[2021] FWC 6076

The attached document replaces the document previously issued with the code [2021] FWCA 5229 on 1 October 2021 to correct document referencing.

Associate to Deputy President Bull

Dated 7 October 2021

DECISION

Fair Work Act 2009
s.225 - Application for termination of an enterprise agreement after its nominal expiry date

Application by Mr David Mapledoram
(AG2019/2673)

ACES (PERMANENT EMPLOYEES) ENTERPRISE AGREEMENT 2007
[AC307851]

Security services

DEPUTY PRESIDENT BULL SYDNEY, 1 OCTOBER 2021

Application for termination of the ACES (Permanent Employees) Enterprise Agreement 2007.

[1] An application to terminate the *ACES (Permanent Employees) Enterprise Agreement 2007* (the Agreement) has been made by Mr David Mapledoram (the applicant). The application lists the United Voice, now known as the United Workers' Union (UWU), as Mr Mapledoram's representative.

[2] The Agreement was filed with the then *Office of the Employment Advocate* and commenced to operate from 27 June 2007, being the date of lodgement.[1] The Agreement has a nominal expiry date of five years from the date on which it was lodged[2] making the nominal expiry date 26 June 2012.

[3] The Agreement is a union collective agreement and was made between the Media Entertainment and Arts Alliance (MEAA) and Australian Concert & Entertainment Security Pty Ltd (ACES).

[4] Should the Agreement be terminated, the relevant modern award which will cover the employees is the *Security Services Industry Award 2020* (the Award), which at clause 4 - *Coverage* states that it covers employers in the security services industry throughout Australia and employees defined in Schedule A *Classification Definitions*.

[1] Exhibit B5 Statement of Sonja Semmens of 5 November 2019 at [6], which reflects the Fair Work Commission record

[2] Clause 3.1

[5] On 23 December 2020, a Full Bench quashed a decision of the Commission to terminate the *ACES (Permanent Employees) Enterprise Agreement 2007* (the Agreement)[3] with the application to terminate the Agreement remitted for redetermination (the appeal decision).

[6] As the Commission is required to redetermine the application pursuant to the order of the Full Bench,[4] it is appropriate for the Commission to do so on the basis of the most current material available[5] and consider the matter afresh, having regard to any previous submissions and evidence where relied upon by either party.[6]

Submissions and evidence of Mr Mapledoram and the UWU

[7] Mr Mapledoram and the UWU have filed further written submissions and witness statements in this proceeding[7] and rely on the previous written submissions and evidence filed. This includes the statements of:

- Mr Mapledoram of 11 October 2019;
- Mr Kujinga - 14 October 2019, 29 January 2021 and 25 February 2021;
- Mr Vance - 12 November 2019, 25 February 2021;[8]
- Paul Murphy - 16 August 2021;

and pay rate calculations filed by Mr Vance.

[8] On the final hearing day, Mr Davis who appeared for Mr Mapledoram and the UWU advised the Commission that the various written submissions relied upon were the joint submissions of Mr Mapledoram and the UWU.[9] The written submissions were listed in Mr Davis' emails of 18 August 2021 and 21 September 2021 to the Commission and include submissions made in the original proceedings:

- Submissions of United Voice (12 Oct 2019)
- UWU Final Submissions (16 March 2020)
- Applicant's additional submissions (1 February 2021)
- Applicant's submissions in reply (25 Feb 2021)
- Applicant's Final Submissions - Remitted Hearing (18 August 2021)

[9] Mr Kujinga who was previously employed as a *Security Officer* with ACES and Mr Vance an *Industrial Officer* with the UWU who provided additional written statements dated 25 February 2021, referred to above, were cross-examined on their additional evidence.

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[3] *Australian Concert & Entertainment Security Pty Ltd T/A ACES Group v David Mapledoram* [2020] FWCFB 7032; *Application by David Mapledoram* [2020] FWCA 4265

[4] Ibid at [36]

[5] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at [20]

[6] *The Australian Workers' Union v Alcoa of Australia Limited* [2019] FWCFB 3834 at [14-17]

[7] 1 February 2021 and 18 August 2021

[8] Exhibits A1, A2, A4, A5, A3 and A6 respectively

[9] In the 13 August 2020 decision it was noted at [16] that it was difficult to ascertain which submissions were being on behalf of Mr Mapledoram and which were being made by the UWU

[10] The joint submissions and evidence of Mr Mapledoram and the UWU is dealt with below under the relevant provisions of s.226 of the *Fair Work Act 2009* (the Act).

Submissions and evidence of ACES

[11] ACES filed written submissions titled 'Respondent's Consolidated Submissions' on 7 September 2021 and a witness statement from Ms Ison.[10] No other earlier evidence or submissions were relied upon in opposing the application. Ms Ison was cross-examined on her evidence.

Relevant Legislation

[12] The Agreement is a collective agreement-based transitional instrument pursuant to Item 2(5)(c)(i) of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act).

