[2020] FWCA 3126

DECISION

Fair Work Act 2009
s.210—Enterprise agreement

Geocon Constructors (ACT) Pty Ltd T/A Geocon
(AG2020/1337)

GEOCON CONSTRUCTORS (ACT) PTY LTD AND EMPLOYEES ENTERPRISE AGREEMENT 2018 - 2022

Building, metal and civil construction industries

COMMISSIONER JOHNS SYDNEY, 15 JUNE 2020

Application for variation of the Geocon Constructors (ACT) Pty Ltd and Employees Enterprise Agreement 2018 - 2022.

[1] An application has been made for approval of a variation to the *Geocon Constructors (ACT) Pty Ltd and Employees Enterprise Agreement 2018 - 2022* (**Agreement**). The application was made by Geocon Constructors (ACT) Pty Ltd T/A Geocon (**Geocon/Applicant**) pursuant to section 210 of the *Fair Work Act 2009* (**FW Act**).

[2] In short, the application seeks to vary (by eliminating) the pay increase that occurred on 1 February 2020 and the pay increase due to occur on 1 February 2021. That is to say, the variation seeks to maintain salaries at the 2019 rates until 1 February 2022. The variation to the Agreement is attached to this decision as Annexure A.

[3] The variation is opposed by the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) on the basis that, it contends:

a) Geocon failed to provide employees with notice of the time when and place where the vote would occur;
b) Geocon failed to explain the effects of the proposed variation to the Agreement; and
c) the Commission cannot be satisfied that the variation was genuinely agreed to by the employees covered by the Agreement.

[4] Noting the broad powers of the Commission, under s.590 of the FW Act, to inform itself in relation to any matter, I granted the CFMMEU the opportunity to make submissions, file evidence and cross examine the Applicant's witnesses. I did so because I was satisfied that the CFMMEU is entitled to represent employees with the job classifications that would otherwise be covered by the *Building and Construction General (On-site) Award 2010* and,

like most unions, plays an important role in maintaining and furthering the safety net of conditions of employment specified in the underlying modern award. The CFMMEU's extensive history of industrial representation of workers in the building and construction industry also led me to the conclusion that I would be assisted in the matter if I granted the CFMMEU the opportunity to make submissions, file evidence and cross examine the Applicant's witnesses. The manner in which Mr Tom Fischer, the CFMMEU's Legal/Industrial Officer, conducted himself proved my conclusion about the useful role that the CFMMEU could play in this matter to be correct.

The Hearing

[5] At the hearing on 5 June 2020:

a) The Applicant was represented by Mr Jack Tracey of counsel. I gave Mr Tracey permission to represent Geocon under s.596 of the FW Act because I was satisfied that the matter was invested with sufficient complexity such that I would be assisted in the efficient conduct of the matter if I allowed Geocon to be represented. My satisfaction was proved correct by the professionalism displayed by Mr Tracey during the hearing.

b) As explained above, the CFMMEU was represented by Mr T Fischer. Mr Fishcer tendered a Statement by Joshua Bolitho, Union Organiser. Mr Bolitho was not required for cross-examination.

c) Mr Damon Smith, General Manager – Construction, gave evidence and was cross-examined about:
   i. the steps taken by Geocon to ensure that the affected employees were given a copy of the written text of the variation (and other relevant materials) during the access period;
   ii. the steps taken by Geocon to notify the affected employees, by the start of the access period, of the time and place at which the vote was to occur and the voting method;
   iii. the steps taken by Geocon to explain the terms of the variation, and the effect of those terms, to affected employees;
   iv. the relevant chronology of events;
   v. the outcome of the vote; and
   vi. the less beneficial nature of the variation in comparison to the Agreement.

d) Mr Sean McInerney, Construction Worker (Grand Central Towers site), gave evidence and was cross-examined about:
   i. the meeting he attended on 12 May 2020, where the variation was explained;
   ii. his understanding of the effect of the variation;
   iii. wanting the vote to be a ballot (not show of hands);
   iv. being pleased that the voting method was change to a ballot;
   v. the vote process on 13 May 2020; and
   vi. having voted.

e) Mr Anthony Laurie, Construction Worker (City 7 site), gave evidence and was cross-examined about:

i. the meeting he attended on 11 May 2020, when Mr Smith first proposed the variation;
ii. his understanding of the effect of the variation;
iii. his concern about a show-of-hands vote;
iv. the email he received on 12 May 2020, advising about the change in voting method;
v. the vote process on 13 May 2020; and
vi. having voted.

f) Mr Jorge Corbonell, Construction Worker (Republic, Belconnen site), gave evidence and was cross-examined about:
i. the meeting he attended May 2020, when Mr Smith first proposed the variation;
ii. his understanding of the effect of the variation;
iii. his understanding that there would be a show-of-hands vote;
iv. the email he received on 12 May 2020 advising about the change in voting method;
v. Mr Smith and Mr Urbaniak's attendance at the Republic, Belconnen site at around 5.30 am on 13 May 2020;
vi. the vote process on 13 May 2020; and
vii. having voted.

g) Mr Matthew Holt, Construction Worker (City 7 site), gave evidence and was cross-examined about:
i. the meeting he attended in early May 2020 when he first heard about the proposed variation;
ii. the email he received from Mr Smith on 11 May 2020;
iii. co-workers expressing concern about a show-of-hands vote;
iv. him reporting those concerns to Mr Dean Lewis and Mr Urbaniak;
v. his understanding of the effect of the variation;
vi. his attendance at the pre-start meeting on 13 May 2020;
vii. the vote process on 13 May 2020; and
viii. having voted.

h) Mr Adam Urbaniak, Construction Manager, gave evidence and was cross-examined about:
i. his attendance at three pre-start meetings on 13 May 2020;
ii. the voting process on 13 May 2020; and
iii. his role in counting the votes.

i) Mr Dean Lewis, Construction Worker and Bargaining Representative, gave evidence and was cross-examined about:
i. meeting with Mr Smith and Ms Lucie Hood on 7 May 2020, to discuss the proposed variation;
ii. the email he received from Mr Smith on 11 May 2020;
iii. co-workers raising with him concerns about the show-of-hands voting method;
iv. him reporting the same to Mr Holt;
v. Mr Holt later advising him that the voting method had been changed;
vi. his absence from work on 13 May 2020; and

vii. Geocon emailing him on 13 May 2020 and providing him with an opportunity to vote by email.

[6] Following the hearing I issued directions for the filing of materials in relation to any further submissions and undertakings the Applicant was prepared to provide in support of the variation and submission in opposition by the CFMMEU. Geocon and the CFMMEU both complied with the direction. Also on 9 June 2020, Geocon filed proposed undertakings. On 10 June 2020 Geocon filed in the Commission and served on the CFMMEU formal undertakings. Later that morning the CFMMEU advised that it took no objection to the undertakings.

[7] In coming to this decision, the Commission, as presently constituted, has had regard to the following:

Exhibit No.	Description
1.	Variation checklist prepared on 15 May 2020
2.	Variation to the Agreement signed on 13 May 2020
3.	Form F23 – Application for approval of a variation dated 13 May 2020
4.	Form F23A – Employer's statutory declaration
5.	Correspondence to the Applicant seeking submissions on the threshold issue
6.	Statement of Damon Smith dated 20 May 2020
7.	Submissions of the CFMMEU dated 29 may 2020
8.	Supplementary statement of Damon Smith dated 3 June 2020
9.	Statement of Sean McInerney dated 3 June 2020
10.	Statement of Anthony Laurie dated 4 June 2020
11.	Statement of Jorge Corbonell dated 4 June 2020
12.	Statement of Matthew Holt dated 4 June 2020
13.	Statement of Adam Urbaniak dated 3 June 2020
14.	Statement of Dean Lewis dated 3 June 2020
15.	Submissions of the CFMMEU dated 4 June 2020
16.	Exhibit withdrawn
17.	Statement of Joshua Bolitho dated 4 June 2020
18	Confidential exhibit – Identified ballots
19.	Form F1s and Form F52
20.	Second supplementary statement (i.e. third statement) of Damon Smith dated 5 June 2020
Post hearing materials	
N/A	Undertakings proffered by the Applicant
N/A	Applicant's submissions dated 9 June 2020
N/A	CFMMEU's submissions dated 9 June 2020

Legislative scheme – variations

[8] Section 211 dictates when the FWC must approve a variation of an enterprise agreement.

