DECISION

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

I-MED Regional Pty Ltd
(AG2024/4534)

COMMISSIONER TRAN MELBOURNE, 9 MAY 2025

Application for approval of the I-MED Regional Victoria Enterprise Agreement 2023 – Employer did not take all reasonable steps to explain the terms and effect of the Agreement – Further submissions required – Directions issued.

[1] **I-MED** Regional Pty Ltd applied to the Fair Work **Commission** for approval of the I-MED Regional Victoria Enterprise **Agreement** 2023 under s 185 of the *Fair Work Act 2009*. I-MED provides diagnostic radiology and operates in private clinics and hospital settings throughout Australia.

[2] The Agreement covers a total of 201 employees[1] who are clerical staff (such as medical receptionists, booking agents and office managers) and health professional staff, who specialise in imaging procedures such as radiography and MRI (magnetic resonance imaging). The Agreement covers employees in regional Victoria: in Gippsland, Sunraysia/Mildura and Goulbourn Valley. The Agreement is a consolidation of 3 industrial instruments, being 2 enterprise agreements that currently apply and the relevant modern award, the *Health Professionals and Support Services Award 2020*.

[3] The Agreement was made on 4 November 2024. 111 out of a total of 142 employees who cast a valid vote voted to approve the Agreement.

[4] I-MED applied for approval of the Agreement on 15 November 2025. The application was supported by an F17B Employer Declaration completed by Mr James Wood, Operations Manager, and included supporting material, such as the Notice of Employee Representational Rights and documents provided to employees prior to the access period and vote.

[5] Health Services Union of Australia Victoria No. 1 Branch trading as Health Workers Union (**HWU**) filed a Form F18 on 5 December 2024 that supported approval of the Agreement.

[6] Health Services Union of Australia Victoria No. 3 Branch trading as Victorian Allied Professionals Association (**VAHPA**) also filed a Form F18 on 5 December 2024. VAHPA did not support approval of the Agreement as it said the Agreement was not genuinely agreed to.

[7] At this stage, I cannot approve the Agreement, as I find that I-MED failed to take all reasonable steps to explain the terms and the effects of the Agreement in relation to changes to the classification structure. My reasons follow.

Procedural Background

[8] On 11 December 2024, I-MED provided responses to concerns that I raised with them following my review of the Commission's Agreements Team checklist, the application, proposed agreement and supporting documentation. I-MED also provided a response to VAHPA's concern about whether employees had genuinely agreed to the Agreement.

[9] I listed the matter for hearing and issued Directions. I-MED and VAHPA filed detailed submissions, witness statements and evidence in accordance with my Directions. The HWU filed brief written submissions in support of approval of the Agreement, also in accordance with my Directions.

[10] I held a hearing via Teams on Monday 10 February 2025.

[11] I-MED relied on the evidence of Ms Angela Duncan, Senior Regional Manager. Ms Duncan was cross-examined at the hearing.

[12] VAHPA relied on the evidence of Mr Alex Leszczynski, Senior Industrial Officer for VAHPA. I-MED did not seek to cross-examine Mr Leszczynski but did object to much of his evidence as being impermissible opinion evidence and conclusions of law.

[13] I accepted Mr Leszczynski's witness statement into evidence. Mr Leszczynski gave limited evidence in his statement. As will be apparent, my reasons for reaching my conclusion rely on Mr Leszczynski's statement only in relation to his evidence of what VAHPA told employees.

Relevant Law

[14] Section 186 of the Act sets out the general requirements for the approval of an enterprise agreement. In summary, in relation to a non-greenfields single enterprise agreement, s 186 requires that the Commission must be satisfied that:

- the agreement has been genuinely agreed to by the employees covered by the agreement: s 186(2)(a);

- the terms of the agreement do not contravene s 55 (which deals with interaction between the National Employment Standards and enterprise agreements: 186(2)(c);

- the agreement passes the better off overall test: 186(2)(d);

- the group of employees covered by the agreement is fairly chosen, taking into account geographic, operational or organisational characteristics: 186(3) and (3A);

- the agreement does not contain unlawful terms or designated outworker terms: 186(4) and (4A);

- the agreement has a nominal expiry date that complies with 186(5); and

- there is a term about settling disputes: 186(6).

[15] There are additional matters of which the Commission must be satisfied as provided for in s 187, which are not relevant considerations for this Agreement.

Which tests apply?

[16] The *Fair Work Legislation Amendment (**Secure Jobs, Better Pay**) Act 2022* made changes to enterprise agreement approval processes in Part 2-4 of the Act. The changes commenced operation on 6 June 2023.

[17] The notification time for the agreement was 5 July 2023 which is after the commencement of operation of the *Secure Jobs, Better Pay Act*. Therefore, the genuine agreement test to be applied is set out in part 14 of schedule 1 to the *Secure Jobs, Better Pay Act*, which is s 188 of the Act.

[18] The Agreement was made on 4 November 2024, which is after the commencement of operation of the *Secure Jobs, Better Pay Act.* Therefore, the Better Off Overall Test to be applied is as set out in Part 16 of Schedule 1 to the *Secure Jobs, Better Pay Act*, which is s 193A of the Act.

Concerns raised regarding the Agreement

[19] The following issues were raised with the parties:

(1) Issues relating to the Notice of Employee Representational Rights;

(2) Issues regarding genuine agreement; and

(3) Issues relating to whether the Agreement passed the Better Off Overall Test.

