DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Bunnings Group Limited
(AG2023/1996)

BUNNINGS RETAIL ENTERPRISE AGREEMENT 2023

Retail industry

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT EASTON
COMMISSIONER MATHESON

PERTH, 14 JULY 2023

Application for approval of the Bunnings Retail Enterprise Agreement 2023.

Introduction

[1] Bunnings Group Limited (Bunnings) has applied for the approval of the *Bunnings Retail Enterprise Agreement 2023* (Agreement), a single-enterprise non-greenfields enterprise agreement, pursuant to s 185 of the *Fair Work Act 2009* (Cth) (FW Act). The notification time for the Agreement was 20 February 2023, the Agreement was made on 5 June 2023, and the application for its approval was lodged on 19 June 2023. Accordingly, all the provisions of the FW Act concerning the approval of enterprise agreements as they were immediately before 6 June 2023 apply to this application.[1]

[2] Two unions acted as bargaining representatives for the Agreement: the Shop, Distributive and Allied Employees' Association (SDA) and The Australian Workers' Union (AWU). The SDA supports the approval of the Agreement. The AWU has declined to advise whether it supports or opposes the approval of the Agreement.

[3] There were four other bargaining representatives. Only one of these, Retail and Fast Food Workers' Union Incorporated (RFFWU Inc), has filed a Form F18A in response to the application for approval of the Agreement. RFFWU Inc has advised in its Form F18A that it opposes the approval of the Agreement. RFFWU Inc acted as bargaining representative for 35 of the 45,484 employees covered by the Agreement at the time that it was made. RFFWU Inc objects to the approval of the Agreement on the basis of the following 'concerns':

(1) The Agreement may not have been 'genuinely agreed' as required by s 186(2)(a) of the FW Act because, in respect of compliance with s 180(5) (see s 188(1)(a)(i) as it was immediately before 6 June 2023), '[t]he explanation of terms and their

effect by the employer went well beyond the information shared by the employer in its application'.

(2) The Agreement, when looked at globally, does not meet the better off overall test (BOOT) requirement in s 186(1)(d), as explicated in s 193 (as it was immediately before 6 June 2023).

[4] Upon receipt of the application for approval of the Agreement, the Agreement was analysed for compliance with the statutory requirements for approval in accordance with the Commission's usual practice. On 28 June 2023, the Commission sent correspondence to Bunnings which identified a number of concerns in relation to the Agreement relating to technical requirements, compliance with pre-approval steps, and some specific matters in relation to the BOOT. In accordance with the Commission's directions, Bunnings replied to these concerns in writing on 3 July 2023. Also in accordance with the Commission's directions, RFFWU Inc filed written submissions detailing its objections to approval of the Agreement on 3 July 2023, and Bunnings filed submissions in response thereto on 5 July 2023. We conducted a hearing in relation to the application on 7 July 2023. At that hearing, we granted Bunnings, the SDA and the AWU permission for legal representation, over the objection of RFFWU Inc. We considered that the jurisdictional prerequisite in s 596(2)(a) of the FW Act was satisfied and that we should exercise our discretion in favour of granting permission because, as we discuss below, RFFWU Inc's grounds of objection to approval of the Agreement raised a significant issue concerning the proper construction of s 193(1) of the FW Act.

[5] Apart from the matters raised by RFFWU Inc and the BOOT concerns identified in the Commission's correspondence of 3 July 2023, there are no other contested issues pertaining to the approval of the Agreement. Apart from these matters, which we consider separately below, we are satisfied on the basis of the material contained in the application and the accompanying Form F17 declaration made by Mr James Cox, Bunnings' Workplace Relations Manager, that the approval requirements in ss 186 and 187, as relevant to the application, are met.

Genuine agreement

[6] RRFWU Inc's submissions in relation to compliance with s 180(5) do not identify any reasonable step that Bunnings failed to take to explain the terms of the Agreement, nor do they identify that Bunnings engaged in any misrepresentation concerning the terms of the Agreement. We are satisfied, on the basis of the information provided in Mr Cox's declaration and the further information provided in Bunnings' submissions of 3 July 2023, that Bunnings complied with s 180(5). There is no issue raised about any other element of genuine agreement in s 188, and we are satisfied that the Agreement was genuinely agreed to by the employees covered by the Agreement as required by s 186(2)(a).

Better off overall test

The test time

[7] There is no dispute that the relevant award, for the purpose of the application of the BOOT, is the *General Retail Industry Award 2020* (Award). Bunnings contends that each employee covered by the Agreement would, at the 'test time', be better off overall if the Agreement applied to them than if the Award covered them. This contention is based upon a

comparison with the terms of the Award, including the pay rates in the Award, as they were at 19 June 2023.

