



# DECISION

*Fair Work Act 2009*  
s.604 - Appeal of decisions

**United Workers' Union**

v

**PM Fresh Pty Ltd**  
(C2025/12448)

DEPUTY PRESIDENT ROBERTS  
COMMISSIONER MATHESON  
COMMISSIONER CRAWFORD

SYDNEY, 24 MARCH 2026

*Appeal against decision [\[2025\] FWCA 3892](#) of Commissioner Perica at Melbourne on 19th of November 2025 in matter number AG2025/3543*

## *Background*

[1] This decision concerns an appeal by the United Workers' Union (UWU) under s.604 of the *Fair Work Act 2009* (Cth) (Act) against a decision of Commissioner Perica on 19 November 2025 (Decision)<sup>1</sup> to approve a proposed enterprise agreement known as the *PM Fresh Pty Ltd Broadmeadows (Vic) and United Workers Union Enterprise Agreement 2025* (Agreement).

[2] In considering the application for approval of the Agreement the Commissioner raised a better off overall test (BOOT) concern with the parties that:

- clause 24.7.2 of the Agreement provided that employees would be paid at 150% for hours worked between 3.00 am and 6.00 am and then at single time (100%) for hours worked thereafter; and
- under clause 24 of the *Food, Beverage and Tobacco Manufacturing Award 2020* (Award) employees are entitled to a shift penalty of 112.5% for the entire shift when commencing between 3.00 am and 6.00 am;
- if an employee started work at 5.00 am and received 150% for the first hour and 100% thereafter it is unclear how this employee would be better off, as under the Award they would attract a penalty rate of 112.5% for their entire shift.

[3] It was not in contention that the Award was the relevant modern award for the purposes of the BOOT. The Commissioner determined to approve the Agreement after the employer covered by the Agreement provided undertakings. The undertakings included the following:

‘6. At clause 24.7.2 Morning Shift Penalties, *replace this clause with Clause 24 of the Award*’ (Undertaking 6)

[4] The Commissioner had sought the views of the UWU as a bargaining representative. The UWU did not raise any objections to the undertakings. In accepting the undertakings, the Commissioner indicated he was satisfied that the undertakings would not cause financial detriment to any employee covered by the Agreement and would not result in substantial changes to the Agreement.<sup>2</sup>

*Permission to appeal*

[5] The UWU requires the Commission's permission to appeal from the Commissioner's decision. Section 604(2) provides that the Commission must grant permission if it is satisfied that it is in the public interest to do so. The parties consented to the question of whether permission to appeal should be granted being determined "on the papers".

[6] Consideration of the public interest involves a broad value judgment.<sup>3</sup> Matters that may engage the public interest include issues of importance and general application, a diversity of decisions at first instance, or if the decision manifests an injustice.<sup>4</sup> Where the public interest is not engaged, the Commission may grant permission to appeal on general discretionary grounds. In deciding whether to grant permission to appeal, it is unnecessary and inappropriate to conduct a detailed examination of the appeal grounds.<sup>5</sup> However, it is necessary to engage with the appeal grounds to consider whether they raise an arguable case of appealable error. An appellant must ordinarily demonstrate that there is such a case in order to be granted permission to appeal, as an appeal cannot succeed in the absence of error.<sup>6</sup> The fact that a member at first instance may have made an error is not necessarily a sufficient basis to grant permission to appeal.

*Grounds of appeal*

[7] The UWU has appealed the Decision on the ground that the Commissioner erred in approving the Agreement and accepting Undertaking 6 in the approval process. The UWU contends that the effect of the undertaking is that employees who commenced their ordinary 8 hour shifts at 3.00am and 4.00am would suffer a financial detriment under the terms of Undertaking 6 in comparison to clause 24.7.2 of the Agreement and that the approval was contrary to s.190(3)(a) of the Act because the Commissioner could not have been satisfied that the acceptance of Undertaking 6 was not likely to cause financial detriment to any employee covered by the Agreement.

[8] In its written submissions the UWU said:

- an employee commencing an early morning shift at 3.00 am, would see their loading reduced from 150% to 95% on each shift; and
- employees working an early morning shift commencing at 3am or 4am will suffer financial detriment under clause 24 of the Award compared to clause 24.7.1 (sic) of the Agreement across all classification levels and years of operation ranging from a loss of \$7.91 to \$86.98 each week;
- in the worst case an employee may be up to \$4,522.96 worse off each year.

[9] The UWU submitted that in purporting to reach a state of satisfaction that the undertaking was not likely to cause financial detriment, the Commissioner either did not

consider whether financial detriment was likely or *did* consider whether financial detriment was likely and reached a conclusion that was not reasonably open to him.

[10] The UWU submitted that permission to appeal should be granted pursuant to s.604(2) because:

- the appeal raises a significant question as to whether the Agreement was ever validly approved and it is in the interest of all parties and the public interest that any doubt as to the effective operation of the Agreement be resolved; and
- the public interest is enlivened as:
  - the appeal raises matters of general importance and application in relation to the approach of the Commission to achieving a state of satisfaction in s.190(3)(a) of the Act;
  - the decision is affected by error and it is in the public interest that the error be corrected;
  - the acceptance of an undertaking which causes financial detriment undermines the legislative outcome and purpose of s.190(3)(a) and is inconsistent with public policy considerations.

