[2023] FWCA 758

The attached document replaces the document previously issued with the above code on 9 March 2023.

Appearances amended.

Associate to Deputy President Anderson.

Dated 10 March 2023.

DECISION

Fair Work Act 2009
s.217—Enterprise agreement

Application by Workzone Traffic Control Pty Ltd
(AG2022/2405)

WORKZONE TRAFFIC CONTROL PTY LTD ENTERPRISE AGREEMENT 2009

Building, metal and civil construction industries

DEPUTY PRESIDENT ANDERSON ADELAIDE, 9 MARCH 2023

Application to vary an enterprise agreement – ambiguity or uncertainty (s 217) – error, defect or irregularity (s 218A) – Workzone Traffic Control Pty Ltd Enterprise Agreement 2009 – casual employees – rate of pay – compliance notice by regulator – pay rates in appendix – textual considerations – surrounding circumstances – ambiguity found – uncertainty found – unnecessary to determine s 218A issue – operative date – retrospectivity – application granted

[1] By application dated 13 July 2022 as amended on 6 January 2023 Workzone Traffic Control Pty Ltd (Workzone) applied under s 217 of the *Fair Work Act 2009* (Cth) (FW Act) to vary an enterprise agreement to remove an ambiguity or uncertainty.

[2] The subject of the application is the *Workzone Traffic Control Pty Ltd Enterprise Agreement 2009* (the Agreement).

[3] Workzone seek an order varying cl 7.4.5 of the Agreement (Casual Employment).

[4] It seeks a variation retrospective to the date the Agreement commenced, being 4 February 2010.

[5] In the alternative, Workzone seeks an order under either s 218A or s 602 of the FW Act to correct an obvious error, defect or irregularity.

Background

[6] It is appropriate to briefly outline the application's somewhat unusual litigation history.

[7] Workzone's application as first filed was brought under s 217 or, in the alternative, s 602 of the FW Act. The s 602 application was not pressed at first instance in light of a Commission full bench decision in *Advantaged Care Pty Ltd v Health Services Union.*[1]

[8] At an early stage in proceedings the then Australian Building and Construction Commissioner (ABCC) intervened under s 110 of the *Building and Construction Industry (Improving Productivity) Act 2016* and opposed the application (an inspector having earlier issued a compliance notice on the employer).

[9] I issued directions on 27 July 2022.

[10] No employee organisations are covered by the Agreement and none were served nor appeared. I directed that Workzone serve its application on current employees. Workzone did so. That notwithstanding, no employee interests appeared.

[11] By consent, I granted Workzone and the ABCC permission to be represented.

[12] Two days prior to the 9 December 2022 hearing, parts of the *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) came into operation (amending Act).

[13] The amending Act abolished the Office of the ABCC and introduced transitional arrangements to that effect. Part 3 of Chapter 9 of the *Building and Construction Industry (Improving Productivity) Act 2016* (which includes s 110) was repealed. The amending Act (s 326) continued the operation of the ABCC's compliance notice that forms part of the background narrative to this matter.

[14] Under Schedule 1 Part 3 (s 324) of the amending Act the ABCC's intervention in proceedings before the Commission was continued by the Fair Work Ombudsman (FWO) on such terms as the FWO saw fit.

[15] The FWO appeared at the hearing in lieu of the ABCC. I continued the intervener's grant of permission to be represented.

[16] At the hearing, the FWO adopted the submissions filed by the ABCC save that in subsequent final written submissions the FWO qualified paragraph [13] of its primary submission. As the s 602 issue was not pressed, the 9 December 2022 hearing primarily dealt with the s 217 question.

[17] A decision was reserved.

[18] Shortly thereafter (20 December 2022) Workzone applied to re-open proceedings to vary its application seeking, in the further alternative, an order under s 218A of the amending Act.

[19] By decision on 21 December 2022,[2] and without objection, I granted permission for the application to be amended:

> "[21] It is appropriate to exercise discretion under s 586(a) of the FW Act to amend application AG2022/2405 so as to include an application to vary the Workzone Traffic Control Pty Ltd Enterprise Agreement 2009 under s 218A of the FW Act.
>
> [22] I will issue further directions for the hearing and determination of the matter. The further directions will require the applicant and intervener to file materials relating to s 218A, amongst other matters.

> [23] Until such time as the s 218A matter has been fully ventilated, a decision on the s 217 elements of the application will remain reserved."

[20] Workzone filed an amended application on 6 January 2023 and served it, as directed, on current employees and the FWO.

[21] No employee interests notified the Commission of renewed interest in the proceedings.

[22] Workzone[3] and the FWO[4] filed further materials on the s 218A issue.

[23] The s 218A issue was dealt with by written submissions. Neither Workzone nor the FWO sought to call or recall witnesses whose statements had been admitted by consent, nor make further oral submissions.

[24] A decision on all issues was again reserved on 23 February 2023.[5]

[25] Thus, although these proceedings have necessarily been conducted in two parts (the s 217 and the s 218A applications) this decision deals with all matters, noting that the s 602 application was not pressed.

Facts

[26] I received into evidence, by consent and without requiring cross-examination, three statements filed by the applicant:

- Andrew White, Managing Director;[6]
- Ilario (Larry) Dimasi, Employee Trainer (former traffic controller);[7] and
- Clive John Summers, Human Resource Business Partner.[8]

[27] The factual background is not in dispute.

Workzone

[28] Workzone provides traffic management services in South Australia for planned or unscheduled emergency work in metropolitan, regional and rural areas.

[29] It engages a large number of casual and a smaller number of weekly hired employees. Approximately 230 of 250 current employees are casuals. Currently, all traffic controllers are casuals. Its administrative staff include weekly hired employees.

Pre FW Act

[30] Prior to the commencement of the FW Act, Workzone employed persons on the terms of industrial instruments made under the then State (South Australian) industrial relations system.

[31] Upon the passage of the FW Act in 2009 and the imminent commencement of modern awards in 2010, Workzone commenced negotiations with its employees for an enterprise agreement under the FW Act.

2009 Agreement

[32] Following negotiations, on 11 December 2009 a first enterprise agreement was made between Workzone and its employees, the *Workzone Traffic Control Pty Ltd Enterprise Agreement 2009*.[9]

[33] In the period prior to making the Agreement, Workzone arranged for a consultant to be the bargaining representative of the employer during negotiations, with its Managing Director Mr White also taking an active role. Mr Dimasi was one of three bargaining representatives of employees (being one of two representing traffic controllers). At that time, Mr Dimasi was employed as a traffic controller.

[34] On 28 January 2010 the Agreement was approved by the then Fair Work Australia (subsequently, the Commission) under the then newly enacted FW Act.[10] The Agreement came into operation on 4 February 2010, with a nominal expiry date of 3 February 2014.

Incorporated awards

[35] Modern awards commenced on 1 January 2010. Rates being paid under premodern awards remained payable until 1 July 2010.

[36] In the month immediately prior to the Agreement commencing, employees of Workzone were employed under the relevant modern award (from 1 January 2010) and prior to that, premodern awards.

[37] When the Agreement first commenced, employees did not receive a pay increase. A wage increase was not negotiated when the Agreement was first made. Employees continued to receive rates of pay that had been payable under premodern awards.

