DECISION

Fair Work Act 2009
s.182(4) - Application for approval of a greenfields agreement

Lofte Australia Pty Ltd
(AG2023/114)

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 5 SEPTEMBER 2023

Application for the approval of the Lofte Australia Pty Ltd Greenfield Agreement 2023 - agreement purportedly made under s 182(4) - whether written notice under s 178B given to an employee organisation that is a bargaining representative for the agreement – whether a notified negotiation period commenced - whether the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work – meaning of the phrase "pay and conditions that are consistent with the prevailing pay and conditions" - application dismissed

[1] Lofte Australia Pty Ltd (Lofte) is establishing a genuine new enterprise which will deliver vessel loading and discharge solutions and other port operations predominantly at regional containerised and non-containerised ports. The new enterprise will initially operate in Western Australia (WA), but Lofte's ambition is to expand the enterprise to ports across Australia.[1] Lofte applies for approval of a greenfields agreement that relates to the new enterprise, titled the *Lofte Australia Pty Ltd Greenfield Agreement 2023* (Agreement) which is said to have been made pursuant to s 182(4) of the *Fair Work Act 2009* (Act). The coverage of the Agreement is framed to operate across Australia consistent with Lofte's ambition[2] rather than being confined to WA where the new enterprise will operate initially.

[2] The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) is a relevant employee organisation with which a greenfields agreement may be made.

[3] David Larsen is Lofte's Managing Director and has been involved in the stevedoring and logistics industry for more than 26 years, having first started as a stevedore in Fremantle, Western Australia in 1997.[3] Mr Larsen participated in negotiations for the Agreement with Jeff Cassar and Will Tracey, who are officials in the WA Divisional Branch of the CFMMEU and he was responsible for bargaining on behalf of Lofte.[4] Along with the application for the approval of the Agreement, Lofte filed a Form F21B – Employer's declaration in support of application for approval of greenfields agreement made under subsection 182(4) of the Act (Employer's declaration) by Mr Larsen addressing the matters that are relevant to the issue of whether the Agreement should be approved.

[4] Several matters are not controversial and on the basis of the Employer's declaration I am satisfied that:

- Lofte is establishing a genuine new enterprise as earlier described and that it has not employed any person who will be necessary for the normal conduct of the new enterprise and who will be covered by the Agreement;
- clause 3.2 of the Agreement contains a nominal expiry date which is four years from the date on which the Agreement is approved by the Commission;
- the Agreement does not cover all of the prospective employees of Lofte. Coverage is confined to operational employees who will perform work in classifications for which clause 19 of the Agreement makes provision. The group of employees covered by the Agreement is operationally distinct and fairly chosen;
- the Agreement does not exclude the National Employment Standards (NES) in any respect and no terms of the Agreement are detrimental to the employees when compared to the NES;
- the Agreement does not contain any prohibited terms nor any right of entry terms;
- the Agreement contains the requisite and compliant dispute resolution procedure, flexibility term and consultation term;
- the prospective employees working shift work who will be covered by the Agreement are also covered by the *Stevedoring Industry Award 2020* (Award) which defines or describes such workers as shiftworkers for the purposes of the NES. The Agreement also describes these employees as shiftworkers for the purposes of the NES;
- the Agreement passes the better off overall test in that as at test time prospective Award covered employees will be better off overall if the Agreement applied to their employment than if the Award so applied.

[5] There is also no dispute, and I am satisfied that the relevant employee organisation that will be covered by the Agreement, the CFMMEU, is entitled to represent the industrial interests of a majority of the employees who will be covered by the Agreement in relation to work to be performed under the Agreement.

[6] There are several additional matters which must be considered in connection with an application to approve a greenfield agreement purportedly made under s 182(4) of the Act. Some of these are set out in s 182(4) which deals with when a greenfields agreement is taken to have been made and provides:

> (4) If:
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> (a) a proposed single-enterprise agreement is a greenfields agreement that has not been made under subsection (3); and
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> (b) there has been a notified negotiation period for the agreement; and
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> (c) the notified negotiation period has ended; and
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> (d) the employer or employers that were bargaining representatives for the agreement (the ***relevant employer or employers***) gave each of the employee organisations that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement; and
>
> (e) the relevant employer or employers apply to the FWC for approval of the agreement;

the agreement is taken to have been ***made***:

(f) by the relevant employer or employers with each of the employee organisations that were bargaining representatives for the agreement; and

(g) when the application is made to the FWC for approval of the agreement.

[7] Lofte is the relevant employer, and it has applied to the Commission for approval of the Agreement. However, the CFMMEU contends that there has not been a notified negotiation period for the Agreement as required by s 182(4)(b) of the Act, in substance because the CFMMEU was not given written notice as required by s 178B, the text of which is set out below:

> **Notified negotiation period for a proposed single-enterprise agreement that is a greenfields agreement**
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> (1) If a proposed single-enterprise agreement is a greenfields agreement, an employer that is a bargaining representative for the agreement may give written notice:
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> (a) to each employee organisation that is a bargaining representative for the agreement; and
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> (b) stating that the period of 6 months beginning on a specified day is the ***notified negotiation period*** for the agreement.
>
> (2) The specified day must be later than:
>
> (a) if only one employee organisation is a bargaining representative for the agreement--the day on which the employer gave the notice to the organisation; or
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> (b) if 2 or more employee organisations are bargaining representatives for the agreement--the last day on which the employer gave the notice to any of those organisations.
>
> *Multiple employers--agreement to giving of notice*
>
> (3) If 2 or more employers are bargaining representatives for the agreement, the notice has no effect unless the other employer or employers agree to the giving of the notice.

[8] Section 187 of the Act also contains 2 additional approval requirements pertaining to a greenfields agreement. *First*, the Commission must be satisfied that it is in the public interest to approve the Agreement (s 187(5)(b)). The CFMMEU contends that Lofte has not established that it is in the public interest to approve the Agreement. *Second*, if an agreement is made under s 182(4), as the Agreement purports to be, the Commission must be satisfied that an agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work (s 187(6)). And in considering the prevailing pay and conditions within the relevant industry for equivalent work, the Commission may have regard to the prevailing pay and conditions in the relevant

geographical area (legislative note to s 187(6)). The CFMMEU contends that the Commission cannot be satisfied that the Agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

[9] I deal with each of these matters below.

[10] The Employer's declaration also sets out in some detail the steps taken by Lofte to give the CFMMEU a reasonable opportunity to sign the Agreement. It is not necessary to rehearse those steps here. It is sufficient to set out the factual matters which underpin the CFMMEU's contention that there has not been a notified negotiation period for the Agreement.

[11] Mr Larsen contacted Mr Cassar on or about 10 June 2022 to inform Mr Cassar about Lofte establishing a new stevedoring and port logistics business, and Lofte's desire to bargain for a new greenfields agreement with the CFMMEU. Mr Cassar is an official of the CFMMEU holding the position of WA Divisional Branch Assistant Secretary of the Maritime Union of Australia (MUA) Division of the CFMMEU. A meeting between Mr Larsen, Messrs Cassar and Tracey was arranged for 13 June 2022.

