DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Karijini Rail Pty Limited
(AG2018/3844)

DEPUTY PRESIDENT BEAUMONT PERTH, 30 APRIL 2019

Application for approval of the Karijini Rail Pty Ltd Rail Operations Pilbara Enterprise Agreement 2018. – whether genuinely agreed s 180(5), s 188(1)(c)

[1] Karijini Rail Pty Ltd made an application to the Commission for the approval of an enterprise agreement known as the *Karijini Rail Pty Ltd Rail Operations Pilbara Enterprise Agreement 2018* (the **Agreement**). The Agreement is a single-enterprise agreement.

[2] There is a controversy over whether the Agreement should be approved by the Fair Work Commission.

[3] The Construction, Forestry, Maritime, Mining, and Energy Union (**CFMMEU**) objected to the approval of the Agreement on several grounds. While the CFMMEU did not have a right to be heard, I decided to hear from it.[1] Karijini had no objection to this course.[2] I was satisfied that the CFMMEU had the requisite interest in the application its rules providing coverage of the mining industry. Further, it was likely, to the extent that Karijini was to employ persons under the Agreement in the future, some would be members of the CFMMEU.[3]

[4] The CFMMEU's objections included that the Agreement had not been genuinely agreed to, it had not passed the Better Off Overall Test (**BOOT**), and a term (or terms) of the Agreement contravened the National Employment Standards (**NES**).

[5] Concerning the issue of whether the Agreement was genuinely agreed to, the first contention was that when the Agreement was made it was not possible for the two train drivers (the **two employees**) who were asked to approve the Agreement to be covered by it. The coverage clause essentially confined coverage to employees employed in the classifications set out in the Agreement when engaged in particular rail operations. When the Agreement was made, Karijini did not have a contract to provide rail crew labour at those particular operations, was not performing such work, and no work was guaranteed.

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[1] *Fair Work Act 2009* (Cth) s 590.

[2] *Construction, Forestry, Mining and Energy Union v CSRP Pty Ltd* [2017] FWCFB 210.

[3] Ibid.

Therefore, the two employees who made the Agreement were not covered by it when made, and it followed, according to the CFMMEU that the Commission could not be satisfied the Agreement was genuinely agreed to.

[6] Adopting a broader view, the CFMMEU submitted that the principal purpose for Karijini's employment of the two employees was simply to enable the making of an enterprise agreement; it was not the performance of work. Again, the CFMMEU submitted that the Commission could not be satisfied the Agreement was genuinely agreed to.

[7] The second issue concerned whether the Commission could be satisfied that Karijini had complied with s 180(5) of the *Fair Work Act 2009* (Cth) (the **Act**), namely that all reasonable steps had been taken to explain the terms of the agreement and their effect. In short, the CFMMEU submitted that the Commission could not be satisfied because what had been provided was a precis of the terms, not an explanation. Further, there was a failure to address terms of confusion and/or contradiction, and a failure to properly identify the less beneficial terms in the Agreement. Non-compliance with s 180(5) thereafter gave rise to the issue of whether the two employees' consent to the Agreement was informed. The CFMMEU contended it was not.

[8] The third issue was that the Agreement had not passed the BOOT due to multiple less beneficial terms, or because there were a number of terms in the Agreement which did not have an equivalent provision in the *Mining Industry Award 2010* (**Award** and **Reference Instrument**). The last issue concerned the annual leave clause, which was said to contravene the NES and render the Agreement unable to be approved.

[9] In short, the pressing issues were those concerning whether or not the agreement had been genuinely agreed to. While there were issues regarding the NES and the BOOT, I considered they were readily addressed by the appropriate undertakings and did not preclude the approval of the Agreement.

[10] Having considered the evidence and submissions, I have arrived at the conclusion that the Agreement was not genuinely agreed to by the two employees covered by the Agreement.

[11] Karijini characterised the CFMMEU's argument concerning s 180(5) as being premised on a misapplication of the authorities and an imbalanced analysis of context in which Karijini explained the terms. I do not agree. Admittedly, the CFMMEU did appear to cavil about the minutiae of all of the explanation. Section 180(5) does not require an employer to do all possible things to explain every detail of an enterprise agreement. The enquiry is whether all reasonable steps were taken to explain the Agreement's terms and their effect, and whether the explanation was appropriate in light of the particular circumstances and needs of the two employees.

[12] In this respect I note that Karijini was not rolling over an enterprise agreement with which the two employees were familiar. The two employees were in fact new to the company, and as it was, the company had only been recently established. An Agreement was presented to the two employees where only three entitlements were more beneficial, or not conferred by, the Reference Instrument.

[13] Those three entitlements (or terms of the Agreement) were the base rates of pay, overtime, and shift work. Those entitlements are significant. In their absence, or rather where

the entitlements were equivalent or less than those provided by the Award, the Agreement would not have passed the BOOT. Although some employees may have altruistic tendencies, and perhaps, for them, information about their rate of pay is not so pressing, for the most part, employees want to know what they will be paid. One of the two employees captured this very curiosity when asking the question 'how is the salary made up for different shift patterns such as night shift, afternoon shift, and weekend work?'. It is a reasonable question. Particularly when the base rate of pay was said to be inclusive of allowances and there was a simple shift loading of 25%. In effect, that question was unanswered save for some information being provided about the operation of an individual flexibility arrangement (**IFA**).

[14] Compliance with s 180(5) in the circumstances of this case necessarily entailed a description of how that base rate of pay was made up and how it compared to the rates of pay and allowances in the Award. It may be the case the penalties are compensated for by the provision of a loading under the Agreement. Again, that required an explanation as to how that loading was arrived at and how it compared to the Reference Instrument. This constitutes an explanation provided in an appropriate manner, and is a step that is reasonable when one considers the phrase 'all reasonable steps'.

[15] I have concluded that the requirements in s 180(5) of the Act were not met. Satisfaction of the requirements under s 186(2)(a) is a jurisdictional prerequisite for the approval of any enterprise agreement. If s 180(5) is not satisfied, then I cannot be satisfied of the requirements of s 188(1).

[16] However, it must be said that while I have concluded that there was non-compliance with s 180(5), it is the case that I have determined that there are no other reasonable grounds for believing the Agreement has not been genuinely agreed to by the two employees.

[17] It follows that having concluded that that the Agreement has not been genuinely agreed to by the two employees, because of non-compliance with s 180(5), consideration turns to whether s 188(2) would nevertheless result in a conclusion to the contrary. The unanswered question is whether the Agreement would have been genuinely agreed to but for a minor procedural or technical error made in relation to the requirements mentioned in s 188(1)(a); and whether the error was such that it was not likely to have disadvantaged the two employees. Directions will be issued to the parties to address this point, in addition to whether an undertaking under s 190 may meet the concern identified in this decision - odd as that may be.

[18] Detailed reasons for my decision follow.

Witnesses

[19] The following witnesses gave evidence on behalf of Karjini:

- Mr Graham Robert Butler, Director of both Karijini and Railtrain Pty Ltd (**Railtrain**) (**Mr Butler**);
- Mr Christopher Elston, General Manager – Operation Support Services at Railtrain (**Mr Elston**).

[20] The CFMMEU relied on the witness statement of Mr Gregory Busson, District Secretary of the Western Australian District Branch of the CFMMEU (**Mr Busson**). Mr Busson was not required for cross examination and did not give oral evidence.

Background

[21] Railtrain Holdings Pty Ltd (**Railtrain Holdings**) is the holding/parent company of Railtrain Group Pty Ltd (**Railtrain Group**), an intermediary holding company. There are several subsidiaries in the Railtrain Group, including Railtrain, TRRC Pty Ltd (**TRRC**), and the later formed, Karijini. Mr Butler is a director of the subsidiaries.[4]

[22] It was Mr Butler's evidence that Railtrain was essentially a labour hire company that supplied train drivers to the rail and mining industry.[5] It had contracts to supply rail labour crews to companies operating across railways in Queensland, New South Wales, Victoria, and South Australia.[6] Railtrain was also the service provider for TRRC, and the newly formed Karijini.

[23] Mr Elston gave evidence that although he did not hold a direct position with Karijini, he provided services to Karijini and a number of other entities in the Railtrain Group through Railtrain. These services were provided on an as required basis, and included human resource, industrial and employee relations, training and safety, and recruitment.[7] Railtrain also conducted management of staff onsite, and payroll for these companies.[8]

[24] TRRC had been providing the rail crew to Roy Hill Infrastructure Pty Ltd (**Roy Hill**) under a contract that was to run until 31 October 2018 (the **TRRC Contract**). Roy Hill was TRRC's only client. The TRRC crew operated trains on the railway line connecting the Roy Hill iron ore mine, in the Pilbara region of Western Australia, to the port of Port Hedland (the **Roy Hill Network**).[9]

[25] In May or June 2018, Roy Hill informed Mr Butler that it was prepared to offer a further four year contract for the supply of train drivers if a new enterprise agreement could be established that would match the further contract.[10] TRRC's existing enterprise agreement was not due to expire until January 2019.[11]

[26] In its Closing Submissions in Reply the CFMMEU provided its perception of the factual circumstances before the Commission:

> As the evidence demonstrates, until 1 November 2018 the CFMMEU had members who were employed by a company related to the Applicant, TRRC Pty Ltd, at the Roy Hill mining

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[4] Witness Statement of Graham Robert Butler (Annexure A1) (**Butler Statement**) [9].

[5] Ibid [10].

[6] Ibid [11].

[7] Transcript PN [959], [975]-[976].

[8] Ibid PN137.

[9] Butler Statement [12].

[10] Transcript PN [75]-[79], [84].

[11] Ibid PN [80].

> operations.[12] The train drivers employed by TRRC Pty Ltd were covered by the TRRC Pty Ltd Operations Agreement ("the TRRC Agreement").[13] The TRRC Agreement was coming up for renegotiation in the second half of 2018, its nominal expiry date having now subsequently passed on 21 January 2019.
>
> In the usual course of bargaining, CFMMEU members, and other employees of TRRC Pty Ltd, would have had the opportunity to propose a new replacement enterprise agreement to apply to the work covered by the TRRC Agreement. Should an agreement have been put to the workforce, TRRC employees would have had the opportunity to vote on the terms and conditions that would cover their employment for the next four years.
>
> However, the employees of TRRC Pty Ltd were never to be given the opportunity of collectively renegotiat[ing] their terms of employment. In May or June 2018, Mr Butler, and others in the Rail Train Group, decided to form a new company, Karijini Rail Pty Ltd, the Applicant in these proceedings. TRRC Pty Ltd would not seek to renew the contract at Roy Hill. Instead, the Rail Train Group would utilise a new entity, Karijini Rail Pty Ltd.[14] The reasons for that decision are said to be so that the Rail Train Group could have an enterprise agreement to match a potential commercial agreement with Roy Hill.[15]

[27] In cross examination Mr Butler was asked several questions about TRRC's contract with Roy Hill, and the impetus for Karijini's establishment. His evidence included:

> Why did TRRC not continue with the contract?---TRRC at the time that we met with Roy Hill prior that there was an opportunity to extend our commercial contract, our TRRC contract – sorry, our enterprise agreement was expiring in January. The commercial arrangement with TRRC was expiring 1 November, and the opportunity for us was if we could have an enterprise agreement to match the commercial agreement, Roy Hill would then offer us the same term to continue onto business. So for us it was about securing four more years' work for the drivers and also a commercial agreement for our business.
>
> I see. So the agreement was expiring, and, what, you need an unexpired agreement to have the contract or - - -?---Not necessarily an unexpired, however, the commercial contract was getting renewed on 1 November, and we had to have an agreement in place prior to that.
>
> But the agreement was still in place at TRRC, wasn't it?---The agreement was expiring in January. I think end of January it was.
> Yes?---But the opportunity for us was to get a new enterprise agreement, to get a commercial agreement in place before 1 November before the old commercial agreement with TRRC expired on 1 November.
>
> But that opportunity – so it was all about getting a new agreement in place. That was - - -?---To have a clear pathway that we could match the commercial agreement with an enterprise agreement, then we'd be allowed to continue to have a commercial agreement with Roy Hill.
>
> And you couldn't do that with TRRC?---Well, we had to have this in place before the contract expired on 1 November, and the enterprise agreement was not expiring until January with TRRC.

