DECISION

Fair Work Act 2009
s.319 - Application for an order relating to instruments covering new employer and non-transferring employees

Application by Viva Energy Retail Pty Ltd
(AG2023/735)

EUREKA OPERATIONS FUEL AND CONVENIENCE TEAM MEMBER AGREEMENT - 2011

Vehicle industry

COMMISSIONER BISSETT MELBOURNE, 14 APRIL 2023

Application for an order relating to instruments covering new employer and non-transferring employees

[1] Viva Energy Retail Pty Ltd (**Viva Energy**) has made an application to the Commission pursuant to s.319 of the *Fair Work Act 2009* (**FW Act**) for an order in relation to an instrument covering the employer and non-transferring employees.

BACKGROUND

[2] Viva Energy and Viva Energy Group have agreed to purchase the 'Coles Express' retail fuels business from Eureka Operations and Coles Group Limited (**Coles**). The sale is expected to be completed on or around 1 May 2023.

[3] As part of the terms of sale Viva Energy has offered employment to all employees who work at the retail stores currently branded as 'Coles Express' as at 1 May 2023. Employees who accept the offer of employment will continue to have their employment governed by the terms of the *Eureka Operations Fuel and Convenience Team Member Agreement 2011* (**the Agreement**) when they commence employment with Viva Energy by virtue of the operation of s.311 of the *Fair Work Act 2009* (**FW Act**). The Agreement was approved by the Commission on 20 May 2012 and operated from 5 June 2012. It has a nominal expiry date of 30 June 2015.

[4] Viva Energy now applies for the Agreement to apply to non-transferring employees – that is, employees employed by Viva Energy after the sale to Viva Energy is complete. Given it is due to complete the sale transaction on 1 May 2023, and anticipates the need to recruit new employees shortly thereafter, Viva Energy seeks that its application be dealt with urgently.

[5] In support of its application Viva Energy has filed a witness statement of Ms Natasha Cuthbert, Chief People and Culture Officer for the Viva Energy Group. Attached to that statement is material relevant to the consideration of the Commission including a comparison of the Agreement with the *Vehicle Repair, Services and Retail Award 2020* (**the Award**), letters of offer to existing employees and relevant information as to wages currently paid to employees covered by the Agreement (which are in excess of the Agreement rates).

[6] On receipt of the application my chambers sought advice from the Shop, Distributive and Allied Employees Association (**SDA**) and The Australian Workers' Union (**AWU**), both of whom are covered by the Agreement, as to whether they wished to be heard on the application of Viva Energy. Both did, so the application was set down for conference on 4 April 2023.

[7] Arising from that conference I provided the SDA and AWU with the opportunity to provide written submissions in relation to the application. Submissions were received from the SDA with a witness statement of Matthew Galbraith, National Industrial Officer with the SDA on 6 April 2023. The AWU indicated its support for the position advanced by the SDA. The SDA indicated that it did not wish to be further heard. A reference to the submissions of the SDA should be taken equally as a reference to the AWU.

[8] On 11 April 2023 Viva Energy filed written submissions and a supplementary statement of Ms Cuthbert in reply to that of the SDA and AWU.

[9] All parties consented to a decision on the basis of the written material filed.

LEGISLATIVE PROVISIONS

[10] Section 319 of the FW Act states as follows:

> **319 Orders relating to instruments covering new employer and non-transferring employees**
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> *Orders that the FWC can make*
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> (1) The FWC may make the following orders:
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> (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a non-transferring employee because of subsection 313(1) does not, or will not, cover the non-transferring employee;
>
> (b) an order that a transferable instrument that covers, or is likely to cover, the new employer, because of a provision in this Part, covers, or will cover, a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
>
> (c) an order that an enterprise agreement or a modern award that covers the new employer does not, or will not, cover a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer.

Note: Orders may be made under paragraphs (1)(b) and (c) in relation to a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer, whether or not the non-transferring employee became employed by the new employer before or after the transferable instrument referred to in paragraph (1)(b) started to cover the new employer.

