[2023] FWC 391 [Note: An appeal pursuant to s.604 (C2023/1713 & C2023/1715) were lodged against this decision.]

DECISION

Fair Work Act 2009
s.768BG - Application for consolidation orders in relation to non-transferring employees

Application by Australian Education Union (284V)
(AG2022/1809)

Application by United Workers' Union (108V)
(AG2022/1961)

COMMISSIONER LEE MELBOURNE, 24 MARCH 2023

Applications pursuant to s.768BG for consolidation orders in relation to non-transferring employees-consideration of matters the Fair Work Commission must take into account under s.s768BG(4)-determination to make consolidation orders sought in both applications.

Background

[1] Prior to 1 July 2022, the former TasTAFE was a public sector employer. Employees of the former TasTAFE were employed pursuant to the *State Service Act 2000* (Tas) (the SS Act).[1] The *Fair Work Act 2009* (cth) (FW Act) did not apply to these employees, as the *Industrial Relations (Commonwealth Powers) Act 2009* (Tas) excluded State public sector employees employed under the SS Act from its reference to the Parliament of the Commonwealth.[2]

[2] On 1 July 2022, the *TasTAFE (Skills and Training Business) Act 2021* (TasTAFE Act) came into effect and established the current iteration of TasTAFE.[3] The TasTAFE Act provides that the former TasTAFE, as it was continued under the *Training and Workforce Development Act 2013* (Tas),[4] is continued as TasTAFE which is a body corporate with perpetual succession and which is an instrumentality of the Crown.[5]

[3] Whereas the former TasTAFE was a State public sector employer, TasTAFE is now a national system employer under the FW Act. The TasTAFE Act effects this reform of the industrial landscape by providing that the SS Act does not apply to TasTAFE employees,[6] by providing that TasTAFE is not a public sector employer for the purposes of the *Industrial Relations (Commonwealth Powers) Act 2009* (Tas),[7] and by providing for transitional provisions to terminate the employment of employees of the former TasTAFE,[8] and appoint those employees as employees of the new TasTAFE.[9]

[4] The parties concur about the operation of the majority of the provisions of Part 6-3A of the FW Act, which is entitled "Transfer of business from a State public sector employer". The parties agree that the TasTAFE Act effects a transfer of business for the purposes of the FW

Act, in that the transferring employees of the former TasTAFE who are appointed by TasTAFE will be performing substantially the same work as they performed for the former TasTAFE, and as the relevant connection between the former TasTAFE and TasTAFE exists,[10] the parties agree that the terms and conditions of transferring employees are provided by "copied State instruments" enforceable under the FW Act.

[5] The copied state instruments that apply to transferring employees are:

- TasTAFE Teaching Staff Award
- TasTAFE Teaching Staff Industrial Agreement 2021
- Tasmanian State Service Award
- Public Sector Union Wages Agreement 2019
- Facility Attendants (Tasmanian State Service) Award
- Education Facility Attendants Salaries and Conditions of Employment Agreement 2019 No.2
- Education Facility Attendant Job Security Industrial Agreement 2019

[6] Employees employed after 1 July 2022 are non-transferring employees. The FW Act does not provide for the copied state instruments to apply to non-transferring employees. The Fair Work instruments that apply to non-transferring employees are the *Miscellaneous Award 2020* and the *Educational Services (Post-Secondary Education) Award 2020.*

[7] The Australian Education Union (AEU) and the United Workers' Union (UWU), respectively, have made applications for the Fair Work Commission (Commission) to make orders pursuant to s.768BG of the FW Act. If those orders are made, the copied state instruments referred to above will also apply to non-transferring employees who perform the transferring work.

[8] The UWU seeks the order for a number of reasons, including that non-transferring employees will be covered by what they describe as the inferior terms and conditions of the *Miscellaneous Award 2020*, instead of the transferring instruments.

[9] The AEU also seeks the order for a number of reasons, including to ensure equity across staff and to avoid different and "worse off" conditions for non-transferring employees.

[10] The TasTAFE, represented by the Office of the Solicitor-General (Litigation) of Tasmania, oppose the making of the orders sought for a number of reasons, including that the applications made by the AEU and UWU are inimical to the success of the transition, misconceive its purpose and fail to comprehend the public interest. [11]

Jurisdictional Considerations raised by the Respondent

[11] It is common ground that the Unions are entitled to make these applications as employee organisations that are entitled to represent the industrial interests of a non-transferring employee who performs, or is likely to perform, non-transferring work, pursuant to s.768BG(3)(b)(iii).

[12] However, the Respondent raised a number of jurisdictional issues in their first submissions.[12] Although these jurisdictional objections were pursued with less vigour or not

mentioned at all in the Respondents final submissions, it is not entirely clear as to whether these jurisdictional issues were still pressed.

[13] I deal with each of the issues raised by the Respondent below. Those issues are:

- the allocation of the onus of proof and the standard of proof;
- whether the mandatory considerations in s.768BG(4) of the FW Act are exhaustive;
- the proper construction of a number of the mandatory considerations, and
- what weight might be given to each of the considerations.

The allocation of the onus of proof and the standard of proof

[14] It is convenient to deal with these two issues together. The Respondent submits that the evidentiary and legal onus rests on the Applicant to satisfy the Commission that an order or orders should be made. Authorities cited for that proposition were decisions of two single members of the Commission.[13] It was submitted that those decisions ought to be followed as a matter of comity unless they were found to be plainly wrong.

[15] However, these decisions are of no great assistance. In the matter determined by Deputy President Asbury, the application was dismissed because the Applicant failed to comply with the directions and file any evidence at all. I agree with the UWU's submissions that "all that Robynne Leanne Black reasonably says is that an applicant must press its case, with evidence addressed to the mandatory criteria which must be taken into account by the Commission. Where that does not occur, the Commission cannot "take into account" the required matters, and therefore is without power to exercise its direction."[14]

[16] The decision of Commissioner Cribb cited turned on a factual finding that there was not a connection between the old employer and the new employer for the purposes of s.311(3) of the FW Act. Therefore, there was not a jurisdictional basis for the Commission to exercise its discretion under s.318 of the FW Act. That threshold issue is not in contest here.

[17] More relevant is the observation of the Full Bench in *Family and Domestic Violence Leave Review 2021* where in the context of an application to vary the Award, the Bench observed:

> "[T]he proponent of an award variation should present a persuasive evidentiary case and the failure to do so may lead to a claim being rejected. But these observations are not intended to import the common law notion of onus or burden of proof. Ultimately, the Commission must be satisfied that a modern award is not achieving the modern awards objective and requires variation."[15]

[18] So, it is here, the proponents must present a persuasive evidentiary case relevant to the factors the Commission is to take into account in exercising its discretion. The Respondent's submissions as to the allocation of the burden of proof are an over-reach and inconsistent with Full Bench authority.

[19] As to the arguments advanced by the Respondent as to the standard of proof, they are rejected. There is no common law "onus of proof" relevant to these proceedings and there is not therefore an onus to establish facts to any particular standard beyond that of a persuasive

evidentiary case. The Respondent has not put forward any Commission precedent where *Briginshaw v Briginshaw* was found to be relevant to the state of satisfaction for the exercise of the discretion in s.768BG of the FW Act or other analogous provisions.[16]

Whether the mandatory considerations in s.768BG of the Fair Work Act 2009 are exhaustive.

[20] The submissions of the Respondent in their first submissions were to the effect that the items in s.768BG of the FW Act were not exhaustive, and merely inclusive, such that the Commission may permissibly consider other matters not therein listed if they are otherwise relevant to the exercise of the s768BG(1) power.[17] However, the Respondent's final submissions indicated that it was not necessary to determine that issue as the evidence "is structured very much towards each of those considerations"[18]

The proper construction of the provisions of s.768BG(4) of the Fair Work Act 2009.

[21] The essential argument advanced by the Respondent is that in respect of various provisions of s.768BG(4) "both sides of the coin" should be considered.[19] For example, while s.768BG(4)(e), which requires the Commission to consider whether the employer would incur significant economic disadvantage if the order were not made, should also be considered in the inverse. That is whether the employer would incur significant economic disadvantage if the order was made. The Respondent submitted that to do otherwise would be to narrowly construe the provisions, and would have the effect of "pre-judging the very decision which the mandatory consideration is directed to guiding".[20]

[22] I reject those submissions. Firstly, the construction advanced by the Respondent requires one to interpret the provisions in a manner which includes words which are simply not there. If the legislature had wanted to express the provisions to apply in the manner suggested by the Respondent, they would have presumably done so, but did not.

[23] Secondly, there is no authority cited for the particular construction advanced by the Respondent. The UWU referred to the decision by Deputy President Hamilton for dealing with analogous provisions in s.319(3)(b) of the FW Act. Deputy President Hamilton rejected the proposition that the provision "whether any employees would be disadvantaged by the order" should be interpreted both positively and negatively to consider who would be disadvantaged if the order was made and if the order was not made. The Deputy President observed "this could have been the provision, but it is not. The ordinary meaning of the language does not extend that far".[21] I respectfully agree with that construction.

The weight to be given to the various considerations.

[24] The Respondent submitted that "although s 768BG(4) lists seven mandatory considerations, they are not matters to which the Commission is required to give equal weight. The Respondent submitted that "in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker to accord such weight to those considerations as the decision maker considers appropriate",[22] noting that error may nevertheless be revealed by a failure to "give adequate weight to a relevant factor of great importance".[23]

[25] The Unions did not submit a contrary view. I agree with the Respondent that this is the correct approach to dealing with the question on the relative weight to be accorded to each of the factors.

The Evidence (AG2022/1809 and AG2022/1961)

[26] Much of the evidence in this matter is not in contest, though there is a significant difference of views of the parties as to how that evidence should influence the decision to make or not make the orders sought.

The establishment of the TasTAFE (Skills and Training Business) Act 2021 and the background to the reform.

[27] The objects of the TasTAFE Act are to benefit the Tasmanian Community by providing skilled workers for the Tasmanian workforce who can contribute to the Tasmanian economy, by providing vocational education and training. The Respondent describes the statutory functions of TasTAFE as "reflect[ing] the legislative intention that TasTAFE will provide vocational education and training that is responsive to the needs of employers, the community and its students, so as to facilitate the workforce participation and further education of members of the Tasmanian community including those in rural and isolated communities and in communities in which other vocational education and training providers are not or cannot meet demand effectively. Importantly, the Tasmanian legislature has determined that TasTAFE will achieve that goal, at least in part, through collaboration with industry, employers and other educational providers in developing models or pathways for the provision of vocational education and training".[24]

[28] When the *TasTAFE* (*Skills and Training Business) Bill 2021* was introduced to the House of Assembly by the relevant Minister, the second reading speech included references to the need for TasTAFE to be more responsive to the needs of industry, students and the Tasmanian Community, and be better placed to attract high quality qualified trainers from industry to support training at times that work better for business and employees.

[29] The second reading speech further developed this focus on flexibility:

> "Feedback from industry and employers is that TasTAFE needs to deliver training in different ways across more hours in a week and across more weeks of the year, meet seasonal training requirements, provide training through holiday periods and take account of business operating requirements, provide more flexibility and choice for learners, including apprentices, particularly those in small business and be able to attract new trainers from industry in a competitive labour market.
>
> Under the transition, TasTAFE will have its own employment powers under the national fair work framework. It will no longer be an agency under the State Service Act 2000. This is given effect by amending schedule 1 to remove TasTAFE as an agency and the CEO as the head of agency. The bill does not specify the Fair Work Act 2009 because all employers in Tasmania who are not subject to specific legislative provisions in the Industrial Relations Commonwealth Powers Act 2009, such as the State Service, are subject to the Fair Work Act 2009. The national fair work framework regulates

> employment and workplace relations. It provides for terms and conditions of employment and sets out the rights and responsibilities of employees, employers and employer organisations in relation to that employment. It is a framework that applies to most employers and employees in Tasmania, including the private sector, the community sector, local government and most state-owned business entities.
>
> It is also the framework that applies to the Victorian public service and TAFEs in a number of Australian jurisdictions, including New South Wales, Victoria, the ACT and the Northern Territory.
>
> … New employees who join TasTAFE after the commencement date will be employed either under a new enterprise agreement or through a contract of employment underpinned by the equivalent modern award and having regard to market pay rates."[25]

[30] The Minister's comments in the second reading speech reflect elements or the recommendations of the Premier's Economic and Social Recovery Advisory Council (PESRAC) which was established to provide advice to the Government on strategies and initiatives to support the recovery from the COVID-19 pandemic. The Respondent's submissions set out the terms of reference for PESRAC and its program of consultation which included receiving submissions and conducting workshops on various topics in Education, Skills and Job Services.