[20] The key issue in this matter is whether employees could have genuinely agreed to the Agreement as I-MED may not have complied with its obligation under s 180(5) to take all reasonable steps to explain the terms and the effect of the Agreement.

Issue (1): Notice – Minor Error Disregarded

[21] I-MED issued the pre-6 June 2023 **Notice** of Employee Representational Rights and therefore did not comply with s 188(3) and s 174(1A). The use of the pre-6 June 2023 Notice was the only error. That is, I-MED did not remove or add any content other than the information it was required to insert.

[22] I-MED submitted that it had done so inadvertently on the basis that it had anticipated bargaining would commence earlier in the year. I-MED submitted that the same group of employees who were provided with the pre-6 June 2023 Notice would have been provided with the updated Notice. I-MED submitted that the notices contained the same information and what differences there were would have had no material impact on employees proposed to be covered by the Agreement.

[23] The differences between the pre-6 June 2023 Notice and the current Notice are:

- The current notice describes the agreement as a single enterprise agreement in various places, where the pre-6 June 2023 Notice did not include the word 'single' before 'enterprise agreement';

- The options in the pre-6 June 2023 Notice relating to low paid authorisations are removed from the current notice;

- The final words "or you revoke the union's status as your representative" in the fifth paragraph of the pre-6 June 2023 Notice is not included in the current notice; and

- The wording relating to certain transitional instruments has changed, so that the current notice refers to sunsetting of instruments in accordance with Schedules 3 and 3A of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

[24] I accept I-MED's submissions and am satisfied that the use of the pre-6 June 2023 Notice was a minor technical error and I disregard the error in accordance with s 188(5) of the Act as I am also satisfied that employees were not disadvantaged by the error.

Issue (2): Genuine Agreement

[25] Section 188 of the Act sets out the considerations when determining whether an Agreement is genuinely agreed to by the employees covered by the Agreement. Those requirements are:

- That the Commission must take into account the **Statement of Principles** made under s 188B;

- That the Commission is satisfied that employees requested to approve the agreement have a **sufficient interest** in the terms of the agreement and are **sufficiently representative** having regard to the employees the agreement is expressed to cover;

- If the agreement is a multi enterprise agreement, the employer must have complied with s 188 of the Act which provides that each bargaining representative that is an employee organisation has agreed in writing to the employer requesting that employees vote on an enterprise agreement;

- the employer must have complied with requirements in relation to the **Notice Of Employee Representational Rights**; and

- the employer must comply with s 180(5) relating to **explaining the terms** of the Agreement.

[26] Under s 188(5), the Commission may disregard minor procedural or technical errors if the Commission is satisfied that employees were not likely to have been disadvantaged by the errors.

[27] Last, the Commission must be satisfied that requirements prescribed by regulations have been met. There are regulations relating to disclosure of benefits under s 179, signing of the agreement under s 185 and requirements for undertakings under s 190.

Explanation of Terms of the Agreement

[28] Section 180(5) of the Act requires 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 circumstances and needs of those employees.

Statement of Principles

[29] Paragraphs 8 – 14 of the Statement of Principles is relevant to s 180(5). The full text of those paragraphs is appended to this decision.

[30] Paragraph 8 of the Statement of Principles provides that all reasonable steps include – at a minimum – explaining to employees how the agreement will alter their existing minimum entitlements and other terms and conditions of employment. Where a proposed agreement will replace an existing agreement, it will generally be sufficient to explain the differences in entitlements and other terms and conditions between the existing agreement and the proposed agreement and the differences between the proposed agreement and any applicable modern award provision that has been varied since the existing agreement was made (paragraph 8(a)). Where a proposed agreement will not replace an existing agreement, it will generally be necessary to explain the differences between the agreement and any applicable award (paragraph 8(b)).

[31] Paragraph 9 of the Statement of Principles provides that there is generally no need to explain trivial differences that have no effect on employees' entitlements and obligations.

[32] Paragraph 10 of the Statement of Principles provides that if the employer makes an incorrect representation or misleads employees about a significant term of the agreement or its effect, the employer will not have taken all reasonable steps.

[33] Paragraph 11 of the Statement of Principles provides that the Commission may have regard to any explanation of the agreement given to employees by one or more employee organisation acting as a bargaining representative for a significant proportion of the employees to be covered by The Agreement.

[34] Paragraphs 11 and 12 of the Statement of Principles provide that the explanation may be provided by:

- hard copy (provided that the Employee has a reasonable opportunity to read the explanation);

- electronic means (provided that the Employee has a reasonable opportunity to read the explanation);

- orally (but the Commission may take into account whether there is a written record or summary kept of the oral explanation, and provided that the employee has a reasonable opportunity to attend the oral explanation); or

- a combination of the above methods.

[35] Paragraph 14 of the Statement of Principles provides that explanations must be provided in an appropriate manner taking into account the particular circumstances and needs of the employees and the Commission may take into account:

- the location where employees are working;

- the environment in which work is performed;

- facilities available at the locations including for example private space for employees to consider materials or information;

- hours of work or rosters that may limit access to relevant facilities or time to consider materials or information;

- circumstances and needs of employees who are absent from a workplace; and

- nature of the work performed by the employees.

