DECISION

Fair Work Act 2009
s.185 - Application for approval of a single-enterprise agreement

Warp Pty Ltd
(AG2023/2072)

COMMISSIONER MATHESON SYDNEY, 12 JANUARY 2024

Application for approval of the WARP WA Enterprise Agreement 2023 – no genuine agreement – failure to take all reasonable steps to explain the terms of the agreement and their effects – undertaking does not cure genuine agreement concern – application dismissed.

[1] An application has been made for approval of a proposed enterprise agreement known as the *WARP WA Enterprise Agreement 2023* (Agreement). The application was made by Warp Pty Ltd (Applicant) pursuant to s.185 of the *Fair Work Act 2009* (Cth) (Act). The Agreement is a single enterprise agreement.

[2] Changes to the Act came into effect on 6 June 2023 in relation to genuine agreement. The Form F17A indicates that the notification time for the Agreement was 24 April 2023. In these circumstances and as a consequence of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Amending Act), clause 66 of Part 13 of Schedule 1 of the Act has the effect that despite the amendments made to the Act by Part 14 of Schedule 1 to the Amending Act, Part 2-4 of the Act continues to apply as if the amendments had not been made. The application has been assessed on this basis, taking into account the provisions of Part 2-4 of the Act in force in relation to genuine agreement immediately prior to 6 June 2023.

[3] The Form F17A filed with the application also indicates that the Agreement was made on 12 June 2023. As the Agreement was made on a date on or after 6 June 2023, recent changes to the Act made in relation to the better off overall test apply to the application.

[4] It is declared in the Form F17A filed with the application that at the time of the vote 62 employees were covered by the Agreement. The demographic data provided in the Form F17A indicates that 58 of these employees are casual employees.

[5] The Applicant's employees were previously covered by the *WARP Pty Ltd Employee Collective Agreement 2008* (Old Agreement) which ceased operation on 7 December 2023, as a result of the sunsetting provisions in clause 20A of Part 13 of Schedule 1 to the Amending Act that applied to agreement-based transitional instruments.

CFMEU intervention

[6] The Commission provided redacted documents in relation to the application to the Construction, Forestry, Maritime and Energy Union (CFMEU) upon its request. On 6 July 2023 the CFMEU wrote to the Commission requesting to be heard in relation to the Application.

[7] The matter was the subject of a case management conference on 13 July 2023 and directions were set down on 14 July 2023 directing that the CFMEU:

- file submissions dealing with the question of whether it is a bargaining representative for the Agreement;
- provide on a confidential basis to the Commission a list of members it says are covered by the Agreement;
- file submissions regarding whether the Commission should otherwise hear from the CFMEU to inform itself pursuant s.590 of the Act.

[8] The Applicant was also directed to file submissions dealing with the question of whether CFMEU is a bargaining representative, to provide on a confidential basis to the Commission a list of its employees covered by the Agreement and instruments of appointment in relation to bargaining representatives and make submissions regarding whether the Commission should otherwise hear from the CFMEU to inform itself pursuant to s.590 of the Act.

The CFMEU position

[9] On 19 July 2023, the CFMEU filed on a confidential basis with the Commission a list of its members that it says are covered by the Agreement together with submissions and a witness statement for Mr Josh Liley of the CFMEU. However, in its submissions, the CFMEU did not press that it was a bargaining representative and dealt with the question of whether the Commission should otherwise hear from the CFMEU under s.590 of the Act.

[10] In this regard the CFMEU submitted that the Commission should exercise its discretion to permit the CFMEU to participate in the proceedings by filing submissions and evidence and cross-examining the Applicant's witnesses for the following reasons.

[11] Firstly, it submitted that there are serious issues concerning whether:

i. the Applicant took all reasonable steps to:

   a. provide employees with copies of the materials incorporated in the Agreement, as required by s.180(2) of the Act (as in force at the relevant time); and

   b. ensure the terms of the agreement and their effect were explained to employees, as required by s.180(5) of the Act; and

ii. the Agreement passes the 'better off overall test' (BOOT) under s.193A of the Act, particularly in relation to the correct reference instrument for the BOOT.

[12] The CFMEU submitted that:

- the Commission would therefore be assisted in determining whether pre-approval requirements are met by having the CFMEU participate as a contradictor;

- the Commission should not exercise its discretion under s.590 disharmoniously with the provisions of the Act which it says grants the CFMEU standing to appeal any decision to approve the Agreement.

[13] Section 590(1) of the Act provides that the Commission "*may, except as provided by this Act, inform itself in relation to any matter in such a manner as it considers appropriate".*

[14] The CFMEU noted that in *CFMEU v Collinsville Coal Operations Pty Ltd*[1] the Full Bench said:

> *"…the Commission may choose in a particular matter to hear from an employee organisation or any other person about the approval of an agreement even though the organisation or person may not otherwise have a right to be heard. The Commission has a broad power to inform itself in relation to any matter in such manner as it considers appropriate, including by inviting oral or written submission from a person or organisation".*

[15] The CFMEU also made reference to a statement of Cambridge C in *Inco Ships Pty Ltd v AIMPE*[2]in which he said:

> *"Employee organizations with a legitimate interest in the industry and occupations covered by the Proposed Agreement may assist in the resolution of these issues of concern. In this way, a process involving open, diligent and comprehensive scrutiny should provide for the correct outcome, and also enhance the broader confidence in the Commission's enterprise Proposed Agreement approval role*".

[16] The CFMEU noted that in relying on the above observation of Cambridge C, Binet DP has found that "*a proper examination of these issues will assist the Commission in the discharge of its statutory function*".[3]

[17] The CFMEU also relied on the following statement of the Full Bench in *Australian Workers' Union v Job Connect Recruitment Pty Ltd*:[4]

> "*Section 590(1) of the FW Act confers on members of the Commission a procedural discretion of the broadest scope, and in numerous cases members have allowed employee organisations to make submissions in relation to applications for approval of enterprise agreements pursuant to s 590(1) in circumstances where they do not have a right to be heard. This is often for the reason that it is considered desirable to have a contradictor in relation to any particular difficult or contentious issues which may arise."*

[18] The CFMEU noted the statement of DP Binet in describing the assistance provided by a union acting in an application for the approval of a proposed enterprise agreement:[5]

> *"The MUA can provide a perspective independent of the author and proponent of the Proposed Agreement, who have a commercial interest in the Proposed Agreement being registered."*

[19] The CFMEU submitted that in the present matter these factors weigh heavily in favour of the Commission exercising its discretion to permit the CFMEU to participate in the proceedings.

[20] The CFMEU also submitted that the following factors weigh heavily in favour of the Commission exercising its discretion under s.590 of the Act to hear from the CFMEU:

- the Applicant and its employees covered by the proposed Agreement are in the construction industry and, specifically, in the industry of general building and construction within the meaning of clause 4.3(a) of the *Building and Construction General On-site Award 2020* (Building Award). Those employees include CFMEU members;
- the CFMEU and its predecessors have been, and continue to be, extensively involved in the building and construction industry in Australia;
- throughout that history the CFMEU has been closely involved in the determination, improvement, maintenance and interpretation of terms and conditions of employment in the building and construction industry across Australia;
- the CFMEU is covered by numerous enterprise agreements with building and construction companies, including traffic management companies like the Applicant;
- the CFMEU has knowledge and experience stemming from a history of coverage and membership in work covered by the proposed Agreement.

[21] As to the extent to which the CFMEU should be heard, the CFMEU submitted that the rigorous scrutiny required in the approval process would be enhanced by its full participation and relied on the following statement of Masson DP in *Quickway Constructions Pty Ltd*:[6]

> "*By permitting the CFMEU to make submissions, lead any evidence which it does have and to cross-examine witnesses, the Commission can properly inform itself in relation to the matters which have been raised and satisfy itself that the requirements for the approval of the Proposed Agreement have been fully met. If, as the Applicant asserts, the CFMEU's concerns are without merit then this will be established by the Applicant in the Commission's consideration of this application."*

The Applicant's position

[22] The Applicant opposed the CFMEU's involvement in the proceedings and on 25 July 2023 filed submissions about this. By way of summary the Applicant submitted:

- the CFMEU was not a bargaining representative for the Agreement and does not seek to be heard by way of right;
- the CFMEU was a stranger to the Agreement making process, has no knowledge of events relevant to the Agreement's approval, and is therefore unable to constructively contribute to the Agreement's approval process;

- the Agreement was made between the Applicant and its employees, the CFMEU did not participate in the bargaining process and did not appear to identify any employee member(s) who were involved in the making of the Agreement. The Applicant submitted this "is perhaps not surprising given the nature of the vast majority of the Applicants work (including that which will be covered by the Agreement) being outside the coverage of the CFMEU's rules";
- the CFMEU stated that the Applicant's employees "include CFMEU members" without any further proof of or basis for the assertion and based on the nature of the work performed by the Applicant, if the CFMEU does have members within the Applicant's workforce, it has been collecting membership dues from them without constitutional ability to enrol them as members;
- when considering whether the CFMEU and its members would be affected by a decision, the effect is limited to a direct effect[7] and it cannot be said in the current circumstances that either the CFMEU or its members will be directly affected;
- the discretion under s.590 of the Act is not without limit and should be exercised in a manner consistent with High Court and Full Bench authorities[8] and objects of Part 2-4 of the Act;
- the exercise of discretion under s.590 of the Act will necessarily involve an evaluative judgment as to what is required, in the specific case, to ensure procedural fairness is afforded to the parties;
- there are no unusual characteristics in this particular matter that justify departure from those principles and in *CFMEU v Collinsville Coal Operations Pty Ltd* the Full Bench noted that:[9]

> "*…an employee organisation has an ongoing relationship with its members who might become covered by an agreement and has a role under its rules in representing those members is not relevant in the context of a right to be heard in relation to the approval of an agreement*."

- a suggestion that the CFMEU has a right to appeal any approval decision because they will be a person aggrieved and that the Commission ought hear from them at the approval stage is misplaced and there is no guarantee that it will be a person aggrieved or have a right to appeal;
- in circumstances where there are no current projects over which the CFMEU would have constitutional coverage, and there are therefore no employees who the CFMEU could validly enrol as members, it is difficult to understand how it says it will be a person aggrieved by any decision to approve the Agreement;
- while the Applicant accepts that the absence of a contradictor may in certain cases warrant leave being granted, this is not such a case as the concerns raised by the CFMEU are matters that the Commission, assisted by the Member Support Research Team and by the submissions of the Applicant, is plainly able to adequately address;
- granting leave to a third party intervener would not be consistent with the objects of the Act.

Consideration

[23] While a number of considerations relevant to the determination of the application are dealt with in this decision, as will become apparent below, two key concerns in this matter relate to the question of whether the Agreement has been genuinely agreed to by the employees covered by it and what modern award/modern awards is/are the "relevant award/s" for the purposes of the better off overall test. These concerns have been identified by both the Commission and the CFMEU in the context of an Agreement which states:

> "6.7 Where the Employer engages or directs an Employee to perform work which would otherwise be covered by the *Building and Construction General On-site Award 2020*, the Employer will pay the Employee, for the performance of such work, the greater of the following amounts:
>
> (a) the rates of pay in clause 6.1 of this Agreement; or
>
> (b) an amount comprising the base rate of pay for the relevant classification in the Award above plus 5%, and any applicable allowances, overtime and penalties plus 5%, as provided for in the Award above".

[24] I am satisfied based on the information before the Commission that the CFMEU has members who are among those employees who cast a vote in relation to the Agreement. This is because among the list of members the CFMEU filed with the Commission are names that appear in an email provided by the Applicant to the Commission on 20 August 2023 of those employees who voted on the Agreement and attaching payslips in relation to those employees. However, a complication arises in this matter as the Applicant says the CFMEU does not have constitutional ability to enrol them as members. Whether this is the case or not may depend upon the work undertaken by the employees. If the work undertaken is such that it falls within the constitutional coverage of the CFMEU, it is likely that the CFMEU is indeed a default bargaining representative for the Agreement, however facts in relation to the question of the nature of the work undertaken by the Applicant are in dispute. The CFMEU does not seek to rely on its status as a bargaining representative in seeking to be heard by the Commission.

[25] Given the nature of the facts in dispute, the apparent relevance of the *Building and Construction General On-site Award 2020* (Building Award) to the questions that will need to be determined and the CFMEU's familiarity with the Building Award and its application, including in the context of work involving traffic controllers, I considered that I would be assisted by the CFMEU as a contradictor in these proceedings. In exercising discretion pursuant to s.590 of the Act, I considered it would be appropriate to inform myself via the CFMEU's involvement in the proceedings and in testing the assertions made by the Applicant regarding the relevance of the Building Award to the application it has made.

[26] As noted by Masson DP in *Quickway Constructions Pty Ltd*:[10]

> *"By permitting the CFMEU to make submissions, lead any evidence which it does have and to cross-examine witnesses, the Commission can properly inform itself in relation to the matters which have been raised and satisfy itself that the requirements for the approval of the Proposed Agreement have been fully met. If, as the Applicant asserts, the CFMEU's concerns are without merit then this will be established by the Applicant in the Commission's consideration of this application."*

[27] The matter was the subject of a hearing across two days with the parties making their closing submissions on 8 September 2023.

Section 185 - The application

Section 185(1) – standing to bring the application

[28] Section 185(1) of the Act provides that if an enterprise agreement is made, a bargaining representative for the agreement must apply to the Commission for approval of the agreement. Section 176(1)(a) provides that an employer that will be covered by the agreement is a bargaining representative for the agreement.

[29] The Form F16 and Form F17A filed with the Application state that the legal name of the Applicant is 'Warp Pty Ltd' and provide the ABN 48 073 690 552. Clause 2.1(a) of the Agreement states that it covers 'Warp Pty Ltd (ABN: 631 848 578)'. An ABN search indicates that the ABN in the agreement relates to a different entity being QTM Pty Ltd.

[30] The Applicant submitted that the incorrect ABN was included in error such that clause 2.1(a) should read:

> "This Agreement covers (a) Warp Pty Ltd (ABN 48 073 690 552)".

[31] The Applicant requested that the Commission make an amendment to the Agreement pursuant to s.218A of the Act.

[32] It is apparent that the ABN stated in the Agreement is an error in the drafting of the Agreement and that it is intended that the employer covered by the Agreement is the Applicant, Warp Pty Ltd. I am satisfied that the Applicant has standing to bring the application. Whether I make the amendment pursuant to s.218A of the Act will depend on the determination of the application.

