DECISION

Fair Work Act 2009
s.604—Appeal of decision

FreshFood Management Services Pty Ltd
v
"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
(C2023/95)

FreshFood Management Services Pty Ltd
v
United Workers' Union
(C2023/96)

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) and United Workers' Union
v
FreshFood Management Services Pty Ltd
(C2023/148)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT CROSS
DEPUTY PRESIDENT HAMPTON

BRISBANE, 29 JUNE 2023

Appeals against decision of Commissioner McKenna at Sydney on 22 December 2022 in matter number C2022/5615.

1. Background

[1] FreshFood Management Services Pty Ltd (**FFMS**) has lodged two appeals and the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (**AMWU**) and United Workers' Union (**UWU**) have lodged a joint appeal against the decision of Commissioner McKenna issued on 22 December 2022[1] (**Decision**) made under s.739 of the *Fair Work Act 2009* (**FW Act**). The Decision dealt with a dispute regarding the *FreshFood Management Services Pty Ltd as a wholly owned subsidiary of FreshFood Australia Holdings Pty Ltd & The United Workers Union, The Australian Manufacturing Workers Union & The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia Enterprise Agreement 2019* (**Agreement**).

[2] The matter at first instance arose from dispute notifications made by the AMWU and the UWU to the Commission in respect of the proper application of the Agreement. In particular, the dispute focused upon the appropriate payments to be applied under clause 40.3.2 concerning personal/carers leave (**PCL**). In addition, upon later notice from the UWU, the payments due under clause 44.1.7 concerning compassionate and bereavement leave (**CBL**) also formed part of the dispute. These are the disputed clauses, although each must be read in the context of the Agreement as a whole.

[3] The background facts pertaining to the dispute are set out in full in paragraphs [1]-[8] of the Decision. In summary, FFMS is engaged in the manufacture, packaging, storage and wholesale of coffee and coffee products at its plant in Concord, New South Wales. The Agreement applies to FFMS and its non-administrative employees who are engaged in production, maintenance and warehouse functions. Most employees work Monday to Friday on day-shift and afternoon-shift, although there is a smaller number of employees who work on rotating morning, afternoon and night shifts over the course of the plant's seven-day operations. It was argued by the AMWU and UWU that the operation of the disputed clauses should attract a higher rate of pay than was being applied by FFMS. In particular, the Unions contended that employees should also receive payments comprising shift loadings and weekend penalties that would, but for the leave, have been paid on the days comprising the leave. For its part, FFMS contended that the provisions of the Agreement required a payment of shift loading or weekend penalties only where such was provided to the relevant employee by virtue of a "quarantined arrangement" under the clause 10 savings provision of the Agreement.

[4] It was common ground that the Commission had the jurisdiction and power to determine the dispute. The immediately relevant clauses of the Agreement are set out below.

[5] Clause 40.3.2 of the Agreement, pertaining to payment to employees for PCL, provides:

> "**40. Personal Leave (Sick & Carer's Leave):**
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> …
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> 40.3.2 If an Employee takes personal leave, the Employer must pay the Employee, for the period of the personal leave, the amount the Employee would reasonably have expected to be paid by the Employer if the Employee had worked during that period.
>
> …".

[6] Clause 44.1.7 of the Agreement, pertaining to CBL provides:

> "**44. Compassionate / Bereavement Leave:**
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> …
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> 44.1.2 Compassionate / Bereavement Leave:
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> In the event that a member of the employee's immediate family or a member of the employee's household is affected by any of the following events:
>
> a. Contracts or develops a personal illness that poses a serious threat to his or her life; or
> b. Sustains a personal injury that poses a serious threat to the life; or
> c. Dies;

"Definition" Immediate family of the wife, husband, father, mother, including step father or step mother, father in law, mother in law, grandparent, grandchild, brother, sister, child or step child of the employee,

They shall be entitled to leave in the following manner:

a. In the circumstances of 44.1.2(a) and (b) the Employee shall be entitled to a period not exceeding two (2) days per occasion.
b. In the circumstances of 44.1.2(c) the employee shall be entitled to a period not exceeding three (3) days per occasion.

Provided further that employee will be only entitled to one or the other (a) or (b) such leave shall be in accordance with clause 44.1.2 and without loss of any ordinary pay which the employee would have earned if they had not been on such leave.

…

44.1.7 When an employee takes paid compassionate / bereavement leave, the Employer must pay the Employee the amount the Employee would have reasonably be [sic] expected to be paid if the Employee had worked during the period of compassionate leave.

…".

[7] Clause 10 of the Agreement is described as a savings provision and clause 10.2 provides:

"**10. Savings Provision:**

10.1 …

10.2 Where existing conditions within an area provide for a higher outcome because of historical differences it is agreed that there is no obligation for the Employer to reflect these arrangements for any other employees, current or new across the site. These arrangements are "quarantined" and are described in Appendix 1. Any future change in work practices or employment arrangements will not import the quarantined conditions and will only reflect the terms and conditions specifically detailed in this Agreement, and these changes will be accepted unilaterally by all Employees.

APPENDIX 1 – Quarantine provisions attached."

[8] Appendix 1 to the Agreement, as referred to in clause 10.2, provides:

"**Appendix 1: Quarantine Provisions – Instant Coffee Plant:**

a. **Payment of overtime** – All overtime done outside ordinary hours is paid at the rate of double time.
b. **Shift Allowance** – 15% payable for ordinary hours (40) worked from Mon-Sun as well as the weekend penalty rates. Shift allowance is paid on sick leave and RDO's.
c. **Penalty Rates** - 4 hours penalty rates for working Saturdays. 8 hours penalty rates for working Sundays. 12 hours penalty rates for working Public Holidays.
d. **Annual Leave Loading** – A loading of 37.5% of the ordinary weekly time rate of pay for the classification in which the employee was employed immediately before commencing annual leave (or the applicable shift loading whichever is the greater)."

[9] Clause 7 of the Agreement provides as follows:

> **"7. Relationship with Parent Awards and the National Employment Standard:**
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> …
>
> 7.3 Upon incorporating Award terms into the Agreement the incorporated Award terms are read as altered with appropriate changes to make them provisions of the Agreement rather than the award. So, for example, the loadings, penalties and allowances in the Award apply to the rates of pay due under the Agreement, not the Award rate.
>
> 7.4 Additionally if a term of this Agreement provides or an entitlement for an employee (the Agreement entitlement) that is the same as an entitlement under the National Employment Standard [NES] (the NES entitlement):
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> c. [sic] Those terms operate in parallel with the Employee's NES entitlement, but not so as to give the employee a double benefit; and
>
> d. [sic] The provisions of the National Employment Standard relating to the NES apply as a minimum standard, to the Agreement entitlement.
>
> 7.5 This Agreement shall be read and interpreted in conjunction with the National Employment Standards (NES) provided that where there is any inconsistency between this Agreement and the NES, the more beneficial provision to an employee shall take precedence."

[10] The AMWU contended that the Commissioner should resolve the dispute by answering the following question:

> "In addition to payment for their ordinary hours, are employees who take personal/carer's leave entitled to shift allowances or penalties for the purposes of clause 40.3.2 of the Agreement?".

[11] Further, the AMWU sought the following orders:

> "1. Within 14 days of this decision, FreshFood must:
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> (a) identify any current and former employees who took personal/carer's leave and did not pay a shift loading or weekend penalty under the Agreement, or any predecessor instrument which contained the current entitlement;
>
> (b) calculate what the employee would have received if they had been paid the shift loading or weekend penalty under the relevant instrument; and
>
> (c) provide calculations to the AMWU and, on request, the relevant employees.
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> 2. Within 7 days of Order 1 being complied with, FreshFood must pay each employee identified under Order 1(a) the amount calculated under Order 1(b) in relation to their employment; and
>
> 3. In the event that there is a dispute about the amounts calculated under Order 1, the parties are granted leave to have the matter relisted at short notice."

[12] The UWU posed the following question:

> "Having regard to the provisions of the Agreement, is FFMS required to pay an employee shift allowances or penalty rates in addition to their weekly time rates of pay when that employee takes:
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> (a) personal leave (sick and carer's leave); or
>
> (b) compassionate leave?"

[13] FFMS posed the following alternative questions for determination by the Commissioner:

"1. Does any employee employed under the terms and conditions contained within the Agreement as operative and applied in relation to the payment of:

(a) personal leave (sick leave)/carer's leave under clause 40.3.3; or,

(b) compassionate/bereavement leave under clause 44.1.7; or,

(c) both,

have any entitlement to payment of an amount calculated above their base rate of pay as defined in s.16 of the Act?

2. If the answer to Question 1 is "Yes" when and under what clause or clauses of the Agreement does the entitlement to an amount calculated at a rate above their base rate of pay arise under the Agreement for the purposes of:

(a) personal leave (sick leave)/carer's leave under clause 40.3.3; or,

(b) compassionate/bereavement leave under clause 44.1.7; or

(c) both?

3. On the basis of the clause or clauses identified, if any, in answer to Question 2 how is "the amount" referred to in:

(a) personal leave (sick leave)/carer's leave under paragraph 40.3.3; or,

(b) compassionate/bereavement leave under paragraph 44.1.7; or,

(c) both

to be calculated?".

[14] In the Decision, the Commissioner in effect answered the combined question posed by the UWU in the affirmative. The Commissioner declined to make the orders sought by the AMWU.

[15] FFMS appeals the Decision concerning the proper application of the Agreement on multiple grounds that we summarise later in this decision. The AMWU and UWU jointly cross-appeal the Decision to decline to make the orders sought.

[16] The Agreement concerned has, in the lead up to the appeals, been replaced by a new enterprise agreement. It was common ground between the parties that the Commission retains the jurisdiction to consider the appeals. We have proceeded on that basis.[2] We observe that the terms of the new enterprise agreement reflect the disputed terms in this matter and FFMS has undertaken to apply the new instrument to reflect the final view taken by the Commission regarding the proper application of the Agreement.

[17] We also observe that the Unions have recently lodged Federal Circuit and Family Court proceedings (**Court proceedings**) seeking declarations and recovery of what they contend are the outstanding entitlements due under the Agreement and under former instruments applying to the workplace. We will return to this aspect as part of our consideration of the cross-appeal.

[18] For reasons that follow, we have granted permission to appeal in each case but have dismissed all appeals.

