[2015] FWCA 4136 Note: This decision and the associated agreement has been quashed - refer to Full Bench decision dated 31 May 2016 [2016] FWCFB 2887
FAIR WORK COMMISSION

DECISION

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

Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo
(AG2015/1164)

COLES STORE TEAM ENTERPRISE AGREEMENT 2014-2017

Retail industry

COMMISSIONER BULL SYDNEY, 10 JULY 2015

Application for approval of the Coles Store Team Enterprise Agreement 2014 - 2017, questions over better off overall test, undertakings requested and provided, agreement approved.

[1] An application has been made by Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited (Coles/the applicant) for the approval of an enterprise agreement known as the *Coles Store Team Enterprise Agreement 2014 - 2017* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act). The Agreement is a single enterprise agreement.

[2] The Agreement is stated to cover "wages-paid" team members employed by Coles who are engaged to perform work for stores throughout Australia in respect of the classifications listed in the Agreement. The accompanying statutory declaration to the application (F17), states that 77,507 employees will be covered by the Agreement of which 36,016 participated in the voting process, and of whom 32,966 voted in favour of making the Agreement.

[3] The Agreement will replace a number of existing agreements:

- *Coles Supermarkets (Australia) Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011,*
- *Coles Supermarkets and AMIEU Tasmania Meat Agreement 2011,*
- *Coles Supermarkets Australia Pty. Ltd. and AMIEU Victorian Meat Agreement 2011,*
- *Coles Supermarkets (Australia) Pty Ltd & Bi-Lo Pty Ltd & AMIEU NSW/ACT Agreement 2012,*
- *Coles Supermarkets (Australia) Pty. Ltd. and Australasian Meat Industry Employees' Union Western Australian Agreement 2012;* and
- *Coles Supermarkets South Australia Meat Agreement 2012* (after its nominal expiry date of 31 August 2015).

[4] The following unions were bargaining representatives for the Agreement:

i. Australasian Meat Industry Employees' Union (AMIEU);

ii. Transport Workers' Union of Australia (TWU);

iii. Shop Distributive and Allied Employees' Association (SDA); and

iv. Australian Workers' Union (AWU).

[5] There were two employee bargaining representatives.

Relevant Statutory Provisions

[6] In approving an enterprise agreement the Fair Work Commission (the Commission) must be satisfied that the requirements of s.186 are met which in part states:

"**Section 186** *When the FWC must approve an enterprise agreement—general requirements*

Basic rule

186(1) If an application for the approval of an enterprise agreement is made under section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

186(2) The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and

(b) if the agreement is a multi-enterprise agreement:

(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

(d) the agreement passes the better off overall test*."*

(my underline)

Better off Overall Test (BOOT)

[7] As prescribed by s.186(2)(d) underlined above, in order to approve an agreement the Commission must be satisfied that the Agreement passes the better off overall test (BOOT).

[8] Section 193(1) of the Act defines the BOOT in the following manner;

> **"193(1)** An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee."

[9] The negotiation of an enterprise agreement allows the employer and its employees to negotiate an agreement that best fits the business and employee needs of the enterprise. As the objects of Part 2-4 Enterprise Agreements of the Act state, there is a focus on providing a simple, flexible and fair process that enables collective bargaining at the enterprise level that deliver productivity benefits. On this basis it is unremarkable that some terms and conditions of an enterprise agreement will be less beneficial than that provided by the relevant award while other terms and conditions will provide a greater benefit. Where this occurs, the Commission is required to be satisfied that each employee would be better off overall. This requires a global assessment to be conducted, rather than the identification of any single provision. As defined in the 5th edition of the *Australian Concise Oxford Dictionary* 'overall' means 'taking everything into account', 'taken as a whole'.

[10] This approach was taken by the Full Bench in *Armacell Australia Pty and Others* 1 where they stated:

> "The BOOT, as the name implies, requires an overall assessment to be made. This requires identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under the agreement."

[11] The breath of coverage, the multiplicity of classifications, the extensive employee numbers and the variety of hours worked by employees no doubt presented challenges in ensuring that each employee and prospective employee would be better off overall, than if the relevant modern award applied.

