DECISION

Fair Work Act 2009
s.739—Dispute resolution

Bega Dairy and Drinks Pty Ltd formerly known as National Foods (Dairy Foods) Limited

v

United Workers' Union
(C2023/2703)

DEPUTY PRESIDENT BOYCE SYDNEY, 23 JANUARY 2024

Alleged dispute about matters arising under an enterprise agreement and the NES – definition or description of the term 'seven day shiftworker' – same term used in various modern awards – arbitral history of term extends back more than 100 years – interaction with NES – term has a specific meaning beyond just that of a shiftworker who performs work regularly on Sundays and public holidays – the term 'seven day shiftworker' is one of general application – the term 'seven day shift worker' is defined or described as a full time or part-time employee who is a shiftworker that, over a relevant period of time, in accordance with the provisions of their roster, regularly perform their ordinary hours of work on each of the seven days of the week – the focus is upon the individual employee concerned, and the shifts that he or she actually works, not the roster of the relevant enterprise, or the mere existence of a seven day continuous process industry or enterprise.

Overview

[1] An application has been made by Bega Dairy and Drinks Pty Ltd (formerly known as National (Dairy Foods) Limited) (**BDD** or **Applicant**) for the Commission to resolve a dispute under the the *Lion Dairy & Drinks Wetherill Park Enterprise Agreement 2020* (**Agreement**).

[2] The Agreement applies to relevant employees at BDD's dairy processing Wetherill Park site in New South Wales, where flavoured milks (such as Dare, Big M, and Farmers' Union), and bespoke white milk, UHT milk and McFrappe, are produced.

[3] The Respondent to the dispute is the United Workers Union – New South Wales (**UWU**).

[4] The parties are in dispute as to the meaning (definition or description) of the term "seven day shiftworker" under clause 15.2(b) of the Agreement. The term "7 day shiftworker" is also used in the modern award that covers and would apply (but for the operation of the Agreement) to relevant employees, being the *Food, Beverage and Tobacco Manufacturing Award 2020* (**FBT Award**).

[5] There is no contest between the parties as to the jurisdiction of the Commission to resolve this dispute by way of arbitration in accordance with clause 11 of the Agreement, and s.739 of the *Fair Work Act 2009* (**Act**). I equally make this finding.

[6] Directions were issued for the filing and serving of submissions and evidence, and a hearing was conducted in Sydney. At the hearing, Ms *Katherine Aistrope*, Special Counsel, HWL Ebsworth lawyers, appeared for BDD, and Mr *Sean Howe*, Lead Industrial Officer (NSW/ACT), and Ms *Emily Orman*, Industrial Officer, appeared for the UWU.[1]

Relevant terms of the Agreement

[7] Clause 15 (Annual Leave), relevantly at 15.2, of the Agreement, reads:

> "15.2 Team Members accrue the following annual leave entitlement for each year of continuous service with the Company:
>
> (a) 152 hours per year for full-time Team Members; and
>
> (b) 190 hours per year for Team Members who are seven day shiftworkers that are regularly rostered to work on Sundays and Public Holidays."[2]

Relevant terms of the modern award

[8] Clause 15.2(b) of the Agreement replicates clause 25.3 of the FBT Award, which reads:

> "For the purpose of the additional week of annual leave provided for in section 87(1)(b) of the Act, a shiftworker is a 7 day shiftworker who is regularly rostered to work on Sundays and public holidays."

Agreed Facts

[9] The parties provided the Commission with the following Statement of Agreed Facts:

> "Production Work at the [BDD] Site
>
> "7. Most production employees at the Site work their ordinary hours of work under the "12:20" roster pattern set out in Appendix C of the Agreement. That pattern includes 6 day shifts and 6 night shifts each week, worked by four crews of employees (Front Day Shift, Back Day Shift, Front Night Shift and Back Night Shift). Each crew has shifts commencing on 3 continuous days, then 4 days with no shift commencing for that crew as follows:

Shift	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Day 6AM - 6.20pm	**NO SHIFT**	Front Day Shift	Front Day Shift	Front Day Shift	Back Day Shift	Back Day Shift	Back Day Shift
Night 6pm - 6.20am	Front Night Shift	Front Night Shift	Front Night Shift	Back Night Shift	Back Night Shift	Back Night Shift	**NO SHIFT**

8. There is no day shift of ordinary hours worked on Sundays and no night shift of ordinary hours commencing on Saturday. The 12:20 roster pattern does not rotate; employees permanently work one of the four shifts.

9. Eight employees, who are engaged as Leading Hands, perform a varied 12:20 night shift pattern which commences twenty minutes earlier and ends twenty minutes earlier than each other 12:20 shift but they otherwise work the same pattern outlined above. There are two Leading Hands for each of the crews.

10. Currently, no ordinary hours are rostered at the Site for employees covered by the Agreement for nearly 24 hours between the period from 6.20pm on Saturday night to 5.40pm on Sunday night.

Mr Wilson's employment

11. Mr Wilson has been employed by the Applicant since 26 July 2018.

12. He is currently employed on the 12:20 Appendix C roster pattern, permanently working the Front Night Shift. Under that pattern Mr Wilson works three night shifts each week, commencing Sunday, Monday and Tuesday. He does not rotate from the Front Night Shift pattern.

13. On Mr Wilson's current shift pattern, he works every Sunday through the year, other than during periods of leave and some major public holidays if the Applicant decides to shut down for the public holiday (such as Christmas Day)."[3]

The Applicant's position

[10] A condensed summary of the Applicant's position is set out in its written submissions, as follows:

"3. The dispute is about whether Mr Ory Wilson, an employee of the Applicant and member of the Respondent, is entitled to an additional week of annual leave each year.

4. The Respondent [UWU] claims that Mr Wilson is entitled to accrue 190 hours of annual leave per year (**the Additional Annual Leave**) in accordance with clause 15.2(b)

of the *lion Dairy & Drinks Wetherill Park Enterprise Agreement 2020* (**the Agreement**).

5. The Applicant disputes that Mr Wilson is entitled to the Additional Annual Leave because he is not a seven day shift worker who regularly works on Sundays and public holidays.

6. The Applicant submits that the dispute turns on the interpretation of clause 15.2(b) and principally the meaning of "seven day shift worker".

7. The Applicant understands that it is not disputed by the Respondent that, in manufacturing industries, the principles underpinning interpretation of the phrase "regularly works on Sundays and public holidays" outlined in *O'Neill v Roy Hill Holdings Pty Ltd* [2015] FWC 2461 (**Roy Hill**) are applicable. It is also not disputed that Mr Wilson's roster means that he is rostered to regularly work shifts commencing on Sunday. However, the Applicant submits that Mr Wilson is not entitled to the Additional Annual Leave because:

(a) he is not a "seven day shift worker"; and

(b) he does not regularly work on public holidays on an application of the principles canvassed in Roy Hill and subsequent decisions of the Fair Work Commission.

8. The Applicant submits that either of the above grounds is sufficient to defeat the claim for an entitlement to Additional Annual Leave. Properly construed, there are two limbs to the applicable test and Mr Wilson must satisfy both to be entitled to the Additional Annual Leave.