[12] Mr Larsen attended the scheduled meeting with Messrs Cassar and Tracey at the CFMMEU's WA MUA Divisional Branch headquarters in Freemantle. Mr Larsen says that during the meeting he handed to Messrs Cassar and Tracey a "Notice to Bargaining Representatives – Proposed Greenfields agreement" and later "sent the Lofte Australia 'Notice to Bargaining Representatives – Proposed Greenfields Agreement' letter". That was attached to an email sent to Messrs Cassar and Tracey, the text of which relevantly provided:

> Thanks to you and Jeff for making time for me today, I look forward to working with you and the team on this project.
>
> Please see attached copy of the notification of a greenfields agreement negotiation period beginning 14th June 2022 which I passed on during today's meeting.
>
> As discussed in today's catch up; we will attend the first scheduled meeting Tuesday 21st June 2022 at 9am in your Offices.

[13] The notice attached to the email was addressed to Mr Tracey in his capacity as "Branch Secretary, MUA" and provided:

> **Notice to bargaining representatives - Proposed Greenfields Agreement**
>
> Thank you for meeting with us on 13 June 2022.
>
> Lofte Australia Pty Ltd (can 660 051 829) (**Lofte**) intends to make a greenfields agreement which will cover and apply to employees of Lofte who are engaged in the classifications in the Lofte Australia Pty Ltd Enterprise Agreement 2022 (Agreement).
>
> Lofte has identified the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) as a bargaining representative for the Agreement.

> The CFMMEU has been identified as a bargaining representative for the Agreement as it is entitled to represent the industrial interests of one or more of the employees who will be covered by the Agreement, in relation to work to be performed under the Agreement.
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> Lofte has agreed to bargain with the CFMMEU in relation to the Agreement.
>
> **Notified negotiation period**
>
> In accordance with section 178B of the Fair Work Act 2009 (Cth), Lofte wishes to notify the CFMMEU that the period of 6 months beginning 14 June 2022 is the notified negotiation period for the Agreement.
>
> Lofte will be in touch shortly to arrange a time to progress. Lofte looks forward to a positive working relationship. [Bold in original]

[14] The CFMMEU makes two points in contending that there is no notified negotiation period. *First*, it contends that as the Agreement has national coverage and operation, giving written notification, as permitted by s 178B of the Act, to MUA Divisional Branch officials in WA was insufficient to trigger a notified negotiation period. *Second*, it points to rule 42 of the *Fair Work Commission Rules 2013* (Rules) which relevantly provides that service of a document on an organisation or branch of an organisation is effected by any one of the enumerated ways but must be directed to the secretary of the organisation or branch or sent to or left at the office of the organisation or branch.

[15] The second may immediately be dismissed. Although the reference to service on the "secretary of the organisation or branch" in the various subparagraphs of rule 42(2) is a reference to the obligation to serve on the organisation or branch as the case requires, so that where a person is required to serve an organisation, service is to the secretary of the organisation, and where service is required on the branch of an organisation, service is to the secretary of the branch. But rule 42 does not have general application to any circumstance under the Act where a person is required to give a notice to another person. Rather it operates upon rule 41(1) which provides that a person who lodges a document with the Commission is required to serve the document as set out in Schedule 1. The reference to a person that is required to serve a document on another person in rule 42(1) is a reference to the requirement specified in rule 41(1) and Schedule 1. Rule 42 sets out how the obligation under rule 41(1) and Schedule 1 must be discharged.

[16] Self-evidently a written notice given to an organisation that is a bargaining representative for an agreement that is a greenfields agreement under s 178B of the Act, is not a document that is lodged by a person in the Commission. Consequently rule 42 has no application. The *Fair Work Regulations 2019* may provide how notice under the Act must or may be given. For example, regulation 2.04 sets out how a notice of employee representational rights may be given. But there is no regulation promulgated which sets out how a written notice pursuant to s 178B may be given.

[17] Whether a written notice under s 178B of the Act has been given to an organisation that is a bargaining representative for the agreement is a question of fact. Consequently, one needs to start with first principles. And in assessing whether such a notice has been given to an

organisation and that which is required by the phrase "give written notice" it is relevant to have regard to the underlying legislative purpose which underpins the written notice. It is for these reasons that the CFMMEU's first contention is not without merit.

[18] Lofte advances five reasons why the CFMMEU's general contention fails. *First*, it says correctly that a branch or an organisation is not a legal entity distinct from the organisation and it is the CFMMEU who is to be served with a written notice under s 178B. It then says that the WA MUA Divisional Branch is the CFMMEU. This cannot be accepted without some serious qualification and in any event, it takes the matter no further. Two examples will suffice. Consider a supplier of goods issuing proceedings in a court against the WA MUA Divisional Branch to recover payments invoiced for goods it supplied pursuant to a supply of goods contract with the WA MUA Divisional Branch. Such a proceeding is bound to fail since the Divisional Branch is not a juristic person. Proceedings would need to be commenced against the organisation, the CFMMEU. And so, in entering into the contract (subject to the rules) and receiving the goods the WA MUA Divisional Branch is the CFMMEU in that the CFMMEU becomes indebted, but it is not the CFMMEU in the sense that it may be named as defendant in any suit instead of the CFMMEU. As a second example consider an employer giving written notice under s 178B of the Act to the Branch Secretary of the WA MUA Divisional Branch for a greenfields agreement in relation to a genuine new enterprise it is establishing that will manufacture prefabricated building products in Victoria and assemble these on construction sites in Victoria. Such a notice is not likely to have been given to the organisation. Therefore, authority and context is important.

[19] *Second*, Lofte correctly points out that rule 42 has no application to a notice given under s 178B of the Act. I have already rejected the CFMMEU's contention about rule 42. *Third*, it says if rule 42 applied, it would be satisfied because the rule reflects a branch's lack of distinct legal personality by allowing service on an organisation to be effected by serving the document on the secretary of the organisation or branch. Although this contention is hypothetical as rule 42 does not operate upon the giving of a notice under s 178B, Lofte's analysis of the operative effect of the rule is incorrect. As I have already pointed out, the reference to service on the "secretary of the organisation or branch" in the various subparagraphs of rule 42(2) is a reference to the obligation to serve the organisation or a branch of the organisation as the case requires. And perhaps to borrow from a common law maxim of statutory construction known by its Latin phrase "*reddendo singular singulis*", which literally translated means " give each to each", effecting service of a document as described on the secretary of an organisation is required when the obligation to serve that organisation arises, but where service is required on a branch of an organisation, it may be effected by serving the document in the manner described on the secretary of the branch of the organisation. Rule 42(1) requires a person who is "required to serve a document on another person" to do so as soon as practicable. Rule 42(2) sets out how the obligation to serve must be carried out and provides that service of a document "on an individual, a body corporate or an organisation or a branch of an organisation may be effected" by one of the enumerated methods, for example by leaving the document with the individual to whom it is addressed or the secretary of the body corporate or the secretary of an organisation or branch. Each of these is mentioned in the preamble and so under rule 42(2) service of a document on the secretary of a branch of an organisation will only be effective if the person was required to serve the document on the branch. It will not be effective if service was required on the organisation in which case, it is the secretary of the organisation to whom the document must be served in accordance with one or more of the methods stipulated.