[31] The Final PESRAC Report included the recommendation that:

> "Education and training, and TasTAFE in particular, are key to recovery. Under its current mode, TasTAFE is not sufficiently responsive to help Tasmanians gain the skills need by employers".[26]

[32] The following was also included in the Final PESRAC Report:

> "Tasmanian employers want TasTAFE to succeed but a key reason it's not doing so now is that it's operating with far too many constraints. Despite good intentions and some recent progress in student satisfaction and employability, we were told that TasTAFE is unable to adapt to the shifting demands of employers and individuals at the pace required to support recovery.
> ...
>
> Industry stakeholders report that industrial relations rigidities inhibit TasTAFE keeping pace with the rapidly evolving, diverse and competitive requirements of industry.
>
> We heard that the employment conditions for TasTAFE trainers align more to a school than an industry environment. Eleven-week paid holiday periods, restrictive maximum training loads and inflexible time-of-day training arrangements makes it difficult to deliver to industry work patterns or for students' out-of-hours needs".[27]
> ...

> "A training system must continuously adapt to the changing structure of the economy and workforce. TasTAFE is constrained and cannot nimbly shift its training resources (staff and facilities) to adapt as required.
>
> TasTAFE's cost base is dominated by employee expenses. With limited staffing flexibility, its overall cost base is largely fixed (so cannot flex in response to changes in demand or funding). In addition, the current employment framework (award and registration requirements) for TasTAFE trainers adds further inflexibility.
>
> In light of the critical role of skills in building recovery, and TasTAFE's central role, the Council believes that TasTAFE must be given the autonomy and workforce flexibility it needs to continuously align its training offering with evolving workforce needs".[28]

[33] In order to improve TasTAFE's flexibility, a range of options were considered. Ultimately, PESRAC recommended:

> "The State Government should re-establish TasTAFE as a government business under the control and accountability of its Board of Directors, with authority and power to employ its workforce under the Fair Work Act 2009".[29]

The AEU's Evidence

[34] The AEU led evidence from Simon Bailey, the President of TasTAFE Division of the AEU Tasmania Branch. Mr Bailey's evidence included the following:

- That he has been the President of the TasTafe Division of the AEU since 2018
- That he is in regular contact with members directly and through the Executive of the TasTAFE Division and the TasTAFE organiser of the AEU
- That he is an employee of TasTAFE, currently as an Education Manager and prior to that as an Advanced Skills Teacher.

[35] By way of background to the application being made, Mr Bailey stated that:

> "The current Teachers Agreement was negotiated between late 2021 and early 2022, the negotiations covered a wide range of issues including removal of compulsory leave, the ability to negotiate an increase in weekly hours, and increase in yearly teaching loads, however, TasTAFE chose not to negotiate these provisions into the Agreement.
>
> The above items (removal of compulsory leave etc.) have been put forward for negotiation by the AEU in previous Agreements. Despite refusing to negotiate these issues with the AEU in the past, TasTAFE ended up including an increase of work hours, teaching hours and have removed compulsory leave for non-transferring employees without any negotiation or consultation with employees.
>
> The final agreement included some changes to previous conditions including the introduction of ETL position, introductions of non-attendance time and removal of flexible leave.

> It is important to note that during these negotiations an offer was made by the AEU to negotiate an agreement for all employees under the Fair Work Act. This offer was refused by TasTAFE who chose to negotiate an Agreement only under the State Service Act.
>
> Following negotiations, the Agreement was signed on and sealed by the Tasmanian Industrial Commission on 27 May 2022 and submitted with a nominal expiry date of 30 June 2023. 89% of members voted in favour of the Agreement"[30]
> …
>
> "On or about November 2022 we contacted TasTAFE to request commencement of negotiations under the Fair Work Act for Teaching and non-teaching staff, on or about 30 November 2022. TasTAFE refused to negotiate an Agreement to be lodged under the Fair Work Act".[31]
> …
>
> "In the AEU's most recent log of claims, an increase of the weekly teaching hours, and a mechanism to work above the weekly limit were put forward but were eventually abandoned as part of the negotiations. The Agreement states that a teacher can work up to 760 hours of direct learning annually, before it is considered excess hours. The 760-hour figure is not a cap and teachers can exceed it, but it will attract a penalty payment or overtime rate once it is exceeded".[32]

[36] As to the views of transferring employees, Mr Bailey gave evidence he had spoken to transferring employees, including those on the Union executive and AEU members said they are supportive of the application as they believe the orders would be fair and create a better work environment. Concerns of the transferring employees are said to include: fairness, confusion in timetabling, equity among staff; and access to workplace rights and that there was no opportunity to negotiate conditions.[33]

[37] There are also concerns about the impact on "fair bargaining":

> "I also have concerns about the impact on fair bargaining that not making this order has. TasTAFE introduced significant changes to the conditions of new employees without bargaining in good faith and without so much as consultation on the proposed changes for new employees. Having two sets of working conditions will make bargaining a more complicated process".[34]

[38] Mr Bailey's view is that no employees will be disadvantaged by the making of an order.[35]

[39] As to the nominal expiry date of the Agreements, Mr Bailey's view was:

> "The nominal expiry date of the Teachers Agreement is 30 June 2023.
>
> Negotiations for this Agreement are due to commence no later than six months prior to the expiry of the agreement.

My view is that if TasTAFE wished to change conditions as they seek to do for new employees, this should have been negotiated and agreed to in good faith through the bargaining process. We requested for this to happen on more than one occasion and were flatly denied this opportunity.

I note that correspondence has been sent from the AEU to TasTAFE to indicate that we wish to participate in good faith bargaining to reach an Agreement under Fair Work for all employees."[36]

[40] In terms of productivity, Mr Baileys' evidence is that making the order would not have a negative impact on productivity because…

"The new conditions allow for an increase of work hours, and an increase of teaching hours. However, the increase is not enough to allow for any increase in the courses delivered. This is because TasTAFE teachers will work up to a maximum of 23 hours teaching, the increase in teaching hours of 25 does not allow for any increase in courses, or reduction of staff required to run courses as the normal teaching day is 7 hours a day. The fact that new employees will be co-teaching with existing employees mean that the new employees will need to fall into step with the current time tabling of classes. Therefore, productivity is not actually improved by the change in conditions and as such consolidation orders will not have any negative impact on productivity.

The administrative burden of having staff employed under two systems means that the new condition has a negative impact on productivity and Consolidation Orders would have a positive impact on productivity.

The administrative work that increases due to having employees on two systems include arranging timetables, the time required for administration related to teaching, more work for payroll with two different sets of pay and Awards.

The introduction of different conditions for new employees is having a negative impact on the morale of employees, and is likely to have a negative impact on productivity."[37]

[41] If consolidation orders were made, Mr Bailey claims that TasTAFE would incur <u>some</u> economic disadvantage because the annual pay of employees would be higher. His evidence was:

"The changes that have been made were done so to help increase the recruitment of new employees, however, it has not helped with this issue at all. Applicants are now aware that they are employed under different conditions which they see as inferior, this has been clear in my role as a manager and part of the recruitment process. This lack of recruitment means there may be some courses that TasTAFE cannot offer due to not being able to staff the course. This will lead to economic disadvantage. Making a consolidation order will likely help recruitment and have economic advantages for TasTAFE.

The workplace instruments which non-transferring employees will be employed under only recognise trainers and assessors, whereas previously TasTAFE has been identified

as having quality and qualified teaching staff. This has attracted students to TasTAFE to receive the best education. With the changes made and the application of the modern award, TasTAFE will lose this professionalism and likely lose enrolments with it. Therefore, my view is that if a consolidation order is not made, TasTAFE will incur economic disadvantage by way of losing enrolments."[38]

[42] Mr Bailey's view is that there is no business synergy between the copied state instruments and any workplace instrument that already covers TasTAFE.

"The workplace instruments covering TasTAFE do not recognise the professionalism which is central to the TasTAFE Teaching Staff Award and Industrial Agreement. The workplace instruments do not mention TAFE teachers specifically, whereas the copied state instruments have been specifically engineered by and for the teaching staff of TasTAFE.

This is compared the high level of business synergy between TasTAFE and the copied state instruments which have been negotiated and designed to suit TasTAFE and the specific circumstances of TasTAFE employees and TasTAFE as an employer."[39]

The UWU evidence

[43] The UWU lead evidence through 3 witnesses.

[44] Ms Amy Brumby, an official of the UWU gave evidence which included the following:

"I am a Lead Organiser in the UWU's Public Sector portfolio and in that role, I have responsibility for UWU's negotiation of agreements for Education Facility Attendants (EFAs).

I also regularly meet with EFA members and non-members employed at TasTAFE in the course of my work.

EFAs are cleaners, groundspersons, kitchen attendants, storepersons, utility officers, caretakers, matrons and housekeepers in schools, colleges and TasTAFE facilities.

TasTAFE currently employs about 70 EFAs
…
Each of the cleaning EFAs are assigned an area based on a map of the facility which they are responsible for cleaning. The amount of area they are assigned is calculated in accordance with the FECA requirements in the Schedule 2 of the Job Security Agreement.

Full-time EFAs work 40 hours per week and accrue 2 hours towards a rostered day off.

Part-time EFAs can work less than 40 hours per week and are paid an additional loading of 10% of the base salary, and accrue rostered days off on a pro rata basis."[40]

[45] Ms Brumby gave evidence that there was consultation about the changes being contemplated to TasTAFE lead by Kim Evans from the Department of State Growth from around July 2021 to September 2021. Ms Brumby states that Mr Evans was asked by the Union to identify problems with the industrial instruments in order that there could be discussions about resolving them. However, Ms Brumby claims Mr Evans was unable to answer that question. At the meeting, other concerns were raised by the Union including concerns about transferring employees losing benefits such as the review mechanism in the SS Act.[41]

[46] Subsequently, the UWU resolved to oppose the legislation. Ms Brumbys evidence included the following:

> "During this time, from March to November 2021, nobody from the Government or TasTAFE ever raised concerns with me about the management of EFAs at TasTAFE or any issues about our industrial instruments. No case was ever put to me or UWU that change was required in the management of the EFA workforce".[42]

[47] In the lead up to the transition on 1 July 2022, Ms Brumby met with Scott Adams the C.O.O. of TasTAFE. Her evidence about her interaction with Mr Adams was as follows:

> "Around February or March 2022 I was contacted by Mr Scott Adams, the Chief Operating Officer of TasTAFE, who invited UWU to consultation discussions on the transition arrangements to be implemented at TasTAFE.
>
> The first meeting I attended with Scott was on 8 March 2022. Scott stated that TasTAFE had commissioned a business called Mercer to perform market-based assessments of the salaries to be payable to new employees after 1 July 2022, including EFAs. It was stated that this work would be shared with us. We also discussed whether TasTAFE wanted to bargain for a new enterprise agreement and whether this would be a single agreement, or separate agreements for parts of the workforce. Scott stated that TasTAFE had a slight inclination towards a single agreement but that this was still up for discussion. We also discussed the need for an agreement on a wage increase in December, because new agreements would not be in place in time for the transition.
>
> On 1 April 2022 I attended a second meeting with Scott and the other unions.
>
> At this meeting Scott stated that TasTAFE would not be in a position to have a Fair Work enterprise agreement in place until the end of 2023.
>
> I asked Scott privately at the end of the meeting whether TasTAFE planned to contract out any of the EFA workforce. He stated that there were no plans to contract out any EFA work and that there was no major restructure of cleaning planned. He stated that TasTAFE was committed to upholding the Job Security Agreement.
>
> I then asked him what award new TasTAFE EFAs would be covered by. Scott responded they would be covered by the Miscellaneous Award 2020 as "that's the only award we could find that vaguely covers what they do." He stated that Mercer had been instructed to undertake their work on the basis that this was the award which applied.