[13] Item 16(1) of Schedule 3, of the *Transitional Act* states:

> "**Collective agreement-based transitional instruments: termination by FWC**
>
> (1) Subdivision D of Division 7 of Part 2-4 of the FW Act (which deals with termination of enterprise agreements after their nominal expiry date) applies in relation to a collective agreement-based transitional instrument as if a reference to an enterprise agreement included a reference to a collective agreement-based transitional instrument."

[14] On the basis of the terms of the *Transitional Act* as extracted above, an application to terminate a collective agreement-based transitional instrument is to be dealt with under the relevant provisions of the *Fair Work Act 2009* (the Act). Section 225 of the Act states:

> "**225 Application for termination of an enterprise agreement after its nominal expiry date**
>
> If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:
>
> (a) one or more of the employers covered by the agreement;
>
> (b) an employee covered by the agreement;
>
> (c) an employee organisation covered by the agreement."

[15] Section 226 sets out when the Commission must terminate an expired enterprise agreement where an application to terminate an agreement is made:

> "**226 When the FWC must terminate an enterprise agreement**

[10] Exhibit B8 Statement of Lenette Ison of 6 September 2021

> If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:
>
> (a) the FWC is satisfied that it is not contrary to the public interest to do so; and
>
> (b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:
>
> (i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and
>
> (ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them."

[16] In respect of s.225 and whether the application before the Commission has been validly made, it is accepted that the UWU has no standing to make the application as it is not an employee organisation covered by the Agreement. However, Mr David Mapledoram is the named applicant and is being represented by the UWU and at the time of the filing of his application was an employee of ACES. Mr Mapledoram is no longer employed by ACES, having been dismissed on 19 November 2019.[11]

[17] In the appeal decision, the Full Bench held that the Commission's jurisdiction to deal with the application was not removed despite Mr Mapledoram no longer being employed by ACES at the time of the hearing. The Full Bench stated that there was no basis in the notion that an applicant must remain employed after an application is validly made up until the Commission issues a decision.[12] While ACES is of the view that this is not the case, it correctly accepts that the Commission as currently constituted is bound by the finding of the Full Bench on this issue.[13]

[18] As such, Mr Mapledoram, being an employee covered by the Agreement as per s.225(b) at the time of filing the application, had the necessary standing to bring the application, and his application remains on foot to be dealt with by the Commission, despite Mr Mapledoram no longer being an employee covered by the Agreement.

Determination under s.226 of the FW Act

S.226(a) - Is termination of the Agreement contrary to the public interest?

[19] There are a number of Full Bench decisions of this Commission and its predecessor, the Australian Industrial Relations Commission (AIRC), which provide guidance on how the Commission should address whether termination of an agreement would be contrary to the public interest.

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[11] Exhibit B8 Statement of Lenette Ison of 6 September 2021 at [168]. The reasons for Mr Mapledoram's dismissal were agreed by the parties to be kept confidential for the purposes of this matter.

[12] *Australian Concert & Entertainment Security Pty Ltd T/A ACES Group v David Mapledoram* [2020] FWCFB 7032 at [15]

[13] *Australian Concert & Entertainment Security Pty Ltd T/A ACES Group v David Mapledoram* [2020] FWCFB 7032 at [25]; ACES' written submissions of 7 September 2021 at [20-22]

[20] In *Kellogg Brown & Root Pty Ltd v Esso Australia Pty Ltd,*[14] (Kellogg) a Full Bench of the AIRC stated at paragraph [23]:

> "The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards. An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them."
>
> (My underline)

[21] In *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd*[15] (Aurizon) the Full Bench also adopted the approach in *Kellogg* in ascertaining the public interest under s.226(a) when stating:

> "[129] Section 226(a) requires a consideration of whether termination of the agreements is not contrary to the public interest. It seems to us that a consideration of the public interest will involve something that is distinct from the interests of the persons and bodies covered by the agreements. This distinction seems to be reflected in the structure of s. 226. The question of how the public interest is to be assessed was considered by a Full Bench of the Australian Industrial Relations Commission in *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000*."

[22] A Full Court of the Federal Court in upholding the Full Bench decision in *Aurizon* made the observation that the Act does not require the Commission to have regard to any particular considerations when deciding whether or not it is satisfied for the purposes of s.226(a), that it is not contrary to the public interest to terminate an agreement.[16]

[23] In *Tahmoor Coal Pty Ltd,* Lawler VP followed the approach in *Kellogg* when stating that the public interest was something distinct from the interests of the parties, although they may be similarly affected.[17]

Submissions of Mr Mapledoram and the UWU

[24] Mr Mapledoram and the UWU submit that the public interest is not served where an unfair advantage is provided to a single company with an expired enterprise agreement that provides "cheaper conditions overall" as other operators are bound by the Award.[18] It is

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[14] PR955357

[15] [2015] FWCFB 540

[16] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126 at [40]

[17] [2010] FWA 6468 at [30]

[18] Written submissions of 18 August 2021 at [6-9]

contended that the Agreement is below minimum standards as set by the Award and provides an inappropriate commercial advantage to ACES and is unfair to employees, as such it would not be contrary to the public interest to terminate the Agreement.[19]

Submissions of MEAA

[25] As referred to above, as part of the applicant's case, a statement from Mr Paul Murphy dated 16 August 2021 has been filed. Mr Murphy is the *Executive Officer* of the MEAA. Mr Murphy's statement makes no direct reference to s.226(a), nor is there any comment regarding the public interest.

