DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Construction, Forestry, Maritime, Mining and Energy Union
v
Burswood Resort (Management) Limited T/A Crown Perth
(C2017/3216)

Hospitality industry

DEPUTY PRESIDENT GOSTENCNIK SYDNEY, 23 APRIL 2018

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)]; construction of provisions of Crown Perth, CFMEU, CEPU Properly Services Enterprise Agreement 2014; meaning and effect of "deeming" provision on entitlement to payment for hours worked in a continuous shift spanning two days; confirmed that employer's practice is the correct application of the Agreement; application determined accordingly .

[1] The Construction, Forestry, Mining and Energy Union, now known as the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) has applied under s.739 of the *Fair Work Act 2009* (Act) for the Fair Work Commission (Commission) to deal with a dispute in accordance with the dispute settlement procedure in the *Crown Perth, CFMEU, CEPU - Property Services Enterprise Agreement 2014* (Agreement). The Agreement is currently in operation and applies to Burswood Resort (Management) Limited, trading as Crown Perth (Crown), the CFMMEU, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) and employees of Crown working in the property services department in a classification for which provision is made under the Agreement.

[2] The dispute concerns the payment of entitlements of employees to whom the Agreement applies who work a night shift of ordinary hours which begins on one day and ends on the following day where one of the days on which the work the shift is performed is a public holiday.

[3] The Commission's power to deal with disputes is not at large and is circumscribed, relevantly by ss.738 and 739 of the Act and by the provisions of the procedure for dealing with disputes contained in an enterprise agreement under which the dispute is being progressed.

[4] There is no dispute between the CFMMEU and Crown that the jurisdiction of the Commission has been properly invoked and that I am able to resolve the dispute by exercising arbitration power for which provision is made in clause 18 of the Agreement.

[5] In its application of the Agreement to employees who work the kind of shift identified above, Crown makes payment to such employees as follows:

- For an employee commencing a night shift on a day that is a public holiday at say 11:00 pm and completes the shift on the following day which is not a public holiday at say 7:00am that employee is paid for the first hour of the shift at the public holiday penalty rate and for the remaining seven hours of the shift at the employee's ordinary rate of pay.

- For an employee commencing night shift the day that is not a public holiday at say 11:00 pm and completes the shift on the following day, which is a public holiday at say 7:00 am that employee is paid for the first hour of the shift at the employee's ordinary rate of pay and for the remaining seven hours of the shift at the public holiday penalty rate.

[6] In short compass, the dispute is concerned with the proper application of clauses 10.21 and 15 of the Agreement in the circumstances described above. The dispute appears confined to the entitlements of continuous shift workers and does not affect day workers or afternoon shift workers as described in the Agreement, although having regard to the definition of afternoon shift worker in clause 4 of the Agreement it appears to me that depending on the starting time of an afternoon shift, such an employee might be rostered to work a shift which spans two days, for example with a starting time of 5:00 pm on one day and a finishing time of 1:00 am on the following day.

[7] The CFMMEU contends that on a proper construction and application of the Agreement an employee whose night shift commences on a public holiday should be paid double time and one half for the entirety of their shift and that an employee whose night shift commences the night before a public holiday should be paid double time and one half for all hours worked on the public holiday. On the examples of the current practice of Crown above the CFMMEU agrees with the practice in the second example but not the first.

[8] Crown contends that the effect of the proper construction of the Agreement is that an employee who commences a shift that traverses two days is entitled to penalties for actual hours worked in accordance with each relevant and applicable penalty provision of the Agreement. It contends that for the purposes of differentiating between a working day and non-working day only, the employee is considered by clause 10.21 to have worked on the calendar day the ordinary hours of the shift commenced. In this respect it is contended that this construction is consistent with the practice earlier noted.

[9] As may be discerned from the above, the resolution of the issue in dispute turns ultimately upon the proper construction of various provisions of the Agreement and the application of orthodox principles of construction.

