be subject to a range of variables and that it was not possible for OS to provide a definitive calculation of the AAG for each employee. The calculations provided were said to be illustrative only. OS submissions appear to acknowledge the inadequacy of its explanation of the remuneration under the Agreement in providing individual employees with a clear picture of the consequences of the Agreement on their salary.

[92] The terms of the guarantee may, on its face, be straight forward. Conceptually it gives employees an indication that their remuneration would always be 5% above the rates of pay required under the Award. It is the application of the term that gives rise to complexity. So much is clear from the pages of material that were devoted to the explanation. The complexity of the remuneration structure arising from the Agreement not only made it impossible for OS to provide each employee of an account of how the AAG would operate in their circumstances, but it also made it impossible for the employees to understand what impact the guarantee would have on their remuneration. Even with the detailed explanation provided, including the numerous tables including identifying the hundreds of rates applying to current rosters, examples of indicative rates and the examples of how those rates are used in a comparison to the remuneration under the contract, I cannot see how employees could have any understanding of what their entitlement to remuneration under the Agreement would be. The employees are mineworkers not accountants.

[93] It appears from the explanation that for some, at the time of voting for the Agreement, there would be no change to remuneration but for others there would. Similarly, over the course of the Agreement some salaries would increase due to the operation of the Agreement while others would not. The steps that were taken to explain the term demonstrate that much. Those steps however did not meet the requirement of explaining the effect clause 7.7 would have on the employees' employment. OS's explanation of clause 7.7 remuneration did not provide the employees with an account of the consequence of the operation of the AAG on the employees' salaries as the employees could not know with any certainty whether it would result in a pay rise or not.

[94] The Agreement term was difficult to explain. Salaries are usually negotiated during bargaining for an enterprise agreement. In that way employee's pay rates are identified and agreed. OS's decision to depart from that means of setting salaries in the Agreement resulted in a need to provide a clear explanation of the consequences of that choice. Other steps may have been taken, for example by providing each employee with a comparison between their salary at the time of the vote and the salary that would apply to them if the AAG was in place. This step would have been reasonable, as the figures should have been available to OS at the time. This was a step that would become necessary from the time the Agreement operated in any event. Armed with that information the employees would know if their acceptance of the Agreement would result in a pay rise.

[95] It seems trite to say that rates of pay are an important factor in coming to agreement on terms and conditions of employment. Taking into account the explanation provided, the terms in which it was conveyed, and having regard to the circumstances of the employees, who should not have been expected to conduct their own calculations to estimate how the AAG might affect their remuneration, I am not satisfied that OS has complied with the requirement in s 180(5).

Hubs

[96] The last specific term raised by the MEU goes to the explanation of the effect clause 6 of the Agreement which allows OS to direct employees to work deployments within hubs as directed. Clause 6.3 describes the hubs as being Queensland, South Australia, Western Australia, or any other region designated as a new hub in the future. The MEU points out that due to the size of the hubs, employees may not be able to comply with the direction and the Agreement would not afford them the redundancy pay they may otherwise be entitled to under clause 34.2 of the BCMIA.

[97] The MEU notes that the employees were told that they would have access to the BHP Redundancy Policy, which has similar benefits in terms of access to redundancy pay to the BCMIA but is also inconsistent with clause 6.3 of the Agreement.

[98] The MEU raises that clause 6.3 also avoids the obligation in the BCMIA to pay for travel time and reimburse travel expenses when an employee is temporarily required to work away from their ordinary location. There was no mention of the loss of this entitlement in the explanatory material.

[99] OS responds that the MEU's criticism does not address the full explanation provided to employees. OS points to the explanation provided in the explanatory material and the comparison tables as reasonable. The explanation of clause 6.3 relevantly included that employees are employed to work at a deployment within a hub as directed from time to time. It also explains the term means employees remain employed for any location in the hub, and not any specific site in the hub. An example is given that if work at one mine ends, the employment may continue if there is work at another mine located in the hub. OS submit that the award redundancy entitlement does not arise in this situation because the employment does end and so does not give rise to a redundancy for the purposes of the Award entitlement to redundancy pay.