[20] *Fourth*, Lofte relies on s 793(1) of the Act which it says provides that for the purposes of the Act and the Rules, any conduct engaged in on behalf of a body corporate by an official of the body within the scope of his or her actual or apparent authority is taken to have been engaged in also by the body corporate. And s 793(2) attributes the person's state of mind in relation to that conduct to the body corporate. Lofte contends that the conduct of each of Mr Tracey and Mr Cassar in receiving the served written notice (and their respective knowledge of the fact of that service) is attributed to the CFMMEU.

[21] There are some difficulties in relying on these provisions because Lofte does not say how receipt by Messrs Tracey and Cassar of a written notice purportedly given under s 178B of the Act was conduct engaged in on behalf of the organisation which was within actual or apparent authority of either person. More about this later.

[22] The *fifth* reason relates to the *second* and nothing further need be said. And given my earlier conclusion, it should be evident that I agree with Masson DP in *Re Randstad Pty Ltd Queens Wharf Project Agreement*[5] that rule 42 has no application to the manner in which written notice may be given under s 178B.

[23] Returning then to first principles. Division 3 of Part 2 – 4 of the Act deals with bargaining and representation during bargaining. Relevantly s 177 sets out the persons who are bargaining representatives for a proposed single enterprise agreement that is a greenfields agreement. Namely the employer, a person whom the employer appoints in writing as the employer's bargaining representative and an employee organisation (here the CFMMEU) entitled to represent the industrial interests of one or more employees who will be covered by the agreement in relation to work performed under the agreement and with which the employer agrees to bargain for the agreement.

[24] By s 12 of the Act "employee organisation" means an organisation of employees, "organisation" means an organisation registered under the Registered Organisations Act, and "Registered Organisations Act" means the *Fair Work (Registered Organisations) Act 2019* (RO Act). An organisation must have rules that make provision for matters required by the RO Act.[6] Such rules must provide, *inter alia*, for the powers and duties of committees of management of the organisation and its branches, and the powers and duties of holders of offices in the organisation and its branches.[7]

[25] The rules of the CFMMEU relevantly provide as follows. By rule 33, the proper officer of the CFMMEU "shall, for all purposes, be the National Secretary", and nothing in rule 33 "affects the operation of any other rule relating to the powers of a Division or Divisional Branch Secretary".

[26] Rule 30 deals with the power to execute agreements and provides the following:

> (a) Subject to these Rules, any agreement may be executed by a National Secretary and either a National President, the National Assistant Secretary, International President or a National Vice-President.

(b) Any agreement which directly affects the employment or conditions of employment of members of only one Division shall be executed by that Division in accordance with its rules.

(c) Any agreement which directly affects the employment or conditions of employment of members of only one Divisional Branch may be executed by the Divisional Branch in accordance with its rules.

(d) Any agreement which directly affects the employment of members of only one Branch may be executed by the Branch in accordance with its rules.

[27] Rule 31 deals with claims, industrial disputes and proceedings, and relevantly provides the following:

(a) Claims, logs of claim, demands and/or requests of the Union or any part thereof may be compiled, made, served and/or otherwise propagated by a National Secretary or National President or National Assistant Secretary or International President or any person authorised by a National Secretary or National President or National Assistant Secretary or International President so to do.

(b) A Divisional Secretary or Divisional Assistant Secretary (including the TCF National Secretary) or any person authorised by a Divisional Secretary or Divisional Assistant Secretary (including the TCF National Secretary) may make, compile, serve and/or otherwise propagate a claim, logs of claim, demands and/or requests of the Union in so far as it affects members of the Division of which the Divisional Secretary or Divisional Assistant Secretary (including the TCF National Secretary) is an officer. To avoid any doubt, such claims, logs of claim, demands and/or requests may affect, directly or indirectly, members of another Division so long as they are persons who are eligible to be members of the Division from which the Divisional Secretary or Divisional Assistant Secretary (including the TCF National Secretary) emanates.

(c) Any of the officers referred to in paragraph (a) or, subject to the limitations contained in paragraph (b) and the necessary changes being made, any of the officers referred to in paragraph (b), may submit, on behalf of the Union for conciliation or arbitration or both, or authorise the submission or institution on behalf of the Union, any claims, logs of claim, demands and/or requests or any industrial dispute arising therefrom or any other industrial dispute howsoever arising on behalf of the Union or otherwise institute any proceedings whatsoever on behalf of the Union.

[28] By rule 27, the CFMMEU is comprised of several divisions, including "The Maritime Union of Australia Division" (MUA division). Employees who would be covered by the Agreement fall within the coverage of the MUA division under the CFMMEU rules. Rule 27 also provides that each division has autonomy in relation to funds and property, the power to make, alter or rescind divisional rules and the power to determine any policy of the division not inconsistent with CFMMEU policy as decided by the National conference or National executive.

[29] The MUA division has rules.[8] Relevantly these rules provide that:

- the Divisional National Council shall have the full control, care, superintendence, management and administration in all respects of the affairs, business, funds and property of the Division and its Divisional Branches and without limiting the generality thereof the Divisional National Council shall have full power to carry out the objects of the Division which powers shall, in addition to powers conferred elsewhere in these Divisional Rules, include the power to:
    - enter into any Industrial Agreement or Contract relating to wages or conditions of employment of members attached to the Division (rule 15(vi));
- the WA Divisional Branch Secretary and WA Divisional Deputy Branch Secretary, along with the Divisional National officials and all other branch and Divisional Branch Secretaries and Assistant Secretaries are members of the Divisional National Council (rule 16);
- the Divisional Branch Officers shall comprise the Divisional Branch Executive and subject to the Rules the Divisional Branch Executive shall, in addition to powers specified elsewhere in the Rules, have the general supervision of the affairs of the Divisional Branch in the area embraced by the Divisional Branch (rule 26);
- the Divisional Branch Officers are the Divisional Branch Secretary, Deputy Secretary, Assistant Secretary/s and the Divisional Branch Presiding Officer (rule 32(c));
- the Divisional Branch office for the WA Divisional Branch is in Fremantle and the area embraced by the Divisional Branch is the State of Western Australia (rule 27);
- the Divisional National Secretary is the Senior Executive Officer of the Division who, *inter alia*, receives and conducts all correspondence of the National Office of the Division and who works in conjunction with Divisional National Council and subject to its direction and is responsible for the drafting, or directing the drafting, of any log of claims that may be submitted on behalf of the Division to the Fair Work Commission or to the representatives of the employers (rule 32);
- a Divisional Branch Secretary is the Senior Executive Officer of the Divisional Branch, who, *inter alia*, receives and conducts all correspondence of the Divisional Branch (rule 38).