Who may apply for an order

(2) The FWC may make the order only on application by any of the following:

(a) the new employer or a person who is likely to be the new employer;

(b) a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;

(c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;

(d) if the application relates to a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

(3) In deciding whether to make the order, the FWC must take into account the following:

(a) the views of:

(i) the new employer or a person who is likely to be the new employer; and
(ii) the employees who would be affected by the order,

(b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;

(c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;

(d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;

(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;

(f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;

(g) the public interest.

Restriction on when an order may come into operation

(4) The order must not come into operation in relation to a particular non-transferring employee before the later of the following:

(a) the time when the non-transferring employee starts to perform the transferring work for the new employer;

(b) the day on which the order is made.

[11] Viva Energy seeks an order that the Agreement will cover all non-transferring employees who fall within the classifications in the Enterprise Agreement in respect of their employment with Viva Energy (s.319(1)(b)).

[12] I am satisfied that Viva Energy is eligible to make the application.

[13] It falls for me to consider those matters set out in s.319(3). In doing so it is apparent from the opening words of s.319(3) that the Commission *must* take into account each of the factors set out but that none of those factors is determinative of whether the order should be issued or not.

EVIDENCE RELEVANT TO THE FACTORS TO BE CONSIDERED

Section 319(3)(a)(i) The views of the new employer affected by the order

[14] In her witness statement Ms Cuthbert says that Viva Energy does not want to have two industrial instruments operating in relation to employees performing the same work. The key reasons for this are that Viva Energy wishes:

(a) to have terms and conditions of employment standardised and consistent across its newly acquired sites;
(b) to avoid employee dissatisfaction or morale issues arising from inconsistent terms and conditions of employment;
(c) to encourage a harmonious, single workplace culture across its sites; and
(d) to avoid the costs associated with implementing and managing two separate industrial instruments across its sites.

[15] Ms Cuthbert says that two different sets of terms and conditions would create complexities in terms of rostering and payroll management.

[16] As part of the sale agreement Ms Cuthbert advises that Coles will, for a transitional period of up to 2 years post the sale, provide payroll support to Viva Energy. If the Award was to apply to non-transferring employees Viva Energy would have to build a new module for the payroll system at substantial cost to Viva Energy. Further, Coles has advised that it does not have the knowledge to manage the application of the Award to non-transferring employees or to respond to queries in relation to Award entitlements.

Section 319(3)(a)(ii) The views of any employees affected by the order

[17] Ms Cuthbert says that it is not possible to know the views of employees affected by the order as there are currently no such employees, and such employees will only be engaged post the sale completion date.

[18] Ms Cuthbert says however that Viva Energy has engaged in discussions with the SDA in relation to the impending sale and application currently before the Commission and had provided both the SDA and AWU with drafts of its application and matters raised in her statement prior to the making of the application.

[19] The evidence of Mr Galbraith is that the SDA has an interest in the matter, having sought (unsuccessfully) to negotiate a replacement agreement with Coles for some time.

Section 319(3)(b) *Whether any employees will be disadvantaged by the order in relation to their terms and conditions*

[20] Ms Cuthbert says that, as part of the sale agreement, Viva Energy has agreed to pay transferring employees the current, above Agreement, rates of pay currently paid by Coles Express.

[21] She says that, if the application for an order is successful, Viva Energy will pay non-transferring employees the same rates and provide the same terms and conditions, as transferring employees. In her supplementary statement Ms Cuthbert says that Viva Energy has made no commitment to pay non-transferring employees the same (above Agreement) rates as being paid to transferring employees if the order it seeks is not made by the Commission.

[22] Mr Galbraith's evidence is that non-transferring employees will be worse off under the Agreement compared to the Award. In particular he points to employees working afternoon or night shift. As Viva Energy identify in its comparison of the Agreement and Award content:

> The Agreement does not provide for any additional penalties for employees working afternoon shifts (defined by the Award as a shift commencing after noon and not later than 6.00pm). Employees who work 'afternoon shift' as defined by the Award are likely to suffer a detriment if they were paid under the Agreement compared to the Award, because they would be entitled to either an 18% penalty (for working afternoon shift only) or a 12.5% penalty for working alternating afternoon shifts with day work/night work.