2. The Decision

[19] After setting out the context of the matter, the disputed clauses and the submissions of the parties, the Commissioner commenced her consideration of the dispute by indicating that the well-established principles for the interpretation of enterprise agreements (including for example, *AMWU v Berri Pty Ltd*[3] (***Berri***) and, more recently, the majority judgment in *James Cook University v Ridd*[4] would be applied.[5]

[20] The Commissioner then stated:

> "[25] …I consider it unnecessary to describe matters including the evidence and the submissions in the case around developments that have occurred over the history of the different iterations of predecessor instruments to the Agreement, and/or the long-running history of unresolved disputation about payment for PCL and/or CBL under both the Agreement and its predecessors. It is also unnecessary to consider what was advanced around matters said to constitute, for example, a purported "common understanding"."

[21] The basis for taking that approach was explained as follows:

> "[26] That is because, it seems to me, the words of the clauses in the current Agreement concerning PCL and CBL have a plain textual meaning (subject to what was, it is common ground, a minor typographical error in the CBL clause); and the import of the text is relevantly the same. The current Agreement is the instrument before me for arbitration of the dispute concerning its operation, not the Agreement's precursors. Following from the type of approach to the correct meaning of an instrument in *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCAFC 50, the correct interpretation of the Agreement is apt for consideration, rather than, in this case, an examination of how the Agreement and its predecessors have been applied as a matter of historical payroll practice and more recent payroll practice."

[22] Ultimately, the Commissioner concluded as follows:

> "[37] I find the proper construction of the Agreement requires an objective inquiry into the amount the relevant employee would reasonably expect to have been paid during a period of leave, had the employee worked during that period – contextualised by reference to what payments would attach under the Agreement to working the particular days/shift hours in question rather than, for example, some subjective-type opinion of what was fair and proper.
>
> [38] I do not consider that the savings provision in clause 10.1 of the Agreement and Appendix 1 relevantly arise for consideration in relation to PCL and CBL more broadly. Those provisions of the Agreement are dedicated provisions designed to deal with discrete matters concerning a particular cohort of employees. For example, as the AMWU's submissions put matters (references not reproduced):
>
> > "18. The reference to *'instant coffee plant'* in Appendix 1 is only referable to rotating shift workers engaged in instant coffee processing. This aligns with the other provisions in the Agreement that reference the *'instant coffee plant'*, as well as the current payment practice whereby rotating shift workers engaged in instant coffee processing receive a 15% shift allowance during a period of personal/carer's leave in accordance with Appendix 1, whilst afternoon and night shift workers do not.
> >
> > 19. The payment of a 15% shift loading during a period of personal/carer's leave for rotating shiftworkers reflects the averaging arrangement for shift loadings. That is, rotating shift workers are paid an average 15% loading so that their income is flat, rather than receiving a fluctuating income arising from the entitlement to no loading for a day shift, 15% loading for an afternoon shift or 30% for a night shift, as the case may be." "

[23] The basis for those conclusions was succinctly stated in the Decision as follows:

"[28] The words in the Agreement concerning the PCL clause presuppose something different from, and/or more beneficial to employees than, what is set out as minimum conditions in s.99 of the Act as part of the NES and the Agreement-specific "wage rates". Specifically, s.99 provides that, under the NES, if an employee takes paid PCL, the employer must pay the employee at the employee's "base rate of pay" for the employee's ordinary hours of work in the period. Section 16 of the Act defines base rate of pay as excluding matters such as incentive-based payments, loadings, monetary allowances, overtime or penalty rates and/or any other separately identifiable amounts.

[29] Clause 40.3.2 of the Agreement does not use the "base rate of pay" formulation contained in the NES concerning payment to employees for PCL. However, as the AMWU submitted, the language in clause 40.3.2 can be distinguished from, for example, the meaning of the phrase "wage rates" in clauses 25 and 26 of the Agreement – with the Agreement's formulation comprising words which are effectively synonymous with the meaning of base rate of pay in the Act. I accept that part of submissions for the AMWU which read:

> "Had the parties intended for personal/carer's leave to be paid at the *'base rate of pay'*, or *'wage rates'*, they would have drafted the clause accordingly. Instead, the clause is drafted having regard to the employee's expectation of income had they worked."

[30] I also accept submissions for the UWU on the question of "wage rates", within the meaning of the Agreement, that read:

> "Had it been intended that employees be paid only an amount calculated at the weekly rates set at clauses 25 and 26, the 2019 Agreement, this would have averted [sic] to this by using different language found in the NES and elsewhere in the 2019 Agreement."

[31] In a similar vein to the PCL clause (albeit somewhat more clumsily-worded - given the minor typographical error that was introduced in a much earlier iteration of the Agreement and which continued thereafter in subsequent iterations without correction), the Agreement's CBL clause reads:

> "When an employee takes paid compassionate / bereavement leave, the Employer must pay the Employee the amount the Employee would have reasonably be [sic] expected to be paid if the Employee had worked during the period of compassionate leave."

[32] Similarly to the PCL provisions that I have earlier considered, the words in the Agreement concerning CBL also presuppose something different from, and/or more beneficial to employees than, the minimum standards set out in s.106 of the Act as part of the NES concerning paid compassionate leave. Specifically, s.106 provides that, under the NES, if an employee takes paid compassionate leave the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period. I have already noted the effectively synonymous meaning of "base rate of pay" as defined in 16 of the Act and the meaning of "wage rates" within the Agreement.

[33] FFMS contended that it has no obligation to pay employees for shift penalties and weekend penalties which they would have received, had they worked, during the period of PCL and CBL. The UWU submitted that the ordinary meaning of the phrase "the amount the Employee would reasonably have expected to be paid if the Employee had worked during the period of ... leave" refers to the total amount the employee should have been paid under the terms of the Agreement, had the employee worked his or her rostered hours in the period during which the PCL or the CBL is taken; and the calculation of payment is set by the expectation of the employee, subject to reasonableness (with the reasonableness of the expectation being conditioned by entitlements otherwise arising in the Agreement, such as to penalty rates).

[34] Notwithstanding the submissions by FFMS about what FFMS contended are the proper payments for PCL and CBL, I find that under the Agreement FFMS is bound to pay an employee, for the period of the PCL and the period of CBL the amount an employee reasonably would have expected to have been paid by FFMS if the relevant employee had worked during that period – as exampled in the following quote from the AMWU's submissions:

> "13. To that end, if, for example, an employee was working an afternoon shift or night shift, they could reasonably expect to be paid an afternoon or night shift allowance, as they [sic] case may

be. If an employee who is entitled to receive a shift allowance undertook weekend work, they could reasonably expect to be paid the higher penalty (without double counting) pursuant to cl.37.5.1 of the Agreement. The same approach to interpretation must be applied in determining the entitlements conferred upon employees when they take personal/carer's leave."

[35] In submissions to similar overall effect as those advanced by the AMWU, the UWU submitted:

"25. The UWU submits that the ordinary meaning of the phrase "the amount the *Employee would reasonably have expected to be paid if the Employee had worked during the period of … leave"* refers to the total amount that the employee should have been paid under the terms of the 2019 Agreement, had they worked their rostered hours in the period during which the personal leave or the compassionate leave is taken.

26. The calculation of payment is set by the expectation of the employee, subject to reasonableness.

27. An employee to whom the 2019 Agreement applies would, in the event that they worked on a week and or on a shift at times attracting a shift allowance, expect that they be paid the shift allowances and penalties otherwise payable to them under the terms of an enterprise agreement that applied to them.

28. This expectation is reasonable in circumstances where the provisions of that enterprise agreement would require those amounts to be paid."

[36] The UWU's submissions continued (references not reproduced):

"32. The deliberate and substantial difference in wording in respect of payment for personal leave and compassionate leave under the 2019 Agreement in comparison to the NES is a contextual indicator that the parties intended to provide for a different and more beneficial entitlement to that provided for under the NES.

33. Further, while the 2019 Agreement does not refer to a "base rate of pay", it does provide for a functionally similar "weekly rates" or "weekly time rates", which are set at at [sic] clause 25 and 26 of the 2019 Agreement for maintenance and production/ warehouse employees respectively. The "weekly rate" or "weekly time rate" is used as the basis for the calculation for a number of entitlements under the 2019 Agreement.

34. Had it been intended that payment for personal leave and compassionate leave be set by the weekly rate or the weekly time rate set out in the 2019 Agreement, it would have been open to the parties to set this out expressly.

35. Again, clauses 40.3.2 and 44.1.7 of the 2019 Agreement are expressed in terms that differ from this simple formulation, which invites a conclusion that the payments provided for at those sub-clauses are calculated at a different and more beneficial rate than the entitlements which are expressed to be calculated on the basis of the "weekly rate" or the "weekly time rate"."

[24] Under what was described as the disposition of the dispute, the Commissioner stated as follows:

"[39] I do not accept that the questions as framed by FFMS need to be addressed, even if I accepted the underpinnings as advanced in FFMS's submissions. That conclusion concerning the FFMS questions arises from my acceptance of the submissions advanced in the unions' cases about such matters. Instead, I accept that the question/s advanced by the unions are appropriate to answered (and answered in the affirmative). It is convenient to answer the question posed by the UWU, as it traverses not only PCL but also CBL. I answer "Yes" to the following question:

"Having regard to the provisions of the Agreement, is FFMS required to pay an employee shift allowances or penalty rates in addition to their weekly time rates of pay when that employee takes:

(a) personal leave (sick and carer's leave); or

(b) compassionate leave?"

> [40] Even if I had power to do so (noting that FFMS submitted such orders would be beyond power), I would not be minded, in the exercise of discretion, to make the orders proposed by the unions. As I would not be minded to make the proposed orders, it is unnecessary to consider the competing submissions concerning the scope power and of the particular proposed orders.
>
> [41] Instead, I say this to "finalise the dispute": as a corollary to the question I have answered in arbitration of the dispute, self-evidently FFMS, in future, is expected to take necessary payroll steps that are consistent with the arbitrated outcome concerning payment rights and obligations for relevant employees under the current Agreement attaching to PCL and CBL. I add that FFMS, also self-evidently, would be well-advised to consider what steps it now needs to take with respect to rectifying past underpayments.
>
> [42] I separately note the submissions indicated that voting for a new/replacement enterprise agreement was underway on the same day as the hearing (the outcome of the ballot was not known when the hearing proceeded). I was informed that the proposed enterprise agreement contains provisions in the same terms as the Agreement concerning PCL and CBL. The submissions indicated, in effect, that the decision of the Commission about PCL and CBL would be honoured by FFMS concerning the operation of the new enterprise agreement if/when made by a vote of employees and approved by the Commission."

3. Permission to appeal

[25] Section 604 of the FW Act provides, in effect, that an aggrieved person may appeal a relevant decision with permission of the Commission. This operates subject to the terms of an instrument otherwise providing the basis for the Commission to determine a matter by arbitration under s.739 of the FW Act.