Section 185(2) – Material to accompany the application and s.185(5) signing requirements

[33] Section 185(2)(a) of the Act provides that the application must be accompanied by a signed copy of the agreement. Section 185(5) provides that the *Fair Work Regulations 2009* (Regulations) may prescribe requirements relating to the signing of enterprise agreements.

[34] Regulation 2.06A of the Regulations prescribes the requirements for the signing of an enterprise agreement for the purposes of s.185(5) and provides that a copy of an enterprise agreement is a signed copy only if:

(a) it is signed by:

  (i) the employer covered by the agreement; and
  (ii) at least 1 representative of the employees covered by the agreement; and

(b) it includes:

(i) the full name and address of each person who signs the agreement; and
(ii) an explanation of the person's authority to sign the agreement.

[35] I am satisfied that the Agreement is signed in a manner that meets the above requirements.

[36] Section 185(2)(b) of the Act provides that the application must be accompanied by any declarations that are required by the procedural rules to accompany the application.

[37] Subrule 24(1) of the *Fair Work Commission Rules 2023* (Rules) provides that if an application is made under s.185 of the Act for approval of an enterprise agreement that is not a greenfields agreement, each employer that is covered by the agreement must lodge a declaration, in support of the application for approval, by the employer or by an authorised officer of the employer within 14 days after the agreement is made.

[38] Subrule 24(2) of the Rules requires that the declaration lodged under subrule 24(1) must be accompanied by a copy of the notice given by the employer under s.173 of the Act, i.e. the notice of employee representational rights (NERR).

[39] A Form F17A declaration (Form F17A) has been made by the Managing Director of the Applicant and filed with the application. It is declared in the Form F17A that the Agreement was made on 12 June 2023. The application was made on 23 June 2023 and the Form F17A was lodged on that date as was a copy of the NERR.

[40] I am satisfied that the requirements of s.185(2) of the Act have been met.

Section 185(3) – when the application must be made

[41] Section 185(3) of the Act provides that if an agreement is not a greenfields agreement, the application must be made:

(a) within 14 days after the agreement is made; or
(b) if in all the circumstances the Commission considers it fair to extend that period – within such further period as the Commission allows.

[42] As noted above, it is declared in the Form F17A that the Agreement was made on 12 June 2023. The application was made on 23 June 2023. I am satisfied that the requirements of s.185(3) have been met.

Section 186 - When the Commission must approve an enterprise agreement – general requirements

[43] Section 186(1) of the Act provides that if an application for the approval of an enterprise agreement is made under s.185, the Commission must approve the agreement if the requirements set out in ss.186 and 187 of the Act are met.

Section 186(2)(c) – National Employment Standards

[44] Section 186(2)(c) of the Act provides that the Commission must be satisfied that the terms of the Agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards (NES) and enterprise agreements).

[45] Section 55(1) provides that an enterprise agreement must not exclude the NES or any provision of the NES. Section 55(4) provides that an enterprise agreement may also include terms ancillary or incidental to the operation of an entitlement of an employee under the NES or that supplement the NES but only to the extent that the effect of those terms is not detrimental compared to the NES.

[46] Clause 5.17 of the Agreement provides for a right for a casual employee, other than an irregular casual employee, to request conversion to part-time or full-time employment where they have been 'engaged for a sequence of periods of employment under [the Agreement] during a period of twelve (12) months'. The Commission raised the concern that this was inconsistent with s.66B(1)(b) of the Act which provides that, subject to s.66C, an employer must make an offer to a casual employee under s.66B if the employee has been employed by the employer for a period of 12 months beginning the day the employment started and during the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

[47] Clause 23.7 of the Agreement provides that if an employee fails to provide the required notice, the employer may deduct from any monies owing an amount equivalent to the period of notice not provided. Clause 23.10 of the Agreement provides that on termination an employee must return all of the employer's property prior to receiving any final payments. The Commission raised a concern that these clauses do not limit the source of monies from which deductions may be made or withheld and may result in an employee not receiving their NES entitlements.

[48] Despite the above concerns, clause 4.3 of the Agreement provides that where there is an inconsistency between the Agreement and NES, and the NES provides a greater benefit, the NES provision will apply to the extent of any inconsistency. Noting clause 4.3 of the Agreement, I am satisfied that the more beneficial entitlements of the NES will prevail where there is an inconsistency between the Agreement and the NES.

Section 186(3) – Fairly chosen

[49] Section 186(3) requires that the Commission be satisfied that the group of employees covered by an enterprise agreement was fairly chosen in order to approve that agreement.

[50] Section 186(3A) has the effect that if the Agreement does not cover all employees of the Applicant, the Commission must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct. Whether or not the group of employees covered by the agreement is geographically, operationally or organisationally distinct is not decisive, rather it is a matter to be given due weight, having regard to all other relevant considerations.[11] The other relevant considerations will vary from case to case.[12]

[51] The Applicant has indicated in its Form F17A that the Agreement does not cover all of its employees but that the group of employees that will be covered is fairly chosen 'because the Agreement is expressed to cover all blue-collar Employees of the employer who are engaged in any work involving or in association with setting in place, managing and removing temporary traffic control schemes, including services contracts and any related or associated works when employed in the classifications contained in the Agreement anywhere within Australia'.

[52] Clause 2.1(b) of the Agreement provides that it covers:

> 'All Employees of the Employer that are engaged in any work involving or in association with setting in place, managing and removing temporary traffic control schemes, including services contracts and any related or associated works when employed in the classifications contained in the Agreement anywhere within Australia.'

[53] The classifications in clause 6 of the Agreement set out three classifications of traffic controller being a 'Level 1 Traffic Controller', a 'Level 2: Competent Traffic Controller' and a 'Level 3: Traffic Controller holding an Advanced Worksite Traffic Management (AWTM) credential or equivalent'.

[54] Having regard to the coverage of the Agreement and materials before the Commission I am satisfied that the group of employees covered is operationally and organisationally distinct and that this weighs in favour of a finding that the group of employees was fairly chosen. In the circumstances of this matter, I am not aware of any other factors that would weigh against a finding that the group of employees covered by the Agreement was not fairly chosen. I am satisfied that the group of employees covered by the Agreement was fairly chosen.

Sections 186(4) and 186(4A)– unlawful terms and designated outworker terms

[55] In order to approve the Agreement the Commission must be satisfied that it does not include any unlawful terms and that the Agreement does not include any designated outworker terms.

[56] Having considered the Agreement I am satisfied that it does not include any such terms.

Section 186(5) – nominal expiry date

[57] In order to approve the Agreement the Commission must be satisfied that it specifies a date as its nominal expiry date and that date will not be more than 4 years after the day on which the Commission approves the Agreement. Clause 3 of the Agreement meets the requirements of s.186(5) in this regard providing that the nominal expiry date of the Agreement will be four years after the date on which the Commission approves the Agreement.

Section 186(6) – dispute settlement term

[58] In order to approve the Agreement the Commission must be satisfied that it includes a term:

(a) that provides a procedure that requires or allows the Commission, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and
(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

[59] Clause 25 of the Agreement meets the requirements of s.186(6) in this regard.

Section 187 – additional requirements

[60] Section 187 of the Act sets out additional requirements that must be met before the Commission approves an enterprise agreement under s.186. I am not aware of any relevant considerations turning to s.187 that would prevent approval of the Agreement.

Matters in contention

[61] It is apparent that the key matters in contention in this matter are:

1. whether the Agreement has been genuinely agreed to by the employees covered by it (s.186(2)(a)); and

2. whether the Agreement passes the better off overall test (s.186(2)(d)).

[62] In the circumstances of this matter, both of these questions require engagement with the question of what modern award or modern awards are relevant to these considerations. I deal with these considerations below.

Sections 186(2)(a) and 188 – genuine agreement requirements

[63] Section 186(2)(a) requires the Commission to be satisfied that the Agreement has been genuinely agreed to by the employees covered by it.

[64] Section 188(1) provides that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the Commission is satisfied that:

(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);

(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

[65] Section 188(2) provides that an enterprise agreement has also been genuinely agreed to by the employees covered by it if the Commission is satisfied that:

(a) the agreement would have been genuinely agreed to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a NERR; and

(b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph 1(a) or (b) or the requirements of sections 173 and 174.

Section 181(2) – voting request

[66] Section 181(1) of the Act provides that an employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

[67] Section 181(2) provides that if an employer is required by subsection 173(1) (which deals with giving notice of employee representational rights) to take all reasonable steps to give notice in relation to the agreement, the request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) in relation to the agreement is given.

[68] It is declared in the Form F17A that the last notice of employee representational rights (NERR) was given on 24 April 2023. It is also declared in the Form F17A that the notification of vote was provided to employees on 2 June 2023 and voting commenced on 12 June 2023.

[69] I am satisfied that the requirements of s.181(2) have been met.

Section 182(1) – when an agreement is made

[70] The Agreement is a single enterprise agreement to which s.182(1) applies and the Applicant is the only employer that will be covered by the Agreement. Section 182(1) provides that if the employees of the employer that will be covered by the agreement have been asked to approve the agreement under subsection 181(1), the agreement is made when a majority of those employees who cast a valid vote approve the agreement. It is declared in the Form F17A that at the time of the vote 62 employees were covered by the Agreement, 23 of these employees cast a valid vote and 21 voted to approve the Agreement. While the CFMEU has raised concerns about the way in which the vote was conducted, this is more pertinent to the consideration of s.188(c) of the Act regarding genuine agreement. I note the Act does not mandate a particular voting method for the purposes of s.182(1). Mr Murray Axford, a person employed by the

Applicant as a casual Traffic Controller, gave evidence about the voting process and while he had said in his statement there were 14 yes votes and 1 no vote, he later clarified this upon watching a video recording of the vote that there were 20 yes votes. I am satisfied based on the materials before the Commission that a majority of the employees who cast a valid vote voted to approve the agreement and therefore the requirements of s.182(1) have been met.

Pre-approval steps – section 180(2) – employees must be given copy of the agreement etc

[71] Section 180(2) provides that the employer must take all reasonable steps to ensure that:

(a) during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be covered by the agreement are given a copy of the following materials:

(i) the written text of the agreement;
(ii) other material incorporated by reference in the agreement; or

(b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

[72] It is declared at question 8 of the Form F17A that the modern award that covers the employer and any employees covered by the Agreement is the *Miscellaneous Award 2020* (Miscellaneous Award).

[73] It is declared at question 22 of the Form F17A that on 2 June 2023, each employee who will be covered by the Agreement was sent an email with the following:

- the proposed Agreement;
- the Miscellaneous Award;
- an explanation sheet regarding the proposed Agreement.

[74] It is declared at question 26 of the Form F17A that the date that voting on the Agreement commenced was 12 June 2023.

[75] The Commission noted that clause 6.7 of the Agreement provides:

> "Where the Employer engages or directs an Employee to perform work which would otherwise be covered by the *Building and Construction General On-site Award 2020*, the Employer will pay the Employee, for the performance of such work, the greater of the following amounts:
>
> (a) the rates of pay in clause 6.1 of this Agreement; or
>
> (b) an amount comprising the base rate of pay for the relevant classification in the Award above plus 5%, and any applicable allowances, overtime, and penalties plus 5%, as provided for in the Award above."

[76] The Commission sought clarification as to whether employees were given a copy of the Building Award during the access period or had access to the Building Award throughout the access period.

[77] In submissions filed with the Commission on 21 August 2023, the Applicant concedes that it did not provide a copy of the Building Award to employees. It submits it did not do this as:

- there was no obligation for it to do so as the Building Award is not 'incorporated' into the terms of the Agreement;
- providing a copy of the Building Award to employees would not have provided any benefit or clarity to employees concerned and would have, in fact, been detrimental to the employee's understanding of the terms of their employment given the way in which the Agreement was intended to operate;
- as noted by the Full Bench, Modern Awards "are publicly available (on a number of websites). This is sufficient for the materials to be readily available to employees".[13]

[78] The Applicant submitted that the Building Award was only relevant in respect of the "future" application of the Agreement that did not at the time the Agreement was negotiated, voted, or made, exist, but a future that was contemplated by both the Applicant and employees. The Applicant submitted that the clause, at the time the Agreement was voted on, had no material effect on the employees' terms and conditions of employment.

[79] As to the question of whether the Building Award is incorporated into the terms of the Agreement, the relevant test is whether the term in the Agreement establishes an entitlement or obligation which operates by reference to documents external to the Agreement.[14]

[80] Regardless as to whether employees were performing work covered by the Building Award at the time the Agreement was negotiated, voted, or made, it is apparent that if the Agreement is approved, it may, in certain circumstances, establish an entitlement that operates by reference to the Building Award. That the entitlement in clause 6.7 is contingent upon the nature of the work carried out at a point in time is not relevant. There are many clauses in agreements that create entitlements that are contingent in nature such that they may not have crystalised. The entitlement in clause 6.7 may only be understood by reference to the Building Award itself. In these circumstances, the terms of the Building Award relevant to clause 6.7 are incorporated by reference in the Agreement.

[81] The next question is whether "all reasonable steps to ensure" compliance with the requirements in s.180(2) have been taken. As noted by the Applicant, the Full Bench in *CFMEU v AKN Pty Ltd*[15] considered an agreement in which there had been partial incorporation of modern awards, found that these were publicly available on a range of websites and that this is sufficient for the material to be readily available to employees.

[82] I am satisfied that the written text of the Agreement was given to employees during the access period and that, given the Building Award is publicly available on a range of websites and readily available to employees, all reasonable steps have been taken in compliance with s.180(2) of the Act and that s.180(2) has in fact been complied with.

Pre-approval steps – section 180(3) – Notification of vote

[83] Section 180(3) of the Act provides that the employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

(a) the time and place at which the vote will occur;
(b) the voting method that will be used.

[84] It is declared in response to question 21 of the Form F17A that on 2 June 2023 each employee who would be covered by the Agreement was emailed a copy of a notice to vote which outlined:

- the voting method;
- the date on which the vote was to occur;
- the place at which the vote was to occur; and
- the time at which the vote was to occur

[85] A copy of the notice was provided with the application, although it is dated 1 June 2023.

[86] It is declared at question 26 of the Form F17A that the date that voting on the Agreement commenced was 12 June 2023.

[87] Based on the materials before the Commission I am satisfied that the requirements in s.180(3) of the Act have been met.

Pre-approval steps – section 180(5) – reasonable steps to explain terms and effect

[88] Section 180(5) of the Act provides that the employer must take all reasonable steps to ensure that:

(a) the terms of the agreement, and the effect of those terms, are explained to the employees employed at the time who will be covered by the agreement; and
(b) the explanation is provided in an appropriate manner taking into account the particular needs and circumstances of those employees.