[10] The principles applicable to the proper construction of an enterprise agreement were canvassed at length in *Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited* (*Golden Cockerel*).[1] The summary of the applicable principles set out in *Golden Cockerel* was modified in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited (Berri)*[2] to take account of the discussion by the Full Bench of the extent to which evidence of prior negotiations and positions adopted in negotiations might be called into aid a construction in light of the statutory scheme under which an enterprise agreement is made and the fact that it is made when a majority of relevant employees vote to approve the agreement. The applicable principles need not be rehearsed at length here and were not put in issue. However, in short compass, much like the approach to construing a statute, the construction of an enterprise agreement begins with a consideration of the ordinary meaning of the words used, having regard to the context and evident purpose of the provision or expression being construed. Context may be found in the provisions of the agreement taken as a whole, or in their arrangement and place in the agreement being considered. The statutory framework under which the agreement is made may also provide context, as might an antecedent instrument or instruments from which particular provisions might have been derived.

[11] Turning then to the provisions of the Agreement. Clause 4 of the Agreement contains various definitions including the following:

> "**'Afternoon shift worker'** means an employee who is required to work ordinary hours after 6:00pm Monday to Friday, but is not required to work at any time in the twenty four (24) hour period on any day of the week;
>
> . . .
> **'Continuous Shift worker'** means an employee who is required to work at any time in the twenty four (24) hour period, on any day of the week;
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> . . .
>
> **'Non-shift worker'** means an employee who does not fit the definition of an afternoon shift worker or continuous shift worker;
> . . .
>
> **'Non-working day'** means a day on which an Employee is not rostered to work by the Employer. Employees shall receive four (4) non-working days in each fortnight;"

[12] As to the definition of a 'non-working day' it is to be observed that although the first sentence operates as a definition, the second appears to confer a substantive entitlement on employees covered by the Agreement. The entitlement conferred is that the employee is to receive four non-working days (that is, four days on which an employee is not rostered to work by Crown) in each fortnight. I will return later to the significance of this entitlement.

[13] Clause 10 of the Agreement deals with hours of work, rest breaks, overtime and weekend work. It relevantly provides the following:

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[1] [2014] FWCFB 7447

[2] [2017] FWCFB 3005

"**Ordinary Hours- Continuous Shift Workers**

10.14 The maximum number of ordinary hours an employee designated as a continuous shift worker shall be required to work in a fortnight shall be eighty (80) hours and shall be rostered so that an employee shall work a maximum of ten (10) shifts per fortnight.

10.15 The maximum number of ordinary hours per shift for Continuous Shift Worker shall be eight (8) hours.

10.16 The ordinary hours of work shall be continuous and shall be inclusive of paid meal breaks.

10.17 The ordinary hours for a Continuous Shift Worker may be worked over any day of the week, Monday to Sunday inclusive and may include public holidays. The Employer operates a twenty four (24) hour per day, seven (7) day per week arrangement on every day of the year including public holidays. The hours of work may be scheduled on any day, and shall be arranged by the Employer in order to meet the needs of the business.

Shift and Forty (40) Hour Week Loadings

10.18 An employee who is designated as a Continuous Shift Worker shall be paid a loading of 27.5% on the ordinary hourly rate of pay. This loading compensates for shift work and additional hours worked as a result of the application of a 40 hour week.

10.19 An employee who is designated as an Afternoon shift worker shall be paid a loading of 20.5% on the ordinary hourly rate of pay. This loading compensates for shift work and additional hours worked as a result of the application of a 40 hour week.

Other Ordinary Hours Provisions

10.20 Each employee shall receive a minimum of ten (10) consecutive hours' break between the finish of ordinary hours on one shift and the commencement of ordinary hours on the following shift. In the case of a change in shift at the employee's request or a changeover of roster, eight (8) consecutive hours shall be substituted for ten (10) hours.

10.21 Where a period of work commences prior to midnight on any day and finishes after midnight on the next day, that work shall be deemed to have been worked on the day upon which the ordinary hours commenced. Provided, however, that the employee shall be paid the appropriate additional rates provided by sub-clauses 10.18 and 10.19 'Shift Loadings', sub-clause 10.25 'Additional Rates for Ordinary Hours', or clause 15 'Public Holidays' according to the actual hours worked.

. . .