Submissions of ACES

[26] ACES submits that the Commission should not be satisfied on the evidence that the termination of the Agreement is not contrary to the public interest.[20]

[27] It was argued that there is no evidence contrary to the UWU's submission that the Agreement provides ACES with a competitive advantage beyond that available to its competitors.[21] ACES submits that it is not paying its employees rates less than the Award and is paying employees above Award rates.[22] It is further put that a transition from the Agreement to the Award will put employment levels and employee engagement at risk.[23]

[28] Under s.226(a), the Commission is only required to be satisfied that the Agreement's termination is not contrary to the public interest and not whether it would be in the public interest to terminate the Agreement, which appears to be the thrust of the submissions from those supporting its termination. The submissions of ACES rely not only on the existing terms and conditions of the Agreement, but the practices it applies outside the Agreement with regard to rates and conditions of employees. The Agreement of itself is clearly inferior to the Award in terms of benefits to employees.

[29] The Commission is not satisfied that the submissions of any party raise public interest considerations as opposed to the direct interests of the employees and ACES and these submissions are more properly considered under s.226(b).

[30] As nothing has been identified that affects the public interest, as distinct from the direct interests of ACES and its employees, I find that terminating the Agreement would not be contrary to the public interest.

S.226(b)(i) - Views of the employees, employer, and any employee organisation covered by the Agreement

Views of employees

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[19] Statutory Declaration from Justin Davis dated 24 July 2019

[20] Written submissions of 7 September 2021 at [138]

[21] Ibid at [140(a)]

[22] Ibid at [140(a)(ii)]

[23] Ibid at [140(c)]

[31] In considering this sub clause, the Commission is unable to have regard to the views of any person who is not presently an employee, although they may have been at the time of the application. Both Mr Mapledoram and Mr Kujinga who provided evidence in this matter are no longer employees and are no longer covered by the Agreement and thus their views are not to be considered under s.226(b)(i).

[32] No employee who is currently employed by ACES gave evidence in this redetermined matter, however ACES provided an employee petition of 218 signatures out of a possible 243 employees who indicated that they did not support termination of the Agreement.[24] Ms Ison in her evidence outlined the circumstances leading to the creation of the petition.[25] Ms Ison's evidence was that of the 218 employees who signed the petition, 202 are still in employment with ACES, although six have since converted to casual employment. It is noted that the Agreement does not apply to casual employees, whereas the Award includes casual employment.

[33] Ms Ison's evidence made reference to an email she received from an employee covered by the Agreement who stated she was writing on behalf of a number of other employees including herself, expressing a concern about the possible termination of the Agreement and requesting that management hold a meeting to look at what that could mean in the future including a worst case roster scenario. A copy of the email was attached to Ms Ison's witness statement.[26] Ms Ison stated that that she organised for interested employees to attend a meeting at which the main theme from employees was, how could they stop the Agreement being terminated.[27]

[34] In the earlier proceedings, Mr Spiros Parissis, a *Security Ranger* employed by ACES, provided two witness statements[28] and gave evidence. Mr Parissis stated that he believed he was better off under the Agreement than the Award. Mr Parissis stated that he liked working 12-hour shifts over fewer days and having more days off. Mr Parissis has not attended the current proceedings and his evidence is not relied upon by ACES in its opposition to the application. It is noted that Mr Parissis was a signature to the more recent petition.

Views of employer

[35] The employer, ACES, is opposed to the Agreement's termination and submits that it would be detrimental to its employees and its business. It is submitted that the Agreement is integral to its business in the security services industry as was set out in the evidence of Ms Ison. Ms Ison's evidence was that if the Agreement was terminated, ACES could not continue the current method of rostering its employees.[29] Ms Ison stated that the Agreement provides

[24] This petition was subject to a confidentiality order issued on 25 February 2021 but made available to all parties

[25] Exhibit B8 Statement of Lenette Ison of 6 September 2021 at [144-158] and Attachment LI-37

[26] Ibid at [137-138] and LI-35

[27] Ibid at [139-141]

[28] Exhibit B1 and Exhibit B4

[29] Exhibit B8 Statement of Lenette Ison of 6 September 2021 at [121]

greater roster flexibility than the Award allowing employees to work less days in a roster cycle for the same pay including working a four-day week.[30]

[36] Ms Ison stated that termination of the Agreement will require it to restructure all of its rosters and require multiple operational practices so they can comply with the Award.[31]

View of employee organisation

[37] As stated above, the employee organisation covered by the Agreement is the Media Entertainment and Arts Alliance.

[38] On 31 July 2019, my chambers wrote to the MEAA requesting a response to Mr Mapledoram's application to terminate the Agreement. On 21 August 2019, MEAA advised it did not intend to take a position and requested a conference be facilitated to see whether the parties could reach an agreed position. Up until the Commission's initial decision delivered on 13 August 2020, the MEAA had not filed any material or attended at any of the hearing dates.