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[12] Exhibit R1 [5], Annexures GB1 and GB2.

[13] AE412376.

[14] Transcript PN [75]-[122].

[15] Ibid PN [75].

> That you had an enterprise agreement with?---Which was expiring.
>
> In January?---2019.
>
> And that was a problem?---Yes.
>
> Okay. So when did you realise that that was a problem?---Just in early discussions with Roy Hill around about May/June is we had our first discussions and they said if we had an enterprise agreement to match the commercial agreement, then they would – then we'd have a contract going forward with Roy Hill.
>
> I see. So Roy Hill, what, encouraged you to set up another - - -?---No, no, Roy Hill didn't encourage that. They just said if we had an enterprise agreement they would match the commercial agreement.
>
> I see. I see. And, so, what, the decision was made in May or June to incorporate a new business?---We actually had a big restructure exactly that time. We actually acquired another business called IRSE Signalling, and we actually had another business unit starting 1 July, so it was part of the restructure that we restructured five different business units including Karijini Rail.
>
> Karijini Rail didn't exist prior to 22 June, did it?---No, it didn't. It got incorporated around about I think it was June. But it was part of a whole restructure of the whole group. The whole business restructured at the same time.[16]

[28] In summary, Mr Butler's evidence was that in June 2018, as part of a larger restructure of the Railtrain Group, Karijini was incorporated. Mr Butler said that a new entity was also created to house a business that was acquired by Railtrain Group called 'IRSE', and that Railtrain Group had established several other 'brands' including RMC Rail, RMC Rail Track Protection, and RMC Rail Signalling.[17]

[29] A decision was then made to pursue a new enterprise agreement through the newly incorporated entity Karijini.[18] Mr Butler accepted that one reason for the decision to use Karijini for this purpose was that it created the opportunity to negotiate a new enterprise agreement, which in turn would allow a further contract with Roy Hill to be obtained.[19]

<u>The employment of the two employees</u>

[30] The evidence of Mr Butler was that the TRRC Contract obliged TRCC to supply to Roy Hill 50 drivers at all times. By early July 2018, TRRC's driver numbers were down to 48, leaving two vacancies.[20] Given the approaching expiry of the TRRC Contract, a business decision was made to fill the vacancies by having the newly formed Karijini employ two train

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[16] Ibid PN [75]-[87].

[17] Ibid PN [188]-[189].

[18] Ibid PN [105]-[106], [111].

[19] Ibid [111], [118]-[122].

[20] Ibid PN [101].

drivers who would be seconded to TRRC until 1 November 2018 (the train drivers are simply referred to as 'the two employees' in this decision).[21]

[31] Karijini was incorporated on or around 22 June 2018 and by 2 July 2018, Mr Butler had interviewed the two employees for positions with Karijini.[22] The agreement for the provision of a rail crew was not with Karijini at that time, it was with TRRC. However, Mr Butler explained that the two employees were placed on secondment with TRRC.[23]

[32] When asked why TRRC had not employed the two employees, Mr Butler gave evidence that 'because, again, we needed a commercial agreement to match the agreement and the decision was taken to employ them through Karijini Rail'.[24] Mr Butler further elaborated that 'the business decision was to agree to put them through Karijini Rail because there was a vacancy with TRRC and the contract was expiring on 1 November'.[25]

[33] When pressed further about the aforementioned 'business decision', Mr Butler gave the following evidence:

> Yes. And that business decision was made because you needed to get an enterprise agreement up that matched the service agreement; is that right?---Yes. That's correct. So the opportunity was if we could have an enterprise agreement the services agreement, the commercial agreement, would be matched to the enterprise agreement.[26]
> …
> Yes. And to get that agreement you needed the two people so you employed? No, we needed the two people because we needed them on the site because we had a vacancy. The decision was made to employ them through KR. But we did have vacancies for those two because we were two short, we had 48 on the roster.
>
> And the decision was made to employ them through KR so you could get an agreement? --- To have a commercial contract, yes. However, there were vacancies to employ them and we took that pathway.[27]

[34] When it came to recruiting the two employees, it appeared they had registered their interest to work at Railtrain. Mr Butler's evidence was that the both were well known to him.[28] Offers of employment with Karijini were signed on 9 July 2018, although Mr Butler said that the two employees would have been informed of their successful applications before that date.[29] The offers were identical in their terms, and provided for flat rates of pay inclusive of all applicable penalties and allowances.[30]

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[21] Ibid [104]-[105].

[22] Butler Statement [31].

[23] Transcript PN [102].

[24] Ibid PN [103].

[25] Ibid PN [105].

[26] Ibid PN [111].

[27] Ibid PN [119]-[120].

[28] Ibid PN [128]-[129], [131]-[132].

[29] Ibid PN [185], [208]-[211], [216]-[220].

[30] Ibid PN [852]-[854].

[35] The two employees commenced as train drivers on a maximum term basis, with a start date of 9 July 2018 and a termination date of 30 April 2022. The 30 April 2022 date was the anticipated end date of the commercial agreement with Roy Hill then under negotiation.[31] The letters of offer specified the hours of work as being 'client requirement which [are] currently 12 hours shifts on a 14 days on/14 days off roster'.[32] Mr Butler explained that the 'client' referred to was TRRC, to which each employee was to be seconded.[33]

[36] A secondment agreement between Karijini and TRRC was put in place until 1 November 2018 so that Roy Hill could be invoiced for the two employees under the existing TRRC Contract.[34]

[37] The two employees started paid work at Karijini on 9 July 2018.[35] For the first 14 days, they carried out training in accordance with their normal roster pattern, for 12 hours per day from 6.00am to 6:00pm, which was apparently typical for new employees.[36] The training consisted of competency training provided by Railtrain trainers and Roy Hill trainers.[37] By the end of the two week period the two employees had demonstrated competency, having had their prior learning tested and recognised.[38]

Bargaining

[38] While the two employees were undertaking training they were also involved in the bargaining process for the Agreement.

[39] In his Statutory Declaration to the Commission (**Form F17**),[39] Mr Butler's evidence was that he informed the two employees that Karijini would be seeking to negotiate an enterprise agreement with them as the first employees.[40] Mr Butler explained that this was necessary because Karijini was negotiating with an iron ore company, Roy Hill, to enter into a 4 year agreement to supply train drivers to operate on Roy Hill's Network.[41] Mr Butler's evidence was that he explained that the enterprise agreement would need to align with the terms of the commercial contract (that is, the commercial contract to supply train drivers), or there was a risk that Karijini would not reach agreement with Roy Hill for the new contract.[42]

[40] Mr Butler gave evidence that during the course of the discussion with the two employees they asked him a 'lot of questions about the effect of the proposed enterprise

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[31] Butler Statement [31], [35]; Exhibit A5; Exhibit A6.

[32] Exhibit A5; Exhibit A6.

[33] Transcript PN [258]-[263].

[34] Ibid PN [144].

[35] Ibid PN [294]-[295].

[36] Ibid PN [296]-[298], [302]-[304], [321]-[327].

[37] Ibid PN [300], [312].

[38] Ibid PN [307], [826]-[828]; Exhibit A7.

[39] Form F17 Employer's statutory declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement) (***Form F17***)

[40] Ibid [2.4].

[41] Ibid.

[42] Ibid.

agreement on the current train drivers working for TRRC and whether they would be disadvantaged as a result'.[43] Mr Butler's evidence was:

> I explained that they would not be disadvantaged because Karijini Rail would offer them employment and for those who accepted the new role, Karjini Rail would maintain their existing rates of pay inclusive of CPI adjustments, provide additional monetary benefits and recognise prior service and allow their accrued entitlements to come across. I also explained that any TRRC train drivers who did not want to work Karijini Rail would receive their full entitlements, including redundancy pay.[44]

[41] On 10 July 2018, the two employees were given a Notice of Employee Representational Rights and were told to consider the approach they wished to take to representation.[45] The first two bargaining meetings took place on 13 July 2018, the final day of the first week of training.[46] This was followed by a second meeting on 23 July 2018, the first business day after the training period ended.[47] Mr Butler gave evidence that he explained to the two employees that if Karijini was not successful in reaching agreement with Roy Hill, then it was likely that the current train drivers working for TRRC would no longer have positions.[48]

[42] Mr Butler's evidence was that at the first bargaining meeting one employee said that he would appoint the other employee as his bargaining representative.[49] It appears that the reason for doing so may have been because that employee had prior experience on the Roy Hill Network.[50] One of the two employees completed a form nominating the other as the bargaining representative at that first meeting. However, while one was the appointed bargaining representative, it was said that the other employee decided to stay at the meeting so he could understand the discussions and ask questions. He also attended the second bargaining meeting.[51]

[43] The first bargaining was held in the meeting boardroom at Railtrain's Perth office, and went for about 2.5 hours. Mr Butler was present as was Mr Elston, who participated by video link.[52] The two employees were given a copy of the draft Agreement which had been prepared by Mr Elston.[53] It was the first time the two employees had seen the draft Agreement, and Mr Elston stepped them through it clause by clause.[54] Explanations were

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[43] Ibid.

[44] Ibid [2.3].

[45] Ibid; Transcript PN [378]-[379].

[46] Transcript PN [384].

[47] Ibid PN [336], [486]-[487].

[48] *Form F17* [2.4].

[49] Transcript PN [428]-[430].

[50] Ibid PN [420]-[422], [430].

[51] Ibid PN [440]-[441], [489].

[52] Ibid PN [388]-[390], [415].

[53] Ibid PN [354]-[356], [385], [395]-[397], [401].

[54] Ibid PN [361]; Exhibit A1 [47].

provided and, questions answered.[55] Mr Butler and Mr Elston agreed to change some of the terms of the draft Agreement to address particular issues raised by the two employees. [56]

[44] Mr Elston was said to be the expert on the detail of the draft Agreement. He had spoken to Mr Butler whilst preparing the draft to obtain details about various operational matters.[57] While Karijini was continuing to negotiate the terms and conditions of its commercial contract with Roy Hill, Mr Butler's evidence was that there were industry standard conditions applicable generally in the Pilbara, such as fly in / fly out roster arrangements, which were capable of being reflected in the draft Agreement even though the negotiations with Roy Hill had not yet concluded.[58]

[45] Mr Elston gave evidence of his recollection of the first bargaining meeting on 13 July 2018.[59] With regard to cl 4 of the draft Agreement, Mr Elston read the clause that provided 'we will only be employing train drivers on maximum and fixed term contracts as this EA will be aligned with our commercial contract that has a known end date'.[60] Mr Elston said that he was asked by the two employees, what was meant by the term 'maximum term contract', and he proceeded to explain that it was a contract with a fixed end date but with either party being able to terminate before the end date.[61]

[46] The second bargaining meeting again involved Mr Butler, Mr Elston, and the two employees, and was of similar duration.[62] An amended version of the draft Agreement was given to Employees, which on this occasion included base rates of pay; these had been absent from the earlier draft.[63] Mr Elston went through the draft Agreement clause by clause, providing explanations and answering questions asked by the two employees. Mr Butler said he was unable to recall the specific detail of the questions that were asked or the answers that were given.[64]

[47] Concerning the redundancy provision at cl 20 of the draft Agreement, Mr Elston said that he read out this clause and said that it was provided for in the NES.[65] Mr Elston said that he asked if 'they', meaning the two employees, had any questions, and they replied 'no'.[66]

[48] On 24 July 2018, following the second bargaining meeting, Mr Butler telephoned the two employees individually, it being an 'off day' on their roster.[67] Mr Butler asked them if they had a good understanding of the terms of the proposed Agreement and whether they had

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[55] Ibid.

