DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Rail Commissioner
v
Craig Rogers
(C2020/8858)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT MASSON
COMMISSIONER WILSON

SYDNEY, 27 JANUARY 2021

Appeal against decision [2020] FWC 5780 of Commissioner Hampton at Adelaide on 17 November 2020 in matter number C2020/6407

Introduction and background

[1] The Rail Commissioner has lodged an appeal against a decision of Commissioner Hampton issued on 17 November 2020[1] (decision) concerning the proper interpretation of certain provisions of the *Rail Commissioner Rail Operations Enterprise Agreement 2016* (2016 Agreement). The decision arose from a dispute application lodged by Mr Craig Rogers pursuant to s 739 of the *Fair Work Act 2009* (FW Act), and was made pursuant to the arbitral powers conferred on the Commission by the dispute resolution procedure in clause 23 of the 2016 Agreement. In this appeal, the Rail Commissioner contends that the Commissioner erred in respect of his determinations as to:

(1) whether the "aggregate wage" of a train driver who has been declared to be excess is to be taken into account under clause 4.2.1(b) of Schedule 5, *Rail Operations - Redeployment, Retraining and Redundancy* (RRR Schedule) of the 2016 Agreement in determining if a proposed redeployment position is "*suitable*" (first issue);

(2) whether the Rail Commissioner has, for the purpose of clause 4.6.1(b) of the RRR Schedule, made a decision to "*privatise, outsource,* [or] *contract out*" (second issue); and

(3) the circumstances in which employees declared excess as a result of a decision of the Rail Commission to privatise, outsource or contract out may be made compulsorily redundant under the RRR Schedule (third issue).

[1] [2020] FWC 5780

[2] The background to the matter is as follows. The Rail Commissioner is a statutory body corporate established under the *Rail Commissioner Act 2009* (SA) (RCA Act). The Rail Commissioner's functions include the operation of public transport train services in metropolitan Adelaide. The 2016 Agreement, when in operation, covered the Rail Commissioner and employees within the classifications contained in the agreement. Mr Rogers is a train driver and is covered by the 2016 Agreement. The 2016 Agreement was approved on 20 January 2017 and commenced operation on 27 January 2017.[2] It ceased operation on 3 December 2020, when the *Rail Commissioner Rail Operations Enterprise Agreement 2020* (2020 Agreement) took effect.[3]

[3] The dispute the subject of the decision being appealed arose in the context of significant changes in the operation of trains in the greater Adelaide region. A decision was made by the South Australian Cabinet in May 2019 to outsource the operation of the Adelaide train network. On 18 September 2020, the Rail Commissioner executed a contract with Keolis Downer Adelaide Pty Limited (Keolis Downer) under which rail operations presently carried out by the Rail Commissioner and its employees under the terms of the 2016 Agreement will be undertaken by Keolis Downer effective from 31 January 2021. It is not in dispute that:

- Keolis Downer will engage employees to perform duties formerly undertaken by employees covered by the 2016 Agreement;

- Keolis Downer will have the option to make offers of employment to current Rail Commissioner employees;

- if a Rail Commissioner employee receives an offer of employment from Keolis Downer, that employee has sole discretion over whether they accept the offer; and

- if the Rail Commissioner employee does not accept the job offered by Keolis Downer or is not offered a job at all, the normal work the employee has been doing will cease at the end of January 2021 and the employee will continue in the employ of the Rail Commissioner.

[4] The dispute application was lodged in the Commission by Mr Rogers on 19 August 2020. The dispute was referred to the Commission pursuant to the dispute resolution procedure in clause 23 of the 2016 Agreement. It is not in dispute between the parties that the prior steps in the process for resolving workplace concerns or disputes required by clause 23 were followed. In his *Form F10 – Application for the Commission to deal with a dispute in accordance with a dispute settlement procedure*, Mr Rogers referred to clause 4.2 of the RRR Schedule and characterised the dispute as follows:

> "ISSUE:
>
> The Applicant says that amounts payable per clause 4 should be calculated as follows:
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> *For the Suburban Train Driver classifications, this is the aggregate wage + an average of overtime worked. For the other Rail Operations workgroups, this is the base rate + an average of shift penalties worked + an average of overtime worked.*

[2] [2017] FWCA 418

[3] [2020] FWCA 6362

> The employer on the other hand believes this amount is limited to the employees base rate…"

[5] The relief sought by Mr Rogers in relation to the dispute was "*a declaration that 'the definition of no loss of income relates to the aggregate wage and overtime as of the time of being a redeployee"*". Following two conferences before the Commissioner on 27 August and 23 September 2020, the Commissioner determined that the matter could not be resolved by further conciliation and the matter proceeded to arbitration in accordance with clauses 23.8 and 23.9 of the 2016 Agreement. Directions for the filing of an agreed statements of facts, evidence and submissions were issued on 6 October 2020 and the matter was listed for hearing on 4 November and 10 November 2020.

[6] By the time the matter went to hearing, the issues in dispute concerning the proper interpretation and application of the RRR Schedule in respect of the pending outsourcing of rail operation to Keolis Downer had expanded to include a number of issues comprising the three issues identified at the outset of this decision and two other questions, namely:

- Whether, if an employee's normal duties cease because their work is being undertaken by an outsourced operator, there is a period where the employee is not performing normal duties before potentially being declared excess for the purposes of the RRR Schedule, and when does each apply?

- What provisions of the 2016 Agreement determine the pay for an employee, from the date they cease normal duties and/or are declared excess until the redeployment process concludes - and what these provisions require the employee to be paid.[4]

[7] The Australian Rail, Tram and Bus Industry Union (RTBU) which, under clause 5 of the 2016 Agreement, is a party bound by the agreement and which represents employees covered by the agreement, did not seek to participate in the hearings before the Commissioner, but did file written submissions which were ultimately considered by the Commissioner in determining the dispute.

Relevant provisions of the 2016 Agreement

[8] The coverage of the 2016 Agreement is described in clause 5, *Incidence and Parties Bound*, which provides that: "*This is an Agreement between the Rail Commissioner, the RTBU and employees classified pursuant to this Agreement*". The disputes resolution procedure is contained in clause 23, *Resolving Workplace Concerns or Disputes*. Clause 23.8 provides that a dispute that is unable to be resolved at the workplace level is to be referred to the Commission "*for resolution by mediation and/or conciliation and if necessary arbitration*". In respect of the Commission's role, clauses 23.9-23.11 provide:

> 23.9 If arbitration is necessary the Fair Work Commission may exercise the procedural powers in relation to hearings, witnesses, evidence and submissions which are necessary to make the arbitration effective, in accordance with the provisions of the Act.

[4] [2020] FWC 5780 at [9], [86]

23.10 Any dispute referred to the Fair Work Commission under this clause should be dealt with by a member nominated by either the head of the relevant panel or the President.

23.11 The decision of the Fair Work Commission will bind the parties, subject to either party exercising a right of appeal against the decision

[9] In respect of classifications and rates of pay, clause 21.1 provides:

21.1 Classification of Positions

21.1.1 Upon commencing employment, an employee will be appointed to a position classified in accordance with this Agreement, will be paid according to the salary applicable to the classification of that position and will remain on that classification unless reclassified or appointed to another position classified at another level.

21.1.2 Employees will be advised in writing of their classification and any subsequent changes.

21.1.3 The remuneration levels applicable to each classification are set out at Schedule 1 and 3 of this Agreement.

21.1.4 Employees engaged under this Agreement will be appointed to a position classified in accordance with the following classifications.

[10] The rates of pay for rail operations employees (including train drivers) are set out in Schedule 1, *Weekly Wage Rates - Rail Operations Employees*. Clause S.1.1 of Schedule 1 initially provides:

S.1.1 Subject to clause 21.15.1 of this Agreement, the weekly wage rates applicable to each classification during the life of this Agreement will be as follows, effective from the first full pay periods on or after the nominated dates:

[11] Immediately below this is a table which sets out the base weekly wage rate for each classification, as adjusted from various specified dates. Clause S.1.2 of Schedule 1 then provides:

S.1.2 Aggregate Wage for Suburban Train Driver Classifications

S.1.2.1 The aggregate wage per week and the aggregate percentage used to calculate such rates will be recalculated by the Rail Commissioner to coincide with each wage increase detailed at clause 21.15.2 and/or the final posting of any major roster change involving Suburban Train Drivers.

S.1.2.2 The calculations will be provided to the RTBU and its delegates for checking prior to tabling the new rates for employees.

S.1.2.3 The calculation of the aggregate wage will continue to be based on the total number of full-time lines of work available within the Master Roster and the full-time equivalent employees required to fill that roster.

S.1.2.4 In circumstances involving extended line closures associated with works related to electrification of the rail network during the life of this Agreement, the aggregate wage will not be reduced to take account of fluctuations in roster arrangements, as would normally be the case.

S.1.2.5 The aggregate wage will not be reduced as a result of the implementation of shift harmonisation.

S.1.2.6 The aggregate wage calculation guideline in operation at the date of approval of this Agreement is attached at Schedule 7 – Aggregate Wage Calculation Guidelines.

[12] Schedule 7, *Rail Operations – Aggregate Wage Calculation Guidelines*, which is referred to in clause S.1.2.6 of Schedule 1 above, sets out the method of calculation of the aggregate wage for train driver classifications. Clause 3.0 of the Schedule defines the aggregate wage as follows:

> So far as normal rostered work is concerned the Parties to this Part of this Award may agree to apply the penalties and allowances provided for Saturday and Sunday time, overtime, shift work, broken shifts, distance payment and annual leave loading (built into the base rate) on an averaging basis and this arrangement will be referred to as the "Aggregate Wage".

[13] Schedule 3, *Weekly Wage Rates – Rail Operations Support Employees*, sets out the rates of pay for support employees. Clause S.3.1 of the Schedule states "*The rates applicable to each classification will be as follows effective from the first full pay period on and from the nominated dates*:", and then sets out in tabular form similar to Schedule 1 the base weekly wage rate for each classification, as adjusted from various specified dates. Clause S.3.2, *Increments*, commences by stating: "*The remuneration levels applicable to each classification level reflect incremental progression for full-time employees*".

[14] Clause 21.12 of the 2016 Agreement, *Acting in a Higher Grade*, sets out a regime for the circumstance where an employee performs the duties of a classification higher than their nominated classification. In a number of its provisions it uses the expression "*remuneration level*"; for example, clauses 21.12.1 commences with: "*An employee may be directed to temporarily perform specified duties in addition to those on which the remuneration level of that employee's position is based for purposes related, but not limited, to*…". The expression is also used in clauses 21.12.2, 21.12.3 and 21.12.4.

[15] The RRR Schedule is reproduced in full in the Annexure to this decision.

The decision under appeal

[16] In his decision, the Commissioner began by setting out the factual background to the dispute, the issues arising for determination, the relevant provisions of the 2016 Agreement

and the RCA Act, the respective cases advanced by the parties and the RTBU, his observations about the evidence and the principles applicable to the construction of enterprise agreements.[5] No issue was taken by any party in the appeal with these aspects of the decision.

[17] The Commissioner then proceeded to consider the context in which the 2016 Agreement was made. The Commissioner summarised the functions and powers of the Rail Commissioner under the RCA Act, and said:

> "[56] The Rail Commissioner has the power to make decisions to enter service contracts including making decisions to outsource work performed by its employees under s.7 of the RC Act. The Minister also has such powers under the *Passenger Transport Act 1994 (SA)* (PT Act)."

[18] The Commissioner then made findings concerning the negotiations which led to the making of the 2016 Agreement. He referred to the context of those negotiations established by the redundancy provisions of the preceding agreement, the *Rail Commissioner Rail Operations Enterprise Agreement 2011* (2011 Agreement) as follows (footnote omitted):

> "[58] The enterprise agreement in place at the time of the negotiations for the 2016 EA, the Rail Commissioner Rail Operations Enterprise Agreement 2011, contained a No Forced Redundancy (NFR) provision, which was common across most of the SA public sector at that time that it was approved. In the lead up to the negotiations in 2016, the State Government policy was to replace the NFR program with a new Redeployment Retraining Redundancy (RRR) program across the broader public sector, introduced via the enterprise bargaining process. The former NFR program provided, amongst other provisions, that if an employee was 'declared excess' and that employee entered into the NFR program, there was no timeframe that triggered 'redundancy'. In the bargaining for the 2016 EA various employee interests initially sought in effect, that the NFR, or at least its key features, be retained."