[26] The dispute resolution provision under which the matter came to the Commission relevantly provides as follows:

> "12.3 The parties agree that the Commission or other agreed arbitrator shall be able to exercise whatever functions and/or powers it considers necessary to conduct any arbitral process and thereby finalise the dispute in question. This shall include the powers to issue subpoenas, direct witnesses to attend and give evidence.
>
> 12.4 It is a term of the Agreement that the parties agree, subject to any right of Appeal, to accept the arbitrated decision of the Commission or other agreed arbitrator as final and binding on the parties."

[27] We consider that clause 12.4 of the Agreement does not establish an independent right of appeal. That is, the relevant provision refers to **any** right of appeal and does not itself directly provide that right. As a result, an appeal lies under s.604(1) only with the permission of the Full Bench of the Commission. The key words in the provision are relevantly akin to those considered by the Full Bench in *DP World*[6] and do not confer a right of appeal that modifies the operation of s.604 of the FW Act.[7]

[28] We are nonetheless satisfied that permission to appeal in each case should be granted. The appeals raise issues of substance and potentially wider application. The FFMS appeals raise issues of importance and general application concerning the proper approach to the construction of an enterprise agreement. In the case of the Unions' cross-appeal, the Decision raises issues of importance and general application with respect to the scope of arbitral powers of the Commission in resolving disputes.

[29] The Decision against which the appeals have been brought concerns the proper construction of the Agreement. The substantive part of the Decision did not involve the exercise of discretion. The answer given by the Commissioner to the proper construction of the

Agreement is either correct or incorrect. In this regard the appeals concerning the proper construction of the Agreement are to be determined by the "correctness standard" (per *Minister for Immigration and Border Protection v SZVFW*).[8] There are elements of the Unions' cross-appeal that involve the exercise of discretion, and in that respect, we adopt the approach stated by the High Court in *House v The King*[9] as follows:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."[10]

4. FFMS appeals on the substantive decision

[30] We deal firstly with the two appeals made by FFMS concerning the substantive outcome determined by the Commissioner. Although there are two appeals made by reference to each of the applicant unions, they canvas largely the same grounds and issues.

Appeal grounds of FFMS

[31] FFMS advanced consistent, but slightly different, grounds of appeal in its two appeals. This was largely the result of the fact that the questions ultimately addressed by the UWU's application involved both the PCL and CBL. For convenience we have concentrated upon the appeal directed at the UWU's application given that it includes all aspects of the matters determined by the Commission on the substantive question and incorporates all aspects of the appeal concerning the AMWU matter.

[32] The grounds of appeal concerning the UWU matter were stated as follows:

> "1. The Commissioner erred in failing to find that the amount payable to an employee under clause 40.3.2 did not include an entitlement to be paid any amount over and above the employee's base rate of pay as provided for within the National Employment Standards (NES) and section 16 of the *Fair Work Act 2009*.
>
> 2. The Commissioner erred in failing to find that the amount payable to an employee under clause 44.1.7 did not include an entitlement to be paid any amount over and above the employee's base rate of pay as provided for within the National Employment Standards (NES) and section 16 of the *Fair Work Act 2009*.
>
> 3. The Commissioner erred by failing to construe the disputed terms of the 2019 EA, clause 40.3.2 and 44.1.7 in context and in whole with other terms of the 2019 EA, particularly clauses 7, 10 and Appendix 1, and 36, and specifically 36.4 of the 2019 EA. The Commissioner had she done so would have properly concluded that the only employees to whom the 2019 EA applied and who were entitled to

any payment above the base rate of pay were those employees to whom the quarantined provisions in Appendix 1 applied.

4. The Commissioner further failed to properly apply the principles of construction of enterprise agreements including as outlined in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union v Berri Pty Ltd* **(Berri).**

5. The Commission erred by failing to find ambiguity existed in relation to the disputed provisions of the 2019 EA and incorrectly proceeded to construe and interpret the 2019 EA and the disputed provisions based upon the plain textual meaning of the disputed provisions. Arising from this error the Commissioner did not consider or apply or take any appropriate account of the history of industrial regulation at the site and between the parties to the 2019 EA under predecessor agreements, including in an appropriate way the issue of common understanding.

6. Further and in the alternative, the Commission erred by failing to find ambiguity existed in relation to the disputed provision of the 2019 EA in relation to clause 44.1.7 by not giving any or any proper consideration to the other terms of the clause and in particular either or both clauses 44.1.2 and 44.1.6 where ambiguity arises on the face of the clause and the use of the terms "ordinary pay" and "without loss of pay".

7. Further and in the alternative, and if the Commissioner was not in error and did not fail in the manner identified in 5 above generally, or specifically in the manner identified in 6 above, and was entitled to proceed upon the basis of the plain textual meaning of the disputed provision the Commissioner erred in that she failed to interpret the disputed provisions in the manner contended for in 3 above, and to give effect to the plain and ordinary meaning of the words including having regard to their context and purpose within the disputed provision and within the 2019 EA in context and in whole.

8. For and upon such other grounds and reasons as appear appropriate to the Full Bench upon the hearing of the appeal."

FFMS Submissions

[33] Ground 1 of the substantive appeals and ground 2 of the appeal concerning the UWU matter go, in effect, to whether the outcome of the Decision was correct.

[34] In relation to grounds 3 and 7 of the appeal concerning the UWU matter (grounds 2 and 5 of the appeal concerning the AMWU matter raised the same concerns about the PCL clause only), FFMS relevantly submitted (references omitted) that:

"17. ...if inquiry was properly to be restricted to the plain and ordinary meaning of the Disputed clauses within the 2019EA unattended by the application of any past practice, and contrary to [FFMS'] submitted position, then both clauses 7.4 and 7.5 fell to be considered in relation to the interpretation of the Disputed clauses in order to interpret the Disputed clauses in whole and in context. This is particularly so where any payment to be made is made conditional upon the employee's expectation…to the extent that the Commissioner declined to consider appropriately the interaction between clause 7 and the Disputed clauses, even if the question of interpretation be restricted to the plain and ordinary meaning of the 2019EA, the Commissioner erred in the interpretation of the Disputed clauses of the 2019EA.

…

19. Savings provisions: Clause 10 and Appendix 1 of the 2019EA: The inclusion of Appendix 1 within the 2019EA (and on the evidence Appendix 1 was included within all predecessor agreements from the 2007CA onwards…) had to have arisen for a particular purpose…a savings provision seeks to preserve an existing entitlement or obligation whilst limiting its extension to others who do not have, or to those who are intended only to have, the entitlement or obligation applied to them. The provision is designed to address a specific need to preserve an existing right or entitlement, and to override a general provision establishing, or maintaining a less beneficial right or entitlement. The manner in which the savings provision was interpreted by the Commissioner, was erroneous, and contrary to Mr Mendis'

> evidence…Within the 2019EA at clause 36.4.2, the payment to be made of shift allowances to the employees on shift work in the ICP is identified prior to any further consideration of the quarantined provisions within Appendix 1. It is to be noted that Appendix 1 is completely silent as to any payment for CBL at any higher rate for persons within the ICP given both the PBL [sic] clause and the CBL clause together with the savings provision (clause 10) and Appendix 1 were first included within the 2007CA and incorporated thereafter in successive agreements including the 2019EA.
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> …
>
> 23. The purpose of the quarantine arrangements: The Commissioner…asked of the unions that each identify *"what work the quarantine arrangements have to do"* noting that those arrangements were *"there for a purpose"*. ...the answers provided by the unions to the Commissioner's enquiry are non-responsive and also of little assistance. Nor do these answers explain the reason for the savings provisions, its' [sic] continuation within the 2019EA and its particular purpose. These submissions should have been rejected and not further considered by the Commissioner."

[35] In relation to ground 4 of the appeal concerning the UWU matter (ground 3 of the appeal concerning the AMWU matter), FFMS submitted that the Commissioner's approach in interpreting the PCL and CBL clauses was contrary to principles 7 to 15 inclusive enunciated in *Berri* and that the Commissioner misapplied the case law in relation to principle 12 in *Berri* regarding the establishment of "objective background facts" and as identified at (i), (ii) and (iii) of that principle. FFMS further submitted (references omitted) that:

> "4. …there is a difference to be drawn between "common understanding" and objective background facts that are "notorious facts" but more importantly, "matters in common contemplation and constituting a common assumption". This question of "common assumption" is of import when applying principle 15 of *Berri* to an interpretation of the Disputed clauses of the 2019EA. The evidence relied upon by FFMS made clear that the Disputed clauses were long standing clauses, included within successive agreements applying at the site, and commencing from the 2007 Collective Agreement (**2007CA**).
>
> 5. FFMS sought to demonstrate that a "common assumption" was held based upon evidence concerning both prior complaint and claims, and the consistent manner of application of the clauses by FFMS over time. This evidence establishing "common assumption" obviated any finding that consistent past practices had arisen due to any "common inadvertence". …the Commissioner, in such circumstances, further erred by failing to appropriately consider and apply *Transport Workers' Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829 (Tracey J) (***Linfox***)…"

[36] In relation to ground 5 of the appeal concerning the UWU matter (ground 4 of the appeal concerning the AMWU matter raised the same concerns about the PCL clause only), FFMS relied on *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union*[11] (citing *Cannon Hill Services Pty Ltd v Australasian Meat Industry Employees Union*[12] at [8]) in submitting that "ambiguity of the requisite kind" might exist notwithstanding that a literal meaning could be given to a disputed clause or clauses. FFMS further submitted (references omitted) that:

> "4. …had the applicable case law been applied the Commissioner would have found the existence of ambiguity within both of the Disputed clauses such that the extrinsic evidence relied upon by FFMS should have been utilised in interpreting the Disputed clauses…
>
> …
>
> 15. The Commissioner in…an unsatisfactory and erroneous manner, rejected the Appellant's submissions concerning consideration of the extrinsic evidence drawn from the agreements and Ms Standley's evidence. If FFMS were to accept this finding uncritically, the finding in terms of the manner in which the Disputed clauses fall to be interpreted must mean that there was no need to extend any inquiry beyond principle 1 as identified within *Berri*, and that principle 9 of *Berri* similarly applied by extension in relation to the use of any extrinsic evidence. However, to do so, would be an error. Resort to extrinsic