[100] OS points to the Full Bench decision in *John David Bourke & Jamie Clifford v OS MCAP Pty Ltd* [2022] FWCFB 178. The Full Bench there considered whether, employees who worked at a mine in NSW asked to choose a different mine in Queensland in circumstances where their contract of employment permitted deployment across the east coast of Australia, who refused to nominate a new mine were dismissed at the initiative of the employer for the purpose of s 386 of the Act. The Full Bench determined that there was not a dismissal. A key component of the facts underpinning that case was the specification in the employees' contracts that they were employed to work across the east coast of Australia and could be deployed at the direction of OS to other worksites. The Agreement has the same effect albeit that the hubs are smaller. OS, relying on the Full Bench, submits that redundancy pay would not be payable in circumstances where an intra-hub transfer was required.

[101] It appears that the Agreement does alter the position of employees, perhaps to their benefit, from the existing arrangements given the hubs appear to be defined as smaller. I consider that to be a matter that warranted some explanation to employees. The lack of entitlement to travel time and expenses also warranted explanation. The explanation given is not directed at how the award entitlements were affected and so reasonable steps were not taken to explain the effect of clause 6.6 of the Agreement.

Employees on Transferring Instruments

[102] The third matter raised by the MEU is that employees to whom transferring industrial instruments applied were given no explanation at all of the effect the Agreement would have on their employment given those instruments would no longer apply. OS identified in its application for approval that a small number of employees employment may be subject to transferring instruments. In its submissions it clarified that no more than 21 employees were covered by transferring instruments. There was some debate about whether the exact number of transferring employees has been identified. However, there is no material to proceed other than on the basis that there were no more than 21 employees. I will proceed on that basis.

[103] The MEU points out that as the explanatory material did not address the effect the Agreement would have on the transferring instruments then the requirement in s 180(5) could not be met for those employees. So much is accepted by OS. It submits that the failure to provide an explanation to these employees was of no consequence because had such an explanation resulted in all 21 employees voting against approving the Agreement it would have made no difference to the outcome of the vote. The MEU contends that the assessment required under s188 cannot be determined by arithmetic.

[104] It is apparent that s 180(5) was not complied with in relation to these employees. An explanation of the consequences of voting in favour of the Agreement was required for all relevant employees including those to whom transitional instruments applies. The subsection required an explanation of the impact of the Agreement on the terms and conditions of their employment. The matter raised by OS about the consequences of failing to meet the requirement is a matter to be considered under s 188(2).

Conclusion – Section 188(1)(a)

[105] For the purposes of determining whether there has been genuine agreement by the employees by reference to s 188)(1)(a) I am not satisfied that OS has complied with s 180(5). I come to this conclusion for the reasons outlined above which are based on a careful consideration of the explanatory material provided to the employees. Without departing from those reasons, I agree with the MEU's general criticism that the explanatory material was deficient because it failed to adequately identify the detrimental effects of the Agreement. The tables which merely paraphrased the terms of the Agreement and compared them to the Awards was insufficient to explain the adverse effect of the Agreement. The failure to provide concise statements of the detriments, especially in circumstances where concise statements of the benefits were provided, rendered the explanation non-compliant the requirement in s 180(5).

[106] Again, for the reasons above, I also agree with the MEU criticism that OS failed to take all reasonable steps to explain the effect of several specific terms of the Agreement. I have dealt with each of those terms earlier. They include important provisions going to remuneration and hours of work. Other terms relevant to redundancy entitlements and public holidays were also not adequately explained and so failed to comply with s 180(5).

[107] I also find that employees whose employment was regulated by transferring instruments were not provided with an explanation of the effect of the Agreement on the terms and conditions of employment found in those instruments. This is a further failure to comply with the requirement in s 180(5).

Section 188(2)

[108] The failures to comply with s 180(5) mean the Agreement cannot be considered to have been genuinely agreed within the meaning of s 188(1)(a). Despite this the Agreement may have been genuinely agreed to if the Commission is satisfied that the Agreement would have been genuinely agreed to within the meaning of subsection 188(1) but for minor procedural or minor technical errors made in relation the requirements in paragraph 188(1)(a) and those errors did not disadvantage employees.