[23] The evidence of Mr Galbraith is that the lack of afternoon and night shift penalties will, in certain scenarios (but not limited to these), leave non-transferring employees worse off under the Agreement than they would be under the Award.[1] Mr Galbraith put forward the following scenarios:

Scenario 1

Monday work performed between midday and 4.00pm

Agreement	$25.68[2] x 4 = $102.72
Award	$23.52[3] x 4 + 18%[4] = $111.01

Scenario 2

Monday work performed between 6.00pm and 10.00pm

Agreement	$25.68 x 4 = $102.72
Award	$23.52 x 4 + 30%[5] = 122.30

[24] Mr Galbraith's evidence is that the disadvantage is further compounded for longer shifts. He also says that Coles Express is a 24 hour operation at many of its outlets such that it is highly likely there will be employees who work afternoon or evening shifts. Such employees will be worse off under the Agreement than the Award. Without specific data from Viva Energy or Coles Mr Galbraith says he cannot determine the scale of the problem.

[25] Mr Galbraith also gave evidence that Coles Express has, in the past, provided increases over and above the last increase specified in the Agreement. From 2017 however, the increase has been provided in two tranches, the first paid in July and the second in the following January. In 2022 the first increase was delayed to September. Further, in 3 years (2018, 2019 and 2021) the 'annual' increase has been less than the commensurate annual wage review amount.[6]

[26] In her supplementary statement Ms Cuthbert set out in detail the rates of pay applicable to transferring employees (that is, the above Agreement rate) and the Award rates for a range of employment types (permanent employment and casual employment) and for various shift types (afternoon shift, night shift, rotating or alternating shifts, ordinary hours etc).

Section 319(3)(c) *If the order relates to an enterprise agreement – the nominal expiry of the agreement*

[27] The order in this case does relate to an enterprise agreement. The nominal expiry date of that agreement is 30 June 2015.

[28] Ms Cuthbert's evidence is that Viva Energy is committed to negotiating a new enterprise agreement with the SDA and AWU that will cover both transferring and non-transferring employees "once the transitional period with Coles has ended" by which time Viva Energy hopes to have a better understanding of its new workforce. Ms Cuthberts says that the SDA has indicated a willingness to negotiate a new agreement "at the appropriate time."

Section 319(3)(d) *Whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace*

[29] Ms Cuthbert's evidence is that to not issue the order sought will have a negative impact on the productivity of the workplace. This is because to have no order will result in both the Agreement and Award applying in the workplace which will:

- Require additional training for staff to understand the differences in wages and terms and conditions between the Agreement and Award
- Adversely affect productivity of management team as they have to deal with rostering and management of staff under two disparate sets of wages and terms and conditions. As the workforce makeup changes over time – as more non-transferring employees join the organisation – management may lose track of which team members are on which set of conditions

- Impact the payroll function and payroll staff as they manage two different wage systems. Further, Viva Energy would have to expend substantial sums on a separate payroll system for team members on the Award and/or support such development within the Coles payroll system for up to the first two years
- Negatively impact staff morale – leading to a negative impact on productivity – if team members see two separate sets of wages for the same work
- Affect the ability to attract and retain talent in a difficult recruitment market will be more difficult if Award terms and conditions are to apply to that new talent

Section 319(3)(e) *Whether the Applicant will incur a significant economic disadvantage as a result of the Agreement transferring and covering the Applicant*

[30] Ms Cuthbert's evidence is that the making of the order will result in less of an administrative burden to Viva Energy. Conversely, failure to make the order will result in significant economic disadvantage. The reasons for this are similar to those outlined above in relation to building a new payroll system to manage those on Award conditions, the training costs and resourcing.

Section 319(3)(f) *The degree of synergy between Agreement and any workplace instrument that already covers the new employer*

[31] Ms Cuthbert's evidence is that there is little synergy between the Award and Agreement as the Agreement was tailored to the Coles Express workplaces while the Award has much broader application. There are, she says, significant operational differences between the Award and Agreement which would make the requirement to administer both burdensome.

CONSIDERATION

[32] Section 319 is found in Part 2-8 of the FW Act. The object of Part 2-8 is at s.309 as follows:

> **309 Object of this Part**
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> The object of this Part is to provide a balance between:
>
> (a) the protection of employees' terms of employment under enterprise agreements, certain modern awards and certain other instruments; and
>
> (b) the interests of employers in running their enterprises efficiently;
>
> if there is a transfer of business from one employer to another employer.