> "(1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC must approve the variation if:

(a) the FWC is satisfied that had an application been made under subsection 182(4) or section 185 for the approval of the agreement as proposed to be varied, the FWC would have been required to approve the agreement under section 186…"

….

"(3) The following provisions:

(a) section 180 (which deals with pre-approval steps);

(b) subsection 186(2) (which deals with the FWC's approval of enterprise agreements);

(c) section 188 (which deals with genuine agreement);

have effect"

[9] That is to say, in relation to the approval of variations to enterprise agreements, certain parts of the FW Act applicable to the approval of enterprise agreements are called up into operation.

[10] Relevant, for present purposes, are the requirements relating to:

a) the preapproval steps in relation to notice about the vote (s.180(3), and
b) genuine agreement (s.186(2)(a)).

Legislative scheme – notice

[11] Section 180(3) provides as follows:

"(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

(a) the time and place at which the vote will occur;

(b) the voting method that will be used."

Legislative scheme – genuine agreement

[12] Section 186(2)(a) provides as follows:

"(2) The FWC must be satisfied that:

if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement."

[13] Section 188(1)(a)(i) provides as follows:

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

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

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

[14] Section 180(5) provides as follows:

> "(5) The employer must take all reasonable steps to ensure that:
> (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
> (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees."

Findings of fact

[15] I make findings of fact that:

a) The Agreement was approved on 29 August 2019.
b) By operation of clause 7 of the Agreement, on 1 February 2020, employees covered by the Agreement received a 5% pay increase.
c) In the week before 11 May 2020, Mr Smith attended pre-start meetings and raised with employees Geocon's desire to vary the Agreement and the reason for seeking to do so.
d) At 4.08pm on Monday, 11 May 2020, Mr Smith sent an email to 41 employees covered by the Agreement with the salutation "Dear Construction Workers". He wrote,

> "As discussed with you last week, Geocon … Is seeking to vary its Enterprise Agreement. The reasons for the proposed variation are due, primarily to the impact of COVID-19 is having on the broader business, resulting in a considerable decrease in market demand and activity.
>
> We have already made significant changes to our head office operations resulting in a 30% decrease in staffing numbers. Our hotel business has also been certificate the impact, with the majority of staff being stood down, and 4/9 of our operations have been temporarily closed stop
>
> Whilst we are continuing to deliver our current projects, we must be considerate of the longer term impacts on our operations to ensure we are best placed to retain our strong position and future pipeline of work.
>
> Attached this document is a copy of the proposed enterprise agreement, a copy of the proposed variation along with incorporated materials referenced in the agreement….
>
> As per the attached voting information sheet, but it will take place on Wednesday, 13 May 2020 at each site daily pre-start by show of hands.
>
> Should you have any questions regarding the above changes please not hesitate to contact your Site Manager or bargaining representatives … To discuss further. Myself and a HR Representative will be on site tomorrow to discuss any further questions you may have in relation to the proposed variation."

Mr Smith attached a document containing voting information for the proposed variation to the Agreement. The memo explained that:

"Method: Show of hands on Wednesday 13 May 2020.
Time: Eligible employees will be able to cast their vote at each sites daily pre-start."

e) At 4.39 pm on 11 May 2020, Mr Smith sent an email to Geocon's three Site Managers with the salutation "Men". He directed them to "print off [relevant documents and] place them on your site notice board and not in your pre-starts tomorrow morning." The Site Managers complied with the direction.
f) On 12 May 2020:
   i. Mr Smith visited each of the three Geocon sites. He met with employees covered by the Agreement. An unspecified number of employees told Mr Smith they had concerns about the proposed voting method. They requested a more confidential process be undertaken. Employees expressed a preference for voting by way of ballot.
   ii. Mr McInerney wanted a ballot and not a show-of-hands vote.
   iii. Mr Laurie had concerns about the show-of-hands vote.
   iv. Mr Holt reported to both Mr Lewis and Mr Urbaniak employee concern about a show-of-hands vote.
   v. Mr Dean Lewis approached Mr Smith and reported that employees had told him they were uncomfortable with a show-of-hands voting method.
   vi. Mr Smith decided to change the vote to a ballot.
g) At 4.36 pm on 12 May 2020, Mr Smith sent an email to employees covered by the Agreement. He wrote "further to my email yesterday and following a number of requests from the workforce, tomorrow's vote will now take place by way of ballot. Updated voting information form attached."
h) On 13 May 2020, Mr Smith attended each of the three pre-start briefings in succession. He took with him a sealed ballot box. The ballot box was placed just outside the lunchroom at each site.
i) At those pre-start meetings the ballot was conducted. Employees were given a ballot paper with their name on it. Employees voted.
j) At the conclusion of the third voting session Mr Smith took the ballot box to Geocon's head office. Mr Smith and Mr Urbaniak counted the votes. Geocon's Director of HR then verified the results.
k) Of the 46 employees covered by the Agreement, 43 voted. The results of the ballot were, 35 in favour of variation and 8 against.[1]
l) At 5.17 pm on 13 May 2020, the Geocon made the present application to the Commission for approval of the Variation. The application was supported by a Statutory Declaration made by Mr Smith.
m) Some members of the CFMMEU told Joshua Bolitho, Organiser, they had concerns about the ballot vote because names were pre-populated on the ballot papers.
n) The CFMMEU organised a petition by SMS to determine if members "felt intimidated by the process and believed that voting against the variation would have resulted in adverse action against [them] by [Geocon]."
o) Some members participated in the petition and advised "yes".[2]

[1] Exhibit 18 is the unredacted ballot papers. I have reviewed them all and can confirm the results.

[2] This is confidential exhibit 21. I have reviewed all the responses personally.

p) Deducting from the "yes" vote for the variation, those members of the CFMMEU who indicated in answer to the petition that they felt intimidated, results in the "yes" vote for the variation remaining the majority vote.

Submissions

[16] On 20 May 2020, Geocon submitted that,

"1. On Wednesday 13 May 2020, the Applicant, Geocon Constructors (ACT) Pty Ltd lodged an application for the variation of the Geocon Constructors (ACT) Pty Ltd and Employees Enterprise Agreement 2018-2022 (the Variation).

2. On Monday 18 May 2020, the Fair Work Commission advised of a threshold issue, relating to the notification of the voting method not being a clear one day as required by the Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 with respect to section 211 of the Fair Work Act 2009 (Cth) (the FW Act) as it modifies subsections 180(2) and (3) of the FW Act .

3. These submissions are filed on behalf of the Applicant in support of its application for approval of the Variation and in response to the threshold issue raised by Commissioner Johns.

4. With these submissions, the Applicant files further evidence which supports the Variation application. That further evidence is

a. a statutory declaration of Damon Smith, General Manager of Construction, dated 20 May 2020.

5. The Applicant relies upon the evidence above in support of its Variation application.

Pre-approval requirements

6. Subsection 180(3) of the FW Act provides that the "*employer must take <u>all reasonable steps</u> to notify the relevant employees of the following by the start of the access period for the agreement:*

(a) The time and place at which the vote will occur

(b) The voting method that will be used." [Emphasis Added]

7. For the reasons outlined below, the Applicant submits that it took all reasonable steps to notify employees of the place, time, and method of the vote in accordance with subsection180(3) of the FW Act .