Additional Rates for Ordinary Hours

10.25 Subject to 10.26 below, ordinary hours worked on a weekend shall be paid in accordance with the following:

i) Ordinary hours worked on a Saturday shall be paid at the rate of time and a half; and

ii) Ordinary hours worked on a Sunday shall be paid at the rate of double time.

> 10.26 Provided that sub-clause 10.25 shall not apply where an employee is designated as a continuous Shift Worker. Employees who are designated as a continuous Shift Worker shall be paid in accordance with sub-clause 10.18 for all ordinary hours worked."

[14] The effect of the above provisions on working arrangements for continuous shift workers is that the ordinary hours of work on any shift must not exceed eight (8) hours and the number of shifts in a fortnight must not exceed ten (10). It will immediately be seen that these provisions in effect ensure that a continuous shift worker employee receives four non-working days in each fortnight as required by the non-working day definition to which earlier reference has been made.

[15] It seems to me evident from the provisions above that it is not possible for a continuous shift worker working 80 ordinary hours per fortnight to be engaged in a fortnight on a shift which spans two days without taking away that employee's entitlement to receive four non-working days in each fortnight. Given the limitation on the number of ordinary hours that can be worked on each shift (8 hours) and the number of shifts that can be worked in a fortnight (10 shifts), a continuous shift worker who works just one shift in the fortnight which spans two days and assuming the other shifts are each worked on the same day will have worked on 11 of the 14 available days in the fortnight. It follows that such an employee will not have received four non-working days in that fortnight but only three. A continuous shift worker who works each shift spanning two days in a fortnight will also not receive four non-working days in that fortnight. This is an important contextual consideration when consideration is given to the proper meaning and effect of clause 10.21 of the Agreement.

[16] Clause 10.33 of the Agreement provides that a continuous shift worker is entitled to a 30 minute paid meal break.

[17] Clause 10 of the Agreement also deals with rosters and relevantly provides the following:

> "**Roster**
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> 10.22 Where practicable, employees will be advised of the roster of working hours fourteen (14) days in advance of the requirement to work. Employees may also be asked to work at short notice due to staff absences or unforeseen work demands. There is an expectation that in such situation, employees be available to work, having regard for personal circumstances.
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> 10.23 In circumstances where a continuous shift worker's roster is altered due to unforeseen demands requiring them to work a weekend shift and providing no less than 7 and no more than 14 days (sic) notice they shall be paid as follows:
>
> a) A shift loading of 30% shall be paid instead of the shift loading of 27.5% specified in clause 10.18. This shall be paid for all ordinary hours worked in the calendar week in which the weekend worked falls. To avoid all doubt, one calendar week starts on a Monday and ends on the following Sunday.
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> 10.24 Should the company wish to change the roster of a shift worker the Shift Roster Changes Standard Operating Procedure (SOP) will be followed.

> a) Should the company wish to make alterations to the SOP during the life of this Agreement, the company will consult with employees who will be affected. Should mutual agreement not be reached during the consultation phase, the matter will be resolved through the Dispute Resolution Procedure of this Agreement. Status quo will be maintained until the dispute is resolved by agreement between the parties or the Dispute Resolution Procedure is complete."

[18] The rostering provision contemplates that ordinary hours of work will be set in a roster and that where practicable employees will be advised of the roster 14 days in advance of the requirement to work, which presumably means the commencement of the roster for a particular period. The ability of Crown to set out ordinary working hours in a roster so far as a continuous shift worker is concerned is necessarily circumscribed by the limitation on the number of hours of a shift and the number of shifts in each fortnight contained respectively in clauses 10.15 and 10.14 of the Agreement.

[19] Subject to the strictures on the maximum number of ordinary hours per shift and the maximum number of shifts per fortnight that may be worked by a continuous shift worker, clause 10.17 otherwise allows Crown maximum flexibility in relation to ordinary hours of work of a continuous shift worker. Thus, such hours may be worked on any day of the week Monday to Sunday inclusive and may include a public holiday. Moreover, as Crown operates a 24-hour seven day arrangement every day of the year including public holidays, the hours of work may be scheduled on any day and may be arranged by the employer in order to meet its business needs. Clause 10.18 contemplates that an employee who is a continuous shift worker would generally work 40 hours per week. These provisions are also important contextual considerations when consideration is given to the proper meaning and effect of clause 10.21 of the Agreement.