[56] *Form F17* [2.4].

[57] Transcript PN [404]-[407].

[58] Transcript PN [468]-[471].

[59] Exhibit A12 [14] – [18].

[60] Ibid [15].

[61] Ibid.

[62] Exhibit A1, [47].

[63] Transcript PN [491]-[492].

[64] Exhibit A1, [47].

[65] Exhibit A12, [15].

[66] Ibid.

[67] Transcript PN [508].

any further questions or comments. As neither of the two employees raised any issue, Mr Butler indicated that he would arrange for the access period to begin, and would send them an email to outline the voting process.[68]

[49] On 25 July 2018, the two employees received an email, which Mr Elston had sent on behalf of Mr Butler.[69] Attached to it was a copy of the Agreement on which the two employees were to vote, a document explaining the terms of the proposed Agreement (**Explanatory Document**), and a ballot paper.[70]

[50] On 27 July 2018, Mr Butler again telephoned the two employees, and asked each if they had any more questions, or needed further explanation or clarification of the application, or effect of the proposed Agreement.[71] Mr Butler's evidence was that neither of the two employees had said they had not received the email or the proposed Agreement, and neither raised any questions or concerns.[72] Mr Butler said that he explained the voting process to each employee.[73]

[51] Mr Elston prepared a 'Further Explanation Sheet' that was emailed to the two employees on behalf of Mr Butler on 30 July 2018.[74] It provided URL addresses linking explanatory material regarding the NES, and to the pieces of legislation referred to in the proposed Agreement.[75]

[52] The ballot for the proposed Agreement was conducted on 2 August 2018 and there was a unanimous vote to approve the Agreement.[76]

Contractual arrangements with Roy Hill

[53] By letter of 5 September 2018, the operator of the mining operations at Roy Hill wrote to Mr Butler, in his capacity as a representative of TRRC, stating that Roy Hill had decided not to renew its contract with TRRC (**TRRC Letter**).[77] The TRRC Letter stated:

> On behalf of Roy Hill Infrastructure Pty Ltd, (RHI) I advise TRRC that RHI has decided not to renew the commercial contract between our two companies. As such, the supply of rail crew labour will cease at the end of the contract term, and the last day of providing the labour will be 31 October 2018.
>
> RHI has moved to secure the services of another company to supply the rail workforce.

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[68] Exhibit A1 [5]-[51]; Transcript PN [532]-[533].

[69] Exhibit A2; Exhibit A1 [52]; Transcript PN [517], [522]-[523].

[70] Exhibit A2; F17 Declaration, Attachment GB-5.

[71] Exhibit A1 [53]-[55]; Transcript PN [542].

[72] Exhibit A1 [54]-[55].

[73] Ibid.

[74] Exhibits A3, A4; Transcript PN [558].

[75] Exhibit A3.

[76] *Form F17* [2.8], [2.10].

[77] Butler Statement [14]; Annexure GB-3.

> This decision is no reflection on the quality of the work and professionalism displayed by your workforce. I have asked the incoming company to use its best endeavours to engage your existing rail crew employees over the period from now up to the start date that the new company will provide the rail crew at site, namely 1 November 2018. In this way, there is the opportunity for continuity of employment for your existing employees and RHI is keen to see this happen. This request is a reflection of the high regard RHI has for your employees…[78]

[54] By letter of the same date, 5 September 2018, the operator of the mining operations at Roy Hill wrote to Mr Brendan Williams, Karijini, informing him:

> On behalf of Roy Hill Infrastructure Pty Ltd, I have great please in confirming formally the Karijini Rail Pty Ltd has been successful in securing the contract to supply the rail crew workforce for the Roy Hill Mine's rail operations in the Pilbara region.
>
> The contract was signed on 3 September 2018. The rail crew services will commence on 1 November 2018 and the contract term is then 3.5 years until 30 April 2022.
>
> Continuity of rail crew supply is important to us. Therefore, as agreed, Karijini Rail will use its best endeavours to engage the existing TRRC employees over the period from now until 1 November 2018 and in doing so provide those people with certainty of employment.[79]

[55] Roy Hill is Karijini's only client.[80]

What happened to the TRRC workforce?

[56] Mr Elston gave evidence that when TRRC's contract with Roy Hill came to an end, its employees moved across to Karijini as maximum term contract employees.[81] At the time of the hearing, there were 54 employees working for Karijini, 52 of those employees were formerly employees of TRRC.[82] Upon commencement with Karijini, their prior service with TRRC was recognised for the purpose of leave and redundancy entitlements.[83]

Statutory framework

[57] For present purposes, it is only necessary to outline the statutory framework in so far as it deals with the process for the making of a single enterprise agreement made between an employer and its employees.

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[78] Witness Statement of Gregory John Busson (**Busson Statement**); Annexure GB-3.

[79] Busson Statement; Annexure GB-4.

[80] Butler Statement [13].

[81] Transcript PN [982], [987].

[82] Transcript PN [53]-[62].

[83] Transcript PN [983]-[986].

[58] Section 172 sets out:

> (2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a ***single-enterprise agreement***):
>
> (a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement;
>
> ...
>
> (6) An enterprise agreement cannot be made with a single employee.

[59] With respect to s 172(2)(a), it can be seen that the section refers to the making of an enterprise agreement with employees 'who are employed at the time the agreement is made and who will be covered by the agreement'. In respect of the phrase 'will be covered', the High Court, in the decision of *ALDI Foods Pty Ltd v Shop, Distributive and Allied Employees Association* (**Aldi**), stated:

> The remaining category of enterprise agreements consists of those that are not greenfields agreements: they are made as referred to in s 172(2)(a). Such agreements are those made in circumstances where the employer already employs employees who are not then, but will be, covered by the enterprise agreement then in contemplation. Section 172(2)(a) and (b)(ii) expressly contemplate that employees 'will be covered' by the proposed agreement, even though the employees are also currently employed under another enterprise conducted by the employer under another agreement.
>
> It is necessarily implicit in s 172(2)(b)(ii) that an employer engaged in establishing a new enterprise may have in its employ at that time persons who will be necessary for the conduct of the new enterprise. Because such an enterprise is one that, as s 172(2)(b)(i) provides, is to be established at some future time, the word 'employed' in s 172(2)(b)(ii) should not be taken to mean 'employed *in that new enterprise*', as the SDA argued: the new enterprise, ex hypothesi, does not yet exist. Rather, 'employed' simply means 'employed' by that employer. An enterprise agreement cannot be made as a greenfields agreement with persons who are already employees of the employer because s 172(2)(b)(ii) allows such an agreement to be made only where none of the persons who will be necessary for the normal conduct of the new enterprise have been employed. Such an agreement, with persons currently employed, must necessarily be made under s 172(2)(a) of the Act.[84]

[60] Section 53 states:

> Employees and employers
>
> (1) An enterprise agreement covers an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.
>
> Employee organisations
>
> (2) An enterprise agreement covers an employee organisation:

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[84] *ALDI Foods Pty Ltd v Shop, Distributive and Allied Employees Association* (2017) 270 IR 459, [23]-[24].

> (a) for an enterprise agreement that is not a greenfields agreement--if the FWC has noted in its decision to approve the agreement that the agreement covers the organisation (see subsection 201(2)); or
>
> (b) for a greenfields agreement--if the agreement is made by the organisation.
>
> Effect of provisions of this Act, FWC orders and court orders on coverage
>
> (3) An enterprise agreement also covers an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement covers the employee, employer or organisation:
>
> (a) a provision of this Act or of the Registered Organisations Act;
>
> (b) an FWC order made under a provision of this Act;
>
> (c) an order of a court.
>
> (4) Despite subsections (1), (2) and (3), an enterprise agreement does not cover an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement does not cover the employee, employer or organisation:
>
> (a) another provision of this Act;
> (b) an FWC order made under another provision of this Act;
> (c) an order of a court.
>
> Enterprise agreements that have ceased to operate
>
> (5) Despite subsections (1), (2) and (3), an enterprise agreement that has ceased to operate does not cover an employee, employer or employee organisation.
>
> Enterprise agreements cover employees in relation to particular employment
>
> (6) A reference in this Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment.

[61] In *Aldi*, their Honours expressed that an agreement 'covers' the employee, 'in the sense contemplated by s 53 because it is expressed to cover the jobs described as being within its scope…'[85]

[62] Turning to the phrase 'particular employment', the Court considered the argument that in speaking of 'the agreement covering the employee in relation to particular employment', it spoke exclusively to the case where an employee actually performed work under the agreement at that time. However, the Court concluded that s 53(6) simply referred to the employee's job as described in the enterprise agreement rather than the actual performance by the employee of the tasks involved in that job.[86]

[63] Section 182(1) sets out when an enterprise agreement is made:

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[85] Ibid [42].

[86] Ibid [75].

> *Single-enterprise agreement that is not a greenfields agreement*
>
> (1) If the employee of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields 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.

[64] Section 186(1) of the Act requires the Commission, on an application for approval of an enterprise agreement under s 182(4) or s 185, to approve the agreement 'if the requirements set out in this section and section 187 are met'. Section 186(2) sets out a requirement that the Commission must be satisfied that:

a) if not a greenfields agreement, the enterprise agreement has been genuinely agreed to by the employees covered by the agreement (s 186(2)(a));

b) the terms of the enterprise agreement do not contravene s 55 (s 186(2)(c)); and

c) the enterprise agreement passes the BOOT (s 186(2)(d)).

[65] Therefore, the Commission must approve an enterprise agreement when certain general requirements are met. One of those requirements is that the agreement has been genuinely agreed to by the employees 'covered by the agreement'.[87] The High Court has said that the question of coverage that arises when the Commission asks whether the agreement has been genuinely agreed to for the purpose of s 186(2)(a) is not whether the employees voting for the agreement are actually employed under its terms, but rather, whether the agreement covers all employees who may in future have the terms and conditions of their jobs regulated by it.[88]

[66] The term 'genuinely agreed' in s 186(2)(a), is explained by reference to s 188(1), which 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 covered by the agreement compiled with ss 180(2), (3) and (5) and s 181(2) in relation to the agreement;

b) the agreement was made in accordance with s 182(1); and

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

[67] There have been no issues raised concerning ss 180(2) and (3), therefore only s 180(5) is traversed. It relevantly provides:

> *Terms of the agreement must be explained to employees etc*
>
> (5) The employer must take all reasonable steps to ensure that:

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[87] Ibid [73]; *Fair Work Act 2009* (Cth) s 186(2)(a).