[8] There is no issue that, for the purpose of the application of the BOOT, the 'test time' is time at which Bunnings lodged its application for approval of the Agreement, namely 19 June 2023, in accordance with s 193(6). Notwithstanding this, RFFWU Inc submits that we should assess the BOOT taking into account the increase to the rates of pay in the Award of 5.75 per cent effective from 1 July 2023 as a result of the *Annual Wage Review 2022-23 Decision*[2] (AWR decision) issued on 2 June 2023. In this respect, RFFWU Inc points to the fact that, under clause 16.2 of the Agreement, the Agreement will not commence until 13 November 2023 (assuming approval by the Commission on or before 8 September 2023), and submits:

> The employer presumes the Commission will undertake its assessment with a test dislocated in time. The Agreement rates are not paid upon approval but rather a future time dictated by the terms of the Agreement.
>
> In such circumstances, the Commission ought consider the value of Award increases (including the 2023 increase now known) with greater concern, and weighting, than it would ordinarily apply.
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> Further, the Commission ought increase its weighting of the Award increases in July 2023 so as to avoid the notoriety occasioned [by] a system if it allowed an employer to game a testing structure by applying for approval a mere 11 days before 5.75% wage increases applied to Award rates. To reiterate, this is in circumstances where the Agreement rates won't even apply from approval.

[9] The above submission proceeds on the premise that the Award rates operating from 1 July 2023 may be used as the point of comparison for the purpose of the BOOT. On that premise, RFFWU Inc's submissions identify a number of detriments in the Agreement compared to the Award and seek to establish that the extent to which the minimum rates in the Agreement are higher than those in the Award is not sufficient to render each award-covered and prospective employee better off overall in all situations.

[10] It is necessary to examine the premise of RFFWU Inc's submission first. Section 193(1) (as it was immediately before 6 June 2023) provides:

> (1) An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

[11] It is apparent that s 193(1) requires the BOOT to be applied by comparing two scenarios: *first*, if the relevant enterprise agreement applies to each award covered and prospective award covered employee at the test time and, *second*, if the relevant modern award applies to these employees as at the test time. The BOOT is passed if the employees are better off overall under the first scenario than the second.

[12] The first scenario is entirely hypothetical and can never occur in reality under the FW Act. That is because, under s 52(1), an enterprise agreement cannot *apply* to a person unless the agreement is in operation and, under s 54(1), an agreement can only commence operating seven

days after it is approved by the Commission or a later day specified in the agreement. Thus, at the test time, which is necessarily before the agreement can be approved by the Commission, although the agreement may *cover* employees (within the meaning of s 53), it cannot yet *apply* to anyone in the sense identified in s 51. The second scenario may also not correspond with reality since, if there is, at the test time, an existing enterprise agreement in place then, by virtue of s 57, a modern award cannot *apply* to the employees covered by the agreement. These matters point to a level of intended artificiality in the BOOT, in that it is not to be applied in respect of a point in time at which the relevant enterprise agreement might actually be operative.

[13] The BOOT must be carried out by reference to two categories of employees: award covered employees and prospective award covered employees. The former category is defined in s 193(4) to mean an employee covered by the enterprise agreement who is, at the test time, covered by a modern award that is in operation, that covers the employee in relation to the work to be performed under the agreement and that covers the employer. It is important to note that it is award coverage *at the test time* which is the essential requirement. The latter category is defined in s 193(5) as 'a person who, if he or she were an employee at the test time' of an employer covered by the agreement, would be covered by the agreement, and would be covered by a modern award that is in operation, that covers the employee in relation to the work to be performed under the agreement and that covers the employer. The latter category plainly consists of hypothetical future employees who are to be treated as if employed, and covered by the relevant modern award, *at the test time* — and not at some future time when they might actually be employed. This further underlines the artificiality of the BOOT.