[20] Clause 15 of the Agreement deals with public holidays and relevantly provides in relation to work performed on a public holiday as follows:

> 15.4 Where an employee is required by the Employer to work a public holiday, the employee shall be paid at the rate of double time and one half the relevant hourly rate of pay prescribed at Schedule 1 of this Agreement, for all such hours worked.

[21] Clause 10.21 clearly contemplates that ordinary hours may be arranged in a manner that those hours commence on one day, that is prior to midnight, and conclude on the next day, that is after midnight. In respect of such an arrangement of hours, clause 10.21 provides that "that work shall be deemed to have been worked on the day upon which the ordinary hours commenced". The ordinary meaning of the word "deem" of which "deemed" is the past participle, is "to form or have an opinion, judge, think"[3] or "to form the opinion, be of opinion, to conclude, to consider, hold".[4] The present participle of "deem" is the verb "deeming" which means to "regard or consider in a specified way".[5] In the context of clause 10.21 it seems to me that the words "shall be deemed" in relation to the words "that work" is used to describe the designation of work performed after midnight to be regarded, considered or designated as work having been performed before midnight. In and of itself, the first

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[3] Macquarie concise dictionary (2009), 5th ed, Sydney, Macquarie Dictionary Publishers

[4] Shorter Oxford English Dictionary (2007), 6th ed, vol 1

[5] Ibid

sentence of clause 10.21 says nothing whatsoever about payment for the hours worked. It is simply deeming that which would not otherwise be, and is not otherwise work before midnight on a particular day, to be such work.

[22] The second sentence of clause 10.21 begins with the words "[P]rovided, however", which indicate to the reader that that which has just been set out in the first sentence is subject to a proviso. That proviso is that "the employee shall be paid the appropriate additional rates provided by sub-clauses 10.18 and 10.19 'Shift Loadings', sub-clause 10.25 'Additional Rates for Ordinary Hours', or clause 15 'Public Holidays' according to the actual hours worked".

[23] The words "according to the actual hours worked" indicate that despite the hours that were worked after midnight being deemed to have been worked before midnight any appropriate additional rates of pay that would be payable in relation to those hours under the clauses identified shall be payable according to the actual hours worked, that is, as they were worked and under the circumstances in which they were worked, namely after midnight. The word "actual" is used as an adjective to describe "hours worked". Used in this way it means "existing in fact; real".[6] The "actual hours worked", in relation to which payments are made stands in contradistinction to those same hours being "deemed" to have been worked before midnight. The former exists in fact, it is real, while the latter is not. As such hours were not actually worked before midnight there can in my view be no question that the deeming provision read in conjunction with the proviso has the effect of determining that hours that are deemed to have been worked before midnight are nevertheless to be paid at the appropriate rates applicable at the time the hours were actually worked, that is after midnight. Were it otherwise the proviso would have no work to do.

[24] The words "actual hours worked" are used to differentiate that circumstance (the appropriate payment for the hours) from the one in the first sentence which deems the hours actually worked on a particular day to have been worked on the day before. The adverb "according" used in conjunction with "to" makes clear that actual payment is to be made according to, or as stated or determined by the "actual hours worked".

[25] That then brings me to the question of what work does the first sentence have to do. When clause 10.21 is read in context it seems to me that its evident purpose is clear. Since the clause itself contemplates ordinary hours of work in one shift spanning two days, given the limitations on the number of shifts per fortnight and the number of hours per shift to which earlier reference has been made, the deeming provision enables an employer to operate a shift across two days consistently with the limitations in clause 10.15 and 10.16 without contravening the employee's entitlement to receive four non-working days in each fortnight. Without the deeming provision in the first sentence of clause 10.21 such an arrangement at least in relation to continuous shift workers would not be possible.