[88] *Aldi* (2017) 270 IR 459, [77].

> (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
>
> (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

[68] Section 188(1)(c) requires that there be no other reasonable grounds for believing that the agreement has not been genuinely agreed by the employees. Section 188(1)(c) is cast in very broad terms.[89] It is intended to pick up anything not caught by paras (a) and (b).[90] Thus, any circumstance which could logically bear on the question of whether the enterprise agreement of the relevant employees was genuine, would be relevant.[91]

[69] With regard to not contravening the NES as referred to in s186(1)(b), s 55 provides:

> *National Employment Standards must not be excluded*
>
> (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

[70] Further, s 186(2)(d) requires that the enterprise agreement pass the BOOT. Section 193(1) explains when an enterprise agreement passes the BOOT:

> An enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if the [Commission] is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

[71] Section 193(6) provides that the 'test time' is the 'time the application for approval of the agreement by the [Commission] was made under subsection 182(4) or section 185'.

[72] In light of the objections of the CFMMEU it is also relevant to traverse s 187(4) which provides that the Commission must approve an enterprise agreement when additional requirements are met. Relevantly, s 196 requires that an enterprise agreement defines or describes an employee as a shiftworker for the purposes of the NES where a modern award is in operation that so describes the employee.

The issues

[73] There are several grounds that the CFMMEU has advanced in objection to the approval of the Agreement. To appreciate those grounds it is first necessary to recall some pertinent sections of Part 2-4.

[74] In short, s 186(2)(a) provides that the Commission must be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement. Section 188

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[89] Ibid [142].

[90] Ibid.

[91] Ibid.

expands upon the meaning of 'genuinely agreed', informing the reader that an agreement has been genuinely agreed to by the employees covered by the agreement if the agreement was made in accordance with subsection s 182(1). There are other provisions that must be complied with, which we will cover later, however, s 182(1) is relevant for now.

Section 182(1) issue – were the two employees covered by the agreement?

CFMMEU's submissions

[75] Section 182(1) provides that an enterprise agreement is 'made' when a majority of employees that will be covered by the agreement, who cast a valid vote, approve the agreement.

[76] The CFMMEU submitted that a combined reading of s 186(2)(a) and s 188(1)(b) provided that for an agreement to be genuinely agreed to the Commission must be satisfied that the employees who voted for the agreement, will, upon its making, be covered by the agreement. The CFMMEU submitted that the two employees, being the employees who made the Agreement, would not be covered by the Agreement when it was made, and accordingly the Commission could not be satisfied that the Agreement was genuinely agreed to.

[77] According to the CFMMEU, the coverage clause of the Agreement was narrow, providing that the Agreement 'shall cover' Karijini and 'the Employees of the Employer employed in the classifications in cl 5 – Classifications and Base Rates of Pay of this Agreement when engaged in rail operations at the Roy Hill Operations in the Pilbara Region **(Employees)'**.

[78] Therefore, for an employee to be covered by the Agreement two conditions had to be met. First, the employee must be employed in one of the classifications listed in the Agreement, and second, the employee must be employed in rail operations at the Roy Hill Operations. At the time the Agreement was made, the two employees had not fulfilled the coverage requirements because when the Agreement was made, Karijini did not have a contract to provide rail crew labour to Roy Hill. Further, it did not undertake any such work, nor was any such work guaranteed. In these circumstances, the CFMMEU asserted that it was not possible for the two employees to be covered by the Agreement when made.

[79] Taking the matter further, the CFMMEU suggested the adoption of a broader view which examined the principal purpose of the employment of the two employees. That principal purpose was, according to the CFMMEU, to make an enterprise agreement. It was not, on any reasonable consideration, the performance of work under the Agreement.

[80] Drawing parallels to the decision of the Full Court in *Broadspectrum (Australia) Pty Ltd v United Voice* (**Broadspectrum**),[92] the CFMMEU advanced that in *Broadspectrum* the business was in its infancy, had yet to secure any contracts for work, and had employed four employees who voted to make an agreement that covered employees listed in the classifications in the enterprise agreement. The CFMMEU purported that the application for approval of the enterprise agreement in *Broadspectrum* was dismissed because the employees

[92] [2018] FCAFC 139.

who voted on the agreement were found not to perform the work covered by it. The CFMMEU's view was that similarly the Commission should dismiss the application here.

Karijini's submissions

[81] In brief, Karijini pressed that the two employees who approved the Agreement would be 'covered by' it, within the meaning of ss 186(2)(a) and 182(1) (the **Coverage Requirement**).

Consideration

The Coverage Requirement

[82] Reflecting on the evidence provided by Messrs Elston and Butler, the two employees were in Perth on and around the period leading up to and including the making of the Agreement. Meetings regarding the negotiation of the Agreement took place on 13 and 23 July 2018 in Perth, with the vote occurring on 2 August 2018. At the time the Agreement was made, Karijini did not have a contract to provide rail crew labour to Roy Hill Operations, nor did Karijini perform the work, and it was not guaranteed the work. The CFMMEU submitted that in these circumstances, it was not possible for the two employees to be covered by the Agreement when the Agreement was made.

[83] In reply to the CFMMEU's contention, Karijini submitted that the words 'covered by' in s 186(2) 'may be read as "those persons currently employed who fall within the whole class of employees to whom the agreement might in future apply"'.[93] Karijini submitted that on any view the two employees fell within that class in the circumstances of this case because:

a) the Agreement covered 'the Employees of the Employer employed in the classifications contained in Clause 5 … when engaged in rail operations at the Roy Hill Operations in the Pilbara Region';[94]

b) the classifications listed in cl 5 include Railway Worker Level 3, for which the indicative tasks listed in Appendix 1 include '[driving] locomotives to full operational requirements on multiple routes';[95]

c) the two employees were each employed as a 'Train Driver at Roy Hill Operations Pilbara',[96] and this work fell within the scope of the Agreement;

d) it was envisaged that the two employees would be driving trains on the Roy Hill Network at least pursuant to secondment agreement,[97] if not subsequently through a contract between Karijini and Roy Hill; in each case the work was within the scope of

[93] *Aldi* (2017) 270 IR 459, [83], [111].

[94] Clause 2.1 of the Agreement.

[95] Appendix 1 to the Agreement.

[96] Exhibit A5, 7; Exhibit A6, 7.

[97] Transcript PN [102], [104], [139], [144].

the Agreement, and it is what the two employees in fact did. The two employees were not engaged to perform any other work;[98] and

e) at the time the Agreement was made, the two employees had been undergoing training in Perth, which was a mandatory prerequisite to driving trains on the Roy Hill line.[99] This work itself fell within the scope of the Agreement, a work incidental to driving trains at Roy Hill.[100]

[84] The proposition in *Aldi* is that there is no requirement that the employees voting for an agreement be actually employed under its terms for that agreement to have been genuinely agreed to under s 186(2)(a). The question is whether the enterprise agreement covers all employees who may in future have the terms and conditions of their jobs regulated by it.[101] An enterprise agreement covering a new enterprise can be made with employees 'who have agreed to work, but are not at that time actually working, as employees in the new enterprise'.[102] In this respect, the two employees did not have to be actually performing the work under the Agreement, and there did not have to be a contract for the supply of rail crew labour with Roy Hill, for them to be covered. Similarly, there was no requirement for a guarantee of work. In *Aldi*, the High Court said that 'to speak of an employee being covered by an agreement is to speak of the agreement providing terms and conditions for the job performed by, or to be performed by, the employee'.[103]

[85] In any event, I am satisfied that when the Agreement was made:

a) the Agreement covered Karijini;

b) each of the two employees was employed as a 'Train Driver at Roy Hill Rail Operations Pilbara',[104] and the work or tasks of the job fell within the classifications contained in cl 5 of the Agreement;

c) the classifications contained in cl 5 of the Agreement referred to three classifications of Railway Worker, namely Railway Worker Levels 1, 2, and 3, and the two employees fell within the scope of a classification; and

d) the two employees were to 'engaged in rail operations at Roy Hill Operations in the Pilbara Region' by virtue of a secondment agreement between Karijini and TRRC.

[86] On the latter point, I observe that at the time the Agreement was made, the two employees had been participating in training in Perth; a mandatory prerequisite to driving trains on the Roy Hill Network. This work itself fell within the scope of the Agreement, as work incidental to driving trains on the Roy Hill Network. At Appendix 1 of the Agreement, an employee at Railway Worker Level 1 performs non-trade tasks incidental to their work,

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[98] Exhibit A1 [38].

[99] Transcript PN [299]-[301].

[100] Appendix 1 to the Agreement.

[101] *Aldi* (2017) 270 IR 459, [77].

[102] *Aldi* (2017) 270 IR 459, [1], [4]; Opening Submissions of Karijini, [11(b)].

[103] *Aldi* (2017) 270 IR 459, [30].

[104] Exhibit A1; Annexure GB-12.

and employees at Railway Worker Levels 2 and 3 must have the ability to perform all Level 1 tasks. Further, the classifications listed in cl 5 of the Agreement include Railway Worker Level 3, for which the indicative tasks are listed in Appendix 1 and include driving 'locomotives to full operational requirements on multiple routes'.

[87] While the CFMMEU submitted that the two employees must be 'employed in rail operations at the Roy Hill Operations', it is observed that cl 5 speaks of the 'Employees of the Employer employed in the classifications contained in Clause 5 … when engaged in rail operations at the Roy Hill Operations in the Pilbara Region'.

[88] Based on the sworn evidence given, I am satisfied that the secondment agreement was an arrangement which permitted the two employees from their commencement, or thereabouts, to be seconded across to TRRC until 1 November 2018.[105] Whilst working for TRRC, the two employees were engaged in rail operations at the Roy Hill Operations in the Pilbara Region.

[89] The CFMMEU's first ground on why the Commission could not be satisfied that the employees were covered by the Agreement is not made out.

The broader view

[90] In its second ground, the CFMMEU advanced that if the principal purpose for the employment of the two employees was examined, the purpose was not the performance of work under the Agreement. Instead, the principal purpose for the employment of the two employees was to make an enterprise agreement; parallels were drawn to the Full Court decision in *Broadspectrum*.

[91] In *Broadspectrum (Australia) Pty Ltd T/ Broadspectrum*,[106] the Deputy President dealt with the application for the approval of the *JBU Enterprise Agreement 2016* (**JBU Agreement**). Before the application was allocated to the Deputy President, it had already been dealt with by a single Commissioner, was successfully appealed on procedural fairness grounds, and thereafter was sent to the Deputy President to determine.

[92] The JBU Agreement had been made in the context of Broadspectrum tendering for the Western Australian Government's court security and custodial services contract. The employees who voted for the JBU Agreement had been employed in circumstances where there was preparatory work to be done such as the development of training modules and induction material for the various bids for correctional work. At the time of making the JBU Agreement, it appeared that the four employees were undertaking preparatory work for the government contract bid.

[93] In his consideration of the application, the Deputy President considered whether the work of the employees was covered by the JBU Agreement's classifications. The Deputy President observed that the applicant, Broadspectrum, had relied on the decision in *Carpenter*

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[105] Transcript PN [139], [144].