[109] I do not consider any of the errors were minor procedural or minor technical errors. As the Court said in *Mechanical Maintenance* detrimental changes to existing conditions will be of particular significance to employees.[10] The object of Part 2-4 found in s 171 includes to provide a "simple, flexible and fair framework" for the making of enterprise agreements. That framework allows employers to conduct votes of employees to approve proposed agreements. Prior to conducting the vote an employer must explain the terms of the proposed agreement and the effects of the agreement to all relevant employees. The explanation is critical in achieving informed agreement. A failure to provide an adequate explanation will undermine that process. I consider this to be the case here. The failure not only to provide an account of the detrimental aspects of the Agreement but to also provide adequate explanations of critical terms of the Agreement going to hours of work and remuneration cannot be considered minor errors.

[10] Op cit at [78].

[110] OS submitted that the failure to explain the effect of the Agreement to the transferring employees should be considered a minor error because the number of employees affected was small. I disagree. In *McColl's Operations Pty Ltd v Transport Workers' Union of Australia*[11] a Full Bench of the Commission considered an argument that the exclusion of a numerically insignificant number of employees from a vote to approve an agreement could be characterised as "minor" on the basis that their inclusion in the vote could not, mathematically speaking, have made a difference. The Full Bench observed that participation in the voting process contemplated by the Act involves more than simply casting a vote. Under s 180, the employer must take all reasonable steps to explain to employees the terms of the agreement and their effect. The real possibility that employees may confer amongst themselves and influence each other's views when this is done cannot be excluded. I consider these observations apt here. The employees who were not informed of the impact of the Agreement on their existing terms and conditions were denied time to engage in such activity meaning the employees were unable to fully participate in the vote in an informed way.

[111] As I am not satisfied that OS had complied with s 180(5) and I do not consider that the non-compliance amounted to minor procedural or technical errors I am not satisfied that the Agreement has been genuinely agreed and will dismiss the application.

Section 188(1)(c)

[112] The MEU raised two other grounds for believing that the Agreement has not been genuinely agreed to by the employees under s 188(1)(c). The first is that the inadequate and misleading explanation of the effect of key terms of the Agreement leads to a conclusion that the employees did not know what they were voting on. The second is that as the Agreement traversed coverage of the MIA and the BCMIA and as work under the two awards is different and regulated differently, the employees were not in a position to understand the effect of, nor had sufficient stake in, the Agreement so far as it related to employees covered the Award they were not familiar with.

[113] As I have found that I am not satisfied that there is genuine agreement within the meaning of s 188 it is not necessary to find that there are other reasonable grounds for believing that the Agreement has not been genuinely agreed to by the employees.

Conclusion

[114] I am not satisfied that the Agreement has been genuinely agreed to by employees for the purposes of s 188(1) or (2) of the Act. As the Agreement was not genuinely agreed to within the meaning of s 188 I cannot be satisfied that the agreement has been genuinely agreed to by employees covered by it for the purposes of s 186(2)(a).

[11] [2022] FWCFB 212 at [49].

[115] The application is dismissed.

DEPUTY PRESIDENT

Appearances:

I Neil, of Senior Counsel, on behalf of the Applicant.
J McLean, of Counsel, on behalf of the Applicant.

C Howell, of Counsel, on behalf of the Mining and Energy Union (MEU).
Instructed by *E Sarlos,* Senior National Legal Officer, MEU.

S Roulstone, National Organising Director - Mining, Australian Workers' Union (AWU), appearing remotely.

Hearing details:

2024.
Brisbane, in person and by video link using Microsoft Teams.
19 February.

Final written submissions:

Submissions filed by the MEU, 13 October 2023.

Submissions filed on behalf of the Applicant, 10 November 2023.

Supplementary submissions filed by the MEU, 5 March 2024.

Supplementary submissions filed on behalf of the Applicant, 19 March 2024.

Supplementary submissions in reply filed by the MEU, 2 April 2024.

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