> Copied of the notes I took at this meeting are attached and marked "AB-2".
>
> On 3 June 2022 Scott sent me a copy of the work done by Mercer for EFAs and the salaries proposed to be paid to new EFAs after 1 July 2022.
>
> After this was provided, UWU decided to make an application for consolidation orders to provide for the existing instruments to apply to new TasTAFE EFAs also."[43]

[48] Ms Brumby was not aware at the time she made her first statement of any new EFA's being employed from which views could be sought. However, in a supplementary statement she set out her evidence as to a conversation with Ms Michele Bradshaw, a casual EFA engaged since 1 July 2022:

> "In the call, I said to Ms Bradshaw that UWU has applied to the Fair Work Commission for an order that, if granted, would mean that her employment as an EFA at TasTAFE would no longer be covered by the Miscellaneous Award 2020 (the Award), but instead would be covered by the industrial instruments which apply to other EFAs at TasTAFE (the copied State instruments). I said that if the order was granted she may lose some entitlements given by the Award and may gain others given by the copied State instruments.
>
> Ms Bradshaw said that she only recently applied to become a casual EFA and had done some casual shifts at the TasTAFE Devonport Campus. She said that she was paid at a rate of $30.23 per hour for that work. She said that the rate of pay was much lower than what she received in her other work as a Teacher Assistant with the Department of Education at the North West Support School and that she wouldn't prioritise doing work for TasTAFE over work as a Teacher Assistant because of this.
>
> James explained to Ms Bradshaw that if she was covered by the copied State instruments, her rate of pay as a casual EFA, level 1.1 would be $32.22 per hour, which is $1.99 per hour more than she said she currently received for that work.
>
> I then asked Ms Bradshaw if she would be more willing to consider working as a casual EFA at TasTAFE if she were able to receive the higher rate of $32.22 per hour. Ms Bradshaw said in response that she would consider it"[44]

[49] Ms Brumby's views as to why she supported the consolidation order being made included:

> "TasTAFE have not once been able to clearly articulate to us what it is that is not fit for purpose with respect to the EFA instruments. I am baffled by why TasTAFE needs one set of EFAs under the Miscellaneous Award 2020 and another on copied State instruments.
>
> I am concerned that it will create inequities in the workforce – for instance, differing procedures for consultation, differing procedures for dispute resolution, differing procedures for the ordering to part-time EFAs of additional hours, different break entitlements, and so on. There is also the more obvious inequities of existing part-time

EFAs being paid 10% more than new EFAs, and existing casual EFAs being paid about 8.3% more than new casual EFAs, for doing the same work.

The way this has been handled by TasTAFE has created fear in the current workforce. From my conversations with our members, a consistent concern raised with me is that if they come to the bargaining table with a different base of terms and conditions to new employees, that they can only go backwards relative to where they are currently."[45]

[50] Ms Connie Ling, an EFA for TasTAFE for some 17 years, gives the following evidence:

"I think it is fair and just for all EFAs to be on the same conditions.

If the Commission do not allow new EFAs to be employed under the same conditions as current EFAs, there is going to end up being two teams of EFAs, one under our agreements and the other under the new Miscellaneous Award.

When the new employees find out that we're on more money and better conditions than them, it's going to act as a disincentive to work. I know I wouldn't want to do the same hours and same workload as someone else who is getting paid more than me. I definitely think that they are going to say in response to some work "Well I'm not getting paid as much so I'm not doing that." It's just not fair across the board.

TasTAFE is already having a lot of issues keeping staff, I think that when new employees find out the difference between us and them, they'll want to leave.

I'm really concerned about my job security as well. I don't think TasTAFE will want to keep us around if we are getting paid more.

I don't even think TasTAFE will want to negotiate a new agreement with us, there wouldn't be any reason to.

But if we are all on the same conditions now, at least we could all negotiate from the same base.

So I think it would be fair for the Commission to allow the new EFAs to be employed on the same conditions as us, and I support that occurring."[46]

[51] Mr Darryl McKendrick is a level 4 EFA of some 30 years experience and in his role manages lower level EFAs. Mr McKendrick is concerned about the different conditions of employment for transferring and non-transferring employees. His evidence was to the following effect:

- He has current difficulty recruiting staff.
- A relief EFA recently declined a shift upon learning of the pay rate.
- Lower rates of pay will exacerbate the difficulty in recruiting.
- There will be confusion about the differing terms and conditions, particularly in respect to the 10 minute paid breaks.

[52] Mr McKendrick is also concerned about the effect on future bargaining if the order is not made:

> "I am also very concerned about how we are going to be able to negotiate a new agreement when some of the EFAs are on lower pay and conditions to the existing EFAs.
>
> I think if we make a new agreement, it would only lead to us existing EFAs losing conditions, because TasTAFE would point to the new EFAs and say that that is the standard. But if we don't make a new agreement, we won't be able to get any new pay rises."[47]

The Respondent's evidence

[53] Mr Mark Bowles, the Department Secretary of Business and Jobs adopted the statement of Ms Conway who was unavailable on the day of the hearing.

[54] In summary, the evidence of Mr Bowles included:

- The need for an improved training service in Tasmania.
- That TasTAFE is the only provider of training in a number of key areas.
- The TasTAFE has a critical role in skilling Tasmanians.
- The experience of some Tasmanians is that TasTAFE can't change its offerings quickly enough and there is a need for more flexibility.
- It is critical to alter the TasTAFE restrictions on teaching hours and leave entitlements.
- It is difficult to attract appropriately qualified staff.

[55] As to funding, Mr Bowles evidence is that:

> "The Tasmanian Government currently provides funding of around $80 million per annum to TasTAFE through a Deed of Purchasing Agreement between TasTAFE and the Department of State Growth. Funding through the Deed has increased from $76.7 million in 2015 to $80.4 million in 2021. Despite Tasmanian Government funding to TasTAFE increasing over recent years, there has been a gradual decline in TasTAFE's training activity."[48]

[56] Mr Bowles evidence is also that the numbers of students enrolling in TAFE is declining and there has been a decline in the hours of training delivered. Mr Bowles evidence was that increases in funding to TasTafe via the Deed of Purchasing Arrangement was increased from $76.7 million to $80.4 million over the period 2015-2021.

[57] It appears that this increase would not be enough to maintain funding to TasTafe in real terms as it equates to a 4.82% increase over that 6 year period. Mr Bowles was asked about this in cross examination.[49] In response Mr Bowles referred to other streams of funding. When asked to elaborate on that matter during re- examination Mr Bowles referred to an additional $98 million in funding committed as part of the transition package[50] and also that capital funding was provided additional to the deed. However, it would seem that the deed of purchasing arrangement is the funding source that supports regular training activity and accounts for most of the running costs for TasTAFE.[51] In my view it is not surprising given the evidence that the relatively low levels of increases of funding for the Deed of Purchasing Arrangement during

the 2015-2021 period would be associated with declining students and hours of training during that time.

[58] The statement adopted by Mr Bowles also refers to the extensive consultation that is said to have been undertaken on the implementation of the PESRAC recommendations:

> "From 1 July 2022, TasTAFE will be the employer and determine employment arrangements offered to new employees. The Government's policy expectation is that these arrangements will have regard to market pay rates:
>
> > "New employees who join TasTAFE after the commencement date will be employed either under a new enterprise agreement or through a contract of employment underpinned by the equivalent modern award and having regard to market pay rates"[52]
>
> The Tasmanian Government has committed to deliver 100 extra TasTAFE teachers over four years, funded through the 2021-22 State Budget. The additional teachers will be across a range of trades and professions with a particular focus on the following industry areas:
>
> • Construction and allied trades
> • Electrotechnology and plumbing
> • Nursing
> • Aged care
> • Disability
> • Alcohol and other drugs
> • Engineering and metal trades
> • Cyber security and blue tech"[53]

[59] Mr Grant Dreher the CEO of TasTAFE gave evidence which included:

> "A fundamental plank of TasTAFE's strategy is to offer learning to students in a manner that works for students, at a time and place that works for students. This will require a shift in focus to more training at a time and place that suits the student, a strong digital presence, workplace delivery and assessment, full year coverage and out of hours training.
>
> The current employment conditions for transferring staff are more aligned to a year 7 to 12 school environment and do not meet the needs of TasTAFE as a Registered Training Organisation or its learners."[54]

[60] Mr Dreher also gave evidence that there is a requirement to offer competitive salaries and the new employment arrangements are competitive and compare favourably with the national market. Further, that to apply the transferring instruments to non-transferring employees will severely restrict TasTAFE's ability to change its delivery models and restrict productivity.

[61] Like the evidence of Ms Conway as adopted by Mark Bowles, Mr Dreher has concerns about the instruments "limiting teaching hours to 760 per annum."

> "The significant impact if the order is made will be significantly reduced training delivery and progress to serving industries needs as they outlined to PESRAC. Direct training delivery by teachers will be reduced by approximately 300 hours per year If applied across TasTAFE teaching workforce this would equate to 126,000 teaching hours per annum.
>
> This will have a significant impact on the number of courses TasTAFE is able to offer going forward and hence the impact on delivering the skilled workforce."[55]

[62] Rachel Holland gave evidence. Ms Holland is the Manager of Education and Training for the VET in Schools, Tourism, Hospitality Land and Food Division of TasTAFE.

[63] Ms Holland's evidence focuses on the productivity aspects of the application. Her evidence includes:

- The benefits of non-transferring employees teaching an extra week compared to transferring employees.
- Concerns the current teaching agreements requirements for compulsory leave leads to 6-8 weeks of leave being taken at a time which impacts on the regularity of training and assessment for apprentices.
- The removal of compulsory leave periods will allow activities to be scheduled during January or any month and would allow scheduling of block training in January.
- Compulsory and extended leave required under the transferring instruments disrupts workplace visit cycles, especially to rural and remote locations.
- Ms Holland has dealt with "several" complaints from farm owners, local councils and landscape business owners about the long break in December/January.
- Removal of compulsory leave periods allows staff to take leave when it suits them.
- The relevant modern award increases the span of hours for teachers allowing flexibility in scheduling. Examples included in hospitality, farm workers, automotive and baking where there is a desire for more night classes which are restricted under the Teachers Agreement.
- Being able to work greater than eight hours per day over a longer period than the agreement allows greater flexibility for individuals.
- The current Agreement requires the "swapping" of teachers in programs that require 6 hour days over a four day week,
- An example was given where training for a skill set related to tourism experience had to be delivered over 4 weeks rather than the 3 it could now be delivered "under the new Award conditions".
- Other examples of courses that could be delivered, under the award conditions, over 4 days per week instead of 3 are in certificate III courses in automotive and constructive pathways.
- Examples are given of difficulties of providing training in remote locations such as Cape Barren, King and Flinders Island and St Helens, where it is impractical to send one teacher for part of the week and another for another part.