[89] Section 180(6) of the Act goes on to say that without limiting s.180(5), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;
(b) young employees;
(c) employees who did not have a bargaining representative for the agreement.

[90] As noted by the Full Court of the Federal Court in *One Key Workforce (No 2)*[16] the purpose of the obligation imposed on employers by s.180(5) is to enable the relevant employees to cast an informed vote: to know what it is they are being asked to agree to and to enable them

to understand how wages and working conditions might be affected by voting in favour of the agreement.

What does the obligation in s.180(5) require of an employer?

[91] In *Construction, Forestry, Maritime, Mining and Energy Union v Ditchfield Mining Services*[17] the Full Bench of the Commission summarised the propositions arising from *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd (One Key Workforce (No 1)*[18] in which Flick J considered the scope and substance of an employer's obligation under s.180(5) of the Act, as follows:

> "**[65]** First, whether an employer complied with the obligation in s.180(5) depends on the circumstances of the case.
>
> **[66]** Secondly, the focus of the enquiry whether an employer has complied with s.180(5) is first on the steps taken to comply, and then to consider whether;
>
> - the steps taken were reasonable in the circumstances; and
> - these were all the reasonable steps that should have been taken in the circumstances.
>
> **[67]** Thirdly, the object of the reasonable steps that are to be taken is to ensure that the terms of the agreement, and their effect, are explained to employees in a manner that considers their particular circumstances and needs. This requires attention to the content of the explanation given.
>
> **[68]** Fourthly, an employer does not fall short of complying with the obligation in s.180(5) of the Act merely because an employee does not understand the explanation provided."[19]

[92] The Full Bench went on to say that the content of the explanation given is an important consideration in assessing whether all reasonable steps were taken for the purposes of s.180(5) as made clear by the Full Court of the Federal Court in *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (*One Key Workforce (No 2)*).[20] In this regard, the Full Court found that:

- in order to reach the requisite state of satisfaction that s.180(5) had been complied with, the Commission was required to consider the content of the explanation and the terms in which it was conveyed, having regard to all the circumstances and needs of the employees and the nature of the changes made by the Agreement;
- a "consideration of the subject-matter, scope and purpose of the relevant provisions of the Fair Work Act indicates that the content of the explanation and the terms in which it was conveyed were relevant considerations to which the Commission was bound to have regard";
- the Commission was required to be satisfied that the employer had taken "all reasonable steps to ensure" that both the terms and the effect of the terms had been explained to the relevant employees as an element in the inquiry as to whether "genuine" agreement had been obtained from them and that the purpose of the

obligation imposed on employers by s.180(5) is to enable the relevant employees to cast an informed vote: to know what it is they are being asked to agree to and to enable them to understand how wages and working conditions might be affected by voting in favour of the agreement;

- in order for the employer to comply with the obligation it must take into account the particular circumstances and needs of those employees, including their cultural and linguistic backgrounds, their youth, and the absence of a bargaining representative.[21]

What steps were taken by the employer?

The Form F17A

[93] Question 23 of the Form F17A asks:

> "What steps were taken by the employer to explain the terms of the agreement, what was explained and how was the effect of those terms explained to the relevant employees?"

[94] In response to this question, it is declared by Mr Stephen O'Dwyer in the Form F17A that between 2 June 2023 and 12 June 2023:

> "Employees were all provided with an Agreement Explanation Sheet and taken through the Agreement with reference to the Explanation Sheet, and the Award. Meeting with employees on the 6/06/23 and 7/06/23.
>
> Throughout this process, Employees were provided with my telephone number and email address for the purpose of asking questions about the Proposed Agreement, and the effect that the terms would have on their employment."

[95] In relation to the explanation given it is declared in the Form F17A:

> "During the discussions on each site with the Employees the Employees reviewed the Proposed Agreement and asked questions regarding the Proposed Agreement.
>
> Answers were provided to the Employees' questions with reference to the Proposed Agreement, Explanation Sheet, me, Britt O'Dwyer and Mark Hudston understanding of the operations of the Company.
>
> This enabled each Employee to understand how the Agreement would impact their employment and provided them with an opportunity to better understand the effect that the Agreement clauses would have on their employment with reference to the differences between the Proposed Agreement and the Award.
>
> I was not contacted by any of the Employees beyond the discussions and information sessions.
>
> I understood this to mean that all employees understood the terms and the effect that those terms would have on their employment.

Britt O'Dwyer and Mark Hudston were contacted via email and asked questions in regard to Ordinary hours of work, Shift Penalties, Allowances, and overtime, the employees' questions were answered with reference to the Proposed Agreement, Award and Explanation Sheet."

[96] Question 24 of the Form F17A asks:

"When the employer explained the terms of the agreement, and the effect of those terms, to the relevant employees, did the employer compare the agreement to any of the following instruments?"

[97] The Form F17A then enables the person making the declaration to identify any instruments that the Agreement was compared to. The Miscellaneous Award has been identified in the Form F17A.

[98] Question 25 of the Form F17A asks:

"When the employer explained the terms of the agreement, and the effect of those terms, to the relevant employees, what was done to take into account the particular circumstances and needs of the relevant employees?"

[99] In response it is declared:

"All employees had extensive experience in the traffic control industry, ranging from 1 year (as an apprentice) to 20 years, including where some employees have been covered by other companies' enterprise agreements.

This enabled me to explain the impact that the Proposed Agreement would have on the Employees employment and highlight the differences between the Proposed Agreement and Award, which the Employees were able to understand at an operational and practical level.

I did not identify any Employee who has any personal attributes or needs which would indicate they require additional assistance or support to understand the terms of the Proposed Agreement or the effect those terms would have on their employment with the employer.

All Employees have English as their first language and as such the employees would understand the written text of the Agreement.

However, in order to ensure employees understood the terms of the Agreement and the effect those term would have on their employment each Employee was provided with a copy of an Agreement, an Explanation Sheet which was given by email to the employees who would be covered by the Proposed Agreement at the commencement of the access period.

Employees who were eligible to vote voted and the majority of Employees voted in favour of approving the Proposed Agreement."

The "Explanation Sheet" comparing the Agreement and Miscellaneous Award

[100] A copy of the document referred to in the above response as the "Explanation Sheet" was lodged with the application (Explanation Sheet). The Explanation Sheet explains that if the Agreement is voted-up and approved by the Commission "it will apply to the exclusion of the Miscellaneous Award 2020" and says, with reference to the Miscellaneous Award:

> "The Award contains a number of terms and conditions that are not provided for in the Agreement (see below for a snapshot). **It is important that you carefully consider the terms of the Award against the Agreement**."

[101] The Explanation Sheet then includes a table with three columns. The first column of the table identifies the relevant Agreement clause, the second column appears intended to provide explanation of the clause and the third column deals with how the Agreement differs from the Miscellaneous Award.

[102] A complication arises in this matter as there is a question around whether other awards are relevant awards and whether the Miscellaneous Award is a relevant award at all.

The explanation of clause 6.7 of the Agreement

[103] Of particular interest is the inclusion of clause 6.7 of the Agreement which provides:

> "6.7 Where the Employer engages or directs an Employee to perform work which would otherwise be covered by the *Building and Construction General On-site Award 2020*, the Employer will pay the Employee, for the performance of such work, the greater of the following amounts:
>
> (a) the rates of pay in clause 6.1 of this Agreement; or
>
> (b) an amount comprising the base rate of pay for the relevant classification in the Award above plus 5%, and any applicable allowances, overtime and penalties plus 5%, as provided for in the Award above".

[104] In relation to clause 6.7 of the Agreement, the Explanation Sheet states:

> "This deals with the circumstance when work that is covered by the Agreement (but not covered by the Award), and how this work will be paid."

[105] Mr Hudston's evidence as set out in his witness statement was as follows:

- Mr Hudston was an executive director of a human resources and industrial relations consulting group, assisted the Applicant with industrial relations matters and has an understanding of its operations.[22]

- During the access period he conducted information sessions to explain the terms of the Agreement to employees.[23]
- When he was explaining clause 6.7 to employees he explained that it was included in the Agreement following an employee claim and that it was unlikely that the Applicant would be covered by the Building Award but if it was, the employees would be paid rates in accordance with the Building Award plus five percent.[24]
- During the access period he recalls being asked by an employee how clause 6.7 would operate and explained that, given the Building Award was more generous than the Miscellaneous Award, the effect of the term was that if the Applicant was, in the future, performing work that would result in the Applicant being covered by the Building Award (notwithstanding the existence of the Agreement) then those employees performing such work would be paid Building Award rates plus 5% which included different penalties and loadings than those otherwise throughout the Agreement.[25]

[106] Ms O'Dwyer's evidence was that Mr Hudston was primarily responsible for running bargaining meetings and Mr Hudston held the information sessions during the access period explaining the terms of the Agreement to employees.[26] Ms O'Dwyer referred to a query from an employee about how their terms and conditions would be applied under the Agreement when they worked on construction sites in the future[27] and said she deferred this query to Mr Hudston as she is "not familiar with the coverage of the Building Award".[28] Ms O'Dwyer's evidence was that Mr Hudston explained to employees that the Applicant is not covered by the Building Award and thus the employees are not covered by the Building Award based on current works.[29]

[107] Ms O'Dwyer's evidence was that she was present for the explanation that Mr Hudston gave in relation to clause 6.7 of the Agreement and recalls that he "explained to the employees that this was included as a result of an employee claim, and that the Company was not covered by the Building Award, so it was unlikely that it would impact the employees, but was included based on the claim, and the possibility that the Company might, in future, become covered by the Building Award."

[108] Mr Daniel Gee, an employee covered by the Agreement, also gave evidence during the proceedings in relation to the explanation of clause 6.7 of the Agreement. Mr Gee's evidence was that:

- he made the claim that "there be some reference to Building Award rates in the Agreement" as the CFMEU had told him in early 2021 that the traffic management industry was covered by the Building Award and "should be the basis for the Agreement";[30]
- during negotiations Mr Hudston and Ms O'Dwyer explained that the Applicant was not covered by the Building Award and that the Applicant and its employees were covered by the Miscellaneous Award.[31]

[109] It seems likely based on the evidence before the Commission that in addition to the explanation about clause 6.7 as set out in the Explanation Sheet, Mr Hudston explained to employees in attendance during an in-person meeting that:

- clause 6.7 of the Agreement was included as a result of an employee claim;

- either the Applicant was not covered by the Building Award or was unlikely to be covered by the Building Award;
- however if the Applicant was covered by the Building Award or performed future work that would result in it being covered by the Building Award, employees performing such work that resulted in such coverage would be paid Building Award rates plus 5% which included different penalties and loadings than those in the Agreement.

[110] In these proceedings the CFMEU has sought to establish the Building Award is not an 'additional award' with marginal relevance to the Applicant's business but has primary application and together with the *Security Services Industry Award 2020* (Security Services Award) "covers the field".[32] If the CFMEU is right about this, it would follow that the Miscellaneous Award would have no relevance and in these circumstances the steps taken by the Applicant as described above could not be 'reasonable steps' because the award it has identified as a comparator would be wrong. However, even if the Miscellaneous Award was an appropriate comparator, a question arises as to whether the steps taken by the Applicant are the only steps that needed to have been taken.

[111] This requires consideration as to what the relevant awards are in the context of the employees who will be covered by the Agreement and explanations given.

The Applicant's work activities

[112] Ms O'Dwyer's evidence was that:

- the Applicant provides traffic control, traffic management planning and design and event management[33] services to clients in three primary industries being utilities, local councils and events;[34]
- the Applicant's employees primarily complete work in the utilities sector, for example where a utilities provider needed to conduct maintenance on its network and needed the Applicant to attend the site and execute a traffic control plan to ensure road users and the client's employees are safe.[35] Ms O'Dwyer's evidence was that the work the Applicant performs for clients in the utilities and local government sectors makes up approximately 73% of the Applicant's operations;[36]
- a typical example of the Applicant's services involves circumstances where Western Power need to conduct maintenance on their network in which case the Applicant will be scheduled or called out in emergencies to attend the site and execute a traffic control plan to ensure road users and Western Power employees are safe;[37]
- this model is replicable when assisting local councils with road maintenance and gardening activities (i.e. pruning, mowing etc);[38]
- to a lesser extent, the Applicant is involved in event management and will provide traffic control services at Optus Stadium during sporting matches and this work typically involves completing road closures and managing traffic flow in a safe manner.[39]

[113] Ms O'Dwyer said that the Applicant's work was not performed on a building or construction site and expressed an understanding that employees do not currently perform any work in the 'civil construction' stream as defined in the Building Award.

[114] Mr Axford gave evidence about the work he carried out. In relation to work for local government, Mr Axford's evidence was that he had undertaken traffic control work for the Applicant in relation to a number of road making projects for the City of Belmont between 10 and 23 March 2023, 16 June 2023 and on certain dates in February 2023.[40] Mr Axford's evidence was that the road works involved digging up the hard surface and laying asphalt using a profiling machine.[41]Mr Axford's evidence was that his role in relation to this was pedestrian management and keeping people from walking into the excavated area and walking or driving on the hot asphalt.[42]Mr Axford said he was stationed around the soft edges and loose surfaces within the exclusion zones, that he needed a white card to do this work and was required to wear high visibility clothing, safety glasses, steel cap boots and to carry an Ultra High Frequency (UHF) radio.[43]

[115] Mr Axford also gave evidence that he did traffic control work in relation to a road making project on the Brand Highway on various dates in February 2023 and March 2023.[44] Mr Axford's evidence was that the project involved using a stabiliser to dig up and mix limestone into a slurry with asphalt machines, water trucks and dump trucks "buzzing in and out".[45] Mr Axford's evidence was that he was stationed on the roadway where the machines were working, having to move the traffic cones closer to traffic or back in towards the worksite, that he needed a white card to do this work and that he was required to wear high visibility clothing, safety glasses, steel cap boots and to carry a UHF radio.[46]

[116] As noted above, Ms O'Dwyer's evidence was that a significant portion of the Applicant's work is undertaken in respect of Western Power operations.[47] Mr Axford's evidence was that he frequently undertook traffic control work for this client with most of the jobs he was engaged on for Western Power being streetlight pole replacements.[48] Mr Axford's evidence in relation to this work is that usually a pole has been hit by a car and Western Power sends crew in to remove the broken stump and lift an 11 metre pole back into place via crane.[49]Mr Axford's evidence was that if the pole being replaced was in the median strip, his work would involve blocking a lane on either side and working in the closed lanes.[50]

[117] Mr Axford also described other Western Power projects including repair of faults.[51] Mr Axford described the work that Western Power was undertaking on a shift he worked in relation to this which involved digging up underground cables well off the road and use of an excavator.[52] Mr Axford said his work involved guarding an open excavation to stop members of the public falling into it.[53] Mr Axford also indicated he had worked on other Western Power projects involving replacement of poles carrying low voltage cables and replacement of high voltage transmission lines that may involve dropping the cable.[54] Mr Axford's evidence was that for some of this work traffic controllers are well removed from where the work is taking place however when the work involves pole replacement the traffic controllers are "right up amongst it" and are required to stop traffic from getting under the pole as it is being lifted so are close to the exclusion area of the crane.[55] Mr Axford's evidence was that he needed a white card for this work as the work involved entering exclusion zones, that he was required to wear high visibility clothing, safety glasses, steel cap boots and to carry a UHF radio.[56]

[118] I note that the Applicant's employees are primarily engaged on a casual basis and Mr Axford is only one of these employees such that he may not be familiar with the full scale of the operations of the Applicant or the work that other employees are engaged on. Notwithstanding this, I accept Ms O'Dwyer's evidence that the current state is that the Applicant's employees primarily complete work in the utilities sector, providing traffic management support to clients including but not limited to Western Power[57] and Mr Axford's experience working for the Applicant does not contradict this.

