



# DECISION

*Fair Work Act 2009*  
s.604—Appeal of decision

**Construction, Forestry, Maritime, Mining and Energy Union**

v

**Norman McMahon Patches Pty Ltd T/A Patches Asphalt**  
(C2022/8109)

DEPUTY PRESIDENT GOSTENCNIK  
DEPUTY PRESIDENT O’NEILL  
ACTING COMMISSIONER BISSETT

MELBOURNE, 17 MARCH 2023

*Appeal against decision [\[2022\] FWCA 3560](#) of Deputy President Boyce at Sydney on 13 October 2022 in matter number AG2022/4059*

[1] Norman McMahon Patches Pty Ltd operates a business which trades as Patches Asphalt and describes itself as an “innovative and reliable civil construction company, providing surfacing solutions for a wide range of road building and maintenance needs”. We will hereafter refer to the corporate entity by its business trading name. On 27 September 2022, Patches Asphalt applied under s 185 of the *Fair Work Act 2009* (Act) for the Commission to approve a single enterprise agreement titled the “*Patches Asphalt Enterprise Agreement 2022 – 2025*” (Agreement). The *Asphalt Industry Award 2020* (Award) is the relevant modern award that covers the employees covered by the Agreement and against which the Agreement is assessed in applying the better off overall test in s 193 of the Act. The application was allocated to Deputy President Boyce, and on 13 October 2022 he approved the Agreement with undertakings (approval decision).<sup>1</sup>

[2] The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) lodged a notice of appeal on 8 December 2008, some 8 weeks after the approval decision was made. Rule 56(2) of the *Fair Work Commission Rules 2013* (FWC Rules) provides that a notice of appeal under s 604 of the Act must be filed within 21 calendar days after the date of the decision the subject of the appeal, or within such further time as may be allowed by the Commission on application by the appellant. By its notice of appeal, the CFMMEU applies for an extension of time under r 56(2)(c) of the FWC Rules to lodge an appeal against the approval decision. If an extension is granted the CFMMEU applies for permission to appeal, and if that is granted, it appeals the approval decision. The CFMMEU also seeks leave to amend its notice of appeal by adding a second ground contending error in the Deputy President’s assessment that the Agreement passed the better off overall test and in the acceptance of undertakings. We will allow the amendment<sup>2</sup> to the notice of appeal because, as will become apparent later in this decision, we consider there is substantial merit to the contention underpinning the additional appeal ground.

[3] Two days after the application to approve the Agreement was lodged, the CFMMEU by email from its Legal Industrial Officer, Mr Tom Fischer, to the Commission’s Member Assist team sought copies of the application, statutory declaration in support and other documentation submitted by Patches Asphalt in support of its application, as well as details of directions made or dates of any hearing.<sup>3</sup> The CFMMEU also requested that it be heard in relation to the approval application.<sup>4</sup> By return email from a staff member of the Commission, the CFMMEU was provided with copies of the application, statutory declaration and Notice of Employee Representational Rights with limited redactions for privacy purposes.<sup>5</sup> The CFMMEU was also advised that the application had yet to be allocated to a Commission Member, and that its “request to be heard, access to documents and this response have been placed on the file and will be brought to the attention of the relevant Commission Member”.<sup>6</sup>

[4] The correspondence was placed on the electronic application file and the “Single Enterprise Agreement Legislative Checklist” prepared by Commission staff in connection with the application and given to the Deputy President contained the following notation on its first page:

**CFMMEU Request:** Email received on 29 Sep 22 from CFFMEU (sic) requesting to be heard and for documents. On 29 Sep 22 redacted documents emailed to CFMMEU.<sup>7</sup>  
 [Bold in original]

[5] The checklist also contained the following table:<sup>8</sup>

Modern Award Classification	Agreement Classification	Modern Award Rate*	Agreement Rate**	Percentage Difference
<b>ASPHALT INDUSTRY AWARD 2020</b>				
Skill Level 1	Level 1	\$24.22	\$23.59	-2.60%
Skill Level 2	Level 2	\$25.41	\$25.28	-0.51%
Skill Level 3	Level 3	\$26.31	\$26.19	-0.46%
Skill Level 4	Level 4	\$27.61	\$27.51	-0.36%
Skill Level 5	Level 5	\$27.82	\$28.55	2.62%
Skill Level 5	Level 6	\$27.82	\$30.00	7.84%
Skill Level 5	Level 7	\$27.82	\$31.50	13.23%

[6] The Modern Award rates specified in the table above as operating at test time include the all-purpose allowances specified in clause 17.2 of the Award so that a direct rates comparison could be made with the pay rates in the Agreement. The latter rates are expressed to include these all-purpose allowances and leave loading.<sup>9</sup> However there appears to have been a double counting of one of the all-purpose allowances and so the Award rates were erroneously inflated. On 4 October 2022, the Deputy President’s Associate wrote to Patches Asphalt attaching a document setting out issues identified with the Agreement and seeking a response.<sup>10</sup> Among the issues raised was the following:

**Level 1 – 4** employees receive rates of pay between 2.60% and 0.36% below Award rates. It is noted that Award rates are inclusive of industry allowance and Agreement

rates are inclusive of industry, first aid and inclement weather allowances. However, rates of pay do not appear high enough to compensate for these reductions.<sup>11</sup> [Bold in original]

[7] The document also records that the “Deputy President notes that the Agreement contains the above identified less favourable entitlements which could cause employees to be worse off overall, in particular employees receiving minimal remuneration increases. Accordingly, submissions, evidence and/or undertakings in respect of the above issues are sought.”<sup>12</sup>

