[2020] FWCA 2696 [Note: This decision and the associated agreement has been quashed - refer to Full Bench decision dated 2 October 2020 [2020] FWCFB 5011]

DECISION

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

The Trustee for Celotti Australia Discretionary Trust T/A Celotti Workforce

(AG2020/467)

CELOTTI WORKFORCE ENTERPRISE AGREEMENT 2020

Vehicle industry

DEPUTY PRESIDENT LAKE BRISBANE, 1 JUNE 2020

Application for approval of the Celotti Workforce Enterprise Agreement 2020 – whether a majority of employees voted to approve agreement – whether genuine agreement reached – whether all reasonable steps taken to explain terms of agreement – genuine agreement reached – all reasonable steps taken – agreement approved.

[1] An application has been made under s.185 of the *Fair Work Act 2009* (the Act) for the approval of an enterprise agreement known as the *Celotti Workforce Enterprise Agreement 2020* (the Agreement) by the Trustee for Celotti Australia Discretionary Trust T/A Celotti Workforce (the Applicant). The Agreement is a single enterprise agreement.

[2] The "parties" to the Agreement are:

- Celotti Workforce;
- "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
- The Australia Workers Union (AWU)
- Construction, Forestry, Maritime, Mining and Energy Union – Maritime Union Branch (MUA)
- Construction, Forestry, Maritime, Mining and Energy Union – General and Construction Branch (CFMMEU)
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

[3] I will first outline a relevant chronology of the matter upon it being lodged with the Fair Work Commission (the Commission). I will then outline the outstanding matters that require my determination and will consider those matters in turn.

Chronology

[4] The Agreement was lodged for approval with the Commission on 26 February 2020.

[5] An analysis of the Agreement and supporting material conducted by the Member Assist Team (MAT) identified a number of concerns in relation to pre-approval steps, genuine agreement and whether the Agreement passes the better off overall test (BOOT) when compared to the 12 relevant Awards. On 27 February 2020, the application was allocated to determine whether the Agreement was capable of approval.

[6] The AMWU, CFMMEU Mining and Energy Division, CFMMEU Maritime Union Australia Division, CFMMEU Construction and General Division, AWU and CEPU (collectively the Unions) corresponded with Chambers on separate dates in relation to the application, advising that each organisation had an interest in the matter and requested the relevant material filed by the Applicant be provided. I decided to exercise the discretion in s.590 of the Act to hear from the Unions, given there were no employee bargaining representatives for the Agreement as evidenced by the Form F16 Application for approval of an enterprise agreement and confirmed by the Applicant in its email dated 9 March 2020.

[7] On 6 March 2020, I corresponded with the Applicant setting out concerns in relation the Agreement. The Unions (except the CEPU as it filed a Form F18 and submissions on 13 March 2020) were included in this correspondence and were provided a copy of the relevant material filed by the Applicant. The Applicant was requested to provide a response and undertakings to the matters raised on the 11 March 2020, and the Unions were requested to provide their concerns in relation to the Agreement by 13 March 2020.

[8] The parties complied with the directions issued and the Applicant filed a revised and completed Form F17 Employer's statutory declaration in support of approval. On 13 March 2020, the CFMMEU Mining and Energy Division advised it no longer sought to be heard in the matter. The CFMMEU – Construction and General Division advised that it adopted and supported the submissions filed by the CFMMEU Maritime Union Australia Division.

[9] On 17 March 2020, the Applicant filed further submissions in response to the matters raised by the Unions.

[10] On 20 March 2020, I corresponded with the parties informing that the matter was to proceed to conference. Prior to the conference, the Applicant was required to provide any material referred in their submissions dated 17 March 2020 by 23 March 2020. The Unions were required to submit "aide memoires of no more than four pages detailing any outstanding issues they wish to raise, and any reason why the agreement should not be approved, having reviewed the Applicant's submissions". No further material was provided by the Applicant, and the Unions provided separate aide memories as required.

[11] On 3 April 2020, I held a conference to deal with the conduct of the hearing.

[12] Following the conference, formal Directions were issued to the parties. The Directions required the Unions to file submissions summarising the relevant legal issues that could impact the approval of the agreement, supporting case law and to raise evidentiary issues regarding he Applicant's evidence by 8 April 2020. The Applicant was required to file its total and final submissions by 14 April 2020.

[13] On 14 April 2020, the Applicant's representative wrote to Chambers, advising that the CFMMEU – MUA had not properly served its submissions on the Applicant and requested an extension to respond to the matters raised by the CFMMEU – MUA. I approved the Applicant's request, and the Applicant filed its submissions on 15 April 2020.