[19] The Commissioner noted that, in the course of bargaining for the 2016 Agreement, two earlier proposals which contained a RRR provision were rejected by a majority of employees voting in each ballot.[6] He found that in the following negotiations, and in light of a concern that there might be a future privatisation of rail services, employees made proposals for an improved RRR provision containing "a higher threshold for an employee to be made redundant and the payments to be made to employees as the outcome of the RRR process would be at their pre-excess declaration average earnings".[7] These proposals were not accepted by the Rail Commissioner, who (it was found) instead advanced a proposed RRR schedule based upon an existing provision contained in a State enterprise agreement applying to another group of employees within the SA public sector, namely the *South Australian Public Sector Wages Parity Enterprise Agreement: Weekly Paid 2015* (the Weekly Paid Agreement).[8]

[20] The Commissioner then made a comparison between the RRR provision contained in the second proposed agreement rejected by employees and the Rail Commissioner's proposed

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[5] Ibid at [1]-[47]

[6] Ibid at [59]

[7] Ibid at [60]

[8] Ibid at [61]

RRR Schedule derived from the Weekly Paid Agreement. Firstly, in relation to the criteria for the assessment of suitable employment, the Commissioner found that the rejected proposal provided as follows (with the subsequently altered provisions in bold):

> 4.2 Criteria for suitable employment
>
> a. The hours of work remain the same or similar where practicable;
>
> b. It is a reasonable distance/location from the employee's residence to the new place of employment;
>
> c. The classification is commensurate with the employee's job fit assessment and analysis, and the employee is assessed as being able to perform the role with reasonable training and support over a reasonable period of time;
>
> **d. The classification does not provide a wage/salary of less than 75% of the employee's substantive wage/salary;**
>
> e. The nature of the work is such that it is reasonable to perform, taking into account the employee's skill and experience;
>
> f. There are no extenuating factors specific to the employee/worksite that would make it unreasonable for the employee to perform the ongoing permanent role.
>
> 4.2.2. The above criteria does not limit further discussions and agreements between the employee and their case manager.
>
> **4.2.3. The applicable Income Maintenance policy will apply to employees transferred to a suitable ongoing role**.[9]

[21] The Commissioner found that the bolded provisions were effectively replaced in the Rail Commissioner's proposed RRR Schedule by:

> b. The level of remuneration is not less than what the employee was earning prior to becoming a redeployee;
> …
> d. The classification is not lower than the employee was previously engaged as;…[10]

[22] In respect of the provision concerning the conclusion of the redeployment process, the Commissioner found that the rejected version had stated:

> 4.6.1 The redeployment process will end only when the following criteria has been satisfied:
>
> a. The employee has accepted employment in an ongoing role; or

[9] Ibid at [64]

[10] Ibid at [65]

> b. For an employee whose position has been determined to be excess as a result of the Rail Commissioner's decision to privatise, outsource, contract out or the closure/part closure of a service(s) and **all reasonable attempts have been made to offer that employee a suitable ongoing permanent role as set out in 4.3**; or
>
> c. The employee has been offered employment in a suitable ongoing permanent role and has declined such ongoing employment;
>
> d. The Rail Commissioner and employee have negotiated, been offered and accepted an additional separation payment
>
> e. **For employees other than those in 4.6.1(b), all reasonable attempts have been made to offer suitable alternative employment and the redeployment process set out in 4.3 is completed**; or
>
> f. The employee has at any stage elected to take a VSP, in accordance with step 4.7.[11]

[23] The equivalent version in the Rail Commissioner's new RRR proposal was:

> 4.6.1 The redeployment process will end only when the following criteria has been satisfied:
>
> a. The employee has accepted employment in an ongoing role; or
>
> b. For an employee whose position has been determined to be excess as a result of the Rail Commissioner's decision to privatise, outsource, contract out or the closure/part closure of a service(s) **and that employee has been offered employment in a suitable ongoing permanent role and has declined such ongoing employment**;
>
> c. The Rail Commissioner and employee (and union if requested by the employee) have negotiated, been offered and accepted an additional separation payment;
>
> d. **For employees other than those in 4.6.1(b), the process set out in 4.3 is completed**; or
>
> e. The employee has at any stage elected to take a VSP, in accordance with step 4.7.[12]

[24] The Commissioner made the following observation about the Rail Commissioner's proposed alteration to clause 4.6.1:

> "[69] I observe that the effect of the new version of this clause involved changing the requirement in subclause (b) from "all reasonable attempts to offer", to the "employee

[11] Ibid at [67]

[12] Ibid at [68]

has been offered employment". Given that what was subclause (c) in the rejected version; "the employee has been offered employment in a suitable ongoing permanent role and has declined such ongoing employment" has been included in subclause (b), an objective understanding of this would be that a change and higher obligation was intended by that revised subclause."

[25] The Commissioner found that a revised enterprise agreement containing the Rail Commissioner's proposed RRR Schedule derived from the Weekly Paid Agreement was put to a ballot of employees and that, for the purpose of the vote, the Rail Commissioner provided an "*Agreement Explained*" document to employees.[13] The Commissioner set out an extract from this document concerning the RRR Schedule, which included:

- "This clause is different from the 2011 Agreement, in which it was titled 'No Forced Redundancy'. This clause now specifies that there will be no forced redundancies up to and including 1 January 2018, and that from 2 January 2018, ongoing employees who are declared excess will be subject to Schedule 5, which forms part of this Agreement."; and

- "If an employee has received written advice of being declared an excess employee and has not accepted a VSP they will become a redeployee. They will also be assigned a case manager who will create a redeployment plan. During the redeployment process the applicable case managers/agency representatives will genuinely seek to identify an alternative role or placement in the public sector (including with reasonable training). At any time while an employee is a redeployee, they may give notice that they wish to accept a VSP."[14]

[26] The Commissioner also found that the Government of South Australia had provided a "formal information poster" which relevantly stated: "Job protection: one suitable job offer guaranteed under RRR"; and "Retention of no forced redundancy till 1 January 2018".[15] Employees approved the proposed new agreement containing the revised RRR Schedule by a large margin,[16] and thus the 2016 Agreement was made.

[27] The Commissioner next dealt with the outsourcing process, and made the following findings:

- In May 2019, the Rail Commissioner was informed that the South Australian Cabinet had made a decision that rail operations would be outsourced to a private sector provider to be selected through a tender process, and that the Rail Commissioner's role would be to help implement the decision including by helping prepare and evaluate the tender process, with a view to the final decision on the awarding on any contract to be made by Cabinet.[17]

- No formal direction was made to this effect (under the RCA Act).[18]

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[13] Ibid at [74]

[14] Ibid

[15] Ibid at [75]

[16] Ibid at [76]

[17] Ibid at [77]

[18] Ibid

- The contract was awarded to Keolis Downer by a decision of the Cabinet in September 2020.[19]

- On 18 September 2020, two service contracts were simultaneously executed: a contract between Keolis Downer and the Rail Commissioner to provide rail operations and a service contract between the Minister for Infrastructure and Transport and the Rail Commissioner. The contract is between Keolis Downer and the Rail Commissioner because the Rail Commissioner is responsible to the Minister for oversight of rail operations under s 7 of the RCA Act.[20]

[28] The Commissioner also referred to the negotiations for and making of the 2020 Agreement, which contains a RRR Schedule in the same terms as the 2016 Agreement.[21]

[29] The Commissioner then turned to the issues for determination. The Commissioner summarised the legal principles concerning the extent to which the evidence of the negotiations for the 2016 Agreement and other contextual matters could be taken into account in construing the agreement.[22] The Commissioner then addressed the two questions set out in paragraph [6] above. In relation to the first of these questions, the Commissioner concluded that there would likely be, under the procedure provided for by the RRR Schedule, "a period between the time that the normal work of the employees ceases due to the outsourcing and any declaration of employees being excess to enable the necessary parts of the above procedure to be undertaken by the Rail Commissioner before the declarations are made."[23] In relation to the second question, the Commissioner found that once an employee ceases normal work due to outsourcing and the process contemplated by the RRR Schedule is being undertaken, the employee is to be paid the relevant weekly rate specified in the 2016 Agreement plus any additional amounts to which they may become entitled under the terms of the agreement.[24]

[30] The Commissioner then addressed the three issues the subject of this appeal which are identified in paragraph [1] of this decision. In relation to the first issue, the Commissioner referred to the aggregate wage provisions applicable to train driver classifications in Schedule 7 and said:

> "[126] In light of the above, based upon the terms of the Agreement I see no objective reason why the concept of the level of remuneration as used in the 2016 EA should not include the different aggregate pay levels for the Drivers. This fits the ordinary and plain meaning of the term and although this leads to a different outcome for Drivers, (as opposed to other classes of employees) the reality is that it is only the Drivers that have the concept of an aggregate wage recognised in the relevant schedules. There is nothing in the context or the other relevant considerations that would support a broader or narrower interpretation of this provision.

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[19] Ibid at [78]

[20] Ibid at [79]

[21] Ibid at [84]

[22] Ibid at [88]-[90]

[23] Ibid at [101]

[24] Ibid at [102], [116]

> [127] I also consider that as intended in the present context, the phrase "prior to becoming a redeployee" is a reference to the commencement of the RRR process for that employee and not necessarily the remuneration being paid at the time the employee is declared to be excess.
>
> [128] As a result, I find that the level of remuneration for present purposes means the relevant rates of pay that are set out in schedules 1 and 3, including the aggregate wage that has been determined under the arrangements contemplated in clause S.1.2 for the different levels of Drivers, that applied prior to the employee concerned becoming a redeployee. However, the level of remuneration for this purpose does not include any (other) allowances, specific shift or disability payments, penalties or overtime payments. This, along with the other elements of clause 4.2.1 of the RRR schedule, set the benchmark requirements for what would be a suitable ongoing role in the Public Sector for the purposes of redeployment."

[31] In relation to the second issue, the Commissioner initially said:

> "[132] Despite first impressions, the clause is ambiguous, and the context supports the notion that it should not be applied narrowly. This includes the context in which it was being negotiated, including that it was this form of outsourcing (amongst others) that was being contemplated when the improvements to the RRR provisions were being negotiated. Further, the clause should be read as a whole; namely contemplation of the Rail Commissioner's decision to privatise, outsource, contract out or the closure/part closure of a service(s). The notion of "privatising" services and the closure of services are more akin to decisions that are made by the Government. In that light, I consider that the objective meaning of the provision is that it applies to circumstances of the kind evident here."

[32] The Commissioner then referred to the decision of the Supreme Court of South Australia in *Public Service Association (SA) Inc v State of South Australia & Ors*,[25] relied upon by the Rail Commissioner, and concluded:

> "[134] I accept that this decision reinforces that there may be a distinction between decisions made by various entities in the State Government and that the employing entity and the Crown, in the sense of decisions made by executive government (Cabinet), are not the same. However, that decision was concerned with proceedings for alleged breach of a consultation obligation that applied to the statutory employer under the relevant State legislation in circumstances where the Government made a policy decision to introduce changes to car parking fees at Government hospitals within the State more generally as part of the 2010/2011 Budget Statement. I consider that this context is important in ascertaining the implication of the decision. In any event, the issue in this case is what the objective intention of the 2016 EA is, having regard to the relevant principles of interpretation that I have set out earlier at some length. In particular, whether the terms of clause 4.4.1 (b) was intended to apply to circumstances such as the current outsourcing decision. The common intention of the parties understood by reference to what a reasonable person would understand by the language in which the parties have expressed their agreement, in the context in which

[25] [2012] SASFC 66

the 2016 EA was made and applies, strongly suggests the broader application of this particular provision was objectively intended."

[33] The Commissioner then dealt with the third issue, and noted Mr Rogers' position that clause 4.6.1(b) did not constitute an absolute obligation to conclude the RRR process and that, as long as exceptional circumstances (as defined in clause 4.3.7 of the RRR Schedule) applied, an excess employee would remain under the provisions of the RRR Schedule.[26] The Commissioner then addressed the Rail Commissioner's contention that paragraphs (b) and (d) of clause 4.6.1 of the RRR Schedule are not mutually exclusive alternatives, and said:

"[138] On face value, clause 4.6.1 operates such that where subclause (b) applies its terms must be met for the redeployment process to conclude (with a redundancy rather than a VSP). That is, where an employee whose position has been determined to be excess as a result of the relevant decision set out in that subclause, the employee must be offered employment in a suitable ongoing permanent role and have declined such ongoing employment for the process to conclude without taking a VSP or other agreed outcome. I observe that if this approach is not adopted, the subclause would have no work to do as the RRR process could end on the basis set out in subclause (b) in any event by virtue of clause 4.6.3.

[139] There are some other factors that also support this interpretation. Subclause (d), which references the conclusion of the arrangements in clause 4.3, expressly applies to employees "other than those in 4.6.1 (b)". Further, the broader objective context, including the communications to the employees as part of the pre-ballot information process, is more consistent with the notion that an offer of employment in a suitable ongoing permanent role would be applied as part of the (improved) RRR process. Finally, the subsections operate as meaning that the RRR process ends "only when the following criteria has been met". However, it is evident that this would not mean that all the criteria must be met in each case as the distinction between (b) and (d) make such an approach problematic and the criteria are expressed as alternatives. In addition, the construction of clause 4.6.1 as a whole is much more consistent with the notion that the relevant criteria is to be satisfied and in the case of the outsourcing, subclause (b) must be met. This would mean that subclauses (b) and (d) are mutually exclusive but subclauses (a) and (e) may also apply to employees to whom subclause (b) applies. This is consistent with the fact that subclause (d) is the only provision that defers to subclause (b). This is the ordinary and natural meaning of the provision and the context, the structure of the provisions, and other relevant considerations do not lead to a different result. This includes the objectives, to prioritise redeployment and retraining, set out in the Objectives provision contained in the RRR schedule itself.