> evidence can properly be made when the existence of ambiguity is in issue. If this is so, it is submitted that the manner in which the Commissioner thereafter proceeded to determine the disputes, and interpret the 2019EA, was clearly in error…
>
> 16. …where the meaning of a term or terms within an enterprise agreement are in contest, and it is established by evidence that the disputed term or terms have been included in a series of successive agreements, and thereafter consistently applied such as with the Disputed clauses of the 2019EA, then absent the establishment of any consistent past practice derived from mere or common inadvertence, the proper inquiry to be made is whether the literal meaning should give way to the prior conduct of the parties and the past practices adopted in the administration of the disputed term or terms. This is the crux of the decision in *Linfox*. It also means by extension that in such circumstances ambiguity is able to be found to exist as two possible meanings are "capable" in relation to either or both of the Disputed clauses. In the alternative, if the Commissioner did not so err and inquiry was to be restricted solely to the terms within the 2019EA, and without resort to extrinsic evidence the Commissioner further erred by failing to interpret the Disputed clauses consistent with principle 1 in *Berri*.
>
> …
>
> 20. "Common understanding" and "common assumption": No submission was made by FFMS or an argument advanced based on any reliance upon "common understanding". FFMS in oral submissions stated that it was not a question of "common understanding" but one of "common assumption". The fact that in *Linfox* it is characterised as "common understanding" is not to be viewed or accepted as the sole or determinative characterisation…it can be read synonymously as there having existed one or more facts by way of a "common assumption" that arose not from "mere inadvertence" and concerning the manner in which the Disputed clauses had been viewed and applied following their inclusion in successive agreements after 2007 by FFMS.
>
> 21. The approach by the Commissioner to this issue was in error. The problem with this approach is that the evidence of the 2004 memorandum, was never relied on by FFMS to support a submission made by it based on "common understanding". …the evidence establishes that prior to the 2007CA there was no entitlement, and on and after the 2007CA, there has been no substantive change to the Disputed clauses apart from "a minor typographical error in the CBL clause"…"

[37] In relation to ground 6 of the appeal concerning the UWU matter, which was put in the alternative, FFMS submitted that the Commissioner failed to address the issues arising from the express terms of the CBL clause, which they contended raised significant issues of interpretation. FFMS submitted that these issues included how subclause 44.1.2 and its identification of "ordinary pay", subclause 44.1.6 with the use of the expression "without loss of pay", and subclause 44.1.7 (the term in dispute) interacted with one another and fall to be interpreted within the Agreement.

[38] FFMS further relevantly submitted (references omitted) that:

> "22. …The CBL clause…has a number of internal inconsistencies in relation to how any period of leave under the clause is to be paid under the 2019EA. These internal inconsistencies were ignored by the Commissioner in terms of the construction of, and the interpretation or meaning of, the disputed terms within clause 44.1.7 and remained substantially unaddressed in any meaningful way by the Commissioner..."

[39] FFMS also contended that the Commissioner was in error when stating that the submissions made by FFMS regarding ambiguity "*were more relevant to the discontinued s.217 application*" and that the Commissioner fell into further error to the extent that the Commissioner thereafter failed to consider whether ambiguity existed, and the ways in which ambiguity might arise. FFMS further contended that a clear delineation is drawn within FFMS' Outline of submissions between the dispute notifications filed by the Unions, and the s.217 application filed by FFMS.

[40] FFMS also submitted that the employee expectation within the PCL clause was intended to be subjective and not objective. That is the provision referenced "the employee" (the definite article) as opposed to "an employee" which would identify a general, objective application of the clause. Further, it contended that if the interpretation was one of subjective expectation how it then applies is what is in issue, and if it lacks certainty, then it follows that the clause is uncertain as to outcome. FFMS acknowledged that although uncertainty is not synonymous with ambiguity, it is possible if not probable that there is ambiguity within the PCL clause and by extension the CBL clause.

[41] We observe that FFMS also raised some related matters in submissions concerning the absence of agreed or common questions.

Unions' submissions on the substantive appeals

[42] The Unions submitted that in interpreting a text, the starting point is the text itself, although it cannot be read in isolation. The Unions stated that the meaning of a text is derived from its documentary and factual context in addition to the words themselves and contended that context can play a dual role of introducing ambiguity and assisting in resolving ambiguity.

[43] The Unions submitted that the PCL and CBL clauses both contain the critical phrase "reasonably have/be expected to be paid if the employee had worked in the period". They contended that the test is objective, as is evidenced by the word "reasonable" and that objectively, the amount to be paid would include amounts that the employee would have been entitled to be paid if they had worked the hours, namely shift loadings and allowances.

[44] In response to FFMS' argument that the PCL and CBL clauses did not include an entitlement to be paid any amount over and above the employee's base rate of pay, the Unions submitted that the parties could easily have expressly stated this in the clauses but instead, the parties selected a phrase that is "akin to *'what they would have otherwise received'*."[13] In support of their submission, the Unions stated (references omitted and emphasis in the original):

> "14. That this language is inherently broader than a pure reference to base rates of pay has been recognised previously by the Commonwealth. In the initial iteration of the Australian Fair Pay and Conditions Standards (**AFPCS**) in the *Workplace Relations Act 1996* (Cth), as introduced by the *Workplace Relations Amendment (WorkChoices) Bill 2005*, the payment rule for personal leave and compassionate leave (ss.247 and 249 respectively) provided that:
>
> > If an employee takes paid [personal or compassionate] leave during a period, the employer must pay the employee for that period the amount the employee would reasonably have expected to be paid by the employer if the employee had worked during that period.
>
> 15. This was amended the following year by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth), to substitute it for language expressly referring to payment at an employee's base rate for their ordinary hours. The explanatory memorandum stated clearly that the purpose, and impact, of this change was to *narrow* the entitlement:
>
> > Under the existing payment rule for personal/carer's leave, an employee who takes leave is entitled to his or her basic rate of pay, **as well as** (for example) any allowances, overtime loadings and penalty rates that the employee could reasonably have expected to be paid had they worked during the period of leave.
>
> 16. This further demonstrates the obvious ordinary meaning of the alternative phrase.

> 17. It is worth noting that the language in the Agreement was introduced in 2007, in the first federal system agreement entered into by FreshFood. It is tolerably clear that the parties have adopted the language from the *earlier* version of the AFPCS, reflecting an apparent deliberate decision to eschew the narrower amended version. This is a relevant contextual factor which tells against FreshFood's construction.
>
> 18. The Commissioner's interpretation also leads to an outcome which is generally consistent with:
>
> a. the protective purpose of leave, which is to allow absence without loss of pay in certain identified circumstances; and
>
> b. the broad scheme of the agreement, noting that employees are entitled to be paid shift loadings etc. in respect of superannuation contributions (cl.31.2.2), annual leave (cl.41) and redundancy (cl.22.3),
>
> and which could not be described as inherently industrially unlikely, particularly in a highly-unionised workplace in which manifestly superior conditions to base award/statutory entitlements have been negotiated over time."

[45] The Unions submitted that, contrary to FFMS' submissions, there was no apparent inconsistency within clause 44.1.7 and that the earlier clause 44.1.2 says that employees will be entitled to leave "…without loss of ordinary pay which the employee would have earned if they had not been on such leave." The Unions submitted that this phrase, unlike clause 44.1.7, is ambiguous and that:

> "22. …On its face, it is capable of meaning employees on compassionate leave would be entitled to *either*:
>
> a. their base rate of pay only; or
>
> b. the pay they would have earned if they had worked their ordinary hours in the period.
>
> 23. The difficulty with the former interpretation arises from the inclusion of 'without loss of pay' and the reference to earnings that would otherwise have been enjoyed: an employee who works shift as a matter of reality loses pay they otherwise would have earned if they are not paid their shift loading for the period of their leave. The problem with the latter arises from the phrase 'ordinary pay', with a question as to what 'ordinary' really refers to."

[46] The Unions submitted that clause 44.1.7 has much plainer language and resolves this ambiguity by demonstrating that the intention is that "employees who take compassionate leave suffer no loss in their ordinary take home wages."[14]

[47] In response to FFMS' argument that there is an identical entitlement in the quarantined Instant Coffee Plant provisions, the Unions relevantly submitted (emphasis in original) that:

> "25. …there is no principle of interpretation that states that redundancy cannot exist within a document or must otherwise be eschewed. Additionally, it is well-established that while as a *general* position all words must *prima facie* be given *some* meaning, this nevertheless must give way to the otherwise clear terms of an agreement: *AMWU v Simplot* [2018] FWCFB 1156 at [28].
>
> 26. FreshFood's argument depends on a construction which leaves Appendix 1 wholly independent from the body of the Agreement. The difficulty is that it is not. Almost the *entirety* of item (b) is replicated in the body of the agreement, notably at cl.36.4.2 which reiterates the 15% Monday to Friday loading and sets out the *'weekend penalties'* which (b) refers to. The clause cannot be understood without reference to the rest of the Agreement. In these circumstances it is unlikely that the fact of duplication means that an alternative meaning was intended.

> 27. What the provision is more likely a product of is the fact that, as a matter of reality, FreshFood has not had a historical practice of paying these entitlements in the Instant Coffee Plant and not elsewhere. It would be reductive to use that to read down the actual words of the Agreement."

[48] As to FFMS' claim that there was a "common assumption", arising from its historical practice that shift loadings were not payable, the Unions submitted that FFMS' claim relied on its conduct after the 2007 Agreement was made. The Unions submitted that the exception to the general rule that post-contractual conduct may not be employed in construing the terms of a contract was very narrow and did not apply here. Rather, the Unions submitted (references omitted) that:

> "35. In this matter, the evidence goes no higher than the fact that FreshFood has not paid these allowances historically. It is not even true silence: there is evidence of at least one prior complaint by the NUW, which went unresolved. This is not a basis upon which the plain words of the clause could be overcome.
>
> 36. *TWU v Linfox* [2014] FCA 829, on which FreshFood relies, involved quite a different circumstance. Critically, the interpretation of the clause there urged by the Union was wholly inconsistent with the historical development of the entitlement and the subsequent conduct of the Union in particular. Tracey J made a clear distinction between these circumstances and matters involving '*common inadvertence'*. None of the active steps relied on in *Linfox* are present here.
>
> 37. Additionally, the interpretation was in fact available on the text of the clause. That cannot be said here…

[49] In conclusion, the Unions contended that the approach adopted by the Commission was consistent with the text of the clause and there was no other available meaning.

Consideration of the substantive appeals

[50] The fact that the parties had not agreed the questions for determination and the Commissioner, in effect adopted the questions posed by one party, is not unique nor inappropriate. The scope and nature of the dispute was known by all parties and the Commissioner, quite reasonably in our view, adopted the form of question that captured the substance of the dispute without containing unnecessary assumptions or decision-steps that might form part of making the ultimate decision. No error is present here.