[119] Mr Josh Liley of the CFMEU also filed two witness statements in the proceedings. In his statement dated 19 July 2023, Mr Liley points to pages within the Applicant's website that describe its services and I have accessed those pages and make the following observations:

- The text of the webpage at https://warpgroup.com.au/our-services/traffic-management states, among other things that 'WARP is a trusted and fully accredited provider of traffic management solutions across Australia. We provide a full range of traffic management services for projects on all roads and freeways, whether it is for construction, maintenance, emergencies or major events…'.
- The text of the webpage at https://warpgroup.com.au/our-services/traffic-management-perth/ states, among other things that 'WARP is a RMS certified company and is regularly involved in traffic management around Perth, ranging from small construction traffic management to council road requirements and some of the largest construction and civil projects within Western Australia'.
- The text of the webpage at https://warpgroup.com.au/our -servics/traffic-control-brisbane/ states, among other things that 'WARP is a RMS certified company and is regularly involved in traffic management around Perth, ranging from small construction traffic management to council road requirements and some of the largest construction and civil projects within Queensland'.
- The text of the webpage https://warpgroup.com.au/a-new-lease-on-life-working-with-warp-group states, among other things that:
    - 'At WARP Group, we've been busy working on the transformation of the iconic Palace Hotel alongside a team of industry experts. Our traffic control and management expertise has been invaluable in the smooth running of the project, transforming the site into the all new Meat & Wine Co. restaurant. You may have spotted us working throughout the night to facilitate construction works and can still catch us maintaining traffic safety along William Street and St Georges Terrace.'
    - 'At WARP Group, we're proud to contribute to the growth and expansion of Perth's metropolitan area. From small short-term projects to long-term developments, we provide leading traffic control in Perth.'

[120] I note that the webpage https://warpgroup.com.au/our-services appears to categorise the services under the headings of 'Planning', 'Traffic Management', 'Emergency Response' and 'Special Events'.

[121] Mr Liley also gave evidence that on 19 July 2023 he accessed the Applicant's Instagram page and retrieved a post dated 21 July 2023 that:

- refers to a Warp employee receiving an award from Broad Construction; and

- includes what appears to be a reproduction of the safety award, which bears the heading "Bethseda Clinic Cockburn".

[122] Mr Liley attached a copy of the Instagram post which states "Our very own Jess receiving a Broad Construction Safety Award. We are very proud Jess – great work!".

[123] Mr Liley said that on 19 July 2023 he accessed the page for the "Bestheda Clinic Cockburn" project on the Broad Construction website at www.broad.com.au/en/our-projects/current/bethseda-clinic and he attached a copy of this page to his statement. This page indicates that the contract type for the project is "design and construct" and that the project involves a "new build' and states that the "Bethseda Clinic is a comprehensive Mental Health Service currently under construction in Cockburn Central West…"

Coverage of the Agreement

[124] The coverage provision in clause 2.1 of the Agreement is broad in its expression, seeking to cover:

> "All employees of the Employer that are engaged in any work involving or in association with setting in place, managing and removing temporary traffic control schemes, including services contracts and any related or associated works when employed in the classifications contained in the Agreement anywhere within Australia".

[125] The classifications in clause 6.1 of the Agreement include:

- "Level 3: Traffic Controller holding an Advanced Worksite Traffic Management (AWTM) credential or equivalent;"
- "Level 2: Competent Traffic Controller";
- "Level 1: Traffic Controller."

Coverage of the Miscellaneous Award 2020

[126] The coverage provisions of the Miscellaneous Award reflect earlier decisions of the Full Bench of the Commission[58] in which detailed consideration was given to which employees are and are not covered by that award in the context of the broader framework of modern awards. In its decision of 12 February 2020[59] the Full Bench gave consideration to the coverage of the then *Miscellaneous Award 2010*, including certain exclusions from coverage set out in clause 4.3 of that award which stated:

> "4.3 The award does not cover employees:
>
> (a) in an industry covered by a modern award who are not within a classification in that modern award; or
> (b) in a class exempted by a modern award from its operation,
>
> or employers in relation those employees."

[127] In deciding to remove the above clause from the coverage provisions of the *Miscellaneous Award 2010* the Full Bench said:

> "[44] … It seems to us that the current and practical effect of clause 4.3 is to exclude from the coverage of the *Miscellaneous Award* employees who are permitted to be covered by a modern award, but who work in an industry covered by a modern award which either expressly excludes them from its coverage or does not contain a classification applicable to them. However the rationale for the exclusion of such employees from the coverage of the *Miscellaneous Award*, which as earlier explained only covers employees performing lower-skilled, semi-skilled or trades-qualified work, is not clear. The Ministerial Request which directed the making of the award did not require or suggest that any such provision be made. The AIRC under that request was required to make a modern award "…to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards…". As we have earlier explained, the coverage of the award as disclosed by clause 4.1 is in respect of employees performing work of a similar nature to that which has historically been regulated by awards. The only exclusion referred to in the request was in respect of managerial employees, and that was on the basis that they had not traditionally been covered by awards (and would thus be excluded from coverage by s 143(7)(a) when it came into effect). Because the effect of clause 4.3 is to exclude from the award's coverage employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards, we do not consider that was ever consistent with the Ministerial Request.
>
> [45] The position may be illustrated with respect to two categories of employees referred to in the UWU's submissions, namely cleaners and security guards. Such employees are not excluded from award coverage by s 143(7), since they have traditionally been the subject of award coverage; for example, there were common rule awards covering cleaners and caretakers in at least New South Wales (Miscellaneous Workers' General Services (State) Award), Western Australia (Cleaners and Caretakers Award, 1969) and South Australia (Caretakers and Cleaners Award). However there is no occupational modern award which covers all cleaners or security guards. The Cleaning Services Award 2010 and the Security Services Industry Award 2010 cover respectively cleaners employed by contract cleaning businesses and security guards employed by contract security businesses only. Some industry awards have classifications for cleaners and/or security guards directly employed by employers in the relevant industry: the Hospitality Industry (General) Award 2010 is an example of an award which contains both. However other industry awards do not contain these classifications. As an example, a building/construction business may directly employ a security guard to watch over a building/construction site in non-working hours, but the Building and Construction General On-site Award 2010 contains no classification for and therefore does not cover such an employee. This employee would not by virtue of clause 4.3(a) be covered by the Miscellaneous Award and would be award-free, notwithstanding that the employee is not excluded from modern award coverage by s 143(7).
>
> [46] We can identify no intelligible industrial rationale for this outcome. With respect to cleaners and security guards, who generally perform lower-skilled duties for low or modest pay, we see no reason why the identity of their employer should make a

> difference as to whether such employees have the benefit of award entitlements or not. Being award-free means, among other things, that such employees have a lesser entitlement to minimum wages (being only entitled to the National Minimum Wage), and have no entitlement to penalty rates for working unsociable hours or for overtime, in circumstances where the work performed is the same as that of award-covered employees."

[128] In deciding to remove clause 4.3 of the then *Miscellaneous Award 2010* and in engaging with the relevant considerations of the modern awards objective in s.134(1) of the Act the Full Bench observed that the award "did not provide a comprehensive safety net for any particular industry or occupation, but rather provides only for basic "catch-all" conditions, including a simplified and generic classification structure and a "fairly rudimentary" scheme of overtime rates and night-time and weekend penalty rates".[60]

[129] Following the variation made by the Full Bench the coverage provisions of the Miscellaneous Award now relevantly provides that (subject to the exclusions in clauses 4.2, 4.3, 4.4 and 4.5) it covers employers throughout Australia and their employees in the classifications listed in the award who are not covered by another modern award. The consequence of this is that the traffic controllers employed by the Applicant and who would be covered by the Agreement will be covered by the Miscellaneous Award if they are not covered by another modern award. The Miscellaneous Award, being a "rudimentary", "catch-all" safety net, is not the right starting point for consideration of award coverage but is called into relevance when employees performing lower-skilled, semi-skilled or trades-qualified roles are not captured by another award. In determining whether the Miscellaneous Award has coverage it is therefore necessary to first engage with the broader modern awards framework.

[130] In this regard, I note there is no modern industry or occupational award which exhaustively covers all traffic controllers. However, some industry awards have classifications for traffic controllers directly employed by employers in the relevant industry and these include the Security Services Award and the Building Award. I deal with the coverage provisions of each below as they relate to traffic controllers.

Coverage of the Security Services Industry Award 2020

[131] Clause 4.1 of the Security Services Award provides that it covers, to the exclusion of any other modern award:

(a) employers in the security services industry throughout Australia; and
(b) employees (with a classification defined in Schedule A – Classification Definitions) of employers mentioned in clause 4.1(a).

[132] Clause 4.2 provides that for the purposes of clause 4.1 'security services industry' includes:

(a) patrolling, protecting, screening, watching or guarding any people or property (including cash or other valuables):

(i) by physical means (which may involve the use of patrol dogs or the possession or use of a firearm); or
(ii) by electronic means; and

(b) crowd control, event control or venue control, whether by physical or electronic means; and
(c) the provision of bodyguard or close personal protection services; and
(d) the operation of a security control room or monitoring centre; and
(e) loss prevention; and
(f) traffic control that is incidental to, or associated with, the activities referred to in clauses 4.2(a), 4.2(b) or 4.2(c) (emphasis added).

[133] Clause 4.3 provides that an employer is not covered by the Security Services Award merely because, as an incidental part of a business covered by another modern award, the employer has employees who perform functions mentioned in clause 4.2.

[134] Clause 4.4(a) also provides that the award covers on-hire employees working in the security services industry within a classification defined in the award and the on-hire employers of those employees.

[135] Clause 4.8 clarifies that if an employer is covered by more than one award, an employee is covered by the award containing the classification that is most appropriate to the work performed by the employee and the industry in which they work.

Coverage of the Building and Construction General On-site Award 2020

[136] Clause 4.1 of the Building Award provides that it covers employers throughout Australia in the 'on-site building, engineering and civil construction industry' and their employees in the classifications of the Building Award to the exclusion of any other modern award.

[137] Clause 4.2 provides that for the purpose of clause 4.1, 'on-site building, engineering and civil construction industry means the industry of general building and construction, civil construction and metal and engineering construction, in all cases undertaken on-site'.

[138] Clause 4.3 provides that for the purposes of clause 4.2:

(a) '**general building and construction'** means:

(i) the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent and maintenance undertaken by employees of employers covered by clause 4.1 of such buildings, structures or works;

(ii) site clearance, earth-moving, excavation, site restoration, landscaping and the provision of car parks and other access works associated with the activities within clause 4.3(a)(i) ; and

(iii)the installation in any building, structure or works of fittings and services;

(b) '**civil construction'** means:

(i) the construction, repair, maintenance or demolition of:

- civil and/or mechanical engineering projects;
- power transmission, light, television, radio, communication, radar, navigation, observation towers or structures;
- power houses, chemical plants, hydrocarbons and/or oil treatment plants or refineries;
- silos; and/or
- sports and/or entertainment complexes;

(ii) road making and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt;

(iii) prefabrication and installation of geomembranes, geotextiles and appurtenances;

(iv) dredging or sluicing work for or at premises provided for persons mentioned in or in connection with work under clause 4.3(b)(i);

(v) batch plants and precast yards at a construction site in or in connection with work under clause 4.3(b)(i);

(vi)traffic management in or in connection with work under clause 4.3(b)(i) ;

(vii) construction and/or establishment of landscape gardens in or in connection with work under clause 4.3(b)(i) , provided that this award does not apply to the:

- maintenance or horticultural establishment work following practical completion of work as specified under the terms of the construction contract or project; and/or
- laying-out, construction, cultivation or keeping in order of gardens in connection with private houses;

(viii) the industry or calling of either or both catering and cleaning for or at premises provided for persons mentioned in clause 4.3(b)(i) ;

(ix)car parks excepting car park buildings and car parks within the alignment of a building; and

(x) railways, tramways, roads, freeways, causeways, aerodromes, drains, dams, weirs, bridges, overpasses, underpasses, channels, waterworks, pipe tracks,

tunnels, water and sewerage works, conduits, and all concrete work and preparation incidental thereto;

(c) '**metal and engineering construction'** means:

(i) metal trades work performed in the work of construction, fabrication, erection and/or installation work or work incidental thereto when it is carried out at a construction site which is specifically established for the purpose of constructing, fabricating, erecting and/or installing the following:

- power stations, oil refineries, terminals and depots; chemical, petro-chemical and hydrocarbon plants; and associated plant, plant facilities and equipment;
- major industrial and commercial undertakings and associated plant, plant facilities and equipment including undertakings for the processing and/or smelting of ferrous and non-ferrous metals, the processing of forest products and associated by-products, acid and fertiliser plants, cement and lime works, and other major industrial undertakings of a like nature;
- plant, plant facilities and equipment in connection with the extraction, refining and/or treatment of minerals, chemicals and the like;
- transmission and similar towers, transmission lines and associated plant, plant facilities and equipment;
- lifts and escalators as prescribed in clause 42 — Lift industry ;
- facilities and equipment in other engineering projects; and
- maintenance and/or repair and/or servicing work carried out on-site by the employees of contractors or subcontractors in connection with contracts for on-site construction work referred to in clause 4.3(c)(i) . This does not include any work which is incidental to or of a minor nature in relation to the work normally performed by an employee of an employer not engaged substantially in metal and engineering construction.