[14] Parties were advised in correspondence sent from Chambers that the purpose of the Hearing was to test contested issues of fact. Accordingly, on 16 April 2020 the Unions collectively filed an aide memoire of the disputed questions of fact and scheduled of objections.

[15] On 24 April 2020, the Applicant provided copies of payroll information and timesheets to my Chambers only which included a spreadsheet of employees who worked during the access period. The Applicant requested the material be kept confidential due to confidentiality of the employee data, timesheets, and pay rates. The material was accompanied by revised submissions which referred to the specific documentation provided rather than the more generalised final submissions provided to parties. Having reviewed the material, I have determined to keep the material confidential but indicated I have considered the fact it was not provided to all parties and given the evidence due weight accordingly.

The Outstanding Issues

[16] The issues raised by me in correspondence with the Applicant can be summarised as follows. In relation to the explanation of the Agreement, the Form F17 Employer's statutory declaration in support of approval stated that a summary document and the relevant award was provided to employees, however did not contain information suggesting that the Applicant had explains the terms and effects of the Agreement. The summary document was not exhaustive.

[17] Concerns were expressed regarding whether the Agreement was genuinely agreed to. My correspondence noted that only 35 of 91 employees voted on the Agreement and the voting period was only from 7:00 am to 3:00 pm, raising the issue of whether casual employees had an opportunity to vote.

[18] In relation to the BOOT, concerns were expressed about a wages reconciliation clause included in the Agreement, and whether that clause was consistent with the requirements for such provisions explained by a Full Bench of the Commission in *Shop Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery*[1] on the basis that it specified reconciliations will occur annually and that it failed to state that any shortfall will be paid to the employees.

[19] Similar to the issues raised by the Commission, the Unions raised concerns as to whether the Agreement:

- was 'genuinely agreed to' pursuant to ss.186(2)(a), 188(1)(a)(i) and 188(1)(c) of the Act and the decisions in *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (*One Key*) and *CFMEU v Ditchfield Mining Services Pty Ltd* [2019] FWCFB 4022 (*Ditchfield*); and
- was approved by a valid majority of employees employed at the time (given the casual cohort of employees); and
- satisfies the BOOT pursuant to s.193(1) of the Act.

Genuine Agreement

Statutory provisions and relevant authorities

[20] Pursuant to ss.186(2)(a), 188(1)(a)(i) and 188(1)(c) of the Act, the Commission must be satisfied that the proposed agreement has been 'genuinely agreed to' by the employees covered by the proposed agreement. Relevantly in the present case, the Commission must be satisfied that the employer has taken 'all reasonable steps' to ensure that the terms of the proposed agreement and their effect has been explained to the relevant employees in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees (s. 180(5) of the Act).

[21] In *Ditchfield*, at [63] – [72], the Full Bench of the Commission outlines the relevant consideration from the relevant authorities that have turned their mind to what constitutes 'all reasonable steps' pursuant to s. 180(5) of the Act. These paragraphs in *Ditchfield*, in part, summarise Flick J's judgment at first instance in *Construction, Forestry, Maritime, Mining and Energy Union v One Key Workforce Pty Ltd* [2017] FCA 1266 on the 'all reasonable steps' requirement and are also derived from Deputy President Gostencnik's summary of the 'all reasonable steps' requirement in *BGC Contracting Pty Ltd* [2018] FWC 1466 (at [75 – 77]) and are, substantially, as follows:

(a) whether the employer has complied with the obligations in s.180(5) depends on the circumstances of the case;

(b) whether an employer has complied with s.180(5) requires the Commission to identify and assess the steps taken to ensure that the terms of the proposed agreement and their effect had been explained to the relevant employees;

(c) after considering the steps taken, the Commission must then consider whether:

(i) the steps taken were *reasonable* in the circumstances; and

(ii) these were *all* the reasonable steps that should have been taken in *the circumstances*.

(d) The Commission must then consider the content of the explanation given to ensure that the object of ensuring that (i) the terms of the proposed agreement and (ii) their effect, have been explained to the relevant employees in a manner that considers their particular circumstances and needs including their cultural and linguistic backgrounds and their age;

(e) the number and content of those steps comprising 'all reasonable steps' will depend on the circumstances. Some employers may, by reasons of the prevailing circumstances, need to take more or fewer steps than other employers with different agreements, facing different circumstances;

(f) the content of the explanation must enable to relevant employees to cast an informed vote, to know the content of the agreement and to enable them to understand how their terms and conditions might be affected by voting in favour of the agreement;

(g) in order to comply with s.180(5), an employer is not always required to identify detriments in an agreement against the relevant modern award or to provide an analysis between the agreement and the modern award, particularly in circumstances where an existing enterprise agreement applies to the employees in their employment with the employer. Where this is an existing enterprise agreement in place at the time of the explanation, it is relevant to have regard to the manner and content of the explanation of the changes made in the proposed agreement relative to the existing agreement; and

(h) an employer does not fail to comply with the obligation in s.180(5) merely because an employee does not understand the explanation provided.