[8] The concern expressed is in part based on the erroneous analysis in the table extracted above and it appears to have procured the third undertaking in annexure A to the approval decision.<sup>13</sup>

[9] The correct all-purpose rates comparison should have been as follows:

Modern Award Classification	Agreement Classification	Modern Award Rate	Agreement Rate	Percentage Difference
<b>Asphalt Industry Award 2020</b>				
Skill Level 1	Level 1	\$23.28	\$23.59	1.33%
Skill Level 2	Level 2	\$24.47	\$25.28	3.31%
Skill Level 3	Level 3	\$25.37	\$26.19	3.23%
Skill Level 4	Level 4	\$26.67	\$27.51	3.15%
Skill Level 5	Level 5	\$26.88	\$28.55	6.21%
Skill Level 5	Level 6	\$26.88	\$30.00	11.60%
Skill Level 5	Level 7	\$26.88	\$31.50	17.18%

[10] As should be evident from the table above, Level 1 to 4 employees would not under the Agreement “receive rates of pay between 2.60% and 0.36% below [the] Award” as stated in the correspondence to Patches Asphalt. Rather the rates of pay as at test time were between 1.33% and 3.15% higher than the corresponding Award pay rates. The table above does not make allowance for the absorption of annual leave loading into the Agreement’s pay rates.<sup>14</sup> However, we take this into account in our analysis further below. We will return to this later in our decision.

[11] On 30 November 2022, Mr Fischer sent an email to the Member Assist team advising that he had “just been made aware that [the Agreement] was approved on 13th October 2022 by the Commission without any further contact with [the CFMMEU] by the presiding member or any other person [and that in an email] on the 29th September [the CFMMEU noted it] wished to be heard”. Mr Fischer requested a response.<sup>15</sup> The Deputy President’s Associate wrote to Mr Fischer later that day advising that the “Deputy President was not aware of the CFMMEU’s email of 29 September 2022 until he received” it.”<sup>16</sup> The Deputy President’s Associate also advised Mr Fischer that as the decision to approve the Agreement had been issued, the Deputy President is “now *functus officio*” and had no power to vary or revoke the approval decision.<sup>17</sup>

[12] An appeal against the approval decision issued on 13 October 2022 needed to be lodged by no later than 3 November 2022. Ms Rosalind Read the CFMMEU’s Construction & General Division, ACT Divisional Branch Senior Legal Officer, and Mr Fischer’s supervisor, gave evidence about the circumstances of the delay.<sup>18</sup> There is no real controversy about the delay in the period between the time for regular lodgement (3 November 2022) passing and 30 November 2022. Despite applying to be heard in relation to the application the CFMMEU’s application was not determined – apparently because the Deputy President was not aware of the request – and the CFMMEU was not heard as to its application to be heard. The approval application was also determined without its input, and it was not notified of the decision to approve the Agreement. The delay during this period is thereby explicable because the CFMMEU was unaware (and it had no reason to think) that the approval decision had been made, and so it was not aware that the time for lodging an appeal had expired.

[13] The adequacy of the explanation for the delay given for the period following 30 November 2022 until the appeal was lodged is contested. We will return to this later, but for present purposes Ms Read’s explanation for the delay in lodgement post 30 November 2022 is as follows:

11. On 30 November 2022, Mr Fischer was reviewing the FWC website and noticed that the Agreement had been approved on 13 October 2022, by Deputy President Boyce in [\[2022\] FWCA 3560](#).

12. As Mr Fischer had had no contact regarding this matter from the FWC between 29 September and 30 November 2022, he wrote to the ‘Member Assist’ email address at the FWC and requested more information about the situation.

13. On 30 November 2022, the Associate to Boyce DP replied to Mr Fischer by email, and advised him that Boyce DP was not aware of the Union’s request to be heard and was functus officio in relation to the matter.

...

15. As Mr Fischer was due to proceed on leave on 1 December 2022, he provided me with the information he had obtained on 30 November 2022.

16. Between 30 November 2022 and 2 December 2022, I was absent from the workplace on personal leave as I had Covid-19. I returned to work on 5 December 2022, however I did not work full days for the first three days as I was very fatigued as a result of my illness the previous week.

17. This delayed the process of drafting the Union’s appeal in relation to this matter until 8 December 2022.<sup>19</sup>

[14] Further to the matters above, Ms Read said that:

- in the morning of 8 December 2022, she spoke to counsel about filing an appeal against the approval decision;

- she instructed counsel to assist in preparing a notice of appeal and a statement explaining the delay in filing an appeal; and
- she and counsel worked to have the notice of appeal and statement ready to be filed in the afternoon of 8 December 2022.<sup>20</sup>

### Standing

[15] Before we deal with the question whether additional time to lodge the appeal should be allowed, it is necessary to deal with the CFMMEU's standing to bring the appeal. Patches Asphalt contends the CFMMEU does not have standing principally because its registered rules do not permit it to enrol as members any person who is or would, when employed by Patches Asphalt, be covered by the Agreement. The CFMMEU says some employees covered by the agreement are eligible to be members under Rule 2(E) but Patches Asphalt contends although Rule 2(E) covers, *inter alia*, operators of plant, the coverage is limited to the specified occupations in relation to the building industry and as Patches Asphalt and the Agreement operates in the asphalt industry (which falls into the civil construction industry), operators of plant covered by the Agreement do not fall within Rule 2(E). In other words, Rule 2(E) is an industry coverage rule rather than an occupational coverage rule. Consequently, Patches Asphalt says the CFMMEU is not a person aggrieved.