[39] On 18 August 2021, the UWU filed a statement of Mr Paul Murray, the MEAA's *Executive Officer* which was dated 16 August 2021. Mr Murray's statement referred to the Agreement not taking into account 'protected award conditions' as per clauses 4.3 and 12.8 and that the current Award contains these provisions and made reference to other provisions not contained in the Agreement.

[40] Mr Murray states that as the Agreement passed its nominal expiry date nine years ago, it is appropriate that it be 'renegotiated' or that a return to the Award occur.

[41] Mr Murray's statement concludes by stating that the MEAA supports the applicant and his representative the UWU in these proceedings. Mr Murphy was not required for cross-examination and provided no oral or other evidence in addition to his statement.

[42] There was no evidence that the MEAA was currently active or engaged with the employees of ACES, nor was there any evidence that the MEAA had taken any steps to renegotiate the Agreement or that it had attempted to ascertain the views of employees, of whom presumedly some are its members.[32]

s.226(b)(ii) - The circumstances of employees, employer and organisations and the likely effect that the termination will have on each of them

Circumstances of employees

[43] The Agreement was approved before the enactment of the *Fair Work Act 2009* and was not subject (as set out at s.193 of the Act) to the 'better off overall test' or any other requirement placed on enterprise agreement approvals by the Act.

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[30] Ibid at [63-67]

[31] Ibid at [124]

[32] See Exhibit B8 Statement of Lenette Ison of 6 September 2021 at [195]

[44] Clause 4.3 of the Agreement excludes 'protected award conditions' as they are defined in the *Workplace Relations Act 1996* at s.354(4).[33] Section 354(2) of the Workplace Relations Act states that protected award conditions are taken to be included in a workplace agreement subject to any terms of the workplace agreement that expressly exclude or modify all or part of them. Clause 12.8 of the Agreement specifies that the rates of pay contained at Schedule B of the Agreement exclude the operation of protected award conditions dealing with:

- penalty rates,
- public holidays,
- overtime,
- shiftwork,
- monetary allowances,
- annual leave loading; and
- incentive-based payments and bonuses.

[45] The Agreement at clause 12.1 states that wage rates are expressed as composite hourly rates of pay that include compensation for penalty rates, loadings and public holidays unless otherwise expressly provided.

[46] Should the Agreement be terminated, the minimum terms and conditions in the Award would apply which includes all of the excluded conditions of the Agreement at 12.8, other than incentive-based payments and bonuses which are not an Award entitlement.

[47] During the hearing on 21 September 2021, it was acknowledged by Senior Counsel for ACES that the Agreement alone is inferior in comparison to the Award terms and conditions, however ACES applies additional benefits to its employees which places their terms and condition above those of the Award. Wage increases have been applied to employees administratively since the last Agreement provided increase on 1 December 2010. To this end ACES has provided an undertaking which they state will apply while the Agreement continues in force.[34]

[48] The Commission has undertaken its own exercise in calculating the financial benefits under the Agreement and current wage payments made by ACES vis a vis the Award rates which it has forwarded to the parties on various occasions. Based on the final response to the Commission from ACES dated 14 April 2021, and modelling on the rosters provided, the actual rates paid to its employees are relevantly comparable with the Award. This is based on accepting the submissions of ACES with regard to the Agreement classifications and their Award comparator classifications and the detailed modelling against rosters provided in the statement of Ms Ison and the undertaking provided.[35]

[49] There are two conditions in the Agreement which differ from the Award and the Commission notes that it is not a straightforward exercise to determine the effect on employees should they no longer apply and the Award terms have application.

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[33] This section of the *Workplace Relations Act 1996* was repealed in 2008

[34] Ibid at [201]

[35] Ibid at [87-113] and [201]

Shift start time

[50] At clause 13.9 and 13.10 of the Agreement employees are required to attend for work 15 minutes prior to their rostered start time for a hand over, equipment issue and shift briefing. This time is not counted as time worked. The evidence in this matter was that employees are required to attend work 15 minutes prior to their start time in accordance with clause 13.9 and 13.10 of the Agreement although Ms Ison's evidence was that the arrival time of employees is not recorded or monitored by management.[36]

[51] In the calculations attached to Mr Vance's statement of 25 February 2021,[37] his Award rate comparison calculations include payment for employees commencing work 15 minutes prior to their roster stating times.[38]

[52] The Award provision is expressed as follows:

> "13.4 **Shift start/end times**
>
> (a) An employee's start and finish times of ordinary hours of work operate from when the employee arrives at, or leaves, their actual job or work station.
>
> (b) However, clause 13.4 applies if:
>
> (i) an employee is required, before going to a worksite, to collect from another place any equipment belonging to the employer (for example, a firearm, keys or a vehicle) or, after finishing work, to return any such equipment to a place other than the worksite; and
>
> (ii) doing this adds more than 15 minutes to the time which would otherwise be required for the employee to travel between the worksite and the employee's residence.
>
> (c) The employee's start and finish times of ordinary hours of work operate from the employee's arrival at the point of collection or return respectively."
>
> (my underline)

[53] In summary, the Award provides that an employee's start and finish time commences from when an employee arrives at or leaves their actual job or work site. However, where an employee is required prior to going to a worksite to collect from another place any equipment or after finishing work to return any such equipment to a place other than the worksite and the time taken to undertake this task adds more than 15 minutes to the time which would otherwise be required for the employee to travel between the worksite and the employee's residence, their ordinary hours are to start and finish at the point of collection or return of the equipment.