[38] Upon the Agreement commencing, the terms of relevant modern awards applicable to Workzone's employees were incorporated into the Agreement by virtue of cl 4.3 of the Agreement, subject to any inconsistency.

[39] In respect of traffic controllers, the modern award incorporated was the *Building and Construction General On-site Award 2010*.

[40] With respect to wages, and as a result of incorporation of the modern award, Workzone increased rates of pay for traffic controllers (including casuals) as the minimum rate in the modern award came to be increased. The first of those increases was the minimum rate increase ordered by Fair Work Australia from 1 July 2010.[11]

[41] In respect of administrative employees, the modern award incorporated was the *Clerks Private Sector Award 2010*. Workzone also increased rates of pay for administrative employees (including casuals) as the relevant modern award rate was increased, and not at the time the Agreement commenced. The first of those increases was also from 1 July 2010.

Casual loading transition

[42] At the time modern awards were made, casual loadings payable by employers under premodern awards (including loadings derived from applicable State awards) were not consistent. Some were set at 25%, others at 20% and others at different percentages or at dollar amounts.

[43] By decision of a full bench of the Australian Industrial Relations Commission on 2 September 2009[12] (the 2009 transitional decision), where a casual loading being paid by an employer at the time modern awards commenced (1 January 2010) was less than 25%, transitional increases to the loading would apply. For example, where the casual loading being paid was 20%, that loading was to be increased to 25% via a five-year transition (an increase on 1 July each year commencing 1 July 2010 until 1 July 2014).[13]

[44] The casual loadings in modern awards applicable to Workzone employees (the *Building and Construction General On-site Award 2010* and the *Clerks Private Sector Award 2010*) at the date modern awards commenced (1 January 2010) were set at 25%[14] subject to the transitional decision applying where a lesser percentage was being lawfully paid by an employer at the time the modern award came into operation.

[45] The premodern awards applicable to Workzone were the then State *Construction and Maintenance (South Australia) Award* and the *Clerks (South Australia) Award.*

Post-Agreement conduct

[46] Although the Agreement reached its nominal expiry date on 3 February 2014, it was not subsequently re-negotiated.

[47] In the years following, Workzone increased rates of pay in Appendix A by movements in the relevant modern award and varied conditions by relevant amendments to modern awards (which were reviewed and re-issued by the Commission in 2020) and National Employment Standards (NES).

Alleged underpayment and compliance notice

[48] In February 2022 a former casual employee raised a complaint with Workzone alleging underpayment. In March 2022 that employee took their complaint to the ABCC. The former employee asserted that the Agreement required Workzone to pay casual employees a loading of 25% on top of the rates set out in Appendix A. Workzone had, for twelve years, been paying casual employees the hourly rate specified for casuals in Appendix A of the Agreement. Workzone had done so because it considered that the casual rates specified in Appendix A were inclusive of the casual loading.

[49] On 16 June 2022 an inspector of the ABCC advised Workzone that she had formed a view that the employer was in breach of the Agreement with respect to hourly rates paid to the former employee. The ABCC issued a compliance notice under the then s 99 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth).

Variation application

[50] Workzone responded to the compliance notice and the ABCC's interpretation of the Agreement by making this application.

[51] Workzone seek an order that the Agreement be varied to correct an ambiguity or uncertainty by deleting cl 7.4.5 and inserting the following in lieu:

> "7.4.5 A casual Employee shall be paid at the rate as contained in Appendix A: applicable to the Employee's relevant classification. The casual loading of 20% transitioned up to 25% in accordance with the Modern Award, of the ordinary rate, is in lieu of all forms of paid leave (with the exception of long service leave), jury service and public holidays not worked."

[52] Workzone seek that the variation be retrospective by more than twelve years, to the date the Agreement commenced (4 February 2010).

[53] In the alternative, Workzone seek an order that the hourly rates of pay in Appendix A be amended to remove the casual loading.

[54] In the further alternative, Workzone seek an order under s 218A correcting what is said to be an obvious error, defect or irregularity.

[55] In accordance with Commission directions, the application and the amended application were served by Workzone on employees (in August 2022 and January 2023 respectively).

[56] According to Mr Summers, three employees sought information and clarification. No current employee has raised concerns with Workzone in relation to its application to vary cl 7.4.5.

Matters in issue

[57] The issues before the Commission are fivefold:

1. Is the Agreement "ambiguous" within the meaning of s 217 with respect to the rate of pay of casual employees, having regard to cl 7.4.5 and Appendix A and the Agreement read as a whole?;

2. Is the Agreement "uncertain" within the meaning of s 217 with respect to the rate of pay of casual employees, having regard to cl 7.4.5 and Appendix A and the Agreement read as a whole?;

3. In the alternative, does the Agreement relevantly contain "an obvious error, defect or irregularity in substance or form" within the meaning of s 218A?;

4. If, but only if the Agreement is ambiguous or uncertain within the meaning of s 217 or contains an obvious error, defect or irregularity within the meaning of s 218A, should a discretion be exercised to vary the Agreement, and if so, on what terms?; and

5. If the Agreement is to be varied, should the variation be prospective or retrospective, and if retrospective, should it be retrospective to the date sought by the applicant?

Submissions

Workzone

[58] Workzone's primary submissions were directed at the s 217 issue.

[59] Whilst accepting that the Commission's discretion to vary under s 217 is enlivened only where an ambiguity or uncertainty is found, Workzone submit that the Agreement is both ambiguous and uncertain with respect to the rates of pay for casual employees.

[60] Workzone submit that the ambiguity arises from a combined textual reading of cl 7.4.5 and Appendix A, and what it submits are provisions reasonably open to multiple meanings.

[61] Workzone submit that the uncertainty arises from the application of cl 7.4.5 and Appendix A, and the potential to double count a casual loading.

[62] Workzone rely on the text of the Agreement, as well as surrounding circumstances to advance each of these propositions. Those surrounding circumstances include what Workzone submits was a common intention that rates for casual traffic controllers were to be those identified in Appendix A.

[63] Workzone also relies on post-Agreement conduct (custom and practice), being the twelve years of payment of casual employees under Appendix A without it adding a further sum to the specified casual rate, and the absence for twelve years of any dispute by employees to that approach until the February 2022 complaint by a former employee.

[64] Workzone submit that these surrounding circumstances and post-Agreement conduct can be taken into account in deciding whether the Agreement is ambiguous or uncertain.

[65] Workzone submit that, upon finding an ambiguity or uncertainty, the Commission's discretion should be exercised to vary the Agreement because it is not in the interests of the continuing operation of the Agreement nor in the interests of the employer or its employees for an Agreement with an ambiguous or uncertain meaning or application on a matter as fundamental as the casual rate of pay to continue to operate unvaried.

[66] Workzone further submit that fairness considerations under s 578, which it says are relevant to applications under s 217, also weigh in favour of varying the Agreement in the terms sought because to fail to do so would result in double-counting and leave the employer exposed to a claim of an additional casual loading being paid on a rate that, according to the employer, already incorporates a casual loading.

[67] Workzone submit that the variation should be retrospective to the date the Agreement commenced because doing so would restore the status quo and reflect the common intention of those who made the Agreement, reflect subsequent post-Agreement conduct, and protect those who made the Agreement from opportunistic claims for sums due amounting to double counting based on an interpretation of the Agreement that does not reflect the common intention.