Reasonable steps taken by the Applicant

8. The evidence of Damon Smith outlines that the following steps were taken by the Applicant to satisfy the pre-approval requirements in subsection 180 of the FW Act:

a. On Monday 11 May 2020, Mr Smith emailed all eligible employees with information regarding the variation of the Agreement which included a copy of the variation, a copy of the proposed Agreement, the Building and Construction (General) Onsite Award 2010 and information relating to the vote titled "voting information- show of hands".

b. On Monday 11 May 2020, Mr Damon Smith also contacted all Site Managers to inform them of the details regarding the vote and requested that all materials be made available at the site and placed up on notice boards, which included the information regarding the vote particulars.

c. The Applicant's site management team confirmed that this material was placed around each of site/s for all employees to review and consider over the access period.

d. On Tuesday 12 May 2020, Mr Damon Smith, visited all three of the Applicant's construction site/s to meet with employees covered under the Agreement to discuss the nature of the proposed changes and address any employee questions. During these discussions' numerous employees informed Mr Smith they had concerns with respect to the proposed voting method and requested a more confidential process be undertaken. The employees reported that voting by way of a ballot would be a much fairer process and requested Management agree to this change. The reasons cited included the public nature of the vote and that some employees may vote against their wishes for fear of reprisal or coercion from other workers.

e. After consulting with the employees, and considering the information provided, Mr Smith sent a follow up email to all employees advising that given a number of requests from the workforce the vote now would take place by way of a ballot.

f. On the day of the vote, forty-six (46) employees were able to vast a valid vote. Of those employees, forty-three (43) voted on the proposed variation.

g. Of those employees who did vote, overwhelmingly thirty-five (35) employees voted in favour of the Agreement.

9. As evidenced by the steps taken and the number of employees who voted on the Variation, the Applicant submits that all of the employees were aware of the time and place the vote was occurring.

10. The Applicant further submits that it had taken all reasonable steps to notify the employees of the voting method, the voting method was only changed to ensure that the employees were able to vote as they pleased, in a confidential manner, without fear of any reprisal or coercion. The change to the voting method ensured the integrity of the process, and was actioned in good faith at the request of the employees who would be voting.

11. It is the Applicant's submission that it has satisfied the conditions of subsection 180(3) of the FW Act, by the taking of reasonable steps to notify the employees of the time, place and method of the vote, and as such the Variation should be approved.

Genuine Agreement

12. Alternatively, if the change to the voting method means that the Applicant has not complied with the requirements of subsection 180(3) of the FW Act, the Commission should not conclude that the Variation was, for that reason, not genuinely agreed by the employees.

13. The change to the voting method was a minor procedural error within the meaning of subsection 188(2) of the FW Act, and the employees of the Applicant were not likely to have been disadvantaged by the error. That is because:

a. The evidence before the Commission concerning the making of the Variation, illustrates that the change to the voting method:
    i. was done at the employees' request; and
    ii. had little or no impact on the employee's participation in the vote;
b. The change of voting method from show of hands to ballot reduces the likelihood of pressures, coercion, favours or reprisals from fellow employees influencing an employee's vote and cannot be said to disadvantage employees.

14. The evidence to which paragraph 13.a) refers (see the statutory declaration of Damon Smith) supports the proposition that the relevant employees were not disadvantaged by changing the method of the vote, quite the contrary, employees were supportive of the amended method given they had requested the change.

15. This evidence fortifies the conclusion that the employees genuinely agreed to the Agreement and its content.

16. The Variation, having been genuinely agreed, should be approved for the above reasons.

Conclusion

17. The Applicant submits that when considering the basis of these submission and the evidence provided, the Variation should be approved on the basis that is has satisfies the pre-approval requirements set out in section 180 of the FW Act.

18. Alternatively, if the Commission finds that the Applicant has not complied with the section 180 of the FW Act, the Applicant submits that the such non-compliance is of the nature of a minor procedural error which has not disadvantaged the employees and that, but for the error, the employees would have genuinely agreed to the Variation in accordance with section 188 of the FW Act."

[17] On 29 May 2020 the CFMMEU submitted that,

"1. Geocon Constructors (ACT) Pty Ltd (Geocon) has made an application for a variation of an enterprise agreement under s210 of the *Fair Work Act 2009* (the Act). The enterprise agreement for which a variation is sought is the *"Geocon Constructors*

(ACT) Pty Ltd and Employees Enterprise Agreement 2018-2022" (the Proposed Agreement), and the comparator Award is the *Building and Construction General (On-site) Award 2010* (the Award).

2. The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) is a bargaining representative for the proposed agreement, insofar as it has members covered by the proposed agreement. Should this be contested, CFMMEU would be prepared to provide the Commission with a list of members at Geocon for comparison with a list of employees provided by the employer. This would be on the condition that the list of members not be made available to Geocon.

3. In the event that CFMMEU is found not to have standing on this basis, CFMMEU seeks that the Commission use its discretion to hear from CFMMEU pursuant to s590(1) of the Act, so as to *"inform itself in relation to any matter in such manner as it considers appropriate."* The issue of standing was the subject of a 2014 Full Bench decision in *CFMEU v Collinsville Coal Operations Pty Ltd*. With respect to s590, the Full Bench stated:

> *"We would make the observation, however, that the Commission may choose, in a particular matter to hear from an employee organisation or other person about the approval of an agreement even though the organisation or person may not otherwise have a right to be heard. The Commission has a broad power to inform itself in relation to any matter in such manner as it considers appropriate, including by inviting oral or written submission from a person or organisation."*

In *Collinsville*, the Full Bench went on to say:

> *"We accept that the CFMEU (as with any person seeking to be heard) is entitled be given a proper opportunity to develop its argument on the question of whether it should be heard."*

4. The combination of s590 and the Collinsville decision are authority for the proposition that the Commission has broad discretion to hear from the CFMMEU in this matter by such means and to the extent that the FWC considers appropriate. Collinsville is also authority for the proposition that a party wishing to be heard should be given a proper opportunity to present a case as to why it should be heard.

5. On this basis, the CFMMEU seeks to be heard in respect to approval of the proposed
agreement for the following reasons:

> a. The Agreement notes at Appendix A that it covers classifications that would otherwise be covered by the Award;
> b. The CFMMEU is involved in maintaining and furthering the safety net of conditions of employment specified by the Award. It has an acute interest in ensuring that award provisions are not undermined by enterprise agreements.
> c. The CFMMEU has extensive history of industrial representation of workers in the building and construction industry and in respect to work to be performed in this industry under the agreement;

d. It is the CFMMEU's view that the agreement undermines the safety net provided by the Award;
e. The CFMMEU, having regard to its constitutional coverage will be a 'person aggrieved' by any decisions to approve the Agreement under s 604 of the Fair Work Act 2009 (Cth) and have a right to appeal any approval decision

6. We rely on the reasoning of Commissioner Cambridge in Application by Warren:

[39] In circumstances where a registered organisation with industry or occupational coverage for work that would be comprehended and regulated by the Agreement seeks to be heard at first instance proceedings, particularly in respect to the BOOT, it would seem to be logical and expedient to permit standing and invite a contradictor. Alternatively, as occurred in both the Concrete Construction and Levent Painting cases, the benefit of the contradictor may only be obtained at the Appeal Bench level.
[40] The Commission is required to ensure that the Agreement complies with the Act, and the resolution of any concerns which have been identified should be conducted with transparency and appropriate rigour. Registered organisations with a legitimate interest in the industry and occupations covered by the Agreement may assist in the resolution of these issues of concern. Concerns about the BOOT in particular are likely to benefit from the presence of a contradictor. In this way, a process involving open, diligent and comprehensive scrutiny should provide for the correct outcome, and also enhance broader confidence in the Commission's enterprise agreement approval role

7. The submissions filed by the CFMMEU will address procedural elements of the agreement making process and provide a helpful analysis for the presiding Member. The CFMMEU is happy to assist the Member further, should the Member be minded to grant standing.

Objections to the approval of the proposed agreement

8. The CFMMEU opposes approval of the proposed agreement on the basis that:

a. The Applicant failed to provide employees notice of the time and place which vote would occur as well as the voting period to be used by the start of the access period;
i. The original notice of vote, provided on or around the commencement of the Access period, noted that the vote would be by show of hands and take place at the daily pre-start at each Geocon site. This information was incorrect;
ii. The second notice of vote was provided significantly after the commencement of the access period; but also provided vague and misleading information about the location of the ballot as well as failing to clearly state the time at which the ballot would open and close;
b. the Commission cannot be sure the effects of the terms of the agreement were properly explained to the workers;
i. There has been no evidence provided by the Applicant demonstrating that they explained the effect of the varied term;

c. the Commission cannot be satisfied that the proposed agreement has been genuinely agreed to by the employees covered by the agreement, as required by s188, since there are other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees;

i. Each ballot provided to an employee was marked with the name of the employee to whom it was issued, a feature of the ballot which was not advertised prior to the distribution of the ballots and which raises a serious concern about the free choice exercised by the eligible workers;

ii. neither the Employee representatives nor any third party apart from officers of the Applicant were permitted to be present at the opening of the ballot box and counting of the votes; nor have they seen any of the completed ballots since that time; raising a concern about the accuracy of the tally and independence of the process.