Case law regarding s 180(5)

[36] The Full Bench in *Rigforce*[2] adopted an earlier Full Bench's four propositions that summarised the Federal Court's analysis of this requirement in *CFMEU v One Key Workforce Pty Ltd*.[3] The four propositions are:

1. Whether an employer has complied with the obligation in s 180(5) depends on the circumstances of the case.

2. The focus of the inquiry [about] whether an employer has complied is *first* on the steps taken to comply and *then* to consider whether

   a. the steps taken were reasonable in the circumstances and

   b. these were all the reasonable steps that should have been taken in the circumstances.

3. 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 relevant employees in a manner that considers their particular circumstances and needs. This requires attention to the content of the explanation given.

4. An employer does not fall short of complying with its obligation merely because an employee does not understand the explanation provided.

[37] The Full Bench in *Rigforce*[4] also adopted Deputy President Gostencnik's (as he then was) analysis in *BGC Contracting*[5] concerning the nature of a statutory obligation to take all reasonable steps being to:

1. Identify the steps a reasonable person would regard as reasonable in the circumstances that apply;

2. Whether particular steps are reasonable will depend on the particular circumstances existing at the time the obligation arises; and

3. The requirement to take all reasonable steps does not extend to all steps that are reasonably open in some literal or theoretical sense.

[38] While the above cases pre-date the Statement of Principles, the Statement of Principles is consistent with the propositions and largely reflects the case law.

[39] Last, the case law is clear that the object of the obligation in s 180(5) is to ensure that employees are informed about the agreement and so can make an informed choice, that is, to genuinely agree to the Agreement because they have an informed and genuine understanding of what they are agreeing to.[6]

Did I-MED comply with its obligations under s 180(5)?

Background to the Agreement

[40] The Agreement is a consolidation of the industrial instruments that apply to 3 different cohorts of employees in regional Victoria:

1. Employees employed in the Gippsland region, to whom the *I-MED **Gippsland** Enterprise **Agreement 2020*** applied. The Gippsland Agreement 2020 was approved by Commissioner Cirkovic on 10 May 2021. The Gippsland Agreement 2020 began operation on 17 May 2021 and has the nominal expiry date of 1 July 2023.

2. Employees employed in the Sunraysia/Mildura region, to whom the *Mildura Medical Imaging Pty Ltd trading as **Sunraysia** Medical Imaging Pty Ltd Health Professionals and Support Services Enterprise **Agreement 2016***. The Sunraysia Agreement 2016 was approved by Commissioner Johns on 12 October 2016. The Sunraysia Agreement 2016 began operation on 19 October 2016 and has the nominal expiry date of 31 October 2019.

3. Employees employed in the Goulburn Valley region, to whom the *Health Professionals And Support Services **Award** 2020* applies.

[41] As the Agreement consolidated the terms and conditions applying across 3 cohorts of employees, the classifications that applied under each industrial instrument were also consolidated.

[42] VAHPA submitted that I-MED did not explain terms relating to updated classifications and the effect of those updated classifications. VAHPA submitted that I-MED did not explain the changes nor the effect of those changes. VAHPA also submitted that the key effect that I-MED failed to explain is that the changed or updated classifications would make it difficult under the Agreement to progress to higher classifications.

Changes from the Gippsland Agreement 2020

[43] VAHPA submitted that the following changes from the Gippsland Agreement 2020 relating to General Radiography Classifications moving to **Medical Imaging Technologists classifications** under the Agreement were not explained to employees:

(1) **Grade 2 Medical Imaging Technologists classifications** in the Agreement are expected to be able to perform **cannulations**, compared with General Radiographer classifications in the Gippsland Agreement 2020 which does not have this requirement;

(2) **Grade 2 MIT Classifications** in the Agreement covers employees possessing extensive skills and knowledge in a **specialist imaging modality** whereas under the Gippsland Agreement 2020, such employees would be classified as Grade 3 where they engage on a regular basis in at least one specialist imaging modality to a very high level of competency;

(3) Under the Agreement, employees who have a Certificate of Mammographic Practise or equivalent will be **Grade 2 MIT classification**, whereas under the Gippsland Agreement 2020, **mammographers** with a Certificate of Clinical

Proficiency or who have completed an accredited course in mammography would be classified as Grade 3;

(4) **Tutors under the Gippsland Agreement 2020** are classified at grade 4 but would under the Agreement be Grade 2 MIT Classification (which covers tutors) or Grade 3 MIT Classification (which covers area tutors and employees teaching undergraduate and or postgraduate students;

(5) Under the Agreement, a **modality site supervisor** is a **Grade 3 MIT classification** whereas under the Gippsland Agreement 2020, supervision of at least one specialist modality at a practise level is classified as grade 4;

(6) Under the Gippsland Agreement 2020 the Grade 4 classification does not require an employee to be **in charge of a site** or assist someone who is in charge of a site, which is required of classifications higher than Grade 3 in the Agreement.