[14] The Explanatory Memorandum for the *Fair Work Bill 2008* emphasises that the purpose of the BOOT, including the provision for a test time, was to simplify the procedures for approval of agreements compared to the statutory regime under the *Workplace Relations Act 1996* (Cth) then in operation. Relevantly, paragraphs 155, 159, 160 and 192 of the Regulatory Analysis of the Bill and paragraph 825 of the Explanatory Memorandum proper state:

> r.155. Under the Bill, all enterprise agreements must be lodged with FWA for approval before they commence operation. The approval process is a simple, point in time assessment of the enterprise agreement and the circumstances under which it was made.
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> …
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> r.159. FWA will apply the BOOT to ensure that each employee covered by the agreement is better off overall in comparison to the relevant modern award. The use of modern awards as reference instruments will further simplify the approval process in comparison to the current, complex minimum standards arrangements.
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> r.160. The BOOT will be an 'on the papers' assessment of the pay and entitlements of an agreement and will avoid the complicated assessment procedures adopted for the Fairness Test, such as accepting written submissions from employees on the personal value of intangible benefits.
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> …
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> r.192. The BOOT will simplify agreement processing. Enterprise agreements will be assessed 'on the papers' against modern awards, providing for a simpler comparison compared to the current assessment against the old award system. The BOOT will also be a point in time assessment.
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> …
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> 825. Subclause 193(6) defines the time at which the better off overall test is applied. The better off overall test is a point in time test, which requires each award covered employee and prospective award covered employee to be better off overall at the test

> time. The test time would be the time that a bargaining representative made the application for FWA approval of the agreement under clause 185.

[15] The provision for a test time in s 193(1) must plainly be treated as a matter of significance. Although this is not stated explicitly in s 193(1), the requirement for employees to be better off overall at the test time implies that the point of comparison is the relevant modern award as it stands at that date. This is underlined by the requirements in s 193(4) and (5) for award covered and prospective award covered employees to be covered by the comparator award at the test time, and not some other time. If the Commission were required to take into account award variations not yet operative at the test time (whether known at the time the BOOT assessment is carried out or predicted), as RFFWU Inc proposes, then it is difficult to understand what significance the test time would have, since this would extend the application of the better off overall requirement to other, later, dates. The passages above from the Explanatory Memorandum tend to support the implication to the extent that they identify the test time as a feature of a BOOT which was intended to simplify the approval process for enterprise agreements so as to involve a comparison of the terms of the agreement and the relevant award 'on the papers'. It is difficult to see how this simplicity could be achieved if the comparison must be with the award as it stands, or perhaps might stand, at various points in time other than at the test time.

[16] There is one other feature of the legislative scheme which is of relevance and significance. Section 206 of the FW Act relevantly provides as follows:

> **206 Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.**
>
> *If an employee is covered by a modern award that is in operation*
>
> (1) If:
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> (a) an enterprise agreement applies to an employee; and
>
> (b) a modern award that is in operation covers the employee;
>
> the base rate of pay payable to the employee under the agreement (the ***agreement rate***) must not be less than the base rate of pay that would be payable to the employee under the modern award (the ***award rate***) if the modern award applied to the employee.
>
> (2) If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.
>
> . . .

[17] 'Base rate of pay' is defined in s 16(1) to mean the rate of pay payable to an employee for ordinary hours of work, excluding incentive-based payments, bonuses, loadings, monetary allowances, overtime or penalty rates, and any other separately identifiable amounts.

[18] Section 206 plainly contemplates that, notwithstanding that passing the BOOT is required for an enterprise agreement to be approved by the Commission and become operative (except in the special circumstances prescribed by s 189), the base rates of pay in an agreement may fall below the base rates in the relevant award during the period the agreement is in operation. This indicates that the better off overall requirement embodied in s 193(1) was never

intended to apply on an ongoing basis during the period of operation of an agreement and at least indirectly underlines the significance of the test time in comparing the agreement to the relevant award for the purpose of the BOOT. This position is confirmed by the Explanatory Memorandum's explanation of the purpose of s 206 as follows:

> 879. This clause will ensure that the base rate of pay under an enterprise agreement cannot be less than the base rate of pay under either the modern award (the award rate) or a national minimum wage order (the employee's order rate) at any time during the life of the agreement.
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> 880. This clause protects an employee's minimum wage entitlement after FWA approves an enterprise agreement and the agreement commences operation, thus ensuring the integrity of the safety net. In deciding whether or not to approve an enterprise agreement, FWA will consider the base rate of pay provided for by the agreement (the agreement rate) as part of the better off overall test. Subclauses 206(2) and (4) deal with the situation where the agreement rate falls below the award rate or the employee's order rate while the agreement is in operation.
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> 881. If FWA approves an enterprise agreement (under clause 186 or clause 190) that provides for a base rate of pay that is less than the award rate or employee's order rate, the employee would be entitled to a base rate of pay that is equal to the award rate or the employee's order rate on the day that the agreement commences operation.
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> 882. Subclauses 206(1) and 206(2) operate where an employee is covered by a modern award that is in operation. If an enterprise agreement applies to the employee and the agreement rate is less than the award rate, the employee is entitled to be paid under the agreement at a rate equal to the award rate.
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> . . .
>
> Illustrative example
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> Min works in the hospitality industry as an assistant in a sandwich shop. She is covered by the modern award for the hospitality industry. In negotiations for a proposed enterprise agreement, Min is told that she will be entitled to $798.00 per week under the agreement but there will be no annual wage increases. At that time, Min is entitled to $744.80 per week under the hospitality award. The proposed enterprise agreement is approved by a valid majority of employees at the sandwich shop and Min's employer applies to have the agreement approved by FWA. At the time that the employer applied for approval of the agreement by FWA, Min would be better off under the agreement than under the hospitality award. Therefore, the agreement would pass the better off overall test. FWA approves the agreement and it commences operation on 24 February 2010. However, on 1 October 2012 the award rate is adjusted to $802.00 per week, and therefore, the agreement rate falls below the award rate. At this time, Min would be entitled to $802.00 per week under the agreement.
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> (underlining added)