[51] The appeals made by FFMS concern, in essence, the approach taken by the Commissioner to adopt what was described as the "plain textual meaning"[15] of the Agreement. This was explained by the Commissioner as:

> "… …. Following from the type of approach to the correct meaning of an instrument in *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCAFC 50, the correct interpretation of the Agreement is apt for consideration, rather than, in this case, an examination of how the Agreement and its predecessors have been applied as a matter of historical payroll practice and more recent payroll practice."[16]

[52] In particular, relying upon *Bianco Walling* and *Transport Workers' Union of Australia v Linfox Australia Pty Ltd*,[17] FFMS contends that the disputed clauses are ambiguous and that the literal meaning should not be adopted when the entire context, including the historical development of the disputed clauses, is taken into account.

[53] For the reasons set out below, we have concluded that other than one aspect of the Commissioner's approach to the task of construing the Agreement, the grounds of appeal

advanced by FFMS are not made out. Further, to the extent that the Commissioner's approach was erroneous, any error did not affect the correctness of the construction determined by the Commissioner and her answers to the questions determining the dispute.

[54] The principles of interpretation of enterprise agreements are well established.[18] The task of construing an industrial instrument begins with a consideration of the ordinary meaning of the words, read in context, and taking into account the evident purpose of the provisions or expressions being construed. Relevant context will include the provisions of the industrial instrument as a whole and the place and arrangement of disputed terms in the instrument. The underlying statutory framework may also provide relevant context, as might prior instrument(s) from which a particular term has been derived. Regard may also be had to relevant surrounding circumstances, for the purpose of determining whether there is any ambiguity in a provision of an industrial instrument.

[55] Further, the language of an industrial instrument is to be understood in the light of its industrial context and purpose, and not in a vacuum or divorced from industrial realities. Context is not itself an end. While a purposive approach to interpretation, and not a narrow or pedantic approach, is appropriate, consideration of the language contained in the text of the instrument remains the starting point and the foundation of the task of construction.

[56] Consistent with these principles, the starting point is the text of the disputed provisions. We agree with the Commissioner's conclusion that the language adopted in the disputed clauses gives a clear indication that something more than the base rate of pay under the National Employment Standards (**NES**), and the ordinary rates under the Agreement, may be payable. This is the clear import of clauses 40.3.2 and 44.1.7. The reference is, in effect, to the amounts reasonably expected to be paid and not to the base or ordinary rates. This remains the case notwithstanding that clause 44.1.2 of the CBL provision refers to without loss of any "ordinary pay". In this respect we also agree with the Commissioner's conclusions.

[57] We are also of the view that the Commissioner properly applied the principles relevant to the construction of agreements in her consideration of the disputed provisions, in the context of the Agreement as a whole. The context provided by the terms of the Agreement, considered as a whole, does not support the notion that the disputed clauses are ambiguous, at least in the sense contended by FFMS, or that something other than the stated words of the disputed clauses was intended. The inclusion of the savings provision in clause 10 and Appendix 1 providing for quarantine provisions for the ICP, also does not provide a basis to read the disputed clauses in the manner contended by FFMS. The Commissioner's view[19] about this aspect was sound.

[58] The Commissioner had regard to other provisions of the Agreement in construing the disputed terms and we agree with the Commissioner's conclusions in this regard. Further, we agree that in the context of the FW Act and the NES, the Commissioner was correct to conclude that the Agreement provided for something more than the NES and that there is no basis for adopting a construction that requires the entitlements provided by the disputed provisions, to be paid at the "base rate of pay" as defined in s. 16 of the FW Act.

[59] The construction determined by the Commissioner reflects the NES provision and clause 44.1.7 of the Agreement expressly supplements those terms. Further, the industrial and legislative context support that approach. The FW Act expressly provides that enterprise agreement provisions may supplement the NES.[20]

[60] In relation to ground 5 of the appeal concerning the UWU matter (ground 4 of the appeal concerning the AMWU matter) we accept that the Commissioner's approach to the consideration of the extrinsic evidence drawn from the agreements and Ms Standley's evidence was erroneous. The history of the disputed clauses is relevant to determining whether words with an apparently plain meaning are uncertain or ambiguous. However, we do not accept that any lack of consideration of the evidence led the Commissioner to adopt an incorrect construction of the disputed terms.

[61] That evidence disclosed that what are now clauses 40.3.2 and 44.1.7 of the Agreement had been part of the successive agreements that applied to employees within FFMS' operations since the inclusion of those clauses within the 2007 Certified Agreement.[21] This inclusion preceded the commencement of the FW Act and the NES.

[62] As suggested by the Unions, the language of the disputed clauses may well have derived from the Australian Fair Pay and Conditions Standards (**AFPCS**) that operated in association with a former legislative scheme. However, the same wording continued to be applied by the parties when making successor agreements despite a subsequent change to the AFPCS to reduce the obligation such that, in effect, only ordinary rates were required to be paid.

[63] As contended by the Unions before us, the case of *TWU v Linfox*, on which FFMS relies to establish error on the part of the Commissioner, can be distinguished on its facts. The clause in dispute in that case originated in an award and continued, in a modified form, to bind the TWU and the employer. The clause provided that all shift workers on day, afternoon or night shift were entitled to a paid crib time of 20 minutes. Tracey J relevantly stated:

> "87 The evidence in the present case establishes that the benefit of a crib break was, historically, made available to shift workers…It was not made available to those working within the ordinary span of hours…The 2004 Award, like its predecessors, contains many provisions which distinguish between "day workers" and "shift workers"…
>
> 88 In order to make good its contention that workers who performed duties within the ordinary hours of work prescribed by the Awards were shift workers, the Union relied on a literal construction of the definition of "day shift". There can be no doubt that, if a literal construction is applied…workers…whose normal working days start about 5.30 am will be taken to be day shift workers. An examination of the history of the provision, however, suggests that it was never intended by the parties to have this effect.
>
> 89 The concept of a "day shift" was introduced…for the first time in August 1987…The variation was proposed jointly by the Union and the relevant employer organisation. Had it been intended that employees, who had hitherto been treated as day workers who performed their duties in the ordinary span of hours, were thereafter to be treated as being shift workers…it would have been necessary for the parties to so advise the Commission in order that it could be satisfied that the proposed variations complied with the wage fixation principles. No such advice was provided.
>
> 90 It might also have been expected that, immediately after the revised Award came into force, the respondent employers would have provided the workers, whose status had changed to shift workers, with the enhanced benefits which that status attracted. Had they failed to do so it would also reasonably be expected that the Union would have sought to enforce the performance of the obligations. Neither the employers nor the Union reacted in this way. It was not until March 2012 when the present demands were made that the Union, for the first time, advocated the construction for which it now contends…
>
> 91 Had matters rested there, it may have been possible to argue that both the Union and the employers…had failed to appreciate the significance of the changes and that their inaction resulted from "common inadvertence". Subsequent events however, render such an argument unsustainable.

> 92 …the Union served a log of claims which clearly drew a distinction between day workers, who worked within the ordinary range of hours, and shift workers in respect of whom separate claims were made. The dispute created by this log led to the making of the 1996 Award which contained clauses in the same terms as those which are centrally relevant in the present proceeding…and no intimation was given that a consequence of the making of the Award would be that the majority of workers covered by it would cease to be day workers and become shift workers. Indeed, the Unions' representative informed the Commission that the Union did not consider that the proposed Award effected any change to the then extant terms and conditions of employment.
>
> 93 When the 2004 Award was made it incorporated the same provisions relating to crib time entitlements for shift workers as had appeared in the 1996 Award. This latter award, in turn, incorporated similar provisions which had previously been found in an appendix to the 1983 Award. The fact that the parties had, at each stage, agreed on the terms of the relevant provision which had consistently been applied in the manner contended for by Linfox in the present proceeding, supports its argument that a common understanding existed. That common understanding should inform the construction of the relevant provisions of the 2004 Award.
>
> … …
>
> 95 This review supports the conclusion that, between the advent of the 1983 Award and, in particular, since the introduction into it in 1987 of the shift work provisions, and March 2012, the parties had, by their conduct, demonstrated that they held a common understanding that the provisions relating to crib time applied only to shift workers and that the large majority of workers who were treated as "day workers" were not "day shift" workers within the meaning of the award. In such circumstances the literal construction of Clause 26 must give way to the common understanding, over almost a quarter of a century, of the parties whose conduct it regulated."

[64] Unlike the circumstances in *TWU v Linfox*, there has in this case been, as noted by the Commissioner, a "long-running history of unresolved disputation about payments for PCL and/or CBL under both the Agreement and its predecessors."[22]

[65] Further, the following observations made by Wheelahan J in *Australian Rail, Tram and Bus Industry Union v KDR Victoria Pty Ltd t/as Yarra Trams*[23] about the "common understanding" principle should also be borne in mind (citations omitted):

> "great care ... must be taken in drawing upon a suggested common understanding as an aid to construction ... The reasons for caution before regard may be had to a suggested common understanding commence from the premise that it is the instrument itself that is to be construed, and any recourse to industrial practices said to amount to a common understanding are no more than part of the context in which the text of the instrument is to be construed. Industrial practices do not take the place of the terms of the instrument. There is also the need to maintain coherence with other principles, including that: (1) usually, recourse to extrinsic matters cannot displace the clear meaning of text; (2) the subjective understanding of individuals is rarely relevant to objective meaning; (3) this is also the case in relation to collective agreements where surrounding circumstances might have to rise to the level of being notorious or known by those intended to be bound by the instrument ... and (4) parties cannot by words or conduct contract out of, or waive the terms of an enterprise agreement, which has statutory force ..."[24]

[66] The evidence of the conduct of the parties, to the extent that it is relevant in the present case, goes no further than the fact that FFMS has historically not paid shift allowances or penalty rates in the manner contended by the Unions. There was also evidence of at least one prior complaint by the National Union of Workers,[25] which went unresolved.

[67] In relation to FFMS' submissions with reference to the decision of the Full Court of the Federal Court in *Bianco Walling* the Court found that the Member at first instance determined that he could only have regard to evidence of common intention if the terms of the relevant agreement were ambiguous or uncertain. The error identified with this approach by the Court

in *Bianco Walling* was that the issue for determination was whether the relevant agreement should be varied pursuant to s. 217 of the FW Act, and this did not necessitate interpretation of the agreement as a first step. The Court found that in deciding that the terms of the agreement had a plain meaning, the Member applied principles 7 and 10 of *Berri* and that mischaracterisation of the case as one requiring interpretation of the agreement, constrained consideration of evidence about the common intention of the parties, which was relevant to determining the application under s. 217.