[44] VAHPA submitted that the following changes from the Gippsland Agreement 2020 relating to **Nuclear Medicine classifications** were not explained to employees:

(1) **Grade 2 NMT classifications** in the Agreement are expected to be able to perform **cannulations**, whereas the Gippsland Agreement 2020 does not have this requirement (although VAHPA notes that cannulation is a task that NMTs would generally perform);

(2) **Grade 3 NMT classifications** in the Agreement covers employees who are **teaching**, whereas teaching is covered under the Grade 4 classification in the Gippsland Agreement 2020;

(3) The Agreement does not refer to employees who are engaged on a regular basis in **PET/CT** and who perform such work to a very high standard, which is a Grade 3 NMT classification under the Gippsland Agreement 2020;

(4) The **Grade 4 NMT classification** in the Agreement requires an employee to be the **Region Nuclear Medicine Co-ordinator**, which is not a requirement of the Grade 4 NMT classification under the Gippsland Agreement 2020.

[45] VAHPA submitted that the following changes from the Gippsland Agreement 2020 relating to **Magnetic Resonance Imaging Technologist classifications** were not explained to employees:

(1) **Grade 2 MRI Technologist classifications** in the Agreement are expected to be able to perform **cannulations**, whereas the Gippsland Agreement 2020 does not have this requirement;

(2) Employees who are **less than 0.5 full-time equivalent Grade 3 MRI Technologist classifications** in the Agreement are required to complete at least 1,000 hours or 2 calendar years before progressing to the next level;

(3) The **Grade 4 MRI Technologist classification** in the Agreement requires an employee to be the **Region MRI Co-ordinator**, which is not a requirement of the Grade 4 MRI Technologist classification under the Gippsland Agreement 2020.

[46] VAHPA submitted that the following changes from the Gippsland Agreement 2020 relating to **Sonographer classifications** were not explained to employees:

(1) The Agreement contains 3 levels of **Trainee Sonographer** classifications, whereas the Gippsland Agreement 2020 contains only 2 levels;

(2) The Agreement does not contain an **exhaustive list of scans** that a **Grade 1 Sonographer** is required to be able to perform, which the Gippsland Agreement 2020 does. VAHPA says the effect of this is that it is less clear and therefore more difficult for a trainee sonographer to progress to Grade 1;

(3) The **list of advanced scans** in the **Grade 2 Sonography** classification under the Agreement does not contain 2 scans listed in the Gippsland Agreement 2020 (Emerging Techniques and Echocardiography);

(4) Relatedly, the Agreement contains specific **Cardiac Sonography** classifications that the Gippsland Agreement 2020 does not;

(5) A **Sonography Tutor** under the Agreement is classified as **Grade 5 Sonographer** and is required to be regularly involved with teaching and training junior and student sonographers, whereas under the Gippsland Agreement 2020, a designated tutor and/or student co-ordinator is classified as Grade 4 Sonographer and does not have the requirement to be "regularly involved".

Changes from the Sunraysia Agreement 2016

[47] VAHPA submitted that classifications in the Agreement are completely different to the classifications in the Sunraysia Agreement 2016. VAHPA drew particular attention to **Grade 2 MIT classifications** applying to **site tutors** under the Agreement, whereas under the Sunraysia Agreement 2016, the same employees are likely to be classified as Grade 3 MIT classifications which applies to employees teaching undergraduate and/or postgraduate students and providing education to staff from other disciplines.

Changes from the Award

[48] VAHPA submitted that classifications in the Agreement are completely different to the classifications in the Award and drew particular attention to:

(1) Under the Agreement, **Grades 2 and 3 MIT, NMT and MRI classifications** can supervise staff but under the Award, staff who are supervising are Health Professional Level 4 classification; and

(2) **Grade 2 MIT and NMT** can perform work across a number of recognised specialties (modalities), whereas under the Award, performing work across a number of recognised specialties within a discipline is contained within Health Professional Level 3 classification.

What steps did I-MED take to explain the Agreement?

[49] I-MED relies on its F17 declaration, Ms Duncan's witness statement and oral evidence to say that it met its obligations to explain the terms and effect of the Agreement by taking a number of steps.

[50] Those steps included:

(1) Regular updates throughout the bargaining period from July 2023 until October 2024.

(2) On 11 October 2024, sending explanatory materials about the Agreement.

(3) In April 2024 and October 2024, providing each employee with a personalised letter that detailed:

a. specific changes to the employee's current role and classification; and
b. change to base hourly rate of pay including percentage increase.

(4) Various information sessions or 'roadshows':
a. onsite and drop-in (informal) sessions in Mildura on 15 and 16 October 2024;
b. onsite informal session at Warragul and an information session onsite at La Trobe regional and online for Gippsland staff on 18 October 2024;
c. onsite in Echuca and online for Goulburn Valley staff on 21 October 2024; and
d. onsite in Shepparton and online for Goulburn Valley staff on 22 October 2024.

[51] The content of the **regular updates throughout the bargaining** period were about the progress of negotiations; and the proposed changes between the Agreement and each of the predecessor Agreements and the Award.

[52] Ms Duncan's evidence included emails sent on 14 and 15 December 2023 that referred to I-MED "seeking to better align our classifications across the VIC/TAS business to provide you with greater consistency and clarity." The email also said that specific information would be provided "in the coming months" about the proposed new classifications. Information in the attached document to the email of 15 December 2023 provided the following information about classifications:

"✓ Updated clerical classifications to provide increased opportunities for progression.