[68] In the alternative, Workzone submit that if not ambiguous or uncertain, the Agreement contains an obvious error, defect or irregularity. It submits that the error is in the drafting of cl

7.4.5 given that "three of the rates in Appendix A are identified as already being casual rates of pay"[15]. It is said to be a defect of substance because "applying a casual loading to a rate that includes a casual loading would be irregular"[16].

[69] Workzone submit that the same discretionary grounds exist in favour of making the variation should an error be found, and the Agreement should be retrospectively varied on the same terms.

FWO

[70] The FWO submit that the Agreement is not ambiguous or uncertain (the s 217 issue) but that, if found to contain a relevant error (the s 218A issue), a variation as sought by Workzone may be appropriate.

[71] The FWO submit that the terms of the Agreement and in particular cl 7.4.5 are pellucidly clear. It submits that no ambiguity or uncertainty exists having regard to the terms of the Agreement or the Agreement when read as a whole.

[72] The FWO submit that cl 7.4.5 expressly provides that the rates in Appendix A must apply and, with respect to casual employees, with the addition of a loading. It does so because it uses the phrase "plus a casual loading".

[73] The FWO submit that it is impermissible for the Commission under s 217 to re-write the Agreement or vary the Agreement simply because those that made the Agreement may have made a mistake. The FWO submit that a mistake in an Agreement is not an ambiguity or uncertainty. Absent an ambiguity or uncertainty, no variation can be made under s 217 irrespective of merit or fairness considerations. There are other avenues for the Agreement to be varied under the FW Act to address the issue, including by making a fresh Agreement.

[74] The FWO submit that simply because a compliance notice has been served on the employer by a regulator asserting a breach of the Agreement with respect to rates of pay does not mean that the Agreement is ambiguous or uncertain with respect to those rates of pay. The test of ambiguity or uncertainty is objective, not subjective.

[75] The FWO submit that s 218A is intended to operate as a 'slip rule' and that if any of the conditions set out in *CFMEU Re Timber and Allied Industries Award 1999*[17] are present in this matter then "it may be appropriate for the Commission to exercise its discretion and vary the Enterprise Agreement as sought by the Applicant"[18].

[76] The FWO makes no submission on the employer's claim for retrospectivity.

Consideration

[77] I deal firstly with the s 217 issue.

[78] Workzone has standing to make this application. It is an employer "covered by the agreement" within the meaning of s 217(1)(a). As the Agreement sought to be varied has not ceased to operate then issues of the type recently considered in *Qube Ports Pty Ltd*[19] do not arise.

Legal principles

[79] Section 217 of the FW Act provides:

> **"217 Variation of an enterprise agreement to remove an ambiguity or uncertainty**
>
> (1) The FWC may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:
>
> (a) one or more of the employers covered by the agreement;
> (b) an employee covered by the agreement;
> (c) an employee organisation covered by the agreement.
>
> (2) If the FWC varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement."

[80] The approach to s 217 was considered by the Full Court of the Federal Court in *Bianco Walling Pty Ltd v CFMMEU*.[20] Based upon this and other decided cases, the relevant principles are:

- the presence of ambiguity or uncertainty is a jurisdictional prerequisite to the exercise of the discretion to vary an enterprise agreement under s 217;
- the Commission is required to make a positive finding as to the existence of ambiguity or uncertainty;
- consideration of this question involves an objective assessment of the words in question, considered in their context;
- the Commission should endeavour to find the industrial purpose behind the disputed provision having regard to the words used by those who made the Agreement and their common intention (if any) at the time the Agreement was made.[21] Evidence of surrounding circumstances including common intention or objectively established past or current practice is relevant in making the required evaluative assessment;[22]
- the task is not one of interpretation of the agreement definitively in the sense of determining its "true meaning" or the "single correct meaning".[23] The task is to determine whether a relevant ambiguity or uncertainty exists;
- while principles applying to the construction of enterprise agreements may be relevant, they are not strictly applied.[24] Other factors that may be taken into account include those referenced in s 578 of the FW Act such as the objects of the FW Act and equity, good conscience and the merits of the case;[25]
- the terms "ambiguity" and "uncertainty" have different meanings, and each must be considered;[26] and
- the Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival constructions objectively advanced and an arguable case is made out for more than one contention.[27]

The Agreement

[81] Clause 7.4.1 of the Agreement provides that a casual employee is one "engaged and paid on an hourly basis".

[82] Clause 7.4.5 provides:

> "A casual Employee shall be paid the rate as contained in Appendix: A applicable to the Employee's relevant classification plus a casual loading of 20% transitioned up to 25% in accordance with the Modern Award, of the ordinary time rate. The casual loading is in lieu of all forms of paid leave (with the exception of long service leave), jury service and public holidays not worked."

[83] Appendix A provides:

APPENDIX A - TABLE - CLASSIFICATIONS & PAY RATES

Item Description	Salary Annual	Hourly Rate	M-F after 8 hrs 150%	M-F after 10 hrs 200%	Public Holidays 250%	Sat - first 2 hrs 150%	Sat - after 2 hrs 200%	Sat - after 12pm 200%	Sunday 200%	Flat Rate Per Day	Flat Rate Per Week
Traffic Controller - Level 1 CAS Construction Worker Grade 1		$19.75	$29.63	$39.50	$49.38	$29.63	$39.50	$39.50	$39.50		
Traffic Controller - Level 3 CAS Construction Worker Grade 3		$20.95	$31.43	$41.90	$52.38	$31.43	$41.90	$41.90	$41.90		
Traffic Controller - Level 3 Construction Worker Gr 3 Perm		$16.79									
Leading Hand		$1.40									
Travel		Equal to ordinary hourly rate per hr									
First Aid Allowance		As per Award									
Living Away From Home Allowance										$39.10	
Vehicle Allowance A - Metro										$11.10	
WTC - Vehicle Allowance B – own vehicle										$33.00	
WTC On-Site Meal Allowance		0.5 Hr of Ord Hrly Rate									
Admin - Casual - level 3		$21.46									
Admin - Permanent Level 3		$17.87									
Admin - Permanent Level 5		$19.97									
Admin - Permanent Level 5		$25.00									
Admin - Trainee		$17.87									
Admin - Salary	$45,000.00										
Admin - Salary	$50,000.00										

[84] Noting that the exercise under s 217 is not one of interpretation to discern a singular correct meaning of the instrument, the construction principles set out in leading cases such as *Ridd*[28], *Workpac v Skene*[29] and *Berri*[30] remain of general relevance, at least insofar as the task under s 217 is to examine the text of the Agreement and consider whether alternate meanings are objectively open. Whilst these principles are to be considered insofar as relevant, the following are of particular relevance to the task of understanding the industrial purpose of the disputed provisions:

- all words in an enterprise agreement must *prima facie* be given some meaning and effect.[31] They should "contribute to a sensible industrial outcome" and one "that will operate fairly towards both parties"[32]; and

- enterprise agreements are to be considered according to well-accepted principles long settled in the industrial context.[33] Those principles include the rejection of "narrow or pedantic approaches" and a recognition that provisions of an agreement (or award) are

> to be approached recognising that those who draft such provisions are likely to have "a practical bent of mind" and are "more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon."[34]

[85] These observations are relevant to the task required by s 217.