[68] For present purposes, the following observations can also be made about *Bianco Walling*. The Court was not considering whether the approach to the construction of the enterprise agreement was correct. It is arguable that if the case had involved the interpretation of the relevant agreement, applying only principles 7 and 10 in *Berri* would have resulted in error, given that those principles focus on the text of an agreement, while principle 8 states that regard may be had to evidence of surrounding circumstances to determine whether an ambiguity exists. In this regard, it is well established that even where the text of a disputed term has an apparently plain meaning, it is necessary to consider the context of that term to determine whether it is ambiguous or uncertain. As we have previously noted, context is not confined to the text of the agreement and may extend to other documents with which there is an association, the history of a clause and the customs and working conditions of the particular industry.[26]

[69] In the present case, the Commissioner determined that the contextual matters raised by the Appellant did not displace the plain meaning of the disputed terms. In reaching that conclusion, it is not apparent how the Commissioner considered the contextual matters raised by FFMS. To the extent that the Commissioner may have disregarded the contextual matters identified by FFMS simply on the basis that the text of the Agreement had an apparently plain meaning, this would have been an error.

[70] We agree with FFMS that the evidence about the previous agreements, which were relevantly in the same terms, was part of the context that should have been considered in determining the proper meaning of the Agreement. However, for reasons outlined earlier, we consider that the Commissioner was ultimately correct in the determination of the questions addressed in the decision.

[71] We also consider that the Commissioner's approach[27] to the notion of what the employee might reasonably expect to be paid – namely, that the proper construction of the Agreement requires an objective inquiry into what the relevant employee would reasonably have expected to be paid during the period of leave, had the employee worked during that period – was correct.

[72] Accordingly, we consider that the construction given to the Agreement by the Commissioner was correct notwithstanding the approach taken to the consideration of context. We therefore reject the grounds of the appeals by FFMS on the substantive elements of the decision and dismiss those appeals.

5. AMWU & UWU cross-appeal

The grounds of the cross-appeal

[73] AMWU and UWU advanced three grounds for their cross-appeal concerning the Commissioner's refusal to make the orders sought by the AMWU. The orders sought before

the Commissioner were set out in full earlier in this decision and include the identification of the employees who may have taken relevant leave under the Agreement and previous instruments, the calculation of the appropriate payments and the provision of those calculations to the AMWU, and upon request, to the employees concerned. The further orders sought that FFMS pay the amounts calculated with access back to the Commission to resolve any disputes about the required amounts.

[74] The Unions' first ground of the cross-appeal is that the Commissioner failed to resolve to finality the aspect of the dispute concerning historic underpayments, failed to properly exercise the jurisdiction vested in the Commission, and thus erred.

[75] The Unions' second ground of cross-appeal is that the Commissioner erred as a matter of law to the extent that the Commissioner found that the orders sought by the Unions were outside its power. This ground was ultimately not pressed.

[76] The third ground of the cross-appeal is that to the extent that the Commissioner determined as a matter of discretion not to issue the orders sought by the Unions, or alternatively any orders at all, she acted on a wrong principle, the determination is otherwise unreasonable, and the Commissioner erred.

[77] The orders sought by the Unions on the cross-appeal, if granted, are as follows:

> "1. Within 7 days of this determination, FreshFood is to:
>
> a. conduct an audit of all amounts paid to employees covered by the Agreement in respect of personal and compassionate leave since the commencement of operation of the Agreement;
>
> b. produce to the Unions a document separately identifying, in respect of each employee and each occasion, amounts:
>
> i. that were paid to them;
>
> ii. that would have been paid for them if shift allowances and/or penalties were paid to them;
>
> iii. representing the difference between the two amounts above; and
>
> iv. representing interest on the difference, calculated at Federal Court rates, and
>
> the underlying information used to perform said calculations.
>
> 2. Within 7 days of receiving the document described above, the Unions are to notify FreshFood of any dispute about the calculations.
>
> 3. If any disputes arise, the parties are to confer within 7 days to attempt to resolve the dispute.
>
> 4. In the event that any disputes remain unresolved, the matter is to be returned to the Commission for determination in proceedings C2023/95, C2023/96, C2023/148, remitted to [insert] for this purpose.
>
> 5. FreshFood is to make payment to each employee an amount of money representing the total of any amounts identified at [1](b)(iii) and (iv) above:
>
> a. in respect of amounts that are not the subject of a dispute under [2]above, within 24 hours of the date identified at [2] above; and

b. in respect of amounts that are the subject of a dispute, within 7 days of the resolution of the dispute either following the conferral required by [3] above or by the Commission's determination per [4] above."[28]

The Unions' submissions

[78] In making their submissions, the Unions have proceeded on the basis that the Commissioner's Decision is a binding arbitral award that requires, while it remains in force, FFMS to pay the additional amounts to the relevant employees from the date of the Decision. This is not in dispute. However, the Unions differentiate this outcome from what they describe as the "historical underpayments", which arise from the fact that the Agreement has up to this point been applied by FFMS in a manner that was not consistent with the determination set out in the Decision.

[79] The Unions submitted that, in relation to the historical underpayments, the Commissioner's Decision simply does not resolve the issue and that the highest it goes is the provision of "(admittedly very sensible) advice to FreshFood as to what it would be wise to do."[29]

[80] In relation to the first ground of the cross-appeal, the Unions submitted that courts and tribunals are duty-bound to exercise discretion vested in them and "failure to do so (directly or constructively) is jurisdictional error. No discretion exists to simply put part of the dispute aside."[30] (References omitted).

[81] The Unions further submitted that the question of what, and when, employees should be repaid was clearly a matter arising under the Agreement, and therefore fell within the ambit of the dispute procedure in the Agreement. They contended that the "Commission had both jurisdiction and a duty to deal with the question"[31] and that the Commissioner's Decision "was, and remains, uncertain as to if and when underpayments will be rectified."[32]

[82] The Unions submitted that the Commissioner's approach is directly inconsistent with Full Bench authority regarding the appropriate conclusion of an arbitration. They referred to the statement in *Falcon Mining* at [75] that arbitration is "intended to be more than simply 'expressing an opinion'" and asserted that paragraph [41] of the Commissioner's Decision, in addressing the issue of underpayments, was merely an opinion.

[83] The Unions submitted that it is established that upon forming an opinion as to the correct result, as was stated by the Full Bench in *DL Employment v AMWU* [2014] FWCFB 7946 at [84]:

"it remains necessary for a final determination or final orders to be made identifying the arbitrated outcome of the dispute, since it is not the role of the Commission to declare the legal rights of the parties."

[84] The Unions submitted that the Commissioner erred in acceding to FFMS' proposition "that the parties, following a declaration of their rights, are best left to their own devices".[33]

[85] In relation to the third ground of the cross-appeal, the Unions submitted (references omitted) that:

"21. In the alternative, if it is the case that the Decision, correctly interpreted, involved the Commissioner:

a. dealing with the aspect of the dispute concerning underpayments; and

b. exercising her discretion in respect of relief to make same non-binding,

her discretion miscarried.

22. Having established that the terms of an enterprise agreement required, and have always required, certain payments be made, the Commission cannot make a binding decision as to remedy inconsistent with this obligation. It is doubtful that a discretion to simply refuse to grant *any* remedy even exists."

[86] The Unions' submissions in this regard were founded by reference to s.739(5) of the FW Act.

[87] In their submissions, the Unions acknowledged that the form of remedy remains discretionary and that while arbitration typically involves making a decision "which conclusively establishes the rights of the parties as to the arbitrated dispute" (*National Union of Workers v Pacific Dunlop Tyres Pty Ltd* (1992) 37 FCR 419; 43 IR 201 at [26]), in the industrial arbitration context, non-binding outcomes – that is, a recommendation – are an accepted form of relief in some circumstances.

[88] The Unions contended that it was not entirely clear that the following statement of the Commissioner at [41] of the Decision constituted a direct recommendation:

"I add that [FFMS], also self-evidently, would be well advised to consider what steps it now needs to take with respect to rectifying past underpayments".

[89] The Unions also contended that the above statement was "more redolent of passing comment in the context of otherwise not dealing with the matter at all. However, the [Unions'] submissions proceed on the basis that it can be understood as a recommendation."[34]

[90] The Unions further submitted (references omitted) that:

"25. The only factor that the Decision identifies as having influenced the Commissioner's exercise of her discretion is an (unresolved) dispute about whether the orders sought were within power. To the extent that the Commissioner acted on the basis that they were *not*, or even arguably not, she acted on a wrong principle in the sense set out in *House v R*.

26. This is because the orders sought were, and are, within power. Private arbitration involves making a decision which:

'extinguishes the original cause of action and imposes new obligations on the parties'

per *TCL Air*, as opposed to determination and enforcement without consent of existing obligations.

27. The orders sought by the Unions, in short form, imposed future obligations on FreshFood to:

a. conduct an audit of payments made to the affected employees, and calculate the relevant underpayments; and

b. subject to any dispute about quantum being resolved, make payment prospectively.

28. The situation is akin to that considered in *Carter*, in which the Full Bench rejected an argument that the making of a compensatory order to resolve a dispute about stand down was an exercise of judicial power rather than statutory arbitration. Similarly, here the Unions were not seeking a payment of a legal entitlement of wages; they were seeking a binding determination of what that entitlement is, and a binding

> process for its implementation. Although the ultimate source of power differs slightly – in that here it is consent rather than statute – the logic remains the same.
>
> 29. Similarly, the Full Bench in *Parks Victoria* considered the difference between a retrospective order for backpay, and an order that commences from the date of its operation and '*gives rise to a new obligation to calculate and provide back pay*.' Again, the same logic applies here.
>
> 30. The orders are accordingly within power. FreshFood's submissions to the contrary below distilled to the proposition that the outcome sought is the same, or similar, to that which would have emerged from enforcement proceedings in a Court. That is common to all commercial private arbitration. The nature of power is identified by examining its source, with the core of judicial power being compulsion. Here the power arises squarely from the consent of the parties; they have agreed to have otherwise justiciable disputes arbitrated by the Commission. It cannot in that context be said that just because a matter, so referred, was separately justiciable, it somehow falls outside the power to arbitrate."

[91] The Unions submitted that there was no other matter that was expressly identified, or that was apparent, in the Commissioner's Decision that made appropriate the exercise of the discretion in favour of non-binding relief and that accordingly, the Commissioner erred.