[139] Clause 4.4 sets out express exclusions in relation to employers covered by certain awards.

[140] Clause 4.5 provides that the Building Award covers any employer which supplies labour on an on-hire basis in the on-site building, engineering and civil construction industry in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry.

[141] Clause 4.8 clarifies that if an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs their work.

Were the steps taken reasonable and, if so, were these <u>all</u> the reasonable steps that needed to be taken to comply with s.180(5)?

[142] The Full Bench said in relation to s.180(5) of the Act that how many steps need to be taken and the content of those steps will depend on the circumstances and that steps that may

in a given case comprise "all reasonable steps" are to be assessed on the circumstances of the particular case.[61] The Full Bench observed that compliance with s.180(5) will not always require an employer to identify detriments in an agreement vis-à-vis the reference instrument, particularly in circumstances where an existing enterprise agreement applies to employees and that the question of compliance with s.180(5) is to be judged against the circumstances that pertain to the time at which compliance was required.[62]

[143] In the circumstances of this matter, employees were covered by the Old Agreement that pre-dates the operation of the Act. The parties have not engaged in bargaining for many years, with the Old Agreement made in 2008 and the explanation provided by the Applicant was the key source of information for employees in relation to the Agreement, its terms and their effect. The Agreement's coverage provisions are broad and a real and complex question arises as to which modern award would otherwise apply to the employees to be covered by the Agreement if the Agreement did not apply to the employees. This is relevant to the choice the employees were being asked to make and, in the circumstances of this matter, this is relevant to the consideration as to whether the steps taken by the Applicant were reasonable and whether the steps taken were all the reasonable steps that the Applicant needed to take to comply with s.180(5) of the Act.

Applicant's position

[144] The Applicant's position in relation to award coverage is that it is not covered by either the Security Services Award or the Building Award.[63]The Applicant submitted that neither of these awards has application to an employer unless the employer is in one of the identified industries and the questions of what the employees do and whether or not their work falls within these awards is a second question that doesn't arise unless the employer itself is in the industry.[64]

[145] The Applicant acknowledged that an employer can be in more than one industry[65] but said that for the purposes of being covered by a modern award, to be in that industry the substantial character of the commercial enterprise must be within that definition.[66]The Applicant submitted for the purposes of being covered by a modern award, to be in that industry the substantial character of the commercial enterprise must be within that industry definition.[67]

[146] The Applicant did not shy away from the assertion that it provides services to the building industry but submitted that the fact that it is a service provider to that industry does not mean that it takes on the character of that industry.[68] The Applicant submitted that this means the employer is a service provider and not an industry participant following the High Court's reasoning in *Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union*[69] (*Poon Bros*).[70]

[147] In *Poon Bros* the High Court considered the AWU's eligibility rules which declared as eligible for membership:

> "every bona fide worker... engaged in manual or mental labour in or in connection with the following industries or callings, namely... metalliferous mining... and... employees engaged in or in connection with ... all work in laundries."

[148] In that matter the companies were contracted by mining companies to provide catering, cleaning, laundry, housekeeping and garbage services to townships built by the mining companies to house the employees working in the mines. The Chief Justice observed:

> "The Full Court of the Commission ... said: "We are of the view that although the catering facilities provided by the respondent employers to those engaged in the mining industry are necessary for those people and would not exist in their absence, the catering industry as performed by Poon Bros and SHRM is identifiably different from the mining industry and when a mining employer decides to obtain the services of a contractor instead of himself catering, the catering becomes a service and is not part of the mining industry whatever it may have been before.
>
> In my opinion, this was a correct view. The business of the respondent companies was quite distinct and separate from that of the mining companies engaged in metalliferous mining. True it is that the respondent companies served the mining companies and provided them with commodities and services the provision of which was desirable if not indeed necessary for the maintenance of the workforce to carry on the mining operations. But that does not mean that in contracting to provide and in providing these commodities and services the respondent companies entered into the business of the mining companies so as themselves to be carrying on metalliferous mining; nor were their employees employed in connection with that industry. Their businesses remained distinct. Though serving the mining industry, the respondent companies did not carry on metalliferous mining or a business or industry in connection with metalliferous mining. Although employees of the mining companies who provided food or services of the kind furnished by the respondent companies might have been held to be working in the industry of metalliferous mining, such work done by an independent contractor has a different nature or quality. It cannot be said to be done as an integral part of the metalliferous mining operation. Sir Owen Dixon in *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 141, thought that the separateness of the establishments in point of control, organization, place, interest, personnel and equipment might furnish a relevant discrimen in deciding the question of fact. Sir John Latham, in the same case, at p 135, thought that the substantial character of the industrial enterprise in which the employer and employee were concerned was decisive of the question whether the employee was engaged in an industry of given description. Here the substantial character of the industrial enterprise in which the respondent companies are engaged is that of catering and of providing cleaning, etc services. That they should at a particular place perform such work exclusively for mining companies and under contract with them does not require or permit the conclusion that in doing so the respondent companies carry on an activity in or in connection with metalliferous mining or that their employees are employed in or in connection with such an industry".[71]

[149] In *Dyno Nobel*[72] the Full Bench of the Commission considered *Poon Bros* together with other relevant High Court authorities and summarised the principles as follows:

> "[51] Drawing the High Court authorities together, we think the position is as follows:

- An eligibility rule, or part of an eligibility rule, that simply refers to persons employed or engaged "in or in connection with" a specified industry or industries is properly characterised a conventional industry rule 42 and the discremen of eligibility under such a rule is the industry of the employer, that is, whether the trade or business of the employer is in or in connection with the specified industry or industries.[73]

- Whether or not the trade or business of an employer is in or in connection with a particular industry is a question of fact.[74]

- The answer to that question of fact is determined by the "substantial character" of the trade or business of the employer and all of its employees and requires a consideration of the business of the employer as a whole.[75]

- The business of an employer can be "in or in connection with" more than one industry.[76] This outcome can arise in different ways:

  (i) The business of the single employer is a single integrated enterprise but nevertheless operates substantially in or in connection with two or more industries simultaneously. This may be because:

    - There is an overlap between industries and the business operates in the area of overlap (in such a case the same business can be described in different ways placing the business in either industry so that it has a "substantial character" that places it in each industry); and/or
    - The nature of the single integrated business is such that the business itself overlaps two or more distinct industries in such a way that it has a "substantial character" within each of those industries.

  (ii) The overall business of the single employer is properly seen as being constituted by two or more distinct businesses or enterprises each of which has a different "substantial character".

- The mere supply of goods or services to a business in a particular industry is not, of itself, sufficient to render the business of the supplier one that is "in connection with" the industry of the business supplied, even if those goods are essential to the operation of that business.[77]

- Where a conventional industry rule applies in relation to a distinct business or enterprise of an employer, all of the employees in that business or enterprise are eligible for membership of the union.[78]"

[150] In this regard, the Applicant submitted that the substantial character of the Applicant's commercial interest is that of traffic management,[79] that it does nothing else and the fact that it is a service provider to the building industry does not mean that it takes on the character of that industry.[80]

[151] The Applicant submitted that it complied with s.180(5) in respect of the explanation provided to employees in that:

1. there was no obligation to explain the terms of the Building Award more fulsomely; and

2. the Company is not currently, nor is it foreseeable that it will, be covered by the Building Award.[81]

[152] In *Badman v Altus Traffic Pty Ltd*[82]an employee lodged an application to terminate an agreement. The employee's application was made on the basis that the *Building and Construction General On-site Award 2010* would operate to regulate employees of the respondent in that matter if the agreement was terminated[83] and that the agreement's terms were inferior to that award and the provisions of the Act.[84] In that matter the CFMEU, as it was then constituted, submitted that:

- the overwhelming preponderance of the respondent's work was in the on-site building, engineering and civil construction industry, which includes maintenance and repair work;
- the respondent was an employer in the on-site building, engineering and civil construction industry;[85]
- the respondent and its competitors had traditionally relied upon the *Building and Construction General On-site Award 2010* as the underpinning award for the purposes of the "better off overall test" and derivation of agreement conditions.[86]

[153] The coverage provisions of the *Building and Construction General On-site Award 2010* are substantially the same as those in the Building Award although clause 4.2 of the Building Award was numbered as clause 4.9 in the predecessor award and clause 4.3 was numbered as clause 4.10. In relation to the coverage of traffic control work O'Callaghan SDP said:

> "**[47]** Clause 4.10(b)(vii) establishes that traffic control work undertaken in connection with civil construction work is covered by the Building and Construction Award. There is no equivalent provision ensuring that traffic control work connected with general building and construction referenced in clause 4.10(a) giving rise to a question about whether that traffic control work is in fact covered by the Building and Construction Award. The parties have predictably differing views on the issue of award coverage.
>
> **[48]** I am inclined to the view that the Building and Construction Award provisions reflect a drafting oversight and that to interpret the reference in clause 4.10(b)(vii) as meaning that traffic control work is only covered by the award when it is connected to civil construction work would simply not make practical sense in that the requirement for that traffic control function operates in both sectors of the industry and the classification appears to have equal relevance. Hence, I am inclined to the position that the traffic management classification can apply to both building and civil work but does not describe, of itself, work which must be building and/or civil work. Nevertheless, I accept that the provisions of the Award are open to challenge in this respect and, absent

the agreement, this could potentially affect around one third of the work done by Altus employees.

[49] A separate issue relative to the average of the Building and Construction Award arises with respect to certain of the work described by Mr King as "maintenance and repair work" and "private property closure/protection". Altus asserts that this work is not covered by the Building and Construction Award. On the limited evidence before me, I have adopted the position that it is likely that a substantial component of this work involves civil construction traffic control in as much as it is covered by clause 4.10(b) of the Building and Construction Award. I am unclear about the extent to which all of the Altus work in this respect is covered by that Award. For instance, if Altus undertakes traffic management work associated with electricity line vegetation clearance functions, I doubt that this would be covered by the Building and Construction Award.

[50] Additionally, the purpose for which traffic management work is undertaken for private clients is relevant to the issue of award coverage. In this respect I am not satisfied that the evidence establishes that the Building and Construction Award will invariably apply to traffic management work undertaken for private clients.

[51] The evidence of Mr King confirms that Altus undertakes significant traffic management work associated with community and sporting events. The "Tour Down Under" was cited as an example. Further, that the "vast bulk"24of Altus employees work across a range of activities. Traffic control work of this nature is not covered by the Building and Construction Award. Section 47 of the FW Act states:

> "47 When a modern award applies to an employer, employee, organisation or outworker entity.
>
> (1) A modern award applies to an employee, employer, organisation or outworker entity if:
>
> (a) the modern award covers the employee, employer, organisation or outworker entity; and
>
> (b) the modern award is in operation; and
>
> (c) no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.
>
> Note 1: Section 57 provides that a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.
>
> Note 2: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

Modern awards do not apply to high income employees.

(2) However, a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee.

Modern awards apply to employees in relation to particular employment

(3) A reference in this Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment."

[52] The fact that Altus is covered by the Building and Construction Award for certain traffic control works does not then establish that this Award will have application to traffic control work which is outside of the coverage of that Award.

[53] Traffic management work associated with community or sporting events may potentially be covered by other modern awards, such as the Security Industry Award 2010 or the Miscellaneous Award 2010. For the purposes of this matter it is sufficient only that I note that both of these awards provide for different (and reduced) employee benefits than does the Building and Construction Award. I note that this conclusion does not pre-empt advice which might be provided to the Commission relative to a future application for approval of an agreement and the appropriate modern award for the purposes of the "better off overall test". It seems to me that, where employees are, or are likely to be engaged in work which is covered by the Building and Construction Award, then that award will need to be specified for the purposes of that test".[87]

[154] The CFMEU, as it was then constituted, subsequently applied to vary the *Building and Construction General On-site Award 2010* to:

"1. Insert a new sub-clause 4.10(a)(iv) as follows:

(iv) traffic management in or in connection with work under clauses4.10(a)(i)-(iii).

2. Delete sub-clause 4.10(b)(vii), renumerate (sic) sub-clauses 4.10(b)(i)-(x), and insert a new sub-clause 4.10(b)(xi) as follows:

(ix) traffic management in or in connection with work under clauses4.10(b)(i)-(x).

3. Insert a new sub-clause 4.10(c)(iii) as follows:

(iii) traffic management in or in connection with work under clauses 4.10(c)(i)-(ii)".[88]

[155] In that matter Watson SDP was not persuaded that there was uncertainty in relation to the *Building and Construction General On-site Award 2010* that warranted rectification and observed that the industry parties were in agreement that businesses (and their employees) engaged in traffic management on a building site are covered by the *Building and Construction General On-site Award 2010*.[89] Watson SDP went on to find that traffic control falls within the scope of the award classifications within the *Building and Construction General On-site Award 2010*[90] and said:

> "**[14]** In my view traffic control work falls within the scope of the classification structure of the On-site Award in respect of all sectors of the industry within the On-site Award and there is no uncertainty requiring correction…"[91]

[156] As noted by Ms O'Dwyer in her evidence, a typical example of the Applicant's services involve circumstances where Western Power need to conduct maintenance on their network in which case the Applicant will be scheduled or called out in emergencies to attend the site and execute a traffic control plan to ensure road users and Western Power employees are safe.[92] Mr Axford's evidence details examples of this type of work including traffic control services in connection with pole replacement activities and repairing of faults. This type of work falls within the description of "civil construction" within clause 4.3(b)(i) which covers repair and maintenance of power transmission and light structures. I accept that the Applicant's clients may be covered by another modern award, e.g. an industry award that falls within the exclusions in clause 4.4 of the Building Award but this does not prevent the work that they do from being captured the descriptor in clause 4.3(b)(i) for the purposes of assessing the Applicant's award coverage.

[157] I accept that employees are not actually doing the maintenance work that would typically be carried out by the client and/or its contractors. I also accept that the project-based model and Applicant's casual workforce may mean that the nature of work carried out by the Applicant is likely to be dynamic and may change from time to time.

[158] However, based on the evidence before the Commission it seems likely that if not for the "civil construction work" as defined in clause 4.3(b) of the Building Award being undertaken by the Applicant's clients and their contractors, the associated traffic management activities would not be required, and that a substantial component of the work undertaken by the Applicant and its employees involves "traffic management in connection with" (clause 4.3(b)(iv)) "civil construction" as defined in clause 4.3(b).