[19] Two comments may be made about the above passages from the Explanatory Memorandum. The first is that paragraph 881 appears to contemplate that the base rate of pay in an enterprise agreement might already be below that of the relevant award at the time the agreement commences operation. One way, and perhaps the only way, this might occur is if the award base rates have been increased to exceed those in the agreement operative from a date that is after the test time but before the date the agreement commences operation. This is apparently not seen as an impediment to the approval of the agreement. The second comment is that the underlined parts of the illustrative example indicate reasonably clearly that the BOOT

is to be carried out by reference to the award rates as they are at the test time. The example goes on to posit a situation where the award rate is adjusted to exceed the agreement rate more than two years later, but there is no apparent reason why this could not equally occur at any date after the test time and thus trigger the operation of s 206 (once the agreement has commenced operation).

[20] The Commission has always proceeded on the basis that s 193(1) requires the BOOT comparison to be conducted by reference to the award terms as they are at the test time. For example, in the 2012 Full Bench decision in *Newlands Coal Pty Ltd v CFMEU*,[3] Hamberger SDP, with whom McCarthy DP relevantly agreed, said:

> [19] … I note that it cannot be the intention of the Act that the BOOT ensure that employees covered by an enterprise agreement always remain better off than the modern award throughout the life of the agreement. It is clear from the Act that when agreements are submitted to FWA for approval they are to be assessed against the modern award as it applied at the time the application was made. An agreement can have a life of up to four years (and indeed continue on after that until terminated). It is highly likely that the modern award will be varied during that time. Clearly the BOOT cannot be expected to anticipate such movements…

[21] In *Loaded Rates Agreements*,[4] a five-member Full Bench said:

> [111] … The statutory purpose of the requirement to assess the BOOT as at the test time is, we consider, to permit rates of pay and other conditions of employment in the agreement and the relevant award to be compared at a fixed point of time when the terms of both are known. Absent such a temporal requirement, the application of the BOOT would require speculation about future changes to the provisions of the award, in circumstances where the agreement to be assessed may also involve agreed changes such as increases in rates of pay at defined intervals, and would involve the impossible task of making multiple comparisons for the whole of the period in which the agreement remains in operation.

[22] In *ANMF v Domain Aged Care (QLD) Pty Ltd*[5] the Full Bench majority (Gostencnik and Colman DPP) expressed the view that the BOOT permitted all the terms of the relevant agreement to be taken into account, including terms which might take effect at a later time during the agreement's nominal term, but confirmed that the required comparison was with the award terms as they were at the test time. They said:

> [27] Section 193 provides than an enterprise agreement passes the better off overall test if the Commission is satisfied, as at the test time, that each award covered employee and each prospective award covered employee would be better off overall if the agreement applied to the employee than if the relevant award applied to the employee. Although the test time is the date the application was lodged, the Commission is required to conduct an overall comparison, for each existing and prospective employee, of agreement and award conditions. This necessarily requires a consideration of the rates of pay under the agreement and the award that apply to existing and prospective award covered employees assessed 'as at the test time'. A 'point-in-time test' is necessary because the award benchmark may change over the nominal life of the agreement, although its base rate of pay would always be the relevant minimum because of s 206. To our mind, this is the anchoring work of the 'test-time'. The BOOT analysis occurs at this time, taking account of all that is known at this time, including all of the terms of the agreement that will apply over its nominal life. In our view, the 'test time' does not confine the BOOT analysis to provisions of an agreement that are applicable only at its inception; employees must be better off overall under the agreement, not just better off at 'test-time'.
>
> (underlining added)