[86] Whilst in this matter a textual focus is necessarily on cl 7.4.5 and Appendix A, in deciding whether an ambiguity or uncertainty exists those provisions should be read in the context of the Agreement as a whole. The following other provisions provide context:

> Clause 4.3
>
> "This Agreement will incorporate the terms of the Award. If an incorporated Award term is inconsistent with an expressed term of this Agreement, the express term in this Agreement prevails over the incorporated Award term to the extent of the inconsistency."
>
> Clauses 15.1.2 and 15.1.3
>
> "The Company commits to provide wage rates at least equivalent to those outlined in Appendix A of this agreement.
>
> The schedule of ordinary time rates comprehends annual increases to minimum rates over the life of the agreement."

Ambiguity

[87] Read in isolation, the text of cl 7.4.5 is straightforward. It states that a casual employee is to be paid the rate specified in Appendix A "plus a casual loading".

[88] This is orthodox language for an industrial instrument, including an enterprise agreement approved under the FW Act. Modern awards made under the FW Act (and premodern awards including applicable State awards) commonly provide a casual loading; that is, one where the hourly rate payable to a casual is increased by a set percentage to compensate for certain non-accrued entitlements.

[89] However, assessing whether an ambiguity or uncertainty exists is not simply a consideration of one clause or one phrase in one clause read in isolation. The agreement as a whole must be considered and the relevant provision must be read in context having regard to its industrial purpose.[35]

[90] Clearly, cl 7.4.5 must be read in the context of Appendix A. That much is clear from the text itself; the clause expressly references Appendix A.

[91] With respect to traffic controllers, Appendix A (column 1) provides three classifications (referred to as "Item Descriptions"):

- Traffic Controller Level 1 CAS;

- Traffic Controller Level 3 CAS; and

- Traffic Controller Level 3.

[92] The uncontested evidence of Mr White is that, at the time of making the Agreement and since, all Traffic Controllers Level 1 were and have since been casual employees. This was in contrast to Traffic Controllers Level 3 for which both casual and weekly hired provision was made (though all are presently casual employees).

[93] Each of the item descriptions in Appendix A are contained in a table which also contains a construction worker classification. Alongside the "Construction Worker Gr 3" description is the abbreviation "Perm".

[94] It is more than tolerably arguable, and not contested in these proceedings, that the letters "CAS" in first two boxes of column 1 of Appendix A is an abbreviation of the word "CASUAL", and that the letters "Perm" in the third box is an abbreviation of the word "Permanent". I so find.

[95] The hourly rates set out in Appendix A (column 3) applicable to each described position are rates applicable to either a casual or a permanent employee as the case may be.

[96] That the Agreement (cl 7) permits the employer to employ both casual (hourly hired) and permanent (weekly hired) employees is consistent with this construction.

[97] Thus, Appendix A provides differential hourly rates of pay between casual and permanent employees. This extends to employees of the same classification (that is doing the same work). For example, a Traffic Controller Level 3 who is a casual has a different hourly rate specified in Appendix A than a Traffic Controller Level 3 who is a permanent employee.

[98] Moreover, under Appendix A, a casual Traffic Controller Level 3 has a higher hourly rate than a permanent traffic controller at the same level.

[99] Turning to quantum, the hourly rates specified are:

- Traffic Controller - Level 1 CAS $19.75

- Traffic Controller - Level 3 CAS $20.95; and

- Traffic Controller - Level 3 $16.79.

[100] The differential between $16.79 and $20.95 is $4.16, or 24.8%.

[101] Appendix A contains position descriptions beyond Traffic Controllers or Construction Workers. It includes administrative employees. With respect to a Level 3 Administrative Employee, a similar distinction is made in Appendix A between casual and permanent employees, though the Appendix uses unabbreviated descriptions ("casual" and "permanent"). Once again, the Appendix provides a differential and higher hourly rate of pay for a casual Administrative Employee Level 3:

- Admin - Casual - level 3 $21.46

- Admin - Permanent Level 3 $17.87

[102] The differential between $17.87 and $21.46 is $3.59, or 20.1%.

[103] It is apparent from these textual considerations, read in context, that the industrial purpose of the Agreement as it relates to casual employees was that the rate of pay for casuals would be identified by reference to Appendix A, and that casual employees would receive a loading to the hourly rate when compared to non-casual employees.

[104] Given the then imminent application of modern awards across industries, the Agreement consolidated into one instrument pay and conditions of employment applicable to persons working in a variety of classifications across the Workzone business. Based on the evidence,[36] this simplification extended to expressing casual rates payable in a manner that did not require the complexity of re-calculation.[37]

[105] Given the express reference to transition in cl 7.4.5 and given that the Agreement expressly incorporates the relevant modern awards (which, as noted, provided for a casual loading of 25% or a five year transition from lower casual loadings to that level), an inference can be drawn that the rates for casual employees in the Agreement were intended to be set at 20% or 25% depending on the relevant classification.

[106] The evidence before me from company officers as to what casual loading was, in fact, being paid by Workzone to traffic controllers and administrative employees at the time the Agreement was made and commenced is imprecise. Whilst the evidence of Mr White and Mr Dimasi suggests that it was either 20% drawn from the State awards or 25% drawn from the modern awards, it is unclear on their evidence whether the loading was the same for both classes of employees.[38] However, the documentary material and in particular the rates set out in Appendix A in the approval decision, when combined with the uncontested evidence that no increase in remuneration occurred at the time the Agreement commenced, supports a strong inference that casual traffic controllers were being paid a 25% loading whilst casual administrative employees a 20% loading.

[107] Without being exhaustive, the ordinary meaning of "ambiguity" includes the existence of a doubtful or equivocal meaning, or imprecision or vagueness in content or expression.[39] An agreement may be ambiguous if susceptible to more than one meaning or if its meaning is not clear.[40]

[108] I am well satisfied that on a textual reading of the Agreement as a whole, and in particular cl 7.4.5 when read in conjunction with Appendix A, that an ambiguity exists with respect to the rate of pay for casual employees and in particular whether the rate specified for "Traffic Controller - Level 3 CAS" and the rate specified for "Admin - Casual - level 3" is inclusive of the casual loading required to be paid.

[109] The ambiguity arises because, for casual employees, cl 7.4.5 requires (on the one hand) payment of the Appendix A hourly rates "plus a casual loading" whilst (on the other) the hourly rates in Appendix A already specify different hourly rates between permanent and casual employees. In other words, cl 7.4.5 provides that casual employees are to be paid "the rate in Appendix A applicable to the employee's relevant classification plus a casual loading" whereas the hourly rates specified in Appendix A expressly provide differential hourly rates between

casual and permanent employees of those same descriptions, and the casual hourly rates specified are higher.

[110] Thus, a construction reasonably open is that the hourly rates specified for casuals in Appendix A include the required casual loading notwithstanding cl 7.4.5 stating that "the rate" payable is to be the rate specified in Appendix A "plus a casual loading".

[111] Put another way, it is more than reasonably open that "the rate" referred to in cl 7.4.5 is to be read as a reference to the unloaded hourly rate in Appendix A (that is, the rate for permanent employees) which cl 7.4.5 then provides must be paid "plus" the relevant modern award casual loading. Under that construction, the apparent confusion between the phrase "plus a casual loading" and the higher casual hourly rates in Appendix A falls away. That construction is reasonably open on a textual consideration of the Agreement.