[16] Section 604(1) of the Act permits a person who is aggrieved by one of a category of decisions to appeal the decision with permission of the Commission. A 'person aggrieved' is of wide import and the interest held in a decision or its outcome by a person aggrieved need not be a legal, financial or proprietary one, but the interest must not be remote, indirect or fanciful and it needs to be beyond that of a general member of the public, an inter-meddler or a busybody. The person claiming to be aggrieved must show that the decision will impact their interests in a manner different or beyond its effect on members of the public at large.<sup>21</sup>

[17] If the CFMMEU is entitled to enrol as members under its rules and therefore entitled to represent the industrial interests of some employees who are covered by the Agreement, then given the nature of Patches Asphalt's business we accept it is likely some members of the CFMMEU will be employed by Patches Asphalt in the future in classifications covered by the Agreement. This would be a sufficient interest in the approval decision and one beyond that of an ordinary member of the public, rendering the CFMMEU a 'person aggrieved' and so it would have standing to appeal.<sup>22</sup> In addition the CFMMEU sought to be heard in the approval application. It was not heard nor was it given an opportunity to set out why it ought to be heard. It is thus a person aggrieved at least in so far as the approval decision was made without its application to be heard first being determined.

[18] As noted earlier, Rule 2(E) allows the CFMMEU to enrol as members, an operator of plant. The rule relevantly provides:

(E) Without limiting the generality of the foregoing and without being limited thereby the following are eligible to be members of the Union:

- (a) An unlimited number of all classes of engine drivers, firemen, crane drivers, mobile crane drivers, forklift drivers, tow motor drivers, excavator drivers,

pump attendants, pile drivers, motor drivers or attendants, greasers, cleaners, trimmers and any other workers assisting in and about the work incidental to any engine, boiler or machinery connected with the production or utilisation of power on land or any harbour or river, and boiler attendants attending boilers not generating steam for power purposes and such persons as have been elected or appointed as paid officers of the Union or a branch of the Union or whilst financial members of the Union are elected as representatives of any working-class organisation to which the Union or a branch thereof is affiliated, or as a working-class member of Parliament.

Provided that mobile crane drivers, operators of fork lifts and/or tow motors engaged on the waterfront upon such work being that of a waterside worker or engaged in the transport of goods by road, or motor truck drivers wherever employed, shall not be eligible for membership.

[19] Patches Asphalt’s contention that the rule is confined to the building industry, and so is in substance an industry rule, finds no support in the text of the above provision and is contrary to the history of the provision and the authorities relating to it. On 23 September 1992, the CFMEU amalgamated with the Federated Engine Drivers’ and Firemen’s Association of Australasia (FEDFA) and the Operative Plasterers and Plaster Workers Federation of Australia (OPPWF). The FEDFA and OPPWF were de-registered on that day and alterations to the rules of the then named Construction, Forestry and Mining Employees Union also took effect.<sup>23</sup> Relevantly rule 2(E) was included to deal with the FEDFA coverage rule and those persons eligible for membership under Rule 2(E) were allocated to the then FEDFA Division.<sup>24</sup> Rule 2(E) is not an industry rule.<sup>25</sup> It is an occupational rule focused on the work activities or industrial occupation of employees not the industry or enterprise of the employer.<sup>26</sup> The rule reflects the craft or occupational nature of the FEDFA, the organisation from which the rule originated.<sup>27</sup>

[20] The reference to occupational the class of “engine drivers” in Rule 2(E) includes plant operators<sup>28</sup> of the kind for which the Agreement provides. We are therefore satisfied the CFMMEU may under its rules enrol as members and is therefore entitled to represent the industrial interests of some of the employees, specifically at least plant operators, covered by the Agreement. Thus, for the reasons earlier given, the CFMMEU is a person aggrieved by the approval decision and has standing to bring the appeal.

### **Further time to lodge the appeal**

[21] It is necessary next to consider whether we should allow the CFMMEU further time to lodge the appeal, since the appeals were lodged some 35 days after the last day permitted by rule 56(2) of the FWC Rules. Rule 56(2)(c) permits the Commission, on application, to accept an appeal lodged outside of the time prescribed within such further time it allows. The principles applicable to the assessment whether an extension of time to lodge an appeal should be granted pursuant to r 56(2)(c) are stated in *Jobs Australia v Eland*.<sup>29</sup> Considerations of whether there is a satisfactory reason for the delay in lodging the appeal, the length of the delay, the nature of the grounds of appeal and their prospects of success, and any prejudice to Patches Asphalt if time were extended are relevant to the assessment whether time ought be extended. The relevant

question, by reference to these considerations is whether, in all the circumstances, the interests of justice favour an extension of the time within which to lodge the appeal.<sup>30</sup>

[22] As we noted earlier, the period of delay to 30 November 2022 is explicable because the CFMMEU was unaware that the approval decision had been made, and so it was not aware that the time for lodging an appeal had expired. Although we accept that the CFMMEU could have been more diligent in following up the progress of its application to be heard and the approval application with the Deputy President's chambers, it was reasonable for the CFMMEU to consider that the Deputy President would notify it whether the application to be heard had been granted or refused before determining whether the Agreement should be approved. This is particularly so given the 29 September 2022 email from Member Assist to Mr Fischer which stated, *inter alia*"

"Should the CFMMEU not be able to establish their status as a bargaining representative for this enterprise agreement or the CFMMEU is not otherwise permitted by the presiding Member to be heard or to make submissions, you are reminded that the CFMMEU will not be included in any correspondence including notification of the Member's intention to determine the application."<sup>31</sup> [Underlining added]

[23] The words of qualification underlined suggest that the CFMMEU would not be included in correspondence only if the qualifying terms were not met and, by implication, that notice one way or the other would first be given to the CFMMEU before any further step was taken.