[22] Further to (h) above, the Full Court in *One Key* at ultimately concluded that (my emphasis added):

> "[172] Nevertheless, the primary judge was correct to find that the Commissioner fell into jurisdictional error by failing to have regard to the content and terms of the explanation OKW purportedly provided the employees before they cast their votes. In addition the Commissioner's decision was affected by jurisdictional error because he failed to appreciate that, **in determining whether the relevant employees had genuinely agreed to the Agreement he needed to consider whether they were likely to have understood its terms and effect**".

[23] The requirement that a person take "all reasonable steps" was put by Deputy President Colman in the recent Full Bench decision of 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* at [115]:[2]

> "…A requirement that a person take 'all reasonable steps' does not mean that the person must take each and every conceivable step that might be reasonable. To "take all reasonable steps" is a turn of phrase that means to take the steps that are reasonably required. There may be hundreds of potentially reasonable steps, any one or more of which might amount to "all reasonable steps", depending on the circumstances. Reasonable minds might differ as to what this might entail."

Applicant's Evidence and Submissions

[24] The Applicant relied on its Form F17 and its witness statement of Mr Adrian Celotti, Director for the Applicant, to establish that the requirements with respect to confirming that genuine agreement had been met.

[25] In the Form F17, Mr Celotti stated at item 2.8 that the followings steps were taken on 10 February 2020 to explain the terms of the Agreement and their effect to relevant employees, and what was done to take into account the particular circumstances and needs of the relevant employees:

> "A Ballot Notice was provided to all employees, it set out that the services available to employees that have a hearing or speech impediment, are under 18 or have a disability, they were several options available to them."

[26] The Declaration goes on to state that:

> "Extra caution was exercised in the drafting of the explanation of terms to ensure that all employees could understand that terms and effects of the Agreement irrespective of their literacy levels."

[27] Further, Mr Celotti declared that:

> "At the beginning of the Access period, employees were provided with further information that included:
>
> - If an employee had a hearing or speech impairment, where they could get additional support;
> - The contact details of a Translation and Interpretation service if there were any language difficult
> - Offering an older person to assist any employees who were under 18years of age
> - An offer for further assistance to anyone under 18 years of age, who had a disability or for whom English was not their first language".

[28] Appended to the Form F17 was a copy of the material contained within the "access pack" that was provided to employees on 10 February 2020. The access pack contained an explanation of terms document and separate tables for each Award that set out each provisions of the Award and how it interacted with the Enterprise Agreement.

[29] In order to be satisfied that the Agreement has been explained, the Commission must consider the contents of the explanation and the way it was, having regard to all the circumstances and needs of the employees, and the nature of the changes made by the Agreement.[3] Accordingly, the summary document is set out in full below:

> "**Explanation of the Terms of the Celotti Workforce Enterprise Agreement 2020**
>
> This explanation is to provide you with a more detailed explanation of how the proposed Enterprise Agreement will work before you have to vote for the Agreement.
>
> **Who is covered?**

The proposed Agreement will apply to all on-hire employees employed by Celotti Workforce that would otherwise be covered by the following Awards:

- Building and Construction General On-site Award 2010;
- Cleaning Services Award 2010;
- Electrical, Electronic and Communications Contracting Award 2010;
- Manufacturing and Associated Industries and Occupations Award 2010;
- Mobile Crane Hiring Award 2010;
- Mining Industry Award 2010;
- Port Authorities Award 2010;
- Storage Services and Wholesale Award 2010;
- Vehicle Manufacturing, Repair, Services and Retail Award 2010;
- Hydrocarbons Industry (Upstream) Award 2010;
- Maritime Offshore Oil and Gas Award 2010; and
- Plumbing and Fire Sprinklers Award 2010.

How long will it go for?

The proposed Agreement will be in place for four years. It will only start seven days after the Fair Work Commission approves it. During this period neither Celotti Workforce or its employees covered by the Agreement will be entitled to make any extra claims as this agreement will apply.

