DECISION

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

Aerocare Flight Support Pty Ltd T/A Aerocare Flight Support
(AG2017/1424)

COMMISSIONER WILSON MELBOURNE, 31 AUGUST 2017

Application for approval of the Aerocare Collective Agreement 2017.

[1] Aerocare Flight Support Pty Ltd and Aero-Care Flight Support Unit Trust (collectively referred to as Aerocare) have applied to the Fair Work Commission (Commission) for approval of an enterprise agreement known as the *Aerocare Collective Agreement 2017* (the 2017 Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act).

[2] The 2017 Agreement is stated to be a single enterprise agreement and not a greenfields agreement. It is stated as having been made between Aerocare Flight Support Pty Ltd ABN 32 103 196 701 and Aero-care Flight Support Unit Trust ABN 67 498 323 240 on the one hand, and, on the other hand "Collectively, the Company Employees who perform the work in one of the classifications contained in this Agreement".[1] Clause 3, the Coverage, Scope and Recognition clause does not explicitly limit the 2017 Agreement's coverage, however Aerocare's Employer Statutory Declaration (the Form F17) filed at the time of making the application states that while the Agreement covers 1,370 part-time employees, it covers zero casual employees.[2] These matters are consistent with the fact that the 2017 Agreement contains no provisions for casual employees.

[3] Aero-Care Flight Support Pty Ltd and its employees are presently covered by the *Aero-Care Collective Agreement 2012*[3] (the 2012 Agreement). The 2012 Agreement covers casual, part-time and full-time employment.[4]

[4] For the purposes of the better off overall test, the reference instrument is the *Airline Operations—Ground Staff Award 2010*[5] (the Ground Staff Award).

ABBREVIATIONS

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[1] Clause 2.

[2] F17, item 4.3.

[3] AE899834.

[4] See, for example, Clauses 5, 9.1, 9.5, and 9.12.

[5] MA000048.

[5] The following abbreviations are used throughout this decision;

2012 Agreement	Aero-Care Collective Agreement 2012
2017 Agreement; CA17 or Agreement	Aerocare Collective Agreement 2017
Act or FW Act	Fair Work Act 2009 (Cth)
Aerocare	Aerocare Flight Support Pty Ltd and Aero-Care Flight Support Unit Trust
ASU	Australian Municipal, Administrative, Clerical and Services Union
BOOT	Better off overall test
Commission or FWC	Fair Work Commission
F17	The Employer's Statutory Declaration in Support of an Application for Approval, filed by Aerocare
Ground Staff Award	Airline Operations—Ground Staff Award 2010
IFA	Individual Flexibility Arrangement
NOERR or NERR	Notice of Employee Representational Rights
PSE	Permanent Secure Employee (see 2017 Agreement, Clause 5)
SOP	Standard operating procedure
TWU	Transport Workers' Union

BACKGROUND

[6] The 2017 Agreement was made after a process commencing on 13 January 2017 when employees were notified by Aerocare of its intention to initiate bargaining. That was followed by a Notice of Employee Representational Rights (NOERR) being issued to employees on 27 January 2017. A second NOERR was provided to employees on 3 March 2017.[6] Both NOERRs were given in the requisite form, with Aerocare giving "notice that it is bargaining in relation to an enterprise agreement (Aerocare Collective Agreement 2017) which is proposed to cover employees who do work covered by the classifications of the Aero-Care Collective Agreement 2012 except for Leader 3 employees". Voting for the 2017 Agreement commenced on Saturday 15 April 2017, which was the day after Good Friday, and finished on Tuesday 18 April 2017. The Aerocare Statutory Declaration (F17) states that 1,370 employees will be covered by the Agreement and that 1,207 cast a valid vote, of whom 1,001 voted to approve the Agreement.[7]

[7] Aerocare's employer bargaining representative was First IR Consultancy Pty Ltd and there were two union bargaining representatives involved in bargaining, the Australian Municipal, Administrative, Clerical and Services Union (ASU) and the Transport Workers' Union (TWU), and one employee bargaining representative, Gary Travers, an employee of Aerocare.

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[6] F17, item 2.8; Exhibit Aerocare 1, Witness Statement of Gregory Shelley, [20] – [23].

[7] F17, item 2.10.

[8] Both the ASU and TWU oppose the approval of the 2017 Agreement. The ASU does not wish to be covered by the 2017 Agreement if it is approved, whereas the TWU seeks to be covered.

[9] The TWU and ASU both object to approval of the 2017 Agreement on several broad grounds detailed below. Their objections include that the Agreement had not been genuinely agreed to by the employees covered by it; that the group of employees covered by the Agreement was not fairly chosen: that it does not pass the better off overall test for several reasons; that it contains an unlawful term; and that it is not an enterprise agreement within the meaning of the Act.

[10] In accordance with usual practice, once the Aerocare application for approval of the 2017 Agreement was made, the Commission's Enterprise Agreement Research Staff prepared an analysis of the 2017 Agreement outlining any concerns there may be about the extent to which the Agreement met the statutory criteria for approval. That document, entitled "Agreement Analysis Summary" was circulated to the parties to this matter and highlighted a number of BOOT issues about which the Commission may be concerned, including whether certain classifications would be better off overall when called upon to work on weekends and public holidays; the impact of "supplementary hours" and "altered hours" provisions when compared with the Ground Staff Award entitlements to overtime; part-employee's access to set, regular hours of work; and the impact on wages from the absence of shift work penalties. The Agreement Analysis Summary also highlighted a number of other matters in which the 2017 Agreement may provide less beneficial terms than the Ground Staff Award.

[11] A hearing relating to the application to approve the Agreement was held in Brisbane on 13 and 14 July 2017. At that hearing, Aerocare was represented by Jim Murdoch QC and Edward Shorten, of Counsel; the TWU was represented by Anthony Howell, of Counsel and the ASU was represented by Justin Cooney, an ASU Industrial Officer. Permission for legal representation of Aerocare and the TWU was granted by me since I was satisfied the criteria within s.596(2)(a) had been enlivened, because it would bring efficiency to the matter, taking into account its complexity. The employee bargaining representative, Mr Travers, did not participate in the hearing. Evidence was received by the Commission on behalf of Aerocare from Gregory Shelley, its General Manager Employee Relations and Coretta Young, an Aerocare employee at the Gold Coast Airport. Therese Walton, the TWU National Industrial Officer/Negotiator and Shane O'Brien, the TWU Director of Aviation Campaigns gave evidence on behalf of the TWU. Mr Cooney gave evidence on behalf of the ASU.

SCOPE OF THIS DECISION

[12] This is a decision relating to various provisions within the Act's Part 2 – 4, Enterprise Agreements. No matters arise for determination within Part 2 – 4 Division 1 (Introduction).

[13] In relation to Division 2 (Employers and employees may make enterprise agreements) a question arises relating to s.172 (2) as to whether the Commission will permit an amendment to the initiating application pursuant to s.586 removing any reference to the Aero-Care Flight Support Unit Trust being one of two employers to be covered by the 2017 Agreement.

[14] Part 2 – 4, Division 3 (Bargaining and representation during bargaining) sets out certain procedural steps for the commencement of bargaining and bargaining itself. I am

satisfied that Aerocare has complied with its obligations to notify employees it intended to initiate bargaining and to provide employees with a compliant NOERR, and that it acknowledged those persons or organisations appointed as bargaining representatives (ss.173 – 176).

[15] There are several matters within Part 2 – 4, Division 4 (Approval of enterprise agreements) requiring determination.

[16] In relation to the pre-approval matters within Subdivision A, while it is accepted that Aerocare provided employees with the written text of the Proposed Agreement before being requested to vote (s.180(2)(a)(i)), the question of whether employees were also "given a copy of … any other material incorporated by reference in the agreement" (s.180(2)(a)(ii)) is a matter requiring determination in this decision. The other elements of s.180 are accepted as having been complied with by Aerocare. The TWU and ASU have not contested Aerocare's compliance with the provisions of s.181 (Employers may request employees to approve a proposed enterprise agreement) and s.182 (When an enterprise agreement is made).

[17] In relation to the matters set out within Subdivision B (Approval of enterprise agreements by the FWC), the following require determination;

- whether s.186(2)(a) is satisfied, having regard to s.188 (genuinely agreed);
- whether s.186(2)(d) is satisfied (better off overall), taking into account the matters set out within Subdivision C;
- whether s.186(3) is satisfied (fairly chosen); and
- whether s.186(4) is satisfied (does not include an unlawful terms).

[18] No matters within s.187 arise for determination.

[19] The Commission is also required to consider whether any concerns it holds in relation to s.186 may be remedied through an undertaking given under s.190.

[20] In the event that the only reason the Commission is not required to approve the 2017 Agreement is that it is not satisfied the 2017 Agreement passes the better off overall test, s.189 may require consideration, which allows approval of an agreement with the Commission being "satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest".

[21] The provisions of Subdivision D (Unlawful terms) require consideration following the claim being raised by the TWU at the end of the hearing after evidence had been heard that the 2017 Agreement includes an unlawful term, which is a matter for consideration within s.186(4).

[22] The provisions of Subdivision E (Approval requirements relating to particular kinds of employees) require consideration in relation to the adequacy with which the 2017 Agreement defines or describes shiftworkers.

[23] No matters within Subdivision F (Other matters) arise for determination (dealing with the model flexibility and consultation terms), although a question about whether or not the model consultation term should have been provided to employees requires addressing in the context of whether the Commission finds the 2017 Agreement was genuinely agreed.

THE TWU AND ASU OBJECTIONS

[24] The TWU and ASU raise objections to approval of the 2017 Agreement upon the following principal grounds:

a) The 2017 Agreement has not been genuinely agreed since casual employees were not permitted an opportunity to vote for it and because it incorporates materials that were not provided to employees in the requisite manner prior to their consideration of the terms of the 2017 Agreement;

b) In the event that the Commission finds casual employees are not covered by the 2017 Agreement, the TWU and ASU argue in the alternative that the group covered by the 2017 Agreement was not fairly chosen;

c) The Commission cannot be satisfied the 2017 Agreement passes the BOOT for several reasons, including;

i). The Commission cannot be satisfied that the classification translations provided by Aerocare are accurate which is a fundament for formation of views about whether employees are better off overall;
ii). The split shifts and overtime arrangements work in such a manner as to leave employees worse off;
iii). Most but not all employees are worse off under the 2017 Agreement when working Sundays and on Good Friday and Christmas Day;
iv). The inclusion by Aerocare in its calculations of a nominal financial value of car parking for all employees significantly overstates its belief that employees are better off overall under the 2017 Agreement;

d) The 2017 Agreement includes an unlawful term in the form of an apparent restriction on applications for enforcement within the Dispute Resolution Procedure.

e) The fact that the 2017 Agreement was made with an entity that is not an employer means that it is not a single-enterprise agreement within the meaning of s.172(2).

[25] While other matters were raised by the unions in the course of their submissions as reasons that may lead the Commission to refuse approval of the 2017 Agreement, in the overall context of this decision and the findings made by me, it is unnecessary to consider all such objections.

(a) Genuinely agreed

[26] Two matters are advanced as reasons that may cause the Commission to find that the 2017 Agreement was not genuinely agreed to by the employees covered by it. The first of these arguments is that casual employees are, as matter of law, covered by the 2017 Agreement although they did not vote upon it. Secondly, it is put forward that the 2017 Agreement incorporates by reference a number of documents external to the Agreement and

that because those documents were not provided to employees during the access period, the Commission is unable to be satisfied there has been compliance with s.180(2).

(i) Casual employees

[27] The argument advanced in respect of the casual employee matter is founded on the interpretation put forward by the TWU and supported by the ASU that casual employees are actually covered by the Agreement notwithstanding that the 2017 Agreement provides no specific provisions for them. It is argued that the fact casual employees were not invited to vote for the Proposed Agreement leaves the Commission unable to be satisfied of the requirement within s186 (2) (a) that "the agreement has been genuinely agreed to by the employees covered by the agreement".

[28] In its submissions the TWU note that the 2017 Agreement's provisions in relation to parties, coverage and classifications are expansive and do not limit application of the Agreement through reference to the types of employment;

> "15. The Agreement identifies the "Parties" to the Agreement in cl 2 as the Applicant and "Collectively, the Company Employees who perform the work in one of the classifications contained in this Agreement (referred to as the employee or employees)".
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> 16. Despite the capitalisation in cl 2, the expression "Company Employees" is not a defined term in cl 5 or elsewhere in the Agreement. The word "Company" is defined in cl 5, but does no more than refer to the entities that are identified as a party in cl 2 and the "Employer" in the definition in cl 5.
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> 17. Clause 3, entitled "Coverage, Scope and Recognition", states in cl 3.3:
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> > "The parties to the Agreement will be the Company and the employees employed by it throughout Australia and deployed in Australia and temporarily overseas in the classifications contained in this Agreement".
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> 18. The "classifications contained in this Agreement" are provided by cl 7 and Schedule A (which commences on pg 34 of the Agreement). Clauses 7.2 and 7.3 relevantly provide:
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> > "On engagement, employees will be graded under one of the classifications in Schedule A to this Agreement (Initial Grading). …The classification structure broadly reflects the duties the employee is required to perform in and in connection with all aspects of aircraft handling and care, as well as associated clerical and administrative functions and other tasks reasonably incidental or peripheral to such tasks, including but not limited to cleaning, reception or call centre duties".
> >
> > …
> >
> > Following the allocation of a default or Initial Grading, and satisfactory completion of the Probation Period under Clause 8 and any training directed to be undertaken, the Company will regularly monitor and assess the employee's

> performance with a view to identifying any appropriate change to the employee's Initial Grading and resulting classification for the employee."

19. The preamble to Schedule A in cl 1 (pg 34) states "This schedule of classifications outlines not only the eligibility criteria for being paid at a certain classification but also the accountabilities and expectations of people in each classification". It then sets out classifications of "Airline Service Trainee", "Airline Service Agent", "Advanced Airline Service Agent", and additionally refers to those performing "Special Duties"."[8] (italics omitted)

[29] It is said in relation to these matters that on its proper construction the 2017 Agreement covers Aerocare "and '…the employees employed by it throughout Australia and deployed in Australia and temporarily overseas in the classifications…' of 'Airline Service Trainee', 'Airline Service Agent', 'Advanced Airline Service Agent', and additionally refers to those employees performing 'Special Duties'" [9] and that;

> "No distinction is made in the coverage terms of the Agreement between various types of employees: the coverage terms do not purport to, nor do they as a matter of law, exclude casual employees employed by the Applicant throughout Australia in the classifications described in Schedule A of the Agreement."[10]

[30] It is submitted that the NOERR circulated to employees by Aerocare included casual employees within its scope and that;

> "The TWU understands that whilst casual employees were initially issued with an NERR, at some point over the course of the negotiations, for reasons unexplained to the bargaining representatives and unexplained in the Applicant's Form F17 statutory declaration of Gregory Luke Shelley dated 24 April 2017 (see Q2.2), a decision was made by the Applicant to exclude casual employees from the then proposed agreement and from the vote."[11]

[31] The TWU notes that at the time employees were invited to vote Aerocare employed a very significant number of casual employees with its understanding being that at the time the 2017 Agreement was made on 18 April 2017 that Aerocare had "approximately the same number of part-time employees" as casual employees, with its understanding being that Aerocare has approximately 2,500 employees overall.[12] It puts forward that it was not in dispute at the time that casual employees were employed by Aerocare in the classifications provided for by the Agreement and that it continues to do so;

> "It appears not to be in dispute that casual employees were at those times, and are currently, employed in the classifications provided for by the Agreement, those casual employees apparently being part of the cadre of "operational employees" identified by the Applicant (to use the language of paragraph 2.2 of the Applicant's Form F17

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[8] Exhibit TWU 3, Updated Outline of Submissions of the TWU, [15] – [19].

[9] Ibid, [20]

[10] Ibid, [21].

[11] Ibid, [26].

[12] Ibid, [23].

> statutory declaration of Gregory Luke Shelley dated 24 April 2017). The TWU certainly understands there to be very significant numbers of employees of the Applicant, employed by it throughout Australia and deployed in Australia in the classifications of (at least) "Airline Service Agent" and "Advanced Airline Service Agent", at the time the NERRs were issued on 27 January 2017 and 3 March 2017, and at the time of the vote (over 15 to 18 April 2017), and at the time the Agreement was "made" (ie 18 April 2017)."[13] (references omitted)

[32] I take the TWU argument to be that the reference in clause 9 of the 2017 Agreement that "Employees will be engaged in the PSE category", is a reference to someone being employed as a Permanent Secure Employee in the future tense. I understand the submission to amount to one that casual employees are covered by the Agreement to the extent that they are already in employment, but that future employment of new employees will only be in the PSE category.

[33] Clause 9.1 of the Agreement provides;

> "9.1. Employees will be engaged in the PSE category of employment and work may be performed in one or more shifts per day."

[34] The submissions of the TWU in this regard are;

> "Clause 9 of the Agreement states that "Employees will be engaged in the PSE category…", but that clause, cast in the future tense (will be engaged), identifies what is to occur when the Agreement becomes operable and does not qualify the plain terms of cl 2 and 3 referred to above. It reflects the position described in the memorandum dated 7 April 2017 and attached to the Applicant's Form F17 statutory declaration of Gregory Luke Shelley dated 24 April 2017, in which it was said (my emphasis):
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> > "*All PSE employees, as at the date of this notice, will be covered by the proposed agreement and are eligible to vote. Additionally, <u>any existing casual employee can convert to PSE at any time prior to or after the ballot and receive the full benefits of the new agreement</u>.*"[14] (original emphasis)

[35] Further to these matters, the TWU submits that there is no evidence that Aerocare complied, in relation to casual employees, with the steps set out within s.180 of the Act requiring employees to be given access to a copy of a proposed enterprise agreement together with incorporated materials and to have the terms of the proposed enterprise agreement explained to them.