[140] I accept that the above approach means that it is more difficult to conclude the process where an offer of an ongoing suitable permanent role in any agency in the Public Sector is not made. This is relevant because the objective intention was that the NFR policy was only to apply for a set period and the clear implication is that after that time employees could be subject to a forced redundancy if the required circumstances are met. However, it was not contended by the Rail Commissioner that offers of this kind could not be made to employees in the circumstances of the employees covered by the 2016 EA and the contextual and drafting considerations

[26] [2020] FWC 5780 at [135]-[136]

supporting the above approach to the meaning of the provision are strong. Further, Mr Rogers' apparent acceptance that clause 4.6.1 (b) does not apply as an absolute, that is, there is no limit to 12 months provided there are exceptional circumstances, is pragmatic and appropriate given the operation of the RRR schedule in its entirety. This is reflected in the determination below to the extent that the terms of the provision allow."

[34] The Commissioner then set out his determination as to "the proper application of the 2016 EA in the context of this dispute".[27] In relation to the three issues the subject of this appeal, his determination was as follows:

"**Meaning of "level of remuneration" for the purposes of clause 4.2.1 (b) of schedule 5**

The level of remuneration for present purposes means the relevant rates of pay that are set out in schedules 1 and 3, including the aggregate wage that has been determined under the arrangements contemplated in clause S.1.2 for the different levels of Drivers, that applied prior to the employee concerned becoming a redeployee. However, the level of remuneration does not include any (other) allowances, specific shift or disability payments, penalties or overtime payments. This, along with the other elements of clause 4.2.1 of the RRR schedule, set the benchmark requirements for what would be a suitable ongoing role in the Public Sector for the purposes of redeployment.

The conclusion of the redeployment process

Clause 4.6.1 (b) of the RRR schedule is intended to deal with the nature of outsourcing that has occurred here and applies to this dispute.

In connection with employees who have been determined to be excess as a result of outsourcing and other decisions covered by clause 4.6.1 (b), and subject to the caveat below, it is the requirement that such an employee will be offered a suitable ongoing permanent role, and if this is declined, the RRR process will conclude.

However, the RRR process may conclude for such employees on some of the other bases set out in clause 4.6 where the relevant criteria have been met. This includes the acceptance of ongoing employment and a VSP as expressly contemplated by subclauses (a) and (e) receptively of clause 4.4.1. In that regard, I also observe that there is no absolute limit of 12 months to the RRR process and where exceptional circumstances under clause 4.3.7 exist, the period may be extended. The absence of any offered suitable ongoing permanent role as defined in clause 4.2.1 of the RRR schedule as determined above, would be a relevant factor for any employee declared to be excess as a result of a decision covered by clause 4.6.1 (b) including the current outsourcing.

Any dispute about the operation of this provision in a particular case, may be dealt with under clause 23 of the 2016 EA."

[27] Ibid at [141]

The Appeal

[35] The Rail Commissioner's notice of appeal was filed on 8 December 2020, five days after the 2016 Agreement ceased to have effect. The notice of appeal stated five grounds of appeal as follows:

1. The Commissioner erred in finding at [128] of the Decision that the phrase 'level of remuneration' in clause 4.2.1(b) of the RRR Schedule includes aggregate wage rates.

2. The Commissioner erred in finding at [131] of the Decision that clause 4.6.1(b) of the RRR Schedule applied in circumstances where the Commissioner had accepted at [77] of the Decision that the South Australian Cabinet had made the decision to outsource in May 2019.

3. In the alternative to Ground 2 above, if clause 4.6.1(b) is enlivened on the basis that the Rail Commissioner made a 'decision to outsource', the Commissioner erred in finding at [138] of the Decision that the redeployment process for employees who were declared excess as a result of that decision to outsource could only conclude (with a redundancy rather than a VSP) if the conditions in clause 4.6.1(b) were met.

4. The Commissioner erred in finding at [139] of the Decision that clauses 4.6.1(b) and 4.6.1(d) of the RRR Schedule are mutually exclusive.

5. The Commissioner erred at [140] of the Decision in failing to give sufficient weight to the objective intention that the no forced redundancy policy referred to in the Enterprise Agreement was only to apply for a set period and the clear implication that after that time employees could be subject to a forced redundancy.

[36] In regards to the grant of permission to appeal, the notice of appeal contended that:

1. The appeal raises interpretation questions which may have broader application across a number of Federal and South Australian Enterprise Agreements.

2. The appeal raises issues not previously considered by a Full Bench.

3. The Decision is sufficiently doubtful to warrant reconsideration by the Full Bench.

4. If leave is refused, this may result in substantial injustice for the Appellant and inequity amongst its employees.

5. An arguable case of appealable error is demonstrated.

6. Alternatively to the matters set out above, permission to appeal is not required, as the Commission will be exercising the powers conferred upon it by clause 23 of the Agreement, by way of a private arbitration: *DP World Brisbane Pty Ltd v Maritime Union of Australia* (2013) 237 IR 180; *AMWU v Silcar* [2011]

FWAFB 2555. However the Rail Commissioner notes the recent Full Bench decision of *Simplot Australia Pty Ltd v AMWU* [2020] FWCFC 5054 may have application.

[37] The notice of appeal sought that the appeal be dealt with on an expedited basis for the following reasons:

1. On 31 January 2021 a private sector operator, Keolis Downer, will take over management of the Adelaide metropolitan rail network from the Rail Commissioner.

2. Keolis Downer are currently in the process of offering employees covered by the Enterprise Agreement roles within its organisation.

3. If employees do not accept these roles, their current roles with the Rail Commissioner will no longer be required after 31 January 2021.

4. As a result, these employees and the Rail Commissioner will commence the processes set out in the RRR schedule.

5. The appeal relates to the correct interpretation and application of the RRR Schedule in relation to matters which are critically important to both the employees covered by the Enterprise Agreement and the Rail Commissioner namely the level of remuneration employees may be entitled to and how the redeployment process under the RRR Schedule can end.

6. The matters raised in the appeal should, in fairness to all parties covered by the Enterprise Agreement, be determined prior to 31 January 2021. This will allow employees to make a fully informed decision about whether to accept a job offer with Keolis Downer or remain with the Rail Commissioner. It will also enable the Rail Commissioner to determine how to manage employees who are declared excess following 31 January 2021.

Appeal submissions

Rail Commissioner's submissions

[38] The Rail Commissioner's primary position was that permission to appeal under s 604 of the FW Act is not required because clause 23.11 of the 2016 Agreement gives the parties a private right of appeal against a decision made by a member of the Commission. In this respect, it relied on the previous decisions of the Commission in *AMWU v Silcar Pty Ltd*[28] and *Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees v Woolworths Limited T/A Woolworths*[29] in which dispute resolution clauses in similar terms had been held to create an independent right of appeal for which permission to appeal is not required. The Rail Commissioner noted the Full Bench decision in *Simplot Australia Pty Ltd v AMWU*[30] (*Simplot*), in which it was determined that the Commission had

[28] [2011] FWAFB 2555, 208 IR 33 at [27]-[28]

[29] [2013] FWCFB 2814, 232 IR 255 at [22]

[30] [2020] FWCFB 5054 at [18]

no jurisdiction to deal with a dispute under an enterprise agreement that has ceased to operate, but submitted that the position here was distinguishable because the 2016 Agreement was still in operation at the time of the Decision and thus its appeal right should continue. In the alternative, the Rail Commissioner submitted that permission to appeal should be granted, and relied upon the grounds of appeal stated in its notice of appeal set out above. In response to the issue of whether the grant of permission to appeal would have any utility in light of the cessation of the operation of the 2016 Agreement, the Rail Commissioner undertook that, should permission to appeal be granted, the outcome determined in the appeal decision would be applied by the Rail Commissioner in respect of the future application of the identical RRR provisions of the 2020 Agreement.[31]

[39] The Rail Commissioner's first appeal ground is concerned with the first issue identified in paragraph [1] of this decision. In respect of the expression "*level of remuneration*" in clause 4.2.1(b), the Rail Commissioner submitted that it has a plain meaning discernible from the provisions of the 2016 Agreement, and that evidence of surrounding circumstances was not required or admissible in order to construe it. It was submitted that:

- clause 4.2.1(b) of the RRR Schedule does not refer simply to remuneration, but to the "*level of remuneration*", with level meaning "*a position on a scale of amount, quantity, extent, or quality*" (as defined by the Oxford Dictionary);

- the 2016 Agreement uses the expression "*remuneration level*" in clause 21.1.3 and in Schedule 3, and it refers to the salaries payable to an employee in Schedules 1 and 3;

- considered in the context of the 2016 Agreement, the terms "*level of remuneration*" and "*remuneration level*" are synonymous;

- where entitlements beyond the remuneration level apply in the 2016 Agreement, various other terms are deployed such as aggregate wage, penalties and overtime, but these terms are not referred to in clause 4.2.1(b);

- there was no evidence of an objective common intention applying to the term "*level of remuneration*";

- the aggregate wage for train drivers is paid in lieu of penalties, allowances and annual leave loading, and is not a wage level or a level of remuneration but rather "*the outcome of a method of calculation dependent upon a number of variable criteria*";

- the fact that the Commissioner's conclusion at paragraph [126] of the decision meant (as he recognised) that train drivers will receive preferential treatment over other classifications under clause 4.2.1(b) of the RRR Schedule demonstrates his conclusion at paragraph [128] is flawed;

- it is also illogical that while an employee is a redeployee, they are only entitled to their relevant weekly wage and not their aggregate wage, but that a higher rate of pay would then have to apply in order to conclude the redeployment process;

[31] Appeal hearing transcript, 20 January 2021, PNs 44-67

- it is evident that clause 4.2.1 requires, when an alternative role is offered, that a "like with like" comparison of the two roles be made at that time, but it would be practically impossible to do this other than by comparing one base rate against another; and

- a train driver's aggregate wage is based on particular rosters being worked at particular times, and it cannot practically be used as a comparator against another position which may have different hours or attract different penalties or allowances.

[40] In regards to the second appeal ground, which relates to the second issue, the Rail Commissioner submitted that the evidence of the Deputy Rail Commissioner, Ms Anne Alford, made it clear that the decision to outsource, and the selection of the successful tenderer, were made by the South Australian Cabinet, not the Rail Commissioner. This evidence was accepted by the Commissioner in paragraph [77] of the decision. Therefore these decisions could not, it was submitted, enliven clause 4.6.1(b). Under the RCA Act, the Rail Commissioner is a body corporate and a distinct statutory authority, and the references to the Rail Commissioner in the 2016 Agreement cannot be taken to be a reference to any other entity or person such as the Crown. The Rail Commissioner therefore submitted that the Commissioner erred in finding that clause 4.6.1(b) had any application to the current outsourcing to Keolis Downer. This was, it was submitted, a conclusion able to be reached on the plain meaning of clause 4.6.1(b), and it was not permissible to take into account evidence of surrounding circumstances and context to assign any different meaning to the provision.

[41] The Rail Commissioner's grounds 3, 4 and 5 all relate to the third issue earlier identified. These grounds are advanced in the alternative to ground 2 – that is, on the assumption that clause 4.6.1(b) is capable of application to the current outsourcing exercise. It was submitted that clause 4.6.1(d) applies to employees other than those referred to in clause 4.6.1(b) and provides in effect that a redeployee can be made redundant after the 12-month process prescribed in clause 4.3 of the RRR Schedule has been completed (provided that no exceptional circumstances arise). In order for clause 4.6.1(b) to apply, it was submitted that four criteria must be met, namely:

(a) the employee must have been declared excess;

(b) that declaration must have been as a result of the Rail Commissioner making a decision to privatise, outsource, contract out or close/part close a service;

(c) the employee must have been made an offer of suitable employment; and

(d) the employee must have declined that offer.

[42] The Rail Commissioner submitted that unless all four of these criteria were satisfied, on the plain and ordinary meaning of the clause an employee would fall under clause 4.6.1(d) (unless the redeployment exercise otherwise ended on a consensual basis under paragraph (a), (c) or (e) of clause 4.6.1). The Commissioner erred, it was submitted, by finding in effect that once the first two criteria are met, the employee can *only* be made redundant if the remaining two criteria in that clause are met. This was said by the Rail Commissioner to be an illogical construction not supported by the objective intention of the 2016 Agreement, in that it would have the practical effect that if an employee is declared excess because of an outsourcing, unless they are offered a suitable ongoing permanent role and decline it, they remain a Rail Commissioner employee in the redeployment process for life.

[43] It was also submitted that because clause 4.6.1 was unambiguous, it was not permissible for the Commissioner to take into account, as he did, the extrinsic materials in paragraphs [74] and [75] of the decision. In any event, it was submitted, this material did not support the Commissioner's finding.