Terms and conditions

This Agreement is a Labour Hire Enterprise Agreement. As such, the provisions of several Awards have been incorporated into the Agreement. When reading the agreement you will be covered by all of the terms set out in the Agreement itself. You will also be entitled to all of the benefits of the Award that would otherwise apply to your employment. The Terms of the Enterprise Agreement that differ from the Award are:

- The Agreement will commence seven days after it is approved by the Fair Work Commission and will run for four years.
- Casual employment will largely be governed by the Award, however, where a casual employee has 6 months of service with the company, they will be entitled to an extra 1% loading in lieu of casual conversion rights.
- The Agreement contains additional definitions that are not included in the Awards.
- Employees are precluded from making extra claims for the life of the Agreement.
- The Agreement sets out that Employees are obligated to follow lawful and reasonable directions. Whilst this is not set out in the Award, it is nevertheless a condition of your current employment.
- The Agreement sets out the circumstances where the Employer may stand an employee down. Whilst this is not set out in the Award, it is nevertheless a condition of your current employment.
- The Agreement contains extra obligations around safety and fitness for work. These are not included in your Enterprise Agreement.
- The dispute resolution clause differs from the underpinning Awards. However, it is similar. The provision in the Agreement reflects the model term set out in the Fair Work Regulations 2009. Please note that arbitration may only be used by the

Commission where both parties consent. Also note that any outcome must be consistent with the Code for the Tendering and Performance of Building Work 2016.

- The Agreement provides for how assignments with other entities will work. Clause 13 of the Agreement sets out that an assignment will be based on the skills of the particular role, not necessarily the skills possessed by the employee. Also, where an assignment cannot be found, an employee's employment may be terminated.
- The wages under the Award will apply to your employment. You will also be entitled to an additional $1.00 per hour. Any time you are paid at a rate higher than the minimum under the Agreement, the additional payment will be in lieu of any other benefits that would otherwise apply (provided that it does not result in you being worse off overall).
- The meal breaks under the Awards will not apply. Meal breaks will be directed by the company.
- The model consultation clause from the Fair Work Regulations has been included in the Agreement. This may differ from some of the underpinning Awards.
- The model flexibility clause from the Fair Work Regulations has been included in the Agreement. This may differ from some of the underpinning Awards.

All other terms and conditions from the Award are included in the Enterprise Agreement. You have been provided with a copy of your underpinning Agreement pursuant."

[30] In its written submissions, the Applicant conceded that it emailed an information package to all employees and did not meet with employees to explain the terms and effects of the agreements. However the Applicant referred to the Form F17, where Mr Celotti declared that the Agreement covers on-hire employees across several industries in all states and territories and that it could not be considered reasonable for personal meetings to be conducted with all of these employees. The Applicant submitted that it was for this reason that employees were provided with contact numbers to allow them to ask management any questions over the phone. Accordingly, the Applicant submitted that all reasonable steps were taken to explain the terms of the agreement and its effect to satisfy s.180(5).

Union's submissions and evidence

[31] As noted above, a collective point advanced by the Unions in relation to genuine agreement is that the Applicant did not take all reasonable steps to ensure that the Agreement and the effects of its terms were explained because the explanatory material was sent to all employees in an email with extensive number of documents (approximately 1130 pages that included the Agreement and 12 Awards) were attached. This bundle of documents, referred to an "access pack" contained:

- A copy of the Agreement;
- A ballot notice
- An explanation of the terms of the agreement
- A comparison table

[32] The Unions submitted that the Applicant relies solely on this single email to discharge its obligation under s.180(5) of the Act to take *all* reasonable steps to explain the terms of the Agreement and their effect on the employees.

[33] The Unions provided separate submissions in support of its above position, with many concerns raised by the Unions overlapping and/or adopted by the other. The Unions submitted that:

- The explanatory material was complex in that it covered 12 separate awards however was also "vague, inaccurate and confusing"[4];
- The explanatory material references the "award" and "the Applicant appears to rely on the employees… to independently identify the correct award that applies to their employment";
- the Applicant has "not actually provided any explanation about the difference in the terms of the Agreement and the relevant instruments, it has merely copied the clauses of a Modern Award and placed these clauses alongside the relevant clause of the Agreement";
- the Applicant did not provide evidence that it drew its employees' attention to content of the Agreement, with the Unions raising issues with clauses 9, 10, 12 and 14 of the Agreement and the effects the terms of the Agreement had on the employees' employment covered by the Agreement;
- the Commission cannot be assured that the employees in fact received the explanatory material sent by email, noting that the Applicant failed to provide explanation as to whether it ordinarily communicates with employees via email and that employees can reasonably be expected to receive the email; and
- the Applicant had others means of communicating the terms and effects of the Agreement, including digital communication methods such as telephone or Zoom conference, however chose not to do so.