[24] As to the delay following 30 November 2022, once Mr Fischer learned of the approval decision, he requested his colleague Ms Read action an appeal as he was due to commence leave. Ms Read was afflicted by Covid-19 at this time and did not return to work until 5 November 2022. Ms Read's uncontested evidence was that she did not work full days for the first few days of her return as she felt very fatigued because of the earlier illness. Ms Read was given responsibility for preparing and lodging the appeal. We accept that Ms Read's illness and its aftereffects contributed to the delay. On 8 November 2022 Ms Read briefed counsel and the appeal was lodged on the same day. We consider that the whole of the period of the delay is satisfactorily explained. Patches Asphalt's contention that the CFMMEU failed to take immediate action in lodging the appeal and did not delegate the task of doing so "to one of its numerous members who has the capacity to lodge the application within the stipulated time", cannot be accepted. Its contention that Ms Read could have requested another CFMMEU officer to lodge the appeal is also not accepted. There is no evidentiary foundation for the contentions. The propositions underpinning the contentions could have been but were not put to Ms Read as Patches Asphalt elected not to cross examine Ms Read about her evidence explaining the delay. Ms Read's evidence was uncontested.

[25] The period of the delay in real terms is not very long, a little over one month, but in relative terms compared to the period allowed for lodgement, the length of the delay is not insignificant. However, the length of the delay in this case should not be adjudged in the abstract but should be assessed in the context of the reason for the delay. Even considering the 8 days which passed between learning of the approval decision and lodging the appeal, having regard to the explanation for the delay, the CFMMEU acted reasonably promptly. Taking all of this into account we are persuaded that the period of the delay does not weigh against a conclusion

that additional time should be allowed and the explanation for the delay positively weighs in favour of such a conclusion.

[26] As to prejudice, Patches Asphalt says it is a small business and that it has been tendering quotes and contracts based on the Agreement. Further, it says that it has updated the payroll based on the Agreement since the approval. Patches Asphalt contends that if the Agreement is set aside, it will be forced to go back to the old agreement. This will expose Patches Asphalt to a risk of breaching its old agreement as it has been operating under the current Agreement since October 2022.

[27] Save that we accept that Patches Asphalt is a small business (not as defined in s 23 of the Act but in a relative sense), these contentions are rejected. *First*, Patches Asphalt is not compelled to revert to paying its employees at the lower rates prescribed by the old agreement. *Second*, how it will be in breach of the old agreement is both unclear and not explained. *Third*, it provided no evidence of the tenders that it has advanced based on the Agreement. Its belated provision of a list of tenders attached to its submission, which submission we allowed Patches Asphalt to file after the hearing, even if admissible at this late stage takes the matter no further. There is no evidence about nor any explanation of the basis upon which a tender under the Agreement was different than that which pertained under the old agreement. And there is no explanation about how these differences are prejudicial or disadvantageous to Patches Asphalt. *Fourth*, and in any event, these contentions concern the impact of the Agreement being set aside, no contention is advanced about the relevant question – which is whether there would be any prejudice suffered by reason of an extension of time to lodge the appeal being granted to the CFMMEU. We are not persuaded that any real prejudice will result if we were to allow a further period for the appeal to be lodged. Consequently, this consideration also weighs in favour of a conclusion to allow a further period.

[28] Turning then to the nature of the grounds of appeal and their prospects of success, the first ground contends a denial of procedural fairness while the second contends the Agreement did not pass the better off over all test and the Deputy President erred in concluding otherwise. As to the first ground, administrative decision-makers, including Members of the Commission must accord procedural fairness to those affected by decisions they make. That which is required is to ensure the decision is made fairly and this is determined by reference to the circumstances of a given case having regard to the legal framework under which the decision is to be made. The focus of procedural fairness requirements is on what should be provided in the circumstances of a case to ensure the decision is made fairly.<sup>32</sup> Put another way the ultimate question is whether there has been unfairness not whether some expectation has been disappointed.<sup>33</sup>

[29] Here it is evident that the Deputy President did not deal with nor determine the CFMMEU's application to be heard. He thus denied the CFMMEU the opportunity to put arguments about its interest and why it ought to be heard. It is uncontroversial that the common law obligation to accord procedural fairness to a person affected by an administrative decision arises when the person is directly affected by such a decision. This is not limited to an affected legal right or to a proprietary, financial or reputational interest that a person may have. It is not the kind of individual interests that a person has that is relevant, rather it is the way it is apt to be affected.<sup>34</sup> In the instant case, as a minimum the CFMMEU was denied the opportunity to speak to its interests in advancing a case as to why it should be heard. But we also consider it



was denied the realistic possibility that the decision-making process would have resulted in a different outcome because the CFMMEU was not given an opportunity to present evidence or make submissions about an issue requiring consideration, relevantly whether the Agreement passed the better off overall test. For the reasons which we discuss below, we consider the Agreement clearly did not pass the better off overall test (even considering the undertakings accepted by the Deputy President). The denial of procedural fairness was therefore material and amounted to jurisdictional error. The grounds of appeal have significant merit and their prospects of success is high. Given the jurisdictional error and the public interest in ensuring that agreement approval applications are properly assessed against the statutory approval requirements, the prospect of permission to appeal being granted is also high.