[36] It was brought forward by the TWU that;

> "28. The TWU understands that casual employees employed throughout Australia in the classifications covered by the Agreement, were not invited to vote and did not in fact vote on the Agreement.

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[13] Ibid, [24].

[14] Ibid, [25].

29. Additionally, there is no evidence that the steps contemplated by s 180 of the Act were complied with in relation to the casual employees employed throughout Australian in the classifications covered by the Agreement, prior to the vote on the then proposed agreement.

30. It is submitted that on its proper construction, the Agreement does as a matter of law and despite the Applicant's claims to the contrary (see Q2.2 of the Applicant's Form F17 statutory declaration of Gregory Luke Shelley dated 24 April 2017), cover casual employees employed by the Applicant throughout Australia and deployed in Australia and temporarily overseas in the classifications of "Airline Service Trainee", "Airline Service Agent", "Advanced Airline Service Agent", and those performing "Special Duties". It is submitted that is the ordinary meaning of the words used in cll 2 and 3 of the Agreement, referred to above.

31. On the evidence, the Commission cannot be satisfied that:

a. All the employees who, on its proper construction, would "be covered by [the] proposed enterprise agreement", were requested by the Applicant to approve the agreement by voting for it (cf s 181(1) of the Act);

b. The pre-approval steps contemplated by s 180 of the Act were taken in relation to all employees who were employed at the time and would, on its proper construction, be covered by the Agreement (cf s 180(2) of the Act); and consequently

c. The Applicant complied with the procedural requirements referred to in s 188(a) or (b); and consequently

d. That the Agreement was genuinely agreed by employees who, on its proper constructions, are covered by the agreement , as required by s 186(2)(a).

32. The pre-approval steps contemplated by s 188 (a) and (b) and about which the Commission must be satisfied in order to be satisfied the Agreement was genuinely agreed, cannot overcome be overcome with undertakings: see by way of analogy *CFMEU v Sparta Mining Services Pty Ltd* [2016] FWCFB 7067 at [15] subparagraph (3).

33. The Commission cannot be satisfied that the Agreement was 'genuinely agreed' (cf s 186(2)(a)). The Application must be dismissed."[15]

(ii) Incorporated materials

[37] The argument made in relation to the alleged failure of Aerocare to ensure that employees were given a copy of "any other material incorporated by reference in the agreement" is founded on the proposition that the 2017 Agreement incorporates by reference a number of documents which are external to the Agreement and are set out by the TWU in its submissions as;

[15] Ibid.

"a. The "company standard operating procedures" referred to in cl 6.2.2 as imposing obligations on employees, as they existed during the "access period" as defined in cl 180(4) of the Act (ie in the seven days from 7 April 2017);

b. Any "safety announcements", "client notices and SOPs", "publications", or "memoranda" referred to in cl 6.2.3 as imposing obligations on employees, as they existed during the "access period" as defined in cl 180(4) of the Act (ie in the seven days from 7 April 2017);

c. Any "performance management or disciplinary procedures" referred to in cl 7.9 and conferring rights on the Applicant and one would infer obligations on employees in the circumstances described in cl 7.9, as they existed during the "access period" as defined in cl 180(4) of the Act (ie in the seven days from 7 April 2017);

d. Any "code of practice" or "protocol" implemented by the Applicant in relation to Fatigue Management referred to in cl 12.5 as qualifying the rights the employees have under the Agreement, as existing during the "access period" as defined in cl 180(4) of the Act (ie in the seven days from 7 April 2017);

e. The legislation providing for the long service leave entitlements contemplated by cl 22.7 of the Agreement, noting cl 22.7 is plainly intended to create an entitlement to long service leave equivalent to that available under State or territory legislation;

f. Any "job description" of the kind referred to in paragraph 33.1 of the Agreement, as they existed during the "access period" as defined in cl 180(4) of the Act (ie in the seven days from 7 April 2017), noting paragraph 33.1 and cl 6 impose obligations with respect to the "duties listed in the respective job description".

g. The "model consultation clause contained in the Fair Work Regulations 2009 – Schedule 2.3 in its entirety": see cl 38.1"[16] (formatting omitted)

[38] It is noted by the TWU that the F17 Employer Statutory Declaration asserts compliance with s.180(2) with Aerocare putting forward at Q2.4 of the F17 that "The Agreement does not incorporate any external material". It is argued;

"40. That is, with respect, self-evidently wrong: cl 38.1 does so expressly in relation to the model consultation clause at the least. Moreover, by including in the Agreement a specific the effect of imposing duties on employees that "Employees will:…Follow company standard operating procedures (SOPs), reasonable lawful instructions and maintain standards implied or prescribed in this Agreement at all times" (cl 6.2.2, my emphasis) is plainly to impose obligations (ie compliance with the SOPS), but also acknowledges that there are "standards implied…in this Agreement". Those implied standards, it is submitted, include those standards the employees are required to "apply", to use the language of cl 6.2.3 when describing "applicable safety announcements, clients notices and SOPs, memoranda and other announcements that are released from time to time".

[16] Ibid, [37].

41. The Commission can infer that none of the documents referred to above that are referred to in the Agreement and create rights and obligations (even if not referred to by name), were notified to employees during the access period (and they are certainly not referred to in the memorandum issued on 7 April 2017 attached to the F17), in either of the two ways contemplated by s 180(2)(a) or (b) of the Act (that is by either taking all reasonable steps to ensure the employees are given a copy or taking all reasonable steps to ensure the employees have access to a copy of those materials).

42. Even if it be assumed (and there is no evidence to this effect in the F17), that each and every one of the documents incorporated by reference into the Agreement was available on the Applicant's internal computer network, there can simply be no doubt that it would have been a "reasonable step" for the employees to have those documents drawn to their attention in the notice issued on 7 April 2017. In the absence of having done so, there must be real doubt as to whether the employees appreciated that each of those documents was, as a matter of law, incorporated by reference into the Agreement. That, of itself would provide a basis for the Commission to conclude that there are "other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees" (cf s 188(c)).

43. The internal Aerocare SOPs are clearly intended to be instructions to employees as to how they are to go about their work. Clause 6.23"[17] (reference and formatting omitted)

[39] It is then submitted that the terms of the 2017 Agreement itself imposes obligations informed by the referenced documents;

"Nonetheless, it is apparent from the terms of the Agreement itself that it imposes obligations informed by those documents: "Employees will…Review and apply all applicable safety announcements, clients notices and SOPS, publications…that are released from time to time." That the obligation is imposed on the form of documents as they exist "from time to time" does not deny the obligation to provide copies of those documents incorporated by reference insofar as they exist at the time the agreement is made: see *Sparta* at [16]."[18] (formatting omitted)

[40] The TWU refers to the example of the model consultation term. Clause 38.1 of the Agreement provides that;

"38.1 The Company is committed to engaging with its employees regarding major changes in the workplace and to this end CA 17 imports the model consultation clause contained in the Fair Work Regulations 2009 - Schedule 2.3 in its entirety."

[41] The submission is then made that;

"47. There no evidence in the F17 to suggest this model consultation clause was provided to employees. From the claim in the F17 that the Agreement "does not

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[17] Ibid.

[18] Ibid, [45]; with reference to *CFMEU v Sparta Mining Services Pty Ltd* [2016] FWCFB 7067.

incorporate any external material", it can be inferred no step was taken to provide employees with either a copy of it or with information about Aerocare having taken any reasonable step to ensure it could be accessed during the access period.

48. It is submitted that it would have been an entirely reasonable step for Aerocare to either provide a copy of the model consultation clause to employees when it supplied a copy of the text of the Agreement (using exactly the same electronic method it used to disseminate the text of the Agreement), or at the very least in its communications to employees to have identified where employees could source a copy of it from (for example), the internet. The obligation of an employer in this connection is to take all reasonable steps, and in the instant case there is no evidence Aerocare took any.

49. That of itself is enough to demonstrate non-compliance with s 180(2). But additionally, it is entirely unclear how the model consultation clause entitlement to be consulted prior to a decision to implement a roster change, imported by cl 38.1, applies to the highly flexible (and secretive) rostering environment reflected in cl 12 and 13 of the Agreement. There must be some very real doubt about whether all the employees actually understood what their entitlement to be consulted (and Aerocare's obligation to consult) under cl 38.1 was, so as to enable them understand what the content of the rights and/or obligations were when considering whether to approve the Agreement: again that, of itself, would provide a basis for the Commission to conclude that there are "other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees" (cf s 188(c)).".[19] (formatting omitted)

[42] As a result of the failure by Aerocare to provide the referenced documents to employees, the TWU argues the Commission cannot be satisfied that the Agreement was genuinely agreed and that the application must be dismissed.

(b) Fairly chosen

[43] The proposition that the employees covered by the 2017 Agreement have not been fairly chosen is put forward by the TWU as an alternative to the argument that the employees covered by the Agreement, have not genuinely agreed to its terms because those employees covered by the Agreement include casual employees who were not permitted to vote. The alternative argument is made that if, as matter of law, casual employees are not covered by the Agreement then the group of employees covered by the 2017 Agreement has not been fairly chosen. This argument is mounted upon the foundation that there is no geographic, operational or organisationally distinct reason to exclude casual employees. After referring to s.186(3A) which deals with the obligation of the Commission to take certain matters into account, where an Agreement does not cover all of the employees of the employer covered by the Agreement, the TWU develops an argument that an examination of those criteria would reasonably lead to a finding that the group covered by the Agreement has not been fairly chosen.

"58. Section 186(3A) provides (my emphasis):

[19] Ibid.

> "*If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct."*

59. Each of the three criteria referred to in s 186(3A) are "mandatory considerations", to be given due weight but are not necessarily determinative.

60. The Commission is required to undertake an examination of the criteria by which the group of employees was chosen, and make findings about whether it was fairly chosen in the exercise of a broad evaluative judgment by reference to (inter alia) the various classes who are included and those who are not. It is a factual enquiry that turns on the facts of each case.

61. Selection of employees that are not geographically, operationally or organisationally distinct, or the selection of employees on an arbitrary or subjective basis, each tell against a finding that the group was fairly chosen.

62. In that connection, it is important to appreciate the Commission "*must be satisfied* that the group of employees covered by the agreement *was fairly chosen*". Without resorting to unhelpful notions of burden of proof in this context (ie where the Commission itself must form the requisite state of satisfaction), the practical reality is:

a. The Commission cannot reach that state of satisfaction without evidence of the reasons (or, to use the phraseology of Siopis J in *John Holland*, the "*legitimate business related characteristic*") of those responsible for making the decision about coverage; and

b. That evidence needs to be referable to the considerations to which regard was had at the time that choice was made; and

c. If the Applicant does not lead evidence that is capable of addressing the mandatory considerations in s 186(3A) or otherwise the reasons for the choice of coverage, referable to considerations applicable at the time when that choice was made, the Commission will not have any evidential foundation upon which it could legitimately ground the positive conclusion it must reach under s 186(3) before it is empowered to approve an agreement; and

d. The Commission must therefore reject the approval of the Agreement.

63. It is not in dispute that the Agreement does not cover all the employees employed by the Applicant. In particular, it does not cover "managerial" employees, or "administrative support functions conducted at the company's headquarters", or even all "operational employees", including on the company's assertion any "casual" employees including casual operational employees: see Q2.2 of the Applicant's Form F17 statutory declaration of Gregory Luke Shelley dated 24 April 2017.

64. As noted above and in Attachment B to the TWU F18, the TWU understands:

a. That when an NERR was first issued in January 2017, it was issued to all employees of the Applicant, including casual employees in the classifications covered by the Agreement. Indeed, even in the form issued on 3 March 2017 (a copy of which is attached to the Applicants form F17) it notified the Applicant was intending to bargain in relation to an enterprise agreement *"...which is proposed to cover employees who do work covered by the classifications of the Aero-Care Collective Agreement 2012 except for Leader 3 employees*". It is not in dispute that the 2012 Agreement covered casual employees; and

b. At some time during the negotiations, the Applicant decided to confine the scope of the Agreement to exclude all of those employees now excluded (other than Leader 3 employees, who were at least excluded at the time of the 3 March 2017 NERR), including a very large number of casual employees."[20] (original formatting; references omitted)

[44] The TWU argues that Aerocare has not provided any reasons regarding their decision to exclude any particular group of employees. Further TWU put forward that Aerocare has not led evidence that would permit the Commission to form the view that the coverage of the 2017 Agreement was fairly chosen nor any evidence that could lead the Commission to a positive conclusion that the exclusion of casual employees was in fact fair;

"65. The Applicant has not properly identified in its Form F17 with precision:

a. Which employees in which classifications or job titles within its business are not covered by the Agreement;

b. Where, geographically, the various employees excluded from coverage work within the context of the Applicant's business;

c. How its business is organised, so as to enable the Commission to assess what (if any) organisational distinctions may or may not exist in relation to any of the employees excluded from coverage (including without limitation the various "organisational employees" who are not covered, which it appears includes the casual employees not covered);

d. What work the various employees excluded from coverage perform, so as to enable the Commission to assess what, if any, operational distinction may or may not exist in relation to any of the employees excluded from coverage (including without limitation the various "organisational employees" who are not covered, including the casual employees not covered);

e. Who within and why the Applicant made the decision to exclude any employees who were otherwise covered by the 2012 Agreement from coverage from the outset of bargaining (in particular, the Leader 3 employees referred to in the NERR);

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[20] Ibid.

f. Who within and why the Applicant made the decision, at some time during the negotiations, to exclude some operational employees and all casual employees who were otherwise covered by the 2012 Agreement; or

g. What, if any, geographical, operational, or organisational distinctions (or other legitimate business characteristic) informed the decision to exclude any and all of the classifications or job titles of employees of the Applicant, but not covered by the Agreement.

66. The Applicant has not led evidence that would permit the Commission to form the view that the coverage of the Agreement was fairly chosen, noting in particular the various benefits which the Applicant alleges flow under the Agreement to those covered: see the memorandum dated 7 April 2017 attached to the F17 Statutory Declaration filed by the Applicant, noting in particular the increase of 5% across all rates of pay over and above the 2012 Agreement (and the other increase in rates of pay for long serving employees), the additional service increments (themselves attracting higher rates of pay), the changes to minimum shift engagements (from 3 to 4 hours), and the facility to "opt out" of split shifts. One might ask rhetorically, on what possible basis could the Commission form the view it was 'fair' to exclude employees from these various benefits, and in particular casual employees who perform work in the same classifications?

67. Further, to the extent that an explanation is provided in Q2.2 of the F17 in relation to the exclusion of casual employees, not only do those reasons fail to provide evidence of there being any geographic, operational, or organisational reason for the exclusion of casual employees (which itself tends to suggest that the exclusion of casuals was not 'fair' given the various benefits that would flow if covered), they ought lead the Commission to a positive conclusion that the exclusion of casual employees was in fact unfair."[21] (formatting removed)

[45] In the foregoing, the TWU refers to that part of the Employer Statutory Declaration which asks "Does the agreement cover all the employees of the employer (other than senior executives)?" to which Aerocare answered "No" and then elaborated;

"This agreement covers operational employees of the Applicant who are Permanent Secure Employees (PSE) (permanent part-time and permanent full-time). It does not cover casual employees, or employees of the applicant who are employed in non-operational roles, such as managerial, and administrative support functions conducted at the company's headquarters.

It does not cover all operational employees.

The distinction between the operational employees so covered and operational employees not covered is on the basis of the seniority of the different roles. The Agreement covers employees in less senior roles and to this extent, these employees are operationally distinct to employees in more senior roles.

[21] Ibid.

> The Commission can be satisfied that the distinction between casual employees, who are not covered by the Agreement and PSEs who are covered by the agreement is fairly chosen because of the following reasons;
>
> a) The Applicant has a stated preference that all employment in its operational arm is to be permanent in nature; and
>
> b) The Applicant will only be offering PSE jobs and will not be offering casual employment in the future; and
>
> c) Any existing employee who prefers to not take up a PSE position will continue to receive the benefits provided by the Aero-Care Collective Agreement 2012 (AE899834)"[22]

[46] It is then said by the TWU that;

> "The reasons identified in Q2.2 of the F17 in substance, identify the underpinning reason for excluding casual employees as being the Applicant's desire to rid itself of casual employees. As the memorandum dated 7 April 2017 explaining the voting process itself states "any existing casual employee can convert to PSE at any time prior to or after the ballot and receive the full benefits of the new agreement"."[23]

[47] It is noted by the TWU in relation to existing casual employees that it can be assumed that these employees took the benefit of casual employment to be many and varied and that;

> "It is submitted it is grossly unfair to exclude from the coverage of the Agreement (and hence the various benefits that would otherwise flow to those covered), a large cadre of casual employees who took the benefit of being employed as a casual employee under the 2012 Agreement (and no doubt entered into contracts of employment in that context), for no apparent reason other than the Applicant has unilaterally adopted a decision to exclude a type of employee contemplated by the Award, because it has a different "preference" to that which it had at the time the 2012 Agreement was made (a preference, at least on the form of the F17 filed by the Applicant, uninformed by the s 186(3A) considerations)."[24]

(c) Better off overall test

(i) Accuracy of classification translation

[48] In respect of the BOOT, the TWU questions the accuracy of the Aerocare translation of classifications from the 2017 Agreement to the Ground Staff Award putting forward that the Commission should not blindly accept the translation table put forward by Aerocare.[25] While it does not directly submit that the translation table is inaccurate and thus any reliance

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[22] F17, Q2.2.

[23] Exhibit TWU 3, [68].

[24] Ibid, [70].

[25] Ibid, [77].

upon it in performance of the BOOT analysis would result in a bias favouring Aerocare, such must be regarded as being implicit within the TWU submission.