[159] I acknowledge that clause 4.2 of the Building Award requires that the work be undertaken "on-site". I accept that the traffic control work may be carried out outside an exclusion zone or in an area adjacent to the site where the construction work is being carried out. However, this does not, in my view, mean that the traffic control work associated with the construction work falls outside the Building Award coverage. The evidence establishes that the purpose of the traffic management work in connection with construction work is to keep people safe, i.e. by keeping them out of or away from the area in which the work is being undertaken. While the traffic control function may be set up close to or a further distance away from risks associated with construction work, such as mobile plant, it would be inimical to the purpose of traffic management if the controller was situated directly where such activity was being carried out. A traffic controller will need to be stationed somewhere outside of the area where the

substantive construction work is undertaken in order to isolate people from that area, whether members of the public or employees of the client, from the risks associated with it. In the context of the work undertaken by the Applicant's employees, the fact that traffic controllers are stationed outside of the area where the substantive construction activity is being undertaken does not, however, prevent them from undertaking "traffic management in or in connection with" (clause 4.3(b)((vi)) "civil construction" (clause 4.3(b)(i)) "on-site" (clause 4.2). Such an interpretation would, in my view, be too narrow. The areas adjacent to those where the construction work is being carried out and where the risks associated with that work are being managed through the traffic control activities are, in my view, part of the 'site' on which the construction work is undertaken when considering whether traffic management activities are undertaken "on-site". Further, I note Applicant's own website holds the Applicant out as undertaking activities that involve 'some of the largest construction and civil projects within' Queensland and Western Australia and in this context it could not be reasonably argued that traffic management activities undertaken in connection with such projects are not undertaken 'on-site'.

[160] The Applicant filed a witness statement for Mr Mark Hudston,[93] the executive director of Mapien, a human resources and industrial relations consulting group. Mr Hudston's evidence was that he assisted the Applicant in making the Agreement, was the bargaining representative for the Applicant and was responsible for explaining clause 6.7 of the Agreement. Mr Hudston's evidence as set out in the witness statement filed was as follows:

- During bargaining, one employee made a claim that the Agreement should make reference to the Building Award, and terms should be set by reference to that, rather than the Miscellaneous Award. When he asked the employee why they thought this, they told him that it was because the CFMEU had been telling them that traffic management is covered by the Building Award.[94]
- Mr Hudston discussed this with Ms O'Dwyer to understand the nature of the Applicant's work and formed an understanding from that conversation that "only a very small portion of the work that the [Applicant] performs is on or in connection with construction projects, none is performed 'on site', and the [Applicant] itself, is not an employer in the building industry (as relevantly defined in the Building Award).[95]
- When the claim was made and repeated, Mr Hudston explained to employees that only a small part of traffic management was covered by the Building Award. However, the employee remained persistent that he wanted something in the Agreement which made reference to the Building Award and Building Award rates.[96]
- Based on the employee claim, and notwithstanding that the Applicant does not operate in the building industry, there was a possibility that work could fall under the scope of the Building Award in future based on the coverage of the Agreement.[97]
- On this basis he suggested to the Applicant that it include clause 6.7 in the Agreement.[98]

[161] Ms O'Dwyer also gave evidence that:

- if the nature of the Applicant's operations expands in the future, there is a possibility that it will be covered by the Building Award, this was another reason for the

inclusion of clause 6.7 in the Agreement and the Applicant "wanted to make sure that the employees are paid what they are owed for the work they perform";[99]

- clause 6.7 was included following discussions with one employee who made a claim that if work is performed in the future that would be appropriately covered by the Building Award, the employees wanted to be paid in accordance with the Building Award.[100] This was the basis upon which clause 6.7 was included in the Agreement, explained to employees and is the reason for the brevity of the explanation in relation to clause 6.7 in the Explanation Sheet;[101]
- fundamentally, clause 6.7 is 'future proofing' the Agreement and "ensuring employees' entitlements are not adversely impacted by the Agreement".[102]

[162] The Applicant submitted:

- it is clear from the evidence of Mr Hudson, Mr Gee and Ms O'Dwyer that all parties, at the time the Agreement was voted on, understood that they were voting on an agreement which would displace the operation of the Miscellaneous Award being the relevant modern award which would apply to the employee's employment when the Old Agreement was terminated by the Amending Act on 7 December 2023;[103]
- the Building Award was (in the parties' mind) only relevant, in respect of the future application of the Agreement, a future that did not, at the time the Agreement was negotiated, voted or made, exist, but a future that was contemplated by both the Applicant and the employees;[104]
- the clause, as at the time the Agreement was voted on, had no material effect on the employees' terms and conditions of employment and could not be described or explained, in terms more specific than those used by Mr Hudson;[105]
- an explanation in more detail would have done the relevant employees no favours as there is no way for the Applicant to know, for example, which terms of the Building Award will be applicable at any given point in future for some yet unknown scope of work. [106]

[163] I have found the Applicant's position regarding the relevance of the Building Award as confusing. On the one hand the Applicant's position is that employees are not actually engaged in work falling within the coverage of the Building Award and that the likelihood of them being so covered is nothing more than a 'slight chance' yet on the other hand it admits that it has endeavoured to "futureproof" the agreement[107] and has included the following coverage provision in clause 2.1 of the Agreement that is broad in its expression:

> "All employees of the Employer that are engaged in any work involving or in association with setting in place, managing and removing temporary traffic control schemes, including services contracts and any related or associated works when employed in the classifications contained in the Agreement anywhere within Australia".

[164] If the Applicant held the belief that the Building Award was unlikely to have relevance it could have excluded work that would ordinarily be covered by the Building Award from the Agreement. Yet it did not do so and instead intentionally sought to draft the Agreement in a way that contemplated coverage under the Building Award. It seems likely that the Applicant considered Building Award coverage to be more than a "slight chance" and from my

consideration of the evidence before the Commission regarding the Applicant's work activities, it appears that the Building Award has application.

[165] Notwithstanding this, even if the Applicant's position that its employees are not engaged in work covered by the Building Award and that there is only a 'slight chance' of them doing so was accepted the Full Bench in *Specialist People* found it is not enough to identify the industry of the employer and the award that applies to it at the time it makes the agreement and that the scope of work that may be undertaken under the agreement is a central part of the analysis.[108] Following the approach of *Specialist People*, I find that the Building Award is a relevant award for the purposes of the better off overall test.

[166] Given my findings about the relevance of the Building Award, I consider that the comparison between the Agreement and the Building Award was a critical part of the analysis and that the employees should have been given the opportunity to have the differences between the Award explained to them in the explanation of the terms of the agreement and their effect, particularly as it seems very likely that the Building Award would apply to their employment in the event that the Agreement did not. This was relevant to the choice the employees were being asked to make. Instead, the Applicant has diverted the employees' attention toward the Miscellaneous Award as the comparator. I find that doing so was not a 'reasonable step' or, even if the Miscellaneous Award was a relevant comparator for some employees the Applicant has not taken all the reasonable steps that needed to be taken to comply with s.180(5) of the Act.

[167] For completeness, I note that the CFMEU had submitted that the Miscellaneous Award did not have application at all, submitting that together with the Security Services Award "covers the field".[109] In this regard I note that the proposition that the Security Services Award has coverage has some merit given the description of the Applicant's activities on its website and the evidence of Ms O'Dwyer. As noted above, it is possible for an employer to be in more than one industry.

[168] Clause 4.1 of the Security Services Award provides that it covers, to the exclusion of any other modern award:

(a) employers in the security services industry throughout Australia; and
(b) employees (with a classification defined in Schedule A – Classification Definitions) of employers mentioned in clause 4.1(a).

[169] Clause 4.2 provides that for the purposes of clause 4.1 'security services industry' includes (among other things) crowd control, event control or venue control, whether by physical or electronic means and **traffic control that is incidental to, or associated with, the activities**. The Applicant is clearly undertaking traffic control that is incidental to, or associated with, the activities described in clause 4.2. The Applicant's website divides its services into the categories of 'Planning', 'Traffic Management', 'Emergency Response' and 'Special Events'.

[170] Clause 4.3 provides that an employer is not covered by the Security Services Award merely because, as an incidental part of a business covered by another modern award, the employer has employees who perform functions mentioned in clause 4.2. The Macquarie Dictionary defines 'incidental' as:

> "1. happening or likely to happen in fortuitous or subordinate conjunction with something else.
>
> 2. incurred casually and in addition to the regular or main amount: incidental expenses.
>
> 3. something incidental, as a circumstance.
>
> 4. (plural) minor expenses.
>
> 5. incidental to, liable to happen in connection with; naturally appertaining to."[110]

[171] The Applicant's employees may undertake traffic control activities in relation to crowd control or event control to a lesser extent than other traffic control activities as reflected in the evidence of Ms O'Dwyer,[111] it does not follow that these activities are merely 'incidental'. The Applicant holds these services out on its website as being a part of its service offering and it is not merely "happening or likely to happen in fortuitous or subordinate conjunction with something else", "incurred casually" or a mere "circumstance". While the work it may undertake from time to time will vary depending on the nature of the contracts that it secures, having regard to the evidence before the Commission and scope of work that may be undertaken under the Agreement, which is a central part of the analysis,[112] the Security Services Award is also a relevant award for the purposes of the better off overall test. This also should have been explained to employees in the explanation of the terms of the agreement and their effect.

[172] However, I am not persuaded that the Building Award and Security Services Award necessarily 'cover the field' as submitted by the CFMEU. Similarly, this decision should not be construed in any way as standing for the proposition that traffic control activities will only be covered by the Building Award and/or Security Servies Award. As noted by O'Callaghan SDP, if traffic management work associated with electricity line vegetation clearance functions is undertaken it seems unlikely that this would be covered by the Building Award. It is also unlikely to be covered by the Security Services Award. This leaves a gap that the Miscellaneous Award may fill in these circumstances. However when the coverage of the Agreement is considered alongside the work the Applicant is undertaking or may undertake under the Agreement, the Applicant's presentation of the Miscellaneous Award as the only comparator to the exclusion of other relevant awards and the cursory explanation provided in respect of clause 6.7 leads me to a conclusion that I am not satisfied that the steps taken to explain the terms and the effect of the Agreement were reasonable and nor am I satisfied that the steps taken were all the reasonable steps that needed to be taken to comply with s.180(5) of the Act.

Section 188(1)(c) – are there other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees?

[173] In *One Key Workforce (No 2)*[113] the Full Court of the Federal Court considered s.188(1)(c) of the Act which requires the Commission to be satisfied that there are no other reasonable grounds for believing that the agreement has not been "genuinely agreed" to by employees. The Court said that the phrase "genuinely agreed" indicates that mere agreement will not suffice and that consent of a higher quality is required.[114] The Court said that the Act prescribes some, but not all, factors that must be taken into account in the consideration of

genuine agreement but that paragraph 188(c) was not at all prescriptive and cast in very broad terms.[115] In this regard the Court said:

> "Paragraph 188(c) is cast in very broad terms. It is intended to pick up anything not caught by paras (a) and (b). Thus, any circumstance which could logically bear on the question of whether the agreement of the relevant employees was genuine would be relevant. One obvious example is the provision of misleading information or an absence of full disclosure (see, for example, *Re Toys "R" Us (Australia) Pty Limited Enterprise Flexibility Agreement 1994* (1995) 37 AILR 3-068 (Print L9066) (C No 23663 of 1994)). Another is the likelihood that the relevant employees understood the operation of the various awards that would be affected by the agreement and the extent to which the wages and working conditions for employees under each of those awards would change, for better or worse, under the terms of the agreement. Thus, if we be wrong to conclude that the Commission is bound by s 180(5) to consider the content of the employer's explanation of the terms of the Agreement and their effect, in order to be satisfied that the Agreement was "genuinely agreed to" having regard to s 188(a)(i), then for similar reasons we would hold that this was a matter which was not only relevant to the question raised by para 188(c), but was a mandatory consideration."

[174] In deciding whether to vote for or against the approval of the Agreement, the explanation would, on an objective view, lead employees to believe that the choice they are making is a choice between the Agreement and, when the Old Agreement ceased to operate, the Miscellaneous Award. The reference made to the Building Award in the oral explanation was no more than cursory in nature and was made in the context of clause 6.7. There was no comparison of the Building Award terms with those of the Agreement, nor was there a comparison of the terms of the Security Services Award with those of the Agreement. The comparator used, being the Miscellaneous Award is uncontroversially less generous in its terms than the Building Award. This is relevant to a consideration of s.188(1)(c). Considered objectively, it is unlikely that the relevant employees understood the operation of all of the awards that would be affected by the Agreement and the extent to which the wages and working conditions for employees under each of those awards differed from those in the Agreement, for better or worse. In these circumstances I am not satisfied that there are no other reasonable grounds for believing that the Agreement has not been genuinely agreed to by the relevant employees.

Can s.188(2) be relied on to establish genuine agreement?

[175] Section 188(2) provides that an enterprise agreement has also been genuinely agreed to by the employees covered by it if the Commission is satisfied that:

(a) the agreement would have been genuinely agreed to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a NERR; and

(b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph 1(a) or (b) or the requirements of sections 173 and 174.

[176] The Applicant submitted that s.188(2) operates to remedy any non-compliance with the obligation to explain the terms of the Building Award.[116]

[177] The Explanatory Memorandum to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* provided examples of potential procedural or technical errors including (without limitation):[117]

- employees being informed of the time and place for voting on the proposed enterprise agreement or the voting method that will be used for the agreement just after the start of the access period rather than by the start of the access period (subsection 180(3));
- employees being requested to approve a proposed enterprise agreement on the 21st day after the last Notice was given, rather than at least 21 days after the day on which the last Notice was given (subsection 181(2));
- the inclusion of the employer's company logo or letterhead on a Notice
- the inclusion of additional materials that are stapled with a Notice; or
- minor changes to the text of the Notice that had no relevant effect on the information that was being communicated in it (for example, the Notice may say to contact a particular person in the human resources department rather than 'contact your employer').

[178] While the above examples are not exhaustive they provide some context regarding the nature of the errors that the legislation contemplated would fall within the remit of s.188(2).

[179] The Full Bench of the Commission considered the application of s.188(2) in *Huntsman Chemical Company Australia Limited T/A RMAX Rigid Cellular Plastics & Others*[118]with the following propositions emerging:

1. Subsections 188(1) and (2) are to be approached sequentially. The first question is whether the Commission is satisfied as to the matters at s.188(1)(a) to (c). If it is so satisfied then the agreement has been genuinely agreed to and there is no need to consider s.188(2).

2. The reference to the 'employees covered by the agreement' in ss.188(1) and (2), is a reference to those employees employed and covered by the agreement at the time of the request to vote under s.181.