[30] Rule 61 of the MUA divisional rules deals with the power to execute agreements and provides:

> (a) Industrial Agreements and other instruments may be made, entered into, executed or from time to time altered, amended, varied, modified or cancelled by or on behalf of the Division by Divisional National Council, provided that no Industrial Agreement shall be entered into unless its contents have been approved by the affected members of the Division or by the Divisional Secretary where authorised by Divisional National Council.
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> (b) Industrial agreements or other instruments not required by law to be under the seal may be executed by the Divisional National Secretary or by the Divisional Deputy National Secretary in the absence of the Divisional National Secretary.

(c) Any instrument required by law to be under seal may be executed under the seal of the Division.

[31] Rule 62 of the MUA divisional rules deals with the submission of industrial disputes and provides:

(a) Industrial disputes may be submitted by the Divisional National Secretary or his or her nominee to any Court or tribunal or other body having jurisdiction. The Divisional National Secretary may authorise all relevant conduct by officers or members associated with such disputes including any conduct required by law.

(b) The Division shall be represented in any such proceedings by the Divisional National Secretary or a representative of the Divsional (sic) National Secretary, together with or by such persons as decided upon by Divisional National Council from time to time.

[32] It has been necessary to undertake this excursion of the rules of the CFMMEU to make the following points. *First*, under its rules the authority to enter into agreements including industrial agreements such as a greenfields agreement is determined by the rules having regard to the scope of the agreement. In simple terms the National Secretary and another of the specified national officials of the CFMMEU may execute any agreement affecting the organisation or a branch or division thereof, but a Divisional Secretary may only execute agreements affecting the division whilst a Divisional Branch Secretary may only execute an agreement which affects members or potential members of the Divisional Branch.

[33] *Second*, the Agreement proposed by Lofte to Messrs Tracey and Cassar was one into which neither had authority to enter, because the Agreement was one that affected members of several branches and divisional branches of the MUA division of the CFMMEU. The Agreement, which will, when in operation, directly affect the employment or conditions of employment of members of the MUA division, not just the WA Divisional Branch, are to be executed by that division in accordance with its rules (rule 61 of the MUA divisional rules) or by the National Secretary and another in accordance with rule 30 of the CFMMEU's rules. Neither rule authorises Mr Tracey, Mr Cassar, nor any other Divisional Branch Officer to enter into or execute such an agreement.

[34] *Third*, I have no evidence which might suggest that there has been any relevant resolution by an authorised CFMMEU decision-making body, or any authorisation from an authorised MUA Divisional Officer or an MUA divisional decision-making body which authorised Mr Tracey or Mr Cassar, or the WA Divisional Branch or any officer thereof to negotiate or enter into any agreements which have application beyond the geographical limits of the WA MUA Divisional Branch's area of responsibility.

[35] As already noted s 178B(1) of the Act provides that an employer that is a bargaining representative for a greenfields agreement may give written notice to each employee organisation that is a bargaining representative for the agreement stating that the period of 6 months beginning on a specified day is the notified negotiation period for the agreement.

[36] The giving of such written notice for which the Act makes provision, involves more than taking perfunctory steps to give the written notice to "any old official" of an employee organisation because there are consequences for the organisation once notice is given. Giving written notice draws to the attention of the organisation that a negotiating period for the agreement has been notified, and commences a process, the end result of which will be either a greenfields agreement actually made with the organisation to whom the written notice was given, or an agreement will in effect be imposed on the organisation and will be deemed to have been made by the employer and the organisation provided the conditions in s 182(4)(a)-(e) have been met. At the end of the notified negotiation period, the good faith bargaining requirements and the capacity to obtain a bargaining order or to bring a bargaining dispute to the Commission under s 240 cease to apply (s 255A(1)(d)). And any bargaining orders earlier obtained cease to have effect (s 255A(1)(e) and (2)). If the agreement is ultimately approved by the Commission and commences operation, the agreement will apply to the organisation, even though it did not agree to make the agreement or seek to be covered by it (ss 201(2A) and 52).

[37] As a written notice under 178B of the Act has the capacity to affect the legal rights and obligations of an organisation that is a bargaining representative for a greenfields agreement, care must be taken to ensure that notice is actually given to the organisation.,

[38] In the instant case, the giving of a written notice of a notified negotiating period for a greenfields agreement with coverage of persons who will be, or will be eligible to be, members of divisional branches in states and territories beyond WA, only to WA Divisional Branch officials is insufficient. As already noted, these officials are not authorised to negotiate, much less conclude such an agreement under the CFMMEU rules. Written notice of a notified negotiating period for a greenfield agreement proposed to operate nationally in the stevedoring industry should have been given or sent to the Divisional National Secretary of the MUA Division of the CFMMEU or to the National Secretary of the CFMMEU as the organisation's proper officer. If the Agreement had a confined operation to WA, then I would have comfortably concluded that the giving of written notice to Mr Tracey on 14 June 2022 was sufficient because negotiating and concluding such an agreement was within the scope of the authority of this Divisional Branch Officer as conferred by the rules.

[39] *Fourth*, Lofte's reliance on s 793(1) of the Act takes the matter no further. Section 793 is concerned with the liability of an organisation and relevantly has the effect that if any conduct engaged in on behalf of a body corporate, here the CFMMEU, by an officer, employee or agent (official) of the body within the scope of his or her actual or apparent authority or by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official, the conduct is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.

[40] The CFMMEU rules specify that which is in the actual authority of Messrs Tracey and Cassar, and as already noted, they never had authority to negotiate or conclude an agreement extending beyond the geographical jurisdiction of the WA MUA Divisional Branch. And it is the Divisional National Secretary who is authorised under the rules to deal with all correspondence of the national office of the division. The written notice given by Lofte for a greenfields agreement with national coverage was plainly correspondence of the national office

of the division, and not correspondence of the WA divisional branch. Mr Tracey only has responsibility for all correspondence of the WA MUA Divisional Branch. As I have already noted there is no evidence that either of Messrs Tracey or Cassar had been authorised to negotiate or conclude a national greenfields agreement covering employees beyond the scope of the WA Divisional Branch's geographical coverage, nor is there any evidence that either held themselves out to have that authority. True it is that there is some evidence that the officials participated in discussions, but those discussions about the Agreement occurred after the purported written notice was given. And it is not at all clear when, if at all, Lofte told either Mr Tracey or Mr Cassar, that the Agreement sought to be negotiated would have national coverage. On the evidence the first time an "EA Draft outline" was presented was on 20 July 2022 followed by the provision of a copy of a "EA Draft" on 22 July 2022. Copies of those documents are not in evidence and so one cannot say whether those documents suggest a national coverage. Nonetheless there is nothing in the summary of the discussions before 20 July 2022 to suggest that an agreement with national coverage was being sought much less that this was communicated to either of the local officials. Nor does the notice given to Messrs Tracey and Cassar disclose that breadth of coverage. And there is no evidence that either of the WA MUA Divisional Branch officers told Mr Larsen, that the purported s 178B notice would be brought to the attention of any relevantly authorised national MUA Divisional official.