Conclusion

9. Should CFMMEU be found to have standing in the matter, or alternatively be granted standing at the Commission's discretion, we seek leave to provide further written submissions and evidence on the matters set out above, as well as other matters that become apparent during the course of the proceedings." (*Citations omitted*)

[18] On 4 June 2020 the CFMMEU submitted that,

"1. These submissions are intended to be read in addition to the submissions of the CFMMEU on 29th May 2020.

Evidentiary matters – SMS Petition

2. CFMMEU seeks to tender evidence of an SMS petition conducted on the 3rd and 4th of June 2020 (the SMS petition); on the basis that the names and phone numbers in the evidence will be kept confidential by the Commission and not released to the Applicant.

3. In addition, as per the F1 attached to these submissions, CFMMEU seeks orders that:

a. that any identifying details of workers included in the SMS Petition produced by the CFMEU to the Commission not be disclosed to any other party to the proceedings during any hearing of the matter under s593 of the Fair Work Act;

b. that any identifying details of workers included in the SMS Petition produced by the CFMEU to the Commission will not be released to any person outside the Commission for a period of 5 years following their tender unless required by law under s594 of the Fair Work Act.

4. This evidence is in the form of screenshots of an organiser's phone that was used to send a short paragraph of text to Geocon workers who have previously supplied their private phone numbers to CFMEU.

5. The text reads:

> *"I am an employee of Geocon Constructors (ACT) Pty Ltd, and I cast a vote in the agreement variation on 13th May 2020. I was not made aware of the method of voting – including the inclusion of my full name on the ballot – until I arrived at work that morning. I felt intimidated by the process and believed that voting against the variation would have resulted in adverse action against me by my employer. I do not believe that I was given a fair opportunity to vote on the proposal, and did not agree with the variation proposed at the time of vesting my vote. If you agree with this statement, please respond to this SMS with your full name – CFMEU undertakes to ensure the confidentiality of all responses."*

6. Accompanying this is a statutory declaration by Mr Joshua Bolitho which provides his evidence of how the results were collected and what was said to the workers during the petitioning process. We do not seek confidentiality in relation to the statement of the Mr Bolitho.

7. We believe these orders justified; and not unduly onerous to procedural fairness or natural justice.

8. The sole importance of the names and phone numbers lies in ascertaining the number of employees of the Respondent who wish to signal to the Commission their agreement with the statement posed, which includes their real fear of adverse action. The provision of the signatories' names to the Respondent after making such a statement would put them further at risk.

9. Any comparison between signatories, workers, notification recipients and voters may be performed by the Commission without the assistance of any of the parties.

10. This process is not an unusual one for the Commission. Comparisons of multiple confidential lists by a member of the Commission are commonly conducted to arbitrate majority support determinations, disputes over whether or not a union is a bargaining representative, and disputes around protected action ballots.

11. Recent cases where such a procedure was followed by consent include:

a. National Union of Workers v Cotton On Group Services (2014) FWC 6601
b. Australian Workers Union v QGC Pty Limited (2016) FWC 6671 – where Commissioner Simpson made this explicitly part of the directions
c. ANMF v Mark Moran at Little Bay (2016) FWC 1981
d. National Union of Workers v National Tiles Pty Ltd (2015) FWC 3473
e. Australian Workers Union v Kantfield Pty Ltd (2016) FWC 6473 – a process where only counsel were permitted to view the names on the list.

12. In *Application by CFMEU [2017] FWC 780,* Deputy President Lawrence made orders that a petition for a majority support determination be subject to confidentiality orders, noting

[36] The confidential comparison of lists method is widely used as the method of determining majority support. Of course, this is usually by consent, either whole or partial…

[41] The risk to employees' right to freedom of association in a hotly contested bargaining dispute is real. It would require, in my view, the Commission to be convinced by a specific submission as to the use they would be put for the Commission to provide them to the employer. No such submission has been made by KNF Construction.

[42] I am not satisfied that there would be procedural unfairness to KNF Construction in the Commission examining the signatures and names on the petition. Nor would there be procedural unfairness to KNF Construction for it to be required to provide a list of employees, covered by the application, to be examined by the Commission on the same basis.

13. This order was subsequently appealed and the appeal dismissed by DP Gooley in *O'Keefe Heneghan Pty Ltd & Rocky Neill Construction Pty Ltd & Auslife Pty Ltd T/A KNF Construction v Construction, Forestry, Mining and Energy Union* [2017] FWC 1127.

14. CFMEU puts forward that the situation here is analogous to that in the KNF matter; insofar as the standard SMS messages functioned as a petition to the affected workers which is capable of examination by the Applicant without the details of exactly which workers responded being necessary; and where the primary function of the names and details of the workers is to permit comparison with other lists which may be confidentially supplied by the Applicant. And, of course, insofar as the affected workers fear retribution from the Employer, regardless of whether this is justified.

15. CFMEU argues that the evidence is very clearly confidential – the names of individuals utilising their industrial rights in defiance of their employer are surely exactly what was intended to be considered by this form of order. In addition, other reasons to make these orders include that there is a public interest in ensuring other signatories of similar petitions know that their information will be treated confidentially; and that the balance of convenience lists strongly in favour of preventing an irreparable risk to workers' rights, privacy and future employment.

16. Should the Applicant have any concerns about the evidence, it would be reasonable to provide a list of employee names and phone numbers to the Commission for comparison. It is within its rights to question the organisers who collected the signatures, and who have both put on evidence about the collection of those responses.

17. Should these orders be granted by the Commissioner, CFMEU is prepared to tender the SMS petition document immediately.

Objections to the approval of the proposed agreement

18. The CFMMEU opposes approval of the proposed agreement on the basis that:

a. The Applicant failed to provide employees notice of the time and place which vote would occur as well as the voting period to be used by the start of the access period as required by s211 (and s180(5));
b. the Commission cannot be sure the effects of the terms of the agreement were properly explained to the workers as required by s211 (and s180(5));
c. the Commission cannot be satisfied that the proposed agreement has been genuinely agreed to by the employees covered by the agreement, as required by s211 (and s188(1) and (2)), since there are other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.
d. the errors throughout the process were neither minor, nor of no disadvantage to the workers, preventing approval of the agreement by s188(2)

Notice of Ballot

19. For the FWC to approve the application, the Applicant must be able to demonstrate that they gave appropriate notice of the time, place and method of voting to the workers at the commencement of the access period. Since 16th April 2020, regulation 2.09B sets
the access period for a varied agreement to 1 calendar day .

20. The Applicant's evidence in this regard is set out at question 2.2 of the Applicant's F23A.

21. According to the Applicant, on 11th May 2020, the Applicant sent the email attached to the F23A and marked "Attachment 1", and the document attached to the F23A and
marked "Attachment 2" to some or all of their workforce by email. CFMEU has not been provided with an unredacted copy of Attachment 1, and as such is not able to verify how many workers were provided with this email.

22. Subsequently, on 12th May 2020, the Applicant sent out the document marked Attachment 3 to some or all of their workforce. CFMEU has not been provided with a copy of the email to which this document was attached, and as such cannot offer a view on how many workers were provided with this email.

23. On the 13th May 2020, the ballot took place at each day's prestart meeting at each Geocon site. It is worth noting that every worker on site is required to attend pre-start as a normal part of their day's work; and their presence does not signify that they had prior knowledge of the vote. It is not known how or whether any employees who were not present at this pre-starts had the opportunity to vote.

24. The concerns with this process are manifestly apparent. Attachment 2, assuming it went to all workers in the affected cohort, includes a date – Wednesday 13th May 2020 – which is more than 1 full calendar day after the date the notice was issued. It includes a place (or rather places) – each sites' pre-start. It does not clearly include a time, but that might be inferred from the regular time of the pre-start meetings. Further, it includes a clear method of voting – a show of hands.