[30] For these reasons we consider in the circumstances that it is in the interest of justice to allow the CFMMEU a further period within which to lodge its appeal. We will extend the period of lodgement until 8 November 2022.

### **Ground 1— procedural fairness**

[31] There can be little doubt that the CFMMEU was denied procedural fairness and for the reasons given above the denial was material. Ground 1 is upheld.

### **Ground 2 – Better off overall test and undertakings**

[32] By ground 2 the CFMMEU contends the Deputy President erred in his assessment of whether the Agreement passed the better off overall test and/or in determining what, if any, undertakings were required to address concerns as to compliance with s 186 of the Act by failing to take into account material considerations in relation to provisions of the Award beneficial to employees which were omitted from the Agreement and provisions of the Agreement which were not contained in the Award which were detrimental to employees.

[33] The CFMMEU sets out several bases, by reference to Award provisions, on which it contends the Agreement did not pass the better off overall test. It is sufficient for us to deal with two examples related to the change in the spread of ordinary hours for which the Agreement provides compared to the Award, to conclude that the CFMMEU has made good this appeal ground.

[34] The Agreement provides that ordinary hours of work are between 5:00 am and 6:00 pm Monday to Friday.<sup>35</sup> Ordinary hours under the Award are to be worked between 6:00 am and 6:00 pm Monday to Friday.<sup>36</sup> A night shift under the Agreement, is any shift starting at or after 8:00 pm and before 5:00 am.<sup>37</sup> Under the Award a night shift means any shift starting at or after 8.00 pm and before 6.00 am.<sup>38</sup>

[35] Thus, under the Agreement, ordinary hours of work may begin at 5:00 am whereas under the Award, work commencing at 5:00 am would be either overtime for the hour before 6:00 am or where the 5:00 am starts form part of a rostered shift, the shift will be a night shift given the starting time is before 6:00 am. The analysis below shows that if a 5:00 am start is treated as overtime under the Award because it is outside the spread of ordinary hours, but under the Agreement that time worked is ordinary time because it is within the spread of ordinary hours in clause 28.1 of the Agreement, employees at Levels 1 to 4 (even when the higher rates

procured through the undertakings accepted by the Deputy President are applied) will not be better off overall.

Agreement Ordinary Rate	\$23.70			Level 1
Hours	Loading	weekly total		
Ordinary hours 5am - 1pm	38	100%	\$900.60	
			\$0.00	
Annual Leave	Yes		\$69.28	
Leave Loading			\$0.00	
<b>Totals</b>	<b>38.00 Hrs</b>	<b>\$969.88</b>		

Award Ordinary Rate	\$23.28			Skill Level 1
Hours	Loading	weekly total		
Ordinary hours 5am - 6am	5	150%	\$174.60	
Ordinary hours 6am - 1pm	33	100%	\$768.24	
Annual Leave	Yes		\$68.05	
Leave Loading	Yes		\$11.91	
<b>Totals</b>	<b>38.00 Hrs</b>	<b>\$1,022.80</b>		

<b>Agreement Total Weekly Rate</b>	\$969.88
<b>Award Total Weekly Rate</b>	\$1,022.80
<b>Dollar / Actual Percentage Difference</b>	-\$52.92 5.17%
<b>Agreement Percentage Increase Required</b>	5.46%

<b>Agreement Ordinary Rate</b>	<b>\$25.35</b>	Level 2	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Ordinary hours 5am - 1pm	38	100%	\$963.30
			\$0.00
Annual Leave	Yes		\$74.10
Leave Loading			\$0.00
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,037.40</b>

<b>Award Ordinary Rate</b>	<b>\$24.47</b>	Skill Level 2	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Ordinary hours 5am - 6am	5	150%	\$183.53
Ordinary hours 6am - 1pm	33	100%	\$807.51
Annual Leave	Yes		\$71.53
Leave Loading	Yes		\$12.52
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,075.08</b>

<b>Agreement Total Weekly Rate</b>	\$1,037.40
<b>Award Total Weekly Rate</b>	\$1,075.08
<b>Dollar / Actual Percentage Difference</b>	-\$37.68 3.50%
<b>Agreement Percentage Increase Required</b>	3.63%

<b>Award Ordinary Rate</b>	<b>\$25.37</b>	Skill Level 3	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Ordinary hours 5am - 6am	5	150%	\$190.28
Ordinary hours 6am - 1pm	33	100%	\$837.21
Annual Leave	Yes		\$74.16
Leave Loading	Yes		\$12.98
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,114.62</b>

<b>Agreement Ordinary Rate</b>	<b>\$26.30</b>	Level 3	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Ordinary hours 5am - 1pm	38	100%	\$999.40
			\$0.00
Annual Leave	Yes		\$76.88
Leave Loading			\$0.00
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,076.28</b>

<b>Agreement Total Weekly Rate</b>	\$1,076.28
<b>Award Total Weekly Rate</b>	\$1,114.62
<b>Dollar / Actual Percentage Difference</b>	-\$38.34 3.44%
<b>Agreement Percentage Increase Required</b>	3.56%

<b>Agreement Ordinary Rate</b>	<b>\$27.60</b>	Level 4	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Ordinary hours 5am - 1pm	38	100%	\$1,048.80
			\$0.00
Annual Leave	Yes		\$80.68
Leave Loading			\$0.00
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,129.48</b>

<b>Award Ordinary Rate</b>	<b>\$26.67</b>	Skill Level 4	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Ordinary hours 5am - 6am	5	150%	\$200.03
Ordinary hours 6am - 1pm	33	100%	\$880.11
Annual Leave	Yes		\$77.96
Leave Loading	Yes		\$13.64
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,171.74</b>