[54] Clause 13.9.1 of the Agreement reads as follows:

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[36] Ibid at [112]

[37] Exhibit A6

[38] PN308, 390 (26 February 2021)

> "Shift Hours: In all cases, you will be paid from the rostered start time (provided that you are on site and ready to commence work 15 minutes prior to the start time in accordance with Clause 13.10) to the time you finish work on site, and finish times may vary according to the operational requirements of ACES enterprise and stakeholder requirements."

[55] Clause 13.10 of the Agreement reads as follows:

> **"Hand Over & Shift Briefing**: All employees under this agreement must be on site, uniformed and shift ready 15 minutes in advance of their rostered shift for the purpose of an adequate brief, shift handover and equipment issue. Such briefing time will not be countered as time worked."

[56] Mr Kujinga stated during cross-examination that the practice was that employees are required to be in attendance at the work site 15 minutes before their rostered start time. During this period employees can change into their uniform, are issued with any equipment such as a mobile phone, radio and notebook in readiness for a briefing.[39]

[57] In comparing the Award and the Agreement clauses it is noted that the Agreement clause provides that the 15 minute period in addition to being used for the purposes of equipment issue is also for the purposes of 'an adequate brief' and 'shift handover'. Whereas the Award provides that if before going to a worksite an employee is required to collect from another place any equipment belonging to the employer or after finishing work, to return any such equipment to a place other than the worksite it is unpaid time, unless this adds more than 15 minutes to the time which would otherwise be required for the employee to travel between the worksite and the employee's residence, in which case, the employee's ordinary hours are to start and finish at the point of collection or return.

[58] The Award also states that time spent checking in or out when entering or leaving the employer's premises is not regarded as ordinary working time.[40]

[59] Taking the relevant Agreement and Award provisions overall it would appear arguable that the Agreement provision is more onerous on employees as the 15 minute period is also required for the purposes of a briefing and handover. Although unlike the Award, there is no potential of an employee working an additional unpaid 15 minutes at the end of their shift.

Breaks

[60] An Agreement benefit not provided for in the Award is an entitlement to 2 x 20 minute paid rest breaks where a 12 hour shift is worked, provided the employee remains on call and is not relieved.[41] The Award provides for a paid rest break or breaks of 30 minutes in total plus an unpaid meal break of 30 minutes. Thus the Agreement provides an additional 10 minute paid rest break but does not provide the unpaid 30 minute meal break.[42]

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[39] PN195, 215, 219, 224-6, (26 February 2021)

[40] 13.2(b)

[41] Agreement clause 13.7

[42] See ACES' written submissions of 7 September 2021 at [106-108]

[61] Whether the Agreement's paid rest period entitlement of 40 minutes for a 12 hour shift is a better benefit than the Award's 30 minute paid rest break, plus a 30 minute unpaid meal break during a 12 hour shift is problematic.[43]

[62] In summary, termination of the Agreement resulting in the Award terms and conditions applying to employees will result in changes to employees' terms and conditions, however based on the Agreement terms and conditions and the additional payments and terms currently applied administratively, the actual if any adverse impact on employees would appear to be limited. The exception to this is the roster arrangements allowed under the Agreement, which includes permitting the 38-hour week to be averaged over a 12-month period,[44] whereas the Award places a limitation on the period over which rosters are averaged of between 2 and 8 weeks.[45] Shift swaps are also provided for under the Agreement but not the Award.[46]

Circumstances of MEAA

[63] Mr Murphy's statement of 16 August 2021, includes the observation that termination of the Agreement 'will cause no deleterious effect on MEAA.' Apart from having no deleterious effect, it is difficult to foresee there being any effect on the MEAA should the Agreement be terminated.

Circumstances of ACES

[64] ACES maintains its strong opposition to the application, submitting that continuation of the Agreement is not only in its interests, but in the interests of its employees. It is submitted that ACES currently conducts its business based on the terms of the existing Agreement and it would be required to amend its rosters to comply with the Award's stricter roster conditions.[47]

[65] Ms Ison's evidence was that ACES could not continue rostering employees in the manner it currently does if the Agreement was terminated. Ms Ison stated that terminating the Agreement would result in having to amend rosters to remove any costs that are not calculated in the tender price and strictly apply the Award conditions.[48]

[66] With the resulting roster changes, Ms Ison expressed the view that there would be significant disengagement and employee turnover should the Agreement be terminated.[49]

Is it appropriate to terminate the Agreement taking into account all the circumstances?