[12] At 3.4 of the applicant's *Employer's statutory declaration in support of an application of an enterprise agreement* (F17) there were a number of terms and conditions that were declared by the applicant as being more beneficial than those contained in the *General Retail Industry Award 2010* (the Award) being the relevant award for the purpose of the BOOT. Without listing all the more beneficial terms and conditions in their entirety they include superior wage rates 2 with annual increases and improvements to public holiday and leave entitlements.

[13] The applicant at 3.5 of the F17 specified a number of terms and conditions that were less beneficial when compared to the Award. At 3.6 the applicant states that in their view the Agreement passes the BOOT.

[14] As extracted above; s.186(2)(d) of the Act requires the Commission to be satisfied that the BOOT has been met prior to approving the Agreement. As the Agreement contained a number of lesser entitlements, a separate BOOT analysis was undertaken by the Commission.

[15] The lesser entitlements appeared to include:

(a) reduced casual loading,(20% as compared to 25% in Award);

(b) reduced percentage of the appropriate adult rate (percentage pay rate) for 17 and 18 year olds;

(c) no penalty loading for shifts commencing at or after 6pm for hours worked on Saturdays for casual employees;

(d) no overtime rates for casuals for hours worked after 6pm on Saturdays; and

(e) reduced penalty rate for Sunday work (50% for work between 6am to 9pm as compared to 100% in Award for all Sunday hours) 3

[16] This exercise resulted in the observation that casual and junior employees under the Agreement who work in circumstances covering the subject matters in (a) to (b) above may be worse off under the Agreement. In respect of the reduced casual and junior rates, the approval application completed by the applicant indicated that 27,765 employees to be covered by the Agreement are casual and 18,273 employees are under 21 years of age. 4

Undertakings

[17] Where the Commission has a concern that an agreement does not meet the requirements set out in s.186 and s.187 which includes that the agreement does not pass the BOOT, s.190 provides the employer with an opportunity to provide a written undertaking acceptable to the Commission aimed at meeting those concerns see *Re BUPA Care Services.* 5

[18] In *Re McDonald's Australia Enterprise Agreement 2009* 6 the Full Bench held that the role of the Commission includes facilitating enterprise agreements:

> **"**[13**]** The appellants emphasised the facilitative aspects of these objectives. We agree that these objectives place the primary role for making enterprise agreements on the parties to those agreements and their representatives and that the role of Fair Work Australia (FWA) [as it was then known] includes facilitating the making of enterprise agreements. In general we believe that the requirements for approval should be considered in a practical, non-technical manner and that reasonable efforts should be made to clarify matters with the parties and consider undertakings to clarify or remedy concerns to the extent that these may be available under s.190 of the Act." 7

[19] In attempting to facilitate the approval of the Agreement and ensuring that the Agreement satisfied the BOOT, I wrote to Coles requesting undertakings to address my concerns. 8 The correspondence also contained some indicative rosters to demonstrate the potential wage deficiencies identified. In particular undertakings were sought in the following terms:

- the casual loading rate be increased to 25% as per the Award;
- junior wages for employees aged 19 or under to receive the same percentage of the adult rate prescribed in the Award (noting that 20 year olds are treated as adults under the Agreement);and
- a reconciliation clause which allows employees a right to request to have their take home pay reviewed in comparison to what they would have received under the Award and back pay an employee in the event an employee's take home pay under the Agreement is found to be less than what they would have received under the Award.

[20] Concerns relating to the requirement under s.205 of the Act to consult about a change of roster or change to ordinary hours of work and to allow an employee to be represented for the purposes of that consultation were also raised.

[21] On 17 June 2015, correspondence was received from the applicant's legal representative Mr Chris Gardner, a partner in the law firm Seyfarth Shaw Australia, which addressed the concerns raised by the Commission by providing a number of written undertakings.

[22] The response provided the written undertakings substantially in the form requested.

[23] The undertakings are:

- the casual loading will increase from 20% to 25%;

- the percentage pay rate for 17 and 18 year old (non-trades) team members raised to 60% and 70% respectively under the relevant classifications 9; and

- provision of a reconciliation term for casual and junior (non-trades) employees to ensure that the take home pay for any 4 week roster cycle under the Agreement be greater than what they would otherwise be entitled to under the Award. The request is to be made within 28 days of the expiry of the relevant reconciliation period. 10

[24] The undertakings provided by Coles address the Commission's concerns, in particular the casual loading and percentage pay rates for junior team members are now aligned with the respective entitlements under the Award.