<b>Agreement Total Weekly Rate</b>	\$1,129.48
<b>Award Total Weekly Rate</b>	\$1,171.74
<b>Dollar / Actual Percentage Difference</b>	-\$42.26 3.61%
<b>Agreement Percentage Increase Required</b>	3.74%

[36] If a 5:00 am start is treated as night shift work (a shift commencing at or after 8:00 pm and before 6:00 am under the Award), then under the Agreement the whole of the shift would be paid as ordinary time day work because a night shift under the Agreement relevantly commences before 5:00 am. Under the Award an employee working a night shift will be paid 115% of their ordinary hourly rate of pay.<sup>39</sup> And an employee who is required to work on non-successive night shifts will be paid 150% of their ordinary hourly rate of pay for the first 8 hours and 200% for hours in excess of 8 hours.<sup>40</sup> An employee working permanent night shifts (other than by request) will be paid 130% of their ordinary hourly rate of pay for all time worked during ordinary working hours on permanent night shift.

[37] The table below illustrates that those employees working patterns of night shift work (5:00 am starts) would not be better off over all if the Agreement applied than if the Award applied to them. The table takes into account the undertakings accepted by the Deputy President in the “Agreement Rate”.

Modern Award Classification	Agreement Classification	Modern Award Rate	Agreement Rate	Percentage Difference
<b>Asphalt Industry Award 2020</b>				

Night				
Skill Level 1	Level 1	\$26.77	\$23.70	-11.48%
Skill Level 2	Level 2	\$28.14	\$25.35	-9.92%
Skill Level 3	Level 3	\$29.18	\$26.30	-9.86%
Skill Level 4	Level 4	\$30.48	\$27.60	-9.44%
Skill Level 5	Level 5	\$30.91	\$28.65	-7.32%
Skill Level 5	Level 6	\$30.91	\$30.00	-2.95%
Skill Level 5	Level 7	\$30.91	\$31.50	1.90%
Permanent Night				
Skill Level 1	Level 1	\$30.27	\$23.70	-21.69%
Skill Level 2	Level 2	\$31.81	\$25.35	-20.31%
Skill Level 3	Level 3	\$32.98	\$26.30	-20.26%
Skill Level 4	Level 4	\$34.67	\$27.60	-20.40%
Skill Level 5	Level 5	\$34.95	\$28.65	-18.01%
Skill Level 5	Level 6	\$34.95	\$30.00	-14.15%
Skill Level 5	Level 7	\$34.95	\$31.50	-9.86%

[38] The overall consequence on a weekly basis taking into account leave and leave loading (noting the latter is folded into the Agreement’s base rates) is set out below by way of example for Level 1 and 2 employees.

**Night shift**

<b>Agreement Ordinary Rate</b>	<b>\$23.70</b>	Level 1	
		<b>Hours</b>	<b>Loading</b>
			<b>weekly total</b>
Night shifts	38	100%	\$900.60
Annual Leave	Yes		\$69.28
Leave Loading			\$0.00
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$969.88</b>

<b>Award Ordinary Rate</b>	<b>\$23.28</b>	Skill Level 1	
		<b>Hours</b>	<b>Loading</b>
			<b>weekly total</b>
Night shifts	38	115%	\$1,017.34
Annual Leave	Yes		\$68.05
Leave Loading	Yes		\$11.91
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,097.29</b>

<b>Agreement Total Weekly Rate</b>	\$969.88
<b>Award Total Weekly Rate</b>	\$1,097.29
<b>Dollar / Actual Percentage Difference</b>	- \$127.42

	11.61%
<b>Agreement Percentage Increase Required</b>	<b>13.14%</b>

<b>Agreement Ordinary Rate</b>	<b>\$25.35</b>	Level 2	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Night shifts	38	100%	\$963.30
Annual Leave	Yes		\$74.10
Leave Loading			\$0.00
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,037.40</b>

<b>Award Ordinary Rate</b>	<b>\$24.47</b>	Skill Level 2	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Night shifts	38	115%	\$1,069.34
Annual Leave	Yes		\$71.53
Leave Loading	Yes		\$12.52
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,153.38</b>

<b>Agreement Total Weekly Rate</b>	\$1,037.40
<b>Award Total Weekly Rate</b>	\$1,153.38
<b>Dollar / Actual Percentage Difference</b>	- <b>\$115.98</b> 10.06%
<b>Agreement Percentage Increase Required</b>	<b>11.18%</b>

**Permanent Night shift**

<b>Agreement Ordinary Rate</b>	<b>\$23.70</b>	Level 1	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Permanent Night shifts	38	100%	\$900.60
Annual Leave	Yes		\$69.28
Leave Loading			\$0.00
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$969.88</b>

<b>Award Ordinary Rate</b>	<b>\$23.28</b>	Skill Level 1	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Permanent Night shifts	38	130%	\$1,150.03
Annual Leave	Yes		\$68.05
Leave Loading	Yes		\$11.91
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,229.99</b>

<b>Agreement Total Weekly Rate</b>	\$969.88
<b>Award Total Weekly Rate</b>	\$1,229.99
<b>Dollar / Actual Percentage Difference</b>	- <b>\$260.11</b>

	21.15%
<b>Agreement Percentage Increase Required</b>	26.82%

<b>Agreement Ordinary Rate</b>	<b>\$25.35</b>	Level 2	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Permanent Night shifts	38	100%	\$963.30
Annual Leave	Yes		\$74.10
Leave Loading			\$0.00
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,037.40</b>