[67] The Agreement was made under the *Workplace Relations Act 1996,* as a union collective agreement and has a nominal expiry date of five years from the date on which it was lodged

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[43] See Ms Ison's comment about having to introduce an unpaid meal break under the Award, Exhibit B8 at [122]

[44] Clauses 8.2 and 13.1

[45] Clause 13.1

[46] Clause 13.3.3

[47] ACES' written submissions of 7 September 2021 at [165]

[48] Exhibit B8 Statement of Lenette Ison of 6 September 2021 at [121-122]

[49] Ibid at [123]

with the Office of the Employment Advocate in 2007, meaning it has continued to operate well beyond its nominal expiry date.

[68] Once an enterprise agreement has passed its nominal expiry date, the Act provides options for the enterprise agreement to be renegotiated or for it to be terminated. It may also remain in place should that be the wish of the parties covered by the Agreement. Where an application to terminate an enterprise agreement is made as in this case, the Commission is to consider the application under ss.225 and 226 of the Act.

[69] The Full Bench decision in *Construction, Forestry, Mining and Energy Union v Peabody Energy Australia PCI Mine Management Pty Ltd* (Peabody)[50] explained the discretionary nature of the decision the Commission is required to make under s.226 of the Act as follows:

> "[17] In identifying that s.226 required the exercise of a discretion, the Full Bench in *AWX Pty Ltd* referred to the following passage in the High Court decision in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[51] (footnotes omitted):
>
> > "[19] "Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment."
>
> [18] Section 226 involves the exercise of a "narrow" discretion of the type described in the last sentence of the above passage. Notwithstanding this, it remains the case that the evaluative assessments required by s.226(a) and (b) allow a degree of latitude on the part of the decision-maker as to the conclusions to be reached. …"

[70] The Commission has determined that the application of Mr Mapledoram was appropriately made under s.225 and that pursuant to s.226(a) that the Agreement's termination would not be contrary to the public interest. On this basis the Commission is left to determine whether it is appropriate to terminate the Agreement taking into account all the circumstances including those set out under s.226(b)(i) and (ii) of the Act.

[71] The Commission has set out in summary form above, the views of ACES, the MEAA and the employees and the circumstances of these parties and the likely effect that termination of the Agreement will have on each of them. The requirement in s.226(b) to take into account all of the circumstances including those set out in s.226(b)(i) and (ii) is a requirement not only

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[50] [2016] FWCFB 3591

[51] [2000] HCA 47; (2000) 203 CLR 194 at [19] per Gleeson CJ and Gaudron and Hayne JJ

to take the matters into account but to give them due weight in assessing whether it is appropriate to terminate an enterprise agreement.[52]

[72] It is accepted that the UWU is not covered by the Agreement and the Commission does not have a statutory obligation under s.226 to take into consideration its views. Despite this, the Commission considers that as an employee organisation with coverage of the security industry, the UWU's views should be considered and accorded whatever weight is appropriate.[53]

[73] The views of Mr Mapledoram as the applicant are said to accord with the views of the UWU. Mr Mapledoram submitted that the Agreement is inferior to the Award in a number of aspects.[54] The fact that the Agreement provides lesser benefits that the Award in a number of areas is accepted by ACES, but it relies on it financial modelling which is based on the actual rates paid to employees and its undertakings, not simply the Agreement rates and conditions.

[74] Ms Ison's evidence was that on commencement of the Agreement, a 3% wage increase has been paid each year up and until 2012.[55] In 2013, the Agreement rates were reset to index against the base pay rate under the Award.[56] Since this date, ACES has increased the Agreement base pay rates by the same percentage as the increase in the Award base pay rates each year, ensuring that the Agreement base rates always stay the same percentage above the Award base pay rates.[57]

[75] In relation to payment for work on a public holiday, Ms Ison's evidence was that the Award public holiday loading was factored into the Agreement on its commencement, but subsequently ACES has paid a public holiday loading in certain listed circumstances which it will continue to do should the Agreement remain in place.[58] The terms of this commitment are reflected in a revised undertaking provided to the Commission on 23 September 2021 by ACES' legal representatives, Ovartis Lawyers.

[76] A number of factors have altered since the decision of the Commission in August 2020 to terminate the Agreement. The Full Bench decision has held that Mr Mapledoram's evidence that was previously considered under s.226(b)(i) cannot be taken into account by the Commission in assessing the views of employees. It therefore also follows that the views of Mr Kujinga who is no longer an employee are also not to be considered under this subsection of the Act.

[77] The Commission has now been provided with a new petition signed by the vast majority of employees who oppose Mr Mapledoram's application. On the last occasion the Commission placed little weight on an employee petition opposing the application as it was not clear to the

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[52] *Construction, Forestry, Mining & Energy Union v Deputy President Hamberger* [2011] FCA 719 at [103]

[53] See decision of Binet DP in *Wilson Security – Western Australian Collective Agreement 2009* [2017] FWCA 1595 at [38]

[54] Submissions of 1 February 2021 at [29-30]

[55] Exhibit B8 Statement of Lenette Ison of 6 September 2021 at [45]

[56] Ibid at [46]

[57] Ibid at [48]

[58] Ibid at [58-62]

Commission that the employees who signed the petition were fully informed of the consequences of the Agreement remaining in operation.[59]

[78] In redetermining this matter, the Commission has been presented with the background to the current employee petition through the evidence of Ms Ison. Ms Ison's evidence as discussed above, was that as a result of receiving an email from an employee covered by the Agreement in October 2020, she organised for interested employees to attend a meeting to discuss the application following which she prepared a document comparing the key differences between the Agreement and the Award which she provided to all supervisors. Supervisors then attended all worksites and met with each employee.[60] Under cross-examination, Ms Ison was steadfast in stating that there was no supervisor pressure placed on employees. This process led to the employee petition opposing the application.