[44] The Rail Commissioner submitted that permission to appeal should be granted and the appeal upheld, and that the following determination should be substituted for the determination reached by the Commissioner as to the three issues:

(a) The meaning of level of remuneration for the purposes of clause 4.2.1(b) of the RRR Schedule means the relevant rates of pay that are set out in Schedules 1 and 3 of the Enterprise Agreement. This does not include the aggregate wage or any other allowances, penalties, overtime payment or loadings.

(b) Clause 4.6.1(b) of the RRR Schedule has no application to the current dispute as the Rail Commissioner did not make a decision which enlivens this clause.

(c) Further in circumstances where clause 4.6.1(b) does apply, there is no requirement, lasting for an open ended period, for the Rail Commissioner to employ redeployees, who have been declared excess, in the event that suitable employment cannot be found. Rather, their employment may be concluded at the end of 12 months (in the absence of exceptional circumstances) pursuant to clause 4.3 of the RRR Schedule.

Mr Rogers' submissions

[45] Mr Rogers submitted, at the outset, that:

- the Commissioner's consideration of the evidence should be preferred on appeal in accordance with the principles stated in *Abalos v Australian Postal Commission*;[32]

- it was necessary for the Rail Commissioner to demonstrate an error in the exercise of the discretion;

- having regard to the recent Full Bench decision in *CFMMEU v AGL Loy Yang Pty Ltd (AGL Loy Yang),*[33] the 2016 Agreement cannot remove the statutory requirement for permission to appeal in s 604 of the FW Act, and in any event the 2016 Agreement did not purport to create an independent right of appeal;

- the effect of the *Simplot* decision was that, given the 2016 Agreement has been superseded by the 2020 Agreement, the Full Bench is now unable to hear an appeal from the Commissioner's decision, and the appeal must be dismissed; and

- if, to the contrary, the appeal was entertained by the Full Bench, the grant of permission to appeal would not qualify as being in the public interest, since the errors claimed do not raise any issue broader than the interests of the parties themselves or

[32] [1990] HCA 47, 171 CLR 167

[33] [2020] FWCFB 7060

manifest any injustice, and the decision was made in the conduct of a private arbitration and thus could not serve as a precedent for any other matter.

[46] In respect of the first issue, it was submitted that the evidence demonstrated that the maintenance of the aggregate wage for train drivers was a subject matter of the negotiations for the 2016 Agreement, and the Rail Commissioner now sought to "*suddenly change the balance by completely ruling out a portion of the agreement and the entitlement of the train drivers involved*". Mr Rogers said that clause 4.2 is dedicated to the premise that the new job is suitable employment, and in that respect its function is to ensure that the new job offered to the train driver does not involve a cut in pay and conditions to the pre-redeployment wage, which is the aggregate wage. The outcome sought by the Rail Commissioner would have the Full Bench re-write the 2016 Agreement and exclude train drivers from the benefit of the aggregate wage. The meaning of the word "*remuneration*" is clearly based, it was submitted, upon payments to train drivers.

[47] In relation to the second issue, Mr Rogers submitted that the evidence of Ms Alford was that it was necessary for the Rail Commissioner to enter into a contract to enable the outsourcing decided by the Minister, and that by operationalising the Cabinet decision the Rail Commissioner was "*complicit in that decision*". Mr Rogers also submitted that it could also be argued that the Rail Commissioner had granted the Cabinet/Minister "*apparent authority*" to make the decision to outsource on his behalf. Further, Mr Rogers submitted, to accept that the Rail Commissioner must independently make an outsourcing decision would make a nonsense of clause 4.6.1(b), since it would mean that once a train driver was made excess, they could decline not one, but any number, of "*suitable ongoing permanent job offers*" and still remain on the payroll. Mr Rogers also referred to the Objectives of the RRR Schedule, which do not require a separate decision by the Rail Commissioner regarding outsourcing or privatisation.

[48] In relation to the third issue, the position of Mr Rogers was the subject of a degree of confusion and lack of coherence. He initially submitted (both orally and in writing) that paragraph (c) of the relief sought by the Rail Commissioner in the appeal (set out in paragraph [44] of this decision above) was no different to the determination made by the Commissioner in the decision. The consequence of this position, as was pointed out to Mr Rogers' counsel at the hearing, was that it was not necessary for any employee to whom clause 4.6.1(b) applied to be offered a suitable alternative position before they could be made compulsorily redundant, provided that 12 months had passed and this was not extended because of exceptional circumstances.[34] Mr Rogers' counsel initially affirmed this position.[35] He also said that Mr Rogers agreed with the Rail Commissioner's construction of clause 4.6.1(b).[36] However, when counsel's attention was drawn to paragraph [138] of the decision, counsel sought further instructions and eventually appeared to adopt the position that it was necessary, in respect of any employee covered by clause 4.6.1(b), for there to be an offer and rejection of suitable alternative employment before the employee could be made redundant.[37] No submissions of substance were advanced in support of this revised position.

RTBU Submissions

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[34] Appeal hearing transcript, 20 January 2021, PNs 317-329.

[35] Ibid, PN 330

[36] Ibid, PNs 341-342

[37] Ibid, PNs 347-354

[49] The RTBU sought, and was granted, leave to makes submissions in the appeal. In relation to the first issue, the RBTU submitted that the Commissioner erred in his construction of the expression "*level of remuneration*" in that he excluded "any (other) allowances, specific shift or disability payments, penalties or overtime payments". In this connection, it submitted that on the ordinary meaning of the word "*remuneration*", it includes the "reward" or "pay" they received prior to being a redeployee, inclusive of all entitlements. This is fortified, it was submitted, by the evident purpose of the provision, which is to provide a protection for employees against a loss of income as a result of redeployment, and it was unlikely that a requirement that employees be provided a "*level of remuneration* [that] *is not less*" than their current remuneration could have been intended to result in employees ending up with lower wages. In the alternative, the RBTU submitted that the Commissioner correctly determined that the expression "*level of remuneration*" was directed to the expressly enumerated rates of pay applicable to particular classification levels. It is submitted that such an interpretation is supported by:

- the express description of the rates of pay pertaining to classification levels as "*remuneration levels*" (see clause 21.1.3); and

- the absence of any alternative methodology for calculation, nor for example, the prescription of a period over which an average level of remuneration would be calculated.

[50] In response to the Rail Commissioner's submissions regarding the first issue, the RTBU submitted that suburban train drivers receive a "rolled up rate" instead of a "base rate" and that this is received in lieu of other amounts. The RTBU further submitted that the base rate is never the "*level of remuneration… that the employee was earning prior to becoming a redeployee*". The RTBU submitted that the Rail Commissioner's submissions misunderstood the comparison required by clause 4.2.1(b), which mandates a process tailored towards the circumstances of the individual employee (including hours of work, classification, particular skills and experience etc) and that "*it is no less practical, and no less a requirement, that the level of remuneration – assessed as at the time of redeployment – of the individual worker be taken into account*".

[51] In relation to the second issue, the RTBU submitted that the circumstances surrounding the making of the 2016 Agreement, namely the highly anticipated potential privatisation of the network and the practical entanglement of the Rail Commissioner and the Government, make it clear that the reference to a decision by the Rail Commissioner is ambiguous. Only on the most narrow and pedantic reading of the 2016 Agreement, it was submitted, could the circumstances of the current dispute be construed as falling outside the terms of clause 4.6.1(b), and such a construction would ignore the industrial realities and practical purpose of the provision and rob employees of the very redundancy protections that secured the passage of the 2016 Agreement.

[52] The RTBU submitted that the task before the Commission is not to resolve fundamental questions about the juristic identity of the Crown as a matter of constitutional law, but rather to determine whether the instant circumstances were within what was contemplated by the words "*a decision of the Rail Commissioner to privatise*" etc. It is not to the point that the Ms Alford subjectively characterised the decision to outsource as a decision of the Cabinet, albeit implemented with the full cooperation of the Rail Commissioner. The

question, it was submitted, is whether these were the circumstances contemplated by the subclause. The RTBU said that it was clearly within the contemplation of the parties that these provisions would operate with respect to privatisation, whatever infelicities of expression might have been adopted, and it is highly unlikely that the parties intended to make a distinction between the different statutory means by which a privatisation might be affected. Further, it was submitted, the construction advanced by the Rail Commissioner would confine the operation of clause 4.6.1(b) to a decision by the Rail Commissioner to make a decision of their own initiative to privatise the rail network, which would be an unlikely and absurd result. In any event, the RTBU submitted, the Rail Commissioner's involvement in the privatisation process, including the preparation and evaluation of the tender process, the taking of all necessary steps to appoint the new contractor, and the entry into the contracts with the private operator constituted decisions to privatise the operations.

[53] The RTBU submitted in relation to the third issue that the Commissioner's conclusion was undoubtedly correct and accorded with the ordinary meaning of the words of clause 4.6.1, considered in their context, because:

- Clause 4.6.1(b) is a provision directed towards privatisation. Clause 4.6.1(d) expressly does not have application to employees affected by privatisation. It provides that it has application "*for employees other than those in 4.6.1(b)*". These clear, unambiguous words are dispositive.

- Clause 4.6.1 commands that "*the redeployment process will end only when the following criteria has been satisfied*". These words make clear that the obligations are cumulative, subject to their own terms.

- Clause 4.6.1(b) is a specific provision directed towards privatisation. The specific provisions predominate over the general provisions: *generalia specialibus non derogant*.

- As the Commissioner noted at [138] of the decision, were it otherwise subclause 4.6.1(b) would be redundant, because redeployment could otherwise conclude in the ordinary course. In this way, as the Commissioner correctly concluded, such a construction is "much more consistent" with a sensible construction of clause 4.6.1 as a whole, allowing the provision to cohere as a whole.

- It is consistent with the broader objective industrial context, including the advice that "one suitable job offer" was guaranteed.

Consideration

Whether the appeal is competent, whether permission to appeal is required, whether permission to appeal should be granted, and the nature of the appeal

[54] We accept at the outset the contention of the Rail Commissioner that clause 23.11 provides, in plain words, for an independent right of appeal. The provision is expressed in the same terms as the agreement provisions which were determined in *AMWU v Silcar Pty Ltd*[38] and *Shop, Distributive and Allied Employees Association (Queensland Branch) Union of*

[38] [2011] FWAFB 2555, 208 IR 33 at [27]-[28]

Employees v Woolworths Limited T/A Woolworths[39] to confer a right of appeal for which permission to appeal is not required. We reject the submission of Mr Rogers that the recent Full Bench decision in *AGL Loy Yang* in some sense superseded these earlier decisions. The Full Bench in the *AGL Loy Yang* decision found that, on the proper construction of the dispute resolution procedure in the enterprise agreement in question, no independent right of appeal was conferred.[40] *AGL Loy Yang* does not stand for any broader proposition that a dispute resolution procedure in an enterprise agreement cannot confer an independent right of appeal against the decision of a single member of the Commission exercising arbitration powers under that procedure.

[55] However, as earlier explained, this appeal was lodged after the 2016 Agreement ceased to have effect. The Rail Commissioner properly acknowledged the Full Bench decision in *Simplot,*[41] in which it was determined that the Commission does not have the jurisdiction under s 739 of the FW Act (or any other provision of the FW Act) to exercise private arbitration powers conferred on the Commission by the dispute resolution procedure in an enterprise agreement once that agreement has ceased to operate. The application of *Simplot* would suggest that the right of appeal conferred by clause 23.11 of the 2016 Agreement became incapable of being exercised after the 2016 Agreement ceased to operate on 3 December 2020.

[56] The Rail Commissioner did not advance any submission that *Simplot* was wrongly decided so, in the circumstances, we think *Simplot* should be applied to this appeal. The Rail Commissioner submitted that *Simplot* was distinguishable because, in this case, the decision the subject of the appeal was delivered before the Agreement ceased to operate. However, it was not articulated why this makes a difference in terms of the Commission's power. Clause 23.11 ceased to confer a right of appeal upon the Rail Commissioner on and from 3 December 2020 because s 51(2) of the FW Act provides that an enterprise agreement does not give a person an entitlement unless the agreement applies to the person, and s 52(1)(a) provides that an agreement only applies to an employer, employee or employee organisation if the agreement is in operation. That the decision which is sought to be appealed was made before 3 December 2020 does not alter this position. It might be arguable that if the Rail Commissioner had lodged the appeal before 3 December 2020, at a time when there was still an entitlement to do so, then jurisdiction would vest in the Commission to hear and determine the appeal at that point. But that is not the situation here and, accordingly, no further consideration of this point is necessary.