[23] In *CFMEU & Ors v OS ACPM Pty Ltd and OS MCAP Pty Ltd*,[6] the Full Bench confirmed that the above passage in the *Domain Aged Care* decision was not to be read as implying that post-test time award rates were to be taken into account in the application of the BOOT, even if known. The Full Bench majority (Hatcher VP and Booth DP, with whom Colman DP relevantly agreed at [108]) quoted the above passage from the *Domain Aged Care* decision and said:

> [64] The above passage does *not* say that, in assessing the BOOT, the comparison point may take into account known changes to the award that occur after the test time. The passage says the opposite, namely that the 'anchoring' point of the BOOT is constituted by the award conditions as they are as at the test time. Were it otherwise, parties attempting to make an enterprise agreement would not know the BOOT benchmark they would have to meet, since future award changes would be unknown to them at the time bargaining for the agreement occurred. The point of the passage is that all of the terms of the relevant agreement, including as they operate over the life of the agreement, must be taken into account in making the required comparison with the award terms as at the test time.

[24] As earlier stated, the BOOT always has a level of artificiality because it operates by reference to a date that is always before the date at which the relevant enterprise agreement can first commence operation. The level of artificiality is significant in this case because the Agreement, if approved, will not commence operation until 13 November 2023 (by virtue of s 54(1)(b)), almost five months after the test time (19 June 2023). The Award rates applicable at the test time will not be the Award rates in operation when the Agreement commences operation or at any time thereafter. However, even in the more usual situation where an enterprise agreement commences operation seven days after approval pursuant to s 54(1)(a), the period between the test time for an enterprise agreement and its operative date may straddle a variation to the terms of the modern award which is the comparator for the purpose of the BOOT. That has not previously been regarded as providing any basis for applying the BOOT by reference to award terms as they are at a date later than at the test time.

[25] In this case, RFFWU Inc submits that the BOOT should be applied by reference to, or should at least take into account, the post-1 July 2023 rates in the Award because they are 'known' as at the test time. This submission finds no support in the text of s 193, which makes no reference to the BOOT being conducted by reference to what is known about future award terms as at the test time (much less the time when the BOOT assessment is carried out). More fundamentally, the hypothetical comparison required by s 193(1) only requires, as earlier explained, that employees be better off overall at the test time, and not at some later date when different award terms might be applicable. Furthermore, the concept of what is 'known' as at the test time will be the case concerning award terms in the future raises a series of imponderables which tell against the adoption of the approach contended for. In this case, the AWR decision which announced wage increases of 5.75 per cent in awards generally was delivered on 2 June 2023, but the determination which gave effect to the decision by varying the Award was not actually made until 20 June 2023[7] — the day after the test time date of 19 June 2023. Was the variation therefore 'known' as at the test time? Further, if the test time in this case were 1 June 2023 instead of 19 June 2023, it would have been wholly predictable that the forthcoming AWR decision would increase the rates in the Award by some amount, but would it have been 'known' that this would be the case? These questions illustrate that the RFFWU Inc submission invites a speculative exercise that is detached from the text of s 193(1) and is inconsistent with the simple 'on the papers' comparative exercise as at the test time that the legislature intended.

[26] It is important to again emphasise that the decision in *Domain Aged Care* does not support RFFWU Inc's position. The comparison to be made is between the terms of the enterprise agreement as they exist as at the test time and the terms of the relevant award as at the test time. In the former case, *all* the terms of the agreement, including terms which operate at various intervals during the life of the agreement (such as wage increases), are terms of the agreement as made and existing as at the test time. Such terms must form part of the comparison, as stated in *Domain Aged Care*. In the latter case, award variations that only take effect after the test time, even if they are in some sense 'known' at the time the Commission considers the application for approval of the agreement, are *not* terms of the award as at the test time and thus do not form part of the required comparison.

[27] Accordingly, we reject the premise of RFFWU Inc's submission. The BOOT will be conducted by reference to the terms of the Award as they were on 19 June 2023.

Benefits and detriments

[28] The Agreement provides for wage rates which are from 14.67 per cent to 20.4 per cent above the Award rates for permanent employees, and from 12.37 per cent to 18 per cent above the Award for casual employees (even taking into account that the casual loading in the Agreement is 22.5 per cent, not 25 per cent as in the Award). In addition, the Agreement provides for a range of additional entitlements that are more beneficial to employees than the Award or the NES. For permanent employees, these include:

- a transition to five weeks' annual leave;
- 84 hours' personal leave per annum;
- more beneficial redundancy payments;
- more beneficial compassionate leave entitlements; and
- paid community service leave, including blood donor leave, Defence Force Reserve Service leave, emergency service leave and extended jury service leave.