✓ Updated technical classifications to provide clarity and definition for our technical leadership roles"

[53] Ms Duncan gave evidence that in April 2024, I-MED sent individual letters to employees that included "an illustration of changes to your role classification and pay rate." A copy of one such letter was put into evidence. The letter details an employee's current role classification and the illustrative classification that the role would be classified under the Agreement. The letter also appended the entire draft classification structure of the Agreement, which was marked 'Without Prejudice'.

[54] Ms Duncan's evidence is that the classification structure changed in July 2024 from the draft classification structure that was emailed to employees in April 2024. I infer from Ms Duncan's evidence that the July 2024 classification structure is the final structure included in the Agreement.

[55] The letter also appended a flyer. On the flyer, the reference to classifications was:

> "NEW classification structure will provide more opportunities for career and pay progression."

[56] Ms Duncan gave evidence that the individual letters were provided to regional managers in each of the regions to send to employees. Ms Duncan also gave evidence that regional managers "consequently engaged in many conversations with individual employees." Ms Duncan gave evidence that these conversations occurred throughout May and June 2024. I do not, however, have direct evidence from any regional manager about the content of any of these conversations.

[57] Ms Duncan also gave evidence that she attended 2 'roadshows' (information sessions) during the bargaining period:

- 30 April 2024 in Goulburn Valley region (with attendance by video facilitated);
- 2 sessions on 13 May 2024 in Gippsland region, the first being an in-person only small meeting at Warragul Hospital which 6 or 7 employees attended and the second at La Trobe Hospital (with attendance by video facilitated).

[58] Ms Duncan says that the sessions "specifically addressed and explained the changes to the classification, including outlining that there would be more defined leadership roles (which was new for Gippsland and Mildura) and more levels and grades, which allow for greater progression."

[59] Ms Duncan provided the PowerPoint presentation that was used for the information sessions. In that presentation, there is one slide that deals with the updated classifications:

[60] Ms Duncan gave evidence that many employees asked questions during the roadshows, which were answered during the sessions and added to an FAQ document. The FAQ document (which was provided to employees as part of the explanatory materials discussed below) had the following questions relating to classifications (with answers that I have not included):

- Why have you changed the classification system? What was wrong with the old one?
- Will I have to apply to progress through Grades and Levels?
- I don't agree with the classification that was in my individual letter or email. Can I appeal this?

[61] Ms Duncan also gave evidence that numerous employees reached out to regional managers, including herself, to ask questions about their classifications. Ms Duncan says those questions related to their specific placement (such as why they were classified as Grade 2 Level 3 rather than Grade 2 Level 4), rather than the classification structure as a whole.

[62] The **explanatory materials** provided to employees at the beginning of the Agreement's access period on 11 October 2024 included:

- A copy of the Agreement;

- Summary of the National Employment Standards;

- Comparison document between Gippsland EA and Agreement (Annexure L to the F17B/ALD-7);

- Comparison document between Mildura EA and Agreement (Annexure D to the F17B/ALD-8);

- Comparison document between Award and Agreement (Annexure E to the F17B-ALD-9); and

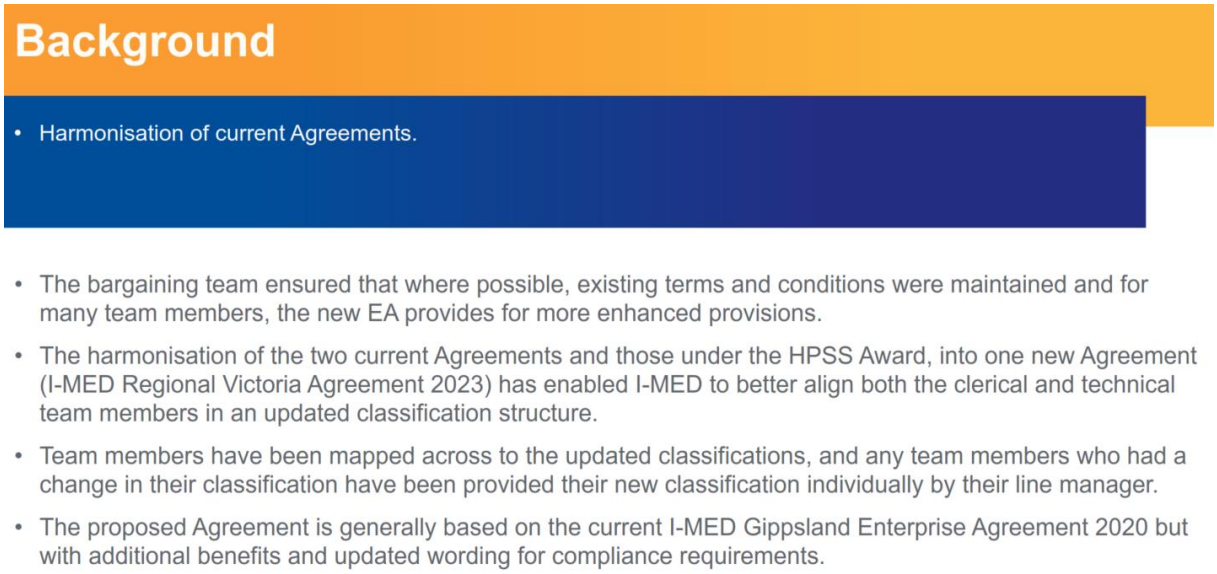
- An FAQ document.

[63] Each of the above materials were provided to me by Ms Duncan as well as with the F17B Employer Declaration.