[34] The AWU further drew the attention of the Commission to the circumstances of the employees to demonstrate the Applicant failed to satisfy the requirements in s.180(5) of the Act. The AWU submitted that the employees did not have a bargaining representative, and despite the Applicant stating as such in the Form F17, no steps were taken to take this circumstance or need into account. The AWU also noted that the there was no union involved in the process, the employees do not appear to be currently covered by an enterprise agreement, and that no bargaining for the Agreement appears to have occurred at all. Accordingly, the AWU submitted that the existence of these circumstances necessarily requires *additional* steps to be taken by the Applicant to explain the terms of the Agreement and their effect.

[35] The Unions collectively took issue with the witness statement of Mr Celotti dated 17 March 2020. The CEPU drew comparison with this matter to the explanation in *One Key*, where the Full Court found that it was not enough for an employer to make a mere statement in its statutory declaration that it explained the terms of the Agreement to the relevant employees to reach the requisite state of satisfaction to satisfy the requirement of section 180(5):

> "[112] […] In other words, a bare statement by an employer that an explanation has been given is an inadequate foundation upon which to reach a state of satisfaction…. 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) 162 CLR 24 at 39–44 (Mason J).
>
> [113] A consideration of the subject-matter, scope and purpose of the relevant provisions of the Fair Work Act indicates that the content of the explanation and the terms in which it was conveyed were relevant considerations to which the Commission was bound to have regard. The absence of that information meant that the Commission was not in a position to form the requisite state of satisfaction.".

[36] The MUA further contended that that the Commission cannot be satisfied that there were no other reasonable grounds for believing the Agreement has not been genuinely agreed to by the employee in accordance with s. 188(1)(c). The MUA adopted the Full Bench findings in *Re KCL Industries Pty Ltd* and submitted that the Applicant, in this matter, entered into an agreement to cover all classification contained in the *Maritime Offshore Oil and Gas Award* 2010 with a group of employees who do not work in the area and have no knowledge, experience or stake in the highly skilled work performed by workers in the unique classifications found in that Award.

The Applicant's submissions in response

[37] In reply to the Union's contention regarding whether employees received the email that contained the "access pack", the Applicant submitted that all employee communications are sent to the email addresses provided by the employees upon their engagement with the company. Employees also receive their payslips, rosters (where applicable) and other documents through these nominated email addresses.

[38] The Applicant rejected the Union's submissions that the explanatory material provided employees was "vague, inaccurate and confusing", stating that the Unions looked at the explanation of terms document in isolation, and without considering the combined effect of all the documents provided in the "access pack" as a whole. The Applicant also submitted that the explanation document provided to employees was provided to "draw employees' attention to potential differences between the Award and the Agreement, and that the employees than had the opportunity to review the comparative table provided to determine how the change impacted their individual circumstances.

[39] The Applicant also submitted that given the nature of the Applicant's industry, it would be difficult to facilitate meetings with employees, as suggested by the Union's in their submissions. The Applicant noted that the Unions have failed to acknowledge that the employees were in fact provided with the opportunity to email or phone the Applicant if they required further information. The Applicant also stated that the employees were at liberty to request meetings, however no request was made.

[40] The Applicant submitted that the facts in the present matter are distinguishable from the fact of *One-Key*. In *One-Key*, three employees voted on an Agreement that covered 11 Award. In the present matter, the Applicant submits that the Agreement will cover an established workforce where each proposed underpinning Award covers at least one employee in the workplace. The Applicant also noted that unlike *One-Key*, employees were provided with extensive comparative tables which set out how each individual term of the Agreement compared with each term of the Award.

Consideration

[41] The facts and circumstances, along with the nature of any explanation given, mean that what constitutes "all reasonable steps" necessarily varies. The term "all reasonable steps" does not give rise to the requirement for "perfection".[5] The assessment is, therefore, a value judgment.[6] There are no absolute rules about what is required in every circumstance by an Applicant to have done, or not to have done.[7] Compliance with s. 180(5) and ss.186(2)(a), 188(1)(a)(i) and 188(1)(c) of the Act varies in each case.

[42] I am not persuaded with the Union's contentions that sufficient explanation was not provided explaining the difference between the Agreements and Awards. Whilst I acknowledge there was a significant amount of documentation provided by emails, the differences were addressed in sufficient detail in the Applicant's explanation.