[41] The notion of "apparent authority" is often related to a principal and agent where an agent may be said to have apparent or ostensible authority to do a thing or to enter into a particular arrangement. But "apparent authority" may also arise as between an officer or employee of a body corporate and the body corporate, as for example when such officer or employee is authorised to do a thing, such as to negotiate and make an agreement on behalf of the body corporate, that officer or employee would also likely have apparent authority to sign the agreement. In such a case the actual authority given - to negotiate and make an agreement - has the effect of cloaking the officer or employee with apparent authority to sign the agreement made.[9] But here there is also no evidence which would suggest that the National Divisional Secretary (or any other authorised decision-making body) gave any direction or consented or agreed to permit either Mr Tracey or Mr Cassar to negotiate a national stevedoring industry greenfield agreement or anything of that kind on behalf of the CFMMEU or the MUA Division, nor that either was given authority to receive a written notice of a notified negotiating period for a greenfields agreement which will have national operation. The apparent authority of a person to do a thing on behalf of another cannot be conferred by the person unto themselves – there must be more.

[42] For these reasons I do not consider that there has been a written notice of a notified negotiating period given to the CFMMEU. Consequently, the Agreement lodged by Lofte has not been made because the absence of a notified negotiating period means that the requirements in s 182(4)(b) and (c) cannot be made out.

[43] But if I am wrong in that conclusion and the Agreement has been made in accordance with s 182(4), I would not approve the Agreement because I am not satisfied that the Agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work as required by s 187(6) of the Act. The reasons for that conclusion follow below.

[44] Section 187(6) provides that if an agreement is made under s 182(4), the Commission must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work. As earlier noted, an accompanying legislative note provides that in considering the prevailing pay and conditions within the relevant industry for equivalent work, the Commission may have regard to the prevailing pay and conditions in the relevant geographical area.

[45] The phrase "consistent with the prevailing pay and conditions within the relevant industry for equivalent work" is not defined. Its meaning is to be determined by reference to text, context (including any relevant legislative history and extrinsic materials), and purpose.[10] Put another way, ascertaining the legal meaning of a statutory provision necessarily begins with the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose. Context includes the language of the Act as a whole, the existing state of the law, the mischief the provision was intended to remedy and any relevant legislative history.[11] Section 15AA of the *Acts Interpretation Act 1901*[12] has the effect that a construction that would promote the purpose or underlying object of the Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the Act, and another does, the latter interpretation is to be preferred. Of course, s 15AA requires me to construe the Act, not to rewrite it, in the light of its purpose.[13]

[46] Lofte contends that the composite phrase "consistent with the prevailing pay and conditions" does not impose a singular benchmark. It contends that properly understood, the prevailing (i.e. generally current) pay and conditions establish a range – or, put colloquially, a 'ballpark' – within or close to which the subject agreement's pay and conditions must be consistent (i.e. accordant, compatible, or not self-opposed). Lofte says that the comparison is to be conducted on an overall basis. And the Commission may be satisfied of the matters in s 187(6) notwithstanding that there may be certain terms or classes of terms in the subject Agreement which are inconsistent with prevailing pay and conditions in the relevant industry for equivalent work, so long as the terms are consistent overall. Lofte contends that unlike the better off overall test, nothing in s 187(6) requires that the 'consistency' analysis be established in relation to each employee and prospective employee to be covered by an agreement. It contends that there may be certain cohorts (in particular classifications, or particular modes of employment) which receive greater or lesser benefit under the subject agreement *vis-à-vis* the comparator instruments.

[47] It may be accepted that the ordinary meaning of "consistent" is that which is agreeing or accordant, compatible, not self-opposed or self-contradictory; or that which is constantly adhering to the same principles, course, etc.[14] And the ordinary meaning of "prevailing" is that which is predominant, generally current, or having superior power or influence or is effectual,[15] or that which is existing at a particular time. The precise meaning of each of course depends on context.

[48] It may also be accepted that the assessment of an agreement's consistency with relevant industry prevailing pay and conditions, does not require exactness or matching of pay and conditions. The relevant industry here is uncontroversial – it is the stevedoring industry.

[49] The mischief with which s 187(6), along with the enactment of or amendments to or the addition of notes to ss 177, 178(2)(c), 178A(3)(b) and (3A), 178B, 182(4), 185(1A), 185(6), 185A, 186(1), 190(1)(a), 192(1) and (6), 201(2), 228(1), 229(1), 230(1), 234, 235(1), 238(1), 240(1), 255(1), 255A, 269(1) and 271A is described in the *Fair Work Amendment Bill 2014 Explanatory Memorandum* as follows:

> 78. The Fair Work Review Panel identified that under the existing greenfields agreement making framework in the Fair Work Act 'there is a significant risk that certain bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia' (page 171). The Fair Work Review Panel observed that under the current framework, a union (or unions) that are able to represent the industrial interests of the majority of employees to be employed in a greenfields project are effectively capable of frustrating the making of a greenfields agreement in a timely way. Evidence and submissions provided by business and industry indicated that these risks undermined the need for certainty over labour costs and may delay the commencement of major new projects.[16]

[50] Earlier, the *Explanatory Memorandum* sets out that the objective of the amendments to the greenfields agreement making scheme in the Act is "to ensure that there are realistic timeframes for the negotiation of greenfields agreements; to ensure that negotiations do not delay or jeopardise investment in major projects; and to provide that the interests of employees to be covered by such agreements are protected".[17]

[51] As to s 187(6) the *Explanatory Memorandum* provides:

> 114. This item inserts new subsection 187(6) to provide an additional approval requirement that must be met where a single-enterprise agreement that is a greenfields agreement has been made under new subsection 182(4) (that is, the parties have been unable to make an agreement under subsection 182(3)). It requires the FWC to be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.
>
> 115. The requirement for the FWC to assess an agreement on an 'overall' basis is intended to make clear that not all entitlements in comparable instruments need to be reflected in the agreement. Provided that the agreement is consistent with prevailing industry pay and conditions when considered overall, the requirement will be satisfied.
>
> 116. Guidance on the factors that the FWC may have regard to in considering whether the agreement provides for pay and conditions that are consistent with prevailing pay and conditions within the relevant industry for equivalent work is provided in a legislative note under the new subsection. That is, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area. This is intended to make clear that the FWC would not be required to

ensure that the pay and conditions provided in the agreement are comparable to existing enterprise agreements across Australia. It is not intended that the reference to prevailing pay and conditions would involve an exhaustive analysis of every source of employment entitlement in a particular industry and in most cases it is expected that it would be appropriate to compare the proposed agreement to a small number of comparable enterprise agreements.

117. It is intended that the FWC could be satisfied of this new approval requirement in circumstances where the FWC is unable to determine whether an agreement is consistent with the prevailing pay and conditions within the relevant industry for equivalent work because it is a new industry (such that making a meaningful assessment of prevailing industry pay and conditions is not possible).

118. This new approval requirement is not intended to modify or delay the current timeframes for FWC consideration and finalisation of these agreements. That is, the approvals process for these agreements is intended to be consistent with the overall purpose of the amendments in this Part to ensure the expeditious negotiation of single-enterprise greenfields agreements and the commencement of new businesses.