[106] [2017] FWC 1818.

v Corona Manufacturing Pty Ltd (**Carpenter**).[107] In that case, a Full Bench of the then Australian Industrial Relations Commission observed:

> In our view, in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed. In this case, such an examination demonstrates that the principal purpose for which the appellant was employed was that of manager. As such, he was not 'employed in the process, trade, business or occupation of…soliciting orders, obtaining sales leads or appointments or otherwise promoting sales for articles, wares, merchandise or materials' and was not, therefore, covered by the award.[108]

[94] Having noted the abovementioned passage from *Carpenter*, the Deputy President went on to consider the evidence regarding the work of the four employees.[109] In doing so, he concluded that the evidence before him suggested that primary, or principal purpose for which the employees were engaged was to undertake the necessary preparatory work relating to the various tenders for correctional services work that Broadspectrum were pursuing, rather than work performed by the classifications listed in the JBU Agreement.[110] While it was acknowledged that the employees would transition into operational roles once work was won, the Deputy President observed that Broadspectrum commenced work under the government contract some 260 days after the JBU Agreement was made. The Deputy President found that the evidence did not support a finding that the principal purpose for which the employees were employed was the positions specified in their contract or that they were therefore covered by the JBU Agreement.

[95] Broadspectrum appealed the decision of the Deputy President to the Federal Court contending there was a jurisdictional error because when the Deputy President assessed whether the JBU Agreement had been genuinely agreed to by the employees covered by it under s 186(2)(a), he took into consideration that the people that consented to the JBU Agreement's making were not covered by it.[111] Broadspectrum said that that consideration was not germane to the task of the Deputy President because it had no bearing upon the genuineness of the approval given by those employees who were covered by the JBU Agreement.[112]

[96] The Full Federal Court observed:

> It is apparent then, that whether the employees who participated in the making of an agreement in the manner contemplated by ss170(2)(a) and 182(1), were employees who will be covered by the agreement when made, is not only a permissible consideration, but is a necessary consideration in the performance of the statutory task required of the FWC in

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[107] (2002) 122 IR 387.

[108] *Broadspectrum (Australia) Pty Ltd T/ Broadspectrum* [2017] FWC 1818, [35].

[109] Ibid.

[110] Ibid.

[111] *Broadspectrum* [2018] FCAFC 139, [19].

[112] Ibid.

> forming the state of satisfaction specified by s 186(2), as to whether or not the agreement has been genuinely agreed to by the employees covered by the agreement.[113]
>
> The Deputy President considered whether the three employees who voted to approve the Agreement were covered by the Agreement and concluded that they, as well as the fourth employee (who did not vote), were not. That consideration was relevant to the statutory task required of the Deputy President and, the taking of that consideration into account, involved no misunderstanding of the nature of the opinion that the Deputy President was required to form.[114]

[97] The Full Federal Court then went on to say that the Deputy President had not confined his assessment to the question of whether the four employees were, at the time the Agreement was made, actually performing work regulated by the JBU Agreement.[115] The Deputy President had considered the purpose of those employments, and did so by reference to the likelihood that at a later time the employees would transition into performing work that was regulated by the JBU Agreement.[116] The Full Federal Court stated:

> A fair reading of [35] of the Deputy President's reasons suggests that, despite his finding that the employees were not performing work regulated by the Agreement at the time of its making, if the principal purpose of those employments at the time the Agreement was made was the performance of such work, the Deputy President would have held that the employees were covered by the Agreement. The reasoning in *ALDI* does not support a conclusion that the reasoning of the Deputy President involved a misconstruction of s 186(2)(a).

[98] The CFMMEU referred to Karijini's evidence concerning its need to make an enterprise agreement to secure work at the Roy Hill Operations, as had been outlined in its Form F17.[117] The CFMMEU contended that the evidence of Mr Butler in cross examination was such that Karijini was created as a legal entity in June 2018 specifically for the purpose of obtaining an enterprise agreement prior to 1 November 2018.[118] Furthermore, the two employees were employed in the context of Karijini having no work, or guarantee of work, but Karijini knew there was a requirement to have an enterprise agreement in order to bid successfully for the work at Roy Hill Operations. The CFMMEU's contention was that this was the only reason for employing the two employees.

[99] In my view, Karijini correctly submitted that the CFMMEU's contention regarding the principal purpose of the employments of the two employees was based on a misinterpretation of reasoning in *Broadspectrum*. As observed, the Full Federal Court had concluded that the Deputy President was correct in his approach not to confine his assessment to the work the employees were performing at the time the JBU Agreement was made. An approach aligned with the decision of the High Court in *Aldi*. Consideration was given to the purpose of the employees' employment by reference to the likelihood that they would later transition into performing work regulated by the JBU Agreement.[119] The Full Federal Court went on to say

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[113] Ibid [26].

[114] Ibid [27].

[115] Ibid [40].

[116] Ibid.

[117] *Form F17* [2.4].

[118] Transcript PN [74]-[87].

[119] *Broadspectrum* [2018] FCAFC 139, [40].

that had the Deputy President concluded that the principal purpose of the employees' employment was the performance of such work, he would have held they were covered by the JBU Agreement.[120]

[100] It can therefore be seen that the focus in *Broadspectrum* with regard to consideration of the principal purpose for the employments was on the type of work the employee was employed to perform. Consideration did not extend to the rationale, motivation, or business purpose behind an employee's employment. The relevant finding of the Deputy President was that the primary or principal purpose for which the employees were employed was to undertake the necessary preparatory work relating to the various tenders for correctional services work which Broadspectrum was pursuing, rather than work performed by the classifications listed in the JBU Agreement.

[101] The Deputy President drew upon the decision in *Carpenter* when adopting the approach he did; a decision that reflects the historical approach to resolving which of multiple possible awards covered an employee.[121] In such circumstances, consideration is given to the different types of work employees do, or might do, and are thereafter compared. Hence the approach of the Deputy President was to compare the type of work the employees were performing, to the work performed under a classification in the JBU Agreement. In *Carpenter* the approach to the principal purpose consideration was expressed in the following terms:

> In our view, in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principle purpose for which the employee is employed.[122]

[102] The CFMMEU did not address in its submissions why the reasoning in *Broadspectrum* should now extend to a consideration of the broader business purpose behind an employee's employment. It is evident from the decision of the Deputy President, and from the later decision of the Full Federal Court, that the consideration of the principal purpose for the employment is a consideration of the nature of the work, or type of work, and the circumstances in which the employee is employed to do the work. It does not extend to consideration of what ultimately is the broader business purpose behind the employment of employees.

[103] If employees are performing work that fits within the employee's job as described in the Agreement, or they may in future have the terms and conditions of their jobs (as so described) regulated by that enterprise agreement, then they will be covered by the Agreement; regardless the reasons for which they were employed.

[104] If it were otherwise, it would not be possible to determine whether an employee is covered by an enterprise agreement by reference only to the type of work she or he performs, or may in future perform; in order to determine coverage. The examination would necessarily

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[120] Ibid.

[121] See *Ware v O'Donnell Griffen Pty Ltd* [1971] AR (NSW) 18.

[122] *Carpenter* (2002) 122 IR 387, 389.

extend to the employer's motivations regarding the employment (and their relative weightings). While the decision in *Carpenter* referenced an examination of the nature of the work and the circumstances in which the employee is employed to do the work, it is not the case that the examination of circumstances includes an examination of employer's motivation, rationale or business purpose. Such an approach to determining coverage of an enterprise agreement would be unworkable, is not endorsed by the authorities referred to, and is therefore not adopted.

[105] At this juncture, I observe that it is not the case that the business rationale for a choice is at all times irrelevant when considering provisions under Part 2-4. For example, had there been controversy over whether the group of employees was fairly chosen, then the taking into account the reason for the choice, and any possibility of unfair exploitation, would have been relevant considerations.[123] However, this was not an issue in these proceedings.

[106] When considering the principal purpose for the employment of the two employees, evidence was given that the TRRC Contract required 50 drivers and that two vacancies had arisen.[124] The two employees were employed to fill those vacancies, and it was undisputed that they were experienced train drivers, one of whom had previously operated trains on the Roy Hill Network. Mr Butler acknowledged that a reason why the two employees were employed through the entity Karijini was to create an opportunity to negotiate an enterprise agreement that would permit Karijini to secure a contract with Roy Hill.[125] Karijini submitted that this evidence went to the purpose for the choice of employing entity rather than the purpose of employing the two employees. The reason behind selecting Karijini as the employing entity, does not, in my view, shed light on the principal purpose for the employments and as such does not assist the Commission to discern whether the two employees are 'covered by' the agreement.[126]

[107] For the reasons outlined above, I have found that the two employees were covered by the Agreement. If required to consider the principal purpose for the employment of the two employees, it is the case that the principal purpose of their employments was to drive trains for Karijini at the Roy Hill Operations on the Roy Hill Network.[127]

Non-compliance with s 180(5) and not genuinely agreed under s 188(1)(c)

CFMMEU's submissions

[108] Section 180(5) provides that an employer must take all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, are explained to the relevant employees. Further, the explanation is to be provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees. The CFMMEU submitted that the flaws in the 'explanation' process fell into three categories:

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[123] *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2015) 228 FCR 297, [33] (***John Holland***).

[124] Transcript PN [101].

[125] Transcript PN [118]-[122].

[126] *Aldi* (2017) 270 IR 459, [83], [111].

[127] Clause 2.1 of the Agreement.

a) a failure to take reasonable steps to properly ensure an explanation was given to employees in the circumstances;

b) a failure to address terms of confusion and/or contradiction; and

c) a failure to properly identify the less beneficial terms in the Agreement.

[109] The CFMMEU referred to the decision in *Falcon Mining Pty Ltd*,[128] in which the Deputy President expressed that consideration should be given to the size of the employer, its resources, and the ability of the employees to receive information when addressing s 180(5).[129] The CFMMEU pointed to Karijini having access to resources including qualified staff and legal practitioners, that the employees were new employees in Karijini and had not performed work covered by the Agreement, and that the Agreement contained 24 clauses and an appendix.

[110] Concerning all reasonable steps, the CFMMEU submitted that Karijini had sought support from the steps it had taken during the negotiation of the Agreement. This, said the CFMMEU, was not available given the decision in *Health Services Union v Clinpath Laboratories Pty Ltd; Strath, Jenny and Others* (**Clinpath**).[130] The Full Bench in *Clinpath* had observed that it is the final terms of the Agreement that are the focus of s 180(5), not the negotiable terms discussed during the negotiation process.

[111] With regard to the Explanatory Document, the CFMMEU distilled all that was deficient with its contents. Counsel for the CFMMEU repeated the observation in *One Key*,[131] asserting that informing the two employees in a few words of what the clause purports to say means that the explanation of the Agreement fell well short of satisfying the requirements necessary for the Commission to make an evaluative judgement that Karijini had taken all reasonable steps.

[112] The gravamen of the CFMMEU's argument was that Karijini had provided a precis of the terms; not an explanation, had failed to identify a complete list of less beneficial terms, and what was provided did not explain how the Agreement changed the applicable terms and conditions that otherwise would be provided by the Award. It followed, it said, that the two employees could not give genuine agreement to the Agreement as they could not have possessed an informed and genuine understanding of the Agreement.

[113] Regarding s 188(1)(c), the CFMMEU questioned the authenticity and moral authority of the Agreement, given that neither Karijini nor the two employees had actual experience of the work and its place of performance. The CFMMEU submitted that while the two employees may have been train drivers, they were, at the time of the making of the Agreement, not driving trains for Karijini at Roy Hill Operations, which the Agreement was designed to cover. This, said the CFMMEU, raised the question of how the two employees could give genuine agreement to an enterprise agreement when they had no actual experience.

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[128] [2017] FWC 5315.

[129] Ibid [157].