(ii) Split shift and overtime arrangements

[49] The TWU submitted there are no split shifts permitted by the Ground Staff Award, in contrast to the 2017 Agreement and the arrangements within the 2017 Agreement lead to employees not receiving overtime, an overtime meal allowance or a paid overtime meal break. It also argued that the arrangements under the 2017 Agreement, including in relation to split shifts, would lead to the absence of overtime payments when employees working the same hours under the Ground Staff Award would receive the overtime payment.

[50] In relation to the TWU's objection about the split shift arrangements of the Agreement, the TWU sets forward the following submissions;

> "83. Additionally, the Agreement permits the working of 'split shifts'. The Award prohibits part-time workers working split shifts. The only way something in the nature of a 'split shift' could be worked under the Award is if the Applicant recalled the employee under cl 32.4, noting that any hours worked following a recall are likely to be in excess of the employees ordinary daily hours or ordinary rostered daily hours (as referred to in cl 11.4) and as such paid at overtime rates (in addition to involving a minimum four hour recall: cl 32.4(a) of the Award). Even if not by way of a 'recall', split shifts do not form part of the ordinary hours scheme for shift workers under cl in cl 28.3 of the Award (noting in particular cl 28.3(d)), and as such under cl 32.1(a) must be paid at overtime rates. Again, that is an additional financial detriment under the Agreement than under the Award, and potentially a very significant detriment depending on the individual employee's roster.
>
> 84. Stated generally, that situation is likely to lead to a situation comparable to that disclosed to the Full Bench in *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited; Australasian Meat Industry Employees Union, The v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWCFB 2887:
>
> > "As one would expect as a matter of simple logic, the more hours that are worked during times when the Agreement rates are higher, the better off an employee will be. Conversely, the more hours worked when the Award rates are higher, the worse off the employee will be compared to the Award. In other words, if an employee works predominantly at nights or on weekends, the higher base rate under the Agreement will be counterbalanced by lower penalties payable under the Agreement at these times".
>
> 85. That there are materially lower rates of pay for part-time employees who work certain hours under the Agreement than under the Award is of particular significance in a context such as this, where the Applicant has provided the Commission absolutely no evidence in its F17, about its current rostering arrangements (given it is an existing enterprise), or indicative rosters under the Agreement (noting cl 14 of the Agreement, that confirms rosters will be published)."[26] (underlining omitted)

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[26] Ibid, [83] – [85].

(iii) Car parking

[51] During the hearing the TWU and ASU took considerable effort in endeavouring to show that, contrary to the submissions of Aerocare its arrangements about the benefit to be derived from the provision of employee car parking, were not as highly stated as Aerocare put forward. The current arrangements are that Aerocare provides car parking to those who desire it, but charges a co-contribution for the use of the car park. Aerocare put forward that in its preparations for a new enterprise agreement one of the matters sought by employees was that car parking should be provided free of charge with no co-contribution.[27] The provision of paid car parking was then incorporated into the 2017 Agreement and the analysis undertaken by Aerocare in respect of the covered employees being better off under the Agreement assumed the provision of paid car parking.[28]

[52] The direction thus taken by the TWU and ASU over the course of the hearing sought to demonstrate that the benefit assumed for car parking was overstated and that its removal from the calculations performed by Mr Shelley would reverse the beneficial analysis shown for many of the calculations he undertook.

[53] Whereas where Mr Shelley took into account an amount for car parking in his BOOT analysis, his evidence to the Commission was that the assumed benefits were likely understated, rather than overstated as argued for by the unions;

> "The car parking calculations do not take into consideration that if the Relevant Employee was required to pay car parking this would come from their post tax dollars and therefore the actual car parking fee to the Relevant Employee would be some 19% or higher depending on their personal marginal tax rate"[29]

(iv) BOOT conclusion

[54] In finality, the TWU made the following submissions about the impact of the BOOT analysis;

> "88. The only proper inference to be drawn from the absence of any evidence about rosters or the rostering arrangements for any (let alone each) of the Applicant's "customers" in the F17, is that evidence would not assist the Applicant (noting this submission is put at a time after the F17 has been filed, but prior to the time for the Applicant to file any additional evidence under the directed timetable).
>
> 89. The practical impact of the absence of any rostering information in these proceedings (which the Commission would appreciate, given the nature of the Applicant's business, may vary wildly depending on the nature of the contract with the Applicant's customer and from customer to customer: see cl 14.1 of the Agreement and the "Priority 1" emphasis on meeting "customer requirements), is that the Applicant simply cannot satisfy the Commission that as at 26 April 2017 (the test time as defined in s 193(6) of the Act) "each award covered employee, and each prospective

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[27] Exhibit Aerocare 1, [19].

[28] Ibid, [60(z)]

[29] Ibid, [63(b)].

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" (my emphasis).

90. The Commission cannot be positively persuaded that the BOOT is met. It is submitted in these circumstances, the Commission must refuse the Application (the Commission in the current circumstances being unable to consider whether any undertaking within the limits of s 190(3) could cure any vice)."[30] (underlining omitted)

(d) Unlawful terms

[55] The Statement of Agreed Facts filed by the Applicant in the matter and at the time supported by the TWU and the ASU, represented to the Commission as a matter of fact that the 2017 Agreement did not contain any unlawful terms.[31] After all oral evidence in the matter had been drawn before the Commission and at the stage where it was putting submissions to the Commission, Mr Howell, Counsel for the TWU advised that his client withdrew its agreement to the part of the Statement of Agreed Facts dealing with the matter of unlawful terms, a step with which the ASU concurred. While the Commission initially refused the TWU leave to amend the document, the TWU pressed its claim that the 2017 Agreement contains an unlawful term.

[56] In this regard, the TWU draws attention to the provisions of Clause 28.4.4, within the Dispute Resolution Procedure, and which is in the following terms;

"28.4.4 No party shall commence any action:

28.4.4.1. To obtain a penalty under the Act as amended, or
28.4.4.2. To obtain damages for breaches of this Agreement, or
28.4.4.3. To enforce a provision of this Agreement or provision of the Act, unless:

28.4.4.4. That party has genuinely attempted to resolve the dispute at the workplace level, and either:

28.4.4.4.1. A period of seven days has expired from the date when that party gave notice that conciliation pursuant to 28.2 is not requested, or

28.4.4.4.2. Conciliation pursuant to clause 28.2 has been completed and was unsuccessful."

[57] The argument by the TWU and ASU in this regard is that the combined effect of ss.186(1) and (4) is that the Commission must not approve an enterprise agreement unless it is satisfied that the agreement does not include any unlawful terms. The matters that are unlawful terms are set out in the Act in Part 2 – 4, Division 4, Subdivision D.

(e) Whether 2017 Agreement is a single-enterprise agreement

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[30] Exhibit TWU 3, [88] – [90].

[31] Exhibit ASOF 1, [20].

[58] Section 172(2) provides that a single enterprise agreement may be made with an employer or two or more employers that are single interest employers. The 2017 Agreement purports to be made, on the employer side at least, with Aerocare Flight Support Pty Ltd ABN 32 103 196 701 and Aero-care Flight Support Unit Trust ABN 67 498 323 240.

[59] As a result of evidence given in the course of the hearing it is evident that the latter of these two entities, the Aero-care Flight Support Unit Trust was not an employer at the time the 2017 Agreement was made. Aerocare submitted that this matter should be dealt with by the Commission through a correction or amendment to the initiating application pursuant to s.586 (a) of the Act.

[60] The TWU and ASU argue that the Commission has no such power to make an amendment and that accordingly the 2017 Agreement is not an enterprise agreement within the meaning of s.172 and that as a result the Commission ought to dismiss the application for approval.

THE COMMISSION'S AGREEMENT ANALYSIS SUMMARY

[61] As part of its standard process for consideration of an application for approval of agreements the Commission's Enterprise Agreement Research Team prepares an Agreement Analysis Summary for the Commission Member dealing with the matter. Such a report was prepared in this matter and provided to me. That report indicated a number of matters that, subject to the submissions and evidence and my own views and analysis, may be taken into account in my consideration of the application for approval.

[62] A modified copy of the original summary document, removing the names of the staff members who had undertaken the work, was provided to the parties on 20 June 2017. The summary identified that, in relation to the BOOT, there may be;

> "Multiple BOOT issues that stem from the fact that rates are not high enough to compensate for extremely flexible hours that limit employee's access to overtime, lack of shift penalties and in some cases lower weekend penalties. Other reductions to allowances and conditions then have a cumulative effect on the BOOT assessment"[32]

[63] The analysis undertaken by the Commission staff proceeded on the basis of assumptions about classification matchings between the 2017 Agreement and the highest possible Ground Staff Award classification. The Agreement Analysis Summary noted that in some instances this could be a harsher analysis than Aerocare's own classification matching. Further, the summary noted that Saturday, Sunday and Public holiday rates were compared with the applicable base rate of pay in the Ground Staff Award so as to be able to see how they compared with the Ground Staff Award loadings.[33]

[64] On 4 May 2017 Aerocare confirmed to the Commission the basis of its classification matching, as follows;

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[32] FWC Agreement Analysis Summary. p.3.

[33] Ibid, p.16.

EA Classification	Award Classification
Airline Service Trainee (AST)	Level 1
Airline Service Agent (ASA)	• Aviation transport workers stream - Level 4 • Clerical, administration and support stream – Level 2
Advanced Airline Service Agent (AASA)	• Aviation transport workers stream - Level 4 • Clerical, administration and support stream – Level 2
Special Duties – Trainer	Level 5
Special Duties – Runway Tow Driver	Level 5
Special Duties – High Frequency Movement Coordinator	Level 5
Special Duties – Manual Load Controller	Level 5
Special Duties – Day Operations Planner	Level 5
Supervisor	Level 5
Senior Supervisor	Level 6

[65] The analysis undertaken by the Commission staff was not identical to the classification matching referred to above. There are some discrepancies between the matches referred to by Aerocare and those used within the Agreement Analysis Summary. Since the basis of those differences and impact of any matters identified within the Agreement Analysis Summary was not resolved in the hearing, not all of the potential BOOT concerns referred to within the summary are identified in this decision. That is, since I cannot be confident that the Commission Enterprise Agreement Research Team's use of a classification matching that "could be harsher than the Applicant's classification matching" is actually warranted on the basis of the duties performed by the people concerned, I have chosen not to identify within this decision those matters that arise potentially because of a difference of approach to the appropriate classification matching between Aerocare and the Commission's staff.

[66] From the table set out above provided by Aerocare and the Commission's Agreement Analysis Summary, there appears to be agreement between the respective authors only about the classification matches for Airline Service Trainee, Airline Service Agent, and Advanced Airline Service Agent, each of which is a classification in the 2017 Agreement.

[67] Whereas Aerocare's matching refers to a Special Duties employee employed under the 2017 Agreement matching to a Level 5 Ground Staff Award classification, the Commission's preliminary analysis suggested that the position may match to Level 7 for those who fall within the Aviation Transport Workers stream. Similarly, the Commission's preliminary analysis identified that a Supervisor employed under the 2017 Agreement would match to Level 7, instead of level 5 as suggested by Aerocare; and a Senior Supervisor was considered by the Enterprise Agreement Team to match to level 8, whereas the Aerocare matching had those employees matching to Level 6. It should be noted in regard to these matchings that the

Commission's Enterprise Agreement Team had little to go on for classification matching when it undertook the analysis and that the classification matching provided by Aerocare was not provided until after the internal analysis had been undertaken. In any event those conducting the internal analysis would not necessarily be bound by that which an Applicant put to them, although obviously it would inform such judgements as they made.

[68] Because of these matters, I consider it sound to refer in this decision only to the concerns identified within the Agreement Analysis Summary pertaining to the Airline Service Trainee, Airline Service Agent, and Advanced Airline Service Agent classifications, being those classifications with an alignment between the matching identified by Aerocare and the Commission's staff.

[69] The analysis undertaken by the Commission's Enterprise Agreement Research Team proceeded from the indicated classification assumptions and then examined the penalties that would apply to part-time employees under the Ground Staff Award for work in ordinary time on Saturdays, Sundays and a Public Holidays, with the applicable loadings being time and half on a Saturday, double time on Sunday, double time on most Public Holidays, and double time and a half on Good Friday and Christmas Day.[34]

[70] The Commission's Agreement Analysis Summary then identified hourly rates for further examination as follows (noting that I report information only for the classification matches about which I am confident);[35]

- Saturday rate
  - Airline Service Trainee, translating from Award Level 1 – Clerical, Administration & Support Stream; and
  - Advanced Airline Service Agent, years 1 to 2, translating from Award Level 3 – Clerical, Administration & Support Stream;

- Sunday rate
  - Airline Service Trainee, translating from Award Level 1 – Aviation Transport Workers Stream and Award Level 1 – Clerical, Administration & Support Stream;
  - Airline Service Agent, years 1 – 7, translating from Award Level 4 – Aviation Transport Workers Stream and Award Level 2– Clerical, Administration & Support Stream;
  - Advanced Airline Service Agent;
  - years 1 – 5, translating from Award Level 4 Aviation Transport Workers Stream; and
  - years 1 – 7, translating from Award Level 3 Clerical, Administration & Support Stream;

- Public holiday rates (not Good Friday or Christmas Day);
  - Airline Service Trainee, translating from Award Level 1 Aviation Transport Workers Stream and Award Level 1 – Clerical, Administration & Support Stream;

[34] Airline Operations - Ground Staff Award 2010: day workers see clauses 28.2, 33 and 37.2; shift workers, see clause 30.7.

[35] FWC Agreement Analysis Summary, pp.17 – 40.

- Airline Service Agent, translating from;
- years 1 – 4, translating from Award Level 4 – Aviation Transport Workers Stream;
- years 1 – 6, translating from Award Level 2 – Clerical, Administration & Support Stream;
- Advanced Airline Service Agent, translating from;
- years 1 – 4, translating from Award Level 4 – Aviation Transport Workers Stream; and
- years 1 – 7, translating from Award Level 3 – Clerical, Administration & Support Stream.

[71] It should be noted that the pay rate analysis undertaken by the Commission's staff was on the basis of the wage rates provided for in the Ground Staff Award before the Annual Wage Review 2016–17.[36]

[72] The 2017 Agreement provides separate hourly rates for work performed Monday to Friday; on Saturday; on Sunday; and on a Public Holiday. Unlike the Ground Staff Award, the 2017 Agreement makes no distinction between the rates payable for Good Friday and Christmas Day and other public holidays with the same hourly rate being paid across any day that is a public holiday. The Ground Staff Award provides that a higher rate is payable on Good Friday and Christmas Day that for other public holidays.

[73] Each of the 2017 Agreement's classifications had their hourly rates compared in the Commission's Agreement Analysis Summary with those that may be payable under the Ground Staff Award for work across Monday to Friday, on Saturdays; on Sundays; and on public holidays. As a result of this analysis any classification which showed an hourly rate lower than might otherwise be payable if the Ground Staff Award applied was identified in the Agreement Analysis Summary as a concern for further consideration.

[74] It is convenient for the sake of this analysis to refer only to the top and bottom of the margins for each of Saturday, Sunday and Good Friday and Christmas Day public holiday work. The following listing indicates only the positions at the top and bottom of the relevant margin range;

- **Saturday work**; the classifications showing a margin of less than 50% above the base rate of pay under the Ground Staff Award (and thus potentially not better off overall when compared with the time and a half Saturday rate provided for in the Award) had a margin ranging between 44.0% (Advanced Airline Service Agent, year 1, translating from Award Level 3 Clerical, Administration & Support Stream) and 48.3% (Airline Service Trainee, translating from Award Level 1 - Clerical, Administration & Support Stream);

- **Sunday work**; the classifications showing a margin of less than 100% above the base rate of pay under the Ground Staff Award (and thus potentially not better off overall when compared with the double time Sunday rate provided for in the Award) had margins ranging between 61.8% (Advanced Airline Service Agent, year 1 translating from Award Level 3 Clerical, Administration & Support Stream) and

[36] See Annual Wage Review 2015–16, PR579818; Annual Wage Review 2016–17, PR592146.

99.4% (Airline Service Agent, year 6, translating from Level 4 – Aviation Transport Workers Stream); and

- **Good Friday and Christmas Day Public Holiday work**; the classifications showing a margin of less than 150% above the base rate of pay under the Ground Staff Award (and thus potentially not better off overall when compared with the double time and a half Good Friday and Christmas Day rate provided for in the Award) showed that the Agreement rates had a margin above the unloaded award rates of between 108.4% (Advanced Airline Service Agent, year one, translating from Award Level 3 Clerical, Administration & Support Stream) and 149.5% (Airline Service Agent, year 6, translating from Level 2 Clerical, Administration & Support Stream).

[75] There are four separate classification matches referred to in the above. In the case of these outlier classifications;

- Airline Service Trainee/Level 1 Clerical, Administration & Support Stream

    - Under the Ground Staff Award an employee would be paid a base rate of $19.75 per hour and $29.63 for Saturday work; $39.50 for Sunday and "regular" public holidays; and work; and $49.38 per hour for work on Good Friday and Christmas Day.[37]
    - In comparison, the 2017 Agreement would provide the employee with a Monday to Friday base rate of $21.50 per hour; $29.30 per hour for Saturday work; $32.90 per hour for work on a Sunday; and $43.00 per hour for work on any public holiday.

- Airline Service Agent, year 6/Level 2 Clerical, Administration & Support Stream

    - Under the Ground Staff Award an employee would be paid a base rate of $20.61 per hour and $30.92 for Saturday work; $41.22 for Sunday and "regular" public holidays; and work; and $51.53 per hour for work on Good Friday and Christmas Day.
    - In comparison, the 2017 Agreement would provide the employee with a Monday to Friday base rate of $25.71 per hour; $35.75 per hour for Saturday work; $40.09 per hour for work on a Sunday; and $51.43 per hour for work on any public holiday.