[112] My conclusion that a textual ambiguity exists is also supported by reference to the actual rates provided for in Appendix A. The differential between a permanent and casual Traffic Controller Level 3 is 24.8%. The differential between a permanent and casual Administrative Employee Level 3 is 20.1%. Allowing for rounding to the nearest percent, these percentages appear to align to a casual loading of 20% to administrative employees and 25% to traffic controllers.

[113] As the FWO acknowledged in its final submissions, the difference between 124.8% and 125% is only marginal.[41]

[114] Further, as it is reasonably arguable that the hourly rate specified for "Traffic Controller Level 3 CAS" includes the casual loading, then it is similarly reasonably arguable that "Traffic Controller Level 1 CAS" likewise does so notwithstanding that no Traffic Controller Level 1 classification is specified for permanent employees.

[115] An alternate construction, one advanced by the FWO and almost wholly reliant on the phrase "plus a casual loading" in cl 7.4.5, remains reasonably arguable given the terms of cl 7.4.5 though I disagree with the FWO's submission that the Agreement is pellucidly clear. It is not so because that construction fails to take account of the fact that Appendix A specifies differential hourly rates between permanent and casual employees, with the casual rates being higher. The FWO was thus left to speculate in its primary submission that the differential may be the product of error or some other cause.

[116] Further, the FWO's construction could well have the effect of double counting a casual loading. That construction is at odds with the evidence that no increase was in fact paid upon the Agreement commencing.

[117] As noted, the task of determining whether an ambiguity exists is not one where the one correct meaning of the Agreement is to be discerned. Ambiguity includes circumstances where reasonable doubt objectively exists. I take into account that ambiguity does not exist simply because multiple interpretations are advanced, as such a contention may well be self-serving.[42] However, in this matter, those alternate meanings are objectively and reasonably arguable and the ambiguity arises not from the mere fact of dispute.

[118] That being so, and on the basis of these textual considerations, I find there to be ambiguity in the Agreement with respect to the rates payable to casual employees.

Uncertainty

[119] The ordinary meaning of "uncertain" includes something not definitively or surely known or which gives rise to reasonably formed doubt.[43] Uncertainty includes uncertainty, objectively found, in the application of an industrial instrument.

[120] I conclude that the Agreement is uncertain within the meaning of s 217.

[121] I have found that ambiguity exists between the terms of cl 7.4.5 and Appendix A having regard to textual considerations.

[122] This supports a conclusion that the Agreement is uncertain in its application in the sense contemplated by s 217. Reasonably available competing constructions exist with obvious practical consequences for determining rights and obligations of the employer and relevant employees.

[123] Neither the employer nor employees can readily discern from the text of the Agreement what is to be the lawfully prescribed casual rate of pay given the ambiguity that exists. Both the employer and employees are left to speculate as to whether the higher rate prescribed in Appendix A for casual employees includes or does not include the casual loading, and if it does not, what that higher rate represents.

[124] This gives rise to uncertainty in the Agreement's application given that it is the obligation of the employer to apply the Agreement and make correct payments to casual employees for each hour worked to at least at the level lawfully required.

[125] The uncertainty is not merely technical or a matter of form. It is a matter of substance. Each of cl 7.4.5 and Appendix A have work to do and in combination they purport to regulate a matter of importance to the operation of the industrial instrument, being rates of pay (in this instance, the rates payable to casual employees).

[126] Further, whilst the reference in cl 7.4.5 to a "casual loading of 20% transitioned up to 25%" is a clear reference to the operation of the 2009 transitional decision, it only makes sense if read down to only refer to those employees of Workzone that were not in fact already being paid a 25% loading at the time the Agreement was made. That consideration adds uncertainty to the application of the Agreement.

[127] These considerations point to a finding that the Agreement is uncertain with respect to the rates payable to casual employees.

Surrounding circumstances

[128] I have found that textual considerations warrant a conclusion that the Agreement, with respect to the rates payable to casual employees, is both ambiguous and uncertain.

[129] Whilst these textual considerations suffice, for the following reasons, I conclude that the surrounding circumstances support the conclusion reached.

[130] The surrounding circumstances relate to both common intention at the time the Agreement was made, and custom and practice since that date.

[131] Workzone submit that the evidence supports a finding of common intention that the casual hourly rates in Appendix A incorporate the casual loading required by cl 7.4.5.

[132] Workzone rely on the evidence of Mr White and Mr Dimasi. As noted, Mr White was Managing Director at the time the Agreement was made, and Mr Dimasi was one of three employee bargaining representatives (one of two representing traffic controllers).

[133] The FWO submit that the evidence of Mr Dimasi and Mr White is insufficient to make a finding of common intention.

[134] The evidence of Mr White and Mr Dimasi support a finding that the employer intended and that Mr Dimasi understood, from the documentation supplied on 25 November 2009, the bargaining meetings held on 10 and 20 November 2009 and their reading of the agreement as put to a vote on 11 December 2009, that a casual loading was to be payable and that the casual rate payable would not require employees to make a further calculation beyond the hourly rates specified in Appendix A.

[135] This is evidence of a common understanding between Mr White and Mr Dimasi. It weighs somewhat in favour of a finding of common intention.

[136] However, this evidence is not, of itself, sufficient to make such a finding. I take into account that "common understanding"[44] is a "limited principle"[45] and "only capable of application where there is clear evidence of a common understanding as to the meaning of the provision and that the parties did not act for another reason, including common inadvertence".[46]

[137] I also take into account that a diversity of interests are involved in making enterprise agreements. This warrants a cautious approach to evidence of positions advanced during negotiations.[47] I do not make a finding of common intention based on positions advanced in negotiations. I do so on the basis of an objective assessment of conduct and the history of the Agreement, and on the basis of inferences reasonably drawn.

[138] That the employer intended a particular outcome is a singular, not common, intention. There were three employee bargaining representatives, of which Mr Dimasi was but one. Forty-four employees were entitled to vote, of which thirty-two did.[48] The minutes of the bargaining meeting of 10 November 2009[49] make no express reference to the casual loading issue or the status of the rates in Appendix A.

[139] However, other surrounding circumstances to the making of the 2009 Agreement are:

- the rates subject to the vote were those as set out in the Appendix A of the Agreement;
- those rates reflected rates paid at the time to casual employees that were employed by Workzone;
- those rates included a casual loading of at least the amount required by applicable premodern (including State) awards; and

- there was no negotiation at the time the 2009 agreement was made resulting in an immediate increase to hourly rates of pay including to casuals. Those hourly rates remained unaltered until the incorporated modern awards were varied months later.

[140] These surrounding circumstances, when considered alongside the evidence of Mr White and the evidence of Mr Dimasi lead me to conclude that the common intention of those that made the Agreement was that the casual rates to be payable were those specified in Appendix A and that those rates as specified incorporated the agreed casual loading and required no further addition or recalculation to the specified casual hourly rates.

[141] I also take into account that the process of making the Agreement was orderly and, having regard to the approval decision, compliant with the then provisions of the FW Act.

[142] Also relevant to the consideration of surrounding circumstances under s 217 is the conduct of the employer and employees since the Agreement was made.[50]

[143] In this matter, that conduct is relevant to whether the common intention at the time the Agreement was made remained the custom and practice during the years that followed. That issue is relevant both to a finding as to whether there is ambiguity or uncertainty and also relevant to whether the Agreement should (if ambiguous or uncertain) be varied and if so, how.