[33] It is apparent from this that, in dealing with an application under s.319 of the FW Act, the Commission must balance competing interests and needs. Further, primacy is not given to any particular form of industrial instruments (in this case the Award or Agreement) as the preferred instrument to apply in a workplace in the determination of an application.

[34] A consideration of those matters in s.319(3) of the FW Act must be undertaken in the context of this object and the object of the FW Act.

Preliminary matters

[35] I am satisfied that the application has been made in accordance with the provisions of the FW Act.

[36] I am satisfied that Viva Energy and transferring employees of Coles Express will be covered by the Agreement (a transferable instrument). Should the order not be issued, non-transferring employees and Viva Energy will be covered by the Award.

[37] I accept the evidence of Ms Cuthbert and the submissions of Viva Energy that there are 710 retail stores and over 5,500 existing employees and that the majority of those employees have accepted offers of employment with Viva Energy. I also accept that Viva Energy, on the basis of the workforce demographics and expected turnover, will employ in excess of 3,200 new employees in the first year of operation. If this is the case up to 3,200 employees (and possibly more) will be non-transferring employees (the exact number cannot be known as, of those new employees, some will be in the cohort of employees who leave and are replaced within that first year of operation). What is apparent however is that the number of transferring employees will reduce over the first year and to be replaced with non-transferring employees.

[38] I acknowledge that Viva Energy accepts the transferable instrument has rates of pay below those of the Award but has committed to paying transferring employees (and non-transferring employees should the order be made) the above agreement rates of pay currently paid by Coles Express (although no commitment as to how those rates might increase in the future prior to negotiating any new agreement is given).

[39] While it may be (and I do accept) that the contractual rates to be paid by Viva Energy to non-transferring employees are above that of the Award, no probative evidence has been given that terms and conditions in the Agreement are *overall* better than those in the Award.

[40] I accept the submissions of the SDA and AWU that, while I must have regard to the matters in s.319(3) of the FW Act, this is not restrictive of the matters to which I may have regard and that it is appropriate that I consider all relevant matters in deciding the application.

Section 319(3)(a)(i) & (ii) The views of the new employer and employees affected by the order

[41] I am satisfied that Viva Energy wishes to have the order made and that there are no employees directly affected by the order (in that non-transferring employees will only be employed once the sale is completed).

[42] Whilst I agree that there are no non-transferring employees to whom I may have regard I accept the submissions of the SDA that I should hear from them in relation to the application.

[43] I accept that the SDA and AWU have the right to represent the industrial interests of transferring and non-transferring employees. The SDA and AWU were bargaining representatives for the Agreement and are covered by that Agreement. To not hear from the

SDA and AWU would mean no contradictor to the application before me in circumstances where such evidence and submissions will enable a properly considered decision.

[44] I have therefore taken into account the SDA and AWU submissions and evidence.

Section 319(3)(b) Whether any employees will be disadvantaged by the order in relation to their terms and conditions

[45] Viva Energy submit that the Commission can be satisfied that non-transferring employees will not be disadvantaged 'overall' if the order sought is made and that 'overall' the Commission can be satisfied that the vast majority of employees would be financially better off under the terms of the Agreement than the Award.

[46] The SDA and AWU say that the evidence of Mr Galbraith shows that, with virtual certainty, some employees who work afternoon and night shift will be disadvantaged and that the number of employees subject to such disadvantage will increase over time. They say this based on the evidence of Ms Cuthbert and submissions of Viva Energy as to the rate of turn over and number of new employees it anticipates it will be required to recruit per year (3,200 on a workforce of 5,778).

[47] I accept that there are differences in employment conditions under the Award and the Agreement. Further, I accept that the base rates of pay Viva Energy is committed to paying non-transferring employees are better than that under the Award. However, the SDA and AWU are correct when they identify areas, in particular afternoon and night shift penalty rates on Monday to Friday where, from a strict wages perspective, non-transferring employees will be worse off on the Agreement compared to the Award.