[130] [2018] FWCFB 5694, [25].

[131] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 277 IR 13 (***One Key***).

[114] According to the CFMMEU, the position in the decision *CFMEU v Australian Industrial Relations Commission* (**Gordonstone**),[132] was analogous with the situation in this matter. Quoting the Full Court, the CFMMEU advanced 'there can hardly be fair agreement-making between employer and employee about wage and employment conditions in a workplace (a mine is a good example) before both set of parties have actual experience of the work and its place of performance'.

Karijini's submissions

[115] Karijini argued that:

a) it took all reasonable steps to explain to the two employees the terms of the Agreement and their effect, within the meaning of s 180(5); and

b) there were no other reasonable grounds for believing that the Agreement had not been genuinely agreed to by the two employees, within the meaning of s 188(1)(c).

[116] It explained further, that the complaint about the explanation was the only area where some of the CFMMEU's submissions may have had a superficial appeal. This was because there was no limit to how much one can explain an enterprise agreement. Karijini submitted that it was always possible to find further details that could, in theory, have been explained to employees. But the superficial appeal fell away once the basic facts were considered. Among other things, Karijini had conducted two formal sessions between the two employees and two senior managers, which lasted as long as 5 hours in total. The sessions involved a clause-by-clause consideration and discussion of the Agreement. The employees — who between them had more than 40 years' experience as train drivers in the Pilbara working under similar conditions — asked intelligent questions and suggested amendments. The proposition that this sort of process was insufficient had, according to Karijini, an air of unreality about it.

Consideration – all reasonable steps (s 180(5))

[117] The factual matters concerning this issue are relatively straightforward, and generally agreed between the parties. The issue in dispute is whether Karijini took all reasonable steps to explain the terms of agreement and the effect of those terms taking into account the circumstances and needs of the relevant employees.

[118] Having heard the evidence, I have no reason to question the credibility of the witnesses. There is no direct conflict in their evidence.

[119] The CFMMEU said that the content of the explanation, including the terms in which it was conveyed, were such that the Commission could not be satisfied that Karijini had taken all reasonable steps to explain the terms of the Agreement and the effect of those terms. Such content should include, according to the CFMMEU, the changes in the Agreement as compared to the Award.

[120] In *One Key* it was held that the nature of the changes to employees' industrial circumstances must be taken into account by the Commission, together with all of the

[132] (1999) 93 FCR 317.

circumstances and the needs of the employees, in assessing the sufficiency of the employer's explanation of the terms of the agreement and their effect.[133]

[121] In *Georgiou*, I concluded that 'reasonable steps' in that instance required the provision of information as to what the relevant awards were, and an explanation comparing the rates of pay under the relevant awards and under the enterprise agreement.[134] However, I note that in *Georgiou* there was evidence that the proposed agreement was a 'baseline agreement' with national operation, and that actual pay rates would vary by region depending on local market conditions.[135] Further, the agreement specifically referenced an unspecified award,[136] and there was no evidence before the Commission to show that the employees had knowledge about the awards in question.[137]

[122] In contrast, Karijini submitted that the two employees had worked on a long standing basis in the industry of driving trains in the Pilbara. So much was clear from the undisputed evidence. They were not novice train drivers. I heard that they were experienced professionals, with one having had 15 years' experience of train driving in the Pilbara, and the other, 25 years.

[123] During the course of the negotiations the two employees were exposed to the detail of the Agreement content, noting that both were involved in the bargaining discussions on 9 and 22 July 2018.

[124] The CFMMEU said that Karijini could not rely on what occurred during the negotiations to support a claim that it had complied with s 180(5). Matters such as information sessions, meetings with bargaining representatives, and summary progress updates were said to shed light on the negotiation of the Agreement rather than the explanation of the final terms.

[125] Between 9 July and 22 July 2018, whether in the context of training or during bargaining, the two employees asked Mr Butler a variety of questions, to which answers were provided. Further, they sought changes to the proposed Agreement.[138] While these matters may not assist the Commission directly in determining whether all reasonable steps were taken to explain the terms of the Agreement and their effect, such evidence may illuminate the circumstances of the two employees and their needs. Those circumstances include the relevant employees' understanding of employment terms and conditions found within the enterprise agreement, and the industry.

[126] It was evident from Mr Butler's evidence that the two employees were intimately involved in the bargaining process and that some of the questions asked by the two employees during the period of 9 July to 22 July 2018 reflected an understanding of some of the employment terms and conditions relevant to the industry.[139] As to their knowledge of the

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[133] *One Key* (2018) 277 IR 23, [112].

[134] *Re Georgiou Group Pty Ltd* [2019] FWC 210, [92] (***Georgiou***).

[135] Ibid.

[136] Ibid [83]-[84].

[137] Ibid [89].

[138] Transcript PN [571]-[572].

[139] Butler Statement [57].

relevant modern award for the purpose of the BOOT, there was evidence that the two employees were informed it was the Award.[140]

[127] An approach where comparisons are drawn with the relevant modern award will not always be necessary to conclude 'all reasonable steps' were taken to ensure the effect of the terms were explained to the therefore employees. What constitutes 'reasonable steps' may depend on the circumstances of the employees and whether they were likely to have understood the terms of the enterprise agreement and their effect, particularly with regard to their personal interests.

[128] On 25 July 2018, Mr Butler gave evidence that he arranged for an email to be sent to the two employees with a final copy of the proposed Agreement, and, amongst other materials, the Explanatory Document.[141] On 27 July 2018, Mr Butler phoned the two employees and explained the terms of the Agreement, and asked if they had any more questions.[142] One of the two employees purportedly responded 'no I am clear and I will see you next week',[143] and the other similarly communicated words to that effect.[144]

[129] The CFMMEU listed in exacting detail the deficiencies regarding the Explanatory Document, observing that it was a 'precis' and not an explanation. However, it is not the case that an employer is to provide an explanation that specifically addresses each and every term of an enterprise agreement in forensic detail.[145]

[130] The precis or Explanatory Document, which was predominately in the form of a table, with an Agreement clause on one side and explanation on the other, stated in its initial two paragraphs:

> The following table provides an explanation of the terms of the proposed Single Enterprise Agreement called the Karijini Rail Pty Ltd Rail Operations Pilbara Enterprise Agreement 2018.
>
> Please consider the explanation of the Agreement provided below and if you have any questions please do not hesitate to contact Graham Butler or Chris Elston.[146]

[131] Under 'Agreement Clause' was a section which stated 'What is the remuneration under this agreement'.[147] The explanation provided was:

> The Agreement provides for minimum base rates of pay over the life of the Agreement which are subject to % increase each year in accordance with CPI.
>
> The classification descriptions are provided in Appendix 1 to the Agreement

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[140] Exhibit A1 [57]; Transcript PN [226], [706].

[141] Butler Statement [52].

[142] Ibid [53].

[143] Ibid [54].

[144] Ibid [54], [55].

[145] *Re Glen Eden Thoroughbreds Pty Ltd t/as Ray White Shailer Park* [2010] FWA 7217, [77].

[146] *Form F17*.

[147] Ibid.

> Casuals will receive 25% casual loading on top of the minimum base rate of pay (see Agreement clause 4.7)
>
> Shift workers will receive a 25% shift loading on top of the minimum base rate of pay (see Agreement clause 9.5)

[132] A further section stated 'Are there any other additional allowance[s] provided under the Agreement', to which the answer was, in effect, 'no'.[148]

[133] During the period of 9 July and 22 July 2018, Mr Butler's evidence was that he was asked by one of the two employees whether they were paid hours worked each swing or the same every fortnight. He responded that 'you'll get paid the actual hours worked each swing so some pays will vary'.[149] Mr Butler was also asked 'how is the salary made up for different shift patterns such as night shift, afternoon shift, and weekend work?', to which he responded:

> Your IFA varies the way the allowances are paid to create a flat rate, this rate will encompass all penalties; the current rate in your LOO is well in advance of the enterprise agreement rate and needs to pass the BOOT Test.[150]

[134] During the course of these discussions the base rates of pay in the Agreement had not been inserted. It was the evidence of Mr Elston that in the bargaining meeting on 23 July 2018 the base rates of pay were included in the Agreement. Mr Elston, relying on the notes he took in the meeting on 23 July 2018, provided a discussion table in his witness statement.[151] The discussion table was headed 'Discussion regarding Final Version of EA on 23 July 2018'. Mr Elston stated that he did not read out every clause of the Agreement but just went to each page and identified any amendments that were made.[152] In this respect regarding cl 5.2, base rates, Mr Elston stated 'I noted that the base rates had now been inserted. No issues or concerns were raised about the amounts stated'.[153] In the From F17, Karijini particularised the allowances that had been omitted from the Agreement citing that their omission was because the base rate of pay in cl 5.2 of the Agreement was inclusive of those allowances.

[135] Of course, it could be said that the meeting and the discussions on 23 July 2018 took place in the context of bargaining. As observed, however, Mr Butler phoned the two employees on 27 July 2018 and his evidence was effectively that they had no questions and were clear.

[136] In *One Key* the Full Federal Court stated:

> In order to reach the requisite state of satisfaction that s 180(5) had been complied with, the Commission [is] required to consider the content of the explanation and the terms in which it

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[148] Ibid.

[149] Butler Statement [57].

[150] Butler Statement [57].

[151] Witness Statement of Chris Elston [23] (**Elston Statement**).

[152] Ibid [24].

[153] Ibid.

> was conveyed, *having regard to all the circumstances and needs of the employees and the nature of the changes made by the Agreement*.[154]

[137] Karijini submitted that implicit in that conclusion is that an explanation of change introduced by the proposed agreement is not always necessary. It continued that the extent of the obligation imposed by s 180(5) varies according to the context, which has been demonstrated by recent decisions of the Commission. I would agree with this submission.

[138] While the decisions have turned on their particular facts, Karijini submitted this did not detract from the relevance of their articulations of principle. Referring to the decision of the Commissioner in *Downer EDI Mining-Blasting Services Pty Ltd* (**Downer**),[155] Karijini advanced that providing an explanation of the 'effect of the Agreement in relation to the Modern Award' is 'not mandatory' but is 'to be assessed on a case by case basis'.[156]

[139] Karijini continued; in *Downer* the wages under the enterprise agreement for new employees were 'only marginally higher than those in the Modern Award'. It was said that the Commissioner observed that 'in this context, when the benefit of the Agreement might be said to [be] only marginally better than the Modern Award it becomes more relevant that employees understand the terms that are less beneficial than the Modern Award'.[157] The conclusion being, Karijini said, that explaining the less beneficial terms of the enterprise agreement compared to the award may be unnecessary where such terms are insignificant compared to the significantly higher wages provided by the agreement.[158] This, said Karijini, accords with the *One Key* principle that the nature of the changes that the agreement makes must be taken into account by the Commission, but need not be explained to the employees in all cases.

[140] I have considered the experience of the two employees as purported by Karijini, and the evidence of their familiarity with with processes, and employment terms and conditions relevant to their industry.[159] As to their knowledge of the relevant modern award, I have observed that for the purpose of the BOOT, the two employees were informed it was the Award.[160]

[141] While the two employees were informed of the Award, and undoubtedly had extensive experience within the Pilbara driving trains, I am not convinced that such circumstances negated all reasonable steps including more than what was provided in the content of the Explanatory Document and the discussion with Mr Butler concerning the final terms of the Agreement. I have taken into consideration the discussions held with Mr Elston, notwithstanding their occurrence during bargaining and training, because I consider such discussions inform as to the needs of the relevant employees. Further, I consider that the two

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[154] *One Key* (2018) 277 IR 23, [112] (emphasis added).