[64] Ms Holland was asked if she was aware that teachers could teach over the 760 hours teaching load under the terms of the copied state instruments. She agreed she was aware but that also remarked "*Its certainly encouraged that we are not to get our teachers to teach over*

760 hours"[56] Ms Holland also accepted that teachers could teach before 7 am if they agreed to it.[57]

[65] Mr Scott Adams, the Chief Operating Officer of TasTAFE provided evidence which includes in summary:

> "TasTAFE will be negotiating with staff on new enterprise agreements under the Federal Fair work system, with the relevant modern award as the basis for the Better Off Overall Test. It is therefore appropriate to move away from the state based copied state awards as soon as possible to facilitate the move to the modern awards."*[58]*
>
> 12-18 months after the commencement of TasTAFE (on 1 July 2022) was a realistic timeframe for negotiation a new enterprise agreement but this would not prevent one being negotiated sooner.
> That a consolidation order would lead to reductions in salary for non-transferring employees who are employed on salaries higher than the copied state instruments (between 10.6% and 13.5% more)[59] and approximately 8.4% from non-teaching staff (excluding EFAs)[60]
>
> That EFA base salaries are largely consistent between the copied state instruments and TasTAFE's new employment arrangements, with minor differences in penalty rates between transferring and non-transferring employees."[61]
>
> That during negotiations over the recently signed TasTAFE teachers industrial agreement, TasTAFE tabled an offer to the AEU on 18th October that included the following key elements:
>
> a. An increase in weekly hours
> b. An increase in both weekly and annual teaching hours
> c. A reduction in recreation leave
> d. Removal of the weekly cap on teaching hours
> e. Reduction in the compulsory leave period
> f. A 7.65% pay increase over 2 years"[62]
>
> that offer was rejected by the AEU.[63]

[66] Mr Adams evidence included the following:

> "TasTAFE tabled another offer on 23th December 2021 that sought a lower increase in weekly and annual teaching hours in exchange for a 7% pay increase. This offer was also rejected. The assertion by Simon Bailey that TasTAFE chose not to negotiate these provisions into the agreement is rejected".[64]
>
> "TasTAFE has incurred significant cost and resource effort to establish the employment framework for non-transferring employees. This includes drafting of contracts and changes to the payroll system. The revised salaries, significantly higher than existing salaries for teachers in particular, have been advertised extensively in the market. To revert back to the copied state instrument pay scale will severely impact on TasTAFE's ability to recruit."[65]

> "It is TasTAFE's view that it is not the role of the commission to determine the public interest, as this has been done by the elected parliament."[66]

[67] As the employer, TasTAFE believes a departure from the current state based employment instruments will address its current recruitment issues. The current state based instruments for teachers offers a lower salary than is offered by other TAFE's and RTO's. Potential employees looking at offers see a lower salary and do not undertake a detailed comparison of other conditions. This results in potential employees not considering TasTAFE."[67]

> "During 21/22 TasTAFE advertised 120 teaching positions. Only 50 of those positions were filled. During the same period TasTAFE advertised 114 nonteaching positions, 76 of those positions were filled. This data clearly shows TasTAFE has faced challenges recruiting roles under the copied state instruments."[68]

[68] However, Mr Adams conceded that there could have been other reasons that might have affected those recruitment outcomes and that he didn't have any definitive evidence that states the Copied State Instruments were responsible for that.[69]

[69] Mr Adams evidence is that TasTAFE compete in a National Market for teachers and referred to the salary benchmarking work undertaken by Mercer.

> "TasTAFE engaged professional remuneration consultants, Mercer, to advise it on the appropriate salaries to attract and retain staff. A summary of the outcomes of the Mercer work are included in Appendices A1, A2 and A3.
>
> Mercer benchmarked teacher salaries across the Australian market.
>
> The findings of the Mercer report clearly demonstrate that TasTAFE needed to offer a higher salary for teachers in order to recruit them. The work also clearly identified that the TasTAFE hours of work and leave entitlements were more generous than those offered elsewhere in the market."[70]

[70] Mr Adams also reiterated that TasTAFE wishes to negotiate new agreements that cover both transferring and non-transferring staff. However, the evidence of Mr Adams as to when these negotiations would commence was somewhat vague. Ultimately his view was that he thought negotiations would commence in 2023 but the authority for determining when it would occur was the TasTAFE Board.[71]

[71] Mr Adams provided some evidence as to the numbers of non-transferring employees recruited which was updated at the time of the hearing:

TasTAFE Figures – 11 November 2022

1. Number of TasTAFE staff as at September 2022, excluding casuals and sessionalS
   a. Headcount of staff 898
   b. Full time equivalent 792

2. Distribution of TasTAFE staff
   a. Teaching staff as at September 2022
      i. headcount 456
      ii. FTE 403
   b. Non-teaching staff as at September 2022
      i. headcount 383
      ii. FTE 333
   c. Educational facilities attendants as at September 2022
      i. headcount 59
      ii. FTE 56
3. Natural attrition rate of TasTAFE staff over 3 years
   2021/2022 Teaching staff 5%, non-teaching staff 10%
   2020/2021 Teaching staff 6%, non-teaching staff 8%
   2019/2020 Teaching staff 3%, non-teaching staff 4%

4. Non-transferring employees recruited since 1 July 2022, and permanent/fixed term/casual ratios as at 7 November 2022
   a. Teachers 10 total (4 permanent, 4 fixed-term (TuS) and 2 casual)
   b. Non-teaching staff 14 total (7 permanent, 5 fixed-term and 2 casual)
   c. EFAs 2 total (casual)

5. Number of positions currently being advertised, with breadown between teaches/non-teaching staff and EFAs 13 totoal: 9 teaching, 4 non-teaching, no EFAs.

6. Number of teachers employed on Level 8. 204 as at 9 November 2022"[72]

[72] Mr Adams also restates a great deal of Ms Holland's evidence which I have already dealt with.

[73] Mr Timothy Witt gave evidence. He is the Industrial Relations Manager of the TasTAFE, a role he has performed since November 2020. Mr Witt has extensive experience working in the Tasmanian public sector and has expertise in the field of employee conditions for the Tasmanian state service, though he is less familiar with the Fair Work Act 2009.

[74] Of the 12 non-transferring employees employed at the time of Mr Witt's statement, he claimed their views were positive "*to the extent that they have felt able to agree to the contract of employment*."[73] Mr Witt denied that this was simply an assumption that he made despite agreeing he had not spoken to any EFA's to ascertain if they were positive about the offer of employment.[74]On re-examination on this point he claimed to have drawn an inference their views were positive from the fact that they could recruit employees on those conditions.[75]

[75] Mr Witt refers to differences in the leading hand/in charge allowance and the 20% penalty for work outside the 7am to 7pm spread of hours as evidence that the copied instrument is not superior in all respects when compared to the Miscellaneous Award 2020.

[76] Mr Witt states that there were both "resisting forces" and "driving forces" on productivity he identified when preparing for TasTAFE teacher agreement negotiations.

> "In my opinion TasTAFE through its agreement negotiation with the Australian Education Union attempted to modify the forces that resist teacher productivity while nurturing the forces that drive productivity."[76]

> "My evidence on paragraph [20] of Simon Bailey's statement is that TasTAFE intends to establish unified conditions that will be voted on by all TasTAFE teachers. Until that can occur it has been TasTAFE's decision to establish conditions that support TasTAFE teacher productivity. The state of having two sets of conditions for teachers is not permanent and will depend on enterprise agreement negotiations."[77]

[77] Mr Witt also states that:

- Non transferring teachers are not worse off but on a higher annual salary reflecting different conditions.
- TasTAFE is largely content with the employment conditions applying to EFA's in the copied state instrument, except for penalty payments and school environment related clauses.[78]

[78] Mr Witts evidence also included the following:

> "I understand that the AEU submits an hourly rate comparison demonstrates non-transferring teachers are worse off compared to transferring teachers. To the contrary, using a divisor of 38 for a level 8 non-transferring teacher produces an hourly rate of $60.15 compared to the hourly rate for a non-transferring teacher level 9, with a divisor of 35 produces an hourly rate of $56.89".[79]

> "The Simon Bailey statement "exhibit A" also claims non-transferring teachers are in the range of 1.9% to 7% worse off compared to transferring teachers. At [32] in my statement, based on productive time, the hourly rate for non-transferring teachers is in the range of 1.08% and 5.73% better compared to a transferring teachers' salary. The exception is transferring teacher level 3 at negative 0.12% ($0.05)." [80]

[79] However, taking into account the award provides 2 x 10 minute paid breaks, Mr Witt calculates the productive work time as 36 hours and 20 minutes per week. When that is factored in, Mr Witt calculates that the hourly rate for non-transferring teachers is higher for all levels except for level 3.[81]

[80] Mr Witt disputes Mr Bailey's evidence that teachers are 26% worse off in terms of workload because of the increase in the teaching hours cap from 19 to 25 hours for non-transferring employees. Mr Witt points out that:

> "Under the Agreement, transferring teachers can already work up to 17 weeks at 21 hours or 3 weeks at 23 hours in a 35 hour week, so the workload impact is overstated by Mr Bailey.[82]
>
> The annual leave and non-attendance time for non-transferring teachers (ten weeks) is better or the same as other comparable TAFE's in Australia with the exception of New South Wales at eleven weeks. Ten weeks non-attendance time/annual leave for non-transferring employees is reasonable in the context of comparator TAFE's." [83]

The Educational Award provides greater scope for teachers to be assigned duties earlier in the day, later in the day and on weekends.[84]

For EFA's, the application made by UWU at 23 (c), (d) and (e.) are agreed facts. Namely when comparing the Modern Award and the copied instrument the penalty rates on weekends and for work outside the normal span of hours is reduced, no 10% loading is payable to part-time employees and there is a reduction in the casual loading payable to casual employees from 33.3% to 25%."[85]

Non-transferring EFAs are paid slightly higher or the same as the copied state instrument (see Appendix 2) and the hourly rates for casual non-transferring employees is slightly less.

That the Miscellaneous Award consultation provision and Dispute Resolution Procedure is in substance the same as that in the EFA award.[86] Mr Witt was extensively cross examined on this point. It was put to him that in fact there were key differences, that the copied state instrument allows for a broader scope of disputes to be resolved; that it allows for unilateral as opposed to consent arbitration under the Miscellaneous Award and that there is a status quo provision in the copied state instrument which is not in the Miscellaneous Award. Mr Witt conceded the point to some extent on consent arbitration, but not the others. It is not apparent why he did not as the differences pointed out by the union are obvious.[87]

The EFA award provides for 10 minute paid breaks after each 3 hours work and the Miscellaneous Award does not. However, management are not impaired from allowing breaks for non-transferring employees, though any such break would be unpaid.

That casual hourly rates for EFAs are $0.18 to $0.40 per hour more than the award rate. Mr Witt did confirm on cross examination that the rates of pay that TasTAFE are paying to transferring EFA's who are casual or part time is higher than the rates paid to those non transferring employees, with the exception of the supervisor rate.[88]

Mr Witt sets out a useful summary of the offers and counter offers made during the bargaining for the currents TasTAFE Teaching Staff Industrial Agreement 2021[89]

His perspective is that the parties were unable to agree to a package that would see hours of work and direct teaching hours increase at an agreeable adjustment percentage. Nor would the union agree to reduce recreation leave below 11 weeks. However, Mr Witt agreed that during negotiations the AEU put offers that would increase both direct teaching and weekly hours of work.[90]

That the TasTAFE Teaching Industrial instrument is more complicated than the Modern Educational Award in the way it regulates the various modes of teaching and learning.[91]

For general staff, the copied state instrument will likely have a negative impact on productivity because it provides annual salary increments as well as cost of living increases[92]

> It is too early to say if the changes made to the conditions for non-transferring employees is successful in terms of recruitment[93]
>
> TasTAFE general staff may be required to work outside traditional Monday to Friday ordinary spread of hours.[94]
>
> From his perspective, TasTAFE would not have acted in the public interest if TasTAFE immediately replicated in the new "TasTAFE" the old TasTAFE renumeration and conditions.

Consideration

Introduction

[81] As stated earlier, much of the evidence and submissions are common to both applications. However, there is evidence that specifically relates to each particular application.

[82] The consideration of each application must logically take into account those commonalities and differences in the evidence as well as differences in the consideration of the relevant factors as they pertain to each application. It is therefore necessary to consider and determine each application in its own right. That consideration follows.