[25] The reconciliation undertaking ensures that casuals and junior employees have the right to review their take home pay in comparison to what they would have received under the Award. Further, in the event that such employees were found to have received less take home pay under the Agreement they will be entitled to reconciliation top up payment.

[26] The AMIEU, in its *Statutory declaration of employee organisation in relation to an application for approval of an enterprise agreement* (F18) raised concerns with the Agreement satisfying the BOOT as a result of a combination of lower percentage pay rates for 17 and 18 year olds, and the reduction of penalty rates.

[27] The concerns and undertaking request from the Commission to Coles and Coles response was copied to all bargaining representatives.

[28] In response to the undertakings provided by Coles, the AMIEU raised concerns about the reconciliation undertaking and in particular the time periods specified by Coles for this process to occur, as well as the classes of employees covered by the undertaking. I have had regard to the AMIEU's observation but am satisfied the undertakings provided although not identical to that requested, are appropriate.

[29] Taking into account the relatively higher rates of pay under the Agreement and the undertakings provided by Coles, I am satisfied that the Agreement results in employees being better off overall under the Agreement.

Consultation Term

[30] With respect to the consultation term contained in clause 8.1 of the Agreement- *Introduction of major change***,** the Commission referred the applicant to the criteria to be satisfied under s.205 of the Act, and in particular the requirement for a consultation term which includes:

- the requirement for the employer to consult employees with regard to a 'change of employees regular roster' or 'ordinary hours of work'; and
- that at any stage an employee may be represented.

[31] I accept as was submitted by the applicant, that the requirement under s.205(1A) to consult with employees about a change to their regular roster or ordinary hours of work while not contained in Part 8 *Change and Resolving Disputes* are met via clause 4.6 of the Agreement - *Establishing or changing rosters - permanent team members*.

[32] Coles further submitted an undertaking which provides that at any stage during the consultation process regarding a change to rosters or ordinary hours, employees may be represented. As noted above, undertakings can be accepted where the Commission has concerns regarding ss. 186 and 187. The consultation requirements found under s.205 cannot be remedied by undertakings. Accordingly, pursuant to s.205(2) of the Act, the model consultation term at Schedule 2.3 of the *Fair Work Regulations 2009* will be taken to be a term of the Agreement. A copy of the model term is attached at **Annexure A**.

[33] The undertakings provided by Coles in regard to all other matters are taken to be a term of the Agreement. A copy of the undertakings is attached at Annexure B.

[34] I am satisfied that each of the requirements of ss.186, 187 and 188 of the Act as are relevant to this application for approval have been met.

[35] The TWU, SDA, AWU, and AMIEU being bargaining representatives for the Agreement, have given notice under s.183 of the Act that they want the Agreement to cover them. All unions support the approval of the Agreement, with the AMIEU stating support is contingent on the Agreement meeting the BOOT. Suffice to say the Agreement cannot be approved without meeting the requirements of the BOOT 11 .

[36] In accordance with s.201(2) of the Act, I note that the Agreement covers these employee organisations.

[37] The Agreement is approved. In accordance with s.54(1), the Agreement will operate from 17 July 2015. The nominal expiry date of the Agreement is 31 May 2017.

[38] This decision and undertakings should be brought to the attention of employees covered by the Agreement by the applicant.

COMMISSIONER

Annexure A

Schedule 2.3 Model consultation term

(regulation 2.09)

Model consultation term

(1) This term applies if:

(a) the employer has made a definite decision to introduce a major change to production, program, organisation, structure, or technology in relation to its enterprise; and

(b) the change is likely to have a significant effect on employees of the enterprise.

(2) The employer must notify the relevant employees of the decision to introduce the major change.

(3) The relevant employees may appoint a representative for the purposes of the procedures in this term.

(4) If:

(a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and

(b) the employee or employees advise the employer of the identity of the representative;

the employer must recognise the representative.