[26] The CFMMEU contends, in effect that the intended operation of clause 10.21 is to compensate both employees in the examples earlier given for having worked on a public holiday, and losing the full utility of that public holiday. It says that the second sentence of clause 10.21 "provides that, in the case of Public Holidays, the employee shall be paid the appropriate *additional* rates provided by the relevant sub-clause, in this case Clause 15, if

[6] Macquarie concise dictionary (2009), 5th ed, Sydney, Macquarie Dictionary Publishers

work is done on a Public Holiday" and that "[t]his removes any disadvantage caused by the first sentence and ensures compliance with Clause 15.4." [Emphasis in the submissions of the CFMMEU]

[27] The proposition advanced by the CFMMEU is rejected not least of all because its contention simply ignores the words "according to the actual hours worked" and that, as already indicated, the textual analysis does not bear this out. Understood in this way where additional rates of pay are required to be paid that requirement stems from the circumstances in which the actual hours had been worked not when the first sentence has deemed those hours to have been worked. The word "additional" simply underscores that the rates identified are additional to the rates ordinarily paid for the hours actually worked, relevantly because the day on which the hours were actually worked was a public holiday.

[28] Although Crown advanced a proposition that the provision at issue was ambiguous, I do not agree. It seems to me that when clause 10.21 is read in the context of the Agreement as a whole and in particular in respect of the provisions to which I have referred, the meaning and effect of the provision is clear. Thus, while ordinary hours worked by an employee in one continuous shift across two days are deemed by reason of the first sentence in clause 10.21 to have been worked on the first of the days, payment for those hours will be made according to the actual hours worked that is the day on which and in the circumstances under which they are worked. It follows that the practice of the Crown as earlier noted is a correct application of the Agreement in the circumstances therein set out.

[29] Although I do not consider it necessary to refer to the historical contextual material related to the provision to which Crown has referred, as the material was fully canvassed, I will out of deference say something about that material.

[30] As earlier indicated in construing an enterprise agreement construction does not take place in a vacuum and provisions at issue should be read in context. Context might be provided by an antecedent instrument or instruments from which particular provisions might have been derived.

[31] In *Short v FW Hercus Pty Ltd*,[7] Burchett J said:

> "The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in the alien ground."[8]

[32] With this in mind Crown referred to that which it described as the history of the provision at issue with which I deal below.

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[7] (1993) 40 FCR 511

[8] Ibid at 518

[33] Crown says that the first record of clause 10.21 (or any similar iteration) appearing in any contract, agreement or award was in the variation to the *Hotel and Tavern Workers Award 1991* No.31 of 1997 *(HTW Award)*.[9] It says that the *HTW Award* appears to have been varied in 1990 which seems to have been triggered by an instruction from the Australian Industrial Relations Commission to vary awards to give effect to the structural efficiency principle that existed at the time.[10] Crown says that this instruction was endorsed at a state level by the Western Australia Industrial Relations Commission (WAIRC) in the 1988 State Wage Case decision.[11] The application[12] that led to the variation was made by the consent of the parties.[13]

[34] As part of the consent variation, a new clause 8(1)(d) was sought to be introduced in the following terms:

> "(1)(b) The ordinary hours of work shall be exclusive of meal breaks and be so rostered that a worker shall not be required to commence work on more than 10 days in each fortnight.
>
> …
>
> (1)(d)Where an ordinary hours work period commences prior to midnight on any day, that work period shall be deemed to have been worked on the day upon which the ordinary hours work period commenced. Provided, however, that the worker shall be paid the appropriate additional rates provided by Clause 9 – Additional Rates for Ordinary Hours or Clause 17 – Holidays, according to the actual hours worked in that period."[14]

[35] The transcript of the consent hearing of the variation application discloses the Mr Jones appearing for the Western Australian Hotels Association Incorporated (Union of Employers) and the Belmont Park Motel and others made the following submissions to the WAIRC about the new proposed clause. The submissions made were as follows:

> "MR JONES: … the commission will see the benefits which the employers have gained by the introduction of the shorter working week.
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> MR JONES: What the claim and what the agreement now introduces is not the concept of a 38 hour working week, where you have 2 rostered days off and one preserves the outrageous anomaly where in a 7-day, 24-hour industry an employee can't be rostered to work ordinary hours on a Sunday, but one opens up the complete flexibility which has been agreed by the union by the introduction of a 76-hour fortnight.
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> …