25. However, the subsequent notice on the 12th May 2020 is flawed in a number of ways. It includes a date – Wednesday 13th May 2020 – which is less than 1 full calendar day after the notice was issued. It includes a place; but the "Geocon Lunch Room" is not clearly identifiable as one or more places that employees can readily access; and the daily pre-starts are not held in any particular place called the "Geocon Lunch Room". It does not include a clear time, but that might be inferred from the time of the daily prestart meetings. Lastly, it includes a method of voting – a ballot – which is a term vague enough to admit a variety of processes; but in the Australian electoral and industrial contexts, generally understood to be a process where votes are marked on otherwise unidentifiable pieces of paper and cast anonymously.

26. On the 13th May, workers, upon arriving at the daily pre-starts, were presented with a "ballot" that included their full name and a space for their signature; which was handed to them directly by an officer of the Applicant. They were required to fill these documents out on the spot and place them in a ballot box set up at the same table at which they received the forms. As per the evidence submitted by CFMEU, one or more workers were taken aback by the process, having not been warned that the ballot would not be secret.

27. The clear failure to provide an accurate notice one calendar day ahead of the vote means that the Commission cannot find the agreement to have been genuinely agreed under s188(1), on the basis that it has not met the requirements at s180(3).

Explanation of the Terms

28. At the present time, the Applicant has still not provided any evidence on what workers were informed was the effect of the clause, beyond the brief note attached and marked "Attachment 4" to the F23A.

29. Attachment 4 clearly sets out the proposed wording of the change; but it does not provide any explanation of how that change would occur. It is apparent from the plain words that at 1st June 2020, the base rates would revert to the rates at 1st February 2019; and not increase again until 1st February 2022. However, it is unclear whether the rates at 1st February 2022 would increase by 5% on the 2019 rates, or whether the reversion that came into effect on 1st June 2020 would cease prior to the increase – that is, whether the February 2022 increase would be 5% on 2019 rates, or 5% on unmodified 2021 rates.

30. Absent further and better evidence of what workers were told about the effect of the variation; the Commission cannot be satisfied that the Applicant complied with s180(5) of the Act.

Genuine Agreement

31. The In addition to this, the FWC must be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement.

32. As previously mentioned, an unusual feature of the voting process was that each ballot provided to an employee was prominently marked with the name of the employee to whom it was issued.

33. This was not a feature of the ballot that was advertised in advance; or clear from the
notice or any other communications to workers made prior to the vote.

34. The submissions of the Applicant to date have been that the change to the method of voting was in response to requests from staff for confidentiality. Given that submission, it is difficult to understand the choice made by management to move to such a clearly nonconfidential method of voting.

35. The evidence of those workers that would communicate with the Union is that they felt intimidated by the method of voting; and that they feared – given the overall climate of cost reduction – that casting their vote against the employer's proposal might lead to an adverse action against them.

36. In fact, one of the workers who voted no was made redundant shortly afterwards on the 28th May – the statement of Mr Timothy Blayden sets out his circumstances and the fate that befell him shortly after casting his vote. Whether or not the two incidents were related, it certainly does not detract from the overall picture of a process designed to intimidate.

37. Finally, neither the Employee representatives nor any third party apart from officers of the Applicant were permitted to be present at the opening of the ballot box and counting of the votes, which apparently took place away from the worksites; nor have they seen any of the completed ballots since that time; raising a further concern about the accuracy of the tally and independence of the process.

38. When combined with the short timeframe and the numerous procedural flaws in the application, the Commission should not be satisfied that there was genuine agreement as required by s188.

Minor or Technical Errors

39. The Applicant may seek to rely on s188(2); which allows the approval to take place in circumstances where "but for minor procedural or technical errors" relating to paragraphs including s180(3) and s180(5), the agreement would have been approved.

40. The evaluative test for what constitutes a "minor or technical error" is set out by a full bench in *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid CellularPlastics & Others [2019] FWCFB 318*. In that decision, the full bench gives the view that what constitutes a minor or technical error is to be determined by reference to the underlying purpose of the requirement, which in the case of s180(3) is given by table 2 at [74] of that decision as

> *"To ensure employees are able to attend and participate in the voting process (should they choose to do so)"*

41. Further, it notes that:

"[79] Whether a failure to comply with s180(3) constitutes a 'minor error depends on the extent of the non-compliance and the circumstances. Generally speaking, the lower the level of non-compliance the more likely it is to be characterised as a 'minor error'."

42. The purpose of the access period is to allow workers to consider the proposal, prepare for the vote, and then cast their vote in a reasonable and informed manner. All key elements of the genuine agreement required to be held by the Commission for it to approve the agreement under s188(1) or (2).

43. While it appears true that a large majority of workers voted in this case, the circumstances – where the vote was held in a place the workers were already compelled to attend under close supervision of the management representatives, and where the process provided meant a failure to vote or a no vote would be readily traceable to each individual worker – argues against treating the failure to provide adequate notice of the time, place or method of the vote as minor.

44. For a worker engaged in the process, the failure to provide even one clear day's notice of the vote, followed by a process that dramatically differed from the generally understood meaning of the term used on the second notice creates a situation where the impression is one of ambush and unease. The evidence of the workers in this matter bears out this impression.

45. For similar reasons, even if the procedural errors are found to be minor, it is hard to see on what grounds the agreement could be considered to have been genuinely agreed a sset out in paragraphs 31 to 38. Unless – but for – the errors, there was genuine agreement, the agreement cannot pass s188(2)(a).

46. The second leg – that workers not be disadvantaged by the errors – is also blocked by the process followed. The failure to provide notice clearly had a negative impact on the workers, preventing them from preparing adequately for the voting process or organising effectively in relation to the proposed variation. The uncertainty around the effect of the clause means that workers could not clearly have understood what they were voting for at the time they cast the votes, a very disadvantageous position indeed.

Conclusion

47. For the reasons set out above, the Application should be rejected." (*Citations omitted*)

[19] On 9 June 2020 Geocon submitted that,

"1. The Applicant (Geocon) lodged an application to vary the above Agreement on 13 May 2020. The variation is straightforward, and amounts to a reversion to pre-1 February 2020 pay rates (as if the increase on that date had not occurred) and an ongoing freeze of those rates until they are again increased from 1 February 2022.

2. Geocon relies upon its primary written submissions in support of the approval of the variation filed in the Commission on 20 May 2020. It also relies upon its email correspondence with the Commission in relation to the application for variation, the

statutory declarations it has filed in support of the variation and the oral evidence given at the hearing on 5 June 2020.

3. Like the written evidence, the oral evidence revealed and demonstrated, among other things, that Geocon's employees genuinely understood and agreed to the variation to the Agreement; that the purpose of the variation was to assist Geocon's business in dealing with adverse conditions arising from the COVID-19 pandemic; that the change in voting method to a ballot occurred because the employees voting on the variation advocated for that change because they were uncomfortable with a "show of hands" method, and in order to avoid bullying by other employees or co-workers who saw how an individual voted as a result of using a show of hands method (see, e.g., evidence of Mr Laurie); that no employee raised any concern about their name being printed on the ballot paper; and that all employees had a clear understanding that they could vote yes or no to the variation, as is illustrated by, inter alia, the fact that eight employees voted no.

4. The CFMMEU opposes the variation. In its written submissions dated 29 May and 4 June 2020, it misstates and misconceives the statutory test for approval of a variation (see paragraph [8] of the former submissions, and paragraph [27] of the latter submissions); it contends, against the evidence, and without adducing any direct, or even compelling hearsay evidence of its own to the contrary, that the employees who voted in favour of the variation did not genuinely agree to it; and it claims that any procedural error somehow does not meet the test in section 188(2) of the *Fair Work Act* 2009 (Cth)(FW Act).

5. For the reasons which follow, Geocon submits that the CFMMEU's submissions should be rejected and that the Commission should approve the variation to the Agreement.

Compliance with sections 211 and 180(3) of the FW Act

6. By way of important legislative background and context, the FW Act does not prescribe any particular voting method for approvals or variations of enterprise agreements. See section 182(1) and the relevant Bench Book, which states:

"The *Fair Work Act 2009* does not prescribe any particular voting method. The Fair Work Act contemplates that a vote could occur by ballot, by an 'electronic method' or by some other method. The voting method is at the discretion of the employer or can be by agreement between bargaining representatives…"

7. Before the start of the access period (namely, the morning of 12 May 2020 – being 24 hours before the morning of 13 May 2020: see FW Act, section 180(4)), Geocon had taken all reasonable steps to notify the employees of the matters in subsections 180(3) (a) and (b).