119. Where the approval requirements have not been met, the amendments made by this Part do not modify the existing position that the FWC may approve the agreement with undertakings (section 190) or not approve the agreement, such that the employer would need to recommence the negotiation process.

[52] Self-evidently the s 187(6) approval requirement applies only where, as here, the employer applies for approval of an agreement which is deemed to have been made, but is not actually made with any bargaining representatives, has not been bargained for with employees, nor has the employer agreed to terms with an employee organisation. In substance the employer has agreed to terms with no one and has unilaterally specified what those terms shall be. The notion that there is an "agreement" that is made is a misnomer. The interests of prospective employees who will be covered by the greenfields agreement when employed will not have any protection by way of an immediate or reasonably proximate ability to bargain for and vote on an agreement, or any requirement that an employee organisation with requisite coverage of persons who would be covered by the proposed greenfield agreement agree to it. Nor is there any requirement that the proposed greenfields agreement be genuinely agreed to by employees – indeed no meeting of minds is required at all.

[53] In this respect the purpose of s 187(6) is plainly protective of the interest of persons who will in the future be covered by an agreement. Whilst the ss 178B and 182(4) mechanism for "making" a greenfields agreement is intended to "ensure that greenfields agreements are negotiated in an appropriate and expeditious manner" and to protect the viability of projects from obstructionism by one or more employee organisations, the protection that is afforded is a requirement that the Commission be satisfied—as neither employees nor any employee organisation have been able to ensure—that the pay and conditions of the agreement "reflect terms and conditions of employment of the relevant industry" so as to "protect the interests of the employees to be covered by such agreements"[18] And as I have earlier noted, a purpose of the amendments made by the *Fair Work Amendment Act 2015*, which amended the Act for the ss 178B and 182(4) mechanism, including enacting s 187(6) is "to provide that the interests of

employees to be covered by such agreements are protected."[19] The mechanism through which the protective object operates is s 187(6).

[54] For this reason, colloquial descriptions of "consistent with", such as pay and conditions within a range or 'ballpark' are unhelpful. How large may the industry range be, and how big may the industry ballpark of pay and conditions be so that pay and conditions under a greenfield agreement are consistent with those prevailing in the relevant industry for equivalent work? As I have already observed, although it is not necessary that pay and conditions as between a greenfields agreement and the comparator (those prevailing in the relevant industry for equivalent work) be the same, given the protective object underpinning s 187(6) of the Act, more than just being in or near an unspecified range or ballpark is required. That which is required is that the pay and conditions in the greenfields agreement should be relevantly consistent with the comparator in the sense that, on an overall basis, pay and conditions are congruent with, in keeping with, in accordance with, compatible with or commensurate with, the prevailing (that is, the predominant and current) pay and conditions in the relevant industry for equivalent work. In short, the first should reflect the second.

[55] As earlier observed the legislative note following s 187(6) provides that in considering the prevailing pay and conditions within the relevant industry for equivalent work, the Commission may have regard to the prevailing pay and conditions in the relevant geographical area. As the *Explanatory Memorandum* explains at [116] the legislative note is intended to make clear that the Commission would not be required to ensure that the pay and conditions provided in the agreement are comparable to existing enterprise agreements across Australia. The note is unsurprising, since an underlying object or purpose of the greenfields agreement mechanism is to address concerns that bargaining practices and outcomes associated with greenfields agreements potentially threatened future investment in major projects in Australia. Major projects are usually confined to a particular geographic area. But here, the Agreement is intended to operate across Australia, including in ports located in Bunbury, Port Hedland, Dampier, Esperance, Gladstone, Newcastle and Adelaide.[20] It seems to me inevitable in the current circumstances that the pay and conditions for which the Agreement provides are to be compared, in order to ascertain the requisite consistency, with the prevailing pay and conditions in each of the geographical areas in which the Agreement would operate if approved by the Commission. As that which is the prevailing (in the sense of current and predominant) pay and conditions in the industry for the equivalent work will likely differ as between different geographical areas, a greenfields agreement with national operation may only sensibly be assessed by reference to a comparison of the Agreement with the prevailing pay and conditions within the industry operating in the various geographical regions for equivalent work.

[56] By its application and Employer's declaration, Lofte advanced four principal industry comparator agreements: the *Three Oceans Maritime Pty Ltd and Maritime Union of Australia Enterprise Agreement 2017* (Three Oceans EA); the *LINX Fremantle Enterprise Agreement 2022* (LINX Fremantle EA); the *Townsville Marine Logistics Enterprise Agreement 2018* (TML EA); and the *Qube Ports Pty Ltd Port of Fremantle Enterprise Agreement 2020* (Qube Fremantle EA).

[57] The CFMMEU points out that Qube Ports Pty Ltd (Qube) is an integrated port solutions provider with bulk and general handling facilities across Australia. Qube employs stevedoring employees at various sites, whose conditions are governed by enterprise agreements approved

under the Act. There are agreements for different ports, and each is in a relevantly identical form in Part A, and differs in conditions from port to port in Part B. There are 18 operative agreements (Qube EAs) which cover the CFMMEU and Qube and which apply to various of Qube's bulk and general operations around Australia as follows:

- *Qube Fremantle EA Qube Ports Pty Ltd Port of Bunbury Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Geraldton Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Esperance Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Port Kembla Enterprise Agreement 2021*
- *Qube Ports Pty Ltd Port of Newcastle Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Darwin Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Brisbane Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Melbourne Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Portland Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Adelaide Enterprise Agreement 2020*
- *Qube Ports Pty Ltd South Australian Outports Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Whyalla Enterprise Agreement 2020*
- *Qube Ports Pty Ltd Port of Tasmania Enterprise Agreement 2020*
- *Qube Ports Pty Ltd TT Line Victoria Enterprise Agreement 2020*

[58] Like Qube, the CFMMEU points out that LINX Cargo Care Pty Ltd (LINX) is also a stevedore providing bulk and general handling facilities across the country. LINX also employs stevedoring employees at various sites, whose conditions are governed by enterprise agreements approved under the Act. There are agreements for different ports. These agreements are also in a relevantly identical form in Part A and differ in conditions from port to port in Part B. There are 12 operative agreements (LINX EAs) which cover LINX and the CFMMEU and which apply to various of LINX's bulk and general operations around Australia as follows:

- *Linx Port Kembla Enterprise Agreement 2022*
- *Linx Geraldton Enterprise Agreement 2022*
- *Linx Dampier- Port Hedland Enterprise Agreement 2022*

- *LINX Fremantle EA*
- *Linx Adelaide Port Pirie Enterprise Agreement 2022*
- *Linx Brisbane Enterprise Agreement 2022*
- *Linx Darwin Enterprise Agreement 2022*
- *Linx Geelong Enterprise Agreement 2022*
- *Linx Western Port Enterprise Agreement 2022*
- *LINX Melbourne Enterprise Agreement 2022*
- *LINX Newcastle Enterprise Agreement 2022*
- *Linx Albany Bulk Handling (ABH) Enterprise Agreement 2022*