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[9] Western Australian Industrial Gazette 70 W.A.I.G 1087 at page 356 – Order dated 1 March 1990 varying the *HTW Award* (Application No. 2177A of 1989)

[10] Application 2177A of 1989 before Commissioner Parks on 1 March 1990 to vary the *HTW Award* at 70 W.A.I.G

[11] 1988 State Wage Case, Application No.730 of 1988, 9 September 1988, 68 W.A.I.G 2412

[12] Application 2177A of 1989

[13] The parties are the Western Australian Hotels Association Incorporated and the Federated Liquor and Allied Industries Employees Union of Australia

[14] Western Australian Industrial Gazette 70 W.A.I.G 1087 at page 356 – Order dated 1 March 1990 varying the *HTW Award* (Application No. 2177A of 1989) – Schedule, item 6

> MR JONES: … Now in order to overcome an anomaly which has been extant in the award for many years and for which no action was ever taken, we have introduced a paragraph (d) which seeks to overcome that anomaly and, briefly stated, the anomaly was raised in the industrial magistrate's court some 14 years ago concerning the Contacio Hotel and it was lost by the employer in the case on the basis that the magistrate interpreted the clause and the award as being that a day, because it wasn't defined otherwise, was a period of 24 hours, midnight to midnight. In the hotel industry one often comes across situations where employees are rostered to work over 2 days. For example, if you are in those sorts of hotels where they have nightclubs and so forth they are often rostered to commence duty on or about 5.00 or 6 o'clock in the evening and they don't finish work until the early hours of the next morning. Now of course, in those situations rather than you be rostered to work 5 days per week you are in fact working 6 days per week and that was a fundamental breach of the current award and because the hours of work transgressed into one of the rostered days off the employer suffered a penalty of 4 hours at a minimum of double time penalty rates.
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> That was never intended but nonetheless in the Contacio Hotel case it threw up the anomaly and the employer was convicted.
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> The current provision seeks therefore to overcome that anomaly by prescribing that where an ordinary hours work period commences prior to midnight upon any day, that worked period shall be deemed to have been worked on the day upon which the ordinary hours worked period commenced, so it deems the hours of work to be completed in 1 day rather than 2 days although the proviso there does indicate that the matter of the effect of the deeming provision, the hours actually worked are rewarded in accordance with clause 9, Additional Rates for Ordinary Hours, or clause 17, Holidays, according to the actual hours worked in that work period. So for example, if one worked 5 hours prior to midnight one would get the additional rates which are prescribed by clause 9, Additional Rates for Ordinary Hours, and if for example after your meal break you completed 3 hours work on a day which was in fact a public holiday you would get 3 hours at the public holiday rate, or double time and a half. Notwithstanding how the actual hours worked, they are deemed to have worked on the day that the shift started, to overcome the anomaly that was thrown up in the Contacio Hotel case."[15]

[36] In an application[16] varying the *Clerks' (Hotels, Motels and Clubs) Award 1979* in that which appears to be a materially identical form to clause 8(1)(d) of the *HTW Award* by inserting a new clause 11(2), Mr Jones made submissions to Commissioner Parks of the WAIRC to the effect that notwithstanding the deeming provision, employees will be paid additional rates for the *actual* hours worked on a public holiday.[17] His submission is recorded in transcript was a follows:

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[15] Transcript of proceedings at Perth on Monday, 12 February 1990 before Commissioner Parks in Application No. 2177 of 1989 at page 10
The *Contacio Hotel* decision referred to by Mr Jones in the transcript is a reference to Complaint Nos.739 and 740 of 1979 between The Federated Liquor and Allied Industries Employees' Union of Australia, Western Australia Branch, Union of Workers and Contacio (1971) Pty Ltd Proprietor, Contacio International Motor Hotel before Industrial Magistrate C N Boys Esq. reported in the Western Australian Industrial Gazette on 28 November 1979 at p 1572

[16] Application No. 1582 of 1989 [R2]

[17] Transcript of Proceedings at Perth on Tuesday, 20 February 1990 before Commissioner Parks in Application No. 1582 of 1989 (R) at page 42

> "MR JONES: … There is a provision however that notwithstanding the deeming provision the worker nonetheless will get paid for the hours worked in accordance with the clause 10, Additional Rates, or clause 17, Holidays, according to the actual hours worked in that work period. So even though the hours are deemed to have been worked on 1 day the employee doesn't forego any benefits to the additional rates for ordinary hours or clause 17 Holidays, if work was performed flowing into a holiday."