<b>Award Ordinary Rate</b>	<b>\$24.47</b>	Skill Level 2	
	<b>Hours</b>	<b>Loading</b>	<b>weekly total</b>
Permanent Night shifts	38	130%	\$1,208.82
Annual Leave	Yes		\$71.53
Leave Loading	Yes		\$12.52
<b>Totals</b>	<b>38.00 Hrs</b>		<b>\$1,292.86</b>

<b>Agreement Total Weekly Rate</b>	\$1,037.40
<b>Award Total Weekly Rate</b>	\$1,292.86
<b>Dollar / Actual Percentage Difference</b>	- \$255.46 19.76%
<b>Agreement Percentage Increase Required</b>	24.63%

[39] The Agreement ordinary rates used in the foregoing analysis include the higher rates the subject of the undertakings accepted by the Deputy President.

[40] The issue of shift work was raised by the Deputy President with Patches Asphalt as follows with the response given by Patches Asphalt in yellow highlight:

Night work:

- Cl 25.1 of the Agreement provides night shift means any shift starting at or after 8pm and before 5am, whilst Cl 20.1 (a) of the Award provides afternoon shift means any shift starting at or after 10am and before 8pm and night shift means any shift starting at or after 8pm and before 6am. It may be that employees under this Agreement are not engaged to work afternoon shifts.

The Deputy President seeks clarification as to whether employees under this Agreement are engaged to work what would be classified as afternoon shifts under the Award as rates of pay may not be high enough to compensate if employees under this Agreement are entitled to the afternoon shift penalty.

Patches Asphalt does not engage employees to work afternoon shifts. Employees would only fall into the categories of day or night shifts under the award.

- CI 25.4 of the Agreement provides weekday night work will be based on five consecutive shifts worked and will be paid at 127.5% loading, whereas CI 20.2 (b) (iv) of the Award provides employee who works permanent night shifts 130%

The Asphalt Industry Award defines Permanent Night Shift as “a period of engagement on shift work where an employee works night shift only; remains on night shift for longer than 4 consecutive weeks; or works on night shift that does not rotate or alternate with another shift or with day work so as to give that employee at least one third of working time off the night shift in each shift cycle.”

Patches Asphalt does not engage employees to work permanent night shifts. Majority of Patches Asphalt shifts are day shift that rotate with occasional night shifts.<sup>41</sup>

[41] The first question is poorly framed. It ought to have been directed to night shift work not afternoon shift work because the alteration to the span of ordinary hours under the Agreement means that an employee roster to commence every day at 5:00 am would likely be working a night shift under the Award, but not the Agreement. Patches Asphalt concedes in its answer that “[e]mployees would only fall into the categories of day or night shifts under the [A]ward.” The analysis earlier set out shows that an employee who is a night shift worker under the Award would not be better off overall if the Agreement applied to that employee working the same pattern of hours.

[42] The second question could also have been better framed. It seeks to compare apples with oranges because the commencement hours for a night shift differ as between the Agreement and the Award, and so too do the conditions for working permanent night shifts. A rostered start time of 5:00 am (absent an operative facilitative provision as to the alteration of the spread of hours) is likely a night shift under the Award (clause 20.1(a)). But under the Agreement, because a night shift is one that begins before 5:00 am (clause 25.1), work commencing at and not before that time is ordinary time day work (clause 28.1). Thus, a full-time day shift employee who always works day shifts under the Agreement starting at 5:00 am would not be a day shift employee under the Award. That person would be a permanent night shift employee, and as the earlier analysis makes clear, such an employee would not be better off overall if the Agreement applied to that working pattern. Patches Asphalt’s answer that it does not engage employees to work permanent night shifts also misses the point. Employees who are permanent night shift workers under the Award may not be permanent night shift workers under the Agreement because of the change in the span of hours. Patches Asphalt says in its answer that a majority of its shifts are day shifts that rotate with occasional night shifts. This also does not advance the matter. If the days shifts are to commence at 5:00 am as the spread of hours in the Agreement permits, then the answer discloses that at least some employees would be permanent night shift employees under the Award. The relevant enquiry is whether an employee working a particular pattern of hours permitted by the Agreement as at test time (in this case a 5:00 am start) would be better off overall if the Agreement applied than if the Award applied. The answer is clearly no.

[43] It is also no answer to the concern that under the Award employees may agree to alter the spread of ordinary hours<sup>42</sup> and thus start ordinary hours at 5:00 am and that the Agreement is how the employees agreed to the change. An agreement obtained under a Modern Award facilitative provision may be withdrawn or altered in the same manner as the agreement was



made. It is not, nor need it be a permanent or long-term change. Thus, an individual agreeing to alter the spread of ordinary hours may later withdraw from the arrangement and insist on the Modern award spread of hours provision. An express provision as to hours in an enterprise agreement cannot so readily or conveniently be altered.

[44] In the circumstances we consider that it is appropriate to grant permission to appeal in the public interest and in any event because appealable error is more than arguable. For the reasons given above we would uphold the appeal and quash the approval decision. We have given consideration to whether we should rehear the application to approve the Agreement but since there are many other issues relevant to the assessment whether the Agreement passes the better off overall test, the circumstances in which some of the rates of pay undertakings were procured (as earlier noted) and consequently the kind of further undertakings that might be necessary or capable of acceptance to permit the Agreement to be approved, the appropriate course is to remit the matter to the Deputy President to rehear the approval application.