[64] I-MED also provided **individual letters** to employees. Letters were provided during bargaining in April 2024 (referred to above) and again on 10 October 2024. The 10 October 2024 letter referred employees to the Agreement for the "full details of the classification structure." The letter also included reference to the explanatory materials that were provided by email and a poster/flyer about the Agreement.

[65] Ms Duncan gave evidence that she held the information sessions that I-MED organised. The sessions were a mix of information sessions and informal drop in sessions and held in each of the regions where employees were located as well as allowing for online attendance. The sessions were also at different times throughout the day. Ms Duncan said that the updated classification structure was explained to employees as having more grades and levels than the existing Gippsland or Sunraysia agreements, and that new leadership grades had been added, which did not exist in the Gippsland Agreement. Ms Duncan also provided the Powerpoint presentation used for the formal information session, but did not have notes of what was discussed during informal drop-in sessions.

[66] The Powerpoint presentations were tailored to each of the sites and had some pages that described the differences between the Agreement and the relevant predecessor instrument (being either the Gippsland Agreement 2020 or the Sunraysia Agreement 2016, or the Award). All of the presentations described the changes to the classification structure in the following slide:



[67] There was no reference to the classification structure in each part of the presentation that was tailored to the particular region.

[68] Ms Duncan gave evidence that specific questions were asked in relation to the NMT stream but that no other concerns were raised about the classification structure. Ms Duncan offered her opinion that this was because employees had been provided with personalised letters in April 2024 and had the opportunity of having individual discussion.

Were the above steps reasonable and all the reasonable steps that the employer should have taken?

[69] I am of the view that the above-described steps are reasonable steps to explain the Agreement. I-MED went to great lengths to provide written and oral explanations. In relation to the written explanation, I-MED gave employees a reasonable period to consider them by having a longer than usual access period (14 days, rather than 7). I-MED also ensured that employees had a reasonable opportunity to attend oral explanations by holding multiple sessions in different locations and facilitating online/video attendance. I-MED also provided me with the Powerpoint presentations to evidence what was discussed during oral explanations, although no notes were kept of questions and answers given during those discussions.

[70] However, I am of the view that in respect of classifications, I-MED's explanation falls short. I reach this view reluctantly; as I indicate above, I-MED went to significant and reasonable lengths to explain the terms and effect of the Agreement and the differences with predecessor instruments. A comparison table or chart that provided the current classification in each predecessor instrument with the Agreement's proposed structure may have sufficed to explain the differences in the terms of the Agreement. How I-MED could have explained the effect of the differences is more challenging.

[71] It is clear that the alignment of the classification structure was a significant part of bargaining. Ms Duncan acknowledges that the initial attempt to align the 3 classification structures into one structure under the Agreement resulted in a classification structure that did not have streams. This structure was more similar to the Award and to the Sunraysia Agreement 2016 but fundamentally different from the Gippsland Agreement 2020. During bargaining, Ms Duncan says I-MED incorporated feedback from VAHPA, employees and the bargaining team, and offered a classification structure that included streams for MIT, NMT and MRI Technologists and "more closely resembled the Gippsland Agreement 2020.

[72] VAHPA cross examined Ms Duncan in detail about each of the differences outlined at paragraphs [43] - [48]. Ms Duncan acknowledged each of the differences and acknowledged that none of the differences were outlined in any other explanatory material provided. In respect to how differences were explained, this was only at the highest level (such as the number of classifications) but does not identify the specific changes.

[73] While specific changes to the classification structure may have been discussed during information sessions in the access period, Ms Duncan acknowledged in cross-examination

that no notes were kept of any oral discussions with employees. I therefore do not have any material upon which I can be satisfied that changes were explained.

[74] Ms Duncan also referred to numerous individual conversations that she and other regional managers had with individual employees about their classification throughout the bargaining period. Again, no notes of any of those conversations were provided. The only written documentation of those discussions is reflected in the FAQ Document. The FAQ Document addresses the changes at a high level: it confirms there are changes; it lists specific leadership roles; references that there are more levels in MRI grades; and says that the classifications are more consistent across VIC/TAS.

[75] I-MED submits that the changes are trivial or minor and did not warrant more than providing the updated classification structure to employees and allowing for discussion. I disagree that the changes were minor, particularly where duties such as teaching or tutoring are moved from a higher classification to a lower classification as appear to have occurred.

[76] I-MED submits that it is appropriate to take into account the circumstances of employees in having regard to whether the steps were reasonable. It says that the employees covered by the Health Professionals stream are tertiary educated and professional, and providing employees with the classification structure and the opportunity to review it was sufficient. At the same time, I-MED submit that providing a comparison table may have been providing too much information that would have caused confusion.

[77] The Act obliges employers to explain terms and their effect to employees. I-MED produced comparison documents that broadly reflected the changes in the Agreement in an appropriate way and produced three separate ones, but it did not do so for the updated classification structure. Given that classification was a significant part of bargaining, it could have also produced a comparison chart or 3 comparison charts for the changes in the classification structure. The failure to do so means that I-MED did not explain the terms of the Agreement to employees.

[78] The Act and Statement of Principles allow me to take into account employees' circumstances and needs in considering whether an explanation has been given in an appropriate manner, but it does not detract from the employer's obligation to give the explanation.