[43] In a recent decision by Colman DP. *Civil Sydney Pty Limited* [2020] FWCA 1033, the matter of providing documentation through a web link or PDF was traversed and the DP stated "there is nothing to suggest that providing the materials to the employees in question by way of email was somehow an inappropriate medium, such that employees did not really have, in substance, proper access to the documents. Colman DP further stated:

> **"[6]** To the extent that the union contends that compliance with s 180(2)(b) requires physical access to the relevant documents, I disagree. Section 180(2) contemplates two alternatives. Employees must either be 'given a copy', during the access period for the agreement, of the written text of the agreement and materials incorporated by reference; or, throughout the access period, employees must 'have access' to a copy of these materials. I see no reason why either of these requirements cannot be satisfied through electronic communication, but particularly so in the case of providing employees 'access' to materials. 'Access' means a way, means or opportunity of approach. It does not connote physical possession."

[44] If employees were unaware which instrument was applicable to their employment and required further clarification, they had the opportunity to contact the Applicant to seek that clarification. As noted by the Applicant, some employees took this opportunity to seek clarification. The explanatory material, whilst lengthy, was sufficient and was written in a way that all employees could have understand the terms.

[45] Accordingly, there is sufficient basis on the method and materials provided to employees to conclude that all reasonable steps were taken and a proper explanation of the terms of the Agreement and their effect was given to employees (particularly on the basis of the context of the manner in which employees normally communicate with the employer and based on their locations).

[46] In the present case, I am satisfied that all reasonable steps were taken to explain the terms of the Agreement and their effect to the relevant employees.

Did a valid majority of employees employed at the time voted in favour of the Agreement?

Statutory provisions and relevant authorities

[47] The Commission must be satisfied under subsection 181(1) and subsection 182(1) of the Act that a valid majority of employees employed at the time voted in favour of an agreement for an agreement to be approved.

[48] Subsection 181(1) of the Act states as follows:

> "**181 Employers may request employees to approve a proposed enterprise agreement**
>
> (1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.
>
> …"

[49] Subsection 182(1) of the Act states as follows:

> "**182 When an enterprise agreement is made**
>
> *Single enterprise agreement that is not a greenfields agreement*
>
> (1) If the employees of the employer, or each employer, that will be covered by a proposed single enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is made when a majority of those employees who cast a valid vote approve the agreement.
>
> …"

[50] A critical issue under s. 188(1)(c) is whether the agreement of the voting cohort of employees is capable of being described as having authenticity based upon a real and true understanding of the consequences of the proposed agreement. As stated by the Full Bench in *One Key:*

> "143.Furthermore, contrary to OKW's submission, authenticity is not irrelevant to para 188(c). To the contrary, it goes to the heart of the matter. Recourse to a standard dictionary of the English language tells us that "authentic" is a synonym for "genuine". The editor of the Oxford English Dictionary online notes that "[t]he distinction which the 18th [century] apologists attempted to establish between genuine and authentic … does not agree well with the etymology of the latter word, and is not now recognised"."[8]

Applicant's evidence and submissions

[51] In response to correspondence sent from my Chambers requesting further information regarding the vote turnout, the percentage of the workforce made up of casual employees and whether the casual employees would be covered by the Agreement, the Applicant submitted a revised Form F17 on 9 March 2020, indicating that:

- 91 employees would have been covered by the Agreement, 90 of whom were casual;
- 35 employees cast a valid vote for approval of the Agreement; and
- 24 employees voted to approve the Agreement

[52] The Applicant submitted that the Act does provide a requirement around the number of employees to cast a valid vote nor does the Act require employees to vote or tell employees they are required to vote. The Applicant stated that there is no objective measure to determine the quality of the level of vote turnout, submitting that a turnout of 35 out of 91 cannot be necessarily considered poor.

Unions' evidence and submissions

[53] The issues of whether a valid of employees employed at the time of the voted in favour of the Agreement was a matter pressed by the Unions. The CEPU adopted the submissions of the AWU, AMWU and the MUA. The CFMMEU adopted the submissions of the MUA.

[54] It was submitted by MUA was that in order for the Commission to be satisfied that the Agreement was made in accordance with s.182(1) of the Act, the Applicant was required to demonstrate that the employees who were asked to approve the Agreement would actually be covered by the Agreement at the time they were asked to approve.

[55] The MUA submitted that Mr Celotti's statement that least one employee fell within the coverage of the one of the twelve Awards listed at Clause 4 of the Agreement was a mere assertion. The MUA submitted that in order for the Commission to be satisfied the Agreement was made in accordance with s.182(1), evidence was required from the Applicant to establish that the employees who were asked to approve the Agreement were in fact covered by the Awards listed at Clause 4 of the Agreement.