- Airline Service Agent, year 6/Level 4 – Aviation Transport Workers Stream

    - Under the Ground Staff Award an employee would be paid a base rate of $20.11 per hour and $30.17 for Saturday work; $40.22 for Sunday and "regular" public holidays; and work; and $50.28 per hour for work on Good Friday and Christmas Day.
    - In comparison, the 2017 Agreement would provide the employee with a Monday to Friday base rate of $25.71 per hour; $35.75 per hour for

[37] Noting that these and all other Ground staff Award rates referred to in this section are those in operation before the Annual Wage Review 2016–17.

Saturday work; $40.09 per hour for work on a Sunday; and $51.43 per hour for work on any public holiday.

- Advanced Airline Service Agent, year 1/Level 3 Clerical, Administration & Support Stream

    - Under the Ground Staff Award an employee would be paid a base rate of $21.77 per hour and $32.66 for Saturday work; $43.54 for Sunday and "regular" public holidays; and work; and $54.43 per hour for work on Good Friday and Christmas Day.
    - In comparison, the 2017 Agreement would provide the employee with a Monday to Friday base rate of $22.69 per hour; $31.34 per hour for Saturday work; $35.22 per hour for work on a Sunday; and $45.38 per hour for work on any public holiday.

[76] What springs from this analysis is that none of the identified penalty rates for the indicated classification matches are uniformly beneath the relevant threshold. Rather it is the case that each is beneath the threshold for only some aspects of the identified penalty rates. This consideration is relevant in as much as it has been said by the Full Bench that;

> "[11] As one would expect as a matter of simple logic, the more hours that are worked during times when the Agreement rates are higher, the better off an employee will be. Conversely, the more hours worked when the Award rates are higher, the worse off the employee will be compared to the Award. In other words, if an employee works predominantly at nights or on weekends, the higher base rate under the Agreement will be counterbalanced by lower penalties payable under the Agreement at these times."[38]

CONSIDERATION

[77] As set out above, consideration needs to be given to these matters;

- whether the 2017 Agreement has been genuinely agreed to, either because casual employees were not given an opportunity to vote on the Agreement, or because the employees who were asked to vote on it were not provided with incorporated materials during the access period;
- whether the employees covered by the 2017 Agreement have been fairly chosen, because casual employees are excluded from the Agreement;
- whether the Commission is satisfied the 2017 Agreement passes the BOOT;
- whether the 2017 Agreement includes any unlawful terms; and
- whether the 2017 Agreement is an agreement within the meaning of s.172(2) and relatedly whether an amendment to the Agreement and other documents before the Commission is necessary or should be made in relation to the employer-side entities covered by the Agreement.

[78] Section 196, within Part 2 – 4, Subdivision E, requires the Commission to be satisfied the agreement defines or describes an employee as a shiftworker for the purposes of the National Employment Standards. I am satisfied that because of the annual leave provisions

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[38] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWCFB 2887.

within the 2017 Agreement's Clause 22, that the agreement provides as required by the section.

[79] Depending upon the findings in relation to the above matters, the Commission may also be required to consider whether any concerns held by the Commission in relation to s.186 of the Act may be remedied through an undertaking given under s.190. Further, should the Commission find that it is not required to approve the 2017 Agreement and the only reason is that it is not satisfied the agreement passes the better off overall test, it may be appropriate to consider the public interest provisions in s.189 of the Act which permits the approval of such an agreement if the Commission is "satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest".

(a) Genuinely agreed

[80] Two considerations arise for determination in respect of whether the provisions of s.186(2) of the Act which requires the Commission be satisfied the 2017 Agreement has been genuinely agreed to by the employees to be covered by it. The first is whether or not the Agreement can be said not to have been genuinely agreed because of the exclusion of casual employees from voting for the Agreement. The second is whether or not the same can be said because those who were called upon to vote for the 2017 Agreement were not provided with access to material incorporated by reference in the Agreement.

(i) Casual employees

[81] Two Notices of Employee Representational Rights were provided to employees, firstly on 27 January 2017 and secondly on 3 March 2017. The second notice was provided to employees for the reason that some new employees had been recruited since the first was distributed, as well as Aerocare desiring to have a better confirmation that there had been a full distribution of the Notice.[39] Each of the notices was in identical terms with it being stated about the need for a second notice;

> "Due to recruitment of new PSE's and in an attempt to have better confirmation of full distribution of the NERR, on 3 March 2017 a second Notice of Employee Representational Rights (Second NERR) was sent to all employees. The Second NERR was identical to the First NERR ... This was sent via their company email account, accessed via Aeronet by employees, including those who were employed between 27 January 2017 and 3 March 2017 and those who were on leave for a prolonged period, giving notice of the right to be represented by a bargaining representative to each employee."[40] (underlining added)

[82] The second NOERR stated Aerocare gave "notice that it is bargaining in relation to an enterprise agreement (Aerocare Collective Agreement 2017) which is proposed to cover employees who do work covered by the classifications of the Aero-Care Collective Agreement 2012 except for Leader 3 employees".[41] The 2012 Agreement's classifications are within Schedule A which is in two broad parts; Part 1 deals with the descriptors for the

[39] Exhibit A1, [22].

[40] Exhibit Aerocare 1, [22].

[41] F17, item 2.8; Exhibit Aerocare 1, Witness Statement of Gregory Shelley, [20] – [23].

relevant classifications; and Part 2 provides rates of pay in turn for casual employees, permanent secure employees and full-time employees. Mr Shelley's evidence is that the first notice was "provided to employees of Aerocare" and the second "was sent to all employees".[42] Ms Walton's evidence is that she understood the first NOERR was issued to casual employees as well as PSEs, but that she does not know whether it is was forwarded to any permanent employees.[43]

[83] On the basis of these matters, it is reasonable for the Commission to find that at least one, if not both NOERRs were provided to all employees and that in any event the stated intention of Aerocare at the time that the Notices were circulated was to include within the scope of the Proposed Agreement any employment covered by the 2012 Agreement. Consideration of the 2012 Agreement shows that it unambiguously covers not only PSEs, but casual employees and full-time employees as well.

[84] However, by 15 March 2017, less than 2 weeks after the second NOERR was sent to all employees, it was Aerocare's view that the Proposed Agreement would be restricted to a narrower class of employment. On 15 March 2017 Mr Shelley caused the distribution to "relevant employees" of a draft agreement, with his witness statement putting forward the following about a narrower class of employees;

> "25. The Aerocare Collective Agreement 2017 (CA17) relates to and covers:
>
> a) Operational employees who are PSE's, namely permanent part-time and permanent full-time; and
>
> b) Only those operational employees in distinct less senior roles i.e. roles below Leader 3.
>
> ("Relevant Employees")
>
> c) Operational employees compromise Airline Service Trainee (AST), Airline Service Agent (ASA),Advanced Airline Service Agent (AASA), Supervisor and Senior Supervisor:
>
> (i) AST's are initial trainee's for a period of six months, before moving to ASA;
>
> (ii) ASA's are the predominate position for all operational staff within Aerocare;
>
> (iii) AASA's provides recognition for those that do their role well. In the Transport Stream, this includes provision to work as a lead loader, i.e. a person who performs the bag count onto aircraft; and
>
> (iv) Supervisor and Senior Supervisor positions are operational supervisors for day of ops only. It is noted that they are still subservient

[42] Ibid, [20], [22].

[43] Exhibit TWU 2, Witness Statement of Therese Walton, [5].

> to duty managers, ramp/customer service manager and the Airport manager."[44]

[85] Why the second NOERR was sent to all employees, but within 2 weeks Aerocare decided to narrow the scope of its bargaining to only part-time employees, deliberately excluding more than 500 employees from the bargaining process has been inadequately explained.[45] At best, its evidence about this change is thin – it wanted to incentivise casual employees to shift to part-time status. There is no evidence before the Commission to the effect that Aerocare notified those covered by the 2012 Agreement that it proposed to restrict the 2017 Agreement to a class of employees narrower than that notified in the NOERRs.

[86] The question for determination by the Commission pursuant to s.186(2) of the Act is, in the case of an agreement not being greenfields agreement, whether "the agreement has been genuinely agreed to by the employees covered by the agreement". Necessarily, consideration of that provision also requires a finding by the Commission in relation to s.180(2) of the Act that "during the access period for the agreement the employees (the relevant employees) employed at the time who will be covered by the agreement are given a copy" of certain materials.

[87] The 2017 Agreement itself states that;

- it "sets out the working relationship between the Company and its employees", with the agreement meeting the competitive needs of Aerocare "whilst delivering opportunity and security to the employees covered by its provisions" (Introduction);
- the agreement is made between Aerocare's two entities identified at the start of this decision, both of which are defined by the 2017 Agreement as "the Company" and "[c]ollectively, the Company Employees who perform the work in one of the classifications contained in this Agreement" (clause 2); noting that the capitalised term "Company Employees" is not defined anywhere in the Agreement although the term "Company" is (Clause 2);
- The agreement "will have effect for all employees covered hereby from the beginning of the first pay period following the date of approval by FWC" (Clause 4.1);
- "Employees will be engaged in the PSE category of employment" (Clause 9.1);
- Schedule A sets out a "Classifications & Remuneration Table" which provides descriptors for the classifications covered and a remuneration table which provides "Rates of Pay for Permanent Secure Employees" (Schedule A, Clause 2.1), but no rates for any casual employee or full-time employee.

[88] Aerocare's submission about the proper construction of the 2017 Agreement is that it simply does not deal with the employment of any casual employees;

> "42. An enterprise agreement covers an employee or employer if the agreement is expressed to cover (however described) the employee or the employer. S53(1) FW Act. A reference in the FW Act to an enterprise agreement covering an employee is a

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[44] Exhibit Aerocare 1, [25].

[45] Aerocare's evidence is that at the start of the access period for the 2017 Agreement it employed 597 casual employees; Exhibit Aerocare 1, [93].

reference to the agreement covering the employee in relation to particular employment. S53(6) of the FW Act.

43. The key element is whether the agreement is expressed to cover (however described) the employee.

44. CA17's terms of coverage are found in the introduction in combination with clauses 2, 3.3, 9 and the definition of Permanent Secure Employee (PSE).

45. Clause 2 refer to employment in one of the classifications contained in the agreement. Likewise, clause 3.3 of CA17 refers to employment in the classifications.

46. The introduction to CA17 has two parts which are important. The first paragraph refers to opportunity and security to the employees and the second paragraph refers to employees having a safe and secure work environment.

47. Engagement under CA17 (clause 9) is only for Permanent Secure Employment, which gives effect to the introduction. The definition of a PSE in clause 5, restricts the category to permanent part time or full time employees.

48. Under CA17 there are no provisions dealing with the terms of casual employment.

49. The language of s53 of the Act, is deliberately wide. This interpretation is further supported by similarly wide language in other parts of the Act dealing with the 'scope' of an EA. See for example s256(A).

50. For these reasons CA17 does not 'cover' (per 53(1)) casual employees."[46]

[89] Interpretation of an enterprise agreement requires construction of the words of the instrument, with the Full Bench in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*[47] setting out the principles for such task. In that matter, and after an extensive analysis of the subject, the Full Bench summarised the principles to be applied in the following way;

"[114] The principles relevant to the task of construing a single enterprise agreement may be summarised as follows:

1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:

(i) the text of the agreement viewed as a whole;

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[46] Exhibit Aerocare 10, Aerocare Outline of Submissions.

[47] [2017] FWCFB 3005.

(ii) the disputed provision's place and arrangement in the agreement;

(iii) the legislative context under which the agreement was made and in which it operates.

2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.

3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.

4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.

5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.

6. Enterprise agreements are not instruments to which the *Acts Interpretation Act 1901* (Cth) applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

(i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;

(ii) notorious facts of which knowledge is to be presumed; and

(iii) evidence of matters in common contemplation and constituting a common assumption.

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.

14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.

15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding."[48]

[90] The text of the 2017 Agreement viewed as a whole does not reasonably lead to the proposition that casual employees are covered by it. While it can be said that the Introduction Clause as well as Clauses 2 and 4 employ loose language inferring that the Agreement codifies the working relationship between the company and all of its employees and not just

[48] Ibid [114].

some of them, that interpretation is dispelled when the Agreement is viewed as a whole. The 2017 Agreement provides that employees are to be engaged in the PSE category of employment; there is not an alternative of casual employment or full time employment. Wages are provided only for PSE employees and none are provided for casual employment or full-time employment.

[91] On the other hand, the basis of bargaining was that it commenced with the distribution of the two NOERRs which unambiguously informed employees, and apparently all of them, that Aerocare was bargaining for a new agreement to cover all employees whose work was covered by the classifications of the 2012 Agreement, except for Leader 3 employees. At some stage relatively early in the bargaining process, Aerocare decided to move away from the intention stated in the two NOERRs and began to narrow the scope of the 2017 Agreement to which it was working. Aerocare then circulated drafts only to the people it intended to cover, being the "Relevant Employees". When Aerocare put its Proposed Agreement to a vote, it limited voting to the "Relevant Employees".

[92] While the combination of the Introduction Clause and Clauses 2 and 4 are poorly drafted, leaving open the possibility that the 2017 Agreement is intended to cover all of its operational employees despite not all of them being afforded an opportunity to vote on it, I am not persuaded this is more than poor drafting. The evidence leads to a finding that whilst Aerocare initially sought to have an Agreement covering everyone, that it subsequently backed away from that prospect, and ensured that only those to be covered by the 2017 Agreement were asked to vote on it. Those who were not to be covered were not asked to vote. There is no proposition to be found within the legislation to the effect that an employer is bound to produce an agreement with a scope identical to that envisaged in the NOERR.

[93] After consideration of the totality of the evidence before the Commission I am satisfied that the 2017 Agreement has been genuinely agreed to by the employees covered by it.

(ii) Incorporated materials

[94] The obligation on an employer within s.180(2) of the Act is to take all reasonable steps to ensure either that during the access period for the agreement, those who will be covered by the agreement are given a copy of the written text of the agreement and "any other material incorporated by reference in the agreement" or to ensure that such "relevant employees have access, throughout the access period for the agreement, to a copy of those materials". The provisions within s.180(2) of the Act are expressed as an alternative. In effect, the employer has an obligation to take all reasonable steps to ensure they either provide employees with a copy of the material or to ensure that they have access to the material throughout the access period. The provision of, or access to these materials, is an important and fundamental foundation for the making of a proposed enterprise agreement. That these materials are to be provided to employees for the duration of the access period and not merely pointed to for an employee to do their own research is reinforced by consideration of the Act's Explanatory Memorandum;

> "732. Subclause 180(2) requires the employer to take all reasonable steps to ensure that the relevant employees are given a copy of, or access to, the proposed enterprise agreement and any other material incorporated by reference in the agreement prior to approving the agreement. The relevant employees are the employees employed during

the access period that will covered by the agreement. This may include new employees that commence employment during that period.

733. An agreement can incorporate by reference any written material (see clause 257). This enables an employer and employee to incorporate by reference terms from materials such as an earlier written agreement, modern award or enterprise award, a State or Territory law or a workplace policy. Subparagraph 180(2)(b)(ii) provides that if an agreement incorporates by reference material contained in another instrument the employer must take all reasonable steps to ensure that the relevant employees are given, or have access to, a copy of that material for the entire seven day access period."[49] (underlining added)

[95] The TWU submits that the 2017 Agreement incorporates four classes of external documents that were not provided to those voting upon the Agreement as required by the legislation;

- Company standard operating procedures (SOPs), referred to in Clause 6.2.2;
- Safety announcements, client notices and SOPs, publications and memoranda referred to in Clause 6.2.3;
- The code of practice or protocol relating to fatigue management referred to in Clause 12.5; and
- The model consultation clause prescribed by the *Fair Work Regulations 2009*, which is referred to within Clause 38.1.[50]

[96] The relevant clauses from the 2017 Agreement are as follows;

"6. General Conditions

6.1. The Company shall determine levels of staffing, equipment and methods of operation, which may be varied from time to time to reflect changes consistent with safe work practices, improved technology, and new types of machinery or systems, contract changes with Customer Carriers or for any other reason. Employees will perform any work the Company may reasonably require and which is safe, efficient and legal, having regard to the respective qualifications of the employee.

6.2. Employees will:

…

6.2.2. Follow company standard operating procedures (SOPs), reasonable lawful instructions and maintain the required performance standards implied or prescribed in this Agreement at all times;

6.2.3. Review and apply all applicable safety announcements, clients notices and SOPs, publications, memoranda and other announcements that are released from time to time;

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[49] *Fair Work Bill 2008, Explanatory Memorandum.*

[50] Exhibit TWU 3, [37].

…"

"12. Employee Nominated Hours

Recognition of Desirability and Availability

An overwhelming number of employees have indicated a desire to have the opportunity to maximize their income by undertaking work outside the provisions of clause 9."

…

Fatigue Management

12.5. Employees will only be considered for Employee Nominated Hours if the hours available to work and which the employee proposes to self-nominate for and work do not cause the employee to breach any work health and safety legislation, code of practice or protocol implemented by the Company from time to time to manage and reduce employee fatigue or any other clause of this Agreement and maximum hours worked within a period.

…"

"38. Consultation

38.1 The Company is committed to engaging with its employees regarding major changes in the workplace and to this end CA 17 imports the model consultation clause contained in the Fair Work Regulations 2009 - Schedule 2.3 in its entirety."

[97] In *Construction, Forestry, Mining and Energy Union v Sparta Mining Services Pty Ltd*,[51] (Sparta) the Full Bench dealt with a matter in which incorporated reference material was similarly in dispute;

"[7] In the proceedings before the Commissioner, the CFMEU was granted leave to intervene. The primary aspect of the CFMEU's case against the approval of the Agreement was that it did not, as required by s.186(2)(d), pass the better off overall test set out in s.193. Its case in that respect was rejected by the Commissioner in the First Decision, and because her conclusions on that score were not challenged in the appeal, it is not necessary to discuss this issue any further at this point. The CFMEU also submitted at first instance that the approval requirement in s.180(5) had not been complied with, but again this submission was rejected by the Commissioner, and that rejection is not challenged in the appeal.