### Order

[45] We order:

1. Leave to amend the notice of appeal filed on 8 November 2022 in the terms as set out in the amended notice of appeal is granted;
2. Pursuant to rule 56(2)(c) of the *Fair Work Commission Rules 2013* we extend until 8 November 2022 the period within which the CFMMEU may lodge an appeal;
3. Permission to appeal is granted;
4. The appeal is upheld;
5. The decision in *Norman McMahon Patches Pty Ltd T/A Patches Asphalt* [2022] FWCA 3560 is quashed; and
6. The application for the approval of the *Patches Asphalt Enterprise Agreement 2022 – 2025* is remitted to Deputy President Boyce for redetermination.



DEPUTY PRESIDENT

*Appearances:*

*Mr P. Boncardo* of counsel with *Ms R. Read* as representative for the appellant  
*Ms C. McMahon, Ms L. O’Conner* and *Mr A. Hewer* as representatives of the respondent

*Hearing details:*

21 February  
Online via Teams  
2023

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<sup>1</sup> *Norman McMahon Patches Pty Ltd T/A Patches Asphalt* [2022] FWCA 3560

<sup>2</sup> See Amended notice of appeal

<sup>3</sup> Appeal Book 106

<sup>4</sup> Ibid

<sup>5</sup> Appeal Book 105

<sup>6</sup> Ibid

<sup>7</sup> Appeal Book 88

<sup>8</sup> Appeal Book 94

<sup>9</sup> Clause 23, *Patches Asphalt Enterprise Agreement 2022 – 2025* – Appeal Book 18-20

<sup>10</sup> Appeal Book 84

<sup>11</sup> Appeal Book 86

<sup>12</sup> Ibid

<sup>13</sup> *Norman McMahon Patches Pty Ltd T/A Patches Asphalt* [2022] FWCA 3560; Appeal Book 38-42

<sup>14</sup> See clause 23, *Patches Asphalt Enterprise Agreement 2022 – 2025* – Appeal Book 18-20

<sup>15</sup> Appeal Book 35

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> Exhibit 1 at [11]-[17] and Exhibit 2 at [3]-[4]

<sup>19</sup> Exhibit 1 at [11]-[17]

<sup>20</sup> Exhibit 2 at [3]-[4]

<sup>21</sup> See generally *Right to Life Association (NSW) Inc v Secretary, Department of Human Services* (1995) 56 FCR 50 at 65; *Construction, Forestry, Maritime, Mining and Energy Union v JFM Civil Contracting Pty Ltd* [2020] FWCFB 4866 at [21]-[23]; *Argos Pty Ltd v Minister for Environment and Sustainable Development* (2014) 254 CLR 394 at [48]; *Transport Workers Union v Coles Supermarkets Australia Pty Ltd* [2013] FWCFB 276 at [29].

<sup>22</sup> *Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Main People Pty Ltd* [2014] FWCFB 8429 at [7]; and *Construction, Forestry, Mining and Energy Union v CSRP Pty Ltd* [2017] FWCFB 2101 at [12]-[13].

<sup>23</sup> *Re Application by Grahame Patrick Kelly* [2021] FWCFB 6002 at [18]

<sup>24</sup> Ibid

<sup>25</sup> *Re Federated Liquor and Allied Industries Employees’ Union of Australia* (1977) 51 ALJR 266 at 268

<sup>26</sup> *Construction, Forestry, Mining and Energy Union v CSBP Ltd* (2012) 212 IR 206 at [41]

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- <sup>27</sup> *Construction, Forestry, Maritime, Mining and Energy Union v Dulux Group (Australia) Pty Ltd* [2021] FWCFB 6020 at [8]-[26]; *Construction, Forestry, Maritime, Mining and Energy Union v Dulux Group (Australia) Pty Ltd* [2022] FCAFC 101 at [42]
- <sup>28</sup> See for example *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2021] ICQ 15; *Construction, Forestry, Maritime, Mining and Energy Union v CSR Ltd* [2019] FWC 7149 at [31]; *Construction, Forestry, Mining and Energy Union v Rapid Metals Developments (Australia) Pty Ltd* [2012] FWA 2790 at [60]; *CFMEU v Kemerton Silica Sand Pty Ltd* [2005] WAIRComm 308 at [4]-[6] and [17]; *Sydney Coal Lumpers Union v FEDFA* (1991) 38 IR 265 at 266 and 269-270
- <sup>29</sup> [2014] FWCFB 4822 at [5]
- <sup>30</sup> *Ibid* at [6]; see also *United Workers' Union v Hot Wok Food Makers Pty Ltd* [2022] FWCFB 191 at [107]; *Tracey v BP Refinery (Kwinana) Pty Ltd and Tracey v BP Refinery (Kwinana) Pty Ltd* [2022] FWCFB 210 at [8]
- <sup>31</sup> Appeal Book 105
- <sup>32</sup> *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, (2015) 256 CLR 326 at [28]-[30]
- <sup>33</sup> *Ibid* at [59]-[61]
- <sup>34</sup> see for example *Kioa and Ors v West and Anor* (1985) 159 CLR 550 per Brennan J at 619
- <sup>35</sup> Clause 28.1 of the Agreement
- <sup>36</sup> Clause 13.2(a) of the Award
- <sup>37</sup> Clause 25.1 of the Agreement
- <sup>38</sup> Clause 20.1(a) of the Award
- <sup>39</sup> Clause 20.2(b)(i) of the Award
- <sup>40</sup> Clause 20.2(b)(ii) & (iii) of the Award
- <sup>41</sup> Appeal Book 53
- <sup>42</sup> Clause 13.2(b) of the Award