[144] I have found that the Agreement was not renegotiated once it commenced. It has continued to operate beyond its nominal expiry by force of law.

[145] Mr White's evidence, which was not contested, was that the employer paid casual employees in accordance with the rates specified in Appendix A upon the commencement of the Agreement and has continued to do so in the years thereafter.

[146] Mr White's evidence was also that no employee or employee interests (including no casual in receipt of the hourly rates paid) raised an issue or dispute with the employer over the casual rate paid in the twelve years between February 2010 and February 2022. No demand, individual or collective, was made to the employer to not continue the approach it had adopted from the time the Agreement commenced.

[147] Mr White's evidence was that it was only when a former employee raised the issue of an alleged underpayment on 22 February 2022 that the employer had any reason to believe that a question-mark existed over the rate payable to casual employees.

[148] Mr Summer's evidence was that no current employee has raised concerns about the proposed change to cl 7.4.5 nor opposed that change.[51]

[149] Given this, I find that an established custom and practice existed in the twelve years following the commencement of the Agreement that reflected the common intention, and that this custom and practice was known to employees and not disputed by employees or employee interests until questioned by a former employee in February 2022.

[150] These surrounding circumstances, being the common intention at the time the Agreement was made and the twelve years of uncontested custom and practice, support a finding that, in the face of the contrary construction now advanced, an uncertainty exists in the application of the Agreement. The construction contended by the FWO would have the effect

of displacing twelve years of established custom and practice and be discordant with the common intention.

[151] A finding of common intention is relevant to whether an ambiguity or uncertainty exists.[52] In this matter, it supports the finding I have made by reference to textual considerations. Also in support is the finding of established and long-standing custom and practice.

Conclusion on ambiguity and uncertainty

[152] I have applied established principles governing whether an ambiguity or uncertainty exists within the meaning of s 217 of the FW Act.

[153] I have conducted an objective examination of the provisions in question in the context of the instrument read as a whole, and other relevant circumstances.[53]

[154] I have found, upon considering the text of the Agreement and discerning its industrial purpose, that the Agreement is both ambiguous and uncertain within the meaning of the FW Act insofar as it concerns rates payable to casual employees.

[155] These textual considerations alone, and without having to take surrounding circumstances such as common intention and post-Agreement conduct into account, lead me to conclude that the Agreement is ambiguous and uncertain with respect to the hourly rates payable to casual employees.

[156] I have also concluded that the surrounding circumstances support this finding. No surrounding circumstances point against such a conclusion.

[157] One unusual feature of this matter is that in between the period the Agreement was made (11 December 2009) and commenced (4 February 2010) the FW Act (and modern awards) commenced (1 January 2010). Whilst contextually relevant, that unusual feature does not directly bear upon my finding of ambiguity or uncertainty, as the terms of the Agreement contemplated those events taking place.

[158] For these reasons, I conclude that the *Workzone Traffic Control Pty Ltd Enterprise Agreement 2009* is ambiguous and uncertain with respect to the hourly rates payable to casual employees.

Should the discretion be exercised?

[159] A finding of ambiguity or uncertainty in an enterprise agreement is a condition precedent to the exercise of power under s 217.[54] In this matter, I have found that both ambiguity and uncertainty exists.

[160] The condition precedent is satisfied.

[161] However, it does not automatically follow that because the relevant jurisdictional fact(s) are established, that the discretion to remediate the ambiguity or uncertainty must be exercised.[55]

[162] Is it appropriate to do so having regard to the overall circumstances?

[163] An enterprise agreement made and approved under the FW Act has legal force. It is an instrument of significance. It is binding on those covered by it. The rights and obligations it creates are matters of substance. They concern wages and conditions of employment. Its legal efficacy arises under statute, not simply by private contract.[56] In this matter, the subject of the application (casual wage rates) is not peripheral or incidental. It is of central importance. Given the instrument's binding nature, it is desirable that certainty exists as to the rates of pay of casual employees.

[164] Having found the existence of an ambiguity or uncertainty of material significance it is fair and proper to exercise powers under s 217 of the FW Act to vary the agreement to cure the ambiguity or uncertainty, insofar as possible. There is utility in doing so. Casual employees remain employed; indeed, they are currently the largest employee cohort.

[165] These factors weigh in favour of exercising a discretion to remove the ambiguity or uncertainty.

[166] I also give weight to the industrial context in which the ambiguous or uncertain terms were created. The instrument is not the result of a legal determination or arbitration. It is the product of collective bargaining between a private business and private individuals voting by ballot. Those covered are likely to have had a practical bent of mind focused more on the industrial relations environment than legal niceties or jargon.[57]

[167] Mr Dimasi's evidence[58] that he and other traffic controllers he spoke to were interested in knowing what the casual rate was and not having to undertake further calculations to determine the rate payable is consistent with such practicality.

[168] Nor should it be considered unusual that a collective agreement may contain an ambiguity or uncertainty. By enacting s 217, the legislature has contemplated such a scenario and provided a solution. It has conferred upon the Commission a discretionary power to vary an enterprise agreement to "remove" ambiguities or uncertainties.

[169] The finding of common intention and established custom and practice also weighs in favour of exercising the discretion. It is a "significant factor."[59] Having ascertained that intention, it would be unusual for other considerations to weigh in favour of a variation that was inconsistent with the intention of the parties.[60]

[170] Further, if the ambiguity or uncertainty is not rectified, it exposes persons bound by the instrument to potential dispute over the rates payable to casual employees, and in particular dispute over the application of the Agreement notwithstanding a common intention and established custom and practice.

[171] Allowing that prospect to manifest would not be consistent with the orderly framework for collective bargaining set by the objects of the FW Act (section 3(f)) or Part 2-4 specifically.[61]

[172] In combination, these are significant factors that weigh in favour of exercising a discretion to vary the Agreement.

[173] There are however some factors which weigh against:

- the Agreement is well past its nominal expiry.[62] It has been open to Workzone or its employees for many years to exercise statutory rights to re-negotiate a fresh enterprise agreement that does not contain ambiguous or uncertain terms; and

- declining to make orders under s 217 would not have the immediate effect of compelling Workzone to abandon established custom and practice. It would simply allow claims by current or past employees to be brought before a court of competent jurisdiction and for a court to determine the correct meaning.

[174] However, Workzone could not reasonably have been expected to identify the need to address the issue by bargaining or otherwise until it became aware of a dispute over casual rates in February 2022. Until then, long-standing custom and practice had applied and there was no contested industrial issue.

[175] Further, leaving the ambiguity or uncertainty to be resolved by future collective bargaining invites disputation over a matter which is and has been the subject of common intention since 2009. It would result in bargaining taking place on an ambiguous and uncertain text. Further, were the Agreement renegotiated on terms that cured the ambiguity or uncertainty, any new enterprise agreement would only have prospective effect[63] and could not address present or past rights and obligations including the potential of windfall gains arising from double-counting of the casual loading.

[176] I have considered these matters. I conclude that the factors in favour of exercising a discretion weigh significantly more strongly than those against.

[177] For these reasons and having regard to the overall merits (s 578 of the FW Act), it is appropriate to exercise a discretion to vary the Agreement to remove, insofar as possible, the ambiguity or uncertainty.