[8] The CFMEU's case before the Commissioner that s.180(2) had not been complied with was founded on the proposition that cll.2.5, 6.1, 6.2 and 14.4.2 incorporated by reference certain documents external to the Agreement. These provisions were as follows:

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[51] [2016] FWCFB 7057.

"2.5 This Agreement is supported by policies and procedures determined by the Employer from time to time. These policies and procedures will not reduce the Employee's substantive entitlements contained in this Agreement but provides guidelines for the fair and efficient administration of the employment relationship.

...

6.1 The Employer agrees to comply with State and Commonwealth Occupational Health & Safety laws and any relevant industry codes of practice.

6.2 The Employee agrees to carry out any instructions, policies and decisions made to promote and maintain a safe workplace required by relevant occupational Health and Safety legislation, including any further requirements specific to the Employer's industry and workplace – even if not specified in the legislation.

...

14.4.2 You will not be required to work more than 5 hours without taking a break unless there are extenuating circumstances and in accordance with the site 'Fitness for Work' and 'Fatigue Management Policy'."

[9] It was not in dispute before the Commissioner that Sparta had not provided any of its employees to be covered by the Agreement with a copy of any of the documents referred to in cll.2.5, 6.1, 6.2 and 14.4.2 prior to the vote upon the Agreement. However Sparta submitted before the Commissioner that:

- for the purposes of cll.2.5, 6.2 and 14.4.2, Sparta had no policies in place of the type referred to in the provisions; and

- by reference to the Full Bench decision in *McDonald's Australia Pty Ltd; Shop, Distributive and Allied Employees' Association* (*McDonalds*) the legislation and industry codes of practice were "laws of the land ... available to Australian citizens in a variety of ways", so that there were no further steps required to be taken to comply with s.180(2).

[10] Sparta also proffered an undertaking pursuant to s.190 which included the following paragraph:

"…the employer…

5. Will give and explain to employees the policies and procedures referred to at clause 2.5, the policies to promote and maintain a safe workplace referred to at clause 6.2 and the Fitness for Work and Fatigue Management Policy referred to at clause 14.4.2, upon any such policy or procedure being developed by the employer."" (references omitted)

[98] In *Sparta* the Full Bench found that it is not necessary for a document to be specifically described by name in order for it to be found to be incorporated material, although to be legally effective the document must be described in a way which permits it to be identified.[52] The Full Bench has separately accepted that legislation is readily available to citizens in a number of ways and that it may therefore presumed for the purpose of s.180(2)(b) to be accessible to employees during the access period.[53] However, that presumption may not be universally applicable with the later Full Bench in *National Tertiary Education Industry Union v University of New South Wales* suggesting "that there may be cases where the characteristics of the workplace and the composition of the workforce may require more than what that Full Bench indicated was adequate".[54] Such presumption may also not be automatically applicable to industry codes of practice, even if made pursuant to workplace health and safety legislation in the absence of particular knowledge as to how readily accessible they may be.[55]

[99] In relation to the provisions within Clauses 6.2.2, 6.2.3 and 12.5 of the 2017 Agreement, the proper construction of those Clauses is to find that they are obligations on employees to maintain a currency about changes within their workplace as well as to conform with those obligations. The provisions are not ambiguous, and no material before the Commission either supports the proposition that they are ambiguous or are to be construed in a manner other than would be provided from the plain meaning of the words used.

[100] The evidence before the Commission is that employees voting upon the 2017 Agreement have constant access to an intranet known as Aeronet, which provides many things for them including their rosters as well as information about standard operating procedures and client notices and the like. Coretta Young is an Aerocare employee at the Gold Coast Airport. Ms Young's evidence is that she accesses Aeronet almost every day and that it gives her access to her personal roster, training programs, policies and procedures, standing operating procedures and safety announcements. She receives information and messages from Aerocare through Aeronet; emails her supervisors and management. She also accessed information about the 2017 Agreement and voted upon it through the system.[56] The evidence before the Commission also includes that employees routinely check Aeronet through a variety of internet connected devices including mobile phones or tablets.

[101] On the basis of this evidence I am satisfied that Aeronet took reasonable steps to ensure that during the access period employees had access to a copy of the materials referred to within Clauses 6.2.2, 6.2.3 and 12.5.

[102] With respect to Clause 38.1 which refers to the model consultation term, there is no direct evidence before the Commission to the effect that the model consultation term was one of the documents available to employees through Aeronet. The term is, of course, a legislative instrument made by the Governor General and publicly available. Despite that status, I am not satisfied that all reasonable steps were taken by Aerocare to ensure that employees were either given a copy of the model consultation term or that they had access to it throughout the

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[52] Ibid, [18]

[53] *McDonald's Australia Pty Ltd v Shop, Distributive and Allied Employees' Association* [2010] FWAFB 4602, [43].

[54] [2011] FWAFB 5163 at [24], (2011) 210 IR 244.

[55] *CFMEU v Sparta* [2016] FWCFB 7057, [23].

[56] Exhibit Aerocare 2, [3].

access period. Subject to what is set out by me below, in the nature of a paradox, consideration of the material referenced in Clause 38.1 is not initially a case in which the Commission, having decided the Agreement does not include a consultation term, determines that the model consultation term is taken to be a provision of the agreement (see s.205(3)). Instead, the issue for consideration under ss.186(2)(a) and 188 is whether, pursuant to s.180(2) Aerocare took all reasonable steps to ensure employees were provided with or had access to the material referenced within the clause. The mere availability of material in the public domain does not mean there were no reasonable steps which Aerocare could have taken to ensure access to a copy of the material.[57] There is no reason it could not have actually set the model term out within the 2017 Agreement if it wanted those terms and nothing else to apply – at just over 400 words long, the model term is not very long.

[103] In finality, I consider that the question of whether Clause 38 refers to material which should have been given to employees during the access period is best resolved through consideration of the provisions of s.205 of the Act which deals with the requirement that enterprise agreements include a consultation term. That section is in the following terms;

> "205 Enterprise agreements to include a consultation term etc.
>
> Consultation term must be included in an enterprise agreement
>
> (1) An enterprise agreement must include a term (a consultation term) that:
>
> (a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:
>
> (i) a major workplace change that is likely to have a significant effect on the employees; or
>
> (ii) a change to their regular roster or ordinary hours of work; and
>
> (b) allows for the representation of those employees for the purposes of that consultation.
>
> (1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer:
>
> (a) to provide information to the employees about the change; and
>
> (b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
>
> (c) to consider any views given by the employees about the impact of the change.
>
> Model consultation term

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[57] *CFMEU v Sparta* [2016] FWCFB 7057, [22].

(2) If an enterprise agreement does not include a consultation term, or if the consultation term is an objectionable emergency management term, the model consultation term is taken to be a term of the agreement.

(3) The regulations must prescribe the model consultation term for enterprise agreements."

[104] The paradox referred to above is that after consideration of s.205, I do not consider that Clause 38 actually amounts to compliant consultation term of the type contemplated by the section and that instead the model consultation term would be taken to be a term of the agreement if it were approved. The clause firstly states Aerocare's commitment to engaging with its employees about matters of major workplace change and continues that "to this end CA 17 imports the model consultation clause contained in the Fair Work Regulations 2009 - Schedule 2.3 in its entirety". I consider that importation of an obligation is not an inclusion of a term that meets the requirements prescribed by the section. The test within s.205 is for the words of the term to provide the required matters. Demonstrably, Clause 38 does not itself require consultation, representation, provision of information, consideration of views, etc.

[105] As result, approval of the 2017 Agreement would have to proceed on the basis that the model consultation term is taken to be a term of the Agreement (s.205 (2)) and further that the Commission would be obliged to note in its decision to approve the Agreement that the model term is included in the Agreement (s.201(1)).

(b) Fairly chosen

[106] As set out above, I have found that the 2017 Agreement does not apply to casual employees.

[107] The TWU argue that it follows from the lack of coverage of casual employees that the Commission cannot be satisfied of the requirements in ss.186(3) and (3A) of the Act which go to the matter of whether or not the Commission is satisfied that the group of employees covered by the 2017 Agreement was fairly chosen taking into account whether the group is geographically, operationally or organisationally distinct.

[108] Aerocare put forward that the question of whether the group covered by the 2017 Agreement is geographically, operationally or organisationally distinct is not the only factor which the Commission may consider in determining whether the group is fairly chosen. Aerocare's key submission is that it has taken a strategic decision to phase out the use of casual employment and that it has already taken significant steps in that direction. It also developed the argument that approval of the 2017 Agreement will lead to no unfairness to the casuals employed and that equally there will be no unfairness to those employees who are covered by the 2017 Agreement, with these things being said because;

"54. The Applicant submits that:

A There has been no unfairness to casuals employed by Aerocare; and

B There is no unfairness to the employees who are covered by CA17, namely the PSEs; because:

(a) Casual employment is being phased out of Aerocare;

(b) Significant numbers of Aerocare casuals have already converted to PSE (currently 387 casuals – down from 1014 at the time of making CA12);

(c) More conversions to PSE are expected after CA17 is approved.

(d) The casuals who remain will administratively receive enhanced pay upon approval of CA17;

(e) Secure permanent employment has long been advocated by the union movement in Australia; and

(f) The Aerocare business model no longer accommodates the hiring of further casuals."[58]

[109] It was also put to the Commission that the rapid transition by Aerocare away from the employment of casual employment should be found to be a good thing. Aerocare is in the process of reducing its employment of casual employees, seeking to have existing employees transfer to employment as PSEs. Mr Shelley's evidence in this regard included that at the commencement of the access period for the 2017 Agreement Aerocare had 1,370 eligible PSE employees as well as 597 casual employees but that the number of casual employees had reduced to 389 by the time he made his affidavit, on 5 July 2017.[59] This reduction in casual employment was part of a deliberate strategy to move people from one category of employment to another. There was an expectation that the shift in the basis of employment of Aerocare's employees would continue.

[110] Section 186(3) of the Act requires the Commission to be satisfied that the group of employees covered by the agreement was fairly chosen, and s.186(3A) requires the Commission, in deciding whether it was fairly chosen, to take into account whether the group is geographically, operationally or organisationally distinct. The Full Bench's consideration in *Cimeco Pty Ltd v CFMEU, AWU, AMWU and CEPU* (Cimeco) of whether employees are geographically, operationally or organisationally distinct included an analysis of the factors involved and the weight to be apportioned;

"[19] Given the context and the legislative history it can reasonably be assumed that if the group of employees covered by the agreement are geographically, operationally or organisationally distinct then that would be a factor telling in favour of a finding that the group of employees was fairly chosen. Conversely, if the group of employees covered by the agreement was <u>not</u> geographically, operationally or organisationally distinct then that would be a factor telling against a finding that the group was fairly chosen.

[20] It is important to appreciate that whether or not the group of employees covered by the agreement is geographically, operationally or organisationally distinct is not

[58] Exhibit Aerocare 10.

[59] Exhibit Aerocare 1, [93] – [94].

decisive, rather it is a matter to be given due weight, having regard to all other relevant considerations.

[21] It is not appropriate to seek to exhaustively identify what might be the other relevant considerations. They will vary from case to case and will need to be demonstrated to the satisfaction of the tribunal. The word 'fairly' suggests that the selection of the group was not arbitrary or discriminatory. For example, selection based upon employee characteristics such as date of employment, age or gender would be unlikely to be fair. Similarly, selection based on criteria which would have the effect of undermining collective bargaining or other legislative objectives would also be unlikely to be fair. It is also appropriate to have regard to the interests of the employer, such as enhancing productivity, and the interests of employees in determining whether the group of employees was fairly chosen. In this regard, it is not only the interests of the employees covered by the agreement that are relevant; the interests of those employees who are excluded from the coverage of the agreement are also relevant. We note that there is a suggestion to the contrary in the oral submissions put on behalf of Cimeco when counsel submitted that:

> "It was an erroneous approach to introduce the identification of the persons who were relevantly employed at the time of the making of the agreement for the purposes of testing the group chosen."[60] (Reference omitted)

[111] While an objective consideration and weighting of all relevant factors is required, it has been held, albeit in the context of a decision considering an application for a scope order and whether the proposed scope therein was fairly chosen, that there is to be no presumption that preference ought to be given to agreements that cover as much of an enterprise as is possible.[61] Further;

> "[14] Depending upon the circumstances of the particular case, there may be more than one way of fairly choosing the group of employees to be covered by a proposed enterprise agreement.
>
> [15] Enterprise agreements that cover all employees in a business are commonplace. Almost all such business will have organisation structures that will allow organisationally distinct groups to be identified. Many of those businesses contain operationally distinct groups. Yet it will rarely be the case that a 'whole of enterprise' group would be unfairly chosen.
>
> [16] It follows that the weight to be attached to the geographical, operational or organisational distinctness of groups with a broader group will be neutral in determining whether an order ought be made, unless there are particular features of, or circumstances associated with, that distinctness that render the broader group one that is not fairly chosen."[62]

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[60] [2012] FWAFB 2206.

[61] *UFU v MFESB; MFESB v UFU and Others*, [2010] FWAFB 3009, [56].

[62] *Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd*, [2014] FWCFB 1476.

[112] In this regard there is no geographic distinction between the group chosen to be covered by the 2017 Agreement and casual employees. The evidence does not support a finding that casual employees and PSEs do not physically work alongside one another. There is no evidence that some ports employ only casual employees and others only PSEs. There is no evidence that certain positions or classifications or jobs are performed by casual employees and others only by PSEs.

[113] It is also the case that there is insufficient evidence for the Commission to find that there is an operational distinction between the group as chosen to be covered by the 2017 Agreement and casual employees.

[114] Finally it is the case that there is insufficient evidence that there is an organisational distinction between the group to be covered by the 2017 Agreement and those who are not. While the argument may be put forward that, by the very nature of their contract of employment, there is an organisational distinction between persons employed on a casual basis and those employed on a part-time or full-time basis, there is insufficient evidence that this goes beyond the nature of the contract of employment and into the work which is undertaken for Aerocare by the employees in the different contractual categories of employment.

[115] On the basis of the material before the Commission, I am not persuaded that the group of employees covered by the 2017 Agreement was fairly chosen. There is no evidence before the Commission of a sufficient nature that would cause me to be of the view that the restriction of the 2017 Agreement to PSEs beneath the Leader 3 level allows a finding that the group of employees to be covered by the Agreement was fairly chosen, taking into account whether it is geographically, operationally or organisationally distinct. Instead the finding is available to the Commission that the selection of the group was arbitrary and discriminatory.

[116] *Cimeco*, referred to above, held that it is appropriate to have regard to the interests of the employer, such as enhancing productivity. In this matter, Aerocare's case included the proposition that it desired to incentivise the shift from casual employment to part-time, PSE employment, and that approval of the 2017 Agreement would do that. I accept that it might. However, incentivisation in the form put forward by Aerocare comes at the price of excluding casual employees from bargaining for a new agreement and ultimately excluding them from the benefits, such as they may be, of the 2017 Agreement. The only basis of their exclusion from the 2017 Agreement is that they are employed as casual employees. By all accounts they work in the same locations as PSE employees and they perform the same work, for the same supervisors.

[117] On no objective analysis of the evidence before the Commission can it be found that the work of Aerocare's PSE employees is either geographically, operationally or organisationally distinct to its casual employees.

[118] As a result the Commission is not satisfied that the group of employees covered by the 2017 Agreement was fairly chosen.

[119] Because the question of whether a group of employees was fairly chosen is a matter arising under s.186(3) of the Act as well as the provisions of s.190, consideration must be given to whether an undertaking could be sought and accepted by the Commission.

[120] Section 190(1) of the Act applies if the Commission has a concern that an agreement does not meet the requirements as set out in ss.186 and 187, with the requirements that the Commission be satisfied that the group of employees covered by the agreement was fairly chosen being dealt with by s.186(3) and (3A). Pursuant to s.190(2) the Commission may approve an agreement under s.186 if it is satisfied that an undertaking under s.190(3) meets the concern. Section 190(3) provides that the Commission may only accept a written undertaking from one or more employers covered by the agreement if satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the Agreement.

[121] I do not consider it appropriate in the circumstances to ask for an undertaking in respect of my finding that the group of employees covered by the 2017 Agreement was not fairly chosen because the result of seeking such an undertaking would, in my view, lead to substantial changes to the 2017 Agreement. Many hundreds more employees would be brought into the Agreement and its contents would need to be modified in substantial regards to provide for casual rates of pay and other provisions specific to the employment of casual employees. Further, it is a matter of fact that none of the employees in question were afforded an opportunity to vote on the Proposed Agreement.

(c) Better off overall test

[122] It is well settled that the better off overall test requires that each of the employees and prospective employees covered by an agreement be better off overall than under the relevant modern award. In this regard Aerocare put forward that past decisions of the Commission demonstrate that being an overall test the BOOT must be applied across all terms and conditions and across a roster cycle with five relevant considerations;

- the test is not a line-by-line test, but is directed at a consideration as to whether an agreement results in the employees being better off overall;
- benefits without a financial value must still be taken into account;
- the BOOT comparison is not with reference to theoretical or 'fanciful' work patterns;
- the analysis requires an examination of whether an employee would be better off overall if the agreement applied rather than the relevant award; and
- consideration of rostering practices is necessary to enable proper comparison with an award.[63]

[123] It may also be added that the BOOT analysis is not whether an employee would be better off overall under the 2017 Agreement rather than the 2012 Agreement. The comparison is between the 2017 Agreement and the relevant award, being the Ground Staff Award.