9. To be a "seven day shiftworker", it is necessary in the Applicant's submission that the Applicant operate a continuous shift across all seven days of the week and that Mr Wilson work a rotating shift pattern across all seven days. Neither is the case. Mr Wilson works a fixed shift pattern of ordinary hours comprising night shifts commencing on Sunday, Monday and Tuesday. Further, the Applicant's operations at the Site are not a continuous process and do not include production shifts throughout every day of the week. Mr Wilson is therefore not a seven day shift worker as that term is properly interpreted."[4]

The UWU's position

[11] The UWU submits that the phrase "seven day shiftworker" is not to be read in isolation from the words "who regularly works on Sundays and public holidays".[5] In short, according to the UWU, the phrase "seven day shift worker who is regularly rostered to work weekends and public holidays" refers to an employee who:

a) is a "shiftworker"; and

b) works under an overall "shift roster system" that rosters employees across seven days of the week (i.e. an individual employee does not need to be rostered across all seven days of the week, they simply need to work on rostered shifts that are part of the seven day shift roster system); and

c) regularly works Sundays and public holidays (with the term 'regularly' being interpreted by reference to a numerical formulae in a particular industry based upon the number of Sundays and public holidays worked by the particular employee).[6]

[12] In advancing the foregoing submissions, the UWU says that the case law relied upon by BDD does not stand for the proposition that an individual employee must themselves work, over a relevant period, across all seven days of a week to be a seven day shift worker, or otherwise qualify for additional annual leave. Rather, the focus is upon the number of Sundays and public holidays worked on an ordinary time basis.[7]

Arbitrated Questions

[13] BDD has set out what it considers to be the questions to be answered in resolution of this dispute:

> (a) Does the phrase "seven day shift workers" in clause 15.2(b) of the Agreement require the Team Member to be:
>
> (i) engaged on a roster of ordinary hours which is continuous 24 hours a day for seven days of the week?
>
> (ii) rostered to perform work on each of the seven days of the week?[8]
>
> (b) Can a Team Member engaged on the 12:20 shift roster prescribed in Appendix C [of the Agreement] be entitled to 190 hours of annual leave per year under clause 15.2(b)?
>
> (c) Is Mr Wilson entitled to 190 hours of annual leave per year under clause 15.2(b) of the Agreement?

[14] Whilst I accept that the answers to the foregoing questions will resolve the ultimate issue in this dispute as to the meaning of seven day shiftworker under clause 15.2(b) of the Agreement, it has also been necessary as part of this decision to resolve various other issues or questions that underpin the resolution of this ultimate issue.

Interpretation of enterprise agreements

[15] My determination in this matter applies the principles set out in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union v Berri Pty Ltd*.[9] Such principles were neatly and helpfully summarised by Deputy President Gostencnik in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union v Paper Australia Pty Ltd*[10]:

> "In short compass, much like the approach to construing a statute, the construction of a provision in an enterprise agreement begins with a consideration of the ordinary meaning of the words used, having regard to the context and evident purpose of the provision or expression being construed. Context may be found in the provisions of the agreement taken as a whole, or in their arrangement and place in the agreement being considered. The statutory framework under which the agreement is made may also provide context, as might an antecedent instrument or instruments from which a particular provision or provisions might have been derived. The industrial context in making an enterprise agreement and in which it operates is also relevant."[11]

Consideration

[16] I do not accept that the term "seven day shift worker" is conjunctive with, or to be read unseparated from, the words "who is regularly rostered to work weekends and public holidays". Case law as to the entitlement of an individual employee to additional annual leave (beyond the standard four weeks), based upon the number of Sundays and public holidays an employee works during a relevant period, is separate and distinct issue from whether or not an employee is to be classified (under a relevant industrial instrument) as either, for example, a day worker, a shiftworker (continuous or non-continuous), or a seven day shiftworker.

[17] A plain and ordinary reading of the words of clause 15.2(b) of the Agreement identifies that in order to be a "shiftworker" for the purposes of the NES (additional or fifth week of annual leave), a relevant employee must *firstly*, be a "seven day shiftworker", and *secondly*, regularly work (i.e. be rostered to work and actually work) both Sundays and public holidays. As set out further below, it is readily apparent that a seven day shiftworker is a particular specie of shiftworker, who is defined or identified by more than just doing shiftwork that gives rise to regularly working (ordinary time) shifts that fall on Sundays and public holidays.

[18] A literal reading of the term "seven day shiftworker" ought not deprive the work to be done, from a construction perspective, of the words "seven day" before the term "shiftworker".

[19] The term "seven day shiftworker" is not used anywhere in the Agreement or the Award, (other than in relation to additional annual leave under the NES). Nor is it a defined term of the Agreement, the Award, or the Act. There is no evidence before me that the meaning of the phrase "seven day shiftworkers" was the subject of negotiation for the Agreement, nor an outcome of common intention.

Statutory framework and purpose

[20] A modern award, such as the FBT Award, or an enterprise agreement, must not exclude or displace the NES, or a provision of the NES (ss 55(1) and 61(1) of the FW Act). However, a modern award or enterprise agreement can include:

a) any term that is "expressly" permitted to be included by any provision of the NES (s 55(2) of the Act);

b) terms that are *"ancillary or incidental"* to the operation of an entitlement under the NES (i.e. terms that govern how the NES can be applied) (s 55(4)(a) of the Act); and

c) terms that *"supplement"* (or build upon) the NES (s 55(4)(b) of the Act).

[21] Noting the words of clause 25.3 of the FBT Award, and as required by s.196 of the Act, clause 15.2(b) of the Agreement provides for 190 hours (5 weeks) annual leave (per year) to a "shiftworker" for the purposes of the National Employment Standards (**NES**) (s.87(1)(b)(ii) of the Act).[12] That "shiftworker" for NES additional annual leave purposes under the Agreement, is a shiftworker that is a "seven day shiftworker" who (in addition to being a seven day shiftworker) is also "regularly rostered to work on Sundays and public holidays".

[22] It is relevant that clause 25.3 of the FBT Award is mirrored (almost identically) by clause 15.2(b) of the Agreement.[13] The decision to copy (or adopt) the terms of clause 25.3 of the Award into the Agreement brings squarely into issue the meaning of the term "seven day shiftworker" by reference to its history and description (or prescription) in case law over the years,[14] especially having regard to its interaction with the NES.[15] I use the term 'description' noting that ss.87(1)(b)(i) and (ii), and s.196 of the Act each contain the words "defines or describes". These two words have different meanings, and different work to do. The term "define" concerns a specific meaning. Whilst the term "describe" concerns an explanation or report as to the nature, characteristics or attributes of something. It follows that the search for the meaning of the term "seven day shiftworker" need not be limited to its definition, but extends to its description (i.e. its essential attributes).

[23] On 28 March 2008, the (then) Minister for Employment and Workplace Relations (Hon. Julia Gillard) issued a request to the President (Hon. Justice Geoffrey Giudice) of the Australian Industrial Relations Commission (**AIRC**) under Part 10A (s.576C) of the (repealed) *Workplace Relations Act 1996* (**WR Act**) to undertake an award modernisation process (via reviewing and rationalising around 1560 previously existing federal and state awards, to create a new system of modern awards).

[24] As part of the award modernisation request, and pursuant to Part 10A of the WR Act, the AIRC was required to establish definitions in modern awards relevant to the additional week's annual leave under the NES. The approach of the AIRC was to do so essentially by:

a) reference to the pre-existing qualification for the additional week's leave in the relevant industry, occupation or area of employment; and/or

b) by supplementing the annual leave entitlements in the NES (in circumstances described in the award modernisation request) where there was an historical basis for a more beneficial entitlement.