[79] Unlike the previous situation existing in August 2020, the Commission does not have before it evidence of any employee support for the termination of the Agreement,[61] and now has a petition of a significant majority of employees opposing termination of the Agreement.

[80] In determining what weight should be attributed to this evidence, the Commission notes that this matter has been ongoing since July 2019, when Mr Mapledoram's application was first made and it appears that employees covered by the Agreement now are well aware of the application and have been informed of the resulting circumstances should the Agreement be terminated or remain operating.

[81] Ms Ison included in her evidence a copy of a screen shot of a text message that several employees had advised management they had received from the UWU regarding their pay and conditions. The text message asked whether they would like to know more and that some employees had as a result spoken to the UWU. Where an employee had responded 'yes' to whether they would like to know more about their pay and conditions, they received a further text message from the UWU advising that their conditions are fixed by an out of date agreement and that the UWU has a case on foot which can lift their conditions to the Award.[62] While the UWU communications to employees are what would be expected of a union running a Commission case (noting the applicant is Mr Mapledoram not the UWU) the communication serves to demonstrate the general awareness of employees around the application to terminate the Agreement.

[82] The Commission now has before it an application made by a previous employee supported by a Union, which while having coverage of security services work, is not covered by the Agreement. The union covered by the Agreement now supports the application but otherwise has demonstrated no interest in the application.

[83] This is to be contrasted with the employer's strong opposition to the application, a petition signed by a significant majority of employees covered by the Agreement opposing the

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[59] [2020] FWCA 4265 at [52]

[60] Exhibit B8 Statement of Lenette Ison of 6 September 2021 at [151-153]

[61] The 12 November 2019 (A3) statement of Mr Vance makes reference at [19] to a petition but this was not tendered.

[62] Exhibit B8 Statement of Lenette Ison of 6 September 2021 at [197-199] and LI-45 and LI-46

application and there being no evidence before the Commission from any employee in support of Mr Mapledoram's application to terminate the Agreement.

[84] The employer has also provided the Commission with a written undertaking that guarantees that the existing benefits that employees receive outside the Agreement will remain for the life of the Agreement. In addition, a number of conditions not currently enjoyed but identified in the Commission's August 2020 decision as being provided under the Award and not the Agreement are also to be applied as per the undertaking.

[85] The employer undertaking identifies the current pay rates for each classification Level in the Agreement in accordance with the roster and hours worked of employees and stipulates that where there is an increase in the base rates of pay under the Award, as set out in the Commission's annual wage review, ACES will vary the Agreement base pay rates by the same percentage in the first full pay period after the date of operation for the Award wage increase.

[86] The undertaking also provides that where an employee works on a public holiday, the employee will receive a loading that is equivalent to, or in excess of, the public holiday penalty rates set out in the Award.

[87] Further, the undertaking applies the Award clauses relating to individual flexibility arrangements, requests for flexible working arrangements, consultation about major workplace change, changes to rosters or hours of work and about change of contract as if they are terms of the Agreement.

[88] The undertaking is more extensive than previously provided and referred to in the August 2020 decision.[63]

[89] The particulars of the undertaking is set out below:

> **"Undertaking**
>
> 1) Australian Concert and Entertainment Security Pty Ltd (**Company**), as at the Date of Undertaking (as defined in paragraph 4), makes an undertaking (**Undertaking**), in accordance with paragraph 2, to:
>
> (a) the Fair Work Commission (**Commission**); and
>
> (b) the following persons (collectively, **employees**):
>
> (i) each employee of the Company covered by the *ACES (Permanent Employees) Enterprise Agreement 2007* (**Agreement**) as at the Date of Undertaking; and

[63] [2020] FWCA 4265 at [71] and Exhibit B6 Statement of Lenette Ison of 6 July 2020 at [14]

(ii) each future employee of the Company covered by the Agreement during the Term of Undertaking (as defined in paragraph 5).

Scope of Undertaking

2) Subject to paragraphs 3, 4 and 5, the Company will:

(a) as and from the Date of Undertaking, pay each employee, for each hour worked by the employee for the Company, at least the following base pay rates (as applicable to each employee's circumstances determined by reference to other provisions of the Agreement) (**Agreement Base Pay Rates**):