[124] For its part the TWU, supported by the ASU, put forward that it is not in dispute that there are a great many provisions of the 2017 Agreement that are less beneficial than those provided by the Ground Staff Award and those detriments are both monetary and non-monetary. The TWU submitted that given that all people covered by the Agreement are part-

[63] Exhibit Aerocare 10, [81] – [85].

time employees, it is relevant to take into account the particular provisions within the Ground Staff Award for part-time employees;

> "Of particular significance given that all of the 1370 persons covered by the Agreement are part-time employees (see Q2.10 and Q4.3 of the Form F17 filed by the Applicant in these proceedings), are those that relate to:
>
> a. The nature of a part-time engagement (contrast a "PSE" as defined in cl 5 of the Agreement, noting the minimum engagement of 60 hours per roster period in cl 9; with cl 11.4(a) of the Award, noting in particular the "reasonably predictable basis";
>
> b. The rostering arrangements, ordinary hours arrangements, shift penalties, and overtime entitlements for part-time workers under the Agreement as against the Award, noting in particular that the Award provides for overtime for any hour outside of the span of ordinary hours (7am to 6pm, Monday to Friday), the Agreement permits split shifts (which the Award prohibits), and does not even allow employees to have confidence on their start and finish times (contrast cll 9 to 14 of the Agreement to 11.4, 28 to 33, and cl 9.2 of the Award)."[64]

[125] The TWU also question the accuracy of the translation of classifications from the Ground Staff Award to the 2017 Agreement submitting that the Commission should not lightly accept the translation table put forward by Aerocare.

[126] The evidence before the Commission about Aerocare's rostering practices includes that all employees receive their rosters through the Aeronet system with those rosters being generated by an algorithm within Aeronet. Rostering is done by Aeronet in such a way as to ensure employees work in the most cost-effective way of providing the services for which Aerocare is contracted by its clients, taking into account the provisions of a number of things including the terms and conditions of any applicable industrial instrument. Mr Shelley gave evidence to the effect that Aerocare's rostering is done in such a way as to avoid any unnecessary "abnormal" costs meaning that if an employee could be rostered in such a way as to avoid overtime being paid either to them or to another employee then that is how Aerocare's requirement to provide labour at the airport or on the tarmac would be met.

[127] Necessarily employees' working hours may be subject to change either because of their own preferences or those of other employees, the needs of Aerocare's clients, or strictures imposed upon Aerocare as a result of any number of documents, including standard operating procedures, legislation or the prevailing industrial instrument.

[128] As a result, and seemingly driven by Aerocare's abnormal cost avoidance business model, as well as its need to maintain its competitive advantages, it was put forward by Aerocare in the course of the Commission's consideration of an application by the TWU and ASU for the production of documents that the basis on which rosters are compiled is confidential and the situation is not new.[65] Evidence was also put forward on that occasion that employees using Aeronet are able to view their current timesheet as well as timesheets for

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[64] Exhibit TWU 3, [76].

[65] Exhibit A2, Affidavit of Gregory Luke Shelley, [12].

several pay periods in the past but not all of the historical records. The same material referred to Aeronet, in 2012, being comprised of a fully relational database, which includes a table related to rosters. However that table does not contain the information of each and every individual roster.[66] Further it was put forward, in a 2012 Affidavit, that reconstruction of the information within Aeronet into a consolidated set of rosters would require new programming which would have no inherent or residual value or benefit to Aerocare.[67] The 2012 situation is maintained into 2017. In effect "a roster" is unable to be printed out.

[129] The need to conduct a BOOT analysis in order to make an application to the Commission for approval of the 2017 Agreement led Mr Shelley to analyse the position of each relevant employee that will be covered by the 2017 Agreement over a four-week roster in February 2017. He took the forecast roster for all relevant employees and proceeded to perform a significant analysis, making adjustments where appropriate, to then compare the financial results with those which would have been delivered under the Ground Staff Award. So far as is relevant;

- A spreadsheet with 55 columns was prepared, "thirty five of which are material to the calculations, analysing the position of each Relevant Employee that will be covered by CA17 over a four week roster for those employees in February 2017";[68]
- Actual rosters were adjusted to model a minimum 4 hour shift provided for by the 2017 Agreement since the 2012 Agreement provides for a minimum 3 hour shift;[69]
- The data used in the calculations "was compiled using Aeronet for each employee, taking into account approximately 24,232 roster entries, covering each classification of employee group in forecast start and finish times (and accounting for breaks) based on the information extracted from Aeronet";[70]
- Finally, having conducted his assessment Mr Shelley was "fully satisfied that each and every employee employed at the time of undertaking the assessment, who will be covered by CA17, will be financially better off overall for each roster period, under CA 17, than they would be if they were paid under the Ground Staff Award".[71]

[130] In his oral evidence Mr Shelley accepted that his analysis had been undertaken on the basis of the forecast rostered hours for each employee rather than the hours that they actually worked.

[131] Assessing whether the 2017 Agreement passes the BOOT is made exponentially more difficult because of Aerocare's claim that there is in effect "no roster" as such but merely a constantly evolving set of hours determined by the algorithms of Aeronet with no human intervention as such. While Aerocare is entitled to put forward that there is no inherent or residual value or benefit of having a mechanism to print a roster, such does not assist them to discharge the onus they carry to satisfy the Commission their Agreement passes the BOOT.

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[66] Ibid, Attachment GLS-1, Affidavit of Darren Andrew Michael, 7 August 2012, [16] – [17].

[67] Ibid, [19].

[68] Exhibit Aerocare 1, [56]

[69] Ibid, [57].

[70] Ibid, [59].

[71] Ibid, [61].

[132] After considering the totality of the evidence and material before the Commission and endeavouring as best as one can to apply that to what can only be described as the unnecessarily mysterious lack of a regular roster for employees covered by the 2017 Agreement it is considered there at least three concerns that arise about whether employees are better off overall;

- the impact of the Agreement's arrangements in respect of car parking;
- the remuneration and other arrangements for what may be regarded as "split shift" practices; and
- several specific hourly rate differences for Sunday and Public Holiday payments for particular classifications.

[133] While other matters are referred to within the objections raised by the TWU and ASU, it is unnecessary, because of my findings on the three foregoing matters, to assess those remaining matters in detail.

(i) Car parking

[134] As set out at an earlier point the TWU and ASU argue that the inclusion by Aerocare in its BOOT analysis of a nominal value for car parking overstates the financial benefits to employees, and potentially significantly so. The unions also put forward that there is a class of employees who have no need for employer-provided car parking at their place of work either because they walk to work in the case of some airports; utilise parking away from the airport; or travel to work with a co-worker. It is then put forward that the argument by Aerocare to the effect that all employees are better off, is not correct in the event when the nominal value of car parking is discounted from the BOOT analysis.

[135] For its part Aerocare consider that the provision of car parking by it to its employees is a material benefit to them since employees use a vehicle to travel to and from work and therefore have a requirement for car parking. In fact Mr Shelley's evidence is that "all Relevant Employees are required to pay for car parking".[72] His analysis proceeded on the basis that he established a nominal value to be attributed to car parking for all ports in which the company operates the lowest paid parking publicly available for 3 to 4 hour periods and used that "to enable a comparative assessment to be completed on the value of paid car parking to each Relevant Employee".[73] He also took into account the effects of Fringe Benefits tax upon its calculations; and that, in response to the argument that employees might carpool, such an arrangement would be most unlikely because of the nature of the rostering arrangements.[74]

[136] The only evidence directly from an Aerocare employee who would be covered by the 2017 Agreement was from Ms Young who worked at the Gold Coast Airport. She did not know her employee number and Aerocare did not volunteer it to the Commission so it was impossible to correlate her circumstances with the 622 pages of employee calculations conducted by Mr Shelley, the key to which was an employee number. Those employee calculations have been performed uniformly on the basis of each employee gaining a benefit

[72] Ibid, [68].

[73] Ibid, [71].

[74] Ibid, [69], [75].

from employer-provided car parking. Ms Young gave evidence that she walked to work from her nearby residence. Accordingly, it would be incorrect to include within any BOOT analysis of her circumstances a factor for employer-provided car parking. I accept that Ms Young is indicative of a much broader class of employee for whom it would be incorrect to include within any BOOT analysis pertaining to them the nominal cost of car parking. While it can be identified that there is such a broader class of employee, the size and scale is obviously unknown to the Commission.

[137] Nonetheless, the fact that there is such a class of employee, being those for whom there is no benefit from employer-provided car parking, leads to a finding that Mr Shelley's analysis for such class of employees is not only incorrect, but that at least some of the calculations that have been performed for that class need to be corrected to show that the employee is not better off overall, but worse off.

[138] The first page of the 622 pages of employee calculations provided by Mr Shelley contains 38 records. When car parking is removed from the analysis undertaken for each of those records, 10 of the calculations concerned show that the employee would be worse off under the 2017 Agreement than compared with their entitlements calculated by Mr Shelley under the Ground Staff Award. While, of course, it is not the case that any assumption can be drawn that each of the 10 employees concerned will not require car parking, having accepted that Ms Young is representative of a class of employee who does not require employer-provided car parking, it likely follows there will be other employees within Mr Shelley's analysis whom he has assumed, incorrectly, will have a benefit from employer-provided car parking.

[139] It follows in turn that the removal of employer-provided car parking from the records where that is required to be done will lead to a finding that at least some of those employees will be worse off.

[140] Lest there be any doubt about the proposition being put by me in this regard, the opacity of the information provided by Aerocare is such that it is impossible for me to ascertain who are the employees for whom employer-provided car parking is not required. Aerocare did not volunteer to the Commission Ms Young's employee number, so I cannot even be satisfied whether she is better off under the 2017 Agreement. The legislation requires that the Commission must be satisfied that the agreement passes the BOOT with that requirement being elaborated as satisfaction that each award covered employee and each prospective award covered employee would be better off overall if the agreement applied to them. On the basis of the evidence before me in relation to car parking I cannot be so satisfied.

(ii) Split shift and overtime arrangements

[141] Potentially two issues arise from the split shift arrangements operated by Aerocare. The first is whether or not there is a non-financial detriment to employees because of the split shift arrangements provided for by the 2017 Agreement when compared with the Ground Staff Award. The second is the extent to which the arrangements might amount to a financial detriment to employees because it means the way hours of work are arranged may mean that overtime payments that may otherwise be payable to an employee for their patterns of work will not be paid under the 2017 Agreement.

[142] The 2017 Agreement provides that "work may be performed in one or more shifts per day" and that "[t]he PSE's ordinary hours of work may be worked in a span (which may not be continuous) on any day of the week". Subject to certain qualifiers with respect to the working of supplementary hours, the span of hours to be worked by an employee is not to be more than 12 hours in any one day; 20 days in the same roster period; or more than 152 hours in the same roster period.[75] The supplementary hours qualifier referred to is that hours additional to these amounts "can only be undertaken if they are authorised and requested to be worked by the company"[76] with those hours then subject to the arrangements within Clause 11. Further, and after a qualifying period, employees who desire not to work split shifts may nominate to Aerocare not to do so;

> "14.3 The provision of working more than one shift in a day is a mechanism to increase employee earnings. Employees may nominate to cease performing more than one shift in a day and, subject to making their request in writing, will not be rostered to work more than one shift per day. Recognising long standing custom and practice that has provided for the rostering of more than one shift per day, and to allow time to recruit and train additional staff where required, this nomination process will be available not more than 6 months after commencement of this Agreement."

[143] One of the features of the 2017 Agreement is that it increases the minimum shift length from three hours to four.[77] Mr Shelley gave evidence that rostering more than one shift per day is a long-standing custom and practice of Aerocare and that it is a mechanism to increase employee earnings.[78] His evidence about the change to the minimum shift length includes that it is the company's intention set forward in the 2017 Agreement to make individual shifts as long as possible and that;

> "If Aerocare was required to pay overtime rates for the second of the split shifts, I believe that Aerocare would no longer allow split shifts. It would employ additional staff to work separate shifts (of four hours). I verily believe that the effect of this would be an adverse affect on overall employee remuneration."[79]

[144] In addition to the 2017 Agreement explicitly permitting split shifts, supplementary hours paid at a penalty rate may be "authorised and requested to be worked by the company" in accordance with the provisions within Clause 11. Further the same clause introduces the concept of "Altered Hours" which allows Aerocare to request an employee to change the start or finish times or both of a rostered shift in order to meet last-minute operational changes including flight delays". Subject to certain rights of refusal, "the company's request that an employee work altered hours shall not be deemed to be unreasonable".

[145] Further, there may be work performed either as employee nominated hours; or alternatively an employee may swap rostered shift with another employee of the same classification. Both matters are dealt with in Clause 12, set out below;

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[75] clause 9.9.

[76] clause 11.1.

[77] Clause 9.3.

[78] Exhibit Aerocare 1, [86].

[79] Ibid, [85].

"12. Employee Nominated Hours

Recognition of Desirability and Availability

An overwhelming number of employees have indicated a desire to have the opportunity to maximize their income by undertaking work outside the provisions of clause 9.

12.1. Periodically, due to employees becoming unavailable to work hours rostered to them in a Roster Period, the Company will identify through Aeronet those hours which are available to be worked within a Roster Period for which employees may self-nominate to work in addition to or in substitution for their own currently rostered hours (Published Shifts), subject to clauses 12.2 & 12.6 inclusive. All hours worked by an employee of an available Published Shift shall be considered Employee Nominated Hours.

Nomination for Employee Nominated Hours

12.2. An employee can only nominate to work Employee Nominated Hours if that employee enters a flexibility agreement pursuant to clause 17 to do so. To be clear, once an employee has proposed an Individual Flexibility Agreement pursuant to clause 17 (which the Company accepts under clause 17), then for the duration of that Individual Flexibility Agreement the employee will be able to nominate for and work Employee Nominated Hours.

Employee Nominated Hours are Ordinary Time

12.3. Recognising the Company always has the option to assign work to an alternate employee at normal time rates, where an individual employee self-nominates for Employee Nominated Hours, any such hours worked will be regarded as Ordinary Time for the purpose of clause 9.

Skills & Training

12.4. Employees will only be considered for Employee Nominated Hours if they have the sufficient skills and training to perform the inherent requirements of the role for which hours are available to work and to which the employee proposes self-nominate.

Fatigue Management

12.5. Employees will only be considered for Employee Nominated Hours if the hours available to work and which the employee proposes to self-nominate for and work do not cause the employee to breach any work health and safety legislation, code of practice or protocol implemented by the Company from time to time to manage and reduce employee fatigue or any other clause of this Agreement and maximum hours worked within a period.

Coercion

12.6. No employee may be coerced by the Company or a fellow employee to nominate themselves for Employee Nominated Hours.

Shift Swaps

12.7. Subject to the Company's prior written approval, an employee may swap rostered shifts with another employee of the same classification, in which event those hours as swapped will be paid to the employee who actually works the hours at the employee's Ordinary Time rate. Shift swaps will not normally be approved that result in an employee exceeding the maximum hours as set out in clause 9.9.

To be clear, no overtime is payable in any circumstances for any hours swapped.

12.8. Subject to the Company's prior written approval, an employee may work a rostered shift of another employee (give-away shift), in which event those give-away shift hours will be paid to the employee who actually works the hours at the employee's Ordinary Time rate, subject to clause 7. Give-away shifts will not normally be approved that result in an employee exceeding the maximum hours as set out in clause 9.9. To be clear, a giveaway shift is not a Published Shift.

12.9. In giving prior written approval under clause 12.7 or 12.8, the Company can nominate the timing and number of hours approved to be worked."

[146] The Ground Staff Award provides that the ordinary hours of work for day workers are to be worked continuously except for meal breaks. Shift work is also provided for by the Ground Staff Award with distinction being made between continuous work, which is work carried on with "consecutive shifts of employees throughout the 24 hours of each of at least six consecutive days without interruption" and non-continuous shift work. Work performed outside ordinary hours on any day or, except where by arrangement between the employees themselves is overtime, with the Ground Staff Award providing that overtime is to be paid at time and half of the first two hours and double time thereafter, or double time for a continuous shift worker.[80]

[147] The argument that Mr Shelley put forward in his evidence is to the effect that if Aerocare was required to pay overtime rates for the second of the split shifts he believed Aerocare would no longer allow split shifts and that it would instead employ additional staff to work separate shifts, thus giving essential life to Aerocare's "abnormal cost" strategy. Unless it absolutely has to it is not about to pay overtime at all. There of course is nothing wrong with such a strategy; in many respects it is simply prudent and good management to avoid unnecessary costs wherever it is possible to do so. However, the assessment which needs to be made in this particular matter is not whether Aerocare are prudent and good managers, but whether the employees who will be covered by the Agreement will be better off overall as a result of the commencement of the 2017 Agreement and the provisions within it.

[148] The innermost workings of the Aerocare method of management in relation to its hours arrangements are not entirely before the Commission. However, it is discernible from the provisions of Clause 12, dealing with employee nominated hours, that such are only available to employees who have entered into an Individual Flexibility Arrangement with

[80] See for example Clauses 28, 29, 30 and 32.

Aerocare and that Clause 17.2 permits an IFA to operate with respect to "arrangements for when work is performed" as well as overtime and penalty rates. The stated purpose of employee nominated hours includes meeting the desires of "an overwhelming number of employees [who] have indicated a desire to have the opportunity to maximise their own income by undertaking work outside the provisions of clause 9". The combination of Clauses 9 and 12 and the contents of those provisions leads reasonably to the proposition that an employee working under the 2017 Agreement;

- May be rostered for a minimum four consecutive hours on any shift and for a minimum of 60 hours over a roster period (being a 28 day recurring period);
- May be rostered for fewer than 60 hours per week upon request and specific agreement with Aerocare;
- May work ordinary hours on any day of the week and those hours need not be continuous;
- Has their ordinary hours limited within a range, unless varied by the supplementary hours and altered hours arrangements in Clause 11, of no more than 12 hours on any one day, 20 days in the same roster period on more than 152 hours in the same roster period;
- May themselves nominate for hours in addition to or in substitution for their own currently rostered hours provided they have entered into an IFA; such hours will be paid as ordinary time and are "regarded as Ordinary Time for the purpose of Clause 9".