[25] In short compass, annual leave clauses in modern awards (that were made) ultimately defined the basis of the additional week's leave for the purposes of NES by defining the term "shiftworker" for this purpose in a similar way to that which the qualification for the additional week was expressed in previous federal awards and State awards (including NAPSAs) in an industry, occupation or area of employment. This was usually a specific class of shiftworker

only (i.e. not all shiftworkers, and not shiftworkers for other purposes under the relevant modern award). To the extent, during the award modernisation consultation process, that an interested group (e.g. a union or employer association) might have sought to advance claims for entitlements less or greater than the relevant standard in an industry, occupation or area of employment, such a claim was generally viewed by the AIRC to be inconsistent with the award modernisation request (and the overall intention of the AIRC) in creating relevant modern awards (albeit there were many and varied exceptions, some of which were explained, and others that were unexplained).

[26] Having reviewed the various award modernisation decisions of the AIRC, there is no suggestion in any of those decisions that the stand alone term "seven day shiftworker" differs in its definition or description from one modern award (or industry or occupation) to another. Nor is there any suggestion that in one industry, because of its history or usual operations, one simply considers whether the employer rosters, or has the ability to roster, employees over seven days of the week, but in another industry, because of its separate history or usual operations, one considers the shifts that an employee actually works, and whether such shifts fall evenly across seven days of the week. Indeed, there is no basis at all, in any case law (including the various award modernisation decisions of the AIRC), for such differing approaches.

[27] Current or existing modern awards contain provisions that define "shiftworker" for the purposes of the additional NES week of annual leave. By their words, these provisions are not uniform. For example, an employee need only work outside of the ordinary hours of a dayworker under the *Aged Care Award 2010* (**AC Award**) to be a "shiftworker" under that award for the purposes of an entitlement to an additional NES week of annual leave.[16] Conversely, under the *Hospitality Industry (General) Award 2020* (**Hospitality Award**), a "shiftworker" for the purposes of the additional NES week of annual leave is a relevant employee who must *firstly*, be a 7 day shiftworker, *secondly*, be (themselves) regularly rostered to work (and thus perform work) on Sundays and public holidays, and *thirdly*, be working in a business in which shifts are continuously rostered 24 hours a day for 7 days a week. In other words, the Hospitality Award contains three separate and distinct qualifiers for an entitlement to additional NES annual leave to arise, whilst under the AC Award one need only be a shiftworker.

[28] Multiple modern awards include the term "seven day shiftworker" to define or describe a shiftworker for NES additional annual leave purposes.[17] It is unfortunate, including from a plain English perspective, that none of these awards provide a simple, straightforward and unambiguous definition or description of a seven day shiftworker. This is especially so in circumstances where a failure to properly comply with a term of a modern award or enterprise agreement is determined on a strict liability basis, and carries potentially hefty pecuniary penalties.[18]

[29] There is no suggestion from either of the parties to these proceedings that clause 25.3 of the FBT Award (as replicated in clause 15.2 of the Agreement) fails to accurately reflect previous award (including NAPSA) qualifications in relation to the NES additional week of leave in the "food, beverage and tobacco manufacturing industry."[19] That said, even if it might be said that the definition or description fails to accurately reflect previous award (including NAPSA) qualifications, the time to raise any concerns in this regard has (for present purposes)

passed, in that the FBT Award has been made, and it's terms have been settled, by both the AIRC (in the award modernisation process), and the Commission (in award review proceedings). In other words, the AIRC, in creating modern awards, settled on a form of words in relation to additional NES annual leave entitlements. There have been no express words inserted into the FBT Award to suggest that the term "seven day shiftworker" in the FBT Award differs from the manner in which that term has been defined or described by the case law (set out at paragraphs [41] to [49] of this decision).

[30] Nor is there any suggestion that the construction of clause 15.2 of the Agreement, or clause 25.3 of the FBT Award, ought be constrained, linked to, or derived from, the manner in which an employee's entitlement to annual leave accrues under s.87(2) of the Act. In this regard, I adopt the conclusions of Anderson DP in *AMWU v Genesse & Wyoming Australia Pty Ltd*[20]:

> "Whether an employee falls within the statutory definition of "shift work" determines the quantum of their annual leave entitlement – not the basis on which annual leave accrues. Section 87(2) provides for the progressive accrual of an existing entitlement in a year and across years of service. It does not create that base entitlement."[21]

[31] To put it another way, the payment of annual leave is not to be determined by looking at the relevant provisions as to annual leave under a relevant industrial instrument (by reference to the accrual provisions under s.87(2) of the Act), and saying that the base entitlement to annual leave hinges upon the manner in which it is to be accrued. The correct position is that an employee becomes entitled to annual leave (accrual or payment (including upon termination)) by reference to work performed (including the times that such work is performed), and the meeting of the relevant qualifiers for that specific annual leave entitlement (albeit, note paragraphs [56] to [57] of this decision).

[32] Indeed, the difficulty with putting 'the cart before the horse', by considering the accrual system prior to, as or as part of, a determination as to a base annual leave entitlement, is that one needs to ascertain *firstly*, whether the relevant employee was a seven day shiftworker during a relevant period,[22] and *secondly*, the number of Sundays and public holidays actually worked[23] in the relevant year of employment, so as to resolve the question of "regularity".[24] Further, unlike in other industrial instruments, neither the Agreement, nor the FBT Award, provide for a pro-rata accrual system (for full time or part-time employees) such that employee can become entitled to additional annual leave that is less than a week's additional annual leave.[25] Under the Agreement, and the FBT Award, one either qualifies for a full week of additional annual leave, or they do not[26] (albeit, again note paragraphs [56] to [57] of this decision).

Agreement framework and production arrangements at BDD's Wetherill Park site

[33] The Agreement is single enterprise agreement that operates to the exclusion of:

a) other industrial instruments (including the FBT Award),[27] and

b) any extra claims.[28]

[34] Employees may be engaged under the Agreement as full time, part-time or casual, on day work or shift work, the latter on 8, or 12:20, hour rosters.

[35] Clause 12 (Hours of Work) of the Agreement sets out comprehensive rules around hours of work and rostering for both "Day Work" and "Shift Work".[29] Relevantly, employees may be rostered, or required to work, on a shift work roster pattern that provides for their ordinary hours to be worked on any days of the week (Monday to Sunday).[30] These shift work ordinary hours may be rostered over all days of the week on a rotational basis, or on fixed days/shifts.[31] Compensation for such ordinary time shift work is provided for by shift, weekend, and public holiday penalty rates.[32] Overtime rates of pay do not apply to ordinary hours of work (i.e. relevant shift work penalties apply for ordinary time shift work).[33]

[36] Production work is engaged in at BDD's Wetherill Park site by relevant employees across all seven days of the week. The 12:20 hour shift work roster pattern is not 24/7 continuous (in the sense that it consists of six day and six nightshifts each week worked pursuant to a 12:20 roster (contained at Appendix C to the Agreement)), giving rise to a break in production (or a break in continuous production) of 23 hours and twenty minutes each shift roster week (i.e. between 6:20pm on a Saturday to 5:40pm on a Sunday where production does not occur). Relevant employees (on the 12:20 roster) work three fixed days (or shifts) each week, and have four fixed rostered days off each week.[34] It follows that the 12:20 roster provides for longer shift hours per day across three consecutive working days, with four consecutive free (or non-work) days off each week.[35] Working and non-working days each week are fixed, enabling an employee to have complete certainty as to their weekly schedule (both at work, and outside of work). There is no suggestion in these proceedings that these patterns of fixed shift work alone were ever used as justification for findings or conclusions (in merits cases over the last 100 or more years) for the awarding of an additional week of annual leave (i.e. beyond the relevant standard as to annual leave quantum at the time).

