



## Can Gina's train deal glitch constitute a minor error?

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The FWC has held that an agreement negotiated with two train drivers but set to cover an entire transferred workforce on the Roy Hill Pilbara mine network was not genuinely agreed, but it is asking whether this is a minor error that can be dealt with via an undertaking, "odd as that may be".

In a decision probing Rail Train's creation of a subsidiary to win a new contract for work on the Roy Hill mine network that was being performed by another subsidiary on an expiring contract, Deputy President Abbey Beaumont has found Karijini Rail Pty Ltd failed to adequately explain a proposed agreement to its first two employees.

However, Deputy President Beaumont rejected the CFMMEU mining and energy division's further contention that the tribunal could not approve the deal because the two train drivers with whom it was negotiated were not covered by the deal at the time as Karijini did not yet have a contract to perform the work.

Rather, she found the two workers had been engaged for the "principle purpose" of driving trains for Karijini on the Roy Hill network and were already performing the work due to a secondment agreement between Karijini and fellow Rail Train subsidiary TRRC.

**The secondment arrangement allowed the two drivers** to work for TRRC until November 1 last year, when TRRC's contract expired and Karijini's contract started, with Karijini engaging TRRC's workforce as maximum-term contract employees with recognition of prior service.

The CFMMEU told the tribunal that by deciding to form a new company with an agreement in place instead of seeking to renew TRRC's contract with Roy Hill, Rail Train denied TRRC's workforce an opportunity to collectively negotiate their future terms of employment.

But the director of Rail Train, Karijini and TRRC, Graham Butler, said that Roy Hill required it to have a new agreement that "matched" the commercial agreement it was negotiating, whereas the TRRC deal was not set to expire until January this year.

### Is failure to explain fatal to deal?

Deputy President Beaumont said Karijini was not "rolling over an agreement" with which the two drivers were familiar and the deal had just three entitlements more beneficial than the award – a base rate inclusive of allowances, overtime and a shift loading of 25%.

She said it was therefore "reasonable" that one of the drivers asked during a bargaining meeting, "How is the salary made up for different shift patterns such as night shift, afternoon shift, and weekend work?"

Butler said he told the driver: "Your IFA varies the way the allowances are paid to create a flat rate, this rate will encompass all penalties; the current rate in your LOO is well in advance of the enterprise agreement rate and needs to pass the BOOT Test".

"In effect, that question was unanswered save for some information being provided about the operation of an individual flexibility arrangement (IFA)," Deputy President Beaumont said.

"Compliance with [s180\(5\)](#) in the circumstances of this case necessarily entailed a description of how that base rate of pay was made up and how it compared to the rates of pay and allowances in the award," she continued.

Deputy President Beaumont concluded that the company failed to meet obligations to take all reasonable steps to explain the effect of the deal to employees, as required by [s180\(5\)](#), and she could not therefore be satisfied that the drivers had genuinely agreed to it according to [s188\(1\)](#).

However, given she found "no other reasonable grounds" for believing the deal had not been genuinely agreed, the deputy president said it "follows" that "consideration turns to whether [s188\(2\)](#) would nevertheless result in a conclusion to the contrary".

"The unanswered question is whether the agreement would have been genuinely agreed to but for a minor procedural or technical error made in relation to the requirements mentioned in [s188\(1\)\(a\)](#); and whether the error was such that it was not likely to have disadvantaged the two employees."

The deputy president said she would issue directions to the parties "to the parties to address this point, in addition to whether an undertaking under [s190](#) may meet the concern identified in this decision – odd as that may be".

#### Company's "manoeuvring" not dealt with by Act

Turning to the CFMMEU's contention that the TRRC drivers would continue doing the work they had always done but "covered by an enterprise agreement over which they had no input", Deputy President Beaumont said the "evidence showed that this occurred".

However, she said this "particular scenario, or as the CFMMEU termed it, 'manoeuvring', was not parked under one of the various subsections of [s188](#) or, for that matter, another section of the Act".

"In Aldi, the High Court said that consistent with the view of [s186\(3\)](#) taken in John Holland, the references in sub-s (2) to 'covered by' may be read as 'those persons currently employed who fall within the whole class of employees to whom the agreement might in future apply'," she said.

"While there has been much made of the position of the employees of TRRC, ultimately the position of those employees would not appear relevant to the approval requirements imposed by the Act," the deputy president continued.

She said they "are not the 'relevant employees' because they were not employees of Karijini at the relevant time, albeit the notion of them becoming employees was clearly contemplated".

"That the agreement could be made with persons who were not yet employed, and might never be employed, in the relevant single business, would seem, to coin the phrase 'a strange result'.

"Notwithstanding that the phrase was used in regard to [s170LK\(1\)](#) of the [Workplace Relations Act 1996 \(Cth\)](#), it appears apposite here in light of the legislative framework."

**CFMMEU mining and energy division national** legal officer Alister Kentish told Workplace Express that the union is considering its next steps in light of Deputy President Beaumont's question.

But he said the CFMMEU's main concern is that the union be given an opportunity to bargain on behalf of members.

Legislation passed late last year empowers the FWC to overlook minor errors in agreements, as long as they don't disadvantage employees (see [Related Article](#)).

[Karijini Rail Pty Limited \[2019\] FWC 2907 \(30 April 2019\)](#)

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