[155] [2018] FWCA 2888 (a subsequent decision of Commissioner Johns after an earlier decision with the same media-neutral citation was quashed by the Full Bench).

[156] Ibid [58].

[157] Ibid.

[158] Karijini's Submissions in Reply [91].

[159] Butler Statement [57].

[160] Exhibit A1 [57]; Transcript PN [226], [706].

employees were afforded opportunities to ask questions about the Agreement. My conclusion, however, remains unchanged.

[142] In the Form F17, the response to whether the Agreement provided more beneficial terms and conditions to the equivalent in the Reference Instrument was in the affirmative, and reference was made to clauses 5, 7, and 9 of the Agreement. Clause 5 relevantly provided the base rates of pay per hour for the three levels of 'Railway Worker'. Clauses 7 and 9 dealt with overtime and shift work respectively.

[143] It can be seen then that cl 5 was one of only three clauses considered more beneficial than the terms of the Reference Instrument. Nevertheless, evidence of the explanation provided concerning the base rates of pay was limited. There was limited information regarding how this clause provided an entitlement that was more beneficial than that provided in the Award, and limited explanation given how the base rate of pay compensated for allowances that would otherwise be provided by the Award. Mr Butler clearly went into some detail with the two employees about pay, when asked. However, the content of the discussion for the most part centred on the operation of the IFA. On this point he stated:

> …So, effectively, they were asking me, "Do we get paid day shift, night shift, penalties, whatever?" And I said, "No, you'll vary with an IFA, individual flexibility arrangement, that we pay a one-off all-up rate, all-inclusive rate."[161]

[144] In the Explanatory Document under the section 'What is the remuneration under this agreement?' there was no reference to the minimum base rates of pay including or excluding any allowances provided by the Award.

[145] While the Explanatory Document stated that shift workers would receive a 25% shift loading on top of the base rate of pay, there was a paucity of explanation concerning what this compensated for in comparison to the loadings, penalties, or allowances in the Award. In a later part of the Explanatory Document concerning allowances, it simply stated 'there are no other additional allowances applicable under this Agreement'.

[146] Karijini submitted:

> In circumstances where enterprise agreements commonly apply in the Pilbara iron ore industry, comparisons to the reference award could confuse employees about their entitlements rather than improve their understanding of the effect of the terms of the Agreement.[162]

[147] While Karijini noted that comparison to the Award could confuse employees, this proposition lacks lucidity in the current context. Karijini itself identified only three Agreement terms that were either more beneficial than, or not conferred by, the Award. If an explanation of the effect of the terms in the Agreement is to be provided then the logical comparator in the circumstances of this case was the Reference Instrument. There has been no prior enterprise agreement in place within the organisation and the two employees had not previously been involved in an agreement making process within the company. A suggestion that such explanation may confuse is not reason enough to conclude it is a step that is not

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[161] Transcript PN [709].

[162] Karijini's Submission in Reply [95].

reasonable. If confusion were to arise that reflects not on the reasonableness of the step, but perhaps on the competence of those explaining the terms.

[148] To ascertain compliance with s 180(5), the evaluation in this case must extend beyond an assessment of the steps taken; it should include the content of the explanation, in light of the circumstances and needs of the relevant employees. The requirement to explain something entails the provision of information, which has more detail than the content of the Agreement, and makes the Agreement terms and their effect, clearer – except of course where the term of the Agreement is evidently self-explanatory. As observed, this does not mean that every term of an enterprise agreement must be explained in a forensic detail. Further, the circumstances and needs of the relevant employees might be such that where an agreement is being rolled over with an established workforce, the explanation may be limited. Perhaps it might entail a one page memorandum, or evidence providing detail of the content of a discussion held only about the proposed changes to the agreement's final terms.

[149] An employee's entitlement as far as base rates of pay, penalties and allowances are concerned, are fundamental considerations for any employee. This was reflected in the question of one of the two employees concerning how the salary was made up. And yet, when this questioned was asked the explanation was, with respect, lacking in clarity.

[150] In this case, compliance with s 180(5) necessarily entailed a description of how the base rate of pay was made up and how it compared to the rates of pay and allowances in the Award. It may be the case the penalties are compensated for by the provision of a loading. Again, that required an explanation as to how that loading was arrived at. This is particularly so when the employer, having used such form of rates would have, in any event, determined the rates (allowances rolled in) and loading, and then assessed whether the Agreement passed the BOOT. As it is, the Form F17 requires that the employer indicate if it thinks the Agreement passes the BOOT. While the two employees were involved in the negotiations for the Agreement, it is not at all apparent that an explanation in the aforementioned terms was given during negotiations, or thereafter.

[151] Section 186(2) requires that the Commission must be satisfied that the enterprise agreement has been genuinely agreed to and in that respect the term 'genuinely agreed to' is given meaning by s 188(1). Section 188(1) informs the reader that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the Commission, is, amongst other matters, satisfied that the employer has complied with s 180(5). No such state of satisfaction has been reached.

Consideration - no other reasonable grounds (s 188(1)(c))

[152] The CFMMEU submitted that there were several grounds for believing that the Agreement had not been genuinely agreed to within the meaning of s 188(1)(c).

[153] The first ground advanced was Karijini's failure to provide an adequate explanation of the Agreement meant that the two employees were not in a position where they could give genuine agreement to the Agreement. The CFMMEU submitted that according to the decision in *One Key*, s 188(1)(c) is directed at the requirement that the employees have

'informed and genuine understanding of what is being approved'.[163] When considering the relationship between s 188(1)(a)(i) and s 188(1)(c) the Court stated:

> Thus, if we be wrong to conclude 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 the Agreement was 'genuinely agreed' 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 s 188(c), but it was a mandatory consideration.[164]

[154] The CFMMEU continued that the interrelationship between s 188(1)(a)(i) and s 188(1)(c) had been followed in two subsequent Full Bench decisions,[165] and further submitted that Karijini had not complied with s 180(5) because of a series of flaws in the explanation process, and the failure to identify and explain a number of provisions that were either confusing and/or contradictory. It said that because of this non-compliance, the Commission could not conclude the two employees were in a position where they could give genuine agreement to the Agreement. The basis for this summation was that the two employees could not have possessed an informed and genuine understanding of the Agreement.

[155] The cases relied upon by the CFMMEU involved matters where there was a failure to identify the less beneficial terms in the Agreement to those in the relevant modern, and the Form F17 statutory declaration had not expressly referenced the less beneficial terms.[166] It was found that in such circumstances the inference that could be drawn (in the absence of any evidence to the contrary) was that the pre-approval explanation could not amount to the taking of all reasonable steps to explain the terms of the enterprise agreement and their effect on employees. This is not the case in the circumstances of this matter as the less beneficial terms were identified.

[156] In *One Key*, reliance was placed on s 188(1)(c) as an alternative argument if the Court was wrong regarding its conclusion concerning s 180(5). There is no authority to indicate that the Court was wrong in its decision to take into consideration the content of the explanation when evaluating compliance with s 180(5).

[157] While I have concluded I am not satisfied there was compliance with s 180(5) of the Act, I am unable to reach the conclusion that there are other reasons for believing that the Agreement was not genuinely agreed to because of the explanation provided. While the steps taken fell short of 'all reasonable steps', it is not the case that the consent of the employees was not informed. It was evident that at material times the employees were asked whether they had any questions, and were provided with opportunities to query answers provided. While it may have been the case that there were some shortcomings with the answers provided, the evidence of Mr Butler was that the two employees asked about the 'BOOT test' and what it stood for. Mr Butler had explained that it was a better off overall test

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[163] *One Key* (2018) 277 IR 23, [156].

[164] Ibid [142].

[165] *CFMEU v Dawsons Maintenance Contractors Pty Ltd* [2018] FWCFB 2992, [49]; *AWU v Professional Traffic Solutions Pty Ltd* [2018] FWCFB 6333, [35].

[166] Ibid.

where the two employees' conditions and rates of pay were measured against the Award.[167] Evidence was given that one of the employees asked about the low rates of pay in comparison to the salary. Mr Butler said he had responded that while the base rate was low if Saturdays, Sundays, weekends, shift work, overtime to that rate were applied, it was tested against the Award to give an all-up rate, and Karijini exceeded that.[168] The Agreement did pass the BOOT.

[158] When determining whether or not there are other reasonable grounds for believing that the enterprise agreement has not been genuinely agreed to, consideration of the authenticity of the enterprise agreement, its soundness,[169] and whether the employees who will be covered by the enterprise agreement are informed of its terms so it can be said that their 'consent' is informed, are relevant considerations. The use of the word 'genuinely' in the phrase 'genuinely agreed' in ss 186(2)(a) and 188(1)(c) of the Act, indicates that mere agreement will not suffice, and that consent of a higher quality is required.[170]

[159] There is no statutory requirement for the employer to provide a full explanation, by explaining every feature or clause in a proposed enterprise agreement. As has been observed much will turn on the circumstances of each case regarding what constitutes 'all reasonable steps'. In this case I have concluded that the consent of the two employees was informed notwithstanding the evident inadequacies concerning the steps taken under s 180(5) regarding the explanation about the beneficial terms. This is because ultimately, the two employees were informed that the base rates of pay and loading in the Agreement exceeded the monetary compensation provided by in the Award; their understanding of this is clear from the evidence.

[160] While the CFMMEU referred to flaws concerning the explanations provided, I do not find that the flaws were such to render the two employees absent an informed and genuine understanding of the Agreement. Again, the two employees were at all relevant times afforded the opportunity to ask questions. If an answer provided failed to satisfy their curiosity as to what they were getting themselves into, the two employees could have sought further explanation. That was readily apparent, and yet the evidence is that they did not.

[161] The second ground that the CFMMEU relied upon was that because the employees were not performing work covered by the Agreement they did not have 'actual experience of the work and its place of performance'.[171]

[162] The CFMMEU said that in the situation where the employees had no actual experience of the work and location, it could not be said that the employees had brought the requisite moral authority and authenticity necessary to be able to genuinely agree to the Agreement (as referred to in *Gordonstone*.

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[167] Transcript PN [266].

[168] Transcript PN [710].

[169] See *Central Queensland Services Pty Ltd T/A BHP Billiton Mitsubishi Alliance* [2015] FWC 1554, [65]; *Ostwald Bros Pty Ltd v CFMMEU* [2012] FWAFB 9512, [154]; *KCL Industries Pty Ltd* [2016] FWCFB 3048, [29].

[170] *One Key* (2018) 277 IR 23, [141].

[171] *Gordonstone* (1999) 93 FCR 317.

[163] However, it is difficult to reconcile the CFMMEU's second contention with what the High Court determined in *Aldi*. Plainly, an enterprise agreement for a new enterprise can be 'made with existing employees of the employer who have agreed to work, but are not at that time actually working, as employees in the new enterprise'.[172] Therefore, the mere fact that the two employees had not yet commenced work driving the trains at the Roy Hill Operations does not alone provide grounds alone for the conclusion that they were incapable of given authentic agreement.