[37] In *The Federated Liquor and Allied Industries Employees' Union of Australia, Western Australia Branch, Union of Workers and Contacio (1971) Pty Ltd Proprietor, Contacio International Motor Hotel* (*Contacio Hotel),*[18] the Industrial Magistrate was required to determine whether an employee had worked on a non-working day, thereby attracting penalties. The *HTW Award* (as in operation at the time) entitled each worker to '*two clear working days off duty per week*'. Hours was described as *'the ordinary hours of work shall be forty per week, not exceeding eight per day…within the daily spread of hours referred to in subclause (2) hereof, and subject to the additional rates prescribed in Clause 9 of this award'*. A day was not defined by the *HTW Award*. There were two competing contentions at the hearing: (i) a day runs from midnight one day to midnight the next, or alternatively, (ii) a day is the 24 hour period following the end of a shift.[19]

[38] The affected employees had commenced a shift on a Saturday evening which had then run into, and concluded, in the early hours of Sunday morning. The employer regarded the Sunday to be a clear working day off duty despite some work having been performed. The employer submitted that the shift was properly characterised as a Saturday shift. If the workers were right, the hours performed on the Sunday attracted double time for a minimum two hours pay. If the employer was right, no further amounts were payable.[20]

[39] The Industrial Magistrate held that for the purposes of the *HTW Award*, a "day" runs from midnight to midnight which meant the work performed by the worker on the Sunday had been performed on a rostered day off. The penalty rates were accordingly payable.[21]

[40] Crown says that the purpose of the introduction of the deeming provision into the *HTW Award* was to ensure that work that starts on one calendar day but concludes on the next day, is regarded as being worked on the day the shift commenced. That is, it is deemed to have been worked on one day only. Crown says that the mischief was the shift being regarded as being worked over two days when the drafters intended it to only be regarded as having been worked on one.[22] Crown submits that the new clause 8(1)(d) to the *HTW Award* solved that problem.[23] On the face of the material that submission appears to me to be correct.

[41] The WAIRC approved the consent variation and the *HTW Award* was formerly varied on 1 March 1990, retrospectively coming into effect on the first pay period commencing on or after 12 February 1990.[24]

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[18] 59 W.A.I.G 1572 decision handed down on 28 November 1979

[19] Ibid at pg.490

[20] Ibid

[21] Ibid

[22] Ibid

[23] Crown's submissions dated 12 February 2018 at [64]

[24] Ibid at [65]

[42] In 1991, the year after the variation to the *HTW Award,* the *Burswood Island Resort Employees Award*[25] (*BI Resort Employees Award*) was varied.[26] The *BI Resort Employees Award* covered hospitality workers, and appears to have adopted the deeming clause of the form of clause 11(1)(d):

> "Where an ordinary hour's work period commences prior to midnight on any day and finishes in the early hours of the next day, that work period shall be deemed to have been worked on the day upon which the ordinary hours' work period commenced. Provided, however, that the employees shall be paid the appropriate additional rates provided by Clause 12 – Additional Rates for Ordinary Hours or Clause 20 – Public Holidays according to the actual hours worked in that work period."

[43] The clause above was retained by Crown in the successor enterprise specific award[27] and agreement.[28]

[44] By 2002, the *Burswood International Resort Casino Employees Award* (2002 Award), the successor to the Burswood Island Resort Employees Award, contained the same clause with the same overall structure.[29] The relevant clause reads as follows:

> "(1)(b) The ordinary hours of work shall be exclusive of meal breaks and be so rostered that an employee shall not be required to commence work on more than 10 days in each fortnight.
>
> …
>
> (1)(d) Where an ordinary hours work period commences prior to midnight on any day, that work period shall be deemed to have been worked on the day upon which the ordinary hours work period commenced. Provided, however, that the worker shall be paid the appropriate additional rates provided by Clause 9 – Additional Rates for Ordinary Hours or Clause 17 – Holidays, according to the actual hours worked in that period."