[59] It is in this context that the CFMMEU was content to adopt the *LINX Fremantle EA* and the *Qube Fremantle EA* as the comparison instruments. But as its cross-examination of Mr Larsen made clear, it also relies on particular geographic specific conditions in other agreements, for example, the *Linx Dampier- Port Hedland Enterprise Agreement 2022*, *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2020* and the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020*.[21]

[60] Lofte criticised the CFMMEU because it said nothing to gainsay the relevance of the Three Oceans EA and the TML EA to the Commission's assessment under s 187(6). One reason might be that the Oceans EA passed its nominal expiry date three years ago, while the TML EA only recently (20 February 2023) passed its nominal expiry date, but the TML EA does not cover the CFMMEU. In any event, these agreements were used by Lofte during the purported negotiation period for reference only.[22] Moreover, although in operation (but subject to current bargaining)[23] the Three Oceans EA in the context of the various agreements operating in the stevedoring industry, would hardly fit the description of "current" for the purpose of assessing whether it may be regarded as part of the prevailing pay and conditions in the stevedoring industry. And Lofte also does not explain why agreements such as the *Linx Dampier- Port Hedland Enterprise Agreement 2022*, *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement* and the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020* are not relevant to the assessment, given that Lofte wants to operate in these geographical areas, the Agreement would operate in those areas and the genuine new enterprise to which the Agreement relates is one that will deliver vessel loading and discharge solutions and other port operations predominantly at regional containerised and non-containerised ports. Given, the breadth of coverage of the Agreement and the genuine new enterprise to which it relates, I consider that the Qube and LINX EAs identified by the CFMMEU set out above are more reflective of the prevailing pay and conditions than the limited sample identified by Lofte. All the more so as Mr Larsen accepted that Lofte's operation would be confined to bulk and general handling stevedoring facilities, that it is not presently a container stevedoring operator and does not hold any equipment for that kind of operation.[24]

[61] The CFMMEU prepared a comparison of the LINX Fremantle EA, the Qube Fremantle EA (comparator agreements) and the Agreement, and it contends, based on its comparison and

contrary to Lofte's Employer declaration, that the pay rates set out in the Agreement are approximately half that of the rates set out in the comparator agreements. And the conditions in the Agreement are significantly inferior to those set out in the comparator agreements. To this Lofte says that the CFMMEU's comparison document provides a materially inaccurate comparison between the Agreement and each of the comparator agreements. Lofte contends that those inaccuracies stem principally from the fact that the Agreement pay rates are base rates, whilst those set out in the comparator agreements are composite rates which include relevant allowances and shift penalties. This is true in part, but the point of the CFMMEU's pay comparison is that under the Agreement an employee working a day shift is paid the base rate of pay, whereas under the comparator agreements for those same day shift hours an employee is paid the composite rate of pay, which is substantially higher than the base rate of pay for which the Agreement provides.

[62] Mr Larsen gave evidence that many enterprise agreements in the industry, including the comparator agreements, use annual salaries or composite rates with no breakdown. He said that the Agreement builds overall remuneration using a base rate of pay as the starting point. He said that for a comparison to be made against other industry agreements (including the comparator agreements), he "built up" the Agreement base rate of pay to an equivalent composite rate for the relevant classifications.[25] He explained his rationale and assumptions (which need not be here repeated).[26]

[63] Lofte's analysis factors in shift penalties into "its composite rates" assumptions, noting that the Agreement does not provide for composite rates. Nevertheless, Mr Larsen's "composite rates" comparison shows the following.

[64] For full-time employees, the "composite rates" Mr Larsen constructs for the Agreement are:

(i) between 7 per cent and 11 per cent above the Three Oceans EA across the Agreement's various classifications;

(ii) between 5 per cent above and 5 per cent below the TML EA across the Agreement's various classifications;

(iii) between 6 per cent and 11 per cent below the LINX Fremantle EA across the Agreement's various classifications; and

(iv) between 4 per cent and 12 per cent below the Qube Fremantle EA across the Agreement's various classifications.

Thus, in most instances, even making allowance for the "composite rates", the rates of pay are below those in the agreements with which the comparison is made. In many cases significantly below.

[65] For guaranteed wage employees, the "composite rates" Mr Larsen constructs for the Agreement are:

(i) between 4 per cent and 16 per cent above the TML EA across the Agreement's various classifications;

(ii) between equal to and 13 per cent below the LINX Fremantle EA across the Agreement's various classifications; and

(iii) between equal to and 9 per cent below the Qube Fremantle EA across the Agreement's various classifications;

Again, in many instances, even making allowance for the "composite rates", the rates of pay are below those in the agreements with which the comparison is made.

[66] For casual employees, the "composite rates" Mr Larsen constructs for the Agreement are:

(i) between 7 per cent and 12 per cent above the Three Oceans EA across the Agreement's various classifications;

(ii) between 19 per cent and 32 per cent above the TML EA across the Agreement's various classifications;

(iii) between 9 per cent above and 5 per cent below the LINX Fremantle EA across the Agreement's various classifications; and

(iv) between 5 per cent above and 5 per cent below the Qube Fremantle EA across the Agreement's various classifications.

While the analysis shows superior casual "composite rates" for the first two agreements, the rates are well below the rates of pay available under the comparator agreements.

[67] But the analysis assumes what a composite rate would be under the Agreement in circumstances where the Agreement does not provide for a composite rate of pay for any classification nor any description of the component parts of any composite rate of pay. Thus, the fundamental problem remains that under agreements which contain a composite rate of pay, that rate is payable for all hours worked, whereas under the Agreement rates of pay for work performed on a day shift will be substantially less than the rates of pay received by employees working those same hours under a composite rate of pay scheme.

[68] Mr Larsen said that he did not consider the CFMMEU's assessment to be an accurate assessment of whether the Agreement is consistent with the prevailing pay and conditions requirement. This was because the comparison is against only two agreements and there are material inaccuracies, for example, as it compares the Agreement base rate of pay (excluding relevant allowances and shift penalties) with all-inclusive annualised salaries in the comparator agreements and does not include a leave loading component in the base rate of pay.[27] Two things should be immediately apparent about Mr Larsen's evidence. *First*, the comparator agreements are amongst the handful of agreements identified by Mr Larsen as relevant. *Second*, while the base rate of pay and all-inclusive annualised pay comparisons might not yield a fair comparison for the actual payments received by employees working shift work, as noted earlier, the comparison makes good the point that employees working day shift under the Agreement would receive a substantially lower rate of pay than employees performing the same work on the same shift but working under either of the comparator agreements.