[48] The analysis attached to the supplementary statement of Ms Cuthbert indicates that:

(i) The above Agreement rates committed to by Viva Energy are above the Award rates (and this is not disputed).
(ii) Permanent employees aged 19 or 21 years old working afternoon shift or alternating afternoon and night shift would be better off (in financial terms) on the Award while employees aged 20 or 18 years or younger[7] would be better off on the Agreement (tables 2.1 and 2.2 of the attachment).
(iii) Permanent employees aged 21 years old working alternating day and afternoon shift or alternating day, afternoon and night shift will be better off under the Award while all other age groups will be better off under the Agreement (table 2.3).
(iv) Permanent employees aged 18 years old and over will be better off under the Award when working night shift from 6.00pm – midnight Monday to Friday (table 3.1).
(v) All permanent employees working night shift between midnight and 6.00am Monday – Friday, alternating night, alternating afternoon and night shift between midnight – 6.00am Monday to Friday or alternating day, afternoon or night shift between midnight – 6.00am would be better off under the Agreement (tables 4.1-4.3).
(vi) Casual employees will be better off under the Agreement (table 5.1-5.3).
(vii) Permanent employees will be better off under the Agreement for all work performed on Saturday, Sunday or public holidays (tables 6.1-9.1).

[49] This analysis (which aligns with the submissions of the SDA) suggests that those employees working afternoon or night shift before midnight would be better off on the Award than the above Agreement rates committed to by Viva Energy. The extent of that advantage is between $0.26521 per hour and $4.88901 per hour.

[50] For those areas where the Agreement provides a better rate that is between $1.40 and over $12.00 per hour better than the commensurate Award rate.

[51] In considering this information I have taken into account that the task before me is not to conduct a better off overall test (BOOT) analysis and neither is the task a straight mathematical analysis (for which, in any case, I do not have relevant data). I have also taken into account that many Coles Express sites operate 24 hours a day. It must also be accepted that the rate of staff turnover is high.

[52] I cannot accept the submission of Viva Energy that the vast majority of employees will not be disadvantaged 'overall,' primarily because I do not know the working patterns of employees of Coles Express (information that Viva Energy also concedes it does not have) but also because Viva Energy does not intend to enter into negotiations for a new agreement until the end of the transition period (of up to 2 years). With no commitment to future pay increases the basis of the claim that employees will not be disadvantaged 'overall' is, at best, opaque.

[53] Given the shifting number of employees in the transferring and non-transferring groups and the spread of advantage and disadvantage to non-transferring employees depending on the industrial instrument, it can be said with confidence only that *some* non-transferring employees will be disadvantaged if the order is made.

[54] That such disadvantage does exists weighs against the grant of the order sought. However, that there are non-transferring employees who will be disadvantaged if the order is not made weighs for the making of the order.

Section 319(3)(c) *If the order relates to an enterprise agreement – the nominal expiry of the agreement*

[55] The nominal expiry date of the Agreement has now well passed. It creates no barrier to Viva Energy negotiating a new enterprise agreement with the employees concerned. The SDA and AWU stand willing to do so.

[56] However, I note that the evidence of Ms Cuthbert is that Viva Energy does not intend to engage in negotiations for a replacement agreement until the conclusion of the transition period. This will be of no comfort to non-transferring employees who may be disadvantaged in their terms and conditions when compared to the Award should the order be made. That Viva Energy have adopted this transitional approach does not seem to be a justification for not engaging in bargaining.

[57] I do not consider it relevant to the matter that I have to decide that the unions negotiated the Agreement as bargaining representatives. As is apparent that occurred many years ago and much has changed in that time. I do agree however that, if the unions were so

concerned about the Agreement there are other means by which they could have dealt with that issue. That they did not does not add weight to the submissions of Viva Energy.

[58] That the nominal expiry date of the Agreement was 8 years ago weighs against the making of the order (although I would observe that the Agreement is not a "zombie' agreement as that term is commonly used, having been made under the FW Act). If the timelines of Viva Energy play out (a two-year transition period) both transferring and non-transferring employees will be working under the terms of an Agreement that expired 10 years ago and was negotiated 14 years ago. There is nothing in such a timeline that suggests currency in the Agreement or some compelling reason to have it apply to the non-transferring employees.