[149] The term "Ordinary Time" is defined within Clause 5 to mean;

> "…all hours worked, or any part thereof, on any shift on any day of the week in accordance with the particular employee's roster, but does not include any reasonable additional hours worked in connection with any shift. To be clear, Ordinary Time includes Monday to Friday Ordinary Hours"

[150] The combination of these provisions leads to the likely outcome that payments to employees of any rate for time worked other than as ordinary time, even when they worked additional hours, or hours not initially rostered, would not only be an abnormal cost, but an exceptionally rare, limited, isolated and unusual eventuality. In contrast an employee working the same hours under the Ground Staff Award, would likely receive at least some overtime penalty payment for the additional hours they work, whether they be unrostered hours, hours stemming from split shifts, or hours in excess of the Ground Staff Award's scheme of ordinary time. Not only could the split shifts be regarded as requiring an overtime payment, but so too could the 2017 Agreement's employee nominated hours, especially when they meet the limits of the span of daily or weekly hours.

[151] The TWU argues strongly that the Ground Staff Award prohibits split shifts whereas the 2017 Agreement permits them, as well as arguing that the Ground Staff Award has been established in such a way as to allow employees to have confidence in their starting and finishing times. Further, the 2017 Agreement applies only to part-time employees, who have an entitlement to a "reasonably predictable basis" of employment under the Ground Staff Award, together with the following rostering and hours entitlements;

> "11.4 Part-time employment

(a) General

(i) A part-time employee is an employee who is engaged to perform less than an average of 38 ordinary hours per week on a reasonably predictable basis.

(ii) Part-time employees are entitled on a pro rata basis to equivalent pay and conditions to those of full-time employees who do the same work in the classification concerned.

(iii) An employer is required to roster a part-time employee for a minimum of four consecutive hours on any shift.

(iv) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.

(b) Part-time day workers

(i) At the time of engagement or appointment of an employee as a day worker, the employer and the part-time employee will agree in writing on a regular pattern of work, specifying:

the guaranteed minimum number of ordinary hours to be worked per week; or
which days of the week the employee will work and the actual starting and finishing times each day.

(ii) Subject to the employer's rights in clauses 8.4 and 28.4 to change an employee's hours of work, changes in hours may only be made by agreement in writing between the employer and employee. Changes in days can be made by the employer giving one week's notice in advance of the changed hours.

(iii) All time worked in excess of the ordinary daily hours mutually arranged will be overtime and paid for at the appropriate overtime rate.

(c) Part-time shiftworkers

(i) At the time of engagement or appointment of an employee as a shiftworker, the employer and the part-time employee will agree in writing the guaranteed minimum number of ordinary hours to be worked per week.

(ii) Subject to clause 11.4(c)(i) part-time shiftworkers will be rostered in accordance with clauses 28 and 30.

(iii) All time worked in excess of the rostered daily hours will be overtime and paid for at the appropriate overtime rate."

[152] Although Aerocare does not explicitly argue that the Ground Staff Award permits split shift arrangements, its case appears to proceed on the basis that the enterprise agreement arrangements enliven the arrangement alluded to within Clause 11.4(a)(iii) of the Ground Staff Award; that is to say that on any particular day there may first of all be one shift,

followed by a break, followed by a further, but separate and distinct shift, unrelated to the first. Its arguments in relation to the 2017 Agreement being better off overall in this respect and therefore capable of approval rely upon two principal arguments; that employees desire such arrangements; and that other enterprise agreements providing for split shifts have been approved by the Commission;

> "102. The provisions of CA17 facilitate the working of split shifts which employees consider highly desirable for reasons of enhanced income and work routines which are more family and lifestyle friendly. Without the flexibility offered by CA17, Aerocare would not be able to justify offering split shifts. The flexibility afforded by the split shift arrangements in CA17 is a win/win arrangement for employer and employee (see statement of Coretta Young of 5 July, 2017). It should weigh in favour of CA17 in the BOOT analysis.
>
> 103. CA17 provides that the Relevant Employees have discretion to work split shifts, if they chose to do so.
>
> 104. Aerocare is obliged under CA17 to increase minimum shifts from three hours to four hours and with the intention of making individual shifts as long as possible.
>
> 105. The evidence is that, if Aerocare was required to pay overtime rates for the second portion of split shift, Aerocare would no longer allow split shifts. It would employ additional staff to work separate shifts (of four hours). ...
>
> 106. Rostering of more than one shift per day is a long standing custom and practice within Aerocare. The provision of working more than one shift in a day is a mechanism to increase employee earnings. Relevant Employees may nominate to cease performing more than one shift in a day, and subject to making their request in writing, will not be rostered to work more than one shift per day. This nomination process will be available not more than 6 months after the commencement of CA17 in order to allow time to recruit and train additional staff where required: CA17 clause 14.3
>
> OTHER GROUND HANDLLING EA'S HAVE SPLIT SHIFTS
>
> 107. There are other Enterprise Agreements, which have been approved by the Commission, that contain provision for split shifts. For example:
>
> > *NTL Ground Handling (Regional Airports) Enterprise Agreement 2014-2018* – approved by FWC on 19 June 2015 by Commissioner Cambridge and operates until its nominal expiration date on 30 June 2018.
>
> 108. *Skystar (Perth Airports) Collective Agreement 2015* - approved by FWC on 28 October and operates until its nominal expiration date of 31 December 2017. I note that, in the decision by FWC Commissioner Rose (sic) that, at clause 7 of the decision:
>
> > "The Transport Workers' Union of Australia has given notice under s.183 of the Act that it wants the Agreement to cover it. In accordance with Section 201(2) of the Act I note that the Agreement covers the organisation."

Clause 9.4.11.2

"9.4.11.2 Shifts

A shift is a continuous period bound by a start and a finish time for which an employee is rostered to work. The employer plans its shifts/rosters around its work load and may have multiple shifts in any one day.

These multiple shifts may overlap or have a break in between them. The shifts that the employees will work are set out in the roster and whilst it is not he employers preference to roster employees to work multiple shifts that have a break in between them in any one day, the employee recognizes that he/she will not be paid for the period between the two shifts."[81] (original emphasis)

[153] The reference in paragraph [106] of the foregoing to Clause 14.3 of the 2017 Agreement is to an explanatory clause, within a broader clause dealing with working patterns and rostering priorities. Clause 14.3 sets out the reasoning for the split shift arrangements, as well as an eligibility period;

> "14.3 The provision of working more than one shift in a day is a mechanism to increase employee earnings. Employees may nominate to cease performing more than one shift in a day and, subject to making their request in writing, will not be rostered to work more than one shift per day. Recognising long standing custom and practice that has provided for the rostering of more than one shift per day, and to allow time to recruit and train additional staff where required, this nomination process will be available not more than 6 months after commencement of this Agreement."

[154] The way that split shifts are arranged in actuality under the 2017 Agreement is through several different mechanisms and principally that prescribed within Clause 9.1 which allows that an employee may perform their work in one or more shifts per day and Clause 9.8 which provides that an employee's "ordinary hours work may be worked in a span (which may not be continuous) on any day of the week".

[155] Ms Young's evidence was that she valued the split shift arrangements and wanted them to continue.

[156] When compared with the provisions of the Ground Staff Award, I am satisfied that the arrangements of the 2017 Agreement in this respect do not leave employees better off overall. Clause 11.4(b)(i) of the Ground Staff Award provides that part-time day workers are entitled to have an agreement in writing on a regular pattern of work specifying the guaranteed minimum number of ordinary hours to be worked each week together with information about the days of the week the employee will work and the actual starting and finishing times each day. Pursuant to the Ground Staff Award's Clause 28.2(c), a day worker has the entitlement to have their ordinary hours worked continuously.

[157] Clause 11.4(c)(i) Ground Staff Award provides that a part-time shiftworker is entitled to be guaranteed in writing the minimum number of ordinary hours worked per week and then

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[81] Exhibit Aerocare 10.

have their rostering to performed in accordance with Clauses 28 and 30. Clause 28.3(a) entitles a continuous shift worker to have their hours worked without interruption, noting that there appears to be no specific provision in regard to non-continuous shift workers.

[158] On the basis of the foregoing, I am satisfied that the proper construction of the Ground Staff Award is that the ordinary hours of work for any employee are to be worked continuously and there is no provision for split shifts, however described.

[159] In considering the question of whether employees would be better off overall as a result of the 2017 Agreement's split shift and overtime arrangements, I have taken into account that because of Aerocare's "abnormal cost" avoidance strategy, employees would, if they worked under the Ground Staff Award, likely neither have longer continuous hours of work or receive overtime payments for non-continuous hours of work and that the hours would, in all likelihood, be redistributed to other employees to work as ordinary hours.

[160] I have taken into account that the split shift arrangements available under the 2017 Agreement therefore provide both a financial benefit to employees (who would receive additional ordinary hours that they would otherwise not receive) as well as a non-financial benefit (being the opportunity to work on the days and shifts which they prefer).

[161] Nonetheless, the requirement of me is to form a view about whether each Award covered employee, and each prospective Award covered employee, would be better off overall if the 2017 Agreement applied to them instead of the Ground Staff Award. In the overall context of the instruments before me, as well as the evidence and noting that there is a requirement to objectively balance all relevant factors, financial as well as non-financial, my consideration of this element does not lead me to the view that employees will be better off covered by the 2017 Agreement.

[162] In particular, the fact that the 2017 Agreement allows ordinary hours of work not to be continuous and does not provide a direct benefit to the employees concerned, whether quantifiable or unquantifiable, leads me not to be satisfied that the relevant employees will be better off overall if the Agreement is approved.

(iv) Saturday, Sunday and Public Holiday payments

[163] In its submissions the TWU argued that most but not all employees are worse off under the 2017 Agreement for all Sunday work and all work on Good Friday and Christmas Day.[82]

[164] In addition, and as referred to at an earlier stage in this decision, the Commission's Enterprise Agreement Research Staff identified that the hourly wage rate provided for by the 2017 Agreement for at least some employee classifications performing work on a Saturday, a Sunday and Good Friday and Christmas Day may be insufficient to leave these employees better off overall for the hours that they may work on those days. None of the evidence before the Commission has led me to a view that the preliminary analysis should be rejected either in part or in whole.

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[82] Exhibit TWU 3, [80].

[165] As set out in an earlier part to this decision, the Agreement Analysis Summary compared the hourly rates for each classification in the 2017 Agreement with those that may be payable under the Ground Staff Award for work across Monday to Friday, on Saturdays; on Sundays; and on public holidays. From that analysis certain classifications were identified as having an hourly rate for work on Saturday, Sunday and public holidays which may be of a concern to the Commission in proceeding to approve the 2017 Agreement. This decision then identified some of the classifications which may be regarded as outliers, meaning that the differences in margins were pronounced.

[166] The concerns that arose in the Commission's Agreement Analysis Summary for the positions in question identified concerns for several positions across a range of margins. It is convenient for the sake of this analysis to refer to the top and bottom of the margins for each of the Saturday, Sunday and Good Friday and Christmas Day public holiday work.

[167] Further consideration of the outlier positions shows the following circumstance for each;

	Ground Staff Award	*2017 Agreement*	*Margin per hour*	*Margin %*
Airline Service Trainee/Level 1 Clerical, Administration & Support Stream				
Monday - Friday	$19.75	$21.50	$1.75	8.9%
Saturday	$29.63	$29.30	-$0.33	-1.1%
Sunday	$39.50	$32.90	-$6.60	-16.7%
Public Holiday (not Good Friday or Christmas Day)	$39.50	$43.00	$3.50	8.9%
Good Friday and Christmas Day	$49.38	$43.00	-$6.38	-12.9%
Airline Service Agent, year 6/Level 2 Clerical, Administration & Support Stream				
Monday - Friday	$20.61	$25.71	$5.10	24.7%
Saturday	$30.92	$35.75	$4.83	15.6%
Sunday	$41.22	$40.09	-$1.13	-2.7%
Public Holiday (not Good Friday or Christmas Day)	$41.22	$51.43	$10.21	24.8%
Good Friday and Christmas Day	$51.53	$51.43	-$0.10	-0.2%
Airline Service Agent year 6/Level 4 – Aviation Transport Workers Stream;				
Monday - Friday	$20.11	$25.71	$5.60	27.9%
Saturday	$30.17	$35.75	$5.58	18.5%
Sunday	$40.22	$40.09	-$0.13	-0.3%
Public Holiday (not Good Friday or Christmas Day)	$40.22	$51.43	$11.21	27.9%
Good Friday and Christmas Day	$50.28	$51.43	$1.15	2.3%
Advanced Airline Service Agent, year 1/Level 3 Clerical, Administration & Support Stream				
Monday - Friday	$21.77	$22.69	$0.92	4.2%
Saturday	$32.66	$31.34	-$1.32	-4.0%
Sunday	$43.54	$35.22	-$8.32	-19.1%

Public Holiday (not Good Friday or Christmas Day)	$43.54	$45.38	$1.84	4.2%
Good Friday and Christmas Day	$54.43	$45.38	-$9.05	-16.6%

[168] What emerges from the foregoing summary table is that hourly rates under the 2017 Agreement for some classifications on some Saturdays, Sundays and Good Friday and Christmas Day are, on face value, significantly lower than the rates of pay that would otherwise prevail under the Ground Staff Award. However, it is also the case that the Monday to Friday hourly rates for each of the four classifications matches are significantly higher, as are the rates of pay for some Saturday and general public holiday work.

[169] Clearly whether or not a particular employee is better or worse off as a result of these and other features of the 2017 Agreement will depend upon not only their classification, but the hours they work. Whereas Mr Shelley's BOOT analysis examined work forecasts to be undertaken by all employees in February 2017 and satisfied himself that no employee was worse off and that all were better off as a result of the 2017 Agreement, February, of course, is a month without a Good Friday or Christmas Day, meaning that his analysis did not model the impact of rates pertaining to those public holidays. It is also the case that given there is not a roster as such and in the face of Aerocare's "abnormal cost" avoidance strategy it is exceptionally difficult for the Commission to extrapolate the class of employee who would be affected by the differential margins set out in the table above and to model whether or not individual employees may be better or worse off.

[170] While plainly "the more hours worked when the Ground Staff Award rates are higher, the worse off the employee will be compared to the Award",[83] the Commission has before it no roster that can be used to test the proposition of whether there is an actual class of employee who will be worse off as a result of the differential is identified above. By way of example, while it can be identified that a person working as an Advanced Airline Service Agent, year 1/Level 3 Clerical, Administration & Support Stream will be significantly worse off under the 2017 Agreement than if they were paid under the Ground Staff Award on an hour-by-hour basis for the time they worked on Saturday, Sunday, Good Friday and Christmas Day, it may well be that such is more than adequately compensated by the hourly benefits flowing to them for work on Monday to Friday and on general public holidays as well as the benefits which may come from elsewhere within the 2017 Agreement.

[171] Unfortunately on the basis of the evidence before the Commission, it is impossible to perform the analysis that would be required to resolve the question, and many others like it.

[172] Were it the case that the matter of the Saturday, Sunday and Public holiday rates differentials for at least the positions identified above the only concerns held by the Commission, then this may well be something that could be the subject of further engagement with the Applicant and the bargaining representatives and, potentially, the subject of a discussion with them about an undertaking to deal with the identified concern.

(d) Whether any unlawful terms

[83] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWCFB 2887, [11].

[173] As set out above, the TWU, and supported by the ASU withdrew very late in the proceedings, and after all evidence had been received by the Commission, its agreement as a stated fact that the 2017 Agreement does not include any unlawful term.

[174] The fact that this occurred so late in the proceedings is unsatisfactory, and an acceptable explanation has not been given as to why the TWU moved away from the Agreed Statement of Facts, and did so after all parties' evidential cases had closed. Worse still, it has left the Commission without proper evidence or considered submissions on the subject. Neither Counsel directed the Commission to any precedents on the subject that would assist the Commission's analysis.

[175] The clause in question is within the Dispute Resolution Procedure, Clause 28, as follows;

> "28.4.4 No party shall commence any action:
>
> 28.4.4.1. To obtain a penalty under the Act as amended, or
> 28.4.4.2. To obtain damages for breaches of this Agreement, or
> 28.4.4.3. To enforce a provision of this Agreement or provision of the Act, unless:
>
> 28.4.4.4. That party has genuinely attempted to resolve the dispute at the workplace level, and either:
>
> 28.4.4.4.1. A period of seven days has expired from the date when that party gave notice that conciliation pursuant to 28.2 is not requested, or
>
> 28.4.4.4.2. Conciliation pursuant to clause 28.2 has been completed and was unsuccessful."

[176] The TWU's argument in respect of this clause is that the provision is an unlawful term within the meaning of s.194 of the Act for reason that it contains an objectionable term. The meaning of an "objectionable term" is defined in The Dictionary in s.12 of the Act to include a term that requires or permits a contravention of Part 3 – 1 the Act which deals with the general protections. For its part Aerocare reject that characterisation by the TWU on the basis that the word "unless" in the clause amounts to a modifier to the proposition which causes the TWU concern, in the sense that actions for penalties, damages, etc. may still be sought but only after a person has endeavoured to resolve their dispute through the 2017 Agreement's Dispute Resolution Procedure.

[177] Given that the matter was only raised in closing submissions by the TWU there is a paucity of reliable information before the Commission on the subject and no evidence at all.