[79] In relation to **explaining the effect of the changes in the classification structure**, I-MED rely on providing individual letters to employees. The letters detailed the employee's classification and rate of pay under the Agreement compared with their current classification and rate of pay. I-MED provided these letters on 2 occasions: during bargaining in April 2024 and on 10 October 2024, before the start of the access period. Together with the letters in April 2024, I-MED provided the then draft classification structure, which was changed in July 2024.

[80] I am persuaded by VAPHA's submission that I-MED misled employees by conveying that the classification structure changes were all positive (e.g. increased opportunities to progress) and without the detail of the actual changes by way of a comparison table or chart may have led to employees forming the view that there were no negative changes, when the

movement of duties relating to teaching across various streams was changed into lower classifications than under the current instruments. It is acceptable for an employer to encourage employees to vote for an agreement by highlighting the positive aspects, but in the absence of pointing out specific differences and changes, I cannot be satisfied that I-MED took all reasonable steps to explain the terms and effect of the Agreement such that employees could make an informed choice.

[81] Further, as observed by Deputy President Gostencnik (as he then was) in *BGC Contracting*, an employer is required by s 180(5) to explain all of the agreement, because employees are not asked to agree to just those parts of an agreement that must apply to them.[7] So, while the step of providing individual employees with how the updated classification affects them is an appropriate and reasonable step, it is not all the reasonable steps that should have been taken.

[82] While the obligation to take all reasonable steps does not include taking all possible steps, that the changes in the classification structure required alignment of 3 predecessor instruments and formed a significant aspect of bargaining leads me to the view that the employer was obliged to take more steps than it did to explain the changes.

[83] Paragraph 11 of the Statement of Principles allows me to have regard to any explanation given by an employee organisation that is a bargaining representative for a significant proportion of the employees to be covered by the Agreement. Mr Leszczynski gave evidence of the material that VAHPA produced and emailed to the approximately 60 employees it had on its mailing list. The "Vote No" flyer produced by VAHPA said only this about the classification structure:

> "lots of issues still remain within the proposed classification structure including areas with many inconsistencies between modalities and much left to the discretion of management, which delegates have expressed would be a problem moving forward."

[84] There is not enough in the above nor in Mr Leszczynski's evidence for me to be satisfied that I-MED has complied with its obligation under s 180(5). Further, 60 employees is not a significant proportion of the employees to be covered by the Agreement, which in Ms Duncan's evidence is 201 and in Mr Wood's F17B declaration 179. 60 is less than half of either total number of employees, and I am of the view that significant means more than a majority.

[85] Last, Ms Duncan's limited evidence of conversations with individual employees who did not otherwise question or seek more information about the updated classification structure cannot be relied upon by the employer to demonstrate that it has complied with its obligation to explain the terms and effect of the Agreement.

[86] In summary, while I am of the view that I-MED did take reasonable steps to explain the Agreement, it failed to take all reasonable steps as it did not explain the terms and effect of the updated classification structure. I am of the view that those changes were not minor or trivial.

[87] Section 190(1) allows me to accept an undertaking with respect to the issue of whether employees have genuinely agreed to an agreement under s 186(2). Section 188(5)(aa) allows

me to disregard minor procedural or technical errors where employees may not have been disadvantaged by the error. It is appropriate to provide I-MED with an opportunity to offer an undertaking or make submissions about the application of s 188(5) before finally determining this matter, and to provide bargaining representatives the opportunity to provide their views on any undertakings.

Issue (3) – BOOT and Offered Undertakings

[88] I raised concerns with I-MED about how certain provisions may have not assisted the Agreement to pass the better off overall test. The concerns related to specific classifications where the Agreement rates of pay were only slightly above the Award. Those particular classifications are:

Clerical
- Support Services: Level 1,Grade 1 level 1
- Support Services: Level 2, Grade 1 level 2
- Support Services: Level 3, Grade 2 level 1
- Support Services: Level 8 – pay point 3, Grade 5 level 3

Medical Typists
- Support Services: Level 3,Grade 1

MIT/NMT
- Health Professional: Level 4 – pay point 3, CMIT Grade 2 level 1
- Health Professional: Level 4 – pay point 4, CMIT Grade 3

[89] I-MED said that they do not employ and are not likely to employ:

- Grade 1 Medical Typists; and
- Grade 1 Clerical Staff

[90] I-MED provided further information and offered relevant undertakings. I intend to consider those undertakings together with any further undertakings that may be offered in my final assessment of whether the Agreement can be approved.

Other matters under s 186

[91] Other than the matters above, I am satisfied that the other relevant statutory requirements for approval of the Agreement in ss 186 and 187 have been met.

Delegates' Rights

[92] The Agreement does not include a delegates' rights term as required by s 205A . If the Agreement is approved, I intend to insert Clause 33A of the *Health Professionals and Support Services Award 2020* into the Agreement.

Directions

[93] I make the following Directions:

2) I-MED may provide further submissions about the application of s 188(5) in relation to my views about its failure to comply with s 180(5) and may offer undertakings to address the matters in this decision (relating to s 180(5) and BOOT issues previously raised). I-MED must do so by emailing my Chambers and copying in all other parties by no later than **12:00pm noon on 16 May 2025**.

3) Bargaining representatives may provide submissions in reply to any submissions of I-MED about the application of s 188(5) and may provide their views by emailing my Chambers and copying in all other parties by no later than **12:00pm noon on 23 May 2025**.