8. Although written notification of those matters is not required, Geocon provided such notification in writing. The voting information provided on 11 May 2020 told the employees there would be a vote for the variation by show of hands at each construction sites' daily pre-start meeting (which meetings occur early each morning in the site lunch rooms). This amounted to Geocon taking all reasonable steps to notify

employees of the time, place and voting method for the variation, by the start of the 24-hour access period.

9. It follows that there has been compliance with the pre-approval steps in section 180(3) of the FW Act. In this regard, it is immaterial that the voting method actually changed *in practice*; that is irrelevant to the matters as to which the Commission must be satisfied having regard to sections 211 and 180(3).

10. At the time of the notification (11 May), Geocon had no reason to believe the vote would take place in a different manner. It was not until the access period had started that Geocon became aware of the employees' desire, and the employees' *advocacy*, that voting occur in a different manner, namely by ballot (not, relevantly, by "secret ballot").

11. The following question has arisen from the CFMMEU's opposition to the approval of the variation: did the change in voting method lead to the employees not genuinely agreeing to the variation for the purposes of section 188(1) of the FW Act? The answer to that question is no, for the following reasons.

12. In the first place, the employees actually asked for the change in voting method themselves. This is confirmed by the evidence of individual employees given by way of statutory declaration, and orally.

13. Secondly, Geocon's agreement to change the voting method actually *supported* and *facilitated* the employees' exercise of their substantive rights to vote for or against the variation to the Agreement.

14. Thirdly, in contrast to a show of hands method, the ballot method sought by the employees provided them with a level of privacy which allowed each of them to freely exercise his choice either for or against the variation, without other employees being aware of his vote. As the oral evidence illustrated, a show of hands, by contrast, inevitably demonstrates an employee's public position and, whether they like it or not, others will witness what stance they take.

15. Fourthly, there is no evidence that employees who voted yes voted that way because they felt they had no option other than to vote yes.

16. Fifthly, the existence of about eight no votes (as the evidence confirms) supports an inference that there was no pressure or coercion placed upon any employee. Moreover, there is no evidence at all of any coercion.

17. If the only way to ensure genuine agreement were the use of secret ballots, then Parliament would have prescribed that method as the only method for agreement approvals and variations under Part 2-4, just as it has required a secret ballot method for protected action ballot orders under Division 8 of Part 3-3 of the FW Act. Parliament has deliberately not made such prescription in relation to voting on enterprise agreements. This is consistent with the object in section 171(a), being the provision of a simple, flexible and fair framework for enterprise agreement-making.

18. If it were to follow from the lack of secrecy of a ballot that one cannot have genuine agreement, then that would effectively amount to a wrong and narrow reading of s 182(1), contrary to that provision's plain meaning; or, to put it another and perhaps better way, such a conclusion would not be consistent with section 182(1) of the FW Act.

19. Plainly, it is permissible and reasonable under the FW Act for an employer to know how an employee voted in a ballot. Part 3-1 of the Act protects employees from unscrupulous employers engaging in adverse action because of, or based upon, knowledge about an employee's particular exercise of a workplace right such as voting for or against an agreement, or variation of an agreement. This protection exists to ensure employees are not treated adversely for exercising their substantive rights.

20. This protection, and a reading of the FW Act as a whole, supports the construction of Part 2-4 of the FW Act for which Geocon contends.

Compliance with sections 211 and 180(5) of the FW Act

21. As noted above, the variation to the Agreement was straightforward.

22. It was explained to employees by a number of methods: a. discussions at pre-start;
b. by email with notice of the variation;
c. briefing of bargaining representatives in relation to the change;
d. bargaining representatives discussing the variation with workers; and
e. the General Manager of Construction and Construction Managers attending sites to discuss the change and answer any questions.

23. There is no evidence before the Commission that the employees did not understand the variation. Indeed, on the contrary, the oral evidence of the employees revealed that they understood what the effect of the variation would be for their pay rates.

24. It follows that Geocon took all reasonable steps to ensure that the terms of the variation, and its effect, were explained to the employees, and that the explanation was provided in an appropriate manner, in accordance with section 180(5) and 211 of the FW Act.

Conclusion on the matter of genuine agreement

25. For the reasons above, Geocon's employees genuinely agreed to the variation for the purposes of sections 211 and 188 of the FW Act. There is no evidence which would support the contrary conclusion and the overwhelming weight of the evidence favours a conclusion that there was genuine agreement.

The operation of FW Act, section 188(2)

26. One does not come to the exercise of the section 188(2) discretion unless there is in fact an error in relation to compliance with section 180(3) or 180(5) (or sections 173, 174 and other subsections of section 180). For the reasons set out above, there was no such error.

27. If, contrary to the preceding submissions, Geocon did not comply with the pre-approval requirements in section 180 on the premise, which Geocon does not accept, that Geocon did not comply with that section due to the employees not being aware of the voting method being changed to a ballot (from a show of hands) until approximately 14 hours before the vote, that was, at most, a minor procedural error that was not likely to have disadvantaged the employees, within the meaning of section 188(2). That is so essentially for the reasons set out above as to the manner in which the voting method change occurred in good faith, the legitimate purpose of the change of voting method and the employees' support and approval of that voting method. Some further reasons are as follows.

28. As the Full Bench observed in Huntsman, "the need to inform employees of the time and date of the vote (s.180(3)(a)) is more significant than informing them of the 'voting method' (s.180(3)(b)) – the first requirement may impact on the employees' capacity to participate in the voting process, the second may not." Here, the notification of the change in voting method during the access period and well before the vote actually occurred, was (in the premises) a procedural error which was minor in nature. It was not an error that was likely to have disadvantaged employees.

29. Geocon's principal submission is that the updated notification of the voting information on 12 May 2020 was just that – all reasonable steps had already been taken to notify the employees when the first voting information notice was provided on 11 May 2020, and so there was compliance with section 180(3). If, however, the updated voting information somehow constituted a new notification for the purposes of section 180(3) and somehow created a new access period, which Geocon contests, all that updated notification did was to confirm a change of voting to a legitimate ballot method, within the scope and contemplation of section 182(1) of the FW Act, and to add some clarity to the location of the ballot boxes. The times and locations (sites) for the vote remained the same.

30. If there was a procedural error, it did not affect the employees' ability to attend and participate in the voting process:

a. 43 out of 46 employees attended the vote on 13 May 2020;
b. they were able to cast a valid vote;
c. none chose to abstain;
d. the error had no impact upon the employees' capacity to participate in the voting process (see Hunstman, supra);
e. the change to the voting method made the vote confidential as between fellow employees, which, as the evidence shows, was the real concern of the employees (and not whether or not Geocon's management knew how they voted); and
f. notice of the terms of the variation had been given before the access period commenced (11 May 2020), and the employees had ample time to consider the proposed variation, to discuss it with co-workers and management, and to vote in an informed manner, which is what they did (both for, and against, the variation).

Conclusion

31. In short, the direct evidence from employees, and the other evidence from Geocon's management, strongly favours a conclusion that the employees freely exercised their substantive rights to vote for or against the variation and to do so in the manner in which they wished to exercise their vote. There is no sound evidentiary basis for the contrary conclusion.

32. The Commission can be well satisfied that there has been genuine agreement and that the variation to the Agreement should be approved.

33. Geocon accepts that approval of the variation should be prospective only, and therefore asks the Commission that the variation take effect from date of approval and not an earlier date.

[20] On 9 June 2020 the CFMMEU submitted that,

1. These submissions are intended to be read in addition to the submissions of the CFMMEU on 29th May 2020 and 4th June 2020.

Matters arising from Evidence

2. The evidence of the workers strengthens concerns about the process of the ballot, in addition to adding some new ones. It is reasonable to assume that difficulties encountered by these 4 workers, as a representative cross-section of all voting workers,
are likely to have been experienced by others who participated in the vote and did not give evidence.