[57] It does not follow however, as submitted by Mr Rogers, that by reason of the above the appeal must simply be dismissed. It remains necessary to consider whether an appeal can be brought pursuant to the statutory appeal facility in s 604 of the FW Act. Section 604(1) provides that a party aggrieved by a "*decision*" made (relevantly) by a single member of the Commission may, with permission, appeal that decision. Section 598(1) provides that a decision of the Commission includes "*…any decision of the FWC however described…*", and goes on to provide that, for the avoidance of doubt, a reference to a decision of the Commission does not include the outcome of a process carried out in accordance with s 595(2). Section 595(2) is concerned with the Commission's power to deal with a dispute other than by arbitration, such as by mediation, conciliation, expressing an opinion or making a

[39] [2013] FWCFB 2814, 232 IR 255 at [22]

[40] Ibid at [32]-[33]

[41] [2020] FWCFB 5054 at [18]

recommendation. Significantly, a decision made pursuant to s 595(3), which is concerned with the Commission's power to arbitrate a dispute where expressly authorised to do so under another provision of the FW Act (which would clearly include s 739), is not excluded from the definition of a "*decision*" in s 598. There can therefore be no doubt that the Commissioner's decision is of a type to which s 604 on its face applies, and neither Mr Rogers nor the RTBU contended otherwise. Rule 56(2) requires that a s 604 notice of appeal be lodged within 21 days of the decision being appealed (unless an extension is granted), and the Rail Commissioner's appeal was lodged within that time period.

[58] Access to s 604 is not expressly excluded by any provision of the 2016 Agreement, and it was not contended by Mr Rogers that it was implicitly excluded. Parties who choose to go to arbitration with the Commission take that body as they find it, with knowledge of the structure of the Commission and of the appellate function performed by the Full Bench; accordingly, if parties intend that there be no appeal pursuant to s 604, they need to say so.[42] Mr Rogers might have argued, but did not, that because "the Full Bench's powers on appeal will reflect the fact that the appeal is from a consent arbitration and is, itself, in the nature of an arbitration",[43] the decision in *Simplot* would suggest that access to s 604 is also precluded once an agreement ceases to operate. In the absence of such an argument being advanced, we do not propose to consider it. We will therefore proceed on the basis that the Rail Commissioner may appeal the decision with permission pursuant to s 604. We note that if we are wrong about this, the conclusion we have ultimately reached in this appeal means that this will not be a material matter.

[59] Should permission to appeal be granted? The subject matter of the dispute underlying these proceedings, which relates to the privatisation of the Adelaide rail network and the redeployment or redundancy of affected employees, is plainly a matter of considerable importance. However, the dispute concerns events which will occur in the future - that is, the relevant aspects of the redeployment process will only be applied to those employees who do not, by 31 January 2021, receive and accept offers of employment with Keolis Downer. Those future events will be subject to the provisions of the 2020 Agreement, not the 2016 Agreement. Because the Commissioner's decision was made arising from a private arbitration of a dispute under clause 23 of the 2016 Agreement, it cannot bind the parties in respect of the 2020 Agreement notwithstanding that the relevant provisions of the 2020 Agreement are the same as the 2016 Agreement. Clause 23.11 of the 2016 Agreement, which provides that an arbitral decision made pursuant to the dispute procedures is binding on the parties (subject to the right of appeal), is itself of no force and effect, and imposes no obligation on the parties, from 3 December 2020 by virtue of s 51 of the FW Act.

[60] That would normally be a powerful consideration weighing against the grant of permission to appeal, since an appeal decision to quash, affirm or vary a decision which no longer has binding effect would be lacking in legal utility. However, as earlier stated, the Rail Commissioner has undertaken to follow the outcome of this appeal in respect of the application of the identical provisions of the 2020 Agreement to the redeployment process. This means that, in a practical sense, an appeal decision in this matter would resolve the dispute between the parties. On that basis, we are persuaded to grant permission to appeal.

[61] We reject the submission of Mr Rogers that this appeal is one which challenges a discretionary decision such as to make applicable the appellate principles stated in *House v*

[42] *AMWU v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123, 235 FCR 305 at [57]

[43] Ibid at [58]

The King.[44] It is the "correctness standard" rather than the "discretionary standard"[45] which applies to this appeal, because it is concerned with the proper construction of the provisions of an enterprise agreement.[46] The discretionary standard only arises where the decision under appeal involves "evaluative conclusions in respect of which the applicable legal criteria [permit] of some latitude of choice or margin of appreciation such as to admit of a range of legally permissible outcomes".[47] That a "unique outcome" is required in an arbitral decision made under s 739 of the FW Act concerning the construction of the terms of an enterprise agreement which applies to the parties is amply confirmed by s 739(5), which has the relevant effect of prohibiting the Commission from making a decision that is inconsistent with the agreement. Accordingly, our duty in determining this appeal is to substitute our own conclusions concerning the proper construction of the relevant provisions of the 2016 Agreement if we disagree with those of the Commissioner.

[62] We observe that Mr Rogers' submission that the Commissioner's "consideration of the evidence … should be preferred" on appeal in accordance with the principles stated in *Abalos v The Australian Postal Commission*[48] is not pertinent because the Rail Commissioner's decision does not challenge any of the Commissioner's findings of fact but, to the contrary, relies upon them.

[63] Finally, we note that it is common ground that the Commissioner correctly identified the relevant leading authorities and principles as to the interpretation of enterprise agreements at paragraphs [40] to [47] of the decision. It is not necessary in the circumstances to re-state those principles, which are well-established, beyond emphasising the proposition that regard may be had to the context of surrounding circumstances in order to identify as well as to resolve ambiguity.

First issue

[64] The submissions of the Rail Commissioner (as well as those of Mr Rogers and the RTBU) as to the first issue focus on the expression "*level of remuneration*" in clause 4.2.1(b) as being determinative of the question as to whether the aggregate wage of train drivers is to be taken into account for the purpose of assessing whether any alternative role should be offered to such an employee during the redeployment process is "*suitable*". We consider this focus to be misplaced. The sentence which comprises clause 4.2.1 as a whole has as its subject "*An ongoing permanent role in any agency in the Public Sector*" – that is, an alternative role which might be identified for a redeployee. Paragraphs (a)-(f) contain the conditions that must be satisfied in order for the subject alternative role to meet the criterion of being "*considered suitable for the purpose of redeployment*" (subject to the employee agreeing otherwise). Read in the context of the sentence as a whole, it is clear that the words with which paragraph (b) begins - "*The level of remuneration*" - are referable to the subject alternative role under consideration, not the redeployee's role prior to being declared excess.

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[44] [1936] HCA 40, 55 CLR 499 at 505

[45] See *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, 264 CLR 541 at [35]-[50] per Gageler J

[46] *Appeal by Australian Municipal, Administrative, Clerical and Services Union; Appeal by CPSU, the Community Public Sector Union* [2013] FWCFB 4752, 234 IR 366 at [13]; *Australian Rail, Tram and Bus Industry Union v Laing O'Rourke Australia Construction Pty Ltd* [2019] FWCFB 33 at [23]

[47] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, 264 CLR 541 at [44] per Gageler J; *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119, 297 IR 210 at [168]

[48] [1990] HCA 47, 171 CLR 167

The level of remuneration of the subject alternative role is, under the condition established by paragraph (b), required to be "*not less than what the employee was earning prior to becoming a redeployee*". The underlined words establish the point of comparison referable to the previous position of the train driver. Thus the proper question is, does the aggregate wage of a train driver declared to be excess form part of "*what the employee was earning prior to becoming a redeployee*"?

[65] We consider that the answer to that question is, plainly, "yes". The relevant ordinary meaning of the verb "*earn*" is "*to gain by labour or service*".[49] The ordinary meaning of the related noun "*earnings*" is "*money earned; wages; profits*".[50] Applying this ordinary meaning, any monetary pay received by a train driver prior to becoming a redeployee is part of "*what the employee was earning prior to becoming a redeployee*". This necessarily includes the aggregate pay received by the train driver pursuant to Schedules 1 and 7 of the 2016 Agreement.

[66] We accept the Rail Commissioner's submission that clause 4.2.1 contemplates a "like with like" comparison, meaning that the "*level of remuneration*" of the subject alternative position must be a broadly equivalent concept to "*what the employee was earning prior to becoming a redeployee*". However, this contextual consideration does not cause us to apply other than the ordinary meaning we have identified. The ordinary meaning of the word "*remuneration*" is broad. In *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*,[51] the Federal Court (Bromberg J) said:

> "[36] Remuneration is the reward paid or provided in return for the performance of a service or for work done. The ordinary meaning of "remuneration" is pay for services rendered: *Chalmers v The Commonwealth of Australia* [1946] HCA 37; (1946) 73 CLR 19 at 37 (Williams J). That connotes a connection between the payment or benefit received and the provision of work or services: *Settlement Agents Supervisory Board v L J Hooker Settlements Pty Ltd* [2009] WASCA 89 at [22] (Martin CJ, with whom Pullin JA and Newnes AJA agreed). As Blackburn J observed in *the Queen on the prosecution of J. B. Saunders v The Postmaster General* [1876] 1 QBD 658 at 663, "... I think the word 'remuneration' is a wider term and means a *quid pro quo*. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them." A comparable understanding has been applied in Australia: *May v Lilyvale Hotel Pty Limited* [1995] IRCA 628 at 9–12 (Wilcox CJ). In *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78 at 81, a Full Bench of the Australian Industrial Relations Commission defined remuneration as:
>
> > ... the reward payable by an employer to an employee for the work done by that employee in the course of his or her employment with that employer. It is a term that is confined neither to cash payments nor, necessarily, to payments actually made to the employee. It would include non-pecuniary benefits and payments made on behalf of and at the direction of the employee to another person out of moneys otherwise due to that employee as salary or wages."

[49] Macquarie Dictionary

[50] Ibid

[51] [2015] FCA 1196, 239 FCR 461, 255 IR 341

[67] The broad concept of "*remuneration*" would, in the case of train drivers covered by the 2016 Agreement, clearly encompass their aggregate wage - that is, the payment for their services rendered. The Rail Commissioner submitted, and we accept, that the ordinary meaning of "*level*" is "*a position on a scale of amount, quantity, extent, or quality*". We do not consider that there is anything in the ordinary meaning of "*level*" which, when used in the composite expression "*level of remuneration*", would operate to narrow the conception of "*remuneration*". Thus, we consider, clause 4.2.1(b) posits a comparison between the relative quantum of reward of the subject alternative position and the monetary earnings of the employee prior to becoming a redeployee. It may be observed that although the matters to be compared are broadly equivalent, they are not precisely like with like. Thus, because "*remuneration*" is inclusive of non-monetary rewards, the total benefits of a subject alternative position may be taken into account in considering whether its level of remuneration is not less than what the redeployee previously earnt.

[68] For the following reasons, we reject the Rail Commissioner's submission that, considered in the context of the 2016 Agreement as a whole, "*level of remuneration*" is a term of art referring to the base weekly wages prescribed in Schedules 1 and 3 of the 2016 Agreement and that, accordingly, a train driver's aggregate wage is not to be taken into account under clause 4.2.1 of the RRR Schedule. First, as earlier explained, the submission focuses upon the wrong expression in clause 4.2.1.

[69] Second, the historical context of the manner in which the 2016 Agreement was developed demonstrates that it is not likely that there was any deliberate alignment of terminology between the RRR Schedule and the rest of the 2016 Agreement. As found by the Commissioner in the decision, and not contested in this appeal, the RRR Schedule was lifted from Appendix 1 of the Weekly Paid Agreement (subject to, as discussed below in relation to the second issue, some adjustments).[52] Clause 4.2.1 of the RRR Schedule in the 2016 Agreement is drafted in precisely the same terms as its equivalent in the Weekly Paid Agreement. Therefore, any alignment in terminology between the RRR Schedule and any other part of the 2016 Agreement is likely to have been coincidental.

[70] Third, and in any event, there is no precise alignment in terminology. The other provisions of the 2016 Agreement exterior to the RRR Schedule upon which the Rail Commissioner relies do not use the expression "*level of remuneration*" but rather "*remuneration level*". This cannot be reconciled with the proposition that the expression "*level of remuneration*" is a term of art that does not bear its ordinary meaning.

[71] Fourth, nowhere in the 2016 Agreement is the aggregate wage for train drivers treated as a broader concept than their "*remuneration level*". Clause 21.1.3 provides that "*The remuneration levels applicable to each classification are set out at Schedule 1 and 3 of this Agreement*" but Schedule 1, which applies to train driver classification, is where the aggregate wage is provided for. Clause S.1.1 of Schedule 1 sets out, in tabular form, the base weekly wage rates of train driver classifications, and these are described as "*weekly wage rates*" rather than remuneration levels. Clause S.1.2 of Schedule 1, entitled "*Aggregate Wage for Suburban Train Driver Classifications*", sets out the method of calculation of the aggregate wage. In doing so, it cross-refers to Schedule 7, which sets out the "*aggregate wage calculation guideline in operation at the date of approval of this Agreement*". In our view, there is no reason not to consider that the reference to "*remuneration levels*" in clause 21.1.3

[52] [2020] FWC 5780 at [61]

means, in respect of train driver classifications, the entirety of the remuneration payable under Schedule 1, which encompasses the aggregate wage. Thus, even if "*level of remuneration*" in clause 4.2.1(b) of the RRR Schedule is to be equated with the expression "*remuneration level*" used elsewhere in the 2016 Agreement - a proposition which we do not accept - the latter expression is not in respect of train driver classifications to be regarded necessarily as exclusive of the aggregate wage in all contexts.