[37] The parties to the Agreement (being BDD and its employees) have both committed themselves (under the Agreement) to achieving flexible working arrangements and improving costs and reducing overheads.[36] Further, clauses 12.1 to 12.4 of the Agreement identify and acknowledge that the hours of work, rosters and shift systems are to be set such that they best meet (or match) the relevant operating requirements of BDD (including from time to time). In other words, under the Agreement, BDD has the right to determine (after relevant consultation, etc) how it considers it best to frame employees (Team Members) hours of work, rosters and shift systems. It also follows that based upon how those hours of work, rosters and shift systems are framed by BDD, certain payments or other entitlements under the Agreement apply or do not apply to Team Members (e.g. allowance/s, particular shift penalties for hours worked, or entitlements to additional annual leave). BDD is entitled to structure its operations (including relevant shift arrangements) on the basis of what BDD considers to be cost effective and/or efficient (consistent with the terms of the Agreement). In other words, it is not inconsistent with the terms of the Agreement for BDD to structure its shift arrangements such that the costs of allowance/s, particular shift penalties, or entitlements to additional annual leave are removed, reduced or contained, whilst at the same time meeting operational requirements and/or maintaining or improving productivity outcomes. Examples of this might include the timing of when shifts start or finish, or the manner in which the roster system operates (via fixed or rotating shifts).

[38] The fact that allowance/s, particular shift penalties, or entitlements to additional annual leave exist under the Agreement does not mean that at least someone (or some category of

employee) to whom the Agreement applies 'must' as a matter of course receive them. One does not start with the proposition that because certain allowance/s, particular shift penalties, or entitlements to additional annual leave exist or are contained in an industrial instrument, they must apply and be payable to someone to whom the Agreement applies. Nor does one (when construing a term) seek to reverse engineer the specific and relevant prerequisites to an entitlement under an industrial instrument based upon the notion that a relevant entitlement must arise (or be payable) for someone in the enterprise. Indeed, it may well be the case that the particular circumstances of the industry, or the operations of an enterprise, when applied to an entitlement, mean that no one qualifies for the entitlement. This does not deny the entitlement (or the words giving rise to that entitlement) work to do. It simply means that any work to be done by the words of the relevant entitlement only crystalise when the relevant employee qualifies for same (ordinarily, via actually undertaking the relevant work or shift/s to obtain the entitlement). Section 87(1)(b)(ii) of the Act only provides for additional annual leave to "shiftworkers" as defined or described in an applicable enterprise agreement. If an employee does not meet that enterprise agreement definition or description of "shiftworker" for the specific purposes of s.87(1)(b)(ii) of the Act, then no entitlement to any additional (or fifth week of) annual leave arises. Equally, s.196 of the Act does not say (or require) otherwise. It simply insists that an enterprise agreement include a shiftworker definition or description where an applicable modern award defines or describes a shiftworker for additional NES annual leave purposes.

The definition of a "seven day shiftworker"

[39] Various decisions over the years have dealt or engaged with the definition or description of seven day shiftworker.[37]

[40] The UWU submits that when grappling with the definition or description of a seven day shiftworker, whether or not an employee is themselves (individually) required to work a shift system that rotates across all seven days of the week, has only ever been addressed in *obiter*.[38] According to the UWU, all that can be taken from previous decisions that refer to seven day shiftworkers, is that to be a seven day shiftworker, an employee must be *firstly*, a shiftworker, and *secondly*, work a particular number of Sundays and public holidays.[39] In other words, it does not matter if a seven day shiftworker works fixed shifts, or shifts that rotate across seven days of the week. Rather, one only need consider that:

a) the industry or workplace operates across seven days of a week; or

b) the industry or workplace has the ability to operate across seven days of the week under the terms of the applicable industrial instrument; and

c) the number (or regularity) of ordinary shifts worked by an individual employee on Sundays and public holidays (with an employee who works ordinary shifts on Sundays and public holidays a shiftworker in any event, as work is performed outside of the ordinary hours of a dayworker).

[41] Terms such as "five day shiftworker', "six day shiftworker" and "seven day shiftworker"[40] have a long arbitral history in Australia going back to at least circa 1913.[41] The point is, each of these terms have been defined or described (over more than the past 100 years)

in arbitral decisions as having specific meanings. Neither of the terms "six day shiftworker" or "seven day shiftworker" have ever been equated (or boiled down) to simply a shiftworker who is not a dayworker, or a shiftworker who works regular fixed shifts that include Sundays and/or public holidays. As was said by the Full Court of the Commonwealth Court of Conciliation and Arbitration in 1937:

> "It was suggested by the applicants that this fortnight's holiday [as opposed to the standard one week's holiday] was given solely as compensation for working [public] holiday or Sunday shifts. The wording as a whole is not consistent with this – having to be on duty for 48 hours each week was also compensated for by the fortnight's holiday."[42]

[42] In the *Shift Workers Case 1972*[43], claims by relevant unions that all shift workers should receive, at the end of each year of their employment, annual leave of five weeks were rejected. In this regard, the five member Full Bench of the New South Wales Industrial Relations Commission (**NSW IRC**) said (under the heading "Additional annual leave for all shift workers"):

> "The formal claim in this regard was that all shift workers should receive at the end of each year of their employment annual leave of five weeks. Mr Wran said, however, that he faced difficulties in asking the Commission to deal with the application in relation to hospital employees because of their claims concerning leave which were before the conciliation committee. Speaking for the intervening unions, Mr Wran departed from the claim as filed. He submitted ultimately that all shift workers were entitled to be compensated for the inconveniences and disabilities of shift work not only by way of payment but also by way of additional leave. He said that the "underlying philosophy" of the claim was to secure uniformity of conditions for all shift workers, but conceded that 7-day shift workers had the claim for most consideration, followed by 6-day shift workers and then 5-day shift workers. No propositions were put before us as to how in an award we should distinguish between the three classes.
>
> We refuse this claim both in relation to hospital employees and employees generally. It is our view that 7-day shift workers in continuous process industries are entitled, unless compensated in some other way, to an additional week's annual holiday (plus an added day if a public holiday should fall in that week) beyond the holiday prescribed by the *Annual Holidays Act*. But the shift allowances and penalty rates which we have fixed for shift workers provide, in our opinion, adequate compensation for the inconveniences and disabilities which all other classes of shift workers suffer."[44]

[43] In 1976, the New South Wales Industrial Relations Commission (**NSW IRC**) in *Re Hospital Employees Conditions of Employment (State) Award*[45] (**1976 Annual Leave Case**) examined in detail the test or qualifications applying to an employee who is to be defined or described as a seven day shiftworker, and made the following conclusions:

> "As to the meaning of the phrase "7-day shift workers" in the passage from the decision of the Commission relating to additional annual leave for shift workers in the *Shift Workers' Case 1972* already cited [1972 AR 633], we think that it refers to shift workers

> who, over a period of time, in accordance with the provisions of their roster, regularly perform their ordinary hours of work on each of the seven days of the week. …"[46]