Consideration of AG2022/1809 – Australian Education Union

Section 768BG(4)(a)(i) of the Fair Work Act 2009, the views of the employees who would be affected by the order

[83] There is no contest that non transferring employees would be affected by the order and to that extent the views of these employees is clearly relevant. There is a contest as to whether within the meaning of s.768BG(4)(a)(i) of the FW Act that the views of both transferring and non-transferring employees should be considered. The Respondent submits that transferring employees are not "relevantly affected" by the order if made. The AEU submit that it would be remiss to exclude transferring employees from the consideration as it would ignore the impact on morale and workplace cohesiveness that working with two sets of conditions of employment has. There is also concern from the AEU about fairness and the impact on bargaining in respect of transferring employees.[95] I reject the Respondents approach to the construction of this provision for the following reasons:

[84] Firstly, the task of statutory construction begins with the ordinary meaning of the words. Had the legislature intended to restrict this consideration to the views of non-transferring employees they could have done so. Indeed within s.768BG of the FW Act there are references to both employees (see s.4(a)(i) and s.4(b) and non-transferring employee (s.768BG (3)(b)(i) and (5) of the FW Act). They could plainly have restricted the consideration in s.(4)(a)(i) to non-transferring employees, but did not.

[85] Secondly, the approach that the Respondent urges me to take requires a narrow construction of the term "affected employees". In particular, their preferred construction narrows its application to employees who have a "legal right or interest" affected by the making of an order. There is no basis to narrowly construe the provision in that way. The Macquarie Dictionary definition of "affected" is:

> "1. Acted upon; influenced.
> 2. Influenced injuriously; impaired; attacked as by climate, disease or pollution, etc.
> 3. Moved; touched: *she was deeply affected*."[96]

[86] The words "affected employees" means ordinarily, those affected in some way by the making of an order. That effect can be as broad as simply influenced or impaired in some way. The Respondent's references to the meaning of a "person aggrieved" is of no assistance here as those words are not in the text and to interpret the provision in this way strays from its ordinary meaning.

[87] Accordingly, the consideration of the views of employees for the purposes of s.768BG(4)(a)(i) of the FW Act should not be limited to only non-transferring employees. Nor is the consideration of "affected employees" to be narrowed in the manner sought by the Respondent. The affect on employees in the two categories (transferring and non-transferring) is different and that needs to be taken into account. But an approach that disregards the views of transferring employees if the evidence shows that they are affected in some way is in my view inconsistent with the proper construction of s.768BG(4)(a)(i) of the FW Act.

[88] I will deal first with the views of non-transferring employees.

The views of non-transferring employees

[89] There is little evidence to draw on as to the views of non-transferring employees affected by this particular application. The AEU's final submission was that the views of non-transferring employees have not been made clear to the AEU.

[90] The only evidence is that of Mr Bailey who gave evidence that he has not been able to speak to non-transferring employees. However, he gave the following evidence:

> "I am not aware of any new employees yet being employed under the proposed conditions"[97]

> "TasTAFE staff members and members of the AEU have made it clear to me that they are less happy working under two sets of conditions and will be less happy if their current conditions are further eroded. Our data provided by the Department of Education shows that 5 teachers have resigned since 1 July 2022. In my view this is likely to continue to increase if consolidation order are not made, which would mean TasTAFE can deliver less courses and will be economically worse off."[98]

[91] Mr Bailey was cross examined on this evidence and clarified that this was "*feedback from members general conversations*".[99] He also gave evidence that some non-transferring employees are members of the AEU.[100]

[92] The evidence of Mr Bailey as to the views of non-transferring employees is rather general and indirect and consistent with the AEU's final submission that the views of non-transferring employees have not been made clear to the AEU. I agree with the Respondent that the AEU's invitation to infer the views of non-transferring employees based on evidence of a reduction in the number of teachers employed should be rejected. There is no proper evidentiary basis on which to draw such an inference. Reasons teachers are leaving could be for a range of reasons. Suggesting the decline in staffing levels has been caused by the new conditions is simply, without an evidentiary basis, speculative.

[93] For the same reasons, the inference drawn by Mr Witt, that non-transferring employees have been positive to the extent they have agreed to be employed on those conditions is of no assistance. New employees may no doubt have agreed to the terms of employment because that is what they have been offered. They may have had a preference for superior conditions, or they may have been positive about what was offered. Mr Witt's evidence on the point is also speculative and does not assist.

[94] Therefore, whilst there were there were a small number of non-transferring employees relevant to this application engaged as at 11 November 2022 there is insufficient evidence to establish what their views are as to the application.[101]

[95] It is convenient to note at this point that the AEU raised an issue about a particular term in the template letter of employment provided to non-transferring employees suggesting that it had the effect of rendering unenforceable anything inconsistent with the modern award.[102] This is because it includes the words "*the terms of the industrial instrument apply to the employees' employment as a matter of law but are not incorporated into the employees' terms of employment, however, to the extent of any inconsistency, the terms of the industrial instrument will prevail*"[103] The effect that the AEU contends that this provision has is wrong. As the Respondent submitted, no relevant "inconsistency" arises where the contract provides for above award conditions, for the simple reason that the National Employment Standards and modern awards provide minimum standards and conditions which the parties can exceed by consent. Once that is appreciated, no relevant "inconsistency" or repugnancy arises where a contractual provision confers some greater entitlement.[104]

The views of transferring employees

[96] The key evidence as to the views of transferring employees is that of Mr Bailey that was summarised earlier in the decision at paragraphs 36 and 37.

[97] Mr Bailey's evidence is that "at last count" the AEU has 268 members in TasTAFE. That is a significant number of the 456 teachers and 383 non teachers at TasTAFE.[105] The views of the TasTAFE executive as evidenced by Mr Bailey including that the consolidation orders are fair and concerns about the failure to bargain over the changes can be presumed to be representative of its substantial membership who are employees of TasTAFE.

[98] The concerns of transferring employees as to the effect on them of there being now two sets of conditions of employment, including the effect that will have on future bargaining, and the effect that making the order sought will have on those concerns, evidence the ways in which transferring employees will be affected.

[99] Mr Bailey as President of the TasTAFE division of the AEU Tasmania Branch has directly spoken to employees about their concerns as to new staff being employed under different conditions. While Mr Bailey is not in a position to say, as he does, that the view of the AEU executive is a good representation of the views of all transferring employees, in my view he is certainly in a position to provide an indication of the views of the significant number of employees he represents and that is one of support for the consolidation orders.

[100] Taking into account all of the evidence on this factor, I am satisfied that the absence of any cogent evidence as to the views of non-transferring employees renders that a neutral consideration. However, the views of transferring employees as reflected in the evidence of Mr Bailey is clearly supportive of the order being made. This weighs in favour of making the order sought.

Section 768BG (4)(a)(ii) of the Fair Work Act 2009, the views of the new employer

[101] It is apparent that the new employer vigorously opposes the making of the order sought.

[102] The AEU make a submission to the effect that I should consider the views of both the old and the new employer. That submission is rejected. The old employer, in the circumstances of this matter, no longer exists. It is not apparent how I would satisfy myself of their views in those circumstances. In any event, the FW Act requires me to contemplate the views of the new employer, not the previous employer.

[103] In their final submissions, TasTAFE assert that they seek to transition to the modern award system for non-transferring employees in order to realise the following benefits:

- Competitiveness in a national market. In order to attract teachers, more competitive salaries need to be offered "within a range within the market place".
- Realise productivity gains from employees. Mr Dreher gave evidence that the copied state instruments were highly restrictive of productivity particularly with regards to teachers leave and hours of duty.
- Specifically, Mr Witt identifies the following conditions in the transferring instruments that restrict productivity:
- "(a) direct teaching hours capped at 760 hours;
  (b) ordinary hours of work max 35 per week, more than 8 hours per day as part of roster cycle by agreement, 0700-1900 Monday to Friday, to 2100 once per week;
  (c) weekly direct teaching caps 19/week over 40 weeks, 21/week over 17 weeks, 23/week over 3 weeks;
  (d) complex teaching load – student cohort and units of competency being delivered requires more than the usual amount of non-contact time;
  (e) 7 weeks flexible leave;
  (f) 4 weeks compulsory leave;
  (g) 100 hours professional development;
  (h) hours of work capped at 1400 per year.

- Together, these restrictions undermine TasTAFE's productivity and its ability to provide an efficient service to the Tasmanian people."[106]
- Obtaining good value for taxpayers investment in TAFE. [107]

[104] The Tasmanian Government has committed to recruit and retain 100 teachers over the next four years. On the modern award system, TasTAFE claim non-transferring teachers can offer TasTAFE an additional 75,000 teaching hours over the next four years over and above the hours which those same teachers could teach if they were employed pursuant to the copied state instruments which is critical to obtaining good value for taxpayers investment.

[105] There is no doubting the views of the new employer. Their objective is to "t*ransition to the modern award system for non-transferring employees*".[108] The making of a consolidation order will impact on that objective and the view of the new employer that it should not be made is understandable in that context.

[106] This factor weighs against making the order sought.

Section 768BG (4)(b) of the Fair Work Act 2009, whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment

[107] The Respondent accepts that there would be no significant disadvantage for employees if the order is made.

[108] The submissions made at first instance that a consolidation order would see teachers suffer a pay cut was not maintained in the employer's final submission in light of the concession of Mr Witt that to do so may well be a breach of the non-transferring employees contractual entitlements.[109]

[109] The only exception was that the teachers modern award provides two 10 minute paid breaks each day which is not an entitlement under the copied state instruments. However, this has to be considered against the more beneficial terms of the transferring instruments such as the 35 hour week and regulation of teaching hours. Overall, it is not apparent that any employees would be disadvantaged by the order.

[110] As I am satisfied that no employees would be disadvantaged by the order, this factor weighs in favour of making the order sought.

Section 768BG (4)(c) of the Fair Work Act 2009, if the order relates to a copied State employment agreement or an enterprise agreement--the nominal expiry date of the agreement

[111] The nominal expiry dates of the relevant agreements are 30 June 2023 for employees covered by the TasTAFE Teaching Staff Industrial Agreement 2021 and 30 June 2022 for the Public Sector Union Wages Agreement 2019.[110]

[112] Therefore, the Teaching agreement has not yet reached its nominal expiry date and indeed was made shortly before the creation of the new TasTAFE. The other agreement nominally expired at around the time the application for orders were made. The Respondent made no particular submission on this matter other than it should be a neutral consideration.

[113] The AEU submit that, given the nominal expiry dates of the agreements, TasTAFE should participate in good faith bargaining if they wish to make changes to the conditions for employees, rather than implement changes for some staff without negotiation or consultation.

[114] The fact that one of the instruments remains within its nominal expiry date and the other has only recently expired in my view weighs in favour of making the order. Indeed the yet to expire teachers agreement provides for a pay increase in March 2023.[111] This is not a case where the relevant agreements are well past their nominal expiry date and are no longer relevant to the workforce. In the case of the TasTAFE Teaching Staff Industrial Agreement 2021, it was negotiated and concluded (commenced operation) in May 2022, only one month before the commencement of the new TasTAFE. Mr Witt agreed that the conditions negotiated were "*appropriate*" at least for transferring employees.[112] Mr Dreher confirmed that TasTAFE were aware of the changes that were to take place to TasTAFE at the time the agreement was concluded.[113] The public sector agreement has passed its nominal expiry date only recently.

[115] For these reasons, taking into account the nominal expiry dates of the Agreements, this factor weighs in favour of making the order sought.

Section 768BG (4)(d) of the Fair Work Act 2009, whether the copied State instrument for employee A would have a negative impact on the productivity of the new employer's workplace

[116] Firstly, dealing with the appropriate construction of this term, the UWU made the following submission:

> "Because of the default position in the FW Act, the copied State instruments will automatically apply to transferring employees, and unlike the provisions in s 318 for transfers of business between two national system employers, there is no ability for the new employer to seek that the copied State instruments do not apply to the transferring employees." [114]
>
> "Therefore, this criteria has to contemplate that the copied State instruments already apply (or are likely to apply) to any transferring employees in the new employer's workplace. Hence, the FWC must be considering the productivity consequences of a future order applying to non-transferring employees of the new employer."[115]

[117] The employer does not cavil with that submission. While this consideration pertains to the AEU application, the construction of this term is relevant to both considerations.