[72] We likewise reject the Rail Commissioner's submission that a comparison process requiring an aggregate wage inclusive of shift and weekend penalties and rostered overtime to be taken into account would be impractical and thus would not have been intended. It may be observed that clause 4.2.1(a) requires that the subject alternative position have the same or similar hours of work; thus this requirement would necessarily bring to bear for the purpose of the comparison the number of hours of work and the days and times at which they are required to be performed. This supports the proposition that shift and weekend penalties and rostered overtime would be relevant to the comparison required by clause 4.2.1(b). We accept the RTBU's submission that the comparison required by clause 4.2.1 as a whole is necessarily an individualised one which, in respect of paragraph (b), requires a comparison between the overall monetary earnings of the redeployee's pre-redeployment position and the quantum of remuneration attaching to a proposed alternative position. That this comparison might require some degree of analysis does not render it impractical.

[73] Finally, we do not accept that there is some anomaly between an approach to clause 4.2.1 of the RRR Schedule which requires more than the base weekly wage to be taken into account and the unchallenged conclusion made by the Commissioner that, whilst a redeployee, an employee is only to be paid the base weekly wage. Once an employee classified as a train driver ceases to perform work as a result of outsourcing, they no longer perform the hours of work which attract the penalty rates and allowances incorporated into the aggregate wage while the redeployment process contemplated by the RRR Schedule is undertaken. In that circumstance, it is logical that the redeployee would only receive the base weekly wage. However, a suitable alternative role must have the same or similar hours as the redeployee's previous role, so there is no anomaly that it must provide for remuneration not less than the earnings for the previous role. Had it been intended that the suitable alternative role only need to provide for the base weekly wage for the redeployee's classification, then clause 4.2.1 would not have referred to the redeployee's earnings "*prior to becoming a redeployee*". Alternatively, the provision could have made an unambiguous reference to the employee's weekly wage for their classification.

[74] The Rail Commissioner's first appeal ground challenges the Commissioner's conclusion in the decision that the aggregate wage for train drivers was to be included for the purpose of the comparative assessment required by clause 4.2.1(b) of the RRR Schedule. For the reasons stated above, we consider that the Commissioner's conclusion in this respect was correct, and accordingly the first appeal ground is rejected. That is all that is strictly necessary to be said about the proper construction of clause 4.2.1 in this appeal. However, we note that the Commissioner's determination in relation to clause 4.2.1 went further than this and involved a conclusion that types of payments other than the aggregate wage would be excluded from the required assessment. It is sufficient to observe that this conclusion is inconsistent with the construction of clause 4.2.1(b) we have arrived at in determining the first appeal ground. If there are further disputes about this issue, they will no doubt be dealt with under the dispute resolution procedure in the 2020 Agreement.

Second issue

[75] There is no factual dispute that the policy decision to outsource the operation of the Adelaide rail network was made by the South Australian Cabinet in May 2019, and that the Cabinet also made the selection of the successful tenderer, Keolis Downer, in September 2020. It is likewise clear that because, under s 4(2) of the RCA Act, the Rail Commissioner is a body corporate, the Rail Commissioner has a separate legal identity to that of the Crown. The essential question raised by the Rail Commissioner's second appeal ground is whether these matters preclude the conclusion that the declaration that any employee is excess as a result of the current outsourcing exercise is "…*a result of the Rail Commissioner's decision to privatise, outsource, contract out*…" for the purpose of clause 4.6.1(b) of the RRR Schedule.

[76] A number of contextual matters suggest that the Rail Commissioner's posited answer to this question is inconsistent with the intention of those who made the 2016 Agreement. The evidence of the negotiations for the 2016 Agreement demonstrates that a concern about future privatisation, and how redundancies and redeployment might be dealt with if it occurred, was the major and most contentious subject matter of the negotiations. This is reflected in the Objectives of the RRR Schedule. As earlier stated, the RRR Schedule was derived from the Weekly Paid Agreement. There are four objectives specified in the version contained in Appendix 1 of the Weekly Paid Agreement. These are reproduced in the RRR Schedule, but a fifth objective is added: "*With the exception of consultation regarding changes to workforce composition, these arrangements will apply to employees who, in the event of outsourcing or privatisation of Rail Operations (or part thereof), do not transfer to the new business under Transfer of Business arrangements under the Fair Work Act 2009 (SA)*". This objective indicates a specific intention that the RRR Schedule address the issue of outsourcing or privatisation of the operation of the rail network. No distinction is made between outsourcing/privatisation resulting from a decision of the Rail Commissioner and any other circumstance in which privatisation might occur.

[77] The next reference to outsourcing/privatisation in the RRR Schedule is in clause 1.1.1(e), which deals with the matters to be notified when "*the Rail Commissioner is seriously considering changes to workforce composition*". This clause reproduces clause 1.1.1 of Appendix 1 in the Weekly Paid Agreement, except that there is a *mutatis mutandis* alteration from "*Employer*" to "*Rail Commissioner*" and paragraph (e) is added, which specifies as a matter to be included in the notification: "*In the event of privatisation or outsourcing, applicable Transfer of Business arrangements under the Fair Work Act 2009 (Cth)*". Again, no distinction is made on the basis of the decision-maker for the privatisation/outsourcing. It may be noted that the Rail Commissioner does not submit that clause 1.1.1 is not applicable to the current outsourcing exercise on the basis that, because it was the South Australian Cabinet who determined that it should occur, the Rail Commissioner never undertook the process of "*seriously considering*" the significant workforce composition changes which would necessarily be associated with outsourcing/privatisation.

[78] The only other operative provision in the RRR Schedule which specifically deals with the matter of outsourcing/privatisation is clause 4.6.1(b) itself. Clause 4.6.1 as a whole is taken from the Weekly Paid Agreement, with *mutatis mutandis* alterations from "*Employer*" to "*Rail Commissioner*" in paragraphs (b) and (c). It seems to us to be counter-intuitive that one of the two operative provisions in the RRR Schedule which specifically deal with a major subject matter of the negotiations for the 2016 Agreement, and address the objective of the RRR Schedule concerning outsourcing/privatisation, would exclude the situation where

employees are made excess because of an outsourcing/privatisation decision made by the South Australian Cabinet. That is particularly the case where:

(1) because any major outsourcing/privatisation is likely to be made at the Government level, the approach taken by the Rail Commissioner would appear in practical terms to render clause 4.6.1(b) largely redundant (notwithstanding that the Rail Commissioner may, under s 7 of the RCA Act, have the power to outsource rail operations);

(2) there is no indication in the internal context of the RRR Schedule provisions considered as a whole, or the external context of the negotiations for the 2016 Agreement, that there was an intention to differentiate between outsourcing/privatisation exercises based upon the decision-making process which brought them about; and

(2) the Rail Commissioner has not identified any rational basis for why clause 4.6.1 would operate differently depending upon the nature of the decision-making process which led to the outsourcing/privatisation.

[79] When Appendix 1 of the Weekly Paid Agreement was adapted to become the RRR Schedule in the 2016 Agreement, all references to "*the Employer*" in the Weekly Paid Agreement were simply replaced with "*the Rail Commissioner*". It may be noted, from clauses 3.1 and 4.2 of the Weekly Paid Agreement, that the employers covered by the Weekly Paid Agreement to which the term "*Employer*" in that agreement refers includes a range of government departments and agencies which are merely administrative units with no juristic identity separate to that of the Crown. That makes it unlikely, in our view, that the reference to the Rail Commissioner in clause 4.6.1(b) of the RRR Schedule was intended to make a sharp point of distinction between decisions of the Rail Commissioner and those made by the South Australian Cabinet.

[80] These matters of context are indicative of ambiguity in the use of the reference to the Rail Commissioner in clause 4.6.1(b). The Rail Commissioner's approach requires a very narrow and literal reading of the provision whereby it applies only where the Rail Commissioner is the sole decision-maker in respect of the relevant outsourcing/privatisation exercise. However, the context indicates that a broader interpretation may be available whereby the reference to the Rail Commissioner is to be understood as comprehending that the Rail Commissioner is an instrumentality of the Crown (as provided for in s 4(2)(d) of the RCA Act) such that the Rail Commissioner's participation in the implementation or operationalisation necessary to give effect to a decision by the South Australian Cabinet to outsource or privatise rail operations is sufficient to constitute a "*Rail Commissioner's decision*" for the purpose of clause 4.6.1(b). We consider that the latter interpretation is to be favoured as one which better fits the intention of the RRR Schedule as disclosed by the subject matter of the negotiations and the stated objectives of the RRR Schedule and which makes practical industrial sense.

[81] The position here is in some degree analogous to that considered by the Federal Court Full Court in *QR Limited v CEPU*.[53] In that case, QR Limited was a government-owned

[53] [2010] FCAFC 150, 204 IR 142

corporation. The Queensland Government decided that the coal and freight transport business operated by QR Limited should be sold to a private operator. QR Limited was bound by enterprise agreements which required it to consult with affected employees and their representatives over any proposed changes that would impact on employees' terms and conditions of employment, including termination of employment and changes in the composition, operation or size of the Company's workforce. At first instance, QR Limited was found to have contravened these consultation provisions. On appeal, QR Limited contended that this finding was in error, in part on the following basis:

> "[22] … The appellants argue that this is not a matter in respect of which cl 36.2 obliges the appellants to consult with their employees. The appellants say that there was no occasion for them to consult with their employees about the decision of the owner, the State Government, to privatise part of the operation of the railways. They were bound to comply with their owner's decision, and that decision did not impact on "employees' terms and conditions of employment.
>
> [23] The appellants argue that the identity of the shareholders of the appellants and any change in that regard was a matter external to the relationship regulated by the agreements. Accordingly, it is not a matter for consultation between employer and employee. The decision partially to privatise the enterprise conducted by the appellants was not a decision made by them but by their shareholder, ie. the executive government of the State of Queensland. They argue that it strains the language of the agreements unduly to suggest that the appellants were duty-bound to consult with their employees as to matters in which the appellants had no relevant decision-making power or function…".

[82] This argument was rejected by the Full Court. The plurality (Keane CJ and Marshall J) said (underlining added):

> "[29] In our respectful opinion, the appellants' arguments directed to the issue of public sector employment are misplaced, so far as the appeal against the finding of contravention is concerned. While it is true that concern as to the radical change wrought by the decision to privatise loomed large in his Honour's reasons, the kernel of the primary judge's reasoning lies in his acceptance of the Union's argument that the appellants' decision to implement its instructions from their shareholders by making offers of transfers of employment to QR Passenger without consulting as required by cl 36.2 was a contravention of a civil remedy provision of the legislation. On behalf of the Unions, no attempt was made to support that part of his Honour's reasoning which related to the absence of consultation about privatisation.
>
> [30] The arguments put on behalf of the appellants do not meet the point that, <u>although the privatisation decision was made by the appellants' shareholder, the exigencies of implementing that decision necessarily gave rise to matters for decision by the appellants which fell within the scope of the consultation obligation</u>. In this regard, the decision to send the letter of 22 January 2010 pre-empted the process prescribed by cl 36."

[83] Whereas the RTBU submitted to the Full Bench that the Full Court's reasoning in *QR Limited v CEPU* was "*apposite*"[54] to the facts in this matter, the Rail Commissioner argued it was a materially different case because the judgment related to an obligation to consult.[55] We disagree with the Rail Commissioner and accept the judgement as relevant to the proper identification of the Rail Commissioner's role in the decision-making process. The words "*as a result* of" in clause 4.6.1(b) require a causal relationship between the Rail Commissioner's decision and the determination that an employee's position is excess. In this case, although the high-level policy decisions concerning the outsourcing of the operation of the Adelaide rail network were made at the Cabinet level, and thus constituted the ultimate cause of positions becoming excess, it was necessary for the Rail Commissioner to take a range of further actions, inferentially involving decision-making, in order for the policy decision to be given practical effect. This included, most notably, the execution of the contract between the Rail Commissioner and Keolis Downer. That decision of the Rail Commissioner may be said to constitute the most proximate or direct cause of employees becoming excess.[56] In our view, having regard to the contextual matters to which we have referred, this decision and perhaps other decisions taken by the Rail Commissioner as an instrumentality of the Crown to implement or operationalise the Cabinet's policy decision is one to which clause 4.6.1(b) of the RRR Schedule applies.

[84] Accordingly, we consider the Commissioner's conclusion in respect of the second issue in the decision to be correct. The Rail Commissioner's second appeal ground is rejected.

Third issue

[85] The practical significance of the third issue is that, on the approach taken by the Commissioner in the decision, an employee who is declared excess as a result of a decision of the Rail Commissioner of the type referred to in clause 4.6.1(b) of the RRR Schedule cannot be made compulsorily redundant unless and until they have received and rejected an offer of a suitable alternative role. The Rail Commissioner's position would lead to the result that such an employee may be made compulsorily redundant even though no offer of suitable alternative employment is made, provided that the 12-month process provided for in clause 4.3 of the RRR Schedule has been completed (subject to any extension because of exceptional circumstances pursuant to clauses 4.3.6 and 4.3.7).