(5) As soon as practicable after making its decision, the employer must:

(a) discuss with the relevant employees:

(i) the introduction of the change; and

(ii) the effect the change is likely to have on the employees; and

(iii) measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and

(b) for the purposes of the discussion — provide, in writing, to the relevant employees:

(i) all relevant information about the change including the nature of the change proposed; and

(ii) information about the expected effects of the change on the employees; and

(iii) any other matters likely to affect the employees.

(6) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.

(7) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.

(8) If a term in the enterprise agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the employer, the requirements set out in subclauses (2), (3) and (5) are taken not to apply.

(9) In this term, a major change is ***likely to have a significant effect on employees*** if it results in:

(a) the termination of the employment of employees; or

(b) major change to the composition, operation or size of the employer's workforce or to the skills required of employees; or

(c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or

(d) the alteration of hours of work; or

(e) the need to retrain employees; or

(f) the need to relocate employees to another workplace; or

(g) the restructuring of jobs.

(10) In this term, ***relevant employees*** means the employees who may be affected by the major change.

Annexure B

17 June 2015

Ms Melissa Phang
Associate to Commissioner Bull
Fair Work Commission
Level 10, Terrace Tower
80 William Street, East Sydney NSW 2011
By email: chambers.bull.c@fwc.gov.au

Dear Ms Phang,

AG2015/1164: Notice of Undertaking

These Undertakings are provided in relation to the Coles Store Team Enterprise Agreement 2014 – 2017 (the Agreement). "The Company" has the same meaning as clause 1.10.5 of the Agreement.

The Company undertakes to apply sub-clauses 4.6.3 and 4.6.6 of the Agreement in such a way so as to allow for the representation of team members for the purposes of consultation at any stage.

The Company undertakes to pay casual team members a loading of 25% for all hours worked, excluding overtime. The loading is paid instead of entitlements to any form of paid leave (except long service leave). This Undertaking will replace clause 4.3 of the Agreement.

The Company undertakes to pay 17 year old junior (non-trades) team members 60% of the adult wage rate for the relevant classification. The Company also undertakes to pay 18 year old junior (non-trades) team members 70% of the adult wage rate for the relevant classification. Noting that under the Agreement, effective from Monday 6 June 2016, 18 year old junior (non-trades) team members will increase to 75%. This Undertaking will replace the relevant percentages outlined in clause 3.5.1 of the Agreement.

The Company undertakes to carry out a reconciliation to ensure that the take home pay for any 4 week roster cycle for a casual or junior (non-trades) team member was more than the team member would have been entitled to under the General Retail Industry Award (the Award), where such team member requests in writing within 28 days of the expiry of the relevant reconciliation period. Reconciliation period means each 12 month period calculated from the team member's anniversary date, or the period from the commencement date of the Agreement until their anniversary date, or the period between the expiry of the last reconciliation period and the termination of the team member's employment. If the Company finds that the team member has received less than what they would have had the Award applied, the Company will pay the team member a reconciliation top up payment.

Yours sincerely

FOR AND ON BEHALF OF THE COMPANY
Angelo Yoannidis
Head of Employee Relations
Human Resources

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coles
A little better every day

1 [2010] FWAFB 9985 at [41].

2 Not including junior wage percentages

3 Some rates under existing agreements were maintained for existing employees

4 As of 1 July 2015 the Award provides that employees aged 20 receive the adult rate

5 *BUPA Care Services v P & A Securities Pty Ltd as trustee for the D'Agostino Family Trust T/as Michel's Patisserie Murwillumbah and others* [2010] FWAFB 2762 at (49).

6 [2010] FWAFB 4602.

7 *Re McDonald's Australia Enterprise Agreement 2009* [2010] FWAFB 4602 at [13].

8 On 9 June 2015 a letter was sent copied to the bargaining representatives.

9 The undertaking makes note that under the Agreement, effective from 6 June 2016, 18 year old junior (non-trades) team members wage rate will increase to 75% of the adult rate.

10 Reconciliation period means each 12 month period calculated from the team member's anniversary date, or the period from the commencement date of the Agreement until their anniversary date, or the period between the expiry of the last reconciliation period and the termination of the team member's employment.

11 Subject to any s.189(2) submission

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