[44] The *1976 Annual Leave Case* also set out or identified employees who are not to be defined or described as a seven day shiftworker, via the following two examples:

> "(A) Shift workers whose shifts are not spread over the seven days of the week but are fixed shifts confined to the same five (or four, or three) days of the week, including Sundays. These shift workers may or may not be required to work on public holidays which occur on rostered working days.
>
> (B) Shift workers whose shifts may or may not be spread over the seven days of the week and whose rosters require them to work irregularly on Sundays in the sense that the number of Sunday shifts is less than would be the case under a regular roster providing over a period for an equal number of shifts on each day of the week. These employees may or may not be required to work on a public holiday which falls on a working day under the roster."[47]

[45] The conclusions of the NSW IRC in respect of seven day shiftworkers in the *1976 Annual Leave Case* (as set out in foregoing paragraph) were endorsed by a Full Bench of the AIRC in *Media, Entertainment and Arts Alliance [MEAA] and Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989*,[48] as follows:

> "The most expansive decision is the *1976 Annual Leave Case* in which the NSW Industrial Commission established the formula for 7-day shift workers who work an "equal number of shifts on each of the seven days of the week": the resultant formula producing a requirement to work a minimum of 34 Sunday shifts and 6 public holidays - this test was accepted by both parties before us as an applicable guideline to apply to 7-day continuous shift workers."[49]

[46] Further, in rejecting an application by the Media, Entertainment and Arts Alliance to provide for a pro-rata additional annual leave entitlement to shiftworkers generally (i.e. shiftworkers who do not actually qualify as seven-day-shiftworkers), and to reduce the application of the term "regularly" from 34 to 31 Sunday shifts, the Full Bench stated:

> "The `31 Sunday standard' (referred to in the proposed variation submitted by MEAA), would appear to be an adaptation of the 34 Sunday standard adjusted for the extra three weeks leave which nurses in WA then received. This logic has no relevance to DHCE workers, and no additional merit arguments were presented in support of the formula sought in the claim to the employees in question.
>
> The creation of a new standard of this kind would be fraught with difficulties which we are not prepared to countenance, at this time, in the absence of much more detailed submissions on the impact of its application throughout the industry.
>
> In light of our decision that the test of regularly working [34] Sundays has not been met on the material before us, we do not intend to determine the other relevant issues including whether or not the employees covered by the claim are `shift workers' or day

> workers rostered to work on some Sundays. Of course, the definition of "regularly working Sundays" and the scope of its application across categories of employees, is open to review in any test case."[50]

[47] The reference to *"nurses in WA"* in the above extracts is a reference to the failed attempt by the Australian Nursing Federation (**ANF**) in the case of *Nurses' (ANF Western Australia Public Sector) Consolidated Award 1990*[51] (**ANF WA Case**) to convince a Full Bench of the AIRC that shifts worked by seven day shiftworkers do not have to be worked evenly through all seven days of a week, and that the mere working of shifts which fall outside of 6am to 6pm Monday to Friday creates an entitlement to additional annual leave where such shifts total 35 or more in a calendar year.[52] In this same case, the ANF also failed (in the alternative) to convince the same Full Bench that the mere working of regular Sundays and public holidays alone qualified an employee to an additional weeks annual leave.[53] As the AIRC Full Bench stated:

> "At the time of hearing this matter, it was the long term implications of a decision in relation to the definition of continuous service which led the Bench to question strongly the rationale behind the grant of additional leave. Justice Maddern expressed the concerns of the Bench in relation to the submission that it was simply work performed regularly on Sundays and public holidays which constituted a continuous shift worker and qualified an employee for extra annual leave. His Honour stated:
>
> > 'why should it be limited to shift workers? There's lots of people, and there's growing number of people, who now work a regular part of their employment on Saturday, Sundays and public holidays. In fact, there are some industries where that is commonplace for day workers. Why, if we accept what you're putting to us, shouldn't we also say: well all right, any day worker who works Saturday, Sundays and public holidays should also get the additional fifth week leave? Because nobody to this stage has given me a distinction which would allow me to support any differentiation between day workers and shift workers ...' [transcript p112]
>
> Against the background of the circumstances in which we find ourselves, we consider that the most appropriate course for us to adopt is the one which is closest to the historical arbitral development in relation to this question. This will not be a significant departure from the general approach taken and should not prejudice a reconsideration of the issue at an appropriate time.
>
> …
>
> It is against the totality of the background of these proceedings that we consider that we are left in the position of selecting one position or the other as our decision. We take the view that the position adopted by the Western Australian employer in relation to the qualification for the additional week's annual leave and what is reflected in a draft order [see Exhibit K6][54] is more in tune with arbitral history than that advanced by the unions. In the circumstances, we propose to adopt it."[55]

[48] The relevant qualifications (or words) adopted for an employee to meet the definition or description of a seven day shiftworker by the AIRC Full Bench in the *ANF WA Case* was in the following terms:

> "… an employee who is required to work ordinary hours of duty in accordance with a roster where the employee is rostered for duty over 7 days of the week, and is required to work and works regularly on every day of the week including public holidays and Sundays, shall be allowed 4 weeks annual recreation leave and additional annual recreational leave of one week."[56]

[49] This is equally consistent with the findings of Duncan DA in *Australian Coal & Shale Employees Federation & Ors v NSW Coal Association & Ors*[57]:

> "The one matter crucial for a successful claim for a week's leave additional to that enjoyed in an industry generally was the regular working of Sundays: see in the *Firemen's and Deckhands' case* (1959 AR 353) per Beattie J. Saturday was not the alternative sabbath or regular sports day. Therefore the Tribunal gave no further consideration to that part of the unions' claim seeking additional annual leave for people who did not regularly work on Sundays. It followed that the position of mineworkers who worked a fixed set of days, for example Thursday to Monday inclusive and consequently worked regularly on Sunday met the first requirement. They were not seven day shiftworkers as that phrase was construed by a full bench of the Industrial Commission in *Re Hospital Employees Conditions of Employment (State) Award* 1976 AR 275 at p.282: "shiftworkers who over a period of time, in accordance with the provisions of their roster, regularly perform their ordinary hours of work on each of the seven days of the week" (but not necessarily rotating shifts [across day, afternoon and night]). That description was adopted by the Tribunal and was taken as to response to the second question referred to earlier. Again, one should look to the employee, not the operation, for an answer."[58]

[50] Having regard to the authorities cited in this decision, I find that the term "seven day shiftworker", absent any further express words that otherwise define, limit, qualify or extend its definition or description, is one of 'general application' to both full time and part-time employees across all industries. In other words:

a) there is no suggestion on the authorities that the singular term "seven day shiftworker" changes from one industry to another, or that the old 'chestnut' submission 'the case law refers to statements of general principle made in the context of particular facts' is available to be advanced; and

b) part-time employees, in the ordinary course, are entitled to the benefit of the provisions of an industrial instrument on a pro-rata basis. That is, they receive pro-rata a relevant entitlement, not pro-rata the actual qualification to obtain the relevant entitlement. In short, a part-time employee who qualifies as (or falls within the definition or description of) a seven day shiftworker receives an additional week of annual leave (paid or accrued) on the basis of their pro-rata hours to that of a full time employee. But a part-time employee's qualification to be a seven day shiftworker (in the first place) is not based upon a pro-rata formula. Of course,

express words to the contrary may alter this position,[59] however, a standard term that provides for the terms of a relevant award or enterprise agreement to apply pro rata to a part-time employee is wholly insufficient.[60]