3. The evidence of Mr McInerney noted:
   a. his understanding that it was explained to him at the meeting on the 12th May
   that if the variation wasn't successful, they would all lose their jobs (PN140, 141)
   b. His work emails were not functioning, and did not receive either a copy of the
   agreement or any of the notices to vote (PN147, 148)
   c. He first heard about the change to ballot via word of mouth on the day of the vote. (PN146)

4. The evidence of Mr Lewis noted:
   a. Despite being one of the workers who gives evidence that he asked management
   for a ballot, did not understand that management intended to mark it with workers' names [PN180]
   b. The first received notice that he would be permitted to vote by email occurred
   after the close of the ballot. [PN183-185]

5. The evidence of Mr Holt noted:
   a. He was not present for any of the explanatory meetings [PN244];

b. He believed that the variation was for a 2.5% reduction each year, rather than a 5% reduction followed by two year pay freeze; and was unaware of what would
happen in 2022 [PN249-254];
c. Despite being a worker who had brought up the show of hands ballot with management, he did not realise the method of vote had changed until the morning of the vote [PN264] and was surprised by having his name written on the ballot [PN265].

6. The evidence of Mr Laurie noted:

a. He believed that the agreement did not stretch as far as 2022, and any pay change in 2022 would be negotiated at the time [PN289];
b. He understood the word ballot to be similar to an election [PN300]

7. In relation to s180(2), the evidence of Mr McInerney at PN146-148 and Mr Holt at PN244 raises a previously unknown issue – an apparently faulty email system. Both workers give evidence that they did not receive emails over the period, raising a concern over whether all workers received a copy of the agreement by the commencement of the access period.

8. In relation to s180(3), Mr McInerney at PN146-148, Mr Lewis at PN180 and PN183-185, Mr Holt at PN264-265 all give evidence that they were not aware of the method of voting change until they turned up for work on the 13th May; raising a concern over whether any notice of vote was given at all during the access period. Adding to this is Mr Lewis's discovery at PN183-185 that he would be permitted to vote by email; a matter not notified to any other known party to the vote.

9. In relation to s180(5), Mr Holt at PN249-254 and Mr Laurie at PN289 both give evidence that demonstrates they did not understand the terms of the agreement; and Mr Holt at PN244 notes that he was not present for any of the explanatory meetings.

10. Finally, the evidence of Mr McInerney at PN140-141 is significant and concerning in terms of genuine agreement. If he was given to understand that a vote against the variation would result in workers "all losing their jobs", this is potential breach of the General Protections of the Fair Work Act, regardless of the phrasing.

11. Section 340 provides a protection for workers exercising or proposing to exercise a workplace right (such as voting on an enterprise agreement ballot) from adverse action, which certainly includes termination or threats of termination. Moreover, s343 provides that a threat against a person or a third person to induce the exercise or non-exercise of a workplace right is also a breach of the Act.

12. The evidence of the Geocon managers Smith and Urbaniak confirms a number of elements of this testimony and adds some additional concerns:

a. that the likelihood of greater redundancies should the variation fail were extensively discussed with staff at the explanatory meetings – Urbaniak at PN115-118 and Smith at PN348-351;
b. the effects of the variation at February 2022 were not explained at these meetings – Smith at PN353-354;

c. that the first workers made aware that absent workers would be able to vote were contacted at about 8.30am; some 2 hours after pre-start meetings as per Urbaniak at PN102 and Smith at PN394
d. that the relevant decision-maker was not aware of issues with the Geocon email system, and all non-email measures undertaken to ensure workers were aware of the changed ballot occurred on the morning of the 13th May 2020, as per Smith at PN372-375;
e. That the decision to place the names of the voters on each ballot was not consulted on with staff or representatives by the decision-maker, and that other methods were not considered – Smith at PN356-368
f. There was no reason provided by the Applicant for the exclusion of the staff representatives from a scrutineering role in the ballot – Smith at PN415.

Undertakings in relation to NES Matters

13. In relation to the matters highlighted by the Commissioner, we would propose that each of the undertakings in relation to clause 44.7, 33.3 and 34.3 state that the clause is deleted and replaced with words repeating the relevant sections of the NES. In relation to clause 36.1, it should suffice to add the words "and any other public holidays gazetted by the State or Territory government relevant to the site where work is performed."

Retrospectivity of the pay cut

14. In relation to the question of retrospectively deducting the proposed pay cuts from worker's ongoing pay, there can be no prospect of achieving this lawfully under the agreement as it stands.

15. The plain text of the agreement does not envision retrospectivity of pay increases or decreases at any point; and this point was not addressed on the evidence of any Geocon workers or management, at any point during the process.

16. In order to make the cuts retrospective, workers would need to have amounts deducted from their future pay packets (or arrange some other kind of debtor repayment scheme beyond the scope of the Fair Work Act 2009 and yet compliant with s325 of the Act).

17. Deductions are regulated by the operation of s324 of the Act; and must be either

a) authorised by an employee and principally for the employee's benefit, which is this is certainly not;
b) authorised by the employee and in accordance with an enterprise agreement; which it is not. There may arguably be an overpayment under the enterprise agreement; but there is no authority provided to deduct any money for that purpose written into it;
c) authorised by a modern award or an FWC order – the modern award makes no such authorisation, and the Applicant has not actually applied for an order in terms that would permit the deduction; it has only applied for a variation;
d) authorised under a law or order of court; which this is not.

18. In this circumstance, any attempt to make the variation retrospective would surely require a new variation to be approved, or alternatively, orders sought from the FWC specific to s324. Absent these steps, any attempt to deduct money from Geocon workers may be subject to civil penalties as set out in Part 4-1.

Conclusion

19. The central issues affecting the proposed variation are distinct; but intimately connected: whether the Applicant adhered to the process requirements set out in the Fair Work Act 2009; and whether the workers then genuinely agreed to the variation as proposed.

20. As revealed in the Applicant's F23A, as well as the evidence of their witnesses; it has not just failed to meet the process requirements of the Fair Work Act, but done so on nearly every possible ground. There can be no argument that the variation is capable of approval under s188(1) of the Act.

21. However, under s188(2), if the Applicant had merely done one of the following:

> a. changed the method of voting; or
> b. failed to ensure that all workers could access their emails (and the voting documents) during the access period; or
> c. failed to explain to workers the effect of the variation in February 2022, or
> d. failed to make arrangements for workers on leave to vote, then it may be a reasonable finding that the errors were minor or technical, and should not thus prevent the approval of the agreement. But in combination, the process is fatally flawed.

22. Complicating the matter is that the Applicant has sought to take advantage of a change in the Fair Work Regulations in April this year (Regulation 2.09B) to reduce the access period required for an agreement variation from 7 calendar days to 1.

23. However, while 2.09B reduces the minimum timeframe for compliance with s211/s180(3), it does not reduce, modify or eliminate any of the substantive requirements of the Act. By choosing to provide an access period of a single day, the Applicant has set themselves a timeframe with no room for error.

24. As a result, the Applicant has found themselves unable to detect or remedy the process flaws that did emerge. For example, should the change to the notice of vote have occurred six days prior to the vote, it seems eminently arguable that the Applicant could have taken additional measures to ensure that all workers received adequate notice in the remaining period of 6 days. As it happened though, no workers had more than 16 hours' notice of the vote (or, using the counting method required under the Act, 0 days), and it would appear that more than one arrived on the morning of the vote unaware of the manner in which the ballot would be carried out – having no effective notice of the vote.

25. Finally, however, the Applicant must satisfy the Commission that the variation was genuinely agreed. In this regard, all the matters above are relevant, as they comprise the Fair Work Act's set of safeguards designed to ensure that workers are

given a fair opportunity to consider a proposal and cast a free vote – and it is incumbent on the Applicant to demonstrate that none of these affected the genuineness of the agreement, matters to which the Applicant has not averted in its submissions to date.

26. However, in addition to the above, the Applicant has laid a further burden on the genuineness of the agreement by including on the ballot – unforewarned – the full name of each voter voting on the agreement, and removing any external scrutiny from the voting process. These inventive and unusual measures, whatever their genesis, created at the very least the perception that management would have the ability to mete out reward or punishment on the basis of workers' votes. The evidence of the Applicant has not been able to demonstrate that this had no impact on the outcome of the vote.

27. The net effect of the above is that the Applicant now must satisfy the Commission that it meets the criteria set out in s188(2); which, as set out in the previous submissions, sets a number of significant bars that the application must clear.