Variation

What variation is appropriate?

[178] Having determined it appropriate to vary the Agreement, I now consider the terms of the variation.

[179] The primary order sought by Workzone is as follows:

> "Pursuant to s. 217 of the Act that, with effect from 4 February 2010, the *Workzone Traffic Control Pty Ltd Enterprise Agreement 2009* (AE873460) be varied by deleting cl 7.4.5 and inserting the following in lieu:
>
> > 7.4.5 A casual Employee shall be paid at the rate as contained in Appendix A: applicable to the Employee's relevant classification. The casual loading of 20% transitioned up to 25% in accordance with the Modern Award, of the ordinary rate, is in lieu of all forms of paid leave (with the exception of long service leave), jury service and public holidays not worked."

[180] In the alternative, Workzone seek an order pursuant to s 217 of the FW Act that the hourly rates of pay in Appendix A be amended to remove the casual loading.

[181] In the further alternative, Workzone seeks an order that the decision issued by the Fair Work Commission on 28 January 2010 ([2010] FWAA 5499) is amended so that the *Workzone Traffic Control Pty Ltd Enterprise Agreement 2009* (AE873460) is replaced with a version of the agreement that sets out cl 7.4.5 as follows:

> "7.4.5 A casual Employee shall be paid at the rate as contained in Appendix A: applicable to the Employee's relevant classification. The casual loading of 20% transitioned up to 25% in accordance with the Modern Award, of the ordinary rate, is in lieu of all forms of paid leave (with the exception of long service leave), jury service and public holidays not worked."

[182] I consider that the primary variation sought would, insofar as possible, remove the ambiguity or uncertainty and be consistent with the common intention and established custom and practice. It is preferable to vary the substantive clause (7.4.5) rather than simply Appendix A as it is the phrase "plus the casual loading" in the substantive clause that gives rise to the ambiguity in the rates payable to casuals under Appendix A, and uncertainty in its application.

[183] It is therefore not necessary to consider the alternative formulations proposed by the employer.

[184] I will make an order in the terms sought.

Should the variation be retrospective?

[185] I now turn to whether the order should be prospective or retrospective.

[186] There is a well-established principle against decisions and orders of courts and administrative bodies being retrospective. Retrospectivity has obvious potential to cause significant prejudice given that it may displace, alter or extinguish previously existing and lawfully established rights and obligations relied upon or capable of being relied upon by affected persons. It is only where necessary to do so "in the interests of justice and fair play"[64] that decisions or orders should apply retrospectively. That there is power to do so with respect to s 217 applications is clear.[65]

[187] I am well satisfied that the overall circumstances before me meet this significant threshold.

[188] Workzone made this application on 13 July 2022, shortly after an inspector advised their view that the employer was in breach of the Agreement by not adding a loading to the Appendix A casual rates.

[189] This occurred five months after Workzone was first advised by a former employee of a potential underpayment.

[190] As noted, until February 2022 Workzone had no basis to believe its application of the Agreement was in breach, or to take advice on the issue.

[191] It was also reasonable for Workzone to await the assessment of the inspector before commencing these proceedings.

[192] Thus:

- given my findings of common intention and established custom and practice, Workzone had no reason in the twelve years following the commencement of the Agreement to believe the Agreement was ambiguous or uncertain or to call into question its practice of paying casual employees the casual rates in Appendix A (as adjusted from time to time by the incorporated modern awards); and

- once aware of a contested interpretation, Workzone did not delay in seeking to remediate the ambiguity or uncertainty.

[193] A retrospective variation would not cause disruption to past payments made. It would not require payroll recalculation as it would neither add nor subtract from payments made to casual employees.

[194] These are compelling reasons why the order should have retrospective effect.

[195] Weighing against these factors is the potential prejudice to employees (current or past) who may assert past breach or underpayment should a retrospective variation be made.

[196] To date, only one such person has foreshadowed a potential exercise of such rights. A supportive view apparently exists from an inspector and a compliance notice has been issued by the former regulator. Any such proceedings, if pursued, are to be determined by a court. They may or may not be merited. If the claims are pursued, it would be litigation conducted in the face of what I have found to be a contrary common intention and established and long-standing custom and practice.

[197] Taking these competing considerations into account, I conclude that the potential prejudice to the employer and employees should a variation not be retrospective outweighs potential prejudice to current or former employees who may seek to advance a claim and test whether the meaning they assert is correct. This is one of those relatively rare cases where retrospectivity is warranted and the reasons for doing so are compelling.

[198] Having concluded that varying the Agreement with retrospective effect would reflect both common intention and established custom and practice, I consider it fair and appropriate to do so. I take into account that the period of retrospectivity sought is lengthy and that a compelling case for an order covering such a period of extreme length needs to exist. In this matter, that case exists. If retrospectivity is to be ordered, there is no logical rationale in ordering only a limited period of retrospectivity. I will make the order retrospective so that the period during which the Agreement operates on the varied terms parallels the period that the common intention has existed. Such an approach is consistent with prior decisions of the Commission.[66] That is, a period of retrospectivity to the date the Agreement commenced.

[199] Doing so places Workzone and its employees in the position they intended by their agreement. Neither the variation nor the date of operation are based on more general standards of industrial fairness or re-writing the Agreement to include something not inherent when it was made.[67]

[200] I will order that the variation come into effect from 4 February 2010, being the date the 2009 Agreement commenced.

Error, defect or irregularity

[201] In light of my finding that the Agreement is ambiguous and uncertain, and that it should be varied in the aforementioned terms, it is not necessary to determine the alternative proposition advanced by Workzone that the Agreement contains an obvious error, defect or irregularity.

[202] More particularly, it is not necessary to determine whether any of the conditions set out in *CFMEU Re Timber and Allied Industries Award 1999*[68] are present in this matter.

[203] That said, the aforementioned findings of common intention and an established and non-controversial custom and practice over a lengthy period appear to align with two of these conditions – that "the enterprise agreement does not conform with the intention of the parties and a correction would have been made if the issue had been mentioned during bargaining or drafting" and that "there is no material difference of opinion between the parties to the enterprise agreement".[69]

[204] Considered overall, the evidence would appear to point strongly towards a finding of error, defect or irregularity for textual and other reasons. On one reasonably open construction, an apparent incongruity, explicable by reference to error, exists between the drafting of cl 7.4.5 and the fact that three of the rates in Appendix A already reference casual rates of pay. As acknowledged by the FWO, the presence of such conditions may render it appropriate to vary the Enterprise Agreement as sought.[70] The FWO's primary submission correctly observed that whilst error does not equate to ambiguity or uncertainty, the prospect of a mistake having been made in the Agreement cannot be discounted.

[205] If this were so, discretionary considerations under s 218A would likely apply in favour of making the variation sought.

Conclusion

[206] The *Workzone Traffic Control Pty Ltd Enterprise Agreement 2009* contains an ambiguity and an uncertainty with respect to the rates of pay of casual employees.

[207] Having been satisfied of the conditions precedent required by s 217 of the FW Act, I conclude that it is appropriate to vary the Agreement to remove the ambiguity and uncertainty.