Section 319(3)(d) *Whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace*

[59] In *Schweppes Australia Pty Ltd v United Voice – Victoria Branch*[8] the Full Bench of Fair Work Australia said:

> **[45]** Accordingly, we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed to 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.
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> **[46]** 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. A reduction of unit labour costs, achieved under Schweppes' shift proposal through less overtime and lower shift loadings, does not constitute productivity within that conventional meaning. Similarly, an increase in the value of output achieved through product differentiation and a higher average value of the quantity of output is not productivity in the conventional sense.

[60] There being no change in labour as a result of the transfer of business it is difficult to see how either the grant of the order or otherwise will impact on the productivity of Viva Energy's (new) workplace.

[61] I do, however, acknowledge the submissions of Viva Energy that the effect on productivity comes about if the transferable instrument does not apply to non-transferring employees although I think the term 'productivity' is used in this context as a proxy for efficiency. This is because, should the order not be made, there will, following the transfer and the engagement of a non-transferring employee, be two distinct industrial instruments that apply in the one workplace to employees doing the same work.

[62] I am satisfied that, should the order not be made, there will be a negative impact on the efficiency of aspects of the business. I accept that additional training will need to be provided to bring particular managers up to a level of knowledge so they may adequately deal with two different sets of conditions in the workplace. Further, I accept that the management of team members will be more complex than otherwise if there are two sets of conditions in the workplace. Efficiency may be further impacted by potential disenchantment in the workplace

where team members, doing the same work side by side, may be in receipt of different wages. These however are not factors that affect 'productivity' as defined in *Schweppes*.

[63] There is no question that the need to have two industrial instruments apply, with an everchanging cohort of workers covered by one or the other instruments, will have a disruptive effect on the ability of the business to operate as efficiently as it might otherwise.

[64] This weighs in favour of the grant of the order as sought.

Section 319(3)(e) Whether the Applicant will incur a significant economic disadvantage as a result of the Agreement transferring and covering the Applicant

[65] Section 319(3)(e) goes to disadvantage caused by the transferable instrument applying to the new employer. Viva Energy says that it will incur a disadvantage if the transferable instrument *does not* apply to non-transferring employees for many of the reasons set out in relation to the productivity question (above) and that it will be less administratively burdensome on it if the order is made. Economic disadvantage, it says will arise if the order is not made and two industrial instruments apply to its workforce.

[66] The SDA submits that, in considering economic disadvantage, it is necessary to consider any disadvantage on the new employer *as a whole* and not just on a part of the new employer, there being no basis to read down the words 'new employer' "to refer to only that part of the entity's operations constituted by the transferred business." The SDA continues that Viva Energy Group is "a very large concern indeed".

[67] In *ANMF v RSL*[9] the Full Bench said that:

> **[27]** As a matter of ordinary language, a new employer may 'incur economic disadvantage' in respect of the transferred business. Such disadvantage may or may not be significant, depending on the circumstances. In assessing whether any economic disadvantage is significant, it is appropriate to look beyond the transferred business. For example, the immediate economic impact of an order in respect of the transferred business might be an increase in cost to the new employer such that it cannot immediately be run as a profitable enterprise. However, the transferred business, whilst loss-making in its own right, might contribute other economic benefits to the new employer, such as a strong brand, goodwill, an inroad into a new market or sector of the economy, or the possibility of other commercially symbiotic dynamics that could have a economic position of the new employer. Each case will turn on its own facts.
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> **[28]** The Commission's evaluation of whether the new employer will incur significant economic disadvantage may be affected by its consideration of the other matters that s.319(3) of the Act requires it to take into account. For example, the Commission must take into account the nominal expiry date of any relevant enterprise agreement. In the present case, the RDNS Agreement passed its nominal expiry date on 1 June 2018. If an order were made under s.319, the RDNS Agreement would of course still apply to the non-transferring employees. However, it can more readily be replaced or terminated than an in-term agreement. Had the RDNS Agreement still had several years of nominal life to run, the effect of any disadvantage incurred from it by the new employer might have been magnified.