[92] We have set out earlier in this decision the orders that the Unions seek in the event that the cross-appeal are granted. They gave two reasons as to why those orders should be made (references omitted):

> "34. **First**, it is consistent with principle and otherwise highly desirable to make an order that resolves the full dispute to finality. The uncertainty caused by the approach taken below and urged by FreshFood – that is, a bare declaration of right – is not in keeping with the Commission's obligations to resolve disputes efficiently and finally. It has led to the situation where FreshFood has not sought a stay of the Decision, but has nevertheless disregarded its impact while the appeal is on foot (i.e. it is not paying workers).
>
> 35. **Second**, there is no discretionary reason why such would be refused. In particular, it is no answer that the Unions could, if they wished, commence Court proceedings. All this would do (given the operation of issue estoppel) would increase expense and delay. In circumstances where the matters can be addressed here, they should ."

[93] We note that since making their submissions in the cross-appeal, the Unions have commenced the Court proceedings to, in effect, enforce the terms of the Agreement and certain previous instruments that applied to the work in question. This is ultimately important for reasons that will become clear.

The submissions of FFMS

[94] FFMS opposed the cross-appeal on various grounds. It contended that the consequential or ancillary orders sought by the AMWU were not necessary in order to resolve the dispute. Further, it contended that the scope of the Commission's power as a private arbitrator was confined by the terms of the disputes provision in the Agreement and that the Commissioner determined the dispute in the Decision as contemplated by that provision. In this case, there was no power or role given to the Commission under the dispute resolution provisions of the Agreement for the Commission to make the form of orders sought by the AMWU.

[95] Fundamental to its approach is that FFMS contended that the Unions were incorrect to characterise paragraph [39] of the Commissioner's Decision as "not more than an "opinion."[35] Rather, it submitted, "a final determination was made by the Commissioner subject to any appeal right…and that the answering of the questions posed by the UWU, was, and remains

sufficient, subject to the appeal right, to resolve the notified disputes, without the need for any further order."[36]

[96] FFMS submitted that the jurisdiction has been fully or properly exercised and that there is nothing that would give rise to any remaining or residual matter upon which any vested discretion could be exercised by the Commissioner in the arbitration hearing.

[97] FFMS further relevantly submitted (references omitted) that:

> "24. The Decision at [40], when properly read and understood is to the effect that if there did exist jurisdiction that the Commissioner may, and not must, act upon in considering to make the consequential or ancillary orders sought by the Unions then as a matter of discretion, assuming it to exist, and the Commissioner did so, then the Commissioner would decline to do so, based upon the matters that were put to her in the arbitrated hearing against the making of the orders by FFMS.
>
> 25. Once the Commissioner determined the arbitral questions (and in the end the questions answered '*Yes*' by the Commissioner were those proposed by the UWU in its submissions…nothing more was required to resolve the dispute based on the terms of clause 12, with particular reference to clause 12.4 of the 2019EA. The AMWU acknowledged this in the submissions made…"

[98] FFMS also contends that the authorities relied upon by the Unions do not concern a pre-existing legal right and should be distinguished.

[99] FFMS also advanced a number of criticisms of the proposed orders and indicated that they lacked utility given the Court proceedings.

[100] FFMS provided an undertaking[37] to the Full Bench that if the substantive appeals were determined adverse to its position, it would move to correct the payments within a period of 28 days and if that became impossible, come back to the Commission and seek an extension of time.

Consideration of the cross-appeal

[101] We commence with the nature of the Decision made by the Commissioner. We have earlier set out the relevant terms and these included[38] what would reasonably be considered to be a definite finding and determination that the question posed by the UWU is answered yes.

[102] The Commissioner later observed that FFMS was "self-evidently" expected to take "the necessary payroll steps that are consistent with the arbitrated outcome concerning payment rights and obligations for relevant employees under the current Agreement attaching to PCL and CBL. Further, the Commissioner added "that FFMS, also self-evidently, would be well-advised to consider what steps it now needs to take with respect to rectifying past underpayments."[39] These observations do not detract from the determination of the dispute confirmed above.

[103] We accept that the Commissioner did not determine whether there was jurisdiction to make the ancillary orders sought by the AMWU and indicated that even if there was power, she would not be minded to do so.[40]

[104] By way of background, conciliation and arbitration have been part of the institutional framework for the predecessors of the Fair Work Commission since the enactment of the *Conciliation and Arbitration Act 1904* (Cth). Indeed, arbitration, in the sense that (interstate)

disputes were determined by the Commission, was at the very basis of what became the award making and dispute resolution role for the Court of Conciliation and Arbitration, and subsequently the more recent predecessors of the Commission. There has also been an historic divide between the creation of rights by arbitration and the role of Courts to interpret and enforce such rights[41] and this largely remains. However, since at least 2001 the Courts have expressly recognised that the statutes have provided the Commission with a much-expanded role, including under the FW Act, to arbitrate disputes about the proper construction and application of instruments by agreement between relevant parties. In that capacity, the Commission is conducting a "private arbitration", a concept confirmed by the High Court in *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission*[42] (the **private arbitration case**) and later reflected in the FW Act.

[105] In the private arbitration case, he High Court was dealing with the validity of s.170MH of the *Industrial Relations Act 1988* (Cth), which provided the capacity for a Certified Agreement to enable the Commission to determine disputes, and the impact of s.89A, which had the effect of substantially limiting the general capacity of the Commission to arbitrate disputes. The High Court said:

> "There is, however, a significant difference between agreed and arbitrated dispute settlement procedures. As already indicated, the Commission cannot, by arbitrated award, require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award because Ch III of the Constitution commits power to make determinations of that kind exclusively to the courts. However, different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person or body and to accept the decision of that person as binding on them.
>
> Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.
>
> To the extent that s 170MH of the IR Act operates in conjunction with an agreed dispute resolution procedure to authorise the Commission to make decisions as to the legal rights and liabilities of the parties to the Agreement, it merely authorises the Commission to exercise a power of private arbitration. And procedures for the resolution of disputes over the application of an agreement made by parties to an industrial situation to prevent that situation from developing into an industrial dispute are clearly procedures for maintaining that agreement. Parliament may legislate to authorise the Commission to participate in procedures of that kind. Accordingly, s 170MH of the IR Act is valid."[43]

[106] Their Honours in the private arbitration case also held that, to the extent that provisions in a certified agreement extended beyond anything that might have been justified by the underlying industrial (constitutional) dispute, those provisions were effective as a matter of "general law"[44].

[107] Sections 595 and 739 of the FW Act provide as follows:

> "**595 FWC's power to deal with disputes**
>
> (1) The FWC may deal with a dispute only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

(2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:

(a) by mediation or conciliation;
(b) by making a recommendation or expressing an opinion.

(3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

Example: Parties may consent to the FWC arbitrating a bargaining dispute (see subsection 240(4)).

(4) In dealing with a dispute, the FWC may exercise any powers it has under this Subdivision.

Example: The FWC could direct a person to attend a conference under section 592.

(5) To avoid doubt, the FWC must not exercise the power referred to in subsection (3) in relation to a matter before the FWC except as authorised by this section

…

739 Disputes dealt with by the FWC

(1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.

(2) The FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:

(a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter; or
(b) a determination under the *Public Service Act 1999* authorises the FWC to deal with the matter.

Note: This does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).

(3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.

(4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

(6) The FWC may deal with a dispute only on application by a party to the dispute."

[108] We observe that, leaving aside the import of the Agreement in question here, there is no suggestion that the parties have authorised the Commission to arbitrate any matters under the terms of the employment contracts or any other written instrument. As a result, the Commission only had jurisdiction to arbitrate this matter if authorised to do so under the terms of the dispute resolution provisions in the enterprise agreement as contemplated in s.739(2)(a) of the FW Act.

[109] The nature of the determinations made by the Commission under s.739 of the FW Act was recently considered by a Full Court of the Federal Court in *Airservices Australia v Civil*

Air Operations Officers' Association of Australia [2022] FCAFC 172 ***(Airservices Australia)***. The Full Court observed that an arbitration conducted by the Commission pursuant to a term in an enterprise agreement is based on the consent of the parties and is a private arbitration.[45]

[110] In *Falcon Mining*,[46] a Full Bench of the Commission noted that the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*[47] clarified that:

> "…The reference to "private arbitration" was not to a private function, as distinct from a public function, but rather to a function the existence and scope of which is founded on agreement as distinct from coercion."[48]

[111] The Full Bench in *Falcon Mining* also went on to observe that the term "arbitration" is not defined in the FW Act but noted that s.595(3) provides that in dealing with a dispute by arbitration, the Commission may make any orders it considers appropriate.[49] The Full Bench concluded that in comparing s.595(2) and (3), it was apparent that "arbitration is intended to be more than simply "*expressing an opinion*".[50] (Emphasis in original).

[112] The Full Court of the Federal Court in *Airservices Australia* concluded that the Commission did not have the power to make orders regarding contraventions of civil remedy provisions of the FW Act[51] and that in an arbitration, the Commission:

> "[95]…may make binding findings of fact falling short of doing that which [the Commission] is not permitted to do (including make declarations of contravention of the FW Act and impose penalties)."

[113] In relation to any factual findings made by an arbitrator, the Full Court in *Airservices Australia* determined that:

> "[96]…the question of whether those facts…constituted a contravention of a civil penalty provision of the FW Act, whether declaratory relief should be granted, and whether penalties should be imposed and if so, in what amount, are all questions that are the exclusive preserve of the courts."

[114] In *Carter v Auto Parts Group Pty Ltd* [2021] FWCFB 1015 (***Carter***), which concerned a stand down dispute pursuant to s.526 of the FW Act, the Full Bench applied the principles enunciated in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd*[52] and concluded that the Commission did not have the power to make a monetary order with respect to an entitlement to wages said to be owing under an award or employment contract but was empowered to make a monetary order to resolve a stand down dispute on the basis of the Commission's consideration of issues relevant to the merits, including what is a fair outcome between the parties.[53] The Full Bench went on to state (citations omitted) that:

> "[28] The decision of the Commission (Anderson DP) in *Stelzer v Ideal Acrylics Pty Ltd*, which is relied upon by Mr Carter in his appeal submissions, contains what is in our view a proper articulation and application of the relevant principles. In that decision, having found that the stand down in question was not consistent with the FW Act, the Deputy President [stated]…:
>
> "…
>
> [73] The Commission does not have jurisdiction to determine legal rights, such as whether…Mr Stelzer had a lawful right to be paid personal leave once stood down.
>
> [74] However, the Commission has jurisdiction to consider these questions in the context of making orders or recommendations for the fair and just settlement of this dispute."

[115] We observe that the approach adopted in *Carter* is relevant to the nature of that particular jurisdiction.