[56] The MUA provided an illustrative example, specifically referring to clause 4 of the *Maritime Offshore Oil and Gas Award*. The MUA submitted that the Applicant was required to establish that the Applicant would need to lead evidence to establish that on the day they were asked to approve the proposed Agreement, those employees covered by the *Maritime Offshore Oil and Gas Award* were engaged in a classification set out in the clause 13 of the Award and engaged in the performance of work for a business which is engaged in the industry set out at clause 4.1 of the Award.

[57] The AMWU submitted that it was rare for casual employees to be engaged under a single continuing contract of employment and that "usually, employees are engaged under a series of separate contracts of employment on each occasion a person undertakings work".[9]

[58] The AMWU provided the following example:

> "If 12 or more of the employees who voted to approve the Agreement were not entitled to vote for the Agreement, in that they were not covered by the Agreement at the time of the vote, then the Agreement can potentially not have been "made", as there will be no "valid" majority of employees at the time."[10]

[59] The AMWU submitted that the Commission is required to consider the manner in which casual employees are employed by the Applicant. If employees engaged in the latter manner and were not at work on the day, it is unlikely that they were employed on the day.[11]

The Applicant's submissions in response

[60] The Applicant, in response to the issue pressed by the MUA, submitted that the Commission can be satisfied that the employee that were asked to approve the Agreement would have been covered by it at the time of the vote. Evidence was provided indicating which Award covered each 91 employees.

[61] In response to the AMWU's contention, the Applicant accepted that casual employment represents a significant number of its employees, however noted that all 90 of the casual employees to be covered by the Agreement were engaged at some point during the 8 hour voting period, hence they were eligible to participate in the vote.

[62] The Applicant submitted that the decision in Kmart Australia Ltd [2019] FWC 6105 found that, nonetheless, where an employer has wrongly allowed some employees to vote, or wrongly excluded some employees from exercising such an opportunity, if it would not have made a difference to whether a valid majority of employees employed at the time of the access period had approved the agreement, then the Commission may still approve the Agreement.

[63] The Applicant also referred to the decision in Appeal by Shop, Distributive and Allied Employees Association [2019] FWCFB 7599 (11 November 2019) (Kmart ruling), which provided:

> "[43] In relation to that element of the genuine agreement requirement in s188(1)(b), there remains an issue to be dealt with arising from the fact that Kmart erroneously included in the voting cohort persons employed after the start of the voting process on 21 November 2018 up to 28 November 2018 who had not been employed immediately before the commencement of the voting process or during the access period. It is necessary to consider whether this error is capable of affecting the conclusion that a majority of employees who were eligible to vote in accordance with s 181(1), and who voted, cast a valid vote to approve the Agreement. The reported outcome of the vote (in the Form F17 statutory declaration of Ms White) was that 23,110 employees voted, and 21,191 of those voted in favour of approval of the Agreement. We were advised by senior counsel for Kmart, and we accept, that its records disclosed that 1,422 employees who were employed after the voting process commenced but had not been employed at the time of the request/access period were included in the voting cohort. That being the case, it is clear that Kmart's error could not have affected the overall result and that the Agreement was made in accordance with s 182(1)."

[64] Evidence was provided by the Applicant to the Commission verifying that of the 91 employees that were given the opportunity to cast a vote, only 3 were not entitled to participate in the ballot, and this will not have affected the overall result of the ballot.

[65] The Applicant relied on this evidence to submit that the Commission could be satisfied that subsection 181(1) and subsection 182(1) of the Act had been met.

Consideration

[66] I accept the evidence of the Applicant that employees were covered by the Agreement during the voting period, noting that the 91 employees fell under the scope of the one of the 12 Awards.

[67] With respect to the casual cohort, I accept the submissions and evidence of the Applicant over the Union's, noting that all 90 of the casual employees were engaged at some point doing the 8 hours voting period.

Better off overall test

[68] Section 193 of the Act deals with the better off overall test (the BOOT). It reads:

> "**193 Passing the better off overall test**
>
> *When a non greenfields agreement passes the better off overall test*
>
> (1) An enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.
>
> *FWC must disregard individual flexibility arrangement*
>
> (2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.
>
> *When a greenfields agreement passes the better off overall test*
>
> (3) A greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.
>
> *Award covered employee*
>
> (4) An award covered employee for an enterprise agreement is an employee who:
>
> (a) is covered by the agreement; and

(b) at the test time, is covered by a modern award (the relevant modern award) that:

(i) is in operation; and

(ii) covers the employee in relation to the work that he or she is to perform under the agreement; and

(iii) covers his or her employer.