[118] I agree that this is the correct construction of this provision. That is what are the impacts on productivity, if any, of a future order applying the copied state instruments to non-transferring employees.

[119] As to the meaning of productivity, this is a matter that has been dealt with in previous decisions of the Commission including Full Bench decisions. The Full Bench in the Penalty Rates case considered the meaning of productivity, specifically in the context of s.134 of the FW Act, the Modern Award Objective, but also more generally in the Fair Work Act:

"[220] The term 'productivity' appears in several Parts of the FW Act:

- Part 1-1 – Introduction: s.3 Object of the Act
- Part 2-3 – Modern Awards: s.134 The modern awards objective
- Part 2-4 – Enterprise agreements: s.171 Objective of the Part, ss.241 and 243 Low paid bargaining and authorisation
- Part 2-5 – Workplace determinations: ss.262 and 275
- Part 2-6 – Minimum wages: s.284 The minimum wages objective
- Part 2-8 – Transfer of business: ss.318–320 Making and variation of transferable instruments.

[221] 'Productivity' is not defined in the FW Act but given the context in which the word appears it is clear that it is used to signify an economic concept.

[222] The Productivity Commission defines productivity as:

> '… a measure of the rate at which outputs of goods and services are produced per unit of input
> (labour, capital, raw materials, etc). It is calculated as the ratio of the quantity of outputs produced to some measure of the quantity of inputs used'.

[223] Similarly, the Commonwealth Treasury also defines productivity by reference to volumes of inputs and output:

> 'Productivity is a measure of the rate at which inputs, such as labour, capital and raw materials, are transformed into outputs. The level of productivity can be measured for firms, industries and economies. Productivity growth implies fewer inputs are used to produce a given output or, for a given set of inputs, more output is produced.'

[224] The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the Schweppes Australia Pty Ltd v United Voice – Victoria Branch:

> '… we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

> Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.'
>
> [225] While the above observation is directed at the use of the word 'productivity' in s.275, it is apposite to our consideration of this issue in the context of s.134(1)(f)."[116]

[120] I agree with that consideration of the Full Bench in Penalty Rates Case and consider that this construction of the term productivity is the appropriate one for applying to the term as it appears in s.768BG(d) of the FW Act.

[121] The AEU submit that:

> "Given the reduction of teachers employed by TasTAFE and the difficulty they are having recruiting new staff since employing staff on the new conditions, productivity cannot be seen to be increasing. It follows that the copied state instruments will not have a negative impact on productivity.
>
> Productivity was described by Mr Dreher as the number of hours taught by teachers. This number would increase with more teachers employed, and given the poor recruitment and retention of TasTAFE, together with the small number of non-transferring staff, there would be nominal impact on productivity if consolidation orders are made.
>
> Mr Witt stated that productivity is measured by additional direct teaching hours. He went on to agree that employing more staff on the copied state instruments would have the same effect of increasing direct teaching hours.
>
> Mr Adams stated "we measure productivity in terms of the amount of delivery hours that teams have available and the amount of students that are being taught."
>
> It is our submission that if the order we are seeking are made, roles at TasTAFE will be more attractive, and morale amongst staff would be better. This will assist with TasTAFE recruitment and retention and thus improve productivity."[117]

[122] There are obvious difficulties with this submission. Firstly, it is accepted that Mr Dreher agreed productivity is measured on the hours worked[118] and Mr Witt agreed that productivity could be increased by employing more staff on the copied state instruments. However, that is not consistent with the definition of productivity properly construed. Increasing the number of teachers employed, on any terms, will increase output. If that output is achieved without any relative change to the value of the input, there would be no change in productivity. I note that at other points in their evidence Mr Dreher and Mr Witt make that point at least indirectly.[119]

[123] In my view there is clear evidence that there will be a negative impact on productivity in respect to non-transferring employees if the order is made.

[124] Firstly, those non-transferring employees already employed prior to the operative date of any order made, will maintain, via a contractual entitlement, a higher salary but also would

have the benefit of the more beneficial terms. Of course, if the order is made, that particular productivity impact would be restricted to the relatively small number of non-transferring teachers already employed, as the employer would be entitled, if they wish, to simply employ teachers engaged after any order was made, on the copied state instrument terms without the enhanced salary. In any event, as Mr Witt pointed out, on an hourly rate basis, taking into account the 38 hour week, the difference is not significant.

[125] Secondly, there is no doubt that non-transferring employees will be available, under their conditions of employment for additional hours, without penalty. The Respondent submits that this will equate to them losing, if the order is made, 75,000 direct teaching hours should a consolidation order be made.[120] However, this is clearly overstated as the Respondent is still able to engage teachers for hours additional to the "cap". Of course, they can only do so at higher rates of pay. Therefore, the ability to exceed the "cap" without the requirement to do so at higher rates of pay certainly represents a productivity benefit, as does the shift from a 35 hour to 38 hour week. Similarly, while there is a "cap" of 19 hours of direct teaching hours under the transferring instrument, rather than the 25 hours for new non-transferring employees, those hours can be increased through averaging over 3 or 17 consecutive week periods. However, these arrangements are still subject to the overall annual cap on direct teaching hours.

[126] While Mr Scott and Mr Dreher gave evidence about the productivity impact of making the order, their evidence did not greatly assist as they were somewhat unconnected to the direct experience of co-ordinating the delivery of the programs.

[127] However, Ms Rachel Holland, who in her role was in a position to provide clear evidence as to the practical productivity effects of the transferring instruments provided clear and largely unchallenged evidence as to the productivity benefits from her perspective of the non-transferring employees not being restricted by the hours cap and the difficulties of rostering with the restrictions in the current agreement.[121]

[128] Similarly, Ms Holland gave persuasive evidence as to the benefits of the less restrictive leave arrangements which would increase the flexibility available to deliver training. The reduction of leave overall from 11 weeks to 10 weeks will represent a productivity improvement as will the removal on the cap on overall hours of work of 1400 per year.

[129] There is possibly a productivity gain from the removal of the 100 hours professional development entitlements though there was no direct evidence as to how that would improve productivity.[122]

[130] Overall, I am satisfied that there is evidence that the copied state instrument for employee A will have a negative impact on the productivity of the new employees workforce. While the employer was inclined to overstate the extent of the negative impact, I am satisfied overall, particularly having regard to the evidence of Ms Holland, that there will be a negative impact on productivity if the order is made.

[131] This factor weighs against making the order sought.

Section 768BG (4)(e) of the Fair Work Act 2009, whether the new employer would incur significant economic disadvantage if the order were not made

[132] The Respondent submits that this factor has no application in the present case.[123] The AEU submit that this factor does not require much consideration. The AEU does submit that there is potential economic disadvantage in the event the order is not made because of the potential for on-going recruitment and retention issues. This submission is based on data showing a reduction of 22 teachers employed compared to immediately prior to the transition[124] I don't accept that the evidence establishes a cause and effect relationship between the changed conditions of employment and the reduced number of teachers. There is not a sufficient evidentiary base to determine if there is a link.

[133] Overall, there is no evidence that the employer would incur significant economic disadvantage if the order were not made. In the circumstances of this matter, the consideration of this factor is neutral.

Section 768BG (4)(f) of the Fair Work Act 2009, the degree of business synergy between the copied State instrument for employee A and any workplace instrument that already covers the new employer;

[134] I agree with the submissions of the Respondent that there is no settled meaning of business synergy apparent from the decided cases.[125]

[135] The Macquarie-Dictionary defines synergy as:

1. Combined action.
2. The Cooperative action of two or more bodily organs or the like.
3. The Cooperative action of two or more stimuli or drugs.
4. The effect greater than the sum of the parts, that comes from the combined operation of a number of forces, persons, mechanisms, etc.[126]

[136] The workplace instrument which already covers TasTAFE is the *Educational Services (Post-Secondary Education) Award 2020*. The question is, having regard to the ordinary meaning of synergy, what is the evidence as to the combined or co-operative action of copied state instruments and the Modern Award? Is there evidence that there is an effect, greater than the sum of the parts of their combined operation?

[137] The evidence does not show any particular degree of business synergy between the respective instruments. Rather, in several significant respects, the instruments are remarkably dissimilar in key areas such as the regulation of hours of work.

[138] The Respondent has implemented a "two system" model to "adapt" to operating under both instruments utilising a combination of contractual entitlements combined with award conditions for new employees.[127] The Respondent submits that there is no evidence that the two systems model produced any loss of business synergy. However, in my view the evidence shows that the two systems model has been developed to deal with this lack of business synergy between the two instruments. While the AEU submission to the effect that the contractual terms of non-transferring employees are not enforceable is wrong (for reasons set out earlier in the decision) that does not alter the fact that the significant differences in conditions of employment have needed to be dealt with through the introduction of the two system model.

[139] Overall, the evident lack of any degree of business synergy between the relevant instruments weighs in favour of making the order sought.

Section 768BG (4)(g) of the Fair Work Act 2009, the public interest

[140] Both parties referred to the Parks Victoria Full Bench as authority for the appropriate construction of what is meant by the public interest. Whilst the Parks Victoria case was dealing with an application under s.275 of the FW Act, there is no reason to view the consideration of public interest to differ in relation to this section of the legislation. Relevantly, that decision included the following:

> "[49] Section 275(d) provides that the Commission must take the 'public interest' into account. The public interest imports a discretionary value judgment confined only by the subject matter, scope and purpose of the FW Act.
>
> [50] The public interest refers to matters that may affect the public as a whole such as the achievement or otherwise of the objects of the FW Act, employment levels, inflation and the maintenance of appropriate industrial standards.
>
> [51] The statutory distinction between the interests of the employer and employees on the one hand (s.275(c)) and the public interest on the other (s.275(d)) leads us to conclude that the public interest is distinct from the interests of the parties, though the considerations may overlap. For example, matters which may be in the public interest may also be in the interests of one or more of the parties." [128]

[141] While the provisions of s.275 of the FW Act and the provisions of the Act here differ, both provide for a separate consideration of the interests of employees and employers (s.275(b) and (c)) or the views of the new employer and employees (s.768BG(a)(i) and (ii)).

[142] Consistent with the reasoning in Parks Victoria, the public interest is something distinct from the views of the parties, though the considerations may overlap. It is a discretionary value judgement confined by the subject matter, scope and purpose of the FW Act. The objects of the FW Act are clearly relevant to a consideration of the public interest as well as matters that may affect the public as a whole. I note that Mr Scott provided his view on public interest in his witness statement that it was not the role of the Commission to determine the public interest as this had been done by the elected (Tasmanian) parliament. I completely reject that proposition. The views of the Tasmanian Parliament are clearly relevant to the consideration of the public interest, but the ultimate determination of the consideration of the public interest in the context of this application is one for the Commission.

[143] The PESRAC report and the associated Tasmanian Government policy imperative to improve training services offered to Tasmanians and deliver greater value from its investment in TasTAFE for the benefit of the Tasmanian community is certainly a matter that is relevant to the public interest. The intersection of that policy imperative and this application, was the decision by the Tasmanian Government to transition TAFE employees to the FW Act.

[144] The relevant PESRAC Recommendation was that the State Government should re-establish TasTAFE as a government business under the control and accountability of its Board

of Directors, with authority and power to employ its workforce under the FW Act.[129] In the event that a consolidation order is made, that objective would still be realised. Mr Bowles claimed that the making of an order would mean that they would not achieve the flexibility the government was anticipating and that if an order were made it would preclude market based salary packages being offered to attract the best trainers and leaders.[130] Mr Bowles was taken to a provision of the copied state instruments which would allow TasTAFE flexibility in offering a competitive salary and asked if agreed if the clause allowed the offering of a competitive salary. His reply was "*Do you accept that this clause allows TasTAFE flexibility in offering a competitive salary?---Only in the context of predefined conditions that it's attached to*".[131] I accept that the view of the employer is they wish to be free of the restrictions of the copied state instruments, particularly in respect to teachers. That position has been made clear. However, to the extent that part of the government objective was to offer "more competitive" salaries, the making of an order will not stop the government from doing so. Indeed, Mr Witt confirmed that this could be done.[132]

[145] The public benefit the Respondent refers to in their final submissions focusses on "the public benefit that will flow from the reforms to TasTAFE and the shift towards the modern award system for non-transferring employees".[133] This is a restatement of the productivity benefits the employer has outlined associated with employing non transferring employees under the terms of the modern award system in combination with common law contracts, a matter I have already taken into account under the consideration of the factors under s.768BG (4)(d) of the FW Act.