28. It must first demonstrate, to qualify under s188(2)(a), that the errors in the process under s180 were – in totality, not individually – minor and technical. It has not provided any submissions that CFMEU is aware of on whether the errors were minor or technical; and as set out in CFMEU's submissions of the 4th June and above at paragraph 22, they cannot reasonably be described as such.

29. It must then show that but for the errors, the agreement would have been genuinely approved. It similarly has not advanced any argument in relation to the counterfactual of what would have occurred if the errors had not been made. On the contrary, it has given evidence that, had it not made the errors, they feared that the agreement's voters might have changed their votes on the basis of unlawful coercion – without actually identifying a person who says they personally could have been so influenced. Even if taken as gospel, there is no indication given of whether or not there would have been genuine agreement absent the errors.

30. The Applicant does address itself to s188(2)(b), however, making the argument that the errors did not disadvantage the workers on the basis that the workers specifically asked for the error in relation to notice of the vote to be made. They do not address the errors under s180(2) or s180(5); or indeed the error under s180(3) where additional methods of voting were added after the fact. The fact that some workers did not understand that a 5% cut would happen immediately or how the agreement would operate in 2022 is a clear disadvantage in relation to their rights under the EBA process.

31. The sole argument of the employer here appears to be implausible; that all the workers are solely concerned with the impact of their colleagues bullying or coercing other workers; but are not concerned with the employer's holding a permanent list of all votes in the middle of downsizing process and recession. Moreover, this argument has within it a fundamental logical contradiction. If there are workers who were so strongly against the proposal that it was feared they would bully or coerce others, were they not disadvantaged by the change in voting method? Apart from the witnesses' apparent concern for some unnamed other workers who might be swayed by unlawful

means, the matter of actual disadvantage of workers is simply not addressed by the applicant.

32. And finally, despite its stated belief in the steadfast support of the workers for this variation, the Applicant declined, even after discovery of a critical error on the 12th of May, to simply restart the access period; and has declined ever since to simply remedy the flaws and re-run the process – which, thanks to r2.09B on which it already relies, could take as little as 36 hours. If the Applicant genuinely believed that "but for" the errors they would have an agreement, the ongoing pursuit of this application is an inefficient and unlikely manner of making it.

33. For the reasons set out above, the Commission cannot be satisfied of the requirements of s211, and the application should be rejected." (*Footnotes omitted*)

Consideration – notice of the vote

[21] The FW Act requires that an employer take "all reasonable steps". It does not require an employer to be perfect. The fact that it might be argued that, in a particular circumstance, the employer could have done more does not mean that the action it took fails the requirement that it take "all reasonable steps".

[22] The employer is required to give notice about:

a) the time of the vote;
b) the place of the vote; and
c) the method of the vote.

[23] Time: Having regard to the facts in this matter I am satisfied that Geocon took all reasonable steps to give notice about the time of the vote. The fact that the notice says "at each site's daily pre-start" rather than a specific time is sufficient. I am satisfied that Geocon's construction workers, who ordinarily attend a pre-start briefing, would have understood when the ballot was to occur. Noting the 93% participation rate in the vote, it is clear that the employees knew when to vote.

[24] Place: Having regard to the facts in this matter I am satisfied that Geocon took all reasonable steps to give notice about the place of the vote. The notice states "at each site's daily pre-start". I am satisfied that Geocon's construction workers, who ordinarily attend a pre-start briefing, would have understood where the ballot was to occur. Noting the 93% participation rate in the vote, it is clear that the employees knew where to vote.

[25] Method: The notice given on 11 May 2020 indicated that the vote would be by "show-of-hands". After employees expressed concerns about the same, on 12 May 2020 the method of vote was changed to ballot. There is no prescription in the FW Act about the method of voting. Having regard to the requirements of FW Act, I am satisfied that Geocon took "all reasonable steps" to notify the employees about the method of voting on 11 May 2020.

[26] The fact that the method of voting changed does not mean that Geocon failed to take all reasonable steps to give notice about the method of voting. It is a matter that might go to genuine agreement (s.186), but it is not a concern in relation to the requirements of s.180(3). The evidence establishes that the change in the method was in response to concerns raised by

employees. They did not want a show-of-hands vote in front of their co-workers. Geocon sensitively responded to that concern and changed the method of the vote.

[27] There was also another change to the method of voting. Mr Lewis was away on the day of the vote. Consequently, Mr Smith emailed Mr Lewis and provided him with an opportunity to vote by email. Mr Lewis chose to do so. No issue arises. It might be argued that Mr Lewis should not have been allowed to vote because he was unable to attend at the site of the pre-start meeting. However, the additional step taken by Mr Smith expanded the franchise. This was a good thing to do. Allowing increased participation enhances the majesty inherent in the democratic process.

[28] For these reasons I am satisfied that Geocon took all reasonable steps in relation to his notification obligations under the FW Act. However, if I am wrong about this finding, then I would have found that any irregularities were "minor procedural or technical errors" under s.188(2) of the FW Act.

Consideration – genuine agreement

[29] In order to be satisfied that the variation was genuinely agreed to, I must be satisfied that Geocon, took all reasonable steps to explain:

a) the terms of the variation; and
b) the effect of those terms.

[30] In the present matter, the "Proposed Variation" document clearly explains the terms of the variation. It is clear how the Agreement as varied will read if the variation is approved.

[31] In terms of the explanation of those terms, it is difficult to see how Geocon could have done more. The variation is simple in its terms and operation:

a) there will be no 5% pay increase on 1 February 2021;
b) base rates of pay under the Agreement will revert to the 1 February 2019 pay rates until the next increase applies (i.e. 1 February 2022).

[32] Noting that there was a 5% pay increase on 1 February 2020, it necessarily follows that the increase is lost if the variation is approved.

[33] Mr Fisher explored the employees' understanding with the construction worker witnesses. I was impressed by their answers and their understanding of the effect of the variation on their pay. Mr Holt was incorrect in his evidence referring to 2.5% decreases rather than 5%, but I'm not confident that it meant he did not understand the effect of the variation. He was simply in error on the day.

[34] Lastly, I should address whether it is likely that the change in the method of voting impacted upon the genuine agreement of the employees. There is no evidence that it did.

[35] During the hearing I expressed my concern about the identified ballots. It seemed to me an unnecessary thing to do as an administrative measure aimed at ensuring that employees only voted once. This could have been done a different way. Employees could have had their

name marked off a list when given a ballot. That is what occurs in Australian elections. It would have been a better method.

[36] However, there is no evidence that the identified ballots affected the genuineness of the majority vote. In this regard, I was greatly assisted by the evidence presented by the CFMMEU concerning its petition. It was a useful way to gauge whether employees felt pressured to vote for the variation because they knew that their employer would know how they voted (because of the pre-population of the ballot paper with employees' names). However, having reviewed the petition replies and compared them against the unredacted vote it is clear that, even if I deduct from the "yes" vote, those who indicated they only voted yes because their name was on the ballot, a majority vote remains the result. The identified ballots did not affect substantially the vote or the genuineness of it. In this respect, the evidence did not assist the CFMMEU. Therefore, it is to be commended for its candour in providing the evidence to the Commission in any case.

[37] For these reasons I am satisfied that the variation was genuine agreed to by employees.

Concluding remarks

[38] The Applicant has provided written undertakings. A copy of the undertakings is attached in Annexure B. These undertakings were not sought at the time that I approved the Agreement on 29 August 2019. They should have been. I am satisfied that the undertakings will not cause financial detriment to any employee covered by the Agreement and that the undertakings will not result in substantial changes to the Agreement. The undertakings are taken to be a term of the Agreement as varied.

[39] Subject to the undertakings referred to above, and on the basis of the material contained in the application and accompanying statutory declaration, for the reasons set out above I am satisfied that each of the requirements of ss.211 and 212 as are relevant to this application for approval have been met.

[40] The variation is approved and the consolidated version of the Agreement, as varied, is attached to this decision.

[41] I am advised that Applicant's pay cycle runs from Monday – Sunday (paid in arrears) and that the most recent pay period was Monday, 8 – Sunday, 14 June 2020. Consequently, in accordance with s.216 of the Act, I have decided that the variation operates from today (15 June 2020).

COMMISSIONER

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