[11] The UWU submitted that further, or in the alternative, the Commission should exercise its discretion to permit the appeal because:

- the decision manifests an injustice in that the current application of Undertaking 6 as a term of the Agreement causes employees who commence their ordinary early morning shift at 3.00 am and 4.00 am to suffer financial detriment;
- employees covered by the Agreement are low-waged employees and are paid base rates of pay between 0.14-3.33% higher than the underlying award, thereby any financial detriment suffered is borne by employees who already earn below-average wages which poses a substantial injustice if leave is refused.

[12] The respondent submitted that:

- there is no financial detriment arising from the acceptance of the undertaking;
- absent the undertaking, employees would have been worse off due to the operation of the former clause 24.7.2, which applied a 150% rate between 3.00 am and 6.00 am, resulting in remuneration below Award entitlements;
- its evidence demonstrates the undertaking was necessary to prevent employees being paid less than the Award and the Commissioner did not fail to consider the likelihood of financial detriment and did not reach a conclusion that was not reasonably open to him;
- the UWU's assertion that the employees are paid base rates between 0.14% and 3.33% is wrong. The Respondent provided calculations to support this submission;
- the BOOT requires a global assessment of whether employees would be better off overall under the Agreement than the Award and not a line-by-line comparison;
- all employees are better off overall;
- the Commissioner did not err in approving the Agreement with the undertaking and the application to appeal should be dismissed.

*Consideration*

[13] Clause 24.6.2 of the Agreement defines ‘early morning shift’ as follows:

‘24.6.2 **Early morning shift** means any shift where an employee’s ordinary hours of work commence between 3.00 am and 6.00 am.’

[14] Clause 24.7.2 of the Agreement states:

24.7.2 **Early morning shift** – An Employee who works on Early Morning Shift shall be paid as follows:

24.7.2.1 At the rate of 150% for the employer’s ordinary hours of work between 3:00am and 6:00am; and then at

24.7.2.2 Single time rates for the remainder of the employee’s ordinary hours of work on the shift i.e. for work performed from 6:00am until the completion of the employee’s ordinary hours on the day, or at the rate or 150% for an early morning shift worked on a Saturday”.

**Note:** Any time worked by an Early morning shiftworker immediately before the employee’s 3:00am shift start is overtime and shall be paid at the rate or 200%.

**Further Note:** Where an Early morning shiftworker continues to work after the completion of the employee’s ordinary hours of work on a shift the employee shall be paid for such overtime at the rate of 150% for the first 3 hours and then 200%.

[15] In comparison, clause 24 of the Award relevantly states:

24. Special provisions for shiftworkers

[Varied by PR730918]

24.1 For the purposes of this award:

...

(a)

(b) early morning shift means any shift starting between 3.00 am (2.00 am for baking production employees) and 6.00 am (or 5.00 am if the span of ordinary hours is varied pursuant to clause **Error! Reference source not found.**);

(c)

24.3 Rates for shiftworkers

(a) An employee who works on early morning shift must be paid **112.5%** of the ordinary hourly rate for that shift.

[16] Subject to any agreed facilitative arrangements, a shift will be considered an ‘early morning shift’ under both the Agreement and Award if the shift starts between 3.00 am and

6.00 am. Under the Agreement, an employee working on early morning shift will be paid at the rate of 150% in respect of ordinary hours between 3.00 am and 6.00 am and will then be paid at a rate of 100% for hours worked after 6:00am. Under the Award, an employee would be paid at 112.5% for the whole early morning shift.

[17] The Agreement does not prescribe a shift length for a shiftworker. The Agreement contemplates that 12-hour shifts may be introduced by agreement between the employer and a majority of employees in the enterprise or part of it, subject to certain conditions including that employees employed on continuous work be paid at the rate of 200% and employees employed on other shiftwork be paid at the rate of 150% for the first 3 hours and 200% thereafter.<sup>7</sup> As such, the issue does not impact 12-hour shifts where higher loadings apply. It is unclear what shift lengths the Agreement-covered employees will be working in practice.

[18] The power to approve an agreement with undertakings is enlivened only if the Commission has a concern that the agreement does not meet the requirements set out in ss.186 and 187. Before an agreement is approved, the Commission must be satisfied that it passes the BOOT. A concern held by the Commission about whether the agreement passes the BOOT empowers it to consider an undertaking provided by an employer. The Commissioner held a BOOT concern. He raised that concern and an undertaking was provided by the Respondent to address the concern. The Commissioner sought the views of each person he knew was a bargaining representative for the Agreement as he was required to do by s.190(4) of the Act. However, the Commissioner was only able to accept Undertaking 6 if he was satisfied that the effect of accepting it was not likely to:

- (a) cause financial detriment to *any employee* covered by the Agreement; or
- (b) result in substantial changes to the Agreement.