[51] To be clear, the foregoing finding is limited to the stand alone definition or description of "seven day shiftworker". It does not extend to the second or other issue as to the quantification, or numerical amount, of the number of Sundays and public holidays that need to be "regularly" worked over a twelve month period (i.e. per annum, or employee anniversary date to employee anniversary date, or in each separate *"year of 'service'"* by an employee with his or her employer). In this dispute, there is no basis upon which I would not apply the Full Bench decision of the AIRC in *Media, Entertainment and Arts Alliance [MEAA] and Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989*,[61] which found a minimum and immutable requirement for a seven day shiftworker to actually work 34 Sunday shifts and 6 public holidays per annum to satisfy the definition of "regularly" working Sunday and public holidays.[62] That said, unlike the definition of "seven day shiftworker", which I have found to be a term of general application, the number of Sundays and public holidays to be worked to satisfy the definition of "regularly" may change from industry to industry based upon a detailed historical analysis of case law going directly to the issue in the relevant industry that clearly justifies a higher or lower quantum.[63]

[52] In summary, I find that a "seven day shiftworker" is defined or described as:

a) a full time or part-time employee;

b) who works his or her shifts 'regularly' over seven days of the week, including Sundays and public holidays, each relevant year of employment (noting that there is no requirement that the relevant employee's shifts "rotate" between morning, afternoon or night shifts).[64]

[53] In respect of the foregoing definition or description:

a) the focus is upon the individual employee concerned, and the shifts that that employee actually works, not simply the employer's operations or its rosters.[65] The fact that an employee 'might' be able to be rostered over seven days of the week is not the test. Rather, the test is (retrospectively) what shifts an individual employee actually (themselves) has worked over the *'relevant period'* and whether those shifts were worked *'regularly'* and evenly over each of the seven days of a week during that relevant period; and

b) the *1976 Annual Leave Case* uses the words "<u>over a period of time</u>, in accordance with the provisions of their roster, <u>regularly perform their ordinary hours</u> of work on each of the seven days of the week" (<u>my emphasis</u>). It follows that the working of shifts evenly over seven days of a week needs to occur 'regularly' over the 'relevant period' ("over a period of time"), with 'relevant period' defined or described here to mean no other than the qualifying period for the entitlement to the five weeks of annual leave (i.e. employee anniversary date to employee anniversary date or *"year of 'service'"* with the employer) and the term *"regularly"* defined or described to mean no other than *"sufficiently substantial"*[66], or for 34 or more weeks

> of the year (which do not need to be worked continuously, but simply add up to 34 weeks as a seven day shiftworker (rostered evenly over seven days of the week) in any given year).[67]

[54] None of the authorities referred to or cited at paragraphs [39] to [51] of this decision support the contention that one simply looks to the operations of an industry or enterprise, and if those operations occur across all seven day of the week, relevant shiftworkers in that industry or enterprise fall within the definition or description of a seven day shiftworker. Indeed, the case law says nothing of the sort. Again, one looks to the individual employee, not the operation, for an answer.[68]

[55] Turning back to the definition or description of a "shiftworker" for the purposes of additional NES annual leave under clause 15.2(b) of the Agreement, it follows that I find that a seven day shiftworker is an employee who must have his or her ordinary hours of work rostered regularly and evenly over seven days of a week during the relevant period, and work regularly on Sundays and public holidays during the relevant period, to qualify for additional NES annual leave. It equally follows that:

a) an employee who is not a seven day shiftworker, but is regularly rostered to work on Sundays and public holidays, does not qualify for additional NES annual leave in part or in whole under the Agreement;

b) an employee who is a shiftworker (of any description) but has not (during the relevant period) been regularly rostered to work on Sundays and public holidays, does not qualify for additional NES annual leave under the Agreement;[69] and

c) an employee either qualifies for additional NES annual leave under clause 15.2(b) of the Agreement or they do not, there is no, for want of a better term, 'half way house'. If an employee's employment comes to an end prior to the satisfaction of the requirements of clause 15.2(b) in any given year, the employee will not have an entitlement to 5 weeks annual leave.[70]

A cautionary note about accruals for seven day shiftworkers

[56] In *Four yearly review of modern awards – Alleged NES Inconsistencies*[71], a Full Bench of the Commission considered the inconsistency between the entitlement of a seven day shiftworker to additional NES annual leave (that properly crystalises) after each year of service, and s.87(2) of the Act which provides that "an entitlement to paid annual leave [be that four or five weeks] accrues progressively during a year of service". In this regard, the Full Bench concluded:

> "We consider that the disability associated with working seven day shiftwork should be compensated for by a uniform additional entitlement to annual leave, namely that provided for by the NES, regardless of the period during which seven day shiftwork is worked. The NES provision for progressive accrual of this entitlement is sufficient to deal with the situation of part-year seven day shiftworkers who meet the award requirement in clause 41.3(a) of being 'regularly rostered'."[72]

[57] It follows that notwithstanding any findings or conclusions set out in this decision to the contrary (based upon historical case law), an employee who works as a seven day shiftworker other than regularly, will be deemed to have been 'regularly rostered' and achieve pro-rata or part accruals towards a fifth week of annual leave by virtue of s.87(2) of the Act.

Answer to Arbitrated Questions

[58] Having regard to the findings set out in this decision, the answers to the questions for arbitration posed by the Applicant in these proceedings are:

> (a) Does the phrase "seven day shift workers" in clause 15.2(b) of the Agreement require the Team Member to be:
>
> > (i) engaged on a roster of ordinary hours which is continuous 24 hours a day for seven days of the week?
> >
> > Answer: No. I do not accept that the definition or description of a seven day shiftworker necessarily requires that the relevant shift or rostering system be "24/7" continuous. Rather, the relevant shift or rostering system needs to be continuous (or roster shifts) across all seven days of the week, including Sundays and public holidays.[73] In this case, shifts at BDD's Wetherill Park site are rostered continuously over seven days of the week (notwithstanding that there is a break of 23 hours and 20 minutes between Saturday and Sunday each week, where no shifts occur, and no production work is performed).
> >
> > (ii) rostered to perform work on each of the seven days of the week?
> >
> > Answer: Yes, the relevant employee (Team Member), be they full time or part time, needs to be individually rostered to work (and actually work) an equal number of his or her shifts on each of the seven days of the week during the relevant period. In other words, the relevant individual employee (Team Member) needs to regularly work shifts that rotate across all seven days of the week during the relevant period. A fixed shift roster (under Appendix C of the Agreement, or otherwise) is not consistent (i.e. wholly inconsistent) with the definition or description of a seven day shiftworker under the Agreement.[74]
>
> (b) Can a Team Member engaged on the 12:20 shift roster prescribed in Appendix C [of the Agreement] be entitled to 190 hours of annual leave per year under clause 15.2(b)?
>
> > Answer: No. See answer to Question (a)(ii) above.
>
> (c) Is Mr Wilson entitled to 190 hours of annual leave per year under clause 15.2(b) of the Agreement?
>
> > Answer: No. See answer to Question (a)(ii) above.

DEPUTY PRESIDENT

Appearances:

Ms *Katherine Aistrope*, Special Counsel, HWL Ebsworth lawyers, appeared for Bega Dairy and Drinks Pty Ltd (formerly known as National (Dairy Foods) Limited) (Applicant).