4) If bargaining representatives make submissions in reply in relation to the application of s 188(5), I-MED may reply to those submissions by emailing my Chambers and copying in all other parties by no later than **12:00pm noon on 27 May 2025**.

[94] I will make a final decision after **27 May 2025**.

COMMISSIONER

Appearances:

Mr S Crilly, Seyfarth Shaw, with permission for the Applicant
Mr A. Leszcynski, for the HSU Victoria no 3 Branch (VAHPA)

Hearing details:

10 February 2025
Melbourne
Via Microsoft Teams

Printed by authority of the Commonwealth Government Printer

<PR786919>

APPENDIX A

Statement of Principles Paragraphs 8-14

8. Section 180(5)(a) of the Fair Work Act requires the employer to take all reasonable steps to explain the terms of a proposed enterprise agreement, and the effect of those terms, to employees employed at the time who will be covered by the agreement. This should include at a minimum explaining to employees how the proposed agreement will alter their existing minimum entitlements and other terms and conditions of employment. In explaining this, subject to paragraph 9:

    a. where a proposed enterprise agreement will replace an existing enterprise agreement—it will generally be sufficient to explain:

        i. the differences in entitlements and other terms and conditions between the proposed agreement and the existing agreement, and
        ii. the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award provisions that have been varied since the existing agreement was made (including award variations that have not yet come into effect), or

    b. where a proposed enterprise agreement will not replace an existing enterprise agreement—it will generally be necessary to explain the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award.

9. In explaining to employees how the proposed enterprise agreement will alter their existing minimum entitlements and other terms and conditions of employment, there is usually no need to explain trivial differences between the proposed agreement and an existing enterprise agreement or modern award that have no effect on employees' entitlements or obligations.

10. Section 180(5) will generally not be satisfied if the employer makes an incorrect representation or misleads employees (by words, action or otherwise) about a significant term of the proposed enterprise agreement or its effect.

11. In determining whether section 180(5) has been complied with, the FWC may have regard to any explanation of the proposed enterprise agreement given to employees by one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees to be covered by the agreement.

12. Subject to paragraph 13, an employee may be provided with the explanation required by section 180(5):
    a. by giving the employee, or ensuring the employee has access to, a hard copy of the explanation

b. by electronic means (either by sending the explanation to the employee, or by sending the employee a link to the explanation or otherwise giving the employee access to the explanation online)
c. orally, but the FWC may take into account whether there is a written record or summary kept of the oral explanation, or
d. by a combination of the above methods.

13. Where an employee is provided with the explanation required by section 180(5) in part or full by the method in paragraph 12(a) or 12(b), the employee should have a reasonable opportunity to read the explanation. Where an employee is provided with the explanation required by section 180(5) in part or full by the method in paragraph 12(c), the employee should have a reasonable opportunity to attend the oral explanation.

14. Section 180(5)(b) of the Fair Work Act requires the explanation of the proposed enterprise agreement to be provided in an appropriate manner taking into account the particular circumstances and needs of the employees. In determining whether the explanation of the proposed enterprise agreement was given in an appropriate manner, in addition to taking into account the circumstances and needs of the kinds of employees in section 180(6), the FWC may take into account:

    a. the location(s) where employees are working
    b. the environment(s) in which work is performed (for example, office, workshop, field, operating equipment or machinery, driving between locations)
    c. facilities available at the location(s) or in the environment(s) in which work is performed (for example, internet access, computer facilities, ability for employees to access mobile telephones while working, printing/copying facilities, private space for employees to consider material or information)
    d. hours of work or rosters which may limit access to relevant facilities or limit the time employees have to consider materials or information
    e. the circumstances and needs of employees who are absent from a workplace due to their roster cycle or for other reasons, and
    f. the nature of the work performed by the employees.

NOTE 1: Under section 180 of the Fair Work Act, before an employer requests that employees vote on a proposed enterprise agreement, 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 (section 180(5)(a)), and
(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees (section 180(5)(b)).

Section 180(6) provides that, without limiting section 180(5)(b), 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 section 180(5)(b):

(a) employees from culturally and linguistically diverse backgrounds

(b) young employees, and
(c) employees who did not have a bargaining representative for the agreement.

NOTE 2: Section 188(5) provides that the FWC may disregard minor procedural or technical errors in relation to section 180(5), provided that it is satisfied that the employees were not likely to have been disadvantaged by the errors.

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[1] Ms Duncan's evidence in her witness statement was that the Agreement covers a total of 201 employees; in I-MED's F17B, Mr James Wood, Operations Manager declared that 179 employees were covered by the Agreement at the time of the vote.

[2] *The Australian Workers Union v* ***Rigforce*** *Pty Ltd* [2019] FWCFB 6960 at [35]

[3] *CFMEU v* ***One Key*** *Workforce Pty Ltd* [2017] FCA 1266, 270 IR 410 at [94]-[109]; affirmed on appeal: [2018] FCAFC 77, 277 IR 23

[4] *Rigforce* above at [36]

[5] *Re* ***BGC Contracting*** *Pty Ltd* [2018] FWC 1466 at [43]

[6] *One Key* [2018] FCAFC 77 at [115] and [156]

[7] BGC Contracting [2018] FWC 1466 at [97]