[19] Consideration of whether the above conditions are met in any given case will require an evaluative judgment to be made in the nature of an exercise of a discretion.<sup>8</sup>

[20] There is now a contest between the UWU and Respondent about whether the Commissioner could have been satisfied that the undertaking would not cause financial detriment to any employee covered by the Agreement. Consistent with the comments of the Full Bench in *Construction, Forestry, Maritime, Mining and Energy Union v Lightning Brick Pavers t/as Lightning Birck Pavers*,<sup>9</sup> we consider that the financial detriment referred to in s.190(3)(a) is one that arises by a comparison between the terms of the Agreement including the undertaking, with the terms of the Agreement as voted upon by the employees (in the case of a non-greenfields agreement).<sup>10</sup> The calculations provided by the respondent on the other hand appear to proceed by comparing the hourly rates and penalty rates provided by the Award with hourly rates and penalty rates provided by the Agreement, including Undertaking 6.

[21] It is unclear as to precisely how the UWU calculated the financial detriment referred to in its submissions and no evidence of actual shift arrangements has been provided to the Commission. It is not necessary to embark on a detailed analysis of all permissible roster scenarios under the Agreement in deciding whether to grant permission to appeal. If permission is granted, the parties will be able to make further submissions. However, based on the Commission's analysis as set out below, an employee working an 8-hour shift and who has a 3.00am start would receive less under the Agreement including Undertaking 6 accepted by the

Commissioner, than they would receive based on the terms of the Agreement as voted upon by the employees.

Agreement Level/hourly rate	Agreement as voted on by employees based on shifts of 7.6 hours	Agreement applying Undertaking 6 based on shifts of 7.6 hours	Difference per shift	Detriment per week assuming 5 shifts
1 - \$25.78	234.60	219.41	-15.19	-75.95
2 - \$26.43	240.53	224.96	-15.57	-77.85
3 - \$27.34	248.79	232.71	-16.08	-80.40
4 - \$28.16	256.26	239.70	-16.56	-82.80
5 - \$29.53	268.74		- 17.41	-87.05

[22] The Commissioner was required to give consideration as to whether the s.190(3) requirements for the acceptance of the undertaking were satisfied. While the acceptance of Undertaking 6 may have addressed the Commissioner’s concern regarding employees who commenced work at 5.00am, it is not apparent from the Decision that the Commissioner considered whether the effect of accepting the undertaking was not likely to cause financial detriment for employees working an early morning shift commencing work at 3.00 am and 4.00 am. Given the figures above and the available material, it appears a financial detriment may arise in respect of those employees.

[23] We note that the UWU is now appealing the Decision in circumstances where the UWU’s views about the undertakings were sought by the Commissioner and the UWU did not raise any concerns. The failure of the UWU to raise this issue was unhelpful to the approval process given that the Commission is required to have regard to the views of the bargaining representatives in applying the BOOT.<sup>11</sup> The figures provided by the UWU in the submissions in this matter were also of limited assistance. The UWU’s failure to raise the issue with the undertakings approved by the Commissioner is a matter of concern. However, the Agreement prescribes minimum conditions of employment for employees covered by the Agreement and its impact obviously extends beyond the interests of the UWU.

[24] As noted above, the Commissioner was required to be satisfied that the effect of accepting Undertaking 6 was not likely to cause financial detriment to *any employee* covered by the Agreement. We find that the UWU has demonstrated an arguable case of appealable error in relation to the Commissioner’s decision to accept Undertaking 6.

[25] If Undertaking 6 could not have been accepted because it was incapable of satisfying the condition in s.190(3)(a), this would amount to a jurisdictional error in the approval of the Agreement. This calls into question whether the Agreement was validly approved. In these circumstances we are also persuaded that it is in the interest of all parties and in the public interest that any doubt as to the effective operation of the Agreement be resolved.

[26] We order that permission to appeal be granted.



DEPUTY PRESIDENT

*Hearing details:*

Determined on the papers

*Final written submissions:*

*Appellant* 6 February 2026

*Respondent* 9 February 2026

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<sup>1</sup> [\[2025\] FWCA 3892](#).

<sup>2</sup> [\[2025\] FWCA 3892](#) at [2].

<sup>3</sup> *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44].

<sup>4</sup> *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266 (*Makin*) at [27].

<sup>5</sup> *Trustee for the MTGI Trust v Johnston* [2016] FCAFC 140 at [82].

<sup>6</sup> *Coal & Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at 204.

<sup>7</sup> Clause 24.4.3.

<sup>8</sup> [\[2018\] FWCFB 3825](#) at [23].

<sup>9</sup> [\[2018\] FWCFB 3825](#) at [26].

<sup>10</sup> See also *Australian Nursing and Midwifery Federation v Uniting Church in Australia Property Trust (Q.)*; *Australian Workers' Union, The; United Workers' Union* [\[2020\] FWCFB 848](#) at [114] and following.

<sup>11</sup> Section 193A.