3. Subsections 188(1) and (2) both provide that an enterprise agreement has been genuinely agreed if the Commission is satisfied as to certain matters (ie those in s.188(1)(a) to (c) and ss.188(2)(a) and (b) respectively). The latitude as to the choice of the decision to be made by ss.188(1) or (2) is quite narrow in that the decision maker is required to conclude that the agreement was genuinely made if he or she forms a particular opinion or value judgment. Assessing the genuineness of agreement under ss.188(1) and (2) involves an evaluative assessment.

4. Section 188(2) is confined to circumstances where the Commission is not satisfied that an agreement has been genuinely agreed to within the meaning of s.188(1), as a result

of 'errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights'.

5. Section 188(2) does not extend to circumstances where the Commission is not satisfied that an agreement was genuinely agreed to in a more general sense, as might arise from a consideration of s.188(1)(c). 6. Section 188(2) does not apply to all procedural or technical requirements with which an employer must comply when bargaining for an enterprise agreement. The 'minor procedural or technical errors' referred to in s.188(2)(a) must be errors '*made in relation* to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights' (emphasis added).

[180] In considering what constitutes a 'minor procedural or technical error' the Full Bench found:[119]

1. The adjective 'minor' qualifies both 'procedural' errors and 'technical' errors, such that the expression reads 'minor procedural errors or minor technical errors'. The word 'minor' is a limitation upon the type of errors contemplated by s.188(2)(a).
2. A failure to comply with a procedural requirement will constitute a 'procedural error' within the meaning of s.188(2)(a).
3. A failure to comply with a technical requirement will constitute a 'technical error' within the meaning of s.188(2)(b).
4. A single error may have both procedural and technical components.
5. The impact of the errors is to be assessed by reference to the objects of the requirements in ss.188(2)(a), 188(1)(b), 173 or 174.
6. What constitutes a 'minor' error calls for an evaluative judgment having regard to the underlying purpose of the relevant procedural or technical requirement which has not been complied with and the relevant circumstances. Table 2 (see below) examines each of the procedural or technical requirements, considers the underlying purpose of these requirements and outlines some ways in which employees might be disadvantaged by a minor technical or procedural error.
7. Generally speaking, the lower the level of non-compliance the more likely it is to be characterised as a 'minor error'.
8. Whether an incidence of non-compliance is characterised as a 'minor error' also depends on the nature of the requirement which has not been complied with.
9. Some species of error are unlikely to be classified as 'minor'.
10. The test in s.188(2)(b) is whether the employees covered by the agreement were 'not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174'. The impact of the errors is to be assessed by reference to the objects of those requirements and not by reference to any more general sense of 'genuine agreement'.
11. Cost or inconvenience to the employer and employee covered by an agreement associated with a delay in the approval of the agreement is not relevant to the question of whether the employees covered by the agreement 'were not likely to be disadvantaged by the errors'.
12. The test suggested by s.188(2)(b) is whether 'the employees covered by the agreement were not likely to have been disadvantaged by the errors'.

13. The word likely in s.188(2)(b) means probable in the sense that there is an odds-on chance of it happening, rather than merely being some possibility of it happening. The word disadvantaged suggests a deprivation which manifests in the employees covered by the agreement being prevented from substantively exercising their rights within the bargaining regime in Part 2-4 of the Act.
14. In assessing whether employees were not likely to have been disadvantaged by an error, it may be necessary to consider the particular circumstances of the employees concerned at the time the error occurred and the impact of the error on the subsequent course of bargaining. This may include considering any steps taken by the employer to address the adverse impact of the non-compliance.

[181] In relation to the requirement in s.180(5)(a) to take all reasonable steps to explain the terms of the agreement and their effects to the relevant employees, the Full Bench identified that the purpose of this obligation is to ensure that employees understand the effect the agreement that is to be voted on, enabling them to make an informed decision.[120] The Full Bench identified that an employee may be disadvantaged if in the circumstances the steps may have been taken such that the employees might not be in a position to make an informed decision about the terms of the agreement upon which they are eligible to vote.[121]

[182] I have earlier found that the Building Award was of relevance and should have been a critical part of the analysis. The differences between the Miscellaneous Award and the Building Award are material. While the Building Award is a comprehensive award with its content influenced by a complex arbitral history, to use the descriptors of the Full Bench the Miscellaneous Award does "not provide a comprehensive safety net for any particular industry or occupation, but rather provides only for basic "catch-all" conditions, including a simplified and generic classification structure and a "fairly rudimentary" scheme of overtime rates and night-time and weekend penalty rates".[122]

[183] It is uncontroversial that the Building Award provides terms that are more beneficial than the Miscellaneous Award and that the terms of those instruments are different in many respects. The term of the Agreement together with clause 4.2 would mean that, notwithstanding the inclusion of clause 6.7, if the Agreement is approved it would apply to employees to the exclusion of the Building Award for a period of four years after the day of approval. Clause 6.7 of the Agreement seeks to provide an entitlement to the greater of the rates of pay in clause 6.1 of the Agreement or "an amount comprising the base rate of pay for the relevant classification in the Award above plus 5%, and any applicable allowances, overtime and penalties plus 5%, as provided for in the" Building Award.

[184] However, the Building Award also includes terms creating entitlements that do not take the specific character of base rates, allowances, overtime and penalties and in relation to which there are less generous or no corresponding entitlements in the Agreement, including but not limited to:

- rostered days off (as set out in clause 16);
- in relation to the general building and construction and metal and engineering construction sectors:

    - rostered shifts off and paid crib time where shiftwork comprises three continuous and consecutive shifts of eight hours each per day (clause 17.1(e));
    - more stringent limitations around alteration of hours for shiftworkers (clause 17.1(g));
- in relation to the civil construction sector, rostered off shifts (clause 17.2(d);
- an industry specific redundancy scheme for the purposes of the on-site building, engineering and civil construction industry where redundancy is defined as a situation where an employee ceases to be employed by an employer to whom the Building Award applies, other than for reasons of misconduct or refusal of duty (clause 41);
- meal break entitlements that are counted as time worked for shiftworkers (clause 18.2);
- more generous rest period and crib time provisions (clause 18.3);
- processes in the event of inclement weather and payment for time lost due to inclement weather subject to a maximum of 32 hours pay in a four week period (clause 24);
- reimbursement of safety boots and replacement at least every 6 months (clause 21.1 (d));
- provision of transport/payment for transport where an employee works overtime or a shift for which they have not been regularly rostered and finishes work at a time when reasonable means of transport are not available (29.7);
- travel time entitlements (clause 26.2(a));
- accident pay (clause 27);
- notice requirements in relation to annual shut downs (clause 31.3);
- dispute resolution procedure training leave for eligible employee representatives (clause 39.10);
- job search entitlement (clause 40.2);
- annual leave loading (noting that clause 14.10 of the Agreement states that employees are not entitled to annual leave loading as it has been incorporated into the base rates).

[185] It seems unlikely that the failure to take all reasonable steps to explain the terms of the Agreement and their effect as required by s.180(5)(a) in failing to explain how the Agreement compares with the terms of the Building Award is an error. Rather, the Applicant appears to have known that the Building Award was a relevant consideration, as evident by the reference it has included in the Agreement and the Agreement's broad coverage provisions, however the content of the Explanation Sheet and the explanation provided by Mr Hudston in relation to clause 6.7 clearly seek to downplay its relevance.

[186] However, even if this omission was to be considered an error, in the circumstances of this matter I am not persuaded that it is a minor or technical error of the nature contemplated by s.188(2)(a). The explanations are such that they would, objectively viewed, lead an employee to believe that the Building Award was of little to no relevance to them, that the reference to the Building Award in the Agreement only came about because of a concern raised by one individual and that they should focus on the terms of the Miscellaneous Award. As noted in the explanation, the Applicant said:

> "The Award contains a number of terms and conditions that are not provided for in the Agreement (see below for a snapshot). **It is important that you carefully consider the terms of the Award against the Agreement**."

[187] In deciding whether to vote for or against the approval of the Agreement, the explanation would, on an objective view, lead employees to believe that the choice they are making is a choice between the Agreement and the Miscellaneous Award. The reference made to the Building Award in the oral explanation was no more than cursory in nature and no explanation of the actual terms of the Building Award was provided in the written explanation.

[188] In these circumstances I consider that the failure of the Applicant to comply with the requirements of s.180(5) in relation to its explanation regarding the comparator awards cannot be considered a minor procedural or technical error as the information as presented to them meant employees could not properly understand the effect of the agreement that is to be voted on and were therefore unable to make a properly informed decision. This means I am not satisfied that the agreement was genuinely agreed to in the more general sense and this cannot be cured by s.188(2).[123]

[189] I note that the overwhelming majority the Applicant's employees (58 out of 62 employees covered) are casual employees and some of the above entitlements would apply to employees other than casuals. While it might be contended that this has some relevance as almost all of those who voted on the Agreement are casual employees and would not be interested in terms that only have application to other employees, this would not assist the Applicant as the Agreement covers casual, full-time and part-time weekly hire employees as well as employees employed for a specified period of time or specified task and the coverage of traffic control work is broad. Similarly, if the Applicant was asking its employees to vote on an agreement covering industries in which they do not work in an attempt to 'futureproof' the Agreement, this does not assist it. Following the decision of the Full Court in *One Key Workforce (No 2)* the approval of the Agreement would, in these circumstances, be lacking in authenticity and moral authority[124] which is a matter that would also be relevant to the consideration of s.188(1)(c) of the Act.

Can the undertaking offered by the Applicant cure the concerns in relation to genuine agreement?

[190] The Applicant proffered an undertaking (Undertaking) in the following terms:

> "Clause 6.7 will be of no effect. However, where an Employee performs work that would otherwise be covered by the Building and Construction General On-Site Award 2020, the Employee will, in lieu of remuneration under this Agreement in respect of such work, be paid what they would be entitled to under the terms of the Building Award (current as at the date of the Agreement's approval) as if it applied to that particular work in its entirety, plus five percent."

[191] The Applicant submitted that the Undertaking provides additional satisfaction that the Applicant took all reasonable steps to explain the terms of the Agreement to employees[125] or resolves any and all concerns in relation to both the BOOT and genuine agreement.[126]

[192] In *Construction, Forestry, Maritime, Mining and Energy Union and others v Specialist People Pty Ltd*[127] the Full Bench, after finding that there was more than one relevant award for the purposes of the better off overall test, said:

> "**[21]** The company's revised F17 statutory declaration dated 30 April 2019 described the various steps it took to explain the Agreement (which we do not repeat here) and appended the explanatory document that the company provided to employees. The explanatory document, we consider, gave an adequate and accurate explanation of the relevant terms of the Agreement, including a description of the classes of work that the Agreement covered and a proper characterisation of the rate structure. The fact that the document did this in brief and summary terms does not, in our view, mean that s 180(5) was not complied with. The informed consent of employees, with which s 180(5) is evidently concerned, might be more readily achieved through a concise, relevant and readily comprehensible explanation than an excessively detailed one.
>
> **[22]** We do nonetheless have a concern about compliance with s 180(5) arising from our conclusion about the coverage of the Agreement. Our concern is not that the explanatory document incorrectly described the coverage of the Agreement; as earlier stated we consider on the contrary that it accurately set out, albeit in a summary way, the classes of work that were covered. However what the document omitted to do was to explain the differences between the rates and conditions of employment provided for in the Agreement as compared to those under the four awards the Agreement was intended to displace in their application to Specialist People's employees. That step was one reasonably necessary to be taken at least in respect of the Building and Construction Award, the Hydrocarbons Award and the Electrical Contracting Award because, as Specialist People has conceded, employees would not be better off overall under the Agreement than under those awards when applicable. That was something the employees obviously needed to know before they were asked to vote to approve the Agreement".

[193] The Full Bench then gave consideration to an undertaking proposed by the employer in the following terms:

> "2. Where the Company engages or directs an employee to perform work which would otherwise be covered by the terms of any of the following award:
>
> - *Building and Construction General On-Site Award 2010;*
> - *Hyrdocarbons Industry (Upstream) Award 2010;*
> - *Electrical, Electronic, and Communications Contracting Award 2010*
>
> (collectively, the **Other Awards**),
>
> the Company will pay an employee, for the performance of such work, the greater of the following amounts:
>
> - the rates of pay set out in clause 5.2 of the Agreement; or
> - an amount comprising:

- the applicable base rate of pay set out in the Other Awards, plus 20%; and
- an applicable allowances and penalties as provided for in the Other Awards."

[194] The Full Bench said:

> "[**23]** The undertaking proposed by Specialist People to address our BOOT concern would also address our concern about compliance with s 180(5). That is because, by ensuring that employees are better off overall under the Agreement by a significant margin when performing work covered by the Building and Construction Award, the Hydrocarbons Award and the Electrical Contracting Award, it effectively renders moot the omission we have identified in that the detriment which required explanation would no longer exist. Acceptance of the undertaking would therefore allow us to be satisfied that s 180(5) was complied with.
>
> **[24]** We do not consider that acceptance of the undertaking would be likely to cause financial detriment to any employee covered by the Agreement or result in substantial changes to the Agreement. Pursuant to s 190(4) we have sought the views of the bargaining representatives, but have received no response. In those circumstances we accept the proposed undertaking."[128]

[195] In *OGS Project Services Pty Ltd*[129] (*OGS*) Asbury DP considered the approach in *Specialist People* and in circumstances where she found that the *Electrical, Electronic and Communications Contracting Award 2010* (Electrical Contracting Award) was a relevant award for the purposes of the better off overall test in addition to the award nominated by the employer, being the Building Award. A provision similar to the undertaking provided in *Specialist People* was included at clause 7.6 of the Agreement, although there was no reference to the Electrical Contracting Award in that clause and it prescribed a margin of 10% above the base rates and allowances in the awards it referred to rather than a 20% margin on the base rate.

[196] Asbury DP said:

> "**[98]** Given my conclusion that the Electrical Contracting Award is relevant for the BOOT, it follows that the explanation about the terms of the Agreement and their effect was required to include consideration of that Award. Clause 7.6 implicitly acknowledges that the Agreement may not pass the BOOT in respect of the Manufacturing Award and the Hydorcarbons Award. It follows that the Agreement may not pass the BOOT in relation to the Electrical Contracting Award.
>
> **[99]** Accordingly, consistent with the Full Bench decision in *Specialist People No. 2*, I would accept an undertaking to the effect that where OGS engages or directs an employee to perform work which would otherwise be covered by the Electrical Contracting Award, OGS will pay the employee the rates of pay in clause 7.1 of the Agreement or an amount comprising the base rate for the relevant classification in the Electrical Contracting Award plus a margin sufficiently in excess of the base rate in that Award, and any applicable allowances, overtime and penalties.