[29] For casual employees, there is an entitlement to paid personal leave accruing at the rate of 3.3 hours for every 152 ordinary hours worked, and a more beneficial notice/payment period for the cancellation of a casual shift. For all employees, paid rest breaks are 15 minutes in duration compared to 10 minutes under the Award.

[30] The Agreement also contains a number of less beneficial entitlements or omits entitlements contained in the Award. These include:

- the omission of the 17.5 per cent annual leave loading contained in the Award;
- the omission of a number of allowances contained in the Award, most notably the laundry allowance;
- a less beneficial transport reimbursement provision;
- slightly reduced penalty rates for work engaged in outside the span of hours, for shift work performed Monday-Friday, for weekend work, and for work performed by casual employees on public holidays;
- a broader span of hours, which is partly dealt with by 'incentive payments' for work performed before 7.00 am or after 6.00 pm Monday-Friday and before or after specified times on weekends;

- lower overtime penalty rates for hours worked between 152 and 160 hours in a 4-week roster cycle in the limited circumstances prescribed in clause 3.2(b); and
- reduced or no minimum engagement periods for attendance at team meetings or training.

Part-time employees – hours of work and rostering

[31] There are also significant differences between the Agreement and the Award concerning hours of work and rostering of part-time employees. Under the Agreement, a part-time employee must be engaged upon a regular pattern of work agreed in writing comprising of the hours to be worked on each particular day of the week and the starting and finishing times of each day (clause 8.2(c)). This is substantially the same as the equivalent award provision (clause 10.5). In both the Agreement and the Award, work performed outside this regular pattern of work is to be paid at overtime rates.[8] However, there are significant differences concerning the means by which this pattern of work may subsequently be altered.

[32] Under both the Agreement (clause 8.2(d)) and the Award (clause 10.6), the regular pattern of work may be changed by agreement, either on a temporary or ongoing basis. These provisions are not significantly different. However, the Agreement additionally contains clause 8.2(f), which provides:

> (f) A part-time Team Member can agree to work additional hours at the Team Member's Contract Rate (plus applicable incentive rates), as follows:
>
> (i) agreement can be made on an ongoing basis in writing, provided additional hours can be verbally accepted or rejected on any occasion;
>
> (ii) a part-time Team Member who does not provide an ongoing agreement can agree to additional hours in writing (including by electronic means) when offered on any occasion;
>
> (iii) additional hours worked at Contract Rates pursuant to this clause will accrue leave and superannuation shall be payable; and
>
> (iv) overtime rates will apply where work otherwise enlivens the overtime conditions set out in clause 3.

[33] The Award contains no equivalent to this provision. Notwithstanding this, we do not consider that it amounts to a substantive detriment for part-time employees under the Agreement as compared to the Award. Under clause 10.6 of the Award, a part-time employee may agree, on a temporary or ongoing basis, to vary their regular pattern of work by including additional hours. In this case, the agreed additional hours will be paid at the ordinary time rate. This is no different in effect than an agreement under clause 8.2(f) of the Agreement to work additional hours at the employee's 'Contract Rate' (effectively, their ordinary rate). Clause 8.2(f) is somewhat more flexible as to the means by which such agreements operate in practice (including that they do not need to be in writing on a daily basis where there is an ongoing agreement in writing), but to the extent this may be said to be a detriment, the other terms of the Agreement need to be taken into account.

[34] The Agreement and the Award also provide for the regular pattern of work to be changed unilaterally by the employer. Under clause 8.2(d)(ii) of the Agreement, rosters for part-time

employees may be varied by Bunnings with 14 days' notice, or at any earlier time by agreement, provided that the variation must not reduce the employee's minimum contracted hours. By comparison, clause 10.10(a) of the Award provides that a part-time employee's agreed regular pattern of work may be changed by the employer giving the employees seven days' notice, or in an emergency 48 hours' notice, of the change. This is subject to the proviso that the employee's 'guaranteed hours' cannot be altered. The 'guaranteed hours', under clause 10.5(a) of the Award, are 'the number of hours to be worked on each particular day of the week'. RFFWU Inc identifies three detriments in the Agreement compared to the Award:

(1) Under the Award, the days upon which a part-time employee may be required to work may be altered unilaterally by the employer under clause 8.2(d)(ii) of the Agreement. This cannot occur under the Award by virtue of the prohibition against varying guaranteed hours.