[86] Contrary to the Rail Commissioner's submissions, we consider clause 4.6.1 to be textually ambiguous insofar as the relationship between paragraphs (b) and (d) is concerned. The Rail Commissioner contends that the reference in clause 4.6.1(d) to "*employees other than those in 4.6.1(b)*" excludes only those employees who, under clause 4.6.1(b), have been determined to be excess as a result of a relevant decision of the Rail Commissioner and have been offered and have rejected a suitable ongoing permanent role. Thus, the Rail Commissioner submits, an employee subject to a relevant decision of the Rail Commissioner who has *not* been offered suitable alternative employment would fall under clause 4.6.1(d), so that such an employee may be terminated after the completion of the process in clause 4.3 without ever having received a suitable job offer. In the decision the Commissioner found, and in this appeal the RTBU submits, that "*employees other than those in 4.6.1(b)*" excludes

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[54] Appeal hearing transcript, 20 January 2021, PN 437

[55] Ibid, PN 472

[56] See the discussion in *CFMMEU v Ta Ann Tasmania Pty Ltd* [2019] FWCFB 5300 at [19]-[23] and the cases there referred to

the whole category of employees who have been determined to be excess as a result of a relevant decision of the Rail Commissioner, with the balance of clause 4.6.1(b) setting out the separate obligation of the Rail Commissioner with respect to this category of employees to make them a suitable job offer before they can be terminated. In our view, both interpretations are textually available having regard to the fact that clause 4.6.1 as a whole is poorly drafted and makes the relationship between its various components unclear. The drafting infelicities include that:

- the words "*when the following criteria has been satisfied*" in the chapeau suffer from plural/singular confusion, and thus render unclear whether the "*criteria*" are cumulative or in the nature of alternatives;

- this lack of clarity is exacerbated by the fact that "*or*" is used at the end of paragraphs (a) and (d) but not (b) and (c); and

- the use of the preposition "*For*" at the commencement of paragraph (b) does not logically relate to the rest of the sentence in the form that it is drafted, indicating a defect in the drafting of the paragraph which must be taken into account.

[87] We prefer the interpretation of clause 4.6.1 adopted by the Commissioner in the decision, for two principal reasons. The first is that, as the Commissioner found, the interpretation advanced by the Rail Commissioner would render clause 4.6.1(b) otiose. Clause 4.6.3 provides, in substance, that where *any* employee has received and rejected an offer of a suitable ongoing permanent role, they may thereupon be made compulsorily redundant on a minimum of five weeks' notice, even if the 12 month period contemplated by clause 4.3 has not completed. This would necessarily bring an end to the redeployment process. That would mean, on the Rail Commissioner's approach, that the separate prescription in clause 4.6.1(b) for employees declared excess as a result of a relevant decision of the Rail Commissioner would serve no separate purpose.

[88] Second, as found by the Commissioner, the South Australian Government made this representation in a poster directed to employees: "*Job protection: one suitable job offer guaranteed under RRR*" (underlining added). In addition, the evidence before the Commissioner included a document headed "*Frequently asked questions*" which was provided to employees by the Rail Commissioner and which included the representation: "*Enhanced redeployment, retraining and redundancy provisions which require one suitable job offer to be made to any employee declared as excess after 1 January 2018*"[57] (underlining added). The "*Frequently asked questions*" document was identified in the declaration dated 12 December 2016 made by Mr Michael Deegan, the Rail Commissioner, in support of the application for approval of the 2016 Agreement as one provided pursuant to s 180(5) of the FW Act to explain the terms of the 2016 Agreement and their effect. Both representations were made preceding the third ballot which ultimately approved the 2016 Agreement, and are to be understood in a context whereby employees were concerned about the possibility of the privatisation of the rail network, had rejected two previous proposed agreements which contained inferior redeployment and redundancy provisions, and had negotiated an improved position with the Rail Commissioner based on the RRR Schedule derived from the Weekly Paid Agreement. In our view, these representations promised to the employees that, if privatisation occurred and employees were declared excess, that they were guaranteed one

[57] Ex A1, Annexure CR-12

offer of a suitable alternative job before being made compulsorily redundant, and the promises were intended to assist to persuade employees to vote to approve the third proposed agreement. As earlier recounted, they did so.

[89] The Rail Commissioner conceded, during the course of oral argument, that the interpretation of clause 4.6.1 it advanced in the appeal did not involve the guarantee of one suitable job offer. This inconsistency with the representations made in the lead-up to the making of the 2016 Agreement was not the subject of any explanation. In our view, such specific representations made by the Rail Commissioner and the South Australian Government cannot be so lightly overlooked. We consider that the making of the representations in the context earlier explained, and the subsequent approval by employees of the proposed agreement to which the representations related, are indicative of a common intention that, in the event of the rail network being outsourced/privatised, there would be a guarantee of one suitable alternative job offer before an employee was made compulsorily redundant. That strongly supports the interpretation favoured by the Commissioner.

[90] As earlier stated, clause 4.6.1(b) as drafted is grammatically defective. Having regard to the two identified considerations above, we believe it should be read as meaning: "*For an employee whose position has been determined to be excess as a result of the Rail Commissioner's decision to privatise, outsource or contract out or the closure/part closure of a service(s), such an employee has been offered employment in a suitable ongoing permanent role and has declined such ongoing employment*". This gives effect to the preposition "*For*" as introducing the description of the category of employees to which the provision relates (*an employee whose position has been determined to be excess as a result of the Rail Commissioner's decision to privatise, outsource or contract out or the closure/part closure of a service(s)*), then sets out in respect of such employees the criterion which must be satisfied before the redeployment process ends (*has been offered employment in a suitable ongoing permanent role and has declined such ongoing employment*). Once this criterion is satisfied, such employees will be made compulsorily redundant (unless one of the consensual alternatives in clause 4.6.1(a), (c) or (e) is adopted). Clause 4.6.1(d) is then to be read as excluding from the scope of its operation the category of employees to which clause 4.6.1(b) applies (*an employee whose position has been determined to be excess as a result of the Rail Commissioner's decision to privatise, outsource or contract out or the closure/part closure of a service(s)*). Thus, an employee in this category cannot be made compulsorily redundant merely because of the passage of the 12 month period contemplated by clause 4.3.

[91] For the above reasons, we reject grounds 3 and 4 of the appeal. In relation to ground 5, we do not consider that the Commissioner erred in "*failing to give sufficient weight*" to the objective intention that the no forced redundancy policy was to end and that thereafter employees could be subject to a forced redundancy. The 2016 Agreement makes it clear that the no forced redundancy policy ends on 1 January 2018. The RRR Schedule makes it equally clear that forced redundancies can occur, but only after a range of criteria have been satisfied. In the case of employees to whom clause 4.6.1(b) applies, the relevant criterion is, consistent with the representations made prior to the approval of the 2016 Agreement by employees, that the employees must have received and rejected a suitable job offer. Ground 5 is therefore also rejected.

Conclusion

[92] Because we have rejected all the grounds of appeal, the appeal must be dismissed. We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is dismissed.

VICE PRESIDENT

Appearances:

Mr *T Duggan SC* for the Appellant.
Mr *M Young* of counsel for the Respondent.
Mr *P Dean* of counsel for the Australian Rail, Tram, Bus Industry Union.

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ANNEXURE

SCHEDULE 5 – RAIL OPERATIONS – REDEPLOYMENT, RETRAINING AND REDUNDANCY

… …

Operation

This Schedule operates in conjunction with consultation provisions contained in the *Rail Commissioner Rail Operations Enterprise Agreement 2016* (the Agreement) and consultation provisions contained in the relevant Award.

This Schedule applies to all agencies/departments identified in Clause 5, Incidence and Parties Bound by the Agreement.

Objectives

The objective of this Schedule is to ensure that proper consultation occurs between the Rail Commissioner, Employees and the Union regarding changes in workforce composition.

The parties acknowledge that:

- Redeployment and retraining is the preferred approach to workforce reductions;

- Forced redundancies should only be used as a last resort;

- With the exception of consultation regarding changes to workforce composition, these arrangements will apply to employees who, in the event of outsourcing or privatisation of Rail Operations (or part thereof), do not transfer to the new business under Transfer of Business arrangements under the *Fair Work Act 2009* (SA);

- Where there is a need for genuine redundancies, employees must be offered a Voluntary Separation Package (VSPs); and

- Any reduction in staffing levels should be achieved by:

    1. Restricting the use of temporary contracts, casual employment and external employment (i.e. labour hire and agency);

    2. Natural attrition; and

    3. Voluntary Separation Packages.

The parties further acknowledge that changes to staffing levels, including the offering of VSPs, has a significant effect on employees because it has the potential to lead to, amongst other things:

- The alteration in required skills of ongoing employees and potential retraining;
- The alteration of workloads and/or hours of work for ongoing employees;
- The potential diminution of job opportunities or promotional opportunities; and
- The possible redeployment of employees.

Nothing in this Schedule is intended to remove or limit the operation of Clause 23, Resolving Workplace Concerns or Disputes contained in the Agreement.

Procedure

1 Seriously considering changes to workforce composition

1.1 Notification

1.1.1 When the Rail Commissioner is seriously considering changes to workforce composition, including calling for employees to express an interest in VSPs or potentially forced redundancies, the public sector agency will notify the affected employees and the Union in writing of the intention. The notification will include (but not be limited to):

a) The reason the Rail Commissioner is considering changes to workforce composition;

b) The affected work/process/service delivery;

c) The affected department/location/worksite/unit;

d) The number and classifications of positions including (but not limited to) changes in position duties and/or responsibilities/tasks/workload;

e) In the event of privatisation or outsourcing, applicable Transfer of Business arrangements under the *Fair Work Act 2009* (Cth);

f) Any relevant information regarding potential effects of staffing changes on continuing employees, including changes to existing practices and/or changes that the Rail Commissioner considers necessary;

g) Any known potential redeployment and job vacancy options;

h) Data regarding the use of existing labour hire, temporary and casual employees and steps taken to reduce the use of labour hire, temporary and casual employees; and

i) Any other relevant information.

1.1.2 The Rail Commissioner agrees to genuinely consider in good faith any feedback provided by employees and/or the Union. The Rail Commissioner agrees to take all reasonable steps to mitigate adverse effects such as reducing, where practicable, the use of labour hire, temporary and casual staff.

1.1.3 The Rail Commissioner will provide the Union with not less than 14 days or as otherwise agreed to respond to written notification.

1.1.4 Where the total number of positions affected may be 20% or more of the FTE at the worksite, the Rail Commissioner will facilitate reasonable paid time for meeting(s) between employees and the Union.

1.1.5 Where the Union respond to the written notification or requests for further information, the Rail Commissioner will respond within 14 days or as otherwise agreed.

1.2 Meetings with Union

1.2.1 The parties agree to meet and seek to reach agreement on the proposed changes to workforce composition, as soon as practicable after step 1.1 has been completed (unless otherwise agreed).

1.2.2 The Rail Commissioner will give genuine consideration to matters raised by the Union including any proposals to mitigate any adverse effects and any other proposals to avoid the redundancy (for example, job swaps where employees may wish to swap roles).

1.2.3 Where any issues remain unresolved following further consultation, either party may utilise Clause 23, Resolving Workplace Concerns or Disputes in the Agreement, including by referring the matter to the Fair Work Commission, noting however that the Commission will not be empowered to make any order having the effect of determining the composition of the workforce.

1.2.4 The parties agree to maintain the status quo whilst the matter remains in dispute.

1.3 Identification of new workforce composition

1.3.1 Prior to calling for expressions of interest (EOI), the proposed new workforce composition (i.e. full-time equivalent required to undertake the required duties) must have been identified in accordance with consultative processes set out in 1.1 and 1.2, and following any Transfer of Business arrangements applicable under the *Fair Work Act 2009* (Cth). The Rail Commissioner will then confirm in writing the new workforce composition to the affected employees and the Union.

1.3.2 An agency cannot use the EOI process to inform/decide what the new workforce/change may be.

1.4 Regional and Remote Localities

In addition to the consultative requirements contained in this Schedule, the following will apply in relation to regional and remote localities:

Where an agency proposes organisational change that will result in an employee who works/resides in a regional or remote locality in South Australia being declared excess, the Chief Executive, Agency Head or delegate must provide details of the proposed organisation change and affected employees to the Commissioner for Public Sector Employment prior to the implementation of the relevant organisational change and the declaration of any employee as excess to requirements.

2. Voluntary Separation Process

2.1 Call for Expressions of Interest (EOIs) for Voluntary Separation Packages (VSP)

2.1.1. The Rail Commissioner will only call for EOIs after the number of genuinely redundant positions has been determined in accordance with the consultation requirements outlined above and following any Transfer of Business arrangements applicable under the *Fair Work Act 2009* (Cth), unless otherwise agreed.

2.1.2. The Rail Commissioner will write to employees (i.e. permanent/ongoing employees) in work sites affected by the proposed change requesting EOIs for VSPs. The request will, at a minimum, be sent to employees working in the positions identified as no longer required (i.e. determined to be excess/redundant).