> **[100]** If OGS provides this undertaking, I would be satisfied that the requirements in s.180(5)(c) have been met and for the reasons set out above, that the Agreement is genuinely agreed as required by s.186(2) and that the requirements in s.188(1)(a)-(c) have been met."

[197] The CFMEU submitted that the current case is not analogous to *OGS* or *Specialist People* which concerned a proposed enterprise agreement drafted by reference to a particular reference instrument. The CFMEU submitted that the difference in this matter is that:

- the Building Award is not an 'additional award' with marginal relevance to the Applicant's business but has primary application and together with the *Security Services Industry Award 2020* (Security Award) covers the field;
- the effect of the undertaking, correctly construed, is that the financial entitlements under the Agreement do not apply to the majority of the Applicant's employees who are covered by the Agreement (or all of them, if the undertaking is extended to include the Security Award);
- this change to the remuneration structure under the Agreement results "in the wholesale reshaping of the agreement, such that it bears no resemblance to the pre-undertaking agreement that was approved by the employees";[130]
- specifically, the undertaking transforms the character of the Agreement from one the essential character of which is to exclude the award, and provide for a small margin above the award rate, into one which incorporates a significant number of award entitlements;[131]
- the undertaking proffered by the Applicant is not in the same terms as the undertakings in *OGS* or *Specialist People*, which provided for the higher of the agreement rates, or the award rates plus an additional margin;
- it may be doubted whether the 5% additional payment under the proffered undertaking (or cl 6.7 of the Agreement) is sufficient remuneration to compensate for the loss of significant non-financial benefits under the Building Award (for example, redundancy inclement weather, RDOs) as well as other financial benefits foregone under the Agreement (such an annual leave loading). By contrast the 'BOOT saving' undertaking in *Specialist People* involved a 20% additional payment and in *OGS* the premium was 10%.[132]

[198] As I have earlier noted, the Miscellaneous Award and Building Award are materially different and I agree with the CFMEU's submission that the Building Award is not an award with 'marginal relevance' and that the undertaking transforms the character of the Agreement.[133]In order to know what they should be paid, an employee doing work covered by an Agreement would need to know what they would be entitled to be paid for that work under the terms of the Building Award (current as at the date of the Agreement's approval) as if it applied to that particular work in its entirety. An employee's substantive entitlements under the Agreement in these circumstances would not come from the text of the Agreement themselves but from the terms of an external instrument, terms that have not been explained to them in any detail.

[199] The additional payment of 5% offered by the undertaking that would apply in addition to what an employee would be entitled to under the Building Award is not significant and is to be paid in respect of the performance of work otherwise covered by the Building Award. It is

unclear as to whether this is intended to capture entitlements in the Building Award that are not directly related to the actual performance of work (e.g. the unique redundancy scheme that the Building Award provides, annual leave loading paid in respect of leave rather than the performance of work or payments in respect of inclement weather where an employee is unable to work) or that relate to matters for which it is unclear whether there is a pay consequence (e.g. the entitlement to cease work in certain circumstances due to inclement weather, notwithstanding that the Building Award prescribes certain payments in respect of inclement weather where an employee is unable to perform work).

[200] The circumstances of this matter are distinguishable from those in *OGS* and *Specialist People*. I do not consider that the undertaking remedies the non-compliance with s.180(5) of the Act and/or the absence of my satisfaction in relation to genuine agreement for the purposes of ss.188(1)(a) and 188(1)(c) of the Act.

Conclusion

[201] I am not satisfied that the Applicant has taken all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, were explained to the employees employed at the time who will be covered by the agreement as contemplated by s.180(5) of the Act and, having considered the explanation provided to employees, I have reasonable grounds for believing that the Agreement has not been genuinely agreed. I have found above that the non-compliance with s.180(5) and the existence of reasonable grounds for believing that the Agreement has not been genuinely agreed to by employees cannot be remedied by s.188(2) or the undertaking offered by the Applicant. The application is therefore dismissed.

[202] I note that the CFMEU also raised concerns about the way voting was carried out. Given the absence of my satisfaction in relation to genuine agreement for the purposes of ss.188(1)(a) and 188(1)(c) of the Act for other reasons I have not needed to make specific findings about the voting process. However I note that the Applicant conducted a show of hands vote that was filmed by the Applicant.

[203] I observe that the Applicant may wish to make a subsequent application for approval of an enterprise agreement. I observe that s.186 of the Act now sets out new requirements regarding genuine agreement, including a requirement in s.188(1) that the Commission take into account a Statement of Principles on Genuine Agreement (SoPs) which have been made by the Commission under new s.188B. Principle 15 of the SoP provides that:

> ‘15. Employees should be given a reasonable opportunity to vote on a proposed enterprise agreement in a free and informed manner. This should include:
>
> (a) a voting process that ensures the vote of each employee is not disclosed to or ascertainable by the employer…’

While a voting process that departs from this is not in itself determinative, it is a matter that the Applicant may wish to reflect upon in considering its future approach.

COMMISSIONER

Appearances:

Mr *S Rogers* of Mills Oakley Lawyers for the Applicant.
Mr *J Liley* on behalf of the Construction, Forestry, Maritime and Energy Union.

Hearing details:

2023.
Sydney (Video by Microsoft Teams).
September 8.

Printed by authority of the Commonwealth Government Printer

<PR770189>

---

[1] [2014] FWCFB 7940 at [75].

[2] [2016] FWC 1637 at [25], cited in *Quickway Constructions Pty Ltd* [2019] FWC 655 at [18].

[3] *Application by DOF Management Australia Pty Ltd* [2016] FWC 3792 at [43]; *Neptune Diving Services Pty Ltd v Maritime Union of Australia* [2017] FWC 5955 at [30].

[4] [2019] FWCFB 5132 at [16].

[5] [2017] FWC 5955 at [23].

[6] [2019] FWC 655 at [17].

[7] *Re Monadelphous Engineering Pty Ltd* [2019] FWC 4471 at [19] citing *Mechanical Maintenance Solutions* [2019] FWCFB 3585 at [22].

[8] *Cetin v Ripon Pty Ltd t/as Parkview Hotel* (2003) 127 IR 205 at [48]-[49], *United Firefighters' CFMEU v Metropolitan Fire and Emergency Services Board* [2017] FWCFB 2500 at [35], *Khayam v Navitas English Pty Ltd t/as Navitas English* [2017] FWCFB 4092 at [30].

[9] [2014] FWCFB 7940 at [69] emphasis added by Applicant.

[10] [2019] FWC 655 at [17].

[11] [2012] FWAFB 2206, [20].

[12] [2012] FWAFB 2206, [21].

[13] *CFMEU v AKN Pty Ltd* [2020] FWCFB 3438 at [44] – [45].

[14] *CFMEU v Sparta Mining Services Pty Ltd* [2016], FWCFB 7075 at [16]; *BCG Contracting Pty Ltd* [2018] FWC 1466 at [58] – [64].

[15] [2020] FWCFB 3438.

[16] [2018] FCAFC 77.

[17] [2019] FWCFB 4022.

[18] (2017) 270 IR 410 at [94] – 109].

[19] The Full Bench observed that this will, of course, depend on the circumstances of each case. Thus, an employer who takes steps to explain the terms of an agreement and the effect of those terms in English to a workforce that does not speak or has difficulty in comprehending English is unlikely to have taken reasonable steps.

[20] [2018] FCAFC 77.

[21] (2018) 365 ALR 535 at [112]-[117].

[22] Witness Statement of Mark Hudston dated 17 August 2023 at [1]-[7].

[23] Witness Statement of Mark Hudston dated 17 August 2023 at [20].

[24] Witness Statement of Mark Hudston dated 17 August 2023 at [22].

[25] Witness Statement of Mark Hudston dated 17 August 2023 at [24].

[26] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [33].

[27] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [34].

[28] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [36].

[29] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [36].

[30] Witness Statement of Daniel Gee dated 17 August 2023 at [7].

[31] Witness Statement of Daniel Gee dated 17 August 2023 at [8].

[32] Further Submissions of the CFMEU dated 21 August 2022 at [58]- [65].

[33] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [6].

[34] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [7].

[35] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [9].

[36] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [26].

[37] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [9].

[38] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [9].

[39] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [11].

[40] Witness Statement of Murray Axford dated 18 August 2023 at [6] – [7].

[41] Witness Statement of Murray Axford dated 18 August 2023 at [8] – [9].

[42] Witness Statement of Murray Axford dated 18 August 2023 at [10].

[43] Witness Statement of Murray Axford dated 18 August 2023 at [11] – [12].

[44] Witness Statement of Murray Axford dated 18 August 2023 at [13] – [15].

[45] Witness Statement of Murray Axford dated 18 August 2023 at [17].

[46] Witness Statement of Murray Axford dated 18 August 2023 at [17] – [19].

[47] Witness Statement of Brittany O'Dwyer dated 18 August 2023 at [27].

[48] Witness Statement of Murray Axford dated 18 August2023 at [20].

[49] Witness Statement of Murray Axford dated 18 August 2023 at [20].

[50] Witness Statement of Murray Axford dated 18 August 2023 at [21].

[51] Witness Statement of Murray Axford dated 18 August 2023 at [22].

[52] Witness Statement of Murray Axford dated 18 August 2023 at [22].

[53] Witness Statement of Murray Axford dated 18 August 2023 at [22].

[54] Witness Statement of Murray Axford dated 18 August 2023 at [23].

[55] Witness Statement of Murray Axford dated 18 August 2023 at [25].

[56] Witness Statement of Murray Axford dated 18 August 2023 at [26].

[57] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [8] – [9].

[58] PR17774, [2020] FWCFB 754, [2020] FWCFB 1589.

[59] [2020] FWCFB 754.

[60] [2020] FWCFB 754 at [58].

[61] [2019] FWCFB 4022 at [70].

[62] [2019] FWCFB 4022 at [71].

[63] Transcript of proceedings, 22 August 2023 at PN43.

[64] Transcript of proceedings, 22 August 2023 at PN50.

[65] Transcript of proceedings, 22 August 2023 at PN51.

[66] Transcript of proceedings, 22 August 2023 at PN52.

[67] Transcript of proceedings, dated 22 August 2023, PN 52.

[68] Transcript of proceedings, dated 22 August 2023, PN 53.

[69] (1976) 51 ALJR 266.

[70] Transcript of proceedings, dated 22 August 2023, PN 55.

[71] 1976) 51 ALJR 266 at 268-9.

[72] *Dyno Nobel Asia Pacific Limited v Construction, Forestry, Mining and Energy Union* PR966868 at [51].

[73] *R v Hibble; Ex parte Broken Hill Pty Co Ltd (1921) 29 CLR 290 at 297; Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union* (1976) 51 ALJR 266 at 268.

[74] *R v Hibble; Ex parte Broken Hill Pty Co Ltd (1921) 29 CLR 290 at 297; Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union* (1976) 51 ALJR 266 at 268.

[75] *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd (1948) 77 CLR 123 at 135; Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union* (1976) 51 ALJR 266 at 268.

[76] *R v Drake Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51 at 57.

[77] *R v Isaac; Ex parte Transport Workers Union* (1985) 159 CLR 323 at 333.

[78] *R v Hibble; Ex parte Broken Hill Pty Co Ltd* (1921) 29 CLR 290.

[79] Transcript of proceedings, 22 August 2023 at PN52.

[80] Transcript of proceedings, 22 August 2023 at PN53.

[81] Applicant's submissions dated 18 August 2023 at [56].

[82] *Mark Badman v Altus Traffic Pty Ltd* [2013] FWC 4409.

[83] *Mark Badman v Altus Traffic Pty Ltd* [2013] FWC 4409 at [6].

[84] *Mark Badman v Altus Traffic Pty Ltd* [2013] FWC 4409 at [12].

[85] *Mark Badman v Altus Traffic Pty Ltd* [2013] FWC 4409 at [14].

[86] *Mark Badman v Altus Traffic Pty Ltd* [2013] FWC 4409 at [15].

[87] [2013] FWC 4409.

[88] [2013] FWC 8725.

[89] [2013] FWC 8725 at [13].

[90] [2013] FWC 8725 at [13].

[91] [2013] FWC 8725 at [14].

[92] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [9].

[93] Witness Statement of Mark Hudston dated 17 August 2023.

[94] Witness Statement of Mark Hudston dated 17 August 2023 at [11].

[95] Witness Statement of Mark Hudston dated 17 August 2023 at [13].

[96] Witness Statement of Mark Hudston dated 17 August 2023 at [14].

[97] Witness Statement of Mark Hudston dated 17 August 2023 at [15].

[98] Witness Statement of Mark Hudston dated 17 August 2023 at [16].

[99] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [30].

[100] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [31].

[101] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [31].

[102] Witness Statement of Brittany O'Dwyer dated 18 Augst 2023 at [31].

[103] Applicant's submissions dated 18 August 2023 at [70].

[104] Applicant's submissions dated 18 August 2023 at [71].

[105] Applicant's submissions dated 18 August 2023 at [72].

[106] Applicant's submissions dated 18 August 2023 at [75].

[107] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [31].

[108] [2019] FWCFB 6307 at [34].

[109] Further Submissions of the CFMEU dated 21 August 2022 at [58]- [65].

[110] Macquarie Dictionary

[111] Witness Statement of Brittany O'Dwyer dated 25 July 2023 at [11].

[112] [2019] FWCFB 6307 at [34].

[113] [2018] FCAFC 77.

[114] [2018] FCAFC 77 at [141].

[115] [2018] FCAFC 77 at [141] - [142].

[116] Applicant's submissions dated 18 August 2023 at [56].

[117] *Revised Explanatory Memorandum to Fair Work Amendment and OtherMeasures) Bill 2012* at [47].

[118] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 218.

[119] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 218, [117].

[120] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 218, [74].

[121] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 218, [74].

[122] [2020] FWCFB 754 at [58].

[123] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 218.

[124] [2018] FCAFC 77 at [131] - [165].

[125] Applicant's submissions dated 18 August 2023 at [59].

[126] Applicant's submissions dated 18 August 2023 at [56].

[127] [2019] FWCFB 7919 at [22].

[128] [2019] FWCFB 7919 at [22].

[129] [2022] FWC 2501.

[130] *CFMEU v Kaefer Integrated Services Pty Ltd* [2017] FWCFB 5630 at [41].

[131] See *Application by Perth Access Scaffolding Pty Ltd* [2016] FWC 8042 [15].

[132] Further Submissions of the CFMEU dated 21 August 2022 at [58]- [65].

[133] See *Application by Perth Access Scaffolding Pty Ltd* [2016] FWC 8042 [15].