(2) Because of the wider span of hours in the Agreement, part-time employees may unilaterally be rostered to work hours which, under the Award, would be outside of the span of hours, and would therefore constitute overtime which could be refused if not reasonable. They could also be rostered to have as little as 10 hours between shifts,[9] whereas the Award requires at least 12 hours between shifts.[10]

(3) While clause 8.2(d)(ii) of the Agreement prohibits the employer from unilaterally reducing a part-time employee's hours of work, the employer is permitted unilaterally to increase the hours of work. This is not permitted under the Award because, again, guaranteed hours cannot be varied.

[35] During the hearing on 7 July 2023, we expressed a 'concern' (for the purpose of s 190(1)(b)) about the third matter and invited Bunnings to propose an undertaking to address the concern. Bunnings subsequently proposed an undertaking in the following terms:

> *Clause 8.2(d)(ii) of the Agreement shall be read as follows:*
>
> Alternatively, rosters for part-time Team Members may be varied by Bunnings with 14 days' notice, or at any earlier time by agreement. Any roster variation by Bunnings must not unilaterally increase or reduce the Team Member's minimum contracted hours.

[36] Bunnings also proposed an undertaking which would vary clause 9.3(a) of the Agreement in parallel terms.

[37] RFFWU Inc accepts that the above undertakings address the third of the three matters which it raised. No bargaining representative opposed their acceptance. We are satisfied that accepting the undertakings would not be likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement.

[38] In relation to the first and second matters, RFFWU Inc submits that, for a part-time employee who is rostered to work a day or at hours that is unsuitable for them, or is forced to work after only a 10-hour break, no other benefit in the Agreement could compensate for this such as to leave the part-time employee better off overall. It submits that this is the case even if, contrary to its primary contention, the Award rates as they were as at 19 June 2023 are used as the point of comparison. It relies upon a witness statement made by Jim Reynolds, a part-

time Bunnings employee, who describes the difficulty which unilaterally-imposed changes to his rostered hours might cause because of his carer's commitments and other reasons.

[39] We do not accept RFFWU Inc's submission for the following reasons. *First*, it does not take into account a more beneficial aspect of clause 8.2(d)(ii), namely that any unilateral change can only occur on 14 days' notice, compared to seven days' notice, or 48 hours' notice in emergencies, under clause 10.10(a) of the Award. This gives employees a significantly greater opportunity to make the appropriate arrangements to adjust to any unilateral change in rostered hours. *Second*, RFFWU Inc does not take into account the range of protections in connection with rostering which the Agreement contains. In particular, clause 9.3 relevantly provides:

> **9.3 Changing Rosters**
>
> . . .
>
> (b) Bunnings will not vary a permanent Team Member's roster every 4-Week Roster Cycle to avoid any Agreement entitlements.
>
> (c) As far as possible, rosters will be set by mutual agreement between Bunnings and the Team Member.
>
> (d) In setting rosters Bunnings will have regard for the family responsibilities and other significant commitments of team members, study commitments, access to safe transport home by Team Members as well as the operational requirements of the business and the need to be fair in its treatment of Team Members as a whole.
>
> (e) Bunnings will consult with any Team Members affected by proposed changes to their regular roster or ordinary hours of work (excluding Team Members whose working hours are irregular, sporadic or unpredictable).
>
> (f) For the purpose of consulting as specified in this clause:
>
> (i) Bunnings must provide the Team Member (and any representative) information about the proposed change (for example, electronic notification about the nature of the change and when it is to begin);
>
> (ii) as soon as practicable the Team Member must either accept the change or elect to meet to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities). The Team Member is welcome to bring their representative (if any) to the meeting to give their views about that impact. The Team Member must provide all relevant information and alternative availability so that operational needs and personal requirements can reasonably be met.
>
> (iii) Bunnings will consider any views given by the Team Member and their representative (if any).

[40] The combined effect of the above provisions is likely in our view to minimise the possibility that a roster change will be imposed upon a part-time employee which would be inconsistent with their personal commitments and circumstances. *Third*, as a last resort, a part-time employee may utilise the dispute resolution procedure in Appendix 6 of the Agreement to contest an unsuitable roster change. Under this dispute resolution procedure, the Commission may arbitrate a dispute that otherwise remains unresolved and thus impose an outcome in relation to a rostering dispute. This is more beneficial than the dispute resolution procedure in clause 36 of the Award, which only allows arbitration by consent. *Fourth*, the other benefits of

the Agreement are relevant. In particular, the Agreement provides for significantly higher remuneration, and the additional leave benefits allow for part-time employees to better manage the interaction between work and their personal lives.