[146] The Ministers second reading speech for the TasTAFE (Skills and Training Business) Bill 2021) stated that new employees would be employed either under a new enterprise agreement or through a contract of employment underpinned by the equivalent modern award and having regard to market of pay rates (emphasis added).[134] However, the Respondents submissions and evidence focus almost entirely on the benefits of the shift to the modern award system and the associated benefits of that.

[147] There is scant evidence that TasTAFE is preparing to engage in enterprise bargaining beyond the rather vague evidence of Mr Witt that there is a marshalling of resources as it is a "big job" and a reference to a Gantt chart that was not in evidence.[135] There was also some rather unsatisfactory last minute evidence extracted on re-examination of Mr Adams to the effect that a new director of people, performance and culture had been employed who be responsible for negotiations, amongst other HR duties.[136] Ultimately, Mr Witt was clear TasTAFE had not commenced bargaining.[137] and Mr Scott was somewhat evasive as to when bargaining would commence.[138]

[148] The rather sluggish approach to commencing bargaining under the FW Act 2009 by TasTAFE is understandable when it is clear from the evidence of their witnesses that they prefer the relative flexibility of the modern award over that of the restrictions on key issues such as hours of work and direct teaching times in the transferring instruments. Overall, the Respondents evidence and indeed their final submissions, clearly shows that the TasTAFE witnesses see the shift to engaging new employees on the modern award system combined with common law contracts as the means by which the productivity improvements they seek can be realised. The evidence of Mr Dreher that there was no appetite from the union to negotiate changes is frankly inconsistent with the evidence of other TasTAFE witnesses particularly Mr Witt who conceded that offers to change key conditions on hours of work were made by the

AEU during the recent bargaining. Mr Baileys evidence was that the parties could not reach agreement on the pay rise to offset the increase in hours being negotiated, not that there was no willingness to contemplate change.[139] Further, Mr Adams could not point to any changes that TasTAFE has or seeks to implement that cannot be done through the bargaining process or policy development.[140]

[149] The objects of the FW Act are clearly relevant to the consideration of the public interest. The most relevant of these is s.3(f) of the FW Act which provides "*achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action*". The productivity and fairness objectives of both parties can likely be achieved through enterprise bargaining. There was clearly contemplation of changes during the recently concluded bargaining on significant issues highlighted by the Respondent affecting productivity in teaching. However, the parties were unable to agree to a package of changes at that time. I think it more likely that making the consolidation order would lead to an emphasis on enterprise level collective bargaining as the parties would be negotiating from a framework of a common set of conditions, rather than the two system model currently in operation. This is consistent with the objects of the FW Act. When Mr Witt was asked if he accepted that unilaterally changing employment conditions for non-transferring employees is not facilitating enterprise bargaining he rejected that stating that he thought it would facilitate enterprise bargaining "*down the track*".[141] I can understand how the approach adopted by TasTAFE will improve the bargaining position of the employer over time as a greater proportion of employees are engaged on the common law contracts underpinned by the award. However, how that facilitates enterprise bargaining is not apparent. Indeed, it builds in an incentive for the employer to delay bargaining to somewhere further "*down the track*".

[150] The stated objectives of PESRAC, adopted by the government to improve TasTAFE's performance and consequently expand the supply of a skilled and trained workforce in order to improve levels of employment are certainly objectives that are in the public interest. It is apparent from the evidence that TasTAFE has formed the view it can most easily realise those gains by way of a shift to the modern award system for new employees. However, productivity improvements can still be achieved under enterprise bargaining, though they will need to be negotiated, not imposed. This approach will be consistent with the object of the Act, and also consistent with the objective of PESRAC, adopted by the Tasmanian Government, to re-establish TasTAFE as a government business with authority to employ its workforce under the FW Act.

[151] Taking into account the consideration above, my assessment of the public interest consideration weighs in favour of making the order sought.

(h) Conclusion in AG2022/1809 Application by Australian Education Union

[152] In respect to the views of employees who would be affected by the order, the views on non-transferring employees is a neutral consideration, The views of transferring employees weighs in favour of making the order. The views of the new employer weighs against making the order. I am satisfied no employees would be disadvantaged by the making of the order in relation to the terms and conditions of employment and this weighs in favour of making the order. Consideration of the nominal expiry dates of the agreements also weigh in favour of

making the order. Consideration of whether the copied state instrument for employee A would have a negative impact on the productivity of the new employers workplace weighs against making the order. There is no evidence the employer would incur significant economic disadvantage if the order is not made. This is a neutral consideration. The lack of business synergy between the copied state instrument and the workplace instrument covering the new employer weighs in favour of granting the application. Public interest considerations also weigh in favour of making the order.

[153] Taking into account all the factors, I am satisfied it is appropriate to make the order sought.

[154] While the negative productivity impacts and the strong views of the employer weigh against making the order, all of the factors must be considered. There are a significant number of factors which weigh in favour of making the order.

[155] On balance, taking into account each of the requirements in s.768BG of the Fair Work Act, I am satisfied that the order sought should be granted.

[156] An order giving effect to my decision will be issued separately.[142] The operative date of the order will be 7 days from the date of this decision.

Consideration of AG2022/1961 – United Workers Union.

Section 768BG (4)(a)(i) of the Fair Work Act 2009, the views of the employees who would be affected by the order

[157] For the reasons set out in the consideration of the AEU application I consider the views of both transferring and non-transferring employees to be relevant.

[158] In respect to this application, the UWU adduced evidence of the views of Ms Bradshaw, a non-transferring employee.

[159] Ms Bradshaw said she would "consider" working as a casual EFA at TasTAFE is she could receive the higher rate of $32.22 per hour. The hearsay evidence of Ms Brumby as to the views of Ms Bradshaw is of little assistance in circumstances where Mr Bradshaw did not provide direct evidence and was not able to be cross examined. In any event, her views are equivocal at best.

[160] For the same reasons as set out in the consideration for the AEU application, the views of Mr Witt that it can be inferred non-transferring employees are positive about the new terms and conditions of employment is not accepted. Overall, the consideration of the views of non-transferring employees is neutral.

[161] As to the views of transferring employees the evidence of Mr McKendrick and Ms Ling, who are transferring employees, support the making of the order.[143]

[162] The UWU who represent a number of transferring employees, clearly supports the making of the order.

[163] The views of transferring employees affected by the order weighs in favour of making the order.

Section 768BG (4)(a)(ii) of the Fair Work Act 2009, the views of the new employer

[164] It is clear the new employer TasTAFE opposes the making of the consolidation order in this case.

[165] However, the submissions of the Respondent setting out the basis of their opposition to the making of the order are almost entirely directed at matters connected to the cohort of non-transferring teachers.[144] The focus of the submissions are understandable as they are reflective of the focus of the Respondents evidence. For example, the evidence of Mr Witt that TasTAFE is largely content with the employment conditions applying to EFA's in the copied state instrument with perhaps two exceptions.[145]"

[166] While the new employer clearly opposes the making of the order sought by the UWU, it is not particularly vigorous in its opposition to the application. Nevertheless, the TasTAFE view is clearly that the application to make the order is opposed. This is a matter that weighs against making the order sought.

Section 768BG (4)(b) of the Fair Work Act 2009, whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment

[167] TasTAFE submit that no employee would be significantly disadvantaged by the making of an order.[146] The Applicant submits that the two currently (as at date of final submissions) employed non-transferring employees will not be disadvantaged by the making of the order in that the effect would be that their casual ordinary rate of pay would increase by between $1.10 per hour and $2.14 per hour.[147] The UWU point to other benefits those Employees would be likely to receive.[148]

[168] However, consideration of whether the employees are advantaged is not relevant. What is relevant is they are clearly not disadvantaged. As no employees will be disadvantaged by the making of an order, that is a factor that weighs in favour of making the order.

Section 768BG (4)(c) of the Fair Work Act 2009, if the order relates to a copied State employment agreement or an enterprise agreement--the nominal expiry date of the agreement

[169] The Education Facility Attendants Salaries and Conditions of Employment Agreement 2019 No. 2 (the Salaries Agreement) expired on 19 September 2022 and the Job Security Agreement expires on 31 December 2022.[149]

[170] The Respondent made no particular submissions as to how this factor should be treated beyond submitting that it is a neutral factor. The UWU submit that the life of any extension the agreements being granted is likely limited as both parties have indicated a desire to bargain for a new Fair Work Agreement. However, the UWU note that the TasTAFE Board must approve the commencement of bargaining and no evidence was led from the Board on this point.

[171] My consideration of this matter is the essentially the same as that taken in the AEU application, however the factual circumstances are slightly different. Neither of the agreements relevant to this application had expired at the time the application was made and one was yet to expire at the time of the hearing of the evidence in this matter.

[172] The fact that one of the instruments remained within its nominal expiry date at the conclusion of the hearing of the matter, and the other has only recently expired, in my view weighs in favour of making the order. This is not a case where the relevant agreements are well past their nominal expiry date and there is evidence that they are no longer relevant to the workforce and that consideration is relevant here. In my view, this factor weighs in favour of making the order sought.

Section 768BG (4)(d) of the Fair Work Act 2009, whether the copied State instrument for employee A would have a negative impact on the productivity of the new employer's workplace

[173] In the consideration of this factor in respect to the AEU application, I set out the appropriate construction of the term, as well as the correct meaning of productivity at paragraphs 116 to 120 of this decision, and repeat those findings for the purpose of this application.

[174] While the respondent dealt extensively in their final submissions with productivity issues related to the AEU application, little was said in respect to the productivity issues related to the UWU application.

[175] This is unsurprising given the evidence of Mr Witt, referred to earlier that, with the exception of penalty payments and "*school environment related clauses*" that TasTAFE is largely content with the employment conditions applying to EFA's in the copied state instrument.[150] Similarly, Mr Bowles was unaware of any productivity improvements for EFA's associated with moving away from state Instruments[151] Indeed Mr Bowles confirmed his statement did not directly deal with TasTAFE EFA's.[152] Mr Dreher confirmed in cross examination that his statement was predominantly about the teaching staff, and that there was nothing in his statement that directly deals with the effect on EFA's if a consolidation order was made.[153] Ms Holland confirmed her evidence did not relate to TasTAFE EFA's.[154]

[176] Mr Scotts evidence on this matter is entirely directed at teachers[155] Mr Scott does say that EFA base salaries are largely consistent between the copied state Instruments and the new employment arrangements, with some minor differences in penalty rates.[156]

[177] Overall, in respect to this application, there is no significant evidence that the Copied state instruments would have a negative effect on the productivity of the new employer. There may be some cost savings to the employer to the extent that wage rates and penalty rates appear lower under the new arrangements. While this will reduce costs to the employer of employing new staff, its effect would seem to be marginal given the evidence of Mr Scott.[157] However, consistent with the views of the Full Bench in Schweppes cited earlier "Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense"[158]

[178] I am not satisfied on the evidence that the copied state instruments would have a negative impact on the productivity of the new employer.

[179] This factor weighs in favour of making the order sought.

Section 768BG (4)(e) of the Fair Work Act 2009, whether the new employer would incur significant economic disadvantage if the order were not made

[180] The UWU submit that there is no evidence that TasTAFE would incur significant economic disadvantage if the consolidation orders are not made and that this is a neutral consideration. TasTAFE does not cavil with that submission.[159]

[181] I agree that there is no evidence that the employer would incur significant economic disadvantage if the order were not made. In the circumstances this is a neutral consideration.