Prospective award covered employee

(5) A prospective award covered employee for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:

(a) would be covered by the agreement; and

(b) would be covered by a modern award (the relevant modern award) that:

(i) is in operation; and

(ii) would cover the person in relation to the work that he or she would perform under the agreement; and

(iii) covers the employer.

Test time

(6) The test time is the time the application for approval of the agreement by the FWC was made under section 185.

FWC may assume employee better off overall in certain circumstances

(7) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee."

[69] The BOOT is an evaluative determination, not to be not to be conducted via a line by line analysis.[12] It is an assessment that requires consideration of the advantages and disadvantages of an enterprise agreement to award covered employees and prospective award covered employees. There will invariably be some advantages to making an agreement, as there will likely be some disadvantages. An enterprise agreement may pass the BOOT even if some award benefits have been reduced, so long as they are more than offset by the benefits of the enterprise agreement.[13] Ultimately the application of the BOOT is a matter that involves the exercise of discretion and it is a value judgment.[14]

[70] I corresponded with the Applicant on 6 March 2020, raising issue with clause 14(c) of the Agreement, raising issue whether the overpayment will be high enough to compensate for penalties and allowance and that the review occurs only once a year. Based on the responses and modelling provided by the Applicant, I am satisfied that the Agreement passes the BOOT. I consider this matter is distinguishable from *Beechworth* as the BOOT has been met in relation to this Agreement, and by virtue of the wording of clause 14(a) and clause 14(c) of the Agreement that the Over Agreement payment must pay rates that are already above the Award.

[71] The issue raised by the Unions, as articulated by the MUA, in relation to the BOOT are as follows:

> "• Clause 9 of the proposed Agreement provides that any failure by an employee to follow a lawful and reasonable direction may result in the termination of their employment but would also be a breach of the Act and potentially subject to a fine;
> • Clause 10 of the proposed Agreement expands the circumstances where the Employer can stand employees down and refuse to pay them beyond those found in the Act; and
> • Clause 12 of the Agreement provides that any breach of the Safety and Fitness for Work clause by an employee may result in the termination of their employment but would also be a breach of the Act and potentially subject to a fine."[15]

[72] I note these matters are likely to be inconsistent with the national employment standards (NES), and not a BOOT issue. Nonetheless, I have considered the Union's submissions and accept that the above provisions are likely to be inconsistent with the NES. However, noting clause 5(d) of the Agreement, I am satisfied that the more beneficial entitlements of the NES will prevail where there is an inconsistency between the Agreement and the NES.

Conclusion

[73] The Agreement is approved. I am satisfied that each of the requirements of ss. 186, 187, 188 and 190 as are relevant to this application for approval have been met.

[74] The Agreement, in accordance with s. 54 of the Act, will operate from 8 June 2020. The nominal expiry date of the Agreement is 1 June 2024.

DEPUTY PRESIDENT

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[1] [2017] FWCFB 1664

[2] [2020] FCFB 2434

[3] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union [2018] FCAFC 77 (25 May 2018) a*t para. 112

[4] AMWU Submissions dated 13 March 2020, page 8

[5] *CFMEU v Shamrock Civil Pty Ltd* [2018] FWCFB 1722 at [36]

[6] Downer EDI Mining – Blasting Services Pty Ltd at [63]

[7] Ibid

[8] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union [2018] FCAFC 77 (25 May 2018) a*t para. 143

[9] AMWU Submissions dated 13 March 2020, para 8 referencing *CFMMEU v Noorton Pty Ltd* [2018] FWCFB 7224 at [21]

[10] Ibid, paragraph [9]

[11] Ibid, reference *CFMMEU v Noorton Pty Ltd* [2018] FWCFB 7224 at [21]

[12] *SDA v Beechworth Bakery Employee Co Pty Ltd T/A Beechworth Bakery* [2017] FWCFB at [12]; *Armaceli Australia Pty Ltd* [2010] FWAFB 9985 at [41]

[13] *Re Australia Western Railroad Pty Ltd T/A ARG – A QR Company* [20111] FWAA 8555 at [8]; *NTEIU v University of New South Wales* [2011] FWAFB 5163 at [47]

[14] *TWU v Jarman Ace Pty Ltd* [2018] FWCFB 7097 at [28]

[15] MUA's Final Submissions – 8 April 2020, paragraph 16