[208] The order of the Commission is that the *Workzone Traffic Control Pty Ltd Enterprise Agreement 2009*[71] be varied by deleting cl 7.4.5 and inserting in lieu:

> "7.4.5 A casual Employee shall be paid at the rate as contained in Appendix A: applicable to the Employee's relevant classification. The casual loading of 20% transitioned up to 25% in accordance with the Modern Award, of the ordinary rate, is in lieu of all forms of paid leave (with the exception of long service leave), jury service and public holidays not worked."

[209] The Order will operate from 4 February 2010.

[210] I issue an order to this effect in conjunction with the publication of this decision.[72]

DEPUTY PRESIDENT

Appearances:

Mr T Duggan KC, *with permission*, with Ms S Porter and Mr B Ashmand, on behalf of Workzone Traffic Control Pty Ltd

Mr M Follet, *with permission*, with Mr M Garozzo, on behalf of the Fair Work Ombudsman

Hearing details:

2022 (s 217, s 602)
Adelaide (by video)
9 December

2023 (s 218A)
Adelaide (on the papers)

Final written submissions:

Workzone Traffic Control Pty Ltd, 23 January 2023

Fair Work Ombudsman, 23 February 2023

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[1] [2021] FWCFB 453; Amended Submissions of the Applicant paragraph 31

[2] [2022] FWC 3357

[3] Amended Submissions of the Applicant 23 January 2023; Letter of compliance with further direction [5] 20 January 2023; Statement of Clive John Summers 24 January 2023

[4] Intervener's Further Submissions 23 February 2023

[5] Email 'Chambers – Anderson DP' 23 February 2023 3.29pm

[6] A1

[7] A2

[8] A4

[9] ACW3

[10] [2010] FWAA 549

[11] Annual Wage Review 2009–10 [2010] FWAFB 4000; Annual Wage Review 2009–10 PR072010

[12] [2009] AIRCFB 800

[13] Ibid at [24], [39], [40] and [84]

[14] PR986361 AIRC Order 3 April 2009 cl 14.5; PR986361 AIRC Order 3 April 2009 cl 14.5

[15] Amended Submissions of the Applicant paragraph 29(b)

[16] Amended Submissions of the Applicant paragraph 29(e)

[17] [2003] AIRC 1137 at [34]

[18] Intervener's Further Submissions paragraph 7

[19] [2023] FWC 508

[20] [2020] FCAFC 50' see also *United Voice v MSS Security Pty Ltd* [2016] FWCFB 4979 at [19] to [24] and *Bradnam's Windows and Doors Pty Ltd* [2019] FWCA 979 at [11]

[21] *Australian and International Pilots Association v Qantas Airways Limited* [2014] FWCFB 8199 at [23]

[22] Ibid [115(c)]

[23] [2020] FCAFC 50 at [72], [92] and [114]

[24] Ibid [92]

[25] Ibid [115(d)]

[26] Ibid [93]

[27] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001 – 2004* PR917548 at [32]; *Re Beltana No 1 Salaried Staff Certified Agreement 2001* PR932468 at [23]; *Re Victorian Public Transport Enterprise Agreement 1994* Print M2454 page 4

[28] *James Cook University v Ridd* (2020) 278 FCR 566, (2020) 298 IR 50, [2020] FCAFC 123 at [65]

[29] *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536, [2018] FCAFC 131 at 197

[30] *AMWU v Berri Pty Limited* (Berri) [2017] FWCFB 3005

[31] *Berri* at [44]

[32] *Amcor Limited v CFMEU* (2005) 222 CLR 241 at 270 per Kirby J

[33] *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 3)* [2020] FCA 1428

[34] *Kucks v CSR Ltd* 66 IR 182 at 184; see also *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at 270 per Kirby J

[35] *Glen Cameron Nominees Pty Ltd v Transport Workers Union of Australia* [2018] FWCFB 3744

[36] A1 Mr White Statement paragraph 11; A2 Mr Dimasi Statement paragraphs 15 and 21

[37] A3 Overview of draft agreement 1.11.2009

[38] Mr White said that traffic controllers were paid a 20% loading (A1 paragraph 35). Mr Dimasi said that traffic controllers were paid either a 20% or a 25% loading (A2 paragraph 14)

[39] *Application by Bianco Walling Pty Ltd T/A Bianco Precast* [2020] FWCA 5777 at 117

[40] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352 per Mason J; *Re Beltana No 1 Salaried Staff Certified Agreement 2001* PR932468 at [23]

[41] Intervener's Further Submissions paragraph 9

[42] Ibid [49] citing *SJ Higgins Pty Ltd v CFMEU* Print PR903843 at [7]

[43] Macquarie Dictionary 3rd edition

[44] *Transport Workers' Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829 at [36]

[45] *Shop, Distributive and Allied Employees' Association v Woolworths Ltd* [2006] FCA 616 at [31]

[46] *Liquor, Hospitality and Miscellaneous Workers Union v Prestige Property Services Pty Ltd* [2006] FCA 11 at [44]

[47] *Berri* at [88]

[48] A3 Employer Declaration 18 December 2009 items 2.8 to 2.10

[49] A1 Attachment 1; A2 Attachment 1

[50] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) (188V) v Berri Limited* [2017] FWCFB 3005 at 106

[51] A4 paragraph 7

[52] *Bianco Walling Pty Ltd T/A Bianco Precast v Construction, Forestry, Maritime, Mining and Energy Union* (105N) - [2019] FWCFB 161 at 42

[53] *Amcor Limited v CFMEU* (2005) 222 CLR 241 at 246

[54] *CFMMEU v Macmahon Contractors Pty Ltd* [2018] FWCFB 4429 at [11]

[55] *CPSU v Telstra Corporation Ltd* (2005) 139 IR 141 at [41]

[56] *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84 at [89]

[57] *Kucks v CSR Ltd* 66 IR 182 at 184

[58] A2 Mr Dimasi Statement paragraphs 21 and 23

[59] *Re Australian and International Pilots Association* (2007) 162 IR 121 at [17]

[60] *CPSU v Telstra Corporation Limited* (2005) 139 IR 141 at [48]

[61] Section 171(a) and (b) FW Act

[62] 30 October 2020

[63] Section 54(1) FW Act

[64] *Warramunda Village Inc v Pryde* [2002] FCA 250 at 50

[65] *Aged Care Services Australia Group Pty Ltd v Health Services Union & Australian Nursing and Midwifery Federation* [2017] FWCFB 2806 at [22]

[66] For example, *Re MS Security Aviation Qld Enterprise Agreement 2014-2017* [2016] FWCA 2774 and [2016] FWCFB 4979 at [22] – [24]; *Aged Care Services Australia Group Pty Ltd v Health Services Union & Australian Nursing and Midwifery Federation* [2017] FWCFB 2806 at [23]; *Re Coles Myer Logistics Pty Ltd National Union of Workers Woodlands 2002 Agreement* PR934488 at [72]; *Re Bianco Walling Pty Ltd* (Redetermination) [2020] FWCA 5777

[67] *Re Australian and International Pilots Association* [2007] AIRC 3030 at 17; *Re Qantas Airways Limited Flight Crew (Short Haul) Workplace Agreement 2007* PR550766 at [9]

[68] [2003] AIRC 1137 at [34]

[69] Ibid at [34]

[70] Intervener's Further Submissions paragraph 6(b) and (c)

[71] [2010] FWAA 549

[72] PR760166