ACES Enterprise Agreement 2007 – Schedule B

PERMANENT SECURITY Rates effective from the first full pay period on or after 1st July 2021.						
Rates	**Level 1**	**Level 2**	**Level** 3	**Level 4**	**Level 5**	**Level 6**
VENUES	Security	Gatehouse / Ranger	Control Room / Team Leader	Shift Sup < 20 / Control Coordinator	Shift Sup >20	Site Supervisor
EVENTS	Security	Crowd Control	Senior Sec / Area Supervisor	Event Super <20	Event Super > 20	Event Venue Super
Rates $ per hour						
Standard Roster Ordinary Hours	22.85	23.51	23.90	24.30	25.09	26.34
Rotate Roster Ordinary Hours	28.56	29.39	29.88	30.38	31.36	32.93
Flexible Roster Ordinary Hours	29.71	30.56	31.07	31.59	32.62	34.25
Additional Hours	31.99	32.91	33.46	34.02	35.13	36.88

(b) where there is an increase in the base rates of pay under the *Security Services Industry Award 2020* (**Award**) as set out in the Fair Work Commission's annual wage review (**Annual Wage Review**) for the Award (**Annual Award Wage Increase**), vary the Agreement Base Pay Rates (from

time-to-time) by the same percentage as the Annual Award Wage Increase, with such variation to apply in the first full pay period after the date of operation for the Annual Award Wage Increase published in the Annual Wage Review;

(c) where an employee works on a public holiday in the State or Territory where the work occurs, pay to that employee a loading that is equivalent to, or in excess of, the public holiday penalty rates set out in the Award applicable to that work (with such comparison with the Award to be measured in absolute dollars in respect of the public holiday, and not percentage of hourly pay rate); and

(d) apply the following clauses from the Award (on the basis that any references in these provisions to the Award are instead taken to be references to the Agreement):

(i) clause 5 ("Individual flexibility arrangements");

(ii) clause 6 ("Requests for flexible working arrangements");

(iii) clause 27 ("Consultation about major workplace change");

(iv) clause 28 ("Consultation about changes to rosters or hours of work"); and

(v) clause 29 ("Consultation about change of contract").

Application of Undertaking

3) This Undertaking applies if, in Fair Work Commission matter number AG2019/2673:

(a) the Commission makes an order (**Order**) pursuant to section 226 of the *Fair Work Act 2009* (Cth) (**Act**) dismissing the application by David

Mapledoram dated 23 July 2019 (**Application**) under section 225 of the Act (thereby determining not to terminate the Agreement) (**Decision**); and

(b) in the Commission's reasons for the Decision, the Commission expressly relies on this Undertaking as a basis for dismissing the Application.

Date of Undertaking

4) This Undertaking takes effect on and from the date of the Order (**Date of Undertaking**).

Term of Undertaking

5) This Undertaking has effect from the Date of Undertaking until the date that the Agreement ceases to operate in accordance with subsection 54(2) of the Act (**Term of Undertaking**)."

[90] In exercising the discretion under s.226(b) and applying the evaluative assessments as described by the Full Bench in *Peabody*, the Commission is of the view that considerable weight should given to the views of the employer and its employees who oppose the application, as they are the parties who will be directly impacted should the Agreement be terminated or remain in operation. There is no evidence before the Commission that any employee supports the application.

[91] While the views of the MEAA as the relevant employee organisation covered by the Agreement must be considered, its views are to be examined in the context of not having demonstrated or attempted to demonstrate any current involvement with employees or the employer. There has been no evidence of any efforts to renegotiate the Agreement and apart from the MEAA's initial response to the application which was sought by the Commission in 2019 and a subsequent statement in support of the application in 2021, the MEAA has been otherwise disinterested in the matter.

[92] The views of Mr Mapledoram and another previous employee and the UWU as an interested third party, while relevant, have not persuaded the Commission on this occasion, that they should be elevated above those of the employer and its employees covered by the Agreement. In any event, the Commission is satisfied that their concerns have been substantially addressed with the undertaking that has been provided by ACES. The undertaking given by ACES as extracted above, is essential to the Commission's decision in this application. The undertaking is to remain in place for the life of the Agreement.

[93] It is noted that undertakings in applications under s.225 of the Act have been previously accepted by the Commission in determining whether to terminate an enterprise agreement,

albeit to date, in matters where an enterprise agreement is terminated.[64] Employers have often successfully argued that an existing enterprise agreement should be terminated as it contains restrictions on a business operating efficiently.[65] In this matter ACES has argued that the Agreement provides operational flexibilities that the Award does not, which are beneficial to its operations and which its employees value.

[94] For the above reasons, the Commission does not consider it appropriate to terminate the *ACES (Permanent Employees) Enterprise Agreement 2007*, and as such the application by Mr Mapledoram is dismissed.

[95] An Order [PR734511] will be issued with this decision.

DEPUTY PRESIDENT

Appearances:

Mr J Davis and *Mr A Aghazarian* on behalf of Mapledoram and the UWU
Mr S Wood AM, QC, Mr P Jeffreys and Mr M Easton of counsel on behalf of ACES

Hearing details:

2021

26 February (Sydney)
21 September (via Microsoft Teams)

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[64] *Murdoch University* [2017] FWCA 4472 at [288]

[65] *Wollongong Coal Limited T/A Wollongong Coal* [2021] FWCFB 2161 at [140]; *Aurizon Operations Ltd; Aurizon Network Pty Ltd; Australian Eastern Railroad Pty Ltd* [2015] FWCFB 540 at [171]