[164] In its closing submissions, the CFMMEU advanced a further the argument centred on authenticity, or the lack there of. In this respect it referred to the decision of the Full Bench in *KCL Industries* (**KCL**),[173] where it was found that the employees had no 'stake' in the agreement because they were to be paid a higher rate of pay regardless of the rate in the agreement. In effect, the CFMMEU considered the situation analogous to that of Karijini. In doing so, it relied upon analogy with the following:

> In summary, the position is that the Agreement covers a wide range of classifications most of which have no relevance to the work performed by KCL's three existing employees, encompasses industries in which KCL does not currently operate, and contains rates of pay which, even in respect of those classifications relevant to the current employees, are not to apply to those employees. In those circumstances we do not consider that any authenticity could attach to the agreement of the two employees to the rates and conditions in the Agreement. The employees had no "stake" in the Agreement's rates of pay, since they were assured that their existing, higher rates of pay would remain in place (subject to "operational needs and satisfactory performance"), and they could not have given informed consent in relation to occupation and industries in which they did not work and presumably had no experience.[174]

[165] In *KCL*, the Full Bench was confronted with an agreement that set out classifications and pay rates for private sector clerical employees, manufacturing employees, and production and staff employees in the black coal mining industry (with the last category including classifications for surveyors, safety officers, deputies, forepersons, open cut overseers, geologists, chemists, production supervisors and undermanagers).[175] To state the obvious, the Agreement before me covers only the classification of train driver, distinguished by three different levels, in an industry in which Karijini was to operate. It can be ascertained from the evidence that the two employees were experienced train drivers, and had worked previously in the iron ore industry. There is no obvious disjunction between the content of the Agreement and the characteristics of those who entered it.[176]

[166] In its submissions, Karijini observed that the assurance of higher rates of contractual pay in *KCL* was one single factor in a factual setting which, viewed as a whole, revealed a lack of authenticity attaching to the agreement of the employees. The general proposition that an employee must be incapable of giving genuine agreement to a proposed enterprise agreement if employed on contractual terms more generous than the minimum entitlements he or she would have under the proposed agreement, is problematic.

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[172] *Aldi* (2017) 270 IR 459, [1], [4].

[173] (2016) 257 IR 266.

[174] Ibid.

[175] Ibid.

[176] Ibid.

[167] Pragmatically, it would require the Commission in each case to evaluate the more and less advantageous aspect of each employee's contract in comparison to the enterprise agreement. The suggestion that an employee lacks a stake in an enterprise agreement where the minimum terms negotiated are better off overall when compared to those in the relevant modern award cannot be correct. While the rate of pay in the contract may be higher, and perhaps other terms in the contract are advantageous in comparison, it remains the case that the employees have negotiated a new safety net of minimal conditions better than those otherwise afforded through a reference instrument. Had it been the intent of parliament to preclude employers from offering more generous contractual conditions one would expect that this would be articulated expressly in the legislation.[177] It is not.

[168] Karijini submitted that the CFMMEU's submissions suggested, at various points, that there was something unusual or even untoward about the manner in which the Agreement was made. Karijini went on to say that it was unclear to it whether the CFMMEU relied on the suggestions in support of its contention that the Agreement lacked 'moral authority or authenticity'.

[169] At paragraph 26 of this decision, I outlined some of the CFMMEU's closing submissions regarding factual circumstances.

[170] Karijini submitted that there was nothing untoward about the selection of the two employees as Karijini's first employees.[178] Two vacancies had to be filled to meet the requirements of the TRRC contract, and apparently employing TRRC drivers would not have resolved the issue. Railtrain's decision to have Karijini secure the Roy Hill contract was said to have reflected the commercial reality that Roy Hill required the labour supplied to have an enterprise agreement of an appropriate duration in place to ensure continuity of production.

[171] The TRRC drivers are, however, worth mentioning. The CFMMEU observed that on or about 1 November 2018, 52 train drivers from TRRC transferred their employment to Karijini. In his evidence Mr Butler touched on the matter of planning to transfer the employees from TRRC to Karijini subject to their acceptance of an offer (and of course Karijini winning the contract). In fact, according to Mr Butler one of the two employees had asked questions about the effect of the agreement on the employees of TRRC, who it appeared from the question asked, and answer given, were already contemplated as being intended to be covered by the Agreement, notwithstanding TRRC having the contract at Roy Hill rather than Karijini.

[172] On the same day that the operator of Roy Hill informed TRRC of the cessation of the contract, Karijini was informed by letter it had secured the contract to supply the rail crew workforce for the Roy Hill Operations. Interestingly, that letter of 5 September 2018 to Karijini referred to the continuity of rail crew supply being important. Reference was made to an agreement in the following terms, '[A]s agreed, Karijini will use its best endeavours to engage the existing TRRC employees over the period from now until 1 November 2018'.

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[177] cf *BGC Contracting Pty Ltd v Australian Manufacturing Workers' Union* (2017) 268 IR 21.

[178] Karijini's Submissions in Reply [112(c)].

[173] During the Agreement making process, Mr Butler had contemplated that the TRRC employees would be covered by the Agreement in the future, and before 5 September 2018, Karijini had agreed to use its best endeavours to engage the existing TRRC employees over a specified period. There was no evidence before the Commission on the date when that agreement to use best endeavours was reached.

[174] The CFMMEU submitted that the vast majority of the TRRC drivers would continue doing the same work they had always done, but they would be covered by an enterprise agreement over which they had no input. The evidence showed that this occurred.

[175] This particular scenario, or as the CFMMEU termed it, 'manoeuvring', was not parked under one of the various subsections of s 188 or, for that matter, another section of the Act. However, somewhat central to the controversy before me, was the making of the Agreement by the two employees in circumstances where the TRRC workforce had no input into its contents.

[176] In *Aldi*, the High Court said that consistent with the view of s 186(3) taken in *John Holland*,[179] the references in sub-s (2) to 'covered by' may be read as 'those persons currently employed who fall within the whole class of employees to whom the agreement might in future apply' (underlining my emphasis). That was the approach which found favour with the Full Bench,[180] and it is one that the High Court considered correct.

[177] While there has been much made of the position of the employees of TRRC, ultimately the position of those employees would not appear relevant to the approval requirements imposed by the Act. They are not the 'relevant employees' because they were not employees of Karijini at the relevant time, albeit the notion of them becoming employees was clearly contemplated. That the Agreement could be made with persons who were not yet employed, and might never be employed, in the relevant single business, would seem, to coin the phrase 'a strange result'.[181] Notwithstanding that the phrase was used in regard to s 170LK(1) of the *Workplace Relations Act* 1996 (Cth), it appears apposite here in light of the legislative framework.

Non-satisfaction of the BOOT (s 186(2)(d))

CFMMEU's submissions

[178] The CFMMEU submitted that the Commission could not be satisfied that the Agreement passed the BOOT due to a number of less beneficial terms. In short, those terms included the forms of employment, rostering, fitness for work, ordinary hours of work, overtime, meal and crib breaks, shift work, annual leave, termination of employment, redundancy, consultation, family and domestic violence leave, and a lack of allowances otherwise provided in the Award. Of the 21 substantive clauses in the Agreement, the CFMMEU submitted that in 12 of those 21, at least one provision of the clause was less beneficial than the provisions in the Award.

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[179] *John Holland* (2015) 228 FCR 297, [1]-[2], [34]-[41].

[180] See *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248, [40]-[42].

[181] *Gordonstone* (1999) 93 FCR 317, [123].

[179] The CFMMEU submitted that there were a number of terms within the Agreement where an equivalent provision was not found in the Award, for example, fitness for work. The CFMMEU advanced that on a number of occasions the Commission had found that the imposition of rights or obligations in an enterprise agreement that were not in an Award were relevant considerations for the BOOT.[182]

Karijini's submissions

[180] Karijini submitted that the Agreement passed the BOOT within the meaning of s 186(2)(d).

[181] The CFMMEU's opening submission raised more than 11 pages of complaints about the BOOT; Karijini advanced that it had provided a detailed response to each complaint in its opening submission. It contended that the CFMMEU's closing submission simply ignored this response. Karijini said it had adduced expert evidence that the wages under the Agreement were at least $21,578 per annum higher than under the Award. The CFMMEU did not cross examine Karijini's expert on his methodology or assumptions, and made no attack on his conclusion in its closing submission. Instead, the CFMMEU continued to press the BOOT complaint in a formal way in the space of only two paragraphs in its closing submission. It appeared to Karijini that the CFMMEU recognised the BOOT complaint had no merit, but wanted to keep it on foot.

Consideration

[182] It is understood that for an enterprise agreement to be approved it must, in most circumstances, pass the BOOT. This is one of those circumstances. The Commission is required to be satisfied, at the time at which the test is undertaken, that each award covered employee and each prospective award covered employee will be better off if the agreement applies to the employee rather than if the relevant modern award applies.

[183] The CFMMEU submitted in its closing submissions, that Karijini's undertakings appeared to be a concession by Karijini that the BOOT could not be satisfied unless the undertakings were given.

[184] In contrast, Karijini submitted the roster arrangement which it had committed to maintain (in its undertakings), resulted in the employees employed on maximum term and casual arrangements, at each of the three classification levels covered by the Agreement, receiving substantially higher monetary benefits than under the Award. The difference being over 22% for maximum term employees at Railway Worker Level 3, and over 46% for casual employees at Railway Worker Level 2.

[185] Turning to the pay rate comparison between the Agreement and the Award the percentage differences for Railway Worker Level 2, 3 and 4 classifications were 23.1%, 30.27% and 30.15% respectively. When modelled for a Railway Worker Level 4

[182] *Falcon Mining Pty Ltd* [2016] FWC 5315; *Glen Eden Thoroughbreds Pty Ltd T/A Ray White Shailer Part* [2010] FWA 7217; *Smith and Nephew Pty Ltd* [2010] FWA 2465; *Lobethal Abattoirs T/A Thomas Food International* [2017] FWC 151.

classification on the roster committed to in Karijini's undertaking, the Commission found the difference between Agreement and Award was approximately 5.33%.

[186] Had I concluded that the Agreement was genuinely agreed to, then it was the case that the Agreement passed the BOOT with the undertakings proffered.

Non-compliance with the NES (s 186(2)(c))

CFMMEU's submissions

[187] Concerning non-compliance with the NES, the issue raised was the requirement to take annual leave by the provision of two weeks' notice. The CFMMEU submitted that the Commission could not be satisfied that the terms of the Agreement did not contravene s 55 and accordingly should not approve the Agreement.

Karijini's submissions

[188] Karijini submitted that the Agreement did not contravene s 55.

Consideration

[189] Under the Agreement, Karijini may require an employee to take accrued annual leave by giving two weeks' notice. Under the NES an employer is permitted to direct an employee to take paid annual leave in circumstances where the requirement is reasonable. In the context of the 4 yearly review of modern awards and the 'common issue' of annual leave, the Full Bench stated that '[A]n award term whereby an employee can be directed to take all or part of their accrued paid annual leave on the provision of 28 days' notice in writing without other considerations and requirements is not "reasonable" within the meaning of s 93(3)'. The CFMMEU submitted that the requirement in the Agreement was inconsistent with the NES and therefore was a contravention of s 55. However, I am of the view that inclusion of such term within the Agreement did not preclude approval of the Agreement in these circumstances given the undertaking that was proffered by Karijini.

[190] Karijini proffered undertakings identified as Appendix A to Karijini's submission to address any concerns about whether the Agreement passed the BOOT or contained a term inconsistent with the NES. These undertakings are those which were proffered prior to the hearing, save that item 3 reflected the variations made at the hearing.

DEPUTY PRESIDENT

Appearances:

Mr Wood *for the Applicant*
Mr Kentish *for the CFMMEU*

Hearing details:

Thursday 13 December 2018

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