Section 768BG (4)(f) of the Fair Work Act 2009, the degree of business synergy between the copied State instrument for employee A and any workplace instrument that already covers the new employer

[182] For the sake of brevity, I repeat and rely on my consideration of the meaning of business synergy with this provision that I set out in the consideration of the AEU application, at paragraphs 134 to 135.

[183] The workplace instrument that already covers TasTAFE is the *Miscellaneous Award 2020.*

[184] The question is, having regard to the ordinary meaning of synergy, what is the evidence as to the combined or co-operative action of the relevant copied state instruments and the Miscellaneous Award 2020.

[185] The evidence does not show that there is any particular degree of business synergy between the relevant instruments. The respondent submits there is no loss of business synergy arising from the two system model. However, the need for the two system model in my view reflects the lack of business synergy between the relevant instruments. In Re Amcor Flexibles (Australia) Pty Ltd, in the context of an application under s 318 of the FW Act, DP Gostencnik accepted that employees performing the same or similar work being covered by the same industrial instrument can promote business synergy.[160]

[186] Overall, the evident lack of business synergy between the relevant instruments weighs in favour of making the order sought.

Section 768BG (4)(g) of the Fair Work Act 2009, the public interest

[187] The consideration of the public interest in respect of the UWU application is essentially the same as that for the AEU application. I repeat and rely on that consideration so far as it is relevant to this application noting of course that there are differences in the evidence as it pertains to the conditions of employment differences. Also the environment surrounding

enterprise level collective bargaining differs considerably to that in the AEU application given the new employer is largely content with the terms of employment applying to EFA's in the copied state instruments with the exceptions being penalty rates and some other matters.[161] However, it is nevertheless more likely that making the consolidation order would lead to an emphasis on enterprise level collective bargaining as the parties would be negotiating from a framework of a common set of conditions, rather than the two system model currently in operation. This is consistent with the objects of the Act and is a significant public interest consideration.

[188] Consideration of this factor weighs in favour of making the order sought.

Conclusion

[189] In respect to the views of employees who would be affected by the order, the views on non-transferring employees is a neutral consideration, The views of transferring employees weighs in favour of making the order. The views of the new employer weighs against making the order. I am satisfied no employees would be disadvantaged by the making of the order in relation to the terms and conditions of employment and this weighs in favour of making the order. Consideration of the nominal expiry dates of the agreements also weigh in favour of making the order. Consideration of whether the copied state instrument for employee A would have a negative impact on the productivity of the new employers workplace weighs in favour of making the order. There is no evidence the employer would incur significant economic disadvantage if the order is not made. This is a neutral consideration. The lack of business synergy between the copied state instrument and the workplace instrument covering the new employer weighs in favour of granting the application. Public interest considerations also weigh in favour of making the order.

[190] Taking into account all the factors, I am satisfied it is appropriate to make the order sought.

[191] While the strong views of the employer weigh against making the order, all of the factors must be considered and there are a significant number of factors which weigh in favour of making the order.

[192] On balance, taking into account each of the requirements in s.768BG of the Fair Work Act, I am satisfied that the order sought should be granted.

[193] An order giving effect to my decision will be issued separately.[162] The operative date of the order will be 7 days from the date of this decision.

COMMISSIONER

Appearances:

J Katarzynski appearing on behalf of the United Workers Union
M Wilkinson appearing on behalf of the Australian Education Union
M Jehne appearing on behalf of TasTAFE
M O'Farrell appearing on behalf of TasTAFE

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[1] Training and Workforce Development Act 2013 (Tas) s 69(2) (as at 30 June 2022).

[2] Industrial Relations (Commonwealth Powers) Act 2009 (Tas) s 6(b).

[3] TasTAFE (Skills and Training Business) Act 2021 (Tas) s 4.

[4] Training and Workforce Development Act 2013 (Tas) s 56(2) (as at 30 June 2022).

[5] TasTAFE (Skills and Training Business) Act 2021 (Tas) s 4(2).

[6] TasTAFE (Skills and Training Business) Act 2021 (Tas) s 12(1)(b).

[7] TasTAFE (Skills and Training Business) Act 2021 (Tas) s 48(2) and Schedule 3.

[8] TasTAFE (Skills and Training Business) Act 2021 (Tas) Sch 3 cl 7(2)(a).

[9] TasTAFE (Skills and Training Business) Act 2021 (Tas) Sch 3 cl 6(1).

[10] Fair Work Act 2009 (Cth) s 768AD(1).

[11] Respondent's Closing Submissions at [3].

[12] Respondent's Submissions at [18].

[13] *Robynne Leanne Black* [2014] FWC 2774, [22]-[23] and *Health Services Union* [2018] FWC 2527.

[14] United Workers' Union Submissions in Reply at [12].

[15] 2022 FWCFB 2001 at [269].

[16] *Briginshaw v Briginshaw (Briginshaw)* (1938) 60 CLR 336, 361-2 and Applicant's Submissions in Reply at [32] and [33].

[17] Respondent's Submissions at [32].

[18] Respondent's Closing Submissions at [10].

[19] Applicant's Submissions in Reply at [38].

[20] Respondent's Submissions at [35].

[21] [2018] FWC 776 at [38].

[22] *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; (2015) 86 NSWLR 527, [196] (Bathurst CJ, Beazley P and Tobias AJA).

[23] Ibid.

[24] Respondent's Submissions at [7].

[25] Hansard, Legislative Council, 9 November 2021, 79-80 and Respondent Submissions at [8].

[26] Respondent's Submissions at [13].

[27] Ibid and PESRAC, Final Report, 23.

[28] Respondent Submissions at [13] and PESRAC, Final Report, 32.

[29] Respondent's Submissions at [15].

[30] Witness Statement of Simon Bailey at [7]-[12].

[31] Ibid at [14].

[32] –Additional Witness Statement of Simon Bailey at [28].

[33] Witness Statement of Simon Bailey at [15]-[17].

[34] Ibid at [22].

[35] Ibid at [21]-[23].

[36] Ibid at [24]-[27].

[37] Ibid at [29]-[32].

[38] Ibid at [34] and [35].

[39] Ibid at [37] and [38].

[40] Witness Statement of Amy Brumby at [4]-[7] and [21]-[23].

[41] Ibid at [31]

[42] Ibid at [35]

[43] Ibid at [36]-[45].

[44] Supplementary Statement of Amy Brumby at [6] - [9].

[45] Witness Statement of Amy Brumby at [49]-[51].

[46] Witness Statement of Connie Ling at [6]-[13].

[47] Witness Statement of Darryl McKendrick at [14]-[15].

[48] Witness Statement of Angela Conway adopted by Mark Bowles at [29].

[49] PN1573 - PN1585.

[50] PN1592.

[51] PN592 and PN593.

[52] TasTafe (Skills and Training Business) Bill 2021 second reading speech, Hansard House of Assembly 9 November 2021.

[53] -Witness Statement of Angela Conway adopted by Mark Bowles at [77]-[78].

[54] Witness Statement of Grant Dreher at [6]-[7].

[55] Ibid at [21]-[22].

[56] PN944.

[57] PN955.

[58] Witness Statement of Scott Adams at [6].

[59] Ibid at [13].

[60] Ibid at [13] and [14].

[61] Ibid at [15].

[62] Ibid at [20].

[63] Ibid at [21].

[64] Ibid at [22].

[65] Ibid at [27].

[66] Ibid at [38].

[67] Ibid at [39].

[68] Ibid at [41].

[69] PN800 and PN801.

[70] Ibid at [60] - [64].

[71] PN855 - PN858 and PN867.

[72] Exhibit #R7.

[73] Witness Statement of Timothy Witt at [9].

[74] PN1102 - PN1104.

[75] PN1418.

[76] Witness Statement of Timothy Witt at [14].

[77] Ibid at [17].

[78] Ibid at [20] and [21].

[79] Ibid at [31].

[80] Ibid at [38].

[81] Ibid at [32].

[82] Ibid at [37].

[83] Ibid at [42].

[84] Ibid at [43]

[85] Ibid at [47].

[86] Ibid at [54] - [56].

[87] PN1182 to PN1199.

[88] PN1237.

[89] Witness Statement of Timothy Witt at [63].

[90] PN1262.

[91] Witness Statement of Timothy Witt at [71].

[92] Ibid at [72].

[93] Ibid at [75].

[94] Ibid at [79].

[95] Witness Statement of Simon Bailey at [15] – [22].

[96] Macquarie Australia's National Dictionary Concise Dictionary, Fifth Edition.

[97] Ibid at [23].

[98]Additional Witness Statement of Simon Bailey at [29].

[99] PN182.

[100] PN187-PN188.

[101] Exhibit #R7.

[102] Australian Education Union Closing Submissions at [6] to [11].

[103] PN1379.

[104] Respondent's Closing Submissions at [14] and [15].

[105] Exhibit #R7.

[106] Respondent's Closing Submissions at [40].

[107] Ibid at [37] - [42].

[108] Ibid at [46].

[109] PN1392.

[110] Respondent's Closing Submissions at [61].

[111] PN469.

[112] PN1254 to PN1257.

[113] PN710 to PN715.

[114] United Workers' Union Closing Submissions at [48].

[115] Ibid at [48] and [49].

[116] [2017] FWCFB 1001.

[117] Australian Education Union Closing Submissions at [34] - [38].

[118] PN727.

[119] PN738, PN1414, PN725 and PN727.

[120] Respondent's Closing Submissions at [67].

[121] Statement of Rachel Holland, 11 August 2022 [17] DCB828: "Many TasTAFE programs within my work group are delivered 6 hours per day, over a four-day week. There are many short courses or units that require this volume of learning prior to assessment. Having to switch to another teacher after three days of delivery so team do not exceed the 19 hours per week is challenging to timetable, has impact on learner experience and continuity of delivery, and makes it challenging for teachers, especially where assessment is required. … When teams are having to split delivery of units over a number of weeks, it impacts on continuity and causes issues when working with fresh ingredients/consumables. Swapping of teacher part way through delivery of a unit, impacts the flow of delivery"; [20] DCB829: "Learners will be able to complete their training and complete their qualifications sooner if programs can run over the four-day week rather than three. This assists TasTAFE to release graduates quicker to meet the industry needs and skills shortages that Tasmania now faces."

[122] Witness Statement of Timothy Witt at [12].

[123] Respondent's Closing Submissions at [25].

[124] TasTAFE Workforce Consultative Committee, 25 November 2022.

[125] Respondent's Closing Submissions at [82].

[126] Macquarie Australia's National Dictionary Concise Dictionary, Fifth Edition.

[127] Respondent's Closing Submissions at [85].

[128] [2013] FWCFB 950 at [49] - [51].

[129] DCB699 and Witness Statement of Scott Adams at [67].

[130] PN1563.

[131] PN1569.

[132] PN1287.

[133] Respondent's Closing Submissions at [94].

[134] DCB816.

[135] PN1357.

[136] PN869.

[137] PN1359.

[138] PN858.

[139] PN429 to PN435.

[140] PN827.

[141] PN1356.

[142] PR760521.

[143] Exhibit #R5, template F.

[144] Respondent's Closing Submissions at [38] - [41].

[145] Witness statement of Timothy Witt at [21] and [22]

[146] Respondent's Closing Submissions at [60].

[147] Annexure B at [1(c)] and [3(c)], Agreed EFA Comparative Table of Provisions.

[148] United Workers' Union Closing Submissions at [42].

[149] United Workers' Union Closing Submissions at [45].

[150] Witness Statement of Timothy Witt at [21] and [22].

[151] PN1548.

[152] PN1556.

[153] PN698 and PN699.

[154] PN917.

[155] Witness statement of Scott Adams at [50] - [55].

[156] Ibid at [15].

[157] Ibid.

[158] [2012] FWAFB 7858 at [46]

[159] Respondent's Closing Submissions at [81].

[160] *Re Amcor Flexibles (Australia) Pty Ltd* [2016] FWC 4347 at [17].

[161] Witness Statement of Timothy Witt at [21] and [22].

[162] PR760522