[116] *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950 (***Parks Victoria***) concerned a workplace determination pursuant to s.276 of the FW Act. The Full Bench in that case observed that s.276(1) does not prevent the Commission from issuing a workplace determination that requires a retrospective wage increase and that as such a provision has legal effect when the workplace determination comes into operation, it in fact operates prospectively. Whilst also relevant, the particular jurisdiction being exercised in *Parks Victoria* must also be considered when assessing the approach adopted in that matter.

[117] The dispute resolution provisions in clause 12 of the Agreement in that case relevantly comprehended that:

> "… …
>
> 12.2 Where any dispute arises about any matters arising under this Agreement, or the NES, the dispute or claim shall be dealt with in the following manner:
>
> … …
>
> 12.2.7 At any time either party shall have the right to notify the dispute to the Fair Work Commission (the Commission) or to another agreed arbitrator, for conciliation in the first instance and if conciliation fails, for arbitration.
>
> 12.2.8 The Employer has equal rights in elevating disputes to include involvement of a union organiser as specified in clauses 12.2.2 to 12.2.5.
>
> 12.3 The parties agree that the Commission or other agreed arbitrator shall be able to exercise whatever functions and/or powers it considers necessary to conduct any arbitral process and thereby finalise the dispute in question. This shall include the powers to issue subpoenas, direct witnesses to attend and give evidence.
>
> 12.4 It is a term of the Agreement that the parties agree, subject to any right of Appeal, to accept the arbitrated decision of the Commission or other agreed arbitrator as final and binding on the parties.
>
> … …"

[118] In assessing the scope of the arbitration authorised by the Agreement, we consider that the following non-exhaustive summary of the approach to such an exercise as provided by Saunders DP in *Davis and others v The University of Newcastle*[54] is apt:

> "[12] The scope of a dispute resolution clause in an enterprise agreement should not be narrowly construed; "to do so would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement."[55]
>
> [13] In characterising the nature of a dispute the Commission is not confined to the application filed to deal with the dispute.[56] The entire factual background is relevant, and may be ascertained from the submissions advanced by the parties on the question of jurisdiction.[57] Further, a dispute may evolve during proceedings in the Commission. It may therefore be necessary in some cases when ascertaining the character of a dispute to have regard to both the nature of the dispute alleged in an originating application and the factual circumstances as they evolve.[58]
>
> [14] It is also important to note that the character of the dispute is distinguishable from any relief which may be sought, or granted, following an arbitration of the dispute.[59] However, the relief sought may cast light on the true nature of the dispute in some cases.[60]
>
> [15] If the Commission has jurisdiction to deal with the dispute, the nature of the relief that the Commission may grant in such circumstances will depend on the agreement of the parties as recorded in

> their enterprise agreement, provided that such relief is reasonably incidental to the application of the Enterprise Agreement to which the dispute relates.[61]

[119] The substance of the orders sought by the AMWU at first instance was that FFMS identify any current and former employees who took personal/carer's leave and were not paid a shift loading or weekend penalty under the Agreement, or any predecessor instrument which contained the current entitlement; calculate what the employee would have received if they had been paid the shift loading or weekend penalty under the relevant instrument; and provide the calculations to the AMWU and, on request, the relevant employees. The orders also sought that FFMS make the payments due to each employee.

[120] Although the determination made by the Commissioner may have had indirect consequences for the other superseded instruments which were in the same terms, given the nature of the arbitration, the proper construction of the Agreement, and not the earlier instruments, was the fundamental matter before the Commissioner. We observe that the Unions have narrowed the scope of the Orders sought on appeal consistent with the above.

[121] In any event, the Commissioner was correct not to make findings and orders about the earlier instruments.

[122] In terms of the other orders sought at first instance, we have ultimately decided that we should not extensively deal with these aspects or grant the cross-appeal because of the Court proceedings taken by the Unions which will comprehensively deal with the obligations flowing from the determination made by the Commissioner. Further, we have taken into account the undertaking[62] provided to the Full Bench by FFMS to, in effect, expeditiously move to address the underpayments arising for the determination of the dispute by the Commission.

[123] We would however observe that whilst it may have been open to the Commissioner to make orders requiring remedial administrative and related actions that flowed from the Decision, it would not, in the present case, have been necessary for the Commission to make orders requiring the payments of outstanding amounts due under the Agreement, as this arises in any event from the force of the arbitrated outcome; that is, the determination and the operation of the FW Act itself. For the Commissioner to decline to make the orders sought by the Unions was an exercise of discretion and no error is established in this respect.

[124] For the reasons set out above, whilst we have granted permission to appeal on the cross-appeal, we have dismissed it.

6. Conclusions and Orders

[125] We have granted permission to appeal in both the substantive appeals and the joint cross-appeal.

[126] For the reasons set out above, we dismiss all appeals.

VICE PRESIDENT

Appearances:

R Moore of Counsel, with *R Baldwin*, with permission for FreshFood Management Services Pty Ltd.
L Saunders of Counsel, with permission, with *J Martin* for The United Workers' Union and *S Howe* for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).

Hearing details:

2023
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[1] [2022] FWC 3320 (**Decision)**.

[2] *Construction, Forestry, Maritime, Mining and Energy Union v Falcon Mining* [2022] FWCFB 93 (***Falcon Mining***).

[3] (2017) 268 IR 285 at [114], [2017] FWCFB 3005 at [114].

[4] (2020) 278 FCR 566, [2020] FCAFC 123.

[5] Decision at [25].

[6] *DP World Brisbane Pty Ltd v Maritime Union of Australia* (2013) 237 IR 180 at [48], [2013] FWCFB 8557 at [48] and *AMWU v ALS Industrial Australia Pty Ltd* (2015) 235 FCR 305 at [51], [2015] FCAFC 123 at [51].

[7] See by contrast *Ricegrowers Limited T/A SunRice, CopRice Feeds and Australian Grain Storage Pty Ltd v United Workers' Union* (2022) 317 IR 205 at [46], [2022] FWCFB 205 at [46].

[8] (2018) 264 CLR 541 at 563, 591-593, [2018] HCA 30 at [48]-[49] and [150]-[154].

[9] (1936) 55 CLR 499.

[10] Ibid at [504]-[505] per Dixon, Evatt and McTiernan JJ.

[11] (2020) 275 FCR 385, [2020] FCAFC 50 at [67] (*Bianco Walling*).

[12] [2016] FWC 7256.

[13] Unions' submissions in reply to the Appeal, paragraph 13.

[14] Unions' submissions in reply to the Appeal, paragraph 24.

[15] Decision at [26].

[16] Ibid.

[17] (2014) 318 ALR 54, [2014] FCA 829.

[18] *Sydney International Container Terminals Pty Limited T/A Hutchison Ports v Construction, Forestry, Maritime, Mining and Energy Union* [2023] FWCFB 87 at [36] and [37] and the authorities referenced by the Full Bench including *James Cook University v Ridd* (2020) 278 FCR 566 at [65], [2020] FCAFC 123, 298 IR 50 at [65], *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197]; [2018] FCAFC 131 at [197]; *Australian Workers' Union v Orica Australia Pty Ltd* [2022] FWCFB 90 at [18].

[19] Decision at [38].

[20] Section 55(4) of the FW Act.

[21] *FreshFood Management Services Pty Ltd as a Wholly Owned Subsidiary of FreshFood Australia Holdings Pty Ltd & National Union of Workers, The Australian Manufacturing Workers Union & The Electrical Trade Union Collective Agreement 2007*.

[22] Decision at [25].

[23] [2021] FCA 1377.

[24] Ibid at [63].

[25] Now part of the UWU.

[26] Op. cit. at [29].

[27] Ibid at [37].

[28] Unions' Outline of Submissions, Schedule A.

[29] Unions' Outline of Submissions, paragraph 6.

[30] Ibid, paragraph 11.

[31] Ibid, paragraph 16.

[32] Ibid, paragraph 17.

[33] Unions' Outline of Submissions, paragraph 20.

[34] Unions' Outline of Submissions, paragraph 24.

[35] Outline of Submissions of FFMS to Unions' Cross Appeal, paragraph 12.

[36] Outline of Submissions of FFMS to Unions' Cross Appeal, paragraph 15.

[37] Appeal transcript PN517.

[38] Ibid at [39].

[39] Ibid at [41].

[40] Ibid at [40].

[41] For both constitutional and statutory reasons. See *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129, [1920] HCA 54.

[42] (2001) 203 CLR 645, [2001] HCA 16 (*Construction, Forestry, Mining and Energy Union*). See also *Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission* (1999) 93 FCR 153, [1999] FCA 298.

[43] *Construction, Forestry, Mining and Energy Union*at 657-658 [30]-[32]. A detailed discussion of this decision and the statutory context leading to that point was provided by the Full Federal Court in *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2016) 244 FCR 178, [2016] FCAFC 82 per North, Jessup and Reeves JJ at [18] to [25].

[44] Ibid at [34].

[45] *Airservices Australia v Civil Air Operations Officers' Association of Australia* (2022) 318 IR 316 at [74], [2022] FCAFC 172 at [74], citing (*Construction, Forestry, Mining and Energy*) at 658 [32] and *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* (2015) 235 FCR 305 at 322 [35], [2015] FCAFC 123 at [35].

[46] (2022), 317 IR 367, [2022] FWCFB 93.

[47] (2013) 251 CLR 533.

[48] Ibid at 29.

[49] (2022) 317 IR 367, [2022] FWCFB 93 at [64].

[50] Ibid at [75].

[51] *Airservices Australia v Civil Air Operations Officers' Association of Australia* (2022) 318 IR 316, [2022] FCAFC 172 at [41].

[52] (1987) 163 CLR 140, [1987] HCA 29.

[53] *Carter v Auto Parts Group Pty Ltd* (2021) 304 IR 1 at [27], [2021] FWCFB 1015 at [27].

[54] [2019] FWC 2282.

[55] *SDA v Big W Discount Department Stores* PR924554 at [23].

[56] *AMWU v Holden Limited* (2003) 128 IR 101 at [47] (*AMWU*); *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 (*ASP*) at [23].

[57] *AMWU v Holden Limited* PR940366 at [47]; *ASP* at [23].

[58] *ASP* at [19] and [23]; *R v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163 at 168, [1984] HCA 9; *United Firefighters' Union v Metropolitan Fire and Emergency Services Board* (2006) 158 IR 1, PR973884 (*United Firefighters' Union*).

[59] *MUA v Australian Plant Services Pty Ltd* PR908236 (*MUA*); *ASP* at [21]-[22].

[60] *United Firefighters' Union* at [20].

[61] *MUA* at [63]; *Seven Network (Operations) Ltd v CPSU* (2003) 122 IR 97 at [31]-[32].

[62] Appeal transcript PN517.