[69] Mr Larsen's evidence was that he also undertook a comparison between the Agreement and 47 different enterprise agreements spanning Australia.[28] It must be said that that analysis uses a "composite comparison rate" constructed by Mr Larsen, and not one which the Agreement provides. And without setting out in full the rates comparison, it shows that even

on Mr Larsen's "composite comparison rate" analysis, employees covered by the Agreement would be paid a rate of pay which is substantially less in many instances, than that which is available in or under a significant number of enterprise agreements particularly those covering employees of Qube, LINX, DP World and Patricks across various ports in Australia.[29]

[70] Mr Larsen's evidence appears to suggest that in a significant number of cases the pay rates under the Agreement, based on his constructed "composite rates", are within plus or minus 10% of the various instruments with which the comparison is made. Such summaries can tend to mislead – *lies, damn lies and statistics* – although I do not suggest deliberately so. But, for example, in the case of the full-time employee analysis of the team leader classification under the Agreement using Mr Larsen's composite rate is between 3% and 15% below the corresponding composite rate in 35 of the 47 agreements analysed, and of those in 25 cases it is between 7% and 15% below, and in 12 of the cases it is 10% or more below. Thus in 74% of cases, the rates of pay for this classification are below and, in most cases, well below those for which the other agreements provide for the classification. In the case of guaranteed wage employees, the rates of pay for the team leader classification are between 2% and 18% below in 33 cases in circumstances where only 36 of the 47 agreements contain provisions for a guaranteed wage employee. And in respect of casual team leaders, in almost half the agreements analysed, those rates are between 1% and 19% above the Agreement rate (in 13 instances between 7% and 19% above the Agreement rate). I do not consider that such differences get a ticket to the proverbial ballpark, much less is the consequential pay consistent with the prevailing pay in the stevedoring industry for equivalent work.

[71] Moreover, there is little by way of analysis of the comparable conditions. Mr Larsen said that he undertook an entitlement comparison analysis to factor in the value of certain entitlements across the 47 enterprise agreements and the Agreement. These concerned superannuation, income protection, annual leave, personal leave and long service leave. Mr Larsen said that he converted the payment value of these entitlements into a percentage contribution, on top of the actual rates payable to employees for time worked, so that he could allocate a true value to the entitlements as a whole to demonstrate the range for all compared enterprise agreements against the Agreement. He said that he had identified that the Agreement is within 10% (above and below) in 25 of the 47 comparison agreements and within 15% of all comparison agreements.[30] But the analysis discloses that it was above in only two of the 25 instances and below in the remainder. The analysis also discloses that in respect of the other 22 comparison agreements the Agreement was inferior to the tune of between 11.4% and 16.1%. Again, in my view, not quite in the ballpark much less are these consistent in the requisite sense.

[72] Lofte makes no attempt to gainsay the CFMMEU's conditions analysis as between the Agreement and the comparator agreements. The analysis shows, and I accept, that the conditions in the Agreement are consistently inferior when compared to the comparator agreements. The conditions in the comparator agreements are also generally found in the LINX and Qube EAs.

[73] Additionally, the Agreement makes no provision for geographic allowances such as the North West allowance available under the *Linx Dampier- Port Hedland Enterprise Agreement 2022*, *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2020* and the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020*.[31] Mr Larsen accepted that such allowances are relevant "to what those areas require" and that he intended to pursue business

in those areas should opportunities arise there and he accepted that the Agreement made no provision for such allowances.[32]

[74] For these reasons, I consider that the prevailing pay and conditions in the stevedoring industry for equivalent work that is to be performed under the Agreement is best reflected in the LINX and Qube EAs. And I am not satisfied, considered on an overall basis, that the Agreement provides for pay and conditions that are consistent with the prevailing pay and conditions within that industry for equivalent work. This remains the case even if I accept Mr Larsen's analysis for the reasons earlier stipulated. In my view the Agreement's pay and conditions considered on an overall basis are substantially inferior to, and therefore not consistent with, the prevailing pay and conditions in the stevedoring industry for the equivalent work. The approval requirement in s 187(6) is not met and the Agreement cannot be approved, at least not without undertakings.

[75] Given these conclusions it is unnecessary to consider the public interest approval requirement. Nor is it necessary to consider whether an undertaking might meet my concern that the approval requirement in s 187(6) has not been met in light of my earlier conclusion that there has not been a notified negotiation period. In any event I consider that the kinds of undertakings that would be required to meet the concern would likely involve substantial change to the Agreement and thus not capable of acceptance.

Conclusion

[76] For the reasons earlier given, I do not consider there has been a notified negotiation period because the requisite written notice was not given to the CFMMEU. In any event the Agreement does not meet the approval requirement in s 187(6) of the Act. Consequently, Lofte's application to approve the Agreement must be dismissed.

Order

[77] The application for the approval of the *Lofte Australia Pty Ltd Greenfield Agreement 2023* is dismissed.

DEPUTY PRESIDENT

Appearances:

A Pollock of counsel for Lofte Australia Pty Ltd
L Edmonds for the Construction, Forestry, Maritime, Mining and Energy Union

Hearing details:

9 June
Melbourne

Written submissions:

Lofte Australia Pty Ltd: 25 May 2023

Construction, Forestry, Maritime, Mining and Energy Union: 21 April 2023

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[1] Exhibit 1 at [31]

[2] Form F21B – employer's declaration in support of application for approval of greenfields agreement made under subsection 182(4) of the Act, Q4 .2

[3] Exhibit 1 at [1]-[4]

[4] Exhibit 1 at [5]; Form F21B – employer's declaration in support of application for approval of greenfields agreement made under subsection 182(4) of the Act, Q1.1

[5] [2020] FWCA 6963

[6] See *Fair Work (Registered Organisations) Act* 2019, s 140

[7] Ibid, s 141(b)(i)

[8] Rules of the CFMMEU, The Maritime Union of Australia Division

[9] See for example *Australian Nursing and Midwifery Federation v Kaizen Hospitals (Essendon) Pty Ltd* [2015] FCAFC 23, (2015) 228 FCR 225 at [66] (Greenwood J), at [107]-[109] (Buchanan and Jagot JJ)

[10] See for example *Talacko v Bennett* (2017) 260 CLR 124 at 145 [65] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ) (Gageler J concurring)); 149 [82] (Nettle J (Gageler J concurring)) and *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ)

[11] See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ); at [37]-[39] (Gageler J)

[12] As in force on 25 June 2009; See *Fair Work Act 2009*, s 40A

[13] See generally, *Sharon Bowker; Annette Coombe; Stephen Zwarts v DP World Melbourne Limited T/A DP World; Maritime Union of Australia, The Victorian Branch and Others* [2014] FWCFB 9227; *Qube Ports Pty Ltd T/A Qube Ports v Construction, Forestry, Maritime, Mining and Energy Union - The Maritime Union of Australia Division* [2023] FWCFB 102 at [16]-[17]

[14] See for example Macquarie Dictionary Online (http://www.macquariedictionary.com.au)

[15] Ibid

[16] *Fair Work Amendment Bill 2014 Explanatory Memorandum* at [78]. See also more extensive discussion at pp *ix-x*

[17] Ibid at p *x*

[18] Ibid p *xi*

[19] Ibid p *x*

[20] Exhibit 1 at [31]

[21] Transcript PN113-PN138
[22] Ibid PN76
[23] Ibid
[24] Ibid PN58-PN72
[25] Exhibit 1 at [12]-[13]
[26] Ibid at [14]
[27] Ibid at [18]
[28] Ibid at [20]
[29] Ibid, attachments DL-1, DL-2 and DL-3
[30] Ibid at [26] and DL-4
[31] Transcript PN109-PN135
[32] Ibid PN136-PN139