Other concerns and undertakings

[41] In the Commission's correspondence to Bunnings of 28 June 2023, a concern was identified that clause 6.7, which concerns the compassionate leave entitlements of permanent employees, might be read as excluding casual employees' NES entitlement to compassionate leave. In response to this concern, Bunnings proposed the following undertaking:

> Clause 6.7 of the Agreement does not operate to exclude the entitlement of casual team members to compassionate leave in accordance with the NES.

[42] The SDA has also identified a further concern, which we share, that clause 3.1(a)(viii) of the Agreement might be read as excluding overtime rates which are payable pursuant to clause 8.2(f)(iv). Bunnings has proposed the following undertaking to address this:

> Clause 3.1(a)(viii) of the Agreement does not operate to exclude overtime rates payable pursuant to clause 8.2(f)(iv).

[43] We accept that the above undertakings address the identified concerns. No bargaining representative contended otherwise or opposed the acceptance of the undertakings. We are satisfied that accepting the undertakings would not be likely to cause financial detriment to any employee covered by the Agreement or result in substantial changes to the agreement.

BOOT conclusion

[44] The undertakings proposed by Bunnings are accepted and, pursuant to s 201(3) of the Agreement, are taken to be terms of the Agreement. A copy of the undertakings is annexure A to this decision. Taking into account all the terms of the Agreement, including the benefits and detriments identified above and the undertakings which we have accepted, we are satisfied that the Agreement passes the BOOT as required by s 186(2)(d). We consider, when the Agreement is compared to the Award, that the identified benefits, most notably the substantially higher rates of pay and the enhanced leave entitlements in the Agreement, outweigh the detriments such as to leave each award covered employee and each prospective award covered employee better off overall as at the test time.

Approval of Agreement

[45] Having dealt with the issues raised by RFFWU Inc concerning genuine agreement and the BOOT, and our own concerns, and on the basis of the undertakings which we have accepted, we are satisfied that all of the applicable requirements of ss 186, 187, 188 and 190 are met. The Agreement must therefore be approved in accordance with s 186(1).

[46] The SDA and the AWU, being (as earlier stated) bargaining representatives for the Agreement, has each given notice under s 183 of the FW Act that it wants the Agreement to cover it. In accordance with s 201(2), we note that the Agreement covers the SDA and the AWU.

[47] The Agreement is approved and, in accordance with s 54(1)(b), will operate from 13 November 2023 consistent with clause 16.2(a)(i) of the Agreement. The nominal expiry date of the Agreement, as specified in clause 16.2(b), is 31 August 2026.

PRESIDENT

Annexure A: undertakings by Bunnings Group Limited

Melbourne, 7 July 2023

IN THE FAIR WORK COMMISSION – AG2023/1996

Bunnings Group Limited – *Bunnings Retail Enterprise Agreement 2023*

Section 185 – Application for approval of a single enterprise agreement

Undertakings provided under section 190 of the *Fair Work Act 2009* (Cth)

I, Damian Zahra (Chief People Officer), have the authorisation given to me by Bunnings Group Limited (**Bunnings**) to provide the following undertakings in relation to the application before the Fair Work Commission to approve the *Bunnings Retail Enterprise Agreement 2023* (**Agreement**).

In relation to the Agreement, Bunnings provides the following undertakings:

1. Clause 3.1(a)(viii) of the Agreement does not operate to exclude overtime rates payable pursuant to clause 8.2(f)(iv).

2. Clause 6.7 of the Agreement does not operate to exclude the entitlement of casual team members to compassionate leave in accordance with the NES.

3. Clause 8.2(d)(ii) of the Agreement shall be read as follows:

   Alternatively, rosters for part-time Team Members may be varied by Bunnings with 14 days' notice, or at any earlier time by agreement. Any roster variation by Bunnings must not unilaterally increase or reduce the Team Member's minimum contracted hours.

4. Clause 9.3(a) of the Agreement shall be read as follows:

   Rosters of permanent Team Members may be varied by Bunnings with 14 days' notice, or at any earlier time by agreement. Any roster variation by Bunnings under this clause must not unilaterally increase or reduce the Team Member's minimum contracted hours.

Damian Zahra
CHIEF PEOPLE OFFICER

7 July 2023

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[1] *Fair Work Act 2009* (Cth) Sch 1, items 66 and 67.

[2] [2023] FWCFB 3500.

[3] [2011] FWAFB 7325, 216 IR 266.

[4] [2018] FWCFB 3610.

[5] [2019] FWCFB 1716.

[6] [2020] FWCFB 2434, 296 IR 351.

[7] PR762112.

[8] Agreement clause 3.1(a)(viii); Award clause 21.2(b).

[9] Agreement clause 11.2(b).

[10] Award clause 16.6(a).