Mr *Sean Howe*, Lead Industrial Officer (NSW/ACT), and Ms Emily Orman, Industrial Officer, appeared for the United Workers Union (Respondent).

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[1] Clause 11.10 of the *Lion Dairy & Drinks Wetherill Park Enterprise Agreement 2020* (**Agreement**) provides that parties may be legally represented as of right in respect of a dispute arising under the Agreement.
[2] Note clause 1.2(a)(iii) of the Agreement.
[3] Statement of Agreed Facts (found at Annexure "AM-1" to Statement of Avanish Meher).
[4] BDD's Outline of Submissions. See also Transcript, PN129, PN169-PN170; BDD's Outline of Submissions In-Reply, at [3]-[23], [26]-[27] and [33]-[43].
[5] UWU Submissions, at [29]-[36].
[6] Ibid.
[7] Ibid, at [44]-[46]. Transcript, PN187.
[8] I work on the basis that "Team Member" is a relevant full time or part-time employee to whom the Agreement applies.
[9] [2017] FWCFB 3005, at [114]. See also *James Cook University v Ridd* [2020] FCAFC 123; (2020) 278 FCR 566, at [65].
[10] [2020] FWC 2130.
[11] Ibid, at [8].
[12] Nothing in the *Explanatory Memorandum to the Fair Work Bill* 2008 provides any assistance as to the operation of s.87 of the Act (see *Explanatory Memorandum to the Fair Work Bill 2008* at pp.58-62).
[13] Despite the minor differences in wording, there can be absolutely no suggestion that clause 25.3 of the *Food, Beverage and Tobacco Manufacturing Award 2020* [MA000073] (**FBT Award**) is not identically mirrored by clause 15.2(b) of the Agreement. Also note clause 1.2(c) of the Agreement.
[14] *James Cook University v Ridd* [2020] FCAFC 123; (2020) 278 FCR 566, at [65](iii) to [65](v), and [65](vii).
[15] *Application by Canavan Building Pty Ltd* [2014] FWCFB 3202, at [46].

[16] *Aged Care Award 2010*, Clause 28.2. See also *Health Services Union v DPG Services Pty Ltd* [2023] FWCFB 81.
[17] See, for example, the *Manufacturing and Associated Industries and Occupations Award 2010*; *Food, Beverage and Tobacco Manufacturing Award 2010*; *Airline Operations – Ground Staff Award 2010*; *Cement and Lime Award 2010*; *Electrical, Electronic and Communications Contracting Award 2010*; *Graphic Arts, Printing and Publishing Award 2010*; *Pharmaceutical Industry Award 2010*; *Poultry Processing Award 2010*; *Premixed*

Concrete Award 2010; *Road Transport and Distribution Award 2010*; *Sugar Industry Award 2010*; *Storage Services and Wholesale Award 2010*; *Textile, Clothing and Footwear Industry Award 2010*; *Timber Industry Award 2010*; *Vehicle Manufacturing, Repair, Services and Retail Award 2010*; *Wine Industry Award 2010*.

[18] See ss.45 and 50 of the Act, also noting ss.545 and 550 of the Act.

[19] As defined at clause 4.2 of the FBT Award.

[20] [2019] FWC 2502.

[21] Ibid, at [83].

[22] See paragraphs [41] to [53] of this decision.

[23] Noting the potential outcomes of the decision in *CFMMEU v OS MCAP Pty Ltd* [2023] FCAFC 51 in relation to the working of public holidays.

[24] See paragraphs [41] to [53] of this decision.

[25] See, for example, the express words used at clause 10(ix) of the *Nurses, Other Than in Hospitals, &c., (State) Award* (NSW NAPSA AN120385); clause 19(ii)(a) of the *Charitable, Aged and Disability Care Services (State) Award* (NSW NAPSA AN120118); *Nurses' (ANF Western Australia Public Sector) Consolidated Award 1990* Print L3678, 2 June 1994, Keogh SDP, Riordan SDP, Smith C, at Attachment 'F' (Item A – Recreation Leave), clauses A(3) and A(4) which provide for an alternative way to qualify for additional annual leave; *Re Hospital Employees Conditions of Employment (State) Award* 1976 AR (NSW) 275, at 283; *Media, Entertainment and Arts Alliance [MEAA] Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989*, Print M7325, 1 December 1995, 2617/1995, Marsh SDP, Duncan DP, Wilks C, p.10: "in some decisions provision is made for a pro rata entitlement for other employees who are not 7-day shift workers to ensure equitable treatment". See also *Australian Municipal, Administrative, Clerical and Services Union – Western Australian Branch v Western Power Corporation*, PR944613, 16 March 2004, per Mansfield C, at [24], and [37]-[38].

[26] Compare, *Re Hospital Employees Conditions of Employment (State) Award* 1976 AR (NSW) 275, at 283.

[27] Agreement, Clause 3.2.

[28] Ibid, Clause 7.

[29] Ibid, Clause 12. Also note clauses 35 and 36.

[30] Ibid, clauses 12.6, 12.7, 12.8. See also, or compare, clause 12 of the FBT Award which provides for similar arrangements (including via facilitative agreements), noting, *James Cook University v Ridd* [2020] FCAFC 123; (2020) 278 FCR 566, at [65](iii) to [65](v), and [65](vii).

[31] Ibid.

[32] Agreement, clauses 12.6 and 12.8.

[33] Ibid, compare, clause 27 in relation to overtime.

[34] Given the 12:20 shifts in Appendix C of the Agreement run for 12 hours and 20 minutes, the shifts are rostered over three days of the week, but straddle into a fourth day.

[35] Ibid.

[36] Agreement, clauses 8.3(f) and (g).

[37] See *Federated Engine-Drivers and Fireman's Association of Australia v Broken Hill Proprietary Company and Ors* (1913) 7 CAR 32; *Amalgamated Engineering Union v Alderdice and Others* (1927) 25 CAR 388; *Metal Trades Employers Association and Ors v Amalgamated Engineering Union and Ors* [1937] CthArbRp 23; (1937) 37 CAR 240; *Amalgamated Engineering Union & Ors and The Metal Trades Employers Association & Ors* (1941) 45 CAR 701; *Re Iron & Steel Works Employees (Australian Iron & Steel Limited - Port Kembla) Award*, Richards, Beattie and Kelleher, JJ, [1957] AR (NSW) 429, at 436-437; *Re Hospital Employees Conditions of Employment (State) Award* [1976] AR (NSW) 275; *Re Crown Employees in Hospitals and Homes re annual leave* [1977] AR (NSW) 774, at 775 (cited in *Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989*, Print M7325, 1 December 1995, 2617/1995, Marsh SDP, Duncan DP, Wilks C); *Re Iron and Steel Works Employees (Australian Iron and Steel Ltd) Conciliation Committee* [1941] AR (NSW) 445, at 446-447, 463, 471-474, and 481; *Re Iron & Steel Works Employees (Australian Iron & Steel Limited - Port Kembla) Award*, Richards, Beattie and Kelleher, JJ, [1957] AR (NSW) 429; *Steel Industry Case* [1958] AR (NSW) 603, at 656-658; *Steel Industry Case* [1965] AR (NSW) 449, at 466-473; *Shiftworkers Case* [1972] AR 633; *John Fairfax & Sons Ltd v NSW Sales Representatives & Commercial Travellers' Guild* [1988] 25 IR 125; *Australian Coal & Shale Employees Federation & Ors v NSW Coal Association & Ors* 1989 AILR 170 (Volume 31, No.10, CCH Australia Limited), 25 May 1989, Coal Industry Tribunal, per DA Duncan, at pp.173-175; *Media, Entertainment and Arts Alliance [MEAA] Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989*, Print M7325, 1 December 1995, 2617/1995, Marsh SDP, Duncan DP, Wilks C; *Australian Municipal, Administrative, Clerical and Services Union – Western Australian Branch v Western Power Corporation*, PR944613, 16 March 2004, per

Mansfield C, at [24], and [37]-[38]; *Four yearly review of modern awards –Registered and Licensed Clubs Award 2010* [2020] FWCFB 4762; *O'Neill v Roy Hill Holdings Pty Ltd* [2015] FWC 2461; *Australian Rail, Tram and Bus Industry Union v One Rail Australia Pty Ltd* [2021] FWC 3097; *TT-Line Company Pty Ltd* [2022] FWC 2662.