[68] In considering the matter before me I have adopted the approach outlined by the Full Bench above. Therefore, any economic disadvantage must be viewed in light of the Viva Energy Group as a whole.

[69] In material attached to the witness statement of Ms Cuthbert in relation to the ASX announcement of Viva Energy's acquisition of Coles Express[10] it says:

> **About Viva Energy**
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> Viva Energy (ASX: VEA) is one of Australia's leading energy companies and supplies approximately a quarter of the country's liquid fuel requirements. It is the exclusive supplier of high-quality Shell fuels and lubricants in Australia through an extensive network of over 1,330 service stations across the country.
>
> Viva Energy owns and operates the strategically located Geelong Refinery in Victoria, and operates bulk fuels, aviation, bitumen, marine, chemicals and lubricants businesses supported by more than 20 terminals and over 50 airports and airfields across the country.
>
> [underlining added]

[70] Attached to the submissions of the SDA was an announcement to the ASX on 5 April 2023 of Viva Energy's acquisition of OTR Group (apparently a convenience store/fuel outlet) in which it is said that the OTR purchase "[s]upports Viva Energy's vision to be Australia's leading convenience retailer…"

[71] Any economic disadvantage therefore needs to be viewed through the lens of a *leading* energy company that is also looking to become a *leading* convenience retailer.

[72] I acknowledge the difficulties that may arise for that aspect of Viva Energy's business concerned with the acquisition of Coles Express but it would appear that the economic disadvantage in this respect must be balanced against the advantage to Viva Energy of the acquisition as a whole.

[73] Having nothing more detailed on economic disadvantage, I consider that this aspect of those matters I am required to consider is balanced and weighs neither in favour or against the grant of the orders sought.

Section 319(3)(f) *The degree of synergy between Agreement and any workplace instrument that already covers the new employer*

[74] By virtue of s.31 of the FW Act a transfer of business will (most likely) occur, there will be transferring employees and the Agreement will, as at the time of completion of the sale, cover Viva Energy. Viva Energy seeks, by this application, to have all of its employees in the transferred business, including non-transferring employees, covered by the one industrial instrument. This will be achieved by the granting of the order sought.

[75] The SDA is correct in its observation that, at the time of the making of the application for an order in relation to non-transferring employees, there is no other workplace instrument in relation to the type of work subject to this application, that covers Viva Energy.

[76] In these circumstances this matter weighs in favour of the making of the order.

Section 319(3)(g) The public interest

[77] Viva Energy says that it is not contrary to the public interest to make the orders sought as the orders would provide more consistency in relation to employment conditions for non-transferring employees. Further, it submits that it is in the public interest to have the Agreement apply to non-transferring employees in that it will allow non-transferring employees to be 'gainfully' employed on 'more advantageous terms and conditions.'

[78] The SDA submits that the public interest in ensuring that at least the modern Award minimum wages are paid to employees outweighs any public interest consideration in the efficiency of the employer's operations.

[79] While the object of Part 2-8 of the FW Act is important so is the object of the FW Act. Section 3(b) of the FW Act states that:

> **3 Object of this Act**
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> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> …
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wages orders;…

[80] To grant the order sought will not ensure a guaranteed safety net of terms and conditions, rather, it will ensure that some non-transferring employees will receive less than they otherwise would if the Award applied and I am not convinced that such an outcome is in the public interest.

[81] I am acutely aware that, to not grant the order, will be to provide some non-transferring employees with wages less than they would otherwise receive. To grant the application however will be to have some non-transferring employees doing better than the safety net *and some worse*. In the context of the FW Act overall I do not consider it to be in the public interest to allow some workers to receive less than the safety net for the benefit of some others. The safety net is there for a reason.

[82] I am mindful, as was noted by Commissioner Simpson in *East Coast Management Services Pty Ltd*,[11] that to grant the order will allow Viva Energy to continue to apply an industrial instrument that passed its nominal expiry date in 2015. However given the transfer of business provisions this expired Agreement will continue to apply to transferring employees. To not grant the order will not resolve this circumstance. To not grant the order

will however result in different conditions applying to transferring and non-transferring employees, including wages as well as some penalty rates.