[45] Crown says that it is clear that the makers of the 2002 Award, the successor to the 1985 Award adopted the very words and must be inferred to have picked up the concept underpinning those awards that underpinned the 1991 amendments to the 1985 Burswood Island Resort Employees Award.[30] This appears to be correct.

[46] The first federally regulated agreement titled the *Hospitality Sector WA LHMU – Burswood Entertainment Complex Union Collective Agreement 2007(LHMU Agreement)* was made for the general workers (casino workers) in 2007. Clause 2.1(3) of the *LHMU*

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[25] Burswood Island Resort Employees Award 1985 No. A 23 and A 25 of 1985 – [71 W.A.I.G 1087] Commissioner A.R. Beech on 11 October 1991 at page 298

[26] Ibid at Schedule, item 7

[27] Clause 11(1)(d) of the *Burswood International Resort Casino Employees Industrial Agreement* 2001 AG 169 of 2001 as delivered at 80 W.A.I.G. 49

[28] (1984) 9 IR 115

[29] Burswood International Resort Casino Employees Award 2002 [83 W.A.I.G 71], clause 12(1)(b) and clause 12(1)(d)

[30] Transcript PN364

Agreement provides *inter alia* that the objective of the Agreement is to "incorporate, preserve and continue the provisions" of *inter alia,* the 2002 Award.

[47] In 2008, the clause appears to have transposed into the *Burswood Entertainment Complex, CFMEU, CEPU – Property Services Union Collective Agreement 2008* in the form of clause 9.8 which provided:

> "Where a period of work commences prior to midnight on any day and finishes after midnight on the next day, that work shall be deemed to have been worked on the day upon which the ordinary hours commenced. Provided, however, that the employee shall be paid the appropriate additional rates provided by sub-clauses 9.15 and 9.16'Shift Loadings', sub-clause 9.18 'Additional Rates for Ordinary Hours', or clause 14 'Public Holidays' according to the actual hours worked."

[48] The clause appears to have been retained in the same form in the *Burswood Entertainment Complex, CFMEU, CEPU – Property Services Enterprise Agreement 2011*[31] at clause 10.22. It appears to have remained unchanged at clause 10.21 to the *Crown Perth, CFMEU, CEPU – Property Services Enterprise Agreement 2014*[32].

[49] The historical contextual material appears to me to confirm both the evident purpose of the provision at issue and supports the construction, which I have already concluded is to be discerned from a reading of the ordinary words of clause 10.21 in the context of the Agreement as a whole. On the face of the contextual historical material, clause 10.21 has a lengthy industrial ancestry. That ancestry appears to have been transplanted into a successive industrial instrument applying to Crown and its predecessors. As I have said the ancestry confirms, that which the ordinary meaning of the words themselves read in context of the Agreement as a whole discloses.

Conclusion

[50] For the reasons given the proper construction of clause 10.21 of the Agreement is as I have earlier stated. In the result, so far as is relevant to the issue in dispute, continuous shift work employees under the Agreement are entitled to payment as follows:

- For an employee commencing a night shift on a day that is a public holiday at say 11:00 pm and completes the shift on the following day which is not a public holiday at say 7:00am that employee is paid for the first hour of the shift at the public holiday penalty rate and for the remaining seven hours of the shift at the employee's ordinary rate of pay.

- For an employee commencing night shift the day that is not a public holiday at say 11:00 pm and completes the shift on the following day, which is a public holiday at say 7:00 am that employee is paid for the first hour of the shift at the employee's ordinary rate of pay and for the remaining seven hours of the shift at the public holiday penalty rate.

[31] AE887883, clause 10.22.

[32] AE409746, clause 10.

[51] The dispute it determined accordingly.

DEPUTY PRESIDENT

Appearances:

Mr K Sneddon, together with *Mr K Singh* appearing for the Construction, Forestry, Mining and Energy Union

Mr S Wood, QC together with *Mr A Manos*, Counsel appearing for Burswood Resort (Management) Limited T/A Crown Perth

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