[38] Transcript, PN225.

[39] Ibid, PN187-PN233.

[40] Including "true 7-day shiftworker" and "7-day continuous process shiftworkers", as compared to "permissive 7-day shiftworkers" (who do not perform obligatory 7-day continuous shiftwork): *Shiftworkers Case* 1972 AR 633, at 658-661 and 667.

[41] *Federated Engine-Drivers and Fireman's Association of Australia v Broken Hill Proprietary Company and Ors* (1913) 7 CAR 32; *Shiftworkers Case* 1972 AR 633, at 658-661 and 667; *Re Iron and Steel Works Employees (Australian Iron and Steel Ltd) Conciliation Committee* [1941] AR (NSW) 445, at 446-447, 463, 471-474, and 481.

[42] *Metal Trades Employers Association and Ors v Amalgamated Engineering Union and Ors* [1937] CthArbRp 23; (1937) 37 CAR 240, at 246.

[43] 1972 AR 633.

[44] Ibid, at 667.

[45] 1976 AR 275 (especially at 281-283).

[46] Ibid, at 282.

[47] Ibid, at 282-283.

[48] *Media, Entertainment and Arts Alliance [MEAA] Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989, Print M7325, 1 December 1995, 2617/1995, Marsh SDP, Duncan DP, Wilks C.*

[49] Ibid, at pp.13-14.

[50] Ibid, at pp.16-17. No such *"test case"* has ever occurred.

[51] Print L3678, 2 June 1994, Keogh SDP, Riordan SDP, Smith C.

[52] Ibid, at pp.2 and 8.

[53] Ibid, at pp.3-4. The AIRC Full Bench in the ANF WA Case adopted the requirement to work regularly over seven days of the week (including Sundays and public holidays).

[54] Exhibit K6 is a reference to the annexure to the ANF WA Case decision (Print L3678) marked as Attachment 'F'.

[55] Print L3678, 2 June 1994, Keogh SDP, Riordan SDP, Smith C, at pp.3-4.

[56] Ibid, Attachment 'F' (Item A – Recreation Leave), clause A(2). I note the express provisions of clauses A(3) and A(4) which provide for an alternative way to qualify for additional annual leave disconnected from the definition and description of a seven day shiftworker.

[57] 1989 AILR 170 (Volume 31, No.10, CCH Australia Limited), 25 May 1989, Coal Industry Tribunal, per DA Duncan, at p.173.

[58] Ibid, at p.174.

[59] See, for example, the express words used at clause 10(ix) of the *Nurses, Other Than in Hospitals, &c., (State) Award* (NSW NAPSA AN120385); clause 19(ii)(a) of the *Charitable, Aged and Disability Care Services (State) Award* (NSW NAPSA AN120118); *Re Hospital Employees Conditions of Employment (State) Award* 1976 AR (NSW) 275, at 283.

[60] See, for example, clause 9.7 of the FBT Award, and clause 36.5 of the Agreement. If an entitlement to additional annual leave is to exist for part-time employees who are not seven day shiftworkers, or for employees who work less than 34 Sunday and 6 public holiday shifts in a qualifying year, the relevant industrial instrument must expressly provide for such lower qualifying thresholds (for example, via pro-rata counter leave accruals such as: 6 or less shifts - nil; 7 to 13 shifts - 1 additional days annual leave; 14 to 20 shifts - 2 additional days annual leave; 21 to 27 shifts - 3 additional days annual leave; 28 to 34 shifts – 4 additional days annual leave; 35 shifts - 5 additional days annual leave). See also *Australian Municipal, Administrative, Clerical and Services Union – Western Australian Branch v Western Power Corporation*, PR944613, 16 March 2004, per Mansfield C, at [24], and [37]-[38].

[61] *Media, Entertainment and Arts Alliance [MEAA] Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989, Print M7325, 1 December 1995, 2617/1995, Marsh SDP, Duncan DP, Wilks C.*

[62] Ibid, at pp.13-14. Noting the potential outcomes of the decision in *CFMMEU v OS MCAP Pty Ltd* [2023] FCAFC 51.

[63] See also, for example, relevant methodology applied in *Steel Industry Case* [1965] AR (NSW) 449, at 469-473, albeit on issues of merit going to increases, versus, the maintenance of the status quo.

[64] A part-time employee must satisfy the same requirements as full time employees, albeit by reference to their ordinary part-time shifts, i.e. the part-time employee must work his or her shifts 'regularly' over seven days of the week, including Sundays and public holidays. If that does not occur, or cannot happen (for whatever reason), a part-time employee will not meet the definition or description of a seven day shiftworker.

[65] See *Re Hospital Employees Conditions of Employment (State) Award* 1976 A.R. 275 at 282: *"Shiftworkers who over a period of time, in accordance with the provisions of their roster, regularly perform their ordinary hours of work on each of the seven days of the week (but not necessarily on rotating shifts)"*; *Australian Coal & Shale Employees Federation & Ors v NSW Coal Association & Ors* 1989 AILR 170 (Volume 31, No.10, CCH Australia Limited), 25 May 1989, Coal Industry Tribunal, per DA Duncan, at p.174: "one should look to the employee, not the operation, for an answer". Noting the potential outcomes of the decision in *CFMMEU v OS MCAP Pty Ltd* [2023] FCAFC 51 as to work on public holdiays.

[66] *Re Hospital Employees Conditions of Employment (State) Award* 1976 AR (NSW) 275, at 282-283.

[67] Albeit, note paragraphs [56] to [57] of this decision.

[68] *Australian Coal & Shale Employees Federation & Ors v NSW Coal Association & Ors* 1989 AILR 170 (Volume 31, No.10, CCH Australia Limited), 25 May 1989, Coal Industry Tribunal, per DA Duncan, at p.174; *Re Hospital Employees Conditions of Employment (State) Award* 1976 AR (NSW) 275, at 282.

[69] Albeit, note paragraphs [56] to [57] of this decision.

[70] Ibid.

[71] [2015] FWCFB 3023.

[72] Ibid, at [12].

[73] *Re Hospital Employees Conditions of Employment (State) Award* 1976 AR 275 (especially at 281); *Media, Entertainment and Arts Alliance [MEAA] and Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989* Print M7325, 1 December 1995, Marsh SDP, Duncan DP, Wilks C.

[74] Ibid. Albeit, note paragraphs [56] to [57] of this decision.