[83] In circumstances where all other matters that I am required to consider are finely balanced between the interests of the employer and those of the non-transferring employees, I consider it appropriate to bring the object of the FW Act to bear on the task before me. For this reason I consider the public interest weighs against the making of the order sought.

Other matters

[84] The SDA put in its submissions that the Commission is not confined to those matters in s.319(3) of the FW Act in determining the question before me. It submits that I should take into account that the purchase of OTR raises questions as to the terms and conditions that will apply to that group and whether Viva Energy will need to run a separate payroll system for those workers who transfer.

[85] I note the submissions of Viva Energy as to matters associated with OTR and, beyond OTR's role in propelling Viva Energy to the position it wishes to occupy as a leading convenience retailer, I have had little regard to what may or may not be the industrial arrangements should that sale proceed to completion.

[86] Viva Energy says that, by its application, it does no more than seek to have the Agreement continue to apply as it would do to new employees if the sale was not an issue.

[87] I have not had regard to the claim of the SDA and the UWU that underpayments will occur unless undertakings are provided by Viva Energy. If the order is made Viva Energy will pay its employees according to the relevant industrial instrument(s) that apply in the workplace, just as Coles Express would should the sale not proceed.

CONCLUSION

[88] There appear to be two key factors driving the application of Viva Energy – firstly the inconvenience and effect on efficiency should it have to manage two separate sets of terms and conditions in the workplace and the associated cost and inconvenience of having to develop and run a parallel payroll system should the order not be granted and, secondly, the desire for a single set of terms and conditions applying to employees performing the same work.

[89] I accept that this cost and inconvenience is real. However, Viva Energy is not a small operation – it has acquired the Coles Express retail fuels business and has advised its intention to acquire the OTR brand – also a convenience store/fuels business. This is in addition to its existing energy business. There is a clear strategic purpose of Viva Energy in these acquisitions. What should not get lost in this however is the right of employees of the business to a 'safety net of fair, relevant and enforceable minimum terms and conditions.' As Viva Energy itself said, while over 5,500 staff will transfer when the sales of Coles Express completes in May 2023 it will need to recruit over 3,200 new employees just to replace staff leaving through turnover. That is, the majority of its employees within 12 months will be covered by the Agreement that does, in circumstances, provide inferior wages outcomes to the Award that would otherwise apply.

[90] In the circumstances of this matter and having carefully considered each of the factors in s.319(3) of the FW Act I decline to grant the orders sought and therefore dismiss the application.

[91] Having declined to issue the order sought I would observe that it is still within the power of Viva Energy to negotiate a standard set of conditions to apply across the transferring and non-transferring employee cohorts.

[92] Viva Energy chose the model of purchase that left payroll and associated functions with Coles Express for up to 2 years. It must be presumed Viva Energy carried out its due diligence, including in relation to employment conditions and must have been awake to the risk of its order not being granted. It, presumably, has a contingency plan in place. No less can be expected of a 'leading' energy company looking to become a leader in convenience stores.

COMMISSIONER

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[1] Note that afternoon and night shift are defined in clause 25.5 of the Award as follows:

For the purposes of clause 25:

(a) afternoon shift means a shift commencing after noon and not later than 6.00 pm

(b) night shift means a shift commencing after 6.00 pm and not later than 4.00 am

[2] Hourly rate to be applied by Viva Energy to

[3] Award minimum hourly rate for a permanent adult employee Level 4 – R4 as at April 2023

[4] Clause 25 of the Award provides for a payment of 118% of the minimum rate for permanent afternoon shifts

[5] Clause 25 of the Award provides for 130% of the minimum hourly rate for night shift

[6] Witness statement of Matthew Galbraith, paragraph 4

[7] Clause 12.2(d) of the Award specifies that employees under 18 years of Age cannot work unsupervised between 7.00pm and 9.00pm and must not be employed between 9.00pm and 6.30am. An undertaking to this effect also forms part of the Agreement

[8] [2012] FWAFB 7858

[9] *ANMF v RSL Care* (20180 281 IR 112 at [24] **(ANMF v RSL**)

[10] Witness statement of Natasha Cuthbert, attachment NC-1

[11] [2013] FWC 8442