2.1.3. The call for EOIs for VSPs will have a specified closing date and will be open for not less than 21 days.

2.1.4. The call for EOIs will include information regarding how a VSP may be estimated, the number of positions that have been determined to be genuinely redundant, details of the position(s) that have been determined "excess" and an option for employees to discuss and explore reasons why these positions are no longer required. A copy of this notification should be provided to the Union.

2.1.5. Employees may seek assistance from a nominated Human Resource representative to determine an approximate calculation as to what a possible VSP would be without completing an EOI. Such a calculation would only be an approximation and possibly subject to variation.

2.2 Agency considers outcomes of EOI process

2.2.1. As soon as practicable after the EOI period has closed, the Rail Commissioner will consider and consult with the relevant employees and the Union regarding the outcomes of the EOI process. For the purposes of consultation, the Rail Commissioner will provide the Union in writing the outcomes of the EOI process and provide the Union with a minimum of 7 days' notice to respond, prior to any VSP offers being made.

2.2.2. In the event the Rail Commissioner has determined potential VSP offers for affected employees, if requested, the parties agree to meet to discuss the proposed VSPs as soon as practicable.

2.2.3. Where a meeting is requested, the Rail Commissioner agrees to delay VSP offers to employees until after the meeting has occurred.

2.2.4. Where the Union requests further information or seeks a response, the Rail Commissioner will respond as soon as practicable.

2.2.5. The Rail Commissioner agrees to delay VSP offers to employees until 7 days after a response is provided to the Union.

2.2.6. In the event that the number of suitable applicants for VSPs is greater than the number of positions identified as "excess" the Rail Commissioner will inform the Union of the selection criteria it will utilise to determine which employees will be offered VSPs. The criteria may include (but is not limited to):

- The new workforce composition position descriptions;
- Hours of work;
- Skills, experience and qualifications; and
- Any other factors (such as geographical location).

2.3 Number of EOIs is the same as the number of identified excess positions

2.3.1 In the event the number of EOIs matches the number of identified excess positions, the Rail Commissioner will notify the affected employees and the Union.

2.4 Number of EOIs is less than the number of identified excess positions

2.4.1 Where the number of EOIs is less than the number of identified excess positions, the Rail Commissioner will not unreasonably refuse to offer an employee a VSP.

2.4.2 In the event the number of EOIs is less than the number of identified excess positions, the Rail Commissioner will move to the steps outlined in 3. Process for Identifying Excess Employees.

2.5 Calculation of a VSP

2.5.1 The parties agree that for the purpose of a VSP, an employee will be paid not less than the *Department of Treasury and Finance – Targeted Voluntary Separation Packages (TVSPs) as at 1st July 2015.*

2.6 Employee offered a VSP

2.6.1 Affected employees will be notified in writing that their EOI for a VSP has been accepted and that they will be paid a lump sum payment of $15,000 plus a VSP as set out in clause 2.5.

2.6.2 The Rail Commissioner must declare that their position is no longer required and therefore "excess" (redundant). Upon receipt of a VSP, their employment in the public sector will cease.

3. Process for identifying excess employees

3.1 Notification to the Union

3.1.1 Where there are insufficient numbers of EOIs to meet the number of excess positions identified in 1.3, the Rail Commissioner will notify the relevant employees and the Union of the following information in writing:

a. The number of remaining excess positions, including job classification/role/worksite location/FTE equivalent;

b. number of affected employees; and

c. The proposed time frames and plan for notification and consultation with affected employees.

3.2 Meeting with Union

Prior to notifying affected employees, per step 3.3, the Rail Commissioner and the Union will meet to discuss the selection criteria to be used for forced redundancies, the proposed time frames and plan for notification and consultation with affected employees.

3.3 Notification to affected employees

3.3.1 The Rail Commissioner will inform the affected employee/s in writing that there were insufficient numbers of EOIs for voluntary redundancies and provide information regarding the number of positions and employees that will no longer be required. A copy of any correspondence will also be provided to the Union.

This will include all relevant information including, but not limited to, why the position/s have been determined to be genuinely redundant, the number of redundant positions, the application of the above selection criteria, and information regarding the timeline and process.

3.3.2 The Rail Commissioner will notify employees of their right to be represented by the Union.

3.3.3 The Rail Commissioner will take all possible steps to mitigate the adverse effect on the employee/s affected, including (but not limited to) consideration

of immediate redeployment to a suitable alternative position with the consent of the affected employee/s.

3.3.4 The Rail Commissioner will organise at least one paid meeting with the affected employee/s to discuss the redundancies. The Union will be invited to attend this meeting.

3.4 Notification to redundant employee(s)

3.4.1 The Rail Commissioner will then notify the redundant employee/s and the Union that the particular employees will be made redundant. Prior to notifying a redundant employee, the Rail Commissioner must declare that the employee's position is no longer required and therefore "excess" (redundant).

3.4.2 The redundant employee/s will be notified in writing that their position is "excess" and may elect to consider a VSP or seek redeployment. In this same notification, the Rail Commissioner will provide the employee with the following:

- The date their position will be made redundant shall be no earlier than 28 days from the date the notification is received;
- Information regarding taking a VSP and information regarding the redeployment process. This information will clearly outline what the employee's entitlement would be if they elect to take a VSP at the date of termination, pursuant to step 2.5 and 2.6.
- That the employee may request a paid time meeting with the Rail Commissioner to discuss any aspect of the redundancy and/or redeployment process.
- That the employee is entitled to be represented during the meeting by the Union.
- Should the employee wish to accept the offer for a VSP at this time, they must do so within the timeframe provided, which must be no less than 28 days. Upon acceptance of the VSP, their employment in the public sector will cease upon receipt of the VSP.

4. Redeployment Process

4.1 Commencement of the Redeployment Process and Case Management

4.1.1 Following receipt of written advice of being declared an excess employee, where an employee has elected to become a redeployee (i.e. has decided not to accept an offer for VSP), the redeployee will be assigned a case manager and will participate in the redeployment/retraining program.

4.1.2 A redeployment plan will be established in consultation with the redeployee which aims to identify a suitable alternative ongoing permanent role in the public sector. The plan will also include (but not be limited to):

- details of any training to be provided; and
- skills or duties relevant to a suitable placement and/proposed role.

4.1.3 A copy of the redeployment plan will be provided to the redeployee.

4.1.4 The redeployee's case manager will have priority access to the notice of vacancies and redeployee will also have access to notice of vacancies.

4.1.5 The excess employee is also expected to cooperate and participate in all reasonable training opportunities or placements.

4.2 Criteria for suitable employment

4.2.1. An ongoing permanent role in any agency in the Public Sector will only be considered suitable for the purposes of redeployment if (unless the employee otherwise agrees):

a. The hours of work remain the same or similar;

b. The level of remuneration is not less than what the employee was earning prior to becoming a redeployee;

c. It is a reasonable distance/location from the employee's residence to the new place of employment;

d. The classification is not lower than the employee was previously engaged as;

e. The nature of the work is such that it is reasonable to perform, taking into account the employee's skill and experience;

f. There are no extenuating factors specific to the employee/worksite that would make it unreasonable for the employee to perform the ongoing permanent role.

4.2.2. The above criteria does not limit further discussions and agreements between the employee and their case manager.

4.3 Making of an offer of suitable employment during redeployment program

4.3.1. Within the first 6 months of an employee being declared excess, the applicable case managers/agency representatives must attempt to identify at least one role or placement that is a reasonable match with the employee's skills and capabilities (including with training).

4.3.2. In the event that an offer for an alternative role/position is not made within 6 months of the employee being declared excess, the case manager must meet with the employee and their representative (if applicable) to discuss and review the employees redeployment plan.

4.3.3. The outcomes of these discussions and the action plan for next steps must be provided in writing to the employee and a copy forwarded to the Office for the Public Sector (OPS).

4.3.4. In the event an offer for a suitable ongoing permanent role has not been identified and made within 9 months from the date of them being declared excess, the relevant agency must notify OPS.

4.3.5. The Rail Commissioner will discuss with the employee (and the Union) any reasons that an alternative role has not been achieved. At this stage the CPSE or representative from the OPS will become involved in order to review the process and options available for redeployment.

4.3.6. In the event that an offer of suitable employment has not been identified and made within 12 months of the employee being declared excess, the agency, the CPSE or representative from OPS, and the employee (and Union) will meet to discuss the outcome of the redeployment/retraining program. The parties will discuss:

- Whether the redeployment plan has been complied with by the Agency and the employee;
- Whether all reasonable efforts have been made to identify suitable employment for the employee; and
- Whether there are exceptional circumstances which could make it reasonable to extend the redeployment/retraining program, and/or amend the redeployment plan, to provide further opportunity to identify suitable employment.

4.3.7. For the purposes of 4.3.6, "exceptional circumstances" may include the geographical location of the employee, the unique skills and/or experience of the employee, the age of the employee, or the circumstances of the employee becoming excess, which circumstances provide additional difficulty to the identification of suitable employment for the employee.

4.3.8. Where any issues remain unresolved, either party may utilise Clause 23, Resolving Workplace Concerns or Disputes in the Agreement.

4.4 Notification of a suitable ongoing permanent role

4.4.1 Where an offer of a suitable ongoing permanent role is made to an employee, such notification will be provided in writing. Written notification will also include:

- A contract of employment for the new role;
- A Job and Person Specification for the new role; and
- Information advising the employee that should they not accept the suitable ongoing permanent role, the employee may be separated with 5 weeks' notice and separation pay outlined in 4.6.3 (provided that the terms of this Schedule have been met). Such information will be clearly outlined to the employee.

4.4.2 An employee will be given a minimum of 14 days to consider whether they wish to accept the suitable ongoing permanent role.

4.5 Deferment of redeployment program

4.5.1. The Rail Commissioner must defer the redeployment period where an employee that has been declared excess is absent from duty by reason of:

- Parental leave; or
- Defence reserves leave; or
- Where an employee is in receipt of weekly payments for a compensable workplace injury or illness and/or subject to a Rehabilitation and Return to Work Plan for such injury or illness.

4.5.2. The Rail Commissioner may approve an application for deferment of the redeployment period by an employee who has been declared excess, on the basis of exceptional personal circumstances by the employee. The Rail Commissioner is required to seek advice from the Commissioner for Public Sector Employment. This decision making function is not to be delegated.

4.6 Conclusion of the Redeployment Process

4.6.1 The redeployment process will end only when the following criteria has been satisfied:

a. The employee has accepted employment in an ongoing role; or

b. For an employee whose position has been determined to be excess as a result of the Rail Commissioner's decision to privatise, outsource, contract out or the closure/part closure of a service(s) and that employee has been offered employment in a suitable ongoing permanent role and has declined such ongoing employment;

c. The Rail Commissioner and employee (and union if requested by the employee) have negotiated, been offered and accepted an additional separation payment;

d. For employees other than those in 4.6.1(b), the process set out in 4.3 is completed; or

e. The employee has at any stage elected to take a VSP, in accordance with step 4.7.

4.6.2 Where the redeployment process ends, the Rail Commissioner will confirm in writing to the employee the outcome of that process.

4.6.3 Where an employee has been offered employment in a suitable ongoing permanent role and has declined such ongoing employment or the redeployment process set out in clause 4.3 is completed, the following will apply:

a. The employee will be provided in writing a minimum of 5 weeks' notice of the date of separation.

b. During the notice period, the Rail Commissioner agrees to allow a minimum of one day of paid leave each week to job seek.

c. During the notice period, the employee may give notice of their intention to resign their employment with 24 hours' notice and be paid the balance of the notice period.

d. A separation payment the equivalent of that provided in clause 4.7.3 will be paid to the employee at the separation date of their employment.

4.7 Separation Payments

4.7.1 At any time while an employee is a redeployee, they may give notice that they wish to accept a VSP.

4.7.2 A redeployee will only be required to provide one weeks' notice to terminate their employment (or less by agreement).

4.7.3 An employee who indicates that they wish to accept a VSP, in accordance with clause 4.7.1, will be entitled to the following amounts of redundancy pay:

a. An employee who has been a redeployee for between **0 to 3 months** is entitled to receive redundancy pay equal to 100% of the VSP prescribed in clause 2.5 plus a lump sum payment of $15,000; or

b. An employee who has been a redeployee for more than **3 months and up to 12 months** is entitled to receive redundancy pay equal to 100% of the VSP prescribed in clause 2.5; or

c. An employee who has been a redeployee for more than **12 months** is entitled to receive redundancy pay equal to 75% the VSP prescribed in clause 2.5.

5. Disputes

5.1. Where a dispute arises in relation to the operation of this Schedule, the parties may raise a dispute in accordance with Clause 23, Resolving Workplace Concerns or Disputes of the Agreement.

5.2. A dispute may be raised at any stage of this Schedule. Where a dispute is raised in relation to this Schedule, the status quo will remain until the matter is resolved.

5.3. Where the parties cannot reach agreement to resolve a dispute in relation this Schedule, the parties agree that the dispute may be arbitrated by the Fair Work Commission.

Review

The Rail Commissioner and the RTBU will review the implementation of this process (i.e. Schedule 5) no earlier than January 2019."

"Declared excess" means the date of written notice to the employee that their position is no longer required."