[178] The obligation the Commission has in this regard is that pursuant to s.186 of the Act generally and s.186 (4) in particular to the effect that the Commission must approve the Agreement under s.186 if satisfied that, pursuant to s186 (4) the Agreement does not include any unlawful terms. I am not, at this time satisfied that the foregoing provision is an unlawful term. That is not to say that it may not be, rather that the submissions and evidence before me are insufficient to make a finding of the nature invited by the TWU.

(e) Whether a single-enterprise agreement

[179] The application is made by Aerocare for the Commission to amend the documents before the Commission referring to the 2017 Agreement being made with two entities on the employer side. The application arises after Mr Shelley reflected on evidence he gave on the first day of the hearing, with him returning to advise the Commission that a change was needed in relation to his evidence on the status of the two entities. The 2017 Agreement provides the following about who it covers;

> "2. Parties
>
> This Agreement is made between:
>
> Aerocare Flight Support Pty Ltd ABN 32 103 196 701 and Aero-care Flight Support Unit Trust ABN 67 498 323 240 (referred to collectively as the Company or Employer), having their registered office at 31 Langland Street, Newstead, 4006.
>
> And
>
> Collectively, the Company Employees who perform the work in one of the classifications contained in this Agreement (referred to as the employee or employees)."

[180] A supplementary affidavit from Mr Shelley, provided by him on the second day of the hearing, indicates that having given evidence on 13 July 2017, he made further inquiries regarding the relationship between the two entities referred to and established that;

> "a) Aerocare Flight Support Pty Ltd is trustee for Aero-care Flight Support Unit Trust;
>
> b) All employees to be covered by the Aerocare Collective Agreement 2017 (CA17) are employees of Aerocare Flight Support Pty Ltd as trustee for Aerocare Flight Support Unit Trust;
>
> c) No employees to be covered by CA17 are employees of Aero-care Flight Support Unit Trust; and
>
> d) As there were no employees of Aero-care Flight Support Unit Trust no notice of representational rights was issued in the name of Aero-care Flight Support Unit Trust."[84]

[181] In relation to whether the 2017 Agreement is validly made, in accordance with s.172(2), it is noted that the section enables a single-enterprise agreement to be made between 2 or more single interest employers. Section 170(5) sets out the requisite connections between entities that may be regarded as "single interest employers" with the definition in each case being predicated on the entity being an employer. Section 170 provides that, for the purposes of Part 2 – 4 an employer is a national system employer. That latter term is separately defined within s.14, which provides, so far as is relevant, that a national system

[84] Exhibit Aerocare 5, Supplementary Affidavit of Gregory Shelley, [2].

employer is a constitutional corporation, so far as it employs or usually employs, an individual. A finding that an entity is or is not a national system employer is a finding of fact and I have insufficient evidence before me that would lead to such a finding. While Aerocare has brought forward evidence about the relationship between the two entities, referred to below, I do not have evidence before me that would allow the factual finding that the Aero-care Flight Support Unit Trust is or is not a national system employer. I am not persuaded that if it is not, that the 2017 Agreement fails to be one that the Commission could approve, with or without an amendment to the entities covered by the agreement.

[182] Aerocare argue that any inaccuracy or confusion in its material can be remedied if all references to "Aerocare Flight Support Pty Ltd ABN 32 103 196 701 and Aero-Care Flight Support Unit Trust ABN 67 498 323 240" are amended to "Aerocare Flight Support Pty Ltd ABN 32 103 196 701 as trustee for Aero-Care Flight Support Unit Trust ABN 67 498 323 240"[85] Aerocare have provided a schedule of proposed amendments to various documents that would be required to give effect to this proposition, and in particular, the originating application form (the F16), the supporting statutory declaration (the F17) and the 2017 Agreement itself as well as the witness statements and submissions it has provided to the Commission and the Statement of Agreed Facts.

[183] Aerocare's amendment application is posited on the provisions of s.586 of the Act which allows a correction or amendment to be made;

> "586 Correcting and amending applications and documents etc.
>
> The FWC may:
>
> (a) allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate; or
>
> (b) waive an irregularity in the form or manner in which an application is made to the FWC."

[184] The TWU and ASU object to an amendment being made in these terms, with the TWU arguing that the 2017 Agreement before the Commission is factually not an enterprise agreement to which s.172 applies. Relevantly, the TWU submits;

> "7. Read literally, an enterprise agreement would appear to meet the description of a "document relating to a matter before" the Commission in s 586(a): such an agreement when made must be the subject of an application for approval to the Commission (s 185), and a signed copy of "the agreement' must be filed with the Application: s 185(2)(a), Fair Work Regulations 2009 reg 2.06A.
>
> 8. To read the general power ins 586 as empowering an amendment or correction to an enterprise agreement "made" under s 182 (particularly so as to change the named employer), is entirely inconsistent with the detailed provisions relating to the content, making and approval of enterprise agreements.

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[85] Aerocare Supplementary Submissions, 21 July 2017, [4].

> 9. Section 172(1) identifies an enterprise agreement as "An agreement .. . that is about one or more of the following matters ... made in accordance with this part" (being Part 2-4).
>
> 10. A "single-enterprise agreement" being the relevant type of enterprise agreement contemplated by Part 2-4, relevantly permits "An employer, or 2 or more employers that are single interest employers" to "make an enterprise agreement" with employees: s 172(2)(a).
>
> 11. Section 173 articulates a series of steps that must be taken by "the employer" in relation to "the agreement". References to "the agreement" throughout s 173 must be understood as reference to proposed enterprise agreement, but use of the single participle "the" nonetheless makes clear the obligations arise in relation to the proposed agreement between the employer, or 2 or more employers that are single interest employers, contemplated by s 172(2)(a)."[86] (reference omitted)

[185] In support of its amendment application Aerocare referred the Commission to several approval decisions in which the Commission had used the power within s.586 to make amendments of the type it foreshadowed.[87]

[186] Aerocare also referred to the views expressed in the Full Bench decision of *DP World Sydney Limited v Lambley* about the breadth of the amendment power.[88] For its part the TWU put forward that none of the decisions referred to by Aerocare were contested matters.

[187] The reference by Aerocare to the matter of *DP World Sydney Limited v Lambley* is to a view by Vice President Lawler in the course of a minority decision;

> "[78] Sections 589 and 602 are separate sources of power for the Full Bench as presently constituted to withdraw the decision of the Full Bench as initially constituted and rehear DP World's appeal from the decision of Sams DP, correcting for the errors within jurisdiction identified by Katzmann J. A power in the Full Bench as presently constituted to amend the earlier decision to correct for those errors is also supported by s.586(a) and the broad approach to such a power adopted by the Full Bench in *Refined Sugar Services Pty Ltd v AWU* [2008] AIRCFB 1069."

[188] Within *Refined Sugar Services* the Full Bench was required to consider a legislative provision in similar terms to s.586, holding that the power was general and was there to permit the real issues between the parties to be dealt with;

> "[13] Central to the appeals is the nature and operation of the Commission's general powers in Part 3 of the Act and their interaction with the statutory scheme relating to bargaining and protected industrial action in Part 9 of the Act. Section 111, which is in Part 3, relevantly provides:

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[86] Reply Submissions of TWU Re "Employer" Issue, 27 July 2017.

[87] (1) amendment to the F16 form, *Warrigal Charters* [2016] FWCA 3476 at [2] and *Burger Urge* [2015] FWCA 5724 at [6]; (2) amendment to the body of the agreement *Working Solutions & Practical Alliance* [2014] FWCA 7012 at [5].

[88] [2013] FWCFB 9230, at [78].

> 111 Particular powers of Commission
>
> (1) The Commission may do any of the following in relation to a proceeding under this Act or the Registration and Accountability of Organisations Schedule:
>
> …
>
> (d) vary or revoke an order, direction or decision of the Commission;
>
> …
>
> (l) allow the amendment, on any terms that it thinks appropriate, of any application or other document relating to the proceeding;
>
> (m) correct, amend or waive any error, defect or irregularity whether in substance or form;
>
> …
>
> [14] It is evident that the powers in s.111(1)(d), (l) and (m) respectively are directed at different situations, although there may be some overlap. Section 111(1)(d) confers a general power to vary an order, direction or decision. Section 111(1)(l) confers a power to permit an amendment of any application or other document relating to the proceeding. Section 111(1)(m) provides a power to 'correct, amend or waive any error, defect or irregularity whether in substance or form.' It is a general power not expressed to be limited to a particular class or classes of documents such as orders, applications etc. The power is conferred for the purpose, no doubt, of permitting the real issues between the parties to be dealt with."[89]

[189] The same Full Bench then found that an amendment to a bargaining notice giving rise to a bargaining period between the union and the Respondent was supported by the section and thus within the power of the Commission to correct and that different parts of the section worked to allow the amendment or correction of orders. The Full Bench also considered the interaction of s.111 with the then applicable sections, s.469 which permitted variation of a ballot order at any time before the order expired and s.496, dealing with the Commission's obligation to make an order that unprotected industrial action stop or not occur;

> "[20] Next we deal with the validity of the amendment of the bargaining orders. It was submitted on behalf of RSS that s.469(1), which we have already set out, operates to the exclusion of the powers in s.111(1)(d). Any general power to vary an order must give way to the prohibition in s.469(1) on the variation of a ballot order after the order expires. (It was common ground that the ballot orders of 2 June 2008 had expired). It was further submitted that the powers in s.111(1)(l) & (m) were not available either, because their use would constitute a variation of the orders, which would therefore also be inconsistent with the prohibition in s.496(1).

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[89] *Refined Sugar Services Pty Ltd v AWU* [2008] AIRCFB 1069.

> [21] We note first that s.111(1)(l) does not confer a power to amend orders. That section could not therefore provide the basis for an amendment of the ballot orders. The question is whether s.111(1)(m) was available. In our view it is highly unlikely that the legislature intended that s.469(1) should operate to prevent the correction of errors once a ballot order had expired. There is no reason of statutory construction or policy supporting such an approach. And there is no reason to suppose that the desirability of correcting errors would be any less after the order had expired than before. Certainly no cogent submission was advanced as to why that would be so. If, as we have found, the bargaining notice gave rise to a bargaining period between the AWU and RSS in this case, there is every reason of convenience, practicality and common sense to suppose that the legislature intended that s.111(1)(m) would be available to regularize the orders in question, even if the error was discovered after the ballot orders had expired.
>
> [22] We have concluded that s.469(1) does not operate to cut down the power in s.111(1)(m) to correct errors."[90]

[190] Having considered the submissions and cases referred to in this matter, together with the application itself as well as the content of the 2017 Agreement, I accept that the Commission is vested with the power to make the amendments sought by Aerocare and that it is both reasonable and desirable for the Commission to make such amendments. However, I consider that in the circumstances it is only necessary for me to amend the Forms F16 and F17 and the 2017 Agreement and note that the other documents referred to in Aerocare's amendment schedule will, to the extent necessary, be read by the Commission as if they have had the indicated amendments made.

[191] Accordingly an Order will be issued by the Commission in the following terms;

> [1] Pursuant to s.586(a) of the *Fair Work Act 2009*, the following amendments are made to the name of the Applicant shown in the following documents pertaining to the proceedings before the Fair Work Commission for approval of an enterprise agreement to be known as the Aerocare Collective Agreement 2017 (matter number AG 2017/1424);
>
> 1. Form F16—Application for approval of an enterprise agreement (other than a greenfields agreement);
>
>   a. The name of the Applicant is amended to "Aerocare Flight Support Pty Ltd ABN 32 103 196 701 as trustee for Aero-Care Flight Support Unit Trust ABN 67 498 323 240"; and
>   b. The answer to Question 2.3 is changed from YES to NO, and the details then appearing in table beneath the question are omitted.
>
> 2. Form F17—Employer's statutory declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement);

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[90] Ibid.

a. The answer to Question 1.1 ("What is the name of the employer/Legal name") is amended to "Aerocare Flight Support Pty Ltd ABN 32 103 196 701 as trustee for Aero-Care Flight Support Unit Trust ABN 67 498 323 240".

3. Aerocare Collective Agreement 2017;

a. Clause 2 (Parties) is amended to the following;

"2. Parties

This Agreement is made between:

Aerocare Flight Support Pty Ltd ABN 32 103 196 701 as trustee for Aero-Care Flight Support Unit Trust ABN 67 498 323 240 (referred to collectively as the **Company** or **Employer**), having their registered office at 31 Longland Street, Newstead, 4006.

And

Collectively, the Company Employees who perform the work in one of the classifications contained in this Agreement (referred to as the **employee** or **employees**)."

b. Clause 5 ("Explanation of terms used in this Agreement") is relevantly amended so that the definitions of "Company" and "Employer" are as follows: "Aerocare Flight Support Pty Ltd ABN (32 103 196 701) as trustee for Aero-Care Flight Support Unit Trust ABN 67 498 323 240."

[2] These amendments take effect from the date of this Order."

Undertakings

[192] The Act provides that in the event the Commission has a concern that an enterprise agreement does not meet the requirements set out in ss.186 – 187 it may approve the agreement if it is satisfied that an undertaking from an employer covered by the agreement meets the concern. It may only accept a written undertaking from one or more employers covered by the agreement if satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or that it does not result in substantial changes to the agreement. In considering whether to accept an undertaking the Commission must not accept an undertaking unless it has sought the views of each person who it knows is a bargaining representative for the agreement.

[193] In the analysis set out above I have made findings about the approval requirements ss.186 – 187 and summarise below those findings, together with consideration of whether an undertaking may be suitable to seek or accept in order for the 2017 Agreement to be approved;

- In relation to the matter of "genuinely agreed" (s.186(2)(a));
    - The 2017 Agreement was genuinely agreed, notwithstanding that it does not cover casual employees.
    - Aerocare took reasonable steps to ensure that during the access period employees had access to copies of the materials referred to within the 2017 Agreement's Clauses 6.2.2, 6.2.3 and 12.5.
    - While the same cannot be found in relation to the referenced material within Clause 38.1, that defect may ultimately be corrected by the Commission finding that since the clause is not consistent with s.205, the model consultation term is taken to be a term of the 2017 Agreement.
    - As a result there is no necessity to consider undertakings in respect of the argument that the 2017 Agreement has not been genuinely agreed.
- In relation to the matter of "fairly chosen" (ss.186(3) and (3A));
    - The group of employees to be covered by the 2017 Agreement was not fairly chosen, due to the exclusion of casual employees.
    - It is not appropriate in the circumstances to seek an undertaking in respect of the "fairly chosen" matter because I could not be satisfied that the effect of accepting the undertaking in that regard is not likely to result in substantial changes to the agreement.
- In relation to the BOOT (s.186(2)(d));
    - Car parking;
        - I am unable to be satisfied that employees, current and prospective, are better off overall once the proper effects of employer-provided car parking are taken into account and that there is most likely a class of employees to whom there is no benefit or an overstated benefit from car parking.
        - On its own it is possible that this matter could be addressed through an undertaking in suitable terms, although it is to be noted that significantly more evidence would be required by the Commission before one could be considered about the scope of the class referred to and how the lack of benefits or the overstating of benefits could be addressed.
    - Split shifts and overtime arrangements;
        - I am unable to be satisfied that because of the split shift and overtime arrangements of the 2017 Agreement that employees, current and prospective, are better off overall.
        - Again, on its own, it is possible that this matter could be addressed through an undertaking in suitable terms; however, it is to be noted that

the Commission considers the scope of this matter to have far wider implications than those that may flow from the question of employer-provided car parking and that ultimately it may not be possible for an undertaking to be given, or that if one is given it would likely result in substantial changes to the Agreement.

- Saturday, Sunday and public holiday payments

  - I am unable to be satisfied that because of the 2017 Agreement's arrangements in relation to Saturday, Sunday and public holiday payments that employees, current and prospective, are better off overall.

  - Again, on its own, this may well be something that could be the subject of further engagement between Aerocare and the bargaining representatives and, potentially, the subject of a discussion with them about an undertaking to deal with the identified concern.

- In relation to the inclusion of an unlawful term (s.186(4));

  - I have not made any findings about there being unlawful terms within the 2017 Agreement.

[194] As set out in the foregoing, there are four matters for which I hold of concern as to whether the 2017 Agreement meets the requirements set out in ss.186 – 187 and which might be considered for the provision of an undertaking.

[195] On the first of those, the matter of whether the group was fairly chosen, I have explicitly indicated that it would not be appropriate to seek or accept an undertaking.

[196] In relation to the remaining matters, all of which pertain to satisfaction as to whether the better off overall test has been met, I have indicated that it is possible that suitable undertakings could be drawn if any one of those matters were the only ones about which the Commission had concern. In total though I consider that undertakings on all of the three BOOT matters would amount to substantial changes to the 2017 Agreement. In relation to employer-provided car parking, a way would have to be found to identify the class of people for whom it was not a benefit or that it was an overstated benefit and remedy provided to them. However, the same class of people, together with potentially everyone else, would also be affected by any proposed changes in respect of the split shift and overtime arrangements and possibly the weekend and public holiday payments. The totality of the evidence before the Commission leads me to the view that it is not appropriate in the circumstance to seek an undertaking.

s.189 approval not contrary to the public interest

[197] The Act also provides in s.189 that if the only reason for the Commission not being required to approve an enterprise agreement under s.186 is that it is not satisfied the agreement passes the better off overall test it may, in the limited circumstances set out within the section nonetheless to approve the agreement if it were satisfied that approval would not be contrary to the public interest. Because of the finding I have made in respect of the

question of whether the group covered by the Agreement was fairly chosen, it is unnecessary for me to consider this provision further.

CONCLUSION

[198] For the reasons set out above I am not satisfied that the provisions of ss.186 – 187 have been met. I decline to approve the 2017 Agreement and accordingly will issue an order at the same time as this decision dismissing the application.

COMMISSIONER

Appearances:

Mr J.E. Murdoch, Queens Counsel and *Mr E Shorten*, Counsel, for the Applicant
Mr A. Howell, Counsel for the TWU
Mr J. Cooney, for the ASU

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